

# ORIGINAL

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



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

PUBLIC DOCUMENT

**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**

COME NOW non-parties Archbold Medical Center ( “Archbold”), Grady General Hospital (“Grady”), and Tift Regional Medical Center (“TRMC”) (collectively, the “Non-Party Hospitals”), by and through the undersigned counsel, and, pursuant to Commission Rules 3.31 and 3.34 and 16 C.F.R. §§ 3.31, 3.34, hereby move to quash or limit the *Subpoenas Duces Tecum* served on the Non-Party Hospitals (as amended, 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 the above-captioned matter. In addition, pursuant to Commission Rules 3.31 and 3.33 and 16 C.F.R. §§ 3.31 and 3.33, Archbold seeks a protective order relating to the *Subpoena Ad Testificandum Deposition* served on Perry Mustian (the “Deposition Subpoena”), limiting the scope of such

deposition and preventing this deposition from going forward until after this motion to quash is ruled upon. Archbold further requests an expedited hearing in advance of the May 21, 2013 deposition of Mr. Mustian.

**STATEMENT REGARDING ORAL ARGUMENT  
AND REQUEST FOR EXPEDITED HEARING**

The deposition of Mr. Mustian is currently scheduled for May 21, 2013. This Motion asks the Court for a protective order preventing Respondents from questioning Mr. Mustian regarding Archbold's Competitive Information (defined below) and to require that the deposition be postponed until after this Court rules on this Motion to Quash, which directly raises the issue of the discoverability of the Non-Party Hospitals' Competitive Information by Respondents. Accordingly, Archbold requests oral argument and a hearing to be scheduled on an expedited basis prior to the May 21, 2013 deposition.

**INTRODUCTION**

For the reasons and objections stated herein, the Subpoenas to the above-defined Non-Party Hospitals should be quashed or limited such that no production pursuant to Request No. 4 of the Long Form Subpoena (defined below) should be required and, except as already committed to, no further action should be required of Archbold, Grady or TRMC. Respondents seek unprecedented discovery from 160-plus hospitals throughout the State of Georgia and others in Alabama and Florida. However, the documents sought are not reasonably calculated to lead to admissible evidence, are overly broad and unduly burdensome, contravene the FTC's Procedural Rules, and seek irrelevant, highly sensitive information that the Non-Party Hospitals should not be required to produce to Respondents.<sup>1</sup>

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<sup>1</sup> To the extent applicable, the Non-Party Subpoena Recipients join in and incorporate by reference the factual background provided in and the arguments in the Motions to Quash or

In addition, pending resolution of this Motion to Quash, Archbold requests a protective order preventing the deposition of Mr. Mustian, currently scheduled for May 21, from going forward. Mr. Mustian is the President and CEO of Archbold. It is anticipated that Respondents will seek the same competitively-sensitive information sought in the Document Subpoena from Mr. Mustian at his deposition. For the reasons stated herein, Respondents are not entitled to such information, and a protective order is needed to prevent discovery into these matters.

### **FACTUAL BACKGROUND**

Phoebe Putney Memorial Hospital (“Phoebe Putney”) is located in Albany, Georgia and has numerous affiliates. It is a 443 bed facility.

Respondents served Archbold Medical Center. Archbold Medical Center is a holding company for among other hospitals, John D. Archbold Memorial Hospital. John D. Archbold Memorial Hospital is located in Thomasville, Georgia and is approximately 55 miles from Phoebe Putney. John D. Archbold Memorial Hospital is a 540 bed facility.

Grady is one of John D. Archbold Memorial Hospital’s three affiliate locations.<sup>2</sup> Grady is located in Cairo, Georgia and is approximately 51 miles from Phoebe Putney. Grady is a 60 bed facility.

TRMC is located in Tifton, Georgia and is approximately 41 miles from Phoebe Putney. TRMC is a 191 bed facility.

On or about April 23, 2013, Respondents served the Deposition Subpoena on Mr. Mustian. On or about April 26, 2013, Respondents served Document Subpoenas on each of the

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Limit Subpoena *Duces Tecum* filed May 6, 2013, by Morris, Manning & Martin, LLP on behalf of other hospitals and medical centers which were served with similar subpoenas.

<sup>2</sup> The other two affiliates are Brooks County Hospital in Quitman, Georgia and Mitchell County Hospital in Camilla, Georgia. Both of these hospitals are critical access hospitals. They also received Document Subpoenas, but counsel for Respondents has represented that the Document Subpoenas directed at critical access hospitals have been withdraw.

Non-Party Hospitals, along with numerous other non-party hospitals in Georgia, Florida, and Alabama. Each of the Document Subpoenas directed to the Non-Party Hospitals attached fifteen (15) categories of documents requested to be produced pursuant to the Document Subpoenas, referred to as the “Long Form.” (Other subpoenas attached four (4) categories of documents requested to be produced referred to as the “Short Form.”)

Following the issuance of the Subpoenas, a flurry of activity ensued, and numerous discussions were convened between and among counsel for the hospitals receiving the subpoenas, the Respondents’ counsel, and the Georgia Hospital Association.

As of May 6, 2013, Respondents’ counsel agreed to withdraw the Subpoenas that were issued to critical access hospitals. As of May 10, 2013, the Long Form subpoena was narrowed to Requests 4 and 9, and the Short Form subpoena was narrowed to Request 3.<sup>3</sup>

Request 4 of the Long Form Document Subpoenas seeks the following:

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.

The Document Subpoenas define “documents” to include

...all computer files and written, recorded, and graphic materials of every kind in your possession, custody, or control. The term documents includes,

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<sup>3</sup> Requests 9 (long form) and 3 (short form) requested the following:

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).

The Non-Party Hospitals believe that they have resolved any disputes regarding production of the requested financials.

without limitation: electronic mail messages, electronic correspondence and drafts of documents, metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that person's files; and copies of documents the originals of which are not in your possession, custody, or control.

(The documents requested by Long Form Request 4 are referred to herein as "Competitive Information.")

Following several discussions and email exchanges with counsel for Respondents, via letter dated May 13, 2013, counsel for the Non-Party Subpoena Recipients articulated objections to the Document Subpoenas on multiple bases. On May 13, 2013, counsel for Respondents further limited the Subpoena such that Long Form Request 4 was limited to (a) seeking only documents that discuss Phoebe Putney and Palmyra Hospital and (b) withdraw the request for emails.

Despite efforts to resolve all objections, the Document Subpoenas still seek disclosure of the Non-Party Hospitals' highly sensitive, confidential Competitive Information for use by Respondents. The Non-Party Hospitals therefore object to producing such documents.

Archbold further objects to going forward with the deposition of its CEO, Mr. Mustian, in which it is anticipated the same information regarding Archbold's Competitive Information will be sought by Respondents.

#### **ARGUMENT AND CITATION OF AUTHORITY**

Under Commission Rule 3.34, motions to quash or limit subpoenas "shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation." 16 C.F.R. § 3.34(c). In addition, 16 C.F.R. § 3.31(d) gives the Administrative Law Judge the authority to "deny discovery or make any other order which justice requires to protect a party or other person from

annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.” 16 C.F.R. § 3.31(d).

Rule 3.31 limits discovery in an adjudicative proceeding before the Commission. Discovery sought pursuant to a subpoena in such a proceeding 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(c)(1). The discovery sought 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). Also, 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 requested by Respondents pursuant to the Document Subpoenas are not proper under these rules, are overbroad and unduly burdensome, seek highly sensitive, irrelevant information, and are not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the Non-Party Hospitals object to the Document Subpoenas on the grounds set forth below and request the relief stated herein.

Depositions in adjudicative proceedings before the Commission are “expected to yield information within the scope of discovery under § 3.31(c)(1).” 16 C.F.R. § 3.33(a). Pursuant to Rule 3.33(b), “[t]he Administrative Law Judge may rule on motion by a party that a deposition shall not be taken upon a determination that such deposition would not be reasonably expected to meet the scope of discovery set forth under § 3.31(c), or that the value of the deposition would be outweighed by the considerations set forth under § 3.43(b).” 16 C.F.R. § 3.33(b).<sup>4</sup> “Objections

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<sup>4</sup> Rule 3.34(b) provides, in part: “Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by

to the . . . relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.” 16 C.F.R. § 3.33(g)(2)(iii)(A).

### **OBJECTIONS TO SUBPOENAS**

First, any Competitive Information maintained by the Non-Party Hospitals in the ordinary course of business are irrelevant to whether the acquisition at issue complies with the antitrust laws. Nothing in this action pertains to the Non-Party Hospitals’ strategic plans and assessments of their respective competitors and other hospitals. It is the conduct of Respondents that is at issue in this adjudicative proceeding, not that of the other 160+ hospitals subject to Respondents’ subpoenas. Accordingly, the Non-Party Hospitals’ Competitive Information is irrelevant to Respondents’ litigation, and Request 4 should be quashed.

Second, the fact that Respondents have narrowed Request 4 to only seek documents relating to Phoebe Putney and Palmyra Hospital does not alleviate the Non-Party Hospitals’ concerns regarding disclosure of their Competitive Information to Respondents. Respondents have essentially narrowed their request to production of the documents that would *most prejudice* the Non-Party Hospitals if disclosed to Respondents. The Non-Party Hospitals 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. Accordingly, Request 4 should be quashed.

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the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” 16 C.F.R. § 3.33(b).

Third, whether and to what extent the Non-Party Hospitals compete with Phoebe Putney can be readily determined without probing the Non-Party 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. Accordingly, Request 4 should be quashed.

Fourth, the Non-Party Hospitals object to any production pursuant to Request 4 because Georgia law expressly protects strategic planning and competitively sensitive materials from disclosure by public hospitals. O.C.G.A. § 31-7-75.2 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.

(emphasis added). Thus, the Georgia legislature has confirmed that such materials are protected and not subject to disclosure by certain hospitals operating in the State. By analogy, the Non-Party Hospitals should receive similar protections from disclosure.

Finally, for the reasons stated above, 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, and the Non-Party Hospitals object to production

on these grounds as well.

For the above reasons, Archbold also objects to the Deposition Subpoena and seeks a protective order preventing Respondents from questioning Mr. Mustian regarding Archbold's Competitive Information and related competitively-sensitive information. In addition, in the interest of judicial economy, Archbold requests a protective order preventing the deposition of Mr. Mustian from going forward prior to resolution of this Motion and the issues addressed herein.

### **CONCLUSION AND REQUEST FOR RELIEF**

For the forgoing reasons, the Non-Party Hospitals respectfully request an Order providing that:

1. Request 4 of the Document Subpoenas are quashed and that no production pursuant to Request 4 of the Long Form is required of the Archbold, Grady, or TRMC;
2. The Deposition Subpoena is limited and a protective order is granted such that Respondents are not permitted to depose Mr. Mustian regarding the topics included in Request 4 of the Long Form or regarding Archbold's Competitive Information and related competitively-sensitive information and such that the deposition of Mr. Mustian will not go forward prior to ruling on this Motion;
3. The Non-Party Hospitals are deemed to have fully complied based on their commitment to produce the financials pursuant to Request 9, as modified and agreed to, to the extent the requested financials exist.

A proposed order is attached hereto as Exhibit A.

Respectfully submitted, this 17<sup>th</sup> day of May, 2013.

WOMBLE CARLYLE SANDRIDGE & RICE,  
LLP

/s/ Brian Allen Hayles

Brian Allen Hayles

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Hospital*

**EXHIBIT A**  
**(PROPOSED ORDER)**

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

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

**ORDER GRANTING ARCHBOLD MEDICAL CENTER’S, GRADY GENERAL  
HOSPITAL’S, AND TIFT REGIONAL MEDICAL CENTER’S MOTION TO QUASH  
OR LIMIT SUBPOENAS AND FOR PROTECTIVE ORDER**

Before the Administrative Law Judge is Archbold Medical Center’s, Grady General Hospital’s, and Tift Regional Medical Center’s Motion to Quash or Limit Subpoenas and for Protective Order and for Expedited Hearing Prior to May 21, 2013 Deposition (“Motion to Quash”), filed by Archbold Medical Center, Grady General Hospital, and Tift Regional Medical Center (collectively, the “Non-Party Hospital Subpoena Recipients”). The motion seeks to quash Request 4 of the Subpoena Duces Tecum served on Non-Party Hospital Subpoena Recipients on or about April 26, 2013 (the “Document Subpoenas”) by Respondents Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., and Hospital Authority of Albany-Dougherty County (collectively, “Respondents”).

The Motion further seeks a protective order relating to the *Subpoena Ad Testificandum* Deposition served on Perry Mustian (the “Deposition Subpoena”), limiting the scope of such deposition and preventing this deposition from going forward until after the Motion to Quash is ruled upon.

Having considered the Motion to Quash and all responses thereto, this Court finds that the motion should be, and hereby is, GRANTED.

IT IS THEREFORE ORDERED that:

1. Request 4 of the Document Subpoenas are quashed and that no production pursuant to Request 4 of the Long Form is required of the Archbold, Grady, or TRMC;
2. The Deposition Subpoena is limited and a protective order is granted such that Respondents are not permitted to depose Mr. Mustian regarding the topics included in Request 4 of the Document Subpoena or regarding Archbold’s Competitive Information and related competitively-sensitive information and such that the deposition of Mr. Mustian will not go forward prior to ruling on this Motion;
3. The Non-Party Hospitals are deemed to have fully complied based on their commitment to produce the financials pursuant to Request 9, as modified and agreed to, to the extent the requested financials exist.

Signed this \_\_\_\_ day of \_\_\_\_\_, 2013.

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D. Michael Chappell Chief  
Administrative Law Judge

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

In the Matter of	)	
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HCA INC., and	)	
	)	
PALMYRA PARK HOSPITAL, INC., and	)	
	)	
HOSPITAL AUTHORITY OF ALBANY- DOUGHERTY COUNTY, Respondents.	)	

**STATEMENT OF DAVID B. HAMILTON PURSUANT TO 16 C.F.R. 3.22(g)**

I am a partner at Womble Carlyle Sandridge & Rice, LLP and counsel for Tift Regional Medical Center, Archbold Medical Center, Grady General Hospital (collectively, the “Non-Party Hospitals”). I submit this statement in connection with Archbold Medical Center’s, Grady General Hospital’s, and Tift Regional Medical Center’s Motion to Quash or Limit Subpoenas and for Protective Order and for Expedited Hearing Prior to May 21, 2013 Deposition (“Motion to Quash”). On April 23, 2013, Phoebe Putney served a *Subpoena Ad Testificandum Deposition* on Perry Mustian. On April 26, 2013, Phoebe Putney served the *Subpoenas Duces Tecum* on the Non-Party Hospitals. On May 2, 2013, and May 8, 2013, I, along with my colleague Brian Hayles, conferred with Brian Burke and 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. On May 8, 2013,

Brian Hayles, further conferred with Mr. Fedele. Additional efforts were made to confer with Mr. Fedele via letter dated May 13, 2013, from Mr. Hayles, and further discussions were held on May 16, 2013. However, we have been unable to resolve by agreement the issues raised therein.

This 17<sup>th</sup> day of May, 2013.

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**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
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	)	
PALMYRA PARK HOSPITAL, INC., and	)	
	)	
HOSPITAL AUTHORITY OF ALBANY- DOUGHERTY COUNTY, Respondents.	)	

**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 **“Archbold Medical Center’s, Grady General Hospital’s, and Tift Regional Medical Center’s Motion to Quash or Limit Subpoenas and for Protective Order and for Expedited Hearing Prior to May 21, 2013 Deposition”** was electronically filed with the Federal Trade Commission using the FTC E-File system which will automatically send e-mail notification of such filing to:

Donald S. Clark  
Secretary  
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Room H113  
600 Pennsylvania Avenue, NW  
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It was also served via electronic mail and United States Mail with sufficient postage affixed thereto, addressed to:

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This 17<sup>th</sup> day of May, 2013.

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