[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' BRIEF IN SUPPORT OF MOTION FOR SUMMARY DECISION

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Your Honor should grant this motion and dismiss this entire action, brought pursuant to section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, because Complaint Counsel cannot prove essential elements of its case, under a *per se* or other basis. Respondent North Texas Specialty Physicians ("NTSP") bases this motion on Complaint Counsel's failure to do the following two things: (1) prove that any actual collusion occurred; and (2) prove a relevant market — or effect on a relevant market — to establish liability under a rule-of-reason analysis, which is required for this type case.

The Complaint in this matter alleges that NTSP, a memberless, non-profit corporation that is the only entity still participating in risk contracts in the Dallas-Fort Worth Metroplex, has restrained trade by purportedly doing three things:

(1) "facilitating, negotiating, entering into, and implementing agreements among its participating physicians on price or other competitively significant terms;"

(2) "refusing or threatening to refuse to deal with payors except on collectively agreed-upon terms;" and

(3) "negotiating fees and other competitively significant terms in payor contracts for NTSP's participating physicians, and refusing to submit payor offers to participating physicians unless and until price and other competitively significant terms conforming to NTSP's contract standards have been negotiated."[1]

To prevail on their theory of antitrust liability, regardless of whether it is on a *per se* or other basis, Complaint Counsel will first have to prove that NTSP has been involved in collusion among its participating physicians. Second, because Complaint Counsel is challenging conduct

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[1] Complaint ¶ 12.

by NTSP that "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,"[2] Complaint Counsel must conduct a rule-of-reason analysis to establish liability. But the evidence (or lack thereof) in this case shows that Complaint Counsel will not be able to prove either of these elements. In fact, Complaint Counsel's expert has admitted under oath that he has not seen any evidence of actual collusion by NTSP's participating physicians and that he has not defined any relevant market. These undisputed failures entitle NTSP to summary decision. Your Honor should, therefore, dismiss this entire action.

II. FACTUAL BACKGROUND

Complaint Counsel alleges that NTSP has participated in collusion among its participating physicians in the "Fort Worth area," which the Complaint defines as "the Dallas-Fort Worth metropolitan area, mostly Fort Worth and the 'Mid Cities.'"[3] NTSP is involved in both risk contracts and non-risk contracts.[4] The Complaint alleges that "NTSP periodically polls its participating physicians" to estimate at what rate levels a majority of the physicians, including those on its risk-capitation panel (the "Risk Panel"), will likely be interested in non-risk contracts.[5] NTSP then calculates the mean, median, and mode of the Risk Panel physicians' poll responses separately for HMO and for PPO types of offers.[6] Because NTSP has limited resources and because NTSP does not want to expend its resources or efforts on offers which will

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

[3] Complaint ¶ 5.

[4] *Id.* ¶ 14.

[5] *See id.* ¶ 17 ("NTSP periodically polls its participating physicians, asking each to disclose the minimum fee, typically stated in terms of a percentage of RBRVS, that he or she would accept in return for the provision of medical services pursuant to an NTSP-payor agreement.").

[6] *See id.* ¶ 17; Deposition of Karen Van Wagner, November 19, 2003, at 16-19.

not involve a significant percentage of its Risk Panel physicians, the board of directors instructs NTSP's staff not to expend their time and resources on payor offers below these two mean/median/mode threshold levels.[7]

[redacted][8] to carry over those same techniques to their non-risk medical care.[9] [redacted][10]

NTSP has no power to bind and does not bind any participating physician or physician group to a non-risk contract.[11] After NTSP's board sets the threshold rate levels for its involvement, any non-risk offer presented by a payor to NTSP and in which NTSP chooses to become involved as a contracting party is always then messengered to NTSP's participating physicians.[12] Each physician or physician group then makes an independent decision whether to

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[7] Deposition of Tom Deas, M.D., October 10, 2002, at 21-22, 25; Deposition of Tom Deas, M.D., January 26, 2004, at 37-38; Deposition of Jack McCallum, M.D., at 121-22, 124; Deposition of Ira Hollander, M.D., at 27-28; Deposition of Harry Rosenthal, Jr., M.D. ("Rosenthal Deposition"), at 25.

[8] [redacted]

[9] Deposition of William Vance, M.D., Volume 1, at 117-118; Deposition of William Vance, M.D., Volume 2, at 287-88.

[10] [redacted] Dr. Wilensky was appointed by President (G.H.W.) Bush to be the Administrator of the Health Care Financing Administration, overseeing the Medicare and Medicaid programs from 1990 to 1992. She also served as a Presidential advisor on health care issues and is one of the nation's top authorities in that area. Dr. Hughes is also a nationally-known authority and serves as professor of health industry management at Northwestern University.

[11] Deposition of H.E. Frech, Ph.D. ("Frech Deposition") at 209.

[12] *See id.* at 209.

accept or reject the offer.[13] For those offers that do not qualify for NTSP involvement or that a payor chooses to present through another independent physician association ("IPA") or directly to physicians, the physicians have the right to accept those offers on their own. [redacted][14]

Complaint Counsel believes that NTSP must messenger every payor offer to its participating physicians,[15] 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. Complaint Counsel's economic expert, Dr. H. E. Frech, admits, however, that messengering is essentially a ministerial task that anyone, including payors, can easily

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[13] *Id.* at 209; Deposition of Tom Quirk ("Quirk Deposition") at 54.

[14] [redacted]

[15] *See* Complaint ¶ 11 (stating that messenger model "will not avoid horizontal agreement" if the messenger "facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payor's offer to them based on the agent's, or the participants', opinion on the appropriateness, or lack thereof, of the offer"); *Id.* ¶ 18 (identifying as alleged illegal act or practice NTSP's statement that it "will not enter into or otherwise forward to its participating physicians any payor offer that does not satisfy those fee minimums").

accomplish.[16] [redacted]

[redacted][17]

As a second phase of the case, Complaint Counsel also challenges various communications and actions by NTSP over the past seven years that are alleged to facilitate collusion among physicians not to deal with payor offers in which NTSP does not participate. One type of communication involves NTSP's disclosure to its panel of participating physicians of the threshold rate levels for non-risk HMO and PPO offers established by NTSP's board of directors.[18] Of course, such disclosures are needed so the physicians will know when NTSP will be available to them as a reviewing and contracting party for a payor's offer.

[redacted][19] [redacted][20] One of MSM's former executives is currently serving a prison term for some of that malfeasance.[21]

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[16] Frech Deposition at 89-91.

[17] [redacted]

[18] 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.").

[19] [redacted]

[20] [redacted]; Deposition of Dave Roberts at 44-48; Deposition of Mark Collins, M.D. ("Collins Deposition") at 6-9.

[21] Press Release, United States Department of Justice, Former Accounting Manager for City of Grand Prairie Sentenced to 8 Years (Nov. 12, 2003), available at http://www.usdoj.gov/usao/txn/PressRel03/miller_sen_pr.html.

[redacted][22][redacted]

[redacted][23]

All of these particularized allegations notwithstanding, Dr. Frech admits that he knows of *no evidence* that any physician has ever colluded with anyone else or has ever refused to entertain any payor offer which was tendered to him or her directly by a payor or through another IPA.[24]

III. ARGUMENT AND AUTHORITIES

A. The legal standard for a motion for summary decision.

The standards governing a motion for summary decision are well settled. Rule of Practice 3.24 provides that "any party . . . may move . . . for a summary decision in the party's favor upon all or any part of the issues being adjudicated."[25] Rule 3.24 further provides that summary decision should be entered when "there is no genuine issue as to any material fact and . . . the moving party is entitled to such decision as a matter of law."[26] Once a motion for summary judgment decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleadings; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial."[27]

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[22] Jagmin Deposition at 74; [redacted]

[23] [redacted]

[24] Frech Deposition at 75-76, 80, 97, 155, 209.

[25] 16 C.F.R. § 3.24(a)(1).

[26] 16 C.F.R. § 3.24(a)(2).

[27] 16 C.F.R. § 3.24(a)(3).

While Your Honor must draw all reasonable inferences in favor of the non-moving party, "antitrust law limits the range of permissible inferences from ambiguous evidence."[28] The Commission has emphasized that "the party opposing summary judgment is required to raise more than 'some metaphysical doubt.'"[29] As the Commission has explained, "[t]he mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. A material fact is a fact which might affect the outcome of a suit because of its legal import."[30]

Although factual issues may exist as to some aspects of Complaint Counsel's allegations, those issues are immaterial because they do not change the two indisputable legal deficiencies in Complaint Counsel's case: (1) failure to identify any actual collusion, and (2) failure to prove a relevant market. For these reasons, NTSP is entitled to summary decision on Complaint Counsel's claims under a *per se* or other theory.

B. Complaint Counsel cannot prove essential elements of their claims.

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,"[31] who are alleged to compete with each other.[32] As the Supreme Court has noted, "[t]he FTC Act's prohibition of unfair competition and

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[28] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "Since the standard for addressing a summary decision motion under Commission Rule 3.24(a)(2), 16 C.F.R. §3.24(a)(2), is similar to that used in considering motions for summary judgment under Fed. R. Civ. P. 56(c), decisions interpreting this rule are persuasive." *In re Rambus Inc.*, No. 9302, 2003 FTC LEXIS 55, at *3 (April 14, 2003) (citing *In re Kroger Corp.*, 98 F.T.C. 639, 726 (1981)).

[29] *In re College Football Ass'n,* No. 9242, 1994 FTC LEXIS 112, at *35 (June 16, 1994) (citations omitted).

[30] *In re Trans Union Corp.,* 118 F.T.C. 821, 839 (1994) (citations omitted).

[31] Complaint Counsel's Second Supplemental Responses to Respondent's First Set of Interrogatories at 6.

[32] *See* Complaint ¶ 12 (stating that NTSP acts as "combination of competing physicians").

deceptive acts or practices overlaps the scope of § 1 of the Sherman Act aimed at prohibiting restraint of trade."[33] The Commission relies on Sherman Act law when deciding cases alleging unfair competition.[34]

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.[35] Regardless of the method of analysis employed, Complaint Counsel must prove some form of "concerted action" to establish liability.[36] "Section 1 of the Sherman Act[, like section 5 of the FTC Act,] does not proscribe independent conduct."[37]

In this case, Complaint Counsel claims that NTSP's conduct is unlawful only under a *per se* or truncated rule-of-reason analysis.[38] Although Complaint Counsel relies on only these two theories, NTSP addresses all three theories below and explains why Complaint Counsel cannot establish liability under any theory of relief.

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[33] *Cal. Dental Ass'n*, 526 U.S. at 763 n.3 (citations omitted).

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

[35] *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).

[36] *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'").

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

[38] Complaint Counsel's Response and Objections to North Texas Specialty Physicians' First Request for Admissions to Complaint Counsel at 3 ("Complaint Counsel admits that it claims that the conduct of NTSP is per se unlawful. Complaint Counsel avers that, in the alternative, the conduct of NTSP is unlawful under a truncated rule of reason analysis.").

1. Complaint Counsel cannot establish liability under a *per se* theory.

Although the rule of reason applies to most claims,[39] 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."[40] To prove horizontal price fixing, Complaint Counsel must submit either direct or circumstantial evidence of an agreement between competitors (*i.e.*, the physicians).[41] Conduct that is as consistent with lawful competition as with conspiracy will not support an inference of conspiracy.[42] To survive a motion for summary decision, Complaint Counsel "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."[43] Based on this standard, Complaint Counsel's *per se* case fails as a matter of law.

a. There is no evidence of a collusive price-fixing agreement.

The evidence (or lack thereof) in this case disproves the existence of a horizontal price-fixing agreement. First, Complaint Counsel, after having been ordered to respond to contention interrogatories, admits 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

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

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

[41] *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 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.").

[42] *Matsushita*, 475 U.S. at 588.

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

significant term.[44] Moreover, Dr. Frech 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;[45]

(2) any participating physician and any other entity agreed to reject a non-risk payor offer;[46]

(3) any participating physician rejected a non-risk payor offer based on a power of attorney granted to NTSP;[47]

(4) any participating physician refused to negotiate with a payor prior to a non-risk offer being messengered by NTSP;[48]

(5) any participating physician knew what another physician was going to do in response to a non-risk payor offer;[49]

(6) any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;[50] or

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[44] 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.").

[45] Frech Deposition at 75-76.

[46] *Id.*

[47] *Id.* at 80.

[48] *Id.* at 75-76.

[49] *Id.* at 155.

[50] *Id.* at 209.

(7) any participating physician gave up his or her right to independently accept or reject a non-risk payor offer.[51]

In fact, Dr. Frech has proven that there is no collusion or agreement among NTSP's participating physicians. [redacted][52] This is 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,[53] and, in some cases, accept offers below the rates established by NTSP's board.[54]

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 rates that are actually used as thresholds by NTSP's board.[55] Such a low response rate and low correlation make it difficult to have an effective price-fixing conspiracy. Indeed, it is undisputed that not all of the participating physicians respond,[56] and that many physicians do not follow their own poll responses.[57]

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[51] *Id.*

[52] [redacted]

[53] Rosenthal Deposition at 24; Deposition of John Johnson, M.D. ("Johnson Deposition") at 25-26, 30; Collins Deposition at 36-37 (free to contract directly or through another IPA).

[54] Rosenthal Deposition at 22-23; Johnson Deposition at 25, 27.

[55] Frech Deposition at 215-16.

[56] *Id.* at 149, 215-18

[57] *Id.* at 82, 215-18.

Likewise, providing only the mean, median, and mode of the poll responses does not tell a participating physician what any other physician will do with respect to a payor offer.[58] Moreover, Dr. Frech admits that, assuming there was a conspiracy, NTSP has no effective method to police compliance.[59] Taken together, all of this evidence (or lack thereof) does not tend "to exclude the possibility that the alleged conspirators acted independently."

b. The evidence is consistent with lawful competition and procompetitive efficiencies.

In addition to being unable to exclude independent action, Complaint Counsel also cannot prove that the evidence is inconsistent with lawful competition. First, 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.[60] Second, he admits that the collection and dissemination of market information, including market prices, can potentially benefit competition.[61] In fact, Dr. Frech believes that payors conduct surveys and know what other payors are offering in a given market.[62] Third, Dr. Frech admits that physicians commonly look to IPAs to handle discussions with a payor as to the legal terms of a contract,[63] and that IPAs save costs by eliminating

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[58] *Id.* at 149, 155.

[59] *Id.* at 81, 237-40.

[60] *Id.* at 92.

[61] *Id.* at 155-58; *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.

[62] Frech Deposition at 156.

[63] *Id.* at 80.

multiplicative legal contractual reviews by individual physicians.[64] Fourth, he concedes that payors usually have to offer a higher price to get a majority or more of physicians to participate in a contract.[65] Higher prices are also especially important to attract physicians that are more sought after and perceived to be of higher quality.[66] Fifth, Dr. Frech concedes that, 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.[67] 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.[68] And NTSP's maintaining continuity of personnel — in this case, the participating physicians — is important to achieving these efficiencies.[69]

Based on all of these undisputed facts, which are admissions made by Complaint Counsel's economic expert, the evidence in this case is consistent with lawful competition and procompetitive efficiencies. Liability under a *per se* theory cannot be established.

2. Complaint Counsel cannot establish liability under a truncated rule-of-reason analysis.

A truncated or "quick look" rule-of-reason analysis is appropriate in only limited circumstances. To utilize that analysis, Complaint Counsel must show that "the great likelihood

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[64] *See id.* at 167-68 (discussing diseconomies from having each practice group conduct its own contract review).

[65] *Id.* at 182-83.

[66] *Id.* at 202; *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.").

[67] *See* Frech Deposition at 109.

[68] *Id.* at 104-05, 110-17, 240-41.

[69] *Id.* at 104-05.

of anticompetitive effects can easily be ascertained."[70] Where "any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry" than merely performing a truncated analysis.[71] In other words, if the conduct at issue "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," the truncated rule-of-reason analysis does not apply.[72]

As discussed above, the evidence in this case shows that there is no horizontal price-fixing agreement, that independent conduct cannot be excluded, and that NTSP's conduct is consistent with lawful competition and procompetitive efficiencies. Based on all that evidence, there is no "great likelihood of anticompetitive effects," and, even if there were, they cannot "easily be ascertained."

Moreover, any alleged anticompetitive effects from NTSP's conduct are "far from intuitively obvious," which eliminates Complaint Counsel's ability to rely on the truncated rule of reason. As discussed in some detail in NTSP's expert reports, which are attached to the separate statement of undisputed facts, NTSP's business model is designed to achieve efficiencies through the clinical integration techniques used for its risk capitation contracts and to extend those same efficiencies to non-risk patients. [redacted]

[70] *Cal. Dental Ass'n*, 526 U.S. at 770.

[71] *Id.* at 759.

[72] *Id.* at 771.

[redacted][73]

NTSP's right to follow its own business model and to refuse to sign and messenger contractual offers outside that model also falls squarely within the Supreme Court's repeated reaffirmations of the *Colgate* doctrine.[74] That right has been recently reiterated by the Fifth Circuit (the Court of Appeals having jurisdiction over NTSP) in its *Viazis* decision.[75]

In sum, 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.

3. Complaint Counsel would not have been able to establish liability under a rule-of-reason theory.

Having established that Complaint Counsel cannot prevail under either theory — *per se* or truncated rule of reason — on which they are relying, NTSP now turns to a theory on which Complaint Counsel does not expressly rely — the rule of reason. 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."[76] A plaintiff's failure to offer evidence of the relevant

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[73] [redacted]

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

[75] *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").

[76] *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1555 (11th Cir. 1996) (affirming summary judgment for defendants); *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.").

product or geographic market entitles a defendant to summary decision.[77] That is exactly the situation here.

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. In looking at your reports, I did not see that you posited any relevant markets in this case. Is that correct?
>
> A. That's correct.[78]

Because he has not defined a relevant market, Dr. Frech admits that he has also not calculated any concentration ratios.[79] Dr. Frech also admitted that, although he has done zip code analysis on physician practices in other cases, he has not done that type of analysis here.[80] Likewise, he has not performed any type of entry analysis in this case.[81] Dr. Frech also conceded that geographic markets tend to become larger the more specialized the specialty;[82] this fact is important because NTSP's participating physicians are mostly specialists. [redacted]

[redacted]

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[77] *Jayco*, 777 F.2d at 320 ("Because Jayco has failed to show a relevant market against which Savin's market power and the anticompetitive effects of its practices can be judged, we dismiss Jayco's § 2 claim and its remaining § 1 claims."); *Bogan v. Hodgkins*, 166 F.3d 509, 516 (2d Cir. 1999) (granting summary judgment against plaintiffs "for failure to specify the relevant market in which the horizontal agreement they allege could have an obvious anticompetitive effect"); *Levine*, 72 F.3d at 1555 ("Because [Plaintiff] has offered no evidence defining the relevant product or geographic market, and because he has not established [Defendant's] market power, the district court properly granted summary judgment to the defendant on this section 1 claim.").

[78] Frech Deposition at 120.

[79] *Id.* at 136.

[80] *See id.* at 134 (admitting that he has performed analysis in another lawsuit, but not this one).

[81] *Id.* at 142.

[82] *Id.* at 132-33.

[redacted][83] 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. Finally, Dr. Frech admits that there can be significant crossovers of services between specialties.[84]

Based on all of these admissions, Complaint Counsel has not shown a relevant market. Accordingly, any attempt to establish liability against NTSP under a rule-of-reason analysis fails as a matter of law.

4. Governing Fifth Circuit authority supports the summary dismissal of this proceeding.

Undoubtedly, Complaint Counsel will argue that Complaint Counsel's numerous failures of proof should be overlooked for one reason or another. In the Fifth Circuit, however, those arguments are unavailing in light of the recent *Viazis* decision.[85] That case involved disciplinary and other action actually taken by the American Association of Orthodontists and others against an orthodontist, Dr. Viazis. The Fifth Circuit first rejected that a trade association is "by its nature a 'walking conspiracy'."[86] The Court of Appeals then went on to hold as a matter of law that there was no antitrust violation.

> 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

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[83] *Id.* at 130-31. [redacted]

[84] Frech Deposition at 121-25.

[85] 314 F.2d 758 (5th Cir. 2002).

[86] *Viazis*, 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)).

> 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.[87]

This case is very similar to *Viazis* in that NTSP is making a decision whether or not it wants to be involved in ("approve") a payor's offer. Although NTSP's decision is well-justified based on its efficiency-directed "spillover" business plan and on its *Colgate* right to limit itself only to those payor offers which are likely to activate much of its existing participating physician network, under Fifth Circuit authority NTSP would 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. That contention is dead on arrival in the Fifth Circuit.[88]

FOR THESE REASONS, NTSP's motion for summary decision should be granted and this action should be dismissed in its entirety. NTSP also requests all other and further relief to which it may be justly entitled.

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[87] *Id.* at 766.

[88] 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 also apposite here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on March 9, 2004, I caused a copy of the foregoing document to be served upon the following persons:

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Barbara Anthony (via certified mail)
Director
Federal Trade Commission
Northeast Region
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New York, NY 10004

Hon. D. Michael Chappell (2 copies via Federal Express)
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Office of the Secretary (original and 2 copies via Federal Express)
Donald S. Clark
Federal Trade Commission
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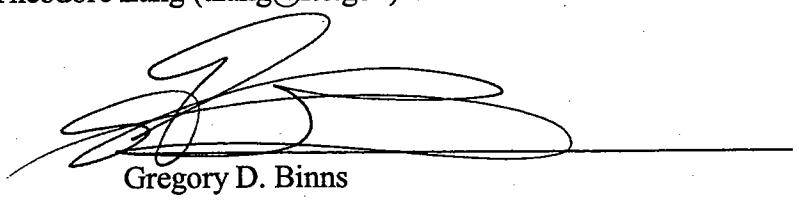
and by e-mail upon the following: Theodore Zang (tzang@ftc.gov) and Jonathan Platt (jplatt@ftc.gov).



Gregory D. Binns

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of North Texas Specialty Physicians, Respondent.	)	Docket No. 9312

PROTECTIVE ORDER
GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

1. "Matter" means the matter captioned *In the Matter of North Texas Specialty Physicians*, Docket Number 9312, pending before the Federal Trade Commission, and all subsequent appellate or other review proceedings related thereto.

2. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this Matter.

3. "North Texas Specialty Physicians" means North Texas Specialty Physicians, a non-profit

corporation organized, existing, and doing business under and by virtue of the laws of Texas, with its office principal place of business at 1701 River Run Road, Suite 210, Fort Worth, TX 76107.

4. "Party" means either the FTC or North Texas Specialty Physicians.

5. "Respondent" means North Texas Specialty Physicians.

6. "Outside Counsel" means the law firms that are counsel of record for Respondent in this Matter and their associated attorneys; or other persons regularly employed by such law firms, including legal assistants, clerical staff, and information management personnel and temporary personnel retained by such law firm(s) to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter; provided that any attorney associated with Outside Counsel shall not be a director, officer or employee of Respondent. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.

7. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. For purposes of Confidential Discovery Material of a Third Party that either is in the possession, custody or control of the FTC or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided the Confidential Discovery Material to the FTC. The Producing Party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of the FTC.

8. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a party to this Matter and their employees, directors, officers, attorneys