

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

ORIGINAL



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

Docket No. 9349

**NON-PARTY KISHHEALTH SYSTEM'S MOTION FOR *IN CAMERA* TREATMENT
OF PROPOSED EVIDENCE**

Third Party KishHealth System ("KishHealth"), by its attorneys, Reinhart Boerner Van Deuren s.c., hereby moves pursuant to 16 C.F.R. §§ 3.45 and 4.10(g), for an order granting *in camera* treatment of certain proposed evidence.

INTRODUCTION

KishHealth Systems produced documents ("KishHealth Documents") to Defendant Rockford Health System ("Rockford"), in response to a *subpoena duces tecum* dated December 21, 2011. KishHealth produced these documents subject to the confidentiality protections in this Court's November 18, 2011 Protective Order. On March 13, 2012, Counsel for Rockford informed KishHealth that it will use certain of the KishHealth Documents as exhibits in the current action, and may also designate certain additional KishHealth documents as exhibits in the near future.

After reviewing the KishHealth Documents designated by Rockford, KishHealth has determined that some confidential documents merit *in camera* protection. These documents are

attached hereto as Exhibits B through G.¹ As described in the Declaration of Kevin Poorten, attached hereto as Exhibit A, KishHealth requests and moves the Court for *in camera* protection because these documents contain highly confidential and competitively sensitive information, which if made public, would harm KishHealth and provide KishHealth's competitors an unfair advantage.

DISCUSSION

I. LEGAL STANDARD

Under 16 C.F.R. § 3.45, a court may enter an order mandating *in camera* treatment of certain evidence if public disclosure of the evidence "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). "[C]ourts have generally attempted to protect confidential business information from unnecessary airing." *H.P. Hood*, 58 F.T.C. at *4. When considering a motion for *in camera* treatment, a court evaluates the following:

- (1) the extent to which the information is known outside of [the movant's] business;
- (2) the extent to which it is known by employees and others involved in [the movant's] business;
- (3) the extent of measures taken by [the movant] to guard the secrecy of the information;
- (4) the value of the information to [the movant] and to his competitors;
- (5) the amount of effort or money expended by [the movant] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Bristol-Myers Co., 90 F.T.C. 455, 456 (1977).

¹ Counsel for Rockford has not yet designated Exhibits F or G as official exhibits for this proceeding, but has indicated that it intends to do so in the future.

A movant must demonstrate that "the documents are secret [and] that they are material to [it]s business." *Id.* The documents produced by KishHealth are confidential and material to its business, such that *in camera* treatment is warranted pursuant to 16 C.F.R. § 3.45.

II. KISHHEALTH'S CONFIDENTIAL DOCUMENTS WARRANT *IN CAMERA* TREATMENT BECAUSE THEIR DISCLOSURE WOULD CAUSE KISHHEALTH SERIOUS COMPETITIVE INJURY.

A. KishHealth Has Preserved the Confidentiality of the Documents and Data Contained Therein.

KishHealth takes many steps to preserve the confidentiality of its documents and to protect the data and information contained therein. (Decl. ¶ 2.) KishHealth produced these documents only after a protective order was in place. (*Id.*) Additionally, KishHealth negotiated an agreement with Rockford's counsel that access to the documents contained in Exhibit F would be further limited to only counsel of record in the case, and that no other attorneys in the McDermott firm would view them. (*Id.*) Within its organization, KishHealth limits access to these documents solely to senior leaders and the Board of Directors. (*Id.*) Occasionally, certain director personnel are permitted to view these documents but only on an as-needed basis. (*Id.*) Moreover, some of the documents are contained in a "contract management system," to which only certain named individuals have access. (*Id.*) Documents in the contract management system are password-protected. (*Id.*) Documents contained in the "contract management system" are attached hereto as Exhibit F. (*Id.*)

KishHealth does not share its confidential documents outside of its organization. (*Id.*) It would be virtually impossible for KishHealth's competitors to access KishHealth's document database or the "contract management system" to obtain this information. Moreover, specifically with respect to Exhibit F, KishHealth is contractually obligated not disclose its

health provider contracts to any other party unless required by law. (*Id.* ¶ 8.) In sum, KishHealth goes to great effort to keep these documents confidential. (*Id.* ¶ 2.)

B. Public Disclosure of the Information Contained in Exhibits B-H would Result in Serious Competitive Injury to KishHealth.

The documents for which KishHealth seeks *in camera* treatment are attached hereto as Exhibits B through G. Exhibit B consists of various confidential research reports and data. (Decl. ¶ 3). KishHealth paid significant amounts for research to be conducted and data to be collected and organized in reports for its senior leaders and board of directors. (*Id.*) The reports themselves contain confidential information and an analysis of that information that is also confidential.

First, the "General Findings" section of a report by Professional Research Consultants, Inc., reveals important statistics and information about KishHealth's market demographic, and provides comparisons to national averages. (*Id.*) KishHealth uses this information to determine its business strategies. (*Id.*) This confidential information would be highly valuable to any of KishHealth's competitors, because it would give them an unfair competitive advantage in marketing their services in KishHealth's service area. (*Id.*)

Second, "Kishwaukee Community Hospital Inpatient Ratings" is a portion of a report prepared by HealthStream Research. (*Id.*) It rates KishHealth's performance using a variety of metrics, and provides a series of charts indicating KishHealth's statistics in comparison to other hospitals in the HealthStream Network database. (*Id.*) This document is highly confidential and contains proprietary information. (*Id.*)

Third, "Hospital Study Findings," prepared by Public Research Group, contains particularly sensitive information regarding KishHealth's efforts to expand its services into another market, and compete with the existing hospital facilities there. (Decl. ¶ 4). The mere

fact that KishHealth is looking at expanding into other geographic areas is confidential. (*Id.*). Moreover, this study provides highly specific confidential information about the strengths and weaknesses of the current facilities in the particular target market, which is not publicly-available. (*Id.*). Any potential competitor could use this information to thwart KishHealth's efforts to compete in this region. (*Id.*).

Fourth, the "Kishwaukee Community Hospital Charge Comparison" is a series of graphs comparing Kishwaukee Community Hospital's charges to those of its competitors for inpatient and outpatient procedures. (*Id.*). This data is not publicly-available in this format, and would be highly valuable to any competitor seeking to gain an unfair advantage over KishHealth System. (*Id.*). KishHealth expended substantial time and money in creating this confidential and highly sensitive document. (*Id.*).

Lastly for the documents in Exhibit B, the "Kishwaukee Community Hospital Facility Assessment" is a highly confidential document, which shows when and where KishHealth is looking to expand, and how and where it plans to add more hospital beds, and drive future volumes. (*Id.*). All of the documents in Exhibit B contain highly sensitive, proprietary, and confidential information of KishHealth's, which if made public, would provide competitors with an unfair advantage.

Exhibit C is a confidential presentation that describes KishHealth's plans for potential future expansion. (Decl. ¶ 5). It contains details about the demographic KishHealth is targeting, the scope of the project, and its feasibility. (*Id.*). This document is confidential, and if publicly released, could impact KishHealth and its existing and potential business relationships. (*Id.*).

Exhibit D is a document detailing the information KishHealth has collected about other hospital systems in its market. (Decl. ¶ 6). It reveals information that KishHealth has spent

substantive time and effort to gather regarding its competitors. (*Id.*). This confidential, proprietary, and strategic planning document is shared exclusively with KishHealth's Board of Directors, and exposes KishHealth's thought-processes for future development. (*Id.*).

Exhibit E is KishHealth's standard physician employment agreement. (Decl. ¶ 7). It contains confidential information, such as the amount of professional liability insurance KishHealth provides its physicians, and the length of a physician's non-compete obligations. (*Id.*). If this contract was revealed to competitors, it would give them a substantial unfair advantage in recruiting and retaining physicians in KishHealth's market. (*Id.*).

Exhibit F consists of five of KishHealth's contracts with health plans and letters regarding rate increases and negotiations. (Decl. ¶ 8). These five contracts are highly confidential, and make up 92% of KishHealth's contracted managed care business. (*Id.*). These contracts include the exact rates of reimbursement that KishHealth receives for specific patient services it provides. (*Id.*). The release of these contracts would reveal valuable information regarding KishHealth's level of success and its methods of negotiating provider contracts. (*Id.*). KishHealth keeps these documents confidential as a regular business practice, and is also contractually obligated to do so. (*Id.*).

Finally, Exhibit G consists of KishHealth's confidential contracts with third-party administrators, who administer health care benefits for KishHealth's employees. (Decl. ¶ 9). These contracts contain highly confidential and sensitive information, including fee schedules revealing the cost of coverage of each employee. (*Id.*). Additionally, these documents reveal the methods by which KishHealth's premium increases are calculated. (*Id.*). If made public, this information would put KishHealth at an unfair competitive disadvantage when negotiating its contracts in the future. (*Id.*).

If the foregoing documents were made public, it would cause clearly-defined, serious injury to KishHealth. "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). Moreover, in some cases evidence of a clearly defined serious injury "may be inferred from the nature of the documents themselves." *H.P. Hood*, 58 F.T.C. 1184, 1961 WL 65882, *4 (Mar. 14, 1961). *In camera* treatment is often warranted when the documents sought to be protected "represent[] a significant work product, compiled at great expense, disclosure of which would give other companies the benefit of [applicant's] labors." *In re General Foods*, 95 F.T.C. 352, 1980 WL 338997, *3 (March 10, 1980). KishHealth spent considerable time and money researching and developing the statistics and summaries in these documents. The information in these documents is not generally known, and KishHealth keeps these documents confidential. If these documents were made a part of the public record, KishHealth's competitors would be receive an unfair competitive advantage at KishHealth's expense.

C. The Public Interest In Disclosure Is Outweighed By the Likelihood of Serious Competitive Harm to KishHealth.

When considering a motion for *in camera* treatment, a judge must weigh "the strength of the policies favoring disclosure in the particular factual context" versus the likelihood of serious harm to the applicant. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 1977 WL 189054, *2 (Nov. 11, 1977). In this particular factual context, making the aforementioned documents a part of the public record would certainly result in substantial competitive harm to KishHealth. However, there is no indication that the disclosure of these documents is essential to the public's understanding of these proceedings. As a non-party, KishHealth's request for *in camera* treatment is to be accorded "special solicitude." *In the Matter of Kaiser Aluminum & Chemical Corp.*, 103 F.T.C. 500 (1984). Courts "generally attempt[] to protect confidential business

information from unnecessary airing" in order to encourage non-parties to participate and cooperate with future discovery requests. *H.P. Hood*, 58 F.T.C. 1184, 1961 WL 65882, *4 (Mar. 14 1961). KishHealth has been a cooperative third-party in these proceedings and has provided documents only after efforts were made to maintain their confidentiality. Thus, its documents should be kept confidential and afforded *in camera* protection.

D. *In Camera* Protection of the Documents Should Extend for Three Years.

KishHealth requests that this court shield the information contained in Exhibits B through G from disclosure for a period of three years. Until that time, the information remains valuable to other hospital systems seeking a competitive advantage. This information warrants lasting protection until the likely competitive injury to KishHealth diminishes over time.

CONCLUSION

Thus, for the aforementioned reasons, KishHealth respectfully requests that this Court grant this motion for *in camera* treatment to the confidential documents in Exhibits B through G for a period of three years.

Dated this 20th day of March, 2012.

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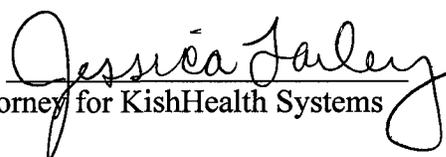
BY 
Attorney for KishHealth Systems

EXHIBIT A

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.)
_____)

Docket No. 9349

**DECLARATION OF KEVIN POORTEN IN SUPPORT OF NON-PARTY
KISHHEALTH SYSTEM'S MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED
EVIDENCE**

I, Kevin Poorten, declare as follows:

1. I am currently the CEO of KishHealth System ("KishHealth"). In my role as CEO, I manage KishHealth's hospitals and subsidiaries, and am knowledgeable about its contractual relationships with health providers and physicians. Consequently, I am familiar with the data and highly confidential information and contracts that KishHealth maintains in its business.

2. KishHealth responded to a third-party subpoena *duces tecum* issued by counsel for Rockford Health System in the above-captioned case, and produced these documents subject to the confidentiality protections in this Court's November 18, 2011 Protective Order. Additionally, KishHealth negotiated an agreement with Rockford's counsel, that access to the documents in Exhibit F would be limited to only counsel of record in the case, and that no other attorneys in the McDermott firm would have access. KishHealth has taken substantial measures to protect the confidentiality of the documents attached as Exhibits B through G of its Motion for *In Camera* Treatment of Certain Proposed Evidence. KishHealth limits access to these

documents to senior leaders and the Board of Directors. Occasionally, certain director personnel are also allowed access, but only on an as-needed basis. KishHealth maintains some of its documents, specifically those in Exhibit F, in a "contract management system." These documents are password-protected. KishHealth does not share any of its confidential documents with anyone outside its organization.

3. Exhibit B contains confidential and proprietary research reports and data, which KishHealth only shares with its senior leaders and board of directors. KishHealth paid significant amounts of money for this research to be conducted, and for the data to be collected and organized in these reports. The "General Findings" section of the report by Professional Research Consultants, Inc. reveals important statistics and information about KishHealth's market demographic, and provides comparisons to national averages. KishHealth uses this information to determine its business strategies. This confidential information would be highly valuable to KishHealth's competitors, as it would give them an unfair competitive advantage in marketing their services in KishHealth's service area. The "Kishwaukee Community Hospital Inpatient Ratings" document is a portion of a report, which was prepared by HealthStream Research. It rates KishHealth's performance using a variety of metrics, and provides a series of charts indicating KishHealth's statistics in comparison to other hospitals in the HealthStream Network database. This document is highly confidential, and contains proprietary information.

4. Exhibit B also contains the "Hospital Study Findings" document, which is a report that was prepared for KishHealth by the Public Research Group. It contains proprietary and particularly sensitive information regarding KishHealth's efforts to expand its services into the geographic area mentioned in the document, and to compete with other facilities there. This information is confidential. The mere fact that KishHealth is looking to create a facility in

another area is confidential. Moreover, this study provides highly specific confidential information about the strengths and weaknesses of current facilities in the area, which is not publicly-available. Any competitor could use this information to thwart KishHealth's efforts to compete in this region. Also in Exhibit B, the "Kishwaukee Community Hospital Charge Comparison" is a series of graphs comparing Kishwaukee Community Hospital's charges to those of its competitors for inpatient and outpatient procedures. This data is proprietary and is not publicly-available in this format, and would be highly valuable to any competitor seeking to gain an unfair advantage over KishHealth. Lastly, the "Kishwaukee Community Hospital Facility Assessment" is a highly confidential document, which shows when and where KishHealth may expand, and how and where it may add more hospital beds.

5. Exhibit C is a confidential presentation that describes KishHealth's plans for potential future expansion. It contains details about the demographic that KishHealth is targeting, the scope of the project, and its feasibility. This document is confidential, and if publicly released, could adversely impact KishHealth and its existing and potential business relationships.

6. Exhibit D is a proprietary document, which details information KishHealth has collected about other hospital systems in its market. It reveals information KishHealth that has spent substantial time and effort to gather about its competitors. This confidential, proprietary, strategic planning document is shared exclusively with KishHealth's Board of Directors because it contains KishHealth's thought-processes regarding future development. The document is confidential, and if publicly revealed, could adversely impact KishHealth in its efforts to compete.

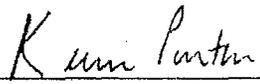
7. Exhibit E is KishHealth's standard physician employment agreement. It contains confidential information, such as the amount of professional liability insurance KishHealth provides to its physicians, and the length of a physician's non-compete obligations. If this contract was revealed to competitors, it would give them an unfair advantage in recruiting physicians.

8. Exhibit F contains five of KishHealth's contracts with health plans and letters regarding rate increases and negotiations. These five contracts are highly confidential, and make up 92% of KishHealth's contracted managed care business. These contracts include the exact rates of reimbursement that KishHealth receives for specific patient services it provides. The release of these contracts would reveal valuable information regarding KishHealth's level of success and its methods of negotiating provider contracts. KishHealth is contractually obligated to keep these documents confidential.

9. Finally, Exhibit G consists of KishHealth's confidential contracts with third-party administrators, who administer health care benefits for KishHealth's employees. These contracts contain highly confidential and sensitive information, including fee schedules revealing the cost of coverage of each employee. Additionally, these documents reveal the methods by which KishHealth's premium increases are calculated. If made public, this information would put KishHealth at an unfair competitive disadvantage when negotiating its contracts in the future.

10. All of the documents identified above are confidential, proprietary and contain sensitive business information. Disclosure of such information to others on a non-confidential basis could harm KishHealth and its business relationships. For these reasons, we respectfully request that Exhibits B through G be accorded *in camera* treatment.

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



Kevin Poorten

Signed this 20th day of March, 2012

EXHIBIT B
(Redacted)

EXHIBIT C
(Redacted)

EXHIBIT D
(Redacted)

EXHIBIT E
(Redacted)

EXHIBIT F
(Redacted)

EXHIBIT G
(Redacted)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 20, 2012, the foregoing was served in the following manner indicated:

Original and one copy of both public and *in camera* versions served via Federal Express; electronic copies served via e-mail (public version) and disk (*in camera* version):

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Federal Trade Commission
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One copy of both public and *in camera* version (disk) served via Federal Express and one copy served via e-mail:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
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oalj@ftc.gov

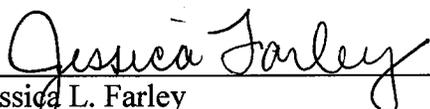
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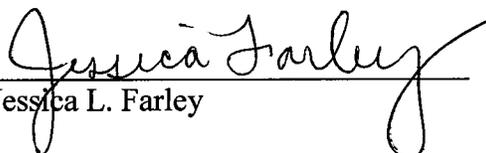
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Jessica L. Farley
Attorney for KishHealth System

CERTIFICATE OF VERIFICATION OF WORD COUNT

I hereby certify that Non-Party KishHealth System's Motion for *In Camera* Treatment o
Proposed Evidence does not exceed the 2,500 word count per 16 C.F.R. § 3.22(c).

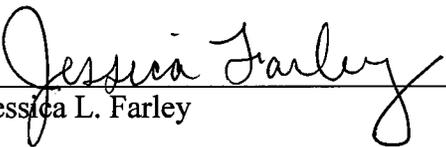


Jessica L. Farley

CERTIFICATION OF ELECTRONIC COPY

I hereby certify that the electronic copy of this Motion is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission this 20th day of March, 2012 by other means.

DATED: March 20th, 2012



Jessica L. Farley