

ORIGINAL

**IN THE 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
PUBLIC VERSION

**NON-PARTIES UNITEDHEALTHCARE, INC.
AND UNITEDHEALTHCARE OF OHIO INC.'S SUPPLEMENTAL
MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED EVIDENCE**

Non-Parties UnitedHealthcare, Inc. and UnitedHealthcare of Ohio, Inc. (collectively, “United”), hereby supplement and renew their motion for *in camera* treatment of proposed evidence with respect to six documents, identified below and attached hereto as Exhibits 22 through 26 and 42, that either ProMedica Health System, Inc. (“ProMedica”) or Complaint Counsel have designated for introduction into evidence in the trial of this matter. On May 5, 2011, United moved for *in camera* treatment of 47 documents. On May 25, 2011, this Court granted United’s motion regarding all but six documents. United files this supplemental motion for *in camera* treatment as to those six documents in order to present additional information for the Court’s consideration regarding the confidentiality of those six documents. Both Complaint Counsel and Counsel for ProMedica have given United permission to represent that that they support this motion seeking *in camera* protection for United’s documents.

United respectfully requests that this Court grant *in camera* treatment of the documents listed below, as they contain commercially and/or competitively sensitive and proprietary business information. In the course of this litigation, and the investigation that preceded it, United produced tens of thousands of pages of information to the Federal Trade Commission and

to ProMedica. The documents that the parties have selected from the United production to use as exhibits contain information that relates to competition among healthcare providers in the Toledo market, which is generally a highly sensitive topic. It is therefore not surprising that United has requested *in camera* treatment for most of the documents the parties have selected for use in the trial of this matter. All six of the documents that are the subject of this motion are confidential documents that receive very limited dissemination within United. Public disclosure of these documents would result in a clearly defined, serious competitive injury to United. The six documents at issue are identified below and attached to this Motion as Exhibits 22 through 26 and 42, and United respectfully moves this Court to order *in camera* treatment for each of them. In support of this Motion, United attaches the declaration of Janette Russell Gee (“Supplemental Gee Decl.”), attached hereto as Exhibit A.

I. United’s Confidential Documents Deserve *In Camera* Treatment Under the Federal Trade Commission’s Rules of Practice

In addition to the United documents previously granted *in camera* treatment by this Court, the following documents also deserve *in camera* treatment:

- PX02488/UHC-FTC-PROD001891--UHC-FTC-PROD001899 (Exhibit 22)
- PX02489/UHC-FTC-PROD001918--UHC-FTC-PROD001926 (Exhibit 23)
- PX02490/UHC-FTC-PROD001927--UHC-FTC-PROD001935 (Exhibit 24)
- PX02491/UHC-FTC-PROD001936--UHC-FTC-PROD001944 (Exhibit 25)
- UHC-PM-PROD000028 (Exhibit 26)
- PX02486/UHC-FTC-PROD001410--UHC-FTC-PROD001562 (Exhibit 42)¹

¹ Exhibit 42 is a paper copy of a formatted Excel workbook. It is presented here in the form in which it was produced to the FTC and ProMedica. In an effort to provide a more reader-friendly version of Exhibit 42, United has included, in PDF format, the spreadsheet from which Exhibit 42 was created. That document is labeled Exhibit 42A. Exhibit 42A was produced at the direction of counsel for this motion and has not previously been provided to the parties.

A party or third party seeking *in camera* treatment of material offered into evidence must show that “public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting in camera treatment.” 16 C.F.R. § 3.45(b); *see also H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). This standard can be met by establishing that the material in question is “sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

Administrative courts weigh six factors when determining secrecy and materiality: (1) the level of knowledge of the information outside of the applicant’s business; (2) whether the information is widely known by employees and others involved in the applicant’s business; (3) the applicant’s efforts to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of money or effort the applicant expended in developing the information; and (6) the difficulty with which the information could be properly acquired or duplicated by others. *See In re Bristol-Meyers*, 90 F.T.C. 455, 456 (1977); *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999). All six factors weigh in favor of granting United’s motion for *in camera* treatment of the documents in question.

A. The Exhibits at Issue are Not Publicly Available, Nor are They Widely Disseminated Within United

United treats each of the six documents in question as confidential and proprietary, none of the documents are widely available within United and none are publicly available.

(Supplemental Gee Decl. ¶¶ 3, 4, 6, and 7.) Exhibits 22 through 26 contain aggregated information obtained through United’s proprietary Hospital Comparison Program for specific hospitals in the Toledo area. United gathers comparative quality and cost information on hospitals for various inpatient conditions and procedures and shares the information, in

disaggregated form, with its members -- and it is not available to the public. (Supplemental Gee Decl. ¶ 4.) But the aggregated form in which the data appears in Exhibits 22 through 26 is not available to anyone other than United employees and would be extremely difficult for even a United member to reproduce. (Supplemental Gee Decl. ¶¶ 3 through 5.) Exhibit 42 is a sensitive, confidential presentation that summarizes United's competitive position across markets throughout the United States in 2009. Exhibit 42 is an internal United document with limited distribution within United that is not known or shared outside of United. (Supplemental Gee Decl. ¶¶ 7 through 9.)

B. Disclosure of Exhibits 22 Through 26 and 42 Would Result In Serious Competitive Injury to United

Exhibits 22 through 26 contain information obtained through United's proprietary Hospital Comparison Program for specific hospitals in the Toledo area. (Supplemental Gee Decl. ¶ 3.) The Hospital Comparison Program is a national UnitedHealthcare program whose purpose is to gather comparative quality and cost information on hospitals for a number of inpatient conditions and procedures. (*Id.*) The Hospital Comparison Program requires both the collection and analysis of large quantities of data. (*Id.*) The employees responsible for the program have extensive contact with, and feedback from, UnitedHealthcare providers. (*Id.*) The data collection and analysis is an ongoing process requiring significant UnitedHealthcare funding and time from UnitedHealthcare employees. (*Id.*) United thus devoted substantial resources to the creation of Exhibits 22 through 26. (*Id.*) It would be extremely difficult and costly for anyone to replicate the Hospital Comparison Program data on the Toledo area hospitals reflected in Exhibits 22 through 26, and some of it would be impossible to replicate. (*Id.*) For example, Exhibits 22 through 26 provide [REDACTED]

[REDACTED] (*Id.*) Such information is not widely disseminated

within United and is never released to competitors. (*Id.*) If United's competitors are able to [REDACTED] it would provide them an advantage when competing against United. (*Id.*)

The aggregate data reflected in Exhibits 22 through 26 is considered by United to be confidential and is not generally available to United employees. (Supplemental Gee Decl. ¶ 4.) Only United employees within Network Management, Care Management or Finance would have access to the aggregate data. (*Id.*) While the data is made available online to United members, even United's members do not have access to the data in the aggregate form set forth in Exhibits 22 through 26. (*Id.*) United members can access the data online using access codes provided by United, but members are only able to search for specific pieces of data and do not see the aggregated information. (*Id.*) [REDACTED]

[REDACTED] (*Id.*)

The Hospital Comparison Program is a benefit available to members who enroll in UnitedHealthcare. (Supplemental Gee Decl. ¶ 5.) In effect, it is a part of the services that UnitedHealthcare sells. (*Id.*) The ability to provide this kind of comparative information to United's members gives United a unique competitive advantage, as many of United's competitors offer less comprehensive data or are only beginning to develop similar programs. (*Id.*) If the aggregated information in Exhibits 22 through 26 were publicly disclosed, [REDACTED]

[REDACTED] (*Id.*) United's competitors would benefit greatly and unfairly by [REDACTED] (*Id.*)

Exhibit 42 is a presentation that summarizes UnitedHealthcare's competitive position across markets throughout the United States in 2009. (Supplemental Gee Decl. ¶ 6.) It contains highly sensitive information regarding UnitedHealthcare's market shares, provider networks, members and competitors in many of the markets in which UnitedHealthcare competes. (*Id.*) The presentation contains detailed information about UnitedHealthcare's position in many markets, and would be extremely damaging to UnitedHealthcare if publicly released. (*Id.*) As one example, regarding the Chicago market, Exhibit 42 [REDACTED] [REDACTED] [REDACTED] (Supplemental Gee Decl. ¶ 6.) As another example, regarding the Cleveland market, Exhibit 42 [REDACTED] [REDACTED] [REDACTED] (Supplemental Gee Decl. ¶ 6.) Similarly, with respect to the Northwest Indiana market, Exhibit 42 [REDACTED] [REDACTED] [REDACTED] (Supplemental Gee Decl. ¶ 6.) Thus, Exhibit 42, among other things, [REDACTED] [REDACTED] [REDACTED] (*Id.*) Such information, if publicly released, would [REDACTED] [REDACTED] (*Id.*)

Exhibit 42 is an internal UnitedHealthcare document and is not known or shared outside of UnitedHealthcare. (Supplemental Gee Decl. ¶ 7.) Exhibit 42 is also kept confidential within UnitedHealthcare and is not widely distributed internally. (*Id.*) Only select UnitedHealthcare

employees, mostly within the network management and sales departments, have access to the document. (*Id.*)

The breadth of information in Exhibit 42 also reflects the substantial amount of time, money and effort required to collect and compile the data contained in the presentation. (Supplemental Gee Decl. ¶ 8.) The information in Exhibit 42 represents information gathered based on UnitedHealthcare's unique position in various markets and its devotion of extensive resources to gather and process competitive data throughout the United States. (*Id.*) Replicating the information contained in Exhibit 42 would therefore be almost impossible due to the infrastructure, industry knowledge, time and effort that has gone into creating it. (*Id.*)

Public disclosure of Exhibit 42 would provide UnitedHealthcare's competitors with valuable insight into [REDACTED] [REDACTED] as well as [REDACTED]

(Supplemental Gee Decl. ¶ 9.) Public disclosure would also give UnitedHealthcare's competitors [REDACTED] [REDACTED] [REDACTED] (*Id.*) This information is thus highly competitively sensitive to UnitedHealthcare and its disclosure would irreparably damage UnitedHealthcare's competitive position in numerous markets. (*Id.*)

C. The Public Interest in Disclosure of Exhibits 22 Through 26 and 42 is Outweighed by the Likelihood of Serious Competitive Harm to United

United deserves "special solicitude" as a non-party requesting *in camera* treatment for its confidential business information. *In the Matter of Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500, 500 (1984) (order directing *in camera* treatment for sales statistics over five years old). Reasonable periods of *in camera* treatment encourage non-parties to cooperate with future

discovery requests in adjudicative proceedings. *Id.* United has cooperated with the discovery demands in this case. Conversely, disclosing documents containing United's highly confidential information will not materially promote the resolution of this matter, nor will these documents lend measurable public understanding to these proceedings. The balance of interests in the six factor test clearly favors *in camera* protection for Exhibits 22 through 26 and 42. *See, e.g., In re Bristol-Meyers*, 90 F.T.C. 455, 456 (1977).

II. United Seeks Five Years of *In Camera* Treatment of Exhibits 22 Through 26 and 42

The nature of the highly confidential information contained in Exhibits 22 through 26 and 42 warrants lasting protection. Public disclosure of the aggregated Hospital Comparison Program data in Exhibits 22 through 26 would [REDACTED] [REDACTED] (Supplemental Gee Decl. ¶ 5.) Public disclosure of Exhibit 42 would irreparably damage United [REDACTED] [REDACTED] (Supplemental Gee Decl. ¶ 9.) Thus, United respectfully requests that Exhibits 22 through 26 and 42 be granted *in camera* protection for five years.

CONCLUSION

Exhibits 22 through 26 and 42 satisfy the standard for *in camera* treatment under the Commission's Rules of Practice and relevant FTC precedent. Accordingly, this Court should order that that this confidential information receives *in camera* treatment.

DATED: May 31, 2011

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD, LLP

By: 

J. Brady Dugan
D.C. Bar No. 991905
Mark J. Botti
D.C. Bar No. 416948
Mollie M. McGowan
D.C. Bar No. 990788
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
Telephone: 202-887-4000
Facsimile: 202-887-4288

**ATTORNEYS FOR NON-PARTIES
UNITEDHEALTHCARE, INC. and
UNITEDHEALTHCARE OF OHIO, INC.**

Exhibit A

[redacted]

Exhibits 22-26, 42, 42A

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2011, I caused an original, one paper copy, and one electronic copy of Non-Parties UnitedHealthcare, Inc. and UnitedHealthcare of Ohio, Inc.'s Supplemental Motion for *In Camera* Treatment of Proposed Evidence to be filed with the Secretary of the Commission and the Chief Administrative Law Judge:

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
oyalj@ftc.gov

I also certify that on this same date, I caused copies of the foregoing motion to be served by electronic mail to:

Alexis Gilman, Esq.
Attorney, Mergers IV
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20580
Tel.: 202.326.2579
Fax: 202.326.2286
agilman@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



Mollie M. McGowan, D.C. Bar No. 990788
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
202-887-4000

IN THE 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

**[PROPOSED] ORDER GRANTING NON-PARTIES UNITEDHEALTHCARE, INC.
AND UNITEDHEALTHCARE OF OHIO INC.'S MOTIONS FOR LEAVE TO FILE
SUPPLEMENTAL MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED
EVIDENCE AND SUPPLEMENTAL MOTION FOR
IN CAMERA TREATMENT OF PROPOSED EVIDENCE**

On May 31, 2011, Non-Parties UnitedHealthcare, Inc. and UnitedHealthcare of Ohio, Inc. (collectively, "United"), filed a Motion for Leave to File Supplemental Motion for *In Camera* Treatment of Proposed Evidence and a Supplemental Motion for *In Camera* Treatment of Proposed Evidence.

IT IS HEREBY ORDERED that United's Motion for Leave to File Supplemental Motion for *In Camera* Treatment of Proposed Evidence is GRANTED.

IT IS HEREBY ORDERED that United's Supplemental Motion for *In Camera* Treatment of Proposed Evidence is GRANTED. The information set forth in the documents identified below will be subject to *in camera* treatment under 16 C.F.R. § 3.45 and will be kept confidential and not placed on the public record of this proceeding for a period of five (5) years.

- PX02488/UHC-FTC-PROD001891--UHC-FTC-PROD001899 (Exhibit 22)
- PX02489/UHC-FTC-PROD001918--UHC-FTC-PROD001926 (Exhibit 23)
- PX02490/UHC-FTC-PROD001927--UHC-FTC-PROD001935 (Exhibit 24)
- PX02491/UHC-FTC-PROD001936--UHC-FTC-PROD001944 (Exhibit 25)

- UHC-PM-PROD000028 (Exhibit 26)
- PX02486/UHC-FTC-PROD001410--UHC-FTC-PROD001562 (Exhibit 42)

IT IS FURTHER ORDERED that only authorized Federal Trade Commission (“Commission”) personnel, and court personnel concerned with judicial review may have access to the above-referenced information, provided that I, the Commission, and reviewing courts may disclose such *in camera* information to the extent necessary for the proper disposition of the proceeding.

ORDERED: _____

The Honorable D. Michael Chappell
Chief Administrative Law Judge

DATED: _____