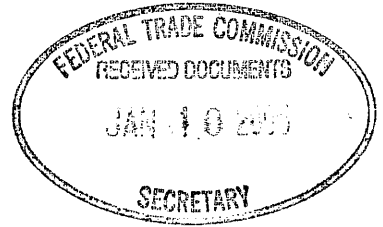


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of)

Evanston Northwestern Healthcare)
Corporation, and)

ENH Medical Group, Inc.)

)

) Docket No. 9315

) **Public**

THIRD-PARTY BLUE CROSS BLUE SHIELD OF ILLINOIS' MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED TRIAL EXHIBITS

Third-Party Blue Cross Blue Shield of Illinois ("BCBSI") hereby files its Motion For *In camera* Treatment Of Proposed Trial Exhibits. BCBSI respectfully requests that the Administrative Law Judge enter an Order pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), granting *in camera* treatment for an indefinite period, or in the alternative, no less than ten years, to the documents and data files described in this Motion and the attached Affidavit of Joseph Arango. The documents and data files are secret and material to BCBSI's on-going and future business. Public disclosure of the information contained in these documents and data files would cause serious competitive injury to BCBSI. In support of this Motion, BCBSI states that Complaint and Respondent counsel do not oppose this motion and respectfully submits the attached Affidavit of Joseph Arango and the argument below.

ARGUMENT

I. Introduction

BCBSI received notice from Complaint Counsel on December 13 and 30, 2004 and from Respondent counsel on December 15, 2004 of their intent to offer into evidence at trial highly confidential and business-sensitive documents and data files that Non-Party BCBSI produced in connection with the FTC's investigation of this matter. Approximately thirty-four of those documents and all of the data files, which BCBSI had diligently marked as "Confidential" or "Restricted Confidential, Attorney Eyes Only" pursuant to the terms of the March 24, 2004 Protective Order Governing Discovery Material in this matter, contain information that is secret and material to BCBSI's current and prospective business. Public disclosure of these documents and data files would add little, if any, incremental value to the public's understanding of the issues in this proceeding. However, it would cause serious competitive harm to BCBSI. Accordingly, BCBSI respectfully requests that the documents and data files described in the Affidavit of Joseph Arango be granted *in camera* treatment.

II. Standard for *In Camera* Treatment

In camera treatment is warranted when the public disclosure of a document would result in a clearly defined, serious injury to the person or corporation whose records are involved. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Disclosure is held to cause such serious injury when: (1) the information is "sufficiently secret and sufficiently material to the applicant's business," and (2) the injury caused by disclosure outweighs the significance of the information in explaining the rationale of the Commission's decision. *In the Matter of Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984); *In the Matter of Bristol-Meyers Co.*, 90 F.T.C. 455, 456 (1977); *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The Commission affords

third-party requests for *in camera* treatment “special solicitude,” recognizing “as a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.” *Kaiser*, 103 F.T.C. at 500.

In considering both secrecy and materiality, the court should weigh the following factors: (1) the extent to which the information is known outside 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. *Id.* In applying these factors, courts have “generally attempted to protect confidential business information from unnecessary airing.” *Hood*, 58 F.T.C. at 1188, and recognized the potential loss of a business advantage as a serious injury meriting *in camera* treatment. *In re Hoechst Marion Roussel*, 2000 FTC LEXIS 138, *7 (2000).

The BCBSI documents and data files described in this Motion and the Affidavit of Joseph Arango meet the above standards for *in camera* treatment.

III. The BCBSI Documents Listed in the Attached Affidavit Satisfy the Standard for *In Camera* Treatment.

The documents and data files for which BCBSI seeks *in camera* treatment relate almost exclusively to the prices and terms at which BCBSI contracts to reimburse hospitals for covered services of BCBSI insureds, one of the most commercially sensitive and valuable areas of BCBSI’s business. Specifically, the material includes four categories of documents and information, comprising thirty-four documents and numerous data files: (1) current agreements,

and amendments to those agreements, between BCBSI and hospitals in the Chicago area; (2) correspondence relating to contract negotiations between BCBSI and hospitals detailing the terms in dispute and, in some cases, possible resolutions; (3) internal pricing analysis and ; and (4) computer files containing claim and reimbursement data on a patient and hospital basis from 1998-2003. As set out below, the documents and computer files within these categories are precisely the type of information for which *in camera* treatment was created. On the one hand, they go to the heart of BCBSI's business and would cause serious injury to BCBSI if disclosed. On the other hand, disclosure will not be necessary for the parties to adjudicate their dispute. Thus, *in camera* treatment is both appropriate and warranted.

A. Current Contracts and Amendments

The first category of documents for which BCBSI seeks *in camera* treatment consists of twenty-two documents, which are current hospital service agreements and amendments to those agreements. The agreements and amendments are between BCBSI and various hospitals in the Chicago area, including: Evanston Northwestern Hospital, Northwestern, St. Francis, Lake Forest, Condell and Rush North Shore. These documents are attached as Exhibit 1.

The agreements contain heavily negotiated, proprietary terms between BCBSI and hospitals that are competitively sensitive. The structure, terms and scope of these agreements are the product of significant investment over many years by BCBSI and are the key to BCBSI's operations. Indeed, contract negotiations can span months and involve hundreds of employee hours, including negotiation, strategic thinking, actuarial analysis, financial modeling and legal and regulatory review and drafting. Disclosure of the information contained in all of these agreements and amendments to competitors and other hospitals would cause serious competitive injury to BCBSI.

BCBSI has taken meaningful steps to protect the confidential nature of these documents. Internal distribution of these agreements is limited to the individuals who deal with the specific providers in implementing the contract terms and to those directly involved in negotiations. BCBSI does not publicly comment on its rates or contract terms, nor does it share this information with third-party hospitals or payor-competitors. In fact, under almost all circumstances, the antitrust laws forbid disclosure of this information to competitors.

All of the agreements for which *in camera* treatment is requested are still in effect. The amendments at issue contain rate changes and additions to covered services to the underlying operative agreements. Hospitals would likely use the pricing and contracting terms, as well as the strategic thinking behind them, to gain unfair leverage in future negotiations. Competitors could and likely would use this information to either undermine BCBSI's business, or harmonize their terms with those offered by BCBSI, not only damaging BCBSI's business but also eliminating competition generally. This injury, both to BCBSI and competition, significantly outweighs any need for the information in explaining the Commission's decision, and necessitates granting *in camera* treatment of these agreements and amendments. Indeed, the Commission has granted prior requests for *in camera* treatment under similar circumstances. *See In the Matter of Hoechst Marios Roussel, Inc.*, 2000 WL 33534760 (FTC) (Oct. 4, 2000) (granting *in camera* treatment to managed care contracts).

B. Correspondence

The second category of documents for which BCBSI seeks *in camera* treatment consists of correspondence between BCBSI and various hospitals regarding the terms at which BCBSI or the hospital would or should contract. Included within this category are one letter between BCBSI and ENH, an internal ENH analysis outlining the pricing terms and rate increases offered

by BCBSI,¹ and five letters between BCBSI and Advocate detailing agreed upon and proposed contract terms. These documents are included as Exhibit 2.

Disclosure of these documents would cause BCBSI serious competitive injury. These letters reflect the terms upon which agreements were reached as well as proposed terms under consideration. Like the final agreements and amendments discussed above, the information contained within these documents is extremely valuable to BCBSI. These letters reflect the negotiations that take place between BCBSI and its hospital clients and contain proprietary and competitively sensitive terms and proposals regarding reimbursement of hospital health-care claims. The fact that some of these terms are not final does not obviate the need for *in camera* treatment. To the contrary, it strengthens this need as disclosure would reveal not only important information relevant to and contained in the final agreements, but also information regarding BCBSI's limits in negotiation and pricing strategy. As such, internal circulation of such correspondence is very limited; typically these letters are viewed only by the BCBSI employee conducting the negotiations and possibly his direct supervisor and the legal department. BCBSI would never share these documents with competitors or other hospitals. With this knowledge, competitors and other hospitals could and likely would severely undermine BCBSI's negotiating ability and competitive standing in its future contract negotiations. Disclosure of these letters is not necessary to the public's understanding of the proceedings, or the Commission's decision. Accordingly, these documents should be granted *in camera* treatment.

¹ BCBSI recognizes that this document reflects strategic analysis of ENH. Accordingly, the court may feel that this ENH document should be disclosed to aid the Public in understanding any Commission determination here. Therefore, BCBSI requests, in the alternative, that a redacted version of this document that shields BCBSI proposed rates and rate increases from public disclosure be published. BCBSI has attached a redacted version of the document for the Court's consideration.

C. Internal Analysis and Strategy Documents

The third category of material for which BCBSI requests *in camera* treatment consists of five documents containing internal pricing analysis, contract negotiation analysis, and/or management strategy. These five documents are included as Exhibit 3. The three documents containing BCBSI's pricing and contract negotiation analysis not only reflects BCBSI's determinations about what prices to charge in general, but also certain pricing methodologies and contracting terms that are still in effect. BCBSI's two internal email communications concerning the Company's conflict with one of its customers describes BCBSI's management strategies in responding to the dispute, including planned responses and communications relating to possible events. These documents go to the heart of BCBSI's business planning and are among the most confidential material that BCBSI maintains.

Disclosure of these materials would cause serious injury to BCBSI. Except as compelled by the CID, these documents were never disclosed externally by BCBSI. Internal circulation was limited only to those involved in strategic provider network planning for the Company and/or in responding to the customer dispute. If this information were made public, hospitals likely would use it against BCBSI in future dealings and negotiations. Other payors would likely also use this information in designing their own competitive strategies to BCBSI's disadvantage. As a result, BCBSI could be adversely affected. On balance, the harm to BCBSI from publication far outweighs the benefit of disclosure. BCBSI's price, contract and negotiating strategies are not necessary for the public to understand these proceedings or any decision rendered by this Court. *In camera* treatment should be granted to these three documents to prevent such injury.

D. Computer Data Files

Finally, BCBSI requests *in camera* treatment for data files produced to the FTC in response to its Civil Investigative Demand. A list of the data files at issue is attached as Exhibit 4. These data files contain claim and reimbursement data by patient, claim and hospital from 1998-2003 for BCBSI's PPO and HMO plans.

The data contained in these computer files is highly confidential. Under no circumstances would BCBSI make it public. BCBSI limits access to the data to a very small number of employees. Even those responsible for negotiating hospitals contracts only see the data on an aggregated basis after it has been used in certain financial models. This compiled dataset is not available from any other source. It could not be duplicated by hospitals or other competing payors.

Disclosure of this computer data would cause significant privacy concerns for BCBSI covered patients and competitive concerns for BCBSI's business. Although the identity of individual patients was masked in the data set produced, the data set contains information that could be used by motivated third parties to uncover patient identifying information. Moreover, much of the information included in the data set is entitled to privacy protection under the Health Insurance Portability and Accountability Act. Thus, disclosure of the data could jeopardize the privacy interests of individuals whose claims, payments and reimbursement records are reflected in the database. In addition, release of the data would allow BCBSI competitors to construct a detailed and accurate financial model of BCBSI's business and use it to BCBSI's detriment. The Commission has granted *in camera* treatment in exactly these circumstances. *In the Matter of E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116 (1981) (granting an extended *in camera* treatment to exhibits containing "valuable, secret and material investment, earnings, profit, operative return

and cost information ... the release of which might enable [the applicant's] competitors to construct an accurate financial model of [the company's] business to its detriment"). Both BCBSI covered patients and BCBSI will suffer serious injury if these data files are made public.

Nothing will be gained from publication of the data files. The data contained on these tapes is of such great volume that it cannot be read or understood without using the processing capabilities of a mainframe or similarly powerful computer. Disclosure of these voluminous data files is simply not necessary for the public to understand these proceedings or their resolution. For these reasons, *in camera* treatment of the data files should also be granted.

IV. *In Camera* Treatment for the Documents Listed in the Attached Appendix Should Extend Indefinitely, or in the Alternative, for a Period of Ten Years.

BCBSI requests indefinite *in camera* treatment for the documents and data files described in this Motion and listed in the attached Affidavit of Joseph Arango because contracts between healthcare providers and payors typically run for a number of years, and because later contracts often incorporate terms found in preceding contracts. Indeed, it is likely that many parties to the contracts will amend these agreements instead of renegotiating entirely new contracts when the contracts at issue expire. Therefore, it is unclear when these documents will cease to reflect current pricing and contracting terms. At a minimum, however, BCBSI requests *in camera* treatment for ten years to provide a reasonable opportunity for the contracts to expire and their terms to become outdated before they are made available to BCBSI's competitors.

CONCLUSION

BCBSI's documents, designated in the attached Affidavit of Joseph Arango, satisfy the standard for *in camera* treatment under the Commission's Rules of Practice and relevant precedent. Accordingly, this Court should grant *in camera* protection to these confidential documents. A proposed order is attached for the benefit of the Court.

DATED: January 10, 2005

Respectfully submitted,



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EXHIBIT 1

[REDACTED]

EXHIBIT 2

[REDACTED]

EXHIBIT 3

[REDACTED]

EXHIBIT 4

[REDACTED]

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

_____)	
In the Matter of)	
)	
Evanston Northwestern Healthcare)	Docket No. 9315
Corporation, and)	
)	
ENH Medical Group, Inc.)	
)	
_____)	

ORDER

Upon consideration of Third-Party Blue Cross Blue Shield of Illinois' ("BCBSI") Motion For *In Camera* Treatment Of Proposed Trial Exhibits, IT IS HEREBY ORDERED that the following materials are to be provided *in camera* treatment until further notice by this Court:

Exhibit	Production Bates Numbers
1	BCBSI-ENH 017002-17005 BCBSI 10199-10203 BCBSI 06825-6826 BCBSI 03612-3614 BCBSI 06818-6824 BCBSI 03615-3616 BCBSI 00059-64 BCBSI 00049-52 BCBSI 03194-3203 BCBSI 05775-5776 BCBSI 05705-5725; 5728 BCBSI 00762-766 BCBSI 00767 BCBSI 05412-5418 BCBSI 05476 BCBSI 05439-5440 BCBSI 05444-05473 BCBSI-ENH 002535-2539 BCBSI 04002-4006 BCBSI 06094-6095 BCBSI 04068-04070 BCBSI 06605
2	BCBSI-ENH 006525-6584 BCBSI-ENH 006517-6523 BCBSI 11198-11200 BCBSI 01636 BCBSI 01635 BCBSI 07723-7724 BCBSI 09126-9127
3	BCBSI 25016 BCBSI 08648-49 BCBSI 01881-82 BCBSI-ENH 005178-5188 BCBSI-ENH 05228-30

Exhibit	Production Bates Numbers
4	BCBSI 25149 BCBSI 25150 BCBSI 25151 BCBSI 25152 BCBSI 25153 BCBSI 25154 BCBSI 25155 BCBSI 25156 BCBSI 25157 BCBSI 25158 BCBSI 25159 BCBSI 25160 BCBSI 25161 BCBSI 25162 BCBSI 25163 BCBSI 25164 BCBSI 25165

Stephen J. McGuire
Administrative Law Judge

DATE: _____

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2005, a copy of the foregoing Third-Party Blue Cross Blue Shield's Public Motion For *In Camera* Treatment of Proposed Trial Exhibits was served via email and by first class mail, postage prepaid, on:

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