

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: JOSEPH J. SIMONS, CHAIRMAN  
MAUREEN K. OHLHAUSEN  
NOAH JOSHUA PHILLIPS  
ROHIT CHOPRA  
REBECCA KELLY SLAUGHTER

**In the Matter of**

**Wilh. Wilhelmsen Holding ASA**  
a public company,

**Wilhelmsen Maritime Services AS,**  
a private company,

**Resolute Fund II, L.P.**  
a private company,

**Drew Marine Intermediate II B.V.**  
a private company,

**And**

**Drew Marine Group, Inc.,**  
a corporation.

**Docket No. 9380**

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ MOTION TO STAY**

Respondents Wilhelm Wilhelmsen and Wilhelmsen Maritime Services AS (together, “Wilhelmsen”) and Resolute Fund II, L.P., Drew Marine Intermediate II B.V., and Drew Marine Group, Inc. (together, “Drew Marine”) have moved to stay the administrative hearing in this case, scheduled to begin on July 24, 2018, until October 22, 2018.<sup>1</sup> Respondents have not,

<sup>1</sup> Respondents’ mischaracterized Complaint Counsel’s position in their May 15, 2018 Expedited Motion for Continuance of Administrative Hearing, when it said, “[g]ood cause exists for granting this *unopposed* motion...”

however, shown “good cause” for a stay, as required by Rule 3.41(f)(1)(i). In particular, in recent decisions, the Commission has found that the mere pendency of a collateral proceeding in federal district court does not constitute “good cause.” Respondents’ motion should therefore be denied.

## ARGUMENT

### I. A Pending Preliminary Injunction Proceeding Does not Constitute “Good Cause” for a Stay of the Part 3 Proceeding.

The Part 3 Rules, as amended in 2009, establish a schedule for administrative hearings. Under Rule 3.11(b)(4), the administrative hearing is scheduled five months after the issuance of the complaint in any case involving a merger which the Commission has sought to preliminarily enjoin under §13(b) of the FTC Act, 15 U.S.C. § 53(b). Rule 3.41(b) expressly provides that, “The hearing will take place on the date specified in the notice accompanying the complaint pursuant to § 3.11(b)(4) . . . .” And, Rule 3.41(f) provides that Part 3 proceedings will not be stayed due to the pendency of a collateral federal court action unless “the Commission *for good cause* so directs . . . .” (emphasis added).

This five-month rule was part of a “comprehensive and systematic” set of 2009 revisions to the Part 3 Rules to establish “tighter time limits” for Part 3 litigation.<sup>2</sup> As part of this effort, the 2009 Amendments specifically deleted the provision that, “the ALJ may stay the administrative proceeding until resolution of the collateral federal court proceeding.”<sup>3</sup> The applicable rules now only permit the Commission to issue a stay on a showing of “good cause.”<sup>4</sup>

Since these 2009 Amendments were adopted, the Commission has regularly denied unilateral requests of other respondents to stay Part 3 proceedings pending a decision in a

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(emphasis added). Respondents’ Expedited Motion for Continuance of Administrative Hearing at p. 2. Complaint Counsel notified Respondents of its opposition to this motion.

<sup>2</sup> 74 Fed. Reg. 1807 (Oct. 7, 2008); see generally 73 Fed. Reg. 58832 (Oct. 7, 2008) (proposed rules); 74 Fed. Reg. 1804 (Jan. 13, 2009) (interim final rules).

<sup>3</sup> See 16 C.F.R. § 3.51(a) (2009).

<sup>4</sup> See 16 C.F.R. § 3.41(f)(1)(i) (2009).

parallel federal court action. For example, in *In re Advocate Health Care Network*, Docket No. 9369, the respondents sought a stay of the Part 3 hearing until 60 days after the federal court had ruled on the preliminary injunction motion pending in federal court. The Commission denied that motion, explaining:

At this time, we see no conflict between the two proceedings, or any other reason that would justify staying the administrative hearing. Furthermore, as reflected in the Commission’s rules, the Commission has made a commitment to move forward as expeditiously as possible with administrative hearings on the merits. *We therefore find that no good cause exists to grant Respondents’ motion to stay.*<sup>5</sup>

Three days later, the Commission reached the same conclusion in *The Penn State Hershey Medical Center*, Docket No. 9368. There, the respondent sought a stay of the administrative hearing – without a stay of discovery or any other deadlines in the Part 3 proceeding – on the grounds that “the district court may not rule on the preliminary injunction request until after the administrative hearing begins. . . .” The Commission expressly rejected this argument, however, because “Respondents’ conjecture . . . is not a basis for delaying the administrative hearing.”<sup>6</sup>

Respondents here argue “continuance will lessen the substantial burden the parties presently face of conducting and preparing for the District Court trial while simultaneously conducting discovery and preparing for the administrative proceeding.”<sup>7</sup> Respondents, however, provide no substantiation for their claims of burden. And just as the drafters of the 2009

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<sup>5</sup> Advocate Health Care Network, Docket No. 9369, Order Denying Motion to Stay the Administrative Hearing at 2, (March 18, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160318advocatehealthcareorder.pdf> (emphasis added).

<sup>6</sup> The Penn State Hershey Medical Center, Docket No. 9368, Order Denying Motion to Stay the Administrative Hearing, at 1-2 (March 21, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160321pinnacleorder.pdf>.

<sup>7</sup> Respondents’ Expedited Motion for Continuance of Administrative Hearing at 2 (May 15, 2018).

Amendments to the Part 3 Rules did not view parallel proceedings to be a substantial burden that would justify a stay in a Part 3 proceeding, neither should the Commission in this instance.

**II. The Preliminary Injunction Hearing Schedule Harmonizes with the Part 3 Administrative Trial Schedule.**

The preliminary injunction hearing in the U.S. District Court for the District of Columbia will commence on May 29, 2018, and will involve eight non-consecutive hearing days, ending on June 14, 2018—well in advance of the July 24, 2018 commencement of the administrative trial on the merits. Respondents point to no Part 3 administrative trial deadlines or other requirements that would require significant efforts or expenditures by Complaint Counsel or Respondents through the duration of the federal court preliminary injunction hearing. These facts further confirm that there is not “good cause” for a 90-day postponement of the administrative trial scheduled to begin on July 24, 2018.

**CONCLUSION**

Respondents have failed to demonstrate the good cause necessary to justify a 90-day stay of this administrative proceeding, as required by Rule 3.41. Absent such a demonstration, Respondents’ motion for a 90-day stay of the Part 3 hearing should be denied.

Dated: May 25, 2018

Respectfully Submitted

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 25, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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Dated: May 25, 2018

By: /s/ Michael Lovinger  
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*Counsel Supporting the Complaint*

**CERTIFICATE FOR ELECTRONIC FILING**

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

May 25, 2018

By: /s/ Michael Lovinger