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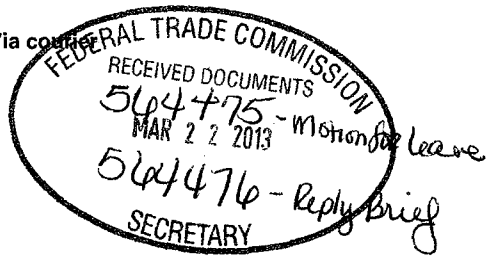
ORIGINAL

March 22, 2013

Via courier



Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

In the Matter of Phoebe Putney Health System Inc., et. al.

Secretary Clark:

Enclosed is a copy of Respondents Phoebe Putney Memorial Hospital, Inc., Phoebe Putney Health System, Inc., Phoebe North Inc., and Hospital Authority of Albany-Dougherty County's March 22, 2013 (1) Reply Brief in Support of Respondents' Motion to Reschedule Hearing Date and (2) Motion for Leave to File Reply Brief in Support of Respondents' Motion to Reschedule Hearing filed with the Federal Trade Commission in the above-noted matter.

Please acknowledge your receipt of this letter and the delivery of the enclosed submission.

Best regards,

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Enclosures

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

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

REPLY BRIEF IN SUPPORT OF RESPONDENTS' MOTION TO RESCHEDULE HEARING

Respondents respectfully raise the following points in support of their motion to re-schedule based on matters discussed before the Administrative Law Judge on March 21.

I. The Opposition Incorrectly Implies that Complaint Counsel Will Rely on Their 2011 Expert Report, Rather than Up to Three New Expert Reports from As-Yet-Unidentified Experts, as Complaint Counsel Told Judge Chappell.

In opposing rescheduling, Complaint Counsel argue:

> Respondents' argument that they would have only 15 days to analyze and prepare their expert rebuttal of Complaint Counsel's economic expert report is equally unavailing. Dr. Garmon's prior report, numbering just 33 pages, was an exhibit to Complaint Counsel's preliminary injunction submission filed with the district court on April 20, 2011. Thus, Respondents have had a copy of this report, and an opportunity to analyze it and prepare for rebuttal, *for almost two years.*

Complaint Count's Opposition to Respondents' Motion to Reschedule Hearing Date ("Opposition") at 4 (emphasis original).

The implication is that Respondents need no more time to develop their rebuttal reports than would be available under a July 15 hearing schedule because Complaint Counsel divulged their expert report two years ago. However, when asked by Judge Chappell at the scheduling conference, Complaint Counsel revealed that they will rely on up to three experts (information they would not divulge during the parties' good faith conferral before Respondents filed this motion).[1] Moreover, Complaint Counsel says that these will be *new* reports, not the one report divulged in April 2011. So Dr. Garmon may or may not be one of the up to three experts that Complaint Counsel will utilize and, even if he is, his report will be new.

Other than the inaccurate impression that Respondents already have the relevant expert report, Complaint Counsel offer no reason why 15 days is adequate to rebut up to three new reports, which will likely contain complex economic analysis, statistical data and other information that takes time to study, test and rebut. Truth-seeking is not advanced by imposing such time pressure, particularly when the hearing date could be adjusted at no prejudice to Complaint Counsel's case.

II. The Opposition Incorrectly Implies that a July Hearing Date is Feasible Because the Parties Already Conducted Six Weeks of Pre-Stay Discovery.

Complaint Counsel argue that "[c]ounting the month and a half of discovery utilized prior to the stay in 2011, this totals approximately five and a half months to prepare for the evidentiary hearing." Opposition at 2. They tack this month-and-a-half of supposed pre-stay discovery onto the four months total of preparation afforded by the July 2013 hearing date in order to argue that

[1] "We will make that decision once we have the information upon which to make it. *If I were to guess today, I would expect complaint counsel to have between one and three experts*, and I just don't have the information upon which to make that final decision." Tr. of Mar. 21, 2013 Conf. at 11-12 (emphasis added).

the current schedule effectively exceeds the five month default period under Rule 3.11(b)(4). Yet, to the best of Respondents' knowledge, no party actually obtained any discovery *responses* during that month-and-a-half period. Moreover, Complaint Counsel informed Judge Chappell that they will withdraw all pre-stay discovery *requests* and issue new ones sufficiently different from the originals so as to moot all pre-stay motions to quash filed by third parties. *See* Tr. of Mar. 21, 2013 Conf. ("Tr.") at 6-7.[2] Tacking a month-and-a-half of pre-stay "discovery" onto the current schedule to make it seem longer unfairly ignores Complaint Counsel's acknowledged intent to start all discovery anew.

Moreover, as Complaint Counsel also acknowledged at the status conference, there has been no discovery regarding *actual* market conditions or pricing since the merger occurred in December 2011. Tr. at 6. Those post-merger events add significant material to what must be discovered. To put this in perspective, FTC staff began this investigation in December 2010 and filed the complaint in April 2011. The hearing was set for September 2011, nine months after the investigation began. Since there has been no investigation of the post-merger period, little or no discovery of the pre-merger period, and discovery is about to start afresh, the hearing is more appropriately set for December 2013 – nine months from now – rather than four months.

III. The Opposition Incorrectly Implies that Respondents Are Delaying Proceedings by Withholding Information.

Complaint Counsel argue that, to the extent that new witnesses – in addition to the hundred it has already named – "are unidentified, it is only because Respondents have not yet

[2] "We, being complaint counsel, would intend to withdraw the discovery that has previously been served prior to the stay, re-serve new, updated discovery on respondents and on third parties. And the reason I mention the outstanding motions to quash is because that would, among other things, obviate the need for the court to rule on those motions, which will have been mooted by the withdrawal and re-serving of new, updated discovery." Tr. At 6-7.

provided Complaint Counsel with information relating to these witnesses." Opposition at 4. Complaint Counsel elaborate that "[d]uring the March 21, 2013, Scheduling Conference, Judge Chappell directed Respondents to timely transfer information to Complaint Counsel relating to updated organizational charts indicating which individuals have had involvement in post-consummation integration, and Complaint Counsel awaits this information." *Id.* at n.7.

The suggestion is that Respondents are obstreperously preventing Complaint Counsel from issuing a revised (and evidently expanded) witness list and thus cannot complain about the time afforded for discovery. This is wrong for two reasons.

First, the parties quite amicably agreed before Judge Chappell to provide *each other* with limited information to enable Complaint Counsel to issue a new preliminary witness list by April 1 and Respondents to do so by April 5. Tr. at 20-22. Judge Chappell gave the parties through March 28 to accomplish that *mutual* exchange. *Id.* Respondents are holding nothing up.

Second, while Complaint Counsel says Respondents are the "only" reason they have not yet identified new witnesses, the truth is that Complaint Counsel have never proposed to update their preliminary witness list sooner than April 1, the date they requested and obtained from Judge Chappell. Tr. at 20 (Complaint Counsel: "April 1st [for a revised, preliminary witness list] is plenty of time, provided that we receive, for example, as week from today or tomorrow updated organizational charts and a list of – a list of certain employees from Respondents."). And, other than April 1 and April 5 for preliminary witness lists, Judge Chappell left the schedule open until the Commission rules on Respondents' motion to reschedule. *Id.* at 9 ("I don't intend to issue a scheduling order until that motion is either granted or denied."). So any suggestion that Respondents are a source of delay is unfair and inaccurate.

****

Despite the inaccurate impressions suggested by the Opposition, the fact remains that this is a factually complex case involving perhaps a hundred fact witnesses, multiple third parties from whom to secure discovery, and multiple experts. Complaint Counsel advocates a rush to hearing based on alleged, ongoing harm to consumers. Yet an *assumption* about the outcome of this proceeding is not a sound basis to hurry at the expense of the well-informed fact finding that is supposed to determine the outcome, particularly when a few months more would materially improve the parties' preparation.

Dated: March 22, 2013

Respectfully submitted,

By /s/ Lee K. Van Voorhis

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CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of March, 2013 a true and correct copy of the foregoing Reply Brief in Support of Respondents' Motion to Reschedule Hearing was filed via FTC e-file, which will send notification of such filing to:

Donald S. Clark
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Federal Trade Commission
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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 22nd 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 22, 2013

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