**UNITED STATES OF AMERICA**
**BEFORE FEDERAL TRADE COMMISSION**

| | |
|---|---|
| **In the Matter of**<br><br>**PIEDMONT HEALTH ALLIANCE, INC.,**<br>**a corporation,**<br><br>**and**<br><br>**PETER H. BRADSHAW, M.D.,**<br>**S. ANDREWS DEEKENS, M.D.,**<br>**DANIEL C. DILLON, M.D.,**<br>**SANFORD D. GUTTLER, M.D.,**<br>**DAVID L. HARVEY, M.D.,**<br>**JOHN W. KESSEL, M.D.,**<br>**A. GREGORY ROSENFELD, M.D.,**<br>**JAMES R. THOMPSON, M.D.**<br>**ROBERT A. YAPUNDICH, M.D.,**<br>**and WILLIAM LEE YOUNG III, M.D.,**<br>**individually** | **Docket No. 9314** |

**RESPONDENTS' RESPONSE IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL SIX PHYSICIAN RESPONDENTS TO APPEAR FOR DEPOSITION**

Complaint Counsel seeks to compel the depositions of Physician Respondents Drs. S. Andrews Deekens, Daniel C. Dillon, Sanford D. Guttler, David L. Harvey, John W. Kessel, and James R. Thompson ("Six Physician Respondents"), all of whom were deposed at length during the FTC's investigation of Piedmont Health Alliance ("PHA"). Respondents respectfully request that Complaint Counsel's motion to compel the second depositions of the Six Physician Respondents be denied in its entirety. Alternatively, Respondents request a protective order limiting the scope of the depositions.

***First,*** deposing the Six Physician Respondents a second time conflicts with Rule 3.31(c)(1)(i), of the Commission's Rules of Practice which restricts unreasonably cumulative or duplicative discovery, or discovery available from another, more convenient and less expensive

source. Complaint Counsel's conclusory statement that it has "new" information does not alone justify a second set of depositions in this case, particularly when the information sought relates to PHA's conduct as an organization and can be obtained from other sources.

***Second***, re-deposing the Six Physician Respondents would impose undue burden and expense on the Physician Respondents and their patients, which is not likely to be outweighed by any putative value the depositions may generate. On balance, the time, expense, and resources required for a second deposition constitute an unreasonable burden. Consequently, re-deposing the Six Physician Respondents would be contrary to Commission Rule 3.31(c)(1)(iii).

**Nevertheless**, if Your Honor grants Complaint Counsel's motion, Respondents respectfully request a protective order that will limit the scope of the depositions. Specifically, Respondents request that Complaint Counsel's questions for the Six Physician Respondents be limited to specific allegations contained in the Commission's complaint that are directed at, and denied by, a particular physician respondent.

## I. BACKGROUND

By letter dated March 5, 2004, Complaint Counsel announced its intent to take the deposition of eighteen individuals, including all ten Physician Respondents, and eight of PHA's employees. Complaint Counsel, however, offered no apparent explanation of its particular need for deposing the Six Physician Respondents. *See* Complaint Counsel's Motion to Compel Six Physician-Respondents to Appear for Deposition, Tab A [hereinafter "Mtn."].

By letter dated March 10, 2004, counsel for Respondents replied to Complaint Counsel's letter, explaining that deposing the Six Physician Respondents for a second time would be cumulative and duplicative in light of the general information apparently sought by Complaint Counsel. *See* Mtn., Tab B. Counsel for Respondents also reminded Complaint Counsel that a

second deposition of these physicians would impose a significant burden on these physicians. *Id.*

## II. ARGUMENT

The Supreme Court of the United States has stated that "[i]t is clear from experience that pretrial discovery by depositions. . . has a significant potential for abuse." *Seattle Times Co. et al., v. Rhinehart et al.*, 467 U.S. 20, 28 (1984). To prevent such abuse, Your Honor has the authority to deny discovery that would be contrary to the Commission's rules, or to alternatively restrict such discovery by granting a protective order. In this case, Complaint counsel seeks discovery that would be cumulative, duplicative, unduly burdensome, and calculated only to obtain information that is more conveniently and economically available from another source. Respondents respectfully request that Your Honor deny Complaint Counsel's motion, or in the alternative, grant a protective order limiting the scope of the depositions.

### A. Deposing the Six Physician Respondents Would Be Unreasonably Cumulative and Duplicative

Commission Rule 3.31(c)(1)(i) authorizes Your Honor to limit discovery if he determines that "[t]he discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient." Complaint Counsel's request to depose the Six Physician Respondents is exactly the type of proposed discovery that the rule is designed to restrict. The depositions sought by Complaint Counsel would most likely be cumulative and duplicative of (1) the prior depositions of the Six Physician Respondents and (2) depositions that will be taken of the four remaining Physician Respondents and PHA's employees.

#### 1. Complaint Counsel Does Not Seek Information Unique To The Six Physician Respondents

Complaint Counsel urges that a second deposition of all Six Physician Respondents is necessary because of their knowledge relevant to (1) the issues in the proceeding, (2) PHA's operations, and (3) because all six appear on PHA's and Complaint Counsel's preliminary

witness lists. *See* Mtn., at 4. Complaint Counsel's reasons relate to PHA's alleged conduct, which is unsurprising since PHA's alleged conduct is at the heart of the case. Complaint Counsel has not, however, articulated any information that is specific to the individual Six Physician Respondents. Moreover, it is unclear to Respondents how Complaint Counsel "cannot know how the six physician-respondents will testify..." in light of the extensive discovery already obtained from PHA and the physician Respondents.[1]

While discovery is designed to elicit new information, some of which is cumulative, discovery is not a license to "engage in repetitious, redundant, and tautological inquiries." *Pulsecard, Inc. v. Discovery Card Servs., et al.,* 168 F.R.D. 295 (D. Kan. 1996). Under the Federal Rules of Civil Procedure, repeat depositions are disfavored.[2] *See, e.g., Graebner v. James River Corp.*, 130 F.R.D. 440, 441 (N.D. Cal. 1989) (denying request for second deposition where party seeking repeat deposition claimed that first deposition was a "settlement deposition" and that it subsequently was seeking a "trial deposition"); 7 MOORE'S FEDERAL PRACTICE § 30.05[1][c], at 30-30 (Matthew Bender 3d ed., rev. 2001) ("Courts generally disfavor second depositions.").

In addition, where new depositions have been granted, it is usually due to a *specific* issue, not simply a party's conclusory statement that they have "new" information – which is to be

---

[1] *See In the Matter of Piedmont Health Alliance,* Dkt. 9314, Initial Pretrial Conference Transcript, at 27-28 (Jan. 29, 2004):

> Complaint Counsel's collected... nearly 100,000... pages of documents from us. They have received thousands of documents in response to subpoenas they have issued to our members. They've collected documents from our three member hospitals, our consultant, Milliman USA and our primary competitor, Western North Carolina Health Alliance. They have held 15 investigational hearings. They've identified 50 third parties in their initial disclosures. Presumably they've interviewed and collected documents from many of these people.

[2] The scope and limits of discovery under the FTC's Rules essentially mirror the Federal Rules of Civil Procedure. Accordingly, case law interpreting the Federal Rules should be considered persuasive authority. *See generally Dura Lube Corp.*, 2000 F.T.C. Lexis 1, at *31 (Jan. 14, 2000; *see also L.G. Balfour Co., et al.,* 61 F.T.C. 1491, 1492 (Oct. 5, 1962) (judicial precedents under the Federal Rules provide helpful guidance in resolving discovery disputes in commission proceedings).

expected from discovery in any event. Complaint Counsel relies on *Keck v. Union Bank of Switzerland* for the proposition that "new evidence" provides the basis for new questions, justifying a second deposition. It is true that the *Keck* court granted a second deposition, but only because a *specific* issue had arisen as a result of an inconsistent statement made in the deposition of a key party to the case. Civ. No. 4912 1997, U.S. Dist. LEXIS 10578, *6-7 (Jul. 22, 1997). The court also limited the scope of the deposition to the narrow dispute at issue, and concluded that the other discovery sought by the movant was irrelevant. *Id.* *10-11.[3]

### 2. Re-Deposing the Six Physician Respondents Is Duplicative and Cumulative

The proposed depositions of the Six Physician Respondents would be cumulative in two respects, only one of which is addressed by Complaint Counsel. First, since Complaint Counsel does not appear to have articulated the need for information that is unique to the Six Physician Respondents, Complaint Counsel apparently seeks to obtain additional information about PHA's organizational conduct. Complaint Counsel, however, has already deposed the Six Physician Respondents at length on these issues. As a result, re-deposing the Six Physician Respondents fully would only generate transcripts duplicative of the 100+ page deposition transcripts generated by each of the Physician Respondents during their investigational hearings.

Second, as noted, the depositions of the Six Physician Respondents will likely focus on PHA's actions as an organization. This is underscored by the complaint in this case, which refers to specific Physician Respondents in only four paragraphs. *See* Complaint, ¶¶ 3, 15, 20, 35 (Attachment 1). Paragraph 3 merely identifies the Physician Respondents' addresses.

[3] Significantly, this case also cited the limited circumstances under which a second deposition has been permitted: where a witness was inhibited from providing full information at the first deposition; where new information comes to light triggering questions that the discovering party would not have thought to ask at the first deposition; where plaintiff changed the date of alleged accident; where subsequent production of a document contained a statement by a witness; where a party was unaware of particular corporate relationships at the time of the deposition; and where new parties and new allegations are involved. *See Keck*, at *4. None of these circumstances apply here.

Paragraphs 15, 20, and 35 make specific allegations about specific Physician Respondents' committee membership, to which the specific Physician Respondents have admitted their committee memberships. *See* Answer, ¶¶ 15, 20, 35 (Attachment 2). Further information regarding the actions of the committees can likely be obtained in the depositions of the four remaining Physician Respondents and PHA's employees.

Moreover, while Complaint Counsel purports to have "new" information about PHA, *see* Mtn. at 6, Complaint Counsel has not identified any issues specific to the Six Physician Respondents despite at least three opportunities to do so in (1) their Complaint, (2) their correspondence with PHA's counsel, and (3) their Motion to Compel. Complaint Counsel's Motion to Compel thus appears calculated to obtain only cumulative and duplicative discovery that is more conveniently available from another source – the very type of discovery courts caution against. *See, e.g., Johnston Dev. Group v. Carpenters' Local Union* No. 1578, 130 F.R.D. 348, 353 (D.N.J. 1990) (stating, as an extreme example, that "recollection of an event witnessed by fifty other persons" would be duplicative). Since Complaint Counsel can obtain the information it seeks without re-deposing the Six Physician Respondents, their Motion to Compel should be denied.

**B. Re-Deposing The Six Physician Respondents Would Be Unduly Burdensome**

Complaint Counsel's attempt to depose the six physician respondent not only conflicts with Commission Rule 3.31(c)(1)(i), it is also at odds with Rule 3.31(c)(1)(iii), which confers authority on Your Honor to protect parties from unduly burdensome and costly discovery.

"In making a decision regarding burdensomeness, a court should balance the burden of the interrogated party against the benefit to the discovering party of having the information." *Hoffman v. United Telecommunications, Inc.*, 117 F.R.D. 436, 438 (D. Kan. 1987). In determining whether discovery is unduly burdensome or expensive, a court should consider "the

needs of the case, the amount in controversy, **limitations on the party's resources,** and the importance of the issues at stake in the litigation." *Hammerman v. Peacock, et al.*, 108 F.R.D. 66, 67 (D.D.C. 1985) (emphasis added).

In the present case, requiring the Six Physician Respondents to submit to a second deposition would be unduly burdensome for three reasons: (1) Complaint Counsel has not articulated any specific reason why its case requires the additional Physician Respondents; (2) requiring six additional depositions would strain Respondents' limited resources; and (3) on balance, the burden of the additional depositions far outweighs any putative benefit Complaint Counsel expects to obtain.

### 1. Complaint Counsel Has Not Shown That The Additional Depositions Are Necessary To Its Case

Complaint Counsel has not established that the depositions of the Six Physician Respondents are needed for its case. As stated above, Complaint Counsel has several sources for the type of information relevant to PHA's conduct apart from the Six Physician Respondents. Complaint Counsel's motion does not identify any specific factual information that is specific to any of the Physician Respondents, suggesting that the Physician Respondents' depositions would be of marginal value. Consequently, the needs of the case do not require that the Six Physician Respondents be deposed for a second time.

### 2. Requiring Six Additional Depositions Would Be Unreasonable Given Respondents' Limited Resources

Complaint Counsel appears to take the position that a party's limited resources are not significant in determining the relative burden additional discovery may impose. Contrary to Complaint Counsel's arguments, the burden that the six additional depositions would impose is far from minimal. Complaint Counsel argues that (1) the burden will be mitigated by their traveling to North Carolina, and (2) the fact that the physicians are "busy" should be disregarded because "busy" corporate executives have been compelled to give a deposition. *See* Complaint

Counsel Motion to Compel, at 7-8.

Complaint Counsel suggests that Your Honor's orders in *Schering* and *Hoechst* addressed issues "identical" to the issues at bar. *Id.* at 4. However, when determining the burden of additional discovery, it is misleading to suggest that the burden of an additional deposition on a company with thousands of employees and billions of dollars in annual revenue is equivalent to the burden that would be imposed on a small business. In contrast to Complaint Counsel's apparent position, when determining the burden imposed by discovery, courts "tak[e] into account the needs of the case, the amount in controversy, **limitations on the party's resources**, and the importance of the issues at stake in litigation." *Hammerman v. Peacock, et al.*, 108 F.R.D. 66, 67 (D.D.C. 1985) (emphasis added).[4]

In the present case, the Respondents' size is critically important in determining the burden that would be imposed by additional depositions. As mentioned above, the Six Physician Respondents appear to have been named in this suit in their capacity as directors of PHA, an organization with roughly 20 employees and $3 million in annual revenues. Many of the Physician Respondents' group practices are even smaller, with substantially less revenues and only a handful of employees. Moreover, the strain on Respondents' resources in this case is magnified by Complaint Counsel's request for *six* duplicative depositions, not just one or two.

### 3. The Physician Respondents' Practices Should Not Be Disrupted

In addition, Complaint Counsel's comparison of the Physician Respondents to a "busy" corporate executive is inapposite. *See* Complaint Counsel's Motion to Compel, at 7-8. In a large corporation, the deposition of a busy executive may be somewhat disruptive, but it does not cause the business to cease operating or reduce its revenues. However, when a physician is deposed, the physician cannot see patients and his practice's revenues are thereby reduced.

[4] This case involved Rule 26(b) of the Federal Rules of Civil Procedure, which is essentially the mirror image of Commission Rule 3.31(c)(1)(iii). *See supra* note 2.

In the present case, compelling the Six Physician Respondents to be deposed for a second time is unwarranted. As discussed above, the information sought by Complaint Counsel is not unique to the Six Physician Respondents and would merely duplicate other discovery. The Six Physician Respondents should not be required to take time away from their practices in order to be deposed for a second time when the information can be easily obtained from other deponents, or other discovery. Significantly, a physician's burden extends to his patients, who would be less able to obtain medical care from the doctor of their choice at that time. Since the burden on the Six Physician Respondents outweighs any putative value Complaint Counsel expects the depositions to yield, Complaint Counsel's motion should be denied.

### C. Alternatively, Respondents Seek A Protective Order Limiting the Scope of the Depositions

Nevertheless, if Your Honor grants Complaint Counsel's motion to compel, Respondents respectfully request a protective order to limit the scope of the deposition. *See* 16 C.F.R. 3.31(d). The bulk of Complaint Counsel's allegations in this case focus on the conduct of PHA as an organization, as well as PHA's 450 physician members. *Compare* Complaint ¶ 26 (describing allegations concerning all physician members) *with* ¶ 34 (describing allegations concerning Physician Respondents) (*See* Attachment 1). Consequently, Complaint Counsel's questions of the Six Physician Respondents should be limited to those allegations that are directed toward a specific Physician Respondent, and were denied.

Several courts have held that it is appropriate to limit the scope of a second deposition. *See In re Champion Spark Plug Co.,* 1981 F.T.C. Lexis 105, *2 (1981) (limiting second depositions "to subjects discussed in documents recently obtained or matters occurring since the previous interviews."); *Tri-Star Pictures, Inc. v. Unger*, 171 F.R.D. 94, 102 ("strictly confin[ing]" second depositions to new issues and prohibiting re-questioning on topics covered in prior testimony); *Perry v. Kelly-Springfield Tire Co., Inc.*, 117 F.R.D. 425, 426 (N.D. Ind.

1987) (limiting second deposition because there was "no logical reason why [the deposing party] should duplicate the same material covered at the first deposition.").

In the present case, granting a protective order will relieve the burdens that the second round of depositions will impose on the Six Physician Respondents, their practices, and their patients. While these grounds are alone sufficient, granting a protective order would also promote efficiency and reduce the costs of the litigation, both of which are critical in this case.

## III. Conclusion

For the foregoing reasons, Respondents respectfully request that this court deny Complaint Counsel's motion to compel depositions of Drs. Deekens, Dillon, Guttler, Harvey, Kessel, and Thompson. Alternatively, Respondents request that any deposition of Drs. Deekens, Dillon, Guttler, Harvey, Kessel, and Thompson be limited to allegations specific to the physician respondent, which the physician respondent has denied.

Dated: March 25, 2004

Respectfully submitted,

By: Linda Holleran

**James H. Sneed**
**Nicholas R. Koberstein**
**Christine L. White**
**Linda M. Holleran**
McDERMOTT, WILL & EMERY
600 Thirteenth Street N.W.
Washington, D.C. 20002
Tel: (202) 756-8000
Fax: (202)756-8855
Email: Jsneed@mwe.com;
NKoberstein@mwe.com;
Lholleran@mwe.com.
Cwhite@mwe.com

ATTORNEYS FOR RESPONDENTS

# Attachment 1

021 0119

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| **PIEDMONT HEALTH ALLIANCE, INC., a corporation,** | ) | **Docket No. 9314** |
| **and** | ) | |
| **PETER H. BRADSHAW, M.D., S. ANDREWS DEEKENS, M.D., DANIEL C. DILLON, M.D., SANFORD D. GUTTLER, M.D., DAVID L. HARVEY, M.D., JOHN W. KESSEL, M.D., A. GREGORY ROSENFELD, M.D., JAMES R. THOMPSON, M.D., ROBERT A. YAPUNDICH, M.D., and WILLIAM LEE YOUNG III, M.D., individually.** | ) | |

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Piedmont Health Alliance, Inc. ("PHA"), Peter H. Bradshaw, M.D., S. Andrews Deekens, M.D., Daniel C. Dillon, M.D., Sanford D. Guttler, M.D., David L. Harvey, M.D., John W. Kessel, M.D., A. Gregory Rosenfeld, M.D., James R. Thompson, M.D., Robert A. Yapundich, M.D., and William Lee Young III, M.D., herein collectively referred to as "Respondents," have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

## NATURE OF THE CASE

1. This action concerns a horizontal agreement among approximately 450 physician shareholders and non-shareholder subcontracted physicians (collectively, "physician members") of PHA to agree collectively on the prices they demand for physician services from payors, including health insurance plans, health maintenance organizations, preferred provider

organizations, employers directly providing self-funded health care benefits to their employees and their employees' dependents, and other third-party purchasers of health care benefits. The physicians, with and through PHA, have eliminated price competition to the detriment of payors and consumers in the "Unifour area" of North Carolina, which comprises Alexander, Burke, Caldwell, and Catawba Counties.

## RESPONDENTS

2. PHA, a physician-hospital organization ("PHO"), is a for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal address at 1899 Tate Boulevard, SE, Suite 2106, Hickory, North Carolina 28602.

3. The following persons ("Physician Respondents") are physicians licensed to practice medicine in the State of North Carolina, and are shareholders in PHA. Their respective names, principal addresses, and roles in PHA are as follows:

A. Peter H. Bradshaw, M.D., Hickory Surgical Clinic, 415 North Center Street, Suite 102, Hickory, North Carolina 28601, has been a voting member of the PHA Board of Directors ("PHA Board");

B. S. Andrews Deekens, M.D., Morganton Family Medicine, PLLC, 115 Foothills Drive, Morganton, North Carolina 28628, has served on the PHA Board as Chairman, a voting member, and a non-voting advisory member;

C. Daniel C. Dillon, M.D., P.A., 11 13th Avenue, NE, Suite 102, Hickory, North Carolina 28601, has served on the PHA Board as Chairman, a voting member, and a non-voting advisory member;

D. Sanford D. Guttler, M.D., Crown Health Care, PA, d/b/a Granite Falls Primary Care Physicians, One Trade Street, Granite Falls, North Carolina 28630, has been a voting member of the PHA Board, and has served both as the Chairman and as a member of the PHA Contracts Committee;

E. David L. Harvey, M.D., Piedmont Nephrology & Hypertension Associates, 1899 Tate Boulevard, SE, Suite 2101, Hickory, North Carolina 28602, has been a voting member of the PHA Board, and was a member of the PHA Contracts Committee;

F. John W. Kessel, M.D., Fairbrook Medical Clinic, 1985 Startown Road, Hickory, North Carolina 28602, has served both as a voting member and as a non-voting advisory member of the PHA Board;

G. A. Gregory Rosenfeld, M.D., Piedmont Neurosurgery, P.A., 1899 Tate Boulevard, SE, Suite 2108, Hickory, North Carolina 28602, has been a voting member of the PHA Board, and was a member of the PHA Contracts Committee;

H. James R. Thompson, M.D., Caldwell Family Care Center, 212 Mulberry Street, SW, Lenoir, North Carolina 28645, has served both as the Chairman and as a voting member of the PHA Board;

I. Robert A. Yapundich, M.D., Neurology Associates, P.A., 1985 Tate Boulevard, SE, Suite 600, Hickory, North Carolina 28602, has been a voting member of the PHA Board, and was a member of the PHA Contracts Committee; and

J. William Lee Young III, M.D., Hickory Family Practice Associates, P.A., 52 12th Avenue, NE, Hickory, North Carolina 28601, has served both as a voting member and as a non-voting advisory member of the PHA Board.

## JURISDICTION AND INTERSTATE COMMERCE

4. At all times relevant to this Complaint, PHA has been engaged in the business of contracting with payors, on behalf of its physician and hospital members, for the provision of health care services to persons for a fee.

5. The general business practices of PHA, including the acts and practices herein alleged, are in or affecting "commerce," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

6. Except to the extent that competition has been restrained as alleged herein, PHA's physician members, including the Physician Respondents, have been, and are now, in competition with each other for the provision of physician services in the Unifour area to persons for a fee.

7. The general business practices of the Physician Respondents, including the acts and practices herein alleged, are in or affecting "commerce," as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

## BACKGROUND

8. Payors often contract with physicians, hospitals, and other providers of health care services in a geographic area to create a network of health care providers ("provider network") that have agreed to provide health care services to enrollees covered under the payors' programs. Those providers may enter into contracts individually and directly with the payor, or through a provider organization, such as a PHO.

9. To become members of payors' provider networks, physicians often enter into contracts with payors that establish the terms and conditions, including fees and other competitively significant terms, for providing health care services to enrollees under the payors' programs. Physicians entering into such contracts often agree to reductions in their usual compensation in order to obtain access to additional patients made available to them by the payors' contractual relationships with their enrollees. Such reductions in physician fees may permit payors to constrain increases in, or reduce, the premiums they charge to their customers, or to offer broader benefits coverage without increasing premium levels or out-of-pocket expenditures by enrollees.

10. Medicare's Resource Based Relative Value Scale ("RBRVS") is a system used by the United States Centers for Medicare and Medicaid Services to determine the amount to pay physicians for the services they render to Medicare patients. The RBRVS approach provides a method to determine fees for specific services. In general, payors in the Unifour area make contract offers to individual physicians or groups at a price level specified as some percentage of the RBRVS fees for a particular year (*e.g.*, "110% of 2003 RBRVS").

11. Absent agreements among competing physicians on the prices and other contract terms on which they will provide services to the payor's enrollees, competing physicians or medical group practices decide unilaterally whether to enter a contract to participate in the payor's provider network on the terms and conditions, including price, offered by the payor.

12. Some self-insured employers contract with other payors to gain access to established provider networks. Payors who are not self-insured employers typically sell their programs to various customers, including employers or other entities that purchase or arrange for (and sometimes pay all or part of the cost of) programs providing health care benefits to their employees and their employees' dependents.

13. To be marketable and competitive in the Unifour area, a payor's health plan generally must include in its physician network a large number of primary care and specialist physicians, offering services in a sufficient number of practice fields, who are available to customers at convenient or accessible locations, and at affordable prices. Because the substantial majority of the primary care and specialist physicians who practice in the Unifour area are members of PHA, many payors doing business in the Unifour area cannot offer marketable and competitive health plans without having at least a substantial portion of PHA's physician members in their provider networks.

## PHA'S FORMATION AND EXPANSION

14. In 1993, the Chief Executive Officer ("CEO") of Frye Regional Medical Center, Inc. ("Frye"), formulated a plan to create a PHO that would include Frye and physicians who practiced at Frye. Frye paid a health care consultant to conduct surveys of physicians practicing at Frye to determine their level of interest in forming a PHO, and the services they would expect the PHO to offer. The consultant told Frye that the surveyed physicians "stated a need to form the group to negotiate with group clout and power" and "maintain[] their income" in anticipation of the arrival of managed care organizations to the Unifour area.

15. Eight physicians practicing at Frye, including Physician Respondents Dillon and Guttler, were recruited to serve on a PHO "steering committee" with Frye's CEO and Chief Operating Officer ("COO"). This committee met periodically, for more than a year, to make decisions about the purpose, form, and organization of the PHO.

16. In 1994, PHA was incorporated and its shareholders elected a Board of Directors, made up of physician and hospital representatives from among the PHA membership. Frye's COO initially directed PHA's operations. In 1995, PHA hired a full-time CEO, who was charged with overseeing the day-to-day operations of PHA, subject to approval by the PHA Board.

17. In early 1995, representatives of PHA participated in discussions with Caldwell Memorial Hospital ("Caldwell Memorial"), Grace Hospital ("Grace"), and their medical staffs about the possibility of joining PHA to form a "super PHO." In 1996, PHA amended its Articles of Incorporation, Bylaws, and Policies and Procedures to permit Grace, Caldwell Memorial, and their respective medical staffs to join PHA and share equally in its governance.

## RESPONDENTS HAVE ENGAGED IN PRICE-FIXING AND OTHER ANTICOMPETITIVE ACTS

18. According to its records, PHA was "created to be a contracting entity for its members and serves to negotiate managed health care contracts with [payors]." In 1994, PHA informed potential physician members that "[e]ach [payor] contract will be carefully reviewed to determine advantages and disadvantages (including but not limited to reimbursement issues) to Piedmont Health Alliance participants and only those [contracts] which the directors determine to be favorable on balance to our participants as a whole will be signed."

19. PHA's physician members signed agreements that bound them to participate in all contracts that PHA entered, to accept PHA-negotiated prices, and to agree that if PHA entered into a contract with a payor with which the physician had an individual contract, then that physician would terminate the individual contract. PHA agreed to attempt to negotiate contracts with payors that included all PHA physician members.

20. In early 1994, the PHA steering committee established a Contracts Committee to negotiate contracts with payors on behalf of PHA and its physician and hospital members. The PHA Bylaws authorized the Contracts Committee to evaluate and negotiate proposed contracts

with payors on behalf of PHA and its members. Until 2001, the Contracts Committee met regularly and was actively involved in PHA's contracting activities. Physician Respondents Guttler, Harvey, Rosenfeld, and Yapundich participated in the activities of the Contracts Committee during this period. Over that period, PHA negotiated and entered into more than 50 payor contracts.

21. From 1994 through early 1996, Frye's Chief Financial Officer ("CFO") and COO served as PHA's principal contract negotiators with payors. Beginning in 1996, PHA's CEO and her staff assumed the responsibility for negotiating PHA's payor contracts, and PHA's Board and Contracts Committee advised PHA's CEO regarding the price and other contract terms to demand from payors.

22. PHA's Board must approve PHA contracts with payors before they can take effect. PHA's Board is composed of 14 physician directors and six hospital directors, two representing each hospital (but with only one vote per hospital). Contract approval requires that both a majority of the PHA physician directors and two of the three hospital shareholders approve the contract. The Physician Respondents and the PHA hospitals' representatives on the PHA Board voted on the approval of contracts containing physician fee schedules that PHA collectively negotiated with payors.

23. PHA hired actuaries and other consultants to develop physician fee schedules containing price terms that PHA subsequently demanded from payors as a condition of contracting for the services of PHA's physician members.

24. PHA's most common contracting method has been to enter into a single-signature contract between PHA and a payor that covers the services of all PHA physician members. Payors that failed to reach agreement with PHA on contract terms, including price and price-related terms, were denied access to PHA's physician members for inclusion in their provider networks.

25. PHA's physician members agreed with each other and with PHA that they would not deal individually, or through any other organization, with any payor with which PHA was attempting to negotiate, or had signed, a contract jointly on behalf of PHA's members. Until 2001, the physicians' participation agreements with PHA expressly included this provision. After 2001, this provision was no longer written into the PHA participation agreements, but PHA physicians nonetheless continued to adhere to it. PHA's physician members also refused to deal directly and individually with payors after PHA terminated its contracts with those payors.

26. By and through PHA, the member physicians and hospitals jointly agreed to require payors, as a condition of dealing with the PHA physicians, to refrain from contracting with non-PHA physicians or physician organizations in the Unifour area.

## PHA'S SO-CALLED "MESSENGER" APPROACH TO CONTRACTING CONSTITUTES PRICE-FIXING

27. Competing physicians sometimes use a "messenger" to facilitate their contracting with payors in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Legitimate messenger arrangements can reduce contracting costs between payors and physicians. A messenger can be an efficient conduit to which a payor submits a contract offer, with the understanding that the messenger will transmit that offer to a group of physicians and inform the payor how many physicians across specialties accept the offer or have a counteroffer. At less cost, payors can thus discern physician willingness to contract at particular prices, and assemble networks, while physicians can market themselves to payors and assess contracting opportunities. A messenger may not negotiate prices or other competitively significant terms, however, and may not facilitate coordination among physicians on their responses to contract offers.

28. In February 2001, the PHA Board voted to change prospectively PHA's method of contracting with payors for physician services. PHA called its new contracting method the "modified messenger model." PHA told physician members that this contracting method would not apply to existing PHA payor contracts or to contracts then in the final stages of negotiation – all of which contained price and other terms that the PHA physician members had fixed and jointly demanded through PHA. Since the PHA Board's decision to institute its so-called "messenger" method for contracting, many existing PHA payor contracts renewed, and a number of new contracts were finalized, without being processed through PHA's messenger model.

29. In setting up this new contracting method, PHA told its physician members to report to PHA the minimum price levels they would accept under payor contracts. To aid physicians in making these price decisions, PHA informed them of the prices they had been paid for their most common medical procedures under several pre-existing, PHA-negotiated payor contracts. All such contracts contained prices that the physicians had collusively fixed and demanded through PHA. Many PHA physician members used these fixed prices to determine the prices that they would demand under the new "messenger" method.

30. PHA has processed two payor contracts for its physician members pursuant to its "messenger" method for contracting – one with CIGNA HealthCare of North Carolina, Inc. ("CIGNA"), and the other with United HealthCare of North Carolina, Inc. ("United"). PHA and its members engaged in price-fixing in connection with both contracts. PHA negotiated with CIGNA and United, respectively, on the overall average price levels that each would pay to all PHA physicians in the aggregate. PHA engaged in this conduct without transmitting contract offers to its physician members for their unilateral acceptance or rejection. As a result of these negotiations, United and CIGNA each agreed to aggregate payment rates substantially higher than their respective aggregate payment rates for North Carolina physicians.

31. After fixing the overall average price level that would be paid to all its physician members under each of these two contracts, PHA, through its actuarial consultant, created fee schedules that established different price levels for each medical procedure and for different medical specialties. The actuary calculated these fee schedules such that, in their aggregate, they

would total the overall average price level that PHA had negotiated for all PHA physicians to receive under the contract. In effect, the overall average price level was the "pie" that the PHA physicians collectively would share, and the fee schedules were the "pieces of the pie" that individual physicians could earn – depending on their specialty and the procedures they performed. PHA negotiated for United's and CIGNA's acceptance of these fee schedules. It did so without transmitting contract offers to its physician members for their unilateral acceptance or rejection.

32. PHA negotiated with United and CIGNA regarding, or collectively agreed on, various other contract terms as well – including pricing terms such as a demand for periodic, across-the-board percentage increases in physician fee levels to occur at certain times under the contract, and cost containment programs – without transmitting contract offers to PHA physician members for their unilateral acceptance or rejection.

33. After PHA had collectively negotiated with United and CIGNA on behalf of its physician members, more than 90% of PHA's physician members agreed to participate in those contracts.

## THE PHYSICIAN RESPONDENTS PARTICIPATED IN PRICE-FIXING AND OTHER ANTICOMPETITIVE ACTS

34. All the Physician Respondents were voting members of the PHA Board. In that capacity, they participated in decisions of the PHA Board to: (a) approve or reject proposed contracts with payors that included fixed prices for PHA's physician members; (b) authorize negotiations with payors by the PHA Contracts Committee and other PHA representatives aimed at gaining acceptance by the payors of physician fee schedules and prices collectively determined by PHA; (c) authorize development of, and approve, physician fee schedules for use by PHA in negotiating and contracting with payors; (d) terminate contracts between PHA and payors;
(e) approve recommendations of the PHA Contracts Committee concerning payor contracts and contract terms, including physician prices; and (f) permit or not permit payors to obtain an exception from PHA's requirement that payors agree, as a condition of dealing with PHA, to refuse to deal with non-PHA physicians and physician organizations. The Physician Respondents directly profited from PHA's price-fixed contracts.

35. Physician Respondents Guttler, Harvey, Rosenfeld, and Yapundich were all members of the PHA Contracts Committee. In that capacity, they participated in activities and decisions of that Committee, including: (a) reviewing and deciding on, subject to final approval of the PHA Board, the acceptability of contracts and contract terms, including physician prices, proposed or offered by payors; (b) authorizing negotiations by PHA representatives with payors, and presentation to payors of specific requested contract terms, including price terms, or counteroffers to payors' offers; (c) recommending to the PHA Board that it approve contracts with payors that included collectively negotiated prices for the services of PHA physician members; (d) recommending to the PHA Board that it terminate contracts between PHA and

certain payors; (e) approving or rejecting fee schedules, reimbursement terms, price levels, or other proposals or analyses relating to fees to be paid to PHA's physician members for use by PHA in negotiating and contracting with payors; and (f) recommending that the PHA Board approve or adopt fee schedules for reimbursement of PHA physician members in contracts between PHA and payors.

## RESPONDENTS' PRICE-FIXING IS NOT JUSTIFIED

36. PHA's collective negotiation of fees and other competitively significant contract terms has not been, and is not, reasonably necessary to achieving any efficiency-enhancing integration.

## ANTICOMPETITIVE EFFECTS

37. Respondents' actions described in Paragraphs 14 through 35 of this Complaint have had, or have tended to have, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in the Unifour area of North Carolina in the following ways, among others:

A. price and other forms of competition among PHA's physician members were unreasonably restrained;

B. prices for physician services in the Unifour area have increased or been maintained at artificially high levels; and

C. health plans, employers, and individual consumers were deprived of the benefits of competition among physicians.

## VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

38. The combination, conspiracy, acts, and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

## NOTICE

Notice is hereby given to the Respondents that the twenty-second day of March, 2004, at 10:00 a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this Complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the Complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this Complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the Complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the Complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the Complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the Complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the Complaint and, together with the Complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the Complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the Complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The Administrative Law Judge will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the Complaint. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

## NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that Respondents Piedmont Health Alliance, Inc. ("PHA"), Peter H. Bradshaw, M.D., S. Andrews Deekens, M.D., Daniel C. Dillon, M.D., Sanford D. Guttler, M.D., David L. Harvey, M.D., John W. Kessel, M.D., A. Gregory Rosenfeld, M.D., James R. Thompson, M.D., Robert A. Yapundich, M.D., and William Lee Young III, M.D. ("Physician Respondents") are in violation of Section 5 of the Federal Trade Commission Act as alleged in the Complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order to cease and desist from entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians: (a) to negotiate on behalf of any physician with any payor; (b) to deal, refuse to deal, or threaten to refuse to deal with any payor; (c) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to, price terms; or (d) not to deal individually with any payor, or not to deal with any payor through any arrangement other than PHA.

2. An order to cease and desist from exchanging, or facilitating in any manner the exchange or transfer of, information among physicians concerning any physician's willingness to deal with a payor, or the terms or conditions, including price terms, on which the physician is willing to deal.

3. An order to cease and desist from attempting to engage in any action prohibited by Paragraphs 1 or 2, above.

4. An order to cease and desist from encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs 1 through 3, above.

Provided, however, Paragraphs 1 through 3, above, would not prohibit any Physician Respondent from forming, participating in, or taking any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, or that solely involves physicians in the same medical group practice. Provided further, Paragraphs 1 through 3, above, would not prohibit PHA, following the seven (7) year period specified in Paragraph 6, from forming, participating in, or taking any action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the arrangement does not restrict the ability, or facilitate the refusal, of physicians who participate in it to deal with payors on an individual basis or through any other arrangement.

5. An order that PHA cease and desist from evaluating or considering, on behalf of any physician, any information, term, condition, or requirement of dealing with any payor, and from advising any PHA physician member to accept or reject any term, condition, or requirement of dealing with any payor.

6. An order that PHA cease and desist, for a period of seven (7) years, from: (a) acting as a messenger, or as an intermediary or agent, for or on behalf of any physicians, with payors regarding contracts or terms of dealing involving the physicians and payors; (b) participating in, organizing, or facilitating any discussion or understanding with or among any physicians or hospitals, pursuant to a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, relating to price or other terms or conditions of dealing with any payor; and (c) contacting a payor, pursuant to a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, to negotiate or enter into any agreement relating to price or other terms or conditions of dealing with any payor, on behalf of any physician or hospital in such arrangement.

7. A requirement that, for any pre-existing contract with any payor for the provision of physician services having a termination or renewal date of one (1) year or less after the date the order becomes final, PHA terminate such contract, without penalty or charge and in compliance with any applicable laws, at the earlier of:

(a) receipt by PHA of a written request from a payor to terminate such contract, or

(b) the earliest termination or renewal date (including any automatic renewal date) of such contract.

Provided, however, a preexisting contract may extend beyond any such termination or renewal date no later than one (1) year after the date on which the order becomes final if, prior to such termination or renewal date: (i) the payor submits to PHA a written request to extend such contract to a specific date no later than one (1) year after the order becomes final; and (ii) PHA has determined not to exercise any right to terminate. Provided further, that any payor making such request to extend a contract retains the right, pursuant to part (a) of this paragraph, to terminate the contract at any time.

8. A requirement that, for any pre-existing contract with any payor for the provision of physician services having a termination or renewal date of more than one (1) year after the date this order becomes final, PHA terminate such contract, without penalty or charge and in compliance with any applicable laws, no later than one (1) year after the date on which the order becomes final. Provided, however, that any such payor retains the right, pursuant to part (a) of Paragraph 7, to terminate the contract at any time.

9. A requirement that, for five (5) years following the end of the seven (7) year period specified in Paragraph 6, PHA give notice to the Commission at least sixty (60) days prior to: (a) participating in, organizing, or facilitating any discussion or understanding with or among any physicians or hospitals relating to price or other terms or conditions of dealing with any payor concerning a clinically-integrated or financial risk-sharing joint arrangement in which PHA participates; (b) contacting a payor, pursuant to any such joint arrangement, to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any payor on behalf of any physician or hospital participating in such joint arrangement; or (c) acting as a

messenger, or as an agent on behalf of any physicians, with payors regarding contracts for physician services.

10. A requirement that PHA distribute a copy of the order and Complaint, within thirty (30) days after the order becomes final, to: (a) each physician who is participating, or has participated, in PHA; (b) each officer, director, manager, and employee of PHA; and (c) all payors with which PHA has been in contact since January 1, 1994, regarding contracting for the provision of physician or hospital services (including a notice to these payors of their right to terminate any of their existing contracts with PHA).

11. A requirement that for ten (10) years after the order becomes final, PHA: (a) distribute a copy of the order and Complaint to: (i) each payor that contracts with PHA for the provision of physician or hospital services; (ii) each person who becomes an officer, director, manager, or employee of PHA; and (iii) each newly participating physician in PHA; and (b) annually publish a copy of the order and Complaint in any official annual report or newsletter sent to all physicians who participate in it, and on its website, with such prominence and identification as is given to regularly featured articles.

12. Requirements that PHA and each Physician Respondent: (a) file periodic compliance reports with the Commission; and (b) notify the Commission of any changes that may affect compliance obligations.

13. Any other provision appropriate to correct or remedy the anticompetitive practices engaged in by PHA and the Physician Respondents.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-second day of December, 2003, issues its Complaint against Piedmont Health Alliance, Inc., Peter H. Bradshaw, M.D., S. Andrews Deekens, M.D., Daniel C. Dillon, M.D., Sanford D. Guttler, M.D., David L. Harvey, M.D., John W. Kessel, M.D., A. Gregory Rosenfeld, M.D., James R. Thompson, M.D., Robert A. Yapundich, M.D., and William Lee Young III, M.D.

By the Commission.

SEAL

Donald S. Clark
Secretary

# Attachment 2

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

| | |
|---|---|
| **In the Matter of**<br><br>**PIEDMONT HEALTH ALLIANCE, INC.,**<br>**a corporation,**<br><br>**and**<br><br>**PETER H. BRADSHAW, M.D.,**<br>**S. ANDREWS DEEKENS, M.D.,**<br>**DANIEL C. DILLON, M.D.,**<br>**SANFORD D. GUTTLER, M.D.,**<br>**DAVID L. HARVEY, M.D.,**<br>**JOHN W. KESSEL, M.D.,**<br>**A. GREGORY ROSENFELD, M.D.,**<br>**JAMES R. THOMPSON, M.D.**<br>**ROBERT A. YAPUNDICH, M.D.,**<br>**and WILLIAM LEE YOUNG III, M.D.,**<br>**individually** | **Docket No. 9314** |

**ANSWER OF RESPONDENTS PIEDMONT HEALTH ALLIANCE, INC., ET AL.,**
**TO COMPLAINT OF FEDERAL TRADE COMMISSION**

Pursuant to 16 C.F.R. § 3.12, Respondents Piedmont Health Alliance, Inc. ("PHA"), Peter H. Bradshaw, M.D., S. Andrews Deekens, M.D., Daniel C. Dillon, M.D., Sanford D. Guttler, M.D., David L. Harvey, M.D., John W. Kessel, M.D., A. Gregory Rosenfeld, M.D., James R. Thompson, M.D., Robert A. Yapundich, M.D., and William Lee Young, III, M.D. (collectively "Respondents"), hereby answer the Complaint of the Federal Trade Commission as

follows:[1]

1. Respondents deny each and every allegation of Paragraph 1 of the Complaint.

2. Admitted.

3. Admitted, except that the zip code for Dr. Deekens is 28655.

4. Respondents admit that PHA has facilitated contracting between its members and payors. Respondents deny each and every remaining allegation of Paragraph 4 of the Complaint.

5. Admitted.

6. Respondents deny each and every allegation of Paragraph 6 of the Complaint.

7. Admitted.

8. Respondents lack knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 8 and, on that basis, deny such allegations

9. Respondents lack knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 9 of the Complaint and, on that basis, deny each such allegation.

10. Respondents admit that the United States Centers for Medicare and Medicaid Services use Medicare's Resource Based Relative Value Scale ("RBRVS") to value the services that physicians render to Medicare patients. Respondents lack knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 10 of the Complaint and, on that basis, deny each such allegation.

11. Respondents lack knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 11 of the Complaint and, on that basis, deny each such

[1] All responses are on behalf of all respondents unless specifically noted otherwise.

allegation.

12. Respondents lack knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 12 of the Complaint and, on that basis, deny each such allegation.

13. Respondents lack knowledge and information sufficient to form a belief as to the truth of the allegations of the first sentence in Paragraph 13 of the Complaint and, on that basis, deny each such allegation. Respondents deny each and every remaining allegation in Paragraph 13 of the Complaint.

14. Respondents PHA, Dillon, Guttler, Harvey, Rosenfeld and Young admit that in 1993 the Chief Executive Officer ("CEO") of Frye Regional Medical Center, Inc. ("Frye"), formulated a plan to create a PHO that would include Frye and physicians who practiced at Frye. These same Respondents also admit that Frye hired a health care consultant in connection with the PHO. All remaining Respondents lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each such allegation. All Respondents lack knowledge and information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 14 of the Complaint and, on that basis, deny each such allegation.

15. Respondents PHA, Dillon and Guttler admit that Drs. Dillon and Guttler served on a steering committee that considered decisions about the formation of the PHO. All remaining Respondents lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each such allegation. All Respondents lack knowledge and information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 15 of the Complaint and, on that basis, deny each such allegation.

16. Respondents PHA, Dillon, Guttler, Harvey, Kessel, Rosenfeld and Young admit that in 1994, PHA was incorporated and its shareholders elected a Board of Directors, composed of physician and hospital representatives from the PHA membership. These same Respondents admit that in late fall of 1995, PHA hired a full-time CEO, who was charged with overseeing the day-to-day operations of PHA, subject to approval by the PHA Board. All remaining Respondents lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each such allegation. All Respondents lack knowledge and information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 16 and, on that basis, deny each such allegation.

17. Respondents admit that in early 1995, representatives of PHA participated in discussions with Caldwell Memorial Hospital ("Caldwell Memorial"), Grace Hospital ("Grace"), and their medical staffs about the possibility of joining PHA. Respondents also admit that in 1996, PHA amended its Articles of Incorporation and Bylaws to permit Caldwell Memorial, Grace and their medical staffs to join PHA. Respondents deny each and every remaining allegation of Paragraph 17 of the Complaint.

18. Respondents lack knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 18 of the Complaint and, on that basis, deny each such allegation.

19. Respondents admit that PHA's physician participation agreements requested that physicians terminate existing contracts with payors, if possible, if PHA also had a contract with that payor. Respondents deny each and every remaining allegation of Paragraph 19 of the Complaint.

20. Respondents PHA, Dillon, Guttler, Harvey, Rosenfeld and Young admit that PHA established a Contracts Committee in 1994, which reviewed payor contracts. All remaining Respondents lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each such allegation. All Respondents admit that the Contracts Committee has not met since April 2001. All Respondents admit that Drs. Guttler, Harvey, Rosenfeld and Yapundich were members on the Contracts Committee for some or all of this time period. All Respondents deny each and every remaining allegation of Paragraph 20 of the Complaint.

21. Respondents PHA, Dillon, Guttler, Harvey, Kessel, Rosenfeld and Young admit from 1994 through early 1996, Frye's Chief Financial Officer ("CFO") and Chief Operating Officer ("COO") communicated with certain payors on behalf of PHA. All remaining Respondents lack knowledge and information sufficient to form a belief as to the truth of these allegations and, on that basis, deny each such allegation. All Respondents admit that, beginning in 1996, PHA's CEO and her staff assumed responsibility for communicating with payors regarding PHA payor contracts. All Respondents also admit that PHA's Board and Contracts Committee reviewed certain terms of certain payor contracts and gave direction to PHA's CEO on whether contracts should be signed. Respondents deny each and every remaining allegation of Paragraph 21 of the Complaint.

22. Respondents admit that PHA's Board authorizes PHA to sign contracts with payors before they can take effect. Respondents also admit that PHA's Board is composed of 14 physician directors and six hospital directors, two representing each hospital (but with only one vote per hospital). Respondents admit that approval of both a majority of the PHA physician

directors and two of the three hospital shareholders is required for actions requiring a super-majority vote under PHA's bylaws. Respondents deny each and every remaining allegation of Paragraph 22 of the Complaint.

23. Respondents admit that PHA hired actuaries for multiple services, including development of certain physician fee schedules. Respondents deny each and every remaining allegation of Paragraph 23 of the Complaint.

24. Respondents admit that many PHA payor contracts have been single-signature contracts covering the services of most of its physician members. Respondents deny each and every remaining allegation of Paragraph 24 of the Complaint.

25. Respondents admit that PHA's physician participation agreements originally had a provision that individual providers generally did not negotiate with payors at the same time PHA was communicating with the same payors on their behalf. This provision was removed in 2001. Respondents deny each and every remaining allegation of Paragraph 25 of the Complaint.

26. Respondents admit that certain PHA payor contracts had exclusivity provisions. Respondents deny each and every remaining allegation of Paragraph 26 of the Complaint.

27. Respondents admit that competing physicians may lawfully use a "messenger model" to facilitate contracting with payors. Respondents further admit that messenger model arrangements reduce contracting costs between payors and physicians, and are one way to achieve efficiencies. Respondents admit that, through the use of a messenger model, payors can, at less cost, discern physician willingness to contract at particular prices and assemble networks, while physicians can more efficiently practice medicine and assess contracting opportunities. Respondents deny each and every remaining allegation of Paragraph 27 of the Complaint.

28. Respondents admit that in February 2001, PHA's Board voted to adopt a "modified messenger model" that applied prospectively to PHA's method of contracting with payors for physician services. Respondents deny each and every remaining allegation of Paragraph 28 of the Complaint.

29. Respondents admit that PHA's modified messenger model allowed its physician members to unilaterally and confidentially report to PHA the minimum price levels at which they would be willing to contract with payors. Respondents also admit that PHA provided certain physician members with information regarding the fees they were being paid under several pre-existing PHA-payor contracts. Respondents lack knowledge and information sufficient to form a belief as to whether many PHA physician members used the information PHA provided to determine the prices that they set as their "standing offer" under the modified messenger model. Respondents deny each and every remaining allegation of Paragraph 29 of the Complaint.

30. Respondents admit that PHA has used its modified messenger model to process payor contracts with CIGNA HealthCare of North Carolina, Inc. ("CIGNA") and United HealthCare of North Carolina, Inc. ("United"). Respondents deny each and every remaining allegation of Paragraph 30 of the Complaint.

31. Respondents deny each and every allegation of Paragraph 31 of the Complaint.

32. Respondents deny each and every allegation of Paragraph 32 of the Complaint.

33. Respondents admit that approximately 90% of PHA's physician members agreed to participate in the contracts with United and CIGNA. Respondents deny each and every remaining allegation of Paragraph 33 of the Complaint.

34. Respondents admit that all of the Physician Respondents were, at times, voting

members of the PHA Board. In that capacity, the Physician Respondents admit that they participated in decisions of the PHA Board, which included whether or not to sign certain payor contracts, terminate certain payor contracts, and approve the development or use of certain fee schedules used in certain payor contracts. Respondents deny each and every remaining allegation of Paragraph 34 of the Complaint.

35. Respondents PHA, Guttler, Harvey, Rosenfeld and Yapundich admit that Drs. Guttler, Harvey, Rosenfeld and Yapundich were members of PHA's Contracts Committee. In that capacity, prior to 2001, Respondents PHA, Guttler, Harvey, Rosenfeld and Yapundich admit that Drs. Guttler, Harvey, Rosenfeld and Yapundich reviewed certain terms of certain payor contracts and made recommendations on such contracts to the Board. Respondents PHA, Guttler, Harvey, Rosenfeld and Yapundich deny each and every remaining allegation of Paragraph 35 of the Complaint. The remaining Respondents lack knowledge and information sufficient to form a belief as to the truth of the allegations of Paragraph 35 of the Complaint and, on that basis, deny each such allegation.

36. Respondents deny each and every allegation of Paragraph 36 of the Complaint.

37. Respondents deny each and every allegation of Paragraph 37, 37(A), 37(B), and 37(C) of the Complaint.

38. Respondents deny each and every allegation of Paragraph 38 of the Complaint.

//

//

//

Dated: January 20, 2004

Respectfully submitted,

By: 

**James H. Sneed**
**Nicholas R. Koberstein**
**Linda M. Holleran**
McDERMOTT, WILL & EMERY
600 Thirteenth Street N.W.
Washington, D.C. 20002
Tel: (202) 756-8000
Fax: (202)756-8855
Email: Jsneed@mwe.com;
NKoberstein@mwe.com;
Lholleran@mwe.com.

ATTORNEYS FOR RESPONDENTS

## CERTIFICATE OF SERVICE

I, Linda M. Holleran, hereby certify that on January 20, 2004:

I caused two copies of Answer of Respondents Piedmont Health Alliance, Inc., et al., to Complaint of Federal Trade Commission, to be served by hand delivery upon the following person:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused two copies of Answer of Respondents Piedmont Health Alliance, Inc., et al., to Complaint of Federal Trade Commission, to be served by electronic delivery and by hand delivery upon the following:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused a copy of Answer of Respondents Piedmont Health Alliance, Inc., et al., to Complaint of Federal Trade Commission to be served via facsimile transmission and followed by U.S. mail delivery to the following person:

David M. Narrow, Esq.
Complaint Counsel
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Room S-3013
Washington, D.C. 20580

I caused a copy of Answer of Respondents Piedmont Health Alliance, Inc., et al., to Complaint of Federal Trade Commission to be served via facsimile transmission and followed by U.S. mail delivery to the following person:

Jeffrey Brennan, Esq.
Assistant Director Health Care Services & Products
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580

Linda Holleran
Linda M. Holleran

## CERTIFICATE OF SERVICE

I, Andrea L. Hamilton, hereby certify that on March 25, 2004:

I caused two copies of Respondents' Response In Opposition To Complaint Counsel's Motion To Compel Six Physician Respondents To Appear For Deposition, to be served by hand delivery upon the following person:

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H-104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused two copies of Respondents' Response In Opposition To Complaint Counsel's Motion To Compel Six Physician Respondents To Appear For Deposition, to be served by hand delivery upon the following:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused a copy of Respondents' Response In Opposition To Complaint Counsel's Motion To Compel Six Physician Respondents To Appear For Deposition, to be served via electronic mail and followed by U.S. mail delivery to the following persons:

John S. Martin, Esq.
David M. Narrow, Esq.
Markus H. Meier, Esq.
Complaint Counsel
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Room S-3013
Washington, D.C. 20580

I caused a copy of Respondents' Reply Memorandum In Opposition Of Complaint Counsel's Motion To Compel Six Physician Respondents To Appear For Deposition, to be served via U.S. mail delivery to the following person:

Jeffrey Brennan, Esq.
Assistant Director Health Care Services & Products
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580

Andrea L. Hamilton