

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

\_\_\_\_\_) )  
**In the Matter of** ) )  
**NORTH TEXAS SPECIALTY PHYSICIANS** ) **Docket No. 9312**  
\_\_\_\_\_) )

**NON-PARTY HUMANA HEALTH PLAN OF TEXAS, INC.’S MOTION TO QUASH PORTIONS OF THE SUBPOENA DUCES TECUM OF NORTH TEXAS SPECIALTY PHYSICIANS OR, ALTERNATIVELY, TO LIMIT THE SCOPE OF THE SUBPOENA AND EXTEND THE TIME TO RESPOND TO SAME**

Non-Party Humana Health Plan of Texas, Inc. (“*Humana*”) hereby requests the Court to quash portions of the Subpoena *Duces Tecum* served by North Texas Specialty Physicians (“*NTSP*”) or, alternatively, to limit the scope of the Subpoena and to extend the deadline by which to respond to same. In support of this Motion, Humana respectfully shows the Court as follows:

**INTRODUCTION**

Pursuant to 16 C.F.R. §3.34 a-2416.2Re by44 rey served byv .00Idlinc o

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**NON-PARTY HUMANA HEALTH PLAN OF TEXAS, INC.’S MOTION TO QUASH PORTIONS OF THE SUBPOENA DUCES TECUM OF NORTH TEXAS SPECIALTY PHYSICIANS OR, ALTERNATIVELY, TO LIMIT THE SCOPE OF THE SUBPOENA AND EXTEND THE TIME TO RESPOND TO SAME**

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

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

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





**REQUEST NO. 2:** All documents previously produced or otherwise sent to the Office of the Attorney General of the State of Texas concerning business relationships with healthcare providers in the State of Texas, including specifically but without limitation the documents provided in response to the Written Notice of Intent to Inspect, Examine and Copy Corporate Documents served in or about March 2002 (a sample of such Written Notice is attached hereto as Appendix A). [At your option, check registers as described in Class 6 of Exhibit C need not be produced]. Such documents should be provided in electronic form only.

**REQUEST NO. 3:** Documents for the time period January 1, 2000 to June 20, 2002 described in Exhibits A through C of the above-referenced Written Notice of Intent to Inspect, Examine and Copy Corporate Documents to the extent such documents are not produced in response to Request No. 2 above. [At your option, check registers as described in Class 6 of Exhibit C need not be produced]. Such documents should be provided in electronic form only.

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

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

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

prohibits the Attorney General, or his authorized assistants or representatives, from making public, or using copies or any information derived in the course of the examination, except in the course of some judicial proceedings in which the State is a party, or in a suit by the State to cancel the permit or forfeit the charter of such domestic or foreign corporation, or to collect

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





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

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

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

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

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

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





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

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

Humana therefore requests that the Court qua

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

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

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



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

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

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

### **CONCLUSION**

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

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

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

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**ATTORNEYS FOR  
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HUMANA HEALTH PLAN OF TEXAS, INC.**

**CERTIFICATE OF SERVICE**

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

***Via Facsimile and Certified Mail***

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FEDERAL TRADE COMMISSION  
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Hon. D. Michael Chappell  
Administrative Law Judge  
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Richard S. Krumholz