[

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1
STATEMENT OF RELEVANT FACTS 2

STATEMENT OF THE QUESTIONS PRESENTED 5

COMMISSION STANDARD OF REVIEW 6

ARGUMENT AND AUTHORITIES 6

I. Under established Supreme Court authority, Complaint Counsel must have shown an actionable contract, combination, or conspiracy that had an anticompetitive effect in a properly-defined relevant market. 6

II. The ALJ erred in finding that Complaint Counsel had shown concerted action when there was no evidence of collusion among NTSP's participating physicians. 8

A. Complaint Counsel failed to show concerted action because there was no evidence of collusion among NTSP's participating physicians. 8

B. Complaint Counsel cannot show concerted action without evidence of physician collusion, and all attempts to do so fail as a matter of law. 12

III. The ALJ erred when he found that Comp

TABLE OF AUTHORITIES

FEDERAL CASES

Alvord-Polk, Inc. v. Schumacher & Co.,
37 F.3d 996 (3d Cir. 1994)....................13, 14

Am. Surety Co. v. Baldwin,
287 U.S. 156 (1932)....................46

Arizona v. Maricopa Co. Med. Soc'y,
457 U.S. 332 (1982)....................27

In re Baby Food Antitrust Litig.,
166 F.3d 112 (3d Cir. 1999)....................7

Beneficial Corp. v. F.T.C.,
542 F.2d 611 (3d Cir. 1976)....................53

Bhan v. NME Hosps., Inc.,
929 F.2d 1404 (9th Cir. 1991)....................58

Cal. Dental Ass'n v. FTC,
224 F.3d 942 (9th Cir. 2000)....................36

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

Hornsby Oil Co. v. Champion Spark Plug Co.,
714 F.2d 1384 (5th Cir. 1983) 36
Int'l Healthcare Mgmt. v. Haw. Coalition for Health,
332 F.3d 600 (9th Cir. 2003) 52, 54
Isaksen v. Vt. Castings, Inc.,
825 F.2d 1158 (7th Cir. 1987) 17
Jacob Siegel Co. v. FTC,
327 U.S. 608 (1946)..60
Jayco Sys., Inc. v. Savis Bus. Machs. Corp.,
777 F.2d 306 (5th Cir. 1985) 36
Levine v. Cent. Fla. Med. Affiliates, Inc.,
72 F.3d 1538 (11th Cir. 1996) 36
Machorec v. Council for the Nat'l Register of Health Care Serv. Providers in Psychology, Inc.,
616 F. Supp. 258 (E.D. Va. 1985) 52
Maple Flooring Mfrs. Ass'n v. United States,
268 U.S. 563 (1925)..52
Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986)..7, 25
McClelland v. Andrus,
606 F.2d 1278 (D.C. Cir. 1979)..46
McLain v. Real Estate Bd. of New Orleans, Inc.,
444 U.S. 232 (1980)..58
Mitchell v. Howard Mem'l Hosp.,
852 F.2d 762 (9th Cir. 1988) 59
Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984)..7
Morris Communications Corp. v. PGA Tow, Inc.,
364 F.3d 1288 (11th Cir. 2004), cert. denied 125 S. Ct. 87 (2004) 58
Mozart v. Mercedes-Benz of N. Am., Inc.,
833 F.2d 1342 (9th Cir. 1987), cert. denied, 488 U.S. 870 (1988) 49
Page v. Work,
290 F.2d 323 (9th Cir. 1961) 59
Schachas v. Am. Acad. Of Ophthalmology, Inc.,
870 F.2d 397 (7th Cir. 1989) 54
Schonfeld v. Hilliard,
218 F.3d 164 (2d Cir. 2000)..43
St. Bernard Gen. Hosp. v. Hosp. Serv. Ass'n,
712 F.2d 978 (1983)..27
State Oil Co. v. Khan,
533 U.S. 3 (1997)..28
Stone v. William Beaumont Hosp.,
782 F.2d 609 (6th Cir. 1986) 59
Trans Sport, Inc. v. Starter Sportswear, Inc.,
964 F.2d 186 (2d Cir. 1992)..49

participate; and if so, whether the entity's choice can depend on how many of the entity's panel of physicians are expected to participate in the non-risk contract.

This is not a case about physician collusion because the undisputed evidence is that there is no collusion among physicians, that the physicians independently contract directly with payors or through various entities (of which NTSP is only one), that NTSP has no authority to bind physicians, and that any non-risk contracts in which NTSP decides to participate are messengered to the physicians who do not accept the contracts a majority of the time. No collusion among physicians means that NTSP has not facilitated any collusion by any conduct asserted by Complaint Counsel.

This case is important because it will decide whether the Commission is going to squelch teamwork among physicians by upholding cases where no anticompetitive effects have been shown, where the Respondent has been denied discovery to obtain data

When NTSP decided to participate on a non-risk contract, it messengered that contract to approximately 600 physicians in eight counties for the physicians' individual

(filed June 30, 2004), and the discussion of the points of appeal in this Brief.[5] Those details are not repeated here due to lack of space.

[5] The ALJ erred by failing to include NTSP's properly-proposed findings (listed in first subparagraphs below) and by including incorrect, irrelevant, or incomplete findings (listed in second subparagraphs below) on, *inter alia,* the following topics:

- NTSP's risk contracts and spillover benefits for non-risk contracts
  - RPF 5, 12-15, 17-19, 23-119, 120, 311-28
  - F. 15, 18, 49, 211, 230, 249, 343, 347, 364-80
- NTSP's use of poll
  - RPF 121-32, 134-36, 151, 160-61
  - F. 87, 99-100, 380
- Absence of NTSP negotiation of rates for non-risk contracts
  - RPF 137, 139-49, 289
  - F. 44, 46, 70, 76-80, 82, 84, 160-61, 190, 206, 284, 302-06, 323, 330, 349-50
- No NTSP collusion with physicians
  - RPF 152, 154-58, 162
  - F. 12, 65-66, 68, 70, 91, 99-100, 184, 205
- NTSP's reasons for not participating in payor offers and speaking out on various issues
  - RPF 163-84, 187-88, 195-96
- Relevant market issues
  - RPF 197-243
  - F. 52-55, 56, 58-63
- No NTSP market power
  - RPF 244-71, 273-87
  - F. 235, 280-81
- Total medical expense issues
  - RPF 290-310
- Aetna
  - RPF 332-38, 342, 344-54, 360-62, 364, 367-68, 372, 375, 377-79
  - F. 264, 270, 279-81, 284, 288, 291-92, 294-95, 302-09, 312, 315, 320-23, 327, 329-30, 333-35, 343-44, 346-50),
- United
  - RPF 382, 385-88, 391-402, 404-05, 407
  - F. 122, 160-61, 169, 173-74, 184, 190
- Cigna
  - RPF 409, 412, 414, 418-20, 423, 425, 427-30, 432-34, 436-39, 442
  - F. 198, 205-06, 211, 218-20, 225-26, 228, 230, 234-35, 239-40, 243, 248-49
- Jurisdiction
  - F. 20-22, 43-44, 104, 197-98, 264

STATEMENT OF THE QUESTIONS PRESENTED

1. Did the ALJ err in finding that Complaint Counsel had shown concerted action when there was not sufficient evidence of collusion among NTSP's participating physicians?

2. Did the ALJ err in finding that Complaint Counsel had shown a violation of Section 1 of the Sherman Act when there was no sufficient evidence of anticompetitive effect in a properly-defined relevant market?

3. Did the ALJ err in finding that NTSP had insufficient evidence of the procompetitive efficiencies of its business model when there was sufficient evidence of justification, the data NTSP had supported its efficiency claims, and NTSP was denied access to all other data despite discovery requests?

4. Did the ALJ err in finding that Complaint Counsel had shown an unreasonable

COMMISSION STANDARD OF REVIEW

On appeal from the Initial Decision in this proceeding, the applicable standard of review is *de novo*."[6]

ARGUMENT AND AUTHORITIES

I. Under established Supreme Court authority, Complaint Counsel must have

there was [an anticompetitive] agreement.'"[11] Complaint Counsel also bears the burden of demonstrating that Respondent's actions in this case are anticompetitive.[12]

To prove there was "concerted action," Complaint Counsel must submit either direct or circumstantial evidence of an agreement between competitors (*i.e.*, the physicians).[13] "Section 1 of the Sherman Act [like Section 5 of the FTC Act] does not proscribe independent conduct."[14] Conduct that is as consistent with lawful competition as with conspiracy will not support an inference of conspiracy.[15] Complaint Counsel "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."[16]

Further, Complaint Counsel cannot argue that an attempt to conspire satisfies the concerted action requirement. An attempt to conspire or otherwise violate Section 1 of the Sherman Act is not a Section 5 violation because the Fifth Circuit does not allow "attempt" as a valid claim under Section 1 of the Sherman Act.[17]

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[11] ID at 61 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984)). *Accord Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 761 (5th Cir. 2002) ("So, to establish a ' 1 violation, a plaintiff must demonstrate concerted action.").
[12] ID at 61.
[13] *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999) ("The existence of an agreement is the hallmark of a Section 1 claim.").
[14] *Viazis*, 314 F.3d at 761.
[15] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).
[16] *Id.* (citations omitted).
[17] *See United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984) ("In sum, our decision that the government has stated a claim does not add attempt to violations of Section 1 of the Sherman Act . . . .").

II. The ALJ erred in finding that Complaint Counsel had shown concerted action when there was no evidence of collusion among NTSP's participating physicians.

A. Complaint Counsel failed to show concerted action because there was no evidence of collusion among NTSP's participating physicians.

This is an alleged physician conspiracy case in which Complaint Counsel admits they cannot prove collusion among otherwise competing physicians.[18] But Complaint Counsel *must* demonstrate concerted action to establish a violation of Section 1 of the Sherman Act (and, consequently, Section 5 of the FTC Act).[19] Because the undisputed evidence shows that there has been no collusion among physicians, Complaint Counsel cannot satisfy this essential element of liability under Section 5.

NTSP cannot and does not bind any participating physician to a non-risk contract.[20] Under NTSP's Physician Participation Agreement ("PPA"), NTSP has no authority to bind the physicians; any non-risk contracts to which NTSP decides to become a party must be messengered to the physicians for their individual decisions on whether to join.[21] Nor does NTSP divulge to any physician or board member whether or how any physician responds to the confidential poll conducted by NTSP's staff.[22]

Complaint Counsel's own expert was unable to find any evidence of collusion among physicians. In fact, his analysis and testimony showed the opposite – that there was no collusion. Complaint Counsel retained Dr. H. E. Frech, an economics professor

[18] RPF 150-58, 160, 162.
[19] ID at 67 (citing *Viazis,* 314 F.3d at 761).
[20] RPF 137-38.
[21] RPF 137-39, 142, 145, 152-58, 161, 166, 271, 275, 284-86.
[22] RPF 129, 133. 135.

who has written a number of articles on healthcare economics.[23] Dr. Frech spent over 200 hours analyzing the evidence in this case[24] and concluded that there was *no evidence* that:

- one or more participating physicians agreed with each other to reject a non-risk payor offer;[25]
- any participating physician and any other entity agreed to reject a non-risk payor offer;[26]
- any participating physician rejected a non-risk payor offer based on a power of attorney granted to NTSP;[27]
- any participating physician rejected a non-risk payor offer because of NTSP's Physician Participation Agreement;[28]
- any participating physician knew what another physician was going to do in response to a non-risk payor offer;[29]

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[23] *See, e.g,* H.E. Frech II, James Langenfeld & R. Forrest McCluer, *Elzinga-Hogarty Tests and Alternative Approaches for Market Share Calculations in Hospital Markets*, 71 ANTITRUST L. J. 921 (2004). *See also* CX 1152 (listing articles).

[24] Frech, Tr. 1357.

[25] RPF 153; *see also* Frech, Tr. 1365 ("Q. Isn't it correct that you have no knowledge of any doctor-to-doctor agreement not to participate in a payor offer? A. That's correct. Q. Isn't it also correct that you have no knowledge of a doctor ever agreeing with any other doctor to turn down a payor offer? A. Yes, I don't – I have no knowledge of such agreement.").

[26] RPF 154, 158; *see also* Frech, Tr. 1365-66.

[27] RPF 156; *see also* Frech, Tr. 1368-69 ("Q. Isn't it also true that you have no knowledge of any doctor who turned down a contractual offer from a payor in deference to a power of attorney? A. I have no knowledge of an individual doctor who did that.").

[28] RPF 157; *see also* Frech, Tr. 1368 ("Q. Isn't it true that you have no knowledge of any doctor that refused to pay – to – isn't it true that you have no knowledge of any doctor that refused to participate in a contract offer by a payor because of a PPA? A. That's true.").

- any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;[30]
- any participating physician gave up his or her right to independently accept or reject a non-risk payor offer;[31] or
- any participating physician knew what any other physician's response was to the poll.[32]

Dr. Frech could not point to any instance of a change in physician conduct due to any of NTSP's activities – the PPA, the powers of attorney, the poll, or anything else.[33] He admitted that he knew of no physician who rejected an offer based on any of those events. He further admitted that physicians chose not to contract through NTSP on more than two-thirds of the contract offers NTSP messengered![34]

Dr. Frech actually proved there was no collusion or agreement among NTSP's participating physicians. He analyzed the physicians' acceptances of contract offers outside of NTSP – the only data analysis he did in the case – and determined that the physicians frequently entered individually into payor contracts at rates both above and

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[29] RPF 136, 159.
[30] RPF 138.
[31] RPF 155; *see also* Frech, Tr. 1363-64 ("Q. It's also your understanding that the physician always has an independent right to accept or reject any contract that's messengered? A. Right, he can always accept or reject a contract that NTSP signs and sends to them, correct.").
[32] RPF 150; *see* Frech, Tr. 1436 ("Q. Let's turn to the poll. It's correct, is it not, that the people who respond to the poll do not know the responses by any other responder? A. The poll doesn't – at least not through the poll. I mean, the polling system itself is not going to tell them what specific other respondent said.").
[33] *See* notes 25-31. Dr. Frech admitted that no physician had refused to participate in a contract offer because of NTSP. RPF 286.
[34] RPF 162. On average, NTSP's participating physicians join only 7.47 contracts out of the 24 contracts available through NTSP. *See* RX 13 (physician participation chart).

below the threshold rate levels used by NTSP's board of directors to determine when NTSP itself was willing to participate in a payor contract.[35] He did not find any physician which adhered to the NTSP board minimum in the physician's own contracting![36]

Based on this overwhelming evidence – virtually all of which was undisputed by Complaint Counsel and/or admitted by Dr. Frech, the Administrative Law Judge found there was no collusion among NTSP's participating physicians.

B. **<u>Complaint Counsel cannot show concerted action without evidence of physician collusion, and all attempts to do so fail as a matter of law.</u>**

1. *NTSP is not a "walking conspiracy," and its mere existence does not satisfy the concerted action requirement.*

This is clearly not a case about a price-fixing conspiracy – there is no evidence of physician collusion.[39] To create concerted action where there is none, Complaint Counsel asserted that NTSP, because it has a board of directors composed of physicians and it messengers some contract proposals to physicians, is a "walking conspiracy" whose every act is an actionable antitrust conspiracy. Of course that is not the law.

In *Viazis*, the Fifth Circuit[40] held that it is improper to presume that a trade or professional organization meets Section 1's (and therefore Section 5's) contract, combination, or conspiracy requirement:

> Despite the fact that "a trade association by its nature involves collective action by competitors, it is not by its nature a 'walking conspiracy,' its every denial of some benefit amounting to an unreasonable restraint of trade."[41]

Under Fifth Circuit law, NTSP's mere existence does not relieve Complaint Counsel of its burden of proof on concerted action.

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[39] The undisputed fact that there was no collusion among NTSP's participating physicians significantly distinguishes this case from what evidently were the facts in many of the other IPA consent-decree cases.

[40] Fifth Circuit decisions govern this case because the acts and omissions at issue occurred in Texas. *See* 15 U.S.C. § 45(c) ("Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business . . . .").

[41] *Viazis* 314 F.3d 764 (quoting *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988)).

To try to support their position that NTSP, by definition, is a combination of competitors that "automatically" meets the concerted action requirement, Complaint Counsel relied on *Alvord-Polk*, a Third Circuit decision from 1994.[42] But that reliance was misplaced – the court in *Alvord-Polk* expressly ***declined*** to find that a trade association, in and of itself, eliminated the need to prove a contract, combination, or conspiracy in a Section 1 case:

> We believe that the *Hydrolevel* rule that an association's economic power may justify its being held liable for the actions of its agents cannot be extended to defeat the "concerted action" requirement of section 1. ***Imposing liability on an association, as we did in Weiss, does not abolish or diminish the first element of section 1 liability***; it merely recognizes that a group of competitors with a unity of purpose are engaged in concerted action, whether or not they act under one name. As we explained in Nanavati, in the absence of a co-conspirator, ***an association's actions satisfy the concerted action requirement only when taken in a group capacity***.[43]

The ALJ adopted the correct readings of *Alvord-Polk* and *Viazis*Hydociationsf Se unT2 1 Tfsf -0.0S0

circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise, among members of the association."[45] Neither party has appealed this holding.[46] Therefore, NTSP's existence does not alone satisfy the concerted action requirement. Complaint Counsel still has the burden of proving concerted action.

2. All refusals to deal by the entity NTSP are protected under the

contract situations.[48] NTSP's actions are not those of the individual physicians in any capacity.

The *Colgate* doctrine gives an entity the right to refuse to deal with anyone it chooses.[49] Squarely within that doctrine is NTSP's right to follow its own business model and to refuse to sign and messenger contractual offers outside that model.

In the recent *Trinko* decision, the Supreme Court strongly reaffirmed the *Colgate* doctrine:

> [A]s a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919).[50]

Trinko also provides valuable insight into the Supreme Court's reluctance to chill innovation and the development of networks by

The Fifth Circuit applied this same law in recognizing that even a trade association has a *Colgate* right to refuse to deal.[53]

> In *Consolidated Metal Products*, 846 F.2d at 296, we held that where an association's product recommendations were nonbinding and the association did not coerce its members to abide by its recommendations, its refusal to sanction plaintiff's product did not show that plaintiff was excluded from the market. Nor can a plaintiff show competitive harm merely by demonstrating that the defendant "refused without justification to promote, approve, or buy the plaintiff's product." Id. at 297.[54]

When NTSP's board makes a decision whether or not it wants to be involved in a payor's offer, NTSP's "approval" or "disapproval" indisputably is not binding on the physicians. Complaint Counsel's claim that NTSP violates the antitrust laws in refusing to deal is dead on arrival in the Fifth Circuit.

Any other result would be illogical. NTSP faces potential liability when it becomes party to a payor contract. Failure to perform obligations to the payor under the contract can subject NTSP to liability to the payor; involvement in payor conduct which is illegal under state or federal law can subject NTSP to liability to the government or physicians and patients; involvement in deficient medical care can subject NTSP to liability to patients.[55] NTSP also has its reputation to protect; involvement in a poorly-performing contract can damage NTSP's ability to interest payors, physicians, employers, and patients in future risk and non-risk contracts.

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[53] *Viazis*, 314 F.3d at 763 n.3 (citing *Monsanto*, 465 U.S. at 761, which cites *Colgate*).
[54] *Id.* at 766 (emphasis added).
[55] Healthcare is a line of business with great legal risk and regulatory complications, especially in a highly litigious state like Texas. NTSP has faced these types of situations with Aetna, Blue Cross, Cigna, and United, and others. RPF 164-65, 169-75, 177-82. Complaint Counsel's expert, Dr. Frech, acknowledged these legal concerns and that there are many reasons an entity may refuse to deal with another. RPF 163.

NTSP's announcements to payors that it woul

preferences and use of the mean, median and mode of the responses to decide when NTSP would participate as an entity in a payor's contract; (4) communicating with payors about contract offers; and (5) communicating with physicians on payor-related activities.

The Initial Decision seems to have accepted the first several arguments:

> that NTSP influenced its member physicians to allow NTSP to negotiate economic terms of non-risk contracts on their behalf and that NTSP rejected offers that fell below Board minimum rates which NTSP had set based upon polling the member physicians.[58]

But none of the arguments made by Complaint Counsel, or accepted in the Initial Decision, undercuts the undisputed evidence that the physicians did not collude. This case is like one of those board games where the player can move his token along a number of different paths, but the end destination is the same. Here, the end destination for every allegation is the undisputed evidence that the physicians did not collude.

The Physician Participation Ath

Dr. Frech admitted that the physicians deal with payors without regard to the PPA and that he knew of no physician who refused to contract with a payor because of the PPA.[67] Nothing in either the language or the use of the PPA supports a finding of concerted action by physicians on contract rates.

If Complaint Counsel's complaint is that a few physicians gave NTSP notice of a payor's offer, Complaint Counsel presented no evidence that even one of those situations involved a "Payor Offer" as defined in the PPA. And such notice, whether pursuant to the PPA or not, could not constitute an actionable conspiracy in light of the undisputed evidence of no collusive action by the physicians in accepting or rejecting contract offers.

Powers of Attorney

The powers of attorney are not evidence of concerted action. Under the PPA, NTSP had no power to bind physicians to non-risk contracts; NTSP was required to use and did use the messenger model for any non-risk offers submitted to physicians.[68] That situation did not change even in those rare circumstances where a power of attorney form was requested by a payor[69] or was given by a physician.

The power of attorney forms themselves were expressly limited in their application to "any ***lawful*** manner."[70] Following that language, NTSP used the powers

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[67] RPF 155, 157; Frech, Tr. 1368 ("Q. Isn't it true that you have no knowledge of any doctor that refused to pay – to – isn't it true that you have no knowledge of any doctor that refused to participate in a contract offer by a payor because of a PPA? A. That's true.").

[68] RPF 139, 142, 145, 152-58, 161, 166, 271, 275, 285.

[69] Aetna required IPAs to receive grants of power of attorney from physicians before engaging in discussions about possible contract offers to be messengered. RPF 148, 367, 368. NTSP even pointed out to Aetna that Aetna's required individual provider addendum (including a grant of power of attorney) should be amended to recognize the limits of messenger model. RPF 368.

[70] RPF 149 (emphasis added).

of attorney only in conjunction with a messenger model.[71] The powers of attorney did not commit a physician to accept or reject an offer.[72] The powers of attorney never gave NTSP any power to bind any physician on a non-risk contract.[73]

Complaint Counsel's expert conceded that there is no evidence that any participating physician rejected a non-risk payor offer based on a power of attorney[74] or that a power of attorney prevented any participating physician from making an independent decision on a payor contract.[75]

At most, the infrequently-used power of attorney forms gave NTSP the opportunity to review a few contracts on behalf of some physicians, with the physicians retaining the right to accept or reject contracts, through NTSP or not, as they pleased.

<u>The Poll</u>

The poll and the board of directors' establishment of a threshold rate for the entity NTSP are not evidence of concerted action. NTSP screens payor offers before deciding whether to expend NTSP's scarce resources in contractual discussions with the payor to determine if the entity NTSP will sign and become a party to an offer.[76] NTSP's internal use of the mean, median and mode of the poll responses[77]

significant number of NTSP's eligible physicians.[78] The poll also informs NTSP as to when a significant number of the physicians in its risk contract pool will likely choose to be involved in the non-risk offer, which is an indication as to when spillover of the risk contract efficiencies will occur.

If a payor makes an offer below the threshold, NTSP refuses to get involved. If the payor makes an offer that meets the threshold, NTSP will then review the offer to see if NTSP will become a party to the contract and eventually messenger the offer.[79] NTSP does not negotiate to raise rates above this threshold.[80] NTSP's actions related to the establishment and use of the threshold rate are actions only of the entity NTSP.

The individual physicians are in no way bound to this threshold in their contracting decisions. Even if the entity NTSP becomes a party to the contract, each physician still has an individual right to decide whether he or she will become a party.[81]

any individual-specific data.[89] And because only the mean, median, and mode of the responses are reported, it is impossible for a physician to determine the response of any specific physician or specialty, or even to determine whether they responded.[90] Dr. Frech also demonstrated that even if a physician had hypothetically been able to learn another physician's poll response, that would have meant nothing, because the physicians did not conform their individual contracting behavior to their poll responses.[91]

The evidence of NTSP's miscellaneous other comments to physicians further supports the conclusion that physicians did not collude. Many of NTSP's dealings with payors related to risk contracts or non-economic terms.[92] Complaint Counsel and the ALJ fail to distinguish between comments about risk and non-risk contract terms or between comments about non-economic and economic terms.[93] Risk contract negotiations do not violate the antitrust laws.[94] Nor do comments about non-economic terms of non-risk offers; IPAs are encrTcrn288 Tm0.0038 Tcot -s 7305.64 410.88 0.9(e.p the mCmm)7.1(ics

Many of the comments challenged by Complaint Counsel also relate to litigation against an affiliate of a payor,[96] breach of contract issues,[97] NTSP's competition with

and the ALJ, however, cite *Maricopa* and a district court decision (*Hassan*) for the proposition that NTSP's conduct is concerted action.[108] But those cases are inapposite to the issue of concerted action in this case. Both *Maricopa* and *Hassan* involved acknowledged agreements among physicians as to which price they would accept.[109] In contrast, it is undisputed here that physicians have not colluded, and could and did act independently of the entity NTSP's decisions on payor contracts. Therefore, *Maricopa* and *Hassan* do not support a finding of concerted action in this case; those cases actually underline the need for Complaint Counsel to have shown concerted action as the first element of their proof.

The Initial Decision also cites to a 1983 Fifth Circuit case, which involved a conspiracy among nine hospitals and a Blue Cross entity to fix the prices paid by Blue Cross to other hospitals.[110] It is difficult to see any relevance of that pre-*Viazis* decision to this case where NTSP chose not to contract and where the physicians did not collude among themselves.

Complaint Counsel's argument that concerted action can be found without proof of physician collusion is an oxymoron which fails as a matter of law.[111]

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[108] *Arizona v. Maricopa Co. Med. Soc'y*, 457 U.S. 332 (1982); *Hassan v. Indep. Practice Assoc., P.C.*, 698 F. Supp. 679 (E.D. Mich. 1988).

[109] As discussed by the ALJ, the Court in *Maricopa* found explicit agreements by the participating physicians to accept set amounts determined by the foundations. ID at 67-68. Similarly, in *Hassan*, the physicians explicitly agreed on a maximum fee schedule. ID at 70.

[110] *St. Bernard Gen. Hosp. v. Hosp. Serv. Ass'n,* 712 F.2d 978, 986 (1983).

[111] NTSP's position is supported by the HEALTH CARE STATEMENTS, which recognize that the issue is "whether the arrangement creates or facilitates an agreement among competitors on prices or price-related terms." Statement 9.C. The Statements even go so far as to allow an IPA entity to accept (and hence not accept) a payor offer on behalf of individual physicians without such being an antitrust violation. Statement 9.C (approving

III. The ALJ erred when he found that Complaint Counsel had shown an actionable conspiracy despite no evidence of anticompetitive effect in a properly-defined relevant market.

A. Even if Complaint Counsel had shown a contract, combination, or conspiracy, the proper analysis would be Rule of Reason.

A contract or conspiracy, if proven, can be an unlawful restraint of trade under three separate theories: (1) *per se*, (2) rule of reason, or (3) truncated or "quick look" rule of reason.[112] The rule of reason is the prevailing standard that applies to most contracts or conspiracies and would be the appropriate analysis in this case.[113] Applying the rule of reason requires a study of the market and the competitive effects of the alleged conspiracy in the market. Therefore, the ALJ erred when he found that no elaborate study of the market was needed to establish illegali

is appropriate only in limited circumstances, when it can be shown that "the great likelihood of anticompetitive effects can be easily ascertained."[117]

In applying the plausible procompetitive or no effects test mandated by *California Dental*, one must look at what, if any, specific contract or conspiracy has been shown by Complaint Counsel. The conspiracy here cannot include collusion among physicians because Complaint Counsel concede there is no such collusion, the evidence does not support a finding of collusion, and the ALJ's unchallenged holding was that there was no collusion among physicians.[118]

What is left to consider for plausible procompetitive or no effects are merely the non-price documents between NTSP and physicians – the Physician Participation Agreement and the powers of attorney – if and to the degree those documents were ever carried out. What little conduct was even arguably shown under those documents clearly has plausible procompetitive effects, and therefore must be judged under the rule of reason.

The PPA is challenged by Complaint Counsel because of a provision requiring physicians to provide NTSP with notice of certain "Payor Offers." Despite Complaint Counsel's suggestion to the contrary, this provision does not require physicians to send every payor offer they receive to NTSP and does not prohibit physicians from negotiating separately with payors. Physicians are only required to give notice to NTSP of a "Payor Offer,"[119] which is a defined term that includes only an offer from an "entity having an

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[117] *Id.*
[118] ID at 68-69.
[119] CX 311, PPA ' 2.1.

active Payor Agreement with NTSP."[120] Most of the situations at issue in this case did not involve a "Payor Offer" as defined in the PPA. NTSP had no contract with Aetna prior to December 2000, no contract with Cigna prior to October 1999, and no direct contract with United prior to November 2001.[121] The PPA also excludes from that definition any offer "in replacement or renewal of a contract which exists between such Payor and physician as of March 1, 1998."[122] Complaint Counsel also challenge situations where physicians were already contracted with payors – situations outside the scope of the challenged PPA notice provision.

A notice provision clearly has plausible procompetitive effects or plausibly no effect. Notifying NTSP of a possible replacement of its contract increases the contracting opportunities in the marketplace by informing NTSP of a new contract opportunity, either for a risk contract or some other type of contract. In fact, most (if not all) of NTSP's contracts require advance notice of termination.[123] The PPA provision is largely redundant of those existing provisions. Are those contractual notice provisions now an antitrust violation under the logic of the Initial Decision?

The language of the PPA allows NTSP only to *receive* these "Payor Offers"; it does not say that a physician is bound by NTSP's action on the offer or that the physician cannot negotiate directly, or through another entity, with the payor.[124] As stated above, it

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[120] CX 311, PPA ' ' 1.16, 1.18.
[121] RX 24 (Aetna contract); RX 25 (United contract); CX 782A, *in camera* (Cigna contract).
[122] CX 311, PPA § 2.1.
[123] *See, e.g.,* RX 24 at ' 7.2 (Aetna-NTSP contract); RX 25 at ' 7.2 (United-NTSP contract).
[124] CX 311, PPA ' 2.1.

is undisputed that physicians did not agree to refuse to contract with payors. Complaint Counsel's expert admitted that physicians dealt with payors without regard to the PPA.[125]

The powers of attorney challenged by Complaint Counsel are also misconstrued. The powers of attorney were gathered by NTSP to inform NTSP of which and how many physicians were willing to be messengered an offer through NTSP.[126] NTSP used powers of attorney at the request of Aetna, who took the position that the Texas Department of Insurance required some document to reflect a doctor's designation of an IPA as the messenger of an offer.[127] Certainly an "indication of interest" cannot be said to be devoid of plausible procompetitive effects.

In no instance was any physician shown to have refused to contract with a payor in deference to a power of attorney.[128] Complaint Counsel's expert so conceded:

> Q. Isn't it also true that you have no knowledge of any doctor who turned down a contractual offer from a payor in deference to a power of attorney?
>
> A. I have no knowledge of an individual doctor who did that.[129]

In one of the few instances challenged by Complaint Counsel – the United situation in the fall of 2001 – the powers of attorney were never delivered to the payor.[130] In another – Aetna – the powers were gathered to meet the payor's request.[131] In both situations, the powers of attorney were always subject to the provisions in the PPA that

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125 RPF 155, 157; Frech, Tr. 1368.
126 RPF 149; *see* CX 544; Jagmin, Tr. 1136-42.
127 RPF 148, 367-68.
128 RPF 156, 289.
129 Frech, Tr. 1368-69.
130 RPF 401.
131 RPF 149. 367-68.

NTSP had no authority to bind any physician, and that any contract through NTSP would have to be messengered for the physician's decision.[132]

NTSP as an entity did take other actions unilaterally – use of the poll to inform itself of when NTSP would become a party to a payor's offer, disclosing to physicians the mean, median, and mode of the poll results, commenting to a payor about a payor's offer, and commenting to physicians about a payor's conduct. None of those unilateral actions is subject to the *California Dental* criterion for contracts and conspiracies.[133] Each of those unilateral acts, moreover, has plausible procompetitive effects, in addition to NTSP's right under the *Colgate* doctrine to govern itself and to avoid risky or unattractive contra

allowed in some circumstances to refuse handling offers of interest to only a minority of its physicians.[137]

Complaint Counsel's experts conceded the plausible validity of procompetitive spillover effects and that the spillover effects would be adversely affected by a lack of continuity between NTSP's risk panel and the panel handling a payor's non-risk patients.[138] Cost efficiency and increased quality of care are procompetitive results of NTSP's own use of the poll. Only if one rejects an IPA entity's right to control its own expenditures and resources, and only if one rejects all of the economic literature on spillover and teamwork, can one say that NTSP's position is not plausible.

Disclosing to physicians when NTSP will not be involved in a payor offer also had plausible procompetitive effects – physicians learn that they need to look to other contracting avenues with payors in those situations. Physicians would learn eventually that no offer was going to come through NTSP; the disclosure merely expedited the contracting process.

Advising a payor of the terms NTSP requires for its own participation is merely the flow of information needed by the payor to decide how to structure an offer. That

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[137] *See* Bay Area Preferred Physicians Advisory Opinion, letter from Jeffrey W. Brennan to Martin J. Thompson, dated September 23, 2003. That opinion addressed the situation where an IPA did "not wish to fund the servicing of contracts in which only a minority of [the IPA's] members participate, because it would 'impose an excessive cost' on the non-participants . . . ." Staff, while taking a neutral stance, noted that "[s]o long as payers have an effective opportunity to contract with physicians individually," the IPA's "refusal to administer contracts to which fewer than half its members subscribe is less likely to have anticompetitive effects."

[138] RPF 86-87, 113-14.

information was necessary if the payor wanted to have NTSP as a party to the contract.

> anticompetitive effects and ***considered whether the effects actually are anticompetitive***. Where, as here, the circumstances of the restriction are somewhat complex, ***assumption alone will not do***.[143]

California Dental requires Complaint Counsel to show actual anticompetitive effects no matter what rule of reason analysis is used.

2. *Complaint Counsel did not prove anticompetitive effects in a relevant market sufficient to find an unreasonable restraint of trade or to require Respondent to prove procompetitive effects.*

population of Tarrant County lives in other cities in the "Mid-Cities Area" along the Dallas County border.[157] There are four major hospitals in the Mid-Cities Area and eight major hospitals in Dallas County.[158] Much of the city of Fort Worth is located closer to the Mid-Cities Area and to Dallas County than to downtown Fort Worth where Fort Worth's two major hospitals are located.

Testimony from Complaint Counsel's expert confirms that the geographic market is broader than the city of Fort Worth.[159] Dr. Frech agreed that the existence of the significant population in the Mid-Cities Area would act to tie Dallas and Tarrant Counties together;[160] this testimony defeats any attempt to limit the relevant market to only Tarrant County, let alone only the city of Fort Worth. Dr. Frech also conceded that geographic markets tend to become larger the more specialized the physician;[161] this fact is important because NTSP's participating physicians are mostly specialists.[162]

The evidence also shows that patients seek medical care near where they live and that many people who work in Fort Worth live outside the city, in Tarrant County and other counties.[163] The Initial Decision's finding that one city in a metropolitan area

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[157] RPF 203; *see also* RPF 201-02.
[158] *See* RPF 220.
[159] Testimony and evidence from payors also confirms that the market is broader than the city of Fort Worth. *See* RPF 226, 228-35 (payors and TDI use a broader service area than Fort Worth).
[160] RPF 204. The Mid-Cities Area constitutes approximately 40% of Tarrant County's population. RPF 201, 203.
[161] RPF 214.
[162] RPF 10-11.
[163] RPF 223-25.

without geographic barriers is a relevant market[164] is insupportable[165] and a rejection of the economic principles which the Commission has sought to establish for two decades.

Complaint Counsel's case fails because a proper relevant market was not defined.

But even if a proper relevant market had been proven, there was no showing of anticompetitive effect from NTSP's conduct in any market. When looking for any showing made by Complaint Counsel of anticompetitive effect in a relevant market, one must proceed in light of the concession that there was no physician collusion. Accordingly, any anticompetitive effect must be shown to flow from the Physician Participation Agreement or the powers of attorney – and not the conduct of physicians or the unilateral conduct of NTSP. No such effect was shown.

There must be a showing of NTSP's market power in determining anticompetitive effect.[166] But Complaint Counsel failed to make any showing as to NTSP's market power or market share.[167]

Further, the evidence brought forth by Respondent proved NTSP does not have market power. Those physicians (located in 8 counties) to whom NTSP messengers

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[164] *See* ID at 63-64; F. 52-63.
[165] *See, e.g, FTC v. Freeman Hosp.*, 69 F.3d 260, 269 (8th Cir. 1995) (rejecting one city and 27-mile radius as relevant market for hospital services and citing other authorities rejecting one-city relevant markets).
[166] *See* notes 145 & 146.
[167] *See* generally F. 52-63; ID at 61-64. In his findings of fact, the Initial Decision did reference NTSP's percentage of physicians in some specialties in Tarrant County, but did not determine which other specialties competed with those listed specialties. *See* ID at 61-64. Complaint Counsel's expert conceded that there can be significant crossovers of services between specialties, meaning that a significant percentage in one specialty is not necessarily evidence of market power. *See* RPF 240; *see also* RPF 242-43. The Initial Decision did not address the undisputed fact that the "participating physicians" do not participate in NTSP contracts most of the time.

contracts constitute less than 23 percent of the physicians in any county.[168] If one takes the DFW Metroplex as the market, as was used by the Department of Justice in its suit against Aetna,[169]

That NTSP could not and did not adversely affect competition is further supported by the evidence that there were no actual anticompetitive effects from any of NTSP's challenged documents with physicians, or even NTSP's unilateral conduct. Complaint Counsel submitted *virtually no* empirical evidence in this case.[175] The ALJ found that NTSP did not receive higher rates than what other physicians and physician groups were already receiving.[176] The ALJ specifically found the allegation that NTSP received higher rates was not supported by the evidence.[177]

What the ALJ found was that "NTSP obtained higher rates or more beneficial economic terms than the health care payors initially offered to NTSP."[178] This finding, however, relates to NTSP's decision about whether to participate in a payor offer, not to conduct by the physicians who provide the medical services to the payors. NTSP as an entity can choose to participate or not participate in a payor offer for any number of reasons – Complaint Counsel's expert so conceded.[179] NTSP's decision about a payor's offer has no antitrust significance in the absence of a showing that physicians entered into a conspiracy with NTSP to boycott the payor.

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[175] *See* RCPF 11, 21-23, 460-62.
[176] *See* F. 188 (United gave NTSP the same rate offered to other IPAs); F. 217 (Cigna gave NTSP a rate the same as at least one IPA and in the general ballpark of rates Cigna paid to other IPAs), F. 328-39 (Aetna gave NTSP the same rate as another IPA); ID at 82 ("[T]here is insufficient evidence to establish that the rates that United, Cigna, and Aetna agreed to with NTSP are uniformly higher than rates health insurance payors offered to other IPAs or directly to other physicians."). Neither party has appealed these findings. *See* Complaint Counsel's Notice of Appeal; Respondent's Notice of Appeal.
[177] *See* ID at 83 (holding that the evidence cited by Complaint Counsel did not support a finding that NTSP's rates were higher than those otherwise offered to physicians). Neither party has appealed this finding. *See* Complaint Counsel's Notice of Appeal; Respondent's Notice of Appeal.
[178] ID at 74.
[179] RPF 163.

Nor was any showing made that NTSP's internal decision affected the rates finally offered by the payor to get enough physicians. NTSP had reason to believe that

effective, not the one who charges a low rate and does not take the time to manage care.[183]

IV. The ALJ erred when he found that NTSP had insufficient evidence of procompetitive justifications when he denied NTSP needed discovery and when all the evidence available shows that NTSP had legal and I5siness

physician providers.[190] Where a litigant has been denied needed discovery on an issue, due process prevents the court or agency from deciding against the litigant on that issue.[191]

Justifications are also apparent as to the conduct challenged by Complaint Counsel. Many of these justifications arise from the nature of what NTSP does.

Applicable to each and every unilateral act of NTSP is the *Colgate* doctrine, which is sufficient justification alone for NTSP's conduct. The *Colgate* doctrine gives an entity, such as NTSP, the right to refuse to deal with anyone it chooses.[192] That doctrine encompasses NTSP's unilateral acts related to NTSP's right to follow its own business model and to refuse to sign and messenger contractual offers outside that model. The ALJ recognized somewhat this doctrine when he refused to infringe on NTSP's right to refuse to become a party to or messenger a payor contract and denied Complaint Counsel's request for a mandatory injunction on this behavior.[193]

Even though NTSP's unilateral acts are legally justified by the *Colgate* doctrine and need not be otherwise justified,[194] NTSP also presented sufficient evidence of specific business justifications for its conduct.

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[190] RPF 107-108. Fortunately, PacifiCare and Cigna had provided NTSP with some information in the normal course of business which showed that NTSP is the best-performing group in the Dallas/Fort Worth Metroplex and that spillover from care under capitated contracts occurs. *See* discussion *infra.*
[191] *See, e.g., Complaint of Bankers Trust Co.*, 752 F.2d 874, 889-91 (3d Cir. 1985); *McClelland v. Andrus*, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979). *See also Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932) ("Due process requires that there be an opportunity to present every available defense. …").
[192] 250 U.S. at 307; *Viazis*, 314 F.3d at 763.
[193] *See* ID at 88-90.
[194] *See* Sections II.B.3 and III.A.

First, NTSP has a right and duty to avoid expending its resources on offers of interest to only a minority of NTSP's physicians. NTSP has limited resources and does not want to use those resources or the efforts of its staff to review and handle offers that will not be of interest to a significant percentage of its physicians.[195] The poll NTSP conducts is an objective method of determining when a majority of NTSP's physicians are likely not interested in participating in a payor offer through NTSP.[196] The poll has a procompetitive effect because it saves NTSP and the payors time and money that would otherwise be wasted on offers with little chance of achieving significant physician participation through NTSP.[197] NTSP can focus its efforts on offers that will activate its network and allow its business model to function properly. The payors can focus their efforts with NTSP on contracts to which NTSP will be able to become a party, and can divert efforts on offers not meeting NTSP requirements to other IPAs or directly to physicians.

Second, NTSP has a right and duty to avoid legally or medically risky situations presented by payor offers. NTSP is very concerned with which contracts it messengers because NTSP the entity signs and becomes a party to those contracts.[198] Payor contracts are full of legal and medical pitfalls NTSP must avoid.[199] Legal issues frequently arise during contract reviews related to: compliance with the Texas Patient Bill of Rights; prompt pay and clean claim definitions and appeal processes; termination provisions;

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[195] RPF 124-25, 166-68.
[196] RPF 121, 124-26, 164-65.
[197] RPF 124, 140. A recent Commission advisory letter also indicates that threshold levels for screening payor offers are legitimate. *See* note 137.
[198] RPF 166.
[199] RPF 168.

gender discrimination; hold harmless clauses; all-products clauses; gag provisions preventing physicians from speaking with patients and other physicians; and provisions relating to medical malpractice insurance.[200] Contracts may also include medical plan details that appear risky from a medical treatment, medical malpractice, or standard-of-care standpoint.[201]

These issues are exemplified by the payor malfeasance found by the ALJ[202] and by the conduct of the payors when dealing with NTSP and its physicians.[203] NTSP's decision to avoid contracts involving potential legal and medical treatment problems is a legitimate business decision. The ALJ explicitly recognized these potential risks when he held that NTSP would not be compelled "to messenger contracts or become a party to contracts sent to it by payors, regardless of potential risks to [NTSP], its member physicians, and its patients."[204]

Third, NTSP has a right to be involved only in contracts that meet its reputation and quality targets. NTSP has been and is involved in risk contracts in which its reputation for high-quality, cost-efficient care is an issue.[205] NTSP also actively seeks risk contracts from payors who are currently involved in only non-risk contracts.[206] NTSP's performance on non-risk contracts is a way to persuade non-risk payors to take

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[200] *See* RPF 170, 172.
[201] *See* RPF 170-72.
[202] *See* F. 192-94, 256-58, 357-63.
[203] *See generally* RPFs.
[204] ID at 89. The ALJ also found that the remedy could not contravene Texas or federal law, citing specific statutes regarding health care contracting requirements involving many of the legal issues referenced by NTSP. *See* ID at 89-90.
[205] *See, e.g.,* RPF 5, 15, 28, 116.
[206] *See, e.g.,* RPF 28, 106, 116, 355, 371, 411-12; *see also* F. 210, 215, 342-46.

on risk contracts with NTSP.[207] In light of these activities, NTSP has the right to choose the offers in which it will put its reputation on the line. If NTSP and physicians who join NTSP on a contract perform poorly or encounter problems, NTSP's reputation with payors can suffer, hurting its chances of increased risk contract business or even decreasing risk business. NTSP's reputation with physicians can also suffer, hurting its chances for recruiting or keeping high-quality physicians for both its risk and non-risk networks.

NTSP must have the ability to decline participation in potentially-problematic payor contracts.[208]

treatment patterns developed for the risk contracts. Dr. Gail Wilensky, a White House advisor and former head of the Health Care Financing Administration (the agency that administers Medicare and Medicaid) and the Medicare Payment Advisory Commission (the agency that advises Congress on Medicare issues), testified that NTSP's spillover business model is effective and beneficial to health care and should be encouraged.[210]

Spillover is recognized in medical care literature as a means for transferring improvements from risk to non-risk treatment.[211] And it is well-recognized that maintaining continuity of personnel enhances teamwork efficiencies.[212] If an offer will not be attractive to a significant number of NTSP's physicians, the teamwork model will not carry over to the non-risk contract and spillover effects will be limited. Therefore, NTSP's poll and board minimums are tools that allow NTSP to achieve the procompetitive effects of cost efficiency and increased quality of care.[213]

NTSP would not need to prove that its spillover model has worked in order to justify its refusal to be involved in some payor offers. If no team could be formed before it achieves the planned-for results, no team could ever form. But even so, all of the

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[210] RPF 23.

[211] RPF 86-88.

[212] *See* RX 3118 (Maness Expert Report) at ¶¶ 83-100; RPF 79, 81-83, 113-16. Complaint Counsel's experts conceded that spillover was likely to occur and that the spillover effect would be adversely affected by a lack of continuity between NTSP's risk and non-risk panels. *See* RPF 86-87, 113-14. If an offer is attractive to a significant number of NTSP physicians, spillover will occur regardless of how the physicians choose to participate with the payor – through NTSP, another IPA, or directly. RPF 115.

[213] NTSP's approach also prevents free riding, which is another procompetitive efficiency. Were NTSP forced to accept all contracts, no matter how unattractive, NTSP (and others) would be deterred from investing the time and effort needed to develop an effective team. The Supreme Court recently refused to order the forced sharing of a network for that reason. *See Trinko,* 124 S. Ct. 872 (telephone provider need not provide competitors with access to its network because competitor free-riding would chill innovation and economic investment).

empirical evidence presented supports the procompetitive effect of NTSP's spillover model.[214] NTSP, with the data available to it,[215] proved the actual existence of spillover effects.[216]

The Initial Decision seems to equate justification under the rule of reason to the Commission's definition of "clinical integration."[217] Yet clinical integration is a only one example of an efficiency justification,[218] and does not define the scope of what conduct is justifiable under the rule of reason.[219] Nor was any proof ever submitted that clinical integration (as restrictively defined by the ALJ[220]) yields greater cost and quality benefits than teamwork among allegedly non-integrated physicians. Complaint Counsel's expert Dr. Casalino admitted he had no such proof.[221]

The only conduct at issue not addressed by the five preceding business justifications – NTSP's communications with payors and physicians – have justifications of their own. NTSP's comments to payors, in addition to being derivative of NTSP's

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[214] Although Complaint Counsel continually criticized NTSP's data during this case, they never came forward with any empirical evidence disproving either NTSP's data or the existence of spillover effects. RCPF 11, 21-23, 460-62.
[215] NTSP cannot be held to task for failing to use data to which it was refused access. *See* notes 189-190.
[216] RPF 86-87, 92-102.
[217] ID at 83-84; F. 364-80.
[218] *See* HEALTH CARE STATEMENTS, Statement 8.C.1.
[219] *See id.*, Statement 8.C (providing other examples of potentially justified conduct); COLLABORATION GUIDELINES, ¶ 2.1 ("The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways.");

Colgate right to refuse to deal, have procompetitive business justifications. Communicating to a payor why NTSP has decided not to participate and what terms physicians might find attractive or reasonable is merely the procompetitive flow of information needed by the payors to decide how to structure an offer.[222] The legitimacy of this provision of information is recognized by the Commission's own Health Care Statements:

> The collective provision by competing health care providers to purchasers of health care services of factual information concerning the fees charged currently or in the past for the providers' services, and other factual

The FTC cannot make such a showing because there was no evidence of physician collusion, no evidence that NTSP could bind or coerce physicians, and no evidence of actual harm resulting from NTSP's actions.[229]

Even comments Complaint Counsel might challenge as suggestive or hortatory are not actionable because there was no resulting physician collusion. Those comments, moreover, were accurate and justified.

The communications with physicians and patients concerning United were related to United's attempts to undercut a NTSP risk contract to treat the employees of the City of Fort Worth.[230] NTSP did not communicate anything to its physicians that was not accurate or that was not related to competition with United.[231] NTSP and its physicians also had the right and duty to contact the City of Fort Worth about issues potentially affecting the care of NTSP's patients.[232] NTSP terminated its relationship with United through another IPA when United began using that relationship competitively against NTSP.[233] After this termination, some physicians previously contracted with another entity Health Texas Physicians Network gave NTSP powers of attorney to try to enter a

contracts and that NTSP followed the messenger model.[235] The powers of attorney were also never shown or delivered to United or otherwise used.[236]

Interestingly enough, in the 2001 City of Fort Worth situation, United was acting, not as the payor, but as a representative of the City of Fort Worth and other employers who were becoming self-insureds.[237] United, in effect, was a common bargaining agent on the purchase side for medical costs being paid by others.[238] It was obvious, however, that United did not use a messenger model in dealing with the self-insureds.[239]

The communications with physicians concerning Cigna were related to Cigna's numerous breaches of contract.[240] When Cigna purchased Health Source, it sent assignment letters to physicians.[241] There were numerous legal questions surrounding Cigna's representations of assignment and the physician's rights under the agreement.[242] NTSP merely looked into the issues and informed physicians of their contractual rights before the physicians took action on the assignment.[243] The challenged communications with Cigna and physicians concerning the NTSP-Cigna agreements related to Cigna's breaches of contract: failing to pay NTSP's physicians in accordance with the agreed-to

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[235] RPF 149, 397-99; Van Wagner, Tr. 1941-44.
[236] RPF 400-01.
[237] Mosley, Tr. 210; Quirk, Tr. 245.
[238] RX25.002 (United contract with NTSP defines "Payor" to include other persons and entities having "the primary financial responsibility for payment of Health Services covered by a Benefit Contract."). Aetna and Cigna also acted as common bargaining agents for self-insured employers. RX 24.019 (Aetna contractual definition of "Payor"); CX 782A.005 (Cigna contractual definition of "Payor").
[239] Nor did Aetna and Cigna.
[240] *See*SP o, 286.98 0 0 7.98 90 135.48 TnfoTc540.0030 Tc(240)Ton 1 0 0 12 1021.94 488.14Tm-0.0003 T8

fee schedules;[244] failing to adjust the fee schedule each year as required;[245] denying NTSP's cardiologists their right to participate in the contract;[246] and denying specialist PCPs their right to participate in the contract.[247]

The communications with physicians concerning Aetna were related to the class action litigation based on NTSP's involvement in an Aetna-MSM contract and NTSP's negotiations with Aetna on a risk contract.[248] NTSP's negotiations with Aetna prior to and throughout most of 2000 were on a risk contract or a linked offer involving both a risk and non-risk contract.[249] The power of attorney forms were required by Aetna before dealing with an IPA.[250] From 1999 to 2001, NTSP was also the class representative for many physicians in class action litigation against MSM for breach of an MSM-Aetna contract.[251] Communications with physicians and discussions with Aetna, as well as the agency documents and powers of attorney with physicians, revolved mainly around resolution of this litigation and risk contract discussions.[252]

Finally, any encouragement by NTSP for its physicians to speak out about any of the payors on issues that affected the delivery of health care or prevent payor deception and violations of the law are justified. NTSP and its physicians had legitimate reasons to

[244] RPF 418-19; *see* F. 218.
[245] RPF 420-21; *see* F. 219-20.
[246] *See* F. 221-22, 224, 226, 228-29, 234; RPF 423.
[247] RPF 426-28, 430-31; *see* F. 237.
[248] *See* F. 282-83; RCPF 310-11, 313, 318, 362-63.
[249] RCPF 310-11, 313; RPF 355; *see also* F. 276-77
[250] RCPF 318; RPF 367-68.
[251] RPF 332, 339, 343, 347; *see also* F. 270-71, 275.
[252] RCPF 310, 313, 318, 362; RPF 347; *see also* F. 283.

speak out and communicate with others, including governmental authorities, about payors, as shown by the ALJ's findings of numerous instances of payor malfeasance.[253]

The Initial Decision conclusorily dismisses NTSP's justification showing, without looking at any of the data as to NTSP's performance and spillover model, without accounting for the payor data to which NTSP was denied access, and without assessing NTSP's many other justifications discussed above. Certainly, the many justifications shown by NTSP (or would have been shown if NTSP had been given the payors' data) are plausible and cognizable under the antitrust laws.[254] Given Complaint Counsel's failure after a full trial to have shown any anticompetitive effect (much less any effects which could "easily be ascertained"), the ALJ should have engaged in a full rule of reason analysis.[255]

anticompetitive effect.[257] Complaint Counsel did not meet their initial burden to show any actual or likely adverse effects on competition, but even if they had, NTSP presented evidence of the procompetitive virtues of its conduct.[258] Once NTSP showed justification for the challenged conduct, Complaint Counsel had the burden to show a net anticompetitive effect – either that NTSP's legitimate objectives could have been achieved by reasonable, less-restrictive alternatives or that NTSP's proffered justifications were merely pretextual.[259] Complaint Counsel presented no evidence and made no arguments related to a less restrictive alternative or a pretext for NTSP's conduct. Therefore, the ALJ erred when he found that Complaint Counsel had met its burden in this case to show that NTSP's conduct unreasonably restrained trade.

VI. The ALJ erred when he found that the Federal Trade Commission has jurisdiction over NTSP because the participating physicians are not "members" of NTSP and none of NTSP's actions were in interstate commerce.

Under Section 5 of the FTC Act, the Commission has jurisdiction over NTSP only if NTSP is organized to carry on business for the pecuniary benefit of its members and NTSP's allegedly anticompetitive conduct was "in or affecting commerce."[260] The burden is on Complaint Counsel to show that the Commission has jurisdiction.[261] When this case is viewed in light of the evidence showing no physician collusion or involvement in NTSP's unilateral conduct and that NTSP's conduct towards payors

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[257] *Viazis*, 314 F.3d at 765-66.
[258] *See* Section IV.
[259] *See, e.g., Morris Communications Corp. v. PGA Tow, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004), *cert. denied,* 125 S. Ct. 87 (2004); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 n.4, 1413 (9th Cir. 1991).
[260] *See* 15 U.S.C. ' ' 44, 45.
[261] *See Cmty. Blood Bank v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969); *see also McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980); ID at 53.

amounted only to a justified refusal to deal, it is clear that there is no support for a finding of membership, pecuniary benefit, or interstate commerce in this case. Therefore, the ALJ erred when he found that the Commission had jurisdiction over NTSP in this proceeding.[262]

Under Texas law, NTSP is a memberless organization.[263] But even if there were members, no substantial part of NTSP's non-risk contracting activities provide pecuniary benefits to its participating physicians.[264] Further, because there was no showing of physician collusion in this case, the only potential basis for jurisdiction would be NTSP's unilateral refusals to act. A refusal to act does not promote the profit of NTSP's alleged members.

NTSP's refusals to act also could not be in or affecting commerce. The finding of jurisdiction rested only on irrelevant evidence. Reliance on the activities of any individual physicians is improper because there was no showing of physician collusion. Reliance on NTSP purchases unrelated to the alleged anticompetitive conduct in this case is also misplaced.[265]

VII. The ALJ erred when he entered an order that was not narrowly tailored to any antitrust violation properly found.

The relief provided in the Initial Decision and Order was not tailored to any violation supported by sufficient evidence and is therefore improper. A remedy must have a "reasonable relation to the unlawful practices found to exist."[267] Conduct by an entity like NTSP violates the antitrust laws only if the conduct creates collusion among competitors, *i.e.,* the physicians. The prohibitions imposed on NTSP are not so conditioned, and accordingly are not proper.[268] Because no collusion among physicians was ever shown by Complaint Counsel, the order set forth in the Initial Decision is not supported by a sufficient basis in the record.[269]

Even if one assumed *arguendo* that the antitrust violation was NTSP's negotiation of contracts, then the remedy would be not to allow NTSP to negotiate a contract – but that cannot be the remedy because NTSP clearly has the right to negotiate its own contracts.[270] And all of NTSP's actions were related only to its own contracts – there was no showing of collusion among the physicians and NTSP.[271]

Because there was no showing of collusion involving the physicians, the antitrust violation cannot be the physicians' acceptance of contracts from the payor. Therefore, the termination of the participating physicians' contracts is not warranted. A remedy that voids physicians' contracts is overly broad and inappropriate.

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[267] *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1956); *Gibson v. FTC*, 682 F.2d 554, 572 (5th Cir. 1982).
[268] *See Doyle v. FTC*, 356 F.2d 381 (5th Cir. 1966) (striking provisions of order addressing individuals because no evidence of violations in an individual capacity).
[269] *See Grove Labs. v. FTC*, 418 F.2d 489, 497-98 (5th Cir. 1969) (striking provisions of Commission's order not supported by substantial evidence).
[270] *See* Section II.B.2.
[271] *See* Section II.A.

Even assuming *arguendo* some violation during one of the contract discussions was shown, the termination of all of NTSP's contracts is not warranted because there was no violation shown applicable to all contracts. To the contrary, the only contracts involving the conduct specifically challenged by Complaint Counsel were highly-individualized situations with payors where NTSP's conduct was justified.[272] Most of NTSP's contracts were unaffected by the conduct challenged by Complaint Counsel; Complaint Counsel complained of only a few payors' contracts out of the 24 contracts offered by NTSP.

The order is also overbroad because it applies well beyond the only geographic market (city of Fort Worth) challenged by Complaint Counsel.

Further, even the termination of NTSP's participation in any affected payor contracts is not warranted because those contracts are already terminable at will by the payors (the allegedly harmed parties). In fact, of the only three contracts cited by Complaint Counsel, one has already been terminated – Aetna in 2001.[273] Cigna could have terminated its contract with NTSP in September 2004,[274] but it did not. The only remaining contract, with United, has been replaced since NTSP's allegedly anticompetitive conduct – United voluntarily approached NTSP and offered a new contract to *increase* the reimbursement rates.[275]

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[272] *See* RPF 329-442 for the circumstances surrounding contracts with United, Cigna, and Aetna.
[273] RPF 380.
[274] CX 809 at ¶ 1, *in camera*.
[275] *See* Van Wagner, Tr. 1746-48 (admitted only as to operative fact that the United offer was made). In fact, in the last two years, none of the non-risk payor offers to NTSP has been at or below either of the Board minimums. *See* Van Wagner, Tr. 1970-71.

Lastly, the order uses general language in prohibiting NTSP from participating in any combination or understanding among physicians to negotiate any term upon which a physician is willing to deal with a payor and further uses general language in prohibiting NTSP from facilitating any exchange of information among physicians concerning any term upon which a physician is willing to deal with a payor. Those provisions apply to non-price terms, and conflict with the Commission's Health Care Statements and applicable law.[276]

For all the reasons stated, the complaint against NTSP should be dismissed.

Respectfully submitted,

Gregory S. C. Huffman
William M. Katz, Jr.
Gregory D. Binns
Nicole L. Rittenhouse

Thompson & Knight L.L.P.
1700 Pacific Avenue, Suite 3300
Dallas TX 75201-4693
214.969.1700
214.969.1751 - Fax
gregory.huffman@tklaw.com
william.katz@tklaw.com
gregory.binns@tklaw.com
nicole.rittenhouse@tklaw.com

Attorneys for Respondent North Texas Specialty Physicians

[276] *See* note 94.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2005, I caused a copy of the foregoing document to be served upon the following persons:

Michael Bloom (via Federal Express and e-mail)
Senior Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

Barbara Anthony (via certified mail)
Director
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

Hon. D. Michael Chappell (2 copies via Federal Express)
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Office of the Secretary (original and 12 copies via Federal Express and e-mail)
Donald S. Clark
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, D.C. 20580

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

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Nicole L. Rittenhouse