



**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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

In the Matter of)
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 Advocate Health Care Network,)
 a corporation;)
)
 Advocate Health and Hospitals Corporation,)
 a corporation;)
)
 and)
)
 NorthShore University HealthSystem,)
 a corporation.)
_____)

Docket No. 9369

PUBLIC DOCUMENT

**JOINT EXPEDITED MOTION
FOR CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS**

Complaint Counsel and Respondents, Advocate Health Care Network (“AHCN”), Advocate Health and Hospitals Corporation (“AHHC,” and together with AHCN, “Advocate”), and NorthShore University HealthSystem (“NorthShore”), jointly seek to continue the administrative proceedings until 30 days after the U.S. Court of Appeals for the Seventh Circuit issues a 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 as there are pre-trial deadlines, such as those for expert depositions and rebuttal reports, beginning July 5.

As required by Rules 3.21(c) and 3.41(f), there is good cause for granting a stay here. On June 17, 2016, the U.S. District Court for the Northern District of Illinois enjoined Respondents' proposed transaction pending appellate review of the District Court's order on the motion for preliminary injunction. ECF No. 482. The Parties have requested expedited briefing before the Seventh Circuit, each proposing their own briefing schedule. The Seventh Circuit's order establishing an expedited briefing schedule and oral argument is currently pending. However, the Seventh Circuit's resolution of the expedited appeal could end this case and moot the administrative hearing. If Respondents lose on appeal, they intend to abandon the proposed transaction. 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 proposed transaction has been enjoined pending appeal, the Parties will be in the same position that they are in now. On the other hand, conducting the hearing before the Seventh Circuit rules would impose burdens not only on the Parties, but also on the many non-parties involved in this proceeding. Given all this, there is no reason to go forward with the hearing before the Seventh Circuit rules, and there are very good reasons to continue the hearing until after that point.

BACKGROUND

An evaluation of this motion requires a brief summary of the status of the judicial proceedings brought by the FTC and the status of the Part 3 proceedings now pending before the Chief Administrative Law Judge.

The Commission initiated this administrative proceeding on December 17, 2015. Four days later, it filed a companion suit for preliminary injunctive relief in the U.S. District Court for the Northern District of Illinois. *FTC et al. v. Advocate Health Care Network et al.*, No. 1:15-cv-11473 (N.D. Ill.). The District Court then held a nine-day evidentiary hearing.

On June 14, 2016, the District Court issued a memorandum opinion and order denying the Commission's request for preliminary injunctive relief. ECF No. 473.

On June 15, 2016, the Commission filed a notice of appeal with the Seventh Circuit. ECF No. 474. On June 16, 2016, the Commission filed a Motion for Injunction Pending Appeal with the District Court. ECF No. 478. On June 17, 2016, the District Court granted the Commission's Injunction Pending Appeal. ECF No. 482.

On June 20, 2016, Advocate and NorthShore filed a motion to expedite with the Seventh Circuit and proposed a briefing schedule that would conclude in July 2016.

On June 21, 2016, Complaint Counsel filed a separate request to expedite with the Seventh Circuit and proposed a briefing schedule that would conclude in August 2016.

The Parties have each separately requested that the Seventh Circuit schedule the case for oral argument as soon as possible after the conclusion of the briefing.

Currently, the administrative hearing is set to begin on July 11, 2016, based on the Commission's order granting the Parties' joint request to continue the hearing to that date. *See* Exhibit A, Commission Order Granting Continuance. Because that prior joint motion was made before the District Court ruled on the preliminary injunction and before the District Court granted Complaint Counsel's motion for an injunction pending appeal, the Parties requested a continuance only to July 11.

ARGUMENT

Under Rule 3.41 of the Commission's Rules of Practice, "[t]he Commission, upon a showing of good cause, may order a later date for the evidentiary hearing to commence." 16 C.F.R. § 3.41(b). Here, good cause exists for a further continuance of the commencement of the administrative trial because the value of conducting the administrative hearing before the Seventh Circuit's ruling is outweighed by the likelihood that the Seventh Circuit's ruling will render the hearing moot, and because of the burden that the hearing would impose on Complaint Counsel, Respondents, and the many non-party witnesses involved in this proceeding.

The Seventh Circuit's decision will resolve this dispute in the following scenarios:

- *First*, if the Seventh Circuit reverses the District Court's decision and orders that the proposed transaction be enjoined pending the outcome of the administrative hearing, Respondents intend to abandon the proposed transaction, thus mooting the hearing.
- *Second*, if the Seventh 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 Seventh 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 District Court has enjoined the proposed transaction 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 Seventh Circuit rules.

There are, on the other hand, very good reasons *not* to proceed with the hearing until after the Seventh 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 Seventh Circuit's decision.

This 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 non-parties involved in this litigation. The Parties have identified dozens of non-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 25 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 burdening so many non-parties in furtherance of

an administrative hearing that will likely be mooted—especially given that simply delaying the hearing will not impose any countervailing harm.

Finally, the prudence of awaiting the Seventh Circuit’s decision is further confirmed by the Parties’ separate requests to treat the appeal on an expedited basis. There is every reason for the Commission to wait the relatively short amount of time it will take the Seventh Circuit to rule on the Commission’s appeal, rather than unnecessarily burdening the Parties and non-parties before the Seventh Circuit’s decision issues.

Conclusion

Given that the Seventh Circuit’s decision is likely to resolve this matter; given that under a scenario in which the Seventh Circuit’s decision does not resolve this matter, the Commission would not be prejudiced by a brief stay; and given the expense and burden to both the Parties and non-parties in having to conduct the administrative hearing, Complaint Counsel and Respondents jointly submit that the interests of the Parties and non-parties are best served by allowing the Seventh Circuit to resolve the expedited appeal before the administrative hearing commences. The Parties therefore jointly and respectfully request that the Commission stay the administrative proceedings until 30 days after the Seventh Circuit issues its mandate in the pending appeal, and that the Commission grant a corresponding extension of all pre-hearing deadlines.

Dated: June 24, 2016

/s/ Robert McCann

Robert W. McCann, Esq.
Kenneth M. Vorrasi, Esq.
Drinker Biddle & Reath LLP
1500 K Street, NW
Washington, DC 20005
Telephone: (202) 842-8800
Email: Robert.McCann@dbr.com
Email: Kenneth.Vorrasi@dbr.com

/s/ Robert Robertson

J. Robert Robertson, Esq.
Leigh Oliver, Esq.
Hogan Lovells US LLP
555 13th Street, NW
Washington, DC 20001
Telephone: (202) 637-5774
Email: robby.robertson@hoganlovells.com

*Counsel for Respondents Advocate Health Care
Network and Advocate Health and Hospitals
Corporation*

/s/ David Dahlquist

David E. Dahlquist, Esq.
Michael Pullos, Esq.
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
Telephone: (312) 558-5660
Email: Ddahlquist@winston.com

*Counsel for Respondent NorthShore University
HealthSystem*

Respectfully submitted,

/s/ Thomas Greene

J. Thomas Greene, Esq.
Kevin Hahm, Esq.
Sean P. Pugh, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-5196
Facsimile: (202) 326-2286
Email: tgreene2@ftc.gov
Email: khahm@ftc.gov
Email: spugh@ftc.gov

Counsel Supporting the Complaint

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
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[PROPOSED] ORDER GRANTING JOINT EXPEDITED MOTION FOR A CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS

Good cause having been shown,

IT IS HEREBY ORDERED THAT Complaint Counsel’s and Respondents’ Joint Expedited Motion For Continuance of the Administrative Proceedings is **GRANTED**; and Commencement of the evidentiary hearing and all other proceedings in this matter are continued until 30 days after the United States Court of Appeals for the Seventh Circuit issues its mandate in the Commission’s pending appeal, *FTC et al. v. Advocate Health Care Network et al.*, No. 16-2492.

By the Commission.

Donald S. Clark
Secretary

ISSUED:

EXHIBIT A

In light of the foregoing, we find there is good cause here to grant the requested continuance. Accordingly,

IT IS HEREBY ORDERED that the evidentiary hearing shall commence on July 11, 2016, and all related pre-hearing deadlines are extended by 26 days.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: June 2, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2016, I caused the foregoing document to be electronically filed with the Secretary of the Commission using the Federal Trade Commission's e-filing system, causing the document to be served on all of the following registered participants:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW Rm. H-110
Washington, DC 20580

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

Robert W. McCann, Esq.
Kenneth M. Vorrasi, Esq.
Drinker Biddle & Reath LLP
1500 K Street, N.W.
Washington, DC 20005
Telephone: (202) 842-8800
Email: Robert.McCann@dbr.com
Email: Kenneth.Vorrasi@dbr.com

J. Robert Robertson, Esq.
Leigh Oliver, Esq.
Hogan Lovells US LLP
555 13th Street, NW
Washington, DC 20004
Telephone: (202) 637-5774
Email: robby.robertson@hoganlovells.com

*Counsel for Respondents Advocate Health
Care Network and Advocate Health and
Hospitals Corporation*

Dan K. Webb
David E. Dahlquist, Esq.
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
Telephone: (312) 558-5660
Email: Ddahlquist@winston.com

*Counsel for Respondent NorthShore University
HealthSystem*

CERTIFICATE FOR ELECTONIC 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.

June 24, 2016

By: s/ Emily Bowne