

**No. 11-12906-EE**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

v.

Phoebe Putney Health System, Inc., *et al.*,

Defendants-Appellees.

---

**MOTION  
OF THE FEDERAL TRADE COMMISSION FOR AN  
EXPEDITED ORDER OF REMAND**

---

DAVID C. SHONKA  
*Acting General Counsel*

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  
iabyad@ftc.gov  
(202) 326-2375

April 18, 2013

Appeal No. 11-12906-EE  
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:

Abbot, Christopher, Attorney, FTC

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

Arlington, 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

Ballet, Lucas, Attorney, 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, Stewart R., Assistant U.S. Attorney, U.S. Attorney's Office, DOJ

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

Brownman, Joseph S., Attorney-Advisor, FTC

Brusser, Vadim M., Counsel for Phoebe Putney

Caplan, Michael A., Counsel for the Hospital Authority

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

Cline, Jeremy, Counsel for Phoebe Putney

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

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

Darrell, David J., Counsel for Phoebe Putney

Davis, Anna H., Attorney-Advisor, FTC

Delaney, Elizabeth A., 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

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

Hassi, Edward D., Chief Litigation Counsel, Bureau of Competition, FTC

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

Herrick, Peter, Senior Trial Attorney, Bureau of Competition, 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., Deputy Chief Trial Counsel, FTC

Kimmel, Lisa, Attorney-Advisor, FTC

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

Krainsky, Ella, Attorney, FTC

Lewis, Amanda, Attorney, FTC

Litvack, Douglas E., Attorney, FTC

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

Luib, Gregory P., Attorney-Advisor, FTC

Middleton, Karin A., Counsel for Phoebe Putney

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

Nathan, Jon, Attorney-Advisor, FTC

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

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

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

Ohlhausen, Maureen K., Commissioner, FTC

Okuliar, Alexander, Attorney-Advisor, FTC

Palmyra Park Hospital Inc., Defendant-Appellee

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

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

Perry, Jeffrey H., Assistant Director, Bureau of Competition, FTC

Phoebe Putney Memorial Hospital, Inc., Defendant-Appellee

Phoebe Putney Health System, Inc., Defendant-Appellee

Phoebe North, Inc., Defendant-Appellee

Rafkin, Brian, Counsel for Phoebe Putney

Ramirez, Edith, Chairwoman, FTC

Razi, Sara Y., Deputy 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

Rybnicek, Jan, Attorney-Advisor, FTC

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

Sands, W. Louis, U.S. District Judge, Middle District of Georgia, Albany, Ga.

Schneirov, Elizabeth, Attorney-Advisor, FTC

Schwab, Jennifer K., Attorney, FTC

Shonka, David C., Acting 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, FTC

Tabas, Matthew, Attorney, FTC

Tsai, Joanna, Attorney-Advisor, FTC

Tucker, Darren S., Attorney Advisor, FTC

Viswanath, Priya B., Attorney, FTC

Van Voorhis, Lee K., Counsel for Phoebe Putney

Walker, Goldie V., Attorney, FTC

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

Winerman, Marc, Attorney-Advisor, FTC

Woodward, Mark, Attorney-Advisor, FTC

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

Wright, Joshua D., Commissioner, FTC

Xenakis, Stelios, Attorney, FTC

Zylberglait, Pablo, Attorney-Advisor, FTC

The Federal Trade Commission (FTC or Commission) respectfully moves, pursuant to Fed. R. App. P. 27 and 11th Cir. R. 27-1, for an expedited order remanding this case to the district court.

### **BACKGROUND**

On April 20, 2011, the FTC, together with the State of Georgia, filed a complaint for temporary restraining order and preliminary injunction in the United States District Court for the Middle District of Georgia, Albany Division. The Commission sought to enjoin the Hospital Authority of Albany-Dougherty County (Authority) from acquiring the assets of Palmyra Park Hospital, Inc. (Palmyra) from HCA Inc., and leasing those assets to a private entity, Phoebe Putney Health System, Inc. (PPHS), on a long-term basis, for a nominal-fee (together, the Transaction), during the pendency of a Commission administrative proceeding looking into the legality of the Transaction.<sup>1</sup> The Authority owns the only other hospital in Albany-Dougherty County – Phoebe Putney Memorial Hospital (Memorial), which it also leases to PPHS. The Commission’s complaint alleged that the Transaction would substantially reduce competition in the relevant market,

---

<sup>1</sup> On April 20, 2011, the Commission also issued an administrative complaint citing reason to believe the Transaction violates antitrust law; a plenary trial was scheduled to begin on September 19, 2011.

in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and, if consummated, Section 7 of the Clayton Act, 15 U.S.C. § 18.

Defendants moved to dismiss the complaint on grounds of state action exemption from federal antitrust law. Following a hearing, the district court granted Defendants' motion to dismiss, finding that the state action doctrine shielded the Transaction from federal antitrust scrutiny. The Commission appealed that decision, and this Court granted an injunction pending appeal.<sup>2</sup>

On December 9, 2011, this Court affirmed the district court's ruling. *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369 (11th Cir. 2011). It agreed with the Commission that "on the facts alleged," the Transaction "would substantially lessen competition or tend to create, if not create, a monopoly," *id.* at 1375, but it concluded that the state action exemption applied to the Transaction. On December 15, 2011, this Court dissolved its previously issued injunction pending appeal, and Defendants consummated the Transaction on that same day.

On February 6, 2012, this Court issued its mandate as to appellant FTC.

The Commission petitioned the U.S. Supreme Court for certiorari, which the Court granted on June 25, 2012. On February 19, 2013, in a unanimous decision,

---

<sup>2</sup> On July 1, 2011, Defendants filed with the FTC an unopposed motion to stay the administrative proceeding pending the outcome of the federal court appeals on the state action issue. The Commission stayed that proceeding on July 15, 2011.

the Supreme Court held that the state action doctrine did not shield the Transaction from federal antitrust scrutiny. *FTC v. Phoebe Putney Health Sys., Inc.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1003, 1017 (2013). The Supreme Court also noted that “[t]he case is not moot \* \* \* because the District Court on remand could enjoin respondents from taking actions that would disturb the status quo and impede a final remedial decree.” *Id.* at 1009 n.3 (citing *Knox v. Serv. Employees*, 567 U.S. \_\_\_, 132 S. Ct. 2277, 2287 (2012); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008) (Opinion of Brown, J.)). Accordingly, the Supreme Court vacated the decision of this Court and remanded the case for further proceedings. A certified copy of the Supreme Court’s judgment was transmitted to this Court on March 25, 2013.

On March 14, 2013, the Commission lifted the stay of its administrative proceeding, noting that time was of the essence in light of the consummation of the Transaction and the potential for ongoing consumer harm. Discovery in that proceeding is well underway, with trial on the antitrust merits scheduled for August 5, 2013.

On April 9, 2013, the Commission filed with the district court an amended complaint, and motions for a temporary restraining order and a preliminary injunction. The Commission seeks to enjoin Defendants from any further integration of the assets and operations of Phoebe North (formerly Palmyra) with

those of PPHS's Memorial hospital, and requiring Defendants to preserve the *status quo* at Phoebe North.

On April 17, 2013, the district court notified the parties that it "has learned from speaking with the 11th Circuit that the matter is pending before the panel. Therefore, this Court does not have jurisdiction and does not believe it can proceed with anything of substance in the case at this time."

### **DISCUSSION**

The Commission moves this Court to issue its remand order to the district court as soon as possible, in order for that court to begin its consideration of the Commission's motions for a TRO and a preliminary injunction. Those motions seek to prevent any immediate and potentially irreversible consumer harm from the loss of interim competition, and to preserve the Commission's ability to successfully restore hospital competition to the Albany, Georgia area if the Transaction is deemed unlawful at the conclusion of the administrative proceeding.

The Commission believes that the district court does have jurisdiction over this case, with this Court having issued its mandate on February 6, 2012. The district court has determined not to consider the Commission's request for temporary and preliminary relief, however, until it has heard from this Court. This Court's issuance of a remand order is, therefore, necessary to enable timely

attention by the district court to the Commission's request for temporary and preliminary relief.

Moreover, the Supreme Court's decision in this case – in denying the Transaction the state action exemption from federal antitrust scrutiny, thus clearing the way for consideration of the antitrust merits of the Commission's complaint – requires from this Court no consideration of any further substantive issue, and thus no further action beyond the issuance of a remand order.<sup>3</sup>

PPHS's CEO, Mr. Joel Wernick, has stated publicly, following the announcement of the Supreme Court's decision: "We will proceed with the plans we have until someone tells us we cannot. No one has told us that yet \* \* \*."

[Jennifer Maddox Parks, \*Supreme Court rules in favor of FTC in Palmyra acquisition\*, Albany Herald \(Feb. 19, 2013\).](#) In light of the ongoing consumer harm at issue, and the time-sensitive motions pending below, it is incumbent upon this Court to issue its remand order swiftly, thereby facilitating needed proceedings in the district court.

---

<sup>3</sup> The district court had, in light of its dismissal of the Commission's complaint on state action grounds, concluded that it "need not further address" the Commission's request for preliminary relief, and thus denied it without consideration of its merits. *FTC v. Phoebe Putney Health Sys., Inc.*, 793 F.Supp.2d 1356, 1381 (M.D. Ga. 2011).

## CONCLUSION

The Commission respectfully urges this Court to issue an Order remanding this case to the district court as soon as is practicable.

Respectfully submitted,

DAVID C. SHONKA

*Acting General Counsel*

JOHN F. DALY

*Deputy General Counsel for Litigation*

LESLIE R. MELMAN

*Assistant General Counsel for Litigation*

/s/ Imad Abyad

IMAD D. ABYAD

*Attorney*

FEDERAL TRADE COMMISSION

600 Pennsylvania Avenue, N.W.

Washington, DC 20580

iabyad@ftc.gov

(202) 326-2375

April 18, 2013

**CERTIFICATE OF SERVICE**

I certify that, on this 18th day of April, 2013, I filed the foregoing “Motion of the Federal Trade Commission for an Expedited Order of Remand” with the Clerk of the United States Court of Appeals for the Eleventh Circuit, using the Court’s ECF system. Attorneys participating in this case are registrants in this Court’s ECF system, and the ECF system will automatically generate, via electronic mail, notifications of such filing to those attorney filers participating in this case. Those notifications constitute service on those attorneys.

/s/ Imad Abyad

Imad D. Abyad

*Attorney*

FEDERAL TRADE COMMISSION

600 Pennsylvania Avenue, N.W.

Washington, DC 20580

iabyad@ftc.gov

(202) 326-2375