

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  
LIMIT SUBPOENA AD TESTIFICANDUM**

Respondent North Texas Specialty Physicians ("NTSP") files this response to Aetna Health Inc.'s ("Aetna") Motion to Limit Subpoena Ad Testificandum. The deposition of Aetna's corporate representative is scheduled for Wednesday, January 28, 2003. Aetna's motion attempts to limit the topics that may be addressed at that deposition. **NTSP requests that the Administrative Law Judge decline to limit the deposition's scope so that questions will not be left unanswered due to the pendency of this motion.** In support, NTSP shows the following:

**I.**

**Background**

On January 12, 2004, NTSP served a subpoena ad testificandum on Aetna. A deposition of Aetna's corporate representative was scheduled for January 28, 2004. On January 22, 2004, less than a week before this scheduled deposition, Aetna filed a Motion to Limit the subpoena ad testificandum, attempting to limit the questions Aetna's corporate representative will have to answer. NTSP contests each of Aetna's grounds for this motion and asks the Administrative Law Judge to enforce the subpoena as written. NTSP additionally requests that the motion be ruled on in an expedited manner so that Aetna's corporate representative will be required to fully answer questions at the scheduled deposition. If this motion is ruled on after the deposition occurs and the Aetna representative has refused to fully answer questions related to examination

topics noticed in the subpoena ad testificandum, NTSP requests that it be allowed to re-depose the Aetna representative within ten days of the Administrative Law Judge's order.

## II.

### Argument and Authorities

**A. Examination topics related to Aetna's contractual negotiations, terms, and reimbursement rates for physician providers other than NTSP<sup>1</sup> are relevant and not overly broad or unduly burdensome.**

The FTC Rules of Adjudicative Proceedings entitle NTSP to discovery 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.”<sup>2</sup> Discovery should be limited only if the burden outweighs the benefit.<sup>3</sup>

**1. Each examination topic seeks relevant information.**

Here, each examination topic 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

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<sup>1</sup> The specific examination topics addressed by Aetna in its motion are (1) “The negotiation and terms of contracts Aetna Health Inc., Aetna U.S. Healthcare of North Texas Inc., Aetna U.S. Healthcare, or any of its parents, subsidiaries, affiliates, predecessors, or successors has had or attempted to negotiate with North Texas Specialty Physicians and other physician providers located in Collin, Dallas, Denton, Ellis, Grayson, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties, all of which are located in the State of Texas.”; (2) “The contractual rates paid by Aetna for medical services provided by physician providers in Texas and any comparisons of those rates conducted by Aetna or others.”; and (6) “The topics listed under the designation of Dave Roberts, Dr. Chris Jagmin, and Celina Burns on Complaint Counsel's Preliminary Witness List, a copy of which is attached as Exhibit A.” Complaint Counsel's Preliminary Witness List is attached to Aetna's Motion to Limit.

<sup>2</sup> 16 C.F.R. § 3.31(c)(1).

<sup>3</sup> *Id.*

deprive payors like Aetna of the benefits of competition between providers.<sup>4</sup> 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 lowered overall physician costs below what they otherwise would have been, but also has lowered cost by reducing the utilization of hospitalization and pharmaceuticals. The examination topics seek exactly this information.

Further, one of the examination topics challenged by Aetna refers specifically to Complaint Counsel's preliminary witness list and summary of testimony.<sup>5</sup> That is certainly relevant, and NTSP is entitled to question Aetna's representative on topics which Complaint Counsel has identified as potential areas of trial testimony from Aetna's representative.

**2. The examination topics are not unduly burdensome.**

The scope of the examination topics is not unduly burdensome. 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. Allowing Aetna to provide information only regarding NTSP will prevent NTSP from discovering information about the entire relevant market or comparing its conduct to that of other providers, both of which are necessary for NTSP to develop its defense.

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<sup>4</sup> See Complaint, ¶¶ 11-12, 16-17, 23-24.

<sup>5</sup> See Subpoena Ad Testificandum topic of examination number 6, attached to Aetna's Motion to Limit.

Aetna claims that this information is highly confidential. A party claiming confidentiality must have specific proof that the information is confidential and that disclosure would be harmful.<sup>6</sup> The protective order currently in place in this proceeding more than adequately protects the confidentiality of any deposition testimony and exhibits and prevents any harm from Aetna's compliance with the subpoena.<sup>7</sup> The protective order provides that any information designated 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.<sup>8</sup> In addition, information may be designated restricted confidential and may be disclosed *only* to outside counsel and experts with limited exceptions.<sup>9</sup> With this protection, information will not be disclosed to Aetna's competitors, physician providers, or the marketplace generally, and Aetna will not be competitively harmed.

Aetna suggests that there are hundreds of thousands of contracts across the country, making these examination topics unduly burdensome. As discussed below, the only relevant contracts are located in Texas. Aetna also states that there are thousands of contracts in Texas and that it would require hundreds of man-hours to find this information. However, this is the type of targeted information Aetna probably uses in its ordinary course of business, and Aetna has not made a sufficient showing of undue burden. Aetna has made only conclusory statements of burden. In fact, Aetna has also argued that this type of information is "highly-sensitive

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<sup>6</sup> *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).

<sup>7</sup> "Discovery Material' includes without limitation deposition testimony, deposition exhibits..." Protective Order Governing Discovery Material, p. 3.

<sup>8</sup> *Id.* at pp. 4, 9.

<sup>9</sup> *Id.* at pp. 6-7.

competitive information maintained by Aetna” and that it would give others an unfair advantage to know this information.<sup>10</sup> If this information truly assists and is vital to Aetna in the competitive process, it seems unlikely that it would disrupt normal business and take Aetna employees hundreds of hours to discover this information. Because Aetna has not met its burden of proof and because the information is vital to NTSP’s defense, the Administrative Law Judge should reject Aetna’s undue burden claim.

**3. The examination topics are not overly broad.**

Further, none of the examination topics are overly broad. Aetna complains that there are no limitations on time, geographic area, or physician specialty. This statement is incorrect. The subpoena ad testificandum limited the relevant time period to January 1, 1997 through the present, which is almost the exact same time period identified as relevant by Complaint Counsel. The subpoena generally limits the geographic area to the State of Texas, and some topics limit their scope to specific counties in the State of Texas. The topics have not been limited by physician specialty because all of the physician specialties are relevant, and, further, the time and geographic limitations are more than enough to make these examination topics reasonable, relevant, and vital to NTSP’s defense.

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<sup>10</sup> Aetna’s Motion to Limit, p. 3.

**B. Examination topics related to Aetna’s costs and cost comparisons<sup>11</sup> are not overly broad or unduly burdensome.**

Aetna’s costs and cost comparisons related both to NTSP and other providers are highly relevant. Cost data and cost comparisons on both NTSP providers and unrelated providers in the State of Texas 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. Further, 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 that is not only efficient in providing physician services, but also is efficient in the utilization of hospital services and pharmacy costs. Therefore, this request is not overly broad.

Aetna has again failed to meet its burden to prove that the request is unduly burdensome. Aetna states merely that the requested information would be in “various sources” in “various offices.”<sup>12</sup> Compared to the relevance and benefit of this information to NTSP, as stated above, the examination topics are not an undue burden. Aetna says this information may not exist. If it does not exist, Aetna does not have to create such information. But if it does exist, as suggested by Aetna when they state that “such data also contains confidential, proprietary cost information,” the Administrative Law Judge should not let Aetna avoid providing that

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<sup>11</sup> The specific examination topics addressed by Aetna in its motion are (3) “Comparisons of medical expense (PMPM) for HMO network primary care physicians located in Texas in regard to physician, pharmacy, and facility costs”; (4) “Comparisons of unique-patient-seen costs per physician or of utilization indicators of procedures performed per unique-patient-seen, by physician or by specialty division”; and (6) “The topics listed under the designation of Dave Roberts, Dr. Chris Jagmin, and Celina Burns on Complaint Counsel’s Preliminary Witness List, a copy of which is attached as Exhibit A.” Complaint Counsel’s Preliminary Witness List is attached to Aetna’s Motion to Limit.

<sup>12</sup> Aetna’s Motion to Limit, p. 4.

information.<sup>13</sup> As discussed earlier, the Protective Order more than adequately protects any confidential information.

Further, one of the examination topics challenged by Aetna refers specifically to Complaint Counsel's preliminary witness list and summary of testimony.<sup>14</sup> That is certainly relevant, and NTSP is entitled to question Aetna's representative on topics that Complaint Counsel has identified as potential areas of trial testimony from Aetna's representative.

### III.

#### Conclusion

In light of the responses to Aetna's objections contained herein, NTSP requests that the Administrative Law Judge (a) deny in whole Aetna's Motion to Limit the Subpoena Ad Testificandum; (b) order Aetna to fully answer questions on the examination topics at the January 28, 2004, deposition, or, alternatively, if this motion is ruled on after the deposition has taken place and the Aetna representative has refused to fully answer questions related to examination topics noticed in the subpoena ad testificandum, allow NTSP to re-depose the Aetna representative within ten days of the Administrative Law Judge's order.; and (c) grant and order such further relief to which NTSP may be justly entitled.

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<sup>13</sup> *Id.*

<sup>14</sup> See Subpoena Ad Testificandum topic of examination number 6, attached to Aetna's Motion to Limit.

Respectfully submitted,

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**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 Limit Subpoena Ad Testificandum**

**I.**

Aetna Health Inc. ("Aetna") was served with a subpoena ad testificandum by Respondent North Texas Specialty Physicians on January 12, 2004. A deposition of Aetna's corporate representative was scheduled for January 28, 2004. On January 22, 2004, less than a week before the deposition was to be taken, Aetna filed a Motion to Limit the subpoena ad testificandum, thereby limiting the questions which could be asked at deposition. Respondent filed a response opposing the motion. For the reasons set forth below, Aetna's motion is DENIED and Aetna must answer all questions related to the examination topics in the subpoena ad testificandum at the January 28, 2004, deposition.

**II.**

Aetna contends that the examination topics are overly broad and unduly burdensome. The burden is on the party challenging the subpoena. Aetna has not shown adequate proof that the topics are unduly burdensome. The topics 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 during deposition testimony or in deposition exhibits.

Ordered:

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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:

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Gregory D. Binns