

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



In the Matter of)
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Phoebe Putney Health System, Inc.)
 a corporation, and)
)
Phoebe Putney Memorial Hospital, Inc.)
 a corporation, and)
)
Phoebe North, Inc.)
 a corporation, and)
)
HCA Inc.)
 a corporation, and)
)
Palmyra Park Hospital, Inc.)
 a corporation, and)
)
Hospital Authority of Albany-Dougherty)
County)

Docket No. 9348

**PHOEBE RESPONDENTS' OPPOSITION TO
BLUE CROSS AND BLUE SHIELD OF GEORGIA'S MOTION TO QUASH
SUBPOENA DUCES TECUM**

Respondents Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc. (collectively, "Phoebe") hereby oppose third-party Blue Cross and Blue Shield of Georgia, Inc.'s ("BCBS") Motion to Quash Subpoena Duces Tecum.

INTRODUCTION

On May 9, 2013, BCBS moved to quash the subpoena *duces tecum* issued by Phoebe to BCBS on April 26, 2013. BCBS has argued that its responses to a February 22, 2011 Civil Investigative Demand ("CID") issued by the Federal Trade Commission ("FTC") and an April 2013 subpoena *duces tecum* issued by the FTC should satisfy all of Phoebe's discovery demands, and that any requests that go beyond the limits set forth by the FTC's CID and subpoena are

unduly burdensome and expensive, and cumulative and duplicative. BCBS further alleges that Phoebe's refusal to have its discovery confined by the requests formulated by Complaint Counsel evidences "a poorly veiled attempt to achieve a delay," rather than an attempt to obtain information relevant to Phoebe's defense to the FTC's complaint.

In its motion to quash, BCBS fails to acknowledge its central role in the litigation between Phoebe and the FTC. In its complaint, the FTC has alleged that the Hospital Authority of Albany-Dougherty County's ("Authority") acquisition of Palmyra Park Hospital, Inc. ("Palmyra"), and subsequent lease of Palmyra to Phoebe Putney Health System, Inc. (the "Transaction"), threatens substantial harm to competition in the relevant market for "inpatient general acute-care hospital services sold to *commercial health plans*." Compl. ¶16 (emphasis added). By BCBS's own admission, BCBS operates one of the largest commercial health plans within the relevant geographic market alleged by the FTC. *See* Cheslock Decl. ¶5 (attached as **EXHIBIT A**). As such, obtaining discovery from BCBS is of critical importance to Phoebe and its ability to proffer a meaningful defense.

Indeed, Amy Cheslock, Vice President, Provider Engagement and Contracting for Wellpoint, Inc., the entity that manages BCBS's networks, submitted a declaration in connection with this proceeding expressing concern about the affect the Authority's acquisition of Palmyra will have on the prices BCBS pays for hospital services. *See id.* ¶¶ 19–20. Phoebe is entitled to obtain documents probing the underlying basis for this assertion. The need for this discovery is particularly important given that in a recent deposition, Ms. Cheslock was not able to explain the basis for several of the statements in her declaration regarding the impact of the Transaction because of, among other reasons, an inability to recall specific details. *See, e.g.*, Cheslock Dep. 71:7-10; 77:18-78:19 (Draft Deposition Transcript attached as **EXHIBIT B**).

The importance of the discovery requested from BCBS is only amplified by the fact that the FTC has included Ms. Cheslock on its Revised Preliminary Witness List, where she is expected to testify regarding the “competitive effects of the consummated transaction, negotiation of the transaction, market definition, member travel patterns for hospital usage, hospital/health plan contract negotiations, barriers to entry, efficiencies, [and] quality of care.” It is difficult to understand how Phoebe Putney’s narrowly tailored document requests that seek documents discussing these very subjects would not fall within the boundaries of permissible discovery.

ARGUMENT

I. Each Request Is Reasonably Expected to Yield Relevant Information and Is Not Overly Broad In Scope Or Unduly Burdensome.

Discovery is allowed in an FTC proceeding of anything “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1). Discovery should only be limited if the burden outweighs the benefit. *Id.* at § 3.31(c)(2).

Here, each discovery request is calculated to yield information relevant and vital to Phoebe’s defense in the pending FTC proceeding. Among other things, the FTC has alleged that:

- The Authority’s acquisition of Palmyra will result in “significant increases in healthcare costs for local residents . . . and the stifling of beneficial quality improvements.” Compl. ¶ 1.
- Health plans have maintained that, prior to the transaction, their networks required the inclusion of Phoebe or Palmyra, or both, in order to be commercially viable for Albany-area employers and other groups. *Id.* ¶ 10.
- The transaction at issue “greatly enhances Phoebe Putney’s bargaining position in negotiations with health plans, giving it the unfettered ability to raise reimbursement rates without fear of losing customers.” *Id.* ¶ 11.

Phoebe disputes all of these allegations and has a good-faith belief that BCBS is likely to have documents in its possession that supports Phoebe's defense. In addition and as explained above, Phoebe should also be permitted to probe the assertions in Ms. Cheslock's declaration filed in this case.

The burden is on the party challenging the subpoena, BCBS, to prove that the subpoena is unduly burdensome. *Plant Genetic Sys. v. Northrup King Co.*, 6 F. Supp. 2d 859, 862 (E.D. Mo. 1998) (citing *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1025 (Fed. Cir. 1986)); *In re Rambus Inc.*, 2002 FTC LEXIS 90, *9 (Nov. 18, 2002). The only burdens arguably specified by BCBS are cost and time, both of which have been held not enough to make production unduly burdensome. *See United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 650 (5th Cir. 1999) (although time and effort required to comply were extensive, subpoena was not unreasonably burdensome because compliance did not "unduly disrupt or seriously hinder normal operations" of the business); *United States v. Int'l Bus. Mach. Corp.*, 71 F.R.D. 88, 92 (S.D.N.Y. 1976) (compliance time of 3-6 months and tens of thousand of dollars not burdensome in light of size and significance of antitrust litigation); *Gandi v. Police Dept.*, 74 F.R.D. 115, 124 (E.D. Mich. 1977) (fact that production will be time consuming is not in itself unduly burdensome).

Because BCBS technically addresses each request separately in its motion—though practically only reasserts its general objections—Phoebe will address each request below.

A. Request number 1 for all contracts between BCBS and health care facilities in Georgia is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

The documents identified in request 1 are necessary for Phoebe's defense and necessary to rebut the assertions in Ms. Cheslock's declaration. Ms. Cheslock asserts that [REDACTED]

[REDACTED]

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

D. Request number 4 for documents sent to or from the FTC is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

As stated in BCBS's motion, Phoebe understands that BCBS has substantially complied with this request.

E. Request number 5 for documents relating to competition between health care facilities in Georgia is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

The FTC has alleged that the transaction at issue is likely to lead to higher prices for inpatient general acute-care hospital services because of the elimination of Palmyra as a supplier of these services. Ms. Cheslock's declaration similarly asserts that [REDACTED]

[REDACTED]

[REDACTED] Cheslock Decl. ¶ 11. This document request is intended to probe the veracity of those statements and, as such, is relevant to Phoebe's defense.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

F. Request number 6 for documents regarding the utilization of hospitals in the Geographic Area by BCBS enrollees is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

The FTC and BCBS maintain that Palmyra was viewed by patients as the next closest substitute for the relevant hospital services identified in the FTC's complaint. The extent to which patients express consumer preference through their utilization of each hospital is useful in disproving the FTC's allegations. These utilization rates may also shed light on the factors that patients consider when selecting a provider of inpatient general acute-care hospital services.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

- G. Request number 7 for documents relating to the shift, diversion, or referral of patients to healthcare facilities in the Geographic Area is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.**

Understanding the boundaries of the relevant geographic market is an essential component of any analysis of the competitive affects of the Hospital Authority's acquisition of Palmyra. The extent to which BCBS refers or directs patients from distant counties to Phoebe or Palmyra bears on this point. Similarly, the extent to which BCBS refers patients from the counties surrounding Phoebe or Palmyra to hospitals located in other areas also bears on the question of what the proper geographic market definition should be.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

- H. Request number 8 for documents relating to complaints concerning a health care facility raising rates on its charge master is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.**

This request is targeted at identifying any increases in prices for the relevant hospital services, or the perception of any increases in the prices for the relevant hospital services. Additionally, this request is targeted at identifying the causes of any potential increases in prices for the relevant hospital services. In light of the allegations in this matter, this request is indisputably relevant.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

- I. Request number 9 for proposals by BCBS to purchasers of its products that discuss health care facilities in the Geographic Area is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.**

BCBS has made numerous assertions about what attributes the products it markets must have in order to be attractive to employers, employer groups, and other purchasers of those products. These attributes include, for example, access to [REDACTED] [REDACTED] Cheslock Decl. ¶ 6. This request seeks to probe what, in fact, BCBS chooses to highlight in its marketing and other materials provided to potential consumers, including whether it highlights the inclusion of particular hospitals. The extent to which Phoebe is and was considered a “must-have” hospital is clearly relevant to the allegations in this case.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

J. Request number 10 for documents relating to the criteria that employers and enrollees use to select among payors and health plans is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

Like request 9, this request seeks to identify what variables consumers consider when making health insurance purchasing decisions. This request is clearly relevant to determining the impact of the transaction on the relevant market.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

K. Request number 11 for data elements related to inpatient discharge is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

Though asserting perfunctory objections to this request, BCBS’s principal objection is that the data it supplied in response to the FTC’s discovery requests should be sufficient for Phoebe to conduct any statistical analyses it may wish to perform using BCBS claims data. The claims data supplied to the FTC, however, were incomplete for a number of reasons. First, BCBS

did not fully comply with the CID issued to BCBS by Complaint Counsel on February 22, 2011.

EXHIBIT C lists the data elements subpoenaed by the FTC and shows the information submitted by BCBS in response. As is obvious from this Exhibit, BCBS did not submit numerous pieces of information that were subpoenaed, including, but not limited to, hospital owner information, race, newborn status, secondary diagnosis and procedures codes, DRG version, admit source, and claims adjustment amounts pursuant to stop-loss provisions. Second, under the terms of the CID (CID specification number 10), BCBS should have provided a data dictionary to facilitate the use or interpretation of all submitted data elements. While a dictionary was provided, it was incomplete. Among the data elements inadequately defined are: [REDACTED]

[REDACTED] Additionally, Exhibit C shows BCBS provided information on fifteen data elements *not* requested by the FTC and for which its submitted data dictionary contains *no* definitions. Third, the FTC's CID specifically excludes BCBS claims that were paid on behalf of enrollees residing in the fourteen Georgia Counties that the FTC defines as the "Metro Atlanta" area. The effect of this omission is the exclusion of the vast majority of BCBS claims that were paid to hospitals located in the Atlanta region. Without such data it is impossible to perform analysis that substantiates or refutes Ms. Cheslock's opinion that case-mix adjusted BCBS reimbursement rates paid to Phoebe Putney are among the higher rates paid by BCBS to hospitals in Georgia. Fourth, notwithstanding that BCBS did not fully comply with the CID issued by the FTC, the data elements which were requested are just a subset of all the data elements that are typically included in a submitted claim and which are commonly used in statistical compilations and analyses of claims data.

Phoebe seeks to remedy the deficiencies both in the FTC's CID and in BCBS's response to that CID by requesting among other things (1) all inpatient data elements submitted by hospitals on a UB-04 or comparable claims form used by Georgia hospitals to submit claims to

BCBS for payment; (2) a full data dictionary that includes complete definitions of data elements, look-up tables and definitions within these look-up tables that are needed to determine the English meaning of data fields that are alpha-numeric, the DRG version and number assigned by BCBS to an inpatient claim; (3) the reimbursement methodology used to pay the claim; and (4) the BCBS commercial name and type of product under which the claim was paid.

Any claims of burden are undermined by Ms. Cheslock's deposition testimony in which she indicates that [REDACTED]

[REDACTED] See Cheslock Dep. 177:5-179:9. As explained in Ms. Cheslock's deposition testimony, [REDACTED]

[REDACTED] *Id.* at 177:5-179:9.

L. Request number 12 for documents relating to studies of hospital reimbursement rates is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

BCBS and the FTC have alleged that Phoebe's reimbursement rates are higher than other hospitals within the State of Georgia. Decl. ¶ 12. This document request is intended to uncover the basis for BCBS's assertion as a means of responding to the FTC's allegations that the acquisition of Palmyra will likely lead to higher prices in the relevant service market.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

M. Request number 13 for documents relating to whether increases or reductions in hospital reimbursement rates are passed on to health plan members is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

The FTC claims that the acquisition of Palmyra will result in "significant increases in healthcare costs for local residents," Compl. ¶ 1, yet most of these residents do not pay the majority of their healthcare costs directly, particularly costs associated with inpatient hospital

services. Rather, these costs are borne by commercial insurance companies such as BCBS. As a result, any impact on these consumers arising from an increase or decrease in the fees for hospital services depends on the degree to which the fees are passed on to them by insurers, such as BCBS. This request seeks to identify documents to determine the extent to which changes in hospital reimbursement rates actually impact consumers.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

N. Request number 14 for documents relating to antitrust litigation in Georgia is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

Through its discovery requests, Phoebe is attempting to identify all factors that may impact a hospital's ability to exert leverage over commercial insurers with respect to pricing. One such factor would be the existence of most-favored-nations clauses in the contracts between certain commercial payors and hospitals. These provisions, which are often the subject of litigation, would essentially establish price-floors. This request attempts to identify these types of provisions.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

O. Request number 15 for documents relating to how BCBS sets its prices is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

As with request 13, this discovery request is relevant to assessing the extent to which the acquisition of Palmyra will have any impact on the healthcare prices paid by patients, not just insurance companies. Responses to this discovery request would address the FTC's allegations of likely consumer harm.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

P. Request number 16 for documents relating to a comparison of Palmyra and Phoebe usage by BCBS members is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

This discovery request directly addresses the question of whether the transaction at issue will result in higher prices for consumers and the overall competitive impact of the transaction, focusing particularly on what will happen to consumers who now have the benefit of having Palmyra within their healthcare network. In addition, data related to patients' utilization of each hospital speaks to the FTC's and BCBS's contention that Palmyra and Phoebe were viewed by patients as the next closest substitute for one another for the relevant hospital services identified in the FTC's complaint.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

Q. Request number 17 for documents related to the impact of most-favored nations clauses is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

As discussed in Phoebe's response to BCBS's objections to request 14, the existence of most-favored-nations clauses in contracts between any hospitals and insurers has the potential to impact the negotiations between other hospitals and insurers in the same geographic market. The ability to extract most-favored nations agreements may also be an indicator of a party's leverage in negotiations. For all of these reasons, this request is likely to lead to relevant information.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

R. Request number 18 for documents related to cost-shifting by hospitals in Georgia is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

Hospital cost shifting—charging private payers more in response to shortfalls in public payments—is an important consideration when assessing the pricing behavior of hospitals. This is particularly true for hospitals that serve large indigent populations, such as Phoebe. The extent to which payors, such as BCBS, may consider a hospital’s need to cost-shift in payor-hospital negotiations is relevant to Phoebe’s defense.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

S. Request number 19 for documents relating to competition between BCBS and the Phoebe Health Plan is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

Again, Phoebe is looking to identify all variables that might impact contract negotiations between Phoebe and BCBS, including any perceived competition from the Phoebe Health Plan, also known as the Phoebe Health Partnership. The Phoebe Health Partnership is a not-for-profit physician hospital organization that includes a large number of healthcare providers in addition to the Phoebe Putney Memorial Hospital.

BCBS has not specified any particular reason why the production of these documents would be unduly burdensome, harassing, or oppressive.

T. Request number 20 for documents sufficient to show the number of BCBS members/subscribers in Georgia is reasonably calculated to lead to relevant information and not overly broad, unduly burdensome, harassing, or oppressive.

As stated in BCBS’s motion, Phoebe understands that BCBS has substantially complied with this request.

II. Response Cannot Be Avoided Merely Because BCBS Asserts the Documents Contain Confidential Business and Commercial Information.

BCBS argues that it is not required to produce documents that seek information or documents that constitute, contain, or refer to trade secrets or other confidential business or commercial information of BCBS. The party claiming confidentiality must have specific proof that the information is confidential. *Centurion Indus., Inc. v. Warren Steurer and Assoc.*, 665 F.2d 323, 325 (10th Cir. 1981); *see also Federal Open Market Committee v. Merrill*, 443 U.S. 340, 362 (1979) (“[T]here is no absolute privilege for trade secrets and similar confidential information.”) (*quoting* 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2043 at 300 (1970)). BCBS, however, makes no specific showing regarding the confidentiality or sensitivity of the information requested by Phoebe.

Even if BCBS had demonstrated that any documents required to be produced by Phoebe’s subpoena were truly confidential, BCBS must also provide specific proof that disclosure of those documents would harm BCBS. *Centurion Indus., Inc.*, 665 F.2d at 325. The protective order currently in place in this proceeding sufficiently protects the confidentiality of any documents that BCBS in good-faith designates as “confidential material,” which is defined in the protective order to include “privileged, competitively sensitive information, or sensitive personal information.” Pursuant to the protective order, documents designated “confidential” will be shared with a limited universe of individuals that does not include employees of the respondents. *See* Protective Order Governing Discovery Material ¶ 7. In addition, those individuals that the Protective Order permits to review the produced materials are only permitted to rely on those documents for the purposes of the preparation of hearing of the instant proceeding. *Id.* at ¶ 8.

To the extent that BCBS has concerns regarding the production of privileged material, the protective order in this case addresses this issue. *See In the Matter of North Texas Specialty Physicians*, 2004 FTC LEXIS 14 (Jan. 30, 2004) (denying non-party Blue Cross Blue Shield of

Texas's motion to quash subpoena due to confidentiality concerns); *see also Centurian Indus., Inc.*, 665 F.2d at 326 (approving the use of protective orders to avoid disclosure of sensitive materials); *Federal Trade Commission v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff'd* 591 F.2d 182 (2d Cir. 1979) (An objection to a subpoena on grounds that it seeks confidential information "poses no obstacle to enforcement."). Specifically, the protective order states "masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor." *See* Protective Order ¶ 6.

CONCLUSION

As explained above, the discovery requests included within Phoebe's subpoena *duces tecum* are not only reasonably calculated to lead to discoverable information, but they are vital to Phoebe's defense to the FTC's allegations regarding the Hospital Authority's acquisition of Palmyra. Given the importance of this discovery, BCBS would need to demonstrate an extremely significant burden to outweigh Phoebe's need for the requested documents. BCBS, however, has made no such showing and set forth only conclusory, general statements as to the time and expense that would be required to comply with Phoebe's subpoena. BCBS has not established a valid basis for quashing Phoebe's subpoena and the instant motion should be denied.

Dated: May 21, 2013

Respectfully submitted,

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Hospital Authority of Albany-Dougherty County)	

[PROPOSED] ORDER

Having reviewed Blue Cross and Blue Shield of Georgia, Inc.’s Motion to Quash Subpoena *Duces Tecum*, and the Phoebe Respondents’ opposition thereto, it is HEREBY ORDERED that Blue Cross and Blue Shield of Georgia, Inc.’s motion is DENIED.

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I hereby certify that this 21st day of May, 2013 a true and correct copy of the foregoing PUBLIC document was filed via FTC e-file, which will send notification of such filing to:

Donald S. Clark
 Secretary
 Federal Trade Commission
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I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing PUBLIC document to:

The Honorable D. Michael Chappell
 Administrative Law Judge
 Federal Trade Commission
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This 21st day of May, 2013.

/s/ Brian Rafkin
Brian Rafkin, Esq.
*Counsel for Phoebe Putney Memorial
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System, Inc.*

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

May 21, 2013

By:

/s/ Brian Rafkin
Brian Rafkin, Esq.
*Counsel for Phoebe Putney Memorial
Hospital, Inc. and Phoebe Putney Health
System, Inc.*

EXHIBIT A
REDACTED IN ITS ENTIRETY

EXHIBIT B
REDACTED IN ITS ENTIRETY

EXHIBIT C
REDACTED IN ITS ENTIRETY