

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,

a corporation.

Docket No. 9312

**NON-PARTY HUMANA HEALTH PLAN OF TEXAS, INC.'S MOTION
FOR *IN CAMERA* TREATMENT OF PROPOSED EVIDENCE**

Humana Health Plan of Texas, Inc. ("*Humana*"), which is not a party to the above-captioned action, respectfully requests that this Court grant *in camera* treatment of several documents that North Texas Specialty Physicians ("*NTSP*") has designated for possible introduction in the administrative trial in this matter. By letter dated April 7, 2004, NTSP notified Humana that it intends to introduce into evidence documents produced by Humana in response to a subpoena issued by NTSP and requests from the FTC in this matter.¹ Among others, the Humana documents designated for introduction into evidence by NTSP were marked by Humana as follows:

HUM 000733 (Exhibit "1");

HUM 000735 (Exhibit "2");

HUM 000749 (Exhibit "3");

HUM 000754-HUM 000755 (Exhibit "4");

HUM 000763-HUM 00765 (Exhibit "5");

¹ Despite the Court's recent Order requiring NTSP to narrow its document designations to only those which represent its counsel's "good faith designation of [...] trial exhibits," a review of NTSP's "narrowed" list of document designations reveals that NTSP has simply re-designated every one of the documents on its prior list except (HUM 001573-HUM 001579). NTSP's failure to reasonably narrow its designation has required Humana to expend significant resources to review each of the many designated documents in preparation for this Motion.

FTC-NTSP-HUMANA 000004-FTC-NTSP-HUMANA 000116 (Exhibit “6”);

FTC-NTSP-HUMANA 000117-FTC-NTSP-HUMANA 000159 (Exhibit “7”);

FTC-NTSP-HUMANA 000170-FTC-NTSP-HUMANA 000172 (Exhibit “8”);

FTC-NTSP-HUMANA 000174 (Exhibit “9”); and

FTC-NTSP-HUMANA 000177-FTC-NTSP-HUMANA 000179 (Exhibit “10”).

As noted on the face of these documents, each of the documents has been marked as either “Confidential” or “Restricted Confidential-Attorney Eyes Only.” The information contained in these documents is competitively sensitive and is held in strict confidence by Humana. Public disclosure of these documents is likely to cause direct, serious harm to Humana’s competitive position. Therefore, pursuant to 16 C.F.R. § 3.45(b), Humana respectfully moves for *in camera* treatment of the confidential documents (Exhibits “1” through “10”) identified in the Declaration of Gary Cole in support of this Motion (“*Cole Decl.*”), attached hereto as Exhibit “A.”

**HUMANA’S CONFIDENTIAL DOCUMENTS DESERVE
IN CAMERA TREATMENT UNDER THE FEDERAL TRADE
COMMISSION’S RULES OF PRACTICE**

The documents that are described in this motion warrant *in camera* treatment as provided by 16 C.F.R. § 3.45(b). Under 16 C.F.R. § 3.45(b), requests for *in camera* treatment must show that public disclosure of the document in question “will result in a clearly defined, serious injury to the person or corporation whose records are involved.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the document in question is “sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980). In this context, “the courts have generally attempted to protect confidential business information

from unnecessary airing.” *Hood*, 58 F.T.C. at 1188. Under this standard, *in camera* treatment of the documents in question is warranted.

A. Humana Has Preserved the Confidentiality of the Documents and Information

Humana has taken significant steps to protect the confidential nature of these documents, which were produced in response to a subpoena issued by NTSP and requests from the FTC. These documents were produced under compulsory process and pursuant to the Protective Order Governing Discovery Material issued in this matter on October 16, 2003 (the “*Protective Order*”). The purpose of the Protective Order was to expedite discovery while ensuring that materials produced would receive sufficient protection from disclosure to competitors and to NTSP business personnel and providers.

In addition to these measures, Humana has taken substantial measures to guard the secrecy of the information contained in Exhibits “1” through “10,” limiting dissemination of such information and taking every reasonable step to protect its confidentiality. (Cole Decl., at ¶ 9.) Indeed, such information is disclosed only to particular employees of Humana. It would be extremely difficult for Humana’s competitors or other outside persons to access or recreate the information in the documents at issue. (*Id.*) These efforts demonstrate that Humana has gone to great lengths to preserve the confidentiality of the information contained in Exhibits “1” through “10.” (*Id.*)

B. Disclosure of the Information in Exhibits “1” Through “10” Would Result in Serious Competitive Injury To Humana

Exhibits “1” through “5” contain an analysis of a number of NTSP physicians which were under contract with Humana in 2002, as well as the fee schedules and rates paid by Humana to various provider groups located in the North Texas area. (Cole Decl., at ¶ 3.)

Humana's fee schedules and rate information are highly confidential and commercially sensitive business information. Indeed, disclosure of these documents would reveal how Humana analyzes and values various provider groups and determines the rates it pays for physician services, a process that Humana has expended thousands of hours and many years to develop. (*Id.*) Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. If Exhibits "1" through "5" were disclosed, Humana could potentially lose its competitive advantage in the marketplace. (*Id.*)

Exhibit "6" contains a list of providers under contract with Humana and includes the billed charges, medical specialties, base fee schedules and allowed procedures for each of these providers. (Cole Decl., at ¶ 4.) Exhibit "6" also includes an analysis of Humana's financial "break even" point as it relates to each of these providers under their current fee schedules. Exhibit "6" also includes a comparison of what the "break even" point would be for each of these providers were Humana to agree to a new proposed contractual rate. (*Id.*) Like its fee schedules and rate information, Humana's internal analyses of its particular financial "break even" points for its various contracted providers are highly confidential and commercially sensitive business information. Disclosure of such information would reveal how Humana analyzes and values various providers and determines the rates it pays for physician services, a process that Humana has expended thousands of hours and many years to develop. (*Id.*) Further, if competitors were able to obtain the information contained in Exhibit "6", they would be able to identify those providers under contract with Humana that perform various procedures with a particular frequency and use this information to build their own relationships with those providers for their own competitive gain, resulting in serious competitive injury to Humana. This information would also equip competitors and NTSP's business personnel and providers

with information about Humana's marketplace strengths and weaknesses in various medical specialties. (*Id.*) At the same time, Humana would not have parallel information on its competitors. If Exhibit "6" were disclosed, Humana could potentially lose its competitive advantage in the marketplace. (*Id.*)

Exhibit "7" contains a summary of Humana's highly sensitive business information and analyses which are contained in Exhibit "6." Exhibit "7" also contains a summary of the fee schedules and average rates paid by Humana to providers in various medical specialties (*e.g.*, gastroenterology) as a percentage of Medicare. (Cole Decl., at ¶ 5.) Disclosure of Exhibit "7" would reveal how Humana analyzes, evaluates and values various medical specialties and determines the rates it pays for physician services in those various medical specialties, a process that Humana has expended thousands of hours and many years to develop. Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. (*Id.*) Further, if competitors were able to obtain the information contained in Exhibit "7", they would be able to identify those providers under contract with Humana that perform various procedures with a particular frequency and use this information to build their own relationships with those providers for their own competitive gain, resulting in serious competitive injury to Humana. (*Id.*) This information would also equip competitors and NTSP's business personnel and providers with information about Humana's marketplace strengths and weaknesses in various medical specialties. At the same time, Humana would not have parallel information on its competitors. If Exhibit "7" were disclosed, Humana could potentially lose its competitive advantage in the marketplace. (*Id.*)

Exhibit "8" is an analysis of the percentage of Humana contracted providers in various medical specialties at various reimbursement rates. (Cole Decl., at ¶ 6.) Disclosure of Exhibit

“8” would reveal how Humana analyzes, evaluates and values various medical specialties and determines the rates it pays for physician services in those various medical specialties, a process that Humana has expended thousands of hours and many years to develop. (*Id.*) Humana’s efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. If Exhibit “8” were disclosed, Humana could potentially lose its competitive advantage in the marketplace. (*Id.*)

Exhibit “9” is an analysis of Humana’s distribution of its particular fee schedules amongst the various medical specialties. (Cole Decl., at ¶ 7.) Disclosure of Exhibit “9” would reveal how Humana analyzes, evaluates and values various medical specialties and determines the rates it pays for physician services in those various medical specialties, a process that Humana has expended thousands of hours and many years to develop. (*Id.*) Humana’s efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. If Exhibit “9” were disclosed, Humana could potentially lose its competitive advantage in the marketplace. (*Id.*)

Exhibit “10” is an analysis of Humana’s distribution of its particular fee schedules amongst the various medical specialties. (Cole Decl., at ¶ 8.) Disclosure of Exhibit “10” would reveal how Humana analyzes, evaluates and values various medical specialties and determines the rates it pays for physician services in those various medical specialties, a process that Humana has expended thousands of hours and many years to develop. (*Id.*) Humana’s efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. If Exhibit “10” were disclosed, Humana could potentially lose its competitive advantage in the marketplace. (*Id.*)

Further, the information contained in Exhibits “1” through “10” 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. (Cole Decl., at ¶ 10.) If this information were to be made public, Humana’s competitors could pinpoint the rates paid by Humana to these various provider groups and could use this information to specifically target and build relationships with such provider groups for their own competitive gain, resulting in serious competitive harm to Humana. (*Id.*) Access to this information would also enable a competitor and NTSP’s business personnel and providers to understand how Humana evaluates the relative importance of the various provider groups to its provider network and therefore could be used by competitors and NTSP’s business personnel and providers to Humana’s severe competitive disadvantage. (*Id.*)

Further, knowledge about how Humana evaluates and compensates its various provider groups who are key to Humana’s networks would arm competitors and NTSP’s business personnel and providers with information that strikes at the core of Humana’s business. (Cole Decl., at ¶ 11.) This would have an immediate and detrimental effect on Humana’s ability to compete, while Humana would enjoy no similar advantage over its competitors (whose fee schedules and rates paid to its provider groups would remain unknown to Humana). (*Id.*)

C. The Public Interest in Disclosure of Exhibits “1” Through “10” is Outweighed by the Likelihood of Serious Competitive Harm to Humana

Humana deserves “special solicitude” as a non-party requesting *in camera* treatment for its confidential business information. *In the Matter of Kaiser Aluminum & Chemical Corporation*, 103 F.T.C. 500, 500 (1984) (order directing *in camera* treatment for sales statistics over five years old). Reasonable periods of *in camera* treatment encourage non-parties to cooperate with future discovery requests in adjudicative proceedings. *Id.* Humana has cooperated with the discovery demands in this case. Conversely, disclosing documents

containing Humana's highly confidential information will not materially promote the resolution of this matter, nor will these documents lend measurable public understanding of these proceedings. The balance of interests clearly favors *in camera* protection for Exhibits "1" through Exhibit "10." See *In re Bristol-Myers*, 90 F.T.C. 455, 456 (1977) (describing six-factor test for determining secrecy and materiality).

D. Protection for Exhibits "1" Through "10" Should Extend For Five Years

The nature of the highly confidential information contained in Exhibits "1" through "10" warrants lasting protection. The fee schedules and rates paid by Humana to the various provider groups in its network are vital to Humana's competitive position and business strategy. (Cole Decl., at ¶ 12.) [INFORMATION REDACTED] Accordingly, Humana respectfully requests that Exhibits "1" through "10" be afforded *in camera* protection for a period of five years.

CONCLUSION

Exhibits "1" through "10" satisfy the standard for *in camera* protection under the Commission's Rules of Practice and relevant FTC precedent. Accordingly, this Court should extend *in camera* protection to these confidential documents.

DATED: April 14, 2004

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

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**ATTORNEYS FOR NON-PARTY
HUMANA HEALTH PLAN OF TEXAS, INC.**

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of
NORTH TEXAS SPECIALTY PHYSICIANS,
a corporation.

Docket No. 9312

PROPOSED ORDER

On April 12, 2004, Non-Party Humana Health Plan of Texas, Inc. ("*Humana*") filed a motion for *in camera* treatment of confidential business information contained in various documents that have been identified by North Texas Specialty Physicians ("*NTSP*") as potential trial exhibits.

IT IS HEREBY ORDERED that Humana's Motion is GRANTED. The information set forth in the Humana documents numbered as follows will be subject to *in camera* treatment under 16 C.F.R. § 3.45 and will be kept confidential and not placed on the public record of this proceeding for a period of five (5) years.

HUM 000733

HUM 000735

HUM 000749

HUM 000754-HUM 000755

HUM 000763-HUM 00765

FTC-NTSP-HUMANA 000004-FTC-NTSP-HUMANA 000116

FTC-NTSP-HUMANA 000117-FTC-NTSP-HUMANA 000159

FTC-NTSP-HUMANA 000170-FTC-NTSP-HUMANA 000172

FTC-NTSP-HUMANA 000174 (Exhibit "9")

IT IS FURTHER ORDERED that only authorized Federal Trade Commission (“*Commission*”) personnel, and court personnel concerned with judicial review may have access to the above-referenced information, provided that I, the Commission, and reviewing courts may disclose such *in camera* information to the extent necessary for the proper disposition of the proceeding.

ORDERED: _____

D. Michael Chappell
Administrative Law Judge

DATED: _____

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the foregoing instrument was served on the following on April 14, 2004.

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Susan E. Raitt

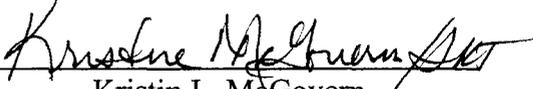

Kristin L. McGovern

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
NORTH TEXAS SPECIALTY PHYSICIANS)

Docket No. 9312

**DECLARATION OF GARY COLE IN SUPPORT OF HUMANA HEALTH
PLAN OF TEXAS, INC.'S MOTION FOR *IN CAMERA* TREATMENT**

I, Gary Cole, declare as follows:

“I am currently Vice President of Sales for Humana Health Plan of Texas, Inc. (“*Humana*”), a position which I have held for the past four (4) months. Prior to my current position, I held the position of Market President for the Dallas-Fort Worth Market for Humana. In my role as Market President, at varying times, I had direct and/or matrix responsibility which included analyzing markets, developing provider networks and analyzing and developing fee structures for payment to various provider groups. As such, I am familiar with the processes by which Humana analyzes and evaluates markets, analyzes, evaluates and organizes potential provider groups and how it prices and negotiates its contracts with health care providers.

“I have reviewed the documents for which Humana seeks *in camera* treatment. By virtue of my current and former positions for Humana, as described above, I am familiar with the type of information contained in the documents at issue. Based upon my review of the documents, my knowledge of Humana’s business, and my familiarity with the confidentiality protection afforded this type of information by Humana, it is my belief that disclosure of these documents

PUBLIC VERSION

to the public, to competitors of Humana and/or to NTSP's business personnel and providers would cause serious competitive injury to Humana.

"Exhibits "1" through "5" contain an analysis of a number of NTSP physicians which were under contract with Humana in 2002, as well as the fee schedules and rates paid by Humana to various provider groups located in the North Texas area. Humana's fee schedules and rate information are highly confidential and commercially sensitive business information. Indeed, disclosure of these documents would reveal how Humana analyzes and values various provider groups and determines the rates it pays for physician services, a process that Humana has expended thousands of hours and many years to develop. Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. If Exhibits "1" through "5" were disclosed, Humana could potentially lose its competitive advantage in the marketplace.

"Exhibit "6" contains a list of providers under contract with Humana and includes the billed charges, medical specialties, base fee schedules and allowed procedures for each of these providers. Exhibit "6" also includes an analysis of Humana's financial "break even" point as it relates to each of these providers under their current fee schedules. Exhibit "6" also includes a comparison of what the "break even" point would be for each of these providers were Humana to agree to a new proposed contractual rate. Like its fee schedules and rate information, Humana's internal analyses of its particular financial "break even" points for its various contracted providers are highly confidential and commercially sensitive business information. Disclosure of such information would reveal how Humana analyzes and values various providers and determines the rates it pays for physician services, a process that Humana has expended

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thousands of hours and many years to develop. Further, if competitors were able to obtain the information contained in Exhibit "6", they would be able to identify those providers under contract with Humana that perform various procedures with a particular frequency and use this information to build their own relationships with those providers for their own competitive gain, resulting in serious competitive injury to Humana. This information would also equip competitors and NTSP's business personnel and providers with information about Humana's marketplace strengths and weaknesses in various medical specialties. At the same time, Humana would not have parallel information on its competitors. If Exhibit "6" were disclosed, Humana could potentially lose its competitive advantage in the marketplace.

"Exhibit "7" contains a summary of Humana's highly sensitive business information and analyses which are contained in Exhibit "6." Exhibit "7" also contains a summary of the fee schedules and average rates paid by Humana to providers in various medical specialties (*e.g.*, gastroenterology) as a percentage of Medicare. Disclosure of Exhibit "7" would reveal how Humana analyzes, evaluates and values various medical specialties and determines the rates it pays for physician services in those various medical specialties, a process that Humana has expended thousands of hours and many years to develop. Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. Further, if competitors were able to obtain the information contained in Exhibit "7", they would be able to identify those providers under contract with Humana that perform various procedures with a particular frequency and use this information to build their own relationships with those providers for their own competitive gain, resulting in serious competitive injury to Humana. This information would also equip competitors and NTSP's business personnel and providers

PUBLIC VERSION

with information about Humana's marketplace strengths and weaknesses in various medical specialties. At the same time, Humana would not have parallel information on its competitors. If Exhibit "7" were disclosed, Humana could potentially lose its competitive advantage in the marketplace.

"Exhibit "8" is an analysis of the percentage of Humana contracted providers in various medical specialties at various reimbursement rates. Disclosure of Exhibit "8" would reveal how Humana analyzes, evaluates and values various medical specialties and determines the rates it pays for physician services in those various medical specialties, a process that Humana has expended thousands of hours and many years to develop. Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. If Exhibit "8" were disclosed, Humana could potentially lose its competitive advantage in the marketplace.

"Exhibit "9" is an analysis of Humana's distribution of its particular fee schedules amongst the various medical specialties. Disclosure of Exhibit "9" would reveal how Humana analyzes, evaluates and values various medical specialties and determines the rates it pays for physician services in those various medical specialties, a process that Humana has expended thousands of hours and many years to develop. Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. If Exhibit "9" were disclosed, Humana could potentially lose its competitive advantage in the marketplace.

"Exhibit "10" is an analysis of Humana's distribution of its particular fee schedules amongst the various medical specialties. Disclosure of Exhibit "10" would reveal how Humana analyzes, evaluates and values various medical specialties and determines the rates it pays for

PUBLIC VERSION

physician services in those various medical specialties, a process that Humana has expended thousands of hours and many years to develop. Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its insureds. If Exhibit "10" were disclosed, Humana could potentially lose its competitive advantage in the marketplace.

"Further, Humana takes substantial measures to guard the secrecy of the information contained in Exhibits "1" through "10," limiting dissemination of such information and taking every reasonable step to protect its confidentiality. Indeed, such information is disclosed only to particular employees of Humana. It would be extremely difficult for Humana's competitors or other outside persons to access or recreate the information in the documents at issue. These efforts demonstrate that Humana has gone to great lengths to preserve the confidentiality of the information contained in Exhibits "1" through "10."

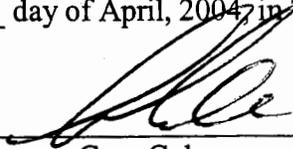
"Further, the information contained in Exhibits "1" through "10" is central to Humana's business and strategic planning and its goal of outperforming its competitors, whose use of such information would directly harm Humana. If this information were to be made public, Humana's competitors could pinpoint the rates paid by Humana to these various provider groups and could use this information to specifically target and build relationships with such provider groups for their own competitive gain, resulting in serious competitive harm to Humana. Access to this information would also enable a competitor and NTSP's business personnel and providers to understand how Humana evaluates the relative importance of the various provider groups to its provider network and therefore could be used by competitors and NTSP's business personnel and providers to Humana's severe competitive disadvantage.

PUBLIC VERSION

“Knowledge about how Humana evaluates and compensates its various provider groups who are key to Humana’s networks would arm competitors and NTSP’s business personnel and providers with information that strikes at the core of Humana’s business. This would have an immediate and detrimental effect on Humana’s ability to compete, while Humana would enjoy no similar advantage over its competitors (whose fee schedules and rates paid to its provider groups would remain unknown to Humana).

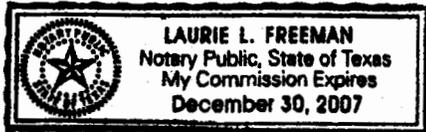
“The fee schedules and rates paid by Humana to the various provider groups in its network are vital to Humana’s competitive position and business strategy. **[REDACTED INFORMATION]** Therefore, the highly confidential information contained in Exhibits “1” through “10” warrants lasting protection.”

"I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 8th day of April, 2004, in Texas."



Gary Cole

SUBSCRIBED AND SWORN TO before me by the said GARY COLE on the 8th day of April, 2004.





Notary Public in and for the State of Texas

Laurie L. Freeman
Printed Name

My Commission Expires:

Dec. 30, 2007

EXHIBIT 1

[REDACTED]

EXHIBIT 2

[REDACTED]

EXHIBIT 3

[REDACTED]

EXHIBIT 4

[REDACTED]

EXHIBIT 5

[REDACTED]

EXHIBIT 6

[REDACTED]

EXHIBIT 7

[REDACTED]

EXHIBIT 8

[REDACTED]

EXHIBIT 9

[REDACTED]

EXHIBIT 10

[REDACTED]