

Public

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney



In the Matter of:

IMPAX LABORATORIES, INC.,
a corporation.

Docket No. 9373

ORIGINAL

RESPONDENT IMPAX LABORATORIES, INC.'S
MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
EXTENSION OF DEADLINE FOR OPPOSING COMPLAINT COUNSEL'S MOTION
FOR SUMMARY DECISION

Public

Respondent Impax Laboratories, Inc. (“Impax”) hereby moves for an extension of the deadline for opposing Complaint Counsel’s August 4, 2017 Motion for Summary Decision. Specifically, Impax seeks a revised deadline of August 31, 2017 for its Opposition. This reflects a less than two-week extension from the current August 18, 2017 deadline.

Complaint Counsel has refused to agree to this modest extension. Instead, believing Impax’s deadline to be Thursday, August 17th, Complaint Counsel would only extend the deadline by two business days to Monday August 21st. This is insufficient for Impax to thoroughly consider and prepare an appropriate response to Complaint Counsel’s 418-page filing, made a week before the close of fact discovery at a time when the parties are still taking and defending multiple depositions in three different states. Impax therefore must resort to the instant motion to assure it has adequate time to “fully address all relevant issues arising from” Complaint Counsel’s Summary Decision request. *See In re N.C. Bd. of Dental Examiners*, 150 F.T.C. 849, 2010 WL 95550005 (F.T.C. Nov. 15, 2010) (noting Commission granted motion to extend briefing schedule for motion to dismiss and motion for summary judgment “[t]o ensure that the parties can fully address all relevant issues arising from these two Motions in their respective filings”).

The Commission may extend any time limit where, as here, good cause exists to do so. *See* 16 C.F.R. § 4.3(b); *see also* Fed. R. Civ. P. 6(b)(1). Such good cause exists where the desired extension involves neither bad faith nor prejudice to the nonmoving party. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1260 (9th Cir. 2010).¹ During meet and confer discussions

¹ Commission Rule 4.3(b) is analogous to Rule 6(b)(1) of the Federal Rules of Civil Procedure. “Where the Commission has adopted provisions substantially similar to provisions in the Federal Rules, judicial constructions of such analogous provisions may serve as interpretive aids, though they are not to be regarded as binding, because application of the Commission’s rules must be tailored to the circumstances of Commission proceedings.” 43 Fed. Reg. 56862, 56863 (FTC Final Rules Dec. 4, 1978), cited in *In re Thompson Medical Co.*, 1983 FTC LEXIS 98, at *9 n.7 (March 11, 1983).

Public

on August 7, 2017, Complaint Counsel's only stated reason for refusing Impax's requested extension was that a deadline beyond August 21st would permit the Commission to decide the motion after the October 24, 2017 Hearing had begun, or to decide the motion too close in time to the hearing date, requiring Complaint Counsel to prepare for trial without benefitting from a possible narrowing of the issues. Complaint Counsel's lack of confidence in the Commission's ability to decide its motion promptly does not reflect undue prejudice. Under the Second Revised Scheduling Order and Commission rules, Complaint Counsel could have filed their Summary Decision Motion as late as September 24, 2017, thirty days before the hearing date. *See* 16 C.F.R. §3.24(a) (summary decision motion must be filed "in accordance with the scheduling order ... but in any case at least 30 days before the date fixed for the hearing"); Dkt. 9373, Second Revised Scheduling Order filed June 19, 2017 (reflecting no earlier deadlines for summary decision motions in this matter). Thus, neither Judge Chappell's scheduling orders nor the governing procedural rules view Complaint Counsel's stated reason for denying Impax's request as a basis for disallowing summary decision briefing. Indeed, had Complaint Counsel filed its motion on the latest permissible date, Impax's opposition would not be due until October 8th—***38 days after the revised deadline Impax now seeks***. Complaint Counsel has not and cannot identify any undue prejudice from Impax's desired extension.

Impax seeks the requested extension in order to have sufficient time to prepare a thorough response to Complaint Counsel's Motion, which seeks to upend 100 years of rule of reason jurisprudence and touches on areas of antitrust law that are still developing in the wake of *FTC v. Actavis*, 133 S. Ct. 2223 (2013). A thorough examination of these novel legal issues by ***both*** parties will not only better guide the instant proceedings, but also serve the larger goals of Part III adjudication. *See* Maureen K. Ohlhausen, "Administrative Litigation at the FTC:

Public

Effective Tool for Developing the Law or Rubber Stamp?,” 12 J. Competition L. & Econ. 623, 641 (2016), *available at*

<https://academic.oup.com/jcle/article/12/4/623/2547756/ADMINISTRATIVE-LITIGATION-AT-THE-FTC-EFFECTIVE> (“The FTC’s Part 3 authority is a powerful tool for developing or clarifying the law.”); *see also* Maureen K. Ohlhausen, “Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC’s Antitrust Mission” (April 20, 2016) at 2 (“Part III is a fundamental institutional strength of the FTC and has allowed the agency to serve a critical function in emerging areas of competition law.”); *id.* at 9-10 (suggesting Part III proceedings and the FTC are “optimally placed” to clarify “an appropriate rule of reason inquiry” under *FTC v. Actavis*).

Given Complaint Counsel’s efforts to rewrite the rule of reason, the novelty of certain of the legal issues involved, the extensive factual record (comprised in part of 22 depositions, six of which have been or will be taken after Complaint Counsel filed its motion), and other pending deadlines—including an August 11th fact discovery deadline and a September 5th deadline for Respondent’s expert reports—Impax would be over-burdened to meet the current August 18th deadline, even if it works diligently towards doing so. *See In re Chicago Bridge & Iron Co.*, 2002 FTC LEXIS 69, *2 (2002) (noting good cause exists when a deadline in a scheduling order cannot be met “despite the diligence of the party seeking the extension”).

For these reasons, Impax respectfully requests the Commission extend the deadline for Impax’s Opposition to Complaint Counsel’s Motion for Summary Decision to August 31, 2017.

Public

Dated: August 8, 2017

O'MELVENY & MYERS LLP

By: /s/ Edward D. Hassi

Edward David Hassi
ehassi@omm.com

1625 Eye Street, NW
Washington, DC 20006-4061
Telephone: +1 202 383 5300
Facsimile: +1 202 383 5414

Counsel for Impax Laboratories, Inc.

Public

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney**

In the Matter of:

IMPAX LABORATORIES, INC.,

a corporation.

Docket No. 9373

[PROPOSED] ORDER FOR EXTENSION OF TIME

Upon consideration of Respondent Impax Laboratories, Inc.'s Motion for an Extension of Deadline for Opposing Complaint Counsel's Motion for Summary Decision, it is hereby **ORDERED** that Respondent's Motion is **GRANTED**. Respondent is hereby granted until August 31, 2017, to file its response to the Motion for Summary Decision.

By the Commission.

ISSUED: _____

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW
Room H-159
Washington, D.C. 20580

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2017, I emailed a copy of the foregoing to the following individuals:

Markus Meier
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: mmeier@ftc.gov

Bradley Albert
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: balbert@ftc.gov

Daniel Butrymowicz
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: dbutrymowicz@ftc.gov

Nicholas Leefer
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: nleefer@ftc.gov

Synda Mark
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: smark@ftc.gov

Maren Schmidt
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759

Email: mschmidt@ftc.gov

Jamie Towey
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: jtowey@ftc.gov

Eric Sprague
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: esprague@ftc.gov

Chuck Loughlin
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580
Telephone: 202-326-3759
Email: cloughlin@ftc.gov

/s/ Anna M. Fabish
Anna M. Fabish
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, California 90071
(213) 430 - 6000

Notice of Electronic Service

I hereby certify that on August 08, 2017, I filed an electronic copy of the foregoing RESPONDENT IMPAX LABORATORIES, INC.'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR EXTENSION OF DEADLINE FOR OPPOSING COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION, 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 August 08, 2017, I served via E-Service an electronic copy of the foregoing RESPONDENT IMPAX LABORATORIES, INC.'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR EXTENSION OF DEADLINE FOR OPPOSING COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION, upon:

Bradley Albert
Attorney
Federal Trade Commission
balbert@ftc.gov
Complaint

Daniel Butrymowicz
Attorney
Federal Trade Commission
dbutrymowicz@ftc.gov
Complaint

Nicholas Leefer
Attorney
Federal Trade Commission
nleefer@ftc.gov
Complaint

Synda Mark
Attorney
Federal Trade Commission
smark@ftc.gov
Complaint

Maren Schmidt
Attorney
Federal Trade Commission
mschmidt@ftc.gov
Complaint

Eric Sprague
Attorney
Federal Trade Commission
esprague@ftc.gov
Complaint

Jamie Towey
Attorney
Federal Trade Commission
jtowey@ftc.gov
Complaint

Chuck Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Alpa D. Davis
Attorney
Federal Trade Commission
adavis6@ftc.gov
Complaint

Lauren Peay
Attorney
Federal Trade Commission
lpeay@ftc.gov
Complaint

James H. Weingarten
Attorney
Federal Trade Commission
jweingarten@ftc.gov
Complaint

Rebecca Weinstein
Attorney
Federal Trade Commission
rweinstein@ftc.gov
Complaint

I hereby certify that on August 08, 2017, I served via other means, as provided in 4.4(b) of the foregoing RESPONDENT IMPAX LABORATORIES, INC.'S MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR EXTENSION OF DEADLINE FOR OPPOSING COMPLAINT COUNSEL'S MOTION FOR SUMMARY DECISION, upon:

Markus Meier
Attorney
Federal Trade Commission
mmeier@ftc.gov
Complaint

Eileen Brogan
Attorney