ORIGINAL

~~PUBLIC~~

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**
	)	
	)	**PUBLIC VERSION**
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 FANNIN REGIONAL HOSPITAL'S, TRINITY HOSPITAL OF AUGUSTA'S, AND FLOWERS HOSPITAL'S MOTION TO QUASH OR LIMIT SUBPOENAS

Respondents Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc. (collectively, "Phoebe") hereby oppose third-party Fannin Regional Hospital's ("Fannin"), Trinity Hospital of Augusta's ("Trinity"), and Flowers Hospital's ("Flowers") (collectively, the "Third-Party Hospitals") Motion to Quash or Limit Subpoenas.

INTRODUCTION

On May 22, 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 any requested financial information they may maintain is irrelevant to the current litigation, (2.)

[1] Phoebe previously agreed not to oppose an extension of the deadline for a motion to quash in a good-faith effort to settle the Third-Party Hospitals' concerns amicably.

that the requested financial information is proprietary and confidential, and (3.) that they should not need to disclose the requested financial information until they understand exactly what information is going to be used and how it will be used.

As the Third-Party Hospitals concede, Phoebe significantly reduced its initial subpoena request, so that Flowers only has two narrow document requests and Fannin and Trinity each have one.[2] The only remaining point of dispute is whether the Third-Party Hospitals are required to produce, pursuant to the Court's Protective Order, audited, hospital-level financial statements from 2010 through the present. Notably, dozens of other hospitals around the state have agreed to produce these same documents. These three hospitals must now do the same.

ARGUMENT

I. The Audited Financial Statements Are Reasonably Expected to Yield Relevant Information.

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, audited financial statements from other hospitals in the region are calculated to yield information relevant and vital to Phoebe's defense in the pending FTC proceeding. Among other things, Complaint Counsel has made multiple allegations regarding the size and profitability of Phoebe and Palmyra, including Palmyra's former parent corporation, HCA. *See* Compl. ¶¶ 15, 17. Moreover, the FTC seems to assume that a non-profit hospital like Phoebe operates in a substantially similar way to for-profit hospitals, *see id.* ¶ 71, and fails to acknowledge the significant financial implications Phoebe's charitable mission entails. Audited financial

[2] Phoebe notes that Flowers has raised no objection to Request number 4 in the subpoena which it received, and accordingly should be ordered to respond to the request.

statements from the Third-Party Hospitals are necessary to serve as comparators to Phoebe and Palmyra in an economic analysis attempting to identify the procompetitive benefits of the transaction at issue—including, for example, investment in capital expenditures— and document the existing constraints of the market in which Phoebe operates, for example, the costs of providing indigent care.

The responsibility lies with the party challenging the subpoena to prove that the subpoena is unduly burdensome, i.e., that the burden outweighs the potential benefit. *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 subpoena request at issue, they could not if they had tried.

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

The Third-Party Hospitals argue that they are not required to produce the requested financial information because the information is proprietary and confidential. 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 concerns.

III. The Third-Party Hospitals Do Not Have a Right to Withhold the Requested Information Until They Know What Specific Information Will be Used.

The Third-Party Hospitals appear to believe that they can withhold the requested financial information because Phoebe has not indicated "which specific line items are purportedly needed" by Phoebe's experts. The Third-Party Hospitals cite to no authority for this extraordinary claim of right. Phoebe's economists will need to be able to review the audited financial data, in conjunction with Phoebe's data and financial data received from hospitals around the state, in order to determine specifically what "line items" are most relevant. In any event, "[d]iscovery is not limited to matters that would be admissible at the trial." 8B C. Wright et al. *Federal Practice and Procedure* § 2206 (2010). Phoebe need only show that the information sought is "reasonably expected to be generally relevant to the issues raised by the pleadings." *In re Rambus, Inc.*, 2002 FTC LEXIS 90, *5 (internal quotation omitted). To the extent the Third-Party Hospitals' concerns regard the way in which the requested information will be used, confidential information will be treated appropriately, pursuant to this Court's Protective Order. *See* Protective Order Governing Discovery Material ¶ 7.

CONCLUSION

As explained above, the 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 29, 2013

Respectfully submitted,

By /s/ John J. Fedele_____

John J. Fedele, Esq.
Baker & McKenzie LLP
815 Connecticut Avenue, NW
Washington, DC 20006
Counsel For Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc.

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[PROPOSED] ORDER

Having reviewed Fannin Regional Hospital's, Trinity Hospital of Augusta's, and Flowers Hospital's Motion to Quash or Limit Subpoenas, and the Phoebe Respondents' opposition thereto, it is HEREBY

ORDERED that Fannin Regional Hospital's, Trinity Hospital of Augusta's, and Flowers Hospital's motion is DENIED.

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I hereby certify that this 29th day of May, 2013, I filed the foregoing document via FTC e-file, with the paper original and a true and correct copy of the paper original via hand delivery to:

Donald S. Clark
Secretary
Federal Trade Commission
Room H113
600 Pennsylvania Avenue, NW
Washington, DC 20580
dclark@ftc.gov

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H110
600 Pennsylvania Avenue, NW
Washington, DC 20580

Edward D. Hassi, Esq.
Trial Counsel
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
ehassi@ftc.gov

Jeff K. Perry, Esq.
Assistant Director
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
jperry@ftc.gov

Maria M. DiMoscato, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
mdimoscato@ftc.gov

Sara Y. Razi, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
srazi@ftc.gov

Christopher Abbott
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
cabbott@ftc.gov

Lucas Ballet
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
lballet@ftc.gov

Amanda Lewis
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
alewis1@ftc.gov

Douglas Litvack
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
dlitvack@ftc.gov

Mark Seidman
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
mseidman@ftc.gov

Joshua Smith
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
jsmith3@ftc.gov

Stelios Xenakis
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
sxenakis@ftc.gov

Jennifer Schwab
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
jschwab@ftc.gov

Emmet J. Bondurant, Esq.
Bondurant@bmelaw.com
Michael A. Caplan, Esq.
caplan@bmelaw.com
Ronan A. Doherty, Esq.
doherty@bmelaw.com
Frank M. Lowrey, Esq.
lowrey@bmelaw.com
Bondurant, Mixson & Elmore, LLP
1201 West Peachtree St. N.W., Suite 3900
Atlanta, GA 30309

Kevin J. Arquit, Esq.
karquit@stblaw.com
Peter Thomas, Esq.
pthomas@stblaw.com
Aimee Goldstein, Esq.
agoldstein@stblaw.com
Jeff Coviello, Esq.
jcoviello@stblaw.com
Jennifer Rie, Esq.
jrie@stblaw.com
Jayma Meyer
jmeyer@stblaw.com
Simpson Thacher and Bartlett, LLP
425 Lexington Avenue
New York, New York 10017

Brian Allen Hayles, Esq.
bhayles@wcsr.com
Womble Carlyle Sandridge & Rice, PLLC
3500 One Wachovia Ctr.
301 S. College St.
Charlotte, NC 28202

David B. Hamilton, Esq.
david.hamilton@wcsr.com
Womble Carlyle Sandridge & Rice, PLLC
250 W. Pratt St., Suite 1300
Baltimore, MD 21201

This 29th day of May, 2013.

/s/ Jeremy W. Cline
Jeremy W. Cline, Esq.
Counsel for Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health 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 29, 2013

By:

/s/ Jeremy W. Cline
Jeremy W. Cline, Esq.
Counsel for Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc.