

ORIGINAL

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**



In the Matter of)

ProMedica Health System, Inc.)
a corporation.)

Docket No. 9346

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTIONS
FOR *IN CAMERA* TREATMENT OF TRIAL EXHIBITS**

Respondent ProMedica Health System, Inc. (“ProMedica”) has moved for *in camera* treatment of nearly 1000 exhibits, and hundreds of testimony excerpts, claiming that disclosure would result in serious competitive injury to ProMedica.¹ Respondent fails to meet its burden of demonstrating a clear injury that would result from disclosure of the majority of these exhibits, and instead groups hundreds of documents together into broad categories, with only cursory explanations of the competitive harm purportedly posed by each. Even a brief review of the proposed *in camera* exhibits makes clear that the scope of Respondent’s motion far exceeds the protections contemplated by Rule 3.45. Providing *in camera* treatment to this broad array of evidence would undermine the clearly stated goals of the Commission to encourage public access to adjudicative proceedings. Respondent’s motion should therefore be denied as to all documents except the contracts with commercial health plans (which Complaint Counsel agrees are competitively sensitive) and patient data (which constitute sensitive health information).

¹ Complaint Counsel submits this brief in opposition to Respondent’s Motion for In Camera Treatment of Trial Exhibits submitted on May 5, 2011 and the Supplemental Motion for In Camera Treatment of Trial Exhibits that Respondent sought leave to file on May 11, 2011.

ARGUMENT

There is a strong presumption in favor of open access to Commission adjudicative proceedings. *Polypore Int'l, Inc.*, D-9327, 2009 FTC LEXIS 256, at *2 (April 27, 2009); *see also H.P. Hood*, 58 F.T.C. 1184, 1186 (1961) (“To foreclose [FTC] hearings and the evidence adduced therein from the scrutiny of . . . interested persons would serve in large measure to defeat the very reason for our existence.”). Open proceedings permit the public to evaluate the “fairness of the Commission’s work,” and they “provide[] guidance to persons affected by [the Commission’s] actions.” *Intel Corp.*, D-9288, 1999 FTC LEXIS 227, at *1 (Feb. 23, 1999) (citing *The Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1714-15 (1967)). Neither the potential for embarrassment nor the desire to protect business information that competitors may be “desirous to possess” are sufficient bases for obscuring material from the public. *See H.P. Hood*, 58 F.T.C. LEXIS at 1184. Instead, Respondent must demonstrate that it will suffer “a clearly defined, serious injury” as a result of disclosure. 16 C.F.R. § 3.45 (b). The motion must also be “narrowly tailored to request *in camera* treatment for only that information that is sufficiently secret and material.” *Polypore Int'l, Inc.*, 2009 FTC LEXIS 256, at *2.

I. Respondent’s Motion Far Exceeds the Scope of Protections Provided by Rule 3.45(b)

Respondent seeks *in camera* treatment for approximately 964 of the 2,682 exhibits submitted by the parties for use at the hearing (1,084 by Complaint Counsel and 1,833 by Respondent, of which approximately 234 overlap). Respondent thus seeks protection for well over a third of the total exhibits that the parties propose to use at the hearing, including the vast majority of the exhibits that were produced from Respondent’s files. Yet Respondent offers only

a cursory explanation of the confidential nature of “the information” contained in “the materials,” rehashing the six-factor test set forth in *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), for the entire set of 964 exhibits. Respondent’s Motion for In Camera Treatment of Trial Exhibits (“Respondent’s Motion”) at 3.

Further, it appears that Respondent is seeking *in camera* treatment for entire documents, in every case, without specifying pages or portions that contain purportedly confidential information. In some cases, quotes and other information in these documents have already been publicly disclosed in the Complaint and in the federal district court proceeding, belying Respondent’s claim that “these documents are not a matter of public record and have not been disclosed in any public context.” Respondent’s Motion at 3. For example, Respondent includes numerous documents on its list as confidential “business records,” despite the fact that these documents are extensively quoted and described in Judge Katz’s publicly-available Opinion and Order granting the preliminary injunction in the related federal district court proceeding. *See, e.g.*, PX2152 (Findings of Fact and Conclusions of Law, *Federal Trade Commission, et al. v. ProMedica Health System*, 3:11-cv-47-DAK (N.D. Ohio)) at ¶ 115 (describing PX1144), ¶ 116 (quoting PX1127/RX813), ¶ 119 (quoting PX1378), ¶ 120 (quoting PX1125/RX891).

II. Respondent’s List of Documents Is Rife With Examples That Do Not Warrant *In Camera* Treatment

Complaint Counsel does not object to the *in camera* treatment of Respondent’s contracts with commercial health plans and of documents containing highly-sensitive patient data. However, the remaining five categories of documents identified by Respondent are clearly

overbroad.² Over four hundred of the documents proposed for *in camera* treatment are labeled as “business records” that, according to Respondent, “reflect strategic and competitive decision-making by ProMedica’s and St. Luke’s senior executives.” Respondent’s Motion at 5. Several hundred more are “financial records” containing historical financial data (of the sort that publicly-traded corporations regularly report, without causing competitive harm), and other financial information. As *H.P. Hood* explains, although *in camera* treatment is appropriate for trade secrets, such as “secret formulas, research or processes,” other types of confidential business records are not afforded the same protection. *H.P. Hood*, 58 F.T.C. at 1188. “Requests to seal relevant evidence [such as confidential business records] should be looked upon with disfavor and only granted in *exceptional circumstances* upon a *clear showing* that irreparable injury will result from disclosure.” *Id.* at 1188 (emphasis added). Respondent neither articulates any exceptional circumstances surrounding the disclosure of these documents nor adequately explains how these documents could be used by competitors or others to cause injury.

While certain documents on Respondent’s list likely do warrant *in camera* treatment, it is obvious that a great many do not, and Complaint Counsel easily found examples within each category of documents (besides the contracts and patient data). By way of illustration, a non-exhaustive review of Respondent’s list of documents reveals:

- Documents containing no discernible information that would be relevant to competitors. (PX00077, PX00510, PX00569, PX01459, PX01256)

² The sheer volume of documents and the failure to specify pages or sections with purportedly confidential information has made it unduly burdensome for Complaint Counsel to specifically identify each and every one of the 964 documents and hundreds of testimony excerpts that are problematic. Complaint Counsel instead provides illustrative examples and requests that the motion be denied as to all documents except those in the categories “contracts with commercial health plans” and “patient data,” which appear to Complaint Counsel to categorically fall within the scope of Rule 3.45(b).

- Documents relating to issues of little (if any) current competitive significance, such as St. Luke’s evaluation of other potential affiliation partners in 2009, a St. Luke’s 2009 IT plan, and years-old meeting minutes. (PX01406, PX01026, PX01120, PX01124, RX01236, PX01281, PX01530)
- Documents that have been publicly discussed, described, or quoted from in the related federal district court proceeding. (PX00020, PX00159, PX01127/RX00813, PX01378, PX01125/RX00891)
- Documents that are more than three years old, with no explanation of why they warrant exception to the presumption of disclosure for such documents, other than the assertion that they “can impact future negotiations between the Respondent and commercial health plans.” (RX811/PX01144, PX01111, PX01448, RX1185, RX1507, PX353, PX356)
- Documents relating to St. Luke’s financial health, an issue that has been discussed extensively in public and in the media, particularly by Respondent, and that has little relevance to competitors beyond what has been publicly reported. (PX00168, PX001507)
- A category of documents labeled “Internal Communications regarding the FTC Investigation, this Proceeding, and Defensive Strategy” (including emails that simply refer to the FTC in passing or discuss issues such as legal fees) with no further explanation of potential competitive sensitivity. (PX00529, PX01578)
- Deposition excerpts reflecting innocuous testimony or discussing information that has been previously publicly disclosed. (PX01913 at 21:16-25:13, 44:9-45:10; PX01918 at 11:3-15:2, 28:21-32:21)

It is clear that Respondent’s proposed list of documents for *in camera* treatment seeks to shield a significant volume of relevant evidence that is appropriate for disclosure. Without this information in the public record, the matter’s ultimate resolution is less useful as a guide to practitioners and the business community. The need for open proceedings is particularly important here, in light of the tremendous interest in antitrust enforcement in the healthcare sector as the industry responds to healthcare reform.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's Motion and Supplemental Motion for *In Camera* Treatment of Trial Exhibits, except as to the documents labeled "patient data" and "contracts with payors."

Respectfully submitted,

Dated: May 12, 2011

/s Matthew J. Reilly
Matthew J. Reilly
Jeffrey H. Perry
Sara Y. Razi
Janelle L. Filson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: 202-326-2350
mreilly@ftc.gov

Complaint Counsel

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[PROPOSED] ORDER

Upon consideration of Complaint Counsel’s Opposition to Respondent’s Motions for In Camera Treatment of Trial Exhibits, it is hereby ORDERED that Respondent’s Motion for In Camera Treatment of Trial Exhibits and Respondent’s Supplemental Motion for In Camera Treatment of Trial Exhibits are GRANTED in part and DENIED in part.

Indefinite *in camera* treatment is granted to each of the exhibits categorized by Respondent as “Patient data” in Table 1 of Respondent’s Supplemental Motion for In Camera Treatment of Trial Exhibits. *In camera* treatment is granted for a period of three years to each of the exhibits categorized by Respondent as “Contracts with payors” in Table 1. *In camera* treatment is denied as to the remaining exhibits listed on Table 1.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2011, I caused copies of Complaint Counsel's Opposition to Respondent's Motions for *In Camera* Treatment of Trial Exhibits and the accompanying Proposed Order to be served on the following:

One electronic copy via the FTC E-Filing system to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, DC 20580

One paper copy via hand delivery and one electronic copy via email to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., N.W., Room H-106
Washington, DC 20580
Email: ojl@ftc.gov

One electronic copy via email to:

David Marx, Jr.
McDermott Will & Emery LLP
227 W. Monroe Street
Chicago, IL 60606
312-372-2000
dmarx@mwe.com

Stephen Y. Wu
McDermott Will & Emery LLP
227 W. Monroe Street
Chicago, IL 60606
312-372-2000
swu@mwe.com

Erin C. Arnold
McDermott Will & Emery LLP
227 W. Monroe Street
Chicago, IL 60606
312-372-2000

earnold@mwe.com

Amy J. Carletti
McDermott Will & Emery LLP
227 W. Monroe Street
Chicago, IL 60606
312-372-2000
acarletti@mwe.com

Amy Hancock
McDermott Will & Emery LLP
600 13th Street, NW
Washington, DC 20005
202-756-8000
ahancock@mwe.com

Jennifer L. Westbrook
McDermott Will & Emery LLP
600 13th Street, NW
Washington, DC 20005
202-756-8000
jwestbrook@mwe.com

Vincent C. van Panhuys
McDermott Will & Emery LLP
600 13th Street, NW
Washington, DC 20005
202-756-8000
vvanpanhuys@mwe.com

Carrie Amezcua
McDermott Will & Emery LLP
600 13th Street, NW
Washington, DC 20005
202-756-8000
camezcua@mwe.com

Christine G. Devlin
McDermott Will & Emery LLP
600 13th Street, NW
Washington, DC 20005
202-756-8000
cdevlin@mwe.com

Daniel Powers
McDermott Will & Emery LLP
600 13th Street, NW
Washington, DC 20005
202-756-8000
dgpowers@mwe.com

James Camden
McDermott Will & Emery LLP
600 13th Street, NW
Washington, DC 20005
202-756-8000
jcamden@mwe.com

Pamela A. Davis
Antitrust Specialist
McDermott Will & Emery LLP
600 13th Street, NW
Washington, DC 20005
202-756-8000
pdavis@mwe.com

s/ Janelle L. Filson
Janelle L. Filson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: 202-326-2882
jfilson@ftc.gov