

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

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.

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. 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

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. 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 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

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 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 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.

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/adjpro/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,

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.

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

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.

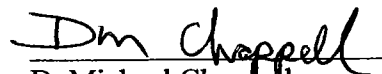
BCBSTX's motion to quash Request Number 8 is denied.

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.

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:


D. Michael Chappell
Administrative Law Judge

Date: January 30, 2004