

FILED

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

2016 MAR 11 A 10:29

In the Matter of:

The Form A Application for the Proposed
Acquisition of Control of:

ARCADIAN HEALTH PLAN, INC.,
a subsidiary of **HUMANA INC.,**

and

The Form E Application for the Proposed
Acquisition of Control of:

HUMANA INC., a Non-Domiciliary
Corporation,

By

AETNA INC., a Pennsylvania corporation.

Docket No. 16-0027

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

**JOINT SUBMISSION ON
CONFIDENTIALITY ISSUES**

Pursuant to Paragraph 5 of the February 26, 2016 Notice of Hearing issued in the captioned administrative proceeding, the Staff of the Office of the Washington State Insurance Commissioner ("OIC Staff"), Aetna Inc. ("Aetna") and Humana Inc. ("Humana") (collectively, the "Parties") hereby submit this Joint Submission on Confidentiality Issues. Aetna and Humana request confidential treatment with respect to the three categories of documents set forth below. The OIC Staff concurs with this request.

I. **The Form E Statement.**

On October 6, 2015, Aetna filed the Form E Preacquisition Notification Form (the "Form E") with OIC. The Washington Insurance Code provides that the Commissioner must give confidential treatment to the Form E in its entirety. *See* Wash. Rev. Code § 48.31B.020(3) (eff. Jan. 1, 2016) (extending confidential treatment to information submitted thereunder "in the

same manner as provided in [Wash. Rev. Code §] 48.31B.038”). The Washington Insurance Code further provides that all documents, materials and information reported therein or provided to the Commissioner in connection therewith “are confidential by law and privileged, and not subject to chapter 42.56 [of the Washington Revised Code], are not subject to subpoena, and are not subject to discovery or admissible in evidence in any private civil action” Wash. Rev. Code § 48.31B.038(1) (eff. Jan. 1, 2016). Accordingly, pursuant to Washington Revised Code § 34.05.446(1), the Parties jointly request that the Hearing Officer enter a protective order requiring that the Form E and all information reported therein receive confidential treatment as required by the Washington Insurance Code, and order that they are not subject to public inspection or disclosure, are not subject to subpoena or discovery, and are not admissible in evidence in any private civil action. *See* Wash. Rev. Code § 34.05.446(1); *see also* Wash. Ct. Gen. R. 15(c) (providing for protection of court records under seal).

2. Biographical Affidavits.

On July 31, 2015, Aetna submitted its Form A Statement to OIC (the “Form A”). Attached as Exhibit 7 to the Form A are the biographical affidavits of the current Directors and Executive Officers of Aetna. To the extent the biographical affidavits contain sensitive personal information, such as information used to prove identity, age, residential address and social security number, such personal information is exempt from public inspection and copying and must be redacted from public records. *See* Wash. Rev. Code § 42.56.230(5) & (7)(a) (protecting personal information from public inspection and copying to prevent compromising the individuals’ personal privacy and exposing them to identity theft); Wash. Ct. Gen. R. 31(e) (requiring personal information to be redacted from court records); *see also* Wash. Rev. Code § 48.31B.038(1) (protecting certain information disclosed to the Commissioner); Wash. Rev.

Code § 48.02.065(6) (2015) (same). Accordingly, Aetna and Humana request that the Hearing Officer enter an order allowing the Parties to redact the personal information in the Directors' and Officers' biographical affidavits, including social security numbers, dates of birth, phone numbers and home addresses.

3. Financial Projections.

Attached as Exhibit 10 to the Form A are financial projections of Arcadian Health Plan, Inc. ("Arcadian"). These financial projections contain key managerial strategic decisions concerning Arcadian's growth prospects which, if known to Arcadian's competitors, would result in competitive harm to Arcadian. These analyses are in the nature of working papers, documents, materials, or information disclosed to the commissioner in the course of an examination that are not required to be disclosed under the Insurance Code. *See* Wash. Rev. Code §§ 48.02.065(1), (5), (6) (eff. Jan. 1, 2016). Aetna and Humana request that these projections be protected from public inspection or disclosure subject to the right to petition to allow inspection thereof as provided in Washington Revised Code § 48.02.065(8). Washington law provides that a public agency shall not be required to disclose trade secrets. *See* Wash. Rev. Code § 48.02.120(3); Wash. Rev. Code § 19.108.010(4); Wash. Rev. Code § 42.56.270(1) & (11); *see also* *Robbins, Geller, Rudman & Dowd, LLP v. State*, 328 P.3d 905, 911 (Wash. Ct. App. 2014) (citation omitted) ("The [Public Records Act] may not be used to acquire knowledge of a trade secret."); *see also* Wash. Rev. Code § 48.31B.038(1) (protecting certain information disclosed to the Commissioner); Wash. Rev. Code § 48.02.065(6) (same). Pursuant to these legal authorities, Aetna and Humana request that the Hearing Officer enter a protective order requiring that the Financial Projections receive confidential treatment and be maintained under seal.

The Inapplicability of the *Ishikawa* Factors.

Finally, the Notice of Hearing references the *Ishikawa* factors outlined in *State v. Waldon*, 202 P.3d 325, 328–29 (Wash. Ct. App. 2009). The Parties do not believe the *Ishikawa* factors apply to this administrative proceeding. As the Washington supreme court recently explained, whether an *Ishikawa* analysis is necessary depends on whether article I, section 10 of the Washington Constitution is applicable. *State v. S.J.C.*, 352 P.3d 749, 412–13 (Wash. 2015). The supreme court has concluded that “article I, section 10 does not apply to the quasi-judicial proceedings of administrative agencies.” *Mills v. W. Wash. Univ.*, 246 P.3d 1254, 1260 (Wash. 2011). Given that this matter is proceeding before this administrative agency, article I, section 10 is inapplicable here and, in turn, the *Ishikawa* factors are also inapplicable.

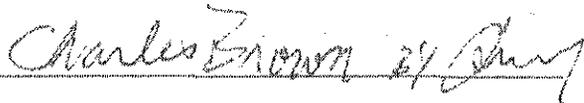
Conclusion

For these reasons, Aetna and Humana respectfully request that the Hearing Officer enter an order (1) requiring that the Form E be maintained as confidential in its entirety, (2) allowing the Parties to redact the personal information in the biographical affidavits of the Directors and Officers, including social security numbers, dates of birth, phone numbers and home addresses, and (3) requiring that the Financial Projections be maintained as confidential. These requested confidentiality protections are supported under established Washington law and the OIC Staff concurs in the request.

Dated: March 10, 2016

STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

By: _____



Charles Brown, Senior Staff Attorney,
Legal Affairs Division

Dated: March 10, 2016

AETNA INC.

By: Steven Whitmer by J. Gingold

Steven T. Whitmer
Timothy Farber
LOCKE LORD LLP
111 South Wacker Drive
Chicago, IL 60606
Phone: (312) 443-1869 (S. Whitmer)
Email: swhitmer@lockelord.com
tfarber@lockelord.com

Jeffrey L. Gingold
GINGOLD LAW FIRM PLLC
400 Harborview Drive SE, Suite 237
Bainbridge Island, WA 98110
Phone: (206) 451-4665
Email: gingoldj@gingoldlaw.com

Dated: March 10, 2016

HUMANA INC.

By: Michael J. Homison by J. Homison

Michael J. Homison
Elena M. Coyle
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
Four Times Square
New York, NY 10036
Phone: (212) 735-2099 (M. Homison)
Email: michael.homison@skadden.com
elena.coyle@skadden.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

CERTIFICATE OF SERVICE

I hereby certify that I was authorized to sign the foregoing document for each respective attorney whose signature appears thereon, and a true and correct copy of the above and foregoing document has been served on the following via hand-delivery, E-Mail and U.S. Mail as designated below, on the 11th day of March, 2016.

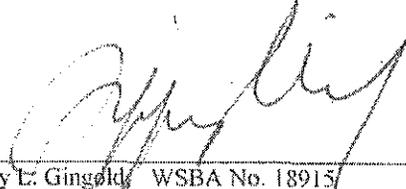
Dorothy Seabourne-Taylor
OIC Hearings Unit
5000 Capitol Blvd. SE
Tumwater, WA 98501
DorothyS@oic.wa.gov
[Hand delivery & E-Mail]

Charles Brown, Esq.
OIC Legal Affairs Division
5000 Capitol Blvd. SE
Tumwater, WA 98501
CharlesB@oic.wa.gov
[Hand delivery & E-Mail]

Steven T. Whitmer, Esq.
Timothy Farber, Esq.
Locke Lorde LLP
111 South Wacker Dr.
Chicago, IL 60606
swhitmer@lockelord.com
tfarber@lockelord.com
[E-Mail by request]

Michael J. Homison, Esq.
Elena M. Coyle, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036
michael.homison@skadden.com
elena.coyle@skadden.com
[E-Mail only by request]

Jeffrey L. Gingold, Esq.
Gingold Law Firm, PLLC
400 Harborview Dr. SE, Suite 237
Bainbridge Island, WA 98110
gingoldj@gingoldlaw.com
[E-Mail & Hand Delivery]



Jeffrey L. Gingold, WSBA No. 18915