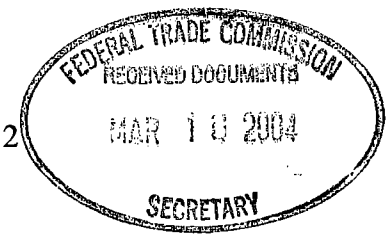
[PUBLIC RECORD]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of North Texas Specialty Physicians, a corporation.

Docket No. 9312

NORTH TEXAS SPECIALTY PHYSICIANS' SEPARATE STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Rule of Practice 3.24(a), Respondent North Texas Specialty Physicians submits the following statement of material facts as to which there is no genuine issue:

1. Complaint Counsel alleges that NTSP has participated in collusion among its participating physicians in the "Fort Worth area," which the Complaint defines as "the Dallas-Fort Worth metropolitan area, mostly Fort Worth and the 'Mid Cities.'"[1]

2. NTSP is involved in both risk contracts and non-risk contracts.[2]

3. The Complaint alleges that "NTSP periodically polls its participating physicians" to estimate at what rate levels a majority of the physicians, including those on its risk-capitation panel (the "Risk Panel"), will likely be interested in non-risk contracts.[3]

4. NTSP calculates the mean, median, and mode of the Risk Panel physicians' poll responses separately for HMO and for PPO types of offers.[4]

5. [redacted][5]

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[1] Complaint ¶ 5. A copy of the Complaint is attached as Exhibit 1.

[2] *Id.* ¶ 14.

[3] *See id.* ¶ 17 ("NTSP periodically polls its participating physicians, asking each to disclose the minimum fee, typically stated in terms of a percentage of RBRVS, that he or she would accept in return for the provision of medical services pursuant to an NTSP-payor agreement.").

[4] *See id.* ¶ 17; Deposition of Karen Van Wagner, November 19, 2003, at 16-19. Copies of the relevant excerpts from this deposition are attached as Exhibit 2.

[5] [redacted]; Deposition of Tom Deas, M.D., January 26, 2004, at 37-38; Deposition of Jack McCallum, M.D., at 121-22 & 124; Deposition of Ira Hollander, M.D., at 27-28; Deposition of Harry Rosenthal, Jr., M.D. ("Rosenthal Deposition"), at 25. Copies of the relevant excerpts from these depositions are attached as Exhibits 3, 4, 5, 6, and 7, respectively.

6. [redacted][6]

7. [redacted][7]

8. [redacted][8]

9. NTSP's business model is designed to achieve efficiencies and quality improvements through clinical integration techniques used primarily on its risk contracts and then allowing the Risk Panel and other participating physicians to carry over those same techniques to their non-risk medical care.[9]

10. [redacted][10]

11. NTSP has no power to bind and does not bind any participating physician or physician group to a non-risk contract.[11]

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6 [redacted]

7 [redacted]

8 [redacted]

9 Deposition of William Vance, M.D., Volume 1, at 117-118; Deposition of William Vance, M.D., Volume 2, at 287-88. Copies of the relevant excerpts from these depositions are attached as Exhibit 11.

10 [redacted]

11 Deposition of H.E. Frech, Ph.D. ("Frech Deposition") at 209. Copies of the relevant excerpts from this deposition are attached as Exhibit 14.

12. After NTSP's board sets the threshold rate levels for its involvement, any non-risk offer presented by a payor to NTSP and in which NTSP chooses to become involved as a contracting party is always then messengered to NTSP's participating physicians.[12]

13. Each physician or physician group then makes an independent decision whether to accept or reject the offer.[13]

14. [redacted][14]

15. Complaint Counsel believes that NTSP must messenger every payor offer to its participating physicians,[15] regardless of whether or not the offer (1) fits within NTSP's business model, (2) creates a risk of noncompliance under Texas law for NTSP or the participating physicians, (3) creates malpractice or other exposure for NTSP or the physicians based on network-design inadequacies, or (4) involves a payor that is financially weak or likely not to pay promptly.

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[12] *See id.* at 209.

[13] *Id.* at 209; Deposition of Tom Quirk ("Quirk Deposition") at 54. Copies of the relevant excerpts from Mr. Quirk's deposition are attached as Exhibit 15.

[14] [redacted]

[15] *See* Exhibit 1 [Complaint] ¶ 11 (stating that messenger model "will not avoid horizontal agreement" if the messenger "facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the agent's, or the participants', opinion on the appropriateness, or lack thereof, of the offer"); *Id.* ¶ 18 (identifying as alleged illegal act or practice NTSP's statement that it "will not enter into or otherwise forward to its participating physicians any payor offer that does not satisfy those fee minimums").

16. Complaint Counsel's economic expert, Dr. H. E. Frech, admits that messengering is essentially a ministerial task that anyone, including payors, can easily accomplish.[16]

17. [redacted][17]

18. Complaint Counsel challenges NTSP's disclosure to its panel of participating physicians of the threshold rate levels for non-risk HMO and PPO offers established by NTSP's board of directors.[18]

19. [redacted][19]

20. [redacted][20]

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[16] Exhibit 14 [Frech Deposition] at 89-91.

[17] [redacted]

[18] Exhibit 1 [Complaint] ¶ 17 ("NTSP then reports these measures back to its participating physicians, confirming to the participating physicians that these averages will constitute the minimum fee that NTSP will entertain as the basis for any contract with a payor.").

[19] [redacted]

[20] [redacted]; Deposition of Dave Roberts at 44-48; Deposition of Mark Collins, M.D. ("Collins Deposition") at 6-9. Copies of the relevant excerpts from these depositions are attached as Exhibits 19, 20, and 21, respectively.

21. One of MSM's former executives is currently serving a prison term for some of that malfeasance.[21]

22. [redacted][22]

23. [redacted][23]

24. Dr. Frech admits that he knows of no evidence that any physician has ever colluded with anyone else or has ever refused to entertain any payor offer which was tendered to him or her directly by a payor or through another IPA.[24]

25. Complaint Counsel claims that NTSP's conduct is unlawful only under a *per se* or truncated rule-of-reason analysis.[25]

26. Complaint Counsel alleges that NTSP's conduct should be judged as *per se* unlawful because "this adjudicative proceeding is about horizontal price fixing, among other things."[26]

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[21] Press Release, United States Department of Justice, Former Accounting Manager for City of Grand Prairie Sentenced to 8 Years (Nov. 12, 2003), available at http://www.usdoj.gov/usao/txn/PressRel03/miller_sen_pr.html. A copy of this document is attached as Exhibit 22.

[22] Exhibit 19 [Jagmin Deposition] at 74; [redacted]

[23] [redacted]

[24] Exhibit 14 [Frech Deposition] at 75-76, 80, 97, 155, 209.

[25] Complaint Counsel's Response and Objections to North Texas Specialty Physicians' First Request for Admissions to Complaint Counsel at 3 ("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."). A copy of this document is attached as Exhibit 24.

[26] *Id.*

27. Complaint Counsel, after having been ordered to respond to contention interrogatories, admits that there is no direct evidence of any agreement between NTSP and a participating physician to reject a payor offer based on price or any other competitively significant term.[27]

28. Dr. Frech admits that he cannot identify any specific evidence showing that any of the following things occurred:

(a) one or more participating physicians agreed with each other to reject a non-risk payor offer;[28]

(b) any participating physician and any other entity agreed to reject a non-risk payor offer;[29]

(c) any participating physician rejected a non-risk payor offer based on a power of attorney granted to NTSP;[30]

(d) any participating physician refused to negotiate with a payor prior to a non-risk offer being messengered by NTSP;[31]

(e) any participating physician knew what another physician was going to do in response to a non-risk payor offer;[32]

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[27] Complaint Counsel's Second Supplemental Responses to Respondent's First Set of Interrogatories at 1-2 ("Complaint Counsel is not aware of communications between NTSP and any other person or entity taking the form of an express request by NTSP that a physician reject a specific payor offer, to which any physician expressly replied, "I agree to reject this offer."). A copy of this document is attached as Exhibit 25.

[28] Exhibit 14 [Frech Deposition] at 75-76.

[29] *Id.*

[30] *Id.* at 80.

[31] *Id.* at 75-76.

[32] *Id.* at 155.

(f) any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;[33] or

(g) any participating physician gave up his or her right to independently accept or reject a non-risk payor offer.[34]

29. [redacted][35]

30. NTSP's participating physicians do not rely on the mean/median/mode of NTSP's aggregated poll results and make their own independent decisions whether to accept an offer individually,[36] and, in some cases, accept offers below the rates established by NTSP's board.[37]

31. Dr. Frech testified that the response rate for the poll was very poor; only a small percentage (in some cases less than 10%) of the participating physicians respond at the rates that are actually used as thresholds by NTSP's board.[38]

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[33] *Id.* at 209.

[34] *Id.*

[35] [redacted]

[36] Exhibit 7 [Rosenthal Deposition] at 24; Deposition of John Johnson, M.D. ("Johnson Deposition") at 25-26, 30; Exhibit 21 [Collins Deposition] at 36-37 (free to contract directly or through another IPA). Copies of the relevant excerpts from Dr. Johnson's deposition are attached as Exhibit 27.

[37] Exhibit 7 [Rosenthal Deposition] at 22-23; Exhibit 27 [Johnson Deposition] at 25, 27.

[38] Exhibit 14 [Frech Deposition] at 215-16.

32. Not all participating physicians respond to the poll,[39] and many physicians do not follow their own poll responses.[40]

33. Providing only the mean, median, and mode of the poll responses does not tell a participating physician what any other physician will do with respect to a payor offer.[41]

34. Dr. Frech admits that, assuming there was a conspiracy, NTSP has no effective method to police compliance.[42]

35. Dr. Frech admits that there are many reasons an entity might refuse to deal with another entity, including legal concerns or even not liking the other entity.[43]

36. Dr. Frech admits that the collection and dissemination of market information, including market prices, can potentially benefit competition.[44]

37. Dr. Frech believes that payors conduct surveys and know what other payors are offering in a given market.[45]

38. Dr. Frech admits that physicians commonly look to IPAs to handle discussions with a payor as to the legal terms of a contract,[46] and that IPAs save costs by eliminating multiplicative legal contractual reviews by individual physicians.[47]

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[39] *Id.* at 149, 215-18

[40] *Id.* at 82, 215-18.

[41] *Id.* at 149, 155.

[42] *Id.* at 81, 237-40.

[43] *Id.* at 92.

[44] *Id.* at 155-58.

[45] *Id.* at 156.

[46] *Id.* at 80.

[47] *See id.* at 167-68 (discussing diseconomies from having each practice group conduct its own contract review).

39. Dr. Frech admits that payors usually have to offer a higher price to get a majority or more of physicians to participate in a contract.[48]

40. Higher prices are especially important to attract physicians that are more sought after and perceived to be of higher quality.[49]

41. Dr. Frech admits that, even where unit costs may be higher in a payor contract, consumers may benefit because of lower utilization rates by physicians that decrease the total cost of care.[50]

42. Dr. Frech admits that NTSP generates efficiencies and improves quality of care through spillover from its risk contracts to the non-risk contracts that are the subject of this adjudicative proceeding.[51]

43. NTSP's maintaining continuity of personnel — in this case, the participating physicians — is important to achieving these efficiencies.[52]

44. [redacted][53]

[48] *Id.* at 182-83.

[49] *Id.* at 202.

[50] *See id.* at 109.

[51] *Id.* at 104-05, 110-17, 240-41.

[52] *Id.* at 104-05.

[53] [redacted]

45. Dr. Frech admits that he has not defined any relevant market.[54]

46. Dr. Frech admits that he has not calculated any concentration ratios.[55]

47. Dr. Frech admits that, although he has done zip code analysis on physician practices in other cases, he has not done that type of analysis in this case.[56]

48. Dr. Frech admits that he has not performed any type of entry analysis in this case.[57]

49. Dr. Frech admits that geographic markets tend to become larger the more specialized the specialty.[58]

50. Dr. Frech admits that the existence of a significant population in eastern Tarrant County (*i.e.*, the Mid-Cities area) on the border of Dallas County would act to tie Dallas and Tarrant Counties together.[59]

51. [redacted][60]

52. Dr. Frech admits that there can be significant crossovers of services between specialties.[61]

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[54] Exhibit 14 [Frech Deposition] at 120.

[55] *Id.* at 136.

[56] *See id.* at 134 (admitting that he has performed analysis in another lawsuit, but not this one).

[57] *Id.* at 142.

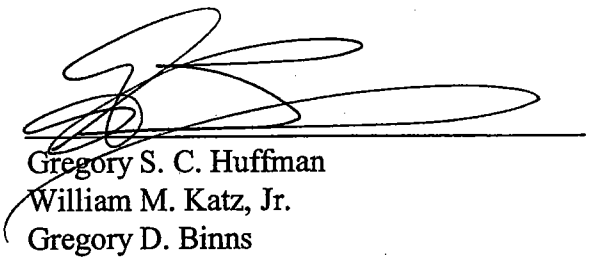
[58] *Id.* at 132-33.

[59] *Id.* at 130-31.

[60] [redacted]

[61] Exhibit 14 [Frech Deposition] at 121-25.

Respectfully submitted,



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Attorneys for North Texas Specialty Physicians

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on March 9, 2004, 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
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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 2 copies via Federal Express)
Donald S. Clark
Federal Trade Commission
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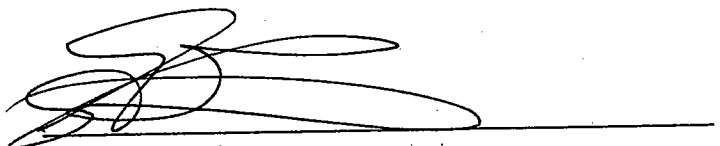
Washington, D.C. 20580

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



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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
North Texas Specialty Physicians, Respondent.	)	Docket No. 9312

PROTECTIVE ORDER
GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

1. "Matter" means the matter captioned *In the Matter of North Texas Specialty Physicians*, Docket Number 9312, pending before the Federal Trade Commission, and all subsequent appellate or other review proceedings related thereto.

2. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this Matter.

3. "North Texas Specialty Physicians" means North Texas Specialty Physicians, a non-profit

corporation organized, existing, and doing business under and by virtue of the laws of Texas, with its office principal place of business at 1701 River Run Road, Suite 210, Fort Worth, TX 76107.

4. "Party" means either the FTC or North Texas Specialty Physicians.

5. "Respondent" means North Texas Specialty Physicians.

6. "Outside Counsel" means the law firms that are counsel of record for Respondent in this Matter and their associated attorneys; or other persons regularly employed by such law firms, including legal assistants, clerical staff, and information management personnel and temporary personnel retained by such law firm(s) to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter; provided that any attorney associated with Outside Counsel shall not be a director, officer or employee of Respondent. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.

7. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. For purposes of Confidential Discovery Material of a Third Party that either is in the possession, custody or control of the FTC or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided the Confidential Discovery Material to the FTC. The Producing Party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of the FTC.

8. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a party to this Matter and their employees, directors, officers, attorneys

and agents.

9. "Expert/Consultant" means experts or other persons who are retained to assist Complaint Counsel or Respondent's counsel in preparation for trial or to give testimony at trial.

10. "Document" means the complete original or a true, correct and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored or reproduced, including, but not limited to, any writing, letter, envelope, telegraph meeting minute, e-mails, e-mail chains, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, tariff, tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, desk pad, telephone message slip, note of interview or communication or any other data compilation, including all drafts of all such documents. "Document" also includes every writing, drawing, graph, chart, photograph, phono record, tape, compact disk, video tape, and other data compilations from which information can be obtained, and includes all drafts and all copies of every such writing or record that contain any commentary, notes, or marking whatsoever not appearing on the original.

11. "Discovery Material" includes without limitation deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, documents produced pursuant to compulsory process or voluntarily in lieu thereof, and any other documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter.

12. "Confidential Discovery Material" means all Discovery Material that is designated by a Producing Party as confidential and that is covered by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and Commission Rule of Practice § 4.10(a)(2), 16 C.F.R. § 4.10(a)(2); or Section 26(c)(7) of the Federal Rules of Civil Procedure and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which to Respondent or Third Parties would cause substantial commercial harm or personal embarrassment to the disclosing party. The following is a nonexhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product roadmaps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose, except that with notice to the Producing Party, a Party may apply to the Administrative Law Judge for approval of the use or disclosure of any Discovery Material, or information derived therefrom, for any other proceeding. Provided,

however, that in the event that the Party seeking to use Discovery Material in any other proceeding is granted leave to do so by the Administrative Law Judge, it will be required to take appropriate steps to preserve the confidentiality of such material. Additionally, in such event, the Commission may only use or disclose Discovery Material as provided by (1) its Rules of Practice, Sections 6(f) and 21 of the Federal Trade Commission Act and any cases so construing them; and (2) any other legal obligation imposed upon the Commission. The Parties, in conducting discovery from Third Parties, shall attach to such discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

2. This paragraph concerns the designation of material as "Confidential" and "Restricted Confidential, Attorney Eyes Only."

(a) Designation of Documents as CONFIDENTIAL - FTC Docket No. 9312.

Discovery Material may be designated as Confidential Discovery Material by Producing Parties by placing on or affixing, in such manner as will not interfere with the legibility thereof, the notation "CONFIDENTIAL - FTC Docket No. 9312" (or other similar notation containing a reference to this Matter) to the first page of a document containing such Confidential Discovery Material, or, by Parties by instructing the court reporter to denote each page of a transcript containing such Confidential Discovery Material as "Confidential." Such designations shall be made within fourteen days from the initial production or deposition and constitute a good-faith representation by counsel for the Party or Third Party making the designations that the document constitutes or contains "Confidential Discovery Material."

(b) Designation of Documents as "RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY – FTC Docket No. 9312."

In order to permit Producing Parties to provide additional protection for a limited number of documents that contain highly sensitive commercial information, Producing Parties may designate documents as "Restricted Confidential, Attorney Eyes Only, FTC Docket No. 9312" by placing on or affixing such legend on each page of the document. It is anticipated that documents to be designated Restricted Confidential, Attorney Eyes Only may include certain marketing plans, sales forecasts, business plans, the financial terms of contracts, operating plans, pricing and cost data, price terms, analyses of pricing or competition information, and limited proprietary personnel information; and that this particularly restrictive designation is to be utilized for a limited number of documents. Documents designated Restricted Confidential, Attorney Eyes Only may be disclosed to Outside Counsel, other than an individual attorney related by blood or marriage to a director, officer, or employee or Respondent; Complaint Counsel; and to Experts/Consultants (paragraph 4(c), hereof). Such materials may not be disclosed to Experts/Consultants or to witnesses or deponents at trial or deposition (paragraph 4(d) hereof), except in accordance with subsection (c) of this paragraph 2. In all other respects, Restricted Confidential, Attorney Eyes Only material shall be treated as Confidential Discovery Material and all references in this Protective Order and in the exhibit hereto to Confidential Discovery Material shall include documents designated Restricted Confidential, Attorney Eyes Only.

(c) Disclosure of Restricted Confidential, Attorney Eyes Only Material To Witnesses or Deponents at Trial or Deposition.

If any Party desires to disclose Restricted Confidential, Attorney Eyes Only material to witnesses or deponents at trial or deposition, the disclosing Party shall notify the Producing Party of its desire to disclose such material. Such notice shall identify the specific individual to whom the Restricted Confidential, Attorney Eyes Only material is to be disclosed. Such identification shall include, but not be limited to, the full name and professional address and/or affiliation of the identified individual. The Producing Party may object to the disclosure of the Restricted Confidential, Attorney Eyes Only material within five business days of receiving notice of an intent to disclose the Restricted Confidential, Attorney Eyes Only material to an individual by providing the disclosing Party with a written statement of the reasons for objection. If the Producing Party timely objects, the disclosing Party shall not disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual, absent a written agreement with the Producing Party, order of the Administrative Law Judge or ruling on appeal. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified individual. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 6(b) of this Protective Order. If the Producing Party does not object to the disclosure of Restricted Confidential, Attorney Eyes Only material to the identified individual within five business days, the disclosing Party may disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual.

(d) Disputes Concerning Designation or Disclosure of Restricted Confidential, Attorney Eyes Only Material.

Disputes concerning the designation or disclosure of Restricted Confidential, Attorney Eyes Only material shall be resolved in accordance with the provisions of paragraph 6.

(e) No Presumption or Inference.

No presumption or other inference shall be drawn that material designated Restricted Confidential, Attorney Eyes Only is entitled to the protections of this paragraph.

(f) Due Process Savings Clause.

Nothing herein shall be used to argue that a Party's right to attend the trial of, or other proceedings in, this Matter is affected in any way by the designation of material as Restricted Confidential, Attorney Eyes Only.

3. All documents heretofore obtained by the Commission through compulsory process or voluntarily from any Party or Third Party, regardless of whether designated confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews and depositions, that were obtained during the pre-complaint stage of this Matter shall be treated as "Confidential," in accordance with paragraph 2(a) on page five of this Order. Furthermore, Complaint Counsel shall, within five business days of the effective date of this Protective Order, provide a copy of this Order to all Parties or Third Parties from whom the Commission obtained documents during the pre-Complaint investigation and shall notify those Parties and Third Parties that they shall have thirty days from the effective date of this Protective Order to determine whether their materials qualify for the higher protection of Restricted Confidential, Attorney Eyes Only and to so designate such documents.

4. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone except to:

(a) Complaint Counsel and the Commission, as permitted by the Commission's Rules of Practice;

(b) Outside Counsel, other than an individual attorney related by blood or marriage to a director, officer, or employee or Respondent;

(c) Experts/Consultants (in accordance with paragraph 5 hereto);

(d) witnesses or deponents at trial or deposition;

(e) the Administrative Law Judge and personnel assisting him;

(f) court reporters and deposition transcript reporters;

(g) judges and other court personnel of any court having jurisdiction over any appeal proceedings involving this Matter; and

(h) any author or recipient of the Confidential Discovery Material (as indicated on the face of the document, record or material), and any individual who was in the direct chain of supervision of the author at the time the Confidential Discovery Material was created or received.

5. Confidential Discovery Material, including material designated as "Confidential" and "Restricted Confidential, Attorney Eyes Only," shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant, unless such Expert/Consultant agrees in writing:

(a) to maintain such Confidential Discovery Material in locked rooms or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;

(b) to return such Confidential Discovery Material to Complaint Counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of the Expert/Consultant's assignment or retention or the conclusion of this Matter;

(c) to not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

(d) to use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

6. This paragraph governs the procedures for the following specified disclosures and challenges to designations of confidentiality.

(a) Challenges to Confidentiality Designations.

If any Party seeks to challenge a Producing Party's designation of material as Confidential Discovery Material or any other restriction contained within this Protective Order, the challenging Party shall notify the Producing Party and all Parties to this action of the challenge to such designation. Such notice shall identify with specificity (i.e., by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation

within five business days of receiving notice of the confidentiality challenge by providing the challenging Party and all Parties to this action with a written statement of the reasons for the designation. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party, preserving its rights, and the challenging Party shall meet and confer in good faith in an attempt to negotiate changes to any challenged designation. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the challenging Party may make written application to the Administrative Law Judge as provided by paragraph 6(b) of this Protective Order. If the Producing Party does not preserve its rights within five business days, the challenging Party may alter the designation as contained in the notice. The challenging Party shall notify the Producing Party and the other Parties to this action of any changes in confidentiality designations.

Regardless of confidential designation, copies of published magazine or newspaper articles, excerpts from published books, publicly available tariffs, and public documents filed with the Securities and Exchange Commission or other governmental entity may be used by any Party without reference to the procedures of this subparagraph.

(b) Resolution of Disclosure or Confidentiality Disputes.

If negotiations under subparagraph 6(a) of this Protective Order have failed to resolve the issues, a Party seeking to disclose Confidential Discovery Material or challenging a confidentiality designation or any other restriction contained within this Protective Order may make written

application to the Administrative Law Judge for relief. Such application shall be served on the Producing Party and the other Party, and be accompanied by a certification that the meet and confer obligations of this paragraph have been met, but that good faith negotiations have failed to resolve outstanding issues. The Producing Party and any other Parties shall have five business days to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the Administrative Law Judge of the proprietary of a requested disclosure or change in designation.

7. Confidential Discovery Material shall not be disclosed to any person described in subparagraphs 4(c) and 4(d) of this Protective Order until such person has executed and transmitted to Respondent's counsel or Complaint Counsel, as the case may be, a declaration or declarations, as applicable, in the form attached hereto as Exhibit "A," which is incorporated herein by reference. Respondent's counsel and Complaint Counsel shall maintain a file of all such declarations for the duration of the litigation. Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter, and all such copies or reproductions shall be subject to the terms of this Protective Order. If the duplication process by which copies or reproductions of Confidential Discovery Material are made does not preserve the confidentiality designations that appear on the original documents, all such copies or reproductions shall be stamped "CONFIDENTIAL – FTC Docket No. 9312."

8. The Parties shall not be obligated to challenge the propriety of any designation or

treatment of information as confidential and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to persons not referred to in paragraph 4. If Confidential Discovery Material is produced without the legend attached, such document shall be treated as Confidential from the time the Producing Party advises Complaint Counsel and Respondent's counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked documents.

9. If the FTC: (a) receives a discovery request that may require the disclosure by it of a Third Party's Confidential Discovery Material; or (b) intends to or is required to disclose, voluntarily or involuntarily, a Third Party's Confidential Discovery Material (whether or not such disclosure is in response to a discovery request), the FTC promptly shall notify the Third Party of either receipt of such request or its intention to disclose such material. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Third Party at least five business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Third Party of its rights hereunder.

10. If any person receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Confidential Discovery Material, the subpoena recipient promptly shall notify the Producing Party of receipt of such request. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Producing Part at least five business days before production, and shall include a copy of this Protective Order and a cover letter that

will apprise the Producing Party of its rights hereunder. The Producing Party shall be solely responsible for asserting any objection to the requested production. Nothing herein shall be construed as requiring the subpoena recipient or anyone else covered by this Order to challenge or appeal any such order requiring production of Confidential Discovery Material, or to subject itself to any penalties for noncompliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission.

11. This Order governs the disclosure of information during the course of discovery and does not constitute an *in camera* order as provided in Section 3.45 of the Commission's Rules of Practice, 16 C.F.R. § 3.45.

12. Nothing in this Protective Order shall be construed to conflict with the provisions of Sections 6, 10, and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 50, 57b-2, or with Rules 3.22, 3.45 or 4.11(b)-(e), 16 C.F.R. §§ 3.22, 3.45 and 4.11(b)-(e).[1]

Any Party or Producing Party may move at any time for *in camera* treatment of any Confidential Discovery Material or any portion of the proceedings in this Matter to the extent necessary for proper disposition of the Matter. An application for *in camera* treatment must meet the standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999) and *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000) and must be supported by a

[1] The right of the Administrative Law Judge, the Commission, and reviewing courts to disclose information afforded *in camera* treatment or Confidential Discovery Material, to the extent necessary for proper disposition of the proceeding, is specifically reserved pursuant to Rule 3.45, 16 C.F.R. § 3.45.

declaration or affidavit by a person qualified to explain the nature of the documents.

13. At the conclusion of this Matter, Respondent's counsel shall return to the Producing Party, or destroy, all originals and copies of documents and all notes, memoranda, or other papers containing Confidential Discovery Material which have not been made part of the public record in this Matter. Complaint Counsel shall dispose of all documents in accordance with Rule 4.12, 16 C.F.R. § 4.12.

14. The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party or further order of the Administrative Law Judge hearing this Matter, continue to be binding after the conclusion of this Matter.

15. This Protective Order shall not apply to the disclosure by a Producing Party or its Counsel of such Producing Party's Confidential Discovery Material to such Producing Party's employees, agents, former employees, board members, directors, and officers.

16. The production or disclosure of any Discovery Material made after entry of this Protective Order which a Producing Party claims was inadvertent and should not have been produced or disclosed because of a privilege will not automatically be deemed to be a waiver of any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of such claimed inadvertent production or disclosure, the following procedures shall be followed:

(a) The Producing Party may request the return of any such Discovery

Material within twenty days of discovering that it was inadvertently produced or disclosed (or inadvertently produced or disclosed without redacting the privileged content). A request for the return of any Discovery Material shall identify the specific Discovery Material and the basis for asserting that the specific Discovery Material (or portions thereof) is subject to the attorney-client privilege or the work product doctrine and the date of discovery that there had been an inadvertent production or disclosure.

(b) If a Producing Party requests the return, pursuant to this paragraph, of any such Discovery Material from another Party, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control—including all copies in the possession of experts, consultants, or others to whom the Discovery Material was provided—unless the Party asked to return the Discovery Material in good faith reasonably believes that the Discovery Material is not privileged. Such good faith belief shall be based on either (i) a facial review of the Discovery Material, or (ii) the inadequacy of any explanations provided by the Producing Party, and shall not be based on an argument that production or disclosure of the Discovery Material waived any privilege. In the event that only portions of the Discovery Material contain privileged subject matter, the Producing Party shall substitute a redacted version of the Discovery Material at the time of making the request for the return of the requested Discovery Material.

(c) Should the Party contesting the request to return the Discovery Material pursuant to this paragraph decline to return the Discovery Material, the Producing Party seeking return of the Discovery Material may thereafter move for an order compelling the return of the

Discovery Material. In any such motion, the Producing Party shall have the burden of showing that the Discovery Material is privileged and that the production was inadvertent.

17. Entry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provisions of this Protective Order.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 16, 2003

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
North Texas Specialty Physicians, Respondent.	)	Docket No. 9312

DECLARATION CONCERNING PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

I, [NAME], hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the "Protective Order Governing Discovery Material" ("Protective Order") issued by Administrative Law Judge D. Michael Chappell on October 16, 2003, in connection with the above-captioned matter. I understand the restrictions on my use of any Confidential Discovery Material (as this term is used in the Protective Order) in this action and I agree to abide by the Protective Order.

3. I understand that the restrictions on my use of such Confidential Discovery Material include:

   a. that I will use such Confidential Discovery Material only for the purposes of preparing for this proceeding, and hearing(s) and any appeal of this proceeding and for no other purpose;

   b. that I will not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

   c. that upon the termination of my participation in this proceeding I will promptly return all Confidential Discovery Material, and all notes, memoranda, or other papers containing Confidential Discovery Material, to Complaint Counsel or Respondent's counsel, as appropriate.

4. I understand that if I am receiving Confidential Discovery Material as an Expert/Consultant, as that term is defined in this Protective Order, the restrictions on my use of Confidential Discovery Material also include the duty and obligation:

a. to maintain such Confidential Discovery Material in locked room(s) or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;

b. to return such Confidential Discovery Material to Complaint Counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of my assignment or retention; and

c. to use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

5. I am fully aware that, pursuant to Section 3.42(h) of the Commission's Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Commission.

_____ Date: _____

Full Name [Typed or Printed]

_____

Signature

B

This Exhibit is not included in the public version of this document.

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Timothy J. Muris, Chairman**
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour

In the Matter of	)	
NORTH TEXAS SPECIALTY PHYSICIANS,	)	**Docket No. 9312**
a corporation.	)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that North Texas Specialty Physicians has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

RESPONDENT

PARAGRAPH 1: Respondent North Texas Specialty Physicians (hereinafter "NTSP") is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of Texas, with its office and principal place of business at 1701 River Run Road, Suite 210, Dallas, Texas 76107.

JURISDICTION

PARAGRAPH 2: NTSP was formed by physicians to facilitate the physicians' contracting with health insurance firms and other third-party payors (collectively, "payors") for the provision of medical services. At all times relevant to this Complaint, participating physicians of NTSP have been engaged in the business of providing medical care for a fee. Except to the extent that

competition has been restrained as alleged herein, participating physicians of NTSP have been, and are now, in competition with each other for the provision of physician services.

PARAGRAPH 3: While NTSP is a memberless corporation under state law, it was founded by, is controlled by, and carries on business for the pecuniary benefit of its participating physicians. Accordingly, the participating physicians are "members" of NTSP, and NTSP therefore is a "corporation," as those terms are used in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH 4: The general business practices of NTSP, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF MARKET AND PHYSICIAN COMPETITION

PARAGRAPH 5: NTSP has approximately 600 participating physicians licensed to practice medicine in the State of Texas who are engaged in the business of providing professional services to patients in the Dallas-Fort Worth metropolitan area, mostly in Fort Worth and the "Mid Cities" (collectively, the "Fort Worth area").

PARAGRAPH 6: Physicians often contract with payors to establish the terms and conditions, including price terms, under which such physicians will render services to the payors' subscribers. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payors' relationship with insureds. These contracts may reduce payors' costs, enable them to lower the price of insurance, and reduce out-of-pocket medical expenditures by subscribers to the payors' health insurance plans.

PARAGRAPH 7: Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by payors, competing physicians decide individually whether to enter into contracts with payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

PARAGRAPH 8: Medicare's Resource Based Relative Value Scale ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, it is the practice of payors in the Fort Worth area to make contract offers to individual physicians or groups at a fee level specified in the RBRVS, plus a markup based on some percentage of that fee (*e.g.*, "110% of 2001 Tarrant County RBRVS").

PARAGRAPH 9: To be competitively marketable in the Fort Worth area, a payor's health insurance plan must include in its physician network a large number of primary care physicians and specialists who practice in the Fort Worth area. Many of the primary care physicians and specialists who practice in the Fort Worth area are participating physicians of NTSP.

PARAGRAPH 10: Competing physicians sometimes use a "messenger" to facilitate the establishment of contracts between themselves and payors in ways that do not constitute or facilitate an unlawful agreement on fees and other competitively significant terms. Such an arrangement, however, will not avoid horizontal agreement if the "messenger" or another agent negotiates fees and other competitively significant terms on behalf of the participating physicians, or facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the agent's, or the participants', opinion on the appropriateness, or lack thereof, of the offer.

RESTRAINT OF TRADE

PARAGRAPH 11: NTSP's participating physicians, including the members of its Board of Directors, constitute numerous discrete economic interests. The conduct of NTSP constitutes combined or concerted action by its participating physicians.

PARAGRAPH 12: NTSP, acting as a combination of competing physicians, and in combination with physicians and other physician organizations, has restrained competition among its participating physicians by, among other things:

A. facilitating, negotiating, entering into, and implementing agreements among its participating physicians on price and other competitively significant terms;

B. refusing or threatening to refuse to deal with payors except on collectively agreed-upon terms; and

C. negotiating fees and other competitively significant terms in payor contracts for NTSP's participating physicians, and refusing to submit payor offers to participating physicians unless and until price and other competitively significant terms conforming to NTSP's contract standards have been negotiated.

FORMATION AND OPERATION OF NTSP

PARAGRAPH 13: NTSP was organized in November 1995 as a nonprofit corporation. Its initial Board of Directors, composed of three participating physicians, was established in NTSP's Certificate of Incorporation. Pursuant to NTSP's By-Laws, successor Board members are elected from among the participating physicians for three-year terms by the members of each of NTSP's sections, which are organized by medical specialty. NTSP is funded through fees paid by physicians on first becoming participating physicians and through its receipt, pursuant to its

physician participation agreements, of a stated percentage of the fees paid by payors to participating physicians pursuant to certain NTSP-payor contracts. NTSP presently is composed of approximately 600 physicians, some 130 of whom are primary care physicians.

PARAGRAPH 14: Pursuant to a few of NTSP's contracts with payors, some of the NTSP physicians who participate in the arrangement share financial risk, for example, through the provision of services at an agreed capitated rate. However, pursuant to the great majority of NTSP's contracts with payors, those NTSP physicians who participate in the arrangement do not share any financial risk, each physician typically receiving a specified fee for each service provided. Whereas only about one-half of NTSP's participating physicians–and few if any primary care providers–participate in any risk-sharing arrangements, substantially all of NTSP's participating physicians participate in some non-risk contracts. With respect to these non-risk contracts, NTSP often has sought to negotiate for, and often has obtained, higher fees and other more advantageous terms than its individual physicians could obtain by negotiating individually with payors.

PARAGRAPH 15: Physicians seeking to participate in NTSP-payor contracts apply for participating physicianship. A physician becomes a participating physician by entering into a "North Texas Specialty Physicians Physician Participation Agreement" with NTSP, granting to NTSP authority to arrange for his or her services to be provided to persons covered by payors pursuant to agreements between NTSP and the payors. Each physician covenants that he or she will forward to NTSP for further handling payor offers the physician receives, and will refrain from pursuing any such offer until NTSP notifies the physician that it is permanently discontinuing negotiations with the payor. If, and only if, NTSP approves and enters into an agreement with a payor, NTSP then forwards the agreement to its participating physicians, who then may elect to participate (or not) in the payor's offer.

NTSP'S ILLEGAL ACTS AND PRACTICES

PARAGRAPH 16: NTSP has engaged in various acts and practices, as more fully described subsequently, that unlawfully restrain competition among NTSP's participating physicians. NTSP has undertaken these acts and practices with the knowledge of its Directors and other participating physicians, and often at their explicit instruction.

PARAGRAPH 17: NTSP periodically polls its participating physicians, asking each to disclose the minimum fee, typically stated in terms of a percentage of RBRVS, that he or she would accept in return for the provision of medical services pursuant to an NTSP-payor agreement. In conformity with its agreement with its participating physicians, NTSP then calculates the mean, median, and mode ("averages") of minimum acceptable fees reported by its physicians. NTSP then reports these measures back to its participating physicians, confirming to the participating physicians that these averages will constitute the minimum fees that NTSP will entertain as the basis of any contract with a payor. Such interchanges of prospective price information among otherwise competing physicians reduce price competition among those physicians, and enable the

participating physicians, acting through NTSP and otherwise, to price their services interdependently to achieve supra-competitive prices.

PARAGRAPH 18: Sometimes when NTSP begins discussions with a payor regarding a possible contract for the provision of services by NTSP's participating physicians, NTSP informs the payor that its physicians have established fee minimums for NTSP-payor agreements, identifies those fee minimums (the poll averages referred to in the preceding Paragraph), and states that NTSP will not enter into or otherwise forward to its participating physicians any payor offer that does not satisfy those fee minimums.

PARAGRAPH 19: In other instances, payors have proposed to NTSP agreements, or amendments to existing agreements, for the services of its participating physicians that included proposed fee schedules that did not satisfy the NTSP physicians' fee minimums. NTSP has then advised the payors of NTSP's established fee minimums and told the payors to resubmit their proposals with fee schedules that satisfy those minimums, or otherwise actively bargained with payors as to fees to be paid NTSP's participating physicians. As a result, payors sometimes have either submitted new offers with higher fees or accepted the higher fees pressed on them by NTSP on behalf of its physicians.

PARAGRAPH 20: In at least one instance, NTSP, at the explicit dictate of its Directors, sought instruction from its participating physicians as to the disposition of a payor offer that already had been made. NTSP wrote to its participating physicians, reminding them of their previously agreed-to minimums and noting that the specified payor's offer approximated those minimums as to some of its medical insurance plans, but fell materially below those minimums as to other plans. NTSP then asked each of its participating physicians to respond to a poll by indicating the minimum fees, again typically stated in terms of a percentage of RBRVS, that he or she would accept in return for the provision of medical services to the specific payor's subscribers. When NTSP calculated the average minimum fees that its participating physicians would accept to contract with that payor, it found that the participating physicians collectively would not accept fees lower than the previously established minimums. It then rejected the payor's offer and explicitly refused to forward the offer to any of its participating physicians, whether or not the proposed fees were above any given physicians' stated minimum acceptable fees. Following refusals by NTSP to forward the proposed contract to its participating physicians and several communications between NTSP and its participating physicians attacking the payor's fee proposal as "below market," the payor increased its proposed fees to the NTSP fee minimums. Only then did NTSP enter into a contract with the payor and forward the agreement to its participating physicians, affording them the option to participate (or not) in the payor's offer.

PARAGRAPH 21: In addition, while seeking to negotiate fees on behalf of its participating physicians, NTSP has discouraged and prevented payors and participating physicians from negotiating directly with one another. In at least one instance, after NTSP fee negotiations with a payor broke down, NTSP orchestrated the simultaneous withdrawal of NTSP physicians from an arrangement pursuant to which numerous NTSP participating physicians had provided medical

services to the payor's subscribers through another physician organization with which NTSP had contracted. This increased the pressure on the payor to contract for the services of NTSP's participating physicians through NTSP, at higher proposed fees. The payor ultimately yielded to that pressure and contracted with NTSP and its physicians at increased fee levels.

LACK OF SIGNIFICANT EFFICIENCIES

PARAGRAPH 22: The acts and practices described in Paragraphs 16 through 21, including NTSP's negotiation of fees and other competitively significant terms of contracts under which each physician is paid on a fee-for-service basis, have not been, and are not, reasonably related to any efficiency-enhancing integration. With respect to these contracts, NTSP's participating physicians do not share substantial financial risk and are not otherwise integrated in ways that would create the potential for increased quality and reduced cost of medical care that the physicians provide to patients.

ANTICOMPETITIVE EFFECTS

PARAGRAPH 23: NTSP's acts and practices as described herein have had, or tend to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Fort Worth area in the following ways, among others:

A. price and other forms of competition among NTSP's participating physicians were unreasonably restrained;

B. prices for physician services were increased; and

C. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

PARAGRAPH 24: The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

NOTICE

Notice is hereby given to the Respondent that the sixteenth day of January, 2004, at 10:00 a.m. o'clock, or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D. C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this Complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an Order

should not be entered requiring you to cease and desist from the violations of law charged in this Complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this Complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the Complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the Complaint, and together with the Complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate Order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions under Section 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under Section 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the Complaint and to enter an initial decision containing such findings, appropriate conclusions, and Order.

The Administrative Law Judge will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by the Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D. C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that Respondent North Texas Specialty Physicians ("NTSP") is in violation of Section 5 of the Federal Trade Commission Act as alleged in the Complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An Order to cease and desist from entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians: (a) to negotiate on behalf of any physician with any payor; (b) to deal, refuse to deal, or threaten to refuse to deal with any payor; (c) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (d) not to deal individually with any payor, or not to deal with any payor through any arrangement other than NTSP.

2. An Order to cease and desist from exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal.

3. An Order to cease and desist from attempting to engage in any action prohibited by Paragraphs 1 or 2, above.

4. An Order to cease and desist from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs 1-3, above.

5. A requirement that, for a period of five (5) years, NTSP notify the Commission prior to entering into any arrangement with any physicians under which NTSP would act as a messenger, or as an agent, on behalf of those physicians.

6. An Order requiring NTSP to terminate, without penalty or charge, and in compliance with any applicable laws, any contract that it has entered into with any payor since January 1, 1998.

7. An Order to cease and desist from engaging in, attempting to engage in, or encouraging others to engage in illegal horizontal agreements with competitors.

8. Any other provision appropriate to correct or remedy the anticompetitive practices engaged in by NTSP.

9. A requirement that NTSP distribute a copy of the Order and Complaint, within thirty (30) days after the Order becomes final, to: (a) each physician who is participating, or has participated, in NTSP since January 1, 1998; (b) each officer, director, or manager, and each employee who has or had any responsibility regarding NTSP's physician networks; and (c) each payor that NTSP has contacted, or been contacted by, since January 1, 1998, regarding contracting for the provision of physician services.

10. A requirement that for five (5) years after the Order becomes final, NTSP distribute a copy of the Order and Complaint, within thirty (30) days of the event triggering this requirement, to: (a) each newly participating physician in NTSP; (b) each person who becomes an officer, director, or manager, or an employee who has any responsibility regarding NTSP's physician networks; and (c) each payor that NTSP contacts, or is contacted by, regarding contracting for the provision of physician services.

11. A requirement that for five (5) years after the Order becomes final, NTSP annually publish a copy of the Order and the Complaint in an official report or newsletter sent to all physicians who participate in NTSP, and on any website maintained by or for NTSP, with such prominence as is given to regularly featured articles.

12. Requirements that NTSP file periodic compliance reports with the Commission, notify the Commission of any changes that may affect compliance obligations, and permit Commission representatives prompt access to NTSP documents and personnel for the purpose of determining or securing compliance with this Order.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this sixteenth day of September, 2003, issues its Complaint against NTSP.

By the Commission.

Donald S. Clark
Secretary

SEAL

FEDERAL TRADE COMMISSION

WITNESS:	EXAMINTAION:
DR. KAREN VAN WAGNER	BY MR. BLOOM - Page 3

EXHIBITS	FOR ID	DESCRIPTION
1000	43	Third Amended and Restated Bylaws of North Texas Specialty Physicians
1001	46	North Texas Specialty Physicians Physician Participation Agreement
1002	107	First Amendment to Physician Participating Agreement
1003	122	Fifth and Sixth Amendments to Physician Participation Agreement and Subcontracts
1004	185	Annual Poll to Establish Minimums

FEDERAL TRADE COMMISSION

In the Matter of:)
North Texas Specialty)
Physicians) File No. D09312
)

Wednesday, November 19, 2003

Federal Trade Commission
Dallas Regional Office
1999 Bryan Street
Suite 2150
Dallas, Texas 75201

The above-entitled matter came on for investigational hearing, pursuant to notice, at 9:13 a.m.

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

MR. MICHAEL JOEL BLOOM, Attorney
Federal Trade Commission
One Bowling Green, Suite 318
New York, New York 10004-1415
(212) 607-2801

ON BEHALF OF NORTH TEXAS SPECIALTY PHYSICIANS:

WILLIAM M. KATZ, JR., Attorney
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693
(214) 969-1700

A. In '97, I believe there was one contract that was presented to the specialists, one Physician Participation Agreement form.

Q. And was there a different physician participation form presented to PCPs at that time?

A. Yes -- well, no, I'm sorry. In '97, I don't believe so. If you want to limit your discussion just to '97 --

Q. Yes, at the moment I do.

A. -- then the answer would be no.

Q. Did PCPs sign in '97 the same Physician Participation Agreement as the specialist?

A. They would have if they -- if they wanted to join the organization.

MR. KATZ: Well, I think he's asking you whether they did.

A. Whether they did? The answer is no.

Q. (BY MR. BLOOM) Does that mean that there were no physicians in the organ- -- no PCPs in the organization in spring '97?

A. In the spring of '97 to the -- to the best that I can recall, there were no PCP contracts within NTSP.

Q. Did there come a time when NTSP began to use a second Physician Participation Agreement?

A. Not in '97.

Q. Did there come a subsequent time?

A. So we're talking about something --

Q. Outside of '97, beyond '97?

A. All right. We're now not talking about '97?

Q. Correct.

A. We had con- -- we -- I'm sorry. Let me start from scratch here.

If you wished to participate in NTSP as a physician who was a specialist that had board representation, that was eligible for nomination to the board, that would pay a one-time dues assessment, it was one contract, and that has not changed -- or that's been amended over the years, but it is still one contract.

Q. Is that contract used only by those physicians who have an interest in sharing risk?

A. No.

Q. What is the qualifier for that contract versus some other?

A. That you wish to participate in NTSP as a physician that has -- is eligible to be nominated for a committee, is eligible to be nominated for a board position, is eligible to participate in

distributions from account surplus, is a, quote/quote, fully participating physician, and there is a thousand dollar activation fee for that type of participation.

Q. What other contract has been used between NTSP and its physicians?

A. We call them affiliate contracts, and there are basically two types. One is at the PCP level, and it's a contract that pretty much mirrors the base document we were previously discussing. PCPs take risk with us, and there is a risk component in that contract. It's really what it does not do. It does not qualify the physician for participation in the governance of the organization.

A second document is a contract that we have with a limited number of our physicians that allow them to participate in our fee-for-service contracts. And that would be similar to the Specialty Net document you showed me at the beginning of this deposition.

Q. What do you call that contract that entitles them to participate in fee-for-service contracts? You're looking at the previously identified by Bates number, NTSP Specialty Net

contract, correct?

A. Right. This is entitled NTSP Physician Participation Agreement, dash, Specialty Net.

Q. Do you have a generic name for that kind of contract that you use for physicians interested only in fee-for-service contracting and don't want to be members paying their thousand a year -- or excuse me, a thousand once, correct?

A. Once activation fee. They're office -- we call them Physician Participation Agreements. I believe all of them are entitled Physician Participation Agreements.

Q. Is that the same name that you use for your physicians that pay the thousand dollars and have the fuller range of participation?

A. I'd have to look at the document to be absolutely sure.

Q. When was the first -- let me back up. Are specialists eligible to sign your fee-for-service Physician Participation Agreement?

A. If they do not live in Fort Worth.

Q. If they do not live in Fort Worth?

A. If they do not practice in Fort Worth.

Q. If they do practice in Fort Worth, are they eligible to sign the fee-for-service

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: D09312

CASE TITLE: North Texas Specialty Physicians

HEARING DATE: November 19, 2003

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: November 21, 2003

Cinnamon Boyle

CINNAMON BOYLE, CSR, RPR

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE FEDERAL TRADE COMMISSION
1999 BRYAN STREET
DALLAS, TEXAS

DATE NOVEMBER 19, 2003

PAGES 1 THROUGH 200

TESTIMONY OF DR. KAREN VAN WAGNER

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

This Exhibit is not included in the public version of this document.

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE RADISSON PLAZA HOTEL
815 MAIN STREET
FORT WORTH, TEXAS

DATE JANUARY 26, 2004

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TESTIMONY OF TOM DEAS

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

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ORAL DEPOSITION OF

DR. TOM DEAS

JANUARY 26TH, 2004

ORAL DEPOSITION OF DR. TOM DEAS, produced as a witness at the instance of the FTC, and duly sworn, was taken in the above-styled and numbered cause on the 26th of January, 2004, from 1:10 p.m. to 4:42 p.m. before Tammy Staggs, CSR in and for the State of Texas, reported by stenographic method, at the Radisson Plaza Hotel, 815 Main Street, Fort Worth, Texas.

A P P E A R A N C E S

FOR THE FTC:
Mr. Theodore Zang and
Mr. Jonathan Platt,
FEDERAL TRADE COMMISSION
Northeast Region
One Bowling Green, Suite 318
New York, New York 10004

FOR THE NTSP:
Mr. Gregory S. C. Huffman
THOMPSON & KNIGHT, LLP
1700 Pacific, Suite 3300
Dallas, Texas 75201

ALSO PRESENT:
Dr. Karen Van Wagner

Q. Okay. And was it your understanding that that second notice was sent to all participating physicians or just those that checked yes under -- from responding to the notice of the payer offer?

A. I really don't know what --

Q. Okay.

A. Again, I would have to guess.

Q. Right. And then based on your understanding of that process, can you, I guess, describe to me how that changed? I mean, I assume -- is that the process that's still used at NTSP?

A. I think it's still basically the same process, yeah.

Q. Okay. And if you could, perhaps explain to me how the poll interacts with that procedure we just discussed.

A. We've -- this gets back into sort of the philosophy of the organization. NTSP at the time of formation was created as an entity that -- to help us be basically competitive in a health care market. And we felt like that this organization basically served three different customers, perhaps more, but that included our patients; it included payers, assuming they wanted NTSP to serve as a network; and then physicians.

The question you're asking has to do with the

physician as a customer for our entity. And we felt from the very beginning that we needed to use those resources wisely, and that there wouldn't -- that we would not be able to or want to necessarily deal with every payer or every offer. And so we've tried to create ways to try to quantitate those things that we needed to deal with on behalf of the physician customer or the participating physician.

And among the many things I listed -- you know, when we got a contract offer, it dealt with a number of contractual issues, and some of those things were very important: indemnification clauses; hold harmless clauses; term and termination; reimbursement issues were important; you know, what hospitals we were going to be expected to work at. You know, it was a pretty lengthy list of things. Malpractice coverage, if a health plan said you have to have five million in coverage and we knew that none of our physicians had that, there was no point in us dealing with that contract.

So we used a number of factors, including the poll, which is your question, to help us assess the likelihood that forwarding that contract to a potential participating physician would generate a network.

Q. Right.

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: D09312

CASE TITLE: NORTH TEXAS SPECIALTY PHYSICIANS

HEARING DATE: JANUARY 26, 2004

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 1-28-04

Tammy Staggs

TAMMY STAGGS

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara J Vance

SARA J. VANCE

For The Record, Inc.
Waldorf, Maryland
(301)870-8025

CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____

TOM DEAS

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this

_____ day of _____, 19___, and executed the above certificate in my presence.

_____

NOTARY PUBLIC IN AND FOR

_____

MY COMMISSION EXPIRES:

_____

WITNESS: TOM DEAS

DATE: JANUARY 26, 2004

CASE: NORTH TEXAS SPECIALTY PHYSICIANS

Please note any errors and the corrections thereof on this errata sheet. The rules require a reason for any change or correction. It may be general, such as "To correct stenographic error," or "To clarify the record," or "To conform with the facts."

PAGE	LINE	CORRECTION	REASON FOR CHANGE

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE RAMADA PLAZA HOTEL
1701 COMMERCE
FORT WORTH, TEXAS

DATE DECEMBER 16, 2003

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TESTIMONY OF DR. JACK MCCALLUM

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

In the Matter of the	)
	)
North Texas Specialty	) Docket No. 9312
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****

ORAL DEPOSITION OF

DR. JACK McCALLUM

DECEMBER 16, 2003

****

ORAL DEPOSITION OF DR. JACK McCALLUM, produced as a witness at the instance of the FTC, and duly sworn, was taken in the above-styled and numbered cause on the 16th of December, 2003, from 11:15 to 5:10 before Susan S. Klinger, CSR in and for the State of Texas, reported by stenographic method, at Ramada Inn, Fort Worth, Texas.

A P P E A R A N C E S

FOR THE FTC:
Mr. Michael Bloom and
Ms. Maria Coppola
UNITED STATES FEDERAL TRADE COMMISSION
Northeast Region
1 Bowling Green, Suite 318
New York, New York 10004

FOR THE NTSP:
Mr. Gregory S. C. Huffman
THOMPSON & KNIGHT, LLP
1700 Pacific, Suite 3300
Dallas, Texas 75201

ALSO PRESENT:

Dr. Karen Van Wagner

A. No.

Q. Do you recall how this practice of annual polling came to be?

A. No.

Q. Was it a practice that preceded your participation on the board?

A. No.

Q. Do you recall anything at all about the origins of it?

A. I can tell you the rationale for it.

Q. What was the rationale?

A. I've told you this before and I'm going to repeat what I've said three other times because I don't think that you either understand or want to understand what I'm saying, but please try to get it so that we can put this to bed.

We polled in this regard for a level that was acceptable for the entity. We have an entity that has limited resources. We can't handle every payor offer that comes through. If our members, if we got six members out of 300 that are going to participate. It makes no sense for us to waste time and money on that offer. We have to pick and choose the offers where we can have a positive effect on the care in the community. We have to do that. We can't do that unless we have a

majority of our membership that is willing to participate through the entity.

The participating physicians have to work through the entity. If it is not a contract that is appropriate to the entity, the entity doesn't participate. That has nothing to do, zero, nothing, not one single thing to do with whether the individual physicians can participate on their own. They are perfectly at liberty to do that. This deals with what is acceptable for the entity and for the entity to use its resources. That is what this is about, this is not about the individual physicians. Can I make it more clear than that?

Q. I don't think you can make it more clear than that.

A. Good.

Q. Focusing on the entity, then, the entity in your view has the right to negotiate the price at which the entity will take the contract; is that correct?

MR. HUFFMAN: Objection, lack of foundation.

A. The entity has no choice except to pick the contracts that it can put together a group of participating physicians and internal resources to manage and service the contract. It has to do, that one aspect of that is whether the participating physicians will participate, that is an aspect.

Q. Do you recall it being established?
A. I see it in the document.
MR. HUFFMAN: I think he's asking you apart from the document.
A. Apart from the document, I don't have any recollection.
Q. It says the board accepted this information and instructed staff to use these levels as minimally accepted fee schedules for HMO and PPO contract offers. Is that an accurate representation in your judgment?
A. That is what the document says.
Q. Is it an adequate representation of the facts?
A. I have no argument with what the document says.
Q. What did it mean for the board to instruct staff to use these levels as, quote, minimally acceptable fee schedules for HMO and PPO contract offers?
A. You would have to really ask the staff that, but my interpretation of that would be that things below that were not putting efforts of the and resources of the organization into.
Q. Did the organization ever put its efforts and resources into a contract below their minimally acceptable fee schedules?
A. I don't know the answer to that.
Q. Did the organization pick and choose which

I, DR. JACK McCALLUM, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

_____

DR. JACK McCALLUM

THE STATE OF _____)

COUNTY OF _____)

Subscribed and sworn to before me by the said witness, DR. JACK McCALLUM,

Given under my hand and seal of office this_____ day of _____, 20 _____.

_____

Notary Public in and for the State of_____

My commission expires _____

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: D09312

CASE TITLE: NORTH TEXAS SPECIALTY PHYSICIANS

HEARING DATE: DECEMBER 16, 2003

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 12/18/03

Susan S. Klinger

SUSAN S. KLINGER

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara J Vance

SARA J. VANCE

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE HAMPTON INN
2700 CHERRY LANE
FORT WORTH, TEXAS

DATE DECEMBER 10, 2003

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TESTIMONY OF DR. IRA HOLLANDER

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

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E X H I B I T S

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North Texas Specialty	)	Docket No. 9312
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****

ORAL DEPOSITION OF

DR. IRA HOLLANDER

DECEMBER 10, 2003

****

ORAL DEPOSITION OF DR. IRA HOLLANDER, produced as a witness at the instance of the FTC, and duly sworn, was taken in the above-styled and numbered cause on the 10th of December, 2003, from 3:30 to 9:00 before Susan S. Klinger, CSR in and for the State of Texas, reported by stenographic method, at Hampton Inn, Fort Worth, Texas.

A P P E A R A N C E S

FOR THE FTC:
Mr. Jonathan Platt and
Mr. Alan B. Loughnan
UNITED STATES FEDERAL TRADE COMMISSION
Northeast Region
1 Bowling Green, Suite 318
New York, New York 10004

FOR THE NTSP:
Mr. Gregory Binns
THOMPSON & KNIGHT, LLP
1700 Pacific, Suite 3300
Dallas, Texas 75201

ALSO PRESENT:

Dr. Karen Van Wagner

A. We polled the participating physicians on a fairly regular basis, asking them about reimbursements that they would be interested in us being the board of NTSP passing through to them. That's really the only type of poll that I recall.

Q. Fairly regular basis would be more than once per year?

A. About annually.

Q. The poll that you say -- are referring to, would they be generally applicable?

MR. BINNS: Objection, vague.

A. I don't know what that means.

Q. What is your understanding of the applicability of the polls?

A. I don't know what -- can you define for me what "applicable" means?

Q. What is your understanding of the purpose of the polls that NTSP conducts?

A. The purpose of the poll is that -- just like any organization, NTSP has very limited resources, and our participating physicians have asked us to help them with contracts from payors in terms of reviewing various facets of the contract, including, but not limited to reimbursement rates.

And so in order to maximize our resources, the

one of the purposes of the polls was to know at what level our participating physicians did not want to see contracts because they would not be likely interested in signing them.

Q. Are you aware of any polls that were payor specific?

A. No.

Q. Has there ever been a poll that referred only to a particular payor offer?

A. I don't think so. Not that I'm aware of.

Q. Going back to what I was trying to get at earlier, generally applicable, I mean, would they be applicable over the course of a certain amount of time for any and all offers that came to NTSP?

A. I think that is a legal definition that I'm not comfortable answering. Could you explain that in sort of standard lay terms?

Q. Once the poll has been completed, are there results shared with the board members?

A. Yes.

Q. And what does the board do with those results?

A. It uses them for information purposes for when future contracts come through.

Q. Are they tabulated or aggregated in any way?

A. It is a -- again, you need to define what

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: 9312

CASE TITLE: NORTH TEXAS SPECIALTY PHYSICIANS

HEARING DATE: DECEMBER 10, 2003

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 12-12-03

Susan S. Klinger

SUSAN S. KLINGER, CSR

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara J Vance

SARA J. VANCE

For The Record, Inc.
Waldorf, Maryland
(301)870-8025

CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____

DR. IRA HOLLANDER

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this

_____ day of _____, 19___, and executed the above certificate in my presence.

_____

NOTARY PUBLIC IN AND FOR

_____

MY COMMISSION EXPIRES:

_____

WITNESS: DR. IRA HOLLANDER

DATE: DECEMBER 10, 2003

CASE: NORTH TEXAS SPECIALTY PHYSICIANS

Please note any errors and the corrections thereof on this errata sheet. The rules require a reason for any change or correction. It may be general, such as "To correct stenographic error," or "To clarify the record," or "To conform with the facts."

PAGE	LINE	CORRECTION	REASON FOR CHANGE

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE RADISSON PLAZA HOTEL
815 MAIN STREET
FORT WORTH, TEXAS

DATE JANUARY 29, 2004

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TESTIMONY OF HARRY ROSENTHAL, JR., M.D.

FOR THE RECORD, INC.
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WALDORF, MARYLAND 20602
(301)870-8025

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FEDERAL TRADE COMMISSION

IN THE MATTER OF THE	)
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ORAL VIDEOTAPED DEPOSITION OF

HARRY ROSENTHAL JR., M.D.

JANUARY 29, 2004

Thursday, January 29, 2004
Radisson Plaza
815 Main
Texas A Conference Room
Fort Worth, Texas

The above-entitled matter came on for deposition pursuant to notice, at 9:22 a.m.

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

THEODORE ZANG JR.

JONATHAN PLATT

Federal Trade Commission

One Bowling Green

Suite 318

New York, New York 10004

ON BEHALF OF NORTH TEXAS SPECIALTY PHYSICIANS:

WILLIAM KATZ, JR.

Thompson & Knight LLP

1700 Pacific Avenue

Suite 3300

Dallas, Texas 75201

Q. Let me use your terminology. So when you refer to significance, the significance of it, what do you mean? Are you referring to the significance of the poll results, for example?

A. I'm just saying it may have less centrality in their considerations what they thought on January 1st that they were going to be contracting at on July 17th as market conditions change, as do circumstances change, as their professional associations change. It may change.

Q. Let me ask you this, given that market conditions change, is it the case that the poll results sometimes are accurate and sometimes are not?

A. I don't know. I really can't tell you.

MR. KATZ: I'll object to the question. Calls for speculation; lack of foundation.

Q. Are you aware of the minimum that Ms. Jones filled out while you were at Ophthalmology Associates, were you aware of that?

A. I was at the time. But I don't remember what it is now. I couldn't tell you, I'm sorry.

Q. At the time, did you ever enter a contract that fell below that minimum?

A. Subsequent to that poll? Is that the question that you're asking me?

Q. Yes.

A. Subsequent to the poll, did I ever enter into a contract that fell below that minimum, absolutely.

Q. How much after the poll -- how subsequent?

A. Within the next 12 months, I guess. Again, I'd have to -- I'm on thin ice. I don't have any of the documents. I haven't looked at them in a long time. It's over two years since I was on the Executive Committee there. But probably within the subsequent 12 months we entered into a contract that was at a different rate.

Q. Can you specify which one or ones?

A. I suspect the PacifiCare contract with Medical Select Management.

Q. And did that contract have both a risk and non-risk component to it?

A. I don't remember.

Q. Can you give a time frame when that contract would have been entered into by you and your associates?

A. It would have been more than two and a half years ago, because that was when I was on the Executive Committee. But beyond that, it would be difficult.

Q. Have you ever discussed the poll results, NTSP roll results, at a Board meeting?

A. Of NTSP?

Q. Yes.

A. Not that I can remember.

Q. Has anybody on the Board discussed them in your presence?

A. No.

Q. How about the conducting of a poll, has that ever been discussed at a Board meeting?

A. Not that I can remember.

Q. Have the poll results ever influenced your opinion as to what would be an acceptable rate for you to accept?

A. No. Because it's an aggregate of 50 different subspecialties and people in different economic situations. So for me, what affects my decision as to what I need to do factors, like, how many patients does the insurance possess. Is this a plan that doctors have referred to me? Are on what they wanted me to be on? Do I have empty chairs? It's like an airline seat. There's nothing more expensive than an empty chair. So those appointments are significantly over capacity if you're operating a large group are expensive. Those are the things that go into my decision-making process.

Q. Does NTSP fail to messenger some proposed contracts to its participating physicians because they fall below the poll results, the aggregate poll results?

MR. KATZ: Objection, lack of foundation.

A. I'm not sure that I understand that.

Q. Why does NTSP conduct the poll?

MR. KATZ: Objection, lack of foundation.

A. I think -- this is Harry's world again -- I think that it's done in order to try to figure out at what level, in general, there is likely to be a large number of members that would be interested in participating in a contract rather than using the resources, the organization to create, read, propagate, forward contracts that nobody's going to sign up for.

Q. Since you've been affiliated with NTSP, has there ever been a time, to your knowledge, when a payer proposed a contract to NTSP that fell below the poll results?

A. I don't know. I do not know.

Q. Does NTSP, to your knowledge, have a policy as to what occurs if a contractual offering falls below the poll results?

A. Not that I'm aware of.

Q. Have you ever heard that a contract offering was not sent out to participating providers because it fell below the polled minimums?

A. I don't remember.

Q. Are you familiar with the term "poll minimum," is that something that you've heard of at NTSP?

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: D09312

CASE TITLE: North Texas Specialty Physicians

HEARING DATE: January 29, 2004

I hereby certify that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the Federal Trade Commission to the best of my knowledge and belief.

DATED: 01-29-04

Stephanie Wimmer

Stephanie Wimmer

CERTIFICATION OF PROOFREADER

I hereby certify that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Stephanie Wimmer

Stephanie Wimmer

This Exhibit is not included in the public version of this document.

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This Exhibit is not included in the public version of this document.

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE RADISSON PLAZA
815 MAIN STREET
FORT WORTH, TEXAS

DATE JANUARY 7, 2004

PAGES 1 THROUGH 211

TESTIMONY OF DR. WILLIAM STERLING VANCE, JR.

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
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(301)870-8025

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North Texas Specialty	)	Docket No. 9312
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****

VIDEOTAPED

ORAL DEPOSITION OF

DR. WILLIAM STERLING VANCE, JR.

JANUARY 7, 2004

VOLUME 1

****

VOLUME 1, VIDEOTAPED AND ORAL DEPOSITION OF DR. WILLIAM STERLING VANCE, JR., produced as a witness at the instance of the FTC, and duly sworn, was taken in the above-styled and numbered cause on the 7th of January, 2004, from 9:05 a.m. to 5:51 p.m., before Dana Taylor, CSR in and for the State of Texas, reported by machine shorthand, at the Radisson, 815 Main, Fort Worth, Texas.

A P P E A R A N C E S

FOR THE FTC:

MR. MICHAEL JOEL BLOOM
MR. JONATHAN PLATT
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ALSO PRESENT: Dr. Karen Van Wagner

Mr. Kevin Thrasher, Videographer

14:15:24 1 best care. And that's the way the organization was
14:15:26 2 organized, and that was its purpose.
14:15:27 3 Q And at that time all of the NTSP specialists
14:15:32 4 were commonly taking risks; is that correct?
14:15:35 5 A When you say at that time, which time?
14:15:38 6 Q At -- at the time that you formed NTSP, it was
14:15:41 7 to be able to accept capitation; is that correct?
14:15:43 8 A That is correct.
14:15:44 9 Q And -- and so every practitioner within NTSP
14:15:50 10 had the same set of incentives; correct?
14:15:55 11 A They had the same set of economic incentives.
14:16:00 12 Q Do you have any idea what portion of NTSP's
14:16:04 13 physicians today are members of the risk pool?
14:16:06 14 A I do not.
14:16:10 15 Q If only a handful of physicians were members
14:16:13 16 of the risk pool, would your statement about how efficiencies
14:16:18 17 are achieved continue to apply?
14:16:21 18 MR. HUFFMAN: Objection, calls for
14:16:21 19 speculation.
14:16:24 20 A I'm not sure I can answer the question in that
14:16:26 21 way. I think that what we found was that -- and what anyone
14:16:31 22 who's ever been involved in medicine is that physicians
14:16:35 23 practice one way. And the idea was to create a structure so
14:16:42 24 that their physician practices were the best possible
14:16:45 25 practices, both economically and medically.

14:16:50 1 The spillover affect was that not only in our
14:16:53 2 risk contracting but in our fee-for-service and our Medicare
14:16:57 3 and our -- things that had absolutely nothing to do with
14:17:00 4 NTSP, all of those were affected, continue to be affected.
14:17:03 5 BY MR. BLOOM:
14:17:03 6 Q Is it -- is it your testimony that because of
14:17:05 7 NTSP's actions with respect to its -- its risk products, that
14:17:12 8 its practice -- its physicians' practice of -- of medicine
14:17:16 9 for the Medicare population was improved?
14:17:20 10 A I believe that to be true.
14:17:21 11 Q So having the ability to set a price above
14:17:27 12 Medicare reimbursement rate isn't an -- a requirement for
14:17:30 13 achieving those efficiencies?
14:17:34 14 MR. HUFFMAN: Objection to form.
14:17:35 15 A I'm sorry. Say that --
14:17:37 16 BY MR. BLOOM:
14:17:37 17 Q Okay. If I understand you correctly, the
14:17:39 18 benefits of MC -- of NTSP's efficient practices, if you will,
14:17:46 19 flow even to the Medicare population served by its
14:17:51 20 physicians?
14:17:51 21 A I believe that to be true, yes.
14:17:53 22 Q And the rates for Medicare are fixed by the
14:17:55 23 government, are they not?
14:17:56 24 A Yes.
14:17:56 25 Q And so even with the government fixing rates

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: D09312

CASE TITLE: NORTH TEXAS SPECIALTY PHYSICIANS

HEARING DATE: JANUARY 7, 2004

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 1/ /

Dana Taylor

DANA TAYLOR

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara J Vance

SARA J. VANCE

For The Record, Inc.
Waldorf, Maryland
(301)870-8025

CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____

DR. WILLIAM STERLING VANCE, JR.

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this

_____ day of _____, 19___, and executed the above certificate in my presence.

_____

NOTARY PUBLIC IN AND FOR

_____

MY COMMISSION EXPIRES:

_____

For The Record, Inc.
Waldorf, Maryland
(301)870-8025

WITNESS: DR. WILLIAM STERLING VANCE, JR.

DATE: JANUARY 7, 2004

CASE: NORTH TEXAS SPECIALTY PHYSICIANS

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PAGE	LINE	CORRECTION	REASON FOR CHANGE

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TESTIMONY OF DR. WILLIAM STERLING VANCE, JR.

VOLUME 2

FOR THE RECORD, INC.
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In the Matter of the	)	
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Physicians.	)	

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VIDEOTAPED

ORAL DEPOSITION OF

DR. WILLIAM STERLING VANCE, JR.

JANUARY 8, 2004

VOLUME 2

****

VOLUME 2, VIDEOTAPED AND ORAL DEPOSITION OF DR. WILLIAM STERLING VANCE, JR., produced as a witness at the instance of the FTC, and duly sworn, was taken in the above-styled and numbered cause on the 8th of January, 2004, from 8:41 a.m. to 2:07 p.m., before Dana Taylor, CSR in and for the State of Texas, reported by machine shorthand, at the Radisson, 815 Main, Fort Worth, Texas.

A P P E A R A N C E S

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ALSO PRESENT: Dr. Karen Van Wagner

Mr. Kevin Thrasher, Videographer

11:58:47 1 MR. HUFFMAN: Thank you.
11:58:53 2 A Okay.
11:58:53 3 BY MR. BLOOM:
11:58:53 4 Q What is the -- this exhibit's entitled PSN
11:58:57 5 Quality Management Committee Agenda, and it's backed by
11:59:01 6 minutes of -- of a -- of a meeting of January 17; is that
11:59:06 7 correct?
11:59:07 8 A That's correct.
11:59:08 9 Q Are you familiar with this document?
11:59:09 10 A Not specifically.
11:59:12 11 Q What is the PSN Quality Management Committee?
11:59:17 12 A It's that committee that is charged with --
11:59:20 13 with reviewing quality issues and maintaining quality within
11:59:24 14 the network.
11:59:29 15 Q And what sorts of actions does it take to
11:59:33 16 accomplish that end?
11:59:34 17 A This particular meeting had to do with the
11:59:37 18 number of case report -- case reviews and questions
11:59:40 19 concerning those cases. That's a sort of typical clinical
11:59:44 20 review.
11:59:50 21 Q And -- and this is -- then is a vehicle for
11:59:52 22 insuring the quality of practice within the PSN?
11:59:56 23 A That's correct.
11:59:57 24 Q Is there any similar effort to insure the
12:00:03 25 quality of practice of the nonPSN participants?

12:00:08 1 A The by-product of -- of this committee is --
12:00:11 2 is the by-product of all of the quality and utilization
12:00:15 3 efforts of the PSN. And as I told you earlier, physicians
12:00:20 4 tend to practice in one way.
12:00:22 5 If Dr. Cravens, who was the subject of one of
12:00:26 6 these case reviews, finds that maybe he's doing things a
12:00:31 7 little bit out of line in a PSN patient, then he's not going
12:00:35 8 to just do that with PSN patients. He's going to do that
12:00:39 9 with all of the other patients. The -- so that the quality
12:00:42 10 issues involved here, there's a tremendous spillover to all
12:00:47 11 the rest of the practice.
12:00:51 12 Q I understand that contention. But what I'm
12:00:54 13 really trying to understand is with respect to doctors who
12:00:55 14 don't in any way participate in the PSN, whether NTSP has any
12:00:59 15 similar kind of quality management or oversight?
12:01:03 16 A We don't have any data for them, no.
12:01:50 17 Q Thank you.
12:01:50 18 (Exhibit No. 1079 was referenced.)
12:01:51 19 BY MR. BLOOM:
12:01:51 20 Q I'm going to show you a document previously
12:01:53 21 marked as FTC 1079. Please let me know when you've had an
12:01:59 22 opportunity to read through it.
12:02:25 23 A Yes.
12:02:26 24 Q Exhibit 1079 is a fax alert to NTSP members
12:02:30 25 and affiliates from Cherise Webster of May 7, 2002; is that

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: D09312

CASE TITLE: NORTH TEXAS SPECIALTY PHYSICIANS

HEARING DATE: JANUARY 8, 2004

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 1-15-04

Dana Taylor

DANA TAYLOR

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara J Vance

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CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____

DR. WILLIAM STERLING VANCE, JR.

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this

_____ day of _____, 19___, and executed the above certificate in my presence.

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MY COMMISSION EXPIRES:

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For The Record, Inc.
Waldorf, Maryland
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WITNESS: DR. WILLIAM STERLING VANCE, JR.

DATE: JANUARY 8, 2004

CASE: NORTH TEXAS SPECIALTY PHYSICIANS

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UNITED STATES AMERICAN FEDERAL TRADE COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

In the Matter of: NORTH TEXAS SPECIALTY PHYSICIANS,	)
	) Docket No. 9312
Respondent,	)
	)
	)
	)

DEPOSITION OF H.E. FRECH III

SANTA BARBARA, CALIFORNIA

MONDAY, FEBRUARY 23, 2004

Reported by:

Martha A. Adams

CSR No. 10345, RPR

Deposition of H.E. FRECH III, taken on behalf of Respondent, at 411 East Carrillo Street, Santa Barbara, California, 93101, on Monday, February 23, 2004, at 9:20 a.m., before Martha A. Adams, CSR No. 10345, RPR.

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ALSO PRESENT:

Tim Deyak
John S. Hekman

INDEX

agreeing to give NTSP the right of first negotiation. I'd view that as an agreement with NTSP sort of like agreement from the outside to the center rather than directly with another physician.

But I would view that as an agreement not to participate in a contract until NTSP's finished negotiating.

Q. Do you know of any doctor that actually honored that particular provision in the PPSA?

A. I've not made a study of that.

Q. So you have no information in that regard?

A. Well, that's a different question. There's a lot of evidence from the fax alerts that when they get powers of attorney and otherwise tell people to hold off negotiating that it seems to be successful and that the payors believe that -- and they believe that limits their ability to contract. But it's -- I don't have a way of tying that to specific physicians --

Q. You know if --

A. -- name by name.

Q. Do you know of any doctor that ever refused to deal with a payor because of the provision in the PPSA?

A. I don't have a -- I don't have a way of tracking that by doctor, by name, by individual.

Q. By any doctor?

A. By any physicians by name.

Q. Apart from what you've seen in the documents concerning what happened at board meetings or committee meetings, do you have any knowledge as to what a particular doctor did when that doctor was wearing an NTSP governance hat?

A. Well, beyond the NTSP documents and -- of various kinds and the NTSP -- and the depositions, I don't have any other source besides that.

Q. Going back to the question that I had asked you before, do you know of any instance in which one doctor agreed with another that they would both refuse to deal with the payor?

A. Separately than agreeing to -- with NTSP?

Q. No. Let me rephrase it. Do you know of any instance in which one doctor and another doctor refused -- agreed that they would turn down a payor's offer?

A. Directly with each other?

Q. Yes.

A. No.

Q. Do you know of any instance in which any doctor has ever agreed with anybody that they would turn down a payor's offer?

MR. BLOOM: This is argumentative. I object.

MR. HUFFMAN: Just asking for a clear answer.

MR. BLOOM: I think you got a clear answer.

THE WITNESS: Yeah. There's no document that says your words. But my interpretation of the powers of attorney is that's exactly what it means. That's the whole response of it.

MR. HUFFMAN: Move to strike everything after but as nonresponsive.

Q. Do you know of any doctor who in fact turned down a payor offer in deference to the power of attorney?

A. Individual doctor by name?

Q. That's correct.

A. I don't know that. Don't have a way of knowing that.

Q. Is it common practice for a doctor to look to an IPA to handle discussions with a payor as to what the contract is going to look like?

A. That's reasonably common I'd say.

Q. All right. So if one gives a power of attorney to an IPA to discuss with the payor what the contract is going to look like, that's not particularly uncommon, is it?

A. Well, the power of attorney part, I have

never heard of that before. Maybe that has happened before. But that was -- that thing I found kind of striking. I think more often just the IPA deals with -- with the payor, the plans and talks to them, perhaps gives them some information.

In the case of a risk contract, of course, it often is very integrated. And IPA actually has to take the risk, take nonrisk and make sure it's -- it's solid enough and all those kinds of things.

MR. HUFFMAN: Would you read that back, please.

(Record read.)

BY MR. HUFFMAN:

Q. Did you undertake to review which physicians accepted and which physicians rejected contracts?

A. Actually, I did in the way to construct one of the -- some of the exhibits -- some of my exhibits.

Q. Did you --

A. I didn't sort of -- I didn't focus on who they were by name or anything. It was just used to generate a quantitative exhibit.

Q. Is it correct to say that you did not endeavor to undertake any analysis of contracting patterns?

A. No. I would say I did. I think that was the whole -- that was what I was doing.

Q. What contracting pattern did you attempt to model?

A. Well, there's basically two issues. One is whether physicians refuse to contract at prices that are less than the prices they communicate in the poll. That's -- that's very important contracting pattern issue. The other issue is whether NTSP members systematically contract more through NTSP than through alternatives. Both of those require looking at it -- the contracting by individuals.

Q. All right. What did you determine in the first instance?

A. That the -- in the several cases where I could track it that many, many NTSP physicians were reporting in the poll a high price. And they were actually accepting a much lower price from -- from the payors.

Q. So in fact, whatever they indicated in the poll in fact did not govern their individual behavior?

A. Mostly it didn't, yeah.

Q. What did you determine in the second regard?

A. The second regard it was that the NTSP

Q. Yes. Whether through NTSP or otherwise.

A. Now, which analysis?

Q. The analysis where you were looking at whether or not individual physicians would take rates that were less than what they had indicated in the poll.

A. Well, there's only three examples of those that we have data for. So there are only basically three prices that they could -- and it's sort of -- not sort of. It is take it or leave it for those three prices. So what we could see for those three prices where it's not a huge variation, that most of them were still taking it regardless of what they had voted in the polls.

MR. HUFFMAN: Let's take a break.

(Recess.)

BY MR. HUFFMAN:

Q. Is messengering a ministerial task?

A. What's a ministerial task? That's not a term I'm familiar with.

Q. Easy.

A. Easy?

Q. Yes.

A. I haven't really studied it. It seems it -- by messengering, you mean sort of taking the information and transmitting it to a bunch of individuals? That seems -- that seems fairly easy. I

haven't really studied the messengering.

Q. Is messengering something that my 16-year-old boy could probably do?

MR. BLOOM: Objection. Vague and ambiguous.

MR. HUFFMAN: Or your 16-year-old son could probably do?

MR. BLOOM: Still vague and ambiguous.

THE WITNESS: Well, my youngest son's 18. Like I say, I haven't studied messengering. If you take a document and make copies of it and mail it to people -- actually, I don't think my son could do it that well, as wonderful a kid he is.

MR. BLOOM: Do you want to have that marked?

THE WITNESS: Yeah.

MR. BLOOM: Sorry. It sticks.

THE WITNESS: So, you know, requires some discipline and organization and some carefulness to do that. But like I said, it's not something I specifically studied. It hasn't really come up.

BY MR. HUFFMAN:

Q. But the point I'm getting at, it's basically a clerical task that a good competent clerk could take care of?

A. If it's just taking in copies and making copies, a good -- yeah -- a good -- a good -- in my

experience, it takes a good clerk and sort of ongoing organization. I've had things like that get screwed up.

Q. So it's a matter of sending out the offer, getting the responses back, putting them together, conveying them on to the payor?

A. I'm basically going with what your definition of messengering is because I'm -- it's not something I'm studying. But if that's all it is, it's a pretty simple operation.

Q. Is it something the payor can do itself, does itself?

A. Yeah. Sure. Does itself. Particularly outside of California, most contracts between physicians and health plans that don't have any intermediary that's playing this role.

Q. Is there anything else involved in being a messenger other than that clerical task of sending the offers out, sending the responses back?

MR. BLOOM: Objection. Vague and ambiguous.

THE WITNESS: Yeah. See, that's where -- the fact I haven't really studied the messenger model or messengering, I don't have really a good answer to that.

BY MR. HUFFMAN:

Q. Is it fair to say you don't have an opinion about messengering?

A. I think that's probably correct, yeah.

Q. Are there good reasons why a company would not want to deal with another company?

MR. BLOOM: Objection.

THE WITNESS: You mean in -- just in general?

MR. HUFFMAN: In general, yes.

THE WITNESS: Sure.

BY MR. HUFFMAN:

Q. What are some of those?

A. Prices too low. Depending on which side of the deal is, price is too low or the price is too high or don't like the -- don't like the contract and other dimensions. Quality's too low. Almost infinite number of things that can go wrong in a competitive industry.

You don't just like the guy. There's little harm in saying "I don't like you. I'm going to deal with someone else." It's a competitive industry with lots of alternatives.

Q. Have you ever been involved in a Daubert challenge?

A. I've -- my reports have been challenged. I don't know if they were Daubert or not.

Q. Challenged in what regard?

A. Tried to -- what's the word? -- limit the testimony, motions in limine. And I don't know if

nonrisk was done that way. Only risk was the NTSP signing the risk physicians.

Q. Going back to the question I'd ask, do you know of any situation in which any physician had agreed with any other physician or with anybody else as to what their response was going to be to the offer being messengered?

A. At that stage, once the offer has been messengered, I don't know of any.

Q. Do you know of any situation in which a payor approached a doctor prior to an offer being messengered by NTSP and the doctor refused to meet or discuss or negotiate with the payor?

A. I've seen evidence that that was a common occurrence, but I don't have the names of specific doctors.

Q. Do you have any knowledge of any specific instance where that occurred?

A. Of a specific doctor –

Q. Yes.

A. – or a specific doctor practice? I don't have that.

Q. Have you ever done any overall analysis of contracts in which NTSP chose it would not be involved and how those contracts faired when they were sent

that have sort of institutional memory of what the practice was in the past. Kind of everybody's gone. Everybody kind of explosively disappears at once.

Q. In teamwork situations, is it important to have continuity of personnel?

A. Oh. It's helpful, sure.

Q. Have you ever done any work in that regard?

A. That specifically, I'd say probably not. Not looking at -- no.

Q. Are you familiar with any of the literature on that?

A. At that specific level, at the -- I don't think so. At the individual level? Yeah. I don't think so.

Q. Is it more likely that NTSP would be able to carry over the efficiency that it's gained on the risk side to the nonrisk side if it uses the same doctors on both sets of business?

A. Well, I think that's -- yeah. Probably. Because the -- the main efficiency it's getting from my reading of the documents in the case and depositions and so on is that it's kind of training some of the doctors on the risk side to utilize less and also different patterns and to use specific other doctors who are also

efficient.

And so to the extent that physicians' behavior is at least similar when they face different economic incentives -- maybe not exactly the same -- there would be some spillovers. And those doctors would be more efficient in general in working for any plan. Could be Medicare.

Q. Would you expect the spillover effects to be greater the more continuous the membership is between the risk business and the nonrisk business?

A. Yeah. I would think there would be more benefits in the non -- for the physicians becoming more efficient in the nonrisk business if they're in the risk business. And I think there'd be very limited of that for physicians who were not in both.

Q. Do you feel that an IPA like NTSP that is trying to maximize spillover has a proper incentive to try to keep the personnel the same?

MR. BLOOM: Objection. Includes testimony not in the record.

THE WITNESS: Yeah. It's not at all obvious to me that NTSP's trying to maximize spillover. And now I forgot the -- thinking of that part. And I forgot what you said after that so --

///

which were capitation based, it was hard to figure out what a price was because the doctors were kind of -- were the insurance company in a sense. So anyway -- so that was -- it was really about rates.

MR. HUFFMAN: Okay.

Q. Well, you got me confused now. Because you sort of drifted out of rates and utilization.

A. Yeah.

Q. Let me --

A. I'm getting tired. Sorry.

Q. Let me ask this question. Was what you were saying that in an HMO situation, even though the doctors might have had a higher rate --

A. Rate of utilization.

Q. Oh. Okay. Okay.

A. Sorry.

Q. I was going to unit rates.

A. Yeah.

Q. So let's go back to unit rates. Is it correct to say that in the HMO situation, the consumer may be benefited because even though unit rates may be higher with an HMO, because of lower utilization, the total medical expense is lower?

A. Sure. It could be benefited by that.

Q. What literature has analyzed that

particular phenomenon?

A. I don't know of any literature. That's why I'm continually talking about utilization because that's been studied intensely. I don't know of any literature that looks specifically at prices -- say prices, we have two kinds of rates -- specifically looked at prices. But it makes perfect sense to me that that would be the case.

Q. Do you know of any literature on spillover, spillover effects between risk and nonrisk treatment?

A. Well, I know there's literature on spillover effects between managed care and unmanaged care --

Q. Okay.

A. -- which is not exactly the same thing. But it's quite close.

Q. Okay. And what is the literature shown on the spillover effect?

A. It's shown that in areas where there's high percentage of customers are in managed care, that fee-for-service medicine is also more efficient as lower costs. So there's spillovers from the managed care sector -- at least is the argument in the literature. There's spillover from the managed care sector to the

nonmanaged care.

Q. And this would be true even though the nonrisk business is not subject to the same capitation rate as they had in the risk business?

A. Well, almost. The -- it actually doesn't split risk versus nonrisk. It's a cruder measure. It's all managed care versus unmanaged care. The unmanaged care, it's safe to say, is no risk and also almost no utilization review. The managed care has -- some of it has risks. Some of it doesn't. Have different kind of management tools other than risk.

So it's not exactly sliced the way you're saying. But it's still the case that the non -- the nonrisk nonmanaged part is getting a benefit from the -- the managed care part of which some of it is risk and some of it isn't.

Q. Okay. And is the assumption in that literature that the work being done under the capitation contracts is what's really driving the efficiency gains on the -- on the HMO side?

A. Well, that's a little bit controversial. My -- my best -- best judgment is that capitation works. And also, these other utilization review techniques that don't necessarily require -- or don't require capitation are risk taking by physician organizations or physicians.

But those also work.

Q. And what are some of those?

A. Utilization review, preauthorization for services. Actually, those are the main two. There's other what's called utilization management sometimes where they -- the plan will track an individual physician for -- could be a long time. And then he's an outlier, too high use, too high utilization, they'll sometimes kick him out of the plan which has been kind of controversial or talk to him, try to get him to reduce his utilization.

These -- many of these tools are done by the plans even when they don't have capitation, even in nonrisk plans, especially in California.

Q. Well, going back to my question, is the assumption in the literature showing that there's -- there are spillover effects from HMO business to non-HMO business? Is that an accurate way to say it?

A. Yeah. That's a more accurate way to say it.

Q. And is the assumption in that that the gains that are being made from capitation work on the HMO side are causing spillover effects into the non-HMO side?

A. Well, I'm saying it's broader than just capitation because there's more differences than that,

these -- all these other tools being used. But the interpretation of it which -- which is in the literature is that the gains from capitation and these other more tight utilization controls in the HMO sector are benefiting the non-HMO sector, the fee-for-service sector.

Q. And that would be true even though the techniques being used in the HMO side are not being used in the non-HMO side?

A. Correct. That's the point of the literature.

Q. And is the work and conclusions coming out of that literature basically that a doctor treats a patient and doesn't usually know what kind of plan the patient is on?

A. Well, that's kind of an overly strict interpretation. I think the interpretation is that there's a tendency for doctors to -- to practice not exactly the same but sort of similar. And I think it's -- it depends on what kind of physician and what the setting is whether they know or not what kind of insurance the guy has.

But there -- I think there is a tendency -- and that's why the spillover effect works. There is a tendency for physicians if they've learned how

to, say, control utilization in their HMO business to practice at least more conservatively in the fee-for-service sector than they would have without that experience. And I think that's what the literature shows.

Q. And let me get into some of the details if I can. Is the assumption that's coming out of that literature that if the doctor learns, for example, that Lab X does a better, less expensive job than Lab Y that they found that out because of the HMO side they were incentivized to do that, that he sets up a pattern so when he comes to an non-HMO patient he sets it up with Lab X instead of Lab Y?

A. Again, it's not necessarily the incentive. It would be an administrative rule.

Q. Or it could just be habit?

A. Well, habit formation is sort of what the interpretation of this is about. But the original use of the -- say, switching this lab to a lower cost lab. But that could be because he was capitated or had some other huge -- not necessarily huge -- some other significant financial incentive.

Or it could have been just because the HMO just called him up and said, "Look. We use Lab X. We want you to use Lab X."

So it doesn't necessarily come from capitation. But okay. I'll leave it there.

Q. Is there anything in the literature about the effect that peer review has on doctors as far as getting into him to practice more efficient, high-quality medicine?

A. What do you mean by peer review?

Q. For example, determination of outliers and counseling them.

A. Yeah. There's evidence that that has some effect.

Q. What kind of literature is there out in the field?

A. It's not directly my field. But there's literature in the health services research. Health services research literature would be more -- I wouldn't say economists would never contribute to this literature. But it's more likely to be physicians and public health type guys who do this.

And this actually has been a subject they've been studying for -- since I started, over 30 years. And there is -- there's always been some evidence that this has some good effects going back a long way.

Q. Is it your opinion that the presence of risk capitation contracts in the marketplace tend to have

a beneficial effect on consumers?

A. Yes. I would agree with that.

Q. Is it also your opinion that to the extent there is spillover from those risk capitation contracts to nonrisk business that that can have a beneficial effect on consumers?

A. I think that's true. I also think the managed care plans that are more administrative and don't use financial risk have a similar effect, have benefits for the fee-for-service unmanaged side.

Q. Is it also your opinion that to the degree an IPA can maximize the spillover effect that that will tend to have a beneficial effect on the consumers?

A. Well, I have to think about what they're giving up in doing that. It's not -- that's not so obvious. Because the measured spillover doesn't even require the same organization or the same physicians. I mean it's measured at market levels. So it's not even necessarily mediated by an organization.

Q. Well, if the IPA is intimately involved in the risk contract -- in fact, the contracting party -- to the degree the IPA can maximize that spillover into non-HMO business, that's going to be a benefit to the consumer, isn't it?

MR. BLOOM: Objection. Argumentative.

THE WITNESS: Yeah. Hypothetically. If there's some way they can do that. I'm not sure how they would do that and what costs they would incur from doing that or what costs consumers would. But to the extent they could get performance in the nonmanaged sector to be basically lower utilization and lower costs, that would be a benefit.

BY MR. HUFFMAN:

Q. Is there any literature concerning the relative importance of utilization management to preventative care as far as bringing benefits to consumers?

A. Yeah. I would say -- this is kind of a summary of many years of -- of research. But I would say that the research by and large is that preventative care is not that important -- odd as that may seem -- that utilization control is a much more important aspect to managed care.

Q. Have they quantified the relative importance of that to consumer benefit?

A. Well, not exactly. They haven't quite brought it down to that level that I know of. I mean maybe there's more recent literature that I haven't seen. But they haven't quite gotten that far down. So there's a little bit of a judgment here that I'm -- I'm saying to

SANTA BARBARA, CALIFORNIA, MONDAY, FEBRUARY 23, 2004

1:38 P.M.

EXAMINATION (CONTINUED)

BY MR. HUFFMAN:

Q. In looking at your reports, I did not see that you posited any relevant markets in this case. Is that correct?

A. That's correct.

Q. And were you instructed that you should not do so?

A. No.

Q. Was it just what you decided not to do?

A. It flowed from what my assignment was.

Q. Okay. I haven't asked you. What was your assignment?

A. My assignment was to examine the behavior of -- NTSP behavior and practices and whether its effects were anticompetitive. And so it wasn't necessary to get to an analysis of that to do this -- to do posited relevant market, things like that.

Q. Have you ever -- well, I know you've had -- you've posited relevant markets in the past, have you not, in physician cases?

A. Yeah. To the extent of Kartell with decisions.

Q. And the work that you've done before --

A. And also Chab -- yeah. Sure. Not just Kartell.

Q. You had some termination cases, didn't you, or privilege cases?

A. Yeah, privilege cases.

Q. And in those, did you -- where did you look to determine how broadly you would draw the product market when looking at physician practices and physician specialties? I'm talking on the product market side. We're not in geographic here.

A. Yeah. The product side, you know, you look at various -- it's, you know, various indicators of: Is the training different? Talking about the different specialties. That's -- I think that's basically -- is the training different? Is the procedures they normally do -- is that different? Is the hospital -- hospital privileges, does that differ by specialty?

Then there's just kind of the general background health economics literature.

Q. What does the literature say as to how you draw the lines -- strike that. Let me make a prefatory statement first. You recognize, do you not, that there

could be significant overlap between specialties and between specialists and PCPs?

A. There can be overlap, sure.

Q. And, for example, a PCP may do a procedure that a specialty -- specialist might also do if the specialist gets the patient?

A. Sure. There are some -- there are definitely overlaps of procedures.

Q. EKG is a simple example; is that correct?

A. Um-hum.

Q. In the literature, is there anything that talks about how you delineate a product market in physician practices since a specialty may be under-inclusive?

A. I'd say there's no literature directly on point. If there is, I'm not aware of it.

Q. All right. In your work in the past, how have you confronted that problem where single specialty is going to be under-inclusive?

MR. BLOOM: Object to the term under-inclusive.

THE WITNESS: I'd say I haven't seen that problem. I mean it hasn't risen in the matters in which I've worked.

BY MR. HUFFMAN:

Q. Why is that?

A. Because in the cases where there's situations where it made sense to go to the level of the specialty and not just count --

(At this time Mr. Heckman reentered the deposition room.)

(Record read.)

THE WITNESS: -- and not just count sort of all physicians together. One case was radiology. That's the only case. But anyway, the radiology case, there didn't seem to be much overlap. I mean obviously other people can read films. But it's really pretty specialized. And I -- I don't think there was any dispute.

I mean I didn't put a lot of effort into trying to differentiate radiologists from surgeons who might occasionally read a film or PCPs or something. I don't think that was really in much dispute. So there wasn't such -- that issue didn't come up.

In case of Weiss, it was really just all physician services. We didn't really distinguish. So I don't think it's -- I don't think this really has come up --

BY MR. HUFFMAN:

Q. In your work?

A. -- in my work so far including in this.

Q. Is it correct that in many of the

specialties that -- where physicians participate with NTSP that there is going to be overlap between specialties or between specialists and PCPs?

A. Oh, sure. There will be some specialties like that. And there will also be some specialties where it kind of goes the other way where there's the specialty, there's sub-specialists within the specialty that are really quite different too. So it -- yeah, it goes both ways. Difference by specialty is not going to be perfect in either direction in terms of economic markets.

Q. And did you see the work that had been done concerning the crossover on CPT codes that NTSP did?

A. You mean that Dr. Maness did in his report?

Q. Yes.

A. Yeah. I did see that.

Q. Okay. Was that a -- was that a valid explication of the possibility of crossover?

A. Well, it's -- there's two levels. It's -- it should demonstrate some crossovers where the same CPT code could be done by people in different specialties. It doesn't go -- it takes more steps in the analysis to say, well, that implies these should all be in the same economic market. That's a different thing.

But it does show that there's overlap in CPT codes which is well-known. And as I say, your first example was a fine one.

Q. What are some of the way -- in the work you've done previously -- I know you didn't do it in this case. But the work you have done previously in looking at geographic market, what methodologies have you used?

A. Well, the one thing I've done is to look at patient flows -- particularly in hospital markets but also in physician markets -- where the patients come from and inflows and outflows. That's one thing I've done. Another thing I've done is to look at how the sort of regulators have chosen to divide the markets. These health planning areas are one thing to look at.

Another thing is the views of the participants expressed in strategic plans and their own statements and -- and things like that. Another thing is the views of the -- of the plans. Another thing is the -- for the plans also, the sort of regulatory issues that are not just obvious issues like what's -- like plans licensed in Massachusetts can't sell policies in Rhode Island and things like that.

Q. And I gather you haven't done any of that in this case?

A. Well, I've talked to payors. I've gotten

Q. In looking at Dallas and Tarrant County, are you aware that 40 percent of Tarrant County population is right at or near the Dallas County line?

A. Well, I saw that in Dr. Maness's report. And I have made no independent investigation. So assuming he's right about that.

Q. And the prior work that you've done, does a -- the presence of an intermediating factor like that have a tendency to unite two areas?

MR. BLOOM: Objection. Doesn't -- there's no testimony that there's an intermediating factor.

THE WITNESS: Yeah. I think you mean -- what do you mean by intermediating factor?

BY MR. HUFFMAN:

Q. An intermediating factor would be here because they live on the county line, they could go to any in either county.

A. You mean because they live in that location?

Q. That's correct. You understand the -- geographically --

A. Yeah.

Q. -- Fort Worth/Dallas/Mid-Cities?

A. Yeah.

Q. Okay.

A. So these guys are in or around Mid-Cities?

Q. That's correct. Forty percent of the Tarrant County population is.

A. Yeah, yeah. Well, these things do depend to some extent on distance. So to the extent that you have more people in the middle, it goes in the direction any way of uniting the two markets.

Q. Have you ever had a situation where you defined a geographic market in a metroplex area like Dallas/Fort Worth where there's a lot of crossover due to commuting patterns?

A. Well, I've never defined a market in such a big city. I think the biggest might have been -- York, Pennsylvania was the biggest one. And King City, California was the smallest. And it's really small. So I don't believe I've ever done it in such a big area.

Q. Do you understand conceptually that commuting patterns like that will tend to unify the various areas?

A. I think they would go in that direction to some extent, sure. So would shopping patterns.

Q. Exactly. That there would tend to be an arbitrage effect because the policyholder could chose to be treated near his home or near his place of work?

A. Sure. There's some of this.

Q. When you were talking to payors -- I think -- it looked like you talked sort of Dallas versus Tarrant County. Did you talk about any counties other than Dallas and Tarrant Counties?

A. Not very much. I may have asked -- I may have asked them if there were any other counties that possibly competing with Tarrant County or something like that. But not -- I don't have a specific memory of doing that.

Q. Are you familiar with the literature that as you move up in the rank from primary to secondary to tertiary that the geographic markets tend to spread?

A. Oh, sure.

Q. And what kind of analysis in the past have you done in that regard?

A. Well, I've looked at patient flows a little bit. I've looked at patient flows by different -- what do you call them? -- different diagnostic categories.

Q. Okay. What have you noticed?

A. Well, as you get to the -- the more exotic diagnostic categories, you get further travel -- on the average, people travel further.

Q. I mean as you get up to quaternary, you could cover an entire state, couldn't you?

A. Well, there's certainly a level -- you could cover the entire state or the world when you get to the exotic transplant things that can only be done in certain parts of the world. Quaternary is -- it's sort of ill-defined. But there's certainly -- there's a level of really exotic things that can only be done in few places where you get to huge, huge market areas and probably where every single firm that does it would probably have market power.

Q. In the neurosurgeon case you did, the Frank case, you were saying you thought it was somewhere 50 to 20 miles. And I can't remember. What town is that in?

A. I think it's probably Portland. But I'm not exactly sure.

Q. Portland, Oregon?

A. No, no. Maine.

Q. Maine?

A. Maine.

Q. All right. The reason I'm asking about it, I'm wondering why you narrowed it. Fifty miles seems narrow for a neurosurgeon geographically.

MR. BLOOM: Did you say 50 or 15?

MR. HUFFMAN: Fifty.

MR. BLOOM: Did you say 50 or 15?

THE WITNESS: Fifty.

MR. BLOOM: Five zero?

THE WITNESS: Five zero. Well, my understanding from talking -- mostly in talking to Dr. Frank because this was, you know, such a hurried thing is if -- this is -- this maybe sounds unduly modest for a doctor. But he was saying the neurosurgery he did was not that exotic. It was not something people would come in from long distance.

BY MR. HUFFMAN:

Q. Have you ever done zip code analysis on physician practices?

A. You know, I think I must have somewhere along the line. I think I did the Chabra.

Q. Chabra? Do you recall what you found? That was the radiology case?

A. Yeah. It was a radiology case. I found that roughly speaking it was something like -- I'm not exactly remembering the numbers. But certainly the majority -- maybe 60 or 70 of the people -- went to Mee Memorial Hospital, a little hospital in the town, went to -- the planning area that went maybe 20, 30 miles in each direction.

Q. This is a King case?

A. Yeah. King City case. That's very rural.

Q. I gather because you did not do -- you didn't define a relevant market -- a posited relevant market, you have not done any concentration ratios?

A. Right.

Q. Have you done concentration ratios in the past?

A. Oh, sure.

Q. Okay. And what's the last one you did? Was it the merger analysis? Or is that just because it's at the bottom of the list it may be the oldest rather than the newest?

A. It's not the newest. The newest is probably -- I think there's one in RTI. Yeah. There must be. Retractable Technologies' one. Certainly was one in Bourns vs. Raychem which was very easy and most the time periods because Raychem had everything, at least accepting my definition of the product.

Q. I'm sorry. What -- what was the most recent?

A. Most recent would be Retractable Technologies.

Q. Okay. And in that did you use the Herfindahl methodology or some other methodology?

A. I think I just did concentration ratios. I may have also done Herfindahl's.

how those come out. That's a factor -- I haven't done any specifically in this case. I mean for -- well, now I screwed -- forgot my own preposition. I haven't done anything specifically about that in this case. But it's from my background knowledge about demand for health care that I know that.

Q. Okay. What do you recall from your background knowledge?

A. The elasticity are on the order of -.2. That's quite inelastic.

Q. Have you done any analysis of entry in this case?

A. Not specifically for this case.

Q. Have you done work previously about entry?

A. Yes. I discussed entry in the Kartell case. And I've discussed the effects of entry in -- in my book. In the Kartell case, I actually was able to get some numbers. In my book, it's more of a theoretical summary.

Q. In your book, what do you say?

A. I talk about the fact that entry can -- because of the nature of the physician markets, entry sometimes does not equilibrate -- doesn't equal across price areas.

Q. Okay. Can you explain that a little more?

selected -- any doctor who otherwise you didn't know about who participated in that poll -- or even if he didn't -- you would -- you would guess, well, he's probably not going to take that really low offer.

Q. Well, but the doctors don't know what the range of responses is to an NTSP poll. You understand that, don't you?

A. Yes, yeah. That's true.

Q. And you understand that the only information that was given to the board was what the mean, median and mode was of all of the --

MR. BLOOM: Objection.

BY MR. HUFFMAN:

Q. -- of the responses across all specialties?

MR. BLOOM: And the objection is foundation. And I don't believe that's an accurate statement of the evidence.

(Record read.)

THE WITNESS: I believe Karen Van Wagner has claimed that once or twice in the deposition. But I don't know if that proves it but --

BY MR. HUFFMAN:

Q. Do you have any information to the contrary?

MR. HUFFMAN: Okay. Move to strike as nonresponsive.

Q. You changed into the conditional. My question was: Do you know of any situation in which one doctor knew what another doctor was going to do in response to a payor offer?

A. Knew with certainty?

Q. That's correct.

A. I don't think so. Maybe that's happened. But I don't know any way I would know it's happened.

Q. Do you feel there's any value to someone conducting a poll of what contract rates have been with payors in a given market?

A. Just what prices have been in --

Q. That's correct.

A. -- past things?

MR. BLOOM: Objection. Vague and ambiguous. You can answer if you understand the question.

THE WITNESS: Okay. Did you say poll or survey? I forgot the --

BY MR. HUFFMAN:

Q. Either one.

A. Okay.

Q. Do you see a distinction?

A. I'm not seeing one right now.

Q. Okay.

A. But I'm not seeing how you could do it in a poll. I think it would have some value to some market participants to know what the other -- other PPOs and other plans are paying. And -- and I would be -- it would surprise me if -- at least if the contracting officers and the major plans didn't have some idea of that, whether it's from surveys or some other sources. And an accurate survey would help them, I would think.

Q. All right. So when you say the plans, you're assuming that the payors survey and know what the other payors are paying in the local area?

A. I would be surprised if they didn't have some idea of that. That would be one of the market research things I would expect them to do as part of their job and -- and that they would like to know that.

Q. And would you assume that physicians similarly would like to know what other physicians are getting?

A. Sure. I think they would like to know that.

Q. All right. And providing more information to the marketplace often can cause a more efficient use of resources, can it not?

A. Sometimes it can. But it's a double-edged

sword. It could also make it easier to get less competitive outcomes.

Q. And isn't it true that there are circumstances where having information about what other physicians are getting can benefit competition?

A. I could imagine there could be. But I think typically it's not that way. I think it's more that improving information among competitors about what other competitors are doing typically tends to reduce competition, make it less intense.

On the other hand, having the competitors know about what's going on on the opposite side of the market -- so having the sellers know more what's going on with the buyers, what their activities are, what their interest is, what their technology is, that's likely to be more helpful.

So most likely the double-edged sword is -- that's where the information changes, whether it's information about the rivals or information about your customers that's being sent to you or given to you in an easier way.

Q. Do you think that the collection and dissemination of information about health care market conditions can have a potential to enhance competition?

A. It could. But I'm saying it's a

double-edged sword.

Q. And that would be true whether or not it was information being gathered and provided to the payors or information being gathered and given to the providers?

A. I think it could, yeah.

Q. And --

A. It's possible.

Q. And in fact, it is relatively common, is it not, for market participants to seek and obtain that kind of information?

A. Yes.

Q. And in fact, there are things that even the FTC does to encourage that kind of conduct?

MR. BLOOM: Objection.

THE WITNESS: I don't know about that part.

MR. HUFFMAN: All right.

Q. But the literature -- there is literature, is there not, saying that there can be a potential benefit to competition by removing those information asymmetries?

A. Well, there's certainly literature that says that there can be an improvement to competition and economic efficiency more generally by reducing information asymmetries usually by buyers and sellers. I would say that.

proposals to doctors?

A. Oh. I think there's a potential benefit in that.

Q. And what is the potential benefit?

A. Well, it's assuming that it's done well to -- some of this can be -- can avoid repetition. So one physician practice wouldn't have to have this lawyer check it and another one have this lawyer. Especially for something simple where the practices are -- at least how they function legally is similar enough. You might be able to economize on legal resources by doing that.

Q. Are there huge diseconomies in having each physician conduct his or her own contract with you?

A. I doubt it. Because most physicians are not practicing as individuals anyway. They're groups.

Q. Well, there are huge diseconomies by having each practice group each conduct their own contract reviews?

MR. BLOOM: Objection.

THE WITNESS: I wouldn't say there's huge diseconomies.

BY MR. HUFFMAN:

Q. Huge overlap?

A. There's some overlap, sure.

Q. 140 times?

A. Sure. But remember, they also review it when they go -- after it goes through NTSP. They're not just saying whatever NTSP says goes, at least for the nonrisk contracts. For the risk contracts since they've signed up to go with NTSP in a mandatory way, that's different.

Q. Is there a significant benefit for physicians having a common contract review?

A. I think there's some benefit.

Q. Is there any literature on this subject?

A. I don't -- not that I know of.

Q. Were you given any guidance by complaint counsel or did you have any assumption as to whether or not NTSP had an obligation to make available the network it had put together for its risk contracts to payors for nonrisk contracts?

A. I don't think I got any guidance on it.

Q. From an economic standpoint, would there be any rationale for NTSP to basically make that network available without any compensation to the payors?

A. Well, to the extent there was -- I -- you mean for NTSP to do it --

Q. Correct.

A. -- itself rather than just let the payors do it? Well, if there was some slight economy -- not

Q. Oh. Okay. Did you have access to what the other doctors other than NTSP participating physicians had signed up with with the plans?

A. No, no. It was just NTSP.

Q. Okay. If you were a plan and you were going to go out and activate providers for your network, is it correct to say that you would need to increase your price in order to get more participation?

A. All else the same, I think that -- yeah. If you wanted -- if you had some -- some price at some level and you wanted to get more, you could either -- well, you could raise your prices or send out contracting agents to sort of encourage -- to talk to people, negotiate or something. But raising your price would be one approach.

Q. Is it common when a payor's talking to an IPA to find out what price they need to set to activate as many doctors as the plan wants to get?

A. Well, I don't know if it's common for them to talk about it. It would be useful information.

Q. Useful information to the payor?

A. Yeah.

Q. And so, for example, if one wanted to activate a majority of the doctors in a particular panel, that price would probably be higher than the price that

would be needed to operate only -- to activate only a few?

A. Probably. I expect you would get more people signing on at a higher price.

Q. So, for example, if a payor had indicated to you that they had some direct contracts out, that wouldn't necessarily tell you what price that payor would have to use in order to activate more physicians in the marketplace?

A. Well, that's true. It wouldn't necessarily say they could get more physicians at that price if they wanted them.

Q. In fact, you would expect that the price would have to be higher?

A. Well, it depends whether they were taking all of the physicians they wanted to at that price. A lot of payors don't do that. A lot of them want to pay on a list smaller. At least in most places. Texas may have some regulation that doesn't allow them to do that. I'm not sure. Couple states have had that.

Q. But the payor has a certain amount of doctors and wants to activate more doctors than what it had gotten through its direct contracting efforts, economics and common logic would say to pay a higher price to get more doctors?

BY MR. HUFFMAN:

Q. Based on the work that you've done considering physician practices, is it your experience that the more sought-after physicians often seek and obtain higher rates?

A. I would say that's generally true.

Q. And so there may be a perceived quality difference. And following basic economic theory, higher quality will often lead to a higher place?

A. I think that's correct.

Q. Have you ever done an analysis as to what the prices would be to activate some of these more highly sought-out physicians that participate from time to time with NTSP?

A. Well, I think you can -- you can get at that with a comparison of prices that we did of what -- what Cigna thought it would have to pay or did have to pay the physicians who were in NTSP when they converted over, things like that. I don't know if that's exactly your question or not.

Q. Yeah. I mean did you -- it really wasn't. Did you ever analyze what rates the highly sought-after physicians were getting whether they went through NTSP or not?

A. I didn't have any way of identifying them.

FTC-NTSP-Cigna 002054 -- scratch that.

MR. BLOOM: Delighted.

BY MR. HUFFMAN:

Q. FTC-NTSP-Cigna 001991 through 002054, can you tell me what this is and how you used it.

A. Well, I believe we just -- yeah. Actually, I don't remember what we used this for. I'm sitting here. I just don't remember. Could look through my report if it's cited or something. That might refresh my memory. Doesn't seem to be cited. Yeah. I just -- I'm blanking on what we used it for if we used it.

Q. Okay. Is it your understanding that NTSP did not have the right to bind any individual physician on nonrisk contracts?

A. That's my understanding.

Q. That the physician would always have the independent right later to either accept or reject a contract?

A. That's my understanding.

Q. Is another way of saying that that NTSP had no authority to collectively negotiate and bind the contract for the physician?

MR. BLOOM: Objection. Form.

THE WITNESS: I would -- I would say it has the right to collectively negotiate it, and it certainly did.

ones voted not for the minimums to be higher but for that category that was taken?

(At this time Mr. Hekman reentered the deposition room.)

MR. HUFFMAN: That's right.

THE WITNESS: Oh, yeah. That would be 56 over 200 something for the HMO. And then for the PPO, it'd be 99 over -- it's got to be roughly the same number, 200 something. That's in 2002. Then in 2001, it's -- actually, I don't remember what happened to that category.

The voting of the whole is a little lower. 2001 you get 106 out of -- again, must be around 200 voting for the HMO for that slice that ended up being the board minimum. And then for PPO you get 70 over. That must be around 200 something. So you can figure it out from there.

BY MR. HUFFMAN:

Q. Now, I'm looking at what you tabulated here. Are you tabulating the PSN physicians who actually sent back responses or everybody who sent back a response?

A. Everybody.

Q. All right. So this would be -- for example, looking at 2002, Exhibit 8A, looking at the HMO

would be 56 out of some 600 would have voted for what ended up being the board minimum?

A. Well, if you divide by the -- the total number of physicians, it would be 56 over 5- something or 600.

Q. So less than ten percent?

A. Well, yeah. Because the response rate is so bad.

Q. How do you know that the physicians ever reached a consensus on 125 if it was less than 10 percent?

A. That's the whole function of NTSP as an organization. They get this voting in. The board meets. And the board adopts the board minimums. That's the consensus.

Q. But there's no consensus in the underlying vote data?

A. The organization arrives at the consensus. That's one of the functions of the NTSP, historically one of the functions.

Q. NTSP makes a decision but --

MR. BLOOM: Argumentative.

MR. HUFFMAN: Not argumentative at all. I'm looking at the data.

Q. Isn't it true that when you look at how

the physicians actually voted that what the board ended up choosing was something that only 16 percent or fewer of the physicians indicated that they agreed with?

A. Well, that's taking account of the fact that -- there's two problems with that. One is that it's not taking account of the fact that only about less than half of them voted. So we get lots of nonparticipants in the voting altogether. The other thing is it depends on how narrow you slice it.

You know, if the voting had been on sort of one percent levels, you'd probably get almost nobody voting on exactly what would be chosen. I don't think that's a very meaningful thing. But the whole function, the whole system works to get a consensus for bargaining out of the whole process including the voting process.

MR. HUFFMAN: Okay. Move to strike as nonresponsive.

Q. Isn't it correct to say that every time a vote was taken, 16 percent or fewer of the NTSP physicians cast votes that agreed with the position that the board took?

MR. BLOOM: Objection. Foundation.

THE WITNESS: No, no. I wouldn't say that.

BY MR. HUFFMAN:

Q. 56 as compared to 600?

A. Well, it's one thing to say what would be my preference or what the minimum should be for the whole organization. It's another thing to say I disagree with how the organization chose out of what it saw when it's putting together the preferences of lots of different sellers and not just me. See? Do you understand the difference I'm making?

Q. Well, you're actually sort of drifting off the question. My question asks specifically: Based on the votes that were cast, isn't it true that 16 percent of the NTSP participating physicians cast votes that were in accordance with what the board took as its minimum?

A. Sixteen percent of the total which is much higher percentage of the people who voted cast a vote that the board minimum should be in that slice where the board actually picked it.

Q. All right. And isn't it true that that didn't change based on any of the data that you saw that in fact 2002 there were fewer -- a smaller percentage of the NTSP doctors who cast a vote that was in line with what the NTSP board chose?

A. I'm sorry. I lost all the predicates. But it's -- in 2002, the percentage of either of the people who voted or the total who voted for that slice, which is exactly where -- what the board picked as a

Q. Is the building of social solidarity important to the maintenance of a cartel?

A. Yes. I think so. Especially this kind.

Q. If you have significant mechanisms for building and maintaining social solidarity, can the cartel continue without overt policing efforts?

A. Yes. I believe so.

MR. BLOOM: I have nothing further.

EXAMINATION

BY MR. HUFFMAN:

Q. Going back to the questions about policing, can you name for me even one instance in all the work that you and your associates have done on this case in which any physician was punished by NTSP?

A. For violating the collective norms or contracting or some -- going around the cartel? Or do you mean for anything?

Q. No. Punish in relation to the cartel that you have mentioned.

A. This is the same answer that I gave before. I don't know of an example other than these cardiologists getting attention brought to them. And then as I said, the punishment --

Q. You consider that punishment?

MR. BLOOM: I appreciate if you let him finish the question before you make the grimace at his response.

MR. HUFFMAN: Well --

THE WITNESS: Well --

MR. HUFFMAN: -- he was confrontating his own earlier testimony. Go ahead.

THE WITNESS: That's what I want -- it's meant to bring social pressure to bear against those guys. And that could be construed as punishment.

BY MR. HUFFMAN:

Q. What is the definition of policing that industrial organizational economists use?

A. It means detection and punishment like the police would do.

Q. And how is punishment normally defined by IO economists?

A. I don't think there's a normal definition of punishment.

Q. Do you know of any economic punishment that had ever been meted out against NTSP by anybody because of a violation of the alleged cartel?

A. In terms of an individual, that's the bad example. That's the only thing I know of in terms of any individual physician groups or physicians.

Q. What punishment was done against the cardiologists?

A. Social pressure was brought by their colleagues. That would be my expectation. That would be my expectation. That's the point of bringing it up and criticizing them. But that's all.

MR. HUFFMAN: Move to strike as nonresponsive.

Q. What economic punishment was done against the cardiologists that you know of?

A. I think I just answered it.

Q. You were talking about something. But I'd asked for economic punishment.

A. That was my answer.

Q. What economic punishment was brought that actually hurt them?

MR. BLOOM: Asked and answered. Argumentative.

THE WITNESS: There's no way I can track whether it hurt them. But my belief is that that was brought up in order to get social pressure on these -- on the cardiologists for going -- for contracting around the cartel.

BY MR. HUFFMAN:

Q. Well, the cardiologists had already left. You understand that, don't you?

A. I don't understand that. I don't know

that.

Q. Did the cardiologists ever come back?

A. My understanding is they left at some point. I don't know if they came back. They had left at the time of that letter?

Q. Yes.

A. I didn't know that.

Q. Did the cardiologists even lose $1 of income as a result of anything NTSP did?

A. I don't know that. The -- the letter would -- I think would be intended to discourage people from using them. But there's not -- I don't -- there's no way I have evidence to track whether that happened. That would be hard to measure anyway if you have the best evidence.

Q. You indicated that spillover occurs from HMO business to non-HMO business; is that correct?

A. Yeah.

Q. Whether or not the non-HMO business is being done by the same people who are doing the HMO business?

A. Right. Whether it's the same organizations or same physicians.

Q. So based on that literature, you would expect there to be some spillover from the NTSP PSN

physicians to the NTSP physicians who were not PSN?

A. I would expect that and some spillover to physicians in that whole geographic area, Tarrant County.

Q. Would you expect there to be more spillover effects from the PSN physicians who were doing the HMO work under the capitation contract to their non-HMO practice by the same physicians?

A. More for them than the ones who were not in PSN?

Q. That's correct.

A. I would expect that.

Q. But you would expect spillovers in both instances based on the literature?

A. Based on the literature, I would expect spillovers to the area regardless.

Q. And you were talking about notes. And I think I tried to give you as full an opportunity to tell me anything you recall about the conversations you had with the payors and others for which you have notes. Is there anything else you can recall?

A. Not as I'm sitting here.

Q. Have you and counsel had a full opportunity to talk about those conversations so that you would have your recollection refreshed?

MR. BLOOM: I'm not on the stand. And so he

DECLARATION

STATE OF CALIFORNIA,)
)
COUNTY OF)

I, H.E. FRECH III, hereby declare:

I have read the foregoing deposition transcript and identify it as my own and approve same.

I declare under penalty of perjury under the laws of the State of California that the foregoing testimony is true and correct.

Dated this ____day of_____, 2004, at_____, California.

H.E. FRECH III

08:41:40

UNITED STATES AMERICAN FEDERAL TRADE COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

In the Matter of: NORTH TEXAS SPECIALTY PHYSICIANS, Respondent,	Docket No. 9312

****

ORAL DEPOSITION OF

THOMAS J. QUIRK

January 29th, 2004

COPY

****

ANSWERS AND DEPOSITION of **THOMAS J. QUIRK**, taken at the instance of the Respondent, on the 29th day of January AD 2004 in the above styled and numbered cause at the offices of Thompson and Knight, 1700 Pacific Avenue, Suite 3300, in Dallas, Dallas County, Texas, before David B. Jackson, RDR, a Certified Shorthand Reporter in and for the State of Texas, pursuant to the Federal Rules of Civil Procedure and the agreements stated on the record.

A P P E A R A N C E S

APPEARING FOR THE PETITIONER:

FEDERAL TRADE COMMISSION
Northeast Region
BY: Mr. Alan Loughnan
One Bowling Green, Suite 318
New York, New York 10004

APPEARING FOR THE RESPONDENT:

THOMPSON & KNIGHT, LLP
BY: Mr. Gregory S. C. Huffman
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201

APPEARING FOR THE WITNESS:

WEIL, GOTSHAL & MANGES, LLP
BY: Ms. Helene D. Jaffe
Ms. Jane Pollack
767 Fifth Avenue
New York, New York 10153-0119

ALSO APPEARING

Ms. Karen Van Wagner

messenger our offer because it did not meet the financial minimums.

Q. Did you understand that if the offer met the financial minimums it would then be messengered to the doctors?

A. Yes.

Q. Did you understand the purpose of that was to allow the doctors to accept or reject the offer individually?

A. If the offer met the minimums?

Q. Yes.

A. Yes.

Q. And you understood, even if the board voted or approved messengering the offer, that the doctors would still have to accept the offer individually or reject it individually?

A. Yes.

Q. Do you recall anything else being said at the board meeting?

A. Yes.

Q. What do you recall?

A. United Healthcare had questioned the actions by NTSP specific to the financial negotiations. We asked how the board -- or how the organization, I should say, set minimums. And we were told that the --

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COUNTY OF DALLAS)
STATE OF TEXAS)

I, David B. Jackson, RDR, certified shorthand reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that there came before me the aforementioned named person, who was by me duly sworn to testify the truth concerning the matters in controversy in this cause; and that the examination was reduced to writing by computer transcription under my supervision; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

Given under my hand and seal of office on this, the 4th day of February, A.D., 2004.

David B. Jackson, RDR, CSR 672
Expiration Date: 12/31/2004
United American Reporting, FRN-209
2725 Turtle Creek Blvd., Suite 200
Dallas, Texas 75219
(214) 855-5300

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UNITED STATES AMERICAN FEDERAL TRADE COMMISSION OFFICE

OF THE ADMINISTRATIVE LAW JUDGE

In the Matter of: NORTH TEXAS SPECIALTY PHYSICIANS, Respondent,	Docket No. 9312

****

COPY

ORAL DEPOSITION OF

CHRIS L. JAGMIN

February 20th, 2004

(Contains Confidential Attorneys' Eyes Only designations)

****

ANSWERS AND DEPOSITION of **CHRIS L. JAGMIN**, taken at the instance of the Respondent, on the 20th day of February AD 2004 in the above styled and numbered cause at the offices of Andrews and Kurth, 1717 Main Street, Suite 3700, in Dallas, Dallas County, Texas, before David B. Jackson, RDR, a Certified Shorthand Reporter in and for the State of Texas, pursuant to the Federal Rules of Civil Procedure and the agreements stated on the record.

A P P E A R A N C E S

APPEARING FOR THE PETITIONER:

FEDERAL TRADE COMMISSION
Northeast Region
BY: Ms. Mazor Matzkevich
One Bowling Green, Suite 318
New York, New York 10004

APPEARING FOR THE RESPONDENT:

THOMPSON & KNIGHT, LLP
BY: Mr. Gregory S. C. Huffman
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201

APPEARING FOR THE WITNESS:

ANDREWS & KURTH, LLP
BY: Ms. Kay Lynn Brumbaugh
1717 Main Street, Suite 3700
Dallas, Texas 75201

ALSO APPEARING

Ms. Karen Van Wagner

Q. Were you aware that Select was having problems in paying physicians?

A. That was the allegation, that Select was having problems with paying physicians.

Q. When did you first become aware of those allegations?

A. Oh, I don't know.

Q. Okay. Would it have been shortly after you joined Aetna?

A. It was probably a year or two later.

Q. Did you ever have any direct role in the litigation between NTSP and Select?

A. No.

Q. Were you ever involved in any discussions of contracts with NTSP?

A. Yes.

Q. What were they? What discussions did you have?

A. As I said before, NTSP approached Aetna about doing a direct contract between their organization and Aetna. Initially the discussions revolved around a risk contract.

Q. Tell me about those, if you will.

A. Oh, there were a series of meetings, discussions, contract proposals, e-mails, multiple

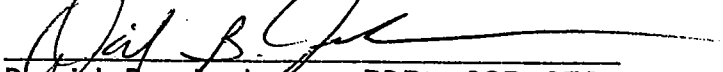
This page of the Exhibit is not included in the public version of this document.

COUNTY OF DALLAS)
STATE OF TEXAS)

I, David B. Jackson, RDR, certified shorthand reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that there came before me the aforementioned named person, who was by me duly sworn to testify the truth concerning the matters in controversy in this cause; and that the examination was reduced to writing by computer transcription under my supervision; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

Given under my hand and seal of office on this, the 23rd day of February, A.D., 2004.



David B. Jackson, RDR, CSR 672
Expiration Date: 12/31/2004
United American Reporting, FRN-209
2725 Turtle Creek Blvd., Suite 200
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UNITED STATES AMERICAN FEDERAL TRADE COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

In the Matter of: NORTH TEXAS SPECIALTY PHYSICIANS,

Respondent.

Docket No. 9312

****

ORAL DEPOSITION OF

DAVID ROBERTS

January 28th, 2004

COPY

****

ANSWERS AND DEPOSITION of **DAVID ROBERTS**, taken at the instance of the Respondent, on the 28th day of January, A.D., 2004 in the above styled and numbered cause at the offices of Andrews & Kurth, 1717 Main Street in Dallas, Dallas County, Texas, before April L. Struck, RPR, a Certified Shorthand Reporter in and for the State of Texas, pursuant to the Federal Rules of Civil Procedure.

A P P E A R A N C E S

APPEARING FOR THE PETITIONER:

FEDERAL TRADE COMMISSION
Northeast Region
BY: Mr. Michael Bloom
One Bowling Green, Suite 318
New York, New York 10004

APPEARING FOR THE RESPONDENT:

THOMPSON & KNIGHT, LLP
BY: Mr. Gregory S. C. Huffman
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201

APPEARING FOR THE WITNESS:

ANDREWS & KURTH
BY: Ms. Kay Lynn Brumbaugh
1717 Main Street, Suite 3700
Dallas, Texas 75201

ALSO APPEARING

Ms. Karen Van Wagner

13:38:28

15:06:56 question.

15:07:24 A. 2001. No. I'm sorry. I don't.

15:07:44 Q. (By Mr. Huffman) What changes were there --

15:07:48 were made in the risk reimbursement structure in the

15:07:50 first couple of years you were on the job in Dallas?

15:07:56 A. Actually, there were no changes to that risk

15:08:00 arrangement after I arrived. Again, my first meeting

15:08:06 with Med Select was at the end of May, and at that

15:08:10 point I was concerned about some of the things that I

15:08:14 heard and contacted our financial area and asked them

15:08:18 to expedite a financial audit, which occurred within

15:08:22 two weeks and -- and this contract began to unravel

15:08:30 either through TDI oversight, which began in July, or

15:08:36 bankruptcy on -- actually, I think that was filed in

15:08:40 June, late June. Must have been July. Late July they

15:08:44 filed bankruptcy.

15:08:44 Q. Was that July 2000?

15:08:46 A. July of -- I'm looking at these dates trying

15:08:52 to figure out -- that would have been 2001.

15:08:56 Q. Okay. So I gather by virtue of your audit you

15:09:06 would have been aware of a lot of the internal

15:09:10 difficulties within that?

15:09:14 A. The difficulty we saw was in the financial

15:09:18 statements.

15:09:18 Q. Were you one of the ones who uncovered the

15:09:24 embezzlement?

15:09:26 A. The team that was sent. I did not participate in the audit. They did find that, yes. And it was reported to me.

15:09:36 Q. Okay. When was that embezzlement found?

15:09:40 A. That week of June 12th.

15:09:42 Q. 2000?

15:09:46 A. 2000 -- must be 2001.

15:09:48 Q. Oh, okay. Let me go back. Because maybe I misunderstood.

15:09:52 A. I think my dates may be off a year.

15:09:54 Q. Okay.

15:09:56 A. I'll clean that up in the review. But --

15:09:58 Q. Let's go back and talk about it now. So when you -- you said you came, what, in May of 2000 -- summer of 2000.

15:10:06 A. It would have been 2001.

15:10:08 Q. Okay. To -- you came back to Dallas in 2001?

15:10:12 A. Right.

15:10:12 Q. All right. And then right after you came back, you heard some things. What did you hear about MSM?

15:10:24 A. Actually, I didn't hear anything. I had a meeting with them. I had a meeting with their officer, and we raised some questions. And we -- I was

15:10:40 concerned and at that point contacted our financial
15:10:44 area and said I need an audit as soon as possible. But
15:10:52 we had been doing ongoing -- pardon me -- as part of
15:10:58 the Texas regulations, there are accountabilities in
15:11:02 any type of risk arrangement and monitoring processes
15:11:04 and things that have to be reported. And we were
15:11:08 already monitoring were they paying claims.
15:11:12 You don't always have claim issues here
15:11:14 and there. Were there trans at that point, no. I
15:11:18 didn't hear any of those things. But in that meeting
15:11:20 in May there were discussions about changes in the
15:11:24 contract, and this contract at that point would have
15:11:26 been less than a year old. Just created concerns, and
15:11:36 it precipitated in an audit.
15:11:38 Q. Okay. So then Aetna did the audit. The June
15:11:42 12 audit uncovers the embezzlement, and I guess a
15:11:46 number of cash flow problems; is that correct?
15:11:48 A. Correct.
15:11:50 Q. Did you make a report to TDI?
15:11:50 A. Yes.
15:11:52 Q. Okay. Then TDI came in and put them under
15:11:54 supervision; is that correct?
15:11:54 A. That's correct.
15:11:56 Q. Some time --
15:11:56 A. Now, whether we instigated that or some other

party, I don't know. But TDI showed up first part of July. We reported it.

Q. Okay. And were you aware as to whether or not anyone had requested an audit prior to the time you got there of MSM?

A. Not that I'm aware of.

Q. Okay. Were you aware that NTSP had requested an audit?

A. No.

Q. Okay. Would that be something Dr. Jagmin would know?

MS. BRUMBAUGH: Objection to the form of the question. How would he know that?

A. I don't know the answer to that.

Q. (By Mr. Huffman) All right. So whatever discussions went on between Dr. Jagmin and NTSP about the need for an audit or MSM difficulties, Dr. Jagmin is the person we should be asking?

A. Yes. Because I don't have knowledge.

Q. TDI then puts MSM under supervision. Then TDI shortly thereafter goes into bankruptcy; is that correct?

A. TDI took over the supervision and began working with the parties to restructure the relationship with all the parties involved and actually

had a meeting to try to finalize that arrangement and for whatever reason wasn't successful, and the very next week was the filing for bankruptcy.

Q. Okay. Going back, if we can, to Exhibit 3112, and this is -- now that I understand that you didn't come until after this, maybe I'm barking up the wrong tree. But any changes in the risk reimbursement structure, would that be something Dr. Jagmin would know?

MS. BRUMBAUGH: Object to the form of the question.

A. If there is knowledge, Dr. Jagmin would know.

Q. (By Mr. Huffman) All right. And when you came in, had you looked at how the reimbursement structure had changed over the last year?

A. I'm trying to recall. I don't recall looking at what the historical reimbursements had been prior to what we were dealing with at that point.

Q. Let me go back. I think you indicated that in June of 2001 the contract between Aetna and MSM was only about a year old?

A. It was a renewed contract, and I think it was about a year old, yes.

Q. Okay. And based on that, is it your belief that the rate structure between Aetna and MSM had not

COUNTY OF DALLAS)
STATE OF TEXAS)

I, April L. Struck, RPR, certified shorthand reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that there came before me the aforementioned named person, who was by me duly sworn to testify the truth concerning the matters in controversy in this cause; and that the examination was reduced to writing by computer transcription under my supervision; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

Given under my hand and seal of office on this, the 9th day of February, A.D., 2004.

April L. Struck

April L. Struck, RPR, CSR 7535
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OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE RADISSON PLAZA HOTEL
815 MAIN STREET
FORT WORTH, TEXAS

DATE JANUARY 27, 2004

PAGES 1 THROUGH 59

TESTIMONY OF DR. MARK COLLINS

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

INDEX

EXHIBITS

REQUESTED DOCUMENTS/INFORMATION
(None)

CERTIFIED QUESTIONS
(None)

In the Matter of the	)	
	)	
North Texas Specialty	)	Docket No. 9312
	)	
Physicians.	)	

ORAL DEPOSITION OF

DR. MARK COLLINS

JANUARY 27TH, 2004

ORAL DEPOSITION OF DR. MARK COLLINS, produced as a witness at the instance of the FTC, and duly sworn, was taken in the above-styled and numbered cause on the 27th of January, 2004, from 9:08 a.m. to 10:40 a.m. before Tammy Staggs, CSR in and for the State of Texas, reported by stenographic method, at the Radisson Plaza Hotel, 815 Main Street, Fort Worth, Texas.

APPEARANCES

FOR THE FTC:
Mr. Theodore Zang and
Mr. Jonathan Platt,
FEDERAL TRADE COMMISSION
Northeast Region
One Bowling Green, Suite 318
New York, New York 10004

FOR THE NTSP:
Mr. William Katz
THOMPSON & KNIGHT, LLP
1700 Pacific, Suite 3300
Dallas, Texas 75201

ALSO PRESENT:
Dr. Karen Van Wagner

A. No.
Q. How about a telephone number?
A. (817) 924-3792.
Q. Any others?
A. Fax, (817) 921-4766.
Q. All right. What was the nature of the depositions that you were involved in a few years ago?
A. Medical and contracting.
Q. Let me ask you to focus on the contracting one. Was it one or more than one?
A. One.
Q. Okay. Could you briefly describe the issue in that matter?
A. What specific?
Q. Well -- all right. Let me ask you this: Was that as part of a lawsuit?
A. Yes.
Q. And do you know who the parties were?
A. Yes.
Q. Who were they?
A. MSM.
Q. And anybody else? Who was on the other side?
A. The physicians.
Q. And you were one of those physicians; is that right?

A. Uh-huh.

Q. And was that a lawsuit in which NTSP was involved?

A. As far as the physician providers, yes.

Q. All right. Why were you deposed, do you know?

A. I was the banner name, the first name on the documents.

Q. How did it come to be that you were the named party on the documents?

MR. KATZ: Well, I'm going to caution you not to disclose any privileged communication that you may have had with counsel. So to the extent that your knowledge as to why your name is a party or you might have been a lead plaintiff is based upon something you've learned from counsel, then you don't have to answer that. That would be privileged.

THE WITNESS: Okay.

A. I'm going to have a hard time recalling at that point. Counsel was involved with a lot of that, so I'm not going to be able to give any specifics. I'd be hesitant to answer any specifics on that or any generalizations.

Q. (BY MR. ZANG) Just prior to the lawsuit, did a large portion of your business in some way or another involve MSM?

A. Describe what you mean by a large portion.

Q. Well, do you have an understanding of a -- what do you understand large portion to mean?

A. Whether it's a significant number of my volume or...

Q. All right. Why don't you use --

A. Are you looking for percentages?

Q. Well, why don't you use that first definition that you've just described, a significant portion of your volume.

A. I wouldn't be able to characterize just how significant it was.

Q. Okay.

A. I did do business with contracts through MSM.

Q. All right. And were those contracts risk or nonrisk?

A. I don't even recall.

Q. What was the nature of the dispute with MSM at the time?

A. The basics was honoring a contract that they had with us as a physician.

Q. In other words, they failed to honor it? Was that one of the allegations?

A. That was my concerns and allegations, yes.

Q. And could you describe in more detail the

nature of your concern that you just eluded to?

MR. KATZ: And let me just say, again, through all this stuff, if you would just please limit your answer to your knowledge, not based on anything you've obtained through counsel. So you can tell him what your thoughts were separate and a part from what you may have learned or discussed with counsel. So you can go ahead and answer to that extent.

A. Can you reask the question again?

Q. (BY MR. ZANG) Sure. You had mentioned that you had a concern with respect to MSM, and I wanted -- I asked you to describe in greater detail the nature of your concern with respect to your MSM relationship at the time.

A. They had a contract with us -- with me that they did not honor, and the general principal would be they would want me to honor my portion of the contract. I expected them to honor their portion of the contract, which they did not.

Q. Did it include a PPO contract?

A. I don't recall whether the PPO was involved in that or not.

Q. All right. Did you do anything to prepare for today's deposition?

A. Meeting with counsel, review of a previous

A. As an individual, my recollection is what I would consider the minimum that I would want to review it based on a fee for an HMO or PPO.

Q. And that would be with respect to both HMO and PPO contracts?

A. As I said, PPO and HMO.

Q. And with respect to yourself, is that a minimum you would like to receive at a particular point in time?

A. As an individual, not as part of the group, as an individual that is what I like to try to maintain a minimum as.

Q. And why is that important to you, if that is important to you?

A. That's my individual preference for what I want as the lowest fee schedule I'm wanting to take.

Q. Is there any -- any reason why you have a preference for such minimums? I'm just trying to understand why, if there are any reasons, that you express your preferences in terms of a minimum fee.

A. That's how I'm paid. I have to have some income to keep my office open.

Q. Right. But I suppose an alternative would be for you to be able to review any contractual offering that might be made by a payer even if it came in below

your so-called minimums, right?

A. I have that opportunity at any time to be available through a direct contract, whether it's a contract through an IPA, any particular one, or go directly to the company. I've always had that opportunity. I still have always that opportunity.

Q. Have you ever entered into a direct contract that fell below your expressed minimums?

A. I don't recall.

Q. Would you?

MR. KATZ: Objection. Form.

A. Depends on the whole contract.

Q. (BY MR. ZANG) Do your minimum -- does your preference for minimum rates change over time? Has it changed over time? Let me ask that question. Has it changed over time?

A. I don't recall because I don't recall what my minimums were originally.

Q. How did you arrive at your minimums? Just picking it out of a hat, the number? Or was there some methodological way you did it?

A. I had no specific methodology to it.

Q. How about a general methodology?

A. I based it on just how I was looking at it at the time.

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: DR. MARK COLLINS

CASE TITLE: NORTH TEXAS SPECIALTY PHYSICIANS

HEARING DATE: JANUARY 27, 2004

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 1-28-04

Tammy Staggs

TAMMY STAGGS

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara J Vance

SARA J. VANCE

For The Record, Inc.
Waldorf, Maryland
(301)870-8025

CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____

DR. MARK COLLINS

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this

_____ day of _____, 19____, and executed the above certificate in my presence.

_____

NOTARY PUBLIC IN AND FOR

_____

MY COMMISSION EXPIRES:

_____

WITNESS: DR. MARK COLLINS

DATE: JANUARY 27, 2004

CASE: NORTH TEXAS SPECIALTY PHYSICIANS

Please note any errors and the corrections thereof on this errata sheet. The rules require a reason for any change or correction. It may be general, such as "To correct stenographic error," or "To clarify the record," or "To conform with the facts."

PAGE	LINE	CORRECTION	REASON FOR CHANGE

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FOR IMMEDIATE RELEASE
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DALLAS, TEXAS
NOVEMBER 12, 2003

Former Accounting Manager for City of Grand Prairie Sentenced to 8 Years

United States Attorney Jane J. Boyle announced today that Frederick Charles Miller, a CPA and former accounting manager for the City of Grand Prairie, Texas, was sentenced today to eight years imprisonment, following his guilty plea in August to money laundering and tax evasion charges. The Honorable United States District Judge John McBryde also ordered Miller to forfeit $1.15 million and pay $1.45 million in restitution, which includes $300,000 to the Internal Revenue Service for taxes owed. In addition, he was ordered to forfeit all of those items, real and personal property, which were identified in the indictment and plea agreement. Miller has been in federal custody since his arrest in June on charges outlined in an 11-count indictment that was returned by a federal grand jury in Fort Worth earlier that month. He is a former resident of Cedar Hill, Texas.

Frederick Charles Miller was the Chief Financial Officer of Harris Methodist Select, Chief Financial Officer and Vice President of Medical Pathways, and Vice President - Secretary - Treasurer of Medical Select Management. Harris Methodist Select and Medical Select Management were companies and health care benefit programs which provided medical benefits, items, and services through medical providers to individuals covered by health care contracts. Medical Pathways was a management company for Medical Select Management.

Miller admitted that beginning in 1998 and continuing through 2001, he embezzled approximately $1,150,000 from Harris Methodist Select and Medical Select Management. He admitted that he used his position as an officer to facilitate the embezzlement and thefts and devised various schemes to defraud and embezzle the funds. On August 15, 2000, Miller purchased a $338,000 cashier's check at Bank of America with the funds obtained from Medical Select Management and Harris Methodist Select. He deposited this cashier's check in another bank account opened in the name of a fake company, Clarice Corporation. Miller conducted this transaction with known criminally derived funds stolen from the health care benefit programs and well knew when he purchased the cashier's check that the funds were embezzled.

Miller also admitted that he attempted to evade his tax liability for 2000 by submitting to the Internal Revenue Service, a false and fraudulent joint income tax return. He intentionally omitted $649,169.52 in income obtained in 2000 which should have been reported to the IRS. Miller stated on the fraudulent tax return that $265,999 was his and his wife's income upon which a tax of $78,808 was owed, when in fact, as Miller well knew, their true income was $915,167.52 and a tax owed of $335,074.24. Miller had stolen those unreported funds from health care benefit programs and was hiding the thefts on this income tax return. Those unreported funds were laundered and hidden in various ways by Miller with the intent to evade detection and taxes owed to the IRS, as well as the victims of the thefts and embezzlement.

Frederick Charles Miller obtained several properties with the embezzled and laundered funds, including $245,490 in cash; 271 gold coins, valued at $113,820, that were obtained with stolen funds; $14,602.94 in negotiable instruments; a residence located on Bentle Branch Lane in Cedar Hill in which the equity was obtained with forfeitable funds; approximately $15,000 in Thomas Kinkade paintings purchased with stolen funds; a Texas Guaranteed Tuition plan with a deposit of stolen funds totaling $44,006; various other investment accounts established with stolen funds; and a 1998 Toyota vehicle purchased with stolen funds.

U. S. Attorney Boyle praised the investigative efforts of the Internal Revenue Service - Criminal Investigation (IRS-CI), the Federal Bureau of Investigation and the U.S. Postal Inspection Service. The case was prosecuted by Assistant United States Attorney Ronald C.H. Eddins.

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This Exhibit is not included in the public version of this document.

1011

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of NORTH TEXAS SPECIALTY PHYSICIANS, a corporation.	**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 departicipations and threatened departicipations 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: December 1, 2003

Respectfully submitted,

Michael Bloom
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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

12/11

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

COMPLAINT COUNSEL'S SECOND SUPPLEMENTAL RESPONSE TO RESPONDENT'S FIRST SET OF INTERROGATORIES

Pursuant to Judge Chappell's Order on Respondent's Motion to Quash and Motion to Compel Responses to Interrogatories, dated December 4, 2003, Complaint Counsel hereby answers the contention interrogatories propounded in Respondent North Texas Specialty Physician's First Set of Interrogatories.

Interrogatory Number One

Identify each and every communication between NTSP and any alleged coconspirator in which the coconspirator agreed that he or she would reject a payor offer, including the date, time, content, and participants of such communication.

In addition to Complaint Counsel's earlier stated objections, Complaint Counsel objects to this interrogatory in that, unless narrowly construed, the request for Complaint Counsel to identify "each and every communication . . . including the date, time, content, and participants of such communication" is unduly burdensome and otherwise unreasonable. Accordingly, Complaint Counsel responds so as to address the substance of the interrogatory.

Respondent asks Complaint Counsel to identify every communication in which a coconspirator agreed that he or she would reject a payor offer. Complaint Counsel is not aware of communications between NTSP and any other person or entity taking the form of an express

request by NTSP that a physician reject a specific payor offer, to which any physician expressly replied, "I agree to reject this offer." There may or may not have been such explicit communications, which are a subject of ongoing discovery. However, such an explicit exchange is not necessary to establish a violation of Section 5. An unlawful agreement may be established directly or indirectly, by words or by actions. The conduct giving rise to an unlawful agreement may be that of NTSP itself, because insofar as NTSP conduct relates to the pricing of physician services, it is concerted action (that is to say, "NTSP" means "NTSP as a collective entity"). Alternatively, the conduct giving rise to an unlawful agreement may be that of NTSP acting in concert with, or facilitating agreement among, some or all of its participating physicians and/or others.

In fact, NTSP, acting for, with, and as a combination of, its participating physicians, undertook a course of conduct to affect the pricing of physician services. Implicated in this course of conduct were innumerable communications of various types, including, among others, contracts with physicians; contacts with payors and other IPAs; communications including email and fax exchanges with participating physicians; and meetings and acts of NTSP directors, agents, and employees.

More particularly, this course of conduct includes, among other things, communications relating to:

* NTSP's proffering and participating physicians' executing of NTSP physician participation agreements insofar as applicable to fee-for-service medical services, *see, e.g.*, NTSP 000032 *et seq.*; NTSP 000044 *et seq.*; NTSP 005141; NTSP 022453 *et seq.*,[1] as well as

[1] Throughout this response, citations to documents are intended to be illustrative and are not inclusive.

NTSP's actions to maintain exclusivity, *see, e.g.,* NTSP 022458 *et seq.* ; NTSP 005080; NTSP 022380 *et seq.*;

* NTSP's soliciting and participating physicians' providing of minimum acceptable fees for the provision of fee-for-service medical services, in connection with NTSP's promise to use such data to determine and disseminate to participating physicians NTSP minimum prices for fee-for-service medical services, and to conduct negotiations with payors in accordance therewith. *See, e.g.,* NTSP 004948 *et seq.*; NTSP 005086 *et seq.* ; NTSP 003960; NTSP 005285; NTSP 014310; NTSP 014913 *et seq.*; NTSP 0022082 *et seq.*;

* NTSP's determining of minimum contract prices for fee-for-service medical services. *See, e.g.,* NTSP 014962 *et seq.*; NTSP 004636 *et seq.*; NTSP 005435; NTSP 003190; NTSP 008449; NTSP 008451;

* NTSP's dissemination to participating physicians of the mean, median, mode, and other data reflecting participating physicians' poll responses applicable to fee-for-service medical services, and of NTSP's minimum contract prices based thereon. *See, e.g.,* NTSP 004636 *et seq.*; NTSP 005080; NTSP 005009; NTSP 005037 *et seq.*; NTSP 005281 *et seq.*; NTSP 014727 *et seq.*; NTSP 014846; NTSP 0022082 *et seq.* ; NTSP 022056 *et seq.*;

* NTSP's informing payors of NTSP minimum contract prices applicable to fee-for-service medical services. *See, e.g.,* NTSP 005080; FTC-NTSP-AETNA 000079; NTSP 070801; NTSP 005281 *et seq.* NTSP's establishment of a *de facto* uniform list price as a common starting point for bargaining with payors through the above and related communications alone violates the antitrust laws;

* NTSP's rejection or threatened rejection of, or failure to timely convey to participating physicians, payor proposals not in accord with established minimum contract prices

for fee-for-service medical services. *See, e.g.,* FTC-NTSP-CIGNA 000453; FTC-NTSP-CIGNA 000451 *et seq.*; NTSP 005055 *et seq.*; NTSP 068668;

* NTSP's on-going negotiations with payors for fee-for-service medical services, including the making of offers and counter-offers to payors regarding the fees to be paid for such services. *See, e.g.,* FTC-NTSP-CIGNA 000461 *et seq.*; FTC-NTSP-CIGNA 000463; FTC-NTSP-CIGNA 001626; FTC-NTSP-CIGNA 000503; FTC-NTSP-AETNA 000079; NTSP Ex. 12; NTSP 022331; NTSP 00470 *et seq.*; NTSP 012599; NTSP 005435; NTSP 014727-014733; NTSP 003190; NTSP 008449 *et seq.*;

* NTSP's reopening of fee-for-service medical services rate negotiations with contracted payors whose rates had fallen below NTSP minimum contract prices. *See, e.g.,* NTSP 014941-43;

* NTSP's advising participating physicians of the status of negotiations with payors regarding the fees to be paid for fee-for-service medical services and other NTSP actions having the purpose or effect of reducing individual participating physician interference with collective price negotiations. *See, e.g.,* NTSP 005086 *et seq.*; NTSP 005080; NTSP 014962 *et seq.*; NTSP 004934; NTSP 014871; NTSP 014860; NTSP 022380 *et seq.*; NTSP 005119; NTSP 015204 *et seq.*; NTSP 005193; NTSP 022341*et seq.*; NTSP 014860l; NTSP 014533; NTSP 015206; NTSP 014491; NTSP 022351; NTSP 022331; NTSP 005285; NTSP 014310; NTSP 022434-022435;

* NTSP's encouraging acceptance and rejection of contracts for fee-for-service medical services, based on adequacy of price. *See e.g.*, NTSP 022385; NTSP 005225;

* NTSP's acting as a common sales agent for otherwise competing physicians to fix prices, through, among other things, its soliciting and participating physicians' granting of powers of attorney applicable to fee-for-service medical services. *See, e.g.,* FTC-NTSP-CIGNA

000234; NTSP 008010-11; NTSP 014941-43; NTSP 004934; NTSP 005104-55; NTSP 005269-70; NTSP 005278; NTSP 014309; NTSP 005120; NTSP 022423-022424; NTSP 014727-014733;

* NTSP's interactions with and communications about other entities, including other IPAs, regarding payor payments and contracts. *See, e.g.*, NTSP 014962; NTSP termination notice of July 20, 2001; NTSP 022380-82; NTSP at 022458; NTSP 022458 *et seq.*; NTSP 005193;

* NTSP's solicitation of participating physicians' letters to employers threatening the non-viability of payor networks unless payors acceded to NTSP's minimum contract prices for fee-for-service medical services. *See, e.g.*, NTSP 008191-92; NTSP 005077-005079; NTSP 014962;

* NTSP's causing or threatening to cause the collective departicipation of NTSP's participating physicians from payor contracts, often at moments of critical import to the payors, such as open enrollment season, thereby dramatically increasing the need for the payor to accommodate NTSP' price demands. *See, e.g.*, NTSP 014962; NTSP 003622; NTSP 014941-43; NTSP 005120; NTSP 022458-022460; FTC-HTPN-[] (NTSP/UHC termination notice of July 23, 2001);

* General meetings of NTSP and its participating physicians, as well as meetings of sub-units of NTSP and of its Directors, employees, and agents, at which any of the above were discussed. *See, e.g.*, NTSP 004311; NTSP 003622; NTSP Board of Directors' Meeting Minutes of October 8, 2001; NTSP 0031901; NTSP 014533; NTSP 015206; NTSP 014491; NTSP 022351; NTSP 014309; NTSP 014310.

Interrogatory Number Two

Identify each and every act or practice of NTSP which you contend restrains trade, hinders competition, or constitutes an unfair method of competition, including the date of each such act or practice and how that act or practice restrained trade or hindered competition.

The acts and practices of NTSP that restrain trade, hinder competition, or constitute an unfair method of competition, insofar as relevant to the Federal Trade Commission's complaint are detailed in the complaint, Complaint Counsel's opening statement to Judge Chappell, Complaint Counsel's responses to Respondent's first request for admissions, and in the response to the prior interrogatory. Those documents are incorporated in this response by reference.

NTSP has fixed the price of fee-for-service medical services, and facilitated, coordinated, and acted as the "hub" of concerted action by its participating physicians. Because the NTSP-effectuated tampering with price structures is "among independent competing entrepreneurs[, it] fit[s] squarely in the horizontal price-fixing mold." *Arizona v. Maricopa Medical Society*, 457 U.S. 332 (S. Ct. 1982). *See also U.S. v. Socony-Vacuum Oil,* 310 U.S. 150 (S. Ct. 1940), quoted in *Arizona v. Maricopa, supra.*

To begin, some or all of NTSP's participating physicians agree, by written contract, to forward to NTSP for further handling any payor offer received, and to refrain from pursuing that offer until NTSP has permanently discontinued negotiations with the payor. *See, e.g.,* NTSP 000032 *et seq.*; NTSP 000044; NTSP 005141; NTSP 022453-55. Thus, by agreement between NTSP and its participating physicians, NTSP and its physicians reduce the likelihood that participating physicians will act as "spoilers" as NTSP seeks advantageous price agreements with payors on behalf of its participating physicians.

NTSP appears to have established minimum contract prices applicable to the practice of fee-for-service medicine for several years prior to having begun its annual polling of participating physicians. *See, e.g.*, NTSP 014962 *et seq.* The communications leading to and beyond the establishment of these prices are not yet known to Complaint Counsel, but they likely were the leading edge of NTSP's price-fixing activities.

Subsequently, NTSP began, at least annually, to poll its participating physicians as to their "minimum acceptable range of compensation," "to establish Contracted Minimums" for the physicians' fee-for-service medical services. *See, e.g.*, NTSP 004948-49; NTSP 005086-88; NTSP 003960; NTSP 005285; NTSP 014310; NTSP 014913-014914; NTSP 004633; NTSP 004636. It set the contracted minimum prices at the midpoint of the minimum acceptable ranges identified by its participating physicians. It then communicated to its physicians the results of the poll and the newly established Board Minimums. Its all-physician Board then instructed its staff "to use these levels as minimally acceptable fee schedules for HMO and PPO contract offers, which they did. *See, e.g.*, NTSP 004636-37; NTSP 005080; NTSP 005009; NTSP 014816; NTSP 005281-005282. The manner in which NTSP conducts its polling and related activities tends to inflate participating physicians' "ask" prices and otherwise facilitate collusive pricing, and the minimum prices jointly set then become the basis of NTSP's future bargaining with payors.

Often when NTSP begins discussions with a payor regarding a possible contract for the provision of services by NTSP's participating physician, NTSP informs the payor that the physicians have established price minimums for NTSP-payor agreements, identifies those price minimums, and states that NTSP will not enter into or otherwise forward to its participating physicians any payor offer that does not satisfy those price minimums. *See, e.g.*, FTC-NTSP-

CIGNA 000453; FTC-NTSP-CIGNA 000451-2; NTSP 005055-56; NTSP 005281-005282; NTSP 014727-014733. In other instances, payors have proposed to NTSP agreements, or amendments to existing agreements, for the services of its participating physicians that included proposed price schedules that did not satisfy the NTSP physicians' price minimums. *See, e.g.,* FTC-NTSP-AETNA 000079; NTSP 005055-56; NTSP 068668. NTSP sometimes has then advised the payors of the established price minimums and informed them that NTSP will await the payors' submission of revised proposals that satisfy those minimums, or otherwise actively bargained with payors as to prices to be paid NTSP's participating physicians. *See, e.g.,* NTSP 005080; FTC-NTSP-AETNA 000079; NTSP 070801. And in some instances, NTSP has reminded participating physicians to allow NTSP to continue negotiations with a payor without the physicians engaging in potentially competing negotiations with the payor. *See, e.g.,* NTSP 005080; NTSP 004934; NTSP 014871; NTSP 014860; NTSP 022380-82; NTSP 005119. As a result, payors sometimes have either submitted new offers with higher prices or accepted the higher prices pressed on them by NTSP for and on behalf of its physicians.

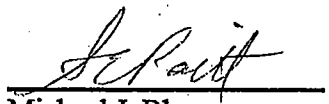
Because Counsel for Respondent has adamantly refused to provide adequate initial disclosures or to supplement its paltry initial disclosures (identifying a mere twelve persons, all of whom were affiliated with NTSP itself), Complaint Counsel may have yet to learn of numerous communications of the type referred to above. Complaint Counsel presently can state that such communications involved, at a minimum, NTSP contacts with, in alphabetical order, Aetna, Inc., Blue Cross Blue Shield of Dallas, Texas, CIGNA Healthcare of Texas, Inc., and United Healthcare of Texas, and spanned the time period from approximately 1998 to 2002 (we have just received respondents documents for 2003).

In addition, NTSP communicated with participating physicians to create and raise barriers to make payor efforts to contract around NTSP and its fixed prices costly and impracticable. These communications related to, among other things, causing or threatening to cause the sudden collective departicipation of NTSP's participating physicians from certain payor contracts, often at moments of critical import to the payors, such as open enrollment season, thereby dramatically increasing the need for the payor to accommodate NTSP' price demands. *See, e.g.*, NTSP 014962; NTSP 003622; FTC-HTPN-[] (NTSP/UHC termination notice of July 23, 2001); NTSP 014941-43; NTSP 008010-11; NTSP 005120; NTSP 022458-022460. Similarly, NTSP has urged its participating physicians, as "part of our negotiations" to write employers and others, impressing upon them that unless the named payor acceded to NTSP's price demands, "a severe network inadequacy problem will exist in Fort Worth." *See, e.g.*, NTSP 008191-92; NTSP 005077-005079; NTSP 014962.

These and similar communications reflect collective actions by NTSP, acting for, with, and as a combination of, its participating physicians, to bolster their pricing power to fix the prices they want. In effect, NTSP and its participating physicians sought to persuade buyers of medical services: that NTSP represents a large and significant panel of Fort Worth-area specialists and primary care practitioners; that if buyers of medical services want to obtain or maintain a significant network of NTSP participating physicians they must pay, or continue to pay, at or above the minimum contract prices fixed by NTSP for and with its participating physicians; and that if buyers seek to negotiate around NTSP and its fixed prices, NTSP and its participating physicians can and will impose significant costs on the buyers and those persons the buyers seek to serve.

As a result of the price-fixing and coercive pressures exerted by NTSP and its participating physicians, some payors increased their offering prices to NTSP participating physicians above what they otherwise would have paid. Some payors abandoned efforts to reduce their prices to NTSP participating physicians. Some payors bore higher costs and/or offered less competitive or inclusive physician panels. NTSP's acts in restraint of trade were not offset by cognizable countervailing efficiencies. Therefore, increased costs imposed by NTSP can be expected ultimately to filter down to employers and patients.

Respectfully Submitted,



Michael J. Bloom
Susan E. Raitt
Complaint Counsel
Federal Trade Commission
Northeast Regional Office
One Bowling Green, Suite 318
New York, NY 10004

Dated: December 11, 2003

CERTIFICATE OF SERVICE

I, Susan E. Raitt, hereby certify that on December 11, 2003, I caused a copy of the foregoing document to be served upon the following persons:

Gregory Huffman, Esq.
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, TX 75201-4693
Gregory.Huffman@tklaw.com

Susan E. Raitt

* * * COMMUNICATION RESULT REPORT (DEC.22.2003 10:03AM) * * *

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DECEMBER 22, 2003

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NAME: Karen Van Wagner

COMPANY: North Texas Specialty Physicians

FAX: 817.332.3614 TELEPHONE: _____

FROM: Greg D. Binns

SUBJECT: FTC Investigation

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OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE RADISSON PLAZA HOTEL
815 MAIN STREET
FORT WORTH, TEXAS

DATE JANUARY 28, 2004

PAGES 1 THROUGH 64

TESTIMONY OF DR. JOHN JOHNSON

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

INDEX

EXHIBITS

FEDERAL TRADE COMMISSION

In the Matter of the	)	
	)	
North Texas Specialty	)	Docket No. 9312
	)	
Physicians.	)	

ORAL DEPOSITION OF

DR. JOHN JOHNSON

JANUARY 28TH, 2004

ORAL DEPOSITION OF DR. JOHN JOHNSON, produced as a witness at the instance of the FTC, and duly sworn, was taken in the above-styled and numbered cause on the 28th of January, 2004, from 3:02 p.m. to 5:10 p.m. before Tammy Staggs, CSR in and for the State of Texas, reported by stenographic method, at the Radisson Plaza Hotel, 815 Main Street, Fort Worth, Texas.

A P P E A R A N C E S

FOR THE FTC:
Mr. Theodore Zang and
Mr. Jonathan Platt,
FEDERAL TRADE COMMISSION
Northeast Region
One Bowling Green, Suite 318
New York, New York 10004

FOR THE NTSP:
Mr. William Katz
THOMPSON & KNIGHT, LLP
1700 Pacific, Suite 3300
Dallas, Texas 75201

Q. Let me ask you this question, though, Dr. Johnson, when you fill out -- I assume you've filled out these annual polls; is that right?

A. Yes.

Q. And when was the most recent time?

A. I don't recall. It's been some time.

Q. All right. When you fill out an annual poll, in your own mind, for how long is the range that you're filling out -- that you would like to see for HMO and PPO contracts, how long is that valid for, in your own mind?

A. Till the next one goes out. I think that they try to send them out annually, but it's been a long time since I've gotten one. It could have been more than a year.

Q. Let me focus my next set of questions on PPO or nonrisk contracts. Has there ever been a situation when you entered into a contract that fell below the range that you said you wanted to see on the annual poll?

A. Yes.

Q. When was that?

A. The -- are you talking through NTSP or another contract?

Q. That's a fair question. Let's start first

with NTSP, through NTSP.

A. Yes. The Aetna contract, I signed an individual physician offering outside of NTSP.

Q. And you signed it at a rate that fell below your expressed preference on the annual poll?

A. Yes.

Q. Can you testify as to the approximate difference in rates?

A. No.

Q. Now, why did you sign that Aetna contract?

A. I signed it in order to be able to continue to see Aetna patients, and it was important for my business.

Q. Can you elaborate just a little bit on why it was important?

A. I had several patients who were Aetna patients, and it was important for continuity of care. The Aetna business made up a significant portion of my practice, so it was important for me to continue to have that income in spite of the fact that I had lost significant amounts of money when MSM administered the Aetna contract.

It was also important as far as my relation with many of the referring physicians because they were continuing or had contracts with Aetna; and in order for

me to continue to see their patients, I needed to be an Aetna provider.

Q. Let's go back now, and I'd like to ask you the same questions with respect to non-NTSP contracts. Have you ever signed -- although, let me stop there and I just want to get clarity --

A. Yeah, define those terms.

Q. And, well, actually that Aetna contract was a non-NTSP contract, right?

A. Correct.

Q. Okay. Any others that you've entered into that fell below your expressed minimums, if you understand -- by minimums, I'm referring to what you put down on the poll. Do you understand that?

A. Yes. There are, but I can't bring those to mind.

Q. And how about any NTSP contracts that you had entered into?

A. Would you define what you mean by that?

Q. Sure. The same question, were there any contracts that you entered into as a participating provider with NTSP that fell below your expressed minimums?

A. I don't know.

Q. How does NTSP use the poll results, do you

were below the mean, median, or mode results of the most recent annual poll that NTSP conducted?

A. I don't know that.

Q. Now, I take it, that you do -- that you have from time to time seen the NTSP poll results, is that right, even though you may or may not remember them as you sit here today?

A. Correct.

Q. Let me ask you, when you see those results, does that affect in any way your perception of what you would like to obtain in contractual offerings?

A. Very little.

Q. Can you describe that?

A. Going back to what I mentioned before, when I consider whether or not to accept a contract, I look at how much business I currently do with that payer. I look at what the payer's penetration into the market is, how many -- how many customers, whether they do business with any large companies in Fort Worth. I also look at what my -- how many patients I currently have with that payer, and I also try to find out whether any of my referring primary care physicians do a large volume with that payer as well.

Q. Okay. A couple of follow-ups. You testified that the NTSP poll results have very little affect on

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: 0210075

CASE TITLE: NORTH TEXAS SPECIALTY PHYSICIANS

HEARING DATE: JANUARY 28, 2004

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 1-29-04

Tammy Staggs

TAMMY STAGGS

CERTIFICATION OF PROOF-READER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

Sara J Vance

SARA J. VANCE

CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____

DR. JOHN JOHNSON

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this

_____ day of _____, 19___, and executed the above certificate in my presence.

_____

NOTARY PUBLIC IN AND FOR

_____

MY COMMISSION EXPIRES:

_____

WITNESS: DR. JOHN JOHNSON

DATE: JANUARY 28, 2004

CASE: NORTH TEXAS SPECIALTY PHYSICIANS

Please note any errors and the corrections thereof on this errata sheet. The rules require a reason for any change or correction. It may be general, such as "To correct stenographic error," or "To clarify the record," or "To conform with the facts."

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