

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the matter of:

:
:
:
:
:
:
:
:
:
:

Docket No.: 9346

PROMEDICA HEALTH SYSTEMS, INC.

Judge D. Michael Chappell

[PUBLIC VERSION]
NON-PARTY MERCY HEALTH PARTNERS'S MOTION FOR
IN CAMERA TREATMENT OF CONFIDENTIAL MATERIALS

Mercy Health Partners ("MHP") respectfully moves pursuant to 16 C.F.R. § 3.45(b) for an order directing *in camera* treatment of certain MHP confidential and competitively sensitive materials that the Parties may introduce into evidence at the administrative trial in this matter.

On August 23, 2010, MHP received a Civil Investigative Demand ("CID") from the Federal Trade Commission ("FTC") in connection with the FTC's investigation of ProMedica Health System, Inc.'s ("ProMedica") proposed acquisition of St. Luke's Hospital ("St. Luke's"). The CID required MHP to produce highly confidential and competitively sensitive business information, including: hospital financial and operational data; business and strategic plans; contracts with and documents reflecting MHP's negotiations with third-party managed-care payors; and information about MHP's negotiated rates, reimbursement levels and other compensation information. Over the period of several months, MHP complied with the CID and produced competitively sensitive materials to the FTC with the understanding that such materials would remain confidential.

MHP produced additional confidential materials in response to subsequent third-party subpoenas issued by the FTC and ProMedica (collectively, the "Parties")—again, with the understanding and expectation that all such materials would remain confidential.

The materials and information MHP seeks to protect generally fall into four categories: (1) clinical/financial data about hospital operations;¹ (2) documents reflecting MHP's internal business analyses and strategic planning objectives²; (3) MHP's contracts with third-party payors ("Contracts")³; and (4) deposition testimony by an MHP senior executive regarding categories (1)-(3) as well as other confidential and competitively sensitive MHP information⁴ (collectively, "MHP Exhibits 1-4"). The information contained in MHP Exhibits 1-4 is highly sensitive and is

¹ The MHP hospital financial and operational data that warrants *in camera* treatment appears in the FTC's Exhibit No. PX01813 as well as the following documents that are attached as Exhibit 1: MHP0252929-MHP0252934; MHP0048907-MHP0049768; MHP0246739-MHP0246786; MHP0246787-MHP0246834; and MHP0246835-MHP0246894.

² A compilation of the documents containing confidential and competitively sensitive information about MHP's internal business analyses and strategic planning objectives is attached as Exhibit 2, which includes: MHP0000596-MHP0000757; MHP0003837-MHP0003972; MHP0003973-MHP0004099; MHP0007541-MHP0007644; MHP0010527-MHP0010636; MHP00246895-MHP00246899 (PX02288); MHP0000234-MHP0000244; MHP0000245-MHP0000249; MHP0000261-MHP0000305; MHP0002929-MHP0002931; MHP00013093-MHP00013095; MHP0013431-MHP0013451; MHP0013479; MHP0032578; MHP0056530; MHP014891-MHP0140901; MHP0243986-MHP0243991; MHP0246900-MHP0246905; MHP0246906-MHP0246917; MHP0246918-MHP0246930; MHP0246931-MHP0246935; MHP0246936-MHP0246949; MHP0246950-MHP0246964; MHP024695-MHP0246970; MHP0246977-MHP0246893; MHP0246984-MHP0246997; MHP0247016-MHP0247027; MHP0247044-MHP0247060; MHP0247061-MHP0247068; MHP0247088-MHP0247102; MHP0247152-MHP0247167; MHP0247168-MHP0247177 (PX02293); MHP0247213-MHP0247215; MHP0247280-MHP0247293; MHP0247294-MHP0247299; MHP0247300-MHP0247313; MHP0247362-MHP0247363; MHP0247382-MHP0247384; MHP0247388-MHP0247395; MHP0252283; MHP0253211-MHP0253220; MHP0254733-MHP0254742; MHP0007742-MHP0007838; MHP0089447-MHP0089455; MHP0089476-MHP00849841; PX002307; PX02323; MHP005682-MHP0005720; and PX02534-001-PX02534-118.

³ A compilation of the Contracts and related documents that warrant *in camera* treatment is attached as Exhibit 3, which includes: MHP0130626-MHP0130628; MHP0130671-MHP0130674; MHP0252327-MHP0252329; MHP0252561-MHP0252572; MHP0014128; MHP0043508-MHP0043509; MHP0044249-MHP0044254; MHP0044273-MHP0044293; MHP0057380-MHP0057392; and MHP0089421-MHP0089429.

⁴ A compilation of the transcript excerpts containing testimony about MHP's confidential and competitively sensitive information is attached as Exhibit 4, which includes: February 3, 2011 Deposition of Scott Shook at 8:24-9:9; 9:21-10:2; 10:18-11:16; 11:19-14:2; 14:15-16; 15:9-18; 16:3-15; 17:9-18:6; 18:23-19:24; 20:6-22:15; 22:24-23:16; 24:1-10; 25:9-15; 26:18-20; 27:1-12; 28:13-29:17; 30:4-9; 33:10-17; 33:20-35:2; 35:5-19; 35:23-40:2; 40:17-41:4; 41:19; 41:23-42:11; 42:15-24; 43:5-7; 43:17-19; 43:21-23; 44:10-13; 46:2-4; 46:7-47:5; 47:11-48:4; 48:19-21; 49:2-4; 50:4-12; 50:21-51:3; 51:14-19; 52:7-9; 52:12-22; 53:3-54:4; 54:7-13; 54:15-55:10; 55:14-56:2; 56:6-12; 56:16-57:3; 58:9-12; 58:21-24; 59:4-11; 59:20-60:1; 60:4-61:13; 62:7-12; 62:17-63:9; 63:18-64:9; 66:5-8; 66:17-68:4; 68:8-21; 69:17-23; 70:1-72:10; 72:14-73:5; 73:8-9; 73:12-14; 73:19-20; 73:24-74:4; 78:5-6; 78:22-24; 79:19-80:12; 80:16-19; 81:1-4; 82:4-17; 83:2-84:9; 84:24-85:23; 86:1-2; 86:5-15; 86:21-88:10; 88:17-89:13; 89:18-90:12; 90:19-91:15; 91:22-24; 92:4-7; 92:9-93:20; 93:23-95:8; April 5, 2011 Deposition of Scott Shook at 10:17-24; 12:17-21; 13:3; 13:5-18:14; 20:8-22:13; 28:18-20; 42:8-16; 43:14-18; 44:10-45:17; 46:25-47:11; 64:12-67:25; 68:15-19; 68:23-69:19; 70:19-71:1; 71:21-25; 72:4-8; 75:7-76:1; 76:9-77:6; 77:10-79:12; 79:17-80:4; 89:25-90:14; and 92:10-17.

held in strict confidence by MHP. *See* Declaration of Barry F. Hudgin (“Hudgin Decl.”) at ¶¶ 2, 4-7, 9-11, 14. Accordingly, when MHP 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 MHP that they intend to introduce into evidence at the administrative trial a number of materials MHP produced in response to the CID and the Parties’ subpoenas *duces tecum*. MHP Exhibits 1-4 are a subset of the materials the Parties identified. The public dissemination of the information contained in this subset of materials—*e.g.*, hospital financial and operational data, internal business and strategic analyses, and MHP’s confidential managed-care rates—would unquestionably cause direct and immediate harm to MHP’s interests and competitive standing in northwestern Ohio. Hudgin Decl. at ¶¶ 2, 3, 5, 8, 12-14.

MHP informed the Parties of its intention to file this Motion. Neither the FTC nor ProMedica oppose granting *in camera* treatment for MHP Exhibits 1-4. Regardless of the Parties’ assent, however, as a non-party, MHP deserves “special solicitude” to protect its highly confidential and competitively sensitive information.

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

Exhibit 1 is a compilation of documents reflecting MHP’s clinical and financial data about hospital operations. This data includes such sensitive and proprietary information as MHP’s utilization rates, labor metrics, and profitability. *See, e.g.*, MHP0246739-86; MHP0246787-834; MHP0246835-94.

FTC Exhibit No. PX01813 also contains information about MHP’s operations in northwestern Ohio from January 1, 2004 through March 31, 2011.⁵ Hudgin Decl. at ¶ 4. This

⁵ Due to the volume of PX01813 and the highly sensitive information contained therein, MHP did not include this data in Exhibit 1. MHP would be happy to submit this data for *in camera* inspection upon request.

document includes sensitive personal information about MHP's patients such as their gender, age, identification numbers, and diagnostic codes for their various inpatient and outpatient treatments.

Id. PX01813 also includes competitively sensitive information such as the amounts billed, the allowed charges, the amount paid by the patient, any amount paid by other insurance, and the net payment for all of MHP's patients in northwestern Ohio for more than seven years. *Id.* The information contained in PX01813 and Exhibit 1 is not publicly available and MHP has taken all reasonable steps to protect its confidentiality. *Id.* at ¶ 5.

Exhibit 2 is a compilation of documents reflecting MHP's internal business analyses and strategic planning objectives. These documents reflect highly confidential information about some of MHP's most competitively sensitive topics such as MHP's strategic market assessments and future business objectives. *See, e.g.*, MHP0246895-99 (Confidential White Paper: Mercy Southwest Strategy); MHP0013093-95 (MHP internal feasibility analysis regarding increasing capacity). For example, many of the documents in Exhibit 2 are confidential notes from closed-doors meetings of MHP's Board of Trustees.⁶ These notes reflect MHP's internal business analyses regarding specific growth strategies and proposed partnership ventures. Hudgin Decl. at ¶ 6. Other than the attendees of these meetings, few MHP employees know about the strategic planning information reflected in these confidential documents. *Id.*

Exhibit 2 also includes various internal analyses regarding MHP's contract negotiations with third-party payors. These documents reflect some of MHP's most competitively sensitive information; namely, its managed-care rates, strategic market assessments, and negotiation

⁶ *See, e.g.*, MHP0246900-MHP0246905; MHP0246906-MHP0246917; MHP0246918-MHP0246930; MHP0246931-MHP0246935; MHP0246936-MHP0246949; MHP0246950-MHP0246964; MHP024695-MHP0246970; MHP0246977-MHP0246893; MHP0246984-MHP0246997; MHP0247016-MHP0247027; MHP0247044-MHP0247060; MHP0247061-MHP0247068; MHP0247088-MHP0247102; MHP0247152-MHP0247167; MHP0247168-MHP0247177 (PX02293); MHP0247213-MHP0247215; MHP0247280-MHP0247293; MHP0247294-MHP0247299; MHP0247300-MHP0247313; MHP0247362-MHP0247363; MHP0247382-MHP0247384; MHP0247388-MHP0247395.

strategies. *See, e.g.*, MHP0140891-901 (MHP's internal analysis regarding its contract negotiation strategy with Medical Mutual of Ohio); MHP0243986-91 (MHP's internal analysis regarding its contract negotiation strategy with Aetna). These documents reflect MHP's internal methodologies and strategic business assessments that are highly confidential and competitively sensitive. Hudgin Decl. at ¶ 7.

The Contracts in Exhibit 3 contain confidential information about MHP's relationships with its third-party payors, including MHP's managed-care rate structures, methodologies, and specific pricing terms. *Id.* at ¶ 9. MHP invests significant time and effort into negotiating these contracts to ensure MHP's financial and competitive viability. *Id.* at ¶ 10. MHP treats its third-party payor contracts, including those in Exhibit 3, as confidential, proprietary information. This information is not shared outside MHP, nor is it widely distributed even within MHP. *Id.*

Exhibit 4 includes deposition testimony by an MHP senior executive regarding managed-care rates, the negotiation of those rates, MHP's contracts with third-party payors, MHP's clinical and financial data about hospital operations, and MHP's internal business and strategic planning objectives. *Id.* at ¶ 14. MHP provided this highly sensitive testimony with the express understanding that it would remain confidential pursuant to the Protective Order. *Id.*

Exhibit 4 also includes **[Redacted]**.

II. MHP'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 PX01813 and MHP Exhibits 1-4 will not be necessary to explain the rationale of the Commission’s decision in this matter, the Court should accord MHP’s confidential documents lasting *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. MHP Has Preserved the Confidentiality of the Information

MHP, which is not a party to this action, has taken great care to guard the confidential and competitively sensitive information contained in PX01813 and MHP Exhibits 1-4. *See* Hudgin Decl. at ¶¶ 2, 4-7, 9-11, 14. These documents were produced under compulsory process in response to the CID and/or subpoenas issued by ProMedica and the FTC. All of the documents at issue were designated “Confidential” 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). As defined in the Protective Order, “Confidential material” specifically includes “any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information.” The Protective Order strictly limits disclosure of confidential materials to persons designated in the Protective Order.

The competitively sensitive information in PX01813 and MHP Exhibits 1-4 is not publicly available, and MHP has taken every reasonable step to protect its confidentiality. Hudgin Decl. at ¶¶ 5-7, 9-11, 14. Only a limited number of MHP employees have knowledge of or access to the information, and they hold that information in strict confidence. *Id.* It would be

extremely difficult, if not impossible, for MHP's competitors or other outside persons to access or re-create the information in PX01813 and MHP Exhibits 1-4. *Id.* at ¶¶ 4-7, 9-11, 14.

B. Disclosure of the Information in PX01813 and MHP Exhibits 1-4 Would Result in Serious Competitive Injury to MHP.

PX01813 and MHP Exhibits 1-4 contain highly confidential and competitively sensitive information that is central to MHP's business; its disclosure would have a direct, negative effect on MHP's competitive position in northwestern Ohio. *Id.* at ¶¶ 2, 3, 5, 8, 12-14. If other payors were to gain access to the information contained in PX01813 or MHP Exhibits 1-4, they could use it against MHP in their negotiations with MHP. *Id.* at ¶¶ 3, 8, 12-14. Worse still, if MHP's competitors were to gain access to the information contained in PX01813 or MHP Exhibits 1-4, they could use it to MHP's detriment in their negotiations with payors. *Id.* at ¶¶ 3, 5, 8, 12-14. Thus, any public disclosure of PX01813 or MHP Exhibits 1-4 would severely jeopardize MHP's ability to negotiate effectively with payors.

In this case, for example, MHP and ProMedica are direct competitors in the general acute-care hospital service market in Lucas County, Ohio. Indeed, ProMedica considers MHP its "primary competitor for patients, physician referrals, and participation in commercial health insurance plans' networks."⁷ Accordingly, access by ProMedica (and other competitors) to MHP's confidential information in PX01813 and MHP Exhibits 1-4 has the likely potential to harm MHP and distort competition both 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").

⁷ Decl. of Randall D. Oostra, *FTC v. ProMedica Health System, Inc.*, No. 11-0047 (N.D. Ohio Jan. 10, 2011), ECF No. 31 at ¶ 6; *see also* Def.'s Opp. to Pl.'s Mot. for Temporary Restraining Order, *FTC v. ProMedica Health System, Inc.*, No. 11-0047 (N.D. Ohio Jan. 10, 2011), ECF No. 29 at 10 (MHP and ProMedica are each other's "next best substitute," and each competitively constrains the other).

Specifically, PX01813 and Exhibit 1 contain MHP's highly sensitive and proprietary information such as MHP's utilization rates, labor metrics, and profitability. Hudgin Decl. at ¶ 4. Public disclosure of this information would cause serious competitive injury to MHP because it would provide MHP's competitors with a behind-the-scenes insight into MHP's relative market strengths and weaknesses. *Id.* at ¶ 5. PX01813 also reveals highly confidential personal information about MHP's patients such as their gender, age, identification numbers, and diagnostic codes for their various inpatient and outpatient treatments. *Id.* at ¶ 4. This alone mandates that PX01813 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 2 contains highly confidential and competitively sensitive information about MHP's strategic market assessments and business objectives, including various strategic analyses, price modeling, and internal communications that reflect MHP's negotiation strategies with third-party payors. Hudgin Decl. at ¶¶ 6, 7. Disclosure of this information would provide competitors—and payors—with insight into MHP's overall internal business strategies and methodologies, including how MHP analyzes and values its relationships with various third-party payors. *Id.* at ¶ 8. MHP has invested years developing its business and MHP's efforts in this regard potentially could be lost if the information contained in Exhibit 2 were disclosed. *Id.*

The contracts in Exhibit 3 include highly sensitive and proprietary information such as MHP's managed-care rate structures, methodologies, and specific pricing terms. *Id.* at ¶ 9. A significant amount of time, effort, and financial modeling are involved in negotiating each of

MHP's contracts to ensure MHP's ongoing financial and competitive viability. *Id.* at ¶ 10. Any public disclosure of the information in Exhibit 3 would cause a direct and serious competitive injury to MHP. *Id.* at ¶ 12. These confidential contracts are central to MHP's business, and the disclosure of their competitively sensitive payment terms would have a negative impact on MHP and its ability to effectively negotiate third-party payor contracts. *Id.* If other third-party payors learned of the information in Exhibit 3, they could use that information to MHP's detriment in their negotiations with MHP. *Id.* Likewise, if MHP's competitors learned of the managed-care rates and other terms reflected in Exhibit 3, they could use that information to undermine MHP's relationships with its third-party payors. *Id.*

Furthermore, the competitive harm MHP faces if Exhibit 3 were publicly disclosed would be both immediate and long-lasting. *Id.* at ¶ 13. Since most managed-care rate negotiations use the prior existing contract as a starting point for negotiations, any public disclosure of Exhibit 3 would enable other payors and MHP's competitors to accurately gauge MHP's managed-care rates for several years into the future. *Id.* The specific terms of these contracts would also provide competitors with a behind-the-scenes insight into MHP's strategies and reveal MHP's relative marketplace strengths and weaknesses. *Id.*

Finally, Exhibit 4 reflects confidential testimony regarding the same competitively sensitive information contained in PX01813 and MHP Exhibits 1-3. These excerpts should remain confidential and be accorded *in camera* treatment as they reflect competitively sensitive information such as MHP's managed-care rate structure, its negotiation strategies, and its assessment of various third-party payors, including their strengths, weaknesses and relative bargaining leverage vis-à-vis MHP. *Id.* at ¶ 14. If made public, this testimony could be used by third-party payors and/or MHP's competitors to MHP's detriment. *Id.*

Taken together, the information contained in PX01813 and MHP Exhibits 1-4 is central to MHP's business and strategic planning. Preserving the confidentiality of this highly sensitive information is critical for MHP to maintain its competitive standing. *Id.* at ¶¶ 2, 3, 5, 8, 12-14. MHP would likely suffer serious competitive injury if this information were disclosed to the public. If this information were publicly disclosed, MHP's competitors could pinpoint MHP's managed-care rates and use this non-public information to target third-party payors for their own competitive gain. Access to this information would also provide MHP's competitors and other payors with a behind-the-scenes insight into MHP's internal strategic plans, which would have an immediate and lasting detrimental effect on MHP's ability to compete in northwestern Ohio.

C. The Public Interest in Disclosure of PX01813 and MHP Exhibits 1-4 is Outweighed by the Likelihood of Serious Competitive Harm to MHP.

MHP deserves "special solicitude" as a non-party requesting *in camera* treatment for its confidential 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 MHP has done in this case. On the other hand, disclosing the materials for which MHP seeks protection 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).

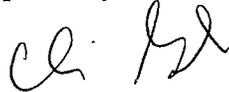
Indeed, PX01813 and MHP Exhibits 1-4 are precisely the type of non-public documents of a non-party that warrant lasting *in camera* protection under 16 C.F.R. § 3.45(b) and relevant FTC precedent. *See, e.g., Kaiser Aluminum*, 103 F.T.C. at 500; *Hood*, 58 F.T.C. at 1188; *see also Avery Dennison Corp. 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").

CONCLUSION

The information contained in PX01813 and MHP Exhibits 1-4 warrants lasting protection because it is “sufficiently secret and sufficiently material to [MHP’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”). Preserving the confidentiality of PX01813 and MHP Exhibits 1-4 is vital to MHP’s competitive position and business strategy. As such, MHP respectfully requests that PX01813 be accorded indefinite *in camera* treatment and MHP Exhibits 1-4 be accorded *in camera* protection for a period of no less than five years.

Dated: May 12, 2011

Respectfully submitted,



Christopher H. Gordon
Christopher.Gordon@ssd.com
SQUIRE, SANDERS & DEMPSEY (US) LLP
1201 Pennsylvania Avenue, N.W., Suite 500
Washington, D.C. 20004
Phone: +1.202.626.6600
Fax: +1.202.626-6780

Attorney for Mercy Health Partners

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2011, a copy of the foregoing Motion for *In Camera* Treatment of Confidential Materials was served by hand and via email on the following:

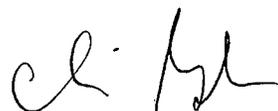
Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-135
Washington, DC 20580
dclark@ftc.gov

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oalj@ftc.gov

I also certify that on this 12th day of May, 2011, a copy of the foregoing Motion for *In Camera* Treatment of Confidential Materials was served by email and first-class mail on the following:

Jeanne Liu
Attorney, Bureau of Competition
U.S. Federal Trade Commission
601 New Jersey Ave, NW
Washington, D.C. 20001
(202) 326-3572 phone
(202) 326-2286 fax
jliu@ftc.gov

David Marx, Jr.
McDermott Will & Emery LLP
227 W. Monroe Street
Suite 4400
Chicago, IL 60606
312/984-7668
312/277-6734 (fax)
dmarx@mwe.com



Counsel for Mercy Health Partners

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of: :
: Docket No.: 9346
: PROMEDICA HEALTH SYSTEMS, INC. : Judge D. Michael Chappell
: :
:

[PUBLIC VERSION]
[PROPOSED ORDER] GRANTING NON-PARTY MERCY HEALTH PARTNERS'S
MOTION FOR *IN CAMERA* TREATMENT OF CONFIDENTIAL MATERIALS

Upon consideration of Non-party Mercy Health Partners's ("MHP") Motion for *In Camera* Treatment of Confidential Materials, and for good cause shown, it is hereby ordered that the information in PX01813 shall be accorded *in camera* treatment indefinitely and the information in MHP Exhibits 1-4 shall be accorded *in camera* treatment until May __, 2016.

PX01813 is a comprehensive spreadsheet containing inpatient and outpatient data for all of MHP's patients in northwestern Ohio from January 1, 2004 through March 31, 2011. This document not only includes MHP's competitively sensitive information, it also reveals "sensitive personal information" about MHP's patients. *See* 16 C.F.R. § 3.45(b).

Exhibit 1 is a compilation of MHP's financial and operational data for its various hospitals. This data includes such sensitive and proprietary information as MHP's utilization rates, labor metrics, and profitability.

Exhibit 2 is a compilation of documents reflecting MHP's internal business and strategic plans. These documents contain highly confidential and competitively sensitive information regarding MHP's strategic market assessments and business objectives as well as internal analyses regarding MHP's contract negotiations with third-party payors.

Exhibit 3 contains MHP's confidential contracts with third-party payors. These documents reflect competitively sensitive information such as MHP's managed-care rate structures, methodologies, and specific pricing terms.

Exhibit 4 is a compilation of transcript excerpts that include testimony by an MHP senior executive about the information contained in Exhibits 1-3 as well as other confidential and competitively sensitive MHP information. Exhibit 4 also includes **[Redacted]**.

The information contained in PX01813 and MHP Exhibits 1-4 warrants *in camera* treatment because it is "sufficiently secret and sufficiently material to [MHP'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). PX01813 shall be accorded *in camera* treatment indefinitely because it reveals "sensitive personal information" about MHP's patients. 16 C.F.R. § 3.45(b). PX01813 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 1-4 warrant lasting *in camera* protection as well because preserving the confidentiality of MHP's internal deliberations, analyses, and final pricing information is vital to MHP's competitive position and business strategy. Thus, the information in Exhibits 1-4 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:	:	Docket No.: 9346
	:	
PROMEDICA HEALTH SYSTEMS, INC.	:	Judge D. Michael Chappell
	:	
	:	

**DECLARATION OF BARRY F. HUDGIN IN SUPPORT OF
NON-PARTY MERCY HEALTH PARTNERS'S MOTION
FOR *IN CAMERA* TREATMENT OF CONFIDENTIAL MATERIALS**

I, Barry F. Hudgin, under penalty of perjury hereby declare that the following is true and correct:

1. I am employed by Mercy Health Partners ("MHP") as its Senior Vice President and General Counsel. I have held that position since January 1, 2011. Prior to that date, I served as Vice President and General Counsel from February 1, 2009 through December 31, 2010. I have been employed in the MHP Legal Department since May 8, 2002. I am familiar with the processes by which MHP analyzes and evaluates markets and third-party payors, and how it prices and negotiates its contracts with third-party payors.

2. I have reviewed the documents for which MHP seeks *in camera* treatment. As Senior Vice President and General Counsel at MHP, I am familiar with the confidential information contained in the documents at issue. Based upon my review of the documents, my knowledge of MHP's business, and my familiarity with the confidentiality protections afforded this type of information by MHP, it is my belief that disclosure of these documents would cause serious competitive injury to MHP.

3. MHP has invested years developing its business. MHP's efforts in this regard would be undermined if the information contained in PX01813 and MHP Exhibits 1-4 were disclosed to the public because such disclosure would severely jeopardize MHP's ability to

negotiate effectively with third-party payors. If other payors were to obtain the information in PX01813 and Exhibits 1-4, they could use it against MHP in their negotiations with MHP. Likewise, if MHP's competitors were to obtain the information in PX01813 and Exhibits 1-4, they could use it to MHP's detriment in their negotiations with third-party payors.

4. Exhibit 1 is a compilation of MHP's financial and operational data for its various hospitals. This data includes competitively sensitive and proprietary information such as MHP's utilization rates, labor metrics, and profitability. The FTC's Exhibit No. PX01813 also contains highly confidential and competitively sensitive information about MHP's treatment of patients in northwestern Ohio from January 1, 2004 through March 31, 2011. This document includes sensitive personal information about MHP's patients such as their gender, age, identification numbers, and diagnostic codes for their various inpatient and outpatient treatments. PX01813 also includes competitively sensitive information such as the amounts billed, the allowed charges, the amount paid by the patient, any amount paid by other insurance, and the net payment for all of MHP's patients in northwestern Ohio for more than seven years.

5. The information contained in PX01813 and Exhibit 1 is not publicly available and MHP has taken great care to protect its confidentiality. This information is not shared outside MHP, nor is it widely disseminated even within MHP. Public disclosure of this information would cause serious competitive injury to MHP because it would provide MHP's competitors with a behind-the-scenes insight into MHP's relative market strengths and weaknesses.

6. Exhibit 2 is a compilation of documents reflecting MHP's internal business analyses and strategic planning objectives. These documents reflect some of MHP's most highly confidential and competitively sensitive information. For example, Exhibit 2 includes a number of confidential notes from closed-doors meetings of MHP's Board of Trustees. These notes

reflect confidential and competitively sensitive information about MHP's business operations and strategic planning such as utilization rates, and its internal analyses regarding specific growth strategies and proposed partnership ventures. Other than the attendees of these meetings, few MHP employees know about the strategic planning information reflected in these confidential documents.

7. Other materials in Exhibit 2 include various strategic analyses, price modeling, and internal communications that reflect MHP's negotiation strategies with third-party payors. These documents reflect MHP's internal methodologies and strategic business assessments that are highly confidential and competitively sensitive. Many of these documents also include information about MHP's managed-care rates, the negotiation of those rates, and MHP's contracts with third-party payors.

8. Disclosure of the information in Exhibit 2 would provide competitors—and payors—with insight into MHP's overall internal business strategies and methodologies, including how MHP analyzes and values its relationships with various third-party payors. MHP has invested years developing its business and MHP's efforts in this regard potentially could be lost if the information contained in Exhibit 2 were disclosed.

9. Exhibit 3 is a compilation of MHP's confidential contracts with various third-party payors. These contracts include competitively sensitive and proprietary information such as MHP's managed-care rate structures, methodologies, and specific pricing terms. In my capacity as Senior Vice President and General Counsel, I am familiar with MHP's third-party payor contracts such as those contained in Exhibit 3. I am also familiar with the confidentiality protections afforded to MHP's payor contracts. Many of these contracts contain express confidentiality provisions. For example, MHP's contract with Blue Cross and Blue Shield of

Michigan specifically provides that both parties “shall keep strictly confidential all compensation arrangements set forth in this Agreement, except as otherwise required by law.”

10. A significant amount of time, effort, and financial modeling are involved in negotiating each of MHP’s contracts to ensure MHP’s ongoing financial and competitive viability. As such, MHP treats its third-party payor contracts, including those in Exhibit 3, as confidential, proprietary information. This information is not shared outside MHP, nor is it widely distributed even within MHP.

11. Within MHP, only a select few individuals are aware of the precise terms and managed-care rates contained in Exhibit 3. These individuals include those who either (a) helped negotiate the contracts; (b) approved the contracts; or (c) help implement the contracts.

12. Based on my knowledge of MHP’s business and MHP’s negotiations of third-party payor contracts, it is my belief that public disclosure of the information in Exhibit 3 would cause a direct and serious competitive injury to MHP. These confidential contracts are central to MHP’s business, and the disclosure of their competitively sensitive payment terms would have a negative impact on MHP and its ability to effectively negotiate third-party payor contracts. If other third-party payors learned of the information in Exhibit 3, they could use that information to MHP’s detriment in their negotiations with MHP. Likewise, if MHP’s competitors learned of the managed care rates and other terms reflected in Exhibit 3, they could use that information to undermine MHP’s relationships with its third-party payors.

13. The competitive harm MHP faces if Exhibit 3 were publicly disclosed would be both immediate and long-lasting. In my experience in this industry, most negotiations with third-party payors use the prior existing contract as a starting point for negotiations. As such, any public disclosure of Exhibit 3 would enable other payors and MHP’s competitors to accurately

gauge MHP's managed care rates for several years into the future. The specific terms of these contracts would also provide competitors with a behind-the-scenes insight into MHP's strategies and reveal MHP's relative marketplace strengths and weaknesses.

14. Exhibit 4 is a compilation of transcript excerpts from Scott Shook's depositions on October 18, 2010 and April 5, 2011. These excerpts should remain confidential and be accorded *in camera* treatment as they reflect competitively sensitive information such as MHP's utilization rates and relative market share. The highlighted excerpts also reflect testimony about MHP's managed-care rate structure, its negotiation strategy, and its assessment of various third-party payors, including their strengths, weaknesses and relative bargaining leverage vis-à-vis MHP. Mr. Shook answered questions about these highly sensitive topics with the express understanding that his testimony would be governed by the Protective Order and remain confidential. The highlighted excerpts, if made public, could be used by third-party payors and/or MHP's competitors to MHP's detriment.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 11, 2011.



Barry F. Hudgin

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

	:	
	:	
In the matter of	:	Docket No.: 9346
	:	
PROMEDICA HEALTH SYSTEMS, INC.	:	Judge D. Michael Chappell
	:	
	:	

[PUBLIC]

**APPENDIX: EXHIBITS CITED TO IN NON-PARTY MERCY HOSPITAL
PARTNERS' MOTION FOR *IN CAMERA* TREATMENT OF CONFIDENTIAL
MATERIALS**

- EXHIBIT 1:** **Compilation of MHP financial and operational data
(filed under seal for *in camera* treatment)**
- EXHIBIT 2:** **Compilation of documents containing confidential and sensitive
information about MHP's internal business and strategic plans
(filed under seal for *in camera* treatment)**
- EXHIBIT 3:** **Compilation of confidential contracts and related documents
(filed under seal for *in camera* treatment)**
- EXHIBIT 4:** **Confidential transcript excerpts from Mr. Shook's depositions on
February 3 and April 5, 2011
4A - Document filed Under Seal
4B - Document filed Under Seal
(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 4A
FILED UNDER SEAL
FOR *IN CAMERA* TREATMENT

EXHIBIT 4B
FILED UNDER SEAL
FOR *IN CAMERA* TREATMENT