

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



ORIGINAL

Docket No. 9366

In the Matter of)

Cabell Huntington Hospital, Inc.)
a corporation;)

Pallottine Health Services, Inc.)
a corporation;)

and)

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

**COMPLAINT COUNSEL'S MOTION TO COMPEL
RESPONDENTS' PRODUCTION OF TESTIMONY, DOCUMENTS,
AND INFORMATION SUBMITTED TO STATE AGENCY**

Complaint Counsel respectfully moves the Court for an order, pursuant to Federal Trade Commission Rules of Practice 3.38, compelling Respondents' production to Complaint Counsel of testimony, documents, and information that Respondents have previously submitted to a state agency with regulatory authority to review Respondents' proposed transaction and to another party in a proceeding before that state agency.

A Memorandum in Support of Complaint Counsel's Motion and a Proposed Order are attached.

Respectfully submitted,

Dated: March 1, 2016

/s/ Alexis J. Gilman

Alexis J. Gilman
Tara Reinhart
Mark D. Seidman
Michelle M. Yost
Elizabeth C. Arens
Jeanine Balbach
Thomas H. Brock
Stephanie R. Cummings
Melissa Davenport
Svetlana S. Gans
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St. Mary's Medical Center, Inc.)	
a corporation.)	

**COMPLAINT COUNSEL'S STATEMENT OF CONFERENCES
WITH RESPONDENTS TO RESOLVE DISCOVERY DISPUTE**

As required by Paragraph 4 of the Additional Provisions of the Scheduling Order that the Court has entered in this matter, Complaint Counsel states that the parties have conferred on multiple occasions in good faith efforts to resolve a discovery dispute related to Complaint Counsel's receipt of testimony, documents, and information that Respondents have provided to a state agency with regulatory authority to review Respondents' proposed merger. Efforts to confer on this issue have included numerous communications, including multiple email communications that began on January 21 and continued through March 1, 2016. Participants in these multiple email communications to confer on this discovery dispute and seek a resolution have included numerous attorneys for each party, including for Complaint Counsel: Alexis J. Gilman, Mark Seidman, Michelle Yost, and Svetlana Gans; for Respondent Cabell Huntington Hospital: Geoffrey Irwin, Tara Zurawski, Kerri Ruttenberg, and Douglas Litvack;

and for Respondent St. Mary's Medical Center: Brett Ludwig and Holden Brooks.

The parties have not been able to reach a resolution of this discovery dispute, despite these multiple good faith communications. As a result, Complaint Counsel respectfully requests that the Court review the dispute and issue an appropriate order.

Counsel for Respondents have stated they will oppose this motion to compel.

Respectfully submitted,

Dated: March 1, 2016

/s/ Alexis J. Gilman

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**MEMORANDUM IN SUPPORT OF
COMPLAINT COUNSEL'S MOTION TO COMPEL
RESPONDENTS' PRODUCTION OF TESTIMONY, DOCUMENTS,
AND INFORMATION SUBMITTED TO STATE AGENCY**

Under West Virginia law, Respondents Cabell Huntington Hospital, Inc. ("Cabell") and St. Mary's Medical Center ("St. Mary's") must apply to the West Virginia Health Care Authority ("HCA") for a Certificate of Need ("CON"). As part of the CON approval process, Respondents have provided testimony, documents, and information to the HCA about Respondent Cabell's proposed acquisition of St. Mary's.

Complaint Counsel's discovery in the matter before this Court seeks production from Respondents of the testimony, documents, and information Respondents previously provided to the HCA. In response to Complaint Counsel's requests for production of documents, Respondents have provided to Complaint Counsel redacted copies of materials that Respondents

submitted to the HCA, but have refused to produce complete copies of their testimony, exhibits, and briefs to the HCA because Respondents designated the materials “confidential” in the CON proceeding and claim that two HCA orders prohibit their production. While the orders in the CON proceeding may require the West Virginia Health Care Authority and the other parties to maintain the confidentiality of Respondents’ materials, they do not protect Respondents against discovery of Respondents’ information in this case. These requested materials pertain to the purported efficiencies Respondents claim will result from the acquisition and are highly relevant to the case before the Court. Further, this information may be used as evidence against Cabell or to test the Cabell witnesses who testify at trial. For these reasons, Complaint Counsel respectfully moves the Court for an order compelling Respondents to produce unredacted transcripts, exhibits, and any other withheld materials that they previously provided in the CON proceeding.

BACKGROUND

This case challenges the acquisition of Respondent St. Mary’s by Respondent Cabell, the only two acute care hospitals in Huntington, West Virginia. Before closing, Cabell must obtain the approval of the HCA under the state’s CON program. The HCA conducted a hearing on December 21 and 22, 2015, in which Cabell, St. Mary’s, their consultants and experts, and third parties presented testimony and other evidence.

In discovery requests to Cabell and St. Mary’s, Complaint Counsel has sought the production of the transcripts, exhibits, and other materials proffered by Cabell and St. Mary’s at the HCA hearing.¹ Respondents do not dispute that these materials are responsive to Complaint

¹ Request No. 2 of Complaint Counsel’s Second Set of Requests for Production to Cabell and Request No. 1 of Complaint Counsel’s Second Set of Requests for Production to Pallottine Health Services, Inc. (St. Mary’s parent company) seek: “All materials produced, received, or used, and all testimony given or proffered by [Cabell, St. Mary’s,] and their consultants or experts, in the West Virginia Health Care Authority’s Certificate of Need

Counsel's document requests and are relevant to this litigation. A substantial portion of the testimony that Respondents have withheld relates to purported justifications for the acquisition, such as the efficiencies that the acquisition purportedly would achieve, and acquisition planning. The withheld testimony includes testimony proffered by Cabell from an executive of The Camden Group, which prepared for Respondents a report and recommendations concerning post-acquisition integration of Cabell and St. Mary's and expected efficiencies (the "Camden Report"). In its Ninth Affirmative Defense, Cabell asserts that the acquisition will result in efficiencies that exceed any anticompetitive effects alleged in the Complaint. In depositions, Cabell executives have stated that Cabell plans to follow the Camden Report's integration recommendations if the acquisition takes place. In addition, Cabell has withheld CON hearing testimony of Monte Ward, Cabell's Chief Financial Officer and Chief Acquisition Officer, who is responsible for the hospital's finances and will supervise the integration of Cabell and St. Mary's, including the implementation of efficiencies identified in the Camden Report.

Although Respondents' materials from the HCA hearing are both relevant to this case and responsive to our discovery request, Respondents have invoked an *in camera* order and a protective order entered in the state CON proceeding as the grounds for refusing to produce these documents to Complaint Counsel, making the novel argument that Respondents' own information is protected against discovery in the litigation before this Court.² A brief analysis of the protective order from the state proceeding shows that Respondents' claim should be rejected. Case law and common sense also dictate that Respondents should be ordered to produce to

proceeding relating to the Relevant Transaction, including, but not limited to, all documents and data, all discovery responses, all expert reports, all un-redacted transcripts of testimony, and all exhibits and demonstratives used or referenced at any hearing."

² Complaint Counsel does not seek to compel Respondents to produce any confidential exhibits or testimony that the other party to the hearing, Steel of West Virginia, may have submitted.

Complaint Counsel the materials Respondents have previously submitted to a state agency and produced to another party in the state CON proceeding.

ARGUMENT

I. **The HCA Protective Orders Do Not Shield Respondents' Materials from Discovery In This Case**

Respondents' refusal to produce materials disclosed in the CON proceeding is based on two orders entered by the HCA in the CON proceeding. Neither of these orders prevents production of Respondents' own information to Complaint Counsel in this case.

The In Camera Order. On the motion of Cabell, the HCA entered an "Order Granting Motion for Proceedings *In Camera*" on December 21, 2015 (the "*In Camera* Order") (See Exhibit A). The *In Camera* Order was entered because, according to the HCA, "the Confidential Materials should not be made available *to the public . . .*" *In Camera* Order at 4 (emphasis added). In defining the obligations and the rights of the parties under the *In Camera* Order, the HCA directed the parties "to treat all Confidential Materials in accordance with the Protective Order" that the HCA had entered 11 days earlier, which is attached to the *In Camera* Order. *In Camera* Order at 5 (*citing* attached Protective Order dated December 10, 2015, as supplemented December 11, 2015) (the "December 10 Protective Order").

The December 10 Protective Order. The HCA entered the December 10 Protective Order on the motion of Cabell, which had sought protection of materials it was required to produce to the other party in the state proceedings, Steel of West Virginia, Inc. ("SWVA") (as mentioned above, the December 10 Protective Order is included in Exhibit A to Complaint Counsel's filing). In the December 10 Protective Order, the HCA repeatedly made clear that the restrictions of the Protective Order applied only to the party *receiving* the discovery (*i.e.*, a party

receiving the confidential information of *another party*).³ For example, Paragraph 4 established limits on only the party receiving the discovery, but, importantly, it did not restrict the *producing party's* disclosure of its own documents. Paragraph 5 is equally explicit:

Any person *receiving* Confidential Materials shall safeguard their confidentiality and shall not reveal or discuss such materials with any other person or entity not entitled to disclosures herein provided. (Emphasis added.)

Paragraph 11 of the December 10 Protective Order eliminates any doubt that discovery of Cabell's materials is permitted in this lawsuit. The Order expressly precludes the producing party from importing its protections into other lawsuits:

. . . nor shall this Protective Order imply that reports or other documents designated as "Confidential Materials" under the terms of this Protective Order are properly discoverable or not properly discoverable . . . in . . . any other proceeding.

The December 10 Protective Order, as incorporated by reference in the *In Camera* Order, does not allow Respondents to avoid discovery in this case of their own information that was submitted in the CON proceeding.

In correspondence concerning their lack of compliance with Complaint Counsel's discovery request, Respondents have asserted that the HCA excluded the public, including Complaint Counsel representatives, from the *in camera* portions of the CON hearing to protect Respondents' materials, and have suggested that Complaint Counsel obtain Respondents' materials from the HCA. But, as explained above, HCA's prophylactic exclusion of members of the public has no bearing on Complaint Counsel's ability to obtain Respondents' confidential information in this litigation. Even if the materials could be obtained from the HCA, Respondents are not relieved of their obligation to comply with a valid discovery request in this case.

³ Also on December 10, 2015, the HCA entered a protective order with identical terms applying to St. Mary's produced materials. *See* Exhibit B.

II. Complaint Counsel's Position is Consistent with Uniform Practice and Precedent

Substantial precedent reinforces the conclusion that materials Respondents' submitted to the state agency in the CON proceeding are subject to discovery in this proceeding. Courts have routinely overruled parties asserting that a protective order in a one case eliminates a party's obligation to produce its own materials in response to discovery in another proceeding. This outcome makes sense because the producing party has the full opportunity to protect the confidentiality of its materials in the second case.

This common sense conclusion was reached by the court in *Deford v. Schmid Products Co.*, 120 F.R.D. 648 (D. Md. 1987). In *Deford*, the court concluded that defendant's documents produced in an earlier litigation were subject to discovery in a second litigation, notwithstanding the protective order in the first litigation. The earlier protective order – like the December 10 Protective Order here – “expressly disclaim[ed] any effect on other cases or any attempt to restrict [the defendant's] right to further disclose the documents it has produced.” *Id.* at 655.

Another relevant example is *Carter-Wallace, Inc. v. Hartz Mountain Industries*, 92 F.R.D. 67 (S.D.N.Y. 1981). In an earlier case in which Hartz was a defendant, the court had entered a protective order that provided:

All documents and information disclosed or produced by a party herein shall be used solely for preparation for and use at the trial of this action and shall not be used or disclosed *by the receiving party* for any other purpose, including any commercial or business purpose.

92 F.R.D. at 69 (emphasis added). The court in a second litigation, in which Hartz was again a defendant, expressly rejected the argument that the protective order in the first litigation precluded Hartz from producing its own materials to the plaintiff in the second lawsuit, stating:

None of the cases or principles cited by Hartz support *the absurd tenet* that a party can avoid discovery in one case merely because it disclosed the same material to an adversary bound by a protective order in another case.

Id. (Emphasis added.) As in *Carter-Wallace*, Complaint Counsel seeks from Respondents nothing more than materials Respondents provided to a government agency and another party in the state CON proceeding.

The Carter-Wallace decision rebuts assertions made by Respondents in meet-and-confers with Complaint Counsel and distinguishes precedent that Respondents may invoke. First, contrary to Respondents' claim that Complaint Counsel should obtain the materials we seek from the HCA, courts have held that a party to the second lawsuit generally cannot obtain the materials directly from the court that entered the protective order. *Carter-Wallace*, 92 F.R.D. at 69 (citing *Martindell v. ITT*, 594 F.2d 291 (2d Cir. 1979)). Second, courts have denied the *recipient* leave to produce protected documents it obtained through discovery that were covered by the protective order in in the first lawsuit. *Carter-Wallace*, 92 F.R.D. at 69 (citing *GAF Corporation v. Eastman Kodak Company*, 415 F. Supp. 129 (S.D.N.Y.1976)). *Carter-Wallace* distinguished this precedent: "A fundamental distinction among the cases is the status of the entity to which the request for production is addressed. . . ." *Carter-Wallace*, 92 F.R.D. at 69.

The court continued:

Significantly, [Carter-Wallace] seeks production not from the court whose order sealed the record nor from the party whose receipt of the information was contingent upon its maintenance of strict security over its further dissemination. Rather, discovery is explicitly directed at Hartz, the party that originally controlled the evidence and the one party not bound by an order which by its own terms prohibits disclosure only by "the receiving party." *Id.*

The same situation applies here: the *In Camera* Order and the December 10 Protective Order might preclude Complaint Counsel from obtaining Respondents' confidential information from either the HCA or the other party to the CON proceeding, SWVA, but Complaint Counsel seeks

this information *from Respondents themselves*, and the HCA's orders do not extend to the matter before this court or protect Respondents against Complaint Counsel's reasonable discovery requests to Respondents for Respondents' information.

Other precedent refutes Respondents' claim that Complaint Counsel must apply to the HCA for access to these materials. For example, in *Shire Development, LLC. v. Mylan Pharmaceuticals*, No: 8:12-cv-1190-T-30AEP, 2013 U.S. Dist. LEXIS 181134, at *8 (M.D. Fla. 2013), the court recognized that its "first inquiry should be whether the prior confidentiality order intends to prohibit the discovery of the protected materials in other suits." The court further determined that referring the matter to the court responsible for the protective order is unnecessary when, as here:

in entering the protective orders in the other cases, the courts did not intend to limit another court's ability to evaluate whether the information protected by the orders in those cases should be subject to disclosure in another case. . . .

Id.; see December 10 Protective Order ¶ 11 ("*nor shall this Protective Order imply that reports or other documents designated as "Confidential Materials" under the terms of this Protective Order are properly discoverable or not properly discoverable. . . .*") (emphasis added).

Finally, the analysis developed in *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495 (D. Md. 2000), is not applicable here: *Tucker* and its progeny are relevant only "when one court is requested *to modify* a protective order entered by another court in previous litigation" *Air Cargo Litig. Trust v. i2 Techs.*, Civ. No. CCB-08-20022010, U.S. Dist. LEXIS 5149, at *6 (D. Md. 2010) (emphasis added); see also *Tucker*, 191 F.R.D. at 499 (the requested order requires "an evaluation of . . . practical matters such as where the court should allocate the burden and expense of seeking modification of the Order.") Here, as in *Mylan*, we only seek to compel the production by Respondents of materials in their possession, custody, or control containing

Respondents' own information already provided to a state agency. This motion does not require a modification of the protective order entered by the HCA.⁴

⁴ Other cases cited in *Tucker* do not support Respondents' apparent position. In *Rogers v. Proctor & Gamble Co.*, 107 F.R.D. 351 (E.D. Mo. 1985), the court had sealed the deposition of a third party; the same court subsequently exercised its discretionary authority to lift that protective order. *Id.* at 352. In *Dushkin Publishing Group, Inc. v. Kinko's Service Corp.*, 136 F.R.D. 334 (D.D.C. 1991), the court merely held that it would not order the production of documents in contravention of the protective order in the first case. Finally, in *Puerto Rico Aqueduct and Sewer Authority v. Clow Corp.*, 111 F.R.D. 65, 67-68 (D.P.R. 1986), the court held that it was obliged to honor the specific terms of the earlier protective order which precluded release of the discovery in the first lawsuit.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court order Respondents to produce unredacted transcripts, exhibits, briefs, and any other withheld materials from the state CON proceeding.

Respectfully submitted,

Dated: March 1, 2016

/s/ Alexis J. Gilman

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Docket No. 9366

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION
TO COMPEL RESPONDENTS' PRODUCTION OF TESTIMONY, DOCUMENTS,
AND INFORMATION SUBMITTED TO STATE AGENCY**

In consideration of the issues presented by Complaint Counsel's motion, and the parties' briefs discussing the relevant authorities, it is hereby,

ORDERED, that Respondents shall, within 3 days of this Order, produce to Complaint Counsel all transcripts of testimony, documents, briefs, and information, in an unredacted format, that Respondents submitted to the West Virginia Health Care Authority as part of the Certificate of Need proceedings related to Respondents' proposed merger.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 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 also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

And I certify that I delivered via electronic mail a copy of the foregoing document to:

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

Dated: March 1, 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.

Dated: March 1, 2016

By: s/ Jeanine Balbach

Exhibit A

WEST VIRGINIA HEALTH CARE AUTHORITY

IN RE: CABELL HUNTINGTON HOSPITAL, INC.
CON File No. 14-2-10375-A

ORDER GRANTING MOTION FOR PROCEEDINGS *IN CAMERA*

On November 30, 2015, Cabell Huntington Hospital, Inc. ("CHH"), the applicant in the above Certificate of Need ("CON") proceeding now pending before the West Virginia Health Care Authority ("Authority"), filed a Motion for Proceedings *In Camera* (the "Motion"). This CON proceeding deals with the proposed acquisition of St. Mary's Medical Center ("SMMC") by CHH.

CHH filed the Motion on the grounds that certain information at issue in the hearing to be held on December 21-22, 2015, contains "competitively sensitive information having commercial value, the release of which would give its users an opportunity to obtain a business advantage over competitors." Included within such competitively sensitive information is The Camden Group report that contains a comprehensive business plan to optimize operational efficiencies following CHH's acquisition of SMMC. CHH's contends that neither it nor SMMC have non-redacted versions of this report because of the competitively sensitive nature of the information included in the report about the other hospital, and that the public disclosure of The Camden Group report may create harmful circumstances to both CHH's and SMMC, which could weaken their prospective competitive positions in the market if the transaction does not ultimately close.

During the discovery phase of this proceeding, Steel of West Virginia, Inc. ("SWVA") issued written discovery requests and a subpoena *duces tecum* to CHH and SMMC,

EXHIBIT # 77
CON FILE # 14-2-10375

respectively, that both CHH and SMMC identified as seeking commercially sensitive information. In addition, SWVA issued a subpoena *duces tecum* to The Camden Group seeking materials that The Camden Group likewise asserted contained competitively sensitive information. For purposes of this Order, those documents identified by CHH, SMMC, and The Camden Group as containing commercially sensitive information shall be referred to as the “Confidential Materials.”

On December 7, 2015, SWVA filed its response to the Motion stating that it would withdraw its objection to holding portions of the hearing *in camera*, and withdraw its objections to the Confidential Materials identified by either CHH or SMMC being placed under seal, provided certain individuals representing SWVA be “permitted to attend and participate in the *in camera* proceedings and have access to the sealed documents.”

In recognition of the proprietary and competitively sensitive nature of the information in the Confidential Materials, the Authority issued a Protective Order dated December 10, 2015, and a Supplemental Protective Order dated December 11, 2015, (together, the “Protective Orders”) to govern and limit public disclosure of the Confidential Materials. The Protective Orders are attached hereto as Exhibit A.

The Authority recognizes that the Constitution of West Virginia provides that “the courts of this state shall be open” and that this right of access extends to other types of quasi-judicial proceedings. W. Va. Const. Article III, § 17; *See, Daily Gazette v. Committee on Legal Ethics*, 174 W. Va. 359 (1984); *Daily Gazette v. W. Va. Bd. of Medicine*, 177 W.Va. 316 (1986).

The Authority further acknowledges that the proceedings before it are generally open to the public as evidenced in the CON governing statute by references to the conduct of a “public hearing” at W. Va. Code § 16-2D-7. However, both the Legislature and the Supreme

Court of Appeals of West Virginia recognize that the right of access to open proceedings may be limited in certain circumstances.

The West Virginia Supreme Court of Appeals has held that “the qualified right of public access to civil court proceedings ... is not absolute and is subject to reasonable limitations imposed in the interest of fair administration of justice or other compelling policies.” Syllabus Point 6, *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W.Va. 611 (1999). In *Hoke*, the Supreme Court of Appeals upheld the closure of the court proceedings even though they were not specifically closed by statute, regulation, or rule because it recognized “a compelling countervailing public interest,” in that case – the confidentiality of juvenile education records. *Id.* at p. 621.

Here, the compelling countervailing public interest is the potential exposure of competitively sensitive information of CHH and SMMC, which would give others an opportunity to obtain a business advantage over competitors. Public disclosure of such information would create harmful circumstances to both CHH and SMMC.

West Virginia recognizes the necessity to protect competitively sensitive information in the West Virginia Uniform Trade Secrets Act, W. Va. Code §47-22-1 *et seq.* (the “Trade Secrets Act”), aimed at protecting confidential business information. The Trade Secrets Act explicitly protects “trade secrets,” which includes:

...information...that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use....

W. Va. Code §47-22-1(d). The Trade Secrets Act provides broad protections for handling such competitively sensitive information:

In an action brought pursuant to this article, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding *in camera* hearings, sealing the records of the action and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

W. Va. Code § 47-22-5.

The Authority, the parties, and West Virginia law all recognize the importance of protecting competitively sensitive information as a compelling public interest. In addition, the Authority's governing statutes grant it flexibility to regulate the course of its proceedings and consider requests such as that presented herein by CHH. W. Va. Code § 16-29B-12(a) states, "All hearings of the board shall be announced in a timely manner and shall be open to the public except as may be necessary to conduct business of an executive nature." Additionally, all hearings are to be conducted in accordance with the State Administrative Procedures Act which provides that the agency conducting the hearing "shall have the power to: ... (3) regulate the course of the hearing, ... [and] (5) dispose of procedural requests or similar matters..." W. Va. Code §29A-5-1(d).

Based on the foregoing, the Authority finds that the Confidential Materials contain extensive competitively sensitive information, the disclosure of which could have a substantial negative impact on both CHH and SMMC. Accordingly, the Authority does hereby find that protection of the Confidential Materials constitutes a compelling countervailing public policy. In light of this compelling countervailing public policy, which is granted protection under West Virginia law, the Authority finds that the Confidential Materials should not be made available to the public, that the information contained therein that is confidential and has not otherwise been made public by the party claiming confidentiality shall only be disclosed at the

hearing through *in camera* proceedings, and that the record in this matter shall be sealed to the extent such Confidential Materials are included.

Due to the complicated nature of the potential testimony and analysis to be presented at the hearing, and the fact that testimony involving the Confidential Materials certainly will be discussed by various witnesses for both CHH and SWVA, the Authority finds that certain portions of the hearing shall be conducted *in camera* and the transcript and any documents designated as "Confidential Materials," as defined in the Protective Order, shall be sealed.

Accordingly, it is **ORDERED** that CHH's Motion for Proceedings *In Camera* is **GRANTED**, and that certain portions of the hearing in this matter currently scheduled to be held on December 21-22, 2015, be conducted *in camera* to the extent testimony will disclose commercially sensitive information that is contained in Confidential Materials and that has not previously been made public by the party claiming confidentiality. It is further **ORDERED** that the hearing transcript for those portions of the hearing held *in camera* shall likewise be sealed. It is further **ORDERED** that all parties present at the hearing shall treat all Confidential Materials in accordance with the Protective Order. It is further **ORDERED** that only the following persons may be present during the *in camera* proceedings:

- (a) Members of the Authority Board and its staff;
- (b) All counsel of record for CHH and SWVA;
- (c) Designated witnesses called to testify;
- (d) The Chief Executive Officer, the Vice President for Administration, and the Benefits Manager for SWVA;
- (e) Three designated representatives of CHH, provided that the Confidential

Materials submitted by SMMC do not form the basis for the underlying testimony of an *in camera* witness;

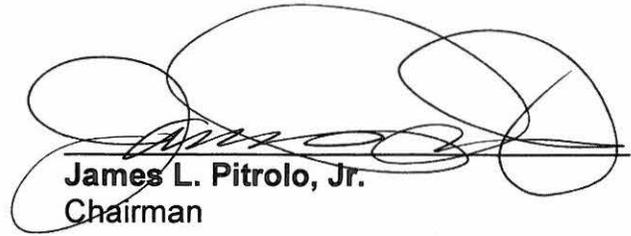
(f) Counsel for The Camden Group, provided that said counsel shall not be permitted to participate directly in the hearing;

and

(g) The court reporter.

The Authority will send copies of this Order to all counsel of record.

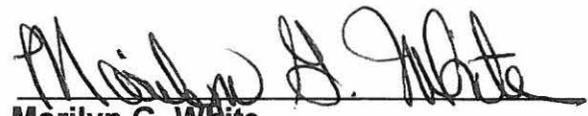
Done this 21 day of DECEMBER, 2015.



James L. Pitrolo, Jr.
Chairman



Sonia D. Chambers
Board Member



Marilyn G. White
Board Member

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Charleston, WV 25301
On Behalf of Steel of West Virginia, Inc.

The Honorable Natalie Tennant
Secretary of State
State Capitol Complex
Charleston, WV 25305

EXHIBIT A

(Attach Protective Orders)

WEST VIRGINIA HEALTH CARE AUTHORITY

IN RE: CABELL HUNTINGTON HOSPITAL, INC.
CON File No. 14-2-10375-A

PROTECTIVE ORDER

Pursuant to Rule 26(c) of the West Virginia Rules of Civil Procedure, for good cause shown, the West Virginia Health Care Authority ("Authority") hereby issues the following Protective Order concerning certain documents produced by Cabell Huntington Hospital, Inc. ("CHH"), the Applicant in the above-captioned matter, in response to Steel of West Virginia's ("SWVA") discovery requests. It is hereby **ORDERED** as follows:

1. Through discovery, SWVA has requested CHH to produce copies of certain documents and to provide certain answers relative to its Certificate of Need ("CON") application now pending before the Authority that would contain proprietary and competitively sensitive information having commercial value, the release of which would give its users an opportunity to obtain a business advantage over competitors. Some of these documents contain information that must be kept confidential from the other party to the proposed transaction, and not just other competitors. In addition, disclosure of some of the requested information may otherwise weaken the prospective competitive position of both CHH and SMMC by inducing employees and other entities to take actions in anticipation of a transaction that may not ultimately close. This competitively sensitive information includes, but is not limited to, CCH's responses to all or parts of Interrogatories 1, 2, 3, 5, 7, and 9 and Requests for Production 1, 2, 4, 5, 6, 9, 10, 16, 18, and 20.

EXHIBIT # 64
CON FILE # 14-2-10375

2. The documents and information produced in response to SWVA's discovery requests shall be held by SWVA in a confidential and secure manner prior to the administrative hearing in this matter. Such documents and information shall be specifically identified by CHH at the time of their production, and referred to herein, as "Confidential Materials."

3. No party or attorney or other person subject to this Protective Order shall disclose, distribute, transmit, or otherwise divulge any Confidential Materials except in accordance with this Protective Order.

4. Confidential Materials shall be made available only to: (a) counsel of record for SWVA, and the legal associates, clerical, or support staff of such counsel assisting in their preparation for the administrative hearing; (b) the Chief Executive Officer, Vice President of Administration, and Benefits Manager of SWVA, to the extent they have a need to know about the Confidential Materials for purposes of testifying or assisting counsel in this administrative hearing; and (c) independent experts, or potential experts, or any other person employed or retained by SWVA or its counsel for the purpose of testifying or assisting counsel in this administrative hearing after said person has executed and delivered to counsel contemplating the disclosure such person's written acknowledgment, agreement, and consent to abide by the terms of this Protective Order.

5. Any person receiving Confidential Materials shall safeguard their confidentiality and shall not reveal or discuss such materials to or with any person or entity not entitled to disclosures herein provided.

6. Upon termination of this proceeding, including any appeals thereof, the original and all copies of Confidential Materials shall be returned to counsel for CHH or destroyed, with the destruction of such documents being certified in writing to counsel for CHH by SWVA.

Written notice of destruction shall be provided within five (5) business days of the destruction of Confidential Materials.

7. Nothing in this Protective Order shall be construed to prejudice a party's right to submit Confidential Materials as an exhibit in the administrative hearing, to use Confidential Materials in the taking of testimony at any deposition or administrative hearing in this matter, in defending against testimony offered by another party, or in oral or written arguments. Confidential Materials may be shown to any witness in preparation for such deposition or hearing, and at such deposition or hearing, after said witness has executed and delivered to counsel contemplating the disclosure such person's written acknowledgment, agreement, and consent to abide by the terms of this Protective Order. None of such disclosures, however, shall operate as a waiver of confidentiality.

8. Confidential Materials to be filed with the Authority by any party to this action shall be filed in sealed envelopes or other appropriately sealed containers, on which shall be a legend substantially of the form:

“PROTECTED DOCUMENT—The enclosed materials are subject to a Protective Order of the West Virginia Health Care Authority. This envelope may not be opened without an Order issued by the Authority, by any person other than the Authority, Authority personnel, or Counsel of Record.”

Inadvertent disclosure of any document to be so filed or served shall not operate as a waiver of confidentiality.

9. Nothing herein shall affect or restrict the rights of any party with respect to its own documents that are not Confidential Materials.

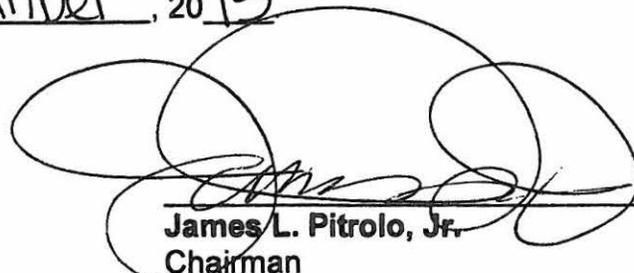
10. By the entry of this Protective Order, the parties shall not be deemed to have waived any objection available to them in response to any discovery request.

11. This Protective Order shall not enlarge or affect the scope of discovery in this administrative hearing, nor shall this Protective Order imply that reports or other documents designated as "Confidential Materials" under the terms of this Protective Order are properly discoverable or not properly discoverable; admissible or not admissible; and relevant or not relevant in this matter or any other proceeding. Confidential Materials produced pursuant to the terms of this Protective Order can only be used in conjunction with this administrative hearing and for no other purpose.

12. Nothing in this Protective Order shall be interpreted to require disclosure of materials that a party contends are protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other privilege.

The Authority will send copies of this Order to all counsel of record.

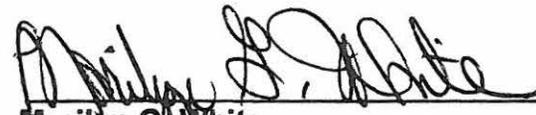
Done this 10th day of December, 2015



James L. Pitrolo, Jr.
Chairman



Sonia D. Chambers
Board Member



Marilyn G. White
Board Member

XC:

James W. Thomas, Esq.
Jackson Kelly PLLC
Post Office Box 553
Charleston, WV 25311
On Behalf of Applicant

Michael I. Spiker, Esq.
Carte P. Goodwin, Esq.
Joseph M. Ward, Esq.
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
On Behalf of Steel of West Virginia, Inc.

WEST VIRGINIA HEALTH CARE AUTHORITY

IN RE: CABELL HUNTINGTON HOSPITAL, INC.
CON File No. 14-2-10375-A

SUPPLEMENTAL PROTECTIVE ORDER

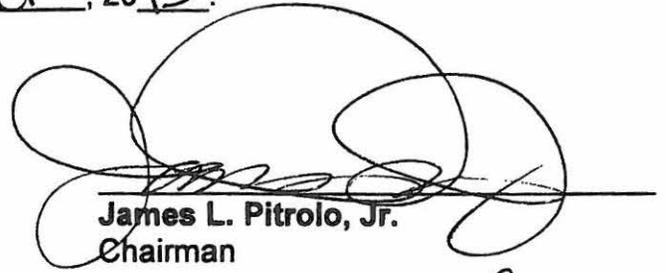
Pursuant to Rule 26(c) of the West Virginia Rules of Civil Procedure, for good cause shown, the West Virginia Health Care Authority ("Authority") hereby issues the following Supplemental Protective Order concerning documents produced voluntarily by The Camden Group pursuant to their December 10, 2015, Agreement with Steel of West Virginia ("SWVA"). It is hereby **ORDERED** as follows:

For the reasons set forth in the Protective Order entered by the Authority in the above-captioned matter on December 10, 2015, the documents produced by The Camden Group shall be considered proprietary and competitively sensitive, and shall also constitute "Confidential Materials" for purposes of said Protective Order. As such, the documents produced by The Camden Group shall be subject to all of the terms, conditions, confidentiality requirements, and limitations on disclosure set forth in the Authority's December 10, 2015, Protective Order, all of which shall be considered to be incorporated by reference herein.

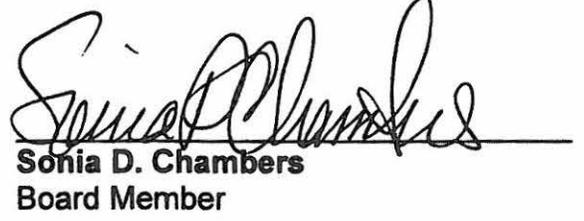
The Authority will send copies of this Order to all counsel of record, including counsel to The Camden Group.

EXHIBIT # 65
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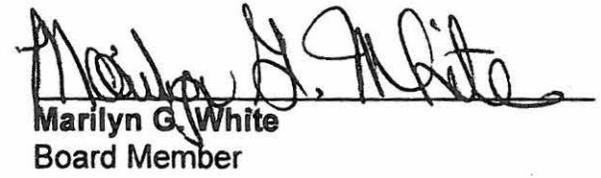
Done this 11th day of December, 2015.



James L. Pitrolo, Jr.
Chairman



Sonia D. Chambers
Board Member



Marilyn G. White
Board Member

XC:

James W. Thomas, Esq.
JACKSON KELLY, PLLC
Post Office Box 553
Charleston, WV 25311
On Behalf of Applicant

Michael I. Spiker, Esq.
Carte P. Goodwin, Esq.
Joseph M. Ward, Esq.
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300 Summers Street, Suite 1500
Charleston, WV 25301
On Behalf of Steel of West Virginia, Inc.

Douglas E. Litvack, Esq.
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001
Counsel for The Camden Group

Natalie Tennant, Secretary of State
State Capitol Complex
Building 1, Suite 157K
Charleston, WV 25305

Exhibit B

referred to herein, as "Confidential Materials."

3. No party or attorney or other person subject to this Protective Order shall disclose, distribute, transmit, or otherwise divulge any Confidential Materials except in accordance with this Protective Order.

4. Confidential Materials shall be made available only to: (a) counsel of record for SWVA, and the legal associates, clerical, or support staff of such counsel assisting in their preparation for the administrative hearing; (b) the Chief Executive Officer, Vice President of Administration, and Benefits Manager of SWVA, to the extent they have a need to know about the Confidential Materials for purposes of testifying or assisting counsel in this administrative hearing and their clerical or support staff; and (c) independent experts, or potential experts, or any other person employed or retained by SWVA or its counsel for the purpose of testifying or assisting counsel in this administrative hearing after said person has executed and delivered to counsel contemplating the disclosure such person's written acknowledgment, agreement, and consent to abide by the terms of this Protective Order.

5. Any person receiving Confidential Materials shall safeguard their confidentiality and shall not reveal or discuss such materials to or with any person or entity not entitled to disclosures herein provided.

6. Upon termination of CON File No. 14-2-10375-A, including any appeals thereof, the original and all copies of Confidential Materials shall be returned to counsel for SMMC or destroyed, with the destruction of such documents being certified in writing to counsel for SMMC by SWVA. Written notice of destruction shall be provided within five (5) business days of the destruction of Confidential Materials.

7. Nothing in this Protective Order shall be construed to prejudice a party's right to

submit Confidential Materials as an exhibit in the administrative hearing held in CON File No. 14-2-10375-A, to use Confidential Materials in the taking of testimony at any deposition or administrative hearing in this matter, in defending against testimony offered by another party, or in oral or written arguments. Confidential Materials may be shown to any witness in preparation for such deposition or hearing, and at such deposition or hearing, after said witness has executed and delivered to counsel contemplating the disclosure such person's written acknowledgment, agreement, and consent to abide by the terms of this Protective Order. None of such disclosures, however, shall operate as a waiver of confidentiality.

8. Confidential Materials to be filed with the West Virginia Health Care Authority by any party to CON File No. 14-2-10375-A shall be filed in sealed envelopes or other appropriately sealed containers, on which shall be a legend substantially of the form:

"PROTECTED DOCUMENT—The enclosed materials are subject to a Protective Order of the West Virginia Health Care Authority. This envelope may not be opened without an Order issued by the Authority, by any person other than the Authority, Authority personnel, or Counsel of Record."

Inadvertent disclosure of any document to be so filed or served shall not operate as a waiver of confidentiality.

9. Nothing herein shall affect or restrict the rights of any party with respect to its own documents that are not Confidential Materials.

10. By the entry of this Protective Order, the parties shall not be deemed to have waived any objection available to them in response to any discovery request or subpoena.

11. This Protective Order shall not enlarge or affect the scope of discovery or any subpoena in this administrative hearing, nor shall this Protective Order imply that reports or other documents designated as "Confidential Materials" under the terms of this Protective Order

are properly discoverable or not properly discoverable; admissible or not admissible; and relevant or not relevant in this matter or any other proceeding. Confidential Materials produced pursuant to the terms of this Protective Order can only be used in conjunction with this administrative hearing and for no other purpose.

12. Nothing in this Protective Order shall be interpreted to require disclosure of materials that a party contends are protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other privilege.

The Circuit Clerk is directed to send copies of this order to counsel listed below.

ENTERED this 10th day of December, 2015.

Christopher D Chiles
Judge Christopher Chiles

PREPARED BY:

Thomas J. Hurney
THOMAS J. HURNEY (WVSB # 1813)
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Counsel for the West Virginia Health Care Authority

WEST VIRGINIA HEALTH CARE AUTHORITY

IN RE: CABELL HUNTINGTON HOSPITAL, INC.
CON File No. 14-2-10375-A

PROTECTIVE ORDER

Pursuant to Rule 26(c) of the West Virginia Rules of Civil Procedure, for good cause shown, the West Virginia Health Care Authority (“Authority”) hereby issues the following Protective Order concerning certain documents produced by Cabell Huntington Hospital, Inc. (“CHH”), the Applicant in the above-captioned matter, in response to Steel of West Virginia’s (“SWVA”) discovery requests. It is hereby **ORDERED** as follows:

1. Through discovery, SWVA has requested CHH to produce copies of certain documents and to provide certain answers relative to its Certificate of Need (“CON”) application now pending before the Authority that would contain proprietary and competitively sensitive information having commercial value, the release of which would give its users an opportunity to obtain a business advantage over competitors. Some of these documents contain information that must be kept confidential from the other party to the proposed transaction, and not just other competitors. In addition, disclosure of some of the requested information may otherwise weaken the prospective competitive position of both CHH and SMMC by inducing employees and other entities to take actions in anticipation of a transaction that may not ultimately close. This competitively sensitive information includes, but is not limited to, CCH’s responses to all or parts of Interrogatories 1, 2, 3, 5, 7, and 9 and Requests for Production 1, 2, 4, 5, 6, 9, 10, 16, 18, and 20.

2. The documents and information produced in response to SWVA's discovery requests shall be held by SWVA in a confidential and secure manner prior to the administrative hearing in this matter. Such documents and information shall be specifically identified by CHH at the time of their production, and referred to herein, as "Confidential Materials."

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4. Confidential Materials shall be made available only to: (a) counsel of record for SWVA, and the legal associates, clerical, or support staff of such counsel assisting in their preparation for the administrative hearing; (b) the Chief Executive Officer, Vice President of Administration, and Benefits Manager of SWVA, to the extent they have a need to know about the Confidential Materials for purposes of testifying or assisting counsel in this administrative hearing; and (c) independent experts, or potential experts, or any other person employed or retained by SWVA or its counsel for the purpose of testifying or assisting counsel in this administrative hearing after said person has executed and delivered to counsel contemplating the disclosure such person's written acknowledgment, agreement, and consent to abide by the terms of this Protective Order.

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6. Upon termination of this proceeding, including any appeals thereof, the original and all copies of Confidential Materials shall be returned to counsel for CHH or destroyed, with the destruction of such documents being certified in writing to counsel for CHH by SWVA.

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The Authority will send copies of this Order to all counsel of record.

Done this 10th day of December, 2015.



James L. Pitrolo, Jr.
Chairman



Sonia D. Chambers
Board Member



Marilyn G. White
Board Member

XC:

James W. Thomas, Esq.
Jackson Kelly PLLC
Post Office Box 553
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On Behalf of Applicant

Michael I. Spiker, Esq.
Carte P. Goodwin, Esq.
Joseph M. Ward, Esq.
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
On Behalf of Steel of West Virginia, Inc.