

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of )

NORTH TEXAS SPECIALTY PHYSICIANS, )

Respondent. )

Docket No. 9312

**NON-PARTY AETNA HEALTH INC.'S RESPONSE IN OPPOSITION  
TO NORTH TEXAS SPECIALTY PHYSICIANS' FIRST AMENDED  
EXPEDITED MOTION TO MODIFY PROTECTIVE ORDER**

Aetna Health Inc. ("Aetna"), a non-party to this proceeding, files the following Response in Opposition to North Texas Specialty Physicians' ("NTSP") First Amended Expedited Motion to Modify Protective Order.

**I. SUMMARY OF ARGUMENT**

In this proceeding, NTSP subpoenaed from Aetna, *inter alia*, commercially-sensitive and confidential pricing and cost analyses that Aetna uses in negotiating contracts with physicians and physician groups, such as NTSP, to provide a competitive provider network to Aetna's clients. When Aetna moved to quash or limit the subpoena to protect its confidential information, NTSP argued in response that the Protective Order Governing Discovery Materials (the "Protective Order") entered in this proceeding restricts the disclosure of confidential information to certain individuals and, therefore, Aetna would be protected from harm from disclosing such information to NTSP. Now that Aetna has produced such information to NTSP, NTSP ignores the dispute resolution provisions of the current Protective Order and instead seeks to modify the Protective Order to effectively open up all of Aetna's information, including

pricing and cost information, to NTSP's Executive Director. NTSP's Executive Director is not currently allowed access to such information under the Protective Order.

There is no need to modify the Protective Order, however. In fact, the current Protective Order sufficiently allows NTSP access to information to prepare its defenses while protecting Aetna from the disclosure of its confidential information to those who could cause it competitive harm. Now that the Protective Order seems inconvenient, NTSP wants to tip that balance in favor of giving access to virtually all of Aetna's information, including its pricing and cost information, to NTSP's Executive Director, who is someone who could cause such competitive harm to Aetna. Any implication that its Executive Director, Ms. Van Wagner, would not use this information for business purposes in the future is unrealistic. Moreover, NTSP makes this request without first complying with the dispute resolution provisions in the Protective Order and without articulating any sound reason why such disclosure is warranted in this case. Indeed, courts routinely restrict access to confidential information for party employees and principals, and such an approach was – and continues to be – appropriate here. NTSP's motion should be denied in its entirety.

## II. BACKGROUND

Under the terms of the Protective Order, a non-party such as Aetna may designate information disclosed in this proceeding as "Confidential," or "Restricted Confidential, Attorney Eyes Only."<sup>1</sup> Once such a designation is made, the documents may not be disclosed to any persons, except as set forth in the Protective Order. Neither employees nor principals of NTSP

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<sup>1</sup> Protective Order Governing Discovery Material, entered on October 16, 2003, at p. 5.

are listed as individuals to whom such information may be disclosed, unless they otherwise fall within an exception to non-disclosure.<sup>2</sup>

The Protective Order also prescribes the procedures for NTSP to challenge any confidentiality designations. To summarize, NTSP must notify the producing party and identify, with specificity, the designation being challenged. The producing party may preserve its designation by giving its written reasons for the designation, and, if there is still a disagreement between the parties, the parties “shall meet and confer in good faith in an attempt to negotiate changes to any challenged designation.”<sup>3</sup> If these negotiations fail, *then* NTSP may make written application to this Judge for relief under the procedures in the Protective Order.<sup>4</sup>

After the Protective Order was entered in this proceeding, NTSP served a Subpoena Duces Tecum on Aetna, requesting some of Aetna’s most confidential and commercially-sensitive proprietary information. In response, Aetna filed a Motion To Quash, Or Alternatively, To Limit The Subpoena Duces Tecum (“Motion to Quash”), arguing that the burden of disclosure of this highly confidential information outweighed any probative value the information may have on the issues in this proceeding. In its Response to Aetna’s Motion to Quash, NTSP argued that the Protective Order protected Aetna from any harm that it may otherwise incur. In fact, NTSP’s Response states:

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**

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<sup>2</sup> *Id.* at p. 9.

<sup>3</sup> *Id.* at pp. 10-11.

<sup>4</sup> Protective Order Governing Discovery Material, Section 6(b), p. 11.

**associated with this proceeding. In addition, information may be marked restricted confidential and may be disclosed *only* to outside counsel and experts with limited exceptions.<sup>5</sup>**

Furthermore, this Judge's Order on Motion of Non-Party Aetna Health Inc. to Quash or Limit Subpoena *Duces Tecum* ("Order on Aetna's Motion to Quash") notes that the "provisions of the Protective Order adequately protect the confidential documents of third parties through a number of safeguards."<sup>6</sup>

In compliance with the Subpoena and Order on Aetna's Motion to Quash, Aetna has produced 2,350 pages of documents marking some of them "Confidential" and others "Restricted Confidential, Attorney Eyes Only" under the Protective Order. Aetna has not received notification from NTSP regarding any challenge to any such designations.

Without even attempting to contact Aetna concerning its designations, NTSP filed its Expedited Motion to Modify the Protective Order ("Motion") on March 5, 2004, requesting that the Protective Order be modified to allow its Executive Director to review all documents falling within two very broad categories, as determined by NTSP: (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. Given the breadth of these two categories, they include, among other things, Aetna's rate information, cost comparisons, efficiency comparisons, cost-effectiveness, etc., of NTSP and other providers. Thus, under NTSP's modification request, Aetna's competitively-sensitive information about costs, pricing, and negotiating strategies with physicians would therefore be disclosed to a director of a physicians group that negotiates provider contracts with payors like Aetna.

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<sup>5</sup> North Texas Specialty Physicians' Response to Aetna Health Inc.'s Motion to Quash, Or, Alternatively, Limit Subpoena *Duces Tecum*, pp. 10-11(bold added; italics in original).

<sup>6</sup> See Order entered on February 4, 2004, pp. 3-4.

In its Motion filed on March 5, 2004, NTSP claimed a modification of the Protective Order was necessary based on the false premise that NTSP could not show anyone at NTSP communications “to and from NTSP concerning NTSP’s performance obligations.” As such, NTSP argued, it could not confirm with the author or recipient whether such communications were sent or received by NTSP, or the other circumstances surrounding the communication. Apparently realizing that the Protective Order does in fact provide that “Confidential” information may be disclosed to the author or recipient of such communications, NTSP subsequently amended its Motion to remove this allegation.<sup>7</sup> In its Amended Motion, NTSP now makes an equally unpersuasive argument that it needs to show NTSP’s Executive Director communications that were not even sent to NTSP. As shown more fully below, there is no merit to the Amended Motion as there was no merit to the first Motion.

### III. ARGUMENT AND AUTHORITIES

#### A. **NTSP’s Request To Unilaterally Determine Which Of Aetna’s Confidential Documents May Be Disclosed To Its Executive Director Should Be Denied For Its Sheer Overreaching Alone**

NTSP’s request to allow its Executive Director access to two very broad categories of documents, as determined by NTSP, effectively allows NTSP to unilaterally decide which documents that Aetna designated as “Confidential” or “Restricted Confidential, Attorney Eyes Only” may be disclosed to its Executive Director. Such a request for unfettered discretion in the disclosure of Aetna’s confidential information completely ignores the dispute resolution procedures of the Protective Order and should be denied for its sheer overreaching alone.

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<sup>7</sup> The nature of the relief sought appears to be the same in the Amended Motion.

**B. The Current Protective Order Sufficiently Balances NTSP's Need to Prepare For Trial With Aetna's Need For Protection From Competitive Harm**

In any event, the current Protective Order allows NTSP sufficient access to discoverable information while maintaining necessary protection for Aetna. Although NTSP claims that the Protective Order must be modified to allow for trial preparation, the Protective Order does, in fact, contemplate trial preparation. For example, "Confidential" documents may be disclosed to "Experts/Consultants" and communications may be disclosed to "any author or recipient" of the information.<sup>8</sup> Although NTSP argues that the Protective Order did not contemplate the "pre-trial" stage of this proceeding, the Protective Order does, in fact, address what documents may be shown before and at trial. For example, "Confidential" information may be disclosed to "witnesses or deponents at trial or deposition"<sup>9</sup> Additionally, the Order outlines the procedures for disclosing information designated as "Confidential, Attorney Eyes Only" at trial.<sup>10</sup> Therefore, the Protective Order contemplates the use of confidential information during the trial preparation phase of this proceeding.

Indeed, this Protective Order balances NTSP's trial preparation needs with the potential competitive harm that would be caused to Aetna by disclosure. As shown in its Motion to Quash, the documents produced by Aetna contain some of the most competitively-sensitive proprietary information that Aetna maintains – Aetna's pricing and cost information.<sup>11</sup> And, providing this information to a group of providers such as NTSP would reveal Aetna's

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<sup>8</sup> See Protective Order, p. 9.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* at pp. 6-7.

<sup>11</sup> See Exhibit A to Aetna's Motion to Quash, Affidavit of David M. Roberts, ¶¶ 4-9.

negotiating strategies with the providers, resulting in significant competitive harm to Aetna.<sup>12</sup> This is because Ms. Van Wagner is the NTSP employee primarily responsible for negotiating with payors. To suggest she could just set aside her knowledge of Aetna's confidential information when she is negotiating with Aetna in the future is completely unrealistic. Additionally, NTSP's assumption that because this information is more than 12-months old, it "is probably generally known in the industry or is not deserving of protection because it is outdated"<sup>13</sup> is wholly unsupported and incorrect. To the contrary, these documents contain information relevant to Aetna's current network strategies and pricing schedules.<sup>14</sup> Such an arbitrary cut-off is unsound and without merit.

**C. NTSP Has Failed To Show Why Any Modification Is Necessary**

The two reasons that purportedly support NTSP's need for the disclosure of these documents to its executive director are unpersuasive. First, NTSP provides one weak example of a specific need for such disclosure, *i.e.*, it needs to test the veracity of and circumstances surrounding e-mails and other correspondence regarding, but not sent to, NTSP. In actuality, however, NTSP's counsel has had ample opportunity to investigate any such communications produced by Aetna. During the day and a half in which NTSP's counsel deposed two Aetna employees who were familiar with such communications, NTSP could have asked questions regarding such matters.<sup>15</sup> Significantly, Ms. Van Wagner was present during portions of these depositions.

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<sup>12</sup> See *id.* at ¶ 6.

<sup>13</sup> North Texas Specialty Physicians' First Amended Expedited Motion To Modify Protective Order, p. 3.

<sup>14</sup> See generally, *id.* ¶¶ 4-9.

<sup>15</sup> NTSP deposed David M. Roberts on January 28, 2004 for a half day, and Chris L. Jagmin, M.D., on February 20, 2004 for almost an entire day.

NTSP's only other alleged reason for the modification is that it does not have the resources to review all 33,000 pages of documents that it received in response to its subpoenas to determine whether any designations need to be challenged. Therefore, it needs the help of Ms. Van Wagner to determine the nature and significance of such documents. This argument is disingenuous in multiple respects. First, even if its Amended Motion were granted, its counsel would have to review all of these documents to determine which ones fall into the two categories that it seeks limited access for Ms. Van Wagner. NTSP has either reviewed these documents to formulate these categories prior to filing its Motion or must do so if the Amended Motion is granted. Second, Aetna has only produced 2,350 pages of documents, all of which were presumably reviewed by NTSP's counsel in preparation for the depositions of Aetna's witnesses. NTSP should not be allowed to circumvent the protections of the Protective Order by complaining that it received too many documents in response to its numerous and overly-broad subpoenas. With such complaint, NTSP attempts to penalize Aetna and the other payors for compliance with NTSP's subpoenas. Moreover, lack of resources is not cause to disclose Aetna's confidential information to NTSP.

In sum, NTSP has failed to show any compelling reason why the Protective Order should be modified to allow its Executive Director access to Aetna's confidential information. As such, NTSP's Amended Motion should therefore be denied. For example, in *D.J. Madigan Assocs., Inc. v. MAG Instrument, Inc.*, the court considered the precise issue of whether a protective order should be limited to the attorneys and designated experts of each party, or should allow certain business principals of the parties themselves to have access to the documents.<sup>16</sup> The court squarely held that the "protective order . . . should not permit access [of the confidential

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<sup>16</sup> No. 86 C 8410, 1988 WL 2775, at \*1 (N.D. Ill. Jan. 13, 1988).



material] to the parties themselves or their employees or sales representatives[.]” because the party seeking such access “has not made a sufficient showing . . . that access . . . is necessary.”<sup>17</sup>

#### **D. Courts Routinely Restrict Parties From Access To Confidential Information**

In crafting protective orders, courts routinely limit confidential information to “independent experts, consultants, or translators for a party, including their support personnel, whose advice and consultation are being or will be used by such party in connection with preparation for trial” in order to limit disclosure “of highly sensitive and confidential data . . . to those who have no employment or other association with the parties.”<sup>18</sup> Indeed, in an analogous case, *Vardon Golf Co. v. BBMG Golf, LTD.*, one party sought to protect, among other things, its pricing information, from its opposing party/competitor.<sup>19</sup> The court found that because the competitor’s trial counsel would be permitted access, it was not necessary to permit the principals of the competitor access as well.<sup>20</sup>

#### **IV. CONCLUSION**

In essence, NTSP seeks to modify the Protective Order to allow it unfettered discretion in determining which of the documents Aetna designated as “Confidential,” and including, presumably, “Restricted Confidential, Attorney Eyes Only,” should be shown to its Executive

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<sup>17</sup> *Id.*

<sup>18</sup> *Digital Equip. Corp. v. Micro Tech., Inc.*, 142 F.R.D. 488, 491 (D. Colo. 1992). *See also Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470-71 (9th Cir. 1992).

<sup>19</sup> No. 91 C 0349, 1991 WL 222258, at \*1 (N.D. Ill. Oct. 24, 1991).

<sup>20</sup> *Id.* at \*2. The two cases on which NTSP relies to show that allowing business personnel access to confidential information is necessary are distinguishable. The first, *United States v. Lever Brothers Company*, concerns the disclosure of publicly-disclosed financial information and Census Bureau reports – not internal pricing and cost information. 193 F. Supp. 254, 256 (S.D.N.Y. 1961). Moreover, the court noted that the requesting party made the necessary showing that the documents were absolutely necessary to the preparation of its defense, which NTSP has not done here. *Id.* Similarly, in *Julius M. Ames Co. v. Bostitch, Inc.*, the other case on which NTSP relies, the court only allowed disclosure to party personnel as necessary for preparing and assisting in the defense of the case. 235 F. Supp. 856, 857 (S.D.N.Y. 1964). Again, in this case, NTSP has failed to make such a showing.

Director, without even advising Aetna which documents NTSP intends to show to her and permitting Aetna to evaluate that request. In effect, NTSP seeks to gut the terms of the Protective Order without showing any need for this disclosure, other than a vague allegation that it is necessary to prepare for trial. NTSP should not be allowed to undermine the purpose and protections afforded to Aetna in the Protective Order.

For the foregoing reasons, NTSP's First Amended Expedited Motion to Modify Protective Order should be denied in its entirety.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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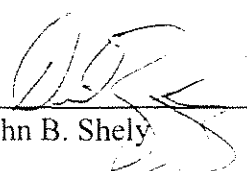
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