

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

In the Matter of)
)
)
EVANSTON NORTHWESTERN)
HEALTHCARE CORPORATION,)
a corporation, and)
)
ENH MEDICAL GROUP, INC.,)
a corporation.)
_____)

Docket No. 9315

**UNITED HEALTHCARE OF ILLINOIS, INC.'S MOTION FOR *IN CAMERA*
TREATMENT OF CONFIDENTIAL AND COMPETITIVELY SENSITIVE
DOCUMENTS AND TESTIMONY**

Nonparty United HealthCare of Illinois, Inc. ("United") hereby moves pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. §3.45(b), for an order granting *in camera* treatment of certain documents produced by United.¹ As described more fully below and in the accompanying confidential Affidavit of Jillian Foucré ("Foucré Aff."), such documents contain current, highly-sensitive, non-public information that would cause United serious competitive injury if published in this proceeding. The materials for which *in camera* treatment is requested are attached as Exhibits A and B to the Foucré Aff. attached hereto as Exhibit 1.

¹ As set forth in United's Motion For Extension of Time to Move for *In Camera* Treatment of Certain Confidential Data filed concurrently with this motion, United also intends to seek *in camera* treatment in relation to a further exhibit – CX 3020 – which Complaint Counsel only notified United of its intention to use at trial on December 30, 2004.

Introduction

On December 13, 2004, Complaint Counsel notified United of its intent to use certain confidential United documents as potential trial exhibits. See letter to Michael Ile from Jeff Dahnke, dated December 13, 2004 (“Dahnke Letter”), attached as Exhibit 2. Complaint Counsel’s list included 10 exhibits. On December 14, 2004, counsel for Respondents Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc. (collectively “ENH”) notified United of its intent to use certain confidential United documents as potential trial exhibits. ENH’s list included 75 exhibits. See letter to Elizabeth M. Avery from Charles B. Klein, dated December 14, 2004 (“Klein Letter”), attached as Exhibit 3. Upon receiving these lists of proposed exhibits, United carefully reviewed each of the documents to determine whether the confidential material warranted *in camera* treatment. Although United, from a business standpoint, would prefer that any information it considers confidential remain outside the public domain, it understands that its own treatment of that information does not mean the materials merit *in camera* protection. Therefore, United has carefully limited the number and nature of the documents for which it requests *in camera* protection.² United does not seek *in camera* treatment for any documents noticed by Complaint Counsel in the Dahnke Letter. All documents for which United seeks *in camera* treatment were documents noticed as potential trial exhibits by Respondents. As United will demonstrate herein, the public disclosure of these materials (as well as disclosure to ENH

² These documents were predominately designated “Restricted Confidential, Attorney Eyes Only” under the Protective Order and were thus afforded the highest level of protection during the discovery process. Neither the FTC nor ENH has ever contested any of these designations.

of documents not related expressly to United's negotiations with ENH and previously shared with ENH), attached as Exhibits A and B to the Foucré Aff., will likely result in a clearly defined, serious injury to United, thus justifying *in camera* treatment under the standard articulated by the Commission in In re Kaiser Aluminum & Chem. Corp., 103 F.T.C. 500 (1984), General Foods Corp., 95 F.T.C. 352 (1980), Bristol-Myers Co., 90 F.T.C. 455 (1977) and H.P. Hood & Sons, Inc., 58 F.T.C. 1184 (1961).

From the lists of proposed trial exhibits, United has identified two limited classes of materials for seeking *in camera* protection: (1) contracts, pricing, negotiations and related documents including correspondence and internal working documents relating to pricing and other contractual terms, contract amendments and other similar correspondence, and (2) documents used for strategic planning. Public disclosure of one or more of these documents is likely to cause direct, serious harm to United's competitive position and to the marketplace at large. Indeed, revealing the information would: (1) allow United's competitors to gain a commercial advantage as they build and maintain their own provider networks; (2) give ENH and other providers a tactical advantage in future negotiations with United; and (3) enable providers to peg the prices they charge United to the prices of other providers, potentially resulting in a decrease of competition between providers and higher prices to United. At the very least, disclosure of the information United seeks to protect would deprive United of its current bargaining position and as this Court has found, "[t]he likely loss of business advantages is a good example of a clearly defined, serious injury." Hoechst Marion Roussel, Inc., Docket No. 9293, 2000 FTC Lexis 138, *7 (F.T.C. Sept. 19, 2000) (internal citations omitted).

Argument

Information is entitled to *in camera* treatment if it is “sufficiently secret and sufficiently material to [the party’s] business that disclosure would result in serious competitive injury.” General Foods Corp., 95 F.T.C. at 355. When judging whether the information is both secret and material, the Court looks at six factors which were outlined in Bristol-Myers and adopted from the Restatement of Torts §757:

- (1) the extent to which the information is known outside of respondent’s business;
- (2) the extent to which it is known by employees and others involved in respondent’s business;
- (3) the extent of measures taken by respondent to guard the secrecy of the information;
- (4) the value of the information to respondent and his competitors;
- (5) the amount of effort or money expended by respondent in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Bristol-Myers Co., 90 F.T.C. at 456-57; see also Hoechst Marion Roussel, 2000 FTC Lexis at *6.

Here, these factors favor a finding that public disclosure would cause a clearly defined and serious injury to United. This is true even when the injury is balanced against the “importance of the information in explaining the rationale of Commission decisions.” General Foods Corp., 95 F.T.C. at 355. Indeed, the public’s understanding of the FTC’s case against ENH does not depend on a nonparty’s strategies, provider information, or reimbursement rates. Moreover, it is a matter of well-settled law that a nonparty’s request for *in camera* treatment should be treated with more leniency than a request made by a party to the litigation. Kaiser Aluminum & Chem. Corp., 103 F.T.C. at 500; In re Schering-Plough Corp., Docket No. 9297, Order on Motions for *In*

Camera Treatment of Documents Listed on Parties' Exhibit Lists at 1 (F.T.C. Jan. 24, 2002).³

I. *IN CAMERA* TREATMENT IS WARRANTED FOR CERTAIN UNITED DOCUMENTS

A. Contracts, Pricing, Negotiations and Related Materials

The reimbursement rates that United pays to providers and the terms related to those rates are central to the maintenance of its provider networks and, by extension, its competitive position. The contracts between United and its providers are often the result of intense negotiations in which reimbursement rates are a key component. Foucré Aff. ¶8. United's production, in response to the FTC's investigation and the subpoenas *duces tecum* issued by both the ENH and the FTC, included the documents listed in Exhibit A. These documents contain information related to current pricing by ENH and non-ENH providers, and well as negotiations on other significant commercially-sensitive terms. These documents memorialize rates in many different ways, including in charts listing the contract rate as a percentage of Medicare or of billed charges, in emails or letters memorializing agreed upon rates, in fee schedules, in the form of contracts or amendments to the contracts themselves, on spreadsheets modeling alternate negotiation strategies or in charts listing the average dollar payment per CPT code.

³ See also Kaiser Aluminum & Chem. Corp., Docket No. 9080 C, 1977 FTC Lexis 1, *12 (F.T.C. Dec. 30, 1977) (requests for *in camera* treatment by third parties should be "received as favorably as possible"); Crown Cork & Seal Co., 71 F.T.C. 1714, 1717 (F.T.C. 1967) ("The request of a third-party by-stander is deserving of special solicitude . . .").

Disclosing reimbursement rates and related materials to ENH and the public at large could cause serious injury to United, not only in future negotiations, but also immediately after disclosure. Indeed, it is possible that providers who are unhappy with their current reimbursement rates would use the rates paid to other providers as a tool for reopening negotiations with United. Similarly, those providers who are currently negotiating with United could also use this information to their advantage. See Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1345 (7th Cir. 1986) (finding that the disclosure of provider price information by a payor to another provider could be used by that provider to his or her advantage in future negotiations). Equally damaging both to United and healthcare price competition in the Chicago area, is the potential for United's competitors to obtain access to this information, which they could use in their own provider negotiations.

Because of the sensitivity of the current fee and pricing information and related terms, only the parties involved (*i.e.*, United and the provider with whom United contracts) are privy to the information. *Foucré Aff.* at ¶10. United does not disclose this information to other providers, and it certainly does not disclose it to other payors; in addition to harming United's competitive position, disclosing such information could provide the basis for an antitrust violation. See, e.g., U.S. v. United States Gypsum Co., 438 U.S. 422, 443 (1969) ("Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act."); see also Ball Mem'l Hosp., 784 F.2d at 1346 (finding access by providers to a payor's hospital pricing data "could turn an antitrust suit into the basis of effective collusion.").

Moreover, neither ENH nor the general public would be able to obtain this information elsewhere. Even access to such information within United is limited. Documents are kept in locked files, and only certain individuals have access to the systems where the information is stored. Foucré Aff. at ¶10. Therefore, United requests that the documents and testimony concerning rates paid under contracts contained in Exhibit A be subject to *in camera* treatment for a period of five years.

B. Strategic Planning Documents

Because of the competitive sensitivity of United's strategic planning, United asks this Court to grant *in camera* treatment for the documents listed in Exhibit B. Each of these documents contains information on United's current and future business. For example, UHCENH 3312-3316 provides information on United's strategic and tactical objectives for contracting with Chicago area providers. The document not only provides market analysis, but also describes United's future plans. Access to this information would enable United's competitors to understand United's strategies, strengths and weaknesses in the market, putting United at a competitive disadvantage, thereby injuring United. See United States v. Dentsply Int'l, Inc., 187 F.R.D. 152, 159 (D. Del. 1999) (holding that disclosure of a "nonparty competitors' sales and marketing plans, financial forecasts, margin, pricing, cost and customer information, etc., would obviously constitute a clearly defined and serious injury to all nonparties"). Indeed, the circulation of these documents within United is very limited. Foucré Aff. at ¶11.

United keeps this information strictly confidential, and it is not available from any other source outside the company. Much time and money is devoted to compiling the reports themselves. Given the importance of this information to United's

current operations and competitive position, United requests that the documents be afforded *in camera* protection for a period of five years.

II. *IN CAMERA* TREATMENT IS ALSO WARRANTED FOR POSSIBLE TRIAL TESTIMONY BY UNITED'S REPRESENTATIVES

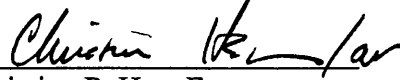
Counsel for the Federal Trade Commission has designated United employee Jillian Foucré as a potential trial witness. Among the topics about which Complaint Counsel has indicated it intends to question Ms. Foucré are United's operations, contracting practices with providers including the contract and negotiations with ENH. Testimony on all of these topics could result in the disclosure of the same information contained in the documents described above. Thus, United also requests that any trial testimony, either upon direct examination or cross examination by either party on any of the these topics, be subject to *in camera* treatment for a period of three to five years depending on the applicable date of the contract containing the reimbursement information.

Conclusion

As a third party, United has already been subject to the tremendous burden of complying with the FTC's investigation and the subpoenas issued by both parties. It should not be penalized for that compliance. Because United has met the standard for *in camera* treatment for the documents attached as Exhibits A and B, United respectfully requests an Order, in the form as attached as Exhibit 4, granting United's motion for *in camera* protection.

Dated: January 4, 2004

Respectfully submitted,



Christine P. Hsu, Esq.
WEIL, GOTSHAL & MANGES LLP
1501 K Street
Suite 100
Washington, DC 20005-1411

Helene D. Jaffe, Esq.
Elizabeth M. Avery, Esq.
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153-0119
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Counsel for Non-Party United HealthCare of
Illinois, Inc.

Exhibits 1, A(1-40), B(1-13),
2, and 3 have been filed
In Camera.

CERTIFICATE OF SERVICE

I, Anant Raut, hereby certify that on January 7, 2005, I caused a true and correct copy of United HealthCare of Illinois, Inc.'s Public Record version of their Motion for *In Camera* Treatment of Confidential and Competitively Sensitive Documents and Testimony, to be served on the following persons:

By hand delivery:

Hon. Stephen McGuire
Chief Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

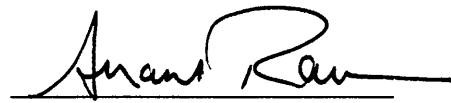
By Federal Express

David Dahlquist
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, Illinois 60601-9703
Counsel to Evanston Northwestern Healthcare Corporation.
and ENH Medical Group, Inc.

By Federal Express

Thomas Brock, Esq.
Federal Trade Commission
600 Pennsylvania Ave. NW
Room H-360
Washington, DC 20580

Jeffrey Dahnke
Federal Trade Commission
Room 5231
601 New Jersey Ave. NW
Washington, DC 2001
Counsel for the Federal Trade Commission


Anant Raut