

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

ORIGINAL



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

DOCKET NO. 9348

**ORDER DENYING MOTION OF
FANNIN REGIONAL HOSPITAL, TRINITY HOSPITAL OF AUGUSTA,
AND FLOWERS HOSPITAL TO QUASH OR LIMIT SUBPOENAS**

I.

On May 22, 2013, nonparties Fannin Regional Hospital (“Fannin”), Trinity Hospital of Augusta (“Trinity”), and Flowers Hospital (“Flowers”) (collectively, the “Nonparty Hospitals”) filed a motion to quash or limit subpoenas *duces tecum* (“Motion”) served on them by Respondents Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., and Hospital Authority of Albany-Dougherty County (collectively, “Respondents”). Respondents filed an opposition to the Motion on May 29, 2013 (“Opposition”). For the reasons set forth below, the Motion is DENIED.

II.

Although the subpoenas originally contained numerous requests, as a result of negotiations between the Nonparty Hospitals and Respondents, the motion seeks relief only as to Respondents’ request, as modified, for all “audited, hospital-level financial statements prepared

from 2010 through the present.”¹ Motion at 3-4 (hereafter at times, “Requested Financial Information”).²

The Nonparty Hospitals object to providing the Requested Financial Information on the following grounds: (A) The Requested Financial Information is irrelevant and overbroad; (B) the Requested Financial Information is proprietary and confidential; and (C) Respondents have failed to articulate to the Nonparty Hospitals “how the Requested Financial Information will be utilized by the Respondents and whether, and to what extent, it will be disclosed” in this litigation. These arguments, and Respondents’ arguments in response thereto, are discussed in turn.

A. Relevance and Overbreadth

The Nonparty Hospitals argue that the Requested Financial Information is irrelevant because Fannin and Trinity are both over 200 miles from the hospitals at issue in this proceeding, Phoebe Putney Memorial Hospital (“Phoebe”) and Palmyra Park Hospital (“Palmyra”), and Flowers is over 90 miles away. Motion at 5. Respondents contend that the requested information is relevant to allegations in the Complaint concerning the size and profitability of Phoebe and Palmyra, and is relevant to allegations regarding Phoebe’s operation as a nonprofit. Complaint ¶¶ 15-17, 71. Respondents state that “[a]udited financial statements from the [Nonparty] Hospitals are necessary to serve as comparators to Phoebe and Palmyra in an economic analysis attempting to identify the procompetitive benefits of the [merger of Phoebe and Palmyra]”. Opposition at 2-3.

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). It cannot be concluded, at this stage of the litigation, that the Requested Financial Information is irrelevant solely on the basis of the distance between Respondents’ hospitals and the Nonparty Hospitals, as the Nonparty Hospitals argue. It should also be noted that Respondents dispute the geographic market alleged in the Complaint, Answer ¶¶ 51-57, and the scope of the geographic market has yet to be proven. For this reason, as well as for the reasons asserted in Respondents’ Opposition, it cannot be concluded that the request for financial information, as modified, is irrelevant for purposes of discovery.

The Nonparty Hospitals also generally assert that their geographic distance “from the epicenter” of the litigation renders the request for financial information overbroad. Motion at 5.

¹ Request 9 of the subpoena issued to Flowers Hospital and Request 3 of the subpoenas to Fannin and Trinity originally requested: “For all years 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).”

² In a footnote within the Opposition, Respondents assert that Flowers has failed to object or comply with Request 4 of the subpoena and then request an order requiring Flowers’ compliance. A request to enforce a subpoena must be presented by a properly supported motion in accordance with Rule 3.22 and, ultimately, be resolved by a Federal Court. *See* Rule 3.22(c),(d),(g); 3.38(c). Respondents’ request for enforcement of the subpoena is procedurally and substantively improper and will not be addressed.

As noted above, the information is sufficiently relevant for purposes of discovery, and as modified by Respondents, the Requested Financial Information is not overbroad.

B. Proprietary and Confidential Information

The Nonparty Hospitals object to disclosure of the Requested Financial Information because the information is “proprietary and confidential.” Motion at 6. Other than stating that such information is not publicly available, the Nonparty Hospitals do not provide supporting facts for this statement, by affidavit, declaration, or otherwise. *See* Motion at 6. Respondents assert that the Nonparty Hospitals have made no specific showing regarding the confidentiality or sensitivity of the information requested, or how disclosure of the Requested Financial Information would harm the Nonparty Hospitals. In addition, Respondents state, the Protective Order entered in the litigation sufficiently protects the confidentiality of any documents that the Nonparty Hospitals designate as confidential and that, pursuant to the terms of the Protective Order, the information will not be shared with employees of the Respondents and can only be used for purposes of the litigation. Opposition at 3-4. In addition, Respondents argue, to the extent any of the Requested Financial Information could be deemed privileged, the Protective Order provides a mechanism for redacting such information.

“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* *FTC 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.

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 information that may be contained in the requested documents. Accordingly, the Nonparty Hospitals' contention that the Requested Financial Information may be withheld on the basis that it is proprietary or confidential is rejected.

C. Use of the Requested Financial Information

Finally, the Nonparty Hospitals argue, without any cited legal support, that the Respondents' request for financial information should be quashed because, despite multiple requests, Respondents have failed "to identify which specific line items are purportedly needed by their expert economists in connection with Respondents' defenses . . . [which is] essential for the [Nonparty] Hospitals to understand how the Requested Financial Information will be utilized by the Respondents and whether, and to what extent, it will be disclosed in the underlying litigation." Motion at 6. Respondents state that there is no legal right to withhold subpoenaed documents on this basis.

As discussed above, the Requested Financial Information is discoverable as "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses" of Respondents. There is no prerequisite to subpoena compliance that the requesting party specifically articulate, to the subpoenaed parties' satisfaction, precisely what information is necessary, the reasons therefor, or how the material might be used. With respect to how the Requested Financial Information may be disclosed, Paragraph 10 of the Protective Order describes the procedures for using confidential material in the litigation, as follows:

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

As indicated above, in the event that Respondents' seek to introduce the Requested Financial Information at trial, the Nonparty Hospitals may file a motion for *in camera* treatment to prevent public disclosure of such information. Rule 3.45 provides in pertinent part:

(a) Except as hereinafter provided, material made subject to an *in camera* order will be kept confidential and not placed on the public record of the proceeding in which it was submitted. Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto, provided that the Administrative Law Judge, the Commission and reviewing courts may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding.

(b) *In camera* treatment of material. A party or third party may obtain *in camera* treatment for material, or portions thereof, offered into evidence only by motion to the Administrative Law Judge. . . .

16 C.F.R. ¶ 3.45(a), (b).

In summary, the Requested Financial Information is discoverable, and the Rules and the Protective Order sufficiently outline the circumstances under which the information might be disclosed and/or used. The Nonparty Hospitals have failed to demonstrate that they can withhold subpoenaed information until they fully “understand” the way(s) in which the information might be used.

III.

“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 the Requested Financial Information should not be provided. Accordingly, based on the foregoing, the Nonparty Hospitals’ Motion to Quash is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 30, 2013