[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' POST-TRIAL REPLY BRIEF

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Complaint Counsel has staked its entire case on the Administrative Law Judge overlooking two huge holes in its case — (1) the failure to prove actual collusion among or with physicians, and (2) the failure to address and prove what anticompetitive effects the actions of Respondent North Texas Specialty Physicians ("NTSP") had on competition among physicians in the relevant markets. Accordingly, Complaint Counsel's case fails, *inter alia*, on the central issues of conspiracy and unreasonable restraint of trade.

Complaint Counsel seems to argue that NTSP is a "walking conspiracy." But that argument conflicts directly with the Fifth Circuit's decision in *Viazis v. American Ass'n of Orthodontists*.[1]

Complaint Counsel purports to base its case on the Commission's decision in *In re Polygram Holding, Inc.*,[2] which is now on appeal to the D.C. Circuit. *Polygram* comes into play, however, only after collusion has been proven and, consistent with the Supreme Court's decision in *California Dental Ass'n v. FTC*,[3] still requires, in a situation like NTSP's, proof of actual anticompetitive effects in a relevant market. Complaint Counsel has proven neither collusion nor anticompetitive effect in a relevant market in this case.

Complaint Counsel must try to establish liability under some form of rule-of-reason analysis,[4]

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[1] 314 F.2d 758, 764 (5th Cir. 2002).

[2] Docket No. 9298 (July 24, 2003).

[3] 526 U.S. 756 (1999).

[4] Although Complaint Counsel suggests a *per se* approach as mentioned in the Commission's *Polygram* decision, the Commission has now abandoned that approach in the *Polygram* appeal in favor of "an abbreviated rule of reason analysis." *See* Final Brief for the Respondent Federal Trade Commission at 14, *Polygram Holding, Inc. v. FTC*, No. 03-1293 (D.C. Cir. 2003).

but has chosen to duck the issue for obvious reasons. Because NTSP's conduct "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," a quick-look rule of reason approach does not apply.[5] And Complaint Counsel has not (and cannot) prove liability under any approach,[6] much less a full rule-of-reason analysis, because — among other things — Complaint Counsel's economist admits that he has not defined ***any*** relevant market in this case.

In sum, Complaint Counsel cannot carry its burden of proof to establish liability under any theory — because there is no proof of actual collusion and because Complaint Counsel has not proven actual anticompetitive effects in a relevant market.

In addition to rejecting Complaint Counsel's liability theories based on the *per se* rule and *Polygram*, the Administrative Law Judge should also reject Complaint Counsel's invitation to analyze NTSP's documents in a vacuum outside their proper context. During the ten days of hearings in this matter, NTSP introduced exhibits and elicited testimony from numerous witnesses, including the payors' representatives, about the proper context of the communications among NTSP, the payors, participating physicians, and patients (like the City of Fort Worth's employees). Despite all that evidence — about how NTSP has reported the payors to regulators for improper contracting activities, about how those regulators agreed with NTSP and fined the payors *millions of dollars*, about how Texas law gives physicians a right to communicate with patients about network adequacy issues and

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[5] *Cal. Dental*, 526 U.S. at 771.

[6] In fact, the failure to define any relevant market also undermines Complaint Counsel's ability to rely on the *per se* rule. *See Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) ("The categories of *per se* illegal practices are an approximation, a shortcut to reach conduct that courts can safely assume would surely have an anticompetitive effect. Thus, it is an element of a *per se* case to describe the relevant market in which we may presume the anticompetitive effect would occur."); *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558-59 (8th Cir. 1998) ("Thus, a plaintiff alleging a horizontal restraint must at least define the market and its participants, which, for reasons discussed below, Double D has failed to do."); *Goss v. Mem'l Hosp. Sys.*, 789 F.2d 353, 355-56 (5th Cir. 1986) (finding that *per se* rule cannot apply to group boycott unless plaintiff shows market power).

compensation rates, and about how NTSP was involved in litigation with the payors or entities closely related to them, just to name a few — Complaint Counsel continues to incorrectly suggest that those communications create antitrust liability.

The most egregious example of Complaint Counsel ignoring what transpired during the ten days of hearings is the continued suggestion that NTSP acted improperly by meeting and communicating with the City of Fort Worth.[7] On May 3, 2004, Complaint Counsel expressly stipulated to the physicians' right to discuss contractual issues with the City of Fort Worth:

> MR. BLOOM: ***We're not contesting the right of a physician to complain or to notify patients about its compensation arrangements, yes, Your Honor.***
> MR. HUFFMAN: I'll accept that stipulation.
> JUDGE CHAPPELL: You withdraw the question?
> MR. HUFFMAN: I do.
> JUDGE CHAPPELL: With that, move along. The stipulation is accepted by the Court.[8]

Complaint Counsel's continued reliance on communications with the City of Fort Worth to establish liability is, therefore, disingenuous (at best) and misleading (at worst).

For the reasons discussed below and in NTSP's Post-Trial Brief, Complaint Counsel's entire case should be dismissed.

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[7] CPF 182-203, 206-08; Post-Trial Complaint Counsel's Brief at 18-21.

[8] Tr. 1149-50 (emphasis added).

II.

ARGUMENT AND AUTHORITIES

A. Complaint Counsel has not proven that the FTC Act applies to NTSP.

Complaint Counsel has not carried its burden to prove jurisdiction over NTSP.[9] First, without citing to any authority whatsoever, Complaint Counsel suggests that the participating physicians are "'members' in the common sense, generally accepted usage of that word."[10] But Texas law makes it clear that NTSP legally is a memberless organization.[11] Accordingly, NTSP does not fit within the FTC Act's definition of "corporation" and falls outside its jurisdiction.[12]

Second, Complaint Counsel has not proven that a substantial part of NTSP's activities provide pecuniary benefits to participating physicians. Complaint Counsel ignores NTSP's non-profit status[13] and fails to recognize the important distinction between risk contracts and non-risk contracts. NTSP's primary function is to enter into risk contracts,[14] and, while those do provide income to NTSP, they are not the subject of this proceeding and are irrelevant for jurisdictional purposes.[15] Conversely, NTSP cannot enter into any non-risk contracts on its participating physicians' behalf; the physicians decide

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[9] *See Community Blood Bank v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969) (stating that Commission bears the burden to establish its jurisdiction). NTSP addresses the jurisdictional arguments in more detail in its Post-Trial Brief at 33-39.

[10] CC's Post-Trial Brief at 54.

[11] *See* TEX. OCC. CODE ANN. § 162.001 (Vernon 2004).

[12] *See* 15 U.S.C. § 44 (defining "corporation" as "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its ***members***" (emphasis added)).

[13] *See* TEX. REV. CIV. STAT. ANN. Art. 1396-1.02(A)(6).

[14] RPF 4; Response to CPF 6.

[15] Tr. 12 ("In a few instances, NTSP members have shared actuarial risk with one another. Those instances, your honor, are not the subject of this suit.").

independently whether to enter into a contract with a health plan and whether to do so through NTSP or another avenue.[16] Complaint Counsel also challenges alleged refusals to deal by NTSP, but such a refusal cannot provide a pecuniary benefit to any participating physicians.

Complaint Counsel also has not shown that NTSP's activities satisfy the commerce requirement of the FTC Act. Any unilateral refusal to deal by NTSP would not qualify as "commerce among the several states."[17] Complaint Counsel improperly focuses on conduct by participating physicians rather than NTSP the entity.[18] Complaint Counsel's reliance on allegations of "collective price negotiations"[19] fails because there is no evidence of any collusion involving physicians. Complaint Counsel then tries to rely on NTSP's contacts with "national insurers" that are "doing business in the Fort Worth area,"[20] even though NTSP deals only with Texas subsidiaries, located in Texas, and no evidence shows any impact NTSP has on the interstate commerce of an insurer, rather than an insurer engaged in interstate commerce.[21] Complaint Counsel suggests that NTSP's conduct impacted "national and multinational corporations, with local operations in Fort Worth."[22] But no evidence supports these claims. The Administrative Law Judge sustained NTSP's objections to any such evidence because Complaint Counsel failed to call any of those corporations as a witness.[23]

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16 RPF 137-38, 159-62, 267, 271-76.

17 15 U.S.C. §§ 44-45.

18 *See* CC's Post-Trial Brief at 67-68.

19 CC's Post-Trial Brief at 67.

20 CC's Post-Trial Brief at 67.

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

22 CC's Post-Trial Brief at 67.

23 Tr. 477-80.

B. Complaint Counsel cannot establish liability under any conceivable theory.

1. The failure to prove collusion among physicians dooms Complaint Counsel's case under any theory.

To establish liability under Section 5 of the FTC Act, Complaint Counsel must prove at least three things: (1) that a contract, combination, or conspiracy exists among two or more separate entities that are subject to the antitrust law; (2) that trade has been unreasonably restrained; and (3) that the acts or practices are in or affecting interstate or foreign commerce.[24] In this case, Complaint Counsel admittedly cannot prove direct collusion among otherwise competing physicians.[25] All Complaint Counsel has shown is circumstantial evidence consistent with independent action and lawful competition.[26]

Purporting to rely on a Third Circuit decision from 1994, Complaint Counsel claims that NTSP, by definition, is a combination of competitors that "automatically" the combination requirements of § 1 of the Sherman Act."[27] But Complaint Counsel has mis-cited that case because the court in *Alvord-Polk* expressly ***declined*** to find that a trade association, in and of itself, eliminated the need to prove a contract, combination, or conspiracy in a Section 1 case:

> We believe that the *Hydrolevel* rule that an association's economic power may justify its being held liable for the actions of its agents cannot be extended to defeat the "concerted action" requirement of section 1. ***Imposing liability on an association, as we did in Weiss, does not abolish or diminish the first element of section 1 liability***; it merely recognizes that a group of competitors with a unity

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[24] *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 414 n.1, 422 (1990).

[25] RPF 150-58, 160, 162.

[26] NTSP's Post-Trial Brief at 18-30.

[27] CC's Post-Trial Brief at 52 (citing *Alvord-Polk, Inc. v. Schumacher & Co.*, 37 F.3d 996, 1009 n.11 (3d Cir. 1994)).

> of purpose are engaged in concerted action, whether or not they act under one name. As we explained in *Nanavati*, in the absence of a co-conspirator, ***an association's actions satisfy the concerted action requirement only when taken in a group capacity***.[28]

Instead of citing to this portion of the Third Circuit's analysis, Complaint Counsel instead cites to a parenthetical in footnote 11 of *Alvord-Polk*, which contains a quote from a twenty-four-year-old article published in the *Antitrust Law Journal*, which is hardly binding authority.[29] Complaint Counsel also does not cite to the section of the Third Circuit opinion which upheld summary judgment "because plaintiffs' evidence tends to show only an opportunity to conspire, not an agreement to do so."[30] The Court went on to discuss how the defendant's actions in foregoing an opportunity that would have disrupted its dealer network did not create an inference of collusion with the dealers.[31]

In fact, Fifth Circuit decisions, not a Third Circuit footnote citing some article from the *Antitrust Law Journal*, govern this case because the acts and omissions at issue occurred in Texas.[32] The Fifth Circuit ruled in 2002 that it is improper to presume that trade or professional associations automatically satisfy Section 1's "contract, combination, or conspiracy" element:

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[28] *Alvord-Polk*, 37 F.3d at 1009 (emphasis added).

[29] *See Alvord-Polk*, 37 F.3d at 1009 n.11 (citing Stephanie W. Kanwit, *FTC Enforcement Efforts Involving Trade and Professional Associations*, 46 ANTITRUST L.J. 640, 640 (1977) ("Because trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of § 1 of the Sherman Act.")).

[30] 37 F.3d at 1013.

[31] *See Alvord-Polk*, 37 F.3d at 1014 ("It is simple syllogistic reasoning that if FSC was aware that most of its dealers were conventional retailers, and believed that its products sold better in the conventional setting, it would conclude that it was in its economic interests to keep the conventional retailers satisfied. That FSC may have foregone some short-term opportunity for sales to 800-number dealers does not suffice to show it acted contrary to its self-interests when its actions clearly would benefit it economically in the long term.").

[32] *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 . . . .").

> 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."[33]

Based on *Viazis*, a case that is not cited ***at all*** in Complaint Counsel's eighty-one-page post-trial brief, Complaint Counsel must actually prove — and cannot automatically presume — the existence of a collusive contract, combination, or conspiracy. Because the undisputed evidence shows that there has been no collusion among physicians, Complaint Counsel cannot satisfy an essential element of liability under Section 5 — *i.e.*, a contract, combination, or conspiracy — under any conceivable theory.[34]

2. Even if Complaint Counsel could prove collusion, it cannot establish liability under the *per se* rule or *Polygram*.

Complaint Counsel bases its entire case on two distinct theories of antitrust liability: (1) the *per se* rule; and (2) the "inherently suspect," burden-shifting approach now on appeal in *Polygram*.[35] Neither theory supports liability here.

a. NTSP's conduct is not *per se* unlawful.

As discussed above, in earlier briefing, and during the ten days of hearings, Complaint Counsel has submitted no direct evidence of collusion, and no circumstantial evidence which is inconsistent with independent action and lawful competition. Instead, Complaint Counsel bases its *per se* argument on

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[33] *Viazis*, 314 F.2d at 764 (quoting *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988)).

[34] Complaint Counsel also cannot argue that an attempt to conspire satisfies the first element of a Section 5 violation because the Fifth Circuit does not allow "attempt" as a valid claim under Section 1 of the Sherman Act. *See U.S. v. Am. Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984) ("In sum, our decision that the government has stated a claim does not add attempt to violations of Section 1 of the Sherman Act . . . ."). The Commission relies on Sherman Act law when deciding cases alleging unfair competition under Section 5. *See Cal. Dental*, 526 U.S. at 763 n.3 (stating that "the Commission relied upon Sherman Act law in adjudicating this case").

[35] CC's Post-Trial Brief at 63 ("Accordingly, we respectfully urge Your Honor to treat NTSP's restraints of trade as *per se* illegal or, at least, inherently suspect, requiring NTSP to put forth plausible and cognizable justifications.").

five types of unilateral conduct by NTSP: (1) "polling and disseminating averaged price data on future prices, and collectively setting and sharing minimum contract prices based thereon"; (2) "negotiating prices with health plans on behalf of" physicians; (3) "collecting powers of attorney from" physicians; (4) "campaigning among" physicians "to press employers to assist NTSP in negotiating higher physician fees with health plans"; and (5) "threatening to terminate and terminating existing contracts with health plans."[36] None of this conduct, even if true, can support *per se* liability.

In looking at each alleged type of conduct, Complaint Counsel's expert will be quoted as to the allegation, and the allegation will then be further discussed.

> Q. Let's turn to the poll. It's correct, is it not, that the people who respond to the poll do not know the responses by any other responder?
> A. The poll doesn't -- at least not through the poll. I mean, the polling system itself is not going to tell them what specific other respondent said.[37]

With respect to the poll, NTSP adopted the poll based on its spillover-enhancing business model and concern about limiting expenditure of scarce resources on contracts that would not interest a significant number of participating physicians.[38] The confidential poll results, which are never shared with any other physician or NTSP board member,[39] present only the mean/median/mode of the Risk Panel's responses about HMO and PPO contract rates that each individual physician would accept through NTSP.[40] Because the poll reports only the mean, median, and mode of all of the responses, it is impossible for a physician to know whether any other specific physician or specialty responded and,

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[36] CC's Post-Trial Brief at 60-61.

[37] Frech, Tr. 1436.

[38] RPF 121, 124-26, 164-65.

[39] RPF 133, 136, 150-51, 159.

[40] RPF 140.

if so, what that response was.[41] In fact, only a limited number of physicians respond to the poll.[42] And, as even Complaint Counsel's economist admits, many physicians deviate from their own responses and contract with payors at rates below the mean/median/mode.[43] At the end of the day, each physician or physician group makes its own decision whether to accept or reject participating in a payor offer through NTSP.[44] A physician interested in a payor offer can participate through NTSP, can contract directly with a payor, or can participate through another entity; NTSP's poll does not force a physician to contract in a particular manner.[45] Indeed, the undisputed record evidence shows that physicians consider several factors when deciding individually to contract with a payor and that the poll results do not impact their decisions.[46]

> Q. Have you ever seen any instance in which NTSP has gone to a payor to talk about a price that was above its minimum?
> A. No, hadn't seen that.[47]

> Q. Isn't it correct that you have no knowledge of any doctor-to-doctor agreement not to participate in a payor offer?
> A. That's correct.
> Q. Isn't it also correct that you have no knowledge of a doctor ever agreeing with any other doctor to turn down a payor offer?
> A. Yes, I don't -- I have no knowledge of such agreement.[48]

> Q. Isn't it true that you have no knowledge of any doctor that refused to pay – to --

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41 RPF 130-133, 136, 150-51.

42 RPF 129, 135.

43 RPF 286.

44 RPF 155, 161, 284, 286.

45 *See, e.g.*, RPF 137-39, 160-61, 267.

46 RPF 161, 286.

47 Frech, Tr. 1370.

48 Frech, Tr. 1365.

> isn't it true that you have no knowledge of any doctor that refused to participate in a contract offer by a payor because of a PPA?
> A. That's true.[49]
>
> Q. Have you found any doctor in all of your work that adhered to the NTSP board minimum when it came time for him to individually contract?
> A. I hadn't seen evidence that would bear on that.[50]
>
> Q. Have you ever seen any instance in which NTSP has gone to a payor to talk about a price that was above its minimum?
> A. No, hadn't seen that.[51]

The evidence shows that NTSP does not negotiate prices on non-risk contracts. Instead, NTSP uses the poll to set its own internal threshold levels for NTSP's being involved in non-risk HMO and PPO offers. If a payor wants to activate NTSP, the payor can do so by offering rates that meet those thresholds; if the payor does not want to do so, the payor can then contract directly with participating physicians or through entities besides NTSP.[52] The evidence shows that each physician or physician group makes its own independent decision whether to accept or reject an offer messengered by NTSP,[53] and each physician or physician group also can and does contract with payors directly or through other IPAs.[54] In other words, even if Complaint Counsel could prove that NTSP negotiates prices (and it does not), NTSP cannot bind the physicians to those prices — which is consistent with the lack of direct or circumstantial evidence of collusion discussed above.

Complaint Counsel's apparent theory borders on the ludicrous – if NTSP decides to participate

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[49] Frech, Tr. 1368.

[50] Frech, Tr. 1372-73.

[51] Frech, Tr. 1370.

[52] RPF 267-69, 271-76.

[53] RPF 155, 161, 284, 286.

[54] RPF 267, 271-76.

in a payor offer and physicians also choose to participate, that is a price-fixing agreement. If that were true, every time an association chose to cooperate with a bank card company or travel company in sending out offers to the association's members, that would be a collective boycott of the less attractive offers that were not sent and a price-fixing agreement as to the one that was sent.

> Q. Isn't it also true that you have no knowledge of any doctor who turned down a contractual offer from a payor in deference to a power of attorney?
> A. I have no knowledge of an individual doctor who did that.[55]

Complaint Counsel totally ignores virtually all of the important record evidence regarding the powers of attorney. Despite filing an eighty-one-page brief, Complaint Counsel never mentions the key language in the powers of attorney that expressly limit their application to "any ***lawful*** manner."[56] Complaint Counsel continues to harp on the powers of attorney as a basis for *per se* liability and makes at least three false statements in its post-trial brief that ignore the powers of attorney's plain language.[57] Complaint Counsel also ignores the following critical facts: (1) some payors require powers of attorney when dealing with IPAs;[58] (2) the powers of attorney were used in non-binding negotiations of non-economic terms or were unrelated to any negotiations;[59] (3) no participating physician rejected a non-risk payor offer based on a power of attorney;[60] (4) the powers of attorney did not prevent

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[55] Frech, Tr. 1368-69.

[56] RPF 149 (emphasis added).

[57] CC's Post-Trial Brief at 8 ("In addition to the Participation Agreement, at various times, NTSP has collected 'powers of attorney' from its member physicians, giving NTSP the right to negotiate contract terms– including price terms– on behalf of those members."), 11-12 ("Subsequently, that threat was underscored by NTSP's amassing of some 180 powers of attorney from its member physicians, authorizing NTSP to act for those members in all transactions relating to MSM and to represent its member physicians in *any* negotiations with Aetna, regarding *any* term." (emphasis in original)), 16 ("The powers of attorney were not limited to non-economic terms.").

[58] RPF 148.

[59] RPF 149.

[60] RPF 156.

participating physicians from making independent decisions on payor contracts;[61] (5) the powers of attorney did not commit a physician to accept or reject an offer;[62] and (6) in at least one case, the powers of attorney were never delivered to the payor or used.[63]

> Q. Were you aware that NTSP had a contract with the City of Ft. Worth that it, United, was trying to supplant?
> A. NTSP had a contract with the city itself? I wasn't aware of that.
> Q. Through PacifiCare.
> A. Oh, PacifiCare? Well, okay, I'm sorry, I had it wrong. They were trying to – United was trying to compete with PacifiCare is my understanding, and I know NTSP had a contract with PacifiCare.

Physicians contacting employers does not give rise to any antitrust liability. As mentioned in the introduction to this brief, Complaint Counsel has stipulated to the participating physicians' right to contact patients (including the City of Fort Worth's employees) about compensation rates.[64] This stipulation comports with Texas law, which expressly allows physicians to contact patients about compensation rates and network adequacy issues.[65] Because the actions challenged by Complaint Counsel are perfectly ***legal*** under Texas law, the *per se* rule does not apply.

The end point of Complaint Counsel's argument is to muzzle physicians and physician groups from informing and discussing with their patients what is going on or will go on with their health plans. This is but one example of Complaint Counsel's overall theory that depriving physicians, patients, employers, and the government of information about what payors are doing is what the antitrust laws

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[61] RPF 289.

[62] RPF 289.

[63] RPF 401.

[64] Tr. 1149-50 (emphasis added).

[65] *See* TEX. INS. CODE ANN. § 843.363 (Vernon 2004).

require – a theory Complaint Counsel never supports logically, empirically, or legally.

> Q. You mentioned at one point in your direct examination that you believe that NTSP had terminated an Aetna contract?
> A. No, I believe it had threatened to terminate the Aetna contract. My understanding is they didn't actually terminate.
> Q. Were you aware that the contract that was terminated was an MSM contract?
> A. I believe they got -- I don't know exactly the connection. I think it may have been through -- originally through MSM.
> Q. Were you also aware that NTSP had filed a litigation saying that MSM had been breaching that contract for several years?
> A. I don't know the details. I know they had filed some litigation against MSM.[66]

Complaint Counsel's allegations about terminating or threatening to terminate contracts with health plans (once again) float with no mooring in the record evidence of what actually occurred. Complaint Counsel has not addressed the undisputed evidence showing that the terminations or threats at issue concerned NTSP exercising its rights under the contracts at issue. The Cigna situation is a perfect example of how ignoring record evidence can create a misimpression about the legality of NTSP's conduct. The contract between Cigna and NTSP expressly applied to **[**

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During cross-examination, Rick Grizzle, a Cigna representative called to testify by Complaint Counsel, admitted that primary care physicians ("PCPs") are considered "specialists."[68] For that reason, Cigna breached the contract by not allowing the specialist PCPs to participate in the contract.[69] Based on

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[66] Frech, Tr. 1443.

[67] RX 20, *in camera* (emphasis added); *accord* RPF 426.

[68] RPF 427.

[69] RPF 428.

Cigna's refusal to abide by the contract's terms — and not based on some allegedly anticompetitive agreement — NTSP sent its notice of termination to Cigna in June 2000.[70]

NTSP's dealings with other payors provide similar examples of situations where NTSP terminated agreements based on contractual or other legal rights. For example, NTSP, as class representative for the participating physicians, sued MSM in 1999 to enforce contractual rights that MSM was violating by not paying the physicians' claims.[71] NTSP terminated the MSM HMO contract in the fall of 2000 based on that litigation.[72] Likewise, NTSP had a contract with HTPN, a Dallas-based IPA, through which the participating physicians could access a contract between HTPN and United.[73] NTSP, as was its right, terminated its contract with HTPN for the treatment of United patients.[74] United even told physicians that the termination was a mutual decision.[75] Based on this undisputed evidence, Complaint Counsel has not proven anything other than NTSP's exercise of its contractual rights, which of course does not qualify for application of the *per se* rule. The end point of Complaint Counsel's argument is that an IPA has no rights, and payors have no duties, under the IPA's existing contracts. Again, Complaint Counsel provides no support for such an extraordinary proposition.

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[70] RPF 430.

[71] RPF 343-44.

[72] RPF 347.

[73] RPF 381-82.

[74] RPF 386.

[75] RPF 387.

b. *Polygram* does not excuse Complaint Counsel's failures in this case.

Realizing the fallacy of its argument under the *per se* rule, Complaint Counsel contends as a fall-back position that NTSP's conduct should be considered "inherently suspect" under *Polygram*, which would require (according to Complaint Counsel's interpretation) "NTSP to put forth plausible and cognizable justifications."[76] But *Polygram* is inapposite for the following reasons: (1) it involved an express agreement; (2) when read consistently with the recently-decided *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, it would not require NTSP to jettison its network business model;[77] and (3) when read consistently with *California Dental*, it requires Complaint Counsel to show actual anticompetitive effects in this factual situation.[78]

i. *Polygram* involved an express agreement.

Polygram is factually distinguishable because the respondents there had "entered into a side agreement not to discount or advertise their previous Three Tenors products for a period of time preceding and following the release of the new Three Tenors recording."[79] Thus, in *Polygram* the existence of an express agreement (or contract) satisfying the first element of a Section 5 violation had been proven. That is not the case here, where Complaint Counsel cannot point to any direct evidence of a collusive agreement between NTSP and a participating physician to reject a payor offer.[80] And

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[76] CC's Post-Trial Brief at 63.

[77] 124 S. Ct. 872 (2004).

[78] Even if *Polygram* applied, however, Complaint Counsel has misinterpreted that case for the reasons discussed below in section II(A)(2)(c).

[79] *Polygram*, Docket No. 9298, slip op. at 3-4.

[80] 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.'").

Complaint Counsel's economist admits that he cannot

identify any direct evidence of potentially collusive acts.[81] Unlike *Polygram*, there has been no proof of a collusive agreement among competing physicians that would even get Complaint Counsel to the issue of whether such an agreement or collusion supports an initial finding of "inherently suspect" under *Polygram*.

Complaint Counsel may try to argue that the Physician Participation Agreement ("PPA") constitutes an agreement for purposes of *Polygram*. Complaint Counsel has already (incorrectly) suggested that the PPA "grants NTSP the right to receive ***all*** payor offers and imposes on the physicians a duty . . . to promptly forward those offers to NTSP,"[82] and that the physicians agree not to pursue offers with payors in deference to NTSP.[83] But the PPA's express language shows that, in reality, there is no prohibition on physicians negotiating directly with payors. Section 2.1 of the PPA says only that NTSP has a right to ***receive*** all "Payor Offers," as that term is defined in Section 1.18 of the PPA; it does ***not*** say that a physician cannot negotiate directly, or through another entity, with a payor.[84] Second, by referring to a "Payor Offer," which is a defined term, Section 2.1 applies only to a very limited number of offers. Under Section 1.18 of the PPA, a "Payor Offer" is made by a "Payor," which is a term defined in Section 1.16 of the PPA to mean "any entity having an active Payor Agreement with NTSP."[85] In other words, Section 2.1 applies only to offers from payors who already

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[81] RPF 136-38, 153, 155-59.

[82] CPF 98.

[83] CPF 99.

[84] Response to CPF 99.

[85] Response to CPF 99.

have an active agreement with NTSP. If a physician receives an offer from a payor that does not already have a contract with NTSP, Section 2.1 is irrelevant and inapplicable. Moreover, Section 2.1 expressly allows a physician to enter into any contract that replaces a contract the physician had as of March 1, 1998[86] — which would apply to any renewals or amendments to contracts in place on that date. That provision automatically disproves Complaint Counsel's argument that ***all*** offers must go to NTSP. Thus, based on Section 2.1's express language, Complaint Counsel's suggestion that ***all*** payor offers must be sent to NTSP is totally wrong.

Complaint Counsel's economist admits that the physicians deal with payors without regard to the PPA.[87] Complaint Counsel, moreover, has failed to bring forward any evidence that even one of the situations at issue here involved a "Payor Offer" situation as defined in the PPA.

ii. *Polygram* must be read consistently with *Trinko*

The *Polygram* decision now on appeal must be read in light of the Supreme Court's more-recent decision in *Trinko.* Although *Trinko* involved a Section 2 claim, its logic and analysis apply with equal force in this case because it focused heavily on — and concretely reaffirmed, without any limiting language — an entity's *Colgate* right to deal with whomever it chooses:[88]

> Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to

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[86] Response to CPF 99.

[87] RPF 155, 157.

[88] Section 2 claims are analyzed under an incipiency standard. *See Am. Airlines*, 743 F.2d at 1119 (stating that decision does not "lower the incipiency gate of Section 2"). Because Section 2's incipiency standard is lower than the standard required to prove a Section 1 or Section 5 violation, which do not have incipiency standards, a defendant (like NTSP) is entitled to more protection in a Section 1 or Section 5 case. Accordingly, a defendant does not lose its *Colgate* right in a higher-standard Section 1 or Section 5 case.

> parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919).[89]

Remarkably, Complaint Counsel's eighty-one-page post-trial brief does not directly address NTSP's *Colgate* argument or *Trinko.* In fact, Complaint Counsel does not cite either case in the argument section of its brief. Instead, Complaint Counsel mentions *Colgate* (but not *Trinko*) only in passing in the remedy section of its brief, claiming that NTSP is relying on "gauzy rationalizations, such as its entirely misplaced reliance on the *Colgate* doctrine."[90] This is an ironic statement because Complaint Counsel never addresses *Colgate* head-on, but instead relies upon a "gauzy,"[91] unsupported statement at the tail-end of its brief to repudiate an eighty-five-year-old Supreme Court case that was reaffirmed and strengthened six months ago in *Trinko.* Given the regard in which the Supreme Court holds *Colgate*, Complaint Counsel ought to explain ***in detail*** why the Administrative Law Judge should reject that case as "gauzy."

Trinko also provides valuable insight on the Supreme Court's reluctance to chill innovation and the development of networks by requiring the creator to provide access to anyone who asks. The plaintiff in *Trinko* sued Verizon Communications, the incumbent local telephone company in New York, for allegedly violating Section 2 of the Sherman Act by breaching duties imposed by the Telecommunications Act of 1996.[92] The Supreme Court framed the issue as follows:

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[89] *Trinko*, 124 S. Ct. at 879.

[90] CC's Post-Trial Brief at 76.

[91] Webster's defines "gauze" as follows: "1 a : a thin often transparent fabric used chiefly for clothing or draperies b : a loosely woven cotton surgical dressing c : a firm woven fabric of metal or plastic filaments 2 : HAZE." http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=gauzy. Complaint Counsel is apparently suggesting that NTSP's reliance on *Colgate*, which was reaffirmed by the Supreme Court earlier this year, is somehow thin, transparent, loose, or hazy.

[92] *Trinko*, 124 S. Ct. at 875.

> In this case, we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act, 26 Stat. 209.[93]

While answering this issue, the Court initially noted that networks which create monopolies and monopoly prices are not automatically unlawful and stressed that they can enhance competition:

> The opportunity to charge monopoly prices — at least for a short period — is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[94]

Indeed, it is these types of procompetitive effects that caused the Court to recognize that overly zealous enforcement of the antitrust laws can create its own problems: "Mistaken inferences and the resulting false condemnations 'are especially costly because they chill the very conduct the antitrust laws are designed to protect.'"[95] Ultimately, the Court concluded that the plaintiff had not stated a valid antitrust claim that would force Verizon to provide competitors with access to its network.[96] Given the Supreme Court's reluctance to condemn too quickly networks that generate monopolies, monopoly prices, and procompetitive effects, Complaint Counsel must provide a compelling reason why NTSP must grant access to its network to anyone who asks.

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[93] *Trinko*, 124 S. Ct. at 875.

[94] *Trinko*, 124 S. Ct. at 879 (emphasis in original).

[95] *Trinko*, 124 S. Ct. at 882 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S. 574, 594 (1986)).

[96] *Trinko*, 124 S. Ct. at 883 ("We conclude that respondent's complaint fails to state a claim under the Sherman Act.").

In addition to reaffirming *Colgate* and emphasizing a network's procompetitive effects, the *Trinko* Court highlighted the many problems with enforced sharing (or, in this case, enforced messengering), which "requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing — a role for which they are ill-suited."[97] Consistent with its disdain for enforced sharing, the Court found that a claim based on the "'essential facilities' doctrine crafted by some lower courts" was not viable because the Supreme Court has "never recognized such a doctrine."[98] As discussed above, the Court also emphasized the risks associated with overly aggressive enforcement and "false condemnations," which can "chill the very conduct the antitrust laws are designed to protect."[99] That concept is relevant here because Complaint Counsel would have the Administrative Law Judge find an antitrust violation based on an "inherently suspect" standard, despite the absence of any direct evidence of collusion, and impose a remedy that could chill NTSP's business model, which produces spillover, generates efficiencies, and improves health-care quality.[100]

Trinko also recognized that certain conduct, even if anticompetitive, cannot be remedied because it is "beyond the practical ability of a judicial tribunal to control."[101] That principle limits a court's ability to control conduct through a consent decree:

> We think that Professor Areeda got it exactly right: "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume

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97 *Trinko*, 124 S. Ct. at 879.

98 *Trinko*, 124 S. Ct. at 880-81.

99 *Trinko*, 124 S. Ct. at 882.

100 *See, e.g.*, RPF 23-25, 29-38, 41, 85-87, 95, 101, 103-05.

101 *Trinko*, 124 S. Ct. at 883.

> the day-to-day controls characteristic of a regulatory agency." Areeda, 58 Antitrust L. J., at 853.[102]

But that is exactly what Complaint Counsel seeks here — a remedy that would require NTSP to deal with all payors, irrespective of its *Colgate* right, and would involve the Commission in NTSP's day-to-day business. That would be improper. As the Supreme Court emphasized in *Trinko*, the antitrust laws forbid a regulator from imposing its own version of greater competition.[103]

iii. *Polygram* must be read consistently with *California Dental*

The Supreme Court in *California Dental* imposed a high evidentiary burden on a party (like Complaint Counsel) trying to prove that conduct has anticompetitive effects. The Court emphasized the need for empirical proof of actual anticompetitive effects before a defendant must submit any proof of procompetitive effects:

> Justice BREYER suggests that our analysis is "of limited relevance," *post*, at 1623, because "the basic question is whether this . . . theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case," *ibid.* He thinks that the Commission and the Court of Appeals "adequately answered that question," *ibid.*, but ***the absence of any empirical evidence on this point indicates that the question was not answered, merely avoided by implicit burden shifting*** of the kind accepted by Justice BREYER. The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, ***there must be some indication that the court making the decision*** has properly identified the theoretical basis for the anticompetitive effects and ***considered whether the***

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[102] *Trinko*, 124 S. Ct. at 883.

[103] *See Trinko*, 124 S. Ct. at 883 ("The Sherman Act is indeed the 'Magna Carta' of free enterprise, but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." (citation omitted)).

> ***effects actually are anticompetitive***. Where, as here, the circumstances of the restriction are somewhat complex, ***assumption alone will not do***.[104]

The Commission in *Polygram* apparently suggests an analytical step prior to the adjudication required in *California Dental*. *Polygram* required Complaint Counsel to "address the [respondent's] justification, and provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely"[105] if the respondent articulated "a legitimate justification."[106] NTSP has clearly shown that pursuing its own business model, avoiding unnecessary expense and risk, and insisting on payor compliance with applicable laws and contractual obligations is more than "a legitimate justification." Complaint Counsel, on the other hand, has not shown any anticompetitive effects, which is one of the reasons the case should be dismissed.

If Complaint Counsel interprets *Polygram* to mean that Complaint Counsel need not show anticompetitive effects, that interpretation is clearly wrong, both under *Polygram* and *California Dental*. Otherwise, Section 5 becomes a strict liability statute triggered only by the Commission's making a subjective interpretation of the conduct as "inherently suspect." Such an interpretation would clearly fly in the face of *California Dental*. Indeed, on appeal to the D.C. Circuit, the Commission in *Polygram* has now abandoned its burden-shifting approach, which "could be characterized as a finding

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[104] *Cal. Dental*, 526 U.S. at 775 n.12 (emphasis added).

[105] Docket No. 9298, slip op. at 33.

[106] Docket No. 9298, slip op. at 29.

of '*per se* illegality,'"[107] in favor of an argument based on "an abbreviated rule of reason analysis."[108] And *California Dental* requires Complaint Counsel to show actual anticompetitive effects under even an abbreviated or "quick-look" analysis.[109]

Because Section 5 requires proof of actual violation[110] and is not an incipiency statute,[111] any burden shifting which goes on eventually will lead to the analysis contemplated by *California Dental*'s empirical-evidence-of-effects-that-actually-are-anticompetitive standard. ***If*** a court of appeals determines that there is preliminary burden shifting as indefinitely suggested by *Polygram*, the burden on the respondent at any particular stage will never be greater than the burden already placed on Complaint Counsel. In other words, a respondent will not face the burden of making a showing of actual (as opposed to likely) fact prior to the time Complaint Counsel has faced the burden of making a showing of actual fact.[112]

In this case, NTSP has done much more than Complaint Counsel in shouldering and carrying the evidentiary burden of showing what has in fact transpired in the provision of healthcare in the Dallas-Fort Worth Metroplex. As noted during the ten days of hearings, however, Complaint Counsel

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[107] Docket No. 9298, slip op. at 49.

[108] Final Brief for the Respondent Federal Trade Commission at 14, *Polygram Holding, Inc. v. FTC*, No. 03-1293 (D.C. Cir. 2003).

[109] 526 U.S. at 775 n.12.

[110] Section 5, like Section 1, requires an actual contract, combination, or conspiracy. *See U.S. v. Am. Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984) (rejecting claim that "attempt" to violate Section 1creates liability).

[111] Incipiency statutes are those like Section 7 of the Clayton Act, which allows the Commission to stop mergers that "may" substantially lessen competition, 15 U.S.C. § 18, or Section 2 of the Sherman Act, which makes an "attempt to monopolize" unlawful. 15 U.S.C. § 2.

[112] *See Cal. Dental*, 526 U.S. at 775 n.12 (finding that Commission must submit "empirical evidence" showing that "effects actually are anticompetitive" before defendant has "burden to show empirical evidence of procompetitive effects").

has submitted ***virtually no*** empirical evidence in this case; it has just criticized NTSP's data.[113] That is improper and unpersuasive. More importantly, it wholly fails to satisfy *California Dental* or *Polygram*.

c. Even if Complaint Counsel's interpretation of *Polygram* applied, NTSP cannot be liable.

Under even Complaint Counsel's reading of *Polygram*, Complaint Counsel must first show that NTSP's conduct is "inherently suspect."[114] NTSP would then articulate "a legitimate justification" for its conduct.[115] NTSP is ***not*** required "to prove competitive benefits" at this stage;[116] it need only articulate a justification that is cognizable (*i.e.*, it explains how the conduct "increase[s] output or improve[s] quality, service, or innovation") and plausible (*i.e.*, it "cannot be rejected without extensive factual inquiry").[117] Once NTSP articulates a legitimate justification, Complaint Counsel must then "address the justification, and provide the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely."[118] Only at that point would NTSP need to "introduce evidence to refute [Complaint Counsel's] arguments or to show that detailed evidence supports its proffered

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[113] Response to CPF 11, 21-23, 460-62.

[114] Docket No. 9298, slip op. at 29.

[115] *Polygram*, Docket No. 9298, slip op. at 29.

[116] Complaint Counsel improperly claims — without citing to any case or other authority — that NTSP "must present evidence that its anticompetitive conduct did *in fact* promote efficiency" before the burden of proof shifts back to Complaint Counsel. CC's Post-Trial Brief at 68-69. That standard directly conflicts with *Polygram* and *California Dental*. *Polygram* refers only to articulating a cognizable and plausible justification and specifically states that a "defendant ***need not produce detailed evidence at this stage***." Docket No. 9298, slip op. at 30-31 (emphasis added). And *California Dental* is even more restrictive, requiring "empirical evidence" that "the effects actually are anticompetitive" before a defendant must "show empirical evidence of procompetitive effects." 526 U.S. at 775 n.12. In other words, *California Dental* forces Complaint Counsel to prove actual anticompetitive effects before NTSP has any obligation to put forth any empirical evidence of procompetitive effects. Complaint Counsel is wrong to suggest otherwise in its post-trial brief.

[117] *Polygram*, Docket No. 9298, slip op. at 30-31.

[118] *Polygram*, Docket No. 9298, slip op. at 33.

justification."[119] Based on these standards, Complaint Counsel's case also fails.

First, Complaint Counsel cannot show that NTSP's conduct is inherently suspect. There is no direct evidence of collusion and one cannot infer collusion from any circumstantial evidence.[120] NTSP generates efficiencies and improves the quality of health care through its spillover business model;[121] efficiencies, improved quality, and spillover are not inherently suspect. Also, as discussed above, NTSP has an absolute right under *Colgate* to deal with whomever it chooses, and the exercise of that right, reaffirmed by the Supreme Court earlier this year in *Trinko*, is not inherently suspect. Moreover, the Commission in *Polygram* — while interpreting *California Dental* — stressed that professional-services markets can differ from commercial markets.[122] Based on the Commission's analysis, *Polygram* and *California Dental* show that this case, which involves the market for physicians' professional services, should be viewed differently than a normal case involving alleged price-fixing in a commercial market.

Second, even if Complaint Counsel somehow had met the "inherently suspect" standard, NTSP has articulated legitimate justifications based on its spillover business model and high-quality network. NTSP designed its business model to achieve efficiencies through the clinical integration

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[119] *Polygram*, Docket No. 9298, slip op. at 33.

[120] RPF 150-62.

[121] RPF 85-87, 95, 101, 103-05.

[122] Docket No. 9298, slip op. at 25-26 ("The Court emphasized the professional context of the case before it, questioning whether market forces 'normally' found in the commercial world apply to *professional* advertising . . . ."); *id.* at 26 n.32 ("The majority opinion [in *California Dental*] used the word 'professional' more than 20 times. Respondents' attempt to downplay the professional setting of [*California Dental*] ignores this striking fact."); *id.* at 40 n.53 ("In contrast to the situation in [*California Dental*], Respondents here make no argument that the particular industry context renders normal economic conclusions about the competitive impact of price and advertising restrictions inapplicable. This failure is unsurprising, because the present case arises in a conventional *commercial* context, rather than the professional context that so influenced the Supreme Court's approach to [*California Dental*].).

techniques used for its risk contracts and to then extend those same efficiencies to non-risk patients.[123] Even Complaint Counsel's economist admits that NTSP generates efficiencies and improves quality of care through spillover from its risk contracts to its non-risk contracts.[124] Spillover occurs because physicians normally do not change their practice patterns patient-by-patient once they have developed an improved technique.[125] The economic literature and Complaint Counsel's economist both recognize that spillover is maximized to the degree the teams performing the risk and non-risk medical care can continue to work together.[126] And NTSP's internal threshold levels for the entity's involvement in non-risk HMO and PPO contracts is consistent with achieving its teamwork model.[127]

NTSP's business model also prevents free riding, which is "a legitimate efficiency."[128] If NTSP were forced to messenger all offers and deal with all payors, without establishing a threshold level for its own involvement, payors would be able to free ride on the network that NTSP has developed and the efficiencies and spillover that it has created. By eliminating NTSP's ability to set its own threshold level of participation, Complaint Counsel would limit NTSP's incentives to develop further and improve its network because any improvements would have to be offered to all payors. That would be true regardless of what each payor was willing to pay and regardless of whether each one's offer would inordinately burden or weaken NTSP for its efforts to develop and improve its network.

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[123] *See, e.g.*, RPF 21-26, 85-87, 89, 117-18.

[124] RPF 86-87.

[125] RPF 88.

[126] RPF 113-14.

[127] RPF 113-18.

[128] *Polygram*, Docket No. 9298, slip op. at 41.

Allowing NTSP to establish threshold levels for its involvement in contracts also eliminates confusion in the marketplace. NTSP has the right to choose which offers in which it wants to participate and put its reputation as a high-quality IPA on the line. But if NTSP were forced to messenger all payor offers and deal with all payors, physicians would not know if the offer was based on NTSP's own assessment about the quality and reliability of the payor. That would be true for employers and patients as well. They would not know if NTSP was contracting with a payor based on an independent assessment of whether NTSP wanted to put its reputation on the line and deal with that payor, or whether NTSP was contracting with that payor because it was forced to do so by the government. For all these reasons, there can be no doubt that NTSP has articulated cognizable and plausible justifications for any alleged "inherently suspect" conduct.

Third, Complaint Counsel has not submitted ***any*** evidence to show that anticompetitive effects are likely. Instead of preparing any empirical data analyses of its own, Complaint Counsel has just criticized NTSP's data,[129] and that is improper. It is incredibly ironic that Complaint Counsel devotes an entire appendix of its post-trial brief to criticizing Dr. Maness, when its experts, Drs. Frech and Casalino, performed virtually no empirical data analyses in their reports. Fortunately for NTSP, however, Dr. French did perform just enough empirical analysis to disprove any collusion by showing that participating physicians do not follow NTSP's threshold contracting levels.[130]

The almost total absence of data analysis in Complaint Counsel's case explains why Complaint Counsel stoops to personally attack Dr. Maness, a former Bureau-of-Economics economist, for such

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[129] Response to CPF 11, 21-23, 460-62.

[130] RPF 160-61.

perceived deficiencies as not having taught in a tenure-track position.[131] Complaint Counsel's approach seems to be as follows: if you have no contrary data to attack the message, just attack the messenger and emphasize that your experts, although having done virtually no empirical analysis here, have previously been active in academia.[132] In sum, personal attacks cannot hide Complaint Counsel's failure even to try to prove that anticompetitive effects are at all likely.

Finally, even if Complaint Counsel had chosen to submit any empirical evidence showing likely anticompetitive effects, NTSP has submitted substantial and mutually-corroborative countervailing evidence showing that procompetitive effects are not only likely, but have occurred.

NTSP's experts testified in detail about NTSP's business model, which achieves efficiencies through the clinical integration techniques used for its risk contracts and extends those same efficiencies to non-risk patients.[133] By limiting NTSP's involvement to non-risk offers which will likely be of interest to most of the Risk Panel physicians, NTSP hopes that those same physicians participate (through NTSP or otherwise) in the payor's non-risk contract, enabling the continuing use (spillover) of the referral and treatment patterns developed for the risk contracts.[134] Spillover does occur, whether

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[131] Maness, Tr. 2094-95.

[132] Complaint Counsel has even gone so far as to attack an expert — Dr. Edward F. X. Hughes — who did ***not*** testify at the hearing. *See* CC's Post-Trial Brief at 44 ("For reasons sufficient to itself (and not known to the rest of us), NTSP did not do so, declining to have Dr. Edward F. X. Hughes, a medical doctor and holder of a Masters degree in Public Health, take the stand."). If Complaint Counsel must know, Dr. Hughes ruptured his Achilles Tendon and would have had difficulty traveling from Chicago to Fort Worth to testify. If NTSP had known that Complaint Counsel would use Dr. Hughes's absence to suggest that NTSP misled the Administrative Law Judge about the number of experts it intended to call, it might have reconsidered its decision not to make Dr. Hughes face the airports, security check points, airplanes, and wheel chairs that he would have endured during his trip to Fort Worth.

[133] *See, e.g.*, RPF 21-26, 85-87, 89, 117-18.

[134] RPF 113-16, 121-22.

the physician participates through NTSP or through another IPA or directly with the payor.[135] That maintaining continuity of personnel enhances teamwork efficiencies is well-recognized, as exemplified by the National Bureau of Economic Research and other research on "organizational capital" cited in Dr. Maness's report, as well as, the testimony of Drs. Maness and Wilensky.[136]

Indeed, Dr. Maness and NTSP, with the data available to them,[137] proved the ***actual*** existence of spillover effects.[138] Dr. Wilensky, a nationally recognized expert, confirmed that fact.[139] For each NTSP physician on the risk panel, there are expected to be — and there are — significant spillover effects from the physician's risk practice to the physician's fee-for-service practice.[140] Many of the techniques that allow NTSP to maintain low medical costs in its risk contracts directly carry over to its non-risk contracts.[141] This comports with the recognition that managed care programs are desirable not only for the effects they produce for their own enrollees but also for the effects they have on the communities in which they are located.[142] Because NTSP has shown that procompetitive effects are likely (and it fact occur), it cannot be liable under *Polygram*.

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[135] RPF 115.

[136] *See* RX 3118 (Maness Report ¶¶ 83-100); RPF 79, 81-83, 113-16.

[137] NTSP cannot be held to task for failing to use data to which it was refused access. NTSP would have liked to present additional proof of actual procompetitive effects, but the payors objected to the production of their data. It is these same payors' representatives — Messrs. Quirk (United), Beaty (United), Roberts (Aetna), Grizzle (Cigna), Haddock (Blue Cross), and Dr. Jagmin (Aetna) — who testified at the hearing at Complaint Counsel's request.

[138] RPF 86-87, 92-102.

[139] RPF 86-87.

[140] RPF 87.

[141] RPF 87.

[142] RPF 91.

C. Complaint Counsel's analysis of NTSP's dealings with payors ignores critical record evidence.

In its proposed findings of fact and post-trial brief, Complaint Counsel relies on virtually the same evidence cited in its pre-trial filings and ignores other critical record evidence. During the ten days of hearings, NTSP (through cross-examination and otherwise) presented evidence showing that, taken in their proper context, the communications challenged by Complaint Counsel are not anticompetitive. The following explanations — organized by payor — highlight critical evidence that Complaint Counsel glosses over or ignores. This evidence, along with all of the other evidence cited in NTSP's proposed findings of fact, shows that "reliable, probative, and substantial evidence" supports NTSP's position.[143] Any attempt by Complaint Counsel to rely on a different standard of proof would be improper.[144]

1. NTSP's dealings with Aetna were not anticompetitive.

Much of what Complaint Counsel criticizes NTSP for relates to risk contract discussions. NTSP and Aetna were discussing a risk contract during 1999 and 2000.[145] Those discussions broke down, however, in October 2000 when Aetna refused to provide NTSP with the data NTSP needed to perform medical and utilization management.[146] After then, the parties began

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[143] 5 U.S.C. § 556(d).

[144] *Compare* 5 U.S.C. § 556(d) ("A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the ***reliable, probative, and substantial evidence***." (emphasis added)) *with* 16 C.F.R. § 3.51(c)(1) ("An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by ***reliable and probative evidence***." (emphasis added)).

[145] Jagmin, Tr. 983-84, 1125, 1167; Van Wagner, Tr. 1692-95, 1700; CX 531.

[146] Jagmin, Tr. 1132; Van Wagner, Tr. 1694-96; CX 531.

discussing a non-risk contract that included some risk elements.[147] Although Complaint Counsel incorrectly tries to characterize NTSP's conduct as negotiating economic terms for non-risk contracts, NTSP merely told Aetna that NTSP had minimum threshold levels for HMO and PPO offers.[148] Obviously, Aetna could choose to make an offer at those thresholds to activate NTSP's network, or it could elect to contract with the physicians directly or through other entities.[149] By choosing not to be involved with certain offers — for example, those that paid different rates to different physicians[150] or those below a certain level — NTSP was merely exercising its *Colgate* right to deal with whomever it chose. Finally, any suggestion by Complaint Counsel that a threshold 140% PPO rate was improper or anticompetitive ignores the fact that Aetna paid that same rate to MSM,[151] and that MSM was Aetna's major contract in the Tarrant County area.

Complaint Counsel has also ignored MSM's breaches of contract and NTSP's class action to rectify those breaches. Aetna had a global-risk HMO and PPO contract with MSM,[152] and many of NTSP's participating physicians contracted with MSM to serve Aetna patients, both before and after NTSP's direct involvement with Aetna.[153] MSM began experiencing financial troubles and was not honoring its contracts with the participating physicians.[154] Acting as the physicians' class representative,

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147 Jagmin, Tr. 1010-11.

148 *See, e.g.*, CX 571 (e-mail to Jagmin containing "numbers on the messenger model return").

149 RPF 272.

150 *See* Roberts, Tr. 523-24, 568; Jagmin, Tr. 1165.

151 *See* Jagmin, Tr. 1132-33; Van Wagner, Tr. 1696-1702, 1708-09.

152 Jagmin, Tr. 997, 984-85; RX 832.

153 Jagmin, Tr. 982; RX 832.

154 RPF 344, 348.

NTSP sued MSM to address MSM's continuing breaches of contract and financial problems.[155] In connection with that lawsuit, NTSP sought powers of attorney from the physicians to confirm that it had the authority to act on their behalf in any ***lawful*** manner.[156] That language meant that the powers of attorney were not used to negotiate economic terms for non-risk contracts.[157] Powers of attorney are not uncommon or illegal — in fact, Aetna required NTSP (and other IPAs) to obtain them from participating physicians.[158] MSM eventually filed for bankruptcy and its chief operating officer was convicted of fraud, money laundering, and tax evasion.[159] NTSP ultimately settled with MSM in the bankruptcy court, and the participating physicians received a substantial payment.[160]

The evidence also shows that Aetna did not need to contract with NTSP, which contradicts Complaint Counsel's claim that NTSP had significant leverage.[161] Aetna performed an analysis to assess the effect, if any, of losing NTSP's participating physicians and determined that it would lose only 154 out of its 1816 physicians in Tarrant County and that it would not lose any physicians in several specialties.[162] When compared to the 7,200 physicians on Aetna's panel in the Dallas-Fort Worth Metroplex,[163] the effect, if any, of losing NTSP was even more remote. The current absence of

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[155] Van Wagner, Tr. 1652-53, 1692; RX 335; RX 849; RX 1556; RX1805.

[156] RPF 149.

[157] RPF 149.

[158] Jagmin, Tr. 1135-37, 1139, 1141-42; Van Wagner, Tr. 1702-05, 1707; CX 548; CX 567.

[159] RPF 351-52.

[160] RPF 353.

[161] *See* CC's Post-Trial Brief at 11 ("During these negotiations, Aetna was subjected to unusual pressure to reach an agreement with NTSP.").

[162] RX 9; RX 319.

[163] Jagmin, Tr. 1121.

a contract between Aetna and NTSP,[164] coupled with the fact that Aetna has never reported having an inadequate network in Tarrant County,[165] confirm that Aetna does not need NTSP in its network. And the evidence shows that Aetna sends contracts directly to NTSP's participating physicians and that those physicians contract directly with Aetna.[166] Aetna has also contracted with NTSP's participating physicians though other IPAs.[167]

Complaint Counsel also ignores critical testimony about Aetna's ability to analyze data when arguing "that there was no empirical justification to support" the rates offered to NTSP.[168] During his cross-examination, Mr. Roberts, an Aetna representative, conceded that, because of problems with its own data, Aetna was unable to evaluate NTSP's efficiency claims by comparing the performance of NTSP's participating physicians to other physicians.[169] Instead, Aetna compared all of Aetna's physicians in Tarrant County to all of Aetna's physicians in the entire Dallas-Fort Worth Metroplex, which comprises twenty-two counties.[170] In other words, Aetna never focused its data analysis on NTSP (or any other IPA) in any way, shape, or form;[171] it was forced to rely only on county-wide or

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[164] RPF 380.

[165] RPF 279.

[166] Roberts, Tr. 544-46.

[167] RX 319.

[168] *See* CC's Post-Trial Brief at 13 ("After thoroughly analyzing patient and utilization data, Aetna concluded that there was no empirical justification to support NTSP's collectively set higher rates.").

[169] Roberts, Tr. 560-61 ("Q. And is it correct to say that Aetna, because of problems with its own data, was not able to run an analysis of NTSP physicians compared to other physicians? A. That is correct.").

[170] Roberts, Tr. 561 ("Q. All right. Then what did Aetna do? A. It compared Tarrant County to the rest of our network, not just Dallas County. Q. Okay. So it took Tarrant County to the -- what, the entire metroplex service area? A. Yes. Q. Okay. And how many counties is that? A. Either full or partial, 22 counties.").

[171] Roberts, Tr. 561-62 ("Q. Now, so the analysis that Aetna ran didn't focus at all on NTSP, is that correct? A. That's correct.").

network-wide data that was not broken down by IPA. Mr. Roberts also conceded that Aetna had significant gaps in its data, even though Complaint Counsel tried to suggest that the gaps were in NTSP's data:

> Q. Can you answer my question? ***Were the gaps that you were talking about in response to Complaint Counsel the gaps in Aetna's own data?***
>
> A. ***Correct.***
>
> Q. And is it correct to say that Aetna, because of problems with its own data, was not able to run an analysis of NTSP physicians compared to other physicians?
>
> A. That is correct.[172]

Complaint Counsel also overlooks the competitive nature of NTSP's relationship with Aetna. Although health plans (like Aetna) normally perform utilization-management services, NTSP proposed that Aetna allow it to perform those services.[173] NTSP believes its risk-contracting experience allows it to monitor utilization better than a payor can, especially when participating physicians work more closely with patients and have more control over the delivery of medical services.[174] Even though Aetna acknowledged that a good IPA (like NTSP) should push to conduct utilization management, it ultimately rejected NTSP's request,[175] which mirrors NTSP's encounters with other payors on that issue.[176] By trying to take a more active role in managing the delivery of health care, NTSP ends up competing with health plans.

Finally, Aetna is biased against NTSP, and the testimony and evidence elicited from Aetna by

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[172] Roberts, Tr. 560-61 (emphasis added).

[173] RPF 371.

[174] RPF 26, 53, 74, 81-83, 85-87, 92, 96, 101, 106-07, 118.

[175] RPF 371–73, 377.

[176] RPF 106-07, 111.

Complaint Counsel is not credible. Aetna's bias arises from NTSP (1) helping the Department of Justice ("DOJ") investigate the all-products requirement in Aetna's contracts,[177] (2) helping the DOJ investigate Aetna's merger with Prudential,[178] and (3) reporting Aetna to the Texas Department of Insurance ("TDI") for prompt pay violations, noncompliance with contracts, and predatory pricing concerns.[179] In November 2001, the TDI fined Aetna $1.15 million and ordered it to pay restitution for failing to follow Texas prompt-pay and clean-claims laws.[180] Aetna lacks credibility because Dr. Jagmin, upon whom Complaint Counsel bases a large part of its case, was personally disciplined by the TDI in August 2001 for making false representations.[181] Because Dr. Jagmin has a history of misrepresenting the facts, his testimony should be given little, if any, weight.

2. NTSP's dealings with Cigna were not anticompetitive.

Complaint Counsel alleges that NTSP jointly negotiated and imposed higher rates on Cigna.[182] That allegation is false for the reasons discussed below.

Complaint Counsel initially focuses on Cigna's acquisition of Health Source, Inc. in late 1997, and Cigna's "request[] that the physicians" assign their Health Source contracts to Cigna.[183] This is inaccurate because, in reality, Cigna falsely told the physicians that the contracts would be assigned and

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[177] CX 57.

[178] RPF 356.

[179] RPF 374.

[180] RPF 376.

[181] RPF 359.

[182] CC's Post-Trial Brief at 13-16.

[183] CC's Post-Trial Brief at 13.

no further action was needed.[184] Cigna attempted to mislead the physicians because the contracts required mutual agreement before they could be assigned.[185] Indeed, Mr. Grizzle admitted that Cigna would have been sensitive to how physicians would have received the change and may not have "follow[ed] purely the contractual provision."[186] Those misrepresentations support NTSP's claim that it has a right to advise physicians about questionable contracting practices by payors.[187]

Complaint Counsel also suggests that NTSP directed physicians to appoint it as their "agent in negotiations with Cigna."[188] But the evidence cited by Complaint Counsel does not show that any physician told Cigna to negotiate with NTSP, and it does not in any way indicate that NTSP negotiated any non-economic term in a non-risk context. The evidence shows that NTSP's actions were the result of numerous legal questions posed by NTSP's participating physicians and requests that NTSP discuss those issues with Cigna.

Complaint Counsel then attempts to tie Cigna's 1997 acquisition of Health Source, and the related misrepresentations by Cigna about the assignment process, to contractual discussions in 1999.[189] But those discussions in 1999 concerned a risk contract between Cigna and NTSP.[190] Cigna

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[184] Response to CPF 259.

[185] Response to CPF 259.

[186] Response to CPF 259.

[187] Indeed, NTSP in 2000 and 2001 reported Cigna to the Texas Department of Insurance ("TDI") for prompt pay violations, noncompliance with contracts, and predatory pricing concerns. Van Wagner, Tr. 1772. In August of 2001, TDI took action against Cigna for violating Texas law; TDI fined Cigna $1.25 million and ordered it to pay restitution to providers as a result of its failure to comply with clean claims laws. RX 3103. Not surprisingly, Cigna's improper conduct caused NTSP to intensify its review of Cigna's contracts and demand that Cigna comply with state law. Van Wagner, Tr. 1772-73.

[188] CC's Post-Trial Brief at 13.

[189] CC's Post-Trial Brief at 13-14.

[190] Grizzle, Tr. 775; Van Wagner, Tr. 1754-55; CX 763, *in camera*.

and NTSP eventually entered into a Letter of Agreement ("LOA") explicitly in anticipation of a risk contract.[191] The LOA expressly refers to the establishment of a risk contract.[192]

Complaint Counsel also alleges that NTSP acted improperly by forcing Cigna to honor is contractual obligations to NTSP. For example, Complaint Counsel suggests that NTSP's engaged in anticompetitive conduct by reminding Cigna that specialist PCPs and cardiologists were contractually entitled to participate in the LOA.[193] As discussed above, the **[**

][194]**[**

][195] Once Cigna's contract with those cardiologists terminated, NTSP told Cigna that the participating cardiologists wanted to

[**]**[196] Cigna denied that request, said that the **[**

][197] Cigna's contractual game-playing is not surprising, given the admission by Mr. Grizzle that **[**

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191 Van Wagner, Tr. 1757-61; CX 784.

192 CX 782A, *in camera*.

193 CC's Post-Trial Brief at 14-15.

194 RPF 426-28.

195 RPF 422; Response to CPF 269.

196 RPF 423; Response to CPF 269.

197 RPF 423; Response to CPF 269.

]**[198] In sum, NTSP has contractual rights, and the exercise of those rights cannot be anticompetitive.

Complaint Counsel also suggests that Cigna considered NTSP to be an important part of its network.[199] But NTSP's number of participating physicians is small when compared to Cigna's provider panel in the Dallas-Fort Worth Metroplex, which has approximately 6,500 physicians.[200] Even considering only Tarrant County, NTSP's number of participating physicians is small compared to Cigna's provider panel, which is more than 1,000, and possibly as high as 2,000 physicians.[201] Cigna's own analysis disproves its need for NTSP. Cigna requires that two specialists of each type be located within 20 miles of the majority of its membership in Fort Worth. **[**

]**[202]

Finally, Complaint Counsel cannot prove that reimbursement rates paid to NTSP's participating physicians were somehow above market or supracompetitive.[203] Mr. Grizzle admitted that **[**

]**[204] He also conceded that **[**

]**[205] And Dr. Deas testified that his gastroenterology group has a direct

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198 Grizzle, Tr. 940-42, *in camera*.

199 CC's Post-Trial Brief at 15.

200 Grizzle, Tr. 759.

201 Grizzle, Tr. 759.

202 RX 2887.012, *in camera*; RX 3118 (Maness Report ¶ 41).

203 CC's Post-Trial Brief at 15-16.

204 Grizzle, Tr. 958, *in camera*.

205 Grizzle, Tr. 959, *in camera*; CX 768, *in camera*.

contract with Cigna at rates higher than what Cigna pays NTSP.[206]

3. NTSP's dealings with United were not anticompetitive.

As an initial matter, Complaint Counsel's stipulation that recognizes the right granted by Texas law to communicate with employers and patients about network adequacy issues and compensation rates makes irrelevant much of the evidence cited in Complaint Counsel's post-trial brief.[207] The City of Fort Worth was the employer-representative of current patients of NTSP's physicians under the PacifiCare risk contract, and NTSP had legitimate concerns about the adequacy of United's panel and the impact on the City's costs if it switched from the PacifiCare-NTSP risk contract to the United non-risk contract. NTSP had the right to discuss those issues with the City. In fact, NTSP's predictions of significantly higher costs under United's non-risk contract came true because the City experienced cost overruns in excess of $10 million shortly after switching to United.[208] Despite Complaint Counsel's suggestions to the contrary, there was nothing improper or anticompetitive about NTSP's communications with the City of Fort Worth.[209]

Complaint Counsel also wrongly suggests that the powers of attorney were anticompetitive.[210] But those documents could be used only "in any lawful way," which precluded NTSP from using them

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[206] RPF 276.

[207] *See* TEX. INS. CODE ANN. § 843.363 (Vernon 2004) (granting physicians right to communicate with patients about network-adequacy issues and compensation rates); Tr. 1149-50 (stipulating that Complaint Counsel is not challenging right to communicate or complain about compensation rates); CC's Post-Trial Brief at 18-21 (discussing communications with City of Fort Worth's representatives about network-adequacy issues and compensation rates).

[208] RPF 394.

[209] This same analysis also proves that there was nothing improper about any communications with Texas Christian University. *See* CC's Post-Trial Brief at 19 n.12.

[210] *See* CC's Post-Trial Brief at 19 (alleging that powers of attorney were solicited to "gain further leverage" in contracting activity).

to negotiate economic terms of non-risk contracts.[211] NTSP told the physicians about this limitation in a general meeting with counsel present.[212] And NTSP told Mr. Quirk of United the same thing; he then made notes stating that the powers of attorney were "for contractual language only," and "NTSP never uses the [powers of attorney] to negotiate rates."[213] Mr. Quirk also admitted that he never saw an executed power of attorney and had no personal knowledge of interactions between NTSP and its participating physicians concerning powers of attorney.[214] Furthermore, NTSP explained to United how the powers of attorney were used consistently with the messenger model.[215]

The termination of the NTSP-HTPN contract also fails to create antitrust liability.[216] As an initial matter, NTSP had no role in HTPN's discussions with payors about the contracts that were available to NTSP physicians through that arrangement.[217] More importantly, however, NTSP had a contractual right to terminate its contract with HTPN, and its exercise of that right cannot create antitrust liability, especially when United has conceded that NTSP was "not critical" to its network.[218] That concession comports with the data, which shows that the termination affected only about 100 of

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[211] RPF 149.

[212] Van Wagner, Tr. 1941-44.

[213] CX 1083.

[214] Quirk, Tr. 328.

[215] Quirk, Tr. 341-42, 419; Deas, Tr. 2432; CX 1122; CX 1083; CX 1086; RX 283.

[216] *See* CC's Post-Trial Brief at 19 ("Realizing that it had to take tougher actions to weaken United's network in Fort Worth before United would capitulate, NTSP went forward and terminated all of its physicians' participation in United through HTPN.").

[217] Van Wagner, Tr. 1559-60.

[218] CX 1034; *see* Quirk, Tr. 353-54 (stating that United has 8000 physicians in the Metroplex), 354-55 (stating that United has over 2000 physicians in Tarrant County).

the 400 NTSP participating physicians currently contracted with United.[219] In other words, the termination affected less than 5% of United's physician panel in Tarrant County and less than 2% of United's physician panel in the Dallas-Fort Worth Metroplex.[220]

Even if Complaint Counsel could show anything improper about the powers of attorney or NTSP exercising its contractual rights — and it cannot — Complaint Counsel has not proven any anticompetitive effects because the undisputed evidence shows that NTSP did not obtain above-market or supracompetitive rates. United offered NTSP the ***very same*** rates that it had previously offered to ASIA and MCNT, two other IPAs, and a ***lower*** rate than it had previously offered to HTPN in February 2001.[221]

Complaint Counsel also overlooks the competitive, horizontal nature of United's relationship with NTSP. United's negotiations with the City of Fort Worth were going to undercut NTSP's risk contract to treat the City of Fort Worth's employees. NTSP was discussing the loss of that contract, and related problems, with the City, and NTSP was offering data and utilization management services to the City similar to those offered by United.[222]

Finally, United (like Aetna) is biased against NTSP and lacks credibility. NTSP reported United to the TDI for prompt-pay violations, noncompliance with contracts, and concerns about anticompetitive predatory pricing.[223] Just two months later, the TDI fined United and ordered it to pay

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[219] Quirk, Tr. 356; CPF 206.

[220] Quirk, Tr. 356.

[221] CX 1099; Quirk, Tr. 348-49, 411; CX1119; Van Wagner, Tr. 1745-46.

[222] CX 1031; CX 1075; RX 2051; Mosley, Tr. 227-228; Van Wagner, Tr. 1730-33, 1741-44; Quirk, Tr. 412, 431-32 (stating that he knew United would supplant a PacifiCare risk contract); Deas, Tr. 2424-25, 2429-31; CX 1117 (NTSP letter to United mentioning PacifiCare risk contract).

[223] Van Wagner, Tr. 1772.

restitution for violating Texas law.[224] One of United's witnesses — testifying at Complaint Counsel's request — had to admit under oath that he lied about the nature of NTSP's termination of its HTPN contract:

> Q. When you wrote this second paragraph, was it entirely truthful? Let me rephrase that. Was it entirely accurate?
> A. No.
> Q. In what respect was it not?
> A. The–this was written–in a sense, to–to really phase out in a more positive light of–of the–the–the relationship between the three parties, was no longer in place.[225]
>
> * * *
>
> Q. So there would have been over a hundred inaccurate letters sent out under your signature, correct?
> A. Yes.[226]

For all of these reasons, Complaint Counsel has not shown that NTSP's dealings with United were anticompetitive and that United's testimony is worth of belief.

4. Complaint Counsel admits that NTSP's dealings with Blue Cross were not anticompetitive.

Complaint Counsel does not allege that NTSP engaged in any anticompetitive conduct with Blue Cross.[227] That fact is not surprising. Much of the discussion between NTSP and Blue Cross concerned a risk contract, but the parties could never agree upon terms.[228] As for non-risk contracts,

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[224] RX 3103.

[225] Beaty, Tr. 453-54.

[226] Beaty, Tr. 461-62.

[227] *See* CC's Post Trial Brief at 10-21 (alleging that NTSP engaged in anticompetitive behavior with Aetna, Cigna, and United).

[228] Van Wagner, Tr. 1719-20; RX 1421 (memorandum regarding Blue Cross risk proposal); CX 84 (Board minutes reporting Blue Cross risk proposal).

NTSP participating physicians had access to a Blue Cross contract through HTPN,[229] and the rates on that contract were more favorable than any Blue Cross offer to NTSP.[230] Blue Cross also indicated that it did not need NTSP in its network and has said that it does not have any contracting needs in Tarrant County.[231]

Rather than rely on Blue Cross as a basis for alleged anticompetitive conduct, Complaint Counsel adduced rebuttal testimony from Rick Haddock, Blue Cross's representative, for the limited purpose of trying to attack Dr. Van Wagner's credibility regarding a 145% PPO reimbursement rate.[232] But the suggestion that any discussion about a 145% rate was improper conflicts with the evidence. First, the HTPN/Blue Cross contract discussed in the preceding paragraph had a 145% rate for the PPO product.[233] Second, Mr. Haddock's notes indicate that the parties discussed a risk contract: "To do risk - payor must be willing to share data."[234] And the notes say nothing about any 145% "minimum." That is consistent with other evidence showing that Blue Cross made offers to NTSP well below 145% and that NTSP messengered those offers to participating physicians.[235] Finally, Mr. Haddock has some credibility issues of his own. He testified that he met with Complaint Counsel for

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[229] Van Wagner, Tr. 1720-21.

[230] Van Wagner, Tr. 1723; CX 306.

[231] Van Wagner, Tr. 1720; CX 709 (letter describing Blue Cross's refusal of a NTSP offer and statement that they have no contracting needs in Tarrant County).

[232] Tr. 2740 (ruling that Mr. Haddock could testify "for the limited reason to rebut the answer you got from Dr. Van Wagner"); CC's Post-Trial Brief at 50 (relying on Mr. Haddock's testimony to attack Dr. Van Wagner).

[233] CX 306.

[234] RX 2089.007-.008.

[235] CX 707; CX 416; RX 1275.

ten to fifteen minutes just before taking the stand,[236] but swore that did not recall discussing the number "145" during his prep session,[237] even though that was the only reason he was called in rebuttal.[238] He also could not recall any other events involving NTSP.[239]

D. Complaint Counsel's suggested remedies are inappropriate.

Although Complaint Counsel has failed to carry its burden in this case, NTSP alternatively discusses the issue of remedy at the direction of the Court.

Complaint Counsel's Proposed Order is overly broad and would make it virtually impossible for NTSP to operate. The Order could cause NTSP to violate Texas state law or to become liable for medical malpractice or other risky conduct. The Order, by forcing NTSP to become party to contracts with payors who are financially unsound or who may be violating state law, would also destroy the risk contract successes and spillover efficiencies that NTSP has achieved. The Order would also require NTSP to expend its resources on contract offers that involve very few of NTSP's participating physicians, discriminate among NTSP's participating physicians, or involve questionable contracting practices likely to lead to time-consuming and divisive disputes.

While the Federal Trade Commission has discretion in formulating orders, that discretion has limitations.[240] The remedy selected, including any "fencing in" provisions, must have a "reasonable

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[236] Haddock, Tr. 2745.

[237] Haddock, Tr. 2746.

[238] Tr. 2740.

[239] Haddock, Tr. 2747-57.

[240] *Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978).

relation to the unlawful practices found to exist."[241] That means that any remedy should be narrowly tailored to any violation found to exist.

Requiring NTSP to become a party to all contracts sent to it by payors, regardless of Texas state law or problems related to the delivery of medical care, is not reasonably related to the asserted charges of price-fixing, nor is it narrowly tailored. At the very least, any remedy should allow NTSP to avoid contracts that put it at risk of violating state law, committing malpractice, or delivering unacceptable health care to patients.

The Proposed Order, like Complaint Counsel's case, ignores the realities of NTSP's need to make business and healthcare decisions. Texas law requires NTSP, as a non-profit 501(a) medical care entity, to have a Board composed of physicians with active practices.[242] Complaint Counsel, despite Fifth Circuit law to the contrary,[243] views NTSP as a "walking conspiracy." Complaint Counsel evidently believes that every decision NTSP makes which disadvantages someone is an event of conspiratorial liability for NTSP. Complaint Counsel phrases its relief as a prohibition of conspiratorial activity, but in the context of the proposed Order those prohibitions of refusals to deal (a double negative) appear to equate to a mandate to contract with all payors. Certainly, Complaint Counsel has not articulated, either on the merits or in regard to proposed relief, any coherent basis for NTSP to operate other than to become a party to and messenger every offer which walks in the door, or to shut down.

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[241] *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1956); *Gibson v. FTC*, 682 F.2d 554, 572 (5th Cir. 1982); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982); *Standard Oil*, 577 F.2d at 662.

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

[243] *Viazis*, 314 F.3d at 764.

NTSP is the only multi-specialty physician entity accepting risk contracts in the North Texas area.[244] If it is unable to choose which non-risk payor contracts it will be involved in, it will likely fail because of the legal and operational problems like those previously described. As Dr. Wilensky noted in her testimony, NTSP has a unique spillover business model that should be encouraged for public policy reasons.[245] Complaint Counsel's proposed relief effectively would put that model out of existence.

In determining the appropriateness of a proposed order, the specific circumstances of the case should be considered.[246] Complaint Counsel must show that there is a "cognizable danger" that similar conduct will recur.[247] The cognizable danger must be more than a "mere possibility."[248] Here, Complaint Counsel has not presented substantial evidence that there is a cognizable danger of recurrent violations. In fact, there is no cognizable danger in this case because the conduct that has been challenged by Complaint Counsel was highly individualized conduct with specific payors. In each of the payor histories used by Complaint Counsel to support its claim there were specific justifying circumstances leading to NTSP's actions.

NTSP had a highly complicated relationship with Aetna, involving contracts through another IPA, Medical Select Management. This relationship involved numerous breaches of contract, a class action lawsuit filed by NTSP as a class representative, a bankruptcy, the indictment of an officer of

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[244] Casalino, Tr. 2891; Van Wagner, Tr. 1575-76.

[245] Wilensky, Tr. 2187-88, 2204-05.

[246] *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959) (proper scope of an order depends on the facts of each case and a judgment as to the extent a particular party should be fenced in); *Standard Oil*, 577 F.2d at 662.

[247] *TRW, Inc. v. FTC*, 647 F.2d 942, 954-55 (9th Cir. 1981).

[248] *TRW*, 647 F.2d at 954-55.

MSM, and lawsuits brought against Aetna by the Department of Justice and the Texas Attorney General.[249] NTSP's relationship with Cigna was marked by Cigna's numerous breaches of a letter of agreement that was entered into pending the finalization of a risk deal.[250] NTSP's relationship with United, and most of the facts cited by Complaint Counsel, centered around United's efforts to undercut a risk deal that NTSP had to treat patients of the City of Fort Worth, and NTSP exercising its right under Texas state law (as stipulated by Complaint Counsel) to inform its patients' representatives about issues affecting their future health care.[251] Due to the unique situation between NTSP and each payor that Complaint Counsel uses to support its claim, there is no "cognizable danger" of any recurrent violations.

Moreover, Complaint Counsel has not shown that its overly broad remedy is necessary to address ***existing*** conduct. The cancellation of existing contracts, for example, would be inappropriate for the following reasons: (1) NTSP currently has no contract with Aetna or Blue Cross;[252] (2) the Cigna letter of agreement **[**

][253] and (3) about one year after NTSP and United entered into their contract, United voluntarily approached NTSP and offered a new contract to increase the reimbursement rates.[254] There has been no showing as to any other non-risk contracts. In fact, in the last two years, none of

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[249] RPF 332-33, 339-44, 346-54, 356-60, 364-65.

[250] RPF 418-23, 426-32.

[251] RPF 384-86, 389-95.

[252] RPF 380, 448.

[253] CX 809, ¶ 1, *in camera* **[ ]**.

[254] Van Wagner, Tr. 1746-48 (admitted only as to operative fact that United offer was made).

the non-risk payor offers to NTSP have been at or below either of the Board minimums.[255] Complaint Counsel has failed to show that its proposed remedy is narrowly tailored to address any alleged violation.

This case involves an entity's right to refuse to deal and decide with whom it contracts. Complaint Counsel makes no effort to recognize the *Colgate* doctrine – in effect reading that doctrine out of existence despite the Supreme Court's very recent reaffirmation of the doctrine in the *Trinko* case. A broad order requiring a healthcare entity to become involved in contracts, regardless of the potential risks to itself, its participating physicians, and its patients, makes no sense – and violates Supreme Court authority.

Any remedy must be limited by Texas healthcare laws. The Supreme Court recently limited another agency's remedies to those that did not conflict with other laws, statutes, and policies unrelated to the agency.[256] In the context of antitrust laws, the Supreme Court has also stated that the fact that a remedy may impinge upon rights is to be considered.[257] Texas healthcare laws are separate from the antitrust laws or any other laws relating to the Federal Trade Commission. So too, especially under the McCarran-Ferguson Act, are Texas insurance laws governing how health insurers are allowed to deal with their insureds.[258] Therefore, any remedy proposed by Complaint Counsel must avoid conflict with

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[255] Van Wagner, Tr. 1970-71.

[256] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144-45 (2002) (stating that Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA").

[257] *Nat'l Society of Prof. Engineers v. U.S.*, 435 U.S. 679, 697-98 (1978); *see also Beneficial Corp. v. FTC*, 542 F.2d 611, 620 (3d Cir. 1976) (finding that FTC should consider a remedy's effect on the right to free speech when drafting an order).

[258] Complaint Counsel does not take into account the provisions of the McCarran-Ferguson Act which reserve to the States the right to regulate the relationship between insurance companies and their insureds. *See* 15 U.S.C. §§ 1011, *et seq*.

Texas state laws on those issues.[259] Complaint Counsel's proposed Order wholly disregards all those conflicts.

Complaint Counsel's Proposed Order also ignores provisions used previously in Commission and the Department of Justice orders to address some of the kinds of issues present here: (1) protecting NTSP's *Colgate* right to refuse to deal;[260] (2) protecting NTSP's right to advise its participating physicians about payor contracts;[261] (3) protecting NTSP from being involved in contracts that impose unacceptable financial, administrative, or standard-of-care liability on NTSP;[262] and (4) protecting

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[259] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 88.002(a) ("A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan has the duty to exercise ordinary care when making health care treatment decisions and is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care."); 28 TEX. ADMIN. CODE § 3.3703 (laying out contracting requirements for PPOs concerning exclusivity, savings inducements, hold-harmless clauses, prompt payment, continuity of care, disclosure of opinions to patients, disclosure of economic profiling criteria, disclosure of quality assessment criteria, and termination); 29 TEX. ADMIN. CODE § 21.2817 (relating to clean claims and prompt payment); TEX. INS. CODE art. 3.70-3C (same issues as TEX. ADMIN. CODE § 3.3703).

[260] The Commission at times has revised its own orders *sua sponte* to reflect a respondent's rights under the *Colgate* doctrine. *See, e.g., Onkyo U.S.A. Corp.*, 122 F.T.C. 325, 326, n.3 (listing prior FTC orders reopened by Commission and modified to recognize *Colgate* right).

[261] *See, e.g.*, FTC v. College of Physicians-Surgeons of Puerto Rico, Final Order at ¶ IV, Civil No. 97-CV-2466 (D. P.R. 1997) ("Provided, Further, that nothing contained in this Order shall prohibit defendant College or corporate defendants from communicating purely factual information describing the terms and conditions of any participation agreement or operations or any third-party payer or from expressing views relevant to various health plans provided that such factual information or views are not undertaken to invite, initiate, encourage, or facilitate any actual or threatened refusal to deal or any other provision of this Order."); Midwest Behavioral Healthcare LLC, DOJ Business Review Letter (Feb. 4, 2000) *at* http://www.usdoj.gov/atr/public/busreview/4120.htm. ("At the request of the participating provider, the messenger may communicate objective information to that provider about a proposed payor contract or its terms, including objective comparisons with terms offered to that participating provider by other payors. 'Objective information' or 'objective comparison' constitutes empirical data that is capable of being verified or a comparison of such data."); *see also* Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, Statement 9 ("The agent also may help providers understand the contracts offered, for example by providing objective or empirical information about the terms of an offer (such as a comparison of the offered terms to other contracts agreed to by network participants).").

[262] *See, e.g.*, Colegio de Cirujanos Dentistas de Puerto Rico, Docket C-3953 (June 12, 2000) ("Provided, However, that nothing contained in this Order shall prohibit respondent from formulating, adopting, disseminating, and enforcing, reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or with respect to uninvited in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.").

NTSP from becoming involved in contracts that create a conflict or risk of conflict with state or federal law.[263]

For all of these reasons, Complaint Counsel's proposed Order is inappropriate.

III.

CONCLUSION

Complaint Counsel cannot establish liability under the *per se* rule or *Polygram*. There is no evidence of collusion, and Complaint Counsel has not proven actual anticompetitive effects in a relevant market, as required by the Supreme Court in *California Dental*. NTSP has a right under *Colgate*, which was recently reaffirmed in *Trinko*, to deal with whomever it chooses. NTSP has established a network that unquestionably generates actual procompetitive effects and spillover. *Trinko* forces regulators to be cautious before chilling a network's procompetitive effects, even when they lead to monopolies or monopoly prices, because those effects encourage the innovation that is the hallmark of our free-market system. NTSP should not be forced to deal with whomever the FTC chooses or to provide access to its efficiency-enhancing network to anyone who asks. That would cripple NTSP and cause confusion among those with whom NTSP deals.

Complaint Counsel has also ignored considerable amounts of record evidence that puts into the proper context the allegedly improper communications at issue. The payors have engaged in improper

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[263] *See, e.g.*, Alaska Healthcare Network, Inc., Docket C-4007 (Apr. 25, 2001) ("Provided That nothing in this Order shall prohibit conduct that is approved and supervised by the State of Alaska insofar as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine."); Texas Surgeons, P.A., Docket C-3944 (May 18, 2000) ("Provided Further that nothing in this Order shall prohibit conduct that is approved and supervised by the State of Texas insofar as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine."). State action can also include prohibitory statutes, which do not require a showing of active state supervision. *See Snake River Valley Elec. Ass'n v. Pacificorp*, 238 F.3d 1189, 1193-94 (9th Cir. 2001) ("...some state statutes may be so comprehensive, or their application so mechanical, that actual state review would be pointless."); *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1499-1500 (10th Cir. 1997) (active state review is not necessary when private defendants have no discretionary authority under the state statute–in this case, all discretion on rate setting for rental cars was given to the city and county).

conduct that caused the TDI to fine them millions of dollars. NTSP reported the payors to the TDI for improper contracting activities. The payors have also breached contracts with NTSP and that has caused NTSP to assert its rights to enforce the contracts' express terms.

The Commission also lacks jurisdiction over NTSP, a memberless, non-profit corporation. NTSP does not qualify as a "corporation" under the FTC Act and does not act for the profit of any "members." Complaint Counsel also has not carried its burden to prove that NTSP's actions in Texas had an effect on interstate commerce.

Finally, Complaint Counsel fails to suggest a viable remedy narrowly tailored to the asserted specific violations and fails to account for NTSP's rights under both federal and state law. NTSP has the *Colgate* right to deal with whomever it chooses. And Texas law gives NTSP the right to communicate with patients about network adequacy issues and compensation rates; it also provides for the inclusion of certain contractual terms and addresses certain payment issues. NTSP should not face malpractice or other potential liability under Texas law because of any potential remedy. Moreover, Complaint Counsel has not carried its burden to prove that any remedy is needed to address ***existing*** conduct. NTSP has no contracts with Aetna or Blue Cross; United voluntarily agreed to increase NTSP's reimbursement rate; and Cigna's contract **[**

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For all of these reasons, NTSP requests that Complaint Counsel's case be dismissed for lack of jurisdiction, or in the alternative, for lack of merit. NTSP also requests all other and further to which it may be justly entitled.

Respectfully submitted,

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Gregory S. C. Huffman
William M. Katz, Jr.
Gregory D. Binns
Nicole Rittenhouse

THOMPSON & KNIGHT L.L.P.
1700 Pacific Avenue, Suite 3300
Dallas TX 75201-4693
214 969 1700
FAX 214 969 1751
gregory.huffman@tklaw.com
william.katz@tklaw.com
gregory.binns@tklaw.com
nicole.rittenhouse@tklaw.com

ATTORNEYS FOR NORTH TEXAS SPECIALTY PHYSICIANS

CERTIFICATE OF SERVICE

I, Nicole L. Rittenhouse, hereby certify that on July 6, 2004, I caused a copy of the foregoing document to be served upon the following persons:

Michael Bloom (via Federal Express and e-mail)
Senior Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

Barbara Anthony (via certified mail)
Director
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

Hon. D. Michael Chappell (via e-mail and 3 copies via Federal Express)
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Office of the Secretary (original and 2 copies via Federal Express)
Donald S. Clark
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, D.C. 20580

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

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Nicole L. Rittenhouse

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