

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



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 580889
SECRETARY

PUBLIC DOCUMENT

RESPONDENTS' MOTION TO STAY THE ADMINISTRATIVE HEARING

Pursuant to Commission Rules 3.22 and 3.41(f), Respondents Advocate Health Care Network and Advocate Health and Hospitals Corporation (together, "Advocate") and NorthShore University Health System ("NorthShore," collectively "Respondents"), hereby move to stay the administrative hearing until 60 days after entry of a ruling on the Federal Trade Commission's ("FTC" or "Commission") complaint for preliminary injunctive relief before the U.S. District Court for the Northern District of Illinois in *Federal Trade Commission v. Advocate Health Care Network*, No.1:15-cv-11473 ("Federal Action").

During the initial pretrial scheduling conference held in this matter on January 20, 2016, the Court reminded the parties of the availability of FTC Rule 3.41(f), under which any party may request a stay of the administrative adjudication in light of the pendency of a collateral federal court action upon a showing of good cause. 16 C.F.R. § 3.41(f). Respondents submit that good cause exists to stay the administrative hearing in this matter due to the fact that the United State District Court in the Federal Action will likely issue its decision *during* the hearing

in this matter, which will significantly impact, and may even completely moot, the above-captioned proceeding.

Irrespective of what the District Court decides, the court's ruling is likely to have a significant impact on the proceedings in this matter. Should the federal court deny the preliminary injunction, not only does Federal Trade Commission ("FTC" or "Commission") policy require it to consider whether to withdraw the complaint, but the FTC nearly always chooses to do so. Moreover, Respondents would have multiple avenues by which to obtain an immediate stay of this proceeding while informally or formally petitioning the Commission for dismissal. On the other hand, should the federal court grant the preliminary injunction, it is unlikely that the Respondents will continue to litigate the FTC's claims in this proceeding.

Nonetheless, the FTC opposes Respondents' motion. As explained below, however, good cause exists for a short stay of the administrative hearing because there is a high likelihood of significantly wasting the Court's, the FTC's, and the Respondents' time and resources preparing this matter for hearing and conducting the hearing when that hearing is unlikely to ever be completed. Further, in the unlikely event that either set of parties here decides to continue with the administrative hearing despite the result in the Federal Action, little will be lost. Discovery continues apace in both actions,¹ and the parties will be able to swiftly prepare for the administrative hearing that will then be scheduled for 60 days after the decision in the Federal Action.

BACKGROUND

On December 21, 2015, the FTC filed a complaint against Respondents in the U.S. District Court for the Northern District of Illinois pursuant to Section 13(b) of the Federal Trade

¹ Unlike in many requests, Respondents here do not request a stay of discovery in this case because discovery is significantly duplicative between the Federal Action and this proceeding and is ongoing at this time.

Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, seeking a temporary restraining order and preliminary injunction preventing the merger that is the subject of this administrative proceeding until final resolution of the merits in this proceeding. Compl. for Temp. Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the FTC Act, *FTC v. Advocate Health Care Network*, Civil Action No. 15-cv-11473 (N.D. Ill. Dec. 21, 2016). The preliminary injunction hearing is scheduled to begin on April 6, 2016 and run for six non-consecutive trial days, concluding on April 15, 2016. Joint Stipulated Case Management Order, ¶ 25, *FTC v. Advocate Health Care Network*, Civil Action No. 15-cv-11473 (N.D. Ill. Jan. 12, 2016). The parties' proposed findings of fact and conclusions of law are due no later than fourteen calendar days after the close of the hearing, *i.e.*, April 29, 2016. *Id.* ¶ 26. A final decision is expected within approximately 30 to 45 days thereafter.

The administrative hearing in this action is set to begin on May 24, 2016. While the parties do not yet know the length of the administrative hearing, the FTC Rules of Practice and Procedure permit up to 210 hours of hearing time, amounting to thirty trial days, at seven trial hours per day. *See* 16 C.F.R. § 3.41(b). In other words, if the administrative hearing is necessary, it is likely to extend until the first week of July 2016 and, therefore, likely to be ongoing when the court rules in the Federal Action.

Congress has previously expressed concern that the FTC uses the pressure of an impending Part III proceeding to the prejudice of potential merging parties.² The FTC Chairwoman has disputed this concern in testimony before the Senate Judiciary Subcommittee

² *See* Chairwoman Ramirez Testimony Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights S. 2102, The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015" at 12 (Oct. 7, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/810871/151007smarteracttestimony.pdf.

on Antitrust and testified that the merging parties receive a robust evidentiary and legal hearing in federal court:

[In federal court, t]he FTC, like DOJ, is required to make a robust evidentiary and legal showing that the transaction would likely be anticompetitive in order to obtain a preliminary injunction. As Assistant Attorney General William Baer has stated, “any effort to seek a federal court injunction against a proposed merger requires the FTC or the division to present a convincing factual and legal basis for competitive concern in order to secure appropriate relief.”

Id. at 13. The Chairwoman further emphasized this point, testifying that “federal district courts closely scrutinize cases brought by both agencies” and that, in a recent exemplary case, “the district court engaged in a detailed examination of the [relevant] industry, the parties’ proposed product and geographic market definitions, market shares and concentration, existing and potential competitors, the likely effects of the proposed transaction on pricing and other dimensions of competition, and the claimed efficiencies from the transaction.” *Id.*³

Based on the current position of the Commissioners, the law, and basic fairness, we respectfully suggest that Respondents, as well as this Court, should be provided the full opportunity to obtain the specific ruling and findings of the U.S. District Court before the Part III hearing begins. Staying the Part III hearing for a brief period of time does not prejudice any party to this proceeding. Rather, the brief stay will better inform the parties, as well as the Court, of the issues in this proposed transaction and potentially moot the entire proceeding.

³ Commissioner Ohlhausen has commented that she shares the concerns of the drafters of the SMARTER Act that the FTC may improperly use leverage of Part III proceedings when a merger case is in federal court. *See* Commissioner Ohlhausen, “A SMARTER Section 5” (Sept. 25, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/804511/150925smartersection5.pdf.

ARGUMENT

I. The Administrative Proceeding Should Be Stayed as It Is Likely to Be Mooted By the Federal Action

Based on the schedules in the respective actions, the decision in the Federal Action is expected to be issued during or immediately following the hearing in the administrative action and moot the administrative hearing. The hearing in this matter is set to begin on May 24, 2016, and a decision from the Federal Action is expected in approximately early June 2016—meaning there is a substantial likelihood that the court in the Federal Action will issue its decision *during the administrative hearing* in this matter.

The FTC Rules of Practice allow the Commission to stay proceedings for “good cause,” pending a U.S. District Court proceeding. 16 C.F.R. § 3.41(f). This is consistent with the practice in other courts.⁴ While the Commission has denied stay requests in the past,⁵ the nature of the schedules in this matter as well as the Commission’s expected change of position on its proceeding after a district court’s denial of preliminary relief makes this case different and warrants an assessment of whether the district court’s proceeding will “substantially affect . . . or be dispositive of the issues.” *Bechtel Corp.*, 544 F.2d at 1215. In addition, the fact that Respondents are requesting a stay only of the hearing, and not of discovery or any other scheduling order deadlines, distinguishes Respondents’ request.⁶ Respondents thus submit that

⁴ “In the exercise of its sound discretion, a court may hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues.” *Bechtel Corp. v. Local 215, Laborers’ Int’l Union of N. Am., AFL-CIO*, 544 F.2d 1207, 1215 (3d Cir. 1976); *accord American Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937).

⁵ See *In re Whole Foods Market, Inc.*, Order Amending Scheduling Order and Denying Respondent’s Motion to Stay Proceeding (Dec. 19, 2008); *In re Inova Health System Foundation*, Order Denying Respondents’ Motion to Stay Administrative Proceedings (May 29, 2008).

⁶ See *In re Arch Coal, Inc., et al.*, Docket No. 9316, Order Denying Motion to Stay Proceeding or to Stay Discovery (June 2, 2004) (denying request for a stay of the administrative proceeding *in its entirety*); *In re Inova Health System Foundation*, Order Denying Respondents’ Motion to Stay Administrative Proceedings (May 29, 2008) (denying motion to “stay *discovery and all other aspects* of this administrative proceeding, pending resolution of the preliminary injunction”).

the Court would have good cause to issue a temporary stay, which will not prejudice the FTC and will serve the interests of justice.

In the event that the District Court denies the FTC's preliminary injunction, the FTC is required to assess, on a case-by-case basis, whether to move forward with its administrative action. *See* Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following Denial of a Preliminary Injunction, 160 Fed. Reg. 39,741, 39,743 (1995). In nearly every case since 1995 where a district court refused to issue a preliminary injunction, the FTC has subsequently abandoned their administrative complaint. *See, e.g., In re Steris Corp.*, Docket No. 9365, Order Returning Matter to Adjudication and Dismissing Complaint (Oct. 30, 2015); *In re Laboratory Corp. of America, et al.*, Docket No. 9345, Order Returning Matter to Adjudication and Dismissing Complaint (Apr. 21, 2011); *In re Foster*, Docket No. 9323, Order Returning Matter to Adjudication and Dismissing Complaint (Oct. 2, 2007); *In re Arch Coal, Inc.*, Docket No. 9316, Statement of the Commission (June 13, 2005); *In re Tenet Healthcare Corp.*, Docket No. 9289, Order Dismissing Complaint (Dec. 23 1999); *In re Butterworth Health Corp.*, Docket No. 9283, Order Granting Motion to Dismiss (Sept. 25, 1997); *In re Freeman Hospital*, Docket No. 9273, Order Dismissing Complaint (Nov. 30, 1995).

In addition, if a preliminary injunction is denied in the Federal Action, Respondents have two avenues by which to request the FTC's reconsideration of whether continuing with the administrative proceeding is in the public interest, both of which immediately suspend the administrative proceeding. *First*, Respondents are permitted to move for withdrawal of the adjudicative proceeding. 16 C.F.R. § 3.26(c). Two days after a motion for withdrawal is filed, the adjudicative proceeding is automatically withdrawn and the parties are permitted to informally present their views to the Commission. *Id.*; Debbie Feinstein, *Changes to*

Commission Rule 3.26 re: Part 3 proceedings following federal court denial of a preliminary injunction, Federal Trade Commission, <https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/changes-commission-rule-326-re-part-3-proceedings> (Mar. 16, 2015). *Second*, Respondents may move to dismiss the administrative complaint, automatically staying the case until the Commission rules on the motion. *See* 16 C.F.R. § 3.26(d). In either case, if Respondents prevail in the Federal Action, it is highly unlikely that this proceeding will continue to trial.

In the event that the District Court grants a preliminary injunction, private litigants often similarly reevaluate whether to proceed, as is evidenced by the number of respondents who have abandoned merger plans in the wake of an adverse district court ruling. *See, e.g., In re Sysco Corp.*, Docket No. 9364, Order Dismissing Complaint (June 30, 2015) (“Respondents have abandoned their proposed merger.”); *In re OSF Healthcare System*, Docket No. 9349, Order Dismissing Complaint (Apr. 13, 2012) (“Respondents are abandoning the proposed affiliation.”); *In re Inova Health System Foundation*, Docket No. 9326, Order Dismissing Complaint (June 17, 2008) (“Respondents have abandoned the transaction.”). Respondents would undoubtedly similarly reevaluate proceeding here in light of a preliminary injunction and likely abandon the transaction.

Therefore, the outcome of the district court proceeding is almost guaranteed to significantly disrupt, and in all likelihood moot, the instant proceedings. Recognizing this, administrative judges, upon a request and showing of good cause, have previously stayed administrative proceeding pending the resolution of the federal action. *See, e.g., In re Whole Foods Market, Inc.*, Docket No. 9324, Order Staying Administrative Proceedings (Aug. 7, 2007) (“In light of the pendency of the federal court proceedings, the Commission, as a matter of

discretion, has determined to stay these proceedings.”). This court should do so as well. A stay will also prevent any need to suspend the administrative hearing in the middle of the trial to allow the parties to consider whether to continue with the hearing. *See* 16 C.F.R. § 3.41(b) (hearings should proceed without suspension).

Most importantly, a short stay will avoid a vast waste of this Court’s and the parties’ resources. There is little reason to proceed, jeopardizing resources and economy, when a short stay will ensure that the Court, the FTC, and Respondents will only invest the significant time and resources required for a thirty-day hearing if the hearing will actually matter. Little harm will result from the stay even if the parties decide to continue with the hearing after resolution of the Federal Action. The parties will be fully capable of quickly preparing for a full administrative hearing.

Accordingly, good cause exists for entry of a short stay of this administrative hearing in interest of judicial economy and efficiency given the unlikelihood that a full administrative hearing in this proceeding ever occurs.

CONCLUSION

For these reasons, Respondents respectfully request a stay of the administrative hearing in this matter until 60 days after the U.S. District Court for the Northern District of Illinois enters its decision on the FTC’s currently pending complaint for preliminary injunctive relief.

Dated: February 5, 2016

Respectfully submitted,

s/ David E. Dahlquist

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2016, I caused a true and accurate copy of the foregoing to be served electronically through the FTC's e-filing system and on February 5, 2016,

I caused a true and accurate copy of the foregoing to be served as follows:

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s/ Laurie T. Curnes

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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: February 5, 2016

s/ Laurie T. Curnes

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Notice of Electronic Service

I hereby certify that on February 05, 2016, I filed an electronic copy of the foregoing Respondents' Motion to Stay the Administrative Hearing, with:

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I hereby certify that on February 05, 2016, I served via E-Service an electronic copy of the foregoing Respondents' Motion to Stay the Administrative Hearing, upon:

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