

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

\_\_\_\_\_  
In the Matter of )  
 )  
 )  
North Texas Specialty Physicians, )  
Respondent )  
 )  
 )  
\_\_\_\_\_ )

Docket No. 9312

**NON-PARTY PACIFICARE OF TEXAS, INC.’S MOTION FOR IN CAMERA  
TREATMENT OF CERTAIN DESIGNATED HEARING EXHIBITS**

Non-Party PacifiCare of Texas, Inc. (“PacifiCare”) hereby files its Motion for In Camera Treatment of Certain Designated Hearing Exhibits. PacifiCare respectfully requests that the Administrative Law Judge enter an Order pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), granting in camera treatment for an indefinite duration or, alternatively, no less than ten years, to the documents and deposition testimony listed in the Appendix to this Motion and the proposed Order. The documents are secret and material to PacifiCare’s on-going and future business. Disclosure of these materials would harm PacifiCare. In support of this Motion, PacifiCare respectfully refers the Court to the accompanying Declaration of John H. Lovelady and submits as follows:

**ARGUMENT**

**I. Introduction**

On March 17, 2004, PacifiCare received notice from both the Federal Trade Commission (“FTC”) and North Texas Specialty Physicians (“NTSP”), of their intent to offer into evidence at trial highly confidential and business-sensitive documents that Non-Party

PacifiCare originally produced to the FTC in connection with the FTC's initial investigation of NTSP.<sup>1</sup> Pursuant to the Court's order of April 1, 2004, NTSP provided an amended list of designations to PacifiCare on April 7, 2004.<sup>2</sup> NTSP's amended notice includes designations to confidential portions of the deposition of John H. Lovelady, Vice President of Network Management for PacifiCare. PacifiCare believes that approximately eighteen of these documents<sup>3</sup> and portions of twenty pages of the deposition testimony, which PacifiCare had diligently marked as "Confidential" or "Restricted Confidential, Attorney Eyes Only" pursuant to the terms of the October 16, 2003 Protective Order Governing Confidential Material in this matter, contain information that is secret and material to PacifiCare's current and prospective business. Accordingly, pursuant to the Court's Order of April 1, 2004, PacifiCare respectfully submits this Motion for In Camera Treatment of Certain Designated Hearing Exhibits as listed on the attached Appendix.

## **II. Standard for In Camera Treatment**

Materials merit in camera treatment when their public disclosure will result in a clearly defined, serious injury to the person or corporation whose records are involved. H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1188 (1961). Such serious injury requires that the information in question is secret and material to the applicant's business. In the Matter of Bristol

---

<sup>1</sup> The FTC in turn produced these documents to NTSP in connection with this action.

Meyers Co., 90 F.T.C. 455, 456 (1977). The following factors should be weighed in considering both secrecy and materiality: (1) the extent to which the information is known outside the applicant's business; (2) the extent to which the information is known by employees and others involved in the applicant's business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its

(including NTSP) regarding the terms at which PacifiCare or the provider would or should contract for healthcare services; (3) internal correspondence and analyses summarizing the terms of the provider contracts and outlining the financial and strategic effect of these terms on PacifiCare; and (4) portions of responses sent to the FTC which contain certain PacifiCare fee schedules and prices and deposition testimony discussing this material. The documents and deposition testimony within these categories goes to the heart of PacifiCare's business and, as set out below, is precisely the type of material for which in camera treatment was created.

The first category of documents for which PacifiCare seeks in camera treatment consists of five documents: (1) the Provider/Payor Services Agreement between NTSP and Harris Methodist Select<sup>4</sup> (FTC-NTSP-PCFC 000036 – 000275) and the amendments to this agreement (FTC-NTSP-PCFC 000003 – 000007; 000008 - 000012; 000021 – 000022; 000023 – 000027; 000030 - 000035); (2) the PacifiCare of Texas ANHC/IPA Services Agreement (Professional Capitation/Approved NonProfit Health Corporation) with NTSP (FTC-NTSP-PCFC 000327 – 000391) and two amendments to this agreement (FTC-NTSP-PCFC 000298 – 000310; 000311 – 000321); (3) PacifiCare's agreement with Texas Health Care (FTC-NTSP-PCFC 01012); and (4) an agreement between PacifiCare and Metroplex Premier Women's Healthcare Association ("Metroplex") and the Letter Agreement anticipating this final contract (FTC-NTSP-PCFC 01013 – 01014; 01015 – 01020). Also at issue are portions of approximately fourteen pages of John H. Lovelady's deposition testimony discussing the terms of these agreements (43:3 – 43:7; 43:14 – 43:22; 51:6 – 53:22; 62:9; 62:24 – 63:14; 64:12 – 64:15; 90:13 – 90:25; 91:24 – 92:2; and 107:15 – 109:12). These documents and pages of the deposition testimony are included as Exh. 2.

<sup>4</sup> Harris Methodist Select assigned its rights under this contract to Harris Methodist Health Plan, Inc. PacifiCare purchased Harris Methodist Health Plan, Inc. on February 1, 2000.

The agreements and the deposition testimony which discusses them contain heavily negotiated, proprietary terms between PacifiCare and individual providers that are extremely competitively sensitive. The agreements are the product of significant investment by PacifiCare and are the key to PacifiCare's profitability. Indeed, contract negotiations can span months and occupy hundreds of employee hours, including not only negotiation time, but also strategic thinking, actuarial analysis, financial modeling and legal and

contracting terms, as well as the strategic thinking behind them, and use this information in future negotiations to disadvantage PacifiCare's contracting position. Publication of the various terms with which PacifiCare contracts with providers also would allow providers to coordinate among themselves. Clearly, this damage, both to PacifiCare specifically and competition generally, necessitates granting in camera treatment of these agreements and the deposition testimony discussing them.

The second category of documents for which PacifiCare seeks in camera treatment consists of correspondence between PacifiCare and various healthcare providers regarding the terms at which PacifiCare or the healthcare provider would or should contract for healthcare services. Included within this category are five letters and/or memoranda between PacifiCare and NTSP detailing agreed upon and proposed contract terms (FTC-NTSP-PCFC-000282 – 000283; 000284 – 000286; 00989 – 00990; 00991 – 00992; and 00993 – 00995); two letters between PacifiCare and Surgical Associates of the Mid-Cities regarding contract terms (FTC-NTSP-PCFC-00998 – 01000; 01001 – 01003); and a letter from Texas Pulmonary Consultants P.A. to PacifiCare regarding proposed contract terms (FTC-NTSP-PCFC-01004 – 01011). These documents are included as Exh. 3.

These few letters and memoranda reflect the terms upon which agreement has been reached as well as proposed terms. Like the final agreements outlined above, the information contained within these documents is extremely valuable to PacifiCare as, once again, it contains heavily negotiated, proprietary and competitively sensitive terms and proposals regarding the cost of providing healthcare services to PacifiCare's members. The fact that some of these terms are not final does not obviate the need for in camera treatment. To the contrary, it strengthens this need as their disclosure will reveal not only important information relevant to

and contained in the current contracts, but also information regarding PacifiCare's negotiating and pricing strategy. Indeed, internal disclosure of this material is even more limited than disclosure of the agreements; these documents are shared only with the negotiating team. None of these documents are of the type that PacifiCare ever would share with competitors or other providers as they lay out the pricing and contracting terms at which PacifiCare will contract for healthcare services. In fact, with this knowledge, both competitors and providers could and would undermine severely PacifiCare's current competitive standing and its future contract negotiations. Consequently, these documents should be granted in camera treatment.

The third category of material for which PacifiCare requests in camera treatment consists of two documents containing internal analysis of the terms upon which PacifiCare agreed to contract with NTSP and the financial and strategic effect of these terms upon PacifiCare (FTC-NTSP-PCFC-000016 – 000020; 000294 – 000295). These two documents are included as Exh. 4. Certain of the terms that are the subject of these analyses are still in effect

Should this information be made public, providers generally and NTSP in particular could and would use it against PacifiCare in future contract negotiations. Competitors too would use this information to PacifiCare's disadvantage, severely injuring PacifiCare's competitive position. In camera treatment should be granted to these two documents in their entirety to prevent such injury.

Finally, PacifiCare requests in camera treatment for portions of letters it sent to the FTC in response to the voluntary access letter the FTC sent to PacifiCare during the FTC's initial investigation, specifically pages FTC-NTSP-PCFC 01031; 01048; and 01401 – 01410, and the deposition testimony of John H. Lovelady discussing these pages (82:16 – 87:25). This material is included as Exh. 5. These pages contain and discuss fee schedules and pricing information under which PacifiCare contracts with numerous providers in the Dallas/Fort Worth area. Although certain of these fee schedules date from 1999 and may no longer apply to the particular provider, most of the fee schedules remain valid. Indeed, the prices at issue are those at which PacifiCare currently contracts with NTSP. Moreover, the information contained in the tables at FTC-NTSP-PCFC 01401 – 01410 would allow both PacifiCare's competitors and the providers with whom it contracts to derive PacifiCare's overall reimbursement rate, as well as the amount PacifiCare pays for each service.

The information contained in these few pages is highly competitively sensitive and is extremely valuable to PacifiCare. It is not publicized in any way outside the company and its distribution inside the company is limited to those employees who administer the contracts and those who negotiate them. Similar to the information contained in the first three categories of documents, this information could and would be used by both competitors and providers to



seriously injure PacifiCare's competitive standing. Providers also could use this information to collude. For these reasons, it merits in camera treatment.

**IV. In Camera Treatment for the Documents and Deposition Testimony Included in the Attached Appendix Should Extend Indefinitely or, at Minimum, for a Period of Ten Years**

PacifiCare requests in camera treatment for the documents and deposition testimony described in this Motion and listed in the attached Appendix for an indefinite period because contracts between healthcare providers and payors typically run for a number of years, and because later contracts often incorporate terms found in preceding contracts. Indeed, it is entirely possible that the parties to the contracts at issue will extend and/or amend the current contracts instead of renegotiating new documents. For example, 1999 fee-for-service agreement between PacifiCare and NTSP has been amended five times and is still in effect. Therefore, it is unclear when these documents and the deposition testimony discussing them will cease to reflect current pricing and contracting terms. At minimum, however, PacifiCare requests in camera treatment for a period of ten years to provide a reasonable opportunity for the contracts to expire and their terms to become outdated.

**V. Conclusion**

PacifiCare strives to set itself apart from its competitors and succeed in the challenging health care arena. In doing so, it has created certain highly sensitive documents relating to the terms and prices at which it contracts for healthcare services. As set out above, disclosure of these documents and the deposition testimony discussing them would result in a clearly defined serious injury to PacifiCare, severely undercutting PacifiCare's efforts in a competitive industry. For these reasons, and for those set out in the declaration of John H.

Lovelady, PacifiCare respectfully requests that this Court grant its motion directing in camera treatment for the exhibits designated in the attached Appendix.

Dated: April 12, 2004

Respectfully submitted,

---

Lynda K. Marshall  
D.C. Bar No. 452440  
Hogan & Hartson L.L.P.  
555 13<sup>th</sup> Street, N.W.  
Washington, DC 20004  
202-637-5838 (Tel.)  
202-637-5910 (Fax)  
[lkmarshall@hhlaw.com](mailto:lkmarshall@hhlaw.com)

Counsel for PacifiCare of Texas, Inc.

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

\_\_\_\_\_  
In the Matter of )  
 )  
North Texas Specialty Physicians, )  
Respondent )  
 )  
\_\_\_\_\_ )

Docket No. 9312

**ORDER GRANTING NON-PARTY PACIFICARE OF TEXAS, INC.’S MOTION FOR  
IN CAMERA TREATMENT OF CERTAIN DESIGNATED HEARING EXHIBITS**

Upon consideration of Non-Party PacifiCare of Texas, Inc.’s (“PacifiCare’s”) Motion for In Camera Treatment of Certain Designated Hearing Exhibits and the Confidential Declaration in support thereof, it is hereby ORDERED that PacifiCare’s motion is GRANTED. It is further ordered that the documents and deposition testimony of John H. Lovelady identified in the attached Appendix are afforded indefinite in camera treatment.

Dated:

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

## CERTIFICATE OF SERVICE

I, Andrea E. Ryan, hereby certify that on April 12, 2004, I caused copies of:

1. Non-Party PacifiCare of Texas, Inc.'s Motion For In Camera Treatment of Certain Designated Hearing Exhibits;
2. Declaration of John H. Lovelady In Support of Non-Party PacifiCare of Texas, Inc.'s Motion for In Camera Treatment of Certain Designated Hearing Exhibits; and
3. Proposed Order

to be served upon the following persons:

Office of the Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
*(Original and 12 copies of both public and confidential versions served via messenger, electronic copies served via e-mail (public version) and disk (confidential version))*

Michael Bloom  
Senior Counsel  
Federal Trade Commission  
Northeast Region  
One Bowling Green  
Suite 318  
New York, NY 10004  
*(Public and confidential versions served via certified mail and e-mail)*

Barbara Anthony  
Director  
Federal Trade Commission  
Northeast Region  
One Bowling Green  
Suite 318  
New York, NY 10004  
*(Public and confidential versions served via certified mail)*

Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
Room H-104  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
*(Two copies each of public and confidential versions served via messenger)*

Counsel for North Texas Specialty Physicians  
Gregory D. Binns  
Gregory S. C. Huffman  
Thompson & Knight, LLP  
1700 Pacific Avenue  
Suite 3300  
Dallas, TX 75201  
*(Public and confidential versions served via certified mail and e-mail)*

Counsel for Aetna Health Inc.  
Kay Lynn Brumbaugh  
Andrews Kurth LLP  
1717 Main Street  
Suite 3700  
Dallas, TX 75201  
(

Counsel for Cigna  
Kevin Maclay  
Jones Day  
51 Louisiana Avenue, NW  
Washington, DC 20001  
*(Public version served via UPS)*

Counsel for MSM  
Lee Morris  
Munsch Hardt Kopf Harr PC  
1445 Ross Avenue  
Dallas, TX 75202  
*(Public version served via UPS)*

---

Andrea E. Ryan