

[PUBLIC]

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

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 exclusi

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

Dated: January 4, 2005

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Counsel for Humana, Inc.

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 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 Cmana’s Motd in Ho

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:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580
(Original and 12 copies served via messenger, and electronic copies served via e-mail)

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