



Order (“Confidentiality Order”). The current Confidentiality Order does not adequately protect the Third Parties’ most competitively sensitive information which, if disclosed to designees of Defendants pursuant to Paragraph 5(c)(3), would cause serious and irreparable harm to the Third Parties and could harm competition generally. In contrast, the Third Parties’ proposal for amending the Confidentiality Order balances the Third Parties’ need to protect their most competitively sensitive information with the Defendants’ interests in having access to the information to pursue their defenses in this preliminary injunction hearing. In support of their Motions, the Third Parties state as follows:

### **BACKGROUND**

Defendants Advocate Health Care Network, Advocate Health and Hospitals Corp. (together, “Advocate”) and NorthShore University HealthSystem (“NorthShore”) are health care providers and actual or potential competitors to the Third Parties.

In the course of the Federal Trade Commission’s (“FTCs”) and State of Illinois’ investigations into the proposed affiliation of Advocate and NorthShore (together, “Defendants”), the Third Parties produced competitively sensitive documents and information, including their current strategic and marketing plans, to the FTC in response to civil investigative demands (“CIDs”) relating to competition for healthcare services in the Chicago area. On December 31, 2015, the FTC provided to the Defendants’ outside counsel all of the documents and information the Third Parties produced to the FTC during its investigation.

On January 8, 2016, this Court entered a Confidentiality Order that provided that one designee from each of Defendants could have access to a producing party’s “Highly Confidential Information,” upon approval by the Court. (Confidentiality Order ¶ 5(c)(3)). Due to the currency and competitively sensitive nature of this information, on January 20, 2016, David L. Hanselman and Ashley M. Fischer, counsel for the Third Parties, spoke by telephone with Robert

W. McCann and Kenneth M. Vorrasi, counsel for Defendants Advocate, to discuss whether Defendants would agree to amend the Confidentiality Order to limit access to the Third Parties' Highly Confidential documents to outside counsel only. Messrs. McCann and Vorrasi declined that request, but informed Mr. Hanselman and Ms. Fischer that Defendants would be willing to evaluate whether certain Third Party documents within the broader category of Highly Confidential Information could be designated as subject to review by "Outside Counsel Only."

Following Advocate's proposal, the Third Parties filed a Motion to Intervene with this Court on January 22, 2016, identifying the specific categories of information that the Third Parties proposed to designate as "Outside Counsel Only" with the hope that the Third Parties and Defendants would reach an agreement to file a joint, uncontested, motion to amend the Confidentiality Order. (Docket No. 65). In furtherance of that effort, on January 25, 2016, Ms. Fischer provided Messrs. McCann and Vorrasi with lists of the documents that the Third Parties proposed to designate as "Highly Confidential – Outside Counsel Only." This subset of documents – 22 Presence Health Network documents; 28 Rush University Medical Center documents; 257 University of Chicago Medical Center documents; and approximately 1,400 Northwestern Memorial HealthCare documents<sup>2</sup> – contains the most competitively sensitive information that the Third Parties' produced to the FTC and comprises the Third Parties' strategic plans and competitive analyses of other healthcare providers in the Chicago area, including Defendants. A list of bates ranges encompassing the documents that the Third Parties proposed to designate as "Highly Confidential – Outside Counsel Only" is provided as Exhibit A to this Motion, but the following documents are representative examples:

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<sup>2</sup> Northwestern Memorial HealthCare has designated a larger number of documents as "Highly Confidential – Outside Counsel Only" because it produced all of its highly competitively sensitive board books from January 1, 2013 through July 2015 to the FTC in response to the CID.

- A Presence Health internal analysis of the competitive impact of the Defendants' affiliation on Presence Health's operations.
- A Presence Health strategic alignment plan that analyzes Presence Health's future service line-specific plans for growth.
- A UCMC internal analysis of potential affiliation opportunities in the Chicago area.
- Several RUMC reports analyzing plans for service line-specific growth.
- Northwestern Memorial Hospital FY2014 August YTD Profitability Reports that contain service line-, payor-, service area-, and physician-specific price and revenue information.
- A Northwestern Medicine 2010-2020 Strategic Plan that contains service line-specific strategic objectives for future growth.
- A Northwestern Medicine FY14 Market Share Update that analyzes Northwestern's competitive position in the Chicago area.<sup>3</sup>

On January 25, 2016, Defendants moved to request that the Court approve their proposed designees to receive Highly Confidential Information under Paragraph 5(c)(3) of the Confidentiality Order. Defendant Advocate moved to designate Eric Tower, Advocate's Vice President, Associate General Counsel – Transactions. Defendant NorthShore moved to designate Sean O'Grady, President, Glenbrook Hospital at NorthShore. Mr. Tower has worked at Advocate for over 10 years. (Exhibit B). In his current position, Mr. Tower's responsibilities include the "development of strategy, and negotiation and drafting of all primary documents." (emphasis added) (Exhibit B). Over the course of his career at Advocate, Mr. Tower has served as "[l]ead counsel to a variety of complex transactions, including mergers, affiliations, asset purchases, joint ventures, and other transactions with hospitals and physicians groups." (Exhibit B). Mr. O'Grady has worked at NorthShore for approximately 9 years. (Exhibit C). In his

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<sup>3</sup> If this Court would find it useful, the Third Parties can make available, for the Court's in camera inspection, the set of documents that the Third Parties have designated as "Highly Confidential – Outside Counsel Only."

current position, Mr. O’Grady’s “is responsible for operations, management, strategic planning and program development.” (emphasis added) (Exhibit C). His “[s]pecialties” include “strategic and business planning.” (emphasis added) (Exhibit D).

On January 26, 2016, Mr. Hanselman and Ms. Fischer, counsel for the Third Parties, spoke telephonically with Mr. Vorrasi, counsel for Advocate, and Messrs. Michael S. Pullos and William A. Roach, counsel for NorthShore, to discuss whether Defendants would agree to file a joint, uncontested, motion to amend the Confidentiality Order to preclude the disclosure of the subset of documents designated by the Third Parties as “Highly Confidential – Outside Counsel Only.” Messrs. Vorrasi, Pullos, and Roach stated that Defendants did not agree to amend the Confidentiality Order.

Due to the competitively sensitive nature of the Third Parties’ “Highly Confidential – Outside Counsel Only” documents, their disclosure to any designees of Defendants, but in particular to Mr. Tower and Mr. O’Grady, will cause the Third Parties serious and irreparable harm. Accordingly, the Third Parties now move to amend the Confidentiality Order to preclude the disclosure of the documents designated by the Third Parties as “Highly Confidential – Outside Counsel Only” to any designees of Defendants.

### **ARGUMENT**

#### **I. THE THIRD PARTIES HAVE SHOWN GOOD CAUSE FOR AMENDING THE AGREED CONFIDENTIALITY ORDER.**

A party seeking a confidentiality order to protect itself from disclosing “confidential . . . commercial information” need only show that “good cause” exists for its issuance. *Jepson, Inc. v. Makita Elec. Works*, 30 F.3d 854, 858 (7th Cir. 1994); Fed. R. Civ. P. 26(c). The movant may establish “good cause” by showing that the risk and harm of inadvertent disclosure of the confidential information outweigh the burden on the party requesting the information if it would

not receive the information it seeks. *See Jacobs v. City of Chi.*, Case No. 14-cv-5335, 2015 U.S. Dist. LEXIS 5385 (N. D. Ill. Jan. 16, 2015) (citing *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997)); *Autotech Techs. Ltd. Psp. v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 407 (N.D. Ill. 2006).

There is good cause to amend the Confidentiality Order to preclude disclosure of documents specifically designated by a Third Party as “Highly Confidential – Outside Counsel Only” to a designee of Defendants’ because: 1) there is a significant risk that the designees of Defendants, inadvertently if not intentionally, will disclose the Third Parties’ competitively sensitive information to the Defendants; 2) such disclosure would cause serious and irreparable harm to the Third Parties; and 3) the risk and harm of even inadvertent disclosure of the Third Parties’ confidential information outweigh the burden on Defendants.

**A. There Is A Significant Risk That Designees of Defendants Will Disclose The Third Parties’ Confidential Information**

There is a significant risk that the designees of Defendants will disclose the Third Parties’ confidential information to their employers, or indirectly disclose the confidential information through comments or statements in strategic discussions, advice, or documents. Although the current Confidentiality Order includes a requirement that the designees of Defendants confirm that they will not share Highly Confidential Information, courts have recognized that there is a high risk of “inadvertent” disclosure when, as is true of Defendants’ proposed designees, the employees receiving the confidential information are involved in competitive decision-making for the party. *See Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992). For these employees in particular, courts have doubted whether they “could lock-up [confidential information] in [their] mind[s], safe from inadvertent disclosure to [their] employer once [they] had read the documents.” *Brown Bag*, 960 F.2d at 1471; *see also St. Alphonsus Med. Ctr. v. St.*

*Luke's Health Sys.*, Case No. 12-cv-00560-BLW-REB, 2013 U.S. Dist. LEXIS 4857 (D. Idaho Jan. 10, 2013) (precluding in-house counsel from access to certain documents due to the risks of inadvertent disclosure, “[e]ven if such in-house attorneys assure that they will comply with restrictions upon the use of information.”).

As evidenced by the Defendants’ January 25, 2016 Motion For Order Approving Designation Of Representatives For Access To Highly Confidential Information (Docket No. 72), the Third Parties’ concerns regarding the risk of inadvertent disclosure are well-founded. Defendant Advocate’s proposed designee, Mr. Tower, is Advocate’s Vice President, Associate General Counsel – Transactions. In this position, according to his LinkedIn biography, he is responsible for the “development of [Advocate’s] strategy, and negotiation and drafting of all primary documents.” (emphasis added) (Exhibit B). Defendant NorthShore’s proposed designee, Mr. O’Grady, is President, Glenbrook Hospital at NorthShore. In this position, according to his Executive Bio on NorthShore’s website, he “is responsible for operations, management, strategic planning and program development.” (emphasis added) (Exhibit C). Mr. O’Grady touts “strategic and business planning” as among his “[s]pecialties.” (Exhibit D). With such significant responsibilities related to Advocate’s and NorthShore’s strategic planning and competitive decision-making, the risk that Mr. Tower and Mr. O’Grady would be unable to “lock-up” the Third Parties’ competitively sensitive information is too high. *See St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.*, 2013 U.S. Dist. LEXIS 4857 (D. Idaho Jan. 10, 2013) (“[T]he risk of inadvertent disclosure of the most sensitive information when [in-house counsel] give advice (often “strategic advice that involves competitive issues) is simply too high.”). Accordingly, courts routinely prohibit the disclosure of confidential information to employees with responsibilities similar to Mr. Tower’s and Mr. O’Grady’s. *See Ball Memorial Hosp., Inc.*

*v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986) (“When counsel act as the negotiators, they become business agents of the Hospitals, and there is little difference between providing information to the president of a hospital and providing it to the hospital’s lawyer-agent.”); *U.S. v. Dentsply Intern., Inc.*, 187 F.R.D. 152, 159-62 (D. Del. 1999) (disregarding in-house counsel’s “carefully crafted” affidavit and ruling that in-house counsel could not have access to documents designated confidential due to his involvement in the acquisition of companies and entering into contractual transactions, because he could make use of third parties’ confidential information in making or implementing strategic acquisitions). Indeed, Advocate’s and NorthShore’s designations of Mr. Tower and Mr. O’Grady are even inconsistent with Paragraph 5(c)(3) of the *current* Confidentiality Order, which requires that Defendants’ designees must not be involved in “competitive decision-making.” (Confidentiality Order ¶ 5(c)(3)). Mr. Tower and Mr. O’Grady publicly highlight their responsibilities in strategic planning and competitive decision-making, despite their declarations to the contrary. *See* Exhibits C-D.

While the risk of inadvertent disclosure is particularly high with respect to Mr. Tower and Mr. O’Grady, it remains unacceptably high for any potential designee of Defendants. *See, e.g., Santella v. Grizzly Indus.*, 2012 U.S. Dist. LEXIS 158349 (“A risk of inadvertent disclosure arises not from an information recipient’s position or influence with a competitor of the party opposing disclosure, but from being in a position where the subtle percolation of the confidential information can tangibly and unavoidably alter the recipient’s actions.”). As many courts have recognized, “it is very difficult for the human mind to compartmentalize and selective suppress information once learned, no matter how well-intentioned the effort may be to do so.” *FTC v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980) (cited by *McDavid Knee Guard, Inc. v. Nike USA, Inc.*, Case No. 08-cv-6584, 2009 U.S. Dist. LEXIS 48193 at \*15 (N.D. Ill. June 9, 2009)

and *Doskocil Cos. v. C&F Packing Co.*, No. 89 C 600, 1989 U.S. Dist. LEXIS 14071, \*\*4-5, 9 (N.D. Ill. Nov. 17, 1989)). Accordingly, there is an unacceptable risk that any designee of the Defendants will disclose the Third Parties' highly competitively sensitive information to the Defendants, and therefore all designees of Defendants should be precluded from receiving documents designated by the Third Parties' as "Highly Confidential – Outside Counsel Only."<sup>4</sup>

**B. The Third Parties Will Suffer Irreparable Harm If Their Confidential Information Is Disclosed To Designees of Defendants**

The serious competitive harm from the disclosure of the documents designated by the Third Parties as "Highly Confidential – Outside Counsel Only" to designees of Defendants is easily foreseeable. These documents contain the most competitively sensitive information that the Third Parties produced to the FTC, including detailed service line-specific strategic plans, internal analyses of potential affiliation opportunities, and even the Third Parties' proposed competitive responses to the affiliation between Defendants. This information is "[p]lainly, [the] type of information [that] could be used to [a party's] disadvantage if in the hands of others." *National Council on Compensation Ins., Inc. v. Am. Int'l Group, Inc.*, No 07 C 2898, 2007 WL 4365372, at \*4 (N.D. Ill. Dec. 11, 2007).

For example, if any designee of Defendants (and in particular, Mr. Tower and Mr. O'Grady) gained access to their current or potential competitors' detailed plans discussing how they intend to competitively respond to the Defendants' affiliation, it would result in irreparable harm to the Third Parties and provide a significant and unfair competitive advantage to the Defendants. *See Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1483 (Fed. Cir. 1986) ("Obviously, where confidential material is disclosed to an employee of a competitor, the risk of

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<sup>4</sup> This restriction is consistent with the protective order entered by the Administrative Law Judge in connection with the FTC's administrative proceeding that will address the legal merits of the proposed affiliation. *See* Protective Order Governing Discovery Material, entered in FTC Docket No. 9369, ¶¶ 1, 2, 3, 7. (Dkt. No. 65-1.)

the competitor's obtaining an unfair business advantage may be substantially increased." ). Similarly, if a designee of the Defendants gained access to the Third Parties' pricing lists, analyses of affiliation opportunities, or prospective strategic plans for service line growth, the Third Parties would likely suffer severe financial harm and competitive disadvantage, which could extend to patients, pricing decisions, and the Third Parties' strategic actions in the Chicago area. Not only will the disclosure of such information harm the Third Parties, but it will also injure the competitive process more broadly. *See Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1388 (7th Cir. 1986).

Recognizing this risk of harm, many courts, including within this district in hospital merger cases just like this one, have prohibited employees of a party from having access to third parties' highly competitively sensitive information, and have instead restricted to outside counsel such information that "if disclosed to another parties' employees" might "have an adverse economic impact on the Producing Party. . . ." Protective Order at ¶ 2, *FTC v. OSF Healthcare Sys.*, No. 11-cv-50344 (N.D. Ill. Dec. 28, 2011); *see also Triangle Ink & Color Co., Inc. v. Sherwin-Williams Co.*, 61 F.R.D. 634 (N.D. Ill. 1974) (restricting disclosure of information containing defendant's trade secrets to plaintiff's trial attorneys); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1345-46 (7th Cir. 1986) (recognizing that plaintiff could "use [a third party's price data] to advantage in the next round of negotiations"); *Fieldturf Intern., Inc. v. Triexe Mgmt. Group, Inc.*, No. 03-C3512, 2004 WL 866494, at \*3 (N.D. Ill. Apr. 16, 2004) (recognizing that "disclosure of confidential financial information to competitor[s] may cause a party great harm" and limiting disclosure to outside counsel); *Doskocil Cos. v. C&F Packing Co.*, No. 89-C0600, 1989 WL 152808 (N.D. Ill. Nov. 20, 1989) (denying defendant's motion to modify protective order to disclose confidential documents to in-house personnel

because of potential competitive harm); *Safe Flight Instrument Corp. v. Sundstrand Data Control, Inc.*, 682 F. Supp. 20, 21 (D. Del. 1988) (precluding party's president from accessing confidential documents as he "might (whether consciously or subconsciously) abuse the confidential . . . information revealed to [the producing entity's] competitive disadvantage. The potential for abuse [and] competitive loss is real"). Similarly, here, the Court should amend the Confidentiality Order to preclude any designees of Defendants from gaining access to the Third Parties' competitively sensitive information in order to protect the Third Parties from suffering irreparable harm.

**C. When Weighing The Risk And Harm Of Disclosing The Third Parties' Confidential Information To Designees Of Defendants With The Burden On Defendants' Of Not Receiving The Information, It Is Clear That The Third Parties' Motion To Amend Should Be Granted.**

A party's "legitimate interest in ensuring that certain confidential information be protected must be weighed in the balance with [another party's] competing interest in . . . having access to that information so that it may prosecute its claims," or pursue its defenses. *Autotech Technologies Limited Partnership v. Automationdirect.com, Inc.*, 237 F.R.D. 405, 407 (N.D. Ill. 2006). Here, the balancing of the Third Parties' and Defendants' competing interests weighs heavily in the Third Parties' favor.

The Third Parties have demonstrated a strong need to amend the Confidentiality Order to protect their current and most competitively-sensitive confidential information. In contrast, the Third Parties' proposed amendment to the Confidentiality Order, would have no impact on the Defendants' ability to pursue their defenses in this litigation. The proposed amendment to the Confidentiality Order provides that a subset of the Third Parties' Highly Confidential documents will not be disclosed to any employees of Defendants. However, these documents will still be available to Defendants' outside counsel and experts for their use in pursuing their defenses in

this case.<sup>5</sup> Moreover, the proposed amendment to the Confidentiality Order would do nothing to prohibit Defendants' internal employees and in-house counsel from assisting outside counsel in defending this litigation; it merely precludes Defendants' employees from gaining access to competitively sensitive information that could harm the Third Parties or provide the Defendants with an unfair competitive advantage. As courts have recognized, this type of arrangement "strikes [the] proper balance between [a party's] right to discover relevant information and the [producing party's] confidentiality interests." *See Fieldturf*, 2004 WL 866494, at \*3.

Accordingly, the Third Parties have shown good cause to amend the Confidentiality Order under Rule 26(c), and this Court should order the parties to meet and confer to amend the Confidentiality Order to preclude disclosure of documents specifically identified by a Third Party as "Highly Confidential – Outside Counsel Only" to a Defendant's designated representative under Paragraph 5(c)(3) of the current Confidentiality Order.

## **II. CONCLUSION**

Because the Third Parties will suffer irreparable harm if the Confidentiality Order is not amended, the Third Party's Motion should be granted.

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<sup>5</sup> Defendants' counsel are experienced healthcare antitrust lawyers who are fully capable of understanding the competitively-sensitive information contained in the Highly Confidential documents the Third Parties have designated as "Outside Counsel Only" without assistance from anyone in-house at Advocate or NorthShore.

DATED: January 27, 2016

*/s/ Kaitlin Sheehan*

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**STATEMENT REGARDING MEET AND CONFER**

Pursuant to Local Rule 37.2, Third Parties' counsel, Ashley M. Fischer and David L. Hanselman, Jr. spoke telephonically with Defendants' counsel Kenneth M. Vorrasi, Michael S. Pullos, and William A. Roach on January 26, 2016 in a good faith attempt to resolve this discovery dispute. At that time, counsel for Defendants informed counsel for the Third Parties that they intend to oppose this Motion.

/s/ Ashley M. Fischer

Ashley M. Fischer

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing document to be sent to all counsel of record on January 27, 2016 by the Electronic Case Filing System of the Northern District of Illinois.

/s/ Kaitlin Sheehan

Kaitlin Sheehan