

Interlocutory Orders, Etc.

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS

Docket No. 9312 Order, September 12, 2008

Order amending Paragraph II.A.2 of the Commission's November 29, 2005, Final Order and Opinion to remove the language that the 5th Circuit determined to be "overly broad and internally inconsistent," and change the prohibition on refusals to deal (or threats to refuse to deal) to those taken in furtherance of otherwise prohibited conduct.

ORDER ON REMAND

This matter is before the Federal Trade Commission on remand from the United States Court of Appeals for the Fifth Circuit. On May 14, 2008, the Fifth Circuit affirmed the Commission decision -- embodied in its November 29, 2005 Final Order and Opinion -- that certain activities of Respondent North Texas Specialty Physicians (NTSP) constituted horizontal price fixing in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).¹ Specifically relevant to the issue before us, the Circuit Court identified concerted refusals to deal as one of the mechanisms NTSP used to increase its bargaining power and help achieve its collective price demands. The Commission's order prohibited NTSP from entering into agreements "to deal, refuse to deal, or threaten to refuse to deal with any payor." Paragraph II.A.2. Although approving most of the order provisions, the

¹ 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 became 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) (2008). In an Order issued on January 20, 2006, the Commission stayed enforcement of the Respondent's obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order until the Fifth Circuit issued its ruling disposing of the petition for review. In a second Order issued on January 20, 2006, the Commission modified the Opinion of the Commission in certain respects not relevant here.

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Court found Paragraph II.A.2 to be “overly broad and internally inconsistent,” and remanded the proceeding to the Commission for modification of Paragraph II.A.2 “in a manner consistent with [the Court’s] opinion.”² *Id.* at 371, 372. Both sides have filed briefs on this issue on remand. Upon consideration of the parties’ submissions and the Commission’s goals in enforcing this Order, the Commission will eliminate the language that gave rise to the possible internal inconsistency and limit the prohibition on refusals to deal (or threats to refuse to deal) to those taken in furtherance of otherwise prohibited conduct.

The Commission Final Order requires NTSP to cease and desist from engaging in the anticompetitive price-fixing conduct alleged in the complaint. Paragraph II of the Order contains the core cease and desist provisions. Paragraph II.A includes provisions that specifically address types of joint activity that the Commission and the Court of Appeals found NTSP used to carry out its unlawful conduct. Paragraph II.A. requires NTSP to cease and desist from:

A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians with respect to their provision of physician services:

² In its brief on remand, Respondent suggests that Federal Rule of Appellate Procedure 19, “Settlement of a Judgement Enforcing an Agency Order in Part,” might apply here. Response of NTSP to Complaint Counsel’s Proposal for Order Modification on Remand at 4 n. 11. As Complaint Counsel points out, that rule only applies when an agency brings a proceeding to enforce one of its orders. See 20 James Wm. Moore et al., *Moore’s Federal Practice – Civil* § 319.10 (3d ed.) (noting that the rule does not apply in a proceeding to review an agency order). Complaint Counsel’s Reply Regarding Order Modification on Remand at 4 n. 3. The Commission did not bring a proceeding to enforce its order in this case, and the Fifth Circuit in this case did not direct the Commission to follow the procedure set forth in Federal Rule of Appellate Procedure 19.

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1. to negotiate on behalf of any physician with any payor;
2. to deal, refuse to deal, or threaten to refuse to deal with any payor;
3. regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or
4. not to deal individually with any payor, or not to deal with any payor through any arrangement other than Respondent;

The Court of Appeals' first concern with regard to Paragraph II.A.2 is that it appears to be internally inconsistent. The Court stated that "[i]t is . . . difficult to see how NTSP can both deal and refuse to deal with any payor". 528 F.3d at 371. The prohibition in Paragraph II.A.2 against NTSP orchestrating agreements among physicians "to deal" with a payor concerning their provision of physician services also appears in Paragraph II.A.3, which bars NTSP's participation in agreements "regarding any term . . . upon which any physician deals or is willing to deal with any payor." In referencing the term "deal," Paragraphs II.A.2 and 3 are designed to make clear that NTSP's involvement in collective decisions by physician members on whether, or on what terms, to participate in a payor network is prohibited, regardless of whether such an agreement is implemented through acceptance or rejection of a payor offer. The Court of Appeals affirmed this aspect of the Commission's decision. For example, in discussing NTSP's use of member polls on prospective fees and communication of those results to members, the Court of Appeals agreed with the Commission that those activities effectuated an agreement on terms of *dealing* with payors, stating that "[t]he FTC reasonably concluded that the 'physicians anticipated that any individual response [to NTSP's poll] would help to raise or

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lower the average fee for the group – an average that NTSP would then use in negotiating with payors.” 528 F.3d at 363.

It is not necessary to prohibit this same type of conduct in two separate provisions. Accordingly, we have decided to delete the reference to agreements “to deal” from Paragraph II.A.2, as Complaint Counsel has suggested. This modification will eliminate the internal inconsistency in the provision to which the Court of Appeals refers, while leaving intact the prohibition against NTSP involvement in collective decisions by physician members on whether, or on what terms, to participate in a payor network in Paragraph II.A.3. Respondent does not take issue with this proposed modification (other than to argue more generally that the entire provision should be deleted, which we discuss below).

The Court of Appeals’ second concern is that Paragraph II.A.2 is overbroad, stating that it could compel NTSP to messenger contracts or become a party to contracts sent to it by payors, regardless of any risks to NTSP, its patients, or members. 528 F.3d at 372. Complaint Counsel argues that the Commission should add the phrase “in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order” to the end of Paragraph II.A.2 to address the Court’s concern about the provision otherwise imposing an absolute and unqualified duty to deal. Complaint Counsel states that the proviso will make it clear that the Order will not obligate NTSP to messenger contracts or become a party to contracts sent to it by payors, regardless of any risks to NTSP, its patients, or members, unless it would otherwise amount to a violation of the provisions of the Order. We agree with Complaint Counsel’s proposal.

Respondent argues that Complaint Counsel’s proposed “in furtherance” clause is ambiguous and “possibly in conflict with the Fifth Circuit’s opinion.” Response of North Texas Specialty Physicians to Complaint Counsel’s Proposal for Order Modification on Remand at 4. We disagree. As the Commission

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stated several times in its Opinion, the Final Order does not impose a general obligation to “messenger” all offers or to contract with all payors regardless of any risks to NTSP or its members and patients. Commission Opinion at 39 and n. 60. The “in furtherance” clause makes this point clear, by expressly linking the ban on refusals to deal to the conduct prohibited by the other provisions of Paragraph II. The Order thereafter cannot be interpreted as requiring NTSP to messenger contracts or become a party to contracts sent to it by payors, regardless of any risks to NTSP, its patients, or members, and the Court of Appeals’ overbreadth concerns should be satisfied.

Respondent also argues that Paragraph II.A.2 should be deleted in its entirety. We reject that position because a prohibition on refusals to deal is an important aspect of the order. As the Commission found, and the Court of Appeals affirmed, NTSP used threats and refusals to deal to reinforce its collective demands on payors. 528 F.3d 366-67. The Court of Appeals further rejected Respondent’s attempt to justify such refusals as mere avoidance of “risky situations.” *Id.* at 369 (finding that concerns about risk had no bearing on NTSP’s use of refusals to deal with payors to obtain higher fees for member physicians). Those findings justify a prohibition on the use of refusals to deal, or threats to refuse to deal, that are taken in furtherance of conduct that is illegal. Neither the Court of Appeals’ remand language, nor any other part of the Court of Appeals opinion, indicates that it believed it necessary to delete Paragraph II.A.2 to cure its overbreadth concern. The Court of Appeals was aware that a similar concern by the ALJ prompted him to strike Paragraph II.A.2, but the Court instructed the Commission to modify the provision and did not direct that it be deleted. 528 F.3d at 372.

We agree with Complaint Counsel’s proposal to modify Paragraph II.A.2 by adding the phrase “in furtherance of any

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conduct or agreement that is prohibited by any other provision of Paragraph II of this Order.”³

This matter having been heard by the Commission on remand from the United States Court of Appeals for the Fifth Circuit, the Commission, for the reasons stated above, has determined to modify Paragraph II.A.2 as follows, so as to be consistent with the Fifth Circuit opinion. Accordingly,

IT IS ORDERED THAT Paragraph II.A.2 be, and it hereby is, modified to read as follows:

“to refuse to deal, or threaten to refuse to deal, with any payor, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;”

and

IT IS FURTHER ORDERED THAT the stay in enforcement of the Respondent’s obligation to comply with Paragraphs IV.B. and IV.C. of the Final Order be, and it hereby is, rescinded.

By the Commission.

³ Complaint Counsel offered an alternative proposal to modify Paragraph II.A.2 that makes specific reference to the types of refusals to deal mentioned in the Court of Appeals opinion (refusals to contract with a payor or to messenger payor offers) and also includes the “in furtherance” clause. Complaint Counsel did not endorse this provision and expressed concern that it could create more ambiguity. While Respondent did not have as much objection to this proposal, it maintained its objection to the “in furtherance” language which we find necessary. We agree with Complaint Counsel that its second proposal could create more ambiguity.

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IN THE MATTER OF

**WHOLE FOODS MARKET, INC.,
AND
WILD OATS MARKETS, INC.**

Docket No. 9324 Order, October 10, 2008

Order granting complaint counsel and Whole Foods Market's joint motion for entry of a protective order governing confidential material.

PROTECTIVE ORDER GOVERNING CONFIDENTIAL 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.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains non-public competitively sensitive information, including trade secrets or other research, development or commercial information, the disclosure of which would likely cause commercial harm to the producing party, or sensitive personal information. "Discovery Material" shall refer to documents and information produced by a party or third party in connection with this matter. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), 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 proceeding.