

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

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’
MOTION FOR DISCLOSURE OF THIRD-PARTY DECLARATIONS**

Respondents’ Motion for Disclosure of Third Party Declarations to Respondents’ Employees should be denied. The Protective Order entered in this case on November 6, 2015, pursuant to Rule 3.31(d) of the Federal Trade Commission (“FTC”) Rule of Practice (the “Rules”), provides a clear process for handling materials designated as confidential. 16 C.F.R. § 3.31(d) & Appendix A. Numerous third parties relied on these confidentiality protections, which are followed in every Part 3 litigation. Respondents’ proposal to deviate from this well-established process is both inappropriate and unnecessary.

The Protective Order, which follows the standard protective order at Appendix A of Rule 3.31 *verbatim*, allows third parties to designate documents submitted in this matter as confidential material. Protective Order ¶ 2. Each of the declarations Respondents seek to disclose were designated confidential by the third parties who submitted them. The Protective

Order prescribes the only people who may access confidential materials and specifically excludes all of Respondents' employees. *Id.* ¶ 7. Therefore, under the Protective Order, Respondents' counsel cannot disclose the confidential third-party declarations to Respondents' employees.

Nor, we respectfully submit, should this Court modify the Protective Order to accommodate Respondents' request for disclosure. Rule 3.31(d) mandates the automatic entry of the standard protective order in every case. The Rule reflects an express policy decision to protect the confidential information of third parties from disclosure to any employees of respondents in Part 3 litigation.

Finally, Respondents suffer no prejudice here. They have already received Complaint Counsel's final proposed witness list, which reveals the identity of any third-party witnesses Complaint Counsel intends to call at trial. Moreover, for any declarations to be offered as evidence at trial, Respondents will have the opportunity to oppose any motions for *in camera* treatment of these declarations in advance of trial.

BACKGROUND

During the investigation preceding this matter, representatives from numerous third parties submitted sworn declarations supporting Complaint Counsel's case in connection with the pre-Complaint Part 2 investigation. In each case, the third party specifically requested confidential treatment of the content of its declaration and the identity of the declarant and the declarant's employer. Complaint Counsel provided those confidential third-party declarations to Respondents in its initial disclosures in this matter on December 3, 2015. Complaint Counsel's Initial Disclosures 2. Not until approximately two months later did Respondents' counsel demand that Complaint Counsel unilaterally strip the confidentiality designation from every third-party declaration to allow *all* of Respondents' employees to review the declarations. *See*

Respondents' Motion for Disclosure Ex. A (Email from T. Zurawski to A. Gilman, Jan. 30, 2015).

Complaint Counsel explained that the Rules and the Protective Order set forth a process for handling third-party confidential information and that Respondents' request would require modifying the Protective Order. Ex. 1 (Letter from A. Gilman to T. Zurawski, Feb. 11, 2016). Complaint Counsel later explained that Respondents could seek to disclose any declarations used at trial by opposing motions for *in camera* treatment as set forth in the Scheduling Order. Ex. 2 (Letter from A. Gilman to T. Zurawski, Feb. 18, 2016). Nevertheless, Respondents have continued to demand that Complaint Counsel take unilateral action to remove the confidentiality requested by, and guaranteed to, third-party declarants under the Protective Order and they now seek judicial intervention.

ARGUMENT

I. THE PROTECTIVE ORDER IS MANDATORY AND IT DOES NOT ALLOW DISCLOSURE OF THIRD-PARTY CONFIDENTIAL MATERIAL TO RESPONDENTS' EMPLOYEES

The Protective Order states that “third parties, in complying with informal discovery requests . . . or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material.” Protective Order ¶ 2. Additionally, the “identity of a third party submitting such confidential material shall also be treated as confidential material for purposes of this Order where the submitter has requested such confidential treatment.” *Id.* The Protective Order also prescribes the only people who may access confidential discovery material and it deliberately excludes Respondents' employees. *Id.* ¶ 7 (allowing disclosure to outside counsel “provided they are not employees of a respondent,” and to anyone retained to assist outside counsel “provided they are not affiliated in any way with a respondent”).

Respondents do not dispute that the declarations have been designated confidential, or that the Protective Order precludes their employees from accessing confidential material. Nor do

they seek to amend the Protective Order to provide disclosure to their employees. Instead, Respondents demand that Complaint Counsel unilaterally override both the terms of the Protective Order and the third parties' requests for confidentiality based on Respondents' view that some of the material contained in the declarations allegedly is not confidential.

Respondents' analysis is rife with both factual and legal mistakes.

Factually, Respondents' repeatedly state, incorrectly, that *Complaint Counsel* designated the declarations confidential. In fact, the *third-party declarants* designated the declarations confidential, requesting that the declaration receive confidential treatment and that the identity of the declarant and the declarant's employer remain confidential, which the Protective Order explicitly allows. Protective Order ¶ 2.

Legally, Respondents mistakenly rely on decisions in federal court to suggest that the Court here can modify the Protective Order prescribed by the Part 3 regulations.¹ In federal court, protective orders are governed by Federal Rule of Civil Procedure 26(c), which allows a party to move for a protective order to avoid "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Federal Rule 26 expressly extends discretion to a federal court, upon a showing of good cause, to enter a protective order that fits the specific needs of the case before the court. This includes the discretion to include a provision in the protective order "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or *be revealed only in a specific way.*" Fed. R. Civ. P. 26(c)(1)(G) (emphasis added). Federal Rule 26 thus grants federal courts broad discretion to

¹ Because the standard protective order is required by regulation, it is unclear whether even the Commission has the authority to modify the Protective Order without first going through the formal rulemaking process.

issue tailored protective orders, to decline from issuing any protective orders, or to modify protective orders.

Rule 3.31, in contrast, specifies the specific protective order that will be entered in all Part 3 litigation. The Commission promulgated Rule 3.31 to create a uniform, mandatory protective order tailored specifically for litigation before the Commission. The Commission's rules are controlling: "The adjudicative rules of the Commission, as interpreted by the Commission and the courts and by ALJs during litigation, are the authority under which proceedings are conducted." FTC Operating Manual for Administrative Litigation § 10.7, *available at* <https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch10administrativelitigation.pdf>. And while the Federal Rules "may be consulted" in resolving issues that might arise in Part 3 litigation, consultation is appropriate only when the "adjudicative rules are derived from the Federal Rules of Civil Procedure." *Id.*²

The Commission confirmed the mandatory nature of the standard protective order in statements during the rulemaking process. The Commission decided to amend Rule 3.31(d) precisely to avoid "disputes arising from case-specific orders." *See* FTC Rules of Practice, Proposed Rule Amendments and Request for Public Comment, 73 Fed. Reg. 58,832, 58,834

² The federal court cases Respondents cite are distinguishable. *See, e.g., FTC v. Sysco Corp.*, 83 F. Supp. 3d 271 (D.D.C. 2015) (motion seeking to amend protective order, under the Federal Rules, to disclose the identity of declarants whose declarations were appended as exhibits to a preliminary injunction motion). As another example, in *Schiller v. City of N.Y.*, Nos. 04 Civ. 7921, 7922 (KMK)(JCF), 2007 U.S. Dist. LEXIS 4285 (S.D.N.Y. Jan. 19, 2007), the court entered a stipulated protective order pursuant to Federal Rule 26, which included the following unique provision granting each party the right to challenge the other's confidentiality designations in a motion to the court: "in the event that either party disagrees with the designation of particular material as 'Confidential,' such party shall attempt . . . to resolve the disagreement and , if the parties cannot resolve the matter, they may raise it with the court." 2007 U.S. Dist. LEXIS 4285, at *4. The court then applied the Federal Rule 26 "good cause" standard to one party's motion to remove the confidentiality designation from certain materials. *See id.* at *13-17.

(proposed Oct. 7, 2008) (to be codified at 16 C.F.R. pts. 3 and 4). The Commission was particularly concerned about the need to protect confidential third-party information from disclosure to employees of respondents³—the relief Respondents now seek. In response to public comments on the proposed Rules amendments, the Commission noted that relying on negotiated, case-specific protective orders would “reduce the confidence of third party submitters that their confidential submissions will be protected.” FTC Rules of Practice, Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804, 1812 (proposed Jan. 13, 2009) (to be codified at 16 C.F.R. pts. 3 and 4).

Finally, none of the FTC administrative orders Respondents cite support their position. All three of those orders arose from respondents’ motions for *in camera* treatment of exhibits under Rule 3.45 *at trial*. Unlike those cases, Respondents here seek disclosure of third parties’ confidential discovery material subject to Rule 3.31 and the Protective Order *during the discovery process*. Respondents cannot point to any provision of the Rules or any other authority suggesting that Complaint Counsel (or Respondents) can unilaterally (or by stipulation) “de-designate” material that a third party designated confidential, or that this Court may deviate from Rule 3.31 and modify the Protective Order. Because there is no such authority, Respondents’ requested relief cannot be granted.

³ In the notice and comment rulemaking, the Commission considered but rejected an comment to modify the proposed Rule 3.31(d) to allow in-house counsel to access confidential materials, explaining that the “Commission believes it is not sound policy to allow third party competitively sensitive information to be delivered to people who are in a position to misuse such information, even if inadvertently.” Interim Final Rules, 74 Fed. Reg. at 1813.

II. THE COURT SHOULD NOT MODIFY THE PROTECTIVE ORDER BECAUSE THIRD PARTIES HAVE RELIED ON THE ORDER'S GUARANTEE OF CONFIDENTIALITY

Even if the Protective Order can be amended—and Respondents' Motion does not even request that it be amended—it is far too late in this litigation to do so now. Before producing any third-party declarations to Respondents, Complaint Counsel notified each third party and sent each a copy of the Protective Order. The third parties produced their confidential business information based on the express representations from the litigants that it would be subject to the protections prescribed in the Protective Order. Given the language of the Protective Order, third parties had no reason to seek additional protection. *See* Order Denying Respondent's Motion to Amend the Protective Order 2, *In re McWane, Inc.*, FTC Docket No. 9351 (Aug. 8, 2012) [*McWane Order*] (Chappell, J.), available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120808aljorddenyrespmoamendprotectord.pdf> (“nonparties receiving subpoenas provided responsive information, and may well have foregone moving to quash the subpoenas or seek other relief, in reliance on the Protective Order then in place”). Third parties “have a right to expect that submissions designated by them as ‘confidential’ will be treated in accordance to the Protective Order.” *Id.* Modifying the Protective Order would violate those legitimate expectations. Further, doing so would severely undermine the Commission's articulated policy to guarantee automatic, robust protection to third-party confidential information. One of the Commission's goals in amending the Rules was to avoid uncertainty for third parties who submit information in Commission matters. Interim Final Rules, 74 Fed. Reg. at 1813. Creating such uncertainty by modifying the Protective Order (particularly *sua sponte*) will impair Commission investigations and the ability of parties to seek third-party discovery in future Part 3 matters.

III. MAINTAINING THE CONFIDENTIALITY OF THE THIRD-PARTY DECLARATIONS WILL NOT PREJUDICE RESPONDENTS

Respondents have articulated no reasons for failing to request access to third-party declarations for their employees earlier in the case or to assert any unique circumstances justifying a deviation from the standard protective order now. *See McWane* Order 2 (denying motion to amend standard protective order where respondent “failed to articulate any reason for failing to request access to confidential information for in-house counsel earlier in the case . . . or to assert any special circumstances that might justify deviation from the standard protective order language”). Complaint Counsel’s final proposed witness list is not confidential, which Respondents acknowledge. Respondents’ Motion for Disclosure 8. Thus, Respondents can now prepare their employee witnesses by telling them the identity of any third-party witnesses Complaint Counsel intends to present at trial, which, as Respondents’ note, is “[o]ne of the key pieces of information that parties exchange in every case.” *Id.* (quoting *FTC v. Sysco Corp.*, 308 F.R.D. 19, 22 (D.D.C. 2015)). Respondents are fully capable of mounting a defense by consulting their employees about Complaint Counsel’s proposed witnesses. Indeed, Respondents had the opportunity to depose all declarants who appeared on Complaint Counsel’s amended *preliminary* witness list. The identity of any third-party declarants not on the witness list has little relevance to Respondents’ trial preparation.

Respondents’ additional concern that they suffer prejudice because they cannot disclose the contents of the third-party declarations to their employees lacks merit. According to the Scheduling Order, Complaint Counsel must notify by March 7, 2016, any third parties whose confidential materials, including declarations, Complaint Counsel intends to offer at trial. Scheduling Order 2. At that point, third parties have until March 17, 2016, to move for *in camera* treatment of their declarations. *Id.* at 3. If they do not do so, any third-party declarations

actually offered into evidence will become part of the public record and Respondents' employees will be able to review them.⁴ Respondents may also oppose any third parties' motions for *in camera* treatment of declarations and thereby seek a ruling on whether those declarations contain confidential information. If this Court concludes that the declarations do not qualify for *in camera* treatment, Respondents' employees will be able to review them and prepare rebuttals at that time. Simply put, Respondents' Motion for Disclosure is premature and unnecessary. They merely seek disclosure of confidential materials earlier in the process than they are entitled to. Respondents cannot claim that abiding by the schedule set forth in this Court's Scheduling Order causes them undue prejudice.

CONCLUSION

For the foregoing reasons, Respondents Cabell Huntington Hospital, Inc. and St. Mary's Medical Center, Inc.'s Motion for Disclosure of Third Party Declarations to Respondents' Employees should be denied.

Respectfully submitted,

Dated: February 29, 2016

/s/ Alexis J. 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

⁴ Any third-party declarations that are not offered into evidence have no relevance to Respondents' defense.

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EXHIBIT 1



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February 11, 2016

VIA E-MAIL

Tara Lynn R. Zurawski
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001

Re: ***In the Matter of Cabell Huntington Hospital, Inc., et al., Docket No. 9366***

Dear Tara:

I write in your response to your letter dated February 9, 2016, regarding Respondents' request that we disclose the identities of third-party declarants and produce third-party declarations with competitively-sensitive information redacted. We have reviewed and considered your proposal.

The process for handling confidential information produced by third parties is clearly set forth in the Commission's Part 3 rules and the protective order entered in this case, which follows the standard protective order required by Rule 3.31. We do not believe there is a reason to deviate from the standard process and confidentiality protections in this case.

Moreover, the proposal you have outlined would require amending the protective order. Even assuming the protective order could be amended, it is an order of the Court, entered pursuant to Commission Rules, and it certainly cannot be amended by stipulation of the parties.

Sincerely,

/s/ Alexis J. Gilman
Alexis J. Gilman
Complaint Counsel

EXHIBIT 2



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February 18, 2016

VIA E-MAIL

Tara Lynn R. Zurawski
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001

Re: ***In the Matter of Cabell Huntington Hospital, Inc., et al., Docket No. 9366***

Dear Tara:

I write in your response to your February 17, 2016, regarding Respondents' request that we disclose the identities of third-party declarants and produce third-party declarations with competitively-sensitive information redacted, and to remove the confidentiality designation from Complaint Counsel's witness list.

First, your letter inaccurately characterizes my letter as a refusal to take any steps to ensure that only confidential information is properly designated as such. Rather, my letter stated that there was no reason to deviate from the standard process and confidentiality protections in this case so as to disclose the identities and content of declarations (to *all* of Respondents' employees). Moreover, we stated that your proposal for disclosing such declaration material would require an amendment to the protective order (assuming it could be amended) rather than a stipulation of the parties.

Second, Complaint Counsel and Cabell cannot unilaterally, or by stipulation, waive a *third party's* confidentiality request and protections under the Part 3 Rules and Paragraph 2 of the Protective Order. Indeed, Paragraph 2 of the Protective Order states in part that the "identity of a third party submitting such confidential information shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment." In this case, all declarants have requested that their identities, their employer's identity, and the content of their declaration remain confidential. Therefore, under the Part 3 Rules and Protective Order, we cannot agree to your request to disclose declarants' identities and declarations to all Respondents' employees, nor can we agree to the process laid out in your February 9, 2016, letter.

Third, the Scheduling Order already provides a process for declarations and other materials, to the extent that they are not confidential, to be disclosed. As you know, on March 7, parties that intend to offer confidential materials of a party or non-party as evidence at the

hearing must provide notice to the party or third party, at which point the party or third party must seek *in camera* treatment for those materials that it wishes to remain confidential; otherwise such materials are part of the public record. *See* Paragraph 7 of the Scheduling Order. Consequently, there is already a process for non-confidential declarations, or portions thereof, submitted as evidence at the hearing to be disclosed to Respondents.

Finally, we agree to remove the confidentiality designation from our preliminary witness list and will produce our final witness list tomorrow on a non-confidential basis so that there is no impediment to you sharing those lists with your client.

Sincerely,

/s/ Alexis J. Gilman
Alexis J. Gilman
Complaint Counsel

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

[PROPOSED] ORDER ON RESPONDENTS' MOTION FOR DISCLOSURE OF THIRD-PARTY DECLARATIONS TO RESPONDENTS' EMPLOYEES

On February 18, 2016, Respondents filed a motion permitting Respondents to disclose to their employees the third-party declarations Complaint Counsel has obtained in this case.

Respondents' motion is **DENIED**.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 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 also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

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

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Dated: February 29, 2016

/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.

February 29, 2016

By: s/ Jeanine Balbach

Notice of Electronic Service

I hereby certify that on February 29, 2016, I filed an electronic copy of the foregoing Complaint Counsel's Opposition to Respondents' Motion for Disclosure of Third-Party Declarations, with:

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

Donald Clark
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I hereby certify that on February 29, 2016, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Opposition to Respondents' Motion for Disclosure of Third-Party Declarations, upon:

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