

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,  
IN AND FOR LEON COUNTY, FLORIDA

MANAGED CARE OF NORTH  
AMERICA, INC., a Florida  
Corporation d/b/a MCNA  
DENTAL PLANS,

Plaintiff,

v.

Case No. 2016 CA 1012

FLORIDA HEALTHY KIDS  
CORPORATION, a Florida  
Non-Profit Corporation,

Defendant,

And

DELTA DENTAL INSURANCE  
COMPANY,

Defendant/Intervenor.

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**OMNIBUS ORDER ON MOTION FOR CLARIFICATION,  
EMERGENCY MOTION FOR STAY AND ON EVIDENTIARY  
HEARING REGARDING CERTAIN INFORMATION ALLEGED  
TO BE TRADE SECRET PROTECTED AGAINST PUBLIC DISCLOSURE,  
AND FINAL JUDGEMENT**

THIS CAUSE came before the Court on October 18,  
2016 for an evidentiary hearing as to whether certain  
information was subject to disclosure under Florida's  
Public Records laws.

The Court entered its non-final order on October 25, 2016. On October 26, the plaintiff filed a motion for clarification of order and an emergency motion for temporary stay of order. On October 27, the intervenor/defendant filed its response to the motion for clarification and a response and amended response to the emergency motion for stay.

The Court took the pending matters under advisement and ruled that the October 18 order be held in abeyance pending resolution of the pending matters. On November 7, the plaintiff filed a copy of the transcript of the October 18 hearing.

The cause came before the Court on December 14, 2016 for review of the transcript and resolution of all pending matters.

The October 18, 2016 order is hereby vacated and replaced with this Omnibus Order, which addresses the issues at the evidentiary hearing and the post-hearing issues.

The Court having carefully considered the testimony, credibility and demeanor of the witnesses at the October 18 hearing and having carefully considered the other evidence in the case, having reviewed the transcript [referenced as T. followed by the page number(s)] and other post-hearing filings, having taken judicial notice of the court file, and being otherwise fully advised in the premises, it is hereby

FOUND AND DETERMINED from the more credible evidence as follows:

### **Background**

1. Managed Care of North America [MCNA] responded to an Invitation to Negotiate [ITN] which the Florida Healthy Kids Corporation [FHK] extended in 2015, relating to a dental plan for the more than 100,000 enrollees in FHK.

2. As explained by its attorney, and not disputed by the other parties, FHK is a private, non-for-profit corporation established by the legislature in section

624.91, Florida Statutes, required to choose health and dental plans through a competitive bidding process, an S-CHIP. The government in the sunshine statute relating to open government meetings does not apply. Chapter 119, the Florida Public Records Law is relevant by virtue of the FHK contract with the Florida Agency for Healthcare Administration [AHCA]. [T.pp. 148-9].

3. FHK selected MCNA from the responses and entered into a dental managed care contract with MCNA.

4. The ITN and contract reflected that the documents responsive to the ITN were to be treated as public records in accordance with Florida's Public Records laws, but also provided that the vendor could identify documents as to which trade secret protection was believed to apply.

5. Unlike its response to the earlier 2012-2013 ITN, MCNA in 2015 marked a large part of its submission as protected trade secret, including all of "Volume II", which contained the list of providers MCNA

included as comprising its network, a summary of providers by county and "geoaccess maps", maps that showed the location of the network providers in the county or other geographic area pertinent to that portion of the response volume.

6. The contract required that upon request for a copy of the ITN response, FHK would notify MCNA and MCNA would - if agreement with the requesting party were not accomplished - file suit for declaratory relief as to whether the requested documents were actually entitled to trade secret protection.

7. Earlier this year, one of the attorneys for bidder Delta Dental [Delta] asked for the MCNA responsive packet of documents, including the geoaccess maps and other information in Volume II.

8. FHK notified MCNA about the request and MCNA filed suit for declaratory relief against FHK; Delta subsequently intervened, and clarified it was looking only for the Volume II information.

9. The parties [including intervenor Delta] stipulated the other materials submitted for in camera review could be returned to MCNA, as there was no extant request as to any documents other than those in Volume II.

10. Volume II contained the geoaccess maps, showing pictorially where the MCNA providers were located throughout Florida. It also contained excel spread sheets showing the names, addresses and other identifying information as to the providers in the MCNA dental network, as the ITN specified. Volume II also contained the summaries, by county, of each of the MCNA providers, as specified in the ITN.

### **Pre-Hearing Discovery**

11. Intervenor Delta noticed several depositions to take place prior to the evidentiary hearing. An impending hurricane resulted in agreed cancellation of those dates and substitute dates being selected by Delta.

12. MCNA moved for protective order, but did not set the motion for hearing, and did not produce the witnesses whose depositions had been noticed.

13. Delta's motion to compel discovery was pending at the time of the October 18 hearing.

14. The hearing went forward without objection as a hybrid hearing, combining a traditional evidentiary hearing with an in camera review by the Court of the allegedly trade secret documents.

### **The Evidentiary Hearing**

15. After the Court had received and reviewed in camera [prior to the hearing] all of the materials as to which MCNA asserted a trade secret privilege, the Court scheduled and held the accelerated evidentiary hearing mandated by section 119.11, Florida Statutes.

16. All three parties were present, with counsel, and various representatives of MCNA and Delta.

17. Testimony was taken as to the geoaccess maps, summary sheets and excel spreadsheets of the provider

network information [the 2166 pages of information in MCNA Volume II] provided by plaintiff MCNA to Florida Healthy Kids in response to ITN 2015-02.

18. Intervenor Delta Dental claimed the records in Volume II were public records; plaintiff MCNA contended the records, even if public records subject to disclosure pursuant to chapter 119, Florida Statutes, were nevertheless confidential, protected as trade secret by Florida's trade secret statute.

19. Before the hearing, MCNA and Delta submitted a variety of affidavits and memoranda, and Delta filed an order from an Iowa case in which the question of whether certain of MCNA's records had to be produced under Iowa's public record and trade secret laws.

20. At the hearing, counsel for MCNA and Delta made arguments, and three witnesses [MCNA corporate officer Salama, Delta corporate officer Gillespie and MCNA C.O.O. Feingold] testified, and various exhibits were moved into evidence.



21. Based on the instructions in the ITN, and on the other evidence, the Volume II information relates to dental providers in three categories: those under contract with MCNA and who have agreed to provide dental care to FHK, those under contract with MCNA to provide dental care, but who have not agreed yet to treat FHK members and those for whom the contracting [with MCNA] has not been completed. Only those in the third category are shown with shading behind the name and other information in the Volume II printouts.

22. MCNA has contended from the outset that all of the Volume II information is trade secret and should not be turned over, notwithstanding that the providers in the first category are listed on its publicly viewable website and that those in the second category may be provided to those members or potential members who call the MCNA office. Clearly, there is no secrecy to the providers in the first two categories. Similarly, because the geoaccess maps appear to contain only those providers in the first two categories, there

is no trade secret provision applicable to that information.

23. In its post-hearing for clarification, MCNA for the first time focuses exclusively on the providers in the third category, which it refers to as "prospective" or "non-contracted" providers. At the hearing, MCNA did not identify the number of providers who were not on the website; none of the MCNA witnesses could give the number or percentage of the MCNA dentists available to FHK members who did not want to be on the website. [T. 88-89]. No witness provided testimony about the number of providers whose names were shown against the shaded backdrop indicating - by the FHK ITN rules - that they were not contracted to be available to the FHK members.

24. The test for determining whether public information is exempt from disclosure as a trade secret pursuant to sections 815.045 and 815.04(3), Florida Statutes (2016) is found by review of the statutory definition of trade secret in section 812.081(3), Florida Statutes (2016):

"Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof, irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and

4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

25. For the sake of argument, Delta does not contest that providers in the third category are secret because, as Mr. Feingold testified, uncontracted providers are not known to anyone. Delta does contend there is no merit or substance to the MCNA argument that the secret non-contracted providers not on the website, listed only in the shaded background portions of the 2166 pages in Volume II, have value.

26. The Volume II provider list in question contains 2166 pages, with pages 1 through 1116 containing the county information of primary dentists; the other pages contain information regarding specialty

dental providers, public providers, other contracted services and affiliated entities.

27. Because the testimony did not illustrate the extent of the allegedly trade secret [not known to anyone], numbers of non-contracted providers with the shaded background, the Court has re-reviewed and scrutinized pages 1 through 1116 to determine the number of primary dental providers in the category now illuminated by the motion for clarification. As it relates to the primary dental provider category, each section begins with a summary for the county, followed by the listing of the providers with the pertinent provider information and concludes with the geoaccess map.<sup>1</sup>

28. Each page has space for up to 25 providers with their information.

29. For Alachua County, a total of six providers have a shaded background, out of some 70 entries. For Baker County, one of nine providers has a shaded

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<sup>1</sup> The geoaccess maps do not identify any prospective [shaded] providers. Salama testimony, T. 80.

background. For Bay County, 10 of 28 providers have a shaded background. For Bradford County, five of 75 providers have a shaded background.

30. The data includes dentists in adjacent counties to reflect dentists within 20 minutes of driving time; many dentists are listed more than once, and the Bradford entries, for example, include dental providers from Clay and Alachua counties.

31. Brevard County has 19 providers with shaded backgrounds out of 209, Broward County, 83 of approximately 2500 listed providers had the shaded backgrounds indicating they were prospective or non-contracted.

32. Calhoun County had one of 10, Charlotte County had 13 of 106, Citrus County 7 of approximately 70, Clay County 23 of approximately 540, Collier County 8 of 101 and Columbia County, 0 of 9. Desoto County had 6 of 16, Dixie County 0 of 8 and Duval County 25 of approximately 603.

33. Escambia County had shading for 11 of 17. Flagler County had shading for 3 of 137 and Franklin County had shading for 0 of 4. Gadsden County had 4 of 17, Gilchrist County 0 of 12, Glades County 1 of 4 and Gulf County 0 of 3. Hamilton County showed shading for 0 of 9, Hardee County 2 of 38, Hendry County 2 of 26, Hernando County 16 of approximately 142, Highlands County 0 of 30, Hillsborough County 49 of approximately 1150 and Holmes County 0 of 31. Indian River County has shading for 15 of 238.

34. Jackson County has shading for 3 of 18 and Jefferson County has shading for 1 of 11. Lafayette County has shading for 1 of 6, Lake County for 33 of approximately 1427, Lee County for 23 of 190, Leon County for 4 of 16, Levy County for 6 of 46 and Liberty County for 0 of 9.

35. Madison County has shaded backgrounds for 0 of 6, Manatee County for 28 of 269, Marion County for 14 of 223, Martin County for 4 of 217, Miami-Dade County

for 76 of 1750 approximately and Monroe County for 0 of 86.

36. Nassau County has shaded backgrounds for 16 of 265. Okaloosa County has shaded backgrounds for 9 of 26, Okeechobee County for 0 of 5, Orange County for 51 of 2029 and Osceola County for 35 of 1293. Palm Beach County had backgrounds shaded for 45 of 2211, Pasco County for 35 of approximately 800, Pinellas County for 39 of 964, Polk County for 29 of approximately 1100 and Putnam County for 9 of 51.

37. Saint Johns County has shading for 25 of 538, Saint Lucie County for 7 of approximately 420, Santa Rosa County for 11 of 17, Sarasota County for 30 of 138, Seminole County for 33 of 1570 approximately, Sumter County for 13 of 295 and Suwannee County for 0 of 8. Taylor County had shading for 1 of 7, Union County for 4 of 25, Volusia County for 17 of 1081 approximately, Wakulla County for 1 of 11, Walton county for 16 of 32 and Washington County for 0 of 34.



38. The Court noted during the review that at least two of the providers were listed both with and without shading at different locations.

39. The amount of shading for the specialty dental providers appears similar to that of primary providers. The bottom line is that very few of the names in any section of Volume II have shading, meaning that very few of the names in Volume II can credibly be viewed as significant in value or any other measure.

40. While Mr. Feingold enthusiastically testified that, to him, everything had value, his saying so did not make it so. Indeed, his testimony regarding the non-visible, secret providers was not credible, nor was his testimony about trade secret for the providers visible on the website or disclosable through phone call, i.e., those in volume II without shading.

41. The terms "of value" are not defined by the statute; thus, it is proper to apply the plain meaning of those words. The term "of" means "belonging to,

relating to, or connected with." <http://www.merriam-webster.com/dictionary/of>. The pertinent and plain meaning of the term "value" is the following:

1. a fair return or equivalent in goods, services, or money for something exchanged.
2. the monetary worth of something: marketable price.
3. relative worth, utility, or importance <a good value at the price> <the value of base stealing in baseball> <had nothing of value to say>
4. a numerical quantity that is assigned or is determined by calculation of measurement <let x take on positive values> <a value for the age of the earth>
5. the relative duration of a musical note
6. relative lightness or darkness of a color: luminosity: the relation of one part in a picture to another with respect to lightness and darkness
7. something (as a principle or quality) intrinsically valuable or desirable <sought material values instead of human values - W. H. Jones>

Merriam-Webster's Collegiate Dictionary [tenth

Edition]. The dictionary definition reflects something having value involves an objective, measurable worth, not a subjective feeling or wishful thinking of the sort displayed by C.O.O. Feingold.

This is corroborated by the statutory definition of trade secret in Section 688.002(4):

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:  
(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and  
(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

42. It is clear from the overwhelming number of non-shaded entries in Volume II that the vast majority of Volume II is simply not secret and is not a trade secret. The purpose of having a network of providers is so that people will know who the providers are for them to see. The information is by contract, information that will be made available to the public, and MCNA's arguments to the contrary are non-credible and border on the frivolous.

43. In its motion for clarification, MCNA moves from trying to shield the entirety of Volume II to focusing the shaded background entries.

44. Some names are shown in some places without shading and in other places with shading, indicating

that MCNA has placed the person on the website or would release the provider's information if asked, meaning that the person is a part of the network to which FHK members and the public are entitled.

45. To the extent there are providers listed only with a shaded background, [a very small number of those included in Volume II], their listings are information without value. They have no contract to care for FHK members and are not under contract with MCNA. [If MCNA did contract with the shaded providers, to care for FHK their information would become public. The undisputed evidence showed that S-Chip provider lists are to be updated no less frequently than every 30 days]. MCNA may not have had any contact with the shaded-background providers, but may have simply chosen to just add them to their response to the ITN, knowing that they had no value because they are not available to treat FHK members and are not part of the MCNA.

46. As to the third and fourth statutory elements of trade secret, MCNA offered no evidence that the

shaded background providers was for use by the business, nor did MCNA offer any evidence to show that listing non-contracted, shaded background providers allowed it to obtain an advantage over others.

47. It is clear from the evidence MCNA's list of shaded background providers, has no value and is unlike, and simply not comparable to, a customer list or supplier list.

48. Dental providers, like others in the medical community may make business arrangements with more than one insurer at a time. That a person is a shaded background provider or even a network provider without shaded background on MCNA's list does not indicate whether they are involved as a provider or prospective provider with any other entity. As noted by Delta "*a non-contracted dentist is not providing anything to MCNA*". Delta response to motion for clarification, pp. 9-10.

Based on the foregoing, the Court having carefully reviewed and analyzed the information in Volume II, and

being otherwise fully advised in the premises, it is hereby

FOUND AND ORDERED:

1. As to Volumes I and III containing all information not contained in Volume II, the Court accepts the parties' stipulation that MCNA may make arrangements to retrieve the Volume 1 information from Judicial Assistant Underwood and the Clerk's Office, as Delta has no request pending for that information. The request for relief as to Volume I and III is denied as moot.

2. The undisputed testimony as to the identity of the MCNA providers [excel spread sheets and summaries by county] makes clear that the vast majority of the information is not intended to be kept secret, even if it is not displayed on the MCNA public website. MCNA personnel repeatedly indicated that they would provide that information to persons calling the MCNA customer call center for providers in the FHK/MCNA dental

network who do not appear on the website. Similarly, the testimony and other evidence made clear that the identity of contracted providers is information intended to be available to FHK members and prospective members, while only a very small amount of the names in volume II are not part of the network and therefore of no value and not eligible to be treated as trade secret.

3. As to the geoaccess maps, the testimony and evidence indicate that the maps were not viewed as trade secret in the Florida system in the 2012-2013 contract, and were not viewed as trade secret in the Iowa case. Given the greater weight of the credible evidence, the geoaccess maps cannot be appropriately categorized as trade secret.

4. The geoaccess maps in Florida relative to the MCNA Response to the 2015 ITN are not protected trade secret and, on the record before the Court, must be produced to Delta.

5. The MCNA spread sheet with the full list of Florida MCNA providers and the summary lists by county are not intended to be kept confidential, even if they are not visible on the MCNA website. The names of the non-contracted or prospective providers are not trade secret and are not protected. This information is not protected trade secret, and must be provided to Delta pursuant to Florida's Public Records law.

6. Within 48 hours, i.e. by 5:00 p.m. E.T. on Monday, December 19, 2016, MCNA and FHK shall provide Delta with all of the Volume II information and the geoaccess maps, and shall retrieve Volume I and Volume III from Judicial Assistant Underwood as the parties previously stipulated.

7. The motion for clarification is otherwise denied as moot.

8. All other pending motions are denied. It is

ORDERED AND ADJUDGED that MCNA takes nothing by this action. Delta Dental is the prevailing party and



is entitled to recover its fees and costs, for which the Court retains jurisdiction. MCNA and FHK shall timely provide (by 5:00 p.m. 12/19/16) the documents to Delta Dental.

ORDERED this 16th day of December, 2016 in Chambers, in Tallahassee, Leon County, Florida.



KAREN GIEVERS  
Circuit Judge

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