

ORIGINAL

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
Phoebe Putney Health System, Inc.)
a corporation, and)
)
Phoebe Putney Memorial Hospital, Inc.)
a corporation, and)
)
Phoebe North, Inc.)
a corporation, and)
)
HCA Inc.)
a corporation, and)
)
Palmyra Park Hospital, Inc.)
a corporation, and)
)
Hospital Authority of Albany-Dougherty County.)
_____)

Docket No. 9348

[PUBLIC] VERSION

EMERGENCY REQUEST TO REVISE SCHEDULING ORDER

Pursuant to Rules 3.22 and 4.3(b) of the Rules of Practice of the Federal Trade Commission (“FTC Rules”), 16 C.F.R. §§ 3.22, 4.3(b), all Respondents - Hospital Authority of Albany-Dougherty County, Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., Phoebe North, Inc., HCA Inc., and Palmyra Park Hospital, Inc., (collectively “Respondents”) respectfully request an Order further revising the Scheduling Order in the above captioned matter.¹ In support of this motion, Respondents state as follows:

¹ Respondents believe that the FTC does not have jurisdiction over them. As explained in paragraph 4 below, the USDC MD GA has issued an order dismissing the FTC’s Motion for a Preliminary Injunction, finding the “transaction,” even as defined by Complaint Counsel, to be immune from federal antitrust laws. This Request should not be considered in any way to conflict with Respondents’ view that the Commission lacks jurisdiction.

1. On April 19, 2011, the Federal Trade Commission (“FTC”) filed a Complaint, Motion for a Temporary Restraining Order, and Motion for a Preliminary Injunction in United States District Court for the Middle District of Georgia (“USDC MD GA”). Simultaneously, on April 19, 2011, Complaint Counsel commenced this administrative action.
2. On April 21, 2011, Judge W. Louis Sands of the USDC MD GA granted the FTC’s Motion for a Temporary Restraining Order.
3. On May 26, 2011, this Court held a scheduling conference, and on May 31, 2011 issued a Scheduling Order.
4. On June 27, 2011, after extensive briefing and an all day hearing, the USDC MD GA dismissed with prejudice the FTC’s Complaint, ruling that the “transaction” as described by Complaint Counsel is immune from federal antitrust laws, denied the FTC’s Motion for Preliminary Injunction, dissolved the Temporary Restraining Order and granted Respondents’ Motion to Dismiss and Vacate the Temporary Restraining Order (attached).
5. On June 28, 2011, the FTC filed in the USDC MD GA a Notice of Appeal to the Eleventh Circuit.
6. On June 29, 2011, the FTC filed an Emergency Motion for an Injunction Pending Appeal and to Expedite the Appeal.
7. On July 1, 2011, Respondents filed an Unopposed Request to Revise Scheduling Order and an Unopposed Motion for Stay.
8. On July 5, 2011, this Court granted the Unopposed Motion to Revise Scheduling Order.
9. On July 6, 2011, the Eleventh Circuit granted without prejudice the FTC’s Motion for an Injunction Pending Appeal and granted the FTC’s Motion to Expedite the Appeal.
10. On July 7, 2011, this Court issued an Order Certifying the Unopposed Motion to Stay, recommending that the Commission stay the administrative hearing proceedings pending

the outcome of the appeal to the Eleventh Circuit. As of the date of this request, the Commission has not ruled on the Unopposed Motion to Stay.

11. On July 8, 2011, the Eleventh Circuit vacated and corrected its July 6, 2011 Order. The Eleventh Circuit issued a new Order granting the Motion for an Injunction Pending Appeal and motion to Expedite the Appeal, with Judge Hull dissenting on the issuance of the injunction and concurring with the motion to expedite the appeal (attached).
12. Also on July 8, 2011, the Clerk of the Eleventh Circuit tentatively set the case for oral argument for the week of October 3, 2011.
13. As recognized by this Court in its July 5 and July 7 Orders, Respondents and Complaint Counsel agree that state action immunity, which is the issue on appeal in the Eleventh Circuit, is critical to the disposition of this administrative proceeding. Should this proceeding go forward, any appeal from a final decision by the Commission would be heard and ruled upon by the Eleventh Circuit. Given the expedited appeal in the Eleventh Circuit and the decision and Order of the District Court, Respondents do not believe that there is any benefit to undergoing the burdens and expense of this administrative proceeding until the Eleventh Circuit rules on the appeal. Therefore, Respondents have requested a stay of this proceeding. That motion was not opposed by Complaint Counsel. This Court certified that motion to the Commission with the recommendation that it be granted. However, the Commission has not yet ruled on the motion, thus leaving the parties and third parties subject to rapidly approaching due dates.
14. In order to alleviate Complaint Counsel, Respondents, third parties, and this Court from participating in potentially unnecessary trial preparation, Respondents respectfully request that all deadlines be adjourned until no earlier than 5 days after the Commission rules on the Unopposed Motion to Stay. Respondents state that this will not only relieve

the parties of expending substantial resources, but it will also relieve the burden on third parties to respond to subpoenas, as well as the burden on this Court to rule on potential motions. Respondents further state that granting this relief will relieve this Court of having to rule on additional requests from the parties to revise the scheduling order. Without this relief, additional requests to revise the scheduling order may be required, for the same reasons stated in this and the prior request, until such time as the Commission rules on the stay.

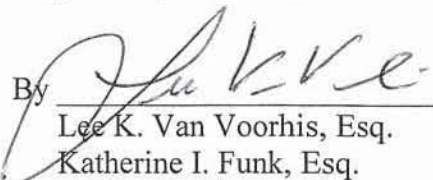
15. Pursuant to this Court's July 5 Order, there are upcoming deadlines including for tomorrow, July 15, 2011, for Respondents' issuance of witness lists and discovery requests; July 18 for motions to quash and other matters; and July 20 for Complaint Counsel's witness list. Respondents therefore urgently request that this Court postpone all response dates set in the scheduling order until no earlier than 5 days after the Commission rules on the Unopposed Motion for Stay.
16. In the alternative, should the Court decide it will not adjourn the response dates set in the scheduling order until no earlier than 5 days after the Commission rules on the Unopposed Motion for Stay, Respondents respectfully request that this Court grant any such relief it deems proper in light of the aforementioned facts.
17. The parties have conferred regarding this Emergency Request to Revise Scheduling Order in a good faith effort to resolve by agreement the issues raised by this motion and have been unable to reach such an agreement. In light of the already-compressed schedule and their estimate of the time necessary to complete fact discovery, Complaint Counsel oppose any further delay absent a decision by the Commission on the unopposed motion to stay already filed by Respondents and certified by the Court. Absent a stay or extension of the hearing date, Complaint Counsel believe that any indefinite delay will

prejudice their ability to properly prepare their case for the hearing. However, Complaint Counsel do not intend to file a separate brief in opposition to this motion.

WHEREFORE, Respondents respectfully request that the ALJ enter an Order further revising the Scheduling Order, as set forth in this motion. A proposed order is attached hereto for the convenience of the ALJ.

Dated: July 14, 2011

Respectfully submitted,

By 

Lee K. Van Voorhis, Esq.
Katherine I. Funk, Esq.
Teisha C. Johnson, Esq.
Baker & McKenzie LLP
815 Connecticut Avenue, NW
Washington, DC 20006

James C. Egan, Jr., Esq.
Jonathan L. Sickler, Esq.
Weil, Gotshal & Manges LLP
1300 Eye Street, NW, Suite 900
Washington, DC 20005
*Counsel For Phoebe Putney Memorial
Hospital, Inc., Phoebe Putney Health
System, Inc., and Phoebe North, Inc.*

Emmet J. Bondurant, Esq.
Frank M. Lowrey, Esq.
Ronan P. Doherty, Esq.
Michael A. Caplan, Esq.
Bondurant, Mixson & Elmore LLP
1201 W. Peachtree Street, Suite 3900
Atlanta, Georgia 30309
*Attorneys for Respondent Hospital
Authority of Albany-Dougherty County*

Kevin J. Arquit, Esq.
Aimee H. Goldstein, Esq.
Paul Gluckow, Esq.
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, New York 10017-3954
*Attorneys for HCA Inc. and Palmyra Park
Hospital, Inc.*

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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Docket No. 9348

[PROPOSED] ORDER

Having reviewed the Emergency Request to Revise Scheduling Order, it is hereby

ORDERED that all response dates are postponed until no earlier than 5 days after the Commission issues its ruling on the Unopposed Motion for Stay filed in the above-captioned proceeding.

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of July, 2011 a true and correct copy of the foregoing Emergency Request to Revise Scheduling Order was filed via FTC e-file, with the paper original and a true and correct copy of the paper original via U.S. First Class Mail to:

Donald S. Clark
Secretary
Federal Trade Commission
Room H113
600 Pennsylvania Avenue, NW
Washington, DC 20580
dclark@ftc.gov

by electronic mail and U.S. First Class Mail to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H110
600 Pennsylvania Avenue, NW
Washington, DC 20580
oalj@ftc.gov

and by electronic mail to the following:

Edward D. Hassi, Esq.
Trial Counsel
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
ehassi@ftc.gov

Matthew K. Reilly, Esq.
Assistant Director
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
mreilly@ftc.gov

Goldie V. Walker, Esq.
Lead Counsel
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
gwalker@ftc.gov

Priya B. Viswanath, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
pviswanath@ftc.gov

Maria M. DiMoscato, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
mdimoscato@ftc.gov

Sara Y. Razi, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
srazi@ftc.gov

Matthew A. Tabas, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
mtabas@ftc.gov

W. Stephen Sockwell, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
wsockwell@ftc.gov

Kevin J. Arquit, Esq.
karquit@stblaw.com
Aimee H. Goldstein, Esq.
agoldstein@stblaw.com
Jennifer Rie, Esq.
jrie@stblaw.com
Meryl G. Rosen, Esq.
mrosen@stblaw.com
Nicholas F. Cohen, Esq.
ncohen@stblaw.com
Paul C. Gluckow, Esq.
pgluckow@stblaw.com
Simpson Thacher and Bartlett, LLP
425 Lexington Avenue
New York, New York 10017

Peter C. Herrick, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
pherrick@ftc.gov

Thomas H. Brock, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
tbrock@ftc.gov

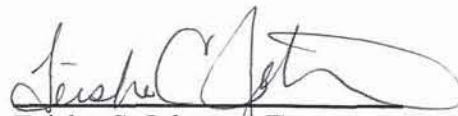
Scott Reiter, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
sreiter@ftc.gov

Lee Van Voorhis, Esq.
lee.vanvoorhis@bakermckenzie.com
Katherine I. Funk, Esq.
katherine.funk@bakermckenzie.com
Teisha C. Johnson, Esq.
teisha.johnson@bakermckenzie.com
Baker & McKenzie LLP
815 Connecticut Ave. NW
Washington, DC 20006

Emmet J. Bondurant, Esq.
Bondurant@bmelaw.com
Michael A. Caplan, Esq.
caplan@bmelaw.com
Ronan A. Doherty, Esq.
doherty@bmelaw.com
Frank M. Lowrey, Esq.
lowrey@bmelaw.com
Bondurant, Mixson & Elmore, LLP
1201 West Peachtree St. N.W., Suite 3900
Atlanta, GA 30309

Robert J. Baudino, Esq.
baudino@baudino.com
Amy McCullough, Esq.
McCullough@baudino.com
Karin A. Middleton, Esq.
middleton@baudino.com
David J. Darrell, Esq.
darrell@baudino.com
Baudino Law Group, PLC
2409 Westgate Drive
Albany, Georgia 31707

Jonathan L. Sickler, Esq.
Jonathan.sickler@weil.com
James Egan, Jr., Esq.
jim.egan@weil.com
Vadim Brusser, Esq.
Vadim.brusser@weil.com
Robin Cook, Esq.
Robin.cook@weil.com
Weil, Gotshal & Manges, LLP
1300 Eye St. NW, Suite 900
Washington, DC 20005-3314



Teisha C. Johnson, Esq.
*Counsel For Phoebe Putney Memorial
Hospital, Inc., Phoebe Putney Health
System, Inc., and Phoebe North, Inc.*