

May 10, 2013

VIA FEDERAL EXPRESS

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



Re: 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

Dear Mr. Clark:

Enclosed are the original and two copies of the following:

1. Mayo Clinic Health System-Waycross's Motion to Quash or Limit Subpoena Duces Tecum.
2. Statement of Gregory E. Karpenko Pursuant to 16 C.F.R. § 3.22(g).
3. Certificate of Service.

By copy of this letter, we are sending a courtesy copy to Judge Chappell and serving counsel of record on the enclosed Certificate of Service.

Sincerely,

Gregory E. Karpenko
Direct Dial: 612.492.7064
Email: gkarpenko@fredlaw.com

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Enclosures

cc: The Honorable D. Michael Chappell (Via Federal Express)
Counsel of Record (see attached Certificate of Service) (Via Federal Express and Email)

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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.,)
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PALMYRA PARK HOSPITAL, INC., and)
)
HOSPITAL AUTHORITY OF ALBANY-)
DOUGHERTY COUNTY.)
_____)

Docket No. 9348

**MAYO CLINIC HEALTH SYSTEM-WAYCROSS'S
MOTION TO QUASH OR LIMIT SUBPOENA DUCES TECUM**

Pursuant to Section 3.34(c) of the Rules of Practice of the Federal Trade Commission (“FTC” or “Commission”), Mayo Clinic Health System-Waycross (“Mayo Waycross”) hereby files its Motion to Quash or Limit the Subpoena *Duces Tecum* (the “Subpoena”) served by Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., and Hospital Authority of Albany-Dougherty County (collectively, “Respondents”).

PRELIMINARY STATEMENT

This Subpoena improperly commands the production of non-discoverable documents from a non-party hospital, Mayo Waycross. Mayo Waycross is located approximately 114 miles from Phoebe Putney and is in a separate and distinct geographic market. Therefore, Mayo Waycross’s confidential financial information is not relevant to this proceeding and is not discoverable. Moreover, the Subpoena is unduly burdensome and overly broad and cannot be

reasonably complied with absent expenditure of unnecessary cost, resources, and time by Mayo Waycross. As set forth herein, Mayo Waycross respectfully requests that the Administrative Law Judge quash the Subpoena.

FACTUAL BACKGROUND

A. Mayo Waycross.

Mayo Waycross is a hospital located in Waycross, Georgia, which is approximately 114 miles away from Phoebe Putney Memorial Hospital (“Phoebe Putney”) in Albany, Georgia. The hospital in Waycross, previously known as the Satilla Regional Medical Center, joined the Mayo Clinic Health System in March 2012. The primary service areas for Mayo Waycross today are Ware and Pierce Counties. The secondary service areas are Appling, Atkinson, Bacon, Brantley, Coffee, Charlton, Clinch, and Wayne Counties. Mayo Waycross does not operate within the service area of Phoebe Putney. There is no overlap in the primary or secondary service area between Mayo Waycross and Phoebe Putney; they do not share the same patient population or referral sources; and the employers in these geographic markets are different.

Additionally, Mayo Waycross does not provide the same breadth of services that Phoebe Putney provides. Phoebe Putney is a tertiary regional hospital that provides many services that Mayo Waycross does not provide, including, but not limited to: neurological surgery, perinatal services, cardiovascular surgery, Da Vinci robotic surgery, radiation oncology services, and neonatal intensive care services.

B. The Issues in this Adjudicative Proceeding.

The Commission alleges that the acquisition of Palmyra Park Hospital, Inc. (“Palmyra”) by Phoebe Putney 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 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 existed historically 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.

C. The Subpoena.

On March 14, 2013, the Secretary of the FTC issued an Order lifting the stay on these adjudicative proceedings. On or about April 26, 2013—more than a month after the stay was lifted—Respondents mailed this Subpoena to Mayo Waycross. The Subpoena sought four broad categories of information: (1) all documents relating to the Transaction; (2) all documents relating to Phoebe or Palmyra; (3) all audited or other financial statements since 2006; and (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 Mayo Waycross. Respondents subsequently withdrew the first, second, and fourth requests. Respondents also limited the third request to documents since January 1, 2010. As set forth below, what remains of this subpoena is improper and should be quashed.

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 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). 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 are not reasonably calculated to lead to the discovery of admissible evidence and are unreasonably broad and unduly burdensome.

A. The Subpoena Improperly Seeks Documents That Are Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

The Subpoena impermissibly seeks the production of documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. 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). Respondents cannot make this showing.

As set forth above, this proceeding concerns the alleged anti-competitive effects of the Transaction in the Albany area. Simply stated, Mayo Waycross serves a different geographic market with a different scope of hospital care. As a result, Mayo Waycross’s financial statements have no bearing on this dispute. Stated differently, if Respondents seek to prove that the Transaction will improve efficiencies and care in their market, the documents sought from Mayo Waycross will have no bearing on those claims.

B. The Subpoena Is Unreasonably Broad 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). Further, to the extent that any of the documents sought are publicly available, those documents are obtainable from “some other source that is more convenient, less burdensome, or less expensive.” *16 C.F.R. § 3.31(2)(i)*.

Here, the Subpoena asks Mayo Waycross to review all pre-acquisition and post-acquisition files to locate and produce all financial statements. Conducting this review would disrupt Mayo Waycross’s operations and divert its limited staff away from activities necessary to support patient care at the hospital. Given the fact that these documents possess no relevance to this dispute, the “burden and expense of [responding to] the proposed discovery ... would outweigh the likely benefit.” *16 C.F.R. § 3.31(c)(2)(iii)*.

GENERAL AND SPECIFIC OBJECTIONS

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

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

3. Mayo Waycross 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. Mayo Waycross objects to the document requests, definitions, and instructions in the Subpoena on the grounds that the expense of satisfying same outweighs any benefit.

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

6. Mayo Waycross 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. Mayo Waycross 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. Mayo Waycross 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. Mayo Waycross 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. Mayo Waycross objects to Instruction C of the subpoena that requires a "complete search" of Mayo Waycross'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. Mayo Waycross 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

Respondents have withdrawn this Request.

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

RESPONSE

Respondents have withdrawn 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).¹*

OBJECTION

Mayo Waycross objects to this Request on the grounds that the word “materials” is vague and ambiguous. Mayo further objects to this request on the grounds that it is unreasonably broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence for this FTC proceeding. Mayo Waycross’s financial statements are confidential and proprietary and should be protected from disclosure. To the extent any financial information was provided to the Georgia Department of Community Health or the Georgia Hospital Association, it is publicly available to Respondents.

¹ Respondents subsequently narrowed the scope of this request to January 1, 2010 to present.

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.*

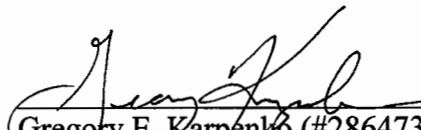
RESPONSE

Respondents have withdrawn this Request.

CONCLUSION

For all of the above reasons, Mayo Waycross requests that this Commission quash or, in the alternative, limit this Subpoena.

May 10, 2013



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**ATTORNEYS FOR MAYO CLINIC HEALTH
SYSTEM-WAYCROSS**

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:)

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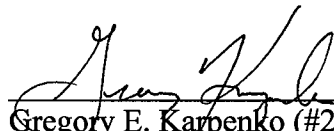
HOSPITAL AUTHORITY OF ALBANY-
DOUGHERTY COUNTY.)

Docket No. 9348

STATEMENT OF GREGORY E. KARPENKO PURSUANT TO 16 C.F.R. § 3.22(g)

I am a lawyer at Fredrikson & Byron P.A., counsel for Mayo Clinic Health System-Waycross. I submit this statement in connection with Mayo Clinic Health System-Waycross's Motion to Quash Subpoena Duces Tecum. On May 8, 2013, I conferred with John Fedele, counsel for the Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc., in a good faith attempt to resolve the issues set forth in the Motion to Quash or Limit the Subpoena *Duces Tecum*. We have been unable to resolve by agreement the issues raised therein.

Dated: May 10, 2013.



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FEDERAL TRADE COMMISSION

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the foregoing matter with a true and correct copy of the within and foregoing “**Mayo Clinic Health System-Waycross’s Motion to Quash or Subpoena or Limit Duces Tecum**” via Federal Express with sufficient postage affixed thereto and via electronic mail where indicated, addressed to:

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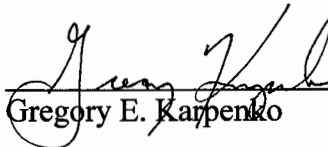
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This 10th day of May, 2013.



Gregory E. Karpenko