[**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 APPEAL BRIEF

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Dated: January 13, 2005

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BRIEF OF RESPONDENT IN SUPPORT OF
APPEAL FROM INITIAL DECISION

TO: THE COMMISSION

Pursuant to Commission Rule of Practice 3.52, Respondent North Texas Specialty Physicians ("NTSP") respectfully appeals the Initial Decision and Order against Respondent, filed by Administrative Law Judge D. Michael Chappell on November 8, 2004.[1]

STATEMENT OF THE CASE

SUMMARY OF THE ARGUMENT

This is a case about whether an entity (North Texas Specialty Physicians) which provides medical services under risk contracts can choose to participate in non-risk contracts; and if so, whether the entity can choose in which non-risk contracts to

[1] NTSP has not appealed certain findings and rulings in the Initial Decision, as recited in Respondent's Notice of Appeal.

participate; and if so, whether the entity's choice can depend on how many of the entity's panel of physicians are expected to participate in the non-risk contract.

This is not a case about physician collusion because the undisputed evidence is that there is no collusion among physicians, that the physicians independently contract directly with payors or through various entities (of which NTSP is only one), that NTSP has no authority to bind physicians, and that any non-risk contracts in which NTSP decides to participate are messengered to the physicians who do not accept the contracts a majority of the time. No collusion among physicians means that NTSP has not facilitated any collusion by any conduct asserted by Complaint Counsel.

This case is important because it will decide whether the Commission is going to squelch teamwork among physicians by upholding cases where no anticompetitive effects have been shown, where the Respondent has been denied discovery to obtain data proving procompetitive effects, and where the evidence of procompetitive justification available to and brought forward by Respondent is ignored.

STATEMENT OF RELEVANT FACTS

NTSP is a memberless, nonprofit corporation headquartered in Fort Worth, Texas. From its inception in 1996, NTSP as an entity has had and performed risk contracts for medical services with payors. More recently, NTSP has also become a party to non-risk contracts with some payors. NTSP has avoided certain non-risk contracts because the offer was unlikely to be of interest to most of NTSP's panel of physicians; NTSP wanted to avoid unnecessary expense and to limit itself to situations where the teamwork developed on its risk contracts would spill over to the non-risk treatment.

When NTSP decided to participate on a non-risk contract, it messengered that contract to approximately 600 physicians in eight counties for the physicians' individual decisions whether to participate. NTSP had no authority to contract for or bind any physician on a non-risk contract.[2]

It is undisputed and the ALJ found that there is no collusion among physicians in this case.[3] Physicians made independent decisions on payor offers and chose to accept contracts through NTSP less than one-third of the time. The rest of the time, physicians contracted with payors either directly, or through another entity, or not at all.

At the hearing, there was much evidence presented relating to NTSP's dealings with physicians and payors. All this evidence is irrelevant in light of the fact that there was no collusion. The ALJ also found that the rates NTSP received were the same or lower than those the payors had already offered to physicians directly or through other entities.[4]

The ALJ, however, ruled against NTSP on the ground that NTSP had rejected initial payor offers based on poll results showing that most of the physicians would not be interested in the offers.

The detailed facts and explanations of health care terms and concepts are discussed fully in Respondent's Post-Trial Briefing and Post-Trial Proposed Findings of Fact (filed June 16, 2004), Response to Complaint Counsel's Proposed Findings of Fact

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[2] Because NTSP had no power to act collectively on behalf of physicians in accepting non-risk contracts, NTSP is better described as an independent physician association entity ("IPA entity") rather than an IPA.

[3] F. 71-75, 92; RPF 137-39, 149, 152-61, 284-85, 289; *see* F. 95, 267, 271-75, 283.

[4] F. 170-71, 188, 209, 216-17, 290, 328; ID at 82.

(filed June 30, 2004), and the discussion of the points of appeal in this Brief.[5] Those details are not repeated here due to lack of space.

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[5] The ALJ erred by failing to include NTSP's properly-proposed findings (listed in first subparagraphs below) and by including incorrect, irrelevant, or incomplete findings (listed in second subparagraphs below) on, *inter alia*, the following topics:

- NTSP's risk contracts and spillover benefits for non-risk contracts
  RPF 5, 12-15, 17-19, 23-119, 120, 311-28
  F. 15, 18, 49, 211, 230, 249, 343, 347, 364-80
- NTSP's use of poll
  RPF 121-32, 134-36, 151, 160-61
  F. 87, 99-100, 380
- Absence of NTSP negotiation of rates for non-risk contracts
  RPF 137, 139-49, 289
  F. 44, 46, 70, 76-80, 82, 84, 160-61, 190, 206, 284, 302-06, 323, 330, 349-50
- No NTSP collusion with physicians
  RPF 152, 154-58, 162
  F. 12, 65-66, 68, 70, 91, 99-100, 184, 205
- NTSP's reasons for not participating in payor offers and speaking out on various issues
  RPF 163-84, 187-88, 195-96
- Relevant market issues
  RPF 197-243
  F. 52-55, 56, 58-63
- No NTSP market power
  RPF 244-71, 273-87
  F. 235, 280-81
- Total medical expense issues
  RPF 290-310
- Aetna
  RPF 332-38, 342, 344-54, 360-62, 364, 367-68, 372, 375, 377-79
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- United
  RPF 382, 385-88, 391-402, 404-05, 407
  F. 122, 160-61, 169, 173-74, 184, 190
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STATEMENT OF THE QUESTIONS PRESENTED

1. Did the ALJ err in finding that Complaint Counsel had shown concerted action when there was not sufficient evidence of collusion among NTSP's participating physicians?
2. Did the ALJ err in finding that Complaint Counsel had shown a violation of Section 1 of the Sherman Act when there was no sufficient evidence of anticompetitive effect in a properly-defined relevant market?
3. Did the ALJ err in finding that NTSP had insufficient evidence of the procompetitive efficiencies of its business model when there was sufficient evidence of justification, the data NTSP had supported its efficiency claims, and NTSP was denied access to all other data despite discovery requests?
4. Did the ALJ err in finding that Complaint Counsel had shown an unreasonable restraint of trade when Complaint Counsel made no showing of a less restrictive alternative or a pretext for NTSP's conduct?
5. Did the ALJ err in finding the FTC had jurisdiction when NTSP is a memberless, non-profit organization and all of its actions took place in Texas?
6. Did the ALJ err in entering an order terminating all non-risk contracts of NTSP and its participating physicians and prohibiting conduct when there was no proof of collusion, most of the contracts were unaffected by the challenged conduct, the contracts were already terminable at will by the payors, and the terminations and prohibitions would have effects outside Fort Worth?

COMMISSION STANDARD OF REVIEW

On appeal from the Initial Decision in this proceeding, the applicable standard of review is *de novo*."[6]

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 alleged that NTSP violated section 5 of the FTC Act by fixing "the price of fee-for-service medical services," and facilitating, coordinating, and acting "as the 'hub' of concerted action by its participating physicians," who were alleged to compete with each other.[7] The Commission relies on Sherman Act law when deciding cases alleging unfair competition.[8] For the Commission to find such a violation, Complaint Counsel must have shown: (1) the existence of a contract, combination, or conspiracy among two or more separate entities that are subject to the antitrust law, (2) that the contract, combination, or conspiracy unreasonably restrains trade, and (3) that the acts or practices are in or affecting interstate or foreign commerce.[9]

The Initial Decision correctly held that "[t]he government bears the burden of establishing a violation of antitrust law."[10] The Initial Decision also correctly held that "'the antitrust plaintiff must present evidence sufficient to carry its burden of proving that

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[6] 16 C.F.R. § 3.54(a).
[7] *See* Complaint ¶ 12 (stating that NTSP acts as "combination of competing physicians").
[8] *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422 (1990); *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986).
[9] *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 421.
[10] ID at 61 (citing *United States v. E.I. DuPont de Nemours & Co.*, 366 U.S. 316, 334 (1961)).

there was [an anticompetitive] agreement.'"[11] Complaint Counsel also bears the burden of demonstrating that Respondent's actions in this case are anticompetitive.[12]

To prove there was "concerted action," Complaint Counsel must submit either direct or circumstantial evidence of an agreement between competitors (*i.e.*, the physicians).[13] "Section 1 of the Sherman Act [like Section 5 of the FTC Act] does not proscribe independent conduct."[14] Conduct that is as consistent with lawful competition as with conspiracy will not support an inference of conspiracy.[15] Complaint Counsel "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."[16]

Further, Complaint Counsel cannot argue that an attempt to conspire satisfies the concerted action requirement. An attempt to conspire or otherwise violate Section 1 of the Sherman Act is not a Section 5 violation because the Fifth Circuit does not allow "attempt" as a valid claim under Section 1 of the Sherman Act.[17]

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[11] ID at 61 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984)). *Accord Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 761 (5th Cir. 2002) ("So, to establish a § 1 violation, a plaintiff must demonstrate concerted action.").
[12] ID at 61.
[13] *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999) ("The existence of an agreement is the hallmark of a Section 1 claim.").
[14] *Viazis*, 314 F.3d at 761.
[15] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).
[16] *Id.* (citations omitted).
[17] *See United States v. Am. Airlines, Inc.*, 743 F.2d 1114, 1119 (5th Cir. 1984) ("In sum, our decision that the government has stated a claim does not add attempt to violations of Section 1 of the Sherman Act . . . .").

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.

A. Complaint Counsel failed to show concerted action because there was no evidence of collusion among NTSP's participating physicians.

This is an alleged physician conspiracy case in which Complaint Counsel admits they cannot prove collusion among otherwise competing physicians.[18] But Complaint Counsel *must* demonstrate concerted action to establish a violation of Section 1 of the Sherman Act (and, consequently, Section 5 of the FTC Act).[19] Because the undisputed evidence shows that there has been no collusion among physicians, Complaint Counsel cannot satisfy this essential element of liability under Section 5.

NTSP cannot and does not bind any participating physician to a non-risk contract.[20] Under NTSP's Physician Participation Agreement ("PPA"), NTSP has no authority to bind the physicians; any non-risk contracts to which NTSP decides to become a party must be messengered to the physicians for their individual decisions on whether to join.[21] Nor does NTSP divulge to any physician or board member whether or how any physician responds to the confidential poll conducted by NTSP's staff.[22]

Complaint Counsel's own expert was unable to find any evidence of collusion among physicians. In fact, his analysis and testimony showed the opposite – that there was no collusion. Complaint Counsel retained Dr. H. E. Frech, an economics professor

[18] RPF 150-58, 160, 162.
[19] ID at 67 (citing *Viazis,* 314 F.3d at 761).
[20] RPF 137-38.
[21] RPF 137-39, 142, 145, 152-58, 161, 166, 271, 275, 284-86.
[22] RPF 129, 133. 135.

who has written a number of articles on healthcare economics.[23] Dr. Frech spent over 200 hours analyzing the evidence in this case[24] and concluded that there was *no evidence* that:

- one or more participating physicians agreed with each other to reject a non-risk payor offer;[25]
- any participating physician and any other entity agreed to reject a non-risk payor offer;[26]
- any participating physician rejected a non-risk payor offer based on a power of attorney granted to NTSP;[27]
- any participating physician rejected a non-risk payor offer because of NTSP's Physician Participation Agreement;[28]
- any participating physician knew what another physician was going to do in response to a non-risk payor offer;[29]

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[23] *See, e.g,* H.E. Frech II, James Langenfeld & R. Forrest McCluer, *Elzinga-Hogarty Tests and Alternative Approaches for Market Share Calculations in Hospital Markets*, 71 ANTITRUST L. J. 921 (2004). *See also* CX 1152 (listing articles).

[24] Frech, Tr. 1357.

[25] RPF 153; *see also* 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. Q. Isn't it also correct that you have no knowledge of a doctor ever agreeing with any other doctor to turn down a payor offer? A. Yes, I don't – I have no knowledge of such agreement.").

[26] RPF 154, 158; *see also* Frech, Tr. 1365-66.

[27] RPF 156; *see also* Frech, Tr. 1368-69 ("Q. Isn't it also true that you have no knowledge of any doctor who turned down a contractual offer from a payor in deference to a power of attorney? A. I have no knowledge of an individual doctor who did that.").

[28] RPF 157; *see also* Frech, Tr. 1368 ("Q. Isn't it true that you have no knowledge of any doctor that refused to pay – to – isn't it true that you have no knowledge of any doctor that refused to participate in a contract offer by a payor because of a PPA? A. That's true.").

- any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;[30]
- any participating physician gave up his or her right to independently accept or reject a non-risk payor offer;[31] or
- any participating physician knew what any other physician's response was to the poll.[32]

Dr. Frech could not point to any instance of a change in physician conduct due to any of NTSP's activities – the PPA, the powers of attorney, the poll, or anything else.[33] He admitted that he knew of no physician who rejected an offer based on any of those events. He further admitted that physicians chose not to contract through NTSP on more than two-thirds of the contract offers NTSP messengered![34]

Dr. Frech actually proved there was no collusion or agreement among NTSP's participating physicians. He analyzed the physicians' acceptances of contract offers outside of NTSP – the only data analysis he did in the case – and determined that the physicians frequently entered individually into payor contracts at rates both above and

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[29] RPF 136, 159.
[30] RPF 138.
[31] RPF 155; *see also* Frech, Tr. 1363-64 ("Q. It's also your understanding that the physician always has an independent right to accept or reject any contract that's messengered? A. Right, he can always accept or reject a contract that NTSP signs and sends to them, correct.").
[32] RPF 150; *see* Frech, Tr. 1436 ("Q. Let's turn to the poll. It's correct, is it not, that the people who respond to the poll do not know the responses by any other responder? A. The poll doesn't – at least not through the poll. I mean, the polling system itself is not going to tell them what specific other respondent said.").
[33] *See* notes 25-31. Dr. Frech admitted that no physician had refused to participate in a contract offer because of NTSP. RPF 286.
[34] RPF 162. On average, NTSP's participating physicians join only 7.47 contracts out of the 24 contracts available through NTSP. *See* RX 13 (physician participation chart).

below the threshold rate levels used by NTSP's board of directors to determine when NTSP itself was willing to participate in a payor contract.[35] He did not find any physician which adhered to the NTSP board minimum in the physician's own contracting![36]

Based on this overwhelming evidence – virtually all of which was undisputed by Complaint Counsel and/or admitted by Dr. Frech, the Administrative Law Judge found there was no collusion among NTSP's participating physicians.

> In this case, there is no evidence that one or more of the member physicians agreed with each other to reject a non-risk payor offer; there is no evidence that one or more of the member physicians consulted with each other when responding to the polls or making decisions on non-risk payor contracts; and, there is no evidence that any member physician knew what another physician was going to do in response to a non-risk payor offer.[37]

This holding and the related findings have not been appealed by either party to this proceeding.[38] There is no evidence in this case of physician collusion, and without this evidence, Complaint Counsel cannot prove an essential element of their Section 5 claim.

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[35] RPF 286. Frech's data analysis showed that a substantial number of NTSP physicians signed up for contracts with Blue Cross, United, and Aetna at lower rates than the physicians' poll responses and at lower rates than NTSP's Board minimums.

[36] *See* Frech, Tr. 1368-69 ("Q. Have you found any doctor in all of your work that adhered to the NTSP board minimum when it came time for him to individually contract? A. I haven't seen evidence that would bear on that."); *see also* RX 10, RX 11, CX 1155 (Frech's study result charts showing NTSP physicians signing up at varying contract rates below poll responses and minimums).

[37] ID at 68-69. *See* also F.67, 71-75 and ID at 65.

[38] *See generally* Complaint Counsel's Notice of Appeal; Respondent's Notice of Appeal.

B. Complaint Counsel cannot show concerted action without evidence of physician collusion, and all attempts to do so fail as a matter of law.

1. NTSP is not a "walking conspiracy," and its mere existence does not satisfy the concerted action requirement.

This is clearly not a case about a price-fixing conspiracy – there is no evidence of physician collusion.[39] To create concerted action where there is none, Complaint Counsel asserted that NTSP, because it has a board of directors composed of physicians and it messengers some contract proposals to physicians, is a "walking conspiracy" whose every act is an actionable antitrust conspiracy. Of course that is not the law.

In *Viazis*, the Fifth Circuit[40] held that it is improper to presume that a trade or professional organization meets Section 1's (and therefore Section 5's) contract, combination, or conspiracy requirement:

> Despite the fact that "a trade association by its nature involves collective action by competitors, it is not by its nature a 'walking conspiracy,' its every denial of some benefit amounting to an unreasonable restraint of trade."[41]

Under Fifth Circuit law, NTSP's mere existence does not relieve Complaint Counsel of its burden of proof on concerted action.

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[39] The undisputed fact that there was no collusion among NTSP's participating physicians significantly distinguishes this case from what evidently were the facts in many of the other IPA consent-decree cases.

[40] Fifth Circuit decisions govern this case because the acts and omissions at issue occurred in Texas. *See* 15 U.S.C. § 45(c) ("Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business . . . .").

[41] *Viazis* 314 F.3d 764 (quoting *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293-94 (5th Cir. 1988)).

To try to support their position that NTSP, by definition, is a combination of competitors that "automatically" meets the concerted action requirement, Complaint Counsel relied on *Alvord-Polk*, a Third Circuit decision from 1994.[42] But that reliance was misplaced – the court in *Alvord-Polk* expressly ***declined*** to find that a trade association, in and of itself, eliminated the need to prove a contract, combination, or conspiracy in a Section 1 case:

> We believe that the *Hydrolevel* rule that an association's economic power may justify its being held liable for the actions of its agents cannot be extended to defeat the "concerted action" requirement of section 1. ***Imposing liability on an association, as we did in Weiss, does not abolish or diminish the first element of section 1 liability***; it merely recognizes that a group of competitors with a unity of purpose are engaged in concerted action, whether or not they act under one name. As we explained in Nanavati, in the absence of a co-conspirator, ***an association's actions satisfy the concerted action requirement only when taken in a group capacity***.[43]

The ALJ adopted the correct readings of *Alvord-Polk* and *Viazis*, finding that "[s]imply because NTSP is an organization of otherwise competing physicians does not mean that the concerted action requirement of Section 1 of the Sherman Act has automatically been satisfied."[44] "[I]n assessing whether a trade association (or any other group of competitors) has taken concerted action, a court must examine all the facts and

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[42] Complaint Counsel's Post-Trial Brief at 52, citing *Alvord-Polk, Inc. v. Schumacher & Co.*, 37 F.3d 996, 1009 n.11 (3d Cir. 1994).

[43] *Alvord-Polk*, 37 F.3d at 1009 (emphasis added).

Instead of citing to this portion of the Third Circuit's analysis, Complaint Counsel cited to a parenthetical in footnote 11 of *Alvord-Polk*, which contains a quote from a 24-year-old article published in the Antitrust Law Journal, which is hardly binding authority. *See id* at 1009 n.11 (citing Stephanie W. Kanwit, *FTC Enforcement Efforts Involving Trade and Professional Associations*, 46 ANTITRUST L.J. 640, 640 (1977)).

Complaint Counsel also did not cite to the section of the Third Circuit opinion which upheld summary judgment "because plaintiffs' evidence tends to show only an opportunity to conspire, not an agreement to do so." *Id*. at 1013.

[44] ID at 67.

circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise, among members of the association."[45] Neither party has appealed this holding.[46] Therefore, NTSP's existence does not alone satisfy the concerted action requirement. Complaint Counsel still has the burden of proving concerted action.

2. All refusals to deal by the entity NTSP are protected under the Colgate doctrine and do not satisfy the concerted action requirement.

After unsuccessfully arguing that NTSP's mere existence violates Section 5, Complaint Counsel attempts to find a violation through NTSP's actions. One type of action is NTSP's refusals, and explanations to payors of its refusals, to become a party to or be involved in a payor's offer. But NTSP's refusals to deal are clearly lawful under the *Colgate* doctrine and do not support an inference of collusion. In refusing, NTSP is acting only as an entity, not as a collective of physicians, and these actions cannot, as a matter of law, be concerted action.

NTSP is a 501a memberless non-profit corporation under Texas law created for the purposes of scientific research, provision of professional health care services, support of medical education, professional improvement, and general public education.[47] To accomplish those purposes, NTSP, like any corporation, must hire and fire employees, contract for physician and other services, sue and be sued, and perform other governance activities. In managing its own affairs, and refusing to deal with payors on non-risk contracts, NTSP is a sole actor. NTSP does not bind anyone, other than itself, in non-risk

[45] ID at 67 (quoting *Alvord-Polk*, 37 F.3d at 1007-08).
[46] *See generally* Complaint Counsel's Notice of Appeal; Respondent's Notice of Appeal.
[47] *See* CX 275 at § 1.1.

contract situations.[48] NTSP's actions are not those of the individual physicians in any capacity.

The *Colgate* doctrine gives an entity the right to refuse to deal with anyone it chooses.[49] Squarely within that doctrine is NTSP's right to follow its own business model and to refuse to sign and messenger contractual offers outside that model.

In the recent *Trinko* decision, the Supreme Court strongly reaffirmed the *Colgate* doctrine:

> [A]s a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919).[50]

Trinko also provides valuable insight into the Supreme Court's reluctance to chill innovation and the development of networks by requiring the creator to provide access to anyone who asks – a concept analogous to NTSP's refusals to deal in this case. In upholding the defendant's right not to share its network with competitors,[51] the Court recognized that overly zealous enforcement of the antitrust laws can actually injure competition and innovation. "Mistaken inferences and the resulting false condemnations 'are especially costly because they chill the very conduct the antitrust laws are designed to protect.'"[52]

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[48] RPF 137-39, 166, 275.
[49] *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).
[50] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S.Ct. 872, 879 (2004). The Court's endorsement of *Colgate* even eliminated the qualifying clause in the earlier case – "In the absence of any purpose to create or maintain a monopoly."
[51] *Id.* at 883 ("We conclude that respondent's complaint fails to state a claim under the Sherman Act.").
[52] *Id.* at 882 (quoting *Matsushita*, 475 U.S. at 594).

The Fifth Circuit applied this same law in recognizing that even a trade association has a *Colgate* right to refuse to deal.[53]

> In *Consolidated Metal Products*, 846 F.2d at 296, we held that where an association's product recommendations were nonbinding and the association did not coerce its members to abide by its recommendations, its refusal to sanction plaintiff's product did not show that plaintiff was excluded from the market. Nor can a plaintiff show competitive harm merely by demonstrating that the defendant "refused without justification to promote, approve, or buy the plaintiff's product." Id. at 297.[54]

When NTSP's board makes a decision whether or not it wants to be involved in a payor's offer, NTSP's "approval" or "disapproval" indisputably is not binding on the physicians. Complaint Counsel's claim that NTSP violates the antitrust laws in refusing to deal is dead on arrival in the Fifth Circuit.

Any other result would be illogical. NTSP faces potential liability when it becomes party to a payor contract. Failure to perform obligations to the payor under the contract can subject NTSP to liability to the payor; involvement in payor conduct which is illegal under state or federal law can subject NTSP to liability to the government or physicians and patients; involvement in deficient medical care can subject NTSP to liability to patients.[55] NTSP also has its reputation to protect; involvement in a poorly-performing contract can damage NTSP's ability to interest payors, physicians, employers, and patients in future risk and non-risk contracts.

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[53] *Viazis*, 314 F.3d at 763 n.3 (citing *Monsanto*, 465 U.S. at 761, which cites *Colgate*).
[54] *Id.* at 766 (emphasis added).
[55] Healthcare is a line of business with great legal risk and regulatory complications, especially in a highly litigious state like Texas. NTSP has faced these types of situations with Aetna, Blue Cross, Cigna, and United, and others. RPF 164-65, 169-75, 177-82. Complaint Counsel's expert, Dr. Frech, acknowledged these legal concerns and that there are many reasons an entity may refuse to deal with another. RPF 163.

NTSP's announcements to payors that it would not be a party to offers that were below the level at which a majority of physicians would be interested in participating, that discriminated against specialties, that violated state law, or that did not meet other contractual requirements of NTSP were merely other *Colgate* events. As the Supreme Court held, "of course, he may announce in advance the circumstances under which he will refuse to sell."[56]

The ALJ recognized somewhat the principles underlying *Colgate* by ultimately refusing to infringe on NTSP's right to refuse to become a party to or messenger a payor contract; the ALJ denied Complaint Counsel's request for a mandatory injunction on this behavior.[57]

3. No other conduct taken by the entity NTSP could or does constitute an actionable contract or conspiracy.

Complaint Counsel has submitted no evidence of collusion by physicians in their contracting conduct, and the evidence shows the physicians' actions were consistent with independent action. The ALJ found that there was no direct evidence of collusion, that NTSP was not a "walking conspiracy," and that NTSP's right to refuse to deal should be protected. Legally, that is the end of Complaint Counsel's case.

To assert concerted action despite this lack of evidence, Complaint Counsel pointed to allegedly "inherently suspect" conduct. That alleged conduct was NTSP's (1) entering into Physician Participation Agreements with physicians; (2) collecting powers of attorney from some physicians; (3) confidential polling of physicians' minimum price

[56] *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *see also, e.g., Isaksen v. Vt. Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (finding that if dealers adhere to prices because they do not want to be cut off after a manufacturer makes a *Colgate* announcement, the dealer's acquiescence is just another part of conduct protected by *Colgate*).
[57] *See* ID at 88-90.

preferences and use of the mean, median and mode of the responses to decide when NTSP would participate as an entity in a payor's contract; (4) communicating with payors about contract offers; and (5) communicating with physicians on payor-related activities.

> The Initial Decision seems to have accepted the first several arguments:
>
> > that NTSP influenced its member physicians to allow NTSP to negotiate economic terms of non-risk contracts on their behalf and that NTSP rejected offers that fell below Board minimum rates which NTSP had set based upon polling the member physicians.[58]

But none of the arguments made by Complaint Counsel, or accepted in the Initial Decision, undercuts the undisputed evidence that the physicians did not collude. This case is like one of those board games where the player can move his token along a number of different paths, but the end destination is the same. Here, the end destination for every allegation is the undisputed evidence that the physicians did not collude.

The Physician Participation Agreement

The ALJ found concerted action because NTSP and the physicians allegedly entered into agreements allowing NTSP to negotiate on behalf of the physicians and bind the physicians to accept the negotiated contracts.[59] The only agreements the ALJ could possibly be referring to are the Physician Participation Agreement ("PPA") and the powers of attorney. The evidence shows that neither constitutes an actionable agreement.

[58] ID at 73.
[59] ID at 69, 73.

The PPA is the document in which the physician and NTSP agree to participate together in NTSP's risk contracts.[60] Complaint Counsel do not challenge in any way NTSP's risk contracts.[61]

The PPA also sets forth a messenger model NTSP is to follow if NTSP decides to become a party to a payor non-risk contract.[62] Complaint Counsel do not dispute that NTSP always followed the messenger model once NTSP had decided whether or not NTSP would be a party to the payor's contract. Complaint Counsel also do not dispute that NTSP had no authority to bind the physicians in a non-risk contracting situation.

Complaint Counsel incorrectly claimed that under the PPA, the physicians agree not to pursue offers with payors in deference to NTSP. But the PPA's express language shows that to be false. The PPA only provides for notice to be given to NTSP of "Payor Offers," a defined term which only includes offers from payors who currently have an active agreement with NTSP.[63] Further, the PPA's terms do not prevent a physician from negotiating with a payor directly or through another entity.[64] The evidence without exception from physicians is that they are free to deal with a payor directly at any time. In fact, in the large majority of situations, physicians contract outside of NTSP[65] and accept fewer than one-third of the payor contracts that NTSP ends up messengering.[66]

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[60] *See* CX 311 at 8-9.
[61] *See* Complaint Counsel's Opening Statement, Tr. 12.
[62] *See, e.g.*, RPF 139, 142, 145, 166, 271, 285.
[63] *See* CX 311, PPA § 1.18 (defining "Payor Offer" as one made by a "Payor"); § 1.16 (defining "Payor" as "any entity having an active Payor Agreement with NTSP"); and 2.1 (establishing NTSP's right to receive "Payor Offers").
[64] RCPF 99.
[65] RPF 162, 267, 271-75.
[66] RPF 162, 271-75.

Dr. Frech admitted that the physicians deal with payors without regard to the PPA and that he knew of no physician who refused to contract with a payor because of the PPA.[67] Nothing in either the language or the use of the PPA supports a finding of concerted action by physicians on contract rates.

If Complaint Counsel's complaint is that a few physicians gave NTSP notice of a payor's offer, Complaint Counsel presented no evidence that even one of those situations involved a "Payor Offer" as defined in the PPA. And such notice, whether pursuant to the PPA or not, could not constitute an actionable conspiracy in light of the undisputed evidence of no collusive action by the physicians in accepting or rejecting contract offers.

Powers of Attorney

The powers of attorney are not evidence of concerted action. Under the PPA, NTSP had no power to bind physicians to non-risk contracts; NTSP was required to use and did use the messenger model for any non-risk offers submitted to physicians.[68] That situation did not change even in those rare circumstances where a power of attorney form was requested by a payor[69] or was given by a physician.

The power of attorney forms themselves were expressly limited in their application to "any ***lawful*** manner."[70] Following that language, NTSP used the powers

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[67] RPF 155, 157; Frech, Tr. 1368 ("Q. Isn't it true that you have no knowledge of any doctor that refused to pay – to – isn't it true that you have no knowledge of any doctor that refused to participate in a contract offer by a payor because of a PPA? A. That's true.").

[68] RPF 139, 142, 145, 152-58, 161, 166, 271, 275, 285.

[69] Aetna required IPAs to receive grants of power of attorney from physicians before engaging in discussions about possible contract offers to be messengered. RPF 148, 367, 368. NTSP even pointed out to Aetna that Aetna's required individual provider addendum (including a grant of power of attorney) should be amended to recognize the limits of messenger model. RPF 368.

[70] RPF 149 (emphasis added).

of attorney only in conjunction with a messenger model.[71] The powers of attorney did not commit a physician to accept or reject an offer.[72] The powers of attorney never gave NTSP any power to bind any physician on a non-risk contract.[73]

Complaint Counsel's expert conceded that there is no evidence that any participating physician rejected a non-risk payor offer based on a power of attorney[74] or that a power of attorney prevented any participating physician from making an independent decision on a payor contract.[75]

At most, the infrequently-used power of attorney forms gave NTSP the opportunity to review a few contracts on behalf of some physicians, with the physicians retaining the right to accept or reject contracts, through NTSP or not, as they pleased.

The Poll

The poll and the board of directors' establishment of a threshold rate for the entity NTSP are not evidence of concerted action. NTSP screens payor offers before deciding whether to expend NTSP's scarce resources in contractual discussions with the payor to determine if the entity NTSP will sign and become a party to an offer.[76] NTSP's internal use of the mean, median and mode of the poll responses[77] limits the expenditure of NTSP's resources in reviewing and handling offers not likely to be of interest to a

[71] RPF 148-49, 396-98, 401; Van Wagner, Tr. 1941-44.
[72] RPF 289.
[73] RPF 137-38, 149.
[74] RPF 156; *see also* Frech, Tr. 1368-69 ("Q. Isn't it also true that you have no knowledge of any doctor who turned down a contractual offer from a payor in deference to a power of attorney? A. I have no knowledge of an individual doctor who did that.").
[75] RPF 156, 289; *see also* Frech, Tr. 1368-69.
[76] RPF 125, 166-68.
[77] RPF 140.

significant number of NTSP's eligible physicians.[78] The poll also informs NTSP as to when a significant number of the physicians in its risk contract pool will likely choose to be involved in the non-risk offer, which is an indication as to when spillover of the risk contract efficiencies will occur.

If a payor makes an offer below the threshold, NTSP refuses to get involved. If the payor makes an offer that meets the threshold, NTSP will then review the offer to see if NTSP will become a party to the contract and eventually messenger the offer.[79] NTSP does not negotiate to raise rates above this threshold.[80] NTSP's actions related to the establishment and use of the threshold rate are actions only of the entity NTSP.

The individual physicians are in no way bound to this threshold in their contracting decisions. Even if the entity NTSP becomes a party to the contract, each physician still has an individual right to decide whether he or she will become a party.[81] In most instances, the physicians do not choose to accept the contract offer through NTSP.

Physicians also are not bound in any way to their poll responses. NTSP's poll does not require or induce a physician to contract in a particular manner or even at all.[82]

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[78] RPF 121, 124-26, 164-65.
[79] RPF 141-42, 166.
[80] RPF 142-43; Frech, Tr. 1370 ("Q. Have you ever seen any instance in which NTSP has gone to a payor to talk about a price that was above its minimum? A. No, hadn't seen that.").
[81] RPF 142, 145, 155, 161, 284, 286. On average, the physicians reject more contracts than they accept through NTSP. RPF 162.
[82] A physician interested in a payor offer can participate through NTSP, can contract directly with a payor, or can participate through another entity. *See, e.g.*, RPF 137-39, 160-61, 267.

It is undisputed that less than 34% of the physicians even responded to the poll,[83] and that less than 16% of those who responded chose the rate later determined by the board as NTSP's internal threshold.[84] Dr. Frech also determined that the physicians who do respond vary from their own poll response in individual business decisions;[85] many physicians contract on their own with payors at rates below (as well as above) the threshold rate used internally by NTSP.[86] At the end of the day, each physician or physician group makes an independent decision to accept or reject a payor offer, whether or not messengered through NTSP.[87]

NTSP's Comments to Physicians

NTSP's communications with physicians cannot be evidence of concerted action. References to Fax Alerts and other comments made to physicians by NTSP are irrelevant to a concerted action inquiry, in light of the undisputed evidence that there was no physician collusion.

Dr. Frech correctly concluded that disclosure of the mean, median, and mode of poll results tells the physicians nothing about what any physician believes or does.[88] Only a limited number of physicians respond to the poll, and physicians never receive

[83] RPF 129.
[84] RPF 135.
[85] RPF 286.
[86] RPF 286.
[87] RPF 155, 161, 284, 286.
[88] RPF 130-33, 136, 150-51; Frech, Tr. 1436 ("Q. Let's turn to the poll. It's correct, is it not, that the people who respond to the poll do not know the responses by any other responder? A. The poll doesn't – at least not through the poll. I mean, the polling system itself is not going to tell them what specific other respondent said.").

any individual-specific data.[89] And because only the mean, median, and mode of the responses are reported, it is impossible for a physician to determine the response of any specific physician or specialty, or even to determine whether they responded.[90] Dr. Frech also demonstrated that even if a physician had hypothetically been able to learn another physician's poll response, that would have meant nothing, because the physicians did not conform their individual contracting behavior to their poll responses.[91]

The evidence of NTSP's miscellaneous other comments to physicians further supports the conclusion that physicians did not collude. Many of NTSP's dealings with payors related to risk contracts or non-economic terms.[92] Complaint Counsel and the ALJ fail to distinguish between comments about risk and non-risk contract terms or between comments about non-economic and economic terms.[93] Risk contract negotiations do not violate the antitrust laws.[94] Nor do comments about non-economic terms of non-risk offers; IPAs are encouraged by the Commission's Statements of Antitrust Enforcement Policy in Health Care ("Health Care Statements") to discuss and even negotiate non-economic terms. [95]

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[89] RPF 129, 133, 135. Not even the NTSP Board is informed of any individual poll responses. RPF 133, 136, 150-51, 159. The poll results are handled by staff and a third-party accounting firm. RPF 132.
[90] RPF 130-33, 136, 150-51.
[91] *See* RX 10, RX, 11, CX 1155; RPF 286.
[92] *See, e.g.*, RPF 355, 411-12, 421.
[93] *See* note 5.
[94] DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care, Statements 8 and 9 (1996) ("HEALTH CARE STATEMENTS").
[95] *Id.* at Statement 8.C.7 (approving "an agent to negotiate the non-fee related aspects of the contracts").

Many of the comments challenged by Complaint Counsel also relate to litigation against an affiliate of a payor,[96] breach of contract issues,[97] NTSP's competition with payors for certain business,[98] and state and federal government enforcement actions being taken against payors' contracting conduct.[99] These types of comments, which would be protected under the First Amendment,[100] were never shown to have created a collusion among physicians on non-risk contract prices.

Hypothetically, even if an entity were to make incendiary comments (which NTSP has not, as shown in this section and in section IV below), in the absence of a showing of collusion by providers, that would not be an antitrust violation. Complaint Counsel never made any showing that those kinds of comments, or any other comments, ever changed the contracting practices of even one physician, much less involved any physician in an actionable collusion with NTSP. [101]

This case is as simple as the old adage – "if there is no collusion, there is no collusion."

NTSP Comments to Payors

Even further afield from a showing of physician collusion are comments by NTSP to payors. Given that NTSP indisputably had no right to bind physicians to non-risk

[96] *See, e.g.*, RPF 329, 339-43, 347-49, 354.
[97] *See, e.g.*, RPF 418-23, 426-32.
[98] *See, e.g,* RPF 384-85 (United was competing with an NTSP risk contract covering employees of the City of Fort Worth); RPF 389, 391, 371 (NTSP competed with payors for the provision of medical management and utilization management functions).
[99] *See* F. 192-94, 256-58, 357-63. Neither party appealed these findings. *See* Complaint Counsel's Notice of Appeal; Respondent's Notice of Appeal.
[100] *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (recognizing that commercial speech is protected by the First Amendment).
[101] Complaint Counsel made no showing that any individual physician decisions were actionable under the *Matsushita* standard. *See* 475 U.S. at 588 (conduct consistent with lawful competition does not support inference of conspiracy).

contracts,[102] and that physicians usually rejected NTSP contracts and contracted on their own with payors,[103] NTSP's comments to payors were just that – comments by NTSP.

Complaint Counsel dangerously implies that comments made by an IPA to a payor as to what physicians might want to see in an offer equates to physician collusion. Such an implication ignores the beneficial informational role an IPA entity[104] can play in educating a payor as to what type of offer might be accepted by the individual physicians. That role is mentioned with approval in the Commission's Health Care Statements.[105]

If Complaint Counsel's implication were valid, any entity or association that persuaded a vendor to make an "attractive" offer of a credit card, vacation package, or merchandise to the entity or association's employees or participants would be deemed to be involved in an actionable conspiracy. This result goes against common sense and, in this case, the undisputed evidence. The fact is that NTSP's participating physicians had an independent right to deal with payors and to accept or reject payor contracts,[106] and did so, whether NTSP participated in the contract or not.[107]

4. The authority cited by Complaint Counsel does not support their position.

As shown above, none of the conduct cited by Complaint Counsel or the ALJ can support a finding of concerted action between NTSP and physicians. Complaint Counsel

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[102] *See* note 20.
[103] *See* note 65.
[104] *See* note 2 for definition of "IPA entity."
[105] HEALTH CARE STATEMENTS, Statement 9.C.

> 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).

[106] RPF 137-38, 155; F. 71.
[107] *See* note 65.

and the ALJ, however, cite *Maricopa* and a district court decision (*Hassan*) for the proposition that NTSP's conduct is concerted action.[108] But those cases are inapposite to the issue of concerted action in this case. Both *Maricopa* and *Hassan* involved acknowledged agreements among physicians as to which price they would accept.[109] In contrast, it is undisputed here that physicians have not colluded, and could and did act independently of the entity NTSP's decisions on payor contracts. Therefore, *Maricopa* and *Hassan* do not support a finding of concerted action in this case; those cases actually underline the need for Complaint Counsel to have shown concerted action as the first element of their proof.

The Initial Decision also cites to a 1983 Fifth Circuit case, which involved a conspiracy among nine hospitals and a Blue Cross entity to fix the prices paid by Blue Cross to other hospitals.[110] It is difficult to see any relevance of that pre-*Viazis* decision to this case where NTSP chose not to contract and where the physicians did not collude among themselves.

Complaint Counsel's argument that concerted action can be found without proof of physician collusion is an oxymoron which fails as a matter of law.[111]

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[108] *Arizona v. Maricopa Co. Med. Soc'y*, 457 U.S. 332 (1982); *Hassan v. Indep. Practice Assoc., P.C.*, 698 F. Supp. 679 (E.D. Mich. 1988).

[109] As discussed by the ALJ, the Court in *Maricopa* found explicit agreements by the participating physicians to accept set amounts determined by the foundations. ID at 67-68. Similarly, in *Hassan*, the physicians explicitly agreed on a maximum fee schedule. ID at 70.

[110] *St. Bernard Gen. Hosp. v. Hosp. Serv. Ass'n*, 712 F.2d 978, 986 (1983).

[111] NTSP's position is supported by the HEALTH CARE STATEMENTS, which recognize that the issue is "whether the arrangement creates or facilitates an agreement among competitors on prices or price-related terms." Statement 9.C. The Statements even go so far as to allow an IPA entity to accept (and hence not accept) a payor offer on behalf of individual physicians without such being an antitrust violation. Statement 9.C (approving

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.

A contract or conspiracy, if proven, can be an unlawful restraint of trade under three separate theories: (1) *per se*, (2) rule of reason, or (3) truncated or "quick look" rule of reason.[112] The rule of reason is the prevailing standard that applies to most contracts or conspiracies and would be the appropriate analysis in this case.[113] Applying the rule of reason requires a study of the market and the competitive effects of the alleged conspiracy in the market. Therefore, the ALJ erred when he found that no elaborate study of the market was needed to establish illegality in this case.[114] The ALJ should have applied the rule of reason as required by *California Dental*.

The Supreme Court's *California Dental* decision requires the application of a rule of reason analysis if the conduct at issue "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[115] *California Dental* advocates "considerable inquiry into market conditions" before "application of any so-called '*per se*' condemnation is justified."[116] And the quick look rule of reason analysis

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an IPA having "authority to accept contract offers"). Here there is no agreement among competitors on prices – and NTSP does not even accept or reject payor offers on behalf of physicians.

[112] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 763 (1999) (identifying three theories of liability); *see also* ID at 84-85. The Fifth Circuit has adopted the *California Dental* approach. *See Viazis*, 314 F.3d at 765.

[113] *State Oil Co. v. Khan*, 533 U.S. 3, 10 (1997).

[114] *See* ID at 87.

[115] 526 U.S. at 771.

[116] *Id.* at 779 (emphasis added).

is appropriate only in limited circumstances, when it can be shown that "the great likelihood of anticompetitive effects can be easily ascertained."[117]

In applying the plausible procompetitive or no effects test mandated by *California Dental*, one must look at what, if any, specific contract or conspiracy has been shown by Complaint Counsel. The conspiracy here cannot include collusion among physicians because Complaint Counsel concede there is no such collusion, the evidence does not support a finding of collusion, and the ALJ's unchallenged holding was that there was no collusion among physicians.[118]

What is left to consider for plausible procompetitive or no effects are merely the non-price documents between NTSP and physicians – the Physician Participation Agreement and the powers of attorney – if and to the degree those documents were ever carried out. What little conduct was even arguably shown under those documents clearly has plausible procompetitive effects, and therefore must be judged under the rule of reason.

The PPA is challenged by Complaint Counsel because of a provision requiring physicians to provide NTSP with notice of certain "Payor Offers." Despite Complaint Counsel's suggestion to the contrary, this provision does not require physicians to send every payor offer they receive to NTSP and does not prohibit physicians from negotiating separately with payors. Physicians are only required to give notice to NTSP of a "Payor Offer,"[119] which is a defined term that includes only an offer from an "entity having an

[117] *Id.*
[118] ID at 68-69.
[119] CX 311, PPA § 2.1.

active Payor Agreement with NTSP."[120] Most of the situations at issue in this case did not involve a "Payor Offer" as defined in the PPA. NTSP had no contract with Aetna prior to December 2000, no contract with Cigna prior to October 1999, and no direct contract with United prior to November 2001.[121] The PPA also excludes from that definition any offer "in replacement or renewal of a contract which exists between such Payor and physician as of March 1, 1998."[122] Complaint Counsel also challenge situations where physicians were already contracted with payors – situations outside the scope of the challenged PPA notice provision.

A notice provision clearly has plausible procompetitive effects or plausibly no effect. Notifying NTSP of a possible replacement of its contract increases the contracting opportunities in the marketplace by informing NTSP of a new contract opportunity, either for a risk contract or some other type of contract. In fact, most (if not all) of NTSP's contracts require advance notice of termination.[123] The PPA provision is largely redundant of those existing provisions. Are those contractual notice provisions now an antitrust violation under the logic of the Initial Decision?

The language of the PPA allows NTSP only to *receive* these "Payor Offers"; it does not say that a physician is bound by NTSP's action on the offer or that the physician cannot negotiate directly, or through another entity, with the payor.[124] As stated above, it

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[120] CX 311, PPA §§ 1.16, 1.18.
[121] RX 24 (Aetna contract); RX 25 (United contract); CX 782A, *in camera* (Cigna contract).
[122] CX 311, PPA § 2.1.
[123] *See, e.g.*, RX 24 at § 7.2 (Aetna-NTSP contract); RX 25 at § 7.2 (United-NTSP contract).
[124] CX 311, PPA § 2.1.

is undisputed that physicians did not agree to refuse to contract with payors. Complaint Counsel's expert admitted that physicians dealt with payors without regard to the PPA.[125]

The powers of attorney challenged by Complaint Counsel are also misconstrued. The powers of attorney were gathered by NTSP to inform NTSP of which and how many physicians were willing to be messengered an offer through NTSP.[126] NTSP used powers of attorney at the request of Aetna, who took the position that the Texas Department of Insurance required some document to reflect a doctor's designation of an IPA as the messenger of an offer.[127] Certainly an "indication of interest" cannot be said to be devoid of plausible procompetitive effects.

In no instance was any physician shown to have refused to contract with a payor in deference to a power of attorney.[128] Complaint Counsel's expert so conceded:

> Q. Isn't it also true that you have no knowledge of any doctor who turned down a contractual offer from a payor in deference to a power of attorney?
> A. I have no knowledge of an individual doctor who did that.[129]

In one of the few instances challenged by Complaint Counsel – the United situation in the fall of 2001 – the powers of attorney were never delivered to the payor.[130] In another – Aetna – the powers were gathered to meet the payor's request.[131] In both situations, the powers of attorney were always subject to the provisions in the PPA that

[125] RPF 155, 157; Frech, Tr. 1368.
[126] RPF 149; *see* CX 544; Jagmin, Tr. 1136-42.
[127] RPF 148, 367-68.
[128] RPF 156, 289.
[129] Frech, Tr. 1368-69.
[130] RPF 401.
[131] RPF 149. 367-68.

NTSP had no authority to bind any physician, and that any contract through NTSP would have to be messengered for the physician's decision.[132]

NTSP as an entity did take other actions unilaterally – use of the poll to inform itself of when NTSP would become a party to a payor's offer, disclosing to physicians the mean, median, and mode of the poll results, commenting to a payor about a payor's offer, and commenting to physicians about a payor's conduct. None of those unilateral actions is subject to the *California Dental* criterion for contracts and conspiracies.[133] Each of those unilateral acts, moreover, has plausible procompetitive effects, in addition to NTSP's right under the *Colgate* doctrine to govern itself and to avoid risky or unattractive contractual situations.

The poll is an objective method of determining when a majority of NTSP's physicians are likely not interested in participating in a payor's offer.[134] Establishing board minimums based on this knowledge enables NTSP to avoid expending its scarce resources on offers in which its physicians are not interested[135] and allows NTSP to predict when its spillover model is likely to achieve efficiency and quality gains for the non-risk patients.[136] An IPA has a plausibly valid concern about expending resources in handling a payor's offer which is of interest to less than 50% of the physicians; a FTC advisory opinion has said so. In the Bay Area Physicians advisory letter, an IPA was

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[132] The powers of attorney were expressly limited to being used "in any lawful manner." RPF 149. In all instances, NTSP followed the messenger model and never engaged in a binding negotiation for a physician on a non-risk contract. RPF 149, 289.
[133] *See* Section II.B.
[134] RPF 121-22.
[135] RPF 121, 124-26, 164-65.
[136] *See, e.g,* RPF 21-26, 85-87, 89, 113-18, 121-22.

allowed in some circumstances to refuse handling offers of interest to only a minority of its physicians.[137]

Complaint Counsel's experts conceded the plausible validity of procompetitive spillover effects and that the spillover effects would be adversely affected by a lack of continuity between NTSP's risk panel and the panel handling a payor's non-risk patients.[138] Cost efficiency and increased quality of care are procompetitive results of NTSP's own use of the poll. Only if one rejects an IPA entity's right to control its own expenditures and resources, and only if one rejects all of the economic literature on spillover and teamwork, can one say that NTSP's position is not plausible.

Disclosing to physicians when NTSP will not be involved in a payor offer also had plausible procompetitive effects – physicians learn that they need to look to other contracting avenues with payors in those situations. Physicians would learn eventually that no offer was going to come through NTSP; the disclosure merely expedited the contracting process.

Advising a payor of the terms NTSP requires for its own participation is merely the flow of information needed by the payor to decide how to structure an offer. That

[137] *See* Bay Area Preferred Physicians Advisory Opinion, letter from Jeffrey W. Brennan to Martin J. Thompson, dated September 23, 2003. That opinion addressed the situation where an IPA did "not wish to fund the servicing of contracts in which only a minority of [the IPA's] members participate, because it would 'impose an excessive cost' on the non-participants . . . ." Staff, while taking a neutral stance, noted that "[s]o long as payers have an effective opportunity to contract with physicians individually," the IPA's "refusal to administer contracts to which fewer than half its members subscribe is less likely to have anticompetitive effects."

[138] RPF 86-87, 113-14.

information was necessary if the payor wanted to have NTSP as a party to the contract.[139] Even NTSP's remarks to a payor as to what terms physicians might find attractive or reasonable if presented in a payor offer can be beneficial. Information concerning possible physician reactions to offers can educate the payor and expedite contracting. If the payor found the information unhelpful, the payor would ignore it, and there would be no effect on competition at all.

Finally, informing physicians about a payor's conduct or the status of a payor offer is merely the collection and dissemination of market information. The procompetitive effects of information sharing in the health care industry, even among competing physicians, is recognized by Complaint Counsel's economic expert and the Commission's advisory opinions.[140] Any negative spin Complaint Counsel might put on such communications by NTSP is belied by their concessions that no physician collusion occurred.

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[139] The ALJ recognized and refused to infringe upon NTSP's right to refuse to deal with payors in his Initial Decision and Order, leaving NTSP free to reject payor offers that do not meet its requirements for participation. *See* ID at 88-90.

[140] *See* Frech, Tr. 1437-38; FTC Staff Advisory Opinion Letter, dated February 6, 2003, from Jeffrey W. Brennan to Gregory G. Binford regarding PriMed Physicians:

> The collection and public dissemination of accurate information and expressions of opinion on matters of public interest usually do not raise concerns under the antitrust laws, even when physicians or other groups composed of competitors do so collectively. Increasing the amount of information available to patients, employers, physicians, and other interested parties can improve the functioning of markets and foster, rather than hinder, competition and consumer welfare. In most instances, physicians' collection and publication of such information, and their advocacy of a point of view on issues affecting the organization, delivery, and financing of health care services, would not likely impair competition or violate the antitrust laws.

Complaint Counsel's expert's concession of no physician collusion and Complaint Counsel's reliance on non-price, justifiable documents make this a rule of reason case.

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

1. Complaint Counsel has the burden to show anticompetitive effects in a relevant market.

Under a rule of reason analysis, any restraint of trade must be evaluated by weighing its probable anticompetitive effects against any procompetitive benefits.[141] The burden is on the complaining party – Complaint Counsel – to demonstrate that the challenged conduct has a net anticompetitive effect.[142]

The Supreme Court in *California Dental* imposed a high evidentiary burden on a party (like Complaint Counsel) trying to prove that a contract or conspiracy has anticompetitive effects. The Court emphasized the need for empirical proof of actual anticompetitive effects before a defendant must submit any proof of procompetitive effects:

> Justice BREYER suggests that our analysis is "of limited relevance," *post*, at 1623, because "the basic question is whether this . . . theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case," *ibid.* He thinks that the Commission and the Court of Appeals "adequately answered that question," *ibid.*, but ***the absence of any empirical evidence on this point indicates that the question was not answered, merely avoided by implicit burden shifting*** of the kind accepted by Justice BREYER. The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, ***there must be some indication that the court making the decision*** has properly identified the theoretical basis for the

[141] *Viazis*, 314 F.3d at 765.
[142] *Id.* at 766.

> anticompetitive effects and ***considered whether the effects actually are anticompetitive***. Where, as here, the circumstances of the restriction are somewhat complex, ***assumption alone will not do***.[143]

California Dental requires Complaint Counsel to show actual anticompetitive effects no matter what rule of reason analysis is used.

The Fifth Circuit explicitly agrees that anticompetitive effects must be shown – supported by data from the "precise market at issue":

> In *California Dental*, the Court recognized that a restriction on advertising related to quality has several potential procompetitive justifications. On remand, the Ninth Circuit determined that the FTC had failed to prove that the advertising restrictions at issue were a net harm to competition. *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000). The court noted that the Federal Trade Commission had failed to prove actual harm by presenting relevant data from the precise market at issue. *Id.*
>
> *Viazis* similarly has failed to present data demonstrating the anticompetitive effects of the advertising restrictions of which he complains. In the absence of such data, he has not carried his burden to demonstrate that the restrictions have a net anticompetitive effect. *See id.*[144]

To prevail in a rule of reason case, Complaint Counsel has the burden to "define the market and prove that [NTSP] had sufficient market power to adversely affect competition."[145] Complaint Counsel would have had this burden even in a *per* se case.[146]

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[143] 526 U.S. at 775 n.12 (emphasis added).
[144] *Viazis*, 314 F.3d at 766.
[145] *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1555 (11th Cir. 1996); *accord Doctor's Hosp. of Jefferson, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 307 (5th Cir. 1997) ("'Proof that the defendant's activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason.'" (quoting *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1392 (5th Cir. 1983)); *Jayco Sys., Inc. v. Savis Bus. Machs. Corp.*, 777 F.2d 306, 319 (5th Cir. 1985) ("In addition, a showing of a relevant market is also necessary to assess anticompetitive effects in rule of reason analysis under § 1.").
[146] *See* ID at 61 and cited authorities. *See also Cal. Dental*, 526 U.S. at 779 ("'considerable inquiry into market conditions' may be required before the application of any so-called 'per se' condemnation is justified").

2. Complaint Counsel did not prove anticompetitive effects in a relevant market sufficient to find an unreasonable restraint of trade or to require Respondent to prove procompetitive effects.

Applying the rule of reason to this case, it is apparent that no antitrust violation exists. Complaint Counsel has not defined a relevant market or proven that NTSP has sufficient market power to adversely affect competition. And even if a relevant market had been defined and NTSP's market power shown, Complaint Counsel has not proven net anticompetitive effect from NTSP's conduct. The ALJ, citing *California Dental*, found that the analytical focus should be on "what conclusions regarding the competitive impact of a challenged restraint can confidently be drawn from the facts demonstrated by the parties."[147] The facts as demonstrated do not support a finding of net anticompetitive effects in a proper relevant market. Therefore, the ALJ erred when he found that to the extent an examination of effects was required, the effects were anticompetitive.[148]

Complaint Counsel's economic expert spent over 200 hours studying this case and chose not to attempt to define a relevant market, either product (service) or geographic.[149] Complaint Counsel presented no evidence as to what the relevant service markets would be, and the ALJ failed to define specific service markets at all.[150] Obviously there are scores of physician specialties, some that compete with one another but many that do not.

As to geographic market, Complaint Counsel conducted no price studies, no patient origin studies, and no data analysis of any type on the relevant market issue.[151]

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[147] ID at 86.
[148] *See* ID at 87-88.
[149] ID at 63; *see also* Frech, Tr. 1393-94, 1424-25; *see also* RPF 197, 236.
[150] *See generally* ID at 61-64.
[151] *See, e.g.*, RPF 198-99.

Complaint Counsel's expert (who has written on the subject of geographic market definition[152]) also failed to support Complaint Counsel's relevant geographic market allegation of the city of Fort Worth.[153] The ALJ pointed out that Complaint Counsel had a "misguided belief that the market need not be defined."[154] The failure to define either a geographic or service market is fatal to any showing of anticompetitive effect by Complaint Counsel.

Complaint Counsel did adduce layperson testimony from payors that a health insurance plan would need physicians in the city of Fort Worth to be marketable and that Fort Worth residents would not drive to other locations even if doing so would save them 5 percent.[155] But that is not the test for defining a geographic market. The test is whether a hypothetical 5 percent or so increase in the alleged market – here, the city of Fort Worth – would be undercut in a non-transitory period of a year by providers in the surrounding areas.[156] There is no testimony on that point.

Further, the geography shows that it would be impossible, under the appropriate test, to define the city of Fort Worth as a relevant geographic market. Fort Worth looks like a hand running north/south in Tarrant County, with the thumb and fingers and wrist closer to Dallas and other counties than to downtown Fort Worth. Forty percent of the

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[152] *See* note 23.

[153] Dr. Frech's testimony on this point could not be more clear: "Q. And by the way, you're not positing any relevant market in this case, isn't that correct? A. That's correct." Frech, Tr. 1393-94. *See also* ID at 63. Complaint Counsel's expert has written on the issue of defining relevant markets and obviously knew the Complaint Counsel's relevant market allegation was bogus.

[154] ID at 63.

[155] The Initial Decision relied on this testimony in defining the relevant market as physician services in the city of Fort Worth. *See* F. 52-64; ID at 63-64.

[156] DOJ/FTC Merger Guidelines, ¶ 1.1 (1997); DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors, ¶ 3.32(a) (2000) ("COLLABORATION GUIDELINES").

population of Tarrant County lives in other cities in the "Mid-Cities Area" along the Dallas County border.[157] There are four major hospitals in the Mid-Cities Area and eight major hospitals in Dallas County.[158] Much of the city of Fort Worth is located closer to the Mid-Cities Area and to Dallas County than to downtown Fort Worth where Fort Worth's two major hospitals are located.

Testimony from Complaint Counsel's expert confirms that the geographic market is broader than the city of Fort Worth.[159] Dr. Frech agreed that the existence of the significant population in the Mid-Cities Area would act to tie Dallas and Tarrant Counties together;[160] this testimony defeats any attempt to limit the relevant market to only Tarrant County, let alone only the city of Fort Worth. Dr. Frech also conceded that geographic markets tend to become larger the more specialized the physician;[161] this fact is important because NTSP's participating physicians are mostly specialists.[162]

The evidence also shows that patients seek medical care near where they live and that many people who work in Fort Worth live outside the city, in Tarrant County and other counties.[163] The Initial Decision's finding that one city in a metropolitan area

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[157] RPF 203; *see also* RPF 201-02.
[158] *See* RPF 220.
[159] Testimony and evidence from payors also confirms that the market is broader than the city of Fort Worth. *See* RPF 226, 228-35 (payors and TDI use a broader service area than Fort Worth).
[160] RPF 204. The Mid-Cities Area constitutes approximately 40% of Tarrant County's population. RPF 201, 203.
[161] RPF 214.
[162] RPF 10-11.
[163] RPF 223-25.

without geographic barriers is a relevant market[164] is insupportable[165] and a rejection of the economic principles which the Commission has sought to establish for two decades.

Complaint Counsel's case fails because a proper relevant market was not defined.

But even if a proper relevant market had been proven, there was no showing of anticompetitive effect from NTSP's conduct in any market. When looking for any showing made by Complaint Counsel of anticompetitive effect in a relevant market, one must proceed in light of the concession that there was no physician collusion. Accordingly, any anticompetitive effect must be shown to flow from the Physician Participation Agreement or the powers of attorney – and not the conduct of physicians or the unilateral conduct of NTSP. No such effect was shown.

There must be a showing of NTSP's market power in determining anticompetitive effect.[166] But Complaint Counsel failed to make any showing as to NTSP's market power or market share.[167]

Further, the evidence brought forth by Respondent proved NTSP does not have market power. Those physicians (located in 8 counties) to whom NTSP messengers

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[164] *See* ID at 63-64; F. 52-63.

[165] *See, e.g, FTC v. Freeman Hosp.*, 69 F.3d 260, 269 (8th Cir. 1995) (rejecting one city and 27-mile radius as relevant market for hospital services and citing other authorities rejecting one-city relevant markets).

[166] *See* notes 145 & 146.

[167] *See* generally F. 52-63; ID at 61-64. In his findings of fact, the Initial Decision did reference NTSP's percentage of physicians in some specialties in Tarrant County, but did not determine which other specialties competed with those listed specialties. *See* ID at 61-64. Complaint Counsel's expert conceded that there can be significant crossovers of services between specialties, meaning that a significant percentage in one specialty is not necessarily evidence of market power. *See* RPF 240; *see also* RPF 242-43. The Initial Decision did not address the undisputed fact that the "participating physicians" do not participate in NTSP contracts most of the time.

contracts constitute less than 23 percent of the physicians in any county.[168] If one takes the DFW Metroplex as the market, as was used by the Department of Justice in its suit against Aetna,[169] NTSP's physicians are only 10 percent of the available physicians.[170] Moreover, the physicians reject most of the contracts messengered by NTSP; Complaint Counsel's expert conceded that less than 8 percent of the contracting activity in Tarrant County is through NTSP-messengered contracts.[171] If one includes adjacent Dallas County, NTSP's potential effect on the market is less than 4 percent![172]

Complaint Counsel also failed to show, and the ALJ did not find, any barriers to entry, which is further evidence that NTSP does not have market power.

All the evidence showed that NTSP has no significant market impact and does not possess market power. NTSP was not alleged to be an essential facility,[173] nor could it be. The numerous avenues through which physicians could and did contract disprove any market power of NTSP based on an essential facility theory.[174]

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[168] RPF 245.
[169] *See* RPF 205.
[170] *See* RX 305-06.
[171] Frech, Tr. 1396-97. NTSP physicians can accept contracts through other IPAs or directly with payors, and the evidence shows they do so with regularity. *See* RPF 162, 267, 271-75. The NTSP physicians who do participate in one or more NTSP contracts almost invariably have a significant number of other contracts in which they participate outside of NTSP. *See* RPF 162, 271-75. On average, NTSP physicians participate in less than a third of NTSP's available contracts. *See* RPF 162, 271-75.
[172] 4% is much less than the 20% level used as a significance threshold by the Commission in assessing competitive impact of joint ventures. HEALTH CARE STATEMENTS, Statement 8.A (safe harbor for 20%-30% or less of the relevant market); COLLABORATION GUIDELINES, ¶ 4.2 (20% safe harbor).
[173] Complaint Counsel's Opening Statement, Tr. 9-10; *see also* Frech, Tr. 1398.
[174] *See* RPF 160-62, 267-69, 271-76, 287, 294-96; *see also* RX 13 (physician participation chart). The payors themselves testified that there were able to find enough local physicians available to them outside of a relationship with NTSP. *See* RPF 277-83, 369-70, 388, 448.

That NTSP could not and did not adversely affect competition is further supported by the evidence that there were no actual anticompetitive effects from any of NTSP's challenged documents with physicians, or even NTSP's unilateral conduct. Complaint Counsel submitted *virtually no* empirical evidence in this case.[175] The ALJ found that NTSP did not receive higher rates than what other physicians and physician groups were already receiving.[176] The ALJ specifically found the allegation that NTSP received higher rates was not supported by the evidence.[177]

What the ALJ found was that "NTSP obtained higher rates or more beneficial economic terms than the health care payors initially offered to NTSP."[178] This finding, however, relates to NTSP's decision about whether to participate in a payor offer, not to conduct by the physicians who provide the medical services to the payors. NTSP as an entity can choose to participate or not participate in a payor offer for any number of reasons – Complaint Counsel's expert so conceded.[179] NTSP's decision about a payor's offer has no antitrust significance in the absence of a showing that physicians entered into a conspiracy with NTSP to boycott the payor.

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[175] *See* RCPF 11, 21-23, 460-62.
[176] *See* F. 188 (United gave NTSP the same rate offered to other IPAs); F. 217 (Cigna gave NTSP a rate the same as at least one IPA and in the general ballpark of rates Cigna paid to other IPAs), F. 328-39 (Aetna gave NTSP the same rate as another IPA); ID at 82 ("[T]here is insufficient evidence to establish that the rates that United, Cigna, and Aetna agreed to with NTSP are uniformly higher than rates health insurance payors offered to other IPAs or directly to other physicians."). Neither party has appealed these findings. *See* Complaint Counsel's Notice of Appeal; Respondent's Notice of Appeal.
[177] *See* ID at 83 (holding that the evidence cited by Complaint Counsel did not support a finding that NTSP's rates were higher than those otherwise offered to physicians). Neither party has appealed this finding. *See* Complaint Counsel's Notice of Appeal; Respondent's Notice of Appeal.
[178] ID at 74.
[179] RPF 163.

Nor was any showing made that NTSP's internal decision affected the rates finally offered by the payor to get enough physicians. NTSP had reason to believe that many, if not most, of the physicians would choose not to participate in a payor offer below a certain level. One would expect that many of the physicians eventually would not participate, as a result of the independent decisions they had already made prior to receiving the poll. Complaint Counsel never showed that the physicians' later conduct was different in any way from what one expect from independently-acting physicians. Complaint Counsel never showed that the payor offers ended up at a different level than they would otherwise have reached. Complaint Counsel's expert conceded that a payor under normal economic circumstances would have to increase its offer to attract more physicians and to attract better-qualified physicians.[180] One can offer a dollar for the Brooklyn Bridge but that does not mean the offer is a realistic basis for determining actual market conditions.[181]

Complaint Counsel also completely ignored total medical expense, of which physician rates are only one variable. Total medical expense is the correct outcome measure for the cost of physician services because the volume and mix of physician, facility, and pharmacy services provided at the direction of the physician are what primarily determine medical costs, not the unit rate paid to the physician.[182] The better physician is the one who manages the patient's care to be cost-effective and quality-

[180] RPF 297, 299.
[181] *See, e.g, Schonfeld v. Hilliard*, 218 F.3d 164, 181 (2d Cir. 2000) (finding that the value placed on an item by a purchaser is not evidence of market value unless it is also a price at which a reasonably informed seller is willing to sell).
[182] *See* RPF 302, 304, 308.

effective, not the one who charges a low rate and does not take the time to manage care.[183]

Complaint Counsel's experts conceded this failure to discuss the proper measure of cost and also conceded that a payor would naturally expect to pay a higher rate for the better physicians who would probably lower total medical expense.[184] Complaint Counsel nonetheless took the simplistic position that higher unit rates for NTSP participating physicians (which the ALJ found not to have occurred[185]) would have been an anticompetitive effect. That position is a serious policy error in a sector of the economy where teamwork is critical in controlling the true measure of cost – total medical expense.[186]

Given these numerous failures of proof, Complaint Counsel failed to carry its burden under *California Dental* to prove anticompetitive effects in a relevant market.[187]

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[183] *See* Thos. Leary, *The Antitrust Implications of "Clinical Integration:" An Analysis of FTC Staff's Advisory Opinion to MedSouth* at 14 ("Payers may be willing to pay MedSouth doctors more money for fewer services simply because these doctors are better at deciding when services are necessary and get better results when they perform those services.").

[184] *See* RPF 303, 308, 310; *see also* RPF 299-300.

[185] *See* ID at 82-83.

[186] Wilensky, Tr. 2173-76 (the biggest driver of health care costs is quantity and mix of services, not physician fees); Wilensky, Tr. 2191-92 (teamwork is important to control costs); Wilensky, Tr. 2204-05 (NTSP's business model is beneficial to health care and should be encouraged); *see also* RPF 302, 304-06. Health care costs have been rising at 8-9 percent a year since 2000. *See* RX 1752-53, 1850; Wilensky, Tr. 2183-85.

[187] Of course, Complaint Counsel's failure to prove any anticompetitive effect was also a failure to have shown a "great likelihood of anticompetitive effects" under the *California Dental* test for a truncated Rule of Reason approach. *See* note 117.

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

Any showing of procompetitive justification depends on whether and to what extent Complaint Counsel proved anticompetitive effects of actionable conduct. Under *California Dental,* the degree of proof for showing justification can be no more stringent than the degree of proof of anticompetitive effects shown by Complaint Counsel.[188] Because Complaint Counsel did not prove an actionable contract or conspiracy or actual anticompetitive effects caused by any such contract or conspiracy, NTSP has no burden to meet on justification.

Nor could NTSP be held to any burden in light of the ALJ's denial of NTSP's discovery requests for the payors' "flat file" data showing how NTSP and other physicians performed on non-risk contracts.[189] The payors' flat files contain detailed information as to how each set of physicians performs; apart from these payor files, NTSP has limited capability to show how NTSP's performance compares to other

[188] 526 U.S. at 775 n.12 (the Court emphasized the need for empirical proof of actual anticompetitive effects before a defendant must submit any proof of procompetitive effects). *See* Section III.B. Even under *Polygram,* if NTSP articulates a "legitimate justification," Complaint Counsel must come forward with "sufficient evidence to show that anticompetitive effects are in fact likely" before NTSP has another burden. *See* In the matter of *Polygram Holding, Inc.*, Docket No. 9298, slip op. at 29, 33. Complaint Counsel did not bring forth evidence of anticompetitive effects, so NTSP's burden of showing justification is met with a mere articulation of its justifications. *See* Section III.B. And even if Complaint Counsel had brought forth evidence of anticompetitive effect, NTSP's burden is only to show that procompetitive effects were also likely.

[189] *See* Order on Motions of Non-Party Payors to Quash or Limit the Subpoenas Duces Tecum served by NTSP, entered on 1/30/04 and 2/4/04, quashing NTSP's discovery requests for the payors' flat file data. *See also, e.g.*, NTSP's Response to United's Motion to Quash, filed with the ALJ on 2/3/04.

physician providers.[190] Where a litigant has been denied needed discovery on an issue, due process prevents the court or agency from deciding against the litigant on that issue.[191]

Justifications are also apparent as to the conduct challenged by Complaint Counsel. Many of these justifications arise from the nature of what NTSP does.

Applicable to each and every unilateral act of NTSP is the *Colgate* doctrine, which is sufficient justification alone for NTSP's conduct. The *Colgate* doctrine gives an entity, such as NTSP, the right to refuse to deal with anyone it chooses.[192] That doctrine encompasses NTSP's unilateral acts related to NTSP's right to follow its own business model and to refuse to sign and messenger contractual offers outside that model. The ALJ recognized somewhat this doctrine when he refused to infringe on NTSP's right to refuse to become a party to or messenger a payor contract and denied Complaint Counsel's request for a mandatory injunction on this behavior.[193]

Even though NTSP's unilateral acts are legally justified by the *Colgate* doctrine and need not be otherwise justified,[194] NTSP also presented sufficient evidence of specific business justifications for its conduct.

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[190] RPF 107-108. Fortunately, PacifiCare and Cigna had provided NTSP with some information in the normal course of business which showed that NTSP is the best-performing group in the Dallas/Fort Worth Metroplex and that spillover from care under capitated contracts occurs. *See* discussion *infra.*

[191] *See, e.g., Complaint of Bankers Trust Co.*, 752 F.2d 874, 889-91 (3d Cir. 1985); *McClelland v. Andrus*, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979). *See also Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932) ("Due process requires that there be an opportunity to present every available defense. …").

[192] 250 U.S. at 307; *Viazis*, 314 F.3d at 763.

[193] *See* ID at 88-90.

[194] *See* Sections II.B.3 and III.A.

First, NTSP has a right and duty to avoid expending its resources on offers of interest to only a minority of NTSP's physicians. NTSP has limited resources and does not want to use those resources or the efforts of its staff to review and handle offers that will not be of interest to a significant percentage of its physicians.[195] The poll NTSP conducts is an objective method of determining when a majority of NTSP's physicians are likely not interested in participating in a payor offer through NTSP.[196] The poll has a procompetitive effect because it saves NTSP and the payors time and money that would otherwise be wasted on offers with little chance of achieving significant physician participation through NTSP.[197] NTSP can focus its efforts on offers that will activate its network and allow its business model to function properly. The payors can focus their efforts with NTSP on contracts to which NTSP will be able to become a party, and can divert efforts on offers not meeting NTSP requirements to other IPAs or directly to physicians.

Second, NTSP has a right and duty to avoid legally or medically risky situations presented by payor offers. NTSP is very concerned with which contracts it messengers because NTSP the entity signs and becomes a party to those contracts.[198] Payor contracts are full of legal and medical pitfalls NTSP must avoid.[199] Legal issues frequently arise during contract reviews related to: compliance with the Texas Patient Bill of Rights; prompt pay and clean claim definitions and appeal processes; termination provisions;

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[195] RPF 124-25, 166-68.
[196] RPF 121, 124-26, 164-65.
[197] RPF 124, 140. A recent Commission advisory letter also indicates that threshold levels for screening payor offers are legitimate. *See* note 137.
[198] RPF 166.
[199] RPF 168.

gender discrimination; hold harmless clauses; all-products clauses; gag provisions preventing physicians from speaking with patients and other physicians; and provisions relating to medical malpractice insurance.[200] Contracts may also include medical plan details that appear risky from a medical treatment, medical malpractice, or standard-of-care standpoint.[201]

These issues are exemplified by the payor malfeasance found by the ALJ[202] and by the conduct of the payors when dealing with NTSP and its physicians.[203] NTSP's decision to avoid contracts involving potential legal and medical treatment problems is a legitimate business decision. The ALJ explicitly recognized these potential risks when he held that NTSP would not be compelled "to messenger contracts or become a party to contracts sent to it by payors, regardless of potential risks to [NTSP], its member physicians, and its patients."[204]

Third, NTSP has a right to be involved only in contracts that meet its reputation and quality targets. NTSP has been and is involved in risk contracts in which its reputation for high-quality, cost-efficient care is an issue.[205] NTSP also actively seeks risk contracts from payors who are currently involved in only non-risk contracts.[206] NTSP's performance on non-risk contracts is a way to persuade non-risk payors to take

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[200] *See* RPF 170, 172.
[201] *See* RPF 170-72.
[202] *See* F. 192-94, 256-58, 357-63.
[203] *See generally* RPFs.
[204] ID at 89. The ALJ also found that the remedy could not contravene Texas or federal law, citing specific statutes regarding health care contracting requirements involving many of the legal issues referenced by NTSP. *See* ID at 89-90.
[205] *See, e.g.*, RPF 5, 15, 28, 116.
[206] *See, e.g.*, RPF 28, 106, 116, 355, 371, 411-12; *see also* F. 210, 215, 342-46.

on risk contracts with NTSP.[207] In light of these activities, NTSP has the right to choose the offers in which it will put its reputation on the line. If NTSP and physicians who join NTSP on a contract perform poorly or encounter problems, NTSP's reputation with payors can suffer, hurting its chances of increased risk contract business or even decreasing risk business. NTSP's reputation with physicians can also suffer, hurting its chances for recruiting or keeping high-quality physicians for both its risk and non-risk networks.

NTSP must have the ability to decline participation in potentially-problematic payor contracts.[208] Not allowing NTSP to do so would destroy NTSP's incentives to develop and promote a high-quality, cost-efficient network.

Finally, NTSP has the right to focus on contracts that will involve most of NTSP's risk physicians and thereby exhibit positive spillover effects. NTSP's business model is designed to achieve efficiencies in performing risk contracts and to extend those same efficiencies to treating non-risk patients. The physicians on NTSP's Risk Panel use financial and clinical integration techniques to develop team-oriented improvements in cost and quality.[209] By limiting its involvement to non-risk offers that will likely be of interest to most of the Risk Panel physicians, NTSP hopes that those same physicians will remain involved in NTSP's non-risk contracts, enabling a spillover of the referral and

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[207] *See, e.g.*, RPF 28, 92-96, 106, 116; *see also* F. 342-46.

[208] *See, e.g.*, *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 189-91 (2d Cir. 1992) (recognizing selection of retailers based on the quality and image the company wanted to project as a valid business justification under § 2 of the Sherman Act); *Mozart v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1350-51 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988) (recognizing protection of a product's reputation as a business justification for a tying arrangement).

[209] RPF 24-27.

treatment patterns developed for the risk contracts. Dr. Gail Wilensky, a White House advisor and former head of the Health Care Financing Administration (the agency that administers Medicare and Medicaid) and the Medicare Payment Advisory Commission (the agency that advises Congress on Medicare issues), testified that NTSP's spillover business model is effective and beneficial to health care and should be encouraged.[210]

Spillover is recognized in medical care literature as a means for transferring improvements from risk to non-risk treatment.[211] And it is well-recognized that maintaining continuity of personnel enhances teamwork efficiencies.[212] If an offer will not be attractive to a significant number of NTSP's physicians, the teamwork model will not carry over to the non-risk contract and spillover effects will be limited. Therefore, NTSP's poll and board minimums are tools that allow NTSP to achieve the procompetitive effects of cost efficiency and increased quality of care.[213]

NTSP would not need to prove that its spillover model has worked in order to justify its refusal to be involved in some payor offers. If no team could be formed before it achieves the planned-for results, no team could ever form. But even so, all of the

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[210] RPF 23.

[211] RPF 86-88.

[212] *See* RX 3118 (Maness Expert Report) at ¶¶ 83-100; RPF 79, 81-83, 113-16. Complaint Counsel's experts conceded that spillover was likely to occur and that the spillover effect would be adversely affected by a lack of continuity between NTSP's risk and non-risk panels. *See* RPF 86-87, 113-14. If an offer is attractive to a significant number of NTSP physicians, spillover will occur regardless of how the physicians choose to participate with the payor – through NTSP, another IPA, or directly. RPF 115.

[213] NTSP's approach also prevents free riding, which is another procompetitive efficiency. Were NTSP forced to accept all contracts, no matter how unattractive, NTSP (and others) would be deterred from investing the time and effort needed to develop an effective team. The Supreme Court recently refused to order the forced sharing of a network for that reason. *See Trinko*, 124 S. Ct. 872 (telephone provider need not provide competitors with access to its network because competitor free-riding would chill innovation and economic investment).

empirical evidence presented supports the procompetitive effect of NTSP's spillover model.[214] NTSP, with the data available to it,[215] proved the actual existence of spillover effects.[216]

The Initial Decision seems to equate justification under the rule of reason to the Commission's definition of "clinical integration."[217] Yet clinical integration is a only one example of an efficiency justification,[218] and does not define the scope of what conduct is justifiable under the rule of reason.[219] Nor was any proof ever submitted that clinical integration (as restrictively defined by the ALJ[220]) yields greater cost and quality benefits than teamwork among allegedly non-integrated physicians. Complaint Counsel's expert Dr. Casalino admitted he had no such proof.[221]

The only conduct at issue not addressed by the five preceding business justifications – NTSP's communications with payors and physicians – have justifications of their own. NTSP's comments to payors, in addition to being derivative of NTSP's

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[214] Although Complaint Counsel continually criticized NTSP's data during this case, they never came forward with any empirical evidence disproving either NTSP's data or the existence of spillover effects. RCPF 11, 21-23, 460-62.
[215] NTSP cannot be held to task for failing to use data to which it was refused access. *See* notes 189-190.
[216] RPF 86-87, 92-102.
[217] ID at 83-84; F. 364-80.
[218] *See* HEALTH CARE STATEMENTS, Statement 8.C.1.
[219] *See id.*, Statement 8.C (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).
[220] NTSP's teamwork and spillover model is properly a form of clinical integration, if that term is defined properly to include economic efficiencies resulting from physician teamwork.
[221] Casalino, Tr. 2894.

Colgate right to refuse to deal, have procompetitive business justifications. Communicating to a payor why NTSP has decided not to participate and what terms physicians might find attractive or reasonable is merely the procompetitive flow of information needed by the payors to decide how to structure an offer.[222] The legitimacy of this provision of information is recognized by the Commission's own Health Care Statements:

> The collective provision by competing health care providers to purchasers of health care services of factual information concerning the fees charged currently or in the past for the providers' services, and other factual information concerning the amounts, levels, or methods of fees or reimbursement, does not necessarily raise antitrust concerns. …
>
> Such factual information can help purchasers efficiently develop reimbursement terms to be offered to providers and may be useful to a purchaser when provided in response to a request from the purchaser or at the initiative of providers. [223]

This type of information is also necessary for NTSP to convey to inform the payor whether NTSP will be a party to the offer. The information will normally be helpful to a payor to determine whether to expend its time and resources making an offer through NTSP or through another channel or whether to make a particular offer at all. In the cases where a payor may not find the information helpful, it would merely be ignored.

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[222] "[T]he Supreme Court has long held that the dissemination of information to consumers has a presumptively pro-competitive effect on the market." *Machorec v. Council for the Nat'l Register of Health Care Serv. Providers in Psychology, Inc.*, 616 F. Supp. 258, 270 (E.D. Va. 1985) (citing *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582-83 (1925)); *see also Zinser v. Rose*, 868 F.2d 938, 941 (7th Cir. 1989) (upholding insurer's ability to contract with chiropractors to receive rate information needed to set price transaction guidelines); *Int'l Healthcare Mgmt. v. Haw. Coalition for Health*, 332 F.3d 600, 608 (9th Cir. 2003) ("Disseminating information that fosters rational business decisions is pro-competitive.").

[223] Statement 5.

Similarly, NTSP's comments to physicians also have procompetitive business justifications. Informing physicians about a payor's conduct or the status of a payor offer is merely the collection and dissemination of market information. Informational asymmetry is not a preferred basis for competition.[224] The procompetitive effects of information sharing in the health care industry is recognized by Complaint Counsel's expert and the Commission's advisory opinions.[225] NTSP's physicians also need to know when and if they can expect NTSP to messenger a non-risk contract so they can decide how to approach contracting with a particular payor.

There is a Constitutional dimension to NTSP's discussions with payors and physicians. NTSP's commercial free speech is protectible – especially in light of the undisputed lack of collusion among physicians.[226] The ALJ indirectly recognized this principle in his ruling, refusing to infringe on NTSP's right to share objective information about payors and payor offers.[227] NTSP's right to commercial free speech cannot be curtailed unless the FTC proves that there is real harm from the speech it seeks to limit and that a restriction on that speech will *in fact* alleviate that harm to a *material* degree.[228]

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[224] *See* note 222.

[225] *See* note 140.

[226] *See Va. State Bd. of Pharmacy*, 425 U.S. at 764-65 (the free flow of commercial information is important to public interest.) The FTC must be concerned with First Amendment issues. *See also, e.g., Beneficial Corp. v. F.T.C.*, 542 F.2d 611, 620 (3d Cir. 1976) (finding that FTC must consider a remedy's effect on the right to free speech).

[227] *See* ID and Order at 94:

> [N]othing contained in this Order shall prohibit Respondent form 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.

[228] *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183, 188 (1999).

The FTC cannot make such a showing because there was no evidence of physician collusion, no evidence that NTSP could bind or coerce physicians, and no evidence of actual harm resulting from NTSP's actions.[229]

Even comments Complaint Counsel might challenge as suggestive or hortatory are not actionable because there was no resulting physician collusion. Those comments, moreover, were accurate and justified.

The communications with physicians and patients concerning United were related to United's attempts to undercut a NTSP risk contract to treat the employees of the City of Fort Worth.[230] NTSP did not communicate anything to its physicians that was not accurate or that was not related to competition with United.[231] NTSP and its physicians also had the right and duty to contact the City of Fort Worth about issues potentially affecting the care of NTSP's patients.[232] NTSP terminated its relationship with United through another IPA when United began using that relationship competitively against NTSP.[233] After this termination, some physicians previously contracted with another entity Health Texas Physicians Network gave NTSP powers of attorney to try to enter a new contract with United.[234] NTSP explained to the physicians and United that the powers of attorney precluded NTSP from negotiating economic terms of non-risk

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[229] *See Schachas v. Am. Acad. Of Ophthalmology, Inc.*, 870 F.2d 397, 398-401 (7th Cir. 1989) (holding that a trade association may provide information, even if it may influence other's conduct, as long as it does not constrain others). *See also Int'l Healthcare Mgmt.*, 332 F.3d at 606 ("[a]n organization's towering reputation does not reduce its freedom to speak out.") (quoting *Schachas*, 870 F.2d at 399).
[230] *See* F. 135-39, 142; RCPF 185-86, 191, 195.
[231] RCPF 185-86, 191. *See also* RPF 384-85, 389-91, 393-94.
[232] *See* Complaint Counsel's Stipulation, Tr. 1149-50 ("not contesting the right of a physician to complaint or to notify patients about its compensation arrangements").
[233] RPF 396-97.
[234] RPF 396.

contracts and that NTSP followed the messenger model.[235] The powers of attorney were also never shown or delivered to United or otherwise used.[236]

Interestingly enough, in the 2001 City of Fort Worth situation, United was acting, not as the payor, but as a representative of the City of Fort Worth and other employers who were becoming self-insureds.[237] United, in effect, was a common bargaining agent on the purchase side for medical costs being paid by others.[238] It was obvious, however, that United did not use a messenger model in dealing with the self-insureds.[239]

The communications with physicians concerning Cigna were related to Cigna's numerous breaches of contract.[240] When Cigna purchased Health Source, it sent assignment letters to physicians.[241] There were numerous legal questions surrounding Cigna's representations of assignment and the physician's rights under the agreement.[242] NTSP merely looked into the issues and informed physicians of their contractual rights before the physicians took action on the assignment.[243] The challenged communications with Cigna and physicians concerning the NTSP-Cigna agreements related to Cigna's breaches of contract: failing to pay NTSP's physicians in accordance with the agreed-to

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[235] RPF 149, 397-99; Van Wagner, Tr. 1941-44.
[236] RPF 400-01.
[237] Mosley, Tr. 210; Quirk, Tr. 245.
[238] RX25.002 (United contract with NTSP defines "Payor" to include other persons and entities having "the primary financial responsibility for payment of Health Services covered by a Benefit Contract."). Aetna and Cigna also acted as common bargaining agents for self-insured employers. RX 24.019 (Aetna contractual definition of "Payor"); CX 782A.005 (Cigna contractual definition of "Payor").
[239] Nor did Aetna and Cigna.
[240] *See* F. 205; RCPF 261, 286.
[241] RPF 408; *see also* F. 200-201.
[242] RPF 408-10; *see also* RCPF 259.
[243] RPF 410; RCPF 261; *see also* F. 204.

fee schedules;[244] failing to adjust the fee schedule each year as required;[245] denying NTSP's cardiologists their right to participate in the contract;[246] and denying specialist PCPs their right to participate in the contract.[247]

The communications with physicians concerning Aetna were related to the class action litigation based on NTSP's involvement in an Aetna-MSM contract and NTSP's negotiations with Aetna on a risk contract.[248] NTSP's negotiations with Aetna prior to and throughout most of 2000 were on a risk contract or a linked offer involving both a risk and non-risk contract.[249] The power of attorney forms were required by Aetna before dealing with an IPA.[250] From 1999 to 2001, NTSP was also the class representative for many physicians in class action litigation against MSM for breach of an MSM-Aetna contract.[251] Communications with physicians and discussions with Aetna, as well as the agency documents and powers of attorney with physicians, revolved mainly around resolution of this litigation and risk contract discussions.[252]

Finally, any encouragement by NTSP for its physicians to speak out about any of the payors on issues that affected the delivery of health care or prevent payor deception and violations of the law are justified. NTSP and its physicians had legitimate reasons to

[244] RPF 418-19; *see* F. 218.
[245] RPF 420-21; *see* F. 219-20.
[246] *See* F. 221-22, 224, 226, 228-29, 234; RPF 423.
[247] RPF 426-28, 430-31; *see* F. 237.
[248] *See* F. 282-83; RCPF 310-11, 313, 318, 362-63.
[249] RCPF 310-11, 313; RPF 355; *see also* F. 276-77
[250] RCPF 318; RPF 367-68.
[251] RPF 332, 339, 343, 347; *see also* F. 270-71, 275.
[252] RCPF 310, 313, 318, 362; RPF 347; *see also* F. 283.

speak out and communicate with others, including governmental authorities, about payors, as shown by the ALJ's findings of numerous instances of payor malfeasance.[253]

The Initial Decision conclusorily dismisses NTSP's justification showing, without looking at any of the data as to NTSP's performance and spillover model, without accounting for the payor data to which NTSP was denied access, and without assessing NTSP's many other justifications discussed above. Certainly, the many justifications shown by NTSP (or would have been shown if NTSP had been given the payors' data) are plausible and cognizable under the antitrust laws.[254] Given Complaint Counsel's failure after a full trial to have shown any anticompetitive effect (much less any effects which could "easily be ascertained"), the ALJ should have engaged in a full rule of reason analysis.[255] In effect, the Initial Decision presumes net anticompetitive effect in a way condemned by *California Dental*.[256]

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.

Under a rule of reason analysis, any restraint of trade must be evaluated by weighing its probable anticompetitive effects against any procompetitive benefits, and the burden is on Complaint Counsel to show that the challenged conduct has a net

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[253] *See* F. 192-94, 256-58, 357-63. *See also* RPF 348-354, 394, 407, 418, 420, 423, 428-29, 432, 437; RCPF 259.

[254] *See Polygram*, Docket No. 9298, slip op. at 30. The *Polygram* decision is currently on appeal, and its application of law may not be upheld, either in the District of Columbia Circuit or Fifth Circuit.

[255] *Cal. Dental*, 526 U.S. at 779 (a quick rule of reason analysis is not appropriate where there is no "great likelihood of anticompetitive effects" which can "easily be ascertained").

[256] *See* ID at 83-86.

anticompetitive effect.[257] Complaint Counsel did not meet their initial burden to show any actual or likely adverse effects on competition, but even if they had, NTSP presented evidence of the procompetitive virtues of its conduct.[258] Once NTSP showed justification for the challenged conduct, Complaint Counsel had the burden to show a net anticompetitive effect – either that NTSP's legitimate objectives could have been achieved by reasonable, less-restrictive alternatives or that NTSP's proffered justifications were merely pretextual.[259] Complaint Counsel presented no evidence and made no arguments related to a less restrictive alternative or a pretext for NTSP's conduct. Therefore, the ALJ erred when he found that Complaint Counsel had met its burden in this case to show that NTSP's conduct unreasonably restrained trade.

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 none of NTSP's actions were in interstate commerce.

Under Section 5 of the FTC Act, the Commission has jurisdiction over NTSP only if NTSP is organized to carry on business for the pecuniary benefit of its members and NTSP's allegedly anticompetitive conduct was "in or affecting commerce."[260] The burden is on Complaint Counsel to show that the Commission has jurisdiction.[261] When this case is viewed in light of the evidence showing no physician collusion or involvement in NTSP's unilateral conduct and that NTSP's conduct towards payors

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[257] *Viazis*, 314 F.3d at 765-66.
[258] *See* Section IV.
[259] *See, e.g., Morris Communications Corp. v. PGA Tow, Inc.*, 364 F.3d 1288, 1295 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 87 (2004); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 n.4, 1413 (9th Cir. 1991).
[260] *See* 15 U.S.C. §§ 44, 45.
[261] *See Cmty. Blood Bank v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969); *see also McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980); ID at 53.

amounted only to a justified refusal to deal, it is clear that there is no support for a finding of membership, pecuniary benefit, or interstate commerce in this case. Therefore, the ALJ erred when he found that the Commission had jurisdiction over NTSP in this proceeding.[262]

Under Texas law, NTSP is a memberless organization.[263] But even if there were members, no substantial part of NTSP's non-risk contracting activities provide pecuniary benefits to its participating physicians.[264] Further, because there was no showing of physician collusion in this case, the only potential basis for jurisdiction would be NTSP's unilateral refusals to act. A refusal to act does not promote the profit of NTSP's alleged members.

NTSP's refusals to act also could not be in or affecting commerce. The finding of jurisdiction rested only on irrelevant evidence. Reliance on the activities of any individual physicians is improper because there was no showing of physician collusion. Reliance on NTSP purchases unrelated to the alleged anticompetitive conduct in this case is also misplaced.[265] Finally, the evidence related to payors showed only that the payors themselves engaged in interstate commerce, not that NTSP's refusals to deal had any impact on interstate commerce of insurers.[266]

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[262] *See* ID at 53-60. NTSP also incorporates by reference its Brief in Support of Response to Complaint Counsel's Motion for Partial Summary Decision on the issue of jurisdiction, filed with the Commission on March 18, 2004.
[263] *See* TEX. OCC. CODE. ANN. § 162.001 (Vernon 2004).
[264] NTSP's risk contracts provide the only ongoing income to NTSP, but those risk contracts are irrelevant for jurisdiction because they are not at issue in this case. RPF 4, 127; RCPF 6; *see* Complaint Counsel's Opening Statement, Tr. 12.
[265] *See* ID at 59-60; *see, e.g.*, *Mitchell v. Howard Mem'l Hosp.*, 852 F.2d 762, 764 (9th Cir. 1988); *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613 (6th Cir. 1986).
[266] *See* ID at 58-59; *see Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961).

VII. The ALJ erred when he entered an order that was not narrowly tailored to any antitrust violation properly found.

The relief provided in the Initial Decision and Order was not tailored to any violation supported by sufficient evidence and is therefore improper. A remedy must have a "reasonable relation to the unlawful practices found to exist."[267] Conduct by an entity like NTSP violates the antitrust laws only if the conduct creates collusion among competitors, *i.e.*, the physicians. The prohibitions imposed on NTSP are not so conditioned, and accordingly are not proper.[268] Because no collusion among physicians was ever shown by Complaint Counsel, the order set forth in the Initial Decision is not supported by a sufficient basis in the record.[269]

Even if one assumed *arguendo* that the antitrust violation was NTSP's negotiation of contracts, then the remedy would be not to allow NTSP to negotiate a contract – but that cannot be the remedy because NTSP clearly has the right to negotiate its own contracts.[270] And all of NTSP's actions were related only to its own contracts – there was no showing of collusion among the physicians and NTSP.[271]

Because there was no showing of collusion involving the physicians, the antitrust violation cannot be the physicians' acceptance of contracts from the payor. Therefore, the termination of the participating physicians' contracts is not warranted. A remedy that voids physicians' contracts is overly broad and inappropriate.

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[267] *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1956); *Gibson v. FTC*, 682 F.2d 554, 572 (5th Cir. 1982).
[268] *See Doyle v. FTC*, 356 F.2d 381 (5th Cir. 1966) (striking provisions of order addressing individuals because no evidence of violations in an individual capacity).
[269] *See Grove Labs. v. FTC*, 418 F.2d 489, 497-98 (5th Cir. 1969) (striking provisions of Commission's order not supported by substantial evidence).
[270] *See* Section II.B.2.
[271] *See* Section II.A.

Even assuming *arguendo* some violation during one of the contract discussions was shown, the termination of all of NTSP's contracts is not warranted because there was no violation shown applicable to all contracts. To the contrary, the only contracts involving the conduct specifically challenged by Complaint Counsel were highly-individualized situations with payors where NTSP's conduct was justified.[272] Most of NTSP's contracts were unaffected by the conduct challenged by Complaint Counsel; Complaint Counsel complained of only a few payors' contracts out of the 24 contracts offered by NTSP.

The order is also overbroad because it applies well beyond the only geographic market (city of Fort Worth) challenged by Complaint Counsel.

Further, even the termination of NTSP's participation in any affected payor contracts is not warranted because those contracts are already terminable at will by the payors (the allegedly harmed parties). In fact, of the only three contracts cited by Complaint Counsel, one has already been terminated – Aetna in 2001.[273] Cigna could have terminated its contract with NTSP in September 2004,[274] but it did not. The only remaining contract, with United, has been replaced since NTSP's allegedly anticompetitive conduct – United voluntarily approached NTSP and offered a new contract to *increase* the reimbursement rates.[275]

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[272] *See* RPF 329-442 for the circumstances surrounding contracts with United, Cigna, and Aetna.
[273] RPF 380.
[274] CX 809 at ¶ 1, *in camera*.
[275] *See* Van Wagner, Tr. 1746-48 (admitted only as to operative fact that the United offer was made). In fact, in the last two years, none of the non-risk payor offers to NTSP has been at or below either of the Board minimums. *See* Van Wagner, Tr. 1970-71.

Lastly, the order uses general language in prohibiting NTSP from participating in any combination or understanding among physicians to negotiate any term upon which a physician is willing to deal with a payor and further uses general language in prohibiting NTSP from facilitating any exchange of information among physicians concerning any term upon which a physician is willing to deal with a payor. Those provisions apply to non-price terms, and conflict with the Commission's Health Care Statements and applicable law.[276]

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

Respectfully submitted,

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[276] *See* note 94.

CERTIFICATE OF SERVICE

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

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