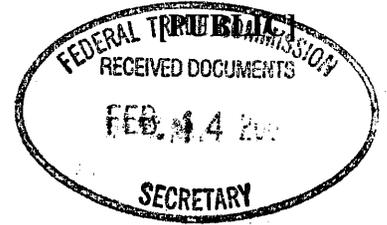


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



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In the Matter of )  
)  
EVANSTON NORTHWESTERN HEALTHCARE )  
CORPORATION, ) Docket No. 9315  
)  
and ) Honorable Stephen J. McGuire  
)  
EHN MEDICAL GROUP, INC., )  
Respondents. )  
\_\_\_\_\_ )

**NON-PARTY HUMANA, INC.'S SECOND AMENDED MOTION FOR  
IN CAMERA TREATMENT OF CERTAIN DESIGNATED HEARING EXHIBITS**

Non-Party Humana, Inc. ("Humana") hereby files its Second Amended Motion for *In Camera* Treatment of Certain Hearing Exhibits that Evanston Northwestern Healthcare Corporation and EHN Medical Group, Inc. ("Respondents") and the Federal Trade Commission ("FTC") have designated for possible introduction in the administrative trial in this matter. Humana respectfully requests that the Administrative Law Judge enter an Order pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), granting *in camera* treatment for a period of ten years to the documents listed in Exhibits 1 and 2 attached to this Motion and the proposed Order. The documents are secret and material to Humana's ongoing and future business, and their disclosure would harm Humana. In support of this Motion, Humana respectfully refers the Court to the accompanying Supplemental Declaration of John Paul Maxwell and submits as follows:

## ARGUMENT

### I. Introduction

Humana received notice of the FTC's and Respondents' intent to offer into evidence at trial highly confidential and business-sensitive documents on December 13, 2004 and December 14, 2004, respectively.<sup>1</sup> Humana seeks *in camera* protection for many of these documents, each of which is described in the tables set forth in Exhibits 1 and 2. All of the documents for which Humana seeks *in camera* protection were treated as "Confidential Discovery Material" or "Restricted Confidential Discovery Material" under the March 24, 2004 Protective Order Governing Discovery Material ("Protective Order") entered by Stephen J. McGuire, Chief Administrative Law Judge.<sup>2</sup> As set forth in more detail below, the documents contain information that is secret, commercially sensitive, and material to Humana's current and prospective business. Accordingly, Humana respectfully requests that the Administrative Law Judge enter an Order pursuant to Section 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), granting *in camera* treatment to these documents for a period of no less than ten years.

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<sup>1</sup>Respondents also advised Humana of their intent to possibly use certain documents at trial that were not previously designated as trial exhibits. These documents primarily consist of attachments to letters that were previously designated as trial exhibits, including: H 016811 (RX-0224; Tab 5); H 019542 (RX-0226; Tab 6); H 017755 (RX-0238; Tab 7); H 020662 (RX-0244-Tab 8); H 018960 (RX-1196; Tab 30); H 336652 (RX-1833; Tab 36); and documents that were recently produced by Humana pursuant to Respondents' request, including: H 451561-451570 (RX-0376; Tab 9) and H 451571-H 451582 (RX-1318; Tab 33). To the extent the Court permits the Respondents to introduce these documents at trial, Humana seeks *in camera* treatment of them.

<sup>2</sup>Each of the documents at issue was either originally produced to the FTC as confidential material in response to its investigative subpoenas and subsequently produced to the Respondents during the discovery proceedings of the above-captioned matter as "Confidential Discovery Material" under the Protective Order, or was produced to the parties during the discovery proceedings of the above-captioned matter and marked as either "Confidential" or "Restricted Confidential-Attorney Eyes Only" in accordance with the terms of the Protective Order.

## II. Standard for *In Camera* Treatment

Materials merit *in camera* treatment when public disclosure of the documents "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). Such serious injury requires that the information in question is secret and material to the applicant's business. *In the Matter of Bristol Meyers Co.*, 90 F.T.C. 455, 456 (1977). The following factors should be weighed in considering both secrecy and materiality: (1) the extent to which the information is known outside the applicant's business; (2) the extent to which the information is known by employees and others involved in the applicant's business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.* A showing of injury may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves. *In the Matter of E.I. Dupont de Nemours & Co.*, 97 F.T.C. 116 (1981). Administrative law judges have broad discretion in applying these factors to determine whether information warrants *in camera* treatment. *See In re General Foods Corp.*, 95 F.T.C. 352 (1980). Third party requests for *in camera* treatment, in particular, deserve special solicitude. *In the Matter of Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984).

The Humana documents described in the Exhibits attached to this Motion meet the above standards for *in camera* treatment.

### III. The Humana Documents Meet the Standard for *In Camera* Treatment

The documents for which Humana seeks *in camera* treatment primarily relate to the prices and terms at which Humana contracts for healthcare services, one of the most commercially sensitive and valuable areas of Humana's business. Specifically, the documents includes five categories of material: (1) contracts with hospitals and healthcare providers; (2) correspondence and internal memoranda regarding the terms of, and negotiations for, provider agreements; (3) internal documents and assessments concerning Humana's business strategies and products; (4) sensitive business information involving potential litigation; and (5) claims data files. The contract terms, fee schedules, and rates, as well as the other highly sensitive, confidential, and proprietary information that are revealed in these documents go to the heart of Humana's business and, as set out below, are precisely the type of materials which *in camera* treatment is designed to protect.

#### A. Category 1: Contract Documents.

The first category of documents for which Humana seeks *in camera* treatment consists of provider contracts and provider contract amendments that are either currently in effect or that refer to or are substantially identical to those currently in effect. Specifically, the documents listed below are contracts or other, related documents for which Humana seeks *in camera* treatment:

#### FTC Exhibits:

<u>Reference/Comments</u>	<u>Trial Exhibit #</u>
Tab 1	CX 05028
Tab 2	CX 05027
Tab 3	CX 05026
Tab 4	CX 05025
Tab 5	CX 05024
Tab 6	CX 05023
Tab 7	CX 05021

Tab 8	CX 05022
Tab 9	CX 05020
Tab 10	CX 05771
Tab 11	CX 05770
Tab 12	CX 05768
Tab 13	CX 05769
Tab 14	CX 05766
Tab 15	CX 05765
Tab 16	CX 05764
Tab 17	CX 05763
Tab 18	CX 05762
Tab 19	CX 05759
Tab 20	CX 05760
Tab 21	CX 05758
Tab 22	CX 05757
Tab 23	CX 05756
Tab 24	CX 05019

The FTC exhibits include a provider agreement that is currently in effect, with several amendments to that agreement, and agreements and amendments that, although no longer in effect, are substantially similar to the terms contained in the present agreements. Specifically,

- FTC Exhibit CX05020 (Tab 9) is a Hospital Participation Agreement between Humana and Evanston Hospital dated January 1, 1993 which is currently in effect.
- FTC Exhibits CX05028 (Tab 1), CX05027 (Tab 2), CX05026 (Tab 3), CX05025 (Tab 4), CX05024 (Tab 5), CX05023 (Tab 6), CX05021 (Tab 7), and CX05020 (Tab 8) are amendments to the provider agreement dated January 1, 1993 which is currently in effect. Although the rates that are revealed in these amendments are no longer in effect, Humana's payment methodology and the rate protection provision contained in the original agreement remain in force. In addition, although the amendments are no longer in effect, the terms of the current provider agreement which are currently in force are substantially the same as the terms revealed in these amendments.
- FTC Exhibits CX05771 (Tab 10), CX05770 (Tab 11), CX05768 (Tab 12), CX05769 (Tab 13), CX05766 (Tab 14), and CX05764 (Tab 15) are prior provider agreements and amendments to provider agreements that were entered into and/or assumed by Humana and Evanston and which were superseded by the current provider agreement dated January 1, 1993. Although the rates that are revealed in the amendments are no longer in effect, Humana's payment methodology and the rate protection provision contained in the original agreement remains in force. In addition, although the amendments are no longer in effect, the terms of the current provider agreement which is currently in force are substantially the same as the terms revealed in the prior provider agreements and amendments.

- Likewise, FTC Exhibits CX05764 (Tab 16), CX05763 (Tab 17), CX05762 (Tab 18), CX05759 (Tab 19), CX05760 (Tab 20), CX05758 (Tab 21), CX05757 (Tab 22), CX05756 (Tab 23), and CX05019 (Tab 24) are provider agreements and amendments to provider agreements between Humana and Highland Park Hospital that were subsequently superseded by the Hospital Participation Agreement between Humana and Evanston Hospital dated January 1, 1993 after ENH purchased Highland Park on July 1, 1999. The provider agreement dated January 1, 1993 is currently in effect. Although the rates that are revealed in these provider agreements and amendments are no longer in effect, Humana's payment methodology and the rate protection provision contained in the original agreements remains in force. In addition, although the amendments are no longer in effect, the terms of the provider agreement currently in force are substantially the same as the terms revealed in the prior provider agreements and amendments.

**Respondents' Exhibits:**

<u>Reference/Comments</u>	<u>Trial Exhibit #</u>
Tab 1	RX-0066
Tab 3	RX-0102
Tab 4	RX-0162
Tab 12	RX-0583
Tab 24	RX-1087
Tab 25	RX-1105
Tab 28	RX-1185
Tab 34	RX-1509
Tab 35	RX-1625

Similarly, the Respondents' exhibits listed above includes provider agreements that are currently in effect, and agreements and amendments that, although no longer in effect, are substantially similar to the terms contained in current agreements. Specifically,

- Respondents' Exhibit RX-0066 (Tab 1) is a Hospital Participation Agreement between Humana and Evanston Hospital dated January 1, 1993 which is currently in effect.
- Respondents' Exhibit RX-0102 (Tab 3) is an amendment to a provider agreement between Humana and Northwestern dated January 1, 1994 which is currently in effect. Although the rates that are revealed in the amendment are no longer in effect, Humana's payment methodology and the rate protection provision contained in this provider agreement under which the rates were changed currently remains in force. In addition, although the amendment is no longer in effect, the terms of the current provider agreement which are currently in force are substantially the same as the terms revealed in the amendment.

- Respondents' Exhibits RX-0162 (Tab 4) and RX-0583 (Tab 5) are amendments to a provider agreement between Humana and Rush North Shore Medical Center which is currently in effect. Although the rates contained in these amendments are no longer in effect, Humana's payment methodology and the rate protection provision contained in the provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibits RX-1087 (Tab 24) and RX-1105 (Tab 25) reference the same amendment to a provider agreement between Humana and Advocate Lutheran General Hospital dated February 1, 1997, which is currently in effect. Although the rates that are revealed in the amendment are no longer in effect, Humana's payment methodology and the rate protection provision contained in this provider agreement under which the rates were changed currently remains in force. In addition, the terms of the current provider agreement which are currently in force are substantially the same as the terms revealed in the amendment.
- Respondents' Exhibit RX-1185 (Tab 28) is an amendment to a provider agreement between Humana and Evanston Northwestern Memorial Hospital. The provider agreement is currently in effect. The amendment is also currently in effect and references rates that are currently in force.
- Respondents' Exhibits RX-1509 (Tab 34) and RX-1625 (Tab 35) reference the same amendment to a provider agreement between Humana and Advocate Lutheran General Hospital. The provider agreement is currently in effect. The amendment is also currently in effect and references rates that are currently in force.

The FTC and Respondents' Exhibits listed above all contain commercially sensitive and highly confidential business information as they reveal the negotiated contract terms, fee schedules, and rates paid by Humana to various provider groups for healthcare services. Each of the provider contracts listed above are either still in effect or Humana currently maintains renewed contracts with the same hospitals and providers on much the same terms. Thus, even the renewed contracts incorporate and contain highly sensitive negotiated terms, financial terms and fee schedules, and rate information set forth in the superseded contracts specified above.

Specifically, the contracts and amendments currently in effect reveal the rates and terms Humana pays provider groups for healthcare services today. Humana has expended thousands of hours and many years to develop these rates and terms. Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its members.

The public disclosure of any of this critically sensitive information would be highly detrimental to Humana as it would provide both the healthcare providers with whom Humana does or may contract and Humana's competitors with sensitive pricing and contracting terms, causing serious and irreparable harm to Humana and resulting in significant loss of business advantage. Were competitors to know with certainty the pricing and contract terms of Humana's contracts with providers, Humana's competition would gain an unfair advantage at Humana's expense. Moreover, healthcare providers armed with Humana's pricing and contracting information could use it to their advantage in future negotiations with Humana.

Furthermore, even where a contract has expired and/or has been renegotiated, disclosure of the prior agreements greatly weakens Humana's business position and competitive stance as its competitors and healthcare providers would become privy to Humana's contract terms, fee schedules, and rates that reflect the contract terms, fee schedules and rates at which Humana currently contracts. This information is vital to Humana's competitive position and business strategy and, if disclosed to the public and to competitors of Humana, would cause serious competitive injury to Humana. (For example, a hospital or provider that discovers it is being paid less now than what another provider was being paid several years ago may attempt to use this information to seek renegotiation of its rates. Similarly, a competitor of Humana that discovers this information can use the knowledge to interfere with Humana's contracts with this and other providers and can also extrapolate from the information to determine current rates, as well as the nature of the proprietary compensation formulas used by Humana in its provider contracting.) Most, if not all, of the contract terms in the original contracts are also used in the subsequent contracts and amendments and have been developed by Humana over a long period of time at great investment. Because of this, disclosure of this information contained in

superseded contracts has the same practical effect as disclosure of contracts that are currently in effect.

Humana limits the internal distribution of its provider contracts – and of any documents that discuss or contain contracted terms – to select employees and does not share its contract terms with outside parties or competitors. In fact, under almost all circumstances, the antitrust laws forbid disclosure of this information to competitors. Were competitors to know with certainty the pricing and contract terms of Humana’s contracts with providers, Humana’s competition would gain an unfair advantage at Humana’s expense. Moreover, hospitals and healthcare providers armed with Humana’s pricing and contracting information could use it to their advantage in future negotiations with Humana. Clearly, this damage both to Humana specifically and competition generally necessitates granting *in camera* treatment of these contracts.

**B. Category 2: Correspondence and Internal Memoranda Involving Contracts and Contract Negotiations.**

The second category of documents for which Humana seeks *in camera* treatment consists of correspondence and internal memoranda that both reflect current contract terms or past terms closely related to those presently in use. These documents also show contract negotiations that reveal highly sensitive financial terms, fee schedules, and rate information involving its reimbursement of health care providers, again, either current information or information closely related to current information. Specifically, the documents listed below are the correspondence and memoranda for which Humana seeks *in camera* treatment:

**Respondents’ Exhibits:**

<b><u>Reference/Comments</u></b>	<b><u>Trial Exhibit #</u></b>
Tab 2	RX-0082
Tab 5	RX-0224

Tab 6	RX-0226
Tab 7	RX-0238
Tab 8	RX-0244
Tab 10	RX-0407
Tab 11	RX-0445
Tab 13	RX-0606
Tab 14	RX-0858
Tab 15	RX-0872
Tab 16	RX-0898
Tab 17	RX-0902
Tab 18	RX-0908
Tab 19	RX-0945
Tab 27	RX-1175
Tab 30	RX-1196
Tab 31	RX-1254
Tab 32	RX-1294

Like the contracts themselves, these documents involve provider agreements and reveal some of the same commercially sensitive and highly confidential contract terms, including sensitive financial terms, fee schedules, discounts, and other rate related information.

- Respondents' Exhibit 0082 (Tab 2) is a Letter of Agreement between Humana and Lutheran General Hospital that reveals price terms and rates that were in effect from January 1, 1995 through December 31, 1995. This Letter of Agreement was superseded by a provider agreement between Humana and Lutheran General Hospital dated February 1, 1997 which is currently in effect. Although the Letter of Agreement is not currently in effect, Humana's payment methodology reflected in the Letter is substantially the same as the methodology contained in the provider agreement which is currently in force.
- Respondents' Exhibit RX-0224 (Tab 5) is correspondence that reveals specific terms of the provider agreement between Humana and Elmhurst Memorial Hospital dated April 1, 1992 which is currently in effect. Although the rates revealed in this correspondence are no longer in effect, Humana's payment methodology and the rate protection provision contained in the provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibit RX-0226 (Tab 6) is correspondence that reveals specific terms of the provider agreement between Humana and Ingalls Memorial Hospital dated April 1, 1992 which is currently in effect. Although the rates revealed in this correspondence are no longer in effect, Humana's payment methodology and the rate protection provision contained in the provider agreement under which the rates were changed currently remains in force.

- Respondents' Exhibit RX-0238 (Tab 7) is correspondence that reveals specific terms of the provider agreement between Humana and Glen Oaks Hospital dated December 1, 1991 which is currently in effect. Although the rates revealed in this correspondence are no longer in effect, Humana's payment methodology and the rate protection provision contained in this provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibits RX-0244 (Tab 8) and RX-0407 (Tab 10) are correspondence that reveal specific terms of the provider agreement between Humana and Lake Forest Hospital dated October 1, 1994 which is currently in effect. Although the rates revealed in these letters are no longer in effect, Humana's payment methodology and the rate protection provision contained in this provider agreement under which these rates were changed currently remains in force.
- Respondents' Exhibit RX-0445 (Tab 11) is correspondence that reveals specific terms of the provider agreement between Humana and Evanston Northwestern Health Care dated January 1, 1993 which is currently in effect. Although the rates revealed in this correspondence are no longer in effect, Humana's payment methodology and the rate protection provision contained in the provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibit RX-0606 (Tab 13) is a Humana e-mail that reveals Humana's internal analysis and negotiating strategies and the specific terms of the provider agreement between Humana and Evanston Northwestern Hospital dated September 1, 1994 which was superseded by the January 1, 2004 provider agreement that is currently in effect. Although the prior provider agreement is no longer in effect, the products and terms of the provider agreement which are being analyzed and negotiated in this e-mail are substantially the same as those contained in the provider agreement currently in force. This e-mail reveals Humana's internal strategies and business tactics in negotiating new provider agreements.
- Respondents' Exhibits RX-0858 (Tab 14) and RX-0872 (Tab 15) are Humana e-mails that reveal Humana's internal analysis and negotiating strategies and the specific terms of the provider agreement between Humana and Lake Forest Hospital. The provider agreement was superseded by the provider agreement dated March 1, 2002 which is currently in effect. Although the prior provider agreement is no longer in effect, the terms of this provider agreement and certain of the products that are being analyzed and negotiated in these documents are substantially the same as those contained in the provider agreement that is currently in force. These documents reveal Humana's internal strategies and business tactics in negotiating new provider agreements.
- Respondents' Exhibit RX-0898 (Tab 16) is correspondence that reveals specific terms of the provider agreement between Humana and Southwest Health Systems, Inc., dated April 1, 1993. This agreement was superseded by the provider agreement dated December 1, 2001 which is currently in effect. Although the prior agreement is no longer in effect, the terms of this provider agreement and Humana's payment methodology are

substantially the same as those contained in the provider agreement that is currently in force. This letter reveals Humana's internal strategies and business tactics in negotiating new provider agreements.

- Respondents' Exhibit RX-0902 (Tab 17) is an Humana e-mail that reveals Humana's internal analysis and negotiating strategies and the specific terms of the provider agreement between Humana and Evanston Northwestern Hospital dated September 1, 1994 which was superseded by the January 1, 2004 provider agreement which is currently in effect.
- Respondents' Exhibits RX-0908 (Tab 18) and RX-1196 (Tab 30) are correspondence that reveal Humana's negotiating strategies and discuss specific terms of the provider agreement between Humana and Holy Cross Hospital dated February 1, 1992 which is currently in effect. Although the rates that are revealed in these correspondence are no longer in effect, Humana's payment methodology and the rate protection provision of the provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibit RX-0945 (Tab 19) is a Humana memorandum that reveals Humana's internal analysis and negotiating strategies and the specific terms of the provider agreement between Humana and Lake Forest. The provider agreement was superseded by the provider agreement dated March 1, 2002 which is currently in effect. Although the rates revealed in this memorandum are no longer in effect, the terms of the provider agreement and certain products that are analyzed and negotiated in the memorandum are substantially the same products as those contained in the provider agreement currently in force. The memorandum reveals Humana's internal strategies and business tactics in negotiating new provider agreements.
- Respondents' Exhibit RX-1175 (Tab 27) is correspondence that reveals Humana's negotiating strategies and the specific terms of the provider agreement between Humana and Northwestern Memorial Hospital dated March 1, 1994 which is currently in effect. Although the rates revealed in this letter are no longer in effect, Humana's payment methodology and the rate protection provision under which the rates were changed currently remains in force.
- Respondents' Exhibit RX-1254 (Tab 31) is an Humana e-mail that reveals Humana's internal analysis of negotiating strategies and the specific terms of provider agreements with several hospitals. Each of the provider agreements referenced in the e-mail is currently in effect, and the rates pertaining to two of the hospitals referenced in this e-mail are currently in force.
- Respondents' Exhibit RX-1294 (Tab 32) is correspondence that reveals Humana's negotiating strategies and the specific terms of the provider agreement between Humana and the several facilities of Advocate Health Care. Each of the Advocate Health Care provider contracts is currently in effect. Although the rates are no longer in effect, Humana's payment methodology and the rate protection provision in these provider agreements under which the rates were changed currently remains in force.

Aside from revealing the negotiated terms of the provider agreements, certain of these documents also reflect Humana's internal analysis and negotiating strategies in coming to terms with various providers. As is the case with provider agreements described in Category One, it is critical to Humana's competitive position and business strategy that the contract terms, fee schedules, and rates paid by Humana to various provider groups for healthcare services, all set forth in these documents, not be disclosed to the public and to its competitors. This is particularly true because these provider contracts are either still in effect or Humana currently maintains renewed contracts with the same providers that incorporate the same terms. Disclosure of these documents would reveal how Humana evaluates and compensates its various provider groups and determines the rates it pays for healthcare services and the terms on which it contracts for such services. Even where a contract has been renegotiated, disclosure of the prior terms weakens its business position and competitive stance as its competitors and healthcare providers would become privy to their contract terms, fee schedules, and rates and use them to their advantage. Humana has expended thousands of hours of market research and many years to develop its business strategy, and Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its members. The public disclosure of any of this critically sensitive information would cause serious and irreparable harm to Humana and result in significant loss of business advantage. Were competitors to know the pricing and terms of Humana's contracts with providers, Humana's competition would gain an unfair advantage at Humana's expense. Moreover, healthcare providers armed with Humana's pricing and contracting information could use it to their advantage in future negotiations with Humana. *In camera* treatment should be granted to these letters and internal memoranda to prevent such injury.

**C. Category 3: Internal Documents and Assessments**

The third category of documents for which Humana seeks *in camera* treatment consists of internal documents and assessments reflecting its business strategies and product evaluations and implementations. Specifically, Humana seeks *in camera* treatment for the following:

**Respondents' Exhibit:**

<b><u>Reference/Comments</u></b>	<b><u>Trial Exhibit #</u></b>
Tab 9	RX-0376
Tab 26	RX-1120
Tab 29	RX-1191
Tab 33	RX-1318
Tab 36	RX-1833

Although this material appears dated, it involves business practices, products, strategies, tactics and analyses currently utilized by Humana and currently in effect. Specifically,

- Respondents' Exhibit RX-0376 (Tab 9) is Humana's Access Plan that it currently utilizes and which reveals Humana's internal methodology for pursuing and maintaining business opportunities.
- Respondents' Exhibit RX-1120 (Tab 26) reveals Humana's confidential business tactics for business that it is currently pursuing.
- Respondents' Exhibits RX-1191 (tab 29) and RX-1318 (Tab 33) reveal Humana's internal analysis and evaluation of certain of its products that are currently in use.
- Respondents' Exhibit RX-1833 (Tab 36) reveals Humana's internal strategy and contract negotiation tactics involving rates for products currently in effect.

These documents reveals Humana's internal and confidential assessments of some of its products and the business strategies employed in the implementation of such products. Like the contract terms, Humana has logged numerous hours into developing its products, and the results are the life blood of the company. Humana would never share this information with competitors, and in fact actively protects such information. With this knowledge, competitors could undermine Humana's current competitive standing and its current and future product offerings.

The public disclosure of any of this sensitive information would be highly detrimental to Humana as it would allow those with whom Humana competes and those to whom Humana markets to preempt Humana's business strategies, resulting in a significant loss of business advantage. Consequently, these documents should be granted *in camera* treatment.

**D. Category 4: Sensitive Business Information Regarding Potential Litigation With Health Care Providers.**

The fourth category of documents for which Humana seeks *in camera* treatment consists of sensitive business information regarding potential litigation with certain health care providers. Specifically, Humana seeks *in camera* treatment of the following documents which reflect sensitive business information regarding potential litigation with certain health care providers:

**Respondents' Exhibits:**

<u>Reference/Comments</u>	<u>Trial Exhibit #</u>
Tab 20	RX-1022
Tab 21	RX-1043
Tab 22	RX-1044
Tab 23	RX-1070

These four letters involve disputes under a provider contract between Humana and certain health care providers dated June 1, 1998 which is currently in effect and reveal sensitive business information involving potential litigation. Humana and the health care providers at issue went to great lengths to avoid public disclosure and media scrutiny of these documents and the information contained therein. The public disclosure of any of this critically sensitive information would be highly detrimental to Humana. Not only would it result in a loss of goodwill, but such disclosure would also result in a significant loss of business advantage and unfairly advantage its competitors by revealing the disputes between the parties concerning interpretations of contract terms and contract performance. For these reasons, these four letters should be granted *in camera* treatment.

**E. Category 5: Claims Data Reports.**

The fifth category of documents for which Humana seeks *in camera* treatment consists of claims data reports. Specifically, the documents listed below are the claims data reports that the FTC has disclosed as Exhibit CX 03018:

<u>Reference/Comments</u>	<u>Trial Exhibit #</u>	<u>Defined Files</u>
Tab 25	CX 03018	files: ftcip.txt REED95A.TXT REED96A.TXT REED97A.TXT REED98A.TXT REED99A.TXT REED00A.TXT REED01A.TXT REED01C.TXT REED02B.TXT
		ftcop.txt REED95B.TXT REED96B.TXT REED97B.TXT REED98B.TXT REED99B.TXT REED00B.TXT REED01B.TXT REED02A.TXT

These data files reveal commercially sensitive and highly confidential business information as to the contract terms, fee schedules, and, specifically, the rates that Humana paid various healthcare providers. As set forth previously, it is critical to Humana's competitive position and business strategy that its contract terms, fee schedules, and rates paid by Humana to various provider groups for healthcare services not be disclosed to the public and to its competitors. From these data files, Humana's competitors and providers can easily calculate and determine Humana's rates and discounts and other financial contract terms which will clearly provide a competitive advantage and be detrimental to Humana's bargaining position with providers. Publication of these data reports, and therefore publication of the rates and terms at which it contracts with providers, would allow Humana's competitors and providers to determine Humana's reimbursement rates and discounts, damaging Humana's future negotiating ability. Providers also could use this information to collude. For these reasons, the data reports merit *in camera* treatment.

#### IV. *In Camera* Treatment for the Documents Listed in the Attached Exhibits Should Extend for a Period of Ten Years

As a non-party seeking *in camera* treatment for its confidential business information, Humana's request should be treated with "special solicitude." *Kaiser Aluminum*, 103 F.T.C. at 500. Reasonable periods of *in camera* treatment encourage non-parties to cooperate with future discovery requests in adjudicative proceedings. *Id.* At tremendous cost, in both time and money, Humana has cooperated with the discovery demands of both parties to this case. The subject documents have been made available for use by Complaint counsel and Respondents in accordance with the terms of the Protective Order, and their public disclosure will in no way promote the resolution of this matter, nor will it lead to any measurable public understanding of these proceedings. There simply is no significant public interest in the disclosure of these confidential materials. Conversely, their public disclosure would cause Humana's serious competitive injury. On balance, *in camera* treatment is clearly warranted for the identified documents. *See In re Bristol-Myers*, 90 F.T.C. at 456.

Further, Humana's request that *in camera* treatment for the subject documents be maintained for ten years is reasonable in light of the commercial realities of the managed care industry. Provider contracts typically continue in force for a number of years and are often renegotiated and renewed with substantial incorporation of the terms of preceding contracts. The documents at issue here show the frequency of amendments of such contracts and their duration. Under these circumstances, it is uncertain as to when the documents will no longer reflect current pricing and contract terms. Therefore, disclosure of the documents is not appropriate as such disclosure would cause Humana serious competitive injury by allowing providers and competitors to divine the current pricing and terms at which Humana contracts for healthcare services. *See In the Matter of Hoechst Marion Roussel, Inc.*, 2000 WL 33534760 (FTC) (Oct. 4,

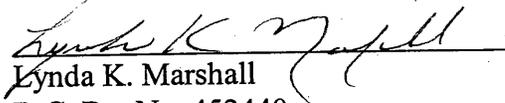
2000) (granting *in camera* treatment of managed care provider contracts where serious injury would be done by their release). Disclosure is also not appropriate because it would reveal to Humana's competitors and other providers Humana's pricing and contracting strategy, as well as other highly sensitive and confidential information relating to potential litigation with certain health care providers. Moreover, with regard to those expired contracts that have been renewed with nearly identical terms, these expired contracts contain valuable contract terms and pricing information that Humana's competitors and providers could use to their competitive or business advantage. Accordingly, Humana requests *in camera* treatment for a period of ten years to provide a reasonable opportunity for the contracts to expire and their terms to become outdated.

#### V. Conclusion

Humana strives to set itself apart from its competitors and succeed in the challenging healthcare arena. In doing so, it has created highly sensitive documents relating to the terms and prices at which it contracts for healthcare services, its product strategy, and potential litigation. As set out above, disclosure of these materials would result in a clearly defined serious injury to Humana, severely undercutting Humana's efforts in a competitive industry. For these reasons, and for those set out in the Declaration of John Paul Maxwell, Humana respectfully requests that this Court grant its motion directing *in camera* treatment for the subject documents.

Dated: February 14, 2005

Respectfully submitted,



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[PUBLIC]

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

\_\_\_\_\_  
In the Matter of )  
 )  
EVANSTON NORTHWESTERN HEALTHCARE )  
CORPORATION, )  
 )  
and )  
 )  
ENH MEDICAL GROUP, INC., )  
Respondents. )  
\_\_\_\_\_ )

Docket No. 9315

**DECLARATION OF PAUL MAXWELL IN SUPPORT OF HUMANA HEALTH PLAN, INC.'S SECOND AMENDED MOTION FOR *IN CAMERA* TREATMENT**

I, John Paul Maxwell, being first duly sworn on oath, declare and state that I am more than 21 years of age, I have personal knowledge of the matters set forth in my declaration, and that, if called as a witness, I could competently testify to the following:

1. I am currently employed by Humana Health Plan, Inc. ("Humana") as Vice President of Network Management. In this position, my responsibilities include negotiation and administration of contracts with hospitals and other providers in Illinois.

2. I began my employment with Humana in February, 1991 at which time my duties included management of contracting for the Humana Staff Model HMO Network. In 1995, I assumed responsibilities for negotiation and administration of hospital contracts for Humana's Illinois Plan and have continued these duties to the present day.

3. I submit this declaration in support of Non-Party Humana's Second Amended Motion for *In Camera* Treatment of Certain Designated Hearing Exhibits which are identified by Complaint Counsel and counsel for Respondents as potential trial exhibits. These documents were produced by

Humana pursuant to subpoena during the investigation stage and during discovery proceedings of the above-captioned matter and consist of: (1) contracts with hospitals and healthcare providers that are either currently in effect or the terms of which refer to or are substantially identical to those currently in effect; (2) correspondence and internal memoranda regarding the terms of, and negotiations for, provider agreements; (3) internal documents and assessments concerning Humana's business strategies and products; (4) sensitive business information involving potential litigation; and (5) claims data files. Each of the FTC's and Respondents' exhibits that Humana seeks *in camera* treatment is identified in Exhibits 1 and 2 to Humana's Second Amended Motion for *In Camera* Treatment of Certain Designated Hearing Exhibits.

4. The first category of documents for which Humana seeks *in camera* treatment consists of provider contracts and provider contract amendments that are either currently in effect or that refer to or are substantially identical to those currently in effect. Specifically, the documents listed below are the contracts or other, related documents for which Humana seeks *in camera* treatment:

**FTC Exhibits:**

<b><u>Reference/Comments</u></b>	<b><u>Trial Exhibit #</u></b>
Tab 1	CX 05028
Tab 2	CX 05027
Tab 3	CX 05026
Tab 4	CX 05025
Tab 5	CX 05024
Tab 6	CX 05023
Tab 7	CX 05021
Tab 8	CX 05022
Tab 9	CX 05020
Tab 10	CX 05771
Tab 11	CX 05770
Tab 12	CX 05768
Tab 13	CX 05769
Tab 14	CX 05766
Tab 15	CX 05765

Tab 16	CX 05764
Tab 17	CX 05763
Tab 18	CX 05762
Tab 19	CX 05759
Tab 20	CX 05760
Tab 21	CX 05758
Tab 22	CX 05757
Tab 23	CX 05756
Tab 24	CX 05019

The FTC exhibits include a provider agreement that is currently in effect, with several amendments to that agreement, and agreements and amendments that, although no longer in effect, are substantially similar to the terms contained in the present agreements. Specifically,

- FTC Exhibit CX05020 (Tab 9) is a Hospital Participation Agreement between Humana and Evanston Hospital dated January 1, 1993 which is currently in effect.
- FTC Exhibits CX05028 (Tab 1), CX05027 (Tab 2), CX05026 (Tab 3), CX05025 (Tab 4), CX05024 (Tab 5), CX05023 (Tab 6), CX05021 (Tab 7), and CX05020 (Tab 8) are amendments to the provider agreement dated January 1, 1993 which is currently in effect. Although the rates that are revealed in these amendments are no longer in effect, Humana's payment methodology and the rate protection provision contained in the original agreement remain in force. In addition, although the amendments are no longer in effect, the terms of the current provider agreement which are currently in force are substantially the same to the terms revealed in these amendments.
- FTC Exhibits CX05771 (Tab 10), CX05770 (Tab 11), CX05768 (Tab 12), CX05769 (Tab 13), CX05766 (Tab 14), and CX05764 (Tab 15) are prior provider agreements and amendments to provider agreements that were entered into and/or assumed by Humana and Evanston. The agreements were superseded by the current provider agreement dated January 1, 1993 which is currently in effect. Although the rates that are revealed in the amendments are no longer in effect, Humana's payment methodology and the rate protection provision contained in the original agreement are substantially similar to the agreement currently in force. In addition, although the amendments are no longer in effect, the terms of the current provider agreement which is currently in force are substantially the same to the terms revealed in the prior provider agreements and amendments.
- Likewise, FTC Exhibits CX05764 (Tab 16), CX05763 (Tab 17), CX05762 (Tab 18), CX05759 (Tab 19), CX05760 (Tab 20), CX05758 (Tab 21), CX05757 (Tab 22), CX05756 (Tab 23), and CX05019 (Tab 24) are provider agreements and amendments to provider agreements between Humana and Highland Park Hospital. These agreements were superseded by the Hospital Participation Agreement between Humana and Evanston Hospital dated 01/01/93 after ENH purchased Highland Park on 07/01/99, which is currently in effect.

Although the rates that are revealed in these provider agreements and amendments are no longer in effect, Humana's payment methodology and the rate protection provision contained in the original agreements are substantially similar to the agreement in force. In addition, although the amendments are no longer in effect, the terms of the provider agreement currently in force are substantially the same to the terms revealed in the prior provider agreements and amendments.

**Respondents' Exhibits:**

<b><u>Reference/Comments</u></b>	<b><u>Trial Exhibit #</u></b>
Tab 1	RX-0066
Tab 3	RX-0102
Tab 4	RX-0162
Tab 12	RX-0583
Tab 24	RX-1087
Tab 25	RX-1105
Tab 28	RX-1185
Tab 34	RX-1509
Tab 35	RX-1625

Similarly, the Respondents' exhibits listed above includes provider agreements that are currently in effect, and agreements and amendments that, although no longer in effect, are substantially similar to the terms contained in the current agreements. Specifically,

- Respondents' Exhibit RX-0066 (Tab 1) is a Hospital Participation Agreement between Humana and Evanston Hospital dated January 1, 1993 which is currently in effect.
- Respondents' Exhibit RX-0102 (Tab 3) is an amendment to a provider agreement between Humana and Northwestern dated 01/01/94; this agreement is currently in effect. Although the rates that are revealed in the amendment are no longer in effect, Humana's payment methodology and the rate protection provision contained in this provider agreement under which the rates were changed currently remains in force. In addition, although the amendment is no longer in effect, the terms of the current provider agreement which are currently in force are substantially the same as the terms revealed in the amendment.
- Respondents' Exhibits RX-0162 (Tab 4) and RX-0583 (Tab 5) are amendments to a provider agreement between Humana and Rush North Shore Medical Center; this agreement is currently in effect. Although the rates contained in these amendments are no longer in effect, Humana's payment methodology and the rate protection provision contained in the provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibits RX-1087 (Tab 24), RX-1105 (Tab 25) reference the same amendment to a provider agreement between Humana and Advocate Lutheran General Hospital dated

02/01/97; this agreement is currently in effect. Although the rates that are revealed in the amendment are no longer in effect, Humana's payment methodology and the rate protection provision contained in this provider agreement under which the rates were changed currently remains in force. In addition, although the amendment is no longer in effect, the terms of the current provider agreement which are currently in force are substantially the same as the terms revealed in the amendment.

- Respondents' Exhibit RX-1185 (Tab 28) is an amendment to a provider agreement between Humana and Evanston Northwestern Memorial Hospital. The provider agreement is currently in effect. The amendment is also currently in effect and references rates that are currently in force.
- Respondents' Exhibits RX-1509 (Tab 34) and RX-1625 (Tab 35) reference the same amendment to a provider agreement between Humana and Advocate Lutheran General Hospital. The provider agreement is currently in effect. The amendment is also currently in effect and references rates that are currently in force.

The FTC and Respondents' Exhibits listed above all contain commercially sensitive and highly confidential business information as they reveal the negotiated contract terms, fee schedules, and rates paid by Humana to various provider groups for healthcare services. Each of the provider contracts and amendments listed above are either still in effect or Humana currently maintains renewed contracts with the same hospitals and providers on much the same terms. Thus, even the contracts no longer in effect incorporate and contain highly sensitive negotiated terms, financial terms and fee schedules, and rate information set forth in the superseded contracts specified above.

Specifically, the contracts and amendments currently in effect reveal the rates and terms Humana pays provider groups for healthcare services today. Humana has expended thousands of hours and many years to develop these rates and terms. Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its members. The public disclosure of any of this critically sensitive information would be highly detrimental to Humana as it would provide both the healthcare providers with whom Humana does or may contract and Humana's competitors with sensitive pricing and contracting terms, causing serious and irreparable

harm to Humana and resulting in significant loss of business advantage. Were competitors to know with certainty the pricing and contract terms of Humana's contracts with providers, Humana's competition would gain an unfair advantage at Humana's expense. Moreover, healthcare providers armed with Humana's pricing and contracting information could use it to their advantage in future negotiations with Humana.

Furthermore, even where a contract has expired and/or has been renegotiated, disclosure of the prior agreements greatly weakens Humana's business position and competitive stance as its competitors and healthcare providers would become privy to contract terms, fee schedules, and rates that reflect the contract terms, fee schedules and rates at which Humana currently contracts. This information is vital to Humana's competitive position and business strategy and, if disclosed to the public and to competitors of Humana, would cause serious competitive injury to Humana. (For example, a hospital or provider that discovers it is being paid less now than what another provider was being paid several years ago may attempt to use this information to seek renegotiation of its rates. Similarly, a competitor of Humana that discovers this information can use the knowledge to interfere with Humana's contracts with this and other providers and can also extrapolate from the information to determine current rates, as well as the nature of the proprietary compensation formulas used by Humana in its provider contracting.) Most, if not all, of the contract terms in the original contracts are also used in the subsequent contracts and amendments and have been developed by Humana over a long period of time at great investment. Because of this, disclosure of this information contained in superseded contracts has the same practical effect as disclosure of contracts that are currently in effect.

5. The second category of documents for which Humana seeks *in camera* treatment consists of correspondence and internal memoranda that reflect current contract terms or past terms

closely related to those presently in use. These documents also show contract negotiations that reveal highly sensitive financial terms, fee schedules, and rate information involving its reimbursement of health care providers, again, either current information or information closely related to current information. Specifically, the documents listed below are correspondence and memoranda for which Humana seeks *in camera* treatment:

**Respondents' Exhibits:**

<b><u>Reference/Comments</u></b>	<b><u>Trial Exhibit #</u></b>
Tab 2	RX-0082
Tab 5	RX-0224
Tab 6	RX-0226
Tab 7	RX-0238
Tab 8	RX-0244
Tab 10	RX-0407
Tab 11	RX-0445
Tab 13	RX-0606
Tab 14	RX-0858
Tab 15	RX-0872
Tab 16	RX-0898
Tab 17	RX-0902
Tab 18	RX-0908
Tab 19	RX-0945
Tab 27	RX-1175
Tab 30	RX-1196
Tab 31	RX-1254
Tab 32	RX-1294

- Respondents' Exhibit 0082 (Tab 2) is a Letter of Agreement between Humana and Lutheran General Hospital that reveals price terms and rates that were in effect from 01/01/95 through 12/31/95. This Letter of Agreement was superseded by a provider agreement between Humana and Lutheran General Hospital dated 02/01/97 which is currently in effect. Although the Letter of Agreement is not currently in effect, Humana's payment methodology reflected in this document is substantially the same as the methodology contained in the provider agreement which is currently in force.
- Respondents' Exhibit RX-0224 (Tab 5) is correspondence that reveals specific terms of the provider agreement between Humana and Elmhurst Memorial Hospital dated 04/01/92 which is currently in effect. Although the rates revealed in this correspondence are no longer in effect, Humana's payment methodology and the rate protection provision contained in the provider agreement under which the rates were changed currently remains in force.

- Respondents' Exhibit RX-0226 (Tab 6) is correspondence that reveals specific terms of the provider agreement between Humana and Ingalls Memorial Hospital dated 04/01/92 which is currently in effect. Although the rates revealed in this correspondence are no longer in effect, Humana's payment methodology and the rate protection provision contained in the provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibit RX-0238 (Tab 7) is correspondence that reveals specific terms of the provider agreement between Humana and Glen Oaks Hospital dated 12/01/91 which is currently in effect. Although the rates revealed in this correspondence are no longer in effect, Humana's payment methodology and the rate protection provision contained in this provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibits RX-0244 (Tab 8) and RX-0407 (Tab 10) are correspondence that reveal specific terms of the provider agreement between Humana and Lake Forest Hospital dated 10/01/94 which is currently in effect. Although the rates revealed in these letters are no longer in effect, Humana's payment methodology and the rate protection provision contained in this provider agreement under which these rates were changed currently remains in force.
- Respondents' Exhibit RX-0445 (Tab 11) is correspondence that reveals specific terms of the provider agreement between Humana and Evanston Northwestern Health Care dated 01/01/93 which is currently in effect. Although the rates revealed in this correspondence are no longer in effect, Humana's payment methodology and the rate protection provision contained in the provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibit RX-0606 (Tab 13) is a Humana e-mail that reveals Humana's internal analysis and negotiating strategies and the specific terms of the provider agreement between Humana and Evanston Northwestern Hospital dated 09/01/94 which was superseded by the 01/01/04 provider agreement that is currently in effect. Although the prior provider agreement is no longer in effect, the products and terms of the provider agreement which are being analyzed and negotiated in this e-mail are substantially the same as those contained in the provider agreement currently in force. This e-mail reveals Humana's internal strategies and business tactics in negotiating new provider agreements.
- Respondents' Exhibits RX-0858 (Tab 14) and RX-0872 (Tab 15) are Humana e-mails that reveal Humana's internal analysis and negotiating strategies and the specific terms of the provider agreement between Humana and Lake Forest Hospital. The provider agreement was superseded by the provider agreement dated 03/01/02 which is currently in effect. Although the prior provider agreement is no longer in effect, the terms of this provider agreement and certain of the products that are being analyzed and negotiated in these documents are substantially the same as those contained in the provider agreement that is currently in force. These documents reveal Humana's internal strategies and business tactics in negotiating new provider agreements.

- Respondents' Exhibit RX-0898 (Tab 16) is correspondence that reveals specific terms of the provider agreement between Humana and Southwest Health Systems, Inc., dated 04/01/93. This agreement was superseded by the provider agreement dated 12/01/01 which is currently in effect. Although the prior agreement is no longer in effect, the terms of this provider agreement and Humana's payment methodology are substantially the same as those contained in the provider agreement that is currently in force. This letter reveals Humana's internal strategies and business tactics in negotiating new provider agreements.
- Respondents' Exhibit RX-0902 (Tab 17) is an Humana e-mail that reveals Humana's internal analysis and negotiating strategies and the specific terms of the provider agreement between Humana and Evanston Northwestern Hospital dated 09/01/94 which was superseded by the 01/01/04 provider agreement which is currently in effect.
- Respondents' Exhibits RX-0908 (Tab 18) and RX-1196 (Tab 30) are correspondence that reveal Humana's negotiating strategies and discuss specific terms of the provider agreement between Humana and Holy Cross Hospital dated 02/01/92 which is currently in effect. Although the rates that are revealed in these correspondence are no longer in effect, Humana's payment methodology and the rate protection provision of the provider agreement under which the rates were changed currently remains in force.
- Respondents' Exhibit RX-0945 (Tab 19) is a Humana memorandum that reveals Humana's internal analysis and negotiating strategies and the specific terms of the provider agreement between Humana and Lake Forest. The provider agreement was superseded by the provider agreement dated 03/01/02 which is currently in effect. Although the rates revealed in this memorandum are no longer in effect, the terms of the provider agreement and certain products that are analyzed and negotiated in the memorandum are substantially the same products as those contained in the provider agreement currently in force. The memorandum reveals Humana's internal strategies and business tactics in negotiating new provider agreements.
- Respondents' Exhibit RX-1175 (Tab 27) is correspondence that reveals Humana's negotiating strategies and the specific terms of the provider agreement between Humana and Northwestern Memorial Hospital dated 03/01/94 which is currently in effect. Although the rates revealed in this letter are no longer in effect, Humana's payment methodology and the rate protection provision under which the rates were changed currently remains in force.
- Respondents' Exhibit RX-1254 (Tab 31) is an Humana e-mail that reveals Humana's internal analysis of negotiating strategies and the specific terms of provider agreements with several hospitals. Each of the provider agreements referenced in the e-mail is currently in effect, and the rates pertaining to two of the hospitals referenced in this e-mail are currently in force.
- Respondents' Exhibit RX-1294 (Tab 32) is correspondence that reveals Humana's negotiating strategies and the specific terms of the provider agreement between Humana and the several facilities of Advocate Health Care. Each of the Advocate Health Care provider

contracts is currently in effect. Although the rates are no longer in effect, Humana's payment methodology and the rate protection provision in these provider agreements under which the rates were changed currently remains in force.

Like the contracts themselves, these documents involve provider agreements and reveal some of the same commercially sensitive and highly confidential contract terms, including sensitive financial terms, fee schedules, discounts, and other rate related information. Certain of these documents also reflect Humana's internal analysis and negotiating strategies in coming to terms with various providers. As described in Paragraph 4, it is critical to Humana's competitive position and business strategy that the contract terms, fee schedules, and rates paid by Humana to various provider groups for healthcare services, all set forth in these documents, not be disclosed to the public and to its competitors. This is particularly true because these provider contracts are either still in effect or Humana currently maintains renewed contracts with the same providers that incorporate the same terms. Disclosure of these documents would reveal how Humana evaluates and compensates its various provider groups and determines the rates it pays for healthcare services and the terms on which it contracts for such services. Even where a contract has been renegotiated, disclosure of the prior terms weakens Humana's business position and competitive stance by allowing competitors and healthcare providers to become privy to these contract terms, fee schedules, and rates and use them to their advantage. Humana has expended thousands of hours of market research and many years to develop its business strategy and Humana's efforts in this regard have allowed it to gain a competitive advantage in the marketplace and better service its members. The public disclosure of any of this critically sensitive information would cause serious and irreparable harm to Humana and resulting in significant loss of business advantage. Were competitors to know the pricing and contract terms of Humana's contracts with providers, Humana's competition would gain an unfair

advantage at Humana's expense. Moreover, healthcare providers armed with Humana's pricing and contracting information could use it to their advantage in future negotiations with Humana.

6. The third category of documents for which Humana seeks *in camera* treatment consists of internal documents and assessments reflecting its business strategies and product evaluations and implementations.

Specifically, Humana seeks *in camera* treatment for the following:

**Respondents' Exhibit:**

<b><u>Reference/Comments</u></b>	<b><u>Trial Exhibit #</u></b>
Tab 9	RX-0376
Tab 26	RX-1120
Tab 29	RX-1191
Tab 33	RX-1318
Tab 36	RX-1833

Although this material appears dated, it involves business practices, products, strategies, tactics, and analyses currently utilized by Humana and currently in effect. Specifically,

- Respondents' Exhibit RX-0376 (Tab 9) is Humana's Access Plan that it currently utilizes and which reveals Humana's internal methodology for pursuing and maintaining business opportunities.
- Respondents' Exhibit RX-1120 (Tab 26) reveals Humana's confidential business tactics for business that it is currently pursuing.
- Respondents' Exhibits RX-1191 (tab 29) and RX-1318 (Tab 33) reveal Humana's internal analysis and evaluation of certain of its products that are currently in use.
- Respondents' Exhibit RX-1833 (Tab 36) reveals Humana's internal strategy and contract negotiation tactics involving rates for products currently in effect.

These documents reveal Humana's internal and confidential assessments of some of its products, as well as the business strategies employed in the implementation of such products. As with the contract terms, Humana has put significant effort and time into developing these strategies. The public disclosure of any of this sensitive information would be highly detrimental to Humana as

it would allow those with whom Humana competes and those to whom Humana markets to preempt Humana's business strategies, resulting in a significant loss of business advantage.

7. The fourth category of documents for which Humana seeks *in camera* treatment consists of sensitive business information regarding potential litigation with certain health care providers. Specifically, Humana seeks *in camera* treatment of the following documents which reflect sensitive business information regarding potential litigation with certain health care providers:

**Respondents' Exhibits:**

<b><u>Reference/Comments</u></b>	<b><u>Trial Exhibit #</u></b>
Tab 20	RX-1022
Tab 21	RX-1043
Tab 22	RX-1044
Tab 23	RX-1070

These documents involve disputes under a provider contract between Humana and certain health care providers. The dispute centered on a contract dated 06/01/98 which is currently in effect.

These documents reveal sensitive business information regarding this contract and involving potential litigation on issues related to this contract. Humana and the health care providers at issue went to great lengths to avoid public disclosure and media scrutiny of these documents and the information contained therein. The public disclosure of any of this critically sensitive information would be highly detrimental to Humana. Not only would it result in loss of goodwill, but such disclosure also would result in a significant loss of business advantage and unfairly advantage its competitors by revealing the disputes between the parties concerning interpretations of contract terms and contract performance.

8. The fifth category of documents for which Humana seeks *in camera* treatment consists of claims data reports. Specifically, the documents listed below are the claims data reports that the FTC has disclosed as Exhibit CX 03018:

<u>Reference/Comments</u>	<u>Trial Exhibit #</u>	<u>Defined Files</u>
Tab 25	CX 03018	files: ftcip.txt REED95A.TXT REED96A.TXT REED97A.TXT REED98A.TXT REED99A.TXT REED00A.TXT REED01A.TXT REED01C.TXT REED02B.TXT
		ftcop.txt REED95B.TXT REED96B.TXT REED97B.TXT REED98B.TXT REED99B.TXT REED00B.TXT REED01B.TXT REED02A.TXT

These files reveal commercially sensitive and highly confidential business information as to the contract terms, fee schedules, and, specifically, the rates that Humana paid various healthcare providers. As described above in Paragraph 4, it is critical to Humana's competitive position and business strategy that its contract terms, fee schedules, and rates paid by Humana to various provider groups for healthcare services not be disclosed to the public and to its competitors. From these data files, Humana's competitors and providers can easily calculate and determine Humana's rates and discounts and other financial contract terms which will clearly provide a competitive advantage and be detrimental to Humana's bargaining position with providers.

9. I am familiar with and have reviewed the documents for which Humana seeks *in camera* treatment, which are identified in Exhibit A to my declaration. Each of the documents for which Humana seeks *in camera* review contain sensitive and confidential information that would result in competitive injury to Humana should it be made public. Each of these documents has been maintained internally by Humana in a confidential manner, only being shared with those individuals requiring knowledge of the information contained within the document. The information was not made available to Humana's competitors or other outside persons. As such, when legally compelled to produce the information under subpoena, the documents were treated as "Confidential Discovery Material" or "Restricted Confidential Discovery Material" in accordance with the terms of the

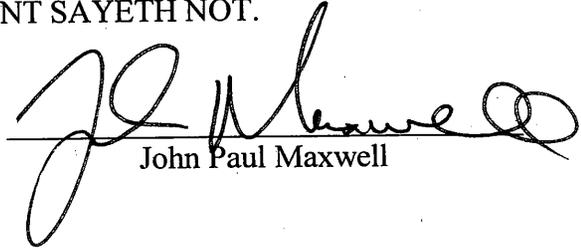
Protective Order Governing Discovery Material entered by Stephen J. McGuire, Chief Administrative Law Judge, on March 24, 2004.

10. By virtue of my current and former positions for Humana, as described above, I am familiar with the type of information contained in the subject documents and affirmatively state that the documents identified in Humana's Motion requesting *in camera* review, and described in Exhibit A to my declaration, contain commercially sensitive and highly confidential business information the disclosure of which would cause serious competitive injury to Humana. Disclosure of the subject documents would reveal how Humana evaluates and compensates its various provider groups and determines the rates it pays for healthcare services and the terms on which it contracts for such 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 members. The public disclosure of any of this critically sensitive information would be highly detrimental to Humana as it would provide both the healthcare providers with whom Humana does or may contract and Humana's competitors with sensitive and confidential information that would cause serious and irreparable harm to Humana and result in significant loss of business advantage.

11. In sum, the documents and claims data files for which Humana seeks *in camera* review are sensitive and material to Humana's business, competitiveness, and profitability. Disclosure of the information contained in these documents will result in loss of business advantage and serious irreparable injury to Humana.

12. I declare, under penalty of perjury, that the above statements are true and correct.

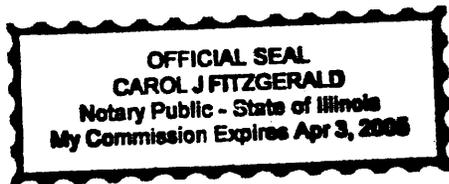
FURTHER AFFIANT SAYETH NOT.

  
John Paul Maxwell

**SUBSCRIBED AND SWORN**

to before me this 10<sup>th</sup> day of  
February, 2005.

  
Notary Public



[PUBLIC]

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

In the Matter of )  
 )  
EVANSTON NORTHWESTERN HEALTHCARE )  
CORPORATION, )  
 )  
and )  
 )  
ENH MEDICAL GROUP, INC., )  
Respondents. )  
\_\_\_\_\_ )

Docket No. 9315

**ORDER GRANTING NON-PARTY HUMANA, INC.'S SECOND AMENDED MOTION  
FOR *IN CAMERA* TREATMENT OF CERTAIN DESIGNATED HEARING EXHIBITS**

Upon consideration of Non-Party Humana, Inc.'s ("Humana's") Second Amended Motion for In Camera Treatment of Certain Designated Hearing Exhibits and the Declaration in support thereof, it is hereby ORDERED that Humana's motion is GRANTED. It is further ordered that the documents identified in Exhibits 1 and 2 of Humana's Second Amended Motion for *In Camera* Treatment of Certain Designated Hearing Exhibits are afforded in camera treatment for a period of ten years.

Dated:

\_\_\_\_\_  
The Honorable Stephen J. McGuire  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I, Andrea E. Ryan, hereby certify that on February 14, 2005, I caused copies of:

1. Non-Party Humana, Inc.'s Second Amended Motion For In Camera Treatment of Certain Designated Hearing Exhibits;
2. Declaration of Paul Maxwell In Support of Humana Health Plan, Inc.'s Second Amended Motion for In Camera Treatment; and
3. Proposed Order Granting Non-Party Humana Inc.'s Second Amended Motion for In Camera Treatment of Certain Designated Hearing Exhibits

to be served upon the following persons:

Office of the Secretary  
Federal Trade Commission  
Room H-159  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
*(Original and two copies of both public and confidential versions served via messenger, and electronic copies served via e-mail (public version) and disk (confidential version))*

The Honorable Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
Room H-106  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
*(Two copies of each of public and confidential versions served via messenger)*

Thomas H. Brock, Esquire  
Federal Trade Commission  
Room H-374  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
*(Public and confidential versions served via messenger)*

Philip M. Eisenstat, Esquire  
Federal Trade Commission  
Room NJ-5235  
601 New Jersey Avenue, NW  
Washington, DC 20580  
*(Public and confidential versions served via messenger)*

Chul Pak, Esquire  
Assistant Director Mergers IV  
Federal Trade Commission  
Room NJ-5328  
601 New Jersey Avenue, NW  
Washington, DC 20580  
*(Public and confidential versions served via messenger)*

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Michael L. Sibarium  
Charles B. Klein  
Rebecca C. Morrison  
Winston & Strawn  
1400 L Street, NW  
Washington, DC 20005-3502  
*(Public and confidential versions served via messenger)*

  
Andrea E. Ryan

## CERTIFICATE OF SERVICE

I, Andrea E. Ryan, hereby certify that on February 14, 2005, I caused copies of:

1. Non-Party Humana, Inc.'s Second Amended Motion For In Camera Treatment of Certain Designated Hearing Exhibits;
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3. Proposed Order Granting Non-Party Humana Inc.'s Second Amended Motion for In Camera Treatment of Certain Designated Hearing Exhibits

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Washington, DC 20580  
*(Two copies of each of public and confidential versions served via messenger)*

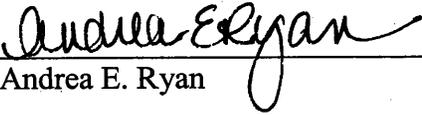
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