

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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

Docket No. 9346
PUBLIC

**RESPONDENT PROMEDICA HEALTH SYSTEM, INC.'S RENEWED MOTION
FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS**

Respondent, ProMedica Health System, Inc., hereby renews its motion for *in camera* treatment of certain proposed trial exhibits, pursuant to 16 C.F.R. §3.45, Paragraph 7 of the Scheduling Order, and Judge Chappell's Order dated May 13, 2011.

In support of this motion, Respondent provides its accompanying memorandum, and Revised Declarations of Kathleen Hanley and Lori Johnston.

WHEREFORE, Respondent ProMedica Health System, Inc. respectfully requests that this Court grant *in camera* treatment to the documents described in the attached memorandum and listed in the attached Table.

Dated: May 18, 2011

Respectfully submitted,



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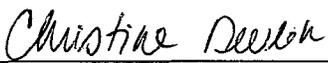
I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Renewed Motion for *In Camera* Treatment of Trial Exhibits, Public Version, upon the following individuals by hand on May 18, 2011.

Hon. D. Michael Chappell
Chief Administrative Law Judge
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600 Pennsylvania Avenue, NW
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Washington, DC 20580

Donald S. Clark
Secretary
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I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Renewed Motion for *In Camera* Treatment of Trial Exhibits, Public Version, upon the following individuals by electronic mail on May 18, 2011.

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

In the Matter of)
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Docket No. 9346
PUBLIC

**RESPONDENT PROMEDICA HEALTH SYSTEM, INC.'S MEMORANDUM
IN SUPPORT OF ITS RENEWED MOTION FOR *IN CAMERA*
TREATMENT OF TRIAL EXHIBITS**

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Adjudicative Practice, Respondent ProMedica Health System, Inc. ("ProMedica") submits this Memorandum in Support of its Renewed Motion for *In Camera* Treatment of Certain Proposed Trial Exhibits.

I. Introduction

ProMedica and St. Luke's Hospital ("St. Luke's"), collectively, have produced over *two million* documents in response to Complaint Counsel's requests for documents during its investigation and as part of discovery for this administrative proceeding. Complaint Counsel requested a substantial range of documents, including competitively sensitive presentations and reports, financial documents, negotiation documents, contracts, patient data, and internal correspondence.

On May 5, 2011, Respondent moved for *in camera* treatment of about 960 proposed trial exhibits. On May 13, 2011, Judge Chappell denied without prejudice Respondent's motion as to all proposed exhibits, other than commercial health plan contracts and documents containing sensitive patient data. (Order at 3.) Judge Chappell granted Respondent leave to file a renewed motion by May 18, 2011. (*Id.*)

Accordingly, and pursuant to 16 C.F.R. §3.45 and Paragraph 7 of the Scheduling Order, Respondent renews its motion and moves for an order granting *in camera* treatment for certain trial exhibits designated by Respondent and Complaint Counsel. These exhibits are listed in Table I and described in the accompanying revised declarations of Kathleen Hanley and Lori Johnston.¹ The confidential information contained in these exhibits, if disclosed, would result in a clearly defined, serious competitive injury to ProMedica and St. Luke's.

ProMedica seeks *in camera* treatment of these exhibits because they are confidential, competitively sensitive documents that relate to ProMedica's and St. Luke's business strategy, payor contracting, and present and future operations. Public disclosure would result in a serious competitive injury to ProMedica and St. Luke's. Counsel for ProMedica has carefully reviewed each and every exhibit identified in Table I and have determined that they qualify under the standards as set forth in Paragraph 7 of the scheduling order for *in camera* treatment.

II. **The Clearly Defined, Serious Injury Standard**

An applicant seeking *in camera* protection for material offered into evidence may receive *in camera* treatment when "its public disclosure will likely result in a clearly defined, serious injury." 16 C.F.R. § 3.45(b). An applicant can meet that standard by establishing that the evidence is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury." *See In the Matter of Evanston Northwestern Healthcare Corp.*, 2005 F.T.C. LEXIS 27, at *1 (Feb. 9, 2005) (internal citations omitted). In making this determination, administrative courts review six factors to determine secrecy and materiality: (1) the extent to which the information is known outside of the

¹ Due to word count limitations set forth in the Scheduling Order and Rule 3.22(c), Respondent has provided a complete list of proposed trial exhibits for which it is seeking *in camera* treatment in Table I. The declarations accompanying this motion explain the basis for *in camera* treatment for each proposed exhibit.

applicant's business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See In the Matter of Bristol-Myers Co.*, 90 FTC LEXIS 455, at *5-6 (Nov. 11, 1997).

III. ProMedica's and St. Luke's Documents Meet The Clearly Defined, Serious Injury Standard

All six factors support granting Respondent's motion for *in camera* treatment. First, Respondent treats as confidential every document for which it seeks *in camera* treatment. (*See* Hanley Decl. ¶ 3; Johnston Decl. ¶ 3.) The information in these materials is not known to the public or generally outside ProMedica or St. Luke's (or the party with whom the entities were negotiating or contracting). These documents are not a matter of public record and have not been fully disclosed in any public context. *Id.* In its response to Respondent's prior motion, Complaint Counsel stated that certain documents were "extensively quoted and described" in United State District Court for the Northern District of Ohio's order granting a preliminary injunction that requires ProMedica to hold separate St. Luke's. (Opp. at 3.) However, quoting and describing certain documents is not equivalent to disclosing them publicly in their *entirety*. Complaint Counsel's argument also does not apply at all to proposed exhibits comprising documents and testimony produced only as part of discovery in *this* matter, and not previously produced in either Complaint Counsel's investigation or the preliminary injunction proceeding.

Respondent has not waived its interest in keeping some of these materials confidential because of any prior discussion about some of them.²

Second, the internal materials reflect the strategic decision-making of senior executives from ProMedica and St. Luke's. The confidential information in these documents is not generally known to all employees within ProMedica or St. Luke's. The internal reports and presentations contain carefully guarded business planning, forecasting, and strategy information. (See, e.g., Hanley Decl ¶¶ 5-153; Johnston Decl. ¶¶ 5-146.) Likewise, documents reflecting contracts and their negotiations with third parties represent the business goals and competitive strategy of senior executives from the relevant institutions. The contracting terms and rate data are not generally known throughout the organizations.

Third, ProMedica and St. Luke's have carefully guarded the secrecy of these materials. (See, e.g., Hanley Decl ¶ 3; Johnston Decl. ¶ 3.) The entities were compelled to produce the materials pursuant to the discovery process, but otherwise they have not publically disclosed the information found within the confidential documents or discussed during the depositions.

Fourth, competitor hospitals, such as Mercy Health Partners or the University of Toledo Medical Center, would benefit significantly from gaining access to these materials. The materials reflect ProMedica and St. Luke's business strategy, financial plans, budgeting scenarios, clinical quality reports, competitive goals, and contracting initiatives, all of which are competitively sensitive. For example, the materials include correspondence revealing negotiations with commercial health plans. These materials are competitively sensitive to St.

² Additionally, Judge Katz issued the following order regarding the discussion of materials subject to the protective order in the preliminary injunction proceeding, "[t]o the extent that any confidential documents subject to the protective orders entered in this case were discussed [during the hearing] contents of such documents shall not be discussed, disclosed, or used outside the confines of this Courtroom." (*FTC, et al., v. ProMedica Health System, Inc.*, Civ. No. 3:11-cv-00047 (N.D. Ohio) (Feb. 14, 2011) (Dkt. No. 101).

Luke's and ProMedica, as well as to the non-parties with which they contract. These documents represent a complex process and are unique to the relevant parties. Hospital competitors and other commercial health plans would benefit significantly and unfairly from gaining access to these materials.

Fifth, ProMedica and St. Luke's have spent significant money in developing some of the materials, particularly reports and presentations created by consultants. ProMedica and St. Luke's have had consultants assist them by analyzing their payor contracting, clinical services, and financial performance. ProMedica and St. Luke's have also engaged consultants to aid their defense of this case with expert reports and related exhibits. The public disclosure of this information would harm ProMedica and St. Luke's business operations, their defense of this case, and, in the case of expert reports and related exhibits, reveal confidential non-party information.³

Finally, it would be difficult for another party to replicate the information found in these materials because they reflect the work product of senior executives with years of experience in these organizations. The materials are unique and tailored to the respective entities and not known to the general public.

ProMedica and St. Luke's would suffer irreparable injury if the information contained in these documents and testimony were disclosed to the public. Disclosure of planning, strategy, clinical quality, and financial documents would give competitor hospitals an improper glimpse into the ProMedica's and St. Luke's day-to-day operations and strategic decision-making, and give them a competitive advantage for future planning and budgeting. (*See, e.g.,* Hanley Decl ¶¶ 5-153; Johnston Decl. ¶¶ 5-146.) Disclosure of payor contracting and negotiating documents

³ Complaint Counsel have sought *in camera* treatment for their expert reports and related exhibits. (Complaint Counsel's Unopposed Motion for *In Camera* Treatment of Hearing Exhibits, May 5, 2011.)

would cause injury to St. Luke's and ProMedica, and to the commercial health plans with which they contract because competitors could access this competitively sensitive rate information. (See, e.g., Hanley Decl ¶¶ 154-219, 337-396; Johnston Decl. ¶¶ 147-198, 236-256.) The third parties recognize the confidential and competitively sensitive nature of these sorts of documents and have sought *in camera* treatment for the exact same types of documents. (See, e.g., Non-Party Mercy Health Partners Motion for *In Camera* Treatment ("Mercy Mem.") at 2 (seeking *in camera* treatment for "clinical/financial data about hospital operations", "internal business analyses and strategic planning objectives" and "contracts with third-party payors"); Non-Party Aetna's Motion for *In Camera* Treatment ("Aetna Mem."), at 5 (seeking *in camera* treatment for "emails dealing with contract negotiations between Aetna and ProMedica"), 6 ("negotiations of contracts and rates with individual hospitals"), 10 (deposition testimony regarding "how Aetna negotiates contracts and rates with the providers"); Non-Party Wood County Hospital's Motion for *In Camera* Treatment ("Wood Mem.") at 2 (seeking *in camera* treatment for "financial and patient data"); Non-Party Wellpoint, Inc.'s Unopposed Motion for *In Camera* Treatment ("Wellpoint Mem."), 5 (seeking *in camera* treatment for "internal e-mails and documents, which set forth Anthem's business plans and negotiation strategies for the Toledo market"), 10 ("confidential business strategies and negotiations forming the foundation for, and leading to, the execution of current Agreements").) Notably, Complaint Counsel has not opposed any third party motions for *in camera* treatment, even though the third parties seek protection for the exact same sorts of documents as Respondent. (See, e.g., Mercy Mem. at 3 ("Neither the FTC nor ProMedica oppose granting *in camera* treatment for MHP Exhibits"), Wellpoint Mem. at 1 ("unopposed motion").)

The tribunal may infer, “without a specific showing of how a competitor would use it, that disclosure of allegedly sensitive information would seriously affect the firm’s commercial position. Underlying this analysis is a general concern for the seriousness of injury to a firm’s commercial or competitive position.” *In the Matter of E.I. Dupont de Nemours & Co.*, 97 F.T.C. LEXIS 116, at *3 (Jan. 21, 1981). The materials at issue here pose a strong likelihood of harming the competitive position of ProMedica, St. Luke’s, and certain non-party commercial health plans if disclosed to the public.

Finally, the information for which Respondent seeks *in camera* treatment remains relevant and significant today. ProMedica and St. Luke’s seek *in camera* treatment for information within three years old. Nevertheless, even aged data is sensitive and remains worthy of protection because they reflect ProMedica’s and St. Luke’s business strategies and can impact future negotiations between the Respondent and commercial health plans. Disclosure of these materials would cause competitive harm to ProMedica, St. Luke’s, and non-party commercial health plans in future contract negotiations. *See in re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. LEXIS 500, at *2 (May 25, 1984) (holding that material that was over five years old was still sensitive and deserving of *in camera* treatment where “a serious injury would be done by release of this information, which they have never made available to the public”).

IV. **Expiration Date**

ProMedica seeks indefinite and temporary *in camera* treatment of these confidential exhibits. Specifically, ProMedica seeks indefinite treatment for patient data. The sensitivity of the information in this category of documents will not lessen over time. *Evanston Northwestern Healthcare Corp.*, 2005 U.S. F.T.C. LEXIS 27, at *2 (Feb. 9, 2005). ProMedica seeks temporary *in camera* treatment for the remaining categories of documents for a period of three

years. Administrative courts grant *in camera* treatment for business records for a period of two to five years. See *Evanston Northwestern Healthcare Corp.*, 2005 F.T.C. LEXIS 27, at *2 (Feb. 9, 2005); *In the Matter of E.I. Dupont de Nemours & Co.*, 97 F.T.C. LEXIS 116, 118 (Jan. 21, 1981) (granting financial data *in camera* treatment for three years); *In re Int'l Ass. Of Conf. Interpreters*, 1996 F.T.C. LEXIS 298 (June 26, 1996) (granting contracts *in camera* treatment for three years). Three years is necessary to protect documents related to ProMedica and St. Luke's agreements with commercial health plans because those contracts may last several years. Three years is also necessary to protect business records with competitively sensitive information that contain projections or forecasts impacting future plans and initiatives. Therefore, documents that are three to five years old remain relevant, material, and confidential, and warrant *in camera* treatment.

V. Conclusion

Pursuant to 16 C.F.R. §3.45 and Paragraph 7 of the Scheduling Order, ProMedica respectfully moves for *in camera* treatment of the proposed exhibits identified in Table I.

Dated: May 18, 2011

Respectfully submitted,



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*Attorneys for Respondent ProMedica
Health System, Inc.*

I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Memorandum in Support of its Renewed Motion for *In Camera* Treatment, Public Version, upon the following individuals by hand on May 18, 2011.

Hon. D. Michael Chappell
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Christine Devlin

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

In the Matter of)
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Docket No. 9346

**[PROPOSED] ORDER GRANTING RESPONDENT'S RENEWED MOTION
FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS**

Upon consideration of Respondent, ProMedica Health System, Inc.'s Renewed Motion for *In Camera* Treatment of Trial Exhibits, it is hereby ordered that the Motion is **GRANTED** and *in camera* treatment will be given to the categories of documents below for the period of time indicated. This order applies only to those documents listed in Table I of Respondent's Renewed Motion for *In Camera* Treatment of Trial Exhibits.

Business Records	Three years
Commercial Health Plan Contracts	Three years
Commercial Health Plan Negotiations	Three years
Patient Data	Indefinite
Defensive Strategy Documents	Three years
Financial Documents	Three years
Deposition Testimony	Three years

Dated: May ____, 2011.

The Honorable D. Michael Chappell
Chief Administrative Law Judge

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

In the Matter of)
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Docket No. 9346
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**DECLARATION OF KATHLEEN HANLEY IN SUPPORT OF RESPONDENT
PROMEDICA HEALTH SYSTEM, INC.'S RENEWED MOTION
FOR *IN CAMERA* TREATMENT**

DOCUMENT REDACTED IN ITS ENTIRETY

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

In the Matter of)
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**DECLARATION OF LORI A. JOHNSTON IN SUPPORT OF RESPONDENT
PROMEDICA HEALTH SYSTEM, INC.'S RENEWED
MOTION FOR *IN CAMERA* TREATMENT**

DOCUMENT REDACTED IN ITS ENTIRETY

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STATEMENT REGARDING MEET AND CONFER

On May 18, 2011, Respondent's Counsel, Christine Devlin, conferred telephonically with Complaint Counsel, Jeanne Liu, regarding Respondent's Renewed Motion for *In Camera* Treatment of Certain Proposed Trial Exhibits. Complaint Counsel indicated that they intend to oppose Respondent's motion.

Dated: May 18, 2011

Respectfully submitted,



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