UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of **PIEDMONT HEALTH ALLIANCE, INC.,** **a corporation,** **and** **PETER H. BRADSHAW, M.D.,** **S. ANDREWS DEEKENS, M.D.,** **DANIEL C. DILLON, M.D.,** **SANFORD D. GUTTLER, M.D.,** **DAVID L. HARVEY, M.D.,** **JOHN W. KESSEL, M.D.,** **A. GREGORY ROSENFELD, M.D.,** **JAMES R. THOMPSON, M.D.** **ROBERT A. YAPUNDICH, M.D.,** **and WILLIAM LEE YOUNG III, M.D.,** **individually**	**Docket No. 9314**

RESPONDENT PIEDMONT HEALTH ALLIANCE'S *REVISED* REPLY IN SUPPORT OF ITS MOTION TO LIMIT OR QUASH SUBPOENA DUCES TECUM TO ORLIKOFF & ASSOCIATES, INC.

Complaint Counsel's Opposition Memorandum ("Complaint Counsel's Opposition") fails to show why PHA's Motion to Limit or Quash Subpoena Duces Tecum to Orlikoff & Associates ("PHA's Motion") should be denied. Complaint Counsel's Opposition has two basic deficiencies:

First, Complaint Counsel's Opposition fails to establish that PHA waived the attorney-client privilege applicable to certain information in the March 12 Letter when it sent the letter to James E. Orlikoff.

Second, Complaint Counsel introduces for the first time an argument based on inadvertent disclosure. This belated argument should be disregarded because it is inconsistent with Complaint Counsel's apparent position on inadvertent disclosure until now. However, even if Your Honor considers Complaint Counsel's argument on the merits, the applicable five factor test

shows that disclosure was inadvertent and there was no waiver.[1]

1. PHA Did Not Waive Privilege By Sending The March 12 Letter to Mr. Orlikoff

Complaint Counsel's Opposition relies heavily on the Declaration of James E. Orlikoff (Attachment 1) to attempt to show that PHA waived privilege to the March 12 Letter. Mr. Orlikoff's Declaration, however, provides little support for Complaint Counsel's position, as Mr. Orlikoff does not recall much of his relationship with PHA, and what he does recall is inconsistent with PHA's understanding on several critical issues. Mr. Orlikoff's faded recollection is understandable, given the passage of time and his heavy client load. *See* Orlikoff Decl. ¶ 2.

While the facts demonstrate that no waiver occurred, the consequences of finding waiver in this case would create a precedent that would seriously circumscribe the ability of organizational clients to implement legal advice. In this case, PHA made a very limited disclosure of the March 12 Letter to a consultant who worked closely with its Board of Directors, whom PHA reasonably believed (1) needed to understand the issues contained in the March 12 Letter, given his specific assignment, and (2) would keep the document confidential. Based on the evidence, Your Honor should conclude that no waiver occurred in this case.

A. Mr. Orlikoff's Relationship With PHA Shows No Waiver Occurred

Complaint Counsel emphasizes the number of hours Mr. Orlikoff billed PHA. Although time can be a relevant factor, courts impose no legal requirement as to the amount of time a consultant must work before he may learn privileged information related to his duties. Instead, courts look to the nature of the activities in which the consultant engaged, his interaction with

[1] PHA notes that Complaint Counsel's Opposition fails to address PHA's argument that since Mr. Orlikoff's production of the March 12 letter would be duplicative, the letter should be excluded from the scope of the Subpoena pursuant to the Administrative Law Judge's authority under Rule 3.31(c). Under Commission Rule 3.22(c), Complaint Counsel's failure to answer that issue may be deemed to be a concession that relief should be granted on that basis. Nevertheless, PHA respectfully requests that Your Honor address the merits so that the privilege claim asserted by PHA may be resolved at this time.

full-time employees, and whether the nature of his work was "intertwined" with privileged legal information. *Fed Trade Comm'n v. GlaxoSmithKline*, 294 F.3d 141, 147-48 (D.C. Cir. 2002).

The facts in this case show that Mr. Orlikoff's relationship with PHA fits squarely within this rubric. According to the Declaration of Sharon J. Alvis (Attachment 2), PHA hired Mr. Orlikoff in 2000 and again in 2001 for the specific purpose of working solely with the PHA Board to address critical issues PHA faced and was unable to resolve alone. Alvis Decl. ¶¶ 4-6, 9-11. In 2001, the critical issue PHA faced was how to transition to a messenger model, which was closely linked to legal advice PHA received. Further, the nature of Mr. Orlikoff's work does not lend itself to lengthy assignments. Mr. Orlikoff admits that he has many clients and travels extensively. Orlikoff Decl. ¶ 2. Mr. Orlikoff's high billing rate likewise suggests that his services are generally provided on a short term basis. Mr. Orlikoff billed PHA for 18 hours of work over two years, plus expenses, for which he was compensated over $17,000 – amounting to a rate of nearly $1,000 per hour. *See* Alvis Decl. ¶¶ 7, 12.

B. PHA Reasonably Believed Mr. Orlikoff Needed The March 12 Letter

Complaint Counsel's Opposition makes much of the fact that Mr. Orlikoff did not request the legal advice contained in the March 12 Letter. Orlikoff Decl. ¶ 9. Mr. Orlikoff's statement is curious in light of his comment that clients often provide him with information they believe he will need in order to perform his work adequately. *Id.* Ms. Alvis' Declaration confirms that this was the very the reason that she provided him with the legal advice. Alvis Decl. ¶ 10. Overall, Ms. Alvis' account better accords with the facts known to date, and it shows that her belief that Mr. Orlikoff needed to understand the legal advice contained in the March 12 Letter to perform his work competently was reasonable. First, the overall subject of the retreat, at which Mr. Orlikoff was the sole presenter, was the need to rethink PHA's strategy given its decision to implement a messenger model. Alvis Decl. ¶ 11. Mr. Orlikoff's presentations to PHA's Board

were titled "Reconsidering PHA's Strategic Direction" and "Selecting the Options"; Mr. Orlikoff also provided an update of national trends, which Complaint Counsel highlights. *Compare* Alvis Decl. ¶ 11 *with* Orlikoff Decl. ¶¶ 9, 11; *see also* Agenda, PHA Retreat March 2001 (Attachment 3). Since the March 12 Letter helps explain the legal basis for PHA's strategic decisions, Ms. Alvis reasonably believed that Mr. Orlikoff needed this information.

C. Mr. Orlikoff and PHA Had A Sufficient Understanding Of Confidentiality

Ms. Alvis' Declaration states that PHA initially hired Mr. Orlikoff because of his unique qualifications in working with corporate boards in the healthcare industry. Alvis Decl. ¶ 3. Ms. Alvis is certain that she discussed confidentiality with Mr. Orlikoff, and consequently "understood that Mr. Orlikoff would maintain the information he received while working with the PHA as confidential." Alvis Decl. ¶ 5. Ms. Alvis explained that absent such an understanding, "I would not have hired him to participate in the retreat, discussed the substance of issues PHA faced with him, or provided him with PHA's confidential documents." Alvis Decl. ¶ 5.

Mr. Orlikoff claims that he does not recall discussing confidentiality with Ms. Alvis, but he admits that his practice is to maintain the confidentiality of client information. Orlikoff Decl. ¶ 16. Mr. Orlikoff's practices, coupled with Ms. Alvis' certainty that confidentiality was discussed, reveals that both PHA and Mr. Orlikoff had some understanding that the information PHA provided would not be disclosed, which is what the law requires. *See GlaxoSmithKline*, 294 F.3d at 147.[2] Moreover, neither Mr. Orlikoff nor Ms. Alvis have disclosed the document to non-privileged persons, which further evinces both parties' commitment to keep the document confidential. Alvis Decl. ¶ 10; Orlikoff Decl. ¶ 16.

[2] Complaint Counsel's emphasis on "separate understanding" is misplaced. Read in context, "separate understanding" merely distinguishes the understanding GlaxoSmithKline had with its consultants, as opposed to the more formal confidentiality agreement it maintained with its full-time employees.

D. PHA Alternatively Requests Until March 9 To Supplement Its Reply

If Your Honor declines to grant PHA's motion at this time, PHA requests that it be given until Monday, March 8 to supplement this response. PHA received copies of Mr. Orlikoff's subpoena response at the close of business March 1. March 8 will provide PHA five business days to review this information and respond fully to Complaint Counsel's Opposition.

2. Complaint Counsel's Belated Inadvertent Disclosure Argument Should Be Disregarded

Complaint Counsel's Opposition raises for the first time its argument that PHA waived the attorney-client privilege with respect to the March 12 Letter when it inadvertently disclosed it to Complaint Counsel. This argument, however, rings hollow for two reasons. First, Complaint Counsel returned three out of the four privileged documents requested by PHA in compliance with relevant law and consistent with the Bureau of Competition Uniform Policy For Treatment of Privileged Documents,[3] without asserting that privilege was lost by inadvertent disclosure. Second, PHA's correspondence with Complaint Counsel in January and February 2004 likewise shows that Complaint Counsel did not assert that privilege was waived by inadvertent disclosure – until now.

- At approximately 4:00 p.m. on New Year's Eve, Complaint Counsel faxed PHA a letter notifying PHA that it had disclosed the March 12 Letter, a potentially privileged document. At that time, Complaint Counsel did not mention inadvertent disclosure, but rather noted only that the privilege may have been waived as a result of the disclosure to Mr. Orlikoff. Attachment 4.
- On January 5, 2004 (the first business day following the holiday weekend) PHA discussed Complaint Counsel by phone. *See* Attachment 5. On January 6, 2004, Complaint Counsel explained by letter that, although it did not believe that the March 12 Letter was privileged, it would reconsider its position if PHA provided sufficient evidence of privilege Again, Complaint Counsel did not raise the issue of inadvertent disclosure. *Id.*
- By letter dated January 27, 2004, Complaint Counsel refused PHA's request for confidential treatment of the March 12 Letter. Complaint Counsel argued that the March 12 Letter "was sent to an outside party, thereby waiving any privilege," but—again—did

[3] *Available at* http://www.ftc.gov/os/2002/12/bcguidelines021211.htm (last visited February 25, 2004).

not raise the issue of inadvertent disclosure.

- By letter dated February 10, 2004, PHA asserted that the March 12 Letter was privilege and requested that Complaint Counsel return it. Complaint Counsel responded on February 13, 2004, and refused to return the March 12 Letter, arguing that PHA waived privilege by disclosing it to an outside party. Again, Complaint Counsel did not assert that the privilege was waived by inadvertent disclosure. *See* Attachments 6-7.

PHA filed its Motion on February 13, and learned of Complaint Counsel's inadvertent disclosure argument for the first time in Complaint Counsel's Opposition filed February 23, 2004. Your Honor should not consider Complaint Counsel's belated inadvertent disclosure argument, as it is belied by Complaint Counsel's correspondence and conduct until now.

3. Assuming Complaint Counsel's Inadvertent Disclosure Argument is Proper, PHA Did Not Waive Privilege to the March 12 Letter

A multi-factor approach is used to determine whether disclosure is inadvertent, or whether the disclosure waives the attorney-client privilege. *F.C. Cycles Int'l Inc., v. Fila Sport*, 184 F.R.D. 64, 76 (D. Md. 1998); *see also United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124, 98 Civ. 3099, 2000 U.S. Dist. LEXIS 7939, at *19 (S.D.N.Y. June 8, 2000). Courts consider (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) overall fairness. *Hoechst Marion Roussel*, Dkt. 9293, 2000 FTC LEXIS 155 at *6 (Oct. 17, 2000). In this case, the disclosure was inadvertent and no waiver occurred.[4]

A. PHA's Precautions Were Reasonable

PHA's document screening and review procedures constitute a reasonable effort to prevent

[4] The facts underlying the Order Denying American Home Products Corporation's ("AHP") Motion for Protective Order from *In re Schering*, Dkt. 9297 (Jan. 15, 2002) are distinguishable from this case. In *Schering*, AHP's counsel was aware that nine documents had been produced, and that Complaint Counsel had used the documents for months. In contrast, PHA took immediate action upon learning of the March 12 Letter's disclosure. In addition, Complaint Counsel has shown no evidence that it relied on the March 12 Letter, apart from its conclusory assertions.

inadvertent disclosure.[5] PHA involved paralegals, associates, and more senior attorneys in its review of documents produced to the FTC during its investigation. Such safeguards are at least as rigorous as precautions held reasonable in other cases. *See, e.g., Prescient Partners, L.P. v. Fieldcrest Cannon*, 96 Civ. 7590, 1997 U.S. Dist. LEXIS 18818, * 14 (S.D.N.Y. 1997); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985).

B. PHA Took Prompt Steps to Rectify The Error

Several courts have held that the producing party must attempt to rectify the error when it is discovered, or should have been discovered. *See, e.g., Zapata v. IBP, Inc.*, 175 F.R.D. 574 (D. Kan. 1997); *In re Southeast Banking Corp. Specs. & Loan Loss Reserves Litig.*, 212 B.R. 386, 393 (S.D. Fla. 1997). PHA was first notified that the March 12 Letter had been produced by letter from Complaint Counsel, sent to PHA's counsel late on New Year's Eve. Attachment 5. As the facts demonstrate, PHA responded promptly to rectify the error:

- PHA called Complaint Counsel on January 5, 2004—the first day following the holiday weekend—concerning Complaint Counsel's December 31, 2003 letter. *See* Attachment 5.
- By letter dated January 9, 2004, PHA requested that Complaint Counsel treat the March 12 Letter as confidential pending its analysis of the privilege issues. Attachment 8. By letter dated January 27, 2004 Complaint Counsel refused PHA's request. Attachment 9.
- Two days later on January 29, prior to Initial Pre-Trial Conference, counsel for PHA reiterated its request for confidential treatment of the March 12 Letter, and advised Complaint Counsel that its analysis of the March 12 Letter's privilege was on-going, but that PHA would likely assert privilege.[6]
- By letter February 10, 2004, PHA asserted that the March 12 Letter and one other document were privileged. Complaint returned one document, but refused to return the March 12 Letter. Upon learning Complaint Counsel's intent, PHA filed its Motion.

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[5] If necessary, PHA will provide a Declaration by an attorney familiar with the PHA document production as to the safeguards taken by PHA. This attorney is currently overseas and will not return to the office until March 8, 2004.

[6] Although this exchange itself is not part of the hearing transcript, its existence is reflected in the transcript. *See* Hearing Transcript for Initial Pretrial Conference, January 29, 2004, at pages 14-15, at Attachment 10. (*E.g.*, Complaint Counsel explains, "there is a document as to which the parties have a dispute over the existence of privilege.... [W]e found the document and didn't think we—didn't think that it was privileged, but we, out of an abundance of caution, have notified PHA about that document on New Year's Eve.")

In total, PHA's discussions and correspondence with Complaint Counsel resulted in PHA securing the return of three of its four inadvertently produced documents from its production of approximately 100,000 pages. In contrast to Complaint Counsel's representations, PHA and Complaint Counsel engaged in several weeks of correspondence and negotiation in an attempt to resolve among themselves the issues related to the privileged documents.

C. The Scope Of Production Weighs In Favor of Finding Non-Waiver

"Courts have routinely found that where a large number of documents are involved, there is more likely to be an inadvertent disclosure rather than a knowing waiver." *United States Fid. & Guar. Co.*, 226 F. Supp. 2d at 467 (internal citations omitted). *See also In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 222 (S.D.N.Y. 2001) (finding no waiver when 17 privileged documents were disclosed in a document production of 15,000 pages). In this case, PHA produced approximately 100,000 pages of documents over one year, and inadvertently disclosed very few documents. Moreover, the privileged information contained in the March 12 Letter is not facially apparent, which underscores the inadvertence of the disclosure. Given the large volume of documents produced, PHA requests that Your Honor find no waiver of privilege with respect to the March 12 Letter.

D. The Disclosure Has Been Limited

The disclosure of the March 12 Letter has been limited. Complaint Counsel, however, states that the disclosure is complete because "members of complaint counsel have read the document and relied on it in preparing for trial."[7] Contrary to Complaint Counsel's assertions, neither the length of time nor the depth of review is dispositive when determining the extent of disclosure. *See Kansas City Power & Light Co., v. Pittsburgh Midway Coal*, 133 F.R.D. 171 at

[7] As a preliminary matter, PHA reiterates PHA is merely seeking to limit the Subpoena to protect a small amount of privileged information on page two of the letter.

173 (D. Kan. 1989) (finding that a party's "intense[ ] review[ ]" of a privileged document over 14 months is not the same as extensive disclosure)[8]

In this case, there is no indication of extensive disclosure. The March 12 Letter has been viewed by a limited number of people, and Complaint Counsel has offered only conclusory statements that it has "relied" on the March 12 Letter. *See* Alvis Decl. ¶10; Orlikoff Decl. ¶ 16, Opposition, at 9. In the present case, PHA requested confidential treatment of the document when it learned that a potentially privileged document had been produced. *See* Attachment 8. Complaint Counsel should not be permitted to disregard PHA's request, use the document, and now claim that disclosure was "extensive."

E. Considerations of Fairness Support Finding That No Waiver Occurred

Finally, fundamental fairness requires the exclusion of the March 12 Letter from the scope of the Subpoena. Courts consider the overriding issues of fairness and the protection of an appropriate privilege. *Gray v. Gene Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996). Courts have explained that fairness often depends on the extent of the opposing side's reliance on the document. *See, e.g., F.C. Cycles,* 184 F.R.D. at 78-79; *Bud Antle, Inc. v. Grow-Tech, Inc.*, 131 F.R.D. 179 (N.D. Cal. 1990).

As stated above, Complaint Counsel apparently used PHA's privileged information, despite PHA's request for segregation, and now claims that it is unfair to foreclose Complaint Counsel from using the privileged information appearing in the March 12 Letter. Even assuming Complaint Counsel's subsequent review of the March 12 Letter was appropriate, it will still suffer little or no prejudice if it is not permitted to use the small amount of privileged information

[8] Complaint Counsel argues that *Parkway Gallery Furn., Inc. v. Kittinger/Penn. House Group, Inc.*, 116 F.R.D. 46, 51 (M.D.N.C. 1987) provides that only partial inadvertent disclosure (*e.g.*, the designation of a document for copying) is excusable disclosure. PHA notes that many courts have criticized *Parkway Gallery* on these grounds, holding that the better reasoned rule is that mere inadvertent production by the attorney does not waive the client's privilege. *See, e.g., Georgetown Manor Inc. v. Ethan Allen, Inc.,* 753 F. Supp. 936, 938 (S.D. Fla. 1991) (internal citations omitted).

contained on page two of the letter. The redacted version of the March 12 Letter produced to Complaint Counsel contains the vast majority of the information contained in the letter.

However, given the sacrosanct nature of the attorney-client privilege, the harm to PHA of finding a waiver is disproportionately great. Complaint Counsel should not have the benefit of PHA's antitrust legal counsel's analysis in its case preparation, particularly when PHA went to great lengths to prevent disclosure and took prompt steps once it discovered its error. Fundamental fairness thus requires a finding that the PHA's production of the March 12 Letter was purely inadvertent, and that no waiver occurred.

* * *

For the foregoing reasons, PHA respectfully requests that Your Honor grant its Motion, and exclude the March 12 Letter from the scope of the Subpoena.

Dated: March 2, 2004

Respectfully submitted,

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ATTORNEYS FOR PHA

ATTACHMENT 1

Declaration of James E. Orlikoff

I, James E. Orlikoff, hereby declare the following:

1. I am the President of Orlikoff & Associates, Inc., a consulting firm specializing in health care governance, leadership, quality, organizational development, strategy, and risk management. I have been involved in health care leadership, governance, and quality issues for over twenty years. I received my BA from Pitzer College in 1976 and my MA in Social and Organizational Psychology from the University of Chicago in 1978.

2. As a consultant for health care companies, one of the things I do is conduct retreats. At these retreats I make a presentation and/or facilitate discussions about strategy, trends, and governance issues. I conduct between 50 and 100 retreats per year, and travel extensively in connection with my work.

3. I was first contacted by Piedmont Health Alliance, Inc. ("PHA") in early 2000. PHA asked me to conduct a retreat for its Board of Directors. I spoke to Ms. Sharon Alvis, CEO of PHA, on March 27, 2000 for no more than one hour about the purpose of the retreat. She told me it was to teach its Board members, many of whom were doctors, how to function well as a Board. I was to go over the role, duties, and responsibilities of a Board of Directors, and address governance issues. As this conversation occurred nearly four years ago, other than the notes that I made of this call, I do not recall all of the details of my discussion with Ms. Alvis.

4. I do not know how Ms. Alvis learned of me or my firm, and I do not recall if she provided me this information when we first spoke. Since I have a large number of clients in the health care industry, it is possible that members of PHA are or have been clients of my firm. I do not recall in detail all my prior communications with other health care providers in North Carolina that may be members of PHA.

5. In advance of this first retreat, Ms. Alvis sent me some materials. These included, for example, a strategic plan, PHA financial statements, an agenda for the retreat, and an eleven page memorandum titled "Antitrust Guidelines for Managed Care Contracting by Provider Controlled Networks." I spent about one to two hours reviewing these materials and preparing for the retreat.

6. The first retreat took place near Greensboro, North Carolina, on April 1, 2000. At the retreat I made two presentations and then I facilitated discussions. I do not recall all the details of my two presentations nor all the discussions I facilitated or participated in during the retreat. I do not recall all of the people who participated in this retreat nor the details of the casual conversations I may have had with the retreat participants while I was there. My work at this retreat lasted approximately six hours.

7. I did no work to follow-up, continue, or advance what had occurred at this first retreat after it concluded. I have no knowledge of the specific manner in which PHA used what occurred at this retreat in its business.

8. To the best of my recollection I next heard from PHA in February 2001, when Ms. Alvis sent me a letter asking me to conduct another retreat. When I spoke to Ms. Alvis after receiving PHA's letter, she informed me that she wanted me to do a presentation to the PHA Board on current health care trends and then to break them up into small groups and facilitate their discussion and identification of three critical issues facing PHA, as well as two or three possible strategies to deal with those issues. I had several communications with Ms. Alvis following the 2001 retreat, but I do not recall when all of these communications occurred nor the details of all these communications. For example, I believe that I have spoken with Ms. Alvis at educational programs sponsored by other organizations. In addition, I also recall asking Ms. Alvis via e-mail to vote in support of my candidacy as one of the most influential people in healthcare.

9. In advance of this second retreat, Ms. Alvis sent me additional materials relating to PHA, under cover of a letter dated March 12, 2001. In this letter, Ms. Alvis provided background information on PHA and issues it was facing, including a brief reference to an opinion on the antitrust legality of its risk contracting and clinical integration. I do not recall requesting this information. However, my clients often provide me with background information regarding their organizations and the issues they face because they believe this information will assist me in preparation for their retreats.

10. I spent about one to two hours reviewing the materials that PHA sent me in March 2001 and preparing for the second retreat.

11. The second retreat took place in Greesnboro, North Carolina, on March 31, 2001. At the retreat I made a presentation and then I facilitated a discussion among small groups. I have no recollection of the issues raised by the small groups at the retreat. My work at this retreat lasted approximately six hours.

12. I did no work to follow-up, continue, or advance what had occurred at this second retreat after it concluded, outside of possibly providing to PHA at the end of the retreat any notes I may have taken. I have no knowledge of the specific manner in which PHA used what occurred at this retreat in its business.

13. Other than the work I did in preparing for, and at, the retreats in April 2000, and March 2001, I have done no work for PHA.

14. Other than the brief e-mail exchange referred to above, I have had no contact with PHA in any professional business or consulting capacity between March 31, 2001 and February 2004. In February 2004, after receiving a subpoena from the Federal Trade Commission, I telephoned Ms. Alvis at PHA to inform her of that event. The next day, PHA's counsel and Ms. Alvis contacted me with respect to the subpoena and requested that I keep confidential the letter of March 12, 2001, from Ms. Alvis to me.

15. Outside of the reference to antitrust legal issues in Ms. Alvis's March 12, 2001, letter to me, I do not recall that any antitrust issues regarding PHA ever arose during my period of participation in either of the two retreats. I do not recall that Ms. Alvis ever raised or discussed antitrust issues with me before either retreat. Antitrust issues relating to PHA, or legal strategies or other responses by PHA to those issues, were not part of my presentation at either retreat. I do not recall any member of the small groups at the second retreat raising antitrust issues regarding PHA as one of the critical issues discussed by the groups. Because raising such issues would have been unusual, it is highly likely that I would remember if those issues, in fact, had been raised. To the best of my knowledge, no antitrust or other legal counsel were present or participated at either retreat during the periods when I was working there.

16. I do not recall discussing confidentiality with Ms. Alvis. I have no recollection that any other person at PHA ever informed me in any way that the documents sent to me, or the communications I had with anyone at PHA regarding my work at either retreat, were confidential, or requested that I keep confidential any documents or information that I had received. I had no understanding that any part of these documents or communications were to be kept confidential, and I do not believe that I ever told anyone that I would keep the materials and information confidential. My practice, however, is not to release information provided to me by my clients without first speaking with and receiving guidance from the client. Although I took no extraordinary measures to keep the materials and information I received from PHA as confidential, I have not disseminated the March 12, 2001 letter, or the information it contained, except in response to the subpoena served upon me by the Federal Trade Commission.

I declare, under penalty of perjury, that the forgoing is true and correct.

Executed: February 23, 2004

James E. Orlikoff
President
Orlikoff & Associates, Inc.

ATTACHMENT 2

Declaration of Sharon J. Alvis

I, Sharon J. Alvis, declare the following:

1. I am the Chief Executive Officer of Piedmont Health Alliance, Inc., ("PHA"). As a part of my responsibilities as Chief Executive Officer of PHA, I organize, arrange and coordinate retreats for the PHA Board of Directors.

2. In 2000, PHA was attempting to implement an integrated delivery system ("IDS") for the Unifour area. At this time, the PHA Board was experiencing difficulty in defining its role and governance policies as they related to overseeing an IDS. To help the Board define its role and develop a governance strategy, I believed that PHA needed assistance from an expert on such issues, and thus decided to hire James E. Orlikoff to work with the Board.

3. Mr. Orlikoff is a highly respected healthcare consultant, and I am aware that he represents many health care clients and frequently gives presentations. The PHA Board consists mostly of physicians, and I believed that Mr. Orlikoff had the requisite credibility to effectively work with the PHA Board members.

4. In early 2000, I contacted Mr. Orlikoff to invite him to be a presenter and discussion facilitator at PHA's Board retreat scheduled for April 2000 in Greensboro, North Carolina. I spoke with Mr. Orlikoff in advance of the retreat, and explained that I wanted him to help the Board define its role in an IDS, and to develop a governance strategy. I do not recall the details of this discussion, but I am certain that we discussed that some of the information that Mr. Orlikoff may receive as a part of his work with the PHA Board was not public and sensitive. As a result of this conversation, I understood that Mr. Orlikoff would maintain the information he received while working with the PHA as confidential.

5. In his role as a presenter and discussion facilitator at our Board retreat, I believed Mr. Orlikoff would need to be familiar with the organization and the key issues the Board faced. To help Mr. Orlikoff prepare for the retreat, I sent him sensitive information that is not typically shared with others outside of the organization. I provided him this information because I believed they were necessary for him to prepare for the retreat. It is my practice to not disclose information sensitive to PHA without first having an understanding that the information will be kept confidential. If I did not understand that Mr. Orlikoff would keep PHA's information confidential, I would not have hired him to participate in the retreat, discussed the substance of issues PHA faced with him, or provided him with PHA's confidential documents.

6. The title of PHA's April 2000 retreat was "Creating a Successful IDS." At this retreat, Mr. Orlikoff made two presentations, titled "Transitions in Integrated Delivery Systems: Successes and Failures" and "The Role of the Board." As these titles reflect, Mr. Orlikoff was speaking on issues that were critical to PHA at the time. Overall, the Board was impressed with Mr. Orlikoff, and found that he effectively helped the Board rethink its role and governance policies.

7. PHA paid Mr. Orlikoff $8,745.50 for his time and expenses in connection with the April 2000 retreat.

8. Following the April 2000 retreat, PHA Board abandoned its efforts to establish an IDS and concurrently decided to establish a messenger model. This decision was due in part to antitrust legal advice PHA received. As a result of this dramatic shift in the direction of the organization, PHA's Board was experiencing difficulty considering a new strategic plan. Given Mr. Orlikoff's success in working with the Board in 2000, I believed that it was important for Mr. Orlikoff to attend PHA's 2001 retreat in order to help the Board develop a vision and strategy for PHA's future. The overall focus of the 2001 retreat was on developing an alternative strategy for PHA in the aftermath of the Board's decision to abandon the IDS.

9. I contacted Mr. Orlikoff in February 2001 and invited him to participate in PHA's March 2001 Board retreat in Greensboro, North Carolina. Prior to the retreat, I spoke with Mr. Orlikoff concerning the issues PHA was facing and why his assistance was needed, although I do not recall the specific details of this conversation. I subsequently sent Mr. Orlikoff a letter dated March 12, 2001. I wrote the March 12 letter in a very casual manner, and it is not my practice to write letters containing important information about PHA in such a casual manner unless I have first discussed the information with the recipient.

10. My March 12 letter was intended to provide Mr. Orlikoff information regarding the critical issues that PHA was facing at the time. In this letter I included a brief description of the antitrust legal advice PHA had received on page two of the letter. This description reflected communications PHA had with its antitrust attorney, and conclusions he reached based on those communications. I believed, and still believe, that Mr. Orlikoff needed to understand why PHA was making a significant change in its prior direction to make a credible presentation to the Board, and to engage in meaningful discussions with the Board members. If I did not understand that Mr. Orlikoff would keep this information confidential, I would not have provided him with this information. I have not disclosed the March 12 letter or the information it contained to anyone other than the PHA Board, PHA's legal counsel, Mr. Orlikoff, and others that needed to know this information.

11. In contrast to Mr. Orlikoff's topics for the April 2000 retreat, which had focused on the Board's role in developing a successful IDS, I asked that Mr. Orlikoff's presentations for the March 2001 retreat focus on the need to completely rethink PHA's strategy given the decision not to implement the IDS. This strategy needed to be considered against the background of PHA's conversion to the messenger model. I also asked Mr. Orlikoff, who was the only presenter at that retreat, to provide an update on national trends and to help the Board develop an alternative strategy for PHA in the aftermath of their decision to abandon the IDS and adopt a messenger model. Accordingly, Mr. Orlikoff gave three presentations: (1) Update of National Trends; (2) Reconsidering PHA's Strategic Direction; and (3) Selecting the Options.

12. PHA paid Mr. Orlikoff $9,118.00 for his time and expenses in connection with the March 2001 retreat.

13. Over the course of Mr. Orlikoff's relationship with PHA, I provided him with sensitive information, including important legal advice that PHA was trying to implement. I provided him with this information because I believed, and still believe, that he needed it to prepare adequately for the April 2000 and March 2001 retreats. If I did not believe that Mr. Orlikoff needed to understand the critical issues PHA faced, I would not have disclosed this information to him. It was always my understanding that Mr. Orlikoff would maintain the confidentiality of this information. Furthermore, if I harbored any uncertainty as to whether Mr. Orlikoff would protect the confidentiality of information he received from PHA, I would not have hired Mr. Orlikoff to work with the Board.

14. Apart from communications related to PHA's April 2000 and March 2001 retreats, I have had a number of other contacts with Mr. Orlikoff. For example, I spoke with Mr. Orlikoff concerning Grace Healthcare System ("Grace"), which I understood to be a client of Mr. Orlikoff. I recall that Mr. Orlikoff offered to speak to Grace on my behalf.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: February 24, 2004

Sharon J. Alvis
Chief Executive Officer
Piedmont Health Alliance, Inc.

ATTACHMENT 3

Piedmont Health Alliance
Board of Directors Annual Retreat
March 31, 2001
The Grandover Resort
Greensboro, NC

Saturday, March 31, 2001

7:30 – 8:15AM	CONTINENTAL BREAKFAST (SPOUSES INVITED) Conference starts at 8:15AM for Board Members Only
8:15 AM	Call to Order
8:20 – 10:00 AM	***Update of National Trends*** James E. Orlikoff, President, Orlikoff & Associates
10:00 – 10:15 AM	Break
10:15 – 12:00 PM	***Reconsidering PHA's Strategic Direction*** James E. Orlikoff
12:00 – 1:00 PM	Working Lunch
1:00 – 2:30 PM	***Selecting the Options*** James E. Orlikoff
2:30 – 2:45 PM	Break
2:45 – 4:00 PM	Wrap-up and Summary
4:00 PM	Adjournment
6:30 PM	COCKTAIL RECEPTION (SPOUSES INVITED) *hosted by Pharmacia Corporation and Pfizer, Inc.*
7:15 PM	DINNER (SPOUSES INVITED)

ATTACHMENT 4

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
601 Pennsylvania Ave., N.W.,
Washington, D.C. 20580
~
David M. Narrow
Attorney
~
Direct Line (202) 326-2744
E-mail: dnarrow@ftc.gov
FAX: (202) 326-3384

December 31, 2003

Nicholas R. Koberstein, Esquire
McDermott, Will & Emery
600 Thirteenth Street, N.W.
Washington, D.C. 20005-3096

Re: Piedmont Health Alliance, Inc., et al.
FTC Docket No. 9314

Dear Mr. Koberstein:

It has just been brought to my attention that document PHA 40526-40528, a letter dated March 12, 2001, from Sharon Alvis to Mr. Jamie Orlikoff of Orlikoff & Associates, Inc., contains a restatement by Ms Alvis of the substance of a legal opinion provided by PHA's legal counsel. While this letter contains information that apparently was provided as part of a privileged communication, the letter itself is not part of a chain of such communication between PHA and its counsel, and therefore does not appear to be privileged. Moreover, by including the information in a letter to an outside party, any privilege that might exist regarding that information appears to have been waived by PHA. However, if you have information that clearly demonstrates that the document is entitled to be given privileged status, we would be willing to reconsider our position regarding the document.

Please call me at (202) 326-2744 if you have any questions.

Very truly,

David M. Narrow
Counsel Supporting the Complaint

ATTACHMENT 5

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
601 Pennsylvania Ave., N.W.,
Washington, D.C. 20580

~

David M. Narrow
Attorney

~

Direct Line (202) 326-2744
E-mail: dnarrow@ftc.gov
FAX: (202) 326-3384

January 6, 2004

Nicholas R. Koberstein, Esquire
McDermott, Will & Emery
600 Thirteenth Street, N.W.
Washington, D.C. 20005-3096

Re: Piedmont Health Alliance, Inc., et al.
FTC Docket No. 9314

Dear Mr. Koberstein:

It has just been brought to my attention that two documents previously submitted by PHA to the Commission – PHA 65634-65638, and PHA 33931- 33935 – may constitute, contain, or transmit information from privileged communications. The first document appears to be a FAX communication from outside counsel Arlene Diosegy to Sharon Alvis. The second document is a statement of PHA goals that was approved by PHA's Board of Directors, and which includes references to the substance of advice provided by antitrust counsel. I am segregating these documents in a sealed envelope, pending your review as to their possible privileged status. If these documents in fact are privileged, and there has been no waiver of the privilege, please let me know, and we will return the originals to you and destroy all copies. Insofar as redacted copies can be provided (*e.g.*, for the latter document, only a small portion of which appears to involve privileged communication) please do so. If you request return of an entire document, please provide a corresponding privilege log supplement.

A third document – PHA 70544 – a letter from Sharon Alvis to PHA shareholders, dated December 00 (sic), 2001 – contains reference to an antitrust audit of PHA, and references to development of an "IDS" being "not legally feasible" and having been "determined not to be consistent with the antitrust audit . . . ." The letter also refers to PHA implementing a messenger model "to meet the antitrust recommendations." While this letter obviously suggests the involvement of antitrust counsel in PHA's actions, the letter itself only specifies actions taken or not taken by PHA based on legal advice. The letter does not actually include or identify the substance of any legal

advice that was communicated between PHA and its legal counsel and, therefore, in our opinion does not constitute a privileged communication. However, as I previously stated with regard to the document about which I notified you on December 31, 2003 (PHA 40526-40528), if you have information that clearly demonstrates that the document is entitled to be given privileged status, we would be willing to reconsider our position regarding this document.

Finally, as we briefly discussed in our telephone conversation yesterday, and in view of the several documents that may contain inadvertent disclosures of possibly privileged communications that we now have called to your attention, we want to emphasize that we do not believe that it is the Commission staff's obligation to perform a privilege review of your document submission, and call to your attention on an ongoing basis all the documents from your submissions to the Commission that may involve inadvertent disclosure of privileged communications. These documents were submitted many months ago, some more than a year ago, and presumably were reviewed by you for privilege prior to being submitted. If the submissions contain privileged material that was inadvertently disclosed, we believe that you and your clients have an obligation promptly to identify such materials and request their return in a timely fashion, or risk the presumption of having waived any such privilege claims.

Please call me at (202) 326-2744 if you have any questions.

Very truly,

David M. Narrow
Counsel Supporting the Complaint

ATTACHMENT 6

A Partnership Including Professional Corporations
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Boston
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Düsseldorf
London
Los Angeles
Miami
Munich
New York
Orange County
Silicon Valley
Washington, D.C.

MCDERMOTT, WILL & EMERY

February 10, 2004

VIA U.S. MAIL

David M. Narrow, Esq.
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: In the Matter of Piedmont Health Alliance, et al., Docket 9314; Privileged Documents

Dear David:

In your letters of December 31, January 6, and January 12, you identified a number of potentially inadvertently produced privileged documents. In this letter, we address the claims of privilege for the documents mentioned in your letters. As a preliminary matter, however, we do not believe that the inadvertent disclosure of these documents in any way constitutes a waiver of the attorney-client privilege, or any other applicable privilege.

Documents DEEK 1166, DEEK 1879, DIL 0004, and PHA 70544

In your letters dated January 6, 2004 and January 12, 2004 you stated that documents numbered DEEK 1166, DEEK 1879, DIL 0004, and PHA 70544 may be privileged. We do not seek the return of these documents. However, we are not waiving the attorney-client privilege, or any other applicable privilege, with respect to the information referenced in these documents.

Document PHA 40526-40528

In your letter of December 31, 2003, you identified the document numbered PHA 40526-28 as a document potentially subject to the attorney-client privilege. This document is a letter from Sharon Alvis to James Orlikoff of Orlikoff & Associates dated March 12, 2001 ("March 12, 2001 letter"). Although you acknowledge that this document appears to reflect a privileged communication, you assert that that the document is not privileged because (1) the letter itself is

not part of a chain of such communication between PHA and its counsel, and (2) PHA waived any privilege by including this information in a letter to an outside party.

We believe that the document is protected from disclosure by the attorney-client privilege because it contains the substance of communications between PHA and its attorneys, made for the purpose of obtaining legal advice. Under certain circumstances, privileged information may be disclosed to third parties without waiving the privilege. *See, e.g., Fed. Trade Comm'n v. GlaxoSmithKline*, 294 F.3d 141, 146 (D.C. Cir. 2002). To preserve the attorney-client privilege in such situations, courts generally require that parties asserting the privilege establish the following prerequisites: first, the document must contain confidential information; second, the document must have been kept confidential. *Id.*.

The March 12, 2001 letter contains confidential information, satisfying the first prerequisite for the attorney-client privilege to attach. As you know, the attorney-client privilege applies to communications that would reveal a client's confidential information given to its attorney. *See, e.g., Tax Analysts v. Internal Rev. Serv.*, 117 F.3d 607, 617 (D.C. Cir. 1997); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). As you acknowledge in your December 31 letter, the document describes substantive legal advice. The disclosure of that advice would reveal information provided by PHA to its counsel in confidence, and thus constitutes the type of communication protected from disclosure by the attorney-client privilege.

The March 12, 2001 letter also meets the second prerequisite of the attorney-client privilege because PHA intended for the communication to be kept confidential, and in fact kept it confidential. To maintain the confidentiality of a communication, the communication can be disclosed only to those who need to know the information, or are authorized to speak or act for the company on such matters. *GlaxoSmithKline*,294 F.3d at 147 (quoting *Coastal States Gas Corp.*, 617 F.2d at 862). In addition, courts have held that, in certain cases, confidential communications can be disclosed to consultants without waiving the attorney-client privilege. *See GlaxoSmithKline*, 294 F.3d at 147-48. In *GlaxoSmithKline*, the D.C. Circuit found that GlaxoSmithKline's disclosure of confidential information contained in 91 documents to public relations and government relations consultants, among others, was protected by the attorney-client privilege because (1) the documents at issue were disclosed only to the individuals whose duties related generally to the contents of the documents; (2) the consultants acted as part of a team, working with full-time employees on issues that were "completely intertwined" with GlaxoSmithKline's legal strategies, and (3) the consultants understood that the information was confidential. *Id.* at 147-49 (citing *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001)).

PHA's disclosure of confidential information in its letter to Mr. Orlikoff likewise demonstrates PHA's efforts to maintain the confidentiality of the information. First, PHA disclosed the document only to Mr. Orlikoff, whose duties unquestionably related to the contents of the document, and implementing the legal advice it contained. Mr. Orlikoff specializes in supporting the organization and governance of boards, as well as the development of strategies in

risk management by boards. His relationship with PHA began more than one year before the March 2001 board meeting, during which time Mr. Orlikoff worked closely with PHA to improve its Board's governance and structure. While Mr. Orlikoff continued to work on these issues in 2001, he also played a pivotal role working with PHA staff and Board members in developing and revising PHA's strategic plan. In order to facilitate the development of a strategic plan, Mr. Orlikoff needed to understand the current issues facing PHA, including legal issues that would play a significant role in any strategic plan PHA adopted. PHA provided Mr. Orlikoff with the March 12, 2001 letter with the understanding that it would remain confidential.

The March 12, 2001 letter is therefore entitled to protection under the attorney-client privilege for the following reasons: First, it contains the type of confidential information that is protected by the attorney-client privilege. Second, PHA maintained the confidentiality of the information by limiting its disclosure to Mr. Orlikoff, a consultant who (a) was provided the confidential information contained in the letter to fulfill his duties within PHA; (b) worked closely with PHA staff and Board members to formulate a framework for a new strategic plan; and (c) understood that the information contained in the letter was confidential and could not be distributed further.

In accordance with Paragraph 17 of the Protective Order, we request that you return your original and all copies of the March 12, 2001 letter. Since only a portion of the March 12, 2001 letter is privileged, we have attached (1) a redacted copy of this document, and (2) the necessary supplement to our Privilege Log.

Document PHA 33931-33935

In your letter of January 6, 2004, you identified document PHA 33931-33935 as a potentially privileged document. This document is an outline of PHA's goals approved by PHA's Board of Directors, which includes substantive legal advice conveyed to PHA based on the confidential information it expressed to its attorney. We believe that this document is protected from disclosure by the attorney-client privilege, and that the attorney-client privilege has not been waived with respect to this document.

It is well-settled that the intra-corporate distribution of legal advice based on confidential client information does not necessarily waive the attorney-client privilege, provided the disclosure is made only to those employees who (1) are directly concerned with the subject matter of the confidential information and therefore have a "need to know" or (2) are authorized to speak or act for the corporation regarding such matters. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980). *See also Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Members of PHA's Board of Directors satisfy these requirements. First, PHA's Board members were closely involved with the matters described in these documents, and therefore had a need to know. Second, the Board members understood the confidential nature of this information. Taken together, these factors place PHA's disclosure of this document squarely within the bounds of the attorney-client privilege.

In accordance with Paragraph 17 of the Protective Order, we request that you return your original and all copies of the document numbered PHA 33931-35. Since only a portion of the document is privileged, we have attached (1) a redacted copy of this document, and (2) the necessary supplement to our Privilege Log.

* * *

Please call me if you wish to discuss any of this further.

Sincerely,

Nicholas R. Koberstein

ATTACHMENT 7

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
601 Pennsylvania Ave., N.W.,
Washington, D.C. 20580

David M. Narrow
Attorney

Direct Line (202) 326-2744
E-mail: dnarrow@ftc.gov
FAX: (202) 326-3384

February 13, 2004

VIA FACSIMILE AND U.S. MAIL

Nicholas R. Koberstein, Esq.
McDermott, Will & Emery
600 13th Street, NW
Washington, DC 20005

Re: *In re Piedmont Health Alliance, Inc., FTC Dkt. No. 9314*

Dear Nick:

Thank you for your letter of February 10, 2004 to me. This letter confirms the phone conversation we had the same day about that letter.

In your letter, you state that you are not asking us to return DEEK 1166, DEEK 1879, DIL 0004, and PHA 70544. You explained to us that while you have not asked for those documents back, you are not waiving privilege beyond that which is on the face of the documents.

In response to your claim of privilege with respect to PHA 33931-33935, we told you that we will collect all copies of that documents and segregate them. Once all copies of PHA 33931-33935 have been collected, we will return them to you. We hope to have that done shortly.

With regard to PHA 40526-40528 ("Orlikoff letter"), we told you we will collect and segregate all copies of that document. We are working on having all copies of that document quarantined.

We also discussed that Mr. Orlikoff has the Orlikoff letter in his custody and presumably will be sending it to us in response to the subpoena we sent him on February 2, 2004. You communicated to us that if PHA and complaint counsel disagreed about the letter's privileged status, you would be filing a motion shortly to limit or quash our subpoena to Mr. Orlikoff.

We informed you that we would review your claim of privilege concerning the Orlikoff letter and would get back to you as soon as possible with a response regarding your assertion that the document is covered by attorney-client privilege. After careful analysis, including considering the points raised in your letter and speaking at length with Mr. Orlikoff, it is our current view that any privilege that the Orlikoff letter may have had has been waived as to all portions, including the sentence referencing the legal opinions of PHA counsel. We also believe that such a waiver would waive privilege as to the underlying substance of the communication referenced in the letter. We may pursue subject matter waiver, given your statement to me today that PHA is unwilling to stipulate that it will not raise a legal defense based on clinical integration – clinical integration is the very subject of the potion of the Orlikoff letter for which you are asserting privilege.

Because we believe the Orlikoff letter does not retain any privilege, we do not believe we have an obligation to return it to you or to limit the subpoena to Mr. Orlikoff with respect to the letter at this time. We also would expect PHA to comply with any requests for information concerning the underlying substance of the communication referenced in the letter.

As we discussed, we think it would be best to have all privilege questions with respect to the Orlikoff letter resolved at one time, and to not burden ALJ Chappell with having to make more than one decision on what are a related set of issues. Please keep this in mind when filing any motions regarding the Orlikoff letter.

If you have any questions or concerns, please contact me at 202-326-2744.

Sincerely,

David M. Narrow
Counsel Supporting the Complaint

FACSIMILE TRANSMISSION SHEET

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
Bureau of Competition
Health Care Division
601 Pennsylvania Avenue, NW S-3115
Washington, DC 20580

FROM: Andrew S. Ginsburg, Esq. ***Direct Dial:*** *(202) 326-3108* ***Health Care:*** *(202) 326-2756* ***Fax:*** *(202) 326-3384*	***TO:*** Nicholas R. Koberstein, Esq. ***Location:*** MCDermott, Will & Emery, 600 13th Street, NW, Washington, DC 20005 ***Phone:*** 202-756-8299 ***Fax:*** 202-756-8087
SUBJECT: Privilege Issues	
COMMENTS:	

217

Number of pages sent (including cover sheet): 3 **Date:** 2/13/2004

ATTACHMENT 8

A Partnership Including Professional Corporations
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Nicholas R. Koberstein
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nkoberstein@mwe.com
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McDERMOTT, WILL & EMERY

January 9, 2004

VIA FACSIMILE

David M. Narrow, Esq.
Federal Trade Commission
Bureau of Competition
601 New Jersey Avenue, N.W.
Washington, D.C. 20580

Re: Piedmont Health Alliance, Inc., et al., FTC Docket No. 9314

Dear David:

This letter is in response to your letters, dated December 31, 2003, and January 6, 2004, regarding potentially privileged documents submitted to the FTC by PHA. The first document identified in your January 6th letter, PHA 65634-65638, is privileged. Please return the document and all copies to us. We will provide privilege log supplements for this and other privileged documents returned to us in accordance with our earlier agreement as to which documents should be listed on the privilege log.

Our review of the other documents referenced in your letters is ongoing. I will contact you regarding whether these documents, or portion thereof, are privileged once we have completed our investigation. Until that time, please keep these documents segregated in the manner described in your January 6th letter.

In your January 6th letter, you remark that these documents were submitted many months ago, and some more than a year ago, and presumably were reviewed by us for privilege prior to being submitted. This is true, but as the Bureau noted in announcing its uniform policy for the treatment of privileged documents in December 2002, "despite parties' efforts, privileged documents occasionally are produced unintentionally . . . ." Unfortunately, this is what has occurred here and I appreciate the manner in which you have treated these documents thus far. I would like to note that presumably you or members of your team also reviewed these documents when they were received by you, some more than a year ago, and only now do you recognize that they may be privileged. I note this fact only to highlight the difficulty of screening for

privileged documents in these types of matters, in spite of what I am sure was all of our best efforts to identify these documents earlier.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Nicholas R. Koberstein

ATTACHMENT 9

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
601 Pennsylvania Ave., N.W.,
Washington, D.C. 20580

~

David M. Narrow
Attorney

~

Direct Line (202) 326-2744
E-mail: dnarrow@ftc.gov
FAX: (202) 326-3384

January 27, 2004

Nicholas R. Koberstein, Esquire
McDermott, Will & Emery
600 Thirteenth Street, N.W.
Washington, D.C. 20005-3096

Re: Piedmont Health Alliance, Inc., et al.
FTC Docket No. 9314

Dear Mr. Koberstein:

This letter is by way of clarification, in response to your letter to me of January 9, 2004, concerning treatment of certain documents that may involve attorney-client privilege issues, which were identified in my letters of December 31, 2003, and January 6, 2004, to you. My letter of December 31 identified a document Bates numbered PHA 40526-40528 that referenced an apparently privileged communication of counsel, but was not itself such a communication, and was sent to an outside party, thereby waiving any privilege. My letter stated that we therefore were not treating the document as privileged, but offered to reconsider such treatment based on any information that you might provide to establish that the document, in fact, is entitled to privileged status.

My letter of January 6 to you identified two documents – PHA 65634-65638, and PHA 33931-33935 -- that we believed might have been produced inadvertently, and which might be entitled to privileged status. I informed you that these two documents would be segregated, and would be returned to you upon confirmation that the documents in fact were privileged, and that there had been no waiver of the privilege. My letter of January 6 also identified another document – PHA 70544 – which referenced the existence of possibly privileged information, but itself was not a privileged communication and did not contain information from any privileged communication. I informed you that, like the document identified in my December 31 letter, we did not consider this document to be privileged, but would be willing to reconsider that position based on any information that you might provide establishing the document's entitlement to privileged treatment.

The only follow-up by you to my letters of December 31 and January 6 has been your letter of January 9 to me. In that letter, you confirmed the privileged status of PHA 65634-65638, and requested its return, which I promptly did. Your letter also stated that "[o]ur review of the other documents referenced in your letters [of December 31, 2003, and January 6, 2004] is ongoing. I will contact you regarding whether these documents, or portion (sic) thereof, are privileged once we have completed our investigation. Until that time, please keep these documents segregated in the manner described in your January 6th letter." This is to confirm that, as stated in my January 6 letter, we are continuing to maintain PHA 33931-33935 segregated, pending confirmation of its privileged status from you. However, we had informed you that we do not consider PHA 70544 to be privileged, and that we consider PHA 40526-40528 either not to be privileged, or to have had any privilege waived by disclosure to an outside party. Therefore, this is to clarify that, in the absence of any information demonstrating that our assessment of the privilege status of these two documents is incorrect, we are continuing to treat them as not privileged, and have not segregated them as requested in your January 9 letter and as we did for the other identified documents whose likely privileged status was more apparent.

Please call me at (202) 326-2744 if you have any questions.

Very truly,

David M. Narrow
Counsel Supporting the Complaint

FACSIMILE TRANSMISSION SHEET

FEDERAL TRADE COMMISSION
Bureau of Competition
Health Care Services and Products Division
601 New Jersey Avenue, NW
Mail Drop NJ-7264
Washington, DC 20001

FROM: David Narrow	**TO:** Nicholas Kibbenstein, Esq. McDermott, Will & Emery
Direct Dial: (202) 326-2744	**Location:** Washington, D.C.
Main Health Care: (202) 326-2756	**Phone:** (202) 756-8288
Fax: (202) 326-3384	**Fax:** (202) 756-8087
SUBJECT: PHA	
COMMENTS:	

Number of pages sent (including cover sheet) 3 **Date** 1/27/04

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___ **Contains no confidential information**

ATTACHMENT 10

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

DOCKET NO. 9314

TITLE PIEDMONT HEALTH ALLIANCE

PLACE FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C.

DATE JANUARY 29, 2004

PAGES 1 THROUGH 39

INITIAL PRETRIAL CONFERENCE

FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

In the matter of:)

PIEDMONT HEALTH ALLIANCE.) Matter No. 9314

INITIAL PRETRIAL CONFERENCE

Thursday, January 29, 2004

2:00 p.m.

Federal Trade Commission

600 Pennsylvania Avenue, N.W., Room 532

Washington, D.C.

BEFORE THE HONORABLE D. MICHAEL CHAPPELL

Administrative Law Judge

Reported by: Susanne Bergling, RMR

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

JOHN MARTIN, Attorney
DAVID M. NARROW, Attorney
KARAN R. SINGH, Attorney
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C.
(202) 326-3755

ON BEHALF OF THE RESPONDENT, PIEDMONT:

NICHOLAS KOBERSTEIN, Attorney
ANDREA HAMILTON, Attorney
McDermott, Will & Emery
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8288

ALSO PRESENT:

Emily Jones, FTC Paralegal

successful in maintaining higher rates."

She goes on in that paragraph, and she poses the hypothetical question -- and she's speaking apparently as the doctors who were complaining about rates going down too much -- "Well, why doesn't PHA just tell them this is as low as we're going to go?" And she responds, "The answer is, that's exactly what the contracts committee and the board have done during these last seven years."

That's what's illegal. It's per se illegal for them to get together and negotiate contracts and attempt to keep prices up unless that activity is very strictly and tightly tied to some pro-competitive activity, and it's not. Ms. Alvis is telling them that what they're about is trying to keep the numbers up.

I mentioned that PHA had changed its activity. I don't want to sidetrack this presentation by looking -- there is a document as to which the parties have a dispute over the existence of privilege. I'm going to skip that, but I want to be on record here as saying that we found the document -- and this is memorialized in the correspondence between the parties -- we found the document and didn't think we -- didn't think it was privileged, but we, out of an abundance of caution, have notified PHA about that

document on New Year's Eve, and we haven't gotten yet their position as to whether or not it's privileged. It's something we think is very important. I just want the record to be clear that we would hope to get that position promptly, but I don't want to sidetrack this proceeding by going into the matter any further. Suffice it to say that we think PHA reached a conclusion that is exactly the position we are taking in this litigation.

I'll move on to what PHA I don't think raises any privilege issue at all with, which is Exhibit Number 5. Sometime around 2000, PHA engaged an antitrust audit, and you'll see, these are the notes from a PHA executive session of its board of directors, and it notes that Sharon Alvis introduced Jim Snead to present the results of the antitrust audit.

We have deposed several of the board members, and they have told us that there was not a business reason for changing PHA's activity. The reason they did it is as a result of the audit, and we don't think there's any claim of privilege as to that fact, which is prominent throughout the record.

What they did following this audit is very important to track in detail. Here, on January 8th, it was proposed that they would adopt what they call a

CERTIFICATE OF SERVICE

I, Andrea L. Hamilton, hereby certify that on March 2, 2004:

I caused two copies of Respondent Piedmont Health Alliance's *Revised* Reply In Support of Its Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, Inc., to be served by hand delivery upon the following person:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused two copies of Respondent Piedmont Health Alliance's *Revised* Reply In Support of Its Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, Inc., to be served by hand delivery upon the following:

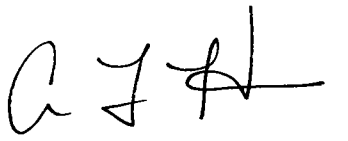
Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused a copy of Respondent Piedmont Health Alliance's *Revised* Reply In Support of Its Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, Inc., to be served by electronic mail and U.S. mail to the following persons:

John S. Martin, Esq.
David M. Narrow, Esq.
Complaint Counsel
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Room S-3013
Washington, D.C. 20580

I caused a copy of Respondent Piedmont Health Alliance's *Revised* Reply In Support of Its Motion To Limit Or Quash Subpoena Duces Tecum To Orlikoff & Associates, Inc., to be served via U.S. mail delivery to the following person:

Jeffrey Brennan, Esq.
Assistant Director Health Care Services & Products
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580



Andrea L. Hamilton