

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FEDERATION OF PHYSICIANS AND
DENTISTS, INC.,

Defendant.

In the interests of (i) ensuring an efficient and prompt resolution of this action and (ii) protecting confidential information of the parties and non-parties from improper disclosure, the United States hereby requests the Court to enter the following Protective Order pursuant to Fed. R. Civ. P. 26(c)(7):

1. As used herein:

(a) "confidential information" means any trade secret or other confidential research, development, or commercial information, as such terms are used in Fed. R. Civ. P. 26(c)(7), produced by or in the possession or control of any protected person (as defined below), the disclosure, or further disclosure, of which would result in a clearly defined and serious injury;

- (b) "disclosed" means shown, divulged, revealed, produced, described, transmitted or otherwise communicated, in whole or in part;
- (c) "document" is defined as the term is used in Fed. R. Civ. P. 34(a);
- (d) "party" or "parties" means plaintiff and/or defendant;
- (e) "protected person" means any party or non-party who voluntarily or in response to either a civil investigative demand from the Department of Justice or a discovery request in this action produced or produces any information in connection with this action or the Department of Justice's investigation of the matters at issue in this action; and
- (f) "this action" means the above-captioned action pending in this Court, including any pretrial or discovery, post-trial or appellate proceedings.

B. DESIGNATION OF CONFIDENTIAL INFORMATION

2. A protected person may designate as confidential any information it has disclosed, or hereafter discloses, in connection with this action, to the extent such information constitutes confidential information as defined in this Order. Such designations shall constitute a representation to the Court that such protected person (and counsel, if any) in good faith believes that the information so designated meets the standard set forth in Fed.R.Civ.P. 26(c)(7). Any production of information without its being designated as confidential shall not thereby be deemed a waiver of any claim of confidentiality concerning such information, and the same may thereafter be designated confidential. However, any such subsequent designation shall not apply retroactively to any information for which disclosure was proper at the time made.

3. A party or protected person designating information as confidential shall stamp or label the face of each document with the designation "CONFIDENTIAL." If the entire document is not confidential, the protected person shall specify on the first page of the document the portions of the document that contain confidential information. Any marks on the document shall be made so as not to interfere with the legibility of the document.

4. (a) All transcripts of depositions taken prior to the date of this Order shall be treated as confidential in their entirety until ten business days from the date the deponent or counsel for the deponent has received a copy of this Order. Any deponent, counsel for the deponent, or counsel for a party may designate at any time during the ten-business-day period any portion of the transcript as confidential by designating, by page and line, and by designating any exhibits, those that are to be treated as confidential. Such designations shall constitute a representation to the Court that such party or protected person (and counsel, if any) in good faith believes that the information so designated constitutes confidential information. The designations shall be provided within the specified time period to plaintiff's counsel, who shall then transmit to defendant's attorneys the designations not originating from defendant's attorneys. Attorneys for each of the parties shall ensure that all transcripts, and exhibits, of all depositions taken before the date of this Order, that are used in this case, are stamped "CONFIDENTIAL" at the top of each page so designated.

(b) All transcripts of depositions taken after the date of this Order shall be treated as if designated as confidential in their entirety for a period of ten business days after a full and complete copy of the transcript has been made available to the deponent

or deponent's counsel. Any deponent, counsel for the deponent, or counsel for a party may designate during the deposition or during the ten-business-day period after the transcript is received from the court reporter any portion of the transcript as confidential by designating, by page and line, and by designating any exhibits, those that are to be treated as confidential. Such designations shall constitute a representation to the Court that such party or protected person (and counsel, if any) in good faith believes that the information so designated constitutes confidential information. The designations shall be provided to the court reporter within the specified time period and the reporter shall then issue an official transcript (and copies) that are stamped "CONFIDENTIAL" at the top of each page so designated.

(c) All documents furnished to the Department of Justice prior to the date of this Order pursuant to the CID process shall be treated as if designated by defendant or a protected person as confidential in their entirety until ten business days from the date the defendant or protected person has received of a copy of this Order. The defendant and counsel for the defendant, as well as any protected person and counsel for the protected person, if any, may designate at any time during the ten-business-day period any document or portion of a document furnished to the Department of Justice as confidential in accordance with the procedures described in Paragraph 3. Such designations shall constitute a representation to the Court that the defendant or protected person (and counsel, if any) in good faith believes that the information so designated constitutes confidential information.

5. This Order shall not apply to information obtained from the public domain or other sources regardless of whether such information is also contained in materials designated as confidential pursuant to this Order.

6. This Order shall be without prejudice to the right of any party to bring before the Court the question of whether any particular information designated as confidential is appropriately designated or whether any particular information designated confidential is or is not discoverable or admissible evidence at any evidentiary hearing or trial in this case. No party concedes by complying with the procedures set forth in this Order that any information designated by any protected person as confidential is in fact confidential as that term is defined in paragraph 1(a) of this Order. However, no information properly designated as confidential pursuant to this Order shall be disclosed except as provided herein unless and until the Court orders the release of such information from the confidentiality provisions of this Order.

C. DISCLOSURE OF CONFIDENTIAL INFORMATION

7. Except as otherwise authorized by this Order, information designated as confidential shall be used only in connection with this action, shall not be disclosed to any person other than the individuals set forth below, may be disclosed only as necessary in connection with this action to the individuals set forth below, and may be used by those individuals only as necessary in connection with this action:

(a) the Court and all persons assisting the Court in this action, including court reporters and stenographic or clerical personnel;

(b) Department of Justice attorneys, employees and independent contractors retained by the Department of Justice to assist in prosecution of this litigation or otherwise assist in the work of the Department;

(c) outside counsel acting for defendant in connection with this action and that counsel's employees and independent contractors (other than members of defendant) assisting such outside counsel in the defense of this litigation;

(d) testifying or consulting experts retained by a party to assist in the prosecution or defense of this action, including employees of the firm with which the expert or consultant is associated to the extent necessary to assist the expert's work in this action, provided that such experts and staff are not employed or affiliated in any other way with defendant;

(e) authors, addressees and recipients of particular information designated as confidential solely to the extent that they have previously had lawful access to the particular information disclosed or to be disclosed;

(f) persons (and their counsel) whom counsel for a party believes in good faith to have, or had, prior access to confidential information, or who have been participants in a communication that is the subject of the confidential information and from whom verification of or other information about that access or participation is sought, solely to the extent of disclosing such information to which they have or may have had access or that is the subject of the communication in which they have or may

have participated; provided that, unless and until counsel confirms that any such persons have had access or were participants, only as much of the information may be disclosed as may be necessary to confirm the person's access or participation; and

(g) subject to the provisions of Paragraph 8, other persons not included in the above Subparagraphs who testify or who, trial counsel believes in good faith, may testify at trial of this action.

8. Before disclosure of confidential information is made to any person or persons specified in Subparagraph 7(g), the party wishing to make such a disclosure shall give notice, via facsimile or hand delivery, at least four business days prior to such proposed disclosure, to the protected person producing such confidential information, stating the names, addresses, and employers of the person(s) to whom the disclosure is proposed to be made. The notice shall identify with particularity the documents or specific parts thereof and the substance of the information to be disclosed. If, within the four-business-day period, an objection is made regarding the proposed disclosure, disclosure of the confidential information shall not be made until so ordered by the Court or later agreement is reached with the objecting protected person. The Court shall permit disclosure unless the objecting protected person bears its burden of demonstrating good cause why the proposed disclosure should not be permitted.

9. Each individual described in Paragraph 7 above to whom information designated as confidential is disclosed shall not disclose that confidential information to any other individual, except as provided in this Order, or use it for any purpose other than in connection with this action. Before any information designated as confidential may be disclosed to any person described in Paragraph 7 above, he or she shall have first read this Order or shall have

otherwise been instructed in his or her obligations under the Order by this Court or counsel for a party, and any person described in Subparagraphs 7(f)-(g) shall have executed the agreement included as Appendix A hereto. The counsel for the party making the disclosure shall retain the original of such executed agreement for a period of at least one year following the final resolution of this action.

10. Notwithstanding the provisions of Paragraphs 7 and 8 above, nothing in this Order shall:

- (a) limit a party or protected person's use or disclosure of its own information;
- (b) prevent a party, subject to taking appropriate steps to preserve the confidentiality of such information, from disclosing information designated as confidential either:

- (1) to another court of law; or
 - (2) as may be required by law; and

- (c) prevent plaintiff, subject to taking appropriate steps to preserve the confidentiality of such information, from disclosing information designated as confidential:

- (1) to duly-authorized representatives of the Executive Branch of the United States Government;
 - (2) in the course of legal proceedings to which the United States is a party;
 - (3) for the purpose of securing compliance with a Final Judgment in this action; or

(4) for law enforcement purposes or as otherwise required by law.

11. The party intending to make any disclosure pursuant to Paragraph 10 shall give notice to that effect to the producing protected person at least 10 business days prior to making any such disclosure.

D. USE OF CONFIDENTIAL INFORMATION IN LITIGATION

12. If any confidential information is contained in any pleading, motion, exhibit or other paper filed with the Court, the party filing such confidential information shall file the document(s) containing the confidential information to the Clerk of the Court in a sealed envelope with the following designation on the face of the envelope: "This envelope contains information designated as confidential pursuant to Order of the Court and may not be disclosed without further order of the Court." Such papers shall nevertheless be furnished to the Court, the plaintiff and defendants' outside counsel. Within four business days of filing any paper containing confidential information, the filing party shall also file on the public docket of the Court a duplicate copy of the paper with the confidential information deleted.

13. The parties' trial exhibits containing confidential information that has been produced by Defendant shall not be treated as confidential information at any evidentiary hearing or trial unless redesignated by defendant in accordance with Paragraphs 1 and 4 of this Protective order when exchanging their trial exhibits or exchanging their objections to Plaintiff's exhibits.

E. PROCEDURES UPON TERMINATION OF LITIGATION

14. Within 90 days after receiving notice of the entry of an order, judgment or decree terminating this action, all persons having received confidential material shall either make a good faith effort to return such material and all copies thereof to counsel for the party or protected person that produced it, or destroy all such confidential material and certify that fact in writing to the party or protected person. The Department of Justice and outside counsel for defendant shall be entitled to retain court papers, deposition and trial transcripts and exhibits, and work product; provided that Department of Justice employees, and defendant's outside counsel and such counsel's employees shall not disclose the portions of court papers, deposition transcripts, exhibits or work product containing confidential material to any person except pursuant to Court order or agreement with the party or protected person that produced the confidential material. All confidential materials returned to the parties or their counsel by the Court likewise shall be disposed of in accordance with this Paragraph. Nothing in this provision, however, shall restrict the rights of the parties under Paragraph 10, or the rights of the plaintiff to retain and use confidential materials for law enforcement purposes or as otherwise required by law.

F. RIGHT TO SEEK MODIFICATION

15. Nothing in this order shall prevent either party from seeking modification of this order upon motion duly made pursuant to the Rules of this Court.

ORDER

SO ORDERED:

Dated: _____, 1998

Wilmington, Delaware

United States District Judge

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

_____)	
)	
UNITED STATES OF AMERICA,)	CA 98-475 JJF
)	
Plaintiff,)	
)	
)	
FEDERATION OF PHYSICIANS AND)	
DENTISTS, INC.,)	
)	
Defendant.)	
_____)	

AGREEMENT CONCERNING CONFIDENTIALITY

I, _____, am employed as a _____ by _____. I hereby certify that:

1. I have read the Protective Order entered in the above-captioned action, and understand its terms.
2. I agree to be bound by the terms of the Protective Order entered in the above-captioned action. I agree to use the information provided to me only for the purposes of this litigation.
3. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.

4. I submit to the jurisdiction of the United States District Court for the District of Delaware solely for the purpose of enforcing the terms of the Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.

5. I make this certificate this _____ day of _____, 19__ .

(SIGNATURE)