

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

[Public]

In the Matter of

North Texas Specialty Physicians,
a corporation.

Docket No. 9312

**RESPONDENT NORTH TEXAS SPECIALTY PHYSICIANS' RESPONSE TO
COMPLAINT COUNSEL'S RULE 3.24 SEPARATE STATEMENT OF MATERIAL
FACTS AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Rule of Practice 3.24, and in response to Complaint Counsel's Rule 3.24 Separate Statements of Material Facts As To Which There Is No Genuine Issue, North Texas Specialty Physicians ("NTSP") submits this statement of material facts as to which there is a genuine issue. The full text of each material fact as to which Complaint Counsel claims there is no genuine issue is set out below, followed by NTSP's respective responses. NTSP's response to any material fact shall not constitute a waiver of any applicable objection, privilege, or other right. NTSP does not, by virtue of replying to any statement of material fact, admit to any legal or factual contention asserted in the text of any material statement.

A. Material facts related to interstate commerce

NTSP disputes the relevancy and materiality of all of Complaint Counsel's facts that allegedly show NTSP's actions directly affect interstate commerce.

The majority of Complaint Counsel's interstate commerce facts relate to individual physicians, not to the NTSP entity. Specifically, these asserted facts are:

6. *Physician members of NTSP routinely receive payments from out-of-state insurance companies, including the federal Medicare and Medicaid programs. Dr. Paul Grant, a member of NTSP's Board and Chairman of its Finance Committee, testified that, like "the vast majority" of NTSP members, he accepts Medicare payments from the federal government, and also accepts Medicaid as a "secondary" source of payments. Grant dep. at 116-17 [Tab 1].*
7. *Dr. Grant's testimony shows the close interrelationship between private and federal insurance:*

A lot of people have two insurances. They'll have - a husband may be insured through one - Aetna, and then the wife is insured through Cigna or something. And so then if you see the husband, his primary is Medicaid and the secondary is Cigna. Some people will have Medicaid as their secondary. They'll have Medicare as their primary and Medicaid as their secondary.

Grant dep. at 116-17 [Tab 1].
8. *Individual physician members of NTSP at least on occasion treat patients from outside Texas. McCallum dep. at 167-68; Vance dep. at 297 [Tabs 5 and 6].*
10. *The physician members of NTSP likewise make purchases or use equipment manufactured or sold outside of Texas. Dr. Jack McCallum, a neurosurgeon who has served as a Board member and Vice President of NTSP, testified that in his practice he sends patients to use diagnostic equipment (such as CT and MRI scanners) made by General Electric, Siemens, and other non-Texas manufacturers. He also testified that he uses out-of-state malpractice insurers. McCallum dep. at 162-66 [Tab 9].*
11. *Dr. Grant, also a Board member, testified that he recently purchased a piece of x-ray equipment costing \$170,000, made by Siemens, a German company. Grant dep. at 115-16 [Tab 10]*
12. *Siemens is a leading supplier of electric transmission systems in the United States and generates over one-third of US electricity; and it processes more than 25% of medical date records in the United States. Its systems are in over 20,000 United States facilities, including the US Postal Service.*

<http://www.usa.siemens.com/index.jsp?sdc p=c194suo1067030pnf1m&sdc sid=5449086638&>
13. *Dr. William Vance, a former President of NTSP, testified that he obtains malpractice insurance from a carrier located outside Texas. Vance dep. at 300-01 [Tab 12].*

These facts are not material because Complaint Counsel has not shown that this case

actually involves a conspiracy with physicians. In fact, NTSP has shown in its Motion for Summary Decision that the evidence establishes that this case is about NTSP's own refusals to deal and not about any conspiracy involving the physicians.¹ Since there is no conspiracy or at least a material dispute as to whether there is a conspiracy at all, these facts the relevancy of which hinges on proof of conspiracy are not determinative at the summary decision stage.

Complaint Counsel also includes as a fact a table of NTSP's out-of-state vendor expenses whose relevancy has not been proven.

9. *NTSP provided a table showing its out-of-state vendor expenses from January 1, 1999 to December 22, 2003. This data shows numerous purchases from outside of Texas, representing total expenditures of \$1,047,820. For example, major vendors included the following:*

<i>Vendor</i>	<i>Purpose</i>	<i>Location</i>	<i>Payments</i>
<i>Aperture Credentialing</i>	<i>Consulting</i>	<i>Louisville, KY</i>	<i>\$33,260</i>
<i>AT&T</i>	<i>Telephone</i>	<i>Omaha, NE</i>	<i>14,572</i>
<i>Avaya Financial Services</i>	<i>Equipment rental</i>	<i>Chicago, IL</i>	<i>18,099</i>
<i>Banco Popular</i>	<i>Supplies, etc.</i>	<i>Baltimore, MD</i>	<i>22,995</i>
<i>Corporate Express</i>	<i>Supplies</i>	<i>Chicago, IL</i>	<i>27,700</i>
<i>Executive Risk</i>	<i>E&O Insurance</i>	<i>Simsbury, CT</i>	<i>13,543</i>
<i>Federal Express</i>	<i>Delivery</i>	<i>Memphis, TN</i>	<i>3,690</i>
<i>Intl. Assoc. of Administrative Profession</i>	<i>Dues, expenses</i>	<i>Kansas City, MO</i>	<i>3,886</i>
<i>Kelly Services, Inc.</i>	<i>Contract labor</i>	<i>Chicago, IL</i>	<i>19,934</i>
<i>Lucent Technologies</i>	<i>Equipment</i>	<i>Chicago, IL</i>	<i>19,934</i>
<i>McPhee & Associates</i>	<i>Stop loss insurance</i>	<i>Lacanda, CA</i>	<i>457,373</i>

¹ See North Texas Specialty Physicians' Motion for Summary Decision and supporting Exhibits, Brief, and Separate Statement of Facts, filed with the Secretary on March 2, 2004.

<i>Millman & Robertson</i>	<i>Consulting</i>	<i>Seattle, WA</i>	<i>38,611</i>
<i>Nextel Communications</i>	<i>Telephone</i>	<i>Los Angeles, CA</i>	<i>4,499</i>
<i>PBCC</i>	<i>Equipment</i>	<i>Louisville, KY</i>	<i>13,211</i>
<i>Principal Financial Group</i>	<i>Health/life insurance</i>	<i>Des Moines, IA</i>	<i>59,851</i>
<i>Standard Insurance Company</i>	<i>Health/life insurance</i>	<i>Portland, OR</i>	<i>36,155</i>
<i>The Hartford</i>	<i>Workman's comp</i>	<i>Hartford, CT</i>	<i>5,404</i>
<i>Transamerica Occidental Life</i>	<i>Health/life insurance</i>	<i>Atlanta, GA</i>	<i>17,907</i>
<i>UPAC</i>	<i>D&O insurance</i>	<i>Kansas City, MO</i>	<i>66,197</i>
<i>Watson Wyatt</i>	<i>Dues & subscriptions</i>	<i>Atlanta, GA</i>	<i>13,114</i>
<i>Xerox</i>	<i>Equipment</i>	<i>Chicago, IL</i>	<i>46,940</i>

Exhibit 1151 (NTSP 083263-96) [Tab 28].

The table shows all NTSP out-of-state vendor purchases for a period of time. But these purchases are only relevant if they relate to the alleged conduct in this case. Only NTSP's conduct with regard to non-risk contracts has been challenged, but this chart includes purchases related to NTSP's operations for both risk and non-risk contracts. Further, this chart deals with NTSP's actions, while the conduct at issue in this case is refusal to act. Complaint Counsel has not attempted to make the requisite showing of the relation between this table and NTSP's alleged conduct.

The remainder of Complaint Counsel's facts are attenuated at best. They include NTSP's dealings with insurers and, indirectly, employers, with offices outside Texas, even though NTSP's contact, if any, is only with the Texas offices.

1. *United, Aetna and Cigna are national insurers, headquartered outside Texas, who sell policies throughout the United States.*

*<http://www.unitedhealthcare.com/WhatWorksForYou/0,1456,pageID%3D101,00.html>;
http://www.aetna.com/history/celebrating_150yrs.htm; http://www.prnewswire.com/cgi-bin/micro_stories.pl?ACCT=165050&TICK=CII&STORY=/www/story/02-25-2004/0002116362&EDATE=Feb+25,+2004*

2. *NTSP negotiates or contracts with United, Aetna, and Cigna; each of which sells insurance policies to corporations or employees located in the Fort Worth area. Some of these employers are large national and multinational corporations, with local operations in Dallas.*

3. [REDACTED]

4. *Alcon Labs operates throughout the United States and the world, with manufacturing plants located in Texas, West Virginia, California, Pennsylvania, Florida, and 8 foreign countries, and worldwide sales of \$3 billion a year.*

http://www.alconlabs.com/corporate/alcon_glance.jhtml.

5. [REDACTED]

Complaint Counsel baldly asserts in its motion that NTSP's conduct affects the business decisions of out-of-state affiliates of local insurers and employers, but makes no attempt to explain how. NTSP disputes there is any effect at all. In support of that material dispute, NTSP offers as evidence the following:

- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and

- [REDACTED]

[REDACTED]

But even without NTSP's evidence of no effect on interstate commerce, Complaint Counsel has failed to show the required connection between any out-of-state affiliates of the insurers and NTSP. Without such a showing, these facts are not determinative at the summary decision stage.

B. Material facts related to NTSP as acting for the profit of its "members".

NTSP disputes the relevancy and materiality of most of Complaint Counsel's facts that allegedly show NTSP was acting for the profit of its members when the alleged misconduct took place.

Many of complaint counsel facts relate to NTSP's risk contracts, at least in part.

Specifically, these facts are:

14. [REDACTED]

15. [REDACTED]

16. *NTSP was created for the purpose of negotiating contracts on behalf of its physicians. Dr. John Johnson testified that "NTSP was going to be a group of physicians that would bring a voice to organizing physicians who often practiced in individual groups to hopefully be able to secure contracts it was to represent physicians ... in obtaining contracts from businesses or insurance companies or in dealing with hospitals"). Johnson dep. at 10- 11 [Tab 14].*

17. [Redacted]

18. [Redacted]

19. [Redacted]

30. [Redacted]

31. [Redacted]

32. [Redacted]

33. [Redacted]

36. [Redacted]

Only NTSP's conduct with regard to non-risk contracts has been challenged, but these

asserted facts relate either in whole or in part to NTSP's operations for both risk and non-risk contracts. Since the risk contract conduct of NTSP is not at issue here, these facts are immaterial to the extent they involve risk contracts. Further, some of these facts refer to contracts that are known to be risk contracts or there is a factual dispute as to the nature of the contracts.

Other facts refer to "NTSP's contracts," again without distinguishing between risk contracts in which NTSP is the contracting party and non-risk contracts for which NTSP acts primarily as a messenger. In support of these material disputes, NTSP shows the following:

- [REDACTED]
[REDACTED] Deposition of Dr. Karen Van Wagner, January 20, 2004, p. 159 [Tab G].
- for non-risk contracts, NTSP operates as a messenger model; *see* Respondent's Separate Statement of Material Facts supporting its Motion for Summary Decision, pp. 1-3 and attached supporting sources.

As specific responses to Complaint Counsel's facts, NTSP shows the following:

- Fact 15: The evidence presented does not support Complaint Counsel's contention.
- Fact 19: [REDACTED]
[REDACTED]
[REDACTED]
- Fact 30: The examples of NTSP's reports to "members" include reports on risk contracts. Complaint Counsel's Tabs 49 and 50 deal with NYLCare, which was a risk contract. *See* Deposition of Dr. William Vance, p. 135 [Tab I]; Deposition of Dr. Karen Van Wagner, November 19, 2003, Volume 1, p. 184 [Tab J]. Complaint Counsel's Tab

40 specifically includes risk contracts in its discussion and also states that NTSP makes no recommendations for economic terms for non-risk contracts.

- Fact 31: Complaint Counsel’s Tab 40 specifically addresses risk contracts and includes the statement “most of our efforts have centered around a single risk contract.”
- Fact 32: Complaint Counsel’s Tab 41 evidence of communications to physicians was in relation to the Nylcare risk contract. *See* Deposition of Dr. William Vance, p. 135 [Tab I]; Deposition of Dr. Karen Van Wagner, November 19, 2003, Volume 1, p. 184 [Tab J].
- Fact 33: [REDACTED]
[REDACTED]
[REDACTED]
- Fact 36: [REDACTED] *See* Deposition of Dr. Paul Grant, p. 57 [Tab K]; [REDACTED]
[REDACTED]

Since Complaint Counsel has made no attempt to show NTSP’s behavior related only to the challenged conduct dealing with non-risk contracts, these facts are not determinative at the summary decision stage.

Complaint Counsel’s material facts also include interpretations and conclusions about NTSP’s relationship with its “members,” which NTSP disputes the facts support at all, let alone prove as a matter of law. NTSP’s specific responses to these facts are as follows:

26. *NTSP provides tangible benefits to its members, such as professional liability insurance, publications, and practice management programs. See Deas dep. at 104 [Tab 21].*

Response: The evidence presented does not support Complaint Counsel’s contention.

29. *NTSP physicians pay dues and elect the Board of Directors. NTSP physicians also meet periodically in "general membership meetings" to discuss matters in the common interest of all physicians, which sometimes includes the negotiation of payor contracts. Hollander dep. at 34, 21-23 [Tabs 24 and 25].*

Response: Complaint Counsel has mischaracterized the nature of these meetings by stating that physicians discuss matters of common interest. These meetings are not for purposes of discussion at all, they are merely meetings to provide information to the physicians. See Deposition of Dr. Ira Hollander, pp. 21-22 [Tab M].

Complaint Counsel's material facts also include interpretations and conclusions about NTSP's alleged "negotiations" with payors and the purpose of NTSP, which NTSP disputes the facts support at all, let alone prove as a matter of law.

16. *NTSP was created for the purpose of negotiating contracts on behalf of its physicians. Dr. John Johnson testified that "NTSP was going to be a group of physicians that would bring a voice to organizing physicians who often practiced in individual groups to hopefully be able to secure contracts it was to represent physicians ... in obtaining contracts from businesses or insurance companies or in dealing with hospitals". Johnson dep. at 10- 11 [Tab 14].*

17. [REDACTED]

19. [REDACTED]

21. *Dr. Deas explained why he was in favor of NTSP pressing a payor to not reduce its reimbursement rates, and said: "I assume you would prefer that your salary not be reduced for services you render." Deas dep. at 87 [Tab 15].*

22. [REDACTED]

23. [REDACTED]

24. [REDACTED]

25. [REDACTED]

28. *NTSP, though its Board members and officers Dr. Vance and Dr. Deas, has admitted that it seeks to negotiate higher fees or compensation levels for its participating physicians, but contends that such higher fees or compensation is justified by certain alleged network efficiencies. Vance dep. at 312-13; Deas dep. at 97 [Tab 19, 23].*

The evidence does not show that NTSP negotiates with payors on non-risk contracts with regard to rates and other economic variables. In fact, the evidence shows that they do not. In support, NTSP shows the following:

- For non-risk contracts, NTSP operates as a messenger, announcing the minimum rate of contracts it will pass on to physicians. The poll was used for this reason only. The purpose of the poll is for NTSP to determine which contracts physicians would be most interested in so that NTSP can maximize resources by only messaging contracts that will be of interest to the majority of physicians. *See Respondent's Separate Statement of Facts supporting its Motion for Summary Decision, at Deposition of Tom Deas, October 10, 2002, pp. 21-22, 25 [Tab 3]; Deposition of Tom Deas, January 26, 2004, pp. 37-38 [Tab 4]; Deposition of Dr.*

Jack McCallum, September 16, 2003, pp. 121-122 [Tab 5]; Deposition of Dr. Ira Hollander, December 10, 2003, pp. 27-28 [Tab 6]; and Deposition of Harry Rosenthal, pp. 25 [Tab 7].

- NTSP was not formed for the purpose of negotiating non-risk contracts with payors, and it does not do so. NTSP was formed to enter into risk contracts and improve patient care through better management. *See* Complaint Counsel’s Tab 14; Deposition of Dr. Ira Hollander, p. 12 [Tab N]; Deposition of Harry Rosenthal, pp. 10, 12-13 [Tab O]; Deposition of Tom Deas, January 26, 2004, p. 24 [Tab P].
- For Complaint Counsel’s cite of an incident of a “negotiation” resulting in a higher price for NTSP physicians, there is also evidence that the contract resulted in an overall lower cost because NTSP physicians were also providing medical management services. *See* Complaint Counsel’s Tab 30.
- A full reading in context of Complaint Counsel’s Tab 15 shows that NTSP physicians were not pressing payors about rates, but merely investigating. *See* Complaint Counsel’s Tab 15 and Deposition of Tom Deas, January 26, 2004, p.86-87 [Tab Q].

Complaint Counsel also cites instances of NTSP acting for its “members” where NTSP was in fact not so acting. NTSP’s specific responses to these facts are as follows:

34. [REDACTED]

Response: [REDACTED]

[Redacted text block]

35. [Redacted text block]

Response: [Redacted text block]

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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