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NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312 Order, January 20, 2006

Order granting stay of requirement that respondent terminate preexisting contracts with payors, and denying stay of remaining provisions of final Commission order pending appeal to the U.S. Court of Appeals for the Fifth Circuit, finding that respondent was unable to demonstrate likelihood of success on appeal, irreparable injury, and that staying the order would be in the public interest.

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S
MOTION FOR STAY OF FINAL ORDER PENDING JUDICIAL REVIEW

On December 21, 2005, Respondent North Texas Specialty Physicians (NTSP) filed a motion to stay the Final Order in this matter, pending judicial review by an appropriate court of appeals¹. Thereafter, Complaint Counsel filed an answer opposing Respondent's motion, and Respondent filed a reply. For the reasons stated below, the Commission stays enforcement of and Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order until the U.S. Court of Appeals for the Fifth Circuit issues a ruling disposing of the petition for review. The Commission denies Respondent's motion in all other respects. Therefore, the Final Order will become effective on February 6, 2006, and Respondent will be required to comply with all its provisions except Paragraphs IV.B. and IV.C. during the pendency of the petition for review.

Applicable Standard

Section 5(g) of the Federal Trade Commission Act, 15 U.S.C. § 45(g)(2), provides that Commission adjudicative orders (except divestiture orders) take effect "upon the sixtieth day after" their date of service, unless "stayed, in whole or in part and subject to such

¹ On January 10, 2006, NTSP filed a petition for review of the Commission's Final Order and Decision in the U.S. Court of Appeals for the Fifth Circuit.

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conditions as may be appropriate, by . . . the Commission” or “an appropriate court of appeals.” The Respondent and Respondent’s counsel were served with the Final Order and the Opinion of the Commission on December 7, 2005, and the Final Order therefore will become effective on the sixtieth day thereafter; that is, on February 6, 2006. *See* 15 U.S.C. § 5(g)(2); Commission Rule 3.56(a), 16 C.F.R. § 3.56(a) (2006). A party seeking a stay must first apply for such relief to the Commission, as Respondent has done here.

Pursuant to Commission Rule 3.56(c), 16 C.F.R. § 3.56(c), a motion for a stay must address the following four factors: (1) “the likelihood of the applicant’s success on appeal,” (2) “whether the applicant will suffer irreparable harm if a stay is not granted,” (3) “the degree of injury to other parties if a stay is granted,” and (4) “why the stay is in the public interest.” Rule 3.56(c) further provides that a motion for a stay must be supported by “supporting affidavits or other sworn statements, and a copy of the relevant portions of the record.” *Id. See also In the Matter of Toys “R” Us, Inc.*, 126 F.T.C. 695, 696 (1998).

We consider each of these factors in turn below.

Likelihood of Success on Appeal

The Commission considers its unanimous decision in this case to be correct, and if there were nothing more to consider in determining the likelihood of success on appeal, this would end the inquiry. However, the Commission additionally considers the complexity of the case; whether the Commission has ruled on a difficult legal question; and whether the balance of the equities supports a stay². *California Dental*, 1996 FTC LEXIS 277, at *9-10;

² The Commission has stated that “the necessary degree or level of possibility of success will generally vary according to an assessment of the other three factors” and that “the probability of success that must be demonstrated is inversely

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Toys “R” Us, 126 F.T.C. at 697³. Because of the relationship between balancing the equities and the other three factors the Commission considers in examining a motion for a stay (irreparable harm, degree of injury to other parties and the public interest), the Commission will balance the equities associated with each of those three factors.

NTSP argues that because the case involves a complex factual record – and difficult, serious legal questions on which it claims it can show a substantial case – it has met the requisite standard for likelihood of success on appeal. NTSP points to the length of the administrative hearing, the number of testifying witnesses, and the number of exhibits and pages of hearing transcript as evidence of a complex factual record, and states that the fact that this case involves the health care industry adds to its complexity and importance. NTSP also reiterates the primary arguments it made before the Commission, which the Commission has already rejected in its November 29, 2005 Opinion. These statements, however, offer the Commission no sufficient reason to question its prior decision or any of the bases for it, and Respondent’s renewal of its legal arguments, without more, is insufficient to justify granting a stay.

proportional to the amount of irreparable injury suffered absent the stay.” *In the Matter of California Dental Ass’n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996), citing *Michigan Coalition of Radioactive Material Users*, 945 F.2d 150, 153 (6th Cir. 1991). With one exception discussed below, the Commission has assessed the other three factors against NTSP.

³ The U.S. Court of Appeals for the Fifth Circuit has held that a movant for a stay “need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.” *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983), quoting *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981). The Commission’s standard is consistent with this approach.

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See Toys “R” Us, 126 F.T.C. at 697; *In re Detroit Auto Dealers Ass’n, Inc.*, No. 9189, 1995 FTC LEXIS 256, at *4 (Aug. 23, 1995).

While the Commission does not question the seriousness or importance of either this case or the legal questions it presents, the case is not sufficiently complex, and the legal questions at issue are not sufficiently difficult as to warrant a stay on that basis alone. NTSP cites the *Novartis* case to support its position, but the present case does not involve the type of complex factual record at issue in that case. *See generally In the Matter of Novartis Corp.*, 128 F.T.C. 233 (1999). There, the Commission had to evaluate numerous scientific studies of consumer behavior in order to assess and remedy potentially lingering misbeliefs fostered by deceptive advertising. *Novartis*, 128 F.T.C. at 234-35. By contrast, in this case there are no comparable sources of complexity, particularly given the Commission’s extensive experience evaluating the types of conduct at issue in this case in the health care industry. The Commission has issued numerous consent orders over the last ten years addressing substantially similar conduct⁴. *See* Commission Opinion at 1, n.1.

As for the difficulty of the legal questions presented here, there is nothing novel about the Commission’s legal analysis; indeed, the Supreme Court has in the past condemned conduct like that of NTSP as *per se* unlawful. *See Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982). Moreover, the Commission and the Department of

⁴ The Commission’s antitrust enforcement expertise in the health care area is also reflected in the recent report on competition policy and health care that it issued with the Department of Justice. The report was based on 27 days of public hearings covering a broad range of health care topics, all focused on ways to promote innovative, cost effective and high quality health care services. The Fed. Trade Comm’n and the U.S. Dep’t of Justice, *Improving Health Care: A Dose of Competition* (July 2004), <http://www.ftc.gov/reports/healthcare/040723healthcare rpt.pdf>.

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Justice have issued extensive guidelines for antitrust enforcement policy in health care that contain specific guideposts for the conduct at issue in this case and clearly present the relevant legal principles. Commission Opinion at 14; U.S. Dep't of Justice & Fed. Trade Comm'n, *Statements of Antitrust Enforcement Policy in Health Care* (1996) reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,153. The Commission Opinion and the Final Order are consistent with these Statements.

Furthermore, the legal analysis the Commission applied – the framework in *Polygram Holding, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (FTC 2003), available at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>, and recently affirmed by the D.C. Circuit⁵ – merely follows the framework the Supreme Court established in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), by synthesizing prior antitrust decisions. This analysis prescribes a flexible analytical approach that replaces a simple dichotomy between categories like “*per se*” and “rule of reason” with a far more legally and economically sophisticated continuum of conduct along which behavior can be analyzed. Applying this analysis in this case is neither controversial nor difficult, and the Commission consequently does not consider this case to be the type of “close case” that would justify a stay.

**Irreparable Injury to NTSP Absent a Stay, Degree of Injury
to Other Parties and the Public Interest**

The Commission addresses these three factors together in this section because NTSP's Motion for Stay examines all three factors together. To show irreparable injury, NTSP must demonstrate that denial of a stay would cause it irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. NTSP must show that the irreparable injury alleged is both substantial and likely to occur absent a stay. See *Michigan Coalition of Radioactive Material Users v. Griepentrog, Inc.*, 945

⁵ *Polygram Holding Inc. v. FTC*, 416 F.3d 29.

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F.2d 150, 154 (6th Cir. 1991). The Commission considers the third and fourth prongs (harm to others and the public interest) together because Complaint Counsel represents the public interest in effective law enforcement. *See California Dental*, 1996 FTC LEXIS 277, at *7-8.

NTSP argues that Paragraphs II, IV, and VI of the Commission's Final Order should be stayed because they allegedly will cause NTSP and third parties irreparable injury and are not in the public interest. NTSP argues that the Order's remaining provisions, which it characterizes as ancillary rather than substantive, should be stayed because they have no purpose or meaning if Paragraphs II, IV and VI of the Final Order are stayed. We discuss each relevant section of the Final Order below.

Paragraph II of the Final Order

Paragraph II of the Order, among other things, requires NTSP to cease and desist from negotiating any term, condition or requirement upon which any physician deals, or is willing to deal, with any payor, and dealing, refusing to deal, or threatening to refuse to deal with any payor. Paragraph II also prohibits NTSP from exchanging or facilitating in any manner the exchange or transfer of information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions on which the physician is willing to deal. Paragraph II exempts any agreement that is reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement.

NTSP argues that Paragraph II of the Order will cause NTSP to incur unrecoverable costs; create confusion among physicians, patients, and health plans regarding NTSP's functions and policies; adversely affect NTSP's reputation and viability; and prevent NTSP from participating in lawful and potentially lawful conduct, including exercise of its right to contract. NTSP also argues that third-party physicians, patients and health plans and the public interest will be harmed because the efficiencies created by NTSP's

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spillover business model, relating to patient care and quality of care, will allegedly be lost.

NTSP further argues that the restrictions on its policies and physician agreements potentially will prevent it from making lawful unilateral decisions, and from disseminating information to physicians and patients, regarding both health care in general and particular payors and contracts. NTSP also argues that if it cannot terminate payor contracts, regardless of payor breaches of contract or illegal conduct, it will be exposed to potential liability and deprived of a contract right.

In addition, NTSP argues that the messengering requirements of the order will block its spillover business model, and thus present a significant danger to NTSP's reputation and continued viability. Finally, NTSP argues that the Order infringes its First Amendment rights by limiting NTSP communications with its hundreds of participating physicians, as well as with every payor in the Dallas-Fort Worth Metroplex.

NTSP has not demonstrated either that irreparable substantial injury to itself or harm to others will occur absent a stay of Paragraph II of the Order or that such a stay of Paragraph II would be in the public interest. The irreparable injury inquiry necessarily examines the consequences to NTSP in complying with the Order if it succeeds on the merits of its appeal. NTSP has not quantified the "unrecoverable costs and business losses" it claims, nor does it elaborate on how the grant or refusal of a stay would affect its reputation. Although NTSP cites *Novartis*, 128 F.T.C. 233, as support for its motion, in that case *Novartis* established that it would have to spend some \$8,000,000 for corrective advertising in order to inform millions of consumers of its misleading advertising. *Novartis*, 128 F.T.C. at 239 n.2. NTSP has not made a comparable showing of harm from compliance with Paragraph II. Moreover, the documentation appended to NTSP's motion from NTSP's Executive Director and from NTSP's Board Vice President contains only

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conclusory and unsupported allegations of harm if Paragraph II of the Order is not stayed.

Furthermore, NTSP has not demonstrated any irreparable harm to itself or to others from the loss of benefits from its spillover model, or that a stay is in the public interest because of that model. Indeed, NTSP has not demonstrated how the conduct prohibited in Paragraph II of the Order relates to any of the spillover benefits it claims. *See* Commission Opinion at 28-32. To the extent that there is any “spillover” from NTSP’s one risk-sharing contract, that “spillover” will occur regardless of whether NTSP engages in the conduct prohibited by Paragraph II of the Final Order; the Final Order does not apply to that contract because, *inter alia*, it involves financial integration⁶. Commission Opinion at 30. Furthermore, Paragraph II of the Final Order specifically allows NTSP to engage in conduct reasonably necessary to form, participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement. Thus, NTSP will be able to engage in efficiency-enhancing activities for which it demonstrates sufficient financial or clinical integration. The Final Order also allows NTSP to act as a proper messenger as long as it provides the Commission notice at least sixty days prior to doing so, for a period of three years. *See* Final Order, Paragraph III.

NTSP claims its viability may be harmed if Paragraph II of the Order is not stayed, but NTSP has not attempted to elaborate on this claim. Moreover, Paragraph II of the Order does not apply to NTSP’s risk-sharing contract, which NTSP’s counsel stated at oral argument was significant to NTSP and the source of 90 percent of NTSP’s revenue. Oral Argument at 12, 23. The requirements of Paragraph II of the Order rather go to the core of NTSP’s illegal

⁶ NTSP’s counsel admitted during oral argument before the Commission that risk-sharing contracts are out of favor in Fort Worth, Texas. Oral Argument at 23. Thus, it is difficult to see how third-party payors and health plans are irreparably harmed by the prohibitions in Paragraph II of the Order.

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conduct. Consequently, it is appropriate to consider the substantial injury to competition and consumers that would result from NTSP's continued unlawful conduct if Paragraph II were stayed. The Commission finds that a stay of this provision is not in the public interest because it would cause substantial harm to consumers and outweigh any conceivable harm to NTSP.

NTSP does not provide any factual support for its argument that Paragraph II of the Order will prohibit its communications with physicians and payors, and its dissemination of health care information, in a manner that will cause irreparable harm, or demonstrate how compliance with Paragraph II will infringe its First Amendment rights. Moreover, NTSP's other arguments for staying Paragraph II of the Order consist of nothing more than simple assertions of harm and conclusory statements based on unsupported assumptions or misconceptions about the requirements of the Order.

Paragraph IV of the Final Order

Paragraph IV.A. of the Final Order requires NTSP, within thirty days after the Order becomes final, to send, by first-class mail, return receipt requested, a copy of the Order and a copy of the administrative Complaint to NTSP's physicians, officers, directors, managers and employees, and to the chief executive of each payor with which NTSP has had contact since January 1, 2001. Paragraph IV.B. requires NTSP to terminate without penalty or charge and in compliance with any applicable laws, any preexisting contract with any payor for the provision of physician services – other than the contract identified in Appendix B to the Order – at the earliest of either receipt of a written request from a payor to terminate such contract (Paragraph IV.B.(1)), or the earliest termination or renewal date (including any automatic renewal date) of such contract (Paragraph IV.B.(2)). Paragraph IV.B. also provides that any payor who makes a request to extend a contract retains the right to terminate the contract at any time. Paragraph IV.C. requires NTSP to send by first-class mail, return receipt requested, a copy of any request from a payor pursuant to Paragraph IV.B.(1) to each

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physician participating in NTSP as of the date NTSP receives the request.

Paragraph IV.D. requires NTSP, for three years after the Final Order becomes final, to send, by first-class mail, return receipt requested, copies of the Order and the Complaint to any new physicians, payors, officers, directors, managers, or employees of NTSP who did not previously receive copies of those documents. NTSP is also required to annually publish copies of the Order and the Complaint in an official annual report or newsletter. Paragraph IV.E. requires NTSP to file a written report with the Commission within sixty days after the Order becomes final, and annually thereafter for three years, describing the manner and form in which NTSP has complied and is complying with the Order, and to file with each such report copies of return receipts required by Paragraphs IV.A., IV.C. and IV.D. of the Order. Paragraph IV.F. requires NTSP to notify the Commission at least thirty days prior to any proposed change in NTSP that may affect compliance obligations arising out of the Final Order, including but not limited to dissolution, assignment or sale.

NTSP states that the Paragraph IV notification requirements would require NTSP to provide the specified notice to each of its hundreds of participating physicians and to every payor in the Dallas-Fort Worth Metroplex. NTSP argues that these requirements would impose unrecoverable costs and business losses on NTSP; would confuse physicians, patients, and payors; and would harm NTSP's reputation.

NTSP failed to demonstrate either that the Paragraph IV notification requirements would likely cause irreparable substantial injury to itself or harm to others or that a stay of these requirements would be in the public interest. While NTSP cites *California Dental*, 1996 FTC LEXIS 277, as support for its allegations, that reliance is misplaced, because in *California Dental* the respondent would have had to notify, and potentially renotify, up to 19,000 member dentists. By contrast, in this case, NTSP will have to notify, and potentially renotify, only approximately 400 member physicians, and a limited

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number of payors in a limited geographic region. Thus, the burden and expense involved in implementing the notice provisions in the two cases are not facially comparable. Moreover, NTSP has adduced no support for its bald assertions that it will suffer business losses, and that the requisite notification efforts will cause physician, patient and payor confusion. In fact, the Commission has required similar notification efforts in numerous consent orders against other physician IPAs.

NTSP also argues that the termination of the 13 contracts that Paragraph IV.B. requires will harm NTSP and non-party physicians, patients, health plans, and the public interest, by disrupting the spillover effects that NTSP has achieved, thereby in turn damaging NTSP's reputation and marketplace viability. In addition, NTSP argues that terminating those contracts will disrupt the medical practices of the non-party physicians, as well as the operation of health plans and patient care for over 200,000 lives covered by those contracts and will impose financial harm on the non-party physicians and payors. NTSP also argues that continuation of the contracts would not be harmful because the only contracts concerning which complaints have been registered have been terminated or replaced, or are already terminable at will by the payors.

As explained above and in the Commission Opinion (*see* discussion above re: Paragraph II of the Order, and Commission Opinion at 28-30), the Commission has found no support for NTSP's claims that its non-risk contract activities produce spillover efficiencies. Accordingly, the Commission concludes that the Paragraph IV contract termination provisions will not disrupt any spillover benefit from NTSP's business model. Nevertheless, the Commission recognizes that – apart from any inconvenience to NTSP or its member physicians – the cancellation of existing contracts may well affect the thousands of patients who are covered by the health plans under contract. While Paragraph IV.B. allows payors to submit written requests to extend particular contracts with NTSP to a specific date, that date can be no later than one year after

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the date the Order becomes final. NTSP therefore might have to terminate some of its contracts at that point; such terminations might have disruptive effects on covered patients and it might be impossible to revive those contracts, once terminated. By staying Paragraphs IV.B. and C. of the Final Order pending appellate review, we ensure that the Court of Appeals will have the opportunity to give plenary consideration to NTSP's petition for review without concern for such disruptive effects from contract terminations in the interim. Moreover, the other core provisions of the Commission's Final Order will prevent NTSP from engaging in any further price-fixing conduct and thus protect the public interest. On balance, therefore, we find that the public interest favors staying of Paragraphs IV.B. and C. of the Final Order, allowing NTSP's contracts to continue in effect until the Court of Appeals disposes of NTSP's petition for review. The Commission undertakes this action without any intent to affect any preexisting rights that payors might hold.

Paragraph VI of the Final Order

Paragraph VI.A. of the Final Order requires NTSP to grant Commission representatives access to its records for the purpose of determining or securing its compliance with the Order. Paragraph VI.B. of the Order requires NTSP to permit Commission representatives to interview NTSP or its employees upon five days notice and in the presence of counsel.

NTSP argues this provision should be stayed because it is "fatally flawed and disregards federal and state law." Motion for Stay at 17. NTSP also maintains that because attorney-client, physician-patient and other privileged and confidential documents and information are not exempt from coverage by the Final Order, the Order therefore infringes on the rights of patients, physicians and NTSP.

NTSP has not demonstrated an irreparable substantial injury to itself or harm to others that is likely to occur absent a stay as to the requirements of Paragraph VI of the Order, nor has it demonstrated

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that a stay of this provision is in the public interest. Paragraphs VI.A. and B. of the Order are necessary for the purpose of determining or securing NTSP's compliance with the Order. Similar monitoring provisions are routinely included in Commission orders. These provisions typically do not expressly identify an exception for privileged and confidential information; however, this does not preclude the respondent from asserting any applicable privileges when – and if – the Commission subsequently invokes the monitoring provision⁷. Moreover, NTSP's argument ignores the Commission's regulations and internal procedures for protecting confidential information. A more fundamental flaw in NTSP's argument, however, is that its concerns regarding possible disclosures of privileged and confidential information are wholly premature and speculative. There is simply no indication that the Commission is likely to seek access to NTSP's records between now and the time that NTSP's petition for review is decided⁸. For all these reasons, we find that a stay of Paragraph VI of the Order is not warranted.

Conclusion

For the foregoing reasons, the Commission has determined to stay enforcement of and Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order until the U.S. Court of Appeals for the Fifth Circuit issues a ruling disposing of the petition for review, and to deny Respondent's motion for stay in all other respects. Accordingly,

⁷ This does not mean that we agree with NTSP's conclusory argument – which it does not elaborate upon – that its compliance with this portion of the Order would violate federal and state law.

⁸ The cases NTSP cites that refer to a patient's constitutional right to privacy and the Health Insurance Portability and Accountability Act are not applicable in the context of the monitoring provisions of the Commission's Order.