

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGE

PUBLIC VERSION

In the Matter of

Cabell Huntington Hospital, Inc.
A corporation;

And

Pallottine Health Services, Inc.
A corporation;

And

St. Mary's Medical Center, Inc.
A corporation.



Docket No. 9366

**NON-PARTY AETNA, INC.'S MOTION FOR
IN CAMERA TREATMENT OF PROPOSED EVIDENCE**

Aetna Inc. ("Aetna"), which is not a party to the above-captioned matter, respectfully requests that this Court grant *in camera* treatment of multiple documents that have been designated for introduction into evidence in the administrative trial in this matter by Complaint Counsel and Counsel for Cabell Huntington Hospital, Inc.

Pursuant to the March 15, 2016 Order Granting Joint Motion to Amend the Scheduling Order and Revised Scheduling Order that provides a deadline of March 28, 2016 "for filing motions for *in camera* treatment of proposed trial exhibits," Aetna seeks *in camera* treatment for the documents identified on the attached Exhibit A.

The confidential information contained in these documents is commercially sensitive, trade secret data pursuant to W.Va. Code § 47-22-1 and 2, and is held in strict confidence by Aetna. Public disclosure of these documents is likely to cause direct, serious harm to Aetna's

competitive position. Therefore, pursuant to 16 C.F.R. § 3.45(b), Aetna respectfully moves for *in camera* treatment of the documents identified on Exhibit A.

AETNA'S CONFIDENTIAL DOCUMENTS QUALIFY FOR *IN CAMERA* TREATMENT UNDER THE FEDERAL TRADE COMMISSION'S RULES OF PRACTICE

The documents listed on Exhibit A to this Motion warrant *in camera* treatment as provided by 16 C.F.R. § 3.45(b). The code section provides for *in camera* treatment of certain business-related information and personal information. Relating to business issues, under C.F.R. § 3.45(b), requests for *in camera* treatment will be granted where public disclosure of the document in question “will result in a clearly defined, serious injury to the...corporation requesting *in camera* treatment.” *Id.* That showing can be made by establishing that the document in question is “sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury.” *In re Dura Lube Corp.*, 1999 F.T.C. LEXIS 255, * (Dec. 23, 1999) (quoting *General Foods Corp.*, 95 FTC 352, 355 (1980)). In this context, “the courts have generally attempted to protect confidential business information from unnecessary airing.” *H.P. Hood & Sons, Inc.* 58 F.T.C. 1184, 1188 (1961).

Six factors will be weighed in determining whether the documents in question are sufficiently material and sufficiently secret that disclosure would result in serious competitive injury:

- (1) the extent to which the information is known outside of the applicant’s business; (2) the extent to which the information is known by employees and others involved in the applicant’s business; (3) the extent of measures taken by the applicant to guard the secrecy of the information; (4) the value of the information to the applicant and its competitors; (5) the amount of effort or money expended by the applicant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Dura Lube, 1999 F.T.C. LEXIS 255 AT *6-*7 (quoting *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977)).

**PUBLIC DISCLOSURE OF BUSINESS DOCUMENT WOULD RESULT IN
SERIOUS COMPETITIVE INJURY TO AETNA**

A. Aetna Has Preserved the Confidentiality of the Documents and Information in Question.

Aetna has taken substantial measures to guard the information contained in Exhibit A by limiting dissemination of such information and taking every reasonable step to protect its confidentiality. Such information is only disclosed to particular Aetna employees. The information is not known outside of Aetna except to the extent necessary to engage in contract negotiations, and it would be extremely difficult for Aetna's competitors or other outside persons to access or duplicate the information contained in the documents at issue. The information was disclosed pursuant to a lawful subpoena and in reliance upon a Protective Order entered in this matter.

Additionally, Aetna is entitled to injunctive relief against both Complaint Counsel and Cabell Huntington Hospital pursuant to W.Va. Code § 47-22-1 and 2: "Actual or threatened misappropriation may be enjoined."

B. Disclosure of the Information Contained in the Documents in Question Would Result in Serious Competitive Injury to Aetna.

The documents identified on Exhibit A contain information regarding negotiations of contracts and rates with individual hospitals, including proposals for rates, counter proposals and discussions of how rates are determined. The documents discuss confidential contract terms, current status of contract negotiations, rates and other information regarding the relationships between Aetna and specific providers. The documents include highly confidential and commercially sensitive information. Their disclosure would reveal valuable information regarding the way Aetna defines relationships with its providers and how rates are determined, processes that Aetna has expended numerous hours and many

years to develop. Aetna's negotiation efforts have allowed it to gain a competitive advantage in the marketplace and to better service its insureds. Disclosure of this confidential information will result in serious damage to Aetna's competitive advantage in the marketplace.

C. The Public Interest in Disclosure of the Documents In Question is Outweighed by the Likelihood of Serious Competitive Harm to Aetna.

As a non-party to the matter, Aetna deserves "special solicitude" as a non-party requesting *in camera* treatment for its confidential business information. *In camera* treatment of information, for reasonable time periods, encourages non-parties to cooperate with future discovery requests in adjudicative proceedings. Aetna has cooperated with the discovery demands in this case only after receiving express assurances that confidentiality would be honored and enforced. To allow both parties to flagrantly disregard Court ordered maintenance of the protections provided by the Protective Order would be a flagrant violation of its rights to confidentiality. Conversely, "public understanding of this proceeding does not depend on access to" Aetna's highly confidential information. The balance of interests clearly favors *in camera* protection for the documents listed on Exhibit A. *See Bristol*, 90 F.T.C. at 456 (describing six-factor test for determining secrecy and materiality).

D. Protection for the Documents In Question Should Extend for 5 Years

The nature of the highly confidential information contained in the documents on Exhibit A warrants lasting protection because they contain information vital to Aetna's competitive position and business strategy. Accordingly, Aetna requests that the documents on Exhibit A be afforded *in camera* protection for a period of five years.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael J. Farrell", is written over a horizontal line.

Michael J. Farrell, Esquire

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Attorney for Aetna, Inc.

CERTIFICATE OF SERVICE

The undersigned counsel for Aetna, Inc. certifies that on March 22, 2016, the foregoing was served in the manner indicated:

VIA FEDERAL EXPRESS – Original, one copy and electronic copy

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-113
Washington, DC 20580
dclark@ftc.gov

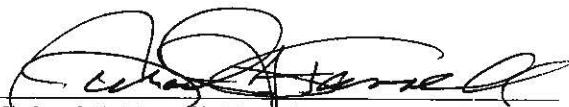
VIA FEDERAL EXPRESS – One copy and electronic copy

The Honorable D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Avenue, NW, H-110
Washington, DC 20580
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Elisa F. Kantor
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CONFIDENTIAL AETNA DOCUMENTS

EXHIBIT A

*In Re: Cabell Huntington Hospital, Pallottine Health Services Inc, and
St. Mary's Medical Center, No. 9366*

BATES NO.	CONFIDENTIALITY DESIGNATION	NOTES/DESCRIPTION
NA	Confidential	Cabell's/Aetna Managed Care Agreement
AET00250-00267	Confidential	St. Mary's/Aetna Managed Care Agreement.
AET00437-00449	Confidential	The FTC's list only has Bates AET00437, which in and of itself is not confidential as it is the first page of the Tri-State PHO. Having said that, the contract should be designated confidential. Especially the rates that appear on Exhibit B at AET00449.
AET00519-00520	Confidential	Amendment – discussion of confidential rates.
AET00523-00525	Partially Confidential	Only second sentence of the email as it discusses Aetna's confidential rate increase.
AET02071-02313	Confidential	AET02072 appears to be the first page of an excel spreadsheet that spans through AET02313 (AET02071 is the email it is attached to). The excel spreadsheet is CONFIDENTIAL.
AET03169	Confidential	References lawsuit between King's Daughter and Aetna.
AET03219-3221 AET03230-3232 AET03228-3239	Confidential	The foregoing Bates numbered documents include discussion of confidential contract rates/discounts.
AET05614-05615 AET05617 AET05720	Confidential	The foregoing Bates numbered documents include discussion of confidential contract rates.
AET05848-05851	Confidential	This document includes attorney-client communication from Alicia Palmer, former Coventry attorney
AET05858-05862	Confidential	These documents include confidential competitor rates.
AET06034-06039	Confidential	The FTC only lists Bates AET06034-06036; however, AET06036 is the first page of an excel spreadsheet that spans through AET06039 – all of which are CONFIDENTIAL
AET06549	Partially Confidential	Discussion of confidential rate in one sentence of the third paragraph of Deloris' email to John Muraca that begins "Said he went from a 15% off charges..."
AET06740-06799	Confidential	References confidential rates, discounts, revenues, and commercially sensitive information
AET06805-06823	Confidential	FTC only listed AET06805 – this is the parent email with an excel spreadsheet attached that spans from AET06806-AET06823 – all of which are CONFIDENTIAL

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AET06886-06888	Confidential	References confidential rates, discounts, revenues and commercially sensitive information.
AET07451-07456	Confidential	References confidential rates, discounts, revenues and commercially sensitive information.
AET07874-07882	Confidential	References confidential rates, discounts, revenues and commercially sensitive information.
AET07913	Confidential	Contains information on confidential OP lab rate In Jon Turner's email, also in Dorsen McConaughy's email to Jon under bullet point three which lists confidential rates for Cabell, Pleasant Valley and St. Mary's.
AET07958	Partially confidential	Third line of the email beginning with " – The agreement we are still using..." references confidential billing discount . The remainder of the chain is not confidential.
AET10527-10550	Confidential	Includes Attorney-Client communication from Alicia Palmer, former Coventry attorney.
AET12775-12780	Confidential	AET12775 is the first page of an excel spreadsheet that spans through AET12780 which contains various contractual information and discounts – all of which are CONFIDENTIAL.
AET14142	Confidential	Letter at AET14142 references confidential discounted rates.
AET14275	Confidential	Letter at AET14275 references confidential discounted rates.
AET14277	Confidential	Letter at AET14277 references confidential discounted rates.
AET15706-15706	Confidential	Includes Attorney-client communication from Robyn Goecke, former Coventry attorney
AET16077-16100	Confidential	Email from AET16077-16081 appears to have member name/ID in the subject line. Cabell contract begins on 16082 and spans through 160100 – all confidential.
AET16176-16177	Confidential	References confidential rates, discounts, revenues and commercially sensitive information.
AET17219	Partially Confidential	Kim Rogers' email to John Grese, specifically bullet points 1 & 2 which reference confidential rates and savings.
AET17470-17470	Confidential	Discussion of confidential contractual discounts.
AET18593-18594	Partially confidential	Only second sentence of Darlene's email to Keith Coyle which discloses the confidential Medicare rate w/St. Mary's vs. that of Cabell's.

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AET18612-18617	Confidential	Discussion of confidential contractual discounts.
AET18624-18631	Confidential	Discussion of confidential contractual discounts.
AE18666	Confidential	Confidential list of allowable rates for services at competing facilities.
AET19527	Confidential	The confidential name of member who has allegedly been balance-billed appears in e-mail.
AET19533-19538	Confidential	The confidential dates and discount information is disclosed.
AET19614	Confidential	The confidential name of member who has allegedly been balance-billed appears in email.
AET21448-21485	Confidential	The confidential rates and discount information is disclosed. The FTC only lists Bates AET21448-21449 – However, AET21449 is the first page of an excel spreadsheet that spans through AET21485 – all of which are CONFIDENTIAL.
AET21911-21912	Confidential	Draft confidential Parity Agreement between Cabell/Aetna.
AET21916	Partially confidential	Discussion of confidential discounted rates in third sentence.
AET22086-22087	Partially confidential	Discussion of confidential rates in first sentence of Darlene's email to Gene Preston. Also in counterproposal sentence beginning with "Inpatient services change from 90%..."
AET22090-22090	Partially confidential	First paragraph of email contains discussion of confidential discounted rates and Aetna's confidential discount vs. that of its competitors.
AET22244-22280	Confidential	AET22244 is the first page of an excel spreadsheet that spans through AET22280 – all of which are CONFIDENTIAL.
Dep_Barrett_PX0209_001-005	Partially Confidential	Declaration: Deloris Barrett. Paragraphs 3, 4, 7, 8, 9, 12, 13, 15 and footnote of the Declaration have been redacted of confidential information and submitted to the FTC.
Dep_Dioguardi PX0210-	Partially Confidential	Declaration: Jerome Dioguardi. Paragraphs 3, 4, 5, 6, 7, 8, 14, 15, and 16 of the Declaration have been redacted of confidential information and submitted to the FTC.
FTC-PROD-0001222-1226	Partially Confidential	Declaration: Jerome Dioguardi. Paragraphs 3, 4, 5, 6, 7, 8, 14, 15, and 16 of the Declaration have been redacted of confidential information and submitted to the FTC.

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FTC-PROD-00001499-1505	Partially Confidential	Declaration: Deloris Barrett. Paragraphs 3, 4, 7, 8, 9, 12, 13, 15 and footnote of the Declaration have been redacted of confidential information and submitted to the FTC.
FTC-PROD-00002618-2623	Partially Confidential	Declaration: Jerome Dioguardi. Paragraphs 3, 4, 5, 6, 7, 8, 14, 15, and 16 of the Declaration have been redacted of confidential information and submitted to the FTC.
FTC-PROD-00004701-4705	Partially Confidential	Declaration: Deloris Barrett. Paragraphs 3, 4, 7, 8, 9, 12, 13, 15 and footnote of the Declaration have been redacted of confidential information and submitted to the FTC.
FTC-PROD-00004706-4709	Partially Confidential	Declaration: Jerome Dioguardi. Paragraphs 3, 4, 5, 6, 7, 8, 14, 15, and 16 of the Declaration have been redacted of confidential information and submitted to the FTC.