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November 7, 2023

VIA EMAIL (smoore@ncdoj.gov)

South A. Moore
Assistant General Counsel
North Carolina Department of Justice
114 West Edenton Street
P.O. Box 629
Raleigh, North Carolina 27602

Re: Investigative Demand Served on HCA Management Services, L.P.

Dear Mr. Moore:

We represent HCA Management Services, L.P. in connection with the Investigative Demand (“ID”) issued by Attorney General Josh Stein on October 27, 2023, seeking various categories of documents related to Mission Health System (“Mission”). We were surprised to receive the ID from the Attorney General, given the many years that Mission has cooperated voluntarily with the Attorney General’s Office (“AGO”), both by providing data and documents to the AGO and attending meetings requested by the AGO. Moreover, Mission provided a tour of its facilities to representatives from the AGO a mere eight days before the ID was issued. Through all of that, the Attorney General has not voiced dissatisfaction with Mission’s voluntary cooperation, a fact that raises real concerns about the actual purpose and intent of the ID.

Regardless of those concerns, the ID appears to be an improper use of the investigative authority of the Attorney General, since it seeks information relating to compliance with a contract—specifically, the Asset Purchase Agreement (“APA”) governing the acquisition of Mission by HCA Healthcare (“HCA”) in 2019. As you are aware, the APA includes specific enforcement provisions that the AGO aggressively negotiated during its extensive review of the acquisition. At the conclusion of that review, the Attorney General confirmed that he was “satisfied” that the “agreement protects healthcare in North Carolina.” Even if the Attorney General now believes that the APA has been breached, a potential breach of contract simply is not a valid basis for an investigation by the AGO pursuant to North Carolina’s consumer protection statute. The courts of North Carolina consistently have rejected attempts by litigants to convert breach of contract claims into consumer protection claims, and the ID plainly is an attempt to do just that.

More important is the fact that Mission has not breached the APA. Mission is now, and always has been, in full compliance with that contract and often exceeds its obligations under the

APA. As the AGO is aware, the APA requires that the Independent Monitor annually confirm that Mission is operating in compliance with its terms, and the Independent Monitor has done so *every single year since 2019*. Finally, the timing of the ID suggests that the AGO is improperly using its authority under the consumer protection statute to investigate whether Mission has complied with the APA. It is noteworthy that only three days after the ID was issued, the Attorney General sent a letter to the Independent Monitor claiming, without specificity or support, that Mission has breached the APA.

For those reasons, and as discussed more fully below, Mission objects to the ID as improper under North Carolina law and beyond the scope of the Attorney General's investigative authority, and requests that it be withdrawn. If the Attorney General agrees to do so, Mission will continue to provide data and documents to the AGO on a voluntary basis, as it has done for years.

I. THE FACTS ABOUT THE ONCOLOGY SERVICES AND EMERGENCY SERVICES AT MISSION

The AGO's most recent statement asserting Mission's failure to comply with the APA is obviously and demonstrably inaccurate, as Mission has explained in its numerous letters responding to the Attorney General's requests for information. Mission would like to work with the AGO to correct the record and provide the facts needed to assist the residents of western North Carolina in making good decisions about their healthcare. We very much understand the interest Attorney General Stein has in ensuring that his constituents understand the quality and scope of healthcare services Mission provides in western North Carolina, especially because he personally allowed HCA's acquisition of Mission to proceed after spending many months negotiating and studying the proposed transaction. Mission again renews its invitation to Attorney General Stein to visit its facilities and observe the quality patient care and healthcare services it provides, as well see its strong support of the community.

Mission is deeply concerned that the ID and the AGO's immediate release of it to the media will confuse the public about the scope and extent of oncology and emergency services that Mission provides. The AGO's focus on oncology services in the ID is particularly surprising, given the first-hand observations your colleague made during her tour of Mission's campus generally, and the SECU Cancer Center and inpatient oncology unit, specifically, on October 19, 2023. We believe that any objective observer participating in that tour would have walked away confident that Mission is providing unparalleled cancer care in western North Carolina and that world-class healthcare providers are choosing Mission as their home for providing excellent care to cancer patients.

We encourage you to review the detailed information about Mission's oncology services provided in a letter from Greg Lowe, President of HCA Healthcare North Carolina Division, to Ms. Walters, dated October 27, 2023, as well as Mr. Lowe's letter to Ms. Walters, dated May 22, 2023. As those letters detail, Mission has made more than \$12.4 million in capital investments in the Mission Cancer Center since 2019. For example:

- Mission recently hired two head and neck surgeons, a breast medical oncologist and a surgical oncologist, some of whom provide oncology care that was not available in western North Carolina before HCA acquired Mission.
- Mission employs the only fellowship-trained musculoskeletal oncologist in western North Carolina, Dr. Donald Gajewski, who is an expert in the area of primary bone tumors, soft tissue tumors and bone disease.
- In October 2020, Mission formally partnered with HCA’s Sarah Cannon Cancer Institute (“Sarah Cannon”) and gained access to world class resources, providers and clinical trials that were not available before HCA’s acquisition, including Sarah Cannon’s Centers of Excellence for lung cancer, breast cancer and hematology.
- Mission has purchased and installed two new linear accelerators and Davinci surgical robots, that are used today by surgical oncologists to provide cutting-edge surgical oncology care.

Mission also is concerned that the AGO’s actions appear designed to support the one-sided narrative advanced by some healthcare providers who simply are unhappy about HCA’s acquisition of Mission and others whose personal financial interests were impacted by that acquisition (even though those providers made plans to leave Mission more than a year before the acquisition). For example, the ID seeks communications between Mission and certain healthcare providers who have complained the loudest about Mission since the acquisition, but seeks no information about the (many) healthcare providers who are proud of the high-quality patient care they and Mission provide in western North Carolina. Most recently, on October 31, 2023, dozens of Mission healthcare providers wrote to the Independent Monitor to rebut the consistently false narrative promulgated by the “loud” healthcare providers.

Equally concerning are the ID’s requests for information about the emergency services provided at Mission—specifically about the wait times in Mission’s emergency department. Those requests are interesting for many reasons, including that Attorney General Stein recently undertook a concerted campaign to *prevent* Mission from obtaining much needed acute care inpatient beds. Currently, all of Mission’s inpatient beds are staffed and occupied. Thus, there are often no inpatient beds to which patients in Mission’s emergency department can be admitted to the extent necessary for their care. So long as no inpatient bed is available, a patient often must remain in the emergency department, and so long as that patient remains in the emergency department, another patient needing emergent care is likely to have to wait for an emergency department bed. In short, too few inpatient, acute care beds at Mission is a major cause of longer wait times at Mission’s emergency department

To address those wait times, and as required by North Carolina law, Mission presented extensive and objective evidence about the community’s need for those additional acute care beds and the fact that additional beds at Mission would alleviate the wait times in Mission’s emergency room by increasing the number of beds available for patients who are admitted through the emergency department. Although Mission was the only healthcare provider who could rapidly

and successfully increase acute care capacity in western North Carolina, which would also relieve demand on Mission’s emergency department, the Attorney General took the position that any additional beds for acute care patients must go to “anyone but Mission.” That position worked only to the detriment of western North Carolina patients, since it resulted in at least a two-year delay before additional acute care beds—the beds to which patients admitted through the emergency department often need access—are available in the region. Attorney General Stein’s gubernatorial campaign website even celebrates his efforts to prevent Mission from expanding its acute care bed capacity to meet community needs for emergency services. *See News, NC Attorney General Stein says state should ‘deny Mission’ hospital expansion application, July 25, 2023 available at <https://www.joshstein.org/news/nc-attorney-general-stein-says-state-should-deny-mission-hospital-expansion-application%E2%80%A2>* (last visited November 3, 2023).

Finally, we simply see no need for the ID given Mission’s continued voluntary cooperation with the AGO since 2019. As discussed above, Mission has cooperated fully and engaged with your office proactively within the parameters of the APA. We continue to believe that the APA is the operative document that governs the AGO’s rights with respect to the issues implicated by the ID.

II. THE INVESTIGATIVE DEMAND IS IMPROPER

We believe the ID is legally improper and unenforceable and should be withdrawn, as explained in the following formal objections.¹

The information sought by the ID is outside the scope of the statute under which it was issued. The ID purports to be issued under the AGO’s power to investigate potential violations of North Carolina’s consumer protection statute. *See* ID at 9 (citing N.C. Gen. Stat. §§ 75-9, 75-10). North Carolina’s consumer protection statute prohibits “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” N.C. Gen. Stat. § 75-1.1. However, the statute expressly excludes from the scope of “commerce” “professional services rendered by a member of a learned profession.” *Id.* North Carolina courts broadly construe the professional services exception to the consumer protection statute and apply that broad exception to medical services. *See Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 334 (2019) (citing *Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 126 (2006) (“Our Court of Appeals has long held that members of health care professions fall within the learned profession exemption to N.C.G.S. § 75-1.1,” and “[t]his exception for medical professionals has been broadly interpreted.”)). The requests in the ID are all directed at information arising from or related to the provision of medical services at Mission, which is clearly not “commerce” for purposes of the consumer protection statute. Thus, the ID is unenforceable because it seeks information expressly *outside* the ambit of the statute under which it purports to be issued.

Even if the medical services at issue in the ID’s requests were “commerce” subject to the North Carolina consumer protection statute, the AGO’s investigative authority under that statute

¹ Mission makes these objections subject to a complete reservation of rights and without waiver of any and all other objections to the ID.

is limited to investigations to “ascertain[] whether the law . . . is being or has been violated[.]” N.C. Gen. Stat. § 75-9. Here, the ID is plainly issued for a different purpose: to “ascertain[]” whether Mission has breached the APA.² The ID seeks information about the quantity and quality of certain medical services—and the identity of the providers rendering them—that Mission may not discontinue for ten years, subject to certain exceptions set out in the APA. That information relates to contractual performance, not “unfair or deceptive acts or practices in or affecting commerce.” N.C. Gen. Stat. § 75-1.1. Further, even intentional breach of a contract is not an “unfair trade practice” under North Carolina’s consumer protection statute. *See Mason v. Universal Underwriters Life Ins. Co.*, 2006 WL 2847288 at *6 (W.D.N.C. Oct. 4, 2006) (citing *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049, 1060 (E.D.N.C. 1980), *aff’d*, 649 F.2d 985 (4th Cir.) (“Generally, even an allegation of an intentional breach of contract will not support an action for unfair and deceptive trade practices under the North Carolina statute.”)).

The ID is also an improper attempt to avoid the thoughtful, negotiated structure set out in the APA for overseeing Mission’s provision of medical services. *See* APA Section 7.17. The AGO knows that structure well, because Attorney General Stein negotiated those terms before he allowed HCA to acquire Mission and only after his extensive “review” left him “satisfied” that the “agreement protects healthcare in North Carolina.” In fact, Attorney General Stein issued a press release outlining his decision to permit HCA’s acquisition and his efforts to obtain certain rights to enforce the APA. *See* Press Release, *Attorney General Josh Stein Does Not Object to Mission/HCA Deal*, January 16, 2019 (“I am also pleased that HCA agreed to enforcement measures – this ensures that my office has the ability to take legal action should HCA fail to comply with the commitments it has made.”). The APA allows for suit against Mission for breach of contract in certain, limited circumstances—nothing more. *See* APA Section 13.13(b). Your office also knows that the structure for enforcement set out in the APA is the *exclusive* means by which the Attorney General may enforce obligations Mission undertook in the APA. Indeed, the Attorney General’s successful efforts to add a right to sue Mission for breach of the APA provisions related to the medical services at issue in the ID undermines any suggestion by the AGO that it also has statutory authority to “investigate” or enforce those obligations. If such statutory authority existed, the Attorney General would have had no need to negotiate for himself contractual rights to enforce those obligations.

* * *

For the reasons set out above, Mission objects to the ID and asks that it be withdrawn. Mission reserves all rights and waives none, including its rights to challenge in a court of

² Indeed, it appears that the AGO is not actually attempting to “ascertain” anything. Instead, the Attorney General has clearly already reached his own conclusion, as made clear in the recent letter to Dogwood Health Trust, which states that Mission “failed to comply with its obligations under section 7.13 and schedule 7.13” of the APA. *See* October 31, 2023 letter from Deputy Attorney General Sarah G. Boyce to Dogwood Health Trust. Thus, the ID is a bald attempt to obtain pre-litigation discovery, masquerading as a consumer protection “investigation.” Mission cannot countenance such an end-run around the North Carolina Rules of Civil Procedure.

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competent jurisdiction the ID and any other improper action taken by your office. Consistent with its practice since entering the APA, if the ID is withdrawn, Mission will continue to work with the AGO, to voluntarily answer questions and provide information. We also are willing and available to meet and confer regarding the ID and any legal positions your office takes regarding Mission's compliance with the APA.

Best regards,

A handwritten signature in black ink, appearing to read "Alice Fisher", written over a light gray rectangular background.

Alice Fisher
of LATHAM & WATKINS LLP

cc: Llogan Walters, Esq.
Jasmine McGhee, Esq.
Marc D. Brunton, Esq.
Phillip T. Jackson, Esq.
Jason Ehrlinspiel, Esq.