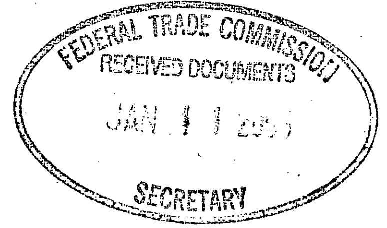


United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

In the Matter Of EVANSTON NORTHWESTERN HEALTHCARE CORP. and ENH MEDICAL GROUP, INC.	)	Docket Number 9315 CHIEF ADMINISTRATIVE LAW JUDGE: Stephen J. McGuire

MOTION OF NON-PARTY, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, FOR *IN CAMERA* TREATMENT OF PROPOSED EVIDENCE

The Illinois Department of Central Management Services ("CMS"), by and through its attorneys, Freeborn & Peters LLP, now moves this Honorable Administrative Law Judge ("ALJ"), pursuant to 16 C.F.R. § 3.45(b), for *In Camera* treatment of proposed evidence. As explained below, the Federal Trade Commission ("FTC") supports maintaining the confidentiality of the proposed evidence.

FACTS

On February 10, 2004, the FTC filed an administrative complaint ("the complaint") against Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc., alleging a violation of Section 7 of the Clayton Act and a violation of Section 5 of the Federal Trade Commission Act. At no time did the FTC make CMS a party to the complaint. However, in connection with its complaint on May 13, 2004, the FTC did seek the production of certain

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 contracts[1] 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.*

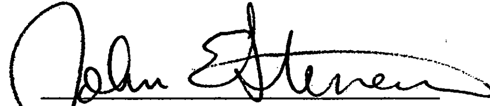
In the present case, CMS is not a party to the underlying complaint. CMS is, instead, merely a non-party who dutifully complied with the FTC's discovery request. Indeed, CMS is a non-party that complied with the FTC's discovery request after receiving special assurance from the FTC that the documents 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,



John E. Stevens
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217 East Monroe Street
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Springfield, Illinois 62701
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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
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Washington, D.C. 20580

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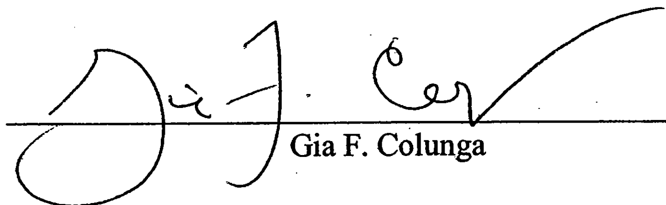
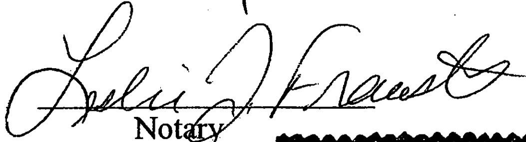
Illinois Dept. of Central Management Services
720 Stratton Office Building
Springfield, IL 62706

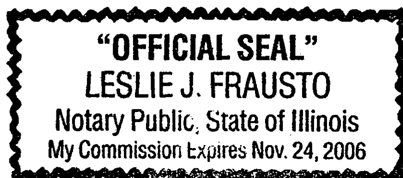


Gia F. Colunga

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



Notary



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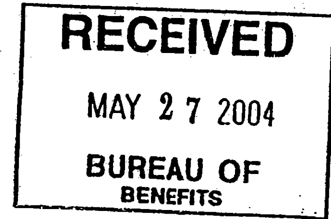
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580



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May 13, 2004

<u>*Via Facsimile and U.S. Mail*</u>
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

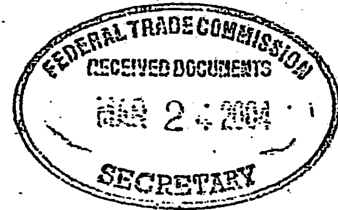
If you have any questions, please do not hesitate to contact me at (202) 326-2111. Thank you for your cooperation in this matter.

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