

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
)

North Texas Specialty Physicians,)
Respondent.)
_____)

Docket No. 9312

**ORDER ON MOTION OF NON-PARTY AETNA HEALTH, INC.
TO QUASH OR LIMIT SUBPOENA *DUCES TECUM***

I.

On January 22, 2004, non-party Aetna Health Inc. ("Aetna") filed a motion to quash or to limit the subpoena *duces tecum* served upon it by Respondent in this matter ("motion to quash"). Respondent North Texas Specialty Physicians ("NTSP") filed its opposition to the motion to quash on January 27, 2004.

On February 3, 2004, following the deposition of Aetna's corporate representative, Respondent filed a motion to supplement its opposition. In its supplement, Respondent makes additional arguments for compelling responses to Request Numbers 2 and 3.

Respondent's motion to supplement is GRANTED. For reasons set forth below, Aetna's motion to quash is GRANTED IN PART and DENIED IN PART.

Aetna shall have 10 calendar days from the date of this order to produce a privilege log and the responsive documents as limited by this Order.

II.

Aetna moves to quash or limit the subpoena served on it by Respondent on two primary grounds. Aetna argues: (1) the subpoena is overly broad and unduly burdensome; and (2) some of the documents sought are privileged, confidential, or proprietary, or are considered trade secrets.

Respondent asserts that its subpoena seeks relevant information and the subpoena is not unduly burdensome. Respondent further asserts that the Protective Order Governing Discovery

Material, entered on October 16, 2003 in this case (“Protective Order”) adequately protects Aetna’s confidential and proprietary information.

III.

Discovery sought in a proceeding before the Commission must be “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent.” 16 C.F.R. § 3.31(c)(1); *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). However, discovery may be limited if the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive, or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(1). Further, the Administrative Law Judge may limit discovery to preserve privileges. 16 C.F.R. § 3.31(c)(2).

The subpoena *duces tecum* at issue consists of nine requests for documents. Aetna raises several general objections in addition to specific objections to each of the nine requests. The general objections, Respondent’s response to each of them, and a ruling on the general objections are set forth in the following section. The specific objections raised by Aetna to each of the nine requests are discussed in the subsequent section.

A.

Aetna raises the following general objections: (1) the length of time for which documents are sought is unreasonably long; (2) the definition of Aetna; (3) the requests seek documents that are confidential and proprietary. In addition, Aetna argues that Respondent should reimburse Aetna for its expenses.

1. Period of time for production

Respondent’s subpoena instructs, unless otherwise indicated, the period of time for which documents should be produced is January 1, 1998 through the present. Aetna objects to the scope of time of six years as placing an undue burden on it. Respondent asserts that it has requested documents from 1998 to present because this is the time frame being investigated by Complaint Counsel.

A request for documents relating to the time period which was investigated by Complaint Counsel is not unreasonable. Unless a request for production indicates otherwise, the period of time for which documents should be produced is January 1, 1998 through the present.

2. Definition of Aetna

Aetna asserts that the subpoena defines Aetna too broadly by defining Aetna as “Aetna

Health, Inc., its parents, subsidiaries, affiliates, employees, agents and representatives.” Respondent does not address this argument in its opposition.

The scope of the subpoena is limited to demand production only from Aetna Health Inc., its employees, agents and representatives.

3. Confidential documents are discoverable

Aetna asserts that the subpoena requests production of documents containing confidential and commercially sensitive information, including competitively sensitive pricing information and Aetna trade secrets.

“The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery.” *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971). *See also Federal Trade Commission v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff’d* 591 F.2d 182 (2d Cir. 1979) (An objection to a subpoena on grounds that it seeks confidential information “poses no obstacle to enforcement.”). In addition, information on competitors is frequently crucial in proceedings such as this one. *See Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.Y. 1954) (“[I]n an action under the antitrust laws, based upon an alleged abuse of competition, a competitors’ business records, where good cause has been shown are not only not immune from inquiry, but they are precisely the source of the most relevant evidence.”). *Accord United States v. Lever Bros. Co.*, 193 F. Supp. 254, 257 (S.D.N.Y. 1961).

Although Aetna asserts that the documents requested contain extremely sensitive information, the burden on Aetna of production does not outweigh Respondent’s need for the documents it requested, as limited by this Order. “Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case.” *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965) (denying motion to quash subpoenas served on competitors). In light of the limitations set forth below and the confidentiality provisions of the Protective Order, enforcement of the subpoenas, as limited by this Order, would not be unreasonable or oppressive.

However, Aetna is not required to disclose patient information. Information concerning particular patients’ names or other data is not relevant and shall be redacted by Aetna. In addition, Aetna is not required to produce privileged information. If information is withheld, on grounds of privilege or any similar claim, Aetna shall submit a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged. *See* 16 C.F.R. § 3.38A.

Pursuant to 16 C.F.R. § 3.31(d)(1), a protective order governing confidential information was issued in this case on October 16, 2003. The provisions of the Protective Order adequately

protect the confidential documents of third parties through a number of safeguards. Documents produced in compliance with this Order may be designated "Confidential" or "Restricted Confidential, Attorney Eyes Only," pursuant to the Protective Order entered in this case.

In addition, Aetna may file a motion for *in camera* treatment to prevent disclosure to the public of its confidential materials at the trial in this matter. Guidelines for filing applications for *in camera* treatment are set forth in the Protective Order.

4. Time for responding to the subpoena

Aetna shall have 10 calendar days from the date of this order to produce the responsive documents as limited by this Order.

5. Costs of compliance

"Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Federal Trade Commission v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, *13 (D.D.C. 1977). In light of the limitations set forth below in this Order, the burden on Aetna is not an undue burden. Aetna's request for reimbursement is denied.

B.

The nine requests for documents, the parties' positions on each of the requests, and a ruling on each of the requests are set forth in order below.

Request Number 1: Documents previously produced or otherwise sent to the Federal Trade Commission concerning your business relationships with healthcare providers in the State of Texas.

Aetna asserts that these documents may be retrieved from the Commission as easily as from Aetna and that because the Commission is a party, while Aetna is a non-party, Respondent should be required to seek the documents from the FTC. Respondent replies that a subpoena may not be avoided merely by saying the information sought is available from another.

Pursuant to Commission Rule 3.31(c)(1), discovery may be limited if it is obtainable from another source that is more convenient. 16 C.F.R. § 3.31(c)(1)(i). It is more convenient for a party, Complaint Counsel, to produce documents already obtained from Aetna than to request production, a second time, from Aetna, a non-party.

To the extent that documents responsive to this request are relevant, Respondent may request them from Complaint Counsel. The issue presented here is distinguishable from other orders addressing whether the Commission, as a repository of documents obtained from non-

parties, should be compelled to produce documents obtained from non-parties. *Cf In re Schering-Plough Corp.*, Docket 9297 (Order on American Home Products Corporation's and Schering Plough Corporation's Motion to Compel and on Non-Parties Andrx Pharmaceutical, Inc.'s and Aventis Pharmaceutical Inc.'s Motion for a Protective Order, September 10, 2001) (available at www.ftc.gov/os/adjpro/index.htm). Here, the non-party, Aetna, is not seeking to prevent Complaint Counsel from producing documents Aetna previously produced to the Commission. Rather, it is asking Respondent to request these documents from Complaint Counsel so that Aetna does not have to bear the costs of production twice for the same documents. Complaint Counsel may not withhold relevant, responsive documents simply because they may be located in investigation or litigation files other than the ones it maintains for this proceeding. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, *11-12 (2000); *In re Exxon Corp.*, 1980 FTC LEXIS 121, *5-6 (1980).

Request Number 1 is quashed.

Request Numbers 2 and 3: Documents previously requested by and provided to the Office of the Attorney General of the State of Texas concerning business relationships with healthcare providers in the State of Texas, including those provided in response to the Written Notice of Intent to Inspect, Examine and Copy Corporate Documents, attached to the subpoena.

Aetna asserts that these requests pertain to a civil investigation of United Healthcare of Texas, Inc. and that Aetna is unaffiliated with United and does not have any responsive documents in its possession. To the extent that Aetna does have responsive documents, it asserts that the data is extraordinarily voluminous, highly confidential, and the burden outweighs any relevance. Aetna further asserts that information provided to the Attorney General in the course of an investigation is privileged and confidential.

Respondent asserts that the requested documents are highly relevant and that the burden of re-producing files does not outweigh the benefit of allowing Respondent to develop a defense. Respondent asserts that its intent was to make the request for documents less burdensome by referencing a previously assembled set of documents. Respondent further asserts that Aetna misconstrues the statute governing information provided to the Texas Attorney General.

The statute governing information gathered by the Texas Attorney General in the course of an investigation, cited by Aetna, only prevents the Texas Attorney General from producing documents produced to it. Tex. Rev. Civ. Stat. Ann. art. 1302-5.04 ("The Attorney General, or his authorized assistants or representative, shall not make public . . ."). It does not insulate Aetna from otherwise producing the documents in another proceeding or forum. Thus, Tex. Rev. Civ. Stat. Ann. art. 1302-5.04 does not provide a basis for Aetna to withhold the requested information.

Respondent, in its supplement filed following the deposition, asserts that Aetna should be compelled to respond to Request Numbers 2 and 3 because Aetna provided claims data to Complaint Counsel and ran an analysis of the data for Complaint Counsel.

Request Numbers 2 and 3 are over broad in that they seek all documents previously requested by the Office of Attorney General without regard to whether such documents are relevant to this proceeding. However, to the extent that documents responsive to these Requests are relevant, documents and information responsive to Request Numbers 2 and 3 that have been provided to the FTC (including any analysis of those documents and supporting documentation) that are not included in Request Number 1, may be requested from Complaint Counsel. In all other respects, Request Numbers 2 and 3 are quashed.

Request Number 4: All internal and external correspondence, memoranda, and messages concerning or relating to NTSP.

Aetna objects that this request is unduly burdensome. Additionally, Aetna asserts, the request seeks communications or documents that reflect patient medical information. Respondent asserts that a major issue in this case is its conduct towards payors such as Aetna. Thus, Respondent asserts, the scope of this request, any correspondence, memoranda, and messages, relating to this conduct, is not over broad.

The subject matter, which relates solely to Respondent, is not overly broad. Aetna's motion to quash Request Number 4 is denied. However, Request Number 4 is limited to only those documents that specifically mention or reference NTSP. Documents referencing NTSP may not be withheld unless Aetna provides a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; and the names, addresses, positions, and organizations of all authors and recipients of the item.

Request Number 5: Documents comparing the cost or quality of medical service provided by any physician provider listed on Appendix A and any other physician providers.

Aetna asserts that this request is overly broad, unduly burdensome, and seeks confidential, proprietary information. Respondent asserts that it has specified the subject matter of the documents it requests to very particular information - cost or quality comparisons between a NTSP provider and another provider.

Request Number 5 is sufficiently narrow in subject matter. Absent a showing of the relevancy of information pertaining to the geographic area beyond the Dallas-Fort Worth Metroplex in Texas, Request Number 5 is limited to documents comparing the cost or quality of medical services provided in the Dallas-Fort Worth Metroplex in Texas. In all other respects,

Aetna's request to quash Request Number 5 is denied.

Request Number 6: Documents sufficient to show the rate paid to each physician provider by Aetna, 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.

Aetna asserts that this request is not limited by geographic scope, is unduly burdensome, and seeks irrelevant information. Further, Aetna asserts, these documents contain some of the most competitively sensitive information that Aetna maintains. Respondent asserts these documents are highly relevant. Respondent further asserts that this request is worded as "documents sufficient to show . . ." and would not be unduly burdensome to produce in summary form.

The need for proprietary information from competitors was not sufficiently demonstrated. Aetna is not required to produce all documents relating to rates paid. Request Number 6 is quashed except that any tables or similar summary charts that Aetna keeps in the ordinary course of business shall be produced. Privileged information may be redacted. In addition, absent a showing of the relevancy of information pertaining to the geographic area beyond the Dallas-Fort Worth Metroplex in Texas, Request Number 5 is limited to documents comparing the cost or quality of medical services provided in the Dallas-Fort Worth Metroplex in Texas.

Request Number 7: 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.

Aetna asserts that this request seeks irrelevant and confidential, proprietary information. Respondent asserts that health care costs are highly relevant because they relate to the marketplace cost and availability of services similar to those offered by NTSP.

The motion to quash is granted to the extent that Request Number 7 will be limited to only documents containing (as opposed to relating to) comparisons of external marketplace cost of health care to patients and insurers in the Dallas-Fort Worth Metroplex in Texas. In all other respects, the motion to quash Request Number 7 is denied.

Request Number 8: 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.

Aetna asserts that this request is overly broad because it is not limited to NTSP's geographic area. Respondent asserts that one of the issues in this 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.

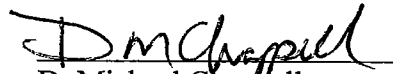
Aetna's motion to quash is granted to the extent that Request Number 8 will be limited to documents used by Aetna to determine which providers will service which geographic areas. In all other respects, the motion to quash Request Number 7 is denied.

Request Number 9: A sample contract used for each contracting entity involving more than 75 physicians in the Counties of Dallas and/or Tarrant and any amendments, revisions, or replacements thereof.

Aetna asserts the request seeks information that is both irrelevant and is confidential or proprietary. Respondent asserts that the request seeks relevant information that will allow NTSP to compare its contracts with payors with those of other providers and demonstrated that competition in the market has not been harmed.

Aetna's motion to quash Request Number 9 is denied. However, the request will be limited. Aetna shall produce only sample contracts for the provision of physician services. Aetna may redact financial information from the contracts it produces.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: February 4, 2004