

went out.

Q. Was Medline invited to participate in the RFP?

A. No.

Q. And can you describe generally what the RFP process was and what the ultimate result was?

A. We selected three vendors that we wanted to participate in the RFP, we met with them, we explained—we showed them the bills of materials, we explained what were going to be doing. We were going to be asking them to quote pricing based on the items—the individual contents of each procedure tray.

We very carefully instructed them not to at this point substitute any of their own items in an attempt to bring the price down. We wanted to get an apples to apples comparison of the vendors' pricing on those devices. And then we set a time to issue the RFP and we did.

Q. What information was provided to the potential vendors as to the tray specifications?

A. Generally, it was the information contained in the BOM, the bill of materials.

Q. And who provided that information to the suppliers?

A. We did. Ruth would have ultimately given them the packets.

Q. Was there a level playing field?

....

A. Yes. Everybody had the same information. Everybody was given exactly the same information and the same instructions.

Q. After the potential vendors were provided with the specifications, what happened next?

A. They took the information and they came back to us with proposals.

Q. In what form?

A. Some sort of written form. And I honestly don't remember what it was. But it was some sort of written response naming each tray and the contents they were going to provide and the price for that tray or procedure pack. Custom procedure—

Q. What happened next?

A. We compared the three responses, we compared them side by side, and we evaluated them on really two basic criteria at that point, price and content of the trays, of the custom procedure trays.

Q. What was the result of the review?

A. The result of the review was two-fold. One, PHS came in as the high bidder. And when evaluating what they bid versus the other two vendors, PHS was the only company that followed our instructions and bid exactly what we asked them to bid.

Q. Meaning what?

A. Meaning that they didn't substitute any of their own supplies or other supply products that they could probably acquire at a lower price. They gave us exactly what we wanted, exactly what our clinicians are used to using and wanted to use.

Q. So what was the ultimate result for the RFP?

A. At that point, because PHS was the only company that followed the basic instructions of the RFP, at that point, we worked with them solely to develop the custom procedure trays and to move forward. (23:22-27).

4) St. Joseph's Hospital - Bangor - Derrill Maynard

Q. All right. When you purchased the CPTs from Maxxim, they weren't under a supply agreement sponsored by Novation, were they?

A. No, they were not.

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Q. And was it under a GPO sponsored by Amerinet?

A. No. To my knowledge—and it was signed by my predecessor. To my knowledge it was an individual contract between Maxxim Medical and St. Joseph's.

Q. Does St. Joe's now purchase CPTs through a contract sponsored by a group purchasing organization?

A. Yes.

Q. What is the name of that group purchasing organization?

A. There are really two involved, but it's Premier Partners that we purchase through, and we access Premier through Yankee Alliance.

Q. All right. I'd like to go through this slowly, if we can, because to me it can be complicated. What is the relationship between Premier on the one hand, and Yankee Alliance on the other?

A. Premier is the national purchasing group. It is owned by a number of other entities. One of those entities is Yankee Alliance. Yankee Alliance, in turn, is a regional purchasing group that is owned by a number of different entities, also. And we access that because one of those entities is Covenant Health Systems, which is a Catholic organization that we are an affiliate member of. (17:16-17).

....

Q. All right. So if you look at the hierarchy, you have St. Joe's, and then it's Covenant, then Yankee Alliance, then Premier?

A. Yes.

Q. If I'm wrong, correct me.

A. No. St. Joe's is an affiliate member of Covenant. Covenant is an owner of Yankee, Yankee is an owner of Premier.

Q. Okay. Did you play a role in the process by which St. Joe's determined whether it would become a member of Covenant, and subsequently become a member of Yankee Alliance?

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A. I did.

Q. Can you describe what that role was?

A. When I arrived there, they were already in the middle of looking at Covenant. My predecessor had begun some cost analysis to see if there were savings to be had through us using Yankee Alliance and Premier. I finished those and passed them on to the CFO, but the real decision was made at the board level and the CEO level of whether or not we would become a member of Covenant.

Q. What was the ultimate decision?

A. They became a member of—an affiliate member of Covenant.

Q. Can you tell us when that was?

A. Around December, I would say, of the year 2001.

Q. At that time, did Premier sponsor a supplier for CPTs?

A. Yes.

Q. Who was that supplier?

A. At that time it was called Allegiance. It's now known as Cardinal Health Systems. (17:18-20).

....

Q. At the time that St. Joseph's joined Yankee Alliance, did St. Joseph's switch immediately its CPT supplier from Maxxim to Cardinal/Allegiance?

A. No.

Q. Why not?

A. Because there was a pre-existing contract in place.

Q. And at the time that St. Joe's joined Yankee Alliance, did you in your own mind have a plan as to what you would do in identifying a future supplier of CPTs?

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A. Yes.

Q. What was your plan?

A. As soon as the Premier contract changed, we would have to be on one of the Premier contracts. They were committed contracts.

Q. Okay. Now, what do you mean by a committed contract?

A. I can back up a little bit. Premier, when they first began, signed single source committed volume contracts with major product areas. Hospitals that wanted to belong didn't have a choice. They were able to drive down market share. And I'm going back, you know, six, seven, eight, nine years.

Subsequent to that, while there are still product areas that are committed, you do have in most cases, as a result of some federal pressure, really, a choice within those product areas. But the product areas themselves are still committed. It means, you need to be on those contracts unless you have some kind of real clinical reason not be on them.

There are a lot of uncommitted contracts that they signed that are usually of lesser importance with other choice. You know, if you want to buy labels you can buy them from two or three different vendors. And they really—it's uncommitted. They really don't care if you use them or not.

Q. Okay. When St. Joe's joined Yankee Alliance, was the Premier contract for CPTs committed or uncommitted?

A. It was committed.

Q. Now, you said that you were delayed making a switch until Premier made its selections? I forget your exact testimony, but it was general statement like that. Can you elaborate?

A. It was my intention that when Premier made their next selection, we would be on one of those contracts. In the meantime, we had a contract that was in effect that we were going to honor.

Q. That was the contract with Maxxim?

A. Yes.

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Q. And when was Premier going to announce its new contracts?

A. I can't tell you an exact date, but I would say sometime in the end of 2003, beginning 2004. Something like that. (17:20-22).

....

Q. Okay. By the way, when you were talking about GPOs, can you state what advantages, if any, accrue to a smaller hospital in the context of GPO membership?

A. It's leverage. If you're a large institution, if you're an IDN, an integrated delivery network, you have a lot more leverage because you bring a lot more dollars to the table. You're also able to, if you commit to move the business, usually you're in a position to move the business. A 100-bed hospital, I would commit to move the business, but I don't have the leverage of dollars that a GPO has.

Yankee happens to be a GPO that has the--while they're not--while not every contract includes every single member, for the most part Yankee has the reputation of moving large volumes of business when they commit to contracts. So we get higher tiers of savings. Tier levels. (17:22-23).

....

Q. And did you have conversations with Mr. Pilkington while he was at Maxxim relating to Maxxim's supply of CPTs to St. Joseph Hospital?

A. Yes.

Q. Now, you've just described to us St. Joseph's becoming a member of Yankee Alliance. Did you advise Mr. Pilkington of that at all?

A. I advised his sales rep of that development.

Q. I'm sorry. Who was his sales rep?

A. It was Susan something.

Q. Was it Susan--...--Lavoie?

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A. Susan Lavoie, yes.

Q.All right, and what did you tell her?

A. That, you know, we would honor the contract until the Premier contracts changed, but there was a difference in timing. Our contract would end, there would be a space of time that we would be without a contract until the new Premier contracts were announced.

At that point, Tom and I met and had a verbal agreement that we would continue to work together. He did some consulting work for us with his team which saved us some money, because I was upset over the costs of the product. But we agreed that St. Joe's Hospital and Maxxim would continue their relationship until the time Premier signed new agreements.

Q. And then what would happen when Premier signed new agreements?

A. Well, whoever got the agreements, we would have to pick among one of them. Tom and I actually talked about, you know, maybe Maxxim Medical would participate in that. That would have been the easiest way out for us, for Maxxim to have gotten the contract because then—it's a very difficult thing to change procedure trays.

Q. Did you tell Tom Pilkington what would happen if Maxxim were not awarded a Premier contract?

A. Yes. I told him that they would no longer have the business. (17:24-25).

....

Q. Okay. Did you ever have any conversations with Karen McCauley relating to your plans with regard to the identity of a CPT supplier in the context of the Premier award?

A. Karen was fully aware and even talked with Tom Pilkington. I mean, everybody at Maxxim was aware from my sales rep to the regional manager that whenever that contract changed at Premier, we were going to be going with a Premier contract.

Q. Did there come a time when Premier announced its new suppliers?

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A. Yes.

Q. Do you recall who the new suppliers were?

A. Of just the kit-packing side?

Q. Yes. Thank you.

A. Okay. Medline, PHS, Windstone and Cardinal are the four that I recall.

Q. All right. And how did you become aware of the new awards?

A. Through Yankee Alliance.

Q. Do you recall approximately when that was?

A. It would have been some time—some time, I would say, in the spring or early summer of 2003. (17:27-28).

....

Q. After the announcement, what did you do next in the context of identifying a new supplier?

A. I waited for some direction from Yankee Alliance.

Q. Did you—

A. Yankee Alliance, I mean—

Q. Yeah, go ahead.

A. Yankee Alliance many times will look at—if there are three or four vendors, they will try and meet with those vendors and decide what would be in the best financial interests of the group, providing that the quality is there. And then they'll make recommendations to us as to how we should go. Us, meaning the membership, the other hospitals. And we generally have a meeting and decide if that's what we want to do. I got a phone call from Tom Lull—

Q. Can you identify—I'm sorry. Can you identify who he is?

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A. Tom Lull was at the time—I think he was—I don't remember his title, but he worked in group purchasing at Yankee Alliance. And Tom called me and said that we were the only hospital in Yankee Alliance that had a prime vendor agreement with somebody other than Cardinal/Allegiance because all of them, because it was a committed contract, had gotten on board through the years. That was a seven-year contract. The initial contracts that Premier signed were seven year agreements. So in those seven years they had gotten everybody on board.

We were the only ones not on board, so he wanted me to do a cost analysis for them to see, you know, what the effect of that contract would have on a hospital that wasn't participating in their agreement already.

Q. What do you mean when you say you were the only one not on board?

A. Well, all the other hospitals, to my knowledge, that were using CPT trays were using Cardinal/Allegiance CPT trays. (17:28-30).

....

Q. And can you describe what your analysis was and how you did it?

A. I took the CPT trays that we used and the annual volumes, put them on a spreadsheet, and then I asked Karen McCauley to give me pricing, PHS pricing, that corresponded to that. And I put the two price sheets, you know, added her pricing to my price sheet and showed the difference, what the savings would be.

Q. And to whom did you show the difference?

A. I showed the difference to Yankee Alliance.

Q. For what purpose?

A. The purpose I just stated. I was supposed to be the hospital that was not on Allegiance. It showed what the savings--cost savings would be. (17:30-31).

....

Q. Can you tell me what the next step was after you prepared your analysis and presented it to Yankee Alliance?

....

A. We had a subsequent meeting that Bill Jacobson, who was our O.R. director and myself attended in Worcester. There are a number of vendors. I think all of the vendors were present, both the kit vendors and the manufacturers of surgical gowns and drapes. We had an opportunity to meet with all of them, some of whom we had never met before.

We spent quite a bit of time actually looking at the fabric of the packs and gowns more than at the kit packers. And we went back into a room in a meeting, and there were materials managers and O.R. directors present. And one by one the microphone was passed to each person in the room and each person was asked to give his or her comments on what they had seen and what they could see happening.

Some people were reluctant to change from Allegiance, Cardinal because they had arrangements with a different kind of kit packing where they actually put it all into a tub and they take the waste and everything else out with it. And they said, it would be difficult for us to get away from that arrangement.

That's the point that I presented this to the rest of the membership, you know, the other hospitals. I said I had done this analysis on behalf of Yankee Alliance and this is what it showed for our hospital. You know, and I think my point was if a small hospital can save, you know, \$35,000, \$36,000, that it would be worth our while, especially for some of the bigger places to recoup some savings. Our O.R. director, Bill Jacobson, talked to the quality of the fabric and stuff that he had seen. (17:36-38).

....

Q. Do you recall what happened at the end of this meeting?

A. Yes. The direction Yankee was to pursue was to see how good a contract they could finalize with PHS and Kimberly-Clark.

Q. And thereafter--well, what happened after the meeting in terms of selecting a new tray supplier?

....

Q. At St. Joseph's Hospital?

A. Well, after the meeting, I'm not sure how much after the meeting, but Yankee said, "Yup, we're going to be trying to do as much as possible with PHS and with Kimberly-Clark." I immediately—I asked Karen then to give me a line-by-line detailed analysis of the cost of our trays—we had just done a gross analysis prior to that—to get me a detailed analysis as to what the costs was of what was in our trays. And to as quickly as possible get us—you know, come in, let's get the—what you do is you say, "Look, here's the trays. Here's how many we use in a year, and we need to see prototypes. Now, we need to see them built to make sure they're going to meet our specifications."

So they went ahead and built prototypes and brought them in. We prearranged for the O.R. director, myself and some of his staff to be in a room and open these. Karen wrote comments about things that we liked or didn't like the way they packed them. You know, they may have put something in the wrong layer, and that's important to an O.R. person as they open their packs.

And then when the changes were made, we wanted to—at some point there, I notified Maxxim that we would—we had signed a new agreement with PHS and that we would use up whatever was at Owens & Minor, which was the distributor, and whatever Maxxim had already manufactured on our behalf. (17:49-50).

....

Q. Now, what information did you provide to PHS in order to assist them in determining what the tray specs would be?

A. The existing list we have.

Q. Would that be in the bill of materials?

A. Yes. It's whatever is already provided. Sometimes it can come off the—sometimes depending on the manufacturer, the tray kit manufacturer, sometimes they'll put it right on the front, and they'll list everything in there, and they'll put the manufacturer, and they'll put the manufacturer's number, and everything else. Sometimes it's just the sheet that they provide us, and we update. Every time we make a change, they'll provide us a new sheet so that we know exactly what's in the kit. (17:54-55).

....

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Q. What procedure was followed—well, what role did you play in the process of determining what the ultimate tray specifications would be, and what the tray design would be?

A. I took the list that we had from Maxxim and asked PHS to match it.

Q. Did you give PHS any information relating to tray layout or tray design?

A. Yes.

Q. What did you give PHS?

A. Well, we gave them everything that we had. I don't know how else to say it. Whatever we already had from Maxxim that says, you know, "In the first fold you put this, in the second layer you put that, and this is the specification," and we gave that to PHS. (17:55-56).

....

Q. All right. The e-mail says, "Paul, the time has come for us to make the switchover to the new Yankee agreement custom packs contract. Please stop manufacturing custom packs for St. Joseph's effective today." Do you see that?

A. Yes.

Q. What was your purpose in making that statement to Mr. Chambers?

A. Well, I had to stop what was being made and put into the pipeline because we have to buy it all out. We had to buy everything that was already in the supply pipeline—the supply chain pipeline.

Q. Whose supply chain pipeline?

A. It's not whose, it's what. Maxxim would be producing them in their facility.

Q. Okay.

A. They might have some inventory on hand. They then would ship them to Owens & Minor, our distributor. They would have some inventory on

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hand. We had inventory on hand. So that's the pipeline. We had to use all of that Maxxim inventory up no matter where it was before we--and time bringing the new PHS stuff in at the same point.

Q. And did you, in fact, purchase all of the existing inventory?

A. Yes. (17:68-69).

....

Q. But you don't know if it was before or after you talked about PHS with Karen McCauley?

A. I would say that I met John after I had talked with Karen McCauley about PHS. I'm not sure if she was an employee of PHS at the time, or not.

Q. Okay.

A. I had heard a rumor and I asked her about it.

Q. Okay. And did you--what did she--did you ask her any questions about PHS in your first meeting with her?

A. My first meeting after what?

Q. No. In your first meeting with her when you thought that she was representing PHS.

A. I'm not sure what we discussed. I'm not sure when that meeting is.

Q. Well, did she ever explain what PHS was to you? Did she--

A. At some point in that time frame I learned basically what--I would say that I got the most information about what PHS was from Yankee Alliance.

Q. Okay. Did Karen McCauley discuss with you any of their customer satisfaction ratings, any of PHS' customer satisfaction ratings?

A. Not that I remember, no.

Q. Did she talk to you about the fact that PHS was not merely a regional

distributor--regional seller of packs?

A. The first time I heard that information was from Yankee Alliance.

Q. Okay.

A. They had explained to us that PHS was both a distributor of MedSurge items, and a custom pack assembler. (17:146-147).

....

Q. Okay. And by this time you had dealt with Karen McCauley for about a year, is that correct? As a Maxxim sales representative?

A. Again, I don't know when Sue left and Karen came on board, but I had dealt with Karen again in a previous position that she had. So I had known her for longer than that period of time. (17:147-148).

....

Q. Okay. And in the one year--she testified that she started in July 1 and ended on June 27, 2005. And in all the time that you were dealing with Karen McCauley as Maxxim's account representative, did she appear to you to be a capable, responsive and intelligent account representative for CPTs?

A. Yes.

Q. Yes, okay. And when you decided to go with PHS, was it important for you to make sure that PHS had a capable, intelligent, and responsive account representative?

A. Prior to the decision making or--

Q. Yes.

A. Yeah. I think it's fair to say we expect anybody we do business with to have a capable, bright, energetic, hopefully capable, account representative, yes.

Q. And responsive, because for CPTs there are many changes that have to be made, and you want them done as quickly as possible. Is that a fair

statement?

A. I would say it's a fair statement with almost anything a hospital buys, yes. (17:149).

....

Q. Was St. Joseph's decision to select PHS as its CPT tray supplier contingent upon Karen McCauley's being the sales representative?

A. No. (17:157).

....

Q. Okay. And then when you were talking about the prototypes again, specifically you were shown an e-mail of September 16, 2003, which discussed the receipt of some prototypes, you said your mindset at the time was, "Yup, it's going to work, let's go ahead and get it done." Do you recall that testimony?

A. "Yup, it's gonna work, let's go ahead and get her done?"

Q. Okay. What did you mean by that?

....

A. We all had—all I can say is we didn't have a choice at that period in time. Maxxim was going down the tubes, our supply was not guaranteed. We needed to move quickly. We only let our surgeons look at the fabric from Kimberly-Clark, like, for a day or two with the sales rep. Normally that's a week or two week process. We had to move very quickly because we were really afraid we were going to get in a bind like some other hospitals had where they didn't have any product to do surgery. (17:158-159).

....

Q. All right, I'll move on. Did there come a time when Yankee Alliance advised you that PHS had been selected as the vendor?

A. Yes.

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Q. Do you recall when that was?

A. It was some time after the meeting in Worcester.

Q. Now, did you ever consider--after Yankee Alliance made its selection, did you ever consider buying CPTs off of the Premier contract?

A. No.

Q. Why is that?

A. Because we were a committed hospital and certainly within our--it's certainly something that we should be able to do. I mean, that's the--we're committed to the Yankee Alliance, Premier philosophy of group purchasing, and this was not something that we could have stood out there and said that these vendors were not acceptable vendors to our institution. So we had no grounds to say, "No, we would not commit to one of these vendors." (17:160).

....

Q. I'm a little bit confused because earlier you had said that turning over pricing information you considered to be unethical.

A. Yeah, there's ethical and unethical. And as I said before, this contract was over.

Q. Which contract?

A. The contract with Maxxim was over. I had current pricing. Maxxim was aware of the fact that I was going to move the business, and Yankee had made a deal that said, "It's a 12 percent guarantee off what you're now paying." I had no alternative at that point but to say, "How do I calculate the 12 percent for Yankee unless I turn the pricing over?"

Q. But did you consider that ethical or unethical?

A. I consider that ethical.

Q. Okay. Now, there did come a time when you learned that Medline had acquired Maxxim?

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A. Yes.

Q. And Medline was a Premier provider?

A. Correct.

Q. Did you ever consider once Medline became--well, once Medline acquired Maxxim, having Medline bid on your CPTs?

....

A. Well, I don't think bid on our CPT. Remember, we didn't issue the RFP, and we didn't issue a request for bids. That was issued by Yankee. So those were already done. We did go to the Medline booth. We did look at--Bill Jacobson and I at the fair, we did look at the Medline products and I was aware of the Medline contract and I don't remember what the savings were guaranteed on that particular contract. So inasmuch as that's concerned, yes, we would have considered it just like we considered a Windstone, or any of those other vendors.

Q. Did you offer to meet with Medline after the Worcester fair? About CPT purchases?

A. I don't believe so, no.

Q. And why is that?

A. Well, because after the Worcester fair, it was clear that the direction that Yankee and most of us would be moving in would be down the PHS, Kimberly-Clark path.

Q. Now, as a member of Yankee Alliance, can you tell us why Yankee Alliance selected PHS?

....

A. My understanding is that they selected them because they were the lowest cost quality option that we all had agreed on at the meeting. And I say "we all," I mean the ones that agreed. There were some that disagreed. They were following the membership's direction. (17:161-164).

IV. Issues in Maxxim's and Medline's Appeal

Maxxim and Medline assert that the Bankruptcy Court committed an error of law, misapplied the law to the facts, was clearly erroneous or abused its discretion as follows:

- A. The Bankruptcy Court failed to make any findings or conclusions regarding McCauley's breach of the clause in her Sales Representative Agreement ("SRA") with Plaintiff Maxxim precluding competition with Maxxim while working as its sales representative;
- B. The Bankruptcy Court failed to find that PHS' and McCauley's breaches and tortious conduct were a substantial factor in Plaintiffs' damages;
- C. The Bankruptcy Court concluded that Maxxim and Medline had no "Legitimate Business Interest" for enforcing the restrictive covenants in the SRA;
- D. The Bankruptcy Court concluded that Maxxim and Medline lack standing to bring a claim under the Florida Deceptive and Unfair Trade Practices Act "because Maxxim was not acting as a consumer or purchaser of goods or services in its dealings with PHS and McCauley";
- E. The Bankruptcy Court concluded that McCauley did not have fiduciary obligations to Maxxim that she violated;
- F. The Bankruptcy Court concluded that PHS had no knowledge of McCauley's fiduciary obligations not to compete with Maxxim;
- G. The Bankruptcy Court concluded that Maxxim had no "actual or identifiable" business relationship with the hospitals in Maine whose Custom Procedure Tray ("CPT") business was [allegedly] misappropriated by PHS and McCauley;
- H. The Bankruptcy Court concluded that Maxxim's competitive and customer specific information, acquired by PHS from McCauley while she was still working for Maxxim, was not a "trade secret" under the Uniform