STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MECOSTA

CHANGE TO WIN,

Plaintiff,

v.

FERRIS STATE UNIVERSITY,

Defendant.

Case No. 09-19001-CZ

Hon. Ronald C. Nichols
Circuit Court Judge

Margaret Kwoka
(admitted pro hac vice)
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PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

NOW COMES the Plaintiff, Change to Win, by and through its attorneys, PUBLIC CITIZEN LITIGATION GROUP and the law offices of KALNIZ, IORIO & FELDSTEIN CO., and hereby submits its Brief in Support of its Motion for Summary Disposition pursuant to MCR 2.116(C)(9) and (10).

INTRODUCTION

Plaintiff Change to Win brought this action under the Michigan Freedom of Information Act (FOIA) to compel Defendant Ferris State University (Ferris State) to produce an unredacted copy of a contract between Ferris State and CaremarkPCS Health L.P. (Caremark) and the marketing materials provided by Caremark in soliciting that contract. Ferris State, a public university, responded to Change to Win's FOIA request by producing eighty-five pages of records, some of which were heavily redacted based on a claim that the redacted material was exempt from disclosure under FOIA's trade secrets exemption. In withholding the redacted sections of the records, Ferris State is violating the Michigan FOIA because no public contract may be withheld from the light of public scrutiny based on the trade secrets exemption.

STATEMENT OF FACTS

Caremark is a pharmacy benefit management company (PBM), which employers and health insurance providers hire to administer their prescription drug benefit programs. *See* Casey Cabalquinto's Aff., May 5, 2009, Ex. A. Caremark is the second-largest PBM in the United States, and, in 2007, it merged with CVS, the nation's largest retail pharmacy chain. Ferris State, in its capacity as a public employer, has contracted with Caremark to provide PBM services. *See* Cabalquinto Aff. Ex. A at 1.

Plaintiff Change to Win is a six million member partnership of seven labor unions founded in 2005 to represent workers in 21st century industries. It is engaged in efforts to reform healthcare and increase accountability and lower costs in healthcare-related industries. As part of this effort, in August 2008, Change to Win submitted to Ferris State a FOIA request for copies of the contract between Ferris State and Caremark and any marketing materials submitted to Ferris State by Caremark. Compl. Ex. 1; Ans. ¶ 5.

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In response, Ferris State provided eighty-five pages of documents with substantial redactions. Compl. Ex. 1; Cabalquinto Aff. Ex. A. As can be discerned from the unredacted portions of the contract, the redactions include the prices that Ferris State must pay Caremark for various administrative services and for the prescription drugs Caremark provides to Ferris State employees under the contract. *See* Cabalquinto Aff. Ex. A at 25, 38-40, 45-55. The unredacted portions of the contract also enumerate Caremark's key obligations under the contract, but the specifics of these obligations are each redacted. *See generally id.* By way of example, redacted portions include the extent of the network of participating pharmacies Caremark must provide as measured by the percent of covered individuals who must live within a certain number of miles of a participating pharmacy, *id.* at 8; the percent of participating pharmacies Caremark must audit, *id.* at 9; the number of days within which Caremark must dispense and ship a certain portion of mail order prescriptions, *id.* at 64; the percent of various types of claims and prescriptions that Caremark must process accurately, *id.* at 64-65; the average number of seconds within which Caremark must answer inbound customer service calls, *id.* at 63; the time period within which Caremark must resolve or initiate resolution of a covered individual's problem, *id.* at 12; the number of days within which Caremark must reimburse a covered individual's submitted claim, *id.* at 12; how often Caremark's satisfaction of various performance standards will be monitored, *id.* at 63; the overall participant plan satisfaction ratings guaranteed by Caremark, *id.* at 65; and the number of days from the end of each month within which Caremark must provide an integrated management report to Ferris State, *id.* at 56.

Ferris State's withholdings, which include various crucial contract terms, effectively prevent accountability to the public for the way it is spending taxpayer dollars and scrutiny of the terms of the contract for any potential waste or abuse of its duty to the public.

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STANDARD OF REVIEW

Change to Win moves for summary disposition pursuant to M.C.R. 2.116(C)(9), under which judgment shall enter against a defendant that has "failed to state a valid defense to the claim asserted against him or her." A motion brought pursuant to this rule is tested by the "pleadings alone, with the court accepting all [of the non-moving party's] well-pleaded allegations as true." *See Grebner v. Clinton Charter Township*, 216 Mich. App. 736, 739 (1996). Summary disposition is appropriate under this provision where the nonmoving party's defenses are "so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery." *Id.*

Change to Win also moves for summary disposition pursuant to M.C.R. 2.116(C)(10), under which judgment on a claim is appropriate if the proffered evidence fails to establish a "genuine issue as to any material fact," and the moving party is entitled to judgment as a matter of law. "A motion under M.C.R. 2.116(C)(10) tests the factual sufficiency" of the pleadings of the nonmoving party. *Corley v. Detroit Board of Educ.*, 470 Mich. 274, 278 (2004) (quoting *Maiden v. Rozwood*, 461 Mich. 109, 119 (1999)).

ARGUMENT

I. CHANGE TO WIN'S FOIA REQUEST FOR A PUBLIC CONTRACT WAS DENIED IN PART AND FERRIS STATE NOW MUST DEMONSTRATE THAT THE WITHHELD RECORDS ARE EXEMPT FROM DISCLOSURE.

FOIA provides the public with "information regarding the affairs of government and the official acts of those who represent them as public officials . . . so that [the public] may fully participate in the democratic process." M.C.L. § 15.231(2). "The thrust of the FOIA is a policy of full and complete disclosure." *Nicita v. City of Detroit*, 194 Mich. App. 657, 662 (1992)

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(citing *Hagen v. Dep't of Education*, 431 Mich. 118, 123 (1988)). Accordingly, the Michigan FOIA gives members of the public the presumptive right to access government records:

> Except as expressly provided in [specific exemptions], upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body.

M.C.L. § 15.233; *see International Union, United Plant Guard Workers of America (UPGWA) v. Dep't of State Police*, 422 Mich. 432, 441 (1985) (FOIA "presumes records are disclosable" and even those categories listed as exempt are "narrowly restricted in the exception sections themselves").

A FOIA exemption may be raised as an affirmative defense to withholding records. *Messenger v. Consumer & Industry Services*, 238 Mich. App. 524, 536 (1999), *appeal denied* 463 Mich. 980 (2001). "Courts narrowly construe any claimed exemption and place the burden of proving its applicability on the public body asserting it." *Detroit Free Press, Inc. v. City of Southfield*, 269 Mich. App. 275, 281 (2005), *appeal denied*, 475 Mich. 860 (2006). This Court reviews *de novo* a determination to withhold, in full or in part, a public record. M.C.L. § 15.240(4). Therefore, if this Court "determines [that] a public record is not exempt from disclosure[, it] shall order the public body to cease withholding or to produce all or a portion of a public record wrongfully withheld." *Id.*

Ferris State admits that Change to Win submitted a request under FOIA, Compl. ¶ 5, Ans. ¶ 5, and that, in response, Ferris State released only a redacted version of its contract with Caremark and a redacted version of marketing materials submitted by Caremark. Compl. ¶ 9, Ans. ¶ 9. Ferris State has claimed the redactions are proper because the information is "trade

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secret or commercial or financial information" and thus exempt under the Michigan FOIA. Def.'s Affirmative Defenses ¶ 4; *see* M.C.L. § 15.243(1)(f).

> The Michigan FOIA is clear on the rights of aggrieved persons to sue in court:
>
> If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option: (a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.
> (b) Commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

M.C.L. § 15.240(4). Change to Win elected the second of the two available options. Contrary to Ferris State's claim, Def.'s Affirmative Defenses ¶ 2, no further action was necessary under the Michigan FOIA because Change to Win had exhausted its administrative remedies when it received Ferris State's final determination to withhold in part the records at issue. *See* Compl. ¶ 9, Ans. ¶ 9. The burden therefore rests on Ferris State to demonstrate that the withheld material is exempt.

II. THE TRADE SECRETS EXEMPTION MAY NEVER BE USED TO WITHHOLD A PUBLIC CONTRACT UNDER THE MICHIGAN FOIA.

Ferris State has improperly invoked the trade secrets exemption as a defense to its withholding of the redacted portions of the Caremark contract and marketing materials. *See* Def.'s Affirmative Defenses ¶ 4. The plain meaning of the exemption's statutory language prohibits its application to materials submitted to the government to gain the benefit of a public contract.

> Under the Michigan FOIA, items exempt from disclosure include:
>
> (f) Trade secrets or commercial or financial information ***voluntarily provided to an agency for use in developing governmental policy*** if:
> (i) The information is submitted upon a promise of confidentiality by the public body.

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> (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
> (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision ***does not apply to information submitted as required by law or as a condition of receiving a governmental contract***, license, or other benefit.

M.C.L. § 15.243(1)(f). Thus, the provision only exempts a narrow category of information submitted by a private party to the government: information that is not required to be submitted and that is given to the government for the government's benefit in developing policy. Not any and all claims of trade secrets justify a withholding under FOIA. *See UPGWA*, 422 Mich. at 442 & n.10 (noting that "the FOIA permits persons to obtain [some] information pertaining to trade secrets" because it provides for exemption only in limited instances).

The final sentence of the trade secrets exemption underscores this point: "This subdivision does not apply to information submitted as required by law or as a condition of receiving a governmental contract, license, or other benefit." M.C.L. § 15.243(1)(f); *see also UPGWA*, 422 Mich. at 442 n.10 (italicizing final sentence to emphasize that not all information that concerns trade secrets is exempt from disclosure). The first and last sentences of the trade secrets exemption are essentially flip sides of the same coin. Materials submitted as required by law are not submitted "voluntarily." And, materials submitted in an attempt by a private party to procure private gain through a government benefit or contract are not "provided to an agency for use in developing governmental policy." *Cf. Herald Co., Inc. v. Tax Tribunal*, 258 Mich. App. 78, 85 (2003) (tax assessment challenge that involved tax determination of a single tax payer could not be exempt as trade secret because it "[l]acked the policy-making potential contemplated by the Legislature in drafting this exemption to the FOIA"). A defendant claiming trade secrets exemption must, therefore, demonstrate both that the information was submitted for

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the purpose of assisting in policymaking (not to obtain a contract) and that the submission was made voluntarily. Ferris State can do neither in this case.

The Court of Appeals has categorically declined to apply the trade secrets exemption to information submitted "as a condition of" receiving a government benefit, rather than for use in policymaking. In *Blue Cross and Blue Shield of Michigan v. Insurance Bureau Hearing Officer*, the court concluded that the Insurance Bureau could not withhold under FOIA the subscriber rates included in a rate increase petition that Blue Cross submitted to the Insurance Bureau in an attempt to secure approval for charging higher rates in its state-regulated insurance program. 104 Mich. App. 113, 132-33 (1981). After determining that the information was not confidential because it was already in the public realm, the court found that "even if the data submitted by Blue Cross constituted a trade secret or protected commercial or financial information, the statutory exemption from disclosure would not protect such information from FOIA disclosure" because the rate petition "was an attempt to acquire a further government benefit." *Id.* at 133. Analyzing the language of the trade secrets exemption, the court opined that "the last sentence of [the trade secrets exemption] would appear to prohibit even the pressing of the claim by [Blue Cross]." *Id.* at 131.

The circumstances here are the same. First, the redacted portions of the eighty-five pages released to Change to Win are all portions of either the actual contract to which Ferris State and Caremark agreed to be bound or the marketing materials Caremark provided to Ferris State in its attempt to persuade Ferris State to enter into that contract. *See* Compl. ¶ 9; Ans. ¶ 9; Cabalquinto Aff. Ex. A. Thus, every piece of information in these documents was submitted to the government solely for the purpose of gaining the benefit of a government contract to provide PBM services to employees of a public university. Just as in *Blue Cross*, where the submitter

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could not have been granted its rate increase petition without submitting subscriber rates, Caremark could not have won a contract to provide PBM services to Ferris State employees without providing the terms of the contract itself. And, given that Caremark provided Ferris State with marketing materials in an attempt to gain a contract from which Caremark would benefit, the marketing materials are indistinguishable from the rate increase petition in *Blue Cross*. The unredacted portions of the marketing materials demonstrate that they explain the types of services that Caremark offers and these materials are, therefore, essentially a proposal to enter a contract. *See* Cabalquinto Aff. Ex. A at 79-85. In any event, none of these materials was submitted to assist with governmental policymaking decisions. *See Herald Co.*, 258 Mich. App. at 85. Ferris State, therefore, may not withhold or redact any portion of these documents under the trade secrets exemption.

Ferris State's defense independently fails, at least as to the contract itself, because Caremark did not voluntarily submit the actual terms of its contract to the government; those terms were required for Caremark to be awarded the contract. No institution would agree to be bound by a contract it has never seen. The prices that Caremark would charge Ferris State, the services that Caremark agreed to provide to Ferris State, and the rights of both parties under the contract had to have been submitted by Caremark for Caremark to secure Ferris State's agreement and for Caremark to be paid for its provision of PBM services. Under the federal FOIA, which Michigan courts look to for guidance, *see Mager v. State, Dept. of State Police*, 460 Mich. 134, 144 (1999), "it is beyond dispute that unit pricing data is required to be submitted in order to compete for a government contract." *Mallinckrodt Inc. v. West*, 140 F. Supp. 2d 1, 5 (D.D.C. 2000); *see McDonnell Douglas Corp. v. U.S. Dept. of Air Force*, 215 F. Supp. 2d 200, 205 (D.D.C. 2002) ("Because contractors are required to submit cost and pricing information if

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they wish to bid on a government contract, cases in this district have found price and cost requirements to be compulsory, not voluntary, submissions."), *aff'd in part, rev'd in part on other grounds*, 375 F.3d 1182 (D.C. Cir. 2004). In short, the redactions in the contract itself are not justified under the trade secrets exemption for the additional and independent reason that they were not submitted voluntarily. *See* M.C.L. § 15.243(1)(f).[1]

The clear language of the statute barring the defense advanced by Ferris State is supported by sound policy justifications. The Michigan Legislature took a considered approach to trade secrets, crafting the statutory language to protect the interests of the government in fulfilling its policymaking function. *See* M.C.L. § 15.243(1)(f). To that end, the provision offers a procedural vehicle for the government to give assurances of confidentiality when requesting trade secret and confidential commercial and financial information from businesses to assist in policy decisions. *See id.* If the government could not offer this protection, its ability to inform policy choices might suffer due to businesses' possible reluctance to comply with a request for information.

In contrast, if a private entity has something to gain by submitting information to the government, such as the substantial financial benefit of winning a government contract, then there is little risk that the business will decline to supply the necessary information. One court said it simply: "Disclosure of prices charged the Government is a cost of doing business with the Government. It is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed." *Racal-Milgo Government Systems, Inc. v. Small Business*

[1] The consequences of the distinction between mandatory and voluntary submissions, however, are different under the federal FOIA. Although mandatory submissions may never be exempt under M.C.L. § 15.243(f), the federal FOIA applies different standards to the release of voluntary and mandatory submissions. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993).

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Admin., 559 F. Supp. 4, 6 (D.D.C. 1981); *see Badhwar v. U.S. Dept. of Air Force*, 622 F. Supp. 1364, 1377 (D.D.C. 1985) (noting that it was difficult to believe that contractors would give up valuable contracts rather than agree to provide technical reports), *vacated on other grounds*, 829 F.2d 182 (1987). This principle holds equally as to information submitted as required by law; because private parties must comply, there is no risk by disclosure that companies will not furnish the requisite submissions. *See Niagara Mohawk Power Corp. v. U.S. Dept. of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999) ("claiming that disclosure would impair the [government's] ability to collect such information in the future ... is inherently weak, where, as here, the [government] has secured the information under compulsion").

Finally, the public has a strong interest in learning what benefits its government is providing to businesses and how its tax dollars are spent. "After all, given that FOIA's primary purpose is to inform citizens about 'what their government is up to,' it seems quite unlikely that Congress intended to prevent the public from learning how much the government pays for goods and services." *Canadian Commercial Corp. v. Department of Air Force*, 514 F.3d 37, 43 (D.C. Cir. 2008) (Tatel, J. concurring) (quoting *U.S. Dep't of Justice v. Reporters Committee or Freedom of the Press*, 489 U.S. 749, 773 (1989)); *see AT& T Information Systems Inc. v. GSA*, 627 F.Supp. 1396, 1403 (D.D.C. 1986) (strong public interest in knowing component and aggregate prices in government contract), *rev'd on other grounds*, 810 F.2d 1233 (D.C. Cir. 1987). "Disclosure of such information permits the public to evaluate whether the government is receiving value for taxpayer funds, or whether the contract is instead an instance of waste, fraud, or abuse of the public trust." *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1194 (D.C. Cir. 2004) (Garland, J. concurring in part, dissenting in part).

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The combination of the overwhelming public interest in knowing how public funds are spent and the inherently small risk that disclosure will cause a company to forgo the potential for a lucrative public contract are reflected in the legislature's decision that submissions of information to gain public contracts can never fall within the trade secrets exemption. Michigan's law should be applied according to its plain meaning: Public contracts are public.

II. EVEN IF THE TRADE SECRETS EXEMPTION COULD BE CLAIMED AS A DEFENSE TO DISCLOSING A PUBLIC CONTRACT, FERRIS STATE CANNOT MEET ITS BURDEN TO SHOW THAT IT APPLIES HERE.

A. Ferris State Has Failed to Properly Record a Description of the Material Claimed to be Exempt as Trade Secret.

To claim a trade secrets exemption under the Michigan FOIA, upon receipt of trade secret material, a public body must promptly record "a description of the information" claimed to be exempt and to "maintain[that description] in a central place within the public body, and [make it] available to a person upon request." M.C.L. § 15.243(1)(f)(iii). Even if the trade-secrets exemption *could* be applied to public contracts, Ferris State has not met the procedural requirement of recording a description of the material and providing that description upon request, and its claim of exemption must therefore fail.

The marketing materials provided by Caremark to Ferris State are dated February 26, 2008, Cabalquinto Aff. Ex. A at 79, and a representative of Ferris State, Warren Hills, signed the contract with Caremark on July 28, 2008. Cabalquinto Aff. Ex. A at 37. Ferris State issued its final response to Change to Win's request for the contract between Ferris State and Caremark and marketing materials provided by Caremark on September 11, 2008. Compl. ¶ 9; Ans. ¶ 9. Had a description of the information claimed exempt as trade secret been recorded and on file by that time, it would have been responsive to plaintiff's request and presumably released. No such

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description, however, was provided in response to the FOIA request. *See* Compl. ¶ 9, Ex. 4; Ans. ¶ 9.

A failure to comply with the recording requirement of the trade secrets exemption is fatal to Ferris State's ability to assert the exemption as a defense. *See Coblentz v. City of Novi*, 475 Mich. 558, 577 (2006) (finding that because delay in recording description of exempt material was unjustified, defendant failed to meet its burden to show that materials were exempt), *reh'g denied*, 477 Mich. 1201 (2006). "This exemption is intended to provide notice to the public that a public body possesses trade secrets, commercial information, or financial information submitted to it for use in developing governmental policy." *Id.* at 576. Because Ferris State has not met its burden to demonstrate that it complied with the recording requirement of the trade-secrets exemption, its affirmative defense fails and summary disposition should be entered for Change to Win.

B. The Redacted Material is Not Confidential and Its Release Would Not Cause Caremark Competitive Harm.

Aside from the procedural bar to Ferris State's defense, the withheld material does not contain "trade secrets or commercial or financial information" as defined under the exemption. *See* M.C.L. § 15.243(1)(f). In construing the term "trade secrets," Michigan courts use as guidance the definition found in the Restatement of Torts. *Hayes-Albion v. Kuberski*, 421 Mich. 170, 181 (1984). Under the Restatement, a trade secret "may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it." Restatement (First) of Torts § 757 cmt. B (1937). The Restatement specifically limits the application of this definition: "[A trade secret] differs from other secret information in a business in that it is not

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simply information as to single or ephemeral events in the conduct of the business, *as for example the amount or other terms of a secret bid for a contract.*" *Id.* (emphasis added). Moreover, "[t]he subject matter of a trade secret must be secret." *Id.* In construing "confidential and financial information," the Court of Appeals has limited this claim to include only valuable business information strictly guarded as confidential by the business and the disclosure of which would actually cause appreciable competitive harm. *See Booth Newspapers, Inc. v. Kent County Treasurer*, 175 Mich. App. 523, 529-30 (1989) ("defendant has failed to persuade us that the type of information which plaintiff seeks is sensitive commercial information or that the hotels and motels affected by this case would be harmed in any appreciable way").

The Michigan Court of Appeals has explained that taken together, the trade secret-commercial information exemption has three general requirements: 1) the information must be a valuable piece of business information that provides a competitive advantage, 2) it must be secret, and 3) it must not readily ascertainable elsewhere. *See Blue Cross*, 104 Mich. App. at 129.

Here, the claim of trade secret or commercial information fails primarily because Ferris State cannot show that Caremark's competitors would gain a competitive advantage by its release; put another way, Ferris State cannot show Caremark would suffer any appreciable harm. *See Booth Newspapers, Inc*, 175 Mich. App. at 529-30. The contract at issue is a final, negotiated contract no longer subject to a competitive process. Michigan protects the competitive process for contracts under an entirely different FOIA exemption, under which a "bid or proposal" for a public contract is exempt "until the time for the public opening . . . or until the deadline for submission of bids or proposals has expired." M.C.L. § 15.243(1)(i). This exemption demonstrates the Legislature's view that disclosure of any public contract proposal or

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final contract does not harm the competitive process once the bidding period is over. In *Nicita v. City of Detroit*, the Court of Appeals credited the requester's argument that "the Legislature's intent is that [this exemption] applies to a competitive bidding process so that one party may not obtain the bid or proposal of a second party in order to devise ways of gaining a competitive advantage over the second party before the bidding process is over." 194 Mich. App. 657, 665 (1992), *appeal denied*, 441 Mich. 909 (1992). The Court of Appeals affirmed the trial court's narrow interpretation of this exemption, finding that the exemption protected only "solicited bids" and only until, at the latest, the time when a proposal is accepted. *Id.* at 666.

Thus, under the bid exemption, the Legislature intended to make available under FOIA even unsuccessful bids once the competitive process was finished. Here, we have the case of a successful, negotiated contract. A bid or contract might contain otherwise exempt material, such as, for example, material involving a personal privacy claim or material that would compromise the ability of the government to maintain security at a penal institution. *See* M.C.L. §§ 15.243(1)(a), (c). The trade secret exemption, however, is concerned with protecting against competitive harm – the very factor that the Legislature expressly addressed under the exemption for proposals or bids. *See Blue Cross*, 104 Mich. App. at 129. In crafting the bid or proposal exemption, the Legislature impliedly found *at least* a presumption that no substantial competitive injury would come from the release of unsuccessful or successful bids or proposals. The trade secrets provision should not operate to second-guess that determination. The competitive process for this contract is over, and any residual use a competitor might find for this information does not rise to the level that the Legislature intended to prevent.

When read together, the bid and trade secrets exemptions represent a comprehensive consideration of public contracts and require their release. Moreover, the Legislature's decision

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that the release of final contracts does not cause competitive harm is supported by sound justification. The terms of a single contract or bid for a contract is inherently lacking in substantial commercial value because the terms and prices for a contract change on a contract-by-contract basis. *See Booth Newspapers, Inc*, 175 Mich. App. at 529-30 (occupancy rates of hotels and motels simply not of the nature of sensitive commercial information). Particularly in an industry, such as pharmaceuticals, where pricing and technology are rapidly evolving, the terms of a contract negotiated today may be dated very quickly and a competitor may glean very little useful information from knowing a single contract's terms. *See Center for Public Integrity v. Dept. of Energy*, 191 F. Supp. 2d 187, 194-95 (D.D.C. 2002) (noting that arguments made in favor of exempting public contract prices are "viewed ... with skepticism, generally requiring agencies to disclose information ... unless they are able to demonstrate that release of the information would be of substantial assistance to competitors," considering changing nature of the industry, and citing numerous cases where disclosure of pricing information was mandated under the federal FOIA).

A review of the unredacted portions of the contract and Caremark marketing materials also undermines Ferris State's claim. From these portions, it is evident that the redactions conceal the prices charged to Ferris State for the prescriptions it agrees to fill under the contract and rebates and the allowances Caremark agrees to provide Ferris State. *See* Cabalquinto Aff. Ex. A at 15, 16, 22, 38-40, 45-55. In addition, Ferris State has redacted portions of the contract describing Caremark's obligations, such as the amount of pharmacy auditing Caremark must conduct, *id.* at 9, the quality of customer service to Ferris State employees as measured in problems resolved and call wait times that Caremark agrees to provide, *id.* at 63, the extent of the pharmacy network Caremark must provide, *id.* at 8, and the accuracy rate of filling prescriptions

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Caremark promises to meet. *Id.* at 64. Redactions include even the time periods within which Caremark must do certain things, such as update subscriber lists, *id.* at 5, report to Ferris State on various matters, *id.* at 56, reimburse Ferris State employee claims, *id.* at 12, and review prescriptions for errors or drug interactions, *id.* at 13. Ferris State has also redacted the section of the contract describing the conditions under which either it or Ferris State may modify or amend its provisions. *Id.* at 44. Ferris State has even redacted two portions of the definitions section of the contract. *See* Cabalquinto Aff. Ex. A at 1, 2-3.

None of these items is trade secret in nature. Every customer, including Ferris State, knows the prices it is being charged and precisely what services are being rendered in exchange. There is no special formulation or secret process at stake that an ordinary customer would not know by purchasing Caremark's product. As the Restatement itself notes, the terms of a contract generally are not trade secrets. *See* Restatement (First) of Torts § 757 cmt. B (1937). These terms also frequently lack commercial value. For instance, Ferris State has redacted half of the definition of "average wholesale price." *See* Cabalquinto Aff. Ex. A at 1. A definition provides no information at all. Even if "average wholesale price" is a number used later in the contract to calculate prices or fees, without knowing those prices or fees it is difficult to believe that Caremark's mere definition of "average wholesale price" would provide an advantage to a competitor.

If Ferris State's claim is that the competitive advantage would come not from the release of this single contract and its specific terms, but rather from the release of this type of information generally and the terms that Caremark *tends* to agree to in its contracts, this theory also fails because these terms generally are widely known. First, Caremark contracts with thousands of separate employers for the provision of PBM services, and, one can presume,

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markets its services to many more. Caremark must provide this information to every single employer who wishes even to consider the use of these services for its employees. Second, many of Caremark's contracts are already public. By way of example, Change to Win has possession of at least twenty unredacted Caremark contracts that have been produced in response to public records requests around the country. *See* Cabalquinto Aff. Ex. B.

Ferris State cannot demonstrate that this information is, by its nature, protected under the trade secrets exemption or that Caremark would suffer competitive harm from its release. Even assuming the trade secrets exemption could be applied to public contracts, it cannot be applied here to keep basic pricing information from the public and insulate Ferris State from any accountability on how it spends public funds.

CONCLUSION

Ferris State has violated the Michigan FOIA. This Court should grant summary disposition to Change to Win, order the release of an unredacted copy of the records at issue, and award attorneys' fees and costs. *See* M.C.L. § 15.240(4), (6). Because Ferris State's violation of the Michigan FOIA was arbitrary and capricious, Change to Win should also be awarded $500 in punitive damages. *See* M.C.L. § 15.240(7).

Respectfully submitted,
PUBLIC CITIZEN LITIGATION GROUP
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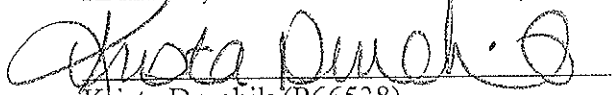

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