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*.	Civil Action No. 20-01113

EINSTEIN HEALTHCARE NETWORK'S MEMORANDUM OF LAW
IN OPPOSITION TO SHANNONDELL INC.'S
MOTION TO QUASH AND/OR MODIFY THE SUBPOENAS

During this unprecedented and uncertain time in the healthcare field, Einstein Healthcare Network ("Einstein") certainly understands the difficulties facing resource-strapped providers in this area, as well as the paramount need to continue prioritizing patient care and safety. Therefore Einstein has conducted discovery in this matter by carefully balancing its need for information to defend against the government's allegations with the needs of third parties to care for the public health. Einstein accordingly issued a limited subpoena to Shannondell at Valley Forge ("Shannondell"), a skilled nursing facility ("SNF") located in the greater Philadelphia area, to obtain materials necessary to Einstein's defense while attempting from the earliest stages to work with Shannondell to alleviate burdens to the extent possible under the circumstances.

The Federal Trade Commission ("FTC") and Commonwealth of Pennsylvania, through its Office of Attorney General ("OAG") (together, "Plaintiffs"), filed this lawsuit seeking to block the proposed merger between Thomas Jefferson University ("Jefferson") and Einstein (together, "Defendants") based on allegations that it would reduce competition in the relevant

market for inpatient acute rehabilitation ("rehab") services in the Philadelphia area. Proving that the merger will reduce competition in a relevant market for antitrust purposes are essential elements of Plaintiffs' claims under the Clayton Act. *See, e.g., FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 117 (D.D.C. 2004).

Jefferson and Einstein strongly dispute Plaintiffs' allegations regarding these elements of their claims and require certain evidence from third-parties such as Shannondell to rebut them. The core of Shannondell's motion is that the information Einstein seeks is not relevant because Plaintiffs allege that SNFs – like Shannondell – do not compete in the Plaintiffs' alleged market for inpatient acute rehabilitation services. Dkt. No. 57, Shannondell Memorandum of Law in Support of Motion to Quash Subpoena ("Mem.") at 13. However, Jefferson and Einstein strongly contest the FTC's allegations regarding competition from SNFs as well as the contours of the proposed relevant market, and seeks the requested discovery to disprove those allegations. The Federal Rules of Civil Procedure do not limit discovery to information that *supports* a plaintiffs' claims; instead the scope of discovery extends to "any nonprivileged matter that is *relevant* to any party's *claim or defense*." Fed. R. Civ. P. 26(b)(1) (emphasis added). Here, the documents and data Einstein seeks clearly are relevant to rebutting Plaintiffs' claims that SNFs like Shannondell do not compete with providers of inpatient acute rehab services and to Einstein's defense that the proposed merger would not reduce competition in a properly-defined relevant market.

Apart from relevance, Shannondell's remaining objections relate to burden, timing, and confidentiality – concerns that are easily addressed. Einstein has attempted to work with Shannondell and other third party subpoena recipients in good faith to adjust deadlines and prioritize requests, and will continue to do so. And the generalized confidentiality concerns

raised by Shannondell are easily addressed by the robust Protective Order entered by the Court in this case on April 17, 2020 that prevents any disclosure of Shannondell's competitively sensitive information. *See* Dkt. No. 55. So long as Plaintiffs continue to pursue their claims, Einstein cannot simply forego important third party discovery to accommodate logistical or confidentiality concerns.

BACKGROUND

Plaintiffs filed their complaint on February 27, 2020 alleging that the merger of Jefferson and Einstein violates Section 7 of the Clayton Act because it would supposedly reduce competition in several distinct markets: (1) the markets for inpatient general acute care hospital services in the "Northern Philadelphia Area" and "Montgomery Area"; and (2) the market for inpatient acute rehab services in the "Philadelphia Area." Dkt. No. 7, Compl. ¶¶ 52, 56. Einstein disputes these allegations and is seeking discovery from facilities that offer acute care hospital and rehab services to demonstrate, among other things, that Plaintiffs' alleged product and geographic markets have been defined too narrowly and exclude numerous entities that compete with Jefferson and Einstein.

Einstein served such a subpoena for documents and data on Shannondell on March 30, 2020 (the "Subpoena"). Shannondell provides a number of services to greater Philadelphia area patients at its SNF location in Audubon, PA, including rehab services. Many of these rehab services are similar to those provided at inpatient rehabilitation facilities ("IRF"s) operated by Defendants, and therefore documents and data from Shannondell are relevant to evaluating Plaintiffs claims and Einstein's defenses, as discussed below. The Subpoena includes 19 requests for documents and data related to any transaction with, or competition with, Jefferson and Einstein (RFP Nos. 2, 5, and 12); Shannondell's rehab facilities and personnel (RFP Nos. 1

and 3); the relevant geographic market and area from which Shannondell draws patients (RFP Nos. 4 and 10); the rehab services offered by Shannondell (RFP Nos. 6 and 8); competition with respect to rehab services (RFP Nos. 7, 9, and 19); data showing patient location and demographics, health plan participation and reimbursement, and claim reimbursement for purposes of evaluating market definition and competitive effects (RFP Nos. 11 and 13-18). *See* Declaration of Stephen A. Loney, Jr., dated May 14, 2020 and filed contemporaneously herewith ("Loney Decl.") at ¶ 3. The discovery sought would support Einstein's defense that the Plaintiffs have failed to account for the extent of competition facing Jefferson and Einstein. Shannondell's responses would be subject to the Protective Order entered by this Court on April 17, 2020. *See* Dkt. No. 55.

After receiving the Subpoena, counsel for Shannondell contacted counsel for Einstein on April 3, 2020, requesting an opportunity to meet and confer regarding the timing and scope of Shannondell's response. Loney Decl. at ¶ 4. Counsel for both parties spoke for the first time on April 6, 2020. *Id.* at ¶ 5. During that call, counsel for Einstein explained that they were willing to work with Shannondell to reduce any burden by providing additional time and narrowing the scope of the requests based on what documents Shannondell perceived as particularly difficult to obtain. *Id.* Counsel for Einstein further offered a preliminary extension of time to respond to the Subpoena to April 30, 2020, and because the Scheduling Order in this matter had not yet been entered, counsel indicated that Einstein would consider a further extension if the parties to the litigation and the Court could settle on a discovery schedule that would accommodate more time for third party discovery. *Id.*

After the first meet and confer, counsel to Shannondell served written Objections to the Subpoena on April 22, 2020. *Id.* at ¶ 6. In the interim, the Court entered a Scheduling Order on

April 17, 2020, with a July 20, 2020 fact discovery deadline. Dkt. No. 54. In light of the Scheduling Order, on April 27, 2020, counsel for Einstein offered Shannondell additional time to respond to the Subpoena, requesting a response by May 15, 2020. Loney Decl., at ¶ 7. However, rather than attempting any further negotiations regarding timing, or any meaningful discussions regarding the scope, Shannondell filed a Motion to Quash on April 30, 2020. *Id*. at ¶ 8.

Had Shanondell conferred with Einstein prior to filing the Motion, it could have narrowed the issues with the hope of avoiding unnecessary motion practice. On May 13, 2020, at the initiation of counsel for Einstein, counsel for Shannondell indicated a willingness to negotiate with Einstein on the timing and scope of the Subpoena and agreed to extend Einstein's briefing deadline to add time for those negotiations to occur. *Id*. at ¶ 9. To facilitate these negotiations, Einstein and Shannondell agreed to delay Einstein's response to the Motion to Quash by one week with the intention of continuing to meet and confer. *Id*. However, despite Einstein's attempts to narrow the scope of its requests in response to Shannondell's burden concerns, Shannondell proved unable or unwilling to negotiate meaningfully. *Id*. at ¶ 11. And despite several discussions between counsel over the past week, Shannondell would not budge from a blanket refusal to produce anything. *See id.* at ¶ 10-11. Indeed, Shannondell stated on May 21, 2020 – Einstein's extended deadline to respond to the Motion to Quash – that it would not produce *anything at all* in response to the Subpoena, regardless of Einstein's efforts to narrow, adjust, or provide more time. *Id.* at ¶ 12.

LEGAL STANDARD

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1); *In*

re Domestic Drywall Antitrust Litig., 300 F.R.D. 234, 238 (E.D. Pa. 2014). A party "must take reasonable steps to avoid imposing undue burden or expense on a person subject to a subpoena." Fed. R. Civ. P. 45(d)(1). A person seeking to quash a subpoena must demonstrate that the subpoena imposes an "undue burden." Fed. R. Civ. P. 45(d)(3); *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. at 239. "[I]t is [movant's] burden to establish the requirements of Rule 45 as the party seeking to quash the subpoenas." *City of St. Petersburg v. Total Containment, Inc.*, No. 06-20953, 2008 WL 1995298, at *2 (E.D. Pa. May 5, 2008). "[The] burden is particularly heavy to support a motion to quash as contrasted to some more limited protection such as a protective order." *Frank Brunckhorst Co. v. Ihm*, No. MISC. 12-0217, 2012 WL 5250399, at *4 (E.D. Pa. Oct. 23, 2012) (citations and quotations omitted).

The subpoenaed nonparty must show that the disclosure will subject it to undue burden that will cause it a "clearly defined and serious injury." *Med. Tech., Inc. v. Breg, Inc.*, No. 10-MC-00100, 2010 WL 3734719, at *2 (E.D. Pa. Sept. 21, 2010); *see also City of St. Petersburg*, 2008 WL 1995298, at *2. And even if the nonparty is successful in demonstrating a clearly defined and serious injury associated with compliance, the Court should still deny the motion to quash if the issuing party shows "a substantial need for the testimony or material that cannot be otherwise met without undue hardship." Fed. R. Civ. P. 45(3)(C)(i). In determining whether the issuing party has demonstrated a "substantial need," the Court conducts a balancing test weighing "(1) the relevance, (2) need, (3) and confidentiality of the requested materials, as well as (4) the harm that compliance would cause the subpoenaed nonparty." *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. at 239.

ARGUMENT

Shannondell makes three arguments in support of its Motion to Quash, none of which satisfy Shannondell's burden. *First*, as to Shannondell's contention that the documents and data Einstein seeks are not relevant, the Subpoena is narrowly tailored to address issues at the heart of this dispute—i.e., competition from SNFs like Shannondell and the scope of the relevant market. *Second*, Shannondell's concerns regarding burden and the time period for a response ignore Einstein's willingness to work with Shannondell to minimize burden and work toward a reasonable timeline for compliance, consistent with the Court's Scheduling Order. *Third*, Shannondell's confidentiality concerns are readily addressed by the Protective Order entered in this case.

I. The Requested Materials Are Relevant to Plaintiffs' Claims and Einstein's Anticipated Defenses Under Rule 26.

Contrary to Shannondell's assertions, the Subpoena seeks information that is directly relevant to Plaintiffs' claims and Einstein's defenses. Under Rule 26 of the Federal Rules of Civil Procedure, a party is entitled to discovery relating to the subject matter of the lawsuit, including from nonparties, as long as the information sought "is reasonably calculated to lead to the discovery of admissible evidence." *First Sealord Sur. v. Durkin & Devries Ins. Agency*, 918 F. Supp. 2d 362, 383 (E.D. Pa. 2013) (citation omitted); *see also City of St. Petersburg*, 2008 WL 1995298, at *4. Courts have construed this language liberally, "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Momah v. Albert Einstein Med. Ctr.*, 164 F.R.D. 412, 417 (E.D. Pa. 1996).

Here, the requested documents and data are relevant to Plaintiffs' claims arising under the Clayton Act. Section 7 of the Clayton Act prohibits mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15

U.S.C. § 18. When considering Plaintiffs' request for a preliminary injunction, the Court must consider Plaintiffs' likelihood of success on the merits and the balance of the equities. 15 U.S.C. § 53(b)(2). Plaintiffs' burden is substantial because a preliminary injunction "may prevent the transaction from ever being consummated." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980); *see also United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998). To satisfy their burden of proving likelihood of success on the merits, Plaintiffs must prove: "(1) the relevant product market in which to assess the transaction, (2) the geographic market in which to assess the transaction, and (3) the transaction's probable effect on competition in the relevant product and geographic markets." *Arch Coal, Inc.*, 329 F. Supp. 2d at 117 (D.D.C. 2004). Plaintiffs' failure to prove the relevant market is fatal to their claims. *See, e.g., FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995); *Arch Coal, Inc.*, 329 F. Supp. 2d at 116–17.

Here, Plaintiffs allege that the proposed merger of Jefferson and Einstein is unlawful because it supposedly reduces competition in several distinct markets: (1) the markets for inpatient general acute care hospital services in the "Northern Philadelphia Area" and "Montgomery Area" and (2) the market for inpatient acute rehab services in the "Philadelphia Area." Compl. ¶¶ 52, 56. Whether Plaintiffs can prove these alleged relevant markets is one of the primary disputes in this action. To that end, the Subpoena seeks documents and information from Shannondell – and other third-parties – required to rebut Plaintiffs' allegations. Because Shannondell provides rehab services that compete with those of the merging parties, discovery from Shannondell is highly relevant to evaluating both the alleged product and geographic market. Einstein has a compelling need for this information because it is not available from the parties themselves; it is solely in the possession of third-parties who provide rehab services.

Each of the requests are relevant to at least one of the disputes in this case and to Einstein's defenses. Specifically:

- Subpoena Request Nos. 2, 5, and 12 relate to any transaction with, or competition with, Jefferson and Einstein;
- Subpoena Request Nos. 1 and 3 relate to Shannondell's rehab facilities and personnel;
- Subpoena Request Nos. 4 and 10 relate to the relevant geographic market and area from which Shannondell draws patients;
- Subpoena Request Nos. 6 and 8 relate to the rehab services offered by Shannondell;
- Subpoena Request Nos. 7, 9, and 10 relate to competition with respect to rehab services; and
- Subpoena Request Nos. 11 and 13-18 relate to data showing patient location and demographics, health plan participation and reimbursement, and claim reimbursement for purposes of evaluating market definition and competitive effects.

Loney Decl. at ¶ 3.

Consistent with Einstein's goal of reducing any unnecessary burden on third-parties, Einstein has offered to prioritize the above requests and evaluate the least burdensome means of obtaining the information necessary to Einstein's defense. However, instead of engaging in such a meet and confer, Shannondell improperly filed this Motion to Quash. In so doing, Shannondell has failed to heed the procedures specifically designed to avoid burdening the Court with needless discovery disputes that can and should be resolved among the parties and subpoena recipients. Under Local Rule 26(f), counsel for Shannondell was required to provide a certification accompanying its motion that "after a reasonable effort" the parties were "unable to resolve that dispute." Not only did Shannondell fail to include such a certification along with its motion, it declined to participate in any meaningful discussion about the substance and scope of the Subpoena before filing the Motion to Quash. *See* Loney Decl. at ¶¶ 4-8. Shannondell then

failed to respond meaningfully to Einstein's renewed attempts following the filing of this Motion to adjust, prioritize and/or narrow its requests in a way that would address Shannondell's burden concerns without the need for further litigation. *Id.* at ¶ 9-12. Nor did Shannondell follow the Court's individual practices and procedures which encourage parties to address discovery disputes through the scheduling of a telephone conference with the Court prior to filing a motion.

Shannondell's sole support for its argument that the Subpoena seek irrelevant discovery is that the Complaint alleges that SNFs, such as Shannondell, are not part of the *alleged* relevant product market for inpatient acute rehab services. Mem. at 13 (citing Compl. ¶ 49). In so doing, Shannondell misses the entire point: Einstein *disputes* these complaint allegations and is seeking the discovery necessary to rebut them, as it is entitled to do. Indeed, SNFs like Shannondell routinely perform rehab services that can be performed at either an IRF or a SNF setting,[1] yet the FTC arbitrarily excludes such SNFs from their alleged relevant market. Compl. ¶¶ 56-57. Shannondell's and Plaintiffs' *ipse dixit* that these SNFs do not compete with Einstein and Jefferson rehab facilities does not make it so. With the benefit of the discovery obtained from Shannondell (and others) Einstein intends to demonstrate to the Court that Plaintiffs cannot carry their burden of proving a relevant market limited to inpatient acute rehab services in the

[1] *See e.g.*, Medicare Payment Advisory Commission, *Report to the Congress: Medicare Payment Policy* 1, 160 (Mar. 2015), *available at* http://www.medpac.gov/docs/default-source/reports/mar2015_entirereport_revised.pdf (recommending Congress establish site-neutral payments for certain conditions treated at both IRFs and SNFs, in part, because "the Commission used criteria to identify conditions that may be appropriate for site-neutral payments between IRFs and SNFs [and f]or the select conditions, the majority of cases are treated in SNFs and the risk profiles of patients treated in IRFs and SNFs are similar"); *see also* CMS, *Medicare Skilled Nursing Facility Provider by RUG Aggregate Report, CY 2016, available at* https://data.cms.gov/Medicare-Skilled-Nursing-Facility-SNF-/Medicare-Skilled-Nursing-Facility-SNF-Provider-by-/b69y-znpa (demonstrating that a large majority of the patients treated at Rehab at Shannondell were categorized in the Ultra-High Resource Utilization Group (RUG) category, *i.e.*, the highest amount of rehab provided).

"Philadelphia Area." Attempting to prevent discovery based on the assumption that Plaintiffs are right on the merits places the cart before the horse, and a ruling from the Court that the information sought in the Subpoena is not relevant would deprive the Court of information necessary to evaluate whether Plaintiffs are likely to succeed on the merits of their claim under Section 7 of the Clayton Act. The discovery Einstein seeks is not just relevant, but of significant importance to Einstein's ability to defend itself against Plaintiffs' incorrect allegations regarding alleged harm to competition in the alleged relevant markets. The Court should deny Shannondell's Motion to Quash the Subpoena.

II. Einstein Has Been and Remains Willing to Negotiate a Reasonable Time for Shannondell to Respond Within the Bounds of the Court's Scheduling Order.

Shannondell also seeks to quash the Subpoena claiming that it does not have the adequate time to respond to the Subpoena in light of the ongoing pandemic. Mem. at 11-12. Einstein cannot over-emphasize how sympathetic it is to the challenges faced by any healthcare system during the COVID-19 pandemic, and indeed shares the same burdens articulated in Shannondell's motion. However, this alone is not sufficient to support Shannondell's Motion to Quash an otherwise valid subpoena. Other than the Plaintiffs, every party and subpoenaed nonparty in this case is part of the healthcare system facing this global crisis. Aware of this fact, the Court has already weighed the challenges facing the parties and nonparties and determined that July 20, 2020 is an appropriate conclusion to the parties' fact discovery period. *See* Dkt. No. 54. And Einstein has demonstrated a willingness to confer about deadlines and scope of production within that time frame. If the Court nevertheless were to hold that the ongoing pandemic represents a sufficiently high burden on Shannondell to avoid responding to the Subpoena in due course, such a ruling would effectively exempt every third party to whom the parties have issued subpoenas from providing much-needed discovery for the same reason.

Einstein is entitled to defend itself against this lawsuit despite the healthcare crisis that is wholly outside of its control, and it cannot do so effectively without this discovery.

Moreover, Einstein has attempted to provide Shannondell with ample time to respond to the limited subpoena requests. While Einstein initially requested an April 20, 2020 return date on its March 30, 2020 subpoena, Einstein voluntarily offered to extend the response period to 45 days, through May 15, 2020, with an offer to continue conferring if Shannondell needed more accommodation under the circumstances. *See* Loney Decl. at ¶ 7. Rather than engage in such a meet and confer, Shannondell filed its motion with the Court, and failed to comply with Local Rule 26.1(f), which requires "a certification of counsel that the parties, after reasonable effort, are unable to resolve the dispute." Fed. R. Civ. P. 26. Meanwhile, as of May 20, 2020, almost two months after issuance of the Subpoena, Shannondell had not even responded to Einstein's attempts to discern whether or when Shannondell could begin trying to locate responsive materials. Loney Decl. at ¶ 11. Only today did Shannondell's counsel write to confirm that Shannondell would not produce *any* materials in response to the Subpoena at this time, regardless of Einstein's efforts to narrow, adjust and provide more time. *Id.* at ¶ 12. Having spent the first 52 days refusing to even gather documents responsive to the Subpoena, Shannondell now requests an *additional* 90 days past its May 15, 2020 deadline to respond to the subpoena, for a total of 135 days; this would extend their response date well past the fact discovery deadline in this case. Even against the background of the COVID-19 crisis, Shannondell cannot support such an extraordinary request, which would effectively foreclose all third-party discovery in this matter.

Courts in this District evaluating motions to quash for failure to allow a reasonable time to comply have noted that "many courts have found fourteen days from the date of service as

presumptively reasonable." *Grant Heilman Photography, Inc. v. John Wiley & Sons, Inc.*, No. 11-CV-1665, 2011 WL 5429005, at *7 (E.D. Pa. Nov. 7, 2011) (citation omitted). Here, Shannondell has been given sufficient time to respond to the Subpoena in light of the pandemic. For many of the same reasons cited in Shannondell's motion, the parties have offered it far more than the presumptively reasonable 14 days to respond to the Subpoena.

To the extent that Shannondell alleges that the 45-day time to comply poses an undue burden, Shannondell has not carried its burden to prove a "clearly defined and serious injury." *Patrick Collins, Inc. v. Does 1-17*, No. 12-CV-3642, 2012 WL 13018273, at *5 (E.D. Pa. Sept. 27, 2012) (citations omitted) (holding "vague claim[s] of harm [fail] to demonstrate a 'clearly defined and serious injury.'"). Its assertions that the pandemic has stretched its staff thin (Mem. at 11-12), while undoubtedly true for Shannondell, the Defendants, and every third-party in this case, does not on its own establish that providing limited and necessary discovery materials in anything less than 135 days will cause a clearly defined and serious injury. Shannondell has not cited, nor has Einstein uncovered, any case law supporting the notion that the Court should grant a motion to quash where circumstances wholly outside the control of either party pose an *independent* burden on a third party who has also been served with a subpoena. While Einstein certainly appreciates the seriousness of the current public health situation, extending the deadline for Shannondell's response by 90 days would effectively foreclose Einstein from the discovery the Court requires to evaluate Plaintiffs' claims.

Even if the Court were to find that Shannondell's alleged harm is clearly defined and serious, the Motion to Quash must be denied because Einstein has substantial need for the discovery sought. In weighing whether the issuing party has a substantial need for the discovery sought in a subpoena, courts weigh "(1) the relevance, (2) need, (3) and confidentiality of the

requested materials, as well as (4) the harm that compliance would cause the subpoenaed nonparty." *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. at 239. On the balance, these factors weigh in favor of Einstein.

As discussed above, the requested data and documents are clearly relevant to Einstein's defense and the definition of the relevant geographic market. *Supra* at 7-10. Moreover, Einstein has a compelling need for the material sought in the Subpoena because the requested information is only available from Shannondell and, as discussed *supra*, is necessary to Einstein's defenses. Shannondell's confidential information is protected from disclosure under the protective order issued by this Court. Finally, Shannondell has not demonstrated any substantial injury arising from compliance with the Subpoena that could justify granting its motion to quash. For these reasons, Shannondell's motion must be denied.

III. The Court's Protective Order is Sufficient to Protect Shannondell's Confidential Information.

Shannondell also asserts that responding to the Subpoena will harm it because the Subpoena requests "privileged, confidential and proprietary information and trade secrets including business operations, plans, presentations, reports, market analysis, and strategies," the disclosure of which would put Shannondell at a competitive disadvantage. Mem. at 16. Shannondell further alleges that "Defendants could use this information to gain an unfair competitive advantage over Shannondell which would detrimentally and seriously impact Shannondell's ability to remain competitive in the relevant marketplace." Mem. at 17.

Shannondell is wrong. On April 17, 2020, the Court entered a Stipulated Protective Order that restricts the disclosure of confidential information. The Protective Order applies "[d]iscovery in this action" . . . "of Defendants or third parties." Dkt. No. 55 at 1. (emphasis added). It protects "Confidential Information," which is defined as "any document or other

information that contains (i) information prohibited from disclosure by statute; (ii) research, development, technical, commercial, or financial information that the party has maintained as confidential; (iii) medical information concerning any individual, or (iv) sensitive personal information . . . ." Dkt. No 55 at ¶ 1. The Protective Order further protects "Highly Confidential Information," which is defined as "any document or other information that contains (1) specific cost, rates, reimbursements, pricing, sales, revenue, reimbursement plans, or margin information relating to the producing party or a customer of the producing party, (ii) specific plans for capacity expansion or reduction, (iii) information that reveals trade secrets, (iv) specific payor contracts; (v) specific payor claims data; (vi) specific marketing and advertising data or plans that identify specific competitors or customers, or (vii) proprietary strategies or policies related to competition that have been kept confidential by the producing party, the disclosure of which poses a substantial risk of causing significant competitive injury to current or future commercial financial interests of the producing party, or a party to the litigation." *Id.* at ¶ 2.

Information designated "Highly Confidential Information" cannot be disclosed to Jefferson or Einstein, and can only be used by the parties' outside counsel and experts. *See id.* at ¶ 9 ("Highly Confidential information shall not be used or disclosed by the parties, counsel for the parties or by any other persons . . . for any purpose whatsoever other than in this litigation."). Protective orders of the type already entered by the Court in this case "adequately address . . . concerns about competitive disadvantage." *City of St. Petersburg*, 2008 WL 1995298, at *2. When a subpoenaed party attempts to quash a subpoena based on potential disclosure of competitive information, "the court examines whether a party will be harmed from disclosure by analyzing the injury that may result *under an appropriate protective order*." *Procter & Gamble Co. v. Be Well Mktg., Inc.*, No. 12-MC-392, 2013 WL 152801, at *2 (M.D. Pa. Jan. 15, 2013)

(emphasis added). Shannondell's concerns are adequately addressed by the Court's protective order and provide no basis to quash Einstein's subpoena.

Additionally, Shannondell's position that "Defendants could use this information to gain an unfair *competitive* advantage" (Mem. at 17 (emphasis added)), is directly contradictory to its other equally unavailing position that Einstein is *not* a competitor and therefore the discovery sought is improper under Rule 26 (*see* Mem. at 3). Shannondell cannot have its cake and eat it too; Einstein either is a competitor, in which case the discovery sought is relevant to the action under Rule 26, or it is not, in which case the subpoena will not harm Shannondell's competitive position. Either way, the motion to quash must be denied.

CONCLUSION

For the foregoing reasons, Einstein respectfully requests that Shannondell's Motion to Quash be denied.

Dated: May 21, 2020

Respectfully submitted,

/s/ Virginia A. Gibson

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CERTIFICATE OF SERVICE

I, Virginia A. Gibson, hereby certify that, on May 21, 2020, I caused a true and correct copy of the Einstein Healthcare Network's Memorandum of Law in Opposition to Shannondell, Inc.'s Motion to Quash and/or Modify the Subpoenas to be electronically filed and served via the Court's electronic filing system upon the parties registered to receive electronic filings.

/s/ Virginia A. Gibson
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