

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGE



ORIGINAL

Docket No. 9369

Judge D. Michael Chappell

In the Matter of)
)
)

Advocate Health Care Network,
a corporation;)
)

Advocate Health and Hospitals Corporation,
a corporation;)
)

and)
)

NorthShore University HealthSystem,
a corporation.)
)

THIRD PARTY-INTERVENOR MULTIPLAN, INC.'S MOTION TO MAINTAIN SPECIFIED INFORMATION, DOCUMENTS AND TESTIMONY UNDER SEAL

Third Party-Intervenor, MultiPlan, Inc. ("MultiPlan"), by the undersigned counsel, hereby respectfully moves this tribunal pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 CFR 4.10 (2) and the Scheduling Order, to enter an order directing that certain confidential documents, testimony and information produced by nonparty MultiPlan in a related action, and identified more specifically herein, be maintained under seal and/or otherwise be precluded from public disclosure in connection with the upcoming administrative hearing. In support, MultiPlan states as follows:

1. MultiPlan is a healthcare cost management company that, on its own and through its affiliates, operates PPO networks which are formed from contracts with healthcare providers, on the one hand, and, contracts with other organizations such as health insurance plans and employers ("payors"), allowing patients covered by the payors' health benefit plans to receive services from the providers at discounted rates in exchange for increased access to such patients.

2. Parties to this action served MultiPlan with subpoenas for documents and deposition testimony in the related federal court matter titled *FTC v. Advocate Health Care Network, et. al.*, 15-cv-11473 (Northern District of Illinois) (hereafter the “Federal Action”).

3. The parties sought the production of documents, deposition testimony and other information that constitutes Confidential and Highly Confidential trade secret and sensitive commercial information.

4. Prior to the disclosure of any of its Confidential or Highly Confidential information in this matter, MultiPlan timely designated certain documents, information and deposition testimony as such in accordance with the Protective Order entered in the Federal Action.

5. No party challenged Multiplan’s Confidential and Highly Confidential designations.

6. On April 5, 2016, the federal judge entered an order granting MultiPlan’s Motion to seal the very documents that are the subject of this motion. The Court’s Order is attached as Exhibit A.

7. On April 25, 2016, MultiPlan received notice that certain of the parties may introduce its Confidential and Highly Confidential Information at the upcoming evidentiary hearing in this proceeding.

8. In accordance with the Scheduling Order, MultiPlan brings this motion within less than ten (10) days of receiving notice.

The Subject Confidential and Highly Confidential Information

9. Certain of the subject information sought to be protected from disclosure at the administrative hearing is contained in Utilization Reports that bear Bates numbers MPI 000118

and MPI 000119 and were previously designated as Highly Confidential. *See* Declaration of Randall Fortuna (the “Fortuna Dec.”) attached as Exhibit B hereto, at ¶ 6.

10. In addition, MultiPlan seeks to protect from disclosure certain paragraphs of a declaration (as well as drafts of the declaration) and deposition testimony provided by one of its employees in this matter that contain confidential information from the Utilization Reports, as well as market share, negotiating and business strategy and pricing information. *See* Fortuna Dec. (Ex. B) at ¶¶ 23-25.

11. The Utilization Reports identify the total dollar amount of claims sent to MultiPlan by the payors, and the total charges billed through MultiPlan for each area hospital in 2015. Fortuna Dec. Ex. at ¶ 8. This information reveals MultiPlan’s negotiating strategies, rates with Healthcare Providers and market share. *Id.* at ¶¶ 9-11.

12. The information is confidential and sensitive commercial business information that would result in injury to MultiPlan if the information was publically disclosed. The information would allow competitors and Healthcare Providers to determine MultiPlan’s market share and use the same to their competitive advantage. *Id.* at ¶¶ 9-12.

13. Mr. Fortuna’s executed declaration produced as part of the Federal Action, as well as drafts thereof, contain additional highly confidential and sensitive commercial business information that would result in injury to MultiPlan if the information is publically disclosed. The declaration contains information regarding MultiPlan’s negotiating strategies, market share, business model, pricing and utilization data. *Id.* at ¶¶ 23-25.

14. Accordingly, MultiPlan requests that paragraphs 9, 12, 13, 14, 16, 17, 19 and 20 of Mr. Fortuna’s prior declaration (including drafts) be maintained under seal. Attached hereto as

Exhibit C is a chart detailing the Bates numbers and specific portions of the documents MultiPlan requests be kept under seal.¹

15. Additionally, in a deposition, the parties questioned Mr. Fortuna on specific portions of his prior declaration and the drafts thereof, including the portions that MultiPlan is requesting be maintained under seal. *See* Ex. B at ¶ 25. MultiPlan therefore asks that certain portions of the deposition transcript also be maintained under seal. Attached hereto as Exhibit D is a chart detailing the page and line numbers of the specific portions of Mr. Fortuna's deposition transcript that MultiPlan requests be kept under seal.

16. Disclosure of the subject information would harm MultiPlan's competitive advantage in the market place and give its competitors an unfair advantage. Ex. B at ¶¶ 10-12, 23-25.

MultiPlan's Efforts to Maintain the Subject Information Confidentially

17. As part of its normal course of business, MultiPlan goes to great lengths to maintain and safeguard the confidential nature of the subject information. *Id.* at ¶¶ 13, 19.

18. The information is accessible only through MultiPlan's internal EnterPrice System (the "System"). Access to the System is strictly controlled and monitored. *Id.* at ¶ 14.

19. Very few of MultiPlan's 1,900 employees have direct access to the System. The only employees that have such access are the employees in MultiPlan's Healthcare Economics Department ("HCE"). *Id.* at ¶¶ 15-16.

20. MultiPlan requires that all of its employees sign a Confidential Information Statement that precludes the dissemination of the very information that is contained in the Utilization Report and Mr. Fortuna's prior declaration. In addition, as a condition of

¹ So that the ALJ may rule on this Motion, MultiPlan is providing unredacted copies of the information it has requested be kept confidential for *in camera* review.

employment, all employees are required to undergo annual confidentiality training and sign annual attestations of confidentiality. *Id.* at ¶¶ 17-18.

21. Moreover, as a standard term and condition, MultiPlan's contracts with Healthcare Providers and insurance companies provide that the reimbursement rates must be kept confidential. Similarly, as a standard term and condition, MultiPlan's contracts with payors require that the negotiated services fees must be kept confidential. *Id.* at ¶¶ 21-22.

MultiPlan's Request to Preserve the Confidential Nature of the Subject Information

22. Pursuant to Rule 3.45 and 16 CFR 4.10 (2), MultiPlan hereby seeks entry of an order maintaining its Confidential and Highly Confidential information under seal and/or otherwise protected from public disclosure.

23. 16 CFR 4.10 (2) provides that trade secrets and commercial or financial information are not required to be made public:

Trade secrets and commercial or financial information obtained from a person and privileged or confidential. As provided in section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), this exemption applies to competitively sensitive information, such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is a proprietary or highly competitive interest.

24. Similarly, under the Federal Rules of Civil Procedure, a court may issue an order protecting trade secrets and other confidential research, development, or commercial information upon a showing of "good cause." Fed. R. Civ. P. 26(c)(7). This protection can prevent disclosure or allow for its use only in a designated way. *Id.*

25. Good cause "generally signifies a sound basis or legitimate need to take judicial action." *Hobley v. Chicago Police Commander Burge*, 225 F.R.D. 221, 224 (N.D. Ill. 2004)

(finding good cause to enter a protective order). Good cause may be established by “showing that the disclosure will cause a clearly defined and serious injury.” *Id.* (citation omitted).

26. In federal actions, the good cause showing is less demanding for nonparties than parties to the litigation. *Global Material Technologies, Inc., v. Dazheng Metal Fibre Co., Ltd.*, 2015 WL 5611667 *6 (N.D. Ill. Sept. 23, 2015) (Kim, Judge).

27. The subject information falls within Section 4.10 and as the federal court found good cause exists because the subject information is highly confidential and sensitive commercial business information that would result in injury to MultiPlan if the information was publically disclosed. The information would allow competitors and Healthcare Providers to determine MultiPlan’s market share and use the same to their competitive advantage. Fortuna Dec. (Ex. A) at ¶¶ 8-12.

28. This information is the subject of confidentiality provisions in MultiPlan’s contracts with Healthcare Providers and payors. Ex. A at ¶¶ 21-22.

29. Healthcare Providers could use the information as leverage to renegotiate more favorable reimbursement rates. Such disclosure would provide Healthcare Providers with an unfair advantage in negotiations with MultiPlan. Fortuna Dec. (Ex. A) at ¶¶ 9-12. This would ultimately result in harm to MultiPlan’s clients, the healthcare payors and their customers, the healthcare consumers, because they would pay more. *Id.* at ¶¶ 9-10.

30. MultiPlan’s competitors could use the subject information to attempt to negotiate more favorable reimbursement rates with Healthcare Providers than the reimbursement rates negotiated by MultiPlan with such Healthcare Providers. *Id.* at ¶ 11.

31. In short, disclosure of the information would harm MultiPlan’s competitive advantage in the market place and give its competitors an unfair advantage. *Id.*

32. The federal court's finding that the subject information is deserving of protection is well supported. In *F.T.C. v. OSF Healthcare System*, 2012 WL 1144620 (N.D. Ill. April 5, 2012) (Kapala, Judge), the court found that documents identifying Blue Cross Blue Shield of Illinois' ("BCBSI") contract terms, contract negotiations and strategies and pricing information constituted confidential commercial information and trade secrets. The court found that disclosure of the documents would result in a competitive disadvantage to BCBSI and permit competitors to use the information for improper purposes. *See also Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002) (holding competitive business information constitutes a trade secret where its "economic value depends on its secrecy"); *SmithKline Beecham Corp. v. Pentech Pharm., Inc.*, 261 F. Supp.2d 1002, 1008 (N.D. Ill. 2003) (information about terms and conditions of contracts "that might give other firms an unearned competitive advantage" is legitimately confidential information that competitors should not have and the public does not need to know to evaluate the judiciary's handling of the litigation.).

33. For ease of reference, MultiPlan has included the charts attached as Exhibit C and Exhibit D. Exhibit C details the portions of documents MultiPlan requests be protected from disclosure. Exhibit D details the page and/ or line numbers of Mr. Fortuna's deposition that MultiPlan requests be protected from disclosure.

34. MultiPlan respectfully requests that to the extent that any party seeks to introduce the subject information at the hearing or in any pleading, that the information be maintained under seal and not be publically disclosed.

35. MultiPlan further requests that the subject information be maintained under seal indefinitely and that it be provided with reasonable notice prior to any hearing or decision as to

whether the information or documents should continue to be maintained the information under seal.

Respectfully submitted,

MULTIPLAN, INC.

By: / s / Mitchell B. Katten

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**UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 6,1
Eastern Division**

Federal Trade Commission, et al.

Plaintiff,

v.

Case No.: 1:15-cv-11473
Honorable Jorge L. Alonso

Advocate Health Care Network, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, April 5, 2016:

MINUTE entry before the Honorable Jorge L. Alonso: Pretrial conference held and continued to 4/8/16 at 10:00 a.m. Preliminary injunction hearing previously set for 4/6/16 is stricken and reset to 4/11/16 at 1:00 p.m. For the reasons stated on the record, Rush University Medical Center's motion to seal [234] is denied without prejudice. University of Chicago Medical Center's motion to seal [236] is denied without prejudice. Northwestern Memorial Healthcare's motion to seal [238] is granted. Presence Health Network's motion to seal [240] is denied without prejudice. Aetna, Inc.'s motion to seal [242] is denied without prejudice. Alexian Brothers–AHS Midwest Region Health Co.'s motion to seal [249] is denied without prejudice. Humana, Inc.'s motion for protective order and to seal [253] is granted. Bain & Company, Inc.'s motion to seal [258] is denied without prejudice. Waukegan Illinois Hospital Company, LLC.'s motion to seal [259] is denied without prejudice. UnitedHealthcare Services, Inc.'s motion for order [264] is denied without prejudice. Multiplan, Inc.'s motion to seal [268] is granted. Loyola University Health System's motion to seal [272] is denied without prejudice. Northwest Community Healthcare's motion to seal [273] is denied without prejudice. Land of Lincoln Health, Inc.'s motion to seal [274] is denied without prejudice. Astellas US LLC.'s motion to seal [278] is denied without prejudice. Cardinal Health 200 LLC.'s motion to seal [282] is granted. Swedish Covenant Hospital's motion to seal [289] is denied without prejudice. Health Care Service Corporation's motion to seal document [296] is denied without prejudice. CIGNA Corporation's motion for protective order [300] is denied without prejudice. Aon plc's motion to seal [303] is granted. All additional submissions shall be filed as directed by the court. Notice mailed by judge's staff (ntf,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

FEDERAL TRADE COMMISSION and)	
STATE OF ILLINOIS)	
)	
Plaintiffs,)	
)	
v.)	No. 15-cv11473
)	
ADVOCATE HEALTH CARE NETWORK,)	Judge Jorge L. Alonso
ADVOCATE HEALTH AND HOSPITALS)	
CORPORATION AND NORTHSORE)	
UNIVERSITY HEALTHSYSTEM.)	
)	
Defendants.)	

**DECLARATION OF RANDALL FORTUNA IN SUPPORT OF
THIRD PARTY-INTERVENOR MULTIPLAN, INC.'S MOTION TO
MAINTAIN SPECIFIC DOCUMENTS AND TESTIMONY UNDER SEAL**

I, Randall Fortuna, depose and state as follows:

1. I am the Regional Director for MultiPlan, Inc. ("MultiPlan"). MultiPlan is a healthcare cost management company that contracts with healthcare providers and then makes those contracts, which allow access to its networks, available for a fee to other organizations such as health insurance plans and employers.
2. I have been employed by MultiPlan since 1999, and have been the Regional Director since January 2015. In total, I have been involved in networking and contracting with healthcare providers on behalf of MultiPlan for 16 years.
3. I supervise MultiPlan's network development in Illinois, Minnesota, Wisconsin, North Dakota and South Dakota. I direct a group of MultiPlan employees responsible for negotiating contracts with healthcare providers, including hospitals, physicians, and outpatient ambulatory surgery centers ("Healthcare Providers"). I am responsible for ensuring the adequacy and competitiveness of our Healthcare Provider networks in my region, which includes the Chicago area. Based on my job responsibilities, I have personal knowledge of the matters set forth herein.
4. Of critical importance in MultiPlan being competitive is safeguarding our negotiating strategies, rates with Healthcare Providers and market share.
5. I work with MultiPlan's Healthcare Economics Department, which among other things, generates reports on market share and cost savings, and provides analytical analysis in support of our marketing effort.

6. In order to respond to Advocate's subpoena, MultiPlan generated utilization reports that bear Bates stamp nos. MPI 000118 and 000119 (the "Utilization Report").

7. The information contained in the Utilization Report reflects information culled from millions of claims in the Chicago Area.

8. The Utilization Report identifies the total dollar amount of claims sent to MultiPlan by the payors, and the total charges billed through MultiPlan for each area hospital for 2015.

9. The Utilization Report contains highly confidential and sensitive commercial business information that would result in injury to MultiPlan if the information was publically disclosed. The information would allow competitors and Healthcare Providers to determine MultiPlan's market share and use the same to their competitive advantage.

10. The information could be used to MultiPlan's detriment in two primary ways. First, by ascertaining MultiPlan's market share, Healthcare Providers could use the information as leverage to renegotiate more favorable reimbursement rates. Such disclosure would provide Healthcare Providers with an unfair advantage in negotiations with MultiPlan. This would ultimately result in harm to MultiPlan's clients, the healthcare payors and their customers, the healthcare consumers, because they would pay more.

11. Second, MultiPlan's competitors could use the subject information to attempt to negotiate more favorable reimbursement rates with the Healthcare Providers than the reimbursement rates negotiated by MultiPlan with such Healthcare Providers.

12. Disclosure of the information would harm MultiPlan's competitive advantage in the market place and give its competitors an unfair advantage.

13. MultiPlan treats the subject information as confidential in the normal course of its business and goes to great lengths to maintain and safeguard the confidential nature of the subject information.

14. The information is accessible only through MultiPlan's EnterPrice System (the "System"). Access to the System is strictly controlled and monitored.

15. Very few of MultiPlan's 1,900 employees have direct access to the System.

16. The only employees that have such access are the forty-four (44) employees in MultiPlan's Healthcare Economics Department ("HCE"). These employees are responsible for conducting analytical analysis of information.

17. MultiPlan requires that all of its employees sign a Confidential Information Statement that precludes the dissemination of the very information that is contained in the Utilization Report.

18. Moreover, as a condition of employment, all employees, including those with access to the System, are required to undergo annual confidentiality training and sign annual attestations of confidentiality.

19. Additionally, MultiPlan monitors employees with access to the System and maintains a list of authorized users that is regularly reviewed and updated.

20. I do not have the ability to access the System, but must request access to such data from HCE.

21. As a standard term and condition, MultiPlan's contracts with Healthcare Providers provide that the reimbursement rates must be kept confidential.

22. Similarly, as a standard term and condition, MultiPlan's contracts with payors require that the negotiated services fees must be kept confidential.

23. I have provided deposition testimony and a Declaration (the "Declaration") in connection with this matter. My deposition testimony and Declaration, as well as drafts thereof, contain highly confidential and sensitive commercial business information that would result in injury to MultiPlan if the information were publically disclosed.

24. Specifically, my Declaration (including all drafts thereof) at ¶¶ 9, 12-14 and 16-20, contains information regarding MultiPlan's negotiating strategies, market share, business model, pricing and utilization data. MultiPlan protects this information from disclosure through all of the techniques identified above in paragraphs 13-22 of this Declaration.

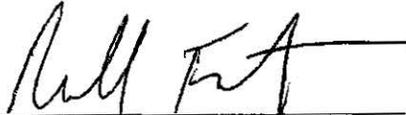
25. The same information set forth in ¶¶ 9, 12-14 and 16-20 of my prior Declaration in this matter is also contained within my deposition. Specifically, the following pages and line numbers of my deposition contain confidential information: 23:20-24; 24:1-7; 48:24; 49:1-24; 50:1-6; 64:15-24; 65:12-21; 71:19-24; 72:1-17; 75:9-13; 78:19-24; 79:1-14; 81:11-16; 83:3-10; 86:24; 87:1-18; 88:2-8, 19-23; 91:5-14; 93:20-24; 94:1-2; 94:14-17; 96:21-24; 111:13-24; 112:1-24; 113:1-2, 22-24; and 114:1-3.

26. I have personal knowledge of the facts contained within this affidavit and could testify to the same if called as a witness.

[Signature Page Follows]

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

Executed on: April 1, 2016



Randall Fortuna

Description of Document	Bates No. of Document	Portions Requested to be Kept Under Seal
Draft of Fortuna Dec (9/25/15)	MPI 000014-18	MPI 000016 at ¶¶ 9, 12-14 MPI 000017 at ¶¶ 16-19 MPI 000018 at ¶ 20
Draft of Fortuna Dec (10/14/15)	MPI 000021-25	MPI 000023 at ¶¶ 9, 12-14 MPI 000024 at ¶¶ 16-20
Draft of Fortuna Dec (10/30/15)	MPI 000028-32	MPI 000030 at ¶¶ 9, 12-14 MPI 000031 at ¶¶ 16-19 MPI 000032 at ¶ 20
Fully executed Fortuna Dec (Unredacted)	MPI 000104-108	MPI 000106 at ¶¶ 9, 12-14 MPI 000107 at ¶¶ 16-19 MPI 000108 at ¶ 20
Utilization Reports	MPI 000118-119	All Portions of MPI 000118-119

Portion of Fortuna Deposition Requested to be Kept Under Seal	Subject of Testimony
Page 7 (23:20-24, 24:1-7)	¶ 9 of Fortuna Dec.
Page 13 (48:24, 49:1-24) Page 14 (50:1-6)	¶¶ 16-17 of Fortuna Dec.
Page 17 (64:15-24, 65:12-21)	¶ 16 of Fortuna Dec.
Page 19 (71:19-24, 72:1-17)	¶¶ 16-17 of Fortuna Dec.
Page 20 (75:9-13)	¶ 17 of Fortuna Dec.
Page 21 (78:19-24, 79:1-14, 81:11-16)	¶ 17 of Fortuna Dec.
Page 22 (83:3-10)	¶ 17 of Fortuna Dec.
Page 23 (86:24, 87:1-18, 88:2-8, 19-23)	¶ 18 of Fortuna Dec.
Page 24 (91:5-14, 93:20-24)	¶ 20 of Fortuna Dec. ¶ 20 of Draft Fortuna Dec. (MPI 000018)
Page 25 (94:1-2, 94:14-17, 96:21-24)	¶ 20 of Draft Fortuna Dec. (MPI 000018) ¶ 19 of Fortuna Dec.
Page 29 (111:13-24, 112:1-24, 113:1-2, 113:22-24) Page 30 (114:1-3)	Confidential information re MultiPlan's position in marketplace/bargaining power

Notice of Electronic Service

I hereby certify that on May 11, 2016, I filed an electronic copy of the foregoing Third Party-Intervenor MultiPlan Inc.'s Motion to Maintain Specified Information, Documents and Testimony Under Seal, with:

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Chief Administrative Law Judge
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I hereby certify that on May 11, 2016, I served via E-Service an electronic copy of the foregoing Third Party-Intervenor MultiPlan Inc.'s Motion to Maintain Specified Information, Documents and Testimony Under Seal, upon:

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