[PUBLIC RECORD]

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

RESPONDENT'S REPLY BRIEF

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Dated: April 14, 2005

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TO: THE COMMISSION

Pursuant to Commission Rule of Practice 3.52(d), Respondent North Texas Specialty Physicians ("NTSP") respectfully replies in support of its appeal of the Initial Decision and Order against Respondent and answers the cross-appeal filed by Complaint Counsel.

SUMMARY OF THE REPLY

Complaint Counsel concedes, either explicitly or by silence, almost all of the salient factual points made by Respondent. Complaint Counsel's case has devolved into issues of law focusing primarily on whether an entity like NTSP is to be treated as a conspiracy whose refusal to participate is a *per se* or similar violation unredeemable by procompetitive justifications. Complaint Counsel's case is doomed by the conceded, undisputed facts and the Supreme Court's and Fifth Circuit's decisions according an entity like NTSP a right to refuse to deal and a right to full rule of reason treatment.

ARGUMENT AND AUTHORITIES

I. Under established Supreme Court authority, Complaint Counsel must have shown an actionable contract, combination, or conspiracy that had an anticompetitive effect in a properly-defined relevant market.

Complaint Counsel concedes either explicitly or silently almost all of the salient factual issues presented by Respondent, including the lack of any proven conspiracy among the physicians and the lack of any proven relevant market. The legal issues on proof of an actionable conspiracy and whether any such conspiracy would be subject to *per se* or rule of reason treatment accordingly snap into focus as pivotal issues in the case. Complaint Counsel themselves assert that "[t]he question whether NTSP engaged in price fixing thus boils down to a legal argument."[1]

Respondent has cited the Supreme Court's decisions in *Colgate*,[2] *Trinko*,[3] and *California Dental*[4] and the Fifth Circuit's decision in *Viazis*[5] as determinative of these legal issues. Complaint Counsel concede that "NTSP is not a 'walking conspiracy' in the *Viazis* sense,"[6] but argue nonetheless that the presence of the various physicians on NTSP's board makes NTSP's decision not to participate in a payor's offer an illegal conspiracy. Complaint Counsel try to sidestep the Supreme Court's admonition in *California Dental* to use a rule of reason analysis, by arguing that NTSP's refusal to participate somehow is price fixing. Complaint Counsel entirely ignore *Colgate* and *Trinko*, evidently being of the belief that an entity like NTSP has no *Colgate* right to

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[1] Answering and Cross-Appeal Brief of Counsel Supporting the Complaint, filed March 15, 2005 ("Answering Brief") at 2.
[2] *United States v. Colgate & Co.*, 250 U.S. 300 (1919).
[3] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004).
[4] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).
[5] *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758 (5th Cir 2002).
[6] Answering Brief at 24.

refuse to deal and that NTSP's creation of a network of physicians is entitled to no deference despite the holding in *Trinko*.

The legal defects in Complaint Counsel's case become glaringly apparent when viewed in light of the conceded, undisputed facts discussed below. Those facts establish, at a minimum, that *Viazis, California Dental, Colgate,* and *Trinko* mandate the dismissal of Complaint Counsel's case.

II. The ALJ erred in finding that Complaint Counsel had shown concerted action when there was no evidence of collusion among NTSP's participating physicians.

Complaint Counsel concedes explicitly (as reflected in the footnoted reference to the Answering and Cross-Appeal Brief of Counsel Supporting the Complaint ["Answering Brief"]) or by silence the following points presented in Respondent's Appeal Brief:

- An assertion of an attempt to conspire does not satisfy the concerted action requirement.
- *Alvord-Polk*[7] supports Respondent's position that an association of otherwise competing physicians does not automatically satisfy the concerted action requirement.
- *Maricopa*,[8] upon which Complaint Counsel relies, involved an acknowledged agreement among physicians as to which price they would accept—no such agreement exists in this case.
- There is no evidence of direct agreements between member physicians, and "Complaint Counsel did not attempt to prove" such agreements.[9]
- "NTSP is not a 'walking conspiracy' in the *Viazis* sense."[10]
- NTSP cannot bind physicians to contracts.[11]

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[7] *Alvord-Polk, Inc. v. Shumacher & Co.*, 37 F.3d 996 (3d Cir. 1994).
[8] *Arizona v. Maricopa Co. Med. Soc'y*, 457 U.S. 332 (1982).
[9] Answering Brief at 23.
[10] Answering Brief at 24.
[11] Answering Brief at 27, 30.

- The poll does not require a physician to contract in a particular manner or even to contract at all.

- NTSP only informed physicians of the average, aggregated poll responses—never any individual results.[12]

- NTSP's disclosure of the mean, median, and mode of poll results tells the physicians nothing about what any physician believes or does—it is impossible for any physician to determine the response of another specific physician or specialty or even if they responded at all.[13]

- "[T]he complaint did not plead the polling activities as an independent violation"[14]

- NTSP's participating physicians independently contract directly with payors or through various entities, of which NTSP is only one.

- All the evidence from NTSP's participating physicians is that they are free to deal with a payor directly at any time.

- Non-risk contracts in which NTSP decides to participate are messengered to physicians, who only accept the contracts less than one-third of the time.

- NTSP always followed the messenger model once NTSP had decided it would be a party to a payor contract.

- The rates offered to NTSP by payors were the same or lower than rates the payors had already offered to physicians in the area directly or through other entities.

- NTSP physicians independently entered into payor contracts at rates both above and below NTSP's threshold rates.

- Complaint Counsel's expert, Dr. Frech, had no evidence that:

    - any physician agreed with another physician to reject a non-risk payor offer;
    - any physician agreed with any entity to reject a non-risk payor offer;
    - any physician rejected a non-risk payor offer based on NTSP's Physician Participation Agreement or a power of attorney granted to NTSP;

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[12] Answering Brief at 42.

[13] *See* Answering Brief at 42 (citing favorably the statement "it is impossible for [anyone] to determine the response of any specific physician").

[14] Answering Brief at 32.

- any physician knew what another physician would do in response to a non-risk payor offer or what another physician's response was to the poll;[15] or
- any physician gave NTSP the right to bind him to or gave up his right to independently accept or reject any non-risk payor offer.

- The evidence shows the actions of NTSP's participating physicians were consistent with independent decision-making.

- "[A]bsent other evidence, mere collective expression of opinion by competitors, without any agreement on their behavior in the marketplace, does not establish an agreement in restraint of trade."[16]

- Personal liability of individual members "depends on facts that show a degree of personal involvement in the challenged conduct beyond mere membership. No questions of personal liability are raised here, however."[17]

These numerous concessions leave Complaint Counsel no room to prove a legally-viable conspiracy. Without individual actions by the physicians parallel to NTSP's conduct, there is no room even to argue conscious parallelism,[18] much less proof of a conspiracy which would satisfy *Matsushita.*[19]

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[15] Complaint Counsel speculates that poll responses could have been interdependent because individual responses could affect the outcome. Answering Brief at 31. Under that kind of logic, voting in the Presidential election becomes an antitrust violation.
[16] Answering Brief at 20.
[17] Answering Brief at 23.
[18] *In re Beef Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) ("When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendants' actions were parallel.").
[19] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). There are many very legitimate reasons a physician might reject or delay a payor offer. The physician might already have a contract directly or through another entity with the payor; the physician might be concerned about the detailed terms and meaning of the offer; the physician might be suspicious due to the payor's being investigated for contracting misconduct by government agencies; the offer might not have met the rate or other criteria the physician had been requiring in his or her practice. Complaint Counsel's failure "to account for the additional . . . factors in their theory" is fatal to their case. *See In re Beef Antitrust Litig,* 907 F.2d at 514.

Complaint Counsel's theory of conspiracy centers on the presence of physicians on NTSP's board.[20] Yet NTSP does not provide physician services on non-risk contracts. The only medical providers on non-risk contracts are the physicians. When Complaint Counsel contend that there is "concerted bargaining" or a "collective minimum price,"[21] we know from the undisputed facts that the physicians took no such action. The reference must be to the NTSP board having decided as a non-provider not to sign and messenger a payor offer which a majority of NTSP's panel of physicians would likely find unattractive. The same can be said of Complaint Counsel's allegation of a "collective departicipation."[22] We know the physicians took no such individual actions, so the reference must be to NTSP having terminated a payor contract.[23]

An organization's refusal or failure to act is not a conspiratorial act, especially where the members have not taken steps consistent with and effectuating the alleged conspiracy.[24] None of the cases relied on by Complaint Counsel for this legal theory of

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[20] Under Texas law, NTSP is required to have licensed physicians "actively engaged in the practice of medicine" as its board members. TEX. OCC. CODE ANN. § 162.001(b)(3) (Vernon 2004).

[21] *See, e.g.*, Answering Brief at 25-26.

[22] Answering Brief at 26.

[23] As discussed *infra*, NTSP terminated its participation in the United contract in 2001 when United began using that contract to undercut NTSP's risk contract to treat the employees of the City of Fort Worth, in a situation in which United was negotiating as a common bargaining agent for several self-insured employers. NTSP also sent a notice of termination to Cigna in 2000 when Cigna breached a contract with NTSP. These facts are discussed *infra* in more detail.

[24] *E.g., Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 764 (5th Cir. 2002)(stating that action on part of organization to suspend plaintiff "can constitute a conspiracy only if the members of [the organization] were conspiring among themselves").

conspiracy supports any broader theory. Each of the cases that found liability involved conduct broader than that of a refusal to participate by the organization.[25]

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[25] The cases cited by Complaint Counsel for where a conspiracy or agreement is found arise:

(A) where the competitors took steps to effectuate the alleged conspiracy. *E.g., FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 416 (1990) ("about 90 percent of the [lawyers] refused to accept any new assignments"); *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 496 (1988) ("they collectively agreed to exclude respondent's product from the 1981 Code"); *FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 449-50 (1986) ("a large number of dentists signed the pledge and insurers found it difficult to obtain compliance with their requests for x rays"); *Ariz. v. Maricopa County Med. Soc'y,* 457 U.S. 332, 335-36 (1982) ("agreements among competing physicians setting, by majority vote, the maximum fees that they may claim in full payment for health services"); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 1928 (1980) ("after entering into the agreement, respondents uniformly refused to extend any credit at all"); *Broad. Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 6 (1979) (members granted the organizations the right to sell their works through "blanket licenses" to users); *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 682-83 (1978) (members "agreed to refuse to negotiate or even discuss the question of fees until after a prospective client has selected the engineer for a particular project"); *United States. v. Sealy, Inc.*, 388 U.S. 350, 352 (1967) ("Sealy agreed with each licensee not to license any other persons to manufacture or sell in the designated area; and the licensee agreed not to manufacture or sell 'Sealy products' outside the designated area"); *Associated Press v. United States.*, 326 U.S. 1, 4, 6 (1945) ("By-Laws which prohibited all AP members from selling news to non-members . . . non-members were denied access to news of AP and all of its member publishers"); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 394 (1927) (sellers "combined to fix prices"); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 407 (1921) ("a persistent purpose to encourage members to unite in pressing for higher and higher prices . . . . it was fully realized"); *Freeman v. San Diego Ass'n of Realtors,* 322 F.3d 1133, 1144 (9th Cir. 2003) (competitor associations fixed fees to organization which were passed on to subscribers); *Pa. Dental Ass'n v. Med. Servs. Ass'n of Pa.*, 815 F.2d 270, 273 (3rd Cir. 1987) ("mass withdrawals of participation by dentists"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214 (D.C. Cir. 1986) ("Every carrier that stayed in the Atlas network adhered to a policy of ending or lessening its competition with Atlas"); *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n,* 744 F.2d 588, 590 (7th Cir. 1984) (competitors divided market locations among themselves through the association); *Plymouth Dealers' Ass'n of N. Cal. v. United.States,* 279 F.2d 128, 129-30 (9th Cir. 1960) (competitors fixed a uniform price list to be used by members of association); *United States v. Addyston Pipe & Steel,* 85 F. 271, 273 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899) (competitors used association to divide markets and fix prices charged by competitors); *Vandervelde v. Put and Call Brokers and Dealers Ass'n,*

The implications of Complaint Counsel's unprecedented theory would be catastrophic. NTSP's board members are drawn from different medical specialties and have not been shown to be competitors of one another.[26] The trigger of illegality under Complaint Counsel's theory apparently is when a director is also one of those served by

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344 F. Supp. 118, 130 (S.D.N.Y. 1972) (horizontal price fixing implemented through association), and/or

(B) where the competitors used the organization to compel the competitors to effectuate the conspiracy by their individual actions. *E.g., Cal. Dental Ass'n v. FTC,* 526 U.S. 756, 761 (1999) (association required membership "to submit copies of their own advertisements . . . to assure compliance with the Code" and used "censure, suspension, or expulsion from the CDA" when members refused to withdraw or revise objectionable advertisements); *Nat'l Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.,* 468 U.S. 85, 95 (1984) ("the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. . . . [M]ost CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of the threatened sanctions"); *Goldfarb v. Va. State Bar,* 421 U.S. 773, 776-77 (1975) (bar association published and enforced fee schedules to be used by lawyers); and/or

(C) where the competitors used the organization to disadvantage a horizontal competitor. *E.g., St. Bernard Gen. Hosp. v. Hosp. Serv. Ass'n of New Orleans, Inc.,* 712 F.2d 978, 985 (5th Cir. 1983) ("the participating hospitals, through the medium of the Blue Cross affiliate, combined to inflict financial harm on the other New Orleans hospitals"); *Hahn v. Or. Physicians' Serv.,* 868 F.2d 1022 (9th Cir. 1989) (physicians alleged to have controlled health plan to pay competitor podiatrists less than physicians); *Nat'l Elec. Contractors Ass'n, Inc. v. Nat'l Constructors Ass'n,* 678 F.2d 492, 501 (4th Cir. 1982) (association of contractors and labor union agreement to add 1% charge to the cost of electrical construction contracts of non-union contractors); *Va. Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 481 (4th Cir. 1980) (physicians conspired to have controlled insurer institute policy of "refusing to cover services rendered by psychologists unless billed by a physician").

Complaint Counsel cite a few cases where the association took no action, but no conspiracy was found in those cases and, as such, they support NTSP's position. *See Viazis,* 314 F.3d 758; *Consolidated Metal Prods. v. Am. Petroleum Inst.,* 846 F.2d 284 (5th Cir. 1988).

[26] *See* RPF 10 (NTSP physicians practice in 26 different specialties), 236 (Complaint Counsel did not posit a relevant product market), 237-239 (specialties do not necessarily compete with each other).

the entity. If a widget user sits on an entity's board and widget users are subscribers to or are provided a service by the entity, a refusal by the entity to be a co-participant in a vendor's offer to the widget users would become an antitrust conspiracy.

Even if there were two widget users on the entity's board, the implications would be catastrophic. If the entity did not like the terms of the vendor's offer and rejected the offer, a potential antitrust violation would have occurred. If a bank card company wanted to solicit the entity's subscribers, the entity's refusal would be deemed conspiratorial – and maybe a *per se* conspiracy if the entity's decision were based on the unappealing price to be charged by the vendor.

The legal precedents all point to there being a requirement of showing two or more competitors having acted in collusion. Complaint Counsel concedes that the physicians are the competitors providing medical services and that the physicians have not conspired with one another, or followed NTSP in their individual actions. Those concessions mean there is no viable antitrust conspiracy in this case.

III. The ALJ erred when he found that Complaint Counsel had shown an actionable conspiracy despite no evidence of anticompetitive effect in a properly-defined relevant market.

A. Even if Complaint Counsel had shown a contract, combination, or conspiracy, the proper analysis would be rule of reason.

Complaint Counsel evidently have concluded that their only hope is to rely on the *per se* rule. Complaint Counsel spend only three pages of their brief on the rule of reason, with not even a perfunctory argument on most of the elements of a rule of reason

case.[27] Complaint Counsel's case stands or falls on a NTSP refusal being treated, not only as a conspiracy, but a *per se* one at that.

Complaint Counsel concedes explicitly or by silence the following points presented by NTSP in Respondent's Appeal Brief:

- There are many reasons an entity may refuse to deal with another.
- Payor contracts are full of legal and medical pitfalls that NTSP must avoid.
- NTSP faces potential liability when it becomes party to a payor contract.
- NTSP and its physicians have the right and duty to speak out about issues potentially affecting the care of their patients.
- There are procompetitive effects of information sharing in the health care industry.
- Some of the conduct and comments of NTSP challenged by the Complaint also relate to non-economic terms of payor contracts, litigation, breach of contract disputes, NTSP's direct competition with payors, and government enforcement actions against payors.[28]
- NTSP participates in risk contracts.[29]
- NTSP has "tried to make a go of its risk-contracting product."[30]
- NTSP's price setting in risk contracts is not challenged in this case.[31]
- Spillover is "certainly plausible in theory."[32]
- Spillover effects through NTSP would be adversely affected by a lack of continuity between NTSP's risk panel and panel handling payor's non-risk patients.
- NTSP was denied discovery of data that may prove spillover effects.[33]

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[27] *See* Answering Brief at 44-47.
[28] Answering Brief at 32.
[29] Answering Brief at 7, 38.
[30] Answering Brief at 3.
[31] Answering Brief at 2.
[32] Answering Brief at 40.

- NTSP has a reputation to protect.
- NTSP actively seeks risk contracts from payors who are currently involved only in non-risk contracts.
- NTSP's performance on non-risk contracts is a way to persuade non-risk payors to take on risk contracts with NTSP.

Complaint Counsel's concessions again make this case a matter of law. Complaint Counsel hang their *per se* hat on NTSP's "refusing to convey payor contract offers with prices that NTSP believes are not sufficiently high to attract a majority of its participating physicians."[34] The issue can be no broader, because Complaint Counsel and their expert have conceded that the physicians did not conspire among themselves.[35] Nor is the issue what happened to offers NTSP messengered, as NTSP was doing what the payors wanted, and the physicians acted independently even on those offers by rejecting them more often than not.[36]

Under *California Dental,* the test for rejecting the *per se* rule is when the conduct can "plausibly be thought to have a net procompetitive effect, or possibly no effect at all."[37] The *California Dental* court was explicit that putting a respondent to an evidentiary proof on the plausibility issue was error.

> Put another way, the CDA's rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created

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[33] Answering Brief at 43, n.43.
[34] Answering Brief at 34.
[35] Frech. Tr. 1365 ("Q. Isn't it correct that you have no knowledge of any doctor-to-doctor agreement not to participate in a payor offer? A. That's correct."); *see also* Frech, Tr. 1363-1369.
[36] RPF 162. On average, NTSP's participating physicians join only 7.47 contracts out of the 24 contracts available through NTSP. *See* RX 13.
[37] 526 U.S. at 771.

> by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators). As a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong.[38]

NTSP's reasons for refusing easily satisfy the *California Dental* plausibility test. Indeed, those reasons do so as a matter of law.

Complaint Counsel concede the validity of many of those reasons – illegality, liability, patient care.[39]

The one reason challenged by Complaint Counsel – NTSP's belief that an offer was "not sufficiently high to attract a majority of its participating physicians"[40] – also surely meets the *California Dental* test. NTSP is funded by revenues from a broad population of the physicians. Why would NTSP expend resources of all those physicians in reviewing a complicated 50-page offer and participating in a contract for the benefit of only a minority of the physicians? That type of resource-allocation decision is made millions of times a day by entities and persons trying to avoid unnecessary expense. Complaint Counsel have cited no authority as to the illegality of such a resource-allocation decision.[41]

Complaint Counsel also concede the validity of the spillover concept underlying NTSP's selection of offers. Despite being denied discovery as to the payors' data showing the spillover effect in non-risk treatment, there was substantial evidence at trial

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[38] *Cal Dental,* 526 U.S. at 775.
[39] *See* concessions listed *supra* at pages 10-11.
[40] Answering Brief at 34.
[41] In fact, a FTC advisory opinion has recognized that an IPA has a plausibly valid concern about expending resources in handling a payor's offer that is of interest to less than 50% of the physicians. *See* Bay Area Preferred Physicians Advisory Opinion, letter from Jeffrey W. Brennan to Martin J. Thompson, dated Sept. 23, 2003. *See also* Respondent's Appeal Brief ["Appeal Brief"] at 32-33 & n.137.

establishing the plausibility and occurrence of spillover. PacifiCare considers NTSP its "top performer" in the Metroplex for both risk and non-risk contracts and believes spillover exists.[42] Dr. Maness demonstrated that NTSP's efficient performance on risk contracts in fact carries over to non-risk contracts.[43] Dr. Deas, NTSP's medical director, explained how the lessons learned in risk care would naturally carry over to non-risk care if the same team of physicians was involved in both types of care.[44] Complaint Counsel do not rebut that evidence.

NTSP's desire to use the teamwork skills of its panel of physicians is no novel development. Teamwork is an essential component of what economists call "organizational capital," which is defined as "the idiosyncratic knowledge that [NTSP] develops and that requires effort for others to replicate."[45] Articles from the economic literature confirm the validity of enhancing performance through development of teamwork skills and maintenance of those skills by continuity of the team personnel.[46] As discussed in a recent economic paper, "In terms of productivity, there is an extensive literature documenting the relationship between organizational capital and firm performance."[47] One need only look to any group of highly-trained professionals (*e.g.*, a musical group, an athletic team, any team of complementary professionals) to see the validity of training and using as much as possible the same team members.

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[42] RPF 30-38, 87.
[43] RX 3130 (in camera); *see* RPF 86-87, 92-102.
[44] *See* RPF 88.
[45] *See* RPF 79.
[46] *See* RX 3118 at nn.122-23.
[47] Sandra Black and Lisa Lynch, *Measuring Organizational Capital in the New Economy* 7 & n.2 (March 2005), *at* http://ssrn.com/abstract=684030.

Complaint Counsel never demonstrated the impossibility of spillover from risk care to non-risk care by maintaining team continuity. All Complaint Counsel suggested were ways spillover could hypothetically be better achieved – but that is not a consideration in the *California Dental* plausibility analysis; that is an issue when one weighs allegedly anticompetitive effects against procompetitive justifications to determine under the rule of reason if there is a less restrictive alternative which could have been used. Complaint Counsel gave up on a rule of reason approach – perhaps partly because their expert conceded that there was no empirical proof that the type of "organized processes" he was touting performed better or worse than the utilization management techniques NTSP was using and trying to spill over into non-risk care.[48]

A third basis for satisfying the *California Dental* plausibility test is NTSP's right under *Colgate* and *Trinko* to refuse to deal for reasons sufficient to itself. Clearly, NTSP as an entity has such rights. But even an association would have such rights, especially where the service provided by the association is not an essential facility. *Trinko* strongly limits the *Aspen* decision in the context of Section 2 litigation.[49] The same rationale about not chilling innovation and avoiding day-to-day judicial involvement in business decisions applies with equal force to an association. The Fifth Circuit explicitly follows this rule.

> In the various cases discussed in *Northwest Wholesale Stationers* and *E.A. McQuade Tours,* the touchstone of *per se* illegality is that the customers or suppliers of the plaintiff had, as a group, agreed or been forced to cease doing business with the plaintiff.[50]

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[48] Casalino, Tr. at 2894 ("I'm not aware of such a study.").
[49] "*Aspen* is at or near the outer boundary of Section 2 liability . . . ." 124 S.Ct. at 879.
[50] *Consolidated Metal Prods., Inc. v. Am. Pet. Inst.,* 846 F.2d 284, 291 (5th Cir. 1988). *See also Alvord-Polk,* 37 F.3d at 1009; *Viazis,* 314 F.3d at 764.

Complaint Counsel make no showing that NTSP is an essential facility or a group boycott. Complaint Counsel concede that physicians contracted through numerous other entities or directly with payors, that physicians usually turned down participation through NTSP, and that the rates offered by payors through NTSP were no different than what had already been offered elsewhere.[51] *California Dental* requires rule of reason analysis if there were "possibly no effect at all" on competition as a whole.[52] Complaint Counsel's concessions establish as a matter of law the possibility of "no effect."

B. Under a rule of reason analysis, Complaint Counsel did not meet their burden to show anticompetitive effects in a properly-defined relevant market.

Complaint Counsel make numerous explicit and silent concessions as to their failure to define a relevant market and to show a significant anticompetitive effect in the market.

- Complaint Counsel's economic expert did not attempt to define a relevant product or geographic market.
- Complaint Counsel presented no evidence of a relevant product market.
- The ALJ did not define a relevant product market.
- Complaint Counsel's economic expert failed to support Complaint Counsel's allegation that the relevant geographic market is the City of Fort Worth.
- Complaint Counsel's layperson testimony as to the relevant market was not the appropriate testimony to establish a relevant geographic market under the Merger Guidelines test.
- Tarrant County and Dallas County are tied together because forty percent of Tarrant County's population is in the Mid-Cities Area along the Dallas County border.

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[51] *See* list of concessions *supra* at pages 3-5.
[52] 526 U.S. at 771.

- There are many major hospitals in the area surrounding Fort Worth, including four in the Mid-Cities Area and eight in Dallas County. Much of the City of Fort Worth is located closer to these hospitals than to Fort Worth's two major hospitals, which are located downtown.

- Geographic markets become larger the more specialized the physicians in question.

- Patients seek care near where they live, and many people who work in the City of Fort Worth live outside the city limits and even outside the county.

- Complaint Counsel made no showing of NTSP's market power or market share in any relevant market.

- Less than eight percent of physician contracting activity in Tarrant County is through NTSP-messengered contracts.

- NTSP is not an essential facility.

- Complaint Counsel made no showing of barriers to entry in any relevant market.

- Complaint Counsel must prove that there was an anticompetitive agreement.

- In a rule of reason analysis, the burden is on the complaining party to demonstrate that the challenged conduct has a net anticompetitive effect in the market.

- NTSP's participating physicians independently contract directly with payors or through various entities, of which NTSP is only one.

- All the evidence from NTSP's participating physicians is that they are free to deal with a payor directly at any time.

- Non-risk contracts in which NTSP decides to participate are messengered to physicians, who only accept the contracts less than one-third of the time.

- NTSP always followed the messenger model once NTSP decided it would become a party to a payor contract.

- The rates offered to NTSP by payors were the same or lower than rates the payors had already offered to physicians directly or through other entities.

- NTSP physicians independently entered into payor contracts at rates both above and below NTSP's threshold rates.

- Complaint Counsel's expert, Dr. Frech, had no evidence that:
    - any physician agreed with another physician to reject a non-risk payor offer;
    - any physician agreed with any entity to reject a non-risk payor offer;
    - any physician rejected a non-risk payor offer based on NTSP's Physician Participation Agreement or a power of attorney granted to NTSP;
    - any physician knew what another physician would do in response to a non-risk payor offer or what another physician's response was to the poll; or
    - that any physician gave NTSP the right to bind the physician to or relinquished the right to independently accept or reject any non-risk payor offer.

- The evidence shows the actions of NTSP's participating physicians were consistent with independent decision-making.

- The poll does not require a physician to contract in a particular manner or even to contract at all.

- NTSP only informed physicians of the average, aggregated poll responses – never any individual results.[53]

- NTSP's disclosure of the mean, median, and mode of poll results tells the physicians nothing about what any physician believes or does – it is impossible for any physician to determine the response of another specific physician or specialty or even if they responded at all.

- Complaint Counsel conducted no price studies, no patient origin studies, and no data analysis of any type to support their case.

- Payors under normal economic circumstances would have to increase their offers to attract more physicians and/or better-qualified physicians.

- Payors would naturally expect to pay a higher rate for high-quality and/or efficient physicians who would probably lower total medical expense.

- Total medical expense is the correct outcome measure for cost of physician services.

- Complaint Counsel made no showing as to total medical expense.

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[53] Answering Brief at 42.

Under *California Dental* as applied in the Fifth Circuit, Complaint Counsel must show under the rule of reason "the precise market at issue."[54] Complaint Counsel fails to do so and fails to even argue any evidentiary facts on that point in the Answering Brief.[55] For that reason alone, Complaint Counsel's case must be dismissed.[56]

Complaint Counsel argues that they need not prove a relevant market under *Indiana Federation of Dentists.*[57] That case is both irrelevant to this case and limited by *California Dental.*

Indiana Federation of Dentists had "a policy requiring its members to withhold x rays from dental insurers."[58] There was "no dispute that [the Federation's] members conspired among themselves to withhold x rays."[59] "[I]nsurance companies were unable to obtain compliance with their requests for submission of x rays . . . ."[60] Here, Complaint Counsel's expert conceded, the evidence showed, and the ALJ found that NTSP's decision not to be involved in a payor offer did not bind or even affect what physicians did in their individual contracting decisions.[61] Complaint Counsel's expert did

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[54] *Viazis,* 314 F.3d at 766.

[55] Complaint Counsel, to their credit, do not attempt to argue they carried their burden on relevant market despite the failure of their expert to support their allegation of the City of Fort Worth as the relevant geographic market and the failure to prove a relevant product market.

[56] *See* Respondent's Appeal Brief at 36 & n.145. Dismissal would be warranted even under a *per se* analysis for the reasons stated in the Initial Decision and in *California Dental.* ID at 61-63; *Cal. Dental,* 526 U.S. at 779.

[57] Answering Brief at 46-47.

[58] *FTC v. Indiana Fed. Of Dentists,* 476 U.S. 447, 447 (1986).

[59] *Id.*

[60] *Id.* at 457.

[61] F.71-72; ID at 65; RPF 137-38, 155, 160-62, 284-286; Frech, Tr. 1368-69, 1372-73.

no price study[62] and the ALJ found that NTSP only received rate offers which had already been made to others.[63] All that Complaint Counsel tries to show is that NTSP sometimes chose not to sign and participate in payor offers which were submitted to it. There is not one shred of evidence that NTSP's failure to be involved in a payor offer had any effect on the undefined "price-setting mechanism of the market."

When Complaint Counsel says there was an agreed minimum price for physicians,[64] they are ignoring their own expert's admissions and misstating (repeatedly) the undisputed facts as to what the physicians did in contracting.

Complaint Counsel's concessions also conclusively prove there was no anticompetitive effect shown. The ALJ, after considering the admissions of Complaint Counsel's economic expert, found there had been no increase in market prices.[65]

Complaint Counsel argue that some payors chose to offer a price to induce NTSP (an entity that does not treat non-risk patients) to sign and join in the payor's offer to physicians who would be treating the non-risk patients. Complaint Counsel cites no precedent that such a choice by a payor to try to involve a non-provider rather than going directly to physicians or through one of the numerous other IPAs creates an anticompetitive effect. Any such alleged effect is contradicted by Complaint Counsel's admissions that the physicians usually contracted directly and through other entities with

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[62] Frech, Tr. 1447-48. Complaint Counsel now try to speculate about what would have happened if NTSP or other IPAs had acted differently. *E.g.,* Answering Brief at 44-46. Those assertions are meaningless in light of Complaint Counsel's failure to present proof at trial.

[63] F. 116, 170-71, 188, 217, 290, 328; ID at 82-83

[64] *See, e.g.,* Answering Brief at 25-26.

[65] *See* note 63.

payors and that physicians acted independently and without regard to NTSP in their contracting decisions, whether NTSP was involved or not.[66]

Complaint Counsel admit that the level at which NTSP chose to participate in a payor offer was no higher than the level of rates already being offered by the payor directly to physicians and thrugh other entities.[67] Complaint Counsel's legal theory is that any level chosen by NTSP as a threshold for itself would have an anticompetitive effect because an individual physician might choose to contract at a lower rate than the group rate made available through NTSP.[68] Of course, any group rate already being offered through other entities had that same characteristic – that is what a group rate is. Complaint Counsel's legal theory would make NTSP a slave to any and all payor offers, so long as the offer would be attractive to as few as two physicians.[69] Complaint Counsel's radical theory is defective as a matter of law.

IV. The ALJ erred when he found that NTSP had insufficient evidence of procompetitive justifications because he denied NTSP needed discovery and all the evidence available shows that NTSP had legal and business justifications for its actions.

Complaint Counsel evidently has given up on its arguments about NTSP's procompetitive justifications – Complaint Counsel does not even include a section in its brief on that subject.

Complaint Counsel concedes numerous points on this subject:

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[66] *See* list of concessions *supra* at pages 3-5.
[67] *See* list of concessions *supra* at pages 3-5; *see also* n.63.
[68] *See* Answering Brief at 29.
[69] Complaint Counsel's theory also would require NTSP participation even if the offer would not fit with NTSP's business model, would endanger NTSP's reputation, or would jeopardize NTSP's financial condition. Complaint Counsel references NTSP's dealings with United, Aetna, and Cigna – despite those entities' questionable offers and the ALJ's refusal to credit the evidence being cited by Complaint Counsel. These situations are discussed *infra* in more detail.

- NTSP and its physicians have the right and duty to speak out about issues potentially affecting the care of their patients.
- NTSP faces potential liability when it becomes party to a payor contract.
- NTSP has a reputation to protect.
- There are many reasons an entity may refuse to deal with another.
- Spillover effects would be adversely affected by a lack of continuity between NTSP's risk panel and panel handling payor's non-risk patients.
- There are procompetitive effects of information sharing in the health care industry.
- NTSP has limited capability to show how NTSP's performance compares to other providers apart from payor data files, which are controlled by payors and have not been disclosed despite NTSP's requests.
- Payor contracts are full of legal and medical pitfalls NTSP must avoid.
- NTSP actively seeks risk contracts from payors who are currently involved in only non-risk contracts.
- NTSP's performance on non-risk contracts is a way to persuade non-risk payors to take on risk contracts with NTSP.
- All of the empirical evidence presented supports the procompetitive effects of NTSP's spillover model.

California Dental was an explicit admonition to consider facts fully in antitrust analysis, both as to actual anticompetitive effects in a relevant market, and if that burden is carried, as to procompetitive justifications.[70] Complaint Counsel's theory of the case not only short shrifts any showing of anticompetitive effect in a relevant market, but reads entirely out of the analysis any consideration of procompetitive justification. They assert "Instead, the issue under the rule of reason inquiry is merely whether NTSP's price fixing was 'likely enough to disrupt the proper functioning of the price-setting mechanism

[70] *Cal. Dental*, 526 U.S. at 775 n.12.

of the market' . . . ."[71] Under that guise, Complaint Counsel tries to evade the weighty evidence of justification adduced by NTSP as well as NTSP's having been denied discovery to further prove the efficacy of its spillover model.

There is little to reply on the point of economic justification because Complaint Counsel chose not to contest the spillover evidence cited by NTSP.

At one point in their brief, Complaint Counsel questioned why the ALJ found facts as to the misconduct of United, Aetna, and Cigna.[72] The reason is clear. The actions of those payors provide powerful legal justification as to NTSP's actions and refusals to deal. The payors' misconduct was clearly instrumental in the ALJ's strong ruling that NTSP has no obligation to messenger payor offers or to involve itself in illegal conduct.[73]

V. The ALJ erred when he found that NTSP's conduct unreasonably restrained trade even though Complaint Counsel failed to make any showing as to a less restrictive alternative or pretext for NTSP's conduct and therefore did not show a net anticompetitive effect.

Complaint Counsel made no showing of these elements of the rule of reason, NTSP pointed out that failure in its brief, and Complaint Counsel have conceded that point by silence. As a matter of law, Complaint Counsel's case has failed.

VI. The ALJ erred when he found that the Federal Trade Commission has jurisdiction over NTSP because the participating physicians are not "members" of NTSP and NTSP's challenged actions were not in interstate commerce.

Complaint Counsel have not carried its burden to prove that NTSP is subject to jurisdiction under the FTC Act. The absence of any physician collusion shows that any

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[71] Answering Brief at 47 (quoting *Ind. Fed. of Dentists*, 476 U.S. at 461-62).
[72] Answering Brief at 33 n.29.
[73] *See* ID at 89-90.

refusal to participate by NTSP is attributable to NTSP *qua* NTSP, and not to the physicians. NTSP's unilateral conduct will not support jurisdiction. This is especially true as to NTSP's refusal to participate in a payor offer. The Supreme Court stated that "the economic benefits conferred upon the CDA's profit-seeking professionals plainly fall within the object of enhancing its members' 'profit,' which the FTC Act makes the jurisdictional touchstone."[74] Complaint Counsel would turn the statute on its head by making a refusal to be involved in an alleged economic benefit (a non-risk contract) a basis for jurisdiction.

Complaint Counsel also cites *California Dental* in arguing that NTSP confers pecuniary benefits on its physicians.[75] But the Supreme Court in *California Dental* concluded that the non-profit California Dental Association provided pecuniary benefits to its dentists, in part, by organizing for-profit subsidiaries to provide insurance and financing to its dentists.[76] In contrast, NTSP has no members, no for-profit subsidiaries and does not provide insurance or financing services to its physicians.

Complaint Counsel likewise has not shown that NTSP's activities meet the essential interstate-commerce element of its Section 5 claim. Complaint Counsel argue that the test is whether "the challenged agreement" would affect interstate commerce.[77] Here Complaint Counsel are challenging NTSP's refusal to deal. There simply is no

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[74] *Cal. Dental,* 526 U.S. at 767.
[75] Answering Brief at 48.
[76] *Cal. Dental,* 526 U.S. at 767.
[77] Answering Brief at 50.

record evidence showing that NTSP's refusals to deal affected interstate commerce, and Complaint Counsel is wrong to suggest that NTSP carries some burden on this issue.[78]

Nor does Complaint Counsel sustain their interstate-commerce burden by showing activities of some health plan. Complaint Counsel relies on only one case to support that position – *Summit Health, Ltd. v. Pinhas*.[79] But that case involved a party (Summit) that owned a hospital that admittedly treated out-of-state patients and derived revenues from outside the state at issue.[80] In this case, NTSP does not treat any patients (much less ones from outside Texas) and there is no record evidence showing that NTSP derives any revenues from outside Texas. Complaint Counsel's focus on whether some health plans' activities are in interstate commerce is wholly irrelevant to whether NTSP is subject to jurisdiction under the FTC Act.

VII. The ALJ's proposed order was not narrowly tailored to any antitrust violation properly found and Complaint Counsel's proposed changes would be even more egregious.

Complaint Counsel's cross-appeal brings into clearer focus the inherent contradictions in Complaint Counsel's case. Not only is there a huge disconnect between the facts conceded by Complaint Counsel and the relief being sought, the impossible position in which NTSP would be placed under either the ALJ's or Complaint Counsel's proposed order raises serious policy questions as to the Commission's agenda concerning physician teamwork efforts.

Complaint Counsel have conceded that this is not a case about collusion among physicians. Complaint Counsel, however, argue their case relying on precedents and

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[78] Answering Brief at 51 (stating that "nothing offered by NTSP suggests otherwise").
[79] 500 U.S. 322 (1991).
[80] 500 U.S. at 327, 329-30.

consent decrees from cases where there was collusion among physicians or vendors. A perfect example of this is Complaint Counsel's citation to the recent consent decree in Piedmont Health Alliance ("PHA").[81] As recited in the Commission's press release, "The FTC alleged that PHA's physician members signed agreements binding them to participate in all contracts PHA entered and to accept only PHA-negotiated prices"[82] According to complaint counsel in that case, the respondent entity[83] had contractually bound most of the physicians in a four-county area to deal exclusively through the entity.[84]

Complaint Counsel, and to some extent the ALJ, try to jam the standard consent decree designed for physician collusion cases onto the facts of this case. Unlike those other cases, NTSP bound no one; the physicians here acted independently and usually rejected offers through NTSP; and only 8% of the physician services in the alleged geographic market involved NTSP. The misfit creates significant policy concerns.

Many of those policy concerns have already been discussed in NTSP's Appeal Brief – the mismatch between the relief sought on the one hand and the allegations, evidence, charged parties, challenged contracts, and asserted market on the other hand.[85]

What Complaint Counsel's cross-appeal suggests is that the goal of this case is even more than prohibiting conduct which in fact has not been challenged. The goal also seems to include preventing any physician teamwork which does not fall within the very

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[81] Answering Brief at n. 62.
[82] FTC News Release, *Piedmont Health Alliance Settles FTC Price-fixing charges*, dated Aug. 11, 2004.
[83] Complaint Counsel also sued 10 physicians individually.
[84] In the Matter of Piedmont Health Alliance, Inc., Docket No. 9314, Complaint at ¶¶ 1, 19-20, 25.
[85] Appeal Brief at 60-62.

narrow confines of the Commission's definitions of financial risk-sharing and clinical integration.

The Information-Dissemination Proviso

Complaint Counsel object to the ALJ's use of a proviso allowing NTSP to provide objective information about offers to physicians. The proviso reads as follows:

> Provided, Further, that nothing contained in this order shall prohibit Respondent from communicating purely factual information describing the terms and conditions of any payor offer, including objective comparisons with terms offered by other payors, or from expressing views relevant to various health plans. "Objective information" or "objective comparison" constitutes emprical data that is capable of being verified or a comparison of such data.[86]

This type of proviso has been used extensively in both FTC and DOJ decrees:

> PROVIDED, FURTHER, that nothing contained in this Order shall prohibit defendant College or corporate defendants from communicating purely factual information describing the terms and conditions of any participation agreement or operations of any third-party payer or from expressing views relevant to various health plans provided that such factual information or views are not undertaken to invite, initiate, encourage, or facilitate any actual or threatened refusal to deal or any other provision of this Order.[87]

> FURTHER PROVIDED THAT nothing in this order shall be construed to prohibit BPHA from continuing to function as a physician-hospital organization that is not a risk-sharing or otherwise integrated entity, as long as each of the following conditions is met:
> * * *
> (b) BPHA's role in the contracting process between third-party payers and physician members of BPHA is limited to:
> * * *
> (iv) providing to a physician member of BPHA objective information about proposed contract terms, including comparisons with terms offered by other third-party payers;[88]

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[86] ID at 94.
[87] FTC v. College of Physicians-Surgeons of Puerto Rico, CA No. 97-2466-HL (D.P.R.), Oct. 2, 1997.
[88] *In The Matter of Montana Associated Physicians, Inc.*, 123 FTC 62, 71-72 (1997).

PERMITTED CONDUCT
(A) Subject to the provisions of Section IV of this Final Judgment:
(1) at a participating physician's request, defendant may communicate to the participating physician accurate, factual, and objective information about a proposed payer contract offer or contract terms, including, if requested, objective comparisons with terms offered to that participating physician by other payers;[89]

As long as the messenger acts consistently with the foregoing, it may: (1) convey to a participating physician objective information about proposed contract terms, including comparisons with terms offered by other payers;[90]

At the request of a participating provider, the messenger may communicate objective information to that provider about a proposed payer contract or its terms, including objective comparisons with terms offered to that participating provider by other payers. "Objective information" or "objective comparison" constitutes empirical data that is capable of being verified or a comparison of such data. It does not, however, encompass any data or information regarding contract terms, positions, opinions, views, or decisions of any other MBH provider, or the views or opinions of the messenger.[91]

The Commission's healthcare guidelines also recognize the wisdom of this type of proviso.

The agent also may help providers understand the contracts offered, for example by providing objective or empirical information about the terms of an offer (such as a comparison of the offered terms to other contracts agreed to by network participants).[92]

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[89] United States v. Federation of Physicians and Dentists, Inc., CA No. 98-475 JJF (D. Del.), Nov. 6, 2002.
[90] United States v. Woman's Hospital Foundation, CA No: 96-389-BM2 (M.D. La.) Sept. 11, 1996.
[91] Dept. of Justice, Midwest Behavioral Healthcare LLC business review letter from Joel I. Klein to Jaye L. Martin, dated Feb. 4, 2000.
[92] Department Of Justice And Federal Trade Commission Statements Of Antitrust Enforcement Policy In Health Care, Statement 9C.

The Commission and DOJ information-dissemination provisos were used in cases involving alleged collusion among physicians. Here there is no such collusion, and hence even more reason not to stifle the flow of information.

Complaint Counsel's advocacy against this type of proviso is puzzling. Certainly use of the proviso is well-precedented. The Commission has also approved dissemination of objective information because it eliminates information asymmetry between the payors and the physicians; the Commission's advisory opinions recognize that benefit.[93]

In this case the proviso is especially appropriate and needed in light of the payors' repeated misconduct in contractual dealings with physicians.[94]

Complaint Counsel's objection to objective information seems pretextual, in that their assertion that such a proviso is "unworkable" lacks any proof or explanation.

Right-to-Refuse Language

Equally curious is Complaint Counsel's objection to the language and proviso in the ALJ's order clarifying that the order does not require NTSP to messenger any contracts or to violate state or federal law.[95] The ALJ structured the order the way he did because he agreed with NTSP's concerns about being forced to deal with the payors.[96] Complaint Counsel submitted numerous proposed findings of fact attempting to excuse

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[93] *See* FTC Advisory Opinion from Jeffrey W. Brennan to Gerald Niederman, dated Nov. 3, 2003, regarding Medical Group Management Association; FTC Advisory Opinion letter from Jeffrey W. Brennan to Gregory G. Binford, dated Feb. 6, 2003, regarding PriMed Physicians.
[94] F. 192-94, 256-58, 357-63.
[95] *See* Answering Brief at 59.
[96] *See* ID at 89-90.

the payors' misconduct in physician dealings, which the ALJ refused to make.[97] The ALJ was correct in stating explicitly that NTSP need not sign or messenger any payor offer or take any action which would be illegal.[98]

Complaint Counsel ironically agrees with both propositions but does not want the order to reflect those truisms.[99]

The End Point of an Overbroad Order

Complaint Counsel seem to want an overly broad, imprecise order – with the effect of chilling legitimate conduct. The ALJ's current order is improper for this reason. Complaint Counsel's proposed changes would greatly exacerbate that defect.[100]

This point about chilling can best be understood in the context of some of the factual occurrences.

In 2001, United was attempting to undercut NTSP's risk contract to treat the City of Fort Worth employees and families.[101] NTSP withdrew from a contract which United was using to undercut NTSP. NTSP was concerned that the United proposal would be detrimental for the City and its employees and so advised the City (the City later suffered a ten million dollar cost overrun under United's administration due to United's failure to submit an accurate proposal to the City).[102] Although both the ALJ and Complaint Counsel seem to state that NTSP need not have participated in the United offers,

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[97] *See* ID at 89-90.
[98] The order would be even clearer if the *Colgate* point were made in an additional proviso.
[99] Answering Brief at 57, 62.
[100] While some of the changes suggested by Complaint Counsel are relatively minor, none is warranted.
[101] The events about United are laid out in the Appeal Brief with citations to the record. *See* Appeal Brief at 54-55.
[102] Quirk, Tr. 376-77.

Complaint Counsel seem to want room to argue that NTSP cannot terminate a contract which is terminable at will, cannot advise an employer about concerns about a defective healthcare proposal, must stand by silently while a company seeks to take away one major group of NTSP's risk patients, and must assist a company which is negotiating collectively on behalf of numerous self-insureds. The failure of any order to address those situations and to leave uncertain whether the order requires such actions would be error.

Cigna and NTSP had numerous disputes about Cigna's failures to honor its agreements with NTSP, one of which was a risk contract containing a pay-for-performance bonus.[103] NTSP exercised its rights under the agreements to have Cigna comply with Cigna's contractual obligations. Complaint Counsel appear to argue that the order should be interpreted to read to prohibit NTSP from protesting or terminating a contract being breached by a payor. Any implication to that effect left in an order would be error.

The situation with Aetna involved a dispute and class action litigation which NTSP brought against a company (Medical Select Management or MSM) which breached its obligations to pay physicians for treatment of Aetna patients.[104] NTSP was also involved in risk contract negotiations with Aetna for some of the time period in an effort to mitigate the damages being caused by the MSM situation. Complaint Counsel apparently contend that the order should be interpreted to prohibit NTSP from acting as a

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[103] The facts about Cigna are laid out in the Appeal Brief with citations to the record. *See* Appeal Brief at 55-56.

[104] The facts about Aetna and MSM are laid out in the Appeal Brief with citations to the record. *See* Appeal Brief at 56.

class representative in a litigation to recover unpaid fees owed on contracts which contained some risk provisions. Any implication left in an order to that effect would be error. Complaint Counsel also apparently contend that NTSP should not make spillover proposals to payors even though the Aetna representative testified that Aetna "always" wanted doctor entities to make proposals "trying to look at total medical expense and trying to come up with a solution on how to reduce it."[105]

One of the overall effects of Complaint Counsel's case and the proposed order is to pressure NTSP into being a passive entity which accedes to illegal conduct and breaches of contract by insurance companies negotiating collectively for self-insured employer-payors. Another of the overall effects is to discourage teamwork efforts among physicians which do not fit the currently narrow definitions of risk-sharing or clinical integration.

As discussed in NTSP's Appeal Brief, NTSP's spillover model was assumed away by the ALJ; the evidence and economic literature supporting the use of a team to maximize spillover was ignored and NTSP was denied discovery of data to prove the validity of its business model.[106] Both the ALJ's order and Complaint Counsel's proposed order effectively preclude teamwork efforts like the spillover model, unless a payor accepts NTSP's pay-for-performance or capitation offers or unless the payor allows clinical integration (as narrowly interpreted by Complaint Counsel) by giving NTSP

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[105] Roberts, Tr. 557-58.

It is unclear whether the ALJ and Complaint Counsel disagree with this witness's opinion and seek to prohibit doctors from teaming together to make innovative proposals. If the ALJ and Complaint Counsel do challenge innovations like that, why do they do so?

[106] Appeal Brief at 49-51, 45-46.

access to data and the ability to control the performance of the physicians' contracts with the payor. Such a preclusion would be both a legal error and a policy mistake.

The concept of integration (whether financial risk integration or so-called clinical integration) is only a subset of the efficiency-creating conduct allowed under the rule of reason.[107] To the degree that the Initial Decision or any order limits justifiable conduct under the rule of reason to financial-risk and clinical integration, that is a clear legal error.

A narrow interpretation of the rule of reason is also a very serious policy error. The healthcare industry is widely-recognized as being one of the most economically troubling sectors of the economy.[108] In the period from 2000 to 2004, healthcare costs in the United States have skyrocketed 32%.[109] Healthcare as a percentage of gross domestic product surged from 13.2% to 15.3% in the same time period.[110] Per capita healthcare

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[107] *See* HEALTH CARE STATEMENTS, Statement 8.C.1 (providing other examples of potentially justified conduct); COLLABORATION GUIDELINES, ¶ 2.1 ("The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways."); *see also* FTC News Release from November 7, 2002, located at 2002 WL 31492645, citing then-Chairman Timothy Muris as saying "clinical integration that increases quality of care is *one example* of permissible collective conduct that may not violate the antitrust laws because there are substantial procompetitive benefits" (emphasis added).

[108] *E.g.,* Paul Barr, *Index shows U.S. healthcare in "crisis",* MODERN PHYSICIAN, March 28, 2005.

[109] BlueCross BlueShield Association, Medical Cost Reference Guide 5 (October 2004), *at* http://www.bcbs.com/mcrg/, citing to Centers for Medicare and Medicaid Services, National Health Expenditures and Selected Economic Indicators, Levels and Average Annual Percentage Change: Selected Calendar Years 1980-2012.

[110] Alan Sager and Deborah Socolar, Health Care Costs Absorb One-Quarter of Economic Growth, 2000-2005 at 7 ex.5 (February 9, 2005), *at* http://dcc2.bumc.bu.edu/hs/Health%20Costs%20Absorb%20One-Quarter%20of%20Economic%20Growth%20%202000-05%20%20Sager-Socolar%207%20February%202005.pdf; *see also* Centers for Medicare and Medicaid Services, National Health Expenditures and Selected Economic Indicators, Levels and

costs in the United States are now more than double, on average, those in Canada, France, Germany, Italy, Japan and the United Kingdom.[111]

Physician services and hospital care each account for 30% of private healthcare spending; pharmacy accounts for 14%.[112] Yet "[p]hysician services are the slowest growing component of healthcare costs . . . ."[113] In the time period 2000-2003, physician prices increased much less than other sectors of healthcare – almost 40% less than total medical care prices.[114]

Physicians are the most critical sector for controlling total medical expense, but not because of the amounts charged by physicians. Although physician incomes constitute 21% of healthcare costs, physicians oversee 87% of personal health spending,[115] due to their role in prescribing drugs and equipment, ordering tests, admitting patients to hospitals and other facilities, and referring patients to other physicians and providers.[116]

A physician normally lacks detailed information as to the costs of a patient's care other than what the physician charges for his or her personal services.[117] A physician

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Average Annual Percentage Change: Selected Calendar Years 1990-2013, *at* http://www.cms.hhs.gov/statistics/nhe/historical/t1.asp.

[111] Sager at 14, citing to data from the Organization for Economic Cooperation and Development, *OECD Health Data 2004,* 1st edition, table 9.

[112] Blue Cross at 8.

[113] Blue Cross at 3.

[114] *See* Centers for Medicare & Medicaid Services, Physician and Clinical Services Expenditures Aggregate and Per Capita Amounts and Percent Distribution, by Source of Funds: Selected Calendar Years 1980-2003, *at* http://www.cms.hhs.gov/statistics/health-indicators/t6.asp.

[115] Sager at 30 ex.10.

[116] *Id.* at 29-30.

[117] Deas, Tr. 2476-80.

normally has no significant incentive to monitor and control those costs under non-risk contracts.[118]

NTSP does monitor and control total medical expense as part of its risk contract by performing utilization management reviews of the data provided by PacifiCare as to physician, prescription, and facility charges. NTSP's success in controlling total medical expense has made NTSP PacifiCare's "top performer" in the Dallas/Fort Worth Metroplex in PacifiCare's opinion.[119]

NTSP's spillover model for non-risk contracts is based on offering payors the opportunity to use a team of physicians containing most of the physicians trained under NTSP's risk-based utilization management method.[120] The limited data available to NTSP indicates that NTSP is able to generate spillover efficiencies in non-risk treatment. NTSP, however, was not given access, either in the course of ordinary business or in discovery, to the payors' data files for non-risk patients.[121] NTSP's lack of access to the data meant that NTSP could not perform utilization management in the ordinary course of business on non-risk care. That lack of access also impeded NTSP from using the payors' files to prove that the NTSP spillover model has succeeded.[122]

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[118] Frech, Tr. 1345.
[119] Lovelady, Tr. 2665, 2668.
[120] Van Wagner, Tr. 1637-38. Maintaining continuity of the risk physicians for non-risk treatment will also tend to maximize spillover to rest of the NTSP physicians. Maness, Tr. 2078-79. The non-risk contract becomes a training ground for eventual inclusion of the non-risk physicians into NTSP's risk contracts. Van Wagner, Tr. 1518-19.
[121] Van Wagner, Tr. 1603; Answering Brief at 43, n.43.
[122] Complaint Counsel stood silent when NTSP sought to compel production of the payors' data – a strange position to take if Complaint Counsel is really interested in finding out what innovations will work in controlling healthcare costs.

Complaint Counsel narrowly defined clinical integration to include only utilization management of the type used by NTSP on risk contracts. That narrow definition of clinical integration ignores the fact that a group of non-risk physicians will lack the data needed to do full utilization review and management unless the payor makes the data available.

Non-risk contracts for medical care run directly between the payor and the physician. An IPA entity usually has no contractual power to perform utilization management, refer to case managers, or police physician compliance with published protocols, unless the payor agrees to allow that intercession with the physicians' performance of the non-risk contracts. Implementation of Complaint Counsel's brand of clinical integration accordingly depends on the agreement of the payor to make available patient data and allow the IPA entity to control partially the treatment of the non-risk patient for which the IPA entity has no financial responsibility or physician-patient relationship.

If payors had cooperated in implementing that narrowly-defined concept of clinical integration, then NTSP would have been able to implement its initial proposals with hopefully even better results than it achieved with its spillover model. Payors unfortunately have chosen not to take that step and have moved to a business model in which they cease taking risk on medical care and become administrators for employers who are self-insured.[123] The administrators perform a utilization management role

[123] See discussion in Appeal Brief at 55.

similar to that performed by NTSP on the PacifiCare contract.[124] Many administrators also negotiate contracts with physicians for groups of self-insured employer-payors, which raises some serious antitrust questions about the administrators' conduct.[125]

The shifting of risk to self-insured employers (and their employees who now pay higher deductibles or co-payments) lessens an insurance company's incentive to agree to clinical integration proposals to try to control healthcare costs. Clinical integration as narrowly defined by Complaint Counsel is unlikely to be achieved on any significant scale in North Texas, or the rest of the United States, anytime soon. In the meantime, healthcare costs continue to climb.

The rule of reason is not limited to arbitrarily-narrow forms of integration. The rule of reason is flexible enough to allow many forms of innovation and experimentation. The rule of reason limits an entity trying to innovate or improve performance only when there is proof of an anticompetitive market effect that outweigh the procompetitive justifications.[126] The arbitrary limits Complaint Counsel try to impose to narrow the rule of reason contravene Supreme Court precedent and are legally improper.

The policy underlying the Commission's attempt to limit innovation in healthcare is very questionable. In the past four years, the Commission has been more active in healthcare enforcement – and healthcare costs have skyrocketed 32%. From 2002-2004,

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[124] *Cf.* Mosley, Tr. 121-23; *see also, e.g.,* CX 782A.028, *in camera,* CX 782A.036, *in camera..*

[125] Mosley, Tr. 210; Quirk, Tr. 245.

[126] An entity need not achieve immediately more efficient outcomes; otherwise a start-up program could never be attempted. The Rule of Reason must allow for a ramp-up period.

health insurance company profits have also soared.[127] It is difficult to find any economic evidence that the Commission's enforcement agenda has had any positive economic effect on controlling total medical expense. In this case, Complaint Counsel have even disdained any consideration of total medical expense data.

If healthcare is going to rationalize itself into a more efficient industry, those improvements are likely going to come from innovation from within the healthcare industry. Any policy by the Commission to limit arbitrarily innovation in healthcare raises serious questions as to the wisdom and reasons for such a policy.

For all the reasons stated, the complaint against NTSP should be dismissed.

Respectfully submitted,

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[127] From 2002 to 2004, income before tax (from continuing operations where applicable) for Aetna increased from $544 million in 2002 to $1.898 billion in 2004; Cigna increased from a $446 million loss to a $1.577 billion gain; United increased from $2.096 billion to $3.973 billion. *See 2005* Forms 10-K for Aetna Inc., Cigna Corporation, and United Healthcare Group, *available at* http:/www.sec.gov/Archives/edgar/data.

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2005, I caused a copy of the foregoing document to be served upon the following persons:

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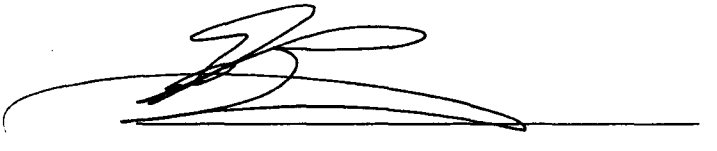

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