

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



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

**RESPONDENTS’ OPPOSITION TO MOTION TO COMPEL
PRODUCTION OF TESTIMONY, DOCUMENTS,
AND INFORMATION SUBMITTED TO STATE AGENCY**

Respondents Cabell Huntington Hospital, Inc. (“Cabell”) and St. Mary’s Medical Center, Inc. (“St. Mary’s,” collectively “Respondents”) hereby oppose Complaint Counsel’s Motion To Compel Respondents’ Production Of Testimony, Documents, And Information Submitted To State Agency (“Motion”).

The plain terms of two orders issued by the West Virginia Health Care Authority (“WVHCA”), an agency that Respondents appear before in the regular course of business, provide that the proceedings before the WVHCA, and documents designated as confidential pursuant thereto, will be maintained as confidential. As a result, Respondents cannot produce the documents and materials requested by Complaint Counsel without violating the WVHCA’s directives.

As Respondents have told Complaint Counsel, however, rather than asking this Court to

order Respondents to violate the WVHCA's orders, Complaint Counsel should seek relief directly from the WVHCA. Respondents have pledged not to oppose such a motion. Instead of pursuing that clear way forward, however, Complaint Counsel now burden this Court and Respondents with an unnecessary motion to compel that seeks to force Respondents into violating the agency's orders. Because Complaint Counsel has pursued its request in the wrong forum, Respondents request that the Court deny the Motion.

FACTUAL BACKGROUND

West Virginia law requires that Respondents receive a Certificate of Need ("CON") from the WVHCA to approve any new institutional health service.¹ The CON procedure is a function of state law, West Virginia Code § 16-2D-1, *et seq.*, and jurisdiction over this program is vested in the WVHCA to determine whether a CON should issue. *Id.* § 16-29B-11. Cabell's proposed acquisition of the membership interest of St. Mary's constitutes a reviewable new institutional health service because it involves the acquisition of a health care facility and a capital expenditure incurred by Cabell in excess of the expenditure minimum established by the statute. *See id.* § 16-2D-3(b)(3). The CON proceedings and briefing have concluded, but the WVHCA has not yet issued its decision. There is no certainty about the date of that decision.

During the CON proceedings, the WVHCA ruled that:

certain portions of the hearing in this matter currently scheduled to be held on December 21-22, 2015, be conducted *in camera* to the extent testimony will disclose commercially sensitive information that is contained in Confidential Materials and that has not previously been made public by the party claiming confidentiality. It is further ORDERED that **the hearing transcript for those portions of the hearing held in camera shall likewise be sealed.** It is further ORDERED that **all parties present at the hearing**

¹ Both Cabell and St. Mary's regularly appear before the WVHCA; abiding by the agency's orders is not only required, but crucial to both hospitals' regular business activities.

shall treat all Confidential Materials in accordance with the Protective Order.

(Mot., Ex. A (“Sealing Order”) (emphasis added).) The WVHCA noted therein that it had previously entered protective orders that would “govern and limit public disclosure” of confidential materials submitted in connection with the proceedings. (Mot., Ex. B (“Protective Orders,” and together with the Sealing Order, the “Confidentiality Orders”)².) The Protective Orders likewise state that “Confidential Materials produced pursuant to the terms of this Protective Order can only be used in conjunction with this administrative hearing **and for no other purpose.**” (Mot., Ex. B (emphasis added).)

Complaint Counsel was present at the CON proceedings, and never challenged the entry of the Sealing Order. Nor did Complaint Counsel raise any objection when it was repeatedly excluded from the confidential portions of the hearings on the basis of the Confidentiality Orders. Instead, Complaint Counsel requested this confidential information in discovery in this proceeding.³ In response to Complaint Counsel’s discovery request pertaining to CON testimony and related materials, Cabell objected “because [the request] seeks sealed materials subject to the Protective Order issued by the [WVHCA and] Cabell is bound by that order and will not disclose the sealed transcripts” (Ex. A (Cabell’s Responses to 2d RFP No. 2).) Pallottine Health Services, Inc. objected as well.⁴ (Ex. B (PHS’s Responses to 2d RFP No. 1).)

² The various protective orders each apply to distinct parties in the CON proceedings.

³ Second Request for Production No. 2 provides: “All materials produced, received, or used, and all testimony given or proffered by the Company, St. Mary’s, and their consultants or experts, in the West Virginia Health Care Authority’s Certificate of Need proceeding relating to the Relevant Transaction, including, but not limited to, all documents and data, all discovery responses, all expert reports, all un-redacted transcripts of testimony, and all exhibits and demonstratives used or referenced at any hearing.”

⁴ Complaint Counsel’s RFPs were propounded on Pallottine Health Services, Inc., not St. Mary’s, a separate entity.

Respondents did produce public versions of the hearing transcripts, redacting the portions that the WVHCA had ordered sealed, as well as hundreds of non-confidential documents in connection with the CON proceedings. Respondents also informed Complaint Counsel that they would *not* oppose a motion made to the WVHCA to unseal the remaining portions of the testimony and related documents.⁵ (Ex. E (Mar. 1, 2016 Email from T. Zurawski to S. Gans).)

Now, by its Motion, Complaint Counsel seeks an order that would require Respondents to violate the WVHCA’s Confidentiality Orders, without having ever filed a petition in that forum seeking the unredacted versions of the documents in question.

ARGUMENT

Complaint Counsel’s Motion should be denied because the Confidentiality Order forbids Respondents from disclosing the requested testimony and documents. Instead of forcing Respondents to violate their obligations to the WVHCA, Complaint Counsel should petition the WVHCA directly for access to the confidential materials—a request Respondents would not oppose.

I. THE CONFIDENTIALITY ORDERS FORBID RESPONDENTS FROM DISCLOSING THE REQUESTED TRANSCRIPTS AND DOCUMENTS.

The Confidentiality Orders forbid Respondents from producing unredacted versions of the requested documents. The Sealing Order is clear that transcripts for confidential portions of hearings before the WVHCA “shall . . . be sealed.” (Mot., Ex. A.) It also provides that

⁵ Complaint Counsel also sought these same materials by *subpoena duces tecum* served on the WVHCA on December 18, 2015. (See Ex. C (Jan. 11, 2016 Ltr.)) In response, the WVHCA cited the Confidentiality Orders and refused to produce the requested document. (*Id.*) Thereafter, non-party Steel of West Virginia inadvertently produced unredacted versions of the CON transcripts and documents to Complaint Counsel. Recognizing the validity of the Sealing Order and the Protective Orders, Complaint Counsel destroyed those materials upon notice of the inadvertent production. (Ex. D (Feb. 10, 2016 email from A. Gilman to R. Craig and T. Zurawski).)

confidential documents related to the hearings be treated “in accordance with the Protective Order.” (*Id.*) The Protective Order, in turn, specifically limits the persons permitted to access the confidential materials so as to include only those who “need to know” about them for purposes of the CON proceedings. (Protective Order ¶ 4.) It then states that “Confidential Materials produced pursuant to the terms of this Protective Order can only be used in conjunction with this administrative hearing and for no other purpose.” (*Id.* ¶ 11.) In sum, under the Confidentiality Orders, Respondents may not disclose testimony and documents deemed confidential in the CON proceedings.

Complaint Counsel argues that the Protective Order applies only to a party *receiving* confidential materials, and does “not restrict the producing party’s disclosure of its own documents.” (Mot. at 4-5.) But the Protective Order states that materials “produced pursuant to the terms of this Protective Order **can only be used in conjunction with this administrative hearing and for no other purpose.**” (Protective Order ¶ 11 (emphasis added).) Thus, contrary to Complaint Counsel’s position, Respondents cannot produce the requested materials.

Complaint Counsel also seeks to rely on the Protective Order’s clarification that its terms do not “imply” that materials falling within its scope are “properly discoverable or not properly discoverable . . . in this matter or any other proceeding.” (Mot. at 5; Protective Order ¶ 5.) But this clause provides no firmer footing for Complaint Counsel’s Motion. Even privileged documents may be deemed “discoverable” in the sense that they fall within the scope of discovery set forth in Rule 3.31(c). *See, e.g., Burlington N. & Santa Fe Ry. v. U.S. Dist. Ct. for the Dist. of Mont.*, 408 F.3d 1142, 1147 (9th Cir. 2005) (noting that a “party [may] withhold[] information otherwise discoverable under these rules by claiming that it is privileged”). The question actually at issue is whether Respondents must produce otherwise discoverable materials

notwithstanding the Confidentiality Orders. Given the plain terms of the Confidentiality Orders, the answer is no.

Complaint Counsel's cases do not compel a contrary result. Complaint Counsel has cited two cases where a litigant in federal court attempts to evade discovery requests on the basis of a protective order entered in a prior federal proceeding. (*See* Mot. at 6-7 (citing *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 92 F.R.D. 67, 68 (S.D.N.Y. 1981) and *Deford v. Schmid Prods. Co., Div. of Schmid Labs., Inc.*, 120 F.R.D. 648, 655 (D. Md. 1987)).) Neither case addresses the issue implicated here, namely whether Respondents must jeopardize their reputation and ability to do business before the WVHCA in the ordinary course of business by producing the protected materials. Further, unlike the district courts who issued the protective orders considered in *Carter-Wallace* and *Deford*, as a state agency the WVHCA has its own independent interest in maintaining the confidentiality of its proceedings and files. The district courts in *Carter-Wallace* and *Deford* did not have to grapple with any similar considerations, as they only needed to decide when a protective order entered in a prior federal proceeding may limit a party's discovery obligations in a subsequent federal case.

The other cases Complaint Counsel cite show that Respondents may *not* disregard the Confidentiality Orders. Complaint Counsel admits that the "first inquiry should be whether the prior confidentiality order intends to prohibit the discovery of the protected materials in other suits." (Mot. at 8 (quoting *Shire Dev., LLC v. Mylan Pharm.*, No: 8:12-cv-1190-T-30AEP, 2013 U.S. Dist. LEXIS 181134, at *8 (M.D. Fla. 2013).) The Protective Order here plainly *does* intend to prohibit such discovery; materials produced thereunder "can *only* be used in conjunction with this administrative hearing and for no other purpose." (Protective Order ¶ 11 (emphasis added).) Complaint Counsel also seeks to rely on a magistrate judge's order which

briefly mentioned that a protective order entered in a prior case could not shield documents from discovery because it “expressly disclaim[s] any effect on other cases.” *Deford*, 120 F.R.D. at 655; (*see also* Mot. at 6). Again, the Confidentiality Orders here contain no such disclaimer, but instead expressly provide that the materials must remain confidential outside the CON proceedings. (Protective Order ¶ 11.)

Thus, the Court should deny Complaint Counsel’s Motion.

II. COMPLAINT COUNSEL MUST DIRECT ITS REQUEST TO THE WVHCA.

If Complaint Counsel wants Respondents to produce documents sealed in a prior proceeding, it must first approach the tribunal that issued the sealing order—the WVHCA—before seeking an order that Respondents violate that order. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1132 (9th Cir. 2003) (holding that “a collateral litigant” should make a “request to the issuing court to modify an otherwise proper protective order”) (emphasis added); *Mugworld, Inc. v. G.G. Marck & Assocs., Inc.*, No. 405CV441, 2007 WL 2229568, at *1 (E.D. Tex. June 15, 2007) (“[W]hen the other matter is ongoing, courts have held that any request necessitating the modification of the protective order be directed to the issuing court.”). This inquiry ensures “as a matter of comity” that one tribunal “respects the order” of another. *Dushkin Pub. Grp., Inc. v. Kinko’s Serv. Corp.*, 136 F.R.D. 334, 335 (D.D.C. 1991). The principle of comity applies to state and federal agencies alike. *See Sauer v. U.S. Dep’t of Educ.*, 668 F.3d 644, 652 n.7 (9th Cir. 2012) (“[C]omity direct[s] us to apply the same interpretative approach [of deference] when considering the discretion of a state agency [as compared with federal agencies].”).

Complaint Counsel, however, has not taken the steps necessary to secure the materials it seeks from the WVHCA. In particular, Complaint Counsel never filed a motion with the WVHCA requesting the modification of the Confidentiality Orders, even though Respondents

informed Complaint Counsel that they would *not* oppose such a motion made to the WVHCA. This inaction is consistent with Complaint Counsel's behavior with respect to the Confidentiality Orders. Among other things, they failed to challenge the entry of the Sealing Order; they did not object when the WVHCA excluded their representatives from the confidential portions of the CON hearings; Complaint Counsel declined to challenge the WVHCA's objections to producing requested materials; and when non-party Steel of West Virginia inadvertently produced unredacted versions of the documents to Complaint Counsel, Complaint Counsel complied with the request to destroy those materials pursuant to the Confidentiality Orders. (*See* Ex. D (Feb. 10, 2016 email from A. Gilman to R. Craig and T. Zurawski).)

In sum, Complaint Counsel has recognized the validity of the Confidentiality Orders, but has not taken the necessary steps to secure confidential materials from the WVHCA.

CONCLUSION

Respondents respectfully request that the Court deny Complaint Counsel's Motion.

Dated: March 7, 2016

Respectfully submitted,

/s/ Geoffrey S. Irwin

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, 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, Rm. H-113
Washington, DC 20580

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

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Chief Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

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/s/ Geoffrey S. Irwin

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EXHIBIT A

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

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

Docket No. 9366

**RESPONDENT CABELL HUNTINGTON HOSPITAL, INC.'S OBJECTIONS AND
RESPONSES TO THE FEDERAL TRADE COMMISSION'S
SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS (NOS. 1-4)**

Pursuant to Federal Trade Commission's ("FTC") Rule of Practice, 16 C.F.R. § 3.37(b), Respondent Cabell Huntington Hospital, Inc. ("Cabell"), by and through its undersigned counsel, hereby objects and responds to the FTC's Second Set of Requests for Production ("RFPs") as follows:

PRELIMINARY STATEMENT

1. Cabell hereby responds to the RFPs as it interprets and understands the RFPs set forth therein. If the FTC subsequently asserts an interpretation of any RFP that differs from Cabell's understanding, Cabell reserves the right to supplement its objections and/or responses.

2. Any statement that Cabell will produce documents in response to any RFP does not constitute a representation that Cabell possesses any such documents, or that such documents exist at all, and is not to be construed as an admission with respect to any issue in this action.

CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER**SPECIFIC OBJECTIONS AND RESPONSE TO REQUEST FOR PRODUCTION NO. 1**

Cabell incorporates by reference each of its General Objections as though fully set forth herein. Cabell objects to this RFP to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, and/or any other applicable common law or statutory privileges, doctrines or immunities. Cabell incorporates by reference its Objection to Paragraph A of the FTC's Instructions on the basis that the time period set forth is overbroad, unduly burdensome, and imposes unnecessary cost on Cabell. In response to the Second Request, Cabell provided documents received or created between January 2010 and June 2015. No basis exists to expand the relevant time period for discovery in this case.

Cabell objects to this RFP as overbroad and unduly burdensome because it asks for "all" documents, without any limitation. Cabell objects to the use of the term "participation" as vague, ambiguous, and undefined or not susceptible to a single meaning.

Subject to and without waiving Cabell's objections and based upon Cabell's understanding of this RFP, Cabell responds as follows: Cabell has already produced all non-privileged, non-immune, and responsive documents or things in its possession, custody, or control in the course of the Second Request.

REQUEST FOR PRODUCTION NO. 2

All materials produced, received, or used, and all testimony given or proffered by the Company, St. Mary's, and their consultants or experts, in the West Virginia Health Care Authority's Certificate of Need proceeding relating to the Relevant Transaction, including, but not limited to, all documents and data, all discovery responses, all expert reports, all un-redacted transcripts of testimony, and all exhibits and demonstratives used or referenced at any hearing.

SPECIFIC OBJECTIONS AND RESPONSE TO REQUEST FOR PRODUCTION NO. 2

Cabell incorporates by reference each of its General Objections as though fully set forth herein. Cabell objects to this RFP to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, and/or any other applicable common law or statutory

CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER

privileges, doctrines or immunities. Cabell objects to this RFP because it seeks sealed materials subject to the Protective Order issued by the West Virginia Health Care Authority. Cabell is bound by that order and will not disclose the sealed transcripts.

Cabell objects to this RFP as unduly burdensome because the FTC attended the CON proceeding and now seeks duplicative discovery and to circumvent the Protective Order issued by the West Virginia Health Care Authority. Cabell objects to this RFP as overbroad and unduly burdensome because it asks for “all” materials, without any limitation. Cabell objects to this RFP to the extent it requests Cabell to produce or otherwise analyze documents or other information that is not within the possession, custody, or control of Cabell, or to prepare any document or other information that does not already exist.

Subject to and without waiving Cabell’s objections and based upon Cabell’s understanding of this RFP, Cabell responds as follows: Cabell shall produce non-privileged, non-immune, and responsive documents or things in its possession, custody, or control created after June 1, 2015.

REQUEST FOR PRODUCTION NO. 3

All documents used or consulted by the Company in responding to Complaint Counsel’s Interrogatories or Requests for Admission in this matter.

SPECIFIC OBJECTIONS AND RESPONSE TO REQUEST FOR PRODUCTION NO. 3

Cabell incorporates by reference each of its General Objections as though fully set forth herein. Cabell objects to this RFP to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, and/or any other applicable common law or statutory privileges, doctrines or immunities. Cabell objects to this RFP as overbroad and unduly burdensome because it asks for “all” documents, without any limitation. Cabell further objects to this RFP as overbroad and unduly burdensome because this RFP consists of forty-three

CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER

Dated: February 1, 2016

Respectfully submitted,

/s/ Geoffrey S. Irwin

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CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER

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EXHIBIT B

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

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

PALLOTTINE HEALTH SERVICES, INC.'S RESPONSES
TO COMPLAINT COUNSEL'S SECOND SET OF REQUESTS FOR PRODUCTION
ISSUED TO PALLOTTINE HEALTH SERVICES, INC.

Pursuant to Federal Trade Commission's ("FTC") Rule of Practice, 16 C.F.R. § 3.37(b), Respondent Pallottine Health Services, Inc. ("PHS"), by and through its undersigned counsel, hereby objects and responds to Complaint Counsel's Second Set of Requests for Production ("Requests") served on Pallottine Health Service, Inc. on December 30, 2015, as follows:¹

PRELIMINARY STATEMENT

1. PHS hereby responds to the Requests as it interprets and understands the Requests set forth therein. If the FTC subsequently asserts an interpretation of any Request that differs from the understanding of PHS, PHS reserves the right to supplement its objections and/or responses.

¹ PHS notes that Complaint Counsel's Requests were propounded to PHS and not to St. Mary's Medical Center, Inc. ("St. Mary's"), which is a separate entity. Thus, PHS is responding to these Requests based on its own records and information, including records and information of St. Mary's reasonably available to it, but does not purport to respond on behalf of St. Mary's.

Responses to Complaint Counsel's Second Set of Requests for Production, whether or not specifically set forth or referred to therein.

**SPECIFIC OBJECTIONS AND RESPONSES TO
COMPLAINT COUNSEL'S SECOND SET OF REQUESTS FOR PRODUCTION**

Subject to and without waiving these General Objections, PHS specifically objects and responds to the Requests as follows:

REQUEST FOR PRODUCTION NO. 1:

All materials produced, received, or used, and all testimony given or proffered by the Company, Cabell Huntington Hospital, and their consultants or experts, in the West Virginia Health Care Authority's Certificate of Need proceeding relating to the Relevant Transaction, including, but not limited to, all documents and data, all discovery responses, all expert reports, all un-redacted transcripts of testimony, and all exhibits and demonstratives used or referenced at any hearing.

SPECIFIC OBJECTIONS AND RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

PHS incorporates by reference each of its General Objections as though fully set forth herein. PHS objects to this Request to the extent it seeks materials protected by the attorney-client privilege, the work product doctrine, and/or any other applicable common law or statutory privileges, doctrines or immunities. PHS objects to this Request to the extent that it seeks materials subject to the Protective Order issued by the West Virginia Health Care Authority. PHS is bound by that order and will not disclose the sealed transcripts.

PHS objects to this Request as unduly burdensome because the FTC attended the CON proceeding and now seeks duplicative discovery and to circumvent the Protective Order issued by the West Virginia Health Care Authority. PHS objects to this Request as overbroad and unduly burdensome because it asks for "all" materials, without any limitation. PHS objects to this Request to the extent that it requests PHS to produce or otherwise analyze documents or other information that is not within the possession, custody, or control of PHS, or to prepare any document or other information that does not already exist.

Subject to and without waiving PHS's objections and based upon PHS's understanding of this Request, PHS responds that it will produce non-privileged, non-immune, and responsive documents or things in its possession, custody, or control created after June 1, 2015.

REQUEST FOR PRODUCTION NO. 2:

All documents used or consulted by the Company in responding to Complaint Counsel's Interrogatories or Requests for Admission in this matter.

SPECIFIC OBJECTIONS AND RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

PHS incorporates by reference each of its General Objections as though fully set forth herein. PHS objects to this Request to the extent it seeks documents protected by the attorney-client privilege, the work product doctrine, and/or any other applicable common law or statutory privileges, doctrines or immunities. PHS objects to this Request as overbroad and unduly burdensome because it asks for "all" documents, without limitation. PHS further objects to this Request as overbroad and unduly burdensome because this Request consists of thirty-three separate requests, and seeks to impose obligations on PHS beyond those imposed by the Court's Scheduling Order or the FTC's Rules of Practice.

Subject to and without waiving PHS's objections and based upon PHS's understanding of this Request, PHS responds that it will produce non-privileged, non-immune, and responsive documents or things in its possession, custody, or control not otherwise produced in the course of the Second Request.

REQUEST FOR PRODUCTION NO. 3:

All documents referenced in the Company's Initial Disclosures in this matter.

Dated: February 1, 2016

Respectfully submitted,

/s/ H. Holden Brooks

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*Counsel for Respondents
Pallottine Health Services, Inc.
and St. Mary's Medical Center, Inc.*

EXHIBIT C

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Governor

James L. Pitrolo, Jr.
Chairman

Karen L. Bowling, Cabinet Secretary
West Virginia Department of
Health and Human Resources



Board Members
Sonia D. Chambers
Marilyn G. White

January 11, 2016

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

Via Federal Express 2nd Day

Re: In the Matter of Cabell Huntington Hospital, Inc.,
Pallottine Health Services, Inc., and St. Mary's Medical Center, Inc.
Docket No. 9366
Subpoena *Duces Tecum* Returnable January 11, 2016

Dear Ms. Balbach:

Pursuant to the Subpoena *Duces Tecum*, please find the West Virginia Health Care Authority's ("Authority") response set forth below:

1. In response to Request No. 1, the Authority transmitted agreed upon data for the year 2014 to the Federal Trade Commission ("FTC") on January 7, 2016.
2. In response to Request No. 2, the Authority produced a revised Exhibit A to the existing Limited Data Use Agreement to Stephanie Cummings on January 8, 2015.
3. In response to Request No. 3, the Authority has provided five (5) folders containing the Authority's file on *In re: Cabell Huntington Hospital, Inc., CON File No. 14-2-10375-A*. Please note that documents admitted subject to a protective order have been omitted. In addition, the Authority did not provide copies of the prehearing or hearing transcripts which must be obtained directly from the court reporter.

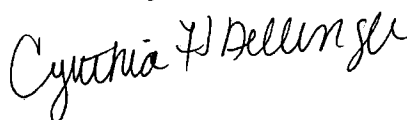
Jeanine Balbach, CC-5506
Federal Trade Commission
January 11, 2016
Page 2

In addition to the case file, the Authority conducted a search and has included hard copies of individual e-mail correspondence. This is attached as Exhibit 3.

4. In response to Request No. 4, the Authority has attached e-mail correspondence. This is attached as Exhibit 4.
5. In response to Request No. 5, the Authority has attached e-mail correspondence. This is attached as Exhibit 5.
6. In response to Request No. 6, the Authority has attached the requested information for the time frame specified in the subpoena, January 1, 2013, to the present. Included is the discount contract list and the order denying the request for the specified time frame.

If you have any questions about the enclosed documents, please do not hesitate to contact either myself or Marianne Kapinos, General Counsel.

Sincerely,



Cynthia H. Dellinger
Assistant General Counsel

Enclosures

CHD/jrh

EXHIBIT D

RE: FTC v. Cabell (Dkt. No. 9366) - Correspondence re SWVA's Violation of Sealing Order 

Tara Zurawski to: Craig, Robert B.

02/11/2016 05:50 PM

4-3879

Cc: "Gilman, Alexis", "Cabell_Service%JONESDAY@JonesDay.com", "Arens, Elizabeth", "Kantor, Elisa", "Balbach, Jeanine", "James R. Bailes", "Davenport, Melissa", "Melissa Eakle Leasure", "milw-smmcservice@foley.com", "McDonald,

Rob -

Thank you for your quick response. At this time, we have no further requests with regard to this issue.

Sincerely,

Tara

Tara Lynn R. Zurawski
Associate

[JONES DAY® - One Firm WorldwideSM](#)

51 Louisiana Avenue, N.W.
Washington, DC 20001
Office +1.202.879.3879
tzurawski@jonesday.com



Please consider the environment before printing this e-mail.

From: "Craig, Robert B." <craigr@taftlaw.com>

To: "Gilman, Alexis" <agilman@ftc.gov>, Tara Zurawski <tzurawski@jonesday.com>

Cc: "Brock, Thomas H." <TBROCK@ftc.gov>, "Arens, Elizabeth" <earens@ftc.gov>, "Kantor, Elisa" <ekantor@ftc.gov>, "Balbach, Jeanine" <JBALBACH@ftc.gov>, "Davenport, Melissa" <mdavenport@ftc.gov>, "McDonald, Matthew D." <mmcdonald@ftc.gov>, "Perry, Michael" <mperry@ftc.gov>, "Seidman, Mark" <MSEIDMAN@ftc.gov>, "Yost, Michelle" <myost@ftc.gov>, "Hopkin, Nathaniel" <nhopkin@ftc.gov>, "Gans, Svetlana" <sgans@ftc.gov>, "Cummings, Stephanie" <srcummings@ftc.gov>, "Sheinberg, Samuel I." <SSHEINBERG@ftc.gov>, "Vieux, Steve" <SVIEUX@ftc.gov>, "Reinhart, Tara" <treinhart@ftc.gov>, "milw-smmcservice@foley.com" <milw-smmcservice@foley.com>, "Cabell_Service%JONESDAY@JonesDay.com" <Cabell_Service%JONESDAY@JonesDay.com>, "James R. Bailes" <jrb@bcyon.com>, "Thomas L. Craig" <tlc@bcyon.com>, Melissa Eakle Leasure <mel@bcyon.com>

Date: 02/11/2016 08:48 AM

Subject: RE: FTC v. Cabell (Dkt. No. 9366) - Correspondence re SWVA's Violation of Sealing Order

Tara:

Please let me know if you need anything further from SWVA relating to this issue.

Rob Craig

-----Original Message-----

From: Gilman, Alexis [<mailto:agilman@ftc.gov>]

Sent: Wednesday, February 10, 2016 11:05 PM

To: Craig, Robert B.; Tara Zurawski

Cc: Brock, Thomas H.; Arens, Elizabeth; Kantor, Elisa; Balbach, Jeanine; Nichols, Jeanne L.;

Davenport, Melissa; McDonald, Matthew D.; Perry, Michael; Schneider, Marc W.; Seidman, Mark;

Yost, Michelle; Hopkin, Nathaniel; Gans, Svetlana; Cummings, Stephanie; Sheinberg, Samuel I.;

Vieux, Steve; Reinhart, Tara; milw-smmcservice@foley.com;

Cabell_Service%JONESDAY@JonesDay.com; James R. Bailes; Thomas L. Craig; Melissa Eakle

Leasure

Subject: RE: FTC v. Cabell (Dkt. No. 9366) - Correspondence re SWVA's Violation of Sealing Order

Rob, Tara -

Complaint Counsel still maintains that Respondents are required to produce the CON transcript with Respondents' own confidential material unredacted pursuant to our properly issued subpoena.

Nonetheless, in order to accommodate SWVA's request, I can confirm that this document was deleted from our files earlier today - but we in no way waive any rights or claims we have to the production of the unredacted CON transcript by Respondents.

Regards,

Alexis

From: Craig, Robert B. [<mailto:craigr@taftlaw.com>]

Sent: Wednesday, February 10, 2016 10:12 AM

To: Tara Zurawski

Cc: Brock, Thomas H.; Gilman, Alexis; Arens, Elizabeth; Kantor, Elisa; Balbach, Jeanine; Nichols,

Jeanne L.; Davenport, Melissa; McDonald, Matthew D.; Perry, Michael; Schneider, Marc W.;

Seidman, Mark; Yost, Michelle; Hopkin, Nathaniel; Gans, Svetlana; Cummings, Stephanie; Sheinberg,

Samuel I.; Vieux, Steve; Reinhart, Tara; milw-smmcservice@foley.com;

Cabell_Service%JONESDAY@JonesDay.com; James R. Bailes; Thomas L. Craig; Melissa Eakle

Leasure

Subject: RE: FTC v. Cabell (Dkt. No. 9366) - Correspondence re SWVA's Violation of Sealing Order

Tara:

On Monday, I spoke with Alexis Gilman and Stephanie Cummings of the FTC about SWVA's inadvertent production of the unreacted transcripts from the CON hearing. They assured me that the hard copies of the transcripts would be destroyed and that any electronic copy would be deleted from the FTC's document system. They will provide me with written confirmation of the destruction of the documents when it occurs, and I will pass that assurance along to you. I discussed this process with Respondents' counsel at the SWVA depositions, Devin Winklosy and Aaron Healey, and they agreed that it was a proper response.

This will also confirm that SWVA has not provided the transcripts to any other persons.

Feel free to contact me if you have any questions or concerns.

Rob Craig

From: Tara Zurawski [<mailto:tzurawski@jonesday.com>]

Sent: Sunday, February 07, 2016 9:42 PM

To: Craig, Robert B.

Cc: tbrock@ftc.gov; agilman@ftc.gov; earens@ftc.gov; ekantor@ftc.gov; jbalbach@ftc.gov; jnichols@ftc.gov; mdavenport@ftc.gov; mmcdonald@ftc.gov; mperry@ftc.gov; mschneider@ftc.gov; mseidman@ftc.gov; myost@ftc.gov; nhopkin@ftc.gov; sgans@ftc.gov; srcummings@ftc.gov; ssheinberg@ftc.gov; svieux@ftc.gov; treinhart@ftc.gov; milw-smmcservice@foley.com; Cabell_Service%JONESDAY@JonesDay.com; James R. Bailes; Thomas L. Craig; Melissa Eakle
Leasure

Subject: FTC v. Cabell (Dkt. No. 9366) - Correspondence re SWVA's Violation of Sealing Order

Counsel -

Please see the attached correspondence regarding SWVA's violation of the WVHCA' s Sealing Order.

Sincerely,

Tara

Tara Lynn R. Zurawski
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Office +1.202.879.3879

tzurawski@jonesday.com

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Taft /

Robert B. Craig / Northern Kentucky Partner in Charge

Taft Stettinius & Hollister LLP

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EXHIBIT E

Re: Cabell: CON Transcripts 

Tara Zurawski to: Gans, Svetlana
4-3879

Cc: "Gilman, Alexis", "bludwig@foley.com", "HBrooks@foley.com", "Seidman, Mark",
"Yost, Michelle", Geoffrey S Irwin, Kerri L Ruttenberg

Bcc: Michelle S Delos Angeles

PUBLIC

03/01/2016 02:18 PM

Svetlana -

We disagree with your representation that Respondents have never previously stated that we would not oppose a motion made to the WWHCA to modify the sealing order. I expressly noted that position on our telephonic meet and confer on February 1, 2016.

We stand by the position that the FTC must seek modification of the at order from the WWHCA before we can produce the sealed transcripts. We reiterate that we will not oppose such a motion before the WWHCA. We do not believe that a motion to compel before Judge Chappell resolves this issue and will oppose your intended motion.

Sincerely,
Tara

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Office +1.202.879.3879
tzurawski@jonesday.com



Please consider the environment before printing this e-mail.

"Gans, Svetlana" <sgans@ftc.gov> wrote on 03/01/2016 11:05:47 AM:

> From: "Gans, Svetlana" <sgans@ftc.gov>
> To: "Tara Zurawski (tzurawski@jonesday.com)"
> <tzurawski@jonesday.com>, "HBrooks@foley.com" <HBrooks@foley.com>,
> "bludwig@foley.com" <bludwig@foley.com>
> Cc: "Gilman, Alexis" <agilman@ftc.gov>, "Seidman, Mark"
> <MSEIDMAN@ftc.gov>, "Yost, Michelle" <myost@ftc.gov>
> Date: 03/01/2016 11:05 AM
> Subject: Cabell: CON Transcripts
>
> Counsel:
>
> Thank you for informing us that Cabell would not oppose a motion by
> Complaint Counsel to the HCA to disclose the sealed transcripts and
> other information Cabell marked confidential in the CON proceeding.
>
> Holden, can St. Mary's confirm that it also does not oppose
> Complaint Counsel's receipt of the CON hearing transcripts and other
> materials Cabell marked as confidential in the CON proceedings, on
> the possibility that any of that information relates to St. Mary's?
>
> Your message yesterday was the first time that Cabell informed us
> that it would not oppose a motion by Complaint Counsel to obtain
> this information from the CON proceeding. We will consider pursuing
> this matter with the HCA, but in the meantime, given the timing of
> the Part 3 hearing, we plan to file a motion to compel with Judge
> Chappell. We continue to believe the Part 3 proceeding is the
> proper venue for this dispute.
>
> Please let us know by 3pm today if you will oppose the motion before
> Judge Chappell.

> that it would not oppose a motion by Complaint Counsel to obtain
> this information from the CON proceeding. We will consider pursuing **PUBLIC**
> this matter with the HCA, but in the meantime, given the timing of
> the Part 3 hearing, we plan to file a motion to compel with Judge
> Chappell. We continue to believe the Part 3 proceeding is the
> proper venue for this dispute.
>
> Please let us know by 3pm today if you will oppose the motion before
> Judge Chappell.
>
> Thanks,
> Svetlana
>
> Svetlana S. Gans
> Bureau of Competition
> 400 7th Street, SW
> Maildrop 6509
> Washington, D.C. 20024
> (202) 326-3708 phone
> (202) 326-2884 fax
> sgans@ftc.gov
>

=====
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private, confidential, or protected by attorney-client or other privilege. If
you received this e-mail in error, please delete it from your system without
copying it and notify sender by reply e-mail, so that our records can be
corrected.
=====

Notice of Electronic Service

I hereby certify that on March 07, 2016, I filed an electronic copy of the foregoing Respondents' Opposition to Motion to Compel Production of Testimony, Documents, and Information Submitted to State Agency, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on March 07, 2016, I served via E-Service an electronic copy of the foregoing Respondents' Opposition to Motion to Compel Production of Testimony, Documents, and Information Submitted to State Agency, upon:

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Federal Trade Commission
TBrock@ftc.gov
Complaint

Alexis Gilman
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agilman@ftc.gov
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Attorney