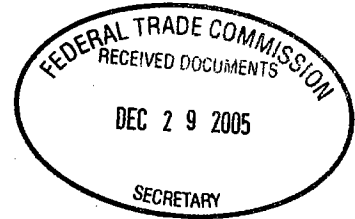


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

PUBLIC

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



In the Matter of

NORTH TEXAS SPECIALTY PHYSICIANS,

a corporation.

Docket No. 9312

**COMPLAINT COUNSEL'S OPPOSITION TO MOTION FOR STAY
OF FINAL ORDER PENDING JUDICIAL REVIEW**

I. INTRODUCTION

"This is not really a close case." So concluded a unanimous Commission in its Opinion and Order of November 29, 2005 condemning NTSP's plentiful and varied price-fixing conduct. Opinion of the Commission ("Op.") 41. So concluded the Commission after cautiously applying the "flexible *Polygram* framework,"¹ *id.*, and after "consider[ing] each of Respondent's defenses in depth," *id.*, and resoundingly rejecting each of them. *See, e.g.*, Op. 28-32 (NTSP's "overriding purpose in each of these activities was to exploit its collective bargaining leverage over payors, not to achieve efficiencies").

¹ *See Polygram Holding, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (FTC 2003), available at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>, *aff'd*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). Moreover, the Commission applied this more searching analytical framework despite recognizing ample precedent for summary condemnation of NTSP's conduct under the *per se* rule. Op. 3, 10, 41.

Nevertheless, NTSP asks the Commission to stay its Order until NTSP exhausts its appeals. In effect, NTSP urges the Commission to allow it to continue—perhaps for several more years—“to orchestrate price agreements among its physicians.”² Op. 41. We respectfully urge the Commission to deny Respondent’s Motion.

II. THE APPLICABLE STANDARD

Prior to 1994, the Federal Trade Commission Act provided that Commission orders automatically were stayed pending appeal. *See California Dental*, 1996 FTC LEXIS 277, at *9. In 1994 Congress eliminated the automatic stay, finding that the automatic stay had encouraged respondents to file petitions for review ““based on frivolous or other unmeritorious claims, largely for the purpose or effect of delay[ing],”” often for years, compliance with the Federal Trade Commission Act. *Id.* at *8-9 (quoting S. Rep. No. 130, 103d Cong., 1st Sess., at 11 (1993)). Following repeal of the automatic stay, the Commission was to stay its own order only when it had ruled on “an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.” *Id.* at *9-10 (citation omitted).

This standard is reflected in the Commission’s Rules of Practice, which provide that in determining whether to grant a stay the Commission will consider (1) “the likelihood of the applicant’s success on appeal;” (2) “whether the applicant will suffer irreparable harm if a stay is not granted;” (3) “the degree of injury to other parties if a stay is granted;” and (4) “why the stay

² This is in contrast to such cases as *California Dental*, wherein the applicants sought to stay only collateral provisions of the orders. *California Dental Ass’n*, Dkt. No. 9259, 1996 FTC LEXIS 277, at *7-8 (May 22, 1996). The Commission observed in *California Dental* that “[r]espondent has not sought to stay those provisions of the order that prohibit continuation of the restraints found to be unlawful. Respondent has thus attempted to minimize the harm to the public interest while focusing on the provisions that create the greatest harm to itself.” *Id.* at *11. NTSP has made no similar effort.

is in the public interest.”³ 16 C.F.R. § 3.56(c). NTSP does not—and cannot—establish any of the requisites for grant of a stay.

III. NTSP IS NOT LIKELY TO SUCCEED ON APPEAL

To establish its likelihood of success on appeal, a respondent must do more than rehash its previously made and rejected arguments. *See, e.g., Kentucky Household Goods Carriers*, 2005 FTC LEXIS 123, at *7 (denying stay where Respondent’s “assertions of a likelihood of success on appeal merely revisit arguments that the Commission already considered and rejected”).⁴ But that is all that NTSP has done. Notwithstanding NTSP’s persistent claim that the Commission’s Complaint was flawed from the opening jurisdictional paragraphs forward, this case does not present complex questions of fact.⁵ The record of the administrative proceeding emphatically, and at length, proves the facts relied upon, first by the Administrative Law Judge and then by the Commission, to establish NTSP’s unjustified price fixing. The Commission’s decision rests on diverse and repeated acts of horizontal price fixing, many of

³ Because Complaint Counsel represents the public interest in effective law enforcement, the Commission considers the third and fourth factors together. *Kentucky Household Goods Carriers Ass’n, Inc.*, Dkt. No. 9309, 2005 FTC LEXIS 123, at *11 (Aug. 19, 2005).

⁴ In *Novartis*, cited repeatedly by Respondent, the Commission found that the applicants’ arguments for a stay, which “merely revisit[ed] arguments that [the Commission had] already considered and rejected,” were “barely” adequate to warrant Commission consideration of the balance of equities. *Novartis Corp.*, 128 F.T.C. 233, 233-35 (1999). Those arguments rose to “barely” adequate, the Commission held, only because of the “complex factual record” in *Novartis*. *Id.* at 234-35. By “complex factual record,” the Commission alluded to difficult questions concerning numerous and conflicting scientific studies of consumer behavior, in the context of assessing and remediating potentially lingering misbeliefs fostered by deceptive advertising. *Id.* at 233-35. No comparable complexities had to be addressed in *NTSP*.

⁵ *See supra* n.4.

them open, notorious, and incontrovertible, that taken together establish a remarkably clear pattern of price fixing. *See, e.g.*, Op. 3, 4, 15-24. NTSP simply does not like the findings made by the Commission and seeks to revisit those findings.

Nor is this a close case on the law (or on application of the law to the facts). NTSP's assertion that its conduct—its coordinating the establishment of minimum prices that it then used, often coercively, in negotiating collective prices for its member physicians—was unilateral conduct protected by the *Colgate* doctrine is uninformed or disingenuous. *See* Motion for Stay of Final Order Pending Judicial Review (“Motion for Stay”) 4-5. In finding that NTSP's conduct constituted horizontal concerted action, the Commission articulated and applied what it called an “uncontroversial legal premise” that “when an organization is controlled by a group of competitors, the organization is viewed as a combination of its members, and their concerted actions will violate the antitrust laws if an unreasonable restraint of trade.” Op. 15.⁶ As the Commission observed, the Supreme Court's *Maricopa* decision holds no less. Op. 16-17.⁷

As the Commission also observed, the Fifth Circuit's decision in *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758 (5th Cir. 2002) is in accord. Op. 16. *Viazis* simply recognized that not all actions of an association of competitors, although inherently collective, are an

⁶ *See also* Op. n.23 and related text.

⁷ *See Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (application of *per se* rule to physicians' *maximum* price fixing despite absence of direct physician-to-physician agreement). The Commission also aptly cited other authorities to similar effect, such as the Supreme Court's decisions in *United States v. Masonite Corp.*, 316 U.S. 256, 276 (1972), and *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939); the Seventh Circuit's decision in *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 934-36 (7th Cir. 2000); the Fourth Circuit's decision in *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 479-81 (4th Cir. 1980); and the Commission's *Statements of Antitrust Enforcement Policy in Health Care*, available at <http://www.ftc.gov/reports/hlth3s.pdf> (Aug. 28, 1996). Op. 17.

unreasonable restraint of trade; *i.e.*, associations of competitors are not inherently pernicious walking conspiracies.⁸ *Viazis*, 314 F.3d at 764. Respondent's request for a stay of the Commission's Order ought to be based on stronger stuff than an assertion that the Fifth Circuit has or will set aside binding Supreme Court precedent in determining the presence or absence of horizontal concerted action.

Respondent also observes that the Fifth Circuit has not examined the *Polygram* standard as such. Motion for Stay 5. However, as the D.C. Circuit recognized in affirming that decision, *Polygram* is nothing more nor less than a synthesis of prior antitrust decisions, especially those of the Supreme Court. *See Polygram*, 416 F.3d at 36. Whether under *Polygram* or an alternative framework, the conclusion that NTSP's price fixing unreasonably restrains trade is unremarkable. *See, e.g.*, Op. n.20, n.43 (Commission would have reached same result had it applied "ancillary restraints" analysis).

Nor does NTSP raise substantial questions with respect to the scope of the Commission's Order. The scope of the Order plainly is informed by the Commission's very considerable experience with similar restraints imposed by similar physician organizations. *See, e.g.*, Op. n.1 and n.2 and related text; Op. 37-40. That experience properly begets judicial deference.⁹

⁸ The Commission agreed with the *Viazis* court, concluding that "[t]here are many ways that associations/agents can legally act for the collective benefit of the group," such as "negotiat[ing] prices for office facilities or wages for employees These are matters of no antitrust significance, because there is no conceivable anticompetitive impact." Op. 15.

⁹ *See FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957) (The Commission is "the expert body to determine what remedy is necessary [and] the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.") (citation omitted); *accord Gibson v. FTC*, 682 F.2d 554, 572 (5th Cir. 1982); *see also Dickinson v. Zurko*, 527 U.S. 150, 160-61 (1999) (explaining basis for judicial deference to agency fact finding).

The Commission is vested with great discretion in fashioning remedies, which may include “fencing-in” relief. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *National Lead Co.*, 352 U.S. at 428; *Kraft, Inc. v. FTC*, 970 F.2d 311, 326-27 (7th Cir. 1992). The Commission’s exercise of that discretion will be upheld provided only that the remedies fashioned are reasonably related to the unlawful conduct found. *See FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946). The Commission’s Order explains the manner in which each element of its relief is specifically addressed to the unlawful conduct of NTSP,¹⁰ and is, in logic and law, not reasonably assailable.

NTSP continues to incant that its “business model” is unique and outside of the Commission’s experience. As the Commission’s Opinion makes evident, however, the relevant point is that Respondent’s “business model” involves unjustified horizontal price fixing in the provision of fee-for-service medicine. This fact is not a *relevant* distinguishing factor for purposes of determining whether the Commission should stay its Order.

IV. THE BALANCE OF EQUITIES IS AGAINST RESPONDENT

Given that “this is not really a close case,” the balance of equities must weigh decisively in favor of a stay in Order for grant of a stay to be appropriate.¹¹ Not only does the balance of

¹⁰ For example, the Commission explains that the ban on collective negotiation of non-price terms as well as explicit price terms is “necessary to ensure that NTSP does not seek to perpetuate its unlawful conduct by orchestrating agreements” that ostensibly relate to non-price terms. Op. 38. Similarly, the Commission explains that mandatory termination of extant contracts with health plans is necessary to ensure that Respondent’s member physicians “do not continue to reap the benefits of their unlawful price fixing.” *Id.*; *see generally* Op. 37-40 (carefully explaining the Commission’s rationale underlying each order inclusion and omission).

¹¹ *See California Dental*, 1996 FTC LEXIS 277, at *10 (necessary possibility of success varies according to assessment of private and public equities).

equities *not* weigh decisively in favor of grant of a stay; the balance of equities tilts pronouncedly in the opposite direction.

A. NTSP Has Not Established That It Will Suffer Irreparable Harm If a Stay Is Not Granted.

An applicant for a stay must establish that it will suffer irreparable harm if a stay is not granted. 16 C.F.R. § 3.56(c). “Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay.” *Kentucky Household Goods Carriers*, 2005 FTC LEXIS 123, at *10. NTSP has failed to establish the requisite likelihood of harm; rather, it simply *asserts* that certain irreparable harms are likely. For example, NTSP does not quantify its alleged “unrecoverable costs and business losses,” does not explain how the grant or refusal of a stay would affect its reputation, and does not explain what *protected* speech would be restricted by the Order. *See* Motion for Stay 9-17. Instead, the entirety of NTSP’s “balance of the equities” argument rests on two declarations, one from NTSP’s Executive Director and one from an officer of NTSP, containing nothing more than broad, naked assertions that a denial of the requested stay will cause irremediable public and private harm.

The insubstantiality of NTSP’s assertions is all-the-more apparent when contrasted with the proofs of applicants granted stays by the Commission. For example, NTSP cites *California Dental* in support of its assertion that a stay is warranted because it would otherwise suffer unrecoverable “costly [but not quantified] notification.” Motion for Stay 9. However, whereas the applicant in *California Dental* would have had to notify, and potentially renotify, some 19,000 member dentists, NTSP will have to notify, and potentially renotify, only some 400

member physicians. Similarly, citing *Novartis*, NTSP asserts unspecified unrecoverable business and reputational costs. Motion for Stay 9. In contrast, *Novartis* established, among other things, that it would have been required to spend some \$8,000,000 for corrective advertising, in effect informing millions of consumers that it had misled them. *Novartis*, 128 F.T.C. at n.2.

B. Staying Implementation of the Order Would Harm the Public.

NTSP also asserts that denial of its requested stay would harm third parties and the public, though just how is unclear. Apparently, the principal alleged harm is the loss to the public of the claimed benefits of NTSP's "spillover" model. But, as previously indicated, the Commission carefully assessed and firmly rejected NTSP's spillover claims, finding them non-cognizable and contrary to the greater weight of evidence.¹²

More importantly, NTSP ignores the preeminent public equity, which cuts sharply against it: the substantial injury to competition and consumers that would result from continued price fixing by Respondent during the perhaps multi-year period of a stay.

Thus, the balance of equities here is not really a close question. Weighing in favor of a stay are airy assertions of harm to NTSP. Weighing against a stay is the public interest in

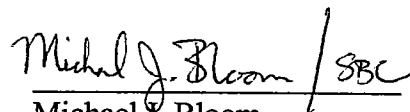
¹² For example, the Commission observes that, among the "flaws in the spillover efficiency claim," Respondent failed to explain: how the half of its member physicians who do not participate in Respondent's single risk contract could achieve spillover efficiencies from that contract; nor even why its risk panel physicians would apply to fee-for-service patients the quality and cost control they use with risk pool patients, given that Respondent neither provides financial incentives nor monitoring and control procedures to fee-for-service medical practices. Op. 30. The Commission further observes that Respondent admitted that risk contracts are disfavored in Fort Worth, and that "NTSP's actions, purportedly justified as efforts to enhance spillover efficiencies from its one risk contract, seem to be perceived by customers merely as an attempt to regulate the terms of access to the more-desired non-risk product." *Id.* That observation would seem to dispose rather completely of Respondent's claim that health plans and their customers—employers and ultimately patients—would be harmed by a refusal to grant the requested stay.

mitigating and avoiding harm to competition resulting from NTSP's unjustified price-fixing practices.

V. CONCLUSION

NTSP has not made—and cannot make—a credible argument either that it has a reasonable prospect of overturning the Commission's Opinion and Order on appeal or that the balance of equities tips in favor of its requested stay. Its application is predicated on nothing more than NTSP's wish to relitigate its previously rejected claims. The facts, as found by the Commission, are firmly established. The law, as articulated by the Commission, is cautious in its analysis and in accord with precedents that also are firmly established. And the overwhelming balance of private and public equities favors bringing an end to Respondent's price fixing now, rather than perhaps several years from now when Respondent has exhausted its appeals. We respectfully urge the Commission to deny Respondent's Motion in full.

Respectfully submitted,

Handwritten signature of Michael J. Bloom in cursive script, with the initials "SBC" written to the right of the signature.

Michael J. Bloom

Counsel Supporting the Complaint

December 29, 2005


CERTIFICATE OF SERVICE

I, Sarah Croake, hereby certify that on December 29, 2005, I caused Complaint Counsel's Opposition for Stay of Final Order Pending Judicial Review to be served upon the following persons:

Office of the Secretary (original and 12 copies via hand delivery, electronic version via e-mail)
Donald S. Clark
Federal Trade Commission
Room H-135
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Gregory S. C. Huffman, Esq. (via Federal Express and e-mail)
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693

and by e-mail upon the following: William Katz (william.katz@tklaw.com) and Gregory Binns (gregory.binns@tklaw.com).


Sarah Croake