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

_____)
)
In the Matter of)
)
OSF Healthcare System,)
a corporation, and)
)
Rockford Health System,)
a corporation)
_____)

Docket No. 9349
PUBLIC

**NON-PARTY THE ALLIANCE'S MOTION FOR *IN*
CAMERA TREATMENT OF PROPOSED EVIDENCE**

I. INTRODUCTION

Employer Health Care Alliance Cooperative ("The Alliance"), which is not a party to the above-captioned action, respectfully requests that this tribunal grant in camera treatment of several documents that Complaint and Respondent Counsel have designated for possible introduction in the administrative trial in this matter. By letters dated March 13, 2012, counsel for the FTC and the OSF Healthcare System ("OSF") notified The Alliance that they intend to introduce into evidence certain data and testimony produced by The Alliance in response to a Civil Investigation Demand ("CID") from the FTC and a subpoena duces tecum issued by OSF in this matter. _____

The Alliance documents designated for introduction into evidence by the FTC have been marked by the FTC as Exhibit Nos. PX4268, 4269, and 4082. The Alliance seeks protection for Exhibit PX4268, which is a composite document consisting of 188 pages from The Alliance's document production, and PX4082, which is a transcript of the deposition of The Alliance's employee Kelly Davit.

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The Alliance documents designated for introduction into evidence by OSF consist of Exhibits 5 through 10 from Ms. Davit's deposition, a directory produced by The Alliance (Bates AL00013-000170), and Ms. Davit's deposition transcript. (As described below, some of these documents duplicate documents identified by the FTC's counsel.) The Alliance seeks protection for all of these documents other than the directory.

These documents and testimony were designated by The Alliance as confidential when they were produced. The information contained in these documents is competitively sensitive and is held in strict confidence by The Alliance. Public disclosure of these documents is likely to cause direct, serious harm to The Alliance's competitive position. Therefore, pursuant to 16 C.F.R. § 3.45(b), The Alliance respectfully moves for indefinite in camera treatment of the confidential documents described in the Declaration of Kelly Davit in support of this Motion, attached hereto as Exhibit A.

II. LEGAL STANDARD

The documents that are described in this motion warrant 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 show that public disclosure of the document in question "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 document 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.

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The secrecy and materiality of the documents in question 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 Corporation*, 103 F.T.C. 500 (1984) (order directing in camera treatment for sales statistics over five years old).

Indefinite in camera treatment is granted under certain circumstances. First, under 16 C.P.R. § 3.45(b), "sensitive personal information . . . shall be accorded permanent in camera treatment unless disclosure or an expiration date is required or provided by law." Second, 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 FTC LEXIS 364 (Oct. 17, 1990). Examples of this information include trade secrets,

secret formulas, processes, and other secret technical information, and information that is privileged. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000).

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

A. Description of Documents for Which Protection Is Sought

1. FTC's Exhibit PX4268. This document is a composite exhibit consisting of documents The Alliance provided in response to a subpoena from Respondent Counsel in this matter, numbered AL0001 through 188. The contents of the document are as follows:

| <u>Pages</u> | <u>Description</u> |
|--------------|---------------------------------------------------------------------------|
| 1-12 | The Alliance's non-public financial statements |
| 13-170 | The Alliance provider directory |
| 171-77 | Tabulation of eligible lives by county for The Alliance |
| 178-79 | Excerpt from consultant's report prepared for the Alliance |
| 180-87 | Ranking of area health care providers internally prepared by The Alliance |
| 188 | Names and addresses for employees involved in negotiations |

The Alliance does not contend that pages 13-170 and 188 of this exhibit are non-public; however, the remainder of the document contains private confidential information. As set forth in the Davit Declaration attached hereto, The Alliance does not make its financial statements (pages 1-12) available to the public, and such information would provide a competitive advantage to others in the industry; the tabulation of eligible lives by county (171-77) is not information available to the public, and the amount and location of lives served by The Alliance would be valuable information for competitors; the consultant's report (178-79) is from a report prepared by a private consultant for The Alliance, which report has not been disclosed and would provide a competitive advantage to others; the ranking of health care providers in the subject area (180-87) was a document prepared by The Alliance for its own internal use in marketing

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within the area, which was not disclosed and which would provide a competitive advantage.

Davit Decl., ¶ 3.

2. FTC's Exhibit PX4082. This document is the deposition transcript of Kelly Davit. This testimony consisted of detailed description of The Alliance's business activities in the subject area, its marketing plans, pricing, negotiations with vendors, and other commercially sensitive information. Davit Decl., ¶ 4. (The testimony also included activities of Ms. Davit's prior employer, The Employers' Coalition on Health ["ECOH"]; based on discussions with counsel for ECOH, we anticipate that ECOH will also move for in camera treatment of this deposition.)

3. Davit Deposition Exhibit 5. This document is a duplicate of pages AL000171-177, already discussed above, item 1, and is confidential for the reasons set forth therein.

4. Davit Deposition Exhibit 6. This document is a duplicate of pages AL000180-187, already discussed above, item 1, and is confidential for the reasons set forth therein.

5. Davit Deposition Exhibits 7 through 9. These documents are The Alliance's current agreements with three healthcare providers in the subject area (including two of the Respondents in this action). The documents are subject to explicit confidentiality provisions set forth in their terms, and in any event contain information as to negotiated terms, including reimbursement rates and discounts, that would provide a significant competitive advantage to others in the marketplace. *See* Davit Declaration, at ¶ 7.

6. Davit Deposition Exhibit 10. This document is a duplicate of pages AL000178-179, already discussed above, item 1, and is confidential for the reasons set forth therein.

B. The Alliance Has Preserved the Secrecy and Confidentiality of the Subject Documents

The Alliance has taken substantial measures to guard the secrecy of the information contained in the subject documents. As set forth in the Davit Declaration, The Alliance has limited dissemination of the documents and information therein, taking every reasonable step to protect its confidentiality. (Davit Decl., ¶ 2). The information is disclosed only to particular employees of The Alliance on a “need to know” bases. *Id.* The information is not made available to the public in any way. *Id.* It would be virtually impossible for The Alliance's competitors or other outside persons to access or recreate the information in the documents at issue. *Id.* Moreover, as a matter of both internal policy and its contractual obligation under its agreements with hospitals, The Alliance does not make pricing information or discount information available other than as required by law. *Id.* In sum, these efforts demonstrate that The Alliance has gone to great lengths to preserve the confidentiality of the information contained in the subject documents.

C. The Information in the Subject Documents Is Sufficiently Material Such That Its Disclosure Would Result in Serious Competitive Injury to The Alliance

The data compiled in the above documents is also sufficiently material to The Alliance's business that disclosure would result in serious competitive injury. *Id.*, ¶¶ 3-11. Making public these documents containing specific financial information, pricing terms, rankings of providers, and private information regarding the subject market would allow The Alliance's competitors to negotiate unfairly with providers or otherwise compete unfairly with The Alliance, which would, in turn, result in serious and significant competitive injury and potential irreparable harm. *Id.* Should other commercial or non-profit health carriers or health maintenance organizations become aware of The Alliance's reimbursement arrangements and methodologies with area

hospitals, the effect would be an erosion of The Alliance's competitiveness in the marketplace. *Id.* This, in turn, would result in an increase in the overall hospital reimbursement payments by The Alliance to participating hospitals and would result in increased premiums to The Alliance's end customers (employees of member employers) as well as increased administrative fees to The Alliance's self-funded customers. *Id.* Disclosure would also interfere with the ability of The Alliance to negotiate and offer quality, affordable health care programs. *Id.*

Likewise, the highly confidential pricing and reimbursement rate information set forth in Davit Deposition Exhibit Nos. 7 through 9, as well as the deposition testimony of Kelly Davits as to The Alliance's ongoing business practices, ongoing contracts, methodologies and strategies for negotiation, and knowledge of the healthcare market in the subject area, is highly material to The Alliance's business. *Id.*, at ¶ 10. The Alliance has maintained market competitiveness in its relationships with hospitals by confidentially negotiating pricing and reimbursement rates. *Id.* Disclosure of such information would equip The Alliance's competitors with information regarding its contractual relationship with multiple hospitals to The Alliance's competitive disadvantage. *Id.* This is information that could be used by The Alliance's competitors for their own advantage in targeting The Alliance's providers and analyzing the manner in which The Alliance determines applicable rates. *Id.*

These prospective pecuniary losses qualify as the "clearly defined, serious injury" required to demonstrate a need for in camera treatment. "The likely loss of business advantages is a good example of a 'clearly defined serious injury.'" *In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *7 (Dec. 23, 1999). Materials that "represent significant work product, compiled at great expense, [and the] disclosure of which would give other companies the benefit of [the

applicant's] labors" are good candidates for in camera treatment. *In re General Foods*, 1980 FTC LEXIS 99, at *7-8 (March 10, 1980).

D. The Public Interest in Disclosure of the Subject Documents Is Outweighed by the Likelihood of Serious Competitive Harm to The Alliance

As a non-party requesting in camera treatment for its confidential business information, The Alliance 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.* The Alliance has cooperated with the discovery demands in this case. Conversely, disclosing documents containing The Alliance's highly confidential information will not materially promote the resolution of this matter, nor will very specific these documents lend measureable public understanding of these proceedings. The balance of interests clearly favors in camera protection for the subject documents. *See In re Bristol- Myers*, 90 F.T.C. at 456.

E. Protection Should Be Extended Indefinitely

The nature of the highly confidential information contained in the subject documents 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 FTC LEXIS 364 (Oct. 17, 1990). Unlike ordinary business records, such as business plans, marketing plans, or sales documents, which often receive in camera treatment for shortened periods of time, the reimbursement rates and payment information set forth in the subject documents, and the strategic information evidenced throughout the documents, are extremely sensitive and of such enduring significant proprietary value to The Alliance's competitive position and business strategy that their value will not

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diminish with the passage of time. Accordingly, The Alliance respectfully requests that the subject documents be afforded indefinite in camera protection.

IV. CONCLUSION

Under the Federal Trade Commission's Rules of Practice and relevant FTC precedent, indefinite in camera treatment of the subject documents is warranted. These documents are both secret and material to The Alliance's business. Accordingly, this tribunal should extend indefinite in camera protection to these confidential documents.

Respectfully submitted this 19th day of March, 2012.



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EXHIBIT A

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

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| In the Matter of |) | |
| |) | Docket No. 9349 |
| OSF Healthcare System, |) | PUBLIC |
| a corporation, and |) | |
| |) | |
| Rockford Health System, |) | |
| a corporation |) | |
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DECLARATION OF KELLY DAVIT

I, Kelly Davit, declare as follows:

1. I am currently the Southern Region Manager for the Employer Health Care Alliance Cooperative (“The Alliance”), based in Madison, Wisconsin, which responded to a Civil Investigation Demand and third-party subpoena *duces tecum* issued by counsel in this case. In my role as Southern Region Manager, I am responsible for negotiating with and helping to manage The Alliance’s provider networks, including contractual relationships with participating hospitals in northern Illinois. I am familiar with the highly confidential information that The Alliance maintains in the course of its contractual and business relationships. I make this declaration on the basis of my personal knowledge of the facts set forth herein.

2. I am familiar with The Alliance documents designated by the FTC as Exhibit Nos. PX4268 and PX4082, and Exhibits 5 through 10 marked at my deposition in this matter. The Alliance takes substantial measures to guard the information contained in these documents from public disclosure. The Alliance limits disclosure of such information only to particular The Alliance employees with a “need to know” such information, and takes every reasonable step to

protect its confidentiality. The information is not known outside of The Alliance except and only to the extent necessary to engage in contract negotiations. The information contained in these documents would be extremely difficult for The Alliance's competitors or other outside persons to access or duplicate. Moreover, as a matter of both internal policy and its contractual obligation under its agreements with hospitals, The Alliance does not make pricing information or discount information available other than as required by law. Disclosure of these materials would cause serious competitive injury to The Alliance.

3. Exhibit PX4268 consists of 188 numbered pages. Numerous pages contain sensitive and confidential information of The Alliance. The financial statements (pages 1-12) are not available to the public, and such information would provide a competitive advantage to others in the industry. The tabulation of eligible lives by county (171-77) is not information available to the public, and the amount and location of lives served by The Alliance would be valuable information for competitors. The consultant's report (178-79) is from a report prepared by a private consultant for The Alliance, which report has not been disclosed and would provide a competitive advantage to others. The ranking of health care providers in the subject area (180-87) was a document prepared by me for The Alliance for its own internal use in marketing within the Northern Illinois area, which was not disclosed to any third parties and which would provide a competitive advantage.

4. At my deposition in this matter, Exhibit PX4082, I provided a detailed description of The Alliance's business activities in the subject area, its marketing plans, pricing, negotiations with vendors, and other commercially sensitive information. This information on The Alliance's ongoing business practices, ongoing contracts, methodologies and strategies for negotiation, and knowledge of the healthcare market in the subject area, is all information that is not disclosed

outside of the Alliance except and only to the extent necessary to conduct negotiations, and such negotiations result in agreements which are themselves confidential.

5. Davit Deposition Exhibit 5 is a duplicate of pages AL000171-177, already discussed above in paragraph 3, and is confidential for the reasons set forth therein.

6. Davit Deposition Exhibit 6 is a duplicate of pages AL000180-187, already discussed above in paragraph 3, and is confidential for the reasons set forth therein.

7. Davit Deposition Exhibits 7 through 9 are The Alliance's current agreements with three healthcare providers in the subject area (including two of the Respondents in this action). The documents are subject to explicit confidentiality provisions set forth in their terms, and in any event contain information as to negotiated terms, including reimbursement rates and discounts, that would provide a significant competitive advantage to others in the marketplace.

8. Davit Deposition Exhibit 10 is a duplicate of pages AL000178-179, already discussed above in paragraph 3, and is confidential for the reasons set forth therein.

9. Disclosure of the information described above would reveal highly confidential and commercially sensitive information regarding how The Alliance negotiates contracts and rates with providers that are part of its network. Disclosure would reveal valuable information regarding the way that The Alliance defines relationships with its providers and how rates are determined, processes that The Alliance has expended numerous hours and many years to develop.

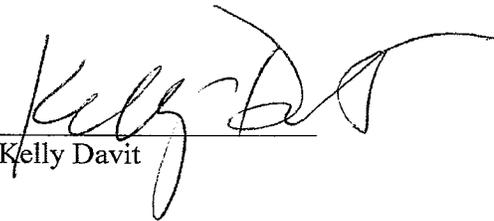
10. The Alliance's negotiation efforts have allowed it to gain a competitive advantage in the marketplace and to better service its clients. Disclosure of this information would result in serious damage to The Alliance's competitive advantage in the marketplace. This is information that could be used by The Alliance's competitors for their own advantage in targeting The

Alliance's providers and analyzing the manner in which The Alliance determines applicable rates.

11. The data compiled in the documents referenced herein is also sufficiently material to The Alliance's business that disclosure would result in serious competitive injury. Making public these documents containing specific financial information, pricing terms, rankings of providers, and private information regarding the subject market would allow The Alliance's competitors to negotiate unfairly with providers or otherwise compete unfairly with The Alliance, which would, in turn, result in serious and significant competitive injury and potential irreparable harm. Should other commercial or non-profit health carriers or health maintenance organizations become aware of The Alliance's reimbursement arrangements and methodologies with area hospitals, the effect would be an erosion of The Alliance's competitiveness in the marketplace. This, in turn, would result in an increase in the overall hospital reimbursement payments by The Alliance to participating hospitals and would result in increased premiums to The Alliance's end customers (employees of member employers) as well as increased administrative fees to The Alliance's self-funded customers. Disclosure would also interfere with the ability of The Alliance to negotiate and offer quality, affordable health care programs.

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

Dated this 21st day of March, 2012.


Kelly Davit

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

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| In the Matter of |) | |
| |) | |
| OSF Healthcare System, a corporation, and |) | Docket No. 9349 |
| |) | PUBLIC |
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| Rockford Health System, a corporation |) | |
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PROPOSED ORDER

On March 21, 2012, non-party Employer Health Care Alliance Cooperative (“The Alliance”) filed a motion for *in camera* treatment of confidential business information contained in various documents that have been identified by counsel in this matter as potential exhibits.

IT IS HEREBY ORDERED that The Alliance’s motion is GRANTED. The Alliance documents designated by Complaint Counsel as Exhibit Nos. PX4268 and PX4082, the deposition transcript of Kelly Davits, and Exhibits 5 through 10 from Ms. Davit’s deposition, will be subject to *in camera* treatment under 16 C.F.R. § 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 the proceeding.

ORDERED: _____
D. Michael Chappell
Chief Administrative Law Judge

DATED: _____

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

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|) | | |
| OSF Healthcare System,) | | Docket No. 9349 |
| a corporation, and) | | PUBLIC |
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| Rockford Health System,) | | |
| a corporation) | | |
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that the foregoing instrument was served on the following on March 19, 2012:

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The Honorable D. Michael Chappell
Administrative Law Judge
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(Original and one copy served via Federal Express, electronic copies served via e-mail and disc)

(Two copies served via Federal Express and e-mail)

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