[**PUBLIC RECORD**]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of NORTH TEXAS SPECIALTY PHYSICIANS, a corporation.	**DOCKET NO. 9312**

To: The Honorable D. Michael Chappell
Administrative Law Judge

NORTH TEXAS SPECIALTY PHYSICIANS' RESPONSE TO POST - TRIAL COMPLAINT COUNSEL'S PROPOSED FINDINGS OF FACT

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Pre-Statement

There are 479 proposed Finding of Fact. NTSP has tried to respond to each proposed finding by subpart. In the event NTSP has failed to respond to a particular subpart, the missing response should be taken as denying the proposed finding. In the event the response to a subpart or proposed finding differs from the position taken by NTSP in its post-trial briefing, generally the position taken in the brief governs.

I. Introduction

1. The Federal Trade Commission's complaint in this matter charges that North Texas Specialty Physicians ("NTSP"), an association of Fort Worth area physicians, has engaged in conduct that violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. *See* (Complaint of the Federal Trade Commission, "Complaint").

Response to Finding No. 1: Admit Complaint so alleges, but deny relevance to disposition of the issues.

2. The Complaint alleges a horizontal agreement by and through NTSP to set the prices paid by health plans and other payors for the services of NTSP participating physicians. *See* (Complaint).

Response to Finding No. 2: Admit Complaint so alleges, but deny relevance to disposition of the issues.

3. A preponderance of the evidence, the relevant standard here, establishes that NTSP has acted in and as an unreasonable restraint of trade as alleged in the Complaint.

Response to Finding No. 3: This is a legal assertion, not a proper statement of fact. This statement of fact is also unsupported by any citations to evidence. Further, NTSP denies that the evidence established the allegations of the complaint and addresses this argument in its Post-Trial Briefing. *See* North Texas Specialty Physicians' Post-Trial Brief and Post-Trial Reply Brief.

4. NTSP restrains trade among its member physicians by acting as a coordinator/agent for physician price-fixing. In the first instance, its contractual relations with its physicians establish rights and forbearances that limit competition between the NTSP collective and member physicians. *See* findings 97-104. Second, NTSP and its member physicians establish consensus minimum prices for use in negotiating fee-for-service contracts with health plans. *See* findings 105-124. NTSP then explicitly uses these fixed minimum prices in its negotiations with health plans. *See* findings 125-128. And finally, NTSP adopts various anticompetitive practices to reduce the risk that health plans will be

A. NTSP is Made Up of Member Physicians

6. NTSP was formed in 1995 and operated by physicians to facilitate the physicians' contracting with health plans and other payors for the provision of medical services for a fee. (CX0350 at 1 (NTSP was formed in an attempt to provide a "seat at the table of medical business"); CX1196 (Van Wagner, 08.29.03 Dep. at 12) ("We obviously have an objective to affiliate and do contracts, do contracting with other area HMOs and PPOs."); CX1182 (Johnson, Dep. at 10-11); CX0311 at 5, 8-10, 14-15; CX0275 at 30-31).

Response to Finding No. 6: Deny because it mischaracterizes NTSP's purpose. (CX0275.004 ("The purpose of [NTSP] is to further any and all purposes permitted under Section 5.01 of the Texas Medical Practice Act and is organized exclusively for charitable, scientific, and educational purposes.")). Furthermore, this finding is misleading because it does not differentiate between risk and non-risk contracting activities. NTSP was formed to allow a group of specialist physicians to accept economic risk on medical contracts and participate in the medical decision-making process. It has since broadened to include, as a secondary activity, non-risk contracting. (Vance, Tr. 587-88; Wilensky, Tr. 2158-59).

7. NTSP is a corporation, and is controlled by and carries on business for the pecuniary benefit of its participating physicians, (CX0275 at 7 (each NTSP Board Member must at all times be a physician actively engaged in the practice of medicine); CX0275 at 30-31 (NTSP shall use best efforts to market itself and its Participating Physicians to payors and to solicit payor offers for the provision of Covered Services by Participating Physicians); CX0310 at 1 (stating that NTSP physician's ability to negotiate "substantially improved" by NTSP; noting NTSP's discussions with payors "should lead to contracts that are more favorable than we would be able to achieve individually or through other contracting entities"); CX0195 ("NTSP wishes to avoid having its members experience a Florida fee-for-service meltdown"); CX0159 (noting contractual issues addressed by NTSP include "maintaining minimum reimbursement standards for its member physicians").

Response to Finding No. 743 expey.vher contracting

actually states that NTSP *does not* consider their participating physicians to be "members" as defined by the 501(a) charter. (Van Wagner, Tr. 1492-93). NTSP addresses the legal arguments concerning the legal definition of "member" in its post-trial briefing. *See* North Texas Specialty Physicians' Post-Trial Brief and Post-Trial Reply Brief.

B. NTSP is Engaged in, and its Acts and Practices Affect, Interstate Commerce

9. NTSP affects and does business in interstate commerce. (CX1187 (McCallum, Dep. at 162-168); CX1199 (Vance, Dep. at 297, 300-301) (NTSP members provide medical services to patients from outside the state of Texas, and purchase malpractice insurance from out-of-state carriers.); CX1195 (Van Wagner, 01.20.04 Dep. at 77); CX1187 (McCallum, Dep. at 162-166); CX1177 (Grant, Dep. at 115-116); CX1199 (Vance, Dep. at 299-301) (NTSP and its members make substantial purchases from vendors located outside the state of Texas.)). NTSP members also accept payments from the United States Government through the nationwide Medicare and Medicaid programs. (CX1177 (Grant, Dep. at 116-117); CX1178 (Hollander, Dep. at 163); CX1187 (McCallum, Dep. at 165-166); CX1199 (Vance, Dep. at 298) (NTSP member physicians recruit physicians from outside of Texas to join their own practices)).

Response to Finding No. 9: This is a legal assertion, not a proper proposed finding. Further, deny. The challenged conduct of NTSP is not business in interstate commerce and does not affect interstate commerce. NTSP's non-risk contracts and refusals to deal also do not related to the evidence cited. Deny that conduct of physicians is attributable to NTSP. *See* North Texas Specialty Physicians' Post-Trial Brief at 36-38. Deny to extent the proposed finding uses the term "member" differently than NTSP's witnesses testified. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

10. NTSP's contracting practices have an effect on national and out-of-state costs of health care. (Roberts, Tr. 474; Quirk, Tr. 248; Grizzle, Tr. 667, 715) (NTSP has business relationships with Aetna,

CIGNA and United, national health plans with out-of-state headquarters); (Roberts, Tr. 476; Quirk, Tr. 253-254; Grizzle, Tr. 681-682) (These health plans all provide health coverage to multi-state employers, including those with significant number of covered lives in the Fort Worth area.); *see e.g.*, CX1063 (listing United Healthcare's national customers); (Roberts, Tr. 476-477; Quirk, Tr. 253-254; Grizzle, Tr. 681-682) (The costs these health plans incur in the Fort Worth area affect their pricing of health coverage out-of-state nationally).

Response to Finding No. 10: Deny. NTSP's contracting practices do not affect national and out-of-state costs of health care. *See* Response to Finding No. 9; *see also* North Texas Specialty Physicians' Post-Trial Brief at 36-38. Deny also as unsupported by sufficient evidence. The fact that Aetna's headquarters are located in Connecticut does not demonstrate that NTSP's activities have an effect on national healthcare costs. (Roberts, Tr. 474). The same is true with respect to the United Healthcare's headquarters and Cigna's headquarters. (Quirk, Tr. 248; Grizzle, Tr. 667, 715). Finally, the United HealthCare's national customer list cited does not prove NTSP's activities effect interstate commerce. The document contains 99% Texas employers (only two employers on the list are outside of Texas), and many of the employers listed are Texas municipalities, which typically do not employ people outside of Texas. (CX1063).

III. Background: Expert and Other Testimony on the Health Care Industry, NTSP, and Health Care in Fort Worth

A. Expert Testimony

11. Expert analysis and valuable insight into the health care industry and economics was provided by Dr. Lawrence Peter Casalino and Dr. H.E. Frech. (Frech, Tr. 1261-1453; Casalino, Tr. 2779-2950).

Response to Finding No. 11: This a legal assertion, not a proper proposed finding. Further, NTSP denies as unsupported by the evidence cited, which is the entire testimony of Drs. Casalino and

Frech. Dr. Frech offered no opinion on the relevant market and did not perform any concentration ratios and analysis or any entry analysis. (Frech, Tr. 1393-94). Dr. Frech did not look at elasticity and substitution in the market. (Frech, Tr. 1436). Dr. Frech did not study which physician specialties would share a product market. (Frech, Tr. 1424-25). Dr. Frech did not look at any cost data for North Texas, did no analysis of cost increases, never considered total medical expense, and never looked at physician utilization. (Frech, Tr. 1416-17, 1421). Dr. Frech did not compare NTSP's rates to the rates of other IPAs. (Frech, Tr. 1440, 1448). In fact, Dr. Frech did not review any data beyond looking at the report of Respondent's expert, Dr. Maness. (Frech, Tr. 1358-59, 1414-15). Dr. Frech had no opinion on the comparative data presented by NTSP. (Frech, Tr. 1357-62). Dr. Frech did not attend any NTSP meetings, did not study how much of physician revenue was related to contracts involving NTSP, and did not have a specific understanding of what payor offers were covered by NTSP's Physician Participation Agreement. (Frech, Tr. 1412, 1432-33, 1366-67). Dr. Frech looked at only a limited sample of payor contracts and formulated his opinion without looking at payor testimony, although he has seen that testimony now. (Frech, Tr. 1388-89, 1357). Dr. Casalino has no experience in the Texas healthcare market (Casalino, Tr. 2881-83). Dr. Casalino's research and knowledge apply solely to the distinctive healthcare market in California and are therefore irrelevant to NTSP's activities. (Casalino, Tr. 2881-83). Dr. Casalino is not an economist, and he admits that he is not an expert in analyzing quantitative data. (Casalino, Tr. 2879; 2884-86). Therefore Drs. Frech and Casalino did not provide expert analysis and valuable insight into the health care industry or economics relevant to this proceeding.

12. Dr. H. E. Frech is a professor of Economics at the University of California, Santa Barbara. He is also an adjunct professor at Sciences Politique De Paris, an adjunct scholar at the American Enterprise Institute, and an affiliate of the Law and Economics Consulting Group. (Frech, Tr. 1261-1262).

Response to Finding No. 12: Admit, but deny relevance to NTSP's activities or the disposition of the issues in this proceeding. *See* Responses to Findings Nos. 11-17.

13. As a professor at University of California, Santa Barbara, Dr. Frech teaches and conducts research relating to the application of the principles of industrial organization to the health care industry. (Frech, Tr. 1263-1264) Dr. Frech has published numerous articles relating to the industrial organization of health care in peer-reviewed journals, and is the author of Competition and Monopoly in Health Care. (Frech, Tr. 1264-1275, Frech, Tr. 1276 (Dr. Frech has testified as an expert in previous health care antitrust cases, for both plaintiffs and defendants.)).

Response to Finding No. 13: Admit, but deny relevance to NTSP's activities or the disposition of the issues in this proceeding. *See* Responses to Findings Nos. 11-17.

14. Dr. Frech's testimony has explained why economic principles predict that the practices of NTSP and its member physicians are likely to produce anticompetitive effects, including higher prices for medical care. (*See* findings 103, 104, 114, 116, 119, 122-124, 137, 140, 423, 477, 478).

Response to Finding No. 14: This is a legal assertion, not a proper proposed finding.

meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

15. In addition, Dr. Frech explained that their practices have, in fact, produced such effects. (*See* findings 103, 104, 114, 116, 121, 122, 140, 142).

Response to Finding No. 15: This is a legal assertion, not a proper proposed finding. Further, NTSP denies this statement. This statement is also supported solely by proposed findings that NTSP denies. Dr. Frech's testimony and the other evidence does not support this statement. *See* NTSP's Responses to Findings Nos. 11, 103-04, 114, 116, 121-22, 140, 142. NTSP addresses the relevant legal arguments in its post-trial briefing. *See* North Texas Specialty Physicians' Post-Trial Brief and Post-Trial Reply Brief.

16. In his analysis of NTSP, Dr. Frech has focused on the competitive implications of NTSP's contracting behavior. To formulate his analysis, Dr. Frech has reviewed substantially all transcripts, court filings, countless documents produced by NTSP and third parties, and interviewed several health plans and Fort Worth employers. (Frech, Tr. 1276-1278; 1395). Dr. Frech used his standard research methodologies in his analysis of NTSP, except to the extent that litigation gives greater documentary access than academic research. (Frech, Tr. 1278-1279).

Response to Finding No. 16: Deny first and third sentences. See NTSP's Response to Finding No. 11. Deny second sentence as overbroad and incomplete. Dr. Frech did not review "substantially all transcripts" to formulate his analysis because Dr. Frech had not reviewed the payors' deposition transcripts, taken under oath, at the time he conducted his analysis. (Frech, Tr. 1357). Moreover, the term "countless" is vague and unquantifiable.

17. Dr. Frech's experience, the considerable breadth of inquiry he undertook prior to formulating his opinion, the clarity of his analysis, and the consistency of his findings with the documentary record here, all indicate that Professor Frech's opinions in this matter are entitled to substantial weight.

Response to Finding No. 17: Deny. This is a legal assertion, not a proposed finding.

nine physicians and served on the board of directors of one of the IPAs in which his medical group participated. (CX1150 at 42; Casalino, Tr. 2781-2785).

Response to Finding No. 20: Admit, but deny as incomplete and as to relevance to NTSP's activities or the disposition of issues in this proceeding. For example, Dr. Casalino has limited experience with payors and IPAs. (Casalino, Tr. 2784, 2893, 2881-83). Likewise, he has no experience in the Texas healthcare market (Casalino, Tr. 2881-83). Dr. Casalino's research and knowledge apply solely to the distinctive healthcare market in California and are therefore irrelevant to NTSP's activities. (Casalino, Tr. 2881-83).

21. As a professor at the University of Chicago, Dr. Casalino teaches and conducts research relating to how the various forms of physician organizations affect the quality and cost of physician services. The research is national in scope and is published in peer-reviewed journals. (CX1150 at 34-37; Casalino, Tr. 2785-89; 2941-42).

Response to Finding No. 21: Admit, but deny as incomplete and as to relevance to NTSP's activities or the disposition of issues in this proceeding. See Response to Finding No. 20. Additionally, Dr. Casalino admits that he has "not analyzed the numbers or generated any new analyses" relative to this case because "that is not [Dr. Casalino's] area of expertise." (Casalino, Tr. 2885-86) *See also* NTSP Response to Finding No. 20.

22. In the course of his research, Dr. Casalino evaluates quantitative analyses of the cost and quality of physician services. Although he does not personally perform the technical statistical adjustments required to make comparisons of costs and quality between different patient populations, he is very familiar with the demographic parameters of these adjustments. (CX1150 at 34-37; Casalino, Tr. 2821-2825).

Response to Finding No. 22: Deny. Dr. Casalino is not an economist. (Casalino, Tr. 2879). Dr. Casalino admits that he does not analyze numbers or generate analyses because he is not

an expert in running data. (Casalino, Tr. 2885-86). Furthermore, because Dr. Casalino is not qualified to make population adjustments, his "familiarity with the demographic parameters" is irrelevant to any determination he makes regarding NTSP's activities. (Casalino, Tr. 2884 ("I am absolutely not an expert at the technical aspects of making population adjustments")). Finally, what limited expertise he possesses in evaluating the cost and quality of physician services is not applicable to the Texas market in which NTSP operates. (Casalino, Tr. 2879-80; 2881-82).

23. In his analysis of NTSP, Dr. Casalino has focused on NTSP's objectives of clinical integration, quality improvement, and cost control, as well as the necessity of NTSP negotiating collectively with health plans to achieve these objectives. To complete his analysis, Dr. Casalino has reviewed documents produced by NTSP and third parties; conducted electronic searches through these documents; and read deposition transcripts, expert reports, and trial transcripts. (Casalino, Tr. 2790-2791). Dr. Casalino used his standard research methodologies in his analysis of NTSP, except to the extent that litigation gives more documentary access than does academic research. (Casalino, Tr. 2791).

Response to Finding No. 23:

2791).

24. Physicians often organize their practices into medical groups, which operate as single integrated entities having a single CEO, office manager and staff, and balance sheet. Physicians practicing through a medical group may be owners or employees of the group. (Casalino, Tr. 2795-96).

Response to Finding No. 24: Admit.

25. Physicians and medical groups often contract with health plans in order to increase the volume of patients available to them. (Frech, Tr. 1288-1289).

Response to Finding No. 25: Admit.

26. Competing physicians and medical groups sometimes enter into arrangements with one another to form independent practice associations, known as IPAs. IPAs are looser combinations of medical groups formed for the purpose of negotiating contracts with managed care health plans. (Casalino, Tr. 2796; Frech, Tr. 1292).

Response to Finding No. 26: Admit first sentence, but deny relevance to NTSP. NTSP was formed to enter into risk contracts and the participating physicians contracted with NTSP for that purpose. *See* Response to Finding No. 6. Deny second sentence. NTSP is an IPA formed for the purposes of furthering "any and all purposes permitted under Section 5.01 of the Texas Medical Practice Act and is organized exclusively for charitable, scientific, and educational purposes." CaX28s syfir into ePoes negotiate risk contracts with health plans, but nto ePoes not negotiate economic terms of non-risk contracts. *See* Response to Finding No. 53.

27.
Casalino, Tr. 2799-2800).

Response to Finding No. 27: Denyr into ecan and Poes control its participating physicians on risk contracts. Deny to extent the proposed finding uses the term"member" differently thaninto 's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any

proposed finding should define that term consistent with the testimony given. *See*

30. Lower prices for physician services may enable employers to offer health care benefits or increased health care benefits to employees and may result in lower co-payments and deductibles for employees and other covered persons. (Frech, Tr. 1291-1292).

Response to Finding No. 30: Admit as an abstract proposition, but deny as unsupported by sufficient evidence concerning the disposition of the issues in this proceeding. There is no cited testimony of physicians, employers, or health plans to support this statement. *See* Response to Finding No. 28. The proposed finding also ignores the concept of total medical expense.

31. Health plans, thereby, can assist consumers in obtaining competitive pricing for physician services as well as in the search for and selection of physician providers. (Frech, Tr. 1281-1282).

Response to Finding No. 31: Admit as an abstract proposition, but deny as unsupported by sufficient evidence concerning the disposition of the issues in this proceeding. There is no cited testimony of physicians, employers, or health plans to support this statement. *See* Response to Finding No. 28.

C. Health Care Insurance and Managed Care

32. Historically, most health care insurance coverage was indemnity insurance. The prevalence of indemnity insurance skewed incentives in such a way that consumers often neither sought to reduce price by seeking lower-priced providers nor quantity by seeking to avoid over-utilization. (Frech, Tr. 1282-1283).

Response to Finding No. 32: Admit.

33. Managed care was introduced to address these deficiencies and control the cost of health care services through health plan contracting with physicians, control of utilization, and management of care. (Frech, Tr. 1282-1284, 1289).

Response to Finding No. 33: Admit.

34. One form of managed care is the Health Maintenance Organization ("HMO"). HMOs generally feature small provider panels, low co-payments for patients, broad administrative controls to limit utilization, with no coverage for patients who choose providers outside the network. (Frech, Tr. 1283-1284).

Response to Finding No. 34: Admit.

35. HMO contracts can involve a variety of physician compensation structures. In some instances, participating physicians are paid a stated fee for each service rendered. This compensation structure is referred to as fee-for-service. (Mosley, Tr. 131-132).

Response to Finding No. 35: Admit.

36. Health plans that contract with physicians on a fee-for-service basis often do so based on a stated percentage of the "Medicare RBRVS" fee schedule, which provides reimbursement rates for a large number of specific procedures. (Frech, Tr. 1286; Mosley, Tr. 137; Grizzle, Tr. 692-693).

Response to Finding No. 36: Admit.

37. The Medicare RBRVS fee schedule refers to Medicare's Resource Based Relative Value System ("RBRVS"), a system developed by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for each service rendered to Medicare patients. (CX1204; *see* Complaint).

Response to Finding No. 37: Admit.

38. The RBRVS establishes weighted values for each medical procedure, such that the application of a percentage multiplier (such as 100% for Medicare itself), enables one to determine the fees for thousands of different services simultaneously. (CX1204; Frech, Tr. 1286).

Response to Finding No. 38: Admit.

39. Fee-for-service reimbursement arrangements do not provide a physician with any incentive to control the utilization of or enhance cooperation with other physicians with whom the physician competes. (Frech, Tr. 1345-1346).

Response to Finding No. 39: Deny. Fee-for-service reimbursement arrangements can include risk provisions that provide physicians with incentives to control utilization and enhance cooperation. NTSP has fee-for-service contracts that include such provisions. *See* Response to

Finding No. 46. Further, Complaint Counsel admits that "shifting financial risk to physicians also can be accomplished by paying a physician or physicians on a fee-for-service basis, but withholding a part of the payment... ." *See* Complaint Counsel Proposed Finding No. 43.

40. In other instances, physicians participating in an HMO are paid (or share) a stated per patient, per month fee, irrespective of the quantity of services rendered. This is referred to as a capitation

collaboration, and interdependence among members of an IPA. (Mosley, Tr. 132-33; Frech, Tr. 1398; Van Wagner, Tr. 1605-06, 1608-11; Lovelady, Tr. 2641-43; Maness, Tr. 2055 (typical withhold range is 5-15%)). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

45. A less tightly controlled form of managed care is the Preferred Provider Organization ("PPO"). Relative to HMOs, PPOs generally involve fewer administrative controls and higher patient co-payments to limit utilization, but larger physician panels and greater access to out-of-network physicians, albeit at a reduced rate of reimbursement. (Frech, Tr. 1283-1284).

Response to Finding No. 45: Admit as a general proposition.

46. PPOs contract with physicians under fee-for-service reimbursement arrangements (Mosley, Tr. 137), which are by definition non-risk bearing. (CX1177 (Grant, Dep. at 78); CX1198 (Vance, Dep. at 36)).

Response to Finding No. 46: Deny. Fee-for-service reimbursement arrangements can include provisions for withholds, bonuses, and other pay-for-performance provisions that make the fee-for-service reimbursement arrangement a risk contract. (Quirk, Tr. 255; Mosley, Tr. 132-33, 206; Frech, Tr. 1398-99; Van Wagner, Tr. 1605-06, 1608-11, 1758-59, 1761; Lovelady, Tr. 2641-44). Further, Complaint Counsel admits that "shifting financial risk to physicians also can be accomplished by paying a physician or physicians on a fee-for-service basis, but withholding a part of the payment... ." *See* Complaint Counsel Proposed Finding No. 43.

47. When prices for HMOs and PPOs are roughly comparable, consumers prefer PPOs because they permit greater patient choice of physicians, through larger panels and the extension of benefits

outside of the network. (Mosley, Tr. 133-134; Jagmin, Tr. 972).

Response to Finding No. 47: Deny as vague and irrelevant. It is unclear whether Mr. Mosley's testimony applies to employers or employees as the consumers or which prices are comparable. The prices for HMOs and PPOs are not necessarily even roughly comparable, and the price to patients can vary because of co-pays, etc. Dr. Jagmin's testimony does not support this statement.

48. When buying health coverage, employers look for networks that include all of the tertiary care hospitals in an area, most of the other hospitals within the area, and a broad selection of physicians in the locale, including a wide selection of specialists within each specialty. (Jagmin, Tr. 972, 1102-1103; Quirk, Tr. 270-272, 275-276).

Response to Finding No. 48: Deny as unsupported by proper employer testimony and vague as to the effect of differences in total medical expenses, quality, and other factors.

49. Health plans respond by trying to assemble and market a panel of physicians that will satisfy employers' preferences for greater access to a wide array of conveniently located physicians, without compromising the overall cost of care. (Quirk, Tr. 270-272; Jagmin, Tr. 972); *see also* findings 154, 156, 296.

Response to Finding No. 49: Deny as unsupported by proper employer testimony and vague as to the effect of differences in total medical expense, quality, and other factors. NTSP has also denied the findings of fact cited in support.

D. NTSP

50. NTSP is an IPA located in Fort Worth, Texas. It is organized as a non-profit corporation under the laws of the State of Texas. (Van Wagner Tr. 1297, 1489-1491; CX1196 (Van Wagner, 08.29.03 Dep. at 8)).

Response to Finding No. 50: Admit.

51. NTSP has approximately 600 participating physicians, of whom about 130 are primary care physicians (the remainder being specialists of various kinds). (CX1196 (Van Wagner, 08.29.03 Dep. at 12); CX1204).

Response to Finding No. 51: Deny. In 2003, NTSP had approximately 575 participating physicians. Currently, NTSP has only 480 physicians. (Van Wagner, Tr. 1510, 1518).

52. Approximately 85-88% of NTSP's member physicians are located in Tarrant County, with the majority located in Fort Worth. (Van Wagner, Tr. 1471; CX1196 (Van Wagner, 08.29.03 Dep. at 15-16)).

Response to Finding No. 52: Admit, but incomplete. NTSP has participating physicians in eight counties in and around the Metroplex. (Van Wagner, Tr. 1469-70). Many of NTSP's participating physicians and physician groups have more than one office, with some offices located outside of Tarrant County. (Van Wagner, Tr. 1470; Lonergan, Tr. 2710). Further, Dr. Van Wagner's cited deposition testimony indicates that her estimate of percentages takes into account physicians located in Fort Worth and the Mid-Cities, which includes portions of Dallas County and Tarrant County. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

53. NTSP's primary purpose and actions are the negotiation of contracts, including fee arrangements, with health plans for and on behalf of its 600 member physicians. (CX0350 (NTSP was started "to provide a seat at the table of medical business for the individual physicians in Fort Worth. . . . NTSP through PPO and risk contracts, has provided a consistent premium fee-for-service reimbursement to the members when compared with any other contracting source."); CX1182 (Johnson, Dep. at 10-11); CX1196 (Van Wagner, 08.29.03 Dep. at 11, 12); CX0311 at 5, 8-10, 14-15).

Response to Finding No. 53: Deny. NTSP's primary purpose is stated in its "Statement of

Purpose" on the first page of the NTSP By-laws. NTSP's statement of purpose says nothing about the "negotiation of contracts" or "fee arrangements, with health plans." (CX0275.004 ("The purpose of [NTSP] is to further any and all purposes permitted under Section 5.01A of the Texas Medical Practice Act *and is organized exclusively for charitable, scientific, and educational purposes*.") (*emphasis added*). None of the citations listed mention NTSP's "primary purpose and actions." Further, NTSP does not negotiate fee arrangements on non-risk contracts. NTSP is unable to conduct and does not conduct any binding negotiation on behalf of physicians on non-risk contracts. (Palmisano, Tr. 1240; Van Wagner, Tr. 1777; Deas, Tr. 2605). On non-risk contracts, NTSP only negotiates non-economic terms. (Vance, Tr. 595; Van Wagner, Tr. 1636-37). The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. See Merriam-Webster *available at* http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=negotiate. ("(1) intransitive senses: to confer with another so as to arrive at the settlement of some matter; (2) transitive senses: a) to deal with -- some matter or affair that requires ability for its successful handling, manage; b)to arrange for or bring about through conference, discussion, and compromise."). When NTSP uses the terms "negotiate" or "negotiation" relating to a non-risk contract, they apply only to the non-economic terms of the contract. (Van Wagner, Tr. 1775-76, 1779-80). In 2003, NTSP had approximately 575 participating physicians. Currently, NTSP has only 480 physicians. *See* Response to Finding No. 51.

54. NTSP originally focused on negotiating shared-risk contracting with health plans, but as the market moved away from risk-sharing arrangements NTSP increasingly sought to negotiate (and negotiated) fee-for-service contracts. (CX0195 (In "an environment where payors were moving to a fee-for-service approach," NTSP "wished to avoid its members experiencing a fee-for-service

meltdown"). *See also* (CX0083 at 3 (NTSP Board acknowledges that "risk business is a small part of the business" and concludes that NTSP's "focus should center on how to benefit members on fee-for-service contracts as well.")).

Response to Finding No. 54: Admit first clause. Deny remainder. Deny response to extent the proposed finding uses the term"negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

55. In 2001, NTSP accepted risk on only approximately 32,000 lives. (CX0616 at 2 (NTSP takes professional risk on approximately 20,000 commercial and 12,000 Medicare lives); CX1197).

Response to Finding No. 55: Admit.

56. NTSP has only one risk-sharing contract – the one it shares with PacifiCare. (CX1177 (Grant, Dep. at 19)).

Response to Finding No. 56:

vastly more lives." Deny entire statement as not supported by evidence cited. Dr. Van Wagner's deposition excerpt discusses quality initiatives, with no mention of fee-for-service contracts or the number of lives covered. CX 265,

proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

60. The Board manages the organization, determines NTSP's minimum contract prices, evaluates contract offers, and obtains contracts on behalf of its members. (CX0275 at 5; Van Wagner, Tr. 1642-43; Vance, Tr. 595; CX1177 (Grant, Dep. at 22-24); CX1174 (Deas, Dep. at 42).

Response to Finding No. 60: Deny as not supported by evidence cited and not distinguishing between risk and non-risk contracts. NTSP's Board sets the minimums for the entry of NTSP, as an entity, into non-risk contracts by reference to the mean, median, and mode of the poll results. (Vance Tr. 595 ("All of us are quite aware that PPO contracting and nonrisk contracting is done on a basis of non-economic issues and that rates -- you don't negotiate rates. It's basically illegal. So that rates were set by the payor to be either accepted or rejected by the individuals."); Van Wagner, Tr. 1639-40, 1642-43). The Board does not obtain contracts on behalf of participating physicians; in fact, the Board has no authority to bind participating physicians to non-risk contracts. (Palmisano, Tr. 1240; Frech, Tr. 1363-64; Van Wagner, Tr. 1637, 1777; Deas, Tr. 2605). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

61. NTSP participants are organized into specialty divisions, based on field of practice. (Van Wagner, Tr. 1510). NTSP's Medical Executive Committee includes the chairs of each of NTSP's specialty divisions, (Deas, Tr. 2559-2560), who are elected by the members within each specialty. (CX0275 at 5; CX1197 (Van Wagner, 08.30.03 Dep. at 203, 228)).

Response to Finding No. 61: Admit, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

62. The Medical Executive Committee transmits information and feedback, including the status of fee-for-service contract discussions, between NTSP's staff and Board and the membership. (CX1174 (Deas, Dep. at 6-7); Deas, Tr. 2560).

Response to Finding No. 62: Admit, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

63. NTSP also communicates with its membership by sending faxes called "Fax Alerts" which keep its membership informed of the activities of NTSP including contractual issues. (CX1187 (Hollander, Dep. at 40; CX1198 (Vance, Dep. at 54)).

Response to Finding No. 63: Admit, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

64. NTSP's executive director is Karen Van Wagner, PhD. Van Wagner joined NTSP in 1997, roughly a year after the organization was established. (Van Wagner, Tr. 1462).

Response to Finding No. 64: Admit.

65. Van Wagner was NTSP's principal fact witness. She is the person primarily responsible for

conducting NTSP's anticompetitive activities. (*See findings* 50-53, 59-61, 64, 66, 68, 266, 324, 326, 333, 337, 339, 343, 358, 369, 374, 375, 393).

Response to Finding No. 65: Admit first sentence. Deny second sentence. This is a legal assertion, not a proposed finding. This statement is also supported solely by proposed findings that NTSP denies. Further, NTSP's activities are not anticompetitive. NTSP is not involved in collusion with its participating physicians and does not negotiate economic terms of non-risk contracts. (Frech, Tr. 1363-66, 1368-69; Maness, Tr. 2048-49; Van Wagner, Tr. 1564, 1637, 1777; Deas, Tr. 2406-07; Lonergan, Tr. 2718). Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 53. NTSP's activities also have procompetitive effects. NTSP addresses these legal arguments in its post-trial briefing. *See* North Texas Specialty Physicians' Post-Trial Brief and Post-Trial Reply Brief.

66. Van Wagner has a significant financial interest in the outcome of this proceeding. Van Wagner's current base salary as NTSP's Executive Director is approximately $270,000. (Van Wagner, Tr, 1813). In addition to her salary, Van Wagner regularly receives a bonus for TriaDlarly receivk17Bstceivk17Bsd Tk17

sentences, but deny relevance to the assertion made. Van Wagner's salary and bonus do not depend on the outcome of this proceeding. (Van Wagner, Tr. 1816-17). Admit fifth sentence, except that Van Wagner's husband is of counsel, not a partner, in the law firm of Thompson & Knight, but deny relevance to the assertion made. Van Wagner's husband's income does not depend on the outcome of this proceeding. (Van Wagner, Tr. 1816-17). Deny sixth sentence as unsupported by the evidence cited. As already stated, Van Wagner's salary and bonus and her husband's income do not depend on the outcome of this proceeding or NTSP's non-risk business model. Further, this statement is solely supported by proposed findings that NTSP denies. Admit seventh sentence.

67. Van Wagner's testimony in this proceeding at times conflicted with other NTSP testimony and with her prior testimony, was lacking in candor, and at times appeared dissembling. (*See* findings 68-72).

Response to Finding No. 67: Deny. This conclusory and argumentative statement is not a proper proposed finding and is supported solely by proposed findings that NTSP denies.

68. Van Wagner testified at trial that member physicians may negotiate fee-for-service arrangements with health plans at the same time that NTSP is considering a health plan offer; but in her investigational hearing of August 29, 2002, Van Wagner testified that a member physician may not act on an offer that he or she receives from a health plan if NTSP is engaged in negotiations with that health plan. (Van Wagner, Tr. 1855-1858).

Response to Finding No. 68: Deny as mischaracterizing testimony. The restatement of Dr. Van Wagner's trial testimony is correct. The restatement of Dr. Van Wagner's investigational hearing testimony is incorrect. Dr. Van Wagner's answer to the investigational hearing questions did not relate to all offers from payors to physicians, but only the limited number defined in the Physician Participation Agreement as "Payor Offers." The questions prior to the question that was read at trial made it clear

her answer was addressing this provision. (CX 1196 (Van Wagner, Dep. at 65-66) ("Q. And is this the Participation Agreement that has been used by the organization for the last few years? A. Yes. Q. I would like to direct your attention to a page that is Bates numbered 29. I'm sorry. Rather 32. And it's paragraph 2.1 where it says, quote, "Receipt of payor offers." Do you see that provision? A. Yes. Q. And I would like to focus on the first sentence of that provision which states, quote, "NTSP shall have the right to receive all Payor Offers...")). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

69. Van Wagner testified that she did not have the authority to send out to members ("to messenger") Aetna's proposal in late 2001, (Van Wagner, Tr. 1713-1714), but Dr. Blue, an NTSP Board Member, testified in her deposition that there was nothing restricting the Board's authority to "messenger" contract offers that fell below NTSP's minimums, (CX1170 (Blue, Dep. at 10-11)), as did Dr. Grant, another NTSP Board member, (CX1177 (Grant, Dep. at 12)) *see also*, CX1194 (Van Wagner IH. at 29-30, 33, 60, 63) (Van Wagner, also testified repeatedly that NTSP's Board lacked the authority to "messenger offers" below the minimums.)

Response to Finding No. 69: Deny as incomplete and not supported by the evidence. Dr. Van Wagner testified that she did not "have authority under the board policy to go forward on that contract?" (emphasis added -- this question refers specifically to Dr. Van Wagner's authority with respect to a single contract, not the board's authority or contracts in general). (Van Wagner, Tr. 1714). The remaining Van Wagner testimony cited, in which Complaint Counsel claims "Van Wagner, also testified repeatedly that NTSP's Board lacked the authority to 'messenger offers' below the minimums," says nothing about board minimums, the board's authority, or messengering offers. In fact,

Dr. Van Wagner's remaining cited testimony refers only to dealings with PacifiCare. (CX 1194 (Van Wagner IH. at 29-30, 33, 60, 63)). Moreover, the cited testimony of Dr. Blue and Dr. Grant is not inconsistent with Dr. Van Wagner's accurately cited statement at trial. Their testimony does not concern authority at all, but merely demonstrates that the board has discretion to messenger contracts below the minimums in rare situations. Specifically, when asked about the board's authority, Dr. Blue states: "I don't think it's an authority issue. I think that, yes, they can pass it on if they choose to do so if it's a good contract otherwise." Dr. Grant's testimony further supports this. (CX1177 (Grant, Dep. at 12) ("They present it to the board and we decide whether it still gets sent out or not . . . I can't think of a specific instance where that happened. I don't think we had very many offers that were below the minimums.") Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

70. Van Wagner testified on direct at length and without qualification that NTSP engaged in numerous utilization and quality initiatives; she indicated only under cross-examination that in fact those initiatives were not undertaken with respect to fee-for-service patients and physicians. (Van Wagner, Tr. 1834-1841;1853).

Response to Finding No. 70: Deny as mischaracterizing testimony. Van Wagner's testimony on direct was that NTSP engaged in utilization and quality initiatives only on risk contracts. Van Wagner never implied or stated that NTSP engaged in these processes with non-risk contracts. She testified numerous times to the fact that the only data NTSP utilized came from PacifiCare and Cigna HMO risk contracts. (Van Wagner, Tr. 1521-22; 1528-29; 1531-32). Van Wagner explained on

cross-examination that her original testimony had been accurately qualified. (Van Wagner, Tr. 1834-41).

71. Van Wagner sought evasively to redefine terms to repudiate her own characterization of NTSP price offers, business documents as ongoing "negotiations" and "NTSP proposals," which clearly pertained to fee-for-service contracts. *Sarly*

meeting he wrote down the rate 145%, but Haddock did not testify that Dr. Van Wagner gave him this rate at that meeting. Further, deny the validity of Haddock's testimony. At this time, NTSP was also involved in risk discussions with Blue Cross. (Van Wagner, Tr. 1719-20). Further, 145% was the current rate with Blue Cross that NTSP participating physicians had access to through an affiliation with HTPN. (CX 306.003).

73. Van Wagner's testimony is unreliable, and to the extent that it conflicts with the ordinary understanding of documentary evidence or the testimony of others it is entitled to little weight.

Response to Finding No. 73: Deny. This statement is an improper proposed finding and is not supported by any cited evidence.

74. Dr. Thomas Deas is the current president and chairman of the Board of NTSP. In addition to heading the Medical Executive Committee, Dr. Deas is a medical director of NTSP. (Deas, Tr. 2524, 2556).

Response to Finding No. 74: Admit.

75. Dr. William Vance was one of the founding members of NTSP, serving as its president from 1996 until 2001. Dr. Vance was a member of the medical management committee from its inception through 2002. In addition, he was the chairman of NTSP's cardiology section. His role within NTSP ceased when his practice group, Consultants in Cardiology, withdrew from NTSP in April of 2002. (CX1198 (Vance, Dep. at 8, 48, 49)).

Response to Finding No. 75: Admit, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

F. NTSP's Member Physicians

76. NTSP's member physicians have distinct economic interests, reflecting their separate clinical practices. (CX1182 (Johnson, Dep. at 21); *see*, CX0524 (Roster of NTSP members listing multiple physicians and/or physician groups practicing the same specialty in Fort Worth).

Response to Finding No. 76: Deny as mischaracterizing the evidence. Dr. Johnson's testimony states: "Within the *division of urology* there are several different economic entities, and sometimes the interests are in agreement and sometimes there's conflict." (CX1182 (Johnson, Dep. at 21)) (*emphasis added*). This statement does not encompass all NTSP specialty practices because it only mentions urology. Likewise, the statement does not mention or imply that all of NTSP's participating physicians have distinct economic interests. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

77. Many NTSP physicians and physician practices are in competition with one another, except where they have restricted competition through NTSP. (CX1182 (Johnson, Dep. at 21) ("We compete for patients. We compete at the different hospitals at which we work."); Frech, Tr. 1280); CX0524 (Roster of NTSP members listing multiple physicians and/or physician groups practicing in the same specialty area in Fort Worth); (CX0550) (noting that NTSP's disagreements with payors were supported by its membership despite the fact that "short term advantage and perceived best interest are always controversial and potentially divisive, weakening the strength that our numbers provide.").

Response to Finding No. 77: Deny. NTSP has not restricted competition. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should

Finding No. 65. Further, the cites to Dr. Johnson's testimony mischaracterize his testimony. Dr. Johnson's cited testimony exclusively refers to his urology division and does not encompass all of NTSP's participating physicians. (CX1182 (Johnson, Dep. at 21)). Most NTSP physicians do not compete with one another because they perform different work. (Frech, Tr. 1424; Maness, Tr. 2017; RX 3118 (Maness Report ¶ 19)). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

78. Substantially all of NTSP's physicians participate in fee-for-service contracts. However, only about half of those physicians – about 300 – participate in any risk-sharing contract. Some of these physicians, participate in NTSP through a participation agreement under which they can gain access to NTSP's non-risk contracts, but are not eligible to participate in NTSP's risk contract. (CX0616 at 2-12; CX1196 (Van Wagner, 08.29.03 Dep. at 228); CX1197 (Van Wagner, 08.30.03 Dep. at 182, 228-29); Van Wagner, Tr. 1830; CX1194 (Van Wagner, 11.19.03 Dep. at 37-38).

Response to Finding No. 78: Deny as mischaracterizing the evidence. None of the cited evidence states that "substantially all" of NTSP's physicians participate in risk contracts. CX 616, cited to support this statement, actually indicates that 60% of NTSP's physicians participated in risk-sharing contracts. Further, some of the physicians who are not eligible to participate in NTSP's risk contract are not eligible because NTSP does not have risk contracts to offer these physicians. For example, NTSP is not delegated risk for radiologists or pathologists, so physicians in these specialties cannot take risk through NTSP. (Van Wagner, Tr. 1514-15).

79. Some of NTSP's non-risk sharing members have no desire to accept risk and consider it a great benefit to be able to profit from NTSP's higher rates without taking risk. (Van Wagner, Tr 1881-1884).

Response to Finding No. 79: Admit, but incomplete and vague because there is no indication as to how many physicians "some" constitutes. As of January 2004, all NTSP's participating physicians who are eligible to take risk must participate in risk contracts or, after a short period of time, the physician will no longer be associated with NTSP. (Van Wagner, Tr. 1517-19; Wilensky, Tr. 2181). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

80. Many NTSP physicians join NTSP because the prices in NTSP health plan agreements were more favorable than the same doctors could obtain directly, and thus they "would do better financially." (CX1183 (Lonergan, Dep. at 23-25); Lonergan, Tr. 2731-2732; CX0550).

Response to Finding No. 80: Deny as not supported by evidence cited. Although the statement indicates "many NTSP physicians," the testimony and exhibits cited relate only to one physician, and even those cites do not support this statement. When asked "isn't it the case also that in some fee-for-service contracts with any IPA, including NTSP, you would do better financially?," Dr. Lonergan responded, "[n]ot across the board, no." (Lonergan, Tr. 2731-2732). Additionally, Lonergan's cited deposition testimony refers solely to risk contracts. (CX 1183 (Lonergan, Dep. at 23-25)).

G. Health Care in Fort Worth

81. In contracting for health plan services, Fort Worth employers demand significant coverage by physicians who practice within the city limits of Fort Worth and who admit patients to Fort Worth hospitals. *See generally* (Grizzle, Tr. 688-689, 722; Frech, Tr. 1304-1305; Mosley, Tr. 141-142; Quirk, Tr. 276-277, 280; Jagmin, Tr. 1104-1107).

Response to Finding No. 81: Deny as mischaracterizing the evidence. Mr. Grizzle was asked: "Do employees in the Fort Worth area require Fort Worth area physicians in the network?," to which Mr. Grizzle replied, "Yes." Mr. Grizzle's use of the "Fort Worth area" does not equate with "Fort Worth city limits." (Grizzle, Tr. 688-689). These are two different geographical locations. Moreover, Mr. Grizzle's testimony does not indicate that Fort Worth employers "demand significant coverage."

82. To be competitively marketable to Fort Worth area employers, health plans must include many physicians who practice in a variety of fields in the Fort Worth area. (Grizzle, Tr. 688-689, 720, 722; Jagmin, Tr. 1104-1107).

Response to Finding No. 82: Admit, but deny relevance to NTSP's activities. NTSP is an organization of specialist physicians. The geographic area for specialists is broader than for other physicians because people will travel farther for specialty care. (Frech, Tr. 1428; Maness, Tr. 1993, 1999; Lonergan, Tr. 2631). This fact is shown by NTSP's physicians drawing patients from a wide geographic area and regulations allowing larger service areas for specialists. (Maness, Tr. 1999-2000; Deas, Tr. 2398-99; Lonergan, Tr. 2708; RX 6; CX 1170 (Blue, Dep. at 14-15); CX 1172 (Collins, Dep. at 12)).

83. When an employer considers contracting with a particular health plan, the employer generally asks the plan to perform a "geographic access" study to determine whether the health plan network will satisfy the employer's and its employees' needs. The employer provides the health plan with a list of employees' residence zip codes; the health plan then assesses how many providers are available

through the network within a certain distance of each of those zip codes. (Mosley, Tr. 141). Employers are also concerned about avoiding potential disruption of their provider network. (Mosley, Tr. 140-141; Jagmin, Tr. 1001-1002).

Response to Finding No. 83: Admit as a general proposition.

84. Fort Worth employers typically would consider adequate a network that had appropriate physicians within 10 miles of at least 85%, and preferably 90%, of its employees. (Mosley, Tr. 141-142).

Response to Finding No. 84: [illegible] Tjequat

irrelevant. Network adequacy issues are covered by state and federal regulations. The numbers in this statement are unrelated to these regulations. (Quirk, Tr. 274; Maness, Tr. 1999-2000; Lovelady, Tr. 2628-30; RX 6). Further, Mr. Mosley never discusses "appropriate physicians."

85. [illegible] Response to Finding No. 84:

so that the employees' health care needs can be served with minimal workplace interruption. (Mosley, Tr. 141-142).

Response to Finding No. 86: Deny as unsupported by proper employer testimony, irrelevant, vague, and overbroad. *See* Response to Finding No. 85. The testimony was that most employers have employees and dependents spread throughout the Metroplex. (Quirk, Tr. 402-03, 434-35; Grizzle, Tr. 761; Mosley, Tr. 229-30; Roberts, Tr. 569).

87. NTSP physicians agree that Fort Worth physicians are better able than physicians located elsewhere to address the needs of patients (and primary care physicians) located in Fort Worth. *See, e.g.,* (CX0583 at 1-2 (Dr. John W. Johnson, an NTSP member, writing: "Obviously a provider network whose business is based entirely here in Fort Worth is better positioned to address the needs

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Response to Finding No.786:

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Response to Finding No. 88: Admit that document is accurately quoted, but deny relevance to disposition of issues in this proceeding. This e-mail related to credentialing issues, not market definition.

89. A network of physicians located in Dallas or the Mid Cities that did not also have a large number of appropriate physicians located in Fort Worth would not achieve geographic access required by employers with large numbers of Fort Worth employees, and would not be acceptable to employers even if they were discounted by five percent relative to those areas. (Mosley, Tr. 142-143). Even a large network of physicians located in Dallas or in the Mid Cities, defined as the areas including Arlington, Hurst, Euless, Bedford, Colleyville, and Southlake. (CX1196 (Van Wagner, 08.29.03 Dep. at 16) would not be marketable to Fort Worth employers if the network did not also have a large number of appropriate physicians located in Fort Worth. (Mosley, Tr. 142-143; Jagmin, Tr. 1103-1104; Quirk, Tr. 280-282). A physician network requiring most patients to travel to Dallas or the Mid Cities to obtain medical care would not be marketable to Fort Worth employers even if discounted 10% relative to those areas. (Quirk, Tr. 279-280).

Response to Finding No. 89: Deny first sentence as unsupported by proper employer

suburbs and adjacent areas to Fort Worth indicates any such increase would be undercut. *See* Response to Finding No. 444, 446.

90. If all Fort Worth physicians increased prices by five percent, health plans serving Fort Worth employers would not be able to avoid the price increase by substituting away from Fort Worth. (Grizzle, Tr. 723; Quirk Tr. 280-282; Jagmin, Tr. 1103-1104).

Response to Finding No. 90: Deny as unsupported by proper employer testimony and irrelevant to the disposition of the issues in this proceeding. As Dr. Maness explained, whether a health plan could avoid a price increase by substituting away from Fort Worth doctors completely was not

Employers look at a larger area than Fort Worth when developing a health plan to support covered lives because many will live beyond Fort Worth. *See* Response to Finding No. 84. Payors use a broader area than Fort Worth or Tarrant County when establishing their networks and service areas. (Quirk, Tr. 236-37 (United's service area is Metroplex); Roberts, Tr. 469; Jagmin, Tr. 972-73 (Aetna's service area is Metroplex and outlying counties); Lovelady, Tr. 2623-35 (PacifiCare's service area is a 13-county area)). Even within Tarrant County, NTSP participating physicians are only 22% of the available physicians and a very small percentage of any provider's physician panel. (Frech, Tr. 1395-96). NTSP's participating physicians participate on average in only one-third of NTSP's contracts. (RX 13).

92. Harris Methodist Hospital is the "must have" hospital for a health plan to be marketable to Fort Worth employers. (Frech, Tr. 1303; Grizzle, Tr. 720-721).

Response to Finding No. 92: Deny as mischaracterizing the testimony. None of the

cited testimony uses the phrase "must have." Mr. Grizzle also lists Cook Children's Hospital as a "critical" hospital, and Dr. Frech states that "Baylor All Saints is also of some importance." (Frech, Tr. 1303; Grizzle, Tr. 720-721). There are numerous hospitals in Tarrant County and the Metroplex. (Van Wagner, Tr. 1473-75, 1478-80; 1482-84; 1487-88).

93. In addition to the hospital itself, health plans also need to have the major admitters to Harris Methodist in their network in order to provide effective access to the hospital. (Frech, Tr. 1304, 1305; Grizzle, Tr. 720-721).

Response to Finding No. 93: Deny as mischaracterizing the evidence. Mr. Grizzle did not testify that health plans need major admitters to Harris Methodist to provide effective access to the hospital. First, Mr. Grizzle said: "We didn't need NTSP to include the hospitals in the network." (Grizzle, Tr. 721). He then stated that his health plan could have access to the hospital without having access to the NTSP physicians but that "you couldn't really benefit so much from it from a sales perspective." *See also* Response to Finding No. 92.

94. NTSP physicians represent the vast majority of admissions to Harris Methodist Hospital in many specialties. (Frech, Tr. 1303, 1305; Grizzle, Tr. 720-721).

Response to Finding No. 94: Deny. NTSP physicians participate, on average, in only one-third of NTSP's contracts and have numerous other contracts directly with payors or through other IPAs. (Frech, Tr. 1394-95; RX 13; Van Wagner, Tr. 1556; Maness, Tr. 2081-82; CX 1170 (Blue, Dep. at 51-52); CX 1172 (Collins, Dep. at 16-18, 21-22, 36-37); CX 1177 (Grant, Dep. at 70); CX 1178 (Hollander, Dep. at 14-15, 111); CX 1182 (Johnson, Dep. at 25-26, 36)).

95. Without adequate NTSP physicians in its panel, a health plan would have to seek to send

patients to hospitals where the patients primary care physician is not available to participate in the

physicians contract with Aetna); Beaty, Tr. 462-63 (some NTSP physicians contracted directly and some through other IPAs)). NTSP was selective in admitting physicians and had only 22% of the physicians in Tarrant County, and a much smaller percentage in the Metroplex. (Frech, Tr. 1395-96; Van Wagner, Tr. 1508-11). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

96.

limit competition between the NTSP collective and member physicians. *See* findings 97-104. Second, NTSP and its member physicians establish consensus minimum prices for use in negotiating fee-for-service contracts with health plans. *See* findings 105-124. NTSP then explicitly uses these fixed minimum prices in its negotiations with health plans. *See* findings 125-128. And finally, NTSP adopts various anticompetitive practices designed to reduce the risk that health plans will be able to contract around NTSP, so as to bolster NTSP's price bargaining power. These restraints of trade are described in general in findings 129-142, below, and their operation demonstrated in the description of NTSP fee-for-service contract negotiations with three particular health plans, which follows at findings 157-257, 258-292, 297-394.

Response to Summary Finding: This paragraph of factual assertions with only cites to proposed findings that are denied by NTSP is an improper proposed finding and is not supported by cited evidence. Further, NTSP denies the contents of this paragraph as detailed in the following responsesf

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payor offers or impose a duty on physicians to promptly forward offers to NTSP. "Payor Offers" is a term defined in the PPA, and this term applies only to a limited number of offers. (CX 311, sections 1.16, 1.18). Further, the PPA does not say anything about preventing physicians from negotiating directly with payors. (CX 311, section 2.1). *See* Response to Finding No. 99. Deny characterization of NTSP's participating physicians as "members." Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

99. The Physician Participation Agreement also grants NTSP a right of first negotiation with payors, with the physicians agreeing that they will refrain from pursuing offers from a health plan until notified by NTSP notifies that it is permanently discontinuing negotiations with the health plan. (CX0276; CX0311 at 8; Deas, Tr. 2405-2406; CX1178 (Hollander, Dep. at 68) ("And there were various criteria like time limits that the participating physician generally agreed that they would just wait and after that time limit was expired, then they were free to negotiate on their own.")).

Response to Finding No. 99: Deny. The PPA does not require physicians to send NTSP all offers they receive directly from payors. First, section 2.1 of the PPA does not prevent physicians from negotiating directly with payors; it says only that NTSP has a right to receive all "Payor Offers," as that term is defined in section 1.18 of the PPA, and says nothing about preventing a physician from negotiating directly with a payor. Second, section 2.1 expressly allows a physician to enter into any contract that replaces a contract the physician had as of March 1, 1998. This would apply to any renewals or amendments to contracts in place on that date. Third, by referring to a "Payor Offer," which is a defined term, section 2.1 applies only to a 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 has an active Payor Agreement with NTSP." In other words, section 2.1 applies only to offers from payors who already have an active agreement with NTSP. If a physician receives an offer from a payor that does not already have a contract with NTSP, section 2.1 is irrelevant and inapplicable. (CX 311.007-.008). Further, physicians do not follow these PPA sections and forward all offers to NTSP. (*See, e.g.,* CX 1178 (Hollander, Dep. at 50-52); CX 1198 (Vance, Dep. at 100-01)).

100. Pursuant to its Physician Participation Agreement, NTSP had a duty promptly upon receipt to deliver health plan price proposals (and other economic provisions of offers) for fee-for-service contracts to its physicians. (CX0275 at 9, 33).

Response to Finding No. 100: Deny. This statement is not supported by the evidence cited. CX 275 at the cited pages discusses the NTSP Board committees and the procedures for the billing of NTSP physician services. There is no mention of "health plan price proposals" or other similar offers for delivery. Further, NTSP does messenger all contracts approved by NTSP and meeting the Board minimums. (Van Wagner, Tr. 1706). NTSP as an entity has many reasons to refuse to deal with a payor. *See, e.g.,* Frech, Tr. 1405; Van Wagner, Tr. 1657-58; Deas, Tr. 2413-14, 2419-20.

101. NTSP did not do not this. Instead it rejected as inadequate, and did not pass on to its members, any health plan offer that fell below its minimum contract price. (CX1196 (Van Wagner, 08.29.03 Dep. at 68-69)).

Response to Finding No. 101: Deny first sentence. *See* Response to Finding No. 100. Admit second sentence, but incomplete. NTSP did not participate in and did not messenger to its participating physicians offers falling below the Board minimums. NTSP's Board does not have authority to messenger these contracts. *See* Response to Finding No. 69. Van Wagner's testimony

explains that the interpretation of the provision at issue had evolved. (CX1196 (Van Wagner, Dep. at 68-69)). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any

Participation Agreement. (CX 311; Frech, Tr. 1368). Further, this statement is not supported by the cited testimony. Dr. Deas's testimony does not discuss the Physician Participation Agreement nor does it demonstrate collective bargaining on NTSP's part. (Deas, Tr. 2405-2406). It merely relates to his physician group's receipt of contract offers and how sometimes it will contract directly and sometimes it will wait to see what NTSP does. *See also* Response to Finding No. 102. Further, NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians participate on average in only one-third of NTSP's contracts, and payors have testified that payors can contract with NTSP physicians without NTSP. *See* Response to Finding No. 95.

104. The Physician Participation Agreements thereby restrain competition and promote NTSP's ability to function as the coordinating agency of price collusion. (Frech, Tr. 1313).

Response to Finding No. 104: This is a legal assertion and an improper proposed finding. Further, NTSP denies this statement as mischaracterizing the testimony. Dr. Frech's testimony is that one part of his conclusion on collusion was dependent on the fact that "physicians [agree] that NTSP will have the right of first negotiation, [agree] to defer negotiation to NTSP." The Physicians Participation Agreement does not represent this agreement by physicians. *See* Responses to Findings Nos. 98-103. Dr. Frech also admits that no NTSP physician has refused to negotiate with a payor because of the Physician Participation Agreement (Frech 1368), that there are no agreements between NTSP and any physician to reject a non-risk payor offer (Frech, Tr. 1365-66), and that no NTSP physician has given up the right to independently accept or reject a non-risk payor offer. (Frech 1363-64).

B. NTSP and Its Participating Physicians Establish Consensus Prices for the Provision of Fee-for-Service Medical Care Including the Use of Polls

105.

given. *See* Response to Finding No. 8.

107. The conveyance of this price information from the membership to NTSP later was communicated through NTSP's polling of its members with respect to specific health plan price offers;

various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See*

Responses to Findings Nos. 106-107.

112. These minimums were identical to those set by the Board as early as 1997, (CX1042), and were in excess of prevailing market rates reported to NTSP by its member physicians. *See* (CX0265 (rate comparison for seven health plans, prepared by NTSP in 2001)). *See also* (CX1177 (Grant, Dep. at 113); CX0103 at 6; and CX0389).

Response to Finding No. 112: Deny. There was no Board minimum as early as 1997. *See* Response to Finding No. 105. The cited evidence does not support this statement. Dr. Grant's Deposition testimony, CX 103, and CX 389, all mention poll results, but do not refer to 1997. Also, none of this evidence mentions NTSP's rates being above market. CX 256 is a comparison of NTSP's rates to *street* rates. IPA market rates are not the street rates. (Van Wagner, Tr. 1805-07; Maness, Tr. 2057-58). NTSP's rates are not above market rates for high-quality, efficient physicians

Response to Finding No. 113: Admit that NTSP conducted this Annual Poll to determine Board minimums, but deny that NTSP used these minimums in negotiations with health plans or that this was only the second Annual Poll. *See* Responses to Findings Nos. 106-07, 111. NTSP informs health plans of the Board minimums and messengers all acceptable contracts with rates above Board minimums. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Admit second sentence.

114. NTSP uses its poll to establish consensus prices with and for its physicians, to be used as target prices in collective negotiation with health plans. (Frech, Tr. 1321).

Response to Finding No. 114: Deny. NTSP's poll determines the Board minimum for messengering non-risk contracts, but it is not a consensus price. NTSP's Board sets the minimums for the entry of NTSP, as an entity, into non-risk contracts. NTSP does not participate in collective negotiation with health plans. *See* Response to Finding No. 65. Further, this statement is unsupported by sufficient evidence. NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians

(CX0565; CX1194 (Van Wagner, 11.19.03 Dep. at 78-80); CX1196 (Van Wagner, 08.29.03 Dep. at 26-29, 43-44, 62)).

Response to Finding No. 115: Admit, but deny as incomplete. The poll answers apply to both risk and non-risk contracts and only to offers coming through NTSP. *See* Responses to Findings Nos. 53, 65, 69, 123.

116. Physicians responding to the poll do not identify the actual minimum prices at which they are willing to contract; rather they identify the price that they believe should be the target price of the collective. (Frech, Tr. 1322).

Response to Finding No. 116: Deny. Dr. Frech did not talk with any physicians when formulating his opinion. (Frech, Tr. 1276-77). There is no citation to testimony of NTSP's participating physicians to support a conclusion of what the physicians are thinking when they respond to the poll. For instance, Dr. Johnson testified that he signed up for an Aetna plan that fell below the NTSP Board minimums "to be able to continue to see Aetna patients, and it was important for my business." Dr. Johnson further stated that his understanding of the poll results was: "When a contract is presented, there may – there is a tabulation, for lack of a better word, that is presented that includes how the terms of the reimbursement are in addition to other favorable or unfavorable, depending on your prospective, aspects of the contract. For example, bundling, prompt pay, is the contract consistent with state and federal law, that sort of thing." (CX 1182 (Johnson, Dep. at 25-31)).

117. The members indicate their price selection by placing a check mark next to one of several pre-printed Medicare RBRVS ranges. (CX1204; CX1196 (Van Wagner, 08.29.03 Dep. at 26-29, 43-44, 62); CX1194 (Van Wagner, 11.19.03 Dep. at 78-80); CX0274; CX0565; CX0633).

Response to Finding No. 117: Admit, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

118. By quoting a particular percentage of RBRVS, one can establish the prices for thousands of different services simultaneously. Using the Medicare index and a percentage of Medicare as a conversion factor voluminous price information is reduced to a single dimension. (Frech, Tr. 1287).

Response to Finding No. 118: Admit, but incomplete. RBRVS is the physician compensation system created by Congress and implemented by the Health Care Financing Administration to ensure fair payments to physicians and control costs. (Wilensky. Tr. 2145-46).

119. By condensing complex pricing information, the Medicare index can serve to facilitate collusion, easing both the formation of pricing agreements and monitoring for deviations from agreed-upon prices. (Frech, Tr. 1287).

Response to Finding No. 119: Deny that the Medicare index has been used to facilitate collusion. The Medicare index was created by Congress partially to ensure fair payments to physicians. *See* Response to Finding No. 118. There is no evidence of collusion among NTSP and its participating physicians. *See* Response to Finding No. 65. Further, Dr. Frech admitted that "there can be

though Medicare controls the fees that physicians are paid, and therefore, there was an expenditure target put in place that would impact fees in case total spending increased at a faster rate than had been legislated by the Congress." (Wilensky, Tr. 2146).

120. After receiving the poll responses, NTSP calculates the mean, median, and mode ("averages") of the minimum acceptable fees identified by its physicians, establishes its minimum contract prices, and then reports these measures back to its participating physicians. (CX0103; CX1196 (Van Wagner, 08.29.03 Dep. at 26-29, 43-44, 62); CX1194 (Van Wagner, 11.19.03 Dep. at 78-80); CX1204).

Response to Finding No. 120: Admit.

121. By providing this information to its member physicians, NTSP effectively informs the physicians as to the potential reward for deferring direct negotiations with health plans while seeking to negotiate collectively through NTSP. (Frech, Tr.1326).

Response to Finding No. 121: Deny. The poll results are gathered, summarized, and distributed in such a way that it cannot promote collusion among NTSP and physicians. *See, e.g.*, Frech, Tr. 1436-37; Deas, Tr. 2423; Maness, Tr. 2046-47; Van Wagner, Tr. 1641-42, 1644. There is no evidence of collusion among NTSP and its participating physicians. *See* Response to Finding No. 65. There is no "potential reward" for dealing with NTSP because NTSP's rates are not above market. In fact, some physicians receive direct contract rates higher than NTSP's contract rates. *See* Response to Finding No. 112. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Further, NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians participate on average in only one-third of NTSP's contracts, and payors have

testified that payors can contract with NTSP physicians without NTSP. *See* Response to Finding No. 95. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

122. Such price information sharing reduces each physician's uncertainty as to the conduct of its competitors (in the aggregate); enhances solidarity among the membership; and increases the likelihood of collusion. (Frech, Tr. 1327). *See also* (Maness, Tr. 2254 (agreeing that reduction of uncertainty among competitors can facilitate collusion); CX1170 (Blue, Dep. at 33) poll results provide "a guideline where we saw the numbers, we would like to have these rates, if possible, and it kind of gave you an idea of where the market was. So if I got other communications independently and some I [*sic*] was paying 80 percent of Medicare, but it looked like a lot of plans were paying 110 percent, then 80 percent of Medicare sounded pretty low.")).

Response to Finding No. 122: Deny. Reporting only the mean, median, and mode aggregated across all physicians in all specialties without revealing any other information, including the response rate, does not allow physicians to glean any competitive information from the NTSP's poll results. (Maness, Tr. 2046-2049; CX 1194 (Van Wagner, Dep. at 16-19)). *See also* Responses to Findings Nos. 113, 121. Further, NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians participate on average in only one-third of NTSP's contracts, and payors have testified that payors can contract with NTSP physicians without NTSP. *See* Response to Finding No. 95. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

123. The setting of a collectively determined minimum price in and of itself is likely to raise prices. (Frech, Tr. 1322-1323).

Response to Finding No. 123: This is an assertion of law and economics and an improper proposed finding. Dr. Frech did not look at any cost data for North Texas, did no analysis of cost increases, never considered total medical expense, and never looked at physician utilization. (Frech, Tr. 1416-17, 1421). Dr. Frech did not compare NTSP's rates to the rates of other IPAs. (Frech, Tr. 1440, 1448). In fact, Dr. Frech did not review any data beyond looking at the report of Respondent's expert, Dr. Maness. (Frech, Tr. 1358-59, 1414-15). Further, deny as unsupported by sufficient testimony and is irrelevant to NTSP's activities. NTSP's Board minimums do not function as a "collectively determined minimum price" because NTSP participating physicians can and do contract directly with health plans and through other IPAs and medical groups. (Quirk, Tr. 288-89, 334; Beaty, Tr. 462-63; Roberts, Tr. 544-46, 568; Grizzle, Tr. 692, 764; Van Wagner, Tr. 1564, 1637; Deas, Tr. 2432, 2400; Lovelady, Tr. 2652; Lonergan, Tr. 2711-12). NTSP's Board sets the minimums for the entry of NTSP, as an entity, into non-risk contracts by reference to the mean, median, and mode of the poll results. NTSP's contract rates are not above market. *See* Response to Finding No. 112.

124. Moreover, while NTSP represents a large number and significant portion of Tarrant County physicians in some specialties, within each specialty there are not a large number of independent sellers (solo practitioners or physician groups). Such a distribution is conducive to successful collusion. (Frech, Tr. 1299, 1302).

Response to Finding No. 124: Deny. In fact, that NTSP does not include a large number of

NTSP's involvement. NTSP has less of an impact on the competitive landscape in this situation.

CX0796 at 1; CX0795 at 2, *in camera (Order on Non-Party Cigna's Motion for In Camera Treatment, 04.23.04)*; Grizzle, Tr. 740 (discussing NTSP e-mail to CIGNA stating that NTSP would not move forward with any proposal until the CIGNA PPO price is brought up to current rates); *See also* (CX1177 (Grant, Dep. at 46); CX1182 (Johnson, Dep. at 10-11); CX0351; CX0295; Deas, Tr. 2538-2539, 2573; CX1061; CX0051 at 3; CX0704; CX0092; CX0526; Roberts, Tr. 537-539 (at NTSP Board meeting he attended, NTSP attempted to negotiate rates referencing powers of attorney)).

Response to Finding No. 127: Deny. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. There is no evidence of collusion among NTSP and its participating physicians. *See* Response to Finding No. 65. The cited evidence does not show that NTSP collectively and aggressively negotiates prices for its physicians. CX 256, a Consultants in Cardiology document, is not a statement of NTSP. *See also* Response to Finding No. 227. CX 795, CX 796, *in camera*, and the cited testimony of Mr. Grizzle all relate to Cigna's breaches of contract. CX 51, CX 295, *in camera*, and CX 526 discuss a tied risk arrangement with MSM. (Van Wagner, Tr. 1609-12; RX 3151). The cited testimony of Mr. Roberts is mischaracterized. These was no attempt to negotiate rates – Mr. Roberts mentions a random comment he heard and has "no idea" who said. *See* Response to Finding No. 411. Further, NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians participate on average in only one-third of NTSP's contracts, and payors have

finding should define that term consistent with the testimony given. *See*

individual answers. CX 159 does not support or mirror the proposed finding. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8. Further, NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians participate on average in only one-third of NTSP's contracts, and payors have testified that payors can contract with NTSP physicians without NTSP. *See* Response to Finding No. 95.

130. NTSP has explicitly recognized that a threat to NTSP's accomplishment of its aims was "the ability of payors to do end runs around the organization," (CX0159 at 2). For that reason, it has

evidence does not support this finding. CX 550 is a letter containing the individual statements of one NTSP participating physician, not NTSP. CX 380 is a letter defending the risk contracting and medical management model and suggesting lobbying on behalf of physicians. CX 400 is a document discussing NTSP's possible transition to a new organizational form and maintaining risk contracts. Further, the quoted sentence in CX 400 continues to read, "with a 30% below market proposal or Blue Cross decides it is just not going to pay you for half your billed codes." CX 195A is survey responses containing the statements of physicians, not NTSP. The quoted phrases are all answers to the questions: "Over the next two years, how can NTSP help me as an organization address [the biggest threat to my practice]?"; "Two years from now, what will NTSP, as an organization, look like?"; and "What specific changes does NTSP need to make over the next 24 months to grow as an organization?". CX 904 is a fax alert dealing with an MCNT risk contract, not a non-risk offer. Lastly, NTSP denies the mischaracterization of the evidence by use of hyperbolic language. NTSP advised and informed its participating physicians of NTSP's activities, but NTSP never "cautioned or "warned" its physicians about "solidarity". NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians participate on average in only one-third of NTSP's contracts, and payors have testified that payors can contract with NTSP physicians without NTSP. *See* Response to Finding No. 95. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

not a decision influenced by NTSP. Further, NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians participate on average in only one-third of NTSP's contracts, and payors have testified that payors can contract with NTSP physicians without NTSP. *See* Response to Finding No. 95.

133. Then, through a variety of NTSP updates to member physicians, implicitly urges the physicians to delay or forgo direct contracting during NTSP's negotiations with health plans. *See, e.g.* (CX0310 (Dr. Deas' advising NTSP physicians that "discussions are ongoing with Aetna U.S. Healthcare, Cigna, and other major payors which should lead to contracts that are more favorable than we would be able to achieve individually or through other contracting entities"). During negotiations with specific payors NTSP has sent fax alerts to its members and held "General Membership Meetings" to continually provide contracting updates for specific payor negotiations and discuss and share NTSP's poll results with the membership. CX1178 at 21-23 (Hollander, Dep. at 21-23); CX0173 - CX0180, CX0182-CX0188 (minutes to general membership meetings, including references to updates to NTSP's negotiations with health plans); CX0615; CX0945; CX0903; CX0617; CX0103; CX0628; NTSP's

NTSP fact sheet containing the address and names of Board and staff members. CX 275 is the NTSP bylaws, and the sections cited by Complaint Counsel relate to the corporate structure, including election and functions of the Board of Directors and Officers. CX 195A is a collection of survey responses from individual participating physicians – statements that do not represent the position of NTSP the entity. CX 159 is minutes discussing Dr. Deas's Dancing With Gorillas presentation, a presentation that focused on risk contracting and the HTPN affiliation, as well as legal problems with payor payment methodologies. (Deas, Tr. 2602-03). Dr. Lonergan's testimony both at trial and at deposition merely relays that some of the contracts he accessed through NTSP were "financially a good deal." Further, NTSP does not prevent its physicians from making independent decisions on contracts or contracting with payors directly or through organizations other than NTSP. *See* Response to Finding No. 133. There is no evidence of collusion among NTSP and its participating physicians. *See* Response to Finding No. 65. Further, NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians participate on average in only one-third of NTSP's contracts, and payors have testified that payors can contract with NTSP physicians without NTSP. *See* Response to Finding No. 95.

135. Accordingly, NTSP has at various times solicited and obtained powers of attorney from its members, giving NTSP the unfettered right to negotiate non-risk contracts on behalf of those members. (CX1173 (Deas, Dep. at 56-57); CX1065; CX1061; CX1070; and Palmisano, Tr. 1250-1251). To incent other physicians to grant it power of attorney, NTSP includes in power of attorney solicitations information about the number of physicians who already have executed the powers of attorney. (CX1066; CX0548 at 1).

Response to Finding No. 135: Deny first sentence as not supported by evidence cited. NTSP has obtained powers of attorneys from participating physicians, but these powers of attorney are

limited in scope. The language of the power of attorney only allows it to be used "in any lawful way," which does not include negotiation of economic terms on non-risk contracts. CX 1070, cited in support of NTSP's "unfettered right to negotiate," it specifically states, "the Board does not negotiate financial terms on our fee-for-service contracts." CX 1065 and CX 1061 are fax alerts with an attached power of attorney containing the limitation "in any lawful way" and there is no contradictory statement of NTSP's limited authority under the power of attorney. The testimony cited includes Mr. Palmisano's explanation that, "I don't ever really recall understanding that whole agency process." (Palmisano, Tr. 1251). NTSP also cannot bind a physician to accept or reject an offer. (Frech, Tr. 1368-69). No NTSP participating physician has rejected a non-risk payor offer based on a power of attorney granted to NTSP. (Frech, Tr. 1368-69). Further, some powers of attorney obtained by NTSP were not directly related to non-risk contracts. Dr. Deas's cited deposition testimony specifically states that NTSP does not send out powers of attorney very often and at least one that was sent out related to the Aetna-MSM lawsuit. NTSP sued MSM as the class representative for physicians and requested powers of attorney to avoid legal problems when physicians were asked to sign contracts including a provision that MSM was the physician's attorney-in-fact. *See, e.g.*, RX 335, CX 548. Deny second sentence as not supported by evidence cited. While NTSP does occasionally provide information about the number of executed powers of attorney, this information is not provided to incent other physicians to grant powers of attorney. CX 1066 and CX 548 provide the number of powers of attorney gathered, but make no accompanying statement that could be considered an incentive to other physicians. The number of POAs gathered is small. (CX 1066; (107 POAs); (CX 548; 180 POAs). Further, Dr. Deas's deposition testimony includes the statement that NTSP does not encourage

participating physicians to submit the powers of attorney other than sending the fax alerts and making the documents available. (CX 1173 (Deas, Dep. at 57)). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

136. NTSP's agency agreements were meant to reduce or preclude health plans' ability to avoid NTSP and the consensus price by approaching member physicians directly. *See* (CX1178 at 30; CX1178 (Hollander, Dep. at 116)); and they have had that effect. For example, NTSP physicians have referred health plans that were attempting to contract directly with them back to NTSP, at times noting that the deferral was based on agency or power of attorney held by NTSP; Beaty, Tr. 453-459; Grizzle, Tr. 696-698, 701, 724; CX0760 (verbal acts)).

Response to Finding No. 136: Deny first sentence. The first citation to CX 1178 is deposition testimony concerning NTSP's poll with no mention of agency agreements or direct contracting with health plans. The second deposition testimony cite contains only Dr. Hollander's individual "understanding" that an agency agreement could mean the payor had to contact NTSP, not the physician. Further, NTSP's powers of attorney were limited in scope and usually only indirectly related to non-risk contracts. *See* Response to Finding No. 135. NTSP never prevented its physicians from making independent decisions on contracts or contracting with payors directly or through other organizations. *See* Response to Finding No. 133. Dr. Frech admitted that NTSP cannot bind a physician to accept or reject a non-risk offer and that no physician has rejected a non-risk payor offer based on a POA granted to NTSP. (Frech, 1368-69). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with

the testimony given. *See* Response to Finding No. 8. Deny second sentence as unsupported by evidence cited. Mr. Beaty's testimony has no mention of agency agreements or powers of attorney and merely recounts Mr. Beaty's story that "some" NTSP physicians referred him to NTSP, while others signed direct contracts with United or indicated they were going to contract through another IPA. (Beaty, Tr. 455). Mr. Beaty, however, testified that he cannot recall which physician offices he contacted directly or the names of people he spoke to during these contacts. (Beaty, Tr. 460-464). Mr. Grizzle's testimony has no mention of agency agreements or powers of attorney other than in a question by Complaint Counsel which was unanswered after a hearsay objection was sustained. This testimony merely recounts that sometimes efforts to contract individually with NTSP physicians were successful and sometimes they weren't. (Grizzle, Tr. 724 ("Q. And were those individual efforts successful? A. No. Oh, in some cases they were and some cases they weren't."). CX 760 is letters sent to Cigna that relate to assignment of a contract, not direct contracting efforts by Cigna. *See* Response to Finding No. 260.

137. Further, NTSP has advised health plans during rate negotiations for fee-for-service contracts and at other times that it represented NTSP member physicians, through powers of attorney, (Roberts, Tr. 540-541), or otherwise (CX0760 (verbal acts) (Letters from NTSP physicians to CIGNA citing NTSP as their contracting "agent"); Beaty, Tr. 453-459). NTSP's brandishing of agency rights and powers of attorney before health plans increases the likelihood that any such health plan will conclude that it has no practical alternative to dealing with NTSP as the collective bargaining agent of its member physicians. (Frech, Tr. 1328-1330).

Response to Finding No. 137: Deny first sentence. Deny response to extent the proposed

with testimony given. *See* Response to Finding No. 53. Further, this statement is unsupported by CX 760 and Mr. Beaty's testimony, which relay comments by individual physicians and not any advisement by NTSP to health plans. CX 760 is also irrelevant because it is letters relating to a contract assignment, not fee-for-service contract negotiations. In situations where NTSP's participating physicians have requested that NTSP represent them, NTSP has so informed payors. These situations often involve breaches of contract or deceptive and potentially unlawful actions by payors. *See* Response to Findings No. 136. Deny second sentence as unsupported by proper testimony of payors themselves and unsupported by evidence cited. Frech's testimony does not state that a health plan will "conclude it has no practical alternative," it only states that there will be an "increase in incentives" to deal with NTSP. But payors apparently concluded there were practical alternatives to dealing with NTSP because they were able to contract with NTSP physicians without NTSP. (Roberts, Tr. 544-46; Quirk, Tr. 288-89; Beaty, Tr. 462-63; CX 1177 (Grant, Dep. at 70); CX 1182 (Johnson, Dep. at 25-26)). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

138. In at least two instances, NTSP used its agency powers to terminate its members' participation in a health plan because NTSP determined that the price being paid by the health plan for fee-for-service medicine had become inadequate. (CX0546; CX0802; CX1054).

Response to Finding No. 138: Deny as not supported by evidence cited. CX 546 is a termination letter sent to MSM because of MSM's breach of the contract. The letter states that the

termination is resulting from MSM's "material breach." CX 802 is a termination letter sent to Cigna because Cigna's breached the contract by not allowing all of NTSP's specialists to participate. *See* Response to Finding No. 268. CX 1054 is a termination letter sent to United, but it does not mention anything about price or rates, let alone that they were inadequate. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

139. Using yet another scheme to enhance its collective price bargaining power, NTSP has orchestrated letter writing campaigns by its member physicians to employers and others seeking to undermine confidence in the adequacy of health plans physician networks. *See, e.g.*, (CX1036; CX1039; CX1046 at 1-2; CX1051; CX1053 (NTSP writing "on behalf of" 588 primary care

care. CX 1051 is a fax alert that mentions nothing about letters, letter writing, or the adequacy of health plan physician networks. CX 583 is a letter from an individual physician with an attached second page of a fax alert whose purpose cannot be determined to support this proposed finding without the context of the first page. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

140. Health plans have taken NTSP's threats seriously because they are credible and serious. As NTSP has itself said: "NTSP has become a 'gorilla network' with 124 PCP's . . . and 528 specialists." (CX0209 at 2; CX0310). NTSP and its physicians present themselves as a unified and strong force within Fort Worth, and the withholding by those physicians, or many of them, of services would severely damage the perceived adequacy of a health plan's physician network in Fort Worth and thereby injure the health plan in its ability to obtain or maintain business. (Grizzle, Tr. 730; Jagmin, Tr. 1091; Mosley, Tr. 140). Such threats raise the expected cost of seeking to contract around the NTSP collective, making health plans more willing to pay the NTSP-physicians consensus price. (Grizzle, Tr. 730, 746-747, 750-751; Frech, Tr.1325).

Response to Finding No. 140: Deny first sentence as unsupported by any evidentiary cites. Further denied because NTSP has not made any threats to payors. Deny second sentence, although document CX 209 is accurately quoted. CX 209 is PCP Council minutes discussing Dr. Deas's presentation, a copy of which is CX 310. Dr. Deas testified that he never referred to NTSP as a "gorilla." (Deas, Tr. 2548-49, 2602-03). Deny third sentence, although admit the testimony of Cigna and Aetna representatives makes this assertion. Mr. Mosley's testimony does not support this statement. NTSP does not prevent its physicians from making independent decisions on contracts and therefore does not present its physicians as a "unified and strong force." *See* Response to Finding No.

] *See also* Responses to Findings Nos. 266-273. Further,

NTSP did not have the ability to control and did not control the market. NTSP physicians have numerous contracts directly with payors and through other IPAs, NTSP physicians participate on average in only one-third of NTSP's contracts, and payors have testified that payors can contract with NTSP physicians without NTSP. *See* Response to Finding No. 95.

142. NTSP's collective price-fixing and related acts and practices have effectively raised prices and/or reduced output of physician services in the Fort Worth area of Tarrant County. (CX0310; CX0209; CX0351; Frech, Tr. 1280-1281, 1332-33; Roberts, Tr 472-473).

Response to Finding No. 142: Deny. CX 310 and CX 209 relate to Dr. Deas's Dancing With Gorillas presentation, a presentation that focused on risk contracting and the HTPN affiliation, as well as legal problems with payor payment methodologies. (Deas, Tr. 2602-03). CX 351 is a letter

medical expense, and never looked at physician utilization. (Frech, Tr. 1416-17, 1421). NTSP has not engaged in price-fixing or related practices. *See*

him to confirm that fact (“would an exclusive right...” and “so if you have an exclusive right...”), and Dr. Hollander did not mention a right of first negotiation. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP’s witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Deny third sentence. Unsupported by any evidentiary cites. NTSP physicians do not know what other physicians do in response to payor offers. (Frech, Tr. 1368, 1436-37; Maness, Tr. 2044-46; Deas, Tr. 2423; Lonergan, Tr. 2718). Deny to extent the proposed finding uses the term"member" differently than NTSP’s witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

144. Further, NTSP member physicians actively participate in reaching the agreement on price. NTSP solicits each member’s prospective minimum price by stating that it will use that information, together with price information provided by the other member physicians, to establish a minimum price that NTSP will use in negotiations with health plans for fee-for-service contracts. CX1195 (Van Wagner, Tr. at 66-67); CX0565; CX1194 (Van Wagner, 11.19.03 Dep. at 78); CX0103. Accordingly, each physician’s participation in the polling is itself an agreement to establish and bargain

CX 1155). Frech also admitted there was no evidence of any agreement among NTSP and its physicians to reject a non-risk payor offer (Frech Tr. 1365-66, 1368), no evidence that the Physician Participation Agreement caused physicians to reject a non-risk payor offer (Frech, Tr. 1368-69), and no NTSP physician has given up the right to independently accept or reject a non-risk payor offer. (Frech, Tr. 1363-64). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8. The third sentence is a legal assertion, not a proper proposed finding, and is unsupported by any evidentiary cites. Further, there is no evidence of any agreements among NTSP and its participating physicians. *See* Response to Finding No. 143.

145. In addition, NTSP physicians, sometimes in response to explicit urging by NTSP, refer health plan contracts to NTSP or refrain from direct contracting activity that could undermine NTSP's collective bargaining of fee-for-service contracts. CX1197 (Van Wagner, 08.30.03 Dep. at 198); CX0942; CX0811; CX0500; CX1008; CX1011: CX0392).

Response to Finding No. 145: Deny. None of the evidence cited involves NTSP physicians referring health plans to NTSP or suggestions that NTSP collectively bargains. NTSP has never participated in "explicit urging" of its physicians to refrain from direct contracts. The cited evidence does not support this proposed finding. In CX 942, NTSP recommends a course of action to physicians, but also provides the physicians with their other options and instructions on how to exercise those options. CX 811, *in camera*, is a description of an offer along with an accept/reject form, but there is no recommendation made by NTSP on how to act. CX 500 gives a contracting update and states that "no further action is required." There is no suggestion on what a physician should do. CX

1008 and CX 1011 are informational fax alerts that discussions with a payor are ongoing and that physicians need not sign and return anything at this time. CX 392 tells physicians that "NTSP and Mutiplan recommend" that physicians not sign direct contracts at this time. Van Wagner's testimony clarifies that NTSP only gives recommendations to physicians when a "very specific nuance" is happening and not as a general rule. In fact, NTSP does not prevent its physicians from contracting with payors directly or through other organizations. *See* Response to Finding No. 133. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53.

146. Going farther, some NTSP physicians have augmented NTSP's collective agency by executing powers of attorney authorizing NTSP to represent them without limitation in negotiations with health plans, including with respect to fee-for-service arrangements. *See* findings 214-225, 245, 286. These physicians necessarily understood that competing physicians were requested to and did provide NTSP with powers of attorney. (CX1066; CX0548). NTSP members also understood that NTSP would use those physicians' powers of attorney in collective bargaining of all of the terms of fee-for-service contracts. Insofar as some physicians then refrained from entering into direct negotiations with health plans citing those powers of attorney, *see, e.g.*, finding 340, those acts too were directly in support and furtherance of the NTSP-physicians price-fixing program. Similarly, insofar as some physicians authorized or acquiesced in NTSP's threats or actual withdrawals of their participation in a health plan's fee-for-service panel, *see, e.g.*, finding 134, 140-141, those acts as well were directly in support and furtherance of the collectively determined minimum price.

Response to Finding No. 146: Deny first sentence. This statement is supported solely by proposed findings that NTSP denies. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Therefore, there is nothing to be "augmented." NTSP has

received, in some circumstances, powers of attorney from some of its physicians. These limited powers of attorney allow NTSP to represent physicians only "in any lawful way," and NTSP does not use these powers of attorney to negotiate economic terms of non-risk contracts. *See*

VII. NTSP's Price-Fixing and Related Acts are Demonstrated in its Dealings with Several Health Plans

A. United Fee-For-Service Negotiations With NTSP

In 1998 NTSP negotiated fee-for-service HMO and PPO contracts–including price terms–on behalf of its membership. To facilitate those negotiations, NTSP discouraged its member physicians from contracting individually with United and solicited powers of attorney from its members. Eventually, NTSP had proposed its members access to a United contract through another IPA with which it was affiliated at that time. The evidence further establishes that in 2001, NTSP rejected United's fee-for-service offer without presenting it to its member physicians; orchestrated and executed a concerted refusal to deal by terminating 108 physicians from United's network at a critical time for United; orchestrated its member physicians' opposition to the price terms of United's offer and a public relations campaign to give added effect to that concerted opposition; and solicited powers of attorney to be used with United for "all contracting activities." NTSP's negotiations tactics led to 10%-15% higher prices not only to the NTSP member physicians but to other physicians in the market.

Response to Summary Finding: This paragraph of factual assertions with no evidentiary cites is an improper proposed finding. Further, NTSP denies the contents of this paragraph as detailed in the following responses.

1. General

147. United Healthcare Services, Inc. is a wholly owned subsidiary of United Healthcare through which United Healthcare offers its PPO and other non-HMO products in Texas. (Quirk, Tr. 234- 235, 239, 241, 247, 248).

Response to Finding No. 147: Admit.

148. United Healthcare of Texas is a wholly owned subsidiary of United Healthcare through which United Healthcare offers its HMO products in Texas. (Quirk, Tr. 235, 247, 248).

Response to Finding No. 148: Admit.

149. Since 1999, Thomas J. Quirk has been the CEO for the North Texas and Oklahoma Region of United Healthcare Services Inc. and the President, Chairman of the Board and the CEO of United Healthcare of Texas (United Services and United HMO collectively referred to as "United"). (Quirk,

Tr. 234-235).

(Quirk, Tr. 244-247).

Response to Finding No. 153: Admit, but deny relevance to NTSP's activities or the disposition of the issues in this proceedings. It is also important to note that over 80% of United's business is self-insured by the employer. (Quirk, Tr. 247-48).

2. NTSP Collectively Negotiated Reimbursement Rates with United in 1998

157. In June 14, 1998, NTSP discussed strategic initiatives it needed to take for the future, and stated that it would exhibit "[a]ggression toward any attempt to sub-contract NTSP" in non-risk contracts. (CX0011 at 8).

Response to Finding No. 157: Admit statement was made, but deny as incomplete and misleading. This excerpt relates to groups who take risk and then sub-contract out physician services on that risk arrangement to other groups like NTSP. NTSP was concerned with becoming the third or fourth level of physicians on a risk contract. Despite being billed as non-risk arrangements, these sub-contracts often involved floating fee schedules that NTSP considered risk arrangements. (*See, e.g.*, Van Wagner, Tr. 1609-12). Additionally, this document addresses multiple strategic initiatives – non-risk contracts only being one.

158. NTSP informed its members that United was attempting to standardize its physician agreements by, among other things, changing the fee schedule. (CX1005 (Fax Alert #79, dated July 14, 1998)).

Response to Finding No. 158: Admit statement was made, but deny relevance. This Fax Alert related to contracting changes United had proposed. Further, NTSP has the right to and does advise its participating physicians about the meaning of contractual terms and NTSP's involvement in payor offers. Payor contracts are long and complicated, with many legal and practical pitfalls physicians need to avoid. (Frech, Tr. 1376; Lonergan, Tr. 2714-15; Van Wagner, Tr. 1648-50; Wilensky, Tr. 2160). This information is meant to assist physicians in the process of contractual review. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed

finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

159. In Fax Alert #79, NTSP sent its physicians an agency agreement for the purpose of obtaining consent to enter into negotiations on behalf of the membership. (CX1005). In Fax Alert #79, NTSP stated that "[b]ecause United Healthcare has the potential to be a major player in this market place, the NTSP Board wishes to contact them and negotiate on behalf of its membership." NTSP later explained that it was United's attempt to change fee schedules that prompted NTSP negotiations with United. (CX1014).

Response to Finding No. 159: Admit NTSP sent out Fax Alert #79, which is correctly quoted, but deny that NTSP had authority to or did negotiate economic terms on non-risk contracts. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

160. NTSP also encouraged its members to "refrain from responding to United Healthcare while NTSP's request for agency status was being tabulated." (CX1005).

Response to Finding No. 160: Admit statement was made, but deny relevance to the disposition of the issues in this case. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

161. NTSP's member physicians authorized NTSP to negotiate with United on their collective behalf. *(See, e.g.*, CX1006 (July 15, 1998 letter from Dr. Deas of Gastroenterology Associates of North Texas ("GANT") to Van Wagner allowing NTSP to serve as its agent in regard to future negotiations, including price terms, with United and instructing NTSP not to agree to any fee schedules lower than 135% of 1997 Medicare for United's HMO product and 147% for United's PPO product); Deas, Tr. 2573-2577)).

Response to Finding No. 161: Deny. NTSP's participating physicians did not authorize any collective negotiations. Powers of attorney were for individual physicians, not a part of any collusive activity. (CX1065). There is no evidence of collusion. *See* Response to Finding No. 65. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Deny

Response to Finding No. 133. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

164. In September 1998 NTSP proposed to United that Dallas RBRVS be used in calculating the rates for its HMO and PPO products for NTSP physicians, and so informed its member physicians in Fax Alert #94 of September 8, 1998. (CX1010).

Response to Finding No. 164: Admit substance, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various

Response to Finding No. 166: Admit statement was made, but deny as incomplete. NTSP gave its participating physicians this contracting update as an advisement. It gave details on dealing with United through NTSP, but did not coerce or prevent physicians from making independent decisions and taking independent actions on a United offer. *See* Response to Finding No. 133. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

167. United had offered NTSP a fee schedule for its HMO and PPO plans, and in December 2, 1998, in Fax Alert #112, NTSP informed its members that "we made a counter proposal which United will respond to in January." (CX1012).

Response to Finding No. 167: Admit statement was made, but deny as incomplete.

process and updating the physicians on the state of United's discussions with NTSP. In fact, it was United who requested the transition, and NTSP informed its participating physicians of United's request. (CX1014). Deny to extent the proposed finding usi577 ti5.v577 ti5.v577 t ti5.v5, and NTSP informed iit as

171. On March 14, 2001, NTSP expressed to United its "desire for a group contract reflecting today's market." (CX1117 (letter from Palmisano); Quirk, Tr. 284-289).

Response to Finding No. 171: Admit.

172. NTSP's discussions with United involved only fee-for-service contracts. NTSP never indicated that it wanted to have a risk-sharing arrangement with United. (Quirk, Tr. 291, 293- 294).

Response to Finding No. 172: Deny. NTSP originally approached United about a risk contract, but United was not interested in delegating utilization and medical management functions to NTSP. (CX 1189 (Palmisano, Dep. at 30) ("I remember United we started risk.")).

173. NTSP has never performed any utilization management, quality control management or disease management services for United's patients. (Van Wagner, Tr. 1830-1831, 1835, 1836-1837; Casalino, Tr. 2793-2794, 2809-2810, 2816-2817, 2858).

Response to Finding No. 173: Admit statement was made, but deny as incomplete. NTSP has not performed these functions only because United will not delegate that authority to NTSP. United believes it can perform these functions better than NTSP, but the evidence shows that physician peer groups are more successful at controlling physician behavior than payors. *See* Response to Finding No. 151.

174. As of March 2001, United had contracts with approximately two-thirds of the NTSP physicians, either directly or through other organizations, such as Health Texas Provider Network ("HTPN"). (Quirk, Tr. 288-289). Therefore, United concluded that there was no need to enter into an agreement with NTSP because United had an adequate network in Fort Worth. (Quirk, Tr. 289-290).

Response to Finding No. 174: Admit.

175. HTPN, which is an affiliate IPA of Baylor Health Care System, is an organization of employed as well as independent contracted physicians in Dallas. NTSP and HTPN had an arrangement

whereby NTSP members would be allowed to access HTPN's payor offers. A significant number of NTSP members accessed health plan contracts through HTPN. (Van Wagner, Tr. 1559; Quirk, Tr. 311-312).

Response to Finding No. 175: Admit statement was made, but deny as incomplete. NTSP has no role in HTPN's discussions with payors about the contracts that are available to NTSP physicians through this arrangement. (Van Wagner, Tr. 1559-60). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

176. On April 12, 2001, NTSP reported at its Primary Care Council Meeting that the reimbursement rates under the United-HTPN contract -- 130% of 1997 St. Anthony RBRVS (145% Radiology) for HMO, 145% of 1997 St. Anthony RBRVS for POS, and 145% of 1997 of St. Anthony RBRVS for PPO -- were below market. The majority of NTSP's members had accepted this contract in 1999. (CX1015). NTSP further reported that "an attempt is being made to raise those rates. Primary care physicians will be polled to determine an acceptable rate." (CX0209 at 3; CX1015).

Response to Finding No. 176: Admit first sentence. Deny second sentence. Deny third sentence, although CX 209 is accurately quoted. The United contract referred to here was a contract available to NTSP physicians through NTSP's affiliation with HTPN. Approximately 107 NTSP physicians were contracted with United through HTPN. (CX 1065). NTSP did not have any involvement in HTPN's discussions with payors relating to these contracts. (Van Wagner, Tr. 1559-

CX0209.003). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

177. In or about May 2001, notwithstanding its view that United already had a sufficient network in Fort Worth, United offered its then-standard rates in the Fort Worth area: 110% of 2001 Dallas

meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. NTSP rejected United's offer of the same rates for HMO and PPO products because the offer was below Board minimums, which are different for HMO and PPO products. (Quirk, Tr. 300-01; CX 1196 (Van Wagner, Dep. at 124-25); CX 628). NTSP informed United of the Board minimums. *See* Response to Finding No. 178.

180. On June 19, 2001, Arrington wrote Carter, of NTSP, explaining that United's rates were identical for HMO and PPO reimbursement because from the physician's standpoint each United patient is administratively the same. (CX1027).

Response to Finding No. 180: Admit.

181. On June 25, 2001, the NTSP Board discussed United's rate offer and rejected it. (CX0089 at 3; Quirk, Tr. 299).

Response to Finding No. 181: Admit statement was made, but deny as misleading. NTSP did not "discuss" United's rate offer beyond noting it was below Board minimums and outside of the Board's authority to messenger. *See* Response to Finding No. 167. The Board's discussion, as indicated in CX 89, involved United's negotiations with the City of Fort Worth, which was a separate issue from United's rate offer to NTSP.

4. In Negotiations NTSP Applied Collective Pressure to Obtain Higher Rates

182. Shortly after NTSP rejected the United offer, NTSP learned that United was negotiating with the City of Fort Worth to provide health coverage to city employees. (CX0089 at 3).

Response to Finding No. 182: Deny. NTSP learned that United was negotiating with the City in spring of 2001.

183. Having adequate network coverage, including physicians, was particularly important to the city of Fort Worth. In fact, United would not have been selected to serve as the City's claims administrator had it failed to have an adequate network. (Mosley, Tr. 141, 164, 167).

Response to Finding No. 183: Admit.

184.

arrangements."); Tex. Ins. Code § 843.363. Further, CX 89 does not state that NTSP encouraged NTSP's participating physicians to contact the City Council. CX 89 indicates that NTSP encouraged its "Board Members." NTSP consisted of 575 physicians at the time this document was created. The board, on the other hand, consisted of 8 individuals. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

186. NTSP provided its members with model letters for the purpose of complaining to city officials. For example, attached to Fax Alert #44 was a sample letter to the Mayor of Fort Worth with the private fax number for the Mayor and the names, addresses, fax numbers, and e-mail addresses of the City Council. The sample letter included the following statements: 1) "Many of my patients are city employees or dependants and I/we have enjoyed caring for and managing their health for years;" 2) "I look forward for your assistance in communicating to United that they offer a reasonable solution to this situation so I/we can continue to see City Employees and their dependants without disruption;" 3) "In the best interest of my/our current City of Ft. Worth patients, I/we ask for your assistance in resolving this dispute before the City transitions to United Health Care." (CX1042 at 4). NTSP also attached talking points, titled "United Environmental Assessment," which included the following statements: "NTSP Board Minimums [125% for HMO and 140% for PPO] have remained constant for four years despite increases in other areas of health care costs"; "Major payors in market -Aetna, Pacificare, Cigna have all established payment schedules in this range:" "NTSP is the only stable physician organization left in the Tarrant County market:" "United Proposal of 110% of Dallas HMO/PPO is: Significantly below market, Will not be accepted, Is the only product paying the same for HMO/PPO:" "United cannot meet employer/employee match or network access standards without NTSP Physicians Participating in the Network;" "3000 Employees and dependents will lose all their physicians;" "11,000 will lose access to majority of their specialty physicians;" "NTSP is not asking for United to pay more than their competitors;" "NTSP is asking they match market pricing to obtain a stable and high quality easily accessible network of physicians." (CX1042 at 3).

Response to Finding No. 186: Admit substance, but deny as incomplete and misleading. *See* Response to Finding No. 185. Dr. Deas explained that the purpose of this fax alert was to inform the physicians about the situation and provided choices on how to address the problem. The

information reflected problems in the contracting process with United and how those problems could affect patients. (CX 1173 (Deas, Dep. at 47-50)). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See*

serious jeopardy," that the United offer was "significantly below market," and stating that unless "this contractual issue is resolved" there was "likelihood that NTSP members will no longer be available to city employees.")). Other NTSP members also wrote letters to the Mayor of Fort Worth reflecting the points discussed by NTSP in Fax Alert #44. (CX1051; CX1036; CX1046 at 1-2; CX1039).

Response to Finding No. 188: Deny first sentence, which refers back to a proposed finding that NTSP denies. *See* Response to Finding No. 187. Admit rest of statements, but deny as incomplete and misleading. NTSP's actions relating to the City of Fort Worth all involved NTSP's right and duty to inform the City of potential and legitimate problems that could potentially affect the delivery of health care to NTSP's physicians' patients. *See* Response to Findings Nos. 185-87. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

189. In addition to its letter-writing campaign, NTSP also met with public officials in an effort to exert pressure on United to raise its rates. (Mosley, Tr. 183, 186-187, 192) (At a meeting regarding United, NTSP representatives expressed their concerns about physicians' loss of income with the City Manager and Director of Human Resources of the City of Fort Worth, specifically stating that United's rates were unacceptable.). NTSP told the City it was going to reject the United offer, and warned the City that "that they may have a significantly different network on October 1" when the City would transition from PacifiCare to United. (CX1034; CX0211 at 3; CX1042).

Response to Finding No. 189: Deny first sentence. Not supported by evidence cited. NTSP did not "exert pressure on United to raise its rates." In fact, Mr. Mosley, in the portion of the transcript cited, admits that NTSP never asked the City to take any action with respect to fee levels. (Mosley, Tr. 183). Admit statement was made in second sentence, but deny as incomplete and misleading. NTSP's meetings with City officials and information conveyed at those meetings involved NTSP's right and duty to inform the City of potential and legitimate problems that could potentially

affect the delivery of health care to NTSP's physicians' patients. *See* Response to Findings Nos. 185-87.

190. m2 .

Response to Finding No. 192: Admit statement was made, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8..

193.

legitimate problems that could potentially affect the delivery of health care to NTSP's physicians' patients. *See* Response to Findings Nos. 185-87. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

196. The possibility that City employees might lose access to NTSP physicians was a matter of concern to the City, because most of NTSP's physicians participated in the United contract and a loss of those physicians would have caused network disruption. (Mosley, Tr. 173, 178-179).

Response to Finding No. 196: Admit that losing access to NTSP physicians was a matter of concern to the City, but deny that the loss of NTSP would cause a network disruption. United does not need NTSP to have an adequate physician panel. In CX 1034, United stated that NTSP was "not critical" to its network. (Quirk, Tr. 353-54 (8000 physicians in the Metroplex), 354-55 (over 2000 physicians in Tarrant County)).

197. In response to NTSP's efforts, at least as early as July 2001, City employees were expressing concern to City managers about the possibility of losing their NTSP physicians, which further troubled City decision-makers. They feared that the existing United network might not continue. (Mosley, Tr. 175, 178).

Response to Finding No. 197: Admit that some employees evidently expressed concern.

198. Jim C. Mosley contacted David Palmer of United and shared with him the City's concerns regarding the continuation, maintenance and preservation of the then existing United network. United was requested to maintain the network without compromising costs. (Mosley, Tr. 179-180, 182; Quirk, Tr. 309).

Response to Finding No. 198: Admit.

199. In addition to its efforts to disrupt United's contracts with the City of Fort Worth, NTSP also attempted to disrupt United's contracts with other Fort Worth employers. Around the same time United's offer to NTSP was rejected, physicians within NTSP, encouraged by NTSP's Board and staff, began contacting United's customers and questioning the rates at which United reimbursed physicians. (Quirk, Tr. 304).

Response to Finding No. 199: Deny. Not supported by evidence cited. Further, United's negotiations with the City of Fort Worth could potentially undercut a risk contract NTSP had to treat City of Fort Worth patients. *See* Response to Finding No. 210. NTSP's actions with the City involved NTSP's right and duty to inform its patients' representatives of potential and legitimate problems that could potentially affect the delivery of health care. *See* Response to Findings Nos. 185-89, including Complaint Counsel's stipulation that "we're not contesting the right of a physicians to complain or to notify patients about its compensation arrangements." (Tr., 1149-50). There were no efforts by NTSP to disrupt United's contracts with other Fort Worth employers. Quirk's statement is unsupported by any foundation of personal knowledge or other evidence in the record.

200. For example, Michael Parks, a Fort Worth insurance broker, contacted Arrington on behalf of a joint client. The joint client had expressed concerns over United's network in Fort Worth. Parks pointed out that there was a possibility that United's network would be compromised. (Quirk, Tr. 303-304).

Response to Finding No. 200: Admit that Quirk so testified, but deny that the statement has any relevance or relation to NTSP.

201. In response to the customer's concerns expressed by Parks, Arrington assured Parks that United had contracts with 400 of NTSP's physicians. Arrington further explained that 113 NTSP physicians are contracted with United through ASIA (another IPA), 108 through HTPN (another IPA), 55 through MCNT as well as smaller numbers through other organizations or direct contracts with

203. United's concerns intensified as it started to receive a tremendous number of inquiries from brokers and customers, particularly the City of Fort Worth and its consultant, Mosley, regarding the stability of its network. The complaints expressed by NTSP member physicians, encouraged by its Board and staff, focused on United's rates and the manner in which it paid claims. (Quirk, Tr. 308-310, 331-333).

Response to Finding No. 203: Admit that a United representative so testified. Deny second sentence as not supported by evidence cited. Mr. Quirk did not make any statements related to the second sentence in the cited pages. Any actions that NTSP took with the City involved NTSP's right and duty to inform its patients' representatives of potential and legitimate problems that could potentially affect the delivery of health care. *See* Responses to Findings Nos. 185-89. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

204. NTSP also directed its disruptive efforts toward Texas Christian University, another United customer. On July 23, 2001 NTSP wrote to William Koehler, Provost and Chief Academic Officer of Texas Christian University, stating that significant network disruption may occur because of United's low reimbursement rates to NTSP physicians. (CX1053).

Response to Finding No. 204: Deny first sentence as argumentative and unsupported by any evidentiary cites. Admit second sentence, but misleading. Texas Christian University was the employer-representative for many patients of NTSP's physicians. Any communication between NTSP or NTSP's physicians and TCU representatives involved the right and duty to inform patients' representatives of potential and legitimate problems that could potentially affect the delivery of health care. *See* Response to Findings Nos. 185-89, 199.

Terminating its Members' Participation in the United Contract

205. Contemporaneous with its efforts directed at United's clients and Fort Worth brokers to undermine the perception of adequacy of United's network, on July 23, 2001, the NTSP Board approved the termination of all NTSP members' participation in United network through HTPN. The NTSP Board also approved the sending of agency letters to its member physicians. (CX0091).

Response to Finding No. 205: Admit that NTSP terminated its participation in the United-HTPN contract, but deny argumentative introductory clause that is not supported by the evidence cited and deny as incomplete. *See also* Responses to Findings Nos. 182-204. "All NTSP's members' participation" was only 108 physicians. The rest of the 400 NTSP physicians contracted with United were in direct contracts or contracted through another IPA. *See* Complaint Counsel's Proposed Findings No. 201. ("Arrington further explained that 113 NTSP physicians are contracted with United through ASIA (another IPA), 108 through HTPN (another IPA), 55 through MCNT as well as smaller numbers through other organizations or direct contracts with United. (CX1055, Quirk, Tr. 302-304)). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

206. On July 23, 2001, NTSP orchestrated a concerted refusal to deal and terminated the contracts of all 108 of its members who were participating with United through Managed Care & Network Development of HTPN. The termination was applicable even to physicians who were compensated above NTSP's Board Minimums, such as "Surgery Thoracic" physicians who were being reimbursed at 149.6% of 2001 Tarrant RBRVS for HMO and 166.9% of 2001 Tarrant RBRVS for PPO; and "Surgery Neurological" physicians who were being reimbursed at 142% for HMO and 158.3% for PPO. (CX1118, CX1201 (Youngblood, Dep. at 122-25, 127 and 129); CX1042 at 2).

Response to Finding No. 206: Deny first sentence. NTSP terminated its contract, which it had the right to do. (Quirk, Tr. 356; Van Wagner, Tr. 1727-29; CX 1068). NTSP did not

orchestrate any concerted refusals to deal. There is no evidence of collusion. *See* Response to Finding No. 127. The legal arguments are discussed in NTSP's post-trial briefing. *See* North Texas Specialty Physicians' Post-Trial Brief and Post-Trial Reply Brief. Admit that NTSP terminated its participation in the United-HTPN contract and that this termination affected approximately 108 physicians. Admit second sentence. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

207. The effective date of termination was October 20, 2001, less than three weeks after the City of Fort Worth had planned to transition its employee health plans from PacifiCare to United. (CX1051B; CX1042 at 1).

Response to Finding No. 207: Admit.

208. NTSP sent a copy of the termination letter to United and to the Mayor of the City of Fort Worth. (CX1118; Quirk, Tr. 312-313).

Response to Finding No. 208: Admit, but incomplete. NTSP had the right and duty to inform the City of this termination that could potentially affect the care of their patients with current NTSP providers. *See* Responses to Findings Nos. 185-89.

209. The unexpected termination of a large number of physicians caused United a great deal of concern. (Quirk, Tr. 312-315, 331-333).

Response to Finding No. 209: Deny as not supported by evidence cited. Deny that the termination was unexpected because United claimed that the termination was mutual. *See* (CX1068

(termination was mutual)). Deny also that a large number was terminated because it was only 108 physicians.

210. Prior to receiving the termination letter, United had not received any notable number of terminations from physicians who were contracted with it through HTPN, nor did HTPN itself indicate that physicians were likely to terminate their United contracts because of price or any other reason. In fact, United was not aware, or informed, of any reason, other than the fact that it was engaged in direct bargaining with NTSP, that could have caused this sudden termination. (Quirk, Tr. 315).

inform their patients' representatives of potential problems affecting the delivery of their health care, including payment issues, does not support the conclusion that NTSP encouraged members to complain about contract terms. *See* Responses to Findings Nos. 185-89. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

212. On July 26, 2001, David C. Beaty, United's Senior Network Account Manager, recorded in an internal United e-mail his lack of understanding as to how a "messenger model" IPA can terminate a contract on behalf of its physicians, noting a prior reference to an agency clause in the agreement between NTSP and its physicians. This same lack of understanding was shared by Quirk and was another source of concern to United. (CX1056; Quirk, Tr. 314-315).

Response to Finding No. 212: Admit, but incomplete. NTSP had the right to unilaterally terminate the HTPN contract it had entered into as an entity. (Van Wagner, Tr. 1727-29). NTSP explained this right to Quirk, as reflected in his notes from a Board meeting. (CX 1083). At this time, United was also attempting to undercut an NTSP risk contract. *See* Response to Finding No. 210.

213. NTSP and its members understood that the United contract was terminated because United offered rates below NTSP's minimum price. *See* (CX1062 Fax Alert #52, dated August 9, 2001, informing member physicians of NTSP's termination of United through HTPN and explaining that the termination was a result of United's proposed PPO/HMO rates falling below Board approved Minimums and United's use of a single fee schedule for both HMO and PPO)).

Response to Finding No. 213: Admit substance but deny as incomplete. United was threatening to displace a NTSP risk contract. (Mosley, Tr. 206-07; Quirk, Tr. 363-65). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

6. NTSP Sought Powers of Attorney to Negotiate Exclusively with United

214. On August 9, 2001, in Fax Alert #52, NTSP solicited powers of attorney from NTSP member physicians because "[as with previous contracts, several members have requested that NTSP act on their behalf in regards to all contracting activity between themselves and United Health Care."

attorney was attached, and decided to keep pressuring the City and Texas Christian University with regard to their choosing United as their health plan. (CX0096).

Response to Finding No. 216: Admit but misleading. Any actions that NTSP took with the City and TCU involved NTSP's right and duty to inform its patients' representatives of potential and legitimate problems that could potentially affect the delivery of health care. *See* Responses to Findings Nos. 185-89. United was also threatening to displace NTSP's risk contracts with these employers. *See, e.g.,* Response to Finding No. 210.

217. A copy of Fax Alert #52 was obtained by United. Quirk made a handwritten notation on this copy indicating United's view that it needed to redevelop a network strategy for Tarrant County. Quirk made this notation because of NTSP's termination of 108 physicians and NTSP's coordinated "public relations campaign" against United which caused United's customers to question its ability to deliver a quality network in the Fort Worth area. (CX1051; Quirk, Tr. 320-321).

Response to Finding No. 217: Admit first and second sentence. Deny third sentence as not supported by the evidence cited. Neither CX 1051 or Mr. Quirk's testimony refers to NTSP coordinating a "public relations campaign" against United. NTSP did not in fact coordinate a "public relations campaign" against United. NTSP exercised its right and duty to inform its patients' representatives of potential and legitimate problems that could potentially affect the delivery of health care. *See* Responses to Findings Nos. 185-89.

218. After carefully examining the power of attorney and the text of Fax Alert #52, Quirk and United's counsel concluded that the power of attorney gave NTSP the right to negotiate all contractual terms, including financial terms. Based on that conclusion, United believed that NTSP would negotiate collectively on behalf of its member physicians for price and non-price terms. (Quirk, Tr. 322-326 (the testimony related to United's antitrust counsel concerns - Tr.
324-326 - not for truth but for state of mind); CX1051; Quirk, Tr. 326).

Response to Finding No. 218: Move to strike first sentence as inadmissible. The conclusions of United's counsel as relayed at trial by Quirk were hearsay admitted only to show Quirk's state of mind, but this statement offers the conclusion of United's counsel for the truth. Further, this statement is not supported by evidence cited. It was not demonstrated in Quirk's hearsay testimony that the power of attorney was "carefully examined." The power of attorney cannot be used to negotiate financial terms of non-risk contracts. *See* Response to Finding No. 135. Admit that second sentence accurately recounts the testimony of United's representative, but deny that the belief was valid. Mr. Quirk was told at an NTSP meeting, and recorded in his own notes, that powers of attorney were "for contractual language only" and "NTSP never uses the [powers of attorney] to negotiate rates." (CX 1083). Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. The power of attorney also does not give NTSP the ability to do so. *See* Response to Finding No. 135. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

219. United decided to try to recruit the terminated NTSP physicians directly. (CX1056; CX1057 at 1). In August of 2001, shortly after NTSP's termination letter, United made the decision that Beaty would contact all of the affected HTPN/NTSP physicians who were terminated by NTSP, in an effort to restore the relations with the terminated physicians via direct contract. (Quirk, Tr. 334; Beaty, Tr. 452, 454).

Response to Finding No. 219: Admit.

220. Beaty wrote to these physicians inviting them to continue participation in United's network under a direct contract with United, and offered them the same reimbursement rates as they had received under the HTPN-United agreement prior to the termination. Only a few physicians accepted this offer. (Quirk, Tr. 334; Beaty, Tr. 452; CX1068).

Response to Finding No. 220: Admit first sentence. Deny second sentence as not supported by the evidence cited. Mr. Quirk's testimony states "Initially, there were just a few." No other evidence demonstrates that after time passed still "only a few" accepted the offer. (*See also* Beaty, Tr. 463-64). Beaty also admitted that the letters he wrote to physicians were inaccurate and designed to cast United in a "more positive light." *See* Response to Finding No. 202. Further, most NTSP physicians were already otherwise contracted with United because only 108 were involved in the HTPN-United agreement. *See* Response to Finding No. 205.

221. On August 24, 2001, Fax Alert #56, NTSP informed its member physicians that it was receiving calls from some member physicians regarding direct offers they had received from United. NTSP repeated its unfavorable assessment of the United offer, reported that the rates paid to the NTSP physicians through the United-HTPN arrangement were below the NTSP acceptable Minimums, and noted that this had been NTSP's reason for terminating the HTSP arrangement. NTSP also informed it member physicians that it "would continue to pursue a direct contract with United Healthcare [*sic*] that meets or exceeds the fee schedule minimums set by the NTSP membership." (CX1066).

Response to Finding No. 221: Admit first sentence. Deny second sentence. NTSP did not repeat an "unfavorable assessment" of the United offers. NTSP merely reported that, under the United contract, "most NTSP divisions fell below the NTSP acceptable minimums." Admit third sentence, but incomplete. NTSP also informed physicians that they could "contract of negotiate directly with United rather than through NTSP." Deny characterization of NTSP's participating physicians as "members." *See* Response to Finding No. 8.

222. Also, through Fax Alert #56, NTSP informed its members that it had already received 107 executed powers of attorney from member physicians that assigned NTSP "to act on their behalf in regard to all contracting activity between themselves and United Healthcare," and sought the submission of executed powers by additional members. (CX1066).

Response to Finding No. 222: Admit, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

223. NTSP advised those member physicians who signed the powers of attorney that they "should

Further, NTSP explained the use of the powers of attorney in accordance with the messenger model. (Quirk, Tr. 341-42, 419; Deas, Tr. 2432; CX 1122; CX 1083; CX 1086; RX 283).

225. NTSP in a September 13, 2001 letter to Garry Jackson, City Manager of Fort Worth, stated that "several offices have contacted NTSP to state they do not wish to contract with United unless a group contract through NTSP is negotiated on their behalf." (CX 1075 at 2).

Response to Finding No. 225: Admit**.**

7. United Capitulated to NTSP's Demand to Increase its Rates

226. In the summer of 2001, in an attempt to restore customer confidence in the stability and adequacy of United's network in Fort Worth that was compromised by NTSP's activities, United increased its offer to ASIA, another Fort Worth IPA through which had contracts with 113 NTSP physicians. (CX 1055). United's offer was 125% of 2001 Tarrant RBRVS for HMO and 130% of Tarrant RBRVS for PPO. (Quirk, Tr. 336-337, 345, 347). The increased offer was also made to MCNT. (CX 1119 at 1).

Response to Finding No. 226: Deny. In the cited testimony of Mr. Quirk, he states that United was fielding concerns from physicians, particularly ASIA physicians. Further, NTSP was not the cause of United's customer problems. NTSP exercised its right and duty to inform its patients' representatives of potential and legitimate problems that could affect the delivery of health care. *See* Responses to Findings Nos. 185-89.

227. NTSP understood that the increased offer to ASIA was a direct result of NTSP's activities (CX 256; CX 1199 (Vance, Dep. at 310-311)).

Response to Finding No. 227: Deny. There is no testimony from United's representative that NTSP was told the circumstances of the ASIA offer. Further, this is not supported by the cited evidence. The citations refer to Consultants in Cardiology meetings and testimony. Specifically, Dr. Vance penned the above cited statement but explained in his

deposition that physicians in his practice group were threatening to leave NTSP. Accordingly, Dr. Vance "emphasized things that would make it more likely that they would stay rather than not." He

Response to Finding No. 230: Admit statement was made, but deny as incomplete. In response Mr. Quirk's cited concerns, NTSP explained to United the limited use of the powers of attorney in accordance with the messenger model and antitrust law. (Quirk, Tr. 341-42, 419; Deas, Tr. 2432; CX 1122; CX 1083; CX 1086; RX 283). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

231. In an August 30, 2001 Board of Directors meeting, NTSP's Board decided to invite Quirk to discuss United's antitrust concerns as previously expressed in his August 28 letter. (CX0097).

Response to Finding No. 231: Admit**.**

232. On September 5, 2001, NTSP held a General Membership Meeting, at which Van Wagner updated NTSP's member physicians on recent progress in contract negotiations with United. (CX1076; CX0158).

Response to Finding No. 232: Admit, but deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

233. On September 7, 2001, United declined NTSP's offer to attend a Board meeting because NTSP had not yet submitted an adequate written response to United's August 28 letter. (CX1121; Quirk, Tr. 338-339).

Response to Finding No. 233: Admit that United's representative so testified, but deny the validity of the claim that NTSP had not submitted an adequate response. NTSP had submitted an adequate response – a letter dated September 5 and an invitation to a Board meeting to further discuss NTSP's business model. (CX 1122). There had also been conversations between NTSP and United.

234. On September 13, 2001, in Fax Alert #60, NTSP reported to its member physicians that United had increased reimbursement levels "via a contract with ASIA, as well as individual direct offers to several NTSP physicians." (CX1076).

Response to Finding No. 234: Admit, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

235. As a result of the increased offers, NTSP deferred activation of the powers of attorney for two weeks subject NTSP's reconsideration. (CX1076).

Response to Finding No. 235: Admit**.**

236. On September 13, 2001, NTSP again invited United to meet with the Board in order to address United's concerns regarding NTSP's conduct, as stated in United's August 28 letter. (CX1072).

Response to Finding No. 236: Admit**.**

237. On September 13, 2001, NTSP met again with representatives of the City of Fort Worth. NTSP represented that even United's new, increased PPO reimbursement offer to NTSP physicians still was unacceptable. NTSP further expressed concerns about United's practice of "bundling" claims, pursuant to which physicians who provided multiple services on a single occasion were reimbursed at a single, bundled rate (lower than the rate at which each service would be compensated if billed separately). NTSP expressed its view that United's bundling practice under-compensated physicians. (Mosley, Tr. 185-189, 190-193; CX1075).

Response to Finding No. 237: Admit, but deny relevance to the disposition of the issues in this proceeding. Deny characterization of offer being "unacceptable." CX 1075 states that "PPO rates may still prove inadequate." NTSP has the right and duty to inform the City of problems that could potentially affect the care of their patients with current NTSP providers, including compensation issues. *See* Responses to Findings Nos. 185-89. Further, United's claims-payment practices, including its bundling logic, were considered possible violations of Texas state law, a fact about which NTSP also informed government authorities. An investigation was conducted, leading to United being fined and ordered to pay restitution to providers. (Van Wagner, Tr. 1772; RX 3103).

238. At the same meeting, NTSP's Dr. Deas made the suggestion that physicians might have to resort to "billing games" to offset losses caused by United's bundling logic. (Mosley, Tr. 189-190).

Response to Finding No. 238: Admit that Mr. Mosley so testified but deny validity. Further, Dr. Deas's comment specifically related to concerns over whether United's bundling logic violated Texas state law regarding payment to providers. (Deas, Tr. 2593; RX 3103).

239.

United's low rates in that discussion. The cited letter also focuses on NTSP's medical management

to further discuss NTSP's business model. NTSP and United also had discussions.

242. On September 21, 2001, Van Wagner updated NTSP's Medical Executive Committee on contract negotiations with United. (CX0198). Several additional updates to the membership were provided between September 21, 2001 and September 25, 2001. (CX0171 at 1-5).

Response to Finding No. 242: Admit substance of statement, but deny that the negotiations with United related to economic terms of a non-risk contract and deny the characterization of NTSP's participating physicians as "members" or part of a "membership." *See* Responses to Findings Nos. 8, 53.

243. NTSP and its members also made an effort to convince the State of Texas that United's rates were too low. In meetings with Texas Governor Rick Perry, NTSP sought support in raising prices and "shared the magnitude of the problem of lower reimbursement rates to physicians." Physicians were encouraged to write to the Governor in that regard. (CX0198; CX0100).

Response to Finding No. 243: Deny as mischaracterizing the evidence. NTSP and its physicians communicated with the Texas Governor regarding stopping "predatory pricing." Nothing in either document cited by Complaint Counsel refers to NTSP convincing the state that United's rates were too low. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

244. On September 24, Quirk and Robert Jagmin of United met with NTSP's Board. NTSP stated that it opposed United's offer of one rate for all products. United's representatives were told that PPO rates should be higher than HMO rates. (Quirk, Tr. 340-341, 344).

Response to Finding No. 244: Deny as incomplete and misleading. NTSP was not

interested in United's offer of the same rates for HMO and PPO products because the offer was below Board minimums, which are different for HMO and PPO products. NTSP only informed United of the Board minimums. *See* Response to Finding No. 178.

245. At this meeting, after United already had threatened to reveal NTSP's anticompetitve conduct to federal and state agencies, NTSP for the first time asserted that its members' powers of attorney were used only for negotiation of non-price contractual terms, not rates. (Quirk, Tr. 341-342). In light of the plain language of NTSP's communications with its members concerning the powers of attorney, Quirk continued to believe that the powers of attorney were being sought for "all contracting activity" and were not limited to non-financial terms. (Quirk, Tr. 341-342).

Response to Finding No. 245: Deny first sentence asponintmsorney were being sonight

had no personal knowledge of

interactions between NTSP and its participating physicians concerning powers of attorney. (Quirk, Tr, 328). Considering this admission, the plain language of the powers of attorney, and the explanation given to Mr. Quirk at his request, on which he took notes, Mr. Quirk's beliefs are without foundation of personal knowledge and invalid. (Quirk, Tr. 341-42, 419; Deas, Tr. 2432; CX 1122; CX 1065.003; CX 1083; CX 1086; RX 283). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

246. Also for the first time, the NTSP Board told United that NTSP's contractual arrangement with HTPN enabled it to terminate the arrangement on behalf of its physicians for United's products. (CX1081).

Response to Finding No. 246: Deny as not supported by the evidence. The cited document does not claim that this is the "first time" NTSP told United the details of its contractual relationship with HTPN. Further, the information given to United was correct – NTSP had the right to terminate its contractual relationship with HTPN for treating United patients. (Van Wagner, Tr. 1727-28; CX 1068).

247. NTSP's Board Minutes of September 24, 2001 reported that Dr. Deas met with Texas Commissioner of Insurance, Jose Montemayor to discuss predatory pricing by health plans. The Commissioner stated that he would send letters to CEO of major plans cautioning them against predatory pricing activities. Dr. Deas also discussed the impact of HMO and PPO contracting revisions on Tarrant County physicians with the Commissioner. (CX0100).

Response to Finding No. 247: Admit**.**

term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

250. Because NTSP's actions turned United's Fort Worth network "upside down," United on or about October 10, 2001 sent NTSP a new, enhanced offer. (CX1088; CX1096). United offered NTSP an increased rate of 125% of 2001 of Tarrant RBRVS for HMO and 130% of Tarrant RBRVS for PPO, in order to put an end to the contractual battles that NTSP imposed on United and its customers. (Quirk, Tr. 347-349).

Response to Finding No. 250: Admit that United sent NTSP an offer on October 10, 2001, but deny that NTSP's actions turned United's network "upside down" or that United's belief that they had was the reason for the offer. United has admitted that it does not need NTSP. (CX 1034). NTSP's termination of the HTPN contract only affected 108 of United's physicians, less than 5% of United's physician panel in Tarrant County and less than 2% of United's physician panel in the Metroplex. (Quirk, Tr. 356). The true reason that United came to NTSP with this offer was that NTSP had reported United to the authorities for possible violations of Texas law in its contracting practices. *See* Complaint Counsel's Proposed Finding No. 247; (Van Wagner, Tr. 1772). Deny second sentence as incomplete. The "increased" rates offered to NTSP were the same rates United had previously offered other IPAs–ASIA and MCNT. These "increased" rates were lower than the rates given to HTPN in February of 2001. (CX 1099) (Quirk, Tr. 348-49, 411; CX1119; Van Wagner, Tr. 1745-46). As previously stated, the real reason United came to NTSP had nothing to do with a "contractual battle."

251. Nevertheless, NTSP still was unsatisfied with these price terms, particularly for the PPO plan. (CX1088).

evidence as to why physicians accepted or rejected the offer. There was no evidence as to whether the physicians' decisions were consistent with what each physician individually had indicated as his minimum. Admit second sentence, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

257. Dr. Vance, a former NTSP President who at the time was a member of the NTSP Board of Directors, summarized NTSP's success in these United negotiations to his medical group, in an effort to convince the group to continue their membership with NTSP: "United Health Care came to town six months ago and offered a straight, 110% of Medicare contract. . . . Through the efforts of NTSP lobbying the City [of Fort Worth] and terming a group contract with Health Texas, United blinked. United was so eager to dilute our effectiveness that they refused to negotiate with NTSP but offered an improved contract thru ASIA. The fees in the Asia [*sic*] contract are very close to the numbers that NTSP presented as market rates for FW [Fort Worth] and were rejected out of hand by United officials. United has now returned to the table with NTSP at the direct request of the commissioner of the Dept of Insurance. This United negotiation is a template for other efforts that will need to occur in the near future and would best be coordinated by NTSP." (CX0256; CX1199 (Vance, Dep. at 310-311)).

Response to Finding No. 257: Admit that the document is accurately quoted but deny accuracy of Dr. Vance's writing. As Dr. Vance explained in his deposition, physicians in his practice group were threatening to leave NTSP. In his letter, Dr. Vance "emphasized things that would make it more likely that they would stay rather than not." He characterized his statements as a "hyperbolic attempt" to secure their continued association with NTSP. As to NTSP's ability to influence higher rates of reimbursement, Dr. Vance testified "[o]ne of the purposes of NTSP was to allow physicians to take risks and to maintain their -- their level of reimbursement by performing in a way that was better than had NTSP not been there. I think that the reason that we were able to get contracts at decent

rates during that time had to do with the fact that the payors ultimately recognized that, although they might have to pay on a per CPT code, a higher rate for NTSP network, that what they got was an overall lowered outlay of their resources because we were a more efficient network. And so I think that NTSP did, in fact, allow us to have individual CPT reimbursement that was higher because we were a quality network. We did what we said we were going to do. We had structures in place that no one else had, and eventually that was -- that was making an impact." (Vance, Dep. 311-313).

Deny to extent the

proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

B. NTSP Collectively Raised Physician Reimbursement Rates for CIGNA Health Plans

The evidence shows that NTSP collectively negotiated fee-for-service contracts with CIGNA and secured higher rates by repeatedly threatening to terminate its physicians from CIGNA's network. CIGNA was introduced to NTSP in 1997, after purchasing another health plan. NTSP's physicians who were directly contracted with this health plan refused to assign their contracts to CIGNA, and insisted that CIGNA negotiate its contracts with its bargaining agent, NTSP. In its 1999 HMO negotiations with NTSP, CIGNA met NTSP's rate demand and agreed to pay at the Board minimum rate. In 2000 and 2001 NTSP negotiated aggressively to add its cardiologists and primary care physicians into the CIGNA-NTSP contract, and specifically to allow those physicians higher reimbursement rates than CIGNA was already paying to them. Eventually CIGNA did not allow those physicians into its network after NTSP's repeated threats to terminate its contract with CIGNA. CIGNA agreed to these cost increases despite the fact that CIGNA would receive no commensurate benefits. Although it first rejected this demand, CIGNA eventfully accepted the rate increase. The negotiations were conducted after CIGNA determined that the impact of a potential termination of all NTSP's physicians would leave it without a marketable network in Fort Worth. NTSP's coordinated efforts increased the level of NTSP's physician reimbursement above market levels.

Response to Summary Finding: This paragraph of factual assertions with no evidentiary cites in an improper proposed finding. Further, NTSP denies the contents of this paragraph as detailed in the following responses.

258. In late 1997, CIGNA purchased Healthsource, a company which offered both HMO and PPO products covering approximately 1 million lives nationally. (Grizzle, Tr. 695).

Response to Finding No. 258: Admit.

259. The acquisition improved CIGNA's physician network in the Fort Worth area and CIGNA requested that the physicians in Healthsource's network assign their contracts to CIGNA. (Grizzle, Tr. 696-697; CX 0760 (verbal acts)).

Response to Finding No. 259: Deny. Cigna's letters to physicians stated that the contracts would be assigned and no further action was needed. (CX 332 ("Cigna indicates the July 31 letter should be considered a termination notice for the Healthsource provider agreements" for physicians with both Healthsource and Cigna contracts)). This was an attempt to mislead the physicians because the contract required a mutual agreement. (Van Wagner, Tr. 1752-53). Grizzle also admitted that Cigna would have been sensitive to how physicians would received change and may not "follow purely the contractual provision." (Grizzle, Tr. 769-770.)

260. CIGNA sent assignment letters to Fort Worth physicians to attempt to contract independently with physicians. (Grizzle Tr. 696-697).

Response to Finding No. 260: Deny as mischaracterizing the evidence. Cigna sent letters to physicians with direct contracts with Health Source explaining that their contracts would be assigned to Cigna. Cigna was not requesting a new direct contract with these physicians. (Grizzle, Tr. 767-70). In addition, Cigna already had direct contracts with some of these physicians. (Grizzle, Tr. 769-71; Van

Wagner, Tr. 1752-54).

261. NTSP learned of the letters and orchestrated and effectuated a concerted refusal of its member physicians to assign their Health Source contracts to CIGNA in order to negotiate as a collective on behalf of the membership (Van Wagner, Tr. 1752; CX0332). NTSP provided and sent to its members a sample letter refusing the contract assignment and directing CIGNA to negotiate with NTSP as their agent, as well as an agency agreement that authorized NTSP to negotiate on the behalf of consenting members. (In the same communication, NTSP informed its members that termination of the members' Health Source provider agreements would risk "depleting [CIGNA's] Health Source provider network.") ("The NTSP Board has determined that this is a contracting situation in which NTSP can be helpful in serving as the agent for its members. Attached you will find an agency form regarding the Healthsource/CIGNA provider agreements. If 50% or more of NTSP members concur that agency is appropriate, NTSP will contact CIGNA and Healthsource directly in regards to this matter. IN THE INTERIM, NTSP ADVISES ITS MEMBERS NOT TO CONSENT TO THE ASSIGNMENT OF YOUR HEALTHSOURCE PROVIDER AGREEMENTS TO CIGNA. YOUR REFUSAL TO CONSENT TO THIS ASSIGNMENT SHOULD BE SENT TO CIGNA FOR YOUR POSSIBLE USE. FINALLY PLEASE RETURN THE AGENCY REPRESENTATION FORM AT YOUR EARLIEST CONVENIENCE.") *(emphasis in original*).

Response to Finding No. 261: Deny first sentence. The statement that NTSP orchestrated and effectuated a concerted refusal to deal is a legal assertion, not a proper statement of fact. NTSP's actions were the result of numerous legal questions posed by NTSP's participating physicians and requests that NTSP discuss these issues with Cigna. (Grizzle, Tr. 769-771; Van Wagner, Tr. 1752-54). Deny second sentence as not supported by evidence cited. The sample letter provided in CX 332 does not inform Cigna to "negotiate with NTSP." It states, "[W]e have requested that North Texas Specialty Physicians represent us in regards to this matter as our agent. NTSP will be contacting you shortly... ." The agency agreement in CX 332 does not authorize NTSP to "negotiate" on behalf of consenting physicians. It states, "authorize North Texas Specialty Physicians to Serve as my Agent in Regards to this Matter as per the Terms of my Participating Physician Agreement." The Physician Participation Agreement does not authorize NTSP to negotiate economic terms on non-risk contracts.

Further, the comment related to depleting the Health Source network refers to Cigna's attempt to mislead doctors into assigning a contract. *See* Response to Finding No. 259. The entire sentence is "Although Cigna can still terminate the Healthsource agreement if you do not wish to assign it to them, they would do so at the risk of depleting their Healthsource provider network." Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

262. In response to the assignment letters, CIGNA received 40 letters all virtually identical to the sample letter provided by NTSP, representing more than 50 NTSP member physicians, in which NTSP physicians refused to assign to CIGNA the Healthsource agreement, and directed CIGNA to negotiate with NTSP on their behalf. (CX0760 (verbal acts); Grizzle, Tr. 696-698, 709, 724).

Response to Finding No. 262: Admit, but incomplete. The physicians that refused to assign the Health Source agreement to Cigna had the contractual right to do so and were merely exercising that contractual right. (Van Wagner, Tr. 1753-54; Grizzle, Tr. 768). Their letters do not refer to NTSP as their negotiator or make any other reference to negotiations. (CX 760). Further, although all but one of the letters in CX 760 cite NTSP as their representative, the evidence does not support the conclusion that the sending parties were actually NTSP participating physicians. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

263. Upon receiving these refusal letters, CIGNA concluded that the doctors would not directly contract with CIGNA and that CIGNA would need to deal with NTSP. (Grizzle, Tr. 697, 709-710, 747).

Response to Finding No. 263: Admit that a Cigna representative so testified, but deny that the conclusion was valid. Cigna received only 40 letters as to only 52 physicians. *See* Complaint Counsel's Proposed Finding No. 262. NTSP had 575 participating physicians. (RX 3118.019). Further, the letters Cigna did receive were in response to concerns about how Cigna was handling the legal and contractual requirements with assigning the contract. (Van Wagner, Tr. 1753-54; Grizzle, Tr. 768; CX 332).

264. As a result, CIGNA contacted NTSP and negotiated with NTSP for the participation of NTSP's specialist member physicians in CIGNA's HMO product at significantly higher fee-for-service prices than market level consistent with NTSP price demands. (Grizzle, Tr. 710-714 (stating that the contents of price discussions included CIGNA's typical offer in the market and what rates NTSP would accept, adding that NTSP "ultimately" accepted 125% 1998 RBRVS); CX0764 at 1, *in camera (Order on Non-Party Cigna's Motion for In Camera Treatment, 04.23.04)*).

Response to Finding No. 264: Deny as mischaracterizing the evidence and irrelevant to the disposition of the issues in this proceeding because the statement relates to risk contract discussions. During the time of these discussions with Cigna, NTSP and Cigna were seeking a risk contract. (Grizzle, Tr. 775; Van Wagner, Tr. 1754-55; CX 763, *in camera*). Any discussion of rates were related to these risk contract discussions and are not economic negotiations on a non-risk contract. The

market. (Grizzle, Tr. 958, *in camera*). Grizzle testified that the discussions included ". . . what

rates [Cigna] would typically offer in the market and what rates [NTSP] would accept." (Grizzle, Tr. 710). His statement does not support the conclusion that Cigna's rates included in those discussions reflected the market rate. Mr. Grizzle's testimony also does not support that NTSP requested "significantly" higher rates than what Cigna offered. Further, the evidence cited does not support the conclusion that the rate was higher, or even significantly higher, than market level. (Grizzle, Tr. 713-14). Cigna's standard rate was not the market rate for IPAs. **[**

] (Grizzle, Tr. 958, *in camera*). Finally, Complaint Counsel erroneously quotes Mr. Grizzle by stating that "NTSP 'ultimately' accepted 125% 1998 RBRVS." (Grizzle, Tr. 714) (The actual statement appears as follows: ". . . we ended up with the 125 on the HMO and I believe 135 on the PPO.") Some rate discussions were also mere recitations of the Health Source rates currently available to physicians on the Health Source contracts that Cigna was attempting to assign to itself. *See* Response to Finding No. 259. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

265. PPO coverage for NTSP specialists was later added in an amendment to the NTSP/CIGNA contract at a reimbursement rate of 135% of Dallas County 1998 RBRVS. (CX0769; Grizzle, Tr. 714).

Response to Finding No. 265: Admit.

266. A year later NTSP renegotiated with CIGNA its specialist physician reimbursement rates for both CIGNA's HMO and PPO products at significantly higher prices than CIGNA paid other Fort Worth physicians for the same services. The resulting rates were consistent with NTSP's price demands. (Grizzle, Tr. 711-714 (stating that CIGNA unsuccessfully tried to negotiate lower rates with Karen Van

Wagner and David Palmisano of NTSP, arriving at rates consistent with NTSP's demands.); Grizzle, Tr. 719; CX0764, *in camera (Order on Non-Party Cigna's Motion for In Camera Treatment, 04.23.04);* CX0769). This agreement was effectuated in a second amendment which increased the fee-for-service HMO rate to current year RBRVS and provided that the rates would be adjusted annually to maintain rates 125% of then current **[ ]** RBRVS. (CX0771 at 1, *in camera (Order on Non-Party Cigna's Motion for In Camera Treatment, 04.23.04)*; Grizzle, Tr. 741 (CIGNA estimates that adjustments to current year RBRVS increase its costs). (These new rates were 15 to 20 percent higher than "CIGNA's other reimbursement

the contract. Cigna's agreement to the second amendment clarifying the proper rate of reimbursement represented the resolution of this contractual issue. *See* Response to

Finding No. 266. Further, NTSP's participating physicians are small in number compared to Cigna's 6,500 providers in Cigna's network in the Metroplex. (Grizzle, Tr. 759). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

268. The agreement and subsequent amendments did not include NTSP's primary care physicians and excluded or "carved out" the specialties for which CIGNA had pre-existing capitation arrangements, which included cardiology among others. (CX0771 at 2, *in camera (Order on Non-Party Cigna's Motion for In Camera Treatment, 04.23.04)*; CX0769 at 1, CX0770; Grizzle, Tr. 713 (agreement did not include cardiology, urology, oncology, podiatry and gastroenterology); 718 (primary care physicians were not part the agreement, "We were contracting for the specialty coverage, and that was NTSP's core business.")

Response to Finding No. 268: Deny that the agreement did not include NTSP's primary care physicians. NTSP's agreement with Cigna provided, **[**

] The agreement did not carve out any other specialties. (RX 20, *in camera*). NTSP's primary care physicians are family practice and internal medicine physicians, who qualify as specialists both under NTSP's definition and Cigna's representative's definition. (Grizzle, Tr. 781; Deas, Tr. 2529-30; Lonergan, Tr. 2696). Therefore, the specialist agreement with Cigna did include family practice and internal medicine specialists classified as primary care physicians. Cigna's representative even testified that he did not recall **[**

] (Grizzle, Tr. 940-42, *in camera*). Admit that the agreement did not include come other carved out specialties, including on an interim basis cardiology.

269. Though NTSP's cardiologists were "carved out" of the agreement, NTSP attempted to

secure their inclusion. (Grizzle, Tr. 725; CX0776). CIGNA responded by offering NTSP's cardiologists an opportunity to contract with the entity CIGNA had contracted with for cardiology services, American Physician Network ("APN"). Accordingly, APN submitted a fee-for-service offer to NTSP's cardiologists. (Grizzle, Tr. 726-727; Van Wagner, Tr. 1768.)

Response to Finding No. 269: Deny first sentence as incomplete and mischaracterizing the evidence. **[**

] (Grizzle, Tr. 927, *in camera*, Van Wagner, Tr. 1764-66; CX 770, *in camera* **[**

]). Cigna did terminate these carve-out agreements, and that is when NTSP sent CX 776 to exercise its option to have its cardiologists included. Cigna refused to let NTSP exercise this option, **[**

]

schedule. (Van Wagner, Tr. 1609-11, 1770; Lovelady, Tr. 2643-44).

270. NTSP rejected APN's offer and sent a letter to APN, stating that the offer "was shared with affected members of NTSP's Cardiology Division and NTSP's board. At this point, we must decline your proposal as it does not meet our minimum reimbursement levels." (CX0349; CX0777A; Grizzle, Tr. 726-727).

Response to Finding No. 270: Admit statement was made, but deny as incomplete. The fee-for-service offer submitted by APN to NTSP's cardiologists was a risk contract because the offer included a floating fee schedule. (Van Wagner, Tr. 1609-11, 1770; Lovelady, Tr. 2643-44). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

271. NTSP then threatened CIGNA with the termination of NTSP's contract with CIGNA in order to secure the inclusion of the NTSP cardiologists. (CX0776; Grizzle, Tr. 730; CX0777 (NTSP letter to CIGNA stating that NTSP's Cardiology Division and Board found CIGNA's proposal to be "woefully inadequate." The letter also states that "obviously Cigna's failure to resolve this issue may affect current NTSP participation and future dialogue with Cigna regarding a PSN type risk.")).

Response to Finding No. 271: Deny as incomplete, mischaracterizing the evidence, and unsupported by sufficient evidence. CX 776 and CX 777 were letters sent by NTSP to Cigna in response to Cigna's breach of contract by not allowing NTSP's cardiologists to exercise their right of first refusal under the contract. *See* Response to Finding No. 269. These letters mention termination because NTSP considered this and Cigna's previous breaches (*See* Responses to Findings Nos. 266-268) to be material breaches by Cigna, giving NTSP the right to terminate the contract if the breaches

its existing rights under the contract.

272. CIGNA took the threat seriously and performed an analysis of the impact of the potential loss of NTSP's physicians from its network. CIGNA determined that NTSP's termination would leave it with gaps in specialty coverage **[ ]**. (Grizzle Tr. 730-731 (stating that CIGNA took the threat seriously because NTSP presents "a fairly unified force, well-represented and looked like a strong entity and working in Fort Worth"); CX0779, *in camera* (charting impact of NTSP termination by specialty)).

Response to Finding No. 272: Deny first sentence. There was no "threat" from NTSP. *See* Response to Finding No. 271. Admit that Cigna performed an impact analysis.

273. NTSP then linked the on-going issue of the inclusion of NTSP's cardiologists to the inclusion of NTSP's primary care practitioners under the contract. (Grizzle, Tr. 732; **[**

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Response to Finding No. 273: Deny first sentence as mischaracterizing the evidence. After Cigna's multiple breaches of contract (*See* Responses to Findings Nos. 266-268), NTSP and Cigna tried to work out a resolution to their contractual disputes. The documents reflect an attempt to reach that resolution on each point of contention — i.e., the inclusion of primary care physician specialists and the right of first refusal of the cardiologists. *See* Responses to Findings Nos. 267-268. Admit second sentence, but incomplete. The dispute that was jeopardizing the relationship was a breach of contract by Cigna. *See* Response to Finding No. 268.

274. In negotiating for the inclusion of its primary care physicians, NTSP also solicited "assistance" from Texas Health Resources ("THR"). (Van Wagner, Tr. 1474-1475). THR is a large hospital system that includes Harris Methodist Fort Worth. In a letter to THR, NTSP writes: "Given that the CIGNA

HMO is offered by THR to many of its employees, we would ask your support in allowing NTSP's contracted PCPs to participate through NTSP's contract with

CIGNA. Participation through NTSP's contract would be economically advantageous to many existing PCPs and would provide a single point of entry for every 100 PCPs and 300 specialists. Specifically, we have requested that Yerxa contact THR's CIGNA representative to make him aware of this contracting situation and urge his support for the inclusion of NTSP's PCPs in the NTSP/CIGNA contracts. By not offering Tarrant County PCPs a market rate, CIGNA puts its ability to provide quality primary health care services to your employees at risk." (CX0709 at 2).

Response to Finding No. 274: Deny first sentence. The testimony does not support any aspect of this statement. Dr. Van Wagner's cited testimony is merely an explanation of what THR is and does not mention anything about "assistance," a relationship with NTSP, or "negotiating for the inclusion of its primary care physicians." (Van Wagner, Tr. 1474-75). Further, NTSP was not "negotiating" for the inclusion of its primary care physicians. The physicians were included under the contract, but Cigna was breaching the contract by not allowing them to participate. *See* Response to Finding No. 268. All of NTSP's actions on the issue were in response to Cigna's breach of contract. Admit second sentence. Admit that the third sentence accurately quotes the document, but deny relation to any conclusions drawn in first sentence. CX 709 states that it is a letter in response to a call NTSP received from someone at THR soliciting NTSP's opinion on various health plans. This has nothing to do with the rest of the proposed finding.

275. CIGNA had already contracted with a sufficient number of primary care physicians at significantly lower rates than those under the NTSP specialist agreement. Allowing NTSP's primary care physicians to opt-in to the NTSP/CIGNA specialist contract would increase CIGNA's costs with *no additional benefit* to CIGNA. (Grizzle, Tr. 733-734; Grizzle, Tr. 718-719).

Response to Finding No. 275: Admit that a Cigna representative so testified, but deny as incomplete and deny relevance. Cigna has a contractual obligation to NTSP to include all specialists that were not carved out — including family practice and internal medicine specialists, also known as primary care physicians. *See* Response to Finding No. 268. Cigna's failure to consider it beneficial to honor its

contractual obligation does not excuse the breach or alter the circumstances of NTSP's actions. Cigna's representative admits that he did not recall anyone at Cigna **[**

](Grizzle, Tr. 940-42, *in camera)*.

276. In order to maintain the relationship with NTSP and despite increasing its costs, CIGNA offered NTSP's primary care physicians a tiered reimbursement fee schedule in which the primary care physicians would initially receive NTSP's specialist rates and return over time back to a "market level." (Grizzle Tr. 734-739).

Response to Finding No. 276: Deny as incomplete and deny that NTSP's primary care physicians would have been paid above "market level," although admit a Cigna representative so testified. This Cigna offer was part of the ongoing resolution of NTSP and Cigna's contractual disputes. *See* Responses to Findings Nos. 266-268, 273.

277. NTSP rejected CIGNA's offer on behalf of its primary care physicians. (CX0791 ("NTSP's Board absolutely cannot and will not negotiate or offer an agreement in which our PCP partners are paid less than our specialists …The 125% of the then current Dallas (not Tarrant County) RBRVS must stand as per our current agreement.")).

Response to Finding No. 277: Deny as mischaracterizing the evidence. NTSP rejected Cigna's attempt to resolve the contractual dispute by lowering the reimbursement rate of specialists from what it should have been under the contract. *See* Responses to Findings Nos. 268, 273.

278. **[**

] NTSP demanded that CIGNA bring the PPO rates to current year RBRVS. (Grizzle, Tr. 740).

Response to Finding No. 278:

contract. *See* Response to Finding No. 275. Admit that Cigna resisted including the primary care physicians at specialist rates, but incomplete. Deny the characterization as in response to "NTSP's demands" because NTSP was exercising its right to enforce the current contract, which required Cigna to include NTSP's primary care physicians at NTSP's specialist rates. *See* Responses to Findings Nos. 268, 273, 275. In addition, the evidence does not support the conclusion that costs would increase. Mr. Grizzle testified that the agreement's effect was "debatable. Current year can move up or move down but typically, it –it moves up, so we would project that it would cost us something as opposed to fixed." (Grizzle, Tr. 741).

281. In response, NTSP orchestrated and executed a concerted refusal to deal, terminating the NTSP/CIGNA PPO contract for the stated purpose of securing the inclusion of NTSP's primary care physicians. (CX0802).

Response to Finding No. 281: Deny as improper and mischaracterizing the evidence. This finding includes a legal assertion that "NTSP orchestrated and executed a concerted refusal to deal," which is an improper proposed finding. It is also erroneous because NTSP was terminating the contract on its own. Further, NTSP's termination of the Cigna PPO contract was in response to Cigna's numerous breaches of contract and refusals to remedy those breaches. *See* Responses to Findings Nos. 266-280.

282. CIGNA succumbed to NTSP's demands by agreeing to negotiate a third amendment to the NTSP/CIGNA contract which allowed for the inclusion of NTSP's primary care physicians, and the future inclusion of specialists who were previously carved-out of the CIGNA HMO contract (Grizzle, Tr. 749-751; Van Wagner, Tr. 1771; CX0810).

Response to Finding No. 282: Deny as mischaracterizing the evidence. The third amendment to the NTSP/Cigna contract was a memorialization of Cigna's final agreement to

[**]** (Grizzle,

Tr. 942-43, *in camera*; Van Wagner, Tr. 1771; CX 809, *in camera*).

283. At trial, Van Wagner offered her own definition of the contractual term "specialist," as it appears in the CIGNA contract, to justify NTSP's attempts to pressure CIGNA to include primary care physicians in the contract. (Van Wagner, Tr. 1762-1763). Van Wagner testified that the term "specialist," **[**

] references a defined term in NTSP's Participation Agreement and Bylaws. (Van Wagner Tr. 1762-1763). Not only does NTSP's Participation Agreement fail to contain a defined term for "specialist;" but NTSP's bylaws actually contain separate definitions for "Medical Specialty Physicians" and "Primary Care Physician or

incomplete and deny relevance. Cigna has a contractual obligation to NTSP to include these NTSP physicians. *See* Response to Finding No. 268. That Cigna did not consider it beneficial to honor its contractual obligation does not excuse the breach or alter the circumstances of NTSP's actions. *See* Response to Findings No. 275. Deny any implication that NTSP's rates on the Cigna contract were above "market rates." **[** **]** (Grizzle, Tr. 958, *in camera*). **[** **]** (Grizzle, Tr. 959; CX 768, *in camera*).

285. **[** **]**

Response to Finding No. 285: Admit first sentence. For second sentence, admit that Cigna representative so testified, but deny validity. A withhold provision normally is a risk element of the contract. (Frech, Tr. 1398; Van Wagner, Tr. 1605-06, 1609-10, 1758-59, 1761; Lovelady, Tr. 2642-43). To the degree NTSP's management would further clinical integration or spillover, it could be considered as something other than a non-risk contract.

286. NTSP's coordination of a collective refusal to deal with CIGNA effectuated through its collection of agency agreements from its member physicians and threats of and actual mass departicipation thwarted CIGNA's attempts and ability to contract at market rates. (Grizzle Tr. 716; 719; 723-724; 738; 746-747 (NTSP as a "unified force"); Grizzle, Tr. 749; Grizzle, Tr. 750-751).

Response to Finding No. 286: Deny. This is a legal assertion, not a proper statement of fact. Further, this proposed finding mischaracterizes the evidence. NTSP's actions were part of

the attempt to resolve the contractual disputes involved in existing contracts. NTSP was exercising its right to enforce the terms of the contract. *See* Responses to Findings Nos. 266-268, 273-277. Deny any implication the NTSP's rates on the Cigna contract were above "market rates." *See* Response to Finding No. 284. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

287. **[**

]

Response to Finding No. 287: Admit first sentence. Deny second sentence as misleading and incomplete. **[**

] (Grizzle, Tr. 946-48, *in camera*; Van Wagner, Tr. 1974-76). **[**

] (Grizzle, Tr. 947-48, *in camera*; Van Wagner, Tr. 1974-76). Further, the first year NTSP missed the bonus by only $3 PM/PM. (Van Wagner, Tr. 1974-75).

288. **[**

] (Grizzle, Tr. 756-757 (NTSP's cost to CIGNA is higher than average)).

Response to Finding No. 288: Admit that a Cigna representative so testified in a generality, but deny validity. The evidence showed that NTSP's physicians performed well on the Cigna contract, with per participating physician per month costs equal to its performance on risk contracts and lower than the Texas average for Aetna, Humana, United, and lower than the national average. (RX 3130; RX 3176, *in camera*). NTSP was unable to cross-examine as to the general statement because despite NTSP's requests for data relating to this proceeding, Cigna has not produced such data. *See* Response to Finding No. 460. No testimony was given as to what Cigna's data showed for other IPAs or other physicians of comparable quality or with comparable patient populations.

289. **[**

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Response to Finding No. 289: Admit, but incomplete. Cigna subsequently breached the third amendment by not paying the primary care physician capitation payments in accordance with the contract. (Van Wagner, Tr. 1770).

290. The third amendment also provided CIGNA's only HMO flat file date data to NTSP. CIGNA

Response to Finding No. 291: Deny as misleading and incomplete. *See* Response to Finding No. 287.

292. CIGNA has never paid anything to NTSP for meeting CIGNA's quality service incentives in the NTSP CIGNA contract. (Van Wagner, Tr. 1868).

Response to Finding No. 292: Admit payment has not been made, but deny otherwise as incomplete. *See* Response to Finding No. 287.

C. Aetna's Fee-for-Service Negotiations with NTSP

The evidence of NTSP's dealing with Aetna indicates that NTSP collectively negotiated price with Aetna, which led to higher prices. In late 2000 NTSP and Aetna negotiated a fee-for-service agreement. Aetna initially offered its standard rate in the marketplace – some 125% for PPO, 111% for HMO and $40 for anesthesia. NTSP countered with 140% for PPO, 125% for HMO and $45 for anesthesia. After negotiating the prices, Aetna agreed to raise its PPO offer to the 140% demanded by NTSP and offered a higher HMO reimbursement rate of 116%. This was unacceptable to NTSP. Further negotiations ensued and NTSP applied additional pressure by collecting powers of attorney from its physicians, terminating NTSP's physicians from Aetna's network, and imposing pressure on Aetna through employers, brokers and the Texas Department of Insurance. Eventually Aetna capitulated and signed a contract that mirrored NTSP's counter offer of 140% for PPO, 125% for HMO and $45 for anesthesia. In 2001, realizing that it was paying NTSP higher rates than any other IPA, Aetna tried to reduce the rates to reflect market conditions. During the negotiations, NTSP claimed that its efficiencies justified higher rates. After throughly analyzing the data, Aetna concluded there was no empirical justification to support the higher rates and terminated its NTSP contract.

Response to Summary Finding: This paragraph of factual assertions with no evidentiary cites is an improper proposed finding. Further, NTSP denies the contents of this paragraph as detailed in the following responses.

1. General Aetna Background

293. Aetna currently has around 13 million covered lives in its different health plans, around 650,000 of them in North Texas, and around 40,000 - 50,000 HMO and 100,000 PPO members in Fort Worth. (Jagmin, Tr. 981; Roberts, Tr. 476).

Response to Finding No. 293: Admit.

294.

[1]MSM was a Texas corporation that recruited and contracted with Tarrant County physicians and physician associations to provide a network of physician services for health plans. In 1999 MSM was contracted with 2,000-2,500 physicians. (Dean, Tr. 2608-2609).

extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

298. The contract between MSM and Aetna which served about 115,000 patients, was primarily a "global risk deal" under which MSM was capitated to cover physicians services. (Jagmin, Tr. 997; 984-985).

Response to Finding No. 298: Admit, but incomplete. The global risk deal related solely to the HMO. MSM also had a non-risk PPO contract. (RX 832).

3. Initial Contract Negotiations Between Aetna and NTSP

299. In late 1999 NTSP initiated a meeting with Aetna and proposed a direct contracting relationship between Aetna and NTSP. (Jagmin, Tr. 981-982). This meeting did not develop into broader negotiations. (Jagmin, Tr. 988-989).

Response to Finding No. 299: Admit, but incomplete. NTSP proposed a risk contract with Aetna. (Jagmin, Tr. 983-84, 1125, 1167; Van Wagner, Tr. 1692-95, 1700; CX 531). NTSP approached Aetna regarding a direct risk contract, without MSM's involvement, due to MSM's breach of contract and a resulting lawsuit by NTSP as the class representative for physicians. (Van Wagner, Tr. 1652-53; RX 335; RX 849).

300. Around April 2000, NTSP again initiated negotiations with Aetna to discuss a direct contract between NTSP and its member physicians and Aetna. (Jagmin, Tr. 989-990).

Response to Finding No. 300: Admit, but incomplete. NTSP's negotiations with Aetna were related to a risk contract. (Jagmin, Tr. 983-84, 1125, 1167; Van Wagner, Tr. 1692-95, 1700; CX 531). Deny to extent the proposed finding uses the term"member" differently than NTSP's

302. In early June 2000, NTSP met with Aetna to discuss future business and contract arrangements. (CX0177). NTSP told Aetna that its member-physicians would pull out of the MSM contract with Aetna. (Jagmin, Tr. 995-996).

Response to Finding No. 302:

Response to Finding No. 304: Admit that Jagmin so testified. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

305. In these internal Aetna discussions NTSP was perceived as representing the "majority of the preferred SPECs [specialists] in Ft. Worth," and specialist-dominated. (CX0525).

Response to Finding No. 305: Admit that an Aetna representative so testified.

306. Aetna wanted NTSP to take obstetrics and gynecology (OB-GYN) risk, but NTSP replied that it did not have OB-GYNs within its network and did not want to assume the risk. (Jagmin, Tr. 1115).

Response to Finding No. 306: Admit.

307. Aetna's position was that in order to have effective clinical integration it was important to include primary care physicians of all sorts, obstetrics and gynecologists (OB-GYNs), and pediatricians in the global capitated entity, because a lot of care is generated in those areas, particularly in normal child birth and pediatrics. Without those types of physicians in the network, care can become fragmented, members get caught in the middle, and the exchange of information regarding the patient is harmed. Also, without those types of physicians, the capitated entity tries to avoid the additional cost associated with referring the patient to outside specialists, even if this treatment is the most appropriate. (Jagmin, Tr. 1112-1114).

Response to Finding No. 307: Admit that an Aetna representative so testified, but deny validity. NTSP had achieved clinical integration, even without OB-GYNs. (Casalino, Tr. 2877). The cited evidence does not support, and there is no evidence that does support, that the lack of OB-GYNs in NTSP creates patient care problems or improper referrals. In fact, the evidence shows that NTSP has a high quality of care. (Deas, Tr. 2452-53; Wilensky, Tr. 2204, 2161-2162; RX 3182; RX 3183).

to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

308. Roughly 30% of hospital days are consumed by OB-GYNs issues, and the large cost associated with that requires coordination between primary care physicians, specialists and OB-GYNs. Customers are interested in "one-stop shopping," where all care will be delivered by one entity. (Jagmin, Tr. 1114-1115).

Response to Finding No. 308: Deny first sentence as unsupported by sufficient evidence. The only cited testimony for this general statement of the state of medical care in Texas is the medical director for one payor. Deny second sentence as unsupported by sufficient evidence or relevant to NTSP's activities. Dr. Jagmin appears to be talking about employers wanting to be able to deal with one health plan that supplies all of their physicians. This is unrelated to whether or not the NTSP group includes physicians of every specialty type because when a health plan like Aetna offers a product, NTSP's physicians are not the only physicians available; Aetna will have other contracts with other types of physicians. Employers do not purchase services directly from NTSP or look to NTSP for "one-stop shopping."

309. Therefore, the lack of OB-GYNs in the NTSP risk contract was another reason for Aetna to view the deal with NTSP as less attractive. (Jagmin, Tr. 1115-1116).

Response to Finding No. 309: Admit that an Aetna representative so testified, but deny validity of Aetna's view. *See* Responses to Findings Nos. 307-08.

310. According to the minutes of an August 2, 2000 general membership, NTSP members were informed that negotiations were ongoing with Aetna, and that each member "will be asked to reconfirm their agency agreement with NTSP in relation to Aetna agreement." (CX0178).

Response to Finding No. 310: Admit, but incomplete. NTSP's negotiations with Aetna were related to a risk contract. (Jagmin, Tr. 983-84, 1125, 1167; Van Wagner, Tr. 1692-95, 1700; CX 531). Further, the agency agreement NTSP is referring to in CX 178 is related to NTSP's representation of its participating physicians in the lawsuit against MSM. *See* Response to Finding No. 302. NTSP was also required to have powers of attorneys for its physicians under the Aetna agreement. (Jagmin, Tr. 1135-37, 39, 41-42; Van Wagner, Tr. 1702-05, 1707; CX 548; CX 567). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

311. In a Fax Alert dated August 7, 2000, Van Wagner informed NTSP member physicians that "NTSP has started negotiations with Aetna in regards to a risk and non-risk contract. As of this date, a term sheet has been received and is being reviewed. It is the goal of both parties to implement a new contract effective January 1, 2001. Given the stages of our negotiation, NTSP will know in approximately thirty days whether or not a direct contract with Aetna will be in the best interest of its members." NTSP asked its members to allow NTSP to continue discussions with Aetna for the next thirty days with the goal of identifying any "deal buster points." (CX0942).

Response to Finding No. 311: Admit, but incomplete. Since the negotiations involved a risk and a non-risk contract, any non-risk contract would be tied to the risk contract. A tied offer is a risk arrangement. (Van Wagner, Tr. 1607-08); (CX 1178 (Hollander, Dep. at 52-53)). The reciprocity rate in the Aetna contract also made it a risk arrangement. (Van Wagner, Tr. 1609-12). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

Finding No. 8.

314.

your contracts with Aetna US HealthCare please sign below and fax return to the NTSP offices. . . ." The Attached Power of Attorney appointed NTSP to act as the signatory attorney in fact with respect to "all contracts and agreement (including without limitation all prospective contracts or agreements)" with Aetna, MSM and other entities. (CX0347 at 1-3).

Response to Finding No. 318: Admit, but incomplete. This statement and these powers of attorney were related to the termination of the MSM contract and the pending class action lawsuit against MSM. *See* Response to Finding No. 302. NTSP was required to have powers of attorneys for its physicians under the Aetna agreement. *See* Response to Finding No. 310. The powers of attorney were limited so that NTSP could not use them to negotiate economic terms of non-risk contracts. *See* Response to Finding No. 135. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

319. In October 2000 the risk negotiations between NTSP and Aetna reached a dead end. (Jagmin,

response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53.

321. In these negotiations, NTSP sought to negotiate rates for anaesthesiologists. Aetna's initial offer of $40 per unit for anesthesia was countered by NTSP proposed rates of $46-$48. (Jagmin, Tr. 1034-1035, 1045; CX0544 at 3).

Response to Finding No. 321: Deny. NTSP did not negotiate economic terms on a non-risk contract with Aetna. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Further, the evidence does not support the statement that NTSP proposed a rate of $46-48. CX 544 is an e-mail from Dr. Van Wagner stating, "anesthesia unit rates for a ppo product are running between 46-48 in our market."

322. Dr. Jagmin rejected NTSP's offer in an October 20, 2000 letter, and stated that NTSP's counter offer for anesthesia was too high. (CX0540 at 4; Jagmin, Tr. 1017).

Response to Finding No. 322: Admit that Dr. Jagmin refused to offer anesthesia rates above NTSP's Board minimums, but deny that NTSP made an "offer" or "counter offer" to Aetna other than to inform Aetna of its Board minimums. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53.

323. Aetna and NTSP had a series of back and forth negotiations on rates for primary care physicians. (Jagmin, Tr. 1010-1016; CX0540 at 4).

Response to Finding No. 323: Deny. NTSP did not negotiate economic terms on a non-risk contract with Aetna. *See* Response to Finding No. 53. The discussions included some risk elements because the individual physicians were being capitated. (Jagmin, Tr. 1010-11). Further, the e-mail contained in CX 540 is not "back and forth negotiations" from NTSP; it is a series of questions from NTSP related to Aetna's offer.

324. Van Wagner asked "if there was any possibility of increasing those rates," by writing to Dr. Jagmin: "we are having pcp meeting in the next couple of weeks… your cap proposal is probably going .. to come in too low for most to consider . . . even with the ffs add ons [*sic*].. however, we continue to get significant interest in the ffs option. . . before we close the cap option off completely is there any

326. NTSP did not present Aetna's rate offer to its member physicians because it fell below the Board's minimums. (Van Wagner, Tr. 1927-1928).

Response to Finding No. 326: Admit, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

327. Dr. Jagmin met with NTSP's Board, had conversations with Board members and with Van Wagner and Palmisano, in which both physicians and staff conveyed to him their wish to get an HMO reimbursement rate of 125% of RBRVS. (Jagmin, Tr. 1021-1022).

Response to Finding No. 327: Admit, but incomplete. NTSP "conveyed" to Dr. Jagmin that NTSP's Board minimum was 125% of RBRVS for HMO and that NTSP did not have the authority to messenger any contracts below this rate. (CX 571 (e-mail to Jagmin containing "numbers on the messenger model return")).

328. NTSP countered Aetna's rate offer with 140% of current RBRVS for the PPO. (Jagmin, Tr. 1023, 1033-1034).

Response to Finding No. 328: Deny as mischaracterizing the evidence. NTSP did not "counter Aetna's rate offer." NTSP told Aetna that NTSP's Board minimum was 140% of current RBRVS for the PPO and that NTSP did not have the authority to messenger any contract below this rate. *See* Response to Finding No. 69.

329. NTSP continued to demand 140% for PPO in an October 24, 2000 e-mail to Dr. Jagmin**:** **"**[P]lease confirm that your group ppo rate of 1r6sv4i849 Tw o223r26.22-0.1476 Tc8-mail f1023, 100as 140% Wme6r

Response to Finding No. 329: Admit that the quoted portions appear in CX 543 but deny implication that NTSP continued to demand any particular rate. CX 543 asks only that Dr. Jagmin confirm the quoted rate. At the time, NTSP wanted to replace the MSM contract for its participating physicians. NTSP knew that the Aetna/ MSM contract provided for 140% on the PPO. (Van Wagner, Tr. 1696-1700). Thus, Dr. Van Wagner was seeking confirmation that the terms continued to be available to NTSP.

330. Also, NTSP offered "an across the Board uniform rate," instead of the different rates to each speciality that Aetna initially had offered. Thus NTSP wrote to Dr. Jagmin on October 24, 2000, "we are running divisional analysis on the ffs data you sent via email today and will share that with our divisions this week...the fee schedule contains considerable variations...we would propose as an alternative an across the Board uniform rate as a more desirable approach that could also be budget neutral....3....am assuming that the fee schedule you sent would apply to all specialties including pcps...if that is not correct please advise....." (CX0543 at 3-4).

Response to Finding No. 330: Admit that the document is accurately quoted, but deny implication that NTSP made an "offer" to Aetna. NTSP refused to be involved in any Aetna non-risk contract proposal that proposed different rates for different participating physicians. (Roberts, Tr. 523-24, 568)(Jagmin, Tr. 1165). NTSP does not choose to be involved in offers that discriminate against any of its participating physicians.

331. Aetna was concerned that NTSP's "across the Board" approach, which dictated one rate to all specialties, would impose overpayment to some NTSP specialties, while other NTSP physicians would choose not to participate in this contract on the basis of underpayment, and Aetna would have to contract with these physicians individually at the appropriate higher rate. (Jagmin, Tr. 1031-1032).

Response to Finding No. 331: Admit that this was Aetna's concern, but not that the concern was valid. Further, NTSP's "across the board" approach was the use of Medicare RBRVS, which is the physician payment method developed and used by the government. *See* Complaint Counsel's

Proposed Finding No. 37. Further, as Complaint Counsel notes, health plans who have fee-for-service contracts with physicians "often do so based on a specific percentage of 'Medicare RBRVS.'" *See* Complaint Counsel's Proposed Finding No. 36.

332. Despite Aetna's concerns regarding an "across the Board" rate, during the negotiation process Aetna decided to increase its HMO offer and abandoned its "reasonable equitable fee schedule" methodology, to across the Board 116% RBRVS of current year, to "salvage the deal." (Jagmin, Tr. 1076-1077).

Response to Finding No. 332: Admit that these are the actions Aetna took and the reasons it claims to have taken them, but deny that the real reason for the actions was to "salvage the deal" or that there was a "negotiation process." There were other potential causes of Aetna's offer. At this time, Aetna was having problems with governmental authorities investigating their contracting practices, and NTSP was assisting in many of those investigations. In May of 2000, NTSP assisted the Department of Justice investigating Aetna's all-products requirement in its contracts. (CX 57). The Texas Attorney General issued an Assurance of Voluntary Compliance providing minimum standards for contract provisions that Aetna used with providers. (RX 3102; CX 505). NTSP was notified of this Assurance of Voluntary Compliance. (CX 103). Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Deny the validity of Aetna's concerns regarding an "across the board" rate, which was the use of a common Medicare RBRVS payment methodology. *See* Response to Finding No. 331.

333. On November 1, 2000, Van Wagner e-mailed to Dr. Jagmin: ". . . .chris. thanks...on the ppo

anesthesia rates...what is your assessment of market for their services...also did we get a confirm on the rates for other physicians to be the 140 of current medicare as based as some factor increase on the hmo fee schedule...kvw. " (CX0544 at 2).

Response to Finding No. 333: Admit.

334. Aetna at this time was concerned about losing physicians because it was late in the enrollment period. (Jagmin, Tr. 1060-1061 (referring to NTSP, "we were – had to face the possibility of either capitulating on rate terms or seeing a relatively public group of physicians, large group of physicians walk out our network at a very inappropriate time of the year"); 1067-1068,1041). Aetna's concerns grew when Dr. Jagmin talked to physician groups to contract with them directly and they referred him back to NTSP as their bargaining agent. This reinforced Aetna's belief that it could not contract around NTSP. (Jagmin, Tr. 1042-1044 (verbal acts)).

Response to Finding No. 334: Admit that Aetna's representative so testified, but deny validity. Aetna had direct contracts and contracts through other IPAs with NTSP physicians. Aetna did an analysis and determined it did not need a contract with NTSP. According to that analysis, Aetna would lose only 154 physicians out of 1816 physicians in the Aetna Tarrant County network. In fact, Aetna would not lose any physicians in several specialties, including audiology, emergency room care, internal medicine, oncology, and pediatrics. (RX 9; RX 319). Aetna has sent direct contracts to NTSP's participating physicians, and the physicians have signed those contracts. (Roberts, Tr. 544-46).

335. Therefore, Aetna decided to accept NTSP's counter offer of 140% of current RBRVS for PPO, thinking it would allow it to "at least hold the line on [its] HMO based business." (Jagmin, Tr. 1041-1042).

Response to Finding No. 335: Admit, but deny characterization of NTSP's conveyance to Aetna of the Board minimum as a "counter offer." *See* Response to Finding No. 328.

336. Thus, on November 2, 2000, Aetna accepted NTSP's counter proposal of 140% for PPO, while holding to Aetna's position regarding the anesthesia rates. (CX0544 at 2-3 (Dr. Jagmin letter to

Van Wagner: "Upon further consideration, I am willing to offer 140% for non-hmo based products, predicated on REF [Aetna's standard 'reasonable and equitable' fee schedule] for [FFS] HMO-based products. I must hold firm on the anesthesia rates.")).

Response to Finding No. 336: Admit that Aetna made this offer, but deny characterization of NTSP's conveyance to Aetna of the Board minimum as a "counter proposal." *See* Response to Finding No. 328.

337. At Van Wagner's request, Dr. Jagmin reiterated Aetna's offer for Anesthesia: "$40/unit." (CX0544 at 2; Jagmin, Tr. 1045).

Response to Finding No. 337: Admit.

338. As NTSP and Aetna continued to discuss the contract and the rates associated with it, powers of attorney were obtained by NTSP. (Jagmin, Tr. 1029).

Response to Finding No. 338: Admit that NTSP obtained powers of attorney, but incomplete. On IPA contracts, Aetna required that the physicians grant power of attorney to the IPA. (CX 548; CX 567; Jagmin, Tr. 1135-37, 1139, 1141-42; Van Wagner, Tr. 1702-05, 1707). Deny that NTSP and Aetna discussed the rates for the contract. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53.

339. Van Wagner sent Aetna a roster of physicians who had signed powers of attorney "delegating NTSP as the organization that would conduct negotiations for them." (Jagmin, Tr. 1029; CX0534).

Response to Finding No. 339:

does not indicate whether the listed physicians accepted or rejected the power of attorney. Additionally, on IPA contracts, Aetna required that the physicians grant power of attorney to the IPA. *See* Response to Finding No. 338. NTSP's powers of attorney were also limited and could not be used to negotiate economic terms on non-risk contracts. *See* Response to Finding No. 135.

340. Dr. Jagmin asked both physicians and NTSP staff about the powers of attorney and was told that the powers of attorney also assigned to NTSP *direct* contracting efforts between Aetna and physicians. (Jagmin, Tr. 1029).

Response to Finding No. 340: Admit, but incomplete. NTSP's powers of attorney were limited in scope and could not be used to negotiate economic terms on non-risk contracts. *See* Response to Finding No. 135.

341. On November 10, 2000, Van Wagner informed Dr. Jagmin that NTSP had sent approximately 180 powers of attorney from NTSP member physicians to MSM, stating that: "have a few more are wandering in and some of our members wish to send their own correspondence directly which is of course their option... given that the power of attorney covers any direct contracting with Aetna as well. I will also send you a packet." (CX0558 at 2).

Response to Finding No. 341: Admit but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

342. This e-mail, a copy of the blank power of attorney that was sent to Aetna, and discussion between NTSP and Aetna conveyed that the powers of attorney "covered any sort of contracting relationship" and any contract term, including price terms, between NTSP member physicians and Aetna. (Jagmin, Tr. 1058-1059).

Response to Finding No. 342: Deny. The quoted statement does not appear in the citation

Response to Finding No. 344: Admit that Dr. Jagmin's testimony is accurately quoted at Tr. 1059, but deny the validity of this statement. The quoted language is from Dr. Jagmin's testimony and represents his interpretation of the situation only and is unsupported by any other evidentiary cites. NTSP's representation of the physicians was limited in scope by the power of attorney. *See* Response to Finding No. 135. Aetna had direct contracts and contracts through other IPAs with NTSP physicians. (RX 319). Aetna has sent direct contracts to NTSP's participating physicians and the physicians have signed those contracts. (Roberts, Tr. 544-46).

NTSP's Board minimums were not above market. The final terms of the Aetna-NTSP agreement included rates equal to those already in place in the Aetna-MSM agreement. (*Compare* RX 968 to RX 24.021).

345. Although Dr. Jagmin expressed concern that the powers of attorney covered price terms, neither Van Wagner nor anyone associated with NTSP disabused him of that view. (Jagmin, Tr. 1059-1060).

Response to Finding No. 345: Deny. Although Dr. Jagmin testified that he came to these conclusions, the evidence does not support his conclusion that the powers of attorney covered price terms. *See*

attorney is limited in scope to use "in any lawful way" and was not used to negotiate price terms on non-risk contracts. *See* Response to Finding No. 135. Moreover, NTSP requested that the powers of attorney be amended to reflect the messenger model. (CX 567) ("We also note that the Individual Provider Addendum needs to be amended to recognize the messenger model for non-risk products.").

346. In the November 10, 2000 e-mail, Van Wagner informed Dr. Jagmin that she thought that Aetna's PPO fee schedule of 140% of current medicare would be "well received when we messenger it out by all except anesthesia...as you know their contracting minimums on PPO rates were not met." Dr. Jagmin understood that most member physicians would accept the 140% rate for PPO but that no anesthesiologist would sign up under the contract. (CX0558 at 2; Jagmin, Tr. 1052).

Response to Finding No. 346: Deny as incomplete and not supported by the evidence. Mr. Jagmin was aware that NTSP used the messenger model. (Jagmin, Tr. 1145). Further, deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8..

347. In addition to negotiating actively on behalf of competing physicians, NTSP also contacted health plan brokers and customers in order to pressure Aetna to raise rates. For example, at the instigation of NTSP, Blake Woodward, a broker, sent the following message to the brokerage community in late 2000: "Subject: URGENT ALERT: AETNA LOSES ITS BEST TARRANT COUNTY SPECIALISTS! Dear Colleagues: I have just received notice that North Texas Specialty Physicians, which includes 230 of the top specialists in Tarrant County, has just dropped off the Aetna network.. . . It is my understanding that NTSP has been negotiating with Aetna for some time to get their own contract independent of Aetna's contract with the powerful Medical Pathways IPO (also called Medical Select and formerly Harris Select). If this is true, it is bad news for Aetna, because these are the docs that handle most of the adult specialty care in Tarrant County. I suggest that everyone contact your Aetna rep and find out what the facts are and put the heat on Aetna to resolve this situation." (CX0560 at 2). *See also* (CX0559 at 1).

Response to Finding No. 347: Deny as not supported by evidence cited. There was no testimony from brokers or customers that NTSP contacted them in any attempt to pressure Aetna to raise rates. There is no evidence that the e-mail from Mr. Woodward was sent "at the instigation of NTSP." Further, the argumentative introduction that NTSP was "negotiating actively on behalf on competing physicians" is unsupported by any evidentiary cites.

348. Aetna was extremely concerned. *See* (Jagmin, Tr. 1089 (It was troubling "[T]o have the people that sell our business believe that a group of physicians was leaving suddenly and to find out such event not from us.").

Response to Finding No. 348: Admit that Aetna's representative so testified, but deny validity or relevance. The quote from Dr. Jagmin's testimony indicates that Aetna was not concerned with NTSP physicians leaving, but instead with the fact that brokers were receiving rumors related to Aetna from other sources. This has no bearing on the disposition of the issues in this proceeding. Further, Aetna was not concerned with NTSP and did not need NTSP. Aetna's provider panel in Tarrant County alone is 2,500, and it has 7,000 physicians in the Metroplex. (Jagmin, Tr. 1121-22; Roberts, Tr. 569). An Aetna analysis showed that Aetna's network was adequate without NTSP and that many NTSP physicians contracted with Aetna through other vehicles. (RX 9; RX 319).

349. Aetna contacted Woodward, and based on Woodward's statement that he had received the information from an NTSP Board member, Aetna immediately started calling brokers and employers in order to tell them that the negotiations with NTSP "appeared not to be going well and while we continued to negotiate in good faith, it may not work out." (Jagmin, Tr. 1089-1091. (Woodward's statement not for truth.))

Response to Finding No. 349: Admit Jagmin so testified, but deny Woodward statement for lack of supporting evidence. Woodward's statement that the information came from an NTSP

Board member was not admitted for the truth, and there is no other evidence in the record to support that the information came from an NTSP Board member.

350. Aetna also reconsidered its rate offer to NTSP because it was obvious that the information alluding to the departure of NTSP physicians from Aetna's network would have "a very deleterious effect" on Aetna's "ability to sell business in Tarrant County." (Jagmin, Tr. 1091).

Response to Finding No. 350: Admit that Aetna's representative so testified, but deny that this was the only reason Aetna reconsidered its rate offer to NTSP. At this time, Aetna was having problems with governmental authorities investigating their contracting practices, and NTSP was assisting in many of those investigations. (CX 586 at 2). In May of 2000, NTSP assisted the Department of Justice investigating Aetna's all-products requirement in its contracts. (CX 57). The Texas Attorney General issued an Assurance of Voluntary Compliance providing minimum standards for contract provisions that Aetna used with providers. (RX 3102; CX 505). NTSP was notified of this Assurance of Voluntary Compliance. (CX 103).

351. On November 20, 2000, NTSP sent Aetna an e-mail: "North Texas Specialty Physicians' (NTSP) 260 doctors have treated Aetna patients for over ten years....We are pleased that Aetna has contacted us in an effort to work out the details for a direct contracting relationship....If a direct contracting relationship between NTSP and Aetna is accomplished, all of Aetna's PPO lives will be served directly by NTSP physicians. In addition, approximately 15,000 of the 100,000 Aetna HMO covered lives will have direct access to NTSP doctors. The remaining approximately 85,000 Aetna HMO covered citizens are contracted through Medical Select Management's Aetna contract. As of today, NTSP has notified Medical Select Management that under current contractual conditions, NTSP physicians can no longer participate." (CX0559).

Response to Finding No. 351: Admit.

5. NTSP Continued to Negotiate Non-risk Fee-for-Service HMO Rates

352. On November 21, NTSP wrote to Aetna: "Attached you will find a Summary Term Sheet for NTSP/Aetna group contract. The purpose of this term sheet is to identify important variables that have

either been agreed upon or are still in the discussion phase. . . . I would like to share this with our General Membership tonight as a status report." (CX0561; Jagmin, Tr. 1072).

Response to Finding No. 352: Admit substance. Although NTSP referred to its participating physicians as "our General Membership," NTSP denies to the extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

353. Attached to the NTSP letter was a term sheet in the form of a table representing "the state of the negotiations between NTSP and Aetna." The table compared the parties' HMO offer and counter-offer at that time: NTSP's position of "Across the Board 125% of current Medicare" versus Aetna's position: "Across the Board 116% of current Medicare." The term sheet was also a manifestation of Aetna's earlier capitulation to NTSP's PPO demand of 140% and the parties' inability to reach an understanding on the anesthesia rates. (CX0561; Jagmin, Tr. 1071-1072).

Response to Finding No. 353: Admit first sentence. Deny second sentence as mischaracterization of the evidence. NTSP's position was not a "counter-offer," but a recitation of the Board minimums to messenger contracts. (RX 393 (Board minimums)). In fact, "counter-offer" does not appear in CX 561. Nor do the words "manifestation," "capitulation," or "demand" appear anywhere is CX 561. Further, there is no "manifestation" of an inability to reach an understanding on the anesthesia rates. The document merely lists NTSP's position as "N/A."

354. At this point in the negotiations, NTSP and Aetna mainly disagreed over the HMO rate and bundling logic issues that affected the pricing of the product. (Jagmin, Tr. 1073-1075).

Response to Finding No. 354: Deny as mischaracterization of the evidence. There were no negotiations on price terms of the non-risk contract. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various

meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. The bundling logic issues were a legal problem, not a price negotiation. (Van Wagner, Tr. 1650-51 (problems with Aetna's bundling logic caused a TDI investigation resulting in new regulations)).

355. On November 17, 2000, NTSP updated its Division Chiefs on the Aetna negotiations and fee schedule and received feedback. (CX0193).

Response to Finding No. 355: Admit, but deny to the extent there were no negotiations on economic terms of non-risk contracts. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53.

356. NTSP also discussed its negotiations with Aetna at a general membership meeting on November 21: "Aetna's response and the NTSP public position was discussed as she [Van Wagner] prepared the group for what is expected to occur next." (CX0180).

Response to Finding No. 356: Admit, but deny to the extent there were no negotiations on economic terms of non-risk contracts. *See* Response to Finding No. 53. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

6. As Part of the Joint Negotiations, NTSP Re-Polled its Members to Establish Minimum Compensation Rates

357.

360. On December 8, NTSP conveyed the poll results to Aetna: "the numbers on the messenger model return for the hmo product are as follows…mean: 124.89% of current medicare; mode 127.38% of current medicare; median 123.70% of current medicare." NTSP wrote to Aetna that those numbers were essentially a repetition of the NTSP counter-offer of 125%. (CX0571).

Response to Finding No. 360: Admit quoted statement was made, but deny the characterization of NTSP's conveyance of the Board minimums to Aetna as a "counter-offer." *See* Response to Finding No. 353. Dr. Van Wagner stated ". . . as we discussed, this response is essentially the current reimbursement rate for aetna hmo lives not attached to msm." (CX 571).

361. Aetna then convened an internal meeting and concluded that increasing its offer by 9% to match NTSP's counter offer-meant losing money on NTSP HMO services. (Jagmin, Tr. 1080).

Response to Finding No. 361: Admit Mr. Jagmin so testified, but deny the characterization of NTSP's conveyance of the Board minimums to Aetna as a "counter-offer." *See* Response to Finding No. 353.

362. On December 11, NTSP sent Fax Alert #84 to its members, containing the following statements: "The membership's message that a 125% of current Medicare HMO fee schedule is required has been transmitted to Aetna and a response on this final contractual item is expected within the next 24 to 36 hours. . . .**NTSP Continues To Act As Your Agent Both With Aetna Direct And With MSM. At This Point, No Further Action Is Required On Your Part**. . . Please refer all contacts and materials received from either Aetna or MSM to NTSP directly." (*emphasis in original*) (CX0500; CX0573).

Response to Finding No. 362: Admit statements were made, but deny as incomplete. NTSP was at that time a class representative in litigation against MSM and prior proposals from MSM to the doctors liability asserted in the litigation. (RX 335), (RX 1300), (Van Wagner, Tr. 1685-88; 1691).

7. Under Pressure Orchestrated by NTSP, Aetna Capitulated "After NTSP Threatened to Term the Entire NTSP Network." (CX0256)

<u>Response to Improper Heading No. 7:</u> Deny. This is an improper proposed finding because it is contained in a "Heading" and not a proposed finding. Moreover, NTSP denies the characterization as NTSP did not orchestrate pressure. Additionally, the document cited is not an NTSP document; it was created by Consultants in Cardiology and therefore does not support this psuedo-finding. (CX 256). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

363. NTSP continued to lobby third parties to pressure Aetna to reevaluate its position. On December 12, 2000, David Palmisano wrote to NTSP's primary care physicians asking them,"[a]s part of our Aetna negotiation," to send faxes to Texas Insurance Department Commissioner Jose Montemayor, and to raise concerns regarding "NTSP no longer participating with the Aetna HMO," because "without NTSP specialists in the Aetna network a severe network inadequacy problem will exist in Fort Worth." Palmisano included a sheet of bullet point statements to be included in the faxes, including the following statements regarding NTSP's departicipation from Aetna's HMO product:

- "approximately **240 NTSP specialties** representing **21 different specialties** will no longer be participating providers for the Aetna HMO."
- Primary Care Physicians contracted directly through Aetna US Healthcare or Medical Select **<u>will not have the ability to make necessary Referrals</u>** to these physicians and existing patients who are currently receiving care from these physicians will be re-directed and disrupted."
- "Aetna and Medical Select will have **<u>an inadequate network</u>** to provide **medically necessary service to approximately 100,000 Aetna HMO covered lives in Fort Worth**."

payors, including advising about issues that affect the delivery of health care and preventing payor deception and violations of the law. (Deas, Tr. 2424-25, 2429-32); (Van Wagner, Tr. 1462, 1651-53, 1659-60, 1729-33, 1772). NTSP's specific problems with Aetna included MSM's breach of an Aetna downloaded risk contract (RX 832), a class action against MSM (RX 335), MSM's bankruptcy (RX 1556, Jagmin, Tr. 1172-73), and Aetna's representations of MSM's solvency, Aetna's assumption of MSM contracts but refusal to remedy breaches (RX 1700, Jagmin, Tr. 1171-72), and Aetna's refusal of a risk proposal by NTSP (CX 531, Van Wagner, Tr. 1694-65, Jagmin, Tr. 1132).

364. As a result of NTSP's directive, its member physicians did send letters to Commissioner Montemayor. For example, one NTSP member wrote the following to the Commissioner: "I also belong to a local physician IPA known as North Texas Specialty Physicians (NTSP) whose organization is wholly based here in Fort Worth. This network is composed of physicians representing all specialties throughout Fort Worth. NTSP is currently seeking a direct contract with Aetna at the current rate Aetna is paying for these services. Obviously a provider network whose business is based entirely here in Fort Worth is better positioned to address the needs of both patient and physicians. Many of us at NTSP will terminate our existing contracts with Aetna administered through MSM effective December 17. Such wholesale termination will result in significant physician provider panel deficiencies within our geographic area and disrupt physician patient relationships that have been mutually satisfying for years. Please assist me in continuing to provide care to my Aetna patients by

legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

365. Another NTSP member, James F. Parker, M.D., who was the President of Texas Health Care wrote to the Commissioner: "[I]n portions of our community, not having NTSP specialists will require patients to have to go to hospitals where the PCP is not available to participate in the patients' care." The letter stated that NTSP specialists "represent the 'cream of the crop' for specialty care for patients in our community." (CX0584).

Response to Finding No. 365: Admit quoted statements were made, but deny relevance. This letter was written by a participating physician of NTSP but was not the statement of NTSP itself and not dispositive on the issue of NTSP's conduct. Further, the truth of this individual physician's statements is not supported by any other evidence. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

366. In December 2000 the Texas Department of Insurance called Aetna's Regional Manager to express concern that the loss of NTSP would cause adequacy problems in Aetna's network. (Jagmin, Tr. 1091-1092).

Response to Finding No. 366: Admit that TDI contacted Aetna regarding network adequacy problems, but deny as unsupported by sufficient evidence that the problems were due solely to the potential loss of NTSP. Mr. Montemayor sent a letter to Aetna stating that problems between providers and MSM ". . . could result in a threat to the stability of Aetna's provider network." The letter does not mention NTSP much less state that it was a source of concern. (CX0586).

367. In response to NTSP's physician letters, the Texas Department of Insurance also sent Aetna a letter calling into question the adequacy of its network. (CX0586).

Response to Finding No. 367: Admit that TDI sent a letter to Aetna questioning the adequacy of its network, but deny as not supported by the cited evidence that this letter was in response solely to NTSP's physician letters. The TDI letter does not mention NTSP; it only states that there have been "provider complaints." (CX 586), (RX 335) (class action petition – more than 200 physicians suing). *See* Response to Finding No. 366.

368. As a result of the Texas Department of Insurance's expressions of concern, Aetna had internal discussions regarding "the rates that we [Aetna] were willing to ultimately accede to." (Jagmin, Tr. 1093-1094; Jagmin, Tr. 1070-1071).

Response to Finding No. 368: Admit Mr. Jagmin so testified.

369. NTSP wrote to Aetna on December 12 to inform it that Van Wagner had "polled the Board informally today" and that the NTSP Board "would urge aetna [*sic*] to reconsider their position on not accepting the members [*sic*] poll results on compensation for the hmo direct contract." (CX0578).

Response to Finding No. 369: Admit statement was made. Although NTSP referred to its participating physicians as "members," NTSP denies to the extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

370. On December 13, after being instructed by his general manager and regional manager to reject the HMO terms and to attempt to finalize a PPO only contract, Dr. Jagmin replied to NTSP, agreeing to proceed with the PPO contract and stating that "the physician expectations for the HMO contracts are not acceptable to Aetna and are rejected." (CX0580 at 1). *See also*, (CX0582 at 1); Jagmin, Tr. 1082-1083).

Response to Finding No. 370: Admit.

371. On December 15, NTSP received Aetna's final proposed IPA agreement which repeated Aetna's position: "Per your discussion with Chris Jagmin, MD, non HMO based products to be paid at 140% of then current RBRVS per the Fort Worth, TX geographic locality. Anything with no established rate is paid at Company's then current Reasonable Equitable Fee Schedule (REF). Anesthesia services at $40 per unit." (CX0660).

Response to Finding No. 371: Admit.

372. Aetna consumers were not satisfied with Aetna having only a PPO contract while losing NTSP as its HMO providers, and expressed their concerns to Aetna. (Jagmin, Tr. 1082).

Response to Finding No. 372: Deny as unsupported by proper testimony of Aetna customers, but admit that Aetna's representative so testified.

373. The conflict between NTSP and Aetna received significant publicity in the marketplace. (Jagmin, Tr. 1081-1092, 1005-1006). Aetna received "calls from large employers in Tarrant County such as the Arlington independent school district," expressing their concern about the loss of NTSP's physicians from Aetna's network.. (Jagmin, Tr. 1094) (*not admitted for truth*). Pressure from employers and brokers during open season ultimately caused Aetna to capitulate to NTSP rate terms. (Jagmin, Tr. 1083).

Texas Attorney General issued an Assurance of Voluntary Compliance providing minimum standards for contract provisions that Aetna used with providers. (RX 3102; CX 505). NTSP was notified of this Assurance of Voluntary Compliance. (CX 103).

374. On December 18, 2000, Van Wagner reported to the NTSP Board that the PPO arrangement had been completed. Van Wagner referred the Board to a letter from Commissioner Montemayor concerning complaints that the Texas Department of Insurance had recently received from physicians. Van Wagner further "reported that NTSP will continue to **negotiate** with Celina Burns [General Manager] of Aetna on an HMO contract. There was a lengthy discussion on an acceptable fee schedule. The membership's response when polled was 125%. The Board instructed NTSP to present 125% on a direct contract." (*emphasis in original*) (CX0076 at 2-3).

Response to Finding No. 374: Complaint Counsel's "emphasis in original" notation is incorrect. The word "negotiate" is not bolded or otherwise emphasized in CX 76. Otherwise, admit statement was made, except to the extent that "negotiate" does not include negotiating economic terms on non-risk contracts. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. Although NTSP referred to its participating physicians as "members," NTSP denies to the extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

375. Later that day Van Wagner wrote to Aetna's Burns: "[A]s followup [*sic*] to our conversation this afternoon, ntsp"s (sic) proposal is as follows 1. PPO...at 140% of current medicare; anesthesia at $45.00; fee schedules adjusted every April of the new year; hcpcs at 100 percent of medicare; non-medicare codes at 100% of aetna ref for ppo...status: completed; awaiting signature copy to be

delivered to ntsp offices today 2. Direct HMO... 125% of current medicare; anesthesia at $43.00; fee schedules adjusted every April [*sic*] of the new year; hcpcs at 100 percent of medicare; non-medicare codes at 100% of aetna ref for hmo...status: base document completed...can be easily changed to include direct component." (CX0585 at 1-2 [*capitalization, spacing, and incorrect ellipses are as in original*

meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

377. The December 18-19 correspondence between Aetna and NTSP not only represented HMO and anesthesia fee negotiations, but also demonstrated that price negotiations had occurred regarding HCPCs – a set of coding technology used to describe drugs, durable medical equipment and medical supplies. Aetna's typical reimbursement methodology for these codes was its REF fee schedule that was lower than Medicare. Aetna tried to hold on to this position but eventually capitulated and accepted NTSP's position to pay at the higher Medicare rate. (Jagmin, Tr. 1084-1088; CX0591).

Response to Finding No. 377: Deny that NTSP negotiated economic terms related to HMO and anesthesia fees on non-risk contracts. *See* Responses to Findings Nos.327-338, 353-354, 360-361. With respect to HCPC discussions, HCPCs are usually paid on a Medicare basis. (CX 1197 (Van Wagner, Dep. at 207)). Aetna had its own fee schedule for HCPCs not based on Medicare. (Jagmin, Tr. 1087). NTSP merely suggested the change to the usual Medicare basis.

378. NTSP responded to Aetna on December 19th: "...ntsp Board members who I have been able to reach since we talked this morning all appreciate aetna's willingness to work with us and agree that your proposal is fair and a good faith effort. . . . 3. a notice will go out to our members today notifying them that the ppo and hmo direct portions have been completed within their messenger minimums...tommorrow [*sic*] they will be informed that they have the following contracting choices... 1. they can choose not to participate in any offering through ntsp. . . [*sic*] 2. they can choose to participate in the ppo and direct hmo offerings or 3. they can choose to participate in the ppo, direct hmo and delegated ipa hmo offering. . . [*sic*] this last choice is of course depndant [*sic*] on their accepting the new minimum for this product. . . which I believe the Board will be willing to recommend they do from my conversation with them today." (CX0589).

Response to Finding No. 378: Admit substance. Although NTSP referred to its participating physicians as "members," NTSP denies to the extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with

the testimony given. *See* Response to Finding No. 8.

379. In a fax alert sent to NTSP member physicians the same day, NTSP notified its members that their joint strategy had been successful in raising the level of reimbursement. NTSP reported that Aetna and NTSP had reached a new contract and its "important provisions" are "1. PPO PRODUCT - 140% OF CURRENT MEDICARE; ANESTHESIA AT $45 PER UNIT. 2. DIRECT HMO 125% OF CURRENT MEDICARE; ANESTHESIA AT $43 PER UNIT." It concluded: "[a]s always, we appreciate our members' support regarding these matters." (*emphasis in original*) (CX0586 at 10).

Response to Finding No. 379: Deny first sentence as unsupported by evidence cited. CX 586 does not mention a "joint strategy" or that NTSP "had been successful in raising the level of reimbursement." In fact, the rates in this contract were identical to Aetna's rates with MSM, another IPA. *See* Response to Finding No. 376. Admit second and third sentences. Although NTSP referred to its participating physicians as "members," NTSP denies to the extent Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

380. NTSP forwarded the new contract to its members. (CX0597; CX0615 at 1). Ultimately, 188 NTSP member physicians signed the NTSP-Aetna contract. (Jagmin, Tr. 1088).

Response to Finding No. 380: Admit, but deny as incomplete. The contract rates were not "new" because they were already being used with MSM — with whom many of the doctors had contracted. Further, deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

381. The rates in the 2000 Aetna-NTSP contracts were higher than rates from other IPAs providing

two years, our market level of reimbursement would be significantly below its present level." (*emphasis added*) (CX0256).

Response to Finding No. 383: Admit statement was made, but deny relevance. CX 256 is the Board minutes of one physician group within NTSP and does not represent the statements or position of NTSP itself. Further, the author of the document explained that it was a " hyperbolic attempt to try to get [Consultants in Cardiology] to stay in NTSP." (Vance, Tr. 1226-27). Furthermore, Vance was also discussing risk and spillover contracts in the cited document. Finally, NTSP physicians have numerous contracts directly with payors and through other IPAs; NTSP physicians participate on average in only one-third of NTSP's contracts; and payors have testified that payors can contract with NTSP physicians without NTSP. *See* Response to Finding No. 95.

384. On August 10, 2001, NTSP submitted its proposal to Aetna for fee-for-service products. (CX0616; Roberts, Tr. 483-487).

Response to Finding No. 384: Deny as incomplete. NTSP submitted a non-risk contract proposal to Aetna that would incorporate NTSP's medical management and utilization management functions. (Roberts, Tr. 508, 550-51, 560; Van Wagner, Tr. 1709-12; CX 616).

385. NTSP proposed retaining the same rates of 125% for HMO and 140% for PPO for an additional three years, even though those rates were higher than those of similar IPAs, and even though the market had changed dramatically. (Roberts, Tr. 472-473, 488).

Response to Finding No. 385: Deny as not supported by evidence cited and incomplete. NTSP did not "propose" the same rates, it incorporated the existing rates into it clinical integration proposal. (CX 616 ("NTSP's present contracted fee schedule would remain in place... ."). *See also* Responses to Findings No. 381, 384. NTSP's rates were not higher than other IPAs. Throughout the

relevant time period, United, Cigna, Aetna, and Blue Cross offered rates to NTSP that were at or below the rates offered to other IPAs. *See* Response to Findings no. 112. Further, there is no dramatic change in the market that would not be reflected by these fees. Because the fees are a percentage of "then current RBRVS," which the percentage remains the same, the amount changes with Medicare fee schedules. (RX 24.021). These fee schedules change with the market, and in 2001, 2002, and 2003, Medicare fee schedules decreased. (Wilensky, Tr. 2174-75; CX 1196 (Van Wagner, Dep. at 138-39)).

386. On September 28, 2001, Roberts wrote to NTSP, stating Aetna's intention to continue discussions to finalize a mutually acceptable new agreement before the end of 2001, to commence on February 1, 2002. The letter terminated Aetna's existing agreement with NTSP effective January 31, 2002. (CX0644; Roberts, Tr. 489-490).

Response to Finding No. 386: Admit.

387. The renegotiation between Aetna and NTSP involved only non-risk components. (Roberts, Tr. 487).

Response to Finding No. 387: Admit, but deny that NTSP negotiated economic terms on a non-risk contract. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53.

388. On October 8, 2001, the NTSP Board reviewed Aetna's termination letter and decided to continue negotiations with Aetna. (CX0102 at 1-3).

Response to Finding No. 388: Admit, but deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has

various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53.

389. Van Wagner informed the Board that Aetna's new proposed rates would be lower and that negotiations would be arduous. (CX0102 at 1-3).

Response to Finding No. 389: Admit, but deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53.

390. On October 15, 2001, the NTSP Board received and accepted the results of NTSP's membership poll. The NTSP Board instructed NTSP staff to use the minimums of 125% HMO and 140% PPO of current Medicare. (CX0103 at 4-5).

Response to Finding No. 390: Admit substance, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

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the statement that the poll results were shared by Fax Alert.

counter offer." (CX0104 at NTSP at 2-3).

Response to Finding No. 394: Admit statement was made.

9. During this Negotiation Process, Aetna Found NTSP's Efficiency Claims Not Credible

395. On November 1, 2001, NTSP sent utilization data to Aetna and in an attached letter advocated against a decrease in NTSP's current fee schedule. NTSP stated: "Although NTSP's current fee schedule is higher than that proposed by Aetna at the unit cost level, budget to actual PMPM [per member, per month] historical figures indicate that significant savings will accrue to Aetna given historical utilization patterns of NTSP physicians." (CX0553).

Response to Finding No. 395: Admit substance. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

396. Aetna believed it was "critical to [their] organization" to determine if NTSP's efficiency claims were valid. Aetna believed that, "if, in fact, there were efficiencies and we couldn't come to terms [with NTSP], then when those services went to other physicians in the marketplace, then the costs would actually go up. . . . so it was critical to us [Aetna] that we do an in-depth review of this data and try to determine if there were efficiencies and, if there were, to make sure this contract continued." (Roberts, Tr. 497).

Response to Finding No. 396: Admit.

397. In evaluating NTSP's efficiency claims, Aetna adjusted for between 10-25 variables, including age, sex, severity of illness, plan design, co-pays, and co-insurance. (Roberts, Tr. 502-503, 508).

Response to Finding No. 397: Deny. Aetna's representative admitted that because of problems with its own data, Aetna was not able to evaluate NTSP's efficiency claims by comparing the performance of NTSP physicians to other physicians. (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.")). What Aetna did instead, and what this variable adjustment refers to is comparing all Aetna Tarrant County physicians to all Aetna Metroplex physicians. (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.")). Aetna did not focus its data analysis on NTSP at all. (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.")).

398. Aetna spent approximately two months, from early September to early November 2001, analyzing NTSP's efficiency claims. For those two months, two Aetna employees, David Roberts and John McGinnes, each spent approximately 30 hours a week analyzing NTSP's claims. Other functional areas within Aetna also participated in the analysis. (Roberts, Tr. 503-504).

Response to Finding No. 398: Deny. Aetna's analysis of NTSP's efficiency claims did not focus on NTSP physicians at all because of problems with Aetna's own internal data. All Aetna actually did was compare Tarrant County physician performance to Metroplex physician performance.

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Response to Finding No. 398:

Further, Aetna not validate or disprove NTSP's claims of clinical efficiencies. *See* Response to Finding No. 397.

400. Aetna found that NTSP's efficiency claims failed to account for numerous variables, including severity of illness, age, sex, plan design, co-pays, co-insurance, and mental health services. (Roberts, Tr. 507, 505, 508-511).

Response to Finding No. 400: Deny. Aetna never asked NTSP to provide the underlying data for its claims. Further, Aetna's analysis of NTSP's efficiency claims did not focus on NTSP physicians at all because of problems with Aetna's own internal data. All Aetna actually did was compare Tarrant County physician performance to Metroplex physician performance. *See* Response to Finding No. 397.

401. The limited information NTSP provided to Aetna data derived from its risk contract with one health plan – PacifiCare, and it did not provide the underlying data. (Van Wagner, Tr. 1911-14; Roberts, Tr. 507, 520-521, 578-89).

Response to Finding No. 401: Admit first clause but deny second clause as incomplete and misleading. Aetna never asked NTSP to provide the underlying data for the PacifiCare risk contract. *See* Responses to Findings Nos. 399-400.

402. NTSP never tried to cure the gaps in the data. (Roberts, Tr. 527).

Response to Finding No. 402: Deny. The gaps were not in the evidence NTSP provided to Aetna, but in Aetna's own internal data. NTSP had no way to cure Aetna's internal data. (Roberts, Tr. 560-61 ("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.")).

403. Aetna based business decisions on its evaluation of NTSP's claims. Had Aetna found NTSP's claims to be valid, Aetna would have offered NTSP a higher rate. (Roberts, Tr. 506).

Response to Finding No. 403: Deny. Aetna's analysis of NTSP's efficiency claims did not focus on NTSP physicians at all because of problems with Aetna's own internal data. All Aetna actually did was compare Tarrant County physician performance to Metroplex physician performance. *See* Response to Finding No. 397.

404. Aetna was confident in its final evaluation that there was no efficiencies justification to pay NTSP higher than market rates. (Roberts, Tr. 528).

Response to Finding No. 404: Deny. Aetna's analysis of NTSP's efficiency claims did not focus on NTSP physicians at all because of problems with Aetna's own internal data. All Aetna actually did was compare Tarrant County physician performance to Metroplex physician performance. *See* Response to Finding No. 397.

405. In evaluating NTSP's efficiency claims, Aetna used the best data that was available to it. (Roberts, Tr. 581).

Response to Finding No. 405: Deny. The data that was used did not pertain specifically to NTSP. Aetna's analysis of NTSP's efficiency claims did not focus on NTSP physicians at all because of problems with Aetna's own internal data. All Aetna actually did was compare Tarrant County physician performance to Metroplex physician performance. *See* Response to Finding No. 397. NTSP had provided Aetna with better data from its PacifiCare risk contract. (CX 616).

406. NTSP never gave Aetna data suggesting that NTSP performed at a higher level than the general community of Tarrant County physicians. (Roberts, Tr. 582, 513).

Response to Finding No. 406: Deny. NTSP provided Aetna with its efficiency data from the PacifiCare contract. (CX 616). NTSP is the best performing group in the Metroplex. (Lovelady, Tr. 2657-59; 2665, 2668).

407. On other occasions Aetna has paid physicians a higher rate based on their performance. (Roberts, Tr. 519-520).

Response to Finding No. 407: Admit this statement was made.

408. NTSP rejected Aetna's proposal for a 10% fee increase for some specialties solely because the reimbursement methodology would not be applied to all of NTSP's physicians. NTSP gave Aetna no data indicating that the specialties not offered a 10% increase merited the increase. (Roberts, Tr. 523-524).

Response to Finding No. 408: Admit first sentence, but deny relevance to the disposition of the issues in this proceeding. NTSP exercised its right to refuse to deal on a payor offer that discriminate against NTSP's participating physicians. (Roberts, Tr. 523-24; Van Wagner, Tr. 1771). Deny second sentence. NTSP provided Aetna with data from its PacifiCare risk contract that supported a 10% increase for all specialties. (CX 616).

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for the HMO product and 133% for the PPO contract. (CX0106). At that Board meeting, NTSP proposed a compromise between the parties at a rate level in the low 120s, which was below NTSP's offer of 125% but above to Aetna's offer of 118%. (Roberts, Tr. 537-539). At that same Board meeting, NTSP informed Aetna that NTSP had collected signed powers of attorney from it members. (Roberts, Tr. 540-541).

Response to Finding No. 411: Admit first and second sentence. Deny third sentence as unsupported by sufficient evidence. Mr. Roberts testified that "I think the number was thrown out low 120s" but when asked about the speaker's identity replied, "I have no idea." (Roberts, Tr. 539). Further, the assertion that NTSP proposed a compromise is unsupported by the evidence. Deny fourth sentence as unsupported by sufficient evidence. Mr. Roberts mentioned this comment while still discussing the rate comment that he believes was made, but he had no idea who made it or any other details. (Roberts, Tr. 540-41 ("Q. Was there a follow-up comment about rates? A. The follow-up comment was related to powers of attorney. Q. And what was that comment? A. The -- the comment was you realize that NTSP has powers of attorney, signed powers of attorney for its members... Q. Who made the comment about powers of attorney, if you know? A. I don't know.")). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

412. The NTSP Board alerted the membership that the Aetna contract was under advisement. (CX0106 at 3).

Response to Finding No. 412: Deny. Although CX 106 might show that the Board contemplated sending a Fax Alert, it does not support the conclusion that the NTSP Board sent out any alert. Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed

Response to Finding No. 415: Admit, but deny that NTSP's current level of reimbursement was not competitive. (Quirk, Tr. 348-49; Frech, Tr. 1390; Van Wagner, Tr. 1746; Grizzle, Tr. 959, *in camera*; CX768, *in camera*; compare RX968 to RX24.021).

416. On December 7, 2001, NTSP informed its member physicians that Aetna's proposal fell "below payment rates our members have messengered to NTSP as acceptable to continue negotiations." NTSP informed its members that they may contract directly with Aetna or request that Aetna re-open negotiations with NTSP. (CX0643).

Response to Finding No. 416: Admit, but deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

IX. NTSP's Collective Fixing of Fee-for-Service Prices is Unrelated to the Achievement of Any Meaningful Efficiencies

417. NTSP engages in certain utilization and quality control efforts in connection with just two health plan agreements: its capitated contract with PacifiCare, and, to a lesser extent, its HMO contract, but not its PPO contract, with CIGNA, (Van Wagner, Tr. 1830-1854). Only with respect to the PacifiCare contract do NTSP physicians share risk and a measure of integration capable of causing material professional cooperation, collaboration, and interdependence. *See* findings 56, 401.

Response to Finding No. 417: Deny first sentence as incomplete. There are some utilization and quality control efforts that NTSP engages in on all its contracts. (Grizzle, Tr. 945-46, *in camera*; Van Wagner, Tr. 1532-33, 1604, 1789-90; Deas 2503-04, 2507; Lonergan, Tr. 2721-24; CX 1182; RX3158; RX3159; RX 3160; RX 3176, *in camera*). Many of the utilization and medical management techniques NTSP uses on its PacifiCare and Cigna contracts could be used on all contracts if the payors would provide NTSP with data or delegate to NTSP the necessary responsibility. The payors

have not done so. (Deas, Tr. 2434-35, 2510-15, 2517-18); (Casalino, Tr. 2869, 2939, 2909, 2912). Deny second sentence as not supported by the proposed findings cited–that NTSP has only one risk contract with PacifiCare (Finding No. 56) and that NTSP only provided Aetna with data from the PacifiCare contract (Finding No. 401). NTSP's current Cigna contract includes risk elements: PCP capitation payments, a pay-for-performance provision, and a withhold provision. (Van Wagner, Tr. 1758-59, 1761). Further, NTSP denies both these proposed findings.

418. Of particular importance, although NTSP has argued that some efficiencies spill over from its risk panel to its fee-for-service panel, price-fixing plainly would not be necessary to the accomplishment of those claimed spill overs. (Deas, Tr. 2577 (asserted spillovers from NTSP's risk to fee-for-service contracts are "completely unrelated" to NTSP's setting of minimum contract prices); CX1196 (Van Wagner, 08.29.03 Dep. at 145-146) (asserting that NTSP's greater efficiency justified imposition of higher prices, rather than fee minimums being necessary to achieve clinical integration). Frech, Tr. 1347-1351 (concluding that NTSP lacks need for collective negotiation of fee-for-service contracts, and any spill-over is unrelated to setting of Board Minimums and joint negotiation. Also concluding that price-fixing of non-risk contracts is not only unnecessary to any efficiency make them artificially attractive to physicians and reduce interest in risk contracting.)).

Response to Finding No. 418: Deny. Complaint Counsel makes a legal assertion, not a proper proposed finding. Spillover occurs; NTSP does not engage in "price fixing." NTSP addresses the legal arguments in its post-trial briefing. *See* North Texas Specialty Physicians' Post-Trial Brief. Further, Dr. Deas testimony is mischaracterized and does not support this statement. (Deas, Tr. 2577 (" Q. In other words, those benefits would flow even if NTSP did not set board minimums, correct? A. Those are completely unrelated issues in my mind. ... Q. Well, you just testified that they're completely unrelated issues, right? A. The two things that are unrelated is -- are price and the quality of health care that derives out of clinical integration."). Dr. Deas testified that NTSP's polling is important to spillover. (Deas, Tr. 2577-78 ("Q. So you could -- you could achieve those benefits

without -- irrespective of whether NTSP polled its members, for example, right? A. Not necessarily. Q. Well, you just testified they're unrelated, right? A. In order to achieve the benefits in a contractual arrangement in a fee-for-service setting, you have to provide the network that can achieve those benefits."). Deny to extent the proposed finding uses the term"member" differently than NTSP's witnesses testified to. The term "member" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with the testimony given. *See* Response to Finding No. 8.

419. NTSP admits that its information systems do not include data for patients under its fee-for-service contracts, (Van Wagner, Tr. 1837-1841; 1877; Deas, Tr. 2487- 2488); that NTSP cannot identify physician utilization outliers within its fee-for-service panel, (Van Wagner, Tr. 1849-1850); and that NTSP does not provide feedback to physicians concerning patient care under its fee-for-service contracts. (Lonergan, Tr. 2722-2723).

Response to Finding No. 419: Deny as incomplete. Cigna provides data for patients. These utilization and medical management techniques could be used on all contracts if the payors would provide NTSP with data or delegate to NTSP the necessary responsibility. The payors have not done so. *See* Response to Finding No. 417.

420. NTSP further admits that NTSP's medical director has no responsibility for controlling costs for patients under its fee-for-service contracts (Deas, Tr. 2553); that NTSP's medical management committee does not evaluate the care of patients under NTSP's fee-for-service contracts (Deas, Tr. 2550-2551); and that NTSP's hospital utilization management program does not apply to patients under its non-risk contracts. (Van Wagner, Tr. 1837-1838).

Response to Finding No. 420: Admit, but incomplete. These utilization and medical management techniques could be used on all contracts if the payors would provide NTSP with data or delegate to NTSP the necessary responsibility. The payors have not done so. *See* Response to

Finding No. 417.

421. Dr. Lawrence Casalino, Complaint Counsel's rebuttal expert in physician organizations and efficiencies, has assessed NTSP's efficiency-related claims. Dr. Casalino, who has an M.S. in public health and a Ph.D. in health services research (Casalino, Tr. 2779-2780), formulated his opinion with care and applied his unquestionable expertise with rigor. His opinions are entitled to substantial weight and are uncontroverted by any other person with relevant expertise.

Response to Finding No. 421: This a legal assertion, not a proper statement of fact. Further, NTSP denies this statement. The statement is also unsupported by any evidentiary cites, other than a citation for Dr. Casalino's education. NTSP addresses the relevant legal arguments in its post-trial briefing. *See* North Texas Specialty Physicians' Post-Trial Brief and Post-Trial Reply Brief. Further, Dr. Casalino's opinions are irrelevant to this proceeding because he is generally unfamiliar with NTSP and the North Texas area. (Casalino, Tr. 2879-84) ("The North Texas area is not an area that [he's] familiar with."). *See*

and apply techniques to control costs and to improve quality that are developed or learned in the context of that risk-sharing arrangement. (Casalino, Tr. 2859- 2860). *See also*, (Frech, Tr. 1353-1354). For an IPA to achieve significant "spillover" benefits from its shared-risk patients to its non-risk patients, it would need to apply organized processes to its non-risk patients. (Casalino, Tr. 2864-2865). IPAs can implement some organized processes to improve quality for patients under fee-for-service contracts, (Casalino, Tr. 2870-2871), but NTSP has taken no collective action as an IPA, and has initiated no organized processes, to improve quality for patient under its fee-for-service contracts. (Casalino, Tr. 2816).

Response to Finding No. 423: Deny first sentence. There is spillover from the risk panel physicians to the non-risk physicians that participate in NTSP. (Wilensky, Tr. 2277; Lovelady, Tr. 2685-88). Deny second sentence and third sentence. NTSP does achieve spillover. (Maness, Tr. 1990-91, 2075-78; Wilensky, Tr. 2163-70, 2204-05; Deas, Tr. 2480-83, 2485-89; Lovelady, Tr. 2659-61). Dr. Casalino could not identify "a single instance of a good risk technique which an NTSP physician has used which he has not used in nonrisk treatment." (Casalino, Tr. 2888-89). Furthermore, Dr. Casalino has no experience in the Texas healthcare market (Casalino, Tr. 2881-83). Dr. Casalino's research and knowledge apply solely to the distinctive healthcare market in California and are therefore irrelevant to NTSP's activities. (Casalino, Tr. 2881-83). And, Dr. Casalino has never observed NTSP or North Texas payor's contracting patterns nor has he inquired as to which payor contracts NTSP's participating physicians enter. (Casalino, Tr. 2879-80) (Dr. Casalino testifies that such information is outside the scope of his report). Finally, Dr. Casalino has never been to an NTSP meeting. (Casalino, Tr. 2897).

424. NTSP is hindered in implementing organized processes for patients under non-risk contracts because it lacks data for these patients. (Casalino, Tr. 2868-2869; Frech, Tr. 1352-1353). With respect to its fee-for-service physicians and patients, NTSP does not operate or refer patients to any disease management programs or patient registries which would improve health care quality for patients with specific, long-term conditions such as diabetes or congestive heart failure. (Casalino, Tr. 2812-2814; Van Wagner, Tr. 1834-1835). (Disease management programs typically include a nurse case

manager who maintains regular contract with each patient; monitors indices of each patient's health; ensures that each patient takes prescribed medications; directs each patient to specialist physicians; and encourages each patient to participate in relevant patient education programs. (Casalino, Tr. 2812-2813).

Response to Finding No. 424:

to be effective. (Deas, Tr. 2505-06). Deny fifth sentence as irrelevant and incomplete. NTSP examines the thousands of guidelines available and determines which ones to adopt, which ones to adapt into NTSP's own guidelines, and on which topics NTSP needs to create a new guideline. (Deas, Tr. 2503-07). NTSP has developed over 100 protocols. (Van Wagner, Tr. 1543).

426. NTSP does not have an electronic medical records system for its physicians' patients, which prevents it from implementing an effective reminder system for patient care at the point of care. (Casalino, Tr. 2839).

Response to Finding No. 426: Deny as to risk contracts. Admit NTSP does not have a full-blown electronic medical records system for non-risk contracts, but deny that NTSP has no such system and deny relevance to the disposition of the issues in this proceeding. NTSP does utilize forms of electronic medical records, such as road maps that track the services rendered to a patient over time. (Deas, Tr. 2568-69; CX 1195 (Van Wagner, Tr. 104-05)). This does not prevent an effective reminder system and deny relevance of having a reminder system to the disposition the issues in this proceeding. NTSP utilizes reminders in risk contracts. (Deas, Tr. 2518-19). Electronic medical records and related reminder systems are organized processes that are not necessary to control cost and improve quality. *See* Response to Finding No. 423.

427. NTSP does not engage in meaningful patient education. The patient education features of its web site were created in 2004 and are largely limited to links to other public web sites. (Casalino, Tr 2844-2848der system and deny relevance of having a reminder system to the disposition arusa2 and relanananar

428. NTSP has not improved quality by improving coordination of patient care between primary care physicians and specialists. (Casalino, Tr. 2848). NTSP's coordination of primary care physicians and specialists has been hindered by the circumscribed participation of primary care physicians in NTSP, (Casalino, Tr. 2848-2849, 2851-2852), the ineffectiveness of NTSP's Primary Care Council in improving quality, which meets only 2 to 4 times per year with attendance at its meetings averaging only 6 to 10, and provides little information about its activities to other NTSP physicians. (Casalino, Tr. 2850-2851).

Response to Finding No. 428: Deny. NTSP's specialists and primary care physicians have relationships and daily interactions that lead to better patient care. (Deas, Tr. 2469-70, 1530-32; Lovelady, Tr. 2685-86; Lonergan, Tr. 2720). NTSP has been active in soliciting the input of PCPs to promote efficiency. (Lonergan, Tr. 2720). The Primary Care Council is involved and integrated into the medical management process. (Deas, Tr. 2612). Furthermore, Dr. Casalino has no experience in the Texas healthcare market (Casalino, Tr. 2881-83). Dr. Casalino's research and knowledge apply solely to the distinctive healthcare market in California and are therefore irrelevant to NTSP's activities. (Casalino, Tr. 2881-83). Dr. Casalino is not an economist, and he admits that he is not an expert in analyzing quantitative data. (Casalino, Tr. 2879; 2884-86).

429. Further, NTSP's stated goal of enhancing teamwork among its physicians involves few organized processes applicable to fee-for-service medicine. (Casalino, Tr. 2856-2857) NTSP's goal of enhanced teamwork among its physicians is hindered by the lack of pediatricians, obstetricians, and cardiologists in NTSP, forcing NTSP patients needing the services of these core specialties to seek physicians outside NTSP. (Casalino, Tr. 2854-2856; Frech, Tr. 1432).

Response to Finding No. 429: Deny first sentence. NTSP has an extensive array of practices for enhancing effective teamwork. (Frech, Tr. 1410-11; Van Wagner, Tr. 1580; Maness, Tr. 2078-79; Wilensky, Tr. 2191-92; RX 3118 (Maness Report ¶ 85)). Other processes are not necessary to control costs and improve quality. *See* Response to Finding No. 423. Deny second

sentence as described by Casalino. NTSP has achieved clinical integration in its risk contracts, even though pediatricians, obstetricians, and cardiologists are not participating physicians. (Casalino, Tr. 2877). The evidence does not show that the lack of these specialists in NTSP prevents effective teamwork. (Lovelady, 2665, 2668; RX 3158; RX 3159; RX 3160; RX 3174).

X. The Testimony of Respondent's Experts is Not Entitled to Any Weight

A. Dr. Rertnsky

430. Dr. Rertnsky is expert in matters of national health care policy. (Rertnsky, Tr. 2155).

Response to Finding No. 430: Admit.

431. However, Dr. Rertnsky has had little exposure to the workings of physician organizations in general and NTSP in particular, *see* findings 433-434; and has very limited familiarity with the relevant facts of this case. *See* findings 432-434.

Response to Finding No. 431: Deny. This a legal assertion, not a proper statement of fact. The statement is also unsupported by the evidence cited, which are proposed findings denied by NTSP. Dr. Rertnsky has had experience with and exposure to physician groups in her work as the

programs, read depositions, and attended at least one of NTSP's meetings. (Wilensky, Tr. 2157-58, 2203). Thus, unlike Complaint Counsel's experts, Wilensky actually conferred with NTSP personnel about how NTSP works.

432. Dr. Wilensky has selectively reviewed background materials in the evidentiary record and has read or skimmed only some of the depositions taken. (Wilensky, Tr. 2157).

Response to Finding No. 432: Deny as mischaracterizing the evidence and deny relevance. Dr. Wilensky conducted a sufficient review of the materials in this case and was comfortable with her understanding of NTSP's business model. *See* Response to Finding No. 431.

433. She has acknowledged that she does not know or fully understand many details about how NTSP and its physicians go about their business, (Wilensky, Tr. 2158); and that she is relatively unclear as to what NTSP does within the fee-for-service context. (Wilensky, Tr. 2199-2200).

Response to Finding No. 433: Deny as incomplete and deny relevance. Dr. Wilensky testified that she has a comfortable understanding of NTSP's business model. (Wilensky, Tr. 2158). In the fee-for-service context, Dr. Wilensky has knowledge of what payor offers NTSP considers and the workings of the poll. (Wilensky, Tr. 2160-61). *See also* Response to Finding No. 431.

434. In particular, Dr. Wilensky acknowledged that she does not know whether NTSP enrolls fee-for-service patients in its palliative care program, (Wilensky, Tr. 2200); whether NTSP enrolls fee-for-service patients in any quality improvement-related program, (Wilensky, Tr. 2200); whether NTSP's medical management committee discusses high acute cases among non-risk patients, (Wilensky, Tr. 2200); whether NTSP has any programs to manage prescription drug utilization, (Wilensky, Tr. 2201), although such controls are important to controlling overall medical costs (Wilensky, Tr. 2201); whether NTSP's disease registry program applies to non-risk patients, (Wilensky, Tr. 2202); and whether NTSP seeks to limit its fee-for-service business to offers that activate a significant portion of its risk panel. (Wilensky, Tr. 2159-2160).

Response to Finding No. 434: Admit, but incomplete and deny relevance. Dr. Wilensky has sufficient knowledge of NTSP to support her opinions in this proceeding. *See* Response to Finding

No. 431. Other witnesses testified as to those details. (Van Wagner, Tr. 1569-70), (Deas, Tr. 2550-59).

435. Accordingly, Dr. Wilensky's opinions in this matter cannot be accorded substantial weight.

Response to Finding No. 435: Deny. This a legal assertion, not a proper statement of fact. The statement is also unsupported by any evidentiary cites. Dr. Wilensky is qualified to give her opinion , and it should be accorded great weight. Dr. Wilensky was appointed by President (G.H.W.) Bush to be the Administrator of the Health Care Financing Administration and oversaw the Medicare and Medicaid programs from 1990 to 1992. She also served as a Presidential advisor on health care issues and is one of the nation's top authorities in that area. *See also* Responses to Findings Nos. 430-434.

B. Dr. Maness

436. Dr. Maness' expertise is in industrial organization in general. (RX3119; Maness, Tr. 2107). He lacks particularized expertise applicable to organization capital or physician organizations. (Maness, Tr. 2095-2098 (his publications are unrelated to organization capital or physician organizations); 1983-1984 (expertise in other areas, not including organization capital or physician organizations)); and Dr. Maness acknowledged on cross-examination that organization capital is not a field in which experts have testified in court. (Maness, Tr. 2099 (nor is organization capital a "field of expertise"); 2106 (nor a "discipline")).

Response to Finding No. 436: Admit first sentence. Deny second sentence. Organizational capital is a part of industrial economics and a proper area for expertise, and Dr. Maness has this expertise. Dr. Maness testified that he was an expert is assessment and measurement of organizational capital and that he has the ability and training to apply these tools to the physician services market. (Maness, Tr. 2106, 2108-09). Dr. Maness is familiar with the concepts and literature on organizational capital. Part of Dr. Maness's dissertation was on organization capital. (Maness, Tr. 2065). There

have also been studies valuing organizational capital. (Maness, Tr. 2067-68). The fact that Dr. Maness's publications are not specifically about these topics does not support the statement that Dr.

health plans' data NTSP had access to); Maness, Tr. 1988, 2225-26 (already considered testimony of health plans).

439. In formulating his opinion in this matter, Dr. Maness often failed to apply the care and rigor that should characterize the work of an expert economist. *See* findings 440-474. *See also*, *e.g.*, (Maness, Tr. 2116-2117; 2131; 2220-2221; 2250-2251; 2294-2295; 2264-2265; 2274-2275; 2300-2301; Maness, Tr. 2127-2130; 2218-2219; 2099; 2121-2123 (lack of independent verification); 2228 (failed to consider the possibility of selection bias)).

(Maness, Tr. 2123-2124 (in general data discovery); 2125-2128 (whether Fort Worth NTSP hospitals had recruited physicians); 2127-2128 (whether any Fort Worth employer generally had recruited physicians); 2128-2130 (whether any health plan had recruited physicians to Fort Worth); 2321-2322 (information about coding practices of NTSP physicians); 2232-2234 (whether NTSP's non-risk business acts as an incubator for the risk-sharing panel)).

Response to Finding No. 441: Deny. Although there are instances where Dr. Maness relied on the statements of Dr. Van Wagner, this was because she was the best source of the information on the inner workings of NTSP's business. *See* Wilensky, Tr. 2203-04. In many of these instances, there were not other sources of information reasonably available. Information received from Dr. Van Wagner was independently checked when possible. (Maness, Tr. 2124). Dr. Maness had worked on another HealthCare matter in Texas and had information which he could use for this case. (Maness, Tr. 2128-29; 2231).

442. Dr. Maness testified that maintaining a common "core" of physicians is key to NTSP's organization capital; but he acknowledged on cross-examination that he did not know what he meant by "core." (Maness, Tr. 2121-2124).

Response to Finding No. 442: Admit first clause, but deny second sentence as mischaracterizing the testimony. Dr. Maness testified that he did not know which physicians necessarily were the "core," not that he did not know what his opinion meant. He stated that NTSP must decide which physicians make up the "core." (Maness, Tr. 2122 ("I don't know who they consider to be core physicians, what I know is they consider there to be core physicians.")). Maness further explained that the "core" meant the important members of NTSP that cover enough specialties and have a good reputation with doctors so that NTSP could get enough participants in contracts to preserve their efficiencies. (Maness, Tr. 2359).

443. Dr. Maness acknowledged on cross-examination that he never "actually consider[ed] whether market power could be exercised if the Ft. Worth area was a relevant market," because he "never considered Ft. Worth to be a possible relevant market." (Maness, Tr. 2219).

Response to Finding No. 443: Admit that the statement was made, but deny as to completeness and relevance. There was no reason to consider Fort Worth as a possible relevant market because Complaint Counsel did not posit a relevant market to be considered (Frech, Tr. 1393-94), and Dr. Maness concluded that a relevant market including locations in Tarrant County would be at least as large as Dallas and Tarrant Counties (*See, e.g.*, Maness, Tr. 1999-2000). The Merger Guidelines state to start with the smallest feasible market and work out. Since Dr. Maness determined that Tarrant County was not a feasible market, there no reason under the Merger Guidelines test to determine whether Fort Worth (an even smaller area) was a feasible market. (Maness, Tr. 1992-93, 2009-11).

444. Dr. Maness testified that he had applied the 5% test set out for market definition in the Merger

that Complaint Counsel's questions were not a proper use of the Merger Guidelines test. (Maness, Tr. 2237-38 ("Q. You don't like the questions as I put them to those witnesses, correct? A. Yes. Q. You don't think – A. Well, "like" is not a word I would use. I don't think those questions are particularly relevant to get at the market definition test as espoused to -- as espoused in the merge guidelines. Q. I apologize, I didn't mean to speak over you. You had an opportunity to give the questions that you would have found preferable to Mr. Huffman prior to his deposition of these same people? A. I suppose I had the opportunity. I don't necessarily know when Mr. Huffman was deposing individual people but yes, in general, I would -- could have had input into the question.")).

445. Dr. Maness claimed to have "actually stud[ied] the question of whether Fort Worth area employers would substitute" Arlington for Fort Worth doctors in response to a 5% relative price increase; but he acknowledged on cross-examination that he conducted no "systematic" or "data" analysis of the matter, nor did he ask any health plan, employer, consultant, or broker about substitution in response to relative price increase. (Maness, Tr. 2232-2233).

446. Dr. Maness disregarded entirely and without adequate explanation health plans' testimony (

452. Dr. Maness testified that comparative data reflecting lower NTSP physician cost per disease episode was evidence of NTSP's relative efficiency; but he acknowledged on cross-examination that he did not know what "disease episode" meant in any given instance or whether "disease episode" had a consistent meaning across his sample. (Maness, Tr. 2269).

Response to Finding No. 452: Admit the statement in the first cluase and deny the statement in the second clause. Dr. Maness did not testify that "disease episode" did not have a consistent meaning across his sample. Dr. Maness acknowledged that at the time of the calculations, he did not know the particular meaning of "disease episode," but stated that because the calculations were "per disease episode," questions arose as to the meaning of that term. (Maness, Tr. 2268-69). *See also* Response to Finding No. 447.

453. Dr. Maness testified that he relied on United HealthCare data that "shows that generally NTSP's physicians were below United's overall average" in some performance measures; but he acknowledged on cross-examination that the data involved only 11 NTSP physicians (out of about 275 in the non-risk only panel) and he did not know how or why the 11 were chosen, who they were, or anything else about the report. (Maness, Tr. 2272-2276).

Response to Finding No. 453: Admit the statement in the first clause. Admit the statements in the subsequent clauses, but deny as incomplete. The doctors in the United HealthCare comparison were chosen by United, not NTSP. (Maness, Tr. 2274-75). NTSP requested access to further data from United, but was denied access. *See* Response to Finding No. 460. *See also* Response to Finding No. 447.

454. Dr. Maness asserted that there is a quality spillover from NTSP's risk physicians to its non-risk panel; but he acknowledged on cross-examination that he did not directly measure the quality of NTSP's non-risk physicians. (Maness, Tr. 2207).

Response to Finding No. 454: Admit the statement in the first clause. Admit the statement in the second clause, but deny as misleading and irrelevant. The correct citation is to Maness, Tr.

2277. Dr. Maness limits his answer to data. (Maness, Tr. 2277). Complaint Counsel made no showing of how anyone, including their own experts, could make the quality comparison they were asking about. Data was presented showing NTSP's physicians to have superior performance as compared to other physicians. *See*, *e.g.*, RX 3130, RX 3133, RX 3134, RX 3158, RX 3159, RX 3160, RX 3162, RX 3167, RX 3173, RX 3174, RX 3176, *in camera*, RX 3177, RX 3178.

455. Dr. Maness testified that in formulating his opinion he relied on the availability of "flat file" data to non-risk physicians, but acknowledged on cross-examination that he did nothing to assess the degree to which non-risk doctors have sought to access the data and did not know whether even one non-risk physician sought access to that data. (Maness, Tr. 2277-2278).

cancelled for want of a quorum;" but he asserted that the information was "not even relevant" to his opinion. (Maness, Tr. 2293-2294).

Response to Finding No. 459: Admit statements were made, but deny relevance. The quotation "not even relevant" is actually a portion of Complaint Counsel's question to which Dr. Maness replied, "No." Those are not Dr. Maness's words. Others testified as to how NTSP communicated information through the divisions and other meetings. (Deas, Tr. 2458-59), (Van Wagner 1580-81).

460. Dr. Maness testified that in formulating his opinion he relied on RX3129, which compared NTSP's capitated PacifiCare contract physicians with non-risk sharing, non-NTSP physicians (Maness, Tr. 2296); but on cross-examination, Dr. Maness acknowledged that he did not know whether the age or severity of illness of patients was the same for each group and that he made no effort to control for differences in plan design. (Maness, Tr. 2304-2308).

Response to Finding No. 460: Admit the statement in the first clause. Deny the statement in the second clause as misstating the evidence. Dr. Maness testified that there were adequate controls for age, severity of illness, and plan design reflected in RX 3129 due to the division of patients by Medicare and Commercial programs. (Maness, Tr. 2304-05). The data Dr. Maness used was reliable. (Maness, Tr. 2357; 2341-42). Further, this was the best data available in this proceeding. NTSP requested access to payor databases, but the payors refused. (Maness, Tr. 2357). Complaint Counsel had access to the same data and did not present any conflicting calculations. (Maness, Tr. 2343).

461. Dr. Maness was aware that many industry experts believe that valid comparisons can be made only by accounting for such variables as age, severity of illness, plan design, and numerous others; but on cross-examination, he asserted that this knowledge did not in the least undermine the validity or utility of his conclusions from RX3129, nor would lack of statistical significance of the delta undermine the validity or utility of his conclusions. (Maness, Tr. 2309-2310; 2310-2313 (impeachment about his understanding of need for demographic adjustment)).

Response to Finding No. 461: Deny as mischaracterizing the testimony. The "many industry experts" here was a hypothetical question by Complaint Counsel referring to the testimony of one health plan representative. With that limitation, Dr. Maness did agree that there was no change to his testimony. (Maness, Tr. 2309). See also Response to Findings No. 460. Complaint counsel presented none of its own calculations to indicate any lack of statistical significance. See Response to Finding No. 460. Dr. Maness was saitisfied that the data was reliable. (Maness, Tr. 2341).

462. But as Dr. Casalino emphasized, the quantitative analyses that purport to address NTSP's performance for controlling costs for patients under its fee-for-service contracts–and on which Dr. Maness relied–do not provide a reliable basis for reaching a conclusion on this question. (Casalino, Tr. 2816). Quantitative analyses that address an IPA's performance in controlling costs or improving quality cannot be relied upon unless patient populations are adjusted for "case mix," that is, the illness status of patients, (Casalino, Tr. 2827-2828), and none of NTSP's data from PacifiCare on cost control and quality improvement includes any adjustment for case mix (Casalino, Tr. 2827-2829); unless they include either all the IPA's specialty physicians or a random sample of the IPA's specialty physicians (which the Dr. Maness-sponsored studies did not include) (Casalino, Tr. 2827-2828); and unless they include the total cost of patient care, not merely the number of procedures (as was the case with some of Dr. Maness' comparisons). (Casalino, Tr. 2827-2829).

Response to Finding No. 462: Deny as incomplete and mischaracterizing the testimony. Dr. Casalino admits that he does not analyze numbers or generate analyses because he is not an expert in running data. (Casalino, Tr. 2885-86). Additionally, Dr. Casalino is not an economist. (Casalino, Tr. 2879). Dr. Casalino does not have the expertise to make a conclusion on the reliability of the

quantitative analysis. Further, none of Complaint Counsel's experts presented a conflicting quantitative analysis, despite access to all of the underlying data. (Maness, Tr. 2343, 2339-40). *See also* Response to Finding No. 460.

463. On cross-examination, Dr. Maness acknowledged, regarding his reliance on RX3129, that he could not explain how and why some year-to-year intra-group differences were much larger than the between group differences that he deemed evidence of NTSP's relative efficiency (Maness, Tr. 2376-2381); but he asserted that, even if shown several such instances, it would not shake his confidence in his reliance on RX3129. (Maness, Tr. 2381).

Response to Finding No. 463: Deny as incomplete and irrelevant. The data was reliable. (Maness, Tr. 2341-42). *See also* Response to Finding No. 460. This statement is also irrelevant because the purpose of RX 3129 was to explain year-to-year intra-group variations. Even if there was more variation across years than within years in some instances, it did not change Dr. Maness's conclusions since that was not the purpose of the comparison. (Maness, Tr. 2071-74). Complaint Counsel was inquiring as to one out of twelve data points. (Maness, Tr. 2341-42).

464. Dr. Maness did not study or even inquire about the degree of clinical integration of any other

did not study or inquire about the degree of clinical integration of any other Metroplex IPA. Casalino admitted he has no experience in the Texas healthcare market (Casalino, Tr. 2881-83).

465. Dr. Maness opined that NTSP's clinical protocols were a source of NTSP's relative efficiency, but on cross-examination he acknowledged that, at the time he formulated his opinion, he did not know whether the clinical protocols numbered 10 or 10,000 nor whether they were merely derivatives of others' work. (Maness, Tr. 2317-2318).

Response to Finding No. 465: Admit the statement in the first clause. Admit the statement in the second clause, but deny as misleading and irrelevant. The quantity or origins of the protocols are irrelevant. The relevant inquiry, and the one that Dr. Maness made, was whether NTSP took steps to communicate and implement these clinical protocols. NTSP did so. *See* Response to Finding No. 425. Testimony from others established that NTSP developed over a hundred protocols and access to more, including national standards, on its website. (Van Wagner, Tr. 1543-48).

466. Dr. Maness cited NTSP development and implementation of disease management programs as evidence of NTSP's integration/efficiency; but Dr. Maness evinced little understanding of the nature of NTSP's palliative care program, to which he referred illustratively. (Maness, Tr. 2318-2320).

Response to Finding No. 466: Deny as distorting testimony. Dr. Maness gave an explanation of the palliative care program in response to Complaint Counsel's question. Complaint

. . in the least" his opinion about the importance of NTSP's disease management. (Maness, Tr. 2318-2321).

Response to Finding No. 467: Admit the statements were made but deny as incomplete and irrelevant. Dr. Maness testified that he did not understand specifically whether NTSP performed disease management on other contracts, but that he was "not surprised" that they don't. Since he was not assuming they did for purposes of his analysis, the understanding that they did not did not affect his opinion. (Maness, Tr. 2319-20).

468. Dr. Maness cited NTSP monitoring of/aiding with physician coding practices as an NTSP efficiency, but did not study coding practices of NTSP or other physicians nor did he consider physicians' personal incentives to code properly. (Maness, Tr. 2321-2322).

Response to Finding No. 468: Admit the statements but deny as incomplete testimony. Dr.

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involve NTSP physicians treating patients from the same general area. Dr. Maness looked at further adjustments, including age and sex of patients, but the further adjustments that were available did not change the bottom-line result. (Maness, Tr. 1339-40). Complaint Counsel had access to the same databases and presented no conflicting calculations. (Maness, Tr. 2339-40). *See also* Response to Finding No. 460.

470. Dr. Maness testified that NTSP enjoyed positive reputational effects with Fort Worth health plans; but when challenged on cross-examination, he knew that to be true only of PacifiCare. (Maness,

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.")). Aetna did not focus its data analysis on NTSP at all. (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."). Further, NTSP requested access to payors' databases, including Aetna, but was refused access. *See* Response to Finding No. 447.

475. Accordingly, Dr. Maness' opinions in this matter should not be accorded any weight.

Response to Finding No. 475: Deny. Complaint Counsel has disregarded most of Dr. Maness's opinions in its proposed findings of fact – including relevant geographic market, relevant product market, low barriers to entry, lack of market power, NTSP's behavior is unlikely to lessen competition, NTSP's business model creates efficiencies, NTSP's efficiencies spill over from risk to non-risk contracting, NTSP has organization capital and valuable teamwork skills, NTSP physicians perform better than other physicians on risk and non-risk contracts, NTSP' poll does not promote coordinated pricing, and there is no collusion among NTSP and its physicians. As to the selected points addressed by Complaint Counsel in its proposed findings of fact, those criticisms generally concern issues tangential to the main substance of the opinions and are not well-founded. *See* Responses to Findings Nos. 436-474. Dr. Maness is a Ph.D. economist. (Maness, Tr. 1982; RX 3119). He has worked for the Federal Trade Commission on health care antitrust cases and on physicians organization cases in the state of Texas. (Maness, Tr. 1983-84). He employed the same methods as he used while at the Commission's Bureau of Economics. (Maness, Tr. 1988-89). His opinions deserve weight. *See* Responses to Findings Nos. 436-474. Complaint Counsel had access to

the same information and data as did Dr. Maness but chose not to present any data as to the findings made by Dr. Maness. Furthermore, Complaint Counsel's assertion in the proposed finding is unsupported by any evidentiary cites.

XI. The Public is Injured By NTSP's Price-Fixing

476. The impact of NTSP price-fixing activity, even if only sometimes successful and then for limited periods of time, is substantial. Relatively small increases in fee-for-service prices translate to large additional costs that must be borne by purchasers. (Van Wagner, Tr. 1875-1876 (change from 125 percent of RBRVS to 130 percent of RBRVS can mean millions of dollars in additional physician reimbursement)).

Response to Finding No. 476: This is a legal assertion, not a proper proposed finding. Further, deny as not supported by any evidentiary cites, although parenthetical is accurate. Dr. Van Wagner's testimony does not mention price-fixing or any impact on purchasers.

477. Price increases immediately affect health plans and self-insured benefits plans, Frech, Tr. 1341; and fully-insured employer health plans are quickly affected–at the latest, when the health plan updates the premium. (Frech, Tr. 1341).

Response to Finding No. 477: Deny as unsupported by sufficient testimony and proper employer testimony. Frech's testimony was in answer to the limited question, "Insofar, then, as you have been able to observe this price increase..." (Frech, Tr. 1341). Frech's answer to that limited question does not support this statement because Frech did not look at any cost data for North Texas or perform an analysis of cost increases. (Frech, Tr. 1416-17, 1421).

478. The effect is then felt by employers who can respond by increasing the co-payments, reducing the scope of the plans, increasing plan premiums, and may lead some to withdraw their sponsorship of health plans. (Jagmin Tr. 980; Frech, Tr. 1342). And the end result of higher prices for physician services is higher costs to consumers and less availability of insurance for consumers. (Frech, Tr. 1342).

Response to Finding No. 478: Deny as unsupported by sufficient testimony and proper employer testimony.

XII. Need for Relief

479. NTSP's acts and practices for and with its participating physicians have and will continue to restrain trade unreasonably, hindering competition in the provision of physician services in the Fort Worth area. *See* findings 105, 97-146, 476-478.

Response to Finding No. 479: This is a legal assertion, not a proper proposed finding. Further, this statement is supported solely by proposed findings that NTSP denies. NTSP has not restrained trade or hindered competition. Deny response to extent the proposed finding uses the term "negotiate" differently than NTSP's witnesses testified to. The term "negotiate" has various meanings, both colloquial and legal, and any proposed finding should define that term consistent with testimony given. *See* Response to Finding No. 53. *See* Responses to Findings Nos. 97-146, 476-78.

Respectfully submitted,

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