

ORIGINAL

May 4, 2011

VIA FEDEX

Mr. Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-135
Washington, DC 20580

Re: *In the Matter of ProMedica Health System, Inc.*
Docket No. 9346

Dear Mr. Clark:

Enclosed for filing is an original, one copy, and an electronic copy of both the public and unredacted versions of Aetna Inc.'s Motion for In Camera Review. Also enclosed are copies of both documents to be time-stamped and returned in enclosed self addressed stamped envelope.

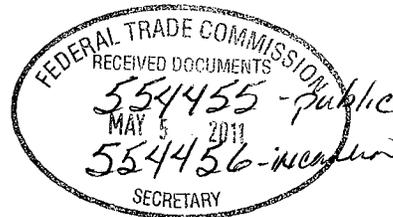
Should you have any questions and/or comments, please call me.

Very truly yours,



Robert J. Fogarty

jc
Enclosures



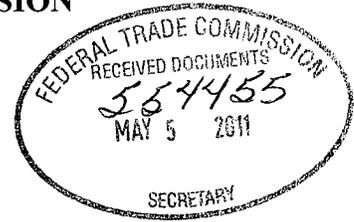
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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

In the Matter of
PROMEDICA HEALTH SYSTEM, INC.,
a corporation.

Docket No. 9346



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

Aetna Inc. ("Aetna"), which is not a party to the above-captioned matter, respectfully requests that this court grant *in camera* treatment of several documents and deposition transcripts that Complaint Counsel has designated for introduction into evidence in the administrative trial in this matter. By letter dated April 27, 2011, the Federal Trade Commission notified Aetna that Complaint Counsel intends to introduce into evidence documents and deposition testimony produced by Aetna in response to subpoenas issued and requests from the FTC in this matter. Aetna seeks *in camera* treatment for the following documents designated for introduction into evidence:

- Exhibit B: Complaint Counsel's Exhibits PX02357, PX02414, PX02415, PX02416, PX02418, PX02419, PX02420, PX02425, PX02429, PX02509, PX02515, PX02516, PX02517, PX02520, PX02524, PX02525, PX02526.
- Exhibit C: Complaint Counsel's Exhibits PX02210, PX02412, PX02510.
- Exhibit D: Complaint Counsel's Exhibits PX02291, PX02295, PX02423, PX02424, PX02434, PX02505, PX02514, PX02518.
- Exhibit E: Complaint Counsel's Exhibits PX02209, PX02212, PX02277, PX02413, PX02422, PX02426, PX02435.
- Exhibit F: Complaint Counsel's Exhibits PX02512, PX02513, PX02428, PX02430, PX02506, PX02508, PX02521, PX02523.
- Exhibit G: Complaint Counsel's Exhibit PX02441, PX02437, PX02440.

PUBLIC VERSION

- Exhibit H: Complaint Counsel's Exhibit PX02507.
- Exhibit I: Complaint Counsel's Exhibit PX02504.
- Exhibit J: Complaint Counsel's Exhibits PX01917, PX01938, PX02067.
- Complaint Counsel's Exhibit PX01800.

The information contained in these documents is competitively sensitive or contains sensitive personal information and is held in strict confidence by Aetna. Public disclosure of these documents is likely to cause direct, serious harm to Aetna's competitive position. Therefore, pursuant to 16 C.F.R. § 3.45(b), Aetna respectfully moves for *in camera* treatment of the data contained in PX01800 and of documents (Exhibits B through J) identified in the Declaration of Greg Radziaowski in support of this Motion (attached as Ex. A).

AETNA'S CONFIDENTIAL DOCUMENTS QUALIFY FOR *IN CAMERA* TREATMENT UNDER THE FEDERAL TRADE COMMISSION'S RULES OF PRACTICE

The documents that are described in this motion warrant *in camera* treatment as provided by 16 C.F.R. § 3.45(b). The code section provides for *in camera* treatment of certain business-related information and personal information. Relating to business issues, under 16 C.F.R. § 3.45(b), requests for *in camera* treatment will be granted where public disclosure of the document in question "will result in a clearly defined, serious injury to the...corporation requesting *in camera* treatment." *Id.* 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 Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, *6 (Dec. 23, 1999) (quoting *General Foods Corp.*, 95 FTC 352, 355 (1980)). In this context, "the courts have generally attempted to protect confidential business information from unnecessary airing." *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

PUBLIC VERSION

Six factors will be weighed in determining whether the documents in question are sufficiently material and sufficiently secret that disclosure would result in serious competitive injury:

(1) the extent to which the information is known outside of the 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.

Dura Lube, 1999 F.T.C. LEXIS 255 at *6-*7 (quoting *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977)).

For personal information, the regulations provide that an administrative law judge may order *in camera* treatment upon a finding that revealing the information would cause “serious injury to the person,” or on a finding that the material constitutes “sensitive personal information.” 16 C.F.R. § 3.45(b). The regulations go on to define sensitive personal information to include social security numbers, birthdates, state identification numbers, and “any sensitive health information identifiable by individual, such as an individual's medical records.” *Id.*

I. PUBLIC DISCLOSURE OF BUSINESS DOCUMENT WOULD RESULT IN SERIOUS COMPETITIVE INJURY TO AETNA.

A. Aetna Has Preserved the Confidentiality of the Documents and Information in Question.

Aetna has taken substantial measures to guard the information contained in the Exhibits B through J by limiting dissemination of such information and taking every reasonable step to protect its confidentiality. (Decl. at 2). Such information is only disclosed to particular Aetna employees. *Id.* The information is not known outside of Aetna except to the extent necessary to

PUBLIC VERSION

engage in contract negotiations, and it would be extremely difficult for Aetna's competitors or other outside persons to access or duplicate the information contained in the documents at issue.

Id. These efforts demonstrate that Aetna has gone through great lengths to preserve the confidentiality of the information contained in Exhibits B through J.

B. Disclosure of the Information Contained in the Documents in Question Would Result in Serious Competitive Injury to Aetna.

Exhibit B¹ contains various compensation schedules. These provider-specific schedules list, by service and bill code, the rates Aetna pays to various hospitals for services. (Decl. at 3). These fee schedules and rate listings are highly confidential and commercially sensitive documents. *Id.* Their disclosure would reveal valuable information regarding the way that Aetna determines rates for physician services, a process that Aetna has expended numerous hours and many years to develop. *Id.* Aetna's efforts to analyze rates have allowed it to gain a competitive advantage in the marketplace and to better service its insureds. *Id.* If the compensation schedules were disclosed, it could result in serious damage Aetna's competitive advantage in the marketplace. *Id.*

Exhibit C² contains spreadsheets and pie charts showing market share for various Lucas County hospitals, shows Aetna's revenue from the facilities, broken down by commercial and government contracts and further details revenue from inpatient and outpatient charges. (Decl. at 4.) It shows the changes in market share after ProMedica's acquisition of St. Luke's. *Id.* The documents contain highly confidential and commercially sensitive financial data. Revealing such information would benefit Aetna's competitors, enabling them to identify Aetna's most lucrative provider contracts and would provide insight into Aetna's financial status, and the

¹ Exhibit B includes Complaint Counsel's Exhibits PX02357, PX02414, PX02415, PX02416, PX02418, PX02419, PX02420, PX02425, PX02429, PX02509, PX02515, PX02516, PX02517, PX02520, PX02524, PX02525, PX02526.

² Exhibit C includes Complaint Counsel's Exhibits PX02210, PX02412, PX02510.

PUBLIC VERSION

breakdown of revenue from various sources. *Id.* Aetna's efforts to guard such information and to formulate rates and contracts have allowed Aetna to gain a competitive advantage in the marketplace and better service its insureds. *Id.* Revealing such information would give competitors insight into Aetna's marketplace strengths and weaknesses broken into various types of provider agreements. *Id.*

Exhibit D³ contains various emails dealing with contract negotiations between Aetna and ProMedica. (Decl. at 5). The emails reveal highly confidential and commercially sensitive information regarding how Aetna negotiates contracts and rates with the providers that are part of its network. *Id.* Their disclosure would reveal valuable information regarding the way that Aetna defines relationships with its providers, a process that Aetna has expended numerous hours and many years to develop. *Id.* Aetna's negotiation efforts have allowed it to gain a competitive advantage in the marketplace and to better service its insureds. *Id.* Revealing such information could result in serious damage Aetna's competitive advantage in the marketplace.

Exhibit E⁴ contains emails between Aetna employees analyzing the impact of St. Luke's merging with ProMedica. (Decl. at 6). The emails include predictions regarding how the merger would potentially impact rates for Aetna, and how Aetna should deal with the situation. *Id.* Moreover, the e-mails include spreadsheets predicting worst case scenarios regarding shifts to different rates. *Id.* Their disclosure would reveal valuable information regarding the way that Aetna determines rates and negotiates contracts with providers, a process that Aetna has expended numerous hours and many years to develop. *Id.* Aetna's efforts to analyze rates and negotiate with providers have allowed it to gain a competitive advantage in the marketplace and

³ Exhibit D includes Complaint Counsel's Exhibits PX02291, PX02295, PX02423, PX02424, PX02434, PX02505, PX02514, PX02518.

⁴ Exhibit E includes Complaint Counsel's Exhibits PX02209, PX02212, PX02277, PX02413, PX02422, PX02426, PX02435.

PUBLIC VERSION

to better service its insureds. *Id.* Disclosure of this information could result in serious damage Aetna's competitive advantage in the marketplace. *Id.*

Exhibit F⁵ contains emails and letters regarding negotiations of contracts and rates with individual hospitals, including proposals for rates, counter proposals, and detailed results of reimbursement-rate focused audits. (Decl. at 7). The documents reveal highly confidential and commercially sensitive information regarding how Aetna negotiates contracts and rates with the providers that are part of its network. *Id.* Their disclosure would reveal valuable information regarding the way that Aetna defines relationships with its providers, a process that Aetna has expended numerous hours and many years to develop. *Id.* Aetna's negotiation efforts have allowed it to gain a competitive advantage in the marketplace and to better service its insureds. *Id.* Disclosure of this information could result in serious damage Aetna's competitive advantage in the marketplace.

Exhibit G⁶ contains internal spreadsheets including information from various Aetna provider hospitals and information regarding Aetna membership. (Decl. at 8). It includes information regarding annual Aetna spending, market share, and the current status of contract negotiations with facilities, as well as information regarding contract negotiations going forward. *Id.* It also includes reports regarding the make-up of Aetna membership, broken down into various types of plans and by geographic region. *Id.* This is highly confidential and commercially sensitive information regarding Aetna's contracts and its revenues. *Id.* These documents reveal sensitive information regarding the relative importance of certain providers to Aetna, and the popularity of various Aetna insurance plans. *Id.* Competitors could use this information to potentially target and build relationships with Aetna's providers for their own

⁵ Exhibit F includes Complaint Counsel's Exhibits PX02512, PX02513, PX02428, PX02430, PX02506, PX02508, PX02521, PX02523.

⁶ Exhibit G includes Complaint Counsel's Exhibit PX02441, PX02437, PX02440.

PUBLIC VERSION

competitive gain, and to model insurance plans to mimic popular Aetna plans. *Id.* Disclosure of this information could result in serious damage Aetna's competitive advantage in the marketplace. *Id.*

Exhibit H⁷ is a spreadsheet, similar to that in Exhibit G, that lists financial information regarding the total claims allowed, percentages of market, rate increases, and detailed information regarding the breakdown of Aetna revenues. (Decl. at 9). This is highly confidential and commercially sensitive information regarding Aetna's finances and how it calculates its rates. *Id.* This is information that could be used by Aetna's competitors for their own advantage in targeting Aetna's providers and analyzing the manner in which Aetna determines its rates. *Id.* Disclosure of this information could result in serious damage Aetna's competitive advantage in the marketplace. *Id.*

Exhibit I⁸ is an email string regarding Aetna's relationship with a particular business whose employees are Aetna members. (Decl. at 10). The emails deal with the manner in which Aetna negotiates when a business is potentially going to switch to another insurance provider. *Id.* The emails reveal highly confidential and commercially sensitive information regarding how Aetna negotiates contracts and rates with the providers that are part of its network. *Id.* Their disclosure would reveal valuable information regarding the way that Aetna defines relationships with its providers, a process that Aetna has expended numerous hours and many years to develop. *Id.* Aetna's negotiation efforts have allowed it to gain a competitive advantage in the marketplace and to better service its insureds. *Id.* Disclosure of this information could result in serious damage Aetna's competitive advantage in the marketplace. *Id.*

⁷ Exhibit H includes Complaint Counsel's Exhibit PX02507.

⁸ Exhibit I includes Complaint Counsel's Exhibit PX02504.

PUBLIC VERSION

Exhibit J⁹ includes the deposition testimony and declaration of Aetna employee Greg Radzialowski. (Decl. at 11). In making the declaration, Radzialowski specifically asked that the contents of the declaration be kept confidential-for attorneys' eyes only- and exempt from public disclosure. *See* Exhibit J at PX02067. Moreover, the deposition was taken pursuant to a stipulation that it would be designated for outside counsels' eyes only. *See* Exhibit J at PX01917. These documents contain highly confidential and commercially sensitive information regarding the breakdown of how Aetna members utilize various participating providers in the Lucas county area, information regarding Aetna's market share of insurance business in the area, information dealing with how Aetna determines reimbursement rates and why Aetna members may chose certain providers over others. (Decl. at 11). Further, it includes information specific to the contract relationships Aetna has with various hospitals, detailed information regarding the factors Aetna considers when negotiating contracts, comparisons of reimbursement rates for various hospitals, and comparisons of the relative bargaining power of various providers. *Id.* The documents reveal highly confidential and commercially sensitive information regarding how Aetna negotiates contracts and rates with the providers that are part of its network. *Id.* Their disclosure would reveal valuable information regarding the way that Aetna defines relationships with its providers, a process that Aetna has expended numerous hours and many years to develop. *Id.* Aetna's negotiation efforts have allowed it to gain a competitive advantage in the marketplace and to better service its insureds. *Id.* This is information that could be used by Aetna's competitors for their own advantage in targeting Aetna's providers and analyzing the manner in which Aetna determines its rates. *Id.* Disclosure of this information could result in serious damage Aetna's competitive advantage in the marketplace. *Id.*

⁹ Exhibit J includes Complaint Counsel's Exhibits PX01917, PX01938, PX02067.

PUBLIC VERSION

C. The Public Interest in Disclosure of the Documents in Question is Outweighed by the Likelihood of Serious Competitive Harm to Aetna.

As a non-party to this matter, Aetna deserves “special solicitude” as a non-party requesting *in camera* treatment for its confidential business information. *In the Matter of Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500, 500 (1984) (order directing *in camera* treatment for five-year-old sales statistics of non-parties). *In camera* treatment of information, for reasonable time periods, encourages non-parties to cooperate with future discovery requests in adjudicative proceedings. *Id.* Aetna has cooperated with the discovery demands in this case. Conversely, “public understanding of this proceeding does not depend on access to” Aetna’s highly confidential information. *Id.* The balance of interests clearly favors *in camera* protection for Exhibits B through J. *See Bristol*, 90 F.T.C. at 456 (describing six-factor test for determining secrecy and materiality).

D. Protection for Exhibits B Through J Should Extend For 5 Years.

The nature of the highly confidential information contained in Exhibits B through J warrants lasting protection. Information contained in the documents, including but not limited to information regarding how Aetna negotiates contracts and determines rates, and financial information regarding utilization of various Aetna providers, is vital to Aetna’s competitive position and business strategy. Accordingly, Aetna respectfully requests that Exhibits B through J be afforded *in camera* protection for a period of five years.

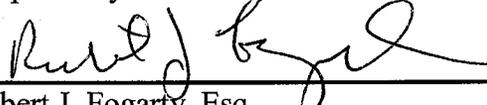
II. DOCUMENTS CONTAINING SENSITIVE PERSONAL INFORMATION MUST BE GRANTED IN CAMERA TREATMENT.

As already noted, the regulations allow an administrative law judge to afford *in camera* treatment of any documents containing sensitive personal information, which is defined to include birthdates, social security numbers, and sensitive health information such as personal

PUBLIC VERSION

medical records. 16 C.F.R. § 3.45(b). Complaint Counsel's Exhibit PX001800 is a data file produced by Aetna that includes claims data for numerous Aetna insureds. This data contains sensitive health information about individual Aetna insureds, including information regarding medical procedures undergone by the various insured's. Such health information clearly falls within the scope of documents afforded in camera treatment by the Federal Regulations. Moreover, this sensitive personal information should be afforded in camera treatment permanently. *See* C.F.R. § 3.45(b)(3). The data also includes reimbursement rates. Those rates constitute highly confidential and commercially sensitive information. (Decl. at 3). Their disclosure would reveal valuable information regarding the way that Aetna determines rates for physician services, a process that Aetna has expended numerous hours and many years to develop. *Id.* Aetna's efforts to analyze rates have allowed it to gain a competitive advantage in the marketplace and to better service its insureds. *Id.*

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 4, 2011, the foregoing was served the following in the manner indicated:

VIA FEDERAL EXPRESS – Original, one copy and electronic copy

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-135
Washington, DC 20580
dclark@ftc.gov

VIA FEDERAL EXPRESS – One copy and electronic copy

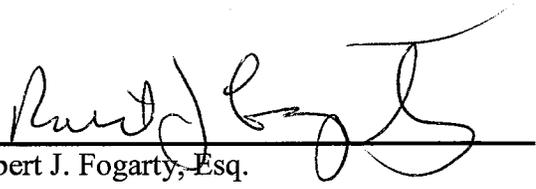
The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oalj@ftc.gov

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Robert J. Fogarty, Esq.
Attorney for Aetna Inc.

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

In the Matter of PROMEDICA HEALTH SYSTEM, INC., a corporation.
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Docket No. 9346

PROPOSED ORDER

On May 5, 2011, Non-Party Aetna Inc. (“Aetna”) filed a motion for *in camera* treatment of confidential business information and sensitive health information contained in various documents that have been identified by Claimant’s counsel as potential exhibits.

IT IS HEREBY ORDERED that Aetna’s Motion is GRANTED. The information set forth in Aetna’s exhibits numbered as followed will be subject to *in camera* treatment under 16 C.F.R. § 3.45 and will be kept confidential and not placed on the public record of this proceeding for a period of five years.

- Exhibit B: Complaint Counsel’s Exhibits PX02357, PX02414, PX02415, PX02416, PX02418, PX02419, PX02420, PX02425, PX02429, PX02509, PX02515, PX02516, PX02517, PX02520, PX02524, PX02525, PX02526.
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- Exhibit G: Complaint Counsel’s Exhibit PX02441, PX02437, PX02440.

PUBLIC VERSION

- Exhibit H: Complaint Counsel's Exhibit PX02507.
- Exhibit I: Complaint Counsel's Exhibit PX02504.
- Exhibit J: Complaint Counsel's Exhibits PX01917, PX01938, PX02067.

IT IS FURTHER ORDERED that the information contained in Complaint Counsel's Exhibit PX01800, an electronic file produced by Aetna, contains both commercially sensitive information and sensitive medical information, and shall be granted permanent *in camera* treatment.

IT IS FURTHER ORDERED that only authorized Federal Trade Commission personnel, and court personnel concerned with judicial review may have access to the above-referenced information, provided that I, the commission, and reviewing courts may disclose such *in camera* information to the extent necessary for the proper disposition of the proceeding.

ORDERED: _____
D. Michael Chappell
Administrative Law Judge

DATED: _____