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

ALBANY DIVISION

FEDERAL TRADE COMMISSION and THE STATE OF GEORGIA, by and through SAMUEL S. OLENS, ATTORNEY GENERAL,	)	
Plaintiffs,	)	No. 11-CV-00058 (WLS)
v.	)	
PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA, INC., PALMYRA PARK HOSPITAL, INC., and THE HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY,	)	
Defendants.	)	

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., AND PHOEBE NORTH, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF CROSS-MOTION TO DISMISS, AND TO VACATE THE TEMPORARY RESTRAINING ORDER

John H. Parker, Jr., Esq.
Georgia Bar No. 562450
Robert M. Brennan, Esq.
Georgia Bar No. 079798
Parker, Hudson, Rainer & Dobbs LLP
1500 Marquis Two Tower
285 Peachtree Center Ave. NE
Atlanta, GA 30303
Telephone: 404-420-5532
Facsimile: 678-533-7776

Lee K. Van Voorhis, Esq. *(pro hac vice)*
Baker & McKenzie LLP
815 Connecticut Avenue, NW
Washington, DC 20006
Telephone: 202-452-7000
Facsimile: 202-452-7074

James C. Egan, Jr., Esq. *(pro hac vice)*
Jonathan L. Sickler, Esq. *(pro hac vice)*
Weil, Gotshal & Manges LLP
1300 Eye Street, NW, Suite 900
Washington, DC 20005
Telephone: 202-682-7000
Facsimile: 202-857-0940

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PRELIMINARY STATEMENT

Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Phoebe Putney Health System, Inc. ("PPHS"), and Phoebe North, Inc. ("PNI") (collectively "Phoebe Putney") are not proper parties to this litigation.

First, Plaintiffs seek a preliminary injunction blocking the acquisition of Palmyra Park Hospital ("Palmyra") by the Hospital Authority of Albany-Dougherty County (the "Authority"). No Phoebe Putney defendant is the buyer of the assets underlying Plaintiffs' preliminary injunction motion, nor was any Phoebe Putney defendant ever contemplated as a buyer. *See* Allen Decl.[1] Ex. J; Wernick Decl.[2] ¶ 53.

The Authority, and only the Authority, is acquiring Palmyra. *Id.* Only the Authority will own Palmyra. *Id.* The Authority alone will have ultimate responsibility for how Palmyra will be operated for the public benefit, as required by state statute. The relief being sought does not justify the participation of Phoebe Putney in this litigation. Plaintiffs have made no allegations against Phoebe Putney that relate to any relief separate from their request that this Court block the acquisition of Palmyra by the Authority.

Second, Plaintiffs speculate, and can do no more than speculate, that the Authority will lease Palmyra to a Phoebe Putney entity under terms that do not ensure adequate supervision by the Authority. There is no lease; the Authority has not commenced negotiation on any lease terms; and by statute, no lease can be executed until at least four months after the acquisition of Palmyra is consummated following a public hearing. Wernick Decl. ¶ 69; O.C.G.A. § 31-7-

[1] All references to the Allen Decl. refer to the Declaration of Annette Miller Allen in Support of the Hospital Authority of Albany-Dougherty County's Motion to Dismiss or for Summary Judgment, and in Opposition to Plaintiffs' Motion for a Preliminary Injunction, filed today.

[2] All references to the Wernick Decl. refer to the Declaration of Joel Wernick in Support of the Hospital Authority of Albany-Dougherty County's Motion to Dismiss or for Summary Judgment, and in Opposition to Plaintiffs' Motion for a Preliminary Injunction, filed today.

74(3). Conjecture about a possible future lease, possible future terms of such a future lease, whether those future terms would require "active supervision" under the future lease, and whether the Authority will exercise its oversight under any lease, is insufficient to create an Article III case or controversy.

Third, the only actual conduct alleged to form a basis for naming PPMH and PPHS as defendants is that PPHS opened negotiations with Palmyra, and then urged the Authority to undertake the acquisition. Plaintiffs have presented these allegations in a misleading fashion. Even if the allegations are taken at face value, however, they posit nothing more than an attempt by a private entity to petition a governmental body to take governmental action. All private parties have a First Amendment right to petition their government, and all such petitioning is immune from antitrust liability under a long line of Supreme Court cases, even if the governmental action ultimately results in anti-competitive effects.

Fourth, Plaintiffs have no statutory authority or jurisdiction over Phoebe Putney. Phoebe Putney is not alleged to be making an acquisition subject to Section 7 of the Clayton Act; it is not alleged to have engaged in any conduct not Constitutionally protected; and the Federal Trade Commission Act does not apply to non-profit corporations such as Phoebe Putney.

Fifth, even if the Complaint adequately alleged a case or controversy involving Phoebe Putney, it would be protected from antitrust liability by the doctrine of "state action."

Phoebe Putney requests that the Court dismiss all Phoebe Putney entities from this action with prejudice, dismiss Plaintiffs' motion for a preliminary injunction, and vacate the temporary restraining order.

I. BACKGROUND

The Hospital Authority of Albany-Dougherty County was activated in 1941 for the purpose of providing healthcare to the Albany-Dougherty County community. Allen Decl. Ex. A. To do so, the Authority acquired Phoebe Putney Memorial Hospital. For most of its existence, the Authority directly employed hospital administrators and executives to operate Phoebe Putney Memorial Hospital. *See* Wernick Decl. ¶ 4. By statute, each hospital authority within the State of Georgia must operate within 12 miles of its home county. O.C.G.A. § 31-7-72; *see also* Wernick Decl. ¶ 5. In the 1980s, it became apparent to the Authority that its geographic limitation was restricting its ability to serve the healthcare needs of the community. *Id.* The population of Dougherty County was too small to support a high quality, financially sound, full service hospital on its own. *Id.* Other hospital authorities throughout Georgia had been able to overcome this problem by restructuring their hospitals through lease arrangements authorized by the Hospital Authorities Law and a 1985 Georgia Supreme Court decision that allowed them to take advantage of the efficiencies that arise from relationships outside their home counties. *Id.*

Thus, in 1990, the Authority created PPMH, a non-profit corporate entity, to operate Phoebe Putney Memorial Hospital through a lease with the Authority, which remains the owner of Phoebe Putney Memorial Hospital. Wernick Decl. ¶¶ 6-8. The Authority also created PPHS, which is also a non-profit corporate entity, to serve as the parent entity to PPMH. *Id.* The Authority has a full and sole reversionary interest in all the assets and property of both PPMH and PPHS upon termination of the lease. *Id.*

The restructuring did not alter the fundamental relationship between the Authority and the hospital Administrator, who is now CEO of PPHS and PPMH, who was and is responsible for the day-to-day management of Phoebe Putney Memorial Hospital. *Id.* ¶ 10. Prior to the

restructuring, the Authority functioned much like a corporate board of directors responsible for strategic decisions and all operational functions, whereas the hospital executives reported to the Authority, and explored and recommended strategic options for the consideration by the Authority. *Id.* ¶ 4. After restructuring, the executives in charge of managing the day-to-day operations of PPMH were no longer directly employed by the Authority; they are employed by PPHS and PPMH, which were created by the Authority. *Id.* ¶ 10. PPMH, under the terms of the lease, must operate Phoebe Putney Memorial Hospital pursuant to various state policy requirements, including continuing its non-profit status. *Id.* ¶¶ 7-8. The relationship of the executives otherwise remains largely unchanged – they periodically report to the Authority on the operation of the hospital, and propose strategic initiatives for the consideration of the Authority. *Id.* ¶ 10.

The Authority has long recognized the need to expand the size of hospital facilities available to the Albany-Dougherty County community. *Id.* ¶¶ 25-26. The Authority has also long considered the possibility of acquiring the underutilized Palmyra as the most cost efficient means of meeting that need. *See id.* Indeed, when the current CEO of PPMH was hired as Administrator of Phoebe Putney Memorial Hospital by the Authority in 1988, among the first projects the then Chairman of the Authority asked him to pursue was the possible acquisition of Palmyra. *Id.* ¶ 25. Furthermore, after the reorganization the executives of Phoebe Putney Memorial Hospital continued to pursue the possibility of an acquisition of Palmyra. *Id.* ¶ 38-46. In the intervening years up until today, Phoebe Putney executives have conferred with Authority leadership on multiple occasions regarding the possibility of such an acquisition. Thus, the possibility of acquiring Palmyra started as a strategic goal of ***the Authority***, and the efforts of the PPHS executives to present the Authority with proposals to meet that goal were undertaken

within the context of their knowledge of the long-standing interest of the Authority in such an acquisition, and the likelihood that it would be the owner of Palmyra, just as it remains the owner of Phoebe Putney Memorial Hospital.

In the most recent efforts that led to an executed asset purchase agreement, PPHS negotiated with Palmyra Park Hospital, Inc. ("Seller") on behalf of the Authority, and eventually presented a proposed acquisition agreement to the Authority for its consideration. *See id.* ¶¶ 50-68. The Authority entered into that asset purchase agreement on December 21, 2010. Allen Decl. Ex. J; Wernick Decl. ¶ 68. The asset purchase agreement provides that the Authority, and only the Authority, will acquire the assets of Palmyra. Allen Decl. Ex. J. PPHS and PPMH are parties to the asset purchase agreement for limited technical purposes which do not alter the fact that only the Authority will purchase and own Palmyra.[3] There is no lease in final or draft form regarding Palmyra's operations after its acquisition by the Authority. Wernick Decl. ¶¶ 69-70, 72. As part of its plan to transition operational control at acquisition close, the Authority has approved the form of a management agreement with PPMH.[4] *See* Allen Decl. Ex. N; *see also* Rosenberg Decl.[5] ¶ 15. It is contemplated that PPMH will provide day-to-day management services of Palmyra immediately upon close of the acquisition and until the Authority can determine a long-term operational solution.

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[3] PPMH is a party merely to agree not to solicit Palmyra employees if the transaction is not completed, and as the interim employer of Palmyra employees if the transaction is completed. PPHS is a party merely to agree not to solicit Palmyra employees if the transaction is not completed, to the possible payment of a break-up or recession fee, and to guarantee the Authority's payment and performance. In that regard, under the Phoebe Putney Memorial Hospital lease, PPHS and PPMH are responsible for all debts incurred by the Authority.

[4] The Authority originally planned to contract for management services with PNI, a PPHS subsidiary created solely for that purpose. It is now contemplated that PPMH will replace PNI in that capacity, per an Authority resolution. *See* Allen Decl. Ex. O. Consequently, PNI no longer will have any role whatsoever related to the Palmyra transaction.

[5] All references to the Rosenberg Decl. refer to the Declaration of Ralph S. Rosenberg in Support of the Hospital Authority of Albany-Dougherty County's Motion to Dismiss or for Summary Judgment, and in Opposition to Plaintiffs' Motion for a Preliminary Injunction, filed today.

The Authority was not in any way a "rubber stamp" or "strawman" in this process, contrary to Plaintiffs' assertions. Instead, the Authority was actively involved from the time the renewed possibility of acquiring Palmyra in 2010 was first brought to the attention of Joel Wernick, the PPHS CEO. He has described the process as follows:

> At no time did I, or anyone at PPMH or PPHS to my knowledge, consider the Authority as any kind of "strawman" or "rubber stamp." There is only one event, which is occurring - the acquisition of Palmyra by the Authority. And the proposed acquisition was never part of any scheme for me, PPHS or PPMH to "get control" of Palmyra, contrary to the Plaintiffs' assertions. Our role is to fulfill the Authority's mission and we take that mission, and the Authority itself, with the utmost seriousness. All of the actions of PPHS and PPMH were aimed at placing the strategic option of an acquisition of Palmyra before the Authority so that the Authority could make a determination as to whether such an acquisition would further its statutory mission. As detailed above, I did not pursue this strategic option for the Authority in a vacuum – I was aware that the Authority had long considered the acquisition of Palmyra, if it could be achieved on reasonable terms, as the most cost efficient means of meeting the ever expanding healthcare needs of the community. I made sure to consult with the Authority members from the very beginning of this most recent purchase process. The Authority members provided me with substantive input and guidance throughout the process. Especially in light of their longstanding leadership in the community, and the Authority's longstanding interest in acquiring Palmyra, it would simply not be possible to expect them to be a "rubber stamp." Instead, I value their input and advice, and indeed, respect their fiduciary responsibilities as owner. The Authority members were actively involved in this acquisition process, including reviewing information I provided them and asking me many questions over a period of weeks, months, and years, as detailed above. All of the actions of PPHS and PPMH were aimed at having the Authority acquire Palmyra just as the Authority acquired Phoebe Putney Memorial Hospital in 1941 and as the Authority wanted to do in 1988-1989 as that is the only step which can occur now. What will occur after the Authority acquires Palmyra remains to be thought through, developed, and decided by the Authority. Wernick Decl. ¶ 72.

Phoebe Putney hereby incorporates by reference the Hospital Authority of Albany-Dougherty County's Statement of Undisputed Facts and its related Brief of the Hospital Authority of Albany-Dougherty County in Support of Motion to Dismiss or for Summary Judgment, and in Opposition to Plaintiffs' Motion for Preliminary Injunction.

II. ARGUMENT

A. The Complaint does not allege a case or controversy involving PPMH or PPHS.

Article III of the U.S. Constitution requires "that those who seek to invoke the power of the federal courts must allege an actual case or controversy." *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974). "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* at 494. The Phoebe Putney defendants are not acquiring Palmyra – there is no claim against the Phoebe Putney defendants in that regard. The only conduct alleged against the Phoebe Putney defendants with regard to the acquisition is that they engaged in Constitutionally protected petitioning of a governmental entity. *See* II.B, *infra*. The only allegations that remain against the Phoebe Putney defendants arise from Plaintiffs' assertions regarding unknown terms of a hypothetical future lease. Those allegations are based on multiple levels of conjecture.

First, there is no claim against the Phoebe Putney defendants arising from the acquisition. No Phoebe Putney defendant is the buyer of the assets underlying Plaintiffs' preliminary injunction motion, nor was any Phoebe Putney defendant ever contemplated as a buyer. Wernick Decl. ¶ 53. The Authority must be the hospital owner in order for the hospitals to be eligible as recipients from both the Medicare Upper Payment Limit program and the Georgia Indigent Care Trust Fund, which are a critical source of funds that allows the Authority to meet its mission and fulfill statutory requirements. *See* Wernick Decl. ¶ 53. In any event, under the lease all Phoebe Putney assets will revert to the Authority upon termination of the lease.[6] *See* Allen Decl. Ex. F at 2; § 3.02; § 4.16; § 9.07.

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[6] Excepted are those assets owned by other hospital authorities, which will revert to those hospital authorities.

The Authority, and only the Authority, is acquiring Palmyra. Only the Authority will own Palmyra. The Authority alone will have ultimate responsibility for how Palmyra will be operated for the public benefit, as required by the Hospital Authorities Law. Wernick Decl. ¶ 72. In no way is the acquisition subject to, limited by, or contingent on how the Authority chooses to operate Palmyra after the acquisition is consummated. The relief being sought does not justify the participation of Phoebe Putney in this litigation. Plaintiffs have made no allegations against Phoebe Putney that relate to any relief separate from their request that this Court block the acquisition of Palmyra by the Authority.

In sum, there is neither a claim nor a case or controversy against the Phoebe Putney defendants arising from the acquisition.

Second, if the Authority ultimately determines that a lease will be in the public interest, the terms of such a lease, including the terms providing for oversight by the Authority, are conjectural. Although Palmyra could ultimately be subject to a lease between the Authority and PPMH, no such lease was part of the acquisition documents, and no such lease has even been drafted. The only executed agreement related to this transaction underlying this litigation is the asset purchase agreement between the Authority and the Seller. Because negotiations for a lease have not yet commenced, it is necessarily the case that the terms of any lease have not been decided upon. Compl. ¶¶ 38, 52. Indeed, under the Georgia Hospital Authorities Law, any possible lease between the Authority and any entity regarding Palmyra would require a 120-day period of public notice and hearing, adding to the uncertainty of the final lease terms. O.C.G.A. § 31-7-74.3. A hearing would have to be held by the Authority in which details about the lease are presented to the public. Public notice 60 days prior to the hearing must be given. Another 60 days is required before any contemplated lease can be executed. O.C.G.A. § 31-7-74.3(a).

Consequently the final form of any lease between the Authority and PPMH would not be known until (1) potential lease terms are drafted and negotiated, (2) the proposed lease has been presented to the public, (3) the 60 day waiting period passes, during which the Authority may react to any public concerns, including by changing the lease terms, which would trigger the need for another hearing and waiting period, i.e., another period of at least 120 days, and (4) PPMH then agrees to any modified lease terms.

Third, layered on the conjecture of a lease and the conjecture of its terms, is conjecture that, if there is a lease, and even if the lease terms require active supervision, the Authority will fail to exercise those terms.

There simply is no Article III case or controversy regarding a conjectural failure to supervise under conjectural terms of a conjectural lease.

B. The only "conduct" alleged against PPMH and PPHS – petitioning a governmental body – the Authority – is protected by the First Amendment.

Plaintiffs allege that "[t]he Transaction was conceived, structured, and negotiated by PPHS…." Mem. ISO Plts.' Motion for Temp. Restraining Order and for Prelim. Injunction at 2. Specifically, Plaintiffs allege that PPHS and PPMH initiated the idea to acquire Palmyra, proposed that idea to the Seller, negotiated a proposed acquisition agreement, and then urged the Authority to execute it. Compl. ¶¶ 3, 32, 42, 49, 51. Plaintiffs further allege that the Authority then agreed to do what PPHS and PPMH were urging upon it. *Id.* ¶ 49. Even if these allegations were factually accurate, and they are not (see Authority Statement of Undisputed Facts), they would merely allege that PPMH and PPHS engaged in a legal, and Constitutionally protected petitioning of a government entity – the Authority. *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). Further, even if the decision of the Authority to proceed with the proposed acquisition is properly characterized as an "agreement"

to do that which PPMH and PPHS proposed or requested, the Authority's state action immunity would be unaffected.

In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), it was alleged that a competitor had "conspired" with the City to enact an ordinance to restrict competitive billboards and exclude plaintiff *Omni* from the market. *Id.* at 367, 374. Like here, it was alleged that the private entity had initiated the idea of governmental action and urged it upon the governmental entity. Plaintiffs argued that the decision of the governmental entity was not entitled to state action immunity because there should be a "conspiracy" exception to state action immunity. The Court ruled that "[t]here is no such conspiracy exception." *Id.* at 374.

The Court went on to explain in detail the inherent illogic of the proposal for a conspiracy or corruption exception to the state action doctrine. It noted that the Supreme Court has long recognized that, as "a corollary" to the state action doctrine, private parties have a Constitutionally protected right to petition government entities to take any action, including action that will displace competition. *Id.* at 379. As long as the private entity is seeking only governmental action, its petitioning is not considered a "sham," and is protected speech. *Id.* at 381-82. The Court then explained that when a governmental entity agrees to act in response to that protected speech, its actions are immune from the antitrust laws under the "state action" doctrine even if those actions are challenged as a conspiracy or "[a] corruption of the governmental process." *Id.* at 376-77. The Court noted that "[f]ew governmental actions are immune from the charge that they are 'not in the public interest' or in some sense 'corrupt.'" *Id.* at 377. It instructed that an inquiry, such as the one Plaintiffs urge upon the Court here, "would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Id.* at 377.

Plaintiffs' allegations characterizing the Authority as a "strawman" and a "rubber stamp" are indistinguishable from arguments the Supreme Court soundly rejected in *Omni*. In that instance, the Court dismissed any notion that there are "sham" or "conspiracy" exceptions to the antitrust immunity provided to private parties who legitimately petition for governmental action under the First Amendment, even if that action results in anticompetitive effects.[7] *Id.* at 382-83.

C. The FTC lacks jurisdiction over Phoebe Putney under the FTC Act.

Without jurisdiction over Phoebe Putney, there can be no Federal Trade Commission ("FTC") administrative proceeding and thus there is no basis for granting a preliminary injunction. The FTC has not properly asserted jurisdiction over Phoebe Putney. The FTC does not have jurisdiction over non-profit corporations under 15 U.S.C. § 44, with only limited exceptions. The Federal Trade Commission Act ("FTC Act") grants the Commission jurisdiction only over an entity "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. The Supreme Court has held that the Commission's jurisdiction may extend to a non-profit organization only if it "provides substantial economic benefit to its *for-profit* members." *California Dental Ass'n v. FTC*, 526 U.S. 756, 759 (1999) (emphasis added).

[7] There is a "sham" exception to the right to petition, but Plaintiffs do not allege the factual basis for such an exception. *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993). It is a sham only when the party is not actually seeking governmental action, but is using the process to create competitive harm. In other words, the exception applies only when the petitioning is not aimed at achieving governmental action, but instead is used as a means of **directly** – without governmental action – harming competition. "The 'sham' exception to Noerr encompasses situations in which persons use the governmental *process* – as opposed to the outcome of that *process* – as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license applications of a competitor, with no expectation of achieving denial of a license but simply in order to impose expense and delay." *Omni*, 499 U.S. at 380. Plaintiffs have not and can not allege that the Phoebe entities engaged in any activity which would directly harm competition. They allege only that the Phoebe Putney entities sought action by a governmental entity.

The Plaintiffs have not and cannot assert any such exception to the plain language of the FTC Act in this case. PPMH and PPHS are undeniably non-profit entities, and there is absolutely no economic benefit provided to any "for-profit" members.

D. The FTC lacks jurisdiction over Phoebe Putney under Section 7 of the Clayton Act.

The FTC also lacks jurisdiction under Section 7 of the Clayton Act. By its terms, Section 7 applies only to entities engaged in a challenged "acquisition." 15 U.S.C. § 18 ("no person … shall acquire …."). The Complaint does not allege that Phoebe Putney is acquiring anything. Even if a future hypothetical lease were somehow to be characterized as an acquisition, the Complaint does not make such an allegation.

E. The acquisition is immune from the antitrust laws.

Even if the Complaint otherwise stated a claim against Phoebe Putney, and even if the FTC had jurisdiction over Phoebe Putney, the transaction at issue – the acquisition of Palmyra by the Authority – is immune from the antitrust laws because it is state action. *See* Authority Brief; *see generally Parker v. Brown*, 317 U.S. 341 (1943). Even if there were a lease of Palmyra to PPMH, state action would make that immune as well.

According to the United States Supreme Court and the Eleventh Circuit, the requirements for the application of state action immunity are: (1) the actor be a political subdivision of the state; (2) the actor is empowered to undertake the conduct at issue; and (3) the State clearly articulated a policy by which competition would be displaced. *See Omni*, 499 U.S. at 370-73; *FTC v. Hospital Bd. of Directors of Lee County*, 38 F.3d 1184 (11th Cir. 1996).

The Plaintiffs have not and cannot dispute that the Hospital Authority is "an instrumentality, agency, or 'political subdivision' of Georgia for purposes of state action immunity." *Crosby v. Hospital Authority of Valdosta*, 93 F.3d 1515, 1525 (11th Cir. 1996).

The Plaintiffs have not and cannot dispute that the Authority is authorized by statute to make this acquisition. O.C.G.A. §§ 31-7-75(4), 31-7-71(5). The Plaintiffs have not and cannot dispute that it is the Authority that will make the acquisition. *See, e.g.*, Allen Decl. Ex. J; Wernick Decl. ¶¶ 68, 72. Thus, the first two tests for state action immunity are met, without dispute.

As to the third test – whether the state of Georgia has articulated a policy to displace competition – the facts in this case are indistinguishable from the controlling Eleventh Circuit precedent in *Lee County*. In that case, the Eleventh Circuit noted that the Lee County Hospital Board was created in 1963, when there was already a single hospital in Lee County, and that the Board had then acquired that hospital. *Lee County*, 93 F.3d at 1192. The Court further noted that the enabling legislation was amended in 1987, to "provide for the operation and maintenance of additional hospitals …." *Id.* at 1186. The Eleventh Circuit went on to conclude that "the legislature must have reasonably anticipated that further acquisitions, resulting from the 1987 legislation, would increase the Board's market share in an anticompetitive manner." *Id.* at 1192.

Here, when the Authority was created, Phoebe Putney Memorial Hospital was similarly the only hospital in Dougherty County. Pursuant to the powers prescribed under the Hospital Authorities Law, the Authority then acquired Phoebe Putney. As was the case in *Lee County*, the Georgia Hospital Authorities Law granting each authority the power to acquire a "project," which term includes "hospitals," plainly authorizing the purchase of multiple "hospitals," O.C.G.A §§ 31-7-71(5), 31-7-75(4), meaning that the Georgia General Assembly anticipated that any authority could acquire multiple hospitals in its home county. At the time of the enactment of the Georgia Hospital Authorities Law, with only one hospital existing in Dougherty County, but with a statutory grant of power to acquire "hospitals," the Georgia legislature must have reasonably anticipated that further acquisitions could increase the Authority's market share to

such an extent that substantial competition was being displaced. In that regard, *Lee County* is indistinguishable.

Moreover, the Georgia legislature has permitted creation of hospital authorizes in each of Georgia's 159 counties. The legislature authorized those hospital authorities to acquire other hospitals in the same county. It is beyond question that the legislature must have foreseen that permitting intra-county acquisitions in counties with populations that can support only a few hospitals (which applies to most of Georgia's counties) meant that many, if not most, of those acquisitions would result in the combination of two or more of only a few hospitals, i.e., the very conduct Plaintiffs seek to enjoin.

Given the above, under Supreme Court and Eleventh Circuit precedent, it is clear that the acquisition is protected by state action immunity.

The Plaintiffs have incorrectly raised the question of whether "active supervision" applies to the state action analysis. State action immunity can extend not only to a "political subdivision" of the state, but also to private actors when the private actors are taking action that is actively supervised by a governmental entity. However, in this case, there is no cause of action involving a private actor. The only cause of action is an acquisition by the Hospital Authority of Albany-Dougherty County. The Eleventh Circuit is "satisfied that the Authority is an instrumentality, agency, or 'political subdivision' of Georgia for purposes of state action immunity; thus, *we need not apply the active state supervision requirement*." *Crosby*, 93 F.3d at 1525 (emphasis added). The FTC's attempt to mischaracterize the action before this Court as some "three part transaction" is unfounded. The only challengeable behavior is the acquisition of Palmyra by the Authority. Whatever potential actions might be possible afterwards are irrelevant as a matter of law.

i. No active supervision analysis is necessary to conclude that state action immunity applies in this instance.

Even if a hypothetical subsequent lease of Palmyra in the future were considered in the analysis, state action immunity would extend to the lessee. Several Circuits have held that where a state actor enters a contract with a private actor and state action immunity applies to the state actor, it necessarily applies to the private actor also. These cases recognize that state action immunity must logically extend to the private party contracting with the state entity because the private party is a necessary counterpart to the government entity's decision. As the Ninth Circuit stated in *Charley's Taxi*: "*Parker* immunity exempts *state action*, not merely *state actors*…. To hold otherwise would allow the *Parker* immunity to be circumvented by artful pleading." *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 878 (9th Cir. 1987) (emphasis added); *see also Elec. Inspectors, Inc. v. Vill. of E. Hills*, 320 F.3d 110, 126 (2d Cir. 2002); *Cine 42nd Street Theater Corp. v. The Nederlander Org., Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986). This Court similarly should not be distracted by the FTC's attempt at artful pleading. If somehow the *potential* future lease of Palmyra was relevant to the analysis, which it is not, PPMH as a possible lessee in this instance would nevertheless be entitled to state action immunity without an inquiry into "active supervision."

Moreover, the very nature of PPMH means that active state supervision in not required under any circumstances. The "requirement of active state supervision serves essentially an evidentiary function; it is ***one way*** of assuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985); *Crosby,* 93 F.3d at 1523. The question is whether there is a "real danger" that the private entity would engage in actions for its private benefit rather than actions which further state policy. *Crosby,* 93 F.3d at 1530. PPMH has neither the ability nor the incentive to engage in actions

for its "private benefit" – indeed, it simply **cannot**: PPMH is a non-profit corporation that was created by the Authority; an Authority member is required to be on its board; its only function is to operate Phoebe Putney Memorial Hospital by the terms of the lease with the Authority, which are required by statute; the terms of the lease require it to function as a non-profit and only in a way that furthers State policy; its reason for being terminates with the lease; and all PPMH assets continue to be owned by the Authority and will revert to the Authority upon termination of the lease. Thus, it is legally impossible for PPMH to operate in its "private" interests separate from State policy – it has no private interests separate from state policy.

The Eleventh Circuit confronted this issue in *Crosby*, an antitrust challenge to the peer review decisions of both a hospital authority and a hospital peer review committee comprised of private doctors. The Eleventh Circuit held that active supervision was not required for either the hospital authority ***or the private actors***: "Because of the control exercised by the Authority over [private doctors engaged in] peer review decisions and the statutory context of peer review in Georgia, we conclude that the actions of individual doctors on peer review committees should be considered actions of the Authority such that the 'active state supervision' requirement is unnecessary to assure that the challenged actions are truly those of the State." *Id.* The logic of *Crosby* is even stronger under the facts here. *Crosby* involved private actors, i.e., independent, competing physicians, with obvious motives to act contrary to State policy. Here, even if the Authority were to lease Palmyra to PPMH in the future, PPMH's interests are completely aligned with, and controlled by, the interests of the Authority and the State.

Finally, even if active supervision were somehow relevant, which it is not, the relevant conduct for any state action analysis in an acquisition context is forward looking and the Authority has committed to exercising such supervision going forward. In cases, unlike here,

where the challenged action is taken by a private entity, state action immunity may still apply if the private actor is supervised by the state entity. Here, the existing longstanding lease terms between PPMH and the Authority, plus the Authority's recent resolution to lease Palmyra only if it contains certain terms that clearly constitute active supervision under the relevant law, is sufficient. *See* Authority Brief and Statement of Undisputed Facts.

Accordingly, it is clear that a Palmyra lease if and when ultimately drafted and entered between the Authority and a Phoebe Putney entity would also be subject to state action immunity.

III. CONCLUSION

Therefore, Defendants PPHS, PPMH, and PNI move the Court to (1) dismiss all three parties from this action with prejudice, (2) dismiss Plaintiffs' motion for a preliminary injunction, and (3) vacate the temporary restraining order.

Dated: May 16, 2011

Respectfully submitted,

By /s/ John H. Parker, Jr., Esq. ____________

John H. Parker, Jr., Esq.
Georgia Bar No. 562450
jparker@phrd.com
Robert M. Brennan, Esq.
Georgia Bar No. 079798
bbrennan@phrd.com
Parker, Hudson, Rainer & Dobbs LLP
1500 Marquis Two Tower
285 Peachtree Center Ave. NE
Atlanta, GA 30303
Telephone: 404-420-5532
Facsimile: 678-533-7776

Lee K. Van Voorhis, Esq.
Admitted *pro hac vice*
lee.vanvoorhis@bakermckenzie.com
Baker & McKenzie LLP
815 Connecticut Avenue, NW
Washington, DC 20006
Telephone: 202-452-7000
Facsimile: 202-452-7074

James C. Egan, Jr., Esq.
Admitted *pro hac vice*
james.egan@weil.com
Jonathan L. Sickler, Esq.
Admitted *pro hac vice*
jonathan.sickler@weil.com
Weil, Gotshal & Manges LLP
1300 Eye Street, NW, Suite 900
Washington, DC 20005
Telephone: 202-682-7000
Facsimile: 202-857-0940

Counsel For Defendants Phoebe Putney Memorial Hospital, Inc., Phoebe Putney Health System, Inc. and Phoebe North, Inc.

CERTIFICATE OF SERVICE

I hereby certify that this 16th day of May, 2011 a copy of the foregoing PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., AND PHOEBE NORTH, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF CROSS-MOTION TO DISMISS, AND TO VACATE THE TEMPORARY RESTRAINING ORDER was electronically filed with the Clerk of Court through the CM/ECF system which will automatically send electronic mail notification of such filing to the CM/ECF registered participants as identified on the Electronic Mail Notice List.

This 16th day of May, 2011.

Parker, Hudson, Rainer & Dobbs LLP

/s/ John H. Parker, Jr.

John H. Parker, Jr., Esq.
1500 Marquis Two Tower
285 Peachtree Center Ave. NE
Atlanta, GA 30303
Tel: 404-420-5532
Fax: 678-533-7776
Email: jparker@phrd.com