STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MECOSTA

CHANGE TO WIN,

Plaintiff,

v.

FERRIS STATE UNIVERSITY,

Defendant,

v.

CAREMARKPCS HEALTH, L.L.C.,

Intervenor.

Case No. 09-19001-CZ

Hon. Ronald C. Nichols
Circuit Court Judge

Margaret Kwoka
(admitted pro hac vice)
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PLAINTIFF CHANGE TO WIN'S BRIEF IN OPPOSITION TO CAREMARK'S MOTION TO COMPEL DISCOVERY RESPONSES

FACTS

On August 12, 2008, Change to Win submitted a request to Ferris State University ("Ferris State") under the Michigan Freedom of Information Act ("FOIA") for, in pertinent part, the contract between Ferris State University and its pharmacy benefits manager, CaremarkPCS Health LLP ("Caremark"), and any marketing materials submitted to Ferris State by Caremark. By letter dated September 11, 2008, Ferris State responded by providing materials with extensive redactions taken purportedly pursuant to the trade secrets/confidential commercial information exemption of the Michigan FOIA. On March 3, 2009, Change to Win filed this lawsuit against Ferris State alleging that the withholdings were unlawful. On May 7, 2009, Change to Win filed a Motion for Summary Disposition.

On May 22, 2009, Caremark filed a Motion to Intervene, to which Change to Win consented despite its stated concerns about delay and potential abusive discovery. On June 4, 2009, Caremark served its first set of Interrogatories and Requests for Production (RFP) on Change to Win. Of particular relevance here, RFP No. 21 asked for "copies of any documents regarding, supporting or otherwise relating to the statement on page 2 of the Brief in support of [Change to Win's] Motion for Summary Disposition filed in this case that [Change to Win is] 'engaged in efforts to reform healthcare and increase accountability and lower costs in healthcare related industries'" and Interrogatory No. 7 asked for the "legal and factual basis for the contention . . . that [Change to Win's] FOIA request to FSU 'for copies of the contract between Ferris State and Caremark[PCS] and any marketing materials submitted to Ferris State by Caremark[PCS]' was part of [Change to Win's] effort 'to reform healthcare and increase accountability and lower costs in healthcare related industries." On July 2, 2009, Change to Win served its responses to Caremark's discovery requests, providing extensive answers and records,

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even over various objections. As to Interrogatory No. 7 and RFP No. 21, Change to Win objected on various grounds, including relevancy, privilege, overbreadth and undue burden. Over these objections, Change to Win nonetheless directed Caremark to Change to Win's website, which includes hundreds of pages of documents responsive to Interrogatory No. 7 and RFP No. 21. On July 16, 2009, Caremark filed a motion to compel further responses to these two discovery requests.

ARGUMENT

Michigan Court Rule 2.302 sets forth the general rules governing discovery. Michigan courts have recognized that the court rules implement "an open, broad discovery policy . . . ." *Reed Dairy Farm v. Consumers Powers Co.*, 227 Mich. App. 614, 616 (1998). Rule 2.302 permits parties to obtain discovery "regarding any matter, not privileged, which is *relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party." M.C.R. 2.302(B)(1) (emphasis added).

Michigan courts recognize, however, that "[w]hile Michigan is strongly committed to open and far-reaching discovery, a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive or irrelevant discovery requests." *In re Hammond Estate*, 215 Mich. App. 379, 386 (1996) (internal citations omitted); *see Cabrera v. Ekema*, 265 Mich. App. 402, 407 (2005) (reversing motion to compel discovery where subject matter not relevant); *Charter Twp. v. Oakland County Clerk*, 253 Mich. App. 1, 35-39 (2002) (affirming trial court's issuance of a protective order where the discovery request had "taken on the appearance of a fishing expedition"). Caremark now seeks to compel discovery responses –

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above and beyond those already provided over objection by Change to Win – on questions that are irrelevant and highly burdensome.

I. Change to Win's Motivation for Making a FOIA Request is Irrelevant to the Legal Issue In This Case.

The legal issue in this case is whether the information contained in the redacted portions of the Ferris State-Caremark contract and related marketing materials is exempt from disclosure as trade secret or confidential commercial information under the Michigan FOIA. A FOIA exemption is raised as an affirmative defense to withholding records. *Messenger v. Consumer & Indus. Servs.*, 238 Mich. App. 524, 536 (1999). The defendant therefore bears the burden of proof, and "[t]he burden of producing evidence and establishing [the relevant] facts rests upon the defendant." *Id.* (*quoting Detroit News, Inc. v. Detroit*, 185 Mich. App. 296, 300 (1990)).

To support a claim of exemption based on trade secrets, Caremark and Ferris State must demonstrate that the information was provided to Ferris State by Caremark voluntarily and for use in governmental policy-making decisions, that Ferris State promised confidentiality, that the promise of confidentiality was authorized by Ferris State's chief administrative officer, and that a description of the claimed exempt material was recorded and made available to the public upon request. *See* M.C.L. § 15.243(1)(f). In addition, Caremark and Ferris State must demonstrate that the information is trade secret or confidential commercial in nature; that is, that the information is kept strictly confidential and that, if released, competitors could use it to gain a competitive advantage. *See Blue Cross and Blue Shield of Michigan v. Insurance Bureau Hearing Officer*, 104 Mich. App. 113, 128-29 (1981).

As explained in Change to Win's Motion for a Protective Order, it is well-settled that a FOIA requester's motivation for seeking the release of public documents does not bear on

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whether the records are subject to an exemption to disclosure. "[A] rule which would permit denial of a request for information on grounds that the requester is 'idly or maliciously curious' is repugnant to the act. A person seeking information under the act is generally not required to divulge the reason for the request." *Cashel v. Smith*, 117 Mich. App. 405, 410 (1982); *see National Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) ("[A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information.").

In *Cashel v. Smith*, the Michigan Court of Appeals reversed the trial court's allowance of a deposition of a FOIA plaintiff because any inquiry into the plaintiff's motive was irrelevant to the whether the documents were exempt from disclosure under the Act. 117 Mich. App. at 410; *see also Messenger v. Ingham County Prosecutor*, 232 Mich. App. 633, 644 (1998) ("[W]here the issue is disclosure under FOIA, generally neither the identity of the requester nor the requester's need for the information is a relevant consideration."); *Kendall v. Paw Paw Tp.*, unpublished opinion per curium of the Court of Appeals, issued Dec. 28, 2006, Docket No. 270115 (2006 WL 3826757) (concluding that the Michigan FOIA "does not authorize the public body to deny otherwise valid requests simply because it questions the requester's motives").[1] Thus, if these documents are exempt, they are exempt from disclosure as to all FOIA requesters; if their

[1] *Cashel* also identified a potential exception to this general rule under the Michigan FOIA, but one that does not apply here. When a public body claims that a document is exempt as an unwarranted invasion of privacy, the court conducts a balancing of the public interest in disclosure against the privacy interest in the documents, and the motivation of the requester might be relevant to the public interest in disclosure. *See Cashel*, 232 Mich. App. at 644; *Kestenbaum v. Michigan State University*, 97 Mich. App. 5, 20 (1980), *aff'd. by equal division*, 414 Mich. 510 (1982). Whatever the standard under the privacy exemption, however, no Michigan court has conducted such balancing with respect to a claim of trade secrets, nor has any party to this litigation claimed that such a balancing should occur. *See Blue Cross and Blue Shield of Michigan*, 104 Mich. App. at 128-29 (analyzing claim of trade secrets exemption without any balancing).

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disclosure is compelled, then it is compelled as to all. *See Favish,* 541 U.S. at 172 ("As a general rule, if the information is subject to disclosure, it belongs to all.").

Caremark's Motion to Compel explicitly states that it seeks discovery on the topic of Change to Win's motivation for making the FOIA request at issue. Caremark's sole argument as to why it may seek expansive and burdensome discovery on a legally irrelevant question is that Change to Win allegedly "injected into this case the issue of why it made the request." Motion to Compel at 3. Change to Win did no such thing. Rather, in the "Statement of Facts" section of its Brief in Support of its Motion for Summary Disposition, Change to Win described itself as a group of affiliated labor unions that works to increase accountability and lower costs in healthcare-related industries, and stated that it requested the Ferris State-Caremark contract as "part of this effort." These statements were offered only as background. Never in any of the argument sections of the brief is there any statement about Change to Win's purpose in requesting the records at issue or any argument that the purpose of the request affects the documents' exempt or nonexempt status.

Far from putting its own motivations at issue, in the section that addresses competitive harm, Change to Win discusses what, if any, use a *competitor* might make of the information were it to be disclosed, because it is the use of information by a competitor – not by any particular requester – that is relevant to the question of trade secret exemption. *See, e.g.*, Pl.'s Br. in Support of Mot. for Summ. Disp. at 14 ("[T]he claim of trade secret or commercial information fails primarily because Ferris State cannot show that Caremark's *competitors* would gain a competitive advantage by its release. . . ." (emphasis added)); *id.* at 15 ("any residual use a *competitor* might find for this information ..." (emphasis added)); *see also Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (A

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competitive harm analysis is "limited to harm flowing from the affirmative use of the proprietary information *by competitors*. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations [of a company's conduct]. . . ." (emphasis in original)).

Accordingly, in *Blue Cross*, the Michigan Court of Appeals, when considering the trade secrets exemption, examined the potential marketplace harm that would result from release of the information to competitors generally, and not to the specific requester. *See Blue Cross and Blue Shield of Michigan*, 104 Mich. App. at 131. The court determined that the information at issue was already readily ascertainable by the company's competitors, and thus that release of the information under FOIA would not cause competitive harm. *Id.* No part of the analysis turned on the requester's identity, intended use for the documents, or purpose in requesting the documents. *See id.*

Never in its brief does Change to Win argue that, because it seeks the documents to promote accountability in and affordability of health care, the trade secrets exemption should be applied any differently than in other cases. Rather, it argues, at each stage, for a proper application of Michigan FOIA law, in which the requester's motivation or purpose does not bear on whether or not records are exempt from disclosure. Change to Win has not "injected" an irrelevant issue into the case by mentioning background context, and Caremark should not be permitted to obtain discovery on an irrelevant issue not likely to lead to the discovery of admissible evidence.

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II. The Discovery Requests Are So Burdensome and Overbroad As To Be Harassing and Improper.

In addition to being irrelevant, the discovery requests on which Caremark has moved to compel further response are so overly broad and would encompass so many documents that Change to Win could not possibly comply without great and undue burden. In particular, RFP No. 21 asks for "copies of all documents regarding, supporting or otherwise relating to [Change to Win's] efforts to reform healthcare and increase accountability and lower costs in healthcare related industries."

First, even if Change to Win's purpose in making the request were somehow relevant, which it is not, Change to Win's activities generally concerning healthcare industries – apart from the FOIA request at issue in this case – would not be. Second, healthcare reform is one of Change to Win's central areas of activity. There would thus be thousands upon thousands of pages of documents that "regard, support, or otherwise relate" to Change to Win's efforts to reform healthcare. As presently formulated, this discovery request would most likely encompass every piece of paper in some Change to Win employees' offices. Moreover, Change to Win, over relevancy and other objections, has directed Caremark to voluminous responsive documents available on Change to Win's website. Any further response to this irrelevant and unduly burdensome request is unwarranted and should not be compelled.

CONCLUSION

The legal issue in this case is whether the redacted portion of the contract between Ferris State and Caremark and the marketing materials submitted by Caremark in pursuit of that contract constitute exempt trade secret or confidential commercial information under the Michigan FOIA. Change to Win's purpose in making the FOIA request for these documents was never and is not

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now at issue; rather, it is legally irrelevant. Moreover, the discovery that Caremark seeks to compel would be so burdensome as to be harassing and improper. Change to Win respectfully requests that this Court deny Caremark's Motion to Compel.

Respectfully submitted,

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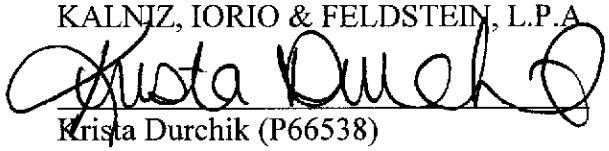

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