

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

[PUBLIC]

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

**NORTH TEXAS SPECIALTY PHYSICIANS' RESPONSE TO HUMANA HEALTH PLAN OF TEXAS,
INC.'S MOTION TO QUASH PORTIONS OF THE SUBPOENA DUCES TECUM OR LIMIT THE
SCOPE OF THE SUBPOENA AND EXTEND THE TIME TO RESPOND TO SAME**

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

I.

Background

On December 18, 2003, NTSP served a subpoena *duces tecum* on Humana after learning from Complaint Counsel that Humana may have provided documents to them through voluntary process. On January 12, 2004, Humana filed a Motion to Quash Portions of or Limit the subpoena *duces tecum* served by NTSP. Humana asks the Administrative Law Judge to quash portions of or limit the subpoena, claiming the requests for documents are overly broad in time and scope, unduly burdensome, and require the production of information Humana considers confidential. NTSP contests each of Humana's grounds for this motion and asks the Administrative Law Judge to enforce the subpoena as written except for the limitations NTSP agrees to in this response.

II.

Argument and Authorities

A. Each request is reasonably expected to yield relevant information and is not overly broad in time or scope or unduly burdensome.

Discovery is allowed in an FTC proceeding of anything “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.”¹ Discovery should only be limited if the burden outweighs the benefit.²

Here, each discovery request is calculated to yield information relevant and vital to NTSP’s defense in the pending FTC proceeding. NTSP has been accused of restraining trade and otherwise hindering competition by using price fixing to obtain supra-competitive prices and deprive payors like Humana of the benefits of competition between providers.³ NTSP needs information on the prices and practices in the marketplace between payors and NTSP providers as well as between payors and unrelated providers to show in its defense that NTSP has not obtained supra-competitive prices and that competition in the marketplace has not been otherwise harmed by its actions. NTSP also intends to show that its network not only has caused overall physician costs to be lower than they otherwise would have been, but also has caused the utilization of hospitalization and pharmacy to have been less costly. The requests in this case seek exactly this information.⁴

¹ 16 C.F.R. § 3.31(c)(1).

² *Id.*

³ See Complaint, ¶¶ 11-12, 16-17, 23-24.

⁴ See Exhibit A of Humana’s Motion to Quash, a copy of the subpoena *duces tecum*. Requests 1, 2, and 3 seek documents related to investigations by the FTC and the Attorney General of the State of Texas into payor and provider business relationships. Request 4 seeks documents showing the relationship between NTSP and Humana. Requests 5, 6, 7, and 9 seek documents showing the state of the marketplace at various times and showing the general business relationships between all payors and

The burden is on the party challenging the subpoena, Humana, to prove that the subpoena is unduly burdensome.⁵ The only burdens specified by Humana are cost and time, both of which have been held not enough to make production unduly burdensome.⁶ In addition, Humana's estimates of cost and time of production were based on producing documents from all Humana divisions across the country.⁷ In response to Humana's concern that responses are required by all Humana divisions across the country, only Humana Health Plan of Texas or related entities which dealt with providers in the state of Texas would appear to need to respond. Therefore, Humana has grossly overstated its burden.

Each request is also reasonably specific as to time and scope. The subject matter for each request has been adequately provided, as explained below. Further, the six-year period requested is the time frame of conduct claimed by Complaint Counsel as being relevant to this suit. Six years is also not an extraordinary length of time as Humana suggests. Humana implies that these documents may not still exist or that they may be stored off-site and requests that the time period be shortened to two years. Besides excluding two-thirds of the relevant time frame being investigated by Complaint Counsel, it is unlikely that Humana destroys documents and other records or even has them moved off-site after only two years. Indeed, Humana has made no

providers. Request 8 seeks documents that will assist in determining the relevant geographic market.

⁵ *Plant Genetic Sys. v. Northrup King Co.*, 6 F. Supp. 2d 859, 862 (E.D. Mo. 1998).

⁶ See *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 650 (5th Cir. 1999) (although time and effort required to comply were extensive, subpoena was not unreasonably burdensome because compliance did not "unduly disrupt or seriously hinder normal operations" of the business); *United States v. Int'l Bus. Mach. Corp.*, 71 F.R.D. 88, 92 (S.D. N.Y. 1976) (compliance time of 3-6 months and tens of thousands of dollars not burdensome in light of size and significance of antitrust litigation); *Ghandi v. Police Dept.*, 74 F.R.D. 115, 124 (E.D. Mich. 1977) (fact that production will be time consuming is not in itself burdensome).

⁷ See Exhibit F, Humana's Motion to Quash, Affidavit of D. Gary Reed ¶¶ 4, 6.

showing of burdensomeness; it has only provided conclusory statements.⁸ Therefore, the time period of six years should be kept for these document requests.

As shown, the benefit of allowing NTSP the discovery necessary to prepare its defense outweighs any burden on Humana. Since Humana also addressed each request separately in its motion, NTSP will respond to Humana's specific arguments in this manner, except for arguments concerning privileges and confidential or proprietary information, which will be addressed separately in later sections.

1. Request number 1 for documents Humana has provided to the Federal Trade Commission⁹ is highly relevant and not overly broad or unduly burdensome.

Humana cannot protect highly relevant information from one party in this proceeding while making it available to the other. A subpoena also may not be avoided merely by saying information sought is available from another.¹⁰

NTSP's request encompasses documents provided to the FTC with regard to Humana's relationship with all providers in the state of Texas, not only its relationship with NTSP. Although Humana contends that its business relationships with other healthcare providers is immaterial, those business relationships are highly relevant because NTSP's conduct will be judged using information for the entire relevant market and comparing NTSP's conduct against that of its competitors. Complaint Counsel has all the information previously provided by Humana available for use, and NTSP seeks the same.

⁸ See Exhibit F, Humana's Motion to Quash ¶ 9. A subpoenaed party may not merely utter claim of burden – it must prove it. *Fed. Trade Comm'n v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981).

⁹ "All documents previously produced or otherwise sent to the Federal Trade Commission concerning your business relationships with healthcare providers in the State of Texas."

¹⁰ *Covey Oil Co. v. Cont'l Oil Co.*, 340 F.2d 993, 998 (10th Cir. 1965).

This request is not overly broad or unduly burdensome, and NTSP has made this request less burdensome by referencing previous document productions.¹¹

2. Requests numbers 2 and 3 for documents previously requested by and provided to the Office of the Attorney General of the State of Texas¹² do not require production of protected information and are not unduly burdensome.

Appendix A of the subpoena provided a sample letter detailing a document request previously made by the Attorney General of Texas. Humana received from the Texas Attorney General the same letter addressed to itself and responded to that letter by producing documents. These are the same documents that NTSP now requests. Again, NTSP has made this request less burdensome by referencing a previous document production. Humana has already assembled and produced these same documents, except for any updated information of the same type.¹³ These documents are highly relevant. Humana's relationships with healthcare providers in the state of Texas will be evidence of NTSP's conduct, other healthcare providers' conduct, and the effects of such conduct considering the entire market. The minimal burden of re-producing and

¹¹ A production request is less burdensome if the documents have already been or are likely to be produced elsewhere. *Plant Genetic Sys.*, 6 F. Supp. 2d at 862.

¹² "All documents previously produced or otherwise sent to the Office of the Attorney General of the State of Texas concerning business relationships with healthcare providers in the State of Texas, including specifically but without limitation the documents provided in response to the Written Notice of Intent to Inspect, Examine and Copy Corporate Documents served in or about March 2002 (a sample of such Written Notice is attached hereto). [At your option, check registers as described in Class 6 of Exhibit C need not be produced]. Such documents should be provided in electronic form only." and "Documents for the time period January 1, 2000 to June 30, 2002 described in Exhibits A through C of the above-referenced Written Notice of Intent to Inspect, Examine and Copy Corporate Documents to the extent such documents are not produced in response to Request No. 2 above. [At your option, check registers as described in Class 6 of Exhibit C need not be produced]. Such documents should be provided in electronic form only."

¹³ Humana states that many of the documents requested by the Attorney General's office were not generated, gathered, or provided to the Texas Attorney General. See Humana's Motion to Quash, p. 5. Humana provides no further explanation for what documents were not produced, how many were not produced, and why they were not produced. To the extent any responsive documents were not provided to the Texas Attorney General, NTSP's request number 3 properly asks for such documents.

updating these electronic files does not outweigh the benefit of allowing NTSP to develop its defense.

Humana's explanation that these documents are subject to a statute and a confidentiality agreement with the Texas Attorney General is irrelevant. The statute cited by Humana only prevents the Attorney General from producing these documents in response to an open records request; it does not insulate Humana from otherwise producing the documents elsewhere.¹⁴ Similarly, the confidentiality agreement with the Attorney General only protects the documents from disclosure by the Texas Attorney General's Office.¹⁵ NTSP has not requested these documents from the Attorney General; it is requesting them directly from Humana. These documents, if generally described in a request, would be available to NTSP from Humana. NTSP has merely tried to save Humana time and money by requesting a previously-assembled set of documents which Humana has readily available for production.

3. Request number 4 for correspondence concerning or relating to NTSP¹⁶ is not overly broad.

A major issue in this proceeding is NTSP's conduct towards payors such as Humana and that conduct's effect in the marketplace. Any correspondence relating to this conduct is clearly relevant, and that is exactly the subject matter of this request. Contrary to Humana's assertion, the request should not be read so broadly as to include all documents related to the healthcare industry or provider groups generally. NTSP understands that Humana will not be producing every single document in its files. NTSP understands the materials referencing NTSP which

¹⁴ Tex. Rev. Civ. Stat. Ann. art. 1302-5.04 states only, "The Attorney General, or his authorized assistants or representative, shall not make public... ."

¹⁵ See Exhibit D-1, Humana's Motion to Quash, ¶¶ 2, 3, 5.

¹⁶ "All internal and external correspondence, memoranda, and messages concerning or relating to NTSP."

Humana has already provided and has promised to provide in their motion¹⁷ are those which should be compelled.

4. Request number 5 for documents comparing cost or quality of NTSP providers to other providers¹⁸ is not overly broad or unduly burdensome.

These documents are highly relevant. Cost and quality comparisons between NTSP providers and other providers will allow NTSP to show in its defense that it has not obtained supra-competitive prices and that competition in the marketplace has not been otherwise harmed. This request is adequately limited in scope by the list of NTSP individual providers attached to the subpoena. Any responsive document would have at least one NTSP provider in the comparison. NTSP providers are all located in Texas, mainly in the Dallas-Fort Worth metroplex, and are only a fraction of the providers in Texas. Therefore, this request is not overly broad and will not be unduly burdensome to Humana.

5. Request number 6 for documents containing specific facts and figures from contracts with providers¹⁹ is not unduly burdensome.

These documents are highly relevant. Statistics from contracts between Humana, a payor, and providers will allow NTSP to show in its defense that it has not obtained supra-competitive prices and that competition in the marketplace has not been otherwise harmed.

¹⁷ “Humana will...endeavor to produce any additional documents that specifically mention or reference NTSP...” Humana’s Motion to Quash, p. 9.

¹⁸ “All documents comparing the cost or quality of medical service provided by any physician provider listed on Appendix A and any other physician providers.”

¹⁹ “Documents sufficient to show the rate (as expressed in terms of a % of RBRVS or otherwise) paid to each physician provider by you, the period for which that rate was paid, whether the rate was for a risk or non-risk contract, whether the rate was for a HMO or PPO or other contract, who the contracting parties were for the contract setting the rate, and which physicians were covered by such contract.”

Humana has estimated the time and cost of response to this request based on searching contracts for all markets across the country. NTSP has agreed to limit the scope of this request to contracts with providers or provider groups with at least one member provider located in the state of Texas. In light of this limitation and the importance of the information, the request is not unduly burdensome.

6. Request number 7 for documents comparing costs of health care²⁰ is not overly broad.

This request is not overly broad; it seeks only documents containing comparisons of costs of health care in Texas. Any health care costs, including hospital care and pharmacy costs, are highly relevant to the pending action because they relate to the marketplace cost and availability of services similar to those offered by NTSP. The burden is also limited because Humana should be familiar with the types of responsive documents. Humana undoubtedly engages in cost comparisons such as those requested in its ordinary course of business. Humana appears to admit that these documents exist by arguing that such comparisons give Humana a competitive advantage.²¹

7. Request number 8 for documents establishing geographic service areas²² is not ambiguous.

This request is not vague or ambiguous – it requests documents used by Humana to determine which providers will service what geographic areas. Such information obviously is relevant in determining the size of the relevant market. NTSP cannot be more specific than its

²⁰ “All documents concerning or relating to comparisons of the cost of physician services, hospital care, pharmacy cost, or cost of health insurance in the State of Texas.”

²¹ See Humana’s Motion to Quash, p. 14.

²² “Documents sufficient to show your policies, rules, and access standards establishing the geographic areas to be serviced by physician providers in the State of Texas.”

request for “policies, rules, and access standards” because it is unfamiliar with Humana’s business practices and does not know where or in what form this information might be.²³ It is acceptable to NTSP if, as Humana states in its motion, Humana produces information it believes is responsive in light of the clarification provided here, subject to NTSP’s contacting Humana’s counsel if such information is insufficient.

8. Request number 9 for sample contracts²⁴ is not ambiguous.

This request is not vague or ambiguous – it requests sample contracts between Humana and any health care providing entity involving more than 75 doctors in two specific counties. Humana has agreed in its motion to provide responsive documents. To the extent these documents are insufficient, NTSP will work with Humana’s counsel to determine the remaining responsive documents.

B. Response cannot be avoided merely because Humana considers the information proprietary, and, further, the confidentiality of the information is adequately protected by the protective order in place.

Humana also claims it does not have to produce documents that it considers confidential and proprietary. A party claiming confidentiality must have specific proof that the information is

²³ If it is not known exactly what documents are needed, how the record keeper keeps his own records, or what the specific contents of records are, broad requests for production are acceptable. *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494, 496 (D. Conn. 1985); *Atlantic Coast Insulating Co. v. Maryland Cas. Co.*, 34 F.R.D. 450, 453 (E.D. N.Y. 1964); *State Theatre Co. v. Tri-States Theatre Co.*, 11 F.R.D. 381, 383 (D. Neb. 1951).

²⁴ “A sample contract used for each contract entity involving more than 75 physicians in the Counties of Dallas and/or Tarrant and any amendments, revisions, or replacements thereof.”

confidential and that disclosure would be harmful.²⁵ The protective order currently in place in this proceeding more than adequately protects the confidentiality of any documents and prevents any harm from Humana's compliance with the subpoena. The protective order provides that any information marked confidential can be used only for purposes of this matter and not for any business or commercial purpose and cannot be directly or indirectly disclosed to persons outside a limited list of persons associated with this proceeding.²⁶ In addition, information may be marked restricted confidential and may be disclosed *only* to outside counsel and experts with limited exceptions.²⁷ NTSP does not object to Humana's requests in its motion to mark certain documents "restricted confidential" and "attorney eyes only." With this protection, the documents will not be seen by Humana's competitors or the marketplace generally, and Humana will not be competitively harmed by this production.

Also weighing in favor of production is that there is no absolute privilege for confidential information, and a claim of confidentiality can be rebutted by a showing that the information is relevant and necessary.²⁸ As explained in the above section, NTSP has met this showing. That Humana has agreements with third parties not to disclose proprietary information is of no relevance. "Parties cannot contract privately for the confidentiality of documents, and foreclose

²⁵ *Centurion Indus., Inc. v. Warren Steurer and Assoc.*, 665 F.2d 323, 325 (10th Cir. 1981); *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 131 F.R.D. 668, 671 (S.D. Tex. 1990).

²⁶ Protective Order Governing Discovery Material, pp. 4, 9.

²⁷ *Id.*, pp. 6-7.

²⁸ *Centurion Indus., Inc.*, 665 F.2d at 326; *Exxon Chem. Patents, Inc.*, 131 F.R.D. at 671.

others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position.”²⁹

C. Truly privileged materials are properly withheld as long as Humana provides a privilege log.

NTSP agrees that Humana has the right to withhold materials subject to the attorney-client, work product, or physician-patient privilege as long as Humana creates a privilege log. NTSP also agrees that Humana may withhold information related specifically to individuals’ diagnosis, treatment, health, quality of care, and any “protected health information” of enrollees.

NTSP does not agree that Humana may withhold documents using a “proprietary privilege,” as such is not a legally-recognized privilege. If Humana does withhold documents from production, a privilege log would be needed as quickly as possible to determine which documents NTSP must request the Administrative Law Judge to compel.

D. The time and form for response were not unreasonable.

The subpoena was sent to Humana on December 18, 2003. The request was made at this time because NTSP only became aware in November of 2003 that Humana had provided documents to Complaint Counsel through voluntary process. The deadline for compliance was originally January 2, 2004, which NTSP agreed to extend to January 12, 2004. The original time for compliance was 15 days. The extension gave Humana 25 days to comply. Although not binding in the case of a time set in a subpoena, Federal Rule of Civil Procedure 6, relating to computation of time, is instructive. If the time period for compliance is more than 11 days,

²⁹ *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87-88 (E.D. N.Y. 1981).

weekends and legal holidays are not excluded when calculating the time for compliance.³⁰ Even if these days were excluded, this would only provide Humana a four-day extension until January 6, 2004, which is less than what NTSP agreed to after speaking with Humana counsel.

Considering that the original time period granted was not unreasonable, that an extension was voluntarily granted by NTSP, that it has already been over a month since the subpoena was sent, and the urgency of NTSP receiving this important information before upcoming deadlines³¹, NTSP asks that the Administrative Law Judge, upon denying the Motion to Quash Portions of and/or Limit the subpoena, set the compliance date to five days from the date of that order.

Further, the form requested for response was not unreasonable. NTSP asked Humana to produce responsive documents in both hard copy and electronic form “where available.” This request was intended to obtain documents in electronic form where the documents already existed in electronic form or would be easier to produce in electronic form. There is no requirement that Humana produce all documents in both hard copy and electronic form or that Humana expend time and money to format hard copies into electronic form.

E. Humana is not entitled to recover its costs of production.

The FTC Rules of Practice in Adjudicative Proceedings do not contain any provisions for the shifting of costs from the producing party to the requesting party. Therefore, it is improper for Humana to request recovery of its costs of production from NTSP.

³⁰ Fed. R. Civ. P. 6(a).

³¹ Close of discovery is January 30, 2004; deadline for filing motions for summary decision is March 2, 2004; and hearing is set for April 28, 2004. See Scheduling Order. In addition, NTSP is currently taking depositions at which this information would be helpful.

III.

Conclusion

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

Respectfully submitted,

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ATTORNEYS FOR NORTH TEXAS
SPECIALTY PHYSICIANS

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

**Order Denying Humana Health Plan of Texas, Inc.'s Motion
to Quash Portions of the Subpoena *Duces Tecum* or Limit the Scope of the Subpoena and
Extend the Time to Respond to Same**

I.

Humana Health Plan of Texas, Inc. ("Humana") was served with a subpoena *duces tecum* by Respondent North Texas Specialty Physicians on December 18, 2003. On January 12, 2004, Humana filed a Motion to Quash Portions of or Limit the subpoena. Respondent filed a response opposing the motion. For the reasons set forth below, Humana's motion is DENIED and compliance with the subpoena *duces tecum* is due within 5 days.

II.

Humana contends that the subpoena was overly broad and unduly burdensome. The burden is on the party challenging the subpoena. Humana has not shown adequate proof that the subpoena is unduly burdensome. The requests in the subpoena are also not overly broad because they are reasonably expected to yield relevant information and correspond in time and subject matter to the events of Complaint Counsel's investigation.

Humana also contends that the subpoena requests confidential information that will not be adequately protected. The Protective Order for Discovery in place in this proceeding will adequately protect any confidential information produced by Humana.

Ordered:

D. Michael Chappell
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on January 22, 2004, I caused a copy of the foregoing to be served upon the following persons:

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