

UNITED STATES DISTRICT COURT  
FOR THE NOTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

**FILED**

FEDERAL TRADE COMMISSION	)
	)
Plaintiff	)
	)
v.	)
	)
OSF HEALTHCARE SYSTEM	)
	)
and	)
	)
ROCKFORD HEALTH SYSTEM	)
	)
Defendant	)
	)

MAR 23 2012

No. 11-cv-50344

THOMAS G. BRUTON  
CLERK, U.S. DISTRICT COURT

Hon. Frederick J. Kapala

Hon. P. Michael Mahoney  
Magistrate Judge

**CECILE KOHRS' MOTION TO INTERVENE  
FOR THE LIMITED PURPOSE OF UNSEALING PUBLIC DOCUMENTS  
CONTAINING INFORMATION REGARDING THE HOSPITALS' POST-MERGER PLANS**

Petitioner CECILE KOHRS, appearing pro se, respectfully seeks leave to intervene in this case to gain access for the public to documents relating to OSF Healthcare System and Rockford Health System's post-merger plans. In support of her petition, Ms. Kohrs submits the following:

**INTRODUCTION**

The United States of America was founded by individuals who believed in the right of the individual to participate actively in his governance, and sought to bind him to the highest ideals by promoting transparency in government. The keystone of the First Amendment is freedom of the press, which allows society to understand what the government is doing on behalf of its citizens.

This motion seeks to give the public the opportunity to see the bases for the parties' arguments and the information on which the Court will rely when making its decision whether to grant the Federal Trade Commission's request for a preliminary injunction. For the reasons discussed below, this Court should permit the petitioner to intervene to request that these documents be unsealed.

**I. THE COURT SHOULD PERMIT PUBLIC ACCESS TO THE DOCUMENTS BECAUSE THEY ARE IN THE PUBLIC INTEREST**

Because the general public has "limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975). The documents at issue here concern the rationale for the Defendants' decision to pursue this merger and the FTC's reasons for challenging it. Where, as in this case, local hospitals which receive federal tax dollars have specifically asked to withhold information, the Court "[has] an especially weighty responsibility as 'the judge is the primary representative of the public interest' in reviewing [protective order] motions." *In re Bridgestone/Firestone Inc.*, 198 F.R.D. 654, 657 (7th Cir. 2001) (quoting *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)). The Rockford-area residents have a vested interest in the future of medical care in the region, and members of the antitrust bar need to know what the FTC and the courts evaluate when deciding to pursue and whether to grant a preliminary injunction, respectively.

**A. Documents Filed in Court are Presumptively Public Under the Federal Rules of Civil Procedure and Good Cause Must Be Shown for them to Remain Confidential**

**1. Documents are presumptively public under FRCP 26 and Seventh Circuit precedent, and good cause must be shown to keep them under seal**

Rule 26(c) of the Federal Rules of Civil Procedure requires that a party show "good cause" to keep a filed document under seal. Fed. R. Civ. P. 26(c). As a proposition, the "public's right of access to court proceedings and documents is well-established." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d. 893, 897 (7th Cir. 1994); see also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Nixon v. Warner Communications Inc.*, 435 U.S. 589 (1978). Further, this Circuit has held that that doubts about whether a document should be sealed "must be resolved in favor of disclosure." *Grove Fresh*, 24 F.3d at 897. The Seventh Circuit has emphasized that "district courts should articulate on the record the reason for any order that inhibits the flow of information between the courts and the public." *Id.*

There is also established precedent in the Seventh Circuit that litigation is public. "[T]he tradition that litigation is open to the public is of very long standing." *Union Oil Co. of Cal. V. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000). "Even disputes about claims of national security are litigated in the open. Briefs in the Pentagon Papers case . . . and the hydrogen bomb plans case

were available to the press. . . . People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials." *Id.* at 567-68.

**2. The documents cannot be completely confidential because the parties referred to the information contained therein in open court**

The parties designated extensive documentation used as evidence in this case "confidential." Among these documents are expert reports that feature analyses of the potential impact of the merger on health care availability in the Rockford area. They also outline the merging parties' stated future plans for the Rockford area (the "FTI Report"). All parties made numerous references to and, in some instances, published the information and conclusions in those documents in open court during the three-day public preliminary injunction hearing. While the reports may indeed contain some confidential information, to maintain that the documents are completely confidential is inconsistent with the parties' treatment of them in court.

**B. The Citizens of Rockford Have a Right to Information Regarding the Future of Medical Care in Their Region, and Members of the Antitrust Bar and the General Public Have a right to Know the Bases for Requesting and Granting Preliminary Injunctions**

The citizens of Rockford, Illinois have a vested interest in the future of medical care in their region. A merger that reduces the number of competing hospitals from three to two will almost certainly have an impact on the prices and types of medical services available to area residents. Considering the Justice Department's challenge in *United States v. Rockford Memorial Hospital Corp.* of a similar merger involving one of the same parties, the citizens of Rockford should be aware of why the parties believe this merger will be different. 717 F. Supp. 1251 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir. 1990), *cert. denied*, 498 U.S. 920 (1990).

The antitrust bar's interest is similar. Although the future of the Rockford area is not in itself their paramount interest, the court's treatment of this particular merger is vitally important, for reasons of precedent. Further, the FTC's basis for seeking a preliminary injunction to halt this merger will inform other parties' decisions whether to pursue future mergers that have elements in common with the instant case. It is in all involved parties' interest to avoid wasting time pursuing a case that might otherwise have been avoided if they had information that would have revealed the futility of attempting a particular merger at its outset.

On a broader level, accountability concerns require that the public has access to the documents on which judges rely when rendering their opinions. The public's right to access ensures that policy goals of transparency and accountability of the court system are met. "Public scrutiny over the court system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding." *Grove Fresh*, 24 F.3d at 897 (citing *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555).

In light of the substantial public interest in the contents of the sealed documents and the parties' numerous public references to the information they contain, Ms. Kohrs respectfully requests that the Court unseal the documents.

## **II. THE COURT SHOULD PERMIT JOURNALIST CECILE KOHRS TO INTERVENE ON BEHALF OF THE PUBLIC**

### **A. Petitioner Cecile Kohrs is a Journalist Who has Reported Extensively on Matters Involving Antitrust and Mergers and Acquisitions**

Cecile Kohrs is an award-winning professional journalist who has spent more than a decade reporting, most of that time covering antitrust law, specializing in mergers and acquisitions.

Currently, Ms. Kohrs is employed as the Chief Correspondent for MLex Market Intelligence. MLex U.S. is a news organization incorporated in Delaware, and based in Washington DC, where Ms. Kohrs leads a team of five antitrust reporters. The subscribers of the service are generally antitrust lawyers based in the United States. Ms. Kohrs is an accredited member of the Senate Press Gallery.

Previously, Ms. Kohrs worked in the Federal Trade Commission's Office of General Counsel, where she assisted in writing "Improving Health Care: A Dose of Competition," for which she and her team were awarded the FTC's coveted Janet D. Steiger award.

### **B. Journalists May Intervene in Suits to Request That Public Documents Be Unsealed**

The Seventh Circuit has clearly established that "the press [has] standing to challenge a protective order for abuse or impropriety." *Grove Fresh Distribs.*, 24 F.3d at 898 (citing *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984)); see also *In re Associated Press v. Ladd*, 162 F.3d 503, 507 (7th Cir. 1998).

The Seventh Circuit has also ruled that “the most appropriate procedural mechanism by which to accomplish this task is by permitting those who oppose the suppression of materials to intervene for that limited purpose.” *Id.* at 507; *see also Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988) (“... where intervention is available (*i.e.* civil cases), it is an effective mechanism for third-party claims of access to information generated through judicial proceedings.”). Ms. Kohrs petitions to intervene pursuant to Federal Rule of Civil Procedure 24, which this Circuit and others have accepted as the relevant provision for the relief sought. “[E]very court of appeals to have considered the matter has come to the conclusion that Rule 24 is sufficiently broad-gauged to support a request of intervention for the purposes of challenging confidentiality orders.” *Jessup v. Luther*, 227 F.3d 993, 997 (7th. Cir. 2000).

#### CONCLUSION

WHEREFORE, Petitioner, Cecile Kohrs respectfully requests that this Court remove any confidential designation from, and allow the public access to, the following materials produced in this litigation:

- Any and all documents used as part of any party’s proposed findings of fact that were considered as part of the court’s opinion.
- The “FTI Study.”

RESPECTFULLY SUBMITTED,



Cecile Kohrs  
Appearing pro se

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