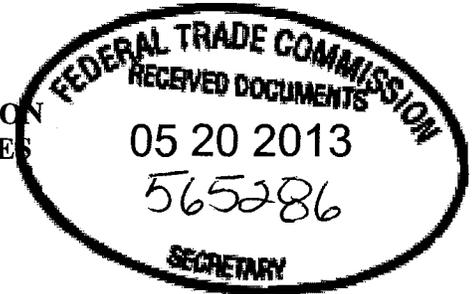


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

**PHOEBE RESPONDENTS' OPPOSITION TO
COMPLAINT COUNSEL'S MOTION TO COMPEL**

Complaint Counsel filed this motion to compel Respondents Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc. (collectively, "Phoebe") to produce on an "immediate" basis documents responsive to Complaint Counsel's First Request for the Production of Documents (the "RFP"). The motion is founded upon at least two faulty premises: (1) that Phoebe was required to produce every responsive document within thirty days of receiving the expansive RFP and (2) that Phoebe is to blame for the time pressure Complaint Counsel faces as a result of the discovery schedule established in this case. Worse yet, the Motion contains an inaccurate and incomplete summary of the interactions among counsel regarding these issues.

Phoebe has already produced more than 118,000 documents, including more than 62,000 that have been in Complaint Counsel's possession since early 2011. See Declaration of Jeremy Cline dated May 17, 2013 ("Cline Decl.") at ¶¶ 2, 6 (Exhibit A). Production is ongoing, and additional documents will be produced soon. Id. at ¶ 7. Contrary to Complaint Counsel's assertions, Phoebe's counsel have repeatedly stated Phoebe's intention to complete its production on a rolling basis by the close of discovery. See Declaration of Jennifer Semko dated May 17, 2013 ("Semko Decl.") at ¶¶ 2, 4, 6 (Exhibit B). Complaint Counsel has not demonstrated that Phoebe has in any way breached its obligations under the Rules of Practice, and the motion should be denied.

BACKGROUND

In February 2011, Complaint Counsel served upon Phoebe a subpoena *duces tecum* ("Subpoena") containing more than 22 categories of document requests. Cline Decl. ¶ 2. Phoebe produced approximately 62,421 responsive documents. Id. Phoebe also produced data and information in response to Complaint Counsel's February 2011 Civil Investigative Demand ("CID"), which also covered a broad array of subject areas. Id. ¶ 3.

After the stay on this proceeding was lifted, Complaint Counsel filed on March 19, 2013, a proposed Scheduling Order with a very compressed discovery period. On March 21, Complaint Counsel opposed Respondents' Motion to Reschedule the Hearing Date, asserting that the schedule "provide[s] sufficient time for both Respondents and Complaint Counsel to prepare effectively for trial." See Complaint Counsel Opposition to Motion to Reschedule Hearing Date at p. 3. The Commission relied upon Complaint Counsel's representation in its April 3 Order denying Respondents' motion.

On April 5, 2013, Complaint Counsel served the RFP, which contains 23 categories of requests covering a broad spectrum of subjects, many of which were also addressed in the 2011

Subpoena. During early discussions and correspondence regarding Phoebe's document collection and review efforts (discussions conspicuously absent from Complaint Counsel's motion), Phoebe's counsel explained that the production was unlikely to be complete by May 7 (the thirtieth day following service of the RFP) but would be complete by May 29. Semko Decl. ¶ 2. Well in advance of the response deadline, Phoebe's counsel requested a teleconference with Complaint Counsel in a good faith effort to discuss potential modifications to the RFP. *Id.* ¶ 3. The parties agreed that certain requests would be narrowed to include only documents created after Phoebe's 2011 document collection effort.¹ Phoebe's counsel reiterated that Phoebe would meet the deadlines set forth in the Scheduling Order. *Id.* ¶ 4. Phoebe's counsel also agreed to endeavor in good faith to honor Complaint Counsel's requests that Phoebe (i) re-prioritize its efforts so as to produce documents held by certain of Complaint Counsel's priority custodians first and (ii) produce deponents' documents in advance of their depositions.²

On May 7, Phoebe timely served its written responses and objections to the RFP. Although Complaint Counsel had earlier that day thanked Phoebe's counsel for "stating your intention to produce in advance as many responsive documents as possible for our top-priority Phoebe Putney witness,"³ Complaint Counsel requested a call to discuss a potential motion to compel.⁴ Contrary to Complaint Counsel's representation, Phoebe's counsel did *not* state during this May 8 call that Phoebe "may not even complete" its production by May 29. Instead, Phoebe's counsel reiterated that Phoebe's intention was to complete its production before the close of discovery, and *when and if* counsel had *any reason to believe* that this would not be possible, she would *inform Complaint Counsel right away*. *Id.* ¶ 6.

¹ See email exchange between Jennifer Semko and Sara Razi dated April 28 and 29, 2013, attached as Exhibit D to the Declaration of Maria DiMoscato, attached to Complaint Counsel's motion.

² See Exhibit D to Declaration of M. DiMoscato.

³ *Id.*

⁴ See email exchange between Jennifer Semko and Sara Razi dated May 7, 2013, attached as Exhibit E to the M. DiMoscato Declaration.

During that call, and in subsequent e-mail correspondence (also absent from Complaint Counsel's motion) Phoebe's counsel explained the status of Phoebe's document review and production efforts. Semko Decl. ¶¶ 7, 9. Counsel urged Complaint Counsel to reconsider its motion because: (i) Phoebe would be producing approximately 21,000 documents within 48 hours, including *all* responsive documents for three of the FTC's top-priority custodians, except for their e-mails; (ii) additional sizeable productions would follow; (iii) counsel would be providing an update as to each rolling production on a regular basis; (iv) Phoebe had not stated any intention of withholding documents; and (v) a motion to compel would distract all parties from completing their discovery efforts. *Id.* ¶ 9.

During another call on May 10, Phoebe's counsel repeated Phoebe's planned document production schedule, including the significant productions that would be delivered later that day (ultimately 19,491 documents in all), the following week, and on a rolling basis thereafter. *Id.* ¶ 10; Cline Decl. ¶4. Phoebe's counsel offered to provide weekly, twice-weekly or even daily updates regarding the status of the production. Semko Decl. ¶ 10. Complaint Counsel filed the instant motion later that same day. As previously promised, Phoebe delivered today an additional 36,344 documents. Cline Decl. ¶5.

ARGUMENT

I. Phoebe's Actions Comply with the Rules of Practice.

A. Phoebe's Document Production Was Not Due on the Thirtieth Day Following Complaint Counsel's RFP.

Complaint Counsel claims that the entirety of Phoebe's document production was due on the thirtieth day after service of the RFP, but there is no support for this in the Rules of Practice or the caselaw. The plain language of Rule 3.37 makes clear that only a party's written responses and objections must be made within 30 days:

No more than 30 days after receiving the request, the response of the party upon whom the request is served *shall state*, with respect to each item or category, *that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated.*

16 C.F.R. § 3.37(b) (emphasis added).

Complaint Counsel is correct that caselaw interpreting Fed. R. Civ. Pro. 34 is useful guidance, but the weight of that precedent backs Phoebe's position. "Rule 34 requires a written response within 30 days after being served, but provides nothing express about the time at which actual production shall take place." L.H. v. Schwarzenegger, 2008 U.S. Dist. LEXIS 86829 at *19 (E.D. Cal. May 14, 2008) (emphasis in original); see also 8B Charles Allen Wright et al., Federal Practice and Procedure § 2212 (3d. 2010). Federal courts have therefore identified three equally appropriate responses to a request for production of documents: (1) an objection to the scope, time, method, and manner of the requested production; (2) an answer agreeing to the request; or (3) a response offering a good faith, reasonable alternative production timeline. See, e.g., Kinetic Concepts, Inc. v. ConvaTec Inc., 268 F.R.D. 226, 240 (M.D.N.C. 2010); Jayne H. Lee, Inc. v. Flagstaff Indus. Corp., 173 F.R.D. 651, 656 (D. Md. 1997). Indeed, it would make little sense for the applicable federal or FTC rules to set a uniform production deadline regardless of the scope or complexity of the requested production.

Moreover, both Rule 34 and Rule 3.37(a) require that the requesting party state a "reasonable time, place and manner" for the inspection or production of the requested documents. Complaint Counsel's RFP failed to set a production time. "If no actual time of production is specified, defendants have little idea concerning the time of actual production . . . Since plaintiffs did not provide a time for actual production, a reasonable time is presumed." Schwarzenegger, 2008 U.S. Dist. LEXIS 86829 at *19-20; see also In re Goodwin, 2009 Bankr. LEXIS 3666 (N.D. Ga. Sept. 9, 2009). Having neither the plain language of the Rule nor the

weight of caselaw on their side, Complaint Counsel are left to rely on passing comments in an unpublished opinion and misquoted dicta.⁵

Nor does Phoebe have any obligation to complete its document production prior to witness depositions. Rule 3.31 expressly provides that the parties “shall, to the greatest extent practicable, conduct discovery simultaneously.” 16 C.F.R. § 3.31(a). This Court has previously noted that “[t]here is no provision . . . that requires parties to produce all documents prior to depositions.” See In the Matter of Polypore Int’l., Inc., 2008 FTC LEXIS 155 at *14-15 (FTC Nov. 14, 2008).⁶ Indeed, Phoebe has already taken depositions in this matter without the benefit of advance access to documents. Complaint Counsel cannot complain just because they are required to do the same.

B. Phoebe is Working Diligently and in Good Faith to Complete its Document Production and Has Never Stated That It Will Not Do So Prior to the Close of Discovery.

The history of Phoebe’s actions and the accurate description of its counsel’s representations make clear that Phoebe is working diligently to produce responsive documents within the discovery period. Complaint Counsel is experienced and well aware that compliance with Second Requests, which are very similar in scope to the massive document request at issue here, generally takes many *months*. It seems disingenuous for Complaint Counsel to suggest that Phoebe’s production should, or even *could*, have been completed within thirty days.⁷

⁵ Contrary to Complaint Counsel’s assertion (Motion at 4, n. 10), Poulos v. Naas Foods, Inc., 959 F.2d 69 (7th Cir. 1992), did not hold that a “party waived any objection to production by failing to object 30 days from service when disclosure was due.” Complaint counsel was apparently attempting to quote the court’s parenthetical citation to Rule 34(b), which states that “[t]he party upon whom the request is served shall serve a written response within 30 days,” *id.*, the plain language of Rule 34 that supports Phoebe’s position.

⁶ Although this Court went on to order Complaint Counsel to produce some documents in advance of depositions, Complaint Counsel in that case both controlled the documents and sought the depositions—and the only advance disclosure required was of those documents Complaint Counsel intended to use during the deposition. 2008 FTC LEXIS 155 at *15.

⁷ Complaint Counsel’s handling of this matter is all the more curious in light of Phoebe’s counsel’s courtesy in agreeing to accept a Rule 3.37 request for inspection of premises in place of a procedurally defective Rule 3.34 subpoena Complaint Counsel attempted to serve upon Phoebe. Semko Decl. ¶¶ 11-12. Counsel did so in good faith

Complaint Counsel also argues that Phoebe has been “well aware of the expedited discovery requirements necessary in this proceeding for over two years” (quoting the April 2013 Commission ruling). But it is patently ridiculous to suggest that Phoebe should have been gathering documents in response to unknown, unseen document requests for the last two years—all while these proceedings were stayed and federal trial and appellate court rulings held that the transaction was immune from antitrust liability. Since Complaint Counsel has been in possession of more than 62,000 documents and Phoebe’s CID response for more than two years, Complaint Counsel cannot reasonably suggest that they lack sufficient evidence and documentation to question Phoebe witnesses intelligently or otherwise prepare for trial.⁸

C. Phoebe’s Specific Objections to the RFP Were Sound and, In Any Event, Complaint Counsel’s Criticism of Those Objections is a Red Herring.

Complaint Counsel devote much of their brief to the purportedly defective nature of Phoebe’s written objections. But it is irrefutable that discovery requests that are unreasonably cumulative or duplicative, obtainable from another more convenient source, unduly burdensome, or request privileged communications are objectionable under Rule 3.31. See 16 C.F.R. § 3.31(2), (4). Phoebe appropriately objected to certain requests for failure to abide by these basic limitations. See, e.g., In the Matter of North Texas Specialty Physicians, No. 9312, 2004 FTC LEXIS 18 (Feb. 4, 2004). These specific and detailed objections spanned 17 pages and were unlike the vague and conclusory objections at issue in the cases cited in the motion (p. 6). At any rate, Complaint’s Counsel’s assertions in this regard are of no moment because the true basis for the instant motion is the timing of Phoebe’s production, not its scope.

and on the mistaken assumption that Complaint Counsel shared the view that motions are wholly unnecessary when both parties are amenable to good faith resolution of disputed issues.

⁸ Equally misleading is Complaint Counsel’s citation to In re Fannie Mae Sec. Litig., 552 F.3d 814, 822-23 (D.C. Cir. 2009), in which the responding party had received three prior extensions of its discovery deadline, misrepresented to the court its obligations and efforts, and had hired the referenced contract attorneys at the very last minute.

II. Complaint Counsel's Concerns Regarding the Timing of Phoebe's Production Stem From the Discovery Schedule, Not From Any Improper Actions by Phoebe.

There is no question that the current accelerated discovery schedule is challenging. However, Complaint Counsel represented to the Commission that it would be able to work within the tight parameters of that schedule, particularly since its expert's report has been complete and available for more than two years. Complaint Counsel cannot have it both ways.

The relief Complaint Counsel seeks is both premature and unnecessary:

- Phoebe has never refused to make its executives available for depositions on a mutually agreeable date within the discovery period (to the contrary, the e-mail exchanges submitted by Complaint Counsel reflect Phoebe's efforts to do so);
- Phoebe is already endeavoring in good faith to produce documents at least five calendar days in advance of depositions, but there is no basis in the Rules of Practice to mandate it;
- Phoebe has already reiterated its intention to complete its production by May 29;
- Complaint Counsel asks for permission to conduct additional, out-of-time depositions and to supplement its reports and submissions if Phoebe's production is "late." But Rule 3.31 requires simultaneous discovery, and Complaint Counsel have previously represented that the discovery schedule allows sufficient time for trial preparation. Additionally, this request is premature unless and until Complaint Counsel can demonstrate how they have been prejudiced by any purported "late" document production.

CONCLUSION

For the foregoing reasons, Complaint Counsel has not established a valid basis for compelling Phoebe to produce its remaining documents “immediately,” or for the other relief it seeks, and the instant motion should be denied.

Dated: May 20, 2013

Respectfully submitted,

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Docket No. 9348

[PROPOSED] ORDER

Having reviewed Complaint Counsel's Motion to Compel Phoebe Putney to Produce Documents Requested by Complaint Counsel's First Request For the Production of Documents, and the Phoebe Respondents' opposition thereto, it is HEREBY

ORDERED that Complaint Counsel's motion is DENIED.

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of May, 2013 a true and correct copy of the foregoing PUBLIC document 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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I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing PUBLIC document to:

The Honorable D. Michael Chappell
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This 20th day of May, 2013.

/s/ Brian Rafkin
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System, Inc.*

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.

May 20, 2013

By:

/s/ Brian Rafkin
Brian Rafkin, Esq.
*Counsel for Phoebe Putney Memorial
Hospital, Inc. and Phoebe Putney Health
System, Inc.*

EXHIBIT A
REDACTED IN ITS ENTIRETY

EXHIBIT B
REDACTED IN ITS ENTIRETY

EXHIBIT 1
REDACTED IN ITS ENTIRETY

EXHIBIT 2
REDACTED IN ITS ENTIRETY

EXHIBIT 3
REDACTED IN ITS ENTIRETY