ORIGINAL

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

In the Matter of	)	
OSF Healthcare System, a corporation, and	)	DOCKET NO. 9349
Rockford Health System, a corporation, Respondents.	)	

ORDER ON RESPONDENTS' MOTION FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Commission's Rules of Practice and the Scheduling Order entered in this matter, on March 20, 2012, Respondents filed a motion seeking *in camera* treatment for designated documents ("Motion"). On March 27, 2012, Complaint Counsel filed its Opposition to the Motion. As set forth below, the Motion is GRANTED in part, DENIED in part, and DENIED WITHOUT PREJUDICE in part.

II.

Under Rule 3.45(b) of the Federal Trade Commission's Rules of Practice, the Administrative Law Judge may order that material "be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment." 16 C.F.R. § 3.45(b). Accordingly, in proceedings at the Federal Trade Commission, "requests for *in camera* treatment must show 'that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.'" *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 1984 FTC LEXIS 60, at *1 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). Applicants for *in camera* treatment must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of decisions at the Commission is "the principal countervailing consideration weighing in favor of disclosure." *Id.*

The Federal Trade Commission recognizes the "substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons." *Hood*, 58 F.T.C. at 1186. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188.

The Commission has recognized that it may be appropriate to provide *in camera* treatment for business records to be introduced as evidence. *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at *2 (April 5, 1982); *see Hood*, 58 F.T.C. at 1188-89; *Kaiser Aluminum*, 103 F.T.C. at 500. Where *in camera* treatment is requested and granted for business records, such as business strategies, marketing plans, pricing policies, or sales documents, it is typically extended for two to five years. *E.g.*, *In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, at *2 (Nov. 22, 2004); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14 (June 26, 1996); *Champion Spark Plug*, 1982 FTC LEXIS 85 at *2 and 1982 FTC LEXIS 92, at *2 (March 4, 1982). In addition, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (citing *General Foods*, 95 F.T.C. at 353; *Crown Cork*, 71 F.T.C. at 1715).

In order to sustain the burden of showing good cause for withholding documents from the public record and to overcome the presumption that *in camera* treatment may be withheld for information that is three or more years old, an affidavit or declaration demonstrating that a document is sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury is required. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004).

III.

Respondents have moved for *in camera* treatment for more than 1,000 of the approximately 2,900 exhibits submitted by the parties for use at the upcoming trial in this matter.[1] In support of their request, Respondents provide declarations from Henry Seybold, Senior Vice President and Chief Financial Officer for Rockford Health System ("RHS"), and from Robert Sehring, Chief Executive Officer, Ambulatory Services and Accountable Care Division of OSF Healthcare System ("OSF").

[1] On Respondents' Proposed Order Granting Respondents' Motion for *In Camera* Treatment of Trial Exhibits, Respondents have listed the exhibits for which they seek *in camera* treatment by DX Number (indicating defendants', in this case, Respondents' exhibits) and, where applicable, PX Number (indicating plaintiff's, in this case, Complaint Counsel's exhibit). The parties are instructed that they are not to introduce multiple copies of the same exhibit. For example, it appears that DX0011 is the same document as PX2261. The parties shall offer into evidence only one of these exhibits.

Respondents seek *in camera* treatment for six categories of documents: (1) business records; (2) contracts with managed care organizations ("MCOs"); (3) negotiations with MCOs; (4) defensive strategy; (5) deposition testimony; and (6) financial documents. Respondents assert that the documents for which they seek *in camera* treatment are confidential, competitively sensitive documents that relate to OSF's and RHS's business strategy, payor contracting, and present and future operations. Respondents further assert that public disclosure of these documents would result in clearly defined, serious competitive injury to Respondents.

Complaint Counsel agrees that *in camera* treatment of Respondents' contracts and negotiations with MCOs is appropriate, but asserts that Respondents' remaining four categories are vastly overbroad. Complaint Counsel points out that many of Respondents' 600 business records contain no competitively sensitive information and that many of Respondents' financial records contain historical financial data that is either the type of information routinely reported by publicly traded corporations or that has already been made public and thus cannot cause competitive harm. Complaint Counsel argues that, if approved, Respondents' expansive proposed list of exhibits for *in camera* treatment would shield a significant volume of relevant, non-confidential evidence from the public.

IV.

Respondents seek *in camera* treatment for more than a third of the total exhibits that the parties propose to use at trial. This request is overbroad and is unacceptable. While trade secrets, such as "secret formulas, research or processes" may require *in camera* protection, many confidential business records do not. *Hood*, 58 F.T.C. at 1188-89. "Requests to seal relevant evidence [such as confidential business records] [are] looked upon with disfavor and granted only in exceptional circumstances upon a clear showing that irreparable injury will result from disclosure." *Id.* at 1189. Respondents have not made that showing with respect to documents they have listed in the following categories: (1) business records; (2) defensive strategy; (3) deposition testimony; and (4) financial documents.

With respect to documents falling in the categories of contracts with MCOs and negotiations with MCOs, that showing has been made and, for those documents, Respondents' Motion is GRANTED.

Respondents stated that they limited their requests to documents that are no older than four years. However, Commission precedent provides a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *Conference Interpreters*, 1996 FTC LEXIS 298, at *15. Respondents have not overcome that presumption. Accordingly, with respect to documents that are more than three years old and do not fall into the categories of contracts and negotiations with MCOs, Respondents' Motion is DENIED.

Any material that has previously been made public will not be afforded *in camera* protection. With respect to documents that have been publicly quoted and described in the related federal court proceeding, Respondents' Motion is DENIED.

As to the remainder, the scope of Respondents' Motion far exceeds the protections contemplated by Rule 3.45. The burden rests on Respondents to demonstrate that the information sought to be withheld from the public record is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury. The Motion and the declarations provided by Respondents fail to make this showing. Accordingly, Respondents have not met their burden for withholding over 1,000 exhibits from the public record.

With respect to the remaining documents for which Respondents seek *in camera* treatment, the Motion is DENIED WITHOUT PREJUDICE. Respondents are hereby ORDERED to review the documents for which they seek *in camera* treatment and narrow their request to only those documents that Respondents can demonstrate are in compliance with the Commission's strict standards for granting *in camera* treatment.

Respondents may file a renewed motion for *in camera* treatment no later than April 4, 2012. Respondents need not re-submit copies of the exhibits for which they seek *in camera* treatment with any renewed motion. Complaint Counsel shall file an opposition to any such renewed motion no later than April 11, 2012.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: March 29, 2012