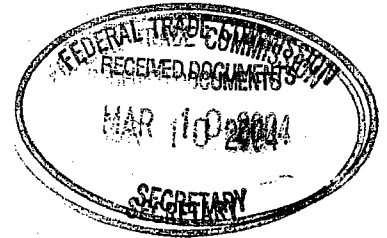


[PUBLIC]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

**NORTH TEXAS SPECIALTY PHYSICIANS' FIRST AMENDED EXPEDITED MOTION TO MODIFY
PROTECTIVE ORDER**

Respondent North Texas Specialty Physicians ("NTSP") seeks an order modifying the Protective Order Governing Discovery Material to allow NTSP's Executive Director Karen Van Wagner limited access to documents that have been marked as "confidential discovery material" pursuant to the terms of the Protective Order. Dr. Van Wagner's examination of these documents and input to counsel regarding same is necessary to the adequate preparation of NTSP's defense now that the case is past the discovery stage. In support, NTSP shows the following:

I.

Background

The current protective order in this case allows documents to be marked "confidential" or "restricted confidential, attorney eyes only." If documents are so marked, NTSP's counsel cannot show these documents to any of NTSP's personnel, including Dr. Van Wagner, prior to their testifying. Approximately 33,000 documents have been produced by third-party payors.¹ Most of these documents have been designated as confidential in some manner, and as a result, NTSP is

¹ Third-party payors producing documents are United Healthcare, Pacificare, Blue Cross Blue Shield, Humana, Cigna, and MSM. Counsel for each is copied on this motion.

only able to review approximately 10% of the produced documents to assist in preparing its defense.

II.

Argument and Authorities

The terms of the protective order worked adequately for discovery purposes, but now that the case has moved closer to the time when NTSP will need to respond to particular documents, the third-party payors' expansive use of confidentiality designations and the implications of those designations impedes Respondent counsel's ability to prepare the case. The vast majority of the approximately 33,000 pages of business records produced by third-party payors have been marked confidential. This means that Respondent's personnel are currently unable to look at any of the documents that will be used for and against them.

The current protective order should be modified to reflect the changed circumstances now that this case has moved past discovery. Many of the documents designated as confidential in some manner may be offered into evidence or otherwise used in the proceedings of this case. Not allowing these documents to be seen and interpreted by NTSP hinders Respondent counsel's preparation. The input of Respondent to its counsel is vital to counsel's understanding of the documents and presentation of Respondent's defense. This input is vital to the preparation of expert testimony.

Because of the expansive use of the confidential designations and because Respondent cannot feasibly go through approximately 33,000 pages of documents to challenge each specific designation when NTSP's unique knowledge may be needed even to determine the nature and

significance of many documents², Respondent requests that the protective order be modified to allow one of Respondent's personnel, Dr. Karen Van Wagner, to have limited access to specific categories of documents:

- (1) documents referring to the conduct or contractual activities of NTSP and its participating providers; and
- (2) documents containing data comparing NTSP and other providers that is more than 12 months old.

The limited nature of these categories should effectively remove concerns that NTSP would be able to use any of the information revealed to Dr. Van Wagner for business purposes. In actuality, any of the information more than a year old is probably generally known in the industry or is not deserving of protection because it is outdated.

Further, not allowing Dr. Van Wagner to view these limited documents would be prejudicial to the Respondent. These documents directly concern NTSP, and to adequately review and be able both to use and respond to these documents, Respondent's counsel needs the input of someone who is intimately familiar with NTSP's operations. For example, a significant number of e-mails and other correspondence regarding, but not sent to, NTSP have been given a confidentiality designation, which prevents their disclosure to NTSP. As a result, Respondent's counsel is unable to determine the veracity of the allegations contained in that correspondence, the circumstances surrounding the occurrences discussed in that correspondence, and whether the contents of those communications were ever brought to the attention of NTSP. Incredibly,

² In a similar situation of expansive confidential designations for *in camera* treatment, a party was order to narrow the designated documents to a significantly more limited field to meet the Federal Trade Commission's strict standards. *In the matter of Hoechst Marion Roussel, Inc.*, Docket No. 9293, 2000 FTC LEXIS 157, at *4-5 (Nov. 22, 2000). The excessive designation was only 483 documents, compared to the designation of approximately 30,000 documents in this case. *Id.* at *4.

almost all data is given a confidentiality designation, regardless of the time period it covers or the physicians it concerns. In fact, even blinded data comparing NTSP to other groups is designated confidential. Therefore, NTSP is unable to determine whether it can contradict or otherwise refute the data produced by the third party payors.

Allowing business personnel limited access to otherwise confidential information has been found necessary in antitrust cases. In *United States v. Lever Brothers Company*, the court found that counsel must be able to discuss sales and production data with its client's personnel in order to have a meaningful review of the information and an adequately prepared defense.³ The data was adequately protected from misuse by a protective order allowing disclosure only for consultation with counsel and preventing personnel from making copies, revealing the contents to others, or using the information for any purpose other than preparation and defense of the pending action.⁴ In reaching this decision, the court also noted that at the trial, personnel would have a full opportunity to examine the documents at issue and that not allowing pre-trial disclosure would result in substantial delay.⁵

In *Julius M. Ames Company v. Bostitch, Inc.*, the court found that confidential business information should not be produced in a manner that would hamper the defendant's ability to prepare its case.⁶ The data was adequately protected by a protective order allowing disclosure only for consultation with counsel, requiring personnel to sign an affidavit of compliance, and

³ 193 F. Supp. 254, 257 (S.D. N.Y. 1961).

⁴ *Id.* at 258.

⁵ *Id.*

⁶ 235 F. Supp. 856, 857 (S.D. N.Y. 1964).

preventing personnel from making copies, revealing the contents to others, or using the information for any purpose other than preparation and defense of the pending action.⁷

Respondent proposes this limited modification of the protective order that is in line with the protective orders found to be adequate in *Lever Brothers* and *Bostitch*. Only one of NTSP's personnel will be allowed access to the documents, and, as described above, her access will be limited. The use of these documents only for proper purposes will be assured by these conditions: (1) Dr. Van Wagner will sign the protective order declaration; (2) Dr. Van Wagner will only view the documents while consulting with counsel and outside experts; and (3) Dr. Van Wagner will not be able to copy the documents, reveal the contents of the documents to others, or use any of the information in the documents for any purpose other than preparation and defense of this action.

III.

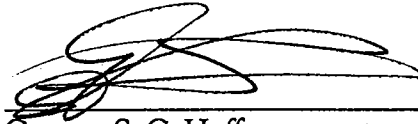
Conclusion

The expansive use of confidentiality designations dramatically changes the circumstances and the functionality of the protective order. To allow NTSP to adequately defend itself, Respondent's counsel needs the input of NTSP on the documents directly relating to NTSP and that will most likely be introduced into evidence or otherwise used. With the proposed limitations both on the categories of documents to be disclosed and the circumstances of disclosure, the information produced by third-party payors will be adequately protected while preventing prejudice to NTSP. For all of these reasons, NTSP requests that the Administrative Law Judge (a) grant its motion to modify the protective order to allow Dr. Karen Van Wagner

⁷ *Id.*

limited access to specified categories of documents in order to assist in the preparation of NTSP's defense; and (b) grant such other and 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**

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on March 9, 2004, I caused a copy of the foregoing to be served upon the following persons:

Michael Bloom (via e-mail and Federal Express)
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 e-mail and original & 2 copies by Federal Express)
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Counsel for Aetna Health Inc. (via Federal Express)
Kay Lynn Brumbaugh
Andrews Kurth LLP
1717 Main Street, Suite 3700
Dallas, TX 75201

Counsel for United HealthCare of Texas (via Federal Express)
Helene Jaffe
Weil, Gotshal, & Manges LLP
767 Fifth Avenue
New York, NY 10153

Counsel for Pacificare (via Federal Express)
Lynda Marshall
Hogan & Hartson LLP
555 Thirteenth Street NW
Washington, D.C. 20004

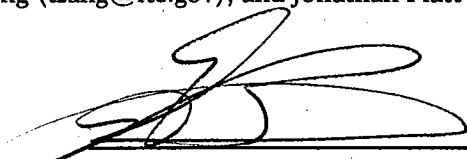
Counsel for Blue Cross Blue Shield of Texas (via Federal Express)
Michael S. Hull
Hull Hendricks & MacRae LLP
221 West Sixth Street
Suite 2000
Austin, TX 78701

Counsel for Humana Health Plan of Texas, Inc. (via Federal Express)
Richard S. Krumholz
Fulbright & Jaworski LLP
2200 Ross Avenue
Suite 2800
Dallas, TX 75201

Counsel for Cigna (via Federal Express)
Kevin Maclay
Jones Day
51 Louisiana Avenue NW
Washington, D.C. 20001

Counsel for MSM (via Federal Express)
Lee Morris
Munsch Hardt Kopf Harr PC
1445 Ross Avenue
Dallas, TX 75202

and by e-mail upon the following: Ted Zang (tzang@ftc.gov), and Jonathan Platt (jplatt@ftc.gov).



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