

ORIGINAL

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of:)
)
PHOEBE PUTNEY HEALTH SYSTEM, INC.,)
)
PHOEBE PUTNEY MEMORIAL HOSPITAL, INC.,)
)
PHOEBE NORTH, INC.,)
)
HCA INC.,)
)
PALMYRA PARK HOSPITAL, INC., and)
)
HOSPITAL AUTHORITY OF ALBANY-)
DOUGHERTY COUNTY.)
)

Docket No. 9348

TY COBB HEALTHCARE SYSTEM, INC.'S
MOTION TO QUASH OR LIMIT SUBPOENA DUCES TECUM
TO COBB MEMORIAL HOSPITAL

Pursuant to Section 3.34(c) of the Rules of Practice of the Federal Trade Commission (“FTC” or “Commission”), Ty Cobb Healthcare System, Inc. (“Ty Cobb”) hereby files its Motion to Quash or Limit the Subpoena *Duces Tecum* (the “Subpoena”) served on Cobb Memorial Hospital (“CMH”) on April 26, 2013.

PRELIMINARY STATEMENT

This Subpoena impermissibly commands the production of non-discoverable documents from a non-party hospital, CMH. CMH was owned and operated by Ty Cobb, but is no longer in existence, having closed on June 30, 2012. Nonetheless, CMH was located some 230 miles from Phoebe Putney Memorial Hospital (“Phoebe Putney”) and the Hospital Authority of Albany-Dougherty County (the “Authority”) (together herein, “Respondents”). CMH operated in a separate and distinct geographic market from Phoebe Putney. As such, CMH’s financial

information and quality rating information requested by Phoebe Putney is not relevant to this proceeding, and is therefore not discoverable as to the allegations raised in the Complaint or Respondents' presumed defense theories. Moreover, the Subpoena is unduly burdensome and overly broad and cannot be reasonably complied with absent excessive cost, resources, and time by Ty Cobb.

As set forth herein, the Subpoena should be quashed because the ALJ "shall" limit discovery which falls outside the boundaries of the Commission's Procedural Rules regarding discovery. To that end, it is overbroad and unduly burdensome; seeks documents which are in most cases publicly available and could be obtained without the time or expense of Ty Cobb; seeks documents that could be obtained from other more convenient, less burdensome, and less expensive sources; and seeks documents for which the burden and expense of production would plainly outweigh any putative benefit. Of equal concern to Ty Cobb, to comply with this request would result in substantial time and expense, and would result in the disruption of Ty Cobb's ongoing business, owning and operating two nursing homes, an assisted living center, and miscellaneous other business.

Additionally, the documents sought in the Subpoena are not reasonably calculated to lead to the discovery of admissible evidence regarding the issues at hand. The focus of this proceeding concerns the anti-competitive behavior of Respondents within their geographic area and market and the impact of such behavior, not that of CMH. Even assuming that Phoebe Putney would seek to establish that its anti-competitive merger somehow passes on efficiencies to its patients, the documents sought in the Subpoena are still not "reasonably" calculated to result in admissible evidence of that theory. And if that is Phoebe Putney's theory, the singular

focus in terms of evidence would still be *Phoebe Putney's* specific market, service area, and services provided and pricing and cost of same.

While Ty Cobb's counsel has approached Respondents' counsel in an attempt to limit the items sought in this Subpoena, those efforts have as of yet been unfruitful. Ty Cobb will consider whether limitations offered by Respondents' counsel to the Subpoena will address the facially broad and non-discoverable Subpoena, however, in the meantime, Ty Cobb moves to quash or alternatively to limit the Subpoena.

FACTUAL BACKGROUND

A. The Activities of CMH

CMH was an acute care hospital located in Royston, Georgia, which is some 230 miles away from Phoebe Putney Memorial Hospital ("Phoebe Putney") in Albany, Georgia. The primary and secondary service areas for CMH were Franklin, Hart, Elbert, Madison, Banks and Stephens Counties. CMH did not operate within the service area of Phoebe Putney Memorial Hospital ("Phoebe Putney"). There was no overlap in the primary or secondary service area between CMH and Phoebe Putney; they did not share the same patient population or referral sources; and the employers in these geographic markets are very different.

Additionally, CMH did not provide the same breadth of services that Phoebe Putney provides. For example, Phoebe Putney provides Certificate of Need ("CON")-approved radiation therapy services and neonatal intensive care services, while CMH did not provide those services.

B. The Issues in this Adjudicative Proceeding

In this adjudicative proceeding, the Commission alleges that the acquisition of Palmyra Park Hospital, Inc. (“Palmyra”) by Phoebe Putney¹ and the Hospital Authority of Albany-Dougherty County (the “Authority”) from HCA Inc. (the “Transaction”) substantially reduces competition and allows the combined entity to raise prices for general acute-care hospital services charged to commercial health plan in Albany, Georgia and the surrounding region.

As a result of this Transaction, the Commission alleges that there is substantial harm to competition in the relevant market for inpatient general acute-care hospital services sold to commercial health plans. The Commission contends that the Transaction eliminates pricing constraints that have existed and increases Phoebe Putney’s ability and incentive to increase reimbursement rates in its market.

The geographic market in which the effects of the Transaction are to be analyzed includes those areas from which Phoebe Putney’s patients originate. The relevant geographic market here includes only six counties: Dougherty, Terrell, Lee, Worth, Baker, and Mitchell Counties. *Complaint*, ¶ 51. The nearest independent hospitals from Palmyra and Phoebe Putney are more than 30 miles away. *Complaint*, ¶ 54.

C. The Timing of the Subpoena

On March 14, 2013, the Secretary of the FTC issued an Order lifted the stay upon these adjudicative proceedings which went in effect in 2011 when the Commission sought preliminary injunctive relief pending the outcome of the instant adjudicative proceeding. Notably, in that collateral proceeding Respondents did not contest the merits of the Commission’s anti-trust complaint, but instead moved for dismissal on the ground that the state action doctrine exempted the challenged acquisition of Palmyra from federal antitrust law. However, the United States

¹ The other entities associated with Phoebe Putney which are parties here are Phoebe Putney Health System, Inc. and Phoebe North, Inc.

Supreme Court of course unanimously held that the challenged transaction was not exempt from federal antitrust law: “respondents’ claim for state-action immunity fails because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership.” *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1011 (February 19, 2013).

Since Respondents’ “state action” defense is gone, Respondents now seek to develop a new defense presumably premised on an argument that supposed efficiencies will result from and outweigh the anti-competitive nature of the Transaction. In a misguided attempt to create this evidence, Respondents seek virtually unlimited discovery from 160-plus hospitals throughout the State of Georgia. Yet the documents sought are not reasonably calculated to lead to admissible evidence, are overly broad, and contravene the FTC’s Procedural Rules. Noticeably, Respondents seek this information at the tail-end of the discovery period but nevertheless presume that such documents could be produced in a timeframe of less than 30 days, by May 23, 2013.

D. The Subpoena

The April 26, 2013 Subpoena seeks to impose upon CMH a document search beyond that required by the applicable Rules and requests documents irrelevant to these proceedings. Further, although the Complaint circumscribes a six-county geographic market, Respondents define the relevant “Geographic Area” for purposes of the Subpoena to include five counties in Alabama, six counties in Florida, and 51 counties in Georgia, for a total of 62 counties.

ARGUMENT

While a party to an adjudicative proceeding before the Commission may sign and issue a subpoena seeking discovery from a non-party, such discovery must of course be “reasonably

expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent.” 16 C.F.R. § 3.31(2). Indeed, any discovery sought by a subpoena shall be limited where it is “obtainable from some other source that is more convenient, less burdensome, or less expensive.” 16 C.F.R. § 3.31(c)(2)(i). Likewise, such discovery shall be limited where the “burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.” 16 C.F.R. § 3.31(c)(2)(iii). Here, the documents sought by Respondents fall outside the boundaries of each of these Procedural Rules, and are additionally not reasonably calculated to lead to the discovery of admissible evidence.

It is plainly unreasonable that Respondents can seek voluminous discovery from so many different hospitals, in so many different markets, providing different services. The market in which CMH operated was separate and distinct from that of Phoebe Putney. Moreover, the data concerning CMH’s market cannot reasonably be admissible – even as a supposed basis for an expert’s opinion – or calculated to lead to the same, where the services offered and geographic markets are markedly different.

A. The Subpoena Is Overly Broad, Seeks Documents Which Would Be Obtainable From Another Source That is More Convenient or Less Burdensome, The Burden and Expense of the Proposed Discovery Would Outweigh its Benefit, and Ty Cobb’s Efforts to Comply with the Subpoena Would Obstruct Its Normal Business Operations.

Assuming that the Subpoena seeks relevant information (which it does not, as explained below), it is overly broad in its scope and unduly burdensome. A subpoena is unenforceable if it is “unduly burdensome or unreasonably broad.” *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977). Indeed, although some information sought may

conceivably be relevant, a request is overly broad when only a fraction of the countless documents requested are relevant. *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 438-39 (9th Cir. 1992). The Subpoena here would have Ty Cobb – and countless hospitals throughout Georgia – conduct a massive search of information when only a small fraction of that information, if any at all, might be relevant. Further, to the extent that any of the documents sought from CMH are publicly available, those documents are obtainable from “some other source that is more convenient, less burdensome, or less expensive” for CMH. *16 C.F.R. § 3.31(2)(i)*.

Since the Subpoena is overly broad, the expense that must be incurred to respond to it is magnified. Personnel, extensive time, and resources would have to be devoted to responding to this Subpoena. Yet, the “burden and expense of [responding to] the proposed discovery ... would outweigh the likely benefit.” *16 C.F.R. § 3.31(c)(2)(iii)*. Respondents cannot justify this burden and expense by the, at best, attenuated benefit of this information.

In fact, because the scope of the search requested by the Subpoena is exceedingly broad, even a good faith effort at compliance would “threaten[] to unduly disrupt or seriously hinder normal operations of a business.” *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). By way of example only, the Subpoena requests that CMH conduct a “complete search of all [of its] files ... wherever located” for “[a]ll documents relating to Phoebe or Palmyra.” *Request No. 2 and Instruction C*. To comply with this Request alone would divert a significant amount of limited resources at Ty Cobb. Considering this request in greater detail, for instance, Ty Cobb would be required to perform a complete search of all of CMH’s files, identify every single document in its possession concerning either of these hospital facilities in any regard; mask all Sensitive Personally Identifiable Information; submit documents in accordance with

Respondents' detailed "Forms of Production" instructions; produce an extensive privilege log; and submit an index identifying documents and their custodians. This is unduly burdensome.

B. The Subpoena Seeks Documents Which Are Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

The Subpoena impermissibly seeks the production of documents which are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Information is not discoverable if it is not relevant. *16 C.F.R. § 3.31(c)(1); Fed. R. Civ. P. 26(b)(1)*. The Subpoena must be "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)*(Emphasis added).

Here, the question is not whether the Subpoena *could* reveal relevant information or *might* reveal relevant information, but rather whether it is "reasonably expected" to do so. Again, the actions of CMH and the other hospitals throughout Georgia are not here at issue. And, even assuming that Respondents seek to show that their anti-competitive behavior results in efficiencies within their market, there is no need for them to seek financial and quality rating information from *other markets* to attempt to make that showing.

C. The Subpoena Requests Documents that are Protected from Disclosure

Several of the documents requested by the Subpoena seek documents that are subject to attorney-work product doctrine and attorney-client privilege, to the extent that several of the documents may concern legal decisions made by Ty Cobb in connection with CMH's healthcare operations. These privileges plainly exist under a subpoena issued to a non-party. *See 16 C.F.R. § 3.34(c)* ("Such motion to limit or quash shall set forth all assertions of privilege."); *16 C.F.R. 3.38A(a)* ("Any person withholding material responsive to a subpoena issued pursuant to § 3.34

... shall assert a claim of privilege or any similar claim not later than the date set for production of the material.”).

GENERAL AND SPECIFIC OBJECTIONS

1. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena to the extent that they require CMH to do more than is required by the applicable rules of procedure.

2. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena to the extent that they are not reasonably calculated to lead to the discovery of admissible evidence.

3. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena to the extent that they seek the disclosure of information or documents subject to the attorney-client privilege, the work product privilege, or any other applicable privileges or immunities.

4. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena on the grounds that the expense of satisfying same outweighs any benefit.

5. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena as overly broad and unduly burdensome.

6. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena on the grounds that satisfying them would unduly disrupt and seriously hinder normal operations of business.

7. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena on the grounds that they are unreasonably cumulative and duplicative and because

discovery is obtainable from other sources that are more convenient, less burdensome, and less expensive.

8. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena because Phoebe Putney has had ample opportunity by discovery in the action to obtain the information sought.

9. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena to the extent that they fail to specify with reasonable particularity the material to be produced.

10. Ty Cobb objects to Instruction C of the subpoena that requires a "complete search" of CMH's files and the production of all responsive documents "wherever located." This Instruction is contrary to the legal requirement of a reasonable search for responsive information.

11. Ty Cobb objects to the document requests, definitions, and instructions in the Subpoena on the grounds that they unreasonably demand the production of all responsive documents by May 21, 2013.

The following specific objections fully incorporate, are subject to, and are made without waiver of the foregoing general objections.

1. *All documents relating to the Transaction, including but not limited to, all documents sent to or received from the Federal Trade Commission, and all documents relating to communications with the Federal Trade Commission.*

RESPONSE

Ty Cobb is not in possession of any documents relating to the Transaction, nor has Ty Cobb sent to or received from the FTC any documents in connection with the Transaction.

2. *All documents relating to Phoebe or Palmyra.*

RESPONSE

Ty Cobb objects to this Document Request to the extent that it is overbroad and requests documents that are irrelevant to the FTC's proceeding and are not reasonably calculated to lead to the discovery of admissible evidence. Further, Ty Cobb objects that this Request seeks the production of documents subject to the attorney-client privilege, the attorney work product privilege, and any other privilege, immunity, or confidentiality.

Specifically, in seeking "all documents" relating to Phoebe or Palmyra, this Request is not reasonably attuned to the issues in this adjudicative proceeding. To search all of its documents for any reference to Phoebe or Palmyra would be unduly burdensome, and the burden and expense of obtaining such documents would plainly outweigh the benefit to Phoebe Putney and the Authority. Subject to the foregoing, Respondents' counsel has withdrawn this Request.

Notwithstanding the foregoing, Respondents have offered to delete this Request.

3. *Since 2006, all audited or other financial statements or materials for Your Hospital prepared for either internal use or presented to third parties, (e.g., the Georgia Department of Community Health, the Georgia Hospital Association, potential investors or lenders, investment banks).*

OBJECTION

Ty Cobb objects to this Document Request to the extent that it is overbroad and requests documents that are irrelevant to the FTC's proceeding and are not reasonably calculated to lead to the discovery of admissible evidence. Further, to the extent that counsel was involved in the preparation of any such financial statement, Ty Cobb objects that this Request seeks the production of documents subject to the attorney-client privilege, the attorney work product

privilege, and any other privilege, immunity, or confidentiality. Additionally, the pricing information sought by Respondents is proprietary and confidential to Ty Cobb, and should be protected from disclosure.

Further, any financial document created prior to the Transaction at issue in this lawsuit would plainly not be relevant to this proceeding. The events leading up to the Transaction that is the subject of the Complaint began in April of 2010. Moreover, to the extent any financial statement was provided to the Georgia Department of Community Health or the Georgia Hospital Association, such would be publicly available.

Subject to the foregoing, Ty Cobb is willing to produce consolidated financial statements for Ty Cobb Healthcare System, Inc. from January 1, 2010 through the close of CMH, consistent with the limitation of this Request offered by Respondents' counsel.

4. *All Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") or other periodic reviews performed by any organization that assigned a "quality rating" or "quality-score" to Your Hospital.*

OBJECTION

Ty Cobb objects to this Document Request to the extent that it is overbroad and requests documents that are irrelevant to the FTC's proceeding and are not reasonably calculated to lead to the discovery of admissible evidence. Further, Ty Cobb objects that this Request seeks the production of documents subject to the attorney-client privilege, the attorney work product privilege, and any other privilege, immunity, or confidentiality. Additionally, this information requested by Respondents is proprietary and confidential to Ty Cobb, and should be protected from disclosure.

Maria M. Dimoscato
Federal Trade Commission
601 New Jersey Ave NW
Washington, DC 20580
Email: mdimoscato@ftc.gov

Sara Y. Razi
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC
Email: srazi@ftc.gov

Emmet J. Bondurant , II
1201 West Peachtree Street, N.W.
3900 One Atlantic Center
Atlanta, GA 30309
Email: bondurant@bmelaw.com

Kevin James Arquit, Esq.
Simpson, Thacher & Bartlett, LLP
425 Lexington Avenue
New York, New York 10017-3954
karquit@stblaw.com

Lee K. Van Voorhis;
Katherine I. Funk; Brian F. Burke;
Jennifer A. Semko;
John J. Fedele; Teisha C. Johnson
Brian Rafkin; Jeremy W. Cline
Baker & McKenzie, LLP
815 Connecticut Avenue, NW

Judge D. Michael Chappell
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-110
Washington, D.C. 20580

Donald S. Clark – Secretary of the
Commission
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room H-113
Washington, D.C. 20580

This 6th day of May, 2013.



Dana S. Durrett