

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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| _____ |) | |
| In the Matter of |) | |
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| North Texas Specialty Physicians, |) | Docket No. 9312 |
| Respondent |) | |
| |) | |
| _____ |) | |

**NON-PARTY PACIFICARE OF TEXAS, INC.’S OPPOSITION TO NORTH TEXAS
SPECIALTY PHYSICIANS’ FIRST AMENDED EXPEDITED MOTION TO MODIFY
PROTECTIVE ORDER**

Non-party PacifiCare of Texas, Inc. (“PacifiCare”) opposes North Texas
Specialty Physicians’ (“NTSP’s”) First Amended Expedited Motion to Modify Protective Order.

In support thereof, PacifiCare submits the following:

I. Background

Between November 2001 and June 2003, PacifiCare, a non-party to this action,
produced to the FTC numerous documents related to NTSP and other health care providers. The
FTC subsequently produced approximately 1,400 pages of PacifiCare’s documents in this
litigation.^{1/} Many of these documents were marked as “Confidential” or “Restricted
Confidential – Attorney Eyes Only” pursuant to the Protective Order, which was agreed to and
signed by NTSP.

The documents marked “Restricted Confidential – Attorney Eyes Only” include,
among other things, PacifiCare’s internal evaluations of contract negotiations between
PacifiCare and NTSP and evaluations of proposed amendments to the contract between

^{1/} The 1,400 pages of documents produced by PacifiCare are a small fraction of the 33,000 pages of
documents produced by third-party payors that NTSP claims are the subject of this motion.

PacifiCare and NTSP. These negotiations regarding the contract and amendments took place between PacifiCare personnel and Dr. Karen Van Wagner, Executive Director of NTSP and the individual primarily responsible for contract negotiations with PacifiCare. The “Restricted Confidential” category also includes documents containing fee schedules and pricing information for other providers that are not parties to this matter and that are in competition with NTSP.

NTSP now asks this Court to modify the Protective Order to which NTSP agreed and grant NTSP’s Executive Director and primary payor negotiator, Dr. Van Wagner, unfettered access to unspecified “Confidential” and “Restricted Confidential” documents. NTSP makes no showing as to why it is necessary for Dr. Van Wagner to have access to any of the protected information, but instead relies only on a vague need to “test the veracity of and circumstances surrounding” various unspecified documents.^{2/} This generalized need is not sufficient to override the confidentiality provisions of the Protective Order. If NTSP wishes its executives or employees to have access to documents protected by the confidentiality designations of the Protective Order, the terms of the Order set forth a procedure for doing so. NTSP should not be allowed to circumvent this procedure.

Moreover, revelation of the PacifiCare information protected by the confidentiality provisions of the Protective Order to Dr. Van Wagner, or any NTSP employee, would cause irreversible harm to PacifiCare, regardless of the protections placed on copying and circulation of the material.

^{2/} NTSP’s First Amended Expedited Motion to Modify Protective Order (“Mot.”) at 3.

II. ARGUMENT

A. If NTSP seeks access to documents protected by the confidentiality provisions of the Protective Order to which it agreed, it should follow the procedures set forth in the Order.

NTSP's motion to modify the Protective Order in this case is unnecessary and overbroad as the terms of the Protective Order to which it agreed provide NTSP with a clear and straightforward method through which it can seek access for its employees to protected documents - challenge the confidentiality designations of the documents produced by PacifiCare. Paragraph 6(a) of the Protective Order specifically states:

If any Party seeks to challenge a Producing Party's designation of material as Confidential Discovery material or any other restriction contained within this Protective Order, the challenging Party shall notify the Producing Party and all Parties to this action of the challenge to such designation. Such notice shall identify with specificity...the designation being challenged.... The Producing Party, preserving its rights, and the challenging Party shall meet and confer in good faith in an attempt to negotiate changes to any challenged designation.

Protective Order ¶ 6(a).

NTSP has made no use of the Protective Order in seeking to allow Dr. Van Wagner access to PacifiCare's protected documents. NTSP failed to notify PacifiCare that NTSP believed Dr. Van Wagner should be permitted access to documents PacifiCare produced with confidentiality designations, failed to identify with specificity any documents that should be made available on a broader basis than their confidentiality designations currently allow, and made no attempt to confer with PacifiCare on this topic.^{3/} Instead, NTSP seeks wholesale modification of the Protective Order to allow Dr. Van Wagner access to two categories of documents:

^{3/} PacifiCare's counsel telephoned counsel for NTSP to discuss this matter on March 9, 2004, but that call was never returned.

1. documents referring to the conduct or contractual activities of NTSP and its participating providers; and
2. documents containing data comparing NTSP and other providers that is more than 12 months old.^{4/}

In support of the broad modification, as opposed to the use of the mechanism set out in the Protective Order, NTSP states that it is too burdensome to review 33,000 pages of documents in order to challenge their specific confidentiality designations and, in any case, the information sought is well-known in the industry.^{5/} Both of these claims are incorrect. First, NTSP must review all 33,000 pages of the protected material in order to categorize it for Dr. Van Wagner's review in any case. Second, as set out below, the material sought is confidential and highly sensitive.

If NTSP wishes to show specific documents produced by PacifiCare to NTSP employees, it simply needs to challenge the designation of those documents under the clear process established in the Protective Order. Instead, without any showing of specific need, or even an identification of the documents upon which it feels the need to seek Dr. Van Wagner's guidance, NTSP attempts to escape the terms of the Protective Order by moving to modify it.^{6/} It is improper for a party to request a wholesale change in the confidentiality designations of materials produced by a third party when, as here, the existing Protective Order contains a framework to challenge the designation of specific documents. *See In the Matter of Polygram*

^{4/} Mot. at 3.

^{5/} *Id.*

^{6/} Indeed, the fact that NTSP has identified 33,000 pages of documents that are the subject of its motion, a small fraction of which were produced by PacifiCare, makes this motion even less appropriate a mechanism to seek access to certain documents. It is not at all clear that any of PacifiCare's documents are among those that NTSP argues are necessary to share with Dr. Van Wagner in order to prepare its defense. Had NTSP followed the procedures delineated in the Protective Order to challenge the confidentiality of specific documents, it would likely be unnecessary for the parties and non-parties to spend time and expense responding to this motion.

Holding, Inc., et al., Docket No. 9298, 2001 WL 1478423 (FTC Nov. 5, 2001) (“If Respondents seek to challenge Warner’s designation of materials as confidential, it must comply with the provisions of the Protective Order which it entered into [as opposed to requesting a change in confidentiality status for all documents produced].”).

B. Revelation of the PacifiCare documents protected by the confidentiality provisions of the Protective Order to NTSP would cause competitive harm to PacifiCare in its future dealings with NTSP and Dr. Van Wagner.

In its motion, NTSP asserts that the information to which it seeks to allow Dr. Van Wagner access is “probably generally known in the industry or is not deserving of protection because it is outdated.”^{7/} This assertion is incorrect. The documents PacifiCare has classified under the confidentiality provisions of the Protective Order contain competitively sensitive material, including internal discussions and evaluation of NTSP’s negotiations with PacifiCare, proposed amendments to the contracts between NTSP and PacifiCare, and pricing information for other health care providers who are not parties to this matter. Dr. Van Wagner personally negotiated the terms and amendments on behalf of NTSP, and PacifiCare assumes that she will continue to be primarily responsible for PacifiCare contract negotiations going forward. Access to these documents by NTSP employees generally, and Dr. Van Wagner in particular, would cause competitive harm to PacifiCare. PacifiCare would be revealing its business evaluation of NTSP’s negotiation positions and its strategy with respect to NTSP’s proposals while needing to negotiate with NTSP over the same or similar issues in the future. In addition, PacifiCare would be revealing pricing terms that had been agreed to by PacifiCare and health care providers that compete with NTSP. Such revelations, in both instances, would put PacifiCare in a significantly disadvantaged position with respect to NTSP.

^{7/} Mot. at 3.

No amount of limitations on access would prevent this harm to PacifiCare.

Although Dr. Van Wagner or any other NTSP employee may sign documents stating that she or he will neither reveal the contents of the documents to others nor use the information for purposes beyond this matter, there is simply no way to prevent that information from being used by NTSP in future contract negotiations with PacifiCare. Memory cannot be erased. Allowing access to the information will put PacifiCare at a severe competitive disadvantage and should not be permitted.

NTSP has shown absolutely no reason to reveal any specific documents, much less a demonstration of need that would outweigh the significant harm that would result for PacifiCare. If NTSP needs to use confidential documents to prepare its defense, its outside counsel and experts are not prevented from using the documents under the Protective Order. NTSP should be required to show that its employees must have access to the information contained in these documents in order to prepare its defense and that access by its third-party representatives is insufficient. *See Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d. Cir. 1979) (holding that where there has been reasonable reliance, a court should not modify a protective order absent a showing of improvidence in its grant or some extraordinary circumstances or compelling need). *See also United States v. Dentsply Int'l, Inc.*, 187 F.R.D. 152, 162 (D. Del. 1999) (barring disclosure of a nonparty's competitively sensitive information to an individual within the defendant organization involved in competitive decision making regarding the nonparty absent: (1) extraordinary detailing of the circumstances required; (2) explanation why any filtering devices would not suffice; and (3) explanation of why reliance on the representations and opinions of outside counsel would not be adequate). No such showing

has been made. Instead, NTSP asks the Court to allow its employee wholesale access to confidential PacifiCare documents. This is inappropriate and should be prohibited.

Absent some showing of overwhelming need to share the information contained in the “Confidential” and “Restricted Confidential – Attorney Eyes Only” categories of documents, NTSP’s counsel should not be permitted to reveal the protected documents in either category to an NTSP executive, or any other NTSP employee, particularly when this information bears on future dealings between PacifiCare and NTSP and would cause harm to PacifiCare in these dealings. Accordingly, NTSP’s motion should be denied.

III. Conclusion

For all the foregoing reasons, NTSP’s motion to modify the Protective Order should be denied in its entirety.

Respectfully submitted,

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