

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA**

ALBANY DIVISION

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

**AMENDED COMPLAINT FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Plaintiff, the Federal Trade Commission (the “FTC” or “Commission”) petitions the Court, pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, for a temporary restraining order and preliminary injunction against Defendants Phoebe Putney Health System, Inc. (“PPHS”), Phoebe Putney Memorial Hospital, Inc. (“PPMH”), Phoebe North, Inc. (“Phoebe North”) (collectively, “Phoebe Putney”); Defendants HCA Inc. (“HCA”) and Palmyra Park Hospital, Inc. (“Palmyra”); and Defendant Hospital Authority of Albany-Dougherty County (the “Authority”), including their domestic and foreign agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint

ventures. As the Transaction¹ is now consummated, we request that this Court enjoin any further integration of the acquired hospital's assets and operations, and preserve the *status quo* at Phoebe North (formerly Palmyra), pending the outcome of the Commission's expedited administrative proceeding.

Plaintiff requires the aid of this Court to maintain the *status quo* during the pendency of the ongoing administrative proceeding, including a trial on the merits scheduled for August 5, 2013, which the Commission initiated pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18, and the Commission's Rules of Practice. The ongoing administrative proceeding will determine the legality of the Transaction, subject to judicial review by a federal Court of Appeals, and provides a forum for all parties to conduct full discovery and present evidence regarding the likely effects of the Transaction and any affirmative defenses raised.

I.

NATURE OF THE CASE

1. The Transaction created a virtual monopoly for inpatient general acute care services sold to commercial health plans and their customers in Albany, Georgia and its surrounding area. It eliminated the robust competitive rivalry between Phoebe Putney and Palmyra – the only two hospitals in Albany and in Dougherty County – that benefitted consumers for decades. The result will be significant increases in healthcare costs for local residents, many of whom are already struggling to keep up with rising medical expenses, and the stifling of beneficial quality improvements. Without temporary and preliminary

¹ The term "Transaction" refers to the three-step transaction that transferred control of Palmyra to Phoebe Putney, consisting of the following steps: (1) the Authority purchased Palmyra's assets from HCA using PPHS's money; (2) the Authority immediately gave control of Palmyra to Phoebe Putney under a management agreement; and (3) Phoebe Putney entered into a lease giving it control of the Palmyra assets for 40 years.

injunctive relief from this Court, Phoebe, having gained full economic and operational control over Palmyra, may eliminate Palmyra's staff, terminate or relocate its services, and raise rates for its services.

2. Phoebe Putney and Palmyra knew that creating a virtual monopoly would not pass muster with the antitrust authorities; indeed, Palmyra conditioned the deal on "no risk of antitrust enforcement activity." So Phoebe Putney – without even informing the Authority that it was doing so – structured the Transaction in hopes of using the state action doctrine to shield the Transaction from potential antitrust challenges. The Transaction positioned the Authority as a strawman to transfer control of Palmyra to Phoebe Putney in a three-step process: *first*, the Authority purchased Palmyra's assets from HCA using PPHS's money; *second*, the Authority immediately gave control of Palmyra to Phoebe Putney under a management agreement; and *third*, Phoebe Putney entered into a lease giving it control of the Palmyra assets for 40 years. In a nutshell, the Authority, using Phoebe Putney's money, bought Palmyra, and then upon closing, immediately turned it over to Phoebe Putney. By using the Authority as a strawman, Phoebe Putney sought to shield this overtly anticompetitive Transaction from antitrust scrutiny.
3. As a result of the Transaction, Phoebe Putney now controls 100% of the licensed general acute care hospital beds in Dougherty County. Even in an expansive geographic market encompassing the six counties surrounding Albany, Phoebe Putney's pre-Transaction market share based on commercial patient discharges neared 75%. Adding Palmyra's 11%, the Transaction yielded a combined market share of approximately 86%. The hospital with the next-largest share (of less than 4% prior to the Transaction) is located

40 miles from Albany. The Transaction has dramatically increased concentration in an already highly-concentrated market, giving rise to a presumption of unlawfulness by a wide margin under the relevant case law and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”).

4. Phoebe Putney and Palmyra were each other’s closest competitors, and they were regarded as the closest substitutes for one another by both health plans and their members. The two hospitals battled fiercely for inclusion in health-plan networks and went to great lengths to increase their appeal to health-plan members. While Palmyra sought to maintain a price advantage relative to Phoebe Putney, the latter has offered its deepest commercial payor discounts to health plans willing to exclude Palmyra from their networks.
5. The Transaction ended that beneficial competition. The CEO of Phoebe Putney stated publicly that the Transaction affords the opportunity to “get the rivalry behind us.” A requirement of the Transaction was that Palmyra drop its pending monopolization lawsuit against Phoebe Putney.
6. Other southwest Georgia hospitals offer scant competition to Phoebe Putney today. The nearest independent hospitals, located over 30 miles from Albany, are small and serve only their own local communities. Given health-plan members’ unwillingness to travel significant distances for inpatient general acute care services, these hospitals are simply too distant to serve as practical substitutes for residents of the Albany area, even in the event of a small but significant price increase at Phoebe Putney’s Albany hospitals. Prior to the Transaction, health plans and local employers testified that their networks must

include PPMH or Palmyra, or both, in order to be commercially viable for Albany-area employers and other groups.

7. The Transaction greatly enhances Phoebe Putney's bargaining position in negotiations with health plans, giving it the unfettered ability to raise reimbursement rates without fear of losing customers. Lacking Palmyra or any other independent competitive alternative to PPMH post-Transaction, health plans will be forced either to accept the higher rates or to exit the local marketplace. Higher hospital rates are borne by the health plans' customers – local employers that pay their employees' healthcare claims directly or pay premiums to health plans on their employees' behalf – and ultimately by the individual health-plan members themselves. Those increased costs impact local employers' ability to compete, expand, and remain vibrant.
8. The vigorous price, quality, and service competition eliminated by the Transaction will not be replaced by other hospitals in the next several years, if ever. Significant barriers to entry and expansion, including Certificate of Need ("CON") regulations and funding requirements, prevent other hospitals from extending their reach into the Albany area. Even Palmyra struggled mightily to expand into new service lines, such as obstetrics, due to stringent CON requirements and fierce opposition from Phoebe Putney. Phoebe Putney has stated it would take many years to construct a new facility comparable to Palmyra. Any purported efficiencies associated with the Transaction are insufficient to offset the great anticompetitive harm resulting from the Transaction.
9. On April 19, 2011, by a 5-0 vote, the Commission found reason to believe that the Transaction would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by

substantially reducing competition, and initiated an administrative proceeding under Part 3 of its Rules of Practice. Although the proceedings were stayed pending the outcome of federal-court appeals on the state-action immunity issue, they have since resumed. In fact, discovery is ongoing and a plenary administrative trial on the merits of the Transaction will begin on August 5, 2013. The merits trial will include up to 210 hours of live testimony. After an initial decision by an administrative law judge, the Commission, upon the appeal of any party or upon its own initiative, may determine the legality of the Transaction, and should it find liability, issue appropriate final remedial relief.

10. Absent an order of this Court, Defendants will be free to take additional steps in furtherance of the Transaction, even while the administrative proceeding is underway, including staff reductions, the elimination or transfer of service lines, the implementation of higher contract reimbursement rates, and the scrambling of Palmyra's assets with Phoebe Putney's. Following the announcement of the Supreme Court's decision, Phoebe Putney CEO Joel Wernick stated publicly, "We will proceed with the plans we have until someone tells us we cannot. No one has told us that yet."² Moreover, Phoebe Putney now has the incentive to allow the wasting of Phoebe North in light of the Supreme Court's rejection of state-action immunity and the greater likelihood that the Transaction will be found anticompetitive and Phoebe Putney will be required to divest the hospital to a competitor. Temporary and preliminary injunctive relief is therefore imperative to preserve the *status quo* during the Commission's pending administrative proceeding.

² Jennifer Maddox Parks, *Supreme Court Rules in Favor of FTC in Palmyra Acquisition*, Albany Herald, Feb.

Such relief is warranted when the Commission raises “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 Commission in the first instance, and ultimately by the Court of Appeals.” Any additional steps taken in furtherance of the Transaction would result in immediate and significant harm to the employers and residents of Albany and the surrounding local area, and will frustrate the Commission’s ability to remedy the anticompetitive effects of the Transaction if the Commission ultimately finds it to be unlawful following the full administrative trial on the merits and any subsequent appeals.

II.

BACKGROUND

A.

Jurisdiction and Venue

11. This Court’s jurisdiction arises under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, and 28 U.S.C. §§ 1331, 1337, and 1345. This is a civil action arising under Acts of Congress protecting trade and commerce against restraints and monopolies and is brought by an agency of the United States authorized by an Act of Congress to bring this type of action.
12. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:
Whenever the Commission has reason to believe –

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public – the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond . . .

13. Defendants, and each of their relevant operating subsidiaries and parent entities are, and at all relevant times have been, engaged in activities in or affecting “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.
14. Defendants all transact business in the Middle District of Georgia and are subject to personal jurisdiction therein. Venue therefore is proper in this District under 28 U.S.C. § 1391(b) and (c) and 15 U.S.C. § 53(b).

B.

The Parties

15. The Commission is an administrative agency of the U.S. Government established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act, 15 U.S.C. § 18.

16. All Phoebe Putney Defendants are not-for-profit corporations under Internal Revenue Code § 501(c)(3) and the Georgia Nonprofit Corporate Code, with their principal places of business at 417 Third Avenue, Albany, Georgia 31701. Defendant PPMH, directly or indirectly, is a Georgia corporation wholly-owned or controlled by PPHS, a Georgia corporation. PPHS is responsible for the operation of all Phoebe Putney hospital facilities in Albany, Georgia as well as the hospital in Sylvester, Georgia (in the Albany Metropolitan Area), where Phoebe Worth Medical Center, Inc. is located. Defendant Phoebe North, Inc. is an entity that was created by PPHS in connection with the Transaction, to manage and operate Palmyra, under the control of PPHS and PPMH.
17. PPMH is a 443-bed hospital located at 417 Third Avenue, Albany, Georgia 31701. Opened in 1911, at its current site, the hospital offers a full range of general acute care hospital services, as well as emergency care services, tertiary care services, and outpatient services. PPMH serves its local community, but also draws tertiary-service referrals from a broader region.
18. In 2011, total annual patient revenues for Phoebe Putney for all services, at all facilities, were over \$1.16 billion. Total discharges for all services were over 19,000. Phoebe Putney's annual net income or surplus was over \$19 million. General acute care hospital services account for the majority of its services and revenues.
19. Phoebe Putney's reach extends beyond Dougherty County, operating, through its wholly-owned subsidiary Phoebe Worth Medical Center, Inc., a 25-bed critical access hospital located at 807 S. Isabella Street, Sylvester, Georgia 31791, and Phoebe Sumter Medical Center, a 76-bed general acute care hospital located in Americus, Georgia.

20. Defendant HCA is a for-profit health system that owns or operates 162 hospitals. Its facilities are located in 20 states and England. Founded in 1968, HCA is one of the nation's largest healthcare service providers with over 41,000 licensed beds. Total annual revenues for HCA for all services and facilities are over \$33 billion. HCA is incorporated in the State of Delaware. Its offices are located at One Park Plaza, Nashville, Tennessee 37203.
21. Prior to the Transaction, HCA owned and operated Defendant Palmyra Park Hospital, Inc., doing business as Palmyra Medical Center, a 248-bed acute care hospital incorporated in the State of Georgia, and located at 2000 Palmyra Road, Albany, Georgia 31701. Palmyra was built in 1971 in response to requests by local physicians and community leaders to broaden the healthcare options available to residents of Dougherty County and the surrounding counties. Palmyra provided general acute care services, including, but not limited to, services in non-invasive cardiology, gastroenterology, general surgery, gynecology, oncology, pulmonary care, and urology.
22. Defendant Authority is organized and exists pursuant to the Georgia Hospital Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.*, a statute which governs 159 counties over the entire state, where at least 92 hospital authorities currently exist. The Authority maintains its principal place of business at 417 Third Avenue, Albany, Georgia 31701, the same address as PPMH; it has no budget, no staff, and no employees. Phoebe Putney pays all the Authority's expenses. The Authority's nine unpaid/volunteer members are appointed to five-year terms by the Dougherty County Commission. The Authority holds title to the hospital's assets, but leased them in 1990 to PPMH for \$1.00 per annum under the

Lease, which has been extended several times and will expire in 2042. The Lease establishes certain contractual rights, duties, and responsibilities that PPMH and the Authority owe with respect to one another. In July 2012, despite the presence of community opposition, the Authority approved an amended and fully restated lease that combines PPMH and Phoebe North under a single lease. PPHS itself is not a party to the Lease and does not report to the Authority.

C.

Phoebe Putney's Private Interests

23. Under the terms of the Lease, the relationship between the Authority and PPMH is defined as, and limited to, that of landlord and tenant. Section 10.18 reads in pertinent part that “no provisions in this Agreement nor any acts of the parties hereto shall be deemed to create any relationship between Transferor and Transferor [sic] other than the relationship of landlord and tenant.”
24. The Lease (and the attachments incorporated into the Lease as stipulated in Sections 4.02(h) and 4.15) provides that PPHS, through its Board of Directors, controls the assets and operations of PPMH. Under the terms of the December 3, 1990, *Contract Between Dougherty County, Georgia and the Authority of Albany-Dougherty County*, an attachment to the Lease, the Authority and Dougherty County stipulate in paragraph no. 4, on page five, that PPMH “has the sole discretion to establish its rate structure.”
25. Since the Lease took effect, in 1990, the Authority has not and does not countermand, approve, modify, revise, or, in other respects, actively supervise Phoebe Putney's actions regarding competitively significant matters. It is Phoebe Putney's executives, not the

Authority, who control Phoebe Putney’s revenues, expenditures, salaries, prices, contract negotiations with health insurance companies, available services, and other matters of competitive significance. At no time, from the date the Authority and PPMH entered into the Lease, has the Authority exercised management, control, or active supervision over the affairs of PPMH. Indeed, during all those years, the Authority never asked once for lower prices at PPMH.

26. As if to illustrate its deference to Phoebe Putney, the Authority waived its right to acquire Palmyra or any other hospital in Albany as a term of the Lease. Section 4.21 of the Lease, at page 26, stipulates that “[d]uring the term of this Agreement, Transferor [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 the [Phoebe Putney Memorial] Hospital in Albany, Georgia”
- Once the Authority rubber-stamped the Transaction and the Management Agreement that would put Phoebe Putney in control of its only Dougherty County competitor, however, PPMH agreed to waive this condition.

D.

The Transaction

27. In the Spring and Summer of 2010, two important events occurred: (1) in April, the Eleventh Circuit reinstated Palmyra’s antitrust suit accusing Phoebe Putney of using its monopoly power in obstetrics, neonatal and cardiovascular care to foreclose competition; and (2) in July, Mr. Joel Wernick, PPHS’s President and Chief Executive Officer,

- authorized Mr. Robert J. Baudino, a consultant and attorney engaged by PPHS, to begin discussions with HCA regarding the possible acquisition of Palmyra by Phoebe Putney.
28. Fully conscious that the Transaction was anticompetitive and would run afoul of federal antitrust laws, Defendants, with the aid of Mr. Baudino, engaged in extensive efforts to avoid antitrust enforcement. On November 10, 2010, in a letter to HCA, Mr. Baudino outlined how PPHS would structure the Transaction to eliminate antitrust risks. He believed that, under the state action doctrine, having the Authority make the acquisition would insulate the deal from notice to, or antitrust law enforcement by, the Commission and the United States Department of Justice. Mr. Baudino went on to explain that “the Authority would acquire Palmyra and, after the acquisition, lease Palmyra to a non-profit corporation controlled by PPHS.”
29. On November 16, 2010, PPHS made a formal offer to HCA for Palmyra for twice its net patient revenue for the prior 12 months and on December 2, the PPHS Board approved the final terms of the deal between PPHS and HCA. PPHS agreed to guarantee a \$195 million payment and a \$35 million break-up fee, representing nearly 18% of the purchase price. In addition, under Section 10.1(a) of the Defendants’ Asset Purchase Agreement, PPHS likewise agreed to pay HCA a \$35 million “rescission fee” if, after closing, there is a final court order rescinding the transaction.
30. On December 15, 2011, after the Eleventh Circuit affirmed this Court’s motion-to-dismiss ruling and dissolved its injunction pending appeal, Defendants consummated their acquisition of Palmyra.

E.

Procedural Developments

31. On April 20, 2011, Plaintiffs filed a complaint under Section 13(b) of the FTC Act in this Court, seeking to preliminarily enjoin consummation of the Transaction during the pendency of the administrative proceedings.
32. Defendants moved to dismiss the action on grounds of state-action immunity.
33. After hearing argument on the antitrust merits and Defendants' state-action defense on June 13, 2011, this Court granted Defendants' motion and dismissed the FTC's complaint, finding that state-action immunity shielded the acquisition from federal antitrust scrutiny.
34. The FTC appealed this Court's dismissal of the complaint, and the Eleventh Circuit granted an injunction pending appeal.
35. On July 1, 2011, Defendants moved for a stay of the administrative proceedings underway at the Commission. On July 15, 2011, the FTC granted Defendants' motion and stayed the administrative proceeding for the limited purpose of awaiting the outcome of federal-court appeals on the state-action immunity issue.
36. On December 9, 2011, the Eleventh Circuit affirmed this Court's order granting Defendants' motion to dismiss and dissolved its injunction pending appeal. The Eleventh Circuit, however, agreed with the FTC that "on the facts alleged, the joint operation of Memorial and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly," but found that state-action immunity applied.

37. The FTC petitioned the United States Supreme Court for certiorari, which was granted on June 25, 2012. Briefing was conducted through the fall, and oral argument took place on November 26, 2012.
38. On February 19, 2013, the Supreme Court reversed the judgment of the Eleventh Circuit. In a unanimous opinion authored by Justice Sotomayor, the Supreme Court held that state-action immunity did not immunize the Phoebe Putney/Palmyra transaction. The Supreme Court also held 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.” The Court further remanded the case for proceedings consistent with its opinion.
39. On February 22, 2013, following the United States Supreme Court’s unanimous ruling that state-action immunity does not apply to Defendants’ hospital acquisition, Plaintiff moved the Commission to lift the stay of administrative proceedings issued on July 15, 2011. The Commission granted the motion to lift the stay on March 14, 2013. Under the Commission’s Part 3 Rules of Practice, expedited discovery already is underway and a plenary administrative trial is scheduled to begin on August 5, 2013.

III.

THE RELEVANT SERVICE MARKET

40. The Transaction substantially harms competition in the relevant market for inpatient general acute care hospital services sold to commercial health plans.
41. Inpatient general acute care hospital services encompasses a broad cluster of basic medical and surgical diagnostic and treatment services that include an overnight hospital

stay. It is appropriate to evaluate the Transaction's likely effects across this cluster of services, rather than analyzing effects as to each service independently, because the group of services in the market was offered by Phoebe Putney and Palmyra under very similar competitive conditions. There are no practical alternatives to the cluster of inpatient general acute care hospital services.

42. The inpatient general acute care services market does not include outpatient services because health plans and patients cannot substitute them for inpatient care in response to a price increase. Similarly, the general acute care hospital services market does not include highly specialized tertiary or quaternary hospital services, such as those involving major surgeries and organ transplants, because they too are not practical substitutes for general acute care hospital services.
43. Prior to the Transaction, Phoebe Putney and Palmyra independently negotiated reimbursement-rate contracts with commercial health plans. These contracts set the reimbursement rates that the health plans (and their self-insured customers) pay the hospitals for the services provided to health-plan members.

IV.

THE RELEVANT GEOGRAPHIC MARKET

44. The relevant geographic market in which to analyze the effects of the Transaction is *no broader than* the six-county region consisting of Dougherty, Terrell, Lee, Worth, Baker, and Mitchell Counties in Georgia.
45. Health-plan members strongly prefer to obtain inpatient hospital services close to their homes. Members' physicians typically have admitting privileges at their local hospitals,

but not more distant facilities. Close proximity provides convenience for patients and also their visiting family members. Members are generally unwilling to travel outside of their communities for inpatient general acute care services, unless a particular needed service is unavailable locally, or the quality offered by local facilities is perceived as insufficient.

46. The only hospitals available to health plans to serve residents of the Albany area are located in Dougherty County, in the City of Albany. Health plans testified prior to the Transaction that they *must have* either Phoebe Putney or Palmyra, or both, in their networks in order to offer commercially viable insurance products to residents of Albany and the six-county area.
47. The nearest independently-owned hospitals located outside of Albany are Mitchell County Hospital (31 miles away) and Crisp Regional Hospital (39 miles away). Health plans and their members do not view these hospitals, given their distance and limited service offerings, as practical substitutes for Phoebe Putney, or Palmyra.
48. Health plans could not steer their members to hospitals outside the six-county area in response to a small but significant rate increase at the hospitals within the area. It would therefore be profitable for a hypothetical monopolist controlling all hospitals in the relevant geographic market to increase commercial reimbursement rates by a significant amount.
49. As reflected by their ordinary-course documents and their actions, Phoebe Putney and Palmyra focused their competitive efforts and attention on one another, to the exclusion of any hospitals located outside the six-county area. Prior to the Transaction, Phoebe

Putney's longstanding contracting strategy was to require health plans to exclude Palmyra, *but no other hospitals*, from their provider networks.

50. Hospitals outside the six-county area do not regard themselves as, and are not, meaningful competitors of Phoebe Putney or Palmyra for inpatient general acute care services as defined herein.

V.

MARKET STRUCTURE AND PRESUMPTIVE HARM

51. The Transaction was for all practical purposes a merger to monopoly, by any measure.
52. In addition to Phoebe Putney and Palmyra, there is only one other independently-owned hospital located within the expansive six-county region set forth above. That hospital is 25-bed Mitchell County Hospital, a very small limited-care facility about 31 miles away. In addition, there are two hospitals located *outside* the six-county area – Tift Regional Medical Center and John D. Archbold Medical Center – which, in 2011, accounted for a small but nontrivial share of discharges for health-plan members residing within the six-county area. The other hospital mentioned above, Crisp Regional, is also located outside the six-county area and accounted for an insignificant share of the relevant market.
53. Under relevant case law and the Merger Guidelines, the Transaction is presumptively unlawful. PPHS's combined post-Transaction market share, based on discharges for commercial patients residing in the six-county area, was approximately 86%. This extraordinarily high market share far exceeds levels that the United States Supreme Court has found presumptively unlawful.

54. The Merger Guidelines measure market concentration using the Herfindahl-Hirschman Index (“HHI”). A merger or acquisition is presumptively likely to create or enhance market power (and presumed illegal) when the post-merger HHI exceeds 2,500 points and the transaction increases the HHI by more than 200 points.
55. The market concentration levels here exceed these thresholds by a wide margin. The post-Transaction HHI increased by 1,675 points to 7,453, as shown in the following table:

<u>Hospital</u>	<u>Discharges</u>	<u>Pre-Transaction Share of Discharges</u>	<u>Post-Transaction Share of Discharges</u>
PPHS	6,662	74.9%	86.1%
Palmyra	1,000	11.2%	
Tift Regional Medical Center	351	3.9%	3.9%
John D. Archbold Memorial Hospital	218	2.5%	2.5%
Others (each 1% or less)	659	7.4%	7.4%
Total	8,890		
Pre-Transaction HHI:			5,778
Delta:			1,675
Post-Transaction HHI:			7,453

VI.

ANTICOMPETITIVE EFFECTS

A.

The Transaction Eliminated a Unique Pricing Constraint Upon Phoebe Putney

56. By eliminating vigorous competition between Phoebe Putney and Palmyra, the Transaction has enhanced Phoebe Putney's ability and incentive to increase reimbursement rates for commercial health plans and their membership.
57. In its actions, documents, testimony, and public statements, Phoebe Putney has acknowledged the intense competition between it and Palmyra. For example, Phoebe Putney had a longstanding contracting strategy in which it offered substantially more attractive reimbursement rates to commercial health plans, including Blue Cross Blue Shield of Georgia, that were willing to enter into an exclusive in-network relationship with Phoebe Putney *but not Palmyra*. In essence, Phoebe Putney recognized that its financial success depended on keeping health-plan members away from Palmyra, its only true competitor.
58. Cognizant of Palmyra's competitive threat, Phoebe Putney has repeatedly challenged Palmyra's efforts to obtain a CON for obstetrics. Palmyra was initially granted a CON to build an obstetrics department, after which Phoebe Putney appealed the decision twice, and lost. Phoebe Putney then sued in state court to block Palmyra from going forward with its plans and was successful. Palmyra's appeal of that decision was pending at the time the Transaction was proposed. Palmyra was also prosecuting an antitrust lawsuit

against Phoebe Putney, alleging monopolization and illegal tying, but this was dropped as part of the signing of the APA in December 2010.

59. Palmyra has demonstrated the ability to capture market share from Phoebe Putney. Palmyra's CEO, Mark Rader, testified that Palmyra's market share increased during the two years prior to the proposal of the Transaction, while Phoebe Putney's share declined by an equal amount. And Mr. Wernick's December 21, 2010 presentation to the Authority states that one of the strategic consequences to Phoebe Putney were it not to buy Palmyra would be "stunted future market share accumulation."
60. In a fact sheet prepared by Phoebe Putney, the Authority stated on December 21, 2010:

With years of rivalry, how did this happen? . . . Typical of normal marketplace behavior, for each of the two hospitals to be successful they had to compete with each other for business. There was a drive for each to match services provided by the other. . . . So the time has come for the rivalry to become a part of history.
61. The overt competitive rivalry between Phoebe Putney and Palmyra yielded price benefits to health plans and their members. While Phoebe Putney offered lower rates to health plans in return for their commitment to exclude Palmyra from their provider networks, Palmyra's competitive strategy in the marketplace was to achieve and maintain a cost advantage versus Phoebe Putney. As the two hospitals are now operating as a single entity, under one lease, the Transaction eliminates incentives for either hospital to discount its rates in an effort to gain business from health plans and their members.
62. As a result of the Transaction, the combined Phoebe Putney/Palmyra system has become an absolute "must-have" hospital for health plans, which will have no available practical alternative hospitals to offer their members. This significant change in the negotiating

dynamic will enhance Phoebe Putney's ability and incentive to obtain rate increases for its own services, as well as for Palmyra's services. Health plans anticipate that Palmyra's rates will increase significantly, and that Phoebe Putney's rates will rise incrementally, as well, due to the elimination of its only meaningful competitor.

63. Rate increases resulting from the Transaction ultimately will be shouldered by local employers and their employees. A significant percentage of the commercial health-plan membership in the Albany area is self-insured. Self-insured employers rely on health plans to negotiate rates and provide administrative support, while directly paying the full cost of their employees' health-care claims. As a result, self-insured employers and employees immediately and directly bear the full burden of higher rates, including higher premiums, co-pays, and out-of-pocket costs. Fully-insured employers also are inevitably harmed by higher rates, because health plans pass on at least a portion of hospital rate increases to these customers through premium increases and administrative fees. To avoid having to pay the higher prices, some Albany-area employers may opt no longer to provide health-care coverage for their employees, and some Albany area residents may be forced to forego or delay health-care services because of the higher prices.
64. Non-profit hospitals such as Phoebe Putney are no less likely than their for-profit counterparts to negotiate aggressively with health plans over reimbursement rates and to exercise market power gained through acquisition of a competitor.

C.

The Loss of Quality Competition

65. The Transaction will reduce the quality and breadth of services available in the Albany area.
66. Absent the Transaction, Phoebe Putney and Palmyra would have continued to be close rivals with differentiated competitive offerings in the market for general acute care hospital services. Health plans perceive little quality difference between the two hospitals currently.
67. Competition between Phoebe Putney and Palmyra spurred the two hospitals to offer additional services; it also fostered other non-price benefits for residents of the Albany area. For example, in response to Palmyra advertising its real-time emergency room wait times on its website and electronic billboards, Phoebe Putney executives sought to improve their own services. After Palmyra was granted a CON for an obstetrics department, Phoebe Putney developed plans to increase the availability of private rooms to its obstetrics patients. The Transaction eliminates these competitive incentives and benefits.

VII.

ENTRY BARRIERS

68. Entry by new hospitals will not deter or counteract the Transaction's likely harm to competition in the relevant service market. No hospitals have entered or expanded in the relevant area since the Transaction was consummated. There is little chance that other firms would be able to enter to counter Phoebe Putney's anticompetitive practices.

69. The regulatory environment in which hospitals are permitted to operate prevents other institutions from entering. Under Georgia law, GA. Code Ann. §§ 31-6-42 (a)(3), only specially licensed facilities are permitted to offer general acute care hospital services, and before they may do so, the State must issue a CON before a new facility may be built. Phoebe Putney has a long history of vigorously opposing CON applications, as its conduct with respect to Palmyra demonstrates.
70. Even if a CON were obtained, the construction of a new general acute care hospital comparable to Palmyra would cost millions of dollars and take well over two years – indeed, six years according to Phoebe Putney’s counsel – from initial planning to opening doors to patients.
71. The construction of Palmyra in 1971 was the last example of new hospital entry in the Albany area. No other hospitals in southwest Georgia – the most likely candidates for new entry or expansion – have stated they will enter, or even are considering entering, the relevant geographic market.

VIII.

ANTICIPATED DEFENSES

72. Extraordinary efficiencies that cannot be achieved absent the merger are necessary to justify the Transaction in light of its vast potential to harm competition. Such efficiencies are lacking here.
73. Any capacity constraints alleged by Phoebe Putney are self-serving and illusory. The Transaction does not increase capacity by one single bed. Rather, the stated goal of the Transaction was for Phoebe Putney to control all beds in Dougherty County.

74. Prior to the Transaction, instead of suffering from capacity constraints, PPMH had excess staffed-bed capacity in virtually all inpatient departments with the possible exception of its intensive care unit.
75. Any assertion with respect to the perceived need for additional capacity at PPMH will fail, in addition to failing as an asserted efficiency, because any pre-Transaction capacity constraints were self-inflicted by Defendant Phoebe Putney's own actions. To the extent any capacity constraints existed at Phoebe Putney, they were the result, *inter alia*, of Phoebe Putney's own operational inefficiencies, inaccurate diagnoses, and improper use of beds.
76. Furthermore, prior to the Transaction, although Palmyra aggressively attempted to expand services and service lines at the hospital through the CON process, in an effort to increase the availability of services in Dougherty County, Phoebe Putney aggressively stood in the way of those expansion efforts.
77. Although Defendants have asserted that the Transaction will result in indigent care improvement, access to indigent care was never discussed in key Transaction justification documents by Phoebe Putney or the Authority. Furthermore, Phoebe Putney's purported capacity constraints do not affect its provision of indigent care and Palmyra's track record for indigent care was strong.
78. Although Defendants have asserted, generally, that it was cheaper for Phoebe Putney to buy Palmyra than for Phoebe Putney to pay to build a new facility, Defendants have put forth no evidence of meaningful cost-saving synergies or improved quality of care that would offset the great anticompetitive harm resulting from the Transaction.

IX.

LIKELIHOOD OF SUCCESS ON THE MERITS AND NEED FOR RELIEF

79. In deciding whether to grant relief, the Court must balance the likelihood of the Commission's ultimate success on the merits against the public equities, using a sliding scale. The principal equity in cases brought under Section 13(b) is the public's interest in effective enforcement of the antitrust laws. Equities affecting only the Defendants cannot tip the scale.
80. The Commission's complaint raises 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. Indeed, the Eleventh Circuit stated that "on the facts alleged, the joint operation of [PPMH] and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly."
81. The Commission staff is likely in the administrative proceeding to succeed in demonstrating, among other things, that:
- a. The Transaction is likely to have anticompetitive effects in violation of Section 7 of the Clayton Act, in the inpatient general acute care hospital services market in the Albany, Georgia area;
 - b. Substantial and effective entry or expansion into these markets is difficult, and would not be timely, likely, or sufficient to offset the anticompetitive effects of the Transaction; and

c. Any efficiencies defense will fail as speculative and/or not merger-specific and any assertion with respect to the perceived need for additional capacity at PPMH will fail, in addition to failing as an asserted efficiency, because it will have been caused by Defendant Phoebe Putney's own prior actions.

82. Should the Commission rule, after the full administrative trial, that the Transaction is unlawful, reestablishing the competitive *status quo ante* would be more difficult in the absence of temporary and preliminary injunctive relief. Any further integration of Palmyra's operations into those of Phoebe Putney, which may include staff reductions, the elimination or transfer of service lines, the implementation of higher contract reimbursement rates, and the scrambling of Palmyra's assets with Phoebe Putney's, will significantly impede any remedial effort to restore Palmyra to its pre-Transaction role as an independent and viable competitor of Phoebe Putney. Moreover, absent temporary and preliminary relief from this Court, substantial harm to competition will occur in the interim, even if suitable divestiture remedies ultimately may be devised.

83. Accordingly, the equitable relief requested here is in the public interest.

WHEREFORE, Plaintiffs respectfully request that, consistent with the attached Proposed Temporary Restraining and Preliminary Injunction Order, the Court:

a. Temporarily restrain and preliminarily enjoin Phoebe Putney from, *inter alia*, taking any further actions to consolidate, integrate, or otherwise combine Palmyra into Defendants' hospital system, including, without limitation, (1) eliminating, removing, or transferring any clinical services or departments, (2) transferring, terminating, or reducing the salary or

compensation arrangements of, any employee or staff of Palmyra, or (3) cancelling any contracts;

- b. Retain jurisdiction and require all Defendants to maintain the *status quo* until resolution of the administrative proceeding that the Commission has initiated, including, *inter alia*, (1) not allowing the destruction, removal, wasting, deterioration, or impairment of Palmyra, except for ordinary wear and tear, and (2) continuing funding and capital expenditures according to, and consistent with, Palmyra's plans before the Transaction;
- c. Report to Plaintiff concerning Defendants' compliance with this Court's Order; and
- d. Award such other and further relief as the Court may determine is appropriate, just, and proper.

Respectfully submitted this 9th day of April, 2013.

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CERTIFICATE OF SERVICE

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

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