

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
)
North Texas Specialty Physicians,)
Respondent)
)
_____)

Docket No. 9312

**NON-PARTY PACIFICARE OF TEXAS, INC.’S MOTION FOR IN CAMERA
TREATMENT OF CERTAIN DESIGNATED HEARING EXHIBITS**

Non-Party PacifiCare of Texas, Inc. (“PacifiCare”) hereby files its Motion for In Camera Treatment of Certain Designated Hearing Exhibits. PacifiCare respectfully requests that the Administrative Law Judge enter an Order pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), granting in camera treatment for an indefinite duration or, alternatively, no less than ten years, to the documents and deposition testimony listed in the Appendix to this Motion and the proposed Order. The documents are secret and material to PacifiCare’s on-going and future business. Disclosure of these materials would harm PacifiCare. In support of this Motion, PacifiCare respectfully refers the Court to the accompanying Declaration of John H. Lovelady and submits as follows:

ARGUMENT

I. Introduction

On March 17, 2004, PacifiCare received notice from both the Federal Trade Commission (“FTC”) and North Texas Specialty Physicians (“NTSP”), of their intent to offer into evidence at trial highly confidential and business-sensitive documents that Non-Party

PacifiCare originally produced to the FTC in connection with the FTC's initial investigation of NTSP.¹ Pursuant to the Court's order of April 1, 2004, NTSP provided an amended list of designations to PacifiCare on April 7, 2004.² NTSP's amended notice includes designations to confidential portions of the deposition of John H. Lovelady, Vice President of Network Management for PacifiCare. PacifiCare believes that approximately eighteen of these documents³ and portions of twenty pages of the deposition testimony, which PacifiCare had diligently marked as "Confidential" or "Restricted Confidential, Attorney Eyes Only" pursuant to the terms of the October 16, 2003 Protective Order Governing Confidential Material in this matter, contain information that is secret and material to PacifiCare's current and prospective business. Accordingly, pursuant to the Court's Order of April 1, 2004, PacifiCare respectfully submits this Motion for In Camera Treatment of Certain Designated Hearing Exhibits as listed on the attached Appendix.

II. Standard for In Camera Treatment

Materials merit in camera treatment when their public disclosure will result in a clearly defined, serious injury to the person or corporation whose records are involved. H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1188 (1961). Such serious injury requires that the information in question is secret and material to the applicant's business. In the Matter of Bristol

¹ The FTC in turn produced these documents to NTSP in connection with this action.

² NTSP's amended list did not reduce significantly the number of designated PacifiCare documents. Rather, NTSP simply removed documents, "which were duplicative or had already been produced by another entity." See Exh. 1, *April 7, 2004 letter from Gregory Binns to Lynda Marshall*. Nor did the amended list significantly narrow the deposition testimony of John H. Lovelady designated by NTSP - NTSP re-designated the vast majority of the deposition instead of designating the deposition in its entirety.

³ PacifiCare considers its fee-for-service contract with NTSP and the amendments thereto to be one document even though it has been broken into pieces on NTSP's exhibit list. Similarly, PacifiCare considers its capitation agreement with NTSP and its amendments to be one document, despite it being broken into multiple exhibits by NTSP.

Meyers Co., 90 F.T.C. 455, 456 (1977). The following factors should be weighed in considering both secrecy and materiality: (1) the extent to which the information is known outside the applicant's business; (2) the extent to which the information is known by employees and others involved in the applicant's business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. Id. A showing of injury may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves. In the Matter of E.I. Dupont de Nemours & Co., 97 F.T.C. 116 (1981). Third party requests for in camera treatment deserve special solicitude. In the Matter of Kaiser Aluminum & Chem. Corp., 103 F.T.C. 500, 500 (1984).

The PacifiCare documents and the portions of John H. Lovelady's deposition testimony described in this Motion and listed in the attached Appendix meet the above standards for in camera treatment.

III. The PacifiCare Documents and Deposition Testimony of John H. Lovelady Listed in the Attached Appendix Meet the Standards for In Camera Treatment

The documents for which PacifiCare seeks in camera treatment relate almost exclusively to the prices and terms at which PacifiCare contracts for healthcare services, one of the most commercially sensitive and valuable areas of PacifiCare's business. Specifically, the material includes four categories of material comprising only eighteen documents and portions of twenty pages of deposition testimony: (1) agreements between PacifiCare and various healthcare providers in the Dallas/Fort Worth area, including NTSP, and deposition testimony discussing these agreements; (2) correspondence between PacifiCare and the various healthcare providers

(including NTSP) regarding the terms at which PacifiCare or the provider would or should contract for healthcare services; (3) internal correspondence and analyses summarizing the terms of the provider contracts and outlining the financial and strategic effect of these terms on PacifiCare; and (4) portions of responses sent to the FTC which contain certain PacifiCare fee schedules and prices and deposition testimony discussing this material. The documents and deposition testimony within these categories goes to the heart of PacifiCare's business and, as set out below, is precisely the type of material for which in camera treatment was created.

The first category of documents for which PacifiCare seeks in camera treatment consists of five documents: (1) the Provider/Payor Services Agreement between NTSP and Harris Methodist Select⁴ (FTC-NTSP-PCFC 000036 – 000275) and the amendments to this agreement (FTC-NTSP-PCFC 000003 – 000007; 000008 - 000012; 000021 – 000022; 000023 – 000027; 000030 - 000035); (2) the PacifiCare of Texas ANHC/IPA Services Agreement (Professional Capitation/Approved NonProfit Health Corporation) with NTSP (FTC-NTSP-PCFC 000327 – 000391) and two amendments to this agreement (FTC-NTSP-PCFC 000298 – 000310; 000311 – 000321); (3) PacifiCare's agreement with Texas Health Care (FTC-NTSP-PCFC 01012); and (4) an agreement between PacifiCare and Metroplex Premier Women's Healthcare Association ("Metroplex") and the Letter Agreement anticipating this final contract (FTC-NTSP-PCFC 01013 – 01014; 01015 – 01020). Also at issue are portions of approximately fourteen pages of John H. Lovelady's deposition testimony discussing the terms of these agreements (43:3 – 43:7; 43:14 – 43:22; 51:6 – 53:22; 62:9; 62:24 – 63:14; 64:12 – 64:15; 90:13 – 90:25; 91:24 – 92:2; and 107:15 – 109:12). These documents and pages of the deposition testimony are included as Exh. 2.

⁴ Harris Methodist Select assigned its rights under this contract to Harris Methodist Health Plan, Inc. PacifiCare purchased Harris Methodist Health Plan, Inc. on February 1, 2000.

The agreements and the deposition testimony which discusses them contain heavily negotiated, proprietary terms between PacifiCare and individual providers that are extremely competitively sensitive. The agreements are the product of significant investment by PacifiCare and are the key to PacifiCare's profitability. Indeed, contract negotiations can span months and occupy hundreds of employee hours, including not only negotiation time, but also strategic thinking, actuarial analysis, financial modeling and legal and regulatory review and drafting.

PacifiCare guards the terms of these agreements closely. Internal distribution of these agreements is limited to the individuals who deal with the specific providers in implementing the contract terms and to those involved in negotiating the contract terms. Outside the context of negotiations, PacifiCare does not publicly comment on its rates and terms, nor does it share this information with providers or competitors. Indeed, under almost all circumstances, the antitrust laws forbid disclosure of this information to competitors.

Four of the five agreements are still in effect. The fifth agreement – a letter agreement between PacifiCare and Metroplex that immediately preceded the current contract - contains some of the same pricing terms found in the contract the two parties ultimately signed. Revelation of the information contained in all of these agreements to competitors and providers would cause serious injury to PacifiCare, as recognized by a previous grant of in camera treatment to managed care contracts. See In the Matter of Hoechst Marion Roussel, Inc., 2000 WL 33534760 (FTC) (Oct. 4, 2000) (granting in camera treatment to managed care contracts). Competitors could and would use this information to either undermine PacifiCare's provider relations, damaging the core of PacifiCare's business, or harmonize their terms with those offered by PacifiCare, eviscerating competition. Providers similarly would take the pricing and

contracting terms, as well as the strategic thinking behind them, and use this information in future negotiations to disadvantage PacifiCare's contracting position. Publication of the various terms with which PacifiCare contracts with providers also would allow providers to coordinate among themselves. Clearly, this damage, both to PacifiCare specifically and competition generally, necessitates granting in camera treatment of these agreements and the deposition testimony discussing them.

The second category of documents for which PacifiCare seeks in camera treatment consists of correspondence between PacifiCare and various healthcare providers regarding the terms at which PacifiCare or the healthcare provider would or should contract for healthcare services. Included within this category are five letters and/or memoranda between PacifiCare and NTSP detailing agreed upon and proposed contract terms (FTC-NTSP-PCFC-000282 – 000283; 000284 – 000286; 00989 – 00990; 00991 – 00992; and 00993 – 00995); two letters between PacifiCare and Surgical Associates of the Mid-Cities regarding contract terms (FTC-NTSP-PCFC-00998 – 01000; 01001 – 01003); and a letter from Texas Pulmonary Consultants P.A. to PacifiCare regarding proposed contract terms (FTC-NTSP-PCFC-01004 – 01011). These documents are included as Exh. 3.

These few letters and memoranda reflect the terms upon which agreement has been reached as well as proposed terms. Like the final agreements outlined above, the information contained within these documents is extremely valuable to PacifiCare as, once again, it contains heavily negotiated, proprietary and competitively sensitive terms and proposals regarding the cost of providing healthcare services to PacifiCare's members. The fact that some of these terms are not final does not obviate the need for in camera treatment. To the contrary, it strengthens this need as their disclosure will reveal not only important information relevant to

and contained in the current contracts, but also information regarding PacifiCare's negotiating and pricing strategy. Indeed, internal disclosure of this material is even more limited than disclosure of the agreements; these documents are shared only with the negotiating team. None of these documents are of the type that PacifiCare ever would share with competitors or other providers as they lay out the pricing and contracting terms at which PacifiCare will contract for healthcare services. In fact, with this knowledge, both competitors and providers could and would undermine severely PacifiCare's current competitive standing and its future contract negotiations. Consequently, these documents should be granted in camera treatment.

The third category of material for which PacifiCare requests in camera treatment consists of two documents containing internal analysis of the terms upon which PacifiCare agreed to contract with NTSP and the financial and strategic effect of these terms upon PacifiCare (FTC-NTSP-PCFC-000016 – 000020; 000294 – 000295). These two documents are included as Exh. 4. Certain of the terms that are the subject of these analyses are still in effect and, accordingly, reflect the terms PacifiCare presently offers to NTSP. The terms no longer in effect are difficult to separate out and, in any case, are at most three years old. Publication of these terms is not appropriate as it may allow providers and competitors to divine the current pricing and contracting terms at which PacifiCare contracts for healthcare services. See Kaiser Aluminum, 103 F.T.C. 500 (granting in camera treatment of documents over five years old where serious injury would be done by their release). Moreover, publication would reveal PacifiCare's pricing and contracting strategy to both providers and competitors.

As set out above, the information in these two documents lies at the heart of PacifiCare's business and is extremely valuable to the company. PacifiCare has never circulated this material outside its walls and, in fact, internal circulation is limited to only a few employees.

Should this information be made public, providers generally and NTSP in particular could and would use it against PacifiCare in future contract negotiations. Competitors too would use this information to PacifiCare's disadvantage, severely injuring PacifiCare's competitive position. In camera treatment should be granted to these two documents in their entirety to prevent such injury.

Finally, PacifiCare requests in camera treatment for portions of letters it sent to the FTC in response to the voluntary access letter the FTC sent to PacifiCare during the FTC's initial investigation, specifically pages FTC-NTSP-PCFC 01031; 01048; and 01401 – 01410, and the deposition testimony of John H. Lovelady discussing these pages (82:16 – 87:25). This material is included as Exh. 5. These pages contain and discuss fee schedules and pricing information under which PacifiCare contracts with numerous providers in the Dallas/Fort Worth area. Although certain of these fee schedules date from 1999 and may no longer apply to the particular provider, most of the fee schedules remain valid. Indeed, the prices at issue are those at which PacifiCare currently contracts with NTSP. Moreover, the information contained in the tables at FTC-NTSP-PCFC 01401 – 01410 would allow both PacifiCare's competitors and the providers with whom it contracts to derive PacifiCare's overall reimbursement rate, as well as the amount PacifiCare pays for each service.

The information contained in these few pages is highly competitively sensitive and is extremely valuable to PacifiCare. It is not publicized in any way outside the company and its distribution inside the company is limited to those employees who administer the contracts and those who negotiate them. Similar to the information contained in the first three categories of documents, this information could and would be used by both competitors and providers to

seriously injure PacifiCare's competitive standing. Providers also could use this information to collude. For these reasons, it merits in camera treatment.

IV. In Camera Treatment for the Documents and Deposition Testimony Included in the Attached Appendix Should Extend Indefinitely or, at Minimum, for a Period of Ten Years

PacifiCare requests in camera treatment for the documents and deposition testimony described in this Motion and listed in the attached Appendix for an indefinite period because contracts between healthcare providers and payors typically run for a number of years, and because later contracts often incorporate terms found in preceding contracts. Indeed, it is entirely possible that the parties to the contracts at issue will extend and/or amend the current contracts instead of renegotiating new documents. For example, 1999 fee-for-service agreement between PacifiCare and NTSP has been amended five times and is still in effect. Therefore, it is unclear when these documents and the deposition testimony discussing them will cease to reflect current pricing and contracting terms. At minimum, however, PacifiCare requests in camera treatment for a period of ten years to provide a reasonable opportunity for the contracts to expire and their terms to become outdated.

V. Conclusion

PacifiCare strives to set itself apart from its competitors and succeed in the challenging health care arena. In doing so, it has created certain highly sensitive documents relating to the terms and prices at which it contracts for healthcare services. As set out above, disclosure of these documents and the deposition testimony discussing them would result in a clearly defined serious injury to PacifiCare, severely undercutting PacifiCare's efforts in a competitive industry. For these reasons, and for those set out in the declaration of John H.

Lovelady, PacifiCare respectfully requests that this Court grant its motion directing in camera treatment for the exhibits designated in the attached Appendix.

Dated: April 12, 2004

Respectfully submitted,

Lynda K. Marshall
D.C. Bar No. 452440
Hogan & Hartson L.L.P.
555 13th Street, N.W.
Washington, DC 20004
202-637-5838 (Tel.)
202-637-5910 (Fax)
lkmarshall@hhlaw.com

Counsel for PacifiCare of Texas, Inc.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
)
North Texas Specialty Physicians,)
Respondent)
)
_____)

Docket No. 9312

**ORDER GRANTING NON-PARTY PACIFICARE OF TEXAS, INC.’S MOTION FOR
IN CAMERA TREATMENT OF CERTAIN DESIGNATED HEARING EXHIBITS**

Upon consideration of Non-Party PacifiCare of Texas, Inc.’s (“PacifiCare’s”) Motion for In Camera Treatment of Certain Designated Hearing Exhibits and the Confidential Declaration in support thereof, it is hereby ORDERED that PacifiCare’s motion is GRANTED. It is further ordered that the documents and deposition testimony of John H. Lovelady identified in the attached Appendix are afforded indefinite in camera treatment.

Dated:

The Honorable D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Andrea E. Ryan, hereby certify that on April 12, 2004, I caused copies of:

1. Non-Party PacifiCare of Texas, Inc.'s Motion For In Camera Treatment of Certain Designated Hearing Exhibits;
2. Declaration of John H. Lovelady In Support of Non-Party PacifiCare of Texas, Inc.'s Motion for In Camera Treatment of Certain Designated Hearing Exhibits; and
3. Proposed Order

to be served upon the following persons:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580
(Original and 12 copies of both public and confidential versions served via messenger, electronic copies served via e-mail (public version) and disk (confidential version))

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

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

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, NW
Washington, DC 20580
(Two copies each of public and confidential versions served via messenger)

Counsel for North Texas Specialty Physicians
Gregory D. Binns
Gregory S. C. Huffman
Thompson & Knight, LLP
1700 Pacific Avenue
Suite 3300
Dallas, TX 75201
(Public and confidential versions served via certified mail and e-mail)

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

Counsel for United HealthCare of Texas
Helene Jaffee
Weil Gotshall & Manges LLP
767 Fifth Avenue
New York, NY 10153
(Public version served via UPS)

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

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

Counsel for Cigna
Kevin Maclay
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001
(Public version served via UPS)

Counsel for MSM
Lee Morris
Munsch Hardt Kopf Harr PC
1445 Ross Avenue
Dallas, TX 75202
(Public version served via UPS)

Andrea E. Ryan