PUBLIC

ORIGINAL

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

In the Matter of	)	
Advocate Health Care Network, a corporation;	)	**Docket No. 9369**
Advocate Health and Hospitals Corporation, a corporation;	)	
and	)	
NorthShore University HealthSystem, a corporation.	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STAY[1]

Complaint Counsel respectfully opposes the motion to stay submitted by Respondents Advocate Health Care Network and Advocate Health and Hospitals Corporation (together, "Advocate") and NorthShore University HealthSystem ("NorthShore").

INTRODUCTION

In 2009, the Commission amended its Part 3 Rules, expressly committing itself to expedited administrative litigation. The 2009 Amendments included a new rule providing that an administrative hearing in a merger case "shall be" held five months after the complaint is filed. The Amendments also deleted an existing rule that had endorsed the stay of Part 3 lawsuits pending decisions in collateral, preliminary injunction cases. Instead, pursuant to the post-2009

[1] Under Rule 3.21(c), the Commission has the exclusive authority to "order a later date for the evidentiary hearing than the one specified in the complaint," and only upon a showing of good cause. Therefore, we request that, pursuant to Rule 3.22(a), the Court certify Respondents' motion to the Commission for its consideration.

rules, administrative proceedings should only be stayed for "good cause." *See* Rule 3.41(f)(i). The Commission adopted these and other measures in response to widespread criticism – both by businesses and by the bar – that the Commission's stop-and-go Part 3 proceedings were "too protracted."[2]

Advocate and NorthShore have moved to stay the administrative hearing in this case, scheduled for May 24, 2016, until 60 days after a ruling in the preliminary injunction litigation. They have not shown good cause for a stay. Respondents do not explain how this case warrants a departure from the 2009 Amendments and cannot distinguish this case from the pre-2009 cases in which motions to stay were denied. Respondents also cannot distinguish this case from any other merger case in which a preliminary injunction is sought and the district court has not yet issued a decision.

Because Respondents have failed to show "good cause" for staying the Part 3 hearing their motion to stay should be denied.

ARGUMENT

I. Under the Part 3 Rules and Past Precedent, Respondents Must Show "Good Cause" for a Stay of the 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 section 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,

[2] 73 Fed. Reg. 58832 (Oct. 7, 2008) (proposed rules), *citing, e.g.*, J. Robert Robertson, *FTC Part 3 Litigation*, 20 Antitrust 12 (Spring 2006).

pursuant to §3.11(b)(4)…." And, Rule 3.41(f) provides that the 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…."

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.[3] One other rule change in the 2009 Amendments is especially important here. Until 2009, Rule 3.51(a) had provided that, "The ALJ may stay the administrative proceeding until resolution of the collateral federal court proceeding." 16 C.F.R. § 3.51(a) (2008). The 2009 Amendments deleted this provision and the applicable rules permit a stay only on a showing of good cause.

Obviously, the Commission retains its inherent authority to stay a Part 3 proceeding, but has done so in two types of merger cases since 2009. In *Ardagh Group S.A.*, Docket No. 9356 (Dec. 13, 2013), the Commission stayed an administrative hearing because a settlement was imminent and the parties jointly requested a stay; the parties had stipulated to a preliminary injunction.[4] In *Phoebe Putney Health Systems, Inc*., Docket No. 9348 (July 15, 2011), the Commission granted the respondents' unopposed motion to stay the administrative proceedings, while the Eleventh Circuit reviewed, on an expedited basis, the district court's decision denying the motion for a preliminary injunction based on the state action doctrine.[5] Since 2009, no Part 3

[3] 74 Fed. Reg. 1807 (Oct 7, 2008), *see generally* 73 Fed. Reg. 58832 (Oct. 7, 2008)(proposed rules); 74 Fed. Reg. 1804 (January 13, 2009)(interim final rules).
[4] *See* Order, *Ardagh Group S.A.*, Docket No. 9356 (Dec. 18, 2013), at https://www.ftc.gov/sites/default/files/documents/cases/131218ardaghorder.pdf The parties had stipulated to a preliminary injunction in the federal litigation. *See* Stipulation and Order dated November 8, 2013, *FTC v. Ardagh Group et al.*, Case No. 13-CV-1021 (BJR).
[5] Order, *Phoebe Putney Health Systems, Inc.*, Docket No. 9348 (July 15, 2011), at https://www.ftc.gov/system/files/documents/cases/130222ccnoa_0.pdf. It is important to note, however, that in the past, even motions to stay pending an appeal have been denied. *Butterworth Health Corp*., 1997 FTC Lexis 97 (1997).

merger case has been stayed – indeed, no party has even moved to stay any Part 3 merger proceeding – pending a district court's decision on a preliminary injunction motion.

Significantly, motions to stay Part 3 proceedings were regularly denied even before 2009. In *Inova Health Systems Foundation*, Docket No. 9326 (2008), as in this case, the Commission had issued the federal complaint for preliminary injunction and the administrative complaint on the same day, and had scheduled the Part 3 hearing to commence several months later. The respondents' motion to stay the Part 3 case was denied because, even before the 2009 rulemaking, the Commission's "most recent practice is not to stay the proceedings pending adjudication of the preliminary injunction."[6] Likewise, in *Arch Coal, Inc.*, Docket No. 9316 (2004), the administrative law judge denied complaint counsel's motion for just an eight-week stay of the Part 3 proceeding pending the federal court's ruling on a motion for preliminary injunction.[7]

The only case that Respondents can cite in which a stay was granted is *Whole Foods Market, Inc.*, Docket No. 9324 (Order dated August 7, 2007), which was litigated before the 2009 Amendments were adopted.[8] In *Whole Foods*, the Commission had issued the Part 3 complaint after the preliminary injunction litigation was well underway. Thus, when the Commission ordered the stay, the parties had completed the preliminary injunction hearing; the

[6] Order dated May 29, 2008, at 5, at https://www.ftc.gov/sites/default/files/documents/cases/2008/05/080530orderdenying.pdf

[7] Order dated June 2, 2004, at https://www.ftc.gov/sites/default/files/documents/cases/2004/06/040602orderdenyingmotiontostay.pdf
Motions to stay were disfavored in other contexts, too. In *In re: Rambus, Inc.*, Docket No. 9302, the respondent moved to stay a case pending a decision in a parallel treble damage action. That motion was denied. Order dated July 18, 2002, at https://www.ftc.gov/sites/default/files/documents/cases/2002/07/020718odms.pdf.

[8] *See* Order dated August 7, 2007, at https://www.ftc.gov/sites/default/files/documents/cases/2007/08/070801commordholdschedconf.pdf.

court was on the verge of issuing a decision on the preliminary injunction motion;[9] and the administrative law judge had not held a scheduling conference or issued a scheduling order.[10]

In sum, the Commission has a strong interest in completing Part 3 proceedings expeditiously and stays pending the completion of preliminary injunction proceedings are strongly disfavored. Under the 2009 Amendments, a Part 3 proceeding must proceed concurrently with any district court litigation in the absence of demonstrable good cause.

II. Respondents Have Not Shown "Good Cause" for Staying the Hearing.

In their motion, Respondents do not acknowledge either the 2009 Amendments or the Commission's commitment to expedited hearings. They do not note that the regulations now prescribe that a hearing "shall be" held five months after issuance of the administrative complaint. They do not mention that the 2009 Amendments deleted the provision of Rule 3.51(a) that had, when the stay was granted in *Whole Foods*, authorized a stay of Part 3 proceedings pending a decision in collateral federal court action. And, they do not discuss, and they certainly do not show, how their case is somehow the "exceptional case" that warrants a departure from the five month rule.

Instead, according to Respondents, a stay is warranted in this case because the district court might not reach a decision on the Commission's preliminary injunction motion prior to the scheduled hearing date, and one of the parties might choose not to proceed with the

[9] The *Whole Foods* court denied the preliminary injunction motion only nine days after the Part 3 proceeding was stayed. *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 3-4 (D.D.C. 2007), rev'd, 548 F.3d 1028 (D.C. Cir. 2008). And, the stay was an anomaly. When the court of appeals reversed and remanded the *Whole Foods* case to the district court for further proceedings, the Part 3 litigation was reopened. The Commission then denied the respondents' motion to stay the Part 3 proceedings pending the conclusion of the remand proceedings before the district court. *See* Order, *Whole Foods Market, Inc.*, Docket No. 9324 (Dec. 19, 2008) at https://www.ftc.gov/sites/default/files/documents/cases/2008/12/12192008orderamending.pdf

[10] *See* Docket, *Whole Foods Market, Inc.*, Docket No. 9324, *at* https://www.ftc.gov/enforcement/cases-proceedings/0710114/whole-foods-market-inc-wild-oats-markets-inc-matter.

administrative case following a decision from the district court.[11] This is not "good cause" for a stay. *Every* case in which the Commission seeks a preliminary injunction may take more than five months to obtain a decision. Despite this, the Commission specifically amended the Part 3 rules to provide for a hearing date five months from the date of the administrative complaint in any proceeding in which the Commission seeks to enjoin a merger pursuant to Section 13(b). Rule 3.11(b)(4). The Commission could have issued a rule calling for the administrative hearing to start after a decision is issued on the preliminary injunction, but it did not. Instead, the Commission deleted the rule providing for a discretionary stay of administrative proceedings during the pendency of a collateral action in federal court and determined that the administrative hearing "shall be" set for five months after the issuance of the administrative complaint.

That Respondents seek a stay of only the hearing date – and do not seek a stay of either discovery or trial preparations – is a distinction without a difference. Expedited discovery and trial preparations are not goals in themselves. Instead, the 2009 Amendments expedited the discovery process and trial preparations to achieve the goal of a quick resolution of the case. Thus, a stay of the hearing date, just like a stay of the entire proceedings, would delay what is truly important: an initial decision by the administrative law judge and, if appealed, a final

[11] Respondents' Motion is unclear about when the stay they seek would expire. *Compare* Respondents' Memorandum in Support at p. 1 ("60 days after the entry of a ruling"), p. 2 ("after the decision in the Federal Action"), and p. 8 ("60 days after the U.S. District Court for the Northern District of Illinois enters its decision"), with Respondents' Proposed Order ("60 days after entry of a ruling on the Commission's complaint for preliminary injunctive relief").

To the extent that Respondents seek a stay until 60 days after a final decision, their motion should be denied for the additional reason that the requested stay is virtually indefinite and substantially increase the costs of litigation. Either side may appeal a ruling by the district court and the ruling itself may be stayed by the district court or the appellate court pending resolution of the appeal. *See* Fed. R. App. P. 8. If the administrative proceedings are stayed for a substantial length of time, Complaint Counsel would likely need supplemental fact discovery from Respondents, and both parties would likely need supplemental fact discovery from third parties. These costs can be avoided by proceeding with the Part 3 hearing as now scheduled.

decision by the Commission.[12] In this light, Respondents' suggestion that precedent can be ignored, Respondents' Brief at 5, because "requesting a stay of only the hearing . . . distinguishes Respondents' request," has no merit.

III. Respondents' Motion is Speculative and Premature.

Although Respondents assert that the district court "will likely" enter its decision during the administrative hearing, it is equally likely that the district court will enter a decision *before* the administrative hearing. According to Respondents, the preliminary injunction hearing will not conclude until April 15, but, while the district court has limited the preliminary injunction hearing to no *more* than six days, the hearing will likely take only three or four days and may end as early as April 8. Moreover, while the Respondents "expect" a decision from the district court 30 to 45 days after the parties file proposed findings of fact and conclusions of law, that expectation has no basis in fact. The district court may enter a decision at any time and there is no reason to believe that the court is unable or unlikely to issue a decision before May 24, even if the preliminary injunction hearing continues to April 15. In short, Respondents' concerns, which are all derived from this speculation, are not "good cause" for a stay.

Respondents do not propose to change the dates for discovery or pre-trial motions practice as now set in the Scheduling Order. Under these circumstances, it is unclear why Respondents have filed a motion, the first week of February, to stay a hearing that will not begin until the last week of May based on speculation about how long the district court may take to issue a decision. There is no immediate need for the stay that Respondents request and their motion is premature.

[12] Much of Respondents' brief confuses two issues. Respondents focus on the Commission's standard for assessing whether to proceed with Part 3 litigation *after* a Court has denied a preliminary injunction motion and the Commission has the benefit of the Court's analysis. Respondents' Brief at 6-7. Respondents then suggest that this standard should be used in assessing whether to proceed with a Part 3 hearing *before* the Court has issued a ruling. Respondents' Brief at 7-8.

CONCLUSION

In light their failure to show good cause for a stay of these proceedings, as required by Rules 3.41(b) and 3.41(f), and consistent with the purpose of the 2009 Amendments to the Part 3 Rules and clear precedent, Respondents' motion for stay of the Part 3 hearing should be denied.

Dated: February 17, 2016

Respectfully Submitted,

/s/ J. Thomas Greene

J. THOMAS GREENE, ESQ.
KEVIN HAHM, ESQ.
SEAN P. PUGH, ESQ.
DANIEL ZACH, ESQ.
JENNIFER MILICI, ESQ.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3201
Facsimile: (202) 326-2286
Email: tgreene2@ftc.gov
Email: khahm@ftc.gov
Email: spugh@ftc.gov
Email: dzach@ftc.gov
Email: jmilici@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 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., 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 to:

Robert W. McCann, Esq.
Kenneth M. Vorrasi, Esq.
Drinker Biddle & Reath LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005
Phone: (202) 354-1361
Kenneth.Vorrasi@dbr.com
Robert.McCann@dbr.com

John R. Robertson, Esq.
Leigh L. Oliver, Esq.
Hogan Lovells LLP
555 13th St. NW
Washington, D.C. 20004
Phone: (202) 637-5600
robby.robertson@hoganlovells.com
leigh.oliver@hoganlovells.com

Counsel for Respondent Advocate Health Care Network and Advocate Health and Hospitals Corp.

David E. Dahlquist, Esq.
Michael S. Pullos, Esq.
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
Phone: (312) 558-5600
DDahlquist@winston.com
MPullos@winston.com

Counsel for Respondent NorthShore University HealthSystem

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.

February 17, 2016 By: s/ Kevin Hahm