



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ORIGINAL

In the Matter of)
)
)
Otto Bock HealthCare North America, Inc.,) Docket No. 9378
)
)
)
a corporation,)
)
)
)
Respondent.)
)
)

CERTIFICATION TO THE COMMISSION

I.

Trial in this matter is scheduled to begin on July 10, 2018. On June 19, 2018, pursuant to Rules 3.25(b) and (c) of the Commission's Rules of Practice, Respondent Otto Bock HealthCare North America, Inc. ("Respondent" or "Ottobock") filed a Motion to Withdraw Matter from Adjudication for Consideration of Proposed Settlement ("Motion"). Respondent submitted a Consent Proposal, which it asserts conforms to Rule 2.32, signed by Respondent, but not by Complaint Counsel. Respondent asks the Administrative Law Judge to make a written determination that there is a reasonable possibility of settlement and certify the Motion to the Commission with a recommendation that the Motion be granted. As set forth below, Respondent's request to certify its Motion to the Commission is GRANTED.

II.

The Complaint alleges that Ottobock's acquisition of FIH Group Holdings, LLC ("Freedom") violated Section 5 of the FTC Act and Section 7 of the Clayton Act based on alleged effects on competition in a market for "the manufacture and sale of microprocessor prosthetic knees ["MPKs"] to prosthetic clinics in the United States." Complaint ¶ 17. Respondent states that on May 29, 2018, { [REDACTED]

(“ ”), [REDACTED] (“ ”)}. Respondent further states that [REDACTED].

Respondent asserts that { [REDACTED]

} and that the { [REDACTED]

}.

Respondent’s Consent Proposal contains {[REDACTED]}

[REDACTED] }. Upon review, Respondent’s Consent Proposal is comprehensive and sufficiently thorough to enable the Commission to make a careful evaluation.¹

Respondent’s Motion details its understanding of the concerns that Complaint Counsel has raised regarding Respondent’s Consent Proposal. Complaint Counsel’s position on {[REDACTED]} is also set forth in Section III.E of Complaint Counsel’s Pre-Trial Brief, which asserts that [REDACTED]

}.

III.

Federal Trade Commission Rule 3.25(b) provides, in pertinent part: “A proposal to settle a matter in adjudication by consent shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose of considering a proposed settlement.” 16 C.F.R. § 3.25(b).

Federal Trade Commission Rule 3.25(c) provides, in pertinent part:

If a consent proposal is not in the form of a consent agreement executed by a respondent, does not otherwise conform to § 2.32, or has not been executed by complaint counsel, and the matter is pending before the Administrative Law Judge, he or she shall certify the motion and proposal to the Commission upon a written determination that there is a *reasonable possibility of settlement*. The certification may be accompanied by a recommendation to the Commission as to the disposition of the motion. The Administrative Law Judge shall make a determination as to whether to certify the motion

¹ The comprehensive details of Respondent’s Consent Proposal, and thus the basis for its Motion, are in marked contrast to the motion presented to the Commission in *In re Tronox*, 2018 FTC LEXIS 84 (Feb. 2, 2018). The Commission denied that motion, emphasizing that: “Rule 3.25 provides a procedure for the withdrawal of a matter from Part 3 adjudication for the Commission to consider a *specific* settlement proposal after an administrative complaint has been issued.” *Id.* at *2 (emphasis in original).

within 5 days after the filing of the motion. The filing of a motion under paragraph (b) of this section and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission shall so order. Upon certification of such motion, the Commission in its discretion may issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve for the purpose of considering the consent proposal.

16 C.F.R. § 3.25(c) (emphasis added).

Rule 3.25 does not define “reasonable possibility of settlement.”² “Reasonable possibility of settlement” is not logically interpreted to mean a reasonable possibility that Complaint Counsel will agree to the Consent Proposal. If Complaint Counsel had agreed to the Consent Proposal, a motion to withdraw from adjudication for consideration of the Consent Proposal would have been filed jointly, pursuant to the first clause of Rule 3.25(c).³ However, Rule 3.25(c) contains two mechanisms for a proposed consent agreement to be submitted to the Commission for consideration, thereby allowing the Commission to consider a Consent Proposal, notwithstanding Complaint Counsel’s lack of agreement. If a “reasonable possibility of settlement” means that a party has made a diligent attempt to settle the issues raised in the complaint, and, in the case of a challenged acquisition, has proposed { [REDACTED] }, and has presented sufficient, specific details to enable the Commission to evaluate the Consent Proposal, then there is a reasonable possibility of settlement in this case.

IV.

Having determined that there is a reasonable possibility of settlement, it is hereby ORDERED that, pursuant to Rule 3.25(c) of the Commission’s Rules of Practice, Respondent’s Motion to Withdraw Matter from Adjudication is CERTIFIED to the Commission. So that the Commission may consider the proposed settlement,⁴ this certification is with the

² A Lexis search did not reveal any Commission cases interpreting this term. In the Federal Register notice accompanying the 2009 change to Rule 3.25, the Commission stated that “[t]he previous ‘likelihood of settlement’ language imposed too strict a standard *given the important benefits that a consent agreement provides for an efficient resolution of a matter*,” and revised Rule 3.25 to require “that the ALJ shall certify the motion so long as he or she determines that there is a reasonable possibility of settlement.” 74 Fed. Reg. 20205, 20206 (FTC Final Rule) (May 1, 2009) (emphasis added).

³ “If a consent agreement accompanying the motion has been executed by one or more respondents and by complaint counsel, has been approved by the appropriate Bureau Director, and conforms to §2.32, and the matter is pending before an Administrative Law Judge, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section.” 16 C.F.R. § 3.25(c).

⁴ The Commission’s Rules of Practice contemplate that a matter is to be withdrawn from adjudication to enable the Commission to consider a proposed settlement. *See* 16 C.F.R. § 3.25(b) (stating that motion for withdrawal from adjudication is “for the purpose of considering” a proposed settlement); § 3.2 (“The term [adjudicative proceedings] does not include . . . negotiations for and Commission consideration of the entry of consent orders.”).

recommendation that the Commission grant Respondent's Motion to Withdraw Matter from Adjudication for Consideration of Proposed Settlement.⁵

ORDERED:

D. Michael Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: June 22, 2018

⁵ Furthermore, the Commission, after review, consideration, and possible communications or negotiations with Respondent, might decide to accept the settlement proposal, in which case the pending litigation would be resolved without the expense of a trial. “[T]he public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary.” *In the Matter of Sanford Health*, 2017 WL 6604532, at *1 (Dec. 21, 2017) (concluding that a limited continuance to allow time for resolution of the judicial proceedings was warranted). Therefore, it is in the public interest to withdraw this matter from adjudication pending the Commission’s determination on the Consent Proposal. It should be noted, also, that Respondent and Complaint Counsel have entered into a Hold Separate and Asset Maintenance Agreement. (Exhibit A to Motion). Thus, withdrawal of this matter from adjudication to allow the Commission time to consider the Consent Proposal would not adversely affect the status quo.