

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

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

**COMPLAINT COUNSEL’S RESPONSE AND OBJECTIONS TO  
NORTH TEXAS SPECIALTY PHYSICIANS’ FIRST REQUEST  
FOR ADMISSIONS TO COMPLAINT COUNSEL**

Pursuant to § 3.32(b) of the Federal Trade Commission’s Rules of Practice for Adjudicative Proceedings (“Rules of Practice”), 16 C.F.R. § 3.32(b) Complaint Counsel hereby submits this Response and Objections to North Texas Specialty Physicians' First Request for Admissions to Complaint Counsel issued on November 20, 2003. Each admission is restated below in italics, followed by Complaint Counsel’s objections and responses. Provision of a response to any request shall not constitute a waiver of any applicable objection, privilege, or other right, and, unless otherwise specifically stated, Complaint Counsel denies each of Respondent’s requests.

General Objections

1. Complaint Counsel objects to the Admissions to the extent that they seek information that may be protected by the work product doctrine, attorney-client privilege, law enforcement privilege, deliberative process privilege, investigatory privilege, government informer privilege and other similar bases for withholding documents and information.

2. Complaint Counsel objects to the Admissions to the extent that they seek to impose obligations broader than those required or authorized by the Rules of Practice or any applicable order or rule of this Court.
3. Complaint Counsel objects to the Admissions to the extent that they are unduly burdensome or require unreasonable efforts on behalf of Complaint Counsel, or efforts that are already undertaken.
4. Complaint Counsel objects to the Admissions, including the Definitions and Instructions, to the extent that Respondent objects to or does not undertake the same burdens in discovery.

These General Objections are incorporated into each specific response below as if set forth fully therein. In those instances in which Complaint Counsel responds by noting that it can neither admit nor deny the request, the information Complaint Counsel currently possesses is inadequate to provide a more substantive response, and Complaint Counsel is making reasonable inquiry with respect to such request. Finally, Complaint Counsel notes that discovery is ongoing and reserves the right to supplement these responses as necessary.

#### Objections and Responses to Individual Admissions

*Request No. 1: Admit that contracts under which NTSP's physicians share risk are not the subject of this adjudicative proceeding.*

**Answer:** Complaint Counsel objects to this Request for Admission insofar as the phrase “physicians share risk,” as used in Respondent’s Request, is vague and ambiguous. Complaint Counsel admits that arrangements solely for the provision of substantial medical care in return

for which NTSP physicians collectively share capitation risk is not the subject of this adjudicative proceeding, except insofar as NTSP may have engaged in conduct in connection with risk-sharing by physicians that may have affected the provision of fee-for-service medicine by NTSP physicians. Complaint Counsel avers that related arrangements for the provision of fee-for-service care are or may be a subject of this adjudicative proceeding, as are or may be fee-for-service contracts that have some shared risk component, as in the provision of incentives for meeting or exceeding specified benchmarks.

*Request No. 2: Admit that you claim this adjudicative proceeding is about horizontal price fixing.*

**Answer:** Complaint Counsel admits that it claims this adjudicative proceeding is about horizontal price fixing, among other things. Complaint Counsel avers that this adjudicative proceeding also is about the adoption of various facilitating practices, concerted refusals to deal or to deal only on specified terms, concerted departicipations from payor agreements, and other anticompetitive conduct as may be embraced by the Commission's complaint.

*Request No. 3: Admit that you claim the conduct of NTSP is per se unlawful.*

**Answer:** Complaint Counsel admits that it claims that the conduct of NTSP is per se unlawful. Complaint Counsel avers that, in the alternative, the conduct of NTSP is unlawful under a truncated rule of reason analysis. Complaint Counsel further avers however, that it will offer such proof as is necessary to establish the unlawfulness of NTSP's conduct under any standard of liability that the Court may deem applicable.

*Request No. 4: Admit that you claim the conduct of NTSP should not be analyzed under a rule of reason theory of liability.*

**Answer:** Complaint Counsel admits that it claims that NTSP's conduct should not be analyzed under a rule of reason theory of liability. Complaint Counsel avers that the conduct of NTSP is unlawful under a per se rule or a truncated rule of reason analysis. Complaint Counsel further avers, however, that it will offer such proof as is necessary to establish the unlawfulness of NTSP's conduct under any standard of liability that the Court may deem applicable.

*Request No. 5: Admit that competing physicians can properly take concerted actions like those complained about in this adjudicative proceeding if those actions do not have the effect of fixing or facilitating the fixing of prices.*

**Answer:** Complaint Counsel denies that competing physicians can properly take concerted actions like those complained about in this adjudicative proceeding if those actions do not have the effect of fixing or facilitating the fixing of prices. Complaint Counsel avers that competing physicians engaged in concerted actions like those complained about in this adjudicative proceeding are engaged in conduct that is plainly unlawful, and with respect to which proof of actual effects on prices charged need not be provided pursuant to the per se rule or a truncated rule of reason analysis. Complaint Counsel further avers that, irrespective of the standard of liability that the Court may deem applicable, competing physicians cannot properly engage in concerted actions like those complained about in this adjudicative proceeding if the result is to fix prices (by which we mean to interfere in any way with the market-pricing mechanism) or

other economic terms; facilitate the fixing of prices or other economic terms; reduce output or variety of goods or services; increase information, transaction, or contracting costs of payors; or otherwise restrain competition without adequate and cognizable justification.

*Request No. 6: Admit that NTSP is not an essential facility.*

**Answer:** Complaint Counsel objects to this Request for Admission insofar as the phrase “essential facility,” as used in Respondent’s Request, is vague and ambiguous. Complaint Counsel admits that this suit does not complain of monopolization, attempt to monopolize, or conspiracy to monopolize, and that NTSP was not under a legal obligation to act in the manner of a public utility. Complaint Counsel avers that proof that NTSP is “an essential facility” is not an element of the violation alleged in the Commission’s complaint.

*Request No. 7: Admit that no conspiratorial meetings occurred between NTSP and its physicians.*

**Answer:** Complaint Counsel objects to this Request for Admission insofar as the phrase “conspiratorial meetings,” as used in Respondent’s Request, is vague and ambiguous. Furthermore, Complaint Counsel lacks sufficient knowledge to admit or deny that “no conspiratorial meetings occurred between NTSP and its physicians.” Complaint Counsel avers that the conduct of NTSP itself, insofar as it relates to the pricing of physician services, is itself concerted action. In addition, Complaint Counsel avers that NTSP took various actions relating to physicians’ pricing—such as NTSP’s polling of, and dissemination of information relating to, physicians’ future price demands, its establishment of NTSP minimum contract prices for

physicians' services, its negotiation with payors on the basis of those minimum contract prices, refusals and threatened refusals to deal with payors or to deal with payors only under specified terms, and de participations and threatened de participations from payor contracts. Complaint Counsel avers that all meetings of NTSP, of NTSP and some or all of its physicians, and of some or all NTSP physicians, that relate to these and similar matters involve concerted action.

Dated: \_\_\_\_\_, 2003

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Christine Rose, hereby certify that on December 1, 2003, I caused a copy of Complaint Counsel's Response and Objections to North Texas Specialty Physicians' First Request for Admissions to Complaint Counsel to be served upon the following persons:

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Christine Rose  
Honors Paralegal