

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

**RESPONDENTS PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY
MEMORIAL HOSPITAL, INC., AND PHOEBE NORTH, INC.'S
ANSWER TO THE FEDERAL TRADE COMMISSION'S COMPLAINT**

Pursuant to 16 C.F.R. § 3.12, Respondents Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., and Phoebe North, Inc. (collectively "Respondents"), by and through their undersigned counsel, answer the Federal Trade Commission's ("FTC") April 19, 2011 Complaint ("Complaint") as follows:

PRELIMINARY STATEMENT

The FTC fails to state a cause of action against Respondents. While the Complaint asserts that future hypothetical actions are likely to take place, there is no actual activity by

Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Phoebe Putney Health System, Inc. ("PPHS") or Phoebe North, Inc. ("PNI") to challenge. Even if future hypothetical actions were somehow challengeable, the Complaint fails to allege any current or incipient antitrust violation by PPMH, PPHS or PNI. Furthermore, to the extent the Complaint were able to identify any challengeable action by PPMH, PPHS or PNI, such action would be immune from liability under the state action doctrine. Furthermore, the FTC fails to provide a clear and concise factual predicate or recitation of the legal authority that provides the FTC with jurisdiction for institution of the proceeding. The FTC does not allege the necessary facts to establish a current or future violation of either Section 5 of the FTC Act or Section 7 of the Clayton Act. Finally, the Complaint is so full of hyperbolic adjectives, conclusory statements and allegations that are without factual basis – and are not reasonably likely to be supported by facts developed in discovery – as to make it nearly impossible for Respondents to admit to anything in the Complaint.

STATEMENT OF FACTS

1. The Hospital Authority of Albany-Dougherty County (the "Authority") is a political subdivision of the State of Georgia. *See Crosby v. Hospital Authority of Valdosta and Lowndes County*, 93 F.3d 1515, 1525 (11th Cir. 1996). The FTC admits this fact in its suit filed in the United States District Court for the Middle District of Georgia. *See Memorandum in Support of Plaintiffs' Motions for Temporary Restraining Order and for Preliminary Injunction* at 6.
2. As the Asset Purchase Agreement ("APA") describes, the Authority is acquiring Palmyra. The FTC admits this fact in its suit filed in the United States District Court for

the Middle District of Georgia. *See* Memorandum in Support of Plaintiffs' Motions for Temporary Restraining Order and for Preliminary Injunction at 1.

3. Post-acquisition, the Authority must undertake a statutorily mandated process before taking any further action, including the entering of a lease. This process, which by law must take at least 120 days, includes a public review and comment of any proposals. This process has necessarily not happened.
4. PPMH and PPHS are Georgia non-profit corporations created in 1990 by the Authority. In addition, PPHS is a § 509(a)(3) public charity formed by the Authority to operate in support of PPMH's charitable mission of providing care for all persons in the community regardless of ability to pay.
5. PPMH and PPHS are parties to the proposed APA for a limited technical purpose that does not alter the fact that neither is acquiring Palmyra. PNI is no longer a party to the transaction according to the Second Amendment to the APA.
6. The Authority has the absolute reversionary interest in all assets of PPMH and PPHS.

RESPONSES TO THE FTC'S ALLEGATIONS

Respondents deny the allegations and legal conclusions contained in the FTC's unnumbered introductory paragraph. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction."

I.
NATURE OF THE CASE

1. The Transaction creates a virtual monopoly for inpatient general acute care services sold to commercial health plans and their 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 benefitted consumers for decades. The result will be significant increases in healthcare costs for local residents, many of whom are already struggling to keep up with rising medical expenses, and the stifling of beneficial quality improvements.

ANSWER: Respondents are without knowledge or information of the meaning and intent of the term “virtual monopoly.” Respondents are without knowledge or information of the meaning and intent of the term “robust competitive rivalry.” Respondents state that the third sentence is without factual support, inflammatory and stated with such imprecision as to render it meaningless. Respondents deny the FTC’s definition and characterizations of the term “Transaction.” Respondents deny the allegations and legal conclusions in 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’ 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.

ANSWER: Respondents are without knowledge or information of the meaning and intent of the term “virtual monopoly.” Respondents are without knowledge or information as to the meaning and intent of the term “strawman.” Respondents are unable to determine what it was that they allegedly did not inform the Authority about and, therefore, must deny the entirety of the second sentence. Respondents admit that, pursuant to the APA, the Authority will

purchase the Palmyra assets from HCA. Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in 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.

ANSWER: Respondents are without knowledge or information of the meaning and intent of the term "on paper only." Respondents are without knowledge or information of the meaning and intent of the term "strawman." Respondents are without knowledge or information of the meaning and intent of the term "overtly anticompetitive." Respondents are without knowledge or information of the meaning and intent of the term "the deal." Respondents are without knowledge or information of the meaning and intent of the term "meaningful role." Respondents are without knowledge or information of the meaning and intent of the term "rubber-stamp." Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the allegations and legal conclusions in 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 [REDACTED].

ANSWER: Respondents are without knowledge or information of the meaning and intent of the term "rubber-stamp." Respondents admit that on December 20, 2010, PPHS entered into a Termination Fee Agreement that includes the language quoted in the second sentence of

Paragraph 4, but state that the language of the agreement speaks for itself. Respondents refer the Commission to the agreement for a complete and accurate statement of its terms. Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in Paragraph 4.

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.

ANSWER: Respondents are without knowledge or information of the meaning and intent of the term "rubber-stamp." Respondents admit that the quoted language was used in an email from the Authority Chairman to PPMH's CEO. Respondents deny that the quoted statement constitutes an admission or stands for the propositions alleged by the FTC. Respondents deny the remaining allegations and legal conclusions in Paragraph 5.

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.

ANSWER: Respondent PPHS and PPMH admit that they are private, non-profit entities created by the Authority, which retains an absolute reversionary interest in both of them, pursuant to the Georgia Hospital Authorities Law. Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remainder of the allegations and legal conclusions 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").

ANSWER: Respondents are without knowledge or information of the meaning and intent of the term "by a wide margin." Respondents deny that either Dougherty County or the six surrounding counties constitute a relevant geographic market. Further, Respondents deny that licensed general acute care hospital beds or commercial patient discharges constitute a relevant product market. Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the allegations and legal conclusions 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.

ANSWER: Respondents state that the first sentence of Paragraph 8 contains allegations that are so lacking in precision as to render it meaningless and, therefore, deny it. To the extent allegations in Paragraph 8 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations. Respondents deny the allegations and legal conclusions in 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.

ANSWER: Respondents admit that Mr. Wernick used the quoted language in a press release. Respondents deny that the quoted statement constitutes an admission or stands for the propositions alleged by the FTC. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." To the extent allegations in Paragraph 9 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations. Respondents deny the remaining allegations in Paragraph 9.

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 for inpatient general acute care services, these hospitals are simply too distant to serve as practical substitutes for residents of the Albany area, even in the event of a small but significant price increase at 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.

ANSWER: Respondents lack knowledge or information sufficient to form a belief as to the truth of the allegations asserted in the last sentence in Paragraph 10 and, therefore, deny it. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations and legal conclusion in 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the allegations in 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.

ANSWER: Respondents lack knowledge and information sufficient to form a belief as to the truth of the allegations asserted in the third sentence in Paragraph 12 and, therefore, deny it. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in 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.

ANSWER: Respondents admit that PPMH and PPHS are not-for-profit Georgia corporations under Internal Revenue Code § 501(c)(3) and the Georgia Nonprofit Corporate Code. PPHS, however, is also an Internal Revenue Code § 509(a)(3) public charity which,

pursuant to the requirements of Federal law, was established specifically for the purpose of providing support to the charitable purpose – indigent care – of a not-for-profit entity, PPMH. Pursuant to the mandate § 509(c)(9) and the corporate governance documents adopted by the Authority in establishing it, PPHS supports the operation of PPMH and Phoebe Worth Medical Center. Respondents admit that PNI was created for the purpose of managing the Palmyra assets during the interim period after the Authority acquires Palmyra and undertakes the statutorily mandated public hearings that will result in the Authority making more permanent arrangements for the management of Palmyra for the benefit of the people of Albany-Dougherty County, Georgia. However, PNI is no longer a party to the APA according to the Second Amendment to the APA. Further answering, Respondents deny the allegations in the third sentence of Paragraph 13. PPMH, not PPHS, is the Lessee of Phoebe Putney Memorial Hospital. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in 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.

ANSWER: Respondents deny that PPMH is a "hospital located at 417 Third Avenue, Albany, Georgia 31701." PPMH is the entity which operates the hospital located at that address. Respondents deny the allegations in the last sentence of Paragraph 14. PPMH provides a broad range of services to a wide area. Respondents admit the remaining allegations in Paragraph 14.

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.

ANSWER: Respondents admit that PPHS's total annual patient revenues for all services, at all facilities, are over \$1.16 billion; total discharges for all services are over 19,000; PPHS's annual net surplus has been over \$19 million; and general acute care hospital services account for the majority of its services and revenues. Respondents deny the remaining allegations in 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.

ANSWER: Respondents admit that PPHS is the parent entity of Phoebe Worth Medical Center Inc., a 25-bed critical access hospital located at 807 S. Isabella Street, Sylvester, Georgia 31791. Respondents admit that PPHS is the parent entity of Phoebe Sumter Medical Center, a 76-bed general acute care hospital located in Americus, Georgia. Respondents are without knowledge of what is meant by "Phoebe Putney's reach" and, therefore, must deny that allegation.

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 healthcare 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.

ANSWER: The allegations in Paragraph 17 relate to entities other than Respondents. Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations, and therefore deny the same. Respondents deny any remaining allegations in Paragraph 17.

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.

ANSWER: The allegations in Paragraph 18 relate to entities other than Respondents.

Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations, and therefore deny the same. Respondents deny any remaining allegations in 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.

ANSWER: Respondents deny that it pays "all of the Authority's expenses," as the Authority pays its own expenses, but states and alleges that PPHS and PPMH, as entities formed by the Authority and over which the Authority retains a complete reversionary interest in the assets of, provides the Authority with the funds to pay its expenses. Respondents admit that on December 11, 1990, PPMH and the Authority entered into a Lease and Transfer Agreement ("Lease Agreement"). Respondents state that the Lease Agreement speaks for itself and refer the Commission to the Lease Agreement for a complete and accurate statement of its terms. Respondents deny the allegation that the total consideration for the Lease is \$1.00 per annum, and further state that the Lease between the Authority and PPMH has been extended two times and will expire in 2049. To the extent allegations in Paragraph 19 relate to entities other than

Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations, and therefore deny the same. Respondents deny any remaining allegations in Paragraph 19.

B.

Jurisdiction

20. Respondents, and each of their relevant operating subsidiaries and parent entities are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

ANSWER: The allegations in Paragraph 20 contain legal conclusions to which no answer is required. To the extent an answer is required, Respondents deny the allegations in 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.

ANSWER: The allegations in Paragraph 20 contain legal conclusions to which no answer is required. To the extent an answer is required, Respondents deny the allegations in Paragraph 20. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction."

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."

ANSWER: Respondents admit that the quoted language appears in the Lease Agreement attachment, and further state that the Lease Agreement and any attachments speak for themselves. Respondents refer the Commission to the Lease Agreement for a complete and accurate statement of its terms. Respondents deny that the quoted statement constitutes an admission or stands for the propositions alleged by the FTC. Respondents deny the remaining allegations in 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."

ANSWER: Respondents admit that the quoted language appears in the Lease Agreement attachment, and further state that the Lease Agreement and any attachments speak for themselves. Respondents refer the Commission to the Lease Agreement for a complete and accurate statement of its terms. Respondents deny that the quoted statement constitutes an admission or stands for the propositions alleged by the FTC. Respondents deny the remaining allegations in 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.

ANSWER: Respondents deny the allegations in 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.

ANSWER: Respondents are without knowledge or information of the meaning and intent of the term “rubber-stamp.” Respondents admit that the quoted language appears in the Lease Agreement, and further state that the Lease Agreement speaks for itself. Respondents refer the Commission to the Lease Agreement for a complete and accurate statement of its terms. Respondents deny that the quoted statement constitutes an admission or stands for the propositions alleged by the FTC. Further answering, Respondents deny the FTC’s definition and characterizations of the term “Transaction.” Respondents deny the remaining allegations in Paragraph 25.

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’ 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.

ANSWER: Respondents admit 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.* Respondents admit that in July 2010, Mr. Wernick authorized Mr. Baudino to investigate whether HCA had any interest in selling Palmyra to the Authority. Respondents deny any inference, characterization, suggestion,

or legal argument concerning the events and admissions of Paragraph 26. Respondents deny the remaining allegations in Paragraph 26.

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.

ANSWER: Respondents deny the allegations in the first sentence of Paragraph 27.

Respondents are without knowledge or information of the meaning and intent of the term "the deal." Respondents admit that Mr. Baudino is a member of or is otherwise affiliated with the Baudino Law Group and Sovereign Group; that Mr. Baudino prepared and gave a presentation to the Authority concerning an acquisition of Palmyra by the Authority; and that PPHS agreed to pay the Sovereign Group a fee of one percent of the acquisition price (subject to certain adjustments) when the Authority acquires the Palmyra assets. Respondents deny the allegation in the fifth sentence of Paragraph 27 that the Authority was unaware of Mr. Baudino's representation of PPHS or his contingency fee. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny 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.

ANSWER: Respondents lack knowledge and information sufficient to admit or deny the second, third, and fourth sentences in Paragraph 28 and, therefore, deny them. Respondents deny the remaining allegations of Paragraph 28.

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

ANSWER: Respondents lack knowledge and information sufficient to admit or deny the first sentence in Paragraph 29 and, therefore, deny it. Respondents deny the remaining allegations in 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.

ANSWER: Respondents deny the allegation in the second sentence of Paragraph 30. Phoebe Putney Memorial Hospital is leased from the Authority by PPMH. Respondents deny the remaining allegations in Paragraph 30, but state that PPHS, as an entity formed by the Authority and in which the Authority retains a complete reversionary interest in all assets including all cash, has cash reserves of over a quarter of a billion dollars.

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' bankers who analyzed similar transactions and found that HCA's demand far exceeded [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.

ANSWER: To the extent allegations in Paragraph 31 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations, and therefore deny the same. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in Paragraph 31.

32. Mr. Baudino believed he had an easy answer to the antitrust risk as well. In a purportedly "[REDACTED]" 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 [REDACTED] admitted that the term sheet is a wish list, to which Phoebe Putney has not agreed, and that the Authority's role after 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."

ANSWER: To the extent allegations in Paragraph 32 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations, and therefore deny them. Respondents admit that the APA provides that the Authority will acquire the assets of Palmyra Park Hospital; and that, under the APA, PPHS has agreed to guarantee the purchase price and the Authority's performance. Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in Paragraph 32.

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.”

ANSWER: Respondents deny the FTC’s definition and characterizations of the term “Transaction.” Respondents deny the remaining allegations in Paragraph 33.

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 rubber-stamp the completed deal at an open meeting, thereby addressing all of HCA’s antitrust and confidentiality concerns.

ANSWER: Respondents admit that the Authority must comply with Georgia’s Open Meetings Act. Further answering, Respondents deny the FTC’s definition and characterizations of the term “Transaction.” Respondents deny the remaining allegations in Paragraph 34.

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

ANSWER: Respondents admit that on October 7, 2010, PPHS had a board meeting that discussed Palmyra. Respondents deny the remaining allegations in Paragraph 35.

36. PPHS’ 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’ 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.

ANSWER: Respondents deny the allegations in the first sentence of Paragraph 36. Respondents admit that on or about September 21, Mr. Wernick and Tommy Chambless, PPHS’s General Counsel, held an informational session with Authority members Raiph Rosenberg and Charles Lingle; and that Mr. Rosenberg and Mr. Lingle signed confidentiality agreements. To the

extent allegations in Paragraph 36 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations, and therefore deny the same. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in Paragraph 36.

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.

ANSWER: To the extent allegations in Paragraph 36 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations, and therefore deny the same.

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."

ANSWER: Respondents admit that the quoted statements were made by Mr. Baudino, but deny that the quoted statements constitute admissions or stand for the propositions alleged by the FTC. The FTC mischaracterizes Mr. Baudino's letter. Mr. Baudino's letter states that the acquisition structure would be like acquisitions in other counties, for which there was no antitrust review. The letter does not say that the acquisition would be structured as an acquisition by the Authority to ensure that the state action doctrine applies. Respondents further state that the letter speaks for itself, and Respondents refer the Commission to the letter itself for a complete and accurate statement of its contents. Further answering, Respondents deny the FTC's definition

and characterizations of the term "Transaction." Respondents deny the 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.

ANSWER: Respondents admit that PPHS, pursuant to the long-standing directive of the Authority, submitted an offer to HCA that was ultimately contingent upon Authority approval. To the extent allegations in Paragraph 39 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations. Respondents deny the remaining allegations in Paragraph 39.

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' advisors, was [REDACTED]. The Authority played no role in negotiating that price, and the [REDACTED] prepared by PPHS' advisors was not shared with the Authority.

ANSWER: Respondents admit that on December 2, 2010, the PPHS Board approved its participation as guarantor of the proposed acquisition of the Palmyra assets by the Authority. Respondents are without knowledge or information of the meaning and intent of the term "the deal." To the extent "the deal" refers to the Authority's acquisition of the Palmyra assets, Respondents deny that the "deal" is between PPHS and HCA. The Authority will acquire the Palmyra assets. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in Paragraph 40.

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 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.

ANSWER: Respondents admit that the APA contains provisions for a break up fee and a rescission fee, and state that the language of the agreement speaks for itself. Respondents refer the Commission to the APA for a complete and accurate statement of its terms. Respondents deny the remaining allegations in Paragraph 41.

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 to [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.

ANSWER: Respondents admit that the Termination Agreement contains the quoted language, and state that the language of the agreement speaks for itself. Respondents refer the Commission to the agreement for a complete and accurate statement of its terms. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in 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' 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' December 2 Board meeting. [REDACTED] 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' desire to do so, the Authority rubber-stamped the Asset Purchase Agreement *exactly* as PPHS had negotiated it.

ANSWER: Respondents admit that on December 21, 2010, the Authority held a special meeting during which Mr. Wernick and Mr. Baudino presented a proposal for the Authority to acquire the Palmyra assets. Respondents admit that a powerpoint presentation regarding a proposal for the Authority to acquire Palmyra's assets was presented at a Board meeting for PPHS. Respondents deny the allegations in the parenthetical in the second sentence of Paragraph 43. Respondents are without sufficient knowledge or information of the meaning and intent of the term "rubber-stamp." Respondents deny the allegations in the third, fifth and sixth sentences of Paragraph 43. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in Paragraph 43.

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.

ANSWER: Respondents admit that the Authority approved a 17-page Management Agreement that would provide for the management of the Palmyra hospital after the Authority acquired it and before the conclusion of the public hearing process that would provide instruction to the Authority about either a lease of the hospital assets or a sale thereof. Respondents deny that the Management Agreement will give Phoebe Putney control over Palmyra's operations immediately upon closing. The Management Agreement specifically states that the Authority retains control and reserves certain powers. Further answering, Respondents deny the FTC's definition and characterizations of the term "Transaction."

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.

ANSWER: Respondents deny 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, [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.

ANSWER: Respondents admit that on April 4, 2011 the Authority voted to approve a lease term sheet prepared by Mr. Baudino, but deny that the term sheet stands for the propositions alleged by the FTC in the first sentence of Paragraph 46. Respondents deny the remaining allegations in Paragraph 46.

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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in 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.

ANSWER: Respondents deny 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.

ANSWER: Respondents admit that PPMH negotiates reimbursement-rate contracts with commercial health plans. PPMH is without information or knowledge as to the allegations about Palmyra and, therefore, denies them. Respondents admit that the contracts that PPMH negotiates with commercial health plans establish the contracted reimbursement rate that each commercial health plan will pay to PPMH for specified services and procedures. Respondents further state, however, that they do not negotiate reimbursement rates with Medicare or Medicaid for the reimbursement of patients covered under those health plans. To the extent there are any remaining allegations in Paragraph 50, Respondents deny them.

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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining 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.

ANSWER: Respondents deny the allegations in Paragraph 52.

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.

ANSWER: Respondents deny the allegations in 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.

ANSWER: Respondents lack knowledge and information sufficient to admit or deny the first sentence in Paragraph 54 and, therefore, deny it. Respondents deny 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.

ANSWER: Respondents deny 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.

ANSWER: Respondents admit that Phoebe Putney and Palmyra are competitors, but deny any inference, characterization, suggestion, or legal argument concerning this fact in Paragraph 56. Respondents deny the remaining allegations in Paragraph 56.

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.

ANSWER: Respondents lack knowledge and information sufficient to admit or deny the allegations in Paragraph 57 and, therefore, deny it.

V.

MARKET STRUCTURE AND PRESUMPTIVE ILLEGALITY

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

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining 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.

ANSWER: Respondents lack knowledge and information sufficient to admit or deny the first and second sentences of Paragraph 59 and, therefore, deny them. Respondents deny the remaining allegations in Paragraph 59.

60. Under relevant case law and the Merger Guidelines, the Transaction is presumptively unlawful. PPHS' 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.

ANSWER: Respondents deny 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.

ANSWER: Respondents admit that the U.S. Department of Justice and Federal Trade Commission's Merger Guidelines measure market concentration using the HHI. Respondents further admit that the Merger Guidelines state that a merger or acquisition is presumed likely to create or enhance market power when the post-merger HHI exceeds 2,500 points and the transaction increases the HHI by more than 200 points. Respondents deny the inference in Paragraph 61 that the Merger Guidelines have any force or effect of law and are anything but guidance.

62. The market concentration levels here exceed these thresholds by a wide margin. The post-Transaction HHI 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. Archibald 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

ANSWER: Respondents deny 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining 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.

ANSWER: Respondents admit the allegation in the first sentence of Paragraph 64 that Phoebe Putney and Palmyra are competitors, but deny that this fact stands for the propositions alleged by the FTC in Paragraph 64. Respondents deny 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.

ANSWER: Respondents admit that Phoebe Putney has challenged Palmyra's efforts to obtain a CON for obstetrics, but deny that this fact stands for the propositions alleged by the FTC. Respondents admit to the allegations in the third and fourth sentences of Paragraph 65. To the extent allegations in Paragraph 65 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations. Respondents deny the 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]."

ANSWER: Respondents lack knowledge and information sufficient to admit or deny the first sentence in Paragraph 66 and, therefore, deny it. Respondents admit that the quoted statement was made by Mr. Wernick, but deny that the quoted statement constitutes an admission, represents Respondents' reason for assisting the Authority in its acquisition of Palmyra, or stands for the propositions alleged by the FTC. Respondents deny the remaining allegations in Paragraph 66.

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

[REDACTED]

ANSWER: Respondents admit that the fact sheet contained the statement quoted in Paragraph 67. Respondents deny the remaining allegations in Paragraph 67.

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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term

"Transaction." Respondents deny the remaining allegations in 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term

"Transaction." Respondents deny 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.

ANSWER: Respondents deny 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term

"Transaction." Respondents deny the remaining 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term

"Transaction." Respondents deny 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term

"Transaction." Respondents deny the 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term

"Transaction." Respondents deny the remaining 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.

ANSWER: Respondents admit the allegations in the second sentence of Paragraph 76.

Respondents further state that GA Code Ann §§ 31-6-42 (a)(3) clearly articulates the intention of

Georgia legislators to displace the antitrust laws with respect to hospital competition in Georgia.

Respondents deny the allegations in the first sentence 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.

ANSWER: Respondents admit that the construction of a new general acute care hospital would take significant time and money, but deny that it would require the specific sum or time period alleged by the FTC. Respondents deny the remaining allegations in Paragraph 77.

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.

ANSWER: Respondents lack knowledge and information sufficient to admit or deny the allegations in Paragraph 78 and, therefore, deny them.

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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." To the extent allegations in Paragraph 81 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations. Respondents deny the remaining allegations in Paragraph 81.

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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." To the extent allegations in Paragraph 81 relate to entities other than Respondents, Respondents are without knowledge or information sufficient to form a belief as to the truth of these allegations. Respondents deny the remaining allegations in Paragraph 82.

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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining 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.

ANSWER: Respondents deny the FTC's definition and characterizations of the term "Transaction." Respondents deny the remaining allegations in Paragraph 84.

IX. VIOLATION

85. The allegations of Paragraphs 1 through 84 above are incorporated by reference as though fully set forth.

ANSWER: Respondents repeat their responses to each of the allegations contained in Paragraphs 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.

ANSWER: Respondents deny the allegations in Paragraph 86. Further answering, Respondents assert that 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 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.

ANSWER: Respondents deny the allegations in Paragraph 87. Further answering, Respondents assert that 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.

NOTICE OF CONTEMPLATED RELIEF

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

FURTHER DEFENSES

Without assuming any burden of proof that they would not otherwise bear, and reserving their right to assert additional defenses as this matter proceeds, Respondents assert the following defenses:

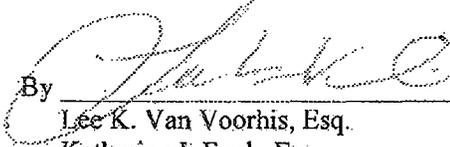
1. The Complaint fails to state a claim upon which relief can be granted.
2. The FTC lacks jurisdiction over Respondents.
3. The Authority's acquisition of the Palmyra assets is not subject to federal antitrust laws by virtue of the state action doctrine.
4. The contemplated relief would not be in the public interest because it would, among other things, harm consumers.
5. Efficiencies and other pro-competitive benefits resulting from the acquisition outweigh any and all proffered anticompetitive effects.

6. Respondents have not knowingly or intentionally waived any applicable affirmative defenses. Respondents reserve the right to assert additional defenses as this matter proceeds.

7. Respondents incorporate by reference and adopt as if stated all defenses otherwise stated by the remaining Defendants.

WHEREFORE, Respondents respectfully request that the ALJ: (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 pursuant to the Access to Justice Act; and (v) grant such other and further relief as the ALJ may deem proper.

Respectfully submitted,

By 

Lee K. Van Voorhis, Esq.

Katherine I. Funk, Esq.

Teisha C. Johnson, Esq.

Baker & McKenzie LLP

815 Connecticut Avenue, NW

Washington, DC 20006

James C. Egan, Jr., Esq.

Jonathan L. Sickler, Esq.

Weil, Gotshal & Manges LLP

1300 Eye Street, NW, Suite 900

Washington, DC 20005

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

CERTIFICATE OF SERVICE AND PAPER FILING

I hereby certify that this 16th day of May, 2011 a true and correct copy of the foregoing [Public Version] of Respondents Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., And Phoebe North, Inc.'s Answer to 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 registered FTC E-File recipients, by electronic mail and U.S. First Class Mail to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H110
600 Pennsylvania Avenue, NW
Washington, DC 20580
dalj@ftc.gov

Donald S. Clark
Secretary
Federal Trade Commission
Room H113
600 Pennsylvania Avenue, NW
Washington, DC 20580
dclark@ftc.gov

Goldie V. Walker, Esq.
Lead Counsel
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
gwalker@ftc.gov

Matthew K. Reilly, Esq.
Assistant Director
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
mreilly@ftc.gov

and by electronic mail to the following:

Edward D. Hassi, Esq.
Trial Counsel
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
ehassi@ftc.gov

Priya B. Viswanath, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
pviswanath@ftc.gov

Maria M. DiMoscato, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
mdimoscato@ftc.gov

Peter C. Herrick, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
pherrick@ftc.gov

Sara Y. Razi, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
srazi@ftc.gov

Thomas H. Brock, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
tbrock@ftc.gov

Kevin J. Arquit, Esq.

karquit@stblaw.com
Aimee H. Goldstein, Esq.
agoldstein@stblaw.com
Jennifer Rie, Esq.
jrie@stblaw.com
Meryl G. Rosen, Esq.
mrosen@stblaw.com
Nicholas F. Cohen, Esq.
ncohen@stblaw.com
Paul C. Gluckow, Esq.
pgluckow@stblaw.com
Simpson Thacher and Bartlett, LLP
425 Lexington Avenue
New York, New York 10017

Emmet J. Bondurant, Esq.
Bondurant@bmelaw.com
Michael A. Caplan, Esq.
caplan@bmelaw.com
Ronan A. Doherty, Esq.
doherty@bmelaw.com
Frank M. Lowrey, Esq.
lowry@bmelaw.com
Bondurant, Mixson & Elmore, LLP
1201 West Peachtree St. N.W., Suite 3900
Atlanta, GA 30309

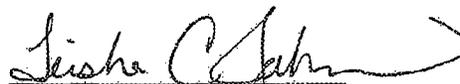
Robert J. Baudino, Esq.
baudino@baudino.com
Amy McCullough, Esq.
McCullough@baudino.com
Karin A. Middleton, Esq.
middleton@baudino.com
David J. Darrell, Esq.
darrell@baudino.com
Baudino Law Group, PLC
2409 Westgate Drive
Albany, Georgia 31707

Lee Van Voorhis, Esq.
Lee.vanvoorhis@bakermckenzie.com
Katherine I. Funk
Katherine.funk@bakermckenzie.com
Teisha C. Johnson
Teisha.johnson@bakermckenzie.com
Baker & McKenzie, LLP
815 Connecticut Avenue, NW
Washington, DC 20006

Jonathan L. Sickler, Esq.
Jonathan.sickler@weil.com
James Egan, Jr., Esq.
jim.egan@weil.com
Vadim Brusser, Esq.
Vadim.brusser@weil.com
Robin Cook, Esq.
Robin.cook@weil.com
Weil, Gotshal & Manges, LLP
1300 Eye St. NW, Suite 900
Washington, DC 20005-3314

I also hereby certify that this copy is a true and correct copy of the paper original, 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.



Teisha C. Johnson, Esq.
*Counsel For Phoebe Putney Memorial
Hospital, Inc., Phoebe Putney Health
System, Inc., and Phoebe North, Inc.*