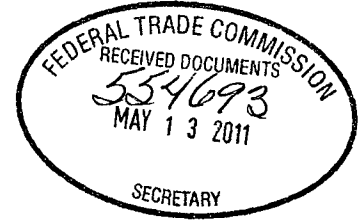


ORIGINAL

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



In the Matter of)
)

ProMedica Health System, Inc.,)
Respondent.)
_____)

DOCKET NO. 9346

ORDER ON RESPONDENT’S MOTION FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Commission’s Rules of Practice and the Scheduling Order entered in this matter, on May 5, 2011, Respondent filed a motion seeking *in camera* treatment for designated documents (“Motion”). On May 11, 2011, Respondent also filed a Motion for Leave to File a Supplemental Motion for *In Camera* Treatment and its Supplemental Motion, which sought *in camera* treatment for additional designated documents. Complaint Counsel filed an Opposition on May 12, 2011.

Respondent’s Motion for Leave to File a Supplemental Motion is GRANTED. As set forth below, the Motion, as supplemented, is DENIED WITHOUT PREJUDICE.

II.

Under Rule 3.45(b) of the Federal Trade Commission’s Rules of Practice, the Administrative Law Judge may order that material “be placed *in camera* only after finding that its 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). Accordingly, in proceedings at the Federal Trade Commission, “requests for *in camera* treatment must show ‘that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.’” *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 1984 FTC LEXIS 60, at *1 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Applicants for *in camera* treatment must “make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of decisions at the Commission is “the principal countervailing consideration weighing in favor of disclosure.” *Id.*

The Federal Trade Commission recognizes the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Hood*, 58 F.T.C. at 1186. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188.

The Commission has recognized that it may be appropriate to provide *in camera* treatment for business records to be introduced as evidence. *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at *2 (April 5, 1982); *see Hood*, 58 F.T.C. at 1188-89; *Kaiser Aluminum*, 103 F.T.C. at 500. Where *in camera* treatment is granted for business records, such as business strategies, marketing plans, pricing policies, or sales documents, it is typically extended for two to five years. *E.g.*, *In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, at *2 (Nov. 22, 2004); *In re Int’l Ass’n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14 (June 26, 1996); *Champion Spark Plug*, 1982 FTC LEXIS 85 at *2 and 1982 FTC LEXIS 92, at *2 (March 4, 1982). In addition, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (citing *General Foods*, 95 F.T.C. at 353; *Crown Cork*, 71 F.T.C. at 1715).

In order to sustain the burden for withholding documents from the public record and to overcome the presumption that *in camera* treatment may be withheld for information that is three or more years old, an affidavit or declaration demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury is required. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004).

III.

Respondent has moved for *in camera* treatment for approximately 964 of the 2,682 exhibits submitted by the parties, including hundreds of testimony excerpts. In support of its request, Respondent provides a declaration from Kathleen Hanley, Chief Financial Officer for ProMedica Health System, Inc., and from Lori Johnson, Chief Financial Officer and Chief Operating Officer for St. Luke’s Hospital.

Complaint Counsel points out that some documents for which Respondent seeks *in camera* treatment have already been publicly disclosed in the Complaint and in the federal district court proceedings. Any material that has previously been made public will not be afforded *in camera* treatment. Complaint Counsel also notes several other documents that: contain no discernable information that would be relevant to competitors; contain little if any information of current competitive significance; have been publicly disclosed or discussed in the related federal district court proceeding; or are more than three years old, with no explanation of why they warrant exception to the

presumption that documents older than three years old do not merit *in camera* treatment.

The burden rests on Respondent to demonstrate that the evidence sought to be withheld from the public record is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. The Motion and the declarations provided by Respondent fail to make this showing. Accordingly, Respondent has not met its burden for withholding all of the nearly 1,000 exhibits for which it seeks *in camera* treatment from the public record.

IV.

The scope of Respondent's Motion far exceeds the protections contemplated by Rule 3.45. Respondent's request for *in camera* treatment is DENIED WITHOUT PREJUDICE.

Respondent is hereby ORDERED to review the documents for which it seeks *in camera* treatment and narrow its request to only those documents which it can show comply with the Commission's strict standards for granting *in camera* treatment.

Respondent is hereby advised that *in camera* treatment will be granted for Respondent's contracts with commercial health plans and for documents containing highly-sensitive patient data. Respondent may renew its request for *in camera* treatment for such materials and shall identify such documents by exhibit numbers in any future motion.

Respondent may file a renewed motion for *in camera* treatment no later than May 18, 2011. Respondent need not re-submit a copy of the exhibits for which it seeks *in camera* treatment with its renewed motion. Complaint Counsel shall file an opposition to any such renewed motion no later than May 23, 2011.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 13, 2011