[Public][1]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF NORTH TEXAS SPECIALTY PHYSICIANS, A CORPORATION.	Docket No. 9312

NORTH TEXAS SPECIALTY PHYSICIANS' MOTION FOR LEAVE TO FILE SUPPLEMENT TO RESPONSE TO AETNA HEALTH INC.'S MOTION TO QUASH, OR, ALTERNATIVELY, LIMIT SUBPOENA *DUCES TECUM*

Respondent North Texas Specialty Physicians ("NTSP") respectfully moves for leave to Supplements its Response to Aetna Health Inc.'s ("Aetna") Motion to Quash, or, Alternatively, Limit Subpoena *Duces Tecum*. In support, NTSP shows the following:

I.

During the deposition of Aetna's corporate representative, NTSP discovered that Aetna has previously compiled and/or provided to Complaint Counsel results from the claims database to which NTSP seeks access in response to the subpoena *duces tecum*. In its motion, Aetna is resisting discovery NTSP needs for its defense, but has previously provided Complaint Counsel with results from Aetna's own analysis of a database that appears to contain the data NTSP seeks in the subpoena *duces tecum*. NTSP seeks to supplement its Response to address Aetna's relevancy, breadth, and burdensomeness arguments in light of this new information. NTSP's supplement is attached as Appendix A.

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II.

For this reason, NTSP requests that the Court grant leave to supplement its Response to Aetna's Motion to Quash, or, Alternatively, Limit Subpoena *Duces Tecum*.

Respectfully submitted,

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ATTORNEYS FOR NORTH TEXAS SPECIALTY PHYSICIANS

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on February 5, 2004, I caused a copy of the foregoing to be served upon the following persons:

Michael Bloom (via e-mail and Federal Express)
Senior Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

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

Hon. D. Michael Chappell (via Federal Express)
Administrative Law Judge
Federal Trade Commission
Room H-104
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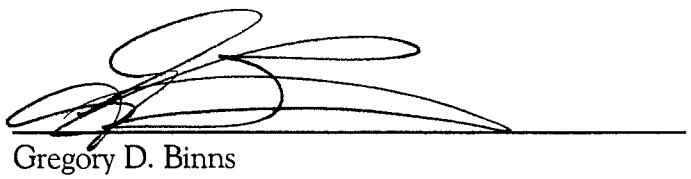
Office of the Secretary (via e-mail and Federal Express)
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, D.C. 20580

John B. Shely (via certified mail and Federal Express)
Counsel for Aetna Health Inc.
600 Travis Street, Suite 4200
Houston, TX 77002

and by e-mail upon the following: Susan Raitt (sraitt@ftc.gov), and Jonathan Platt (jplatt@ftc.gov).



Gregory D. Binns

Appendix A

[Public]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF NORTH TEXAS SPECIALTY PHYSICIANS, A CORPORATION.	Docket No. 9312

NORTH TEXAS SPECIALTY PHYSICIANS' SUPPLEMENT TO ITS RESPONSE TO AETNA HEALTH INC.'S MOTION TO QUASH, OR, ALTERNATIVELY, LIMIT SUBPOENA *DUCES TECUM*

Respondent North Texas Specialty Physicians ("NTSP") files this supplement to its response to Aetna Health Inc.'s ("Aetna") Motion to Quash. In support, NTSP shows the following:

I.
Background

On December 18, 2003, NTSP served a subpoena *duces tecum* on Aetna. On January 22, 2004, Aetna filed a Motion to Quash or Limit the subpoena *duces tecum* served by NTSP, and NTSP filed a response on January 26, 2004. On January 29, 2004, NTSP deposed Aetna's corporate representative, Dave Roberts. NTSP submits this supplement to its response to further dispute Aetna's grounds for its motion, in light of the information learned in this deposition.

II.
Argument

These arguments are in addition to NTSP's arguments in support of these document requests in its original response.

A. Aetna claims NTSP's request for data is overly broad, irrelevant, and unduly burdensome, yet it provided a special analysis of similar data to Complaint Counsel.

NTSP served Aetna with a subpoena *duces tecum* seeking claims data previously provided to the Texas Attorney General by Aetna. NTSP intends to analyze this data to show the efficiencies of NTSP physicians *vis-a-vis* other physicians in the market. In an effort to decrease the burden of production on Aetna, NTSP requested data that had already been produced to the Texas Attorney General. Aetna, however, refused to produce that data and filed a motion to quash or limit the subpoena *duces tecum* that NTSP served.

During the deposition of Aetna's corporate representative NTSP learned that Aetna's position on providing claims data to NTSP is much different than Aetna's position with regard to requests made by Complaint Counsel. At the request of Complaint Counsel, Aetna looked at claims data like that requested by NTSP and actually ran an analysis of that data for Complaint Counsel.[2] Aetna analyzed that data and ran special reports for Complaint Counsel specifically for the purpose of rebutting the efficiency arguments NTSP seeks to support through the data it seeks via the subpoena *duces tecum*.[3] It appears that Aetna conducted this analysis voluntarily, without compulsory process,[4] which is why NTSP served the subpoenas *duces tecum* on payors in the first place.

Incredibly, although Aetna claims that merely providing the data is unduly burdensome and that the data is overly broad and irrelevant, it went a step farther for Complaint Counsel and actually analyzed data for them. Aetna's action is not only inconsistent with the arguments it

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[2] Excerpt from the Deposition of Dave Roberts taken January 29, 2004, attached as Exhibit A, at p. 26, ll. 7-10; p. 27, ll. 10-14; p. 31, ll. 12-17; p. 32, l. 23 through p. 33, l. 12.

[3] Exhibit A at p. 32, l. 23 through p. 33, l. 15.

[4] Exhibit A, p. 31, ll. 12-17; p. 32, l. 23 through p. 33, l. 15.

sets forth in its motion, but is also patently unjust in light of NTSP's effort to ease Aetna's burden when responding to the subpoena. NTSP sought only the data, with no special analyses. NTSP sought information that has already been assembled and produced. And NTSP will go one step further and ask that Aetna produce only the claims data that was provided to the Texas Attorney General in electronic form so that NTSP may conduct its own analyses.

In light of Aetna's actions with regard to Complaint Counsel's requests, Aetna should be required to respond fully to request numbers 2 and 3 in the subpoena *duces tecum* served by NTSP, to the extent such information was produced electronically. Unless NTSP has such data, NTSP is effectively foreclosed from conducting analyses in rebuttal to those conducted by at least one payor at Complaint Counsel's request.[5]

B. The relevance of the data NTSP requests is buttressed by the fact that Aetna produced the results of analyses of similar data to Complaint Counsel.

Aetna's corporate representative testified that the data it analyzed for Complaint Counsel included some of the same types of data sought by NTSP. In fact, it appears that the data Complaint Counsel had Aetna analyze may be broader than that requested by NTSP. [

]6

Aetna's argument that such information is irrelevant is clearly not supported by the actions it took to assist Complaint Counsel in its case. Instead, it shows that NTSP's request for data was, in fact, more targeted than Aetna would lead the Administrative Law Judge to believe.

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5 NTSP has also learned that at least one other payor (United Healthcare) has also extracted data from its database for Complaint Counsel.

6 Exhibit A, at p. 30, l. 18 through p. 31, l. 2; p. 32, l. 23 through p. 33, l. 19.

As such, Aetna should not be allowed to decide what is relevant or irrelevant to NTSP's case and deny NTSP access to information, when it has already provided Complaint Counsel with information that takes into account everything that occurs during the physician-patient relationship.

[

]7 As such, NTSP must obtain the data it requested in the subpoena *duces tecum*, not only for NTSP physicians, but also for other physicians in the market, so that NTSP can make proper efficiency comparisons.

C. Aetna must also provide the data that underlies the special analyses it conducted for Complaint Counsel.[8]

NTSP has received the results of certain data runs requested by Complaint Counsel;[9] however, to properly prepare a defense, NTSP needs access to the raw data used to create these data runs so that NTSP can assess the validity of those selected runs and perform its own analysis of the data. [

]10 NTSP cannot dispute the propriety of these calculations or prepare calculations to counter the conclusions drawn from the data runs requested by Complaint Counsel if it is not given the

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7 *Id.* at p. 29, ll. 4-14.

8 Counsel for NTSP requested that Aetna's counsel produce the underlying data on the date this motion was filed. NTSP does not anticipate that Aetna will produce such information considering Aetna' position with regard to the similar data NTSP seeks to obtain through the subpoena *duces tecum*.

9 *See* Exhibit B, Documents Produced by Aetna, AE000001466-73.

10 *See* Exhibit A at p. 32, l. 23 through p. 33, l. 19.

opportunity to examine the data itself.[11] The only information about the data that will be available at the hearing will be the calculations that Complaint Counsel specifically requested be printed out to further its case.

III.
Conclusion

In light of the supplemental information contained herein and the previous responses in NTSP's Response to Aetna's Motion to Quash or Alternatively Limit Subpoena *Duces Tecum*, NTSP requests that the Administrative Law Judge (a) deny in whole Aetna's Motion to Quash or Alternatively Limit Subpoena *Duces Tecum*; (b) order Aetna to comply with the subpoena within five days of the Administrative Law Judge's order; and (c) grant and order such further relief to which NTSP may be justly entitled.

Respectfully submitted,

Gregory S. C. Huffman
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ATTORNEYS FOR NORTH TEXAS SPECIALTY PHYSICIANS

[11] *Cf.* FED. R. EVID. 1006 (requiring the back-up for summaries of voluminous writings and recordings to be made available for examination and copying by other parties).

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on February 5, 2004, I caused a copy of the foregoing to be served upon the following persons:

Michael Bloom (via e-mail and Federal Express)
Senior Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

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

Hon. D. Michael Chappell (via Federal Express)
Administrative Law Judge
Federal Trade Commission
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John B. Shely (via certified mail and Federal Express)
Counsel for Aetna Health Inc.
600 Travis Street, Suite 4200
Houston, TX 77002

and by e-mail upon the following: Susan Raitt (sraitt@ftc.gov), and Jonathan Platt (jplatt@ftc.gov).

Gregory D. Binns

EXHIBIT A
[Not included in public version.]

EXHIBIT B
[Not included in public version.]

Exhibit C

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

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

PROTECTIVE ORDER
GOVERNING DISCOVERY MATERIAL

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

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

DEFINITIONS

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

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

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

corporation organized, existing, and doing business under and by virtue of the laws of Texas, with its office principal place of business at 1701 River Run Road, Suite 210, Fort Worth, TX 76107.

4. "Party" means either the FTC or North Texas Specialty Physicians.

5. "Respondent" means North Texas Specialty Physicians.

6. "Outside Counsel" means the law firms that are counsel of record for Respondent in this Matter and their associated attorneys; or other persons regularly employed by such law firms, including legal assistants, clerical staff, and information management personnel and temporary personnel retained by such law firm(s) to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter; provided that any attorney associated with Outside Counsel shall not be a director, officer or employee of Respondent. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.

7. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. For purposes of Confidential Discovery Material of a Third Party that either is in the possession, custody or control of the FTC or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided the Confidential Discovery Material to the FTC. The Producing Party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of the FTC.

8. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a party to this Matter and their employees, directors, officers, attorneys

and agents.

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

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

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

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

TERMS AND CONDITIONS OF PROTECTIVE ORDER

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

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

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

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

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

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

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

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

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

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

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

(e) No Presumption or Inference.

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

(f) Due Process Savings Clause.

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

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

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

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

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

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

(d) witnesses or deponents at trial or deposition;

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

(f) court reporters and deposition transcript reporters;

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

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

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

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

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

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

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

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

(a) Challenges to Confidentiality Designations.

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

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

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

(b) Resolution of Disclosure or Confidentiality Disputes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: October 16, 2003

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

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

DECLARATION CONCERNING PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

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

1. [Statement of employment]

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

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

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

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

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

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

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

b. to return such Confidential Discovery Material to Complaint Counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of my assignment or retention; and

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

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

_____ Date: _____

Full Name [Typed or Printed]

_____

Signature

EXHIBIT D

Specific Pages of Motion Subject to Protective Order (Exhibits A and B in their entirety are also subject to the Protective Order)

[Not included in public version.]

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

John B. Shely
Counsel for Aetna Health Inc.
600 Travis Street, Suite 4200
Houston, TX 77002