PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION TO NTSP'S MOTION FOR SUMMARY DECISION

Mischaracterizing the factual record, the testimony of Complaint Counsel's expert economist, Complaint Counsel's burden of proof, and applicable law, Respondent North Texas Specialty Physicians ("NTSP") now asks Your Honor to summarily dismiss this complaint issued by a unanimous Commission. NTSP, however, has not met its heavy burden of demonstrating the absence of material facts in dispute. The record developed thus far provides compelling evidence that NTSP has violated the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*., (the "FTC Act") by entering into horizontal agreements to restrain price competition among competing physicians. Therefore, Complaint Counsel respectfully request that Your Honor deny NTSP's motion and render judgment only after reviewing the entire factual record at trial.

I. Introduction

The issue in this litigation is whether NTSP and its participating members physicians restrained price competition among its physicians, and if so, whether these restraints were reasonably ancillary or necessary to achieve cognizable and plausible efficiencies. Not only is the evidence of concerted action relating to price and other terms of competition crystal clear, but

NTSP has offered nothing more than conjecture to carry its burden of proving reasonably ancillary efficiencies. There are not only material factual disputes; there is, in fact, overwhelming evidence that NTSP's conduct was anticompetitive and not justified by any procompetitive efficiencies

Through a wide variety of anticompetitive practices, NTSP and its member physicians directly restrained price competition among its member physicians:

- NTSP obtained from many of its member physicians, a first right of negotiation with health plans.
- NTSP negotiated fee levels with health plans on behalf of its approximately 600 member physicians
- NTSP collected powers of attorney from its member physicians and used those powers of attorney to strengthen its negotiating position
- NTSP conducted "polls" through which it collected future price information from its member physicians and disseminated that information back to its members
- Based in part on the poll data, NTSP's Board of Directors (made up entirely of member physicians) established "minimum" acceptable fees, and rejected health plans offers below those minimums
- Though holding itself out as a "messenger model" IPA, NTSP Board regularly refused to "messenger" offers below its minimum contract price to member physicians for individual decisions to opt in or opt out of a specific plan (until it had succeeded in negotiating higher fees)
- NTSP also strengthened its negotiating power with health plans by terminating existing contract relationships between some of its member physicians and a health plan, and by urging employers to support NTSP efforts to extract higher fees from health plans.

Such price-related collective action by a physician group is unlawful under leading court decisions, and is condemned by the Commission's own Health Care Statements. *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *Michigan State Medical Soc'y*, 101 F.T.C. 191

(1983); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CCH) ¶ 13,153 (August 28, 1996) ("*Health Care Statements*"). The acts of NTSP, taken individually and as a whole (as they must be), restrained price competition among its member physicians. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002) (Posner, J.) ("*HFCS*"). Moreover, the "efficiencies" claimed by NTSP to justify this conduct--which NTSP has the burden of proving--are not plausible, and are not legally cognizable because they are not reasonably related to the price restraints, and could have been achieved without engaging in collective price negotiations and the other price-related conduct at issue here. Thus, NTSP's motion for summary decision must be denied.

II. Summary Judgment is Not Appropriate Because The Evidence Shows Genuine Issues of Fact for Trial

In assessing a motion for summary decision, the initial burden is on the moving party to prove the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-25 (1986).[1] To defeat a motion for summary decision, a non-movant need only present "specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. § 3.24 (a) (3). The Commission has held that "the burden falls on the moving party to establish that no relevant facts are in dispute," and the Court "must resolve all ambiguities and draw all reasonable inferences against the moving party." *Trans Union Corp.*, 118 F.T.C. 821, 839-40 (1994); *see*

[1] Decisions on motions for summary judgment under Fed. R. Civ. P. 56(c) are "persuasive" in interpreting the Commission's rules. *In re Kroger* Corp., 98 F.T.C. 639, 726 (1981).

also Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000); *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 631 (9th Cir. 1987).

When confronted with a summary decision motion in the context of a horizontal restraint case such as this, courts must be careful to avoid three traps: (1) the temptation "to weigh conflicting evidence (the job of the jury)," (2) "to suppose that if no single item of evidence presented by plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment," and (3) "failing to distinguish between the existence of a conspiracy and its efficacy." *HFCS,* 295 F.3d at 655-56.

Here, NTSP's motion invites this Court to enter every one of the "traps" described by Judge Posner in *HFCS.* NTSP asks this Court to examine every piece of evidence in isolation, and evaluate whether the conspiracy was effective in obtaining the collusive price in every instance. Under the proper standard for evaluating a summary decision motion, however, the evidence easily creates a triable issue of fact as to whether NTSP and its members entered into a "contract, combination or conspiracy" in violation of § 1 of the Sherman Act and § 5 of the FTC Act.

III. Summary of the Evidence

NTSP's memorandum provides only an incomplete and misleading description of NTSP's activities. In fact the primary purpose, and primary activity, of NTSP is to engage in collective fee negotiations on behalf of its members, close to [redacted] specialist physicians practicing in or near Fort Worth.[2] NTSP is operated by a Board of Directors, made up entirely of member

[2] Van Wagner 8/29/02 dep. at 12, 15-16 **[Tab 33]**.

physicians elected by the members, and representing various specialties.[3] This Board hires a professional staff, and supervises NTSP's activities, including the price-related conduct that is the subject of this litigation.[4] NTSP's own documents show that it operates for the pecuniary benefit of its members, including obtaining the highest possible fees from health plans.[5]

There is abundant evidence demonstrating that NTSP was founded for the purpose of negotiating health plans contracts, including reimbursement rates.[6] Originally, NTSP negotiated risk-sharing contracts for managed care plans, under which NTSP and its members physicians accepted monthly payments in exchange for providing whatever medical services covered members required.[7] Over the past four years, however, the market has moved away from such risk-sharing managed care plans,[8] and NTSP has changed its focus to negotiating contracts with fee-for-service reimbursement for non-risk sharing health plan plans.

The evidence shows that NTSP engages in aggressive price negotiations with health plans, in which it attempts to obtain the highest possible fee levels for its [redacted] member

---

[3] FTC Ex. 1000 (NTSP Bylaws) at 000009-000024 **[Tab 4]**.

[4] Van Wagner 8/29/02 dep. at 79-80 **[Tab 38]**.

[5] Grant dep. at 42 **[Tab 42]**. *See also* FTC Ex. 1129 **[Tab 20]**; FTC Ex. 1070 at SWN 001010 **[Tab 16]**; FTC Ex. 1037 at NTSP 022341-342 **[Tab 14]**. This issue was briefed in detail in Complaint Counsel's memorandum in support of its Motion for Summary Decision, at pp 18-22. Consequently, this evidence is not discussed in detail here.

[6] Johnson dep. at 10-11 **[Tab 45]**. *See also* FTC Ex. 1000 at NTSP 00002; *Id*. at NTSP 00032-34, provisions 2 through 2.6; *Id.* at NTSP 00038-39, provision 41 **[Tab 5]**.

[7] Vance dep. at 9-10 **[Tab 46]**.

[8] Frech dep. at 170 **[Tab 50]**.

physicians.[9] These collective rate negotiations constitute a restraint of price competition among these otherwise-competing physicians, implemented by and through NTSP acting as their agent and representative.

NTSP and its members have engaged in numerous collusive practices in furtherance of this price agreement. NTSP has at various times collected "powers of attorneys" from a number of its individual physicians, giving it the right to negotiate contract terms–including price terms–on behalf of those members.[10] NTSP has then used these powers of attorney to strengthen its hand in negotiating fees with health plans. The powers of attorney are supplemented by NTSP's Physician Participation Agreement which gives NTSP a first right to negotiate with healthplans before members have the right to negotiate with the plan directly.[11]

NTSP also conducts polls of its members, through which the physicians inform NTSP what fees they would accept for current or future contracts with health plans.[12] This data is used for a number of purposes.[13] First, NTSP staff calculates the fees that would be acceptable to the "average" physician (using "mean, median and mode" calculations).[14] This aggregated

---

[9] FTC Ex. 1103 **[Tab 19]**. *See also* FTC Ex. 1014 at NTSP 005435 **[Tab 7]**; FTC Ex. 1017 **[Tab 9]**.

[10] FTC Ex. 1076 **[Tab 17]** ; FTC Ex. 1103 **[Tab 19]**. *See also* Deas 10/10/02 dep. at 56-57 **[Tab 44]**.

[11] FTC Ex. 1000 at NTSP 000025, 32-34 **[Tab 5]**

[12] Van Wagner 8/29/02 dep. at 26-29 **[Tab 34]**.

[13] *See e.g.,* FTC Ex. 1022 ([redacted]) **[Tab 10]**.

[14] Van Wagner 8/29/02 dep. at 43-44 **[Tab 35]**; Van Wagner 11/19/03 dep. at 78-80 **[Tab 40]**.

information is given to the Board, and then disseminated to NTSP's members, who thus learn what prices their competitors, on average, will charge in the future.[15] The dissemination of this future pricing information encourages individual physicians to maintain a common front through NTSP in order to achieve at least these "average" prices for all physicians, rather [redacted] and sign individual contracts with health plans at lower fee levels. The likely effect is to stabilize and raise prices.[16]

The Board also uses the poll results to establish "minimum" prices that it believes would be acceptable to most of the NTSP members.[17] Based on these minimums, NTSP then rejects health plan offers that it considers too low–without consulting its members or giving them an opportunity to "opt into" a health plan proposal that is below the Board-established minimums.[18] The one thing that NTSP does not do with the poll results is the very thing that, as a self-described "messsenger model IPA," it is supposed to do: NTSP never conveys to health plans information derived from the polls that would allow the health plans to assess how many NTSP physicians might be willing to join a plan that offered certain levels of reimbursement for physician services. After NTSP's Board or staff has rejected a health plan offer, the health plan has sometimes submitted a new proposal with higher fees that it thinks may be acceptable to

---

[15] Van Wagner 8/29/02 dep. at 43, 62 **[Tabs 35, 37]**; Van Wagner 11/19/03 dep. at 87-88 **[Tab 41]**.

[16] Frech Rep. at 12 **[Tab 64]**.

[17] Van Wagner 8/29/02 dep. at 46 **[Tab 36]**.

[18] Van Wagner 8/29/02 dep. at 153-54 **[Tab 39]**; Deas 10/10/02 dep. at 26-29 **[Tab 43]**.

NTSP, and this process may continue until NTSP has obtained the fee levels it desires.[19] On other occasions, NTSP has entered into a more active negotiation process with a health plan, in which both sides made a series of counteroffers until NTSP, on behalf of its physicians, obtained a fee level that it considered acceptable.[20] Only when NTSP has achieved what it regards as an acceptable fee agreement (often at the level of the Board "minimum," but sometimes slightly less) will NTSP then carry out its "messenger model" function of sending the health plan proposal to its members physicians for individual decisions to participate or not participate.[21]

To further strengthen its negotiating power with health plans, NTSP has at least once used its power to act on behalf of its members to terminate existing contractual relationships between a health plan and a significant number of NTSP's participating physicians.[22] NTSP has also on occasion gone to a large employer that had signed a contract with a health plan, and warned the employer that NTSP physicians might not participate in the health plan's network unless the employer "assisted" NTSP in obtaining higher fees from the health plan.[23] At least one health plan has testified that these actions of NTSP forced it to offer higher fees to physicians in order to assuage the employer's concerns about the adequacy of its network to serve a Fort

---

[19] Quirk dep. at 53-54 and 64-65 **[Tabs 54, 56]**; FTC Ex. 1097 **[Tab 18]**.

[20] FTC-NTSP[redacted] 000461-462 **[Tab 28]**; FTC-NTSP-[redacted] 000491-492 **[Tab 29]**; FTC-NTSP-[redacted] 000881 **[Tab 30]**.

[21] Complaint Counsel will in addition present testimony at trial that NTSP has expressly refused to "messenger" health plan offers that NTSP's Board regarded as too low. *See* Quirk dep. at 43-43 **[Tab 54]**

[22] NTSP 051933 **[Tab 24]**.

[23] Mosley dep. at 91 **[Tab 59]**; Quirk dep. at 104-05 **[Tab 57]**. *See also* OA 006545-48 **[Tab 32]**.

Worth-based employee population.[24] In addition, NTSP often urged member physicians to refrain from signing individual contracts with a health plan while NTSP was engaged in collective fee negotiations with that health plan, in order to maintain and strengthen the bargaining power of the entire NTSP physician group.[25]

All of these actions are an integral part of NTSP's basic function of engaging in collective bargaining with health plans on behalf of its [redacted] participating physicians. Its actions were intended to, and did, strengthen NTSP's bargaining power and force health plans to accept fees at or close to the "minimums" set by NTSP's Board. The member physicians participated in this process: they joined NTSP, elected the Board, participated in the polls, received information about pricing and health plan negotiations from NTSP's Board and staff, and generally supported the collective fee negotiations by refraining from contracting directly with health plans while the collective negotiations were proceeding. The evidence is sufficient for the Court to conclude that this setting of a "minimum" price and its enforcement by NTSP through collective fee negotiations and other conduct constitutes direct price fixing by NTSP and its member physicians.

IV. The Documents and Testimony, Read in the Light Most Favorable to Complaint Counsel, Demonstrate that NTSP Restrained Price Competition Among Competing Physicians

This case involves concerted pricing by a group of competing physicians–a horizontal restraint of trade. In evaluating this horizontal conduct, this court should adopt a "sliding scale" analysis that looks "to the circumstances, details, and logic of a restraint." *California Dental*,

---

[24] Quirk dep. at 104-05 **[Tab 57]**.

[25] NTSP 005140-5141 **[Tab 23]**.

526 U.S. at 780-81. As the Commission explained recently, "the evaluation of horizontal restraints takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect." *Polygram Holding, Inc.,* 5 Trade Reg. Rep. (CCH) ¶ 15,453 at 22, 456 (FTC 2003) ("*Three Tenors*"), available at http:www.ftc.gov/os/2003/07/polygramopinion.pdf, slip op. at 22. This continuum precludes reliance on simplistic *per se* versus rule-of-reason analysis. As the Supreme Court noted, "[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear." *California Dental*, 526 U.S. at 779.

A. NTSP And its Members Entered Into Agreements Relating to Price and Other Terms of Competition

Apparently, NTSP assumes that proof of an agreement requires Complaint Counsel to show that all of its members reached an enforceable agreement related to a specific price for a specific transaction. The law requires no such thing. *United States v. Masonite Corp.*, 316 US 265, 276 (1942) ("*Masonite*") (fixing prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as fixing prices by direct, joint action); *Vitamins Antitrust Litigation*, No. 99-197(TFH, MDL. 1285, 2004 WL 438586, at *9 (D. D.C. Mar. 9, 2004) ("*Vitamins*") (need not show evidence of formal agreement or knowledge by defendant of every detail of conspiracy). Moreover, the existence of an agreement may be shown by either direct or circumstantial evidence. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (it is sufficient to provide evidence that the parties "had a conscious

commitment to a common scheme designed to achieve an unlawful objective"). [26] Similarly, evidence of a tacit or implicit agreement, or of an indirect agreement through an intermediary is sufficient to survive summary decision. *See, e.g., Isaksen v. Vermont Castings, Inc.,* 825 F.2d 1158, 1162-3 (7th Cir. 1987) (Posner, J.) (jury could find an informal vertical price agreement from evidence that a dealer raised its prices a year after the manufacturer threatened to "mix up" its orders); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (medical society fixed prices). *See also Bender v. Southland Corp.*, 749 F.2d 1205, 1212-13 (6th Cir. 1984); *Helicopter Support Systems v. Hughes Helicopter*, 818 F.2d 1530, 1535 (11th Cir. 1987).

Here, the evidence of unlawful agreements includes testimony, documents showing communications, invitations to engage in collective action, and subsequent actions by the conspirators acting on suggestions. NTSP is a combination of competitors that acted to restrain competition by (1) collecting of powers of attorney from members, (2) negotiating prices with health plans on behalf of members, (3) polling and disseminating aggregated data on current or future prices, (4) terminating existing contracts, and (5) urging employers to assist NTSP in negotiating higher physician fees with health plans. The totality of this evidence demonstrates that NTSP entered into a "contract, combination or conspiracy" under the antitrust laws, and creates a genuine issue of material fact.

---

[26] Communications among the parties to an agreement are one of the "plus factors" that, in conjunction with parallel conduct, may support inference of an agreement. *See In re Medical X-Ray Film Antitrust Litig.*, 946 F. Supp. 209, 218 (S.D.N.Y. 1996). Other "plus factors" include "(1) evidence of conduct that is contrary to the defendants' independent self-interest; (2) the presence or absence of a strong motive to enter into the alleged conspiracy; (3) the artificial standardization of products." The evidence discussed herein supports the existence of at least the first two of these risk factors. *See* section IV. A. 6 of this memorandum, *infra.*

NTSP ignores all of this evidence, and instead quotes out of context a few statements by Complaint Counsel's expert economist, Dr. Frech, who indicated only that he had not seen evidence of certain kinds of anticompetitive practices (such as agreements among physicians to reject a health plan offer, or physicians giving up their right to contract individually with health plans.) Dr. Frech's testimony is clear, however, that he was only referring to the absence of evidence that the physicians came to an agreement [redacted] As noted, an agreement reached through an intermediary is sufficient to violate the FTC Act. *Masonite* 316 U.S. at 276 (fixing prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as fixing prices by direct, joint). In fact, [redacted].[29]

1. NTSP is a combination of competitors subject to the antitrust laws

There can be no doubt that NTSP's horizontal price restraints subject it and its members to the antitrust laws because it is an organization whose members have distinct economic interests. *See Alvord-Polk, Inc. v. Schumacher & Co.*, 37 F.3d 996, 1009 n.11 (3d Cir. 1994) ("a trade association, in and of itself, is a unit of joint action sufficient to constitute a section 1 combination."). Trade and professional associations, including NTSP, are "by definition, [an] organization[] of competitors, [that] automatically satisf[ies] the combination requirements of § 1

---

[27] Frech dep. at 73 **[Tab 47]**.

[28] Frech dep. at 76-77 **[Tab 48]**.

[29] Frech dep. at 209 **[Tab 51]**.

of the Sherman Act." *Id*. at fn.11 (citations omitted).[30] As a result, trade associations are subject to the antitrust laws when those associations attempt to restrain competition. *Addino v. Genesee Valley Med. Care, Inc.*, 593 F.Supp. 892, 896-97 (W.D. N.Y. 1984). When competitors in such organizations band together to jointly set the terms, including price terms, upon which they will deal with customers, then they are merely vehicles for price fixing.

NTSP's reliance on *Colgate*[31] misses the mark by a mile. NTSP's "business model" is merely to jointly set rates among competing physicians. Whatever *Colgate* stands for, it does not stand for the proposition that an organization of competitors can set the rates at which they will deal with customers. NTSP is not a single entity with a "complete unity of interest," thus incapable of conspiring with itself. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). Rather, it is an association of individual competing physicians, who have not integrated their practices and thus have separate economic interests. NTSP claims that it has a right to "follow its own business model" and refuse to messenger health plan contracts that are "outside that model." Your Honor must look to the substance of NTSP, not its self-described form. The *Addino* court, addressing a similar issue, held that the defendant organization "is merely a vehicle for the member MDs to fix prices charged by those MDs as well as other health care providers.... It is not sufficient to assert, as defendants do, that a corporation cannot conspire with itself. We must look at substance rather than form." *Addino*, 593 F.Supp. at 896-97. *See*

---

[30] *See also Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 500 (1988) (holding unlawful certain conduct by a standards-setting organization, and observing that: "There is no doubt that the members of such associations often have economic incentives to restrain competition" and that their actions "have a serious potential for anticompetitive harm").

[31] *United States v. Colgate*, 250 U.S. 300, 307 (1919)

also Hahn v. Oregon Physicians' Serv., 868 F.2d 1022, 1030 (9th Cir. 1989) (denying summary judgement where plaintiff produced evidence demonstrating that the defendant was an organization of physicians).[32]

Viazis v. American Ass'n of Orthodontists, 314 F.3d 758 (5th Cir. 2002), also provides little comfort for NTSP.[33] As an initial matter, *Viazis* had absolutely nothing to do with joint price negotiations, but related only to the internal workings of the association's administrative procedures for addressing alleged ethical violations. The plaintiff presented no evidence that the proceedings were in any way designed to limit competition. *Viazis*, 314 F.3d at 764. In contrast, NTSP's conduct has the clear purpose of limiting price competition among its members. The Commission's complaint in this case challenges (and Complaint Counsel intends to prove) that NTSP and its members have engaged in unlawful agreements to restrain competition among NTSP's participating physicians.

---

[32] Similarly, in recent years the Commission has authorized complaints against trade associations that engage in anticompetitive conduct. For example, in *In re Fair Allocation System*, the Commission charged an incorporated association of franchised automobile dealerships with acting "in agreement, combination or conspiracy with some of its members to restrain trade . . . by threatening to boycott particular models." Complaint, at http://www.ftc.gov/os/1998/10/9710065cmp.htm. *See also United States v. General Motors Corp.*, 384 U.S. 127 (1966) (noting that car dealers "collaborated, through the [trade] associations and otherwise, among themselves and with General Motors").

[33] NTSP asserts that *Viazis* and other Fifth Circuit cases "control" this case because most of NTSP's conduct took place in Texas. The FTC, however, has a statutory mandate to promote competition nationally, and as such, cases from any federal circuit can have persuasive value in cases brought to the Commission. While we do not believe that *Viazis*, correctly read, is in any way inconsistent with the Supreme Court, appellate court and Commission authority discussed in text, we believe that the Court here should follow the broad weight of authority rather than NTSP's idiosyncratic reading of a single Fifth Circuit decision.

Furthermore, if NTSP's extreme interpretation of *Viazis* were accepted by Your Honor, it would render § 1 of the Sherman Act essentially toothless. Competitors would be free to engage in naked price-fixing merely by forming an "association"-- horizontal price-fixing would thus become *per se* legal. Such a result obviously is contrary to the longstanding (and correct) view that "associations" negotiating prices for their members are, in that capacity, nothing more than devices for collective action, fully subject to the antitrust laws. *Addino*, 593 F.Supp. at 896-97. *See also Hahn*, 868 F.2d at 1030.

2. NTSP collected and used powers of attorneys to act as an exclusive negotiating agent for a number of competing member physicians.

As discussed in detail above, NTSP reached agreements among its member physicians by collecting powers of attorney from its member physicians, which by their express terms gave NTSP the right to serve as their bargaining agent, and used these powers of attorney in health plan price negotiations. The powers of attorney serve to further solidify the contractual arrangements between NTSP and its physicians contained in NTSP's Physician Participation Agreement which provide NTSP with a right of refusal and/or right of first negotiation with health plans before it members "have the right" to negotiate with the plan directly. The agreements also include provisions for NTSP members to collectively reject and make counter-offers to health plans who have submitted offers to NTSP.[34] The Commission addressed similar conduct in *Michigan State Medical Soc'y*, 101 F.T.C. at 284-89. There, the Commission found evidence of an agreement, based in part on evidence that a division of the Society was empowered to coordinate negotiations with third party health plans, to collect "non-participation"

[34] See FTC Ex. 5 at NTSP 000025, 32-34

proxies, and to serve as members' "exclusive bargaining agent." *Id.* at 284-89. Not only did NTSP openly solicit powers of attorney from its physicians in communications to its entire membership, it actually reported to members that it had, in fact, collected numerous such powers of attorney.[35] Thus, each physician who provided a power of attorney knew that at least some additional physicians had done the same, and knew that NTSP represent their shared interest in obtaining the highest possible fees.

Although NTSP asserts that these powers of attorney were used only for risk contracting, and for negotiating non-price terms, testimony from health plans suggests that NTSP used the powers of attorney more broadly, to make NTSP the exclusive negotiator of prices for those doctors for all purposes.[36] Viewed most favorably to Complaint Counsel, NTSP's unsupported assertion is insufficient to overcome the plain language contained in the documents and the testimony of health plans who paid higher prices because they understood that NTSP was negotiating on behalf on competing physicians. *See HFCS*, 295 F.3d at 655-56 (on a summary judgment motion, court must avoid weighing the evidence).

3. NTSP, on behalf of its members, engaged in collective price negotiations with health plans.

NTSP reached agreements among its members by engaging in price negotiations with health plans for non-risk contracts, using "minimum" fees set by its Board on the basis of information received from member physicians through periodic polls. As part of this collective negotiating process, NTSP regularly rejected health plans' offers that were below the fee levels

---

[35] FTC Ex. 1076 **[Tab 17]**; FTC Ex. 1103 **[Tab 19]**.

[36] *See, e.g.*, Jagmin dep. at 146-49 [redacted] **[Tab 52]**; Quirk dep. at 57-58 [redacted] **[Tab 55]**.

set by the Board and refused to "messenger" them to members for individual opt-in/opt-out decisions. Such collective price negotiations on behalf of competing physicians violates the antitrust laws. *See New York v. St. Francis Hosp.*, 94 F.Supp.2d 399, 413-14 (S.D. N.Y. 2000). In *St. Francis*, two hospitals that claimed to have "virtually merged" jointly negotiated rates with health insurers, and continued to negotiate jointly "despite protests from insurers." The court condemned the joint negotiations, holding it improper for the collective entity to price negotiate as if it were a unilateral entity consisting of both hospitals. *Id.* The court explained that, by negotiating jointly, "defendants essentially have an opportunity to unilaterally determine a range of prices acceptable to them, much like the maximum fee schedules established by the *Maricopa* defendants." *Id*. at 413-14.

In conducting these negotiations, the Board of Directors and staff of NTSP was acting on behalf of its members physicians and to further their pecuniary interests by obtaining the highest possible fees. The Board supervised these negotiations and determined what fee levels would be acceptable to them and to the membership. The Board and staff of NTSP reported to members on the status of the collective negotiations, and even boasted of their success in obtaining higher fees for the individual members.[37] At times, NTSP's membership met to discuss these collective negotiations. On at least one occasion NTSP went to a large employer, [redacted]

[37] *See e.g.,* FTC Ex. 1129 at FTC-NTSP-[redacted]-009054 [redacted] **[Tab 20]**. *See also* FTC Ex. 1070 at SWN 001010 [redacted] **[Tab 16]**; FTC Ex. 1027 at NTSP 002876 **[Tab 11]**; FTC Ex. 1037 at NTSP 022341-342 **[Tab 14]**; FTC Ex. 1159 **[Tab 21]**; FTC Ex. 1029 **[Tab 12]**.

and urged the [redacted] to support NTSP's attempts to get higher fees from a health plan.[38] This is compelling evidence of horizontal conduct. *See Michigan State Medical Soc'y, supra.*

4. NTSP used its position in price negotiations to terminate existing contracts between member physicians and a health plan

On at least one occasion, in 2001, NTSP used its position as a representative of its participating physicians to terminate an existing contractual relationship that more than 100 of NTSP's physicians had with [redacted] The incontrovertible reason for this termination was NTSP's dissatisfaction with what it believed to be too-low physician fee levels.[39] The termination took place in conjunction with negotiations between NTSP and [redacted] during which NTSP sought, and ultimately obtained, higher fees for its members.[40] Such a concerted refusal to deal with a health plan except on collectively agreed-to prices is an agreement. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). By acquiescing in NTSP'S termination, on their behalf, of their [redacted] contract, the individual physicians ratified the tacit agreement to act together through NTSP in collective price negotiations.

In addition, there is evidence that NTSP, working with and through individual members physicians, on occasion tried to dissuade the members from signing individual contracts with

---

[38] *See* NTSP 003270 [redacted] **[Tab 22]**. *See also* Mosley dep. at 91**[Tab 59]** ; Quirk dep. at 104-05 **[Tab 57]**.

[39] Quirk dep. at 58-59. **[Tab 55]**. NTSP termed its member physicians' participation in the [redacted] arrangement because [redacted] *See* Ex. 1103 at NTSP 004919 **[Tab 19]**.

[40] Quirk dep. at 90-105 **[Tab 57]**.

health plans while NTSP was trying to negotiate a collective fee schedule.[41] Under cases such as *Monsanto* and *Isaakson*, this evidence would support a finding of an implicit agreement. NTSP's "suggestion" that its member refrain from individual contracting can be viewed as an "offer" to agree, which the individual physicians accept by their own actions.

It is not necessary to prove that the members physicians of NTSP participated individually in the Board's decision to set and enforce the collective price. The members' knowing participation in that process and their adherence to the collectively-set prices is sufficient to establish an agreement. *See, e.g., Masonite*, 316 US at 276 (fixing prices by one member of a group pursuant to express delegation, acquiescence, or understanding is just as illegal as fixing prices by direct, joint action); *Vitamins*, No. 99-197(TFH, MDL. 1285, 2004 WL 438586, at *9 (need not show evidence of formal agreement or knowledge by defendant of every detail of conspiracy); *General Glass Co., Inc. v. Globe Glass and Trim Co.,* 1980-2 Trade Cas. (CCH) 63,531 (N.D.Ill. 1980) (noting that the important factor is the agreement not to change prices).

5. NTSP collected and disseminated current and future pricing information of its members.

As discussed in the DOJ/FTC health care guidelines, courts should view with extreme suspicion exchanges of future pricing information among competing health care professionals:

> Exchanges of future prices for provider services or future compensation of employees are very likely to be considered anticompetitive. If an exchange among competing providers of price or cost information results in an agreement among competitors as to the prices for health care services or the wages to be paid to health care employees, that agreement will be considered unlawful per se.

---

[41] FTC Ex. 1044 **[Tab 15]**. *See also* FTC Ex. 1016 **[Tab 8]**; FTC Ex. 7 **[Tab 1]**; NTSP 014553 FA #84 **[Tab 25]**.

Health Care Statements, Statement 6 - Provider Participation in Exchanges of Price and Cost Information, at http://www.ftc.gov/reports/hlth3s.htm#6

As discussed above, it is uncontroverted that NTSP conducts "polls" of its members, through which each member is asked to state what level or range of fees would be acceptable for current or future HMO or PPO contracts,[42] that the poll results are used to calculate acceptable fees to be used by NTSP in negotiation with health plans, and that these average fees are circulated to the Board and the member physicians. Such dissemination of current or future pricing data among competitors is highly suspect under the antitrust laws. *See, e.g., United States v. Container Corp. of America,* 393 U.S. 333 (1969); *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978). While not necessarily illegal in and of itself, such evidence that competitors have shared current or future pricing data may be one "plus factor" that may lead to an inference of an agreement among those competitors. *See, e.g., In re Petroleum Products Antitrust Litigation,* 906 F.2d. 432, 445-50 (9th Cir. 1990). *See also HFCS*, 295 F.3d. at 655-56 (on a summary judgment motion, evidence cannot be evaluated in isolation).

6. The evidence of agreement tends to exclude the possibility that NTSP and its participating physicians acted independently

The courts have noted each competitor has an interest in raising prices if market conditions permit, but that often no one competitor can afford to risk raising prices for fear of losing market share. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp,* 475 U.S. 574 (1986). In that situation, the behavior of the various firms may be "interdependent," in the sense that no

---

[42] Van Wagner 8/29/02 dep. at 26-29 **[Tab 34]**.

firm alone would act in this way, but it will do so if it knows that its competitors will do the same.[43] In this situation, an agreement may be inferred.

In this case, both the evidence and Dr. Frech's expert analysis demonstrate that the members physicians of NTSP have an economic interest in collectively negotiating prices. For example, NTSP's polling tends to inflate prices through collective action. Every doctor has an incentive to put down a high figure for the "minimum" acceptable fee, because that strengthens the power of the group in collective price negotiations, but does not subject the doctor to any risk of having to drop out of a plan if the IPA fails to achieve the desired result.[44] Even though these collective negotiations may not always succeed, the ability of NTSP to extract higher fees when circumstances are favorable is an anticompetitive effect.

NTSP seeks to avoid liability by asserting that physicians sometimes accepted rates below the collective price and the response rates to the illegal polls was "low." These facts, even if true, are of no consequence in determining the existence of an illegal price restraint. This, again, is another invitation by NTSP into the trap described by Judge Posner. At best, evidence of lower transaction prices reflects upon the efficacy of the illegal agreement, not its existence. *See* HFCS, 295 F.3d at 656 (fact that many sales were made at prices lower than the list prices set by the defendants was not grounds for summary judgment). Similarly, in *Plymouth Dealers Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960), a car dealers' association agreed to price

---

[43] For a discussion of interdependent pricing, see *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 228-29 (1993) (discussing interdependent pricing in the context of an oligopolies).

[44] Frech 2/6/04 Rep. at 11 **[Tab 63]**.

schedules, but the members sometimes diverted from them.[45] The court found that "once the agreement to fix a price is made," it is immaterial "whether the purpose of the conspiracy was accomplished in whole or part." The court stressed that "the fact that the dealers used the fixed uniform price list in most instances only as a starting point, is of no consequence. It was an agreed starting point; it had been agreed upon between competitors; . . . it had to do with, and had its effect upon, price." *Id.* at 132. Accordingly, even if NTSP's members sometimes deviated from their jointly-negotiated prices, the joint negotiation of those prices constituted an unlawful agreement.

Likewise, the response rate to the polls is irrelevant. When physicians avail themselves of the benefits of the collusive price by entering into collectively negotiated contracts, the fact they did not respond to the poll is of no moment. They have agreed on a collective price. *Monsanto*, 316 U.S. at 276 (acquiescence may constitute joint action).

B. Agreements Related to Price Among NTSP and its Members are Inherently Suspect and Require No Detailed Examination of Product or Geographic Markets or Market Power

In addition to misconstruing the record, NTSP apparently also suffers from a fundamental misunderstanding of basic Sherman Act § 1 jurisprudence. The Supreme Court and the Commission have disavowed the formulaic and static analytic categories suggested by NTSP. Furthermore, the evidence demonstrates that NTSP and its members reached agreements to restrain price competition. Because such conduct is inherently suspect and there is evidence of

---

[45] Likewise, NTSP's apparent assertion that Complaint Counsel must prove that NTSP had an effective method to police compliance finds no support in the law. *See Bogan v. Hodgkins*, 166 F.3d 509, 511 n.3 (2d Cir. 1999) ("[p]laintiffs need not show enforcement of the alleged agreement in restraint of trade to prove their antitrust claim.") (citing *American Tobacco Co. v. United States*, 328 U.S. 781 (1946))

actual anticompetitive effects, Complaint Counsel need not waste Commission resources by engaging in a detailed examination of the metes and bounds of the relevant market. Nevertheless, under any level of analysis, NTSP's conduct has violated the FTC Act and NTSP has not satisfied its burden of demonstrating that its price restraints are justified as being reasonably necessary to achieve procompetitive efficiencies. Certainly, at the summary decision stage, NTSP has not demonstrated the absence of material facts under any level of analysis.

1. Horizontal Conduct to Restrain Price Competition Traditionally Has Been Condemned as *Per Se* Illegal

Horizontal price restraints falls within the category of conduct that traditionally has been condemned as *per se* unlawful without need for further analysis of effects. *See United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (price fixing by railroads illegal, even if resulting rates "reasonable"); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) (same). As shown by "past judicial experience and current economic learning," *per se* unlawful conduct warrants "summary condemnation" due to its "likely tendency to suppress competition." *Three Tenors*" at 29. Price restraints by professionals, such as physicians, as subject to the same standard, *i.e.*, it has been subject to such *per se* condemnation by the courts. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).[46] Similarly, the Commission also condemns horizontal price restraints in the health care field:

> [T]here have been arrangements among physicians that have taken the form of networks, but which in purpose and effect were little more than efforts by their

---

[46] In *Maricopa*, a physicians' association sought to jointly set prices in contracting with insurers. The Court held that the horizontal price-fixing was per se illegal: "The fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price-fixing mold." *Id*. at 357. *See also Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (lawyer price fixing illegal).

> participants to prevent or impede competitive forces from operating in the market. . . . Such arrangements have been, and will continue to be, treated as unlawful conspiracies or cartels, whose price agreements are per se illegal.

Health Care Statements at 73-74.[47]

NTSP's conduct fits squarely within the price related conduct that courts and the Commission summarily have condemned. Here, as discussed above in greater detail, there is overwhelming evidence that NTSP has engaged in the same type of conduct struck down as *per se* illegal in *Maricopa*. NTSP, on behalf of its member physicians, sets "minimum" acceptable fee levels and collectively negotiates and contracts with health plans as to the prices at which NTSP's otherwise competing members physicians will sell their individual professional services. NTSP also collects and disseminates to its members current and future pricing information (through the use of polling),[48] and refuses to accept or even to "messenger" to members for individual "opt-in" decisions, health plan offers that it does not accept. NTSP also has terminated existing contracts that do not meet the collectively-set pricing standards of the NTSP physicians.

Furthermore, extensive market analysis is not required when there is proof of actual anticompetitive effects. *Todd v. Exxon Corp.*, 275 F3d 191, 206 (2d Cir. 2001) ("actual adverse

---

[47] *See also Health Care Statements* at pp 89-92 (illustrative example finding "per se unlawful" a physician network where, *inter alia,* "physicians' purpose in forming network "is to increase their bargaining power with payers," notwithstanding physicians contribution of capital. *Id.* at 91.

[48] NTSP cites an FTC staff advisory opinion for the proposition that dissemination of price information is consistent with competition. *See* NTSP Brief at 12 n. 61 (citing FTC Staff Advisory Opinion Letter, dated November 3, 2003). But as is clear from the face of the Letter, the conduct at issue concerned dated price information. NTSP, however, distributes current and future price information.

effect on competition....arguably is more direct evidence of market power than calculations of elusive market share figures"); *Re/Max International, Inc. v. Realty One, Inc.*, 173 F3d 995, 1018 (6th Cir. 1999) ("an antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as a high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition"). The documents and testimony demonstrate that NTSP has successfully obtained higher prices for physician services due to NTSP's illegal agreements.[49] Because NTSP's conduct fits squarely within conduct traditionally condemned as *per se* illegal, there is no need to engage in a market definition exercise. *See Three Tenors*.

Even if Your Honor deems it necessary to engage in more extensive review, the evidence demonstrates that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 770.[50] The setting of prices by competitors and the use of those prices in joint negotiations with customers (health plans) "are of a sort that generally pose significant competitive hazards," and are thus inherently suspect. In *Indiana Federation of Dentists*, 476 U.S. 447, the Court found that a conspiracy among dentists to refuse to submit x-rays to dental insurers for use in benefits determinations constituted an unfair method of

---

[49] *See* Section III of this memorandum, supra.

[50] Not surprisingly, NTSP cites only cases that pre-date *California Dental* for its rule-of-reason argument. *See* NTSP memo at 15-17 nn. 76-84. Four of the cases date from 1996 or earlier, and the fifth case, *Bogan v. Hodgkins*, *supra* note 42, was decided three months before *California Dental*. As a result, none of these cases use the flexible framework required by the Supreme Court. Indeed, in *Viazis*, 314 F.3d at 765-66, which NTSP relies on heavily, the court expressly acknowledged that *California Dental* sets forth the appropriate analytic framework.

competition.[51] The Court held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of "horizontal agreements, "absent some countervailing procompetitive virtues - such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services." *Id*. at 459. Likewise, in *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988), the Commission struck down advertising restrictions, finding that the association's actions were controlled by practicing optometrists who stood to benefit financially from the restraints on competition, and ruled that the board's conduct constituted a "combination or conspiracy." *See also Michigan State Soc'y*, 101 FTC 191 (1983) (a medical society unlawfully conspired with its members to influence third-party reimbursement policies by, *inter alia*, seeking to negotiate collective agreements with insurers.)

Under the standards developed in *California Dental*, *Three Tenors*, and *Schering*, Complaint Counsel has more than satisfied its burden of creating a triable issue of fact. Substantial evidence indicates that NTSP's conduct was likely to, and did, produce demonstrable anticompetitive effects. Chris Jagmin, Medical Director of [redacted] testified that NTSP negotiated rates jointly, particularly after obtaining powers-of-attorney from NTSP members.[52] The collective action of NTSP's members may have led to price effects. [redacted] Chief Executive Officer of Texas and Oklahoma operations testified that the actions of NTSP caused [redacted] to increase its fees for Fort Worth physicians.[53]

---

[51] The Court rejected the argument that the Commission erred in not making elaborate market power determinations, stating "the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation." *Id*. at 460.

[52] Jagmin dep. at 147 **[Tab 52]**.

[53] Quirk dep. at 90-105 **[Tab 57]**.

Assuming, *arguendo*, that Complaint Counsel is required to define relevant product and geographic markets, NTSP has again failed to carry its burden of demonstrating no material disputed fact. NTSP appears to suggest that it is entitled to summary decision based upon the mere fact the Complaint Counsel's expert has not engaged in an elaborate market definition exercise. Expert testimony, however, is not required to prove the existence of a relevant market. The record contains sufficient evidence from fact witnesses to create a material factual dispute that the relevant geographic market is Fort Worth (Tarrant County). Health plans and employers, including the [redacted], have testified to the importance of having Fort Worth doctors in a network because of Dallas' distance. For example, Jim Mosley, a consultant to the [redacted] testified that the [redacted] As a result, NTSP had leverage with [redacted] and had the ability to threaten that United would not have a viable network without NTSP.

In any event, Dr. Frech's testimony is entirely consistent with finding a Ft. Worth market. Dr. Frech discussed in detail why he believes that there are local geographic markets in physician cases, and criticized the use of certain statistical indices for geographic market analysis in physician cases because they incorrectly suggest overly-large markets.[55] Thus, under level of analytical scrutiny, NTSP has not carried its burden of demonstrating the absence of a material factual dispute.

---

[54] Mosley dep. at 53 **[Tab 58]**.

[55] Frech dep. at 126-129 **[Tab 49]**.

2. NTSP Has Not Met Its Burden to Demonstrate That There Is No Material Dispute That Its Price Restraints Are Ancillary to Any Procompetitive Efficiencies.

Nowhere in NTSP's motion does it acknowledge the fact that it bears the burden of proving that its asserted efficiencies are cognizable under the antitrust laws or facially plausible. *Three Tenors* at 33. When a defendant has engaged in "inherently suspect" conduct, such as price fixing, it must advance "a legitimate justification" for the challenged practices. *Three Tenors* at 29. The justification must be "both cognizable under the antitrust laws and at least facially plausible." *Id*. at 30. To be "cognizable," the justification must warrant consideration under the antitrust laws, and to be "plausible," the justification must "create or improve competition" and establish a "specific link between the challenged restraint and the purported justification." *Id.* at 31-32.[56] In the health care area, the Commission has recognized the potential efficiency benefits of two types of integration: (1) financial integration through some form of sharing of risk of financial loss or potential gain; and (2) clinical integration among otherwise competing health care providers in interdependently providing their services in a more efficient and effective manner.[57] To avoid the dangers of price-fixing, the clinical integration

---

[56] *See, e.g., United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-282 (6th Cir. 1898); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 20-24 (1979); *National Collegiate Athletic Ass'n. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 100-102 (1984). *See also Arizona v. Maricopa County Medical Soc'y*, 457 U.S. at 356-57 (1982) (distinguishing *per se* illegal price fixing agreements among the physicians in that case from "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit.").

[57] *See Health Care Statements* at 70-74, 107-112. *See also* letter from Jeffrey W. Brennan, Assistant Director, Bureau of Competition, Federal Trade Commission to John J. Miles (February 19, 2002) (available at http://www.ftc.gov/bc/adops/medsouth.htm); John J. Miles, *Joint Venture Analysis and Provider-Controlled Health Care Networks*, 66 Antitrust L. J. 127 (1997).

must be achieved "prior to [the network] contracting on behalf of competing doctors." (*See Health Care Statements* at 86 (competitive analysis of Statement 8, Example 1, regarding "Physician Network Joint Venture Involving Clinical Integration").

Here, there is, at the very least, a material factual dispute as to whether NTSP's price-fixing results in any pro-competitive efficiencies. First, NTSP has not integrated financially for the non-risk contracts challenged here, as NTSP's members do not share the risk of financial loss.[58] Non-risk contracts involve straight fee-for-service reimbursement and, therefore, no risk.

Second, although NTSP claims some degree of clinical integration, the extent of their alleged clinical integration is very much in dispute. NTSP's expert, Dr. Maness, claims that NTSP lowers overall medical costs for its risk business, and that these benefits [redacted][59] Aside from this self-serving testimony, however, the evidence directly refutes NTSP's assertions. Indeed, the overwhelming weight of the evidence indicates that NTSP's members have not integrated their clinical services. In their expert reports, both Drs. Casalino and Frech pointed out that NTSP's claims have almost no support in the record.[60]

---

[58] *See Three Tenors* at 13-29; Fed. Trade Commission & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (April 2000) at 8-9, 23-25; *Healthcare Statements* at 70-74, 107-112. *See also* letter from Jeffrey W. Assistant Director, Bureau of Competition, Federal Trade Commission to John J. Miles (February 19, 2002) (available at http://www.ftc.gov/bc/adops/medsouth.htm); John J. Miles, *Joint Venture Analysis and Provider-Controlled Health Care Networks*, 66 Antitrust L. J. 127 (1997).

[59] Maness Rep. ¶ 92 **[Tab 62]**.

[60] NTSP makes much of some statements by Dr. Frech recognizing that some of the efficiencies claimed by NTSP might, in theory and to some unspecified extent, provide some hypothetical benefit to health plans or consumers. This, however, is not the relevant test. The issue is not whether NTSP may have created some small or marginal efficiencies. The question is whether the collective price negotiations and other conduct is "reasonably ancillary" to cognizable efficiencies. If the claimed efficiencies are small or minimally related to the

For example, [redacted] Medical Director, Chris Jagmin testified that not only did NTSP neglect to assert that there would be any "spillover" from the risk to the non-risk contracts, but that he would not have given such assertions any weight:

[redacted]

[redacted]

Finally, even if NTSP's conduct results in some efficiencies, these supposed efficiencies are legally insufficient to justify the horizontal price-fixing agreements. NTSP makes no attempt to demonstrate why it must set prices collectively to accomplish its goals.[62] Dr. Frech's report demonstrates that none of the specific clinical integrations and efficiencies claimed by NTSP, under any economic theory, require NTSP to engage in collective price negotiations or the other price-related activity that is the subject of this lawsuit.[63] All of the efficiencies cited by Dr. Maness applicable to the NTSP non-risk business could be accomplished equally well in a

---

collective pricing conduct, they cannot be cited as a justification.

[61] Jagmin dep. at 180 **[Tab 53]**.

[62] See Subsection A. above. The allegations in the complaint relate only to the setting of price terms in "non-risk" contracts, under which the participating physicians have not accepted any liability for unusually high expenditures required by consumers covered by a plan. NTSP claims that there are so-called "spillover" efficiency effects from its price fixing on its risk business, that benefit health plans with non-risk plans. NTSP has not articulated why such benefits require price-fixing on the non-risk business, and Dr. Frech has explained that such claimed spillover effects have been made in other industries and notes that "they are not dependent on and do not justify price fixing."

[63] Other physician organizations have been able to offer their members similar benefits without collectively negotiating prices.

competitive environment. For example, NTSP suggests that its actions create "organizational capital" through analysis of data from risk contracts and other activity, but Dr. Frech explains that even if this makes the physicians more efficient, [redacted]."[64] In a freely competitive environment, consumers and health plans would be able to benefit from the alleged "quality" improvements cited by NTSP while at the same time benefitting from lower prices for the services of its physicians.

NTSP also suggests that it reduces costs because it is cheaper for physicians and health plans to negotiate a single contract.[65] Even apart from the fact that the health plans have expressed no desire to have NTSP serve this role and perceive no such benefit, Dr. Frech has explained that such "transactional" efficiencies cannot justify price-fixing, noting that a cartel or monopolist, given the power to raise prices, cannot be trusted to raise prices only high enough to capture those transactional savings, and not seek to use its bargaining clout to charge even higher prices.[66] He also explains that the efforts of NTSP to maintain group solidarity have had the

---

[64] Frech Rep. at 10 **[Tab 61]**. Likewise, NTSP suggests that higher prices may help attract higher quality physicians, and argues that because of utilization rates payments to physicians may be less despite higher fee levels. NTSP memo at 12-13. Such allegations– which are contradicted by testimony from health plans and others and are thus in dispute–are simply irrelevant to the legal analysis. The question is whether the fees under the collectively-negotiated non-risk contracts are higher than they would be in a competitive marketplace, and NTSP does not claim (nor could it prove) that these alleged "efficiencies" have ever led it to offer or accept a lower fee level on a non-risk contract than it can obtain through the exercise of its collective bargaining power.

[65] NTSP memo at 12-13.

[66] Frech Rep. at 7-8 **[Tab 60]**.

reverse effect of making it more difficult and costly to contract directly with its member physicians, thus raising the cost to a health plan of negotiating individually with physicians.

CONCLUSION

NTSP has failed to discharge its burden of demonstrating the non-existence of material disputed facts. As indicated above, there is sufficient evidence that NTSP, through various illegal practices restrained price competition among competing physicians. Historically, in a horizontal price agreement case such as this, such conduct has been condemned as *per se* illegal. Nevertheless, under any level of analytic scrutiny, there is sufficient evidence of an illegal agreement, actual adverse effects, and well defined markets to preclude summary decision. Furthermore, NTSP has not met its burden of demonstrating that its alleged efficiencies either are cognizable under the antitrust laws or plausible in fact. Therefore, NTSP's motion for summary decision should be denied in its entirety.

Respectfully submitted,

_____

Michael J. Bloom
Theodore Zang, Jr.
Alan B. Loughnan
Elvia P. Gastelo
Asheesh Agarwal
Jonathan W. Platt

Attorneys for Complaint Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
(212) 607-2829
(212) 607-2822 (facsimile)

Dated: March 19, 2004