

documents from the non-party CMS. *See*, Letter from Jeff Dahnke to Michael Ferega of 5/13/04, attached hereto as Exhibit A.

In making this request, the FTC's Complaint Counsel Jeff Dahnke recognized the confidential nature of the documents requested. (Exh. A.) Thus, he assured CMS that its documents could be protected from public disclosure pursuant to a protective order. (Exh. A.) In fact, Mr. Dahnke drafted a protective order to govern CMS's documents and to protect "against the improper use and disclosure of confidential information" within those documents. *See*, Protective Order, attached hereto as Exhibit B. Also, he instructed CMS to mark the documents as "Confidential – FTC Docket No. 9315." (Exh. A.) Mr. Dahnke included the protective order and his instruction for designating the documents as confidential in the same letter in which he requested the documents. (Exh. A.)

Based on the FTC's assurance that the documents would remain confidential through the protective order, the non-party CMS dutifully complied and produced the requested documents to the FTC. *See*, Letter from Daniel Fewkes to Jeff Dahnke on 6/03/04, attached hereto as Exhibit C; *See also*, Handwritten notes by Daniel Fewkes to Michael Feraga, attached hereto as Exhibit D. Prior to doing so, CMS marked each document as "Confidential – FTC Docket No. 9315," as Mr. Dahnke instructed. Moreover, on June 3, 2004, CMS's Deputy General Counsel Daniel Fewkes specifically informed Mr. Dahnke that the documents produced were "subject to the terms and conditions of the Protective Order." (Exh. C.)

On December 13, 2004, Mr. Dahnke sent a letter to CMS's Deputy General Counsel Mr. Fewkes in which he stated, in relevant part:

We are contacting you now because you have produced documents to the Federal Trade Commission in connection with this matter. By this letter we are providing notice . . . that Complaint Counsel intend to place the documents referenced on

the enclosed list on our exhibit list and intend to offer these documents into evidence in the administrative trial of this matter.

Under . . . the Commission's Rules of Practice . . . you have "an opportunity to seek an appropriate protective or *in camera* order."

Under Administrative Law Judge McGuire's October 12, 2004, modification to the March 24, 2004, Scheduling Order, the deadline for *in camera* motions is January 4, 2005.

Upon receiving Mr. Dahnke's letter and its attached exhibit list, CMS determined that a Motion for *In Camera* Treatment was necessary to protect the confidential and sensitive information contained within the six contracts¹ noted on the exhibit list.

The six contracts are examples of the many contracts that the State of Illinois, through CMS, negotiates to provide health care to approximately 350,000 State employees and retirees. The contracts contain the rates that the State of Illinois has agreed to pay for specific health care services at specific hospitals. All hospitals do not receive the same rates; instead, the State negotiates the rates on a contract-by-contract basis, establishing different rates with roughly 225 hospitals under contract with the State of Illinois. By offering different rates to the various hospitals, the State is able to keep costs down for the taxpayers of Illinois, while still providing State employees and retirees with adequate health care. Only because the State negotiates each contract separately and confidentially is the State able to provide health care to its employees and retirees at the current cost. Therefore, if the rates within the contracts at issue become public knowledge, any hospitals with lower rates, armed with the knowledge of these rates, will likely demand the State to pay them a higher rate. Accordingly, the State will lose its present

¹ CMS has not attached the six contracts as exhibits to this Motion for *In Camera* Treatment of Proposed Evidence because doing so would place the documents in the public eye, defeating the very purpose of this Motion. As the Federal Trade Commission has noted "movants [for *in camera* treatment] cannot be expected to reveal so much detail [about their documents] that they will defeat the purpose of their application." *In re Coca-Cola Co.*, No. 9207, 1990 FTC LEXIS 364, at *3 (FTC Oct. 17, 1990) (citing to *In re Bristol-Myers Co.*, 90 F.T.C. 455, 457 (1977)).

bargaining position, resulting in higher health care costs for the State of Illinois. This is an unacceptable result, especially because it forces the taxpayers of Illinois to pay the bill. Consequently, CMS filed this Motion for *In Camera* Treatment of Proposed Evidence.

APPLICABLE LAW

In camera treatment, pursuant to 16 C.F.R. § 3.45(b), is proper and necessary for the six contracts that the FTC seeks to place into evidence and described both in this motion and the Declaration of Daniel S. Fewkes in support of this Motion, attached hereto as Exhibit E. Under 16 C.F.R. § 3.45(b), *in camera* treatment is warranted if public disclosure of the documents “will result in a clearly defined, serious injury to the person or corporation whose records are involved.” *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961). A showing that the documents in question are “sufficiently secret and sufficiently material to the applicant’s business” is mandatory to demonstrate the requisite injury. *In re General Foods Corp.*, 95 F.T.C. 352 (1980).

In considering both the secrecy and materiality of the documents, the FTC in *In re Bristol-Myers Co.* set forth six relevant factors: “(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” 90 F.T.C. 455 (1977). Moreover, the FTC has noted that a document is more likely sufficiently secret and material if the document is the type excluded from disclosure under the Freedom of Information Act. *In re General Foods Corp.*, *supra*. Finally, the FTC has placed great significance on whether the movant initially conditioned production of the documents on the examiner’s assurance that the

documents would be placed *in camera* or would otherwise remain confidential. *In re H.P. Hood & Sons, Inc., supra.*

ARGUMENT

I. PUBLIC DISCLOSURE OF THE SIX CMS CONTRACTS WILL RESULT IN A CLEARLY DEFINED, SERIOUS INJURY TO CMS

In the present case, a “clearly defined, serious injury” will result to CMS if this ALJ does not grant *in camera* treatment to the proposed evidence. The six CMS contracts are “sufficiently secret and sufficiently material” to justify protection from public disclosure. The very existence of a protective order governing the six contracts demonstrates the secrecy and materiality of the contracts. The protective order expressly recognizes that the contracts are confidential documents. Furthermore, the protective order recognizes the need to prevent improper public disclosure of the contracts. Yet, perhaps more importantly, the protective order and the correspondence memorializing the protective order demonstrate that CMS conditioned its production of the contracts on the FTC’s assurance that the documents would remain confidential. In its seminal case *H.P. Hood & Sons, Inc.*, the FTC explained that “if documents were tendered and received upon the express condition that they would be placed ‘in camera,’ there is no room for [analysis] since good faith would demand that the condition be kept.” In the instant case, the FTC did not promise that the documents would receive *in camera* treatment; nevertheless, the FTC did promise to preserve the confidentiality of the documents when it drafted and suggested the protective order. CMS relied in good faith on the FTC’s promise and produced its documents based on the express condition that the documents remain confidential. Thus, as in *Hood*, this ALJ should require the FTC to keep its promise of confidentiality and grant the contracts *in camera* treatment.

The six *Bristol-Myers* factors also prove the secrecy and materiality of the CMS contracts and, hence, justify *in camera* treatment of the contracts. For instance, the first factor examines “the extent to which the [document’s] information is known outside of [the movant’s] business.” *In re Bristol-Myers Co., supra*. Here, this factor is clearly satisfied through evidence of the confidentiality provisions in the contracts and the lack of public access to the contracts. Only CMS and the specific hospital that it is contracting with at the time has knowledge of the negotiated rate and the other contents of each contract. In fact, each contract expressly contains a confidentiality provision. Exhibit numbers CX05127, CX05128, and CX05129 provide for the “confidentiality of member information and rates,” requiring the contracting parties to protect against the “unauthorized disclosure of the negotiated fee agreement” and patient information. Similarly, exhibit numbers CX05715, CX05125, and CX05124 require the parties to keep confidential any information collected pursuant to the agreement and pertaining to patient medical records. Moreover, unlike most government contracts, the CMS contracts are not public records located in the State of Illinois Comptroller’s office. A public citizen, therefore, may not simply walk into the Comptroller’s office to view the rates paid to various hospitals.

Furthermore, the Illinois Freedom of Information Act also demonstrates the lack of availability of the contracts outside CMS. The relevant portion of the Act exempts from disclosure contracts “which if [they] were disclosed would frustrate procurement or give advantage to any person proposing to enter into a contractor agreement with the body.” 5 ILCS 140/7(h) (2004). This provision applies to the CMS contracts because the hospitals viewing the contract rates would gain an advantage by learning of the higher amounts paid to other hospitals and by using this knowledge to exert pressure on the State for more compensation. Consequently, the overall cost of the State’s health care program would rise, thus frustrating the

entire procurement process. This plainly shows that the Illinois Freedom of Information Act applies to the CMS contracts and demonstrates the limited “extent to which the [contract’s] information is known outside of” CMS. The limited knowledge of the contracts outside of CMS, in turn, establishes the secrecy and materiality of the contracts. *See In re General Foods, supra*. (indicating that FOIA exemptions serve as reference tools for determining if documents are sufficiently secret and sufficiently material to warrant *in camera* treatment).

The second *Bristol-Myers* factor is the “extent to which [the contract contents are] known by [the movant’s] employees.” *In re Bristol-Myers Co., supra*. Here, only those CMS employees who were directly involved in a contract negotiation with a hospital ever have access to the negotiated contract. The number of such employees is minuscule. Indeed, only Daniel Fewkes, the Deputy General Counsel of CMS, and other CMS contract and procurement personnel have been directly involved in any contract negotiations and, thus, only they would know the rates paid and other terms within the CMS contracts. This limitation on the number of employees with access to the contracts establishes that the contracts are sufficiently secret and sufficiently material to warrant *in camera* treatment.

The next relevant factor is the “extent of measures taken by [the movant] to guard the secrecy” of the information. *In re Bristol-Myers Co., supra*. In the instant case, CMS took extensive measures to protect the secrecy of its contracts. In particular, CMS expressly conditioned its production of documents to the FTC on the use of a protective order. CMS also labeled each contract “Confidential – FTC Docket No. 9315” prior to production. In short, CMS produced the contracts to the FTC only after ensuring that the negotiated rates would remain out of the public eye. In addition, CMS guarded the secrecy of the contracts by including a confidentiality provision in each contract. As noted previously, these provisions call for the

“confidentiality of member information and rates,” requiring the contracting parties to protect against the “unauthorized disclosure of the negotiated fee agreement” and patient information. Therefore, through the protective order and confidentiality provisions, CMS has extensively guarded the secrecy of its contracts, which justifies *in camera* treatment of such contracts.

Another factor relevant when considering whether to place documents *in camera* is the value of the document contents to the movant party and its competitors. *In re Bristol-Myers Co.*, *supra*. In the present case, CMS has no true competitors because it is a governmental entity. Nevertheless, CMS greatly values the confidential rates contained within its contracts. As previously stated, only because the hospitals do not know what the State is paying to other hospitals is the State able to vary its rates and maintain its current health care budget. If the rates become public, on the other hand, hospitals could compare the rates that they receive with rates to other hospitals and thus demand higher rates. This would fuel a push for price uniformity at the highest price level, thus increasing the cost to CMS and, ultimately, Illinois taxpayers. As such, there is no question that CMS places substantial value on its confidential rates.

Furthermore, CMS’s substantial value in its contracts’ confidential rates persists, despite the age of its contracts. As stated in *In re Coca-Cola Co.*, “the general rule that documents older than [three years] are not often given *in camera* treatment, offers little guidance as to particular documents.” No. 9207, 1990 F.T.C. LEXIS 364, at *3-4 (FTC Oct. 17, 1990) (citations omitted). Instead, the value of the document contents must be examined on a case-by-case basis. *Coca-Cola Co.*, 1990 F.T.C. LEXIS 364, at *3-4; *E.I. Dupont de Nemours & Co.*, 97 F.T.C. 116 (1981). For instance, in *In re Coca-Cola*, the FTC recognized the high value of *Coca-Cola*’s market research documents and granted *in camera* treatment even though many of the documents were over three years old. 1990 F.T.C. LEXIS 364, at *3-4. Similarly, in *In re I.E. Dupont de*

Nemours & Co., the FTC found that *in camera* treatment of six-year-old documents was warranted due to the sensitive nature of the financial documents. *Dupont, supra*.

CMS's contracts, in the present case, contain extremely valuable information and should not be subject to the general "three year" rule for two reasons. First, the CMS contracts govern the relationship between State government and hospitals, not between two private, commercial entities. Thus, the injury resulting from public disclosure would fall on Illinois taxpayers, not on a private businessman. Because the State and its contracting parties have always kept the rates completely confidential, knowledge of even expired rates would damage the State's bargaining position and necessarily result in a higher cost for the healthcare program and a higher burden on the taxpayers. Second, the State has renewed the six contracts and the renewed contracts contain rates similar to those in the expired contracts. Because of the renewal and the similar rates, the age of the original contracts is irrelevant. As such, these contracts are precisely the "particular documents" for which the general rules offers little guidance. Regardless of contract term period, the unique nature of the rates contained within the contracts renders the contracts especially valuable and warrants *in camera* treatment.

The next *Bristol-Myers* factor to consider is the amount of money expended to develop the documents. *In re Bristol-Myers Co., supra*. In this case, the State spends hundreds of millions of dollars on its employee health care program. As a result, if the rates paid to the various hospitals change even slightly, due to the public disclosure of the six contracts at issue, the cost to the State of Illinois and its taxpayers could be literally millions of dollars. Even the possibility of such a large cost to the Illinois taxpayers illustrates the secrecy and materiality of the contracts in question and, thus, justifies *in camera* treatment.

Finally, CMS also satisfies the last *Bristol-Myers* factor, “the ease or difficulty with which the information could be properly acquired or duplicated by others.” In particular, it is near impossible to acquire or duplicate CMS’s negotiated rates. As mentioned above, each contract is subject to a confidentiality provision. The contracts are not filed as public records with the State of Illinois Comptroller’s office. Furthermore, the Illinois Freedom of Information Act specifically exempts CMS from disclosing contracts of this nature to citizens upon request. Finally, only a limited number of people at CMS have access to the contracts. In reality, one may properly acquire a CMS contract only if it is the specific hospital contracting with CMS at that time or if a specific circumstance requires access to a contract, such as the document request by the FTC in the present case. As such, the difficulty in obtaining the negotiated rates demonstrates that the contracts are sufficiently secret and sufficiently material to warrant *in camera* treatment.

Accordingly, CMS has justified protection from public disclosure. CMS has demonstrated that it will suffer “a clearly defined, serious injury” if its records are not given *in camera* treatment. Specifically, the CMS contracts in question are “sufficiently secret and sufficiently material” to its ability to provide adequate health care to State employees and retirees at the current budgeted amount. If the rates within CMS’s contracts become public knowledge, any hospital with lower rates will likely demand the State to pay them a higher rate, which will result in higher health care costs for the State. This is an unacceptable result that mandates a grant of *in camera* treatment for the CMS contracts.

II. CMS DESERVES SPECIAL CONSIDERATION BECAUSE IT IS A NON-PARTY

CMS, as a non-party, deserves special consideration when determining whether to extend *in camera* treatment to its documents. As a “policy matter,” *in camera* treatment for non-parties

“encourages cooperation with future adjudicative discovery requests.” *In re Kaiser Aluminum & Chem. Co.*, 103 F.T.C. 500 (1984). Furthermore, an understanding of the FTC’s proceedings does not depend on public access to the documents of non-parties. *Kaiser, supra*. The balance of interests, thus, favors *in camera* protection of the documents of non-parties. Indeed, the FTC has often noted that the requests of non-parties for *in camera* treatment “deserve special solicitude.” *Coca-Cola Co.*, 1990 F.T.C. LEXIS 364, at *3; *Kaiser, supra*.

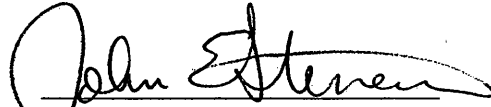
In the present case, CMS is not a party to the underlying complaint. CMS is, instead, merely a non-party who dutifully complied with the FTC’s discovery request. Indeed, CMS is a non-party that complied with the FTC’s discovery request after receiving special assurance from the FTC that the documents would remain confidential. While a grant of *in camera* treatment will not hinder resolution of the case, nor the public’s understanding of the case, a denial of *in camera* treatment will severely injure CMS. As noted repeatedly above, making the contract rates publicly available will damage CMS’s bargaining position, causing the price of the State’s health care program to rise and thus increasing the burden on Illinois taxpayers. In addition, a denial of *in camera* treatment may cause CMS to hesitate when responding to future adjudicative discovery requests. Accordingly, this ALJ must grant the non-party CMS “special solicitude” and extend *in camera* treatment to its contracts.

CONCLUSION

WHEREFORE, because exhibits CX05715, CX05125, CX05124, CX05127, CX05128, and CX05129 satisfy the standard for *in camera* protection, non-party CMS respectfully requests that this Honorable ALJ grant its Motion for *In Camera* Treatment of Proposed Evidence. Moreover, because of the highly sensitive nature of the information contained within the

documents, CMS requests that the *in camera* status for exhibits CX05715, CX05125, CX05124, CX05127, CX05128, and CX05129 be permanent and ongoing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John E. Stevens". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke extending to the right.

John E. Stevens
FREEBORN & PETERS LLP
217 East Monroe Street
Suite 202
Springfield, Illinois 62701
(217) 535-1060

Counsel for Illinois Department of
Central Management Services

CERTIFICATE OF SERVICE

The undersigned, Gia F. Colunga, on oath certifies that she caused a copy of the foregoing **Motion Of Non-Party, Illinois Department Of Central Management Services, For In Camera Treatment Of Proposed Evidence** to be served on the following individuals via Federal Express overnight service from 311 S. Wacker Drive, Suite 3000, Chicago, Illinois, 60606-6677 prior to 5:00 p.m., this 10th day of January, 2005:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Pennsylvania Ave., N.W. (H-106)
Washington, D.C. 20580

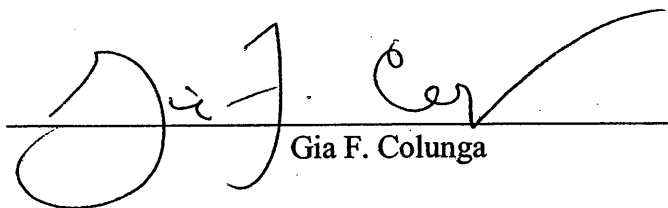
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Jeff Dahnke
Complaint Counsel
Federal Trade Commission
601 New Jersey Ave., N.W.
Washington, D.C. 20580

Chul Pak
Assistant Director Mergers IV
Federal Trade Commission
601 New Jersey Ave., N.W.
Washington, D.C. 20580

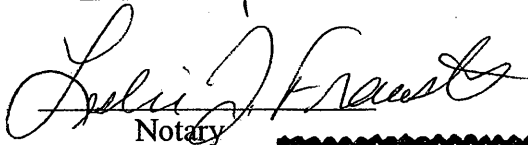
Duane M. Kelley
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601-9703

Daniel S. Fewkes
Deputy General Counsel
Illinois Dept. of Central Management Services
720 Stratton Office Building
Springfield, IL 62706

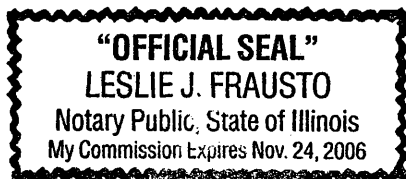


Gia F. Colunga

Subscribed and Sworn to
Before me this 10th day
Of January, 2005.



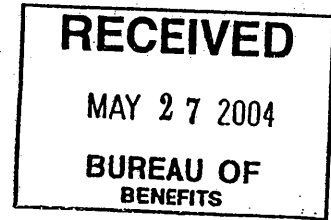
Notary



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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



Bureau of Competition

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Fax
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May 13, 2004

Via Facsimile and U.S. Mail

Mr. Michael Ferega
PPO Administrator
Central Management Services
Bureau of Benefits
201 East Madison, Suite 3C
P.O. Box 19208
Springfield, IL 62794-1908

Re: State of Illinois Managed Care Contracts

Dear Mr. Ferega:

As you may know, a complaint has issued against Evanston Northwestern Healthcare concerning the merger of the Evanston and Highland Park hospitals. As part of our investigation, we need documents from various health care industry programs in the Evanston area. At this time we ask that the State of Illinois Department of Central Management Services voluntarily submit certain documents described below.

Providing these documents on a voluntary basis would assist our antitrust analysis. If the documents are confidential, they can be marked "Confidential - FTC Docket No. 9315" and be subject to the terms and conditions of a Protective Order. I am enclosing that order for your review.

We request that you provide the following documents:

1. The Fiscal Year 1996 (07/01/95 - 06/30/96) Agreement for the State and Local Government Employees' Group Health Plan between the State of Illinois and Highland Park Hospital.
2. The Fiscal Year 2000 (07/01/99 - 06/30/00) Agreement for the State and Local Government Employees' Group Health Plan between the State of Illinois and Highland Park Hospital.

3. The Fiscal Year 1999 (07/01/98 - 06/30/99) Agreement for the State and Local Government Quality Care Health Plans between the State of Illinois and Evanston Northwestern Healthcare. (If there were separate, but identical, agreements for Evanston Hospital and Glenbrook Hospital for Fiscal Year 1999, please include both agreements).
4. The Fiscal Year 2001 (07/01/00 - 06/30/01) Agreements for the State and Local Government Quality Care Health Plans between the State of Illinois and the three Evanston Northwestern Healthcare hospitals. Please include the three separate, but identical, agreements for Evanston Hospital, Glenbrook Hospital, and Highland Park Hospital.

Please send the responsive documents to:

Renée S. Henning
Federal Trade Commission
Room 5237
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

If you have any questions, please do not hesitate to contact me at (202) 326-2111. Thank you for your cooperation in this matter.

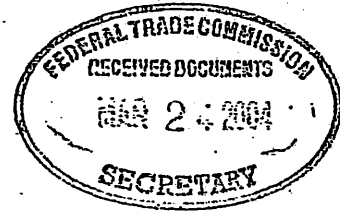
Sincerely yours,



Jeff Dahnke

Enclosure

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



In the matter of)
)
)

EVANSTON NORTHWESTERN HEALTHCARE)
CORPORATION,)
)

and)
)

ENH MEDICAL GROUP, INC.,)
. Respondents.)
)

Docket No. 9315

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. "Evanston Northwestern Healthcare Corporation" means Evanston Northwestern Healthcare Corporation, a corporation organized and existing under the laws of the State of

Illinois, with its principal place of business at 1301 Central Street, Evanston, Illinois 60201, and its predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.

2. "Evanston Northwestern Medical Group" means Evanston Northwestern Medical Group, a corporation organized and existing under the laws of the State of Illinois, with its principal place of business at 1301 Central Street, Evanston, Illinois 60201, and its domestic parent, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.

3. "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.

4. "Confidential Discovery Material" means all Discovery Material that is confidential or proprietary information produced in discovery. These are materials that are referred to in, and protected by, section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f); section 4.10(a)(2) of the FTC Rules of Practice, 16 C.F.R. § 4.10(a)(2); section 26(c)(7) of the Federal Rules of Civil Procedure, 28 U.S.C. § 26(c)(7); and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which would likely cause commercial harm to the Producing Party. The following is a non-exhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, corporate alliances, or mergers and acquisitions) that have not been 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

financial data or projections; proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material; payor contracts not currently in force that do not qualify for designation as Restricted Confidential Discovery Material; and documents discussing specific prices to be charged, strategic plans, physician performance, or utilization review. Discovery material will not be considered confidential if it is in the public domain.

5. "Counsel of Record" means counsel who have filed notices of appearance in this matter.

6. "Disclosing Party" means a Party that is disclosing or contemplating disclosing Discovery Material pursuant to this Protective Order.

7. "Discovery Material" includes deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, Documents produced pursuant to compulsory process or voluntarily in lieu of process, 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. Information taken from Discovery Material that reveals its substance shall also be considered Discovery Material.

8. "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, and includes all drafts and all copies of every writing, record, or graphic that contain any commentary, notes, or marking that does not appear on the original. "Document" includes, but is not limited to, every writing, letter, envelope, telegram, e-mail, meeting minute, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten

note, working paper, chart, index, tabulation, graph, drawing, chart, photograph, tape, phono record, compact disc, video tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, organizer, desk pad, telephone message slip, note of interview or communication, or any other data compilation from which information can be obtained.

9. "Expert/Consultant" means testifying or consulting experts, and their assistants, who are retained to assist Complaint Counsel or Respondents' counsel in preparation for the hearing or to give testimony at the hearing.

10. "Matter" means the matter captioned *In the Matter of Evanston Northwestern Healthcare Corporation and Evanston Northwestern Medical Group*, Docket Number 9315, pending before the Federal Trade Commission, and all subsequent appellate or other review proceedings related thereto.

11. "Outside Counsel" means (1) the law firm or firms that are counsel of record for Respondents in this Matter and their associated attorneys, with the exception of any such attorney who is also a director, officer or employee of either Respondent; (2) other persons regularly employed by such law firm(s), including, but not limited to, legal assistants, clerical staff, and information management personnel; and (3) temporary personnel, outside vendors or other agents retained by such law firm(s) to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.

12. "Party" means either the FTC, Evanston Northwestern Healthcare Corporation, or Evanston Northwestern Medical Group.
13. "Person" means any natural person, business entity, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust.
14. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. With respect to Confidential Discovery Material of a Third Party that 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 Discovery Material prepared by, or on behalf of, the FTC.
15. "Respondents" means Evanston Northwestern Healthcare Corporation and Evanston Northwestern Medical Group.
16. "Restricted Confidential Discovery Material" means Confidential Discovery Material stamped "Restricted Confidential Discovery Material" that contains non-public, current information that is highly sensitive the disclosure of which would likely cause substantial commercial harm to the Producing Party. The following is a non-exhaustive list of examples of information that likely will qualify for treatment as Restricted Confidential Discovery Material: marketing plans; pricing plans; financial information; trade secrets; documents discussing physician performance; payor contracts currently in force; or payor contracts not currently in

force, but the disclosure of which would likely cause substantial commercial harm. It is the intention of the Parties that this particularly restrictive designation will not be used more than is reasonably necessary.

17. "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.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of 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. 9315.

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. 9315" (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. 9315."

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. 9315" by placing on or affixing such legend on each page of the document, or, by Parties by instructing the

court reporter to denote each page of a transcript containing such highly sensitive commercial information as "Restricted Confidential, Attorney Eyes Only." 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 material that should be considered "Restricted Confidential, Attorney Eyes Only." All deposition transcripts shall be treated as Restricted Confidential, Attorney Eyes Only until the expiration of the fourteen days after the publication of the transcript.

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, Complaint Counsel, and to Experts/Consultants (paragraph 4(c), hereof). Such materials may not be disclosed 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) 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;

(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); any individual who was in the direct chain of supervision of the author at the time the Confidential Discovery Material was created or received; any employee or agent of the entity that created or received the Discovery Material; or anyone representing an author or recipient of the Discovery Material in this Matter; and
- (i) any other Person(s) authorized in writing by the Producing Party.

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 separate 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 Respondents' 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 propriety 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 Respondents' 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. Respondents' 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. 9315."

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 Respondents' 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

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.

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

13. At the conclusion of this Matter, Respondents' 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.

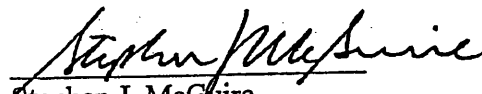
(b) If a Producing Party requests the return, pursuant to this paragraph, of any such Discovery Material from another Party, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control-including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


Stephen J. McGuire
Chief Administrative Law Judge

March 24, 2004

