

**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

**RESPONDENT CABELL HUNTINGTON HOSPITAL, INC.'S UNOPPOSED MOTION  
FOR ISSUANCE OF SUBPOENA DUCES TECUM TO MARSHALL UNIVERSITY  
UNDER RULE OF PRACTICE 3.36**

Respondent Cabell Huntington Hospital, Inc. ("Respondent") brings this motion pursuant to Federal Trade Commission ("Commission") Rule of Practice 3.36, 16 C.F.R. § 3.36, to request the issuance of a subpoena duces tecum for the production of documents directed towards Marshall University, a public university in West Virginia. On January 4, 2016, Complaint Counsel requested the issuance of a subpoena to Marshall University, and by this motion Respondent seeks the issuance of a subpoena that will ensure Respondent promptly receives from Marshall University the same documents and information that Complaint Counsel will receive in response to its anticipated subpoena. An unsigned version of Respondent's requested subpoena duces tecum is attached at **Exhibit A**. Complaint Counsel does not oppose Respondent's request to issue a subpoena, but takes no position on the contents of this motion or the scope of the subpoena.

## ARGUMENT

By this motion, Respondent requests that the Court issue a subpoena duces tecum for production of documents directed towards Marshall University. Complaint Counsel recently moved the Court to issue a subpoena duces tecum to Marshall University, and the requested subpoena seeks all documents and information that Marshall University provides in response to that subpoena, as well as communications between Marshall University and Complaint Counsel. In other words, the subpoena Respondent requests by this motion is necessary to ensure that Respondent has equal access to any discovery Marshall University makes available to Complaint Counsel, and to ensure that Respondent has a role in negotiating the proper scope of the discovery Marshall University will provide in this action.

Pursuant to Rule 3.36(b) of the Commission's Rules of Practice, a party seeking the issuance of a subpoena to a governmental agency for the production of documents must show that:

- (1) the requested 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.

16 C.F.R. § 3.36(b). All four requirements are met here.

*First*, the scope of the material requested in the subpoena duces tecum is reasonable. Respondent is entitled to have equal access to any discovery materials non-party Marshall University provides to Complaint Counsel, and the subpoena is limited to those documents and communications. *See Mauricio v. Duckworth*, 840 F.2d 454, 460 (7th Cir. 1988) (noting that “discovery [is] . . . a level playing field where rules are in place to ensure equal access to

material information”). Therefore, the scope of the materials sought here is limited and reasonable.

*Second*, the material sought is relevant to the allegations in the Complaint. Marshall University and its School of Medicine are located in Huntington, where both are major employers. Students from the School of Medicine receive residency training at St. Mary’s Medical Center and Cabell Huntington Hospital, and Marshall University faculty members also practice as physicians in both hospitals. Moreover, Respondent has identified four employees of Marshall University as potential witnesses on its amended preliminary witness list, and they are expected to testify about the lack of anticompetitive effects from the transaction, transaction rationale, market definition, efficiencies, community benefits from the transaction, relationship with Marshall University Medical School, employer healthcare costs and Marshall University’s support for the transaction. Complaint Counsel sought documents relevant to these topics in its subpoena, and Respondent is entitled to those same materials.

*Third*, the documents cannot be reasonably obtained by other means. Marshall University is the sole repository of information relating to the effects of the transaction on Marshall University and its School of Medicine, and Respondent is entitled to receive directly from Marshall University any materials it might provide to Complaint Counsel. While the Scheduling Order requires a party to provide to the opposing party copies of documents received from non-parties in response to a subpoena, Complaint Counsel may wait three business days before doing so, and Respondent would be prejudiced by that delay in this expedited proceeding.

*Fourth*, the material meets the requirements of Rule of Practice 3.37(a), which requires requests for electronically stored information to be specified with reasonable particularity. The subpoena requests documents and communications provided to Complaint Counsel by Marshall

University as well as any communications with Complaint Counsel about this matter, and therefore seeks a clearly defined universe of materials.

In sum, the requested subpoena meets all four requirements of Rule 3.36(b) of the Commission's Rules of Practice.

### CONCLUSION

For the reasons stated above, therefore, Respondent respectfully requests that the Court issue the attached subpoena to Marshall University.

Dated: January 5, 2016

Respectfully submitted,

*/s/ Geoffrey S. Irwin*

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*Counsel for Respondent  
Cabell Huntington Hospital, Inc.*

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Docket No. 9366

**RESPONDENT'S MEET AND CONFER STATEMENT**

Pursuant to the Scheduling Order issued on December 4, 2015, Respondent submits this statement in support of its Motion for Subpoena *Duces Tecum* Under Rule of Practice 3.36 to Marshall University. On January 5, 2016, Respondent's counsel provided Complaint Counsel via electronic mail notice of its intent to file the instant motion. That same day, Complaint Counsel advised Respondent's counsel that it does not oppose this motion.

Dated: January 5, 2016

Respectfully submitted,

*/s/ Geoffrey S. Irwin*

---

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*Counsel for Respondent  
Cabell Huntington Hospital, Inc.*

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**[PROPOSED] ORDER ON RESPONDENT'S MOTION FOR ISSUANCE OF  
SUBPOENA DUCES TECUM TO MARSHALL UNIVERSITY**

On January 5, 2016, pursuant to Rule 3.36 of the Commission's Rules of Practice, Respondent filed a motion for the issuance of a subpoena duces tecum to Marshall University, a public university in the State of West Virginia, for documents and information provided by Marshall University to Complaint Counsel, as well as communications between Marshall University and Complaint Counsel. Complaint Counsel does not oppose Respondent's motion.

The requirements of Rule of Practice § 3.36(b) are met. Accordingly, Respondent'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

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

4. MATERIAL WILL BE PRODUCED TO

5. DATE AND TIME OF PRODUCTION

6. SUBJECT OF PROCEEDING

7. MATERIAL TO BE PRODUCED

8. ADMINISTRATIVE LAW JUDGE

9. COUNSEL AND PARTY ISSUING SUBPOENA

Federal Trade Commission  
Washington, D.C. 20580

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.

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Docket No. 9366

**RESPONDENT CABELL HUNTINGTON HOSPITAL, INC.'S  
SUBPOENA DUCES TECUM ATTACHMENT**

In accordance with the Rules of Practice for Adjudicative Practice (16 C.F.R. 3.1 *et seq.*), Respondent Cabell Huntington Hospital, Inc. requests the following documents and things be produced in accordance with the Definitions and Instructions below, on the date and location indicated in the accompanying *Subpoena Duces Tecum*, or at such other time and place as you and counsel for Respondents Cabell Huntington Hospital shall mutually agree.

**I. REQUESTS FOR PRODUCTION**

1. All documents responsive to the Federal Trade Commission's Subpoena *Duces Tecum* to Marshall University dated January 2016.

2. All documents relating to any internal communications or communications between you, or anyone acting on your behalf, and anyone employed by or acting on behalf of the Federal Trade Commission, relating to the proposed acquisition of St. Mary's Medical Center by Cabell Huntington Hospital., the Federal Trade Commission's investigation of the proposed

acquisition, or *In the Matter of Cabell Huntington Hospital, Pallottine Health Services, Inc. , and St. Mary's Medical Center*, No. 9366 currently pending before the Federal Trade Commission, Office of Administrative Law Judges.

## **I. DEFINITIONS**

These requests incorporate the following definitions and instructions:

1. "You," or "your" shall each mean and refer to Marshall University, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing. The terms "subsidiary," "affiliate" and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control between Marshall University and any other person.

2. The singular form of a word should be interpreted in the plural, and the plural form of a word shall be interpreted as singular, whenever appropriate, in order to bring within the scope of the request any information that might otherwise be considered beyond its scope. Any pronoun shall be construed to refer to the masculine, feminine, or neutral gender as in each case is most appropriate.

3. The use of the present tense shall be construed to include the past tense, and vice versa, so as to make the request inclusive rather than exclusive.

4. As used herein, "and" and "or" shall be construed conjunctively and disjunctively so as to acquire the broadest meaning possible.

5. As used herein, "any" and "all" shall each be construed to mean "each and every," so as to acquire the broadest meaning possible.

6. The term "communication" means any transmittal of information in the form of facts, ideas, inquiries, or otherwise, including without limitation any transmission of information by one or more persons and/or between two or more persons by any means such as, but not limited to, telephone conversations, voicemails, letters, telegrams, teletypes, telexes, telecopies,

electronic mail, other computer linkups, metadata, written memoranda, and face-to-face conversations, including without limitation, a person(s) seeing or hearing any information by any means and any document memorializing or referring to the contact or communication.

7. “Relate to,” “related to,” and “relating to” shall mean in whole or in part concerning, reflecting, alluding to, mentioning, regarding, discussing, bearing upon, commenting on, constituting, pertaining to, demonstrating, describing, depicting, directly or indirectly relating to, summarizing, containing, embodying, showing, comprising, evidencing, refuting, contradicting, analyzing, identifying, stating, dealing with, and/or supporting.

8. The term “document(s)” is defined broadly and includes all tangible things, all originals (or, if originals are not available, identical copies thereof), all non-identical copies of a document, all drafts of final documents, all other written, printed, or recorded matter of any kind, and all other data compilations from which information can be obtained and translated if necessary, that are or have been in your actual or constructive possession, custody or control, regardless of the medium on which they are produced, reproduced, or stored (including without limitation computer programs and files containing any requested information), and any recording or writing. Any document bearing marks, including without limitation, initials, stamped initials, comments, or notations not a part of the original text or photographic reproduction thereof, is a separate document. The term “document” shall include, without limiting the generality of the foregoing, all electronic mail, letters, voicemails, text messages, correspondence, contracts, agreements, notes to the files, notebooks, reports, memoranda, mechanical and electronic sound records or transcripts thereof, blueprints, flow sheets, formal or informal drawings or diagrams, calendar or diary entries, memoranda of telephone or personal conversations or of meetings or conferences, studies, reports, interoffice communications, price lists, bulletins, circulars, statements, manuals, summaries of compilations, minutes of meetings, maps, charts, graphs, order papers, articles, announcements, books, catalogs, records, tables, books of account, ledgers, vouchers, cancelled checks, invoices, bills, marketing materials, white papers, and data sheets. A draft or non-identical copy is a separate document within the meaning of this term.

9. The terms “identify” and “identification,” when used with respect to any natural person, means that the following information shall be provided: The person’s full name; last known home address and telephone number; last known business address and telephone number; last known title or occupation; and last known employer.

10. The terms “identify” and “identification,” when used with respect to any entity (including without limitation corporation, company, firm, partnership, joint venture, association, governmental body or agency or persons other than a natural person), means that the following information shall be provided: The full legal name of the entity; the place of incorporation or organization; the principal place of business; and the nature of the business conducted by that legal entity.

11. The terms “identify” and “identification,” when used with respect to a document, subject to the option to produce records under 16 C.F.R. § 3.35(c), means to provide information sufficient to locate that document, including but not limited to the following: the Bates range, the date appearing on such document or, if no date appears thereon, the approximate date the document was prepared; the identifying code number, file number, title, or label of such document; a general description of such document (e.g., letter, memorandum, drawing); the title or heading; the number of pages of which such document consists; the name of each person who signed or authorized the document; the name of each addressee; the name of each person having possession, custody, or control of such document; if the document existed at one time but does not presently exist, the reason(s) why it no longer exists and the identity of the last person having custody of it; and, if the document is in a foreign language, whether an English translation of the document exists, whether partial or complete.

12. The terms “identify” and “identification” when used with reference to any communication, means that the following information shall be provided: (a) a summary of the communication; (b) the date and place of the communication; (c) each person who was present at, involved in, connected with or who participated in the communication; (d) the form of

communication (e.g., telephone call, meeting, letter, etc.); and (e) each document memorializing or referring to the communication.

13. The terms “identify” and “identification” when used with reference to an event means to provide a description of the event, the date of the event, the location of the event, and the individual and organizational entities participating in the event.

14. The terms “identify” and “identification” when used with reference to factual or legal basis, means to state in detail each and every fact, and each and every legal proposition or interpretation, upon which a belief, claim, assertion, allegation, or contention is based, and identify all documents, persons, and events that support that belief, claim, assertion, allegation, or contention.

15. Where an instruction or request below names a corporation or other legal entity, the instruction or request includes within its scope any parent, predecessors-in-interest, subsidiaries, affiliates, directors, officers, employees, agents, and representatives thereof, including attorneys, consultants, and accountants.

## **II. INSTRUCTIONS**

1. These requests shall apply to all documents in your possession, custody or control at the present time or coming into your possession, custody, or control prior to the date of the production. If you know of the existence, past or present, of any documents or things requested below, but are unable to produce such documents or things because they are not presently in your possession, custody or control, you shall so state and shall identify such documents or things, and the person who has possession, custody or control of the documents or things. “Documents within your control” shall apply to documents or things in the possession, custody or control of a third party over which you have control or who has agreed to cooperate or provide assistance relating to the subject matter of This Litigation.

2. If no documents are responsive to a particular request, you are to state that no responsive documents exist.

3. For any responsive documents or tangible things that have been lost or destroyed, you shall provide a written statement setting forth:

- a. the date of the document;
- b. the identity of the document;
- c. the nature of the document (*e.g.*, letter, memorandum, chart);
- d. the identity of each and every person who received the document;
- e. a brief description of the subject matter of the document; and
- f. the circumstances of the loss or destruction of the document.

4. In the event a document is withheld or redacted on a claim of attorney/client or work product privilege, you shall provide a detailed privilege log which describes the nature and basis for your claim and the information withheld, in a manner sufficient to disclose facts upon which you rely in asserting your claim, and to permit the grounds and reasons for withholding the information to be identified. Such description shall, at a minimum:

- a. state the type of document (*e.g.* letter, memorandum, contract, etc.);
- b. state the title of the document;
- c. state the date of the creation of the document;
- d. state the last date the document was modified or revised;
- e. identify each and every author of the document;
- f. identify each and every person who prepared or participated in the preparation of the document;
- g. identify each and every person who received the document, or a copy thereof;
- h. identify each and every person from whom the document was received;
- i. state the present location of the document and all copies thereof;
- j. identify each and every person having custody or control of the document and all copies thereof;
- k. describe the subject and purpose of the document; and



1. provide sufficient further information concerning the document and circumstances thereof to explain the claim of privilege or immunity and permit the adjudication of the propriety of that claim.

5. If an attorney work product claim is asserted, in addition to the information specified in Instruction 4 above, identify each person who received copies, when the work product was prepared, and the litigation for which the work product was prepared.

6. If you object or otherwise decline to produce any of the documents requested herein for grounds other than attorney/client or work product privilege, specify the precise grounds upon which you rely in sufficient detail to permit the Respondents and the Court to determine the legal sufficiency of your objection or position, and provide any and all documents you are willing to provide without a court order.

7. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If a privilege is asserted with regard to part of the material contained in a document, the party claiming the privilege must clearly indicate the portions as to which the privilege is claimed. When a document has been redacted or altered in any fashion, identify as to each document the reason for the redaction or alteration, the date of the redaction or alteration, and the person performing the redaction or alteration. Any redaction notation must be clearly visible on the redacted document.

8. In the event that you object to any request on the ground that it is overbroad and/or unduly burdensome for any reason, respond to that request as narrowed to the least extent necessary to render it not overbroad/unduly burdensome and state specifically the extent to which you have narrowed that request for purposes of your response.

9. In the event that you object to any request on the ground that it is vague and/or ambiguous, identify the particular words, terms or phrases that are asserted to make such request vague and/or ambiguous and specify the meaning actually attributed by you to such words for purposes of your response thereto.

10. No information shall be withheld on the asserted grounds that such information therein is not relevant unless (i) the burden of responding is fully described and (ii) persons familiar with the information requested are identified.

11. These requests are submitted for the purpose of discovery and are not to be taken as waiving any objections which may be made at trial or any hearing to the introduction of evidence on subjects covered by these requests or as an admission of the relevance or materiality at trial of any of the matters covered by these requests.

12. If, after responding, you obtain or become aware of any further information responsive to these Requests for Production, you are required to supplement the responses and provide the Respondents with such additional information as required under 16 C.F.R. § 3.31.

13. Where identified documents are not in your possession, custody or control, state the names of the persons who have possession, custody or control of such documents. If such documents were in your possession, custody or control in the past but are no longer in your possession, custody, or control, state what disposition was made of them, the reasons for such disposition, persons having any knowledge of such disposition, and the persons responsible for such disposition.

14. These requests seek all responsive documents in their original language and, if such original language is not English, these requests also seek English-language translations that may exist for all or part of any given document.

15. Each document is to be produced along with all drafts, without abbreviation or redaction, in their entirety including attachments, enclosures, cover letters, memoranda, exhibits, and appendices.

16. If any portion of a document or tangible thing is responsive to a request, the entire document or tangible thing shall be produced, redacting only privileged material, if any.

17. You are to produce the original and each non-identical copy of each document or tangible thing requested herein which is in your possession, custody or control.

18. No request for production shall be construed with reference to any other request for production for purposes of limitation.

19. Documents that are in paper form or that constitute other physical objects from which recorded information may be visually read, as well as audio or video tapes and similar recordings, shall be produced in their original form or in copies that are exact duplicates of the originals.

20. All documents shall be produced with Bates numbers that shall be unique for each page. Bates numbers shall contain a prefix that can be readily attributed to you. Bates numbering shall be sequential and consist of not less than seven (7) digits with zero fill as necessary to maintain the seven-digit sequence. If a Bates number is skipped, you must provide information identifying and explaining the missing Bates numbers.

21. All documents are to be produced in accordance with any agreements between you and Respondent regarding the production of electronically stored information and any protective order entered by the Court. In the absence of any agreement, all documents shall be produced in the following manner:

- a. All electronically stored documents shall be produced as single-page TIFF Group IV images with an OPT load file; images for individual documents must be contained in a single folder; and extracted or OCR text shall be provided as document level files, in the same folder as the images for the document.
- b. Parent-child relationships (association between an attachment and its parent document) shall be preserved. The attachment(s) shall be produced immediately after the parent document.
- c. Metadata, if available, shall be produced with a DAT load file as follows:
  - (1) For email, the metadata fields will include: Beginning Bates Number, Ending Bates Number, Attachment Beginning Bates, Page Count, Custodian, To, From, CC, BCC, Subject, Date and Time Sent

(MMDDYYYY HH:MM), Date and Time Received (MMDDYYYY HH:MM), and MD5 Hash.

(2) For email attachments, the metadata fields will include: Beginning Bates Number, Ending Bates Number, Title, Author, Page Count, Parent Beginning Bates, Custodian, Creation Date and Time (MMDDYYYY HH:MM), Last Modified Date and Time (MMDDYYYY HH:MM), Size, Location or Path, Original File Name, File Extension, Native DocLink, and MD5 Hash.

(3) For loose files other than email, the metadata fields will include: Beginning Bates Number, Ending Bates Number, Title, Author, Page Count, Custodian, Creation Date and Time (MMDDYYYY HH:MM), Last Modified Date and Time (MMDDYYYY HH:MM), Size, Location or Path, Original File Name, File Extension, Native DocLink, and MD5 Hash.

- d. Excel, Access, and PowerPoint files shall be produced in native format and with a corresponding TIFF Group IV image placeholder and document level extracted text files.
- e. All documents originating in hard copy form shall be produced as TIFF Group IV images with an OPT load file; images for individual documents must be contained in a single folder; and OCR text shall be provided as document level files, in the same folder as the images for the document. To the extent that metadata is available, it shall be produced as set forth in Instruction 21(c)(3) above.

**CERTIFICATE OF SERVICE**

I hereby certify that on January 5, 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

Thomas H. Brock  
Alexis Gilman  
Tara Reinhart  
Mark D. Seidman  
Michelle Yost  
Elizabeth C. Arens  
Jeanine Balbach  
Stephanie R. Cummings  
Melissa Davenport  
Svetlana S. Gans  
Elisa Kantor  
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Marc Schneider  
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Notice of Electronic Service

**I hereby certify that on January 05, 2016, I filed an electronic copy of the foregoing CHHI's Unopposed Motion for Issuance of Subpoena Duces Tecum to Marshall University, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
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**I hereby certify that on January 05, 2016, I served via E-Service an electronic copy of the foregoing CHHI's Unopposed Motion for Issuance of Subpoena Duces Tecum to Marshall University, upon:**

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