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September 12, 2013

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

RE: *In the Matter of Phoebe Putney Health System, Inc., et al.*
Docket No. 9348

Greetings:

This letter is submitted in objection to the proposed consent order. The FTC has announced "this proposed order is the most effective and efficient resolution that can achieved at this time", "[b]ecause divestiture in unavailable in light of Georgia's strict certificate of need legislation". I would respectfully request that the FTC objectively consider this explanation and the numerous alternatives.

The Hospital Authority, at the direction of the Phoebe entities, consolidated the licenses for the two hospitals while the FTC's appeal was pending in the Supreme Court. An independent Hospital Authority would not have conceivably relinquished control of a license to a community hospital without commissioning an impact study and seeking comment from the public. It is apparent consolidation of the licenses was expedited so that the respondents could argue it would be unfair and impractical to require divestiture once the ruling of the circuit court was reversed.

The FTC was obviously aware of state CON procedures when this action was filed. The Phoebe entities maintained the acquisition of Palmyra was justified, as Phoebe Putney did not have adequate beds to serve the community. Those same entities have now convinced the FTC, which became intimately familiar with the heavy-handed and often illegal tactics they employ, that the state would not allow HCA to transfer the license for Palmyra to a third-party, **as there is a surplus of beds in Dougherty County**!

The FTC contends Georgia's CON laws and regulations would **make it unlikely** that any buyer would be able to obtain approval to operate the hospital. The assessment that the Department of Community Health would not approve a license for a second hospital is **purely speculative**. Competition in this market would be beneficial to consumers and this would be an important consideration for DCH.

The stated motivation in entering into this agreement is specious. Divestiture would **restore** the license to Palmyra. HCA would be paid a $35 million "break-up fee", pursuant to its contract with the Hospital Authority. HCA could then offer Palmyra for sale, should it be unwilling to operate the hospital. The FTC's speculation that it is "unlikely" transfer of the license would be approved would, of course, prove irrelevant should HCA return to this market.

Another option, which has presumably not been considered, would be to allow the Hospital Authority to retain Palmyra, on the condition that the hospital be leased or sold to an independent entity.

Each of these alternatives are predicated upon the assumption that Georgia's CON laws and regulations are not preempted by federal law. **The CON procedures would not be a consideration should the Clayton Act, as I am led to believe, preempt state law and regulations**.

The FTC had two objectives in refusing to approve the sale of Palmyra. One was to prevent private actors from circumventing federal antitrust laws by using governmental entities to accomplish what the private actor would otherwise be prohibited from doing. The Supreme Court has now clarified the parameters of the state action doctrine. The other objective was to maintain competition in this market. The agency has now abandoned the second objective, as it is obviously unwilling to dedicate the resources required to prosecute this matter to divestiture. This decision is shameful, as the Phoebe entities deliberately consolidated the licenses to frustrate an equitable remedy in this matter. The proposed consent order essentially rewards those entities for unethical and illegal conduct, and abandons the very citizens this case was filed to protect.

I have enclosed a copy of my March 12th letter to Edward Hassi, in which I set forth "compelling reasons for the FTC to pursue this matter, now that the decision of the circuit court has been reversed". **I trust the commissioners are aware the Hospital Authority's purchase of Palmyra followed reinstatement of an antitrust lawsuit Palmyra had filed against the Authority and the Phoebe entities**. *Palmyra Park Hosp. v. Phoebe Putney Memorial Hosp.*, 604 F.3d 1291 (11th Cir. 2010). The attorney for the Phoebe entities notified HCA his clients were prepared to pay "[an] aggressive premium cash purchase price", and assured HCA there was "[n]o risk of antitrust enforcement activity", as the Hospital Authority would be identified as "purchaser to trigger State Action Immunity". It is important to note that this proposal was extended without consulting the Hospital Authority and almost one month before PPHS' board of directors initially met to discuss purchase of Palmyra.

The CFO for the Phoebe entities, in a handout presented to PPHS' board of directors, identified benefits the proposed purchase would bring. These include "**avoid antitrust lawsuit**", "**control all hospital beds in county**", "**increase market share**", and "**increase negotiation power with all payors**". (The handout refers to acquisition of Palmyra as "Project Olympus".) Thus, the stated objectives were to resolve a lawsuit initiated because the Phoebe entities had systematically convinced insurers and health plans to exclude Palmyra from their networks, and purchase its only competitor, so that it could increase the already exorbitant fees negotiated with representatives of privately-insured patients.

I have enclosed a summary of scholarly articles Dr. Corleen Thompson submitted to the Hospital Authority, at the public hearing held on May 24, 2012. The Commission should consider this paper, which verifies not-for-profits are "equally likely to exploit their market power". Dr. Thompson references the Phoebe entities' "horrendous record of competitive behavior". Though no studies have been conducted to determine how prices are impacted where the only two hospitals in a market merge, one study predicts such a transaction "**would increase prices by 24.6%**".

I have also enclosed a map from a recent article published in the *Atlanta Journal-Constitution* which, using information from Blue Cross/Blue Shield of Georgia and Coventry, confirmed insurance premiums are higher in this market (where over 25% of the population live at or below the poverty level, and 12% are 65 years and older) than in any other region of the state. http://www.myajc.com/news/ga-insurance-exchange-regions/. The only explanation for this disparity is the virtual monopoly the Phoebe entities have enjoyed and exploited during the last 15 years.

The commissioners should be aware **Phoebe Putney recently had the ignominious distinction of being included in a list of the 25 worst hospitals in the country**. Patient surveys consistently verify high levels of dissatisfaction, and Phoebe Putney has an appalling infection rate. The quality of care in this market will not improve unless genuine competition is restored.

The failure to insist upon price caps or monitor negotiations with private insurers reflects a total indifference to the consequences of the merger which will be accomplished should the proposed consent order be adopted. The FTC, in considering the proposed consent order, should understand any resolution short of complete divestiture will be catastrophic for this community. Allowing the Phoebe entities to retain Palmyra would be a travesty, which should not be countenanced by an agency dedicated to the promotion of competition. I would request that my letter and the enclosures be provided to the

commissioners, so that they may review same prior to ruling on the proposed consent order.

I appreciate any consideration which may be afforded this submission.

Respectfully,

Kermit S. Dorough, Jr.

KSDjr/ag

cc: Joseph W. Stubbs, M.D. (w/out enclosures)
Corleen J. Thompson, Ph.D. (w/out enclosures)