

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

[PUBLIC]

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

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II.

Argument and Authorities

A. Each request is reasonably expected to yield relevant information and is not overly broad in time or scope or unduly burdensome.

Discovery is allowed in an FTC proceeding 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.”¹ Discovery should only be limited if the burden outweighs the benefit.²

Here, each discovery request 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 deprive payors like Humana of the benefits of competition between providers.³ 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 caused overall physician costs to be lower than they otherwise would have been, but also has caused the utilization of hospitalization and pharmacy to have been less costly. The requests in this case seek exactly this information.⁴

¹ 16 C.F.R. § 3.31(c)(1).

² *Id.*

³ *See* Complaint, ¶¶ 11-12, 16-17, 23-24.

⁴ *See* Exhibit A of Humana’s Motion to Quash, a copy of the subpoena *duces tecum*. Requests 1, 2, and 3 seek documents related to investigations by the FTC and the Attorney General of the State of Texas into payor and provider business relationships. Request 4 seeks documents showing the relationship between NTSP and Humana. Requests 5, 6, 7, and 9 seek documents showing the state of the marketplace at various times and showing the general business relationships between all payors and

The burden is on the party challenging the subpoena, Humana, to prove that the subpoena is unduly burdensome.⁵ The only burdens specified by Humana are cost and time, both of which have been held not enough to make production unduly burdensome.⁶ In addition, Humana's estimates of cost and time of production were based on producing documents from all Humana divisions across the country.⁷ In response to Humana's concern that responses are required by all Humana divisions across the co

providers. Request 8 seeks documents that will assist in determining the relevant geographic market.

⁵ *Plant Genetic Sys. v. Northrup King Co.*, 6 F. Supp. 2d 859, 862 (E.D. Mo. 1998).

⁶ *See United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 650 (5th Cir. 1999) (although time and effort required to comply were extensive, subpoena was not unreasonably burdensome because compliance did not "unduly disrupt or seriously hinder normal operations" of the business); *United States v. Int'l Bus. Mach. Corp.*, 71 F.R.D. 88, 92 (S.D. N.Y. 1976) (compliance time of 3-6 months and tens of thousands of dollars not burdensome in light of size and significance of antitrust litigation); *Ghandi v. Police Dept.*, 74 F.R.D. 115, 124 (E.D. Mich. 1977) (fact that production will be time consuming is not in itself burdensome).

⁷ *See Exhibit F, Humana's Motion to Quash, Affidavit of D. Gary Reed ¶¶ 4, 6.*

showing of burdensomeness; it has only provided conclusory statements.⁸ Therefore, the time period of six years should be kept for these document requests.

As shown, the benefit of allowing NTSP the discovery necessary to prepare its defense outweighs any burden on Humana. Since Humana also addressed each request separately in its motion, NTSP will respond to Humana's specific arguments in this manner, except for arguments concerning privileges and confidential or proprietary information, which will be addressed separately in later sections.

1. Request number 1 for documents Humana has provided to the Federal Trade Commission⁹ is highly relevant and not overly broad or unduly burdensome.

Humana cannot protect highly relevant information from one party in this proceeding while making it available to the other. A subpoena also may not be avoided merely by saying information sought is available from another.¹⁰

NTSP's request encompasses documents provided to the FTC with regard to Humana's relationship with all providers in the state of Texas, not only its relationship with NTSP. Although Humana contends that its business relationships with other healthcare providers is immaterial, those business relationships are highly relevant because NTSP's conduct will be judged using information for the entire relevant market and comparing NTSP's conduct against that of its competitors. Complaint Counsel has all the information previously provided by Humana available for use, and NTSP seeks the same.

⁸ See Exhibit F, Humana's Motion to Quash ¶ 9. A subpoenaed party may not merely utter claim of burden – it must prove it. *Fed. Trade Comm'n v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981).

⁹ "All documents previously produced or otherwise sent to the Federal Trade Commission concerning your business relationships with healthcare providers in the State of Texas."

¹⁰ *Covey Oil Co. v. Cont'l Oil Co.*, 340 F.2d 993, 998 (10th Cir. 1965).

This request is not overly broad or unduly burdensome, and NTSP has made this request less burdensome by referencing previous document productions.¹¹

¹¹ A production request is less burdensome if the documents have already been or are likely to be produced elsewhere. *Plant Genetic Sys.*, 6 F. Supp. 2d at 862.

¹² “All documents previously produced or otherwise sent to the Office of the Attorney General of the State of Texas concerning business relationships with healthcare providers in the State of Texas, including specifically but without limitation the documents provided in response to the Written Notice of Intent to Inspect, Examine and Copy Corporate Documents served in or about March 2002 (a sample of such Written Notice is attached hereto). [At your option, check registers as described in Class 6 of Exhibit C need not be produced]. Such documents should be provided in electronic form only.” and “Documents for the time period January 1, 2000 to June 30, 2002 described in Exhibits A through C of the above-referenced Written Notice of Intent to Inspect, Examine and Copy Corporate Documents to the extent such documents are not produced in response to Request No. 2 above. [At your option, check registers as described in Class 6 of Exhibit C need not be produced]. Such documents should be provided in electronic form only.”

¹³ Humana states that many of the documents requested by the Attorney General’s office were not generated, gathered, or provided to the Texas Attorney General. *See* Humana’s Motion to Quash, p. 5. Humana provides no further explanation for what documents were not produced, how many were not produced, and why they were not produced. To the extent any responsive documents were not provided to the Texas Attorney General, NTSP’s request number 3 properly asks for such documents.

updating these electronic files does not outweigh the benefit of allowing NTSP to develop its defense.

¹⁴ Tex. Rev. Civ. Stat. Ann. art. 1302-5.04 states only, “The Attorney General, or his authorized assistants or representative, shall not make public... .”

¹⁵ See Exhibit D-1, Humana’s Motion to Quash, ¶¶ 2, 3, 5.

¹⁶ “All internal and external correspondence, memoranda, and messages concerning or relating to NTSP.”

Humana has already provided and has promised to provide in their motion¹⁷ are those which should be compelled.

4. Request number 5 for documents comparing cost or quality of NTSP providers to other providers¹⁸ is not overly broad or unduly burdensome.

These documents are highly relevant. Cost and quality comparisons between NTSP providers and other 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. This request is adequately limited in scope by the list of NTSP individual providers attached to the subpoena. Any responsive document would have at least one NTSP provider in the comparison. NTSP providers are all located in Texas, mainly in the Dallas-Fort Worth metroplex, and are only a fraction of the providers in Texas. Therefore, this request is not overly broad and will not be unduly burdensome to Humana.

5. Request number 6 for documents containing specific facts and figures from contracts with providers¹⁹ is not unduly burdensome.

These documents are highly relevant. Statistics from contracts between Humana, a 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.

¹⁷ “Humana will...endeavor to produce any additional documents that specifically mention or reference NTSP...” Humana’s Motion to Quash, p. 9.

¹⁸ “All documents comparing the cost or quality of medical service provided by any physician provider listed on Appendix A and any other physician providers.”

¹⁹ “Documents sufficient to show the rate (as expressed in terms of a % of RBRVS or otherwise) paid to each physician provider by you, 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.”

²⁰ “All 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.”

²¹ *See* Humana’s Motion to Quash, p. 14.

request for “policies, rules, and access standards” because it is unfamiliar with Humana’s business practices and does not know where or in what form this information might be.²³ It is acceptable to NTSP if, as Humana states in its motion, Humana produces information it believes is responsive in light of the clarification provided here, subject to NTSP’s contacting Humana’s counsel if such information is insufficient.

8. Request number 9 for sample contracts²⁴ is not ambiguous.

This request is not vague or ambiguous – it requests sample contracts between Humana and any health care providing entity involving more than 75 doctors in two specific counties.

²³ If it is not known exactly what documents are needed, how the record keeper keeps his own records, or what the specific contents of records are, broad requests for production are acceptable. *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494, 496 (D. Conn. 1985); *Atlantic Coast Insulating Co. v. Maryland Cas. Co.*, 34 F.R.D. 450, 453 (E.D. N.Y. 1964); *State Theatre Co. v. Tri-States Theatre Co.*, 11 F.R.D. 381, 383 (D. Neb. 1951).

²⁴ “A sample contract used for each contract entity involving more than 75 physicians in the Counties of Dallas and/or Tarrant and any amendments, revisions, or replacements thereof.”

confidential and that disclosure would be harmful.²⁵ The protective order currently in place in this proceeding more than adequately protects the confidentiality of any documents and prevents any harm from Humana's compliance with the subpoena. The protective order provides that any information marked 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.²⁶ In addition, information may be marked restricted confidential and may be disclosed *only* to outside counsel and experts with limited exceptions.²⁷ NTSP does not object to Humana's requests in its motion to mark certain documents "restricted confidential" and "attorney eyes only." With this protection, the documents will not be seen by Humana's competitors or the marketplace generally, and Humana will not be competitively harmed by this production.

Also weighing in favor of production is that there is no absolute privilege for confidential information, and a claim of confidentiality can be rebutted by a showing that the information is relevant and necessary.²⁸ As explained in the above section, NTSP has met this showing. That Humana has agreements with third parties not to disclose proprietary information is of no relevance. "Parties cannot contract privately for the confidentiality of documents, and foreclose

²⁵ *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).

²⁶ Protective Order Governing Discovery Material, pp. 4, 9.

²⁷ *Id.*, pp. 6-7.

²⁸ *Centurion Indus., Inc.*, 665 F.2d at 326; *Exxon Chem. Patents, Inc.*, 131 F.R.D. at 671.

others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position.”²⁹

C. Truly privileged materials are properly withheld as long as Humana provides a privilege log.

NTSP agrees that Humana has the right to withhold materials subject to the attorney-client, work product, or physician-patient privilege as long as Humana creates a privilege log. NTSP also agrees that Humana may withhold information related specifically to individuals’ diagnosis, treatment, health, quality of care, an

²⁹ *Grumman Aerospace Corp. v. Titanium Metals Corp.*, 91 F.R.D. 84, 87-88 (E.D. N.Y. 1981).

III.

Conclusion

In light of the explanations and responses to Humana's objections and requested clarifications contained herein, NTSP requests that the Administrative Law Judge (a) deny in whole Humana's Motion to Quash Portions of and/or Limit Subpoena *Duces Tecum*; (b) order Humana to comply with the subpoena within five days of the Administrative Law Judge's order; and (c) grant and order such further relief to which NTSP may be justly entitled.

Respectfully submitted,

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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

**Order Denying Humana Health Plan of Texas, Inc.'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**

I.

Humana Health Plan of Texas, Inc. ("Humana") was served with a subpoena *duces tecum* by Respondent North Texas Specialty Physicians on December 18, 2003. On January 12, 2004, Humana filed a Motion to Quash Portions of or Limit the subpoena. Respondent filed a response opposing the motion. For the reasons set forth below, Humana's motion is DENIED and compliance with the subpoena *duces tecum* is due within 5 days.

II.

Humana contends that the subpoena was overly broad and unduly burdensome. The burden is on the party challenging the subpoena. Humana has not shown adequate proof that the subpoena is unduly burdensome. The requests in the subpoena 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.

Humana 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 Humana.

Ordered:

D. Michael Chappell
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on January 22, 2004, I caused a copy of the foregoing to be served upon the following persons:

Michael Bloom (via certified mail and e-mail)