

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

FEDERAL TRADE COMMISSION

and

COMMONWEALTH OF
PENNSYLVANIA,

Plaintiffs,

vs.

PENN STATE HERSHEY
MEDICAL CENTER

and

PINNACLE HEALTH SYSTEM,

Defendants.

Civil Action No.: 1:15-cv-02362

Hon. John E. Jones III

PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL

For the purpose of protecting the interests of the parties and non-parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Confidential Material, as hereafter defined.

1. As used in this Order, “Confidential Material” shall refer to any document or portion thereof that contains privileged information, Competitively Sensitive Information, or Sensitive Personal Information. “Sensitive Personal

Information” shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial information, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Competitively Sensitive Information” shall refer to, but is not limited to, trade secrets or other confidential research, development, commercial, and financial information, as such terms are used in Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and in the cases so construing that rule. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a non-party.

2. The “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding. “Commonwealth” shall refer to the Pennsylvania Office of Attorney General or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding. “Producing Party” shall mean any Defendant or non-party to this matter, or in a Commission or Commonwealth investigation or administrative proceeding.

3. Any document or portion thereof submitted by a Producing Party during the Commission's or the Commonwealth's investigations or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any other federal or state statute or regulation, or under any federal or state court or Commission precedent interpreting such statute or regulation, as well as any information that discloses the substance of the contents of any Confidential Material derived from a document subject to this Order, shall be treated as Confidential Material for purposes of this Order. The identity of a party or non-party submitting such Confidential Material shall also be treated as Confidential Material for the purposes of this Order where the submitter has requested such confidential treatment.

4. The parties and any non-parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as Confidential Material, including documents obtained by them from non-parties pursuant to discovery or as otherwise obtained.

5. The parties, in conducting discovery from non-parties, shall provide to each non-party a copy of this Order so as to inform each non-party of his, her, or its rights herein. Nothing in this order shall be construed as limiting any rights of a non-party from seeking other or further relief from this Court regarding the

disclosure of Confidential Material.

6. A designation of material as “Confidential” shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain, that counsel believes the material so designated constitutes Confidential Material as defined in Paragraph 1 of this Order.

7. Material may be designated as “Confidential” by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or, if an entire folder or box of documents is “Confidential,” by placing or affixing to that folder or box, the designation “CONFIDENTIAL,” together with an indication of the portion or portions of the document considered to be Confidential Material. Confidential Material contained in electronic documents may also be designated as confidential by placing the designation “CONFIDENTIAL” on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions masked or redacted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been masked or redacted and the reasons therefor.

8. Confidential Material shall be disclosed only to:

- (a) the Court presiding over this proceeding and personnel assisting the

Court;

- (b) the Plaintiffs, Plaintiffs' employees, and personnel retained by Plaintiffs as experts or consultants for this proceeding;
- (c) judges and other court personnel of any court having jurisdiction of any appellate proceeding involving this matter;
- (d) outside counsel of record for any Defendant, their associated attorneys and other employees of their law firm(s), provided they are not employees of a Defendant;
- (e) testifying or consulting experts retained to assist outside counsel in the preparation or hearing of this proceeding, including employees of the firm with which the expert or consultant is associated or independent contractors who are necessary to assist the expert's work, provided they are not employees of a Defendant and have signed an affidavit to abide by the terms of this Order;
- (f) any witness or deponent who may have authored or received the information in question; and
- (g) subject to Paragraphs 9-14 below, one designated in-house counsel for each Defendant, and one administrative assistant for each

designated in-house counsel. Defendant Penn State Hershey Medical Center's designated in-house counsel and administrative assistant are identified in Appendix A. Defendant Pinnacle Health System's designated in-house counsel and administrative assistant are identified in Appendix B. The access that the designated in-house counsel and administrative assistants may have to Confidential Material is subject to reconsideration for good cause shown.

9. Disclosure of Confidential Material to any person pursuant to this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Plaintiffs may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose Confidential Material as provided by the Commission's Rules of Practice, sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Plaintiffs.

10. The designated in-house counsel and administrative assistants listed in Appendices A and B shall file a declaration under penalty of perjury affirming that the in-house counsel and administrative assistants will not under any circumstances: (a) disclose Confidential Material to anyone not identified in Paragraph 8, above, or (b) use Confidential Material for any purpose not described

in Paragraph 9, above.

11. No Confidential Materials may be shown to any designated in-house counsel until after Defendants serve on Plaintiffs and the Producing Party a notice that: (1) identifies the specific in-house counsel that is seeking to receive the disclosure; (2) identifies the specific Confidential Material that is requested to be disclosed to the designated in-house counsel; and (3) states generally the reasons that such disclosure to the designated in-house counsel is necessary. Compliance with the notice in this paragraph does not require Defendants to waive any privileges (e.g., attorney work product or attorney-client privilege) and no statements made in the notice shall be deemed a waiver of any privilege.

Defendants must also serve on the Producing Party a copy of the declaration signed by the designated in-house counsel and his/her administrative assistant who seeks to review the specified Confidential Material and a copy of this Protective Order. Designated in-house counsel and his/her administrative assistant shall not receive access to the specified Confidential Material earlier than ten (10) calendar days after Defendants serve such notice to Plaintiffs and Producing Parties absent express written consent of the Plaintiffs and the Producing Parties. For purposes of calculating, if the tenth day falls on a holiday or weekend, the time is extended to the next business day.

12. If, during the subsequent 10-day period set forth in Paragraph 11,

Plaintiffs or a Producing Party objects to the designated in-house counsel and his/her administrative assistant having access to the specified Confidential Material, then such Confidential Material shall not be disclosed to the designated in-house counsel or his/her administrative assistant until all applicable objections are resolved. To resolve a dispute, the Plaintiffs or the Producing Party and the Defendants must meet and confer within the 10-day period. If the Plaintiffs or the Producing Party and the Defendants are unable to resolve the objections, any party may seek relief from the Court.

13. Defendants, their attorneys and the designated in-house counsel and his/her respective administrative assistant shall take all steps reasonable to secure and maintain the confidentiality of the Confidential Materials. Plaintiffs or Producing Parties may limit the disclosure of certain particularly sensitive Confidential Materials to designated in-house counsel and their respective administrative assistants through limited access, such as in person at the offices of Defendants' outside counsel, or using a secure electronic data room or document review platform using individual login identifications and passwords. If the Defendants object to the Plaintiffs' or Producing Party's limitation to access, and the parties are unable to resolve the Defendants' objections, any party may seek relief from the Court. However, Confidential Materials shall not be disclosed to designated counsel until the objection has been resolved.

14. Where Confidential Material is disclosed to only the designated in-house counsel and his/her administrative assistant of one party, such designated in-house counsel or his/her administrative assistant is not permitted, and nothing in this Protective Order shall be construed as permitting this designated in-house counsel or his/her respective administrative assistant, to share, exchange or discuss the Confidential Material, directly or through any other means, including through outside counsel, with the other party, including the other party's designated in-house counsel and his/her administrative assistant.

15. Notwithstanding the foregoing, any Confidential Material produced to the Plaintiffs by any physicians or physician groups shall not be disclosed to any individuals identified in Paragraph 8(g), above, provided, however, that the Defendants may seek leave of Court to disclose such Confidential Material to the individuals identified in Paragraph 8(g) for the purpose of rebutting or verifying the accuracy of statements made by the physicians or physician groups.

16. The parties shall promptly report any confirmed or suspected unauthorized use or disclosure of Confidential Material to the Court, to the parties and to the Producing Party.

17. In the event that any Confidential Material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Court, the Court shall be so informed by the Party filing such papers, and such papers shall be

filed *in camera*. To the extent that such material was originally submitted by a non-party, the Party including the material in its papers shall immediately notify the submitter of such inclusion. Confidential Material contained in the papers shall continue to have *in camera* treatment until further order of the Court, provided, however, that such papers may be furnished to persons or entities who may receive Confidential Material pursuant to Paragraph 8. Upon or after filing any paper containing Confidential Material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal Confidential Material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly Confidential Material.

18. Counsel for all parties to this action shall use their best efforts to avoid the need to disclose the contents of any Confidential Material when questioning witnesses or making arguments during the hearing.

19. Where it is not possible to avoid disclosing the contents of Confidential Material during witness examinations, counsel for all parties shall use their best efforts to consolidate their questioning regarding Confidential Material to a single portion of their examination of that witness, such as at the beginning or end of the examination, and shall notify the Court and counsel for the other parties before proceeding with such questioning. For that portion of the witness examination, the Court shall close the courtroom to the public and any employee

representatives of the Defendants who are not authorized to view the Confidential Material.

20. If Confidential Material is used during the hearing by counsel for any party, such material shall be displayed in Court in a manner that shows them only to the testifying witness, counsel, and the Court.

21. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of Confidential Material submitted by another party or non-party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least ten (10) business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of Confidential Material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Court. The recipient shall not oppose the submitter's efforts to challenge the disclosure of Confidential Material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 C.F.R. § 4.11(e), to discovery requests in another proceeding that are

directed to the Commission.

22. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing Confidential Material. At the conclusion of this proceeding, including the exhaustion of judicial review, each party shall, at the option of the Producing Party, either (1) return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 C.F.R. § 4.12; or (2) certify to the Producing Party within seven (7) business days that they have destroyed such material.

23. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Court, continue to be binding after the conclusion of this proceeding.

IT IS SO ORDERED.

ISSUED this 25th day of January, 2016.

s/ John E. Jones III
John E. Jones III
United States District Court Judge

APPENDIX A

1. Mark Faulkner, Associate General Counsel, Penn State Hershey Medical Center.
2. Mandy Houser, Executive Assistant/Paralegal, Penn State Hershey Medical Center.

APPENDIX B

1. Chris Markley, Senior Vice President & General Counsel, Pinnacle Health System.
2. Jennifer Woodford, Executive Assistant/Paralegal, Pinnacle Health System.