No. 11-12906-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,

Appellant,

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., *ET AL.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA (1:11-CV-00058-WLS)

REPLY BRIEF OF APPELLANT FEDERAL TRADE COMMISSION

***Of Counsel*:**

RICHARD A. FEINSTEIN
Director
NORMAN A. ARMSTRONG, Jr.
Deputy Director
EDWARD D. HASSI
Chief Litigation Counsel
MATTHEW J. REILLY
Assistant Director
SARA Y. RAZI
Deputy Assistant Director
BUREAU OF COMPETITION

August 23, 2011

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LESLIE R. MELMAN
Assistant General Counsel for Litigation

IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-2375

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PRELIMINARY STATEMENT

In its opening brief, the Commission demonstrated that the challenged transaction amounts to a merger to monopoly, putting into the hands of a private entity full economic control over all hospital beds in the region surrounding Albany, Georgia. In response, defendants persist in their express plan of "avoiding * * * antitrust enforcement," PX0207-002, by urging this Court to ignore the economic realities alleged in the Complaint on the basis of a facade of public involvement. But defendants' attempts to characterize the controlling private entity – PPHS – as subordinate to the Authority do not contradict the Commission's showing that it is an independent economic actor with full control over all of the decisions on pricing, quality, and range of services that affect consumers. Nor do defendants' citations to legal precedents involving challenges to genuine governmental actions have any bearing on the unprecedented ruse they have used to dress private actions in public clothing.

Defendants likewise fail to satisfy the standards of the state action doctrine – even assuming those standards are applicable. As to each prong of the established test, they articulate a standard so broad and so lacking in limiting principle that the doctrine would be stretched to protect any restraint of trade conceivably resulting from a state legislative enactment, and to the acts of any private party that enters into any sort of contractual arrangement with a public entity. Such standards are contrary to controlling Supreme Court teachings, and this Court should reject them.

ARGUMENT

A. This Transaction Is a Private Consolidation of Market Power, Subject to Antitrust Scrutiny Under Section 7

1. The economic reality is that PPHS is acquiring Palmyra

In a wide range of contexts, courts have recognized that, to perform a reliable antitrust analysis, "a court must view an arrangement's economic substance rather than its form." *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, 1433 (11th Cir. 1989) (Clark, J., dissenting) (determining types of agreements constituting per se price fixing), *rev'd*, 498 U.S. 46, 111 S. Ct. 401 (1990); *see Day v. Taylor*, 400 F.3d 1272, 1277 (11th Cir. 2005) (distinction between independent distributors and manufacturers' "agents" turns on "the substance of the relationship, not its form or description"). This is not surprising, for the chief concern of the antitrust laws is economic harm to consumers flowing from the concentration of market power, and such harm does not depend upon the form of the action at issue. Accordingly, antitrust courts "'seek the central substance of the situation' and therefore ' * * * are moved by the identity of the persons who act, rather than the label of their hats.'" *American Needle, Inc., v. National Football League*, 130 S. Ct. 2201, 2209-10 (2010) (quoting *United States v. Sealy, Inc.*, 388 U.S. 350, 353, 87 S. Ct. 1847, 1850-51 (1967)).

Defendants draw this Court's attention to "the label of their hats." The Authority, for example, emphasizes that "the plain terms of the Asset Purchase Agreement"

name it as the acquiring party (Auth. Br. 14), and that it unanimously endorsed the deal at a properly constituted meeting (*id*. at 24). The private defendants similarly stress the Authority's formal acts of executing the Agreement (PPHS Br. 3-4) and its nominal ownership (*id*. at 20). Defendants thus seek to keep the Court's attention on the surface of the challenged actions, and away from their substance. As the Commission has already shown, the key facts it has alleged (and which must be taken as true) establish that the economic reality here is the acquisition by PPHS of its only rival in the area. *See* FTC Br. 6-8, 25-27.

What defendants consistently fail to recognize, both in their factual and legal assertions, is that the issue at the heart of any case under Section 7 of the Clayton Act, 15 U.S.C. § 18, is the *effective* ownership and control of productive assets that play a competitive role in the market. The ownership of property is not the simple yes/no matter defendants imply. Property consists of a "bundle of rights," *United States v. Shotts*, 145 F.3d 1289, 1296 (11th Cir. 1998), and the salient issue in an antitrust case is who can exercise those rights regarding productive assets that will affect consumers in the market. Here, PPHS will have complete operational control over Palmyra, pursuant to a long-term, dollar-a-year lease. Complaint, Doc. 2, ¶¶ 2, 44, 50-52; PX0009.[1] Under that lease, PPHS will have plenary control over day-to-day matters

[1] The Authority speaks of the prospective long-term lease of Palmyra to PPHS as if it were a speculative future contingency. Auth. Br. 7-8, 15. But that lease

such as pricing, negotiating contracts with third-party payors, expanding (or contracting) the range of services offered, and determining staffing levels and other resource allocations – in short, over every decision that will affect the price and quality of the services received by consumers.[2] PPHS is thus, for every purpose relevant to antitrust analysis, the real acquiring party. To refuse to recognize this reality – as defendants' state action arguments would do – would not only elevate form over substance, but would reward an overt scheme to evade the antitrust laws.

Defendants attempt to blunt the force of this argument by introducing factual assertions outside the allegations of the Complaint. *See* PPHS Br. 2-11, 19-20; Auth. Br. 3-9. Regardless of whether those facts should even be considered in this appeal from a dismissal on the pleadings, those facts are – as PPHS itself acknowledges – "ultimately irrelevant." PPHS Br. 1. Defendants emphasize, for example, that the Authority took steps to effect the initial formation of PPHS, and that the Authority

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has been a fundamental and expressly-stated feature of the overall deal from the early planning and negotiating stages. *See, e.g.*, PX0207. In any event, this case is brought to enforce Section 7 of the Clayton Act, 15 U.S.C. § 18, which seeks to prevent potentially anticompetitive combinations in their incipiency, requiring only a "reasonable probability," not "certainty" of competitive harm. *See, e.g.*, *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008). In assessing the present transaction, this Court has no reason to doubt that defendants will adhere to the "proven format" they advanced at the outset. PX0207-002.

[2] Even in the immediate term, pending finalization of the long-term lease, PPHS will have full control over Palmyra's operations pursuant to the Management Agreement the Authority has already approved. *See* Doc. 2, ¶¶ 50-51; PX0009.

itself *had been* interested in the acquisition of Palmyra even before that time. PPHS Br. 2-6; Auth. Br. 4. But regardless of its origins, PPHS has been for 20 years – and likely will be well into the future[3] – an independent economic entity with full autonomy over all of the economic decisions that affect consumers of hospital services in Albany, Georgia. And regardless of the Authority's erstwhile desire to acquire Palmyra, it not only failed to do so, but expressly promised PPHS that it *would not* do so (or, for that matter, acquire any other hospital). PX0002-031; *see* Doc. 2, ¶ 31.

Defendants similarly fall far short of undermining the Commission's case by relying on PPHS's contractual commitments and the theoretical possibility of early reversion of hospital assets to the Authority. PPHS Br. 7-9; Auth. Br. 4-5, 27. The long-term lease of PPMH is not terminable at will, but only (with respect to its performance of contractual agreements) on a showing of "substantial failure." PX0002-39. Moreover, the "specific requirements governing the operational conduct of Phoebe Putney" on which defendants rely (PPHS Br. 7) are in fact quite general and largely hortatory in nature. Open-ended commitments to take the "intent" and "policy" of the state law into account when setting prices, or to "provid[e] for the health care needs of the community" (*id*. at 8) leave PPHS with enormous flexibility in setting the economic terms of engagement and in functioning as an independent

[3] The lease of PPMH was for an initial term of 40 years, PX0002-015.

economic actor.[4] Past experience at PPMH bears this out. Notwithstanding its assertions about serving state policies, PPMH has exercised its already-substantial leverage in negotiations with health plans to extract high commercial reimbursement rates. Doc. 2, ¶¶ 7, 11. And, on a rare occasion when one Authority member questioned PPMH's pricing practices, he was admonished by the Authority's Chairman that "the Authority really has no authority as far as running the hospital." PX0040.

In short, PPHS has long acted as the effective owner of PPMH, setting prices, making service decisions, and retaining and using funds available after paying operating expenses.[5] If it is allowed to lease Palmyra under "substantially the same

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[4] Although the private defendants ultimately acknowledge that their nonprofit status does not place them beyond the antitrust laws, they nevertheless argue that such status makes it "impossible" for them to have economic interests different from the Authority's. PPHS Br. at 30 & n.8; *see id.* at 19; Auth. Br. 25. But courts have long recognized that nonprofit entities have their own interests – distinct from those of the community at large – as "[t]he adoption of the nonprofit form does not change human nature." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986) (Posner, J., collecting authorities recounting anticompetitive behavior by nonprofit hospitals); *see also* Havighurst and Richman, *The Provider Monopoly Problem in Health Care*, 89 Or. L. Rev. 847, 854-857 (2011) (summarizing evidence that "should finally dispel any impression that nonprofit hospitals, as community institutions, can safely be allowed to possess market power on the theory that, as nonprofits, they can be trusted not to exercise it"). This Court has previously recognized that, notwithstanding "public scrutiny," a nonprofit hospital merger may violate antitrust laws. *FTC v. University Health, Inc.*, 938 F.2d 1206, 1224 (11th Cir. 1991).

[5] The supposed limits on the use of retained earnings that the Authority cites (Auth. Br. 27 & n.10) are barely limits at all, allowing broad discretion for all manner of "improvements" and "expansions" – including, evidently, the sort of merger-to-monopoly acquisition funded here.

terms," PX0207-005, then it will similarly exercise complete economic control over that former competitor. Once the entirely nominal role of the Authority is seen for what it is, it is evident that PPHS is the real owner of PPMH, and proposes to become the owner of Palmyra. This Court should brush aside defendants' smokescreen, and "adhere to the time-tested adage: if it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck." *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1337 (11th Cir. 1998).

2. Defendants' legal arguments and authorities are beside the point

The Authority insists that the Commission's arguments regarding the true economic nature of this transaction are "all variations on a theme forbidden by the Supreme Court's decision in" *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 111 S. Ct. 1344 (1991) – namely, that "an official act of a political sub-division ceases to be state action because it was influenced. * * * by private business." *See* Auth. Br. 16; *see* PPHS Br. 22. Not so. To be sure, the Commission has argued, both below and in this Court, that PPHS's leading role in planning, packaging, and promoting the acquisition is highly relevant to the analysis, because it shows that PPHS was acting on its own behalf. And the Authority's perfunctory consideration is similarly relevant as an indication that it was doing no more than providing a "gauzy cloak of state involvement over what is essentially a private * * * arrange-ment." *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445

U.S. 97, 106, 100 S. Ct. 937, 943 (1980). Ultimately, however, the critical issue is where the parties have arrived, not how they got there. The Commission does not base its argument on the quality of the Authority's decision-making, and it has never questioned the private defendants' right to petition the Authority.[6] As explained above, the pivotal and extraordinary feature of this case is that, under the facts the Commission has alleged, PPHS will in economic fact "acquire" Palmyra, and is thus itself directly subject to Section 7 of the Clayton Act. The nominal governmental conduct is mere camouflage, and should be disregarded.

Omni and the other precedents cited by defendants have no bearing on the argument the Commission advances here because they did not address it – and *could not* have addressed it, because the same argument could not have been made in those cases. *Omni* involved a restriction imposed by a local zoning ordinance – something that *only* a governmental entity can do. Whatever the facts surrounding its enactment, however good or bad the reasoning or intentions of the officials approving it, the

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[6] *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523 (1961). Refusing to grapple with the allegations the Commission has actually, made, PPHS baselessly accuses the Commission of trying to avoid a constitutional issue and asserts that it is "not alleged to have done anything not protected by the Constitution." PPHS Br. 18-19. But what the Commission has actually alleged is that, in economic fact, PPHS has obtained a private monopoly by effectively acquiring its principal competitor. Nothing in the Constitution protects such actions. In any event, as PPHS acknowledges, the court below decided the case solely on state action grounds. PPHS Br. 2, 4.

enactment of such an ordinance is uniquely within the power of the public body in question. By contrast, while acquiring and exercising control over productive assets is something that a governmental entity can do (*cf.* Auth. Br. 22-24), it is also something that a private entity can do, which is what has been alleged here. That is why the present case involves a threshold inquiry that was logically impossible in *Omni – i.e.*, whether the act that creates the restraint was a public act influenced by private parties, or whether it actually *was* the act of private parties.

The other precedents defendants cite are inapposite for the same reason. In *Bolt v. Halifax Hosp. Med. Ctr.*, 980 F.2d 1381 (11th Cir. 1993), the restraint was the exclusion of a physician from practice at a public hospital, by denying him staff privileges. The only entity that had the legal authority to effect such an exclusion was the peer review board of that hospital. The individual doctors who made up that board would have no means of excluding a doctor unless they could wield the power of a public entity. This Court addressed a similar situation in *Crosby v. Hosp. Auth. of Valdosta and Lowndes Cnty.*, 93 F.3d 1515 (11th Cir. 1996), a subsequent case also involving staff privileges at a public hospital. In both cases, the alleged anticompetitive action *required* the involvement of a public entity. Here, by contrast, PPHS did not require the Authority to effect the acquisition of Palmyra, but only to further its scheme to evade antitrust scrutiny. And *Municipal Util. Bd. v. Alabama Power Co.*,

21 F.3d 384 (11th Cir. 1994), involved restraints enacted into law by the legislature itself – a situation with no bearing whatsoever on the present case.

The inapplicability of the precedents defendants are forced to rely on is unsurprising, for their scheme to avoid antitrust scrutiny appears to be unprecedented. We are unaware of any prior case in which a public agency has allowed its name and facial authority to be used to grant a private entity full economic control over a monopoly, with vague exhortations to serve the public interest as the only "safe-guards" to protect consumers. Unfortunately, although this scheme is novel in the case law, it could easily be replicated, as a "proven format" to evade the antitrust laws. *See* PX0207-002. This Court should prevent such a distortion of the law by recognizing that the antitrust state action doctrine does not apply to such schemes.

B. The Transaction Does Not Satisfy the Elements of the *Midcal* State Action Test

Defendants are no more successful in refuting the Commission's showing that, even if the transaction were properly analyzed as state action, it fails to satisfy either element of the test established in *Midcal*. As to each prong of that test, defendants advance a standard so lacking in limiting principles that the resulting rule would allow a private party to be handed a wholly unregulated monopoly simply because a subordinate state entity has been granted a general power to buy and sell property, and executes its deal with the private beneficiary by contract. This is not the "rigorous

two-pronged test" the Supreme Court has prescribed; it is the "gauzy cloak" it has warned against. *Patrick v. Burget*, 486 U.S. 94, 100, 108 S. Ct. 1658, 1662 (1988); *Midcal*, 445 U.S. at 106, 100 S. Ct. at 943.

1. This transaction does not further a clearly articulated state policy

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123 (1978), the Supreme Court established that, in order for state political subdivisions to qualify for state action immunity, they must show that their challenged actions were taken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. 435 U.S. at 410, 98 S. Ct. at 1135; *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39, 41-44, 105 S. Ct. 1713, 1716, 1718-19 (1985); *Crosby*, 93 F.3d at 1521-22, 1532.[7] Yet, the position defendants now advance – that a legislature's grant of general powers to acquire property is sufficient to satisfy the "clear articulation" requirement and thus confer antitrust immunity as to any such acquisition – would effectively eviscerate that requirement, as such generic powers are routinely attached to most, if not all, lower state subdivisions.

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[7] This Court has interpreted this standard to mean that the action at issue must be shown – by defendants – to be "foreseeable," or "reasonably anticipated" under the pertinent state law. *See Crosby*, 93 F.3d at 1532; *FTC v. Hosp. Bd. of Dirs. of Lee Cnty.*, 38 F.3d 1184, 1188 (11th Cir. 1994). But it is not sufficient that it be shown to be "merely 'plausible'." *Id*. at 1191 n.6 (quoting *University Health*, 938 F.2d at 1213 n.13).

The statute at issue here, Georgia's Hospital Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.,* empowers the Authority to, among many other things, "acquire by purchase, lease, or otherwise and to operate projects." § 31-7-75(4). The term "project" is defined by the same statute to include, not just "hospitals," but also, for example, "dormitories, office buildings, clinics, housing accommodations," and any other property that can be deemed a "public health facilit[y]." § 31-7-71(5). From the language of those general terms, defendants would have this Court conclude that there exists a "clearly articulated and affirmatively expressed" state policy in Georgia to allow an anticompetitive hospital merger in the extraordinary circumstances of this case. But if such a grant of general powers to acquire property is enough to constitute a clear articulation, what must a state legislature do in order to *avoid* expressing such a policy? Defendants' position would effectively force state legislatures affirmatively to disavow an intent to displace competition whenever they engage in any type of economic regulation or empowerment of subordinate entities. As the Supreme Court has warned, such a result is directly contrary to the principles of federalism that underlie the state action doctrine. If such a test is applied, "our doctrine will impede [the States'] freedom of action, not advance it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 112 S. Ct. 2169, 2178 (1992).

Defendants argue that this Court's decision in *Lee County* mandates the rule they advance in this case – that a legislature's grant to state hospital authorities of the

general power to acquire property constitutes a state policy to displace competition, thus immunizing from antitrust scrutiny any acquisition by such authorities. *Lee County* does not dictate such a sweeping rule. The circumstances and statutory context at issue in *Lee County* made it clear to this Court that the Florida legislature must have foreseen that the only possible acquisition by the hospital authority of Lee County would be anticompetitive. But the legislature nonetheless authorized such acquisition, leaving no doubt about its intent to displace competition in that particular county. Those circumstances do not exist here.

The statute at issue in *Lee County* created a hospital "Board" to establish and operate a public hospital "in Lee County." 38 F.3d at 1186. At the time that statute was enacted, there was only one hospital operating in Lee County. *Id*. Then, in 1987, with the Board still in possession of substantial market power, "the Florida Legislature amended the Board's enabling legislation and extended the Board's power, allowing operation of additional hospitals in Lee County." *Id*. Thus, when the Board sought to acquire another hospital, this Court concluded that the acquisition was immunized by the state action doctrine, because the Florida legislature "knew about the market and the community at the time the legislation was enacted," and thus was well aware of the "specific anticompetitive consequences" flowing from its acts. *Id*. at 1192.

Defendants attempt to liken these circumstances to those existing in Dougherty County at the time Georgia's Hospital Authorities Law was enacted, in 1941. But any

similarity they can show is insufficient to attribute to the Georgia legislature an intent to displace competition in Dougherty County. Had the Georgia statute been limited to Dougherty County, defendants might have had a reasonable ground to argue that *Lee County* was applicable to the circumstances at issue here, but that is not the case. Georgia's Hospital Authorities Law is applicable state-wide, to counties and municipalities with widely varying competitive conditions, so it is not apparent or implicit in these circumstances that the legislature "knew about the market and the community" in each of those counties and, therefore, was aware of the "specific anticompetitive consequences" of its legislative action. *Lee County*, 38 F.3d at 1192.

Defendants further argue that, because of Georgia's rural nature, the vast majority of counties have a small number of hospitals, so the legislature must have anticipated that most hospital acquisitions in most Georgia counties would be potentially anticompetitive, and therefore viewed the displacement of competition as "inevitable." PPHS Br. 24-25. That line of argument overlooks entirely key provisions of the Georgia statute, which, as explained above, deals generically with the acquisition and ownership of a wide range of "projects," not just hospitals. O.C.G.A. §§ 31-7-71(5), 31-7-75(4). Thus, even if one assumes that the Georgia legislature contemplated that each and every local hospital authority would make one or more acquisitions of a "project," most of those acquisitions – *e.g.*, "office buildings," "dormitories," or "clinics" – are unlikely to pose any competitive concerns. It is

fantasy to suppose that a state legislator, voting to give local authorities generic authority to acquire "projects," "reasonably anticipated" the creation of a hospital monopoly in the hands of a private actor. *See Crosby*, 93 F.3d at 1532.

Furthermore, defendants' argument rests on a demonstrably incorrect premise. Rural counties often have no hospitals (like four counties in the six-county Albany-Dougherty County area) or only one hospital. As to such counties, defendants' suppositions about what the legislature "reasonably anticipated" makes no sense at all. On the contrary, all that the legislature could reasonably have anticipated is that counties would engage in the acquisition of smaller "projects" that would not even raise competitive concerns. Accordingly, the contention that the circumstances of this case are just like *Lee County*, and thus warrant similar treatment here, does not withstand scrutiny.

Lee County is inapposite for other reasons. In contrast to the Florida statute at issue there, the Georgia legislation leaves localities free to decide how to achieve the statutory purpose of providing health care to their citizens, without necessarily consolidating market power in the process. It allows more than one municipality, for example, to sponsor a single authority to carry out the legislative mandate. *See* O.C.G.A. § 31-7-72(d). It also allows, pursuant to a 1993 amendment, high-population counties to sponsor more than one authority within their boundaries. *See* § 31-7-

73(a). The range of options thus open to Georgia localities belies any notion that the creation of monopolies was foreseen, much less "inevitable."

When the Georgia legislature's 1993 grant of limited immunity is taken into account, it becomes even more evident that it intended no antitrust immunity for the sort of transaction at issue here. The Authority argues that the Commission is relying on the 1993 provision "to infer from the fifty-years-ago silence of the 1941 legislature that it intended to exclude such immunity." Auth. Br. 37. But that criticism misconstrues the Commission's argument. The 1941 statute, which preceded the Supreme Court's first articulation of the state action doctrine in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943), is (as defendants concede) silent on the issue of antitrust immunity. The legislature's inclusion, in 1993, of an express grant of immunity for the limited scope of hospital authority actions,[8] reflects *its* judgment, based on *its* reading of the existing statute, in the context of the legal standards prevailing at the time,[9] that the explicit language was necessary to provide antitrust immunity for the

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[8] In its 1993 amendment to the Hospital Authorities Law, which added Section 31-7-72.1 to permit the consolidation of hospital authorities existing within a single high-population county, the Georgia legislature granted antitrust immunity to hospital authorities in effectuating such consolidations. *See* O.C.G.A. § 31-7-72.1(e) (with respect to "this Code section," the hospital authorities "are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia").

[9] Section 71-7-72.1 was enacted subsequent to decisions of the Supreme Court and of this Court which clarified that explicit immunity language is not always

limited range of hospital authority actions addressed by that provision. *See Warshauer v. Solis*, 577 F.3d 1330, 1336 (11th Cir. 2009) (a legislature "acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language). As a corollary, the amendment reflects the 1993 Georgia legislature's judgment that the other provisions of that statute, as *it* read them, did not reflect a state policy to displace competition and provide antitrust immunity. Although that legislative judgment does not substitute for this Court's own construction of the relevant statutory provisions, it does provide compelling evidence that defendants' position regarding the import of Georgia's grant of a general power to acquire property was not shared by the 1993 Georgia legislature. The 1993 provisions remain the Georgia legislature's only "clearly articulated" policy respecting antitrust immunity – and it is limited to the consolidation of authorities, not hospitals.

Defendants' other arguments regarding the proper construction of the Georgia statute merit only brief attention. *See* Auth. Br. 31-32. That the Authority is empowered to acquire property by eminent domain says nothing about its immunity from antitrust scrutiny. In fact, a rule that turned on the existence of such powers would do away with the requirement for clear articulation for all state subdivisions, including

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necessary. *See Town of Hallie*, 471 U.S. at 44, 105 S. Ct. at 1719; *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64-65, 105 S. Ct. 1721, 1731 (1985); *Askew v. DCH Regional Health Care Auth.*, 995 F.2d 1033, 1040-41 (11th Cir. 1993).

most municipalities, as well as many private entities, such as railways and utilities. Likewise, the fact that Georgia may have effected a limited constraint on competition, through its Certificate of Need requirements, does not mean that the Authority is free to constrain competition in other ways, which were not provided for by the State. In fact, this Court rejected just such an argument, involving the same Georgia statutes, in *University Health*. 938 F.2d at 1213 n.13 ("Georgia's certificate of need statute specifically exempts most acquisitions by existing hospitals, including the acquisition here, from prior regulatory approval. * * * [I]t is at least equally plausible, if not more so, that Georgia intended that the transactions exempt from its regulatory review be subject to antitrust scrutiny").

2. A private monopoly created in this manner must be subject to active governmental supervision

Where state law confers on private parties the authority to act in contravention of our national policy of free competition, the Supreme Court has long required that such actions "must be 'actively supervised' by the State itself." *Midcal,* 445 U.S. at 105, 100 S. Ct. at 943 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 410, 98 S. Ct. at 1135 (opinion of Brennan, J.)). Defendants make no argument that such supervision exists;[10] rather, they offer a number of excuses why it

[10] PPHS, for example, makes no claim of active supervision, although it touts the supposed effects of various lease provisions on its operations. PPHS Br. 7-8. As discussed above, however, those provisions are quite open-ended and leave PPHS

supposedly is not needed. But the extraordinary facts of this case make clear that active supervision is needed, to ensure that the Authority cannot "confer antitrust immunity on private persons by fiat." *Ticor*, 504 U.S. at 633, 112 S. Ct. at 2176.

First, defendants err in supposing that *Midcal* and *Ticor* somehow limit the active supervision requirement to horizontal price-fixing cases. Auth. Br. 43-44. That argument has been soundly rejected as contrary to subsequent Supreme Court teaching,[11] and is, in any event, illogical. A merger to monopoly can be every bit as "pernicious," *Ticor*, 504 U.S. at 639, 112 S. Ct. at 2180, in its impact on consumer welfare as cartel activity. Indeed, because of the ongoing effects that an acquisition of productive assets can have, there is need for continuing active supervision to ensure that the private party's actions remain "in harmony with the expressed goals" of state policy. *North Carolina ex rel. Edmisten v. P.I.A. Asheville, Inc.*, 740 F.2d 274, 278-79 (4th Cir. 1984).[12]

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with broad discretion as to pricing and output determinations affecting consumers. Such passive measures fall far short of the "[a]ctual state involvement," *Ticor*, 504 U.S. at 633, 112 S. Ct. at 2176, that is essential to serve the purposes of the active supervision requirement.

[11] *See Electrical Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110, 126 & n.10 (2d Cir. 2003) (citing *Patrick v. Burget*, 486 U.S. at 100, 108 S. Ct. at 1663).

[12] *See also* Blumstein, *Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 Cornell L. Rev. 1459, 1504-05 (1994) ("even mergers justified on grounds of efficiency generate ongoing issues for the state to review. * * * These situations all involve private choice without the accountability and oversight that *Ticor* would seem to mandate. * * *

Defendants also try to avoid the need for supervision by deconstructing their own elaborate plan, urging the Court to separate out the elements of their integrated transaction and view the initial nominal purchase, the subsequent lease, and the ensuing imposition of monopoly prices as unrelated events. Auth. Br. 45-46; PPHS Br. 26-27. Despite its other errors, the court below flatly rejected this ploy, recognizing that Section 7's policies can be given proper effect only if its terms encompass the full spectrum of transactions that parties may devise, viewed from a practical, rather than technical, perspective. Doc. 91 at 8-13. That portion of its ruling comports with the principles discussed above, regarding the need to apply the antitrust laws on the basis of economic reality rather than form. Indeed, the entire discussion in Part A, *supra* (as well as that in Part I.A of the Commission's principal brief) is highly pertinent to the active supervision issue. Even if this Court determines that there was an adequate degree of governmental involvement in the transaction at issue to make application of the two-part *Midcal* test necessary, the active supervision element of that test must be based on a practical assessment of the restraint imposed, to ensure that it is genuinely "a product of deliberate state intervention." *Ticor*, 504 U.S. at 634, 112 S. Ct. at 2177. That means that the entire integrated transaction (and

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Ongoing oversight of the implementation of a merger deal therefore would seem to be critical.").

its ongoing impact on health care consumers) must be actively supervised – something that clearly has never been envisioned here.

The remainder of defendants' efforts to avoid the active supervision requirement consist of variations on their own favorite theme – that there is supposedly no need for supervision whenever a public entity chooses to grant a private monopoly by contract, or by calling the private actor its "agent," or even by *post hoc* "ratification" of anticompetitive acts. Auth. Br. 47-54; PPHS Br. 29-30. For example, citing *Southern Motor Carriers*, the Authority argues that any contracting private party or agent "necessarily shares" the immunity of the public entity with which it is dealing. But *Southern Motor Carriers* said nothing of the sort. It simply held that such a private party *may* share state action immunity, because automatically disqualifying private entities from asserting the immunity would turn it into a pleading rule. 471 U.S. at 56-57, 105 S. Ct. at 1726. Such private entities must, however, still meet the two-part *Midcal* test. In fact, *Southern Motor Carriers* had nothing to do with the active supervision requirement, which was expressly conceded there. 471 U.S. at 66, 105 S. Ct. at 1731. And while defendants apparently find it anomalous that the active supervision requirement could restrict the options of a public entity as to how it may implement a policy to displace competition, that is the very purpose of the requirement. If a State wishes to allow private parties to engage in anticompetitive activity, it *must* make provision for active supervision.

The various cases that defendants cite in this regard share a common characteristic – none subjected consumers to the harms of a private monopoly, without meaningful regulatory protection. For example, one case cited by both defendants, *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987), involved an unremarkable decision by a public airport authority to grant an exclusive franchise to a particular group of *regulated* taxi operators. The Ninth Circuit upheld the State's choice and – following the *Southern Motor Carriers* holding discussed above – likewise immunized the private taxi operators. 810 F.2d at 878. The court of appeals did not address the active supervision requirement, but there was no need for it to do so – the taxis in question were subject to the normal panoply of taxi regulation, including price regulation. *See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 562 F. Supp. 712, 723 & n.16 (D. Haw. 1983). The district court had concluded that even this level of supervision was inadequate, *id*., but the Ninth Circuit's implicit rejection of that holding does not imply that a city or even a State could confer a monopoly on an *unregulated* private party. It is impossible to imagine, for example, that a municipality would grant an exclusive taxi franchise to a single company, while at the same time imposing *no* specific restrictions on price or requirements of quality, apart from broad contractual language exhorting the

monopolist to "serve the public interest." As unthinkable as such a situation is, it is precisely the equivalent of what the Authority and PPHS ask this Court to endorse.[13]

Finally, the Authority's strained attempts to import common law agency principles into the state action analysis (Br. 51-54) are as illogical as they are unprecedented. Agency principles were developed for entirely different purposes than the active supervision element of the state action doctrine, and the mere fact that one acts as an agent does not necessarily mean that the public sector principal is exercising the type of control (*e.g.*, particularly over pricing and output decisions) that ensures that any anticompetitive actions reflect state policy. On the contrary, this Court has recognized that any application of "agency" principles in this context does not turn on

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[13] Other cases the defendants rely upon are inapposite for a variety of reasons. *Commuter Transp. Syst., Inc. v. Hillsborough County Aviation Auth.,* 801 F.2d 1286, 1290-91 (11th Cir. 1986), addressed only arguments about supervision *of* the Aviation Authority, not of private entities. *Zimomra v. Alamo Rent-a-Car, Inc*., 111 F.3d 1495, 1497 (10th Cir. 1997), involved daily usage fees that car rental companies operating at the Denver airport were required to charge, and which were set according to a statutory formula and with the participation of a public official. *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1037 (2d Cir. 1986), involved the leasing of individual parcels of property through competitive bids; and, as we have noted previously, the court of appeals there emphasized that "the state must be an active participant in the decision-making process and not merely ratify anticompetitive actions taken by private actors." *Id*. at 1044. *Automated Salvage Transp., Inc. v. Wheelabrator Env. Syst., Inc.*, 155 F.3d 59 (2d Cir. 1998), involved a market allocation between a public entity and a private business, which was unilaterally imposed on the latter as a condition of entry – thus, leaving the private entity itself with no ability or occasion to impose any restraints beyond those imposed upon it.

common law rules, but requires inquiry into "the policies underlying the state action immunity doctrine and the context of the particular activities" at issue. *Crosby*, 93 F.3d at 1530. Accordingly, a mere "right to exercise control," Auth. Br. 52 n.22, may make one an agent under Georgia common law, but it certainly does not satisfy the state action doctrine. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Ticor*, 504 U.S. at 638, 112 S. Ct. at 2179. And the Authority's notion that a *post hoc* "ratification" of a private entity's anticompetitive act can satisfy the active supervision requirement is doubtful under any circumstances, and plainly inappropriate here. The only "ratifications" defendants can point to are the Authority's votes to rubber-stamp PPHS's acquisition of Palmyra, which did nothing to exert any control over the pricing, service, and other economic decisions that remain in the hands of a private monopolist. No matter how defendants try to characterize the players or their relationship to one another, this sort of ratification is the epitome of the "gauzy cloak of state involvement" that the Supreme Court has instructed cannot satisfy the state action doctrine. *Midcal*, 445 U.S. at 106, 100 S. Ct. at 943.

C. The Commission Is Entitled to a Preliminary Injunction

As the Commission has shown previously, in the event this Court reverses the district court's order of dismissal, it can and should immediately enter the needed statutory injunction, to freeze the status quo pending the Commission's adjudication

of the merits. FTC Br. 49-52. Although the court below granted a motion to dismiss, a full preliminary injunction record was before it, and the defendants made no real effort to deny that the Commission was likely to prevail in establishing that this merger-to-monopoly violates Section 7.

The Authority's arguments in favor of a remand (Br. 54-56) reflect only its continuing refusal to acknowledge the true issues at stake. The Commission's position is not based on whether the Authority made a "sufficiently independent or informed decision" regarding the acquisition, much less whether some *post hoc* ratification can somehow save PPHS's elaborate scheme to evade the antitrust laws. The insoluble problem for defendants is that this transaction is, in practical and economic fact, an acquisition by and for PPHS, not the Authority. That is how it was set up from the start, as the basic planning documents attest. *See* PX0207. Moreover, the Authority – which has no budget and no paid staff, *see* Doc. 2, ¶ 27 – has never had any ability to exercise meaningful supervision over the economic decisions concerning Palmyra that will affect consumers. Accordingly, any sort of "remedy" based on lease terms (Auth. Br. 55) would be meaningless. This case is about a private merger to monopoly masquerading as governmental action. This Court should recognize it as such, and take immediate action to ensure the Commission's ability to issue an effective administrative order.

CONCLUSION

For the forgoing reasons, and those stated in our principal brief, the Court should reverse the district court's decision and issue a preliminary injunction requiring the merging parties to maintain the status quo during the pendency of the Commission's administrative proceedings.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LESLIE R. MELMAN
Assistant General Counsel for Litigation

IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-2186

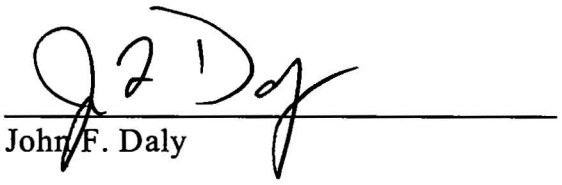
Of Counsel:

RICHARD A. FEINSTEIN
Director
NORMAN A. ARMSTRONG, Jr.
Deputy Director
EDWARD D. HASSI
Chief Litigation Counsel
MATTHEW J. REILLY
Assistant Director
SARA Y. RAZI
Deputy Assistant Director
BUREAU OF COMPETITION

August 23, 2011

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32 (a)(7)(B), in that it contains 6777 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R 32-4.



John F. Daly

CERTIFICATE OF SERVICE

I certify that a copy of the "Reply Brief of Appellant Federal Trade Commission" was served on the 23rd day of August, 2011, by electronic mail, pursuant to the parties' mutual consent, upon:

Counsel for Hospital Authority of Albany-Dougherty County:

Emmet J. Bondurant (bondurant@bmelaw.com)
Frank M. Lowrey IV (lowrey@bmelaw.com)
Ronan P. Doherty (doherty@bmelaw.com)
Michael A. Caplan (caplan@bmelaw.com)
BONDURANT, MIXSON & ELMORE LLP
1201 W. Peachtree St., Suite 3900
Atlanta, GA 30309
(404) 881-4100

Karin A. Middleton (middleton@baudino.com)
BAUDINO LAW GROUP, PLC
2409 Westgate Drive
Albany, GA 31704
(229) 883-0051

E.B. Wilkins, Jr. (ewilkin@perrywalters.com)
PERRY & WALTERS, LLP
P.O. Box 71209
Albany, GA 31708-1209
(229) 439-4000

Counsel for Phoebe Putney Health Sys., Inc.; Phoebe Putney Mem'l Hosp., Inc.; Phoebe North, Inc.:

John H. Parker, Jr. (jparker@phrd.com)
Robert M. Brennan (bbrennan@phrd.com)
Thomas D. Watry (tdw@phrd.com)
PARKER, HUDSON, RAINER & DOBBS LLP
1500 Marquis Two Tower
285 Peachtree Center Ave., N.E.
Atlanta, GA 30303
(404) 523-5300

Lee K. Van Voorhis (lee.vanvoorhis@bakermckenzie.com)
BAKER & MCKENZIE LLP
815 Connecticut Ave., N.W.
Washington, DC 20006
(202) 452-7000

James C. Egan, Jr. (jim.egan@weil.com)
WEIL, GOTSHAL & MANGES LLP
1300 Eye St., N.W., Suite 900
Washington, DC 20005
(202) 682-7000

Counsel for HCA Inc.; Palmyra Park Hosp., Inc.:

Kevin J. Arquit (karquit@stblaw.com)
Aimee H. Goldstein (agoldstein@stblaw.com)
Paul C. Gluckow (pgluckow@stblaw.com)
SIMPSON THACHER & BARTLETT LLP
425 Lexington Ave.
New York, NY 10017
(212) 455-2000

Charles E. Peeler (cpeeler@fpplaw.com)
FLYNN PEELER & PHILLIPS, LLC
517 West Broad Ave.
Albany, GA 31701
(229) 446-4886

John F. Daly