

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;)
)
 Pallottine Health Services, Inc.)
 a corporation;)
)
 and)
)
 St. Mary's Medical Center, Inc.)
 a corporation.)

**COMPLAINT COUNSEL'S UNOPPOSED MOTION FOR ISSUANCE OF SUBPOENA
DUCES TECUM TO KENTUCKY CHFS 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 *Duces Tecum* for the production of documents, as defined in in Rule of Practice 3.34(b), 16 C.F.R. § 3.34(b), to the Kentucky Cabinet for Health and Family Services ("Kentucky CHFS"), an agency of the Commonwealth of Kentucky. Respondents do not oppose Complaint Counsel's 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 *Duces Tecum* for the Kentucky CHFS 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 to an official or employee of another governmental agency for the production of documents 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 an adjudicative hearing, the material is reasonably relevant;
- (3) the material cannot reasonably be obtained by other means;
- (4) the material meets the requirements of Rule of Practice § 3.37.

The material sought is reasonable in scope. The Kentucky CHFS is the state agency that administers Kentucky's human services and health care programs, including monitoring of hospital utilization within the Commonwealth. The CHFS maintains records of hospital usage within the state in its ordinary course of business. The subpoena requests production of existing agency records in its standard format.

The material sought is highly relevant to Complaint Counsel's allegations in the Complaint and Respondents' defenses. Hospital utilization by Kentucky residents is relevant to the issue of the relevant geographic market, as well as to the likely effect of the proposed transaction on competition.

The material cannot be reasonably obtained by other means. The Kentucky CHFS is the sole repository of data relating to overall hospital utilization within Kentucky. The alternative—obtaining information on hospital utilization from every hospital in Kentucky—would be time consuming and burdensome for both Complaint Counsel and the hospitals.

The material requested meets the requirements of Rule of Practice § 3.37. The subpoena requests documents, as defined in Rule of Practice 3.34(b), including electronically stored information in the possession or control of the Kentucky CHFS.

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 Kentucky CHFS.

Dated: December 16, 2015

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
Elisa Kantor
Michael Perry
Marc Schneider
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Complaint Counsel
Federal Trade Commission
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Washington, DC 20580
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Facsimile: (202) 326-2655

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and)	
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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 Subpoena *Duces Tecum* Under Rule of Practice 3.36 to the Kentucky Cabinet of Family and Health Services.

On December 14, 2015, Complaint Counsel provided Respondents via electronic mail with a copy of Complaint Counsel's proposed Motion for Subpoena *Duces Tecum* and subpoena to the Kentucky Cabinet of Family and Health Services. On December 15, 2015, Respondents advised Complaint Counsel that they do not oppose this motion.

Respectfully submitted,

Date: December 16, 2015

/s/ Svetlana Gans
Svetlana S. Gans, Esq.
On behalf of Complaint Counsel

16 C.F.R. § 3.36(b).

Complaint Counsel's motion provides a description of the material it seeks, describes how its request is reasonable in scope, and demonstrates how the material is "reasonably relevant." In addition, Complaint Counsel notes why the material cannot reasonably be obtained by other means and how the material requested meets the requirements of Rule of Practice § 3.37.

Based on the description provided, the material sought appears to meet the requirements of Rules of Practice § 3.36(b) and § 3.37. Accordingly, Complaint Counsel's motion is GRANTED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

EXHIBIT A



SUBPOENA DUCES TECUM

PUBLIC

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

1. TO
Dondra J. Meredith, Assistant Counsel
Kentucky Cabinet for Health and Family Services
275 East Main Street, 4W-E
Frankfort, KY 40621

2. FROM

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

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

4. MATERIAL WILL BE PRODUCED TO
Jeanine Balbach, Esq. and Svetlana Gans, Esq.

5. DATE AND TIME OF PRODUCTION

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

7. MATERIAL TO BE PRODUCED

Documents & materials responsive to the attached Subpoena Duces Tecum Requests for Production

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell

Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

DATE SIGNED

SIGNATURE OF COUNSEL ISSUING SUBPOENA

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 9, 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 9 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 9.

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 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:*

on the person named herein on:

(Month, day, and year)

(Name of person making service)

(Official title)

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a corporation.)	

**COMPLAINT COUNSEL’S SUBPOENA *DUCES TECUM* ATTACHMENT TO
THE KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES**

Pursuant to the Federal Trade Commission’s Rule of Practice, 16 C.F.R. §§ 3.31 and 3.34, and the Scheduling Order entered by Chief Administrative Law Judge Chappell on December 4, 2015, Complaint Counsel hereby requests that the Kentucky Cabinet for Health and Family Services produce the following in accordance with the Definitions and Instructions set forth below:

1. All data used in the preparation of the submission to the SID for the years 2011 through 2015, sufficient to show Relevant Information for all inpatient admissions for Kentucky hospitals, regardless of the patient’s location.
2. Documents sufficient to show a full description of each data field or variable that appears in the Entity’s response to Specification 1 of this Subpoena.

DEFINITIONS

- A. The terms “and” and “or” have both conjunctive and disjunctive meanings.
- B. The term “documents” means all computer files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the Entity. The term “documents” includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that person’s files; and copies of documents the originals of which are not in the possession, custody, or control of the Entity.
- (1) Unless otherwise specified, the term “documents” excludes: (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature; (b) architectural plans and engineering blueprints; and (c) documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.
 - (2) The term “computer files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Entity should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Entity premises. If the Entity believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Complaint Counsel’s need for documents and information, you are encouraged to discuss a possible modification to this instruction with the Complaint Counsel representative identified in the final instruction of this SDT. The Complaint Counsel representative will consider modifying this instruction to:
 - (a) exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Entity;
 - (b) limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Complaint Counsel representatives; or
 - (c) include other proposals consistent with Complaint Counsel’s discovery needs and the facts of the case.

- C. The terms “each,” “any,” and “all” mean “each and every.”
- D. The term “Entity” means the Kentucky Cabinet for Health and Family Services.
- E. The term “hospital” means a facility that provides general acute care inpatient services, collectively or individually.
- F. “Relevant Information” is defined as:
- i. A patient identification number (masked to preserve patient privacy, but specific to the patient to track admissions of a patient across hospitals and readmissions of a patient);
 - ii. The identity of the hospital at which each treatment was conducted, including the hospital’s name, street address, five-digit zip code, state, city, town, or village, Medicare provider number and NPI;
 - iii. The identity (*e.g.*, NPI) of the admitting physician and treating (or attending) physician;
 - iv. The patient’s five-digit zip code;
 - v. The patient’s age (including the age in days for patients less than one year old) and gender;
 - vi. The admission date and the discharge date, or the admission month, admission year, and the patient’s length of stay;
 - vii. Whether the treatment provided was for an emergency;
 - viii. Whether the admission was classified as an observation case;
 - ix. The source of the patient (*e.g.*, emergency room, transfer from another short-term hospital) and the type of admission (*e.g.*, newborn, elective, etc.);
 - x. The type and specific identity of the primary payer (*e.g.*, HMO, PPO, Highmark Blue Cross Blue Shield, Aetna, etc.) and form of insurance product (*e.g.*, Medicare, Medicaid, Commercial, Medicare HMO, Uninsured, Worker’s Comp, etc.);
 - xi. The Diagnosis Related Group (“DRG”) and Major Diagnostic Category (“MDC”) associated with the patient’s admission and any other service category used to classify patient admissions;

- xii. The primary ICD9 diagnosis code and any secondary ICD9 diagnosis codes associated with the patient's admission, including an indication of whether each diagnosis was present on admission;
 - xiii. The primary ICD9 procedure code and any secondary ICD9 procedure codes associated with the patient's treatment;
 - xiv. The total billed charges and any available breakdown of charges by type of service or accommodation (*e.g.*, ICU charges); and
 - xv. The patient's discharge status.
- G. The term "SID" means the State Inpatient Database portion of the Healthcare Cost and Utilization Project (HCUP).
- H. The term "submission" means the present or future sending of data for inclusion in the HCUP database.
- I. The term "treatment" is defined as any individual occurrence when a patient receives medical attention (such as a diagnosis, clinical procedure, surgery, imaging service, rehabilitation session, visit, or any other medical assessment, care, procedure, or action) from a physician or other medical professional at one specific location.

INSTRUCTIONS

For the purposes of this SDT, the following Instructions apply:

- A. To protect patient privacy, the Entity shall mask any Sensitive Personally Identifiable Information ("SPII"). For purposes of this Request, SPII means an individual's Social Security Number alone; or an individual's name, address, or phone number in combination with one or more of the following: date of birth; driver's license number or other state identification number, or a foreign country equivalent; passport number; financial account number; claim number or similar medical record identifier; or credit or debit card number. Where required by a particular Specification, the Entity shall substitute for the masked information a unique patient identifier that is different from that for other patients and the same as that for different admissions, discharges, or other treatment episodes for the same patient. Otherwise, the Entity shall redact the SPII but is not required to replace it with an alternate identifier.
- B. The Entity shall submit the information in delimited text or Microsoft Excel format. Other formats should be discussed with the Complaint Counsel representative(s) identified in Instruction H.

- C. The Entity shall encrypt the data and information before producing to Complaint Counsel. Using NIST FIPS-Compliant cryptographic hardware or software modules is strongly encouraged.
- (1) For any production over 10 gigabytes, use IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data; data can be provided on a FIPS-Compliant encrypted hard drive;
 - (2) For productions under 10 gigabytes, CD-R, CD-ROMs, and DVD-ROM for Windows-compatible personal computers, and USB 2.0 Flash Drives are also acceptable storage formats; and
 - (3) All information produced in electronic format shall be scanned for and free of viruses. Complaint Counsel will return any infected media for replacement, which may affect the timing of the Entity's compliance with the SDT.
- D. Each submission responsive to the SDT shall be accompanied with a letter that includes all of the following:
- (1) Volume name;
 - (2) A description of encryption software/hardware used;
 - (3) The total number of files; and
 - (4) A list of data fields in the order in which they appear in the data files.
 - (5) The password for the encrypted data and information shall be provided separately, via email, to the Complaint Counsel representative(s) identified in the final Instruction of this SDT.
- E. Unless otherwise specified or required, each of the Specifications calls for documents and/or information for each of the years from January 1, 2011, to the present. Where information is requested, provide it separately for each year. If the most recent yearly data is not yet available, provide data for the calendar year to date. If calendar-year information is not available, supply the data for the periods available, and provide the Entity's best estimate of calendar-year data.
- F. This Subpoena shall be deemed continuing in nature so as to require production of all information responsive to any specification included in this SDT produced or obtained by the Entity up to thirty (30) calendar days prior to the date of the Entity's full compliance with this SDT.
- G. In order for the Entity's response to this SDT to be complete, the attached certification form must be executed by the official supervising compliance with this SDT, notarized, and submitted along with the responsive materials. No official of the Entity need appear

to testify with the documents, but Complaint Counsel reserves the right to have an Entity representative testify as to the adequacy of the return at a later date.

- H. Any questions you have relating to the scope or meaning of anything in this SDT or suggestions for possible modifications to it should be directed to Svetlana S. Gans at (202) 326-3708 or sgans@ftc.gov.
- I. The Entity's response to these Requests shall be delivered to the attention of Jeanine Balbach, between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission, 400 7th Street SW, Washington, DC 20024. For courier or other delivery, please contact Jeanine Balbach, at 202-326-2568 or jbalbach@ftc.gov. The Entity shall submit data files containing SPII separately from documents without SPII, either by submitting data containing SPII on separate media or hardware, or by separate secure file transfer. Any password(s) necessary to access the responses shall be emailed to Ms. Balbach at jbalbach@ftc.gov.

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

(Signature of Official)

(Title/Entity)

(Typed Name of Above Official)

(Office Telephone)

CERTIFICATE OF SERVICE

I hereby certify that on December [], 2015, I served via FedEx delivery a copy of the attached Subpoena *Duces Tecum* to Kentucky Cabinet for Health and Family Services to:

Dondra J. Meredith, Assistant Counsel
Kentucky Cabinet for Health and Family Services
275 East Main Street, 4W-E
Frankfort, KY 40621

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

Geoff Irwin
Kenneth W. Field
Jones Day
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Counsel for Respondent Pallottine Health Services, Inc. and St. Mary's Medical Center, Inc.

Dated: December [], 2015

/s/ Svetlana S. Gans
Svetlana S. Gans, Esq.
On behalf of Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2015, 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
oalj@ftc.gov

I further certify that on December 16, 2015, I served, via electronic mail, the accompanying Complaint Counsel's Motion for Subpoena *Duces Tecum* to the Kentucky Cabinet for Health and Family Services under Rule of Practice 3.36, on the following counsel:

Geoff Irwin
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*Counsel for Respondent Pallottine Health Services, Inc. and
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Dondra J. Meredith
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dondra.meredith@ky.gov
Counsel for Third-Party Kentucky Cabinet for Health and Family Services

Dated: December 16, 2015

/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: December 16, 2015

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