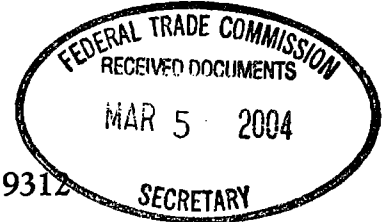


[PUBLIC]

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,  
A CORPORATION.

Docket No. 9312

**NORTH TEXAS SPECIALTY PHYSICIANS' EXPEDITED MOTION TO MODIFY PROTECTIVE ORDER**

Respondent North Texas Specialty Physicians ("NTSP") seeks an order modifying the Protective Order Governing Discovery Material to allow NTSP's Executive Director Karen Van Wagner limited access to documents that have been marked as "confidential discovery material" pursuant to the terms of the Protective Order. Dr. Van Wagner's examination of these documents and input to counsel regarding same is necessary to the adequate preparation of NTSP's defense now that the case has passed the discovery stage. In support, NTSP shows the following:

**I.**

**Background**

The current protective order in this case allows documents to be marked "confidential" or "restricted confidential, attorney eyes only." If documents are so marked, NTSP's counsel cannot show these documents to any of NTSP's personnel, including Dr. Van Wagner, prior to their testifying. Approximately 33,000 documents have been produced by third-party payors.<sup>1</sup> Most of these documents have been designated as confidential in some manner, and as a result, NTSP is only able to review approximately 10% of the produced documents to assist in preparing its

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<sup>1</sup> Third-party payors producing documents are United Healthcare, Pacificare, Blue Cross Blue Shield, Humana, Cigna, and MSM. Counsel for each is copied on this motion.

defense. Some of the documents marked confidential and, therefore, unable to be reviewed include correspondence to and from NTSP itself.

## II.

### **Argument and Authorities**

The terms of the protective order worked adequately for discovery purposes, but now that the case has moved closer to the time when NTSP will need to respond to particular documents, the third-party payors' expansive use of confidentiality designations and the implications of those designations impedes Respondent counsel's ability to prepare the case. The vast majority of the approximately 33,000 pages of business records produced by third-party payors have been marked confidential. This means that Respondent's personnel are currently unable to look at any of the documents that will be used for and against them.

The current protective order should be modified to reflect the changed circumstances now that this case has moved past discovery. Many of the documents designated as confidential in some manner may be offered into evidence or otherwise used in the proceedings of this case. Not allowing these documents to be seen and interpreted by NTSP personnel hinders Respondent counsel's preparation. The input of Respondent's personnel to its counsel is vital to counsel's understanding of the documents and presentation of Respondent's defense. This input is vital to the preparation of expert testimony.

Because of the expansive use of the confidential designations and because Respondent cannot feasibly go through approximately 33,000 pages of documents to challenge each specific designation when NTSP's unique knowledge may be needed even to determine the nature and

significance of many documents<sup>2</sup>, Respondent requests that the protective order be modified to allow one of Respondent's personnel, Dr. Karen Van Wagner, to have limited access to specific categories of documents:

- (1) documents referring to the conduct or contractual activities of NTSP and its participating providers; and
- (2) documents containing data comparing NTSP and other providers that is more than 12 months old.

The limited nature of these categories should effectively remove concerns that NTSP would be able to use any of the information revealed to Dr. Van Wagner for business purposes. In actuality, any of the information more than a year old is probably generally known in the industry or is not deserving of protection because it is outdated.

Further, not allowing Dr. Van Wagner to view these limited documents would be prejudicial to the Respondent. These documents directly concern NTSP, and to adequately review and be able both to use and respond to these documents, Respondent's counsel needs the input of someone who is intimately familiar with NTSP's operations. For example, many of the documents marked by third-party payors as confidential are copies of e-mails or letters to and from NTSP concerning NTSP's performance or contract negotiations. If Dr. Van Wagner is unable to review this type of document, Respondent's counsel may be unable to determine whether these communications were actually sent or received by NTSP, whether there were any

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<sup>2</sup> In a similar situation of expansive confidential designations for *in camera* treatment, a party was order to narrow the designated documents to a significantly more limited field to meet the Federal Trade Commission's strict standards. *In the matter of Hoechst Marion Roussel, Inc.*, Docket No. 9293, 2000 FTC LEXIS 157, at \*4-5 (Nov. 22, 2000). The excessive designation was only 483 documents, compared to the designation of approximately 30,000 documents in this case. *Id.* at \*4.

special circumstances of the communications, or whether the interpretation of the communications is affected by special meanings of terms or references to specific persons.

Allowing business personnel limited access to otherwise confidential information has been found necessary in antitrust cases. In *United States v. Lever Brothers Company*, the court found that counsel must be able to discuss sales and production data with its client's personnel in order to have a meaningful review of the information and an adequately prepared defense.<sup>3</sup> The data was adequately protected from misuse by a protective order allowing disclosure only for consultation with counsel and preventing personnel from making copies, revealing the contents to others, or using the information for any purpose other than preparation and defense of the pending action.<sup>4</sup> In reaching this decision, the court also noted that at the trial, personnel would have a full opportunity to examine the documents at issue and that not allowing pre-trial disclosure would result in substantial delay.<sup>5</sup>

In *Julius M. Ames Co. v. Bostitch, Inc.*, the court found that confidential business information should not be produced in a manner that would hamper defendant's ability to prepare its case.<sup>6</sup> The data was adequately protected by a protective order allowing disclosure only for consultation with counsel, requiring personnel to sign an affidavit of compliance, and

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<sup>3</sup> 193 F. Supp. 254, 257 (S.D. N.Y. 1961).

<sup>4</sup> *Id.* at 258.

<sup>5</sup> *Id.*

<sup>6</sup> 235 F. Supp. 856, 857 (S.D. N.Y. 1964).

preventing personnel from making copies, revealing the contents to others, or using the information for any purpose other than preparation and defense of the pending action.<sup>7</sup>

Respondent proposes this limited modification of the protective order that is in line with the protective orders found to be adequate in *Lever Brothers* and *Bostitch*. Only one of NTSP's personnel will be allowed access to the documents, and, as described above, her access will be limited. The use of these documents only for proper purposes will be assured by these conditions: (1) Dr. Van Wagner will sign the protective order declaration; (2) Dr. Van Wagner will only view the documents while consulting with counsel and outside experts; and (3) Dr. Van Wagner will not be able to copy the documents, reveal the contents of the documents to others, or use any of the information in the documents for any purpose other than preparation and defense of this action.

### III.

#### Conclusion

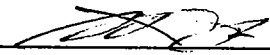
The expansive use of confidentiality designations dramatically changes the circumstances and the functionality of the protective order. To allow NTSP to adequately defend itself, Respondent's counsel needs the input of NTSP's personnel on the documents directly relating to NTSP and that will most likely be introduced into evidence or otherwise used. With the proposed limitations both on the categories of documents to be disclosed and the circumstances of disclosure, the information produced by third-party payors will be adequately protected while preventing prejudice to NTSP. For all of these reasons, NTSP requests that the Administrative Law Judge (a) grant its motion to modify the protective order to allow Dr. Karen Van Wagner

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<sup>7</sup> *Id.*

limited access to specified categories of documents in order to assist in the preparation of NTSP's defense; and (b) grant such other and further relief to which NTSP may be justly entitled.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on March 4, 2004, I caused a copy of the foregoing to be served upon the following persons:

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UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,  
A CORPORATION.

Docket No. 9312

**Proposed Order Granting North Texas Specialty Physicians'  
Motion to Modify Protective Order**

**I.**

Respondent North Texas Specialty Physicians filed a Motion to Modify the Protective Order on March 4, 2004. For the reasons set forth below, Respondent's motion is GRANTED.

**II.**

The current Protective Order Governing Discovery Materials allows for the designation of documents as "Confidential" or "Restricted Confidential-Attorney's Eyes Only." Documents so designated cannot be viewed by NTSP personnel except at deposition or trial. However, because of the excessive use of confidentiality designations, the likelihood that these documents will be used against NTSP personnel, and the necessity of NTSP personnel's expertise and input for counsel to fully understand these documents, the current Protective Order is prejudicial to Respondent. A new provision in the Protective Order allowing one designated NTSP representative limited access to limited categories of documents is appropriate to allow NTSP to fully prepare a defense.

**III.**

The current Protective Order Governing Discovery Materials is modified to allow Dr. Karen Van Wagner, NTSP's Executive Director, access to the following categories of documents: (1) documents referring to the conduct or contractual activities of NTSP and its participating providers; and (2) documents containing data comparing NTSP and other providers that is more than 12 months old. These documents may be disclosed to Dr. Van Wagner only after Dr. Van Wagner signs the protective order declaration. Terms of disclosure are that Dr. Van Wagner will only view the documents while consulting with counsel and outside experts, may not copy the documents, may not reveal the contents of the documents to others, and may not use any of the information in the documents for any purpose other than preparation and defense of this action.

Ordered:

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Date: