

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

02 18 2016  
581048

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

ORIGINAL

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 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. ., Appendix ¶ 7.

During the meet and confer session in which the parties engaged prior

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.

, 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. 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 use and disclosure of confidential information."

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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.

16 C.F.R. § 3.31(d) (emphasis added).<sup>2</sup> The protective order defines “confidential material” as “any document or portion thereof that contains privileged, competitively sensitive, or sensitive personal information.” ., Appendix ¶¶ 1, 7. As the party resisting disclosure of information, Complaint Counsel bears the burden of demonstrating the need for concealment.

., 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”); ., 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

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<sup>2</sup> 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. ., 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.*

., No. 6:03-cv-796-Orl-28KRS, 2005 U.S. Dist. LEXIS

44820, at \*13-14 (M.D. Fla. Jan. 26, 2005) (emphasis added);

., 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 . . . .” . ¶ 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 (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. ,

, No. 9349 (Order dated Mar. 29, 2012), at p. 3,

<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. *\_\_\_\_\_*, 230 F.R.D. 38, 40 (D.D.C. 2005) (“[t]he party requesting a protective order must make a

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.

*\_\_\_\_\_*, 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”); *\_\_\_\_\_*, 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 *\_\_\_\_\_* 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 \_\_\_\_\_, 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.

., 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’ \_\_\_\_\_ 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.” 16 C.F.R § 3.31, Appendix ¶ 2, . ¶¶ 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].” ., 83 F. Supp. 3d 271, 275 (D.D.C. 2015).

remain secret for long in any event. at 275. Complaint Counsel now agrees that their own witness lists are not confidential, so there would seem to be no basis to



Dated: February 18, 2016

Respectfully submitted,

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**EXHIBIT A**

**FTC v. Cabell: Third Party Declarations** 

**Tara Zurawski** to: Seidman, Mark

01/30/2016 09:01 PM

4-3879

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

**EXHIBIT B**

Direct Number: (202) 879-3879  
tzurawski

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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.

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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,

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 7<sup>th</sup> 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 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 890 TdclosurTD[so]

February 18, 2016  
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,

Tara Lynn R. Zurawski

cc: Counsel of Record

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

In the Matter of

Cabell Huntington Hospital, Inc.  
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**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
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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

**[PROPOSED] ORDER ON RESPONDENTS' MOTION FOR DISCLOSURE OF THIRD  
PARTY DECLARATIONS TO RESPONDENTS' EMPLOYEES**

**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  
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---



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:**

D. Michael Chappell  
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600 Pennsylvania Ave., NW  
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Donald Clark  
600 Pennsylvania Ave., NW  
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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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