

UNITED STATES OF AMERICA

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shall treat all Confidential Materials in accordance with the Protective Order.

(Mot., Ex. A (“Sealing Order”) (emphasis added).) The WVHCA noted therein that it had previously entered protective orders that would “govern and limit public disclosure” of confidential materials submitted in connection with the proceedings. (Mot., Ex. B (“Protective Orders,” and together with the Sealing Order, the “Confidentiality Orders”)².) The Protective Orders likewise state that “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.**” (Mot., Ex. B (emphasis added).)

Complaint Counsel was present at the CON proceedings, and never challenged the entry of the Sealing Order. Nor did Complaint Counsel raise any objection when it was repeatedly excluded from the confidential portions of the hearings on the basis of the Confidentiality Orders. Instead, Complaint Counsel requested this confidential information in discovery in this proceeding.³ In response to Complaint Counsel’s discovery request pertaining to CON testimony and related materials, Cabell objected “because [the request] seeks sealed materials subject to the Protective Order issued by the [WVHCA and] Cabell is bound by that order and will not disclose the sealed transcripts” (Ex. A (Cabell’s Responses to 2d RFP No. 2).) Pallottine Health Services, Inc. objected as well.⁴ (Ex. B (PHS’s Responses to 2d RFP No. 1).)

² The various protective orders each apply to distinct parties in the CON proceedings.

³ Second Request for Production No. 2 provides: “All materials produced, received, or used, and all testimony given or proffered by the Company, St. Mary’s, and their consultants or experts, in the West Virginia Health Care Autesings on the

confidential documents related to the hearings

notwithstanding the Confidentiality Orders. Given the plain terms of the Confidentiality Orders, the answer is no.

Complaint Counsel's cases do not compel a contrary result. Complaint Counsel has cited two cases where a litigant in federal court attempts to evade discovery requests on the basis of a protective order entered in a prior federal proceeding. (*See* Mot. at 6-7 (citing *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 92 F.R.D. 67, 68 (S.D.N.Y. 1981) and

briefly mentioned that a protective order entered in a prior case could not shield documents from discovery because it “expressly disclaim[s] any effect on other cases.” *Deford*, 120 F.R.D. at 655; (*see also* Mot. at 6). Again, the Confidentiality Orders here contain no such disclaimer, but instead expressly provide that the materials must remain confidential outside the CON proceedings. (Protective Order ¶ 11.)

Thus, the Court should deny Complaint Counsel’s Motion.

II. COMPLAINT COUNSEL MUST DIRECT ITS REQUEST TO THE WVHCA.

If Complaint Counsel wants Respondents to produce documents sealed in a prior proceeding, it must first approach the tribunal that issued the sealing order—the WVHCA—before seeking an order that Respondents violate that order. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1132 (9th Cir. 2003) (holding that “a collateral litigant” should make a “request to the issuing court to modify an otherwise proper protective order”) (emphasis added); *Mugworld, Inc. v. G.G. Marck & Assocs., Inc.*, No. 405CV441, 2007 WL 2229568, at *1 (E.D. Tex. June 15, 2007) (“[W]hen the other matter is ongoing, courts have held that any request necessitating the modification of the protective order be directed to the issuing court.”). This inquiry ensures “as a matter of comity” that one tribunal “respects the order” of another.

Dated: March 7, 2016

Respectfully submitted,

/s/ Geoffrey S. Irwin

Geoffrey S. Irwin

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 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
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Michael Perry
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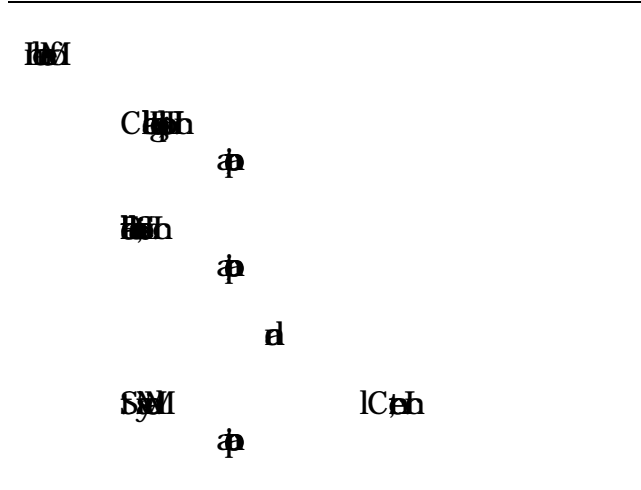
Counsel Supporting the Complaint

/s/ Geoffrey S. Irwin

*Counsel for Respondent
Cabell Huntington Hospital, Inc.*

EXHIBIT A

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



Doc 366

RESPONDENT CABELL HUNTINGTON HOSPITAL, INC.'S OBJECTIONS AND
RESPONSES TO THE FEDERAL TRADE COMMISSION'S
SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS (NOS. 1-4)

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PRELIMINARY STATEMENT

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SPECIFIC OBJECTIONS AND RESPONSE TO REQUEST FOR PRODUCTION NO. 1

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CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER

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REQUEST FOR PRODUCTION NO. 3

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SPECIFIC OBJECTIONS AND RESPONSE TO REQUEST FOR PRODUCTION NO. 3

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Delaware, 2016

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CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER

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~~ChP~~
~~ChI~~ H

EXHIBIT B

Responses to Complaint Counsel's Second Set of Requests for Production, whether or not specifically set forth or referred to therein.

SPECIFIC OBJECTIONS AND RESPONSES TO
COMPLAINT COUNSEL'S SECOND SET OF REQUESTS FOR PRODUCTION

Subject to and without waiving these General Objections, PHS specifically objects and responds to the Requests as follows:

REQUEST FOR PRODUCTION NO. 1:

All materials produced, received, or used, and all testimony given or proffered by the Company, Cabell Huntington Hospital, and their consultants or experts, in the West Virginia Health Care Authority's Certificate of Need 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.

SPECIFIC OBJECTIONS AND RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

PHS incorporates by reference each of its General Objections as though fully set forth herein. PHS objects to this Request to the extent it seeks materials protected by the attorney-client privilege, the work product doctrine, and/or any other applicable common law or statutory privileges, doctrines or immunities. PHS objects to this Request to the extent that it seeks materials subject to the Protective Order issued by the West Virginia Health Care Authority. PHS is bound by that order and will not disclose the sealed transcripts.

PHS objects to this Request as unduly burdensome because the FTC attended the CON proceeding and now seeks duplicative discovery and to circumvent the Protective Order issued by the West Virginia Health Care Authority. PHS objects to this Request as overbroad and unduly burdensome because it asks for "all" materials, without any limitation. PHS objects to this Request to the extent that it requests PHS to produce or otherwise analyze documents or other information that is not within the possession, custody, or control of PHS, or to prepare any document or other information that does not already exist.

Subject to and without waiving PHS's objections and based upon PHS's understanding of this Request, PHS responds that it will produce non-privileged, non-immune, and responsive documents or things in its possession, custody, or control created after June 1, 2015.

REQUEST FOR PRODUCTION NO. 2:

All documents used or consulted by the Company in responding to Complaint Counsel's Interrogatories or Requests for Admission in this matter.

SPECIFIC OBJECTIONS AND RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

PHS incorporates by reference each of its General Objections as though fully set forth herein. PHS objects to this Request to the extent it seeks documents protected by the attorney-

Dated: February 1, 2016

Respectfully submitted,

/s/ H. Holden Brooks

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EXHIBIT C

James E. Pitolo, Jr.

Earl Ray Tomblin



Jeanine Baibach, CC-5506

EXHIBIT D

RE: FTC v. Cabell (Dkt. No. 9366) - Correspondence re SWVA's Violation of Sealing Order

Tara Zurawski to: Craig, Robert B.

02/11/2016 05:50 PM

4-3879

"Gilman, Alexis", "Cabell_Service%JONESDAY@JonesDay.com", "Arens, Elizabeth", "Kantor, Elisa", "Balbach, Jeanine", "James R. Bailes", "Davenport, Melissa", Melissa Eakle Leasure, "milw- smmcservice@foley.com", "McDonald,

Rob -

Thank you for your quick response. At this time, we have no further requests with regard to this

Tara:

Please let me know if you need anything further from SWVA relating to this issue.

Rob Craig

-----Original Message-----

From: Gilman, Alexis [<mailto:agilman@ftc.gov>]

Sent: Wednesday, February 10, 2016 11:05 PM

To: Craig, Robert B.; Tara Zurawski

Tara:

On Monday, I spoke with Alexis Gilman and Stephanie Cummings of the FTC about SWVA's inadvertent production of the unreacted transcripts from the CON hearing. They assured me that the hard copies of the transcripts would be destroyed and that any electronic copy would be deleted from the FTC's document system. They will provide me with written confirmation of the destruction of the documents when it occurs, and I will pass that assurance along to you. I

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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

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EXHIBIT E

- > that it would not oppose a motion by Complaint Counsel to obtain
- > this information from the CON proceeding. We will consider pursuing
- > this matter with the HCA, but in the meantime, given the timing of
- > the Part 3 hearing, we plan to file a motion to compel with Judge
- > Chappell. We continue to believe the Part 3 proceeding is the
- > proper venue for this dispute.
- >
- > Please let us know by 3pm today if you will oppose the motion before
- > Judge Chappell.
- >
- > Thanks,
- > Svetlana
- >
- > Svetlana S. Gans
- > Bureau of Competition
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- > Maildrop 6509
- > Washington, D.C. 20024
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- > (202) 326-2884 fax
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=====

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=====

Notice of Electronic Service

I hereby certify that on March 07, 2016, I filed an electronic copy of the foregoing Respondents' Opposition to Motion to Compel Production of Testimony, Documents, and Information Submitted to State Agency, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
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Washington, DC, 20580

I hereby certify that on March 07, 2016, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to Motion to Compel Production of Testimony, Documents, and Information Submitted to State Agency, upon:

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