



The Subpoena was served on Humana on December 22, 2003. A true and correct copy of the Subpoena is attached hereto as Exhibit “A.” The Subpoena requests Humana to respond with all responsive documents on or before January 2, 2004, ten (10) days after service on Humana; however, NTSP has now agreed to allow Humana to object and/or respond to the Subpoena on or before January 12, 2004, in order for Humana and NTSP to try to negotiate a compromise regarding the scope of the Subpoena and allow Humana a short period of time to assess the significant burdens associated with trying to respond to the Subpoena. A true and correct copy of the letter agreement is attached hereto as Exhibit “B.”

As more specifically discussed below, NTSP’s Subpoena seeks the production of literally hundreds of thousands of pages of documents and data and calls for documents created over six (6) years ago. This onerous and unfair burden—imposed on a non-party—far exceeds any resulting benefit to this proceeding. Moreover, the documents potentially responsive to NTSP’s numerous requests likely contain privileged, confidential and commercially sensitive business information, including Humana’s proprietary analyses and trade secrets.

Pursuant to Rule 3.22(f) of the FTC Rules, and as detailed in this Motion and in the accompanying Affidavit of Richard S. Krumholz filed in support of this Motion (“*Krumholz Affidavit*”), Humana has conferred with counsel for NTSP in good faith to resolve the issues raised by this Motion and has been unable to reach full agreement regarding this issues presented. *See Krumholz Affidavit*, attached hereto as Exhibit “C.”

**COURT SHOULD QUASH OR MODIFY  
PORTIONS OF THE SUBPOENA AS REQUESTED**

An administrative law judge in an FTC proceeding must quash or limit any subpoena that is unduly burdensome or would somehow require the disclosure of privileged or confidential and proprietary information. 16 C.F.R. §3.31(c)(1)(iii) (use of subpoena and other discovery methods “shall be limited by the Administrative Law Judge” where the “burden and expense of the proposed discovery outweighs its likely benefit”); 16 C.F.R. §3.31(c)(2) (authorizing Administrative Law Judge to “enter a protective order denying or limiting discovery to preserve” a privilege); FED. R. CIV. P. 45(c)(3) (a court “shall quash or modify the subpoena if it . . . requires disclosure of privileged or other protected matter . . . [or] subjects a person to undue burden”). Moreover, an Administrative Law Judge has the power to modify the subpoena and limit the scope of permissible discovery. 16 CFR §3.31(d)(1) (authorizing Administrative Law Judge to “deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense”); *see also* FED. R. CIV. P. 26(c) (court may grant a protective order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense); *see also* Fed. R. Civ. P. 45(c)(3) (a court may quash or modify a subpoena requiring the disclosure of a trade secret or other confidential research, development or other commercial information).

**SPECIFIC OBJECTIONS TO THE SUBPOENA**

With the above as a backdrop, Humana asserts the following specific objections to NTSP’s Subpoena:

**REQUEST NO. 1:** All documents previously produced or otherwise sent to the Federal Trade Commission concerning your business relationships with healthcare providers in the State of Texas.

Request No. 1 calls for irrelevant materials that are not reasonably calculated to lead to the discovery of any admissible evidence in the pending action. As indicated above, the FTC's Complaint alleges that NTSP engaged in anti-competitive business practices and has improperly restrained trade. Humana notes that, pursuant to a request from the FTC, it has already produced all documents responsive to this request that specifically relate to NTSP in this case, and Humana understands NTSP has been provided these materials. Putting aside the merits of the FTC's case, other, unrelated documents produced or otherwise sent to the FTC concerning *Humana's* business relationship with other healthcare providers in the State of Texas have no bearing on the issues in dispute. Indeed, neither Humana, nor any of its parents or affiliates, have ever had a contract with NTSP, nor has Humana or any of its affiliated entities been named or referenced in the FTC's Complaint.

Humana therefore requests the Court to quash or modify this request consistent with its objections to same. Humana also requests that, to the extent that it is required to produce any additional documents responsive to this request, or does produce any additional documents responsive to this request, that the Court allow those documents to be designated: "Confidential" and "Restricted Confidential, Attorney Eyes Only," such that only attorneys for the FTC and for NTSP can review or otherwise see those materials produced.

**REQUEST NO. 2:** 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 as Appendix A). [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.

**REQUEST NO. 3:** Documents for the time period January 1, 2000 to June 20, 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.

Request Nos. 2 and 3 broadly call for documents and materials regarding investigations performed by the Office of the Attorney General of the State of Texas (the “*Texas Attorney General*”). Importantly, the investigations by the Texas Attorney General were not in any way related to NTSP, and did not concern any alleged anti-trust violations. *See* Affidavit of E. Paul Herrington (“*Herrington Affidavit*”), attached hereto as Exhibit “D.” Therefore, any documents and/or data responsive to the above requests are likely irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; and certainly the burden of production outweighs any probative value the documents and data may provide.

In addition, many of the documents described in request Nos. 2 and 3 in the Subpoena have not been generated, gathered or provided to the Texas Attorney General. *Herrington Affidavit*. Therefore, to the extent materials responsive to NTSP’s request Nos. 2 and 3 must be produced, they must first be identified, if they exist at all, gathered, and reviewed for privilege, trade secret, and confidentiality and marked in accordance with the Court’s Protective Order. *Id.*

Moreover, the Texas Attorney General issued the Notice of Intent to Inspect pursuant to the Texas Miscellaneous Corporation Laws Act, Tex. Rev. Civ. Stat. Ann. art 1302-5.04, which

prohibits the Attorney General, or his authorized assistants or representatives, from making public, or using copies or any information derived in the course of the examination, except in the course of some judicial proceedings in which the State is a party, or in a suit by the State to cancel the permit or forfeit the charter of such domestic or foreign corporation, or to collect penalties for a violation of the laws of this State, or for information of any officer of this State charged with the enforcement of its laws. *See* Exhibit “1” attached to *Herrington Affidavit*. In addition, Humana only agreed to produce documents after the Attorney General executed a confidentiality agreement confirming, among other things, the protections in article 1302-5.04. *Herrington Affidavit*. As a result, Humana has not reviewed any such documents in light of confidentiality, privilege, or trade secrets concerns for disclosure to third parties. *Id.* Therefore, to the extent materials responsive to NTSP’s request Nos. 2 and 3 must be produced, they must first be completely identified and reviewed for privileged, trade secret and trade sensitive information and marked in accordance with the Court’s Protective Order. *Id.*

Humana further objects to request Nos. 2 and 3 to the extent responsive documents include documents relating to third parties that Humana has an obligation to protect from disclosure because of agreements with third parties or laws governing Humana’s business. More specifically, (1) Humana has agreements with third parties not to disclose their confidential proprietary information; (2) the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) Privacy and Security Rules prohibits disclosure of Humana’s members Protected Health Information (“PHI”); and (3) the Texas Insurance Code provides protection for information in Humana’s custody about Humana’s members and imposes an affirmative obligation for Humana to protect such information. Documents responsive to Classes 3 and 5 of

the Notice of Intent include information Humana is prohibited from disclosing because of confidentiality agreements with vendors and licensees. *Herrington Affidavit*. Virtually all documents responsive to Classes 1-4 in the Notice of Intent contain PHI. *Id.* The HIPAA Privacy and Security Rules impose certain requirements on Covered Entities when using or disclosing PHI, including with regard to judicial and administrative proceedings. 45 C.F.R. § 164.512(e). Among other things, HIPAA requires a qualified protective order that (1) prohibits NTSP from using or disclosing the PHI for any purpose other than the instant proceeding and (2) requires the return of PHI to Humana or the destruction of the PHI (including all copies) at the end of the proceeding. Texas Insurance Code § 843.007(a) provides that any information relating to the diagnosis, treatment, or health of an enrollee or applicant obtained by a health maintenance organization from the enrollee or applicant or physician or provider is held in confidence and may not be disclosed except in limited situations. In addition, a health maintenance organization is entitled to claim the statutory privileges against disclosure that the physician or provider who provides the information is entitled to claim. *Id.* at §843,007(b). The protections afforded by the Texas Insurance Code derive from the Constitutional right to privacy and the inability in situations like this for individuals to know about the potential for disclosure and to seek their own protection. Texas Insurance Code § 843.102 provides that records of enrollees are confidential and privileged and are not subject to public information law or to subpoena. Health maintenance organizations have an affirmative obligation to provide adequate protection of the confidentiality of medical information and it is subject to subpoena only on a showing of good cause. *Texas Insurance Code § 843.156(e)*.

Documents responsive to request Nos. 2 and 3 would include information about contracts, agreements, or other arrangements with physicians and providers, medical, hospital, and health records of enrollees and records of physicians and providers, and information relating to the diagnosis, treatment, or health of an enrollee or applicant. *Herrington Affidavit*. NTSP has not sought to modify the Court's Protective Order as provided therein to protect the rights of these third parties, to the extent such an order can overcome Constitutional concerns and federal and Texas law.

Humana also objects to these requests to the extent they call for attorney-client, work product and/or proprietarily privileged information or materials.

In light of the above burdens, and the apparent lack of any probative value of these documents and data and the extremely sensitive nature of the documents requested, Humana requests that the Court quash request Nos. 2 and 3 of NTSP's Subpoena in their entirety. Alternatively, Humana requests that NTSP explain why such material could possibly be relevant to the instant action before Humana is forced to attempt to comply with such requests. To the extent Humana has any documents probative of the issues in the above-entitled cause, Humana requests that the Administrative Law Judge order NTSP to narrowly tailor a discovery request designed to elicit such documents with minimal burdens on Humana. Further, Humana requests that the costs, fees and expenses that will be required to produce such documents and data, including any and all attorneys' fees, be borne by NTSP.

Humana also requests that, to the extent that it is required to produce any documents responsive to this request, or does produce any documents responsive to this request, that the



court allow those documents to be designated: “Confidential” and “Restricted Confidential, Attorney Eyes Only,” such that only attorneys for the FTC and for NTSP can review or otherwise see those materials produced.

**REQUEST NO. 4:** All internal and external correspondence, memoranda, and messages concerning or relating to NTSP.

Humana objects to request No. 4 as the phrase “concerning or relating to NTSP” is vague and ambiguous since this request could be read broadly enough to include all documents regarding this industry or physician provider groups generally. Humana further objects to this request to the extent it calls for attorney-client and/or work product privileged information or materials. With that said, Humana has produced many such documents (as indicated above in connection with its response to request No. 1), and Humana will, subject to the foregoing objections, endeavor to produce any additional documents that specifically mention or reference NTSP as it identifies such materials, which Humana is diligently attempting to locate (to the extent they exist).

Therefore, Humana requests the Court to limit or modify the Subpoena or this request to seek only those documents that Humana has already produced or has agreed to produce (as described above).

**REQUEST NO. 5:** All documents comparing the cost or quality of medical services provided by any physician provider listed on Appendix B and any other physician providers.

Humana objects to request No. 5 as it calls for materials which are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence, and for documents that contain proprietary and trade secret information and analyses. Humana assumes Appendix B

contains a list of physician providers who are members of NTSP; however, to the extent comparisons were performed regarding the cost or quality of medical services provided by such physicians, disclosure of such documents would reveal how Humana analyzes and organizes potential provider groups and how it prices and negotiates its contracts with healthcare providers, a process developed by Humana through years of trial and error. *See* Affidavit of William Barnes (“*Barnes Affidavit*”), attached hereto as Exhibit “E.” Humana’s processes and analyses are commercially sensitive business information, which have been developed at great expense to Humana, over many years, and which would be quite valuable if disclosed to Humana’s competitors or the marketplace generally. *Barnes Affidavit*.

Further, as described above in response to request Nos. 2 and 3, any quality of care information about Humana’s members is protected from disclosure by Texas law and, to the extent it includes PHI, by HIPAA.

Further, this request is overly broad and unduly burdensome, especially given the lack of probative value of the materials/information requested. Specifically, this request is not expressly limited in scope to any specific geographic location. Consequently, in order to respond to this request, Humana would be required to expend substantial effort and resources to locate, gather and review potentially responsive documents because these documents may be kept in multiple, different locations across the country, depending on the particular region of the country where the various provider groups are located and the networks in which they participate. *See* Affidavit of Gary Reed (“*Reed Affidavit*”), attached hereto as Exhibit “F.” *Id.* The effort to locate, review

and produce these documents will likely take in excess of 100 man hours to complete and will cost Humana tens of thousands of dollars. *Id.*

Humana therefore requests that the Court quash this request in its entirety. In the alternative, Humana requests that, to the extent that it is required to produce any additional documents responsive to this request, or does produce any additional documents responsive to this request, that the Court allow those documents to be designated: “Confidential” and “Restricted Confidential, Attorney Eyes Only,” such that only attorneys for the FTC and for NTSP can review or otherwise see those materials produced.

**REQUEST NO. 6:** 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 an 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.

Humana objects to request No. 6 as it calls for information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Humana further objects to this request as it calls for proprietary and/or trade secret information. Further, this request is overly broad and unduly burdensome, especially in light of the lack of probative value of the materials/information requested.

Specifically, this request does not contain any geographic limitation and would therefore require Humana to produce documents that have absolutely nothing to do with the geographic region in which NTSP provides medical services. Consequently, in order to respond to this request, Humana would be required to search and retrieve from its databases voluminous fee schedules for all of its markets across the country. *Reed Affidavit*. This would require Humana to expend substantial scarce programmer and computer resources to locate, gather and review

potentially responsive fee schedules. *Reed Affidavit*. The effort to locate, review and produce these documents will likely take in excess of 100 man hours to complete and will likely cost Humana tens of thousands of dollars. *Id.*

Furthermore, documents regarding the rates paid by Humana to provider physicians and Humana's pricing information are highly confidential and commercially sensitive business information. *Barnes Affidavit*. Indeed, disclosure of such documents would reveal how Humana develops the rates it pays for physician services, a process that Humana has expended thousands of hours and many years to develop. *Id.* This effort has likewise allowed Humana to gain a competitive advantage in the marketplace and better serve its insureds. If such documents were disclosed, Humana could potentially lose its competitive advantage in the marketplace. *Barnes Affidavit*.

Further, and aside from the real and significant concerns regarding the potential loss of Humana's competitive advantage in the marketplace were it required to produce documents regarding its rates, Humana is nevertheless precluded from producing a substantial number of potentially responsive documents to request No. 6 because of confidentiality provisions contained in its agreements with various physician provider groups. *Barnes Affidavit*. Typically, these physician provider group agreements contain mutual confidentiality provisions, precluding either Humana or the physician provider groups from disclosing the terms of the agreement (including rates paid by Humana to the physician provider groups). *Id.* Accordingly, Humana would be in breach of its agreements with these various physician provider groups if it were to produce the agreements without first contacting each of these various physician provider groups

and obtaining a release from each of these various physician provider groups to produce these agreements. *Id.*

Humana further objects to this request to the extent it calls for attorney-client and/or work product privileged information or materials.

Humana therefore requests that the Court quash this request in its entirety. In the alternative, Humana requests that, to the extent that it is required to produce any additional documents responsive to this request, or does produce any additional documents responsive to this request, that the Court allow those documents to be designated: “Confidential” and “Restricted Confidential, Attorney Eyes Only,” such that only attorneys for the FTC and for NTSP can review or otherwise see those materials produced.

**REQUEST NO. 7:** 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.

Humana objects to request No. 7 as it calls for information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Specifically, it calls for “comparisons” relating to hospital care and pharmacy costs that do not appear to be related in any way to the pending action brought by the FTC. Additionally, the burden of gathering this information and these materials far outweighs any probative value gained by NTSP. To collect what might be deemed “comparisons” of the costs of physician services in the State of Texas, Humana would need to search each of its offices in the State of Texas to determine what documents might somehow be responsive. *Reed Affidavit.* Given the fact that any such documents are not collected in any one file, but could instead be located in the files of anyone working on network development, Humana would be required to expend in excess of 100 man

hours to identify, review and collect any responsive documents. *Reed Affidavit*. This burden is simply too great for a non-party to carry given the relative lack of probative value these documents might provide. Humana further objects to this request to the extent it calls for attorney-client, work product and/or proprietarily privileged information or materials.

Further, disclosure of documents prepared by Humana which contain or evidence comparisons regarding these costs would reveal how Humana analyzes, evaluates and synthesizes information regarding costs in a particular market (*i.e.*, the State of Texas). *Barnes Affidavit*. Humana's analyses are commercially sensitive business information, which have been developed at great expense to Humana, over many years, and which would be quite valuable if disclosed to Humana's competitors or the marketplace generally. *Id.*

Humana therefore requests that the Court quash this request in its entirety. In the alternative, Humana requests that, to the extent that it is required to produce any additional documents responsive to this request, or does produce any additional documents responsive to this request, that the Court allow those documents to be designated: "Confidential" and "Restricted Confidential, Attorney Eyes Only," such that only attorneys for the FTC and for NTSP can review or otherwise see those materials produced.

**REQUEST NO. 8:** 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.

Humana objects to Request No. 8 because it is vague and ambiguous as to the policies, rules and "access standards" inquired about. Humana simply should not be required to guess at the meaning of this request. Humana further objects to this request to the extent it calls for attorney-client, work product and/or proprietarily privileged information or materials. Subject to

the foregoing objections, Humana will produce information it believes may be responsive and invites NTSP to contact Humana's counsel if such information is insufficient. Humana requests the Court to limit or modify the Subpoena or this request to seek only that information that Humana has agreed to provide (as described above).

**REQUEST NO. 9:** A sample contract used for each contract entity involving more than 75 physicians in the Counties of Dallas and/or Tarrant and any amendments, revisions, or replacements thereof.

Humana objects to Request No. 9 as it is vague and ambiguous; however, subject to this objection, Humana will produce the sample contracts that it uses for physician groups in the counties inquired about. Since these will be sample contracts, no "amendments, revisions or replacements" will be applicable or produced. Humana requests the Court to limit or modify the Subpoena or this request to seek only those documents that Humana has agreed to produce (as described above).

### **OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

Humana hereby asserts the following objections to NTSP's Definitions and Instructions in the Subpoena:

In its Definitions and Instructions, NTSP attempts to require Humana to respond to this Subpoena not only on its own behalf, but also on behalf of its "parents, subsidiaries . . . [and] affiliates." Humana has affiliates throughout the country, none of which could possibly be at issue in connection with the current action brought by the FTC. As a result, this instruction is overly broad, unduly burdensome and harassing. Humana requests that the Court limit the Subpoena to Humana Health Plan of Texas, Inc., the only entity served with the Subpoena and, apparently, the only entity with documents NTSP deems relevant.

NTSP, through its instructions in the Subpoena, has also attempted to require Humana to produce documents created at anytime between January 1, 1998, and the present – a period of over six (6) years. Obviously, the amount of effort, time and expense necessary to respond to the NTSP Subpoena grows in proportion to the length of time covered by the Subpoena. *Reed Affidavit*. Older records, to the extent they exist, are stored off-site thus increasing the effort, time and expense necessary to respond. *Id.* Given the issues in dispute in this case, and given the fact that the statute of limitations on anti-trust claims is at most four (4) years, Humana respectfully objects to this six (6) year period as unrealistically long. Accordingly, Humana requests that NTSP's Subpoena be expressly limited to January 1, 2001, to the present, a period of two (2) years.

NTSP has further instructed Humana to produce responsive documents in both hard copy and electronic form “where available.” To the extent this is an effort to require Humana to produce documents in a form in which they do not exist, or to reduce hard copy documents to some sort of electronic disk or tape where they do not already reside, Humana objects because this sort of burden to a non-party to litigation is unreasonable, especially where, as here, the burden imposed would fail to provide any additional probative value to the case.

NTSP has also requested that Humana provide NTSP with a privilege log containing all documents withheld from production pursuant to a claim of privilege or some other, similar claim. However, the burden of providing such a log in connection with this sort of massive document request will likely take weeks to complete. *Reed Affidavit*. To the extent that Humana



is required to respond at all to NTSP's Subpoena, it respectfully requests that the Court provide it forty-five (45) days to create and submit a log that adequately describes the materials withheld.

### **NTSP SHOULD BEAR THE COSTS OF RESPONDING TO THIS SUBPOENA**

As described above, the burden and expense to respond to the subpoena is substantial. Accordingly, Humana requests that the Court require NTSP to reimburse Humana for all costs, expenses and fees related to responding to NTSP's Subpoena. *See* Fed. R. Civ. P. 45(c)(2)(B)(court "*shall* protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded")(emphasis added).

### **CONCLUSION**

For the foregoing reasons, Humana respectfully requests that the Administrative Law Judge quash portions of the Subpoena *Duces Tecum* issued by NTSP in this action as set forth herein. Alternatively, Humana requests that the Administrative Law Judge limit the scope of NTSP's Subpoena as specified above, extend the deadline by which responsive documents and a privilege log must be produced to forty-five (45) days from any order issued in connection with this Motion, and require NTSP to reimburse Humana for all expenses incurred in complying with and contesting this Subpoena *Duces Tecum*.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

By: \_\_\_\_\_

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**ATTORNEYS FOR  
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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that the foregoing instrument was served on the following on January ~~14~~<sup>12</sup>, 2004.

***Via Facsimile and Certified Mail***

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