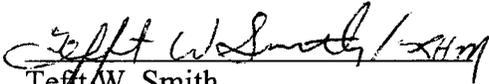


memorandum in support of the motion and a proposed form of order are attached hereto.

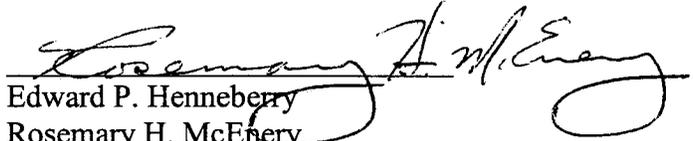
Respectfully submitted,



Jeff W. Smith
Mark L. Kovner
Colin R. Kass
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, DC 20005
Phone: 202-879-5000
Fax: 202-879-5200

Attorneys for Respondent
Milnot Holding Corp.

Dated: January 10, 2001



Edward P. Henneberry
Rosemary H. McEnery
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, N. W.
Washington, D.C. 20004
Phone: 202-783-0800
Fax: 202-383-6610

Attorneys for Respondent
H. J. Heinz Company

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)	
)	
H.J. HEINZ COMPANY,)	
a corporation;)	
)	
MILNOT HOLDING CORPORATION,)	Docket No. 9295
a corporation;)	
)	
and)	
)	
MADISON DEARBORN CAPITAL)	
PARTNERS, L.P.,)	
a limited partnership.)	
)	
)	

To: The Honorable D. Michael Chappell
Administrative Law Judge

**MEMORANDUM IN SUPPORT OF RESPONDENTS'
MOTION TO STAY PROCEEDINGS**

Respondents H.J. Heinz Company (“Heinz”) and Milnot Holdings Corporation (“Beech-Nut”) submit this memorandum in support of their motion for a stay of administrative proceedings pending the decision of the D.C. Circuit Court of Appeals in this matter. Complaint counsel does not oppose this motion. (Pretrial Conference Transcript, Dec. 20, 2000 at p.9, attached at Tab A).

PROCEDURAL BACKGROUND

The Federal Trade Commission (“FTC” or “Commission”) challenged the Heinz acquisition of Beech-Nut in July, 2000 seeking a preliminary injunction before the federal district court for the District of Columbia. After a five-day full evidentiary hearing, Judge Robertson

denied the Commission's request for a preliminary injunction. *F.T.C. v. H.J. Heinz Co., et al.*, 166 F. Supp.2d 190 (D.D.C. 2000). Thereafter, the FTC noticed its appeal of the district court decision, and the D.C. Circuit, after granting an injunction pending appeal, set an expedited schedule for the appeal. The Commission submitted its brief to the court on November 29, 2000 and appellees submitted their brief on December 29. The FTC's reply brief is to be filed today, January 10, 2001, and argument is scheduled for February 12. The Commission filed its administrative complaint in this matter on November 22, 2000.

DISCUSSION

Because the D.C. Circuit's decision will determine the outcome or, at the very least, substantially shape the course of administrative proceedings in this matter, respondents Heinz and Beech-Nut request a stay of the present Commission proceeding. Granting a stay pending review by the D.C. Circuit is an appropriate exercise of the Administrative Law Judge's ("ALJ") discretion. Under 16 C.F.R. § 3.51 an ALJ "may stay the administrative proceeding until resolution of the collateral federal court proceeding." Moreover, to accommodate the issuance of such an order, 16 C.F.R. § 3.51(a) explicitly provides that the "pendency of any collateral federal court proceeding that relates to the administrative adjudication shall toll the one-year deadline for filing the initial decision."

Given the pendency of the appeal of the district court decision in this matter, any further action in this administrative forum at this time runs the risk of being obviated by the opinion of the D.C. Circuit. That is, if the D.C. Circuit reverses the district court's denial of the FTC's request for a preliminary injunction, respondents have unequivocally stated that they will abandon the transaction, rendering moot the liability phase of administrative proceedings before the Commission. In the alternative, should the D.C. Circuit uphold the lower court's denial of the preliminary injunction, respondents will move for dismissal under the express provisions of

16 C.F.R. § 3.26(c) (Motions Following Denial of Preliminary Relief). The FTC would then decide whether further litigation would be in the public interest.¹

Even if the Commission voted to pursue further action, however, the D.C. Circuit's opinion would shape any continued litigation in this forum. If the FTC does not prevail in the current appeal to the D.C. Circuit, the Commission in its administrative proceedings will, as a practical matter, be obligated to go beyond the arguments that it unsuccessfully presented to both federal courts, given that the burden of proof rests with the Commission and any appeal of an administrative decision would ultimately be made to the D.C. Circuit. To do otherwise would result in identical shortcomings in the FTC's administrative case and would yield an entirely duplicative effort with no different result. For that reason, proceeding with discovery at this time, such as the exchange of witness lists and expert reports, is premature and would result in the unnecessary expenditure of resources by the parties and the Commission.

There is ample precedent for a stay of administrative proceedings in merger cases pending collateral litigation in federal court. Most recently, in *Tenet Healthcare*, a stay of administrative proceedings was granted pending appellate review of the district court's decision on the issuance of a preliminary injunction. *Tenet Healthcare*, Docket No. 9298 (Sept. 15, 1998) (attached at Tab B). In doing so, substantial burdens on all parties were avoided by eliminating duplicative efforts in collateral proceedings. And ultimately, the FTC's administrative complaint

¹ In 1995, the FTC adopted a policy of not automatically pursuing administrative litigation when injunctive relief has been denied. See 60 Fed. Reg. 39741, 39743 (1995). Rather, upon denial of preliminary relief, the FTC will make a case-by-case determination as to the propriety of conducting administrative litigation, considering, among other factors: the legal and factual findings of the courts; the policy implications of the case; and the costs and benefits of further proceedings. A stay of administrative proceedings pending decision from the D.C. Circuit would be the most prudent course of action, allowing the Commission to consider the complete landscape of factors before embarking on efforts in an administrative proceeding that might prove to be wasted.

Further, it should be noted that in every recent case where the FTC filed an administrative complaint while an appeal of the district court's decision regarding a preliminary injunction was still pending with a circuit court, the administrative action was terminated after the circuit court affirmed the denial of preliminary relief. See *Butterworth Health Corp.*, 124 F.T.C. 424 (1997) (Order Granting Motion to Dismiss subsequent to 6th Circuit decision), *Freeman Hospital*, 120 F.T.C. 1003 (1995) (Order Dismissing Complaint issued after 8th Cir. decision); *Hospital Board of Directors of Lee Co.*, 120 F.T.C. 1 (1995) (Order Sua Sponte Dismissing Proceeding subsequent to 11th Circuit decision) (hereinafter *Lee Memorial Hospital*); See also, *Tenet Healthcare*, 1999 FTC LEXIS 267 (1999) (Order Dismissing Complaint issued after 8th Circuit decision).

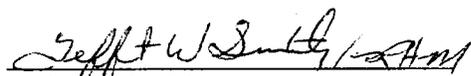
was dismissed following the Eighth Circuit's finding that the Commission had failed to make the proper showing necessary for injunctive relief. *Tenet Healthcare*, 1999-2 Trade Cas. ¶ 72,578 (8th Cir. July 21, 1999).

Similarly, in *Lee Memorial Hospital*, the FTC sought to preliminarily enjoin the merger of two hospitals in Florida. The district court for the Middle District of Florida denied the motion and the Commission appealed the decision thereafter. When the FTC instituted administrative proceedings while the case was on appeal, the hospitals sought and were granted a stay of administrative proceedings, as the 11th Circuit decision could dispose of the matter entirely. *Lee Memorial Hospital*, Docket No. 9265 (June 20, 1994) (First Order Granting Stay) (attached at Tab C). When the stay issued by the ALJ lapsed prior to issuance of the decision by the 11th Circuit, the ALJ then issued a second stay that also lapsed. *Lee Memorial Hospital*, Docket No. 9265 (Aug. 26, 1994) (Second Order Granting Stay) (attached at Tab D). Although the ALJ declined to issue an additional stay, in the interest of administrative and judicial economy, the 11th Circuit itself stayed the administrative proceedings. *F.T.C. v. Hospital Board of Directors of Lee Co.*, Case No. 94-2642 (11th Cir. 1994) (Order Granting Emergency Motion to Stay Administrative Proceedings) (attached at Tab E). Thereafter, the 11th Circuit affirmed the District Court's ruling in favor of defendants and the Commission subsequently closed its administrative case.

CONCLUSION

Given the procedural posture of this matter, a ruling by the D.C. Circuit will likely be dispositive of the case or, at a minimum, will frame the substantive issues to be determined in these administrative proceedings. For all the foregoing reasons, respondents' motion for stay of administrative proceedings pending decision by the D.C. Circuit in this matter should be granted.

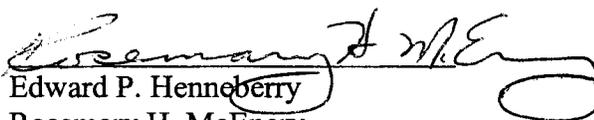
Respectfully submitted,



Tefft W. Smith
Mark L. Kovner
Colin R. Kass
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Washington, DC 20005
Phone: 202-879-5000
Fax: 202-879-5200

Attorneys for Respondent
Milnot Holding Corp.

Dated: January 10, 2001



Edward P. Henneberry
Rosemary H. McEnery
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, N. W.
Washington, D.C. 20004
Phone: 202-783-0800
Fax: 202-383-6610

Attorneys for Respondent
H. J. Heinz Company

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
H.J. HEINZ COMPANY,)
a corporation;)
MILNOT HOLDING CORPORATION,) Docket No. 9295
a corporation;)
and)
MADISON DEARBORN CAPITAL)
PARTNERS, L.P.,)
a limited partnership.)

ORDER STAYING PROCEEDINGS

The above-captioned matter is hereby STAYED until two weeks after the D.C. Circuit Court of Appeals issues its decision in *F.T.C. v. H.J. Heinz Co., et al.*, Case No. 00-5362 (D.C. Cir. 2001).

SO ORDERED this __th day of January, 2001

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondent H.J. Heinz Company's Motion To Stay and Memorandum In Support Of Respondent's Motion To Stay were served by hand delivery, this 10th day of January 2001 upon:

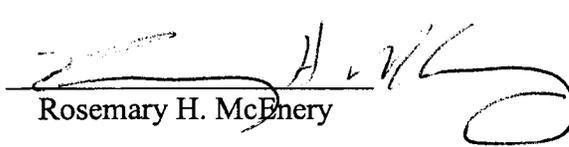
Richard G. Parker
Director
Federal Trade Commission
601 Pennsylvania Avenue, N.W. Rm H-370
Washington, D. C. 20580

Paul J. Nolan
Assistant to the Director
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Hon. D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W. Room H-104
Washington, D.C. 20580

Tefft W. Smith
Kirkland & Ellis
655 - 15th Street, N.W.
Washington, D.C. 20580

Phillip L. Broyles
Assistant Director
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W. Room S-2602
Washington, D. C. 20580


Rosemary H. McEnery

In The Matter Of:

*H.J. HEINZ COMPANY
MATTER NO. D09295*

*PRETRIAL CONFERENCE
December 20, 2000*

*For The Record, Inc.
Court Reporting and Litigation Support
603 Post Office Road
Suite 309
Waldorf, MD USA 20602
(301) 870-8025 FAX: (301) 870-8333*

*Original File 01220HELASC, 22 Pages
Min-U-Script® File ID: 3329851460*

Word Index included with this Min-U-Script®

[1] FEDERAL TRADE COMMISSION
 [2] INDEX
 [3]
 [4]
 [5] PRETRIAL HEARING — Page No. 4
 [6]
 [7]
 [8]
 [9]
 [10]
 [11]
 [12]
 [13]
 [14]
 [15]
 [16]
 [17]
 [18]
 [19]
 [20]
 [21]
 [22]
 [23]
 [24]
 [25]
 [26]

[1] APPEARANCES:
 [2] ON BEHALF OF THE FEDERAL TRADE COMMISSION:
 [3] RICHARD DAGEN, ESQ.
 [4] DAVID BALTO, ESQ.
 [5] Federal Trade Commission
 [6] 600 Pennsylvania Avenue, N.W.
 [7] Washington, D.C. 20850
 [8] (202)326-2628
 [9]
 [10] ON BEHALF OF H.J. HEINZ COMPANY:
 [11] ROSEMARY H. McENERY, ESQ.
 [12] DYLAN M. CARSON, ESQ.
 [13] Howery, Simon, Arnold & White
 [14] 1299 Pennsylvania Avenue, N.W.
 [15] Washington, D.C. 20004-2402
 [16] (202)383-7026
 [17]
 [18] ON BEHALF OF MILNOT HOLDING COMPANY AND MADISON DEARBORN
 [19] PARTNERS:
 [20] COLIN R. KASS, ESQ.
 [21] Kirkland & Ellis
 [22] 655 Fifteenth Street, N.W.
 [23] Washington, D.C. 20005
 [24] (202)879-5172
 [25]

[1] UNITED STATES OF AMERICA
 [2] FEDERAL TRADE COMMISSION
 [3]
 [4] In the Matter of:)
 [5] H.J. HEINZ COMPANY,) Docket No. 9295
 [6] a corporation,)
 [7]
 [8] MILNOT HOLDING CORPORATION,)
 [9] a corporation,)
 [10] and)
 [11] MADISON DEARBORN CAPITAL)
 [12] PARTNERS, L.P.,)
 [13] a limited partnership)
 [14]
 [15] Wednesday, December 20, 2000
 [16]
 [17] Federal Trade Commission
 [18] Room 532
 [19] 600 Pennsylvania Avenue, N.W.
 [20] Washington, D.C. 20850
 [21]
 [22] The above-entitled matter came on for
 [23] prehearing conference, pursuant to notice, at 2:00 p.m.
 [24]
 [25] THE HONORABLE JUDGE D. MICHAEL CHAPPELL

PROCEEDINGS

[1]
 [2]
 [3] **JUDGE:** For the record this is a hearing
 [4] conference or a hearing in Docket 9295. I'll hear
 [5] appearances from the parties now starting with the
 [6] Government.
 [7] **MR. DAGEN:** Richard Dagen, Your Honor. I'm
 [8] sorry about the voice. It's not appearing with me today.
 [9] **MR. BALTO:** David Balto.
 [10] **MS. McENERY:** Rosemary McEnery for H.J. Heinz
 [11] Company, Respondent.
 [12] **MR. KASS:** Colin Kass for Milnot Holding
 [13] Company and Madison Dearborn Partners, L.P.
 [14] **MR. CARSON:** Dylan Carson also for H.J. Heinz.
 [15] **JUDGE:** So, you're representing Milnot and
 [16] Madison?
 [17] **MR. KASS:** That's correct, Your Honor.
 [18] **JUDGE:** Okay. Has everyone had a chance to
 [19] look over the draft scheduling order?
 [20] **MS. McENERY:** Yes, Your Honor.
 [21] **JUDGE:** Well, before I get to that, I always
 [22] give the attorneys a chance, if you'd like, to make a
 [23] statement to summarize your position in the case. I
 [24] always offer that if — does anyone want to do that?
 [25] **MR. DAGEN:** We could.

Page 5

Page 7

[1] MS. McENERY: We —

[2] MR. DAGEN: Did you want to bring up your other
[3] issue first?

[4] MS. McENERY: I will. We have confirmed — if
[5] I might, Your Honor?

[6] JUDGE: Sure. Could you come to the podium?
[7] We have — so everybody can hear.

[8] MS. McENERY: Mr. Dagen's voice has escaped him
[9] today, but we conferred earlier with complaint counsel
[10] and we are in agreement. We requested, and they agreed,
[11] the complaint counsel agreed, that we, the respondent,
[12] would like the opportunity to file a motion to stay the
[13] administrative proceedings pending the appeal of this
[14] matter at the D.C. Circuit, which is currently on
[15] expedited review. Our briefs are due in the matter next
[16] week. The Government's briefs are due just over a week
[17] thereafter and oral argument in the expedited appeal is
[18] scheduled for February 12th.

[19] So, they have — complaint counsel agreed with
[20] our request for an opportunity to file that stay motion
[21] with you and they have — they will not oppose our
[22] motion.

[23] So, our position here is that we — before we
[24] get to entering a scheduling order, we be allowed to
[25] present that motion to you.

[1] proceedings under Rule 3.51.

[2] JUDGE: That — and I don't disagree with you.

[3] I'm just going to have to research that and make sure
[4] that this tolls my one-year deadline.

[5] MS. McENERY: It doesn't —

[6] JUDGE: Because it doesn't behoove any of us to
[7] get — and I understand if parties are attempting to
[8] merge, people want to get this thing resolved, they want
[9] to know whether they can merge or not merge, and, you
[10] know, I think for the benefit of everyone, we need to
[11] move along. But if everyone wants this stayed, then I
[12] will consider that. But I do like to have — you know,
[13] that needs to be in writing.

[14] MS. McENERY: We will — and we'd like to
[15] formally put that in writing for your benefit to outline
[16] our position. The rule is — that I'm reading from is
[17] 3.51, Your Honor. It's buried in the middle of a
[18] paragraph, but 3.51 under Initial Decision, middle of the
[19] paragraph.

[20] JUDGE: Are you reading from the latest C.F.R.?
[21] Is that your cite?

[22] MS. McENERY: I believe I am, sir. My C.F.R.,
[23] it's page 70. The sentence I'm referring to begins with,
[24] the pendency of any collateral Federal Court proceedings
[25] that relate to the administrative adjudication shall toll

Page 6

Page 8

[1] JUDGE: Is that motion drafted?

[2] MS. McENERY: We would just — what we'd like,
[3] Your Honor, is a little opportunity to do so. We are
[4] under a gun in this proceeding. The scheduling is not of
[5] our making. We're filing a brief next week responding
[6] both to the Government's brief on appeal — it's FTC's
[7] appeal of the case — as well as an amicus brief brought
[8] by 36 or so State Attorneys' General.

[9] So, I might just ask, out of fairness, that we
[10] be given a bit of time to file that early in January
[11] right after our brief is due, if we might.

[12] JUDGE: Well, I understand that you have
[13] briefing deadlines, but everyone here needs to understand
[14] also that I have a deadline. Once the Government issues
[15] the complaint, I have a statutory deadline to have a
[16] trial, to have an opinion out, to have the decision
[17] rendered. So, we all have deadlines.

[18] MS. McENERY: I understand that, but —

[19] JUDGE: And just so you'll know, my intent was
[20] to move this along because I assumed that the parties
[21] would like to push this case up rather than delay it.

[22] MS. McENERY: My understanding, Your Honor,
[23] under the FTC's rules is that your requirement for a time
[24] table is tolled during the pendency of the appeal and you
[25] have specific authority to stay the administrative

[1] the one-year deadline for filing the initial decision.

[2] JUDGE: It's going to be the Government's
[3] position that this is a collateral proceeding to the
[4] Federal proceeding?

[5] MR. DAGEN: We —

[6] JUDGE: I mean, I'm going to leave it to the
[7] parties to bring me within the confines of this rule.

[8] MR. DAGEN: Your Honor, I have not looked at
[9] the rule that they have cited. They indicated they would
[10] like to seek a stay. A similar stay was sought to which
[11] the complaint counsel did not oppose in the Poplar
[12] Bluff's case. So, I'm aware that it has occurred. I'm
[13] not aware of this particular citation.

[14] JUDGE: You probably don't have the docket
[15] number, but when was that case, Poplar Bluff?

[16] MR. DAGEN: The docket number is 9289.

[17] JUDGE: That's probably recent then. Okay.

[18] MR. DAGEN: Yes. That was Tenet Health Care
[19] and Poplar Bluff, before Judge Timony.

[20] JUDGE: Oh, Tenet Health Care.

[21] MR. DAGEN: Right.

[22] JUDGE: I didn't recognize it as Poplar.

[23] Well, I'm amenable to listening — do you want
[24] to argue that now or you just want to let me know it's on
[25] the way? How do you want to proceed?

[1] MS. McENERY: I would like to put that to you
 [2] formally in writing and outline that proceeding. I would
 [3] just like the opportunity to do that, to outline our
 [4] position in that motion. That would be joined by both
 [5] respondents.
 [6] JUDGE: Okay. Now, is that going to be a joint
 [7] motion joined by complaint counsel or just not opposed?
 [8] MR. DAGEN: We will not be opposing it.
 [9] JUDGE: All right.
 [10] MR. DAGEN: We are prepared to move forward.
 [11] But given that it's the parties' desire — the merging
 [12] parties' desire to wait, and our understanding is, I
 [13] guess, potentially reevaluate going forward at the end of
 [14] the appellate decision if it, in fact, reaffirms what was
 [15] stated in the emergency stay position, then it might, in
 [16] fact, preserve resources on a going-forward basis.
 [17] JUDGE: Okay.
 [18] MS. McENERY: I can address that directly. Mr.
 [19] Dagen is correct. If the Appellate Court reverses the
 [20] decision of the District Court, which denied the
 [21] preliminary injunction, this transaction will be
 [22] abandoned and we'll come to you with a motion to dismiss
 [23] this as moot.
 [24] JUDGE: Did I hear that right? If the District
 [25] Court is reversed?

[1] MS. McENERY: That is correct. The District
 [2] Court —
 [3] JUDGE: I thought if the District Court was
 [4] reversed, then they would have the stay they wanted, the
 [5] injunction they wanted.
 [6] MS. McENERY: Yes. If an injunction enters, we
 [7] will abandon the transaction.
 [8] JUDGE: Oh, the merger will be abandoned?
 [9] MS. McENERY: Correct, Your Honor.
 [10] JUDGE: Okay. That's what I didn't understand.
 [11] MS. McENERY: Thus obviating the need for
 [12] administrative proceedings.
 [13] JUDGE: Okay. Well, this is interesting. But
 [14] you understand I needed to get this on the record because
 [15] I do have the one-year time period which is sacred. I
 [16] know there's a 60-day, but I don't consider that part of
 [17] the rule. I get them out in a year if I can.
 [18] MS. McENERY: Yes, Your Honor, that's why I
 [19] wanted to be prepared to give you that citation for your
 [20] benefit.
 [21] JUDGE: And you have a brief due, what, the
 [22] 29th?
 [23] MS. McENERY: The 29th unfortunately, yes, Your
 [24] Honor, with the D.C. Circuit.
 [25] JUDGE: Is that en banc or is it just —

[1] MS. McENERY: A three-judge panel, Your Honor.
 [2] JUDGE: All right. So, is it the parties'
 [3] desire then to hold off on this scheduling order until
 [4] that works its way through the system?
 [5] MS. McENERY: Yes, Your Honor.
 [6] JUDGE: Is the Government amenable to that?
 [7] MR. DAGEN: If the stay is granted, yes, I
 [8] think we could wait and deal with the scheduling order at
 [9] that time.
 [10] One aside, Your Honor, in terms of the
 [11] scheduling order, I noticed we may have a little more
 [12] time than it set forth here. I think this contemplates
 [13] an April 3rd trial date which would, I think, be if the
 [14] merging partners have requested fast track, which my
 [15] understanding is they did not.
 [16] JUDGE: No.
 [17] MR. DAGEN: So, we might not —
 [18] JUDGE: Well, if they had requested fast track,
 [19] you would have had a February trial date.
 [20] MR. DAGEN: My understanding is — I may be
 [21] wrong. I haven't worked under the new rules. But my
 [22] understanding is that the ID would have to be out a year
 [23] from the complaint.
 [24] JUDGE: Well, it's always a year. Fast track
 [25] is six months.

[1] MR. DAGEN: Right.
 [2] JUDGE: It has to work through the entire
 [3] system in 13 months.
 [4] MR. DAGEN: Okay. So —
 [5] JUDGE: But I'm — right now, I'm contemplating
 [6] how I'm going to comply with the statute. I have to get
 [7] an order out — first of all, so it's clear to everyone,
 [8] I had to have this hearing within so many days of the
 [9] last answer being filed. Then I've got to have an order
 [10] — a scheduling order out in ten days from today. And
 [11] I'm wondering how that's going to affect if I hear the
 [12] motion to stay.
 [13] Well, if I issue a scheduling order, then I'd
 [14] just let everyone know, if the stay is granted, then the
 [15] scheduling order's off the table and we'll do another one
 [16] later. But I have a statutory obligation to issue an
 [17] order two days from today.
 [18] MS. McENERY: And, Your Honor, if I might, the
 [19] — in Rule 3.21(c)(2), for good cause, you can extend any
 [20] of these dates including C, which is the requirement that
 [21] you issue an order two days after this scheduling
 [22] conference.
 [23] My view is that our — the agreement of the
 [24] parties that we file a stay motion is good cause to
 [25] extend the time for issuing the scheduling order until we

[1] know what happens on the stay request. I'm reading —
[2] JUDGE: 3.22?
[3] MS. McENERY: I'm reading 3.21(c)(2), Your
[4] Honor.
[5] JUDGE: Well, no, the — I don't agree with
[6] your interpretation. That is a date already having been
[7] set in a scheduling order. That allows me, for example,
[8] to extend the discovery deadline or a filing deadline,
[9] not the initial scheduling order that has to go out. So,
[10] I couldn't — that's not a safe refuge for me. I'm not
[11] saying that's a problem, I'm just saying I don't think
[12] that rule applies to the initial order.
[13] That rule, as has been used in the past, the
[14] order's already out, three or four months down the road
[15] someone needs some relief based on an emergency or some
[16] unforeseen circumstance, then I will extend the deadline
[17] within the scheduling order already issued.
[18] MS. McENERY: The trouble we have with a — we
[19] have a record in this case. The trouble we have with the
[20] scheduling order as proposed or any proposed order at
[21] this point is we're kind of flying blind. We need to
[22] know what complaint counsel intends to do in this
[23] proceeding beyond what the record is as it exists. And
[24] based on what new discovery or witnesses or experts or
[25] work they want to do in this forum, only then can we know

[1] what sort of discovery and what kind of time that would
[2] take so that we can meaningfully respond to a scheduling
[3] order.
[4] So, at this point, our position is that this
[5] scheduling order is premature and we would rather proceed
[6] with the motion for stay, which I think will obviate the
[7] need for it. But beyond that, if we have to get to a
[8] scheduling order, we need to do it based on our knowledge
[9] of how the complaint counsel intends to proceed before we
[10] can meaningfully address that.
[11] The order contemplated appears to presuppose
[12] that we're going to rest on the record below in the
[13] District Court, and I haven't heard from complaint
[14] counsel that they intend to rest on the existing record.
[15] JUDGE: Actually, it didn't presuppose that.
[16] It allowed what I thought would be adequate discovery for
[17] a case of this type.
[18] MS. McENERY: Well, for us to list our — our
[19] preliminary witness list under this order would require
[20] us — would not be able to be amended unless for good
[21] cause shown. So that before we even know what they
[22] intend to do, whether they intend to bring in more
[23] experts, more economists or what have you, we have to
[24] list our witnesses. So, that leaves us sort of unable to
[25] really address this schedule.

[1] We have a — you know, there's a substantial
[2] record in this case already, and under the circumstances
[3] and given the complexity of the case, we'd need more
[4] information before we could meaningfully respond to this
[5] schedule.
[6] JUDGE: So, I think what I'm hearing is your
[7] position is as a respondent, the Government having the
[8] burden of proof, you want to see their witness list and
[9] list of experts and then respond to that rather than at
[10] the same time.
[11] MS. McENERY: Yes, Your Honor.
[12] JUDGE: And that's —
[13] MS. McENERY: But the fundamental position
[14] being that it's premature at this juncture to enter a
[15] scheduling order at all because we'd like to have an
[16] opportunity to file a motion to stay.
[17] JUDGE: When would the motion to stay be filed?
[18] MS. McENERY: First week in January, Your
[19] Honor, since our brief is due in the Circuit Court the
[20] 29th of this month.
[21] JUDGE: You must be working on a lengthy motion
[22] to stay then if you're talking —
[23] MS. McENERY: No, Your Honor, I don't — the
[24] problem is we're not working on it, we're working on the
[25] Appellate Court brief. Again, this — I believe fairness

[1] dictates we have a little time to do it. This schedule
[2] was sort of hoist upon us by the Government. They didn't
[3] bring their administrative case in July when they sued us
[4] for a PI, they brought it in November so that our answer
[5] date in this hearing fell right in the middle of our
[6] Christmas vacation briefing schedule.
[7] So, I'm just asking for time to get, again, I
[8] believe a short motion, but I'd like to thoroughly
[9] outline our position for your benefit so that you can
[10] give a considered decision on it.
[11] JUDGE: Did you have something to add?
[12] MR. DAGEN: I do have a copy of what was filed
[13] in Tenet by the respondents, which I assume would be
[14] somewhat similar to what would be here. If the Court
[15] would like we can hand this up to you. We had just taken
[16] a look at this.
[17] JUDGE: Do we have that? Yeah, we have that.
[18] Once I found out it was Tenet, I knew we had that.
[19] MR. DAGEN: Okay.
[20] JUDGE: That's a case that was originally
[21] assigned to me a couple years ago.
[22] Okay. Where we are then is the parties are
[23] going to — at least the respondents are going to submit
[24] a motion to stay pending the collateral proceeding in
[25] Federal Court. The Government is not going to oppose it.

[1] And it's the parties' position we don't need to enter a
 [2] scheduling order until after we see what happens with the
 [3] stay and down the street here.
 [4] You're in D.C. Court of Appeals?
 [5] **MR. DAGEN:** Yes.
 [6] **MS. McENERY:** Yes, sir, D.C. Circuit.
 [7] **JUDGE:** Well, to be more efficient what I'm
 [8] going to do is have a recess for 20, 30 minutes, go back
 [9] and look over the rules, see what I think and then come
 [10] back. So, we're going to recess for say 30 minutes and
 [11] then we'll go back on the record, okay?
 [12] **MR. DAGEN:** Okay.
 [13] **JUDGE:** Thank you.
 [14] **MS. McENERY:** Thank you.
 [15] (A brief recess was taken.)
 [16] **JUDGE:** We're back on the record in Docket
 [17] Number 9295.
 [18] Having viewed the rules, if I had a written
 [19] motion to stay in front of me, I could rule on that
 [20] today. Since I don't, I agree with counsel for
 [21] respondent, that I can stay this proceeding under the
 [22] rule. However, I'm going to wait till I get a written
 [23] motion filed.
 [24] What I am going to do, based on my statutory
 [25] requirement to issue a scheduling order, I'm going to

[1] issue a scheduling order, but the parties don't need be
 [2] concerned. The first date of anything is going to be two
 [3] months further out than it is now. So, there will be
 [4] nothing required before March. So, you don't need be
 [5] concerned about anything on the scheduling order. And I
 [6] will meet the statutory requirement.
 [7] I will favorably review a motion to stay,
 [8] preferably joint, but if it's concurring — if the
 [9] Government doesn't object, I would rather have it be
 [10] concurring. Assuming the stay is granted, I will, at
 [11] that time, vacate the scheduling order so it will go
 [12] away.
 [13] Is that acceptable to the parties?
 [14] **MS. McENERY:** Yes, Your Honor. Could the order
 [15] stipulate that if the stay for some reason is denied,
 [16] that we would have leave to — consulting with and in
 [17] agreement with — consulting with complaint counsel, that
 [18] we could work out a revised schedule at that time?
 [19] In other words, what you're entering is bumping
 [20] this one out two months, but we still have the issue of
 [21] the simultaneous requirements. And again, we would like,
 [22] if we have to proceed, to be able to amend that to
 [23] perhaps have — alter it slightly so that the Government
 [24] comes forward first with their witness list or their
 [25] proposed discovery or their proposed new evidence they

[1] intend to pursue so that we can then respond. But if
 [2] they're —
 [3] **JUDGE:** You're saying if the stay is denied?
 [4] **MS. McENERY:** Correct.
 [5] **JUDGE:** Okay. What I'm telling you —
 [6] **MS. McENERY:** If your order would just —
 [7] **JUDGE:** What I'm telling you here on the record
 [8] in front of everybody is if it is denied, then we will
 [9] revisit the issue of coming up with some dates that are
 [10] agreeable to everybody. I go by the book and the book
 [11] says I've got to issue an order and I'm going to do that.
 [12] I can vacate that order if the stay is granted.
 [13] **MS. McENERY:** No, my only concern was knowing
 [14] that we could revisit the schedule if required.
 [15] **JUDGE:** Okay. I understand, that's not a
 [16] problem.
 [17] Now, when did you want to file the motion?
 [18] When did you —
 [19] **MS. McENERY:** The first week in January, Your
 [20] Honor.
 [21] **JUDGE:** How's January 10th sound?
 [22] **MS. McENERY:** That's fine.
 [23] **JUDGE:** How about ten days into January, is
 [24] that —
 [25] **MS. McENERY:** That's perfect, Your Honor, thank

[1] you.
 [2] **JUDGE:** Okay. Anything else?
 [3] **MR. DAGEN:** No, Your Honor.
 [4] **JUDGE:** And now, we're going to issue the
 [5] order. Basically it's what you've seen, and like I said,
 [6] I'm going to kick the dates out. We're going to
 [7] basically insert counsel's name for service of pleadings,
 [8] which I did leave out.
 [9] Another thing I will mention, in the event we
 [10] proceed to trial, the — we're going to have to have a
 [11] protective order and just so you'll know, you know, it's
 [12] to protect the documents between and amongst the parties.
 [13] But what I do is I protect the third parties that may
 [14] have documents involved.
 [15] I also have a gatekeeping function here. I'm
 [16] the gatekeeper for the public for in camera and we have
 [17] some very strict in camera provisions in our rules. If
 [18] you haven't practiced here before, you need to review
 [19] those, because if you slip up, then the documents you
 [20] filed are part of the public record. I just wanted you
 [21] to be thinking about that, along those lines.
 [22] I will include the in camera provisions in the
 [23] protective order we ultimately will sign — or we will
 [24] all agree to and I will issue in the case.
 [25] **MS. McENERY:** There's a protective order

Page 21

[1] already entered on the record we have. Is that something
[2] that the Court and your staff will become a party to so
[3] that you could see the non-public documents already
[4] produced in this case?

[5] **JUDGE:** I haven't thought about that angle. I
[6] will begin my analysis with that protective order, but I
[7] know that it will need in camera provisions because they
[8] are unique to the FTC under the statute we have.

[9] **MS. McENERY:** Right. I'm just suggesting it
[10] might be helpful to the Court to have access to the very
[11] substantial record we already have in place in this case.

[12] **JUDGE:** We'll consider that. Anything further?

[13] (No response.)

[14] **JUDGE:** Okay. We're adjourned. Thank you.

[15] (At 2:47 p.m., the prehearing conference was
[16] adjourned.)

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

Page 22

[1] **CERTIFICATION OF REPORTER**

[2] **DOCKET/FILE NUMBER: 9295**

[3] **CASE TITLE: H.J. HEINZ CO., MILNOT HOLDING CO. & MADISON**

[4] **DEARBORN PARTNERS, L.P.**

[5] **HEARING DATE: DECEMBER 20, 2000**

[6]

[7] I HEREBY CERTIFY that the transcript contained
[8] herein is a full and accurate transcript of the notes
[9] taken by me at the hearing on the above cause before the
[10] FEDERAL TRADE COMMISSION to the best of my knowledge and
[11] belief.

[12]

[13] **DATED: JANUARY 4, 2001**

[14]

[15]

[16] **SONIA GONZALEZ**

[17]

[18] **CERTIFICATION OF PROOFREADER**

[19]

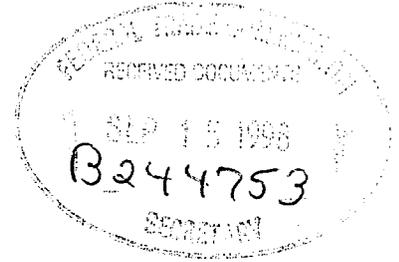
[20] I HEREBY CERTIFY that I proofread the transcript for
[21] accuracy in spelling, hyphenation, punctuation and
[22] format.

[23]

[24]

[25] **ELIZABETH M. FARRELL**

ORIGINAL



UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
)
)
 TENET HEALTHCARE CORPORATION,)
 a corporation,)
)
 and)
)
 POPLAR BLUFF PHYSICIANS GROUP, INC.)
 d/b/a Doctors Regional Medical Center,)
 a corporation.)

DOCKET NO. 9289

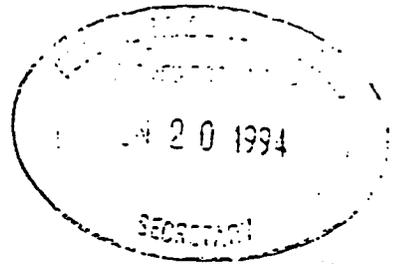
ORDER STAYING PROCEEDINGS

This matter arose on the motion by respondents Tenet Healthcare Corporation and Poplar Bluff Physicians Group, Inc., d/b/a Doctors Regional Medical Center, to stay these proceedings. Complaint counsel do not oppose the stay. For the reasons in the motion, IT IS HEREBY ORDERED that the above-captioned matter is STAYED until fourteen days after the United States Court of Appeals for the Eighth Circuit issues its decision in FTC v. Tenet Healthcare Corporation, No. 98-3123 (8th Cir. 1998).

James P. Timony
James P. Timony
Administrative Law Judge

Dated: September 15, 1998

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

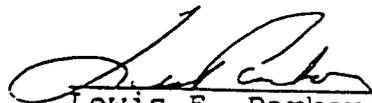


In the Matter of
HOSPITAL BOARD OF DIRECTORS OF
LEE COUNTY,
doing business as
LEE MEMORIAL HOSPITAL.

Docket No. 9265

ORDER

The above-captioned matter is hereby STAYED until two weeks after the Eleventh Circuit Court of Appeals issues its decision in Federal Trade Commission v. Hospital Board of Directors of Lee County d/b/a Lee Memorial Hospital, No. 94-2642 (11th Cir. 1994), or September 1, 1994, whichever occurs first. SO ORDERED this 20th day of June, 1994.


Lewis F. Parker
Administrative Law Judge

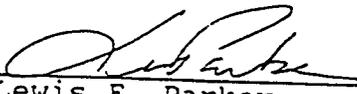
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
HOSPITAL BOARD OF DIRECTORS OF
LEE COUNTY,
doing business as
LEE MEMORIAL HOSPITAL.

Docket No. 9265

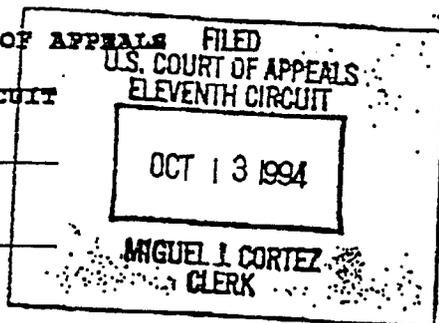
ORDER

The above-captioned matter is hereby STAYED until two weeks after the Eleventh Circuit Court of Appeals issues its decision in Federal Trade Commission v. Hospital Board of Directors of Lee County d/b/a Lee Memorial Hospital, No. 94-2642 (11th Cir. 1994), or October 1, 1994, whichever occurs first. SO ORDERED this 26th day of August, 1994.


Lewis F. Parker
Administrative Law Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2642



FEDERAL TRADE COMMISSION,

Plaintiff-Appellant,

versus

HOSPITAL BOARD OF DIRECTORS OF
LEE COUNTY, WEST COAST HEALTH SYSTEM, INC.,
CAPE CORAL MEDICAL CENTER, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

BEFORE: HATCHETT and BLACK, Circuit Judges, and YOUNG*, Senior
District Judge.

BY THE COURT:

Appellees' "emergency motion to stay administrative
proceedings" is GRANTED and the administrative proceedings are STAYED until
further order of the court.

*Honorable George C. Young, Senior U.S. District Judge for the
Middle District of Florida, sitting by designation.