Responses to Petitions to Quash

BANNER HEALTH

FTC File No. 081 0054 – Decision, May 15, 2008

RESPONSE TO BLUE CROSS BLUE SHIELD OF ARIZONA, INC.'S PETITION TO QUASH OR LIMIT SUBPOENA DUCES TECUM

Dear Ms. Peck:

This letter advises you of the disposition of the Petition to Quash or Limit Subpoena Duces Tecum ("Petition") filed by Blue Cross Blue Shield of Arizona, Inc. ("Petitioner" or "BCBSAZ"). The subpoena duces tecum ("subpoena") was served on BCBSAZ in conjunction with the Federal Trade Commission's ("FTC" or "Commission") investigation of a proposed merger between two hospital services providers located in Arizona. The Petition is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the subpoena is May 27, 2008.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1]

I. Background and Summary

Petitioner is a health insurer that provides a variety of "health insurance products, services and networks to more than 1 million Arizonans[, including] . . . various health plans for individuals, families, and small and large businesses." Petition at 1-2. The Commission is conducting an investigation to determine whether the proposed merger of two hospital services providers in Arizona is likely to violate § 7 of the Clayton Act, 15 U.S.C. § 18, or § 5 of the

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Federal Trade Commission Act, 15 U.S.C. § 45. The Petition does not question the fact that the information sought by the subpoena is relevant to the Commission's investigation or that the act of producing the records and information sought by the subpoena would impose an undue hardship or burden on Petitioner. Petitioner has, however, requested particular guarantees from Commission Staff to protect the confidentiality of certain sensitive business information in the event the Commission seeks to enjoin the merger it is investigating. Petitioner is particularly concerned about the continued confidentiality of its "contracts with member hospitals in Maricopa and/or Pinal County, as well as documents relating to the negotiations of those contracts (the 'Confidential Contract Information')." Petition at 3. In effect, the Petitioner wants the Commission to guarantee that any use of such Confidential Contract Information, during a subsequent judicial proceeding brought by the FTC to enjoin the merger being investigated, will occur only if the court shall have imposed a protective order deemed adequate by Petitioner. *Id.*

Petitioner conditions its compliance with the subpoena on the Commission's agreement to one of BCBSAZ's two alternative proposals for assuring confidentiality of its sensitive information. The Commission's first option would be to enter into an agreement "that should a satisfactory protective order not be entered into in any subsequent litigation with [the merging parties], that the FTC would agree to return any unredacted copies of BCBSAZ's Confidential Contract Information back to BCBSAZ." *Id*. (intending to cite Goodwin Aff. ¶ 8). "BCBSAZ's second proposal recommended that, in lieu of producing unredacted copies, that BCBSAZ could provide access to FTC counsel to review unredacted copies of BCBSAZ's hospital documentation. . . . During this review, FTC counsel would be permitted to review the documents at length, and make notes of any review, so long as the FTC agreed that it would assert work product protection over any such notes should the Investigation proceed to litigation." *Id*. (intending to cite Goodwin Aff. ¶¶ 9-10). Commission Staff advised Petitioner that these alternatives are "not workable." *Id*. at 4 (intending to cite Goodwin Aff. ¶ 12).

Petitioner claims that the disclosure of its Confidential Contract Information to the merging parties through discovery[2] "would jeopardize BCBSAZ's ability to compete in the marketplace, and unnecessarily risk disrupting its business relationships. The information would be deemed valuable not only by BCBSAZ's negotiating partners, but also by BCBSAZ's competitors and the marketplace generally." Petition at 5. Petitioner further claims that disclosure of such information to a merging party would permit such party,

> in subsequent negotiations with BCBSAZ, to demand that it receive the highest reimbursement rates of all the hospitals with which BCBSAZ contracts. . . . Allowing large hospital entities . . . to dictate the terms of reimbursement would impact not only BCBSAZ, but its many thousands of insureds in the event BCBSAZ is no longer able to pay the inflated amounts that [such entities] might demand. . . . BCBSAZ may no longer be able to provide its insureds with covered access to [such entities], or might be forced to eliminate or reduce other coverages, in other areas, just to pay the amounts [such entities] might demand. . . . It is also possible that. . . [such entities] might. . . obtain a competitive advantage as against other hospitals in the relevant areas, affecting the number of hospitals available for consumers in a manner that would eclipse any competitive effect of the proposed merger that is the subject of the instant Investigation.

[2] "BCBSAZ is aware that it will have the opportunity to challenge any disclosure of its confidential contract information to [the merging party] in an adjudicative proceeding. The FTC, however, has refused to agree that should BCBSAZ *lose* such a challenge, and a protective order not be entered by the court, that the FTC will not produce such documentation to [the merging party]. Simply put, the FTC is unwilling to bear that risk, however remote the FTC believes it to be." Petition at 5 n. 2 (emphasis in original).

Id. at 6 (citing Hannon Aff. ¶¶ 15-17). The Commission disputes neither the commercial significance of Petitioner's Confidential Contract Information nor the importance of maintaining it in confidence, or, at least, out of the hands of competitors and other market participants; that, however, provides no sufficient basis for limiting or quashing this subpoena.

II. Petitioner Has Provided No Factual Or Legal Basis for Relief

It is necessary at the outset to emphasize the fact that the party who petitions the Commission to quash or limit an investigative subpoena bears the burden of demonstrating that a particular subpoena specification is unreasonable – the Commission does *not* need to demonstrate that a specification is reasonable. "[T]he burden of showing that an agency subpoena is unreasonable remains with the respondent, . . . and where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met. (Citations omitted)." *Fed. Trade Comm'n v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979), *quoting Sec. and Exchange Comm'n v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). Petitioner has mistakenly argued that the Commission "has not offered any factual or legal justifications for why BCBSAZ's proposals are unworkable."[3] Petition at 7. The Commission has no such burden to provide a factual or legal justification for rejecting BCBSAZ's proposals.

[3] The unworkability of Petitioner's alternative proposals is virtually self-evident. The first proposal could effectively obligate the Commission either to put itself in contempt of court or engage in some other form of litigation misconduct. If the court denied BCBSAZ's application for a protective order, or entered an order not deemed acceptable to BCBSAZ, and at the same time ordered the Commission to produce Petitioner's Confidential Contract Information to the merging parties, a response from the Commission that it had, pursuant to its agreement, returned the evidence to BCBSAZ would quite likely be viewed as contumacious or some other form of litigation misconduct subject to sanction, and either finding could result in the dismissal of the Commission's complaint. *See e.g.* Fed. R. Civ. P. 37(b)(2)(A)(v). Alternatively, obtaining the contracting data under

Petitioner has offered no legal support for its claim that this subpoena should be quashed or limited through the imposition of one of its two conditions on the Commission. The factual predicates for the harms that Petitioner alleges might occur are too speculative and uncertain to justify limiting or quashing the subpoena. *See Exxon Corp. v. Fed. Trade Comm'n*, 589 F.2d 582, 589 n.14 (DC Cir. 1978) ("[J]udicial intervention to prevent potential injury from prospective governmental misconduct [improper disclosure of confidential information] is only justified when such misconduct is imminent, not merely hypothetical."). Petitioner has failed to meet its burden.

The Commission also finds that BCBSAZ's legitimate concerns with the confidentiality of its sensitive business information are adequately protected by 15 U.S.C. § 57b-2 and, in the event the Commission's investigation leads to federal court litigation, by the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order. . . (g) requiring that. . . confidential research, development, or commercial information not be revealed or be revealed only in a specified way. . . ."). Accordingly, Petitioner has

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the second proposal would mean that the Commission would get the data it requires for the sophisticated economic analyses and modeling utilized in modern merger litigation by way of notes taken from complex contract documents. Those notes would also be subject to work product protections. The Commission's trial evidence would, thus, be based on data collection practices lacking in the rigor and reliability necessary to support expert economic testimony. Further, withholding our "notes" on the basis of work product claims would be totally at odds with the FTC's discovery obligation to provide the data upon which its expert analyses depended. *See* Fed. R. Evid. 705. The resulting evidence would rightly be excluded from the trial because it was both unreliable (suspect data collection practices) and because the data supporting the evidence had not been produced in discovery. Based on its experience in the enforcement of the antitrust laws against mergers, the Commission, like Staff, finds these options unworkable and inconsistent with its responsibility to enforce the antitrust laws of the United States. Indeed, Petitioner's conditions for access to the evidence necessary to enforce this nation's antitrust laws would hold public law enforcement hostage to each subpoena recipient's perceived data security needs. The Commission cannot countenance such a vision of the public good.

failed to demonstrate that the Commission should grant BCBSAZ's Petition as a matter of discretion.

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED** that the Petition be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), Petitioner must comply with the CID by May 27, 2008.

By direction of the Commission.

NUTRACEUTICALS INTERNATIONAL, LLC

FTC File No. 082 3130 – Decision, June 25, 2008

RESPONSE TO NUTRACEUTICALS INTERNATIONAL, LLC'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Klivinyi:

This letter advises you of the disposition of the Petition to Quash or Limit Civil Investigative Demand ("Petition") filed by Nutraceuticals International, LLC ("NI" or "Petitioner"). NI's Petition claims that the Civil Investigative Demand ("CID") seeks information that is "clearly beyond the scope of the investigation as defined by the Commission." Petition at 1. The Petition is denied because it is procedurally defective and substantively without merit. Pursuant to 16 C.F.R. § 2.7(e), Petitioner is ordered to comply with the CID on or before July 7, 2008 at 5:00 p.m. E.S.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1]

I. Background and Summary

This Petition deals with the second of two CIDs that have been served on NI during the course of this investigation. "The first civil investigative demand served upon the Company was fully answered and submitted in the time agreed. The interrogatories requested the number of employees and the identification of employees involved

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