UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

In the Matter of **NORTH TEXAS SPECIALTY PHYSICIANS,** **a corporation.**	**DOCKET NO. 9312**

COMPLAINT COUNSEL'S RESPONSE IN SUPPORT OF NONPARTY PAYORS' JOINT EXPEDITED MOTION TO MODIFY THE FIRST REVISED SCHEDULING ORDER AND TO NARROW DOCUMENT DESIGNATIONS

I. INTRODUCTION

During mid March 2004, Respondent NTSP served on six nonparty health plans[1] notices of intent to use confidential and restricted confidential materials of the health plans at trial. Although allegedly made pursuant to this Court's Protective Order Governing Discovery Material ("Protective Order"), Respondent NTSP's disclosures are plainly noncompliant, necessitating the nonparty health plans' motion to require Respondent NTSP to in good faith narrow its evidence designations. Moreover, the great scope of Respondent NTSP's document designations–covering some 90% of the documents produced by the nonparty health plans (and consisting of more than 10,000 pages)–reflects a decided lack of discernment by NTSP in designating its plausible nonparty trial exhibits. It appears that this is not merely an incident of lack of care or consideration, but rather a failure of Respondent NTSP's duty to proceed in good faith. Certainly, its impact, as the nonparty health plans explain, is to encumber rather than aid

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[1] The health plans include United Health Care of Texas. Inc., CIGNA HealthCare of Texas, Inc., Aetna Health, Inc., PacifiCare of Texas, Inc., Humana Health Plan of Texas, Inc., and Blue Cross/Blue Shield of Texas.

the nonparty health plans proper use of the Commission's procedures to assess the need for, and where necessary seek, *in camera* treatment of evidence.[2] Respondent NTSP's maximizing of the burdens imposed on nonparty health plans smacks of retaliation and harassment. Such conduct may chill nonparty cooperation in Federal Trade Commission investigations and litigation, resulting in public harm. Therefore, Complaint Counsel files in support of the nonparty health plans' motions to require NTSP to narrow its document designations (and asks Your Honor to modify the First Revised Scheduling order to accommodate that requirement).

II. ARGUMENT

Health plans that contract for the provision of physician services in the Fort Worth Texas area have provided documents to Federal Trade Commission staff and Respondent NTSP. A great many of these documents contain highly sensitive business information, and were provided to Federal Trade Commission staff pursuant to statutory and other protections. All of these documents are subject to this Court's Protective Order, which precludes disclosure of confidential nonparty documents subject to exceptions and procedures described therein. Similar protections are afforded portions of deposition transcripts in which nonparty confidential information is recorded.

This Court's Protective Order requires Respondent NTSP to afford nonparty witnesses notice of proposed disclosure of confidential information specifically identifying (1) the documents and information to be disclosed and (2) the specific individuals to whom the documents and information are to be disclosed.[3] Each nonparty, having been so notified, then may seek from Your Honor *in camera* treatment of its documents and information. NTSP simply has declined to identify the materials to be

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[2] As Your Honor noted in your March 25, 2004 "Order Requiring Expedited Response and Extending Deadline for Filing Motions for *In Camera* Treatment," the nonparty health plans will have to make specific and substantial showings to justify *in camera* treatment. However, the nonparty health plans are not yet seeking *in camera* treatment; rather, they are simply asserting that Respondent NTSP's overbroad and noncompliant evidence designations greatly increase their cost/reduce their opportunity to evaluate the need for and in good faith seek *in camera* treatment in protection of their property rights and in compliance with the law. They therefore seek only to compel Respondent NTSP to present its considered, "real" exhibit list so that the nonparty health plans can take proper account of those exhibits. They then can properly review a delimited pool of documents and seek *in camera* treatment for those documents that they believe require such treatment, and Your Honor can determine whether, for each such document, the proponent has made the requisite showing.

[3] Protective Order, para. 2(c). *See also* First Revised Scheduling Order.

disclosed and the persons to whom those materials are to be disclosed in the manner required by Your Honor in the Protective Order.[4]

Furthermore, Respondent NTSP has indiscriminately designated the nonparty health plans' documents as exhibits.[5] Neither the nonparty health plans nor Complaint Counsel are able to discern any meaningful effort on the part of Respondent NTSP to limit its designations to those documents that it is plausibly going to use at trial. Each of the nonparty health plans' moving papers aptly characterize Respondent NTSP's indiscriminate designations.[6] We cite but a single example which, we believe, underscores Respondent NTSP's lack of good faith in making its designations. Respondent NTSP designated more than 2,000 pages of Humana Health Plan of Texas, Inc.'s commercially sensitive documents as exhibits–almost the entirety of Humana's production.[7] How inexplicable, given that: Complaint Counsel has not deposed any Humana personnel; Respondent NTSP has not deposed any Humana personnel; Complaint Counsel has neither designated any Humana witnesses for trial nor any other witnesses that will tell "a Humana story"; Respondent NTSP has neither designated any Humana witnesses for trial nor any other witnesses that will tell "a Humana story"; and Complaint Counsel has designated no Humana documents as possible trial exhibits. Considered in that light, NTSP's designation of Humana documents appears nothing short of promiscuous.

The nonparty health plans have aptly described their need for relief and the decisional law supporting their requests. We respectfully refer Your Honor to their filings for fuller descriptions. What Complaint Counsel wishes to note is that Your

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[4] For example, NTSP does not identify by name the persons to whom it proposes to make disclosure. Nor does NTSP designate with particularity which portions of designated deposition transcripts it proposes to disclose.

[5] This is consistent with Respondent NTSP's generally indiscriminate RX designations to Complaint Counsel, which numbered in excess of 3,300 documents, which, Complaint Counsel has been told, would together fill roughly a dozen boxes.

[6] See, for example, Joinder of CIGNA HealthCare at 1 (describing Respondent NTSP's "'kitchen sink' tactic [which] would force CIGNA to move for *in camera* treatment of hundreds of highly confidential documents, most of which will almost certainly never be used at trial"). See also Joinder of Aetna Health, Inc. at 4 ("The over expansiveness of NTSP's requests suggests that its true motive is once again to try to give [to NTSP material that it could use] to NTSP's advantage in future negotiations with Aetna").

[7] Again, Respondent NTSP was identically indiscriminate in its RX designations of Humana documents.

Honor's Protective Order and the *in camera* procedures of the Commission's Rules of Practice appropriately balance the burdens and risks to providers of confidential business information, on the one hand, and the parties to litigation, on the other. The case law is fully supportive of those and like provisions that limit discovery and use of nonparty documents and information to protect nonparties from inconvenience, harassment, and commercial prejudice. *See, e.g., Hoechst Marion Roussel, Inc.,* Docket No. 9293, 2000 Lexis 138, *1 (FTC Sept. 20, 2000) (refusing to put nonparties to *in camera* application burden when confronted with an overbroad list of potential trial exhibits); *Collins & Aikman Corp. v. J.P.* Stevens & Co., 51 F.R.D. 219, 221 (D.S.C. 1971) ("discovery would be more limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents").

Respondent NTSP's willful shortcutting of the protections Your Honor has given the nonparty health plans through your Protective Order, and its indiscriminate designation of nonparty health plan documents as exhibits threatens to inflict each of the above-noted harms. *See, e.g., Ball Mem'l Hosp., Inc. V. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1345 (7th Cir. 1986) (disclosure of health care provider's price information to a competitor could prejudice the former in future commercial negotiations); *United States v. Dentsply Int'l, Inc.*, 187 F.R.D. 152, 159 (D. Del. 1999) (disclosure of nonparty competitors' sales and marketing plans, financial forecasts, and other price- and customer-related information clearly and seriously would injure the nonparties).

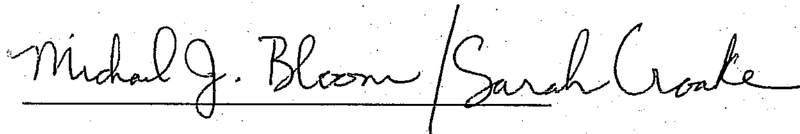
Moreover, undue risk of inappropriate disclosure of nonparties' confidential documents and information to suppliers, competitors, and customers–the very threat Respondent NTSP presents to the nonparty health plans–threatens not only the owners of the at-risk proprietary information. It threatens the Federal Trade Commission's ability to efficiently and effectively enforce the antitrust laws, and so the public at large. The health plans provided many of the documents at issue to Commission staff, often voluntarily, in reliance on confidentiality protections afforded by statute and pursuant to the Protective Order entered by Your Honor. Even where the health plans provided documents and information to Respondent NTSP following Your Honor's issuance of an Order requiring them to do so, the health plans' complied without making any costly and time-consuming collateral challenge, no doubt in important part because Your Honor's Protective Order and the Commission's *in camera* procedures provided needed comfort and assurance. The Federal Trade Commission depends in significant part on the initiative and cooperation of nonparties in its law enforcement investigations and in

litigation. That initiative and cooperation would be sharply eroded if nonparties came to believe that they could not rely on the Commission's confidentiality protections. Investigation and enforcement of the law would, as a result, be compromised. Therefore, requiring Respondent NTSP to, in good faith, narrow and detail its nonparty exhibit designations is a matter of substantial public as well as private interest. *See, e.g., Laxalt v. McClatchy*, 116 F.R.D. 455 (D. Nev. 1986) (denying disclosure of materials where such disclosure would impair future agency decision making). *See also SEC v. TheStreet.com*, 273 F.3d 222 (2nd Cir. 2001) ("[I]f previously-entered protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future").

III. CONCLUSION

Accordingly, we respectfully urge this Court to grant the nonparty health plans' motions to require NTSP to narrow its document designations, and modify the First Revised Scheduling order to accommodate that requirement.

Respectfully submitted,



Michael J. Bloom

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Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
(212) 607-2829
(212) 607-2822 (facsimile)

Dated: March 29, 2004

CERTIFICATE OF SERVICE

I, Sarah Croake, hereby certify that on 29 March 2004, I caused a copy of Complaint Counsel's Response in Support of Nonparty Payors' Joint Expedited Motion to Modify the First Revised Scheduling Order and to Narrow Document Designations to be served upon the following:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Gregory S. C. Huffman, Esq.
Thompson & Knight, LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201-4693

Sarah Croake
Honors Paralegal
Federal Trade Commission

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

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

ORDER REQUIRING EXPEDITED RESPONSE AND EXTENDING DEADLINE FOR FILING MOTIONS FOR *IN CAMERA* TREATMENT

On March 24, 2004, Nonparties United HealthCare of Texas, Inc., Cigna HealthCare of Texas, Inc., ("Cigna"), Aetna Health Inc., PacifiCare of Texas, Inc., ("PacifiCare"), Humana Health Plan of Texas, Inc., and Blue Cross Blue Shield of Texas (collectively, the "Nonparty Payors"); field a motion to modify the First Revised Scheduling Order to extend the time for the Nonparty Payors to file motions for *in camera* treatment. Also on March 24, 2004, Cigna and PacifiCare filed separate Joinders in the Nonparty Payors' motion.

The First Revised Scheduling Order establishes March 29, 2004 as the deadline for filing motions for *in camera* treatment. The Nonparty Payors assert that they were notified on March 16, 2004, of the parties' intent to offer into evidence at trial each Nonparty Payor's confidential documents. The Nonparty Payors assert that the notices by Respondent North Texas Specialty Physicians ("NTSP") to the Nonparty Payors were overbroad. For example, the Nonparty Payors assert that NTSP's notice to United was a list of over 90% of United's production and that NTSP designated well over 4,000 pages of documents as potential exhibits.

The Nonparty Payors seek an order compelling NTSP to revise its exhibit list to reflect the Nonparty Payor documents that NTSP actually intends to use at trial and to specifically identify the individuals to whom it wishes to show those documents, before requiring the Nonparty Payors to move for *in camera* treatment.

The Nonparty Payors are advised that simply because they consider documents to be confidential, the documents do not necessarily rise to the level necessary for an *in camera* treatment order. Any motion for *in camera* treatment must be narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material.

In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the

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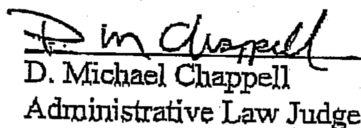
person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977). In order to sustain the heavy burden for withholding documents from the public record, an affidavit or declaration demonstrating that a document is sufficiently secret and material to the applicant's business that disclosure would result in serious competitive injury is generally required. The required affidavit or declaration must be provided by a person with personal knowledge, and not by outside counsel representing the movant.

The Nonparty Payors are further advised that each nonparty must submit its own motion for *in camera* treatment and supporting affidavit or declaration, and may not simply join in on another nonparty's request.

It is hereby ORDERED that NTSP shall file its response to the Nonparty Payors' motion by March 29, 2004. It is further ORDERED that the deadline for Nonparty Payors to file motions for *in camera* treatment is revised. Nonparty Payors shall file their motions for *in camera* treatment on April 5, 2004. Responses to motions for *in camera* treatment filed on April 5, 2004 are due on April 12, 2004.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: March 25, 2004

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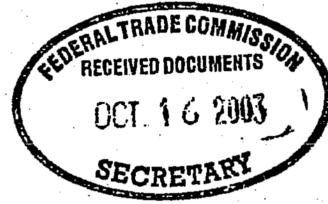
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

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[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.

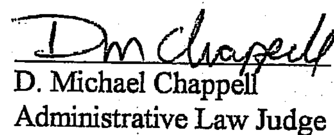
(b) If a Producing Party requests the return, pursuant to this paragraph, of any such Discovery Material from another Party, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control—including 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

FIRST REVISED SCHEDULING ORDER

On February 11, 2004, the parties filed a joint motion to modify the scheduling order. The motion is GRANTED IN PART and DENIED IN PART. The revised schedule follows:

March 2, 2004	-	Deadline for filing motions for summary decision.
March 6, 2004	-	Deadline for depositions of experts (including rebuttal experts).
March 9, 2004	-	Complaint Counsel provides to Respondent's counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness. Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.
March 16, 2004	-	Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition and copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness. Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.

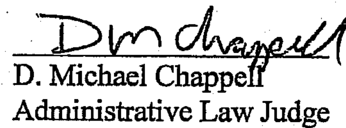
March 16, 2004	-	Parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).
March 19, 2004	-	Deadline for filing responses to motions for summary decision.
March 23, 2004	-	Deadline for filing motions *in limine* and motions to strike.
March 29, 2004	-	Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
April 2, 2004	-	Deadline for filing responses to motions *in limine* and motions to strike.
April 5, 2004	-	Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
April 7, 2004	-	Complaint Counsel files pretrial brief, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.
April 8, 2004	-	Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. Exchange objections to the designated testimony to be presented by deposition and counter designations.
April 15, 2004	-	Exchange proposed stipulations of law, facts, and authenticity.
April 21, 2003	-	Respondent's Counsel files pretrial brief, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.
April 23, 2004	-	File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
April 27, 2004	-	Final prehearing conference to be held at 10:00 a.m. in a courtroom location specified in a subsequently issued order. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including

the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.

April 28, 2004 or immediately following the conclusion of the final prehearing conference	-	Commencement of Hearing, to begin at 10:00 a.m. in a courtroom location to be specified in a subsequently issued order.

The "Additional Provisions" set forth in the Scheduling Order entered on October 16, 2003 remain unchanged.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: February 12, 2004