

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



In the Matter of

Cabell Huntington Hospital, Inc.
a corporation;

and

Pallottine Health Services, Inc.
a corporation;

and

St. Mary's Medical Center, Inc.
a corporation

Docket No. 9366

**RESPONDENTS CABELL HUNTINGTON HOSPITAL, INC.
AND ST. MARY'S MEDICAL CENTER, INC.'S
MOTION FOR DISCLOSURE OF THIRD PARTY DECLARATIONS
TO RESPONDENTS' EMPLOYEES**

Respondents Cabell Huntington Hospital, Inc. and St. Mary's Medical Center, Inc. ("Respondents") bring this motion to enforce the terms of the protective order entered in this case ("Protective Order") so as to require the Federal Trade Commission ("Complaint Counsel") to de-designate the portions of the third party declarations they have obtained in connection with this proceeding that do not meet the Protective Order's standard for confidential material. Doing so will permit Respondents' counsel to disclose these declarations to Respondents' employees, which is critical to allow Respondents adequately to prepare for trial in these expedited proceedings. However, because Complaint Counsel has *blanket* designated these declarations as "Confidential," Respondents' counsel has been prevented from sharing even basic non-confidential information about these declarations with Respondents' employees. Despite

repeated requests, Complaint Counsel has refused to indicate which portions of the declarations it contends meets the Protective Order's standard for confidentiality. This is wholly improper.

Complaint Counsel cannot show that all of the information contained in these declarations is "confidential material" as defined in the Protective Order. As such, Respondents respectfully request that they be permitted to disclose the third party declarations to their employees. To the extent that portions of the declarations contain competitively sensitive information, Respondents have already proposed and would agree to provide properly redacted versions of the declarations as an alternative.

FACTUAL BACKGROUND

The Court issued the Protective Order in this case on November 6, 2015, in accordance with Rule 3.31(d) of the Commission's Rules of Practice, 16 C.F.R § 3.31(d). Complaint Counsel then designated the entirety of the dozens third party declarations they have obtained in this matter as confidential under the Protective Order, which means that no one other than Respondents' outside lawyers are permitted to access them. *Id.*, Appendix ¶ 7.

During the meet and confer session in which the parties engaged prior to the filing of this motion, Respondents' counsel explained that as to the declarations, they seek to disclose to their clients only (1) the identities of the third party declarants, and (2) the portions of the declarations that do *not* involve competitively sensitive information. *See* Ex. A (Email from T. Zurawski to A. Gilman, Jan. 30, 2015); Ex. B (Letter from T. Zurawski to A. Gilman, Feb. 9, 2016). In fact, Cabell's counsel sent Complaint Counsel a detailed proposal as to how Respondents proposed to provide advance notice to third parties of any disclosure and adequate time for any objection and or redaction. *See id.*¹ Cabell's counsel also explained why this information was critical to

¹ That proposal consisted of the following:

Respondents' preparation for trial. Those efforts to resolve this matter informally have been unavailing, which is unfortunate given that such conferences may often resolve these issues. *See, e.g., Schiller v. City of N.Y.*, Nos. 04 Civ. 7921, 7922 (KMK)(JCF), 2007 U.S. Dist. LEXIS 4285, at *5-6 (S.D.N.Y. Jan. 19, 2007) ("Upon receiving this list [of materials believed to be improperly designated as confidential], the City agreed to remove the designations from a number of the documents identified by the plaintiffs."). Here, Complaint Counsel has refused to even identify the portions of the declarations it contends give rise to the need for confidential treatment, despite Cabell's repeated requests that it do so. *See* Ex. B; Ex. C (Letter from T. Zurawski to A. Gilman, Feb. 18, 2016).

Having reached an impasse on the issue, Respondents now seek the Court's permission to disclose the third party declarations to their employees as needed for trial preparation.

LEGAL STANDARD

Although the Commission rules require the Court to enter a protective order, it is intended only to "protect . . . against *improper* use and disclosure of confidential information."

-
- FTC provides immediate notice to all of its third-party declarants that it will permit Respondent's counsel to disclose their identities to our client after 24 hours of receiving such notice from the FTC.
 - FTC has two days to provide proposed redacted declarations—only redacting information that clearly qualifies for confidential treatment under the Protective Order—to its third-party declarants, giving its declarants 5-days notice before permitting Respondent to share these redacted declarations with our client.
 - If the third-party disagrees with proposed redactions, FTC will work in good faith with the declarant to create a redacted version that complies with the Protective Order and the FTC's Rules of Practice.
 - FTC will provide Respondent with redacted copies of declarations within 5-days from the date of notice to declarants. These redacted declarations can be shared with Respondent's client.

Id.

16 C.F.R. § 3.31(d) (emphasis added).² The protective order defines “confidential material” as “any document or portion thereof that contains privileged, competitively sensitive, or sensitive personal information.” *Id.*, Appendix ¶¶ 1, 7. As the party resisting disclosure of information, Complaint Counsel bears the burden of demonstrating the need for concealment. *See In re H P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961) (requests for in camera treatment before the Commission must demonstrate that the disclosure “will result in a clearly defined, serious injury”); *Zavala v. Wal-Mart Corp.*, No. CIV.A.03-5309 JAG, 2007 U.S. Dist. LEXIS 67282, at *18-19 (D.N.J. Sept. 12, 2007) (“once Plaintiff challenged the ‘confidential’ designation of the materials under the stipulated Discovery Confidentiality Order, the burden shifted to Wal-Mart to show good cause exists to warrant confidentiality”).

ARGUMENT

Respondents seek a ruling that Complaint Counsel’s blanket designation of the entire body of third party declarations as confidential does not suffice to trigger the protections afforded to genuinely “confidential” material under the Protective Order, namely “competitively sensitive” material. In order to prepare for trial, Respondents must be able to show their employees the third party declarations Complaint Counsel obtained. The Court should authorize it to do so.

Courts have flatly rejected “broad[.]” interpretations of the term “competitively sensitive information” if used to circumscribe attorneys’ eyes only material in a protective order, instead ruling that the

² Unlike other protective orders, the standard order at issue here does not require parties to challenge confidential designations in any particular manner or set forth a standard for such requests. *See, e.g., Schiller*, 2007 U.S. Dist. LEXIS 4285, at *8 (noting protective order specifies procedures for challenging confidential designations).

‘competitively sensitive information’ that may not be disclosed to individuals involved in competitive decisionmaking encompasses ***information that has economic value from not being generally known, and that has been the subject of reasonable efforts aimed at secrecy, and the disclosure of which is likely to result in a clearly defined and very serious injury to the designating party by providing a competitor with information that would give it a competitive advantage in ongoing or reasonably foreseeable competitions.***

Lockheed Martin Corp. v. Boeing Co., No. 6:03-cv-796-Orl-28KRS, 2005 U.S. Dist. LEXIS 44820, at *13-14 (M.D. Fla. Jan. 26, 2005) (emphasis added); *see also Rosen v. Provident Life & Accident Ins. Co.*, 308 F.R.D. 670, 678 (N.D. Ala. 2015). Section 3.31(d) imposes that standard here by mandating that the Protective Order extend only to documents containing “privileged, competitively sensitive, or sensitive personal information[.]” 16 C.F.R. § 3.31(d), Appendix ¶ 1. And the Protective Order, in turn, specifies that designations may extend only to “material that . . . constitutes confidential information” *Id.* ¶ 5. Because the materials at issue in this motion plainly are not covered by either Rule 3.31(d) or by the Protective Order, the Court has the power to determine that those materials may be disclosed to Respondents’ employees.

The vast majority of the declarations’ contents fails to satisfy the *Lockheed* (or any other reasonably limited) standard. By way of illustration, many of the declarants testify as to blatantly non-sensitive matters such as:

- Cabell and St. Mary’s Medical Center’s public advertising;
- The location of various hospitals, and the ease with which people can get to them;
- Routine administration practices in the health care sector generally; and
- Predictions about Cabell’s and St. Mary’s future conduct.

Statements like those do not warrant confidential treatment under the Protective Order, because they do not comprise competitively sensitive information. *See, e.g., In re OSF Healthcare Sys.*

and Rockford Healthcare Sys., No. 9349 (Order dated Mar. 29, 2012), at p. 3, *available at* <https://www.ftc.gov/sites/default/files/documents/cases/2012/03/120329aljrespmocamtreat.pdf> (denying motion to keep confidential “records [that] contain no competitively sensitive information”).

Complaint Counsel’s blanket assertions about a purported need for confidentiality cannot be enough to keep these declarations secret even from Respondents’ employees, now that Respondents have sought their disclosure. *See Fonville v. Dist. of Columbia*, 230 F.R.D. 38, 40 (D.D.C. 2005) (“[t]he party requesting a protective order must make a *specific demonstration of facts* in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one.”) (emphasis added).

Moreover, to the extent any other portions of the documents do arguably contain any confidential information, they can certainly be redacted. Given that Respondents have no objection to redacting genuinely sensitive information, Respondents should be permitted to disclose the non-confidential information to their employees. *See Renaissance Nutrition, Inc. v. Jarrett*, 747 F. Supp. 2d 374, 380 (W.D.N.Y. 2010) (“the . . . documents on their face [do not] contain or disclose trade secret or proprietary information. . . . such information may be redacted and does not require that the entire document be designated Attorneys Eyes Only thereby precluding the documents from being shared with defendants”); *In re Polypore Int’l*, No. 9327, 2009 FTC LEXIS 256, at *4 (Apr. 29, 2009) (denying motion where it was not “narrowly tailored to request in camera treatment for *only* that information that is sufficiently secret and material.”) (emphasis added).

Courts have permitted the disclosure of third-party declarations in other FTC merger challenges. For instance, in *FTC v. Sysco Corp.*, the district court rejected the FTC's confidentiality claims as to third-party declarants who had

expressed the view that [the proposed] merged . . . entity would concentrate too much market power in the hands of one company. Those views are premised on the declarants' first-hand experiences with Defendants and their employees. Defendants have the right to rebut those assertions. One way they can do so is to ask their own employees, who know these declarants, their businesses, and their markets, about the accuracy or reliability of the [third party d]eclarants' statements.

FTC v. Sysco Corp., 308 F.R.D. 19, 25 (D.D.C. 2015) (permitting disclosure of third party declarations to party). Here, too, Respondents have the right to rebut the third party declarations, and can only do so effectively if they can consult their own employees about those declarations and their contents.

Complaint Counsel have designated even the third party declarants' *identities* as confidential. Yet the Protective Order only treats declarants' identities as presumptively confidential if the contents of the declaration are "entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission." *Compare* 16 C.F.R § 3.31, Appendix ¶ 2, *with id.* ¶¶ 1, 3. Complaint Counsel have not even claimed that any, let alone all, of the third party declarants fall into that category. Indeed, Courts have recognized that "[t]he disclosure of the third party declarants' identities [to party opponents] does not rise to the level of an 'extensive intrusion' [into the affairs of those third parties]." *FTC v. Sysco Corp.*, 83 F. Supp. 3d 271, 275 (D.D.C. 2015).

Moreover, witness lists and hearing transcripts often enter the public realm through Commission proceedings, so it is altogether likely that the third party declarants' names will not

remain secret for long in any event. *See id.* at 275. Complaint Counsel now agrees that their own witness lists are not confidential, so there would seem to be no basis to treat the identities of the declarants differently. Permitting Respondents to disclose at least the declarants' names to their employees will merely facilitate their ability to mount a defense, and is unlikely to affect these declarants' ultimate ability to remain anonymous, which is limited in any event. *See Sysco Corp.*, 308 F.R.D. at 22 (“One of the key pieces of information that parties exchange in every case is the identity of witnesses.”); *FTC, et al., v. Penn State Hershey Med. Ctr., et al.*, Mem. and Order, ECF No. 62, No. 1:15-cv-02362-JEJ-MCC, at 9 (M.D. Pa. Feb. 18, 2016) (ordering disclosure of potential third party witnesses because “the wholesale exclusion of in-house counsel from matters as fundamental as witness identification, preparation and assessment would be both unworkable as a practical matter and would present significant potential due process concerns”); *see also* 16 C.F.R. 3.31(b).

CONCLUSION

For the reasons stated above, therefore, Respondents respectfully request that the Court permit their counsel to disclose the third party declarations to Respondents' employees as needed for trial preparations, except insofar as Complaint Counsel can demonstrate a specific basis for their confidential designation.

Dated: February 18, 2016

Respectfully submitted,

/s/ Geoffrey S. Irwin

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and St. Mary's Medical Center, Inc.*

EXHIBIT A

FTC v. Cabell: Third Party Declarations 

Tara Zurawski to: Seidman, Mark
4-3879

01/30/2016 09:01 PM

Cc: "Gilman, Alexis", "bludwig@foley.com", "HBrooks@foley.com", "Yost, Michelle",
"Gans, Svetlana", Geoffrey S Irwin, Kerri L Ruttenberg, Douglas E Litvack

Counsel -

We write to revisit the FTC's decision to designate the entirety of every third party declaration the FTC has obtained in this matter as confidential under the protective order. As you know, the FTC's decision means that Respondents' employees are not permitted to access these declarations. Information within these declarations is critical and material to Respondents' preparation for depositions and trial. In order to alleviate these barriers to Respondents' deposition and trial preparations, we request the FTC de-designate all or portions of the third party declarations allowing Respondents' counsel to disclose certain declaration information to Respondents' employees. Respondents will only disclose (1) the identities of the third party declarants, and (2) the portions of the declarations that do not involve competitively sensitive information. We believe this is a reasonable request and are certain that your cooperation and understanding will resolve this matter without requiring judicial intervention. We are happy to discuss this issue further with you if needed, but due to the compressed discovery timeline, your response to our request would be appreciated by noon on Monday.

Many thanks,
Tara

Tara Lynn R. Zurawski
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EXHIBIT B

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February 9, 2016

VIA EMAIL

Alexis Gilman
Bureau of Competition
Federal Trade Commission
400 7th St., SW
Washington, DC 20024

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

Dear Alexis:

I write on behalf of Cabell Huntington Hospital, Inc. (“Respondent”) to follow-up on our discussion last week about disclosing third-party declarant information to our client, namely the identity of all declarants and copies of all the declarations with any competitively-sensitive information redacted to comply with the Protective Order in this proceeding.

As we discussed, Respondent is significantly disadvantaged if the Federal Trade Commission (“FTC”) continues to shield our client from knowing who is testifying against them and what statements were made in their declarations. Absent access to this information, our client cannot gather evidence from its employees who interact with these declarants, which in turn, is necessary to test the validity of the declarations through cross-examination, identify relevant counterevidence, and otherwise mount a proper defense. The FTC’s own Rules of Practice strongly favor public disclosure. And Rule 3.45(b) only permits non-public treatment of materials if “public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation” *See also* Memorandum Opinion and Order, at 6, *FTC v. Sysco Corp. et al.*, 83 F. Supp 3d 1 (D.D.C. Mar. 18, 2015) (modifying protective order to allow defendants to disclose identify of third-party declarants after giving FTC 24-hours notice).

You asked Respondent to propose a procedure for disclosing the above-outlined third-party declarant information to our client. Accordingly, we propose:

- FTC provides immediate notice to all of its third-party declarants that it will permit Respondent’s counsel to disclose their identities to our client after 24 hours of receiving such notice from the FTC.
- FTC has two days to provide proposed redacted declarations—only redacting information that clearly qualifies for confidential treatment under the Protective

February 9, 2016
Page 2

Order—to its third-party declarants, giving its declarants 5-days notice before permitting Respondent to share these redacted declarations with our client.

- If the third-party disagrees with proposed redactions, FTC will work in good faith with the declarant to create a redacted version that complies with the Protective Order and the FTC's Rules of Practice.
- FTC will provide Respondent with redacted copies of declarations within 5-days from the date of notice to declarants. These redacted declarations can be shared with Respondent's client.

Thank you for your prompt attention to this matter, and we hope to reach a resolution without involving the Court. Please let me know when you are available to further discuss our proposal.

Sincerely,

/s/ Tara Lynn R. Zurawski

Tara Lynn R. Zurawski

cc: Counsel of Record

EXHIBIT C

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February 18, 2016

VIA EMAIL

Alexis Gilman
Bureau of Competition
Federal Trade Commission
400 7th St., SW
Washington, DC 20024

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

Dear Alexis:

I write on behalf of Cabell Huntington Hospital, Inc. (“Cabell”) in response to your February 17, 2016 letter, in which you continue to stand by your improper blanket designation of all third party declarations as “confidential material” subject to the Protective Order entered in this case. We respectfully disagree with your position and intend to seek relief from the Court today.

You contend that the March 7, 2016 deadline in the Scheduling Order should assuage our concerns that we are unable to adequately prepare our witnesses for trial. We disagree. It is unclear how that date has any relevance to this dispute. The March 7th date only triggers a lengthy process for providing notice to third parties as to the confidential materials anticipated to be submitted as part of the trial’s public record. However, our immediate dispute is about third party materials that were *improperly* designated as confidential and should be immediately corrected to eliminate further prejudice to Respondents. To that end, we have requested that you provide redacted versions of the declarations that conceal only genuinely confidential materials as defined in the Protective Order. You have flatly refused to do so. Because we have reached an impasse on this issue, we will seek the Court’s intervention.

You repeatedly emphasize that we seek to share the material you have designated as confidential with all of Cabell’s employees. However, as we have stated in our correspondence on this issue, our need for this disclosure arises out of the need to prepare witnesses for trial. Material shared with Cabell’s employees would be on an as needed basis, and would be limited to those employees who must learn of the declarants’ identities and testimony in order to ensure Cabell is not prejudiced in its trial preparations.

As a final note, we appreciate your removal of the confidential designation of the FTC’s witness list. However, this belated concession of an otherwise improper designation does not resolve our concerns. At this time, we can prepare our witnesses only by telling them the names

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Page 2

of those expected to testify in support of the FTC's case, without the ability to disclose the nature of that testimony. We can hardly be expected to adequately prepare our witnesses for trial given such constraints. The Part 3 proceeding is a public trial, and to shroud the evidence in secrecy even with respect to those witnesses participating in it puts Respondents at a severe and unfair disadvantage.

Sincerely,

/s/ Tara Lynn R. Zurawski

Tara Lynn R. Zurawski

cc: Counsel of Record

**UNITED STATES OF AMERICA
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and

St. Mary's Medical Center, Inc.
a corporation

Docket No. 9366

RESPONDENT'S MEET AND CONFER STATEMENT

Pursuant to the Scheduling Order issued on December 4, 2015, counsel conferred regarding the issues raised in this motion by a series of detailed letters, emails and phone calls in the weeks leading up to the filing of this motion. No agreement was reached, and therefore on February 18, 2016, Cabell's counsel provided Complaint Counsel via electronic mail notice of its intent to file the instant motion. Complaint Counsel did not advise Cabell's counsel that it would not oppose this motion.

Dated: February 18, 2016

Respectfully submitted,

/s/ Geoffrey S. Irwin

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Louis K. Fisher
Tara Lynn R. Zurawski
Douglas E. Litvack

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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 **GRANTED**.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 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 further 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

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Counsel Supporting the Complaint

/s/ Geoffrey S. Irwin

*Counsel for Respondent
Cabell Huntington Hospital, Inc.*

Notice of Electronic Service

I hereby certify that on February 18, 2016, I filed an electronic copy of the foregoing Respondents' Motion for Disclosure of Third Party Declarations to Respondents' Employees, with:

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I hereby certify that on February 18, 2016, I served via E-Service an electronic copy of the foregoing Respondents' Motion for Disclosure of Third Party Declarations to Respondents' Employees, upon:

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