Nondisclosure Agreements: A Lesson from Daughters of Charity

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On February 23, 2015, Daughters of Charity Health System filed a complaint in Santa Clara County against Service Employees International Union, the local SEIU affiliate, and Blue Wolf Capital, the SEIU's ally in a bid for the purchase of Daughters of Charity's six-hospital system. At the core of the complaint and the heart of the dispute that has been brewing for months are alleged extortionate schemes, threats, and politicization of the bidding process by the SEIU and Blue Wolf. However, embedded in the complaint is an argument regarding Blue Wolf's alleged breach of its nondisclosure agreement through use of its "mouthpiece," the SEIU—and any organization involved in a bidding, negotiation, or acquisition process should take note.

The complaint describes the SEIU's public opposition to the sale of Daughters of Charity to Prime Healthcare Services, Inc., the party ultimately awarded the bid. It alleges that the SEIU sought out Blue Wolf as its selected bidder in the process, and that if Blue Wolf were the winning bidder, Blue Wolf agreed to renegotiate the collective bargaining agreements on Daughters of Charity's employees.

According to the complaint, the nondisclosure agreement between Blue Wolf and Daughters of Charity was the subject of negotiation, with Blue Wolf demanding a number of terms, including exclusivity in bidding and waivers permitting it to communicate with third parties, that it ultimately did not get. The parties signed the nondisclosure agreement on May 5, 2014, wherein Blue Wolf agreed "not to discuss the proposed Transaction with any potential purchaser, healthcare provider, union, tenant, lender, investor, or partner without prior written consent" of Daughters of Charity, subject to limited waivers that Daughters of Charity granted.

The complaint alleges that Blue Wolf breached the terms of the nondisclosure agreement on several occasions, specifically by using the SEIU as its "mouthpiece." According to Daughters of Charity, Blue Wolf used SEIU officers to contact competing bidders, dissuading them from participating in the bidding process or causing them to submit lower bids or drop out of the sale process as a result of the SEIU's communications. According to the complaint, the SEIU officers told other bidders directly to drop out because Blue Wolf was the SEIU's selection and the only viable bidder.

On the basis of allegations regarding Blue Wolf's use of SEIU officers as its "mouthpiece," Daughters of Charity asserts claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Blue Wolf, stating that the parties entered into the nondisclosure agreement for the express purpose of "exploring a possible sale and related corporate transaction." However, Blue Wolf allegedly used its strategic partner to circumvent its own nondisclosure obligations and duty to act in good faith.

Parties subject to a nondisclosure agreement should take Daughters of Charity's complaint against the SEIU and Blue Wolf as a reminder of the potential reach of a nondisclosure agreement. Blue Wolf was prohibited from discussing the transaction with potential bidders; SEIU allegedly communicated directly with potential bidders. Blue Wolf owed Daughters of Charity a duty of good faith; Blue Wolf allegedly breached that duty by conspiring with the SEIU to chill other bids. When involved in any negotiations subject to a nondisclosure agreement, look closely at the terms of the agreement, and monitor both your communications and the communications of parties who share your interests. As highlighted in the Daughters of Charity complaint, using a party who is not subject to the nondisclosure agreement as a conduit for communications that would be prohibited if you made them yourself may subject you to a claimed breach of the agreement. Further, before disclosing information to equity participants, lenders, or consultants, it is vital to make sure that such disclosure is authorized by the nondisclosure agreement itself or via a waiver process.

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