

PUBLIC

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



In the Matter of

OSF Healthcare System and Rockford Health
System,

Respondents,

DOCKET NO. 9349

Chief Administrative Law Judge
D. Michael Chappell

[PUBLIC]

**MOTION OF NON-PARTY BLUE CROSS AND BLUE SHIELD OF ILLINOIS
FOR *IN CAMERA* TREATMENT OF PROPOSED EVIDENCE**

Blue Cross and Blue Shield of Illinois (“BCBSIL”), a division of Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, respectfully requests that this Court grant *in camera* treatment of various documents and testimony that Complaint Counsel and Respondents’ Counsel have designated for possible introduction in the administrative trial in this matter. BCBSIL, which is not a party to the above-captioned action, produced the documents at issue in response to a Civil Investigative Demand (“CID”) served on it by Complaint Counsel, and a subpoena issued by Respondents in connection with the preliminary injunction proceedings pending in the United States District Court for the Northern District of Illinois.. The deposition testimony sought to be introduced was also subpoenaed by Respondents.

By letter dated March 13, 2012, Complaint Counsel notified BCBSIL that it intends to introduce into evidence three documents and a Declaration produced by BCBSIL in response to the CID, and the transcript of testimony given by Joseph Arango, a BCBSIL employee, in a deposition (the “Arango deposition”). By letter dated March 13, 2012, counsel for Respondent OSF Health System likewise advised BCBSIL that Respondents intend to introduce into

evidence various documents produced by BCBSIL and portions of the same Arango deposition designated in full by Complaint Counsel.

Many of the documents designated by the Parties and the Arango deposition transcript have been designated confidential by BCBSIL.¹ As demonstrated below, this evidence meets the standard required to justify indefinite *in camera* treatment in this proceeding. Information contained in these documents and in the Arango transcript is competitively sensitive and is held in confidence by BCBSIL. Public disclosure of this evidence is likely to cause direct, serious harm to BCBSIL's competitive position. Therefore, pursuant to 16 C.F.R. § 3.45(b), BCBSIL respectfully moves for indefinite *in camera* treatment. BCBSIL submits the Declaration of Joseph Arango, its Vice President, Provider Contracting and Strategy, attached hereto as **Exhibit A**, in further support of this Motion.

The BCBSIL documents designated for introduction into evidence by Complaint Counsel have been marked as Exhibit Numbers: PX 0252, PX 1025, PX 1026, and PX 1030. The Arango deposition has been marked as PX 4005. Respondents' Counsel has provided a list of documents designated only by bates-numbers, and deposition excerpts by page and line. Respondents' designated evidence for which BCBSIL seeks *in camera* treatment is listed on **Exhibit B** to this Motion. Copies of all of these documents are included in a non-public Appendix to this Motion.

I. APPLICABLE LEGAL STANDARD

The evidence described in this motion warrants *in camera* treatment as provided by 16 C.F.R. § 3.45(b). Under 16 C.F.R. § 3.45(b), requests for *in camera* treatment must demonstrate

¹ Many of the documents designated by the parties are not in fact discrete documents, but rather complete files or compilations of numerous documents. It is BCBSIL's understanding that these documents will be offered into evidence in the form in which they have been designated to BCBSIL. BCBSIL therefore moves for protection of them as they have been designated, while acknowledging that not every page of each "document" is confidential or proprietary.

that public disclosure of the evidence at issue "will 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 of a clearly defined, serious injury can be made by establishing that the information in question is "sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980). In this context, "the courts have generally attempted to protect confidential business information from unnecessary airing." *Hood*, 58 F.T.C. at 1188.

The secrecy and materiality of the documents in questions are evaluated according to the following standards articulated by the Commission in *In re Bristol-Meyers Co.*, 90 F.T.C. 455, 456 (1977):

- (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 party in developing the information; and
- (6) the ease of difficulty with which the information could be properly acquired or duplicated by others. (*Id.*)

A non-party requesting *in camera* treatment deserves "special solicitude" for its confidential business information. *In the Matter of Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984) (order directing *in camera* treatment for sales statistics over five years old). Indefinite *in camera* treatment may be granted where the competitive sensitivity or other proprietary value of

the information will not diminish with the passage of time. *In re Coca Cola Co.*, 1900 FTC LEXIS 364 (Oct. 17, 1990).

II. BCBSIL'S CONFIDENTIAL DOCUMENTS WARRANT *IN CAMERA* TREATMENT UNDER THE FEDERAL TRADE COMMISSION'S RULES OF PRACTICE.

A. Description of Documents and Nature of Confidential Information Designated By Complaint Counsel

PX 1025

PX 1025 is BCBSIL's Contract with Saint Anthony Medical Center in Rockford, Illinois, including various amendments.² Arango Declaration at ¶ 2. This set of documents reveals highly confidential and commercially sensitive information about the nature and specifics of BCBSIL's financial relationship with this provider. Public disclosure of these documents would provide valuable information to BCBSIL's competitors in the health insurance market, and to other hospitals in Illinois that BCBSIL negotiates with. (*Id.*) As a result, public disclosure of this information could result in significant damage to BCBSIL's commercial interests.

PX 1026

PX 1026 is a file maintained by BCBSIL with respect to its contract negotiations with Respondent OSF Healthcare System for the 2009 contract year and related historical information. Arango Decl. at ¶ 3. It contains specific information about payments made to St. Anthony's Hospital in Rockford, and four other OSF hospitals in Illinois. *See e.g.*, BCBSIL 718FTC-RKM (showing 2008 PPO and HMO payments). It also contains notes and correspondence reflecting and constituting negotiations between BCBSIL and OSF on rates and performance payments, network issues and marketing strategies. It also includes OSF's

² PX 1025 also includes a file cover and various transmittal pages that were included in the contract file. BCBSIL does not contend that the pages of PX 1025 bates-labeled BCBSIL 118FTC-RKM, BCBSIL 121FTC-RKM, BCBSIL 122FTC-RKM, BCBSIL 123FTC-RKM and BCBSIL 128FTC-RKM contain confidential information warranting protection.

proposals, with BCBSIL's notes on the proposals, and BCBSIL's counterproposals, and internal BCBSIL analysis and communications regarding these proposals and negotiating strategies. Arango Decl. at ¶ 3. The confidentiality of this information is key to BCBSIL's ability to negotiate contracts with hospitals, including Respondents, in the future. Disclosure of it would also harm BCBSIL's competitive situation vis-à-vis other insurance companies in the Illinois market. (*Id.*)

PX 1030

PX 1030 is a copy of an entire BCBSIL file containing analysis of financial information and medical claims experience related to the three hospitals currently in the Rockford, Illinois area.³ Arango Decl. at ¶ 4. Much of the document consists of printouts from BCBSIL's proprietary PPO financial modeling program. (*Id.*) The file also includes BCBSIL's internal comparisons of the three hospitals on various measures and internal communications about comparative rates and bids. (*Id.*) While some of the financial analysis is dated, the specifics about the analysis and the methodology used by BCBSIL is highly confidential and proprietary information. Public disclosure of this information about how BCBSIL conducts critical aspects of its business would be very damaging to its competitive interests. (*Id.*)

PX 0252

PX 0252 is a Declaration of Joseph Arango dated August 9, 2011. Mr. Arango is Vice President, Provider Contracting and Strategy for BCBSIL. Arango Decl. at ¶ 1. Mr. Arango provided the Declaration to the FTC in connection with the CID served on BCBSIL. The Declaration includes, among other confidential information, specific information about BCBSIL's competitive position in the Rockford metropolitan area (PX 0252 ¶ 5), its hospital

³ PX 1030 is actually a compilation of dozens of documents. Some of the individual pages contained in PX 1030 are not confidential. *See e.g.*, PX 1030-002 through 006.

reimbursement methodologies (*Id.* ¶ 18), its business practices with respect to incentives designed to steer patients to particular hospitals (*Id.* ¶ 19), and the terms of its current contracts with the three hospitals in Rockford (*Id.* ¶¶ 20-23). All of this information is secret information that BCBSIL protects from public disclosure because of its competitive value to its competitors in the market for health insurance and to the hospitals it negotiates with.

PX 4005

BCBSIL understands that PX 4005 is the complete transcript of the deposition of Joseph Arango, taken in the related preliminary injunction proceedings on January 20, 2012. The transcript is 153 pages long. The transcript should be afforded *in camera* treatment because portions of it include highly sensitive competitive, trade secret information. For example, there were questions posed to Mr. Arango by reading portions of confidential documents, like current hospital contracts, into the record, and subsequent testimony about the terms of those contracts and the negotiations that led to them. (*See e.g.*, PX 4005 at pp. 41-45 (discussing terms in an Amendment to contract with St. Anthony's Hospital; 76-79 (discussing terms of current contract with Swedish American Hospital).) There are questions and testimony about specific hospital rates (*Id.* at p. 51), BCBSIL's negotiating strategies and techniques (pp. 56; 83-85), the number of subscribers to various BCBSIL products in Rockford (p. 142), and the possible competitive effects, both positive and negative, of the proposed merger on the financial interests of BCBSIL (pp. 102-03). Mr. Arango also testified about BCBSIL's use of pricing models and the terms of its contract with a hospital in Bloomington, Illinois. (PX 4005 at pp. 50-56.) Disclosure of this information to BCBSIL's competitors and the hospitals it negotiates with would give them an unfair advantage that would damage BCBSIL's business interests. Arango Decl. at ¶ 8.

B. Description of Documents and Nature of Confidential Information Designated By Respondents

BCBSIL 181FTC-RKM-BCBSIL 184FTC-RKM

This document is an amendment to BCBSIL's current contract with non-party Swedish American Hospital. Swedish American is the only full service inpatient competitor to Respondents in Rockford. Arango Decl. at ¶ 5. Public disclosure of this document, which contains inpatient and outpatient rates through at least 2013, and other highly sensitive information regarding the current terms of the contracted relationship between BCBSIL and Swedish American, would severely injure BCBSIL's competitive interests. (*Id.*)

BCBSIL 764FTC-RKM

This document outlines the "Pay for Performance" incentives offered by BCBSIL to the OSF Healthcare System hospitals for 2009. Arango Decl. at ¶ 6. Public disclosure of this information would give other Illinois hospitals information that would inform their bargaining positions with BCBSIL. It would also give BCBSIL's competitors information about BCBSIL's business operations that is not public and is highly material. (*Id.*)

BCBSIL 6838FTC-RKM-6858FTC-RKM

These two documents are drafts of the Arango Declaration discussed above,⁴ and contain the same competitively sensitive information as the final Declaration.

BCBSIL 3297FTC-RKM-3384FTC-RKM, BCBSIL 3707FTC-RKM-3858FTC-RKM and BCBSIL 3689FTC-RKM-4058FTC-RKM

These three documents contain instructions for accessing and interpreting various interations of highly confidential claims data sent to the FTC by BCBSIL pursuant to the CID,

⁴ The two documents as designated also include fax cover sheets and a transmittal letter. See BCBSIL 6838FTC-RKM, 6848FTC-RKM and 6856FTC-RKM. BCBSIL does not contend that these pages are independently confidential.

and printouts of screenshots and data files relating to that data. The information in these documents provides an open window into BCBSIL's operational systems. Arango Decl. ¶ 7. A person with the right kind of technical expertise and experience with health insurer claim systems, like an employee of a BCBSIL competitor, could unfairly glean a substantial amount of secret information about BCBSIL's operations by analyzing these documents.

Excerpts from PX 4005

Respondents have designated specific page/line portions of the Arango transcript designated by Complaint Counsel as PX 4005. If the transcript is not offered or admitted in its entirety, BCBSIL requests *in camera* treatment of the following specifically designated sections, all of which reflect competitively sensitive and non-public information: 48:3-13, 55:6-57:8, 61:8-63:15, 70:19-71:17, 73:10-22, 79:13-80:4, 87:17-88:14, 88:22-89:8 and 102:9-25.

C. BCBSIL Has Preserved the Secrecy and Confidentiality of the Documents and Data.

The confidential information contained in the documents described above is maintained as confidential by BCBSIL. Arango Decl. ¶ 9. Information about the terms of specific hospital contracts, for example, is limited to employees in Mr. Arango's Contracting and Strategy group, the Legal department, and others with a business need to know. (*Id.*) BCBSIL uses proprietary financial analysis tools in connection with its hospital contracting that it maintains in strict confidence. (*Id.*) Thus, the information BCBSIL seeks *in camera* treatment for in this proceeding is not known outside BCBSIL's business and could not be easily acquired by others.

D. The Public Interest in Disclosure is Outweighed by the Likelihood of Serious Competitive Harm to BCBSIL.

As a non-party requesting *in camera* treatment for its confidential business information, BCBSIL justifiably requires and merits receiving "special solicitude." *In the Matter of Kaiser Aluminum & Chemical Corporation*, 103 F.T.C. 500 (1984) (order directing *in camera* treatment

for sales statistics over five years old). *In camera* treatment encourages non-parties to cooperate with future discovery requests in adjudicative proceedings. *Id.* BCBSIL has cooperated with the discovery demands in this case and the related preliminary injunction proceeding. Disclosing documents containing BCBSIL's highly confidential information will not materially promote the resolution of this matter, nor will these documents lend measureable public understanding of these proceedings. The balance of interests clearly favors *in camera* protection for the information at issue in this Motion.

E. Protection Should be Extended Indefinitely

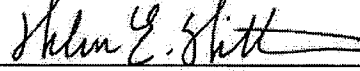
The nature of the highly confidential information in the designated documents and testimony warrants indefinite *in camera* treatment. Indefinite *in camera* treatment may be granted where the competitive sensitivity or the proprietary value of the information will not diminish with the passage of time. *In re Coca Cola Co.*, 1990 F.T.C. LEXIS 364 (Oct. 17, 1990). Unlike ordinary business records, which often receive *in camera* treatment for shortened periods of time, the reimbursement rate and payment information, negotiating strategies, and financial and claim system structures reflected in the documents at issue here are extremely sensitive and of such enduring significant proprietary value to BCBSIL's competitive position and business strategy that their value will not diminish with the passage of time.

III. CONCLUSION

Under the Federal Trade Commission's Rules of Practice and relevant FTC precedent, indefinite *in camera* treatment of the documents in Exhibit No. PX 0252, Exhibit No. PX 1025, Exhibit No. PX 1026, Exhibit No. PX 1030, Exhibit No. PX 4005 and the documents listed on Exhibit B is warranted. BCBSIL respectfully requests *in camera* treatment of all these documents indefinitely.

Dated: March 20, 2012

Respectfully submitted,



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FEDERAL TRADE COMMISSION
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DOCUMENT PROCESSING

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

In the Matter of

OSF Healthcare System and Rockford Health
System,

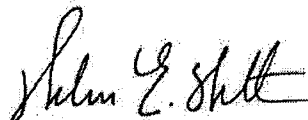
Respondents,

DOCKET NO. 9349

Chief Administrative Law Judge
D. Michael Chappell

CERTIFICATE OF VERIFICATION OF WORD COUNT

I HEREBY CERTIFY that Motion of Non-Party Blue Cross Blue Shield of Illinois for *In Camera* Treatment of Proposed Evidence does not exceed the 10,000 word count per 16 CFR § 3.22 (c).



Helen E. Witt

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

In the Matter of

OSF Healthcare System and Rockford Health
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D. Michael Chappell

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion was served on the following
on March 20, 2012.

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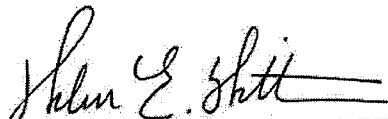
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Helen E. Witt
*Counsel for Non-Party Blue Cross and Blue
Shield of Illinois*

PUBLIC

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of

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**DECLARATION OF JOSEPH ARANGO IN SUPPORT OF
MOTION OF NON-PARTY BLUE CROSS AND BLUE SHIELD
OF ILLINOIS FOR *IN CAMERA* TREATMENT OF PROPOSED EVIDENCE**

I, Joseph Arango, declare as follows:

1. I am Vice President, Provider Contracting and Strategy, for Blue Cross and Blue Shield of Illinois ("BCBSIL"). In that position, I am responsible for BCBSIL's contractual relationships with hospitals throughout the State of Illinois. I have had responsibility for negotiating with Illinois hospitals, including hospitals in Rockford, for more than 15 years. I have personal knowledge of the information that BCBSIL protects as confidential in the normal course of its business. Based on my job responsibilities, I also have an understanding and knowledge of the types of information that would harm BCBSIL's competitive situation relative to competitors in the health insurance market, or its bargaining abilities with hospitals, if publically disclosed.

2. PX 1025 is BCBSIL's Contract with Saint Anthony Medical Center in Rockford, Illinois, including various amendments. This set of documents reveals highly confidential and commercially sensitive information about the nature and specifics of BCBSIL's financial relationship with this hospital. Public disclosure of these documents would provide valuable

information to BCBSIL's competitors in the health insurance market, and to other hospitals in Illinois that BCBSIL negotiates with.

3. PX 1026 is a file maintained by BCBSIL with respect to its contract negotiations with OSF Healthcare System for the 2009 contract year, and related historical information. It contains specific information about payments made to St. Anthony's Hospital in Rockford, and four other OSF hospitals in Illinois. It also contains notes and correspondence reflecting and constituting negotiations between BCBSIL and OSF on rates and performance payments, network issues and marketing strategies. It also includes OSF's proposals, with BCBSIL's notes on the proposals, and BCBSIL's counterproposals, and internal BCBSIL analysis and communications regarding these proposals and negotiating strategies. The confidentiality of this information is key to BCBSIL's ability to negotiate contracts with hospitals, including hospitals in Rockford, in the future. Disclosure of this file would also harm BCBSIL's competitive situation relative to other insurance companies in the Illinois market.

4. PX 1030 is a copy of an entire BCBSIL file containing analysis of financial information and medical claims experience related to the three hospitals currently in the Rockford, Illinois area. Much of the document consists of printouts from BCBSIL's proprietary PPO financial modeling program. The file also includes BCBSIL's internal comparisons of the three hospitals on various measures, and internal communications about comparative rates and bids. While some of the financial data contained in the file is dated, the specifics about the types of analyses BCBSIL does, and the methodology used by BCBSIL, are highly confidential and proprietary information. Public disclosure of this information would be very damaging to BCBSIL's competitive interests.

5. BCBSIL 181FTC-RKM-BCBSIL 184FTC-RKM is an amendment to BCBSIL's current contract with Swedish American Hospital. Swedish American is the only full service inpatient competitor to Respondents in Rockford. Public disclosure of this document, which contains inpatient and outpatient rates through at least 2013, and other highly sensitive information regarding the current terms of the contractual relationship between BCBSIL and Swedish American, would severely injure BCBSIL's competitive interests.

6. BCBSIL 764FTC-RKM outlines the "Pay for Performance" incentives offered by BCBSIL to the OSF Healthcare System hospitals for 2009. Public disclosure of this information would give other Illinois hospitals information that would inform their future bargaining positions with BCBSIL. It would also give BCBSIL's competitors information about BCBSIL's business operations that is not public and is highly material.


7. BCBSIL 3297FTC-RKM-3384FTC-RKM, BCBSIL 3707FTC-RKM-3858FTC-RKM and BCBSIL 3689FTC-RKM-3911FTC-RKM contain instructions for accessing and interpreting various iterations of highly confidential claims data sent to the FTC by BCBSIL, and printouts of screenshots and data files relating to that data. The information in these documents provides an open window into BCBSIL's operational systems. A person with technical expertise could glean a substantial amount of information about BCBSIL's methods of operation by analyzing these documents.

8. PX 4005 is the complete transcript of my deposition taken in the related preliminary injunction proceedings on January 20, 2012. The transcript is 153 pages long and includes highly sensitive competitive, trade secret information. For example, there were questions posed to me by reading portions of confidential documents, like current hospital contracts, into the record, and subsequent testimony about the terms of those contracts and the

negotiations that led to them. There are questions and testimony about specific hospital rates and BCBSIL's negotiating strategies and techniques, and the possible competitive effects, both positive and negative, of the proposed merger on the financial interests of BCBSIL. Disclosure of this information to BCBSIL's competitors and the hospitals we negotiate with would give them an unfair advantage that would damage BCBSIL's business interests.

9. BCBSIL protects the secrecy of the confidential information contained in the documents described above. Information about the terms of specific hospital contracts, for example, is restricted to people in my group, legal, and others with a business need to know. We use proprietary financial analysis tools that are maintained in strict confidence.

I declare under penalty of perjury that the foregoing statements are true and correct.



Joseph Arango

Signed this 16 day of March 2012.

PUBLIC

EXHIBIT B

BCBSIL EVIDENCE DESIGNATED BY RESPONDENTS

BCBSIL 181FTC-RKM-BCBSIL 184FTC-RKM

BCBSIL 764FTC-RKM

BCBSIL 6838FTC-RKM-6847FTC-RKM

BCBSIL 6848FTC-RKM-6858FTC-RKM

BCBSIL 3297FTC-RKM-3384FTC-RKM

BCBSIL 3707FTC-RKM-3858FTC-RKM

BCBSIL 3689FTC-RKM-4058FTC-RKM

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Chief Administrative Law Judge
D. Michael Chappell

PROPOSED ORDER

On March 20, 2012, Non-Party Blue Cross Blue Shield of Illinois ("BCBSIL") filed a Motion for *In Camera* Treatment of Proposed Evidence containing confidential business information in various documents and a deposition transcript identified by Complaint Counsel and Respondents as potential trial exhibits.

IT IS HEREBY ORDERED that BCBSIL's Motion is GRANTED. The BCBSIL documents designated by Complaint Counsel as Exhibits Nos. PX 0252, 1025, 1026, 1030 and 4005 and the documents designated by Respondents by production numbers BCBSIL181FTC-RKM-BCBSIL-184FTC-RKM, BCBSIL764FTC-RKM, BCBSIL6838FTC-RKM-6847FTC-RKM, BCBSIL6848FTC-RKM-6858FTC-RKM BCBSIL3297FTC-RKM-3384FTC-RKM, BCBSIL3707FTC-RKM-3858FTC-RKM, and BCBSIL3689FTC-RKM-4058FTC-RKM will be subject to *in camera* treatment under 16 C.R.F. § 3.45 and indefinitely will be kept confidential and not placed on the public record of this proceeding or at any point thereafter.

IT IS FURTHER ORDERED that only authorized Federal Trade Commission personnel, and court personnel concerned with judicial review may have access to the above-referenced information, provided that I, the Commission, and reviewing courts may disclose such *in camera* information to the extent necessary for the proper disposition of this proceeding.

PUBLIC

ORDERED: _____

D. Michael Chappell
Chief Administrative Law Judge

DATED: _____

APPENDIX

REDACTED