

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

**FEDERAL TRADE COMMISSION**

And

**COMMONWEALTH OF  
PENNSYLVANIA**

Plaintiffs,

v.

**THOMAS JEFFERSON UNIVERSITY**

And

**ALBERT EINSTEIN HEALTHCARE  
NETWORK**

Defendants.

No. 2:20-cv-01113-GJP

**PLAINTIFFS FEDERAL TRADE COMMISSION AND COMMONWEALTH  
OF PENNSYLVANIA'S RESPONSE TO SHANNONDELL, INC.'S MOTION  
TO QUASH AND/OR MODIFY THE SUBPOENAS TO PRODUCE DOCUMENTS**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....ii

BACKGROUND .....1

    A. Procedural Background.....1

    B. Shannondell, Inc. ....2

    C. Defendant Einstein’s Subpoena .....2

    D. Plaintiffs’ Follow-On Subpoena .....3

    E. Plaintiffs’ Extension of Shannondell’s Return Date.....3

ARGUMENT .....4

    I. Plaintiffs have consistently offered to extend their subpoena return date, and permitting Shannondell to produce documents after fact discovery and expert deadlines will likely unfairly prejudice Plaintiffs. ....5

    II. The Stipulated Protective Order adequately protects confidential information.....7

CONCLUSION.....8

**TABLE OF AUTHORITIES**

**Cases**

*In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 234 (E.D. Pa. 2014) ..... 7

*Grant Heilman Photography, Inc. v. John Wiley & Sons, Inc.*, No. 11-cv-1665, 2011  
 WL 5429005 (E.D. Pa. Nov. 7, 2011) ..... 5

**Rules**

Fed. R. Civ. P. 45 ..... 5, 7

Plaintiffs Federal Trade Commission and Commonwealth of Pennsylvania are mindful of the burdens on Shannondell, Inc. arising out of the ongoing public health emergency, and Plaintiffs agree with Shannondell that it does not compete with Defendants in the relevant markets at issue in this case. Nevertheless, on March 30, 2020, Defendant Albert Einstein Healthcare Network (“Einstein”) served Shannondell with a subpoena to produce a broad array of documents. Plaintiffs subsequently served a follow-on subpoena requesting only documents deemed responsive to Einstein’s subpoena. Plaintiffs, accordingly, take no position on whether the subpoenas impose an undue burden on Shannondell, as any such burden arises entirely out of Einstein’s subpoena.

Plaintiffs, however, respond to two points in Shannondell’s Motion to Quash Plaintiffs’ subpoena. First, Shannondell’s request to modify the subpoena return date to “at least” July 29, 2020 is after the July 20, 2020 close of fact discovery and after the deadline for serving opening expert reports set in the Court’s Scheduling Order. Permitting such a late return date will likely unfairly prejudice Plaintiffs. Second, Shannondell’s request to quash the subpoenas because they request confidential information is premature because Shannondell has not articulated why the protections afforded Shannondell in the Stipulated Protective Order in this case do not suffice.

Accordingly, Plaintiffs ask the Court to deny Shannondell’s Motion without prejudice so that the parties can work out a mutually agreeable date for production in accordance with the Protective Order in this case.

## **BACKGROUND**

### **A. Procedural Background**

On February 27, 2020, Plaintiffs filed this antitrust action seeking a preliminary injunction to stop the proposed merger of Defendants Thomas Jefferson University (“Jefferson”)

and Einstein pending the FTC's administrative review of the transaction. *See* Compl. for Temporary Restraining Order & Prelim. Injunction (ECF No. 1). The Court granted the unopposed motion for entry of a temporary restraining order prohibiting Defendants from consummating their proposed transaction until seven days after the Court rules on Plaintiffs' request for a preliminary injunction. Order (Feb. 28, 2020) (ECF No. 11) ¶ 4.

Fact discovery ends on July 20, 2020. Stipulated Scheduling Order (Apr. 17, 2020) (ECF No. 54) ¶ 1. The parties have served written discovery on each other and on nonparties.

### **B. Shannondell, Inc.**

Shannondell is a Pennsylvania corporation that operates a continuing care retirement community, a personal care home, and a skilled nursing facility ("SNF"). Nonparty Shannondell, Inc.'s Mem. of Law in Supp. of Mot. to Quash and/or Modify Subpoenas (ECF No. 57) ("Shannondell Mem.") at 2. Shannondell "is not a direct competitor of Jefferson or Einstein" and "does not provide general acute care or inpatient hospital services like Jefferson or Einstein." *Id.* at 3. "The services provided by Shannondell's SNF are not in the same competitive market as those services provided by the Defendants' hospitals and their direct competitors in the Greater Philadelphia and Montgomery County area. Rather the services provided by Shannondell's SNF are complementary in nature to the services provided by Defendant [sic]." *Id.*

### **C. Defendant Einstein's Subpoena**

Defendant Einstein served a subpoena to produce documents on Shannondell on March 30, 2020. *Id.* at 1. Einstein's subpoena requested, for the time period of January 1, 2016 to the present, nineteen categories of documents, including: strategic and business planning documents; "encounter-level data" for Shannondell patients; documents discussing

Shannondell's possible or actual termination of its participation in health plans; documents or communications reflecting Shannondell's contract concessions to any commercial payer; and all documents discussing, describing, or analyzing the entry or expansion of inpatient rehabilitation hospitals, inpatient rehabilitation units within hospitals, and/or skilled nursing facilities by any other healthcare provider in the Greater Philadelphia Area from January 1, 2016 to the present.<sup>1</sup> Einstein's subpoena set a return date of April 20, 2020. *See* ECF 56-1 at ECF p. 2.

**D. Plaintiffs' Follow-On Subpoena**

Plaintiffs served a follow-on subpoena on Shannondell on March 30 that contained one request for production of documents: "Submit all documents and information responsive to Document Requests enumerated in" Einstein's subpoena.<sup>2</sup> Plaintiffs' subpoena set the same return date as Einstein: April 20, 2020. ECF 56-1 at ECF p. 23.

**E. Plaintiffs' Extension of Shannondell's Return Date**

Upon Shannondell's request, Plaintiffs extended the date for Shannondell to provide its responses and objections to Plaintiffs' subpoena to April 28. *See* Ex. A, attached. On April 22, Shannondell served its objections and responses to Einstein's and Plaintiffs' subpoenas. *See* ECF No. 56-2. Shannondell objected to the subpoenas *in toto* and refused to produce any documents on the grounds that the subpoenas "fail to allow a reasonable time to comply," "subject Shannondell to an undue burden and expense," and "to the extent they seek disclosure

---

<sup>1</sup> Einstein's subpoena is reproduced in Shannondell, Inc.'s Motion to Quash and/or Modify the Subpoenas to Produce Documents, Ex. A (ECF No. 56-1) at ECF pages 2-21. Einstein's requests for production of documents are located in that document at ECF pages 15-18.

<sup>2</sup> Plaintiffs' subpoena is reproduced in Ex. A to Shannondell's Motion to Quash (ECF No. 56-1) at ECF pages 23-33. Plaintiffs' request for the production of documents is located in that document at ECF page 26.

of confidential, proprietary and/or trade secret information . . . and Plaintiff[s] and Defendant have not shown that the subpoena requests are relevant to their respective claims or defenses and proportional to the needs of the case.” *Id.* at ECF pp. 2-5.

On April 16, Plaintiffs agreed to extend the deadlines related to Plaintiffs’ subpoena until May 15 “with additional reasonable extensions possible once a scheduling order is in place, in order to avoid the need for Shannondell to expend any time or money on a motion to quash at this time.” Ex. B, attached.

On May 13, Plaintiffs told Shannondell that Plaintiffs are open to extending the deadline for compliance up to a reasonable period before the close of fact discovery, so long as Plaintiffs have sufficient time to review any documents and take appropriate follow-up actions. *See* Ex. C, attached. Specifically, Plaintiffs have offered to extend the deadline on the subpoenas again to June 15, 2020. *Id.*

### **ARGUMENT**

Plaintiffs agree with Shannondell that it does not compete with Defendants in the relevant markets at issue in this case. Plaintiffs subpoenaed Shannondell only after Defendant Einstein did so, and Plaintiffs requested only those documents deemed responsive to Einstein’s subpoena. Plaintiffs’ accordingly take no position on the issue of undue burden, which arises solely out of Einstein’s subpoena. *See, e.g.*, Shannondell Mem. at 15 (discussing Einstein Subpoena Request Nos. 7-9).

Plaintiffs, however, respond to two points raised in Shannondell’s Motion to Quash. First, Plaintiffs have offered reasonable extensions to Shannondell to ease its burden. Shannondell’s request to modify the subpoena return date to “at least” July 29, 2020, which comes after the close of fact discovery and after the deadline for serving opening expert reports

will likely unfairly prejudice Plaintiffs. Second, Shannondell's refusal to produce documents solely because such documents contain Shannondell's confidential information is premature. The Stipulated Protective Order in this case protects nonparties' confidential information, and Shannondell has neither demonstrated the insufficiency of those protections nor proffered any additional protections that it believes would suffice.

**I. Plaintiffs have consistently offered to extend their subpoena return date, and permitting Shannondell to produce documents after fact discovery and expert deadlines will likely unfairly prejudice Plaintiffs.**

Although Shannondell is correct that Rule 45 requires the Court to quash a subpoena that "fails to allow a reasonable time to comply," Fed. R. Civ. P. 45(d)(3)(A)(i), Shannondell's arguments regarding the timing of compliance with the Plaintiffs' subpoena, *see* Shannondell Mem. at 3-4, 11-12, should be rejected at this time.

First, Shannondell's argument that the subpoenas fail to allow a reasonable time for compliance is incorrect as applied to Plaintiffs. *See* Shannondell Mem. at 3-4, 11-12. Plaintiffs are sympathetic to Shannondell's position as a health care provider during this time. Plaintiffs, therefore, consistently offered to extend the return date for their subpoena. Plaintiffs initially matched the April 20, 2020 return date in Einstein's subpoena, then agreed to extend the return date to May 15, 2020, and then offered to extend the return date to June 15, 2020. *See, supra*, at 3-4. Plaintiffs have told Shannondell that Plaintiffs are open to additional extensions of the deadline for compliance up to a reasonable period before the close of fact discovery. *See* Ex. C, attached. "[M]any courts have found fourteen days from the date of service as presumptively reasonable." *Grant Heilman Photography, Inc. v. John Wiley & Sons, Inc.*, No. 11-1665, 2011 WL 5429005, at \*7 (E.D. Pa. Nov. 7, 2011) (quotation marks omitted). Here, Plaintiffs offered Shannondell forty-four days from the date of service with reasonable extensions thereafter. So



long as Plaintiffs receive fair discovery of Shannondell alongside Einstein, Plaintiffs are willing to extend the deadline for Shannondell's compliance with its subpoena up to any time sufficiently in advance of the close of fact discovery that protects Plaintiffs' ability to review Shannondell's production and take appropriate next steps.

Second, even if Plaintiffs' had failed to offer a reasonable time for compliance, Shannondell's requested extension to produce documents "at least an additional ninety (90) days from the date of Shannondell's Motion to Quash," *i.e.*, July 29, 2020, should be denied. Shannondell Mem. at 12 (emphasis in original). To begin with, the time that Shannondell needs to produce documents depends at least in part on what documents it is required to produce. That second question has not yet been answered either through negotiation with the parties or by the Court. Until Shannondell's obligations are clarified, there is little basis for setting a date for Shannondell's compliance.

In any event, Shannondell's proposed deadline of "at least" July 29, 2020 should be denied because it comes after the close of fact discovery on July 20 and after the deadline for opening expert reports on July 23. *See* Stipulated Scheduling Order (Apr. 17, 2020) (ECF No. 54) ¶¶ 1-2. Plaintiffs need sufficient time to review any documents Shannondell produces and determine if any follow-up action is required before fact discovery closes. Plaintiffs' experts need time to review pertinent Shannondell documents before serving their reports on July 23, 2020. Shannondell's requested deadline of "at least" July 29 unfairly prejudices Plaintiffs.

In the event the Court requires Shannondell to produce any documents responsive to Einstein's subpoena, Shannondell should do so sufficiently before the close of fact discovery so that Plaintiffs and their experts have a fair opportunity to review the documents.

**II. The Stipulated Protective Order adequately protects confidential information.**

Shannondell argues that the confidential nature of the information requested justifies quashing the subpoena. *See* Shannondell Mem. at 16-19. Plaintiffs appreciate that Einstein’s subpoena—and, therefore, Plaintiffs’ subpoena—call for confidential information. *See, e.g., id.* at 16 (discussing Einstein Subpoena Request Nos. 4, 5, 6, 7, 8, 10, 12, 15, 16, 18, and 19). However, Shannondell’s arguments do not address any deficiencies in the protections provided in the Stipulated Protective Order that the Court entered in this case. Accordingly, Shannondell’s motion to quash is premature to the extent it argues that Shannondell should not be required to produce confidential information.

“If the subpoenaed nonparty claims the protections under Rule 45(d)(3)(B) or asserts that disclosure would subject it to undue burden under Rule 45(d)(3)(A), it must show that disclosure will cause it a clearly defined and serious injury. This burden is particularly heavy to support a motion to quash as contrasted to some more limited protection such as a protective order.” *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 234, 239 (E.D. Pa. 2014) (internal citations and quotation marks omitted).

Here, the Stipulated Protective Order allows nonparties such as Shannondell to safeguard their confidential information to prevent the unauthorized disclosure and use of such information during and after the course of this litigation. For example, under the Stipulated Protective Order, “information that reveals trade secrets” may be designated as “Highly Confidential Information.” Stipulated Protective Order (ECF No. 55) ¶ 2. Highly Confidential Information may not be disclosed to Defendants’ employees. *See id.* ¶ 11. Similarly, Shannondell may designate its “research, development, technical, commercial, or financial information that [it] has maintained as confidential” as “Confidential Information.” *Id.* ¶ 1. Shannondell’s Confidential Information

may be shared with Defendants' employees in limited circumstances, including only after Defendants inform Shannondell in advance about which employees are seeking access to its Confidential Information. *Id.* ¶ 10. After Shannondell receives notice, Shannondell has the opportunity to contest Defendants' plan to share any of its Confidential Information with Defendants' employees. *Id.*

Given the protections in the Stipulated Protective Order, Shannondell's right to move for additional protections tailored to its needs, and that Shannondell has not requested any specific additional protections, Shannondell has not met its heavy burden to quash Plaintiffs' subpoena solely because the subpoena requires Shannondell to produce confidential information. Plaintiffs continue to express a willingness to work with Shannondell to provide reasonable extensions during these unprecedented times for healthcare providers.

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny without prejudice Shannondell's Motion to Quash with respect to Plaintiffs' subpoena.

Dated: May 14, 2020

Respectfully submitted,

/s/ James H. Weingarten

JAMES H. WEINGARTEN  
MARK SEIDMAN  
CHARLES DICKINSON  
ALBERT TENG  
JAMIE FRANCE  
GUSTAV CHIARELLO  
RYAN ANDREWS  
CHRISTOPHER HARRIS  
GUIA DIXON  
JONATHAN WRIGHT

Federal Trade Commission

/s/ Tracy Wertz

TRACY WERTZ, PA 69164  
JENNIFER THOMSON, PA 89360  
ABIGAIL WOOD, PA 325273  
STEPHEN KOVATIS, PA 209495

Office of the Attorney General  
Commonwealth of Pennsylvania  
Strawberry Square  
Harrisburg, PA 17120  
(717) 787-4530  
twertz@attorneygeneral.gov

Bureau of Competition  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
(202) 326-3570  
jweingarten@ftc.gov  
mseidman@ftc.gov  
cdickinson@ftc.gov

*Attorneys for Plaintiff  
Commonwealth of Pennsylvania*

*Attorneys for Plaintiff  
Federal Trade Commission*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 14th day of May 2020, I served the foregoing on all counsel of record via the Court's electronic filing system.

/s/ James H. Weingarten

JAMES H. WEINGARTEN

Attorney for Plaintiff Federal Trade Commission