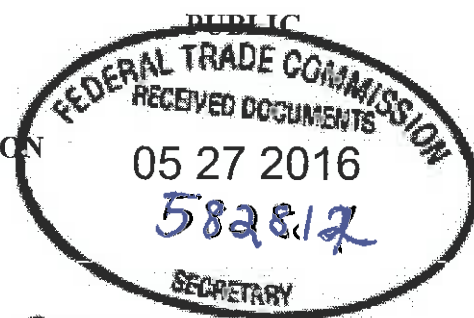


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney



ORIGINAL

In the Matter of

The Penn State Hershey Medical Center,
a corporation,

and

Pinnacle Health System,
a corporation.

Docket No. 9368

PUBLIC DOCUMENT

**JOINT EXPEDITED MOTION FOR
CONTINUANCE OF THE ADMINISTRATIVE HEARING**

Complaint Counsel and Respondents, Penn State Hershey Medical Center and Pinnacle Health System, jointly seek to continue the administrative hearing in this matter until 21 days after the U.S. Court of Appeals for the Third Circuit issues its mandate resolving the Commission's currently pending appeal in the companion federal-court litigation. The parties also seek a corresponding extension of all pre-hearing deadlines. The parties respectfully request that the Commission rule on this motion expeditiously, so that they can plan and take any necessary steps in light of the Commission's decision.

As required by Rules 3.21(c) and 3.41(f), there is "good cause" for granting a stay here. As the Commission knows, the Third Circuit has enjoined Respondents' planned combination pending appeal. The court has also set the appeal for expedited consideration, with briefing to conclude by June 17 and oral argument (if needed) calendared for July 26. The Third Circuit's resolution of the expedited appeal could end this case and moot the administrative hearing. If Respondents lose on appeal, they will abandon the combination. If the Commission loses on appeal but chooses to go forward with the hearing, there is no harm in waiting until that point to commence the hearing: because the combination has been enjoined pending appeal, the parties will be in the same position then that they are in now. On the other hand, conducting the hearing *before* the Third Circuit rules would impose tremendous burdens not only on the parties but also

on the many third parties involved in this proceeding. Given all this, there is no reason to go forward with the hearing before the Third Circuit rules, and there are very good reasons to continue the hearing until after that point.

BACKGROUND

The Commission initiated this administrative proceeding on December 7, 2015. Two days later, it filed a companion suit for preliminary injunctive relief in the U.S. District Court for the Middle District of Pennsylvania. *FTC v. Penn State Hershey Med. Ctr.*, No. 1:15-cv-2362 (M.D. Pa. Dec. 9, 2015), ECF No. 1. The parties conducted extensive discovery in the federal litigation, collectively taking nearly forty depositions and producing tens of thousands of documents. The district court then held a five-day evidentiary hearing, during which the parties presented live testimony from 16 witnesses.

On May 9, 2016, the district court issued a memorandum opinion and order denying the Commission's request for preliminary injunctive relief. ECF No. 131.

On May 10, the Commission filed a notice of appeal with the Third Circuit. ECF No. 132. Two days later, it filed a motion asking the Third Circuit to enjoin the transaction pending appeal. FTC's Corrected Emergency Mot. For Inj. Pending Appeal, *FTC v. Penn State Hershey Med. Ctr.*, No. 16-2365 (3d Cir. May 12, 2016). The Third Circuit granted that motion on May 24. Order at 2 (3d Cir. May 24, 2016). The court also expedited the appeal: briefing will conclude by June 17, and oral arguments (if needed) will be held on July 26. *Id.*; Amended Calendaring Notice (3d Cir. May 26, 2016).

As things currently stand, the administrative hearing is set to begin on June 21, based on the Commission's order granting the parties' joint request to continue the hearing to that date. *In re Penn State Hershey Med. Ctr.*, No. 9368, Comm'n Order Granting Continuance (May 26, 2016), <https://goo.gl/XKTNo3>. Because that prior joint motion was made before the Third Circuit granted Complaint Counsel's motion for an injunction, the parties requested a continuance only to June 21. In its Order, however, the Commission noted that granting that request "would provide [the parties] with needed time to determine how to proceed in this

administrative adjudication *and whether to make any further motions before the Commission.*”
Id. at 1 (emphasis added).

ARGUMENT

Under the Rules of Practice, the Commission has authority to stay the administrative hearing upon a showing of “good cause.” 16 C.F.R. §§ 3.21(c), 3.41(f). Good cause exists here, as the value of conducting the administrative hearing before the Third Circuit rules is greatly outweighed by the substantial likelihood that the Third Circuit’s ruling will render the hearing moot, and by the significant—and likely unnecessary—burden that the hearing would impose on Complaint Counsel, Respondents, and the many non-party witnesses involved in this proceeding.

The Third Circuit’s decision will almost certainly resolve this dispute:

- *First*, if the Third Circuit reverses the district court’s decision and orders that the combination be enjoined pending the outcome of the administrative hearing, Respondents will abandon the combination, thus mooting the hearing.
- *Second*, if the Third Circuit affirms the district court’s decision denying injunctive relief, Respondents will move to have this matter withdrawn from administrative adjudication under Rule 3.26(b). If the Commission abandons the administrative complaint, the hearing would be moot.
- *Third*, if the Third Circuit affirms but the Commission—after withdrawing the matter from adjudication—nevertheless reinstates the matter and moves forward with the hearing, the Commission will not have suffered any harm whatsoever from granting this requested continuance. Because the Third Circuit has enjoined the combination pending appeal, the parties would be in the same position then that they are in right now.

Given these possibilities, there is simply no reason for commencing the administrative hearing before the Third Circuit rules.

There are, on the other hand, very good reasons *not* to proceed with the hearing until after the Third Circuit issues its decision. As the parties have jointly recognized in their prior motions for continuances, proceeding with the hearing would require substantial preparations and expenses on behalf of both Complaint Counsel and Respondents; going forward now would create the risk that those preparations and expenses will ultimately be rendered meaningless by the Third Circuit’s decision. In fact, moving forward is even less justified now than it was at the time of the parties’ last joint request for a continuance, given that, as things currently stand, the

parties would be preparing for the administrative hearing at the same time that they are engaged in briefing the appeal on an expedited basis.

This substantial burden, moreover, would not impact the parties alone. Rather, as the parties' prior motions have noted, the burden of moving forward would be especially onerous for the many third parties involved in this litigation. The parties have identified 66 third-party witnesses they may call to testify; proceeding with the hearing raises the risk that those many individuals will incur substantial out-of-pocket expenses—and take time out of their schedules to travel to Washington, D.C.—all in furtherance of a proceeding that will likely be rendered moot. The parties have also obtained discovery from 53 non-parties that would need to expend money and effort reviewing their materials, identifying confidential materials, and potentially filing motions for *in camera* treatment. There is no basis for significantly burdening so many third parties in furtherance of an administrative hearing that will probably be mooted—especially given that simply delaying the hearing will not impose any countervailing harm at all.

Finally, the prudence of awaiting the Third Circuit's decision is further confirmed by the fact that that court has agreed to treat the appeal on an expedited basis and has directed the matter to be fully briefed three weeks from now (on June 17). There is every reason for the Commission to wait the relatively short amount of time it will take the Third Circuit to resolve the Commission's appeal, rather than substantially—and, very likely, unnecessarily—burdening the parties and third parties before the Third Circuit's decision issues.

CONCLUSION

Given that the Third Circuit's decision is very likely to resolve this matter; given that under the only scenario in which the court's decision does not resolve this matter, the Commission would not be prejudiced by a brief stay; and given the tremendous expense and burden to both parties and third parties in having to conduct the administrative hearing, Complaint Counsel and Respondents jointly submit that the interests of all parties and third parties are best served by allowing the Third Circuit to resolve the expedited appeal before the administrative hearing commences. The parties therefore jointly and respectfully request that the Commission stay the

administrative hearing until 21 days after the Third Circuit issues its mandate in the pending appeal, and that the Commission grant a corresponding extension of all pre-hearing deadlines.

Dated: May 27, 2016

Respectfully submitted,

/s/ William H. Efron

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

The Penn State Hershey Medical Center,
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**[PROPOSED] ORDER GRANTING
RESPONDENTS' MOTION TO STAY THE ADMINISTRATIVE HEARING**

This matter having come before the Commission upon Complaint Counsel and Respondents' Joint Expedited Motion For Continuance of The Administrative Hearing, and having considered the positions of all parties, it is hereby ORDERED that the administrative hearing is continued until 21 days after the United States Court of Appeals for the Third Circuit issues its mandate in the Commission's pending appeal, *FTC v. Penn State Hershey Medical Center*, No. 16-2365.

SO ORDERED.

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W., Rm. H-113
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The Honorable D. Michael Chappell
Chief Administrative Law Judge
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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 documents that is available for review by the parties and the adjudicator.

Dated: May 27, 2016

/s/ Adrian Wager-Zito
Adrian Wager-Zito

Notice of Electronic Service

I hereby certify that on May 27, 2016, I filed an electronic copy of the foregoing Joint Expedited Motion for Continuance of the Administrative Hearing, with:

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I hereby certify that on May 27, 2016, I served via E-Service an electronic copy of the foregoing Joint Expedited Motion for Continuance of the Administrative Hearing, upon:

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I hereby certify that on May 27, 2016, I served via other means, as provided in 4.4(b) of the foregoing Joint Expedited Motion for Continuance of the Administrative Hearing, upon:

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