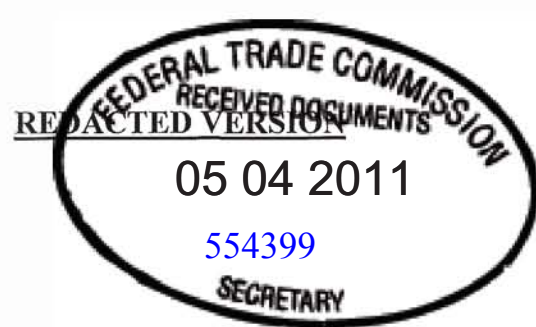


ORIGINAL



IN THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF:

PROMEDICA HEALTH SYSTEMS, INC.,
a Corporation

DOCKET NO. 9346

REDACTED PUBLIC VERSION

**NON-PARTY FINDLEY DAVIES, INC.'S MOTION FOR *IN CAMERA* TREATMENT
OF PROPOSED EVIDENCE**

Consistent with the February 7, 2011 Scheduling Order, Findley Davies, Inc. (“Findley Davies”), which is not a party to the above-captioned matter, respectfully moves for an order granting *in camera* treatment of information that the Federal Trade Commission (“FTC”) and ProMedica Health System, Inc. (“ProMedica”) have designated as potential trial exhibits and intend to introduce into evidence in the administrative trial in this matter.

On April 27, 2011, the FTC identified the following eleven documents that it intends to introduce into evidence that were produced by Findley Davies in response to a subpoena issued by the FTC in this matter:

- FTC-FD-00000062 (“Exhibit 1”)¹
- FTC-FD-00000091 (“Exhibit 2”)
- FTC-FD-00000092 (“Exhibit 3”)
- FTC-FD-00000096 (“Exhibit 4”)
- FTC-FD-00000128 (“Exhibit 5”)
- FTC-FD-00000129 (“Exhibit 6”)
- FTC-FD-00000227 (“Exhibit 7”)
- FTC-FD-00000234 (“Exhibit 8”)

¹ All documents subject to this Motion are attached as Exhibits 1-17 to the Declaration of Neville Arjani in Support of this Motion (“Arjani Decl.”) attached hereto as Exhibit A.

- FTC-FD-00000235 (“Exhibit 9”)
- FTC-FD-00000133 (“Exhibit 10”)
- FTC-FD-00000135 (“Exhibit 11”)

On April 28, 2011, ProMedica identified the following five documents that it intends to introduce into evidence:

- FIN-000264 (“Exhibit 12”)
- FIN-000805 (“Exhibit 13”)
- FIN-FTC-000683 (“Exhibit 14”)
- FIN-FTC-001468 (“Exhibit 15”)
- FIN-FTC-001804 (“Exhibit 16”)

Also, the FTC and ProMedica intend to introduce excerpts of Neville Arjani’s deposition transcript. Mr. Arjani is the Chief Actuary of Findley Davies and legal actuary for the ProMedica and St. Luke Hospital (“SLH”) retirement plans. Arjani Decl. at ¶1. He was deposed in this matter subject to a subpoena issued by the FTC. Those portions of Mr. Arjani’s deposition testimony that the FTC and ProMedica intend to introduce at trial are underlined in Exhibit 17. Findley Davies only seeks to protect those portions of the deposition designations that are highlighted in Exhibit 17.

A. Findley Davies’ Confidential Information Should Be Protected Under 16 C.F. R. § 3.45.

The information contained in Exhibits 1 through 17 is competitively sensitive and proprietary, and reflects personal sensitive information of ProMedica and SLH employees that is held in strict confidence by ProMedica, SLH, and Findley Davies. Public disclosure of these documents is likely to cause direct serious harm to both Findley Davies’ competitive position and potentially to ProMedica and SLH employee’s personal financial and medical information. Therefore, pursuant to 16 C.F.R. § 3.45(b), Findley Davies respectfully moves for an Order

granting *in camera* treatment of the confidential documents (Exhibits “1 through 17”) identified in the Declaration of Neville Arjani in support of this Motion.

The documents that are described in this Motion warrant *in camera* treatment as provided by 16 C.F.R. § 3.45(b), which states in pertinent part:

the Administrative Law Judge may order material, or portions thereof, offered into evidence . . . to be placed *in camera* on a finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting their *in camera* treatment. . . . No material . . . may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which *in camera* treatment will expire, and including: (1) A description of the material; (2) A statement of the reasons for granting *in camera* treatment; and (3) A statement of the reasons for the date on which *in camera* treatment will expire.

In *Bristol-Myers*, the FTC outlined six factors to be weighed when determining materiality and secrecy: (1) the extent to which the information is known outside of the applicant's business; (2) the extent to which the information is known by employees and others involved in the applicant's business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456-57 (1977). Under 16 C.F.R. Section 3.45(b), a party seeking *in camera* treatment must show that public disclosure of the document in question “will result in a clearly defined, serious injury to the person or corporate whose records are involved.” *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). A party can satisfy this requirement by establishing that the document 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). Here, “the courts

have generally attempted to protect confidential business information from unnecessary airing.” *Hood*, 58 F.T.C. at 1188. Under this standard, protection of Findley Davies’ documents is warranted.

B. Findley Davies Took Significant Measures to Protect the Confidential Information.

Findley Davies has taken significant steps to protect the confidential nature of this information contained in Exhibits 1 through 17. Arjani Decl. at ¶7. Findley Davies produced the documents and testimony under the compulsory subpoena processes and pursuant to the January 6, 2010 Protective Order Governing Discovery Material (“Protective Order”), which is intended to protect this very information. *Id.* The Protective Order requires that “any documents or portion thereof submitted by a respondent or a third party during the Federal Trade Commission investigation or during the course of this proceeding ... shall be treated as confidential material for purposes of this Order.” *Id.* Likewise, consistent with the Protective Order, each Exhibit subject to this Motion is marked “CONFIDENTIAL.” *Id.*

Additionally, Findley Davies took substantial measures to guard the sensitive, proprietary, confidential information contained in Exhibits 1 through 17 by limiting dissemination of this information internally and externally. *Id.* at ¶8. Only a limited number of Findley Davies’ employees have access to this confidential information. *Id.* Further, all employees are required to log-on with a username and password before accessing any client information. *Id.* Due to Findley Davies’ measures to protect the disclosure of this information, it would be extremely difficult for any outside person to access or re-create this information. *Id.*

C. Disclosure of the Confidential Information Would Cause Serious Competitive Injury to Findley Davies.

Exhibits 1 through 16 contain analysis of ProMedica and St. Luke's retirement plans. *Id.* at ¶3. Specifically, Exhibits 1 through 16 contain actual and estimated calculations of funding status and variables relied upon in preparation of those calculations; final and draft financial disclosure statements and actuarial valuations; and projected summaries and valuations of retirement benefits, liabilities, funding status, and cash contributions needed to avoid penalties. *Id.* These calculations, estimates, and projections are based upon confidential, sensitive, and personal information provided by St. Luke's and ProMedica regarding its employees. *Id.* Furthermore, Findley Davies' prepared these valuations and projections based upon its own proprietary calculations, which took hundreds of hours and over one year for Findley Davies to create for this client alone. *Id.* Revelation of how Findley Davies prepared its reports; how it values, analyzes and evaluates certain variables; and its valuation methods for achieving optimum funding status in accordance with Federal guidelines, which is commercially sensitive business information, would allow its competitors to usurp analysis and valuation processes that took years to develop.² *Id.* Further, the majority of the documents are confidential drafts that reflect estimates relating to projected benefit obligations, asset valuations, and unfunded status of the ProMedica and St. Luke retirement plans. *See e.g.* Exhibits 1-11, 13, 15-16. If Exhibits 1 through 16 were disclosed, Findley Davies would suffer irreparable harm and its competitors would confer an unfair competitive advantage on it in the marketplace. Arjani Decl. at ¶3.

² While Exhibit 14 does not contain or reflect retirement plan calculations, it does contain internal Findley Davies discussions regarding strategies relating to the preparation of and impact of such calculations. This information should also receive *in camera* treatment. Arjani Decl. at ¶3, fn. 1.

Additionally, Exhibits 1 through 16 reflect highly sensitive, personal information regarding employees' of ProMedica relating to retirement plan benefits. *Id.* at ¶4. If Findley Davies were required to disclose such personal and sensitive information regarding its clients without further protection, clients and potential clients could see this as a threat to their confidential, sensitive information. *Id.* Disclosure of Exhibits 1 through 16 would have an immediate and detrimental effect on Findley Davies ability to compete. *Id.*

Exhibit 17 contains deposition testimony of Findley Davies' lead actuary for the ProMedica and St. Luke retirement plans. *Id.* at ¶5. Findley Davies is not seeking to have the deposition in its entirety subject to *in camera* inspection; rather, it seeks to have the deposition excerpts identified by the parties, which reflect the variables, calculations, and processes used by Findley Davies in preparing the plan funding status reports, protected. *In re Union Oil Co. of Calif.*, 2005 F.T.C. LEXIS 9, at * 1 (Jan. 19, 2005) (granting *in camera* treatment where parties sought it only "for narrowly tailored portions of deposition testimony"). Arjani Decl. at ¶5. Those designations for which Findley Davies seeks *in camera* treatment are highlighted on Exhibit 17.

During the deposition, Mr. Arjani discusses the proprietary methods used by Findley Davies in evaluating funding status, and its confidential advice to its clients regarding application of cash contributions, penalties, and market impacts. Arjani Decl. at ¶6. Disclosure of the analysis and methods utilized by Findley Davies would enable competitors to gain knowledge it took years to develop and cause Findley Davies to lose its competitive advantage. *Id.*

D. Public Interest in Disclosure of these Exhibits Is Substantially Outweighed by the Likelihood of Serious Competitive Harm to Findley Davies.

The Commission has emphasized that non-parties deserve a “special solicitude” in requesting *in camera* treatment for confidential, business information. *In the Matter of Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984) (order directing *in camera* treatment for sales statistics over five years old). Orders granting reasonable periods of *in camera* treatment encourage non-parties to cooperate with future discovery requests and adjudicative proceedings. *Id.* Here, Findley Davies has fully cooperated with the discovery demands in this case and public disclosure of its highly confidential information will not prohibit the resolution of this matter or lead to further public understanding of these proceedings. As a result, the balance of interest clearly favors *in camera* protection for Exhibits 1 through 17. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 456-57 (1977).

E. Protection of Exhibits 1 through 16 Should Extend for Five Years.

The nature of the highly confidential information contained in Exhibits 1 through 17 warrants lasting protection. Arjani Decl. at ¶9. The calculations and valuation processes are vital to Findley Davies’ competitive position and business strategies. *Id.* Accordingly, Findley Davies respectfully requests that Exhibits 1 through 17 be afforded *in camera* protection for a period of five years.

CONCLUSION

The famous British jurist, William Blackstone, wrote that “the public good is in nothing more essentially interested, than in the protection of every individual's private rights.” The matter before us is no different. In order to preserve the public good, we must preserve the individual private rights of Findley Davies and protect its confidential, proprietary information

from public disclosure. Findley Davies has satisfied the standard for *in camera* protection under the Commission's Rules of Practice and, therefore, Exhibits 1 through 17 should be extended this protection for five years.

Respectfully submitted,

/s/ Stacy RC Berliner 
Stacy RC Berliner (0076683)
Thacker Martinsek LPA
2330 One Cleveland Center
1375 East 9th Street
Cleveland, OH 44114
Tel: (216) 456-3840
Fax: (216) 456-3850
sberliner@tmlpa.com

Attorney for Non-Party Findley Davies, Inc.

IN THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF:

PROMEDICA HEALTH SYSTEMS, INC.,
a Corporation

DOCKET NO. 9346

REDACTED PUBLIC VERSION

PROPOSED ORDER

On May 4, 2011, non-party Findley Davies, Inc. (“Findley Davies”) filed its Motion for *In Camera* Treatment of Proposed Evidence (“Motion”) contained in various documents that have been identified by the Federal Trade Commission and ProMedica Health System, Inc. as potential trial exhibits.

IT IS HEREBY ORDERED that Findley Davies’s Motion is GRANTED. The information set forth in the following Findley Davies documents 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:

- FTC-FD-00000062 (“Exhibit 1”)
- FTC-FD-00000091 (“Exhibit 2”)
- FTC-FD-00000092 (“Exhibit 3”)
- FTC-FD-00000096 (“Exhibit 4”)
- FTC-FD-00000128 (“Exhibit 5”)
- FTC-FD-00000129 (“Exhibit 6”)
- FTC-FD-00000227 (“Exhibit 7”)
- FTC-FD-00000234 (“Exhibit 8”)
- FTC-FD-00000235 (“Exhibit 9”)
- FTC-FD-00000133 (“Exhibit 10”)
- FTC-FD-00000135 (“Exhibit 11”)
- FIN-000264 (“Exhibit 12”)
- FIN-000805 (“Exhibit 13”)

- FIN-FTC-000683 (“Exhibit 14”)
- FIN-FTC-001468 (“Exhibit 15”)
- FIN-FTC-001804 (“Exhibit 16”)
- Highlighted Excerpts of Neville Arjani’s (“Exhibit 17”)

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

ORDERED: _____
D. Michael Chappell
Chief Administrative Law Judge

EXHIBIT A

IN THE UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of _____)
)
ProMedica Health System, Inc.)
)
_____)

Docket No. 9346

**DECLARATION OF NEVILLE ARJANI IN SUPPORT OF FINDLEY DAVIES, INC.’S
MOTION FOR *IN CAMERA* TREATMENT**

I, Neville Arjani, declare as follows:

1. “I am currently the Chief Actuary of Findley Davies, Inc. (“Findley Davies”). Since my employment with Findley Davies in November 2000, I have been the primary actuary for ProMedica Health System, Inc. (“ProMedica”) providing it with actuarial services for all pension and employee benefit plans. In early 2010, Findley Davies assisted ProMedica with analyzing the funded status of the pension plan for St. Luke’s Hospital (“St. Luke’s”) and providing estimated funding requirements and estimated expense calculations for financial reporting purposes. Later in 2010, Findley Davies was appointed to be the actuary for the St. Luke’s pension plan. At that time, I had direct responsibility for analyzing and directing all actuarial services relating to St. Luke’s pension plan, including developing methods and calculations for determining the funding requirements and expense calculations to be reflected in financial statements. As such, I am familiar with the processes by which Findley Davies analyzes, calculates, and values funding status to evaluate expenses, liabilities, and cash contributions in order to avoid federally mandated penalties for underfunded plans.”

2. “I have reviewed the documents for which Findley Davies seeks *in camera* treatment. By virtue of my current position for Findley Davies, I prepared and/or am familiar

with the information contained in the documents at issue. Based upon my review of the documents, my knowledge of Findley Davies's business, and my familiarity with the confidential protection afforded to this type of information by Findley Davies, it is my belief that disclosure of these documents to the public and to Findley Davies' competitors would cause serious competitive injury to Findley Davies."

3. "Exhibits 1 through 16 contain analysis of ProMedica and St. Luke's retirement plans. Specifically, Exhibits 1-16 contain actual and estimated calculations of funding status and variables relied upon in preparation of those calculations; final and draft financial disclosure statements and actuarial valuations; and projected summaries and valuations of retirement benefits, liabilities, funding status, and cash contributions needed to avoid penalties. These calculations, estimates, and projections are based upon confidential, sensitive, and personal information provided by St. Luke's and ProMedica regarding their employees. Furthermore, Findley Davies prepared these valuations and projections based upon its own proprietary calculations, which took hundreds of hours and over one year for Findley Davies to create for these clients alone. Revelation of how Findley Davies prepared its reports; how it values, analyzes and evaluates certain variables; and its valuation methods for achieving optimum funding status in accordance with Federal guidelines, which is commercially sensitive business information, would allow its competitors to usurp analysis and valuation processes that took years to develop.¹ Further, the majority of the documents are confidential drafts that reflect estimates relating to projected benefit obligations, asset valuations, and unfunded status of the ProMedica and St. Luke retirement plans. *See e.g.* Exhibits 1-11, 13, 15-16. If Exhibits 1

¹ While Exhibit 14 does not contain or reflect retirement plan calculations, it does reflect internal Findley Davies discussions regarding strategies relating to the preparation of and impact of such calculations. This information should also receive *in camera* treatment.

through 16 were publically disclosed, Findley Davies would suffer irreparable harm and its competitors would confer an unfair competitive advantage on it in the marketplace.”

4. “Additionally, Exhibits 1 through 16 reflect highly sensitive, personal information regarding employees of ProMedica relating to retirement plan benefits. If Findley Davies were required to disclose such personal and sensitive information regarding its clients without further protection, clients and potential clients could see this as a threat to their confidential, sensitive information. Disclosure of Exhibits 1 through 16 would have an immediate and detrimental effect on Findley Davies’ ability to compete in the marketplace.”

5. “Exhibit 17 contains my deposition testimony regarding the ProMedica and St. Luke retirement plans. I am the lead actuary for those plans. Findley Davies is not seeking to have the deposition in its entirety subject to *in camera* inspection; rather, it seeks to have the deposition excerpts identified by the parties and that reflects the variables, calculations, and processes used by Findley Davies in preparing the plan funding status reports, protected.”

6. “During the deposition, I discuss the proprietary methods used by Findley Davies in evaluating funding status, and its confidential advice to its clients regarding application of cash contributions, penalties, and market impacts. Disclosure of the analysis and methods utilized by Findley Davies would enable competitors to gain knowledge it took years to develop and cause Findley Davies to lose its competitive advantage.”

7. “Findley Davies has taken significant steps to protect the confidential nature of the information contained in Exhibits 1 through 17. Findley Davies produced the documents and testimony under the compulsory subpoena processes and pursuant to the January 6, 2010 Protective Order Governing Discovery Material (“Protective Order”), which is intended to protect this very information. The Protective Order requires that “any documents or portion

thereof submitted by a respondent or a third party during the Federal Trade Commission investigation or during the course of this proceeding ... shall be treated as confidential material for purposes of this Order.” Likewise, consistent with the Protective Order, each document is marked ‘CONFIDENTIAL.’”

8. “Findley Davies took substantial measures to guard the sensitive, proprietary, confidential information contained in Exhibits 1 through 17 by limiting dissemination of this information internally and externally. Only a limited number of Findley Davies’ employees have access to this confidential information. Further, all employees are required to log-on with a username and password before accessing any client information. Due to Findley Davies’ measures to protect the disclosure of this information, it would be extremely difficult for any outside person to access or re-create this information.”

9. “The nature of the highly confidential information contained in Exhibits 1 through 17 warrants lasting *in camera* protection. The calculations and valuation processes are vital to Findley Davies’ competitive position and business strategies.”

"I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 3rd day of May, 2011 in Ohio"

Neville A. Arjani

Neville Arjani

SUBSCRIBED AND SWORN TO before me by the said Neville Arjani on the 3rd day of May, 2011.

Carol A. Gruttaduria

Notary Public in and for the State of Ohio
CAROL A. GRUTTADURIA
Notary Public, State of Ohio
My Commission Expires March 13, 2012
(Recorded in Lake County)

Printed Name

CAROL A. GRUTTADURIA
Notary Public, State of Ohio
My Commission Expires March 13, 2012
(Recorded in Lake County)

My Commission Expires: 3/13/2012

EXHIBIT 1

REDACTED

EXHIBIT 2

REDACTED

EXHIBIT 3

REDACTED

EXHIBIT 4

REDACTED

EXHIBIT 5

REDACTED

EXHIBIT 6

REDACTED

EXHIBIT 7

REDACTED

EXHIBIT 8

REDACTED

EXHIBIT 9

REDACTED

EXHIBIT 10

REDACTED

EXHIBIT 11

REDACTED

EXHIBIT 12

REDACTED

EXHIBIT 13

REDACTED

EXHIBIT 14

REDACTED

EXHIBIT 15

REDACTED

EXHIBIT 16

REDACTED

EXHIBIT 17

REDACTED

CERTIFICATE OF SERVICE


The undersigned counsel hereby certifies that the foregoing instrument was served on
May 4, 2011 upon the following via FedEx Overnight:

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H110
Washington, DC 20580

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room 172
Washington, DC 20580

The undersigned counsel hereby certifies that the foregoing instrument was served on
May 4, 2011 upon the following via email:

Matthew J. Reilly
Jeffrey H. Perry
Sara Y. Razi
Jeanne H. Liu
Alexis J. Gilman
Stephanie L. Reynolds
Janelle L. Filson
Maureen B. Howard
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
mreilly@ftc.gov
jperry@ftc.gov
srazi@ftc.gov
jliu@ftc.gov
agilman@ftc.gov
sreynolds@ftc.gov
jfilson@ftc.gov
mhoward@ftc.gov



Stacy RC Berliner