

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE C**

¹ The Respondent and Respondent's counsel were served with the Final Order and the Opinion of the Commission on December 7, 2005, and the Final Order therefore became effective on the sixtieth day thereafter; that is, on February 6, 2006. *See* 15 U.S.C. § 5(g)(2); Commission Rule 3.56(a), 16 C.F.R. § 3.56(a) (2008). In an Order issued on January 20, 2006, the Commission stayed enforcement of the Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order until the Fifth Circuit issued its ruling disposing of the petition for review. In a second Order issued on January 20, 2006, the Commission modified the Opinion of the Commission in certain respects not relevant here.

² In its brief on remand, Respondent suggests that Federal Rule of Appellate Procedure 19, “Settlement of a Judgment Enforcing an Agency Order in Part,” might apply here. Response of NTSP to Complaint Counsel’s Proposal for Order Modification on Remand at 4 n. 11. As Complaint Counsel points out, that rule only applies when an agency

implemented through acceptance or rejection of a payor offer. The Court of Appeals affirmed this aspect of the Commission's decision. For example, in discussing NTSP's use of member polls on prospective fees and communication of those results to members, the Court of Appeals agreed with the Commission that those activities effectuated an agreement on terms of *dealing* with payors, stating that "[t]he FTC reasonably concluded that the 'physicians anticipated that any individual response [to NTSP's poll] would help to raise or lower the average fee for the group – an average that NTSP would then use in negotiating with payors.'" 528 F.3d at 363.

It is not necessary to prohibit this same type of conduct in two separate provisions. Accordingly, we have decided to delete the reference to agreements "to deal" from Paragraph II.A.2, as Complaint Counsel has suggested. This modification will eliminate the internal inconsistency in the provision to which the Court of Appeals refers, while leaving intact the prohibition against NTSP involvement in collective decisions by physician members on whether, or on what terms, to participate in a payor network in Paragraph II.A.3. Respondent does not take issue with this proposed modification (other than to argue more generally that the entire provision should be deleted, which we discuss below).

The Court of Appeals' second concern is that Paragraph II.A.2 is overbroad, stating that it could compel NTSP to messe

³ Complaint Counsel offered an alternative proposal to modify Paragraph II.A.2 that

IT IS FURTHER ORDERED THAT the stay in enforcement of the Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order be, and it hereby is, rescinded.

By the Commission.

Donald S. Clark
Secretary

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ISSUED: September 12, 2008