[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
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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
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Washington, D.C. 20580

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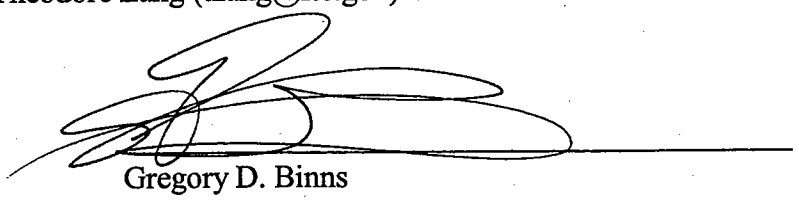
and by e-mail upon the following: Theodore Zang (tzang@ftc.gov) and Jonathan Platt (jplatt@ftc.gov).



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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

and agents.

9. "Expert/Consultant" means experts or other persons who are retained to assist Complaint Counsel or Respondent's counsel in preparation for trial or to give testimony at trial.

10. "Document" means the complete original or a true, correct and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored or reproduced, including, but not limited to, any writing, letter, envelope, telegraph meeting minute, e-mails, e-mail chains, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, tariff, tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, desk pad, telephone message slip, note of interview or communication or any other data compilation, including all drafts of all such documents. "Document" also includes every writing, drawing, graph, chart, photograph, phono record, tape, compact disk, video tape, and other data compilations from which information can be obtained, and includes all drafts and all copies of every such writing or record that contain any commentary, notes, or marking whatsoever not appearing on the original.

11. "Discovery Material" includes without limitation deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, documents produced pursuant to compulsory process or voluntarily in lieu thereof, and any other documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter.

12. "Confidential Discovery Material" means all Discovery Material that is designated by a Producing Party as confidential and that is covered by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and Commission Rule of Practice § 4.10(a)(2), 16 C.F.R. § 4.10(a)(2); or Section 26(c)(7) of the Federal Rules of Civil Procedure and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which to Respondent or Third Parties would cause substantial commercial harm or personal embarrassment to the disclosing party. The following is a nonexhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product roadmaps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or revenues); personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose, except that with notice to the Producing Party, a Party may apply to the Administrative Law Judge for approval of the use or disclosure of any Discovery Material, or information derived therefrom, for any other proceeding. Provided,

however, that in the event that the Party seeking to use Discovery Material in any other proceeding is granted leave to do so by the Administrative Law Judge, it will be required to take appropriate steps to preserve the confidentiality of such material. Additionally, in such event, the Commission may only use or disclose Discovery Material as provided by (1) its Rules of Practice, Sections 6(f) and 21 of the Federal Trade Commission Act and any cases so construing them; and (2) any other legal obligation imposed upon the Commission. The Parties, in conducting discovery from Third Parties, shall attach to such discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

2. This paragraph concerns the designation of material as "Confidential" and "Restricted Confidential, Attorney Eyes Only."

(a) Designation of Documents as CONFIDENTIAL - FTC Docket No. 9312.

Discovery Material may be designated as Confidential Discovery Material by Producing Parties by placing on or affixing, in such manner as will not interfere with the legibility thereof, the notation "CONFIDENTIAL - FTC Docket No. 9312" (or other similar notation containing a reference to this Matter) to the first page of a document containing such Confidential Discovery Material, or, by Parties by instructing the court reporter to denote each page of a transcript containing such Confidential Discovery Material as "Confidential." Such designations shall be made within fourteen days from the initial production or deposition and constitute a good-faith representation by counsel for the Party or Third Party making the designations that the document constitutes or contains "Confidential Discovery Material."

(b) Designation of Documents as "RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY – FTC Docket No. 9312."

In order to permit Producing Parties to provide additional protection for a limited number of documents that contain highly sensitive commercial information, Producing Parties may designate documents as "Restricted Confidential, Attorney Eyes Only, FTC Docket No. 9312" by placing on or affixing such legend on each page of the document. It is anticipated that documents to be designated Restricted Confidential, Attorney Eyes Only may include certain marketing plans, sales forecasts, business plans, the financial terms of contracts, operating plans, pricing and cost data, price terms, analyses of pricing or competition information, and limited proprietary personnel information; and that this particularly restrictive designation is to be utilized for a limited number of documents. Documents designated Restricted Confidential, Attorney Eyes Only may be disclosed to Outside Counsel, other than an individual attorney related by blood or marriage to a director, officer, or employee or Respondent; Complaint Counsel; and to Experts/Consultants (paragraph 4(c), hereof). Such materials may not be disclosed to Experts/Consultants or to witnesses or deponents at trial or deposition (paragraph 4(d) hereof), except in accordance with subsection (c) of this paragraph 2. In all other respects, Restricted Confidential, Attorney Eyes Only material shall be treated as Confidential Discovery Material and all references in this Protective Order and in the exhibit hereto to Confidential Discovery Material shall include documents designated Restricted Confidential, Attorney Eyes Only.

(c) Disclosure of Restricted Confidential, Attorney Eyes Only Material To Witnesses or Deponents at Trial or Deposition.

If any Party desires to disclose Restricted Confidential, Attorney Eyes Only material to witnesses or deponents at trial or deposition, the disclosing Party shall notify the Producing Party of its desire to disclose such material. Such notice shall identify the specific individual to whom the Restricted Confidential, Attorney Eyes Only material is to be disclosed. Such identification shall include, but not be limited to, the full name and professional address and/or affiliation of the identified individual. The Producing Party may object to the disclosure of the Restricted Confidential, Attorney Eyes Only material within five business days of receiving notice of an intent to disclose the Restricted Confidential, Attorney Eyes Only material to an individual by providing the disclosing Party with a written statement of the reasons for objection. If the Producing Party timely objects, the disclosing Party shall not disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual, absent a written agreement with the Producing Party, order of the Administrative Law Judge or ruling on appeal. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified individual. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 6(b) of this Protective Order. If the Producing Party does not object to the disclosure of Restricted Confidential, Attorney Eyes Only material to the identified individual within five business days, the disclosing Party may disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual.

(d) Disputes Concerning Designation or Disclosure of Restricted Confidential, Attorney Eyes Only Material.

Disputes concerning the designation or disclosure of Restricted Confidential, Attorney Eyes Only material shall be resolved in accordance with the provisions of paragraph 6.

(e) No Presumption or Inference.

No presumption or other inference shall be drawn that material designated Restricted Confidential, Attorney Eyes Only is entitled to the protections of this paragraph.

(f) Due Process Savings Clause.

Nothing herein shall be used to argue that a Party's right to attend the trial of, or other proceedings in, this Matter is affected in any way by the designation of material as Restricted Confidential, Attorney Eyes Only.

3. All documents heretofore obtained by the Commission through compulsory process or voluntarily from any Party or Third Party, regardless of whether designated confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews and depositions, that were obtained during the pre-complaint stage of this Matter shall be treated as "Confidential," in accordance with paragraph 2(a) on page five of this Order. Furthermore, Complaint Counsel shall, within five business days of the effective date of this Protective Order, provide a copy of this Order to all Parties or Third Parties from whom the Commission obtained documents during the pre-Complaint investigation and shall notify those Parties and Third Parties that they shall have thirty days from the effective date of this Protective Order to determine whether their materials qualify for the higher protection of Restricted Confidential, Attorney Eyes Only and to so designate such documents.

4. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone except to:

(a) Complaint Counsel and the Commission, as permitted by the Commission's Rules of Practice;

(b) Outside Counsel, other than an individual attorney related by blood or marriage to a director, officer, or employee or Respondent;

(c) Experts/Consultants (in accordance with paragraph 5 hereto);

(d) witnesses or deponents at trial or deposition;

(e) the Administrative Law Judge and personnel assisting him;

(f) court reporters and deposition transcript reporters;

(g) judges and other court personnel of any court having jurisdiction over any appeal proceedings involving this Matter; and

(h) any author or recipient of the Confidential Discovery Material (as indicated on the face of the document, record or material), and any individual who was in the direct chain of supervision of the author at the time the Confidential Discovery Material was created or received.

5. Confidential Discovery Material, including material designated as "Confidential" and "Restricted Confidential, Attorney Eyes Only," shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant, unless such Expert/Consultant agrees in writing:

(a) to maintain such Confidential Discovery Material in locked rooms or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;

(b) to return such Confidential Discovery Material to Complaint Counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of the Expert/Consultant's assignment or retention or the conclusion of this Matter;

(c) to not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

(d) to use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

6. This paragraph governs the procedures for the following specified disclosures and challenges to designations of confidentiality.

(a) Challenges to Confidentiality Designations.

If any Party seeks to challenge a Producing Party's designation of material as Confidential Discovery Material or any other restriction contained within this Protective Order, the challenging Party shall notify the Producing Party and all Parties to this action of the challenge to such designation. Such notice shall identify with specificity (i.e., by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation

within five business days of receiving notice of the confidentiality challenge by providing the challenging Party and all Parties to this action with a written statement of the reasons for the designation. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party, preserving its rights, and the challenging Party shall meet and confer in good faith in an attempt to negotiate changes to any challenged designation. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the challenging Party may make written application to the Administrative Law Judge as provided by paragraph 6(b) of this Protective Order. If the Producing Party does not preserve its rights within five business days, the challenging Party may alter the designation as contained in the notice. The challenging Party shall notify the Producing Party and the other Parties to this action of any changes in confidentiality designations.

Regardless of confidential designation, copies of published magazine or newspaper articles, excerpts from published books, publicly available tariffs, and public documents filed with the Securities and Exchange Commission or other governmental entity may be used by any Party without reference to the procedures of this subparagraph.

(b) Resolution of Disclosure or Confidentiality Disputes.

If negotiations under subparagraph 6(a) of this Protective Order have failed to resolve the issues, a Party seeking to disclose Confidential Discovery Material or challenging a confidentiality designation or any other restriction contained within this Protective Order may make written

application to the Administrative Law Judge for relief. Such application shall be served on the Producing Party and the other Party, and be accompanied by a certification that the meet and confer obligations of this paragraph have been met, but that good faith negotiations have failed to resolve outstanding issues. The Producing Party and any other Parties shall have five business days to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the Administrative Law Judge of the proprietary of a requested disclosure or change in designation.

7. Confidential Discovery Material shall not be disclosed to any person described in subparagraphs 4(c) and 4(d) of this Protective Order until such person has executed and transmitted to Respondent's counsel or Complaint Counsel, as the case may be, a declaration or declarations, as applicable, in the form attached hereto as Exhibit "A," which is incorporated herein by reference. Respondent's counsel and Complaint Counsel shall maintain a file of all such declarations for the duration of the litigation. Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter, and all such copies or reproductions shall be subject to the terms of this Protective Order. If the duplication process by which copies or reproductions of Confidential Discovery Material are made does not preserve the confidentiality designations that appear on the original documents, all such copies or reproductions shall be stamped "CONFIDENTIAL – FTC Docket No. 9312."

8. The Parties shall not be obligated to challenge the propriety of any designation or

treatment of information as confidential and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to persons not referred to in paragraph 4. If Confidential Discovery Material is produced without the legend attached, such document shall be treated as Confidential from the time the Producing Party advises Complaint Counsel and Respondent's counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked documents.

9. If the FTC: (a) receives a discovery request that may require the disclosure by it of a Third Party's Confidential Discovery Material; or (b) intends to or is required to disclose, voluntarily or involuntarily, a Third Party's Confidential Discovery Material (whether or not such disclosure is in response to a discovery request), the FTC promptly shall notify the Third Party of either receipt of such request or its intention to disclose such material. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Third Party at least five business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Third Party of its rights hereunder.

10. If any person receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Confidential Discovery Material, the subpoena recipient promptly shall notify the Producing Party of receipt of such request. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Producing Part at least five business days before production, and shall include a copy of this Protective Order and a cover letter that

will apprise the Producing Party of its rights hereunder. The Producing Party shall be solely responsible for asserting any objection to the requested production. Nothing herein shall be construed as requiring the subpoena recipient or anyone else covered by this Order to challenge or appeal any such order requiring production of Confidential Discovery Material, or to subject itself to any penalties for noncompliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission.

11. This Order governs the disclosure of information during the course of discovery and does not constitute an *in camera* order as provided in Section 3.45 of the Commission's Rules of Practice, 16 C.F.R. § 3.45.

12. Nothing in this Protective Order shall be construed to conflict with the provisions of Sections 6, 10, and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 50, 57b-2, or with Rules 3.22, 3.45 or 4.11(b)-(e), 16 C.F.R. §§ 3.22, 3.45 and 4.11(b)-(e).[1]

Any Party or Producing Party may move at any time for *in camera* treatment of any Confidential Discovery Material or any portion of the proceedings in this Matter to the extent necessary for proper disposition of the Matter. An application for *in camera* treatment must meet the standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999) and *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000) and must be supported by a

[1] The right of the Administrative Law Judge, the Commission, and reviewing courts to disclose information afforded *in camera* treatment or Confidential Discovery Material, to the extent necessary for proper disposition of the proceeding, is specifically reserved pursuant to Rule 3.45, 16 C.F.R. § 3.45.

declaration or affidavit by a person qualified to explain the nature of the documents.

13. At the conclusion of this Matter, Respondent's counsel shall return to the Producing Party, or destroy, all originals and copies of documents and all notes, memoranda, or other papers containing Confidential Discovery Material which have not been made part of the public record in this Matter. Complaint Counsel shall dispose of all documents in accordance with Rule 4.12, 16 C.F.R. § 4.12.

14. The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party or further order of the Administrative Law Judge hearing this Matter, continue to be binding after the conclusion of this Matter.

15. This Protective Order shall not apply to the disclosure by a Producing Party or its Counsel of such Producing Party's Confidential Discovery Material to such Producing Party's employees, agents, former employees, board members, directors, and officers.

16. The production or disclosure of any Discovery Material made after entry of this Protective Order which a Producing Party claims was inadvertent and should not have been produced or disclosed because of a privilege will not automatically be deemed to be a waiver of any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of such claimed inadvertent production or disclosure, the following procedures shall be followed:

(a) The Producing Party may request the return of any such Discovery

Material within twenty days of discovering that it was inadvertently produced or disclosed (or inadvertently produced or disclosed without redacting the privileged content). A request for the return of any Discovery Material shall identify the specific Discovery Material and the basis for asserting that the specific Discovery Material (or portions thereof) is subject to the attorney-client privilege or the work product doctrine and the date of discovery that there had been an inadvertent production or disclosure.

(b) If a Producing Party requests the return, pursuant to this paragraph, of any such Discovery Material from another Party, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control—including all copies in the possession of experts, consultants, or others to whom the Discovery Material was provided—unless the Party asked to return the Discovery Material in good faith reasonably believes that the Discovery Material is not privileged. Such good faith belief shall be based on either (i) a facial review of the Discovery Material, or (ii) the inadequacy of any explanations provided by the Producing Party, and shall not be based on an argument that production or disclosure of the Discovery Material waived any privilege. In the event that only portions of the Discovery Material contain privileged subject matter, the Producing Party shall substitute a redacted version of the Discovery Material at the time of making the request for the return of the requested Discovery Material.

(c) Should the Party contesting the request to return the Discovery Material pursuant to this paragraph decline to return the Discovery Material, the Producing Party seeking return of the Discovery Material may thereafter move for an order compelling the return of the

Discovery Material. In any such motion, the Producing Party shall have the burden of showing that the Discovery Material is privileged and that the production was inadvertent.

17. Entry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provisions of this Protective Order.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 16, 2003

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

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

DECLARATION CONCERNING PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

I, [NAME], hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the "Protective Order Governing Discovery Material" ("Protective Order") issued by Administrative Law Judge D. Michael Chappell on October 16, 2003, in connection with the above-captioned matter. I understand the restrictions on my use of any Confidential Discovery Material (as this term is used in the Protective Order) in this action and I agree to abide by the Protective Order.

3. I understand that the restrictions on my use of such Confidential Discovery Material include:

a. that I will use such Confidential Discovery Material only for the purposes of preparing for this proceeding, and hearing(s) and any appeal of this proceeding and for no other purpose;

b. that I will not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

c. that upon the termination of my participation in this proceeding I will promptly return all Confidential Discovery Material, and all notes, memoranda, or other papers containing Confidential Discovery Material, to Complaint Counsel or Respondent's counsel, as appropriate.

B

This Exhibit is not included in the public version of this document.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of North Texas Specialty Physicians, a corporation.	Docket No. 9312

PROPOSED ORDER ON MOTION FOR SUMMARY DECISION

Came on to be heard Respondent North Texas Specialty Physicians' Motion for Summary Decision and the Administrative Law Judge, having considered the Memorandum in Support of the Motion for Summary Decision, the Separate Statement of Material Facts as to Which There is No Genuine Issue, any responses or replies to the Motion, Memorandum, or Separate Statement, along with any arguments of counsel, hereby **GRANTS** Respondent's Motion.

IT IS THEREFORE ORDERED that Respondent's Motion is granted and all claims against Respondent are hereby dismissed with prejudice.

DATE: _____, 2004

_____
Honorable D. Michael Chappell
Administrative Law Judge