

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

**The Penn State Hershey Medical Center,**  
a corporation,  
and  
**Pinnacle Health System,**  
a corporation.

Docket No. 9368

PUBLIC DOCUMENT



**ORIGINAL**

**RESPONDENTS' MOTION TO STAY THE ADMINISTRATIVE HEARING**

In accordance with Commission Rules 3.21(c) and 3.41(f), Respondents Penn State Hershey Medical Center (“Hershey”) and Pinnacle Health System (“Pinnacle”; collectively, “Respondents”) respectfully request a stay of the administrative hearing in this matter until sixty days after the ruling on the Federal Trade Commission’s (“FTC’s” or “the Commission’s”) complaint seeking a preliminary injunction in the United States District Court for the Middle District of Pennsylvania in *FTC v. Penn State Hershey Medical Center*, No. 1:15-cv-2362. Respondents do not seek a stay of any other deadlines leading up to the hearing.

As required by Rule 3.41(f), there is “good cause” for granting a stay here. The district court will have held a weeklong hearing and received full post-hearing briefing in this matter just over two weeks before the Part III hearing is set to begin, and that court is exceedingly likely to issue its decision well before any ruling in the Part III hearing. That decision will almost certainly have the effect of mooted the hearing: If the district court denies relief, history indicates that the Commission is likely to abandon the administrative complaint, as it has done following *every* denial of injunctive relief in the past two decades. If the court instead enjoins the transaction, Respondents have no intention of pursuing the combination, barring extraordinary circumstances. Thus, regardless of what the district court decides, its holding is likely to be case-dispositive, and the Part III hearing will accomplish little more than unnecessarily consuming the Commission’s—and Respondents’—limited resources.

This unnecessary consumption of resources would counsel in favor of a stay in any circumstances. But the propriety of a stay is even greater here, given that the Part III hearing is set to occur at a time that the Commission’s docket is already historically full. This hearing is scheduled to begin one week *after* a separate Part III hearing involving the world’s largest office-supplies seller, and one week *before* another hospital-merger hearing—in addition to a third hospital-merger hearing set to begin the month before these three cases. And all four hearings will be presided over by the Chief Administrative Law Judge (“Chief ALJ”). Staying this hearing will ensure that the other hearings will be unconstrained by this case’s presence on the docket. On top of all this, granting a stay would further the interests underlying currently pending legislation seeking to protect entities from any pressure associated with the pendency of Part III hearings, and would not cause any harm.

For all of these reasons, a stay is warranted—as the Chief ALJ recognized when he advised the parties to consider jointly seeking a stay “so that we don’t end up trying a case that becomes moot a week after we start.” Sched. Conf. Tr. at 5:18-23 (Jan. 13, 2016) (excerpt attached as Ex. A). Notwithstanding the Chief ALJ’s suggestion, complaint counsel has informed undersigned counsel that they oppose a stay. As explained below, however, all relevant considerations lead to the conclusion that a stay is warranted here.

### **BACKGROUND**

The FTC initiated this administrative proceeding on December 8, 2015. A day later, it filed a companion suit for preliminary-injunctive relief in the District Court for the Middle District of Pennsylvania. *Fed. Trade Comm’n v. Hershey Med. Ctr.*, No. 1:15-cv-2362-JEJ (Dec. 9, 2015), ECF No. 1. Discovery in both matters has already progressed significantly.

The district court has set the preliminary-injunction hearing to begin on April 11, 2016. Stip. Case Mgmt. Order at 10 (Jan. 19, 2016), ECF No. 44. The hearing is to “be held over no more than five (5) days,” and will conclude no later than April 15. *Id.* Afterwards—by April 29—the parties will file their respective Proposed Findings of Fact and Conclusions of Law. *Id.*,

Ex. A (Proposed Schedule for District Court Proceeding). The court will then rule on the FTC’s motion for a preliminary injunction, though it has not indicated any timeline for its decision.

Meanwhile, the administrative hearing in this matter is set to begin on May 17—just eighteen days after the parties submit their Proposed Findings of Fact and Conclusions of Law to the district court. Sched. Order at 4 (Jan. 13, 2016). And once the hearing commences, the Commission’s Rules of Practice require the hearing to “proceed with all reasonable expedition, and, insofar as practicable, . . . continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded.” 16 C.F.R. § 3.41(b). The hearing has no set end date, other than the 210-hour limit set forth in the Rules of Practice. *Id.* Assuming the average hearing day lasts seven hours (resulting in a possible 30 days of trial), the hearing could run until late June—or even later, if the Chief ALJ finds it necessary to pause the proceedings for “brief intervals,” as contemplated by Rule 3.41(b). And given the urgency of this matter, there is every reason to believe the district court will issue its ruling well before the conclusion of the administrative hearing.

As things currently stand, the Part III hearing in this matter would fall during an especially busy time for the Commission. This merger challenge was one of three that the FTC initiated in an 11-day span in December 2015; the Commission has also challenged the Staples–Office Depot merger (*In re Staples, Inc.*, No. 9367) and the Advocate Health Care Network–NorthShore University Health System merger (*In re Advocate Health Care Network*, No. 9369). In addition, the Commission challenged a third hospital merger—between Cabell Huntington Hospital and St. Mary’s Medical Center—in November 2015 (*In re Cabell Huntington Hospital, Inc.*, No. 9366). The Chief ALJ will be presiding over the hearings in all four of these matters, all of which are scheduled to begin over a seven-week period commencing on April 5. *See* Sched. Order at 4, *In re Cabell Huntington Hosp., Inc.* (Dec. 4, 2015) (hearing to begin on April 5); Sched. Order at 4, *In re Staples, Inc.* (Jan. 4, 2016) (hearing to begin on May 10); *In re Advocate Health Care Network* (Jan. 20, 2016) (hearing to begin on May 24). The hearing in this matter is set to begin one week after that in *Staples*, and one week before that in *Advocate*

*Health Care Network*.<sup>1</sup> Accordingly, under the current schedule, the Chief ALJ would face a choice between adhering to the presumption that proceedings “shall continue . . . without suspension,” 16 C.F.R. § 3.41(b)—which would result in each of the hearings receiving far less than the allowable 210 hours—or repeatedly pausing the hearing in one matter to attend to the hearing in another.

### **ARGUMENT**

There is “good cause” for staying the Part III hearing. 16 C.F.R. § 3.41(f). The district court’s decision is all but certain to be the last word on this matter. And given the congested state of the Chief ALJ’s docket, there is simply no reason to maintain the hearing date on the remote off-chance that the district court’s decision is *not* dispositive—which, again, would be contrary to two decades of FTC dismissals in cases where courts deny injunctive relief, and to Respondents’ intention (barring extraordinary circumstances) to walk away from the combination if the court grants a preliminary injunction.<sup>2</sup>

*First*, there is a substantial likelihood that this matter will be rendered moot before or during any administrative hearing. As the Chief ALJ recognized during the scheduling conference in this matter, once the district court rules on the Commission’s motion for injunctive relief, it is exceedingly unlikely that the losing party will press its case any further:

---

<sup>1</sup> The Respondents in *Advocate* have similarly moved for a stay of their administrative hearing. Resps.’ Mot. to Stay Admin. Hearing (Feb. 9, 2016). That motion currently remains pending.

<sup>2</sup> Previously, the Rules of Practice authorized ALJs to grant stays pending the resolution of federal-court proceedings. The Commission amended this rule as part of a broader set of revisions in 2009, granting itself exclusive authority to stay hearings upon a showing of “good cause.” 74 Fed. Reg. 1804, 1821 (Jan. 13, 2009). In introducing this set of amendments, the Commission explained its “belie[f] that any adjudicative process should balance three factors: the public interest in a high quality decisionmaking process; the interests of justice in an expeditious resolution of litigated matters; and the very real interest of the parties in litigating matters economically without unnecessary expense.” 73 Fed. Reg. 58,832, 58,833 (Oct. 7, 2008). Respondents file this motion precisely because of their “very real interest” in litigating this matter “without unnecessary expense,” and neither of the other objectives the Commission identified would counsel against granting a stay specifically sought by the merging entities.

Based on what I've heard today and my experience in similar cases, the odds are pretty good that our trial may become moot, because generally, the Respondents tend to walk away when there's an injunction, and the Government tends to withdraw the case if it's not granted, especially ultimately on any appeal, by not getting an injunction.”

Sched. Conf. Tr. at 5:11-17 (Jan. 13, 2016) (Ex. A).

The Chief ALJ's observation was, of course, well-founded. History demonstrates that if the district court rules for Respondents and denies injunctive relief, the FTC will probably choose not to pursue this administrative proceeding. Indeed, in that situation, the Commission is affirmatively required to reconsider its decision to pursue administrative relief: “The Commission's guiding principle is that the determination whether to proceed in administrative litigation following the denial of a preliminary injunction and the exhaustion or expiration of all avenues of appeal must be made on a case-by-case basis.” Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741, 39,743 (Aug. 3, 1995). And in past cases where the Commission engaged in this reconsideration, its decisions have been uniform: as Commissioner Ohlhausen recently noted, “the Commission has not pursued a Part III proceeding following a PI loss in federal court for twenty years.” Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Remarks to U.S. Chamber of Commerce: A SMARTER Section 5, at 17 (Sept. 25, 2015) (“Ohlhausen Remarks”), <https://goo.gl/ZkjZ0Y>.<sup>3</sup> There is no reason to believe this case would be any different.<sup>4</sup>

---

<sup>3</sup> The motion filed by the respondents in *Advocate* catalogued a number of these instances in which the Commission declined to pursue a Part III proceeding after failing in its claim for injunctive relief. See, e.g., *In re Steris Corp.*, No. 9365, Order Returning Matter to Adjudication and Dismissing Comp. (Oct. 30, 2015); *In re Lab. Corp. of Am.*, No. 9345, Order Returning Matter to Adjudication and Dismissing Comp. (Apr. 21, 2011); *In re Foster*, No. 9323, Order Returning Matter to Adjudication and Dismissing Comp. (Oct. 2, 2007); *In re Arch Coal, Inc.*, No. 9316, Statement of the Comm'n (June 13, 2005); *In re Tenet Healthcare Corp.*, No. 9289, Order Dismissing Comp. (Dec. 23 1999); *In re Butterworth Health Corp.*, No. 9283, Order Granting Mot. to Dismiss (Sept. 25, 1997); *In re Freeman Hosp.*, No. 9273, Order Dismissing Comp. (Nov. 30, 1995).

<sup>4</sup> Commissioner Ohlhausen also noted her “concern[.]” with “past Commission statements expressing its intention to pursue Part III litigation no matter the outcome in federal court.” Ohlhausen Remarks at 13.

Moreover, wholly separate from the Commission’s deliberative process, the Rules of Practice give respondents who prevail in district court two means of staying an administrative hearing. *First*, within 14 days of a ruling denying injunctive relief, Respondents could “move that the adjudicative proceeding be withdrawn from adjudication in order to consider whether the public interest warrants further litigation.” 16 C.F.R. § 3.26(c). The Secretary would then be required to “issue an order withdrawing the matter from adjudication 2 days after such a motion is filed.” *Id.* At that point, the parties would be free to “present their views to the Commission informally” as to whether the Part III hearing should go forward. Debbie Feinstein, *Changes to Commission Rule 3.26 re: Part 3 Proceedings Following Federal Court Denial of a Preliminary Injunction* (Mar. 16, 2015), <https://goo.gl/bDFX3a>. *Second*, Respondents could move “to dismiss the administrative complaint on the basis that the public interest does not warrant further litigation.” § 3.26(d)(1). A motion to dismiss automatically “stay[s] the proceeding until 7 days following the disposition of the motion by the Commission, and all deadlines established by these rules shall be tolled for the amount of time the proceeding is so stayed.” § 3.26(d)(2). Either of these alternatives would automatically stay the Part III hearing and related deadlines, freeing the Commission to enter into the deliberative process that has for two decades unfailingly resulted in the termination of administrative proceedings. And Respondents have every intention of utilizing one of these options in the event that the court rules in their favor.

If, by contrast, the FTC succeeds in securing injunctive relief, the upshot is the same as far as this proceeding is concerned: in that event, Respondents intend to walk away from the challenged combination barring extraordinary circumstances. This, too, is consistent with the norm in merger challenges.<sup>5</sup> The bottom line is that, regardless of how the district court rules, its decision will almost certainly stand as the final word on this matter.

---

<sup>5</sup> *See, e.g., In re Sysco Corp.*, No. 9364, Order Dismissing Comp. (June 30, 2015) (“Respondents have abandoned their proposed merger.”); *In re OSF Healthcare Sys.*, No. 9349, Order Dismissing Comp. (Apr. 13, 2012) (“Respondents are abandoning the proposed affiliation.”).

*Second*, even if the presumably dispositive effect of the district court’s ruling were not itself sufficient reason to stay the hearing in this matter, the historically crowded state of the Chief ALJ’s docket establishes “good cause” for doing so. It is bad enough that an administrative hearing is unlikely to have any impact on the ultimate resolution of this matter; it is even worse that this hearing would occur at a time that the Chief ALJ will be presiding over as many as three other substantial merger challenges. Even if the Commission grants the motion to stay the *Advocate* matter, the hearing in this matter is set to begin one week after the *Staples* hearing, a major dispute involving “the world’s largest seller of office products and services.” Press Release, FTC Challenges Proposed Merger of Staples, Inc. and Office Depot, Inc. (Dec. 7, 2015), <https://goo.gl/DZnwul>. Granting a stay would ensure that, should the *Staples* hearing go forward, it will not be constrained by a hearing in this matter, thus effectuating the default rule that hearings should “continue . . . without suspension until concluded.” 16 C.F.R. § 3.41(b).<sup>6</sup>

*Third*, a stay would also help to address the increasingly prominent concern—reflected in legislation currently pending in both Houses of Congress—that the possibility of a Part III hearing can be used to pressure entities into abandoning mergers. Specifically, the Standard Merger and Acquisitions Reviews Through Equal Rules Act of 2015 (commonly known as the SMARTER Act) would address this possibility by, among other things, largely removing the Commission’s ability to challenge mergers via Part III administrative hearings. Standard Merger and Acquisitions Reviews Through Equal Rules Act of 2015, S. 2102 § 3(1) (Sept. 30, 2015). In a hearing on the SMARTER Act before the Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, Chairwoman Ramirez sought to assuage this concern by emphasizing that the Commission, in district-court preliminary-injunction proceedings, “is required to make a robust evidentiary and legal showing that the transaction would likely be

---

<sup>6</sup> In addition, because there is no accompanying federal-court proceeding in *Cabell*, that Part III hearing is especially likely to go forward. That hearing will commence on April 5 and thus could very well carry into mid-May, raising the potential for conflicts with the hearings in *Staples*, *Advocate*, and this matter, as currently scheduled.

anticompetitive,” and that “preliminary injunction cases typically involve several-day hearings with extensive prior briefing, live witnesses, and expert testimony.” *S. 2102, The “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015”: Hearing Before the S. Comm. On the Judiciary, Subcomm. On Antitrust, Competition Policy and Consumer Rights* at 13 (Oct. 7, 2015) (Prepared Statement of FTC, presented by Edith Ramirez, FTC Chairwoman), <https://goo.gl/3xLkXJ>.<sup>7</sup> But the fact that the parties will already have put on “extensive” presentations of their respective cases only underscores why there is no need to immediately pivot to a second airing of the same evidence and arguments—particularly given the likelihood that the party who is defeated in court will ultimately choose to walk away from this litigation.

*Finally*, granting a stay will not cause any harm whatsoever. Should the non-prevailing party in the district court choose to pursue this litigation after the court’s decision, the Part III hearing would simply go forward. And unlike in other cases in which the Commission has denied stays,<sup>8</sup> Respondents are not seeking to stay any deadlines other than the hearing itself, meaning that the hearing could proceed without delay. A stay would thus simply avoid imposing the harm that would otherwise result from potentially wasted resources, without imposing any counterbalancing injury on anyone.

### **CONCLUSION**

Respondents respectfully request that the Commission stay the Part III hearing until sixty days after the district court rules on the FTC’s motion for preliminary-injunctive relief.

---

<sup>7</sup> *See also id.* (“[A]ny 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.” (quoting Assistant U.S. Att’y Gen. William Baer)).

<sup>8</sup> *See, e.g., In re Inova Health System Foundation*, No. 9326, Order Denying Resps.’ Mot. to Stay Admin. Proceedings (May 29, 2008) (denying motion to “stay discovery and all other aspects of this administrative proceeding, pending resolution of the preliminary injunction”); *In re Arch Coal, Inc.*, No. 9316, Order Denying Mot. to Stay Proceeding or to Stay Discovery (June 2, 2004) (denying request to stay administrative proceeding in its entirety).



Dated: February 22, 2016

Respectfully submitted,  
*/s/ Adrian Wager-Zito*

---

Adrian Wager-Zito  
Julie E. McEvoy  
Toby G. Singer  
Kenneth W. Field  
Christopher N. Thatch  
William D. Coglianese  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001-2113  
adrianwagerzito@jonesday.com  
jmcevoy@jonesday.com  
tgsinger@jonesday.com  
kfield@jonesday.com  
cthatch@jonesday.com  
wcoglianese@jonesday.com  
T: (202) 879-3939  
F: (202) 626-1700

*Counsel for Respondents  
Penn State Hershey Medical Center  
& Pinnacle Health System*

# **EXHIBIT A**

**In the Matter of:**

The Penn State Hershey Medical Center, et al.

*January 13, 2016  
Scheduling Conference*

**Condensed Transcript with Word Index**



For The Record, Inc.  
(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555

Scheduling Conference

The Penn State Hershey Medical Center, et al.

1/13/2016

1

1 UNITED STATES OF AMERICA  
 2 FEDERAL TRADE COMMISSION  
 3  
 4 In the Matter of: )  
 5 The Penn State Hershey )  
 6 Medical Center, )  
 7 a corporation, )  
 8 and ) Docket No. 9368  
 9 PinnacleHealth System, )  
 10 a corporation, )  
 11 Respondents. )  
 12 -----)  
 13  
 14  
 15 SCHEDULING CONFERENCE  
 16 January 13, 2016, 2:00 p.m.  
 17 PUBLIC SESSION  
 18  
 19  
 20 BEFORE THE HONORABLE D. MICHAEL CHAPPELL  
 21 Administrative Law Judge  
 22  
 23  
 24  
 25 Reported by: Susanne Bergling, RMR-CRR-CLR

2

1 APPEARANCES:  
 2  
 3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:  
 4 WILLIAM H. EFRON, ESQ.  
 5 JARED P. NAGLEY, ESQ.  
 6 GERALD A. STEIN, ESQ.  
 7 Federal Trade Commission  
 8 One Bowling Green  
 9 Suite 318  
 10 New York, New York 10004  
 11 (212) 607-2816  
 12 wefron@ftc.gov  
 13  
 14 ON BEHALF OF RESPONDENTS:  
 15 ADRIAN WAGER-ZITO, ESQ.  
 16 JULIA E. MCEVOY, ESQ.  
 17 CHRISTOPHER N. THATCH, ESQ.  
 18 KENNETH W. FIELD, ESQ.  
 19 Jones Day  
 20 51 Louisiana Avenue, N.W.  
 21 Washington, D.C.  
 22 (202) 879-3891  
 23 adrianwagerzito@jonesday.com  
 24  
 25

3

1 P R O C E E D I N G S  
 2 - - - - -  
 3 (2:00 p.m.)  
 4 JUDGE CHAPPELL: Okay. Let me call to order  
 5 Docket 9368, Penn State Hershey Medical Center and  
 6 PinnacleHealth System. We'll start by taking the  
 7 appearances of the parties, the Government first.  
 8 MR. EFRON: Thank you, Your Honor. William  
 9 Efron, Complaint Counsel. I'm here with my colleagues  
 10 Jared Nagley and Gerald Stein.  
 11 MR. NAGLEY: Good afternoon, Your Honor.  
 12 MR. STEIN: Good afternoon.  
 13 JUDGE CHAPPELL: For Respondents?  
 14 MS. WAGER-ZITO: Adrian Wager-Zito, Jones Day,  
 15 for Penn State Hershey Medical System and  
 16 PinnacleHealth, and with me, Julie McEvoy, Christopher  
 17 Thatch, and Ken Field.  
 18 JUDGE CHAPPELL: Okay, welcome. And you are  
 19 representing all Respondents?  
 20 MS. WAGER-ZITO: Yes, Your Honor.  
 21 JUDGE CHAPPELL: All right. Let's talk about  
 22 the ancillary federal action. I'd like to hear about  
 23 the nature and status of the federal action related to  
 24 this matter. I'll let you go first.  
 25 MR. EFRON: Thank you, Your Honor.

4

1 As you know, the Commission did authorize staff  
 2 to also seek a TRO and preliminary injunction in the  
 3 Middle District of Pennsylvania to prevent the parties  
 4 from consummating the merger. We filed the action  
 5 jointly with the Office of the Pennsylvania Attorney  
 6 General. This was done on December 8th.  
 7 On December 9th, The Honorable John Jones  
 8 entered a stipulated TRO maintaining the status quo  
 9 pending a ruling on the preliminary injunction motion,  
 10 and hearing in that matter has been tentatively  
 11 scheduled for the week of April 11th.  
 12 JUDGE CHAPPELL: Did he give any indication --  
 13 did the Judge give any indication of when a ruling is  
 14 expected?  
 15 MR. EFRON: No, Your Honor. The only other date  
 16 that we have is we would submit findings of fact,  
 17 conclusions of law, post-hearing briefs after -- about  
 18 two weeks after. So, that would be due, I think, under  
 19 the proposed case management order, around April 29th.  
 20 JUDGE CHAPPELL: Anything to add to that?  
 21 MS. WAGER-ZITO: No, Your Honor.  
 22 JUDGE CHAPPELL: In the event the injunction  
 23 request is not granted, are you prepared to tell us what  
 24 the plans are for the Government?  
 25 MR. EFRON: At this time we are not, Your Honor.

5	<p>1 We would have to confer and consider that.</p> <p>2 JUDGE CHAPPELL: What about Respondents? Are</p> <p>3 you prepared to tell us what your plans are if the</p> <p>4 injunction is granted?</p> <p>5 MS. WAGER-ZITO: Not at this time, Your Honor.</p> <p>6 Our clients will have to weigh their options at that</p> <p>7 time.</p> <p>8 JUDGE CHAPPELL: Okay. Pursuant to Commission</p> <p>9 Rule 3.41(f), a pending collateral federal court action</p> <p>10 doesn't stay our proceeding unless the Commission so</p> <p>11 directs for good cause. Based on what I've heard today</p> <p>12 and my experience in similar cases, the odds are pretty</p> <p>13 good that our trial may become moot, because generally,</p> <p>14 the Respondents tend to walk away when there's an</p> <p>15 injunction, and the Government tends to withdraw the</p> <p>16 case if it's not granted, especially ultimately on any</p> <p>17 appeal, by not getting an injunction.</p> <p>18 So, I'd like the parties to consider whether or</p> <p>19 not they would file a joint motion to stay this</p> <p>20 proceeding, let's say there's no ruling within a week or</p> <p>21 so of our trial starting in this matter, so that we</p> <p>22 don't end up trying a case that becomes moot a week</p> <p>23 after we start. I'm not telling anybody to do anything.</p> <p>24 I'm just throwing out some facts.</p> <p>25 Any questions?</p>	7
6	<p>1 MR. EFRON: No, Your Honor.</p> <p>2 MS. WAGER-ZITO: No, Your Honor.</p> <p>3 JUDGE CHAPPELL: And if a joint motion is not</p> <p>4 agreed to, I don't see anything in the rule that</p> <p>5 prevents one party from filing a request to stay, and</p> <p>6 that does need to be filed with the Commission. They do</p> <p>7 dictate the start date of the hearings. Other dates, I</p> <p>8 can move around, but the start date, I don't mess with.</p> <p>9 Let's talk about the scheduling order that</p> <p>10 was -- the draft that was sent to the parties. I've</p> <p>11 looked over your modifications that were proposed. I</p> <p>12 found two issues. The first one is the exchange of</p> <p>13 expert reports. Those are set via rule, and to comply</p> <p>14 with the rules, the requested modifications will be</p> <p>15 altered slightly.</p> <p>16 The second issue has to do with the time frame</p> <p>17 for providing notice to nonparties of the intent to</p> <p>18 offer into evidence nonparties' confidential</p> <p>19 information. There are a lot of timing issues in that I</p> <p>20 can't deal with an in camera motion until I get an in</p> <p>21 camera issue from a nonparty. They won't know to file</p> <p>22 an in camera motion until they have been notified by one</p> <p>23 of you that you intend to use their information. And to</p> <p>24 keep that all running smoothly and give me and my staff</p> <p>25 time to deal with in camera motions, the proposed date</p>	8
5	<p>1 is not going to work. So, I am going to modify that one</p> <p>2 slightly. Everything else seems to be fine that the</p> <p>3 parties submitted.</p> <p>4 I'll take the proposed modification under</p> <p>5 advisement, and the scheduling order will be issued</p> <p>6 shortly.</p> <p>7 Regarding the first issue in the scheduling</p> <p>8 order, I think I talked about expert reports. It -- the</p> <p>9 timing that was submitted had to do with the witness</p> <p>10 lists of one side. That's why I'm going to have to</p> <p>11 modify that requested date.</p> <p>12 All right. Let's talk about settlement</p> <p>13 discussions. I trust the parties have attempted to</p> <p>14 settle the matter. Would someone like to provide a</p> <p>15 status of settlement discussions?</p> <p>16 MR. EFRON: I can, Your Honor. We have not</p> <p>17 really had substantive settlement discussions with the</p> <p>18 other side. We did confer about the scheduling order on</p> <p>19 Monday, and I did -- we did raise the issue of</p> <p>20 settlement. We confirmed that there is no offer from</p> <p>21 either side. So, there really have been -- there is no</p> <p>22 offer on the table to consider from either side.</p> <p>23 JUDGE CHAPPELL: Anything to add?</p> <p>24 MS. WAGER-ZITO: Nothing to add to that, Your</p> <p>25 Honor.</p>	7
6	<p>1 JUDGE CHAPPELL: Are there any impediments to</p> <p>2 the merger other than the injunction issue? Has</p> <p>3 everything been approved, authorized? Is there a</p> <p>4 certificate of need issue, anything like that, in</p> <p>5 Pennsylvania?</p> <p>6 MS. WAGER-ZITO: No, Your Honor. Our clients</p> <p>7 are ready to proceed pretty much as soon as we have a</p> <p>8 ruling.</p> <p>9 JUDGE CHAPPELL: Okay.</p> <p>10 All right. At this time, I'll hear the overview</p> <p>11 or summary of the case by both parties. I'll start with</p> <p>12 the Government, and you have 15 minutes. Go ahead.</p> <p>13 MR. EFRON: Okay. Thank you, Your Honor.</p> <p>14 This case involves the merger of the two largest</p> <p>15 health systems in the Harrisburg, Pennsylvania, area,</p> <p>16 Penn State Hershey Medical Center and PinnacleHealth</p> <p>17 System. This merger would create a dominant hospital</p> <p>18 system that would control approximately 64 percent of</p> <p>19 the market for general acute care inpatient hospital</p> <p>20 services in the Harrisburg area.</p> <p>21 JUDGE CHAPPELL: Is the Penn State Medical</p> <p>22 Center in Harris -- is it in -- what is it called,</p> <p>23 College Station or -- what's that town, Penn State?</p> <p>24 MS. WAGER-ZITO: State College.</p> <p>25 THE COURT: State College. Is it in State</p>	8

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

**The Penn State Hershey Medical Center,**  
a corporation,  
and  
**Pinnacle Health System,**  
a corporation.

Docket No. 9368

PUBLIC DOCUMENT

**[PROPOSED] ORDER GRANTING  
RESPONDENTS' MOTION TO STAY THE ADMINISTRATIVE HEARING**

This matter having come before the Commission upon Respondents' Motion To Stay The Administrative Hearing, and having considered the positions of all parties, it is hereby ORDERED that the administrative hearing in the above-captioned matter is stayed until 60 days after entry of a ruling on the Commission's complaint for a preliminary injunction in the District Court for the Middle District of Pennsylvania, *FTC v. Penn State Hershey Medical Center*, No. 1:15-cv-2362. All other deadlines in the Scheduling Order remain in effect.

SO ORDERED.

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on February 22, 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  
Washington, DC 20580

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
FEDERAL TRADE COMMISSION  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

William H. Efron  
Jared P. Nagley  
Geraldyn J. Trujillo  
Ryan F. Harsch  
Jonathan W. Platt  
Nancy Turnblacer  
Theodore Zang  
Gerald A. Stein  
BUREAU OF COMPETITION  
FEDERAL TRADE COMMISSION  
NORTHEAST REGION  
One Bowling Green, Suite 318  
New York, NY 10004  
wefron@ftc.gov  
jnagley@ftc.gov  
T: (212) 607-2829  
F: (212) 607-2832

*Counsel Supporting the Complaint  
Federal Trade Commission*

**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 22, 2016

/s/ Adrian Wager-Zito  
Adrian Wager-Zito

Notice of Electronic Service

**I hereby certify that on February 22, 2016, I filed an electronic copy of the foregoing Respondents' Motion to Stay the Administrative Hearing, Certification of Meet & Confer, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**I hereby certify that on February 22, 2016, I served via E-Service an electronic copy of the foregoing Respondents' Motion to Stay the Administrative Hearing, Certification of Meet & Confer, upon:**

William Efron  
Regional Director  
Federal Trade Commission  
wefron@ftc.gov  
Complaint

Ryan Harsch  
Attorney  
Federal Trade Commission  
rharsch@ftc.gov  
Complaint

Jared Nagley  
Attorney  
Federal Trade Commission  
jnagley@ftc.gov  
Complaint

Jonathan Platt  
Attorney  
Federal Trade Commission  
jplatt@ftc.gov  
Complaint

Gerald Stein  
Attorney  
Federal Trade Commission  
gstein@ftc.gov  
Complaint

Geralyn Trujillo  
Attorney  
Federal Trade Commission  
gtrujillo@ftc.gov  
Complaint

Nancy Turnblacer  
Attorney  
Federal Trade Commission  
nturnblacer@ftc.gov



Complaint

Theodore Zang  
Attorney  
Federal Trade Commission  
tzang@ftc.gov  
Complaint

Adrian Wager-Zito  
JONES DAY  
adrianwagerzito@jonesday.com  
Respondent

Toby Singer  
JONES DAY  
tgsinger@jonesday.com  
Respondent

Kenneth Field  
JONES DAY  
kfield@jonesday.com  
Respondent

Julia McEvoy  
JONES DAY  
jmcevoy@jonesday.com  
Respondent

William Coglianesse  
JONES DAY  
wcoglianesse@jonesday.com  
Respondent

Christopher Thatch  
JONES DAY  
cthatch@jonesday.com  
Respondent

Peggy Bayer Femenella  
Attorney  
Federal Trade Commission  
pbayer@ftc.gov  
Complaint

James W. Frost  
Attorney  
Federal Trade Commission  
jfrost@ftc.gov  
Complaint

Lynda Lao  
Attorney  
Federal Trade Commission  
llao1@ftc.gov  
Complaint

Adrian Wager-Zito  
Attorney