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

ORIGINAL

In the Matter of PHOEBE PUTNEY HEALTH SYSTEM, INC., and PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., and PHOEBE NORTH, INC., and HCA INC., and PALMYRA PARK HOSPITAL, INC., and HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, Respondents.	DOCKET NO. 9348

ORDER DENYING 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

I.

On May 17, 2013, nonparties Archbold Medical Center ("Archbold"), Grady General Hospital ("Grady"), and Tift Regional Medical Center (collectively, the "Nonparty Hospitals") filed a motion seeking to quash or limit subpoenas *duces tecum* served on them (the "Document Subpoenas") by Respondents Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., and Hospital Authority of Albany-Dougherty County (collectively, "Respondents"). In addition, Archbold seeks a protective order relating to the subpoena *ad testificandum* served on Mr. J. Perry Mustian noticing a deposition for May 21, 2013 (the "Deposition Subpoena"). Archbold further requests an expedited hearing in advance of May 21, 2013. On May 23, 2013, Respondents filed their opposition. For the reasons set forth below, the Motion is DENIED.

II.

Although the Document Subpoenas originally contained numerous requests,[1] the only document request at issue in this motion is Request 4, which seeks:

> All documents relating to competition in the provision of any health care service in the Geographic Area, including but not limited to, market studies, forecasts, and surveys; competitor assessments; SWOT analyses; the supply and demand conditions, including the patient service area for Your Hospital and any other health care facility; and all documents relating to the quality of health care (however defined) provided by any health care facility.

Respondents and the Nonparty Hospitals agreed to narrow Request 4 to only documents mentioning Phoebe or Palmyra and also agreed that the Nonparty Hospitals need not produce emails.

The Nonparty Hospitals object to Request 4 of the Document Subpoena on the following grounds: (A) the request seeks information that is irrelevant; (B) the request seeks information that Respondents can ascertain from their own documents; (C) the request seeks documents that contain competitive and potentially privileged information; and (D) the request seeks information that is protected from disclosure by state law. These arguments, and Respondents' arguments in response thereto, are discussed in turn.

A. Relevance

The Nonparty Hospitals argue that the information sought by Request 4 is irrelevant. Specifically, they argue that the Nonparty Hospitals' strategic plans and assessments of their respective competitors and other hospitals, documented by the Nonparty Hospitals in the ordinary course of business, are irrelevant to whether the acquisition at issue complies with the antitrust laws, and that it is the conduct of Respondents that is at issue in this proceeding, not that of the Nonparty Hospitals.

Respondents contend that the foregoing competitive information held by the Nonparty Hospitals, which are all located within approximately 50 miles of Respondent Phoebe Memorial Hospital ("Phoebe"), is directly relevant to the Complaint's allegations that the hospital merger

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[1] According to the Motion, Respondents withdrew all other subpoena categories except for Request 4, above, and Request 9, which seeks:

> 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).

As to Request 9, the Motion states: "The Non-Party Hospitals believe that they have resolved any disputes regarding production of the requested financials." Motion at 5 n.3. This assertion, which is not supported by any submitted affidavit or document, is not addressed in Respondents' Opposition. On the present record, there is insufficient basis to grant the Nonparty Hospitals' request for an order that they have "fully complied" with Request 9. *See* Motion at 9-10 and Proposed Order.

between Phoebe and Palmyra Park Hospital ("Palmyra") will create a "virtual monopoly . . . in Albany, Georgia and its surrounding area," Complaint ¶ 1; that "[o]ther southwest Georgia hospitals offer scant competition" to the combined Phoebe and Palmyra, Complaint ¶ 10; and that the merger gives Phoebe "the unfettered ability" to raise reimbursement rates to area health insurance plans "without fear of losing customers." Complaint ¶ 11. In addition, Respondents note, Mr. Mustian, the CEO and president of the parent organization that runs Nonparty Hospitals Archbold and Grady and whose deposition is the subject of the Nonparty Hospitals' requested protective order (*see infra*), filed an affidavit in this proceeding stating, among other things, that he did not view Palmyra or Phoebe as competitors and did not consider them in his negotiations with health insurance plans. Opposition, Exhibit A (Declaration of J. Perry Mustian), ¶¶ 6-7.

The Nonparty Hospitals' argument that the requested competitive information is irrelevant because this case involves the conduct of Respondents and not that of the Nonparty Hospitals takes too narrow a view of the scope of permissible discovery. Rule 3.31(c)(1) states: "Parties may obtain discovery to the extent that it may 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). Given the broad allegations of the Complaint, and the fact that Mr. Mustian has submitted an affidavit relevant to those allegations, the Nonparty Hospitals have failed to demonstrate that Request 4, particularly as modified by agreement to only those documents mentioning Phoebe or Palmyra, is not "reasonably expected to yield information relevant to the Complaint, to the proposed relief, or to the defenses of any respondent. . . ." *Id.* Accordingly, Request 4, as modified, may not be quashed on the ground of irrelevance.

The Nonparty Hospitals also generally assert, without any supporting argument or facts, that Request 4 is "overly broad and unduly burdensome." Motion at 6-9. *See* Rule 3.31 (c)(2)(iii) (limiting discovery where "[t]he 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). "A party seeking to quash a subpoena has the burden of demonstrating that the request is unduly burdensome." *In re Lab. Corp. of Am.*, 2011 FTC LEXIS 31, *7 (Feb. 28, 2011) (citations omitted). "Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding." *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009). As noted above, the information is relevant. Moreover, as modified by Respondents, Request 4 seeks only information mentioning Phoebe or Palmyra, which considerably narrows the original scope of Request 4. Accordingly, the Nonparty Hospitals have failed to meet their burden of establishing that Request 4 is overly broad or unduly burdensome.

B. Duplicative sources

The Nonparty Hospitals next argue that Request 4 should be quashed because whether and to what extent the Nonparty Hospitals compete with Phoebe "can be readily determined without probing the [Nonparty] Hospitals' Competitive Information. Specifically, the Respondents have at their disposal their own ordinary course documents that presumably

describe the competitive landscape, as well as patient origin data that identify, unequivocally, where patients go for various hospital services." Motion at 8. This assertion, which is not supported by references to any facts or legal authority, does not provide a sufficient basis to quash Request 4, as modified by Respondents. Even if Respondents possess their own assessments of the competitive landscape or patient origin data for their own patients, the Nonparty Hospitals fail to explain, or persuade, that this should prevent discovery of documents and testimony regarding the Nonparty Hospitals' assessments of the competitive landscape or the Nonparty Hospitals' patient origin data. Accordingly, Request 4, as modified, will not be quashed on the basis that the information is duplicative of information already possessed by Respondents.

C. Competitive and privileged information

The Nonparty Hospitals object to disclosure of their competitive information to Respondents, stating that they "should not be required to turn over their strategic planning materials to their competitor merely because their competitor is in litigation over compliance with the antitrust laws." Motion at 4. In addition, the Nonparty Hospitals assert that, "Request 4, as drafted, potentially seeks the production of documents subject to the attorney-client privilege, the attorney work product privilege, and other privilege, immunity or confidentiality, including the peer review and strategic planning privileges and protections." Motion at 8.

Respondents assert that the Nonparty Hospitals have made no specific showing regarding the confidentiality or sensitivity of the information requested, that the Protective Order entered in the litigation sufficiently protects the confidentiality of any documents that the Nonparty Hospitals designate as confidential, and that the Protective Order provides a mechanism for addressing any privilege claims the Nonparty Hospitals might have. Opposition at 4-5.

"The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *In re Lab. Corp. of Am.*, 2011 FTC LEXIS 22, *5 (Feb. 17, 2011) (quoting *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971); *see also 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.")). Courts routinely issue protective orders which allow disclosure of confidential information, restricted to outside counsel only. *In re Lab. Corp. of Am.*, 2011 FTC LEXIS 5, *3 (Jan. 28, 2011) (citing *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 546 F. Supp. 2d 951, 954 (S.D. Cal. 2008); *Biovail Labs., Inc. v. Anchen Pharm., Inc.*, 463 F. Supp. 2d 1073, 1076 (C.D. Cal. 2006); *see also ODS Techs., L.P. v. Magna Entm't Corp.*, 583 F. Supp. 2d 1141, 1142 (C.D. Cal. 2008)).

Pursuant to Commission Rule 3.31(d), a Protective Order Governing Discovery Material was entered in this case on April 21, 2011 ("Protective Order"). The Protective Order adequately protects the materials that the Nonparty Hospitals seek to withhold from production. The Protective Order provides that any document that was provided by any third party during the course of this proceeding that is entitled to confidentiality, as well as any information taken from any portion of such document, shall be treated as "confidential" material and may be disclosed only to Respondents' outside counsel. Protective Order ¶¶ 1, 2, 7. Outside counsel may only use

confidential material "for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever." *Id.* ¶ 8. Thus, under the Protective Order, Respondents' outside counsel is barred from supplying confidential material to its client. Accordingly, the Nonparty Hospitals' pleas that their confidential information not be produced or disclosed to their competitors are denied.

The Protective Order also provides a mechanism for protecting documents that contain privileged information. "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." Protective Order ¶ 6. Pursuant to Commission Rule 3.38A, a person withholding material responsive to a subpoena issued pursuant to § 3.34 or § 3.36 on the grounds that the material is privileged, shall if so directed in the subpoena submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. 16 C.F.R. § 3.38A. The Nonparty Hospitals do not suggest that the mechanisms of the Protective Order and Commission Rule 3.38A are not sufficient to protect any privileged information that may be contained in the requested documents. Accordingly, the Nonparty Hospitals' assertion that Request 4 "potentially seeks the production of [privileged] documents" does not provide a basis for withholding the requested documents.

D. Georgia state law

In addition, the Nonparty Hospitals object to any production pursuant to Request 4 on the grounds that Georgia law expressly protects strategic planning and competitively sensitive materials from disclosure by public hospitals. The Nonparty Hospitals cite to Georgia Code §31-7-75.2 which provides:

> Notwithstanding any other provision of law to the contrary, no Georgia nonprofit corporation in its operation of a hospital or other medical facility for the benefit of a governmental entity in this state and no hospital authority shall be required by Chapter 14 of Title 50 or Article 4 of Chapter 18 of Title 50 to disclose or make public any potentially commercially valuable plan, proposal, or strategy that may be of competitive advantage in the operation of the corporation or authority or its medical facilities and which has not been made public. This exemption shall terminate at such time as such plan, proposal, or strategy has either been approved or rejected by the governing board of such corporation or hospital authority. Except as provided in this Code section or as otherwise provided by law, hospital authorities shall comply with the provisions of Chapter 14 of Title 50 and Article 4 of Chapter 18 of Title 50.

O.C.G.A. §31-7-75.2. The Nonparty Hospitals do not state that they are nonprofit corporations operating for the benefit of a governmental entity and that therefore O.C.G.A. §31-7-75.2 bars them from producing documents to Respondents. Instead, they argue that, pursuant to this section, competitively sensitive materials are not subject to disclosure by "certain hospitals

operating in the State" and that "by analogy, the Nonparty Hospitals should receive similar protections from disclosure." Motion at 8.

Respondents state that the statute relied upon by the Nonparty Hospitals provides a narrow exception for hospitals to public disclosure requirements contained in two other Georgia statutes, neither of which is relevant to the instant case. Opposition at 6, citing O.C.G.A. §50-14 (Open Meetings Act); §50-18-4 (Inspection of Public Records Act). Respondents further assert that the statute does not purport to prevent other disclosure of hospital documents, and even if it did, a validly issued federal subpoena would preempt it. Opposition at 6, citing *Memorial Hosp. v. Shadur*, 664 F.2d 1058, 1063-64 (7th Cir. 1981).

"Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied." *In re Polypore Int'l*, 2008 FTC LEXIS 155, *16 (Nov. 15, 2008). The Nonparty Hospitals here have not demonstrated that they are in fact covered by this statutory provision or that it operates to prevent them from producing documents pursuant to a subpoena issued in this case, particularly in light of the restrictive measures of the Protective Order. Furthermore, in the event that competitively sensitive information of the Nonparty Hospitals is introduced at trial, the Nonparty Hospitals may file a motion for *in camera* treatment to prevent public disclosure of such information. *See* Scheduling Order at ¶ 7; 16 C.F.R. § 3.45.

E. Conclusion

Based on the foregoing, the Nonparty Hospitals' Motion to Quash is DENIED. Under the Scheduling Order issued in this case and revised by the Revised Scheduling Order, issued May 24, 2013, the close of discovery is June 7, 2013. The Nonparty Hospitals shall produce responsive documents no later than June 4, 2013.

III.

Nonparty Hospital Archbold also seeks a protective order relating to the Deposition Subpoena served on Mr. Mustian, limiting the scope of such deposition and preventing the deposition from going forward until after the motion to quash is ruled upon. Archbold states that the deposition of Mr. Mustian was scheduled for Tuesday, May 21, 2013. Archbold filed its motion around 4:30 p.m. on Friday, May 17, leaving insufficient time for a response by Respondents or a resolution of the contested issues before the scheduled May 21st deposition. Accordingly, Archbold's request for oral argument and a hearing to be scheduled on an expedited basis prior to the May 21, 2013 deposition is DENIED.

Archbold objects to the Deposition Subpoena and seeks a protective order preventing Respondents from questioning Mr. Mustian regarding Archbold's competitively sensitive information, including information that may be contained in documents produced pursuant to Request 4. As noted above, Respondents state that Mr. Mustian provided an affidavit in support of several of the FTC's claims, has information that is highly relevant to the FTC's allegations and Respondents' defense against them, and, thus, Respondents should be allowed to depose Mr. Mustian. *See* Opposition, Exhibit A.

As addressed above, the competitive information sought pursuant to Request 4 is relevant and not duplicative. In addition, Archbold's concerns about revealing competitively sensitive information to Respondents' outside counsel do not provide a basis for resisting discovery. *In re Lab. Corp. of Am.*, 2011 FTC LEXIS 22, *5 (Feb. 17, 2011). Accordingly, Archbold's motion for a protective order to prevent the deposition of Mr. Mustian is DENIED.

IV.

Based on the foregoing, the Motion of the Nonparty Hospitals is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 28, 2013