UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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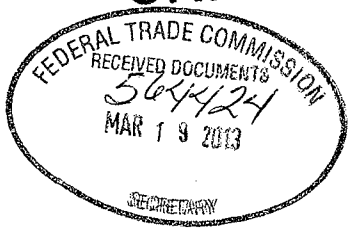

COMMISSIONERS: **Edith Ramirez, Chairman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

In the Matter of Phoebe Putney Health System, Inc. a corporation, and	)	Docket No. 9348
Phoebe Putney Memorial Hospital, Inc. a corporation, and	)	***Public* Version**
HCA Inc. a corporation, and	)	
Palmyra Park Hospital, Inc. a corporation, and	)	
Hospital Authority of Albany-Dougherty County	)	

MOTION TO RESCHEDULE HEARING DATE

Pursuant to Rules 3.21(c), 3.41(b), and 3.22(a) of the Rules of Practice of the Federal Trade Commission, Respondents respectfully move that the hearing in this matter be rescheduled for no earlier than December 2013. On March 14, 2013, the Commission issued an Order lifting its stay, which had been in effect since July 7, 2011. The Commission scheduled an evidentiary hearing to begin no later than July 15, 2013, just four months after the stay was lifted.

Rules 3.21(c) and 3.41(b) permit the Commission to order a later date for the evidentiary hearing "upon a showing of good cause." There is good cause to reschedule the hearing on this matter for a date later than July 15, 2013 and no earlier than December 2013. Maintaining a hearing date of July 15, 2013 would deprive at least Respondents (and, realistically, also

Complaint Counsel) of the ability to prepare effectively and responsibly for the evidentiary hearing in this complex matter. The Administrative Law Judge has circulated a draft revised scheduling order based on the July 15, 2013 hearing date. Under that draft schedule, the parties would have essentially six weeks to conduct fact discovery in a case where, prior to the 2011 stay of proceedings, Complaint Counsel had already identified one hundred witnesses, including about 18 third-party witnesses. In addition to those one hundred witnesses, there are as yet unidentified witnesses that have become relevant now that there are post-merger facts to explore. And those are just Complaint Counsel's witnesses. In addition, there will be pre- and post-merger witnesses identified by Respondents. Six weeks is far too short a time to conduct that volume of discovery.

Further, under that draft schedule, Respondents would have a mere 15 days to analyze the new expert reports to be filed by Complaint Counsel and prepare their expert rebuttal of these reports. These and similar features of the draft scheduling order could not be meaningfully addressed by changes within that draft schedule. Instead, they are a function of the fact that – however allocated – there simply are not enough days between now and July 15 to conduct all of the fact and expert discovery and otherwise adequately prepare a case of this complexity for trial.

Respondents are mindful of the Commission's policy of expediting merger challenge proceedings. However, as the Commission has acknowledged, the primary motivation behind that policy is to protect respondents in unconsummated merger cases so that they are not forced to abandon their transaction due to a protracted administrative process. That policy is not implicated by this already closed transaction. Further, the Commission has announced that one factor favoring good cause to extend the time for a hearing is "if a respondent agrees not to consummate a merger that has not been enjoined by a court during the pendency of the Part 3

proceeding."[1] In light of that, and in order to avoid any prejudice to Complaint Counsel's case, Respondents would agree to cease any further integration of the two hospitals if the hearing is rescheduled to a later date that provides sufficient time for all parties to prepare.

I. A July 15, 2013 Hearing Date Does Not Allow Sufficient Time for Fact and Expert Discovery and Hearing Preparation, to the Particular Prejudice of Respondents.

A July 15, 2013 hearing date does not allow sufficient time for fact discovery. As exemplified by the Administrative Law Judge's draft schedule, working backwards from that date allows at most about six to seven weeks for fact discovery. No discovery of any substance occurred prior to the stay, and Complaint Counsel have informed Respondents that they intend to withdraw and reserve the requests they served before that stay. Thus, in approximately six weeks, the parties would have to serve their written discovery, respond to the opposing side's written discovery, gather documents from each other and from multiple third parties, and then complete depositions of all party and third-party fact witnesses. That is neither practical nor desirable.

As noted above, Complaint Counsel's Preliminary Witness List—served shortly before the 2011 stay—includes over 100 witnesses. Eighteen of those witnesses are third parties whom Respondents have had no opportunity to investigate, obtain discovery from or depose. Respondents anticipate seeking discovery from these witnesses, which include at least four third-party payors (such as insurance companies), three health care providers, and nine local businesses. Any schedule based on a July 15 hearing date will not be sufficient for Respondents to obtain necessary document discovery from these and other relevant third parties, let alone review and analyze the documents and take depositions of key representatives. Further, Complaint Counsel will surely want to depose some number of its listed witnesses, too. (We understand that Complaint Counsel intend to take the position that this period is sufficient for

[1] Federal Register Vol. 74, No. 8 (Jan. 13, 2009).

both parties to complete all discovery, although in the parties' March 18 conferral Complaint Counsel could not say—even to the nearest *dozen*—how many of the hundred-plus witnesses they have identified that they intend to depose).

In addition, Complaint Counsel's list of a hundred witnesses does not include the fact witnesses to be designated by Respondents. Nor does it include the additional witnesses who have become relevant during the two-year period since Respondents consummated the transaction at issue, as permitted by the district court and Eleventh Circuit decisions finding the transaction exempt from antitrust scrutiny. The parties have collected no evidence from this post-merger period, including evidence of post-merger pricing, quality improvements or changes in market conditions. Yet, according to the Horizontal Merger Guidelines, such evidence is very important.[2] In the *Evanston* matter, for example, Commissioner Rosch emphasized post-consummation evidence, noting that "the fact that this is a consummated merger means that ours is a retrospective analysis. We can look to see if there is any probative post-merger evidence that demonstrates whether or not the merger has been anticompetitive."[3] That kind of research takes time that is not available within the current schedule.

In sum, a July 15 hearing date would not allow a sufficient fact discovery period for the parties to (1) serve and answer each other's interrogatories and document requests; (2) gather and review all of the relevant documents from each other and from third parties; and (3) depose all of the party and third-party witnesses with knowledge of the pre- and post-merger facts relevant to this matter.

Nor could a schedule set based on a July 15 hearing date allow adequate expert discovery. For example, under the draft schedule circulated by the Administrative Law Judge,

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[2] U.S. Dep't of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, ¶ 2.1 (2010) ("Evidence of observed post-merger price increases or other changes adverse to customers is given substantial weight.").
[3] *In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, Docket No. 9315, Op. of Comm'r Rosch (Aug. 6, 2007).

Respondents would have only 15 days to analyze and prepare their expert rebuttal of Complaint Counsel's expert(s) report(s). As of the parties' March 18 conferral regarding the schedule, Complaint Counsel would not divulge how many experts they would use, only that the report or reports would *not* be the same as the one they produced prior to the stay. The pre-stay report of economist Christopher Garmon exceeded 2000 pages, including text and 69 attachments. Presumably the report(s) that Respondents would have to rebut on 15 or so days' notice would be comparably complex and voluminous. The economic and social welfare issues (including quality of and access to care) presented by this case are too important for such truncated treatment. Moreover, the burden of that truncated expert schedule would largely fall on Respondents, since Complaint Counsel would have months to prepare its report(s), but Respondents would have only two weeks to rebut them. Working within the July 15 hearing date, there is no satisfactory way to fix that unequal burden.

Finally, although the Commission noted in its Order lifting the stay that Respondents did not move to dismiss the Section 13(b) proceeding on the antitrust merits, Respondents have in *this* proceeding expressly contested the allegation that the transaction is anti-competitive.[4] Stating a claim based on the alleged competitive effects of a merger is a different, and far less demanding task than determining those effects after a full evidentiary hearing on the merits. Both sides will need information from the pre- and post-merger period to present the most accurate cases based on the evidence. The current schedule does not allow sufficient time to collect, process, and review what likely will be a substantial volume of critical documents, data, testimony, and other evidence.

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[4] *See In the Matter of Phoebe Putney Health System, et al.*, Docket No. 9348, Respondents Phoebe Putney Health System Inc., Phoebe Putney Memorial Hospital, Inc., and Phoebe North, Inc.'s Answer to the Federal Trade Commission's Complaint (May, 16, 2011) at 37, *passim*; *See also In the Matter of Phoebe Putney Health System, et al.*, Docket No. 9348, Respondent Hospital Authority of Albany-Dougherty County's Answer and Defenses to Administrative Complaint (May 16, 2011) at 2-3, *passim.*

II. Extension of the Hearing Date Would Be Consistent with Commission Policies and Precedents.

This matter no longer deals with an unconsummated merger, as it did when the Complaint was filed and the original schedule ordered. As the Commission has acknowledged, the primary motivation behind its policy of expediting proceedings is to protect respondents in unconsummated merger cases so that they are not forced to abandon the transaction as a result of a protracted administrative process.[5] Here, where the transaction already has been consummated, any policy that might otherwise support allowing only four months to the hearing should give way to a schedule that allows reasonable time for discovery and hearing preparation.

In the Matter of Whole Foods offers guidance. The *Whole Foods* hearing was stayed for a year while the case was litigated in district and circuit court. When it lifted the administrative stay, the Commission initially gave the parties over five months to prepare for the evidentiary hearing,[6] then later extended that time by another almost two months.[7] The Commission ordered such a schedule even though, unlike here, the preliminary injunction briefing focused on the competitive merits, and that parties had already obtained voluminous discovery, deposed numerous witnesses, and developed expert reports.[8] Here, by contrast, the court litigation focused exclusively on the narrow issue of state action immunity, rather than the antitrust analysis.

Under Rule 3.21(c), the Commission will order a later hearing date "upon a showing of good cause." In its comments to the proposed rulemaking, the FTC stated that, "[t]he

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[5] Federal Register Volume 74, Number 8 (January 13, 2009) ("The Commission typically seeks preliminary injunctive relief under Section 13(b) when it challenges an unconsummated merger, and the Part 3 proceedings in these cases are frequently the ones that are most in need of expedition. As noted above, parties have argued that protracted proceedings for merger cases could result in their abandoning transactions before their antitrust merits can be adjudicated.").

[6] *In the Matter of Whole Foods Market, Inc.*, Docket No. 9324, Scheduling Order (Sept. 10, 2008) (the stay in *Whole Foods* was lifted in August of 2008 and the hearing scheduled for February of 2009).

[7] *See In the Matter of Whole Foods Market, Inc.*, Docket No. 9324, Order Amending Scheduling Order and Denying Respondent's Motion to Stay Proceeding (Dec. 19, 2008).

[8] *See FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 4 (D.D.C. 2007).

Commission, in its discretion, could also consider other factors in determining whether to find good cause to extend the hearing date, for example, if a respondent agrees not to consummate a merger that has not been enjoined by a court during the pendency of the Part 3 proceeding."[9] In keeping with this guidance, and in order to ensure that Complaint Counsel's case is not prejudiced by an extension of the hearing date, Respondents would be willing to agree to cease any further integration activities if the hearing is rescheduled to a later date that provides sufficient time for all parties to prepare effectively.

CONCLUSION

For the reasons stated above, there is good cause for the Commission to order a later date for the evidentiary hearing. Thus, Respondents respectfully request that the hearing on the Complaint filed in this matter be rescheduled for a date to be set no earlier than December 2013, and that no schedule should be set until resolution of this motion.

[9] Federal Register Vol. 74, No. 8 (Jan. 13, 2009).

Dated: March 19, 2013

Respectfully submitted,

By _____

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Palmyra Park Hospital, Inc.	)	
a corporation, and	)	
	)	
Hospital Authority of Albany-Dougherty	)	
County	)	

[PROPOSED] ORDER

Having reviewed the Respondents' Motion to Reschedule Hearing Date, it is hereby

ORDERED that the Motion is GRANTED; and it is further

ORDERED that the hearing on the Complaint will begin December ___, 2013;

By the Commission.

Donald S. Clark
Secretary

Dated:

PUBLIC

STATEMENT OF MEET AND CONFER

In accordance with paragraph 4 of the Scheduling Order, Respondents hereby certify that they conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised in Respondents' Motion to Reschedule Hearing Date and were unable to reach such an agreement.

Dated: March 19, 2013

Respectfully submitted,

By _____

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CERTIFICATE OF SERVICE

I hereby certify that this 19th day of March, 2013 a true and correct copy of the foregoing Motion to Reschedule Hearing Date was filed via FTC e-file, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
Room H113
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dclark@ftc.gov

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
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This 19th day of March, 2013.

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

March 19, 2013

By:

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