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FTC Non-Compete Ban

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In January 2023, the Federal Trade Commission (FTC) proposed the Non-Compete Clause Rule (“NCCR”),¹ which would, among other things, provide that it is an unfair method of competition for an employer to use non-compete clauses in its employment contract with its workers.² The FTC works to protect consumers and promote competition in the marketplace by enforcing its regulations against deceptive, unfair, and anticompetitive business practices.³ And evident by the NCCR, the FTC considers non-compete clauses, which block people from working for a competing employer, or starting a competing business, after their employment ends,⁴ to be an unfair method of competition.⁵ In the notice for public rulemaking, the FTC does not clarify whether the agency intends for the NCCR to apply to non-profit organizations that regularly use non-compete clauses, such as non-profit hospitals.⁶ Instead, the FTC sends mixed signals.

First, the FTC thoroughly analyzed the effect of non-complete clauses upon American physicians, the majority of whom are employed by non-profit hospitals.⁷ The FTC concluded that non-compete clauses harm physicians and increase healthcare costs.⁸ However, the agency later acknowledged limits to its authority – it declared that an entity that is not “organized to

¹ 16 C.F.R. Part 910.

² 88 F.R. 3482

³ *What We Do*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do> (last visited Apr. 24, 2023).

⁴ 16 C.F.R. 910.1(b). The NCCR also includes “de facto” non-compete clause that may not be identified as a non-compete clause but has the effect of prohibiting the worker from accepting employment or operating a business after conclusion of the worker’s employment. *Id.*

⁵ *Fact Sheet: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM’N, https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf (last visited Apr. 24, 2023).

⁶ See e.g., Ben Sutherly, *Nationwide Children’s doctors face 100-mile non-compete ban*, *The Columbus Dispatch* (Feb. 6, 2016), <https://www.dispatch.com/story/lifestyle/health-fitness/2016/02/07/nationwide-children-s-doctors-face/23381213007/> (last visited Apr. 24, 2023).

⁷ In 2021, more than 57 percent of community hospitals in the US were non-profit. *State Health Facts - Hospitals by Ownership Type*, KFF, <https://www.kff.org/other/state-indicator/hospitals-by-ownership/?dataView=1¤tTimeframe=0&selectedDistributions=non-profit&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (consolidating ownership type data from the American Hospital Association annual survey).

⁸ 88 FR 3490.

carry on business for its own profit or that of its members . . . would not be subject to the [Non-Compete Clause] Rule.”⁹

Many law firm articles¹⁰ addressed this caveat to the FTC’s authority and concluded that the Proposed Rule will not apply to non-profit hospitals. Some anti-trust lawyers,¹¹ however, expressed concern that the FTC will try to apply the NCCR to non-profit hospitals, arguing that the hospitals are “organized to carry on business for its own profit or that of its members.”¹² This article will first detail how Section 4 of the FTC Act defines corporation to historically limited the FTC’s ability to enforce unfair trade practice regulations against non-profits. Then, the article will argue why the FTC could succeed in proving its jurisdiction over multi-million- and billion-dollar non-profit organizations, such as non-profit hospital systems.

I. How the FTC Act’s ‘Corporation’ Definition Restricts the FTC’s Authority to Enforce Section 5 Against Non-Profits

The FTC relies on Section 5 of the FTC Act, which states that “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful,”¹³ as its legal underpinning for enforcing the NCCR. Because of its reliance on Section 5, the FTC explicitly notes that *some* employers, including

⁹ 88 FR 3510 (referencing the “Corporation” definition in 15 U.S.C. § 44 that is traditionally interpreted to exclude most non-profit organizations from the FTC Act’s authority in Section 5).

¹⁰ See Hogan Lovells, *FTC’s proposed ban of employer non-competes: Are non-profits exempt?* (January 17, 2023), <https://www.lexology.com/library/detail.aspx?g=a66897b8-7d88-4ec3-b90c-1410ac77e106>; Stevens & Lee, *FTC Proposed Non-Compete Ban: Impact on Nonprofit Hospitals and Nonprofit Affiliates* (January 12, 2023), <https://www.stevenslee.com/health-law-observer-blog/ftc-proposed-non-compete-ban-impact-on-nonprofit-hospitals-and-nonprofit-affiliates/>; Jones Day, *FAQs for Recent FTC Actions Against Employer/Employee Non-Compete Clauses White Paper* (January 2023), <https://www.jonesday.com/en/insights/2023/01/faqs-for-recent-ftc-actions-against-employeremployee-noncompete-clauses>.

¹¹ Ben Dryden, partner at Foley & Lardner and vice chair of Foley’s antitrust practice group cautions that “[t]he scope of nonprofit exemption itself is not very well settled”; Barak Richman, antitrust law professor at Duke University, notes that the FTC’s “jurisdictional limitations are much fuzzier than many say,” especially here because “most nonprofit health entities DO carry on business for its members/employees/partners’ profit.” HealthcareDive, *Nonprofit hospitals may evade noncompete ban enforcement, experts say* (January 20, 2023), <https://www.healthcaredive.com/news/noncompete-ban-apply-nonprofit-hospitals/640769/>.

¹² 15 U.S.C. § 44.

¹³ 15 U.S.C. § 45.

those not “organized to carry on business for its own profit or that of its members,” would be exempt from the NCCR.¹⁴ The exemption exists because FTC can only enforce Section 5 against “persons, partnerships, or corporations.”¹⁵ And Section 4 of the FTC Act defines a corporation as an entity “organized to carry on business for its own profit or that of its members.”¹⁶

It is well-established that the FTC can enforce Section 5 against certain non-profits, such as trade associations,¹⁷ fraudulent charities,¹⁸ and physician-hospital organizations,¹⁹ if the non-profit is organized and operated for the benefit of its members. If the FTC attempted to enforce the NCCR against a non-profit health system or university, however, the agency bears the burden in establishing its jurisdiction.²⁰

To successfully prove jurisdiction over a non-profit health system that appealed the FTC’s decision, the FTC must convince the court that the corporation engages in business for profit within the traditional and generally accepted meaning of profit.²¹ In *Community Blood Bank*, the non-profit petitioners,²² challenged the FTC’s final decision and order directing the

¹⁴ 88 FR 3510.

¹⁵ 15 U.S.C. § 45(a)(2).

¹⁶ 15 U.S.C. § 44.

¹⁷ See e.g., *Cal. Dental Ass’n. v. FTC*, 526 U.S. 756, 767 (1999) (finding that the FTC does have jurisdiction to enforce Section 5 against trade and professional associations)

¹⁸ See e.g., *In re Ohio Christian College*, 80 F.T.C. 815 (May 19, 1972) (enforcing Section 5 against an organization claiming to be a “non-profit residence school” to scam individuals seeking degrees over correspondence).

¹⁹ See e.g., Decision and Order, Preferred Health Services, Inc., FTC Docket No. C-4143 (April 13, 2005) (consent order), <https://www.ftc.gov/sites/default/files/documents/cases/2005/04/050419do0410099.pdf>.

²⁰ *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S. Ct. 673, 86 L. Ed. 951 (1942); *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936).

²¹ *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1022 (8th Cir. 1969); see also *Cal. Dental Ass’n. v. FTC*, 526 U.S. 756, 767 (1999), fn. 6 (finding that Commission’s jurisdiction extended to “any legal entity without shares of capital which engages in business for profit within the traditional meaning of that language,” and noting the decision is “fully consistent with *Community Blood Bank*”).

²² The court broke the *Community Blood Bank* petitioners into three groups: “(1) Community Blood Bank of the Kansas City Area, Inc., (Community), a Missouri not-for-profit corporation 3 and its officers, directors, and agents; (2) Kansas City Area Hospitals Association (AHA), a Missouri nonprofit corporation, and its officers, directors and agents and certain member hospitals. AHA is composed of hospital administrators and most of the Kansas City area hospitals and serves its dues paying members by collecting information and providing a forum for discussion of hospital problems and their solutions; (3) Individual pathologists affiliated with various hospitals located in the Kansas City area.” 405 F.2d at 1013-1014.

petitioners to “cease and desist from unfair methods of competition and unfair acts and practices . . . in violation of § 5(a) of the Federal Trade Commission Act (14 U.S.C. § 45(a)).”²³ The FTC had charged the petitioners with actively coordinating to hinder the development of two commercial blood banks.²⁴ Following the FTC’s final decision, the petitioners sought judicial review under Section 5(c) of the FTC Act.²⁵ The petitioners challenged the FTC’s jurisdiction to enforce Section 5(a) against them as non-profit organizations.²⁶ The FTC argued that “the word ‘profit’ should be given one meaning as applied to corporations having shares of capital stock and another meaning as applied to those without shares.”²⁷ The FTC thus concluded that “any corporation engaged in business only for charitable purposes and which is forbidden by law to carry on business for profit, that receives income in excess of expenses, is in fact carrying on business for its own profit if it is capable of self-perpetuation or expansion.”²⁸

The court found that “neither the legislative history²⁹ of the Act nor the language³⁰” of Section 4 of the FTC Act supported the FTC’s theory that Congress intended for “profit” to receive different meanings depending upon the character of the corporation under consideration.³¹ And as Section 7 of the Sherman Act,³² and Section 12 of the Clayton Act,³³ did

²³ *Id.* at 1013.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 1014.

²⁷ *Id.* at 1016.

²⁸ *Id.*

²⁹ The *Community Blood Bank* court notes contemporaneous correspondence between senators that expressed concerns about the drafted “corporation” definition because it exempted all non-profit organizations, including trade associations, from § 5 enforcement. *Id.* at 1017-1018. The conversation prompted revisions to the “corporation” definition, expanding coverage to include non-profit organizations that profit their members. *Id.*

³⁰ It is a well-established principle that Congress “will be presumed to have used a word in its usual and well-settled sense.” *Id.* at 1016 (quoting *United States v. Stewart*, 311 U.S. 60, 63 (1940)). The generally accepted that “profit” means “gain from business or investment over and above expenditures, or gain made on business or investment when both receipts or payments are taken into account.” *Id.* at 1017.

³¹ *Id.* at 1017.

³² 15 U.S.C. § 7.

³³ 15 U.S.C. § 12. The same Congress that passed the FTC Act enacted the Clayton Act. 405 F.2d at 1018.

not differentiate between for-profit and non-profit corporations,³⁴ the court concluded that Congress intended to differentiate the two corporation types with Section 4's language.³⁵ So, the plain language of profit - gain from business or investment over and above expenditures³⁶ - governs.³⁷

In *Community Blood Bank*, the court found that the record supported the petitioners' claim of non-profit status.³⁸ Thus, the FTC "lacks jurisdiction over nonprofit corporations without shares of capital, which are organized for and actually engaged in business for only charitable purposes, and do not derive any 'profit' for themselves or their members within the meaning of the word 'profit' as attributed to corporations having shares of capital," setting aside and annulling the Commission's order against the petitioners.³⁹

II. FTC's Jurisdiction Over Multi-Million- and Billion-Dollar Non-Profits

The FTC has jurisdiction to enforce Section 5 against corporations that engage in business for profit within the traditional and generally accepted meaning of profit.⁴⁰ "Under *Community Blood Bank*,⁴¹ the Eighth Circuit evaluated whether or not the organization carried on business for its own profit or that of its members by reviewing the following factors: (1) how

³⁴ Section 7 of the Sherman Act and § 12 of the Clayton Act define the word "'person' or 'persons', wherever used . . . [in these Acts] shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 15 U.S.C. § 7; 15 U.S.C. § 12.

³⁵ *Id.* at 1018.

³⁶ The court also outlined some flexibility for non-profits if, while serving their charitable causes, their income exceeds their expenditures in a fiscal year. *Id.* at 1017. To be considered for-profit, engaging in business, and making profits must be more than an incidental characteristic of a corporation's existence. *Id.*; *See also Southerland v. Decimo Club*, 16 Del. Ch. 183 (1928). And even if a corporation's income exceeds its disbursements, its nonprofit character is not necessarily destroyed, unless the excess is paid to its members as dividends or pecuniary benefits. *Id.*; *See also Associated Hospital Service, Inc. v. City of Milwaukee*, 13 Wis. 2d 447 (1961).

³⁷ *Id.*

³⁸ *Id.* at 1020.

³⁹ *Id.* at 1022.

⁴⁰ *Id.*

⁴¹ Years later, the FTC itself used *Community Blood Bank*'s standard to determine whether the Challenger Center For Space Science Education qualified as a non-profit. *See* Fed. Trade Comm'n., Informal Staff Advisory Op. 99-4 (1999).

the corporation was organized under State law; (2) whether the corporation had been granted tax-exempt status by the Internal Revenue Service; (3) whether the corporation had ever distributed or used profits to the benefit of any of their members, directors, or officers;⁴² (4) whether all receipts had been used exclusively for the purposes authorized by law and as outlined in the corporation's articles of incorporation; (5) whether the corporation had any shares of capital or capital stock or certificates; (6) what the corporation's articles of incorporation outlined as its purposes, objectives, member benefits, and dissolution plans, (7) how the corporation received its funds; and (8) whether the corporation's receipts meets or exceeds its expenses.⁴³

This section will analyze a test case – Mayo Clinic (“Mayo”), a world-renown, non-profit hospital system that uses non-competes⁴⁴ – against the *Community Blood Bank* factors and the court's analysis of Community Blood Bank of the Kansas City Area, Inc., (Community) to support the FTC's jurisdiction over non-profit hospital systems. This analysis will focus primarily on the Mayo Clinic's 2019 Form 990 and Mayo Clinic Group Return 2019 Form 990,⁴⁵ which is the most recent year available to the public.⁴⁶ In 2019, Mayo submitted a Group Return

⁴² *Community Blood Bank* dictum indicates that officer or director salaries may be scrutinized. *Id.* at 1020.

⁴³ *Id.* at 1021.

⁴⁴ See Elizabeth Dohms-Harter, *Patients Grieve Firing Of Mayo Clinic Doctor After He Self-Published A Book About COVID-19, 2020 Politics*, Wisconsin Public Radio (Sept. 8, 2021), <https://www.wpr.org/patients-grieve-firing-mayo-clinic-doctor-after-he-self-published-book-about-covid-19-2020-politics> (“[Dr. Weiss's] contract, dated Dec. 26, 2001, states that he cannot work within 25 miles of Mayo Clinic in Eau Claire for two years.”); Dr. Steven Weiss's *Non-Compete Agreement*, Wisconsin Public Radio (Sept. 8, 2021), https://www.wpr.org/sites/default/files/weiss_employment_agreement.pdf.

⁴⁵ IRS Form 990 is an annual information return that most organizations claiming federal tax-exempt status must file yearly. Form 990 requires filing organizations to report on the organization's exempt and other activities, finances, governance, compliance with certain federal tax filings and requirements, and compensation paid to certain persons. An organization's completed Form 990 is generally available for public inspection as required by section 6104. A non-profit organization with many subordinate organizations can file a group return, which typically includes all related organizations. *Instructions for Form 990 Return of Organization Exempt From Income Tax*, Internal Revenue Service (2022), <https://www.irs.gov/pub/irs-pdf/i990.pdf>.

⁴⁶ Nonprofit Explorer, *Mayo Clinic - Form 990 for period ending December 2019*, ProPublica, <https://perma.cc/DYL3-86BV> [hereinafter “*Mayo 2019 Form 990*”]; Nonprofit Explorer, *Mayo Clinic Group Return - Form 990 for period ending December 2019*, ProPublica, <https://perma.cc/P8B4-7GA8> [hereinafter “*Mayo GR 2019 Form 990*”].

Form 990 (the “Group Return”) for its 16 affiliated non-profit organizations⁴⁷ and a single Form 990 for Mayo Clinic (the “Organization”), its central organization.⁴⁸

Both Mayo Clinic and Community are organized as non-profit entities within their respective states⁴⁹ and the Internal Revenue Service (IRS) has granted both organizations tax-exempt status,⁵⁰ thus both organizations satisfy Factors 1 and 2.

Looking at Factor 3, neither the FTC Commission nor the court found that any funds received by Community had ever been distributed or inured to the benefit of any of their members, directors, or officers.⁵¹ In fact, Community only paid its staff; its officers and directors worked for free.⁵² Mayo Clinic, however, paid \$74,559,981 in compensation to its current officers, directors, trustees, and key employees in 2019.⁵³ Mayo’s CEO alone made \$2,685,375 in reportable compensation.⁵⁴ Mayo also reported providing clear benefits to some of its officers, directors, trustees, and key employees: first-class or chartered travel for employees and their selected travel companions; housing allowance or a resident for personal use; personal services,

⁴⁷ The 16 affiliated organizations are: Charterhouse Inc., Mayo Clinic Ambulance, Luther Lakeside Apartments, Inc., Mayo Clinic Arizona, Mayo Clinic Florida, Mayo Clinic Health System – Austin Foundation, Mayo Clinic Health System – Fairmount, Mayo Clinic Health System – Franciscan Medical Center Inc., Mayo Clinic Health System – Lake City, Mayo Clinic Health System – Northwest Wisconsin Region Inc., Mayo Clinic Health System – Southeast Minnesota Region, Mayo Clinic Health System – Southwest Minnesota Region, Mayo Clinic Health System – St. James, Mayo Clinic Hospital – Rochester, Mayo Clinic Jacksonville, and Mayo Foundation for Medical Education and Research. *Mayo GR 2019 Form 990*, 45.

⁴⁸ *Mayo 2019 Form 990*, 1, 265. Together, the two Form 990s reveal Mayo’s complete financial assets.

⁴⁹ Mayo Clinic is a registered charity in Minnesota. *Mayo Clinic Group Return*, The Office of Minnesota Attorney General, <https://www.ag.state.mn.us/Charity/Search/Default.asp> (search “383952644”). Community was recognized as a non-profit in Missouri. *Community Blood Bank*, 405 F.2d at 1019.

⁵⁰ See *Mayo 2019 Form 990*, 1:I; Decision and Order, *Community Blood Bank of the Kansas City Area, Inc., et al.*, 70 F.T.C. 728, 949 (Sept. 28, 1966) (Elman, C., dissenting)

⁵¹ *Community Blood Bank*, 405 F.2d at 1019.

⁵² *Id.*

⁵³ *Mayo GR 2019 Form 990*, 10:5. That year, Mayo reported that it did not use a process for determining C-suite and officer compensation that included a review and approval by independent persons, comparability data, or contemporaneous substantiation of the deliberation and decision. See *Mayo GR 2019 Form 990*, 6:15.

⁵⁴ *Mayo 2019 GR Form 990*, 16.

such as a maid, chef, and chauffeur; and health or social club dues or initiation fees.⁵⁵ While Community’s compensation scheme satisfies Factor 3, Mayo’s does not.

Moving to Factor 4, both the FTC Commission and the court concluded that any profit realized by Community had been used exclusively for the purposes authorized by law and their articles of incorporation, which outlined its purpose “to create, establish and maintain a permanent blood bank of human blood, to collect whole human blood from voluntary or paid donors.”⁵⁶ While Mayo Clinic’s articles of incorporation are not readily available,⁵⁷ its mission is to “inspire hope and contribute to health and well-being by providing the best care to every patient through integrated clinical practice, education, and research.”⁵⁸ Yet in 2019, Mayo spent billions unrelated to medicine, such as \$119,876,485 in travel,⁵⁹ \$25,656,513 in advertising and promotion,⁶⁰ \$1,971,120 in lobbying,⁶¹ \$3,584,054 in investment management fees,⁶² and \$3,212,005,599 in investments outside the United States,⁶³ with \$1,338,796,557 invested in Central America and the Caribbean.⁶⁴ In contrast, Mayo spent only \$63,929,809 - less than 1%

⁵⁵ *Mayo 2019 Form 990*, 228; *Mayo 2019 GR Form 990*, 424.

⁵⁶ *Community Blood Bank*, 405 F.2d at 1019.

⁵⁷ Mayo Clinic’s articles of incorporation are available at the MN Secretary of State office or upon request from Mayo Clinic. *Mayo 2019 GR Form 990*, 273.

⁵⁸ *Mayo 2019 Form 990*, 14.

⁵⁹ Combined total from both Form 990s: \$54,567,934 (*Mayo 2019 GR Form 990*, 10:17) and \$65,308,551 (*Mayo 2019 Form 990*, 10:17).

⁶⁰ Combined total from both Form 990s: \$9,977,274 (*Mayo 2019 GR Form 990*, 10:12) and \$15,679,239 (*Mayo 2019 Form 990*, 10:12).

⁶¹ Combined total from both Form 990s: \$179,481 (*Mayo 2019 GR Form 990*, 10:11d) and \$1,791,639 (*Mayo 2019 Form 990*, 10:11d).

⁶² Combined total from both Form 990s: \$53,666 (*Mayo 2019 GR Form 990*, 10:11f) and \$3,530,388 (*Mayo 2019 Form 990*, 10:11f).

⁶³ Combined total from both Form 990s: \$3,196,939,599 (*Mayo 2019 GR Form 990*, 67-72) and \$15,066,000 (*Mayo 2019 Form 990*, 89-90).

⁶⁴ Combined total from both Form 990s: \$1,337,896,557 (*Mayo 2019 GR Form 990*, 67) and \$900,000 (*Mayo 2019 Form 990*, 90). It is well established that Mayo, like other non-profit hospital systems, invests in pure captive insurance firms in the Cayman Islands. See e.g., Jeff Kiger, *Mayo’s international investments top \$2.5 billion*, Post Bulletin (Jan. 6, 2018), <https://www.postbulletin.com/newsmd/mayos-international-investments-top-2-5-billion>; *Cayman Captive Forum 2023*, Cayman International Insurance, <https://caymanintinsurance.ky/captive-forum/> (Last visited Apr. 25, 2023).

of its total expenses⁶⁵ - on charity care,⁶⁶ and regularly sues patients that likely qualify for charity care for their unpaid medical bills.⁶⁷ Mayo does not satisfy Factor 4.

With respect to Factor 5, Community did not have any shares of capital or capital stock or certificates.⁶⁸ While it is unclear whether Mayo has stockholders,⁶⁹ it does not have capital stock.⁷⁰ It does, however, own 65% of Latigo Petroleum, LLC⁷¹ and 100% of BWL Holdings, Inc.,⁷² two for-profit oil and gas exploration companies, and 60% of Resoundant, Inc., a for-profit medical device manufacturer,⁷³ both of which may have capital, capital stock, or certificates. It is unknown whether Mayo satisfies Factor 5.

Factor 6 concerns a non-profit's articles of incorporation. Community's articles of incorporation sufficiently outlined its charitable purpose and safeguards against distributing profits to members during operation or at dissolution.⁷⁴ While Mayo Clinic's articles of incorporation are not readily available,⁷⁵ it is highly likely that the document meets the legal requirements for a non-profit, thus both organizations fulfill Factor 6.

⁶⁵ *Mayo 2019 GR Form 990*, 103:7a.

⁶⁶ Non-profit hospitals are required to provide financial assistance through free or discounted care to patients unable to pay for their emergency and/or medically necessary care, but there is no minimum expense requirement. 26 I.R.C. § 501(r)(4). From 2016-2021, non-profit hospitals spent an average 2.3% of their annual expenses on charity care. Molly Castle Work and Jeff Kiger, *Medical bills can be crippling. Mayo Clinic's charity care? Arguably lacking*, Post Bulletin (Sept. 30, 2022), <https://www.postbulletin.com/news/local/medical-bills-can-be-crippling-mayo-clinics-charity-care-arguably-lacking>.

⁶⁷ See Molly Castle Work, *They could have qualified for charity care. But Mayo Clinic sued them*, Post Bulletin (Nov. 22, 2022), <https://www.postbulletin.com/newsmd/they-could-have-qualified-for-charity-care-but-mayo-clinic-sued-them>

⁶⁸ *Community Blood Bank*, 405 F.2d at 1020.

⁶⁹ The Organization's Form 990 indicates that it does not have stockholders, yet the Group Return does. Compare *Mayo 2019 Form 990*, 7 with *Mayo 2019 GR Form 990*, 7.

⁷⁰ *Mayo 2019 Form 990*, 11; *Mayo 2019 GR Form 990*, 11.

⁷¹ *Mayo 2019 Form 990*, 278:2.

⁷² *Mayo 2019 Form 990*, 284.

⁷³ *Mayo 2019 GR Form 990*, 486.

⁷⁴ *Community Blood Bank*, 405 F.2d at 1020.

⁷⁵ Mayo Clinic's articles of incorporation are available at the MN Secretary of State office or upon request from Mayo Clinic. *Mayo 2019 GR Form 990*, 273.

When investigating Factor 7, the court found that Community funding originated from “gifts, loans and grants, replacement blood donations and payment of responsibility and processing fees” – all expected sources of program service revenue⁷⁶ for a blood bank.⁷⁷ In 2019, Mayo received \$17,236,399,399 in revenue,⁷⁸ but only \$13,668,793,223 in program service revenue.⁷⁹ Mayo’s almost \$4 billion in other revenue, including millions in income from for-profit businesses,⁸⁰ indicates that Mayo does not satisfy Factor 7.

Lastly, with respect to Factor 8, the court found that Community’s lack of profits to be of “added significance.”⁸¹ In direct contrast, in 2019, even with investing over \$3 billion outside the United States as an expense, Mayo made \$1,600,030,049 in profits.⁸² Mayo profits far exceed its expenses, thus it fails Factor 8.

After failing to satisfy Factors 3, 4, 6, 7, and 8, Mayo Clinic conclusively carries on business for its own profit or that of its members and, thus, is under the FTC’s jurisdiction for Section 5 enforcement.

III. What the FTC’s Jurisdiction Means Going Forward

While Mayo Clinic may seem like an extreme test case, the non-profit hospital system is not unique. Together, non-profit hospital systems held more than \$283 *billion* in stocks, hedge

⁷⁶ Program service revenue refers to the funds received by an organization in exchange for providing the services for which it received its tax-exempt status. *Instructions for Form 990 Return of Organization Exempt From Income Tax*, Internal Revenue Service (2022), <https://www.irs.gov/pub/irs-pdf/i990.pdf>.

⁷⁷ *Community Blood Bank*, 405 F.2d at 1020.

⁷⁸ Combined total from both Form 990s: \$10,416,976,478 (*Mayo 2019 GR Form 990*, 9:12) and \$6,819,422,921 (*Mayo 2019 Form 990*, 9:12).

⁷⁹ Combined total from both Form 990s: \$9,653,258,223 (*Mayo 2019 GR Form 990*, 9:2g) and \$4,015,535,000 (*Mayo 2019 Form 990*, 9:2g).

⁸⁰ In 2019, Mayo received: \$13,852,584 in income from Bain Capital Credit, which is in the Cayman Islands and is 67.4% owned by Mayo; \$29,419,817 in income from Mayo Insurance Company Ltd, which is also in the Cayman Island and is 100% owned by Mayo; and \$9,878,248 in income from Latigo Petroleum. *Mayo 2019 Form 990*, 278, 284.

⁸¹ *Community Blood Bank*, 405 F.2d at 1020.

⁸² Combined total from both Form 990s: \$465,367,657 (*Mayo 2019 GR Form 990*, 12:3) and \$1,134,662,392 (*Mayo 2019 Form 990*, 12:3).

funds, private equity, venture funds and other investment assets in 2019.⁸³ And of that \$283 billion, the non-profit hospitals classified 93% of their total investments as principally devoted to producing income rather than supporting their non-profit mission.⁸⁴ And out of 1,773 non-profit hospitals evaluated by the Lown Institute in 2023, 77% followed Mayo's lead and spent less on charity care and community investment than the estimate value of their tax break.⁸⁵

Though the NCCR's timeline and upcoming legal challenges⁸⁶ are currently unknown, if the NCCR survives, the FTC should attempt to enforce it against large non-profit hospital systems. Not only would the FTC likely succeed in establishing jurisdiction, but also set a precedent that would put other large non-profits, such as universities and its adjacent non-profits like The College Board and the National Collegiate Athletic Association, on notice. Non-compete agreements by design benefit employers, regardless of the employer's for-profit status.⁸⁷ And to the extent that an employer has valuable proprietary information to protect, a non-compete agreement is overkill when compared to less restrictive and more targeted means, such as trade secret laws and targeted non-solicitation agreements.⁸⁸

⁸³ Jordan Rau, *Mission and Money Clash in Nonprofit Hospitals' Venture Capital Ambitions*, KFF Health News (Aug. 24, 2021), <https://kffhealthnews.org/news/article/mission-and-money-clash-in-nonprofit-hospitals-venture-capital-ambitions/> [hereinafter "*Mission and Money Clash*"].

⁸⁴ *Mission and Money Clash*.

⁸⁵ Lown Institute Hospital Index, *2023 Results: Fair Share Spending* (Apr. 11, 2023), <https://lownhospitalsindex.org/2023-fair-share-spending/>

⁸⁶ The U.S. Chamber of Commerce has already committed to filing suit to stop the NCCR. Ken Klippenstein, Lee Fang, and John Schwarz, *Big Business' Plan to Block Biden's Ban on Noncompete Agreements*, *The Intercept* (Feb. 3, 2023), <https://theintercept.com/2023/02/03/ftc-non-compete-agreement-ban/>.

⁸⁷ Kurt Lavetti, Carol Simon & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 *JOURNAL OF HUMAN RESOURCES* 1025, 1025 (2020).

⁸⁸ See Najah A. Farley and Sandeep Vaheesan, *Why the US Must Ban Non-Compete Clauses*, *Project Syndicate* (Dec. 14, 2022), <https://www.project-syndicate.org/commentary/biden-white-house-must-ban-noncompete-clauses-labor-antitrust-by-najah-a-farley-and-sandeep-vaheesan-2022-12>

But even if the NCCR succumbs to legal challenges,⁸⁹ the FTC announced a new Section 5 policy statement, restoring the agency’s policy of rigorously enforcing the federal ban on unfair methods of competition.⁹⁰ And there is no better way to rigorously enforce Section 5 than to establish its lawful jurisdiction over non-profit hospital systems.

⁸⁹ If the NCCR makes its way before the Supreme Court, the author foresees the Major Questions doctrine rearing its ugly head to strike down this agency’s efforts to regulate per its regulatory authority. *See e.g., West Virginia v. EPA*, ___U.S. ___, 142 S.Ct. 2587, 2609-10, 213 L.Ed.2d 896 (2022).

⁹⁰ *FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition*, FED. TRADE COMM’N (Nov. 10, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition>