

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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 MOTION FOR MOTION FOR IN CAMERA
TREATMENT OF CERTAIN DESIGNATED HEARING EXHIBITS**

Non-Party Humana, Inc. (“Humana”) hereby files its 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 an indefinite duration or, alternatively, no less than 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 on-going and future business, and their disclosure would harm Humana. In support of this Motion, Humana respectfully refers the Court to the accompanying Declaration of John Paul Maxwell and submits as follows:

ARGUMENT

I. Introduction

A description of each document identified by the FTC and Respondents as potential trial exhibits for which Humana seeks in camera treatment is attached hereto as Exhibits 1 and 2, respectively. All of the documents 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.¹ 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 an indefinite duration or, alternatively, for a period of no less than ten years.

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

¹ 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.

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 solitude. *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 relate almost exclusively 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 four categories of material: (1) contracts with various healthcare providers in the Chicago metropolitan area, including Evanston Northwestern Healthcare; (2) correspondence regarding the terms of such contracts; (3) internal documents and assessments concerning the contracts; and (4) patient claims data that reflects rates for healthcare services. The contracts, correspondence, and other documents within these categories go to the heart of Humana's

business and, as set out below, are precisely the type of materials for which in camera treatment was created.

The first category of documents for which Humana seeks in camera treatment consists of Humana's contracts with various healthcare providers in the Chicago metropolitan area, including Evanston Northwestern Healthcare. The contracts contain heavily negotiated, proprietary terms between Humana and providers that are extremely competitively sensitive. The agreements are the product of significant investment by Humana, and are the key to Humana's profitability. Contract negotiations can span months and occupy hundreds of employee hours, including not only negotiation time, but also strategic thinking, actuarial analysis, financial modeling, and legal and regulatory review and drafting. Similarly, the correspondence and internal documentation contained in the second and third categories of documents for which Humana seeks in camera treatment include or reflect proposed and actual contract terms, and reveal Humana's negotiating and pricing strategies. In the same manner as the contracts themselves, these documents contain confidential and proprietary information, the public disclosure of which would result in material harm to Humana. So too, the claims data contains pricing information that clearly reveals contracted provider rates should be protected from disclosure.²

Humana guards the terms of its provider contracts closely. Internal distribution of these contracts – and of any documents relating to these contracts – is limited to those requiring knowledge of the material contained within the contract or related document. Humana does not share its rates and contract terms with outside parties or with competitors. Indeed, under almost

² Furthermore, to the extent the documents contain fee and rate schedules, they clearly constitute "trade secrets" under Section 368b of the Illinois Trade Secrets Act as a matter of law. 215 ILCS 5/368b(b) ("The fee schedule, the capitation schedule, and the network provider administration manual constitute confidential, proprietary, and trade secret information and are subject to the provisions of the Illinois Trade Secrets Act").

all circumstances, the antitrust laws forbid disclosure of this information to competitors. Accordingly, when legally compelled to produce these materials under subpoena, Humana treated the documents as “Confidential Discovery Material” or “Restricted Confidential Discovery Material” in accordance with the terms of the Protective Order.

Disclosure of this highly sensitive, confidential, and proprietary information would cause serious competitive injury to Humana. Specifically, disclosure would reveal how Humana evaluates and compensates its various provider groups and how Humana determines the rates it pays for healthcare services and the terms on which it contracts for such services – a process that Humana has invested extensive time to develop. Providers could and would use this information against Humana in future contract negotiations. Competitors too would use this information to Humana’s disadvantage, severely injuring Humana’s competitive position.

IV. In Camera Treatment for the Documents Listed in the Attached Exhibits Should Extend Indefinitely or, at Minimum, 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 great expense, 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 disclosure will not materially promote the resolution of this matter nor lend measurable public understanding of these proceedings. On balance, in camera treatment is clearly warranted for these materials. *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 an indefinite period 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 Humana's pricing and contracting strategy to both providers and competitors. At minimum, 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. 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: January 4, 2005

Respectfully submitted,

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Counsel for Humana, Inc.

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Docket No. 9315

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

Upon consideration of Non-Party Humana, Inc.’s (“Humana’s”) 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 Motion for In Camera Treatment of Certain Designated Documents are afforded indefinite in camera treatment.

Dated:

The Honorable Stephen J. McGuire
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Andrea E. Ryan, hereby certify that on January 4, 2005, I caused copies of:

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

to be served upon the following persons:

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(Original and 12 copies served via messenger, and electronic copies served via e-mail)

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