

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

AETNA INC., and HUMANA INC.,

Defendants.

Civil Action No. 1:16-cv-1494-JDB

**NOTICE OF SUBMISSION TO THE SPECIAL MASTER
OF PLAINTIFFS' RESPONSE TO CONCERNS RAISED BY
PROTECTED PERSONS REGARDING THE PROTECTIVE ORDER**

Pursuant to the Order appointing the Hon. Richard A. Levie (Ret.) as Special Master (ECF No. 53), Plaintiffs hereby give notice that Plaintiffs' Response to Concerns Raised by Protected Persons Regarding the Protective Order was submitted to Special Master Levie for his consideration. A copy of Plaintiffs' Response to Concerns Raised by Protected Persons Regarding the Protective Order is attached to this notice as Exhibit A.

Date: September 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2016, a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF system.

Date: September 1, 2016

/s/ Peter J. Mucchetti

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

AETNA INC., and HUMANA INC.,

Defendants.

Civil Action No. 1:16-cv-1494-JDB
Submitted to the Special Master,
The Hon. Richard A. Levie (Ret.)

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

ANTHEM, INC. and CIGNA CORP.,

Defendants.

Civil Action No. 1:16-cv-1493-ABJ
Submitted to the Special Master,
The Hon. Richard A. Levie (Ret.)

**PLAINTIFFS' RESPONSE TO CONCERNS RAISED BY
PROTECTED PERSONS REGARDING THE PROTECTIVE ORDER**

Plaintiffs hereby provide comments on the 19 proposed Protective Order modifications submitted by Protected Persons. Plaintiffs also respond to the questions posed by the Special Master in his email of August 31, 2016.

The Protected Persons' responses—13 of which opposed Aetna and Humana's proposed modifications to the Protective Order—articulate the risk of serious harm that would result from Aetna's and Humana's in-house counsel having access to confidential, competitively sensitive information. Plaintiffs raised many of the same concerns in their Opposition to Aetna and Humana's motion, which was submitted on August 26, 2016. The responses of Protected Persons confirm and amplify Plaintiffs' objections, as well as Plaintiffs' concerns that failing to

protect third parties' confidential information will undermine Plaintiffs' ability to conduct effective law enforcement investigations.¹

In crafting a protective order, the Court must “strike a balance between [the Defendants’] ability to prepare and present [their] defense and the interests of third parties in avoiding the inadvertent use or disclosure of their confidential information.” *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 4 (D.D.C. 2015). The current Protective Orders properly strike that balance. Plaintiffs address specific proposed modifications to the Protective Order in the chart below, but first address the questions posed by the Special Master to all parties.

4. A Penalty Provision. A “penalty provision,” such as the one referenced in *FTC v. Sysco Corp.*, does not ameliorate the legitimate concerns of Protected Persons that their businesses might be harmed by their suppliers’ or competitors’ accessing their confidential information. Plaintiffs, like many third parties, are concerned with predictable use or disclosure of confidential information that is not necessarily ill-intentioned. In-house counsel may use confidential information because they are unable to “compartmentalize and selectively suppress information once learned.” *See FTC v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980). Or in-house counsel may disclose confidential information without remembering where they learned it. A penalty provision thus would not prevent the most likely misuses of competitively sensitive information. Further, a penalty provision is likely unenforceable in practice. The likely recipients of inadvertently disclosed or used confidential information—employees of Aetna or Humana—likely will not know that the information is protected by a Protective Order and will have no reason to raise the issue with the Protected Party that provided the information. And Protected Persons have no practical way of learning that Aetna or Humana has disclosed or used their confidential information.

¹ *See, e.g.*, Letter from Amanda P. Reeves, Latham & Watkins LLP, to Hon. Richard A. Levie (“Aon only provided the [submitted information] to DOJ under CID and by secure transmission, and only following several consultations with DOJ regarding, and in reliance on, the strict confidentiality laws and regulations governing it.”).

5. *Narrowing the Categories of Information Available to In-House Counsel.*

Attempting to narrow the categories of confidential information to which in-house counsel have access is unworkable and will not adequately address the concerns of Plaintiffs and Protected Persons because it will not foreclose in-house counsel's access to competitively sensitive information. Access to confidential information is not necessary for Defendants' in-house counsel to meaningfully advise their clients. *See Sysco*, 83 F. Supp. 3d at 4 (in-house counsel was "still able to assist outside counsel and advise [his client] on litigation strategy" even though he was not permitted to access his client's competitors' confidential information). Aetna and Humana have retained experienced outside counsel, who can provide them with a meaningful defense under the framework of the current Protective Order.

6. *Notice to Protected Persons Before Disclosure to In-House Counsel.* A process designed to provide notice to Protected Persons and to give Protected Persons an opportunity to object when their information is to be disclosed to in-house counsel might prove burdensome in practice. Although such a provision may deter the disclosure of information to in-house counsel in the first place, the likely additional burden imposed by having to resolve third parties' objections—particularly given the accelerated timeline of this case—further demonstrates that the more reasonable and straightforward solution is to deny Aetna and Humana's motion to modify the Protective Order. In addition, some third parties may have responded to subpoenas issued by the parties in reliance on the current Protective Order. If the Protective Order is modified, fairness requires that those third parties be provided with the modified protective order and an opportunity to object—which may result in another round of notice and hearings, like the one scheduled for September 2, 2016. All parties have an interest in avoiding such an outcome.

* * * *

In sum, Protected Persons have confirmed what Plaintiffs originally argued: Aetna and Humana's motion to modify the Protective Order should be denied. Below, Plaintiffs summarize

Protected Persons' proposed changes and Plaintiffs' position or comments on those proposed changes.

	Description Of Concern	Entity Raising Concern	Plaintiffs' Position
1.	Section B(1) The Protective Order does not explicitly require the parties to provide third parties with notice of a motion to modify the protective order.	UPMC Health Plan	Plaintiffs oppose. Providing notice to all Protected Persons is burdensome. Interested Protected Persons can receive notice of a motion to modify the Protective Order by monitoring the dockets. And, should any party propose a modification, the Special Master can determine any needed additional notification at that time; any party moving for such a modification should specify its recommendation concerning notice.
2.	Section C(5) Non-parties should be able to designate their Confidential Information as being beyond the scope of permissible discovery.	UnitedHealth Group ("United")	Plaintiffs oppose. Third parties are not in a position to understand the parties' discovery needs or determine what information is within the scope of permissible discovery.
3.	Subsection C(6)(b) The protective order fails to protect confidential information at depositions, because it does not prohibit party representatives or other persons not authorized to receive confidential information from attending depositions of Protected Persons.	UPMC Health Plan United	Although Plaintiffs respect this legitimate concern, Plaintiffs consider the concern adequately addressed by the current language. Under the Protective Order, disclosure of Confidential Information is limited to individuals listed in Section E(1), which does not include party representatives. Defendants can address whether they have any current intention of having any party representative at third-party depositions.

4.	<p>Subsection C(6)(b) This subsection could be interpreted to expand the categories of individuals entitled to possess or review Confidential Information under Section E of the Protective Order.</p>	Tufts Associated Health Plans, Inc. (“Tufts”)	Although Plaintiffs respect this legitimate concern, Plaintiffs consider the concern adequately addressed by the current language. Subsection C(6)(b) does not address access to Confidential Information, and nothing therein contradicts Section E, which addresses that issue directly.
5.	<p>Section D(1) To the extent there is a challenge to the designation of confidentiality, the party making the challenge should bear the burden of demonstrating otherwise.</p>	Medical Mutual of Ohio	The proposal is contrary to the general policy of a presumption of openness of court proceedings. <i>See Nixon v. Warner Commc'ns, Inc.</i> , 435 U.S. 589, 598 (1978); <i>United States v. Amodeo</i> , 71 F.3d 1044, 1049 (2d Cir. 1995).
6.	<p>Section D(1) The Protective Order does not specify a time period in which Protected Persons must move for relief if there is a dispute regarding confidentiality designation.</p>	Baylor Scott & White Holdings, Duke University Health Systems, Inc., and Iowa Health System (“BSWH et al.”)	Not necessary. Under Section D(1) of the Protective Order, the objecting party and the Protected Person have 10 days to reach an agreement on an objection to the confidential designation. If an agreement is not reached, either party can raise the dispute with the Court.
7.	<p>Section E(1) There should be a two-tier approach to allow access to certain categories of Confidential Information to individuals identified in Subsections E(1)(a) – E(1)(c) (if in-house counsel receive any Confidential Information)</p>	Medical Mutual of Ohio Collective Health	This concern is mooted if Aetna and Humana’s motion to modify the Protective Order is denied. Plaintiffs note that they proposed, and Judge Bates rejected, a two-tier approach to limit in-house counsel’s access to Confidential Information.
8.	<p>Section E(1) There should be a two-tier approach to limit access to others like testifying and consulting experts, outside vendors or service providers, outside trial consultants, mediators and arbitrators, and those who previously had access to the information.</p>	Aon plc (“Aon”)	Plaintiffs oppose a two-tier approach in these circumstances. Plaintiffs note that they proposed, and Judge Bates rejected, a two-tier approach to limit in-house counsel’s access to Confidential Information.

9.	<p>Subsection E(1) The Protective Order does not prohibit outside counsel, testifying or consulting experts, outside vendors or service providers, and trial consultants with access to a third party's Confidential Information from participating or providing consulting services to a competitor of the third party whose information the individuals had access.</p>	United	Plaintiffs oppose. Outside counsel, experts, vendors or service providers, and trial consultants routinely receive Confidential Information. Section E(4) of the Protective Order prohibits unauthorized use of Confidential Information.
10.	<p>Subsection E(1)(c) Defendants should provide notice and/or give third parties an opportunity to participate if Defendants file a motion seeking to share a third-party's Confidential Information with in-house attorneys.</p>	<p>Tufts BSWH et al. WellCare Health Plans, Inc. University of Colorado Health</p>	This concern supports Plaintiffs' position that in-house counsel should not be granted access. See Plaintiffs' narrative response, above at page 3.
11.	<p>Subsection E(1)(c) The Protective Order does not place limits on the disclosure of confidential information to outside counsel.</p>	<p>BSWH et al. United</p>	Plaintiffs oppose any modification to address this concern. Outside counsel routinely receive Confidential Information. Section E(4) of the Protective Order prohibits unauthorized use of Confidential Information.
12.	<p>Subsection E(1)(c) The Protective Order does not define "competitive decision-making."</p>	BSWH et al.	This concern is mooted if Aetna and Humana's motion to modify the Protective Order is denied. In the alternative, the definition of "competitive decision-making" will need to be very broad to encompass the potential actions that could restrict competition.

13.	Subsections E(1)(c) – E(1)(f) Access to Confidential Information should be limited to persons described in the above subsections only if they are not involved in the Defendants' competitive-decision making.	United	Although Plaintiffs respect this legitimate concern, Plaintiffs consider the concern adequately addressed by the current language. Section E(4) of the Protective Order prohibits unauthorized use of Confidential Information.
14.	Subsection E(1)(d) The Protective Order does not adequately protect against disclosure of third party Confidential Information to experts or consultants.	Aon Collective Health, Inc.	Plaintiffs oppose any modification to address this concern. Experts and consultants routinely receive Confidential Information and their ability to do so is essential to efficient litigation, especially on an accelerated schedule. Section E(4) of the Protective Order prohibits unauthorized use of Confidential Information.
15.	Subsection E(1)(i) The "good faith" standard contained in the subsection above is too broad to provide third parties with sufficient protection under the Protective Order.	Tufts Collective Health, Inc.	Although Plaintiffs respect this legitimate concern, Plaintiffs consider the concern adequately addressed by the current language.
16.	Subsection E(5)(b) The reference to a "party" possessing Confidential Information in the above subsection could be interpreted to expand the categories of individuals permitted to review Confidential Information under Section E of the Protective Order.	Tufts	Although Plaintiffs respect this legitimate concern, Plaintiffs consider the concern adequately addressed by the current language. Subsection E(5)(b) does not grant parties any additional access to Confidential Information.
17.	Subsection E(5)(b) The above subsection allows for disclosure of Confidential Information to any current employee of the producing party. This provision is problematic for companies that do not allow many current employees broad access Confidential Information.	UPMC Health Plan	Plaintiffs oppose. Depositions may be unreasonably burdened if parties are not permitted to proffer a Protected Person's documents to a deponent who is employed by or appears on behalf of a Protected Person. Protected Persons will also likely be represented by counsel, who may address any such issues (likely to be rare) when they arise.

18.	Subsection E(5)(c) The above subsection allows disclosure with “consent.” The Protective Order should be amended to require “express written consent.”	Collective Health, Inc.	Although Plaintiffs respect this legitimate concern, Plaintiffs consider the concern adequately addressed by the current language.
19.	Subsection E(5)(e) and E(5)(f) Third parties should be notified and given an opportunity to object if the United States uses any of their confidential information outside the context of this litigation.	University of Colorado Health	Plaintiffs oppose. This provision attempts to modify established law concerning the United States’ use of submitted information for law enforcement purposes.
20.	Section F Third parties should receive notice when a party receives an objection or challenge to the filing of a third party’s Confidential Information under seal.	Tufts	Plaintiffs do not oppose in concept, but, if adopted, the language should read: “Upon receipt of an objection or challenge to the filing of a Protected Person’s Confidential Information under seal, the party that filed the Confidential Information under seal shall notify the Protected Person of such objection or challenge in sufficient time to allow the Protected Person to seek protection from the Court.”
21.	Section G The above section may not provide sufficient protection for “Protected Health Information” or “Personally Identifiable Information.”	Tufts	Plaintiffs oppose. Permitting third parties to redact PII is likely to interfere with the timely delivery of useful data. Reliance on the existing provisions adequately protects this information.
22.	Section H The parties should provide third parties with notice and an opportunity to comment on any proposed order governing the disclosure of Confidential Information at trial.	Tufts Collective Health, Inc.	This request is premature. The treatment of Confidential Information at trial will be governed by a separate order.

23.	Section H Third parties should be notified in advance and given the opportunity to be heard if any of their Confidential Information will be submitted to the court or cited or discussed in any trial material.	Centene Corporation UPMC Health Plan Collective Health, Inc.	This request is premature. The treatment of Confidential Information at trial will be governed by a separate order.
24.	Section I The above section should be revised to make it more consistent with other provisions.	BSWH et al.	Although Plaintiffs respect this legitimate concern, Plaintiffs consider the concern adequately addressed by the current language.
25.	Section I(1) The Protective Order does not require certification of the destruction of Confidential Information.	BSWH et al. United	Plaintiffs oppose. The return or destruction of Confidential Information is required by the Protective Order, which provides adequate protection.
26.	The Protective Order lacks a penalty provision.	BSWH et al.	See Plaintiffs' narrative response, above at page 2.
27.	Highly Confidential Information should be transmitted only using secure transmission.	Aon	Although Plaintiffs respect this legitimate concern, Plaintiffs considers the concern adequately addressed by the current language.

Date: September 1, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2016, a true and correct copy of the foregoing was served on all counsel of record by email pursuant to the order appointing the Special Master (ECF No. 53).

Date: September 1, 2016

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