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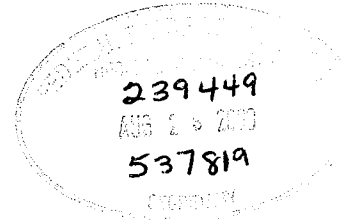
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August 28, 2008

Via Federal Express

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Room H-159
Washington, DC 20580



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

Dear Mr. Clark:

Enclosed are the original and thirteen (13) copies of the Response of North Texas Specialty Physicians to Complaint Counsel's Proposal for Order Modification on Remand, along with a disk containing same. Please return a file-marked copy to me by way of the pre-addressed envelope enclosed.

Thank you for your courtesies in this regard.

Very truly yours,

A handwritten signature in black ink, appearing to read "Nicole Williams".

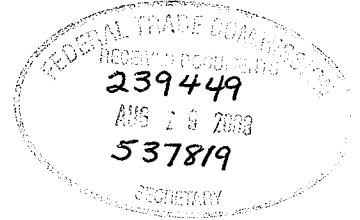
Nicole Williams

NW/lc
Enclosures

c: Jonathan Platt (via regular and electronic mail)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: William E. Kovacic, Chairman
Pamela Jones Harbour
Jon Leibowitz
J. Thomas Rosch



In the Matter of

North Texas Specialty Physicians,
a corporation.

Docket No. 9312

**RESPONSE OF NORTH TEXAS SPECIALTY PHYSICIANS TO COMPLAINT
COUNSEL’S PROPOSAL FOR ORDER MODIFICATION ON REMAND**

The Fifth Circuit, in remanding this proceeding to the Commission, stated

While we do not accept many of NTSP’s arguments regarding this section of the order, NTSP’s contention that subsection (A)(2) is overly broad and internally inconsistent has merit. The ALJ refused to include such a provision, recognizing that it “could have the effect of compelling Respondent to messenger contracts or become a party to contracts sent to it by payors, regardless of potential risks to Respondent, its member physicians, and its patients.”¹ This observation is valid. It is also difficult to see how NTSP can both deal and refuse to deal with any payor.²

The Fifth Circuit opinion must be read in light of the numerous comments, by the Commission in its original and revised opinion and by counsel for the Commission before the Fifth Circuit. Those comments made clear that NTSP has legitimate concerns in deciding whether to deal or not deal with a payor, concerns

¹ *N. Tex. Specialty Physicians*, 2004 WL 3142857, slip op. at 89 (F.T.C. Nov. 15, 2004) (ALJ’s Initial Decision), available at <http://ftc.gov/os/adipro/d9312/041116initialdecision.pdf>.

² 528 F.3d 346, 371 (5th Cir. 2008).

which the Fifth Circuit obviously believed needed to be given greater recognition in the order.

Contrary to NTSP's contention, the Order does not broadly prohibit it from deciding whether or not to deal with a payor. Nor does the Order require NTSP to contract with all payors or to messenger all payor offers.³

These limitations [in the Initial Decision] were based on the ALJ's view that a prohibition of agreements to refuse to deal would impose on NTSP a broad duty to contract with all payors. ID at 89. The language in our order does not mandate that result.⁴

NTSP remains free, for example, to offer utilization management services to payors and to set a price for those services, and to refuse to deal with payors that do not meet its price, because that agreement would not involve an agreement among physicians with respect to their provision of physician services.⁵

As the Commission has noted, Paragraph III of the Order reflects the fact that the Order's prohibitions do not bar the legitimate provision of information; thus, a proviso exempting the communication of purely factual information from the Order is unnecessary to permit legitimate conduct. Op. 40; *see id.* at 24-26 (discussing legitimate messenger activity).⁶

The communication of "purely factual information" is already covered by Paragraph III, which allows NTSP to act as a messenger⁷

There is nothing in the order we enter that will require Respondent to engage in illegal activity.⁸

³ Brief for Respondent Federal Trade Commission before the Fifth Circuit (Corrected) at 54 ("Brief for Respondent").

⁴ Opinion of the Federal Trade Commission at 39 ("Opinion").

⁵ Brief for Respondent (Corrected) at 54.

⁶ Brief for Respondent (Corrected) at 55.

⁷ Opinion at 40.

⁸ Opinion at 40.

