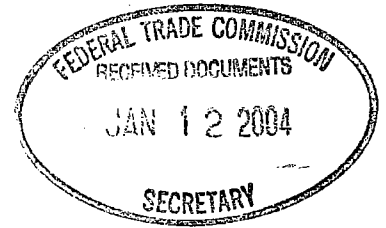


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

DOCKET NO. 9312

**EXPEDITED MOTION OF COMPLAINT COUNSEL FOR AN
ORDER COMPELLING COMPLIANCE WITH INTERROGATORIES
OR EXCLUDING RELATED EVIDENCE; AND RESCHEDULING
DEPOSITION OF DR. KAREN VAN WAGNER**

Complaint Counsel seeks an expedited Order compelling Respondent NTSP to provide to Complaint Counsel the information sought in Complaint Counsel's First Set of Interrogatories (a copy of which is attached as Appendix I). Complaint Counsel served these interrogatories on Respondent on December 5; Respondent has declined to comply with the interrogatories (a copy of Respondent's Response to Complaint Counsel's Interrogatories is attached as Appendix II); and counsel met and conferred and reached impasse on January 5, 2004.

Complaint Counsel's First Set of Interrogatories consists of 12 interrogatories. Most of the interrogatories are simple contention interrogatories. Some ask Respondent to identify those documents that Respondent contends evidence key assertions it makes in its defense. Others ask for such basic information as the identity of persons with whom Respondent contends it competes. A few ask for other information that is plainly relevant and to which Respondent has superior access, such as data regarding patients' zip codes. All of the interrogatories are relevant, reasonable, and proper. Respondent has not articulated any sound basis for its continued refusal to provide Complaint Counsel with lawful, and sometimes mandated, discovery. Indeed, several of Complaint Counsel's interrogatories, and other discovery that Complaint Counsel has had to undertake, were necessitated by Respondent's abject refusal to meet its obligation under the Commission's Rules to provide and update initial disclosures.¹ **As fact discovery will close**

¹ Rule 3.31(b) requires each party to disclose "[t]he name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent . . ." 16 C.F.R. § 3.31(b). Respondent initially disclosed the identities of only 12 persons, all of whom were NTSP officers, directors, employees, or agents. Complaint Counsel protested that fair disclosures would include such information as the identities of payor representatives with whom NTSP had contract discussions, putative competitors. Respondent

under the Court's Scheduling Order on January 30, we ask the Court to expedite consideration of this motion.

Complaint Counsel seeks an Order requiring Respondent to fully answer Complaint Counsel's First Set of Interrogatories within five days of entry of the Court's Order. In addition, Complaint Counsel asks the Court, pursuant to Commission Rule 3.38, to bar Respondent from using documents now in its custody or control to later support the propositions around which Complaint Counsel's interrogatories center but which Respondent fails to identify within five days of entry of the Court's Order. Finally, Complaint Counsel is scheduled to depose Respondent's Executive Director on January 20 and 21.² To permit Complaint Counsel to have the benefit of Respondent's answers in the questioning of Dr. Van Wagner, Complaint Counsel asks the Court to order that Dr. Van Wagner's deposition be rescheduled to ten business days after the Court's entry of an order requiring Respondent to answer Complaint Counsel's interrogatories.³

I. Respondent Should be Ordered to Fully And Precisely Answer Complaint Counsel's First Set of Interrogatories.

A. Respondent's General Objections.

Respondent makes several objections that it claims are applicable to several or all of Complaint Counsel's interrogatories. Those objections are spurious at best. For example, Respondent has objected because the interrogatories use defined terms that "vary from normal parlance"; because commonplace instructions, such as those requiring Respondent, when identifying persons, to do so by name, title, and last known address, are, Respondent says,

refused to amend its disclosures, claiming that it could not sufficiently understand the charges against it to respond more fully—despite Respondent having been privy to the pre-complaint hearings and Exhibits that formed much of the basis of the Commission's action, the Commission's complaint (Respondent did not move for a more definite statement of the complaint), Complaint Counsel's opening statement to the Court, and numerous discussions with Complaint Counsel (and other Commission personnel) both pre- and post-complaint. Having stated that Respondent would reconsider its position following Complaint Counsel's substantive reply to Respondent's contention interrogatories, Respondent recently updated its paltry initial disclosure adding the names of two other NTSP personnel.

² Dr. Van Wagner testified at a pre-complaint investigational hearing and again as Respondent's designee in a highly delimited Rule 3.33 deposition of NTSP. This will be the sole post-complaint deposition of Dr. Van Wagner in her own right.

³ Complaint Counsel asked Respondent to delay Dr. Van Wagner's appearance to the last week of January, but they refused to do so.

“ambiguous,” “overly broad,” and “burdensome”⁴; and to the extent that Complaint Counsel’s interrogatories may exceed the 50 interrogatory limit imposed by the Court (this in response to Complaint Counsel’s First Set of Interrogatories which consists of only 12 single-part interrogatories). Indeed, Respondent has refused to identify, in its original or subsequently modified Initial Disclosures, the names of any persons other than its own officers or employees.

Finally, Respondent has refused to provide substantive answers to Complaint Counsel’s interrogatories because “Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.” That is plainly wrong. Complaint Counsel cannot know what documents Respondent contends support Respondent’s defenses unless Respondent so indicates. Complaint Counsel is not required to guess as to Respondent’s contentions. Not only is there no basis for Respondent’s refusal to answer Complaint Counsel’s contention interrogatories; in this very proceeding, in granting in relevant part Respondent’s own motion to compel, the Court has held that Respondent’s quite similar contention interrogatories had to be fully answered. “The purpose of interrogatories,” the Court explained, “is to narrow the issues and thus help determine what evidence will be needed at trial,” and therefore the contention interrogatories at issue must be answered “fully” with “facts supporting [each] contention.” Order on Respondent’s Motion to Quash and Motion to Compel Responses to Interrogatories (Dec. 4, 2003). Complaint Counsel is not aware, nor has Respondent to date claimed, that Complaint Counsel’s and Respondent’s contention interrogatories are somehow different in kind. It is jarring, to say the least, for Respondent to assert that it need not answer the same kinds of questions that the Court required Complaint Counsel to answer at Respondent’s behest. Similarly, as to Complaint Counsel’s fact interrogatories, Respondent may not require Complaint Counsel to hunt, peck, and guess its way through Respondent’s document production when the facts sought are known or readily accessible to Respondent, as they are here.

Interrogatories 1 through 8 ask Respondent to identify the documents that tend to indicate the correctness of each of eight assertions that are likely to be made in defense of Respondent’s conduct. In declining to answer each of Interrogatories 1 through 8, Respondent repeatedly states that it “does not know what is meant by ‘tend to indicate.’” Complaint Counsel believes that the meaning of the phrase is clear, but need not rely on that fact; by email of December 23, 2003, Complaint Counsel explained to Respondent’s counsel that “[t]hese interrogatories simply seek each document that Respondent contends evidences the stated propositions. For example, in number 1, Complaint counsel ask for [identification of] all documents that Respondent contends

⁴ See Instruction P and Respondent’s objection thereto. Equally lacking in merit is Respondent’s objection, on the same grounds, to the formbook definition of “describe” or “explain” to mean “specify in detail and to particularize the content of the answer to the question and not just to state the reply in summary fashion.” Haydock et. al, *Fundamentals of Pretrial Litigation*, 5th ed. (2001) at 376-377. See also Respondent’s objection to Instruction B, another formbook instruction that if Respondent is unable to fully answer an interrogatory it is to “detail what it did in attempting to secure unknown information . . .,” *id.* at 374-375, because, Respondent says, it “potentially” seeks privileged information.

evidence the proposition that ‘the dissemination by NTSP to participating physicians of aggregated data regarding participating physicians' minimum acceptable compensation for fee-for-service medical services was reasonably necessary to the achievement of material improvements . . .’; and then instruct Respondent to explain in detail Respondent's contentions as to how each such document evidences the stated proposition.” It appears to Complaint Counsel that Respondent has willfully refused to interpret these interrogatories in the light either of reason or Complaint Counsel’s simple clarification. That is not acceptable.

Respondent repeatedly adds that it “does not recall any document produced by Respondent which specifically discusses the stated proposition.” But Complaint Counsel has not asked Respondent to identify “documents that discuss[] the stated proposition.” Rather, Complaint Counsel seeks to learn which documents Respondent believes evidence those propositions. That conforms to the very purpose of modern discovery: to clarify the legal theories and defenses on which the parties will rely and the evidence that the parties believe support those theories and defense. The identification of documents and other information tending to uphold Respondent’s contentions, and the way in which those documents and other information do so, is uniquely within Respondent’s knowledge. Discovery of that information is necessary to enable Complaint Counsel a fair opportunity to prepare to meet those assertions at trial, rather than to have to prepare blindly at the risk of unwarranted trial surprises that may prejudice a just outcome. Respondent should not be permitted to rely at trial on documents that it will not now—while further discovery may yet be accomplished—identify as evidencing the defenses it wishes to assert.

Accordingly, Complaint Counsel asks the Court to order Respondent to reply comprehensively to Complaint Counsel’s first set of interrogatories or be barred from seeking to introduce as evidence or otherwise use in support of the inquired of propositions any documents that it failed to disclose in response to the Court’s Order.

B. Objections to Specific Interrogatories

Respondent’s objections to specific interrogatories are equally lacking in merit.

1. Interrogatories 1 and 2

In Interrogatories 1 and 2 Complaint Counsel asks Respondent to “[i]dentify all documents in or subject to the custody or control of NTSP that tend to indicate that the dissemination by NTSP to participating physicians of aggregated data regarding participating physicians’ minimum acceptable compensation”⁵ Respondent claims it does not know what is meant by “aggregated data.” Respondent’s claim is disingenuous. The record is replete with Respondent’s own references to “aggregated” or “aggregating” data in connection with its recurring solicitation of future price information from participating physicians and its

⁵ Complaint Counsel’s First Set of Interrogatories at 4.

dissemination to participating physicians and use in negotiations with payors of that data in aggregated form, specifically means, medians, modes, and distribution curves, and related Board-established minimum rates.⁶

2. Interrogatories 3 - 8

In Interrogatories 3 through 8 Complaint Counsel asks Respondent to “[i]dentify all documents in or subject to the custody or control of NTSP that tend to indicate that the [establishment/refusal to submit to/dep[ar]ticipating] by NTSP of minimum contract prices for fee-for-service medical services was reasonably necessary to the achievement of” Respondent objects, claiming that it does not understand the phrase “establishes minimum contract prices for physicians’ non-risk fee-for-service medical services.” That seems a remarkable failure of understanding. Respondent’s establishment of minimum contract prices for those services is at the core of this proceeding, and has been much discussed by Complaint Counsel and counsel for Respondent.⁷ Moreover, Complaint Counsel carefully defined the relevant construct in its Instructions and Definitions, and did so in terms of Respondent’s own documented uses of those terms. For example: “‘Minimum contract price’ means ‘Contracted Minimums’ or ‘Board Minimums’ as those or similar phrases are used in the documents provided to the Federal Trade Commission by NTSP bearing Bates numbers NTSP 003960, 004634, 004948, and 014432, among others.”⁸

3. Interrogatories 7 and 8

Interrogatories 7 and 8 seek information indicating how dep[ar]ticipation of NTSP physicians was reasonably necessary to the achievement of material improvements / reduction of costs of physicians’ services. Here Respondent claims that it does not know what is meant by “the dep[ar]ticipating by NTSP of NTSP physicians from payor agreements.” Again, the claim of failure to understand strains credulity. Allegations of concerted dep[ar]ticipation of NTSP physicians from health plans were outlined in, among other things, the Commission’s Complaint, Complaint Counsel’s opening statement before the Court, and Complaint Counsel’s Response to

⁶ See, *e.g.*, August 29, 2002 Van Wagner Tr., at 28-29, 111; August 30, 2002 Van Wagner Tr., at 204-205, 208-211; November 19, 2003 Van Wagner Tr., at 73-74, 88, 110, 113, 117-118.

⁷ See, *e.g.*, Administrative Complaint, In the Matter of North Texas Specialty Physicians (filed Sep. 16, 2003); October 15, 2003 Prehearing Conference Tr., at 38-43; Complaint Counsel’s Second Supplemental Response to Respondent’s First Set of Interrogatories (Dec. 11, 2003).

⁸ Complaint Counsel’s Interrogatories at 3.

Respondent's Interrogatories.⁹ In addition, Complaint Counsel expressly told Respondent that instances of such deparicipation include Respondent's withdrawal of more than 100 of its participating physicians from a United Health Care contract that those physicians were participating in through an NTSP-Heath Texas Provider Network arrangement. That withdrawal is amply evidenced by documents in NTSP's possession.

4. Interrogatory 10

Interrogatory 10 asks Respondent to list its competitors. Again, Respondent objects, pleading difficulty of understanding. This time, Respondent says, it "does not understand what is meant by the reference to NTSP being 'in competition for the provision of fee-for-service medical services.'" One is almost at a loss to respond. Respondent understands enough to state that Respondent is "aware of the following independent practice associations and physician-hospital organizations which are or have been in existence in the Dallas-Fort Worth metropolitan area" Respondent simply refuses to disclose with which, if any, of these organizations Respondent believes it competes. Respondent has contended before this Court that it competes in a 13 county market.¹⁰ Complaint Counsel is entitled to know with which of the listed independent practice associations and physician hospital organizations Respondent contends it has been in competition, so that if appropriate Complaint Counsel can conduct discovery of those organizations and otherwise prepare to debunk Respondent's geographic market assertion.

5. Interrogatory 12

Interrogatory 12 seeks data on patients' zip codes. Respondent replies to this interrogatory by stating, "[w]ithout waiver of its objections, Respondent has tendered or will tender documents in response to this interrogatory." As explained previously, Respondent is not entitled to merely state that it has tendered or will tender documents containing the requested information. If it was going to tender documents in answer to the interrogatories, it had a duty to do so on the return date. More to the point, Respondent seeks to magnify Complaint Counsel's discovery burden impermissibly by pointing at the haystack of documents it has produced and saying, in effect, the needle you seek is in there somewhere; you go find it. The Rules of Practice make it abundantly clear that such a response is not acceptable. Documents that contain requested information can be specified in lieu of interrogatory responses—"it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained"—but expressly on condition that "[t]he specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained." 16 C.F.R. § 3.35(c). Pointing to a haystack of documents plainly

⁹ Administrative Complaint, *supra* at 7; Prehearing Conference, *supra* at 7; Complaint Counsel's Second Supplemental Response to Respondent's First Set of Interrogatories (Dec. 11, 2003).

¹⁰ Prehearing Conference Tr., *supra* at 7, at 46.

contravenes this provision. Such a response to an interrogatory is, under the Commission's Rules, no response at all.

In sum, Respondent has adduced no adequate reasons for its failure to answer fully and with precision each of Complaint Counsel's interrogatories, and should be ordered to do so within five days of receipt of an order compelling it to answer fully and with precision.

II. Unless Respondent Discloses Such Documents Promptly, Respondent Should Be Barred from Using at Trial Documents that Should have been Disclosed in Response to Complaint Counsel's Contention Interrogatories.

As explained, Complaint Counsel is entitled to know what documents Respondent believes evidence Respondent's defensive assertions. Obtaining that knowledge is the purpose of Complaint Counsel's contention interrogatories. If Respondent continues in its refusal to respond fully and precisely to those interrogatories, Respondent should be precluded from using documents now in its custody or control to later support the propositions around which Complaint Counsel's interrogatories center. Prosecution of the Commission's Complaint in this matter otherwise would be unfairly prejudiced. Complaint Counsel is entitled to interrogatory responses to assist it in evaluating Respondent's potential evidence, including during depositions of Respondent's personnel, and determining what evidence Complaint Counsel will need at trial. See *In re TK-7 Corp.*, 1990 FTC LEXIS 20, *1-2 (1990), quoted by the Court in its Order Granting, in pertinent part, Respondent's Motion to Compel dated Dec. 4, 2003. If Respondent "does not recall" any documents in its own files that support its contentions, it should not be permitted to "recall" any such documents at some later date—after the period set by the Court for fact discovery has ended.

The requested barring of use of documents is an appropriate remedy for Respondent's refusal, if persisted in, to cooperate in discovery. Under Commission Rule 3.38 (b), if a party refuses to comply with a discovery order, the Court may: "Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;" or, alternatively: "Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence." Rule 37 (b)(2) of the Federal Rules of Civil Procedure, provide similar remedies. See, e.g., *Astrazeneca AB v. Mutual Pharmaceutical Co., Inc.*, 278 F. Supp. 2d 491, at 544-52 (E.D.Pa 2003), where the court excluded evidence relating to a defense contention not disclosed during discovery.¹¹

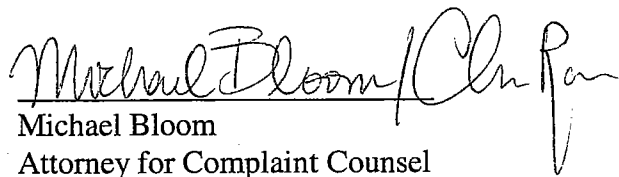
¹¹ The standards for imposing such a sanction under the Federal Rules has been discussed recently by the Third Circuit in *Quinn v. Consolidated Freightways Corp. Of Delaware*, 283 F.3rd 572 (3rd Cir. 2002) (declining to order the more extreme sanction of excluding testimony of a critical witness). See also *Outley v. The City of New York*, 837 F.2d 587 (2nd Cir. 1988).

III. NTSP and Dr. Karen Van Wagner Should be Ordered to Appear for Deposition Ten Business Days After the Court's Entry of an Order Requiring Respondent to Answer Complaint Counsel's Interrogatories.

Dr. Karen Van Wagner is NTSP's Executive Director. Dr. Van Wagner is the foremost repository of relevant information within NTSP and is likely to be NTSP's key witness. For that reason, as Complaint Counsel has on several occasions advised NTSP's counsel, Complaint Counsel wishes to depose Dr. Van Wagner near the conclusion of fact discovery. Respondent has refused to make Dr. Van Wagner available later than the week of January 19. Deposing Dr. Van Wagner during that week, however, would preclude Complaint Counsel's use at deposition of information obtained in response to a Court order compelling Respondent to answer Complaint Counsel's interrogatory responses, further obstructing Complaint Counsel's discovery and prejudicing prosecution of the Commission's Complaint. Accordingly, we ask that the Court order NTSP and Dr. Karen Van Wagner that Dr. Van Wagner appear and be deposed ten business days after the Court's entry of an order requiring Respondent to answer Complaint Counsel's interrogatories.

Dated: January 12, 2004

Respectfully submitted,



Michael Bloom
Attorney for Complaint Counsel
Federal Trade Commission
Northeast Region
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New York, NY 10004
(212) 607-2801
(212) 607-2822 (facsimile)


CERTIFICATE OF SERVICE

I, Christine Rose, hereby certify that on January 12, 2004, I caused a copy of Complaint Counsel's Motion to Compel or Exclude Evidence to be served upon the following persons:

Gregory Huffman, Esq.
Thompson & Knight, LLP
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Dallas, TX 75201-4693
Gregory.Huffman@tklaw.com

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, D.C. 20580



Christine Rose
Honors Paralegal

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

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

DOCKET NO. 9312

**ORDER GRANTING COMPLAINT COUNSEL'S EXPEDITED MOTION TO COMPEL
COMPLIANCE WITH INTERROGATORIES OR EXCLUDE RELATED EVIDENCE;
AND RESCHEDULING DEPOSITION OF DR. KAREN VAN WAGNER**

I.

Complaint Counsel filed a Motion to Compel or Exclude Evidence and for other relief on January 12, 2004. Respondent filed its opposition. For the reasons set forth below, Complaint Counsel's motion is GRANTED.

II.

Pursuant to 16 C.F.R. § 3.38, Complaint Counsel seeks an order compelling Respondent to respond to Complaint Counsel's First Set of Interrogatories. Because Respondent has not provided substantive answers to Complaint Counsel's interrogatories, including a failure to identify specific documents in response to contention interrogatories as set forth in 16 C.F.R. § 3.35(c), Respondent is ordered to provide full and complete responses to Complaint Counsel's First Set of Interrogatories, with service no later than five days from the date of this order.

III.

If Respondent fails to provide substantive answers to Complaint Counsel's interrogatories, Complaint Counsel seeks an order barring Respondent from using any of its own documents that it has declined to identify in response to the contention interrogatories. Because Respondent should have produced these documents, if it fails to do so, pursuant to 16 C.F.R. § 3.38, this Court orders that Respondent be prohibited from introducing into evidence or otherwise relying upon such documents, in support of any claim or defense that is related to the subject of Complaint Counsel's interrogatories.

IV.

Complaint Counsel has asked this Court to order that the deposition of the Executive Director of North Texas Specialty Physicians, Karen Van Wagner, take place ten business days from the date of issuance of this Order. Because Complaint Counsel may need full responses to its interrogatories in order to conduct a thorough deposition of Dr. Van Wagner, this Court orders Respondent to postpone the deposition until ten business days from the date of issuance of this Order.

Ordered:

D. Michael Chappell
Administrative Law Judge

Date:

Appendix I:
Complaint Counsel's Interrogatories to Respondent North Texas Specialty Physicians

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

DOCKET NO. 9312

**COMPLAINT COUNSEL'S INTERROGATORIES TO
RESPONDENT NORTH TEXAS SPECIALTY PHYSICIANS**

Pursuant to 16 C.F.R. § 3.35, Complaint Counsel hereby requests that Respondent North Texas Specialty Physicians ("NTSP") respond to the following interrogatories within twenty days of service in accordance with the definitions and instructions set forth below.

I.

Definitions and Instructions

Complaint counsel requests and instructs that NTSP answer the interrogatories in accordance with the following definitions and instructions:

- A. Each interrogatory shall be answered separately and fully in writing under oath. The answers are to be signed by the person making them.
- B. If you cannot answer any interrogatory in full after exercising due diligence to secure the full information to do so, so state and answer to the extent possible, specifying your inability to answer the remainder, stating whatever information or knowledge you have concerning the unanswered portion, and detailing what you did in attempting to secure the unknown information.

in machine-readable form (translated, if necessary, into reasonably usable form by Complainant). See 16 C.F.R. § 3.34(b).

- H. "Payor" means any third-party payor, health maintenance organization, preferred provider organization, fee-for-service indemnity insurance, employer self-insured health benefit plan, Medicare, Medicaid, or any other private or governmental health care plan or insurance of any kind.
- I. "Participating physician" means any physician or physician entity that has contracted with NTSP with regard to the provision or contemplated provision of the physician's services to any hospital, payor, or other physician organization.
- J. "Physician entity" means a sole proprietorship, partnership, foundation, or professional corporation of physicians.
- K. "Physician organization" means any association of physicians including, but not limited to, physician entities and physician independent practice associations.
- L. "Minimum acceptable compensation" means "minimum acceptable compensation" or "minimum acceptable range of compensation" as those or similar phrases are used in the documents provided to the Federal Trade Commission by NTSP bearing Bates numbers NTSP 003960, 004948, 004634, and 014432, among others.
- M. "Minimum contract price" means "Contracted Minimums" or "Board Minimums" as those or similar phrases are used in the documents provided to the Federal Trade Commission by NTSP bearing Bates numbers NTSP 003960, 004634, 004948, and 014432, among others.
- N. "Related to" or any variant thereof means in whole or in part constituting, containing,

concerning, embodying, reflecting, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.

- O. "Describe" or "explain" means to specify in detail and to particularize the content of the answer to the question and not just to state the reply in summary fashion.
- P. "Identify," when used in reference to a natural person, when used in reference to a natural person, means state his or her name, job title and description of each of his or her positions during the relevant time period, and the present or last known residence address and business name and address.
- Q. These requests are continuing and require supplemental response if you, or any person acting on your behalf, obtains additional information called for by the Request between the time of the original response and the time of hearing. See 16 C.F.R. § 3.31(e)(2).

II.

Interrogatories

1. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the dissemination by NTSP to participating physicians of aggregated data regarding participating physicians' minimum acceptable compensation for fee-for-service medical services was reasonably necessary to the achievement of material improvements in the quality of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.
2. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the dissemination by NTSP to participating physicians of aggregated data

regarding participating physicians' minimum acceptable compensation for fee-for-service medical services was reasonably necessary to the achievement of material reductions in the cost of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.

3. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the establishment by NTSP of minimum contract prices for fee-for-service medical services was reasonably necessary to the achievement of material improvements in the quality of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.
4. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the establishment by NTSP of minimum contract prices for fee-for-service medical services was reasonably necessary to the achievement of material reductions in the cost of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.
5. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the refusal by NTSP to submit to NTSP physicians offers from payors that do not satisfy minimum contract prices established by NTSP for fee-for-service medical services was reasonably necessary to the achievement of material improvements in the quality of participating physicians' (a) fee-for-service medical services and (b) other than

fee-for-service medical services, and explain in detail how each identified document tends to so indicate.

6. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the refusal by NTSP to submit to NTSP physicians offers from payors that do not satisfy minimum contract prices established by NTSP for fee-for-service medical services was reasonably necessary to the achievement of material reductions in the cost of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.
7. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the departicipating by NTSP of NTSP physicians from payor agreements that do not satisfy minimum contract prices established by NTSP for fee-for-service medical services was reasonably necessary to the achievement of material improvements in the quality of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.
8. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the departicipating by NTSP of NTSP physicians from payor agreements that do not satisfy minimum contract prices established by NTSP for fee-for-service medical services was reasonably necessary to the achievement of material reductions in the cost of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document

tends to so indicate.

9. Separately for each of the years 1998 thru 2002, or if such data is not available, for the most recent 18-month period for which such data is available (and if such data is not available for 18 months, then for all of such lesser time for which such data is available), using the "flat file" database as referred to in the testimony of Dr. Karen Van Wagner on November 19, 2003, at page 120, list each CPT code used and for each such CPT code indicate by NTSP division and in total the frequency of use of each CPT code and the number of doctors that used the CPT code.
10. Identify each independent practice association, physician-hospital organization, or similar entity contracting for or on behalf of physicians (other than the physicians in a single practice group) with which NTSP has been in competition for the provision of fee-for-service medical services or other medical services and fully describe the subject, nature, and time period of that competition (e.g., competed with XYZ independent practice association for ABC Insurance Company contract for the provision of PPO medical services and capitated HMO medical services for the year 2000) and the basis of NTSP's knowledge that it was engaged in such competition.
11. Identify each payor with which NTSP communicated relating to the possible, proposed, or actual provision of fee-for-service medical services or other medical services and identify and identify and fully describe the persons engaged in those communications, the subject matter of those communications, and the time period in which those communications occurred (e.g., communications during the period June 1999 thru Dec. 1999 among Mr. A and Ms. B of XYZ insurance and Dr. X and Mr. Y of NTSP relating

to the possible provision of PPO medical services and capitated HMO medical services for the year 2000).

12. Separately for each zip code in which resides any patient provided care under a capitated care agreement between NTSP and a payor, state the number of patients provided care under each such capitated care agreement in each of the years 1998 thru 2002, or if such data is not available, for the most recent 18-month period for which such data is available (and if such data is not available for 18 months, then for all of such lesser time for which such data is available).

Dated: _____, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Maria Coppola, hereby certify that on December 8, 2003, I caused a copy of Complaint Counsel's Interrogatories to Respondent to be served upon the following person by email and by first class mail:

Gregory Huffman, Esq.
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and by email upon the following: William Katz (William.Katz@tklaw.com), Gregory Binns (Gregory.Binns@tklaw.com).

Maria Coppola

Appendix II:
Respondent's Response to Complaint Counsel's Interrogatories

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

RESPONDENT'S OBJECTIONS TO COMPLAINT COUNSEL'S
INTERROGATORIES TO RESPONDENT NORTH TEXAS SPECIALTY PHYSICIANS

Respondent North Texas Specialty Physicians ("NTSP") submits this its Objections and Responses to Complaint Counsel's Interrogatories to Respondent North Texas Specialty Physicians.

General Objections

1. NTSP objects to Complaint Counsel's Interrogatories to Respondent North Texas Specialty Physicians to the extent those Interrogatories use terms which vary from normal parlance.
2. NTSP objects to Complaint Counsel's Interrogatories to Respondent North Texas Specialty Physicians to the extent those interrogatories seek information that is protected by the attorney-client privilege and work product doctrine.
3. NTSP objects to the Definitions and Instructions contained in Complaint Counsel's Interrogatories to Respondent North Texas Specialty Physicians to the extent those definitions and instructions were objected to by Complaint Counsel in discovery previously served by NTSP in this adjudicative proceeding.
4. NTSP objects to the portion of Definition/Instruction B which seeks to require NTSP to detail what it did in attempting to secure unknown information because it seeks to impose

a burden on NTSP that is greater than that imposed by 16 C.F.R. § 3.35 and because it potentially seeks information that is protected by the attorney-client privilege.

5. NTSP objects to Definition/Instruction O because it is vague, ambiguous, and renders the interrogatories to which it applies, if any, overly broad and unduly burdensome.
6. NTSP objects to Definition/Instruction P because it is ambiguous, overly broad, and renders the interrogatories to which it applies, if any, unduly burdensome.
7. NTSP objects to Complaint Counsel's Interrogatories to Respondent North Texas Specialty Physicians to the extent such interrogatories exceed the limits ordered by the Administrative Law Judge.

RESPONSES

1. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the dissemination by NTSP to participating physicians of aggregated data regarding participating physicians' minimum acceptable compensation for fee-for-service medical services was reasonably necessary to the achievement of material improvements in the quality of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

2. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the dissemination by NTSP to participating physicians of aggregated data

regarding participating physicians' minimum acceptable compensation for fee-for-service medical services was reasonably necessary to the achievement of material reductions in the cost of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

3. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the establishment by NTSP of minimum contract prices for fee-for-service medical services was reasonably necessary to the achievement of material improvements in the quality of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

4. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the establishment by NTSP of minimum contract prices for fee-for-service medical services was reasonably necessary to the achievement of material reductions in the cost of participating physicians' (a) fee-for-service medical services and (b) other than

fee-for-service medical services, and explain in detail how each identified document tends to so indicate.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

5. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the refusal by NTSP to submit to NTSP physicians offers from payors that do not satisfy minimum contract prices established by NTSP for fee-for-service medical services was reasonably necessary to the achievement of material improvements in the quality of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

6. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the refusal by NTSP to submit to NTSP physicians offers from payors that do not satisfy minimum contract prices established by NTSP for fee-for-service medical services was reasonably necessary to the achievement of material reductions in the cost of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-

service medical services, and explain in detail how each identified document tends to so indicate.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

7. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the departing by NTSP of NTSP physicians from payor agreements that do not satisfy minimum contract prices established by NTSP for fee-for-service medical services was reasonably necessary to the achievement of material improvements in the quality of participating physicians' (a) fee-for-service medical services and (b) other than fee-for-service medical services, and explain in detail how each identified document tends to so indicate.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

8. Identify all documents in or subject to the custody or control of NTSP that tend to indicate that the departing by NTSP of NTSP physicians from payor agreements that do not satisfy minimum contract prices established by NTSP for fee-for-service medical services was reasonably necessary to the achievement of material reductions in the cost of participating physicians' (a) fee-for-service medical services and (b) other than

fee-for-service medical services, and explain in detail how each identified document tends to so indicate.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

9. Separately for each of the years 1998 thru 2002, or if such data is not available, for the most recent 18-month period for which such data is available (and if such data is not available for 18 months, then for all of such lesser time for which such data is available), using the "flat file" database as referred to in the testimony of Dr. Karen Van Wagner on November 19, 2003, at page 120, list each CPT code used and for each such CPT code indicate by NTSP division and in total the frequency of use of each CPT code and the number of doctors that used the CPT code.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

10. Identify each independent practice association, physician-hospital organization, or similar entity contracting for or on behalf of physicians (other than the physicians in a single practice group) with which NTSP has been in competition for the provision of fee-for-service medical services or other medical services and fully describe the subject, nature, and time period of that competition (e.g., competed with XYZ independent practice association for ABC Insurance Company contract for the provision of PPO medical

services and capitated HMO medical services for the year 2000) and the basis of NTSP's knowledge that it was engaged in such competition.

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

11. Identify each payor with which NTSP communicated relating to the possible, proposed, or actual provision of fee-for-service medical services or other medical services and identify and fully describe the persons engaged in those communications, the subject matter of those communications, and the time period in which those communications occurred (e.g. communications during the period June 1999 thru Dec. 1999 among Mr. A and Ms. B of XYZ insurance and Dr. X and Mr. Y of NTSP relating to the possible provision of PPO medical services and capitated HMO medical services for the year 2000).

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

12. Separately for each zip code in which resides any patient provided care under a capitated care agreement between NTSP and a payor, state the number of patients provided care under each such capitated care agreement in each of the years 1998 thru 2002, or if such data is not available, for the most recent 18-month period for which such data is available (and if such data is not available for 18 months, then for all of such lesser time for which such data is available).

Response: Respondent objects to this interrogatory on the grounds that such interrogatory is vague, unreasonably burdensome, and Complaint Counsel have an ample opportunity to make such determinations on their own. Respondent has already produced documents sufficient for Complaint Counsel to make any such determinations.

Respectfully submitted,

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**ATTORNEYS FOR NORTH TEXAS
SPECIALTY PHYSICIANS**

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on December 22, 2003, I caused a copy of Respondent's Objections to Complaint Counsel's Interrogatories to Respondent North Texas Specialty Physicians, to be served upon the following person by e-mail and by Federal Express:

Michael Bloom
Senior Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

and by e-mail upon the following: Susan Raitt (sraitt@ftc.gov), and Jonathan Platt (Jplatt@ftc.gov).

Gregory D. Binns

Appendix III: Transcripts

August 29, 2002 Karen Van Wagner Transcript

- 27-30
- 109-111

August 30, 2002 Karen Van Wagner Transcript

- 204-206
- 208-211

November 19, 2003 Karen Van Wagner Transcript

- 70-78
- 86-90
- 110-120

October 15, 2003 Prehearing Conference Transcript

- 38-43
- 46-47

August 29, 2002 Karen Van Wagner Transcript

1 it.

2 Q. How frequently, if at all, do you have
3 conversations with your members about pending contracts
4 and whether or not they are satisfied with the economic
5 terms?

6 A. Formally we do that once a year.

7 Q. How about informally?

8 A. Every year the Board asks the members to tell
9 them what they consider to be appropriate reimbursement.

10 Q. And how about --

11 A. And --

12 Q. I'm sorry.

13 A. No. That's fine. Once a year we poll the
14 members and get that information from them.

15 Q. Do you ever have less formal communications or
16 conversations with your members about what reimbursement
17 rates they would be satisfied with with respect to a
18 particular contract?

19 A. With respect to a specific contract?

20 Q. Yes.

21 A. No. We pretty much go by what they tell us in
22 the poll and they know that. They know that whether they
23 want to accept or reject a contract is their decision.

24 We actually have a lot of conversations with
25 them on bundling logic, the hidden parts of the fee

1 schedule. They pretty much know in their own minds what
2 fee schedules will work for them.

3 It's really is this a self-insured situation?
4 Is there some really grievous -- egregious bundling logic
5 that we're aware of? Have we been able to get from the
6 payor what their bundling program is? Does the payor pay
7 promptly? Is there a hidden cost of chasing the money
8 that we're aware of. Oh, what's the -- if it's a
9 self-insured employer, does this payor sell to employers
10 that don't fund?

11 Those kinds of questions are what we usually
12 discuss with the members on a specific contract level.
13 They can figure out the fee schedule without any much
14 help from us. They want to know what's behind the fee
15 schedule.

16 Q. Does NTSP have a requirement that its members
17 sign up for each contract that NTSP enters into?

18 A. Yes. With the exception of risk. Risk
19 contracts the Board can obligate the network.

20 Q. What do you do with the information that you
21 receive as a result of polling your members once a year
22 on fees?

23 A. We will -- we will determine what the mean,
24 median and mode, modal response is for that data and its
25 group aggregate data.

1 There's no individual -- individuals do not
2 know and the Board doesn't know, I don't know what each
3 individual doctor has responded, but we'll group it mean,
4 median and mode, and we will present that to the Board
5 and say here's the results of the polls.

6 The physicians are saying that this is their --
7 this is the level at which they would like to see
8 contracts presented to them. The Board will look at
9 that. They'll review the process and they will say,
10 Okay, then that's our -- that's what we are authorized to
11 do. Next year we -- this coming 12 months the members
12 are authorizing us to achieve this objective for them.

13 Q. What happens if a proposal comes in from a
14 payor with rates that are lower than the results that you
15 obtain from your members?

16 A. The Board isn't authorized by the members to
17 share that with them.

18 Q. Can you elaborate on that?

19 A. Yeah. When we send the -- one of the purposes
20 of polling the members is to get from them what they are
21 authorizing the Board to send back to them, so to speak.
22 And if they tell us that they want to see offers at "X"
23 percent of Medicare, then the Board is authorized to send
24 those offers to them. Anything that would fall below
25 those offers the Board is not authorized to share back

1 with the members.

2 Q. You've referred in your prior answers to the
3 Board being authorized or not authorized to do things.
4 From where does that authorization come? In other words,
5 is there an explicit statement, for example, on the polls
6 or surveys that are sent out to members once a year
7 stating that by completing this you are authorizing the
8 Board to negotiate for rates that are equal to or higher
9 than what you're designating but not lower?

10 A. Yeah. I don't remember the exact wording. But
11 clearly that's the understanding. The members know that
12 if they put down I wish to have -- I wish to accept
13 offers of "X" or above, the Board is not going to bother
14 them with offers that don't meet that -- those
15 instructions.

16 Q. Is that understanding formalized in any
17 document such as the Physician Participation Agreement?

18 A. I don't believe it's in the Physician
19 Participation Agreement.

20 Q. Is it in any other document that you recall?

21 A. It may be in one of the Board or Finance
22 Committee minutes, but I do not specifically recall.

23 Q. Now, does the Board use the mean, the median or
24 the mode numbers as the basis for its authority?

25 A. Well, interestingly they will consider all

1 A. A reciprocity rate is that you have a -- you
2 have people who sign up under your contract. You have
3 physicians who are members of your contract. And Aetna
4 had another contract with other physicians participating.
5 A reciprocity rate affects the fee schedule when our
6 specialists, for example, would be asked to treat a
7 patient coming from another contractual relationship.

8 Q. Do your physicians have the ability to refer
9 their patients to non-NTSP physicians?

10 A. Yes.

11 MR. ZANG: I will now have the reporter
12 mark -- you can put that document aside and we'll mark
13 another document as NTSP Exhibit 13, which is a four-page
14 document Bates numbered NTSP 5055 through 5058.

15 (Exhibit 13 marked).

16 THE WITNESS: Okay.

17 BY MR. ZANG:

18 Q. What is this document?

19 A. It's a fax alert to the members regarding
20 Aetna's contracting efforts dated December 7, 2001.

21 Q. Direct your attention to the bottom paragraph
22 on the first page which states that some figures,
23 reimbursement figures presumably, fall below payment
24 rates our members have messengered to NTSP as acceptable
25 to continue negotiations. Was that referring, in fact,

1 to Aetna's proposed reimbursement rates on the HMO and
2 PPO products?

3 A. Correct.

4 Q. And it then goes on to state, "Therefore, [Aetna]
5 cannot further negotiate Aetna's proposed contract with us
6 and cannot present a payor offer to our membership at
7 this time."

8 A. Correct.

9 Q. And so was it the case that initially [Aetna's]
10 Board decided not to repoll the membership and then at
11 some point the Board revised that position and repolled
12 the membership?

13 A. No. This is a year later. This is 2001.

14 Q. All right.

15 A. The contract in 2000 was brought to closure and
16 then this is the year after that.

17 Q. So what is the background then preceding this
18 fax alert? Were there some negotiations towards the end
19 of 2001 with Aetna?

20 A. Yes. In 2001 Aetna sent us notice that they
21 were terminating our contract and then there was a
22 then they submitted an amendment to the contract that
23 suggested different reimbursement terms.

24 Q. What were those terms?

25 A. They're as you have them in this fax alert.

1 Q. 115 percent for HMO products and 129 percent
2 for non-HMO?

3 A. In aggregate. It was a little more complex
4 than that. Different codes were weighted in at different
5 levels, but when we analyzed it that's what they came out
6 to overall.

7 Q. What happened in those negotiations? Can you
8 describe the process going forward?

9 A. Well, the discussions we had with Aetna
10 concentrated on the language in the document that needed
11 to be changed. The presentation of the proposal that
12 Aetna gave to us, there were not a lot of discussions
13 on -- there weren't any discussions on it. It was
14 presented to the Board. They talked to the Board about
15 the fact that this was their proposal and that was it.
16 They did not --

17 Q. Who talked to the Board from Aetna?

18 A. Mr. Blanford and Mr. Roberts, I believe.

19 Q. That was at a board meeting?

20 A. Yes.

21 Q. When was that?

22 A. It would have to be -- well, it says on Monday,
23 December 3, so I'll assume that is correct.

24 Q. Were you present?

25 A. Yes.

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1 comes to a division meeting, his attendance is noted;
2 but there's no requirement that he comes.

3 Q. So the requirements are substantially less for
4 them?

5 A. Yeah, they are significantly less.

6 MR. BLOOM: Off the record.

7 (Off-the-record discussion.)

8 BY MR. ZANG:

9 Q. Karen, let's go back to our earlier discussion
10 of this morning with respect to the various CPT codes
11 and payor offers that sometimes offer different
12 reimbursement rates depending upon the CPT code. And
13 you testified -- I don't want to put words into your
14 mouth -- but something to the effect that you will let
15 your doctors know what those different reimbursement
16 rates are for the different CPT codes. And if --
17 there's divergence between the overall reimbursement
18 rate and the reimbursement rate for the CPT codes that
19 they tend to bill out. Is that accurate?

20 A. We'll provide them with an analysis of how
21 those differing rates impact them.

22 Q. Uh-huh. In what form do you provide that
23 analysis?

24 A. Usually in aggregate form. We'll say the
25 division of neurology, the codes that they use equate

1 to this amount of Medicare. And then if a physician
2 wants to see by -- on a CPT code level, we surely will
3 send those to them.

4 Q. And the aggregate information that you supply
5 to physicians, at what point in time do you supply
6 that?

7 A. It's -- they can have it as soon as the
8 analysis is complete, and that's usually the first
9 step -- one of the first steps we have in the process.
10 We will tell them -- we'll tell the membership if
11 someone has not already requested it before they have
12 to make their decision on what they wish to do.

13 Q. Do you as a matter of course always provide
14 that information then before they make their decisions?

15 A. Yes.

16 Q. And again, does that -- what point in time
17 does that information get shared with the physicians?
18 Is it when the first offer comes in, or is it later
19 after you've been negotiating with the payor?

20 A. It could be at several points. If the deal --
21 if the offer changes, then obviously we redo our
22 analysis. The board's general position is they do not
23 like CPT code by CPT code fee schedules. They're very
24 deceptive. If a payor has -- and payors understand
25 that. It's a very -- I mean, the majority of payors

1 will say it's X percent of Medicare across the board.
2 Now, they'll make differentiation on HCPCS, J-codes,
3 site of service bundling; but most payors will go
4 across the board because they understand that moving
5 CPT code stuff around is not a good idea either.

6 Q. The United contract that we were talking about
7 yesterday, is that the case with them, that they do
8 across the board reimbursements?

9 A. Yes, yes.

10 Q.. And how about Cigna?

11 A. Our contract with Cigna is across the board
12 with the exception of the HCPCS and the J-codes and the
13 unlisted codes. Those are not part of the -- I mean,
14 those are always handled as kind of a subpart of the
15 contract.

16 MR. ZANG: Can I just have that answer
17 read back?

18 (Requested material was read back.)

19 BY MR. ZANG:

20 Can you please tell me what you mean by
21 the Hick (phonetic) codes?

22 A. HCPCS are --

23 Q. HCPCS?

24 A. Yeah. HCPC codes are any code that begins
25 with a letter.

1 addition to J-codes? Can you give another example?

2 A. Sure. Q-codes, that's your Neupogen, your
3 Epogen. L-codes are usually your DME codes. Anesthesia
4 are usually DME or some of the cardiovascular
5 radioisotopes.

6 Q. Uh-huh. Now, yesterday, you were testifying
7 about the mean, median, and mode analyses that you
8 prepare --

9 A. Right.

10 Q. -- after you receive the polling results, and
11 is it the case that you do not separate out the mean,
12 median, and mode numbers for PCPs on the one hand and
13 specialists on the other?

14 A. I'm sorry.

15 Q. Do you calculate the mean, median, and mode
16 results for all physicians? Or do you aggregate over
17 PCPs on the one hand and specialists on the other?

18 A. No, it's an overall.

19 Q. Why do you take that approach?

20 A. Well, number one, the -- we don't have any
21 PCPs that are members of NTSP that participate in that
22 contract.

23 Q. Which contract are you referring to?

24 A. The Exhibit 1.

25 Q. What about on the nonrisk side?

1 A. That's where they would fall. Well, no, they
2 take risks; but they -- they take risks with us, but
3 they do not participate in our fee for service
4 contracts on a member basis. They're not part of the
5 governance structure.

6 Q. And in that answer, by they, who are you
7 referring to?

8 A. Excuse me? The PCPs are not part of the
9 governance structure. They participate in our risk
10 contracts as a contract holder. I mean, they sign on
11 the dotted line; but it is a subcontracted arrangement.

12 Q. All right. Let me go back to my question and
13 see if I understand what the answer is, then. So with
14 respect to the nonrisk contracts, is it the case that
15 you do separate out the mean, median, and mode numbers
16 for the PCPs and the specialists?

17 A. No. We just give an aggregate number for all
18 the respondents including the PCPs including the
19 specialists, wherever they are.

20 Q. And you do have both PCPs and specialists
21 participating in nonrisk contracts?

22 A. Sure.

23 Q. Why is it that you do not separate out the
24 numbers for the PCPs and for the specialists?

25 A. There's no reason to do that.

1 Q. Might it not be the case that there's a large
2 divergence between what the PCPs would be willing to
3 accept and what the specialists would be willing to
4 accept?

5 A. I have no reason to believe that's the case.

6 Q. Have you ever studied that?

7 A. There have not -- there has not been a
8 contract offer put on the street by a major payor in
9 the last six years that says here's the PCP rate;
10 here's the specialist rate.

11 Q. But --

12 A. If -- if a -- I mean, there's just -- nobody
13 has ever done that.

14 Q. Understanding that there may not have been an
15 offer put on the plate separated out in that way, might
16 it not be the case that your members would have
17 different hopes and expectations for reimbursement
18 rates depending upon whether they were specialists or
19 PCPs?

20 A. I don't think so.

21 Q. Have you studied that?

22 A. I don't know what that would -- I don't think
23 that's an issue for study. I think the market
24 experience and the payors' response to the market has
25 been that that's not an issue.

1 Q. But you haven't studied it?

2 A. It's not necessary.

3 Q. So you just don't know if, for example, the
4 primary care physicians would have a particular
5 reimbursement rate that they would be willing to accept
6 in the aggregate and the specialists would have another
7 one? You just don't know?

8 A. It's not a relevant question. From our
9 experience, it's not a relevant question.

10 Q. And again, the question is, do you know that
11 or -- to be the case?

12 A. If I had to guess, I would say there is no
13 difference. The contracts that have been put on the
14 street for the last six years do not make this
15 differentiation. PCPs have been accepting them.
16 Specialists have been accepting them. I'm not aware of
17 any contract that was accepted by a bunch of PCPs and
18 not accepted by specialists on the basis of -- of a
19 rate.

20 Q. Do you have an opinion on how in order to
21 achieve the best utilization control your membership
22 ought to split out between PCPs and specialists
23 assuming that, say, you have about 500 members in
24 total? Have you studied what the idea split out should
25 be between specialists and PCPs?

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1 physician agreements came into place when we --
2 mostly to participate in our risk agreements.
3 Then we moved to, as we saw in March of '99, to
4 something with Specialty Net. And very -- later
5 that year we said, you know, we need to -- we need
6 to think about a way to make the best use of our
7 resources here. We're looking at doing more and
8 more fee-for-service contracting, and that's when
9 polling came up as a possibility.

10 Q. Had NTSP had a problem with accepting
11 contracts that too many doctors rejected for fee
12 for service prior to the advent of polling?

13 A. We hadn't done enough fee for service to
14 really tell you that one way or the other.

15 Q. In connection with polling, can you tell
16 me what the 50 percent rule is?

17 A. No.

18 Q. Does NTSP require for its acceptance of a
19 fee-for-service contract that it exceed the price
20 at which 50 percent, roughly, of the doctors
21 indicated by their polls that they would
22 participate?

23 A. Say that again.

24 MR. KATZ: I have an objection to
25 the form of the question.

1 MR. BLOOM: Would you read back the
2 question?

3 A. I didn't understand the question, so.

4 MR. BLOOM: Would you read it back,
5 please?

6 (Last question was read back)

7 Q. (BY MR. BLOOM) It's a long question.
8 Let me try and break it into pieces for you.

9 When the poll was first constructed,
10 how was it to be used?

11 A. It was to be sent to the physicians so
12 they could indicate at what minimum level they
13 would authorize the board to offer them a paid
14 contract.

15 Q. And did the board know what it was going
16 to do with that data before it sent out the first
17 poll?

18 A. I don't understand.

19 Q. Well, did -- did the board know what use
20 it was going to make of the data at the time that
21 it constructed the poll?

22 A. The board wanted to know at what level
23 the physicians would authorize them to send them a
24 contract, yes.

25 Q. And what had the board decided about what

1 prior to sending out the poll?

2 A. That that was information they needed to
3 receive from the participating physicians.

4 Q. Okay. Did the board know what it would
5 do with that information when received?

6 MR. KATZ: Objection, form.

7 Q. (BY MR. BLOOM) You can answer the
8 question.

9 MR. KATZ: If you understand what
10 he's asking. I mean, I...

11 A. The board -- you're talking about the
12 data, when they receive the data?

13 Q. (BY MR. BLOOM) Let me rephrase. If the
14 question is difficult, please -- if you don't
15 understand it --

16 A. We may be just doing -- we may be talking
17 at cross purposes. Try another word here.

18 Q. Not a problem. I trust that if you don't
19 understand a question, you're going to tell me you
20 don't understand it; is that correct?

21 A. That would be correct.

22 Q. Okay. Was there a protocol, a practice,
23 a procedure thought out in advance about how the
24 polling data would be used?

25 A. In advance of sending it out?

1 Q. Yes.

2 A. To the -- the board wanted to have the
3 membership respond to what minimum levels they
4 would authorize the board to release a contract to
5 them. So in the sense that this discussion
6 occurred, that was their intent on taking the data
7 that we had and converting it into some kind of
8 useful board policy or information.

9 Q. Well, the board looks at the mean,
10 median, and mode of the data, correct?

11 A. In aggregate, yes.

12 Q. In aggregate. Did they know that they
13 were going to look at the mean, median, and mode
14 before they sent out the contract -- excuse me,
15 before they sent out the poll?

16 A. They knew they would be looking at mean,
17 median -- they knew that they would be looking at
18 aggregate averages. If you went and asked each
19 board member did you know you were going to look
20 at means, medians, and modes, I'm not sure they
21 would all relate to those terms.

22 Q. Um-hmm.

23 A. But they knew that the only thing -- the
24 only level at which they could receive the data
25 and take a look at it would be at a high-level

1 aggregate.

2 Q. Did they know at the time that the poll
3 was first conducted that they would set the NTSP
4 minimum contract price at the mean-median-mode
5 point?

6 MR. KATZ: Objection, form.

7 A. Would they use the mean, median, and mode
8 as the cutoff, so to speak, for minimum -- I'm --
9 they obviously made that decision. I'm wrestling
10 with did they do it before they saw the data or
11 did they do it afterwards. I'm not sure.

12 Q. (BY MR. BLOOM) The polling instrument
13 uses Medicare RBRVS as the index, correct?

14 A. Correct.

15 Q. It always has?

16 A. It always has.

17 Q. How was that index selected?

18 A. It's a standard externally verifiable
19 source that all the physicians are familiar with
20 and health clinics use to present their offers.

21 Q. Was there consideration of creating the
22 poll using numbers other than the Medicare RBRVS
23 index?

24 A. Such as?

25 Q. Such as asking people to specify what

1 they wanted for each CPT code?

2 A. No, that wasn't -- that's not doable.

3 Q. There are other indices than Medicare
4 RBRVS; is that correct?

5 A. A health plan can make up its own fee
6 schedule without any linkage to Medicare if they
7 wish.

8 Q. But my question is: Are there other
9 indices used in the profession in addition to or
10 as alternatives to the Medicare RBRVS?

11 A. All fee schedules are comprised of a
12 conversion factor and some kind of work value
13 factor, so -- and that equals the fee schedule.

14 Now, you can have different -- you
15 can have a plan say, "Well, I'm going to -- I'm
16 not going to take the Medicare conversion factor,
17 I'm going to do my own. Or you could have someone
18 say, "I don't accept Medicare RVUs, I'm going to
19 do my own." But every fee schedule in the
20 industry is $A + B = C$.

21 Q. Are there other recognized conversion
22 factors other than Medicare RBRVS?

23 A. Not widely recognized, no.

24 Q. What is the St. Anthony's RBRVS?

25 A. That is -- that is another company that

1 does a fee schedule approach. They concentrate on
2 taking a little bit different waiting on surgical
3 versus medical. And in -- the CPT codes for
4 Medicare has not yet established a fee. They'll
5 go and try and fill in those areas for you.

6 Q. Having referred to the St. Anthony's
7 RBRVS, does that bring to mind any other
8 recognized indices?

9 A. Well, being recognized by someone like me
10 and being understood by the average physician on
11 the street are two different things.

12 Q. Well, how about recognized by someone
13 like you?

14 A. St. Anthony's has been around forever.
15 And yes, if we have some kind of problem with
16 Medicare, we'll go to St. Anthony's as a backup.

17 Q. Are there -- are there other indices that
18 you're familiar with?

19 A. No.

20 Q. When polling was first begun, was a
21 decision made to use the Tarrant County RBRVS as
22 the index?

23 A. I think that was the understanding. And
24 I'm trying to think if it was a decision staff
25 made or if the board actually was involved in

1 that. I can't tell you for sure.

2 Q. Was there any time at which an index
3 other than Medicare, Tarrant County RBRVS was used
4 in the polling document?

5 A. In establishing the polls?

6 Q. Yes.

7 A. I don't think so.

8 Q. Just to make sure I'm understanding you
9 correctly. It's your belief and understanding
10 that the polling instrument always referred to
11 Medicare RBRVS and Tarrant County?

12 A. Correct.

13 Q. Did it always refer to current year
14 RBRVS? Current year meaning, the RBRVS of the
15 year the poll was being taken?

16 A. Correct.

17 Q. Do you remember whether there was
18 discussion at any time about changing that to a
19 Dallas County RBRVS?

20 A. I don't recall any.

21 Q. In preparation for today's deposition,
22 did you discuss with anyone else how the polling
23 document was at first created?

24 A. No.

25 Q. Did you discuss with anyone else in

1 preparation for this deposition why it took the
2 shape it took?

3 A. The polling documents?

4 Q. Yes.

5 A. No.

6 Q. Is the case that the data was faxed back
7 by the doctor -- the doctor's response was faxed
8 back?

9 A. They could fax it back, yes.

10 Q. They could also mail it back?

11 A. They could bring it by if they wanted to.

12 Q. Who collected the physician's responses
13 in the initial poll?

14 A. Probably the person who opened the mail,
15 the clerical person.

16 Q. And would have routed them to whom?

17 A. The data people, Ms. Demetrk's office.

18 Q. And how do you spell her name please?

19 A. This is the toughest question of the day.

20 Q. Then I have to work on it.

21 A. Demetrk, D-e-m-e-t-r-k, I think.

22 Q. And what did she do with the polling
23 responses?

24 A. Well, she would have analyzed them and
25 applied the formulas for mean, median, and mode

1 MR. BLOOM: I'm going to ask the
2 reporter to read back the last question and answer
3 prior to our break, please.

4 (Requested portion was read back)

5 Q. (BY MR. BLOOM) When was the first poll
6 actually conducted?

7 A. '99.

8 Q. You sounded a little quizzical when you
9 said that. Are you certain that it was

10 A. I believe it was '99.

11 Q. When in '99, roughly?

12 A. Late.

13 Q. Last quarter?

14 A. I believe so, November maybe.

15 Q. Other than the fax that constituted the
16 polling instrument, was there any other
17 explanation to physicians about the poll?

18 A. No.

19 Q. Had NTSP contemplated providing any other
20 information to the doctors prior to doing the
21 poll?

22 A. No. We did a -- I may be off a year. It
23 may be '98, I'm sorry. I didn't review that part
24 of the fax alerts we sent to you. I know we did
25 one in '99, in the fall. We may have done the

1 first one in '98. I'm sorry. I really can't tell
2 you if it was late '98 or late '99, that we did
3 the first one.

4 Q. Okay. But there would have been a fax
5 alert in any event. So a check of the fax alert
6 should tell me when the first poll was conducted?

7 A. That is correct.

8 Q. Had you determined that the mean, median,
9 and the mode were the relevant data points of the
10 board prior to you seeing the distribution?

11 A. Well, I think you use the distribution to
12 determine that. The mean, median, and mode would
13 be the basic metrics that you would hope you could
14 use to say, look this is the average, and the
15 average is not so skewed or not so lopsided that
16 we're not dealing with the use of these metrics.
17 But you would only make your final decision after
18 you had seen the distribution around those metrics
19 and say yes, it makes sense to talk about the
20 mean, median, and mode as being okay to make
21 some -- you know, it works here. You have a
22 distribution where the mean, median, and mode
23 means something.

24 Q. If, for example, there had been a bimodal
25 distribution --

1 A. Exactly.

2 Q. -- those measures would not have had the
3 same meaning?

4 A. Correct.

5 Q. And so is it the case that you, after
6 looking at the distribution, made a decision that
7 the mean, median, and mode were meaningful data
8 points and not others?

9 A. Yeah, ultimately, it would have been my
10 decision to present that to the board, yes.

11 Q. Now, did the board ask you about the
12 shape of the distribution?

13 A. Yes.

14 Q. Who on the board?

15 A. I don't recall.

16 Q. How many physicians received the first
17 poll?

18 A. I couldn't give you an exact number. It
19 would be our roster as of 1998 or 1999.

20 Q. About how many physicians would that have
21 involved?

22 A. In 1998, it would probably be about 300.
23 In 1999, I would believe we were at, maybe, 500.

24 Q. At the time that you presented the data
25 to the board, the aggregated data, were you aware

1 of the response rate to the poll?

2 A. Yes. You mean -- the percentage of
3 physicians that that actually affects, yes.

4 Q. What was the response rate?

5 A. The lowest I have seen is 60-some percent
6 over the years.

7 Q. More than 65 percent?

8 A. Yes. I think one year it came to 67,
9 maybe. I'm -- don't hold me to that. It will be
10 somewhere between mid to upper 60 percentile.

11 Q. I'd like to make sure I understand that
12 then. I take it that when you -- if you polled
13 300 members then, that that meant that not fewer
14 than 195 physicians responded?

15 A. Well, I didn't do the math in my head, so
16 I can't really respond to that. It would -- I
17 would -- it means that a certain percentage of the
18 300 did respond.

19 Q. Okay. But I understand you to be saying
20 that out of each hundred physicians polled, 65 or
21 more responded --

22 A. Responded.

23 Q. -- in each and every instance of polling?

24 A. Correct.

25 Q. Do you know anything about the

1 characteristics of responders versus
2 nonresponders?

3 A. No.

4 Q. Was any effort made to understand the
5 different characteristics of responders and
6 nonresponders?

7 A. No.

8 Q. So there's no way of knowing whether PCPs
9 were more likely than specialists to respond?

10 A. We did not differentiate the sample.

11 Q. In any manner?

12 A. In any manner.

13 Q. Had you considered differentiating the
14 sample?

15 A. No.

16 Q. Had the board ever discussed
17 differentiating the sample?

18 A. No.

19 Q. Prior to conducting the first poll, had
20 the board decided that it would use a single
21 minimum contract price for all physicians?

22 A. I'm sorry. Say that a little bit
23 differently.

24 Q. Yes. Prior to conducting the first poll,
25 when the board talked about polling.

1 (Document was handed to counsel)

2 Q. (BY MR. BLOOM) NTSP looks at the
3 aggregated polling data and they reach what
4 conclusion based on that?

5 A. The minimum level that they are
6 authorized to send to the members in regards to
7 payor offers.

8 Q. Has the board made a determination, that
9 is it is looking for roughly the point at which 50
10 percent of the physicians, according to polling
11 data, would participate?

12 A. Yes.

13 Q. Has that always been since the inception
14 of polling what the board has looked for?

15 A. Yes.

16 Q. Given that the poll is stated in terms of
17 Medicare RBRVS, how is that information applied to
18 a payroll offer that is not stated in those terms?

19 A. We have not received one that is not
20 stated in those terms.

21 Q. Have all your payor offers been stated in
22 terms of a percentage of RBRVS, a single -- pardon
23 me, a single percentage of RBRVS?

24 A. No. Payors can -- I think the most -- I
25 think Aetna was probably the most complex and that

1 was a hodgepodge of different codes.

2 Q. CPT codes?

3 A. CPT codes.

4 Q. So that -- some payrolls would submit an
5 offer based not on RBRVS, but on a stated price
6 for a stated CPT code?

7 A. No. It was always linked to RBRVS, but
8 different codes have different values. Like E and
9 M codes would be at one value or surgical codes
10 would be at another value and lab, radiology would
11 be at, maybe, a different indexing to RBRVS.

12 Q. But all payor offers have indexed in the
13 offer itself to the RBRVS?

14 A. Yes.

15 Q. No payor has submitted an offer based on
16 a stated price for a given CPT code?

17 A. Not that I'm aware of.

18 Q. Would your answer be the same if rather
19 than offer I asked about a proposal?

20 A. Yes.

21 Q. Do some payor offers, then, state that
22 for certain CPT codes it will be one percentage of
23 Medicare RBRVS, but for other CPT codes a
24 different percentage?

25 A. Correct.

1 Q. And how do you relate that, then, to the
2 polled single number for all CPT codes?

3 A. What a caveat. A payor may send us a
4 list of CPT codes with a price attached, but that
5 index is back to RBRVS. If you're -- if a payor
6 receives -- if you ask a payor what is your fee
7 schedule for an E and M code, they'll give you a
8 dollar amount; but then you look back to the
9 RBRVS, and you convert it to a percentage of
10 RBRVS. So it's -- you always get back to that
11 everybody -- if you get a dollar value, it is
12 equal to some percentage of RBRVS.

13 Q. I'd like to make sure I understand this.
14 So that it is the case that sometimes the payor
15 will not state the offer or proposal in RBRVS
16 terms, but you will convert it to RBRVS terms in
17 working with that number?

18 A. That's possible. That is possible.

19 Q. Okay. Where you have, either by
20 translation or the way the document was
21 structured, a payor offer that has different
22 RBRVSs --

23 A. Right.

24 Q. -- for different procedures, how do you
25 work with that?

1 A. We run -- we take those rates and we
2 compare them against the database we have
3 internally for codes that have been billed by our
4 physicians in the past for other payors, and then
5 we will run the proposal through that database to
6 get an overall number.

7 Q. Does -- would it be correct to call that
8 an algorithm?

9 A. No.

10 Q. It would not be correct?

11 A. No.

12 Q. Is there an appropriate shorthand for
13 describing that process?

14 A. Not that I'm aware of. Doctors do this
15 in their office as well. They -- a simple example
16 at the doctor level, you have -- know all the
17 codes you billed for last year. So a payor comes
18 in and says, I'm going to pay "X" amount for these
19 codes and "Y" amount for those codes. You take
20 the price times the utilization of the code and
21 you add it all up and then you go back and say,
22 what does an aggregate -- the total indexed.

23 Q. Okay. You do that based on your -- on
24 the NTSP database?

25 A. Correct.

1 Q. And from what input is that database
2 constructed?

3 A. The payors.

4 Q. How do you know how to weight a given CPT
5 code in determining how the payor offer compares
6 with your single RBRVS number?

7 A. Well, we know how many times that CPT
8 code has been used in the past five years by that
9 physician or by any of our physicians.

10 Q. When you run this through your database
11 do you run it through based on the average
12 physician's usage?

13 A. No. It's code by code, doctor by doctor.

14 Q. Okay. You make a decision as to whether
15 or not the offer measures up to the minimum
16 acceptable NTSP price; is that correct?

17 MR. KATZ: Objection, form.

18 A. Say it again.

19 Q. (BY MR. BLOOM) Yes. NTSP makes a
20 decision as to whether a given payor offer
21 measures up to the minimum price the board has set
22 for that year, correct?

23 MR. KATZ: The same objection. It
24 mischaracterizes the evidence. It's inaccurate.

25 A. We analyze each payor offer. Each

1 proposed payor offer to see if it does.

2 Q. (BY MR. BLOOM) And how do --

3 A. It either does or it doesn't.

4 Q. How do you do that?

5 A. We run it through a rather -- a very
6 extensive database of all the CPT codes that have
7 been billed by all of our physicians over the last
8 year or two years and we go up to five years.

9 Q. And when you run it through, do you
10 weight the procedure so that a higher value is given
11 calculation is given to a procedure that is
12 performed more often than another procedure?

13 A. No. It's simply the number of times the
14 procedure's been used, multiplied times whatever
15 the plan is proposing for that procedure. So if
16 you have billed an E and M code five times, it
17 would be five times the rate.

18 Q. And is this done based on the data for
19 the last full year?

20 A. It can be.

21 Q. What do you do routinely?

22 A. We never go below a year. We'll try to
23 do the most recent 12 to 18 months.

24 Q. And you will run this calculation for the
25 uses of all codes?

- 1 A. Correct.
- 2 Q. By all doctors, correct?
- 3 A. Correct.
- 4 Q. And you'll also run it by other sets,
5 correct?
- 6 A. By divisions.
- 7 Q. By division. Anything lower than the
8 divisional level of aggregation?
- 9 A. Well, the ultimate would be by CPT code
10 or by physician.
- 11 Q. Do you do it by physician other than on
12 request by the physician?
- 13 A. No.
- 14 Q. When you do it by the division, is that
15 routine?
- 16 A. Yes.
- 17 Q. Who is that information shared with?
- 18 A. The physicians.
- 19 Q. In that division?
- 20 A. Yes.
- 21 Q. Does a physician in one division learn
22 what the equivalent RBRVS number is for another
23 division?
- 24 A. Yes.
- 25 Q. Why?

1 A. Why not?

2 Q. Is there any reason?

3 A. I can't see of any reason not to.

4 Q. What is the relevance to a member of the
5 cardiology division of the RBRVS percentage being
6 offered to a neurosurgeon?

7 A. There's no reason to -- I mean,
8 basically, the analysis covers all divisions and
9 aggregates up to an NTSP minimum authentication
10 level. Each division can look at how -- if you
11 just give a division their number, it is, and
12 equal the overall. So in order for the divisions
13 to analyze and understand how the proper it will
14 comes up to or down to or whatever to the
15 threshold for the organization as a whole we
16 provide the entire data set by division.

17 Q. Is there any reason why you need to tell
18 a cardiology division what the fee-for-service
19 offer for neurosurgeons or OBs is?

20 A. Yes.

21 Q. What is that reason?

22 A. I just gave you the reason.

23 Q. Is there any other reason?

24 A. That would be the main reason.

25 Q. Is there any other reason other than the

1 main reason?

2 A. Not that I can think of right now.

3 Q. Do the board members get to see the
4 breakdown by division?

5 A. Yes.

6 Q. Does anyone other than an individual
7 requesting an individual breakdown get to see the
8 individual breakdowns? I believe you stated that
9 you'd use at least one -- let me ask again. I
10 believe I asked how many years data you would want
11 this through, and you had a minimum that you would
12 use. I don't recall whether it was one or two.
13 What was it?

14 A. The most recent 12 months, the most
15 recent completed 12 months.

16 Q. What would lead you to use a different
17 time period?

18 A. If we wanted to look at a small division,
19 for example, that maybe doesn't have the same data
20 set parameters as the larger division, you need to
21 go back further in time. If Dr. Jones wanted to
22 sit down and find out what his profile is, you may
23 have to go back further in time because the unit
24 of analysis is smaller.

25 Q. And if you were looking at the aggregate

1 number rather than in a divisional breakdown,
2 would you have routinely used the most recent 12
3 months?

4 A. As that matter of routine, we would
5 unless something unusual occurred.

6 Q. Does NTSP today have the list of
7 procedures times the frequency of procedures that
8 it used in evaluating recent contracts?

9 A. Most -- usually they're attached to the
10 fax alerts or the payor offers or the fax alerts.
11 When the payor offers go out on a fax, if we've
12 done that, we'll include that as an attachment.

13 Q. I'd like to make sure I understand this,
14 so I'm going to tell you what -- what I think I
15 understand and ask you to correct me if I misstate
16 the facts. In relating an offer that is not
17 stated as a single percentage of RBRVS to the
18 board's number, you take the offer and you run the
19 offer prices through your database and simply
20 multiply the procedure times the number of times
21 it's performed, do that for every procedure, and
22 that gives you your weighted average or percent of
23 RBRVS?

24 A. Correct.

25 Q. Is that correct?

1 And then you compare that number
2 with the board's number, and it's either higher or
3 lower.

4 A. That's correct.

5 Q. What do you call that database?

6 A. I call it our flat file. It doesn't have
7 a -- you have it. It's the claims file.

8 Q. When you say it's the "flat file," does
9 that mean that it's based solely on your risk
10 experience?

11 A. Oh, yes. It's risk data and a little bit
12 fee-for-service, Cigna data, fee-for-service. But
13 for the most part, it's risk.

14 Q. How many CPT codes are included within
15 that database?

16 A. Oh, there's 8,000 CPT codes. Most
17 physicians don't use more than ten. So you can
18 get 80 percent of your usage in 25 codes or less.

19 Q. Do you do that or do you run it through
20 all codes?

21 A. We'll run it through all codes. The
22 program is set up such that it doesn't matter.
23 It's no more work to run it through the entire
24 base as it is...

25 Q. Is there any reason to believe that the

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1 an EKG for 600 different doctors in the Fort Worth area?

2 MR. BLOOM: Typically what NTSP did was send out
3 a fax to its members asking them to specify by what
4 to index the relative value scale used in the government
5 insurance programs a percentage to be applied to that
6 that would be the minimum acceptable range of
7 compensation for a plan rather than a service. We
8 basically they were saying, take the relative value
9 guide published by the government, we want -- the
10 question would be, do you want 120 percent of that, 130
11 percent of that, 140 percent of that? Those are not
12 literally the categories, Your Honor, but for relative
13 purposes. The physician would then check off the box
14 saying this is what I want you to get for me, NTSP
15 NTSP would aggregate this information, set its standard
16 contract price based exclusively on its understanding of
17 that data, selecting mean, medium and low, which are
18 basically on top of one another here, and that would
19 become the minimum contract price for NTSP.

20 JUDGE McGUIRE: But are you saying that, for
21 example, an office visit, say Medicare allows \$20, then
22 they would tip a percent above that?

23 MR. BLOOM: That's correct.

24 JUDGE McGUIRE: Fifty percent above that?

25 MR. BLOOM: That's correct. If, for example,

1 established price minimums for NTSP payer agreements.
2 identifies those price minimums, and indicates that NTSP
3 will not enter into or otherwise forward to
4 participating physicians any offer that falls short of
5 those minimums.

6 In other instances, first payers have proposed
7 prices to NTSP, or proposed pricing agreements to NTSP
8 where they had existing contracts. Where those contracts
9 or proposed terms did not satisfy the minimum
10 conditions, again, NTSP cited the price minimums and said
11 this is the minimum that our doctors will accept. And
12 won't even messenger it, and sent the payer back to their
13 drawing boards.

14 JUDGE McGUIRE: So then that payer, that
15 payer's -- I guess that payer's members, for example that
16 BlueCross, everyone with a BlueCross card would not be
17 able to go to that doctor?

18 MR. BLOOM: If there was a pre-existing
19 contract, for example, between BlueCross and NTSP, and
20 BlueCross sought to reduce their rate in a way that NTSP
21 would not messenger, NTSP would say, now either the
22 contract we have stands, or you're out of luck. You can
23 go around us, if it's practical, you can try and
24 negotiate directly with the doctors, but you cannot go
25 through NTSP, the payers will state that as a practical

1 matter, it was extremely difficult to contract with a
2 significant block of physicians, because of the
3 solidarity of the membership.

4 And indeed, there were instances in which NTSP
5 reminded physician members to allow NTSP to continue
6 negotiations with a payer without themselves entering
7 into negotiations that might undercut NTSP's attempt to
8 obtain a consensus price.

9 For example, several payers have indicated that
10 they met the price demanded by NTSP because they judge
11 particularly impracticable the possibility of getting
12 specialists in adequate numbers to serve the Fort Worth
13 community.

14 As I've intimated, NTSP orchestrated various
15 actions to create, maintain and communicate this
16 impracticability to payers and others, including causing
17 or threatening to cause the sudden collectively
18 departicipation of its physician members from payer
19 contracts, often at moments of critical import to the
20 payer, such as health care open season, thereby
21 dramatically increasing the need for the payer to
22 accommodate NTSP's price demands for precisely the
23 reason Your Honor mentioned. They were at risk of not
24 being able to provide physicians to service the
25 businesses that they either had contracted or were

1 seeking to contract to provide care for.

2 JUDGE McGUIRE: And do you know were these
3 typically one-year agreements?

4 MR. BLOOM: These agreements, my recollection
5 is, vary, Your Honor. Some of them are evergreen and
6 can be taken exception to by either party on a brief
7 period of notice, I think others offered it to them.

8 By way of example, NTSP has urged its members,
9 and again I quote from an NTSP document that we will
10 offer into evidence, "As part of our negotiations," to
11 right employers and others and pressing upon them that
12 unless the main payer exceeded to NTSP's pricing
13 demands, "a severe network inadequacy problem will exist
14 in Fort Worth."

15 NTSP's message to many of its payers is this:
16 NTSP represents a large and critical panel of Fort Worth
17 area specialists as well as several hundred primary care
18 practitioners. If you want to obtain or maintain a
19 significant network of NTSP physicians, you must pay or
20 continue to pay at or above the minimum contracted
21 prices established by NTSP for and with its physician
22 members, and if you seek to negotiate around NTSP, we
23 and our members can and will impose costs on you.

24 Not surprisingly in response to NTSP's
25 representations and pressures, some payers increased

1 their offer in prices to NTSP physician members above
2 what they otherwise would have paid. Some payers
3 abandoned efforts to reduce their prices to NTSP
4 physician members: Some payers bore higher costs and/or
5 offered less competitive physician panels in order to
6 avoid having to contract at those imposed prices. And
7 the increased costs imposed by the NTSP can be expected
8 ultimately to filter down to employers and patients
9 through higher than necessary premiums, deductibles and
10 copays or in the form of reduced physician services.

11 So, then, what is this case about? Ultimately,
12 it's about harm to payers, employers and patients caused
13 when an organization of otherwise competing physicians
14 coordinates and orchestrates the physicians practicing a
15 fee-for-service medicine. It is about conduct that is
16 not traditionally related to the advancement of
17 physician risk sharing, or substantial clinical
18 integration. It is about conduct traditionally
19 condemned as per se unlawful. Conduct that is in recent
20 parlance inherently suspect and properly condemnable
21 without elaborate inquiry.

22 I would like to take just a moment more to say
23 what this case is not about. Counsel for the respondent
24 has asserted at various points in time that each of
25 these are issues in the case, but we think they are not.

1 of the doctor groups were unable to manage the risk and
2 they have, in fact, gone bankrupt. NTSP is the only
3 entity remaining in the Dallas/Fort Worth area that
4 carries a risk contract.

5 JUDGE MCGUIRE: Can you just give me a ballpark,
6 I know the complaint says about 600 physicians. Do you
7 know what percentage of available physicians is in the
8 DFW area?

9 MR. HUFFMAN: It's very small. And it's
10 probably less than 10 percent. And you put your finger
11 on one of the important points in this case. The number
12 of doctors that are out there in the Dallas/Fort Worth
13 Metroplex, and the Dallas/Fort Worth Metroplex has been
14 defined by the Department of Justice in its proceeding
15 against Aetna as being the relevant geographic market in
16 this area. That the number of doctors out there as
17 compared to NTSP is enormous. NTSP physicians
18 constitute not only a very small percentage, less than
19 10 percent, we believe, of all the doctors that are in
20 the Metroplex, but constitutes something like 20 percent
21 of doctors that are in Tarrant County, and so there are
22 a number of very qualified good doctors to which a payer
23 can go.

24 JUDGE MCGUIRE: Of course the relevant number is
25 not going to be the total number, it will be, for

1 example, what percentage of qualified endocrinologists
2 are represented by your client.

3 MR. HUFFMAN: I can't give you that right off
4 the top of my head.

5 JUDGE McGUIRE: And I don't expect you to.

6 MR. HUFFMAN: It's not even a significant number
7 when you break it down into the specialties. So, there
8 are a number of doctors that payers can go to. There
9 are a number of other groups like NTSP that are what
10 sometimes are called IPA, independent physician
11 associations. All of the doctors that contract with
12 NTSP also contract directly with payers. The payers can
13 and do go directly to doctors.

14 So, NTSP is out there basically as a group that
15 got its genesis in putting together very coordinated
16 care, a higher quality care. These doctors devote time
17 over and above their practices in order to put together
18 the protocols that are necessary to try to be sure that
19 they are getting efficient high quality care.

20 These are not just numbers that I'm coming up
21 with, and I wish I had the data ready at hand, but the
22 actual survey showed that in fact NTSP is probably the
23 most efficient provider of critical care in Fort Worth
24 and Dallas/Fort Worth. Its patient satisfaction survey
25 results are enormous. Something like 90 percent of the

Appendix IV:
Complaint Counsel's Supplemental Response to
Respondent's First Set of Interrogatories

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

DOCKET NO. 9312

**COMPLAINT COUNSEL'S SUPPLEMENTAL RESPONSE TO RESPONDENT'S
FIRST SET OF INTERROGATORIES**

Pursuant to Section 3.31(e)2 of the Federal Trade Commission's ("the Commission") Rules of Practice, Complaint Counsel hereby supplements its initial response of October 27, 2003 to Respondent North Texas Specialty Physician's ("NTSP") First Set of Interrogatories. As stated in our Objections to Respondent's First Set of Interrogatories of October 16, 2003 ("Complaint Counsel's Objections"), Interrogatories Number 1 and 2 are objectionable and we are not responding to those interrogatories herein. Subject to and in conformity with Complaint Counsel's Objections, in response to Interrogatories Number 3 and 4, we are providing supplemental responsive information acquired over the course of discovery and the preceding investigation of NTSP. Each response is preceded by the full text of the corresponding interrogatory.

Interrogatory Number 3:

Identify each person or entity from whom you have received documents or information concerning payor contracts in the DFW Metroplex.

1. Leanne Kimp
Employee Benefits Analysis Corp.
2. Gladdys Redwine
Alcon Labs

3. Bonnie Laufer-Beuck
Blockbuster Inc.
4. Justin Hitt, Esq.
First Health Group Corp.
5. James D. Hubbard
Higginbotham & Associates, Inc.
6. John Carson, Esq.
Radio Shack
7. John Meyer
Fringe Benefits Management, Inc.
8. Mike Trader
The Brants Company
9. Mark Washington
City of Fort Worth
10. James Mosley
Effective Plan Management Inc.
11. Gerald Pruitt, Esq.
City of Forth Worth
12. Richard Rose
Cook Children's Medical Center
13. John McNay
Cook Children's Medical Center
14. Tara Bettendorf
Prudential Financial
15. Dr. David Ellis
United Healthcare
16. Dottie Whitson
Aetna Inc.

17. Randy Guillory
CIGNA Healthcare
18. David Marlin
Texas Health Choice
19. David Veltum
Bank One Corp.
20. Tom Jensen
Bank One Corp.
21. John Rust
Lockheed Martin Corp.
22. Scott McKay, Esq.
Lockheed Martin Corp.
23. Marc Simeroth
Bell Helicopter Textron, Inc.
24. Holly Merrill
United Healthcare

Interrogatory Number 4:

Identify each person or entity from whom you have received documents or information concerning NTSP.

1. Gladdys Redwine
Alcon Labs
2. Eric Bassett
Mercer Human Resources Consulting
3. John Meyer
Fringe Benefits Management, Inc.
4. Mike Trader
The Brants Company

5. Mark Washington
City of Fort Worth
6. James Mosley
Effective Plan Management Inc.
7. Gerald Pruitt, Esq.
City of Forth Worth
8. Richard Rose
Cook Children's Medical Center
9. John McNay
Cook Children's Medical Center
10. Dr. David Ellis
United Healthcare
11. Dottie Whitson
Aetna Inc.
12. John Rust
Lockheed Martin Corp.
13. Scott McKay, Esq.
Lockheed Martin Corp.
14. Holly Merrill
United Healthcare

Respectfully submitted,

Jonathan Platt
Complaint Counsel
Northeast Region
Federal Trade Commission
1 Bowling Green, Suite 318
New York, NY 10004

Dated: December 4, 2003

**VERIFICATION OF COMPLAINT COUNSEL'S SUPPLEMENTAL RESPONSE TO
RESPONDENT'S
FIRST SET OF INTERROGATORIES**

I state under penalty of perjury that Complaint Counsel's Supplemental Response to Respondent's First Set of Interrogatories, as served on December 4, 2003, was prepared and assembled under my supervision, and that the information contained therein, is to the best of my knowledge, true and correct.

Jonathan Platt
Complaint Counsel
Northeast Region
Federal Trade Commission
1 Bowling Green, Suite 1000
New York, NY 10004

CERTIFICATE OF SERVICE

I, Christine Rose, hereby certify that on December 5, 2003, I caused a copy of Complaint Counsel's Verification of Complaint Counsel's Supplemental Response to Respondent's Discovery Set of Interrogatories to be served upon the following persons:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Gregory S. C. Huffman, Esq.
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693

and by email upon the following: William Katz (William.Katz@tklaw.com).

Christine Rose
Honors Paralegal

Appendix V:
Fundamentals of Pretrial Litigation

FUNDAMENTALS OF PRETRIAL LITIGATION

Fifth Edition

By

Roger S. Haydock

Professor of Law, William Mitchell College of Law

Director, The Forum

Member, Minnesota and Federal Bars

David F. Herr

Partner, Maslon Edelman Borman & Brand, LLP

Minneapolis, Minnesota

Jeffrey W. Stempel

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§ 7.3 THE INTERROGATORY FORM

The document containing the interrogatories may well include more than just the questions. It is common for the document to include several parts: a preface, instructions, and definitions, followed by the questions themselves. Not all forms require the first three components, but there is usually good reason to include them. Some courts have set forth local rules regulating certain aspects of the proper interrogatory form.

§ 7.3.1 *The Preface*

The preface merely explains the request and the bases for that request. For example:

Plaintiff requests that the defendant answer the following interrogatories in writing and under oath pursuant to Rule 33 of the Rules of Civil Procedure and that the answers be served on the plaintiff within thirty (30) days after service of these interrogatories.

There is no requirement under the rules that this statement be included, but tradition and professional custom favor the use of some such preface. Some jurisdictions require that the first paragraph include certain information, such as the set number of interrogatories.

§ 7.3.2 *Instructions*

Instructions may be included in the introduction to inform the other party about certain conditions in answering the interrogatories. An instruction should clarify the nature and source of the information sought:

In answering these interrogatories, furnish all information, however obtained, including hearsay that is available to you and information known by or in possession of yourself, your agents and your attorneys, or appearing in your records.

Rule 33(a) requires a corporate or government organization to furnish information through its officers and agents. This instruction paraphrases that rule. There is case law and expert commentary requiring a party to disclose such information even if not listed in an instruction.¹

Another instruction can remind the recipient of the duty to conduct a reasonable investigation. Answers to interrogatories must contain all information possessed by the party.² This reminder may prod your opponent into greater diligence and may clarify your expectations.

An instruction may also explain what to do if the party does not have information:

§ 7.3

1. 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2177 (2d ed.1994 &

Supp.2001).

2. *Budget Rent-A-Car of Missouri, Inc. v. Hertz Corp.*, 55 F.R.D. 354, 357 (W.D.Mo.1972).

Sec. 7.3

THE INTERROGATORY FORM

If you cannot answer the following interrogatories in full after exercising due diligence to secure the full information to do so, state and answer to the extent possible, specifying your best answer to the remainder, stating whatever information you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information.

Again, there is case law requiring a party to include such a disclaimer in response to a question that cannot be fully answered when the instruction is omitted.³

Another instruction can suggest an alternative to full answers:

A question that seeks information contained in or substantially similar to or identification of any documents may be answered by providing a copy of such document for inspection and copying or by furnishing a copy of such document without a request for production.

Rule 33(c) expressly allows a responding party the option of providing "business records" in answer to an interrogatory. This instruction reminds the other side that it may provide other types of records and documents as an alternative or supplementary response. Neither this instruction nor this reminder permits the opposition to respond with a collection of incomprehensible documents. The Rule 33(c) option is not a device with which to evade the duty to supply information. Before the interrogated party must state specifically and identify precisely those documents that will provide the information sought by the interrogatories.⁴ Indeed, the rule explicitly states that the specification of documents must be detailed enough that the interrogating party can identify the records "as readily as can the party served." Here, in the room, here is the pile, open the drawers and see all the files and do you do.

Another instruction may require supplementary answers:

These interrogatories shall be deemed to be continuing until and during the course of trial. Information sought by these interrogatories and that you obtain after you serve your answers must be disclosed to the plaintiff by supplementary answers.

This statement does not automatically make such questions continuing unless the information must be supplemented pursuant to this rule, unless the other party agrees to provide such information. However, this statement may encourage the updating of answers even if it does not compel such updating.

You may want to add another instruction specifying the time period relevant to the questions:

3. See, e.g., *Harlem River Consumers Co-operative, Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459, 463 (S.D.N.Y.1974).

4. See, e.g., *Steelman v. United States Fidelity & Guaranty Co.*, 80 F.R.D. 139, 141 (W.D.Mo.1964); *Olmert v. Nelson*, 63 F.R.D. 369 (D.D.C.1973).

Unless otherwise indicated in an interrogatory, the questions shall refer to the time period from August 1, 2001, until August 15, 2001.

Additionally, an instruction can direct the party answering to provide some identifying information pursuant to Rule 33(a):

The person or persons who provide information in answer to the following interrogatories will each identify which answers have been provided and furnish his or her name, address, and title.

The practice in many areas ignores the separate identifications of all who provided information contained in an answer. Often, only the party named, an individual or one agent for a corporation, signs the answers. Sometimes the signature of the party's attorney appears on the answers. Rule 33(a) requires more specificity than that, however, and a requesting party needing such specificity can successfully enforce this rule.

Finally, other instructions may be added for other purposes, including the definition of certain terms.

§ 7.3.3 Definitions

Definitions may precede the interrogatories to define certain words or phrases used in the questions.⁵ They serve several purposes.

First, definitions specify the exact meaning of a word that may mean different things to different attorneys:

Describe: This word means to specify in detail and to particularize the content of the answer to the question and not just to state the reply in summary or outline fashion.

Definitions also identify a word or phrase that is peculiar to or commonly used throughout the interrogatories:

August 15 Contract: This term refers to the contract signed by both the plaintiff and the defendant on August 15, 2001, and attached as Exhibit A to the Complaint.

Third, definitions aid economy by shortening the questions, avoiding the need to repeat the meaning of a much-used term, such as:

The word document means any written, recorded, printed, imprinted, digitized, or graphic matter, whether produced, reproduced, or stored on papers, cards, tapes, belts, computer devices, or any other medium in your possession, custody, or control or known by you to exist; and it includes originals, all copies of originals, and all prior drafts.

Finally, definitions can mask the exact number of questions asked by defining one term to include several subtopics. For example:

The word identify or identity, when used in reference to a natural person means to state his or her full name, present business and home addresses, present employer and position with employer, the

⁵ *Harlem River Consumers Co-operative, Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459, 465 (S.D.N.Y.1974).

Sec. 7.4

DRAFTING INTERROGATORIES

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relationship, business or otherwise, between such person and the person answering the interrogatory.

This technique does have its moments. Excessive use of such definitions may result in a seemingly reasonable number of interrogatories being rendered excessively burdensome and thereby subject to a successful motion to strike all or a portion of the interrogatories. Some attorneys refrain from employing definitions, viewing their use as a substitute for well-drafted individual interrogatories.

§ 7.4 DRAFTING INTERROGATORIES

§ 7.4.1 *General Techniques*

Interrogatories should contain clear, precise, direct questions. They should neither be vague, nor too broad, nor overly inclusive. The questions should have the other attorney immediately thinking, "Yes, I understand what they want to know." Such thinking comes easier for some attorneys than others.

Interrogatory drafting must take into consideration the myriad responses different attorneys may make to seemingly straightforward, innocent questions. There are the responders, the ramblers, the self-servers, the quibblers, the evaders, and the objectors. Their responses to a simple interrogatory vary:

State the name of your spouse.

Responders: Roger S. Haydock.

Ramblers: My spouse retained his original name after our marriage. Roger means wise and courageous in Teutonic. Haydock means calling for medical help in English.

Self-servers: Roger Haydock, but his income consists of law-school welfare benefits, which are exempt from execution on a judgment against me in this case.

Quibblers: By *name*, do you mean first, middle, maiden, birth, baptismal, confirmation, sur-, or nick-?

Objectors: The answer is readily known to his parents and is privileged under the Sixth Commandment.

The adversary system allows attorneys to take advantage of situations involving questions that are not reasonable, clear indications of the information sought. Poorly drafted interrogatories inevitably produce poor responses on the principle that if you ask a foolish question, you should expect, and will receive, a foolish answer. Poorly drafted interrogatories may also allow your opponent to strike your interrogatories in their entirety¹. You can avoid this situation by playing the devil's advocate after drafting your interrogatories:

§ 7.4

¹ See *Boyd v. Troken*, 60 F.R.D. 625, 626 (N.D.Ill.1973).