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VIA ELECTRONIC FILING

Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex D)  
600 Pennsylvania Avenue, N.W.  
Washington D.C. 20580

Re: In the Matter of Phoebe Putney Health Systems, Inc .*et al*; Docket No. 9348

Dear Commissioners:

We have been requested by the Independent Doctors of Georgia, Inc. ("INDDOC") and independent medical practices in Albany, Georgia to submit comments regarding the Proposed Agreement Containing Consent Order ("Proposed Agreement") in the above stated matter. The Albany practices include Albany Internal Medicine, P.C., Allergy and Asthma Clinics of Georgia, Albany Surgical Association, Albany Vascular Specialists, Albany Urology, Premier Orthopedics, Medical Associates of Albany, Palmyra Surgical, Albany ENT, Albany Neurology and Headache Center, Southwest Georgia Pediatrics, and Orthopedic Associates (collectively "the Practices"). INDDOC is a trade association that is made up of approximately 500 independent practicing physicians and affiliated professionals in the State of Georgia. As part of its mission, it promotes and advocates for independent physician practices and for robust competition in the medical field. It recognizes the need for physicians and hospitals to work together in various types of agreements in a collaborative manner but is concerned about the rapid consolidation of medical services in one dominant or a few dominant providers in an area. The Practices are directly impacted by the actions of Phoebe Putney Health Systems, Inc., and its affiliates (collectively "Phoebe").

Certificate of Need Law

The Analysis of Proposed Agreement Containing Consent Order To Aid Public Comment explains that the Proposed Agreement is acceptable to the Federal Trade

Commission ("FTC") because of the unusual circumstances created by Georgia's Certificate of Need ("CON") law. According to the Analysis, the CON law would "likely prevent divestiture of hospital assets from being effectuated to restore competition". (Analysis, p. 1) The Analysis further states that the re-division of the single state-licensed hospital into two separate hospitals and the transfer to a new owner from the Hospital Authority would require CON approval from the Georgia Department of Community Health ("DCH"). (Analysis. P.4) The explanation of the CON law, however, is incorrect.

The first justification for settling the matter is that DCH cannot revoke Phoebe's single-hospital license to operate both hospitals. The Proposed Agreement does not require the State of Georgia to take any action because it is an agreement between the FTC and Phoebe. Nothing prevents Phoebe from voluntarily relinquishing its license to operate both hospitals and obtaining a license to operate just the Phoebe facility. The Proposed Agreement is no different than other FTC settlement agreements that require the Respondent to take certain actions.

The second justification is that the CON law requires DCH to issue a CON for a proposed buyer to buy Palmyra Park Hospital. The Analysis cites to O.C.G.A. § 31-6-40(a)(2) which requires CON approval for any expenditure over 2.5 million dollars by a health care facility. The Analysis also cites to the DCH Rules which set out the analysis for a new hospital to be built in the Dougherty County area and concludes that the application cannot be approved. Again, the Analysis incorrectly describes Georgia law. An existing hospital can be sold and the right to operate transferred to a buyer without CON approval. In fact, there have been numerous transfers of CON regulated facilities (including the transfer from HCA, Inc. to the Hospital Authority) without obtaining a new CON. O.C.G.A. § 31-6-40(a)(2) and the need rules do not apply to an existing facility which can be sold or conveyed to another party without CON approval.

The only requirement for the acquisition of a health care facility is notice to DCH within 45 days of the closing of the purchase. (O.C.G.A. § 31-6-40.1) A new CON is not required and no other permission from DCH is required in any manner under the CON program. The buyer is required to apply for a new license in its name but that has nothing to do with the CON program. The fact that Phoebe and Palmyra Park are grandfathered is also irrelevant to the analysis. DCH has always treated grandfathered facilities in the same manner as those who receive a CON. The grandfathered facilities have the same rights as any other health care provider that has received a CON including the right to sell the facility without getting a new CON. As a result, the justification given by the Analysis for the FTC agreeing to the Proposed Agreement is legally incorrect.

### Phoebe Health Partners

The Proposed Agreement does not address in any manner Phoebe Health Partners, Inc. ("PHP") PHP is an entity that is commonly referred to as a "hospital physician organization". It serves as a contact point for insurers and self-funded employer insurance plans to access medical providers in the Dougherty County area. Phoebe is a member and effectively controls PHP notwithstanding the fact that PHP has independent physicians as part of the organization. PHP is another tool used by Phoebe to restrict competition in its geographic service area.

PHP is the network used by the Georgia State Health Benefit Plan ("SHBP") and Phoebe's own employees. The SHBP includes all state employees and others that are covered by it such as teachers. If a physician is not a part of the PHP he is not in network and is effectively precluded from providing services to a significant part of the population in the Dougherty County area. A new physician that wants to practice in the Dougherty County area must as a practical matter join the staff at Phoebe and join the PHP. The applications are sent to the physician jointly by Phoebe and considered simultaneously by each organization. Although the process is supposed to be separate there is clearly sharing of information between the two organizations. The Board of PHP includes many Phoebe affiliated individuals including Phoebe's Vice Presidents for Physician Practices.

The use of hospital physician organizations as a network for insurers and employers is not new. The use of those organizations to limit competition and manipulate the market is becoming more of a concern particularly in markets where there is one dominant provider like Phoebe. Any Agreement to resolve the case should address the relationship between Phoebe and PHP and require the appropriate mechanism to limit control of the PHP by Phoebe.

*The Statement of Department of Justice and Federal Trade Commission Enforcement Policy on Multiprovider Networks* provides that that the FTC and DOJ will use a rule of reason analysis to determine whether a network is creating an anti-competitive effect. The Statement recognizes there are justifications for allowing certain activities including precluding certain providers from joining the network. The Statement also provides, however, that exclusion of providers or referral policies may create significant anti-competitive concerns where the providers cannot compete effectively unless they are part of the network at issue.

In this case, FTC should consider appropriate mechanisms to limit Phoebe's ability to use PHP as a tool for market manipulation and anti-competitive effects.

## Remedies

The Proposed Agreement requires Phoebe to (i) notify the FTC for ten years if it intends to acquire other providers in the geographic service including physician groups of more than 5 members; (ii) not oppose for 5 years any CON application for a new hospital in the geographic service area; and (iii) provide to FTC for 5 years any objections made by Phoebe to any CON application for clinics to provide services provided by Phoebe. Assuming the FTC decides to move forward with a settlement of the matter with Phoebe the Proposed Agreement should incorporate more robust limitations on Phoebe.

Phoebe provides a full array of medical services under its umbrella including inpatient and outpatient services. It has acquired physician practices or recruited physicians to work for it as employees and that has disrupted the traditional referral pattern of the area at the expense of independent physicians and other independent providers. The consolidation of services in Phoebe allows it to set costs for healthcare services. A good example is outpatient surgery. Phoebe is the largest provider of outpatient surgery in the area and has routinely opposed CONs for free standing surgery centers that may compete with it. In order to truly allow competition in the area the Proposed Agreement should address these issues.

As you know, in order to encourage competition in the Dougherty County area the local physicians should not be concerned about retribution by Phoebe through threats to their privileges at Phoebe's hospital. Most physicians need to have privileges at a hospital to practice and Phoebe is the only option at this point. They should not be concerned about retribution if they support a competitor of Phoebe's in the future. As you know, any competitor will need physician support to have any chance of success.

In addition to the items referenced in the Proposed Agreement, the following should be included in the Proposed Agreement: (i) Phoebe should be precluded from hiring any physician from outside of the area for a service that is already being provided in the area by an independent physician for a period of 5 years; (ii) Phoebe should provide advanced written notice to the FTC of any intent to acquire or employ physicians in the area and not just those that have 5 or more members. Many groups in the area are smaller and just hiring one of them could significantly disrupt the referral pattern in the area and reduce competition. In fact, it can be assumed that an employed physician will refer to other employed physicians before referring to an independent physician and that by itself which will have a significant impact on competition; (iv) Phoebe should be precluded for 10 years from opposing any applications for CONs for (not just give FTC copies of opposition comments) for freestanding surgery centers which provide services at significantly lowers costs than hospital outpatient surgery centers. The loss of Palmyra as a competitor removes any competition Phoebe has to

its out-patient surgery services and just limiting its ability to oppose another hospital (which is expensive to build) will not likely create more competition. The prohibition should include freestanding surgery centers; and (v) Phoebe should be prohibited from taking any adverse action against physicians that are members of the hospital staff as retribution for physicians supporting a competitor.

### Conclusion

We appreciate the efforts of the FTC in challenging the merger of Phoebe and Palmyra Park and recognize the work done by its staff. We believe that the need for competition in the area is important to allow consumers to obtain the best quality care at the best price. The rapid consolidation in the health care market is most acutely felt by those in rural or semi-rural areas where there is one dominant provider. Unless the FTC and other agencies take steps to limit those activities and allow competition the increasing costs of healthcare will have no barrier.

The Analysis of the Proposed Agreement is inaccurate regarding the CON law and should be revisited before the Agreement is made final. The fact is that any facility made be sold without CON approval and only notice is required. If the FTC decides to move forward, additional steps should be taken to limit Phoebe's ability to limit competition.

Very truly yours,

Victor L. Moldovan