UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9312

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation

COMPLAINT COUNSEL'S REPLY BRIEF ON CROSS-APPEAL

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The following abbreviations and citation forms are used:

CAB	Complaint Counsel's Answering Brief, filed March 15, 2005
CX	Complaint Counsel Exhibit
ID	Initial Decision, filed November 15, 2004
IDF	Initial Decision Finding of Fact
RAB	Respondent's Appellate Brief, filed January 13, 2005
RRB	Respondent's Reply Brief, filed April 13, 2005
RX	Respondent Exhibit
TAB	Material contained in Complaint Counsel's Selected Exhibits, filed March 15, 2005

Citations to the trial transcripts include the witness name and page number: Quirk, Tr. 1420.

Pages of exhibits are referenced by page number: CX 212 at 2.

References to investigational hearing or deposition transcripts that have been included in the trial record as exhibits include the exhibit number, the transcript page(s), the witness name, and the designation "IH" or "dep": CX 1178 (Hollander, Dep. at 68).

Introduction

NTSP's response to Complaint Counsel's cross-appeal demonstrates the need for a strong order in this case. Confronted with the legal standards that apply to Commission orders, NTSP ignores them and continues to invoke the "narrowly tailored" standard it argued to the ALJ (RRB 24), notwithstanding the Supreme Court's holdings to the contrary.[1] Moreover, in opposing the cross-appeal (RRB 24-37), NTSP: claims that statements and actions of the antitrust agencies support its position, when they do not (Part I); says the order should recognize that NTSP has a broad right to refuse to deal under the *Colgate* doctrine, though it is indisputably a competitor-controlled organization, and *Colgate* is inapplicable (Part II); relies on a characterization of its past conduct that is simply at odds with the evidence and the ALJ's findings (Part III); and argues that an order that would not recognize its failed "spillover" defense reflects a Commission policy "to limit innovation in healthcare" (Part IV).

The cross-appeal asks the Commission to broaden the core prohibitions of the ALJ's order and eliminate two provisos the ALJ added that would significantly curtail application of the order. NTSP's arguments opposing Complaint Counsel's proposed order, however they are framed, all show that what NTSP seeks is the ability to continue to engage in the very conduct that the ALJ found to be unlawful.

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[1] *See, e.g., FTC v. National Lead Co.*, 352 U.S. 419, 428 (1956) (a remedy is proper unless it has "no reasonable relation to the unlawful practices" and may restrain otherwise lawful practices that have served as the means to achieve an unlawful goal); *National Society of Professional Engineers v. United States,* 435 U.S. 679, 697 (1978) ("While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation."). *See also* discussion at CAB 55-56, 60.

I. NTSP's Defense of the ALJ's Information-Dissemination Proviso Misconstrues the Plain Language of Agency Orders and Underscores the Need to Eliminate the Proviso

Complaint Counsel's cross-appeal asks the Commission to delete the proviso in the ALJ's order that states "nothing contained in this Order" prohibits NTSP from "communicating purely factual information" or "expressing views relevant to various health plans." ID 94. As we discussed in our prior brief, the proviso is unnecessary to protect legitimate conduct; threatens to insulate conduct that the order is designed to prohibit; and would be particularly harmful in this case, because NTSP has already defended its conduct in furtherance of price fixing as the mere dissemination of information and opinion. CAB 59-61.

NTSP's claim that "[t]his type of proviso has been used extensively in both FTC and DOJ decrees" is wrong. RRB 26. The two Department of Justice orders NTSP cites (RRB 27) directly contradict NTSP's claim. As is discussed below, these orders do not exempt information dissemination activities from the scope of the order; instead, they make such activities subject to numerous limitations. And while one of the two FTC consent orders NTSP cites is like the ALJ's proviso here, as we previously explained, the Commission stopped using this type of proviso several years ago. CAB 60. Respondents can almost always characterize their anticompetitive conduct as providing information and views (as this case amply demonstrates). *See, e.g.*, RAB 25-26, 33-34. Consequently, a proviso that purports to protect all communications falling within its terms drastically lowers the prospects for effective enforcement of the order. NTSP's contention that the federal antitrust agencies extensively use such a proviso simply ignores the facts.

The ALJ's information proviso (which states "nothing in this Order shall prohibit . . .") carves out the conduct described in the proviso from the scope of the order. The information proviso in *United States v. Federation of Physicians and Dentists, Inc.,* however, is qualified by introductory language that it is "[s]ubject to the provisions of Section IV of this Final Judgment."[2] Section IV of the order contains the substantive prohibitions. Thus, unlike the ALJ's proviso, the proviso in the DOJ order does not carve out information dissemination from the scope of the order. On the contrary, it expressly provides that such conduct remains subject to its constraints.

The other DOJ order, issued in 1996 in *United States v. Woman's Hospital Foundation,* also does not contain a proviso like the one the ALJ adopted. That order includes a provision expressly permitting the defendants to operate a "messenger model," and has a lengthy definition establishing 12 separate conditions that must all be met to qualify as a "messenger model."[3] The provision authorizing defendants to convey objective information about proposed contract terms to physicians is subject to these conditions. It applies only "[a]s long as the messenger acts consistently with the foregoing [12 requirements]."[4] The FTC order in *Montana Associated Physicians, Inc.*, 123 FTC 62 (1997), on which NTSP also relies, takes a similar approach.[5]

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[2] CA 98-475 (D. Del. 2002), at 9, *available at* http://www.usdoj.gov/atr/cases/f200600/200654.htm.

[3] CA No. 96-389-BM2 (M.D. La. 1996), at 2-6, *available at* http://www.usdoj.gov/atr/cases/f0800/0872.htm.

[4] *Id.* at 6.

[5] It contains a proviso stating that the physician-hospital organization (PHO) respondent (BPHA) may undertake certain activities related to contracting between payors and physicians, but sets forth a list of 11 conditions that must be met. *Id.* at 72. This proviso does

Aside from these orders, NTSP quotes a Department of Justice business review letter, which discusses whether the requester's proposed conduct would likely be deemed to violate the antitrust laws–not an order against a party who has already violated the law. NTSP also claims that the agencies' *Statements of Antitrust Enforcement Policy in Health Care*[6] "recognize the wisdom of this type of proviso." RRB 27. The *Statements*, however, do not discuss any such proviso, or even purport to address what sort of remedies are appropriate in cases in which a violation has been found. Instead, the *Statements* describe factors the agencies consider in assessing whether certain arrangements involve an unlawful agreement on price, which, as the they note, "is a question of fact in each case." *Statements* at 126.

NTSP's chronic misuse of agency statements in an attempt to defend the conduct it wishes to pursue has been amply demonstrated throughout this proceeding. *See, e.g.*, CAB 14-16 (discussing NTSP's claims to follow "the messenger model" while engaging in conduct that the agencies have expressly stated is *per se* unlawful price fixing), CAB 33 (claim that agencies encourage negotiation of non-price terms), CAB 44 (claim that FTC staff advisory opinion supports NTSP's conduct). NTSP's misstatements in defense of the ALJ's proviso confirm the substantial risk that this proviso would encourage NTSP to continue conduct that the order seeks to prohibit.

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not apply to the other respondent in the case, a physician organization. That group was alleged to have violated the law through its own conduct, and also by acting through the PHO.

[6] United States Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care, available at* http://www.ftc.gov/reports/hlth3s.pdf (Aug. 28, 1996).

II. NTSP's Contention That the ALJ's Order Properly Recognizes Its "Right to Refuse to Deal" Rests on Its Erroneous Single Entity Defense

The ALJ's narrowing of proposed prohibitions on NTSP's conduct and his addition of the state law proviso rested on his mistaken belief that Complaint Counsel's proposed order would have deprived NTSP of any ability to refuse to messenger a contract offer from a payor or to refuse to become a party to a payor contract. *See* CAB 57.[7] NTSP, however, contends that the ALJ's order "clarif[ies] that the order does not require NTSP to messenger any contracts or to violate state or federal law." RRB 28. NTSP's claim of a broad "right to refuse" based on the ALJ's order illustrates the need to make the modifications we request in our cross-appeal.

NTSP makes no attempt to explain how the language of the proposed order would otherwise create a broad duty to participate in or accept all payor offers. We observed in our previous brief (CAB 57) that the language of the proposed order in no way dictates that result. Selective decisions about whether to messenger a contract or to contract with a payor could violate Paragraph II, but only if the action furthers the type of collective action barred by the order. The record amply demonstrates the need to clearly and unambiguously bar NTSP from using selective refusals to act as a messenger for certain payor offers as a signaling mechanism to physicians, such as a signal to reject certain offers because NTSP deems the fees too low.[8]

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[7] The ALJ rejected provisions proposed by Complaint Counsel that would have prohibited, in connection with the provision of physician services: agreements on terms of dealing with payors (without regard to whether there is any agreement to "negotiate"); collective refusals to deal with payors; and agreements that physicians not deal individually with payors or through entities other than NTSP.

[8] The proposed order would place no undue burden on NTSP. The order does not require NTSP to act as a messenger of payor offers in the first instance. Furthermore, the order would not prevent NTSP from charging payors a fee to cover its costs of acting as a messenger, provided such a fee program is based on actual costs, is non-discriminatory, and is structured and

NTSP's reply brief similarly offers no explanation of how the order would compel it to violate state law. NTSP can, of course, continue to report suspected violations of law to the appropriate law enforcement authorities. But NTSP has already invoked "payor misconduct" as a defense for its anticompetitive conduct, even though the record shows NTSP was perfectly willing to deal with those same payors if their price offers were sufficiently high. The ALJ's state law proviso is an invitation to abuse and continued anticompetitive actions.

NTSP's reply brief confirms that the ALJ's approach threatens to permit NTSP to continue a variety of activities that it used to further its unlawful price fixing. What NTSP asserts–and says the ALJ's order provides–is what it calls "the *Colgate* point." NTSP interprets the ALJ's order as embodying a broad right to refuse to deal. According to NTSP, the ALJ's order would be "even clearer if the *Colgate* point were made in an additional proviso." RRB 29 n.98. As we discussed in our prior brief, NTSP is controlled by competing physicians; it is not a single entity. CAB 20-25. The Commission should reject NTSP's claim to the same broad right to refuse to deal possessed by a single entity under *United States v. Colgate & Co.*, 250 U.S. 300 (1919), and adopt the modifications requested in the cross-appeal.

III. The Evidence Contradicts NTSP's Claim That the Circumstances of Its Negotiations with Payors Demonstrate the Proposed Order Is Overly Broad

NTSP's argument that the proposed order would "chill[] legitimate conduct" relies on statements about its prior conduct (RRB 29-31) that are contradicted by the evidence discussed in our prior brief and the ALJ's findings. Indeed, NTSP's own prior statements often directly refute

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operated to prevent it from serving as an anticompetitive signaling device.

the assertions in its reply brief. Its continued attempts to characterize its conduct as legitimate confirms the need for a strong order. We provide a few examples below:

United

NTSP has said its collective conduct concerning United was a response to an effort by United to "undercut" NTSP's risk contract to serve the City of Fort Worth. But the record shows that NTSP's conduct was not about saving its risk business with the City (which had decided to self-insure). Instead, NTSP was pursuing a campaign begun early in 2001 aimed at getting United to raise the prices it was offering NTSP physicians on non-risk contracts.[9] By the summer of 2001, NTSP had devised a three-pronged strategy to increase United's offer: (1) terminating a contract with Health Texas Provider Network (HTPN) (a contract that gave United patients access to NTSP physicians); (2) complaining about United's rates to the City of Fort Worth (United's new customer); and (3) collecting powers of attorney from NTSP physicians to use in negotiations with United.[10]

NTSP's claim in its reply brief that it terminated the HTPN contract because United was using it to undercut NTSP's risk arrangement with the City provides an apt example of how

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[9] In early 2001, NTSP identified United as a "re-negotiation target." CX 211 at 3. *See also* CX 1117; IDF 122 (approaching United in March 2001 about a "group contract reflecting today's market").

[10] *See, e.g.,* CX 1043 at 1 (TAB 10) (noting NTSP and United are "far apart in agreeing to a market reimbursement fee schedule" and urging members to send letters to the City of Fort Worth as a "strategy" to attempt before NTSP termination of the HTPN contract); CX 91 at 4 (NTSP Board approved terminating HTPN contract and instructed staff to "prepare agency letters"); CX 1062 (TAB 12) (notifying members of termination of HTPN contract and soliciting powers of attorney); CX 1066 (TAB 14) (soliciting powers of attorney and stating "NTSP will continue to pursue a direct contract with United Healthcare that meets or exceeds the fee schedule minimums set by the NTSP membership").

NTSP's own prior statements get in the way of the story it tries to tell in its briefs. RRB 29. NTSP told its members that it terminated its contract with HTPN because United's reimbursement rate was too low. In an August 2001 Fax Alert, NTSP stated:

> NTSP's Board terminated this contract [with HTPN] for two reasons:
>
> 1. The proposed reimbursement rates for the HMO and PPO product had fallen significantly below Board approved minimums.
> 2. United was proposing a single fee schedule for both the HMO and PPO product.

CX 1062 at 1 (TAB 12). *See also* CX 1199 (Vance, Dep. at 316) (NTSP terminated the HTPN contract because "[i]t didn't offer enough money"). The HTPN termination was about price. The same is true of NTSP's complaints to the City of Fort Worth and its collection of powers of attorney.[11]

CIGNA

NTSP says it "exercised its rights under the agreements to have Cigna comply with Cigna's contractual obligations." RRB 30. What the record shows, however, is that NTSP undertook unlawful collective bargaining on behalf of its member physicians beginning in 1998, before NTSP ever had any agreement with CIGNA. IDF 205-06, 211-12. Moreover, NTSP's suggestion that its later conduct to raise the fees CIGNA paid NTSP physicians was legitimate self-help enforcement of NTSP's contractual rights is deficient in two respects. First, as we have observed, a contract dispute would not justify NTSP's orchestrating collective refusals to deal to impose the physicians' preferred interpretation of the contract. *See* CAB 33 & n.30 (citing

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[11] *See* CAB 32 n.28.

cases). Second, as a factual matter, NTSP's claim that it was merely attempting to get CIGNA to live up to its contractual obligations is simply implausible.

NTSP threatened to terminate its contract with CIGNA after CIGNA refused NTSP's demand that the payor allow primary care physicians (PCPs) to participate in a contract that expressly covered only NTSP "specialists." IDF 237-44. Not surprisingly, NTSP's own documents reflect the ordinary distinction between PCPs and "specialists." *See, e.g.*, CX 1117 at 3 (defining "Specialty Physicians" and "Subcontracted Primary Care Physicians"). Moreover, NTSP initially suggested that CIGNA include PCPs simply as a "good faith gesture" during negotiations with CIGNA over another issue. IDF 238. In the face of NTSP's termination threat, however, CIGNA acceded to NTSP's fee demands. IDF 245-48.

We also note that NTSP says one of the agreements that CIGNA failed to honor was "a risk contract containing a pay-for-performance bonus" (RRB 30), but it called this same contract a "non-risk agreement" when presenting it to its physicians. IDF 251, *quoting* CX 810 (*in camera)*. Of course, even if NTSP's claim were true, it would not undermine either the case against NTSP on liability, or the propriety of the proposed order. But, in any event, the ALJ found that the contract in question (the "Third Amendment") was not a risk contract (IDF 249), and NTSP has not explained why this finding is incorrect.[12]

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[12] So-called "pay-for-performance" arrangements (*i.e.*, the payment of bonuses if providers meet specified cost or quality targets) can constitute the sharing of substantial financial risk. *See Statements* at 67-70. *See also* CAB 5-6 (distinguishing risk assumption and risk sharing); CAB 5-6, 10 n.7 (distinguishing "risk" and "non-risk" arrangements). Whether a given pay-for-performance plan actually involves such risk sharing, however, depends on the facts of the particular arrangement. The record shows that, aside from its group capitation arrangements, NTSP did not use financial incentives to influence physician behavior or apply organized processes to improve physician performance. *See* CAB 39-40; IDF 364-75.

Aetna

NTSP says "[t]he situation with Aetna involved a dispute and class action litigation" against Medical Select Management (MSM), in which NTSP was acting as a class representative. RRB at 30.[13] But NTSP's contemporaneous documents state: "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." RX 335 at 1. Aetna was not a party to NTSP's suit against MSM (RX 335 at 2), and NTSP makes no attempt to explain how its role as class representative in litigation against MSM could possibly justify its collective fee negotiations with Aetna.[14]

NTSP also cannot explain how the proposed order would prevent it from engaging in litigation, whether individually or as a class representative. The proposed order bars NTSP from orchestrating or participating in agreements among physicians concerning their behavior in the marketplace. Mere advocacy of governmental action through the filing and pursuit of a lawsuit would not, by itself, necessarily create such a prohibited agreement.

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[13] MSM was an IPA that contracted with individual NTSP physicians, and the dispute with MSM revolved around those individual physician contracts. NTSP, which was not a party to those contracts, filed suit as a class representative. According to the complaint, MSM agreed to provide or arrange to provide medical services to Aetna patients. RX 335 at ¶¶ 19, 22. MSM later renegotiated its agreement with Aetna under terms that the physicians deemed unfavorable to them. *Id.* at ¶¶ 24-25. Plaintiffs sued MSM for breach of fiduciary duty, breach of contract, breach of the duty of good faith and fair dealing, misrepresentation, and negligence. *Id.* at ¶¶ 39-48. *See also* IDF 267-75. The parties settled the litigation after MSM declared bankruptcy. Van Wagner, Tr. 1688.

[14] NTSP also asserts that it was involved in risk-contract negotiations with Aetna "for some of the time period." RRB 30. The ALJ found, however (and NTSP does not dispute), that the prospect of reaching agreement on a risk deal had been abandoned by both Aetna and NTSP by late October 2000. IDF 285. After that time, NTSP continued actively negotiating to increase Aetna's non-risk offer (IDF 286-330), and to enforce its fee demands it invoked powers of attorney it had previously collected from its members. CAB 12.

IV. NTSP's "Policy" Objection to the Proposed Order Is Merely a Recycling of Its Failed Spillover Defense

NTSP claims that the proposed order would prevent or discourage "physician teamwork" that might occur outside the context of risk-sharing arrangements or clinically-integrated ventures. *See, e.g.*, RRB 24, 25-26, 31. Of course, the order would not prevent NTSP physicians from engaging in teamwork. Indeed, as Complaint Counsel's expert, Dr. Lawrence Casalino, explained, NTSP could have undertaken various activities to promote teamwork and high quality, cost-effective care for patients under non-risk contracts, but NTSP did not do so. Casalino, Tr. 2805-16. NTSP's reply brief professes a desire to seek solutions to the problem of rising health care costs. But, the record shows, with respect to non-risk contracts (which are the vast majority of its contracts), NTSP has devoted its efforts to raising the prices payors offer its physicians.

NTSP's real complaint is that the proposed order–like the ALJ's order and a host of prior FTC consent orders–would "effectively preclude teamwork efforts like the spillover model." RRB 31. The "spillover model" is NTSP's proffered defense for its unlawful price fixing, a defense that the ALJ correctly rejected. Thus, NTSP's true policy objection is either (1) an argument that the ALJ erred in rejecting its spillover defense, or (2) an argument that application of established antitrust principles regarding ancillary restraints to physician price fixing is undesirable as a matter of public policy.

NTSP is conspicuously silent on the ancillary restraint issue. It neither addresses the case law regarding ancillary restraints nor attempts to show a plausible connection between its price fixing and the purported spillover. Instead, it complains that Complaint Counsel and the ALJ disregarded the evidence and economic literature it offered to support its spillover defense (RRB

31)–an assertion that is manifestly false. *See, e.g.*, CAB 40-41 (noting spillover benefits theoretically possible but finding a lack of any logical nexus between price fixing and the claimed efficiencies); IDF 380 (finding any spillover benefits that might occur do not require collective fee setting).

NTSP also renews its complaint that the ALJ erroneously denied it discovery that it sought to prove "the validity of its business model." RRB 31. As we previously observed, however, absent some reason to conclude that NTSP's price fixing was plausibly connected to the spillover benefits it claimed, the ALJ's refusal to grant NTSP's discovery request could not affect the outcome in this case. CAB 43 n.43. Even if we assume that the data would have shown that NTSP physicians were more cost-effective than other doctors, that would not justify NTSP's price fixing unless that price fixing was reasonably necessary to achieve the claimed efficiencies. But, as explained at length in our prior brief, NTSP has not even offered a plausible argument that its price fixing was an ancillary restraint. Accordingly, even if the data would have shown that a well-informed payor should prefer NTSP doctors–and therefore should want to accede to NTSP's fee demands in order to secure the services of such highly cost-effective physicians–NTSP is not entitled to "pre-empt the workings of the market" to produce the result that it believes payors should choose.[15]

The challenges presented by rising health care costs in this country are important. NTSP trivializes those concerns when it suggests that a refusal to credit its flimsy spillover defense would discourage innovative efforts to address rising health care costs. In fact, accepting

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[15] *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 462 (1986) ("The Federation is not entitled to pre-empt the workings of the market by deciding for itself that its customers do not need that which they demand.").

NTSP's vague assertions about "physician teamwork efforts" 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.

Conclusion

For the reasons set forth above and in Complaint Counsel's Answering and Cross-Appeal Brief, the Commission should modify the ALJ's order as requested by Complaint Counsel.

Respectfully submitted,

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April 28, 2005

CERTIFICATE OF SERVICE

I, Sarah Croake, hereby certify that on April 28, 2005, I caused a copy of Complaint Counsel's Reply Brief on Cross Appeal to be served upon the following persons:

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