

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' MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF
MOTION FOR DISCLOSURE OF
THIRD PARTY DECLARATIONS TO RESPONDENTS' EMPLOYEES**

Pursuant to Rule 3.31(d) of the Commission's Rules of Practice, 16 C.F.R § 3.31(d), Respondents Cabell Huntington Hospital, Inc. ("Cabell") and St. Mary's Medical Center, Inc. ("Respondents") seek leave to file the attached brief Reply in Support of their Motion For Disclosure Of Third Party Declarations To Respondents' Employees ("Motion"), filed February 18, 2016. On February 29, 2016, Complaint Counsel filed an opposition to Respondents' Motion ("Opposition"). The Opposition contained several express or implied misstatements. The attached response "could not have been raised earlier in the . . . principal brief" because Respondents could not have anticipated these misstatements. *See* 16 C.F.R. 3.22(d). In order to obtain a ruling on Respondents' motion that is fair and based on an accurate record, Respondents thus move for leave to file the attached Reply in support of their Motion.

Dated: March 2, 2016

Respectfully submitted,

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**[PROPOSED] ORDER ON RESPONDENTS' MOTION FOR LEAVE TO FILE REPLY
IN SUPPORT OF MOTION FOR DISCLOSURE OF THIRD PARTY DECLARATIONS
TO RESPONDENTS' EMPLOYEES**

On March 2, 2016, Respondents filed a motion seeking leave to file a reply in support of their Motion For Disclosure Of Third Party Declarations To Respondents' Employees pursuant to 16 C.F.R. § 3.22(d).

Respondents' motion is **GRANTED** and the reply is deemed submitted.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

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**RESPONDENTS' REPLY IN SUPPORT OF MOTION FOR DISCLOSURE OF
THIRD PARTY DECLARATIONS TO RESPONDENTS' EMPLOYEES**

Respondents Cabell Huntington Hospital, Inc. ("Cabell") and St. Mary's Medical Center, Inc. ("Respondents") submit this brief reply to correct express or implied misstatements in the Federal Trade Commission's ("Complaint Counsel") opposition ("Opposition") regarding Respondents' arguments set forth in their Motion For Disclosure Of Third Party Declarations To Respondents' Employees ("Motion").

First, Complaint Counsel misstates that Respondents seek to permit "*all* of Respondents' employees to review the declarations." (Opp. at 2 (emphasis added).) To the contrary, Respondents only ask the Court to permit them to "disclose the third party declarations to

Respondents' employees *as needed for trial preparations*," (Mot. at 8), and reiterated throughout the motion that the disclosure was necessary only for that purpose.

Second, Complaint Counsel misstates that Respondents only seek to disclose the identity of third party declarants. Complaint Counsel relies on this misstatement to argue that that Respondents will suffer no prejudice if the declarations remain shielded because Respondents' employees may see Complaint Counsel's final witness list. (Opp. at 2.) But Respondents' counsel seek to disclose to their clients not only the *identities* of the third party declarants, but also the *portions of the declarations* that do not involve competitively sensitive information, consistent with the Court's Protective Order. (*See* Mot., Exs. A-C; Protective Order at ¶¶ 1, 7 (providing that only "privileged, competitively sensitive, or sensitive personal information" is entitled to confidential treatment).) While Respondents' counsel certainly need to share with Respondents the names of the witnesses who will be called against them, counsel must also be able to disclose the substance of the declarations. Otherwise, Respondents and their counsel cannot properly prepare to rebut those witnesses at trial. To suggest all prejudice is cured by disclosure of the declarants' names misses the point of Respondents' Motion.

Third, Complaint Counsel misstates that Respondents have deposed *all* of the witnesses designated on Complaint Counsel's amended preliminary witness list. This is not true. As Complaint Counsel is well aware, Respondents have not been able to depose four of the witnesses included on Complaint Counsel's amended preliminary witness list, and six of the witnesses included on Complaint Counsel's final witness list, despite Respondents' diligent, good faith efforts. Complaint Counsel uses this misstatement to try to undermine the need for Respondents' counsel to disclose the declarations to Respondents' employees. (Opp. at 8.) But whether depositions have been taken is irrelevant to the actual dispute at issue. Respondents'

counsel seek to share limited, non-confidential information in the declarations with their clients in order to properly prepare to rebut those statements at trial. That Respondents' *counsel* have deposed most of Complaint Counsel's witnesses is irrelevant to Respondents' counsel's need to share third party witnesses' declarations with their *clients*.

Fourth, Complaint Counsel misstates that they had no role in the designation of third party materials as confidential. This, too, is untrue. Complaint Counsel promised the third party declarants confidentiality. In fact, Complaint Counsel admits in its own brief that the third party declarants offered declarations "based on the express representations from litigants"—*i.e.*, Complaint Counsel. (Opp. at 3-4; *id.* at 7.) However, improper promises Complaint Counsel made to third parties regarding confidentiality do not transform the declarations into "confidential material" according to the standard set forth in the Protective Order, and do not preclude the Court from ordering their disclosure. *See FTC v. Sysco Corp.*, 308 F.R.D. 19, 26 (D.D.C. 2015) ("Some of the . . . declarants argued that the FTC provided them with assurances that their identities would remain confidential and, for that reason, their names should not be revealed to Defendants' employees. . . . Whatever was said, . . . [w]hen the FTC concluded its investigation and filed this lawsuit, the decision whether to disclose declarants' identities shifted from the FTC to the court.").

CONCLUSION

Respondents respectfully request that the Court grant their Motion.

Dated: March 2, 2016

Respectfully submitted,

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RESPONDENTS' 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 emails leading up to the filing of this motion for leave to file a reply. No agreement was reached, and therefore on March 2, 2016, Cabell's counsel provided Complaint Counsel via electronic mail notice of its intent to file the instant motion. Complaint Counsel indicated that it would oppose this motion.

Dated: March 2, 2016

Respectfully submitted,

/s/ Geoffrey S. Irwin

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 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
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Notice of Electronic Service

I hereby certify that on March 02, 2016, I filed an electronic copy of the foregoing Respondents' Motion for Leave to File Reply In Support of Motion for Disclosure of Third Party Declarations to Respondents' Employees, with:

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I hereby certify that on March 02, 2016, I served via E-Service an electronic copy of the foregoing Respondents' Motion for Leave to File Reply In Support of Motion for Disclosure of Third Party Declarations to Respondents' Employees, upon:

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