

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 AETNA HEALTH INC.'S MOTION TO
QUASH, OR, ALTERNATIVELY, LIMIT SUBPOENA *DUCES TECUM***

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

I.

Background

On December 18, 2003, NTSP served a subpoena *duces tecum* on Aetna after learning from Complaint Counsel that Aetna may have provided documents to them through voluntary process. On January 22, 2004, Aetna filed a Motion to Quash or Limit the subpoena *duces tecum* served by NTSP. Aetna asks the Administrative Law Judge to quash or limit the subpoena, claiming the requests for documents are overly broad in time and scope, unduly burdensome, and require the production of information Aetna considers confidential. NTSP contests each of Aetna's grounds for this motion and asks the Administrative Law Judge to enforce the subpoena as written.

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 Aetna 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 be 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 B of Aetna’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 Aetna. 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 providers. Request

The burden is on the party challenging the subpoena, Aetna, to prove that the subpoena is unduly burdensome.⁵ The only burdens specified by Aetna are cost and time, both of which have been held not enough to make production unduly burdensome.⁶ Aetna has not even provided specific estimates or evidence as to the exact cost and time anticipated; it has merely stated that information sought is “extraordinarily voluminous” and production “would likely take hundreds and, more likely, thousands of man hours at a substantial cost.”⁷ These conclusory and vague statements of burden do not meet Aetna’s burden of proof.

Further, each request is reasonably specific as to time and scope. In response to Aetna’s objection to the definition of Aetna Health Inc. that it contends requires response by all Aetna affiliated health maintenance organizations, only Aetna Health Inc. or related entities which dealt with NTSP would appear to need to respond. Aetna also objected to the time period of six years. The six-year period requested is the time frame of conduct identified by Complaint Counsel as being relevant to this suit. Six years is also not an extraordinary length of time as Aetna suggests. Aetna 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

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 Aetna’s Motion to Quash, pp. 4-5; Exhibit A, Aetna’s Motion to Quash, Affidavit of David M. Roberts, ¶¶ 10-11.

Aetna destroys documents and other records or even has them moved off-site after only two years. Aetna also asserts that it should not have to produce documents during the time period that NTSP participated with Aetna through Medical Select Management. First, Aetna may still have documents prior to the time NTSP contracted directly with them that are responsive, and all responsive documents should be provided. Second, a subpoena may not be avoided merely by saying information sought is available from another.⁸ Therefore, the time period of six years should be kept for these document requests. With these reasonable limitations, the benefit of allowing NTSP the discovery necessary to prepare its defense outweighs any burden on Aetna.

Since Aetna addressed each request separately in its motion, NTSP will respond to Aetna'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 Aetna has provided to the Federal Trade Commission⁹ is highly relevant and not overly broad or unduly burdensome.

Aetna 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

Aetna has agreed to produce documents concerning its relationship with NTSP that it has provided the FTC in this proceeding. But NTSP's request encompasses documents provided to the FTC with regard to Aetna's relationship with all providers in the state of Texas, not only

⁸ *Covey Oil Co. v. Cont'l Oil Co.*, 340 F.2d 993, 998 (10th Cir. 1965).

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.*, 340 F.2d at 998.

its relationship with NTSP. Although Aetna contends that its business relationships with other healthcare providers is immaterial, those business relationships are actually highly relevant because NTSP's conduct will be judged using information for the entire relevant market and comparing its conduct against that of its competitors. Complaint Counsel has all information previously provided by Aetna available for use, and NTSP seeks the same.

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. NTSP has not requested that Aetna provide any information concerning United Healthcare. Further, the sample letter provided is a matter of public record, and NTSP's disclosure of this letter to Aetna was not improper. Aetna 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,

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."

NTSP has made this request less burdensome by referencing a previous document production. Aetna has already assembled and produced these same documents, except for any updated information of the same type.

These documents are highly relevant. Aetna'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 request was not limited by healthcare provider for this reason. The Texas Attorney General's request implicitly limits the geographic area to the state of Texas. Further, the responsive documents to this request are the same responsive documents compiled for the Attorney General of Texas. The amount of information provided is irrelevant. The minimal burden of re-producing those electronic files does not outweigh the benefit of allowing NTSP to develop its defense.

Aetna's claim that these documents are protected by statute is erroneous. The statute cited by Aetna only prevents the Attorney General from producing these documents in response to an open records request; it does not insulate Aetna from otherwise producing the documents elsewhere.¹³ NTSP has not requested these documents from the Attorney General; it is requesting them directly from Aetna. These documents, if generally described in a request, would be available to NTSP from Aetna. NTSP has merely tried to save Aetna time and money by requesting a previously-assembled set of documents which Aetna has readily available for production.

¹³ Tex. Rev. Civ. Stat. Ann. art. 1302-5.04 states only, "The Attorney General, or his authorized assistants or representative, shall not make public... ."

3. Request number 4 for correspondence concerning or relating to NTSP¹⁴ is not overly broad.

A major issue in this case is NTSP's conduct towards payors such as Aetna 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. Aetna is not qualified to make the determination of which correspondence concerning NTSP is relevant to the issues in this proceeding or to NTSP's defense. Therefore, the request is not overly broad, and Aetna should be required to produce all responsive documents.

4. Request number 5 for documents comparing cost or quality of NTSP providers to other providers¹⁵ is not overly broad or unduly burdensome.

Aetna has already agreed to provide a cost analysis with respect to NTSP physicians performed when the parties were attempting to negotiate. Aetna objects to providing any other cost analyses. 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 located only 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 Aetna. If Aetna does not have any other responsive documents already existing, as suggested by their motion, Aetna does not have to

¹⁴ "All internal and external correspondence, memoranda, and messages concerning or relating to NTSP."

¹⁵ "All documents comparing the cost or quality of medical service provided by any physician provider listed on Appendix A and any other physician providers."

create such documents. But if they do exist, production should be compelled by the Administrative Law Judge.

5. Request number 6 for documents containing specific facts and figures from contracts with providers¹⁶ is not unduly burdensome.

These documents are highly relevant. Statistics from contracts between Aetna, as 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. Also, the request is worded as “documents sufficient to show” a rate, time period, type of contract, type of insurance plan, parties, and covered physicians for Aetna contracts. This is the type of targeted information Aetna probably uses in its ordinary course of business and has not been shown to be unduly burdensome to obtain or produce in summary form.

6. Request number 7 for documents comparing costs of health care¹⁷ is not unduly burdensome.

The documents requested, contrary to Aetna’s argument, do have bearing on the issues in this proceeding. 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. NTSP holds itself out as a network of physicians which is not only efficient in providing physician services, but also is efficient in the utilization of hospital services and pharmacy costs. Aetna has not shown the request to be unduly

¹⁶ “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.”

¹⁷ “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.”

burdensome; it has only made conclusory statements that responsive documents would be in “various sources” in “various offices.”¹⁸ The burden is also limited because Aetna should be familiar with the types of responsive documents. Aetna undoubtedly engages in cost comparisons such as those requested in its ordinary course of business. Aetna appears to admit that these documents exist by arguing that such comparisons give Aetna a competitive advantage.

7. Request number 8 for documents establishing geographic service areas¹⁹ is not overly broad.

One of the issues in the case is the relevant geographic market, including what territories are typically recognized by payors in Texas as being proper for primary care and specialist physicians. In some instances, those physician treatment territories may encompass a significant part of the state. NTSP’s request is not overly broad because it includes the entire state of Texas. NTSP’s geographic area is not confined to “North Texas” as Aetna suggests. The relevant geographic market for this proceeding has yet to be determined. This information requested will help determine the proper geographic area, and information for the entire state of Texas is necessary to make that determination. Therefore, all the information requested is relevant, and the request is not overly broad.

¹⁸ Aetna’s Motion to Quash, p. 8.

¹⁹ “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.”

8. Request number 9 for sample contracts²⁰ is not irrelevant.

NTSP's request for sample contracts between Aetna, as payor, and large provider groups is not irrelevant. This information will allow NTSP to compare its contracts with payors with those of other providers and demonstrate that competition in the marketplace has not been harmed by its conduct.

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

Aetna 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 confidential and that disclosure would be harmful.²¹ The protective order currently in place in this proceeding more than adequately protects the confidentiality of any documents and prevents any harm from Aetna'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.²² In addition, information may be marked restricted confidential and may be disclosed *only* to outside counsel and experts with limited

²⁰ "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."

²¹ *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).

²² Protective Order Governing Discovery Material, pp. 4, 9.

exceptions.²³ With this protection, the documents will not be seen by Aetna's competitors or the marketplace generally, and Aetna 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.²⁴ As explained in the above section, NTSP has met this showing. That Aetna 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 others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position."²⁵

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

NTSP agrees that Aetna has the right to withhold materials subject to the attorney-client, work product, or physician-patient privilege as long as Aetna creates a privilege log. NTSP also agrees that Aetna may withhold information related specifically to individuals' eligibility, diagnosis, treatment, health, quality of care, and any "protected health information" of enrollees. If such categories exist, they can be redacted as long as the remaining portions of the documents, including more general data needed by NTSP for its market analysis, are produced.

²³ *Id.*, pp. 6-7.

²⁴ *Centurion Indus., Inc.*, 665 F.2d at 326; *Exxon Chem. Patents, Inc.*, 131 F.R.D. at 671.

²⁵ *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87-88 (E.D. N.Y. 1981).

D. The time for response was not unreasonable.

The subpoena was sent to Aetna on December 18, 2003, after NTSP had learned of, received, and reviewed Aetna-related documents produced by Complaint Counsel. The deadline for compliance was originally January 2, 2004, and NTSP was working with Aetna to obtain responses until January 22, 2004. The original time for compliance was 15 days. 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, weekends and legal holidays are not excluded when calculating the time for compliance.²⁶ Further, even if these days were excluded, this would only provide Aetna a four-day extension until January 6, 2004. The 30-day compliance deadline recommended by Aetna is ridiculous. Aetna has had the subpoena for over a month. Discovery will be closed in less than week, and the final hearing in this proceeding is only three months away. Considering that the original time period granted was not unreasonable, that NTSP has attempted to work with Aetna for an additional 3 weeks, that it has already been over a month since the subpoena was sent, and the urgency of NTSP receiving this important information before upcoming deadlines²⁷, NTSP asks that the Administrative Law Judge, upon denying the Motion to Quash and/or Limit the subpoena, set the compliance date to five days from the date of that order.

²⁶ Fed. R. Civ. P. 6(a).

²⁷ 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.

E. Aetna 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 Aetna to request recovery of its costs of production from NTSP.

III.

Conclusion

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

Respectfully submitted,

Gregory S. C. Huffman
William M. Katz, Jr.
Gregory D. Binns

THOMPSON & KNIGHT LLP
1700 Pacific Avenue, Suite 3300
Dallas TX 75201-4693
214.969.1700
214.969.1751 - Fax
gregory.huffman@tklaw.com
william.katz@tklaw.com
gregory.binns@tklaw.com

**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 Aetna Health Inc.'s Motion
to Quash, or, Alternatively Limit Subpoena *Duces Tecum***

I.

Aetna Health Inc. ("Aetna") was served with a subpoena *duces tecum* by Respondent North Texas Specialty Physicians on December 18, 2003. On January 22, 2004, Aetna filed a Motion to Quash or Limit the subpoena. Respondent filed a response opposing the motion. For the reasons set forth below, Aetna's motion is DENIED and compliance with the subpoena *duces tecum* is due within 5 days.

II.

Aetna contends that the subpoena is overly broad and unduly burdensome. The burden is on the party challenging the subpoena. Aetna 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.

Aetna 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 Aetna.

Ordered:

D. Michael Chappell
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on January 26, 2004, I caused a copy of the foregoing to be served upon the following persons:

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

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

Hon. D. Michael Chappell (2 copies via Federal Express)
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Office of the Secretary (via Federal Express and e-mail)
Donald S. Clark
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, D.C. 20580

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

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

Gregory D. Binns