UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and STATE OF MICHIGAN, *Plaintiffs*, v. HILLSDALE COMMUNITY HEALTH CENTER, W.A. FOOTE MEMORIAL HOSPITAL, D/B/A ALLEGIANCE HEALTH, COMMUNITY HEALTH CENTER OF BRANCH COUNTY, and PROMEDICA HEALTH SYSTEM, INC., *Defendants*.	Case No.: 5:15-cv-12311-JEL-DRG Judge Judith E. Levy Magistrate Judge David R. Grand

PLAINTIFFS' MOTION FOR ENTRY OF PROTECTIVE ORDER GOVERNING CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION

The United States and the State of Michigan ("Plaintiffs") respectfully move the Court, pursuant to Federal Rule of Civil Procedure 26(c)(1), to enter the attached, proposed Protective Order Governing Confidential and Highly Confidential Information for the reasons stated in Plaintiffs' accompanying memorandum. Pursuant to Local Rule 7.1(a), attorneys for the United States and the State of Michigan conferred with counsel for W.A. Foote Memorial Hospital,

d/b/a Allegiance Health regarding the terms for a jointly proposed protective order, but were unable to reach agreement.

Respectfully Submitted,

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October 23, 2015

UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA and STATE OF MICHIGAN, *Plaintiffs*, v. HILLSDALE COMMUNITY HEALTH CENTER, W.A. FOOTE MEMORIAL HOSPITAL, D/B/A ALLEGIANCE HEALTH, COMMUNITY HEALTH CENTER OF BRANCH COUNTY, and PROMEDICA HEALTH SYSTEM, INC., *Defendants*.	Case No.: 5:15-cv-12311-JEL-DRG Judge Judith E. Levy Magistrate Judge David R. Grand

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF PROTECTIVE ORDER GOVERNING CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION

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STATEMENT OF ISSUE

Should the court enter a protective order pursuant to Fed. R. Civ. P. 26(c)(1) that: (1) limits disclosure of highly confidential information to outside counsel, and (2) limits disclosure of confidential information to outside counsel and one in-house counsel from Allegiance who is not involved in business decisions?

Or:

Should the court enter a protective order pursuant to Fed. R. Civ. P. 26(c)(1) that permits Allegiance's general counsel, who is a competitive decision maker, access to confidential information of Allegiance's direct competitors?

TABLE OF AUTHORITES

Cases

Rules

* Denotes controlling or most appropriate authority for the relief sought. LR 7.1(d)(2).

Introduction

The United States and the State of Michigan ("Plaintiffs") move, pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure, for a protective order governing the use of confidential information in this action. Plaintiffs and W.A. Foote Memorial Hospital, d/b/a Allegiance Health ("Allegiance") generally agree on the contents of the protective order, except that they disagree about whether Allegiance's general counsel, who is involved in Allegiance's business decisions, should have access to confidential information of Allegiance's direct competitors. *See* Plaintiffs' Proposed Protective Order ¶ 12(i). This memorandum focuses on the main disputed issue, but Plaintiffs are not attempting to limit the scope of Allegiance's counter-proposal.

Plaintiffs' proposed protective order is designed to prevent the improper disclosure of confidential commercial information produced in the pre-complaint investigation and through discovery in this action. At the same time, the proposed order sufficiently protects the interest of Allegiance in obtaining discovery necessary to litigate this case. By appropriately balancing the rights and obligations of third parties and Allegiance, entry of Plaintiffs' proposed order will facilitate timely and efficient discovery and eliminate the need for the Court to address multiple requests for protective orders by third parties who have or will produce confidential information in this matter.

Plaintiffs and Allegiance have agreed on a two-tier system for persons who produced or will produce confidential commercial information to designate material as "confidential" or "highly confidential." While the proposed order allows third parties to identify the materials they deem in need of protection from disclosure, it also places the burden on the designating party to defend its designations, if challenged. Under Plaintiffs' proposal, Allegiance's outside counsel and experts have full access to all materials designated "confidential" and "highly confidential." Moreover, Allegiance may designate one in-house counsel, who is not involved in business decisions, to review "confidential" documents.

For the reasons described below, the proposed order fairly balances the interests of both Allegiance and producing parties. Accordingly, the United States and the State of Michigan respectfully request that the Court grant this motion for entry of the proposed protective order.

I. Background

On June 25, 2015, the United States and the State of Michigan filed their complaint alleging that Hillsdale Community Health Center ("Hillsdale") entered into agreements with three rival hospitals to unlawfully allocate territories for the marketing of competing healthcare services. While Plaintiffs have settled with Hillsdale, Community Health Center of Branch County, and ProMedica Health System (collectively, "Settling Defendants"), the litigation is ongoing with respect

to defendant Allegiance. Consistent with the violations alleged in the Complaint, Plaintiffs' investigation focused on illegal agreements with competing hospitals to limit marketing. Consequently, discovery requests in this antitrust enforcement action have and will continue to target the marketing activities of hospitals that are direct competitors of Allegiance. As part of the relief obtained by Plaintiffs in the Final Judgment, the Settling Defendants are prohibited from communicating with Allegiance employees about past, present, or future marketing activities. (ECF No. 36). That prohibition restricts communications only outside of the discovery context in this litigation. Thus, Plaintiffs maintain a corresponding interest in minimizing the risk of inadvertent disclosure and use of competitors' confidential information produced in this action.

Based on the obligations imposed by Rule 26(a)(1) and in response to Allegiance's first request for production of documents served on Plaintiffs, Plaintiffs are prepared to produce to Allegiance materials designated confidential by third parties who responded to requests for documents during Plaintiffs' pre-complaint investigation. Additionally, Plaintiffs and Allegiance contemplate seeking discovery from third parties during the course of this litigation. Accordingly, Plaintiffs and Allegiance have been negotiating the terms of a stipulated protective order to protect confidential information from improper disclosure and use, but have been unable to reach agreement.

In particular, Plaintiffs and Allegiance disagree on whether the protective order should restrict access to confidential information by in-house counsel who are involved in competitive decision making. The practical effect of this disagreement is whether Mr. Kenneth Empey, Allegiance's general counsel, who is involved in competitive decision making, should be allowed access to confidential business information of Allegiance's hospital competitors. Mr. Empey regularly participates in meetings of Allegiance's leadership, including the Executive Council, the Board or Directors, and the Board of Trustees, where marketing and business development plans are considered. On September 8, 2015, Allegiance proposed a two-tier system where parties producing sensitive information could designate materials "confidential" or "highly confidential." Allegiance's proposal restricted access to outside counsel only for highly confidential information and provided access for all Allegiance in-house counsel for confidential information. The problem, of course, is that when in-house counsel has access to competitors' confidential information and personally participates in business decision making, it creates more of a risk that the information will be inadvertently disclosed. Allegiance maintains that it cannot voluntarily agree to a proposed protective order that does not grant Mr. Empey access to its competitors' confidential information.

II. Argument

Under the Federal Rules, this Court may enter a protective order "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." Fed. R. Civ. P. 26(c)(1)(G). In reviewing a proposed protective order, courts balance the risk of inadvertent disclosure of commercially sensitive information to competitors against the needs of the party seeking discovery to prosecute or to defend against the claims at issue. *See, e.g.*, *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992). Where in-house counsel seeks access to competitors' confidential information, courts weighing the risk of inadvertent disclosure do not rely on the integrity of in-house counsel, but focus on an objective factor: whether the in-house counsel is a "competitive decision maker." *See, e.g., U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) ("In a particular case, *e.g.*, where in-house counsel are involved in competitive decisionmaking, it may well be that a party seeking access should be forced to retain outside counsel or be denied the access recognized as needed."); *see also Methode Elecs., Inc. v. DPH-DAS LLC*, 679 F. Supp. 2d 828, 830–831 (E.D. Mich. 2010) (applying competitive decision-maker test to outside litigation counsel in the context of patent litigation).

Competitive decision-making refers to "business decisions that the client would make regarding, for example, pricing, marketing, or design issues when that

party granted access has seen how a competitor has made those decisions." *FTC v. Sysco Corp.*, 83 F. Supp. 3d 1, 3 (D.D.C. 2015) (citations and internal quotation marks omitted). As a competitive decision maker, in-house counsel need not have final decision-making authority with respect to those decisions. *Id.* at 4. Instead, competitive decision making "more broadly encompasses a lawyer's 'activities, association, and relationship' with a client and its competitive decision-making activities." *Id.* (citing *FTC v. Whole Foods Market, Inc.*, No. 07-1021 (PLF), 2007 U.S. Dist. LEXIS 53567, at *7 (D.D.C. July 6, 2007)). The "primary concern" of the competitive decision-making test is whether "confidential information will be used or disclosed inadvertently because of the lawyer's role in the client's business decisions." *United States v. AB Electrolux*, No. 1:15-cv-01039-EGS, 2015 U.S. Dist. LEXIS 137870, at *4 (D.D.C. Oct. 9, 2015) (citing *Brown Bag Software*, 960 F.2d at 1470). Where courts conclude that counsel is a competitive decision maker, access to confidential information has been restricted to prevent the risk of competitive harm. *See Brown Bag Software*, 960 F.2d at 1471; *Methode Elecs.*, 679 F. Supp. 2d at 836; *Sysco*, 83 F. Supp. 3d at 4.

A. Allegiance's general counsel should not have access to competitors' confidential information because he is a competitive decision maker.

Here, as in other cases courts have considered, the inquiry should focus on whether in-house counsel is a competitive decision maker. In *Brown Bag*

Software, the Ninth Circuit upheld the district court's entry of a protective order excluding the company's only in-house counsel, who was litigating the case without outside counsel, from directly accessing the defendant's trade secrets. 960 F.2d at 1470–72 (allowing access to the competitor's trade secrets only through an independent consultant). In that case, counsel was responsible for advising the company "on a gamut of legal issues, including contracts, marketing, and employment." *Id*. at 1471. If the in-house counsel learned, for instance, about the competitor's confidential marketing strategies, the court concluded counsel would be placed in an "'untenable position' of having to refuse his employer legal advice" on competitive marketing decisions. *Id.* Otherwise, such in-house counsel would risk improperly or indirectly revealing protected information. *Id.* Mr. Empey's role with Allegiance presents the same concerns because he is responsible for advising the company on legal issues related to the subjects of discovery in the litigation.

The United States has proposed protective orders in antitrust cases in this district before. One such proposed protective order in a Sherman Act case denied in-house counsel access to confidential information and one in a merger case granted in-house counsel access to confidential information. *Compare United States v. Blue Cross Blue Shield of Mich.*, No. 10-14155, ECF No. 36 (E.D. Mich. March 16, 2011) (stipulated protective order denying in-house counsel access to

confidential information), *with United States v. Northwest Airlines Corp.*, No. 98-CV-74611-DT, 1999 WL 34973961 (E.D. Mich. May 21, 1999) (United States proposed a protective order that allowed in-house counsel to access confidential, but not highly confidential, information). In this case challenging Allegiance's marketing activity, the former approach of denying in-house counsel involved in competitive decision-making access to confidential information is appropriate.

Restricting Mr. Empey's access to confidential information is appropriate in this case because he is a competitive decision maker who advises the company on issues including marketing. Mr. Empey is the General Counsel of Allegiance. In that role, he reports directly to Ms. Georgia Fojtasek, the President and CEO of Allegiance. According to Allegiance, Ms. Fojtasek is the executive most involved in Allegiance's marketing decisions and relations with other hospitals, the conduct at issue in this action.

Mr. Empey is a member of Allegiance's Executive Council. In addition to Ms. Fojtasek and Mr. Empey, members of the Executive Council include or have included the Vice President of Marketing and the Vice President of Physician Integration and Business Development. As described in Plaintiffs' Complaint, business development activities such as physician outreach and health screenings constitutes marketing activity. Compl. ¶ 15. The Vice President of Physician Integration and Business Development is involved in those operations. The

Executive Council meets regularly, and Allegiance does not dispute it covers marketing plans, including plans for specific service lines. Mr. Empey also attends meetings of Allegiance's Board of Directors and Board of Trustees, where, again, marketing and other business development plans are discussed.

Mr. Empey's relationship to Ms. Fojtasek and his participation in Executive Council and Board meetings bring him "well within the orbit" of Allegiance's competitive decision making. *See Sysco*, 83 F. Supp 3d, at 4 (finding that counsel was a competitive decision maker based on his membership on the company's Executive Team, where "issues such as pricing, purchasing, and marketing may be discussed"). Importantly, Plaintiffs' concern is not over Mr. Empey's integrity or willingness to abide by the terms of the proposed protective order. As courts have noted, however, "those considerations alone do not control the inquiry." *Sysco*, 83 F. Supp. 3d at 3 (explaining that the objection to in-house counsel was "not about his integrity or his ethics"); *see also Brown Bag Software*, 960 F.2d at 1471 (lower court had "expressly credited in-house counsel's integrity and good faith"). Instead, Mr. Empey's involvement in marketing and business development presents an unreasonable risk of inadvertent disclosure. Therefore, this Court should restrict Mr. Empey's access to competitors' confidential information.

B. The proposed protective order protects Allegiance's ability to litigate this case.

As discussed above, the court must weigh the risk of inadvertent disclosure of confidential information against Allegiance's ability to prepare and present its defense. *See Sysco*, 83 F. Supp. 3d at 4 (citing 960 F.2d at 1470). In this case, Plaintiffs' proposed protective order adequately protects Allegiance's ability to litigate its case for three reasons: (1) Allegiance may designate in-house counsel who is not a competitive decision maker; (2) Allegiance's general counsel, who is a competitive decision maker, may still oversee the litigation; and (3) Allegiance may continue to rely on outside counsel whose area of expertise is healthcare antitrust litigation.

First, the proposed protective order permits Allegiance to designate one in-house counsel who may review the confidential materials of third parties. Allegiance employs in-house attorneys other than Mr. Empey. In discussions with Plaintiffs, Allegiance has not claimed that Plaintiffs' proposal would bar all of Allegiance's counsel as competitive decision makers, only that any proposal must allow access by Mr. Empey. Under these circumstances, requiring Allegiance to designate an attorney that is not a competitive decision maker strikes a reasonable balance between Allegiance's need to review competitors' confidential information and the risk of inadvertent disclosure.

Second, Mr. Empey will still be able to oversee the litigation and advise Allegiance on litigation strategy. *See Sysco*, 83 F. Supp. 3d at 4 (describing counsel's ability to advise on the litigation without access to confidential material). He will have access to redacted pleadings, expert reports, deposition transcripts, and discovery not designated as "confidential" or "highly confidential" information. And, in this antitrust case challenging Allegiance's conduct, Mr. Empey will have access to all of Allegiance's own information and any information produced voluntarily by other parties. Mr. Empey will be able to assist outside counsel by imparting his personal knowledge of the healthcare industry and of Allegiance's marketing activity, which is the subject of this litigation. The only restriction on Mr. Empey is that he may not review confidential materials from third parties, including hospitals that compete with Allegiance. For that, he will be able to rely on the judgment of another member of Allegiance's legal department, in addition to retained outside counsel, who can summarize the strength and significance of any such evidence for him. Given Mr. Empey's participation in business decisions, the "limited impairment" imposed by restricting his access to confidential information, again, strikes a reasonable balance, in light of the risk of inadvertent disclosure. *Id.*

Third, Allegiance has retained experienced outside counsel to lead the litigation in this matter. Outside counsel specializes in healthcare law, antitrust

law, and litigation. During the investigative phase, Allegiance relied on this same outside counsel to represent the company's interests and to keep in-house counsel informed. For example, in-house counsel did not attend the depositions of Allegiance's CEO or Vice President of Marketing and Communications or otherwise engage directly with Plaintiffs, except during one meeting that Allegiance's CEO attended. Moreover, this case alleging an illegal agreement to limit marketing does not involve highly specialized or technical information that outside counsel would have difficulty understanding. In short, with experienced outside counsel and in-house counsel other than Mr. Empey, Allegiance's ability to defend this action is not prejudiced by Plaintiffs' proposed protective order.

Conclusion

Plaintiffs' proposed order facilitates efficient discovery, protects confidential information from improper disclosure, and provides Allegiance with access to the discovery necessary to litigate this case. Accordingly, the United States and the State of Michigan respectfully request that the Court enter Plaintiffs' proposed protective order.

Respectfully Submitted,

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October 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 5:15-cv-12311-JEL-DRG, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

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