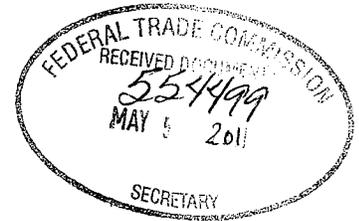


ORIGINAL

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



In the matter of:

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Docket No.: 9346

PROMEDICA HEALTH SYSTEMS, INC.

Judge D. Michael Chappell

[PUBLIC]

**NON-PARTY MEDICAL MUTUAL OF OHIO'S MOTION FOR
IN CAMERA TREATMENT OF CONFIDENTIAL MATERIALS**

Medical Mutual of Ohio ("MMO") respectfully moves pursuant to 16 C.F.R. § 3.45(b) for an order directing *in camera* treatment of certain materials that it produced in response to third-party subpoenas issued by Federal Trade Commission ("FTC") and ProMedica Health Systems, Inc. ("ProMedica") (collectively, the "Parties").

The MMO materials that are the subject of this motion contain confidential personal and competitively sensitive information, and fall into five general categories: (a) claims data for MMO's members in northwestern Ohio¹; (b) MMO's contracts with healthcare providers in Lucas County ("Contracts")²; (c) documents reflecting MMO's negotiations with St. Luke's

¹ The MMO claims data that warrants *in camera* treatment appears in the FTC's Exhibit No. PX01805, which is attached as Exhibit 1 (filed under seal).

² A compilation of the Contracts that warrant *in camera* treatment is attached as Exhibit 2 (filed under seal), which includes: MMO 000059-MMO 000087; MMO 000088-MMO 000167; MMO 000176-MMO 000231; MMO 00232-MMO 000264; MMO 000265-MMO 000315; MMO 002278-MMO 002280; MMO 002281-MMO 002285; MMO 002735-MMO 002855; MMO 002856-MMO 002984; MMO 003376-MMO 3462; MMO 002483-MMO 002495; MMO 002496-MMO 002504; MMO 002505-MMO 002599; MMO 002600-MMO 002684; MMO 002686-MMO 002702; MMO 002703-MMO 002715; MMO 002716-MMO 002724; MMO 002725-MMO 002734; MMO 003002-MMO 003036; MMO 003037-MMO 003069; MMO 003070-MMO 003126; MMO 003127-MMO 003201; and MMO 003295-MMO 003353.

Hospital (“St. Luke’s”) regarding St. Luke’s 2009 request for a reimbursement rate increase³; (d) documents reflecting MMO’s internal analyses and negotiations with ProMedica in 2010 and 2011 concerning the current St. Luke’s contract⁴; and (e) deposition and hearing testimony by an MMO senior executive regarding categories (a)-(d) as well as other confidential and competitively sensitive MMO information⁵ (collectively, “MMO Exhibits 1-5”). The information contained in MMO Exhibits 1-5 is competitively sensitive and is held in strict confidence by MMO. Accordingly, when MMO produced these materials, it designated them “Confidential” under the January 6, 2011 Protective Order.

By letters dated April 27 and April 28, 2011, counsel for the FTC and counsel for ProMedica informed MMO that they intend to introduce into evidence at the administrative trial a number of materials MMO produced in response to the Parties’ subpoenas *duces tecum*. MMO Exhibits 1-5 are a subset of the materials the Parties identified. The public dissemination of the information contained in this subset of materials—namely, personal patient data, business and strategic analyses, confidential negotiations with healthcare providers, and MMO’s negotiated

³ A compilation of the documents containing confidential and competitively sensitive information about MMO’s negotiations with St. Luke’s is attached as Exhibit 3 (filed under seal), which includes: MMO 003283; MMO 003284-MMO 3285; MMO 003286-MMO 003288; and MMO 003294.

⁴ A compilation of the documents containing confidential and competitively sensitive information about MMO’s negotiations with ProMedica is attached as Exhibit 4 (filed under seal), which includes: FTC-MMO-000001-FTC-MMO-000003; FTC-MMO-000004; MMO 003355; MMO 003356; MMO 003361-MMO 003362; MMO 003369; and MMO 003463-MMO 003465.

⁵ A compilation of the transcript excerpts containing testimony about MMO’s confidential and competitively sensitive information is attached as Exhibit 5 (filed under seal), which includes: October 14, 2010 Investigational Hearing of Donald M. Pirc Transcript (“IH Tr.”) at 14:15; 15:23; 16:1-2; 16:5; 16:9-12; 17:9; 23:18-21; 24:2-16; 25:24-26:9; 27:20-21; 28:8-14; 35:9-10; 35:12; 35:14; 35:16-17; 35:19; 35:22-23; 36:18-22; 37:1; 40:17; 44:22-45:7; 45:16-25; 46:22-24; 48:4-11; 50:1-9; 51:17-22; 52:2-54:25; 55:17-56:19; 60:21-61:23; 63:6-64:12; and 64:15-65:18 (collectively “Pirc Hearing Excerpts”); April 7, 2011 Deposition of Donald M. Pirc (“Pirc Dep. Tr.”) at 10:23; 11:2-4; 11:8; 11:12; 11:16; 11:22; 14:2; 16:14; 16:16-25; 17:7-12; 18:6; 18:15-17; 20:3-14; 21:1-8; 21:15-20; 21:25-22:5; 22:18-23; 24:6-9; 24:20-25:1; 25:21; 26:5-27:5; 28:23-29:1; 29:6; 29:8-12; 29:18-22; 30:1-2; 32:5; 34:13-17; 34:22-35:4; 35:9; 35:11-18; 36:3-13; 36:25; 39:11-40:11; 42:3-9; 45:10; 46:14-18; 46:23-47:1; 47:6; 47:10-20; 47:23-48:24; 49:9-50:6; 52:13; 52:15-55:4; 62:7-17; 62:22-24; 72:15; 72:19; 72:24; 73:5; 73:10-17; 76:5; 76:7-16; 77:11-78:11; 82:23; 83:5-10; 83:14-84:5; 84:20; 85:24-86:1; 86:3-19; 87:16; 87:22; 87:25; 88:3; 88:6; 88:18-20; 88:22-24; 89:22-90:2; 90:11-16; 90:20-91:6; 92:16; 92:19-20; 94:7-17; 95:2; 95:7-25; 96:3-9; 96:12-16; 96:19; 97:10-17; 97:19-23; 97:25-98:2; 98:4-17; 98:19-25; 99:2-9; 99:11-14; 99:16-100:5; 100:7-22; 102:13-103:1; 103:4-7; 103:10; 105:21-106:6; 106:9-13; 106:15; and 108:4-5 (collectively “Pirc Deposition Excerpts”).

rates, reimbursement levels, and other compensation information—would cause direct and immediate harm to MMO’s interests and competitive standing in Lucas County and northwestern Ohio.

MMO informed the Parties of its intention to file this Motion. Neither the FTC nor ProMedica oppose granting *in camera* treatment for MMO Exhibits 1-5. Regardless of the Parties’ assent, however, MMO, a non-party, deserves “special solicitude” to protect its highly confidential and competitively sensitive information.

I. MATERIALS FOR WHICH MMO SEEKS *IN CAMERA* TREATMENT

Exhibit 1 is a comprehensive spreadsheet containing inpatient claims data for all of MMO’s members in northwestern Ohio from January 1, 2004 through March 31, 2011. This document reveals confidential personal information about MMO’s members such as their gender, age, identification numbers, and diagnostic codes for their various inpatient treatments. This alone mandates that Exhibit 1 be accorded permanent *in camera* treatment. *See* 16 C.F.R. § 3.45(b) (material shall be placed *in camera* “after finding that the material constitutes sensitive personal information”); *see also* 16 C.F.R. § 3.45(b)(3) (“sensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law”).

Exhibit 1 also reflects information that goes to the core of MMO’s business; *i.e.*, rate and payment structure with healthcare providers, including amounts billed, allowed charges, amount paid by the patient, and the net payment for all of MMO’s members in northwestern Ohio for more than seven years. Disclosure of this information would provide competitors—and

providers⁶—with insight into MMO’s overall internal business strategies and methodologies, including MMO’s assessment of the market and various healthcare providers.

The Contracts in Exhibit 2 are the product of intense, confidential negotiations between MMO and the provider. These documents establish the relationship between MMO and each provider, including reimbursement rate structures (*i.e.*, the price agreed upon by a hospital that sells services and an insurer that purchases those services) and specific contingencies clauses that establish a framework for rate bumps/triggers and renegotiations (*i.e.*, future pricing).⁷ MMO invests significant time and effort (including financial modeling and analyses) negotiating each contract to ensure MMO’s ongoing financial viability and ability to offer lower premiums to its members.

Exhibit 3 is a compilation of emails that reflect confidential negotiations between MMO and St. Luke’s that began in 2009 after St. Luke’s requested a reimbursement rate increase. These emails contain MMO’s assessments of the market and specific negotiation terms (*e.g.*, scheduled rate increases, rate escalators, incentive structures, etc.). The candor exhibited in these emails reflects MMO’s and St. Luke’s expectation that the exchange would remain confidential.

Exhibit 4 includes similar documents regarding MMO’s recent confidential negotiations with ProMedica that culminated in a new agreement between MMO and St. Luke’s Hospital. Specifically, Exhibit 4 includes internal MMO deliberations reflecting MMO’s negotiation strategy and financial analyses and modeling of pricing proposals.

⁶ Indeed, while each individual provider knows the reimbursement rates it commands from MMO, no provider is aware of the reimbursement rates commanded of MMO by their competitors. Moreover, none of MMO’s competitors have knowledge of the reimbursement rates MMO negotiates with each provider.

⁷ Some of these contracts themselves have strict “confidentiality” provisions. *See, e.g.*, MMO 000110 (“all matters respecting this Hospital Agreement and other written agreements and the contents thereof, including negotiations with respect thereto and any draft, amendment, correspondence and other document related thereto (the ‘Confidential Information’) shall remain absolutely confidential. Neither party . . . may in any manner disclose any of the Confidential Information without the prior written consent of the other”); MMO 000287 (same); MMO 003092 (same).

Exhibit 5 is a compilation of transcript excerpts that include testimony on confidential, sensitive topics.⁸ The Pirc Hearing Excerpts, for example, include testimony by MMO's then-Director of Network Management, Don Pirc, about MMO's customer base,⁹ annual revenue,¹⁰ and market share,¹¹ reimbursement rate structure,¹² and MMO's business objectives and negotiation strategies.¹³ As the MMO employee responsible for contracting with all the healthcare providers in northern Ohio and Indiana, Mr. Pirc also testified regarding MMO's relative assessment of various healthcare providers.¹⁴ Healthcare providers and/or MMO's competitors could use this information to gain an unfair advantage in the market.

II. MMO'S CONFIDENTIAL DOCUMENTS DESERVE *IN CAMERA* TREATMENT

Under 16 C.F.R. § 3.45(b), motions for *in camera* treatment must demonstrate that public disclosure of the documents at issue “will result in a clearly defined, serious injury to the person or corporation whose records are involved.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Movants may satisfy that burden by showing that the information is “sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980). Because the confidential and commercially sensitive information in MMO Exhibits 1-5 will not be necessary to explain the rationale of the Commission’s decision in this matter, the Court should accord MMO’s

⁸ MMO only seeks *in camera* treatment of the subset of testimony (and questions reflecting testimony) highlighted in the excerpts the Parties designated.

⁹ *See, e.g.*, IH Tr. at 15:23.

¹⁰ *See, e.g., id.* at 14:15.

¹¹ *See, e.g., id.* at 17:9.

¹² *See, e.g., id.* at 44:22-45:7; 45:16-25; 46:22-24; 48:4-11.

¹³ *See, e.g., id.* at 50:1-9; 51:17-22; 52:2-54:25; 55:17-56:19; 60:21-61:23; 63:6-64:12; 64:15-65:18.

¹⁴ *See, e.g., id.* at 23:18-21; 24:2-16; 25:24-26:9; 28:8-14.

confidential documents *in camera* treatment. *See id.*; *see also Hood*, 58 F.T.C. at 1188 (“courts have generally attempted to protect confidential business information from unnecessary airing”).

A. MMO Has Preserved the Confidentiality of the Information.

MMO, which is not a party to this action, has taken great care to guard the confidential and competitively sensitive information contained in MMO Exhibits 1-5. The information reflected in MMO Exhibits 1-5 is not publicly available, and MMO has taken reasonable steps to protect its confidentiality. Only a limited number of MMO employees have knowledge of or access to the information in MMO Exhibits 1-5, and they hold that information in strict confidence. It would be extremely difficult, if not impossible, for MMO’s competitors or other outside persons to access or re-create the information in MMO Exhibits 1-5.

Additionally, MMO only produced these documents pursuant to compulsory process (*i.e.*, subpoenas issued by ProMedica and the FTC). MMO designated all documents at issue as “Confidential”¹⁵ pursuant to the Protective Order Governing Discovery Material (“Protective Order”), which this Court issued on January 6, 2011 “to protect the parties and third parties against improper use and disclosure of confidential information” in accordance with Commission Rule 3.31(d). The Protective Order strictly limits disclosure of confidential materials to persons designated in the Protective Order.

B. Disclosure of the Information in MMO Exhibits 1-5 Would Result in Serious Competitive Injury to MMO.

MMO Exhibits 1-5 contain information that is central to MMO’s business; its disclosure would have a direct, negative effect on MMO’s competitive position in northwestern Ohio. This information would be extremely valuable to MMO’s business partners and competitors, as it

¹⁵ The Protective Order defines “Confidential” material to include “any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information.”

would provide a behind-the-scenes insight into MMO's business and negotiation strategies, and is not otherwise available to the public.

For example, armed with MMO's confidentially negotiated rates, MMO's competitors (*e.g.*, Paramount) would be able to leverage that information to their advantage while negotiating their own rates with those providers. Likewise, permitting healthcare providers, such as ProMedica, access to information regarding MMO's negotiating strategy, analyses of each provider, and reimbursement rates would similarly place healthcare providers at a distinct competitive advantage vis-à-vis MMO during future negotiations.

Taken together, the information contained in MMO Exhibits 1-5 is central to MMO's business. Preserving the confidentiality of this commercially sensitive information is critical for MMO to maintain its market position and competitive advantage, which are the result of substantial investment over many years. If accorded access to this confidential information, MMO's competitors and business partners could unfairly exploit the information to their advantage. Disclosure would allow MMO's competitors to pinpoint MMO's rates and use this non-public information to target healthcare providers for their own competitive gain. Access to this information would also enable MMO's competitors and providers to gain an understanding about how MMO values the relative importance of various providers and how it approaches negotiations, all of which would have an immediate and lasting detrimental effect on MMO's ability to compete in the northwestern Ohio market. Indeed, information about how MMO evaluates and compensates its various providers is information that strikes at the heart of MMO's business.

Simply put, these non-public documents of a non-party are the types of protected materials the public—and by extension competitors—should not be permitted to access. *See*

Avery Dennison Corp. v. Kitsonas, 118 F. Supp. 2d 848, 854 (S.D. Ohio 2000) (by definition, “pricing information, sales strategies, and . . . business philosophy . . . [are] trade secret[s] under Ohio law”). Protecting MMO’s confidential information from public disclosure is important because “[t]heir only value consists in their being kept private. If they are disclosed or revealed, they are destroyed.” *In re Iowa Freedom of Information Council*, 724 F.2d at 662.

C. The Likelihood of Serious Competitive Harm to MMO Outweighs any Public Interest in Disclosure of MMO Exhibits 1-5.

MMO deserves “special solicitude” as a non-party requesting *in camera* treatment for its confidential and competitively sensitive business information. *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984). Reasonable periods of *in camera* protection encourage non-parties to cooperate with discovery requests, which MMO has done in this case. On the other hand, publicly disclosing MMO’s sensitive information will not materially promote the resolution of this matter, nor will it be necessary to understand the Court’s decision-making process. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977). Instead, disclosure—in a case where the central issue is whether there is a lessening in competition—would itself distort competition in Lucas County and northwestern Ohio. *See Crane Plastics Co. v. Louisiana-Pacific Corp.*, 119 F. Supp. 2d 749, 752 (S.D. Ohio 2000) (recognizing that disclosure of sensitive business information to a competitor is “generally presumed . . . harmful”).

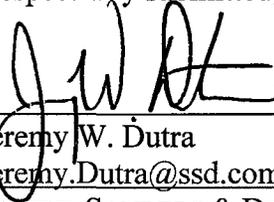
CONCLUSION

The information contained in MMO Exhibits 1-5 warrants lasting protection because it is “sufficiently secret and sufficiently material to [MMO’s] business that disclosure would result in competitive injury.” *General Foods*, 95 F.T.C. at 355; *see also* 16 C.F.R. § 3.45(b); *Hood*, 58 F.T.C. at 1188 (“courts have generally attempted to protect confidential business information from unnecessary airing”). Exhibit 1, in particular, warrants indefinite *in camera* treatment

because it contains “[s]ensitive personal information” about MMO’s members. 16 C.F.R. § 3.45(b). Exhibit 1 also contains information that is so highly confidential and competitively sensitive that the need for confidentiality is not likely to decrease with the passage of time. Exhibits 2-5, and in particular Exhibit 5, warrant lasting *in camera* protection as well because preserving the confidentiality of MMO’s internal deliberations, analyses, and final pricing information is vital to MMO’s competitive position and business strategy. As such, MMO respectfully requests that MMO Exhibit 5 be accorded indefinite *in camera* treatment and MMO Exhibits 2-4 be accorded *in camera* protection for a period of no less than five years.

Dated: May 5, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

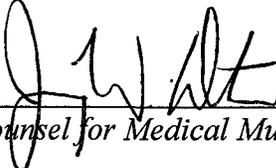
I hereby certify that on this 5th day of May, 2011, I caused a copy of the foregoing Motion for *In Camera* Treatment of Confidential Materials was served by email and first-class mail on the following:

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The Honorable D. Michael Chappell
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Counsel for Medical Mutual of Ohio

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

In the matter of:

PROMEDICA HEALTH SYSTEMS, INC.

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Docket No.: 9346

Judge D. Michael Chappell

[PUBLIC]

**[PROPOSED] ORDER GRANTING NON-PARTY MEDICAL MUTUAL OF OHIO'S
MOTION FOR *IN CAMERA* TREATMENT OF CONFIDENTIAL MATERIALS**

Upon consideration of Non-party Medical Mutual of Ohio's ("MMO") Motion for *In Camera* Treatment of Confidential Materials, and for good cause shown, it is hereby ordered that the information in MMO Exhibits 1 and 5 shall be accorded *in camera* treatment indefinitely and the information in MMO Exhibits 2-4 shall be accorded *in camera* treatment until May __, 2016.

Exhibit 1 is a comprehensive spreadsheet containing inpatient claims data for all of MMO's members in northwestern Ohio from January 1, 2004 through March 31, 2011. This document not only includes MMO's competitively sensitive information, it also reveals "sensitive personal information" about MMO's members. *See* 16 C.F.R. § 3.45(b).

Exhibit 2 is a compilation of MMO's confidential contracts with healthcare providers. These documents contain highly confidential and competitively sensitive information regarding MMO's reimbursement rate structures, methodologies, and pricing terms.

Exhibits 3 and 4 are compilations of emails that reflect confidential and competitively sensitive information about MMO's negotiations with St. Luke's Hospital and ProMedica Health Systems, Inc. ("ProMedica"). These documents include email exchanges as well as MMO's

internal emails that reflect MMO's competitively sensitive information such as negotiation strategy, reimbursement rate increases, and reimbursement rate structures.

Exhibit 5 is a compilation of deposition and hearing transcript excerpts that include testimony by an MMO senior executive about the information contained in Exhibits 1-4 as well as other confidential and competitively sensitive MMO information.

The information contained in Exhibits 1-5 warrants *in camera* treatment because it is "sufficiently secret and sufficiently material to [MMO's] business that disclosure would result in competitive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *see also H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Exhibit 1 shall be accorded *in camera* treatment indefinitely because it reveals "sensitive personal information" about MMO's members. 16 C.F.R. § 3.45(b). Like Exhibit 5, Exhibit 1 also contains information that is so highly confidential and competitively sensitive that the need for confidentiality is not likely to decrease with the passage of time. As such, Exhibits 1 and 5 shall be accorded *in camera* treatment indefinitely. Exhibits 2-4 warrant lasting *in camera* protection as well because preserving the confidentiality of MMO's internal deliberations, analyses, and final pricing information is vital to MMO's competitive position and business strategy. Thus, the information in Exhibits 2-4 shall be accorded *in camera* treatment until May __, 2016.

Dated: May ____, 2011

D. Michael Chappell
Chief Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of

PROMEDICA HEALTH SYSTEMS, INC.

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Docket No.: 9346

Judge D. Michael Chappell

[PUBLIC]

APPENDIX TO EXHIBITS CITED TO IN NON-PARTY MEDICAL MUTUAL OF
OHIO'S MOTION FOR *IN CAMERA* TREATMENT OF CONFIDENTIAL
MATERIALS

- EXHIBIT 1:** **Claims Data from Medical Mutual of Ohio (01/01/2004 – 03/31/2011)**
(filed under seal for *in camera* treatment)
- EXHIBIT 2:** **Compilation of Contracts**
(filed under seal for *in camera* treatment)
- EXHIBIT 3:** **Compilation of Negotiation Communications between St. Luke's
Hospital and Medical Mutual of Ohio's**
(filed under seal for *in camera* treatment)
- EXHIBIT 4:** **Compilation of Negotiation Communications and Internal Analyses
between ProMedica and Medical Mutual of Ohio®**
(filed under seal for *in camera* treatment)
- EXHIBIT 5:** **Compilation of Excerpts from Mr. Pirc's deposition and
investigational hearing transcripts (10/14/10; 04/07/11)**
(filed under seal for *in camera* treatment)

EXHIBIT 1
FILED UNDER SEAL
FOR *IN CAMERA* TREATMENT

EXHIBIT 2
FILED UNDER SEAL
FOR *IN CAMERA* TREATMENT

EXHIBIT 3
FILED UNDER SEAL
FOR *IN CAMERA* TREATMENT

EXHIBIT 4
FILED UNDER SEAL
FOR *IN CAMERA* TREATMENT

EXHIBIT 5
FILED UNDER SEAL
FOR *IN CAMERA* TREATMENT