

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



ORIGINAL

Docket No. 9366

In the Matter of)
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 Cabell Huntington Hospital, Inc.)
 a corporation;)
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 Pallottine Health Services, Inc.)
 a corporation;)
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 and)
)
 St. Mary's Medical Center, Inc.)
 a corporation.)

**COMPLAINT COUNSEL'S UNOPPOSED MOTION FOR ISSUANCE OF A
SUBPOENA AD TESTIFICANDUM TO WEST VIRGINIA HEALTH CARE
AUTHORITY UNDER RULE OF PRACTICE 3.36**

INTRODUCTION

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 James L. Pitrolo, Jr., Chairman of the West Virginia Health Care Authority (“WVHCA”), an agency of the State of West Virginia, for testimony, as defined in Rule of Practice 3.34(b), 16 C.F.R. § 3.34(b). Respondents do not oppose Complaint Counsel’s motion. Mr. Pitrolo appears on Complaint Counsel’s amended witness list and Complaint Counsel issued a subpoena *duces tecum* to the WVHCA on December 18, 2015, pursuant to this Court’s order of December 17, 2015. Pursuant to this Court’s order of January 6, 2016, granting Respondent Cabell Huntington Hospital’s request to issue a subpoena *ad testificandum* to Mr. Pitrolo, Respondent issued its subpoena to Mr. Pitrolo on January 7, 2016. To further Complaint

Counsel's discovery of the WVHCA and in order to preserve Complaint Counsel's right to depose Mr. Pitrolo, Complaint Counsel seeks to cross-notice Mr. Pitrolo. Complaint Counsel understands that under Provision 13 of the Scheduling Order, Mr. Pitrolo's deposition will be limited to a total of seven (7) hours and will proceed in accordance with the provisions describing how time will be split between Complaint Counsel and Respondents.

Because the material sought meets the requirements set out in Rule 3.36, we respectfully ask that Complaint Counsel's Motion be granted and that the subpoena be issued as requested. An unsigned Subpoena *Ad Testificandum* to Mr. Pitrolo of the WVHCA is attached as Exhibit A.

ARGUMENT

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

- (1) the material sought is reasonable in scope;
- (2) if 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) the material cannot reasonably be obtained by other means.

The proposed subpoena meets each of these three standards. The subpoena seeks the testimony of James L. Pitrolo, Jr., the Chairman of the West Virginia Health Care Authority, who possesses knowledge of the hospital utilization of West Virginia residents, the WVHCA's Certificate of Need process, the requirements for the WVHCA to grant a Certificate of Need to Cabell for the Cabell/St. Mary's transaction; proposed legislative changes to the WVHCA's ability to conduct

hospital rate review, the WVHCA's programs, and the WVHCA's denials of payor contracts or rates.

The WVHCA is the state agency that collects, analyzes, and disseminates financial and clinical data to assess hospital utilization within West Virginia. The agency also reviews acute care hospital rates and contracts between health plans and health care service providers ("providers"), and administers the state's Certificate of Need program, under which the agency reviews certain capital expenditures by providers. As Chairman of the WVHCA, Mr. Pitrolo oversees and possesses knowledge of the WVHCA's processes, information it collects and analyses, including hospital usage within the state, as well as information on the WVHCA's rate and contract review programs, certificate of need submission materials, and proposed legislation impacting the authority of the WVHCA in its ordinary course of business. The scope of the testimony sought here is limited and reasonable in scope and cannot be reasonably obtained by other means.

Mr. Pitrolo's knowledge of hospital utilization by West Virginia residents, the WVHCA's rate and contract review processes, and its Certificate of Need program are highly relevant to the issue of the relevant geographic market, as well as to the likely effect of the proposed transaction on competition. Information that Mr. Pitrolo has on the proposed legislation that would impact the WVHCA's authority is relevant to the likely effect of the proposed transaction on competition.

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 Corp.*, 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 the WWHCA.

Dated: January 13, 2016

Respectfully submitted,

/s/ Alexis 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
Nathaniel Hopkin
Elisa Kantor
David Laing
Michael Perry
Marc Schneider
Samuel I. Sheinberg
Steve Vieux

Complaint Counsel
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2579
Facsimile: (202) 326-2655

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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and)	
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St. Mary’s Medical Center, Inc.)	
a corporation.)	
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COMPLAINT COUNSEL’S MEET AND CONFER STATEMENT

Pursuant to the Scheduling Order issued on December 4, 2015, Complaint Counsel submits this statement in support of its Motion for Issuance of a Subpoena *Ad Testificandum* to James L. Pitrolo, Jr., Chairman of the West Virginia Health Care Authority.

On January 12, 2016, Complaint Counsel provided Respondents via electronic mail with a copy of Complaint Counsel’s proposed Motion for Subpoena *Ad Testificandum* to James L. Pitrolo, Jr., Chairman of the West Virginia Health Care Authority. On January 12, 2016, Respondents advised Complaint Counsel via email that they do not oppose Complaint Counsel's request for the issuance of subpoena.

Respectfully submitted,

Date: January 13, 2016

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

**UNITED STATES OF AMERICA
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a corporation.)	

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR
ISSUANCE OF SUBPOENA AD TESTIFICANDUM TO
WEST VIRGINIA HEALTH CARE AUTHORITY**

On January 13, 2016, pursuant to Rule 3.36 of the 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 James L. Pitrolo, Jr., Chairman of the West Virginia Health Care Authority ("WVHCA"), an agency of the State of West Virginia. Respondents do not oppose Complaint Counsel's motion. Complaint Counsel represents that Respondents do not oppose the request to issue a subpoena *ad testificandum*.

Rule 3.36(b) requires the party seeking issuance of a subpoena to an official or employee of another government agency for testimony 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's motion meets the requirements of Rule 3.36 and is therefore GRANTED.

Pursuant to Rule 3.34, in the event that the West Virginia Health Care Authority seeks to limit or quash the subpoena, the West Virginia Health Care Authority 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 subpoena, with a copy of this authorizing order attached. Complaint Counsel shall serve a copy of this order on the West Virginia Health Care Authority at the time it serves the subpoena. 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</p> <p>James L. Pitrolo, Jr. c/o Marianne Kapinos, General Counsel West Virginia Health Care Authority 100 Dee Drive Charleston, WV 25311</p>	<p>2. FROM</p> <p>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</p> <p>To Be Determined Huntington, West Virginia</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Svetlana Gans, Esq., or designee</p> <hr/> <p>5. DATE AND TIME OF DEPOSITION</p> <p>January 20, 2016, 9:00 a.m.</p>
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6. SUBJECT OF PROCEEDING

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

<p>7. ADMINISTRATIVE LAW JUDGE</p> <p>The Honorable D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>8. COUNSEL AND PARTY ISSUING SUBPOENA</p>
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<p>DATE SIGNED</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p>
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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/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

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 Fed Ex

on the person named herein on:

January x, 2016

(Month, day, and year)

Svetlana Gans

(Name of person making service)

Attorney

(Official title)

CERTIFICATE OF SERVICE

I hereby certify that on January [xx], 2016, I served via FedEx delivery a copy of the attached Subpoena *Ad Testificandum* to James L. Pitrolo, Jr. and a copy of the protective order governing this matter to:

James L. Pitrolo, Jr.
c/o Marianne Kapinos, General Counsel
West Virginia Health Care Authority
100 Dee Drive
Charleston, WV 25311

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

Geoffrey S. Irwin, Esq.
Kenneth W. Field
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3963
cabell_service@jonesday.com
Counsel for Respondent Cabell Huntington Hospital, Inc.

Thomas Craig
James Bailes
Bailes, Craig & Yon, PLLC
401 10th Street, Suite 500
Huntington, WV 25701
(304) 697-4700
tlc@bcyon.com
jrb@bcyon.com
Counsel for Respondent Cabell Huntington Hospital, Inc.

David W. Simon, Esq.
H. Holden Brooks, Esq.
Foley & Lardner LLP
3000 K Street, N.W., Suite 600
Washington, DC 20007
(202) 945-6033
MILW-SMMCSERVICE@foley.com
*Counsel for Respondent Pallottine Health Services, Inc.
and St. Mary's Medical Center*

Dated: January [xx], 2016

/s/ Svetlana Gans
Svetlana Gans
On behalf of Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 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
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 on January 13, 2016, I served, via electronic mail, the accompanying Complaint Counsel's Motion for Subpoena *Ad Testificandum* to James L. Pitrolo, Jr., Chairman of the West Virginia Health Care Authority, under Rule of Practice 3.36, on the following counsel:

Geoff Irwin
Kenneth W. Field
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001
(202) 879-3963
cabell_service@jonesday.com
*Counsel for Respondent Cabell
Huntington Hospital, Inc.*

Thomas Craig
James Bailes
Bailes, Craig & Yon, PLLC
401 10th Street, Suite 500
Huntington, WV 25701
(304) 697-4700
tlc@bcyon.com
jrb@bcyon.com
*Counsel for Respondent Cabell
Huntington Hospital, Inc.*

David Simon
H. Holden Brooks
Foley & Lardner LLP
3000 K Street, NW, Suite 600
Washington, DC 20007
(202) 945-6033
MILW-SMMCSERVICE@foley.com
*Counsel for Respondent Pallottine
Health Services, Inc. and
St. Mary's Medical Center, Inc.*

Marianne Kapinos
General Counsel
West Virginia Health Care Authority
100 Dee Drive
Charleston, WV 25311
304-558-7000 (Ext. 213)
mkapinos@hcawv.org
Counsel for Third-Party WVHCA

Dated: January 13, 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.

Date: January 13, 2016

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