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OFFICE OF
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HEARINGS UNIT
Fax: (360) 664-2782

Heard by: Patricia D. Petersen
Chief Hearing Officer

Patricia D. Petersen
Chief Hearing Officer
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Kelly A. Cairns
Paralegal
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February 27, 2012

SENT VIA ELECTRONIC MAIL

Gary P. Timin, Esq.
Squire Sanders (US) LLP
200 South Biscayne Boulevard, Suite 4100
Miami, FL 33131

RE: Proposed Acquisition of Arcadian Health Plan, Inc. by Humana Inc.
Docket No. 12-0010

Dear Mr. Timin:

This letter is in response to yours dated February 14, 2012, written on behalf of your client Applicant Humana Inc. You object to deferring the hearing until after resolution of the Department of Justice's (DOJ) investigation because of your risk of jeopardizing the consummation of the transaction and because you and Arcadian advise that Arcadian's 1st lienholders agreed not to call a default on their note in exchange for the plan of sale that was to close not later than November 15, 2011, and Arcadian has had to pay millions of dollars in fees to the 1st lienholders because the acquisition did not close by then. While these disadvantages are acknowledged, the hearing file indicates that your Form A was not even filed with the OIC staff until late September, 2011; as of November and December 2011 there was still necessary, statutorily-required information which the OIC staff had requested but not received from you; and therefore the Form A and request for hearing could not even be filed with the Hearings Unit until December 30, 2011, long after you had agreed to close the sale with Arcadian. While Arcadian is unfortunately faced with negative consequences at this time, the OIC staff took a remarkably short period of time to review your Form A and notify you of what information still needed to be provided to comply with statute. The entire process is for the protection of all



parties, and this is not a situation which involves "prolonged regulatory reviews" as you suggest. In addition, it would have saved time if you had simply revealed the fact of the DOJ's investigation as soon as you were aware of it in at least November 2011 so I would not have had to schedule the hearing for February 6, 2012, then cancel it upon discovery that the DOJ was in the midst of conducting an investigation to determine the scope of its antitrust concerns regarding this proposed acquisition (for the reasons stated in my January 24 letter). Please recognize that the statutes which apply to this proceeding must be respected. (While you mention Texas and Arizona have given their approval, both have different laws, e.g. Arizona and likely Texas need not even address anticompetitive or many other issues at all, and Washington is the state of primary jurisdiction.)

In response to your request, I can schedule another prehearing conference to discuss a new hearing date in this matter. The topics to be addressed during the second prehearing conference are as follows:

1. On February 2, 2012, you filed a fully executed Letter Agreement dated January 19, together with a fully executed First Amendment to Agreement and Plan of Merger ("First Amendment") dated January 31. In your February 2 transmittal letter you state that *"if the Office considers that the changes to the transaction terms embodied in these documents call for an amendment to Humana's application, we respectfully request that you accept this letter and the enclosures [the Letter Agreement and the First Amendment] as an amendment to the Form A. They have been reviewed and authorized by Humana for that purpose. Because the Amendment to the Merger Agreement includes non-public proprietary information about the parties and the transaction, it is stamped "Confidential," and Humana must ask your Office to accord it confidential treatment for the time being in accordance with RCW 49.31C.130."*

- As you recognize, the Letter Agreement as well as the First Amendment change terms upon which this proposed acquisition is to be consummated. Therefore, as you suggest, they are filed as amendments to the Form A. The Letter Agreement is published now.
- However, you also request that the First Amendment not be made public because it "includes non-public proprietary information about the parties and the transaction" and simply cite RCW 49.31C.130. It does not appear that there is any "non-public proprietary information" in this document. Further, the parties' original Agreement and Plan of Merger, which includes the original terms of this proposed acquisition, has been published and is the central subject of the adjudicative proceeding. To provide public notice of the original Agreement which is to be considered at hearing, and then to not publish the First Amendment thereto - which as you recognize does embody changes to the transaction terms included in the original Agreement - would

be misrepresentation of the terms of the proposed transaction which are the central consideration in the adjudicative process. Because of these considerations, we have had no acquisition hearings here where a party has asked that the Agreement and/or any amendments be kept confidential (save one, and without argument that applicant withdrew his application instead of having the Agreement published).

- As a courtesy, even though the First Amendment clearly does not appear to be “non-public, proprietary information,” and because as above it would be fallacious to publish the original terms being considered without also publishing the changed terms, the First Amendment will be published in ten business days from the date of this letter in order to allow you to seek an injunction from the Thurston County Superior Court if you choose. However, should you choose to seek an injunction, then the required period for public notice prior to the hearing will not be able to begin until after you have obtained or been denied an injunction. (This is because, as we discussed at first prehearing conference, we publish - for an adequate period for public notice and opportunity to object - a notice on the OIC’s website of the nature of the hearing and the hearing date, and we also publish the Form A which includes the accurate transaction terms.) As we also discussed at first prehearing conference, most recent acquisition hearings have included four to five weeks of public notice prior to hearing, but I indicated that two weeks of full notice could be given in your situation. Again, as the notice period cannot commence until the terms being considered are published, it will be your decision whether you wish to delay the hearing for this ten day period or not.

2. You ask that I reconsider deferring the hearing until after final resolution of the Department of Justice’s antitrust investigation in order to prevent further negative consequences to Arcadian. This is possible to do, however I would like you to present your specific proposal during the second prehearing conference with a follow up letter, as follows:

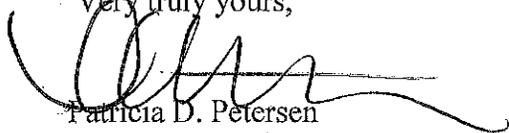
- In d. of your letter you suggest that an approval order could carry a variety of conditions, possibly including completion of the DOJ process. Please provide a detailed proposal for how an approval order can be conditioned in a way that is in compliance with applicable Washington laws and – very importantly - gives all deference to the considerations and decisions made by DOJ. You advise that you cannot predict the timing of conclusion of the DOJ process, the timing of DOJ’s official approval and execution of an agreement – which you advise you are still negotiating – and that this is entirely within DOJ’s discretion and control, and you believe it likely that final DOJ approval will not be forthcoming until close to March 31, 2012. In proposing such conditions, are you not saving just the two week notice period, because in your Agreement and Plan of Merger the closing is expressly

conditioned on obtaining all requisite regulatory approvals including approval of DOJ?

- Please submit actual evidence of the scope and nature of the DOJ investigation – at this point it appears all that has been filed is your statements as to what you believe DOJ is focusing on, along with the Agreement Amendment which you present as proof of the only states and counties where DOJ is focusing and may require Humana to divest some assets. As it is, to my knowledge, unprecedented in Washington for there to be a DOJ antitrust investigation ongoing at the time the adjudicative proceeding regarding a proposed acquisition is ongoing, it seems advisable for evidence to be included that DOJ is aware that Washington is currently considering approval or disapproval of the proposed acquisition herein, and to have evidence of DOJ's position in the matter: i.e., does DOJ believe that a condition in an approval order such as you propose would constitute full deference to DOJ as the, as you suggest, primary federal governmental body charged with antitrust investigation and enforcement responsibilities?
- It would be most helpful for the OIC staff to submit its proposal for just how an approval order can be conditioned in a way that is in compliance with applicable Washington laws while also giving deference to the considerations and decisions made by DOJ. Once again, while you state in d. that "*it is common for state insurance authorities to include conditions in orders approving Form A applications, and we understand that OIC often does so*" this is not entirely accurate and has never to my knowledge included a condition in the area of antitrust.

As stated above, we will convene a second prehearing conference per your request. I would like you to be prepared to discuss each of the above points in the order in which they are presented. Toward that end, and with the intent to facilitate a proceeding including a hearing to be convened as promptly as possible, but which also must give deference to the ongoing federal efforts under the Hart-Scott-Rodino Act, be in compliance with Washington laws, and be in the best interests of all parties, you, Mr. Hoffman and Mr. Novello representing Arcadian, and Mr. Brown will be contacted today to participate in the second prehearing conference with the intent to go over the above considerations in the order in which they are presented above. Please advise Kelly at that time who else you wish to be included in that second prehearing conference so that she can make sure that those others are included.

Very truly yours,



Patricia D. Petersen
Chief Hearing Officer
Presiding Officer

Mr. Gary P. Timin, Esq.

February 27, 2012

Page 5

Copies sent by email to:

James Novello, Sr. Vice President and General Counsel, Arcadian Management Svcs. Inc.

Robert W. Hoffman, Esq., Record Counsel for Arcadian Health Plan, Inc.

Charles Brown, Esq., Sr. Staff Attorney, Legal Affairs Division