

The Commission issued an administrative complaint in this matter on April 20, 2011, alleging that Phoebe Putney's proposed acquisition of rival Palmyra Park Hospital from HCA Inc. would reduce competition substantially and allow the combined entity to raise prices for general acute-care hospital services charged to commercial health plans in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and – if consummated – Section 7 of the Clayton Act, 15 U.S.C. § 18, substantially harming patients and local employers and employees. Administrative proceedings began under Chief Administrative Law Judge Chappell, and a trial in the matter was scheduled to begin on September 19, 2011. On April 20, 2011, the Commission also filed in the U.S. District Court for the Middle District of Georgia a complaint for preliminary injunction, which Defendants (Respondents here) moved to dismiss on grounds of state-action immunity. Defendants did not contest the Commission's claim that the acquisition of Palmyra would tend to create, if not actually create, a monopoly in the relevant market. Following a hearing that took place on June 13, 2011, the District Court granted Defendants' motion and dismissed the FTC's complaint, finding that state-action immunity shielded the acquisition from federal antitrust scrutiny. The FTC appealed, and the Eleventh Circuit granted an injunction pending appeal.

On July 1, 2011, Respondents moved for a stay of these administrative proceedings under Commission Rule 3.22(a). Respondents asserted that the Commission lacked jurisdiction over them, because the District Court ruled that the Respondents' transaction was immune from the federal antitrust laws.¹ Indeed, the Respondents pointed out that "state action immunity, the very issue on appeal . . . is critical to the disposition of this administrative proceeding."² Respondents

¹ Unopp. Mot. to Stay, n.1 ("Respondents believe that the FTC does not have jurisdiction over them. As explained in paragraph 4 below, the USDC MD GA has issued an order dismissing the FTC's Motion for a Preliminary Injunction, finding the 'transaction,' even as defined by Complaint Counsel, to be immune from federal antitrust laws. This Motion should not be considered in any way to conflict with Respondents' view that the Commission lacks jurisdiction.").

² Unopp. Mot. to Stay at ¶ 8.

further noted that “[i]n the event of a reversal [relating to the District Court’s state action immunity ruling], proceedings can resume with no prejudice.”³ Complaint Counsel did not oppose Respondents’ motion.

On July 15, 2011, the Commission granted Respondents’ Unopposed Motion to Stay Proceeding. The Commission found good cause to grant the stay, noting that, in spite of the Commission’s “strong interest” in completing Part 3 proceedings expeditiously,⁴ “[t]he applicability of the state action doctrine is a key issue in this proceeding and will be addressed by the Eleventh Circuit on an expedited basis.”⁵ The Commission specifically noted Respondents’ assurance that “if the Eleventh Circuit were to rule in the FTC’s favor, these administrative ‘proceedings can resume with no prejudice.’”⁶ The Commission also took comfort that the Eleventh Circuit’s grant of an injunction pending appeal would help ensure that the status quo is preserved and the proposed acquisition is not consummated. Under these circumstances, the Commission stated, a waste of resources would be avoided and neither side would be prejudiced.⁷

Although agreeing with the Commission that “on the facts alleged, the joint operation of Memorial and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly,”⁸ on December 9, 2011, the Eleventh Circuit affirmed the District Court’s motion to

³ *Id.* Respondents also stated, “Respondents and Complaint Counsel agree that if a stay is granted and subsequently lifted, and this proceeding resumes, both parties will move the Commission for a new hearing date, and a new scheduling order preserving the filing time allotments for each party as granted under the current scheduling order.” *Id.* at ¶ 10.

⁴ *See* Rule 3.1, 16 C.F.R. § 3.1 (“[T]he Commission’s policy is to conduct [adjudicative] proceedings expeditiously.”); Rule 3.41(b), 16 C.F.R. § 3.41(b) (“Hearings shall proceed with all reasonable expedition . . .”); Rules of Practice Amendments, 61 Fed. Reg. 50,640 (FTC Sept. 26, 1996) (“[A]djudicative proceedings shall be conducted expeditiously and . . . litigants shall make every effort to avoid delay at each stage of a proceeding.”).

⁵ Order Granting Resp. Unopp. Mot. to Stay Proceedings at 2. *See also* Rule 3.41(f), 16 C.F.R. § 3.41(f) (“The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceedings unless a court of competent jurisdiction or the Commission for good cause, so directs.”).

⁶ Order Granting Resp. Unopp. Mot. to Stay Proceedings at 2.

⁷ *Id.*

⁸ *FTC v. Phoebe Putney Health System, Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011).

dismiss, ruling that state-action immunity applied to Respondents' acquisition, and dissolved its injunction pending appeal.⁹ Respondents consummated their acquisition of Palmyra on December 15, 2011.

These administrative proceedings remained stayed while the FTC petitioned the United States Supreme Court for certiorari, which was granted on June 25, 2012.¹⁰ Merits briefing was conducted through the fall, and oral argument took place on November 26, 2012. On February 19, 2013, in a unanimous decision, the Supreme Court reversed the judgment of the Eleventh Circuit. In an opinion authored by Justice Sotomayor, the Court held that state-action immunity did not immunize the Phoebe Putney/Palmyra transaction.¹¹ The Court also noted that, “[t]he case is not moot . . . because the District Court on remand could enjoin respondents from taking actions that would disturb the status quo and impede a final remedial decree.”¹² The Court further remanded the case for proceedings consistent with its opinion.

Accordingly, as the Supreme Court has held that state-action immunity does not immunize the challenged transaction, Complaint Counsel moves that the stay of the administrative proceedings be lifted as soon as possible. As this is now a consummated acquisition in which significant integration of hospital assets and operations – and likely, interim harm to competition – may have taken place, the Commission’s “strong interest” in expeditious completion of these proceedings is more paramount than ever. Complaint Counsel is prepared to resume prosecution of its case against the challenged transaction at the soonest opportunity.

⁹ *Id.* at 1377 (11th Cir. 2011).

¹⁰ *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 28 (2011).

¹¹ *FTC v. Phoebe Putney Health System, Inc.*, ___ U.S. ___, 2013 WL 598434 *12 (2013).

¹² *Id.* at *5, n.3 (2013) (citing *Knox v. Service Employees*, 567 U.S. ___, ___ (2012) (slip op., at 7) and *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1033-1034 (D.C. Cir. 2008) (Brown, J.)).

Dated: February 22, 2013

Respectfully submitted,

/s/ Jeffrey H. Perry

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**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 Edith Ramirez
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright

In the Matter of)	
)	
Phoebe Putney Health System, Inc.)	
a corporation, and)	DOCKET NO. 9348
)	
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.)	

[PROPOSED] ORDER

Having reviewed the [Unopposed] Motion to Lift Stay, it is hereby ORDERED that the stay on this administrative proceeding is LIFTED. It is further ORDERED that a scheduling conference in this matter will be held at [time] on [date].

By the Commission.

Donald S. Clark
Secretary

ISSUED: February [xx], 2013

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2013, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark Secretary
Federal Trade Commission
600 Pennsylvania Ave.,
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Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
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Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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CERTIFICATE FOR ELECTRONIC FILING

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

February 22, 2013

By:

/s/ Maria M. DiMoscato
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Attorney for Complaint Counsel