

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

ORIGINAL



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

Docket No. 9346
PUBLIC

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

Respondent, ProMedica Health System, Inc., hereby moves for *in camera* treatment of eight additional trial exhibits, pursuant to 16 C.F.R. §3.45 and Paragraph 7 of the Scheduling Order.

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

WHEREFORE, Respondent ProMedica Health System, Inc. respectfully requests that this Court grant *in camera* treatment to the supplemental documents designated in the attached memorandum.

Respectfully submitted,

Dated: May 11, 2011

Christine Devlin

By: CHRISTINE G. DEVLIN

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*Attorneys for Respondent ProMedica
Health System, Inc.*

CERTIFICATE OF SERVICE

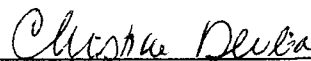
I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Supplemental Motion for *In Camera* Treatment, Public Version, upon the following individuals by hand on May 11, 2011.

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H110
Washington, DC 20580

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

I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Supplemental Motion for *In Camera* Treatment, Public Version, upon the following individuals by electronic mail on May 11, 2011.

Matthew J. Reilly
Jeffrey H. Perry
Sara Y. Razi
Jeanne H. Liu
Alexis J. Gilman
Stephanie L. Reynolds
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Christine Devlin

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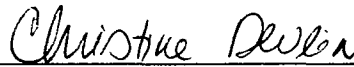
Docket No. 9346

STATEMENT REGARDING MEET AND CONFER

On May 11, 2011, Respondent's Counsel, Christine Devlin, conferred telephonically with Complaint Counsel, Jeanne Liu, regarding the proposed supplemental exhibits for which Respondent is seeking *in camera* treatment. Complaint Counsel indicated that they intend to oppose Respondent's motion.

Dated: May 11, 2011

Respectfully submitted,



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*Attorneys for Respondent ProMedica
Health System, Inc.*

**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 SUPPLEMENTAL 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 its Memorandum in Support of its Supplemental Motion for *In Camera* Treatment of Certain Proposed Trial Exhibits.

I. Introduction

On May 9, 2011, Complaint Counsel submitted its addendum to its final proposed exhibit list. This addendum contained 33 new documents, of which 26 were ProMedica or St. Luke's Hospital ("St. Luke's") documents. Counsel for Respondent reviewed each of these and determined that seven warrant *in camera* treatment because they are confidential documents that contain non-public financial data, competitively sensitive business strategies, or discuss competitively sensitive future plans.

Additionally, Complaint Counsel submitted its expert rebuttal reports on Friday, May 6, 2011. In response to these reports, and pursuant to the scheduling order, Respondent submitted its revised and amended final proposed exhibit list on May 10, 2011. Respondent included one additional document that warrants *in camera* treatment because it is a confidential business record that contains non-public financial data and reflects the analyses of consultants hired by Respondent.

Respondent could not have included the eight documents for which it now seeks to supplement its prior motion for *in camera* treatment in its original filing on May 5, 2011. Complaint Counsel did not disclose seven of these exhibits until after 6:00 p.m. on May 9, 2011. Further, Respondent could not have anticipated the need for one until obtaining Complaint Counsel's expert rebuttal reports after 8:00 p.m. on Friday, May 6, 2011. Had Respondent known of Complaint Counsel's use, or the need for its own use, of these documents, it would have included them in its original motion filed May 5, 2011. Finally, the supplemental exhibits are similar to a number of exhibits contained in Respondent's Motion for *In Camera* Treatment, such as RX 214, RX 229, RX 244, PX00572, and PX01392.

Accordingly, and pursuant to 16 C.F.R. §3.45 and Paragraph 7 of the Scheduling Order, ProMedica moves for an order granting *in camera* treatment of eight additional trial exhibits designated by ProMedica and Complaint Counsel. These exhibits are listed in Table I and copies are provided in Appendix A.

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 his 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

A. Reasons for *In Camera* Treatment for All Identified Documents

All six factors weigh in favor of granting Respondent's supplemental motion for *in camera* treatment. The information in these materials are not known to the public or generally outside ProMedica or St. Luke's (or the party with whom the entities were negotiating or contracting). ProMedica treats as confidential every supplemental document for which it seeks *in camera* treatment. (See Hanley Suppl. Decl. ¶¶ 4-6; Johnston Suppl. Decl. ¶¶ 4-7.) These documents are not a matter of public record and have not been disclosed in any public context. *Id.* Second, the materials reflect the decision-making of senior executives from ProMedica and St. Luke's. The confidential information in the trial exhibits for which Respondent seeks *in camera* protection is not generally known to all employees within those organizations. Third, ProMedica and St. Luke's have carefully guarded the secrecy of these materials. The entities were compelled to produce the materials pursuant to the discovery process, but otherwise they do not share or disclose the information found within the confidential documents and disclosed during the depositions. Fourth, competitor hospitals, such as Mercy Health Partners or the University of Toledo Medical Center would significantly benefit from gaining access to these materials. The materials reflect ProMedica and St. Luke's business strategy, future plans, goals, and initiatives, all of which are competitively sensitive. Hospital competitors and commercial health plans could benefit significantly 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. 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.

Furthermore, ProMedica and St. Luke's would suffer irreparable injury if the information contained in these documents and testimony were disclosed to the public. Disclosure would give ProMedica's and St. Luke's competitors an improper advantage. (See Hanley Suppl. Decl. ¶¶ 4-6; Johnston Suppl. Decl. ¶¶ 4-7.) 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 and St. Luke's if disclosed to the public.

Finally, the information at issue remains relevant and significant today. The eight supplemental documents for which Respondent seeks *in camera* treatment are not older than two years.

B. Specific Exhibits For Which Respondent Seeks *In Camera* Treatment

Respondent identifies below the eight documents for which it seeks *in camera* treatment. The specific exhibits are identified in Table I and affixed in the appendix to this motion.

1. PX00596

This is a confidential financial record that ProMedica maintains in its ordinary course of business and has not disclosed to the public. The financial data in this document is recent, dated

December 31, 2010. ProMedica would suffer a competitive disadvantage should this documents become public and commercial health plans or hospital competitors gained access to it.

2. PX00599

This is a confidential, ProMedica business record. The financial data included in this document is recent, dated January 31, 2011. The document also contains confidential information regarding St. Luke's, including recent financial records and contracting with commercial health plans. ProMedica treats documents such as PX00599 as confidential and does not disclose them publicly. ProMedica would suffer a competitive disadvantage should this document become public and commercial health plans or hospital competitors gained access to it.

3. PX01599

This is a confidential email regarding 2011 strategic planning. The attached document reflects strategic and competitive decision-making by St. Luke's senior executives regarding future contracting with commercial health plans. St. Luke's would suffer a competitive disadvantage should this document become public and commercial health plans or hospital competitors gained access to it.

4. PX01602 and PX01604

These are confidential reports regarding St. Luke's employee retirement plan. The documents include confidential financial information for St. Luke's. St. Luke's treats these documents as confidential and does not disclose them publicly. St. Luke's would suffer a competitive disadvantage in retaining and recruiting employees should these documents become public and hospital competitors gained access to them.

5. PX01608

This is a confidential email regarding strategic plans, future projections, and quality initiatives. This document is confidential because it reflects competitive decision-making by St. Luke's executives, and it contains financial projections. St. Luke's treats documents such as this as confidential and does not disclose them publicly. St. Luke's would suffer a competitive disadvantage should this documents become public and commercial health plans or hospital competitors gained access to it.

6. PX01612

This is a confidential report dated February 3, 2010. This document is confidential because it contains discussion reflecting St. Luke's strategic planning regarding quality initiatives. St. Luke's treats documents such as this as confidential and does not disclose them publicly. St. Luke's would suffer a competitive disadvantage should this documents become public and commercial health plans or hospital competitors gained access to it.

7. RX-9

RX-9 is a confidential business record reflecting the analysis and work product of consultants that Respondent retained. The document is recent, dated August 18, 2010, and Respondent has not disclosed it to the public. The confidential information in this document includes finances, claims, and liability data. Respondent would suffer a competitive disadvantage should this documents become public and commercial health plans or hospital competitors gained access to it.

IV. Expiration Date

ProMedica seeks temporary *in camera* treatment for the eight supplemental 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 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 eight supplemental exhibits listed in Table I and attached in Appendix A.

Dated: May 11, 2011

Respectfully submitted,



By: CHRISTINE G. DEVLIN

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*Attorneys for Respondent ProMedica
Health System, Inc.*

CERTIFICATE OF SERVICE

I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Supplemental Memorandum in Support of its Motion for *In Camera* Treatment, Public Version, upon the following individuals by hand on May 11, 2011.

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H110
Washington, DC 20580

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

I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Supplemental Memorandum in Support of its Motion for *In Camera* Treatment, Public Version, upon the following individuals by electronic mail on May 11, 2011.

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Christine Devlin

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
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PROMEDICA HEALTH SYSTEM, INC.)
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Docket No. 9346
PUBLIC

TABLE I AND APPENDIX A TO RESPONDENT PROMEDICA
HEALTH SYSTEM, INC.'S SUPPLEMENTAL MOTION
FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS

DOCUMENTS
REDACTED
IN THEIR
ENTIRETY

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

In the Matter of)
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Docket No. 9346

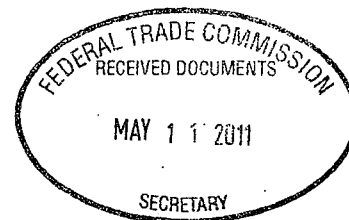
**[PROPOSED] ORDER GRANTING RESPONDENT'S SUPPLEMENTAL
MOTION FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS**

Upon consideration of Respondent ProMedica Health System, Inc.'s Supplemental 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 following eight documents for a period of three years: PX00596, PX00599, PX01599, PX01602, PX01604, PX01608, PX01612, RX-9.

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 SUPPLEMENTAL MOTION
FOR IN CAMERA TREATMENT**

I, Kathleen Hanley, declare as follows:

1) I provide this declaration, pursuant to Federal Trade Commission Rules of Practice for Adjudicative Proceedings §3.45 and Scheduling Order ¶ 7, in support of Respondent's Supplemental Motion for *In Camera* Treatment of Trial Exhibits.

2) I am employed as the Chief Financial Officer and Strategic Planning and Business Development Officer for ProMedica Health System, Inc. ("ProMedica"). I have been Chief Financial Officer since 1996, and Strategic Planning and Business Development Officer since July of 2010. In my role, I have personal knowledge regarding the matters set forth in this declaration. Specifically, I am familiar with ProMedica's documents and the level of confidentiality associated with the subject matter(s) contained therein.

3) I have reviewed the supplemental documents for which ProMedica seeks *in camera* treatment and have determined that public disclosure of these materials would cause a clearly defined, serious injury to ProMedica.

4) PX00596 is a confidential financial record that ProMedica maintains in its ordinary course of business and has not disclosed to the public. The financial data in this document is recent, dated December 31, 2010. ProMedica would suffer a competitive disadvantage should

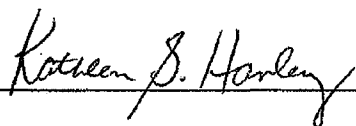
this documents become public and commercial health plans or hospital competitors gained access to it.

5) PX00599 is a confidential, ProMedica business record. The financial data included in this document is recent, dated January 31, 2011. The document also contains confidential information regarding St. Luke's, including recent financial records and contracting with commercial health plans. ProMedica treats documents such as PX00599 as confidential and does not disclose them publicly. ProMedica would suffer a competitive disadvantage should this documents become public and commercial health plans or hospital competitors gained access to it.

6) RX-9 is a confidential business record reflecting the analysis and work product of consultants hired by ProMedica. This document also includes confidential financial data. The document is recent, dated August 18, 2010 and ProMedica has not disclosed it to the public. The information in this document includes finances, claims, and liability data. ProMedica would suffer a competitive disadvantage should this documents become public and commercial health plans or hospital competitors gained access to it.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 11, 2011


Kathleen S. Hanley

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

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

**DECLARATION OF LORI A. JOHNSTON IN SUPPORT OF RESPONDENT
PROMEDICA HEALTH SYSTEM, INC.'S SUPPLEMENTAL
MOTION FOR *IN CAMERA* TREATMENT**

I, Lori Johnston, declare as follows:

- 1) I provide this declaration, pursuant to Federal Trade Commission Rules of Practice for Adjudicative Proceedings §3.45 and Scheduling Order ¶ 7, in support of Respondent's Supplemental Motion for *In Camera* Treatment of Trial Exhibits.
- 2) I am employed as the Chief Financial Officer and Chief Operating Officer for St. Luke's Hospital ("St. Luke's"). I have held this position since September 1, 2010. In this position, I am responsible for the overall financial and operational performance of St. Luke's. I am oversee the finance, information technology, purchasing, nursing and all professional services departments of the hospital. In my role as Chief Financial Officer and Chief Operating Officer, I have personal knowledge regarding the matters set forth in this declaration. Specifically, I am familiar with St. Luke's documents and the level of confidentiality associated with the subject matter(s) contained therein.
- 3) I have reviewed the supplemental St. Luke's documents for which Respondent seeks *in camera* treatment and have determined that public disclosure of these materials would cause a clearly defined, serious injury to Respondent and St. Luke's.

4) PX01599 is a confidential email regarding 2011 strategic planning. The attached document reflects strategic and competitive decision-making by St. Luke's senior executives regarding future contracting with commercial health plans. St. Luke's would suffer a competitive disadvantage should this document become public and commercial health plans or hospital competitors gained access to it.

5) PX01602 and PX01604 are confidential reports regarding St. Luke's Retirement Plan. The documents include confidential financial information for St. Luke's. St. Luke's treats these documents as confidential and does not disclose them publicly. St. Luke's would suffer a competitive disadvantage should these documents become public and commercial health plans or hospital competitors gained access to them.

6) PX01608 is a confidential email regarding strategic plans, future projections, and quality initiatives. This document is confidential because it reflects competitive decision-making by St. Luke's executives, and it contains financial projections. St. Luke's treats documents such as this as confidential and does not disclose them publicly. St. Luke's would suffer a competitive disadvantage should this documents become public and commercial health plans or hospital competitors gained access to it.

7) PX01612 is a confidential report dated February 3, 2010. This document is confidential because it contains discussion reflecting St. Luke's strategic planning regarding quality initiatives. St. Luke's treats documents such as this as confidential and does not disclose them publicly. St. Luke's would suffer a competitive disadvantage should this documents become public and commercial health plans or hospital competitors gained access to it.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 11, 2011

Lori A. Johnston

Lori A. Johnston