

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



ORIGINAL

DOCKET NO. 9366

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

ORDER ON RESPONDENTS' MOTION FOR DISCLOSURE OF THIRD PARTY DECLARATIONS TO RESPONDENTS' EMPLOYEES

I.

On February 18, 2016, Respondents Cabell Huntington Hospital, Inc. and St. Mary's Medical Center, Inc. ("Respondents") filed a Motion for Disclosure of Third Party Declarations to Respondents' Employees ("Motion"). Federal Trade Commission ("FTC") Complaint Counsel ("Complaint Counsel") filed its Opposition on February 29, 2016. For the reasons set forth below, Respondents' Motion is GRANTED IN PART AND DENIED IN PART. On March 2, 2016, Respondents' filed a Motion for Leave to File a Reply in Support of Respondents' Motion, which is DENIED AS MOOT.

II.

Respondents state that in the course of discovery in this matter, Complaint Counsel produced "dozens" of third party declarations that Complaint Counsel received from third parties during the investigative phase of this matter, each of which is designated, in its entirety, as "confidential." ("Third Party Declarations"). The Protective Order Governing Discovery Material, issued in this matter on November 6, 2015 ("Protective Order"), provides that confidential material may be disclosed only to specifically enumerated entities, including Respondents' outside counsel, but specifically excluding employees of Respondents. Protective Order ¶ 7.

Respondents contend that the Third Party Declarations include material that is not properly deemed "confidential," as that term is defined in the Protective Order. Respondents argue that, in order to prepare their defense, it is critical that Respondents be permitted to disclose such non-confidential material, as well as the identities of the declarants, to employees needed for trial

preparation. Non-confidential matters in the Third Party Declarations include, according to Respondents: Cabell and St. Mary's Medical Center's public advertising; the location of various hospitals, and the ease with which people can get to them; routine administration practices in the health care sector generally; and predictions about Cabell's and St. Mary's future conduct. Respondents request an order directing Complaint Counsel to "de-designate" non-confidential portions of the Third Party Declarations, and permitting Respondents to disclose these portions of the Declarations, as well as the identities of the declarants, to Respondents' employees needed for trial preparation.

Complaint Counsel states that it received the Third Party Declarations during the investigative phase of this case and that each third party declarant requested confidential treatment of the declaration as well as the identity of the declarant and the declarant's employee. Complaint Counsel states that it was the third party declarants, not Complaint Counsel, who designated each of the Third Party Declarations as confidential and that Complaint Counsel produced them to Respondents' counsel, with the confidentiality designation, as part of Complaint Counsel's initial disclosures.

Complaint Counsel argues that the Protective Order requires maintaining the confidentiality of the Third Party Declarations and that maintaining confidentiality will not prejudice Respondents for two reasons. First, Respondents had the opportunity to depose all declarants who appeared on Complaint Counsel's amended preliminary witness list and the identity of declarants not on a witness list has little relevance to Respondents' trial preparation. Second, the deadline for filing motions for *in camera* treatment for documents that a party intends to offer into evidence, March 17, 2016, is approaching, and if these third parties do not move for *in camera* treatment, those declarations that either party intends to offer into evidence will become public, at which point Respondents' counsel can share such declarations with Respondents' employees.¹

III.

The Protective Order issued in this case governs the handling of "confidential material." "Confidential material" means material that is "privileged information, competitively sensitive information, or sensitive personal information." Protective Order ¶ 1. In addition, where a third party submits material during an investigation or proceeding that is entitled to confidential treatment, the identity of the submitter is entitled to confidential treatment, if the submitter so requests. Protective Order ¶ 2.

Respondents have demonstrated that the Third Party Declarations include at least some material that is not "confidential," defined by the Protective Order as material that is "privileged information, competitively sensitive information, or sensitive personal information." It cannot, on the present record, be determined the extent to which the Third Party Declarations contain material that is, or is not, "confidential," as defined by the Protective Order. For this reason, it also cannot be determined whether the identities of the declarants in the Third Party Declarations must be treated as confidential, because the right to such confidentiality is based on whether or not the submission contains confidential information. Protective Order ¶ 2 ("The identity of a third party submitting such confidential material shall also be treated as confidential material . . ."). In

¹ Complaint Counsel also contends that any third party declarations that are not offered into evidence have no relevance to Respondents' defense.

addition, at least some of the third party declarants have been listed as witnesses on Complaint Counsel's witness list, which Complaint Counsel states is not confidential. Opposition at 8. Because Complaint Counsel has already made the identities of these declarants public, the Protective Order no longer bars Respondents from disclosing the identity of these declarants to their employees.

As asserted by Complaint Counsel, the Third Party Declarations were designated "confidential" by the declarants, and not by Complaint Counsel. Thus, it is not appropriate to order Complaint Counsel to "de-designate" the portions of the Third Party Declarations that do not meet the Protective Order's definition of "confidential." However, Complaint Counsel is the entity that collected the Third Party Declarations during the investigation and, presumably, advised these third parties that they could designate the entirety of their declarations "confidential," without regard to whether all information in each declaration is, in fact, "confidential" within the meaning of the Protective Order.

Based on the foregoing, Respondents' Motion is GRANTED IN PART and DENIED IN PART, and it is hereby ORDERED:

(1) Complaint Counsel shall, no later than March 4, 2016, notify those who submitted Third Party Declarations, in writing, that they are to review their declarations to confirm the extent to which the declarations contain "confidential information," as defined by the Protective Order, and instruct the declarants to redact only material or information from their declarations that is in fact "confidential" within such definition and provide Complaint Counsel with their properly redacted, revised version no later March 10, 2016;

(2) Complaint Counsel shall, no later than March 11, 2016, provide the properly redacted, revised version of its Third Party Declarations to Respondents, so that the statements may be provided by Respondents to employees needed for Respondents' trial preparation; and

(3) Complaint Counsel may not introduce into evidence any Third Party Declaration or call any witness that provided a Third Party Declaration, unless: (A) the Third Party Declaration has been reviewed by the declarant and properly redacted pursuant to paragraph (1) of this order, and Complaint Counsel has produced such properly redacted, revised version to Respondents by March 11, 2016; or (B) the Third Party Declaration or witness testimony based thereon is subject to an *in camera* treatment order that may be issued in this matter.²

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 3, 2016

² Under the Scheduling Order, the parties are required to provide notice to the opposing party or non-party of their intent to offer as evidence confidential materials of an opposing party or non-party by March 7, 2016 and the deadline for filing motions for *in camera* treatment of proposed trial exhibits is March 17, 2016.