



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

In the Matter of )  
 )  
 )  
OSF Healthcare System, )  
 a corporation, and )  
 )  
Rockford Health System, )  
 a corporation, )  
 Respondents. )  
\_\_\_\_\_ )

Docket No. 9349

**PUBLIC**

**COMPLAINT COUNSEL’S UNOPPOSED MOTION FOR  
IN CAMERA TREATMENT OF HEARING EXHIBITS**

**I. Introduction**

Pursuant to Rule 3.45 of the Federal Trade Commission’s Rules of Practice, Complaint Counsel respectfully moves for *in camera* treatment of seven proposed exhibits. Each of these exhibits relates to Complaint Counsel’s experts: (i) five exhibits encompass Dr. Cory Capps’ expert reports, deposition testimony, and supporting materials from the related federal district court proceeding and this proceeding; and (ii) two exhibits contain excerpts from Nancy McAnallen’s deposition testimony from the district court proceeding.<sup>1</sup>

Dr. Capps’ materials rely on, discuss, and integrate confidential business information, documents, and testimony provided to Complaint Counsel by Respondents, third-party hospitals and commercial health plans, and other sources. Because Dr. Capps consolidated and synthesized that confidential information in his analysis, it would be extremely difficult, if not

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<sup>1</sup> Complaint Counsel’s experts have not been deposed in this proceeding yet, but Complaint Counsel anticipates that Dr. Capps’ upcoming deposition testimony will cover ground

impossible, for third parties to review his reports or testimony for their own confidential information without simultaneously learning others' confidential information as well. Likewise, the short excerpts from Ms. McAnallen's deposition testimony contain competitively sensitive and confidential business information belonging to third parties. That information, which is subject to contractual non-disclosure agreements, is readily identifiable and can be redacted without materially altering the content of her testimony.

Complaint Counsel does not seek *in camera* treatment for any information in its approximately 1,500 other exhibits.<sup>2</sup> Accordingly, Complaint Counsel's request for *in camera* treatment is narrowly tailored to protect Respondents and third parties from competitive injury, while still promoting public access to the evidence before the Court.

## **II. Discussion**

Under Rule 3.45(b) of the Commission's Rules of Practice, the Court may grant *in camera* treatment to material after finding that "its public disclosure will likely 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). That showing can be made by establishing that a document is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury." *In re Gen. Goods Corp.*, 95 F.T.C. 352, 355 (1980).

The expert reports, supporting materials, and testimony described above contain the same types of information that have been accorded *in camera* treatment in previous matters involving

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similar to his prior deposition and will likely require *in camera* treatment for the same reasons set forth in this Motion.

<sup>2</sup> Complaint Counsel's understanding is that some third parties will be separately moving for *in camera* treatment for their own documents and testimony as appropriate.

the health care industry.<sup>3</sup> Dr. Capps' reports and testimony include, among other things, discussions and analyses of the business strategies of healthcare providers in and around Rockford, rate negotiations with payers, and confidential contracts.<sup>4</sup> Dr. Capps' conclusions also rely on payer claims data files and other sensitive and confidential information.<sup>5</sup> And, as noted, Ms. McAnallen's deposition excerpts include sensitive business information that she is contractually obligated not to publicly disclose.<sup>6</sup> As such, consistent with prior orders concerning healthcare-related information,<sup>7</sup> Complaint Counsel requests that these materials be accorded *in camera* treatment for a period of five years:

Exhibit Number	Name of Exhibit	Portion To Be Accorded <i>In Camera</i> Treatment	Expiration Date
PX4047, PX4048	Deposition Transcript of Nancy McAnallen, Jan. 22, 2012 (Filed Under Seal)	Vol. 1 (PX4047): 38:13-41:17, 44:8-46:1, 53:8-19, 59:1-7, 63:2-66:3, 68:3-11, 71:5-15, 75:23-76:5  Vol. 2 (PX4048): 164:23-165:4, 190:5-191:16, 202:8-9, 208:13-23, 257:8, 261:10-262:16, 266:3-21	Mar. 20, 2017
PX2501	Affidavit of Dr. Cory Capps, Nov. 23, 2011 (Filed Under Seal)	All	Mar. 20, 2017

<sup>3</sup> See, e.g., *In re ProMedica Health Sys., Inc.* (Order Granting Complaint Counsel's Motion for *In Camera* Treatment (May 25, 2011)), available at <http://www.ftc.gov/os/adjpro/d9346/110525promedicacmptmotion.pdf>; *In re Evanston Nw. Healthcare Corp.*, Docket No. 9315 (Order on Parties' Motions for *In Camera* Treatment (Feb. 9, 2005)), available at <http://www.ftc.gov/os/adjpro/d9315/050209orderonpmfict.pdf>.

<sup>4</sup> See Kenneth W. Field Decl. ¶ 3.

<sup>5</sup> See *id.*

<sup>6</sup> *Id.* at ¶ 4.

<sup>7</sup> See, e.g., *ProMedica Health Sys.* (Order Granting Complaint Counsel's Motion for *In Camera* Treatment (May 25, 2011)).



Exhibit Number	Name of Exhibit	Portion To Be Accorded <i>In Camera</i> Treatment	Expiration Date
PX2506	Reply Affidavit of Dr. Cory Capps, Jan. 11, 2012 (Filed Under Seal)	All	Mar. 20, 2017
PX2515	Expert Report of Dr. Cory Capps, Feb. 24, 2012 (Filed Under Seal)	All	Mar. 20, 2017
PX2520	Rebuttal Report of Dr. Cory Capps, Mar. 20, 2012 (Filed Under Seal)	All	Mar. 20, 2017
PX4044	Deposition Transcript of Dr. Cory Capps, Jan. 18, 2012 (Filed Under Seal)	All	Mar. 20, 2017

### III. Conclusion

Disclosure of the information contained in these expert reports and testimony would likely result in serious competitive injury to Respondents and third parties. Disclosure would neither materially promote the resolution of this matter nor assist the public's understanding of the litigation, particularly in light of the substantial other evidence and testimony likely to be available to the public. *In camera* treatment is therefore appropriate.

For the foregoing reasons, Complaint Counsel requests that the identified exhibits receive *in camera* treatment.

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Dated: March 20, 2012

Respectfully submitted,



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**STATEMENT REGARDING MEET AND CONFER**

On March 20, 2012, Respondents' Counsel Nicole Castle affirmed by electronic mail to Complaint Counsel Peter C. Herrick that Respondents do not intend to oppose Complaint Counsel's Motion for *In Camera* Treatment of Hearing Exhibits.

Dated: March 20, 2012

Respectfully submitted,



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UNITED STATES OF AMERICA  
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OSF Healthcare System,	)	
a corporation, and	)	Docket No. 9349
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Rockford Health System,	)	<b>PUBLIC</b>
a corporation.	)	
_____	)	

**DECLARATION OF KENNETH W. FIELD**

I, Kenneth W. Field, declare as follows:

1. I am an Attorney in the Bureau of Competition of the Federal Trade Commission. I serve as Complaint Counsel in this matter. The statements made in this declaration are made based upon my personal knowledge unless otherwise indicated.
2. I submit this declaration in support of Complaint Counsel’s Motion for *In Camera* Treatment of Dr. Cory Capps’ expert reports, supporting materials, and deposition testimony and excerpts of Nancy McAnallen’s deposition testimony.
3. PX2501 and PX2506 are Dr. Capps’ expert reports and supporting materials that were originally submitted in connection with the related federal district court proceeding. PX2515 and PX2520 are Dr. Capps’ expert reports and supporting materials submitted in connection with this proceeding. PX4044 is Dr. Capps’ testimony taken during a deposition for the related federal district court proceeding. I have reviewed these reports and deposition transcripts and have found that they contain likely confidential business information of numerous third parties and Respondents, including discussions and conclusions based on business strategies, contract terms and negotiations, payer claims data, and other sensitive material.

4. PX4047 and PX4048 contain testimony from Ms. McAnallen taken during a deposition for the related federal district court proceeding. I have reviewed this testimony and have found that it contains confidential business information belonging to third-party hospitals that I understand is subject to contractual non-disclosure agreements.
  
5. It has been my experience at the Federal Trade Commission that third parties who provide information of the type included here consider such information to be competitively sensitive and highly confidential. Further, when third parties produced this information to the Commission, they requested that it be treated as confidential and not be publicly disclosed. I expect that the affected third parties will want the information reflected in these exhibits to be given *in camera* treatment if used during the hearing.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge.

Executed on March 20, 2012.



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Kenneth W. Field





<b>Exhibit Number</b>	<b>Name of Exhibit</b>	<b>Portion Accorded <i>In Camera</i> Treatment</b>	<b>Expiration Date</b>
PX2520	Rebuttal Report of Dr. Cory Capps, Mar. 20, 2012 (Filed Under Seal)	All	Mar. 20, 2017
PX4044	Deposition Transcript of Dr. Cory Capps, Jan. 18, 2012 (Filed Under Seal)	All	Mar. 20, 2017

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Dated:

**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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*Counsel for Rockford Health System*

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

March 20, 2012

By: s/ Sarah Swain  
Attorney

PX2501

Filed *In Camera* & Redacted In Its Entirety

PX2506

Filed *In Camera* & Redacted In Its Entirety



PX2515

Filed *In Camera* & Redacted In Its Entirety

PX2520

Filed *In Camera* & Redacted In Its Entirety

PX4044

Filed *In Camera* & Redacted In Its Entirety

PX4047

Filed *In Camera* & Redacted In Its Entirety



PX4048

Filed *In Camera* & Redacted In Its Entirety