

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312

**MOTION OF NON-PARTY TEXAS ONCOLOGY, P.A.
FOR PROTECTIVE ORDER MODIFYING OR LIMITING FTC SUBPOENA**

I. INTRODUCTION

Pursuant to 16 C.F.R. §3.34 and Rule 3.34(c) of the Rules of Practice for Adjudicative Proceedings before the United States Federal Trade Commission ("FTC Rules of Practice"), non-party Texas Oncology, P.A. ("TOPA") respectfully submits this motion for a protective order modifying or limiting the subpoena *duces tecum* purportedly served on TOPA by the Federal Trade Commission ("FTC") in the above-styled proceeding.

The FTC filed the above-styled adjudicative proceeding against respondent North Texas Specialty Physicians ("NTSP"), an independent physician association ("IPA") operating in Fort Worth, Texas. On November 10, 2003, the FTC served a subpoena *duces tecum* on TOPA in Fort Worth requiring the production of scores of categories of documents less than 10 business days later halfway across the country in New York City. Attached as Exhibit A is a copy of the subpoena. Compliance with this subpoena would be unfair and oppressive to TOPA, and injurious to competition.

TOPA is a physician group practice with offices throughout Texas and New Mexico.

Neither TOPA nor its physicians are parties to this adjudicative proceeding. TOPA has never been a member of NTSP. Yet, the FTC's subpoena seeks to force TOPA to search through potentially hundreds of thousands of pages of documents in its possession and produce every payor contract, correspondence, pricing information, and analysis created during a period of nearly six years. This onerous burden – imposed on a non-party – would far exceed any resulting benefit in this proceeding. Moreover, documents responsive to numerous requests in the subpoena would contain privileged matter or otherwise confidential and commercially sensitive information, including TOPA's competitively sensitive pricing strategies and other trade secrets. Forced disclosure of such information here would jeopardize TOPA's ability to compete and unnecessarily risk both disrupting its business relationships with payors and subjecting TOPA to further litigation and possible liability.

Under Rule 3.22(f), and as explained below, and in the accompanying Declaration of James F. Adams filed in support of this motion ("Adams Decl."), TOPA has conferred with the FTC in an effort in good faith to resolve by agreement the issues raised by this motion and has been unable to reach such an agreement. *See* Adams Decl., Ex. B. TOPA thus respectfully requests an order reasonably limiting the production burden the subpoena would impose and requiring reimbursement of related costs by FTC. Pending the resolution of this motion, enforcement of the FTC subpoena should be stayed.

II. FACTS

A. FTC Complaint

On September 17, 2003, the FTC filed its Complaint alleging that NTSP may be improperly restraining trade. As described in paragraph 14 of the Complaint, there are generally two types of contracts between physicians and payors: (1) "non-risk" fee-for-service contracts,

and (2) "risk" contracts, where the physicians share financial risk. The Complaint challenges NTSP's business practices only as to the non-risk contracts. See, Complaint ¶14. Neither TOPA nor any related physician or entity is or has ever been a party to the underlying FTC proceeding. Indeed, TOPA is not even mentioned in the Complaint.

B. TOPA's relationship to NTSP

As noted above, TOPA has never been a member of NTSP. See, Sims Dec., ¶4, attached as Exhibit C. According to the FTC, a very small minority of TOPA's physicians are purported individually members of NTSP. However, neither TOPA nor its physicians have any "non-risk" payor contracts through NTSP. See, Sims Dec., ¶4. Accordingly, neither TOPA nor its physicians are indirectly the subject of the remedial relief sought in the Complaint.

C. The FTC Subpoena

On October 16, 2003, a subpoena duces tecum was issued to TOPA at the FTC's request. The FTC first served the subpoena on one of TOPA's competitors. The FTC belatedly served the subpoena on a TOPA field office in Fort Worth on November 10, 2003, almost a month after its issuance. See, Sims Dec., ¶2. The FTC subpoena calls for the production of documents in New York on November 21, 2003, less than 10 business days after service.

The FTC subpoena is quite broad in duration. The FTC subpoena demands production of all documents generated or received since January 1, 1998, a period of nearly six years. Subpoena at p. 1, ¶6.

The FTC subpoena is quite broad in scope. It is divided into 17 broad categories of requested documents. Each category is further expanded into many subcategories. See, e.g., Request No. 1 (requesting 9 separate categories of documents related to approximately 200 physicians — a total of 1,800 categories of documents); Subpoena at p. 10; Request Nos. 2 and 3

(seeking all contracts, amendments, and communications regarding 4 categories of payors for approximately 200 physicians – a total of over a thousand categories of documents) Subpoena at p. 10; Request No. 14 (requesting documents sufficient to show physician's annual revenues derived from treatment of patients that reside in (a) Tarrant County; (b) Johnson County; (c) Parker County; (d) Denton County; (e) Collin County; (f) Ellis County; (g) Wise County; (e) Dallas County; (f) other counties; and (g) each zip code of patient residence, and requiring explanatory documents) (sic) Subpoena at p. 12. The result is that the FTC subpoena seeks the production of hundreds of categories of documents, many of which are sweeping in scope.

Moreover, while the FTC subpoena is addressed solely to TOPA, the requests purportedly extend to TOPA and "affiliated enterprises, physicians practicing medicine through Texas Oncology, P.A. or any affiliated enterprise and the officers, directors, employees, agents, representative, consultants and all other persons under the direction or control of Texas Oncology, P.A. or any affiliated enterprises". Subpoena at p. 1, ¶1 (defining "practice group" in this manner). Such definition further expands the scope of the subpoena.

The subpoena also requests production of documents containing privileged or confidential and commercially sensitive information, including TOPA trade secrets such as competitively sensitive pricing information. For example, the subpoena demands production of privileged and confidential information, such as "[a]ll documents relating to contracts ... between physicians and ... any health plan ... or hospital ...". Such request would include attorney-client communications, attorney work product and proprietary pricing information. Subpoena at p. 10, Request No. 3.

D. Efforts to Resolve This Dispute

On November 12, 2003, TOPA's counsel spoke with the FTC's counsel about extending

the time to respond to the FTC subpoena so as to permit TOPA adequate time to investigate the impact on TOPA's business operations of attempting to respond to the FTC subpoena, and to permit the parties time needed to meet and confer in a good faith effort to resolve issues raised by the subpoena without prejudice to TOPA. The FTC would not agree to extend the deadline for filing this motion or responding to the subpoena. Adams Decl., ¶8. While the FTC was willing to limit the scope of the subpoena on some matters "for now", most requests were refused. Adams Decl., ¶5. Having attempted in good faith to resolve these issues informally, TOPA respectfully moves for a protective order to modify and limit the FTC subpoena by (1) extending the time in which to object and respond, (2) narrowing the scope of documents to be produced, and (3) requiring that FTC reimburse TOPA for its associated costs.

III. AN ORDER LIMITING THE SCOPE OF THE SUBPOENA IS NECESSARY AND WARRANTED.

TOPA moves to modify and limit the FTC subpoena due to its extremely overbroad and burdensome scope. Like a federal court, an Administrative Law Judge in an FTC proceeding must quash or limit any subpoena that is unduly burdensome or require the disclosure of privileged or confidential and proprietary information. 16 C.F.R. §3.31(c)(1)(iii) (use of subpoena and other discovery methods "shall be limited by the Administrative Law Judge" where the "burden and expense of the proposed discovery outweigh its likely benefit"); 16 C.F.R. §3.31(c)(2) (authorizing Administrative Law Judge to "enter a protective order denying or limiting discovery to preserve" a privilege); Fed. R. Civ. P. 45(c)(3) (a court "shall quash or modify the subpoena if it ... requires disclosure of privileged or other protected matter ... [or] subjects a person to undue burden"). Moreover, an Administrative Law Judge has the power to modify the subpoena and limit the scope of permissible discovery. 16 C.F.R. §3.31(d)(1)

(authorizing Administrative Law Judge to “deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense”); *see also* Fed. R. Civ. P. 26(c) (court may grant a protective order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense); Fed. R. Civ. P. 45(c)(3) (a court may quash or modify a subpoena requiring the disclosure of a trade secret or other confidential research, development or other commercial information).

Here, compliance with the subpoena should be limited in several significant respects. First, the FTC subpoena cannot reach the individual physicians’ documents which are not within the possession, custody and control of TOPA, the entity to which the subpoena is addressed. *See* Part III, A below. Second, TOPA should not be required to produce documents generated or received over a 6 year period, as requested by the FTC. *See* Part III, B below. Third, because the burdens of complying with this overbroad subpoena dwarf the likely benefits, TOPA should not be required to produce any documents unless and until the FTC limits its requests in a manner sufficient to reasonably alter that balance. *See* Part III, C below. Fourth, the subpoena requests a wide range of confidential and commercially sensitive documents from TOPA, including trade secrets and privileged information. TOPA should not be forced to produce such documents when doing so could foreseeably cause serious and irreparable harm to TOPA’s business and subject TOPA to resulting litigation. *See* Part III, D below. Finally, the FTC should reimburse TOPA’s expenses related to responding to this subpoena. *See* Part III, E below.

A. The Subpoena Cannot Compel Production of Documents Controlled by Individual Physicians.

The FTC subpoena is, in part, a thinly veiled attempt by the FTC to obtain documents

related to and controlled by the almost 200 physician members of TOPA and their professional associations. For example, the FTC has requested various categories of documents related to the physicians' communications with NTSP regarding membership and other matters. As noted above, TOPA is not a member of NTSP, therefore communications, if any, with NTSP regarding membership or related matters would have been with the physicians in their individual capacities, not on behalf of TOPA. For each separate physician the FTC subpoena separately requests certain financial (e.g., revenue by physician arising from work at each TOPA office, and revenue by physician and county of patient residence for each patient served by that physician) and personal practice data (e.g., hours each physician spends at each TOPA office, what factors are important to a physician, and how certain non-risk contracts affect each physician's practice of medicine). As a group practice, TOPA does not have a need to report such information for the individual physicians. Sims Decl., ¶5. Accordingly, the FTC subpoena should be expressly limited to documentation maintained by TOPA as a group practice, and exclude any documentation that the physicians might individually maintain.

B. The Six Year Period is Unreasonably Long.

The FTC subpoena seeks documents generated or received over a 6 year period. The amount of effort, time and expense necessary to respond to the FTC subpoena grows in proportion to the length of time covered by the subpoena. Sims Decl., ¶6. Older records, if they still exist, are stored off-site thus further increasing the effort, time and expense necessary to respond. Sims Decl., ¶6. Most payor contracts are only 1 year in length, while the statute of limitations on antitrust claims is at most 4 years. Counsel for TOPA requested that the FTC limit the time period covered by the subpoena, but the FTC refused. Adams Decl., ¶7. TOPA respectfully submits that a 6-year period is unrealistically long. Accordingly, TOPA requests

that the FTC subpoena be expressly limited to the last 2 years.

C. Subpoena's Burdens Dwarf Benefits.

The burden of complying with this overbroad subpoena dwarfs the likely benefit. For example, TOPA is not a member of NTSP, thus TOPA is unlikely to have many of the documents requested, such as communications regarding membership in NTSP and related matters. Thus, the FTC is seeking discovery that is needlessly broad.

TOPA is a group practice with almost 200 physicians spread over many communities in Texas and New Mexico. Sims Decl., ¶3. Only about 15 TOPA physicians regularly practice medicine in the Fort Worth area where NTSP operates; the other physicians practice in communities not served by NTSP. Sims Decl., ¶7. Of those TOPA physicians in Fort Worth, only some of them are purportedly individually members of NTSP. Thus, the vast majority of TOPA physicians have no affiliation with NTSP in any capacity. Sims Decl., ¶7. Yet, the FTC subpoena unreasonably seeks information about all TOPA physicians. While the FTC has expressed a willingness to limit its discovery "for now" to TOPA's Fort Worth physicians, it currently refuses to permanent limit its discovery to just those physicians purportedly members of NTSP. Adams Decl., ¶5. Thus, the FTC is seeking discovery that is again needlessly broad.

Moreover, the NTSP-affiliated contracts that the small minority of TOPA's Fort Worth physicians individually currently have are only risk contracts with a single payor. Sims Decl., ¶7. As noted in the Complaint, such risk contracts are not the subject of the FTC's claims. Thus, none of TOPA's contract documents or communications regarding such contracts will be relevant to the FTC's claims. TOPA's pricing, revenue and patient information for risk contracts of any affiliation and non-risk contracts not affiliated with NTSP likewise is not relevant to the FTC's claims. Yet the burden to TOPA of gathering and producing such information is huge.

Hundreds of thousands of pages of information would have to be reviewed and many employees diverted from their normal job assignments. Sims Decl., ¶8 TOPA respectfully submits that it should not be required to produce any documents unless and until the FTC limits its requests in a manner sufficient to reasonably alter that balance.

D. Existing Protective Order Does Not Adequately Protect TOPA.

Many of the documents requested by the FTC subpoena contain competitively sensitive information, such as pricing, revenues, contract terms, utilization, and practice analysis data. All such information is confidential and treated by TOPA as trade secrets. Sims Decl., ¶9. TOPA would be competitively disadvantaged if such information were disclosed to TOPA's competitors or its payors. Sims Decl., ¶9. Moreover, the requested information also necessarily contains patient identification and other patient data which may not be disclosed by law. Sims Decl., ¶9.

On October 16, 2003, a protective order was issued in this proceeding. TOPA was not invited to participate in the drafting of that order. The protective order allows the producing party to designate certain documents as either confidential or "For Attorney Eyes Only"; however the administrative cost and burden on TOPA to comply the mechanisms in the order are substantial. While the protective order places some restrictions on certain categories of documents, the order does not adequately protect TOPA. For example, there is no category for designating documents that contain patient identification and other patient data, which may not be disclosed by law with limited exceptions not applicable here. As another example, certain documents can be designated as "For Attorney Eyes Only", yet such documents can be shown to competitor or payor witnesses with little or no warning to TOPA, thus effectively preventing judicial review before disclosure. Moreover, the protective order does not adequately prevent

attorneys in the case from discussing the data in the documents with their respective clients. TOPA respectfully submits that it should not be required to produce any documents unless and until the entry of a more restrictive protective order that adequately protects TOPA and its patients while reducing the administrative cost and burden on TOPA to comply with the order.

E. FTC Should Reimburse Non-Party TOPA For Its Expenses.

The cost of complying with the FTC subpoena in its present form will be substantial requiring the work of dozens of employees reviewing, organizing, and copying thousands of documents. Sims Decl., ¶8. TOPA will also incur legal expenses contesting the scope of subpoena. Compliance with the FTC subpoena will cause TOPA to suffer undue financial harm. Sims Decl., ¶8. Accordingly, the FTC should reimburse TOPA's expenses related to responding to this subpoena.

CONCLUSION

For the foregoing reasons, TOPA respectfully submits that the Administrative Law Judge should modify or limit the FTC subpoena to non-party TOPA, who is not a member of respondent NTSP, and issue an order clarifying that TOPA need not produce the individual physicians' documents, limit the time scope of the subpoena to two years, limit the unfair and disproportionate burden this subpoena would otherwise impose on TOPA, impose more protection for documents produced while decreasing the administrative burden and cost to TOPA, and require the FTC to reimburse TOPA for all expenses incurred in complying with and contesting this subpoena.

Respectfully submitted,

PASSMAN & JONES,
A Professional Corporation

By: 

James F. Adams
State Bar No. 008363450

2500 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 742-2121
(214) 748-7949 – FAX

ATTORNEYS FOR NON-PARTY MOVANT
TEXAS ONCOLOGY, P.A.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the foregoing instrument was served on the following on November 19, 2003:

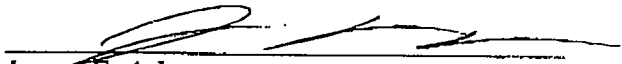
Michael J. Bloom
Federal Trade Commission
One Bowling Green, Suite 318
New York, NY 10004

Barbara Anthony, Director
Federal Trade Commission
One Bowling Green, Suite 318
New York, NY 10004

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

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

Gregory S.C. Huffman
Thompson & Knight, L.L.P.
1700 Pacific Ave. #3300
Dallas, TX 75201-4693


James F. Adams



SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

<p>1. TO</p> <p>Texas Oncology, PA 1001 12th Avenue, Suite 200 Fort Worth, Texas 76104</p>	<p>2. FROM</p> <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION OR INSPECTION</p> <p>Federal Trade Commission One Bowling Green, Suite 318 New York, New York 10004</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p style="text-align: center;">Maria Coppola</p>
<p>5. DATE AND TIME OF PRODUCTION OR INSPECTION</p> <p style="text-align: center;">November 21, 2003</p>	

6. SUBJECT OF PROCEEDING

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7. MATERIAL TO BE PRODUCED

See attached specifications.

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL REQUESTING SUBPOENA</p> <p>Michael J. Bloom Federal Trade Commission One Bowling Green, Suite 318 New York, New York 10004</p>
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<p>DATE ISSUED</p> <p>OCT 16 2003</p>	<p>SECRETARY'S SIGNATURE</p> <p style="text-align: center;"><i>Donald S. Clark</i></p>
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GENERAL INSTRUCTIONS

<p style="text-align: center;">APPEARANCE</p> <p>The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.</p> <p style="text-align: center;">MOTION TO LIMIT OR QUASH</p> <p>The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.</p>	<p style="text-align: center;">TRAVEL EXPENSES</p> <p>The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address of this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.</p>
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This subpoena does not require approval by O the Paperwork Reduction Act of 1980.

EXHIBIT

A

Subpoena Duces Tecum to Texas Oncology
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DEFINITIONS

1. The term "practice group" means Texas Oncology, PA, affiliated enterprises, physicians practicing medicine through Texas Oncology, PA or any affiliated enterprise, and the officers, directors, employees, agents, representatives, consultants and all other persons under the direction or control of Texas Oncology, PA or any affiliated enterprise. An "affiliated enterprise" is any person that partially or totally controls, is partially or totally controlled by, or is under common partial or total control with Texas Oncology, PA.
2. The term "physician," insofar as it relates to the practice group, means each physician, and all persons acting for or on behalf of each physician, who practices medicine under the apparent auspices of the practice group, irrespective of such factors as ownership interest, employee status, or full- or part-time designation. Insofar as it relates to other physicians, the term "physician," means each physician and all persons acting for or on behalf of each physician.
3. The term "NTSP" means North Texas Specialty Physicians, affiliated enterprises, and the officers, directors, members, participating physicians, employees, agents, representatives, consultants and all other persons under the direction or control of North Texas Specialty Physicians or any affiliated enterprise. An "affiliated enterprise" is any person that partially or totally controls, is partially or totally controlled by, or is under common control with North Texas Specialty Physicians.
4. The term "health plan" includes any third-party payor, health maintenance organization (HMO), preferred provider organization (PPO), fee-for-service indemnity insurance, employer self-insured health benefit plan, Medicare, Medicaid, or any other private or governmental health care plan or insurance of any kind.
5. The term "physician organizations" means all associations of physicians, including sole proprietorships, partnerships, foundations, professional corporations of physicians, physician independent practice associations ("IPAs"), Physician-Hospital Organizations ("PHOs"), and PPO networks.
6. The term "documents" means all computer files and written, recorded, and graphic materials of every kind in the possession, custody or control of the company. The term "documents" includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer

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systems; copies of documents that are not identical duplicates of the originals; and copies of documents the originals of which are not in the possession, custody or control of the company.

(a) Unless otherwise specified, the term "documents" excludes bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature and also excludes architectural plans and engineering blueprints.

(b) The term "computer files" includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If the company believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss a possible modification to this instruction with Commission representative, Michael Bloom, whose contact information is given at Instruction 8 of this Request. The Commission representative will consider modifying this instruction to:

(i) exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, servers searched by the company;

(ii) limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Commission representatives; or

(iii) include other proposals consistent with Commission policy and the facts of the case.

7. The term "relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.
8. The terms "discuss" or "discussing" mean, in whole or in part, constituting, containing, describing, or addressing the designated subject matter, regardless of the length of the treatment; detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. In addition, a document that "discusses"

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another document includes the other document itself (e.g., a document that "discusses" an agreement or contract includes the agreement or contract itself). Further, these terms include any operating or financial data about the designated subject matter where such data are separately set out as in a chart, listing, table, or graph.

9. The term "including" means including, but not limited to.
10. The terms "documents sufficient to show" and "documents sufficient to identify" mean documents that are necessary and sufficient to provide the specified information. If summaries, compilations, lists or synopses are available that provide the information, these should be provided in lieu of the underlying documents.
11. The terms "identify," "identification," and "identity" mean: (a) when used in reference to a natural person, state his or her name, job title and description of each of his or her positions during the relevant time period, and the present or last known residence address and business name and address. In addition, when used in reference to a physician practicing in connection with the practice group, provide a curriculum vitae or similar documents indicating the physician's degrees, years of practice, areas of practice and specialization, Board certification or eligibility; and hospital affiliations; (b) when used in reference to a person other than a natural person, state the entity's name and address and principal place of business; (c) when used in reference to a document, state the type of document (e.g., letter, memorandum, book, telegram, application, chart, report, photograph, sound reproduction, etc.), its date, title and general subject matter, its title in the case of publication, its author, each addressee, all individuals designated on the document to receive a copy (or if any such document was, but is no longer in existence, state precisely what disposition was made of it, when such disposition took place, and the identity of the person who ordered or authorized such disposition); and, (d) when used in reference to an oral communication, to identify the persons who participated in the conversation and state when it took place, where, who was present, and who said what to whom, in words or substance.
12. The terms "each," "any," and "all" mean "each and every."
13. The terms "and" and "or" have both conjunctive and disjunctive meanings as necessary to bring within the scope of this request anything that might otherwise be outside its scope.
14. The singular form of a noun or pronoun includes its plural form, and vice versa; and the use of a verb in any tense shall be construed as the use of the verb in all other tenses as

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necessary to bring within the scope of the request all documents that might otherwise be construed to be outside its scope.

15. The term "year" means either the calendar year or, for financial records, the fiscal year.
16. The term "agreement" means any oral or written contract, arrangement or understanding, whether formal or informal, between two or more persons, together with all modifications or amendments.
17. The term "plan" means a proposal, recommendation or consideration, whether or not precisely formulated, finalized, authorized, or adopted.
18. The term "person" includes NTSP and means any natural person, business entity, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust.
19. The term "communication" means any exchange, transfer, transmittal or dissemination of information, regardless of the means by which it is accomplished, in the form of facts, opinions, ideas, inquiries or otherwise.
20. The term "revenues" means revenues attributable to the provision of physician services.
21. The term "participating physician" means any physician or physician entity that has contracted with NTSP regarding the provision or contemplated provision of the physician's services to any hospital, health plan, or other physician organization, irrespective of whether NTSP refers to such physician or physician entity as a member, participating physician, sub-contracted physician, or by any other designation. "Participating physicians" includes all or any subset of participating physicians not limited to members of a single physician entity.
22. The terms "sharing of financial risk," "financial risk-sharing," and similar terms mean the sharing of substantial financial risk by participating physicians, through such devices as: the provision of physician services to payors at a capitated rate; the provision of physician services for a predetermined percentage of premium or revenue from payors; the use of significant financial incentives (e.g., substantial withholds) for physicians who participate to achieve, as a group, specified cost-containment goals, or the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any individual

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patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors.

23. The term "participation agreement" means any agreement between NTSP and a physician regarding the provision or contemplated provision of the physician's services to any hospital, health plan, or other physician organization.
23. The term "contract" means any agreement or contemplated agreement between or among two or more people supported, or contemplated to be supported, by mutual consideration. "Contract" includes, but is not limited to, partial or complete proposals, descriptions, summaries, drafts, counter-offers, revisions, amendments, and terms thereof, whether or not any agreement ultimately was executed.

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INSTRUCTIONS

1. Unless otherwise indicated, each specification covers documents dated, generated, received, or in effect from January 1, 1998 to the September 30, 2003.
2. Compliance with this request requires a search of all documents, wherever located, within the possession, custody, or control of practice group.
3. Production of documents "separately for each physician in the practice group" requires the production of documents applicable to each physician individually and to physicians within the practice group more generally (e.g., a payor-practice group contract for the provision of medical services by the practice group generally). Where documents applicable to individual physicians are unavailable, generally responsive documents should be provided for the practice group as a whole and for any parts, sections, or departments of the practice group for which responsive documents are available.
4. This subpoena does not call for the production of patient records or other information to the extent containing confidential patient information.
5. In addition to hard-copy documents, the search will include all of practice group's electronically-stored computer and voicemail data. Sources of such data include the following:
 - a. Desktop personal computers ("PCs") and workstations; PCs, workstations, minicomputers and mainframes used as file servers, application servers, or mail servers; laptops, notebooks, and other portable computers, whether assigned to individuals or in computer pools available for shared use; and home computers used for work-related purposes;
 - b. Backup disks and tapes, archive disks and tapes, and other forms of offline storage of computer or voicemail data, whether stored onsite with the computer used to generate them, stored offsite in another practice group facility or stored offsite by a third-party, such as in a disaster recovery center; and
 - c. Computers and related offline storage used by agents, consultants, and other persons as defined above, which may include persons who are not

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employees of practice group or who do not work on practice group's premises.

6. The response to this Request shall be submitted in the following manner:

- a. Documents provided shall be complete and, unless privileged, unredacted, submitted as found in the company's files (e.g., documents that in their original condition were stapled, clipped or otherwise fastened together or maintained in separate file folders shall be produced in such form).
- (i) practice group may submit legible photocopies (with color photocopies where necessary to interpret the document), in lieu of original documents, provided that such copies are accompanied by an affidavit of an officer of practice group stating that the copies are true, correct and complete copies of the original documents.
- (ii) With the agreement of the Commission representative identified on the last page of this Request, practice group may submit electronic reproductions in lieu of photocopies or original documents, provided that such reproductions are accompanied by an affidavit of an officer of practice group stating that the reproductions are true, correct and complete reproductions of the original documents, and provided that the Commission representative approves the electronic document format and production method in advance. Electronic formats and production methods the Commission representative will consider include, without limitation, production in a common page-based format providing images combined with or linked to searchable text files, with the files provided to the Commission either through a secure online web-based or equivalent hosted document repository offering industry-standard access, security, and functionality deemed acceptable by the Commission representative in advance, or on an external network appliance or CD-ROM providing the files in a searchable local database format such as Summation® that provides functionalities equivalent to those available on hosted online repositories, and deemed acceptable by the Commission representative in advance.

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- b. Documents submitted in hard copy shall be submitted in sturdy cartons not larger than 1.5 cubic feet. Number each such box and mark each such box with corporate identification and the name(s) of the person(s) whose files are contained in that box.
- c. Documents submitted (whether in hard copy or electronic form) shall either be produced: as they are kept in the usual course of business or organized and labeled to correspond with the specifications in this subpoena. Mark each page with corporate identification and consecutive document control numbers. Place all documents produced in file folders, and mark each file folder with practice group's name, the name of the person whose documents are in the folder, how the original file was labeled, and, if organized by specification, information sufficient to ascertain to which specification(s) the document is responsive; provide equivalent information for documents produced in electronic form.
- d. Provide a master list showing: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that persons' documents; and (iii) if organized by specification, information sufficient to ascertain to which specification(s) the document is responsive. If the master list exists as a computer file(s), provide the master list both as a printed hard copy and in machine-readable form (provided that Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission staff representatives will provide a sample master list upon request.
7. In the event that any document required to be identified or produced has been destroyed, lost, discarded, or otherwise disposed of, any such document is to be identified as completely as possible, including, but not limited to, the following information: date of disposal, manner of disposal, reason for disposal, person authorizing the disposal and person disposing of the document.
8. If any documents are withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log that includes each document's authors, addressees, date, a description of each document, and all recipients of the original and any copies. Attachments to a document should be identified as such and entered separately on the log. For each author,

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addressee, and recipient, state the person's full name, title, and employer or firm, and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable the Commission to assess the applicability of the privilege claimed. For each document withheld under a claim that it constitutes or contains attorney work product, also state whether practice group asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all nonprivileged portions of any responsive document (including nonprivileged or redactable attachments) for which a claim of privilege is asserted (except where the only nonprivileged information has already been produced in response to this instruction), noting where redactions in the document have been made.

9. Responsive documents, together with a verified statement identifying the person(s) involved and the procedures followed in conducting the document search and preparing the response to this subpoena, should be sent to: Maria Coppola, Federal Trade Commission, One Bowling Green, Suite 318, New York, NY 10004. Questions regarding this request should be addressed to Ms. Coppola at 212.607.2821.

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SPECIFICATIONS

Separately for each physician in the practice group:

1. Documents sufficient to identify (a) physician; (b) each location from which he/she has practiced medicine and indicating whether his/her practice at each such location is or is not in connection with the practice group; and (c) the percentage of that physician's total hours and revenues attributable to each such location; and to show (d) each physician organization in which physician participates or has participated; (e) the nature of physician's participation in each physician organization (e.g., participating or member physician, section or committee member, officer or director); and (f) the period(s) of each such participation and capacity.
2. All contracts and amendments thereto between physician and; (a) NTSP, (b) any other physician organization, (c) any health plan, (d) or any hospital, relating to the provision of physician services.
3. All other documents relating to contracts and amendments thereto between physician and (a) NTSP, (b) any other physician organization, (c) any health plan, (d) or any hospital, relating to the provision of physician services, including, but not limited to, correspondence, memoranda, and notes of discussions between or among physicians, or with any physician organization or health plan, relating to possible, contemplated, or actual participation in a contract for the provision of health services, possible, contemplated, or actual terms of participation in any health plan, and possible, contemplated, or actual price(s) or pricing of services.
4. All correspondence of any kind between physician and NTSP, or between physician and any other person relating to NTSP; and all other documents relating to NTSP.
5. All correspondence of any kind between physician and any other physician organization, or between physician and any other person, relating to any other physician organization; and all other documents relating to any other physician organization.
6. Separately for each of physician's 100 most commonly used CPT codes and for each of physician's 100 most revenue-producing CPT codes, documents sufficient

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- to show: (a) the payment due physician from each health plan under each plan in which physician has participated or participates, (b) physician's annual revenues attributable to each such CPT code, and (c) the number of procedures performed under each such CPT code.
7. Documents sufficient to show physician's annual revenues: (a) separately for each office or facility at which physician has practiced; and (b) in total. If the sum of the annual revenues listed in part (a) of this specification does not equal the total shown in response to part (b) of this specification, provide documents sufficient to explain the difference.
 8. Documents sufficient to show physician's annual revenues attributable to: (a) contracts between each health plan and NTSP, (b) contracts between each health plan and each other physician organization; (d) direct contracts between physician and health plans; and (e) payment by patients themselves. If the sum of the annual revenues listed in specification 8 does not equal the total annual revenues shown in response to specification 7, provide documents sufficient to explain the difference.
 9. Documents sufficient to show physician's annual revenues attributable to each health plan. If the sum of these revenues and those detailed in response to specifications 8(d) and (e) (relating to direct contracts between physician and health plans and payments by patients themselves) does not equal the total annual revenues shown in response to specification 7, provide documents sufficient to explain the difference.
 10. Documents sufficient to show physician's annual revenues attributable to contracts between each health plan and NTSP that is derived from: (a) HMO arrangements pursuant to which physician bears significant financial risk; (b) fee-for-service HMO arrangements; (c) PPO arrangements; and (d) any other arrangements. If the sum of these revenues does not equal those detailed in response to specification 8(a) (relating to contracts between each health plan and NTSP), provide documents sufficient to explain the difference.
 11. All other documents that relate to the importance to physician of contracting, directly or indirectly, for the provision of medical services: (a) through physician organizations or any particular physician organization(s); or (b) with any particular health plan(s).

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12. All other documents that relate to physician's consideration or determination to participate (directly or indirectly) or not participate in: (a) NTSP; (b) any other physician organization(s); and (c) any health plan or type of health plan.
13. Documents sufficient to show the number of physician's patients that reside in: (a) Tarrant County; (b) Johnson County; (c) Parker County; (d) Denton County; (e) Collin County; (f) Ellis County; (g) Wise County; (e) Dallas County; (f) other counties; and (g) each zip code of patient residence. If the sum of the patients enumerated in response to parts (a) through (f) of this specification does not equal the sum enumerated in response to part (g) of this specification, provide documents sufficient to explain the difference.
14. Documents sufficient to show physician's annual revenues derived from treatment of patients that reside in: (a) Tarrant County; (b) Johnson County; (c) Parker County; (d) Denton County; (e) Collin County; (f) Ellis County; (g) Wise County; (e) Dallas County; (f) other counties; and (g) each zip code of patient residence. If the sum of the revenues enumerated in response to parts (a) through (f) of this specification does not equal the sum enumerated in response to part (g) of this specification, provide documents sufficient to explain the difference.
15. All documents that relate to changes in physician's practice of medicine required to be undertaken or undertaken as a result of physician's contemplated or actual participation in any contract with another physician organization.
16. All other documents that relate to any physician's possible, contemplated, or actual participation or deparicipation in any health plan.
17. Such other documents as will identify each physician within the practice group and his/her area of practice, e.g., primary care, allergy and immunology, or general surgery.

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Docket Number 9312

VERIFICATION

This response was prepared by me or under my personal supervision from the documents and records of Texas Oncology, PA, in accordance with the instructions and definitions in the subpoena duces tecum issued by the Federal Trade Commission in docket number 9312. It is complete and correct to the best of my knowledge and belief. Where copies of documents have been provided, the copies are true, correct, and complete copies of Texas Oncology, PA's original documents.

Signature of Official

Type or Print Name

Title

Date

Subscribed and sworn to before me at the County of _____, State of _____, this _____ day of _____, 2003.

NOTARY PUBLIC

My commission expires _____

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Docket Number 9312

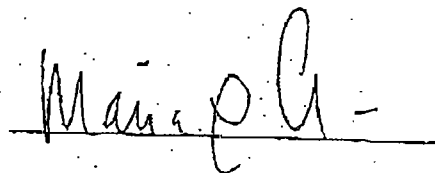
CERTIFICATE OF SERVICE

I, Maria Coppola, hereby certify that on November 6, 2003, I caused a copy of the attached subpoena duces tecum to be served upon the following persons by certified mail:

Texas Oncology, PA
1001 12th Avenue, Suite 200
Fort Worth, Texas 76104

and the following person by Federal Express:

Gregory S. C. Huffman, Esq.
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693



Maria Coppola

subpoena with FTC attorney John Platt. Later the same day, Mr. Platt and I discussed at length various topics, including TOPA's concerns about the scope of the subpoena, the time in which to respond, the perceived vagueness of the subpoena language, various privilege issues, and the burden of complying with the FTC subpoena.

5. TOPA is a group practice with several dozen physicians working in offices in communities throughout Texas and also New Mexico. Mr. Platt indicated that while the FTC was willing to limit the scope of the subpoena to documentation and information about just TOPA's Fort Worth based physicians "for now", the FTC was unwilling to agree to a permanent limit. Mr. Platt indicated that the FTC also refused to limit the scope of the subpoena to just those physicians that were purportedly members of North Texas Specialty Physicians ("NTSP"), which operates in Fort Worth, Texas.

6. Mr. Platt indicated that the FTC was also unwilling to limit the requested contracts just to non-risk payor contracts affiliated with NTSP. Mr. Platt indicated that the FTC was also unwilling to limit the requested contracts just to any type of payor contracts affiliated with NTSP.

7. Mr. Platt indicated that the FTC was unwilling to limit the duration of the requested documents to any period less than 6 years.

8. Mr. Platt indicated that the FTC was unwilling to extend the deadline to respond to the subpoena.

9. After conferring with TOPA, I left two messages for Mr. Platt on November 18, 2003 to further discuss a narrowing of the scope of the FTC subpoena, an extension of time in which to investigate and respond, and a protective order that adequately protected TOPA. I did not receive a reply.

10. On November 19, 2003, I again called Mr. Platt and was informed that his voicemail box

was full. I was told by the FTC staff that Mr. Platt would not be back in the office until November 21, 2003, the compliance deadline. On that same day, I left a message for Ms. Coppola requesting to discuss the scope of the FTC subpoena, an extension of time in which to respond, and confer regarding TOPA's motion for a protective order. I did not receive a reply as of the execution of this declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 19, 2003.



James F. Adams

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312

DECLARATION OF J. E. SIMS

I, J. E. Sims, declare as follows:

1. My name is J. E. Sims. I am over the age of 21 years old, and I am competent and qualified to make this declaration. I have never been convicted of a felony or a crime of moral turpitude. I have personal knowledge of the facts set forth herein, all of which are true and correct.

2. I am an employee of Texas Oncology, P.A. ("TOPA") and have knowledge of TOPA's general business operations. I have reviewed the subpoena duces tecum issued to TOPA at the request of the Federal Trade Commission in the above-styled adjudicative proceeding ("FTC subpoena"). TOPA received the FTC subpoena at its Fort Worth office on November 10, 2003. The FTC subpoena calls for the production of documents at the FTC's offices in New York, New York on November 21, 2003. Compliance with this subpoena would be unfair and oppressive to TOPA, and potentially injurious to competition in my opinion.

3. TOPA is a physician group practice with almost 200 physicians working in multiple offices in communities located throughout Texas and also New Mexico. Neither TOPA nor its physicians are parties to the above-styled adjudicative proceeding.



4. North Texas Specialty Physicians ("NTSP") is an independent physician association operating in Fort Worth, Texas. TOPA has never been a member of NTSP. Neither TOPA nor its physicians currently have any "non-risk" payor contracts through NTSP.

5. The FTC subpoena appears to seek documents related to and controlled by the individual physician members of TOPA. For example, the FTC subpoena requests certain financial and personal practice data that TOPA, as a group practice, does not have a need to routinely report broken down by the individual physicians.

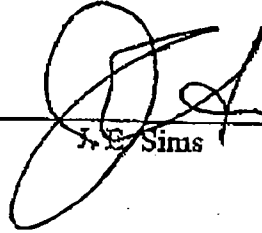
6. The FTC subpoena seeks documents generated or received over almost a 6-year period. The amount of effort, time and expense necessary to respond to the FTC subpoena grows in proportion to the length of time covered by the subpoena. Older records, if they still exist, are stored off-site thus further increasing the effort, time and expense necessary to respond.

7. Only about 15 TOPA physicians regularly practice medicine in the Fort Worth offices; the other physicians practice in other communities. Of those TOPA physicians in Fort Worth, only some of them are purportedly individually members of NTSP. The only NTSP-affiliated contracts that those TOPA physicians currently have are risk contracts with a single payor. Revenue from those contracts is minimal; I estimate that such contracts generate less than 0.1% of TOPA's annual revenue. The vast majority of TOPA physicians have no affiliation with NTSP in any capacity.

8. The burden to TOPA of gathering and producing the documents and information requested by the FTC subpoena in its current form will be huge. If the scope of the current FTC subpoena is not modified, hundreds of thousands of pages of information will potentially have to be reviewed and many employees diverted from their normal job assignments. Such compliance efforts could cause operational disruption and financial harm to TOPA.

9. Many of the documents requested by the FTC subpoena contain competitively sensitive information, such as pricing, revenues, contract terms, utilization, and practice analysis data. All such information is confidential and treated by TOPA as trade secrets. In my opinion, TOPA would be competitively disadvantaged if such information were disclosed to TOPA's competitors or its payors. Some of the requested information, in its current form, also necessarily contains patient identification and other patient data.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 19, 2003.



J. E. Sims

PASSMAN & JONES

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

2500 RENAISSANCE TOWER
1201 ELM STREET
DALLAS, TX 75270-2599
(214) 742-2121
(214) 748-7949 - FAX
WWW.PASSMANJONES.COM

FAX TRANSMISSION

November 20, 2003

2:52 PM

PLEASE DELIVER: 37 PAGE(S) (Including Cover Sheet) TO THE FOLLOWING:

<u>Name</u>	<u>Company Name</u>	<u>Facsimile Number</u>	<u>Phone Number</u>
Honorable D. Michael Chappell		(202) 326-2496	

FROM: Jim F. Adams

EMAIL ADDRESS: jimadams@passmanjones.com

FILE NO.: 20184-078

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

IF YOU EXPERIENCE A PROBLEM RECEIVING THIS FAX, PLEASE CALL CAROLYN AT 214-742-2121, EXT. 2051

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