

[PUBLIC]

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

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

In the Matter of

North Texas Specialty Physicians,  
a corporation.

Docket No. 9312

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

TO: THE COMMISSION

Pursuant to Commission Rule of Practice 3.56, North Texas Specialty Physicians (“NTSP”) respectfully files this Reply to Complaint Counsel’s Opposition to NTSP’s Motion for Stay.

**INTRODUCTION**

Complaint Counsel filed an Opposition to NTSP’s Motion to Stay on December 29, 2005. In this opposition, Complaint Counsel claims that NTSP is not likely to succeed on appeal and that the balance of equities supports denial of the stay. Complaint Counsel does not address any specific provisions of the order that NTSP seeks to stay or NTSP’s specific arguments — instead, they make broad assertions that the Commission’s ruling that NTSP engaged in price fixing effectively prevents a stay. This cursory response to NTSP’s request for a stay does not meaningfully address the grounds for the stay. NTSP’s motion was specific to each provision of

the Order and raised serious legal issues as to the Order's provisions that bar otherwise lawful conduct, limit NTSP's lawful communications, and terminate contracts without any showing as to or concern for third-party health plans, physicians and patients. Further, Complaint Counsel's filing of a Petition for Clarification of Certain Statements in the Commission Opinion highlights that the Opinion is legally problematic and potentially affects adversely the public interest.

### ARGUMENT AND AUTHORITIES

#### **I. Likelihood of Success on Appeal**

Under both Commission and Fifth Circuit standards, NTSP must show only a substantial case on the merits when a serious legal question or complex factual record is involved and the balance of equities supports a stay.<sup>1</sup> NTSP's Motion to Stay discussed the serious legal questions and complex factual record in this case and made the required substantial showing. In opposition, Complaint Counsel merely declares that because the Commission found against NTSP in what the Commission called "not really a close case," there are no serious legal issues or complex factual issues in this case. Complaint Counsel largely ignores NTSP's arguments, including NTSP's list of issues that will be reviewed *de novo* by the Fifth Circuit; Complaint Counsel concedes, however, that the Fifth Circuit has not examined the *Polygram* analysis.<sup>2</sup> Complaint Counsel also misstates the holdings of *Viazis* and *Maricopa*.<sup>3</sup>

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<sup>1</sup> *In the Matter of Novartis Corp.*, 128 F.T.C. 233, 234 (1999); *In the Matter of Toys "R" Us, Inc.*, 126 F.T.C. 695, 697 (1998); *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983).

<sup>2</sup> Complaint Counsel's Opposition to Motion to Stay of Final Order Pending Judicial Review, filed December 29, 2005 ("CC Opposition") at 5.

<sup>3</sup> CC Opposition at 4-5. *Viazis* held that it is improper to presume that a trade or professional organization meets the concerted action requirement. *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 761, 764 (5th Cir. 2002). Similarly, *Maricopa* did not involve concerted action merely because there was an organization controlled by competitors; that case involved an acknowledged agreement among physicians as to which price they would accept. *Arizona v. Maricopa Co. Med. Soc'y*, 457 U.S. 332, 337 (1982).

Complaint Counsel themselves have concerns regarding the Commission’s Opinion. They have filed a Petition for Clarification of Certain Statements in the Commission Opinion, requesting that the Commission remove or qualify several fundamental statements made in the Opinion regarding appropriate use of the messenger model, allowable activities by physician groups, and the conformance of the opinion with the *Health Care Statements* and FTC Advisory Opinions.<sup>4</sup> Complaint Counsel’s request echoes some of the same issues as support NTSP’s defense on the merits.

## **II. Balance of Equities**

As applied to every significant provision in the Order, NTSP’s Motion to Stay explained (and supported with affidavits and other evidence) how the balance of equities — whether there is irreparable harm to NTSP if a stay is not granted, whether others will be harmed if a stay is granted, and whether a stay is in the public interest — weighs in favor of NTSP. Complaint Counsel argues that NTSP’s claims of injury have no merit because NTSP has not sufficiently quantified or explained future potential business and reputation losses.<sup>5</sup> NTSP has explained and quantified these losses by affidavit to the extent it is possible — NTSP obviously cannot predict exactly the future harm to its reputation and business.<sup>6</sup> NTSP’s loss will depend on the reactions of persons outside NTSP. The effect of limitations on NTSP’s rights to free speech and to contract will depend on payors’ future legal violations, breaches of contract, and other conduct.<sup>7</sup>

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<sup>4</sup> Complaint Counsel’s Petition for Clarification of Certain Statements in the Commission Opinion, filed December 20, 2005.

<sup>5</sup> CC Opposition at 7.

<sup>6</sup> In upholding findings of irreparable harm without such predictions, courts have recognized that “[b]y its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages.” *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 20 (1st Cir. 1996).

<sup>7</sup> Payors involved in this case have previously breached contracts with NTSP and been found guilty of repeated illegal conduct. *E.g.*, Initial Decision Findings of Fact 194, 218-19, 228, 257-58, 357-60, 362.

Complaint Counsel further disregards entirely the harm third-party health plans, physicians and patients will suffer.

Complaint Counsel argues that the public interest weighs against a stay because of “continued price fixing” by Respondent. But how is the public interest harmed by leaving alone contracts that are already terminable-at-will by payors and were admitted by Complaint Counsel’s expert to have been no different than what the payors were already offering in the market? Complaint Counsel avoids those points for obvious reasons. Complaint Counsel also ignores the many fencing-in provisions which relate to conduct for which no evidence was shown at trial — including provisions that drastically limit NTSP’s speech on matters recognized elsewhere as appropriate by the Commission and which deny NTSP the right to enter into and enforce its own contracts.

#### **PRAYER FOR RELIEF**

Complaint Counsel has side-stepped the specifics of NTSP’s motion. Because North Texas Specialty Physicians has shown that it meets the Federal Trade Commission’s requirements for the granting of a stay, North Texas Specialty Physicians requests that the Commission stay the Final Order, effective upon NTSP’s filing of a petition for review<sup>8</sup> and remaining in effect until 90 days after the U.S. Court of Appeals for the Fifth Circuit issues a decision vacating the Final Order or otherwise ruling on the petition for review.

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<sup>8</sup> Due to Hurricane Katrina and the Fifth Circuit’s relocation to New Orleans from its temporary office in Houston, the Office of the Clerk of the U.S. Court of Appeals for the Fifth Circuit has been closed to new filings until January 9, 2006. Order of the U.S. Court of Appeals for the Fifth Circuit, entered November 18, 2005, available at <http://www.ca5.uscourts.gov/DisplayNews.aspx?NewsItem=104>. NTSP’s petition for review will be filed on January 9, 2006.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2006, I caused a copy of the foregoing document to be served upon the following persons:

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and by e-mail upon the following: Theodore Zang (tzang@ftc.gov) and Jonathan Platt (jplatt@ftc.gov).

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