

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of)
)
PROMEDICA HEALTH SYSTEM, INC.)
a corporation.)
)

Docket No. 9346
PUBLIC

**RESPONDENT PROMEDICA HEALTH SYSTEM, INC.'S
UNOPPOSED SUPPLEMENTAL MOTION FOR
IN CAMERA TREATMENT OF NEW TRIAL EXHIBITS**

Respondent ProMedica Health System, Inc., hereby moves for *in camera* treatment of certain exhibits introduced during the hearing including designations from the parties' expert witness depositions, pursuant to 16 C.F.R. §3.45, Paragraph 7 of the Scheduling Order.

In support of this motion, Respondent provides its accompanying memorandum, table, and Supplemental Declarations of Lori Johnston and Kathleen Hanley.

WHEREFORE, Respondent ProMedica Health System, Inc. respectfully requests that this Court grant *in camera* treatment to the documents described in the attached memorandum and listed in the accompanying table.

Respectfully submitted,

Dated: August 24, 2011

Christine Devlin

By: CHRISTINE G. DEVLIN

David Marx, Jr.
Stephen Y. Wu
Amy J. Carletti
Erin C. Arnold
MCDERMOTT WILL & EMERY LLP
227 West Monroe Street
Chicago, Illinois 60606
Telephone: (312) 372-2000
Facsimile: (312) 984-7700

dmarx@mwe.com
swu@mwe.com
acarletti@mwe.com
earnold@mwe.com

Jennifer L. Westbrook
Vincent C. van Panhuys
Carrie G. Amezcua
Christine G. Devlin
Daniel Powers
James B. Camden
MCDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005-3096
Telephone: (202) 756-8000
Facsimile: (202) 756-8087
jwestbrook@mwe.com
vvanpanhuys@mwe.com
camezcua@mwe.com
cdevlin@mwe.com
dgpowers@mwe.com
jcamden@mwe.com

*Attorneys for Respondent ProMedica
Health System, Inc.*

I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Unopposed Supplemental Motion for *In Camera* Treatment of New Trial Exhibits, Public Version, upon the following individuals by hand on August 24, 2011.

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

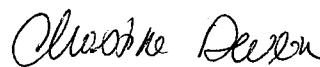
Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room 172
Washington, DC 20580

I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Unopposed Supplemental Motion for *In Camera* Treatment of New Trial Exhibits, Public Version, upon the following individuals by electronic mail on August 24, 2011.

Matthew J. Reilly
Jeffrey H. Perry
Sara Y. Razi
Jeanne H. Liu
Alexis J. Gilman
Stephanie L. Reynolds
Janelle L. Filson

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



Christine Devlin

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

In the Matter of)
)
PROMEDICA HEALTH SYSTEM, INC.)
a corporation.)
)

Docket No. 9346
PUBLIC

**RESPONDENT PROMEDICA HEALTH SYSTEM, INC.'S MEMORANDUM IN
SUPPORT OF ITS UNOPPOSED SUPPLEMENTAL MOTION FOR *IN CAMERA*
TREATMENT OF NEW TRIAL EXHIBITS**

Pursuant to Rule 3.45 of the Federal Trade Commission's Rules of Adjudicative Practice, Respondent ProMedica Health System, Inc. ("ProMedica") submits its Memorandum in Support of its Unopposed Supplemental Motion for *In Camera* Treatment of New Trial Exhibits.

I. Introduction

Over the course of the hearing, Complaint Counsel introduced into evidence new exhibits. On August 19, 2011, Complaint Counsel gave Respondent's Counsel notice of fifteen documents it intends to admit into evidence. Counsel for Respondent reviewed these fifteen documents and determined that four of them require *in camera* treatment because they are competitively sensitive documents relating to payor contracting, St. Luke's financial status, and potential joinder efficiencies.

Additionally, Respondent moves for *in camera* treatment of certain designations from the parties' expert witnesses depositions.

Public disclosure of these materials would result in a serious competitive injury to Respondent and St. Luke's. Counsel for ProMedica has determined that the four documents and certain deposition designations qualify under the standards as set forth in Paragraph 7 of the scheduling order for *in camera* treatment. These documents are similar to documents for which

the Court has previously granted *in camera* treatment on May 25, 2011. Complaint Counsel do not oppose this motion.

II. The Clearly Defined, Serious Injury Standard

An applicant seeking *in camera* protection for material offered into evidence may receive *in camera* treatment when “its public disclosure will likely result in a clearly defined, serious injury.” 16 C.F.R. § 3.45(b). An applicant can meet that standard by establishing that the evidence is “sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury.” *See In the Matter of Evanston Northwestern Healthcare Corp.*, 2005 F.T.C. LEXIS 27, at *1 (Feb. 9, 2005) (internal citations omitted). In making this determination, administrative courts review six factors to determine secrecy and materiality: (1) the extent to which the information is known outside of the applicant’s business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *See In the Matter of Bristol-Myers Co.*, 90 FTC LEXIS 455, at *5-6 (Nov. 11, 1997).

III. The New Trial Exhibits and Expert Witness Depositions Designations Meet The Clearly Defined, Serious Injury Standard

All six factors support granting Respondent’s supplemental motion for *in camera* treatment. First, Respondent treats as confidential the four documents for which it seeks *in camera* treatment. The information in these materials is not known to the public or generally outside ProMedica or St. Luke’s. These documents are not a matter of public record and have not been fully disclosed in any public context.

Second, the materials reflect the strategic decision-making of senior executives from ProMedica and St. Luke's. The confidential information in these documents is not generally known to all employees within ProMedica or St. Luke's. These documents also regard payor contracting with non-parties.

Third, ProMedica and St. Luke's have carefully guarded the secrecy of these materials. ProMedica and St. Luke's produced the documents pursuant to the discovery process, but otherwise they have not publicly disclosed the information found within the confidential communications.

Fourth, competitor hospitals, such as Mercy Health Partners or the University of Toledo Medical Center, would benefit significantly from gaining access to these materials. The materials reflect ProMedica's and St. Luke's business strategies and contracting initiatives, which are competitively sensitive. These documents also include correspondence with non-parties. Hospital competitors and other commercial health plans would benefit significantly and unfairly from gaining access to these materials.

Fifth, ProMedica and St. Luke's has spent significant money, time, and effort in developing their strategic goals and negotiating with non-parties. The public disclosure of this information would harm ProMedica's and St. Luke's business operations.

It would be difficult for another party to replicate the information found in these materials because they reflect the work product of senior executives with years of experience in these organizations. The materials are unique and tailored to the respective entities and not known to the general public.

Respondent and St. Luke's would suffer irreparable injury if the information contained in these documents were disclosed to the public. Disclosure of strategic decision-making,

competitively sensitive efficiency estimates, and contract negotiations with non-parties would cause injury to ProMedica and St. Luke's. Your Honor has recognized the confidential and competitively sensitive nature of payor contracts and negotiations by granting *in camera* treatment for these types of documents in this matter. *See* Orders Granting Respondent's Renewed Motion for *In Camera* Treatment, and Non-Parties' Motions for *In Camera* Treatment, dated May 25, 2011.

With regard to the expert witness deposition designations, the parties' experts had access to competitively sensitive information generated during discovery. During their depositions, the parties' experts testified about competitively sensitive information gleaned from discovery including specific contract provisions between hospitals and non-party payors, cost coverage ratios, billed charges and discharges, non-party information already granted *in camera* treatment, specific dollar amounts charged for various services, sensitive financial data, and discussions of documents already granted *in camera* treatment. Allowing public disclosure of certain expert witness deposition designations would circumvent the safeguards provided by the protective order entered in this matter.

Finally, the information for which Respondent seeks *in camera* treatment remains relevant and significant today. Respondent and St. Luke's seek *in camera* treatment for information within three years old. Nevertheless, even aged data is sensitive and remains worthy of protection because they reflect St. Luke's business strategies and can impact future negotiations between Respondent or St. Luke's and commercial health plans. Disclosure of these materials would cause competitive harm to ProMedica, St. Luke's, and FrontPath in future contract negotiations. *See in re Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. LEXIS 500, at *2 (May 25, 1984) (holding that material that was over five years old was still sensitive and

deserving of *in camera* treatment where “a serious injury would be done by release of this information, which they have never made available to the public”).

IV. **Expiration Date**

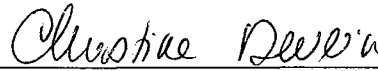
ProMedica seeks temporary *in camera* treatment of these confidential exhibits. Specifically, ProMedica seeks *in camera* treatment for a period of three years. Administrative courts grant *in camera* treatment for business records for a period of two to five years. See *Evanston Northwestern Healthcare Corp.*, 2005 F.T.C. LEXIS 27, at *2 (Feb. 9, 2005); *In the Matter of E.I. Dupont de Nemours & Co.*, 97 F.T.C. LEXIS 116, 118 (Jan. 21, 1981) (granting financial data *in camera* treatment for three years); *In re Int’l Ass. Of Conf. Interpreters*, 1996 F.T.C. LEXIS 298 (June 26, 1996) (granting contracts *in camera* treatment for three years). Therefore, documents that are three to five years old remain relevant, material, and confidential, and warrant *in camera* treatment.

V. **Conclusion**

Pursuant to 16 C.F.R. §3.45, ProMedica respectfully moves for *in camera* treatment of the proposed exhibits identified in the accompanying table.

Dated: August 24, 2011

Respectfully submitted,



By: CHRISTINE G. DEVLIN

David Marx, Jr.

Stephen Y. Wu

Amy J. Carletti

Erin C. Arnold

MCDERMOTT WILL & EMERY LLP

227 West Monroe Street

Chicago, Illinois 60606

Telephone: (312) 372-2000

Facsimile: (312) 984-7700

dmarx@mwe.com

swu@mwe.com

acarletti@mwe.com
earnold@mwe.com

Jennifer L. Westbrook
Vincent C. van Panhuys
Carrie G. Amezcua
Christine G. Devlin
Daniel Powers
James B. Camden
MCDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005-3096
Telephone: (202) 756-8000
Facsimile: (202) 756-8087
jwestbrook@mwe.com
vvanpanhuys@mwe.com
camezcua@mwe.com
cdevlin@mwe.com
dgpowers@mwe.com
jcamden@mwe.com

*Attorneys for Respondent ProMedica
Health System, Inc.*

I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Memorandum in Support of its Unopposed Supplemental Motion for *In Camera* Treatment of New Trial Exhibits, Public Version, upon the following individuals by hand on August 24, 2011.

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

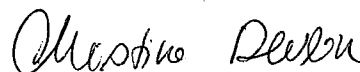
Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room 172
Washington, DC 20580

I, Christine Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent's Memorandum in Support of its Unopposed Supplemental Motion for *In Camera* Treatment of New Trial Exhibits, Public Version, upon the following individuals by electronic mail on August 24, 2011.

Matthew J. Reilly
Jeffrey H. Perry
Sara Y. Razi
Jeanne H. Liu
Alexis J. Gilman
Stephanie L. Reynolds
Janelle L. Filson

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



Christine Devlin

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

In the Matter of)
)
PROMEDICA HEALTH SYSTEM, INC.)
 a corporation.)
)

Docket No. 9346

**[PROPOSED] ORDER GRANTING RESPONDENT'S UNOPPOSED
SUPPLEMENTAL MOTION FOR *IN CAMERA* TREATMENT
OF NEW TRIAL EXHIBITS**

Upon consideration of Respondent, ProMedica Health System, Inc.'s Unopposed Supplemental Motion for *In Camera* Treatment of New Trial Exhibits, it is hereby ordered that the Motion is **GRANTED** and *in camera* treatment will be given to the exhibits listed in the Table below for the period of time indicated.

PX/RX Number	Length of <i>In Camera</i> Treatment	Expiration of <i>In Camera</i> Treatment
PX00257	Three Years	August 24, 2014
PX00905	Three Years	August 24, 2014
PX00915	Three Years	August 24, 2014
PX00923	Three Years	August 24, 2014
PX01950	Three Years	August 24, 2014
RX-1	Three Years	August 24, 2014
PX01951	Three Years	August 24, 2014
RX-2	Three Years	August 24, 2014
PX01954	Three Years	August 24, 2014
RX-6	Three Years	August 24, 2014

Dated: August __, 2011.

The Honorable D. Michael Chappell
Chief Administrative Law Judge

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

In the Matter of)
)
PROMEDICA HEALTH SYSTEM, INC.)
a corporation.)
)

Docket No. 9346

STATEMENT REGARDING MEET AND CONFER

Respondent's Counsel, Jennifer Westbrook, conferred telephonically with Complaint Counsel, Jeanne Liu, on August 22, 2010 at approximately 3:00 p.m., and via email on August 23, 2011 at approximately 1:30 p.m., regarding Respondent's Supplemental Motion for *In Camera* Treatment of New Trial Exhibits. Complaint Counsel indicated that they do not oppose Respondent's motion.

Dated: August 24, 2011

Respectfully submitted,



By: CHRISTINE G. DEVLIN

David Marx, Jr.

Stephen Y. Wu

Amy J. Carletti

Erin C. Arnold

MCDERMOTT WILL & EMERY LLP

227 West Monroe Street

Chicago, Illinois 60606

Telephone: (312) 372-2000

Facsimile: (312) 984-7700

dmarx@mwe.com

swu@mwe.com

acarletti@mwe.com

earnold@mwe.com

Jennifer L. Westbrook
Vincent C. van Panhuys
Carrie G. Amezcua
Christine G. Devlin
Daniel Powers
James B. Camden
MCDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005-3096
Telephone: (202) 756-8000
Facsimile: (202) 756-8087
jwestbrook@mwe.com
vvanpanhuys@mwe.com
camezcua@mwe.com
cdevlin@mwe.com
dgpowers@mwe.com
jcamden@mwe.com

*Attorneys for Respondent ProMedica
Health System, Inc.*

DM_US 29679182-2.049344.0010
8/23/11