

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



_____)
In the Matter of)
)
)
ProMedica Health System, Inc.,)
Respondent.)
_____)

DOCKET NO. 9346

**RESPONDENT PROMEDICA HEALTH SYSTEM INC.'S UNOPPOSED MOTION
TO MODIFY PROTECTIVE ORDER**

Respondent ProMedica Health System, Inc. (“ProMedica”) respectfully moves for an order modifying the Protective Order Governing Discovery Material (“Protective Order”) to conform this Protective Order to the modified Stipulated Interim Protective Order entered by the United States District Court for the Northern District of Ohio (“the District Court”) in the Commission’s related action seeking a preliminary injunction pending the outcome of this proceeding. ProMedica has conferred with Complaint Counsel about this Motion and they have indicated that they will not oppose it.

I. FACTS

On January 10, 2011, the District Court entered the Stipulated Interim Protective Order. On January 11, 2011, the District Court granted ProMedica’s Motion To Modify the Stipulated Interim Protective Order to permit two attorneys within ProMedica’s legal department to access information designated as confidential. On January 20, 2011, the district court granted Plaintiffs’ unopposed motion to modify that Stipulated Interim Protective Order to permit two attorneys within ProMedica’s legal department access to certain documents, provided that in-house counsel were not permitted to access documents containing competitively sensitive information and documents designated FOR OUTSIDE COUNSEL’S EYES ONLY.

On January 6, 2011, this Court entered the Protective Order governing discovery in this proceeding. The Protective Order limits access to confidential materials to ProMedica's outside counsel. ProMedica brings this motion to modify the Protective Order to make it identical to the modified Stipulated Interim Protective Order entered by the District Court, thereby allowing certain members of its legal department to assist with the defense of this litigation, while safeguarding the confidentiality of any competitively sensitive information. Doing so will also simplify compliance with the two protective orders for all parties in the related proceedings.

II. ARGUMENT

Certain members of ProMedica's legal department, Chief Legal Officer and General Counsel, Jeffrey C. Kuhn, and Associate General Counsel, Priya Bathija, require access to some materials designated as "Confidential" pursuant to the Protective Order in order for ProMedica to prepare and conduct its defense in this litigation. Further, ProMedica's in-house counsel agree to respect and be bound by all terms of the Protective Order.

Without access to some confidential materials filed in this litigation, ProMedica's in-house counsel will not be able to assist outside counsel in preparing their defense. ProMedica's in-house counsel are in a unique position to aid outside counsel due to their specialized knowledge about the parties, facts, and industry underlying this litigation. Further, outside counsel need the ability to communicate candidly with in-house counsel regarding this case as it develops and they prepare their defensive strategy. ProMedica will be severely prejudiced in this task if outside counsel cannot candidly discuss legal advice with in-house counsel. The requested modification is narrowly tailored, as it is limited to only two attorneys, as opposed to ProMedica's employees, generally. Mr. Kuhn and Ms. Bathija will not share the Confidential information with any other ProMedica attorneys or employees. The modification is also

narrowly tailored because Mr. Kuhn and Ms. Bathija will not be permitted to access any competitively sensitive information, including but not limited to, payor/provider contracts, proprietary data, and strategic plans of third parties. Finally, as lawyers, Mr. Kuhn and Ms. Bathija understand the implications of and will fully comply with all requirements of the Interim Protective Order.

Other courts have granted in-house counsel access to information subject to a protective order where, as here, in-house counsel operate in a legal capacity without overlap in the business operations of the company. The proper test is whether in-house counsel participates in the “competitive decisionmaking” of the company. *See U.S. Steel Corp. v. U.S.*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (permitting in-house counsel access to confidential information because they were not involved in “competitive decisionmaking”). That test compels modification of the Protective Order here where ProMedica’s in-house counsel function in a legal capacity without participating in competitive decisionmaking of the company. (*See Ex. 1, Kuhn Affidavit; Ex. 2, Bathija Affidavit.*) In particular, ProMedica’s in-house counsel do not participate in negotiating contracts with commercial health plans, the crux of the Plaintiffs’ concerns in this case. (*See Ex. 1, Kuhn Affidavit; Ex. 2, Bathija Affidavit .*) Similar Courts have granted modifications in prior FTC cases. *See FTC v. Foster*, 2007 U.S. Dist. LEXIS 55163, at *16-19 (D.N.M. Apr. 26, 2007) (modifying protective order to permit in-house counsel to access confidential information in government action to prevent defendants’ acquisition and noting that “Competitive decision making encompasses a counsel’s activities, association, and relationship with a client that are such as to involve counsel’s advice and participation in any and all of client’s decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor”) (internal citations omitted). Finally, a modification is compelled as it would be “*extremely*

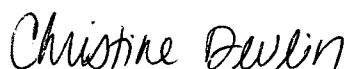
difficult, if not impossible, for the Defendants' outside counsel to prepare this case for trial without the assistance of in-house counsel" and to deny a modification would be to "deny outside counsel access to the lawyers most familiar with their clients' business and the industry in which they compete and who will have a much deeper and complete understanding of the documents being produced and the expert testimony to be derived from it." *U.S. v. Sungard Data Sys., Inc.*, 173 F. Supp.2d 20, 21 (D.D.C. 2001) (permitting in-house counsel access to confidential documents in government action to prohibit merger) (emphasis added).

III. CONCLUSION

Accordingly, ProMedica respectfully requests that this Court grant its unopposed motion to modify the Protective Order in order to conform it with the protective order entered in the related federal court proceeding and to permit two members of its in-house counsel, Jeffrey Kuhn and Priya Bathija, to access non-competitively sensitive materials designated as Confidential.

Dated: January 31, 2011

Respectfully submitted,



By: Christine G. Devlin

DAVID MARX, JR.

STEPHEN Y. WU

AMY J. CARLETTI

ERIN C. ARNOLD

McDermott Will & Emery LLP

227 West Monroe Street

Chicago, Illinois 60606

Telephone: (312) 372-2000

Facsimile: (312) 984-7700

dmarx@mwe.com

swu@mwe.com

acarletti@mwe.com

earnold@mwe.com

AMY E. HANCOCK
JENNIFER L. WESTBROOK
VINCENT C. VAN PANHUYS
CHRISTINE G. DEVLIN
CARRIE G. AMEZCUA
JAMES CAMDEN
DANIEL G. POWERS
McDermott Will & Emery LLP
600 13th Street, N.W.
Washington, D.C. 20005-3096
Telephone: (202) 756-8000
Facsimile: (202) 756-8087
ahancock@mwe.com
jwestbrook@mwe.com
vvanpanhuys@mwe.com
cdevlin@mwe.com
camezcua@mwe.com
jcamden@mwe.com
dgpowers@mwe.com

*Attorneys for Respondent ProMedica
Health System, Inc.*

CERTIFICATE OF SERVICE

I, Christine G. Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent ProMedica Health System Inc.'s Unopposed Motion to Modify the Protective Order upon the following individuals by hand on January 31, 2011.

D. Michael Chappell, Chief Administrative Law Judge, Federal Trade Commission
Donald S. Clark, Secretary, Federal Trade Commission

I, Christine G. Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent ProMedica Health System Inc.'s Unopposed Motion to Modify the Protective Order upon the following individuals by electronic mail on January 31, 2011.

Matthew J. Reilly
Jeffrey H. Perry
Sara Y. Razi
Jeanne H. Liu
Alexis J. Gilman
Stephanie L. Reynolds
Janelle L. Filson
Maureen B. Howard
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
mreilly@ftc.gov
jperry@ftc.gov
srazi@ftc.gov
agilman@ftc.gov
sreynolds@ftc.gov
jfilson@ftc.gov
mhoward@ftc.gov

Christine Devlin

Christine G. Devlin

CERTIFICATE OF SERVICE

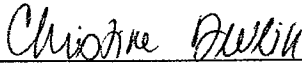
I, Christine G. Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent ProMedica Health System Inc.'s Unopposed Motion to Modify the Protective Order upon the following individuals by hand on January 31, 2011.

Hon. D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H110
Washington, DC 20580

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room 172
Washington, DC 20580

I, Christine G. Devlin, hereby certify that I served a true and correct copy of the foregoing Respondent ProMedica Health System Inc.'s Unopposed Motion to Modify the Protective Order upon the following individuals by electronic mail on January 31, 2011.

Matthew J. Reilly
Jeffrey H. Perry
Sara Y. Razi
Jeanne H. Liu
Alexis J. Gilman
Stephanie L. Reynolds
Janelle L. Filson
Maureen B. Howard
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
mreilly@ftc.gov
jperry@ftc.gov
srazi@ftc.gov
jliu@ftc.gov
agilman@ftc.gov
sreynolds@ftc.gov
jfilson@ftc.gov
mhoward@ftc.gov



Christine G. Devlin

EXHIBIT 1

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

In the Matter of)

ProMedica Health System, Inc.,)
Respondent.)

DOCKET NO. 9346

**AFFIDAVIT OF JEFFREY C. KUHN IN SUPPORT OF
RESPONDENT'S MOTION TO MODIFY PROTECTIVE ORDER**

I, Jeffrey C. Kuhn, declare:

- 1) The statements contained within this declaration are based upon my personal knowledge and experience.
- 2) I am the Chief Legal Officer and General Counsel for ProMedica Health System ("ProMedica").
- 3) I have served as Chief Legal Officer and General Counsel for ProMedica since 1998.
- 4) As Chief Legal Officer and General Counsel, I provide legal advice to ProMedica. I am responsible for ProMedica's legal affairs and management of the legal department, which includes seven attorneys. Over the years, I have served an essential role in the development and maintenance of ProMedica's academic relationships; provided legal guidance on the development of an employed physician model; and provided legal guidance and support on the creation of a children's hospital, the construction of two hospitals, and the joinder of seven hospitals into ProMedica. As secretary to every ProMedica organization, I am also responsible for all minutes and other records.
- 5) I also attend ProMedica's managed care strategy meetings. My role at those meetings, however, is one of legal advisor; I ensure compliance with applicable laws and regulations. I do not participate in making business decisions. Rather, I am responsible for making sure that ProMedica observes information firewalls between ProMedica's hospitals', which contract with third party commercial health plans, and its affiliate commercial health plan, Paramount Health Care, which contracts with hospitals that compete with ProMedica's.
- 6) I am not involved in the competitive decisionmaking of ProMedica as it relates to the issues in this case. For example, I do not participate in negotiating contracts with commercial health insurance companies. When reviewing draft contracts, I do not see the rates. I also do not make decisions or provide any business advice regarding pricing, marketing, or other competition-related issues that would be the likely subjects of competitively sensitive

EXHIBIT 2

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of January, 2011, in Toledo, Ohio.

Priya Bathija

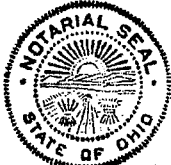
Priya Bathija

Subscribed and sworn to before me at the City of Toledo,

State of Ohio, this 31st day of January, 2010.

[Signature]
(Notary public)

No expiration
(Date commission expires)



Jeffrey Thomas Wisniewski
Notary Public, State of Ohio
Commission has no expiration.
Section 147.03 ORC

