

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

COMMISSIONERS: **Joseph J. Simons, Chairman**
 Noah J. Phillips
 Rohit Chopra
 Rebecca K. Slaughter
 Christine S. Wilson

In the Matter of

**Thomas Jefferson University
a corporation,**

and

**Albert Einstein Healthcare Network
a corporation.**

Docket No. 9392

**JOINT EXPEDITED MOTION FOR A CONTINUANCE
OF ADMINISTRATIVE PROCEEDINGS**

Pursuant to Rule 3.41 of the Federal Trade Commission (“FTC” or “Commission”) Rules of Practice, Complaint Counsel and Respondents, Thomas Jefferson University and Albert Einstein Healthcare Network, jointly move for a 60-day continuance of the commencement of the administrative hearing currently scheduled to begin on January 5, 2021. Complaint Counsel and Respondents also move for a corresponding stay of related pre-hearing deadlines.

BACKGROUND

On February 27, 2020, Complaint Counsel filed this action and, together with Commonwealth of Pennsylvania, a complaint in the United States District Court for the Eastern District of Pennsylvania seeking a preliminary injunction to enjoin the proposed transaction between Respondents until completion of this administrative proceeding. Respondents stipulated to the entry of a temporary restraining order in the federal litigation, which provides that the proposed transaction may not be consummated “until after 11:59 PM Eastern Time on the seventh calendar day after the Court rules on Plaintiffs’ motion for a preliminary injunction.” Order [Docket No. 11], *FTC, et al. v. Thomas Jefferson University, et al.*, No. 2:20-cv-01113-GJP (E.D. Pa.). A six-day preliminary injunction hearing concluded on October 1, 2020, the Parties filed proposed findings of fact and conclusions of law on October 12, 2020, and the District Court heard closing arguments on October 26, 2020. The District Court has now taken the matter under advisement following closing arguments, and though it has not announced when it will issue a ruling, the Parties anticipate a decision before the end of the year.

Respondents now affirm that, if they are enjoined from consummating the transaction after all appeals in the federal proceeding are exhausted, they will abandon the proposed transaction.

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 continuance of the commencement of the administrative hearing for several reasons:

1. The third-party and Respondent witnesses who may be called to testify live at the administrative hearing are involved in the healthcare industry in an unprecedented time of a global pandemic. These witnesses include operators of skilled nursing facilities, hospitals, and clinicians themselves. A brief stay will allow these healthcare providers sufficient time to juggle the demands of their already-disrupted schedules with the needs of this litigation, and may even obviate the need to impose any additional burdens should the administrative hearing become moot. “The public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary.” Order Granting 14-Day Continuance, *In the matter of Sanford Health* (Nov. 3, 2017).
2. Absent the continuance, third parties and the Parties will be required to devote significant resources to meeting various interim deadlines between now and January 5, 2021 (the current commencement date for the administrative hearing), including extensive document and data review and redaction, depositions, and motion practice. For example, numerous third parties whose confidential material may be used at the hearing will be required to move by December 15, 2020, for *in camera* treatment of any material they do not want presented on the public record. Such motions will address significant volumes of competitively and commercially sensitive documents and data that were produced during the course of the preliminary injunction proceeding and the FTC’s merger review.

If the Commission grants this motion for a brief stay, then the third parties may avoid the substantial burden of reviewing voluminous documents, performing line-by-line proposed redactions of confidential information, preparing legal memoranda requesting in camera treatment of those materials, and filing copies of all such materials with the Court.

3. Absent the continuance, third-party and party witnesses—virtually all of whom reside outside of the Washington, D.C. area—will need to incur significant expenses, including legal fees, associated with preparation for the administrative hearing and potential travel costs. These expenses will be particularly burdensome in the midst of a global pandemic and because the administrative hearing is scheduled to overlap with holiday-related travel and disruptions. The Parties have identified approximately 69 third parties as witnesses that may be called live at the administrative hearing. Already, six third-party and four party fact witnesses have been called to testify at a deposition, and there may be at least seven expert depositions. A temporary stay may allow these third parties and the Parties to avoid these additional expenses entirely should the administrative hearing become moot.
4. Absent the requested continuance, the Office of the Administrative Law Judge will be required to devote time and resources to pre-hearing preparation and adjudication of issues for a hearing that it may not have to conduct.

The requested relief will serve the public interest and will not prejudice the Commission’s ability to discharge its duties. If after all appeals in the federal proceeding are exhausted, they are enjoined from consummating the transaction, Respondents do not intend to proceed with their merger and this administrative proceeding will be moot. If the motion for preliminary injunction is denied, Respondents will file a motion pursuant to Rule 3.26 to withdraw the case from adjudication or dismiss the complaint. Rule 3.26(b)-(d). Once a respondent files such a motion, “the new rule now provides for an automatic withdrawal or automatic stay” of the administrative proceeding, depending on the type of motion. FTC Revisions to Rules of Practice, 80 Fed. Reg. 15,157, 15,158 (Mar. 23, 2015); *see also* Rule 3.26(c); Rule 3.26(d)(2). Imposing a brief stay now avoids the inefficiency of conducting discovery and other pre-hearing matters only to suspend the proceeding following the ruling by the District Court, without prejudicing the Commission. A 60-day continuance is appropriate so that, if necessary, interim deadlines for fact discovery would occur after the holidays.

RELIEF REQUESTED

For all the reasons foregoing, Complaint Counsel and Respondents jointly and respectfully request that the Commission exercise its discretion under Rule 3.41(b) and/or Rule 3.41(f) to continue commencement of the administrative hearing by 60-days, or until such later date as may be convenient for the Chief Administrative Law Judge and the Commission. Complaint Counsel and Respondents also request that interim pre-hearing deadlines be stayed for 60-days.

Dated: October 29, 2020

Respectfully submitted,

/s/ Kenneth M. Vorrasi

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**[PROPOSED] ORDER GRANTING JOINT EXPEDITED MOTION FOR A 60-DAY
CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS**

Good cause having been shown,

IT IS HEREBY ORDERED THAT Complaint Counsel’s and Respondents’ Joint Expedited Motion for a 60-Day Continuance of Administrative Proceedings is **GRANTED**; and

- (1) Commencement of the evidentiary hearing in this matter is moved from January 5, 2021, to March 8, 2021;
- (2) All other proceedings in this matter are stayed for 60 days from the date of this order. And

(3) The Administrative Law Judge shall issue a revised Scheduling Order consistent with the terms of this order.

By the Commission.

April J. Tabor
Acting Secretary

ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
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ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I also certify that I caused the foregoing document to be served via email to:

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By: s/ Mark Seidman
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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 document that is available for review by the parties and the adjudicator.

October 29, 2020

By: s/ Mark Seidman
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