

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

[PUBLIC]

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

**NORTH TEXAS SPECIALTY PHYSICIANS' RESPONSE TO BLUE CROSS BLUE SHIELD OF TEXAS'S
MOTION TO QUASH AND/OR LIMIT SUBPOENA *DUCES TECUM***

Respondent North Texas Specialty Physicians ("NTSP") files this response to Blue Cross Blue Shield of Texas's ("BCBSTX") Motion to Quash. In support, NTSP shows the following:

I.

Background

On December 18, 2003, NTSP served a subpoena *duces tecum* on BCBSTX. Respondent counsel spoke with BCBSTX counsel on December 30, 2003, and January 5, 2004, when BCBSTX counsel expressed their intent not to comply with the subpoena and did not offer a reasonable counterproposal for production.

On January 7, 2004, BCBSTX filed a Motion to Quash and/or Limit the subpoena *duces tecum* served by NTSP requesting documents related to this action. BCBSTX asks the Administrative Law Judge to quash or limit the subpoena, claiming the requests are overly broad in time and scope, unduly burdensome, and require the production of information BCBSTX considers confidential. NTSP contests each of BCBSTX's grounds for this motion and asks the Administrative Law Judge to enforce the subpoena as written.

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

The burden is on the party challenging the subpoena, BCBSTX, to prove that the subpoena is unduly burdensome.⁵ The only burdens arguably specified by BCBSTX are cost and time, both of which have been held not enough to make production unduly burdensome.⁶ BCBSTX has not even provided specific estimates or evidence as to the exact cost and time anticipated.⁷ In response to BCBSTX's concern that responses would be required by all of Health Care Service Corporation's divisions, only BCBSTX or related entities which dealt with NTSP would appear to need to respond. Further, each request is reasonably specific as to time and scope. As such, the benefit of allowing NTSP the discovery necessary to prepare its defense outweighs any burden on BCBSTX.

Since BCBSTX addressed each request separately in its motion, NTSP will respond to BCBSTX's specific arguments in this manner.⁸

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 A reference was made in its motion to an anticipated affidavit of an employee, but that affidavit has not yet been received by NTSP and no specifics as to the contents of that affidavit were provided. See Motion to Quash, p.4, fn. 1.

⁸ For request number 9, "a sample contract used for each contracting entity involving more than 75 physicians in the Counties of Dallas and/or Tarrant and any amendments, revisions, or replacements thereof", BCBSTX only requests clarification on the type of contract and the time period that has already been provided by Respondent counsel. The request includes contracts for the provision of physician services for the past six years.

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

BCBSTX 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 in any capacity, not only for the investigation in this case. Although BCBSTX contends that its business relationships with other health care 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 that information against that of its competitors. Complaint Counsel has all information previously provided by BCBSTX available for use, and NTSP seeks the same.

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

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).

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. Respondent has also told BCBSTX that it need not produce the documents which Complaint Counsel has already provided to Respondent.

2. Requests numbers 2 and 3 for documents previously requested by and provided to the Office of the Attorney General of the State of Texas¹² do not require production of privileged or otherwise protected information and are not unduly burdensome.

Appendix A of the subpoena provided a sample letter detailing a document request previously made by the Attorney General of Texas. BCBSTX received from the Texas Attorney General the same letter addressed to itself and responded to that letter by producing documents.¹³ These are the same documents that NTSP now requests. Again, NTSP has made this request less burdensome by referencing a previous document production. BCBSTX has already assembled and produced these same documents, except for any updated information of the same type. These documents are highly relevant. BCBSTX's relationships with health care providers in the state of Texas will be evidence of NTSP's conduct, other health care providers' conduct, and the effects of such conduct considering the entire market. The minimal burden of re-producing those electronic files does not outweigh the benefit of allowing NTSP to develop a defense.

BCBSTX's claim that these documents are protected by statute is erroneous. The statute cited by BCBSTX only prevents the Attorney General from producing these documents in

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 See BCBSTX's Motion to Quash, p. 5.

response to an open records request; it does not insulate BCBSTX from otherwise producing the documents elsewhere.¹⁴ NTSP has not requested these documents from the Attorney General; it is requesting them directly from BCBSTX. These documents, if generally described in a request, would be available to NTSP from BCBSTX. NTSP has merely tried to save BCBSTX time and money by requesting a previously-assembled set of documents which BCBSTX has readily available for production.

3. Request number 4 for correspondence concerning or relating to NTSP¹⁵ is not overly broad.

A major issue in this case is NTSP's conduct towards payors such as BCBSTX and that conduct's effect in the marketplace. Any correspondence relating to this conduct is clearly relevant, and that is exactly the subject matter of this request. Further, the six-year period requested is the time frame of conduct claimed by Complaint Counsel as being relevant to this suit. Therefore, the request is not overly broad.

Six years is also not an extraordinary length of time as BCBSTX suggests. BCBSTX implies that these documents may not still exist or that they may be stored off-site and requests that the time period be shortened to two years. Besides excluding two-thirds of the relevant time frame being investigated by Complaint Counsel, it is unlikely that BCBSTX destroys documents and other records or even has them moved off-site after only two years. Indeed, BCBSTX has made no showing of burdensomeness. Therefore, the time period of six years should be kept for these document requests.

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 "All internal and external correspondence, memoranda, and messages concerning or relating to NTSP."

4. Request number 5 for documents comparing cost or quality of NTSP providers to other providers¹⁶ is not overly broad.

BCBSTX claims that this request is overly broad because it seeks "all documents." This argument overlooks the remainder of the request. NTSP has specified the subject matter of the documents it requests to discover very particular information – cost or quality comparisons between a NTSP provider and another provider. NTSP is not in a position to know BCBSTX's business records-keeping practices and, therefore, in which documents it is most likely this information will be found. On the other hand, BCBSTX is familiar with its business practices, and given the specific subject matter of the request, requesting "all documents" for that subject matter is not overly broad or unduly burdensome for BCBSTX.¹⁷

In an effort to assist BCBSTX with this request, NTSP provided a list of NTSP providers as an attachment to the subpoena.¹⁸ The unidentified group of "other physician providers" cited by BCBSTX as making this request unreasonable was not an addition to the list of providers, but rather a description of against whom the comparisons might be made.¹⁹

¹⁶ "All documents comparing the cost or quality of medical service provided by any physician provider listed on Appendix A and any other physician providers."

¹⁷ If it is not known exactly what documents are needed, a subpoena may request all documents relating to a specified matter or issue. *State Theatre Co. v. Tri-States Theatre Co.*, 11 F.R.D. 381, 383 (D. Neb. 1951). Broad requests for production are also more acceptable if the outsider does not have knowledge of how the record keeper keeps his own records or is ignorant of the specific contents of records. *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).

¹⁸ Exhibit B, BCESTX's Motion to Quash.

¹⁹ NTSP providers are located in the Dallas-Fort Worth metroplex, which will tend to limit the number of responsive documents. If broader comparisons exist, they should be relatively few in number.

5. Request number 6 for documents containing specific facts and figures from contracts with providers²⁰ is not unduly burdensome.

Contrary to BCBSTX's claim that this request requires production of thousands of documents, including every contract BCBSTX has in Texas, this request seeks only specific pieces of information that could be located in a table or similar summary chart or obtained from specific pages of contracts. The request is worded as "documents sufficient to show" a rate, time period, type of contract, type of insurance plan, parties, and covered physicians for BCBSTX contracts. This is the type of targeted information BCBSTX probably uses in its ordinary course of business and has not been shown to be unduly burdensome to obtain or produce in summary form to avoid the production of thousands of pages of contracts.

6. Request number 7 for documents comparing costs of health care²¹ is comprehensible and not overly broad.

BCBSTX once again claims that use of the term "all documents" renders a request overly broad despite the specificity of the subject matter of the request. This request is not overly broad; it seeks only documents containing comparisons of costs of health care in Texas. This request is also easily comprehensible – NTSP has specified the types of relevant health care costs. BCBSTX seeks clarification of the word "cost"; that term refers to the external marketplace cost to patients and insurers, not the internal cost to physicians or hospitals. The comprehensibility of the request is evidenced by BCBSTX's own response – the patterns and compilations of cost

²⁰ "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."

²¹ "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."

information mentioned are responsive to the request, and BCBSTX should be familiar with these types of documents because it undoubtedly engages in cost comparisons such as those requested in its ordinary course of business.

7. Request number 8 for documents establishing geographic service areas²² is not ambiguous.

BCBSTX's response to this request demonstrates its understanding of the information being requested. BCBSTX has agreed to produce "maps used to determine geographic areas within Texas for business purposes." NTSP also requests that BCBSTX provide any other documents used in addition to these maps to determine "geographic areas to be serviced by physician providers" in Texas, including, but not limited to, policies, rules, and access standards. This information will show how payors assign geographic service areas to providers and is relevant to determining the breadth of the appropriate geographic market in this proceeding.

B. Response cannot be avoided merely because BCBSTX considers the information proprietary, and, further, the confidentiality of the information is adequately protected by the protective order in place.

BCBSTX also claims it does not have to produce documents that it considers confidential and proprietary. In support of this claim, BCBSTX makes the vague statements that "a great deal of the information...is sensitive financial information" and "BCBSTX itself considers information confidential and proprietary."²³ The party claiming confidentiality must have specific proof that the information is confidential.²⁴ BCBSTX makes no such showing. Even if BCBSTX were able

²² "Documents sufficient to show your policies, rules, and access standards establishing the geographic areas to be serviced by physician providers in the State of Texas."

²³ BCBSTX's Motion to Quash, p. 6.

²⁴ *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).

to prove that these documents are truly confidential, it must also have specific proof 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 BCBSTX's production. 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 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.

BCBSTX also claims that business negotiations between the parties will be affected by this request and that BCBSTX may otherwise be placed at a significant competitive disadvantage.²⁹ NTSP is interested in this information solely to prepare its defense in this proceeding. Not only is NTSP not interested in using this information to benefit itself in negotiations, it is unable to do so under the protective order.

BCBSTX claims the protective order is inadequate for several reasons that NTSP will specifically address. First, BCBSTX is concerned with disclosure of patient information. No

²⁵ *Centurion Indus., Inc.*, 665 F.2d at 325; *Exxon Chem. Patents, Inc.*, 131 F.R.D. at 671.

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.

²⁹ BCBSTX's Motion to Quash, pp. 7-9.

information concerning particular patients' names or other personal data is considered relevant by NTSP and may be redacted by BCBSTX. Second, BCBSTX is incorrect in its statement that restricted confidential documents may be disclosed to witnesses and competitors with little or no warning. Before any restricted confidential documents are disclosed, notice must be given to the producing party—in this case, BCBSTX. Upon that notice, BCBSTX may object to disclosure simply by providing a written statement of reasons. If there is an objection, disclosure is *not allowed* unless by order of the administrative law judge or an appeals court.³⁰ Judicial review before disclosure has not been circumvented; it has been firmly put in place. Finally, BCBSTX claims that NTSP attorneys could discuss the documents with their clients without violating the protective order. This is simply not true. The protective order prevents the confidential documents from being "disclosed."³¹ Disclosure encompasses direct or indirect means of disclosure – clearly, counsel reading a document aloud to an unauthorized person would be considered disclosure.³²

C. The time for response was not unreasonable.

The subpoena was sent to BCBSTX on December 18, 2003. The deadline for compliance was originally January 2, 2004, which NTSP agreed to extend to January 9, 2004. The original time for compliance was 15 days. Although not binding in the case of a time set in a subpoena, Federal Rule of Civil Procedure 6, relating to computation of time, is instructive. If the time period for compliance is more than 11 days, weekends and legal holidays are not excluded when

³⁰ Protective Order Governing Discovery Material, pp. 6-7.

³¹ *Id.* at p. 6.

³² *Id.* at p.9.

calculating the time for compliance.³³ Exactly what BCBSTX wants to do is exclude these days. Further, even if these days were excluded, this would only provide BCBSTX a four-day extension until January 6, 2004, which is less than what NTSP agreed to after speaking with BCBSTX counsel. Considering that the original time period granted was not unreasonable, that an extension was voluntarily granted by NTSP, that it has already been over three weeks since the subpoena was sent, and the urgency of NTSP receiving this important information before upcoming deadlines³⁴, NTSP asks that the Administrative Law Judge, upon denying the Motion to Quash and/or Limit the subpoena, set the compliance date to five days from the date of that order.

III.

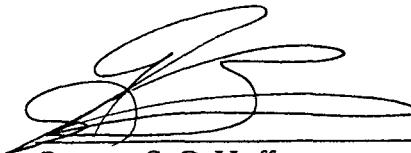
Conclusion

In light of the explanations and responses to BCBSTX's objections and requested clarifications contained herein, NTSP requests that the Administrative Law Judge (a) deny in whole BCBSTX's Motion to Quash and/or Limit Subpoena *Duces Tecum*; (b) order BCBSTX 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.

³³ Fed. R. Civ. P. 6(a).

³⁴ NTSP must submit its revised witness list by January 21, 2004; close of discovery is January 30, 2004; deadline for filing motions for summary decision is March 2, 2004; and hearing is set for April 28, 2004. See Scheduling Order. In addition, NTSP is currently taking depositions at which this information would be helpful.

Respectfully submitted,



Gregory S. C. Huffman
William M. Katz, Jr.
Gregory D. Binns

THOMPSON & KNIGHT LLP
1700 Pacific Avenue, Suite 3300
Dallas TX 75201-4693
214.969.1700
214.969.1751 - Fax
gregory.huffman@tklaw.com
william.katz@tklaw.com
gregory.binns@tklaw.com

**ATTORNEYS FOR NORTH TEXAS
SPECIALTY PHYSICIANS**

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF

NORTH TEXAS SPECIALTY PHYSICIANS,
A CORPORATION.

Docket No. 9312

**Order Denying Blue Cross Blue Shield of Texas's Motion
to Quash and/or Limit Subpoena *Duces Tecum***

I.

Blue Cross Blue Shield of Texas ("BCBSTX") was served with a subpoena *duces tecum* by Respondent North Texas Specialty Physicians on December 18, 2003. On January 7, 2004, Blue Cross Blue Shield of Texas filed a Motion to Quash and/or Limit the subpoena. Respondent filed a response opposing the motion. For the reasons set forth below, Blue Cross Blue Shield of Texas's motion is DENIED and compliance with the subpoena *duces tecum* is due within 5 days.

II.

BCBSTX contends that the subpoena was overly broad and unduly burdensome. The burden is on the party challenging the subpoena. BCBSTX has shown no specific proof as to how 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.

BCBSTX 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 BCBSTX.

Ordered:

D. Michael Chappell
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I, Gregory D. Binns, hereby certify that on January 13, 2004, I caused a copy of the foregoing to be served upon the following persons:

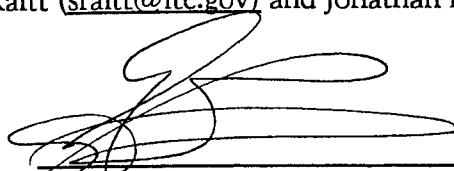
Michael Bloom (via certified mail and e-mail)
Senior Counsel
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004

Hon. D. Michael Chappell (2 copies via Federal Express)
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Office of the Secretary (via Federal Express and e-mail)
Donald S. Clark
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Michael S. Hull (via certified mail and Federal Express)
Counsel for Blue Cross Blue Shield of Texas
Hull Hendricks & MacRae LLP
Bank One Tower
221 West 6th Street, Suite 2000
Austin, Texas 78701

and by e-mail upon the following: Susan Raitt (sraitt@ftc.gov) and Jonathan Platt (jplatt@ftc.gov).



Gregory D. Binns