

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

Docket No. 9346

NON-PARTY THE UNIVERSITY OF TOLEDO'S MOTION FOR *IN CAMERA* TREATMENT OF HEARING EXHIBITS DESIGNATED BY COMPLAINT AND DEFENSE COUNSEL

Non-party The University of Toledo, known in these proceedings as University of Toledo Medical Center ("UTMC"), files this motion Pursuant to 16 C.F.R. § 3.45(b), and moves for *in camera* treatment of documents and files produced by UTMC in response to third party subpoenas.¹ The information produced contains confidential information, the public dissemination of which could harm the interests of both UTMC and the patients of UTMC. Each document or file was designated confidential when produced. Counsel for the Federal Trade Commission and also ProMedica Health System, Inc. have now notified UTMC of their intention to place these files into evidence at the administrative hearing.

I. Description of UTMC Confidential Documents

UTMC seeks *in camera* treatment for the following information provided to both Complaint and Defense Counsel designated as Confidential when produced:

- Exhibit A: UT00000016, UTMC-002422- UTMC-002422, UTMC-560768- UTMC-560771, UTMC-302999, UTMC-380728- UTMC-380729, UTMC-549808- UTMC-549819, UTMC-550410- UTMC-550411, UTMC-550412- UTMC-550415, UTMC-560754- UTMC-560757, UTMC-560758- UTMC-560763, UTMC-590212, UTMC-591324- UTMC-591404, UTMC-592185, UTMC-592190- UTMC-592192, UTMC-136350- UTMC-136351, UTMC-

¹ The Scheduling Order established May 6, 2011 as the deadline for seeking *in camera* treatment; on May 5, 2011 UTMC filed a motion to extend and was granted until May 12, 2011.

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303000- UTMC-303001, UTMC-282540- UTMC-282546, UTMC-002586-
UTMC-002588, UTMC-286321-UTMC-287849, the 10th Amendment to the
Hospital Agreement between MMO and UT.

- Complaint Counsel's Exhibit PX01814 (Electronically Produced)

The documents in Exhibit A contain information regarding managed care rates, proposals and terms and payor mix information. The information in Complaint Counsel's Exhibit PX01814 contains hospital data that is confidential and may contain protected health information.

II. Legal Standard

This should be accorded *in camera* treatment based on the factors set forth in *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977):

- (1) the extent to which the information is known outside of [the] business;
- (2) the extent to which it is known by employees and others involved in [the] business;
- (3) the extent of measures taken by [the business] to guard the secrecy of the information;
- (4) the value of the information to [the business] and [its] competitors;
- (5) the amount of effort or money expended by [the business] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

By meeting these factors, UTMC satisfies the 16 C.F.R. 3.45(b) requirement that motions for *in camera* treatment will be granted when disclosure of the information would "result in a clearly defined, serious injury to the [party] requesting *in camera* treatment."

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). Moreover, as the Commission has stated, a request for *in camera* treatment by a company such as UTMC, which is not a party to the FTC proceeding, should be given "special solicitude." *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714 (1967); *Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984).

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III. Information Contained within Exhibit A Documentation Meets the Standard for *In Camera* Treatment.

UTMC documents UT 00000016, UTMC 560768-560771, UTMC 302999, UTMC 380728-380729, UTMC 549808-549819, UTMC 550410-550415, UTMC 560754-560757, UTMC 560755-560763, UTMC 136350, UTMC 303000-303001, UTMC 282540-282546 UTMC 286321 and UTMC-286321-UTMC-287849 contain data regarding managed care rates and terms, rate proposals, payer mix, payer analysis, payment analysis, and reimbursement analysis. UTMC 002586-002588 is documentation of a confidential e-mail regarding network products. Document UTMC 302999 contains data relating to quality of care analysis. Documents UTMC 590212, UTMC 591324-591404, UTMC 592185, and UTMC 592190-592192 contain the agreement entered into between Medical Mutual of Ohio (MMO) and UT and a subsequent amendment, as well as a UT draft memorandum, draft negotiation notes and proposed terms.

A. UTMC Has Preserved the Confidentiality of the Information

UTMC has taken measures in guarding the information contained within Exhibit A. The information is not known outside of UTMC; the information is password protected on UTMC computers; and access to the information is available to limited UTMC employees, who hold it in confidence. UTMC has only produced these documents pursuant to subpoenas issued by ProMedica Health System, Inc. and the Federal Trade Commission. In addition, UTMC's current production of these documents indicated that they be "confidential." These efforts demonstrate UTMC's preservation of the confidentiality of the information contained in Exhibit A. Furthermore, because of the efforts taken by UTMC to preserve the confidentiality of the information contained in Exhibit A, it would very difficult for UTMC competitor's to access or re-create same.

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It should also be noted that UTMC documents contain agreements or information between UTMC and MMO, and other payers.

B. Disclosure of the Information Contained in Exhibit A Would Result in Serious Competitive Injury to UTMC

Exhibit A contains various rate schedules; disclosure of this information would have a negative impact on the competitive position of UTMC in the healthcare arena in northwest Ohio. To allow UTMC's competitors access to confidential negotiated reimbursement rates would allow such competitors to use such information to their advantage in negotiating their own rates. Preserving the confidentiality of payer information is critical to the continued operations and market position of UTMC. Disclosure of Exhibit A would provide negotiation strategy information which is utilized by UTMC in regard to reimbursement rates, and strategic planning information for future UTMC operations. Such disclosure would place UTMC at a disadvantage in negotiating future rates, and could give competitors insight into UTMC's business strengths and weaknesses.

C. The Public Interest In Disclosure of UTMC Exhibit A is Outweighed by the Likelihood of Serious Competitive Harm to UTMC

UTMC 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). UTMC has cooperated with the discovery demands in this case and disclosure of UTMC's confidential information is not necessary for resolution of the current matter.

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IV. Information Provided Electronically to Complaint Counsel's Exhibit PX01814 Meets the Standard for *In Camera* Treatment.

The documents provided electronically to Complaint Counsel identified as Exhibit PX01814 contain highly sensitive patient data maintained confidentially by UTMC and may include individually identifiable health information, as defined under 45 C.F.R. 160.103 as required to be protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191. This patient and payor information is core to the business operations of UTMC and disclosure of this information may harm UTMC and the identity and protected health information of its patients. All such information is carefully guarded by UTMC and only those employees with a proper purpose and with proper authority may access such patient information.

UTMC has taken measures in guarding the information contained within PX01814. The information is not known outside of UTMC; the information is password protected on UTMC computers; and access to the information is available to limited UTMC employees, who hold it in confidence and who may only use and access the information for a proper business purpose. UTMC has only produced these documents pursuant to subpoenas issued by ProMedica Health System, Inc. and the Federal Trade Commission. In addition, UTMC's current production of these documents indicated that they be "confidential."

V. Summary: Information Contained within Exhibit A and PX01814 Meets the Standard for *In Camera* Treatment and Affidavit of Support.

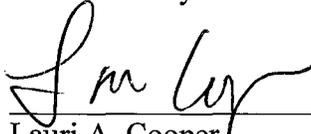
As discussed above, the information contained within Exhibit A and PX01814 meets the standard for *in camera* treatment. This is supported by the affidavit of Jeffrey P. Gold, M.D., Chancellor and Executive Vice President for Biosciences and Health Affairs, Dean of the College of Medicine, attached as Exhibit "B."

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DATED MAY 11, 2011

Respectfully submitted,

MIKE DEWINE
Ohio Attorney General

A handwritten signature in black ink, appearing to read "Lauri A. Cooper", written over a horizontal line.

Lauri A. Cooper
ASSISTANT ATTORNEY GENERAL
SENIOR LEGAL COUNSEL AND
ASSOCIATE VICE PRESIDENT
Counsel for The University of Toledo

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CERTIFICATE OF SERVICE

I declare as follows:

I certify that on May 11, 2011, I caused an original and two copies of the Motion of Third- Party UTMC for *In Camera* Treatment of Certain Records to be filed with the Secretary of the Commission and the Administrative Law Judge by overnight Federal Express and electronic copy to:

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

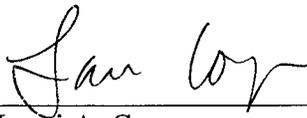
Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-135
Washington, DC 20580
dclark@ftc.gov

I also certify that on this same date, I caused one copy of the foregoing motion to be served electronically upon:

Jeanne Liu
Attorney, Bureau of Competition
U.S. Federal Trade Commission
601 New Jersey Ave, NW
Washington, D.C. 20001
(202) 326-3572 phone
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MIKE DEWINE
Ohio Attorney General



Lauri A. Cooper
ASSISTANT ATTORNEY GENERAL
SENIOR LEGAL COUNSEL AND
ASSOCIATE VICE PRESIENT
Counsel for The University of Toledo

**UNITED STATES OF AMERICA
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In the Matter of,

**PROMEDICA HEALTH SYSTEM, INC.,
a corporation**

Docket No. 9346

**APPENDIX TO EXHIBITS CITED IN NON-PARTY THE UNIVERSITY OF TOLEDO'S
MOTION FOR *IN CAMERA* TREATMENT OF HEARING EXHIBITS DESIGNATED
BY COMPLAINT AND DEFENSE COUNSEL**

- EXHIBIT A: UT00000016, UTMC-002422- UTMC-002422, UTMC-560768- UTMC-560771, UTMC-302999, UTMC-380728- UTMC-380729, UTMC-549808- UTMC-549819, UTMC-550410- UTMC-550411, UTMC-550412- UTMC-550415, UTMC-560754- UTMC-560757, UTMC-560758- UTMC-560763, UTMC-590212, UTMC-591324- UTMC-591404, UTMC-592185, UTMC-592190- UTMC-592192, UTMC-136350- UTMC-136351, UTMC-303000- UTMC-303001, UTMC-282540- UTMC-282546, UTMC-002586- UTMC-002588, Tenth Amendment to Hospital Agreement Between Medical Mutual of Ohio and University of Toledo
- EXHIBIT B: Affidavit of Jeffrey P. Gold, M.D., Chancellor and Executive Vice President for Biosciences and Health Affairs, Dean of the College of Medicine, The University of Toledo

Exhibit A

Filed under seal for *In Camera* treatment

Exhibit B

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)	

AFFIDAVIT

State of Ohio,
County of Lucas, ss:

Now comes Jeffrey P. Gold, M.D., and being first duly cautioned and sworn, deposes and states as follows:

1. I am the Chancellor and Executive Vice President for Biosciences and Health Affairs and Dean of the College of Medicine of The University of Toledo with oversight of the clinical and hospital operations of the University (commonly referred to as "University of Toledo Medical Center" or "UTMC"). I make this affidavit based upon my personal knowledge and review of the pertinent records.

2. I have reviewed with counsel the following files:

- Exhibit A: UT00000016, UTMC-002422- UTMC-002422, UTMC-560768- UTMC-560771, UTMC-302999, UTMC-380728- UTMC-380729, UTMC-549808- UTMC-549819, UTMC-550410- UTMC-550411, UTMC-550412- UTMC-550415, UTMC-560754- UTMC-560757, UTMC-560758- UTMC-560763, UTMC-590212, UTMC-591324- UTMC-591404, UTMC-592185, UTMC-592190- UTMC-592192, UTMC-136350- UTMC-136351, UTMC-303000- UTMC-303001, UTMC-282540- UTMC-282546, UTMC-002586- UTMC-002588, UTMC-286321-UTMC-287849 and the 10th Amendment to the Hospital Agreement between MMO and UT.
- Electronic files of PX01814

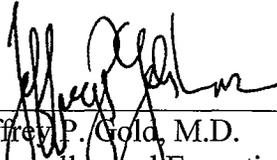
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3. The documents included in Exhibit A contain highly competitive or highly sensitive information and are held in strict confidence by UTMC. Public disclosure of the information contained in these documents is likely to cause UTMC serious harm. The information contained in the documents is necessary to the fundamental business operations of UTMC, which includes payment terms and rates and negotiations strategies for the core business of UTMC, namely, providing acute inpatient and outpatient health care. This information, if disclosed, may be used by UTMC competitors to UTMC's serious disadvantage. The public disclosure of such information and may also substantially harm the managed care contracting entities with which UTMC conducts business.

4. UTMC enters into confidentiality provisions with such managed care contracting entities that prohibits the disclosure of this highly competitive and sensitive information. UTMC may be in breach of these agreements should the information contained in the documents be released.

5. The documents provided electronically to Complaint Counsel identified as PX01814 contain highly sensitive patient data maintained confidentially by UTMC and may include individually protected health information, as defined under 45 C.F.R. 160.103 as required to be protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191. This patient and payor information is core to the business operations of UTMC and disclosure of this information may harm UTMC and the identity and protected health information of its patients. All such information is carefully guarded by UTMC and only those employees with a proper purpose and with proper authority may access such patient information.

Further affiant says not.



Jeffrey P. Gold, M.D.
Chancellor and Executive Vice President for
Biosciences and Health Affairs
Dean of the College of Medicine
The University of Toledo

Sworn to before me and subscribed in my presence this 11 day of May, 2011



Notary Public

ELLEN ELIZABETH MOUNT
Notary Public, State of Ohio
My Commission Expires 6-5-2015

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ORDER FOR *IN CAMERA* TREATMENT

Pursuant to 16 C.F.R. § 3.45(b), at the request of non-party The University of Toledo (“UTMC”) motion for *in camera* treatment of files produced by UTMC in response to third party subpoenas the motion is hereby granted.

This motion is **GRANTED**.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May __, 2011