

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.)

**COMPLAINT COUNSEL'S UNOPPOSED MOTION FOR ISSUANCE OF A
SUBPOENA AD TESIFICANDUM TO CONGRESSMAN EVAN JENKINS
UNDER RULE OF PRACTICE 3.36**

INTRODUCTION

As per this Court's Order of January 5, 2016, granting the parties permission to seek to take discovery from nonparty Congressman Evan Jenkins after the close of fact discovery, 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 *Ad Testificandum* to Congressman Jenkins, an elected official representing West Virginia's Third District. Respondents do not oppose Complaint Counsel's request for the issuance of a subpoena but take no position on the contents of this 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 *Ad Testificandum* for Congressman Evan Jenkins is attached at Exhibit A.

ARGUMENT

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

- (1) the information sought from the official or employee of the governmental agency is reasonable in scope;
- (2) for discovery, the appearance of the official or employee of the governmental agency falls within the limits of discovery under Rule 3.31(c)(1); and
- (3) for discovery, the information sought from the official or employee of the governmental agency cannot reasonably be obtained by other means.

The proposed Subpoena *Ad Testificandum* to Congressman Jenkins meets all requirements of Rule 3.36(b). Movant Complaint Counsel is sensitive to the responsibilities of, and potential burden upon, Congressman Jenkins. Because Respondents have placed Congressman Jenkins on their Final Proposed Witness List (which was served on March 7, 2016), however, Complaint Counsel is compelled to seek testimony from Congressman Jenkins that is relevant to Cabell Huntington Hospital's proposed acquisition of St. Mary's (the "Proposed Acquisition").

The material sought is reasonable in scope. Complaint Counsel does not seek any documentary discovery from Congressman Jenkins and has limited the scope of discovery to deposition testimony. The scope of the testimony sought from Congressman Jenkins will relate to the Proposed Acquisition and the impact of the Proposed Acquisition on the community. Respondents have stated that they expect Congressman Jenkins to testify about information relating to the lack of anticompetitive effects of the acquisition and the benefits from the transaction to the community. The scope of testimony sought is limited to these and related

topics, which is reasonable in scope relative to the Respondents' naming of Congressman Jenkins as a witness in this matter.

The testimony sought is relevant to Complaint Counsel's allegations in the Complaint and Respondents' defenses. As Respondents have named Congressman Jenkins as a proposed witness expected to testify about Respondents' defenses, the testimony sought from Congressman Jenkins falls within the limits of discovery under Rule 3.31(c)(1), which requires that discovery be "reasonably expected to yield information relevant to the allegations of the complaint . . . or to the defenses of any respondent."

The testimony cannot be reasonably obtained by other means. As Respondents have named Congressman Jenkins as a proposed witness expected to testify about Respondents' defenses, the testimony sought from Congressman Jenkins cannot be reasonably obtained by other means.

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 Corporation*, 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 Congressman Jenkins.

Respectfully submitted,

Dated: March 10, 2016

/s/ Alexis J. Gilman
Alexis J. Gilman

Tara Reinhart
Mark D. Seidman
Michelle M. Yost
Elizabeth C. Arens
Jeanine Balbach
Thomas H. Brock
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)	
and)	
)	
St. Mary's Medical Center, Inc. a corporation.)	
)	

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR
ISSUANCE OF SUBPOENA AD TESTIFICANDUM
TO CONGRESSMAN EVAN JENKINS**

On March 10, 2016, pursuant to Rule 3.36 of the Federal Trade Commission's Rules of Practice, Federal Trade Commission Complaint Counsel filed a motion for an order authorizing the Secretary of the Commission to issue a Subpoena *Ad Testificandum* to Congressman Evan Jenkins, an elected official representing West Virginia's Third District, and thus a government official as described in Rule 3.36(a).

Rule 3.36(b) requires the party seeking issuance of a subpoena requiring the appearance of an official or employee of another government agency to make a showing that: the material sought is reasonable in scope; the material is within the limits of discovery under Rule 3.31(c)(1); and the information or material sought cannot reasonably be obtained by other means. Complaint Counsel represents that Respondents do not oppose the request to issue the subpoena *ad testificandum*.

Additionally, on January 5, 2016, this Court granted the parties permission to seek to take discovery, pursuant to Rules 3.34 and 3.36, from nonparty Congressman Evan Jenkins after the close of fact discovery and no later than seven days after the service of Respondents' Final Proposed Witness List.

Complaint Counsel's motion meets the requirements of Rule 3.36 and is therefore GRANTED.

Pursuant to Rule 3.34, in the event that Congressman Evan Jenkins seeks to limit or quash the subpoena, he shall have the earlier of ten days after service of the subpoena or the time for compliance therewith to file any such motion. 16 C.F.R. § 3.34(c).

Pursuant to Rule 3.36(c), Complaint Counsel may forward to the Secretary a request for the authorized subpoenas, with a copy of this authorizing order attached. Complaint Counsel shall serve a copy of this order on Congressman Evan Jenkins at the time Complaint Counsel serves the subpoenas. 16 C.F.R. § 3.36(c).

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

EXHIBIT A



SUBPOENA AD TESTIFICANDUM PUBLIC DEPOSITION

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

<p>1. TO Congressman Evan Jenkins c/o Eleni M. Roumel, Assistant Counsel Office of General Counsel U.S. House of Representatives 219 Cannon House Office Building Washington, DC 20515-3902</p>	<p>2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF DEPOSITION Place to be determined Washington, DC</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE Alexis Gilman, or designee Complaint Counsel</p> <hr/> <p>5. DATE AND TIME OF DEPOSITION March 21, 2016; 9:00 am</p>
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6. SUBJECT OF PROCEEDING

In the Matter of Cabell Huntington, Inc., Pallottine Health Services, Inc., and St. Mary's Medical Center, Inc.,
Docket No. 6366

<p>7. ADMINISTRATIVE LAW JUDGE The Honorable D. Michael Chappell Federal Trade Commission Washington, D.C. 20580</p>	<p>8. COUNSEL AND PARTY ISSUING SUBPOENA Donald S. Clark Secretary Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580</p>
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DATE SIGNED	SIGNATURE OF COUNSEL ISSUING SUBPOENA
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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 8, 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 8 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 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCsRulesofPractice>. 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:*

via FedEx

on the person named herein on:

March [x], 2016

(Month, day, and year)

Jeanine Balbach

(Name of person making service)

Attorney

(Official title)

CERTIFICATE OF SERVICE

I hereby certify that on March [x], 2016, I served via FedEx and electronic mail delivery a copy of the attached Subpoena *Ad Testificandum* to Congressman Evan Jenkins, a copy of the Administrative Law Judge's order authorizing the subpoena, and a copy of the Protective Order governing this matter to:

Congressman Evan Jenkins
c/o Eleni M. Roumel, Esq.
Assistant Counsel
Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, DC 20515-3902
Eleni.Roumel@mail.house.gov

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

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

Dated: March [x], 2016

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

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2016, I filed the foregoing Complaint Counsel's Motion for Subpoena *Ad Testificandum* to Congressman Evan Jenkins under Rule of Practice 3.36 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

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

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Eleni.Roumel@mail.house.gov
Counsel for Congressman Evan Jenkins

Dated: March 10, 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.

March 10, 2016

By: /s/ Jeanine Balbach