

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

ORIGINAL



_____)
In the Matter of)
)
PHOEBE PUTNEY HEALTH)
SYSTEM, INC., and)
)
PHOEBE PUTNEY MEMORIAL)
HOSPITAL, INC., and)
)
PHOEBE NORTH, INC., and)
)
HCA INC., and)
)
PALMYRA PARK HOSPITAL, INC., and)
)
HOSPITAL AUTHORITY OF)
ALBANY-DOUGHERTY COUNTY,)
Respondents.)
_____)

DOCKET NO. 9348

**ORDER DENYING WITHOUT PREJUDICE COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY RESPONDENTS**

I.

On May 10, 2013, pursuant to Federal Trade Commission Rule of Practice 3.38(a), 16 C.F.R. § 3.38(a), Complaint Counsel filed a Motion to Compel Production of Documents ("Motion") by Respondents Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc. (collectively, "Phoebe"). Phoebe filed an opposition to the Motion on May 17, 2013 ("Opposition"). As discussed below, the Motion is DENIED WITHOUT PREJUDICE as premature.

II.

According to the record in this case, and the declarations and email correspondence submitted by the parties in connection with the Motion and Opposition, the material facts are as follows:

On April 4, 2013, a Revised Scheduling Order was issued in this case setting, *inter alia*, May 29, 2013 as the deadline for the "[c]lose of discovery, other than discovery permitted under

Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits”; and August 5, 2013 as the date for commencement of the evidentiary hearing.¹ On April 5, 2013, Complaint Counsel served Phoebe with a First Request for Production of Documents, containing 23 separate categories of documents (the “RFP”). Motion, Exhibit B.

The parties discussed discovery matters on a conference call on April 22, 2013, including whether the scope of the document request could be narrowed. Opposition, Exhibit 1 at 2. Complaint Counsel took the position that the discovery rules required Phoebe to produce all documents by May 7, 2013 – 30 days from service of the RFP -- and that if Phoebe failed to do so, Complaint Counsel might seek an extension of the May 29 discovery deadline to take depositions and/or file motions *in limine* to exclude any unproduced materials. Opposition, Exhibit 1 at 2. In that telephone conference, Phoebe disagreed with Complaint Counsel’s interpretation of the discovery rules; stated that Phoebe would comply with the discovery rules; and advised that given the breadth of the RFP it was unlikely that it would complete all document production by May 7. *Id.* at 1.

The parties proceeded to negotiate the scope of the RFP and, on April 29, 2013, the parties reached an agreement on a narrowed scope of production (“Production Agreement”). Phoebe further advised Complaint Counsel that it would proceed with document production efforts accordingly, and would prioritize production of documents pertaining to Complaint Counsel’s “high priority” deponents. Motion, Exhibit D; Declaration of Jennifer Ancona Semko, Exhibit B to Opposition (hereafter “Semko Decl.”) ¶¶ 4-5.

On May 7, 2013, Phoebe served Objections and Responses to Complaint Counsel’s RFP, raising certain objections, but stating that notwithstanding the objections, Phoebe would produce documents in accordance with the RFP as modified by the Production Agreement. Motion, Exhibit C. Thereafter, Complaint Counsel advised Phoebe that because no responsive documents had been produced by Phoebe by May 7, Complaint Counsel anticipated filing a motion to compel. Motion, Exhibit E. The parties again conferred by telephone on May 8, 2013 regarding discovery issues, including Complaint Counsel’s anticipated motion to compel. Phoebe reiterated its disagreement with Complaint Counsel’s assertion that Phoebe’s entire document production was due by May 7, 2013. Semko Decl. ¶¶ 8-9. Phoebe advised that it would be producing approximately 21,000 documents by May 10, including all responsive documents sought by Complaint Counsel in connection with planned depositions of four document custodians, with the exception of email; that it had a very large team of attorneys reviewing data for responsive documents on a full-time basis; that it was working as fast as possible; that it anticipated an additional sizable production the following week; and that it intended to complete its production, on a rolling basis, by the discovery deadline of May 29, but that if Phoebe counsel had any reason to believe that this would not be possible, it would inform Complaint Counsel. Opposition, Exhibit 3; Semko Decl. ¶¶ 6-7; *see also id.* ¶ 10 (reiterating same in conference call on May 10, 2013).

¹ The Commission stayed all proceedings in this matter on July 15, 2011 pending the FTC’s appeal of federal court rulings that Respondents’ merger was immune from federal antitrust law as “state action.” On February 19, 2013, the United States Supreme Court reversed and remanded. *FTC v. Phoebe Putney Health Sys.*, ___ U.S. ___, 133 S. Ct. 1003, 1017 (2013). The Commission lifted the stay on March 14, 2013.

On May 10, 2013, Phoebe provided approximately 19,491 documents to Complaint Counsel. Declaration of Jeremy Cline, Exhibit A to Opposition (hereafter “Cline Decl.”) ¶ 4; *see also* Motion at 3 n.7. Also on May 10, Complaint Counsel filed the instant Motion to Compel, arguing that Phoebe’s failure to produce all responsive documents by May 7 was a violation of the discovery rules, and requesting an order: requiring Phoebe to “take all necessary steps” toward making their representatives available for depositions no later than May 29, 2013; requiring Phoebe to produce all remaining responsive documents no later than 5 days in advance of such depositions; and allowing Complaint Counsel to conduct additional depositions, after the discovery deadline, and to supplement other submissions as needed, in the event Phoebe fails to produce all requested documents. Motion, Proposed Order.

On May 17, 2013, the same day that Phoebe filed its Opposition, Phoebe produced an additional 36,344 documents responsive to the RFP as modified by the Production Agreement. Cline Decl. ¶¶ 5. Phoebe anticipates that it will produce approximately 35,000 additional responsive documents on or around May 21, 2013. *Id.* at ¶ 7.

III.

As discussed above, the emails and declarations submitted by the parties show that: Phoebe and Complaint Counsel negotiated a narrowing of the RFP in good faith; that thereafter Phoebe produced, and continues to produce, responsive documents in accordance with that agreement; that Phoebe intends to complete, and anticipates completing, production by the discovery deadline of May 29, 2013, as provided under the Revised Scheduling Order; and that Phoebe is cooperating in the scheduling of depositions and prioritizing its document production accordingly. There is no indication that Phoebe is withholding any documents from Complaint Counsel, or that Phoebe has failed or refused to make any of its representatives available for deposition. In the event it appears to Phoebe that it will be unable to complete document production by May 29, 2013, as required under the Revised Scheduling Order, the burden will be on Phoebe to seek an extension of the discovery deadline and to demonstrate good cause. 16 C.F.R. §3.21(c) (“The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order . . .”).

Similarly, the Revised Scheduling Order already requires depositions of all fact witnesses to be completed by May 29, and Complaint Counsel cites no basis for entering a duplicative order here. In the event that the requested depositions cannot be completed by the discovery deadline because Phoebe’s document production is not sufficiently complete, Complaint Counsel can seek appropriate relief, such as a renewed motion to compel under Rule 3.38, a motion for an extension of the discovery deadline under the Revised Scheduling Order pursuant to Rule 3.21(c), and/or a motion to preclude Phoebe from relying on any evidence that has not been produced in discovery.

In summary, Complaint Counsel has failed to present a sufficient basis for entering its proposed order. For all the foregoing reasons, Complaint Counsel's Motion is DENIED WITHOUT PREJUDICE as premature.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 22, 2013