

ORIGINAL

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**



)
In the Matter of)
Phoebe Putney Health System, Inc.)
a corporation, and)
)
Phoebe Putney Memorial Hospital, Inc.)
a corporation, and)
)
Phoebe North, Inc.)
a corporation, and)
)
HCA Inc.)
a corporation, and)
)
Palmyra Park Hospital, Inc.)
a corporation, and)
)
Hospital Authority of Albany-Dougherty County.)

Docket No. 9348

**PUBLIC
VERSION**

**RESPONDENT HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY
COUNTY'S ANSWER AND DEFENSES TO ADMINISTRATIVE COMPLAINT**

Pursuant to 16 C.F.R. § 3.12(b), Respondent the Hospital Authority of Albany-Dougherty County (the "Authority") submits the following Answer and Defenses to the allegations of the Complaint filed by the Federal Trade Commission (the "FTC") on April 19, 2011.

DEFENSES AND IMMUNITIES

Without assuming any burden of proof that it would not otherwise bear, and reserving its right to assert additional defenses as this matter proceeds, the Authority asserts the following defenses and immunities:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Commission is without subject-matter jurisdiction over the claims asserted in this case.

THIRD DEFENSE

Neither the Authority nor its acquisition of the Palmyra Park Hospital in Albany-Dougherty County is subject to the federal antitrust laws by virtue of the state action doctrine. *See Parker v. Brown*, 317 U.S. 341 (1943). The unexecuted and non-finalized management agreement similarly is immune from the federal antitrust laws and the Commission's efforts to apply those laws in this case. And although the Authority has not agreed to lease the acquired Palmyra Park Hospital to any party and cannot do so without complying with O.C.G.A. § 31-7-74.3, O.C.G.A. § 31-7-75, O.C.G.A. § 31-7-89.1, and other state laws, any such future agreement to lease the hospital to a non-profit entity similarly would be immune from the federal antitrust laws and the Commission's efforts to apply those laws in this case.

FOURTH DEFENSE

The acquisition by the Authority of Palmyra Park Hospital will produce specific efficiencies and other benefits for the Georgia citizens that the Authority serves. In particular, the acquisition will transform a private hospital, operated for profit and for the benefit of private shareholders, and create a network of hospitals and other medical facilities in Albany-Dougherty County that are owned by the Authority and operated for the benefit of citizens of Albany-Dougherty County and neighboring counties. Further, the approved but as yet unexecuted management agreement will produce specific efficiencies and other benefits for the Georgia citizens that it serves. In particular, those efficiencies include the provision of high-quality

medical care to the indigent residents of Albany-Dougherty County at no material cost to the taxpayers of Albany-Dougherty County.

Finally, should the Authority, after providing notice and the requisite public hearing, approve a lease of the acquired Palmyra Park Hospital assets to a non-profit entity in accordance with Georgia law, that decision similarly will be based upon the Authority's judgment that the operation of the Palmyra Park Hospital pursuant to that structure will benefit the patients and citizens of Albany-Dougherty County and neighboring counties.

FIFTH DEFENSE

The contemplated relief would not be in the public interest because it would, among other things, harm consumers, as well as the taxpayers and citizens of Albany-Dougherty County.

OTHER DEFENSES

The Authority reserves the right to assert other defenses as the case and any discovery in this or any other related action proceeds. The Authority also hereby incorporates by reference any and all defenses stated by the other Respondents to this action.

RESPONSES TO THE FTC'S ALLEGATIONS

Pursuant to 16 C.F.R. § 3.12(b)(1)(ii), the Authority provides the following response to the allegations of the Commission's Complaint:

Unnumbered Introductory Paragraph

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Respondents Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Phoebe North, Inc. ("PNI") (collectively, "Phoebe Putney"); Respondents HCA Inc. ("HCA") and Palmyra Park Hospital, Inc. ("Palmyra"); and Respondent Hospital Authority of Albany-Dougherty County ("the Authority"), having entered into an agreement pursuant to which control of Palmyra shall be transferred to Phoebe Putney (the "Transaction"), in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest,

hereby issues its complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), and Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), stating its charges as follows:

RESPONSE: The Authority denies the allegations and legal conclusions contained in the unnumbered introductory paragraph of the Complaint. Further answering, the Authority denies the FTC’s definition and characterization of the term “Transaction.” The acquisition at issue is limited to Authority’s acquisition of the assets of Palmyra Park Hospital, Inc. (“Palmyra”). The Authority reincorporates this specific denial in its Response to Paragraphs 1-87 of the Administrative Complaint below.

I.

NATURE OF THE CASE

1.

The Transaction creates a virtual monopoly for inpatient general acute care services sold to commercial health plans and theft customers in Albany, Georgia and its surrounding area. The Transaction will eliminate the robust competitive rivalry between Phoebe Putney and Palmyra — the only two hospitals in Albany and in Dougherty County — that has benefited 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.

RESPONSE: The Authority denies the allegations of Paragraph 1.

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 [REDACTED]. 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 positions the Authority as a strawman to transfer control of Palmyra to Phoebe Putney in a three-step process: *first*, the Authority will purchase Palmyra’s assets from HCA using PPHS’s money; *second*, the Authority will immediately give control of Palmyra to Phoebe Putney under a management agreement; and *third*, Phoebe Putney will enter into a lease giving it control of the Palmyra assets for 40 years. In a nutshell, the Authority, using Phoebe Putney’s money, would buy Palmyra, and then upon closing, immediately turn it over to Phoebe Putney.

RESPONSE: The Authority denies the allegations of Paragraph 2.

3.

Thus, the Authority is the acquirer of Palmyra on paper only. By using the Authority as a strawman, Phoebe Putney sought to shield this overtly anticompetitive Transaction from antitrust scrutiny. The Authority played no meaningful role in the Transaction. Phoebe Putney initiated and negotiated the deal. The Authority undertook no substantive analysis of the Transaction or its effect on the community and played no independent role in negotiating it. The parties included the Authority at the eleventh hour solely in an effort to avoid antitrust enforcement by having the Authority rubber-stamp this sale from one private party to another. Indeed, the entire Transaction is premised on the immediate handover of Palmyra's assets to Phoebe Putney; the Authority has considered no other options.

RESPONSE: The Authority denies the allegations of Paragraph 3.

4.

So certain was Phoebe Putney that the Authority would rubber-stamp the Transaction, that it [REDACTED] with Palmyra. Before the Transaction was even presented to the Authority, Phoebe Putney agreed with Palmyra that if the Authority failed to [REDACTED] Phoebe Putney would pay [REDACTED].

RESPONSE: The Authority lacks knowledge and information sufficient to form a belief as to the allegations of the first sentence of Paragraph 4, and on that basis, denies the allegations of the first sentence of Paragraph 4. The Authority denies the remaining allegations of Paragraph 4, except that the Authority admits that on December 20, 2010, PPHS entered into a Termination Fee Agreement that includes the language quoted in the second sentence of Paragraph 4 and refers the Commission to the agreement for a complete and accurate statement of its terms.

5.

Phoebe Putney's confidence that the Authority would rubber-stamp the deal comes from years of operating without active supervision by the Authority under its long-term Lease and Management Agreement of the hospital's assets to Phoebe Putney's subsidiary, PPMH ("the Lease"). As the [REDACTED] explained to a new Authority member and to Phoebe Putney's CEO, [REDACTED]. The [REDACTED] has similarly expressed that he did not consider hospital oversight a function of the Authority.

RESPONSE: The Authority denies the allegations of Paragraph 5, except that the Authority admits that the Authority Chairman and Vice Chairman have stated that the

Authority has not “run” the day-to-day operations of Phoebe Putney Memorial Hospital since the Authority leased that hospital to PPMH in 1990.

6.

Phoebe Putney, a private hospital system determined to increase its already dominant market share, acted alone when it sought out the Transaction. And Phoebe Putney alone will benefit from it at the expense of area businesses and residents. There is no *bona fide* state action whatsoever associated with the Transaction. Even under a new prospective lease arrangement, the [REDACTED] expects it to be business as usual, as the Authority does not plan to engage in any meaningful additional oversight of the *de facto* monopoly, falling far short of the active state supervision required to satisfy the state action doctrine.

RESPONSE: The Authority denies the allegations and legal conclusions contained in Paragraph 6.

7.

Following the Transaction, Phoebe Putney will control 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 nears 75%. With the Transaction, this will jump to approximately 86%. The hospital with the next-largest share (of less than 4%) is located 40 miles from Albany. The Transaction dramatically increases 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”).

RESPONSE: The Authority denies the allegations of the first sentence of Paragraph 7 as well as the allegation that either Dougherty County or the six counties surrounding Albany constitutes a relevant geographic market. The Authority lacks the information or knowledge necessary to admit or deny the remaining allegations of the second, third and fourth sentences of Paragraph 7 and, on that basis, denies the remaining second, third and fourth sentences of Paragraph 7. The Authority denies the remaining allegations and legal conclusions contained in Paragraph 7.

8.

Phoebe Putney and Palmyra are each other's closest competitors, and they are regarded as closest substitutes for one another by both health plans and their members. The two hospitals have battled fiercely for inclusion in health-plan networks and have gone to great lengths to increase their appeal to health plan members. While Palmyra has [REDACTED] relative to Phoebe Putney, the latter has for years offered its deepest commercial payor discounts to health plans that exclude Palmyra from their networks.

RESPONSE: The Authority lacks the information or knowledge necessary to admit or deny the allegations of Paragraph 8 and, on that basis, denies the allegations of Paragraph 8.

9.

The Transaction will end 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 is that Palmyra drop its pending monopolization lawsuit against Phoebe Putney.

RESPONSE: The Authority denies the allegations of Paragraph 9, except that the Authority admits that upon information and belief Mr. Wernick has used the language in the second sentence of Paragraph 9 in a public statement.

10.

Other southwest Georgia hospitals offer scant competition to Phoebe Putney and Palmyra. 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 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 the Albany hospitals. Health plans and local employers have testified that their networks must include PPMH or Palmyra, or both, in order to be commercially viable for Albany-area employers and other groups.

RESPONSE: The Authority lacks the information or knowledge necessary to admit or deny the allegations of Paragraph 10 and, on that basis, denies the allegations of Paragraph 10.

11.

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. Without Palmyra or any other independent competitive alternative to PPMH,

health plans will be forced either to accept the higher rates or to exit the local marketplace. Higher hospital rates are ultimately 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 by the individual health-plan members themselves. Those increased costs impact local employers' ability to compete, expand, and remain vibrant.

RESPONSE: The Authority denies the allegations of Paragraph 11.

12.

The vigorous price and non-price 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”) and funding requirements, prevent other hospitals from extending their reach into the Albany area. Even Palmyra has 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 almost certain to result from the Transaction.

RESPONSE: The Authority (and the FTC) lacks the information or knowledge necessary to admit or deny the allegations of the first sentence of Paragraph 12 and, on that basis, denies the allegations of the first sentence of Paragraph 12. The Authority admits the allegation in the second sentence of Paragraph 12 insofar as it states that the State of Georgia has enacted and enforces Certificate of Need requirements on hospitals, including any hospitals that seek to open or expand in the Albany area. The Authority denies the allegations of the third sentence of Paragraph 12, except that the Authority admits that Palmyra has applied for a Certificate of Need and that Phoebe Putney has exercised its right to oppose that application in accordance with Georgia and federal law. The Authority admits the allegations of the fourth sentence of Paragraph 12. The Authority denies any remaining allegations of Paragraph 12.

II.

BACKGROUND

A.

Respondents

13.

All Phoebe Putney Respondents 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. Respondent 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. Respondent 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.

RESPONSE: The Authority admits the allegations of the first and second sentences of Paragraph 13, except that the Authority denies that PPHS is a not-for-profit corporation under Internal Revenue Code § 501(c)(3). The Authority denies the remaining allegations of Paragraph 13.

14.

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.

RESPONSE: The Authority admits that Phoebe Putney Memorial Hospital opened in 1911 and is located at 417 Third Avenue, Albany, Georgia 31701. The Authority denies the remaining allegations of Paragraph 14, and avers that PPMH is the entity that leases and manages the day-to-day operations of the Phoebe Putney Memorial Hospital.

15.

Total annual patient revenues for Phoebe Putney for all services, at all facilities, are over \$1.16 billion. Total discharges for all services are over 19,000. Phoebe Putney's annual net

income or surplus is over \$19 million. General acute care hospital services account for the majority of its services and revenues.

RESPONSE: The Authority admits that (i) PPHS's total annual patient revenues for all services, at all facilities, are over \$1.16 billion; (ii) total discharges for all services are over 19,000; (iii) PPHS's annual net surplus has been over \$19 million; and (iv) general acute care hospital services account for the majority of PPHS's services and revenues. The Authority denies any remaining allegations of Paragraph 15.

16.

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.

RESPONSE: The Authority admits that (a) PPHS is the parent entity of Phoebe Worth Medical Center, Inc., which operates a 25-bed critical access hospital located at 807 S. Isabella Street, Sylvester, Georgia 31791; and (b) PPHS is the parent entity of Phoebe Sumter Medical Center, which operates a 76-bed general acute care hospital located in Americus, Georgia. The Authority denies any remaining allegations of Paragraph 16.

17.

Respondent HCA is a for-profit health system that owns or operates 164 hospitals in 20 states and Great Britain. Founded in 1968, HCA is one of the nation's largest health care service providers with almost 40,000 licensed beds. Total annual revenues for HCA for all services and facilities are over \$30.68 billion. HCA is incorporated in the State of Delaware. Its offices are located at One Park Plaza, Nashville, Tennessee 37203.

RESPONSE: The Authority admits the allegations of Paragraph 17 upon information and belief.

18.

HCA owns and operates Respondent 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 provides general acute

care services, including but not limited to services in. non-invasive cardiology, gastroenterology, general surgery, gynecology, oncology, pulmonary care, and urology.

RESPONSE: The Authority admits the allegations of the first and third sentences of Paragraph 18 and further admits the allegation that Palmyra was built in 1971. The Authority lacks the knowledge or information necessary to admit or deny any remaining allegations of Paragraph 18 and, on that basis, denies any remaining allegations of Paragraph 18.

19.

Respondent 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 PPMH and the Authority owe with respect to one another. PPHS itself is not a party to the Lease and does not report to the Authority.

RESPONSE: The Authority admits the allegations of Paragraph 19, except that the Authority denies the allegations that (a) the total consideration for the Lease is \$1.00 per annum; (b) the Lease between the Authority and PPHS has been extended any more than two times; and (c) as amended, the Lease will expire in 2042.

B.

Jurisdiction

20.

Respondents, and each of the 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.

RESPONSE: The Authority denies the allegations of Paragraph 20.

21.

The Transaction, including the Authority's acquisition of Palmyra and lease of Palmyra's assets to Phoebe Putney, constitutes an acquisition subject to Section 7 of the Clayton Act.

RESPONSE: The Authority denies the allegations of Paragraph 21.

C.

Phoebe Putney's Private Interests

22.

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."

RESPONSE: The Authority admits the allegations of Paragraph 22.

23.

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."

RESPONSE: The Authority denies the allegations of the first sentence of Paragraph 23.

The Authority admits that the language quoted in the second sentence of Paragraph 23

appears in the Lease attachment identified in the second sentence of Paragraph 23, but

refers the Commission to the entire document and the Lease for a full and complete

statement of its terms. The Authority denies any remaining allegations of Paragraph 23.

24.

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.

RESPONSE: The Authority denies the allegations of Paragraph 24.

25.

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.

RESPONSE: The Authority denies the allegations of Paragraph 25, except that the Authority admits that the Lease includes the language quoted in the second sentence of Paragraph 25 and refers the Commission to the Lease for a complete and accurate statement of its terms.

D.

The Transaction

26.

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.

RESPONSE: The Authority admits the allegation that in April 2010, the U.S. Court of Appeals for the Eleventh Circuit reversed the trial court’s grant of a motion to dismiss the action styled *Palmyra Park Hospital, Inc. v. Phoebe Putney Memorial Hospital, et al.* The Authority denies the remaining allegations of Paragraph 26, except that the Authority admits upon information and belief that in July 2010, Mr. Wernick authorized Mr.

Baudino to investigate whether HCA had any interest in selling the Palmyra Park Hospital to the Authority.

27.

Mr. Baudino played a number of roles in the Transaction. Through his Baudino Law Group, he provides legal counsel to PPHS with regard to the deal and other matters. He is also a member of the Sovereign Group which was engaged by PPHS to represent it in the Transaction in a non-legal capacity. The Sovereign Group is charging PPHS a fee of [REDACTED] percent of the \$ [REDACTED] million transaction value, plus expenses, the payment of which is contingent on closing the Transaction. More recently, Mr. Baudino has also claimed to represent the Authority as “special counsel” in the Transaction, although the Authority was unaware of his representation of PPHS or his nearly \$ [REDACTED] contingency fee.

RESPONSE: The Authority admits the allegations of Paragraph 27 insofar as it alleges that (a) Mr. Baudino is a member of or is otherwise affiliated with the Baudino Law Group and Sovereign Group; (b) Mr. Baudino prepared and gave a presentation to the Authority concerning an acquisition of the Palmyra Park Hospital by the Authority; and (c) PPHS has agreed to pay the Sovereign Group a fee of [REDACTED] percent of the acquisition price (subject to certain adjustments) if the Authority acquires the Palmyra Park Hospital. The Authority denies the remaining allegations in Paragraph 27.

28.

Mr. Baudino and his Sovereign Group began negotiations on behalf of PPHS to acquire Palmyra in August 2010. At this point, Phoebe Putney had not notified the Authority that it was considering buying its rival. HCA, Palmyra’s owner, did not intend to sell the hospital and informed Mr. Baudino that “[REDACTED].” Palmyra’s business was improving, and HCA executives expected its financial performance to continue improving; they also expected to be successful in the battle with Phoebe Putney in both the antitrust lawsuit and in obtaining Palmyra’s obstetrics CON.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the third and fourth sentences of Paragraph 28 and, on that basis, denies those allegations. The Authority denies the remaining allegations of Paragraph 28, except that the Authority admits that Mr. Baudino has for many years and on various occasions sought

to open discussions concerning the Authority's potential acquisition of the Palmyra Park Hospital.

29.

HCA was open to hearing an offer for Palmyra, but it expected "[REDACTED]" " [REDACTED]" and "[REDACTED]" PPHS set out to meet those requirements and to acquire Palmyra.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the first sentence of Paragraph 29 and, on that basis, denies the first sentence of Paragraph 29. The Authority denies the remaining allegations of Paragraph 29.

30.

The [REDACTED] was the easiest condition. Although it is a non-profit, PPHS operates the very lucrative PPMH, leased from the Authority for \$1 per year. Phoebe Putney has cash reserves of over a quarter of a billion dollars.

RESPONSE:

The Authority denies the allegations of Paragraph 30, except that the Authority admits that (i) it leases Phoebe Putney Memorial Hospital to PPMH and refers the Commission to the Lease for a complete and accurate statement of its terms; and (ii) PPHS has cash reserves of over a quarter of a billion dollars, over which the Authority retains a complete reversionary interest.

31.

As the negotiations progressed, HCA made clear that an [REDACTED] offer would have to meet or exceed [REDACTED] times Palmyra's annual net revenue. HCA's expectations were shared with PPHS's bankers who analyzed similar transactions and found that HCA's demand far exceeded [REDACTED]

[REDACTED] HCA's demand presented an obvious obstacle: it would be difficult to find an independent investment bank to issue a fairness opinion to PPHS opining that the price to be paid for Palmyra is fair, as is often done in significant transactions. But Mr. Baudino had a ready solution: structure the deal so that the Authority would acquire Palmyra, likely eliminating the need for a fairness opinion. Mr. Baudino was right. When Phoebe Putney finally presented the Transaction and the sale price to the Authority,

the Authority neither sought a fairness opinion nor asked a single question about the price, despite never before having reviewed a transaction of this magnitude.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the first, second, third, fourth, and fifth sentences of Paragraph 31 and, on that basis, denies those allegations. The Authority denies the remaining allegations of Paragraph 31, except that the Authority admits that it did not obtain (and was not required to obtain) a separate fairness opinion concerning its acquisition of the Palmyra Park Hospital.

32.

Mr. Baudino believed he had an easy answer to the antitrust risk as well. In a purportedly “**██████**” method, Phoebe Putney would not buy Palmyra directly. Rather, it would structure the Transaction so that the Authority would acquire Palmyra, with PPHS guaranteeing the purchase price and the Authority’s performance under the purchase agreement. Once the Authority obtained title, it would simply lease Palmyra to PPHS for \$1.00 per year for 40 years on terms similar to the PPMH lease. Subsequently, in an effort to head-off an antitrust enforcement action by the Commission and the State of Georgia, the Authority approved a term sheet prepared by Mr. Baudino for implementing the new lease with ostensibly more oversight than had been exercised in the past two decades under the original 1990 Lease. But the **████████████████████** **██████** admitted that the term sheet is a wish list, to which Phoebe Putney has not agreed, and that the Authority’s role alter the Transaction will not differ meaningfully from its current one — *i.e.*, it will continue to let Phoebe Putney do “whatever it takes to make the wheels turn.”

RESPONSE: The Authority denies the allegations of Paragraph 32, except that the Authority admits that (a) the Asset Purchase Agreement provides that the Authority will acquire the assets of Palmyra Park Hospital; (b) under the Asset Purchase Agreement, PPHS has agreed to guarantee the purchase price and the Authority’s performance; and (c) the Authority approved a term sheet prepared by Mr. Baudino concerning negotiations for a potential future lease of the Palmyra Park Hospital after its acquisition by the Authority.

33.

HCA's demand that there not be any [REDACTED] until the Transaction was signed also did not pose a problem. PPHS does not consider itself subject to Georgia's Open Meetings Act, and it strictly limited the knowledge of the Transaction to people with a "need to know." Although PPHS was negotiating an agreement that included the Authority as a key party, PPHS did not consider the Authority to be among those with a "need to know."

RESPONSE: The Authority denies the allegations of Paragraph 33, except that the Authority admits that the Asset Purchase Agreement and its terms were kept confidential until they were publicly announced in December 2010.

34.

Unlike PPHS, the Authority must comply with Georgia's Open Meetings Act. But PPHS sidestepped that problem by not presenting the Transaction to the Authority until all of its terms were definitively determined and the vote was a "[REDACTED]." The Authority could then rubberstamp the completed deal at an open meeting, thereby addressing all of HCA's antitrust and confidentiality concerns.

RESPONSE: The Authority denies the allegations of Paragraph 34, except that the Authority admits the allegation in the first sentence of Paragraph 34 insofar as it states that the Authority is subject to the Georgia's Open Meetings Act, as amended by the Hospital Authorities Law.

35.

On October 7, 2010, PPHS's board approved management's recommendation that it make a formal offer to HCA for Palmyra.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the allegations in Paragraph 35 and, on that basis, denies those allegations.

36.

PPHS's negotiations for Palmyra were well underway before PPHS even mentioned them to any of the Authority's nine members. On October 21, Mr. Wernick and Tommy Chambless, PPHS's General Counsel, held a 30-minute informational session with two of the Authority's members, Ralph Rosenberg and Charles Lingle. The Authority had neither delegated responsibility for the Transaction to them nor designated them to speak on its behalf. Mr. Wernick informed them that PPHS intended to acquire Palmyra, but gave them no documents explaining the acquisition or justifying the substantial premium PPHS was contemplating.

Rosenberg and Lingle signed confidentiality agreements, which they understood prevented them from discussing the Transaction with other Authority members.

RESPONSE: The Authority denies the allegations of Paragraph 36, except that the Authority admits the allegation that (a) on or about September 21, Mr. Wernick and Tommy Chambless, PPHS's General Counsel, held an informational session with Authority members Ralph Rosenberg and Charles Lingle; and (b) Mr. Rosenberg and Mr. Lingle signed confidentiality agreements that they understood to preclude them from discussing the Authority's potential acquisition of the Palmyra Park Hospital with other Authority members until those other Authority members signed similar confidentiality agreements.

37.

Two weeks later, on November 4, 2010, the Authority had its regularly scheduled quarterly meeting. There was no discussion of the Transaction at that meeting.

RESPONSE: The Authority admits that on or around November 4, 2010, it held a regularly scheduled meeting, and that it did not discuss the acquisition of the Palmyra Park Hospital during that meeting. The Authority denies any remaining allegations of Paragraph 37.

38.

On November 10, 2010, Mr. Baudino, acting as "counsel to Phoebe Putney Health System Inc.," explained to HCA in a six-page letter 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. That lease would be on substantially the same terms as the Authority's existing lease of Phoebe Putney Memorial Hospital Inc."

RESPONSE: The Authority admits that Mr. Baudino transmitted a November 10, 2010 letter that includes the statements quoted in Paragraph 38, but respectfully refers the Commission to the letter itself for a complete and accurate statement of its contents. The

Authority further admits that Mr. Baudino (accurately) believed and represented that the Authority's acquisition of the Palmyra Park Hospital is not properly subject to the antitrust laws by virtue of the state action immunity doctrine. The Authority denies any remaining allegations in Paragraph 38.

39.

On November 16, 2010, PPHS made a formal offer to HCA for Palmyra for [REDACTED] its net patient revenue for the prior 12 months. The Authority did not review or approve the offer.

RESPONSE: The Authority denies the allegations of Paragraph 39, except that the Authority admits that on November 16, 2010, PPHS presented a proposal for the Authority to acquire substantially all the assets of Palmyra for [REDACTED] what HCA had represented to be Palmyra's net patient revenue for the prior 12 months.

40.

On December 2, the PPHS Board approved the final terms of the deal between PPHS and HCA. PPHS and HCA concluded their negotiations shortly thereafter. The Transaction had still not been presented to, or vetted by, the Authority. PPHS agreed to guarantee a \$195 million payment, which according to reports generated by PPHS's advisors, was [REDACTED]. The Authority played no role in negotiating that price, and the [REDACTED] prepared by PPHS's advisors was not shared with the Authority.

RESPONSE: The Authority denies the allegations in Paragraph 40, except that the Authority admits that it did not receive a copy of the [REDACTED] prepared by PPHS's advisors as of December 2, 2010.

41.

PPHS also agreed to pay a \$ [REDACTED] million break-up fee, representing nearly [REDACTED] % of the purchase price. In addition, under Section 10.1(a) of the Respondents' *Asset Purchase Agreement*, PPHS likewise agreed to pay HCA a \$ [REDACTED] million "rescission fee" if, after closing, there is a final court order rescinding the transaction. The Authority had no role in negotiating the break-up or rescission fees.

RESPONSE: The Authority admits the first and second sentences of Paragraph 41. The Authority denies the final sentence of Paragraph 41, except the Authority admits that no

member of the Authority had an active role in the back-and-forth negotiations of the amount of the break-up or rescission fees.

42.

With the negotiations between PPHS and HCA concluded, it was time to present the Transaction to the Authority. But first, on December 20, 2010, the eve of the meeting at which it would be presented to the Authority, PPHS [REDACTED] would approve the Transaction without any changes.

[REDACTED] If, once presented, the Authority failed [REDACTED] PPHS would pay [REDACTED] within two business days' time. During the preceding week, Mr. Wernick had met in small groups with other Authority members without the knowledge of the Authority Chairman.

RESPONSE: The Authority denies the allegations of the first and second sentences of Paragraph 42. The Authority admits the allegations of the third and fourth sentences of Paragraph 42, but respectfully refers the Commission to the Termination Agreement for a full and complete statement of its terms. The Authority admits the last sentence of Paragraph 42 insofar as it alleges that Mr. Wernick met with Authority members, but denies any remaining allegations of Paragraph 42.

43.

On December 21, 2010, at a special meeting, the Transaction was presented to the Authority for the first time. In a 94-minute meeting, PPHS's CEO and its advisor, Mr. Baudino (who appeared as special counsel to the Authority without addressing his work for Phoebe Putney or the Sovereign Group's financial interest in the Transaction), presented the terms of the Transaction and the related transactions using a PowerPoint presentation recycled from PPHS's December 2 Board meeting. [REDACTED] the Authority, but the Authority did just what PPHS expected it would do. The members did not seek to change a single term of the Transaction. Indeed, they asked no questions and sought no extra counsel or independent analysis. Having no reason to acquire Palmyra independent of PPHS's desire to do so, the Authority rubber-stamped the Asset Purchase Agreement *exactly* as PPHS had negotiated it.

RESPONSE: The Authority lacks the information or knowledge necessary to admit or deny the allegation that the PowerPoint presentation used at the Authority's December 21,

2010 meeting “was recycled from PPHS’s December 2 Board meeting” and, on that basis, denies that allegation of Paragraph 43. The Authority denies the remaining allegations of Paragraph 43, except that the Authority admits that (a) on December 21, 2010, the Authority held a special meeting during which Mr. Wernick and Mr. Baudino presented the terms of a proposal for the Authority to acquire Palmyra; (b) that presentation was the first time the APA had been presented to the entire Authority; (c) the Authority approved the proposed acquisition in the form presented; and (d) there was no discussion of Mr. Baudino’s work for Phoebe Putney or the Sovereign Group’s financial interest in any transaction at the December 21 meeting.

44.

At that meeting, the Authority also approved a 17-page Management Agreement that will give Phoebe Putney control over Palmyra’s operations immediately upon closing the Transaction:

RESPONSE: The Authority denies the allegations of Paragraph 44, except that the Authority admits the allegation that at the December 21, 2010 meeting, the Authority approved a 17-page Management Agreement that contemplates that a non-profit entity will operate the Palmyra Park Hospital for a period of time after the Authority acquires the Palmyra assets. In further response to Paragraph 44, the Authority refers the Commission to the Management Agreement for a complete and accurate statement of its terms.

45.

The Authority understood that the Transaction negotiated and entered into by PPHS was an integrated transaction which included the expected lease of Palmyra to Phoebe Putney.

RESPONSE: The Authority denies the allegations in Paragraph 45.

46.

On April 4, 2011, the Authority approved a lease term sheet prepared by Mr. Baudino that makes abundantly clear that the Authority’s plan remains to lease Palmyra’s and PPMH’s assets to Phoebe Putney under a single lease. The term sheet is a wish list that has not even been presented to Phoebe Putney, let alone agreed upon. But even assuming Phoebe Putney were to

agree to every single proposed term, the [REDACTED] does not expect the Authority to make significant changes from its current activities, such as hiring staff to oversee Phoebe Putney's *de facto* monopoly or involving itself in Phoebe Putney's pricing or arrangements with commercial health-plan providers. In other words, Phoebe Putney will have free rein, just as it has for the last 20 years, only now it will operate as a virtual monopolist.

RESPONSE: The Authority denies the allegations of Paragraph 46, except that the Authority admits that on or about April 4, 2011, the Authority voted to approve a lease term sheet prepared by Mr. Baudino and respectfully refers the Commission to the term sheet for a complete and accurate statement of its terms.

III.

THE RELEVANT SERVICE MARKET

47.

The Transaction threatens substantial harm to competition in the relevant market for inpatient general acute-care hospital services sold to commercial health plans.

RESPONSE: The Authority denies the allegations in Paragraph 47.

48.

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 is 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.

RESPONSE: The Authority denies the allegations of Paragraph 48.

49.

The inpatient general acute-care services market excludes 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.

RESPONSE: The Authority denies the allegations in Paragraph 49.

50.

Phoebe Putney and Palmyra negotiate reimbursement-rate contracts with commercial health plans. These Contracts set the reimbursement rates that the health plans (and their self-insured customers) will pay the hospital for the services provided to health-plan members.

RESPONSE: The Authority admits that PPMH negotiates reimbursement-rate contracts with commercial health plans. The Authority lacks the knowledge or information necessary to admit or deny the allegations about Palmyra, and on that basis, denies them. The Authority denies the remaining allegations in Paragraph 50.

IV.

THE RELEVANT GEOGRAPHIC MARKET

51.

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.

RESPONSE: The Authority denies the allegations in Paragraph 51.

52.

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.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the allegations in Paragraph 52 and, on that basis, denies those allegations.

53.

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 *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.

RESPONSE: The Authority denies the allegations of the first sentence of Paragraph 53.

The Authority lacks the knowledge or information necessary to admit or deny the second sentence of Paragraph 53 and, on that basis, denies the second sentence of Paragraph 53.

54.

The nearest independently owned hospitals located outside of Albany are Mitchell County Hospital (31 miles away), Crisp Regional Hospital (39 miles away), and Calhoun Memorial 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.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the first sentence of Paragraph 54 and, on that basis, denies it. The Authority denies the remaining allegations in Paragraph 54.

55.

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.

RESPONSE: The Authority denies the allegations in Paragraph 55.

56.

As reflected by their ordinary-course documents and their actions, Phoebe Putney and Palmyra focus their competitive efforts and attention on one another, to the exclusion of any hospitals located outside the six-county area. Phoebe Putney's longstanding contracting strategy was to require health plans to exclude Palmyra, *but no other hospitals*, from their provider networks.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the second sentence in Paragraph 56 and, on that basis, denies it. The Authority denies the remaining allegations of Paragraph 56, except that the Authority admits that Phoebe Putney Memorial Hospital and Palmyra Park Hospital compete for the provision of health care services.

57.

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.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the allegations in Paragraph 57 and, on that basis, denies those allegations.

V.

MARKET STRUCTURE AND PRESUMPTIVE ILLEGALITY

58.

The Transaction is for all practical purposes a merger to monopoly, by any measure.

RESPONSE: The Authority denies the allegations in Paragraph 58.

59.

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 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 account for a small but nontrivial share of discharges for health-plan members residing within the six-county area. The two other hospitals mentioned above, Crisp Regional and Calhoun Memorial, are also located outside the six-county area and account for an insignificant share of the relevant market.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the allegations contained in Paragraph 59 and, on that basis, denies those allegations.

60.

Under relevant case law and the Merger Guidelines, the Transaction is presumptively unlawful. PPHS's post-Transaction market share, based on discharges for commercial patients residing in the six-county area, is approximately 86%. This extraordinarily high market share easily exceeds levels that the United States Supreme Court has found presumptively unlawful.

RESPONSE: The Authority denies the allegations in Paragraph 60.

61.

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.

RESPONSE: The Authority admits that the U.S. Department of Justice and Federal Trade Commission's Merger Guidelines measure market concentration using the HHI. The Authority further admits that the Merger Guidelines state that a merger or acquisition is presumed likely to create or enhance market power with the post-merger HHI exceeds 2,500 points and the transaction increases the HHI by more than 200 points. The Authority denies any remaining allegations in Paragraph 61.

62.

The market concentration levels here exceed these thresholds by a wide margin. The post-Transaction Hill will increase 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

RESPONSE: The Authority denies the allegations in Paragraph 62.

VI.

ANTICOMPETITIVE EFFECTS

A.

The Transaction Eliminates a Unique Pricing Constraint Upon Phoebe Putney

63.

By eliminating vigorous competition between Phoebe Putney and Palmyra, the Transaction enhances Phoebe Putney's ability and incentive to increase reimbursement rates for commercial health plans and their membership.

RESPONSE: The Authority denies the allegations in Paragraph 63.

64.

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.

RESPONSE: The Authority admits that Phoebe Putney and Palmyra compete for the provision of health services, but deny any inference, characterization, suggestion, or legal argument concerning this fact in Paragraph 64. The Authority lacks the knowledge or information necessary to admit or deny the second and third sentences of Paragraph 64, and for that reason, denies those sentences. The Authority denies the remaining allegations in Paragraph 64.

65.

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 is currently pending. Palmyra is also prosecuting an antitrust lawsuit against Phoebe Putney, alleging monopolization and illegal tying.

RESPONSE: The Authority denies the allegations of the first, second, and third sentences of Paragraph 65, except that the Authority admits that (a) Phoebe Putney has exercised its right to challenge Palmyra's efforts to obtain a CON for obstetrics pursuant to Georgia law; and (b) Palmyra filed and has prosecuted an antitrust suit against Phoebe Putney.

The Authority admits to the allegations in the fourth and fifth sentences of Paragraph 65 and denies any remaining allegations in Paragraph 65.

66.

Palmyra has demonstrated the ability to capture market share from Phoebe Putney. [REDACTED], testified that Palmyra's market share has increased during the last two years, while Phoebe Putney's share has 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 is "[REDACTED]"

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the first and second sentences contained in Paragraph 66 and, on that basis, denies those sentences. The Authority admits that Mr. Wernick's December 21, 2010 presentation to the Authority includes the statement quoted in the third sentence of Paragraph 66, but refers the Commission to the entire presentation for a complete and accurate statement of its terms. The Authority denies any remaining allegations in Paragraph 66.

67.

In a fact sheet prepared by Phoebe Putney, the Authority stated on December 21st:

[REDACTED]

RESPONSE: The Authority admits that the fact sheet contained the statement quoted in Paragraph 67, but respectfully refers the Commission to the fact sheet for a complete and accurate statement of its terms.

68.

The overt competitive rivalry between Phoebe Putney and Palmyra has yielded price benefits to health plans and their members. While Phoebe Putney has [REDACTED] Palmyra's competitive strategy in the marketplace has been to [REDACTED] versus Phoebe Putney. As the two hospitals will operate 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.

RESPONSE: The Authority lacks the information and knowledge necessary to admit or deny the allegations of the first and second sentences of Paragraph 68 and, on that basis, denies the allegations of the first and second sentences of Paragraph 68. The Authority denies the remaining allegations in Paragraph 68.

69.

Following the Transaction, the combined Phoebe Putney/Palmyra will 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 significant competitor.

RESPONSE: The Authority denies the allegations of the first and second sentences of Paragraph 69. The Authority lacks the knowledge or information necessary to admit or deny the remaining allegations of Paragraph 69 and, on that basis, denies the remaining allegations of Paragraph 69.

70.

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’ healthcare 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 healthcare coverage for their employees, and some Albany area residents may be forced to forego or delay healthcare services because of the higher prices.

RESPONSE: The Authority denies the allegations in Paragraph 70.

71.

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.

RESPONSE: The Authority denies the allegations in Paragraph 71.

C.

The Loss of Quality Competition

72.

The Transaction will reduce the quality and breadth of services available in the Albany area.

RESPONSE: The Authority denies the allegations in Paragraph 72.

73.

Absent the Transaction, Phoebe Putney and Palmyra would continue 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.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the second sentence contained in Paragraph 73 and, on that basis, denies it. The Authority denies the remaining allegations in Paragraph 73.

74.

Competition between Phoebe Putney and Palmyra has spurred the two hospitals to offer additional services; it also has 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. If the Transaction moves forward, these benefits of competition will be lost.

RESPONSE: The Authority denies the allegations of the first and fourth sentences of Paragraph 74. The Authority lacks the knowledge or information necessary to admit or deny the second and third sentences contained in Paragraph 74 and, on that basis, denies

the allegations contained in the second and third sentences of Paragraph 74. The Authority denies any remaining allegations in Paragraph 74.

VII.

ENTRY BARRIERS

75.

Entry by new hospitals will not deter or counteract the Transaction's likely harm to competition in the relevant service market. There is little chance that other firms would be able to enter to counter Phoebe Putney's anticompetitive practices.

RESPONSE: The Authority denies the allegations in Paragraph 75.

76.

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.

RESPONSE: The Authority admits the allegations in the second sentence of Paragraph 76 and denies any remaining allegations of Paragraph 76.

77.

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, ■ years according to Phoebe Putney's counsel — from initial planning to opening doors to patients.

RESPONSE: The Authority denies the allegations of Paragraph 77, except that the Authority admits that the construction of a new general acute care hospital would take significant time and money from the initial planning to opening the doors of a new hospital to admit patients.

78.

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.

RESPONSE: The Authority lacks the knowledge or information necessary to admit or deny the allegations of Paragraph 78, and on that basis, denies the allegations of Paragraph 78.

VIII.

ANTICIPATED AFFIRMATIVE DEFENSES

A.

State Action

79.

The Transaction was motivated and planned exclusively by Phoebe Putney, which acts in its independent, private, and pecuniary interests. Rather than acting in furtherance of the public interest, or even evaluating those interests, the Authority served only as a strawman to permit Phoebe Putney to attempt to shield this overtly anticompetitive Transaction from antitrust scrutiny.

RESPONSE: The Authority denies the allegations in Paragraph 79.

80.

The Authority engaged in no independent analysis to determine whether the Transaction would be in the public's interest: Having no reasons for acquiring Palmyra other than those advanced by Phoebe Putney, it authorized a \$195 million purchase of Palmyra — using Phoebe Putney's money — without even considering: (i) the adverse effect this virtual merger to monopoly would have on healthcare pricing in the community; (ii) the valuation of Palmyra; (iii) alternatives to leasing Palmyra's to Phoebe Putney; or (iv) who specifically from Phoebe Putney would run Palmyra immediately after the Transaction.

RESPONSE: The Authority denies the allegations in Paragraph 80.

81.

Just as it played no supervisory role in the Transaction, since at least 1990 when the Lease became effective, the Authority has not actively supervised Phoebe Putney in any sense, including with respect to strategic planning, pricing, and other competitively sensitive affairs. Rather, the Authority's oversight is limited to conducting quarterly breakfast meetings (the minimum required by statute) lasting approximately one hour. The [REDACTED] testified that he cannot remember an instance in which a vote was less than unanimous, and he had never seen a price list for the services provided by the hospital, despite serving on the Authority for over five years. The [REDACTED] believes pricing is a function of the hospital board, not the Authority. Consistent with that belief, the Authority made no effort to challenge, or even evaluate, PPMH's most recent price increases. The [REDACTED] testified that he was not aware of PPMH's price changes in the last several years or how much PPMH's prices have

increased during his eight-plus years on the Authority. And, the Authority has no authority to oversee PPHS.

RESPONSE: The Authority denies the allegations in Paragraph 81, except that the Authority admits that (i) the Authority Chairman previously testified that he could not remember an instance in which an Authority vote was less than unanimous, (ii) the Authority Chairman previously testified that he could not remember seeing a price list for the services provided by the Hospital; and (iii) the Authority Vice-Chairman testified that he was not aware of PPMH's price changes in the last several years or how much PPMH's prices have increased during the time he has served on the Authority.

82.

By contract, beginning immediately after the Transaction, Phoebe Putney will assume responsibility for setting prices for the services furnished at Phoebe North, the hiring and firing of Phoebe North employees, and other competitively significant decisions necessary for the operation of a hospital or hospital annex. The [REDACTED] does not expect any of that to change when it officially leases Palmyra's assets to Phoebe Putney.

RESPONSE: The Authority denies the allegations in Paragraph 82, except that the Authority admits that, the unexecuted and non-finalized Management Agreement approved by the Authority contemplates that, after the acquisition of Palmyra by the Authority, a non-profit entity would operate the day-to-day affairs of the acquired Palmyra Park Hospital pursuant to a written management agreement and refers the Commission to the unexecuted and non-finalized Management Agreement for a complete and accurate statement of its terms.

83.

In sum, there is no state action here. Rather, it is the private, self-interested Phoebe Putney that has agreed to purchase Palmyra and will exercise — unfettered and unchecked by the Authority or any hospital competitor — the extraordinary market power gained through the Transaction.

RESPONSE: The Authority denies the allegations in Paragraph 83.

B.

Efficiencies

84.

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.

RESPONSE: The Authority denies the allegations in Paragraph 84.

IX.

VIOLATION

85.

The allegations of Paragraphs I through 84 above are incorporated by reference as though fully set forth.

RESPONSE: The Authority repeats its responses to each of the allegations contained in Paragraph 1 through 84 as if they were stated in this Paragraph 85.

86.

The Transaction constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

RESPONSE: The Authority denies the allegations in Paragraph 86. Further answering, the Authority avers that it is immune from suit and the FTC lacks jurisdiction under Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

87.

The Transaction, if consummated, would substantially lessen competition in the relevant markets in violation Of Section 7 bf the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

RESPONSE: The Authority denies the allegations in Paragraph 87. Further answering, the Authority avers that it is immune from suit and the FTC lacks jurisdiction under

Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

RESIDUAL DENIAL

The Authority denies each and every allegation of the Complaint not expressly admitted herein.

NOTICE OF CONTEMPLATED RELIEF

The FTC's Notice of Contemplated Relief contains statements and conclusions of law to which no response is required. Nevertheless, the Authority denies that the FTC is entitled to any relief as set forth in more detail herein.

WHEREFORE, the Authority respectfully requests that the Administrative Law Judge and/or Federal Trade Commission

- (i) deny the FTC's contemplated relief;
- (ii) dismiss the Complaint in its entirety with prejudice;
- (iii) award Respondents the costs of suit, including attorneys' fees, and
- (iv) grant such other and further relief as the ALJ and/or Federal Trade Commission may deem proper.

Respectfully submitted this 16th day of May, 2011.

/s/ Emmet J. Bondurant
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CERTIFICATE OF SERVICE AND PAPER FILING

I hereby certify that this 16th day of May, 2011 a true and correct copy of the foregoing
RESPONDENT HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY'S
ANSWER AND DEFENSES TO ADMINISTRATIVE COMPLAINT was electronically
filed with the Federal Trade Commission using the FTC E-File system which will automatically
send e-mail notification of such filing to:

Donald S. Clark
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I also hereby certify that this copy is a true and correct copy of the paper original (with confidential information redacted), and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

This 16th day of May, 2011.

/s/ Emmet J. Bondurant
Emmet J. Bondurant, Esq.

*Attorney for Respondent Hospital
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