[PUBLIC RECORD]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of North Texas Specialty Physicians, a corporation.	Docket No. 9312

NORTH TEXAS SPECIALTY PHYSICIANS' POST-TRIAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES

STATE STATUTES

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Complaint Counsel has sued North Texas Specialty Physicians ("NTSP"), a memberless, non-profit corporation. Complaint Counsel alleges that NTSP collectively fixed prices in violation of Section 5 of the FTC Act.[1] After ten days of hearings, testimony from seventeen witnesses, and the introduction of over a thousand exhibits, Complaint Counsel has not proven essential elements of its case, including (a) any collusion among physicians, (b) any relevant market, and (c) any anticompetitive effects. Instead, Complaint Counsel relies on a myriad of allegations about NTSP's risk contracts, NTSP's litigation activities, NTSP's competition with payors, and NTSP's contacts with governmental authorities and patients – none of which satisfy Complaint Counsel's burden of proof in this case.

The rule of reason is the prevailing antitrust standard, and it is the appropriate standard for this case because Complaint Counsel challenges conduct by NTSP that "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[2] Any standard with a less robust economic analysis than the rule of reason is inappropriate. Under the rule of reason, Complaint Counsel must prove, *inter alia,* that NTSP's conduct had a net anticompetitive effect. But the evidence shows that NTSP's conduct and business model have strong procompetitive effects and efficiencies, both for risk and non-risk contracts. Accordingly, Complaint Counsel cannot carry its heavy burden of proof.

Complaint Counsel has also failed to prove that any actual collusion occurred. To establish antitrust liability, under a rule-of-reason or any other type of analysis, Complaint

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[1] Complaint ¶ 12.

[2] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999).

Counsel must first prove that NTSP has been involved in collusion among participating physicians. But Complaint Counsel's economic expert, Dr. H. E. Frech, admitted that he has seen no evidence of actual collusion by NTSP's participating physicians. And there is no evidence in the record, direct or circumstantial, to support such a finding.

Moreover, Complaint Counsel has failed to prove a relevant market — or any effect on a relevant market — to establish liability under a rule-of-reason analysis. Dr. Frech admitted that he has not defined any relevant market or performed any concentration or entry analyses. That failure is fatal to Complaint Counsel's case. NTSP's expert underlines Complaint Counsel's failure by showing how modest a presence NTSP has in the Dallas/Fort Worth Metroplex.

Additionally, much of the conduct challenged by Complaint Counsel cannot possibly establish antitrust liability. As shown by the evidence, many of the contractual issues about which Complaint Counsel complains related to risk contracts or fee-for-service contracts that are tied to and part of risk contracts. Complaint Counsel has also improperly asserted that NTSP's right to sue or threaten to sue a payor or other entity for violating a contract is somehow illegal. Many of the communications Complain Counsel challenges also arise in the context of horizontal competition between NTSP and payors for contracts or medical or utilization management activities. And, although Complaint Counsel originally criticized NTSP for communicating with the City of Fort Worth and others, Complaint Counsel ultimately stipulated that NTSP has the right – as recognized by Texas law – to communicate with patients and employers about network adequacy issues and compensation rates.

Finally, Complaint Counsel cannot establish jurisdiction over NTSP under the FTC Act. NTSP is not an association acting for the profit of its members in regard to the challenged conduct, and NTSP's challenged conduct did not affect interstate commerce. NTSP is merely a

memberless, nonprofit corporation organized under Texas law that declines offers outside its business model.

II.

ARGUMENT AND AUTHORITIES[3]

Complaint Counsel alleges 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 are alleged to compete with each other.[4] For the Administrative Law Judge to find such a violation, Complaint Counsel must prove: (1) the existence of a contract, combination, or conspiracy among two or more separate entities, which entities are subject to the antitrust law, that (2) unreasonably restrains trade, and that (3) the acts or practices are in or affecting interstate or foreign commerce.[5] As the Supreme Court has noted, "[t]he FTC Act's prohibition of unfair competition and deceptive acts or practices overlaps the scope of § 1 of the Sherman Act aimed at prohibiting restraint of trade."[6] The Commission relies on Sherman Act law when deciding cases alleging unfair competition.[7]

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[3] Because NTSP is relying upon the facts in its proposed findings of fact, which are being filed concurrently with this brief, NTSP has not prepared a separate statement of facts for this brief. Instead, NTSP will cite to relevant facts from its proposed findings of fact when making its legal arguments.

[4] *See* Complaint ¶ 12 (stating that NTSP acts as "combination of competing physicians"); Complaint Counsel's Second Supplemental Responses to Respondent's First Set of Interrogatories at 6.

[5] *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

[6] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 763 n.3 (1999) (citations omitted).

[7] *See id.* (stating that "the Commission relied upon Sherman Act law in adjudicating this case").

A. Under the appropriate rule of reason analysis, NTSP has not committed an antitrust violation because it has not unreasonably restrained trade.

Restraints of trade can be unlawful under section 1 of the Sherman Act under three separate theories: (1) *per se*, (2) rule of reason, or (3) truncated or "quick look" rule of reason.[8] Complaint Counsel alleges that NTSP's conduct should be judged as *per se* unlawful because "this adjudicative proceeding is about horizontal price fixing, among other things."[9] But the rule of reason is the prevailing standard that applies to most claims and is the appropriate analysis in this case.[10]

1. The appropriate analysis for this case is a rule of reason analysis because NTSP's conduct has plausible procompetitive effects.

A rule of reason analysis should be applied if the conduct at issue "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."[11] NTSP currently is involved in both risk contracts and non-risk contracts.[12] NTSP is now the only multi-specialty entity still involved in physician risk contracts in the Dallas/Fort Worth area.[13]

The physicians on NTSP's risk-capitation panel (the "Risk Panel") perform NTSP's risk contracts by using financial and clinical integration techniques to develop team-oriented improvements in costs and quality.[14] Those same physicians as well as NTSP's other

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[8] *See id.* at 763 (identifying three theories of liability); *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002) (discussing rule of reason, *per se* rule, and quick-look analysis).

[9] Complaint Counsel's Response and Objections to North Texas Specialty Physicians' First Request for Admissions to Complaint Counsel at 3.

[10] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

[11] *Cal. Dental Ass'n*, 526 U.S. at 771.

[12] Complaint ¶ 14; Answer of Respondent North Texas Specialty Physicians to Complaint of Federal Trade Commission ¶ 14.

[13] NTSP's Proposed Findings of Fact 18 (hereinafter, "RPF").

[14] RPF 24-27.

participating physicians[15] apply these same techniques to non-risk medical care.[16] This process of developing and transferring improvements from risk to non-risk treatment is referred to as "spillover" in the medical care literature.[17] Complaint Counsel's economic expert admits that NTSP generates efficiencies and improves quality of care through spillover from its risk contracts to its non-risk contracts.[18] Spillover occurs because physicians normally do not change their practice patterns patient-by-patient once they have developed an improved technique.[19]

Spillover is maximized to the degree the teams performing the risk and non-risk medical care can continue to work together. This phenomenon is recognized in the economic literature and by Complaint Counsel's own expert.[20]

NTSP's conduct is not only plausibly, but obviously, procompetitive. NTSP's experts testified in detail about NTSP's business model, which is designed to achieve efficiencies through the clinical integration techniques used for its risk contracts and to then extend those same efficiencies to non-risk patients.[21] By limiting its involvement to non-risk offers which 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 the continuing use

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[15] In 2003, NTSP had approximately 300 physicians on its Risk Panel and approximately 275 additional physicians eligible to participate in one or more non-risk contracts. RPF 21. These physicians are located in Tarrant, Dallas and at least eight contiguous counties. RPF 209-10. The 575 eligible physicians are referred to as "participating physicians" under the NTSP Physician Participation Agreement. RPF 9. On average, the eligible physicians participate in 7.47 of NTSP's risk and non-risk contracts. RPF 162.

[16] RPF 85-88.

[17] RPF 86-87.

[18] RPF 86-87.

[19] RPF 88.

[20] RPF 113-14.

[21] *See, e.g.*, RPF 21-26, 85-87, 89, 117-18.

(spillover) of the referral and treatment patterns developed for the risk contracts.[22] Spillover should occur, whether the physician participates through NTSP or through another IPA or directly with the payor.[23] That maintaining continuity of personnel enhances teamwork efficiencies is well-recognized, as exemplified by the National Bureau of Economic Research and other research on "organizational capital" cited in Dr. Maness's report, as well as, the testimony of Drs. Maness and Wilensky.[24]

The model is also designed to limit the expenditure of NTSP's resources on offers not likely to be of interest to a significant number of NTSP's eligible physicians.[25] NTSP reviews payor offers before deciding whether to accept and become a party to an offer.[26] Because NTSP does not want to expend its limited resources in reviewing and handling offers likely to involve or interest only a minority of its physicians,[27] NTSP's board of directors sets a threshold limit on the offers. That threshold is set based on the mean/median/mode of the Risk Panel's responses to a periodic confidential poll as to what HMO and PPO contract rates the individual physician would accept through NTSP. The board then authorizes NTSP's staff to consider offers which meet those thresholds.[28] The responses of those individual physicians who respond to the poll

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[22] RPF 113-16, 121-22.

[23] RPF 115.

[24] *See* RX 3118 (Maness Report ¶¶ 83-100); RPF 79, 81-83, 113-16.

[25] RPF 121, 124-26, 164-65.

[26] RPF 125, 166-68.

[27] A physician who is interested in a payor offer may choose to participate through NTSP or enter into a contract directly or through another entity with the payor. NTSP's poll in no way commits a physician to choose which way the physician may eventually decide to contract. *See, e.g.*, RPF 137-39, 160-61, 267.

[28] RPF 124, 140.

are never shared with any other physician or any member of the board.[29] Many of the physicians never respond to the poll.[30]

The staff uses these thresholds for both risk and non-risk offers. If a payor presents an offer meeting the threshold, NTSP will then review the offer's contractual terms, after which the board will decide if NTSP will participate. NTSP may choose for many reasons not to participate in an offer meeting the threshold, not the least of which are that the offer fails to comply with applicable law or otherwise fails to meet NTSP's business model.[31]

If the offer is for a non-risk contract and NTSP chooses to participate, the offer is then messengered to NTSP's participating physicians.[32] Each physician or physician group can choose to accept or reject participating in the offer through NTSP.[33] On average, the physicians reject more contracts than they accept.[34]

A recent advisory letter from the Commission's staff shows that using a 50% participation level for screening payor offers is legitimate. In that letter, staff took a neutral stance on an IPA's refusal to be involved in offers which fall below the IPA's 50% minimum level of participants.[35] Staff noted that "[s]o long as payers have an effective opportunity to

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[29] RPF 133, 136, 150-51, 159.

[30] RPF 129, 135.

[31] RPF 163-82.

[32] RPF 142, 145.

[33] RPF 155, 161, 284, 286.

[34] RPF 162.

[35] *See* Bay Area Preferred Physicians Advisory Opinion, letter from Jeffrey W. Brennan to Martin J. Thompson, dated September 23, 2003.

> You asserted that the medical societies forming BAPP do not wish to fund the servicing of contracts in which only a minority of BAPP members participate, because it would "impose an excessive cost" on the non-participants, and that this is a rational, cost-based business decision. The staff offers no view on the commercial or economic reasonableness of this decision, or on whether a participation threshold

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."[36] Here, Complaint Counsel has inexplicably failed to show any anticompetitive market effects or the lack of alternatives for contracting with physicians.

California Dental advocates "considerable inquiry into market conditions" before "application of any so-called '*per se*' condemnation is justified."[37] Under *California Dental*, there is no doubt that NTSP's conduct "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," for which reason a full rule of reason analysis must be used.[38]

Complaint Counsel urges the Administrative Law Judge to use at most a "quick look" rule of reason analysis. But this is appropriate in only limited circumstances that are not present here. To utilize that analysis, Complaint Counsel must show that "the great likelihood of anticompetitive effects can easily be ascertained."[39] The evidence in this case shows that NTSP's conduct is consistent with lawful competition and procompetitive efficiencies.[40] Based on all that evidence, there is no "great likelihood of anticompetitive effects," and, even if there were, they cannot "easily be ascertained."

Even more inappropriate in light of the evidence is Complaint Counsel's assertion that *per se* rules apply, resulting in no economic analysis at all. Complaint Counsel's view is that a

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of 50% or less is a justifiable demarcation for determining whether to service a payer contract.

[36] *Id.*

[37] 526 U.S. at 779.

[38] *See, e.g.*, RPF 23-24, 29, 41, 85-87, 92, 96, 101, 103.

[39] *Cal. Dental*, 526 U.S. at 779.

[40] *See, e.g.*,RPF 23-24, 29, 41, 85-87, 92, 96, 101, 103, 113-118, 122, 140.

refusal by NTSP to participate in a contract is *ipso facto* a collective boycott and an antitrust violation. But, if NTSP chooses to participate in a contract with a payor and physicians, Complaint Counsel says that is a collective price-fixing agreement and an antitrust violation if the payor chooses to complain. If that were the law, any entity involved in a team or network situation is doomed from the start. Teams and networks would be able to arise only when the entity is able to hire all of the various participants as employees. Of course, there would be many fewer teams and networks in that kind of world – which would decrease both innovation and efficiency. NTSP's very plausible procompetitive effects are why the Supreme Court's decision in *California Dental* mandates review under some form of a rule-of-reason analysis.[41]

2. Complaint Counsel cannot show an antitrust violation because it cannot meet its burden of showing that NTSP's conduct has a net anticompetitive effect.

Applying the rule of reason, it is apparent that there is no antitrust violation here. Any restraint of trade must be evaluated by weighing its probable anticompetitive effects against any procompetitive benefits.[42] The burden is on the complaining party – Complaint Counsel – to demonstrate that the challenged conduct has a net anticompetitive effect.[43] Complaint Counsel has not met its burden.

The slight conjecture of anticompetitive effects that Complaint Counsel presented does not outweigh the actual and admitted procompetitive effects and efficiencies of NTSP's conduct,

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[41] 526 U.S. 756, 771, 779 (1999) (rejecting application of quick-look analysis and requiring more detailed market inquiry when "restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition").

[42] *Viazis v. Am. Assoc. of Orthodontists*, 314 F.2d 758, 765 (5th Cir. 2002).

[43] *Id.* at 766.

as proven by the evidence and testimony in the record,[44] including testimony from Complaint Counsel's experts.[45]

Further, Complaint Counsel cannot rely on the mere fact that NTSP refuses to messenger some payor contracts. In *Viazis v. American Association of Orthodontists*, the Fifth Circuit rejected the idea that a trade association is "by its nature a 'walking conspiracy'."[46] A plaintiff cannot show competitive harm "merely by demonstrating that the defendant "refused without justification to promote, approve, or buy the plaintiff's product."[47] This case is very similar to *Viazis* in that NTSP is making a decision whether or not it wants to be involved in (*i.e.*, "approve") a payor's offer.

Physicians can accept contracts through another independent physician association ("IPA") or directly with the payor – and the evidence shows that they do so with regularity.[48] NTSP physicians who participate in one or more NTSP contracts almost invariably have a significant number of other contracts in which they participate outside of NTSP.[49] The evidence also shows that some NTSP physicians accept direct contracts that are below NTSP's

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[44] *See*,RPF 23-24, 29, 41, 85-87, 92, 96, 101, 103, 113-118, 122, 140.

[45] *See, e.g.,* RPF 23, 86-87, 114, 117-18.

[46] 314 F.2d at 764 ("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." (quoting *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.,* 846 F.2d 284, 293-94 (5th Cir. 1988)).

[47] *Id.* at 766.

[48] RPF 162, 267, 271-75.

[49] RPF 162, 271-75.

thresholds.[50] It also shows that NTSP physicians are able to obtain rates in direct contracts that are *better* than the rates NTSP receives from the same payor.[51]

NTSP has limited involvement with payors on fee-related matters for non-risk offers. If a payor makes an offer below the threshold, NTSP may disclose the threshold or refuse to get involved. If the payor decides to make 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.[52] NTSP does not negotiate to raise rates above this threshold.[53]

3. Complaint Counsel cannot establish liability because it cannot prove a relevant market or NTSP's market power.

To prevail in a rule-of-reason case, Complaint Counsel "must define the market and prove that [NTSP] had sufficient market power to adversely affect competition."[54] Complaint Counsel has not done so.

The evidence in this case shows that Complaint Counsel has not even attempted to prove a relevant market. 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?

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[50] RPF 160-61.

[51] RPF 276, 294-96.

[52] RPF 141-42, 166.

[53] RPF 142-43.

[54] *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1555 (11th Cir. 1996); *accord Doctor's Hospital*, 123 F.3d at 307 ("'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. Savin 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.").

A. That's correct.[55]

Because he has not defined a relevant market, Dr. Frech admits that he has not calculated any concentration ratios or performed any concentration analysis.[56] Likewise, he has not performed any type of entry analysis in this case.[57] Dr. Frech also conceded that geographic markets tend to become larger the more specialized the specialty;[58] this fact is important because NTSP's participating physicians are mostly specialists.[59] He also testified that the existence of a significant population in eastern Tarrant County on the border of Dallas County would act to tie Dallas and Tarrant Counties together;[60] this testimony would defeat any attempt Complaint Counsel might have made to limit the relevant market to only Tarrant County or its county seat, Fort Worth. Testimony and evidence from payors confirms that the market here is broader than Fort Worth.[61]

Finally, Dr. Frech admits that there can be significant crossovers of services between specialties.[62] This is consistent with testimony from Drs. Deas and Lonergan, who confirmed that there can be significant overlap in the services provided by primary care physicians and specialists.[63]

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[55] RPF 197; Frech, Tr. 1393-94.

[56] RPF 198.

[57] RPF 199.

[58] RPF 214.

[59] RPF 10-11.

[60] RPF 204. The Mid-Cities area constitutes approximately 40% of Tarrant County's population. RPF 201, 203.

[61] *See, e.g.*, RPF 226, 228-235, 258.

[62] RPF 240.

[63] RPF 242-43.

NTSP's participating physicians constitute less than 23% of the physicians in any county.[64] If one takes the entire DFW Metroplex, as was used by the Department of Justice in its suit against Aetna,[65] NTSP's eligible physicians are only 10% of the physicians in the Metroplex.[66] Of course, the eligible physicians also have their own contracts independent of NTSP, and participate, on average, in less than a third of NTSP's available contracts.[67] In effect, if one were to adjust the physician percentages by the proportion of contracts those physicians actually accept through NTSP, NTSP's potential effect on the market would be less than 4%. Complaint Counsel's argument that NTSP constitutes some sort of widespread group boycott that brings payors to their knees dies in the face of these facts. The payors themselves confirm the fallacy of Complaint Counsel's argument.[68]

Even if Complaint Counsel had attempted to show a relevant market, the overlapping patterns of physician practices in the Metroplex make it impossible to define a relevant market limited to Fort Worth's city limits.[69] Dr. Frech admits that the large population in the Mid-Cities area between Fort Worth and Dallas ties Dallas and Tarrant Counties together as a market.[70] The

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[64] RPF 245.

[65] RPF 205.

[66] This number is even overestimated because it was calculated only using the total number of doctors in Dallas and Tarrant County compared to NTSP physicians in the entire metroplex. *See* RX 305 and 306 (TBME data for doctors in Dallas and Tarrant County).

[67] RPF 162, 271-75.

[68] RPF 277-283, 369-70, 388, 448.

[69] If Complaint Counsel were correct, there would be hundreds of supermarket relevant markets in every metropolitan area, because a shopper normally goes to his or her neighborhood store. Yet that is not the law. A relevant geographic market must be economically significant, which requires containing an "appreciable segment of the product market" as well as following the rule of reasonable interchangeability. *See Apani Southwest, Inc. v. Coca-Cola Enter., Inc.*, 300 F.3d 620, 627-628 (5th Cir. 2002) (rejecting a relevant geographic market of 27 facilities selling bottled water).

[70] RPF 204.

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, either in Tarrant County or outlying areas.[71] This impacts the scope of the geographic market and expands it beyond Fort Worth's city limits. Testimony from Drs. Deas and Lonergan confirms that a Fort Worth market is too narrow because they draw patients from a wide geographic area.[72]

There is also no evidence that a payor was unable to find enough local physicians available to it outside of NTSP. In fact, the payors' testimony is to the contrary,[73] which is consistent with the physicians' testimony that they have belonged to IPAs other than NTSP and have entered into direct contracts with payors.[74]

Based on all of this evidence, or lack thereof, Complaint Counsel cannot show a relevant market. Accordingly, any attempt to establish liability against NTSP under a rule-of-reason analysis fails.

4. Although Complaint Counsel cannot prove a relevant market, it has improperly criticized the use of the Merger Guidelines in this case.

It is undisputed that Complaint Counsel's economic expert has not posited any relevant market in this case.[75] In contrast, NTSP's economic expert, Dr. Maness, has shown that any relevant market here would be much broader than Fort Worth's city limits and would include others counties and cities.[76] As part of his relevant-market analysis, Dr. Maness relied on the

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[71] RPF 223-25.

[72] RPF 212-13.

[73] RPF 277-83, 369-70, 388, 448.

[74] *See, e.g.*, RPF 267-69, 287.

[75] RPF 197.

[76] *See, e.g.*, RPF 200, 202, 204, 207-10, 212-14, 233-34.

Merger Guidelines developed jointly by the Commission and the Department of Justice.[77] Although this case does not involve a merger, it is well-recognized that the Merger Guidelines analysis for defining relevant markets applies in non-merger contexts.[78]

Nevertheless, during cross-examination, Complaint Counsel criticized Dr. Maness for relying on the Merger Guidelines because this was a price-fixing case, not a merger case.[79] Complaint Counsel's criticism is completely unfounded. Both the Commission's Statements of Antitrust Enforcement Policy in Health Care and Antitrust Guidelines for Collaborations Among Competitors reference the Horizontal Merger Guidelines as appropriate for defining relevant markets.[80] In addition, Section 7 of the Clayton Act is an incipiency statute[81] which, if anything, would ease the Commission's burden of proof by allowing narrower markets than would be required under other statutes applying to actual restraints. Complaint Counsel's position undercutting the Commission's stated positions indicates the weakness of Complaint Counsel's proof in this case.

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[77] RPF 207.

[78] *E.g., C.F. Indus., Inc. v. Surface Trans. Bd.*, 255 F.3d 816, 824 (D.C. Cir. 2001) (upholding Surface Transportation Board decision regarding market dominance based, in part, on the Merger Guidelines); *Todd v. Exxon Corp.*, 275 F.3d 191, 208-09 (2d Cir. 2001) (disagreeing with district court's conclusion based on application of Merger Guidelines in section 1 case to define relevant market, but not criticizing district court's use of Merger Guidelines to define market); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001) (relying on Merger Guidelines in section 1 case); *Anti-Monopoly v. Hasbro, Inc.*, 958 F. Supp. 895, 902 (S.D.N.Y. 1997) (relying on Merger Guidelines in non-merger case); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 735 F. Supp. 231, 235 (E.D. Mich. 1990) (denying summary judgment in tying case based, in part, on expert testimony regarding market definition under the Merger Guidelines).

[79] Maness, Tr. 2241-42.

[80] Fed. Trade Comm'n and U.S. Dept. of Justice, Statements of Antitrust Enforcement Policy in Health Care, Statement 8 at n.38 (1996); Fed. Trade Comm'n and U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors, § 3.32(a) (2000).

[81] Section 7 allows the Commission to stop mergers which "may" substantially lessen competition. 15 U.S.C. § 13..

B. The lack of collusion among NTSP and any of its participating physicians disproves an antitrust violation under any analysis.

Regardless of the method of analysis employed, Complaint Counsel must prove some form of "concerted action" to establish an antitrust violation.[82] "Section 1 of the Sherman Act [like Section 5 of the FTC Act] does not proscribe independent conduct."[83]

To prove "concerted action" or collusion, Complaint Counsel must submit either direct or circumstantial evidence of an agreement between competitors (*i.e.*, the physicians).[84] But conduct that is as consistent with lawful competition as with conspiracy will not support an inference of conspiracy.[85] Complaint Counsel "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."[86] Based on this standard, Complaint Counsel cannot prove any collusion that would establish an antitrust violation.

1. Complaint Counsel concedes there is no direct evidence of collusion.

Complaint Counsel, after being ordered to respond to contention interrogatories, admitted that there is no direct evidence of any agreement between NTSP and a participating physician to reject a payor offer based on price or any other competitively significant term.[87] Furthermore,

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[82] *See Viazis*, 314 F.3d at 761 ("So, to establish a § 1 violation, a plaintiff must demonstrate concerted action."); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir. 1999) (finding that liability under section 1 of the Sherman Act "is necessarily based on some form of 'concerted action'").

[83] *Viazis*, 314 F.3d at 761.

[84] *In re Baby Food Antitrust Litig.*, 166 F.3d at 117 ("The existence of an agreement is the hallmark of a Section 1 claim."); *see also Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984) ("The pharmacy agreements do not constitute a *per se* illegal horizontal combination . . . because the agreements do not run between competitors in the pharmaceutical industry, nor between competitors in the insurance industry, but between individual pharmacies and Blue Shield, which does not compete with pharmacies.").

[85] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

[86] *Id.* (citations omitted).

[87] Complaint Counsel's Second Supplemental Responses to Respondent's First Set of Interrogatories at 1-2 ("Complaint Counsel is not aware of communications between NTSP and any other person or entity taking the form of an express request by NTSP that a physician reject a specific payor offer, to which any physician expressly replied, 'I agree to reject this offer.'").

Complaint Counsel's expert admits that he cannot identify *any* specific evidence showing that any of the following things occurred:

(1) one or more participating physicians agreed with each other to reject a non-risk payor offer;[88]

(2) any participating physician and any other entity agreed to reject a non-risk payor offer;[89]

(3) any participating physician rejected a non-risk payor offer based on a power of attorney granted to NTSP;[90]

(4) any participating physician refused to negotiate with a payor because of NTSP's Physician Participation Agreement;[91]

(5) any participating physician knew what another physician was going to do in response to a non-risk payor offer;[92]

(6) any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;[93] or

(7) any participating physician gave up his or her right to independently accept or reject a non-risk payor offer.[94]

2. Circumstantial evidence does not support an inference of collusion because any alleged conduct is consistent with independent action.

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88 RPF 153.

89 RPF 158.

90 RPF 156.

91 RPF 157.

92 RPF 136, 159.

93 RPF 137-38.

94 RPF 155.

Complaint Counsel claims that NTSP wants to collectively negotiate and bind physicians on non-risk contracts, and uses that claim to support a requirement that NTSP show justification. But that claim does not fit the facts here.

NTSP cannot and does not bind any participating physicians to non-risk contracts.[95] NTSP's Physician Participation Agreement ("PPA") requires the messengering of non-risk contracts.[96] The PPA gives NTSP no authority to bind the physicians and any non-risk contracts to which NTSP decides to become a party must then be messengered to the physicians for their individual decisions to join or not.[97]

Complaint Counsel is merely complaining about NTSP refusing to become involved in a few payor offers. Because NTSP has the legal right under various legal principles, including the *Colgate* doctrine and *Trinko*, to avoid involvement, there is nothing that needs to be economically justified.[98] But, in any event, the evidence and data shows that the economic

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[95] RPF 137-38.

[96] RPF 139, 145, 285.

[97] *See, e.g.*, RPF 139, 142, 145, 166, 271, 285. Complaint Counsel incorrectly argues that the PPA requires physicians to send NTSP all offers they receive directly from payors. First, section 2.1 of the PPA does not prevent physicians from negotiating directly with payors; it says only that NTSP has a right to receive all "Payor Offers," as that term is defined in section 1.18 of the PPA, and says nothing about preventing a physician from negotiating directly with a payor. Second, section 2.1 expressly allows a physician to enter into any contract that replaces a contract the physician had as of March 1, 1998. This would apply to any renewals or amendments to contracts in place on that date. Third, by referring to a "Payor Offer," which is a defined term, section 2.1 applies only to a limited number of offers. Under section 1.18 of the PPA, a "Payor Offer" is made by a "Payor," which is a term defined in section 1.16 of the PPA to mean "any entity have an active Payor Agreement with NTSP." In other words, section 2.1 applies only to offers from payors who already have an active agreement with NTSP. If a physician receives an offer from a payor that does not already have a contract with NTSP, section 2.1 is irrelevant and inapplicable.

[98] *See United States v. Colgate & Co.*, 250 U.S. 300, 3078 (1919) (establishing manufacturer's right to refuse to deal); *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 880-81 (2004) (establishing network's right to refuse to make itself available).

justification for NTSP's refusal is supported by its spillover model and its right to avoid expending time and effort on proposals not likely to activate NTSP's team of physicians.[99]

Complaint Counsel also challenges NTSP's disclosure of the board's threshold rate levels for non-risk HMO and PPO offers to its panel of eligible physicians.[100] Of course, those disclosures enable physicians to know when NTSP will be involved in reviewing a payor's offer. Complaint Counsel alleges that this facilitates collusion among physicians. But this information cannot be used by individual physicians to coordinate or raise rates because only a limited number of physicians respond to the poll and physicians never receive any individual-specific data.[101] Because only the mean, median, and mode of all of the responses are reported, it is impossible for a physician to determine the response of any other specific physician or specialty, or to know even if they did, in fact, respond.[102] Additionally, the evidence shows that physicians consider several factors when deciding individually to contract with a payor and that the poll results do not impact their decisions.[103]

In fact, Dr. Frech has actually proven that there is no collusion or price-fixing agreement among NTSP's participating physicians. His testimony and exhibits show that participating physicians frequently enter individually into payor contracts at rates below the threshold rate levels used by NTSP's board to determine if NTSP is willing to contract with a payor.[104] This is

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[99] *See, e.g.*, RPF 85-87, 91-92, 95-96, 103-04.

[100] Complaint ¶ 17 ("NTSP then reports these measures back to its participating physicians, confirming to the participating physicians that these averages will constitute the minimum fee that NTSP will entertain as the basis for any contract with a payor.").

[101] RPF 129, 133, 135.

[102] RPF 130-133, 136, 150-51.

[103] RPF 161, 286.

[104] RPF 286.

consistent with physician testimony that they do not rely on the mean/median/mode of NTSP's aggregated poll results and make their own independent decisions whether to accept an offer individually, and, in some cases, accept offers below the rates established by NTSP's board.[105]

Dr. Frech also testified that the response rate for the poll was very poor, which explains why only a small percentage (in some cases less than 10%) of the participating physicians respond at the rate that is actually used as the threshold by NTSP's board.[106] Such a low response rate and low correlation make it impossible to have an effective price-fixing conspiracy. Indeed, it is undisputed that many of the participating physicians do not respond,[107] and Dr. Frech has further opined that many physicians do not follow their own poll responses in their individual business decisions even when they do respond.[108] Likewise, providing only the mean, median, and mode of all of the poll responses does not tell a participating physician what any other physician will do with respect to a payor offer.[109]

Taken together, all of this evidence (or lack thereof) does not tend "to exclude the possibility that the alleged conspirators acted independently."

3. The evidence shows that NTSP's conduct is consistent with lawful competition.

In addition to being unable to exclude independent action, Complaint Counsel also cannot prove that the evidence is inconsistent with lawful competition. Dr. Frech admits that the collection and dissemination of market information, including market prices, can potentially

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[105] RPF 161, 286.

[106] RPF 135.

[107] RPF 129.

[108] RPF 286.

[109] RPF 133, 136, 151.

benefit competition.[110] In fact, Dr. Frech believes that payors conduct surveys and know what other payors are offering in a given market.[111] Dr. Frech also admits that physicians commonly look to IPAs to handle discussions with a payor as to the legal terms of a contract, and that IPAs save costs by eliminating multiplicative legal contractual reviews by individual physicians.[112] Further, he concedes that payors usually have to offer a higher price to get a majority or more of physicians to participate in a contract.[113] Higher prices are also especially important to attract physicians that are more sought after and perceived to be of higher quality.[114] Even where unit costs may be higher in a payor contract, consumers may benefit because of lower utilization rates by physicians that decrease the total cost of care.[115] Finally, Dr. Frech admits that NTSP generates efficiencies and improves quality of care through spillover from its risk contracts to the non-risk contracts that are the subject of this adjudicative proceeding.[116] And NTSP's

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[110] RPF 134; *see also* FTC Staff Advisory Opinion Letter, dated November 3, 2003, from Jeffrey W. Brennan to Gerald Niederman regarding Medical Group Management Association:

> The survey will seek information regarding several aspects of physicians' contractual relationships with third-party payers, including information about amounts that health plans pay for physician services. MGMA will publish the information obtained through the survey only on an aggregated basis; it will not disclose information about individual payers. As discussed below, it does not appear likely that publication of the survey results, in the manner described in your letters, will prompt coordinated anticompetitive behavior by physicians. Accordingly, the Commission staff has no intention to recommend law enforcement action regarding the proposed conduct.

[111] RPF 134.

[112] RPF 298.

[113] RPF 297.

[114] RPF 299; *see Doctor's Hospital, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 310 (5th Cir. 1997) ("In medical care, it must be remembered, a provider's higher prices are not necessarily indicative of a less competitive market; they may correlate with better services or more experienced providers.").

[115] RPF 301-04, 308, 400.

[116] RPF 86-87.

maintaining continuity of personnel — in this case, the participating physicians — is important to achieving these efficiencies.[117]

An absence of collusion is also supported because NTSP has no authority to accept non-risk contracts on behalf of the participating physicians.[118] It is an undisputed fact that every non-risk contract that NTSP decides to sign is then messengered to physicians who individually decide whether each wants to participate.[119] NTSP does not bind anyone, other than itself, to a non-risk contract.[120] NTSP's "refusal to deal" is, therefore, only its own refusal *qua* NTSP, and is not the individual physicians' refusal.

The *Colgate* doctrine confirms the propriety of NTSP's refusal to deal. NTSP's right to follow its own business model and to refuse to sign and messenger contractual offers outside that model falls squarely within the Supreme Court's repeated reaffirmations of the *Colgate* doctrine.[121] That right has been recently reiterated by the Fifth Circuit in its *Viazis* decision.[122]

> 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.[123]

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[117] RPF 114.

[118] RPF 138.

[119] *See, e.g.*, RPF 145, 152-58, 161, 275.

[120] RPF 137-39, 166, 275.

[121] *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

[122] *Viazis*, 314 F.3d at 763 n.6 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984), which cites *Colgate* for the proposition that "[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever is likes, as long as it does so independently").

[123] *Id.* at 766.

Although NTSP's decision is well-justified based on its efficiency-directed "spillover" business plan, under Fifth Circuit authority NTSP does not even need a justification to refuse to messenger a payor's offer. Complaint Counsel seeks to impose a duty on NTSP to messenger all payor offers.[124] That contention is dead on arrival in the Fifth Circuit.

In the normal situation, horizontal competitors have little reason to come together and "plus"-type inferences can be drawn when they do. But when a network of complementary medical practitioners comes together, the network is necessary to provide the full range of treatments to the patient population by the various types of generally non-competitive practitioners. There is nothing sinister to presume when the network entity does what one would expect be done in operating a network.[125] That is the point being made by the Fifth Circuit's decision in *Viazis v. American Association of Orthodontists*.[126]

Health care is a line of business with great legal risk and regulatory complications, especially in a highly litigious state like Texas.[127] NTSP faces significant disincentives to being involved in offers which are problematic or involve only a relative few of those physicians who

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[124] Although Complaint Counsel concedes that a refusal to messenger, standing alone, is insufficient to create antitrust liability, Complaint Counsel still seeks relief that would require NTSP to messenger all offers its receives from payors. *See* Complaint Counsel's Opening Statement, Tr. 60.

[125] The Supreme Court's recent rejection of a duty to make one's network available under an essential facility or similar argument in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 880-81 (2004) is apposite here.

[126] 314 F.3d 758, 764 (5th Cir. 2002) (finding that trade association's action, in and of itself, was not conspiratorial because plaintiff failed to prove association's members "were conspiring among themselves" and that association was not a "walking conspiracy"). Complaint Counsel make an extraordinary suggestion, without any supporting authority, that Fifth Circuit law does not govern this proceeding. Complaint Counsel's Memorandum in Opposition to NTSP's Motion for Summary Decision ("Complaint Counsel's Opposition") at 14 n.33. That argument is wrong. *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 . . . ."). In this case, NTSP "resides" and "carries on business" in the Fifth Circuit and that is the circuit in which "the method of competition or the act or practice in question" was used. Accordingly, any appeal of an adverse order from the Commission would go to the Fifth Circuit for determination and that circuit's law is controlling here.

[127] *See, e.g.*, RPF 55, 62, 170.

are qualified enough to be part of NTSP's limited panel. Among the legitimate reasons NTSP may refuse to messenger a payor contract are (1) avoiding illegal or potentially illegal contracts; (2) avoiding use of its resources in reviewing and servicing contracts when only a minority of its physicians will be involved; (3) avoiding credentialing and other activities in situations where NTSP does not want that burden; (4) avoiding situations that will drain NTSP's and its physicians' time and resources through the use of incomprehensible compensation methodologies; (5) avoiding payors who are discriminating against NTSP's physicians; (6) avoiding payors who are not financially sound; (7) avoiding medical plans that appear risky from a medical treatment standpoint; (8) avoiding situations that appear legally risky to NTSP from a financial, administrative, or standard-of-care standpoint; (9) avoiding payors who are undercutting a NTSP risk contract; (10) avoiding payors who are breaching an existing contract; (11) avoiding payors who have engaged in deceit or other conduct condemned by state officials; (12) avoiding payors who refuse to share medical data with NTSP to assist in NTSP's medical management goals; and (13) avoiding situations where NTSP is not given time to make a knowledgeable decision on the offer.[128] Even Dr. Frech admits that there are many reasons an entity might refuse to deal with another entity, including legal concerns or even not liking the other entity.[129] NTSP's refusals to deal are lawful under the *Colgate* doctrine and do not support an inference of collusion.

All of the payors on whom Complaint Counsel has based this case have engaged in conduct falling within one or more of the above thirteen reasons. Many payors — including United Healthcare, Aetna, Cigna, and Blue Cross — have been fined millions of dollars and

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[128] *See, e.g.*, RPF 165-66, 168-75, 177-82.

[129] RPF 163, 169, 171.

reprimanded by the Texas Department of Insurance ("TDI") for engaging in improper activities.[130] One of Aetna's witnesses, Dr. Jagmin, was personally censured by the TDI for making improper misrepresentations.[131] Complaint Counsel has tried to argue that these types of "bad acts" are irrelevant and that NTSP has not tied these acts to its allegedly anticompetitive conduct. Both arguments are incorrect.

As noted by the Administrative Law Judge, the payors' conduct goes to the bias and credibility of any witness testifying at the hearing. The conduct is also important to put into context many of the communications between NTSP and the participating physicians that Complaint Counsel challenges. Because the payors have a history of violating the law, NTSP has a legitimate basis — unrelated to any allegedly anticompetitive conduct — to advise the physicians to be cautious about hard-to-understand contractual language or payment methodologies. In fact, Dr. Frech opened the door to the relevance of the payors' conduct by claiming that NTSP acted improperly by advising physicians to take time to review payors' offers and to be wary of non-RBRVS compensation methodologies.[132] NTSP has a right at trial to respond to that criticism and show that its advice was based on legitimate concerns about the payors' conduct. Federal Rule of Evidence 404(b) confirms that NTSP's intent and purpose in reviewing payor offers and advising physicians about potential issues in those contracts is relevant.[133] That rule also makes relevant the payors' motives, intent, and plans in any

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[130] RPF 175, 190-91, 193, 358-59, 365, 374, 376, 403, 440-41, 450.

[131] RPF 175, 190, 358-59.

[132] *See, e.g.*, Frech, Tr. 1309-11, 1314-16, 1342-43, 1450-51.

[133] *See* FED. R. EVID. 404(b) (stating that evidence of other crimes, wrongs, or acts is admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

contractual discussions with NTSP or physicians. Finally, the payors' conduct, and NTSP's actions in reporting the payors to governmental authorities,[134] impacts whether NTSP's actions are potentially anticompetitive — as Complaint Counsel alleges — or just part of the normal tension that exists between entities (*i.e.*, the payors) that have done something improper and the entity (*i.e.*, NTSP) that has reported them to the appropriate authorities.

In addition to the "bad acts" discussed above, the payors have engaged in other conduct that justifies NTSP's conduct. United, for example, acted to undercut a risk contract that NTSP had with the City of Fort Worth.[135] NTSP warned the city about the potential cost overruns from switching to United, but the city switched anyway and incurred overruns of around $10 million, just as NTSP predicted.[136] **[**

] [137] **[**

[[138] All of these reasons, and many others, justify NTSP's conduct in challenging the payors's improper conduct or advising its physicians to be cautious when dealing with payors or considering a payor offer.

All Complaint Counsel has shown at trial is actions by the entity NTSP. Even though those actions reflect lawful competition and what one would expect any network entity to do in

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[134] *See, e.g.*, RPF 189, 194, 364, 378, 403, 441.

[135] RPF 182, 384-85.

[136] RPF 389-91, 393-94.

[137] RPF 418-20, 422-23, 426-28, 432, *in camera.*

[138] RPF 429, *in camera*.

making its own decisions and managing its own resources, the more critical point is that the cited activities are not what the physicians did. Any theory of conspiracy and collusion – which is a required showing for Complaint Counsel's case – must show what the physicians actually did and why. Complaint Counsel not only does not do that, but Dr. Frech admits that the physicians have not acted consistently with what NTSP does.

Complaint Counsel contends that NTSP must messenger every payor offer to its participating physicians, regardless of whether or not the offer (1) fits within NTSP's business model, (2) creates a risk of noncompliance under Texas law for NTSP or the participating physicians, (3) creates malpractice or other exposure for NTSP or the physicians based on network-design inadequacies, or (4) involves a payor that is financially weak or likely not to pay promptly. But payors do not need NTSP to messenger their offers. Dr. Frech admits that messengering is essentially a ministerial task that anyone, including the payors themselves, can easily do.[139] And several IPAs other than NTSP have been available in the Metroplex to messenger payor offers.[140]

Many of the actions challenged by Complaint Counsel involved payors with whom NTSP was negotiating for risk contracts.[141] Of course, NTSP has the right under the law and the Commission's Statements of Principles to negotiate and compete vigorously as a group for risk

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[139] RPF 270.

[140] RPF 268-69.

[141] RPF 311, 329, 333-34, 336-38, 342, 346, 355, 411-12, 415-16, 425, 433-34, 443-44.

contracts.[142] This principle also applies to tied offers, which are ones where a risk offer and a fee-for-service offer are linked together and an IPA must take both or neither.[143]

Complaint Counsel also challenges NTSP's communications with physicians related to NTSP's service as a class representative in litigation against Medical Select Management ("MSM"), an IPA that failed to pay the physicians in a timely and full manner.[144] The Texas Department of Insurance eventually took over MSM, and MSM later filed for bankruptcy following disclosure of financial malfeasances by its management.[145] One of MSM's former executives is currently serving a prison term for some of that malfeasance.[146] NTSP eventually made a substantial recovery in the bankruptcy court on behalf of the physicians in the class action.[147]

Competitive tensions also exist among NTSP and the payors, and those tensions explain the context of many communications challenged by Complaint Counsel. In other words, instead of NTSP and the payors always being in a vertical relationship, NTSP and the payors often compete horizontally for contracts or to manage the provision of health care services, including utilization or medical management. The United situation with the City of Forth Worth is an example of the former situation, where NTSP was competing with a payor to continue to provide health care services under a risk contract. NTSP had a risk contract under which it was

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[142] *See* Fed. Trade Comm'n and U.S. Dept. of Justice, Statements of Antitrust Enforcement Policy in Health Care, statements 8 and 9 (1996).

[143] RPF 336-37.

[144] RPF 339, 343, 346-47, 353.

[145] RPF 350-52.

[146] RPF 352.

[147] RPF 353.

providing services to the city's employees, retirees, and their dependents.[148] United tried to supplant that contract and was eventually successful.[149] To understand the communications between NTSP and the city, one must look at Texas law, which allows physicians to communicate with their patients about network adequacy issues and compensation rates,[150] and the competitive tension between United and NTSP, who were both vying to provide services to the city.[151] Although Complaint Counsel originally suggested that NTSP's communications with the city were improper, during the hearing Complaint Counsel stipulated that those communications were not improper or illegal.[152]

NTSP's contacts with Aetna are an example of the latter situation, where NTSP was competing with a payor to manage the delivery of health care services. NTSP made a proposal to Aetna that would have allowed NTSP to provide utilization management services.[153] NTSP believes that, based on its risk contracting experience, it has developed processes and procedures that enable it to monitor utilization more effectively than a payor can, especially because participating physicians are closer to the patients and have more control over the delivery of

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[148] RPF 384.

[149] RPF 385, 394.

[150] *See* TEX. INS. CODE ANN. § 843.363 (Vernon 2004).

[151] RPF 384-85, 388-93.

[152] RPF 183.

[153] RPF 371.

medical services.[154] Utilization management is a function that must be delegated to NTSP by a payor,[155] and NTSP wanted Aetna to delegate that function to it.[156] But Aetna refused to do so.[157]

NTSP has had similar encounters with payors in which it has pressed them to delegate the utilization management function.[158] By trying to take a more active role in managing the delivery of health care, NTSP ends up urging the payors to allow NTSP to provide utilization management services to the payor's customers. As Aetna's representative testified, that is exactly what a good IPA should do.[159]

C. Public policy rationales show that NTSP's conduct should be encouraged and not challenged as potentially illegal.

Dr. Gail Wilensky, a nationally recognized health care expert, testified that NTSP's business model is effective and beneficial to health care and should be encouraged.[160] In fact, Dr. Wilensky testified that NTSP's practice of marketing its clinical integration techniques to payors and offering to perform medical management functions is unique.[161]

The correct outcome measure for the cost of physician services is total medical expense or overall costs.[162] Overall costs, or total medical expense, include physician costs, facility costs,

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[154] RPF 26, 53, 74, 81-83, 85-87, 92, 96, 101, 106-07, 118.

[155] RPF 111.

[156] RPF 371.

[157] RPF 371–73, 377.

[158] RPF 106-07, 111.

[159] RPF 372.

[160] RPF 23.

[161] RPF 106.

[162] RPF 302.

and pharmacy costs.[163] A physician, especially a specialist physician, can have an impact on controlling all three types of costs.[164] As noted by Dr. Wilensky, the quantity and mix of services provided, not physician reimbursement rates, are the biggest drivers of health care costs.[165] Unit cost, which is what Complaint Counsel has focused on here, is not the proper outcome measure.[166] NTSP's business model and risk contracts motivate participating physicians to become concerned about utilization and to control total medical expense, including facility and pharmacy costs.[167] NTSP's model reduces overall medical costs on risk contracts through the development of a comprehensive medical management process involving all segments of the continuum of care, including physician, facility, and pharmacy costs.[168]

By offering to keep its team of risk panel physicians together when contracting, NTSP creates and fosters organizational capital that benefits patients because physicians have developed teamwork improvements.[169] This teamwork fosters close relationships and daily interactions that generate greater medical care rapport and information sharing that improve the quality and lower the cost of patient care.[170] Peer pressure and peer morale are important factors that impact a physician's behavior.[171] It is more likely NTSP will be able to carry over the efficiencies gained on its risk contracts to non-risk contracts if the same physicians are involved

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[163] RPF 304.

[164] RPF 304.

[165] RPF 302.

[166] RPF 302.

[167] RPF 305.

[168] RPF 25.

[169] RPF 81.

[170] RPF 81.

[171] RPF 83.

in both types of contracts.[172] In other words, spillover effects will be greater if there is more continuity among the physicians who practice under NTSP's risk contracts and non-risk contracts.[173]

Dr. Wilensky confirmed that the data and logic show that spillover occurs from NTSP's risk-contracting activities to its fee-for-service activities that are at issue in this proceeding.[174] For each NTSP physician on the risk panel, there are expected to be — and there are — significant spillover effects from the physician's risk practice to the physician's fee-for-service practice.[175] Many of the techniques that allow NTSP to maintain low medical costs in its risk contracts directly carry over to its non-risk contracts.[176] This comports with the recognition that managed care programs are desirable not only for the effects they produce for their own enrollees but also for the effects they have on the communities in which they are located.[177] Because NTSP's conduct is beneficial for patients and the community at large, it should not be forced to change its behavior in this proceeding.

D. The FTC Act does not apply to NTSP because it is a memberless, nonprofit corporation and the challenged conduct does not affect interstate commerce.

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[172] RPF 114.

[173] RPF 113-14.

[174] RPF 86-87.

[175] RPF 87.

[176] RPF 87.

[177] RPF 91.

The "Commission has only such jurisdiction as Congress has conferred upon it by the Federal Trade Commission Act."[178] When the jurisdiction of the Commission is challenged, the Commission bears the burden of establishing its jurisdiction.[179]

1. NTSP is not an association acting for the profit of any members.

Under Section 5 of the FTC Act, the Commission has jurisdiction to prevent only "corporations" from using unfair methods of competition.[180] The FTC Act defines "corporation" to include "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members."[181] In addition to proving that NTSP is a "corporation" under the FTC Act, Complaint Counsel must also show that NTSP is an association acting for the pecuniary interest of its participating physicians.[182]

Complaint Counsel cannot meet its burden of proof for at least two reasons. First, NTSP is incorporated under Section 162.001 of the Texas Occupations Code, formerly Section 5.01(a) of the Texas Medical Practice Act, as an organization with no members.[183] That statute allows for the corporate practice of medicine by non-profit entities involved in research, medical education, or the delivery of health care to the public.[184] Because NTSP is a memberless

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[178] *Community Blood Bank v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969).

[179] *Id.*

[180] 15 U.S.C. § 45.

[181] 15 U.S.C. § 44.

[182] *See* 15 U.S.C. § 45.

[183] TEX. OCC. CODE ANN. § 162.001 (Vernon 2004).

[184] *Id.* Specifically, the text of the statute directs the Texas State Board of Medical Examiners to approve the formation of an organization if it meets these requirements:

> (b) The board shall approve and certify a health organization that:
> (1) is a nonprofit corporation under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq.,

organization, it falls outside the definition of a "corporation" under the FTC Act. The Commission, therefore, lacks jurisdiction over NTSP.

Second, NTSP is a nonprofit corporation that makes no money from the non-risk contracts entered into by its participating physicians – the contracts at issue in this case.[185] What funds NTSP does have are generated from two sources: (1) a one-time $1000 fee when a physician's application to NTSP is accepted, and (2) NTSP's share of the profits from its risk contracts.[186] NTSP was formed in order to enter into risk contracts for medical care; in the past five years it has had capitation or other risk-type contracts with Amcare, Cigna, and PacifiCare.[187] Subsequent to its formation, NTSP has also messengered some non-risk contracts to its participating physicians.[188] Its foremost motivation, however, is to be involved in contracts that activate the network NTSP created and uses for risk contracts, with the goal that payors will eventually allow the network to take on additional risk contracts.[189]

Vernon's Texas Civil Statutes) organized to:
(A) conduct scientific research and research projects in the public interest in the field of medical science, medical economics, public health, sociology, or a related area;
(B) support medical education in medical schools through grants and scholarships;
(C) improve and develop the capabilities of individuals and institutions studying, teaching, and practicing medicine;
(D) deliver health care to the public; or
(E) instruct the general public in medical science, public health, and hygiene and provide related instruction useful to individuals and beneficial to the community;
(2) is organized and incorporated solely by persons licensed by the board; and
(3) has as its directors and trustees persons who are:
(A) licensed by the board; and
(B) actively engaged in the practice of medicine.

185 *See* TEX. REV. CIV. STAT. ANN. Art. 1396-1.02(A)(6).

186 RPF 127.

187 RPF 5.

188 RPF 4.

189 RPF 4, 18-19, 27-28, 106, 121-22, 164-65.

To determine whether a nonprofit entity is organized to carry on business for its own profit or that of its members, there is no "threshold percentage of activity" of the nonprofit entity's total activities which must be aimed at its members' pecuniary benefit.[190] Courts look to the pecuniary benefit received by members of nonprofit organizations.[191] Thus, if it were determined that NTSP had any members (even though that would conflict with applicable law), Complaint Counsel must still prove that NTSP provided pecuniary benefits to its "members." But there is no evidence in the record that NTSP provided any tangible, pecuniary benefits to them.

Finally, even if NTSP was considered to be organized for the profit of its "members," NTSP still does not come within the jurisdiction of the Federal Trade Commission because there is no evidence of collusion among NTSP and the participating physicians; accordingly, the only potential basis for liability would be NTSP's refusals to act. But a refusal to act does not promote the profit of NTSP's members, if any. Although Complaint Counsel claims this case is more than a unilateral refusal to deal, Complaint Counsel has not proven anything more than a unilateral refusal to deal as a matter of law.[192] Without further proof, there is no jurisdiction.

2. NTSP's actions are not in or affecting commerce.

The FTC Act prohibits unfair methods of competition "in or affecting commerce."[193] The FTC Act defines commerce as meaning "commerce among the several states."[194] In finding

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[190] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 766 (1999).

[191] *See, e.g., In re Mich. State Med. Soc'y*, 101 F.T.C. 191 (1983).

[192] *See, e.g.*, RPF 150-62.

[193] 15 U.S.C. § 45.

[194] 15 U.S.C. § 44.

jurisdiction under Section 5, the Commission has applied the same legal standards as federal courts have applied under the Sherman Act.[195]

Complaint Counsel has the burden to show that the actual conduct of NTSP at issue affected interstate commerce or that NTSP operates in interstate commerce.[196] Further, this effect must be considered in proportion to NTSP's business as a whole.[197] To meet the effect on commerce theory, a specific aspect of interstate commerce must be identified and it must be proven that NTSP's actions had a substantial effect on that aspect of commerce.[198] Complaint Counsel must show a factual nexus between the alleged restraint and the effect on commerce, and the effect on commerce must either be shown to actually exist or be present as a matter of practical economics.[199] Because NTSP has contested jurisdiction, Complaint Counsel "must proceed to demonstrate by submission of evidence beyond the pleadings either that [NTSP's] activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce."[200]

Complaint Counsel alleges that an effect on interstate commerce is demonstrated because: (1) the collective price negotiations and other conduct of NTSP affects interstate commerce; (2) NTSP physicians accept payments from the federal government through the Medicare and Medicaid programs; (3) NTSP physicians provide medical services to patients from outside the state of Texas; and (4) both NTSP and its physician members make substantial

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[195] *See McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241-42 (1980).

[196] *Id.* at 242.

[197] *Musick v. Burke*, 913 F.2d 1390, 1395 (9th Cir. 1990).

[198] *McLain*, 444 U.S. at 242; *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994).

[199] *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 331 (1991).

[200] *McLain*, 444 U.S. at 242 (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 202 (1974)).

purchases from vendors located outside the state of Texas. Complaint Counsel cannot prove an effect on interstate commerce under any of its four theories.

First, there is no evidence of any collusion among NTSP and participating physicians. Accordingly, there are no collective price negotiations or similar joint conduct that could affect interstate commerce.

Second, there is no evidence that the actions of the participating physicians can be attributed to NTSP. What evidence Complaint Counsel presents does not connect the actions of NTSP with any effects on interstate commerce. Instead, Complaint Counsel attempts to show an effect on interstate commerce by evidence of isolated instances of out-of-state equipment purchases, patients, and insurance carriers for individual physicians while failing to show evidence of any conspiracy or collusive action by physicians connecting them with the alleged anti-competitive conduct of NTSP. This evidence relates only to individual physicians, not NTSP. Any individual conduct of physicians which may meet the requirements for interstate commerce is irrelevant in this action against NTSP because, as discussed previously, Complaint Counsel has not shown as a matter of law that the individual physicians are involved in the alleged anticompetitive conduct.

Third, there is no evidence that NTSP the entity has provided any medical services to patients outside the state of Texas. Again, those services are provided by the participating physicians and cannot be attributed to NTSP.

Finally, there is no evidence that NTSP's out-of-state purchases or dealings with Texas insurers confer jurisdiction. Courts have recognized that out-of-state purchases and insurance are only factors to be considered and do not necessarily compel a finding of effects on interstate

commerce.[201] Considering that NTSP has only one office, located in Texas, that NTSP deals only with insurers located in Texas, that none of the alleged conduct took place outside of Texas, and that Complaint Counsel cannot point to even one example of a specific effect or even possible effect on interstate commerce that is more than a conclusory allegation not supported by "practical economics," Complaint Counsel has not proven effects on interstate commerce.

Furthermore, the alleged effects on interstate commerce must be considered in proportion to the party's business as a whole.[202] Also, the acts complained of must affect the interstate commerce of a business, not just a business engaged in interstate commerce.[203] At best, Complaint Counsel has shown only a mere effect on a business engaged in interstate commerce, and that effect is de minimis compared to the business as a whole.[204]

E. Any remedies should preserve NTSP's legal rights.

In accordance with the Administrative Law Judge's request, NTSP will address the issues of remedies, although NTSP believes that Complaint Counsel has not carried its burden to prove liability. Therefore, there is no legal basis to award any relief to Complaint Counsel.

At this point in time, NTSP is unsure of what relief Complaint Counsel will seek in light of what the evidence at trial showed as to NTSP's business model and the open, competitive

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[201] *Mitchell v. Howard Mem'l Hosp.*, 853 F.2d 762, 764 (9th Cir. 1988) (no effect on interstate commerce despite some out-of-state insurance and out-of-state supplies); *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613 (6th Cir. 1986) (no effect on interstate commerce despite hospital having out-of-state funding, out-of-state suppliers, and out-of-state patient income).

[202] *Musick v. Burke*, 913 F.2d 1390, 1395 (9th Cir. 1990).

[203] *Page v. Work*, 290 F.2d 323, 330 (9th Cir. 1961).

[204] *Stone*, 782 F.2d at 614 (finding that an exclusion from a local facility only 2-3 times per month has de minimis effect and does not support Sherman Act jurisdiction).

nature of the relevant markets. During opening statements, Complaint Counsel admitted that the failure to messenger a contract, without more, is not an antitrust violation.[205] Complaint Counsel on the other hand indicated that it would seek relief that "broadly requir[es] NTSP to messenger contracts."[206] But as shown by the evidence and the briefing, there are many legitimate reasons why NTSP should not be mandatorily enjoined to become party to and messenger payor contracts.[207]

A mandatory injunction is an extraordinary remedy that should be granted in only compelling circumstances.[208] A party seeking a mandatory injunction must make a higher showing of clear entitlement to the relief under both the facts and the law.[209] Mandatory injunctions are not favored because they compel a person to act.[210] Complaint Counsel's requested remedy would do exactly that which is disfavored by the courts – compel NTSP to act by becoming a party to and messenger contracts.

To issue a mandatory injunction to become party to and messenger contracts would subject NTSP to crippling liability and risk. NTSP would also be forced into contracts well outside its team-centered business model. Some of the numerous problems raised by Complaint Counsel's proposed relief can be seen from the following list:

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[205] Complaint Counsel's Opening Statement, Tr. at 60.

[206] Complaint Counsel's Opening Statement, Tr. at 60.

[207] *See, e.g.*, RPF 163-82.

[208] *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980); *Justin Indus., Inc. v. Choctaw Sec., L.P.*, 747 F. Supp. 1218, 1220 (N.D. Tex. 1990), *aff'd*, 920 F.2d 262 (5th Cir. 1980).

[209] *Justin Indus., Inc.*, 747 F. Supp. at 1220.

[210] *Id.*

1. Disregard of NTSP's right to refuse to become a party to or messenger an offer of a non-risk contract pursuant to *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919);[211]

2. Disregard of NTSP's right to refuse to promote or approve an offer of a non-risk contract pursuant to *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758 (5th Cir. 2002) so long as NTSP does not coerce physicians to abide by its decision.[212]

3. Forcing NTSP into contracts which conflict with or risk conflicting with applicable state or federal law, guidelines, or relevant enforcement decrees;[213]

4. Forcing NTSP to expend time and effort and to risk its reputation on offers involving directly or indirectly only a small portion of NTSP's participating physicians;[214]

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[211] In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

250 U.S. at 307.

[212] In *Consolidated Metal Products, Inc.* [*v. Am. Petroleum Inst*]., 846 F.2d [284 (5th Cir. 1988)] 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. . . . Moreover, [defendant] GAC has, at most, a 20% market share in orthodontic brackets. Therefore, GAC's refusal to market on behalf of Viazis could not significantly impede his ability to market the brackets, either independently or through GAC's competitors.

314 F.3d at 766. NTSP as a non-profit entity has an even greater right to refuse than did the association in *Viazis*.

[213] There are many legal prohibitions which can come to play in payor proposals. *See, e.g.*, 28 TEX. ADMIN. CODE § 3.3703 (laying out contracting requirements for PPOs concerning exclusivity, savings inducements, hold-harmless clauses, prompt payment, continuity of care, disclosure of opinions to patients, disclosure of economic profiling criteria, disclosure of quality assessment criteria, and termination); 28 TEX. ADMIN. CODE § 21.2817 (relating to clean claims and prompt payment); TEX. INS. CODE art. 3.70-3C (same issues as TEX. ADMIN. CODE § 3.3703); *State of Texas v. Aetna, Inc.*, Assurance of Voluntary Compliance, Civil Action No. 98-13972 (District Court, Travis County), *at* http://www.oag.state.tx.us/notice/avc_fin1.pdf (regulating many aspects of payor conduct, including use of all-products clauses).

[214] *Cf.* Bay Area Preferred Physicians Advisory Opinion, letter from Jeffrey W. Brennan to Martin J. Thompson, dated September 23, 2003 (taking neutral position on IPA's use of a 50% standard).

5. Forcing NTSP into providing credentialing, utilization management, or other services under a contract which Respondent NTSP does not wish to provide;[215]

4. Requiring use of a compensation methodology or inconsistent contractual terms which are not readily understood or easily able to be monitored for contractual compliance;[216]

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[215] Complaint Counsel has conceded that NTSP is not an essential facility. Complaint Counsel's Opening Statement, Tr. 9-10; Frech, Tr. 1398. The Supreme Court has also refused to acknowledge the validity of the essential facility doctrine. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004).

[216] Unclear contractual terms engender disputes and increase transaction costs. The agencies recognize the need for clarity of proposed contractual terms.

> 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).

Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care, Statement 9.

> At the request of a participating provider, the messenger may communicate objective information to that provider about a proposed payer contract or its terms, including objective comparisons with terms offered to that participating provider by other payers. "Objective information" or "objective comparison" constitutes empirical data that is capable of being verified or a comparison of such data.

Midwest Behavioral Healthcare LLC, DOJ Business Review Letter (Feb. 4, 2000) *at* http://www.usdoj.gov/atr/public/busreview/4120.htm.

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

Montana Associated Physicians, Inc., 123 FTC 62, 71-72 (1997).

5. Requiring involvement with a payor which has less than a "B" rating by Weiss Ratings, Inc. or otherwise is in a financially-unstable position;[217]

6. Requiring use of treatment protocols, referral networks, or referral policies which present unacceptable risks of inadequate health care treatment for patients;[218]

7. Imposition of unacceptable financial, administrative or standard-of-care liability on NTSP;

8. Preventing NTSP from obtaining medical data and information needed by NTSP to facilitate NTSP's medical management process; or

9. Not allowing NTSP adequate time to review the offer as to the above matters.

The evidence at trial repeatedly illustrated the difficulties Complaint Counsel's claims for mandatory relief would create for NTSP. The evidence at trial also showed repeatedly the validity of Complaint Counsel's concession that any payor can effectively messenger its own contract proposals. The mandatory injunction sought by Complaint Counsel suffers the double infirmity of forcing NTSP take costly and risky action at the beck and call of sometimes ill-intentioned payors when the payors already can and do perform those actions for themselves.

Complaint Counsel presumably will include other provisions in their proposed relief. Some of those provisions likely will be phrased in double-negative fashion to prohibit NTSP from refusing to take action – *i.e.,* a mandatory injunction in sheep's clothing. All of those provisions will likely avoid in simplistic fashion the countervailing considerations of 1) the necessity of NTSP to make internal governance decisions as to its own individual conduct and

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[217] Weiss ratings are ratings on the financial security and resources of insurers and HMOs.

[218] *See* TEX. CIV. PRAC. & REM. CODE § 88.002(a) ("A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan has the duty to exercise ordinary care when making health care treatment decisions and is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care.").

operations,[219] 2) the Constitutional and statutory propriety of NTSP's monitoring and preventing misconduct by payors,[220] and 3) the mandate under Texas law to keep patients and their representatives advised as to information and opinions regarding the terms and services of the patient's health care plan; the termination of the provider's contract with the patient's health care plan; or any other reasons for the provider's no longer providing services under the patient's health care plan.[221] NTSP will address these points in more detail after it reviews Complaint Counsel's post-trial brief.

III.

CONCLUSION

Respondent's prediction in its pretrial briefs has turned out to be correct – Complaint Counsel' s case at trial was little more than a mish-mash of miscellaneous facts mentioning NTSP, without any proof as to actual collusion by physicians, the contours of a realistic relevant market, or actual anticompetitive effects. Respondent accordingly prays that Complaint Counsel's case be dismissed for lack of jurisdiction, or in the alternative, for lack of merit, and for such other and further as to which Respondent may be justly entitled.

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[219] *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002).

[220] *See Video Int'l Prod., Inc. v. Warner-Amex Cable Communications*, 858 F.2d 1075, 1082-83 (5th Cir. 1988) (explaining *Noerr-Pennington* antitrust immunity for interactions with the government).

[221] TEX. INS. CODE ANN. § 843.363 (Vernon 2004).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory S.C. Huffman, hereby certify that on June 16, 2004, I caused a copy of the foregoing document to be served upon the following persons:

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