

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of
NORTH TEXAS SPECIALITY PHYSICIANS,

a corporation.

Docket No. 9312

**COMPLAINT COUNSEL’S RULE 3.24(a)(2) SEPARATE STATEMENT
OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Rule of Practice 3.24(a)(2), and in opposition to NTSP’s motion for summary decision, Complaint Counsel submits this separate statement of material facts as to which there is no genuine issue. Complaint Counsel objects to and contests NTSP's Statement of Material Facts on the grounds that such asserted facts are immaterial and insufficient as a matter of law to support NTSP's Motion for Summary Decision. Consequently, Complaint Counsel contends that it is not necessary for it to respond specifically to each purported fact set forth by NTSP. In this statement, Complaint Counsel sets forth material facts that are sufficient to create a genuine issue of material fact for trial. Complaint Counsel’s Separate Statement shall not constitute a waiver of any applicable objection, privilege, or other right, nor shall it constitute an admission of any fact identified in NTSP’s Statement of Material Facts.

OBJECTIONS

The following general objections apply to each of the facts identified in NTSP’s Statement of Material Facts.

1. Complaint Counsel reserves the right to object to any specific statements of material fact identified by NTSP, and to provide additional information regarding any such statement.

2. Complaint Counsel does not admit to any legal or factual contention asserted in the text of any material statement identified by NTSP.
3. To the extent that any statement of material fact quotes from a document or references a statement and solicits an admission that the quote or statement is evidence of the truth of the matter asserted, Complaint Counsel objects on grounds of hearsay.
4. Complaint Counsel objects generally because no definitions were provided for any terms referenced in the statements of material fact and many of the terms are open to widely different interpretations, making many of the statement of material fact inherently vague and ambiguous.

SEPARATE STATEMENT OF MATERIAL FACTS

1. The primary purpose, and primary activity, of NTSP is to engage in collective fee negotiations on behalf of its members, close to █████ specialist physicians practicing in or near Fort Worth. Van Wagner 8/29/02 dep. at 12, 15-16.
2. NTSP is operated by a Board of Directors, made up entirely of member physicians elected by the members, and representing various specialties. FTC Ex. 1000 at 000009-000024.
3. This Board hires a professional staff, and supervises NTSP's activities, including price-related conduct. Van Wagner 8/29/02 dep. at 79-80.
4. NTSP operates for the pecuniary benefit of its members, including obtaining the highest possible fees from payors. Grant dep. at 42. *See also* FTC Ex. 1129; FTC Ex. 1070 at SWN 001010; FTC Ex. 1037 at NTSP 022341-342.
5. NTSP was founded for the purpose of negotiating payor contracts, including reimbursement rates. Johnson dep. at 10-11. *See also* FTC Ex. 1000 at NTSP 00002, NTSP 00032-34, provisions 2 through 2.6, NTSP 00038-39, provision 41.

6. Originally, NTSP negotiated risk-sharing contracts for managed care plans, under which NTSP and its physician members accepted monthly payments in exchange for providing whatever medical services covered members required. Vance dep. at 9-10.

7. NTSP engages in price negotiations with payors, in which it attempts to obtain the highest possible fee levels for its [REDACTED] member physicians. FTC Ex. 1103. *See also* FTC Ex. 1014 at NTSP 005435; FTC Ex. 1017.

8. NTSP has at various times collected “powers of attorneys” from a number of its individual physicians, giving it the right to negotiate contract terms—including price terms—on behalf of those members. NTSP has then used these powers of attorney in negotiating fees with payors. FTC Ex. 1076; FTC Ex. 1103. *See also* Deas 10/10/02 dep. at 56-57.

9. NTSP also conducts polls of its members, through which the physicians inform NTSP what fees they would accept for current or future contracts with payors. Van Wagner 8/29/02 dep. at 26-29.

10. This data is used for a number of purposes. *See, e.g.*, FTC Ex. 1022. First, NTSP staff calculates the fees that would be acceptable to the “average” physician (using “mean, median and mode” calculations). Van Wagner 8/29/02 dep. at 43-44; Van Wagner 11/19/03 dep. at 78-80. This aggregated information is given to the Board, and then disseminated to NTSP’s members, who thus learn what prices their competitors, on average, will charge in the future. Van Wagner 8/29/02 dep. at 43, 62; Van Wagner 11/19/03 dep. at 87-88.

11. The Board also uses the poll results to establish “minimum” prices that it believes would be acceptable to most of the NTSP members. Van Wagner 8/29/02 dep. at 46. Based on these minimums, NTSP then rejects payor offers that it considers too low—without consulting its members or giving them an opportunity to “opt into” a payor proposal that is below the Board-

established minimums. Van Wagner 8/29/02 dep. at 153-54; Deas 10/10/02 dep. at 26-29.

NTSP never conveys to payors information derived from the polls that would allow the payors to assess how many NTSP physicians might be willing to join a plan that offered certain levels of reimbursement for physician services. *See id.*

12. After NTSP's Board or staff has rejected a payor offer, the payor has sometimes submitted a new proposal with higher fees that it thinks may be acceptable to NTSP, and this process may continue until NTSP has obtained the fee levels it desires. Quirk dep. at 53-54 and 64-65; FTC Ex. 1097. On other occasions, NTSP has entered into a more active negotiation process with a payor, in which both sides made a series of counteroffers until NTSP, on behalf of its physicians, obtained a fee level that it considered acceptable. FTC-NTSP-██████████ 000461-462; FTC-NTSP-██████████ 000491-492; FTC-NTSP-██████████ 000881.

13. NTSP has at least once used its power to act on behalf of its members to terminate existing contractual relationships between a payor and a significant number of NTSP's participating physicians. NTSP 051933.

14. NTSP has also on occasion gone to a large employer that had signed a contract with a payor, and told the employer that NTSP physicians might not participate in the payor's network unless the employer "assisted" NTSP in obtaining higher fees from the payor. Mosley dep. at 91; Quirk dep. at 104-05. *See also* OA 006545-48. At least one payor has testified that these actions of NTSP forced it to offer higher fees to physicians in order to assuage the employer's concerns about the adequacy of its network to serve a Fort Worth-based employee population. Quirk dep. at 104-05.

15. NTSP often urged member physicians to refrain from signing individual contracts with a payor while NTSP was engaged in collective fee negotiations with that payor. NTSP 005140-5141.

16. NTSP's actions caused at least one payor, [REDACTED] to increase its fees for Fort Worth physicians. Quirk dep. at 89-93, 104-105.

17. Payors and employers, including the [REDACTED], believed that it was important to have Fort Worth doctors in a network because of Dallas' distance. The [REDACTED]

[REDACTED]

[REDACTED]. Mosley dep. at 53.

18. An [REDACTED] employee testified that NTSP neglected to assert that there would be any [REDACTED] from the risk to the non-risk contracts, and that he would not have given such assertions any weight. Jagmin dep. at 180.

19. NTSP's members have distinct economic interests and separate clinical practices. *See* Johnson dep. at 21.

Respectfully submitted,

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