[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' PRETRIAL BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Complaint Counsel has brought suit against North Texas Specialty Physicians ("NTSP"), a memberless, non-profit corporation. NTSP is the only entity still participating in risk contracts in the Dallas-Fort Worth Metroplex. Complaint Counsel alleges that NTSP has collectively fixed prices in violation of Section 5 of the FTC Act.[1] But Complaint Counsel cannot prove the essential elements of its case, including collusion among physicians, the relevant market, and anticompetitive effects. Instead, Complaint Counsel presents a hodge-podge of assertions about NTSP's risk contracts, litigation efforts, and contacts with governmental authorities – none of which supports Complaint Counsel's case.

The rule of reason is the prevailing standard that is applied to most claims and is the appropriate analysis in this case. The conduct of NTSP that Complaint Counsel is challenging "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition"[2] – hence any lesser analysis is inappropriate. The burden is on Complaint Counsel to prove that NTSP's conduct has a net anticompetitive effect. Complaint Counsel fails because of the clear procompetitive effects and efficiencies of NTSP's business model.

Complaint Counsel has also failed to prove that any actual collusion occurred. To prevail on their theory of antitrust liability, regardless of whether a rule of reason or other analysis is used, Complaint Counsel will first have to prove that NTSP has been involved in collusion among participating physicians. But even Complaint Counsel's own expert has admitted under oath that he has not seen any evidence of actual collusion by NTSP's participating physicians. And there is no evidence in the record, direct or circumstantial, to support such a finding. Any

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[1] Complaint ¶ 12.

[2] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999).

evidence Complaint Counsel may point to is insufficient because it is not inconsistent with independent judgment, lawful competition, or NTSP's own right to refuse to deal.

Complaint Counsel has also failed to prove a relevant market — or effect on a relevant market — to establish liability under a rule-of-reason analysis. Complaint Counsel's own expert has admitted under oath that he has not defined any relevant market.

Finally, there is no jurisdiction over NTSP under the Federal Trade Commission Act. NTSP is not an association acting for the profit of its members in regard to the challenged conduct and NTSP's challenged conduct did not affect interstate commerce. NTSP is merely a memberless, nonprofit corporation organized under Texas law that declines offers not falling within its business model.

II. SUMMARY OF FACTS[3]

A. NTSP's business model promotes efficiency and improves quality of care.

NTSP was organized in 1995 as a memberless non-profit corporation under Section 5.01(a) of the Texas Medical Practice Act.[4] That statute allows for the corporate practice of medicine by non-profit entities involved in research, medical education, or the delivery of health care to the public.[5] NTSP was formed in order to enter into risk contracts for medical care; in

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[3] A more complete understanding of the facts expected to be shown at trial can be found in Respondent's Proposed Findings of Fact and Conclusions of Law, being filed simultaneously with this brief.

[4] Now TEX. OCC. CODE ANN. § 162.001 (Vernon 2004).

[5] *Id.* Specifically, the text of the statute directs the Texas State Board of Medical Examiners to approve the formation of an organization if it meets these requirements:

> (b) The board shall approve and certify a health organization that:
> (1) is a nonprofit corporation under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes) organized to:
> (A) conduct scientific research and research projects in the public interest in the field of medical science, medical economics, public health, sociology, or a related area;
> (B) support medical education in medical schools through grants and scholarships;
> (C) improve and develop the capabilities of individuals and institutions studying, teaching, and practicing medicine;
> (D) deliver health care to the public; or

the past five years it has had capitation or other risk-type contracts with Amcare, Cigna, and Pacificare.[6] Subsequent to its formation, NTSP has also messengered some non-risk contracts to its participating physicians.[7]

NTSP currently is involved in both risk contracts and non-risk contracts.[8] [redacted] [9] NTSP is now the only medical care entity still involved in physician risk contracts in the Dallas/Fort Worth area.[10]

The physicians on NTSP's risk-capitation panel (the "Risk Panel") perform NTSP's risk contracts by using financial and clinical integration techniques to develop team-oriented improvements in costs and quality. Those same physicians as well as NTSP's other participating physicians[11] apply these same techniques to non-risk medical care.[12] [redacted]

(E) instruct the general public in medical science, public health, and hygiene and provide related instruction useful to individuals and beneficial to the community;
(2) is organized and incorporated solely by persons licensed by the board; and
(3) has as its directors and trustees persons who are:
(A) licensed by the board; and
(B) actively engaged in the practice of medicine.

[6] Deposition of Karen Van Wagner, taken on January 20, 2004 at 15; Van Wagner Deposition taken on August 29, 2002 at 14.

[7] Van Wagner Deposition taken on August 29, 2002 at 14.

[8] Complaint ¶ 14; Answer of Respondent North Texas Specialty Physicians to Complaint of Federal Trade Commission ¶ 14.

[9] Expert Report of Gail R. Wilensky, Ph.D. ("Wilensky Report") at 10.

[10] Deposition of Peter Casalino, M.D., Ph.D. at 148.

[11] NTSP has approximately 300 physicians on its Risk Panel and approximately 275 additional physicians eligible to participate in one or more non-risk contracts. Van Wagner Deposition taken on August 30, 2002 at 225, 227-28. These physicians are located in Tarrant, Dallas and at least eight contiguous counties. Van Wagner Deposition taken on August 29, 2002 at 15. [redacted] Expert Report of Robert S. Maness, Ph.D. ("Maness Report") ¶ 19. On average, the eligible physicians participate in 7.47 of NTSP's risk and non-risk contracts. RX 359 (NTSP physician participation chart).

[12] Deposition of William Vance, M.D., Volume 1, at 117-18; Vance Deposition, Volume 2, at 287-88.

[redacted][13] Complaint Counsel's economic expert admits that NTSP generates efficiencies and improves quality of care through spillover from its risk contracts to its non-risk contracts.[14] Spillover occurs because physicians normally do not change their practice patterns patient-by-patient once they have developed an improved technique.[15]

[redacted][16]

B. NTSP's physicians act independently, and payors also have the ability to contract with NTSP physicians directly or through other entities.

NTSP cannot and does not bind any participating physicians to non-risk contracts.[17]

[redacted][18]

NTSP reviews payor offers before deciding whether to accept and become a party to an offer.[19] Because NTSP does not want to expend its limited resources in reviewing and handling

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[13] Expert Report of Edward F.X. Hughes, M.D., M.P.H. ("Hughes Report") at 14-15; Wilensky Report at 5-6, 11-15. Dr. Wilensky was appointed by President (G.H.W.) Bush to be the Administrator of the Health Care Financing Administration, overseeing the Medicare and Medicaid programs from 1990 to 1992. She also served as a Presidential advisor on health care issues and is one of the nation's top authorities in that area. Dr. Hughes is also a nationally-known authority and serves as professor of health industry management at Northwestern University.

[14] Deposition of H.E. Frech, Ph.D. at 104-05, 110-17, 240-41.

[15] Frech Deposition at 104-05; Deposition of Harry Rosenthal, Jr., M.D. at 45.

[16] *See* Wilensky Report at 12-16; Hughes Report at 15-18; Maness Report ¶¶ 83-100; Frech Deposition at 104-05.

[17] Frech Deposition at 209.

[18] *See* RX 26 (NTSP Physician Participation Agreement).

[19] Van Wagner Deposition, taken on November 19, 2003 at 114-15.

offers likely to involve or interest only a minority of its physicians,[20] NTSP's Board of Directors sets a threshold limit on the offers. That threshold is set based on the mean/median/mode of the Risk Panel's responses to a periodic confidential poll as to what HMO and PPO contract rates the individual physician would accept through NTSP. The Board then authorizes NTSP's staff to consider offers which meet those thresholds.[21] The responses of those individual physicians who respond to the poll are never shared with any other physician or any member of the Board.[22] Many of the physicians never respond to the poll.[23]

The staff uses these thresholds for both risk and non-risk offers. If a payor presents an offer meeting the threshold, NTSP will then review the offer's contractual terms, after which the Board will decide if NTSP will participate.

If the offer is for a non-risk contract and NTSP chooses to participate, the offer is then messengered to NTSP's participating physicians.[24] Each physician or physician group can choose to accept or reject participating in the offer through NTSP.[25] On average, the physicians reject more contracts than they accept.[26]

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[20] A physician who is interested in a payor offer may choose to participate through NTSP or enter into a contract directly or through another entity with the payor. NTSP's poll in no way commits a physician to choose which way the physician may eventually decide to contract.

[21] Deposition of Tom Deas, M.D., October 10, 2002, at 21-22, 25; 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; Rosenthal Deposition at 25.

[22] Deposition of John Johnson, M.D. at 36.

[23] Frech Deposition at 149, 215-18; RX 14, 15, 16, and 17 (NTSP poll results).

[24] Frech Deposition at 209.

[25] Frech Deposition at 209; Deposition of Tom Quirk at 54.

[26] *See* RX 359 (NTSP physician participation chart).

Physicians also can accept contracts through another independent physician association ("IPA") or directly with the payor. And physicians do accept such offers.[27] The evidence in this case shows that those NTSP physicians who participate in one or more NTSP contracts almost invariably have a significant number of other contracts in which they participate outside of NTSP.[28] The evidence also shows that some NTSP physicians accept direct contracts that are below NTSP's thresholds.[29]

[redacted][30] [redacted],[31] NTSP's eligible physicians are only 10 % of the physicians in the Metroplex.[32] Of course, the eligible physicians also have their own contracts independent of NTSP, and participate, on average, in less than a third of NTSP's available contracts.[33] In effect, if one were to adjust the physician percentages by the proportion of contracts those physicians actually accept through NTSP, NTSP's potential effect on the market would be less than 4 %. Complaint Counsel's argument that NTSP constitutes some sort of widespread group boycott

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[27] *See, e.g.*, RX 13 [redacted].

[28] Maness Report at Exhibit 10. [redacted] *See also* RX 9 [redacted].

[29] Rosenthal Deposition at 22-23; Johnson Deposition at 25-26; Frech Deposition at 82, 215-18.

[30] Frech Report at Exhibit 3.

[31] *See* Maness Report ¶ 30.

[32] This number is even overestimated because it was calculated only using the total number of doctors in Dallas and Tarrant County compared to NTSP physicians in the entire metroplex. *See* RX 305 and 306 (TBME data for doctors in Dallas and Tarrant County).

[33] *See* RX 359 (NTSP physician participation chart).

that brings payors to their knees dies in the face of these facts. The payors themselves confirm the fallacy of Complaint Counsel's argument.[34]

Complaint Counsel contends that NTSP must messenger every payor offer to its participating physicians,[35] 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. But payors don't need NTSP to messenger their offers. Complaint Counsel's own economic expert admits that messengering is essentially a ministerial task that anyone, including the payors themselves, can easily do.[36] A number of IPAs in addition to NTSP have been available in the Metroplex to messenger payor offers.[37]

C. NTSP does not collectively set rates or facilitate rate-setting among physicians.

NTSP has limited involvement with payors on fee-related matters for non-risk offers. If a payor makes an offer below the threshold, NTSP may disclose the threshold or refuse to get involved. If the payor decides to make an offer that meets the threshold, NTSP will then review the offer to see if it should be accepted and eventually messengered.[38] NTSP does not negotiate

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[34] Roberts Deposition at 28-29 (stating that Aetna has a adequate network without NTSP); RX 9 [redacted]; CX 1034 [redacted]; CX 709 [redacted].

[35] *See* 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"); Complaint ¶ 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").

[36] Frech Deposition at 89-91.

[37] RX 280 [redacted].

[38] Van Wagner Deposition taken on August 29, 2002 at 62-63; Deposition of Dave Palmisano at 19.

to raise rates above this threshold.[39] In fact, NTSP has refused to negotiate in this way despite invitations to do so.

Complaint Counsel also challenges NTSP's disclosure of the Board's threshold rate levels for non-risk HMO and PPO offers to its panel of eligible physicians.[40] Of course, such disclosures are needed so physicians will know when NTSP will be involved in reviewing a payor's offer. Complaint Counsel alleges that this facilitates collusion among physicians. Yet this information cannot be used by individual physicians to coordinate or raise rates. Only a limited number of physicians respond to the NTSP poll, and no individual data is ever disclosed to the participating physicians.[41] [redacted][42] Further, the evidence in this case shows that physicians use a number of factors when making their individual decisions on payor contracts; the results of this poll do not determine those decisions.[43]

D. NTSP has many legitimate reasons for refusing to deal with certain payors or contracts.

Complaint Counsel asserts that NTSP must messenger every payor offer to its participating physicians to avoid an antitrust violation. But there are many legal, economic, and

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[39] Van Wagner Deposition taken on August 29, 2002 at 24-25; Deposition of Leslie Carter at 20-21, 39-40, 44-45, 138, 141; Deas Deposition taken on October 10, 2002 at 73.

[40] 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.").

[41] *See* Deposition of John Johnson, M.D. at 36; Frech Deposition at 149, 215-18; RX 14, 15, 16, and 17 (NTSP poll results).

[42] Maness Report ¶ 55.

[43] Rosenthal Deposition at 24; Johnson Deposition at 25-26, 30; Collins Deposition at 36-37.

business reasons why NTSP cannot and does not messenger every contract presented to it. Specifically, NTSP may refuse to deal with a particular payor or contract to (1) avoid illegal or potentially illegal contracts; (2) avoid use of its resources in reviewing and servicing contracts when only a minority of its physicians will be involved; (3) avoid credentialing and other activities in situations where NTSP does not want that burden; (4) avoid situations that will drain NTSP's and its physicians' time and resources through the use of incomprehensible compensation methodologies; (5) avoid payors who are discriminating against NTSP's physicians; (6) avoid payors who are not financially sound; (7) avoid medical plans that appear risky from a medical treatment standpoint; (8) avoid situations that appear legally risky to NTSP from a financial, administrative, or standard-of-care standpoint; (9) avoid payors who are undercutting a NTSP risk contract; (10) avoid payors who are breaching an existing contract; (11) avoid payors who have engaged in deceit or other conduct condemned by state officials; (12) avoid payors who refuse to share medical data with NTSP to assist in NTSP's medical management goals; and (13) avoid situations where NTSP is not given time to make a knowledgeable decision on the offer. All of the payors on whom Complaint Counsel evidently bases this case have engaged in conduct falling within one or more of these reasons for NTSP's refusals.

E. Other specific actions challenged by Complaint Counsel are irrelevant to this case and do not show any collusion between NTSP and its participating physicians.

Many of the actions challenged by Complaint Counsel involved payors with whom NTSP was negotiating for risk contracts.[44] Of course, NTSP has the right under the law and the

[44] Deposition of Chris Jagmin at 74; [redacted].

Commission's Statements of Principles to negotiate and compete vigorously as a group for risk contracts.[45]

Complaint Counsel has challenged NTSP's communications with physicians related to NTSP's service as a class representative in litigation against Medical Select Management ("MSM"), an IPA that failed to pay the physicians in a timely and full manner.[46] The Texas Department of Insurance eventually took over MSM, and MSM later filed for bankruptcy following disclosure of financial malfeasances by its management.[47] One of MSM's former executives is currently serving a prison term for some of that malfeasance.[48] NTSP eventually made a substantial recovery in the bankruptcy court.

F. Complaint Counsel's Justification Argument Is a Diversion.

Complaint Counsel, for obvious tactical reasons, tries to make this case sound like one where NTSP wants to collectively negotiate and bind physicians on non-risk contracts.[49] Complaint Counsel uses that straw-man argument to try to require some heavy showing of justification.[50] Complaint Counsel's argument does not fit the facts of this case.

NTSP has no contractual or other authority to negotiate non-risk contracts collectively for the physicians. The Physician Participation Agreement gives NTSP no authority to bind the

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[45] *See* Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care.

[46] *See* Deposition of Karen Van Wagner, August 29, 2002, at 89 (discussing NTSP's role in events leading up to and during Cause No. 352-178824-99 in the 352nd District Court of Tarrant County, Texas); *see also* RX 832 (fax alert detailing situation).

[47] *See* Roberts Deposition at 44-48; RX 3102 (TDI press release on supervision); RX 1555 and 1556 (TDI press releases on bankruptcy).

[48] *See* RX 1805 (indictment); RX 3101 (article regarding conviction).

[49] *See, e.g.*, Complaint Counsel's Pretrial Brief at 8, 10-11, 15, 20, 23, 27.

[50] *See, e.g.*, Complaint Counsel's Pretrial Brief at 33-34.

physicians and any non-risk contracts to which NTSP decides to become a party must then be messengered to the physicians for their individual decisions to join or not.[51] Complaint Counsel is merely complaining about NTSP refusing to become involved in a few payor offers. Because NTSP has the legal right under various legal principles, including the Colgate doctrine and Trinko, to avoid involvement, there is nothing that needs to be economically justified.[52] The economic justification for NTSP's refusal in any event would be modest and more than amply shown by NTSP's solid data supporting its spillover model.

III. ARGUMENT AND AUTHORITIES

Complaint Counsel alleges that NTSP violated section 5 of the FTC Act by fixing "the price of fee-for-service medical services," and facilitating, coordinating, and acting "as the 'hub'of concerted action by its participating physicians," who are alleged to compete with each other.[53] For the Administrative Law Judge to find such a violation, Complaint Counsel must prove:

(1) the existence of a contract, combination, or conspiracy among two or more separate entities, which are subject to the antitrust law, that (2) unreasonably restrains trade, and (3) the acts or practices are in or affecting interstate or foreign commerce.[54] As the Supreme Court has noted, "[t]he FTC Act's prohibition of unfair competition and deceptive acts or practices overlaps the

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[51] *See,* RX 26 (NTSP Physician Participation Agreement).

[52] *See United States v. Colgate & Co.,* 250 U.S. 300, 3078 (1919) (establishing manufacturer's right of refusal to deal) and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP,* 124 S.Ct. 872, 880-81 (2004) (establishing a network's right of refusal to make itself available).

[53] *See* Complaint ¶ 12 (stating that NTSP acts as "combination of competing physicians"); Complaint Counsel's Second Supplemental Responses to Respondent's First Set of Interrogatories at 6.

[54] *FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411 (1990).

scope of § 1 of the Sherman Act aimed at prohibiting restraint of trade."[55] The Commission relies on Sherman Act law when deciding cases alleging unfair competition.[56]

A. Under the appropriate rule of reason analysis, NTSP has not committed an antitrust violation because it has not unreasonably restrained trade.

Restraints of trade can be unlawful under section 1 of the Sherman Act under three separate theories: (1) *per se*, (2) rule of reason, or (3) truncated or "quick look" rule of reason.[57] 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."[58] But the rule of reason is the prevailing standard that applies to most claims and is the appropriate analysis in this case.[59]

1. The appropriate analysis for this case is a rule of reason analysis because NTSP's conduct has plausible procompetitive effects.

A rule of reason analysis should be applied if the conduct at issue "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[60]

NTSP's conduct is not only plausibly, but obviously, procompetitive. NTSP's expert reports discuss in detail NTSP's business model, which is designed to achieve efficiencies

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[55] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 763 n.3 (1999) (citations omitted).

[56] *See id.* (stating that "the Commission relied upon Sherman Act law in adjudicating this case").

[57] *See id.* at 763 (identifying three theories of liability); *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002) (discussing rule of reason, *per se* rule, and quick-look analysis).

[58] Complaint Counsel's Response and Objections to North Texas Specialty Physicians' First Request for Admissions to Complaint Counsel at 3.

[59] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[60] *Cal. Dental Ass'n*, 526 U.S. at 771.

through the clinical integration techniques used for its risk contracts and to then extend those same efficiencies to non-risk patients. By limiting its involvement to non-risk offers which will likely be of interest to most of the Risk Panel physicians, NTSP hopes that those same physicians will remain involved in NTSP's non-risk contracts, enabling the continuing use (spillover) of the referral and treatment patterns developed for the risk contracts. [redacted][61]

The model is also designed to limit the expenditure of NTSP's resources on offers not likely to be of interest to a significant number of NTSP's eligible physicians. That such a resource-allocation purpose can be legitimate is shown by the Commission staff's own advisory letter taking a neutral stance on an IPA's refusal to be involved in offers which fall below the IPA's minimum number of participants.[62] Staff went on to point out that "[s]o long a payers have an effective opportunity to contract with physicians individually," the IPA's "refusal to administer contracts to which fewer than half its members subscribe is less likely to have anticompetitive effects."[63] In the present case, Complaint Counsel inexplicably tries to avoid any need to show market effects.

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[61] *See* Wilensky Report at 12-16; Hughes Report at 15-18; Maness Report ¶¶ 83-100.

[62] *See* Bay Area Preferred Physicians Advisory Opinion, letter from Jeffrey W. Brennan to Martin J. Thompson, dated September 23, 2003.

> You asserted that the medical societies forming BAPP do not wish to fund the servicing of contracts in which only a minority of BAPP members participate, because it would "impose an excessive cost" on the non-participants, and that this is a rational, cost-based business decision. The staff offers no view on the commercial or economic reasonableness of this decision, or on whether a participation threshold of 50% or less is a justifiable demarcation for determining whether to service a payer contract.

[63] *Id.*

California Dental advocates "considerable inquiry into market conditions" before "application of any so-called '*per se*' condemnation is justified."[64] Under *California Dental*, there is no doubt that NTSP's conduct "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," for which reason a full rule of reason analysis must be used.

Complaint Counsel urges the Administrative Law Judge to use at most a "quick look" rule of reason analysis. But this is appropriate only in limited circumstances that are not present here. To utilize that analysis, Complaint Counsel must show that "the great likelihood of anticompetitive effects can easily be ascertained."[65] As discussed above, the evidence in this case shows that NTSP's conduct is consistent with lawful competition and procompetitive efficiencies. Based on all that evidence, there is no "great likelihood of anticompetitive effects," and, even if there were, they cannot "easily be ascertained."

Even more inappropriate in light of the evidence is Complaint Counsel's assertion that *per se* rules apply, resulting in no analysis at all. Complaint Counsel's view is that a refusal by NTSP to participate in a contract is *ipso facto* a collective boycott and an antitrust violation. Yet, if NTSP chooses to participate in the contract with the payor and the doctors, Complaint Counsel says that is a collective price-fixing agreement and an antitrust violation if the payor chooses to complain. But if that were the law, then any entity involved in a team or network situation is doomed from the start. Teams and networks would be able to arise only where the entity is able to hire all of the various participants as employees. Of course, there would be many fewer teams and networks in that kind of world – which would decrease both innovation

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[64] 526 U.S. at 779.

[65] *Id.* at 770.

and efficiency. The very plausible procompetitive effect of NTSP is why the Supreme Court's decision in *California Dental* mandates that this type of situation must be viewed under some form of a rule of reason analysis.[66]

Complaint Counsel recently seems to be backing away from its contention that NTSP must messenger and be involved in every payor offer. Instead, Complaint Counsel appears to be relying more on a mish-mash of various event arising out of, *inter alia,* a) NTSP's pursuit of risk contracts with Aetna, Cigna, and others, b) NTSP's efforts arising out of a risk contract it had covering the City of Fort Worth's employees, c) NTSP's litigation against and eventual successful recovery against an entity (Medical Select Management) contractually connected to Aetna, d) NTSP's enforcement of contractual obligations in existing contracts with MSM, Aetna, Cigna, HTPN, and others, and e) NTSP's involvement in regulatory proceedings brought by federal and state authorities against Aetna, Blue Cross, Cigna, and United. Of course, those activities would not constitute antitrust violations due to the obvious legal justifications.[67] Complaint Counsel's reliance on these additional assertions, moreover, is just a further mandate of the expanded legal review required by the Supreme Court's *California Dental* decision.

2. Complaint Counsel cannot show an antitrust violation because it cannot meet its burden of showing that NTSP's conduct has a net anticompetitive effect.

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[66] 526 U.S. 756, 771, 779 (1999) (rejecting application of quick-look analysis and requiring more detailed market inquiry when "restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition").

[67] Litigation and cooperation or disclosure to governmental authorities are Constitutionally-protected, as well as covered, depending on exactly how Complaint Counsel proceeds with its proof, by the *Noerr-Pennington* doctrine. *See Video Int'l Prod., Inc. v. Warner-Amex Cable Communications*, 858 F.2d 1075, 1082-83 (5th Cir. 1988) (explaining Noerr-Pennington antitrust immunity for interactions with government). Competitive activities involving risk contracts are not actionable under the protections afforded by the Statements of Principles and other applicable law. *See* DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care, Statement 8. Enforcement of existing contractual rights and obligations is justified conduct, unless the contract were alleged to be illegal, which is not a contention being made by Complaint Counsel. *See Delta Marina, Inc. v. Plaquemine Oil Sales, Inc.*, 644 F.2d 455, 458 (5th Cir. 1981) (finding a contract enforceable despite allegations of antitrust violations).

When the rule of reason analysis is applied, there is no antitrust violation in this case. Any restraint of trade is evaluated by weighing its probable anticompetitive effects against any procompetitive benefits.[68] The burden is on the complaining party to demonstrate that the challenged conduct has a net anticompetitive effect.[69] Complaint Counsel cannot meet its burden. Complaint Counsel does not really try to do so.

The slight conjecture of anticompetitive effects that Complaint Counsel will present does not outweigh the actual and admitted procompetitive effects and efficiencies of NTSP's conduct as proven by an abundance of evidence and expert opinions, including the opinion of Complaint Counsel's own expert.[70]

Further, Complaint Counsel cannot rely, as it attempts to, on the mere fact that NTSP refuses to messenger some payor contracts. In *Viazis v. American Association of Orthodontists*, the Fifth Circuit rejected the idea that a trade association is "by its nature a 'walking conspiracy'."[71] A plaintiff cannot show competitive harm "merely by demonstrating that the defendant "refused without justification to promote, approve, or buy the plaintiff's product."[72] This case is very similar to *Viazis* in that NTSP is making a decision whether or not it wants to be involved in ("approve") a payor's offer.

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[68] *Viazis v. Am. Assoc. of Orthodontists*, 314 F.2d 758, 765 (5th Cir. 2002).

[69] *Id.* at 766.

[70] Frech Deposition at 99, 104-05, 110-17, 240-41; *see generally* Wilensky Report, Hughes Report, and Maness Report.

[71] 314 F.2d at 764 ("Despite the fact that '[a] trade association by its nature involves collective action by competitors[,] . . . [it] is not by its nature a "walking conspiracy", its every denial of some benefit amounting to an unreasonable restraint of trade." (quoting *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988)).

[72] *Id.* at 766.

3. Complaint Counsel also cannot show an antitrust violation because it cannot prove a relevant market or NTSP's market power.

To prevail in a rule-of-reason case, Complaint Counsel "must define the market and prove that [NTSP] had sufficient market power to adversely affect competition."[73] Complaint Counsel cannot.

The evidence in this case shows that Complaint Counsel has not even attempted to prove a relevant market. Dr. Frech's testimony on this point could not be more clear:

> 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.[74]

Because he has not defined a relevant market, Dr. Frech admits that he has also not calculated any concentration ratios.[75] Dr. Frech also admitted that, although he has done zip code analysis on physician practices in other cases, he has not done that type of analysis here.[76] Likewise, he has not performed any type of entry analysis in this case.[77] Dr. Frech also conceded

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[73] *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1555 (11th Cir. 1996); *accord Doctor's Hospital*, 123 F.3d at 307 ("'Proof that the defendant's activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason.'" (quoting *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1392 (5th Cir. 1983)); *Jayco Sys., Inc. v. Savin Bus. Machs. Corp.*, 777 F.2d 306, 319 (5th Cir. 1985) ("In addition, a showing of a relevant market is also necessary to assess anticompetitive effects in rule of reason analysis under § 1.").

[74] Frech Deposition at 120.

[75] Frech Deposition at 136.

[76] Frech Deposition at 134.

[77] Frech Deposition at 142.

that geographic markets tend to become larger the more specialized the specialty;[78] this fact is important because NTSP's participating physicians are mostly specialists. He also testified that the existence of a significant population in eastern Tarrant County on the border of Dallas County would act to tie Dallas and Tarrant Counties together;[79] this testimony would defeat any attempt Complaint Counsel might have made to limit the relevant market to only Tarrant County or its county seat, Fort Worth. Finally, Dr. Frech admits that there can be significant crossovers of services between specialties.[80]

Even if Complaint Counsel had attempted to show a relevant market, no type of rule-of-reason violation can be made out against NTSP because the overlapping patterns of physician practices in the Metroplex make impossible a relevant market limited to the city limits of Fort Worth.[81] Dr. Frech admits that the large population in the "Mid-Cities Area" between Fort Worth and Dallas ties Dallas and Tarrant Counties together as a market.[82] There is also no evidence that a payor was unable to find enough local physicians available to it outside of NTSP. In fact, the payors' testimony is to the contrary,[83] which is consistent with the physicians'

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[78] Frech Deposition at 132-33.

[79] Frech Deposition at 130-31. [redacted] Maness Report ¶ 29.

[80] Frech Deposition at 121-25.

[81] If Complaint Counsel were correct, there would be hundreds of supermarket relevant markets in every metropolitan area, because a shopper normally goes to his or her neighborhood store. Yet that is not the law. A relevant geographic market must be economically significant, which requires containing an "appreciable segment of the product market" as well as following the rule of reasonable interchangeability. *See Apani Southwest, Inc. v. Coca-Cola Enter., Inc.*, 300 F.3d 620, 627-628 (5th Cir. 2002) (rejecting a relevant georgraphic market of 27 facilities selling bottled water).

[82] Frech Deposition at 130-31.

[83] Roberts Deposition at 28-29 (stating that Aetna has a adequate network without NTSP); RX 9 [redacted]; CX 1034 [redacted]; CX 709 [redacted].

testimony that they have belonged to IPAs other than NTSP and have also entered into direct contracts with payors.[84]

Based on all of this evidence or lack thereof, Complaint Counsel cannot show a relevant market. Accordingly, any attempt to establish liability against NTSP under a rule-of-reason analysis fails.

B. Under any analysis, there is no antitrust violation because there is no collusion among NTSP and any of its participating physicians.

Regardless of the method of analysis employed, Complaint Counsel must prove some form of "concerted action" to establish an antitrust violation.[85] "Section 1 of the Sherman Act [like Section 5 of the FTC Act] does not proscribe independent conduct."[86]

To prove there was "concerted action" or collusion, Complaint Counsel must submit either direct or circumstantial evidence of an agreement between competitors (*i.e.*, the physicians).[87] But conduct that is as consistent with lawful competition as with conspiracy will not support an inference of conspiracy.[88] Complaint Counsel "must present evidence that tends

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[84] *See, e.g.*, Collins Deposition at 36-37.

[85] *See Viazis*, 314 F.3d at 761 ("So, to establish a § 1 violation, a plaintiff must demonstrate concerted action."); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999) (finding that liability under section 1 of the Sherman Act "is necessarily based on some form of 'concerted action'").

[86] *Viazis*, 314 F.3d at 761.

[87] *In re Baby Food Antitrust Litig.*, 166 F.3d at 117 ("The existence of an agreement is the hallmark of a Section 1 claim."); *see also Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984) ("The pharmacy agreements do not constitute a *per se* illegal horizontal combination . . . because the agreements do not run between competitors in the pharmaceutical industry, nor between competitors in the insurance industry, but between individual pharmacies and Blue Shield, which does not compete with pharmacies.").

[88] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

to exclude the possibility that the alleged conspirators acted independently."[89] Based on this standard, Complaint Counsel cannot prove any collusion.

1. Complaint Counsel concedes there is no direct evidence of collusion.

Complaint Counsel, after being 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.[90] Further, Complaint Counsel's expert admits that he cannot identify *any* specific evidence showing that any of the following things occurred:

(1) one or more participating physicians agreed with each other to reject a non-risk payor offer;[91]

(2) any participating physician and any other entity agreed to reject a non-risk payor offer;[92]

(3) any participating physician rejected a non-risk payor offer based on a power of attorney granted to NTSP;[93]

(4) any participating physician refused to negotiate with a payor prior to a non-risk offer being messengered by NTSP;[94]

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[89] *Id.* (citations omitted).

[90] 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.'").

[91] Frech Deposition at 75-76.

[92] Frech Deposition at 75-76.

[93] Frech Deposition at 80.

[94] Frech Deposition at 75-76.

(5) any participating physician knew what another physician was going to do in response to a non-risk payor offer;[95]

(6) any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;[96] or

(7) any participating physician gave up his or her right to independently accept or reject a non-risk payor offer.[97]

2. Circumstantial evidence does not support an inference of collusion because any alleged conduct is consistent with independent action.

Complaint Counsel's expert, Dr. Frech, has actually proven that there is no collusion or agreement among NTSP's participating physicians. [redacted][98] This is consistent with physician testimony that they 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,[99] and, in some cases, accept offers below the rates established by NTSP's board.[100]

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[95] Frech Deposition at 155.

[96] Frech Deposition at 209.

[97] Frech Deposition at 209.

[98] Report of H.E. Frech at Exhibits 8A-8C.

[99] Rosenthal Deposition at 24; Johnson Deposition at 25-26, 30; Collins Deposition at 36-37.

[100] Rosenthal Deposition at 22-23; Johnson Deposition at 25, 27.

Dr. Frech also testified that the response rate for the poll was very poor, which explains why only a small percentage (in some cases less than 10%) of the participating physicians respond at the rate that is actually used as the threshold by NTSP's board.[101] Such a low response rate and low correlation make it impossible to have an effective price-fixing conspiracy. Indeed, it is undisputed that many of the participating physicians do not respond,[102] and Complaint Counsel's expert has opined that many physicians do not follow their own poll responses in their individual business decisions even when they do respond.[103]

Likewise, providing only the mean, median, and mode of all of the poll responses does not tell a participating physician what any other physician will do with respect to a payor offer.[104] Moreover, Dr. Frech admits that, even assuming *arguendo* a conspiracy, NTSP would have no effective method to police compliance.[105] Taken together, all of this evidence (or lack thereof) does not tend "to exclude the possibility that the alleged conspirators acted independently."

3. The evidence shows that NTSP's conduct is consistent with lawful competition.

In addition to being unable to exclude independent action, Complaint Counsel also cannot prove that the evidence is inconsistent with lawful competition. Dr. Frech admits that the collection and dissemination of market information, including market prices, can potentially

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[101] Frech Deposition at 215-16.

[102] Frech Deposition at 149, 215-18.

[103] Frech Deposition at 82, 215-18.

[104] Frech Deposition at 149, 155.

[105] Frech Deposition at 81, 237-40.

benefit competition.[106] In fact, Dr. Frech believes that payors conduct surveys and know what other payors are offering in a given market.[107] Dr. Frech also admits that physicians commonly look to IPAs to handle discussions with a payor as to the legal terms of a contract,[108] and that IPAs save costs by eliminating multiplicative legal contractual reviews by individual physicians.[109] Further, he concedes that payors usually have to offer a higher price to get a majority or more of physicians to participate in a contract.[110] Higher prices are also especially important to attract physicians that are more sought after and perceived to be of higher quality.[111] 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.[112] Finally, 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.[113]

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[106] Frech Deposition at 155-58; *see also* FTC Staff Advisory Opinion Letter, dated November 3, 2003, from Jeffrey W. Brennan to Gerald Niederman regarding Medical Group Management Association:

> The survey will seek information regarding several aspects of physicians' contractual relationships with third-party payers, including information about amounts that health plans pay for physician services. MGMA will publish the information obtained through the survey only on an aggregated basis; it will not disclose information about individual payers. As discussed below, it does not appear likely that publication of the survey results, in the manner described in your letters, will prompt coordinated anticompetitive behavior by physicians. Accordingly, the Commission staff has no intention to recommend law enforcement action regarding the proposed conduct.

[107] Frech Deposition at 156.

[108] Frech Deposition at 80.

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

[110] Frech Deposition at 182-83.

[111] Frech Deposition at 202; *see Doctor's Hospital, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 310 (5th Cir. 1997) ("In medical care, it must be remembered, a provider's higher prices are not necessarily indicative of a less competitive market; they may correlate with better services or more experienced providers.").

[112] *See* Frech Deposition at 109.

[113] Frech Deposition at 104-05, 110-17, 240-41.

And NTSP's maintaining continuity of personnel — in this case, the participating physicians — is important to achieving these efficiencies.[114]

An absence of collusion is also supported because NTSP has no authority to accept non-risk contracts on behalf of the participating physicians.[115] Every non-risk contract which NTSP decides to sign is then messengered to physicians who individually decide whether each wants to participate. Dr. Frech and the payors admit this undisputed fact.[116] NTSP does not bind anyone other than itself to a non-risk contract.[117] NTSP's "refusal to deal" is, therefore, only its own refusal *qua* NTSP, not the individual physicians' refusal.[118]

And this refusal to deal by NTSP is proper under the *Colgate* doctrine. NTSP's right to follow its own business model and to refuse to sign and messenger contractual offers outside that model falls squarely within the Supreme Court's repeated reaffirmations of the *Colgate* doctrine.[119] That right has been recently reiterated by the Fifth Circuit in its *Viazis* decision.[120]

> In *Consolidated Metal Products*, 846 F.2d at 296, we held that where an association's product recommendations were nonbinding and the association did not coerce its members to abide by its recommendations, its refusal to sanction plaintiff's product did not show that plaintiff was excluded from the market. Nor

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[114] Frech Deposition at 104-05.

[115] Frech Deposition at 209.

[116] *See, e.g.,* Frech Deposition at 209; Deposition of Tom Quirk at 54.

[117] Frech Deposition at 209.

[118] *See* Frech Deposition at 209; Rosenthal Deposition at 24; Johnson Deposition at 25-26, 30; Collins Deposition at 36-37.

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

[120] *Viazis*, 314 F.3d at 763 n.6 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984), which cites *Colgate* for the proposition that "[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever is likes, as long as it does so independently").

can a plaintiff show competitive harm merely by demonstrating that the defendant "refused without justification to promote, approve, or buy the plaintiff's product." *Id.* at 297.[121]

Although NTSP's decision is well-justified based on its efficiency-directed "spillover" business plan, under Fifth Circuit authority NTSP does not even need a justification to refuse to messenger a payor's offer. Complaint Counsel seeks to impose a duty on NTSP to messenger all payor offers. That contention is dead on arrival in the Fifth Circuit.

In the normal situation, horizontal competitors have little reason to come together and "plus"-type inferences can be drawn when they do. Where a network of complementary medical practitioners comes together, the network is a necessity to provide the full range of treatments by the various types of generally non-competitive practitioners to the patient population. There is nothing sinister to presume when the network entity does what one would expect be done in operating a network.[122] That is the point being made by the Fifth Circuit's decision in *Viazis v. American Association of Orthodontists*.[123]

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[121] *Id.* at 766.

[122] The Supreme Court's recent rejection of a duty to make one's network available under an essential facility or similar argument in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 880-81 (2004) is apposite here.

[123] 314 F.3d 758, 764 (5th Cir. 2002) (finding that trade association's action, in and of itself, was not conspiratorial because plaintiff failed to prove association's members "were conspiring among themselves" and that association was not a "walking conspiracy"). Complaint Counsel make an extraordinary suggestion, without any supporting authority, that Fifth Circuit law does not govern this proceeding. Complaint Counsel's Memorandum in Opposition to NTSP's Motion for Summary Decision ("Complaint Counsel's Opposition") at 14 n.33. That argument is wrong. *See* 15 U.S.C. § 45(c) ("Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business . . . ."). In this case, NTSP "resides" and "carries on business" in the Fifth Circuit and that is the circuit in which "the method of competition or the act or practice in question" was used. Accordingly, any appeal of an adverse order

Healthcare is a line of business with great legal risk and regulatory complications, especially in a highly litigious state like Texas. NTSP faces significant disincentives to being involved in offers which are problematic or involve only a relative few of those physicians who are qualified enough to be part of NTSP's limited panel. Among the legitimate reasons NTSP may refuse to messenger a payor contract are (1) avoiding illegal or potentially illegal contracts; (2) avoiding use of its resources in reviewing and servicing contracts when only a minority of its physicians will be involved; (3) avoiding credentialing and other activities in situations where NTSP does not want that burden; (4) avoiding situations that will drain NTSP's and its physicians' time and resources through the use of incomprehensible compensation methodologies; (5) avoiding payors who are discriminating against NTSP's physicians; (6) avoiding payors who are not financially sound; (7) avoiding medical plans that appear risky from a medical treatment standpoint; (8) avoiding situations that appear legally risky to NTSP from a financial, administrative, or standard-of-care standpoint; (9) avoiding payors who are undercutting a NTSP risk contract; (10) avoiding payors who are breaching an existing contract; (11) avoiding payors who have engaged in deceit or other conduct condemned by state officials; (12) avoiding payors who refuse to share medical data with NTSP to assist in NTSP's medical management goals; and (13) avoiding situations where NTSP is not given time to make a knowledgeable decision on the offer. NTSP has faced these types of situations with Aetna, Blue Cross, Cigna, and United, and others.

Further, 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.[124] NTSP's refusals to

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from the Commission would go to the Fifth Circuit for determination and that circuit's law is controlling here.

[124] Frech Deposition at 92.

deal are clearly lawful competition under the *Colgate* doctrine and do not support an inference of collusion.

All Complaint Counsel can show is actions by NTSP.[125] Even though those actions reflect lawful competition and what one would expect any network entity to do in making its own decisions and managing its own resources, the more critical point is that the cited activities are not what the physicians did. Any theory of conspiracy and collusion – which is a required showing for Complaint Counsel's case – must show what the physicians actually did and why.[126] Complaint Counsel not only does not do that, but Complaint Counsel's expert admits that the physicians have not acted consistently with what NTSP does.

C. NTSP does not come within the FTC Act's jurisdiction because it is a memberless nonprofit corporation and the challenged conduct does not affect interstate commerce.

There are two requirements for jurisdiction under the FTC Act. First, NTSP must be an association acting for the profit of its members. Second, NTSP's actions must affect interstate commerce.

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[125] In addition to focusing only on NTSP, Complaint Counsel misconstrues and mis-cites much of the evidence it relies upon to oppose NTSP's motion for summary decision. *See, e.g.* Complaint Counsel's Opposition at 2 (alleging that NTSP's primary purpose is negotiating on behalf of participating physicians, but citing evidence that says nothing about negotiating contracts), 6 (alleging that NTSP used powers of attorney, but citing no evidence to support that proposition), 7 (citing portion of Dr. Frech's report as support for allegation that NTSP's activities likely stabilized and raised prices, when cited portion contains no such assertion), 9 (alleging that NTSP enlisted employer's assistance to obtain higher fees, but citing no evidence referring to any such activities). There is little reason, however, to parse these many errors because, as explained previously, Complaint Counsel has failed to provide evidence of collusion among the participating physicians and has not defined any relevant market.

[126] Complaint Counsel cites a Third Circuit case, *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), which actually supports Respondent on this point; a summary judgment for defendants was affirmed because plaintiffs only showed an opportunity to conspire, rather than actual conspiracy. 37 F.3d at 1013.

Complaint Counsel must prove that NTSP is an association acting for the profit of its members. But, as organized under Texas law, NTSP is a memberless, nonprofit corporation.[127] By definition, NTSP cannot be an association acting either for profit or for members it does not have. Further, NTSP is a non-profit entity which makes no money from being involved in non-risk contracts, the conduct at issue in this case. Its motivation is to be involved in contracts which activate the network NTSP created and uses for risk contracts, with the goal that payors will eventually allow the network to take on additional risk contracts.

Even if NTSP was considered to be organized for the profit of its "members," NTSP still does not come within the jurisdiction of the Federal Trade Commission because the alleged anti-competitive conduct of NTSP does not involve NTSP "acting" for the profit of its members, it only involves NTSP's refusal to act. Such a refusal to act does not promote the profit of NTSP's members, if any. Although Complaint Counsel claims this case is more than a unilateral refusal to deal, Complaint Counsel cannot prove any more than a unilateral refusal to deal as a matter of law. Without further proof, there is no jurisdiction.

The second jurisdictional requirement of interstate commerce must be satisfied under either the "in commerce" or "effect on commerce" theory.[128] To satisfy the "effect on commerce" theory, the relevant aspect of interstate commerce must be identified, and it must be shown that the allegations, if proven, would have a substantial effect on an appreciable activity in interstate commerce.[129] Complaint Counsel must show a factual nexus between the alleged restraint and the effect on interstate commerce. The specific effect does not have to be proven,

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[127] TEX. REV. CIV. STAT. ANN. Art. 1396-1.02(A)(6) (Vernon 2004).

[128] *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980).

[129] *Id.*; *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994).

but if it is not proven, then the nexus must exist as a matter of "practical economics."[130] Complaint Counsel cannot show any effect under this standard.

Complaint Counsel's facts consist of NTSP's dealing with insurers and, indirectly, employers, with offices outside Texas, even though NTSP only has contact with often independently-operated Texas offices, and out-of-state vendor expenses. There is no effect at all based on these instances, whether by direct proof or "practical economics." Complaint Counsel assumes that a few out-of-state purchases and "six degrees of separation"-type relationships with out-of-state offices of insurers and employers are enough to establish effects on interstate commerce.

Complaint Counsel has not addressed any other possible factors. But courts have recognized that out-of-state purchases and insurance are only factors to be considered and do not necessarily compel a finding of effects on interstate commerce.[131] Considering that NTSP has only one office, located in Texas, that NTSP deals only with insurers located in Texas, that these Texas insurers make their own business decisions independent of out-of-state affiliates, that none of the alleged conduct took place outside of Texas, and that Complaint Counsel cannot point to even one example of a specific effect or even possible effect on interstate commerce that is more than a conclusory allegation not supported by "practical economics," Complaint Counsel has not proven effects on interstate commerce.

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[130] *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 331 (1991); *McLain*, 444 U.S. at 246.

[131] *Mitchell v. Howard Mem'l Hosp.*, 853 F.2d 762, 764 (9th Cir. 1988) (no effect on interstate commerce despite some out-of-state insurance and out-of-state supplies); *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613 (6th Cir. 1986) (no effect on interstate commerce despite hospital having out-of-state funding, out-of-state suppliers, and out-of-state patient income).

Further, the alleged effects on interstate commerce must be considered in proportion to the party's business as a whole.[132] Also, the acts complained of must affect the interstate commerce of a business, not just a business engaged in interstate commerce.[133] Any showing Complaint Counsel can possibly make does not amount to more than a mere showing of effect on a business engaged in interstate commerce, and that effect is de minimis compared to the business as a whole.[134]

The evidence does not connect the actions of NTSP with any effects on interstate commerce. Complaint Counsel also considers as interstate commerce evidence isolated instances of out-of-state equipment purchases, patients, and insurance carriers for individual physicians while failing to show evidence of any conspiracy or collusive action by physicians connecting them with the alleged anti-competitive conduct of NTSP. This evidence relates only to individual physicians, not NTSP.

Any individual conduct of physicians which may meet the requirements for interstate commerce is irrelevant in this action against NTSP because, as discussed previously, Complaint Counsel has not shown as a matter of law that the individual physicians are involved in the alleged anti-competitive conduct.

CONCLUSION

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[132] *Musick v. Burke*, 913 F.2d 1390, 1395 (9th Cir. 1990).

[133] *Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961).

[134] *Stone*, 782 F.2d at 614 (finding that an exclusion from a local facility only 2-3 times per month has de minimis effect and does not support Sherman Act jurisdiction).

Respondent prays that Complaint Counsel's case be dismissed for lack of jurisdiction, or in the alternative, for lack of merit, and for such other and further as to which Respondent may be justlyentitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on April 22, 2004, I caused a copy of the foregoing document to be served upon the following persons:

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