

schedule on May 12, 2016, nearly contemporaneously with the Commission's May 12 Order and therefore was not before the Commission when it issued that Order.

Under Rule 3.26 of the Commission's Rules of Practice, Respondents intend to move the Commission to withdraw this matter from adjudication, but may not do so until the Court of Appeals has ruled on the FTC's emergency motion. The parties anticipate that the Third Circuit will rule no later than May 27, 2016. If the Third Circuit denies the Commission's emergency motion, the Part 3 proceedings will be postponed indefinitely. However, significant trial preparations would need to be made, with the risk that, only days before trial is set to start, the proceedings could be stayed – either automatically or by Commission decision. Accordingly, granting a continuance of the administrative hearing will avoid significant and potentially unnecessary costs of trial preparations that numerous third parties and the parties would otherwise incur if the Commission's emergency motion is denied and this case is withdrawn from adjudication.

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.

When it issued the administrative complaint in this action, the Commission originally scheduled the Part 3 hearing to begin on May 17, 2016. On May 4, 2016, the parties moved the Commission for a continuance of the administrative hearing to June 7, 2016. The purpose of that motion was to avoid potentially unnecessary expense to non-parties and the parties while the Commission's motion for preliminary injunction to enjoin the consummation of the proposed

merger pending the completion of these proceedings was *sub judice* at the United States District Court for the Middle District of Pennsylvania.

By Memorandum and Order dated May 9, 2016, the District Court denied the FTC's motion for a preliminary injunction. On May 12, 2016, in response to the FTC's motion for an injunction pending appeal, the District Court extended its original temporary restraining order enjoining the merger until May 27, 2016.¹ The District Court concluded that it was "prudent" to extend the temporary restraining order to permit the FTC to file and the parties to fully brief an emergency motion for an injunction pending appeal with the Third Circuit. *See* Exhibit A.

On May 12, the FTC filed with the Third Circuit its emergency motion for injunction pending appeal and a motion to expedite that appeal. That same day, at 3:56 pm, the Third Circuit established a briefing schedule on the motion, which the parties will complete on May 19, 2016. *See* Exhibit B. Just over half an hour later, before the parties could advise the Commission of the District Court's extension of the temporary restraining order or the Third Circuit's briefing schedule on the emergency motion, the Commission issued its May 12 Order rescheduling the commencement of the administrative hearing for June 1, 2016. The parties have advised the Court of Appeals of the District Court's extension of its temporary restraining order and anticipate that the Third Circuit will rule on the FTC's emergency motion no later than May 27, 2016.

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

¹ Respondents indicated that they would not object to this approach in order to allow the Third Circuit to rule on the Commission's emergency motion for an injunction pending appeal.

administrative trial due to the exigency of the briefing schedule established by the Third Circuit on the Commission's emergency motion for an injunction pending appeal.

When the Commission rescheduled the hearing to commence on June 1, 2016, it contemplated that this two-week extension would be sufficient "to allow the parties time to determine how to proceed and to make any motions before the Commission." May 12 Order at 2. Due to the briefing schedule established by the Third Circuit, however, the parties cannot make this determination in a two-week time frame. The parties will not complete briefing on the Commission's emergency motion until May 19, 2016, and the Third Circuit may not rule on the emergency motion until May 27, 2016, just before the District Court's recently-extended temporary restraining order now expires.

If the Third Circuit denies the Commission's emergency motion, the Part 3 proceedings will be postponed indefinitely. The Part 3 Rules explicitly provide that Respondents may file a motion to withdraw this matter from adjudication or to dismiss this case within 14 days once "a court of appeals has denied a Commission motion for relief pending appeal." 16 C.F.R. Rule § 3.26(b)(2). The withdrawal from adjudication of a matter that meets the requirements of Rule 3.26(b)(2) is nondiscretionary: the regulation provides that the Secretary "*shall* issue an order withdrawing the matter from adjudication 2 days after such motion is filed. . ." if the requirements of that section are met.

Meanwhile, trial preparations for an administrative hearing beginning June 1 will require a significant expenditure of resources in the next two and a half weeks. The burden on non-parties will be particularly onerous. Complaint Counsel and Respondents also have identified 66 non-party witnesses whom they may call to testify at trial. In the next two and a half weeks, the parties would need to notify the non-parties whom they intend to call as witnesses, and these

non-parties will incur the out-of-pocket expenses necessary to appear as witnesses. The non-parties will need to schedule a trip to Washington and adjust their schedules accordingly. In addition, many of these non-parties will incur their own legal fees to prepare to testify at trial. Moreover, the parties obtained discovery from 53 non-parties who would incur the expense of reviewing their materials that the parties have designated as exhibits, identifying the confidential information in these materials, and filing *in camera* motions and briefs with the Chief Administrative Law Judge to protect the confidentiality of these materials.²

In short, absent a continuance of the commencement of the administrative hearing, there would be a tremendous waste of party and non-party resources in preparing for trial if the Third Circuit ultimately denies the Commission's emergency motion.³

If the Third Circuit grants the Commission's emergency motion, on the other hand, the parties would be willing and able to make a recommendation about how to proceed, as previously requested by the Commission. Given that the Court of Appeals' decision on the FTC's motion, the duration of any injunction granted, and the schedule for the appeal will not be known by the parties until possibly as late as May 27, 2016, the parties will not be able to make

² The parties would also incur significant expenses, including legal fees for Respondents, expert witness fees for both Complaint Counsel and Respondents, travel costs for counsel, witnesses, and experts, and court reporting expenses. For instance, Complaint Counsel and most of their experts are not located in D.C. and would need to make arrangements for travel to and accommodations in D.C. Typically, hotels will give discounted arrangements for blocks of rooms only with significant penalties if the room reservations are cancelled. Similarly, Respondents' witnesses, some of whom are physicians with clinical responsibilities, live and work in central Pennsylvania, and they would need to adjust their schedules to set aside time to testify at an administrative hearing which may not occur.

³ The parties are in a similar position as we were when we initially sought, and the Commission granted, a continuance of the administrative proceedings pending a decision of the District Court. As we explained in that earlier joint motion:

... "[a]n injunction would force Pinnacle and Hershey to abandon the combination." If the District Court denies the preliminary injunction, Respondents will file a motion pursuant to Rule 3.26 to withdraw the case from adjudication or dismiss the complaint.

Joint Expedited Motion for Continuance of Administrative Proceedings dated May 4, 2016, at 3-4 (citation omitted), at https://www.ftc.gov/system/files/documents/cases/582532_2.pdf.

any recommendation until that time. Granting a further three-week continuance of the administrative hearing will give both Complaint Counsel and the merging parties sufficient time to weigh the various considerations and make a suitable recommendation to the Commission prior to investing significant resources into preparing for an administrative trial.⁴

CONCLUSION

For the foregoing reasons, Complaint Counsel and Respondents jointly move the Commission for an order granting a continuance of the commencement of the administrative hearing until June 21, 2016, or until such later date as may be convenient for the Chief Administrative Law Judge and the Commission. Complaint Counsel and Respondents also request an extension of all interim pre-trial deadlines in the Scheduling Order, as amended, for 20 days.⁵

Dated: May 19, 2016

Respectfully Submitted,

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⁴ In addition, Complaint Counsel’s lead trial counsel has work commitments on June 16 and 17 in New York; beginning trial the following week would enable him to keep those commitments.

⁵ If the Commission grants this Joint Expedited Motion, the parties are prepared to submit a proposed amended scheduling order to the Chief Administrative Law Judge to include revised pre-trial deadlines.

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

FEDERAL TRADE COMMISSION

and

COMMONWEALTH OF
PENNSYLVANIA,

Plaintiffs,

vs.

PENN STATE HERSHEY
MEDICAL CENTER

and

PINNACLEHEALTH SYSTEM,

Defendants.

Civil Action No.: 1:15-cv-02362

Hon. John E. Jones III

ORDER

May 12, 2016

On May 10, 2016 Plaintiffs filed a Motion for Injunction Pending Appeal with brief in support. (Docs. 133, 135). Within the Motion, Plaintiffs seek an injunction pursuant to Fed. R. Civ. P. 62(c) enjoining the proposed merger between Defendants Penn State Hershey Medical Center and PinnacleHealth System pending appellate review of this Court's Memorandum and Opinion denying

Plaintiff's Motion for Preliminary Injunction, filed on May 9, 2016. (Doc. 131). The Plaintiffs note that, pursuant to the December 9, 2015 Stipulated Temporary Restraining Order ("TRO") (Doc. 14), the Defendants may consummate their proposed merger three business days following the Court's ruling on Plaintiffs' Motion for Preliminary Injunction, or at 12:01 a.m. on Friday, May 13, 2016. (Doc. 14, ¶1).

On today's date, Defendants filed an Opposition to Plaintiffs' Motion for an Injunction Pending Appeal. (Doc. 137). Within the brief, the Defendants outline the possibility of a nascent agreement with the Plaintiffs whereby the Defendants would not oppose a two-week extension of the TRO (Doc. 14) if the Plaintiffs would file for an injunction with the Court of Appeals for the Third Circuit today and the parties would complete briefing on the same by Thursday, May 19, 2016. At the conclusion of the brief, the Defendants note that, in any event, they do not oppose a two-week extension of the TRO. (Doc. 137, p. 10).

Given the aforesaid, we find that the most prudent course is to grant a two-week extension of the TRO, and direct the parties to alert the Court as to whether

the Plaintiffs have indeed filed an application for an injunction with the Third Circuit, via letter on the docket.¹

IT IS HEREBY ORDERED THAT:

1. Paragraph 1 of the Stipulated Temporary Restraining Order entered on December 9, 2015 (Doc. 14) is **EXTENDED** until May 27, 2016.
2. The parties shall alert the Court, via letter filed on the docket, in the event the Plaintiffs file an application for an injunction with the Third Circuit.

s/ John E. Jones III
John E. Jones III
United States District Judge

¹ It is the Court's view that if the Plaintiffs file an application for an injunction with the Third Circuit we would be fully divested of jurisdiction in this matter, and thus without authority to adjudicate the instant Motion.

EXHIBIT B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16-2365

Federal Trade Commission v. Penn State Hershey Medical Center

ORDER

The emergency motion filed by Appellants on May 12, 2016 seeks to expedite the appeal. The motion, however, does not include a proposed briefing schedule for the appeal as required under 3d Cir. L.A.R. 4.1. On or before 3:00 p.m. on Friday, May 13, 2016, Appellants must file a supplement to the motion outlining the proposed briefing schedule.

Appellees' response to the emergency motion for an injunction pending appeal and to expedite appeal must be filed on or before 3:00 p.m. on Wednesday, May 18, 2016. Any reply by Appellants must be filed on or before 3:00 p.m. on Thursday, May 19, 2016.

For the Court,

s/ Marcia M. Waldron
Clerk

Dated: May 12, 2016
PDB/cc: All Counsel of Record

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of)	
)	
)	
The Penn State Hershey)	
Medical Center,)	Docket No. 9368
a corporation,)	
)	
and)	
)	
PinnacleHealth System,)	
a corporation.)	
)	

[PROPOSED] ORDER GRANTING JOINT EXPEDITED MOTION FOR 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 Administrative Proceedings is **GRANTED**; and

- (1) Commencement of the administrative hearing in this matter is moved from June 1, 2016 to June 21, 2016; and
- (2) All other proceedings in this matter are continued for 20 days from the date of this order.

By the Commission.

Donald S. Clark
Secretary

ISSUED

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 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:

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PUBLIC

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.

Dated: May 19, 2016

By: s/ Gerald A. Stein
Gerald A. Stein