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May 5, 2011

Donald S. Clark **Federal Trade Commission** Office of the Secretary 600 Pennsylvania Avenue, NW, H-106 Washington, DC 20580

Re: In the Matter of ProMedica Healthy System, Inc., Federal Trade Commission Docket No. 9346

Dear Secretary:

Please find enclosed the original version and two copies of Non-Party Humana, Inc.'s Motion for In Camera Treatment of Proposed Evidence for filing. The original is to be filed with your office. Please file-stamp the copy and return it in the enclosed self-addressed envelope.

Your assistance with this matter is greatly appreciated.

Sincerely,

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Enclosures

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CRAL TRADE COMM

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

	RECEIVED DOCUMENTS SO MAY 6 2011
DOCKET NO. 9346	

In the Matter of
PROMEDICA HEALTH
SYSTEM, INC.

NON-PARTY HUMANA INC.'S MOTION FOR IN CAMERA TREATMENT OF PROPOSED EVIDENCE

Humana Inc. ("Humana"), who is not a party to the above-captioned action, respectfully requests that this Court grant *in camera* treatment of data, documents, and testimony that have been designated for possible introduction in the administrative trial in this matter. By letter dated April 28, 2011, the Federal Trade Commission ("FTC") notified Humana of its intent to introduce into evidence information produced by Humana in response to subpoenas issued by ProMedica Health System, Inc. ("ProMedica") and the FTC in this matter. The Humana information designated for introduction as evidence is as follows:

Declaration of Thomas L. McGinty, Exhibit No. PX02073; and Data provided to FTC by Humana, Exhibit No. PX01804. ¹

The data, documents, and testimony were designated confidential when produced and contain confidential information, the public dissemination of which would harm the interests of Humana and its clients. Public disclosure is also likely to cause direct, serious harm to Humana's competitive position in the marketplace. Therefore, pursuant to 16 C.F.R. § 3.45(b),

¹ Exhibit Nos. PX02073 and PX01804 can be made available but was not submitted herewith due to its voluminous size and because it contains highly sensitive business information. Additionally, Humana does not seek *in camera* treatment for Exhibit No. PX02427.

Humana respectfully moves for *in camera* treatment of the confidential data, documents, and testimony listed above and in the Declaration of Helen Thompson in support of this Motion ("Thompson Decl."), attached hereto as Exhibit "A."

HUMANA'S CONFIDENTIAL INFORMATION DESERVES IN CAMERA TREATMENT UNDER THE FEDERAL TRADE COMMISION'S RULES OF PRACTICE

The information described in this motion warrants *in camera* treatment as provided in 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 information "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. Furthermore, the Commission has held that "special solicitude" should be given to a request for *in camera* treatment by non-party to an FTC proceeding. *See In re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984). Under this standard, *in camera* treatment of the information in question is warranted.

A. Humana Has Preserved the Confidentiality of the Data, Documents, and Testimony

Humana has taken significant steps to protect the confidential nature of the data, documents, and testimony, which were produced in response to subpoenas issued by ProMedica and the FTC. This information was produced under compulsory process and pursuant to the Protective Order Governing Discovery Material issued in this matter on January 6, 2011 (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 ProMedica business personnel and providers.

In addition to these measures, Humana has taken substantial measures to guard the secrecy of the information, limiting the dissemination of such information and taking every reasonable step to protect its confidentiality. (Thompson Decl., at 3). Indeed, such information is disclosed only to particular employees of Humana. (*Id.*). Therefore, the data, documents, and testimony deserve *in camera* treatment.

B. Disclosure of the Information Would Result in Serious Competitive Injury to Humana

The testimony contained in Exhibit No. PX02073 contains highly confidential and commercially sensitive business information. Disclosure of this testimony would reveal how Humana internally analyzes various contract negotiations with providers. If forced to disclose, competitors would be able to gain an unfair competitive advantage against Humana in the marketplace.

The data provided to the FTC by Humana contained in Exhibit No. PX01804 is highly confidential and commercially sensitive. The large amount of data contains every inpatient admission for patients residing in Lucas County, Ohio from 2007 to present. The data includes identifying information of the hospital, healthcare facility, or physician practice at which the patient was treated, identifying information of the patient including the patient's residence zip code, age, gender, date of admission, date of discharge, the primary diagnosis, the source of the patient referral, the specific name of the entity and type of health plan that was the principal source of payment, the billed charges, the identity of the patient's admitting physician and treating physician, and the patient's status upon discharge. Again, disclosure of such information could result in a serious competitive injury to Humana.

CONCLUSION

The information provided by Humana satisfies 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 this confidential information for an indefinite and perpetual period because the competitive sensitivity of the information will not likely diminish with the passage of time.

Respectfully submitted,

John K. Bush

Jessica T. Sorrels

GREENEBAUM DOLL & McDonald, PLLC

3500 National City Tower

101 South Fifth Street

Louisville, Kentucky 40202

Phone: (502) 589-4200

COUNSEL FOR HUMANA INC.

CERTIFICATE OF SERVICE

It is hereby certified that a complete and true copy of the foregoing was served on this 5th day of May, 2011, to the following:

Via E-mail (dmarx@mwe.com)

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Counsel for ProMedica Health System, Inc.

Via Federal Express and E-mail (oalj@ftc.gov)

The Honorable D. Michael Chappell Chief Administrative Law Judge Federal Trade Commission Room H-104 600 Pennsylvania Avenue, NW, H-106 Washington, D.C. 20580 oalj@ftc.gov

Via Federal Express and E-mail (dclark@ftc.gov)

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OUNSEL FOR HUMANAINC.

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

In the Matter of)	
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PROMEDICA HEALTH)	
SYSTEM, INC.)	DOCKET NO. 9346
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PROPOSED ORDER

On May 5, 2011, Non-Party Humana Inc. ("Humana") filed a motion for *in camera* treatment of confidential business information contained in various data, documents, and testimony that have been identified by the FTC as potential trial exhibits:

IT IS HEREBY ORDERED that Humana's Motion is GRANTED. The information set forth in the exhibits described as follows will be subject to *in camera* treatment under 16 C.F.R. § 3.45 and will be kept confidential and not placed in the public record of this proceeding for an indefinite and perpetual period.

Declaration of Thomas L. McGinty, Exhibit No. PX02073; and

Data provided to FTC by Humana, Exhibit No. PX01804.

IT IS FURTHER ORDERED that only authorized Federal Trade Commission ("FTC") personnel, and court personnel concerned with judicial review may have access to the above-referenced information.

	ORDERED:		
		D. Michael Chappell Administrative Law Judge	
DATED:			

EXHIBIT A

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

In the Matter of		
PROMEDICA HEALTH)	
SYSTEM, INC.)	DOCKET NO. 9346
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DECLARATION OF HELEN THOMPSON IN SUPPORT OF NON-PARTY HUMANA INC.'S MOTION FOR IN CAMERA TREATMENT OF PROPOSED EVIDENCE

I, Helen Thompson, declare as follows:

- 1. I am legal counsel for Humana Inc. ("Humana").
- 2. I have reviewed the information for which Humana seeks *in camera* treatment. Based upon my review of the information, 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 to the public, to competitors of Humana and/or ProMedica's personnel and providers would cause serious competitive injury to Humana.
- 3. Humana takes substantial measures to guard the secrecy of the information ProMedica seeks to introduce at trial, limiting dissemination of such information and taking every reasonable step to protect its confidentiality. Indeed, dissemination of such information is disclosed only to particular employees of Humana. These efforts demonstrate that Humana has gone to great lengths to preserve the confidentiality of the information contained in Exhibit Nos. PX02073 and PX01804.

I declare under penalty of perjury, pursuant 28 U.S.C. §1746 that the foregoing is true and correct.

Date: May <u>5</u>, 2011

Helen Thompson







May 9, 2011 BY HAND **DLA Piper** LLP (US) 1251 Avenue of the Americas, 27th Floor New York, New York 10020-1104 www.dlapiper.com

Paolo Morante paolo.morante@dlapiper.com T 212.335.4813 F 212.884.8713

The Hon. Donald S. Clark Secretary Federal Trade Commission 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580

Re: In re ProMedica Health System, Inc. - Docket No. 9346

Dear Secretary Clark:

As requested by your staff, we submit additional copies of the following <u>highly confidential</u> materials on behalf of Ambac Assurance Corporation in the above-referenced matter:

- A hard copy of the non-public version of the Motion of Non-Party Ambac Assurance Corporation for *In Camera* Treatment of Proposed Evidence, with accompanying Declaration of Stephen P. Rochford in Support of Motion of Non-Party Ambac Assurance Corporation for *In Camera* Treatment of Proposed Evidence, Exhibits 1 through 27, and Proposed Order;
- 2. A CD-ROM containing a PDF version of the non-public version of the Motion of Non-Party Ambac Assurance Corporation for *In Camera* Treatment of Proposed Evidence, with accompanying Declaration of Stephen P. Rochford in Support of Motion of Non-Party Ambac Assurance Corporation for *In Camera* Treatment of Proposed Evidence, Exhibits 1 through 27, and Proposed Order.

Please acknowledge receipt of these materials by date-stamping the enclosed copy of this letter as "received" and returning it with our messenger. Thank you.

Very truly yours,

DLA Piper LLP (US)

Paolo Morante