

UNITED STATES OF AMERICA
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,)
)
Respondents.)

DOCKET NO. 9366

**ORDER ON COMPLAINT COUNSEL'S MOTION TO COMPEL
RESPONDENTS' PRODUCTION OF TESTIMONY, DOCUMENTS, AND
INFORMATION SUBMITTED TO STATE AGENCY**

I.

On March 1, 2016, pursuant to Rule 3.38 of the Federal Trade Commission's Rules of Practice, Federal Trade Commission Complaint Counsel ("Complaint Counsel") filed a motion to compel Respondents to produce testimony, documents, and information that Respondents have previously submitted to a state agency ("Motion"). Complaint Counsel's Motion is accompanied by a Statement Regarding Meet and Confer, as required by Commission Rule 3.22(g). Respondents Cabell Huntington Hospital, Inc. ("Cabell") and St. Mary's Medical Center, Inc. ("St. Mary's") (collectively, "Respondents") filed an Opposition on March 7, 2016. For the reasons set forth below, Complaint Counsel's Motion is GRANTED IN PART and DENIED IN PART.

II.

This case challenges the proposed acquisition of St. Mary's by Cabell. West Virginia law requires that Respondents receive a Certificate of Need ("CON") from the West Virginia Health Care Authority ("HCA") to approve a new institutional health service. As part of the CON approval process, Respondents have provided testimony, documents, and information to the HCA about Cabell's proposed acquisition of St. Mary's.

Complaint Counsel states that in its discovery requests to Respondents, Complaint Counsel sought the production of the transcripts, exhibits, and other materials proffered by Respondents at the HCA hearing. Complaint Counsel further states that Respondents do not dispute that these materials are responsive to Complaint Counsel's requests and are relevant to this litigation. Complaint Counsel contends that Respondents have invoked an *in camera* order and a protective order entered in the state CON proceeding as grounds for refusing to produce these documents to Complaint Counsel.

Respondents reply that the plain terms of two orders issued by the HCA provide that the proceedings before the HCA, and documents designated as confidential pursuant thereto, will be maintained as confidential. Respondents further assert that Respondents cannot produce the documents and materials requested by Complaint Counsel without violating the HCA's directives and that, instead, Complaint Counsel should seek the requested materials from the HCA. Respondents do not contend that the requested materials are not relevant or responsive to a document request in this matter.

III.

A.

Complaint Counsel recites that, on motion of Cabell, the HCA entered an "Order Granting Motion for Proceedings *In Camera*" on December 21, 2015 (the "HCA *In Camera* Order"). The HCA *In Camera* Order states that confidential materials submitted to the HCA "should not be made available to the public . . ." Motion Exhibit A. In defining the obligations and rights of the parties under the HCA *In Camera* Order, HCA directed the parties "to treat all Confidential Materials in accordance with the Protective Order" that HCA had entered 11 days earlier. ("HCA Protective Order," Motion Exhibit A).

The HCA Protective Order states that it governs confidential materials produced by Cabell in response to discovery requests of Steel of West Virginia ("SWVA"). The restrictions of the HCA Protective Order apply to persons *receiving* confidential information of another party. For example Paragraph 2 states: "documents and information produced in response to SWVA's discovery requests shall be held by SWVA in a confidential and secure manner . . ." Paragraph 4 states: "Confidential Materials shall be made available only to [specifically enumerated individuals affiliated with] SWVA." Paragraph 5 states: "Any person receiving Confidential Materials shall safeguard their confidentiality . . ." Motion Exhibit A. Contrary to Respondents' assertions, nothing in the HCA *In Camera* Order or the HCA Protective Order prohibits Respondents from producing their own information, that would otherwise be discoverable in this matter, simply because Respondents also produced the information in the HCA proceeding.

Moreover, to the extent that the HCA Protective Order and HCA *In Camera* Order are designed to provide confidential treatment for materials submitted by Respondents in the CON proceeding, production of Respondents' materials to Complaint Counsel in this proceeding will not compromise their confidentiality. Pursuant to the Protective Order Governing Discovery Material, issued in this matter on November 6, 2015 ("Protective Order"), Respondents may

designate any material that is “privileged information, competitively sensitive information, or sensitive personal information” as Confidential Material prior to submitting it to Complaint Counsel, and thereby prevent public exposure of the documents. Similarly, Respondents can seek to prevent public disclosure of these materials in the event either party seeks to introduce them at trial, by filing motions for *in camera* treatment pursuant to Commission Rule 3.45.

B.

In its Motion, Complaint Counsel states that it is seeking an order for “Respondents to produce unredacted transcripts, exhibits, briefs, and any other withheld materials from the state CON proceeding.” Motion at 2. Complaint Counsel’s document requests sought: “All materials produced, received, or used, and all testimony given or proffered by [Cabell, St. Mary’s] and their consultants or experts, in the West Virginia Health Care Authority’s Certificate of Need proceeding” Motion at 2-3 n.1. Complaint Counsel’s Motion clarifies that it does not seek to compel Respondents to produce any confidential exhibits or testimony that the other party to the hearing, SWVA, may have submitted. Motion at 3 n.2.

IV.

Complaint Counsel’s Motion is GRANTED IN PART and DENIED IN PART, and it is hereby ORDERED, that Respondents shall, by March 11, 2016, produce to Complaint Counsel all non-privileged materials and testimony submitted by Respondents to the HCA in the CON proceeding that are relevant to the allegations of the Complaint and any defenses thereto. To the extent Complaint Counsel is requesting entire, unredacted transcripts of the CON proceedings and Respondents’ counsel’s briefs to the HCA, Complaint Counsel has failed to demonstrate it is entitled to discovery of such materials, and therefore, that request is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 8, 2016

Notice of Electronic Service

I hereby certify that on March 08, 2016, I filed an electronic copy of the foregoing Order on Complaint Counsel's Motion to Compel Respondent's 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 08, 2016, I served via E-Service an electronic copy of the foregoing Order on Complaint Counsel's Motion to Compel Respondent's Production of Testimony, Documents, and Information Submitted to State Agency, upon:

Thomas H. Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Alexis Gilman
Attorney
Federal Trade Commission
agilman@ftc.gov
Complaint

Tara Reinhart
Attorney
Federal Trade Commission
treinhart@ftc.gov
Complaint

Mark D. Seidman
Attorney
Federal Trade Commission
mseidman@ftc.gov
Complaint

Michelle Yost
Attorney
Federal Trade Commission
myost@ftc.gov
Complaint

Kenneth Field
Jones Day
kfield@jonesday.com
Respondent

Geoffrey Irwin
Jones Day
gsirwin@jonesday.com

Respondent

Kerri Ruttenberg
Jones Day
kruttenberg@jonesday.com
Respondent

Michael Fried
Jones Day
msfried@jonesday.com
Respondent

Louis Fisher
Jones Day
lkfisher@jonesday.com
Respondent

Tara Zurawski
Jones Day
tzurawski@jonesday.com
Respondent

Douglas Litvack
Jones Day
dlitvack@jonesday.com
Respondent

Aaron Healey
Jones Day
ahealey@jonesday.com
Respondent

Thomas Craig
Bailes, Craig & Yon, PLLC
tlc@bcyon.com
Respondent

James Bailes
Bailes, Craig & Yon, PLLC
jrb@bcyon.com
Respondent

David Simon
Foley & Lardner LLP
dsimon@foley.com
Respondent

H. Holden Brooks
Foley & Lardner LLP
hbrooks@foley.com
Respondent

Benjamin Dryden
Foley & Lardner LLP
bdryden@foley.com
Respondent

Elizabeth C. Arens
Attorney

Federal Trade Commission
earens@ftc.gov
Complaint

Jeanine Balbach
Attorney
Federal Trade Commission
jbalbach@ftc.gov
Complaint

Stephanie R. Cummings
Attorney
Federal Trade Commission
srcummings@ftc.gov
Complaint

Melissa Davenport
Attorney
Federal Trade Commission
mdavenport@ftc.gov
Complaint

Svetlana S. Gans
Attorney
Federal Trade Commission
sgans@ftc.gov
Complaint

Elisa Kantor
Attorney
Federal Trade Commission
ekantor@ftc.gov
Complaint

Michael Perry
Attorney
Federal Trade Commission
mperry@ftc.gov
Complaint

Marc Schneider
Attorney
Federal Trade Commission
mschneider@ftc.gov
Complaint

Samuel I. Sheinberg
Attorney
Federal Trade Commission
ssheinberg@ftc.gov
Complaint

David J. Laing
Attorney
Federal Trade Commission
dlaing@ftc.gov
Complaint

Nathaniel Hopkin

Attorney
Federal Trade Commission
nhopkin@ftc.gov
Complaint

Steve Vieux
Attorney
Federal Trade Commission
svieux@ftc.gov
Complaint

Lindsey Lonergan
Jones Day
llonergan@jonesday.com
Respondent

Jessica Casey
Jones Day
jcasey@jonesday.com
Respondent

Brett Ludwig
Foley & Lardner LLP
bludwig@foley.com
Respondent

Max Meckstroth
Foley & Lardner LLP
mmeckstroth@foley.com
Respondent

Timothy Patterson
Foley & Lardner LLP
tpatterson@foley.com
Respondent

Philip Babler
Foley & Lardner LLP
pcbabler@foley.com
Respondent

Miriam Carroll
Foley & Lardner LLP
mcarroll@foley.com
Respondent

Emily Brailey
Foley & Lardner LLP
ebrailey@foley.com
Respondent

Matthew McDonald
Attorney
Federal Trade Commission
mmcdonald@ftc.gov
Complaint

Jeanne Liu Nichols
Attorney

Federal Trade Commission
jnichols@ftc.gov
Complaint

Sergio Tostado
Jones Day
stostado@jonesday.com
Respondent

Benjamin Menker
Jones Day
bmenker@jonesday.com
Respondent

Devin Winklosky
Jones Day
dwinklosky@jonesday.com
Respondent

Debra Belott
Jones Day
dbelott@jonesday.com
Respondent

Lynnette Pelzer
Attorney