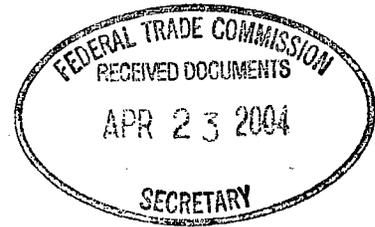


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
)

North Texas Specialty Physicians,)
Respondent.)
_____)

Docket No. 9312

**ORDER ON NON-PARTIES' MOTIONS FOR *IN CAMERA* TREATMENT
OF DOCUMENTS LISTED ON PARTIES' EXHIBIT LISTS**

I.

Pursuant to Commission Rule 3.45(b) and the Scheduling Order entered in this litigation, several non-parties have filed motions for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter.

In Commission proceedings, requests for *in camera* treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984); *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documentary evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury," and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions. *Kaiser*, 103 F.T.C. at 500; *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *In re Bristol Myers Co.*, 90 F.T.C. 455, 456 (1977).

Indefinite *in camera* treatment is granted only in those "unusual" cases where the competitive sensitivity or the proprietary value of the information will not diminish with the passage of time. *In re Coca Cola Co.*, 1990 FTC LEXIS 364 (Oct. 17, 1990). Examples of documents meriting indefinite *in camera* treatment are trade secrets, such as secret formulas, processes, and other secret technical information, and information that is privileged. *See Hood*, 58 F.T.C. at 1189; *In re R.R. Donnelley & Sons Co.*, 1993 FTC LEXIS 32 (Feb. 18, 1993); *In re Textron, Inc.*, 1991 FTC LEXIS 135 (April 26, 1991). Where *in camera* treatment is granted for ordinary business records, such as business plans, marketing plans, or sales documents, it is typically extended for two to five years. *E.g., In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116 (1981); *In re International Ass. of Conf. Interpreters*, 1996 FTC LEXIS 298 (June 26, 1996).

The Federal Trade Commission strongly favors making available to the public the full record of its adjudicative proceedings to permit public evaluation of the fairness of the Commission's work and to provide guidance to persons affected by its actions. *In re Crown Cork & Seal Co., Inc.*, 71 F.T.C. 1714, 1714-15 (1967); *Hood*, 58 F.T.C. at 1186 (“[T]here is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.”). A heavy burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Hood*, 58 F.T.C. at 1188. Further, requests for indefinite *in camera* treatment must include evidence to provide justification as to why the document should be withheld from the public's purview in perpetuity and why the requestor believes the information is likely to remain sensitive or become more sensitive with the passage of time. *See DuPont*, 1990 FTC LEXIS 134 at *2. Thus, in order to sustain the heavy burden for withholding documents from the public record, an affidavit or declaration demonstrating that a document is sufficiently secret and material to the applicant's business that disclosure would result in serious competitive injury is required. The parties and non-parties have been advised of this requirement. Protective Order, ¶ 12; Order on Motions Seeking to Compel Respondent to Narrow Its Document Designations and Further Extending Deadline for Filing Motion for *In Camera* Treatment; April 1, 2004 (available at www.ftc.gov/os/adjpro/d9300). Also, requests for *in camera* treatment shall be made only for those pages of documents or of deposition transcripts that contain information that meets the *in camera* standard.

As set forth below, each of the non-party payors filed separate motions for *in camera* treatment that complied with the standards for granting *in camera* treatment. Each motion was supported by an affidavit or declaration of an individual within the company who had reviewed the documents. These affidavits or declarations provided the necessary support to demonstrate that the documents meet the *in camera* treatment standards. Each motion attached the documents or deposition testimony for which *in camera* treatment was sought. From the broad lists of confidential documents that the parties provided to the non-parties indicating their intent to introduce at trial, each non-party significantly narrowed the scope of documents for which it sought *in camera* treatment. Where *in camera* treatment for deposition testimony was sought, the non-parties narrowed their requests to specific page and line numbers. The specific motions of each of the non-parties are addressed below.

II.

Non-party Aetna Health Inc. (“Aetna”), on April 12, 2004, filed a motion seeking *in camera* treatment for approximately 22 documents containing information relating to four subject matters: (1) documents and testimony reflecting reimbursement rates that are currently in effect in the North Texas area; (2) documents and testimony reflecting Aetna internal efficiency analyses of certain providers in the North Texas area; (3) a document analyzing Aetna's customer base including a listing of Aetna's “top ten” current customers; and (4) personal financial and patient information. With respect to categories (1) through (3), Aetna seeks *in camera* treatment for a period of three years. With respect to category (4), Aetna seeks indefinite *in camera*

treatment.

Respondent filed a consolidated response to the motions filed by non-party payors, including Aetna. Respondent makes a general objection that the range of documents for which the non-party payors seek *in camera* treatment is broad, but does not provide any specific objections to any specific documents.

Aetna's motion provides an affidavit of David M. Roberts, Network Vice-President for Aetna in the North Texas area, ("Roberts Affidavit"). As described by the Roberts Affidavit, the documents for which *in camera* treatment is sought contain competitively sensitive documents, the disclosure of which could cause serious competitive injury to Aetna. The Roberts Affidavit also states that the information for which Aetna seeks *in camera* treatment is not widely distributed within Aetna's business, that it is disclosed to very few people outside of Aetna's business and that it is maintained in confidence by those persons.

Aetna also seeks indefinite *in camera* treatment for certain personal and financial information of the providers with whom it deals and members of Aetna health plans. Due to the sensitive nature of such personal financial information and the potential damage to those individuals if their personal financial information were disclosed to the public - which sensitivity and potential damage will not decrease over time - Aetna seeks that such information be protected indefinitely.

In addition, Aetna seeks *in camera* treatment for portions of the depositions of Roberts and of Aetna employee Chris Jagmin. Aetna has submitted a narrow request for only certain pages and line numbers of these depositions. Aetna also seeks *in camera* treatment for trial testimony that may be provided by any current or former Aetna employee regarding any of the documents for which *in camera* treatment has been granted and other narrow topics.

A review of the affidavit in support of the motion, the excerpts of the deposition testimony, and the documents reveals that the information sought to be protected meets the standards for *in camera* treatment. Accordingly, Aetna's motion is GRANTED. *In camera* treatment, for a period of three years, to expire on May 1, 2007, will be granted to the trial testimony of current or former Aetna employees who provide live testimony regarding the documents for which *in camera* treatment has been granted or the substantive information within those documents, Aetna's reimbursement rates currently in effect in the North Texas area, the ETG or SIT scores, or any ongoing negotiations with any providers or provider groups. A separate order issued concurrently sets forth the document numbers and exhibit numbers of the documents and the length of time for which *in camera* treatment has been granted by this Order.

III.

Non-party Baylor All Saints Medical Center ("Baylor All Saints"), on March 29, 2004, filed a motion seeking *in camera* treatment for one document, marked as BASMC/NTSP 001-

018. Baylor All Saints seeks *in camera* treatment for a period of seven years. No oppositions to this motion have been filed.

Baylor All Saints' motion provides a declaration by Sandy Aaron, Chief Operating Officer and Interim President, ("Aaron Declaration"). As described by the Aaron Declaration, the document for which *in camera* treatment is sought contains internal competitive information of a highly sensitive nature. Aaron states that the information regarding the total number of admission days accounted for by physicians with admitting privileges, together with the total revenues attributable to those admissions, is a central part of Baylor All Saints' business strategic planning and its goal of outperforming its competitors. The Aaron Declaration further states that if its competitors were to obtain the information contained in BASMC/NTSP 001- 018, competitors could use this information to cause serious competitive injury to Baylor All Saints. In addition, Aaron declares, Baylor All Saints guards the secrecy of this information, disclosing it only to particular employees of Baylor All Saints on a need to know basis.

A review of the declaration in support of the motion and the document itself reveals that the information sought to be protected meets the standards for *in camera* treatment. However, Baylor All Saints has not demonstrated circumstances for extending *in camera* treatment for a period of seven years. Accordingly, Baylor All Saints' motion is GRANTED in part and DENIED in part.

In camera treatment for a period of five years, to expire on May 1, 2009, is granted to BASMC/NTSP 001- 018.

IV.

Non-party Blue Cross Blue Shield of Texas ("BCBSTX"), on April 19, 2004, filed a motion for leave to file its motion for *in camera* treatment out of time and its motion for *in camera* treatment. BCBSTX represents that Respondent does not oppose the requested extension. The motion for leave to file the motion for *in camera* treatment out of time is GRANTED.

BCBSTX's motion seeks *in camera* treatment for six documents containing confidential reimbursement information paid to participating providers in PPOs and HMOs within the BCBSTX network. BCBSTX seeks *in camera* treatment for a period of five years.

Respondent, prior to the time that BCBSTX filed its motion, filed a consolidated response to the motions filed by non-party payors, including BCBSTX. Respondent makes a general objection that the range of documents for which the non-party payors seek *in camera* treatment is broad, but does not provide any specific objections to any specific documents. Respondent has indicated it does not intend to file a separate opposition to BCBSTX's motion.

BCBSTX's motion provides an affidavit of Rick Haddock, Regional Director for the

Professional Provider Network department for BCBSTX, (“Haddock Affidavit”). BCBSTX asserts that the documents contain confidential reimbursement information that is closely guarded by BCBSTX and is not known to anyone other than BCBSTX and the providers themselves. As described by the Haddock Affidavit, the documents for which *in camera* treatment is sought contain highly confidential information that, if disclosed, would cause competitive harm to BCBSTX.

A review of the motion, affidavit in support of the motion, and documents reveals that the information sought to be protected meets the standards for *in camera* treatment. BCBSTX’s motion is GRANTED. *In camera* treatment for a period of five years, to expire on May 1, 2009, is granted to: FTC-NTSP-BCBS 001167-72. These five documents have been grouped together by Respondent as one exhibit, RX 2093.

V.

Non-party CIGNA Healthcare of Texas, Inc. (“CIGNA”), on April 14, 2004, filed a motion seeking *in camera* treatment for approximately 87 documents containing information related to five subject matters: (1) confidential correspondence between NTSP and CIGNA concerning a dispute over cardiology services containing secret rate, fee and reimbursement information; (2) confidential executed amendments, addendums and exhibits to agreements governing the contractual relationship between CIGNA and NTSP that are still in force and contain non-public, highly competitive fee, pricing and reimbursement information, as well as trade secrets; (3) internal CIGNA notes, spreadsheets and handwritten documents reflecting confidential deliberations, strategic planning, and containing competitive formulas, issues, internal cost and pricing analyses; (4) confidential email correspondence between negotiators at CIGNA and NTSP that contain current, secret, competitive fee, rate and reimbursement information and reveal both methods and style of deliberations and negotiations of CIGNA; and (5) confidential draft agreements and draft amendments thereto between CIGNA and NTSP that contain non-public, highly competitive fee, pricing and reimbursement information as well as trade secrets. On April 14, CIGNA also filed a supplemental addendum seeking *in camera* treatment for two additional documents falling in category (3) above. For all these documents, CIGNA seeks *in camera* treatment for a period of five years.

Respondent filed a consolidated response to the motions filed by non-party payors, including CIGNA. Respondent makes a general objection that the range of documents for which the non-party payors seek *in camera* treatment is broad, but does not provide any specific objections to any specific documents.

CIGNA’s motion provides a declaration from James Sabolik, Vice-President, Network Operations of North Texas and Oklahoma for CIGNA, (“Sabolik Declaration”). As described by the Sabolik Declaration, the documents for which *in camera* treatment is sought contain secret, competitively sensitive documents, the disclosure of which could cause serious competitive injury to CIGNA. The Sabolik Declaration also demonstrates that the documents for which

CIGNA seeks *in camera* treatment are not accessible to any unauthorized persons and that its contracts with NTSP are unknown outside of CIGNA, with the exception of NTSP. Sabolik avers that core business operations of CIGNA would be impaired if the confidentiality of its reimbursement rates between different providers were revealed.

A review of the declaration in support of the motion and the documents reveals that the information sought to be protected meets the standards for *in camera* treatment. Accordingly, CIGNA's motion, including the supplemental addendum, is GRANTED.

A separate order issued concurrently sets forth the document numbers and exhibit numbers of the documents granted *in camera* treatment by this Order. *In camera* treatment is granted for a period of five years, to expire on May 1, 2009.

VI.

Non-party Humana Health Plan of Texas, Inc. ("Humana"), on April 14, 2004, filed a motion seeking *in camera* treatment for ten documents containing competitively sensitive information relating to fee schedules and rates paid by Humana to various provider groups located in the North Texas area, an analysis of Humana's financial "break even" point as it relates to providers, analyses of schedules and average rates, and distribution of particular fee schedules. Humana seeks *in camera* treatment for a period of five years.

Respondent filed a consolidated response to the motions filed by non-party payors, including Humana. Respondent makes a general objection that the range of documents for which the non-party payors seek *in camera* treatment is broad, but does not provide any specific objections to any specific documents.

Humana's motion provides a declaration from Gary Cole, Vice-President of Sales for Humana. ("Cole Declaration"). As described by the Cole Declaration, the documents for which *in camera* treatment is sought contain secret, competitively sensitive documents, the disclosure of which could cause serious competitive injury to Humana. The Cole Declaration also demonstrates that the documents for which Humana seeks *in camera* treatment are guarded from disclosure; and that such information is disclosed only to particular employees of Humana. Cole avers that the information contained in these documents is central to Humana's business and strategic planning and its goal of outperforming its competitors, whose use of such information would directly harm Humana.

A review of the declaration in support of the motion and the documents reveals that the information sought to be protected meets the standards for *in camera* treatment. Accordingly, Humana's motion is GRANTED.

In camera treatment for a period of five years, to expire on May 1, 2009, is granted to the following documents:

HUM 000733
HUM 000735
HUM 000749
HUM 000754-55
HUM 000763-65
FTC-NTSP-HUMANA 000004-116
FTC-NTSP-HUMANA 000117-159
FTC-NTSP-HUMANA 000170-172
FTC-NTSP-HUMANA 000174
FTC-NTSP-HUMANA 000177-179

VII.

Non-party PacifiCare of Texas, Inc. (“PacifiCare”), on April 12, 2004, filed a motion seeking *in camera* treatment for eighteen documents and portions of twenty pages of deposition testimony. The information for which *in camera* treatment is sought falls into four categories: (1) agreements between PacifiCare and various healthcare providers in the Dallas/Ft. Worth area, including NTSP, and deposition testimony discussing these agreements; (2) correspondence between PacifiCare and the various healthcare providers 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. PacifiCare has submitted a narrow request for only certain page and line numbers of the deposition of John Lovelady. PacifiCare seeks *in camera* treatment for an indefinite period, or, in the alternative, for ten years.

Respondent filed a consolidated response to the motions filed by non-party payors, including PacifiCare. Respondent makes a general objection that the range of documents for which the non-party payors seek *in camera* treatment is broad, but does not provide any specific objections to any specific documents.

PacifiCare’s motion provides a declaration from John Lovelady, Vice President of Network Management for PacifiCare, (“Lovelady Declaration”). As described by the Lovelady Declaration, the documents for which *in camera* treatment is sought contain secret, competitively sensitive documents, the disclosure of which could cause serious competitive injury to PacifiCare. The Lovelady Declaration also demonstrates that the documents for which PacifiCare seeks *in camera* treatment have been maintained internally by PacifiCare in a confidential manner, being shared only with those individuals requiring the knowledge contained within the document or the subject of the testimony. Lovelady avers that these documents and deposition testimony contain highly sensitive information relating to the prices and terms at which PacifiCare contracts for healthcare services. Lovelady further declares that if a competitor were to know with certainty the pricing and contracting terms of PacifiCare, its competitors

would gain a competitive advantage to the detriment of PacifiCare.

A review of the declaration in support of the motion, the documents and the deposition testimony reveals that the information sought to be protected meets the standards for *in camera* treatment. However, PacifiCare has not met the heavy burden of establishing the unusual circumstances that may warrant indefinite *in camera* treatment for its confidential materials. Accordingly, PacifiCare's motion is GRANTED IN PART and DENIED IN PART.

A separate order issued concurrently sets forth the document numbers and exhibit numbers of the documents granted *in camera* treatment by this Order. *In camera* treatment is granted for a period of five years, to expire on May 1, 2009.

VIII.

Non-party United Healthcare of Texas, Inc. ("United"), on April 14, 2004, filed a motion seeking *in camera* treatment for 77 documents and portions of several pages of deposition testimony. The information for which *in camera* treatment is sought falls into three categories: (1) documents or testimony regarding current reimbursement rates; (2) documents used for strategic planning; and (3) documents or testimony showing current provider information (i.e., negotiation documents and cost or clinical comparisons). United has selected only those pages within documents that meet the *in camera* standards and has submitted a narrow request for only certain page and line numbers of the depositions of Dr. David Ellis and Mr. Thomas Quirk. United seeks *in camera* treatment for a period of three years for information on reimbursement rates and fee schedules. United seeks *in camera* treatment for a period of five years for information relating to strategic planning, negotiation documents, and cost or clinical comparisons.

Respondent filed a consolidated response to the motions filed by non-party payors, including United. Respondent makes a general objection that the range of documents for which the non-party payors seek *in camera* treatment is broad, but does not provide any specific objections to any specific documents.

United's motion provides an affidavit from Thomas J. Quirk, Chief Executive Officer of United. ("Quirk Affidavit"). As described by the Quirk Affidavit, the documents for which *in camera* treatment is sought contain highly sensitive documents, the disclosure of which would be highly detrimental to United's business operations. The Quirk Affidavit demonstrates that the documents for which United seeks *in camera* treatment have been maintained internally by United in a confidential manner, and are shared outside of United only with those individuals who are parties to the contracts with United containing that information.

In addition, United seeks *in camera* treatment for portions of the depositions of Ellis and Quirk that include details about United's negotiating strategies and United's methodology used to generate cost and clinical provider comparisons and United's databases. United has submitted

a narrow request for only certain page and line numbers of these depositions. United also seeks *in camera* treatment for trial testimony that may be provided by Quirk, Ellis, David Beaty and Douglas Arrington concerning United's negotiations with physicians, the cost of physician services, and physician compensation under fee for service contracts.

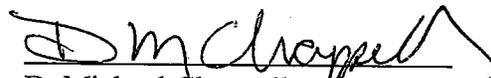
A review of the declaration in support of the motion, the documents and the deposition testimony and the topics of proposed trial testimony reveals that the information sought to be protected meets the standards for *in camera* treatment. A separate order issued concurrently sets forth the document numbers and exhibit numbers of the documents granted *in camera* treatment by this Order. *In camera* treatment is granted for a period of three years or five years, depending on the category set forth in the Order issued concurrently, to expire on May 1, 2007 or May 1, 2009, respectively. *In camera* treatment is granted for a period of three years, to expire on May 1, 2007, to the trial testimony that may be provided by Quirk, Ellis, Beaty and Arrington concerning United's negotiations with physicians, the cost of physician services, and physician compensation under fee for service contracts.

IX.

Each non-party that has documents or information that has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been extended to the material described in this Order. At the time that any documents that have been granted *in camera* treatment are offered into evidence or before any of the information contained therein is referred to in court, the parties shall identify such documents and the subject matter therein as *in camera*, inform the court reporter of the trial exhibit number(s) of such documents, and request that the hearing go into an *in camera* session.

The parties are required to prepare a joint exhibit that lists by exhibit number the documents that have been granted *in camera* treatment and that sets forth the expiration date of *in camera* treatment for each exhibit.

ORDERED:


D. Michael Chappell
Administrative Law Judge

Date: April 23, 2004