

[PUBLIC]

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

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz



In the Matter of

North Texas Specialty Physicians,
a corporation.

Docket No. 9312

**RESPONSE OF NORTH TEXAS SPECIALTY PHYSICIANS TO
COMPLAINT COUNSEL'S PETITION FOR CLARIFICATION OF
CERTAIN STATEMENTS IN THE COMMISSION OPINION**

TO: THE COMMISSION

North Texas Specialty Physicians ("NTSP") respectfully files this Response to Complaint Counsel's Petition for Clarification of Certain Statements in the Commission's Opinion, dated December 20, 2005 and served December 21, 2005.

Complaint Counsel properly identify the "all or nothing" principle for messengering contracts as a serious legal error in the Opinion of the Commission.¹ Complaint Counsel's Band Aid®-like proposal of rewriting several sentences, however, fails to correct the effect that one error has had on the Commission's decision and order. As discussed extensively in Respondent's briefing, the categorical approach used by the Commission concerning

¹ Complaint Counsel also seek revision of a sentence which contradicts the holdings in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) and *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Their proposed revision, however, does not recognize or address the Commission's specific fundamental error in this case, which is to deny an entity like NTSP any viable way of acting within the protections of the *Colgate* doctrine.

messaging disregards the Supreme Court's decision in *California Dental*² and the Fifth Circuit's decision in *Viazis*,³ reads out of existence any viable reading of the Rule of Reason, disregards the facts surrounding NTSP's conduct, denies NTSP a due process right to conduct discovery on and litigate the issue of justification, and conflicts with the Commission's Statements of Antitrust Enforcement Policy in Health Care and staff advisory letters.

The same error also permeates the order issued by the Commission by mandatorily terminating health care contracts without any inquiry into the circumstances of the contracts or any concern for the wishes of patients, physicians, and health plans availing themselves of the contracts. The "all or nothing" principle also led the Commission to fail to recognize the many legitimate reasons NTSP has for refusing to become involved in a payor's offer and for communicating factual information to physicians, employers, patients, and health care plans.

By using the word "*dicta*" Complaint Counsel try to mask the significance of the error — but the error is in reality a linchpin holding for the Commission's decision and order.

The Commission should recognize the legal error pointed out by Complaint Counsel by retracting the entire opinion and order and eliminating all points and rulings which rely on the error now conceded by Complaint Counsel.

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

³ *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758 (5th Cir. 2002).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2005, I caused a copy of the foregoing document to be served upon the following persons:

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