[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' MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DECISION

Respondent North Texas Specialty Physicians ("NTSP") respectfully moves for leave to file a short Reply Brief in Support of its Motion for Summary Decision, a copy of which is attached as Exhibit C. In support, NTSP shows the following:

I.

Complaint Counsel's Memorandum in Opposition to NTSP's Motion for Summary Decision raises certain arguments to which NTSP would like to respond. Federal courts have found that a party who files a motion generally has the right to open and close the briefing:

> Following this court's decision in *Dondi Properties Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc), there should be little doubt "that the party with the burden on a particular matter will normally be permitted to open and close the briefing." This principle is sound. In our jurisprudence the party who must persuade the court of the merits of the relief it seeks is almost always given the final word. "It should thus be rare that a party who opposes a motion will object to the movant's filing a reply."[1]

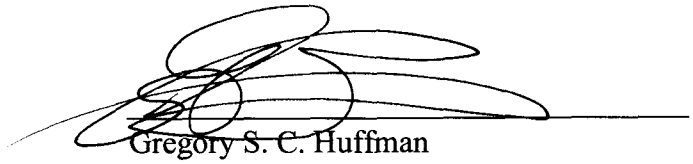
[1] *Spring Indus., Inc. v. Am. Motorists Ins. Co.*, 137 F.R.D. 238, 239 (N.D. Tex. 1991) (quoting *Dondi*, 121 F.R.D. at 291-92) (citations and footnote omitted).

This principle is limited only by the movant's inability to submit and rely on "new evidentiary support" in a reply brief.[2] Because NTSP is the movant and is not relying on any new evidence, NTSP requests that the Administrative Law Judge grant leave to file a short reply brief.

II.

For these reasons, NTSP requests that the Administrative Law Judge grant it leave to file a short reply brief.

Respectfully submitted,



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ATTORNEYS FOR NORTH TEXAS SPECIALTY PHYSICIANS

[2] *Id.*

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on March 26, 2004, I caused a copy of the foregoing document to be served upon the following persons:

Michael Bloom (via Federal Express and e-mail)
Senior Counsel
Federal Trade Commission
Northeast Region
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New York, NY 10004

Barbara Anthony (via certified mail)
Director
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

Hon. D. Michael Chappell (2 copies via Federal Express)
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue NW
Washington, D.C. 20580

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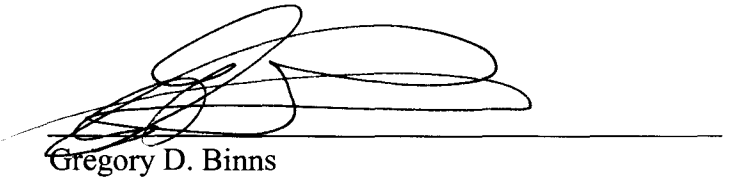
and by e-mail upon the following: Theodore Zang (tzang@ftc.gov) and Jonathan Platt (jplatt@ftc.gov).



Gregory D. Binns

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EXHIBIT A

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

EXHIBIT A

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.

4. I understand that if I am receiving Confidential Discovery Material as an Expert/Consultant, as that term is defined in this Protective Order, the restrictions on my use of Confidential Discovery Material also include the duty and obligation:

a. to maintain such Confidential Discovery Material in locked room(s) 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 my assignment or retention; and

c. 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.

5. I am fully aware that, pursuant to Section 3.42(h) of the Commission's Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Commission.

_____ Date: _____

Full Name [Typed or Printed]

_____

Signature

EXHIBIT B

Specific Pages of Motion Subject to Protective Order

(all from Exhibit C–North Texas Specialty Physicians' Reply Brief in Support of Motion for Summary Decision)

Persons to be notified of Commission's intent to disclose in a final decision any of the confidential information contained in this document:

Counsel for Respondent
Gregory S. C. Huffman
Thompson & Knight L.L.P.
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Suite 3300
Dallas, TX 75201

Complaint Counsel
Michael Bloom
Senior Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

EXHIBIT C

[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' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DECISION

The absurdity of Complaint Counsel's position can be seen by looking at a simple hypothetical. Assume that a number of freelance musicians come together to practice and perform as a dance band. Their goal is to try to develop a reputation as an accomplished group with a recognized name and quality of performance. In putting the band together the band's business manager knows what it takes to meet the musicians' individual prices so that the performers would participate in a gig. As customers contact the business manager, he informs the customers of that composite price. If a customer does not like the composite price, the business manager declines participation in the gig and the customer contacts the individual musicians to arrange for them on an individual basis at whatever price(s) the customer can negotiate. Of course, gigs performed by individual performers and others apart from the band are not done using the band's name.

Complaint Counsel's position would be that this type of event, which happens innumerable times every day, is not only an antitrust violation, but a *per se* one at that. The logic expressed in Complaint Counsel's response leads to the following absurdities:

- The band and its business manager would have to be involved in any offer made by a customer even if everyone, including the customer and the musicians, knows that the gig is going to involve only a relative few of the band's musicians and that the rest of the musicians in the gig are going to be outsiders.
- Because the band and its business manager are contractual parties with certain duties along with the musicians on band gigs, the band and its business manager would have to execute contracts with all the risks involved in such contracts, even though only a relative few of the band's musicians are going to be involved in the gig.
- The band's financial resources generated through the efforts of all of the band's

members would have to be expended in reviewing contracts, even when the contract is going to involve only a relative few of the band's members.

- The band's business manager's time and resources would have to be expended in reviewing contracts, even when the contract is going to involve only a relative few of the band's members.
- If the band and its business manager send out contracts without review, the band and its business manager face the risk of being a party or an aider and abettor to conduct which might subject them to potential liability.
- If the gig does not go well, the reputation of the band and its business manager could be tainted by having been involved.
- If the customer uses the band's name, persons paying to attend the gig would be misled.
- If the band and its business manager refuse to be involved, the government would sue, even though the evidence shows that the customers are able to find as many musicians as they need in the community and that a significant number of the band's members are willing to do individual gigs at the customers' prices.
- If an individual musician chooses not to accept a customer's offer because he or she had always worked for a price higher than that offer, or had more than enough business already, or liked working with the better group of musicians who worked in the band's gigs, or did not otherwise like the customer's gig, the government would take the position that none of those reasons would be given any recognition and the individual musician would be presumed to be part of a *per se* antitrust violation – even though the individual musician had never even been told what any other

musician's, much less any other similar musician's, individual price was.

The situation of NTSP is even more benign than that of the hypothetical musicians' band in several regards:

- NTSP has no authority to accept non-risk contracts on behalf of the participating physicians.[1] Every non-risk contract which NTSP signs is then messengered to physicians who individually decide whether each wants to participate.[2] Although not pointed out by Complaint Counsel, Dr. Frech and the payors admit this undisputed fact.[3] NTSP clearly does not "negotiate" non-risk contracts in the sense used by Complaint Counsel. NTSP does not bind anyone other than itself to a non-risk contract.[4] NTSP's "refusal to deal" is, therefore, only its own refusal *qua* NTSP, not the individual physicians' refusal.[5]
- NTSP is a non-profit entity which makes no money from being involved in non-risk contracts. Its motivation is to be involved in contracts which activate the network NTSP created and uses for risk contracts, with the goal that payors will eventually allow the network to take on additional risk contracts.
- Healthcare is a line of business which has much greater legal risk and regulatory

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[1] Deposition of H.E. Frech, Ph.D. ("Frech Deposition") at 209. Copies of the relevant excerpts from this deposition are attached as Exhibit 14 to NTSP's Separate Statement of Material Facts to Which There is No Genuine Dispute ("Separate Statement").

[2] *Id.*

[3] *See id.*; Deposition of Tom Quirk at 54. Copies of the relevant excerpts from Mr. Quirk's deposition are attached as Exhibit 15 to NTSP's Separate Statement.

[4] Frech Deposition at 209.

[5] *See id.*; Deposition of Harry Rosenthal, Jr., M.D. at 24; Deposition of John Johnson, M.D. at 25-26, 30; Deposition of Mark Collins, M.D. ("Collins Deposition") at 36-37. Copies of the relevant excerpts from the depositions of Drs. Rosenthal, Johnson, and Collins are attached to NTSP's Separate Statement as Exhibits 7, 21, and 27, respectively.

complications than does music, especially in a highly litigious state like Texas. NTSP faces much greater disincentives in being involved in offers which are problematic or involve only a relative few of those physicians who are qualified enough to be part of NTSP's limited panel.

Complaint Counsel's case is a haze of citations to cases which involve primarily horizontal, non-teamwork situations. Complaint Counsel's brief misses the point. In the normal situation, horizontal competitors have little reason to come together and "plus"-type inferences can be drawn when they do. Where a network of complementary medical practitioners comes together, the network is a necessity to provide the full range of treatments by the various types of generally non-competitive practitioners to the patient population. There is nothing sinister to presume when the network entity does what one would expect be done in operating a network. That is the point being made by the Fifth Circuit's decision in *Viazis v. American Association of Orthodontists*.[6]

Complaint Counsel's view is that a refusal by NTSP to participate in a contract is *ipso facto* a collective boycott and an antitrust violation. Yet, if NTSP chooses to participate in the contract with the payor and the doctors, Complaint Counsel says that is a collective price-fixing

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[6] 314 F.3d 758, 764 (5th Cir. 2002) (finding that trade association's action, in and of itself, was not conspiratorial because plaintiff failed to prove association's members "were conspiring among themselves" and that association was not a "walking conspiracy"). Complaint Counsel make an extraordinary suggestion, without any supporting authority, that Fifth Circuit law does not govern this proceeding. Complaint Counsel's Memorandum in Opposition to NTSP's Motion for Summary Decision ("Complaint Counsel's Opposition") at 14 n.33. That argument is wrong. *See* 15 U.S.C. § 45(c) ("Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business . . . ."). In this case, NTSP "resides" and "carries on business" in the Fifth Circuit and that is the circuit in which "the method of competition or the act or practice in question" was used. Accordingly, any appeal of an adverse order from the Commission would go to the Fifth Circuit for determination and that circuit's law is controlling here.

agreement and an antitrust violation if the payor chooses to complain. In short, heads Complaint Counsel wins; tails NTSP loses. If that were the law, then any entity involved in a team or network situation is doomed from the start. Teams and networks would be able to arise only where the entity is able to hire all of the various participants as employees. Of course, there would be many fewer teams and networks in that kind of world – which would decrease both innovation and efficiency. The very plausible procompetitive effect of NTSP is why the Supreme Court's decision in *California Dental Association v. FTC*[7] mandates that this type of situation must be viewed under some form of a rule of reason analysis.

Complaint Counsel, however, knows that no type of rule-of-reason violation can be made out against NTSP because the overlapping patterns of physician practices in the Metroplex make impossible a relevant market limited to the city limits of Fort Worth. Complaint Counsel's expert does not even try to argue that Fort Worth is a relevant market. Dr. Frech admits that the large population in the "Mid-Cities Area" between Fort Worth and Dallas ties Dallas and Tarrant Counties together as a market.[8] Complaint Counsel does not directly address the decisions holding that its argument is invalid as a matter of law.[9] Complaint Counsel also does not provide any evidence that a payor was unable to find enough local physicians available to it outside of NTSP. In fact, the payors' testimony is to the contrary, which is consistent with the physicians'

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[7] 526 U.S. 756, 771, 779 (1999) (rejecting application of quick-look analysis and requiring more detailed market inquiry when "restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition").

[8] Frech Deposition at 130-31.

[9] *See Apani Southwest, Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 633 (5th Cir. 2002) (affirming dismissal of claims because "alleged geographic market did not correspond to the commercial realities of the industry and was not economically significant"); *Doctor's Hospital, Inc. v. Southeast Med. Alliance, Inc.*, 123 F.3d 301, 311-12 (5th Cir. 1997) (affirming summary judgment because plaintiff's proposed market was too narrow); *Jayco Sys., Inc. v. Savin Bus. Machs. Corp.*, 777 F.2d 306, 318-19 (5th Cir. 1985) (affirming summary judgment because plaintiff's proposed market of one purchaser was too narrow).

testimony that they have belonged to IPAs other than NTSP and have entered into direct contracts with payors.[10]

Complaint Counsel criticizes NTSP for citing cases that pre-date *California Dental* and claims that "none of [those] cases use the flexible framework required by the Supreme Court."[11] But those cases are not inconsistent with *California Dental*, which advocates "considerable inquiry into market conditions" before "application of any so-called '*per se*' condemnation is justified."[12] In those cases, the plaintiffs lost on summary judgment because they failed to define a relevant market and, therefore, could not conduct any "considerable inquiry into market conditions." That is exactly Complaint Counsel's failure here. Rather than follow the "flexible framework required by the Supreme Court" in *California Dental*, Complaint Counsel wants to pigeon-hole this case into the *per se* category, which explains why Complaint Counsel's economic expert has made absolutely **no** attempt to define **any** relevant market.[13] That is totally inconsistent with the Supreme Court's mandate to conduct a "considerable inquiry into market conditions" before applying the *per se* rule.[14] By addressing the *per se* rule, the rule of reason, and the "quick look" approach in its motion, NTSP is not relying on a "simplistic *per se* versus rule-of-reason analysis,"[15] but is showing that, regardless of where this case falls on the Supreme

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[10] *See, e.g.*, Collins Deposition at 36-37.

[11] Complaint Counsel's Opposition at 25 n.50.

[12] 526 U.S. at 779.

[13] Frech Deposition at 120 (admitting that he has not defined any relevant market); *see also id.* at 136 (no calculation of concentration ratios), 134 (no zip code analysis), 142 (no entry analysis).

[14] *See Cal. Dental Ass'n*, 526 U.S. at 779.

[15] Complaint Counsel's Opposition at 10.

Court's "sliding scale,"[16] Complaint Counsel cannot maintain its claims as a matter of law.

Although the burden was on Complaint Counsel to come forward with its theory of the case,[17] Complaint Counsel has failed to explain why NTSP's effect on the market would not be part of whatever form of rule of reason analysis is appropriate for this case. [redacted] If Complaint Counsel is going to maintain that there is some negative effect on the market which outweighs NTSP's procompetitive effects, that weighing must necessarily be done in the context of a relevant market. Complaint Counsel's failure to make out a relevant market is a primary reason that this case should be dismissed.

Complaint Counsel also misconstrues this case in at least another significant regard. Complaint Counsel repeatedly characterizes this case as one involving price-fixing by the physicians (who are the providers paid by the payors under non-risk contracts). Complaint Counsel ignores the testimony of its own expert, who admits that he has found **no evidence** showing that any of the following things occurred:

(a) any participating physicians agreed with each other to reject a non-risk payor offer;[19]

(b) any participating physician and any other entity agreed to reject a non-risk payor

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[16] *Cal. Dental Ass'n*, 526 U.S. at 780.

[17] *See Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 642 (10th Cir. 1987) (finding that plaintiff in summary judgment proceeding "must at least present its legal theory and support it with more than conclusory allegations"); *see also Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 486 (3d Cir. 1992) (ruling that plaintiff in summary judgment proceeding "must allege a plausible theory of causation of 'injury of the type the antitrust laws were designed to prevent'").

[18] [redacted]

[19] Frech Deposition at 75-76.

offer;[20]

(c) any participating physician rejected a non-risk payor offer based on a power of attorney granted to NTSP;[21]

(d) any participating physician refused to negotiate with a payor prior to a non-risk offer being messengered by NTSP;[22]

(e) any participating physician knew what another physician was going to do in response to a non-risk payor offer;[23]

(f) any participating physician gave NTSP the right to bind him or her to any non-risk payor offer;[24] or

(g) any participating physician gave up his or her right to independently accept or reject a non-risk payor offer.[25]

[redacted] Even though those actions reflect what one would expect any network entity to do in making its own decisions and

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[20] *Id.*

[21] *Id.* at 80.

[22] *Id.* at 75-76.

[23] *Id.* at 155.

[24] *Id.* at 209.

[25] *Id.*

[26] [redacted]

managing its own resources, the more critical point is that the cited activities are **not** what the physicians did. Complaint Counsel's case is like the plaintiff who points to what a magazine or newspaper said or did and argues that all of the publication's subscribers must have acted in the same way. If the American Bar Association journal were to take a position on some point, does that mean that any significant number of lawyers would take any action in that regard or even have the same belief? If a lawyer did act, would he or she necessarily be a "conspirator" violating the antitrust laws? Any theory of conspiracy – which is a required showing for Complaint Counsel's case – must show what the physicians actually did and why.[27] Complaint Counsel not only does not do that, but Complaint Counsel's expert admits that the physicians have not acted consistently with what NTSP does. That is a second fundamental reason the case should be dismissed.

Complaint Counsel conducted a pre-filing investigation and post-filing discovery over a nineteen-month period, took more than twenty depositions, and received over 83,000 pages of documents from NTSP, over 30,000 pages from third-party payors, and over 45,000 from other third parties. Complaint Counsel nonetheless has not made the requisite showing of conduct by individual physicians and hence cannot make out any case.

Because NTSP's conduct as an entity creating and working with a network of physicians also "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition,"[28] some form of rule-of-reason analysis showing an effect on a relevant market must be done. Complaint Counsel, however, has conceded its inability to show a relevant

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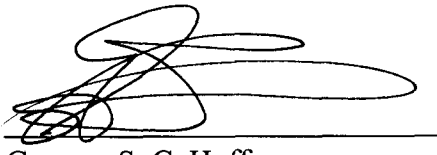
[27] Complaint Counsel cites a Third Circuit case, *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3rd Cir. 1994), which actually supports Respondent on this point; a summary judgment for defendants was affirmed because plaintiffs only showed an opportunity to conspire, rather than actual conspiracy. 37 F.3d at 1013.

[28] *Cal. Dental Ass'n*, 526 U.S. at 771.

market.

FOR ALL THESE REASONS, and for those set forth in its Motion for Summary Decision, Brief in Support of Motion for Summary Decision, and Separate Statement of Material Facts as to Which There is No Genuine Dispute, NTSP prays that this case be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2004, I caused a copy of the foregoing document to be served upon the following persons:

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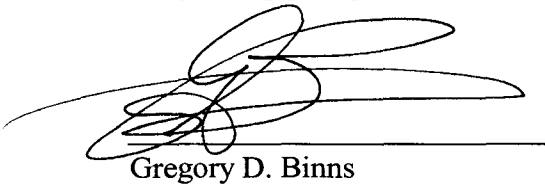

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