[PUBLIC RECORD]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of North Texas Specialty Physicians, a corporation.

Docket No. 9312

Respondent's Consolidated Response to Complaint Counsel's Motions *in Limine*

INTRODUCTION

Complaint Counsel has challenged bits and pieces of the reports of each of Respondent's three experts. Complaint Counsel has brought forward no expert evidence, however, to support its arguments that these selected parts of the expert reports should not be heard along with the full testimony of these experts at trial. In many instances, Complaint Counsel is complaining because Respondent's experts have pointed out the deficiencies or admissions in Complaint Counsel's and Complaint Counsel's expert's own proof. None of Complaint Counsel's challenges rise to the level of a proper *Daubert* challenge. All Complaint Counsel succeeds in doing in its motions is to implicitly establish and underline Complaint Counsel's own failures to sustain its burden of proof under the rule-of-reason-type analysis mandated by the Supreme Court's *California Dental* decision.

THE LEGAL STANDARDS

The initial burden is on the party opposing expert testimony to sufficiently call the expert's opinion into question.[1] This is usually accomplished by offering conflicting literature or expert testimony.[2] A challenge to a test's methodology is improper when there is no expert opinion in the record to show the methodology is wrong.[3] Here, Complaint Counsel fails to bring forward any expert testimony challenging what Respondent's experts have done.

Daubert challenges are also disfavored in settings similar to this case. Complaint Counsel points out that Federal Rule of Evidence 702 and *Daubert* itself are not controlling in this administrative proceeding.[4] And even courts bound by the Federal Rules of Evidence have held that *Daubert* is less important in cases where the judge sits as the trier of fact.[5] Given this authority and the paucity of grounds for Complaint Counsel's motions (as explained more fully below), there seems to be little reason for the Administrative Law Judge to spend time on a preliminary challenge like this in lieu of hearing the experts' opinions in the fuller context of their and others' trial testimony.

A proper *Daubert* challenge would also have to focus on the principles and methodology

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[1] *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 581 (5th Cir. 2001).

[2] *Tanner v. Westbrook*, 174 F.3d 542, 546 (5th Cir. 1999).

[3] *See, e.g., Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 808 (3d Cir. 1997) (argument that improper test was run failed when there was no expert opinion that the test was an inappropriate method).

[4] *See* Complaint Counsel's Memorandum in Support of Motion *In Limine* to Preclude Report and Testimony of Edward F.X. Hughes, p. 2.

[5] *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000).

of an expert opinion, not its conclusions.[6] An opposing party does not properly attack an expert by rehashing arguments related to the central factual disputes of the case.[7] An expert is also not required to establish the validity of disputed facts in order to have a proper factual basis for his opinion.[8]

While the proponent of the expert has to show admissibility, this burden is low. The party must only show that the testimony will "assist the trier of fact," not that it will satisfy the burden on the ultimate issue at trial.[9] Experts should be excluded only if their testimony is so fundamentally unsupported that it cannot possibly help the factfinder.[10]

The proper scope of a *Daubert* challenge is very limited. The question is one of admissibility only – arguments going to the weight of expert testimony are not proper.[11] As the *Daubert* opinion itself reminds us, the traditional and appropriate means of attacking admissible evidence are cross-examination, presentation of contrary evidence, and careful instruction on burden of proof.[12] The ability to test evidence in these ways makes exclusion of expert testimony unnecessary in most circumstances. An expert is not required to know the answers to all

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[6] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993).

[7] *Int'l Adhesive Coating Co. v. Bolton Emerson Int'l, Inc.*, 851 F.2d 540, 545 (1st Cir. 1988).

[8] *Id.*

[9] *Ambrosini v. Labarraque*, 101 F.3d 129, 135 (D.C. Cir. 1996).

[10] *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989)

[11] *See Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002); *Cummings v. Standard Register Co.*, 265 F.3d 56, 65 (1st Cir. 2001).

[12] *Daubert*, 509 U.S. at 595.

questions presented in a case – not even fundamental questions.[13] Exclusion is not required even when the expert's opinion is tentative or speculative.[14]

Most arguments disguised as *Daubert* challenges actually attack the weight of the expert testimony, not its admissibility. For example, challenges to the factual bases or underpinnings of an expert opinion usually go only to weight and credibility of the evidence, not admissibility.[15] Further, the test for admissibility is not whether the expert might have done a better job.[16] Pointing out the limits of an expert's research or things the expert failed to do usually goes only to the weight of the evidence.[17] Using these principles, courts have found no basis for exclusion when experts were challenged for failing to take into account certain data,[18] choosing an incorrect base point,[19] compiling a faulty database,[20] and failing to control factors and omitting variables.[21]

RESPONDENT'S EXPERT WITNESSES

In order to understand the context of the expert opinions being expressed by

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[13] *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 390 (6th Cir. 2000).

[14] *Int'l Adhesive Coating Co.*, 851 F.2d at 545.

[15] *Hartley*, 310 F.3d at 1061; *Hurst*, 882 F.2d at 311; *Int'l Adhesive Coating Co.*, 851 F.2d at 545.

[16] *Kannankeril*, 128 F.3d at 809.

[17] *Ambrosini*, 101 F.3d at 140.

[18] *Cummings*, 265 F.3d at 65.

[19] *Id.*

[20] *Tyler v. Union Oil Co.*, 304 F.3d 379, 392-93 (5th Cir. 2002).

[21] *Id.*

Respondent's experts, it is important to know what their experience and qualifications are.

Dr. Gail Wilensky has a Ph.D. in economics from the University of Michigan and is one of the foremost authorities concerning healthcare policy in the country. She has served as the Administrator of the Healthcare Financing Administration from 1990 to 1992, a Deputy Assistant of Policy Development to President Bush from 1992 to 1993, the Chair of the Physician Payment Review Commission from 1995 to 1997, the Chair of the Medicare Payment Advisory Commission from 1997 to 2001, and very recently as the Co-Chair of the President's Task Force to Improve Healthcare Delivery for Our Nation's Veterans. She has written extensively in the area of healthcare, as shown by her attached *curriculum vitae*.[22] As will be seen, Dr. Wilensky is being called by Respondent to show how NTSP and its business model have procompetitive attributes in the context of U.S. healthcare policy. Dr. Wilensky, like Respondent's other two experts, establishes the plausibility of procompetitive justifications for NTSP's position in this case, and thereby eliminates under the *California Dental* decision any applicability of the *per se* or other abbreviated review on which Complaint Counsel solely bases its case.[23] Furthermore, the procompetitive attributes of NTSP and its business model, even if Complaint Counsel had tried or been able to carry its burden of proof under a rule of reason analysis, would establish that on balance NTSP's conduct is not an antitrust violation.

Dr. Edward Hughes holds a medical degree from Harvard Medical School and a Master

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[22] A copy of Gail R. Wilensky, Ph.D.'s *curriculum vitae* is attached as Exhibit B.

[23] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 771 and 778 (1999) (stating that if the challenged conduct "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," the truncated rule-of-reason analysis does not apply).

of Public Health degree from Columbia University of Public Health. For many years he has been a Professor of Management and Strategy and of Health Industry Management at the Kellogg School of Management at Northwestern University, as well as being a Professor of Preventive Medicine at Northwestern University Medical School. He is nationally recognized in matters concerning health industry management and the development and functioning of managed care in the U.S. For almost 30 years he has taught courses concerning managerial leadership in the healthcare industry. His extensive writings and experience are included in his attached *curriculum vitae*.[24] Dr. Hughes is being called by Respondent primarily to discuss the procompetitive aspects of NTSP and its business model in the context of Dr. Hughes' experience with organizational models and teams in the healthcare industry.

Dr. Robert Maness holds a Ph.D. in economics from Texas A&M University and has specialized in the fields of antitrust industrial organization and health economics. He was a staff economist for the Federal Trade Commission from 1995 to 1996, where he worked on healthcare antitrust issues. From 1996 to the present he has been with LECG, Inc., working on healthcare-related and other matters.[25] Dr. Maness has carried the typical load of an antitrust economist in this type of case. Drs. Wilensky and Hughes have relied on Dr. Maness's detailed analysis of NTSP in drawing their supplemental opinions.

RESPONDENT'S EXPERTS' REPORTS

[redacted]

[24] A copy of Edward F. X. Hughes, MD, M.P.H.'s *curriculum vitae* is attached as Exhibit C.

[25] A copy of Robert S. Maness, Ph.D.'s *curriculum vitae* is attached as Exhibit D.

[redacted]

[26] Deposition of Robert S. Maness, Ph.D. at p. 146, attached as Exhibit E.

[27] A copy of Robert S. Maness, Ph.D.'s expert report is attached as Exhibit F.

[28] Exhibit F at pp. 2-3.

[29] *Id.* at pp. 9-14.

[30] *Id.* at pp. 3, 5.

[31] *Id.* at 22.

[32] *Id.* at pp. 26, 30.

[redacted]

Dr. Wilensky provides a report[37] which is supplemental to the report of Dr. Maness. Her report contains the following major points:

- [redacted]

[33] *Id.* at pp. 3, 19-20.

[34] *Id.* at p. 4.

[35] *Id.* at pp. 4, 38-39.

[36] *Id.* at p. 43.

[37] A copy of Gail R. Wilensky, Ph.D.'s expert report is attached as Exhibit G.

[38] Exhibit G at pp. 6-9.

[39] *Id.* at pp. 11-12.

- [redacted]

Dr. Hughes also provides a report[42] supplemental to that of Dr. Maness. Dr. Hughes makes the following major points:

- [redacted]

[40] *Id.* at pp. 12-14

[41] *Id.* at p. 16.

[42] A copy of Edward F. X. Hughes, MD, M.P.H.'s expert report is attached as Exhibit H.

[43] Exhibit H at pp. 4, 9-10.

[44] *Id.*

[45] *Id.* at pp. 16-18.

[redacted]

COMPLAINT COUNSEL'S ARGUMENTS

SPILLOVER ANALYSIS

The principal point which is made by Complaint Counsel in regard to the expert opinions of Drs. Maness, Wilensky and Hughes is a criticism of a study comparing the medical, pharmacy, and total costs per member per month ("PMPM") for NTSP's patients under the PacifiCare capitation contract and under the CIGNA fee-for-service contract. That study showed that under the two payment methodologies the costs were quite similar and that spillover of medical management improvements was occurring from NTSP physicians' treatment of capitation patients to their treatment of fee-for-service patients. In short, the data validated NTSP's business model in creating a network for capitation risk contracts and then continuing to be involved with payors who want to use the network for fee-for-service contracts. Because the PMPM costs of treatment under the two types of contracts were so similar, the gains NTSP has made through medical management techniques for its risk contract clearly have had a similar effect of lowering costs on NTSP's fee-for-service work under the CIGNA contract.

Complaint Counsel attacks this very significant study, asserting that the study could be done "better."[47] That argument has two defects. First, whether a study can be done "better" is not the standard for whether or not the study will be admitted and considered by the fact finder. "[T]he test for admitting his expert testimony is not a question of whether his methods were

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[46] *Id.* at pp. 17-18.

[47] *See* Memorandum in Support of Motion *in Limine* to Preclude Certain Opinion Testimony of Gail R. Wilensky, p. 8.

perfect or whether a possibility exists that the 'expert might have done a better job.'"[48] Second, Complaint Counsel brings forth no expert testimony that the study is invalid and should not be admitted under the *Daubert* standard (even if the *Daubert* standard were applicable in this type of proceeding).[49] Without any supporting expert evidence, Complaint Counsel's motions are merely comments by lawyers. It is telling that Complaint Counsel and Complaint Counsel's expert never try to bring forward any different statistical comparisons of the PacifiCare and Cigna populations, even though Complaint Counsel says it should be done.

[redacted]

[48] *Eclipse Elec. v. Chubb Corp.*, 176 F. Supp. 2d 406, 412 (E.D. Pa. 2001) (quoting *Oddi v. Ford Motor Co.*, 234 F.3d 136, 156 (3d Cir. 2000)).

[49] *See, e.g., Kannakeril,* 128 F.3d at 808 (argument that test was unreliable rejected because no supporting expert opinion).

[50] *See* Declaration of Robert S. Maness in Response to Complaint Counsel's Motion *in Limine* to Preclude Certain Testimony at p. 4 and 6, attached as Exhibit I.

[51] Exhibit I at pp. 3-5.

[52] Exhibit I at pp. 4-7.

Complaint Counsel's own expert, Professor Frech, has already admitted that his opinion, as well as that of the literature, is that there is spillover from managed care to other forms healthcare.[53] In fact, Professor Frech stated that he expected there would be spillover from NTSP physicians participating in the risk contract to NTSP physicians who did not participate as well as spillover to medical practice in the entire geographic area.[54] Professor Frech's admission also corroborates the repeated testimony in the record by doctors that the medical management lessons they have learned under NTSP risk contracts are applied in their treatment of non-risk patients.[55] Indeed, physicians have testified that they often do not even know what type of insurance a patient has when the patient is being treated.[56] Complaint Counsel's attack not only is without substance, but also contradicts Complaint Counsel's own expert.

Complaint Counsel also has a related criticism of Respondent's experts. Complaint Counsel questions why Respondent has not done a study comparing NTSP's costs for patients under the PacifiCare and CIGNA contracts to patients treated under other payors' contracts. Complaint Counsel is well aware of the fallacy of its argument. Although Respondent issued subpoenas to the other payors seeking access to the payors' databases so that such studies could be done, the payors successfully resisted producing such databases. Although Respondent had sufficient data in its own possession concerning the PacifiCare and CIGNA patient populations

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[53] Deposition of Professor H.E. Frech III at pp. 104-105, 110, 240-241, attached as Exhibit J.

[54] *Id.* at p. 240-241.

[55] Deposition of Ira Hollander, MD, at pp. 164-165; Deposition of Mark Presley, MD, at pp. 135-136; Deposition of Harry Rosenthal, Jr., MD, at pp. 45-46; attached as Exhibits K, L, and M.

[56] Exhibit K at p. 164; Exhibit L at p. 135; Exhibit M at p. 46.

to run a spillover comparison for those populations, NTSP has never had access to sufficient data for the patient populations for other payors. Respondent has done what it can with the available data and has conclusively shown that spillover has occurred, corroborating the testimony of physicians that such spillover of treatment techniques in fact occurs. Complaint Counsel's criticism as to wanting even more data seems misplaced, especially in light of Complaint Counsel's expert's own admission that spillover does occur. Complaint Counsel's criticism is not a sufficient foundation for a *Daubert* challenge.

RELEVANT MARKET

Complaint Counsel also challenges why Dr. Maness did not do detailed price analyses in his study of a relevant market. Complaint Counsel's challenge is surprising, to say the least, in that the burden to prove a relevant market is on Complaint Counsel, and Complaint Counsel chose not to prove a relevant market.[57] As pointed out in Respondent's pending Motion for Summary Decision, that is one reason why Complaint Counsel's complaint should be dismissed.

Although Respondent has no burden of proof to delineate a relevant market, Respondent has done more than enough to show that any relevant market would have to include Dallas and other counties, in addition to Tarrant County. [redacted] Dallas County is only 15 miles from downtown Fort Worth. [redacted]

[57] Some courts have held that construction of the relevant market must be based on expert testimony. *E.g.*, *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1246 (11th Cir. 2002).

[58] Exhibit F at p. 11.

[redacted] Complaint Counsel's own expert acknowledges as much.[60] In addition, some payors use the same payment rates for Dallas and Tarrant Counties.[61]

The 1992 Merger Guidelines use a "small but significant and non-transitory" price increase hypothetical as a conceptual construct to draw on "all relevant evidence" to predict what "likely" would occur, so that a relevant market and the participants in a relevant market can be determined.[62] Complaint Counsel takes the extraordinary position that a respondent's expert has to perform price or "quantitative" analyses to rebut an allegation as to relevant market. Complaint Counsel, of course, cites no authority for this proposition.

In this case, Respondent did not have access to price data to do an empirical market study like the one Complaint Counsel argues should have been done. Instead, Complaint Counsel made no effort to prove a relevant market, and Respondent used structural factors to show that Complaint Counsel would never be able to prove that Tarrant County, much less the City of Fort Worth, constituted a valid relevant market. As Dr. Maness discusses in his attached declaration, the methodology he used in his analysis of relevant market is consistent with the approach he used while an economist in the Bureau of Economics. Interestingly enough, Complaint Counsel's own expert admits the validity of many of the factors Dr. Maness used to show that a local city or

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[59] *Id.* at p. 13.

[60] Exhibit J at pp. 130-31.

[61] Deposition of David Roberts, p. 60, attached as Exhibit N; Exhibit J at p. 166.

[62] Exhibit J at pp. 130-132.

county market was not sustainable.[63] Complaint Counsel's challenge to Dr. Maness's work on relevant market is groundless and only highlights Complaint Counsel's own failure to demonstrate a relevant market.

DR. WILENSKY'S OPINIONS

Complaint Counsel's criticism of Dr. Wilensky's report is more like a citation-less lawyer's final argument than a Daubert challenge.

To the degree Complaint Counsel carries forward its criticism that the PacifiCare/ CIGNA spillover analysis could be done "better," Respondent incorporates the discussion already made above.

Complaint Counsel makes an argument that Dr. Wilensky should not be able to comment on the fact that NTSP has taken steps to improve spillover by requiring all the doctors on NTSP's non-risk panel to be available for risk contracts. [redacted] Complaint Counsel cites no authority, nor really any cogent reason, why Dr. Wilensky cannot testify on the positive implications of an improvement in NTSP's business model. Given Professor Frech's admission that spillover tends to increase the more continuity in physicians there is between the risk physician panel and the non-risk physician panel,[65] Dr. Wilensky's testimony on this point seems incapable of being contradicted.

Complaint Counsel also criticizes Dr. Wilensky for not replicating Dr. Maness's and

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[63] *Id.* pp. 130-132.

[64] Exhibit G at pp. 5, 14-15.

[65] Exhibit J at p. 241.

others' intensive reviews of NTSP's operations.[66] Complaint Counsel, of course, cites no authority that every expert in a case has to perform his or her own review of data and facts independent from all other experts. Such a rule would be not only hugely expensive, but would render impossible the coordination of experts from different disciplines (*e.g.*, economics and accounting) who need to rely on each other's works in making conclusions within their own fields of expertise.[67] Legal precedent, in fact, rejects such a rule.[68]

Dr. Wilensky's opinions go well beyond the data and proof as to NTSP's performance shown by Dr. Maness and NTSP, much of which has been admitted as conceptually valid by Complaint Counsel's expert. [redacted]

Complaint Counsel's attack on Dr. Wilensky's opinions as "speculation" is greatly out of place. There are few persons more expert than Dr. Wilensky concerning healthcare trends and policy in the United States and what changes are needed so that increases in healthcare spending

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[66] Memorandum in Support of Motion *in Limine* to Preclude Report and Testimony of Gail R. Wilensky at pp. 7-8.

[67] Part of Complaint Counsel's motivation in this case seems to be to want to raise the bar for NTSP's evidentiary showings, despite the fact that Complaint Counsel not only fails to meet the standard it posits, but also fails to make any showing comparable to the depth and quality of the showings made by Respondent.

[68] *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 94-95 (2d Cir. 2000)

[69] Exhibit G at p. 16.

abate. Dr. Wilensky has spent more than a decade in charge of many of the governmental bodies expressly charged with determining how to avoid healthcare spending increases. She has been repeatedly called to testify before Congress on these same issues.[70] Her explanation of the procompetitive aspects of NTSP's business model in the context of the structure of the healthcare industry is entitled to great weight. Complaint Counsel's attempt to restrict Dr. Wilensky to statements about NTSP's (uncontroverted) performance data is merely an attempt to avoid having Complaint Counsel's theory judged in the light of the lessons applicable to the healthcare industry in general.

DR. HUGHES'S OPINIONS

Dr. Hughes, like Dr. Wilensky, is providing a report which is supplemental to that of Dr. Maness. Dr. Hughes has had personal experience and involvement in observing NTSP's medical management operations, and hence is able to draw on that background in commenting on how NTSP compares to the many other organizations Dr. Hughes has encountered in his long career. Dr. Hughes also relies on the detailed analysis which Dr. Maness did of NTSP's operations.

Dr. Hughes has spent a substantial portion of his career consulting with healthcare organizations on how to create teamwork through leadership. Dr. Hughes has been able to observe how effective teamwork among doctors improves the quality and efficiency of medical practice. He has personally investigated the functioning of NTSP in that context through site visits and conferences with NTSP's physician leadership at the board, divisional, and medical management levels. He has further interacted through on-site visits and conferences with the

[70] *Id.* at p. 2; Exhibit B.

staff of NTSP when conducting his analysis.

Dr. Hughes is critical of Complaint Counsel's use of unit cost as virtually the only criterion of market impact in this case, because that is an ineffective measure. The cost paid by payors is a composite of provider cost, facility cost, pharmacy cost, and other costs. Physicians, as one type of provider, charge based on the number and types of services provided (what is sometimes referred to as "utilization"), multiplied by the unit cost for each of the services. Dr. Hughes explains that implementing more efficient and cost-effective utilization is a result of effective physician teamwork and can be much more important than unit cost in reducing the charges paid by a payor. He will also be able to explain that physicians act as decision-makers for patients' stays in hospitals and other facilities and for patients' use of pharmaceutical drugs. Physicians, through more effective teamwork, can achieve dramatic improvement in facility and pharmacy costs, and those efficiencies can be much more important than physician unit cost.

Dr. Hughes will also be able to explain why effective teamwork is very vulnerable to changes in membership in the physician team. More than a decade of teaching managed care organizational leadership gives him the perspective to explain why Complaint Counsel's attempt to force NTSP to move outside NTSP's business model of making available the same network for non-risk contracts as is being used for risk contracts is counterproductive and bad public policy.[71]

Complaint Counsel challenges Dr. Hughes because Dr. Hughes relies on the testimony

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[71] The National Bureau of Economic Research and others have published studies showing the value of teamwork processes - what economists call "organizational capital." *See, e.g.*, Lev, Baruch and Radhakrishnan, "The Measurement of Firm-Specific Organization Capital," NBER Working Paper #9581, March 2003; Chowdhry and Garmaise, "Organizational Capital and Intrafirm Communication," March 2003 Working Paper, The Anderson School at UCLA; Atkeson and Kehoe, "Measuring Organizational Capital," Federal Reserve of Minneapolis, Research Department Staff Report 291, September 2002, p. 1.

and analysis done by Dr. Maness and others as to the spillover of NTSP's medical management gains on the risk contracts to non-risk treatment. This challenge is misplaced because Dr. Hughes is allowed to rely on other experts' and witnesses' work and testimony.[72]

Dr. Hughes's primary task is not to replicate what Dr. Maness and others have done in demonstrating that NTSP performs better than most other comparable organizations and physicians and that spillover exists between NTSP's treatment of capitation patients and fee-for-service patients.[73] Instead, his primary tasks are to address the implications of those results in his criticism of Complaint Counsel's reliance on unit cost as the appropriate measure and Complaint Counsel's disregard of the positive implications NTSP's network business model for achieving improvements in overall cost. As demonstrated above, Complaint Counsel's criticism of the spillover analysis is incorrect; Complaint Counsel does not even try to bring forward expert evidence in its motions to contradict the data showing the spillover of NTSP's superior performance. Complaint Counsel also does not challenge Dr. Hughes's points that overall cost is the appropriate way to measure physician performance and that physician performance in controlling overall cost is enhanced by maintaining the continuity of the physicians engaged in risk and non-risk contracts.

Complaint Counsel has a second criticism of Dr. Hughes – that Dr. Hughes has not addressed Complaint Counsel's contention that NTSP must participate in every payor offer

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[72] *See* FED. R. EVID. 703 (facts or data relied upon by expert may be those "made known" to expert); *Gussack Realty Co. v. Xerox Corp.*, 224 F.3d 85, 94-95 (2d Cir. 2000) (expert need not conduct own tests).

[73] *See Id.*

unless Respondent proves that there are "significant efficiencies in NTSP's non-risk-sharing business."[74] Complaint Counsel's criticism is multi-flawed.

[redacted] Many of these points are conceded by Complaint Counsel's expert.[76]

Secondly, Complaint Counsel's contention is wrong as a matter of law in at least two regards. NTSP, like any entity, has the right to refuse to deal under the *Colgate* doctrine.[77] That point has been recently emphasized in a similar context for an association in the *Viazis* decision.[78] That right to refuse does not depend on the refusal being based on expensive and complicated economic studies by highly-paid experts. In addition, under the non-abbreviated analysis mandated by *California Dental*, Complaint Counsel has failed to carry its burden of showing an adverse impact in a relevant market in light of the clear points made by Dr. Hughes and others that there are plausible pro-competitive effects from NTSP's network business model.

Thirdly, and the point most directly in point with Complaint Counsel's *Daubert* motion,

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[74] *See* Memorandum in Support of Motion *in Limine* to Preclude Report and Testimony of Edward F. X. Hughes, at p. 14-15.

[75] Exhibit F at pp. 42-44.

[76] Exhibit J at pp. 105, 115, 240-241.

[77] *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

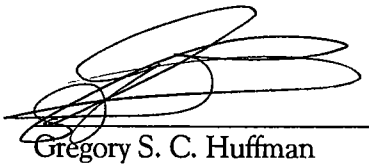
[78] *See Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002).

the admissibility of Dr. Hughes's opinions do not depend on his also addressing other positions Complaint Counsel would like to argue about, especially when Complaint Counsel's positions are both factually and legally flawed.

CONCLUSION

Every challenge to NTSP's experts goes to the weight of the testimony, not its admissibility. Complaint Counsel has done nothing except challenge portions of these experts' reports, and it has based these challenges not on expert evidence, but on rehashed arguments concerning the issues in dispute in this case. Because none of Complaint Counsel's arguments presents a proper *Daubert* challenge, NTSP requests that Complaint Counsel's Motions *In Limine* to preclude expert testimony be denied in whole. NTSP also requests all other and further relief to which it may be justly entitled.

Respectfully submitted,



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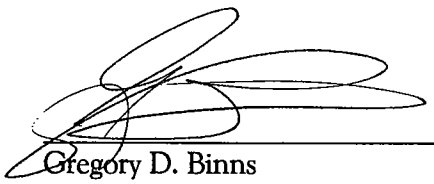

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The Specific Pages of Respondent's Consolidated Response to Complaint Counsel's Motion *in Limine* that are subject to the Protective Order Governing Discovery Material are pages 7, 8, 9, 10, 11, 13, 14, 15, 16, and 20.

In addition, Exhibits F, G, H, and I are subject to the Protective Order Governing Discovery Material

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

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

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

PROTECTIVE ORDER
GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

1. "Matter" means the matter captioned *In the Matter of North Texas Specialty Physicians*, Docket Number 9312, pending before the Federal Trade Commission, and all subsequent appellate or other review proceedings related thereto.

2. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this Matter.

3. "North Texas Specialty Physicians" means North Texas Specialty Physicians, a non-profit

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

GAIL R. WILENSKY, PH.D.

Project HOPE
7500 Old Georgetown Road
Suite 600
Bethesda, Maryland 20814
301.656.7401

EMPLOYMENT

PROJECT HOPE
Senior Fellow (January 1993 – Present)
(John M. Olin Senior Fellow, June 1995 – August 2003)

Develops and analyzes policies relating to health care and the economy; serves as a formal and informal advisor to government and the private sector, and writes and speaks about health care reform.

PRESIDENT'S TASK FORCE TO IMPROVE HEALTH CARE DELIVERY FOR OUR NATION'S VETERANS
Co-Chair (June 2001 – May 2003)

Two-year task force created by President Bush to identify ways to improve benefits and services for veterans and military retirees through better coordination of services between the VA and DOD, and to improve business practices and identify opportunities for improved resource use between the VA and DOD.

THE MEDICARE PAYMENT ADVISORY COMMISSION
Chair (October 1997 – 2001)

Congressionally created commission that advises Congress on issues of payment and expenditure growth for all parts of Medicare and on non-payment issues such as risk selection, access to care, quality/performance measures, graduate medical education and the relationship of Medicare with the rest of the health care sector.

THE PHYSICIAN PAYMENT REVIEW COMMISSION
Chair (May 1995 – September 1997)

Congressionally created commission that advised Congress on physician payments and expenditure growth, capitation payments, quality and performance measures for Medicare and on access issues for both Medicare and Medicaid.

THE WHITE HOUSE
Deputy Assistant to the President for Policy Development (1992 – 1993)

Advised and briefed the President, the Vice President, and other senior administration officials on issues related to health care and welfare reform. Led working group of senior officials in developing legislation to implement President Bush's Comprehensive Health Reform Program.

U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administrator, Health Care Financing Administration (1990 – 1992)

Directed the Medicare and Medicaid programs, with an annual budget of $200 billion and a staff of 4,200. Advised the Secretary and the Administration on issues related to health policy and health care financing.

PROJECT HOPE
Vice President, Health Affairs (1983 – 1989)

Developed the Center for Health Affairs and served as the administrative head for the domestic policy division of Project HOPE.

NATIONAL CENTER FOR HEALTH SERVICES RESEARCH, DHHS
Health Service Fellow and Senior Research Manager (1975 – 1983)

Co-director of the National Medical Care Expenditure Survey and head of the analytic team of NMCES, a longitudinal survey of 40,000 individuals focusing on their health care use, expenditures and health insurance status with follow-on surveys of their employers, insurance companies, physicians and hospitals.

UNIVERSITY OF MICHIGAN
Visiting Assistant Professor and Associate Research Scientist (1973 – 1975)

Joint research and teaching appointment in the Department of Economics and the Institute of Public Policy Studies. Research Appointment at the Survey Research Center. Teaching responsibilities included public finance and public sector decision-making.

URBAN INSTITUTE
Senior Research Associate (1971 – 1973)

Research focus on micro-simulation modeling of health care expenditures and the relationship between income and education.

MARYLAND COUNCIL OF ECONOMIC ADVISERS
Executive Director (1969 – 1971)

Responsible for advising the Governor on revenue and expenditure estimates for various programs; co-directed a Maryland tax study.

PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS
Staff Economist (1968 – 1969)

Responsible for setting up the micro-simulation model used to estimate the effects of various welfare reform proposals and writing portions of the Commission report.

EDUCATION

UNIVERSITY OF MICHIGAN

B.A., 1964	Psychology (with honors and distinction)
M.A., 1965	Economics
Ph.D., 1968	Economics

PERSONAL

Born:	June 14, 1943	Detroit, Michigan
Married:	Robert J. Wilensky, M.D., Ph.D.	August 4, 1963
Children:	Peter B. Wilensky	May 19, 1969 (DOB)
	Sara E. Wilensky	May 5, 1971 (DOB)
Grandchildren:	Jadyn A. Wilensky	Sept. 23, 1998 (DOB)
	Jara A. Wilensky	June 19, 2002 (DOB)
	(Born to Peter B. and Shawn Davis Wilensky)	

HONORS

Honorary Degree, The University of the Sciences in Philadelphia (2002)
Honorary Degree, Rush University (June 1997)
Honorary Degree, Hahnemann University (June 1993)
Marshall J. Seidman Lecturer, Harvard Medical School (April 2003)
John D. Thompson Distinguished Visiting Fellow, Yale Health Management Program (February 2003)
TeKolste Scholar, Indiana Hospital and Health Association (1997)
Member, Institute of Medicine, National Academy of Sciences (1989 – Present)
Who's Who in America (1989 – Present)
Who's Who of American Women (1989 – Present)
Flinn Foundation Distinguished Scholar in Health Policy and Management (1986)

AWARDS

Darrel J. Mase Distinguished Leadership Award, University of Florida (2000)
The Latiolais Honor Medal, The American Managed Care Pharmacy Association (1996)
Dean Conley Award, American College of Healthcare Executives (1989)
Alumna in Residence Award, University of Michigan (1989)

COMMITTEE AND ORGANIZATION PARTICIPATION

Member, Board of Trustees, University of the Sciences in Philadelphia (2004 -)
Board Member, National Campaign To Prevent Teen Pregnancy (2004 -)
Director, American Heart Association (2002 -)
Trustee, United Mineworkers of America, Combined Benefits Fund, D. C. (1993 -)
Director, Vice Chair and Chair, AcademyHealth, Washington, DC (1999 -)
Chair, Medicare Payment Advisory Commission (1997 - 2001)
Chair, Physician Payment Review Commission (1995 - 1997)
Commissioner, Physician Payment Review Commission (1989 - 1990)
Member, Advisory Committee on Health, General Accounting Office, U. S. Congress (1989, 1993 - 1995)
Selected Committees of the Institute of Medicine, National Academy of Sciences, and the National Research Council

PUBLICATIONS

"How to Curb Spending on Drugs" op-ed in The Washington Post, Page B07, February 15, 2004.

"Thinking Outside The Box: A Conversation with John Breaux" in Health Affairs, Web Exclusive, W3-124 to W3-125, March 5, 2003.

"The Implications of Regional Variations in Medicare - What Does It Mean for Medicare?" in the Annals of Internal Medicine, Volume 138, Number 4, February 18, 2003.

"Medicare Reform - Now Is The Time" in The New England Journal of Medicine, Volume 345, Number 6, August 9, 2001.

"Paying for Graduate Medical Education: The Debate Goes On" in Health Affairs, Volume 20, Number 2, March/April 2001.

"What's Behind the Public's Backlash?" in the Journal of Health Politics, Policy and Law, Duke University Press, October 1999 issue, Volume 24.

"Medicare: What's Right? What's Wrong? What's Next?" in Health Affairs, Volume 18, Number 1, January/February 1999.

"Incremental Reform: The Health Insurance Portability and Accountability Act of 1996" in The Future U. S. Health Care System: Who Will Care for the Poor and Uninsured, Stuart Altman et al (ed.), Chicago, Il: Health Administration Press, 1998.

"Who Will Pay for Graduate Medical Education," New England of Medicine, July 2, 1998.

"Medicare Managed Care: Why is it Coming" in Gastroenterology Clinics of North America, Vol. 26, No. 4, December 1997.

"Reducing Provider Payments vs. Restructuring Medicare" Stuart Altman et al (ed.), Princeton, NJ: Robert Wood Johnson Foundation, July 1997.

"Promoting Quality: A Public Policy View" in Health Affairs, Volume 16, Number 3, May/June 1997.

"Remaining Competitive in an Era of Managed Care," Imaging Economics, Vol. 10, No. 2, March-April 1997.

"Alleviating the Physician Glut: What's the Government's Role?" in Journal of the American Medical Association, Vol. 272, No. 1, January 1, 1997.

"Medicare Managed Care: The Next Big Wave" in The Internist, Volume XXXVII, No. 7, July-August 1996.

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Other Current Positions:

Member, Editorial Board, Health Care Business Digest, 1996 -
Member, Editorial Board, Journal of Clinical Outcomes Management, 1994 -
Member, Editorial Board, Counseline, 1993 -
Member, Editorial Board, Managed Healthcare News, 1990 -
Member, Editorial Board, ManagedCare Interface, 1988-
Member, Faculty Advisory Committee, Executive Leadership Program/Executive Leadership Program-Medical Directors, American Managed Care and Review Association, 1992 -
Member, Robert H. Lurie Cancer Center, The McGaw Medical Center of Northwestern University
Member, Advisory Board, Biotech Medical Management Association, 1998 -
Charter Member, The Health Care 500, 1993-
Fellow, American College of Physician Executives, 1986-

Other Current Positions: (Continued)
Fellow, Center on Aging, McGaw Medical Center, Northwestern University, 1987
Member, Advisory Board, National Managed Health Care Congress
Co-Chairman, Steering Committee, MD/MM Joint Degree Program, The Kellogg Graduate School of Management & The Medical School, Northwestern University, 1986-91
Who's Who in America, 1986-
Steering Committee, National Managed Health Care Congress, 1988
Member, Medical Administrators Conference, 1977-present

Consulting Reviewer:
- New England Journal of Medicine
- Journal of the American Medical Association
- Health Care Financing Review
- Medical Care
- Milbank Memorial Fund Quarterly/Health and Society
- American Journal of Public Health

Other Previous Positions:

Founding Editor, HMO/PPO Trends, 1987-1989
Member, Board of Directors, Boston Latin School Club of Chicago, 1981-1985
Consultant, Blue Cross and Blue Shield of Illinois, Division of Provider Affairs, Professional Relations and Government Affairs, 1985-86
Charter Member, Editorial Board, HMO Practice, 1986-90
Senior Consultant, Midwest Business Group on Health, 1983-88
Consultant, American Medical Association, Department of Health Care Financing and Organization, 1980-83
Consultant, American College of Surgeons, SocioEconomic Affairs Department, 1978-80
Co-Founder; Charter Vice President; Member, Board of Directors; Chairman, National Affairs Committee; Association for Health Services Research, Washington, D.C., 1982-85
Member, Committee on Institutional Research, Association of University Programs in Health Administration, Washington, D.C., 1982-84
Who's Who in the Midwest, 1982
Personalities of America, 1982
Men of Achievement, 1981
Member, National Advisory Board, The American Network: Subsidiary of American Medical Buildings, Inc., Milwaukee, Wisconsin, 1981-83
Consultant, National Center for Health Services Research, Office of the Director:
Member, Advisory Group, "Synthesis and Dissemination of Research Findings on Catastrophic Health Insurance," Lewin and Associates, 1980-82.
Member, Advisory Group, "Synthesis and Dissemination of Research Findings on HMO Operations and Performances," Applied Management Sciences, 1979-81
Member, Advisory Group, "Contract Workshops on Health Services Research Tools," University of Pennsylvania National Health Care Management Center, 1978-79

Member, Advisory Group, "Evaluation of Computerized Problem-Oriented Medical Information System (PROMIS)," 1975-78
Member, Advisory Committee: American Academy of Pediatrics Research Project, Division of Health Services Research, "Physician Participation in Medicaid," 1980-82
Who's Who in the East, 1976
Outstanding Young Men, U.S. Jaycees, 1976
Member, Committee on Public Health, New York Academy of Medicine, 1975-77 Chairman, Subcommittee on Medical Care, New York Academy of Medicine, 1975-77
Member, Board of Directors, Association of Teachers of Preventive Medicine, 1973-75
Representative, Council of Academic Societies, Association of American Medical Colleges, 1975-77
Consultant, Office of Policy Planning and Research, Health Care Financing Administration; Member, Advisory Group: "Evaluation of Ambulatory Surgical Centers," 1975-77
Member, Caucus on Renewal of Health Manpower Legislation, Washington, D.C., 1974
Founding Member, Editorial Board, Journal of Community Health, 1974-78
Consultant, Subcommittee on Organization, Financing, and Delivery of Surgical Care: Study of Surgical Services in the United States, American College of Surgeons--American Surgical Association, 1971-76
Consultant, Office of the Administrator, Health Services Administration of the City of New York, 1970-73

Professional Associations

American College of Physician Executives
American Economic Association
American Public Health Association
Association for Health Services Research
Association of Teachers of Preventive Medicine
New York Academy of Medicine
Society for Medical Decision Making
Boylston Society, Harvard Medical School

Grant Resources Raised at Northwestern University
(Total Grant Resources Raised = over $20 million

Publications
Books:

Perspectives on Quality in American Health Care, (Editor), McGraw-Hill, Washington, D.C., 1988.

Hospital Cost Containment Programs: A Policy Analysis, (with D.P. Baron, D.A. Dittman, B.F. Friedman, B.B. Longest Jr., M.V. Pauly and K.R. Smith), Ballinger Press, Cambridge, Massachusetts, 1978.

Publications (Continued)

Chapters:

"Assessing the Impact of Total Quality Management and Organizational Culture on Multiple Outcomes of Care for Coronary Artery Bypass Graft Surgery Patients," (with Shortell, S, et al.) Medical Care, February, 2000, Vol. 38:2, 207-217.

"Implementing Continuous Quality Improvement," (with Robin Gillies, Katherine Reynolds, Stephen Shortell, Peter Budetti, Alfred Rademaker, Cheng-Fang Huang, David Dranove) The Quality Imperative , Edited by John R. Kimberly, Univ. of Pennsylvania and Etienne Minvielle, Paris, Chapter 5, 2000.

"Physician Involvement in Quality Improvement: Issues, Challenges, and Recommendations," (with Stephen Shortell, Ph.D, James O'Brien, M.A, James Carman, Ph.D.; Richard Foster, Ph.D., Heidi Boerstler, Ph.D., Edward O'Connor, Ph.D. and Robin R. Gillies, Ph.D.) Improving Clinical Practice: Total Quality Management and the Physician, Edited by D. Blumenthal and A.C. Scheck, San Francisco: Jossey-Bass, Chapter 8, 1995.

"The Ascendancy of Management: National Health Care Reform, Managed Competition and Its Implications for Physician Executives." Lead Chapter in New Leadership in Health Care Management: The Physician Executive II, The American College of Physician Executives, Tampa, FL, 1994.

"Forward," in The Physician's Guide to Managed Care, David B. Nash, (Editor), Aspen Publishing, 1993.

"The Challenges Facing American Medicine: The Search for a New Equilibrium and Its Implications for Physician Executives." Lead Chapter in The Physician Executive, American Academy of Medical Directors, Tampa, FL, 1988.

Articles:

"Organizational and Economic Determinants of Formulary Adoption Decisions," Dranove, D., Hughes, E., Shanley, M., Health Services Research, 2002, Forthcoming.

"Does Continuous Quality Improvement Matter? The Case of Total Hip Replacement," Budetti, P., Dranove D., Gilles, R., Huang, C., Hughes, E., Rademaker, A., Reynolds, K., Shortell, S., Under Review.

"Keys for Successful Implementation of TQM in Hospitals," Carman, J.M., Shortell, S.M., Foster, R.W., Hughes, E.F.X., Boerstler, H., O'Brien, J.L., O'Connor, E.J; Health Care Management Review, Vol 21, #1, Winter, 1996.

"Implementation of Total Quality Management: Conventional Wisdom versus Reality Boerstler, H, Foster, R.W., O'Connor, E.J., O'Brien, J.L., Shortell, S.M., Carman, J.M.,

Hughes, E.F.X., The Journal of Hospital & Health Services Administration, Vol. 41, #2, 143-159, Summer, 1996.

"An Integrative Model for Organization-wide Quality Improvement: Lessons from the Field," O'Brien, J.L.; Shortell, S.M.; Hughes, E.F.X.; Foster, R.W.; Carman, J.M.; Boerstler, H; and O'Connor, E.J; Quality Management in Health Care, 3(4), 19-30, 1995.

"Assessing the Impact of Continuous Quality Improvement/Total Quality Management: Concept versus Implementation" Shortell, S; O'Brien, J; Hughes, E; Boersteler, H; and O'Connor, E; Health Services Research, 30:2, pp 377-401, June, 1995.

"Assessing the Evidence on CQI: Is The Glass 1/2 Empty or 1/2 Full?" Shortell, S, Levin, D.Z, O'Brien, J.L, and Hughes, E.F.X. Hospital and Health Services Administration, Vol 40, #1, pp 4-24, 1995.

"Assessing the Progress of TQM in US Hospitals: Findings from Two Studies," S. Shortell, J. O'Brien, E. Hughes, J. Carman, R. Foster, H. Boerstler, and E. O'Connor. The Quality Letter, pp 14-19, 1994.

"Evaluating New Ways of Managing Quality: An Interview with Stephen M. Shortell and Jim O'Brien," (Interviewed by A. B. Cohen). Journal on Quality improvement, Vol 20, #2, pp 90-96, 1994.

"The Impact of Managed Care on Dermatology," (with T. M. Waters), Cutis, pp. 2-8, November, 1993.

"Open Cholecystectomy: A Contemporary Analysis of 42, 474 Patients," (with J. Roslyn, M.D., G. Binns, Ph.D., K. Saunders-Kirkwood, M.D., M. Zinner, M.D., and J. Cates, M.D., Annals of Surgery, Vol. 218, No. 2, 129-137, August, 1993.

"Should Cost-Effectiveness Analysis Be a Criterion for Medical Coverage? A Moderating Viewpoint," (with R. Friedman), Medical Interface, January, 1992.

"Regional Variation in Medicare Hospital Mortality," (with L.M. Manheim, J. Feinglass, and S.M. Shortell), Inquiry, 29: 55-66, Spring, 1992.

"The Physician's Role in Quality Assessment and Improvement," (with J. L. O'Brien), Topics in Health Care Financing, 18(2), pp. 33-45, Winter, 1991.

Health Care in the 1990s and Beyond--Focus on Outcomes, (Editor), Highlights of Symposia, Excerpta Medica, Inc., April 28, 1990, Newport Beach, CA. and June June 23, 1990, Minneapolis, MN.

Publications (Continued)
Articles: (Continued)

"Training House Officers to be Cost Conscious: Effects of an Educational Intervention," (with L.M. Manheim, J. Feinglass, R. Hughes, G. Martin and K. Conrad), Medical Care, January, 1990.

"Trends in Health Care Systems Delivery." Prepared for the American Association of Colleges of Pharmacy for "Pharmacy in the 21st Century" Conference, 1989

"The Effects of Regulation, Competition, and Ownership on Mortality Rates Among Hospital Inpatients," (with S.M. Shortell), The New England Journal of Medicine 318:17, pp. 1100-1107, April 28, 1988.

"The Future of Managed Care: Challenges Within the Search for the New Equilibrium-I." Keynote Address in "Changing Patterns of Health Care Delivery: Opportunity or Obstacle?" January 10, 1986. Proceedings of the Annual Meeting, The Medical Directors Division of the Group Health Association of America, Inc., Washington, D.C., 1986

"Medicare Beneficiary Decision Making About Health Insurance: Implications for a Voucher System," (with S.A. LaTour and B.F. Friedman), Medical Care 24:7, July 1986.

"The Cost-Effectiveness of Non-Steroidal Anti-Inflammatory Drugs for Arthritis." (Guest Editor.) Postgraduate Medicine, Special Supplement, July 1986.

"A Synopsis of Federal-State Sponsored Preventive Child Health" (with J. Reis and S. Pliska), Journal of Community Health 9:3, pp. 222-239, 1984.

"The Vouchering of Medicare: A Marketing Research Approach" (with S. LaTour and B. Friedman). Presented at the Conference on the Future of Medicare sponsored by the U.S. House of Representatives Committee on Ways and Means, the Congressional Budget Office, and Congressional Research Service, 98th Congress, 2nd Session, Washington, D.C., November 29-30, 1983. U.S. Government Printing Office, Washington, D.C., February 1, 1984.

The Model Competitive Health Care Purchasing System, Midwest Business Group on Health, Chicago, Illinois, 1984. Chapter 4: Basis of Payment - Hospitals; Chapter 5: Basis of Payment - Physicians; Chapter 6: Basis of Payment - Other Providers. "Surgical Utilization Statistics: Some Methodologic Considerations," (with V. Sauter) Medical Care, 21:370-377, 1983.

"The Contribution of Health Services Research to National Health Policy," Testimony before the Subcommittee on Health and the Environment, Committee on Commerce and

Energy, U.S. House of Representatives, at its hearings on the Renewal of the National Center for Health Services Research and the National Center for Health Statistics (H.R. 2562), April 7, 1981, Serial No. 97-14, U.S. Government Printing Office, 1981, pg.241-256.

"Paraprofessional Manpower Policy and the GMENAC Report," The Crisis in Health Professions' Strategy, National Health Council, New York, 1981.

"Technological Innovation Under Regulatory and Competitive Cost Containment," Health Care Regulation and Competition: Are They Compatible? (Volume I),

Project Hope Institute for Health Policy, Health Sciences Education Center, Millwood, Virginia, 1981.

"Research on the Utilization of Evaluations: A Review and Synthesis," (with L. Leviton), Evaluation Review, 4:525-548, 1981.

"A Comparison of Surgical Assistance in a Prepaid Group Practice and a Community Hospital," (with E.M. Lewit, S. Bentkover, J. Bentkover), Medical Care, 18:916-929, 1980.

"Commentary:" Ghez, G.R. and Grossman, M., "Preventive Care, Care for Children and National Health Insurance," in National Health Insurance: What Now, What Later, What Never, Mark V. Pauly (Ed.), American Enterprise Institute, 1980.

"Why Does Medical Care Cost So Much?" in The Nation's Health, University Extension, University of California, San Diego, 1980.

"The Cost/Quality Tradeoff: A Critical Consideration in the Containment of Medical Care Costs," Special Report: Health and Medical Care Costs, Medical and Health Annual, 1980, Encyclopedia Britannica, 1979.

"The Study on Surgical Services for the United States: A Valid Prescription for American Surgery?" (with E.M. Lewit and M.V. Pauly), The Milbank Memorial Fund Quarterly: Health and Society, 55:465-484, 1977.

"Residency Training and Service," (with E.M. Lewit), New England Journal of Medicine, 294:1190, 1976.

"Time Utilization of a Population of General Surgeons in a Prepaid Group Practice," (with R.N. Watkins, and E.M. Lewit), Medical Care, 14:824-838, 1976.

"The Utilization of Surgical Manpower in Comparative Settings: The Case of One Community and One Prepaid Group Practice" in "Getting Ready for National Health

Insurance: Unnecessary Surgery." Hearings before the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce.

U.S. House of Representatives. Ninety-fourth Congress, Serial No.94-37, pp.183-190, U.S. Government Printing Office, Washington, D.C., 1975.
"Time Utilization of a Population of General Surgeons in a Community Practice," (with E.M. Lewit and F.V. Lorenzo), Surgery, 77:371-383, 1975.

"Residency Redistribution: The Need for Partnership." Proceedings of Hearings before the Senate Subcommittee on Health: "Residency Control Measures in the Health Professions Educational Assistance Act of 1975." U.S. Senate, September 30, 1975. U.S. Government Printing Office, p.1436-1473, Washington, D.C.

"Halsted and American Surgery," Surgery, 75:169-177, 1974.

"Training the Surgical Resident," (with E.M. Lewit), New England Journal of Medicine, 290:1384-1385, 1974.

"The Demand for Surgical Residents: Some Preliminary Observations," Surgery, 76:176-183, 1974.

"Utilization of Surgical Manpower in a Prepaid Group Practice," (with E.M. Lewit, R. Watkins and R. Handschin), New England Journal of Medicine 291:759-763, 1974. Reprinted in Issues in Health Services, ed. Stephen J. Williams, Sc.D., John Wiley & Sons, New York, 1979.

"On Monopoly in Medicine," (with E.M. Lewit), New England Journal of Medicine, 288, 1973.

"Operative Work Loads in One Hospital's General Surgical Residency Program," (with E.M. Lewit and E.H. Rand), New England Journal of Medicine, 289:660-666, 1973.

Transportation for Health for the East Harlem Triangle," Proceedings of Symposium: "A Health Care Plan for East Harlem--NOW." Annals of New York Academy of Sciences, 196:64-65, 1972, Article II.

"Alcoholism," in Marshall, C.L., Dynamics of Health and Disease, Appleton-Century-Crofts, New York, 1972.

"Surgical Work Loads in a Community Practice," (with V.R. Fuchs, J.E. Jacoby, and E.M. Lewit), Surgery, 71:315-327, 1972. Reprinted in The Health Economy, V. Fuchs, Editor. Harvard University Press, 1986.

Published Panel Presentation:

"What's Ahead for Governing Boards? Panelists Look at the 80's", Trustee, January, 1980, p. 18-25.

4/3/03

ROBERT S. MANESS

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College Station, TX 77845
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802 Prestwick Ct.
College Station, TX 77845
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EDUCATION

Ph.D., Economics, TEXAS A&M UNIVERSITY, TX, December 1992.
Doctoral Dissertation: *"Essays on Organizational Form and Pricing Behavior"*

B.S., Economics, LOUISIANA STATE UNIVERSITY, LA, December 1985.

Fields of Specialization: Antitrust, Industrial Organization, Health Economics, Microeconomics, Econometrics

PRESENT EMPLOYMENT

LECG, LLC, June 1996 - present.
Senior Managing Economist, 1999 - present
Office Director, 1998 - present
Senior Economist, 1996 – 1998

- Testify in deposition and trial
- Do presentations before government agencies
- Develop economic analysis for complex litigation, including antitrust, transfer pricing, and contract and business damages..
- Prepare white papers, consulting reports, expert witness reports, affidavits.
- Engagements have involved a number of industries, including petrochemicals, oil, chemicals, pharmaceuticals, health care, telecommunications, software, and airlines.
- Have worked on a number of engagements for the FTC and for parties investigated by the FTC
- Manage case development and support staff.

PROFESSIONAL EXPERIENCE

TEXAS A&M UNIVERSITY, College Station, TX
Adjunct Associate Professor 2000-2003

Visiting Associate Professor Fall 2000, Fall 2002

- Taught Undergraduate Industrial Organization

Visiting Assistant Professor Spring 1998

- Taught Principles of Macroeconomics

FEDERAL TRADE COMMISSION, Washington, D.C., 1995 - 1996.
Staff Economist

- Reviewed proposed mergers for potential antitrust concerns.
- Investigated complaints of anticompetitive behavior in violation of FTC and federal statutes.
- Worked closely with the FTC legal staff in both of these functions and prepared written reports and recommendations for use in FTC deliberations.

ALTON OCHSNER MEDICAL FOUNDATION, New Orleans, LA, 1995 - June 1996.
Adjunct Staff Economist

- Researched cost-effectiveness issues and the role of technology in reducing health care costs.
- Participated in preparing a successful contract proposal to Sandia National Laboratories for which Ochsner was awarded a two-year contract for $1.6 million to study the role of technology in reducing health care costs.
- Worked closely with physicians and the staff of their HMO in performing health economics research, including modeling of disease states and treatment regimes and performing statistical analysis and simulations on the cost-effectiveness of competing technologies and treatment regimes.

LOUISIANA STATE UNIVERSITY, Baton Rouge, LA, 1992 - 1995.
Visiting Assistant Professor

- Researched and published papers in various fields of economics, including Industrial Organization and Health Economics.
- Taught a wide variety of courses including Principles of Macroeconomics, Intermediate Microeconomics and International Trade.
- Developed a new Industrial Organization class and a new Managerial Economics class for the M.B.A. program.

HONORS AND AWARDS

Bradley Dissertation Fellowship Recipient, 1990

E. Ralph Daniels Fellowship Recipient, 1990

GRANTS AND CONTRACTS

Co-principal Investigator with Dr. Richard Re and Dr. M.A. Krousel-Wood in a two-year, $1.6 million contract awarded by Sandia National Laboratories to The Alton Ochsner Medical Foundation to study, "The Role of Technology in Reducing Health Care Costs."

COURSES TAUGHT

Principles of Macroeconomics
Intermediate Microeconomics
Industrial Organization
Managerial Economics (for M.B.A. students)
International Economics

PROFESSIONAL AFFILIATIONS

American Economic Association
American Bar Association - Associate Member - Antitrust Section

SELECTED CASEWORK

Testimony

W.E. Howell, et al. v. Texaco Inc., et al., No. CJ-2002-206E, District Court for Stephens County, Oklahoma. 2003. Deposition. Analyzed natural gas contracts between producers and a gas processing plant. Reviewed whether there existed a market at the wellhead for gas production and other market issues. Reviewed plaintiffs' damages calculations.

Johns Manville, f.k.a., Johns Manville International, Inc. v. New Pig Corporation, et al., American Arbitration Association, Case Reference No. 51-181-0194-02. 2003. Testimony in Arbitration. Analyzed the economics of distribution contract and damages related to alleged breach of distribution agreement.

Dr. Gerry Holland, DO, et al. v. Mr. Norm Lambert, et al., Civil Action No. 2-02CV-0157J, United States District Court, Northern District of Texas, Amarillo Division, 2003. Deposition. Analyzed market definition issues, market power issues, and alleged anticompetitive behavior.

Barb Bjerken, D.C., et al v. Blue Cross Blue Shield of North Dakota, et al, Civil Action No. A-01-059, United States District Court, District of North Dakota, Southwestern Division, 2002. Deposition. Analyzed alleged attempted monopolization of the market for chiropractic services in North Dakota, including analysis of alleged horizontal and vertical anticompetitive actions and antitrust damages.

Acoustic Systems, Inc. v. Wenger Corporation and Steve Bright, Civil Action No. A-97-CA-436-ADA, United States District Court, Western Division of Texas, Austin Division, 2001. Deposition and Trial Testimony. Analyzed issues related to alleged monopolization in the market for music practice rooms, including market definition, market power issues, evidence of anticompetitive acts such as tying and predatory pricing, and antitrust damages.

San Jacinto Surgery Center, Ltd. v. San Jacinto Methodist Hospital and Bill Simmons, Cause No. 98-11137, Harris County District Court, 334 Judicial District, Texas, 2000. Deposition. Analyzed issues related to alleged antitrust behavior in the market for outpatient surgery facilities. Issues included product and geographic market definition, monopoly power, and antitrust damages. Also analyzed potential damages related to allegations of commercial disparagement and tortious interference.

Imagents v. The University of Texas Health Science Center, Cause No.: 90-056735, Harris County District Court, 190th Judicial District, Texas, 1997. Deposition. Calculated damages related to alleged breach of contract regarding use of a University cyclotron to produce radiopharmaceuticals.

Other Expert Work

- For several retail pharmacy chains. Analyzed the potential for increased costs to payers from pharmaceutical benefits managers with integrated mail order pharmacy operations. Calculated the potential cost impact of certain PBM behaviors to the government under a proposed Medicare prescription drug benefit. Presented findings to the Congressional Budget Office, the Federal Trade Commission, and numerous members of Congress and Congressional committees.
- For a major consumer products company. Analyzed the relevant geographic and product markets in a merger involving consumer products.
- For a major cruise line: Analyzed an announced merger in the cruise industry and produced a report for use by the American Antitrust Institute to assist them in reaching a determination of whether to support or oppose industry consolidation. Issues included product and geographic market definition, market power, and an analysis of how the proposed merger would affect competition in a number of relevant market.
- For a major oil company: Analyzed antitrust issues related to the merger of two major oil companies. Conducted an analysis of potential overlaps and anticompetitive issues relating to pipelines. Also analyzed competition issues related to certain intellectual property owned or licensed by the two companies. Presented findings to the Federal Trade Commission.
- For a Houston area hospital: Analyzed product and geographic market definition in a potential antitrust case involving the merger of two local hospitals.
- For a pharmaceutical manufacturer: Reviewed issues related to illegal tying allegations by the Texas Attorney General's Office.
- For a major chemical company: Provided competitive analysis and antitrust review to present to the FTC regarding the competitive effects and potential efficiencies of a proposed merger.

Selected Major Consulting Projects

- For a major pharmaceutical company: Analyzed the antitrust implications of the settlement of a patent dispute between a brand-name drug manufacturer and a generic drug manufacturer. Analyzed the impact of certain laws and FDA regulations on the antitrust implications of these types of settlements.

- For a pharmaceutical manufacturer: Analyzed potential antitrust liability from the acquisition of a pharmaceutical product being investigated by the FTC for potential patent misuse.

- For a major Computer Reservation System: Performed a valuation of certain intellectual property as part of an analysis of the tax implications of a planned restructuring of the company.

- For a hospital and its HMO: Analyzed cost-effectiveness of various drug therapies, and helped in the development of a methodology to analyze the potential cost-effectiveness of health care technologies.

- For a major oil company: Analyzed gasoline distribution and wholesale pricing practices and provided damages analysis in a suit involving a franchised retailer and the oil company.

- For an oilfield waste disposal company: Provided analysis of antitrust issues and issues related to potential damages from a tortious interference claim.

- For a major air courier service: Analyzed transfer pricing issues related to compensation for delivery of packages shipped from abroad by its international subsidiary in a suit brought by the Internal Revenue Service.

- For a major aircraft manufacturer: Analyzed transfer pricing issues related to a special tax exemption granted to aircraft manufacturers on sales abroad in a suit brought by the Internal Revenue Service.

- For a major pharmaceutical manufacturer: Analyzed potential liability and damages related to a class action lawsuit alleging suppression of research on bioequivalence between brand name and generic synthetic hormone products.

- For a major pharmaceutical manufacturer: Analyzed potential liability and damages related to a class action lawsuit alleging conspiratorial pricing to retail pharmacies.

- For a major accounting firm: Provided analysis of potential liability and damages, and provided industry analysis in a case involving the auditing and eventual bankruptcy of a pharmaceutical wholesaler.

- For an independent physician practice association: Provided analysis of liability and damages in an antitrust suit brought against the association by an HMO regarding how the association contracted with physicians.

- For a major software company: Provided analysis of liability and potential damages related to allegations of anticompetitive pricing practices for certain types of mainframe software.

- For several major telecommunications companies: Provided analysis of competitive conditions and potential efficiencies for the merging parties in several telecommunications mergers. Results were presented to the DOJ, the FCC, and numerous state Public Utilities Commissions.

- For a food consumer product company: provided and analysis of competitive implications of a merger to DOJ.

<u>FTC Work</u>

- Worked as an outside consultant on a pharmaceutical matter

As an FTC employee:

- Analyzed several mergers between pharmaceutical manufacturers and pharmacy benefits managers. Analyzed the competitive consequences of the mergers, as well as potential efficiencies and made recommendations to the Commission.

- Analyzed a merger between major pharmaceutical manufacturers. Analyzed the competitive consequences of the merger, as well as potential efficiencies and made recommendations to the Commission.

- Analyzed several cases involving pricing between retail pharmacies and pharmacy benefits managers. Issues included allegations of boycotts against the compensation arrangements between pharmacists and a pharmacy benefits manager. Studied whether the pharmacists' behavior was consistent with an organized group boycott, or was individually rational. Made recommendations to the Commission on whether to pursue legal remedies.

- Analyzed several cases involving potential collusive pricing of physician services to HMOs in different parts of the country. Issues included contracting practices between physicians and their group practice associations, and whether the associations had market power sufficient to raise prices above their competitive levels.

- Analyzed a major retail pharmacy merger. Issues included the potential for the merger to result in increased market power in many individual markets. Made recommendations to the Commission regarding potential consent decrees to allow the merger to proceed.

PAPERS AND PUBLICATIONS

"Price Competition in Pharmaceuticals: The Case of Antiinfectives," with Steven N. Wiggins, *Economic Inquiry* (Forthcoming in April 2004).

"The Cost of PBM 'Self-Dealing' Under a Medicare Prescription Drug Benefit," with James Langenfeld, September 9, 2003.

"Analysis of the Proposed Carnival/Princess Merger," with James Langenfeld, Prepared for the American Antitrust Institute, June 25, 2002.

"Demand Systems and the 'True' Subindex of the Cost-of-Living for Pharmaceuticals" with Michael R. Baye and Steven N. Wiggins, *Applied Economics*, vol. 29, pp. 1179-1189, 1997.

"Incomplete Contracts and the Choice Between Vertical Integration and Franchising," *Journal of Economic Behavior & Organization,* September 1996.

UNPUBLISHED RESEARCH and PRESENTATIONS

"The Strategic Use of Patents: Implications for Antitrust," with Daniel L. Rubinfeld.

"Antitrust Treatment of Patent Settlements," Presentation to Latham & Watkins, August 27, 2002.

"Assessing Cost Savings from Technological Innovation in the Presence of Sample Selection and Censoring: Application to Coronary Artery Disease," with W. David Bradford, Andrew N. Kleit, Marie A. Krousel-Wood, and Richard N. Re (Submitted)

"Rates of Return, the Cost of Capital and Profitability in the Pharmaceutical Industry," with Steven N. Wiggins.

WORK IN PROGRESS

"Discrete Demand and Credible Price Paths for Durable Goods Monopolists," with Andreas Ortmann.

"Demand Structures as Commitment Devices for Durable Goods Monopolists," with Andreas Ortmann.

"Contracting Between Physicians and Payers: Closed Versus Open PPO Structures and the Effect of 'Any-Willing-Provider' Statutes".

"Principal-Agent Models and the Relationship between Patients, Doctors and Third Party Payers".

"The Relationship Between Advertising and Prices in Pharmaceuticals," with Steven N. Wiggins.

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UNITED STATES AMERICAN FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

In the Matter of: NORTH TEXAS SPECIALTY PHYSICIANS,	)	Docket No. 9312
Respondent,	)	
	)	
	)	

DEPOSITION OF H.E. FRECH III
SANTA BARBARA, CALIFORNIA
MONDAY, FEBRUARY 23, 2004

Reported by:
Martha A. Adams
CSR No. 10345, RPR

Deposition of H.E. FRECH III, taken on behalf of Respondent, at 411 East Carrillo Street, Santa Barbara, California, 93101, on Monday, February 23, 2004, at 9:20 a.m., before Martha A. Adams, CSR No. 10345, RPR.

APPEARANCES:

FOR PETITIONER:

FEDERAL TRADE COMMISSION
By: Michael Joel Bloom
Senior Counsel to the Northeast Region
One Bowling Green
Suite 318
New York, New York 10004-1415
(212) 607-2801

FOR RESPONDENT:

THOMPSON KNIGHT LLP
By: Gregory S. C. Huffman, Esq.
1700 Pacific
Suite 3300
Dallas, Texas 75201
(214) 969-1144

ALSO PRESENT:

Tim Deyak
John S. Hekman

that have sort of institutional memory of what the practice was in the past. Kind of everybody's gone. Everybody kind of explosively disappears at once.

Q. In teamwork situations, is it important to have continuity of personnel?

A. Oh. It's helpful, sure.

Q. Have you ever done any work in that regard?

A. That specifically, I'd say probably not. Not looking at -- no.

Q. Are you familiar with any of the literature on that?

A. At that specific level, at the -- I don't think so. At the individual level? Yeah. I don't think so.

Q. Is it more likely that NTSP would be able to carry over the efficiency that it's gained on the risk side to the nonrisk side if it uses the same doctors on both sets of business?

A. Well, I think that's -- yeah. Probably. Because the -- the main efficiency it's getting from my reading of the documents in the case and depositions and so on is that it's kind of training some of the doctors on the risk side to utilize less and also different patterns and to use specific other doctors who are also

efficient.

And so to the extent that physicians' behavior is at least similar when they face different economic incentives -- maybe not exactly the same -- there would be some spillovers. And those doctors would be more efficient in general in working for any plan. Could be Medicare.

Q. Would you expect the spillover effects to be greater the more continuous the membership is between the risk business and the nonrisk business?

A. Yeah. I would think there would be more benefits in the non -- for the physicians becoming more efficient in the nonrisk business if they're in the risk business. And I think there'd be very limited of that for physicians who were not in both.

Q. Do you feel that an IPA like NTSP that is trying to maximize spillover has a proper incentive to try to keep the personnel the same?

MR. BLOOM: Objection. Includes testimony not in the record.

THE WITNESS: Yeah. It's not at all obvious to me that NTSP's trying to maximize spillover. And now I forgot the -- thinking of that part. And I forgot what you said after that so --

///

particular phenomenon?

A. I don't know of any literature. That's why I'm continually talking about utilization because that's been studied intensely. I don't know of any literature that looks specifically at prices -- say prices, we have two kinds of rates -- specifically looked at prices. But it makes perfect sense to me that that would be the case.

Q. Do you know of any literature on spillover, spillover effects between risk and nonrisk treatment?

A. Well, I know there's literature on spillover effects between managed care and unmanaged care --

Q. Okay.

A. -- which is not exactly the same thing. But it's quite close.

Q. Okay. And what is the literature shown on the spillover effect?

A. It's shown that in areas where there's high percentage of customers are in managed care, that fee-for-service medicine is also more efficient as lower costs. So there's spillovers from the managed care sector -- at least is the argument in the literature. There's spillover from the managed care sector to the

a beneficial effect on consumers?

A. Yes. I would agree with that.

Q. Is it also your opinion that to the extent there is spillover from those risk capitation contracts to nonrisk business that that can have a beneficial effect on consumers?

A. I think that's true. I also think the managed care plans that are more administrative and don't use financial risk have a similar effect, have benefits for the fee-for-service unmanaged side.

Q. Is it also your opinion that to the degree an IPA can maximize the spillover effect that that will tend to have a beneficial effect on the consumers?

A. Well, I have to think about what they're giving up in doing that. It's not -- that's not so obvious. Because the measured spillover doesn't even require the same organization or the same physicians. I mean it's measured at market levels. So it's not even necessarily mediated by an organization.

Q. Well, if the IPA is intimately involved in the risk contract -- in fact, the contracting party -- to the degree the IPA can maximize that spillover into non-HMO business, that's going to be a benefit to the consumer, isn't it?

MR. BLOOM: Objection. Argumentative.

Q. In looking at Dallas and Tarrant County, are you aware that 40 percent of Tarrant County population is right at or near the Dallas County line?

A. Well, I saw that in Dr. Maness's report. And I have made no independent investigation. So assuming he's right about that.

Q. And the prior work that you've done, does a -- the presence of an intermediating factor like that have a tendency to unite two areas?

MR. BLOOM: Objection. Doesn't -- there's no testimony that there's an intermediating factor.

THE WITNESS: Yeah. I think you mean -- what do you mean by intermediating factor?

BY MR. HUFFMAN:

Q. An intermediating factor would be here because they live on the county line, they could go to any in either county.

A. You mean because they live in that location?

Q. That's correct. You understand the -- geographically --

A. Yeah.

Q. -- Fort Worth/Dallas/Mid-Cities?

A. Yeah.

Q. Okay.

A. So these guys are in or around Mid-Cities?
Q. That's correct. Forty percent of the Tarrant County population is.
A. Yeah, yeah. Well, these things do depend to some extent on distance. So to the extent that you have more people in the middle, it goes in the direction any way of uniting the two markets.
Q. Have you ever had a situation where you defined a geographic market in a metroplex area like Dallas/Fort Worth where there's a lot of crossover due to commuting patterns?
A. Well, I've never defined a market in such a big city. I think the biggest might have been -- York, Pennsylvania was the biggest one. And King City, California was the smallest. And it's really small. So I don't believe I've ever done it in such a big area.
Q. Do you understand conceptually that commuting patterns like that will tend to unify the various areas?
A. I think they would go in that direction to some extent, sure. So would shopping patterns.
Q. Exactly. That there would tend to be an arbitrage effect because the policyholder could chose to be treated near his home or near his place of work?
A. Sure. There's some of this.

Q. When you were talking to payors -- I think -- it looked like you talked sort of Dallas versus Tarrant County. Did you talk about any counties other than Dallas and Tarrant Counties?

A. Not very much. I may have asked -- I may have asked them if there were any other counties that possibly competing with Tarrant County or something like that. But not -- I don't have a specific memory of doing that.

Q. Are you familiar with the literature that as you move up in the rank from primary to secondary to tertiary that the geographic markets tend to spread?

A. Oh, sure.

Q. And what kind of analysis in the past have you done in that regard?

A. Well, I've looked at patient flows a little bit. I've looked at patient flows by different -- what do you call them? -- different diagnostic categories.

Q. Okay. What have you noticed?

A. Well, as you get to the -- the more exotic diagnostic categories, you get further travel -- on the average, people travel further.

Q. I mean as you get up to quaternary, you could cover an entire state, couldn't you?

including multiple physician markets.

So I think just as a matter of sort of administrative manageability of a payor case that you would use a much wider market definition.

Q. Are you aware that the payors used the same price across the Dallas/Fort Worth metroplex?

MR. BLOOM: Objection. Foundation.

THE WITNESS: My understanding is that some of them -- some of them do and some of them don't.

BY MR. HUFFMAN:

Q. Which ones do?

A. Oh. I don't remember which is which. But I remember seeing one of them used Dallas -- RVRBD is both Dallas/Fort Worth County. And then they switched in not doing that. So I remember seeing it both -- both ways.

Q. Do you know how Aetna does it?

A. I don't recall plan by plan.

Q. Or United?

A. I don't recall.

Q. So you have no knowledge?

A. Well, I don't recall which is which at this point. I have seen it both ways.

Q. Do you believe that there's a potential benefit in having someone analyze the legalities of

that.

Q. Did the cardiologists ever come back?

A. My understanding is they left at some point. I don't know if they came back. They had left at the time of that letter?

Q. Yes.

A. I didn't know that.

Q. Did the cardiologists even lose $1 of income as a result of anything NTSP did?

A. I don't know that. The -- the letter would -- I think would be intended to discourage people from using them. But there's not -- I don't -- there's no way I have evidence to track whether that happened. That would be hard to measure anyway if you have the best evidence.

Q. You indicated that spillover occurs from HMO business to non-HMO business; is that correct?

A. Yeah.

Q. Whether or not the non-HMO business is being done by the same people who are doing the HMO business?

A. Right. Whether it's the same organizations or same physicians.

Q. So based on that literature, you would expect there to be some spillover from the NTSP PSN

physicians to the NTSP physicians who were not PSN?

A. I would expect that and some spillover to physicians in that whole geographic area, Tarrant County.

Q. Would you expect there to be more spillover effects from the PSN physicians who were doing the HMO work under the capitation contract to their non-HMO practice by the same physicians?

A. More for them than the ones who were not in PSN?

Q. That's correct.

A. I would expect that.

Q. But you would expect spillovers in both instances based on the literature?

A. Based on the literature, I would expect spillovers to the area regardless.

Q. And you were talking about notes. And I think I tried to give you as full an opportunity to tell me anything you recall about the conversations you had with the payors and others for which you have notes. Is there anything else you can recall?

A. Not as I'm sitting here.

Q. Have you and counsel had a full opportunity to talk about those conversations so that you would have your recollection refreshed?

MR. BLOOM: I'm not on the stand. And so he

DECLARATION

STATE OF CALIFORNIA,)
)
COUNTY OF .)

I, H.E. FRECH III, hereby declare:

I have read the foregoing deposition transcript and identify it as my own and approve same.

I declare under penalty of perjury under the laws of the State of California that the foregoing testimony is true and correct.

Dated this day of , 2004, at , California.

H.E. FRECH III

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE HAMPTON INN
2700 CHERRY LANE
FORT WORTH, TEXAS

DATE DECEMBER 10, 2003

PAGES 1 THROUGH 168

TESTIMONY OF DR. IRA HOLLANDER

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

I N D E X

E X H I B I T S

(Exhibits retained by Mr. Platt.)

1	1016	112	Bates 14727-733
2	1043	118	Bates 14533
3	1006	125	Bates 144309
4	1044	127	Bates MC 218
5	1018	132	Bates 5086-88
6	1020	141	Bates 3188-92
7	1008	149	Bates 14306
8	1022	151	Bates 14913-94
9	1024	154	
10	1029	154	Bates 4633-38
11	1025	157	Bates 22082-86

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

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ORAL DEPOSITION OF

DR. IRA HOLLANDER

DECEMBER 10, 2003

****

ORAL DEPOSITION OF DR. IRA HOLLANDER, produced as a witness at the instance of the FTC, and duly sworn, was taken in the above-styled and numbered cause on the 10th of December, 2003, from 3:30 to 9:00 before Susan S. Klinger, CSR in and for the State of Texas, reported by stenographic method, at Hampton Inn, Fort Worth, Texas.

A P P E A R A N C E S

FOR THE FTC:
Mr. Jonathan Platt and
Mr. Alan B. Loughnan
UNITED STATES FEDERAL TRADE COMMISSION
Northeast Region
1 Bowling Green, Suite 318
New York, New York 10004

FOR THE NTSP:
Mr. Gregory Binns
THOMPSON & KNIGHT, LLP
1700 Pacific, Suite 3300
Dallas, Texas 75201

ALSO PRESENT:

Dr. Karen Van Wagner

Q. Do you participate in any fee for service contracts in which there are incentives or penalties?

A. I don't think so, no.

Q. Have you ever?

A. I can't recall.

Q. Do you know when you receive a patient under what contract that patient will be provided services under?

A. When I receive the patient, no.

Q. Do you practice medicine differently, depending on whether the patient is a PPO or an HMO?

A. No.

Q. How has the practice of medicine for you personally changed since your joining of NTSP?

A. I think that it's more efficient and I'm better in taking care of my patients.

Q. In what way are you more efficient?

A. Through some of the medical information sharing at the divisional level, and we learned better ways to take care of people some of the research that is done at the division level that we would present to each other, gain extra information. May learn better techniques for doing surgery, better ways of taking care of people in the hospital, better ways of working out various urologic problems.

Q. That would be the result of NTSP meetings,

division meetings?

A. Medical management, I think that the data that we get, quality data helps to indicate that each of the individual practitioners including myself where we fit in terms of how we approach various problems, tests that we order, tests that we don't order, costs and types of medicines that we might use to treat a various, to treat various problems. Best antibiotics that work the best, have the least cost, just countless ways of that knowledge in a situation like NTSP helps with the quality and efficiency of care.

MR. PLATT: Well, I would like to thank you very much for your patience. I think we kept you until 9:00 p.m. I appreciate all your time, and I think we can close this.

MR. BINNS: No questions. Reserve.

(Deposition adjourned at 9:00 p.m.)

CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____

DR. IRA HOLLANDER

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this

_____ day of _____, 19___, and executed the above certificate in my presence.

_____

NOTARY PUBLIC IN AND FOR

_____

MY COMMISSION EXPIRES:

_____

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE HAMPTON INN
2700 CHERRY LANE
FORT WORTH, TEXAS

DATE DECEMBER 9, 2003

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TESTIMONY OF DR. MARK PRESLEY

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

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

****

ORAL DEPOSITION OF

DR. MARK PRESLEY

DECEMBER 9, 2003

****

ORAL DEPOSITION OF DR. MARK PRESLEY, produced as a witness at the instance of the FTC, and duly sworn, was taken in the above-styled and numbered cause on the 9th of December, 2003, from 8:30 to 12:40 before Susan S. Klinger, CSR in and for the State of Texas, reported by stenographic method, at Hampton Inn, Fort Worth, Texas.

APPEARANCES

FOR THE FTC:
Mr. Jonathan Platt and
Mr. Alan B. Loughnan
UNITED STATES FEDERAL TRADE COMMISSION
Northeast Region
1 Bowling Green, Suite 318
New York, New York 10004

FOR THE NTSP:
Mr. Gregory S. C. Huffman and
Mr. Gregory Binns
THOMPSON & KNIGHT, LLP
1700 Pacific, Suite 3300
Dallas, Texas 75201

ALSO PRESENT:

Dr. Karen Van Wagner

I N D E X

E X H I B I T S

(Exhibits retained by Mr. Platt.)

I'm familiar, not that I know of, not that I remember.

Q. We should be wrapping up here. Did you participate in any fee for service contracts to which there are either incentives or penalties?

A. I don't know.

Q. What type of contracts do you participate in?

A. We have some contracts that are fee for service and some contracts that are capitated and all the contracts go through Texas Healthcare right now.

Q. Are there -- is there any middle ground? Is there contracts that have incentives?

A. I don't read these things carefully enough to know if Texas Healthcare pans them down. I take care of the patient.

Q. So your treatment of the patient would not differ between those hospital plans, because you are not --

A. When I see a patient, I don't have a clue what insurance they're on. I don't care. I treat them all the same. Only time I look at the insurance is physical therapy or MRI scan so it is cost efficient for the patient and if it is an inadequate MRI I get it reread by somebody else for their benefit.

Q. Do you know what a withhold is?

A. Yes.

Q. What is it?

A. They pay you part of the money up front and withhold some of the other money.

Q. Is it withheld pending some determination?

A. I guess, I don't know the details of them.

Q. Well, what types of things would allow them to release --

A. I don't know.

Q. -- that withhold? Would there be incentives for utilization management?

A. I guess there could be. That is stuff I don't pay attention to.

Q. Since you have been a member of NTSP, has your treatment of patients changed?

A. Has it changed? It has gotten more efficient from the data that I get back from the NTSP.

Q. What data do you get back from NTSP?

A. I think cost efficient physical therapies to use this is the information I get is from the capitated program. And I don't treat the patients any different, so I treat capitated patients -- if I see one physical therapist is just as good as another and it is less expensive, I might use them more frequently. That benefit goes for the capitated contracts to the fee for service contract.

Q. Do you know how many capitated contracts you are

I, DR. MARK PRESLEY, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

_____

DR. MARK PRESLEY

THE STATE OF _____)

COUNTY OF _____)

Subscribed and sworn to before me by the said witness, DR. MARK PRESLEY,

Given under my hand and seal of office this_____ day of _____, 20 _____.

_____

Notary Public in and for the State of_____

My commission expires _____

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09312

TITLE NORTH TEXAS SPECIALTY PHYSICIANS

PLACE RADISSON PLAZA HOTEL
815 MAIN STREET
FORT WORTH, TEXAS

DATE JANUARY 29, 2004

PAGES 1 THROUGH 51

TESTIMONY OF HARRY ROSENTHAL, JR., M.D.

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

INDEX

FEDERAL TRADE COMMISSION

IN THE MATTER OF THE	)	
NORTH TEXAS SPECIALTY	)	DOCKET NO. 9312
PHYSICIANS.	)	
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ORAL VIDEOTAPED DEPOSITION OF

HARRY ROSENTHAL JR., M.D.

JANUARY 29, 2004

Thursday, January 29, 2004

Radisson Plaza

815 Main

Texas A Conference Room

Fort Worth, Texas

The above-entitled matter came on for deposition pursuant to notice, at 9:22 a.m.

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

THEODORE ZANG JR.

JONATHAN PLATT

Federal Trade Commission

One Bowling Green

Suite 318

New York, New York 10004

ON BEHALF OF NORTH TEXAS SPECIALTY PHYSICIANS:

WILLIAM KATZ, JR.

Thompson & Knight LLP

1700 Pacific Avenue

Suite 3300

Dallas, Texas 75201

time at all?

A. We look at data for the risk contract on a fairly regular basis on the Board. And my personal involvement with flat file data has been limited, because I'm no longer Section Chief in Ophthalmology. So the person that would have the responsibility for looking at any other data that would come in, would be the person who is Section Chief in Ophthalmology.

Q. Who is that presently?

A. Brian Flowers presently.

Q. Has your status as a participating provider for NTSP increased your cooperation with physicians outside your own practice?

MR. KATZ: Objection, form; vague.

Q. Do you understand?

A. Well, I'm trying to get my arms around that. Have I had more cordial relationships with primary care doctors? There are a variety of things that come under the term "cooperation." So I would guess on balance, I would say yeah.

Q. In your estimation, does that have any impact on the quality of care provided to your PPO patients?

A. Absolutely.

Q. Just limiting it to PPO patients, describe how?

A. Because you don't change your practice patterns

based on what the payer is. And you see a patient, you take care of the patient. You create practice patterns. And for me, at least, those practice patterns are present whatever the payer is. And that's just the way it is. So if I see a patient, I'm not immediately aware of whether it's a risk patient, a PPO patient, a indemnity patient on Medicare. I just take care of patients. And the relationships that you have and the practice patterns that you have don't change based on who the payer is.

Q. Does NTSP provide educational programs for your patients?

A. For my patients?

Q. Yeah.

A. They provide some educational material. And the website, it's under development, has a section for patients also. So the answer to that would be yes.

Q. When did NTSP first put up this website?

A. I don't know. And I'm not even sure it's completely up yet. They have had some -- I think they've had some previous web present, but I'm not sure. But there have been other things for patients that have been other things that NTSP has sponsored.

Q. Is that the case for PPO patients as well as HMO ones?

A. I don't know if there's a differentiation

CERTIFICATE OF DEPONENT

I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me.

Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

_____
Harry Rosenthal Jr., M.D.

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this _____ day of _____, 2003, and executed the above certification in my presence.

_____
NOTARY IN AND FOR

_____

MY COMMISSION EXPIRES:

_____

UNITED STATES AMERICAN FEDERAL TRADE COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

In the Matter of: NORTH TEXAS SPECIALTY PHYSICIANS, Respondent.	Docket No. 9312

****

ORAL DEPOSITION OF

DAVID ROBERTS

January 28th, 2004

COPY

****

ANSWERS AND DEPOSITION of **DAVID ROBERTS**, taken at the instance of the Respondent, on the 28th day of January, A.D., 2004 in the above styled and numbered cause at the offices of Andrews & Kurth, 1717 Main Street in Dallas, Dallas County, Texas, before April L. Struck, RPR, a Certified Shorthand Reporter in and for the State of Texas, pursuant to the Federal Rules of Civil Procedure.

A P P E A R A N C E S

APPEARING FOR THE PETITIONER:

FEDERAL TRADE COMMISSION
Northeast Region
BY: Mr. Michael Bloom
One Bowling Green, Suite 318
New York, New York 10004

APPEARING FOR THE RESPONDENT:

THOMPSON & KNIGHT, LLP
BY: Mr. Gregory S. C. Huffman
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201

APPEARING FOR THE WITNESS:

ANDREWS & KURTH
BY: Ms. Kay Lynn Brumbaugh
1717 Main Street, Suite 3700
Dallas, Texas 75201

ALSO APPEARING

Ms. Karen Van Wagner

13:38:28

Q. Okay. Is that any accord with NTSP's analysis? I mean, did you have a different analysis?

A. Well, our analysis -- our proposal did not contain that number, but it was based on Dallas RBRVU's and Medicare structure. They had actually converted that to Tarrant County in an effort to simplify our claim payment processes across all of the metroplex. We had adopted the Dallas Medicare process to -- well, to assist in claim payment, and so they had taken our standard fee schedule and done that analysis.

Q. Okay. And when had Aetna gone to a standard fee schedule using the Dallas RBRV's?

A. We began that with the recruitment of Med Select, which would have been in September of '01.

Q. Is that when you basically went to a situation where the bases for -- basis for all your contracts was going to be the Dallas RBRV's?

A. Yes.

Q. And so when NTSP was using 118 percent, what did you understand that calculation to be?

A. Well, the -- the rate that we had proposed was actually 115 percent, but it was of the Dallas numbers not the Tarrant county numbers, and there is -- those RBRVU's are different than Tarrant County.

Q. All right. Anything else you can recall about

CHANGES AND SIGNATURE (Cont'd)

PAGE	LINE	CHANGE	REASON

I, **DAVID ROBERTS**, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

_____
DAVID ROBERTS

THE STATE OF _____)

COUNTY OF _____)

Before me, _____, on this day personally appeared DALE ROBERTS, known to me (or proved to me under oath or through _____ (description of identity card or other document) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of _____, 2004.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF _____