

are identical to CX 324 and RX 581 respectively, which were already granted *in camera* protection in the February 9 order.

2. Respondent requests that a Marketing Analysis Report (RX 2021) [REDACTED].

3. Respondent requests that the following documents be given *in camera* treatment for ten years due to the extremely sensitive nature of the contents that only a very lengthy passage of time can protect:

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]

4. Finally, Respondent requests permanent *in camera* treatment for [REDACTED] (RX 2034); and the excerpted transcript of witness Lois Humaniak (CX6285). Respondent also requests that this court modify its February 9, 2005, order to make permanent the ten year *in camera* treatment previously ordered for RX 1771 (HPH Improvement Plan with patient details), and CX 2312 (same).

The grounds for this motion are set forth in full in the accompanying memorandum of law, and the motion is supported by the Declarations of Brian Washa (pricing issues), David Loveland (marketing issues), and Margaret King (patient and employee issues), previously filed in support of Respondent's Motion for *in camera* treatment of certain trial exhibits on February 3, 2005.

Finally, ENH requests that the Court issue an order confirming that the trial exhibits previously granted *in camera* status that are listed in Exhibit D are no longer afforded *in camera* status to the extent indicated in that exhibit. Exhibit D is an index

detailing certain trial exhibits previously granted *in camera* treatment but determined by ENH during trial not to warrant such treatment.

Dated: May 20, 2005

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2005, a public copy of the foregoing *Respondents' Second Supplemental Motion for In Camera Treatment of Certain Exhibits* was served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

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

In the matter of)	
)	
Evanston Northwestern Healthcare Corporation,)	Public Version
a corporation, and)	Docket No. 9315
)	
ENH Medical Group, Inc.,)	
a corporation.)	
)	

**MEMORANDUM IN SUPPORT OF RESPONDENT’S
SECOND SUPPLEMENTAL MOTION FOR
IN CAMERA TREATMENT OF CERTAIN EXHIBITS**

Pursuant to Rule 3.45(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.45(b), Respondent Evanston Northwestern Healthcare, Inc. (“ENH”) submits this supplemental memorandum in support of its second supplemental motion for an order directing *in camera* treatment of certain documents containing highly confidential information produced in this proceeding. This memorandum incorporates by reference ENH’s original Memorandum of Law in Support of its Motion For *In Camera* Treatment of Certain Exhibits (“Memorandum of Law”) filed on January 4, 2005, and ENH’s Supplemental Memorandum filed on February 3, 2005.

INTRODUCTION

On February 9, 2005, the Court issued an Order granting ENH’s motion for *in camera* treatment of certain exhibits that were described in Revised Supplemental Exhibits A and B. The Order noted that a review of the declarations “in support of the motion and the

documents reveals that the information sought to be protected meets the standards for *in camera* treatment.” February 9, 2005 Order at 3.

During trial, Respondent and Complaint Counsel moved to admit trial exhibits that were not part of the “A” Trial Exhibit Lists admitted into evidence. The documents at issue were new exhibits selected from trial exhibit lists commonly referred to as the “B” lists, which contained exhibits for possible use during trial. These new exhibits were not the subject of any prior motion for *in camera* treatment and, therefore, they were not addressed in the Court’s order issued on February 9, 2005.

All new exhibits discussed in this memorandum are described in Exhibit C, attached to the underlying motion. Copies of each new exhibit described in Exhibit C will be delivered to the Court contemporaneously with this filing.

ENH also requests that the Court issue an order confirming that the trial exhibits previously granted *in camera* status that are listed in Exhibit D are not afforded *in camera* status to the extent indicated in that exhibit. Exhibit D is an index detailing certain trial exhibits previously granted *in camera* treatment but determined by ENH during trial not to warrant such treatment.

ARGUMENT

The documents described in Exhibit C are highly sensitive and proprietary in nature, were used only during closed sessions at trial, and, if made public, would cause irreparable harm to ENH and would likely result in an overall loss of competition. ENH requests an order requiring these materials be maintained under seal for the time periods specified in Exhibit C.

ENH determined at trial that the documents described in Exhibit D do not meet this standard. Accordingly, those documents should not be afforded *in camera* treatment.

I. Information Categories Needing *In Camera* Protection Have Not Changed

The new exhibits for which ENH is seeking *in camera* treatment fit into the original categories created and discussed in the original Motion and Memorandum of Law. These new exhibits fall into the following categories of information:

1. [REDACTED];
2. [REDACTED];
3. [REDACTED];
4. [REDACTED].

These exhibits, if made public, would provide private payors and ENH's competitors with critical knowledge of confidential information proprietary to ENH, as well as confidential employee and patient information.

Exhibit C, the index describing each exhibit needing protection, includes one of these category fields: [REDACTED], to aid the Court in making its determinations for *in camera* protection of each listed exhibit. Further, Exhibit C also has a field noting which of the original Declarations supporting the need for *in camera* protection of a specific category of information applies to each newly added exhibit. Finally, the period of time to seal each new exhibit is also reflected in Exhibit C for the convenience of the Court.

II. ENH Seeks Protection Of All Information Related To Current Contract Prices And Contract Negotiating Strategy Contained In Excerpts From The Reports of Professor Jonathon Baker, And Party Negotiating Documents

The original Memorandum of Law discussed the sensitivity of information related to current pricing information. This category includes [REDACTED]

The February 9, 2005 court order ruled that ENH had established that Professor Jonathon Baker's expert report, RX 1909, should receive *in camera* treatment. Professor Baker's report, [REDACTED]

Three exhibits in Exhibit C that fall into the "prices and rate negotiations" category include sensitive information from Professor Baker's Expert Report: RX 2038, RX 2040¹ and RX 2041. [REDACTED]

One exhibit in Exhibit C, RX 2039, falls into the "prices and rate negotiations" category and was excerpted from Professor Baker's Supplemental Expert Report. [REDACTED]

Finally, two exhibits containing sensitive pricing information, RX 839 and CX 1099, are identical to exhibits CX 324 and RX 581, which this Court already ordered contain sensitive pricing information that should receive *in camera* treatment. ENH has included these newly-numbered exhibits on Exhibit C.

III. ENH Seeks The Protection Of Certain Marketing Materials

ENH's marketing staff prepared RX 2021, [REDACTED]

IV. ENH Seeks Protection Of All Information Related To Peer Review Information, Which Includes Confidential Patient Data As Well As Employee Performance Information

The original Memorandum of Law discussed the sensitivity of information related to the Peer Review process, which includes both discussion of patient care details and errors, as well as employee performance details. Employee performance and peer review information are competitively sensitive and would damage ENH specifically, and competition generally, if disclosed to customers and competitors. In addition, law and policy

¹ RX 2040 and RX 2041 were both "derived from" RX 1909, Dr. Baker's Expert Report.

considerations demand that employee performance and peer review information receive the protection of *in camera* treatment.

[REDACTED] Respondent moves the court to modify its February 9, 2005, order to enlarge the ten year *in camera* sealing period for RX 1771 and CX 2312 to permanently seal these two exhibits.

[REDACTED]. For the same reasons discussed in Respondent's Memorandum of Law, RX 2033 and RX 2034 should also receive *in camera* treatment.

[REDACTED]. For these reasons, ENH requests that this exhibit be granted *in camera* protection.

Finally, [REDACTED] For these reasons, RX 324 should be granted *in camera* protection.

IV. ENH Has Waived *In Camera* Protection for Some Trial Exhibits Granted This Protection

During trial, ENH waived *in camera* protection as to certain exhibits that do not warrant such protection. Exhibit D lists three trial exhibits where *in camera* protection was waived as to only certain pages, and thirteen trial exhibits where *in camera* protection was waived for the entire document.² Exhibit D includes a field noting the type of information being waived.

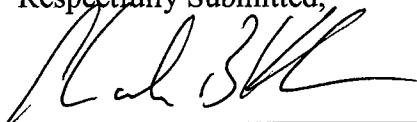
² For the convenience of the Court and the parties, Respondent has attempted to identify in Exhibit D all exhibits for which Respondent waived *in camera* treatment at trial. However, this list may not be comprehensive. If Respondent explicitly waived *in camera* treatment of other exhibits at trial, as reflected in the trial transcript, the Court, Complaint Counsel and Respondent need not afford those exhibits *in camera* treatment.

CONCLUSION

For the foregoing reasons, ENH requests that the Court grant *in camera* treatment to the exhibit listed on Exhibit C, and that the Court modify its February 9, 2005 order consistent with Exhibit D to reflect changes in the *in camera* status of certain documents.

Dated: May 20, 2005

Respectfully Submitted,



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			order)
RX-2021		All	3 years
RX-2033		All	10 years
RX-2034		All	permanent
RX-2038		All	5 years
RX-2039		All	5 years
RX-2040		All	5 years
RX-2041		All	5 years
RX-2044		All	5 years

and it is further

ORDERED, that all documents (or, as appropriate, pages of documents) as to which Respondent waived *in camera* treatment at trial, including but not necessarily limited to the following documents, shall not be subject to *in camera* treatment:

Exhibit No.	Duplicate Exhibit No.	Pages Granted Protection	Pages Waived Protection
RX0324	CX 2315	All	ENHL PK 029713
RX0349		ENH RS 003438; 3439 40	ENH RS 003438
RX0657	CX 6267	ENHL PK 029799 823.01	ENHL PK 029821
RX0679	CX 1607	ENHL RG 004137 8	All
RX0684	CX 0075	CX00075 007 16; CX00075 0035 39(BAIN 00048 00053)	All
RX0696	CX 0111	UHC 016222 016225	All
RX0705		All	All
RX0785	CX 00067	ENH DS 000194 212	All
RX0889		ENHL PK 016483 – 85	All
RX0925		All	All
RX1445		ENHL PK 051620; ENHL PK 051622	All
RX1910		All	001-030
RX1912		All	001-013, 019(map), 025, 060
RX1993	CX 01998	CX01998 40 54(BAIN 00129 00139)	All

The Honorable Stephen J. McGuire
Chief Administrative Law Judge

Date: _____, 2005

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2005, public copies of the foregoing Memorandum in Support of Respondent's Second Supplemental Motion for *In Camera* Treatment of Certain Exhibits and a proposed order were served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

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EXHIBIT D

**INDEX NOTING WAIVER OF IN CAMERA TREATMENT
FOR CERTAIN TRIAL EXHIBIT INFORMATION**

Exhibit No.	Date	Description	Beg. Bates Number	Ending Bates Number	Pages Granted Protection	Pages Waived Protection	Sealed Time Period
REDACTED							
RX0679 (CX01607)	11/18/99	Fax from Miller to Ogden forwarding Bain memorandum re ENH meeting with First United for rate negotiations.	ENHL RG 004132	ENHL RG 004140	ENHL RG 004137 8	All	5 years
RX0684 (CX00075)	11/29/99	Bain & Company, Evanston Northwestern Healthcare Growth Opportunities from the Highland Park Merger re: section on contracting strategy	BAIN 00038	BAIN 00082	CX00075 007 16; CX00075 0035 39(BAIN 00048 00053)	All	5 years(3 years)
RX0696 (CX00111)	12/3/1999	"Letter to James L. Watson, V.P. Medical Delivery Systems, United Healthcare of Illinois from Jack Gilbert, Sr. V.P., Finance, Chief Financial Officer with attachment	UHC 016222	UHC 016225	UHC 016222	All	5 years
RX0705	12/07/99	Bain Memorandum Letter and attachments from Foster to Gilbert, Chan, Levin et al. re Humana PPO/POS negotiations.	ENHL JL 023050	ENHL JL 023059	All	All	5 years
RX0785 (CX00067)	02/01/2000	Bain & Company, Evanston Northwestern Healthcare Growth Opportunities from the Highland Park Merger Final Project Review	ENH DS 000163	ENH DS 00212	ENH DS 000194 212	All	5 years
RX0889	06/20/00	Minutes of Meeting of HPH QI Subcommittee re Professional Staff Quality Improvement	ENHL PK 016482	ENHL PK 016485	ENHL PK 016483 – 85	All	10 years
RX0925	08/13/00	Memo from King to O'Brien re Nursing and Patient Care Quality Issues	ENHL PK 051687	ENHL PK 051688	All	All	10 years

EXHIBIT D

**INDEX NOTING WAIVER OF IN CAMERA TREATMENT
FOR CERTAIN TRIAL EXHIBIT INFORMATION**

Exhibit No.	Date	Description	Beg. Bates Number	Ending Bates Number	Pages Granted Protection	Pages Waived Protection	Sealed Time Period
RX1445	02/00/03	State of Nursing, Inpatient Department Report	ENHL PK 051620	ENHL PK 051622	ENHL PK 051620; ENHL PK 051622	All	10 years
REDACTED							
RX1993 (CX01998)	01/06/00	Bain & Company, "Growth Opportunities from the Highland Park Merger" with contracting strategy	BAIN 00089	BAIN 00150	CX01998 40 54(BAIN 00129 00139)	All	5 years