PUBLIC

ORIGINAL

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

In the Matter of	)	
	)	
Phoebe Putney Health System, Inc. a corporation, and	)	**Docket No. 9348**
	)	
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	)	

PHOEBE RESPONDENTS' OPPOSITION TO ARCHBOLD MEDICAL CENTER'S, GRADY GENERAL HOSPITAL'S, AND TIFT REGIONAL MEDICAL CENTER'S MOTION TO QUASH OR LIMIT SUBPOENAS AND FOR PROTECTIVE ORDER

Respondents Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc. (collectively, "Phoebe") hereby oppose third-party Archbold Medical Center's ("Archbold"), Grady General Hospital's ("Grady"), and Tift Regional Medical Center's ("Tift") (collectively, the "Third-Party Hospitals") Motion to Quash or Limit Subpoenas, for Protective Order, and for Expedited Hearing Prior to May 21, 2013 Deposition.

INTRODUCTION

On May 13, 2013, the Third-Party Hospitals moved to quash or limit the subpoenas *duces tecum* issued by Phoebe to them on April 26, 2013.[1] The Third-Party Hospitals argued (1.) that

[1] Phoebe previously agreed not to oppose an extension of the deadline for a motion to quash in a good-faith effort to

any competitive information they may maintain is irrelevant to the current litigation, (2.) that they would be prejudiced by the disclosure of the competitive and/or privileged materials requested in the concededly narrowed subpoena, (3.) that Phoebe has its own competitive information that would duplicate the information the Third-Party Hospitals maintain, and (4.) that their strategic planning and sensitive information is protected by Georgia Code § 31-7-75.2.

The importance of the Third-Party Hospitals' information to the current litigation is suggested by how close these hospitals are to Phoebe. All three of the Third-Party Hospitals are within forty or fifty-odd miles of Phoebe, easy driving distance and some of Phoebe's closest hospital neighbors in this rural corner of Georgia. Nevertheless, Phoebe bent over backwards to accommodate the Third-Party Hospitals' concerns, slashing a 15-question document request to two questions and agreeing to further narrow those two questions to minimize the inconvenience borne by these hospitals. These surviving requests go to the heart of the litigation regarding hospital competition in Southwest Georgia and easily fall within the boundaries of permissible discovery.

ARGUMENT

I. Both Requests Are Reasonably Expected to Yield Relevant Information and Are 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, both discovery requests are calculated to yield information relevant and vital to Phoebe's defense in the pending FTC proceeding. Among other things, the FTC has alleged that:

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settle the Third-Party Hospitals' concerns amicably.

- The Hospital Authority of Albany-Dougherty County's ("Hospital Authority") acquisition of Palmyra Medical Center ("Palmyra") will result in "a virtual monopoly for inpatient general acute care services . . . in Albany, Georgia and its surrounding area." Compl. ¶ 1.

- "Other southwest Georgia hospitals offer scant competition to Phoebe Putney and Palmyra." *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.

[redacted]

Phoebe disputes all of the FTC's above allegations and has a good-faith belief that the Third-Party Hospitals are likely to have documents in their possession that support Phoebe's defense.

[redacted] Competitive information held by the Third-Party Hospitals, such as competitor assessments and SWOT analyses, would be highly relevant to these allegations and Phoebe's defense against them.[2]

In addition, as modified by Phoebe, this request is only limited to documents that discuss Phoebe or Palmyra. To the extent that such documents exist, they are clearly relevant to assessing the competitive impact of the acquisition of Palmyra. The Third-Party Hospitals argue that they do not compete with Phoebe or Palmyra—if that is the case and no documents

[2] For substantially the same reasons, the request to limit the scope of Mr. Mustian's deposition is meritless and should be denied.

responsive to Phoebe's request exist, the Third-Party Hospitals' only obligation is to communicate that a reasonable search has been conducted and no documents found. However, to the extent that the Third-Party Hospitals' representations are undermined by the existence of documents that discuss Phoebe and Palmyra with respect to competition for the relevant hospital services, Phoebe is entitled to review those materials.

The burden is on the party challenging the subpoena 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 Third-Party Hospitals have not even tried to demonstrate undue burden, and given the very limited scope of the remaining subpoena requests, they could not if they had tried.

II. Response Cannot Be Avoided Merely Because the Third-Party Hospitals Assert the Documents Contain Confidential Competitive and Privileged Information.

The Third-Party Hospitals argue that they are not required to produce documents that contain prejudicial competitive and strategic planning materials, or are subject to various privileges. 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)). The Third-Party Hospitals, however, make no specific showing regarding the confidentiality or sensitivity of the information requested by Phoebe, or the prejudice they might suffer if the information is disclosed.

Even if the Third-Party Hospitals had demonstrated that any documents required to be produced by Phoebe's subpoena were truly confidential, they must also provide specific proof

that disclosure of those documents would harm them. *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 the Third-Party Hospitals designate 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 the instant proceeding. *Id.* at ¶ 8.

To the extent that the Third-Party Hospitals have 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 20 (Feb. 5, 2004) (denying third-party's motion to quash on, *inter alia*, a claim of privilege and ordering production of privilege log and responsive documents within 10 days); 16 C.F.R. § 3.38A (outlining procedure for withholding requested material); s*ee 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. The Third-Party Hospitals have not even tried to suggest that this method is inappropriate or unresponsive to their privilege claims.

III. Phoebe's Competitive Information is Not Duplicative of Information Held by the Third-Party Hospitals.

The Third-Party Hospitals' claim that they should be excused from disclosure of their competitive information because similar information is also held by Phoebe is meritless on its face. Although Phoebe may possess information regarding how it views and competes with the Third-Party Hospitals, only they possess information regarding how they view and compete with Phoebe. For instance, Phoebe does not have access to data showing where the Third-Party Hospitals' patients reside, even if they are residents of Albany. The vigor with which the Third-Party Hospitals now seek to avoid producing this information shows that it is not publically available or already known by Phoebe. Both perspectives will be relevant for the fact-finder in determining the actual relevant geographic area and the state of the relevant market in Georgia. This claim must be denied.

IV. Georgia State Law Does Not Bar Compliance with Phoebe's Subpoenas.

The Third-Party Hospitals' reliance on Georgia Code § 31-7-75.2 is misplaced. This statute provides a narrow exception for hospitals to public disclosure requirements in two other Georgia statutes, neither of which is relevant to the instant case. *See* O.C.G.A. § 50-14 (Open Meetings Act); § 50-18-4 (Inspection of Public Records Act). The statute does not purport to prevent other disclosures of hospital documents, and even if it did, a validly-issued federal subpoena would preempt it. *See Memorial Hospital v. Shadur*, 664 F.2d 1058, 1063-64 (7th Cir. 1981) (discovery in antitrust case governed by federal law, which preempts state confidentiality provisions).

CONCLUSION

As explained above, the two carefully narrowed discovery requests included within Phoebe's subpoenas *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. The Third-Party Hospitals have not established a valid basis for quashing Phoebe's subpoenas, and the instant motion should be denied.

Dated: May 23, 2013

Respectfully submitted,

By /s/ Lee K. Van Voorhis

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[PROPOSED] ORDER

Having reviewed Archbold Medical Center's, Grady General Hospital's, and Tift Regional Medical Center's Motion to Quash or Limit Subpoenas, for Protective Order, and for Expedited Hearing Prior to May 21, 2013 Deposition, and the Phoebe Respondents' opposition thereto, it is HEREBY

ORDERED that Archbold Medical Center's, Grady General Hospital's, and Tift Regional Medical Center's motion is DENIED.

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I hereby certify that this 23rd 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:

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I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing PUBLIC document to:

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This 23rd day of May, 2013.

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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 23, 2013

By:

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EXHIBIT A
REDACTED IN ITS ENTIRETY