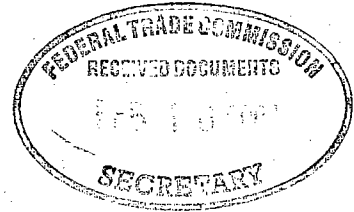


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

Docket No. 9312

MOTION FOR EXTENSION OF TIME

TO THE HONORABLE JUDGE OF SAID COURT:

Non-party Blue Cross Blue Shield of Texas files the following Motion for Extension of Time.

1. On Friday, February 6, 2004, BCBSTX learned, for the first time, of the issuance of an order relating to the Motion to Quash and/or Limit Subpoena Duces Tecum filed by BCBSTX on January 7, 2004. Although the order was issued on January 30, 2004, BCBSTX did not receive a copy of the order until after a conversation between counsel for BCBSTX and counsel for another non-party, Aetna, which had received a similar order relating to a similar motion. (See Exhibit A.)
2. Upon learning of the existence of the order, counsel for BCBSTX requested that counsel for Aetna forward a copy of the order at her earliest convenience. Aetna's counsel did so, and that order was received by BCBSTX counsel at approximately 1:59 p.m. on Friday, February 6, 2004. (See Exhibit B.) No copy of the order had been received by BCBSTX counsel, and the order was not reflected on the docket sheet on the FTC website. (See Exhibit C.)
3. The order provides that responsive documents must be produced within ten days of the date of the order, or February 9, 2004. However, of the ten days contemplated by the order, seven had passed before BCBSTX was even aware of the order and the following two days were

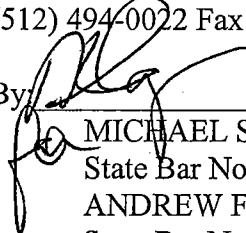
a Saturday and Sunday.

4. Accordingly BCBSTX respectfully requests it be permitted a one week extension to produce the documents responsive to the January 30, 2004 order or to file a motion requesting the ALJ reconsider his determination. Counsel for BCBSTX attempted to contact counsel for Respondent North Texas Specialty Physicians and left a voice-mail message asking whether NTSP would oppose this motion. At the time this motion is being filed, that message has not been returned.

Respectfully submitted,

HULL HENRICKS & MACRAE LLP
Bank One Tower
221 W. 6th Street, Suite 2000
Austin, Texas 78701-3407
(512) 472-4554
(512) 494-0022 Fax

By



MICHAEL S. HULL
State Bar No. 10253400
ANDREW F. MacRAE
State Bar No. 00784510

ATTORNEYS FOR BLUE CROSS
BLUE SHIELD OF TEXAS

CERTIFICATE OF SERVICE

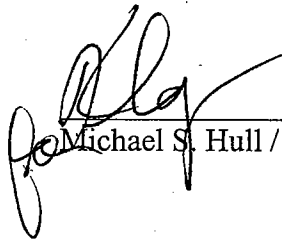
I hereby certify that the foregoing document has been sent to the following counsel of record via overnight delivery on this _____ day of February 2004.

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, NW
Washington, DC 20580

Michael Bloom
Senior Counsel to the Northeast Region
Federal Trade Commission
One Bowling Green, Suite 318
New York, NY 10004

Gregory D. Binns
Thompson & Knight LLP
1700 Pacific Ave., Suite 3300
Dallas, TX 75201

Ms. Barbara Anthony
Federal Trade Commission
One Bowling Green, Suite 318
New York, NY 10004



Michael S. Hull / Andrew F. MacRae

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)

North Texas Specialty Physicians,)
Respondent)

Docket No. 9312

AFFIDAVIT OF ANDREW MacRAE

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Andrew MacRae, who, being by me duly sworn on oath, deposed and stated as follows:

“My name is Andrew MacRae. I am over the age of twenty-one (21) years and am fully competent in all respects to make this Affidavit. I am outside counsel for non-party Blue Cross Blue Shield of Texas (“BCBSTX”), a division of Health Care Service Corporation, a Mutual Legal Reserve Company. All the facts recited here in are within my personal knowledge and are true and correct.

“On Friday, February 6, 2004 at approximately 1:00 p.m., I returned the telephone call of Ms. Kay Lynn Brumbaugh, an attorney with the law firm of Andrews & Kurth in Dallas, who represents Aetna in connection with a subpoena duces tecum served by Respondent North Texas Specialty Physicians. Ms. Brumbaugh advised me of the existence of an order issued January 30, 2004 relating to the Motion to Quash and/or Limit Subpoena Duces Tecum previously filed by BCBSTX. I was previously unaware of the existence of such an order. Accordingly, I asked Ms. Brumbaugh to fax me a copy of the order, which she did. That order was received in my office at approximately 1:59 p.m. Upon receipt of the order from Ms. Brumbaugh, I faxed it to

Mr. Neill Fleishman, in-house counsel for BCBSTX. I also called Mr. Fleishman and learned he would be out of the office for the remainder of the afternoon.

“Neither my client nor I was aware of the existence of the order on the Motion to Quash and/or Limit Subpoena Duces Tecum until 1:00 p.m. on Friday, February 6, 2004. Nor, in my opinion, should my client or I have known of the existence of the order. As of approximately 4:00 p.m. Central Standard Time on Friday, February 6, 2004, the docket sheet available on the FTC website does not reflect the issuance of the order. (See Exhibit C to the foregoing Motion for Extension of Time.)

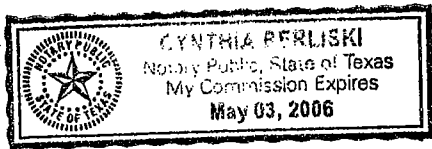
“On Monday morning, February 9, 2004, I placed a call to Gregory Binns, counsel for Respondent North Texas Specialty Physicians, and left him a voicemail message explaining that I first became aware of the existence of the order on Friday afternoon, February 6. I asked Mr. Binns to let me know if his client opposed the foregoing Motion for Extension of Time. I had not heard back from him before signing this affidavit.

“Neither BCBSTX nor I was aware of the existence of the order until Friday afternoon, February 6. Indeed, the FTC website did not reflect that the order had been issued as of Friday afternoon. (See Exhibit C to the foregoing Motion for Extension of Time.)”

Andrew MacRae

ANDREW MacRAE

SUBSCRIBED AND SWORN to before me by the said Andrew MacRae this 9th day of
February, 2004.



Cynthia Berliski

Notary Public, State of Texas

5/3/06

My Commission Expires:

Cynthia Berliski

Printed Name

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ADMIN LAW JUDGES

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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.

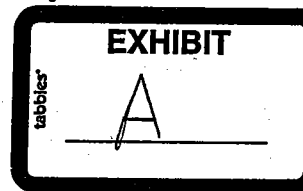
Respondent's motion to supplement is GRANTED. For reasons set forth below, Aetna's motion to quash is GRANTED IN PART and DENIED IN PART.

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 Actna'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. Actna 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 Actna to each of the nine requests are discussed in the subsequent section.

A.

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

Actna asserts that the subpoena defines Actna too broadly by defining Actna as "Actna

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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

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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 main 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/adipr/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 Marton 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.

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ADMIN LAW JUDGES

02/04/04

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.

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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.

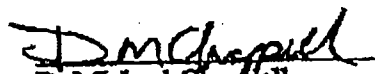
Aetna's motion to quash is granted to the extent that Request Number 8 will be limited to documents used by Aetna to determine which providers will service which geographic areas. In all other respects, the motion to quash Request Number 7 is denied.

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



Federal Trade Commission

FAX Number: 202/326-2427

Facsimile Transmittal Sheet

To:	Michael J. Bloom, Esq. - (212) 607-2822 Gregory S.C. Huffman, Esq. - (214) 969-1751 John B. Shelf, Esq. - 713/230-4285	Total number of pages sent (including this cover sheet): 9
	Fax number:	
From:	The Office of Judge D. Michael Chappell Telephone: 202/326-3637	Sending Org Code: 1366
		Date: 2/4/04
		Time:
Subject:	North Texas Speciality Physicians, Docket No. 9312	
Note:	AETWA	

In case of transmission errors, call

ANDREWS
ATTORNEYS **KURTH** LLP

ORIGINAL
1717 Main Street, Suite 3700
Dallas, Texas 75201
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andrewskurth.com

Austin
Houston
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Fax Cover Sheet

From: Kay Lynn Brumbaugh Employee No.: 09751

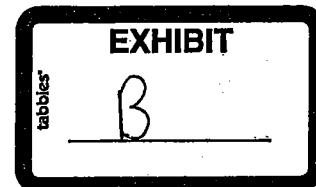
Sender's Direct Phone No.: 214-659-4702 Sender's Direct Fax No.: 214-659-4788

Date: 2/6/2004 Matter No.: 152663 No. of pages (including cover sheet): ~~20~~ 19

RECIPIENT	COMPANY	FAX NUMBER	CONFIRMATION NUMBER
Andrew MacRae		512-494-0022	

Message

Please see attached.



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FEB 03 '04 07:30PM AETNA L&RA

NEW YORK

2/2/04

**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 MOTIONS OF NON-PARTY BLUE CROSS BLUE SHIELD
OF TEXAS TO QUASH OR LIMIT SUBPOENA DUCES TECUM,
TO SUPPLEMENT MOTION TO QUASH, AND TO FILE A REPLY**

I.

On January 7, 2004, non-party Blue Cross Blue Shield of Texas ("BCBSTX") filed a motion to quash or to limit the subpoena served upon it by Respondent in this matter ("motion to quash"). On January 9, 2004, BCBSTX filed a motion to supplement, seeking to supplement its motion to quash with an affidavit.

Respondent North Texas Specialty Physicians ("NTSP") filed its opposition to the motion to quash on January 14, 2004.

On January 23, 2004, BCBSTX filed a motion for leave to reply to Respondent's opposition.

The motion to supplement is **GRANTED**. The motion for leave to reply is **GRANTED**. For reasons set forth below, the motion to quash is **GRANTED IN PART** and **DENIED IN PART**.

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

II.

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

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NEW YORK

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secrets; and (3) the scope and short time frame for response make compliance impossible.

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 BCBSTX'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. BCBSTX 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 BCBSTX to each of the nine requests are discussed in the subsequent section.

A

BCBSTX raises the following general objections: (1) the length of time for which documents are sought is unreasonably long; (2) the definition of BCBSTX; (3) the requests seek documents that are confidential and proprietary; (4) the Protective Order does not adequately protect BCBSTX; and (5) the time provided for responding to the subpoena was unreasonably short. In addition, BCBSTX argues that Respondent should reimburse BCBSTX for its expenses.

I. 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. BCBSTX 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

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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 BCBSTX

BCBSTX asserts that the subpoena defines BCBSTX as "Blue Cross and Blue Shield of Texas, a Division of Health Care Service Corporation, a Mutual Legal Reserve Company, its parents, subsidiaries, affiliates, employees, agents and representatives." BCBSTX asserts that this definition expands the scope of the subpoena to Health Care Service Corporation itself and all of its divisions. Respondent does not address this argument in its opposition.

The scope of the subpoena is hereby limited to demand production only from Blue Cross and Blue Shield of Texas, its subsidiaries, affiliates, and employees.

3. Confidential documents are discoverable

BCBSTX asserts that the subpoena requests production of documents containing confidential and commercially sensitive information, including competitively sensitive pricing information and BCBSTX 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. Rockfeller, 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 BCBSTX asserts that the documents requested contain extremely sensitive information, the burden on BCBSTX 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, BCBSTX is not required to disclose patient information. Information concerning particular patients' names or other data is not relevant and shall be redacted by

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BCBSTX. In addition, BCBSTX is not required to produce privileged information. If information is withheld, on grounds of privilege or any similar claim, BCBSTX 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.

4. The Protective Order protects BCBSTX's documents

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, including provisions to limit disclosure of materials designated as "Restricted Confidential, Attorneys Eyes Only." By designating its documents "Restricted Confidential, Attorneys Eyes Only," BCBSTX ensures that counsel will not disclose the documents to its clients. Further, before any restricted confidential information is disclosed, notice must be given to the producing party. Upon that notice, the producing party, BCBSTX, may object to disclosure by providing a written statement of reasons. If there is an objection, disclosure is not allowed unless by order.

In addition, BCBSTX 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.

5. Time for responding to the subpoena

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

6. 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 Indur, 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 BCBSTX is not an undue burden. BCBSTX'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.

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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.

BCBSTX asserts that these documents may be retrieved from the Commission as easily as from BCBSTX and that because the Commission is a party, while BCBSTX 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 BCBSTX than to request production, a second time, from BCBSTX, 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/edipro/index.htm). Here, the non-party, BCBSTX, is not seeking to prevent Complaint Counsel from producing documents BCBSTX previously produced to the Commission. Rather, it is asking Respondent to request these documents from Complaint Counsel so that BCBSTX 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.

BCBSTX asserts that to reproduce the extraordinary amount of data produced to the Texas Attorney General would take substantial time, effort, and expense. In its affidavit filed by its Regional Director for the Professional Provider Network Department, BCBSTX avers that the response to the Office of the Attorney General of Texas consists of "thousands of documents."

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and probably millions." Affidavit of Rick Haddock, filed January 9, 2004, at 4. BCBSTX also asserts that the 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 previous document production which, Respondent asserts, BCBSTX has already assembled. Respondent further asserts that BCBSTX 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 BCBSTX, 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 BCBSTX 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 BCBSTX to withhold the requested information.

However, 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.

- Request Numbers 2 and 3 are quashed.

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

BCBSTX objects that this request is not reasonably limited by time or subject matter. It objects that six years is an over broad time frame and that literal compliance with the request would require BCBSTX to sort through correspondence, memoranda and data to determine whether something "concerned or related to" NTSP. In addition, BCBSTX asserts that BCBSTX and NTSP are in active negotiations regarding NTSP becoming an "at-risk" provider within the BCBSTX HMO network. BCBSTX wants to shield internal communications about those negotiations from NTSP.

Respondent asserts that a major issue in this case is its conduct towards payors such as BCBSTX and the effect of that conduct in the marketplace. Thus, Respondent asserts, the scope of this request, any correspondence, memoranda, and messages, relating to this conduct, is not over broad.

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BCBSTX's objection to the scope of years for which documents are requested and its concerns about maintaining the confidentiality of its documents are addressed *supra*, section III.A. The subject matter, which relates solely to Respondent, is not overly broad.

BCBSTX's request to quash Request Number 4 is denied. However, internal information about active negotiations between BCBSTX and NTSP may be redacted. Entire documents relating to NTSP may not be withheld unless BCBSTX 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.

BCBSTX asserts that this request is overly broad, unduly burdensome, and not reasonably limited by time or scope. BCBSTX asserts that the request apparently seeks information pertaining to all the 40,000 or more providers throughout Texas. 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, BCBSTX's request to quash Request Number 5 is denied.

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

BCBSTX asserts that this request appears to call for the production of every contract between BCBSTX and healthcare providers in Texas. BCBSTX also asserts that the information requested is confidential and proprietary. Respondent asserts that this request seeks only specific pieces of information that could be located in a table or similar summary chart or obtained from specific pages of contracts.

The need for proprietary information from competitors was not sufficiently demonstrated. BCBSTX is not required to produce the complete contracts between BCBSTX and healthcare

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providers. Request Number 6 is quashed except that any tables or similar summary charts that BCBSTX keeps in the ordinary course of business shall be produced. Privileged information may be redacted.

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.

BCBSTX asserts that this request is vague, over broad, and seeks confidential information. Respondent, in its opposition, has narrowed the request to only documents containing comparisons of costs of health care in Texas and has narrowed the term "cost" to the external marketplace cost to patients and insurers, not the internal cost to physicians or hospitals.

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.

BCBSTX asserts that this request is vague and ambiguous, but has agreed to produce copies of maps it uses in determining geographic areas within Texas for business purposes. Respondent asserts that the request is not vague and seeks relevant information.

Merely furnishing maps is not an adequate response. BCBSTX shall also produce documents sufficient to show its policies, rules, and access standards establishing the geographic areas to be serviced by physician providers in the State of Texas.

BCBSTX's motion to quash Request Number 8 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.

BCBSTX objects to the production of financial information, but otherwise does not object to providing sample contracts. Respondent asserts that the request seeks only contracts for the provision of physician services for the past six years.

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BCBSTX request to limit Request Number 9 is granted. BCBSTX shall produce only sample contracts for the provision of physician services. BCBSTX may redact financial information from the contracts it produces.

ORDERED:

Dm Chappell
D. Michael Chappell
Administrative Law Judge

Date: January 30, 2004



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Docket No. 9312

In the Matter of North Texas Specialty Physicians.

February 2, 2004

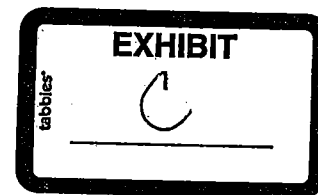
- North Texas Specialty Physicians' Motion to Compel Substitution of Corporate Representative for Deposition from Non-Party Aetna Health Inc. [PDF 962K]

January 27, 2004

- Notice of Appearance for Timothy R. McCormick [PDF 18K]

January 26, 2004

- North Texas Specialty Physicians' Response to Aetna Health Inc.'s Motion to Limit Subpoena Ad Testificandum; and Proposed Order [PDF 142K]
- North Texas Specialty Physicians' Response to Aetna Health Inc.'s Motion to Quash, Or, Alternatively, Limit Subpoena Duces Tecum; and Proposed Order [PDF 194K]



January 22, 2004

- North Texas Specialty Physicians' Response to Humana Health Plan of Texas's Motion to Quash Portions of the Subpoena Duces Tecum or Limit the Scope of the Subpoena and Extend the Time to Respond to Same; and Proposed Order [PDF 142K]

January 19, 2004

- Respondent North Texas Specialty Physicians' Response to Complaint Counsel's Second Requests for Admissions [PDF 142K]
- Respondent North Texas Specialty Physicians' Response to Expedited Motion of Complaint Counsel for an Order Compelling Compliance with Interrogatories or Excluding Related Evidence; and Rescheduling Deposition of Dr. Karen Van Wagner at proposed Order [PDF 2M]

January 13, 2004

- ALJ Order Requiring Expedited Response [PDF 32K]
- North Texas Specialty Physicians Response to Blue Cross Blue Shield of Texas's Motion to Quash and/or Limit the Subpoena Duces Tecum [PDF 537K]

January 12, 2004

- Expedited Motion of Complaint Counsel for an Order Compelling Compliance with Interrogatories or Excluding Related Evidence and Rescheduling Deposition of Dr. Karen Van Wagner [PDF 3M]
- Non-Party Humana Health Plan of Texas, Inc.'s Motion to Quash Portions of the Subpoena Duces Tecum of North Texas Specialty Physicians or, Alternatively, to Limit the Scope of the Subpoena and Extend the Time to Respond to Same [PDF 142K]

- o Exhibit A [PDF 1.3M]
- o Exhibit B [PDF 32K]
- o Exhibit C [PDF 42K]
- o Exhibit D [PDF 195K]
- o Exhibit E [PDF 107K]
- o Exhibit F [PDF 103K]

January 9, 2004

- Motion to Supplement Filed on Behalf of Blue Cross and Blue Shield of Texas [PDF 1.6M]

January 7, 2004

- Motion to Quash and/or Limit Subpoena Duces Tecum Filed on Behalf of Blue Cross Blue Shield of Texas [PDF 2.4M]

December 30, 2003

- Complaint Counsel's Second Requests for Admissions to Respondent North Texas Specialty Physicians [PDF 241K]

December 18, 2003

- Respondent's Objections and Responses to Complaint Counsel's Requests for Admissions to Respondent North Texas Specialty Physicians [PDF 168K]

December 15, 2003

- Respondent North Texas Specialty Physicians' Preliminary Witness List [PDF 47K]

December 9, 2003

- ALJ's Order on Non-Party Texas Oncology P.A.'s Motion for Protective Order Modifying or Limiting Complaint Counsel's Subpoena [PDF 71K]
- Complaint Counsel's Preliminary Witness List [PDF 54K]

December 8, 2003

- Complaint Counsel's Requests for Admissions to Respondent North Texas Specialty Physicians [PDF 43K]
- Notice of Appearance Filed by Theodore Zang, Counsel Supporting the Complaint for the Federal Trade Commission [PDF 43K]

December 4, 2003

- ALJ's Order on Respondent's Motion to Quash and Motion to Compel Responses to Interrogatories [PDF 172K]

December 1, 2003

- Complaint Counsel's Response and Objections to North Texas Specialty Physicians' First Request for Admissions to Complaint Counsel [PDF 56K]
- Complaint Counsel's Objections to Respondent North Texas Specialty Physicians' Second Request to Complainant for Production of Documents and Things [PDF 46K]

November 20, 2003

- Respondent's First Request for Admissions to Complaint Counsel [PDF 118K]
- Motion of Non-party Texas Oncology, P.A. for Protective Order Modifying or Limiting FTC Subpoena [PDF 1.5M]
- Notice of Appearance Filed by James F. Adams (Passman & Jones, P.C.) on behalf of Texas Oncology, P.A. [PDF 56K]

November 19, 2003

- Complaint Counsel's Opposition to Respondent's Motion to Quash Depositions [PDF49k]
 - Attachment A [PDF 280K]
 - Attachment B [PDF 349K]
 - Attachment C [PDF 2.4M]

November 17, 2003

- Complaint Counsel's Opposition to Respondent's Motion to Compel Responses to Interrogatories [PDF 2.4M]

November 14, 2003

- ALJ's Order on Respondent's Motion for Protective Order and Motion to Quash [PDF 200K]
- Complaint Counsel's Opposition to Respondent's Expedited Motion for a Protective Order and to Stay Depositions, or in the Alternative, Motion to Quash Depositions [PDF 634K]

November 13, 2003

- ALJ's Order Requiring Expedited Response [PDF 46K]

November 12, 2003

- Expedited Motion of North Texas Specialty Physicians and Southwest Neurological Associates for a Protective Order and Depositions, or the Alternative, Motion to Quash Depositions; and Proposed Order [PDF 3.4M]

November 4, 2003

- Respondent's Motion to Compel Responses to Interrogatories and Proposed Order [PDF 1.3M]

October 16, 2003

- Administrative Law Judge's Scheduling Order [PDF 349K]
- Administrative Law Judge's Protective Order Governing Discovery Material [PDF 789K]

October 8, 2003

- Administrative Law Judge's Order on Prehearing Conference [PDF 33K]

October 7, 2003

- Answer of Respondent North Texas Specialty Physicians to Complaint of Federal Commission [PDF 164K]

October 6, 2003

- Notice of Appearance Filed by Counsel for North Texas Specialty Physicians [PDF 79K]

October 3, 2003

- Notice of Appearance Filed by Counsel Supporting the Complaint on Behalf of the Federal Trade Commission [PDF 60K]

September 22, 2003

- Order Designating D. Michael Chappell as Administrative Law Judge [PDF 26k]

September 17, 2003

- Administrative Complaint
- News Release

Last Updated: Wednesday, February 4, 2004

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