No. 06-60023

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NORTH TEXAS SPECIALTY PHYSICIANS,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of a Final Order
of the Federal Trade Commission

Opinion of the Commission: Commissioner Thomas B. Leary
Initial Decision: Administrative Law Judge D. Michael Chappell

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BRIEF FOR THE RESPONDENT (CORRECTED)

JEFFREY SCHMIDT
Director
Bureau of Competition

MICHAEL J. BLOOM
Director of Litigation
Bureau of Competition

JONATHAN W. PLATT
Attorney
Northeast Regional Office
Federal Trade Commission

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

MICHELE ARINGTON
Attorney
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-3157

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5 Cir. R. 28.2.4, Respondent respectfully requests oral argument. This case presents important issues regarding application of the federal antitrust laws, and the Commission believes that oral argument would be highly beneficial to the Court.

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MISCELLANEOUS

ABBREVIATIONS

AMA Br.	Brief for the American Medical Association and the Texas Medical Association as *Amici Curiae*
CX	Complaint Counsel's Exhibit
ID	Initial Decision of the Administrative Law Judge
IDF	Initial Decision Finding of Fact
Op.	Opinion of the Commission, Dkt. No. 9312 (Nov. 29, 2005)
Pet. Br.	Brief of Petitioner
RX	Respondent's [Petitioner in this appeal] Exhibit
Tr.	Trial Transcript

STATEMENT OF JURISDICTION

The Court has jurisdiction to review the final decision and order of the Federal Trade Commission ("Commission" or "FTC") under Section 5(c) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(c).[1]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Commission properly concluded that NTSP has engaged in unlawful horizontal price fixing, where substantial evidence shows that NTSP has: orchestrated an agreement among its competing member physicians to defer to NTSP in contract negotiations with payors, established a consensus minimum price for its physicians' services, negotiated with payors on behalf of its physicians for this minimum price, refused to submit payor offers to its physicians unless they comply with NTSP's minimum price, and used actual and threatened terminations of its physicians' participation in health plans as leverage to force payors to agree to its minimum price; and failed to articulate any plausible, legitimate procompetitive justification for this conduct.

2. Whether the Commission acted within its remedial discretion in entering a cease and desist order that prohibits NTSP from engaging in the type of conduct the

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[1] Contrary to Petitioner's statement of jurisdiction, 15 U.S.C. § 21 does not apply to actions brought under Section 5 of the FTC Act.

Commission found unlawful, and requires that NTSP terminate the contracts with payors that it unlawfully negotiated on behalf of its physicians.

STATEMENT OF THE CASE

In September 2003, the Commission issued an administrative complaint alleging that North Texas Specialty Physicians ("NTSP"), acting as a combination of competing physicians, and in concert with its member physicians, has restrained competition among its physicians in violation of section 5 of the FTC Act, 15 U.S.C. § 45, by, among other things, implementing agreements among its physicians on prices for their services, negotiating price terms in payor contracts on behalf of its member physicians, and refusing to deal with payors except on collectively agreed-upon terms. The case was tried before an Administrative Law Judge ("ALJ"). In an Initial Decision issued on November 8, 2004, the ALJ found that NTSP's conduct amounts to unlawful horizontal price fixing and is unrelated to any procompetitive efficiencies, and recommended entry of a cease and desist order.

The Commission, reviewing *de novo*, affirmed, and issued its Opinion and Final Order on November 29, 2005. On January 10, 2006, NTSP filed this petition for review of the Commission's decision, pursuant to 15 U.S.C. § 45(c). On January 20, 2006, upon a motion for clarification by Complaint Counsel, the Commission issued an order modifying certain language in its Opinion in minor respects. Also on

January 20, 2006, upon motion by NTSP for a stay pending appeal, the Commission stayed certain provisions of the Final Order that require termination of existing payor contracts. On January 26, 2006, NTSP filed a motion in this Court for a stay of the remaining provisions of the Final Order, which the Court denied on March 16, 2006.

STATEMENT OF FACTS

A. NTSP's General Activities.

NTSP is an organization of independent physicians, predominantly specialists, who practice in and around Fort Worth, Texas. IDF 31, 37. NTSP is what is commonly known as an "independent practice association" ("IPA"), an association of independent physicians formed to contract with managed health care plans. IDF 3-4, 17. NTSP's participating physicians have distinct economic interests and are competitors within their common fields of practice. IDF 35-36. NTSP is funded and managed by its physicians, who pay a membership fee upon joining NTSP and elect representatives from among their ranks to serve on NTSP's eight-member Board of Directors ("Board"), which manages the organization. IDF 21, 23-24, 33, 38.

NTSP was founded in 1995. IDF 37. By 2001, it had approximately 650 participating physicians. CX 209 at 2 ("NTSP has become a 'gorilla' network with approximately 124 PCP's [primary care physicians] . . . and 528 specialists"). NTSP's doctors make up a substantial portion of practitioners in certain specialties

in the Fort Worth area. IDF 61. For example, in Tarrant County, NTSP represents approximately 80% of specialists in pulmonary disease, 70% of specialists in urology, and 60% of specialists in cardiovascular disease. Tr. 1299. In many specialties, NTSP's doctors account for the vast majority of admissions at Fort Worth's leading hospital. Tr. 1303-05.

In this litigation, NTSP seeks to portray itself primarily as an association that provides medical care under risk-sharing contracts and trains "teams" of physicians to work together more efficiently. *See* Pet. Br. 6-7, 37-38.[2] However, although NTSP originally focused on negotiating risk contracts, NTSP's predominant form of contracting has been through non-risk arrangements.[3] IDF 46-48; CX 83 at 3 (in 2001 Board decided that "risk business is a small part of the business" and NTSP's "focus should center on how to benefit members on fee-for-service contracts as well"); CX 380 at 3 ("Despite our past success with risk contracting, this contracting

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[2] Typically, under risk-sharing contracts (sometimes referred to as capitation agreements), the group of doctors is paid a fixed amount for each covered patient, irrespective of the quantity of services provided. Risk-sharing arrangements create incentives for physicians to cooperate to increase efficiency, because the group bears financial risk that the cost of services provided will exceed the predetermined payment. IDF 13-14.

[3] Non-risk contracts typically reimburse doctors on a "fee-for-service" basis. Reimbursement fees under these contracts are generally expressed as a percentage of the Medicare Resource Based Relative Value System ("RBRVS"). IDF 10-12, 15.

model is unlikely to be a viable mechanism for the foreseeable future."). At the time of trial, NTSP had approximately 20 non-risk contracts but only one risk contract, and half of its members did not even participate in its risk contract. IDF 49-51; Tr. 1830.[4]

This case involves only NTSP's actions with respect to non-risk contracts. In this context, NTSP does *not* provide medical services (as NTSP itself acknowledges, Pet. Br. 7), or assemble "teams" of physicians, or employ any of the utilization management programs that it employs under its risk contract. IDF 364-73, 378-79; Tr. 2550-54).[5] Rather, its activities in question are directed solely at coordinating the contractual arrangements between those who do provide services (the physicians) and those who pay for them. IDF 43-45.

B. NTSP's Price-Fixing Activities.

Although NTSP describes its activities regarding non-risk contracts as involving, primarily, the "messengering" of payor offers to its member physicians

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[4] NTSP contends that its non-risk physicians who do not participate in the risk contract have indicated an interest in being on the risk panel (Pet. Br. 8); but NTSP's executive director acknowledged that a number of its non-risk physicians have no interest in taking risk and consider it a great benefit of participation in NTSP that they can enjoy NTSP's higher rates without taking risk. Tr. 1881-84.

[5] Although NTSP asserts that it provides certain "ancillary" services under non-risk contracts (Pet. Br. 8), it receives no compensation under non-risk contracts for any such services. Tr. 1548.

(Pet. Br. 8), in reality, NTSP has acted not simply as a "messenger,"[6] but as a collective bargaining agent and a coordinating agency for the establishment of minimum prices for its physicians' services. *See* CX 159 at 2 ("Contracting issues addressed by NTSP this year included . . . maintaining minimal reimbursement standards for its physicians."). NTSP has employed various means to accomplish this.

As an initial step, member physicians agree to give NTSP the right of first negotiation with payors. IDF 64-69. When physicians join NTSP, they enter into a Physician Participation Agreement ("PPA") that grants NTSP the right to receive all payor offers and imposes on the physicians a duty to forward to NTSP all payor offers they receive. CX 275 at 24 (¶ 2.1); CX 173 at 1 (PPA "will give NTSP exclusive right to receive contracts on behalf of its member physicians"). Although NTSP's physicians may contract with health plans directly rather than through NTSP, the

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[6] NTSP thus seeks to characterize itself as a "messenger model" IPA, which is a term used in the FTC and Department of Justice *Statements of Antitrust Enforcement Policy in Health Care*, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153 (Aug. 28,1996) ("*Health Care Statements*"). The *Health Care Statements* explain that, under a messenger model, a physician network may use an agent to convey to providers contractual offers made by payors, or to convey to payors information obtained individually from providers about the prices the providers are willing to accept, as long as the agent does not negotiate on behalf of the providers, and each provider makes an independent, unilateral decision to accept or reject the contractual offers. *Id.* at 20,831 (Statement 9.C).

physicians agree that they will refrain from independently pursuing payor offers until NTSP notifies them that it is permanently discontinuing negotiations with the payor. CX 1196 at 66 (there is a "period of time" during which members "may not act upon an offer that is received from a payor if that payor has also presented NTSP with an offer").[7] In addition, in the course of specific contract negotiations, NTSP has expressly advised its members to refrain from responding to payors, while NTSP negotiates with the payor on their behalf. CX 332 at 2; CX 942 at 2; CX 1005 at 2.

NTSP sets minimum fees for its negotiations with payors by conducting an annual poll of its membership, asking the physicians to indicate the minimum reimbursement rates that they would like to receive in future fee-for-service contracts. IDF 83-100. NTSP's polling form sets forth specific price ranges for the physicians to select among, and explains that the purpose of the poll is "to establish Contracting Minimums" and that NTSP "utilizes these minimums when negotiating managed care contracts on behalf of its participants." CX 387. NTSP's Board then establishes a

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[7] Although NTSP argues that its physicians merely have a duty to notify it of offers from payors with whom NTSP already has a contract (Pet. Br. 46), the evidence demonstrates that its physicians' agreement to defer initially to NTSP for contract negotiations is not so limited. CX 1178 at 68 ("there were . . . time limits that the participating physicians generally agreed they would just wait and after that time limit expired, then they were free to negotiate on their own"); CX 174 at 2 ("NTSP has the exclusive right to negotiate contracts on behalf of the physician members").

minimum fee schedule based on the averages of the rates indicated by its physicians in the poll. IDF 93; Tr. 1640. Although NTSP claims in this litigation that it uses the poll to determine the extent to which its risk panel doctors will be interested in non-risk payor offers (Pet. Br. 10), its executive director admitted that NTSP does not, in fact, distinguish between the poll responses of risk and non-risk doctors. CX 1194 at 85.[8]

NTSP negotiates on its physicians' behalf to achieve the minimum fees set by the polling of its members, and takes various steps to enhance the effectiveness of its collective bargaining. For instance, NTSP forwards to its physicians only those payor offers that are at or above this minimum fee schedule. IDF 68; CX 1196 at 29-30, 62-63.[9] NTSP reports the results of its annual polls back to its members, telling them that these are the rates "the 'average NTSP physician' would find acceptable for the next twelve months." CX 393. NTSP regularly reminds its members of the poll-derived minimum rates, and on occasion has expressly urged its members to consider

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[8] NTSP's further assertion that it uses the poll to determine the rates it needs for its *risk* contracts (Pet. Br. 48), is contradicted by the extensive evidence, discussed below, showing that NTSP uses the poll results for negotiating *non-risk* contracts.

[9] In this respect, NTSP's actual practice is contrary to the provisions of the PPA, which states that NTSP must deliver to its physicians the fee schedule and other economic provisions of any non-risk payor offer it receives. IDF 68.

the poll results in their evaluation of a payor's offer. CX 1097 at 2; CX 1042; CX 565.[10]

In addition, to solidify its power as a bargaining agent on behalf of its members and minimize the risk that payors will by-pass NTSP by negotiating directly with its physicians, NTSP uses powers of attorney obtained from members that broadly confer upon NTSP the authority to negotiate non-risk contracts – including price terms – on their behalf. IDF 76-82; CX 332; CX 548; CX 1005; CX 1062.[11] NTSP has instructed its physicians to inform payors that NTSP is their contracting agent and to inform payors that they should contact NTSP with respect to any contracting activity. CX 548; CX 1066. And when these efforts have not succeeded, NTSP has used its agency authority to terminate, or has threatened to terminate, its

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[10] NTSP's efforts to discourage its members' acceptance of rates below its minimum fee schedule does not necessarily end once NTSP decides to discontinue negotiations with a payor. For example, when Blue Cross/Blue Shield ("BCBS") refused to negotiate rates with NTSP in 2001, NTSP informed its members that it deemed BCBS's offered rate to be "below market," and that, while BCBS was seeking direct contracts with physicians, "NTSP does not recommend participation." CX 704.

[11] Language in certain power of attorney forms authorizing NTSP to act on the physician's behalf "in any lawful way" has not prevented NTSP from negotiating prices on behalf of its members, as NTSP claims (Pet. Br. 57). *See*, *e.g.*, CX 1066 at 2 (in soliciting powers of attorney, NTSP informed members that it would pursue a contract with United "that meets or exceeds the fee schedule minimums set by the NTSP membership"); *see* note 33, *infra*.

members' participation in a health plan to secure the payor's agreement to its minimum fee demands. IDF 147-54, 232-33, 237-46, 289-97.

For example, in 2001 NTSP informed its physicians that it would initiate contract negotiations with United Healthcare ("United"), based on its perception that the rates they were then receiving from United through another IPA (Health Texas Provider Network, or "HTPN") were "below market." IDF 121-25; CX 209 at 3. Although United saw no need to contract directly with NTSP because it already had contracts with approximately two-thirds of NTSP's physicians directly or through other IPAs, it offered NTSP a contract with its then-standard reimbursement rates in the Fort Worth area. IDF 126; Tr. 289-90, 297-98. NTSP rejected the offer because it was below NTSP's minimum fee schedule. IDF 127-29; CX 1034. When United still would not agree to NTSP's fee demands, NTSP sought and obtained over 100 powers of attorney from its members designating NTSP as their contracting agent with United. IDF 160-69; CX 1062; CX 1066. To increase its leverage in these negotiations, NTSP also terminated its physicians' participation in the United health plan through HTPN,[12] and threatened United, both directly and through

[12] Although NTSP claims that this termination was unrelated to its dissatisfaction in negotiations with United (Pet. Br. 55), NTSP's documents show otherwise. *See* CX 1042 (reporting that NTSP and United "are far apart in agreeing to a market reimbursement fee schedule. . . . Therefore, the NTSP Board has authorized termination [of] the United Health Care contract."). And contrary to

communications with United customers, with mass network disruption if it did not accede to NTSP's fee demands. IDF 130-54; Tr. 443-44.[13]

When United – faced with the termination of the NTSP doctors' participation through HTPN and under pressure from customers to preserve its network – sought to contract with NTSP physicians directly, it was repeatedly rebuffed and told that NTSP was negotiating on the physicians' behalf. IDF 171-73; Tr. 454-55, 459-60. United warned NTSP that its actions raised serious antitrust concerns, but NTSP brushed off these concerns. CX 1067.[14] In the end, United gave in and offered higher reimbursement rates, and the parties agreed to a contract. IDF 183-90; Tr. 345-48.

NTSP used similar tactics in its negotiation of a non-risk contract with Aetna in 2000. At that time, many of NTSP's members provided care to Aetna patients in

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NTSP's claim that it terminated its relationship with HTPN, not United (Pet. Br. 56), United was the only plan affected by the termination – NTSP's physicians continued toarticipate in other health plans through NTSP's arrangement with HTPN. CX 1081.

[13] *See* CX 1042 (NTSP urges members – as "one last strategy" before it terminates the United contract – to contact the City of Fort Worth, a new United customer, to complain about United's low rates and warn of potential network disruption).

[14] NTSP denied to United that it solicited powers of attorney in connection with fee negotiations (CX 1081), but this representation was patently untrue. As NTSP specified when it asked its members to execute powers of attorney authorizing NTSP to act on their behalf with regard to "all contracting activity" with United, the goal of these negotiations was to obtain a contract "that meets or exceeds the fee schedule minimums set by the NTSP membership." CX 1066.

the Fort Worth area pursuant to contracts with another IPA (Medical Select Management, or "MSM"). IDF 267. After some initial back and forth, NTSP and Aetna agreed upon reimbursement rates for Aetna's PPO product, but remained far apart on rates for a non-risk HMO contract. IDF 289; CX 558 at 2. NTSP informed Aetna that it was terminating its members' participation in Aetna through the MSM contract (IDF 297), and that it had approximately 180 powers of attorney from its members designating NTSP as the physicians' agent for any contract negotiations with Aetna. IDF 302-07; CX 558 at 2; Tr. 1029, 1048-50.[15] When Aetna subsequently attempted to contract directly with NTSP's physicians, the physicians confirmed that NTSP was their bargaining agent and refused to negotiate with Aetna. Tr. 1042-44, 1067-68.[16] Aetna thus concluded that, if it wanted to keep NTSP doctors

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[15] Aetna understood that these powers of attorney included the authorization to negotiate price, and immediately voiced its concerns to NTSP that use of the powers of attorney potentially violated federal and state antitrust laws. Tr. 1050-52. NTSP did not disabuse Aetna of the notion that the powers of attorney applied to price negotiations, but neither did it address Aetna's antitrust concerns. Tr. 1059-60.

[16] NTSP's claim that discussions of an Aetna contract were related to its role as class representative in litigation against MSM (Pet. Br. 58) is contravened by its contemporaneous documents. *See* RX 335 at 1 ("It is important to understand that this lawsuit is in no way directed towards Aetna as we believe Aetna is simply a third party regarding this matter . . . . "). NTSP's attempt to justify its use of powers of attorney by claiming that Aetna itself required them is similarly without merit, because Aetna's representative testified that all Aetna required was a provision to guarantee that patients would continue to receive care from participating physicians

in its health plan, it had little choice but to contract with NTSP. Tr. 1059.[17]

As a result, Aetna increased its offer to NTSP for HMO rates. CX 561. This offer, however, was still below NTSP's minimum rates, so NTSP decided to re-poll its members "on the acceptability of the present Aetna offering," while reminding them of the amount of the "minimum standard previously shared by the membership on an HMO product." CX 565; IDF 308-16. Shortly thereafter, NTSP informed Aetna that its membership was adhering to its existing minimum rates. CX 573.[18] Aetna ultimately capitulated and agreed to NTSP's price terms. IDF 317-30.

NTSP also used the threat of contract terminations as a bargaining tool in dealing with Cigna Healthcare ("Cigna"). In 1999, NTSP and Cigna entered into a non-risk contract that applied to "NTSP specialists." IDF 212-17. The following year, NTSP demanded that Cigna allow its primary care physician members to "opt in" to this contract. IDF 238.[19] However, Cigna already had most of these primary

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in case the IPA went out of business. Tr. 1054-55.

[17] Aetna's representative testified that the loss of NTSP's physicians from its network would have "a very deleterious affect [sic] on our ability to sell business in Tarrant County." Tr. 1091.

[18] NTSP reminded its members that "NTSP Continues To Act As Your Agent With Aetna Direct" and instructed them to "refer all contacts and materials received from . . . Aetna . . . to NTSP directly." CX 573.

[19] NTSP's documents belie its claim (Pet. Br. 54) that its primary care physicians had a "contractual right" to participate in the specialist contract, because

care physicians in its network at lower rates than under the NTSP contract, and determined that allowing NTSP's primary care physicians to opt in to the contract would increase costs without any corresponding benefit. IDF 239; Tr. 718-19, 733-34. Nonetheless, to maintain a good relationship with NTSP, Cigna offered its primary care physicians tiered reimbursement rates, in which they would initially receive NTSP's specialist rates, and over time those rates would return to a lower "market level." IDF 240; Tr. 735-36. NTSP rejected this offer on behalf of its primary care physicians, and threatened termination of the contract, if Cigna did not agree to its fee demands. IDF 241-44; CX 802.[20] NTSP's gambit was successful. To avoid losing the participation of NTSP's specialists, Cigna agreed to a contract that met NTSP's demands. IDF 245-46; Tr. 749-51.[21]

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they show that NTSP suggested that Cigna include them in the contract simply as a "good faith gesture" pending resolution of another issue. IDF 238.

[20] NTSP's letter to Cigna made clear that this threat of termination was tied to the dispute regarding primary care physicians and not, as NTSP suggests (Pet. Br. 53-54) other contractual issues. CX 802. NTSP did, however, use another contractual dispute (regarding inclusion of cardiologists, who were carved out of the initial contract, IDF 222) as further leverage to force Cigna to accede to its fee demands for primary care physicians. Tr. 731-32.

[21] Cigna's representative testified that NTSP's core group of physicians – the specialists in Fort Worth – were critical to Cigna's network. Tr. 719-20.

NTSP's scattershot discussion of these incidents (Pet. Br. 52-59) misses a fundamental point: the Commission found that in each of these instances NTSP used various means together to enhance the joint bargaining power of its physicians and command higher prices. NTSP's own leaders have acknowledged that their success in these contract negotiations was directly attributable to NTSP's coordination of its members' responses to the payors. For example, in mid-2001, Dr. William Vance (NTSP Board member and president from 1996 to 2001, IDF 29) explained:

> United Health Care came to town six months ago and offered a straight, 110% of Medicare contract. . . . Through the efforts of NTSP lobbying the City and terming [terminating] a group contract with Health Texas, United blinked. . . . This United negotiation is a template for other efforts that will need to occur in the near future and would best be coordinated by NTSP.
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> NTSP has been successful in negotiating decent rates from Aetna but only after threatening to term [terminate] the entire NTSP network last year. As I have argued for a number of years, physicians divided will be cannon fodder in this business. . . . Without NTSP's influence this last two years, our market level of reimbursement would be significantly below its present level.

CX 256; CX 1199 at 310-11; CX 351 (NTSP "has provided consistent premium fee-for-service reimbursement to members when compared with any other contracting source").

C. The Proceedings Below.

As noted above, the administrative complaint alleged that NTSP, acting as a combination of competing physicians, has violated Section 5 of the FTC Act by, among other things, implementing agreements among its physicians on prices for their services, negotiating price terms in payor contracts on behalf of its member physicians, and refusing to deal with payors except on collectively agreed-upon terms. Complaint ¶ 12. The complaint did not challenge NTSP's practices relating to its risk contract, nor did it challenge any effort by NTSP to apply utilization or medical management programs to its non-risk business – *i.e.*, its "spillover" model. Instead, the complaint challenged NTSP's collective bargaining activities for non-risk contracts, which, taken together, improperly interfere with individual price-setting and are unrelated to any efficiency-enhancing integration. *Id*. at ¶¶ 16-24.

The ALJ concluded that NTSP's challenged conduct amounts to an unlawful horizontal price-fixing agreement, and the Commission affirmed. The Commission found, as an initial matter, that it has jurisdiction in this case under the FTC Act, 15 U.S.C. §§ 44 and 45, because NTSP carries on business for the profit of its physician members, and its conduct is "in or affecting" interstate commerce. Op. 7-8. The Commission also found that the conduct at issue is properly construed as concerted action – not mere unilateral action – for purposes of the antitrust laws, because NTSP

is controlled by its physicians and serves as a common agent for its physicians in negotiating with payors. *Id*. at 15-17.

Turning to the central question, the Commission concluded that NTSP's non-risk contracting activities amount to horizontal price fixing. *Id*. at 17-27, 41. The Commission found, among other things, that NTSP's practices harm competition because they enable competing physicians to communicate to each other their intentions about future prices, are likely to increase prices overall, and hinder the ability of payors to assemble a marketable physician network in the Fort Worth area without bargaining with NTSP. The Commission organized its discussion by general categories of activity, but made it clear that its ultimate conclusions were predicated on the likely effects of NTSP's actions taken together. *Id*. at 17, 41.[22]

The Commission found that NTSP's conduct challenged here is substantially similar to conduct that the Supreme Court condemned as *per se* unlawful price fixing in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Op. 10. Nonetheless, the Commission declined to apply the *per se* rule here, explaining that it wants to encourage providers to engage in efficiency-enhancing collaborative

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[22] Contrary to NTSP's contention (Pet. Br. 13), the Commission did not condemn NTSP's conduct simply because it failed to messenger all payor offers to its physicians, but rather because the totality of NTSP's non-risk contracting activities amounted to price fixing. *See* Order Modifying Opinion of the Commission (Jan. 20, 2006), at 1.

activity and to avoid any impression that proffered justifications for joint conduct will not be considered. *Id*. at 11-12. Instead, the Commission analyzed the challenged conduct under a rule of reason analysis, following the guidance provided by *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), as elaborated in *Polygram Holding, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (FTC 2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005), concerning how such an analysis is to be conducted. Op. 9-14, 26-32. In accordance with this analysis, the Commission held that NTSP's conduct is likely, absent procompetitive justifications, to suppress competition, because it confers on competitors a collective power over price and fits within the classic definition of price fixing. *Id*. at 26-28.

The Commission next considered whether NTSP had advanced a plausible, procompetitive justification for its conduct that would warrant a more searching examination of competitive effects. After careful analysis of each of NTSP's proffered justifications, the Commission rejected them, because NTSP failed to show any logical connection between the challenged conduct and its asserted efficiencies. *Id.* at 28-30. The Commission found, moreover, that NTSP's proffered justifications were contradicted by the record. *Id*. at 20, 24, 29-32. Because NTSP failed to articulate any plausible, legitimate justification for its inherently suspect conduct, the Commission concluded that, under the framework of *California Dental* and

PolyGram, NTSP's conduct can be condemned without further analysis of competitive effects, such as proof of a relevant market and market power. Op. 35-37.

Having found that NTSP's conduct violates Section 5 of the FTC Act, the Commission entered a cease and desist order that prohibits NTSP from engaging in the type of conduct found to be unlawful. So that NTSP does not continue to benefit from its unlawfully negotiated contracts, the order requires NTSP to terminate its existing non-risk contracts upon a payor request to terminate or at the earliest termination or renewal date of the contract. Op. 37-40.

SUMMARY OF ARGUMENT

NTSP's arguments in this appeal all spring from a single erroneous proposition: that this case involves nothing more than a single entity's internal decision whether or not to participate in a payor offer. NTSP ignores the claims charged in the complaint, the Commission's actual findings, and abundant record evidence to the contrary – all of which show that what this case is really about is the use by independent competing physicians of a common agent (NTSP) to establish a consensus price for their services and to bargain collectively with payors to secure that agreed-upon price.

The Commission properly found that NTSP's activities at issue amount to concerted action, not mere unilateral conduct, because NTSP is controlled by its

competing physician members and acts as agent for its members, obtaining its physicians' agreement to refrain from individual negotiations with payors so that NTSP can bargain collectively on their behalf. This conclusion is amply supported by the relevant case law and the factual record. The Commission did not, as NTSP contends, hold that every action by NTSP is necessarily concerted action, but instead drew careful distinctions between unilateral and concerted action. (Part I.B.)

The Commission properly assessed NTSP's course of conduct under a rule of reason analysis that carefully adhered to the Supreme Court's cases, which emphasize flexibility in the analysis of horizontal restraints and instruct that conduct may be outside a strict *per se* category yet still be condemned without a full-blown rule of reason analysis. (Part I.C.)

The Commission properly concluded that NTSP's course of conduct is "inherently suspect" in that it is likely, absent offsetting efficiencies, to harm competition. The Commission's conclusions are firmly grounded in judicial experience and economic learning, which establish that NTSP's activities – setting a consensus price, obtaining its members' agreement to defer to NTSP for negotiations with payors, and collectively refusing to deal with payors unless they agree to the consensus price – harm competition, because they restrain individual price-setting and are likely to result in higher prices. The Commission's conclusions

are supported by substantial evidence showing instances in which NTSP's conduct actually forced payors to pay higher fees to NTSP's physicians than they would have paid absent NTSP's tactics. (Part I.D.)

Although the Commission found that such conduct has routinely been condemned as *per se* unlawful price fixing, it carefully considered NTSP's proffered "procompetitive" justifications for its conduct, and properly found them lacking because NTSP failed to show any logical connection between its activities interfering with individual price-setting and the claimed efficiencies. In addition, the Commission reasonably concluded that, absent some demonstration of a nexus between the challenged conduct and the purported spillover efficiencies, further discovery regarding the performance of NTSP's physicians would not have affected the outcome of this case. (Parts I.E and F.)

The Commission also properly rejected NTSP's challenge to its jurisdiction, because NTSP's price-fixing activities, if successful, could be expected to affect interstate commerce. (Part I.G.)

Having found that NTSP violated Section 5, the Commission issued a cease and desist order that prohibits NTSP from engaging in the types of activities that the Commission concluded were unlawful, while allowing NTSP to pursue arrangements that may produce efficiencies without significant risk of anticompetitive

consequences. Contrary to NTSP's contention, the order does not prohibit NTSP from making unilateral decisions whether or not to deal with payors, interfere with NTSP's right to free speech, or threaten to disrupt any delivery of health care. The Commission's order is well within its discretion. (Part II.)

ARGUMENT

I. THE COMMISSION PROPERLY FOUND A VIOLATION OF SECTION 5.

A. Standard Of Review.

The "findings of the Commission as to the facts, if supported by the evidence shall be conclusive." 15 U.S.C. § 45(c).[23] Reviewing courts may not "make [their] own appraisal of the [evidence], picking and choosing . . . among uncertain and conflicting inferences." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); *accord Gibson v. FTC*, 682 F.2d 554, 568-69 (5th Cir. 1982); *Colonial Stores Inc. v. FTC*, 450 F.3d 733, 739-40 (5th Cir. 1971) ("Findings of fact cannot and will not be set aside if the evidence in the record reasonably supports the administrative conclusion, even though suggested alternative conclusions may be equally or even more reasonable and persuasive."). Rather, under the "substantial evidence"

[23] Contrary to NTSP's statement of the standard of review, the Administrative Procedure Act has no application here. Rather, review of the Commission's Final Order is solely pursuant to Section 5 of the FTC Act, 15 U.S.C. 45(c).

standard, "the court must accept the Commission's findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Indiana Federation of Dentists*, 476 U.S. at 454 (citation omitted).[24] This deferential standard also applies to the Commission's findings regarding a practice's economic effects. *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir. 1965); *Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1385-86 (7th Cir. 1986).

Review of the Commission's legal analysis and conclusions is *de novo*, "although even in considering such issues the courts are to give some deference to the Commission's informed judgment." *Indiana Federation of Dentists*, 476 U.S. at 454; *accord Colonial Stores*, 450 F.2d 733, 740 n.14 ("even when the Commission's findings are framed in terms of legal conclusions, their presumptive validity is considerable").

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[24] NTSP erroneously suggests (Pet. Br. 2) that the Commission's findings of fact are not entitled to deference if they overturn factual findings of the ALJ. *See Alterman Foods, Inc. v. FTC*, 497 F.2d 993, 998-99 (5th Cir. 1974) ("the Commission . . . bears the ultimate responsibility of decision and may, therefore, reach results contrary to those of its hearing officer"). In any event, the Commission's factual findings are consistent with and supported by the ALJ's factual findings – indeed, the Commission expressly adopted the ALJ's findings of fact. Op. 2-3.

B. The Commission Correctly Found That The Challenged Conduct Is Concerted Action.

The Commission held that the conduct at issue in this case amounts to concerted action, based on settled antitrust law that an action nominally taken by a single entity is construed as the product of agreement for purposes of the antitrust laws when the entity is controlled by a group of competitors and serves as agent for its members. Op. 15-17. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (these types of associations "have traditionally been the objects of antitrust scrutiny" because their members "often have economic incentives to restrain competition").[25] The Commission recognized that not every act of such an organization will be deemed unlawful collusion:

> Associations can, for example negotiate prices for office facilities or wages for employees; agents can establish prices for services that the association itself provides for members or non-members. These are matters of no antitrust significance, because there is no conceivable

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[25] A leading antitrust treatise explains: "Characteristically, these associations are not separately organized to earn a profit; however, a principal purpose of their existence is to further the particular industry, thus increasing the profits of individual members. Also characteristically, the effective decision makers are individual profit-making firms or individuals. For example, the association's voting membership may be composed primarily if not exclusively by producers, and important decisions are made by vote of the membership." As a consequence,"[t]rade associations are routinely treated as continuing conspiracies or 'combinations' of their members. . . ." Philip E. Areeda & Herbert Hovenkamp, VII *Antitrust Law* ¶ 1477 at 311 (2d ed. 2003).

> antitrust impact. However, if the association negotiates prices for services that the *members* will provide, the organization's conduct is considered to be that of a combination or conspiracy of its members, not unilateral action.

Op. 15 (emphasis in original). *See Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1202-03 (10th Cir. 2006) (holding that trade association's conduct was concerted action, because it did not merely involve the association's day-to-day operations, but instead was "a decision from which every other member-trader stood to benefit"). In this case, the conduct that the Commission challenges unquestionably falls into the latter category.

As an initial matter, it is undisputed that NTSP is controlled by its member physicians and that many of these physicians compete with each other. IDF 33, 35-36.[26] NTSP's members elect physician representatives to serve on NTSP's Board, which manages the organization and is responsible, among other things, for setting its minimum contract prices and directing its negotiations with payors. IDF 23-24, 38. Many courts, this Court included, have found that such evidence of physician control suffices to bring a health care entity's activities within the reach of Section 1 of the Sherman Act. *See St. Bernard General Hosp. v. Hospital Service Ass'n of*

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[26] NTSP also does not dispute the Commission's factual findings that, notwithstanding its incorporation under Texas law as a "memberless" non-profit organization, NTSP operates for the pecuniary benefit of its participating physicians, who are considered "members" of NTSP. Op. 7-8. *See* IDF 20.

New Orleans, Inc., 712 F.2d 978, 985, 987 (5th Cir. 1983) (finding that, where participating hospitals controlled a health plan's board of directors, its establishment of pricing schedules amounted to a "concerted combination"); *Hahn v. Oregon Physicians' Service*, 868 F.2d 1022, 1028-30 (9th Cir. 1989) (holding that plaintiffs' claims of concerted action survived summary judgment, where evidence showed that physicians formed a majority of the defendant health plan's board of directors); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 479-81 (4th Cir. 1980) (finding concerted action because the defendant health plan was controlled by its participating physicians and was properly viewed as an agent of its physicians).

But the Commission's finding of concerted action here does not rest on the mere fact of physician control of NTSP. The Commission also found, based on substantial evidence, that NTSP has functioned as a common agent for its competing physicians in negotiating non-risk contracts, employing a physician membership agreement (the PPA) that gives NTSP the right of first negotiation with payors, and obtaining powers of attorney that grant NTSP broad authority to negotiate payor contracts (including price terms) on the physicians' behalf.[27] Op. 17, 20-22. NTSP

[27] Some courts have found the requisite concerted action in the members' initial agreement to abide by the association's rules. *See Silver v. New York Stock Exchange*, 373 U.S. 341, 349 n.5 (1963); *United States v. Realty Multi-List, Inc.*, 629

recognizes that its physicians' cooperation in refraining from individual negotiations with payors serves to strengthen the association's collective bargaining power. As NTSP's president emphasized in an "Open Letter To The Membership": "The strength of [NTSP] is the degree to which the . . . individual NTSP members cooperate to a common goal." He warned that this "cooperation is always at risk due to the lack of strong economic links and differences in practice," and that the "[s]hort-term advantage and perceived best interest" of independent practices "weaken[] the strength that our numbers provide." CX 351. Time and time again, NTSP reiterated the message to its members: hold off on negotiating independently with payors; let NTSP take the lead, and together we can achieve higher fees. IDF 70; CX 310 ("discussions are ongoing with . . . major payors which should lead to contracts that are more favorable than we would be able to achieve individually or through other contracting sources"). And, as payors found out when they tried to contract directly with NTSP's physicians only to be told they had to negotiate with NTSP, the physicians agreed to cooperate. Tr. 454-55, 459-60, 1042-44, 1067-68. *See* Statement of Facts, *supra*, at pp. 5-15.

F.2d 1351, 1361 n.20 (5th Cir. 1980). Under this approach, NTSP's physicians' initial agreement at the outset to abide by the PPA shows an agreement to defer to NTSP's collective bargaining.

This evidence of concerted action squarely contradicts NTSP's repeated assertion that this case involves nothing more than its unilateral, internal decisions whether itself to participate in payor contracts. Moreover, it is emphatically not the case, as NTSP contends (Pet. Br. 19-20), that there can be no concerted action absent a finding of direct agreement among NTSP's physicians.[28] As shown above, courts have repeatedly found that the activities of trade associations – including physician associations – amount to concerted action, without finding direct agreement among members. Indeed, in *Maricopa*, the Supreme Court did not question that the conduct of physician associations in setting maximum rates amounted to concerted action, and certainly did not require that participating physicians directly agree among themselves. *Maricopa*, 457 U.S. 332. *See also Capital Imaging Assocs., P.C., v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 544-45 (2nd Cir. 1993) (holding that evidence that IPA's actions designed to insulate member physicians from increased competition sufficed to show collective action); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994) (holding that "when [an association of competing dealers] takes action it has engaged in concerted action so

[28] NTSP erroneously implies that the ALJ's analysis of concerted action supports it. On the contrary, the ALJ found that neither *Maricopa* nor the other relevant cases require evidence of direct agreement among an association's members, and that NTSP's conduct here amounts to collective action. ID 67-71.

as to trigger potential section 1 liability").[29] The Commission's analysis is amply supported by these cases.

There is likewise no merit to NTSP's argument that the Commission's decision contravenes *United States v. Colgate*, 250 U.S. 300 (1919), and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), which address the right of a single entity to refuse to deal. *See* Pet. Br. 20-22. *Colgate* and *Trinko* apply only to firms acting unilaterally, and thus are not relevant to the circumstances here.[30] *See St. Bernard General Hosp.*, 712 F.2d at 987 (holding that the *Colgate* doctrine was inapplicable because a health plan whose board was controlled by separate hospitals was not a "single trader"). Furthermore, contrary to NTSP's contention (Pet. Br. 22, 24), the Commission's finding of concerted action is not inconsistent with *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758 (5th Cir. 2002), and *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988). Those cases stand for the uncontroversial principle that the

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[29] NTSP's reliance on *Alvord-Polk* (Pet. Br. 22-23) is entirely misplaced because the court there merely questioned whether statements made by an association's officer could properly be characterized as conduct of the association acting in its group capacity. 37 F.3d at 1007-10.

[30] NTSP's example of members of a musical group or church agreeing among themselves not to involve the group in a contract (Pet. Br. 34) has no application here because – unlike NTSP's physicians – members of those groups are not competitors with independent economic interests.

fact that "[a] trade association by its nature involves collective action by competitors" is not enough – there must also be an unreasonable restraint of trade. *Viazis*, 314 F.3d at 764; *Consolidated Metal Prods.*, 846 F.2d at 293-94. The Commission made it clear that it agrees with this proposition and does not consider every action of a trade association to be an unlawful conspiracy. Op. 15. NTSP's effort to pigeonhole the *entirety* of its conduct as "internal governance decisions" wholly ignores the careful distinction the Commission drew between an association's unilateral and collective actions.[31]

NTSP's final argument – that there can be no finding of collective action because its board members do not substantially compete with one another (Pet. Br. 26-27) – is also without merit. As one court has explained, "[t]he proper inquiry is not whether individual board members *themselves* were in actual competition;" rather, "the proper inquiry is whether practitioners sharing substantially similar economic interests [in restraining trade] collectively exercised control of" the association. *Hahn*, 868 F.2d at 1029 (emphasis in original). In this case, NTSP's competing physicians *do* exercise control over NTSP, because they elect NTSP's Board.

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[31] NTSP also argues that its decisions regarding whether to participate in a payor offer are not binding on its physicians (Pet. Br. 25); but, as we explain in Part I.D, *infra*, NTSP's challenged conduct harms competition regardless of whether it was able to bind its physicians.

Moreover, notwithstanding their differing specialty practices, NTSP's Board members (along with the general membership) share an interest in augmenting the association's collective bargaining power in negotiations with payors.

C. The Commission Applied The Correct Legal Standards In Condemning NTSP's Conduct As An Unreasonable Restraint Of Trade.

The Commission concluded that NTSP's conduct at issue here amounts to unlawful horizontal price fixing in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, applying the standards of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See generally FTC v. Cement Institute*, 333 U.S. 683, 689-93 (1948) (Sherman Act violations redressed as violations of Section 5). The Commission adhered closely to *California Dental* and other Supreme Court decisions holding that Section 1 requires a flexible inquiry into competitive effects – an analysis upon which the Commission recently elaborated in *PolyGram*.

For over two decades, the Supreme Court has steadily moved away from the view that there is a sharp dichotomy between horizontal restraints that are *per se* illegal and those that warrant rule of reason inquiry. For instance, in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) ("*NCAA*"), the Court declined to apply a *per se* rule to the NCAA's restrictions on televising college football games, *id*. at 100-03, but nonetheless did

not require empirical proof to find that the restraints were unlawful. The Court flatly rejected the NCAA's argument that its conduct could not be condemned under the rule of reason because it lacked market power, holding that, "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'" *Id.* at 109 (quoting *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978)). Similarly, in *Indiana Federation of Dentists*, *supra*, although the Court declined to apply the *per se* rule to a dental association's policy of withholding x-rays from insurers, 476 U.S. at 458-59, it did not require any elaborate market analysis to conclude that the association's practices were unlawful. "Absent some countervailing procompetitive virtue," the Court stated, "such an agreement limiting consumer choice by impeding the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason." *Id*. at 460 (citations and internal quotation marks omitted).

In *California Dental*, the Court explicitly acknowledged that its prior cases support an abbreviated or "quick look" rule of reason analysis. 526 U.S. at 770-71. In considering a dental association's ethical rules restricting advertising, the Court recognized that restraints on advertising normally harm competition and consumers, but noted that the association had advanced a number of reasons why normal

economic conclusions about the impact of advertising restrictions were plausibly inapplicable in a market for professional services "characterized by striking disparities between the information available to the professional and the patient," which "magnif[y] the danger to competition associated with misleading advertising." *Id*. at 771-72. The Court concluded that, under these circumstances, and given the association's identification of plausible procompetitive justifications (preventing false and misleading advertising), obvious anticompetitive effects had not been shown. *Id.* at 774-78.

NTSP incorrectly asserts that *California Dental* requires full-blown rule of reason analysis (including proof of a relevant market, a showing of market power, and proof of actual anticompetitive effect) in any case in which a defendant asserts plausible procompetitive justifications. Pet. Br. 28. But even if NTSP had advanced a justification that had any logical connection to the restraints at issue – and, as discussed below, it has not – this argument would be unavailing. The Supreme Court made clear that, even when plausible justifications are advanced, the "fullest" market analysis is not necessarily required. *California Dental*, 526 U.S. at 779. "The truth," said the Court, "is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear." *Id.* The Court emphasized that rule of reason analysis should be flexible:

> What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Id. at 781.

This Court has recognized that *California Dental* does not require a full market analysis, but instead "an analysis is sufficient if it openly addresses the 'circumstances, details, and logic of a restraint' in reaching its conclusion." *Viazis*, 314 F.3d at 766 (quoting *California Dental*).[32] Similarly, the D.C. Circuit upheld the Commission's application of this analytic framework in *PolyGram*, to condemn as "inherently suspect" an agreement by joint venturers to forego price discounting and advertising of products outside the joint venture, without the need to prove market power or actual effects. The court of appeals recognized that the Commission's analysis "follows from the case law":

> If, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent anticipated harm.

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[32] Thus, contrary to NTSP's contention (Pet. Br. 33), *Viazis* did not interpret *California Dental* as requiring proof of a "precise market" or actual anticompetitive effect.

PolyGram, 416 F. 3d at 36 (Ginsburg, J.) (citing *NCAA*, *Indiana Federation of Dentists*, and *California Dental*). The court affirmed the Commission's decision, because it agreed that the restraints at issue "in all likelihood had a deleterious effect upon consumers," and the defendants' asserted justification was not legally cognizable. *Id*. at 37-38.

In the present case, the Commission likewise adhered faithfully to the teachings of *California Dental* and other Supreme Court precedent, in concluding that NTSP's non-risk contracting activities impair competition without any offsetting competitive justification. Although NTSP objects to the Commission's "inherently suspect" analysis as "a standard of its own making" (Pet. Br. 28), it fails to recognize that this term is simply a shorthand means of expressing a principle that the Supreme Court has repeatedly recognized – that practices that "facially appear[] to be one[s] that would always or almost always tend to restrict competition and decrease output," or practices "the great likelihood of anticompetitive effects [of which] can easily be ascertained" are subject to condemnation without elaborate market analysis or a showing of actual effects. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979); *California Dental*, 526 U.S. at 770. *See also PolyGram*, 416 F.3d at 37 ("the rebuttable presumption of illegality arises . . . from

the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare").

D. The Commission Correctly Held That NTSP's Conduct Is Likely To Harm Competition.

The Commission concluded that NTSP's activities at issue add up to a serious restraint on independent price-setting by competitors. The Commission did not condemn each particular activity in itself, but instead found that NTSP used these activities to effect unlawful price fixing. Op. 17-27, 41. In this appeal, NTSP adamantly refuses to confront the Commission's theory and conclusion, and instead seeks to defend its activities piecemeal. However, settled case law and the evidence in this case amply support the Commission's conclusion that, viewed as a whole, NTSP's challenged practices fall within a category of restraints likely, absent an efficiency justification, to have substantial anticompetitive effects.

NTSP does not dispute that the collective negotiation of non-risk contract rates on behalf of competing physicians constitutes unlawful price fixing. Indeed, Dr. Vance, NTSP's former president, admitted as much. Tr. 595 ("All of us are quite aware that PPO contracting and nonrisk contracting is done on a basis of noneconomic issues and that rates – you don't negotiate rates. It's basically illegal."). Although NTSP denies, as a factual matter, that it has negotiated non-risk contract

rates on behalf of its physicians, substantial evidence shows otherwise. *See* pp. 10-15, *supra*.[33] Like the conduct condemned as *per se* unlawful in *Maricopa*, such collective bargaining joins together competitors who would otherwise make independent decisions on price and thus "fit[s] squarely into the horizontal price-fixing mold." *Maricopa*, 457 U.S. at 357.

The anticompetitive nature of NTSP's non-risk contracting activities is apparent not only from the simple fact of its negotiation of price terms on behalf of members, but from other factors on which the Commission relied. Dr. Frech, Complaint Counsel's economic expert, testified that the agreement by physicians to defer initially to NTSP in contract negotiations with payors – even if not perfectly adhered to – makes it difficult for payors to assemble a panel of physicians without submitting to collective negotiations through NTSP, and that, as a matter of economics, prices obtained through such collective negotiations are likely to be

[33] For example, in 1998, NTSP asked its physicians to execute an "agency agreement" authorizing it to "negotiate on behalf of its membership" with United. CX 1005. The response by Dr. Deas (current NTSP president and chairman of the Board, IDF 28) on behalf of his practice group makes it clear that what NTSP sought, and obtained, was the authority to negotiate price terms on behalf of its members. CX 1006 (authorizing NTSP to serve as the practice group's agent, so long as NTSP could get higher rates than under the group's existing contract).

higher than the prices individual doctors can negotiate. Tr. 1315-16, 1321-22.[34] He also testified that NTSP's polling activities – particularly its practice of communicating poll results back to its physicians and informing them that these numbers will be used as the minimum reimbursement rates in negotiations with payors – function to establish a consensus price for collective negotiations, and are likely to raise prices and harm consumers because they will tend to raise the prices of "low end" physicians (*i.e.*, physicians who would have been willing to accept lower reimbursement rates), without reducing the prices that "high end" physicians (*i.e.*, physicians who can command higher prices because of the demand for their services) can receive by opting out of the group contract and contracting individually with payors. Tr. 1316-24.[35] NTSP's conduct thus fits squarely within the classic

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[34] NTSP incorrectly asserts that Dr. Frech "admitted" that physicians deal with payors without regard to the PPA, and that NTSP's challenged conduct did not change physician behavior. Pet. Br. 31, 45. Dr. Frech merely said that he had no knowledge of any particular physician refusing to participate in a payor offer because of the PPA or powers of attorney. Tr. 1367. He made it clear, however, that NTSP's practices directly affect the physicians' incentives to defer to NTSP's negotiation with payors and hinder payors' ability to contract directly with physicians rather than collectively negotiating through NTSP. Tr. 1306-16, 1324-29. Moreover, there *is* evidence that NTSP physicians declined to negotiate directly with payors because they had designated NTSP as their bargaining agent. Tr. 454-55, 459-60, 1042-44, 1067-68.

[35] Dr. Frech explained that the fact that NTSP informs its physicians of the group averages, rather than the exact responses of individual physicians, does not diminish the anticompetitive effects of this conduct, because competitive harm arises

definition of unlawful price fixing – *i.e.*, "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Maricopa*, 457 U.S. at 345-47.

In contrast to the circumstances in *California Dental*, the applicability of normal economic conclusions regarding the effects of price fixing in the health care industry is well established.[36] Tr. 1305-12. What NTSP disputes here are the Commission's factual findings about the nature of its conduct. For example, it argues that nothing in the PPA requires its physicians to defer to NTSP for negotiations with payors. Pet. Br. 45-46. But, contrary to NTSP's contention, there is substantial evidence that the PPA requires physicians to defer initially to NTSP for contract negotiations. CX 1196 at 66; CX 1178 at 68. *See* pp. 6-7, *supra*. Moreover, the anticompetitive character of NTSP's conduct does not depend on whether its physicians are *required* to defer to it, but rather arises because NTSP's actions create powerful incentives (and provide the means) for physicians to defer to collective

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from communicating to physicians NTSP's target prices, thereby informing them what the rewards will be for delaying individual negotiations and deferring to NTSP. Tr. 1325-27; IDF 99-100.

[36] In *Maricopa*, the Supreme Court emphasized that "'the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.'" 457 U.S. at 350 (quoting *Socony-Vacuum*, 310 U.S. at 222).

negotiation by NTSP to achieve higher prices from payors than they could generally expect to get individually. Tr. 1326-27. Such interference with "the determination of those prices by free competition alone" constitutes unlawful price fixing, *Socony Vacuum*, 310 U.S. at 223, regardless of whether NTSP's physicians have alternative avenues of contracting. *See Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1137 (5th Cir. 1976) ("Any reduction or limitation in price competition brings a combination within the *per se* violation despite the existence of alternative channels where competition might occur.").

As the Commission observed, the manner in which NTSP uses its poll and minimum fee schedule has much the same effect as an agreement fixing list prices: it effectively sets "the starting point for the bargaining and the higher it is (within reason) the higher the ultimately bargained price is likely to be." *High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 656 (7th Cir. 2002). Accordingly, the Seventh Circuit has held that "[a]n agreement to fix list prices is . . . a per se violation of the Sherman Act, even if most or for that matter all transactions occur at lower prices." *Id*. Similarly, in *Plymouth Dealers Ass'n of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960), the court had little difficulty in concluding that an agreement by competing automobile dealers setting list prices was *per se* unlawful price fixing, notwithstanding that individual dealers were free to apply their own

discounts to arrive at a final selling price. The court found that the list price "was an agreed upon starting point; it had been agreed upon between competitors; it was in some instances in the record respected and followed; it had to do with, and had its effect upon price." *Id*. at 132. The same can be said about NTSP's use of its poll-derived consensus price. *See* Tr. 1312-34.

Although NTSP argues that the Commission failed to show an increase in market prices or that the rates NTSP negotiated were higher than the rates that other IPAs received (Pet. Br. 31), such proof is not required.[37] *See Indiana Federation of Dentists*, 476 U.S. at 461 (where conduct "is likely enough to disrupt the proper functioning of the price-setting mechanism of the market . . . it may be condemned even absent proof that it resulted in higher prices"). Rather, the question is whether the reviewing tribunal can arrive at "a confident conclusion about the principal *tendency* of a restriction." *California Dental*, 526 U.S. at 781 (emphasis added). As discussed above, the Commission's conclusions about the anticompetitive character of NTSP's practices are firmly supported by judicial experience and economic testimony. Indeed, as the Commission observed, the rates received by other physician groups is not particularly revealing, because those rates may be associated with

[37] NTSP incorrectly claims that the ALJ found that NTSP did not receive higher rates than other physician groups. Pet. Br. 31. In fact, the ALJ merely found there was "insufficient evidence" that prices were "uniformly higher." ID 82.

higher quality of care or different competitive conditions. Op. 36.[38]

Moreover, the record shows that NTSP's conduct actually forced payors to pay higher fees to NTSP physicians than they would have payed absent NTSP's tactics. *See* pp. 10-15, *supra*. The statements of NTSP's own representatives also corroborate the Commission's assessment of the effect of NTSP's actions. CX 256 ("Without NTSP's influence this last two years, our market level of reimbursement would be significantly below its present level."); CX 351 (NTSP "has provided a consistent premium fee-for-service reimbursement to members when compared with any other contracting source").[39] This evidence further strengthened the Commission's ability to draw "a confident conclusion about the principal tendency" of the conduct at issue. *California Dental*, 526 U.S. at 781.

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[38] The rates received by other physician groups also may reflect physician collusion. For instance, two large IPAs in the Dallas/Fort Worth area have settled FTC charges of unlawful collective bargaining. *See* SPA Health Organization, Inc. and Genesis Physician Group, Inc., Dkt. No. C-4088 (consent order July 17, 2003), *available at* http://www.ftc.gov/os/2003/07/spahealthdo.pdf; System Health Providers, Inc., Dkt. No. C-4064 (consent order issued Oct. 24, 2002), *available at* http://www.ftc.gov/os/2002/11/shpdo.pdf.

[39] NTSP's claim that its membership is too insignificant to harm competition (Pet. Br. 35, 43) is belied by this evidence, and by payor testimony that they need NTSP's physicians to assemble a marketable network. *See* notes 17 & 21, *supra*; IDF 61-63; CX 380 at 2 ("we have repeatedly seen that no single physician group is able to bring to bear the influence contained in our present countywide network").

E. NTSP Presented No Plausible, Legitimate Justification For The Challenged Conduct.

Because the Commission staff established that NTSP's conduct is likely to harm competition, it was incumbent upon NTSP to advance a procompetitive justification for those restraints. *NCAA*, 468 U.S. at 110. The Commission made clear that NTSP was not required, at this stage, to prove the competitive benefits, but simply to articulate a plausible, legitimate justification. Op. 12-13, 29.

NTSP has argued that its activities help it to conserve scarce resources, allow it to avoid legally or medically risky contracts, and promote the "spillover" of efficient treatment patterns established in its risk contract, by limiting its involvement in non-risk contracts to those contracts that will be of interest to most of its risk panel physicians.[40] Here again, NTSP simply fails to address the Commission's findings

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[40] Contrary to NTSP's contention (Pet. Br. 36 n.134), the Commission's staff advisory opinion letter to Bay Area Preferred Physicians does not support its efficiency arguments, because that group's activities did not involve the type of collective price negotiations that NTSP has undertaken. Indeed, the letter describes the conduct alleged here as an example of an "anticompetitive abuse of the messenger concept." Letter from Jeffrey W. Brennan, Esq., FTC, to Martin J. Thompson, Esq., Mannatt, Phelps & Phillips, L.L.P. (Sept. 23, 2003), *available at* http://www.ftc.gov/bc/adops/bapp030923.htm. Moreover, the *Health Care Statements* do not, as NTSP claims (Pet. Br. 49) endorse the type of polls that it uses to set minimum prices, but instead merely state that the provision of factual information concerning physicians' *historical* or *current* fees are unlikely to be challenged by the agencies. *Health Care Statements*, *supra* note 6, at 20,809 (Statement 5.A). NTSP, however, polls its physicians about fees they would like to get in the *future*. Op. 18.

regarding the nature and competitive impact of its conduct. Instead, NTSP hides behind the fiction that all it did was make unilateral decisions regarding payor offers. The Commission properly rejected these proffered justifications, because NTSP failed to show any logical connection between its actual course of conduct and the claimed efficiencies. NTSP has failed to explain, for instance, how its activities interfering with payors' ability to contract directly with its physicians or its collective termination of physician contracts to extract its minimum consensus price for its physicians' services bear any relationship to the conservation of resources, or the avoidance of legal or medical risk.

NTSP has likewise failed to show any logical connection between the conduct that *actually* occurred and the achievement of spillover efficiencies. As the Commission noted, NTSP polls all of its members – risk and non-risk alike – and does not distinguish between the prices indicated by its risk physicians and non-risk physicians. Op. 29. *See* CX 1194 at 85. Accordingly, there is no foundation for NTSP's claim that its polling and setting minimum fees serves to limit its participation to contracts of specific interest to its risk panel physicians. Notably, nothing in the abundant contemporaneous documents (including NTSP's internal management communications and its communications with members and payors)

supports NTSP's spillover defense. *See* Op. 32. The absence of such support confirms that this argument is a post-hoc invention.

Furthermore, the expert testimony that NTSP cites fails to show any connection between NTSP's price-fixing activities and its achievement of spillover efficiencies.[41] On the contrary, one of its two experts expressly conceded that it is *not* necessary "for NTSP's physicians to agree on a consensus price in order to achieve the efficiencies" claimed by NTSP. Tr. 2262-63. He further testified that the critical mass of participating physicians needed for NTSP to achieve spillover benefits could be achieved even if physicians did not participate in NTSP's contract, *i.e.*, doctors could participate in the health plan through other IPAs or individual contracts and still achieve efficiencies. Tr. 2359-60. *See also* Tr. 2533-35 (NTSP's president and Board chairman testified that spillover and teamwork efficiencies can occur without doctors contracting through NTSP, as long as the doctors are a part of the health plan's network). NTSP's other expert did not even address NTSP's price-fixing activities (much less show that those activities are reasonably necessary to achieve

[41] Dr. Frech did not, as NTSP claims, support its claims of spillover efficiencies. He testified that, even assuming spillover efficiencies occur in some measure, the fixing of price for non-risk contracts does not promote such efficiencies, but on the contrary will likely reduce interest in the risk business by making non-risk contracts artificially attractive to physicians. Tr. 1348-51.

spillover or teamwork efficiencies), but only testified generally about the benefits of spillover effects. *See, e.g.,* Tr. 2163-70.[42]

The testimony of NTSP's executive director further belies its efficiency claims. When asked whether NTSP's minimum fee levels were necessary for NTSP to achieve integration efficiencies, she replied that "it's the other way around" – that it is NTSP's efficient operations that "justify the minimums that the members authorize us to go and try and find." CX 1196 at 145-46. As the Commission recognized, however, this amounts to an argument that the minimum prices NTSP demands are reasonable, which is decidedly not a legitimate justification for price fixing. Op. 29-30. *See Socony-Vacuum*, 310 U.S. at 224 & n.59 ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness."). If NTSP's physician network provides more efficient, higher quality services, payors presumably should be willing to pay more; but NTSP is not entitled to "pre-empt the workings of the market" to produce the results that it believes payors should choose. *Indiana Federation of Dentists*, 476 U.S. at 462.

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[42] Indeed, Dr. Wilensky demonstrated little knowledge about the actual nature of NTSP's activities. She did not even know, for example, whether NTSP's various medical management programs for its risk contract apply to non-risk contracts. Tr. 2198-2201. (They do not. IDF 364-80; Tr. 2550-54.)

There is no merit to the argument made by NTSP and *amici curiae* the American Medical Association ("AMA") and the Texas Medical Association that the only efficiencies the Commission will entertain to justify joint price-setting are financial integration and clinical integration. Pet. Br. 40; AMA Br. 13-14. In fact, the *Health Care Statements* expressly state that the antitrust agencies will consider other forms of integration.[43] The Commission expressly recognized that, even without financial and clinical integration, there are many ways that physician associations can make medical practice, and even contracting, more efficient. Op. 33-35. In the case of NTSP's non-risk contracts, however, there simply is no meaningful integration of any sort.

The AMA also argues that payors have been allowed to grow larger and more powerful through mergers, and that a "more flexible standard" should be applied to IPAs to allow them to bargain collectively to exercise countervailing market power against payors.[44] AMA Br. 17-20. Although the AMA couches its argument in terms

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[43] *See Health Care Statements, supra* note 6, at 20,816 (Statement 8.B) (financial and clinical integration "are not . . . the only types of arrangements that can evidence sufficient integration to warrant rule of reason analysis, and the Agencies will consider other arrangements that may also evidence such integration").

[44] To the extent that the FTC and Department of Justice have allowed such mergers, it is because the agencies have carefully analyzed them under an existing body of case law that looks to whether the combination is likely to reduce competition and whether such effects are offset by integrative efficiencies. *See*

of an analysis of competitive effects, what it is really arguing is that the current state of competition is unfair. However, the Supreme Court has made clear that such arguments that competition is unfair or lead to socially undesirable results are not cognizable under the antitrust laws. *National Society of Professional Engineers*, 435 U.S. at 695-96. As the Court stated in *Socony-Vacuum*,

> [Congress] has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by Congress.

310 U.S. at 221-22 Indeed, in recent years, the medical profession has repeatedly sought legislation that would allow independent competing physicians to bargain collectively with health plans by exempting them from the antitrust laws. Congress, however, has refused to grant such an exemption.[45] The AMA apparently wants to have it both ways, by allowing physicians to remain independent economic actors

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Federal Trade Comm'n & U.S. Dep't of Justice, *Improving Health Care: A Dose of Competition* (July 2004), Chapter 6 ("Competition Law: Insurers"), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf.

[45] *See Improving Health Care*, *supra* note 44, Chapter 2 at 17-25 (discussing statutory changes sought by the medical profession, including Quality Health-Care Coalition Act of 1999, H.R. 1304, 106th Cong. (1999); and Health Care Antitrust Improvements Act of 2003, H.R. 1120, 108th Cong. (2003)).

while bargaining collectively. But the existing antitrust laws simply do not permit this.[46]

The challenges presented by rising health care costs in this country are important. NTSP and *amici* trivialize these concerns when they suggest that a refusal to credit NTSP's flimsy justifications would discourage innovative efforts to address rising health care costs. Indeed, accepting NTSP's vague assertions about "spillover" and "teamwork" benefits as a defense for price fixing would be far more likely to discourage physicians from undertaking true innovations that could help to solve the cost, quality, and access challenges facing our health care system.

F. The Commission Properly Upheld The ALJ's Denial Of NTSP's Discovery Request.

In order to demonstrate a denial of due process, NTSP must show "substantial prejudice." *Calderon-Ontiveros v. INS*, 809 F.2d 1050, 1052 (5th Cir. 1986); *Ka Fung Chan v. INS*, 634 F.2d 248, 258 (5th Cir. 1981); *Arthur Murray Studio of Washington, Inc. v. FTC*, 458 F.2d 622, 624 (5th Cir. 1972). NTSP has failed to make this showing.

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[46] As the AMA states on its website: "*Legislation is needed* to enable physicians and other health care professionals to effectively negotiate with health plans without fear of violating antitrust laws." American Medical Ass'n, "National Legislative Activities," *available at* http://www.ama-assn.org/ama/pub/category/12980.html (last updated May 25, 2005) (emphasis added).

NTSP argues that the discovery it sought would have shown that its physicians provided higher-quality, lower-cost medical care than other physicians, and thus would have proved that its spillover model worked. Pet. Br. 60. Whether NTSP's physicians operate efficiently, however, is not the issue; rather, the question is whether there is a demonstrable connection between NTSP's anticompetitive conduct and the achievement of any such efficiencies. As the Commission correctly found, absent some demonstration of a nexus between the challenged conduct and the purported spillover efficiencies, further discovery regarding the performance of NTSP's physicians would not have affected the outcome of this case. Op. 32-33.

G. The Commission Correctly Held That NTSP's Actions Affect Interstate Commerce.

The Commission has jurisdiction over conduct that, though "local in nature," "has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980).[47] It is sufficient to show that, "as a matter of practical economics," the challenged conduct "could be expected" to affect the flow of interstate commerce.

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[47] Section 5 of the FTC Act, 15 U.S.C. § 45, applies to conduct "in or affecting commerce." "Commerce" is defined as "commerce among the several States or with foreign nations." *Id*. at § 44. The Commission's jurisdiction thus is as broad as under the Sherman Act. *See* Phillip E. Areeda & Herbert Hovenkamp, IA *Antititrust Law* ¶ 266a at 289 (2d ed. 2000).

Hospital Building Co. v. Trustees of Rex Hosp., 425 U.S. 738, 745 (1976). *See St. Bernard General Hosp.*, 712 F.2d at 984 (the "requirement of effect on interstate commerce demands little more than a 'not insubstantial' effect on commerce") (citing *McLain*, 444 U.S. at 246).

The Supreme Court confirmed the breadth of this jurisdictional reach in *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991), in which it ruled that an alleged conspiracy to deny a single opthamalogical surgeon access to hospitals in the Los Angeles market had a sufficient nexus to interstate commerce to support federal jurisdiction. The Court noted, in particular, that "[i]n cases involving horizontal agreements to fix prices . . . within a single State, we have based jurisdiction on a general conclusion that the defendants' agreement 'almost surely' had a marketwide impact and therefore an effect on interstate commerce." *Id*. at 331 (citing *Burke v. Ford*, 389 U.S. 320, 322 (1967)).

The Commission does not, as NTSP claims, need to prove that NTSP's conduct actually affected market prices – "proper analysis focuses, not upon actual consequences, but rather upon the potential harm that could ensue if the conspiracy were successful." *Id.* at 330. Moreover, contrary to NTSP's suggestion that a certain magnitude of interstate commerce must be involved, the Supreme Court has made clear that "once an effect is shown, no specific magnitude need be proved." *Goldfarb*

v. Virginia State Bar, 421 U.S. 773, 785 (1975). *See McLain*, 444 U.S. at 243 ("Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact on defendant's conduct."). As this Court has recognized, "[t]he commerce requirement of antitrust jurisdiction depends on the nature of the restraint and its effect on interstate commerce, and not the amount of the commerce." *St. Bernard General Hosp.*, 712 F.2d at 984 (internal quotations marks omitted).

In this case, the Commission properly found that it has jurisdiction because NTSP's horizontal price-fixing activities, if successful, could be expected to affect the flow of interstate payments from out-of-state payors to NTSP physicians. Op. 8.[48] The fixing of physician fees could be expected to affect not just the payors who contract for the physicians' services, but also employers (including out-of-state companies) that purchase health care coverage for their employees.[49] Under modern Supreme Court case law, this suffices to establish jurisdiction.

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[48] *See* IDF 101-02, 195, 259.

[49] Payors testified that they provide multi-state health care coverage to national companies with employees in Texas, and an increase in health care costs in the Fort Worth area would affect the overall health insurance costs of these national companies. IDF 103-04, 197, 262.

II. THE COMMISSION'S ORDER IS REASONABLE.

The Commission has broad discretion to fashion a remedy once a violation of the FTC Act is established. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946); *Gibson v. FTC*, 682 F.2d 554, 572 (5th Cir. 1982). A reviewing court may not set aside or modify the order if the remedy has a reasonable relationship to the unlawful conduct. *Jacob Siegel Co.*, 327 U.S. at 613; *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Alterman Foods, Inc. v. FTC*, 497 F.2d 993, 997 (5th Cir. 1974).

The Commission's Final Order prohibits the type of conduct that NTSP has used to carry out its unlawful price fixing. It requires NTSP to cease and desist from participating in or facilitating any conspiracy between physicians with respect to their provision of physician services, through negotiations with payors on behalf of physicians, agreements on the terms of dealing with payors, concerted refusals to deal with payors, or agreements that physicians will not deal individually with payors. Final Order ¶ II. It affirmatively permits, however, NTSP to engage in any conduct (including setting prices for its physicians' services) that is reasonably necessary to a qualified risk-sharing or clinically integrated arrangement. *Id.* The Order also requires NTSP, for three years, to notify the Commission if it elects to act as a

messenger for contracts with payors. *Id*. at ¶ III. In addition, the Order requires NTSP to terminate its existing non-risk contracts, upon a payor request or at the earliest termination or renewal date; but, if a payor so requests, a contract may be extended for up to a year after the date the Commission's Order becomes final. *Id*. at ¶ IV.B. This Order is consistent with relief accepted in settlement of similar cases, and reflects the Commission's extensive experience in crafting appropriate remedies for physician associations that have engaged in conduct much like NTSP's conduct in this case. Op. 37.[50]

Contrary to NTSP's contention, the Order does not broadly prohibit it from deciding whether or not to deal with a payor. Nor does the Order require NTSP to contract with all payors or to messenger all payor offers. Rather, it prohibits NTSP from participating in certain agreements among physicians "with respect to their provision of physician services." Final Order ¶ II. NTSP remains free, for example, to offer utilization management services to payors and to set a price for those services, and to refuse to deal with payors that do not meet its price, because that conduct would not involve an agreement among physicians with respect to their provision of physician services. Op. 37. Although NTSP prefers the narrower ALJ order, the Commission found, based on its *de novo* review of the record, that the

[50] *See* Op. 1 n.1(citing past consent decrees).

ALJ's order failed to provide adequate protection against further violations. Op. 39-40. NTSP's continued insistence in this appeal – in the face of the Commission's findings and abundant evidence to the contrary – that the entirety of its conduct challenged here amounts to "internal decisions" simply underscores the need for the more comprehensive prohibitions in the Commission's Order.[51]

NTSP also errs in arguing that the Order impermissibly interferes with its right to free speech. As the Commission noted, Paragraph III of the Order reflects the fact that the Order's prohibitions do not bar the legitimate provision of information; thus, a proviso exempting the communication of purely factual information from the Order is unnecessary to permit legitimate conduct. Op. 40; *see id.* at 24-26 (discussing legitimate messenger activity). Such a proviso would be particularly inappropriate here, given that NTSP has defended its conduct in furtherance of price fixing as the mere dissemination of information.[52]

Furthermore, the fact that the Order does not list the specific price-fixing mechanisms (PPA, poll, etc.) that NTSP employed in this case – but more generally

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[51] NTSP's repeated contention that the Commission treats it as a "walking conspiracy" ignores the careful distinction the Commission drew between an association's unilateral conduct and collective action. *See* Op. 15.

[52] *See*, *e.g.*, Respondent's Appeal Brief, dated Jan. 13, 2005 (FTC Dkt. No. 9312), at 25.

prohibits the type of conduct that NTSP used to carry out its unlawful price fixing – does not, as NTSP contends, make the order impermissibly broad or vague. On the contrary, Paragraph II of the Order reflects the proposition – consistently ignored by NTSP – that the gravamen of the Commission's ruling on the merits was not that each mechanism NTSP used is necessarily unlawful by itself, but that NTSP used these activities to effect unlawful price-setting. This Order reflects the Commission's judgment that merely proscribing the particular mechanisms NTSP employed in this case would not sufficiently protect the public against future violations, because it would leave NTSP free to devise alternative methods of price fixing. This decision is entirely within the Commission's discretion. As the Supreme Court has emphasized, "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past," but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Ruberoid Co.*, 343 U.S. at 473; *accord Alterman*, 497 F.2d at 997; *Arthur Murray Studio*, 458 F.2d at 624-25.

Finally, NTSP has failed to show that the Commission exceeded its discretion in ordering NTSP to terminate its existing non-risk contracts with payors. The Commission determined that this provision is needed so that NTSP and its members do not continue to benefit from unlawfully negotiated contracts. Op. 38. The

Commission also found that mandatory termination (at the earliest contract termination or renewal date) is necessary because payors might be reluctant to exercise their right to terminate (*e.g.*, for fear of retaliation). *Id*. at 38-39. Contrary to what NTSP argues, there is no reasonable basis to believe that this provision – or, indeed, *any* of the relief in the Order – will disrupt health care delivery. NTSP's physicians who have contracted with payors directly or through other IPAs are unaffected by this provision; and those physicians and payors who have contracted through NTSP will have ample time to make alternative arrangements. Physicians may still participate in group contracts through NTSP, so long as NTSP does not seek to coordinate their responses to payor offers. Moreover, given how readily NTSP itself used actual and threatened contract terminations as a means to bolster its bargaining leverage over payors, its claims of harm are simply not credible.

Because the remedy the Commission has selected relates directly to the violation found, the Order is squarely within the Commission's remedial discretion and must be affirmed. *Ruberoid Co.*, 343 U.S. at 473; *Jacob Siegel Co.*, 327 U.S. at 613.

CONCLUSION

For the foregoing reasons, the Commission's Final Order should be affirmed.

Respectfully Submitted,

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

/s/ Michele Arington
MICHELE ARINGTON
Attorney
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-3157

JEFFREY SCHMIDT
Director
Bureau of Competition

MICHAEL J. BLOOM
Director of Litigation
Bureau of Competition

JONATHAN W. PLATT
Attorney
Northeast Regional Office
Federal Trade Commission

August 15, 2006

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2006, two true and correct copies of the foregoing Brief for the Respondent (Corrected) were sent by e-mail and regular U.S. mail to counsel for North Texas Specialty Physicians as follows:

Gregory S. C. Huffman
William M. Katz, Jr.
Nicole L. Rittenhouse
Thompson & Knight L.L.P.
1700 Pacific Avenue, Suite 3300
Dallas, TX 75201-4693

/s/ Michele Arington
MICHELE ARINGTON
Attorney
Federal Trade Commission

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Michele Arington
MICHELE ARINGTON
Attorney
Federal Trade Commission

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