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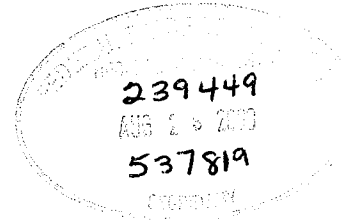
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August 28, 2008

Via Federal Express

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Room H-159
Washington, DC 20580



Re: *In the Matter of North Texas Specialty Physicians*; Docket No. 9312

Dear Mr. Clark:

Enclosed are the original and thirteen (13) copies of the Response of North Texas Specialty Physicians to Complaint Counsel's Proposal for Order Modification on Remand, along with a disk containing same. Please return a file-marked copy to me by way of the pre-addressed envelope enclosed.

Thank you for your courtesies in this regard.

Very truly yours,

A handwritten signature in black ink, appearing to read "Nicole Williams".

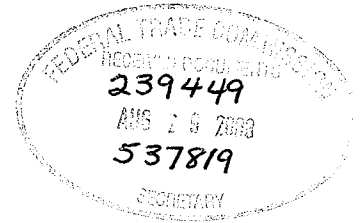
Nicole Williams

NW/lc
Enclosures

c: Jonathan Platt (via regular and electronic mail)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch



In the Matter of

North Texas Specialty Physicians,
a corporation.

Docket No. 9312

**RESPONSE OF NORTH TEXAS SPECIALTY PHYSICIANS TO COMPLAINT
COUNSEL’S PROPOSAL FOR ORDER MODIFICATION ON REMAND**

The Fifth Circuit, in remanding this proceeding to the Commission, stated

While we do not accept many of NTSP’s arguments regarding this section of the order, NTSP’s contention that subsection (A)(2) is overly broad and internally inconsistent has merit. The ALJ refused to include such a provision, recognizing that it “could have the effect of compelling Respondent to messenger contracts or become a party to contracts sent to it by payors, regardless of potential risks to Respondent, its member physicians, and its patients.”¹ This observation is valid. It is also difficult to see how NTSP can both deal and refuse to deal with any payor.²

The Fifth Circuit opinion must be read in light of the numerous comments, by the Commission in its original and revised opinion and by counsel for the Commission before the Fifth Circuit. Those comments made clear that NTSP has legitimate concerns in deciding whether to deal or not deal with a payor, concerns

¹ *N. Tex. Specialty Physicians*, 2004 WL 3142857, slip op. at 89 (F.T.C. Nov. 15, 2004) (ALJ’s Initial Decision), available at <http://ftc.gov/os/adipro/d9312/041116initialdecision.pdf>.

² 528 F.3d 346, 371 (5th Cir. 2008).

which the Fifth Circuit obviously believed needed to be given greater recognition in the order.

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.³

These limitations [in the Initial Decision] were based on the ALJ's view that a prohibition of agreements to refuse to deal would impose on NTSP a broad duty to contract with all payors. ID at 89. The language in our order does not mandate that result.⁴

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 agreement would not involve an agreement among physicians with respect to their provision of physician services.⁵

As the Commission has 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).⁶

The communication of "purely factual information" is already covered by Paragraph III, which allows NTSP to act as a messenger⁷

There is nothing in the order we enter that will require Respondent to engage in illegal activity.⁸

³ Brief for Respondent Federal Trade Commission before the Fifth Circuit (Corrected) at 54 ("Brief for Respondent").

⁴ Opinion of the Federal Trade Commission at 39 ("Opinion").

⁵ Brief for Respondent (Corrected) at 54.

⁶ Brief for Respondent (Corrected) at 55.

⁷ Opinion at 40.

⁸ Opinion at 40.

In every instance in which NTSP has been approached by a payor, the payor is seeking to have NTSP become a party to the contract. Of course, in contracts involved in NTSP's capitated program, NTSP is the contracting party. In other contracts, NTSP and physicians participating in the program will both be parties to the payor's contract. In some situations, NTSP will be contractually bound to provide credentialing or utilization management services. Of course, NTSP's being a party to a contract entails a potential risk of liability and of damage to its reputation, the point recognized as a valid concern by the Fifth Circuit.

Complaint Counsel offers two alternative revisions to the order, neither of which sufficiently meets the Fifth Circuit's ground for remand. As the Fifth Circuit noted, the ALJ omitted any provision such as subparagraph II(A)(2). The proper response to the Fifth Circuit's order is to delete the provision.

Both of Complaint Counsel's alternative suggestions also contain the clause "in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order." If this clause is meant to be a belt-and-suspenders repetition of the other provisions, it is unnecessary. If the clause is meant to have in some way "the effect of compelling Respondent to messenger contracts or become a party to contracts sent to it by payors, regardless of potential

risks to Respondent, its member physicians, and its patients,” then the clause runs afoul of the Fifth Circuit’s decision.⁹

Complaint Counsel’s second alternative suggestion does make an effort to include a proviso recognizing “that nothing in this Paragraph II.A.2 shall be construed to require Respondent to become a party to a contract offered by a payor, to convey a payor offer to Respondent’s participating physicians, to convey a response to such offer from Respondent’s participating physicians, or otherwise to deal with a payor who seeks Respondent’s services.” That specific language seems consistent with the intent and holding of the Fifth Circuit.

In conclusion, the revision most in line with the Fifth Circuit’s opinion is the deletion of paragraph II.A.2. However, of the two alternatives suggested by Complaint Counsel, the second version does contain language in the proviso consistent with the Fifth Circuit’s opinion, with the exception of the “in furtherance” clause which is confusingly ambiguous¹⁰ and possibly in conflict with the Fifth Circuit’s opinion.¹¹

⁹ 528 F.3d at 371.

¹⁰ Once the Final Order has been finally determined, NTSP will have an obligation to send the notice required in paragraph IV of the Final Order, which has been stayed pending the final determination. NTSP will need a clear understanding of its obligations and rights under paragraph II in responding to what will likely be a large number of inquiries by payors, employers, and patients subject to the termination order.

¹¹ The Commission will need to address a procedural issue as to the revision of the Final Order -- whether and how Federal Rule of Appellate Procedure 19 applies in this situation where the agency’s order has been remanded. *Cf. Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 217 (9th Cir. 1979).

Dated August 28, 2008.

Respectfully submitted,



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ATTORNEYS FOR NORTH TEXAS SPECIALTY
PHYSICIANS

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2008, I caused a copy of the foregoing document to be served upon the following persons:

Office of the Secretary (via Federal Express)
Donald S. Clark
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Jonathan Platt (via regular mail and e-mail)
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
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