IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

FEDERAL TRADE COMMISSION and THE STATE OF GEORGIA,	)	
Plaintiffs	)	
v.	)	No. 1:11-cv-58 (WLS)
PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL INC., and HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY,	)	**REDACTED PUBLIC VERSION**
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF
FEDERAL TRADE COMMISSION'S MOTIONS FOR
TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Federal Trade Commission (the "FTC" or "Commission")[1] hereby renews its motions for temporary and preliminary relief following the U.S. Supreme Court's unanimous ruling that the Authority's acquisition of Palmyra (the "Transaction") is not shielded by state-action immunity.[2] As the Transaction is now consummated,[3] we request that this Court enjoin any further integration of the acquired hospital's assets and operations with those of Phoebe Putney, and preserve the status quo at Phoebe North (formerly Palmyra), pending the outcome of the Commission's ongoing expedited administrative proceeding. That proceeding, which is well underway, allows for full fact and expert discovery and up to 210 hours of live testimony at a plenary trial beginning on August 5, 2013,[4] upon which an ultimate decision on antitrust liability and remedy will be made, subject to review by a U.S. Court of Appeals. Relief from this Court, however, is the *only* means to prevent immediate and potentially irreversible consumer harm and to preserve the Commission's ability to successfully restore hospital competition to the Albany, Georgia area if the Transaction ultimately is deemed unlawful. Phoebe Putney's CEO Joel Wernick stated publicly following announcement of the Supreme Court's decision: **"We will proceed with the plans we have until someone tells us we cannot. No one has told us that yet . . . ."**[5] It is incumbent on this Court to do just that.

By its executives' own admission, the Transaction represented Phoebe Putney's effort to

[1] This action is brought pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), which authorizes the FTC to seek, and empowers this Court to grant, preliminary relief pending the completion of the administrative proceeding challenging the proposed acquisition. 15 U.S.C. § 53(b). The FTC has filed a separate administrative complaint under Sections 7 and 11 of the Clayton Act. 15 U.S.C. §§ 18, 21. All terms used in this brief have the same meaning as in previous Plaintiff's briefs and in the Complaint, unless otherwise indicated.

[2] *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1017 (2013).

[3] Br. for Pet'r, *FTC v. Phoebe Putney Health Sys., Inc.*, No. 11-1160, 2012 WL 3613363, at *16 (Aug. 20, 2012).

[4] *See* PX0351 (Revised Scheduling Order, *In re Phoebe Putney Health Sys., Inc.*, Docket No. 9348 (Apr. 4, 2013)).

[5] PX0345 at 2 (emphasis added).

"get the rivalry [with Palmyra] behind us,"[6] and, in turn, created a virtual monopoly for inpatient general acute care services sold to commercial health plans and their customers in Albany and its surrounding area. Phoebe Putney is now the sole provider of hospital services in Albany and wields an estimated 86% market share in the broadly-drawn, six-county relevant geographic market.[7] Fully conscious that the Transaction was anticompetitive and would run afoul of federal antitrust laws, Defendants engaged in extensive efforts to avoid antitrust enforcement and invoke state-action immunity. In the wake of the Supreme Court's decision, Defendants can no longer shield this anticompetitive acquisition from challenge.

Phoebe Putney and Palmyra were arch rivals. They battled fiercely for inclusion in health plan networks and went to great lengths to increase their appeal to patients. While Palmyra sought to maintain a price advantage relative to Phoebe Putney in health plan contract negotiations, Phoebe conditioned discounted rates on health plans' agreement to exclude Palmyra from their preferred provider networks. Palmyra even filed a private antitrust lawsuit challenging Phoebe Putney's alleged market power abuses, including its exclusive contracting and repeated efforts to block Palmyra's expansion into new hospital services, such as obstetrics. This competition, although fierce, brought extensive benefits to the local community in the way of prices, quality of care, and amenities. By eliminating the intense, storied rivalry between Phoebe Putney and Palmyra, the Transaction not only results in substantial increases in healthcare costs for local residents, many of whom are already struggling to keep up with rising medical expenses, but will also stifle beneficial quality and service improvements. In short, prices will rise, and quality and service will suffer.

Defendants have offered no cognizable efficiencies or other justifications for the

[6] PX0321 at 1.

[7] PX0418 (Garmon Decl.) at ¶ 33 (based on pre-merger shares).

Transaction that can come close to overcoming its significant harm to competition. Given Georgia's strict Certificate-of-Need ("CON") requirements and a history of fierce CON oppositions by Phoebe Putney, new hospital entry or expansion is highly unlikely to replace the competition eliminated by the Transaction.

The discrete issue now before this Court is whether preliminary injunctive relief is authorized under Section 13(b) of the FTC Act. Section 13(b) authorizes such relief where Plaintiff raises "serious, substantial" questions going to the merits. This is surely true in this clear case of a merger-to-monopoly, accompanied by abundant direct evidence of pre-merger competition, and of the likely harm that will flow from its elimination. Healthcare costs in Albany already far exceed state averages,[8] and the community – local employers seeking to provide insurance coverage to their employees, as well as individual patients requiring hospital services – can hardly afford to shoulder additional price increases.

Defendants closed the Transaction at their own peril, even after the Eleventh Circuit's finding on the alleged facts that the Transaction would substantially lessen competition, if not create a monopoly.[9] Following the Supreme Court's rejection of state-action immunity in this case, Phoebe Putney lacks incentive to continue investment in Phoebe North as a general acute care hospital. The appointment of a monitor, chosen by the Defendants and approved by the Court and the FTC, is critical in order to protect consumers now and through the Commission's administrative proceeding, and to preserve the opportunity for full, effective relief – including the divestiture of Phoebe North, if warranted. Accordingly, Plaintiff respectfully requests that

[8] *See, e.g.*, PX0330 at 4.

[9] *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011). On July 19, 2012, the FTC sent Defendants a letter requesting: (1) the Authority defer any lease under which Phoebe Putney would control Palmyra's assets, operations, or services; and (2) Phoebe Putney and the Authority enter into a voluntary agreement to prevent further integration at Palmyra. PX0352. Defendants declined the request on July 30, 2012. PX0353.

this Court issue the attached TRO and PI orders at its soonest opportunity, on the basis of the record evidence previously submitted and additional materials submitted herewith.

STATEMENT OF FACTS

I. The Transaction

Opened in 1911, PPMH is Phoebe Putney's flagship 443-bed hospital located in Albany, Georgia.[10] Prior to the Transaction, HCA owned and operated Palmyra, a 248-bed acute care hospital located approximately two miles from PPMH. Palmyra was built in 1971, in response to requests by local physicians and community leaders to broaden the healthcare options available to Albany-area residents.

Phoebe Putney conceived, structured, and negotiated the Transaction in service of its goals to [11] while attempting to escape the application of federal antitrust law. Two important events occurred in 2010: (1) the Eleventh Circuit reinstated Palmyra's antitrust suit accusing Phoebe Putney of using its monopoly power in obstetrics, neonatal, and cardiovascular care to foreclose competition;[12] and (2) Mr. Wernick authorized Robert Baudino, Jr., a consultant and attorney engaged by PPHS, to begin discussions with HCA regarding the possible acquisition of Palmyra by Phoebe Putney.[13] HCA would accept an offer only if there was "[n]o risk of antitrust enforcement."[14] Adhering to the "Baudino Method,"[15]

[10] Phoebe Putney's reach extends beyond Dougherty County. It also operates acute care hospitals in the Georgia cities of Sylvester, Americus, and Cuthbert, as well as numerous outpatient centers throughout southwest Georgia.

[11] PX0021 at 1.

[12] *See* PX0232 (*Palmyra Park Hosp. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291 (11th Cir. 2010)).

[13] PPHS agreed to pay Mr. Baudino's company, the Sovereign Group, a fee of 1% of the nearly $200 million transaction value, contingent on a successful purchase of Palmyra. PX0057.

[14] PX0058 at 2.

PPHS and HCA negotiated and drafted an Asset Purchase Agreement ("APA") through which (1) the Authority would acquire Palmyra for $195 million; (2) PPHS would guarantee the $195 million purchase price or pay a $35 million break-up fee; and (3) Palmyra would drop its antitrust suit against Phoebe Putney.[16] PPHS also drafted a 17-page Management Agreement giving it operational control of Palmyra.[17] On December 21, 2010, the Authority approved the APA and draft Management Agreement.

II. Procedural History

On April 20, 2011, the FTC and the State of Georgia filed a complaint for temporary restraining order and preliminary injunction in this Court, alleging that the Transaction would substantially reduce competition and allow Phoebe Putney to raise prices in the relevant market in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and, if consummated, Section 7 of the Clayton Act, 15 U.S.C. § 18. Defendants moved to dismiss on grounds of state-action immunity.[18] Following a hearing on June 13, 2011, in which this Court heard argument on Plaintiffs' antitrust allegations as well as Defendants' state-action defense, this Court granted Defendants' motion to dismiss, finding that state-action immunity shielded the Transaction from federal antitrust scrutiny. Plaintiff FTC appealed, and the Eleventh Circuit granted an injunction pending appeal.

On April 20, 2011, the Commission also issued an administrative complaint citing reason to believe the Transaction violates antitrust law; a plenary trial was scheduled to begin on

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[15] Created by Mr. Baudino, PPHS and HCA would "structure" the Acquisition using the Authority as a strawman. PX0207 at 4-9 (Baudino Letter to HCA entitled "Avoidance Of Antitrust Issues Through State Action Immunity"); PX0223 at 2. PPHS would acquire Palmyra through the Authority in the belief that doing so would result in an exemption from the Hart-Scott-Rodino Act and attachment of the state-action immunity. *Id*.

[16] *See* PX0008 at 30 (§ 2.5), 80-81 (§ 12.21), 64 (§ 10.1), 106-119 (Exs. G-I); PX0404 at 55 (Wernick Tr. 211:4-17).

[17] *See* PX0009.

[18] For purposes of their motion, Defendants did not contest Plaintiffs' claims that the Transaction would tend to create, if not actually create, a monopoly in the relevant market.

September 19, 2011. On July 1, 2011, Defendants filed an unopposed motion to stay the administrative proceeding pending the outcome of federal court appeals on the state-action immunity issue. The Commission stayed the proceeding on July 15, 2011.

On December 9, 2011, the Eleventh Circuit affirmed this Court's order granting Defendants' motion to dismiss and dissolved its injunction pending appeal.[19] The Eleventh Circuit agreed with Plaintiff that "on the facts alleged, the joint operation of [PPMH] and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly,"[20] but found that state-action immunity applied to the Transaction. Defendants consummated the Transaction on December 15, 2011.[21] Plaintiff FTC petitioned the U.S. Supreme Court for certiorari, which was granted on June 25, 2012.[22]

On February 19, 2013, in a unanimous opinion authored by Justice Sotomayor, the Supreme Court held that state-action immunity did not immunize the Transaction from antitrust liability.[23] The Supreme Court also noted that, "[t]he case is not moot . . . because the District Court on remand could enjoin respondents from taking actions that would disturb the status quo and impede a final remedial decree."[24]

On March 14, 2013, the Commission lifted the stay of the administrative proceeding, noting time was of the essence given consummation of the Transaction and an antitrust challenge long-delayed. Discovery in that proceeding is ongoing, with opening statements scheduled for August 5, 2013.

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[19] *See generally Phoebe Putney Health Sys.*, 663 F.3d 1369.

[20] *Id.* at 1375.

[21] Br. for Pet'r, *Phoebe Putney Health Sys.*, 2012 WL 3613363, at *16.

[22] *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 28 (2012).

[23] *Phoebe Putney Health Sys.*, 133 S. Ct. at 1017.

[24] *Id.* at 1009 n.3 (citing *Knox v. Serv. Employees*, 132 S. Ct. 2277, 2287 (2012); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008) (Brown, J.)).

ARGUMENT

The FTC Act makes the district court "a vital 'enforcement arm' of the statute."[25] The standard requires this Court to assess two independent factors: (1) the Commission's likelihood of success on the merits under Section 7 of the Clayton Act; and (2) the equities.[26] Congress enacted Section 13(b) to preserve the Commission's ability to order effective relief after completion of the administrative proceeding.[27] Accordingly, the "only purpose of a proceeding under [Section 13(b)] is to preserve the status quo until [the] FTC can perform its function."[28] Plaintiff does not need to present "detailed evidence of anticompetitive effect" in the proceeding before this Court, nor is it required to "prove the merits" of its underlying antitrust claim.[29] Rather, Plaintiff "just has to raise substantial doubts about a transaction."[30] In this merger-to-monopoly case, substantial doubts are obvious from the outset and reinforced by direct evidence of beneficial pre-merger competition, especially given the Eleventh Circuit's acknowledgement of competitive concerns.[31]

I. The FTC Is Likely to Succeed on the Merits of Its Section 7 Challenge.

To demonstrate a likelihood of success on the merits, Plaintiff need only raise "'questions

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[25] *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 720 (5th Cir. 1982) (quoting *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 19-20 (1974)).

[26] *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1374 n.9 (11th Cir. 2011) (citing 15 U.S.C. § 53(b)); *FTC v. ProMedica Health Sys.*, No. 3:11-CV-47, 2011 WL 1219281, at *53 (N.D. Ohio Mar. 29, 2011).

[27] H.R. Rep. No. 93-624, at 31 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2523; *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring) ("[T]he FTC – an expert agency acting on the public's behalf – should be able to obtain injunctive relief more readily than private parties . . . .").

[28] *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976); *accord Whole Foods*, 548 F.3d at 1035 (Brown, J.), 1050 (Tatel, J., concurring).

[29] *Whole Foods*, 548 F.3d at 1035; *accord FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991).

[30] *Whole Foods*, 548 F.3d at 1036. *See also Univ. Health*, 938 F.2d at 1218 ("[T]he government must show a reasonable probability that the proposed transaction would substantially lessen competition in the future."); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 49 n.6 (D.D.C. 2011) (noting "a lesser showing is required to obtain preliminary relief in an FTC preliminary injunction case, as opposed to a full merits trial[.]").

[31] *Phoebe Putney Health Sys.*, 663 F.3d 1369 at 1375.

going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.'"[32] Courts assess whether "serious, substantial" questions have been raised within the same framework that will be used in the administrative proceeding to judge the merits of the Section 7 claim.[33] To prevail at the merits stage, the Commission must demonstrate by a preponderance of the evidence that the acquisition's effect "*may be* substantially to lessen competition, or to tend to create a monopoly."[34] Congress used the words "may be" because Section 7 was designed to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints . . . ."[35] Section 7 deals in "probabilities" and does not require certainty, or even a high probability, that an acquisition substantially lessens competition.[36] Moreover, a transaction is presumed to substantially lessen competition if the FTC demonstrates that the acquisition will lead to "undue concentration" in any market, let alone the extraordinary market concentration created here by the Transaction.[37] The burden then shifts to the defendant to rebut the presumption with evidence of offsetting procompetitive benefits.[38]

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[32] *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1074 (N.D. Ill. 2012) (quoting *Univ. Health*, 938 F.2d at 1218); *see also ProMedica*, 2011 WL 1219281, at *53. The most recent court to evaluate a hospital merger in a 13(b) proceeding concluded that the FTC need only raise a question that is serious, substantial, difficult *or* doubtful. *OSF Healthcare*, 852 F. Supp. 2d at 1074 n.5 (citing *Heinz*, 246 F.3d at 727; *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1164 (9th Cir. 1984)).

[33] *See OSF Healthcare*, 852 F. Supp. 2d at 1074; *ProMedica*, 2011 WL 1219281, at *53.

[34] 15 U.S.C. § 18 (emphasis added).

[35] *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 n.39 (1962) (discussing legislative history). *See also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963).

[36] *Brown Shoe*, 370 U.S. at 323; *OSF Healthcare*, 852 F. Supp. 2d at 1073.

[37] *Phila. Nat'l Bank*, 374 U.S. at 363.

[38] *Univ. Health*, 938 F.2d at 1218-19 (collecting cases); *OSF Healthcare*, 852 F. Supp. 2d at 1074-75; *ProMedica*, 2011 WL 1219281, at *53.

A. The Transaction Eliminates Significant Price and Quality Competition.

Documents from Defendants' files and testimony from Defendants' executives, as well as the affidavits and documents of health plans, employers, and other third parties, demonstrate the unique and significant pre-merger pricing constraints Phoebe Putney and Palmyra exerted on one another. The Transaction eliminates these constraints, enabling Phoebe Putney to raise rates, and dampens Phoebe Putney's incentives to maintain or improve its clinical quality and service.

1. The Transaction Has and Will Continue to Empower Phoebe Putney to Raise Prices, and the Community Will Bear the Costs.

For years, Phoebe Putney and Palmyra battled each other on prices, which kept healthcare costs lower than absent this vigorous competition. Phoebe Putney employed a longstanding contracting strategy in which it offered substantially more attractive reimbursement rates to commercial health plans – including the largest health plan in Georgia, Blue Cross Blue Shield of Georgia ("BCBS of Georgia")[39] – that were willing to enter into an exclusive in-network relationship with PPMH but not Palmyra.[40] By offering more substantial discounts to health plans in exchange for exclusivity, Phoebe Putney increased patient volume at the direct expense of Palmyra.[41] The health plans' customers – employers and individual insureds – benefitted from the lower rates, which were the product of competition with Palmyra.

In an attempt to retain volume despite being out of network with BCBS of Georgia and other health plans that contracted exclusively with Phoebe Putney, Palmyra had a general policy of writing off any difference in a patient's co-pay between an in-network and out-of-network

[39] PX0416 at ¶ 3.

[40] PX0007 at 2 (Compl., *Palmyra Park Hosp. v. Phoebe Putney Mem'l Hosp.*, No.1:08-CV-102 (M.D. Ga. Jul. 3, 2008)); PX0416 at ¶ 10

[41] PX0038 at 2; PX0048; PX0053 at 2-3; PX0401 at 27 (Rader Tr. 99:19-101:8); PX0418 (Garmon Decl.) at ¶ 43.

hospital.[42] For those health plans whose networks included both Phoebe Putney and Palmyra, Palmyra was routinely the lower-priced hospital.[43]

Phoebe Putney's executives relished the idea of eliminating this direct competition and taking advantage of increased bargaining power as a result. Indeed, one rationale for the Transaction cited in a high-level Phoebe Putney deal analysis was to

[44] More negotiation power for Phoebe Putney means, quite simply, the ability to raise rates and maintain them at higher levels after the Transaction.[45]

According to multiple health plans, the Transaction makes Phoebe Putney an absolute "must have" hospital system, leading to higher healthcare costs.[46] Rate increases from the Transaction ultimately will be shouldered by local employers and their employees.[47] A significant percentage of the commercial health plan membership in the Albany area is self-insured.[48] Self-insured employers rely on health plans to negotiate rates and provide administrative support, while directly paying the full cost of their employees' health care claims.[49] As a result, self-insured employers and employees immediately and directly bear the full burden of higher reimbursement rates, including higher premiums, co-pays, and out-of-

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[42] PX0401 at 14-15, 21 (Rader Tr. 49:25-51:8, 74:9-75:6).

[43] *See* PX0412 at ¶ 16; PX0413 at ¶ 8; PX0415 at ¶ 15; PX0416 at ¶ 13.

[44] PX0021 at 1.

[45] PX0418 (Garmon Decl.) at ¶¶ 10, 35-38.

[46] PX0412 at ¶¶ 17-18; PX0413 at ¶ 13; PX0415 at ¶ 18.

[47] PX0405 at ¶ 7; PX0406 at ¶ 7; PX0417 at ¶ 7.

[48] *See, e.g.*, PX0413 at ¶ 4; PX0416 at ¶ 3; PX0412 at ¶ 5.

[49] *See, e.g.*, PX0421 at ¶ 5.

pocket costs.[50] Fully-insured employers are also harmed by higher rates resulting from the Transaction because health plans pass on at least a portion of hospital rate increases to their customers through premium increases and administrative fees.[51] As a result of increased healthcare costs, employers may choose to reduce or relocate production, leading to reduced employment in the area.[52]

The non-profit status of Phoebe Putney is immaterial to its ability and incentive to extract higher rates from health plans. According to health plans and third-party hospitals, as well as empirical economic research, non-profit hospitals exploit their bargaining power by raising prices just like for-profit hospitals do.[53] Indeed, Phoebe Putney is "particularly aggressive" in seeking the highest rates possible.[54] PPMH's cash and cash equivalents as set forth in its audited financials for 2012 are in excess of $70 million.[55]

Despite Phoebe Putney's defensive and offensive strategies, Palmyra grew its market share in the years preceding the Transaction. Its increased inpatient volume came directly at the expense of PPMH, confirming other evidence that Palmyra was PPMH's closest substitute for patients.[56] Palmyra's then-CEO, Mark Rader, testified that Palmyra's market share increased

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[50] *See, e.g.*, PX0415 at ¶ 21; PX0416 at ¶ 21; PX0421 at ¶ 5.

[51] PX0416 at ¶ 21; PX0419 at ¶ 6; PX0420 at ¶ 7; PX0417 at ¶ 7; PX0405 at ¶ 7.

[52] PX0418 (Garmon Decl.) at ¶ 11; PX0330 at 6 (noting that two employers closed Albany production facilities in part due to high healthcare costs).

[53] *See, e.g.*, PX0413 at ¶ 5; PX0415 at ¶ 19; PX0416 at ¶ 11; PX0410 at ¶ 8; PX0409 at ¶ 6. *See generally* PX0350 (Br. of *Amici Curiae* Economics Professors in Supp. of Pet'r, *FTC v. Phoebe Putney Health System, Inc.* (No. 11-1160)).

[54] PX0415 at ¶ 19.

[55] PX0346 at 5. This amount is even after Phoebe Putney paid $195 million in cash for Palmyra. PX0013 at 39.

[56] PX0418 (Garmon Decl.) at ¶ 39; PX0203 at 6; PX0401 at 12-13 (Rader Tr. 41:12-42:6); PX0068 at 3.

through 2010, while PPMH's share declined by a proportionate amount.[57] And Phoebe Putney's executives took note of these market share losses. In fact, Phoebe Putney's CEO, Mr. Wernick, projected "stunted future market share accumulation" if Phoebe Putney failed to buy Palmyra.[58] In a fact sheet prepared by Phoebe Putney, the Authority stated on December 21, 2010:

> With years of rivalry, how did this happen?... Typical of normal marketplace behavior, for each of the two hospitals to be successful they had to compete with each other for business. There was a drive for each to match services provided by the other… So the time has come for the rivalry to become a part of history.[59]

Although Palmyra did not offer obstetrics at the time of the Transaction, it had applied for a CON with Georgia's Department of Community Health ("DCH") to begin offering those services.[60] Both Palmyra and Phoebe Putney knew that the introduction of obstetrics at Palmyra would lead to lower obstetrics volumes at PPMH.[61] Palmyra estimated that opening its obstetrics unit would take births per year away from PPMH.[62] Likewise, Phoebe Putney determined that, if Palmyra added obstetrics services,

[63] Cognizant of Palmyra's competitive threat,[64] Phoebe Putney repeatedly challenged Palmyra's efforts to obtain a CON for obstetrics services.[65] Absent

[57] PX0401 at 12-13 (Rader Tr. 41:12-42:6).
[58] PX0044 at 25.
[59] PX0008 at 8.
[60] PX0211 at 4.
[61] PX0418 (Garmon Decl.) at ¶ 39.
[62] PX0401 at 18 (Rader Tr. 62:8-20).
[63] PX0048 at 1.
[64] *See* PX0022 at 2

[65] Palmyra was initially granted a CON to build an obstetrics department, after which Phoebe Putney appealed the decision with the DCH twice and lost. *See* PX0218 at 14 (granting Palmyra's initial CON application on January 9, 2009); PX0211 at 37 (affirming the DCH's decision on October 18, 2009); PX0311 (discussing the DCH's December 18, 2009 Final Order). Undeterred, Phoebe Putney then sued in state court to block Palmyra from going forward with its plans. *See* PX0011 (Superior Court of Sumter County Order, June 9, 2010); PX0102 (Superior Court of Dougherty County Order, June 22, 2010). Although initially successful in the lower courts, the Georgia

the Transaction, Palmyra would have used its CON to build an obstetrics department, thus becoming a direct competitor and an attractive alternative to Phoebe Putney for those services.

2. The Transaction Has and Will Reduce the Quality and Breadth of Services Available in the Albany Area.

If not for the Transaction, Phoebe Putney and Palmyra would continue to be arch rivals with diverse competitive offerings in the market for general acute care hospital services. Health plans perceived little pre-merger quality difference between the two hospitals.[66] To the extent that Phoebe Putney argues the Transaction will improve quality of care at Phoebe North, this is highly unlikely. A Leapfrog Group study announced in November 2012 gave PPMH an "F" letter grade, ranking it among the nation's 25 worst hospitals in terms of preventable medical errors, injuries, accidents, and infections; the same study awarded Palmyra a "B" letter grade.[67]

Competition between Phoebe Putney and Palmyra also had spurred the hospitals to offer additional services, yet these were terminated as a result of the Transaction.[68] For example, Palmyra opened a specially-designed pediatrics unit, but closed it after its nurses resigned following announcement of the Transaction.[69] Palmyra was also in the process of redesigning its mammography unit to be more competitive with PPMH's women's health unit, but this work also was halted.[70]

Pre-merger competition between Phoebe Putney and Palmyra fostered other benefits for

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Court of Appeals affirmed the CON awarded to Palmyra and overturned the lower courts' rulings. *Palmyra Park Hosp., Inc. v. Phoebe Sumter Med. Ctr.*, 714 S.E.2d 71, 81 (Ga. Ct. App. 2011). As a last attempt to prevent Palmyra from entering with its obstetrics services, Phoebe Putney filed a petition for writ of certiorari with the Georgia Supreme Court, which was denied on November 7, 2011. *Phoebe Sumter Med. Ctr. v. Palmyra Park Hosp., Inc.*, No. S11C1753, 2011 Ga. Lexis 910 (Ga. Nov. 7, 2011).

[66] *See* PX0415 at ¶ 9; PX0412 at ¶ 11.

[67] PX0348; PX0349; *see also* PX0347.

[68] PX0418 (Garmon Decl.) at ¶¶ 50-51.

[69] PX0401 at 24 (Rader Tr. 89:14-23).

[70] PX0401 at 25 (Rader Tr. 91:10-21).

Albany-area residents, as well. For example, in response to Palmyra advertising its real-time emergency room wait times on its website and electronic billboards, Phoebe Putney executives sought to improve their emergency room services.[71] Additionally, after Palmyra successfully fended off opposition by Phoebe Putney and was granted a CON to build a new obstetrics department, Phoebe Putney determined to increase the availability of private rooms for its obstetrics patients.[72] These and other quality-related benefits are now eliminated by the Transaction, as competitive incentives to maintain and improve quality are reduced substantially.

B. The Transaction Is Presumptively Unlawful in the Relevant Market.

As described above, direct evidence shows that the Transaction will eliminate vigorous, beneficial competition between Phoebe Putney and Palmyra. To help analyze a transaction's competitive effects, courts also rely on defined relevant markets, which have two components: a relevant product or service market, and a relevant geographic market.[73] Market definition is not an end in itself but rather is intended to illuminate the likely effects of a merger or acquisition.[74] The boundaries of a relevant product or service market are determined by "reasonable interchangeability of use" and "cross-elasticity of demand"; that is, "courts look at whether two products can be used for the same purpose, and, if so, whether and to what extent purchasers are willing to substitute one for the other."[75] A related approach is to consider whether a hypothetical monopolist could increase prices profitably by a "small but significant" amount, for

[71] PX0418 (Garmon Decl.) at ¶ 48; PX0401 at 13, 30-31 (Rader Tr. 44:2-45:21, 113:10-115:8); PX0029 at 1.

[72] PX0418 (Garmon Decl.) at ¶¶ 49-50.

[73] *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009).

[74] *H & R Block*, 833 F. Supp. at 84-85 n.35 (discussing treatises, case law and Merger Guidelines indicating that market definition is not necessary to analysis of competitive effects or market power). *See also* PX0326 at 11-13 (Merger Guidelines § 4.1.1 (the purpose of defining the market and measuring market shares is to "illuminate the evaluation of competitive effects.")).

[75] *H & R Block*, 833 F. Supp. 2d at 50-51 (citations and internal quotation marks omitted).

a meaningful period of time, over a given set of substitutable products or services; if so, the set of services is a relevant service market.[76]

Under this analysis, each hospital service offered by PPMH and Palmyra could be analyzed as a separate market, because they are not functionally interchangeable. For example, knee replacement surgeries and gall bladder removals are not substitutes for each other. Because it would be burdensome to analyze separately the hundreds of services offered by hospitals, courts instead rely on "cluster markets," in which many different services are grouped and analyzed together for competitive effects.[77] Services are properly included in a cluster market only if the competitive conditions for each are similar, such that the competitive analysis is not distorted.[78]

The relevant market here is primary and secondary inpatient general acute care hospital services sold to commercial health plans.[79] This "cluster market"[80] does not include services that Palmyra currently does not perform (typically the most complex "tertiary" and "quaternary" services),[81] nor does it include outpatient services, which are offered by a somewhat different set of providers under different competitive conditions.[82]

The relevant geographic market – the local area affected by the Transaction – is no

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[76] *See* PX0326 at 11-13 (Merger Guidelines § 4.1.1). Although not binding, courts often rely on the Merger Guidelines as persuasive authority. *See, e.g., H & R Block*, 833 F. Supp. 2d at 52 n.10; *ProMedica*, 2011 WL 1219281, at *54 (collecting cases).

[77] *ProMedica*, 2011 WL 1219281, at *54; *OSF Healthcare*, 852 F. Supp. 2d at 1075-76.

[78] For example, services offered by a different set of market participants or with different entry conditions should not be included within the same cluster market because analyzing such services together could lead to incorrect or misleading results. *ProMedica*, 2011 WL 1219281, at *54-55; *OSF Healthcare*, 852 F. Supp. 2d at 1076.

[79] PX0418 (Garmon Decl.) at ¶¶ 17-22. The market is also defined to include obstetrics, for which Palmyra has obtained a CON, and to exclude interventional cardiology as Palmyra does not offer that service. *See id.*

[80] Cluster markets of this type are consistently recognized by courts reviewing hospital merger cases. *See, e.g., Univ. Health*, 938 F.2d at 1210-11; *United States v. Rockford Mem'l Hosp.*, 898 F.2d 1278, 1284 (7th Cir. 1990); *In re Evanston Nw. Healthcare*, No. 9315, 2007 WL 2286195, at *45-47 (FTC Aug. 6, 2007) (collecting cases).

[81] PX0418 (Garmon Decl.) at ¶¶ 19, 21-22; *see also ProMedica*, 2011 WL 1219281, at *9.

[82] PX0418 (Garmon Decl.) at ¶ 20; *see also ProMedica*, 2011 WL 1219281, at *9. In addition, substitution to outpatient services is driven by clinical concerns rather than price differences. *Id.*

broader than the six-county region consisting of Dougherty, Terrell, Lee, Worth, Baker, and Mitchell counties.[83] The conventional test for assessing the geographic market's bounds is whether providers of the relevant services can increase prices in an area without triggering a price-constraining outflow of customers to providers in other areas.[84] The six-county region is an appropriate geographic market because it corresponds to "commercial realities," *i.e.*, the way that the competitors and customers themselves analyze the market. Phoebe Putney focuses its competitive efforts in the Albany area, having sought to exclude Palmyra from health-plan provider networks, but not seeking to exclude others.[85] Moreover, according to health plans, third-party hospitals, local employers, and the parties themselves, residents in the Albany area strongly prefer PPMH and Palmyra for general acute care services and generally will not travel to more distant medical facilities for such services, even in the face of significant price increases.[86] The nearest independent hospitals, located over 30 miles from Albany, are small community hospitals that do not compete meaningfully with the Albany hospitals.[87] Health plans and local employers have testified without exception that their networks must include PPMH or Palmyra, or both, in order to be commercially viable for Albany-area employers and other groups.[88] All of this evidence demonstrates Albany is the healthcare nucleus of a tightly circumscribed relevant geographic market.

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[83] PX0418 (Garmon Decl.) at ¶¶ 24-30.

[84] PX0326 at 16-17 (Merger Guidelines § 4.2); *see generally Phila. Nat'l Bank*, 374 U.S. at 358-62.

[85] *See* Section I.A.1., *infra*.

[86] *See, e.g.*, PX0407 at ¶¶ 4-5; PX0406 at ¶¶ 2, 6; PX0405 at ¶ 6; PX0415 at ¶ 10; PX0202; PX0416 at ¶¶ 7-9.

[87] PX0407 at ¶ 5; PX0409 at ¶ 4; PX0410 at ¶ 6.

[88] For health plans, *see* PX0412 at ¶ 9; PX0413 at ¶ 7; PX0415 at ¶ 10; PX0416 at ¶ 6; PX0417 at ¶ 5; PX0420 at ¶ 3. For employers, *see* PX0405 at ¶ 5; PX0419

Under established precedent, a reviewing court must enjoin an acquisition resulting in a significant increase in concentration absent a strong showing by the defendant that anticompetitive effects are unlikely.[89] The "most prominent method" of measuring market concentration is using the post-acquisition Herfindahl-Hirschman Index ("HHI").[90] Based on pre-merger commercial-patient discharge data, the Transaction gave Phoebe Putney a market share of 86%.[91] In the seminal merger case *Philadelphia National Bank*, the Supreme Court found that a post-merger market share of 30% (*less than half* of the combined market share here) threatened undue concentration, thus establishing a presumption of anticompetitive effect.[92] And under the *Merger Guidelines*, an acquisition that increases the HHI by over 200 points in a highly-concentrated market (*i.e.*, where the HHI exceeds 2,500) is presumed likely to enhance market power.[93] Here, the Transaction increases the HHI by 1,675 points, bringing the total HHI to 7,453 and creating an extraordinarily strong presumption of harm.[94]

II. Defendants Cannot Rebut Plaintiff's *Prima Facie* Case.

The strength of Plaintiff's *prima facie* case here creates an insurmountable burden for Defendants, particularly at the preliminary injunction stage. Defendants have not, and cannot, come close to demonstrating the requisite procompetitive effects such as new hospital entry or expansion in the relevant geographic market, or efficiencies from the Transaction that would be

[89] *United States v. Dairy Farmers of Am.*, 426 F.3d 850, 858 (6th Cir. 2005) (citing *Phila. Nat'l Bank*, 374 U.S. at 363); *Heinz*, 246 F.3d at 720.

[90] *Univ. Health*, 938 F.2d at 1211 n.12. The HHI is the sum of the squares of each firm's market share. *Id. See also* PX0326 at 21-22 (Merger Guidelines § 5.3).

[91] *See* PX0418 (Garmon Decl.) at ¶ 33 and Table 1.

[92] 374 U.S. at 364.

[93] PX0326 at 21-22 (Merger Guidelines § 5.3).

[94] PX0418 (Garmon Decl.) at ¶ 34 and Table 1. By comparison, in *University Health*, the court found that the FTC had "clearly established a *prima facie* case of anticompetitive effect" when it proved that a merger of two nonprofit hospitals would have reduced the number of competitors from five to four and resulted in a combined share of about 43%, an increase in HHI of over 630, and a post-merger HHI of 3,200. 938 F.2d at 1211 n.12, 1218.

required to offset the overwhelming evidence condemning this Transaction. In fact, there is no evidence whatsoever to suggest entry by new competitors will occur in a timely manner, Palmyra's entry in 1971 being the last relevant example. There are significant barriers to entry due to the CON process and no evidence that any entity in southwest Georgia plans to open a hospital in the relevant market.[95]

No court ever has found that efficiencies rescue an otherwise unlawful transaction in a Section 13(b) proceeding.[96] Even at the merits trial, Defendants bear a heavy burden to "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."[97] Although they have asserted generally that it was cheaper to buy Palmyra than to build a new facility, Defendants have put forth no evidence of meaningful cost-saving synergies or improved quality of care. Any capacity constraints alleged by Phoebe Putney appear self-serving and illusory.[98] Rather, a stated goal of the Transaction was to

.[99]

[95] PX0418 (Garmon Decl.) at ¶¶ 52-55; PX0407 at ¶ 9

PX0410 at ¶ 9; PX0409 at ¶ 7.

[96] *ProMedica*, 2011 WL 1219281, at *57 (citing *Phila. Nat'l Bank*, 374 U.S. at 371); *see also FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").

[97] *H&R Block*, 833 F. Supp. 2d at 91 (quoting Merger Guidelines § 10 (internal quotation marks omitted)); *see also Univ. Health*, 938 F.2d at 1223 ("speculative, self-serving assertions" will not suffice); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1089-90 (D.D.C. 1997) (rejecting claimed efficiencies that were "unverified" and not supported by "credible evidence"); *see also* PX0326 at 32-34 (Merger Guidelines § 10).

[98] *See, e.g.*, PX0418 (Garmon Dec.) at ¶¶ 70-71.

[99] PX0021 at 1.

III. The Equities Weigh Heavily in Favor of a Preliminary Injunction.

Defendants cannot prevail based on the equities. Indeed, no court has ever denied relief in a Section 13(b) proceeding where the plaintiff has demonstrated a likelihood of success on the merits.[100] In weighing the equities, "public equities are paramount."[101] Private equities, on the other hand, "are not proper considerations for granting or withholding injunctive relief under section 13(b)."[102] The public interest in effective enforcement of the antitrust laws weighs strongly as a public equity in favor of Plaintiff.[103] Meanwhile, there are no valid equities weighing against a preliminary injunction. Defendants have asserted no significant efficiencies but, even if they had, "if the benefits of a merger are available after the trial on the merits, they do not constitute public equities weighing against a preliminary injunction."[104]

In the two most recent Section 13(b) proceedings involving hospital mergers – each with lower combined market shares than seen here – both federal courts concluded that the equities, particularly the public interest in effective enforcement of the antitrust laws, favored the plaintiffs, and therefore granted the FTC's requested relief.[105] The courts were particularly concerned with preserving the Commission's ability to order effective relief at the conclusion of the trial on the merits.[106] Allowing Phoebe Putney to continue integrating Palmyra into its system and/or starving Phoebe North of funding and support needed to flourish if later restored

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[100] *OSF Healthcare*, 852 F. Supp. 2d at 1094-95; *ProMedica*, 2011 WL 1219281, at *60.

[101] *ProMedica*, 2011 WL 1219281, at *60.

[102] *Id.* (quoting *Food Town*, 539 F.2d at 1346 (internal quotation marks omitted)); *see also OSF Healthcare*, 852 F. Supp. 2d at 1094 ("[T]he FTC need not show any irreparable harm, and the private equities alone cannot override the FTC's showing of likelihood of success." (quoting *Whole Foods*, 548 F.3d at 1034-35 (internal quotation marks omitted))).

[103] *Whole Foods*, 548 F.3d at 1035 (noting that the public interest in enforcement of the antitrust laws was "Congress's specific 'public equity consideration' in enacting [Section 13(b)]" (quoting *Heinz*, 246 F.3d at 726)).

[104] *ProMedica*, 2011 WL 1219281, at *60; *see also OSF Healthcare*, 852 F. Supp. 2d at 1095 (rejecting efficiencies that could be achieved after the merits trial as public equities weighing against a preliminary injunction).

[105] *OSF Healthcare*, 852 F. Supp. 2d at 1094-95; *ProMedica*, 2011 WL 1219281, at *60-61.

[106] *Id.*

to independence could cripple the effectiveness of a divestiture remedy, if one is ultimately warranted. These actions also would permit interim harm, as Phoebe Putney is now free to eliminate staff, relocate or terminate services, and renegotiate Palmyra's health plan contracts in order to raise prices.[107]

Phoebe Putney now has reduced incentives to continue investing in Palmyra given the Supreme Court's rejection of state-action immunity and the attendant likelihood of a potential divestiture.[108] The appointment of a monitor is necessary to ensure compliance with this Court's remedial order. A monitor is uniquely capable of preventing Phoebe Putney from taking actions, perhaps not specifically identified in the proposed order, which would, nonetheless, put Phoebe North in a weakened state, such that it will be more costly and difficult to be restored as a viable competitor through divestiture, if warranted.

CONCLUSION

Plaintiff has demonstrated a strong likelihood that the Transaction violates Section 7 of the Clayton Act by substantially reducing critically important hospital competition in Albany and the surrounding counties in Georgia, thereby significantly harming consumers. Plaintiff respectfully requests that the Court grant the attached proposed orders granting the injunctive relief necessary to preserve the status quo during the administrative proceeding, thereby ensuring the Commission's opportunity for an effective remedial decree.

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[107] *See ProMedica*, 2011 WL 1219281, at * 61 ("Another principal reason for preliminary relief is to prevent interim harm to consumers while the merits trial and any appeals are underway . . . .").

[108] *See In re Chi. Bridge & Iron Co.*, 138 FTC 1024, 1162 (2005) (recognizing that "common sense tells us that Respondents' self-interests will be best served by creating less rather than more competition from the divested assets" and "[e]xperience has shown . . . that a seller has the incentive to create a weak competitor with its divestiture package").

Respectfully submitted this 9th day of April, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2013, I filed the foregoing with the Clerk of Court via the CM/ECF system, which will automatically send electronic mail notification of such filing to the CM/ECF registered participants as identified on the Notice of Electronic Filing.

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