

No. 11-12906-EE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

v.

Phoebe Putney Health System, Inc., *et al.*,

Defendants-Appellees.

**REPLY OF THE FEDERAL TRADE COMMISSION
IN SUPPORT OF ITS MOTION FOR AN
EXPEDITED ORDER OF REMAND**

DAVID C. SHONKA
Acting General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LESLIE R. MELMAN
Assistant General Counsel for Litigation

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April 18, 2013

“Appellees do not oppose the timely issuance of a remand order.” Appellees’ Response at 1.

But Appellees somehow take issue with the grounds on which the Commission based its motion; namely, the potential for imminent harm, and the time sensitivity of the motions pending in the district court. *Id.* They base their objections on their purported representation to the district court that they will maintain the *status quo* at the acquired hospital until the district court holds a chambers conference on the Commission’s motions. That representation, contained in an email concerning the scheduling of such a conference (attached hereto), does not come close to meeting the terms of the temporary and preliminary relief requested by the Commission. Accordingly, the potential for imminent consumer harm, including the loss of interim competition, remains true, as does the time sensitivity of the Commission’s motions pending in the district court.

Accordingly, the Commission respectfully urges this Court to remand this case to the district court as soon as is practicable.

Respectfully submitted,

DAVID C. SHONKA

Acting General Counsel

JOHN F. DALY

Deputy General Counsel for Litigation

LESLIE R. MELMAN

Assistant General Counsel for Litigation

/s/ Imad Abyad

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April 18, 2013

CERTIFICATE OF SERVICE

I certify that, on this 18th day of April, 2013, I filed the foregoing reply with the Clerk of the United States Court of Appeals for the Eleventh Circuit, using the Court's ECF system. Attorneys participating in this case are registrants in this Court's ECF system, and the ECF system will automatically generate, via electronic mail, notifications of such filing to those attorney filers participating in this case. Those notifications constitute service on those attorneys.

/s/ Imad Abyad

Imad D. Abyad

Attorney

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ATTACHMENT

Abyad, Imad Dean

From: Frank M. Lowrey <lowrey@bmelaw.com>
Sent: Tuesday, April 16, 2013 2:14 PM
To: Dimoscato, Maria; Perry, Jeffrey; Razi, Sara
Subject: FW: FTC v Phoebe Putney 1:11cv58

Jeff and Sara – didn't realize until just now you weren't among the many cc's. I think it went just to Maria (among the FTC team)

Frank

From: Frank M. Lowrey
Sent: Tuesday, April 16, 2013 1:11 PM
To: 'Dimoscato, Maria'; 'Joan_King@gamd.uscourts.gov'; 'asponseller@law.ga.gov'; 'sibarrett@dhr.state.ga.usjim.egan'; Emmet J. Bondurant; 'jparker@phrd.com'; 'karquit@stblaw.com'; 'jrie@stblaw.com'; 'lee.vanvoorhis@bakermckenzie.com'; 'jonathan.sickler@weil.com'; 'agoldstein@stblaw.com'; 'cpeeler@fpplaw.com'; 'pgluckow@stblaw.com'; 'McCullough@baudino.com'; 'darrell@baudino.com'; 'ewilkin@perrywalters.com'; 'middleton@baudino.com'; 'baudino@baudino.com'; Michael A. Caplan; Ronan P. Doherty; 'bbrennan@phrd.com'; 'Razi, Sara'; 'Perry, Jeffrey'
Subject: RE: FTC v Phoebe Putney 1:11cv58

Dear Judge Sands and Ms. King,

We agree with the FTC that one hour should be sufficient for a scheduling conference. And we respectfully request that such conference be held either on May 10 or May 13, two of the dates you suggested.

However, since the FTC has felt it necessary to reiterate its request for a TRO hearing in spite of Ms. King's email requesting availability for a scheduling conference, we feel we must reiterate our objections.

First, this Court does not yet have jurisdiction and will not have jurisdiction until the mandate from the Supreme Court has been received by the 11th Circuit, and in turn transmitted to the district court. Until then, the case is still on appeal.

Second, the FTC is not entitled to a TRO according to Fed. R. Civ. P. 65(b). A TRO is by definition an injunction issued without written or oral notice to the defendant and is available only if the plaintiff can file an affidavit that complies with Rule 65(b)(1)(A) that "clearly show[s] that immediate and irreparable injury ... will result to the movant before the adverse party can be heard."

The FTC's motion is not a motion for a TRO because the FTC has not and cannot comply with Rule 65(b)(1)(A) and (B). It is therefore a motion for a preliminary injunction governed by Rule 65(a). The defendants are entitled to reasonable notice and a reasonable opportunity to respond at a hearing, not a status conference, at which the defendants are afforded an opportunity to put on evidence either through live

witnesses or by affidavit. Setting a schedule for such a proceeding is of course, exactly the subject of the scheduling conference.

Moreover, there is no emergency for at least two reasons, as noted in our email last Thursday.

First, the transaction was closed in December of 2011 after the stay was dissolved. Nothing prevented the FTC from asking the 11th Circuit to reinstate the stay while the FTC petitioned for certiorari or from petitioning the Supreme Court for a hold separate order, pending the filing of a petition for cert. There was nothing preventing the FTC from petitioning the Supreme Court for a stay after cert was granted. Similarly, nothing stopped the FTC from moving for an injunction sooner after the Supreme Court ruled in February. The FTC has stated no reason why the situation is different now and it cannot do so.

Second, we again note our representation to the Court that our clients will maintain the status quo and will effect no material change in the status quo with respect to the preservation of the Palmyra assets between now and when the Court conducts a chambers conference to provide further guidance to the parties.

Finally, we note that the FTC's proposed, 11-page TRO incorrectly contemplates that we can somehow operate the assets purchased from Palmyra as a "hospital-within-a-hospital." Those assets are part of a single licensed hospital, not a separately-licensed entity. We anticipate showing the Court that they cannot lawfully or practically or safely be operated as a separate hospital, with a separate medical staff, separate resources and other artificial divisions presumed by the FTC's proposed order. We strenuously object to the FTC's attempt to pressure the Court into entry of a premature, unnecessary and unreasonably broad order without giving the defendants a fair opportunity to be heard, and set forth all of the reasons that entry of such a broad order would interfere with our ability to treat patients using the best facilities, personnel and resources available to us.

Respectfully submitted,

Emmet Bondurant

From: Dimoscato, Maria [mailto:mdimoscato@ftc.gov]

Sent: Monday, April 15, 2013 4:45 PM

To: 'Joan_King@gamd.uscourts.gov'; 'asponseller@law.ga.gov'; 'sibarrett@dhr.state.ga.usjim.egan'; Emmet J. Bondurant; 'jparker@phrd.com'; 'karquit@stblaw.com'; 'jrie@stblaw.com'; 'lee.vanvoorhis@bakermckenzie.com';

'jonathan.sickler@weil.com'; 'agoldstein@stblaw.com'; 'cpeeler@fpplaw.com'; 'pgluckow@stblaw.com';

'McCullough@baudino.com'; 'darrell@baudino.com'; 'ewilkin@perrywalters.com'; 'middleton@baudino.com'; Frank M.

Lowrey; 'baudino@baudino.com'; Michael A. Caplan; Ronan P. Doherty; 'bbrennan@phrd.com'; Razi, Sara; Perry, Jeffrey

Subject: RE: FTC v Phoebe Putney 1:11cv58

Dear Ms. King:

Thank you very much for your email. Counsel for Plaintiff FTC is available for a Status Conference at each of the times proposed in your email of this morning. We understand from our discussions today with counsel for defendants that they are available only on the two later dates, May 10th and May 13th.

If the Court wishes to hear from counsel solely regarding procedural and scheduling issues, we believe one hour will be ample. In addition, however, FTC counsel wishes to be heard at the Court's soonest convenience, telephonically or in person, regarding the pending TRO motion in this case. If the Court has no availability prior to the dates in May listed below, or simply prefers to hear argument on the TRO motion at the time of the Status Conference, we suggest that two hours be set aside (1 hour for TRO; 1 hour for procedural matters/PI scheduling).

Thank you very much for your assistance. If possible, please add the following FTC counsel to your email distribution list: Jeffrey Perry (jperry@ftc.gov) and Sara Razi (srazi@ftc.gov).

Sincerely,

Maria M. DiMoscato

Maria M. DiMoscato
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From: Joan_King@gamd.uscourts.gov [mailto:Joan_King@gamd.uscourts.gov]

Sent: Monday, April 15, 2013 10:43 AM

To: Dimoscato, Maria; asponseller@law.ga.gov; sibarrett@dhr.state.ga.us; jim.egan; bondurant@bmelaw.com;

jparker@phrd.com; karquit@stblaw.com; jrie@stblaw.com; lee.vanvoorhis@bakermckenzie.com;

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lowrey@bmelaw.com; baudino@baudino.com; caplan@bmelaw.com; doherty@bmelaw.com; bbrennan@phrd.com

Subject: FTC v Phoebe Putney 1:11cv58

Good Morning,

Pursuant to your request, a Status Conference will be set in this matter. Please discuss with lead counsel for each party and let me know if any of the below dates/times will be available for a status conference and how much time should be set aside based on matters that need to be discussed. Due to the number of attorneys on the docket, and some of them not providing e-mail addresses, some may not have been included in this e-mail. If someone has been omitted and needs to be notified, please forward same.

The Court will be available on May 7th at 10:00 a.m.; May 8th at 10:00 a.m.; May 10th all day; and May 13th all day.

Please let me know as soon as possible if any of these dates will work.

Thank you,

Joan B. King

Courtroom Deputy / Scheduling Clerk
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