
¹ Specifically, NTSP's response is being filed in response to (1) Nonparty Payor's Joint Expedited Motion to Modify the First Revised Scheduling Order and to Narrow Document Designations, (2) Nonparty Pacificare of Texas, Inc.'s Joinder to Nonparty Payors' Joint Expedited Motion to Modify the First Revised Scheduling Order, (3) Nonparty Humana Health Plan of Texas, Inc.'s Joinder in Nonparty Payors' Joint Expedited Motion to Modify the First Revised Scheduling Order and to Narrow Document Designations, (4) Nonparty Cigna Healthcare of Texas, Inc.'s Joinder in Nonparty Payors' Joint Expedited Motion to Modify the First Revised Scheduling Order and to

portions of each of those depositions with confidential designations pursuant to the Protective Order. Pacificare designated an entire deposition as confidential, United designated 83 pages out of 163 in one deposition confidential and 64 pages out of 73 in another deposition as confidential, and Aetna designated 143 out of 201 pages in one deposition confidential and 44 out of 131 pages in another deposition as confidential.

As a result of the breadth of the Nonparty Payors' use of the confidential designations under the Protective Order, and because this case is beyond the discovery phase and trial preparation has begun, Respondent's ability to prepare its defense has been severely hampered. Only a small portion of the documents produced and the deposition testimony given by the Nonparty Payors can be shown to any of Respondent's employees. In an effort to alleviate this burden, Respondent sought to modify the protective order to allow one of Respondent's employees access to the documents under strict circumstances. The Nonparty Payors have opposed this request.

Now that Respondent has designated its trial exhibits, the Nonparty Payors now complain that Respondent's exhibit list is somehow too broad and that Respondent's notice is somehow insufficient. As discussed below, however, neither allegation has merit. The true culprit for the Nonparty Payors' woes is their overly expansive use of the confidentiality designations in the protective order and their refusal to allow any of Respondent's employees access to documents it must have to adequately prepare its defense.

II.

Argument and Authorities

A. The Nonparty Payors have abused their ability to designate documents and deposition testimony as confidential under the terms of the Protective Order.

Of the approximately 33,000 pages produced by the Nonparty Payors, at least 90% have been designated as confidential. Notably, not one of the Nonparty Payors disputes this fact. Furthermore, out of the 706 pages of deposition testimony from the Nonparty Payors 472 pages, or 67%, has been designated as confidential. As a result, the party against whom the FTC has brought this proceeding is unable to view the vast majority of the documents produced and deposition testimony provided by the Nonparty Payors. The Nonparty Payors' abuse of the provisions in the Protective Order has severely hampered Respondent's ability to prepare its defense and negatively impacted Respondent's ability to make the best assessment regarding what documents it intends to use with each witness. What the Nonparty Payors now complain about is the effect of their own over breadth with regard to the use of the confidentiality designations.

B. Respondent's exhibit list is not overly broad.

Respondent is entitled to make decisions regarding the exhibits it intends to use at trial. Although that ability has been prejudiced by the Nonparty Payors' confidentiality designations, Respondent has made every effort to make its exhibit list as narrow as possible. Given the severe financial restraints on Respondent, counsel for Respondent has no desire to have a burdensome amount of exhibits.

As the Nonparty Payors recognize, Respondent must be careful to be inclusive in its exhibit designations. Respondent cannot predict each document it will need at the hearing.

This only makes sense, for Respondent puts its case on second. Respondent must be prepared to meet the evidence Complaint Counsel presents. Respondent does not know what Complaint Counsel will ask of each witness, what exhibits Complaint Counsel will show to each witness, or how each witness will testify. Not only does Respondent have to try to predict these unknowns, but under the present circumstances, it must attempt to do so without the assistance of its client.

The Nonparty Payors make reference that some of the exhibits designated by Respondent are “irrelevant.” For instance, they state that many of the documents contain rate information from providers who are not related to Respondent. The Nonparty Payors really have no standing to argue what is and what is not relevant to Respondent’s defense. The Nonparty Payors also miss the point. Comparative rate information provides perspective for the allegations being made by Complaint Counsel. The Nonparty Payors also argue that clinical performance data for providers not affiliated with Respondent has no bearing on this matter. Again, the Nonparty Payors fail to recognize that in this rule of reason case, the efficiencies created by Respondent’s risk contracting activities carry over into the provision of medical care under non-risk contracts. The increased efficiencies of Respondent’s physicians can be shown by comparisons to clinical

document production.

Finally, the Nonparty Payors claim that the list of Bates ranges is insufficient. This argument is hollow at best. Complaint Counsel's list also has a Bates range of documents, but includes only three other pieces of information: the exhibit number, the date of the document, and a description. As a practical matter, Respondent is willing to provide the Nonparty Payors with its exhibit list. It is unclear, however, how this information will make the Nonparty Payors' *in camera* motions any easier. Surely the Nonparty Payors are going to review each document and do not intend to rely on Respondent's description of their own documents to make determinations regarding *in camera* treatment.

C. The Nonparty Payors' complaint about Respondent's desire to use "Restricted Confidential, Attorney Eyes Only" material at trial is without merit.

Pursuant to paragraph 4 of the Protective Order, material designated "Confidential - FTC Docket No. 9312" can be shown to witnesses at trial. No notice by Respondent of its intent to do so is required.

The Nonparty Payors argue that the notice indicating Respondent's desire to use "Restricted Confidential, Attorneys Eyes Only" documents is defective. The Nonparty Payors failed to read the letter. The letter provides a list of Bates ranges of the documents Respondent

exactly who the experts are, who the specific Nonparty Payor employees and representatives are, and the finite universe of other individuals which may be shown the document if they had been given previous access. Furthermore, as required by the Protective Order, the affiliation for each of these persons is clearly listed in the exhibit lists.

The letter the Nonparty Payors complain about is not intended to be some ruse whereby Respondent is able to gain access to the documents by Karen Van Wagner. A motion seeking such relief is already on file and will be determined by the Administrative Law Judge. Respondent does anticipate, however, that it will ask to be allowed to keep an NTSP representative in the courtroom during the hearing to assist Respondent's counsel with the defense.

The Protective Order provides the next step, which is for the Nonparty Payors and Respondent to confer regarding the disclosure of "Restricted Confidential, Attorneys Eyes Only" discovery materials. Counsel for Respondent will do so and, to the extent it cannot reach agreement with the Nonparty Payors, it will file the appropriate motion to use such materials at the trial of this matter. Hopefully, the Nonparty Payors will review their own documents in light of Your Honor's recent order so that any unnecessary burden on the Court and the parties is eliminated.

D. The Nonparty Payors have received an extension to file motions for treatment.

The Nonparty Payors seek an extension for their deadline to file motions for *in camera* treatment. Respondent understands that Your Honor has already ruled upon this request. Due to the high standard that must be met for *in camera* treatment, Respondent questions whether *in camera* treatment is warranted for the documents the Nonparty Payors seem to indicate must be

kept from the public record and anticipates that once the standard is scrutinized, the number of documents for which *in camera* treatment will be sought will decrease significantly.

III.

Conclusion

For the foregoing reasons, Respondent requests that the Nonparty Payors' motions be denied and that the Nonparty Payors be required to file the appropriate motions for *in camera* treatment as they deem necessary in accordance with the scheduling provided by the Administrative Law Judge. Respondent also requests such other relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2004, I caused a copy of the foregoing document to be served upon the following persons:

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