No. 11-12906-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,

Appellant

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA (1:11-CV-00058-WLS)

BRIEF OF APPELLANT FEDERAL TRADE COMMISSION

WILLARD K. TOM
General Counsel

***Of Counsel*:**

RICHARD A. FEINSTEIN
Director
NORMAN ARMSTRONG
Deputy Director
EDWARD D. HASSI
Chief Litigation Counsel
MATTHEW J. REILLY
Assistant Director
SARA Y. RAZI
Deputy Assistant Director
BUREAU OF COMPETITION

JOHN F. DALY
Deputy General Counsel for Litigation

LESLIE R. MELMAN
Assistant General Counsel for Litigation

IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-2375

July 27, 2011

Appeal No. 11-12906EE
FTC v. Phoebe Putney Health System, Inc.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 11th Cir. R. 26.1-1, 26.1-2, 26.1-3, and 27-1(a)(9), appellant Federal Trade Commission hereby submits the following list of interested persons:

Abyad, Imad D., Attorney, Office of General Counsel, FTC

Arington, Michele, Attorney, Office of General Counsel, FTC

Armstrong, Norman A., Deputy Director, Bureau of Competition, FTC

Arquit, Kevin J., Counsel for HCA and Palmyra Park

Arthaud, Victoria C., Attorney-Advisor, FTC

Baudino, Robert, Counsel for Phoebe Putney

Brennan, Robert M., Counsel for Phoebe Putney

Bondurant, Emmett J., Counsel for the Hospital Authority

Brill, Julie, Commissioner, FTC

Brennan, Robert M., Counsel for Phoebe Putney

Brock, Thomas H., Attorney, Bureau of Competition, FTC

Brown, Stuart R., Assistant U.S. Attorney, U.S. Attorney's Office, DOJ

Brownman, Joseph S., Attorney-Advisor, FTC

Brussser, Vadim M., Counsel for Phoebe Putney

Caplan, Michael A., Counsel for the Hospital Authority

Chappell, D. Michael, Chief Administrative Law Judge, FTC

Cohen, Nicholas F., Counsel for HCA and Palmyra Park

Cooper, James, Attorney-Advisor, FTC

Daly, John F., Deputy General Counsel for Litigation, FTC

Darrell, David J., Counsel for Phoebe Putney

Davis, Robert, Attorney-Advisor, FTC

Dimoscato, Maria M., Attorney, Bureau of Competition, FTC

Doherty, Ronan P., Counsel for the Hospital Authority

Egan, James, Counsel for Phoebe Putney

Federal Trade Commission, Plaintiff-Appellant

Feinstein, Richard A., Director, Bureau of Competition, FTC

Funk, Katherine I., Counsel for Phoebe Putney

Gluckow, Paul C., Counsel for HCA and Palmyra Park

Goldstein, Aimee H., Counsel for HCA and Palmyra Park

Hassi, Edward D., Attorney, Bureau of Competition, FTC

HCA Inc. (symbol: HCA), Defendant-Appellee

Herrick, Peter, Attorney, Bureau of Competition, FTC

Hollman, Hugh, Attorney-Advisor, FTC

Horoschak, Mark, Counsel for HCA and Palmyra Park

Hospital Authority of Albany-Dougherty County, Defendant-Appellee

Johnson, Teisha C., Counsel for Phoebe Putney

Jones, Veronica, Attorney, U.S. Attorney's Office, DOJ

Kades, Michael B., Attorney-Advisor, FTC

Kimmel, Lisa, Attorney-Advisor, FTC

Koslov, Tara Isa, Deputy Director, Office of Policy Planning, FTC

Kovacic, William E., Commissioner, FTC

Krainsky, Ella, Attorney-Advisor, FTC

Leibowitz, Jonathan, Chairman, FTC

Lowrey, Frank, M., Counsel for the Hospital Authority

Middleton, Karin A., Counsel for Phoebe Putney

Melman, Leslie R., Assistant General Counsel for Litigation, FTC

Nathan, Jon, Attorney-Advisor, FTC

Nelson, Megan K., Attorney, U.S. Attorney's Office, DOJ

Olens, Samuel S., Attorney General, State of Georgia

Palmyra Park Hospital Inc., Defendant-Appellee

Parker, John H. Jr., Counsel for Phoebe Putney

Peeler, Charles E., Counsel for HCA and Palmyra Park

Phoebe Putney Memorial Hospital, Inc., Defendant-Appellee

Phoebe Putney Health System, Inc., Defendant-Appellee

Phoebe North, Inc., Defendant-Appellee

Ramirez, Edith, Commissioner, FTC

Razi, Sara Y., Deputy Assistant Director, Bureau of Competition, FTC

Reilly, Matthew J., Assistant Director, Bureau of Competition, FTC

Reiter, Scott, Attorney, Bureau of Competition, FTC

Rie, Jennifer, Counsel for HCA and Palmyra Park

Rosen, Meryl G., Counsel for HCA and Palmyra Park

Rosch, J. Thomas, Commissioner, FTC

Schneirov, Elizabeth, Attorney-Advisor, FTC

Shonka, David C., Principal Deputy General Counsel, FTC

Slater, Abigail, Attorney-Advisor, FTC

Sockwell, W. Stephen, Attorney, Bureau of Competition, FTC

Sponseller, Alex F., Assistant Attorney General, State of Georgia

Stickler, Jonathan L., Counsel for Phoebe Putney

Su, Henry, Attorney-Advisor, FTC

Tabas, Matthew, Attorney, Bureau of Competition, FTC

Tom, Willard K., General Counsel, FTC

Tucker, Darren S., Attorney Advisor, FTC

Viswanath, Priya B., Attorney, Bureau of Competition, FTC

Van Voorhis, Lee K., Counsel for Phoebe Putney

Voss, Oscar M., Attorney, Bureau of Competition, FTC

Walker, Goldie V., Attorney, Bureau of Competition, FTC

Wilkin, Edgar B. Jr., Counsel for HCA and Palmyra Park

Winerman, Marc, Attorney-Advisor, FTC

Woodward, Mark, Attorney-Advisor, FTC

STATEMENT REGARDING ORAL ARGUMENT

The Federal Trade Commission requests the opportunity to present oral argument, as it may aid in the Court's resolution of this case. The legal issues presented in this case are complex, and the factual circumstances are unusual in the context of the state action doctrine – which formed the primary basis for the district court's ruling below. Accordingly, oral presentation of the issues and argument may be helpful to this Court's consideration of those issues.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (Cont'd) **PAGE**

TABLE OF CITATIONS

CASES **PAGE**

CASES (Cont'd) **PAGE**

CASES (Cont'd) **PAGE**

CASES (Cont'd) **PAGE**

CASES (Cont'd) **PAGE**

FEDERAL STATUTES **PAGE**

STATE STATUTES

STATE STATUTES (Cont'd) **PAGE**

RULES AND REGULATIONS

MISCELLANEOUS

GLOSSARY

For ease of reference, the following acronyms, abbreviations, and citation forms are used in this brief:

Doc.	Document Number As Noted on the District Court's Docket Sheet.
IH Tr.	Transcript of Federal Trade Commission's Investigational Hearing.
PX	Federal Trade Commission Exhibit.
*	Material filed under seal.

PRELIMINARY STATEMENT

This case concerns the efforts of Phoebe Putney Health System, Inc. (PPHS) – a private entity – to "[c]ontrol all hospital beds" in the Albany, Georgia, region. PX0021[*] at 1. PPHS controls Phoebe Putney Memorial Hospital, Inc. (PPMH), the largest hospital in Albany. Having failed in its prior efforts to contain competition from PPMH's rival, Palmyra Park Hospital, Inc. (Palmyra), *the only other hospital* in Albany-Dougherty County, PPHS determined that the only way to stem Palmyra's growing threat was to buy it. But, as the anticompetitive effects of such a merger-to-monopoly were not in doubt, and indeed were not contested below, PPHS used a state entity, the Hospital Authority of Albany-Dougherty County (Authority), as a strawman, attempting to engineer "attachment of the state action immunity to prevent an antitrust enforcement action." PX0207[*] at 5; Doc. 2[*] ¶38. Thus, after PPHS negotiated and finalized the terms of the purchase with Palmyra's parent corporation, HCA Inc. (HCA), PPHS had the Authority rubber-stamp the agreement "in exactly the form" agreed to by the private parties. If the deal is allowed to go forward, PPHS will exercise complete economic and operational control over the only two hospitals in Dougherty County.

Despite these facts, the district court denied the request of the Federal Trade Commission (Commission or FTC) for a statutory preliminary injunction in aid of its administrative proceedings to adjudicate the proposed transaction's legality. The

district court also dismissed the Commission's complaint on the pleadings, concluding that the transaction is immunized from antitrust scrutiny by the state action doctrine. But no such defense exists here. Indeed, if the Authority's role in this case is *not* the "gauzy cloak of state involvement" that the Supreme Court has repeatedly rejected as a basis for antitrust exemption, then it is difficult to conceive of what would be.

STATEMENT OF JURISDICTION

The Federal Trade Commission and the State of Georgia filed this action in the United States District Court for the Middle District of Georgia, Albany Division, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, for a preliminary injunction in aid of administrative proceedings before the Commission to determine if defendants-appellees' proposed hospital merger violates Section 7 of the Clayton Act, 15 U.S.C. § 18. (Doc. 2[*]; Doc. 5). *See* 15 U.S.C. § 21(a) (granting FTC authority to enforce Section 7 of the Clayton Act); *see also, e.g., FTC v. University Health, Inc.*, 938 F.2d 1206, 1214-17 & n.23 (11th Cir. 1991). The district court had jurisdiction under 15 U.S.C. §§ 26, 53(b), and 28 U.S.C. §§ 1331, 1337, 1345.

On June 27, 2011, the district court denied the plaintiffs' request for a preliminary injunction, and dismissed the case with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6). (Doc. 91). It entered its judgment on June 29, 2011. (Doc. 93). On June 28, 2011, the Commission filed a timely notice of appeal. (Doc. 92).

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 (over a final district court order); and under 28 U.S.C. § 1292(a)(1) (over a district court order denying an injunction).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in concluding that PPHS's proposed acquisition of its only rival hospital is immunized from antitrust scrutiny by the state action doctrine, when the private party conceived, structured, financed, and guaranteed that acquisition, and the state entity merely acquiesced to being the nominal acquirer.

2. If the proposed transaction is not immunized by the state action doctrine, whether the Commission is entitled to a statutory preliminary injunction in aid of its administrative proceedings, when the anticompetitive effects of the transaction are not in doubt, and were not contested below.

STATEMENT OF THE CASE

A. Nature of the Case; Course of Proceedings; Disposition Below

This is an action for a preliminary injunction in aid of an administrative agency's adjudication of the merits of a proposed hospital merger. The Commission filed its complaint on April 20, 2011, pursuant to 15 U.S.C. § 53(b), seeking to enjoin the defendants' proposed transaction during the pendency of Commission proceedings

to determine if the transaction violates Section 7 of the Clayton Act, 15 U.S.C. § 18.[1] The district court issued a temporary restraining order on April 21, 2011, enjoining the defendants from "proceeding or taking additional steps towards the consummation of the subject transaction." (Doc. 11).

On May 16, 2011, the defendants filed separate motions to dismiss or, in the case of the Authority and HCA/Palmyra, alternatively for summary judgment. Their primary argument was that their proposed transaction was immunized from the federal antitrust laws by operation of the state action doctrine. (Doc. 45; 46; 53). *See* Doc. 91, at 16 n.12 (district court disposing summarily of other grounds).

The district court heard the Commission's request for preliminary injunction and the defendants' motions to dismiss or for summary judgment on June 13, 2011. (Doc. 81, 90). *See* Doc. 91, at 5-6 & n.8.[2] It issued its decision on June 27, 2011,

---

[1] The Commission issued its administrative complaint on April 19, 2011, but stayed its proceedings on July 15, 2011, at defendants' request. Should the Commission ultimately succeed on the merits, and an FTC cease and desist order is issued against the defendants, that order will be subject to review in this Court. *See* 15 U.S.C. § 45(c); *Univ. Health*, 938 F.2d at 1218.

[2] The district court construed those motions "as motions to dismiss instead of ones for summary judgment because the Court's findings and conclusions [t]herein with respect to the state action immunity issue [we]re made without reference to matters outside of the pleadings." Doc. 91, at 5 n.8 (citing *Harper v. Lawrence County, Ala.*, 592 F.3d 1227, 1232 (11th Cir. 2010)).

dismissing the complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6),[3] denying preliminary relief, and dissolving its earlier temporary restraining order. Doc. 91, at 7 & n.9, 39-40. Judgment was entered on June 29, 2011 (Doc. 93). This appeal followed.

On June 29, 2011, the Commission filed in this Court an emergency motion for an injunction pending appeal and to expedite the appeal. On July 6, 2011, this Court granted the Commission's motion and set an expedited briefing schedule. On July 8, 2011, this Court issued a corrected Order as to which Judge Hull filed a separate opinion, dissenting with regard to the injunction pending appeal.

B. Statement of Facts

Defendants' proposed transaction would create a monopoly in the market for inpatient general acute care hospital services sold to commercial healthcare plans and their customers in Albany, Georgia, and six surrounding counties. Doc. 2[*] ¶¶1, 7. The Authority is the nominal acquirer of Palmyra, but the transaction was conceived, structured, financed, and guaranteed by PPHS, for its private pecuniary interest, with the ultimate purpose of gaining full economic and operational control over both PPMH and Palmyra. *Id*. ¶¶2, 38, 46.

---

[3] Defendants had also challenged the court's jurisdiction under Fed. R. Civ. P. 12(b)(1), but the district court concluded that its "review of Plaintiffs' Complaint is governed by Rule 12(b)(6) standards" because the defendants' motions "require the Court to review the sufficiency of the pleadings." Doc. 91, at 7 n.9.

1. *Defendants' Merger-to-Monopoly Transaction*

PPMH is a 443-bed hospital located in Albany, Georgia. Doc. 2* ¶¶22-23. Opened in 1911 at its current site, PPMH offers a full range of general acute care hospital services, as well as emergency care services, tertiary care services, and outpatient services. *Id*. It serves its local community, but also draws tertiary-service referrals from a broader region. *Id*. General acute care hospital services account for the majority of PPMH's services and revenues. *Id*.

Palmyra is a 248-bed acute care hospital, also located in Albany, Georgia. Doc. 2* ¶26. It was built in 1971 in response to requests by local physicians and community leaders to broaden the healthcare options available to the residents of Dougherty County and the surrounding counties. *Id*. Palmyra provides general acute care services, including but not limited to services in non-invasive cardiology, gastroenterology, general surgery, gynecology, oncology, pulmonary care, and urology. *Id*. PPMH and Palmyra are two miles apart.

The proposed transaction, if allowed to proceed, would give PPHS, a private party, monopoly control over acute care services, under an integrated, purchase-and-lease deal. The Authority owns PPMH's assets, but in 1990 it ceded control to PPHS through a 40-year, one-dollar-a-year lease. Doc. 2* ¶¶21, 27. As a result, PPHS now controls PPMH in all meaningful and relevant respects – economically, operationally, and, thus, competitively. *Id*. ¶¶28-31. The Authority, with no budget or paid

employees, and acting throughout as an absentee landlord, neither controls nor actively supervises PPHS. *Id*. Under the terms of the 1990 lease, for example, PPHS expressly controls PPMH's assets and operations, including PPMH's "sole discretion to establish its rate structure." *Id*. ¶29. Since the 1990 lease took effect, moreover, the Authority has not, and does not now, countermand, approve, modify, or in any other respect actively supervise PPMH's actions regarding competitively significant matters, such as rates, service offers, staffing, or facilities capacity. *Id*. ¶30. Indeed, as the Authority's own Chairman acknowledged, in response to a new Authority member's concerns about PPMH's high prices, "the Authority really has no authority as far as running the hospital." PX0040*. To reinforce PPHS's control over all hospital affairs, the Authority, in the 1990 lease, even committed to forgoing any future competition with PPHS, by agreeing not to acquire any other hospital in its area of operation, including Palmyra[4] – a condition which PPHS was willing to, and did, waive as part of the transaction at issue in this case. *Id*. ¶31.

Likewise, the transaction at issue here contemplates all-encompassing control by PPHS over Palmyra, in a three-step process: first, the Authority would lend its name to the asset purchase agreement finalized previously by PPHS and HCA, placing

---

[4] *See* PX0002-031* (Authority "shall not own, manage, operate or control or be connected in any manner with the ownership, management, operation or control of any hospital or other health care facility other than [PPMH]"); Doc. 2* ¶31.

the Palmyra assets under the Authority's nominal ownership; second, the Authority, as part of the same integrated transaction, would immediately transfer control over Palmyra's assets to PPHS, under a temporary management agreement; third, also as part of the same integrated transaction, PPHS would enter into a long-term lease with the Authority for the combined assets of PPMH and Palmyra, on substantially the same terms as its existing PPMH lease (thus, presumably, also for one dollar per year). *Id*. ¶¶2, 44, 50-52; PX0009[*]. In the end, PPHS would be in full economic and operational control of both PPMH and Palmyra. *Id*. ¶52.

The proposed transaction's anticompetitive effects are clear, and were *not* contested below. PPMH and Palmyra are the only two general acute care hospitals in Albany and Dougherty County. *Id*. ¶¶1, 7-8. Following their merger, PPHS will control 100% of the licensed general acute care hospital beds in Dougherty County. *Id*. ¶7. Even in an expansive geographic market encompassing the six counties surrounding Albany, PPHS's market share based on commercial patient discharges will jump from an already dominant 75% to a monopolistic 86%, with the hospital possessing the next-largest market share (of only 4%) 40 miles away from Albany. *Id*.

With PPMH as the dominant Albany hospital in terms of size, scope of services, and market share, PPHS has substantial leverage in negotiations with health plans and has correspondingly high commercial reimbursement rates. *Id*. ¶¶7, 11. PPHS's

leverage will be enhanced if the merger is consummated. PPMH and Palmyra are each other's closest competitor, and are considered to be the closest substitute for each other by both health plans and their members. *Id*. ¶8. Their merger will, thus, further enhance PPHS's bargaining position with commercial health plans, leading to higher reimbursement rates. *Id*. ¶11. Those resulting higher rates would be ultimately borne by the health plans' customers – local employers that pay their employees' healthcare claims directly or pay premiums to health plans on behalf of their employees – and by the individual health plan members themselves. *Id*.

The transaction will also reduce the quality and breadth of services available in the relevant markets. The vigorous competition existing between the two hospitals has spurred significant and tangible improvements desired by consumers in those markets. *Id*. ¶¶78-80.[5] Such improvements will be stifled by the elimination of that competition. *Id*.

Thus, the Commission's complaint has alleged that the transaction threatens substantial lessening of competition in the market for inpatient general acute-care hospital services sold to commercial health plans and their members, in an area no

[5] For example, in response to Palmyra's advertising its real-time emergency room wait times on its website and electronic billboards, PPMH executives sought to improve their own emergency services. And after Palmyra was granted a state Certificate of Need (CON) for an obstetrics department, PPMH developed plans to increase the availability of private rooms to its own obstetrics patients. *Id*. ¶80.

broader than the six Georgia counties of Dougherty, Terrell, Lee, Worth, Baker, and Mitchell. *Id*. ¶¶53, 57.

2. *PPHS's Driving Role in the Transaction*

The acquisition and lease of Palmyra's assets form an integrated transaction that was conceived, structured, financed, and guaranteed by PPHS, a private entity, to stem the growing competitive threat of Palmyra without attracting antitrust scrutiny, not only of this transaction, but also of PPHS's prior conduct aimed at limiting competition from PPMH's only rival. Doc. 2* ¶¶32-52. Responding to PPHS's attempts to constrain its market participation, Palmyra had filed a federal antitrust suit against PPHS, alleging that the latter was using its market power to prevent commercially insured residents of Albany and the surrounding counties from being able to use Palmyra's services. *See* Complaint, *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp., Inc.*, No. 1:08-cv-00102-WLS (M.D. Ga. *filed* July 3, 2008) (PX0007*). The district court initially dismissed the suit for want of antitrust standing, but this Court reversed. *See Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp., Inc.*, 604 F.3d 1291 (11th Cir. 2010).

Shortly after this Court reinstated Palmyra's antitrust claims, PPHS initiated discussions with Palmyra's parent company, HCA, regarding the acquisition of Palmyra. Doc. 2* ¶¶32-34. HCA was receptive to "an aggressive premium cash"

offer, of two or more times Palmyra's annual net revenue, but only if there was "no risk of antitrust enforcement activity." *Id*. ¶35.

These terms were aggressive indeed. After analyzing comparable transactions, PPHS's investment bankers determined that HCA's demand far exceeded the median price-to-revenue multiplier of 1.5 times revenue in ten recent hospital sales in Georgia, and was almost double the median multiplier of 1.04 times revenue for five recent HCA sales. *Id*. ¶37. Indeed, of the 44 comparable transactions analyzed by PPHS's bankers, only *one* had a higher revenue multiplier than that demanded by HCA. *Id*. HCA's price demand made it unlikely, therefore, that an independent investment bank would issue a fairness opinion for the Palmyra acquisition, as is often done in significant transactions. *Id*. By structuring the deal as a purchase by the Authority, while using the substantial, PPHS-controlled cash reserves of PPMH to finance it, PPHS bypassed the need for a fairness opinion. *Id*. In the end, judging that the acquisition of a monopoly was worth it, PPHS's Board approved an aggressive formal offer to HCA, for twice the net revenue of Palmyra in the previous 12 months – and it took that step *independent of any input* from the Authority. *Id*. ¶¶ 40-45.[6] For

[6] Negotiations with HCA were in their advanced stages before PPHS informed two of the Authority's nine members of PPHS's plan to acquire Palmyra. Doc. 2[*] ¶42. Those two members had not been delegated any responsibility related to the transaction, and were required to sign confidentiality agreements preventing them from discussing the transaction, even with other Authority members. *Id*. Except for one member who sits on the PPHS board, the other Authority members had no

its part, the Authority neither sought a fairness opinion before acquiescing to the Palmyra purchase, nor undertook any inquiry into the unusually high purchase price. *Id*. ¶¶37, 45.

PPHS recognized that structuring the transaction with the Authority as the nominal acquirer of Palmyra was even more critical for another purpose: evading antitrust scrutiny. HCA apparently was willing to accept PPHS's aggressive offer, but only if there was also "no risk of antitrust enforcement" that might derail the deal. *Id*. ¶35. Thus, PPHS's counsel and consultant proposed his "proven" method of using the Authority as a vehicle to preclude antitrust scrutiny: PPHS would acquire Palmyra through a state entity, the Authority, to provide an "exemption from an HSR filing," thus not alerting the antitrust agencies, and to seek "attachment of the state action immunity to prevent an antitrust enforcement action" by those agencies. PX0207* at 5; Doc. 2* ¶38, 44. PPHS and HCA thus finalized the terms of an Asset Purchase Agreement (APA), under which the Authority would acquire Palmyra for $195 million, and PPHS would guarantee the purchase price or pay a $35 million break-up fee to HCA (nearly 20% of the purchase price). Doc. 2* ¶¶ 44-47. PPHS also prepared a "Management Agreement" to be formally executed at the closing of the

knowledge at all of PPHS's plan to acquire Palmyra until a handful of private meetings with PPHS just days before they had to take the vote approving the transaction. *See* Doc. 45, at 10; Doc. 48 ¶35.

acquisition, giving PPHS immediate control of Palmyra, awaiting the amendment to its existing lease with the Authority to add Palmyra's assets to that long-term lease. *Id*. ¶¶50-51; PX009*.[7] The Authority had no input or role in negotiating any of those terms.

PPHS's aggressive purchase price offer and the near twenty-percent break-up fee were apparently insufficient to assuage HCA's concerns regarding the viability of the deal as structured by PPHS, so the latter agreed to provide additional insurance. In a separate "Termination Fee Agreement" between only PPHS and HCA's Palmyra (PX0226*), and with the parties acknowledging that, as of the time of that agreement, "neither the form of the Asset Purchase Agreement nor the transactions contemplated thereby ha[d] been presented to, or approved by, the Authority," PPHS agreed to pay HCA $17.5 million in the event the Authority failed to authorize the APA "in exactly the form" previously agreed to by PPHS and HCA. PX0226* at 1, 5; Doc. 2* ¶¶4, 48.

But just as PPHS had anticipated, the Authority, in its December 21, 2010, special meeting – having been presented with the transaction's documents for the first

---

[7] On April 4, 2011, the Authority approved a lease term sheet prepared by PPHS's counsel (PX0082*) that confirmed PPHS's original plan for PPHS to lease the combined assets of PPMH and Palmyra, once the transaction closed. Doc. 2* ¶52. The term sheet, constructed well into the Commission's investigation of the proposed transaction as an attempt to convince the agency not to try to block the deal, does not actually commit PPHS to any of its terms, *id*.; PX0082*, and in any event does not address the Commission's concerns about PPHS's acquisition of monopoly power via its structured plan as outlined here.

time during that meeting – unanimously approved the $195 million transaction, in exactly the form presented to them by PPHS. Doc. 2* ¶49. Also at that meeting, the Authority sanctioned the Management Agreement, previously drafted by PPHS, which transfers control over Palmyra to PPHS immediately upon closing of the acquisition. *Id*. ¶50.

C. Decision of the District Court

The district court's decision to deny the Commission its requested statutory relief and to dismiss the complaint on the pleadings was based on its purely legal conclusion that the transaction at issue was immunized from the federal antitrust laws by the state action doctrine.

First, with regard to the contours of the subject transaction, and thus its scope of review, the district court agreed with the Commission that Palmyra's nominal acquisition by the Authority, the latter's immediate transfer of control over it to PPHS via the Management Agreement, and the defendants' plan for subsequent long-term leasing of Palmyra's assets to PPHS, on substantially the same terms as the existing PPMH lease, should be analyzed as a single integrated transaction that is subject to the requirements of Section 7 of the Clayton Act. Doc. 91, at 8-13. The court found that "the inchoate or unexecuted nature of the subject transaction should not limit" the court's review, and that the "putative lease * * * should constitute a part of the subject 'acquisition' and therefore part of the transaction" under review. *Id*. at 11. Likewise,

the court found "no reason to exclude the Management Agreement from the purview of the alleged 'transaction'." *Id*. at 13. Each, the district court recognized, "represents the transfer of a sufficient part of the bundle of legal rights and privileges' [in Palmyra] * * * to give the transfer economic significance and the prescribed adverse effect under the Clayton Act." *Id*. (internal quotation marks and citations omitted). "These facts, coupled with the approximately $200 million Phoebe Putney has guaranteed for the transaction," the district court found, "remove the lease of Palmyra to PPHS by the Authority from the speculative realm into the realistic." *Id*.

Turning to the state action issue, the district court acknowledged the "central question" in this case: "whether the Authority's approval of the acquisition as negotiated and structured by Phoebe Putney is sufficient to shield the transaction from antitrust scrutiny under the state action immunity doctrine." *Id*. at 18. And it noted the Supreme Court's teaching that the determination whether "anticompetitive activities constitute state action 'is not a purely formalistic inquiry'." *Id*. at 21 (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985)).

Nonetheless, the court then bifurcated its analysis of the transaction. With regard to the Authority, the court concluded that its analysis hinged on "whether the suppression of competition in the manner alleged in the Complaint is a reasonably foreseeable result of the conduct authorized and the powers granted to the Authority under Georgia Hospital Authorities law." *Id*. at 22. It also noted that "the Supreme

Court and Eleventh Circuit have rejected inquiries into the motives and reasons for a government's anticompetitive actions." *Id*. at 25 (citing *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Bolt v. Halifax Hosp. Med. Ctr.*, 980 F.2d 1381 (11th Cir. 1993)).

As for private defendants such as the Phoebe Putney entities and HCA/Palmyra, the court acknowledged that, generally, "a greater level of state involvement in anticompetitive conduct must be demonstrated"; namely, that defendants "must show clear articulation and active supervision." *Id*. at 27 (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)). But the district court qualified that rule, first, by misapplying the *Noerr-Pennington* doctrine's proscription on antitrust condemnation of private efforts to seek or influence anticompetitive government action, when no such challenge was asserted by the Commission. *Id*. at 26, 27-28. It also created another, novel exception to the *Midcal* rule. It opined that if the private party "can establish that it acted * * * as an agent of the political subdivision which has received antitrust immunity," then "it should share the political subdivision's immunity," *and, moreover,* in such cases, "the need for evaluation of the *Midcal* 'active state supervision' element for private parties is eliminated." *Id*. at 27-28; 26 (citing *Crosby v. Hosp. Auth. of Valdosta and Lowndes Cnty.*, 93 F.3d 1515, 1529-31 (11th Cir. 1996)).

Applying these principles, the district court concluded, first, that the Georgia Hospital Authorities Law, O.C.G.A. § 31-7-70 *et seq*., "created a scheme for establishing and enforcing anticompetitive conduct, particularly through leasing authority-owned hospital facilities or property to another hospital or its affiliated entity as manager and lessee." *Id*. at 31-32. Construing this Court's decisions in *FTC v. Hosp. Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184 (11th Cir. 1994), and *Askew v. DCH Regional Health Care Auth.*, 995 F.2d 1033 (11th Cir. 1993), the district court concluded that "the Authority's exercise of the same powers here, which are restricted to the 'area of operation' of Albany, Dougherty County, Georgia, makes the Authority's ownership and lease of PPMH and Palmyra, the two major hospital competitors in Albany, Dougherty County, Georgia, reasonably foreseeable." Doc. 91, at 33. It reasoned that the Georgia statutory scheme "encourages and may reasonably require hospital authorities to work with private parties," *id*. at 33-34, and inferred from that an "increase[d] likelihood" that a hospital authority "may enter into a lease for the operation of one of its acquired hospitals by another hospital or hospital network with which the acquired hospital once competed." *Id*. at 33. The court said that it reached that conclusion "even accepting Plaintiffs' allegations that the subject transaction was effectively motivated and controlled by PPHS through its own independent private and pecuniary interests and that the transaction was structured to circumvent antitrust law." *Id*. at 35.

The district court ignored those same complaint allegations, however, in holding that "state action immunity applies to the private Defendants as well." *Id*. at 36. Without explanation, the court opined that "the challenged action at issue here is really directed by the Authority and not Phoebe Putney." *Id*. It also misconstrued the complaint's allegations, concluding that the private defendants' conduct "constitutes private encouragement of, private involvement in, or agency action on behalf of a local government that is permitted under *Noerr-Pennington* or the principles established in *Cine 42nd Street* [*Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032 (2d Cir. 1986)] and *Crosby* that establish a private actor's enjoyment of the state's antitrust immunity under *Parker* [*v. Brown*, 317 U.S. 341 (1943)]." *Id*. Thus, the district court found, "even if Phoebe Putney is not considered a private party whose actions are protected under *Noerr-Pennington*, it may be considered an effective agent of the Authority based on its negotiation of, planning for, and funding and facilitation of the subject transaction." *Id*. at 37. Citing the terms of the *temporary* Management Agreement, *id*. at 38-39,[8] but making no reference to the planned 40-year lease (the terms of which are substantially the same as the existing

[8] The Management Agreement was only designed to bridge the period of "months" between the closing of the Palmyra acquisition and the entry into the long-term lease agreement with PPHS, the latter having to await the expiration of a statutory public notice-and-hearing period before the Authority can enter into the formal lease arrangement. *See* PX009[*] §§ 1.01, 7.03(c); O.C.G.A. § 31-7-74.3(a); PX0082[*], at 002-003.

PPMH lease), the court found – again contrary to the complaint allegations – that "Phoebe Putney is merely an 'agent' of the Authority in operating Palmyra." *Id*. at 38.

Finally, in view of its decision to dismiss the complaint on the pleadings, the district court concluded that it "need not further address Plaintiffs' PI Motion." *Id*. at 39.

D. Standard of Review

A district court's grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. *Speaker v. U.S. Dep't of Health and Human Svcs. Ctrs. for Disease Control and Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010). "In ruling on a 12(b)(6) motion, the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff." *Id*. And while "it is generally true that the 'scope of the review must be limited to the four corners of the complaint'," this Court "has recognized an important qualification to this rule where certain documents and their contents are undisputed: * * * 'if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged'." *Id*. (quoting *St. George v. Pinellas Cnty.*, 285 F.3d 1334, 1337 (11th Cir. 2002); *SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010)). Moreover, the Court should "'not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face'." *Id*. at 1380 (quoting *Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, __U.S. __, 129 S. Ct. 1937, 1949 (2009). That standard "is not akin to a 'probability requirement'," however, "but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*.

This Court "review[s] the decision to deny a preliminary injunction for abuse of discretion." *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010). In so doing, the Court "review[s] the findings of fact of the district court for clear error and legal conclusions *de novo*." *Id*. Moreover, as the Commission's action in the district court was brought pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), the standards relevant to that statutory relief are applicable here. Section 13(b) allows courts to grant preliminary injunctions provided there is a "proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b); *see, e.g., FTC v. Bishop*, Nos. 10-10715, 10-12901, 2011 WL 1560656 (11th Cir. April 25, 2011); *Univ. Health*, 938 F.2d at 1209.

SUMMARY OF THE ARGUMENT

The district court's ruling, on defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), is erroneous for a number of reasons. The court misconstrued the Commission's theory of the case; it relied on factual inferences that contradict the complaint's allegations; and it misapplied well settled legal principles. If allowed to stand, the district court's ruling could provide a roadmap for private parties wishing to bypass any antitrust scrutiny, by structuring their hospital mergers as nominal acquisition-and-leases by the many state hospital authorities empowered to do such transactions, not only in Georgia but in other states as well.

First, in its overly formalistic approach to analyzing the purported state action defense, the district court did not take into account the Commission's principal complaint allegations – that no state action exists here because the Authority merely provided a veneer for an otherwise private transaction seeking a private monopoly. The district court found, without explanation, that the Authority is "truly" the acquirer of Palmyra's assets, when the complaint allegations and substantial evidence before it pointed in another direction entirely – namely, that by any practical measure, PPHS was the effective actor. PPHS not only planned and executed the merger agreement with HCA, using its own resources, but it stood as the lone beneficiary from that arrangement. In contrast, the Authority was contractually precluded from acquiring Palmyra, until PPHS, through PPMH, waived that condition, and its involvement in

the transaction was not only unnecessary, but was sought by PPHS, solely and expressly, to evade antitrust scrutiny. The district court not only failed to properly address the threshold question of whether a state action in fact existed under these circumstances, but its analysis presumed an answer in the affirmative, contrary to the complaint allegations. That was legal error. *See* Part I.A. *infra*.

Furthermore, the district court's actual analysis of the state action it assumed to exist compounded its error. In addressing *Midcal*'s first prong – that the challenged action be taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition – it concluded that Georgia's Hospital Authorities Law meets that standard by reasonably anticipating the private merger-to-monopoly at issue here. To do so, the district court misconstrued this Court's precedents in *Lee County*, *Askew*, and *Crosby*, which are readily distinguishable from the extraordinary circumstances of this case. It failed to take into account, for example, the fact that Georgia's statute was addressed not only to the relevant markets here, but to all 159 counties in that State, with their myriad market conditions and consumer needs, making reasonable anticipation of the transaction at issue here far less likely. Moreover, the district court failed even to address the significantly probative fact that the Georgia legislature did expressly provide immunity from antitrust scrutiny, but only for limited actions by the hospital authorities, which are not at issue in this case. *See* Part I.B.1. *infra*.

Likewise, in addressing *Midcal*'s second prong – that PPHS's actions be actively supervised by the State – the district court committed further error by assuming – contrary to the complaint allegations and contrary to Supreme Court teachings – that PPHS is merely an "agent" of the Authority, thus not required to show active state supervision. The complaint allegations make clear, however, that PPHS is not an agent of the Authority, either historically or with regard to the particular transaction at issue here. Nor is it correct, as the district court held, that a mere agency relationship (even if it existed) would eliminate the *Midcal* requirement that private parties be actively supervised by the State itself. Contrary to the district court ruling, the Authority cannot have it both ways; first, ceding its economic and operational functions to an *unsupervised* private actor, then claiming no need for active state supervision when that private actor is seeking a monopoly. *See* Part I.B.2. *infra*.

Finally, there is no need for this Court to remand the case to the district court for issuance of the Commission's requested preliminary injunction, as all the elements necessary for such relief are satisfied. Defendants conceded below the Commission's likelihood of success on the merits. Under the pertinent statutory standard, moreover, the equities weigh heavily in favor of the Commission's efforts to preserve the public benefits of competition. With their only defense, the state action doctrine, resolved by this Court, this Court can, and should, issue the preliminary injunction itself. *See* Part II *infra*.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STATE ACTION DOCTRINE IMMUNIZES THE TRANSACTION FROM ANTITRUST SCRUTINY

Giving effect to form over substance, the district court held that the state action doctrine shields this transaction from the federal antitrust laws – citing *Parker v. Brown*, 317 U.S. 341 (1943). As *Parker* itself cautioned, however, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id*. at 351. Rather, the litmus test for qualifying for the antitrust exemption, indeed "[t]he only requirement," has always been whether the action can be deemed to be "that of 'the State acting as a sovereign'." *Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977)); *see also id*. ("The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act"). No such "state action" exists here.

Even where there is genuine state action, moreover, the *Parker* doctrine exempts the activities of subordinate state entities only if their conduct is undertaken pursuant to a clearly articulated and affirmatively expressed policy of the state, acting as a sovereign, to displace competition. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985). Private parties – further removed from being a sovereign – must

meet stricter conditions: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks and citation omitted). The proposed transaction meets neither of these conditions.

A. This Is a Private Transaction, Not *Parker* "State Action"

Rooted in the principles of federalism, the *Parker* doctrine protects only the *sovereign* acts of a state.[9] As the Supreme Court stated in *Goldfarb v. Virginia State Bar*, "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." 421 U.S. 773, 790 (1975); *see also Crosby*, 93 F.3d at 1530 ("The core policy underlying *Parker* immunity is that actions by the State, as sovereign, lie beyond the intended scope of the antitrust laws"). But no such sovereign action exists in the circumstances of this case. The acquisition and lease of Palmyra is an integrated transaction that was conceived, structured, financed, and guaranteed by PPHS – a private entity – for its own private interest. The

[9] "In a dual system of government, * * * the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker*, 317 U.S. at 351. Thus, with "nothing in the language of the Sherman Act or in its history" to suggest otherwise, the Court held that when "[t]he state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application," it is exempt from the proscriptions of that Act. *Id*. at 350-51, 352.

Authority's role in the transaction was limited to rubber-stamping PPHS's prior agreement with HCA, and that *de minimis* role was not necessary for the completion of the transaction; indeed, it was crafted *only* to evade antitrust scrutiny.

It was PPHS that sought to "[c]ontrol all hospital beds" in Albany-Dougherty County. PX0021* at 1; PX0422-032* (Lingle IH Tr. 120:10-20). Only a few months after this Court revived Palmyra's antitrust claims that PPHS had "used [its] monopolies in obstetrics, neonatology, and cardiovascular care to foreclose competition [from Palmyra] in other hospital services," PX0007* at 2, PPHS began the process of acquiring its primary rival. Doc. 2* ¶¶32-34. It conducted the entire negotiations with HCA without any input from the Authority. *Id*. ¶¶40-48. It reached agreement on the final terms of the APA, including a "very aggressive" purchase price and a near-twenty-percent break-up fee, without any prior authorization from the Authority, but still with sufficient confidence in the Authority's acquiescence to those terms, "in exactly the form" agreed to by PPHS and HCA, to risk an additional $17.5 million "termination fee." *Id*.; PX0226*. PPHS financed the purchase of Palmyra from the PPMH cash reserves under *its*, not the Authority's, control, PX0422-054* (Lingle IH Tr. 208:18-209:25); PX0402-019* (Rosenberg IH Tr. 66:4-9), and then *itself* guaranteed the payment of each and every financial obligation of all the "buying" parties under the APA. PX0013* §12.21. Thus, PPHS orchestrated the entire complex plan: it negotiated the contracts and made independent financial

guarantees to HCA without any involvement of the Authority, with the expectation that it would exercise complete economic control over the acquired hospital, as it already does with PPMH, under a "dollar a year" lease that the Authority could be counted on to provide. In every economic and practical sense, therefore, PPHS was the acquirer of Palmyra.

By contrast, the Authority's role was akin to that of a public notary, certifying the formalities of a transaction, but having no hand in its substance. The Authority in fact was foreclosed from making the acquisition, until PPHS allowed it to do so. The 1990 lease agreement for PPMH's assets precluded the Authority from competing with PPMH, stipulating that the Authority "shall not own, manage, operate or control or be connected in any manner with the ownership, management, operation or control of any hospital or other health care facility other than [PPMH]." PX0002-031[*]; *see* Doc. 2[*] ¶31. The Authority's purchase of Palmyra would have been, therefore, in violation of the terms of that agreement, which the Authority was powerless to change unilaterally. But because PPHS was in fact the driving force behind the acquisition, and stood to gain from it by eliminating its main rival in Albany, it agreed to have its subsidiary, PPMH, waive that condition. *Id*.

Moreover, as discussed above, the Authority had no role in negotiating the terms of the purchase, and did not even consider the acquisition until the very day PPHS presented it with the APA and asked that the Authority approve it "in exactly

the form" previously agreed to by PPHS and HCA. PX0226* at 5.[10] The Authority promptly did so. Doc. 2* ¶49. No questions were asked by the Authority members, and not a single term of the APA was modified (or sought to be modified). *Id*. The Authority was not presented with the "termination fee" agreement between PPHS and HCA – in which PPHS bet $17.5 million that the Authority would not change a single term of the APA – but, just as PPHS had expected, it still sought no changes in the previously agreed APA. *Id*. ¶49.

Nor was the Authority's involvement in Palmyra's acquisition necessary for that transaction to take place. PPHS had closed several recent significant transactions of a similar nature, without any Authority involvement. PX0012* at 10. But in this instance, PPHS specifically sought the Authority's rubber-stamp, because it served the critical goal of evading pre-merger notification of the acquisition, and – PPHS had hoped – antitrust scrutiny. *See* PX0207* at 5 (PPHS consultant proposing a "proven" method of using the Authority as a vehicle to provide "exemption from an HSR filing and attachment of the state action immunity").

Thus, the Authority's singular act in the entire process was to acquiesce to lending its name to PPHS's prior decision and agreement to acquire Palmyra. But

---

[10] While Phoebe Putney met with individual members during the week before the December 21 Authority meeting – which avoided Georgia's open records act – the first time the Authority met as a body (with the required quorum) to consider the transaction was on December 21, when its members voted to approve it.

longstanding Supreme Court precedent teaches that such state involvement does not create an exemption from the antitrust laws. *See, e.g., FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) (a state "may not confer antitrust immunity on private parties by fiat"); *Midcal*, 445 U.S. at 106 (antitrust scrutiny "cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private * * * arrangement"); *Parker*, 317 U.S. at 351 ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it"). As this Court emphasized in *Crosby*, for state action immunity to apply, "[w]hat is critical is that the action be truly that of the State and not that of an individual or private actor." 93 F.3d at 1530; *see also Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1017 (3d Cir. 1971) ("an arrangement sponsored by the state is not necessarily state action for the purposes of the antitrust laws"). The Authority here is merely a strawman, and the transaction is properly viewed, for *Parker* purposes, as PPHS's own.

The district court's formalistic bifurcation of the state action analysis into the actions of the Authority on the one hand and those of PPHS and HCA on the other, *see* Doc. 91 at 17-18, 28-36, 36-39, in effect, presumed the answer to a central question in this case: whose acquisition was Palmyra's? The district court apparently concluded that it "truly" was the Authority's acquisition, *Crosby*, 93 F.3d at 1530, but it neither made the factual findings necessary for that conclusion, nor explained its reasoning for such an inference in light of the complaint allegations to the contrary.

That erroneous presumption, in turn, allowed the district court to dismiss the private parties' role in this transaction as merely the "reasons for and motivations behind acquisitions and their structure," Doc. 91, at 35, and thus reduce the Commission's theory to a complaint that "the Authority was not sufficiently involved in the transaction." *Id*. at 5.

But the Commission is not attacking the *quality* of the Authority's decision-making process. Rather, the complaint allegations – which, on a motion to dismiss, must be taken as true, *Speaker*, 623 F.3d at 1379, and which were supported by essentially uncontroverted evidence – show that it was PPHS, not the Authority, that was the effective decision maker.[11] PPHS is not an arm of the State of Georgia; rather, it is a private entity whose interests, as shown above, are *not* coterminous with those of the Authority.[12] PPHS merely used the Authority's name on the acquisition

---

[11] Several courts of appeals, including this Court, have looked to the effective decision maker in delimiting the contours of the state action doctrine. *See Crosby*, 93 F.3d at 1530-31 ("the control exercised by the Authority over all staff credentialing decisions is strong evidence that it is the Authority and not its staff members acting"); *see also, e.g.*, *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 538 (6th Cir. 2002) ("If the private actor was the effective decision maker * * *, then it is not immune, unless it can show that it was actively supervised by the state"); *Electrical Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110 (2d Cir. 2003) (whether town had "ultimate control" over board's monopoly is relevant fact in state action analysis).

[12] Defendants have tried to confuse PPMH, the corporation set up to operate the Authority's existing hospital in Albany, with PPHS, PPMH's parent holding company which owns many other entities – some of which are outside the Authority's

agreement, in an effort to have the Authority "confer antitrust immunity on private persons [PPHS and HCA] by fiat." *Ticor*, 504 U.S. at 633.

Thus, contrary to the district court's reasoning (*see* Doc. 91 at 24-25, 35), the present case bears no resemblance to *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991), where a private party's lobbying influence over a municipality's issuance of a favorable ordinance was alleged to constitute a conspiracy that precluded application of the state action doctrine (as well as the *Noerr-Pennington* doctrine).[13] The Court rejected such an exception, and for good reason: "*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' *acts of governing*, and the latter the citizens' participation in government." *Id*. at 383 (emphasis added). The key action at issue in *Omni* was the enactment of a city ordinance, a core "act[] of governing" to which the state action doctrine is directed. As the Court recognized, adherence to the doctrine's policies requires that antitrust courts not "deconstruct[]"

---

permissible area of operation. *See* PX0002-028* thru -30*; Doc. 2* ¶24. It is PPHS, which is not supervised by the Authority, not PPMH, that has conceived, structured, financed, and guaranteed the purchase of Palmyra.

[13] *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

such public acts by inquiring into the quality or motivations behind the public decision-making process. *Id*. at 377.[14]

Here, by contrast, the initial question – not posed in *Omni* – is whether there was a public act *at all.* *See Goldfarb*, 421 U.S. at 790 ("whether the activity is required by the State acting as sovereign" is a "threshold inquiry" in state action analysis). The actions in question here involve no ordinances or regulatory enactments, but a series of contracts affecting the disposition and control of property. Were those actions in reality an assumption of economic control over Palmyra by the Authority, they would arguably constitute state action, subject to the usual inquiries into clear articulation and active supervision. *See* Part B, *infra*. But the Commission's complaint alleges that this is not what happened. On the contrary, the actual effect of the series of carefully-constructed transactions here is to allow a

---

[14] When a state entity acts in a regulatory capacity, delegated to it by a sovereign state, such as in enacting municipal ordinances, *political* values, such as federalism and the First Amendment right of citizens to petition their government, are implicated. *Omni*, 499 U.S. at 376-80 (citing *Parker*; *Noerr*; *Pennington*). But no such values are implicated where, as here, the state entity is *not* exercising its regulatory functions. *See Parker*, 317 U.S. at 352 (exemption applied because the state "as sovereign, imposed the restraint as an act of government"); *Crosby*, 93 F.3d at 1530 (only "actions by the State, as sovereign" are exempted). In *Omni* itself, the Court cautioned that the doctrine applies only to "anticompetitive actions by the States in their governmental capacities as sovereign regulators." 499 U.S. at 374; *see also id*. at 379 (states may not "exempt *private* action from the scope of the Sherman Act; we in no way qualify the well established principle that 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful'") (quoting *Parker*, 317 U. S. at 351).

private entity to acquire its principal, private competitor, using its own economic resources to effect the acquisition, and thereby gain the ability to operate (through a 40-year lease) its preexisting and acquired assets as a private monopoly. The mere fact that a public entity has allowed its name to be attached to these transactions – surely just "a gauzy cloak of state involvement," *Midcal*, 445 U.S. at 106 – does not transform them into public acts. Under these extraordinary circumstances, an antitrust court has no occasion even to reach the issues addressed in *Omni*, or to apply the criteria of the state action doctrine, for there is no state action to evaluate.[15]

Moreover, the district court's holding – that the Authority's simple act of voting in favor of the deal is sufficient to bestow antitrust immunity on the merger-to-monopoly transaction – is at odds with this Court's reasoning in *Crosby*, a case involving a different Georgia statute governing medical peer review. 93 F.3d at 1531. This Court found it significant in that case that, in order for a hospital authority to

---

[15] For these same reasons, the district court's alternative holding that the private parties' conduct here is immunized by the *Noerr-Pennington* doctrine, *see* Doc. 91, at 37, is also erroneous. Because there has been no government action here, there is no occasion for the court to apply *Noerr-Pennington*'s protections with regard to private efforts to influence or bring about such action. In fact, the Commission's complaint makes no allegations regarding efforts to petition the Authority. The district court misconstrued the complaint's allegations regarding PPHS's and the Authority's respective roles in effectuating the acquisition as an attack on private efforts to induce favorable government actions. But the Commission is challenging the legality of the transaction itself, not any "petitioning" leading up to it. The Commission's allegation is that PPHS itself is the effective purchaser of Palmyra, not that it improperly influenced the Authority to make the purchase.

enjoy the immunity of state action, the authority "does not merely 'rubber stamp' the [physician peer review] committee recommendations; instead it conducts an independent, meaningful review." *Id*. at 1530-31. The need for such close scrutiny, reasoned this Court, arises from the very purpose of the state action doctrine, for it is "critical" that the action sought to be exempted from antitrust scrutiny "be truly that of the State." *Id*. at 1530. Thus, the "action" half of the required "state action" is not a mere formality. The district court bypassed this inquiry altogether, however, reasoning that "so long as the Authority determines that the proposed transaction will continually fulfill the Authority's mission * * * the Authority may collaborate with private parties such as Phoebe Putney to execute the proposed transaction." Doc. 91, at 35. But there was no such "determination" by the Authority. No consideration of the effects of the acquisition on the Authority's mission was undertaken; indeed, no discussion of the public merits of the transaction ever took place. The Authority's role here was no more than the "gauzy cloak of state involvement" that the Supreme Court has rejected as a basis for state action exemption. *Midcal*, 445 U.S. at 106.[16]

[16] This Court's decision in *Bolt v. Halifax Hosp. Med. Ctr.*, 980 F.2d 1381 (11th Cir. 1993), is not to the contrary. *See* Doc. 91 at 25. The Court there merely reversed its earlier holding that a hospital's "conspiracy" with a physician peer review committee precluded state action immunity, because such exception was specifically rejected in *Omni*. *See* 980 F.2d at 1389.

Likewise, *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032 (2d Cir. 1986), is inapposite. *See* Doc. 91 at 24-25, 34. There, disappointed bidders brought an antitrust action against New York's Urban Development Corporation (UDC) alleging that, in acquiring dilapidated movie houses in New York City's Times Square and then leasing them, through a competitive bidding process, to private parties to renovate and operate, UDC was substantially lessening competition in the Broadway theater market. *Id*. at 1035. The court of appeals concluded that UDC's actions were exempted by the state action doctrine. *Id*. at 1044-47. The district court's application of *Cine 42nd Street* to the present case fails, however, for a number of reasons. *See* Doc. 91 at 34. To be sure, in both cases, the state entity engaged in an acquisition of property followed by a lease of the acquired assets to private parties to operate, but that is where the similarity ends. First, there was no question in *Cine 42nd Street* that the state entity, UDC, was the effective decision maker throughout the entire process, and that the challenged actions were taken by UDC in accordance with its own plan to revitalize urban decay around Times Square. 790 F.2d at 1035-37. Indeed, the Second Circuit emphasized that, for the state action doctrine to apply, "the state must be an active participant in the decision-making process and not merely ratify anticompetitive actions taken by private actors." *Id*. at 1044. In contrast, whether the transaction at issue in this case is "truly" the

Authority's action is a question at the heart of the Commission's complaint allegations, but one that was not properly addressed by the district court's ruling.

Moreover, the New York statute at issue in *Cine 42nd Street*, which empowers UDC itself to undertake the challenged actions in that case, and which the Second Circuit concluded clearly articulates a state policy to displace competition, *id*. at 1044-45, is very different from the Georgia statute at issue in this case, which conveys a contrary legislative intent. *See* Part B.1. *infra*.

B. The Transaction Does Not Qualify for *Parker* Protection As Neither *Midcal* Prong Is Satisfied

Wholly apart from the economic reality that PPHS, *not* the Authority, is the real acquirer here – rendering the transaction a private, not state action – defendants below also failed to show that the stringent requirements for the state action doctrine are satisfied.

1. There Is No Clear Articulation of State Policy to Displace Competition

For an action to qualify for *Parker* immunity, it must be taken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. *Town of Hallie*, 471 U.S. at 39, 41-44; *Crosby*, 93 F.3d at 1521-22, 1532. Such authorization need not be explicit, *id*.; *Askew*, 995 F.2d at 1041, but neither is that condition satisfied "when the State's position is one of mere *neutrality*." *Community Comm. Co., Inc. v. City of Boulder*, 455 U.S. 40, 55 (1982); *see Lee County*, 38 F.3d

at 1191 n.6 ("[t]here must be some showing that the anticompetitive results were more than merely 'plausible'") (quoting *Univ. Health*, 938 F.2d at 1213 n.13). As this Court has applied these standards, the transaction here must be "foreseeable," or "reasonably anticipated," under the Georgia Hospital Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.* – the legislation that empowered the Authority to acquire Palmyra. *Crosby*, 93 F.3d at 1532; *Lee County*, 38 F.3d at 1188. But that statute provides no such cover for the transaction challenged here. In fact, the basic tenets of statutory construction reveal a contrary legislative design.

The Georgia statute creates a hospital authority for each county and municipality in the state, § 31-7-72(a), and further authorizes: the creation of additional authorities within large-population counties, § 31-7-73; the consolidation of authorities within each such high-population county, § 31-7-72.1; the acquisition and operation of "projects," § 31-7-75(4) (which include hospitals, § 31-7-71(5)); the construction or improvement of such projects, § 31-7-75(5); the leasing of such projects for up to 40 years, § 31-7-75(6); the setting of rates and charges for services and use of the facilities of each such authority, § 31-7-75(10); and the managing or contracting for the management of any such project, § 31-7-75(23) and (24). Nowhere in Georgia's Hospital Authorities Law does the state evince an intention to exempt from antitrust scrutiny any anticompetitive hospital merger, much less one under the extraordinary circumstances of this case, where the only involvement by a

state entity was the Authority's *pro forma* approval of an otherwise private merger-to-monopoly.

Citing this Court's decision in *Lee County*, the district court concluded that the Georgia statute "reasonably anticipates" the transaction at issue here. Doc. 91 at 32-33. But that decision does not dictate the outcome of this case. *Lee County* dealt with a 1963 "special act of the Florida Legislature" that created a hospital "Board" to establish and operate a public hospital "in Lee County." 38 F.3d at 1186 (citing 1963 Fla. Spec. Laws ch. 63-1552 § 1). In 1987, "the Florida Legislature amended the Board's enabling legislation and extended the Board's power, allowing operation of additional hospitals in Lee County." *Id*. Later, pursuant to these new powers, the Board sought to acquire another hospital, "reducing the number of hospitals in Lee County from four to three." *Id*. at 1187. Rejecting the Commission's challenge to that acquisition, this Court concluded that the acquisition was immunized by the state action doctrine, because the Florida legislature "knew about the market and the community at the time the legislation was enacted," and thus was well aware of the "specific anticompetitive consequences" flowing from its acts. *Id*. at 1192. The same cannot be said of the Georgia statute at issue in this case.

The Georgia Hospital Authorities Law is a general regulatory scheme, applicable not to a single county, but to all 159 counties in Georgia, with their myriad variations of competitive circumstances. So while this Court found it reasonable to

conclude that the Florida legislature must have anticipated that Lee County's Board could be involved in an anticompetitive four-to-three merger – having previously created a local monopoly in the hands of that very board, then expanded its powers so it can acquire other hospitals – it cannot be reasonably assumed that the legislature here "knew about the market and the community" in each of those 159 Georgia counties. The district court highlighted the similarities between the positions of the Lee County Board and the Authority,[17] but failed to take into account the general applicability of the Georgia statute. The reasonably anticipated consequences of Georgia's general grant of power to acquire hospitals, therefore, do not encompass the conduct at issue here – a public entity's decision to allow a private party effectively to act in its name, in order to consummate a merger-to-monopoly.[18]

---

[17] *See* Doc. 91 at 33 ("the Authority's exercise of the same powers here, which are restricted to the 'area of operation' of Albany, Dougherty[] County, Georgia, makes the Authority's ownership and lease of PPMH and Palmyra, the two major hospital competitors in Albany, Dougherty County, Georgia, reasonably foreseeable").

[18] The district court's reliance on *Cine 42nd Street* is, likewise, misplaced. *See* Doc. 91 at 34. Unlike Georgia's intended application of its Hospital Authorities Law to all 159 of its counties, with their varying market circumstances, the New York statute at issue in *Cine 42nd Street* was addressed directly at UDC, empowering that state entity to take the very actions challenged in that case. 790 F.2d at 1035-36. In any event, even if the court below was correct in concluding that the Georgia legislature contemplated *some* collaboration with private entities, that does nothing to show that the legislature clearly articulated a policy to displace competition through such collaboration.

Nor was the court below warranted in its reliance on *Askew* to support its reasoning that a legislative intent to displace competition can be inferred from the general grants of authority in the Georgia statute. *See* Doc. 91 at 33. In *Askew*, this Court relied upon a far more direct basis for concluding that the Alabama statute at issue meant to displace competition – an *express* legislative statement that the general powers granted there could be exercised to their full extent, even if they "'may be deemed "anticompetitive" within the contemplation of the antitrust laws of the state or of the United States.'" 995 F.2d at 1040 (quoting Ala. Code § 22-21-318(a)(31)). There could hardly be a clearer indication that the legislature envisioned that its grant of authority would lead to consolidations that would otherwise be unlawfully anticompetitive, and that it intended to displace competition. No such indication can be gleaned from the present statute, *either* from express language, or from circumstances indicating that anticompetitive results were "foreseen" as "inevitable." *See id*. at 1041 (discussing *Town of Hallie*).

On the contrary, the Georgia legislature's addition to the present statute of an express but carefully limited immunity provision makes even clearer that it did not intend to displace competition in circumstances such as those presented here. In its 1993 amendment to that statute, Georgia's legislature added Section 31-7-72.1 to its Hospital Authorities Law, which permits the consolidation of hospital *authorities*

existing within a single high-population county.[19] In doing so, it declared, with respect to "this Code section," that hospital authorities effectuating such consolidations "are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia." O.C.G.A. § 31-7-72.1(e).

Thus, the Georgia legislature itself recognized that the other provisions of that law – including the ones at issue here – do not reflect a previously existing state policy to displace competition. Otherwise, there would have been no need to treat Section 31-7-72.1 differently, by including an express immunity in subsection (e). The fact that it did so, therefore, evinces its intent that the other acts of hospital authorities (such as the acquisition of hospitals) should *not* be immune from antitrust scrutiny.[20]

---

[19] The amended provisions state in relevant parts: "A hospital authority activated for a county pursuant to Code Section 31-7-73 may be merged with a hospital authority activated for that county under Code Section 31-7-72 upon compliance with this Code section and approval by resolution of the governing authority of the county in which the authorities are located." O.C.G.A. § 31-7-72.1(a). Code Section 31-7-72 provided for the "[c]reation of hospital authority in each county and municipality," while Code Section 31-7-73 provided for the "[c]reation of additional hospital authority in counties with large populations."

[20] The amended provisions were enacted after landmark decisions had held that express articulation of legislative intent to displace competition was not required. *See Town of Hallie*, 471 U.S. at 43; *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 61 (1985); *see also Askew*, 995 F.2d at 1040-41. The Georgia legislature determined that the express limited immunity in Section 31-7-72.1 was nonetheless necessary, reflecting its views that the other parts of that law do not impart such immunity, even in light of those decisions.

See Warshauer v. Solis, 577 F.3d 1330, 1336 (11th Cir. 2009) (a legislature "acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language). Indeed, had the Georgia legislature intended to bestow such immunity more generally, it could have done so very easily, by merely substituting the word "chapter" for the word "section," in § 31-7-72.1(e). But it chose not to do so. Thus, the district court's reading of the Georgia grant of a general power to acquire projects in the same manner as this Court read the Florida special law provisions in *Lee County* would render Georgia's subsection 31-7-72.1(e) impermissibly superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citations omitted); *Accardo v. U.S. Attorney General*, 634 F.3d 1333, 1337 (11th Cir. 2011) ("An interpretation that * * * would render [part of the statutory text] superfluous * * * would of course violate the well-established rule of statutory construction that we must give effect to every word of a statute when possible.") (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The district court did not address this argument at all.[21]

---

[21] In its opposition to the Commission's emergency motion in this Court for injunction pending appeal, the Authority cited to other Florida law provisions with purportedly express grants of antitrust immunity, but that does not render the statutory scheme analyzed in *Lee County* identical to the one at issue here. *See* Authority Opp.

2. There Is No Active Supervision by the State Itself

Whether active state supervision is necessary (and thus required) depends on the confidence that a court would have that the challenged entity's decision-making process is sufficiently independent from private interests.[22] Here, as discussed above, PPHS, a private actor, was the driving force behind the transaction, for the purpose of gaining a monopoly over acute care hospital services in Albany and the surrounding counties – with the Authority but a strawman, set up by PPHS as the nominal acquirer of Palmyra for the express purpose of evading antitrust scrutiny. As the product of private action, the transaction must, therefore, be "actively supervised

---

to Emergency Mo., at 8-9. First, those provisions existed in different Florida statutes. *Compare* Fla. Stat. Ann. § 381.04065(1) *with* 1963 Fla. Spec. Laws ch. 63-1552 § 1. In contrast, Georgia's grant of express immunity was added to the very statute at issue here. Moreover, this Court in *Lee County* did not consider the Florida provisions that the Authority cited, so its holding in that case regarding the import of that general grant of power to acquire cannot be said to have been made notwithstanding the express immunity provisions in Florida's other laws.

[22] *See Ticor*, 504 U.S. at 634 (*Midcal*'s active supervision prong ensures that "the State has exercised sufficient independent judgment and control so that the details of the [challenged restraint] have been established as a product of deliberate state intervention"); *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (the need for active state supervision "stems from the recognition that '[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State'") (quoting *Town of Hallie*, 471 U.S. at 47). That need is especially strong where "there is an apparent devious design to abdicate or obstruct control." *TEC Cogeneration Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560, 1570 (11th Cir. 1996).

by the State itself." *Midcal*, 445 U.S. at 105. But active state supervision is non-existent here.

First, as to the acquisition itself, the Authority did not exert any measure of control over any step in the process. As detailed above, PPHS conceived, structured, financed and guaranteed the acquisition, and even bet $17.5 million that the Authority would approve the APA "in exactly the form" previously agreed to by PPHS and HCA. PX0226* at 5. PPHS took those steps without any input, much less active supervision, by the Authority. The Authority had not reviewed any of the APA's terms before its December 21 vote to approve the deal, and when it finally did receive the purchase documents, its members hardly had time to read them, much less review and consider the terms of the acquisition. In short, the Authority exercised no control over the acquisition, and its mere endorsement of it is insufficient to satisfy the active supervision prong. *See Ticor*, 504 U.S. at 633 ("Actual state involvement, not deference" to the private actor, is necessary).

Nor will the Authority exercise active supervision over Palmyra's operations after the acquisition. That task is ceded entirely to PPHS, first under the temporary Management Agreement, then under the planned 40-year lease, the terms of which are substantially the same as the existing PPMH lease that gives PPHS full economic and operational control. *See Ticor*, 504 U.S. at 633 (active state supervision must be "ongoing"); *N.C. ex rel. Edmisten v. P.I.A. Asheville, Inc.*, 740 F.2d 274, 278-79 (4th

Cir. 1984) (because adverse effects of a merger linger long after consummation, so too must active state supervision). As detailed above, the Authority's role in PPMH's operations (and thus likewise of Palmyra's) is that of an absentee landlord. Responding to the concerns of a new Authority member regarding PPMH's lack of "affordable health care," for example, the Authority's Chairman informed the new member that "the Authority really has no authority as far as running the hospital." PX0040[*]. Indeed, the Authority has no control over any economic, operational or competitive decisions such as pricing, staffing, equipment capacity, or quality of care. Thus, as to the future operation of Palmyra, the Authority fails *Midcal*'s second prong as well.

In concluding that it need not apply *Midcal*'s second prong to Phoebe Putney, because it was an "effective agent" of the Authority, *see* Doc. 91 at 37, 38, the district court made factual findings that are contrary to the complaint allegations, and misconstrued the applicable legal standard. There is no "agency" exception to *Midcal*'s active supervision requirement; both prongs of *Midcal* apply to allegations of anticompetitive conduct by private actors under contract with government entities. Indeed, such an exception would effectively render the active supervision requirement meaningless, as private actors in the state action context nearly always exercise some powers delegated to them by the state entities.

First, PPHS is not an agent of the Authority. As discussed above, their existing relationship under the 1990 lease for PPMH's assets is that of a tenant and a landlord, with PPHS having independent economic and operational control over PPMH's assets. Doc. 2* ¶¶21, 27-31; PX0002*. That relationship will continue to be the same once the PPMH lease agreement is amended to add Palmyra's assets, as the terms of the new lease are to be substantially the same as the existing one. Doc. 2* ¶¶2, 44, 50-52; PX0009*. The district court erroneously relied on the terms of the Management Agreement (PX0009*) to support its inference of an agency relationship, *see* Doc. 91 at 38-39, but reliance on that limited-scope, *temporary* agreement, *see supra* note 8, is insufficient to establish PPHS's agency role – especially in light of the complaint's other allegations, discussed above, regarding PPHS's acting, both historically and with regard to the transaction at issue in this case, quite independently of the Authority. Doc. 2* ¶¶29-31.

Furthermore, contrary to the district court's holding, even if PPHS could be considered an agent of the Authority, the mere existence of an agency relationship between a municipal entity and a private actor does not nullify the requirement that a private actor be actively supervised in order to be accorded antitrust immunity. For example, in *Electrical Inspectors,* the Second Circuit vacated a district court decision that had held a municipality's "exclusive agent" automatically immune from antitrust scrutiny, remanding the case for the district court to determine in the first instance

whether *Midcal*'s active supervision requirement had been satisfied. 320 F.3d at 126-129. In so doing, the court of appeals recognized that the active supervision requirement "seeks to prevent states from transforming the *Parker* doctrine, designed to accommodate the states' sovereign interest in regulating commerce, into an unbounded license for the states to issue Sherman Act exemptions to private parties." *Id*. at 124; *see also id*. at 127 ("mere status as a government contractor," is insufficient to confer antitrust immunity). Thus, the actions of a private contractor – beyond the mere act of contracting with the governmental entity – must still be actively supervised, in order to ensure that such actions "further the interests of the State." *LaFaro v. New York Cardiothoracic Group, PLLC*, 570 F.3d 471, 477 (2d Cir. 2009).

The general rule that, to qualify for *Parker* protection, private parties "must establish both" elements of the *Midcal* test remains applicable, therefore, even when those parties are contractors of a municipality. *Michigan Paytel*, 287 F3d at 536; *see also Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 442 F.3d 410, 442-43 (6th Cir. 2006), *rev'd on other grounds*, *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291 (2007). This is so because "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Town of Hallie*, 471 U.S. at 47; *see also supra* note 22. It is only in those rare instances (not present in this case) where the governmental entity retains "ultimate control," and

operates as the "effective decision-maker," that the active supervision prong need not be satisfied. Thus, in *Consol. Television Cable Serv., Inc. v. City of Frankfort,* 857 F.2d 354 (6th Cir. 1988), the court of appeals did not deem it necessary to engage in an active supervision inquiry, but only because there was no dispute (on the facts, and also under *res judicata* principles) that the municipal authority had "ultimate control" over the private entity that it had created for the purpose of providing cable television services. 857 F.2d at 358-59. So too in *Crosby*, this Court eschewed the active supervision inquiry only after concluding that the hospital authority acted as more than a "mere[] rubber stamp," and "alone exercise[d] ultimate control" over the challenged anticompetitive conduct. 93 F.3d at 1531, 1532. Moreover, the *Crosby* court explicitly recognized that the active supervision prong could apply where, as here, the private actors exercised "unbridled discretion" in making decisions and where the municipal authority "had completely delegated" the decision making for the challenged actions. 93 F.3d at 1532, n.24.

The district court committed legal error when it ignored these precedents and relied, in its Rule 12(b)(6) decision, on factual inferences that contradicted the complaint allegations.

II. THE COMMISSION IS ENTITLED TO A PRELIMINARY INJUNCTION DURING THE PENDENCY OF ITS ADMINISTRATIVE PROCEEDINGS

There is no need for this Court to remand this case to the district court, as this Court can and should issue the Commission's requested relief. *See, e.g.*, *Scott v. Roberts*, 612 F.3d at 1298; *Univ. Health*, 938 F.2d at 1209.

In enacting Section 13(b) of the FTC Act, Congress sought to preserve for the Commission the ability to order effective relief upon concluding its own proceedings. *See* H.R. Rep. No. 93-624, 1973 U.S.C.C.A.N. 2417, 2523. "Thus, in determining whether to grant a preliminary injunction under section 13(b), a * * * court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities." *Univ. Health*, 938 F.2d at 1217.[23] This Court's "present task is not to make a final determination" on whether the acquisition violates Section 7, but to make "only a preliminary assessment" of its impact on competition. *Id*. at 1218.

---

[23] Ordinarily, a preliminary injunction requires showing: (i) substantial likelihood of success on the merits; (ii) irreparable injury to movant should relief be denied; (iii) absence of harm to others if relief is granted; and (iv) that public interest favors granting the relief. *Forsyth Cnty. v. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1039 (11th Cir. 2011). The same showing is required for an injunction pending appeal. *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000) (*en banc*). But here, "the FTC need not satisfy the traditional equity standard that courts impose on private litigants–the FTC need not prove irreparable harm." *Univ. Health*, 938 F.2d at 1218. *See also FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring) ("the FTC – an expert agency acting on the public's behalf – should be able to obtain injunctive relief more readily than private parties").

Preliminary relief is appropriate, therefore, on a showing that there exist "questions 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." *Id*. The Commission's request for an injunction pending conclusion of its administrative proceedings more than meets this standard.[24]

A. The Commission's Affirmative Showing of Section 7 Violation Is Strong and Uncontroverted

The Commission's Section 7 case before the district court was based on strong and unrebutted evidence. *See Br. of Hosp. Auth. in Supp. Mo. Dismiss*, at 13 n.3 (opting to "not dispute" the competitive impact of the transaction). The transaction combines the only two hospitals in the Albany region, with a monopoly (86% share) in the market for inpatient general acute care services sold to commercial health plans and their customers in Albany and the six surrounding counties. It likely will result in significant increases in consumer healthcare costs, and a retardation of quality improvements. Entry barriers, including Georgia's CON process, are very high. There is no doubt, therefore, that the acquisition will substantially lessen competition in the relevant markets, within the meaning of Section 7 of the Clayton Act.

---

[24] The Commission's likelihood of success on the merits with regard to the state action defense has been demonstrated above.

B. The Balance of Equities Weighs Heavily in Favor of Granting the Commission's Requested Relief

The principal equity in a proceeding under Section 13(b) of the FTC Act is the public interest in effective enforcement of the antitrust laws. *Univ. Health*, 938 F.2d at 1225; *Whole Foods*, 548 F.3d at 1035. Private equities, on the other hand, are afforded "little weight, lest [the Court] undermine section 13(b)'s purpose of protecting the public-at-large, rather than individual private competitors." *Univ. Health*, 938 F.2d at 1225 (internal quotation marks and citations omitted); *see also id.* ("No doubt many private injuries result when a transaction is enjoined, particularly on the eve of its consummation; these injuries alone, however, do not outweigh the injury the public suffers from anticompetitive practices").

Here, the harm to the public interest in antitrust enforcement from denial of interim relief will be substantial. Competition between PPMH and Palmyra will be lost during the pendency of the FTC's administrative proceedings, and effective relief (should the FTC ultimately prevail on the merits) will be seriously undermined because, with plans for immediate restructuring upon closing,[25] defendants will be

[25] Among the planned actions at closing are reconfiguration of Palmyra's core business, including relocation of rehabilitation services and the women and children's center from PPMH to Palmyra, PX0010-007[*]; likely consolidation and relocation of other service lines, PX0344[*]; retrofitting of Palmyra's campus, PX0010-007[*]; dismissal of Palmyra's antitrust lawsuit, PX0010-007[*]; elimination of Palmyra's CON applications, PX0013-026[*]; and the likely relocation of senior Palmyra management staff to other HCA facilities, PX0013-053[*].

able to consummate a merger that will be difficult, if not impossible, to disentangle. In contrast, defendants' harm is of "little weight" in this Court, and is negligible anyway, given the length of time the transaction has been in the works.[26]

CONCLUSION

The Court should reverse the district court's decision, and issue a preliminary injunction requiring the merging parties to maintain the status quo during the pendency of the Commission's administrative proceedings.

---

[26] HCA's earlier assertions in this Court of continuing financial harm are without merit. *See* HCA Opp. to Emergency Mo., at 4-9. As a threshold matter, private injuries "do not outweigh the injury the public suffers from anticompetitive practices." *Univ. Health*, 938 F.2d at 1225. In this case, moreover, such claims of injury by HCA are specious. Not only was HCA well aware from the start of the legal hurdles facing such a merger-to-monopoly, and thus negotiated "an aggressive premium cash purchase price" from PPHS, Doc. 2* ¶35, but it further ensured against just such a contingency by guaranteeing itself a $35 million break-up fee (amounting to nearly twenty percent of the entire purchase price) if the transaction is not consummated by December 2011. HCA, in reality, cannot lose in this deal.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LESLIE R. MELMAN
Assistant General Counsel for Litigation

Of Counsel:

RICHARD A. FEINSTEIN
Director
NORMAN ARMSTRONG
Deputy Director
EDWARD D. HASSI
Chief Litigation Counsel
MATTHEW J. REILLY
Assistant Director
SARA Y. RAZI
Deputy Assistant Director
BUREAU OF COMPETITION

IMAD D. ABYAD
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-2186

July 27, 2011

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32 (a)(7)(B), in that it contains 13,201 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R 32-4.

_____

Imad D. Abyad

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing "Brief of Appellant Federal Trade Commission" was served this 27th day of July, 2011, by electronic mail, pursuant to the parties' mutual consent, upon:

Counsel for Hospital Authority of Albany-Dougherty County:

Emmet J. Bondurant (bondurant@bmelaw.com)
Frank M. Lowrey IV (lowrey@bmelaw.com)
Ronan P. Doherty (doherty@bmelaw.com)
Michael A. Caplan (caplan@bmelaw.com)
BONDURANT, MIXSON & ELMORE LLP
1201 W. Peachtree St., Suite 3900
Atlanta, GA 30309
(404) 881-4100

Karin A. Middleton (middleton@baudino.com)
BAUDINO LAW GROUP, PLC
2409 Westgate Drive
Albany, GA 31704
(229) 883-0051

E.B. Wilkins, Jr. (ewilkin@perrywalters.com)
PERRY & WALTERS, LLP
P.O. Box 71209
Albany, GA 31708-1209
(229) 439-4000

Counsel for Phoebe Putney Health Sys., Inc.; Phoebe Putney Mem'l Hosp., Inc.; Phoebe North, Inc.:

John H. Parker, Jr. (jparker@phrd.com)
Robert M. Brennan (bbrennan@phrd.com)
Thomas D. Watry (tdw@phrd.com)
PARKER, HUDSON, RAINER & DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Ave., N.E.
Atlanta, GA 30303
(404) 523-5300

Lee K. Van Voorhis (lee.vanvoorhis@bakermckenzie.com)
BAKER & MCKENZIE LLP
815 Connecticut Ave., N.W.
Washington, DC 20006
(202) 452-7000

James C. Egan, Jr. (jim.egan@weil.com)
WEIL, GOTSHAL & MANGES LLP
1300 Eye St., N.W., Suite 900
Washington, DC 20005
(202) 682-7000

Counsel for HCA Inc.; Palmyra Park Hosp., Inc.:

Kevin J. Arquit (karquit@stblaw.com)
Aimee H. Goldstein (agoldstein@stblaw.com)
Paul C. Gluckow (pgluckow@stblaw.com)
SIMPSON THACHER & BARTLETT LLP
425 Lexington Ave.
New York, NY 10017
(212) 455-2000

Charles E. Peeler (cpeeler@fpplaw.com)
FLYNN PEELER & PHILLIPS, LLC
517 West Broad Ave.
Albany, GA 31701
(229) 446-4886

Imad D. Abyad