IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

PHARMACY BUYING ASSOCIATION, INC.,)
)
Plaintiff,)
)
v.) Case No. 0916-CV29582
) Division 6
AMERISOURCE BERGEN DRUG CORP.,)
)
Defendant.)

JUDGMENT

On November 12, 2009, the motion of plaintiff Pharmacy Buying Association, Inc. ("PBA") for a preliminary injunction came on for hearing. Plaintiff appeared by Anthony Rupp and Amy Morgan. Defendant AmerisourceBergen Drug Corporation ("ABDC") appeared by Craig Mills and Floyd Finch. On October 2, 2009, and pursuant to Rule 92.02(c)(3) of the Missouri Rules of Civil Procedure, the Court advanced the trial on plaintiff's request in Count VI of its Verified Petition for a permanent injunction against defendant with the hearing on plaintiff's motion for preliminary injunction. Specifically, Count VI of plaintiff's petition seeks a permanent injunction against defendant, "directing defendant to perform in compliance with the GPO Agreement (the Group Purchasing Organization Agreement between plaintiff and defendant) and to refrain from soliciting plaintiff's actual or prospective Members in contravention thereof. . . . " Verified Petition, pp. 22-23. After reviewing the parties' submissions and the evidence and argument presented at the hearing, it is the Court's conclusion that plaintiff's request for preliminary and permanent injunction against defendant should be DENIED.

BACKGROUND

The essential facts related to plaintiff's request for injunctive relief are as follows. Plaintiff is a "group purchasing organization," as authorized by federal law. It is engaged in the business of providing member pharmacies the opportunity to negotiate purchases of pharmaceuticals and other products from large distributors of such products. The idea is that through a GPO, independent pharmacies are better able compete with large pharmacy chains by negotiating improved costs and rebates, and the ability to purchase at group-negotiated discounts. PBA makes money primarily by earning rebates for its members (a portion of which it retains) and being paid administrative fees.

Defendant is a national distributor of pharmaceuticals and other products and services. It purchases branded, generic, and over-the-counter pharmaceutical products and other related products directly from manufacturers, warehouses them, and ships them to customers. Its customers include small independent pharmacies, pharmacy buying groups, chain drug stores, and hospitals.

On June 1, 2004, plaintiff and defendant entered into the GPO agreement at issue in this case which, highly summarized, established a relationship between them whereby plaintiff engaged defendant to perform certain services on behalf of plaintiff's members through plaintiff's GPO program. Those services included the sale and distribution of certain products. In return for the administrative services plaintiff provided pursuant to the agreement, plaintiff received administrative fees from defendant. The original agreement has been amended twice, most recently in early 2009. This second amendment extended the term of the original agreement to June 30, 2012. It was undisputed that the relationship between plaintiff and defendant was a mutually-

beneficial one. In 2008, plaintiff's members accounted for more than $333,000.00 in revenue for defendant. According to Donald Raby, plaintiff's chief financial officer, the monthly payments plaintiff received from defendant on a monthly basis accounted for approximately 20 percent of plaintiff's operating profit each month.

In late 2008 and early 2009, a dispute arose between plaintiff and defendant purportedly revolving around the issue of "subgroups" or, as defendant refers to them, "pods" of pharmacies. These subgroups are, essentially, groups of pharmacies (either commonly owned, separately owned, or some combination thereof) which want to receive, as s group, the benefits of being a member of plaintiff's GPO program. From plaintiff's perspective, subgroups are an essential aspect of its efforts to provide services to its member pharmacies and access to the products defendant sells at better pricing and on better terms. According to defendant, subgroups – especially those that are not commonly owned – present it with numerous undesirable issues, including the potential need to renegotiate agreements it has already reached with customers, and the inability to effectively evaluate and approve subgroup members individually.

The evidence is in conflict regarding, among other issues, the nature and extent of plaintiff's involvement in organizing these subgroups, plaintiff's recruitment of members into them, and defendant's knowledge or lack of knowledge of the level of plaintiff's involvement in doing so. The evidence is also in conflict regarding the impact of these and other issues on defendant's decision to extend the GPO agreement to June 2012. Given the basis for the Court's disposition of plaintiff's claim for injunction, it is unnecessary to resolve these and the myriad other facts that are in dispute regarding the parties' performance or alleged lack thereof under the GPO agreement. Suffice it to say,

during the summer of 2009, the dispute between plaintiff and defendant escalated when plaintiff's counsel wrote a letter alleging that defendant was in breach of the GPO agreement by refusing to bid on groups of pharmacies. Defendant's counsel responded with a letter of his own dated August 27, 2009 (Pl. Ex. 45), alleging, among other things, that plaintiff's continued involvement in the formation of subgroups and insistence that defendant bid on such subgroups was a violation of plaintiff's best efforts obligation under the agreement. Counsel proposed two "options" to plaintiff – one of which was for plaintiff to agree to discontinue the promotion of non-commonly owned subgroups, and the other of which was that plaintiff would not agree to do so.

Ultimately, after defendant received no assurance that plaintiff would not discontinue its efforts regarding subgroups, defendant notified plaintiff that it was terminating the GPO agreement, effective September 27, 2009. Since that date, defendant has been soliciting plaintiff's customers directly, with some limited success to date in obtaining definite commitments from those pharmacies to buy from defendant direct. According to defendant's figures, of the 142 total ABDC customers, ABDC has retained 42, seven have left, and 93 are as yet undecided about what they will do.

Both sides have also raised claims that the other party either has or is currently utilizing information designated as confidential pursuant to Section 12.1 of the GPO agreement. Plaintiff alleges that before and after September 27, 2009, defendant has made use of various types of confidential information in violation of the agreement in an effort to persuade plaintiff's member pharmacies to buy from it directly, and has wrongfully disclosed this information to one of plaintiff's competitors, Smart-Fill. Defendant has countered that it believes plaintiff has violated the terms of the

confidentiality provisions in Section 12; however, defendant's vice president A.J. Caffentzis admitted that he is not aware of any evidence that this has, in fact, occurred. Again, it is unnecessary in light of the basis for the Court's disposition of plaintiff's claim for injunctive relief to resolve these disputes at this time.

ANALYSIS

An injunction, including a mandatory injunction such as the one sought here, is an extraordinary and harsh remedy. *Harris v. Union Electric Co.*, 766 S.W.2d 80 (Mo. banc 1989). For this reason, in addition to the other elements which plaintiff must prove in order to be successful in its claim for a permanent injunction, plaintiff must show that it has no adequate remedy at law, and that irreparable harm will result if the injunction is not granted. *City of Kansas City, Missouri v. New York – Kansas Building Associates*, 96 S.W.3d 846, 855 (Mo. App. W.D. 2002) (quoting *Walker v. Hanke*, 992 S.W.2d 925 (Mo. App. W.D. 1999)).

The phrase "irreparable harm" has been construed to mean that monetary remedies cannot provide adequate compensation for the defendant's allegedly improper conduct. *Glenn v. City of Grant City*, 69 S.W.3d 126, 130 (Mo. App. W.D. 2002). Similarly, a plaintiff establishes that it lacks an "adequate remedy at law" when it shows that damages will not compensate it for the injury or threatened injury. *Id.*; *City of Kansas City, Missouri*, 96 S.W.2d at 855. Thus, if damages are available to a plaintiff, injunctive relief is generally not available. *Walker*, 992 S.W.2d at 933. See also, *Eberle v. Missouri Department of Corrections*, 779 S.W.2d 302, 305 (Mo. App. W.D. 1989) (corrections officers allegedly wrongfully removed from emergency squad at penitentiary not entitled to injunction where damages for lost overtime pay calculable and

administrative review of removal available). This is so even where the party seeking the injunction alleges that, without the injunction, its ability to do business will be threatened. *State ex rel. Turco Development Co. v. Lasky*, 581 S.W.2d 935, 938 (Mo. App. E.D. 1979) (evaluating in context of request for temporary restraining order).

Evaluating plaintiff's claim in Count VI within these parameters causes the Court to conclude that plaintiff's request for a permanent injunction should be denied. Assuming, without deciding, that plaintiff proved that defendant's termination of the GPO agreement and use of confidential information are breaches of the agreement, and that its subsequent refusal to pay amounts allegedly due under the agreement and solicitations of plaintiff's member pharmacies in an attempt to convince those pharmacies to purchase directly from defendant are causing plaintiff economic harm, it is clear to the Court that this economic loss is easily calculable.

Amounts allegedly due plaintiff in rebates and administrative fees had the GPO agreement not been terminated by defendant can be calculated, as can any resulting loss in net and/or operating profit. The same can be said for defendant's alleged use of confidential information in order to solicit plaintiff's members away from plaintiff. Moreover, since the GPO agreement as extended expired on June 30, 2012, a delineated time period for any such losses has been firmly established. If a member pharmacy terminates its relationship with plaintiff, and it can be determined through discovery that defendant's representatives disclosed or otherwise made improper use of plaintiff's confidential information in order to convince the pharmacy to do so, the "wrongful" loss of revenue and resulting profit that would have otherwise been realized by plaintiff is similarly calculable and recoverable. Thus, it cannot be said that the losses plaintiff

alleges to be incurring are "irreparable" in the way they must be in order for injunctive relief to be proper.

Although there is support for the argument that irreparable harm is shown by proof of "complete devastation of an ongoing concern," *Doran v. Salem Inn*, 422 U.S. 922, 932, 95 S.Ct. 2561, 45 L.Ed. 648 (1975), such was not plaintiff's evidence at the hearing. Mr. Raby testified that the amounts plaintiff received each month from its relationship with defendant accounted for approximately 20 percent of its operating profit. Indeed, plaintiff's chief operating officer Clark Balcom testified that during the four-year period from 2005 to 2008, defendant's contribution to plaintiff's gross operating margins has decreased from 25 percent to 17 percent. Thus, defendant's contribution to plaintiff's financial performance has already been decreasing for several years. In addition, plaintiff has historically been able to weather the loss of pharmacy members. It was undisputed that in 2006, a year in which plaintiff lost between 50 and 60 member pharmacies, it nevertheless realized a record profit.

Mr. Raby testified that the company is talking to Bank of America – its primary lender – about defendant's termination of the GPO agreement, but that neither Bank of America nor any other lender has altered the terms of its loan agreements with plaintiff, nor has any other creditor altered the terms of any credit agreement or reduced the company's line of credit. Mr. Raby testified that the company is evaluating "various areas where we would have to cut," including the possible termination of three to five employees. He also testified that the company is not planning on paying discretionary holiday bonuses this year, and that retained earnings and the resulting growth those earnings represent will be "a lot less." While certainly not insignificant financial

repercussions, this evidence regarding the current financial impact of defendant's alleged breach of the GPO agreement fails to meet plaintiff's burden to show the potential for "complete devastation" of its financial condition that would transform its remedies at law to irreparable harm justifying the extraordinary remedy of an injunction.[1]

This conclusion is not changed by the provisions of Section 12.3 of the GPO agreement which provide the parties' acknowledgement that violations of the confidentiality agreement would create harm for which "money damages would not be a sufficient remedy." While courts have historically considered such contractual recitations in determining whether injunctive relief is appropriate, "they nonetheless characteristically hold that such statements alone are insufficient to support a finding of irreparable harm and an award of injunctive relief." See *Dominion Video Satellite v. Echostar Satellite Corp.*, 356 F.3d 1256, 1264 (10th Cir. 2004) (citations omitted). Especially where the Court has expressly determined that the financial effect of defendant's alleged breaches of the GPO agreement does not rise to the level of "irreparable" harm, supplanting the Court's equitable powers with the recitations in Section 12.3 would be inappropriate.

In sum, even if there was evidence adduced at the hearing from which a reasonable fact finder might ultimately conclude that defendant breached the GPO agreement and/or is tortiously interfering with plaintiff's business expectancy or relationship with plaintiff's member pharmacies, the Court cannot determine that the

---

[1] It is true that Mr. Raby also testified that if the other wholesalers with whom plaintiff does business felt they were free to terminate their relationship with plaintiff "at will" as defendant is characterized as having done, the loss associated with plaintiff's inability to operate as a GPO would be "incalculable." The Court determines, however, that this possibility is too remote a basis upon which to rely in finding that plaintiff will be subject to irreparable harm if an injunction does not issue. There was no evidence that any of the other wholesalers have even hinted that such action is possible.

result of any such alleged wrongdoing is anything other than harm for which there exists an adequate remedy in the form of money damages. Accordingly, IT IS HEREBY ORDERED, that plaintiff's request in Count VI of its Verified Petition for a permanent injunction should be, and the same is hereby, DENIED, and JUDGMENT IS HEREBY ENTERED against plaintiff and in favor of defendant on Count VI of plaintiff's Verified Petition.

As the Court indicated to the parties at the conclusion of the hearing, this ruling does not finally dispose of this case or the other claims both sides have asserted against each other – all of which must be determined at trial. Accordingly, this matter is set for a telephonic case management conference on _________________, 2009 at ______ a.m. for the purpose of establishing a trial date, as well as discovery and other pretrial deadlines. Plaintiff's counsel shall initiate the call by contacting the law clerk at (816) 881-3677.

IT IS SO ORDERED THIS _____ DAY OF ___________________, 2009.

____

J. DALE YOUNGS, Circuit Judge