

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Respondent North Texas Specialty Physicians (“NTSP”) files this response to Aetna Health Inc.’s (“Aetna”) Motion to Limit Subpoena Ad Testificandum. The deposition of Aetna’s corporate representative is scheduled for Wednesday, January 28, 2003. Aetna’s motion attempts to limit the topics that may be addressed at that deposition.

In support, NTSP shows the following:

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

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

² 16 C.F.R. § 3.31(c)(1).

³ *Id.*

deprive payors like Aetna of the benefits of competition between providers.⁴ NTSP needs information on the prices and practices in the marketplace between payors and NTSP providers as well as between payors and unrelated providers to show in its defense that NTSP has not obtained supra-competitive prices and that competition in the marketplace has not been otherwise harmed by its actions. NTSP also intends to show that its network not only has lowered overall physician costs below what they otherwise would have been, but also has lowered cost by reducing the utilization of hospitalization and pharmaceuticals. The examination topics seek exactly this information.

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

The scope of the examination topics is not unduly burdensome. Statistics from contracts between Aetna, as payor, and providers will allow NTSP to show in its defense that it has not obtained supra-competitive prices and that competition in the marketplace has not been otherwise harmed. Allowing Aetna to provide information only regarding NTSP will prevent NTSP from discovering information about the entire relevant market or comparing its conduct to that of other providers, both of which are necessary for NTSP to develop its defense.

⁴ See Complaint, ¶¶ 11-12, 16-17, 23-24.

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

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

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

¹⁰ Aetna’s Motion to Limit, p. 3.

Aetna's costs and cost comparisons related both to NTSP and other providers are highly relevant. Cost data and cost comparisons on both NTSP providers and unrelated providers in the State of Texas will allow NTSP to show in its defense that it has not obtained supra-competitive prices and that competition in the marketplace has not been otherwise harmed. Further, any health care costs, including hospital care and pharmacy costs, are highly relevant to the pending action because they relate to the marketplace cost and availability of services similar to those offered by NTSP. NTSP holds itself out as a network of physicians that is not only efficient in providing physician services, but also is efficient in the utilization of hospital services and pharmacy costs. Therefore, this request is not overly broad.

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

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

¹² Aetna's Motion to Limit, p. 4.

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

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

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

¹³ *Id.*

¹⁴ *See* Subpoena Ad Testificandum topic of examination number 6, attached to Aetna's Motion to Limit.

Respectfully submitted,

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IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,

I, Gregory D. Binns, hereby certify that on January 26, 2004, I caused a copy of the foregoing to be served upon the following persons:

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