

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

Docket No. 9366

In the Matter of)
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 Cabell Huntington Hospital, Inc.)
 a corporation;)
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 Pallottine Health Services, Inc.)
 a corporation;)
)
 and)
)
 St. Mary's Medical Center, Inc.)
 a corporation.)

**COMPLAINT COUNSEL'S UNOPPOSED MOTION FOR ISSUANCE OF
SUBPOENA DUCES TECUM TO WEST VIRGINIA HEALTH CARE AUTHORITY
UNDER RULE OF PRACTICE 3.36**

INTRODUCTION

Complaint Counsel brings this Motion pursuant to Federal Trade Commission ("Commission") Rule of Practice 3.36, 16 C.F.R. § 3.36 for the issuance of a Subpoena *Duces Tecum* for the production of documents, as defined in Rule of Practice 3.34(b), 16 C.F.R. § 3.34(b), to the West Virginia Health Care Authority ("WVHCA"), an agency of the State of West Virginia. Respondents do not oppose Complaint Counsel's motion. Because the material sought meets the requirements set out in Rule 3.36, we respectfully ask that the Motion be granted and that the subpoena be issued as requested. An unsigned Subpoena *Duces Tecum* to the WVHCA is attached as Exhibit A.

ARGUMENT

Rule 3.36(b) of the Commission's Rules of Practice requires the party seeking issuance of a subpoena to an official or employee of another governmental agency for the production of documents to make a specific showing regarding the requested subpoena. With respect to subpoenas to be served within the United States, the party must show that:

- (1) the material sought is reasonable in scope;
- (2) if for an adjudicative hearing, the material is reasonably relevant;
- (3) the material cannot reasonably be obtained by other means;
- (4) the material meets the requirements of Rule of Practice § 3.37.

The proposed subpoena to the WVHCA meets each of these four standards. The subpoena seeks data on hospital utilization; and documents relating to the Certificate of Need process for the Cabell/St. Mary's transaction, a proposed legislative change to the WVHCA's ability to conduct hospital rate review, the Assurance of Voluntary Compliance entered into between Respondents and the West Virginia Attorney General, which references programs of the WVHCA, and the WVHCA's denials of payor contracts or rates.

The material sought is reasonable in scope. The WVHCA is the state agency that collects, analyzes, and disseminates financial and clinical data to assess hospital utilization within West Virginia. The agency also reviews acute care hospital rates and contracts between health plans and health care service providers ("providers"), and administers the state's Certificate of Need program, under which the agency reviews certain capital expenditures by providers. The WVHCA maintains records of hospital usage within the state, information on the rate and contract review programs and, certificate of need submission materials, and information on proposed legislation impacting the authority of the WVHCA in its ordinary course of

business. The WVHCA may also possess unique documents on the Assurance of Voluntary Compliance (“AVC”) entered into between Cabell Huntington Hospital, St. Mary’s Medical Center, and the West Virginia Attorney General, which references programs of the WVHCA. The subpoena requests production of existing agency records in its standard format. The scope of the materials sought here is limited and reasonable in scope.

The material sought is highly relevant to Complaint Counsel’s allegations in the Complaint and Respondents’ defenses. Hospital utilization by West Virginia residents, the WVHCA’s rate and contract review processes, and its Certificate of Need program are relevant to the issue of the relevant geographic market, as well as to the likely effect of the proposed transaction on competition. Material that the WVHCA has on the AVC or proposed legislation that would impact the WVHCA’s authority is relevant to the likely effect of the proposed transaction on competition.

The material cannot be reasonably obtained by other means. The WVHCA is the sole repository of data relating to overall hospital utilization within West Virginia. The alternative—obtaining information on hospital utilization from every hospital in West Virginia—would be time consuming and burdensome for both Complaint Counsel and each and every third-party hospital in the state. Additionally, the WVHCA is the sole repository of submissions under the Certificate of Need program and hospital rate and health plan/provider contact review material. Finally, the WVHCA may have documents about the AVC or the proposed legislation (both discrete topics) that would be unique to the files of the WVHCA.

The material requested meets the requirements of Rule of Practice 3.37(a). The subpoena requests documents, as defined in Rule of Practice 3.34(b), including electronically stored information in the possession or control of the WVHCA.

CONCLUSION

This Court has recognized that issuance of a subpoena to a governmental agency is appropriate if the moving party meets the criteria under Rule 3.36. *In the Matter of Intel Corp.*, FTC Docket No. 9341 (Order dated Jun. 9, 2010), available at <https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100609intelorder.pdf>. For the reasons stated above, therefore, Complaint Counsel respectfully requests that the Court grant the Motion and issue the subpoena to the WVHCA.

Respectfully submitted,

Dated: December 16, 2015

/s/ Alexis Gilman
Alexis J. Gilman
Tara Reinhart
Thomas H. Brock
Mark D. Seidman
Michelle M. Yost
Elizabeth C. Arens
Jeanine Balbach
Stephanie R. Cummings
Melissa Davenport
Svetlana S. Gans
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Washington, DC 20580
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a corporation;)	
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a corporation.)	
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COMPLAINT COUNSEL'S MEET AND CONFER STATEMENT

Pursuant to the Scheduling Order issued on December 4, 2015, Complaint Counsel submits this statement in support of its Motion for Subpoena *Duces Tecum* Under Rule of Practice 3.36 to the West Virginia Health Care Authority.

On December 14, 2015, Complaint Counsel provided Respondents via electronic mail with a copy of Complaint Counsel's proposed Motion for Subpoena *Duces Tecum* and subpoena to the West Virginia Health Care Authority. On December 15, 2015, Respondents advised Complaint Counsel that they do not oppose this motion.

Respectfully submitted,

Date: December 16, 2015

/s/ Svetlana S. Gans
Svetlana S. Gans, Esq.
On behalf of Complaint Counsel

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a corporation.)	

**[PROPOSED] ORDER ON COMPLAINT COUNSEL’S MOTION FOR ISSUANCE OF
SUBPOENA *DUCES TECUM* TO WEST VIRGINIA HEALTH CARE AUTHORITY**

On December 16, 2015, Complaint Counsel, pursuant to Rule 3.36 of the Commission’s Rules of Practice, filed a motion for the issuance of a subpoena *duces tecum* to the West Virginia Health Care Authority (“WVHCA”), an agency of the State of West Virginia for agency records on hospital usage, the Certificate of Need process for the Cabell/St. Mary’s transaction, a proposed West Virginia legislative change, the Assurance of Voluntary Compliance entered into between Respondents and the West Virginia Attorney General, and the WVHCA’s denials of payor contracts or rates. Respondents do not oppose Complaint Counsel’s motion.

A party requesting the issuance of a subpoena *duces tecum* to a government agency to be served within the United States must demonstrate that:

- (1) the material sought is reasonable in scope;
- (2) if for an adjudicative hearing, the material is reasonably relevant;
- (3) the material cannot reasonably be obtained by other means; and

(4) the material meets the requirements of Rule of Practice § 3.37.

16 C.F.R. § 3.36(b).

Complaint Counsel's motion provides a description of the material it seeks, describes how its request is reasonable in scope, and demonstrates how the material is "reasonably relevant." In addition, Complaint Counsel notes why the material cannot reasonably be obtained by other means and how the material requested meets the requirements of Rule of Practice § 3.37.

Based on the description provided, the material sought appears to meet the requirements of Rules of Practice § 3.36(b) and § 3.37. Accordingly, Complaint Counsel's motion is GRANTED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

EXHIBIT A



SUBPOENA DUCES TECUM

PUBLIC

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO
Marianne Kapino, General Counsel
West Virginia Health Care Authority
100 Dee Drive
Charleston WV 25311

2. FROM

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

Federal Trade Commission
C/O Jeanine Balbach, CC-5506
400 7th Street, SW
Washington, DC 20024

4. MATERIAL WILL BE PRODUCED TO
Jeanine Balbach, Esq. and Svetlana Gans, Esq.

5. DATE AND TIME OF PRODUCTION

6. SUBJECT OF PROCEEDING

In the Matter of Cabell Huntington Hospital, Inc.; Pallottine Health Services, Inc.; and St. Mary's Medical Center, Inc.,
Docket No. 9366

7. MATERIAL TO BE PRODUCED

Documents & materials responsive to the attached Subpoena Duces Tecum Requests for Production

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell

Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

DATE SIGNED

SIGNATURE OF COUNSEL ISSUING SUBPOENA

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1995.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

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**COMPLAINT COUNSEL’S SUBPOENA *DUCES TECUM* ATTACHMENT TO
THE WEST VIRGINIA HEALTH CARE AUTHORITY**

Pursuant to the Federal Trade Commission’s Rule of Practice, 16 C.F.R. §§ 3.31 and 3.34, and the Scheduling Order entered by Chief Administrative Law Judge Chappell on December 4, 2015, Complaint Counsel hereby requests that the West Virginia Health Care Authority produce the following in accordance with the Definitions and Instructions set forth below:

1. All data used in the preparation of the submission to the SID for the years 2011 through 2015, sufficient to show Relevant Information for all inpatient admissions for West Virginia hospitals, regardless of the patient’s location.
2. Documents sufficient to show a full description of each data field or variable that appears in the Entity’s response to Specification 1 of this Subpoena.
3. All documents relating to communications with Cabell Huntington or St. Mary’s regarding the Relevant Transaction, including documents relating to the Certificate of Need application filed in connection with the Relevant Transaction.
4. Submit all documents relating to West Virginia Senate Bill 336, as introduced on January 27, 2015, or any other bill that would eliminate or affect the West Virginia Health Care Authority’s ability to conduct hospital rate review, review hospital charges, approve contracts between healthcare providers (e.g., hospitals) and health plans, or set rates for healthcare providers, including, but not limited to, all communications with health plans or healthcare providers regarding any proposed bill.

5. Submit all documents relating to the Assurance of Voluntary Compliance.
6. Submit all documents relating to any West Virginia Health Care Authority denial of a contract, or the reimbursement terms or rates included in a contract, negotiated between a healthcare provider and a health plan, including the identification of the provider and health plan, the date of the denial, the discount percentage requested, the discount percentage approved, and the rationale for the denial.

DEFINITIONS

For the purposes of this SDT, the following Definitions apply:

- A. The terms “and” and “or” have both conjunctive and disjunctive meanings.
- B. The term “Assurance of Voluntary Compliance” means the Assurance of Voluntary Compliance executed by Cabell Huntington Hospital and St. Mary’s Medical Center on July 30, 2015, and approved by the Attorney General of West Virginia on July 27, 2015, and filed in the Circuit Court of Cabell County, WV, on July 31, 2015, and any amendments or revisions thereto.
- C. The term “Cabell Huntington” means Cabell Huntington Hospital, Inc.; its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing.
- D. The term “documents” means all computer files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the Entity. The term “documents” includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that person’s files; and copies of documents the originals of which are not in the possession, custody, or control of the Entity.
 - (1) Unless otherwise specified, the term “documents” excludes: (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature; (b) architectural plans and engineering blueprints; and (c) documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.
 - (2) The term “computer files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Entity should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other

forms of offline storage, whether on or off Entity premises. If the Entity believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Complaint Counsel's need for documents and information, you are encouraged to discuss a possible modification to this instruction with the Complaint Counsel representative identified in the final instruction of this SDT. The Complaint Counsel representative will consider modifying this instruction to:

- (a) exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Entity;
- (b) limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Complaint Counsel representatives; or
- (c) include other proposals consistent with Complaint Counsel's discovery needs and the facts of the case.

- E. The terms "each," "any," and "all" mean "each and every."
- F. The term "Entity" means the West Virginia Health Care Authority.
- G. The term "general acute care inpatient services" refers to the provision of inpatient services (including any physician services that may be provided on an inpatient basis) for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities, excluding non-acute long-term services (e.g., skilled nursing care) and the treatment of mental illness or substance abuse.
- H. The term "healthcare provider" means any entity that provides the Relevant Service. The term "healthcare provider" includes but is not limited to hospitals, freestanding outpatient facilities, physician groups, individual physicians, and other healthcare facilities.
- I. The term "health plan" means any health maintenance organization, preferred provider arrangement or organization, managed health care plan of any kind, self-insured health benefit plan, other employer or union health benefit plan, Medicare, Medicaid, TRICARE, or private or governmental health care plan or insurance of any kind.
- J. The term "hospital" means a healthcare provider that provides general acute care inpatient services, collectively or individually.

- K. The term “inpatient services” refers to the provision of medical services that require at least one overnight stay at a healthcare provider or at least 24-hour nursing care, including any physician services rendered as part of the inpatient treatment.
- L. The term “outpatient services” refers to the provision of medical services, including physician services, that do not require an overnight stay at a healthcare provider or 24-hour nursing care.
- M. The term “Pallottine Health Services” means Pallottine Health Services, Inc., and its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.
- N. The term “Relevant Information” means:
- i. A patient identification number (masked to preserve patient privacy, but specific to the patient to track admissions of a patient across hospitals and readmissions of a patient);
 - ii. The identity of the hospital at which each treatment was conducted, including the hospital’s name, street address, five-digit zip code, state, city, town, or village, Medicare provider number and NPI;
 - iii. The identity (*e.g.*, NPI) of the admitting physician and treating (or attending) physician;
 - iv. The patient’s five-digit zip code;
 - v. The patient’s age (including the age in days for patients less than one year old) and gender;
 - vi. The admission date and the discharge date, or the admission month, admission year, and the patient’s length of stay;
 - vii. Whether the treatment provided was for an emergency;
 - viii. Whether the admission was classified as an observation case;
 - ix. The source of the patient (*e.g.*, emergency room, transfer from another short-term hospital) and the type of admission (*e.g.*, newborn, elective, etc.);
 - x. The type and specific identity of the primary payer (*e.g.*, HMO, PPO, Highmark Blue Cross Blue Shield, Aetna, etc.) and form of insurance product (*e.g.*, Medicare, Medicaid, Commercial, Medicare HMO, Uninsured, Worker’s Comp, etc.);

- x. The Diagnosis Related Group (“DRG”) and Major Diagnostic Category (“MDC”) associated with the patient’s admission and any other service category used to classify patient admissions;
 - xi. The primary ICD9 diagnosis code and any secondary ICD9 diagnosis codes associated with the patient’s admission, including an indication of whether each diagnosis was present on admission;
 - xii. The primary ICD9 procedure code and any secondary ICD9 procedure codes associated with the patient’s treatment;
 - xiii. The total billed charges and any available breakdown of charges by type of service or accommodation (*e.g.*, ICU charges); and
 - xv. The patient’s discharge status.
- O. The term “Relevant Service” encompasses and information shall be provided separately for: (a) all general acute care inpatient services (as defined herein), collectively and individually; and (b) all outpatient services (as defined herein), collectively and individually.
- P. The term “Relevant Transaction” means the proposed acquisition of St. Mary’s Medical Center, Inc., by Cabell Huntington Hospital, Inc., pursuant to the Agreement entered into on November 7, 2014, between and among Pallottine Health Services, Inc., St. Mary’s Medical Center, Inc., and Cabell Huntington Hospital, Inc., and any amendments thereto; or pursuant to any other agreements and any amendments thereto.
- Q. The term “SID” means the State Inpatient Database portion of the Healthcare Cost and Utilization Project (HCUP).
- R. The term “St. Mary’s” means St. Mary’s Medical Center, Inc.; Pallottine Health Services, Inc.; their domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures; and all directors, officers, employees, agents, and representatives of the foregoing.
- S. The term “submission” means the present or future sending of data for inclusion in the HCUP database.
- T. The term “treatment” is defined as any individual occurrence when a patient receives medical attention (such as a diagnosis, clinical procedure, surgery, imaging service, rehabilitation session, visit, or any other medical assessment, care, procedure, or action) from a physician or other medical professional at one specific location.

INSTRUCTIONS

For the purposes of this SDT, the following Instructions apply:

- A. Unless otherwise specified, each request calls for documents received or created from January 1, 2013 to the present.
- B. Unless modified by agreement with Complaint Counsel, these Requests require a complete search of all the files of the Entity. The Entity shall produce all responsive documents, wherever located, that are in the actual or constructive possession, custody, or control of the Entity and its representatives, attorneys, and other agents, including, but not limited to, consultants, accountants, lawyers, or any other person retained by, consulted by, or working on behalf or under the direction of the Entity.
- C. These Requests are continuing in nature and shall be supplemented in the event that additional documents responsive to this request are created, prepared, or received between the time of the Entity's initial response and trial.
- D. All documents responsive to these Requests, regardless of format or form and regardless of whether submitted in hard copy or electronic format:
 - (a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Entity's files.
 - (b) Shall be marked on each page with corporate identification and consecutive document control numbers;
 - (c) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;
 - (d) Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any document (e.g., a chart or graph), makes any substantive information contained in the document unintelligible, the Entity must submit the original document, a like-colored photocopy, or a JPEG format image;
 - (e) Shall be accompanied by an affidavit of an officer of the Entity stating that the copies are true, correct, and complete copies of the original documents; and
 - (f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents, and if submitted in paper form, the box number containing such documents. The Complaint Counsel representative will provide a sample index upon request.

E. Forms of Production: The Entity shall submit all documents as instructed below absent written consent signed by Complaint Counsel.

(a) Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:

(i) Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(ii), (a)(iii) and (a)(iv).

(ii) Submit emails in image format with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.
To	Recipient(s) of the email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.

Metadata/Document Information	Description
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

- (iii) Submit email attachments in image format other than those identified in subpart (a)(i) with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.
Parent Email	The Document ID of the parent email.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- (iv) Submit all other electronic documents other than those described in subpart (a)(i) in image format accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the original custodian of the file.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- (v) Submit documents stored in hard copy in image format accompanied by OCR with the following information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.

Metadata/Document Information	Description
Custodian	The name of the original custodian of the file.

- (vi) Submit redacted documents in PDF format accompanied by OCR with the metadata and information required by relevant document type described in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above.
- (b) Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- (c) If the Entity intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in its computer systems or electronic storage media, or if the Entity's computer systems contain or utilize such software, the Entity must contact the Complaint Counsel representative to determine, with the assistance of the appropriate Complaint Counsel representative, whether and in what manner the Entity may use such software or services when producing materials in response to these Requests.
- (d) Produce electronic file and image submissions as follows:
- (i) For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - (ii) For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats;
 - (iii) All documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of the Entity's compliance with these Requests; and
 - (iv) Encryption of productions using NIST FIPS-Compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.
 - (v) Each production shall be submitted with a transmittal letter that includes the Docket Number (No. 9366); production volume name;

encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load-file fields in the order in which they are organized in the load file.

- (e) To protect patient privacy, the Entity shall mask any Sensitive Personally Identifiable Information (“SPII”). For purposes of this Request, SPII means an individual’s Social Security Number alone; or an individual’s name, address, or phone number in combination with one or more of the following: date of birth; driver’s license number or other state identification number, or a foreign country equivalent; passport number; financial account number; claim number or similar medical record identifier; or credit or debit card number. Where required by a particular Specification, the Entity shall substitute for the masked information a unique patient identifier that is different from that for other patients and the same as that for different admissions, discharges, or other treatment episodes for the same patient. Otherwise, the Entity shall redact the SPII but is not required to replace it with an alternate identifier.
- F. If any documents are withheld from production based on a claim of privilege and have not previously been logged in a privilege log submitted to Complaint Counsel, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a searchable and sortable log that includes each document’s authors, addresses, date, a description of each document, and all recipients of the original and any copies. Attachments to a document should be identified as such and entered separately on the log. For each author, addressee, and recipient; state the person’s full name, title, and employer or firm; and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable Complaint Counsel or a court to assess the applicability of the privilege claimed. For each document withheld under a claim that it constitutes or contains attorney work product, also state whether the Entity asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the Entity that were not directly or indirectly furnished to the Entity or any third-party, such as internal firm memoranda, may be omitted from the log.
- G. If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Entity’s document retention policy, but the Entity has reason to believe such documents have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the request(s) to which they are responsive, and identify persons having knowledge of the content of such documents.

- H. Whenever necessary to bring within the scope of a request a response that might otherwise be construed to be outside its scope, the following construction should be applied:
- (a) Construing the terms “and” and “or” in the disjunctive or conjunctive, as necessary, to make the request more inclusive;
 - (b) Construing the singular form of any word to include the plural and plural form to include the singular;
 - (c) Construing the past tense of the verb to include the present tense and present tense to include the past tense;
 - (d) Construing the masculine form to include the feminine form; and
 - (e) Construing the term “date” to mean the exact day, month, and year if ascertainable; if not, the closest approximation that can be made by means of relationship to other events, locations, or matters.
- I. Unless otherwise stated, construe each request independently and without reference to any other purpose of limitation.
- J. In order for the Entity’s response to these Requests to be complete, the attached certification form must be executed by the official supervising compliance with this request, notarized, and submitted along with the responsive materials.
- K. Any questions you have relating to the scope or meaning of anything in this SDT or suggestions for possible modifications to it should be directed to Svetlana S. Gans at (202) 326-3708 or sgans@ftc.gov.
- L. The Entity’s response to these Requests shall be delivered to the attention of Jeanine Balbach, between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission, 400 7th Street SW, Washington, DC 20024. For courier or other delivery, please contact Jeanine Balbach, at 202-326-2568 or jbalbach@ftc.gov. The Entity shall submit data files containing SPII separately from documents without SPII, either by submitting data containing SPII on separate media or hardware, or by separate secure file transfer. Any password(s) necessary to access the responses to the Specifications 1-2 shall be emailed to Ms. Balbach at jbalbach@ftc.gov.

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

(Signature of Official)

(Title/Entity)

(Typed Name of Above Official)

(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that on December [], 2015, I served via FedEx delivery a copy of the attached Subpoena *Duces Tecum* to The West Virginia Health Care Authority to:

Marianne Kapino, General Counsel
West Virginia Health Care Authority
100 Dee Drive
Charleston, WV 25311

I further certify that I served the foregoing on the following counsel via electronic mail:

Geoff Irwin
Kenneth W. Field
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3963
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hbrooks@foley.com
Counsel for Respondent Pallottine Health Services, Inc. and St. Mary's Medical Center, Inc.

Dated: December [], 2015

/s/ Svetlana S. Gans
Svetlana S. Gans, Esq.
On behalf of Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2015, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580
oyalj@ftc.gov

I further certify that on December 16, 2015, I served, via electronic mail, the accompanying Complaint Counsel's Motion for Subpoena *Duces Tecum* to the West Virginia Health Care Authority under Rule of Practice 3.36, on the following counsel:

Geoff Irwin
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Marianne Kapino
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304-558-7000 (Ext. 213)
mkapino@hcawv.org
Counsel for Third-Party WVHCA

Dated: December 16, 2015

/s/ Jeanine Balbach
Jeanine Balbach, Esq.
On behalf of Complaint Counsel

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Date: December 16, 2015

/s/ Jeanine Balbach
Jeanine Balbach, Esq.
On behalf of Complaint Counsel