UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., *Plaintiffs*, v. AETNA INC. and HUMANA INC., *Defendants*.	Case No. 1:16-cv-01494 (JDB)

REPORT AND RECOMMENDATION NO. 1 OF THE SPECIAL MASTER

Pending before the Special Master is Defendants Aetna, Inc., and Humana Inc.'s Motion Seeking Modification of the Protective Order (Dkt. No. 73), in which Defendants ask that specially designated in-house counsel be permitted to view "references to and discussions of Confidential Information contained in written submissions to the Court or Special Master, in draft and final expert witness reports, and draft and final exhibits prepared by experts for potential use in their draft and final reports." For the reasons that follow, the Special Master recommends that the Court deny Defendants' Motion.

I. Background

The Court entered the underlying Protective Order in this case on August 12, 2016. (Dkt. No. 54). The Protective Order [¶ E.(1)(c)] permits Defendants to "file motions with the Special Master seeking modification of this provision [dealing with Permitted Disclosure of Confidential Information] to share Confidential Information with a very small number of specified in-house attorneys, so long as those attorneys are not involved in Defendants' competitive decision-making." [*Id*. at ¶ E(1)(c)].

Defendants submitted the instant Motion on August 24, 2016, seeking "modification of the Protective Order to permit limited disclosure of confidential information to in-house attorneys – two each at Aetna and Humana – who are not involved in competitive decision making." [Def. Mot. (Dkt. No. 73) at 1).

More specifically, Defendants' proposed modifications would grant in-house attorneys[1] access to

> references to and discussions of Confidential Information contained in written submissions to the Court or Special Master, in draft and final expert witness reports, and in draft and final exhibits that were prepared by the experts for potential use in their draft and final reports. This provision shall not permit In-house Attorneys to directly access or review any non-party documents that have been designated as Confidential Information.

[Def. Mot. Ex. 2 (Redlined [proposed] Amended Protective Order) at ¶ E(1)(j)].

Defendants' proposed amendments also include provisions intended to limit the types of in-house counsel who have access to such confidential information, and to grant non-parties the right to object to disclosure of their information to in-house counsel:

> Before any information designated as Confidential Information may be disclosed to any In-house Attorney pursuant to subparagraph E(1)(j) of this Order, the Defendant for whom the In-house Attorney employed must: (1) file an affidavit or declaration of the In-house Attorney certifying that the In-house Attorney does not participate in competitively sensitive decision-making for his or her employer and will abide by the provisions of this Protective Order; (2) obtain the Agreement Concerning Confidentiality in Appendix A to this Order signed by the In-house Attorney; (3) provide this amended Protective Order to non-parties who have produced Confidential Information in this matter; and (4) wait for five days after such notice to affected non-parties is provided before making the disclosure to the In-house Attorney. Notice to a

[1] Defendants' requested modifications define "in-house attorneys" as "up to two attorneys who are employees of each Defendant, for whom the Defendant has filed the In-house Attorney's affidavit or declaration certifying that the In-house Attorney does not participate in competitively sensitive decision-making for his or her employer and will abide by the provisions of this Protective Order, and who have signed the Agreement Concerning Confidentiality" attached to the Protective Order. [Mot. Exh. 2 at ¶ A(1)(s)].

> non-party of a motion for entry of this Amended Protective Order and an opportunity to object thereto shall satisfy the third requirement.

[*Id*. at ¶ E(2)].

In support of their proposed modifications, Defendants note that they do not ask that in-house counsel be permitted to access underlying non-party confidential information, but only "briefs, expert reports, and exhibits thereto" and written submissions to the Court and Special Master which may refer to or discuss confidential information. (Mot. at 1). According to Defendants, "such limited access is necessary to ensure that Defendants are able to participate meaningfully in their defense" because "Defendants' outside counsel need access to individuals familiar" with the healthcare insurance industry. (Mot. at 1-2). Defendants claim that denying in-house counsel access to confidential information would require outside counsel to "redact every draft and final brief and expert report for in-house counsel, depriving their review of much of its value and imposing a time-consuming burden on litigation teams in an expedited proceeding." (Mot. at 2).[2]

Defendants claim that "courts in [the District of Columbia] routinely permit parties' in-house counsel to access confidential materials if they have no role in competitive decision-making." [*Id*. at 2 (citations omitted)]. Defendants contend that, to restrict in-house counsel access, the government must provide specific facts showing that such limitation is necessary to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." [*Id*. at 2 (citations omitted)].

[2] Even permitting in-house counsel to view confidential information would not alleviate all of the burden associated with redactions, of course, as the parties will still be required to redact all confidential information contained in final public versions of documents.

Finally, Defendants include declarations from the two Aetna in-house counsel and two Humana in-house counsel whom Defendants request be given access to confidential information: Michelle Matiski, Vice President and Head of the Corporate Legal Group at Aetna; John Edward Neugebauer, Vice President and Chief Litigation Officer at Aetna; Matthew Varzally, Senior Counsel at Humana; and Elysia Solomon, Associate General Counsel at Humana. In each declaration, the individual lists his or her responsibilities; asserts that the declarant requires access to confidential information in order to provide legal advice to the declarant's company and to assist outside counsel; states that "[b]ecause I understand the Company and the questions and concerns of our management, I am better able than outside counsel alone to advise the Company about the arguments being raised, the strength of the arguments, and the strength of the evidence in terms that the [declarant's company's] executives can understand;" and represents that he or she will not use the documents for any purpose other than supervising outside counsel and advising management in the instant case. [*See* Mot. Exh. 3 (Matiski Decl.) at ¶ 3-4, 6-7, 11; Mot. Exh. 3 (Neugebauer Decl.) at ¶ 3-4, 6-7, 11; Mot. Exh. 4 (Varzally Decl.) at ¶ 3-4, 7, 11; Mot. Exh. 4 (Solomon Decl.) at ¶ 3-4, 6-7, 11]. In their Motion, Defendants represent that these declarations ensure that the in-house counsel will not use any confidential information for any improper purpose, and that the proposed modifications therefore do not pose any risk to the non-parties who provide this information. (Mot. at 3).

Plaintiffs oppose Defendants' request. First, Plaintiffs contend that neither of the Defendant corporations should have direct access to the confidential information because companies have an interest in protecting their sensitive information from competitors, and because Plaintiffs, who regularly conduct law enforcement investigations, have an interest in

ensuring that companies forthrightly supply information during the course of such investigations without fear that their information may be disseminated to competitors. (Opp. at 1).

Plaintiffs argue that limiting the in-house counsels' access to references and discussion in draft and final briefs, expert reports, and exhibits is insufficient because proposed findings of fact and "expert reports, in particular, are likely to assemble and distill some of the most competitively significant competitor documents and information." (Opp. at 1).

Plaintiffs express particular concern about the chilling effect that disclosure in this particular case may have on Medicare Advantage insurer bids for future coverage periods. "If insurers become concerned that their bidding data could be viewed by their competitors – *i.e.*, Aetna or Humana employees – that could affect their participation or bidding." (Opp. at 1-2).

Plaintiffs assert additional concerns as to whether the particular in-house counsel identified by Defendants – Ms. Matiski and Mr. Neugebauer for Aetna, and Mr. Varzally and Ms. Solomon for Humana – "are appropriate persons to receive confidential information, particularly in this regulated industry." (Opp. at 2). Plaintiffs cite to various entries in the Aetna and Humana privilege logs which Plaintiffs suggest indicate that these individuals may in fact be involved in competitive decision-making. (Opp. at 2-3).[3]

In reply to Plaintiffs' Opposition, Defendants argue Plaintiffs have failed to show that the in-house counsel at issue are in fact involved in competitive decision making. (Reply at 1-2).

Largely adopting language proposed by the parties, the Special Master issued Special Master Order #1 [Dkt. No. 74] affording non-parties who have already produced or have received subpoenas to produce documents an opportunity to comment, *inter alia*, on the instant

[3] Upon the request of the Special Master, Plaintiffs identified ten privilege log entries applicable to each of the four in-house counsel, and Defendant provided the relevant pages to the Special Master for *in camera* review. (See Pl. Aug. 31, 2016 email to the Special Master and parties; Def. Sept. 1, 2016 Submission to the Special Master).

Motion. The Special Master received submissions on this matter from 20 non-party Protected Persons[4] who object to Defendant's proposed modifications. These non-parties fall into two broad categories, albeit with some overlap: non-parties who have already provided information to the government and / or Defendants in response to requests issued by the government during its investigation into this matter, or in response to subpoenas issued during the pendency of this litigation; and non-parties who have received subpoenas from parties to this case but have not yet provided responsive information.

Specific concerns raised by some, but not all, of the Protected Persons noted the exceptional importance of maintaining the confidentiality of the information sought and/or already provided, arguing that improper disclosure of this information could potentially inflict great harm on the entity which provided it. Likewise, most non-parties have expressed concern about the risk of in-house counsel inadvertently relying on this information when advising their clients regarding business decisions, noting that, once an in-house counsel has learned sensitive information, it will be impossible for that counsel to forget it. Finally, many of the objecting non-parties argue that Defendants have failed to meet the burden to show good cause justifying amending the Protective Order to include disclosure to the identified in-house counsel. These not parties contend, among other arguments, that Defendants failed to demonstrate a sufficient need

[4] Non-party Protected Persons objecting to Aetna's proposed modifications include: Advocate Health Care Network; Anthem Inc. (treated as a non-party for purposes of this case); Aultman Health Foundation; Baylor Scott & White Holdings; Blue Cross and Blue Shield of Florida, Inc.; Centene Corporation; Cigna, Inc. (treated as a non-party for purposes of this case); CommunityCare Managed Healthcare Plans of Oklahoma; Duke University Health Systems, Inc.; Essence Healthcare, Inc.; Guidewell Mutual Holding Corporation; Health Alliance Medical Plans, Inc.; Health Options, Inc.; Iowa Health System d/b/a UnityPoint Health; Medical Mutual of Ohio; Mercer Health and Benefits LLC; Tufts Associated Health Plans, Inc.; UPMC and UPMC Health Plan, Inc.; UnitedHealth Group Inc.; and University of Colorado Health. In response to Special Master Order No. 1, some of the above-listed Protected Persons and additional non-parties also provided comment expressing concerns with other aspects of the Protective Order and/or with other aspects related to the treatment of protected information. These other arguments and comments are not properly before the Special Master at this time. Procedures for addressing other concerns with the current Protective Order are addressed in Special Master Order No. 2, filed on September 2, 2016. (Dkt. No. 92).

for in-house counsel to have access where, as here, the Defendants are represented by very experienced antitrust lawyers who have been involved in a large number of prior merger cases.

In response to the non-party comments, Defendants assert that courts routinely grant in-house counsel access to confidential discovery materials. (Def. Resp. to Protected Person's Submissions at 2). Defendants also reiterate their earlier arguments that their request seeks only limited access to confidential information. (*Id*. 2-3). In addition, Defendants argue that they require in-house counsel access to confidential material in order to litigate this case effectively because those counsel are "intimately familiar with these developments [in the health insurance industry] and with the broader [health insurance] industry," such as the procedures for obtaining funding and reimbursement from the Centers for Medicare and Medicaid Services (CMS), how organizations such as Defendants "design their benefits," and "how the industry reacts to changing requirements from CMS," and are knowledgeable as to Defendants' "penetration rates within particular geographic areas." (*Id*. at 4-5). By contrast, Defendants argue, any potential risks to non-parties are "speculative and unfounded." (*Id*. at 6-7).

Finally, Plaintiffs also submitted a response to the arguments raised by the Protected Persons in accordance with Special Master Order #1. Plaintiffs' response argues that the non-party comments "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," and support Plaintiffs' position that the current Protective Order appropriately balances the competing interests of enabling Defendants to prepare and defend themselves in this matter, while also protecting the interests of nonparties. (Pl. Response at 1-2).

The Special Master has reviewed all submissions made by the parties and non-parties in this matter. In addition, the Special Master heard argument from the parties and from all non-

parties who submitted written comments on the instant Motion and also who chose to participate in the oral argument. This matter is now ripe for resolution.

II. Legal Standard

The party which seeks to modify a protective order – here, Defendants – bears the burden of showing that good cause exists to justify the desired change. [*Infineon Tech. A.G. v. Green Power Tech. Ltd.*, 247 F.R.D. 1, 2 (D.D.C. 2005)(Bates, J.)(citing *Alexander v. F.B.I.*, 186 F.R.D. 54, 57 (D.D.C. 1998)].[5]

In determining whether to grant access, the Special Master must balance Aetna and Humana's interest in defending themselves – in other words, their need for in-house counsel to access this information – against the risk of inadvertent disclosure of that information.

Access to confidential information "should be denied or granted on the basis of each individual counsel's actual activity and relationship with the party represented, without regard to whether a particular counsel is in-house or retained." [*U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1469 (Fed. Cir. 1984); *see FTC v. Whole Foods Market, Inc.*, 2007 WL 2059741 at *2 (D.D.C. Jul. 6, 2007)]. "Thus, proper review of protective orders in cases such as this requires the district court to examine factually all the risks and safeguards surrounding inadvertent disclosure by *any* counsel, whether in-house or retained." [*Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992)]. In conducting such an assessment, a court should consider "the factual circumstances surrounding each individual counsel's activities, association,

[5] The Special Master views the Protective Order entered by Judge Bates as affording Defendants the opportunity to seek the relief that is encompassed by the instant Motion. The Special Master does not understand the language in the Protective Order here as shifting the burden on establishing entitlement to a modification from the movants – here, the Defendants. At oral argument Defendants acknowledged that they have the burden of establishing good cause and asserted that, in their opinion, they meet the "good cause" standard. (9/1/16 Tr. at 18-19).

and relationship with a party, whether counsel be in-house or retained." (*U.S. Steel*, 730 F.2d at 1468).

III. Discussion

Defendants have not met their burden to show that good cause exists to modify the protective order because they have not shown that the need for in-house counsel to have access to the confidential information at issue outweighs the risk of inadvertent disclosure in this case. Additionally, Defendants have failed to demonstrate that the in-house counsel designated by Defendants are not involved in competitive decision-making.

A. Risk of Inadvertent Disclosure

As the court noted in *F.T.C. v. Advocate Health Care Network*, ___ F. Supp. 3d ___, 2016 WL 770099 at *3 (N.D. Ill. Feb. 29, 2016):

> 'Where in-house counsel are involved in competitive decision making … the risk of inadvertent disclosure is obviously higher than for retained counsel.' In that context, compartmentalization of protected information from that which may be properly utilized in competitive decision-making is, to borrow Justice Cardozo's phrase used in another context, 'a feat beyond the compass of ordinary minds (citation omitted).' The inescapable reality is that once an expert – or a lawyer for that matter – learns the confidential information that is being sought, that individual cannot rid himself [herself] of the knowledge he [she] has gained; he [she] cannot perform a prefrontal lobotomy on himself [herself], as courts in various contexts have recognized (citations omitted).

This is so because information, once learned, is impossible to forget. "[I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so." [*F.T.C. v. Exxon Corp.*, 636 F.2d 1336, 1350 D.C. Cir. 1980)].[6]

[6] Adding to the concerns is the reality that the persons for whom access is sought may be promoted up the corporate hierarchy or change employment to an entity having an interest in the information to which access is sought here.

Indeed, with respect to the type of material at issue here, "the very nature of competitive information makes it difficult to compartmentalize." [*Saint Alphonsus Medical Ctr. V. St. Luke's Health System*, 2013 WL 139324 at *4 (D. Idaho Jan. 10, 2013)]. Thus, granting in-house counsel access to confidential information risks placing that counsel "in the 'untenable position' of having to refuse his employer legal advice on a host of contract, employment, and competitive marketing decisions lest he improperly or indirectly reveal [a competitor's] trade secrets." [*Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992)].

Moreover, because of the nature of the health insurance industry and the type of information at issue in this case, the term "competitive decision making" itself should be broadly construed in this case. "The primary concern underlying the 'competitive decision-making' test is not that lawyers involved in such activities will intentionally misuse confidential information; rather, it is in the risk that such information will be used or disclosed inadvertently because of the lawyer's role in the client's business decisions." [*F.T.C. v. Sysco Corp.,* 83 F. Supp. 3d 1, 3 (D.D.C. 2015)]. Providing Defendants' in-house counsel with access to the confidential information of other insurers undoubtedly risks giving Defendants an unfair advantage in competition in the insurance marketplace should the counsel later rely upon that knowledge when advising his or her client with regards to a competitive situation

A not insignificant number of the concerned non-parties, however, do not compete directly with Defendants in the insurance marketplace but, rather, are healthcare providers with whom Defendants regularly negotiate rates for services. Knowing what reimbursement rates these providers have negotiated with other insurers, a provider's enrollment projections, or cost and profitability data for a provider could provide the Defendants with a significant advantage in

future negotiations with these providers.[7] As the *Advocate* court explained, "we are not talking about an exchange of documents between two sides in a lawsuit. We are talking about a number of third parties, not targets of any [government] action, who had to give up exceedingly confidential information in response to a government subpoena." (*Advocate*, 2016 WL 770099 at *5).

Finally, the Special Master finds unpersuasive Defendants' claim that the actual information to be disclosed is limited in scope. The language proffered by Defendants would grant in-house counsel access to any confidential information presented by a non-party, provided that the information is discussed or referenced in a "written submission[ ] to the Court or Special Master, in draft [or] final expert witness report[]," or "in draft and final exhibits that were prepared by the experts for potential use in their draft and final reports." [Def. Mot. Ex. 2 (Redlined Amended Protective Order) at ¶ E(1)(j)]. As such, while Defendants have represented that they believe information to be included in such documents would be limited in scope, the actual language offered does not provide any such restriction. Rather, while in-house counsel may not have access to the actual documents produced by non-parties, nothing in the requested provision would prevent Defendants from including that exact information in a submission, expert report, or related exhibit.

B. Appropriateness of Designated In-House Counsel[8]

[7] At oral argument, Defendants represented that they did not intend to include such information in their submissions, expert reports, or related exhibits. The issue, however, is not only limited to whether, at this juncture, they anticipate use of such information. Rather, because the subpoenas and investigative demands have specifically targeted such information, under the type of blanket order that Defendants seek, any such information could be included in these reports and thus could potentially be available to in-house counsel.

[8] During oral argument counsel for each Defendant indicated that the named individuals for whom access is sought are the most important persons on behalf of each Defendant to have need for the access to the information at issue. (9/1/16 Tr. at 76).

The Special Master has reviewed the declarations of each in-house counsel[9] and is unpersuaded that these individuals are sufficiently removed from the competitive decision-making process such that they may safely have access to the broad range of confidential information at issue here.

First, Ms. Matiski represents that she "is not involved in decisions regarding pricing, marketing, distribution, product design, or other competitively sensitive issues that are the subjects of confidential information in this case." (Matiski Decl. at ¶ 4). She declares that she "cannot provide informed legal advice to the Company, unless I have access to *all* information – including Confidential Information – at issue in this matter." (*Id.*at ¶ 6)(emphasis supplied).

Ms. Matiski does claim to be involved in, *inter alia*, "mergers and acquisitions." (*Id*.) Permitting Ms. Matiski to have access to direct competitors' information therefore creates a risk that she may inadvertently disclose such information when advising management regarding future mergers, including those that may impact these competitors.

In addition, an *in camera* review of privileged materials withheld related to Ms. Matiski[10] makes clear that she advises Aetna management regarding negotiations with non-party healthcare providers who have provided information as part of this proceeding, including with certain providers who submitted statements as part of this proceeding arguing that disclosure of their information directly to Defendants creates a risk of significant harm.

[9] Here, as in *Advocate*, "[t]he course of the Declarations is essentially identical, with each Declaration parroting the language of the confidentiality order and assuring that the Declarant does not participate in the executive level decision-making; or business decisions regarding pricing, marketing, or design; competitive decision-making in areas like expansion, pricing or strategies." (2016 WL 770099 at *4).

[10] Of the ten documents provided for *in privilege* review, four strongly suggest that Ms. Matiski is involved in such negotiations. If this R&R is appealed to the Court and the Court wishes to review *in camera* the documents considered by the Special Master, the documents with respect to Ms. Matiski or any of the declarants will be provided to the Court.

Mr. Neugebauer's declaration creates similar problems. Just like Ms. Matiski, he claims that he does "not participate in competitive decision making" and is "not involved in decisions regarding pricing, marketing, distribution, product design, or other competitively sensitive issues that are the subjects of Confidential Information in this case." (Neugebauer Dec. at ¶ 4). He does, however, state that he "supervise[s] litigation and provide[s] risk awareness counseling." (*Id*.) Aetna almost certainly litigates with providers from time to time. Indeed, as non-party UPMC pointed out in its submission to the Special Master, publications have quoted Mr. Neugebauer discussing Aetna strategy with respect to providers. [*See* Christopher Cheney, Aetna, Providers Battle Over Billing Practices, Health Leaders Media (Mar. 5, 2015), http://www.healthleadersmedia.com/health-plans/aetna-providers-battle-over-billing-practices].

In addition, an *in camera* review of Aetna privilege log entries related to Mr. Neugebauer show that he is involved in strategic discussions regarding negotiations with providers, and regarding pricing and reimbursement strategy, all of which is contained in the confidential material sought and/or provided in this case.[11] Granting Mr. Neugebauer broad access to non-party information risks creating a situation in which he may inadvertently disclose information learned in the course of this case during litigation with such providers.

Mr. Varzally, from Humana, also avers that he is "not involved in decisions regarding pricing, marketing, distribution, product design, or other competitively sensitive issues that are the subjects of Confidential Information in this case." (Varzally Decl. at ¶ 2). He does state that he is involved in "litigation and investigation matters" related to "antitrust and competition; intellectual property; bankruptcy; offensive litigation and recoveries; general commercial

[11] Of the ten documents provided concerning Mr. Neugebauer, three provide evidence of his involvement in these matters.

litigation; member/provider disputes; ERISA; and the TCPA." (*Id*.) As with Ms. Matiski at Aetna, Mr. Varzally's participation in antitrust matters is troubling for purposes of this case. Granting Mr. Varzally access to direct competitors' information creates a risk that he may inadvertently disclose such information when advising management regarding future mergers with or against competitors whose information has been disclosed to him.

More concerning, however, is Mr. Varzally's participation in disputes with healthcare providers, which he admits is a key part of his role. The *in camera* review of Mr. Varzally's privileged material confirms that he is regularly involved in litigation concerning provider contracts.[12] Granting him access to the confidential information at issue in this case thereby creates a heightened risk of inadvertent disclosure of that information in ongoing or future litigations or employment.

Finally, Ms. Solomon, like Mr. Varzally, Mr. Neugebauer, and Ms. Matiski before her, declares that she is "not involved in decisions regarding pricing, marketing, distribution, product design, or other competitively sensitive issues that are the subjects of Confidential Information in this case." (Solomon Decl. at ¶ 4). She declares, however, that she oversees all litigation matters handled by the Humana Law Department, including, presumably, all of the litigation in which Mr. Varzally is involved. An *in-camera* review of documents prepared by or addressed to Ms. Solomon confirms that she is involved in such litigation.[13]

For all of these reasons, Defendants have not met their burden to show that good cause exists to amend the Protective Order to permit any of the above-listed in-house counsel to access to confidential information in this case. This conclusion is not based on a "general assumption

[12] Three of the ten documents provided involving Mr. Varzally show his participation in these matters.

[13] Seven of the ten documents provided regarding Ms. Solomon show her involvement in such litigation.

that one group of lawyers are more likely or less likely inadvertently to breach their duty under a protective order." (*U.S. Steel*, 703 F.2d at 1468). Rather, it is reflects the conclusion based on the declarations submitted that where, as here, a very significant number of non-parties have submitted highly confidential information on a wide variety of topics, "the specific facts" of this situation "indicate a probability that confidentiality … would be seriously at risk" if in-house counsel were granted access to that information in the fashion sought by Defendants in their proposed amendment. (*Id*. at 1469).

C. In-house counsel's need for this information

As balanced against the significant risk associated with the potential for inadvertent disclosure, Defendants have not provided a sufficient showing of need to justify granting in-house counsel blanket access to any confidential material contained in submissions and expert reports and exhibits.

While the Declarations of Ms. Matiski, Mr. Neugebauer, Mr. Varzally, and Ms. Solomon all assert that the declarant is "better able than outside counsel alone to advise the Company about the arguments being raised, the strength of the arguments, and the strength the evidence in terms that the business executives can understand," none of the declarations explain what specific benefit the in-house counsel will confer or how defense of the companies will be prejudiced or harmed by lack of access.

Defendants' Response to the Submissions of Protected Persons (non-parties) asserts that "the health-insurance industry is highly complex and highly regulated, with significant changes occurring on a regular basis." (Def. Resp. at 4). According to Defendants, the in-house counsel are "deeply knowledgeable about how the Centers for Medicare and Medicaid Services ('CMS') funds and reimburses Medicare Advantage Organizations like Defendants, how such

organizations design their benefits, and how the industry reacts to changing requirements from CMS. Similarly, in-house counsel will have special insight into penetrations rates within particular geographic areas, a topic that could well be relevant to this litigation." (*Id*. at 4-5).

Defendants' showing of need simply is not persuasive. While the Special Master does not doubt that in-house counsel have knowledge of and experience in these areas, Defendants have retained highly qualified and sophisticated outside counsel with experience in other merger cases and can be expected to retain equally qualified experts.[14] It is unclear – and Defendants do not convincingly explain - what special insight in-house counsel will offer into such topic areas here, in the abstract, without reference to any particular information or document, particularly when the information that is being withheld concerns companies that the in-house counsel do not represent. *See Advocate*, 2016 WL 770099 at *6 ("It is difficult to see how [the defendant's in-house counsel] would have any special insight into confidential materials from companies they don't work for – or at least that they would have a familiarity sufficiently different from that possessed by their outside counsel that could justify the risk of exposing the highly confidential information provided by the defendants' competitors.").

All of the declarants state that they are "better able than outside counsel alone to advise the Company about the arguments being raised, the strength of the arguments, and the strength of the evidence in terms that the business executives can understand . . .." (Mot. Exh. 3 at Matiski ¶ 6; Neugebaurer ¶ 7; Exh. 4 at Varzally ¶ 7; Solomon ¶ 7). Again, the Special Master does not doubt that the declarants are highly qualified attorneys, but the declarants have not explained *why* they are better positioned to explain these matters to their corporate management, or why

[14] The submission of non-party UPMC provides extensive detail about the experience of the law firms and certain lead counsel for the firms retained by Defendants to demonstrate the experience of retained outside counsel. (*See* UPMC Submission at 11-12 and n.4).

their respective "business executives" have a need to understand the legal arguments in a way that only the in-house counsel can explain. Given the quality of retained outside counsel in this case, the Special Master cannot accept this proposition of asserted need.

Moreover, while it is true, as Defendants argue, that some "courts in this District have recognized that 'it would be extremely difficult, if not impossible, for the defendants' outside counsel to prepare their case for trial without the assistance of in-house counsel,'" [Mot. at 3 (quoting *United States v. Sungard Data Sys. Inc*., 173 F. Supp. 2d 20, 21 (D.D.C. 2001)],[15] preventing in-house counsel from viewing confidential information does not prevent them from assisting Defendants' retained counsel. To the contrary, in-house counsel may certainly assist outside counsel – they must just rely upon redacted versions of submissions, expert reports and exhibits. [*See F.T.C. v. Sysco Corp.*, 83 F. Supp. 3d 1, 3 (D.D.C. 2015)]. To the extent that outside counsel require in-house counsel assistance with respect to particular documents, nothing prevents outside counsel from requesting that in-house counsel have access to that particular information based upon more specific and compelling grounds than are present at this juncture.

D. Other concerns

The Special Master finds persuasive Plaintiffs' argument that granting Defendants' in-house counsel access to the information at issue may deter non-parties from producing information to the government in future cases. (Pl. Resp. to Non-party Submissions at 1-2; *see* 9/1/16 Tr. at 53). While this concern, standing alone, might not be a sufficient basis upon which

[15] Defendants' citation to *Sungard* must be analyzed in light of the fact that trial in that case there was set occur in 17 days from the date of the Court's order. [173 F. Supp. 2d at 21 ("The lawsuit is on a track to trial which can only be described as heroic. Next to it, the renowned 'rocket docket' is a slow moving train.") While timing alone is not a dispositive factor, it clearly was significant in the decision there. The discovery timeline in this case, while condensed, does not come close to the situation in *Sungard*.

to recommend against in-house counsel access, the government has presented valid concerns that such disclosure may impede future law enforcement investigations.[16]

Additionally, other cases which have permitted in-house counsel to access to confidential information typically include in the protective order a penalty provision designed to deter against misuse of confidential information. The penalty provision in *Whole Foods Market*, for example, stated that:

> Any violation of this Order will be deemed a contempt and punished by a fine of $250,000. This fine will be paid individually by the person who violates this Order. Any violator may not seek to be reimbursed or indemnified for the payment the violator has made. If the violator is an attorney, the Court will deem the violation of this Order to warrant the violator being sanctioned by the appropriate professional disciplinary authority and Judge Friedman will urge that authority to suspend or disbar the violator.

(2007 WL 2059741 at *3). The penalty provision in *Sysco* was similar. (See 83 F. Supp. 3d at 5).

In the Response to the Protected Person's submissions and again at oral argument, however, Defendants expressed an unwillingness to accept such a provision. Defendants contend that "it is extremely unlikely that in-house counsel would gain any knowledge that would even make it possible that they could breach the Protective Order," and that "the parameters set forth

[16] In *F.T.C. v. Sysco Corp.*, ("Sysco II"), the court determined that disclosure of the identities of various entities who provided comment to the FTC regarding the pending merger at issue in that case would not have a chilling effect on future FTC investigations. (*F.T.C. v. Sysco Corp*., 83 F. Supp. 3d 271, 275 (D.D.C. 2015). That case is inapposite here. First, the categories of information in this case are far broader than the list of names at issue in *Sysco II*. Second, the court in that case noted that witness names have become public in other cases without resulting in a demonstrated chilling effect. (*Id*.) Finally, in that case, only one declarant (out of 90) declared that he would not have voluntarily offered information to the FTC had he known that his name would be made public. (*Id*.) By contrast, in this case, the type of information at issue is unlikely to become public at trial.

The actual information at issue here is far more detailed than that in *Sysco II*, and concerns confidential business details related to non-parties, rather than simply the names of the non-parties. Numerous non-parties have asserted that they provided information to the government based in large part upon the government's express assurances that the information would be protected. The details of this case, therefore, create a much stronger possibility that granting in-house counsel access may result in a chilling effect on future investigations.

in Defendants' modified Protective Order – which the designated in-house counsel agreed to under penalty of perjury – will sufficiently deter those individuals (who are all officers of the court) from violating the Order." (Def. Response at 9; see 9/1/16 Tr. at 30-31).

The Special Master does not question the integrity of the in-house counsel at issue here. Indeed, "like retained counsel … in-house counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions." (*U.S. Steel*, 730 F.2d at 1468). Nevertheless, given the type of highly confidential information at issue here, and cognizant of the discomfort that numerous non-parties have expressed concerning the possibility of in-house counsel having access to that highly confidential information, a penalty provision at least would have at least offered a step towards mollifying (albeit not relieving) non-party concerns. To the extent that Defendants contend that a breach of the Protective Order is unlikely, the unlikeliness of a breach suggests that Defendants should be more, rather than less, willing to accept such a provision.

To be sure, while a penalty provision arguably might provide some level of deterrence against improper disclosure, it cannot "un-ring the bell" in the case of an inadvertent disclosure. Inclusion of a penalty provision therefore does not resolve all of the other above-listed and serious risks associated with granting in-house counsel access to confidential information. For this reason, even if Defendants had agreed to or even suggested including a penalty provision, it would not change the Special Master's recommendation.

Likewise, some cases and some of the Protected Persons here have suggested that the issue of in-house counsel access to confidential information might be dealt with by establishing two tiers of confidentiality – (1) confidential and (2) "highly confidential" or "highly confidential – outside counsel only." Defendants oppose creating this type of provision as well,

contending that it "would require Protected Persons to re-designate large swaths of confidential material already produced to DOJ, which would consume additional time in an already-condensed schedule." (Def. Resp. to Protected Persons Submissions at 8). On this point, the Special Master agrees with Defendants. This case is being tried on a highly expedited schedule. It would be highly inefficient to require re-designation of all material already produced.

IV. Conclusion

For all of these reasons, the Special Master recommends that the Court deny Defendants' Motion.

V. Certification

As noted above, Plaintiffs orally and in writing have objected to this recommendation. Given that this recommendation involves a provision in the Protective Order entered by the Court, the Special Master, pursuant to paragraph 5 of the appointment order (Dkt. 66) certifies this Report and Recommendation for appeal to the Court. The parties are urged to inform the Court within 24 hours of the issuance of this Report and Recommendation whether there will be a need for appeal. Regardless of the outcome of any appeal to the Court on this issue, there is no need for any party to delay commencement of any appropriate non-party discovery.

September 5, 2016

/s/ Hon. Richard A. Levie (Ret.)
Hon. Richard A. Levie (Ret.)
Special Master