

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman  
J. Thomas Rosch  
Edith Ramirez  
Julie Brill  
Maureen Ohlhausen



In the Matter of )  
)  
)

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

Docket No. 9346  
PUBLIC

**RESPONDENT'S RESPONSE TO THE COMMISSION'S NOTICE OF INTENT TO DISCLOSE *IN CAMERA* INFORMATION**

On April 17, 2012, the Commission issued a Notice of Intent To Disclose *In Camera* Information (the "Notice"), in which it provided a list of *in camera* material contained in its Opinion and Final Order that it intended to place on the public record.

Respondent hereby respectfully objects to public disclosure of certain *in camera* information identified by the Commission in the *In Camera* Reference List attached to its Notice. Such *in camera* information, if publicly disclosed, will result in a clearly defined and serious injury to Respondent that outweighs any public interest in favor of its disclosure. This narrow subset of *in camera* information - a small fraction of the *in camera* material identified by the Commission in its Notice - is listed in the Attachment to this Memorandum.

**I. Standard for *In Camera* Treatment**

Information in evidence may be provided *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 seeking

*in camera* treatment may 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 agencies review six factors to determine secrecy and materiality: (1) the extent to which the information is known outside of the applicant’s 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 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. See *In the Matter of Bristol-Myers Co.*, 90 F.T.C. LEXIS 455, at \*5-6 (Nov. 11, 1997). The Commission weighs any likely competitive injury of disclosure with the importance of publicly disclosing the information in order to explain the rationale of the Commission’s decision. See *In the Matter of General Foods Corp.*, 95 F.T.C. 352, at \*3 (Mar. 10, 1980).

## **II. The Information Identified by Respondent in the Attachment Meets the *In Camera* Standard**

### **A. Judge Chappell Determined that Respondents Had Shown that the Material Met the *In Camera* Standard**

Respondent originally sought *in camera* treatment for the materials identified in the Attachment because they are confidential, competitively sensitive information that relate to ProMedica’s and St. Luke’s commercial health plan contracting, and public disclosure would result in a clearly defined, serious competitive injury to ProMedica and St. Luke’s. (See, e.g., Respondent ProMedica Health System, Inc.’s Renewed Motion for In Camera Treatment of Trial Exhibits, May 18, 2011).

Chief Administrative Law Judge Chappell agreed with Respondent that the materials in question are competitively sensitive. By Orders dated May 25, 2011, and May 27, 2011, Judge Chappell granted Respondent's Renewed Motion for *In Camera* Treatment, providing the materials in the Attachment (in addition to other materials) *in camera* status for three years, to expire June 1, 2014. (See Order on Respondent's Renewed Motion for In Camera Treatment, May 25, 2011; Order Granting Respondent's Renewed Motion for *In Camera* Treatment of Trial Exhibits, May 27, 2011). Judge Chappell determined that Respondent had "shown that the information for which it seeks *in camera* treatment remains relevant and significant today" and that:

- 1) the information in these materials is not known to the public or generally outside ProMedica or St. Luke's;
- 2) the internal materials reflect the strategic decision-making of senior executives from ProMedica and St. Luke's;
- 3) ProMedica and St. Luke's have carefully guarded the secrecy of these materials;
- 4) competitor hospitals would benefit significantly from gaining access to these materials;
- 5) ProMedica and St. Luke's expended significant money in developing some of these materials; and
- 6) it would be difficult for another party to replicate the information found in these materials.

Order on Respondent's Renewed Motion for *In Camera* Treatment, May 25, 2011.

**B. The Small Subset of Materials for which Respondent Seeks To Retain *In Camera* Treatment Is Particularly Competitively Sensitive**

The *in camera* information that Respondent identifies in the Attachment relates to ProMedica's and St. Luke's current contract terms and negotiations with commercial health plans or recent past negotiations with commercial health plans. This information is competitively sensitive to ProMedica and St. Luke's, as well as to the non-parties with which they contract. Commercial health plan contracting is a complex process that is unique to the relevant parties. Consequently, this information is not known to the public, or even generally within ProMedica and St. Luke's. In addition, this information reflects the strategic decision-making of senior executives of ProMedica and St. Luke's, and their hospital competitors and

other commercial health plans would benefit significantly and unfairly from gaining access to these materials. As a result, ProMedica and St. Luke's, as well as the commercial health plans with which they contract, would suffer irreparable injury if this information is disclosed to the public.

Furthermore, the *in camera* information that Respondent identifies in the Attachment remains "relevant and significant today." (See Order on Respondent's Renewed Motion for In Camera Treatment, May 25, 2011). All of the information listed in the Attachment concerns contract terms that are currently in effect, or negotiations that recently took place, and therefore, if disclosed, would cause ProMedica, St. Luke's, and non-party commercial health plans significant competitive injury. (See, e.g. PX00365 at 001, 012, *in camera* (contract in effect as of October 1, 2010, with an initial term of three years); PX00366 at 001, 012, *in camera* (contract in effect as of October 1, 2010, with an initial term of three years)). This distinguishes the information here from other matters in which the Commission determined that disclosure of *in camera* material would not cause a party a "clearly defined, serious injury." For example, when the Commission disclosed certain *in camera* material in *RSR Corp.*, it noted that "the information contained *in camera* is four to five years old." *In the Matter of RSR Corp.*, 88 F.T.C. 206 (1976). Similarly, the Commission disclosed *in camera* information at issue in *Orkin* after noting it was two years old. *In the Matter of Orkin Exterminating Co., Inc.*, 108 F.T.C. 147 (1986). Even still, certain aged material may yet be sensitive and worthy of *in camera* protection. See *in re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. LEXIS 500, at \*2 (May 25, 1984) (holding that material that was 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”). Nevertheless, here, the *in camera* information is relevant and significant *today*.

**C. The Information at Issue Does Not Constitute “General References” to *In Camera* Material**

The *in camera* information identified by Respondent in the Attachment does not “constitute general references or statements based on the content of confidential materials.” 16 C.F.R. § 3.45(d). On the contrary, the *in camera* information at issue here includes references to specific contract terms and negotiations, the disclosure of which would cause serious competitive injury to ProMedica, St. Luke’s, and non-party commercial health plans. For example, Items 3, 4, and 5 of the Attachment all refer to specific provisions in ProMedica’s contracts with certain commercial health plans concerning separate rates and payment methodologies for specific services. These contract provisions remain in effect today. (*See* PX00365 at 001, 012, *in camera*; PX00366 at 001, 012, *in camera*; PX02520, *in camera*). Public disclosure of such information would provide ProMedica’s hospital competitors - as well as competitors of the non-party health plans who contracted with ProMedica - access to these competitively sensitive terms, causing serious competitive injury to ProMedica and the non-party health plans. Items 14, 31, and 43 refer to reimbursement rates and rate negotiations between Respondent and commercial health plans. For example, Item 14 describes specific reimbursement rate offers and counteroffers during negotiations between a hospital and a health plan. Item 31 details reimbursement rate comparisons between St. Luke’s and certain ProMedica hospitals. Item 43 references negotiated rates between ProMedica and Anthem. (*See, e.g.* PX00231, *in camera*). Hospital competitors, as well as health plan competitors, would unfairly and significantly benefit from access to this information, causing serious competitive injury to ProMedica, St. Luke’s, and the non-party health plans. Finally, Item 51 cites a specific provision in ProMedica’s contracts

with two commercial health plans. (*See, e.g.* IDF 719).<sup>1</sup> The disclosure of such specific, confidential information would result in a serious competitive injury to ProMedica, as well as the two commercial health plans.

**D. The Likely Injury to Respondent Outweighs the Public Interest in Disclosure**

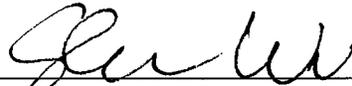
The Commission weighs any likely competitive injury of disclosure with the importance of publicly disclosing the information in order to explain the rationale of the Commission's decision. *In the Matter of General Foods Corp.*, 95 F.T.C. 352, at \*3 (Mar. 10, 1980). Here, the public interest in disclosure of the information identified in the Attachment does not outweigh the significant and serious competitive harm that will likely result if the information is disclosed. As mentioned above, the information in the Attachment relates to commercial health plan contracting and negotiations and is highly confidential. Public disclosure of this information will cause serious and irreparable competitive injury to ProMedica, St. Luke's, and non-party commercial health plans. Furthermore, the public's understanding of this proceeding does not depend on access to these seven specific references to ProMedica's and St. Luke's highly confidential and competitively sensitive contract terms and negotiations.

Consequently, Respondent respectfully requests that the Commission not publicly disclose the information listed in the Attachment to this Memorandum.

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<sup>1</sup> IDF refers to the Numbered Findings of Fact in the ALJ's Initial Decision.

This the 27th of April, 2012.



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# ATTACHMENT

(Document Redacted in its Entirety)

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## CERTIFICATE OF SERVICE

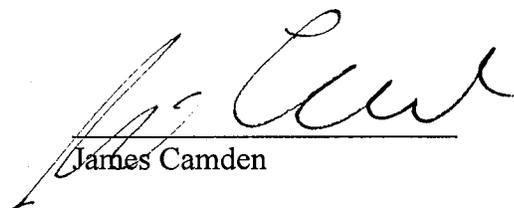
I, James Camden, hereby certify that I served a true and correct copy of the foregoing Respondent's Response to The Commission's Notice of Intent to Disclose *In Camera* Information, Public Version, upon the following individuals by hand on April 27, 2012.

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room 172  
Washington, DC 20580

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

I, James Camden, hereby certify that I served a true and correct copy of the foregoing Respondent's Response to The Commission's Notice of Intent to Disclose *In Camera* Information, Public Version, upon the following individuals by electronic mail on April 27, 2012:

Matthew J. Reilly  
Jeffrey H. Perry  
Sara Y. Razi  
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