

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

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

In the Matter of

**Thomas Jefferson University
a corporation,**

and

**Albert Einstein Healthcare Network
a corporation.**

Docket No. 9392

RESPONDENTS' MOTION TO WITHDRAW MATTER FROM ADJUDICATION

Respondents Thomas Jefferson University (“Jefferson”) and Albert Einstein Healthcare Network (“Einstein”) respectfully move pursuant to Rule 3.26(c), 16 C.F.R. § 3.26(c), to withdraw the above-captioned matter from adjudication to allow the Commission to consider whether further litigation is in the public interest following the denial of the Federal Trade Commission (“FTC” or “Commission”) and Commonwealth of Pennsylvania’s motion for a preliminary injunction in this matter and denial of the FTC’s emergency motion for an injunction pending appeal.

BACKGROUND

On February 27, 2020, Complaint Counsel filed this action and, together with the 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 (“TRO”) in the federal litigation, which provided 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 [Dkt. 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. On December 8, 2020, the District Court denied the FTC and the Commonwealth of Pennsylvania’s (collectively, “Plaintiffs”) request for a preliminary injunction, concluding that the Plaintiffs had failed to show a likelihood of success on the merits in any of the three markets they alleged. Memorandum Opinion [E.D. Pa. Dkt. 277].

Plaintiffs filed an Emergency Motion for Injunction Pending Appeal on December 9, 2020 [E.D. Pa. Dkt. 279], which Respondents, as Defendants, opposed [E.D. Pa. Dkt. 282]. The FTC (and not the Commonwealth of Pennsylvania) filed a Notice of Appeal on December 10, 2020 [E.D. Pa. Dkt. 280]. On December 11, 2020, the FTC filed an Emergency Motion for an Injunction Pending Appeal in the United States Court of Appeals for the Third Circuit. *See* Emergency Motion of the Federal Trade Commission for an Injunction Pending Appeal [Dkt. 5-1], *FTC, et al. v. Thomas Jefferson University, et al.*, No. 20-3499 (3d Cir.). Respondents, as Defendants-Appellees, opposed this motion. *See* Appellees’ Opposition to the Emergency Motion of the Federal Trade Commission for an Injunction Pending Appeal [3d Cir. Dkt. 7].

On December 14, 2020, with the consent of the Respondents, the District Court extended the expiration of the TRO until 11:59 p.m. on December 21, 2020, but denied Plaintiffs’

Emergency Motion for Injunction Pending Appeal. Order [E.D. Pa. Dkt. 285]. On December 21, 2020, the Third Circuit denied the FTC's Emergency Motion for an Injunction Pending Appeal. Order [3d Cir. Dkt. 16].

Respondents Jefferson and Einstein timely file this motion within 14 days after the Third Circuit's denial of the FTC's Emergency Motion for an Injunction Pending Appeal. *See* FTC Rule 3.26(b)(2), 16 C.F.R. § 3.26(b)(2). Both Respondents consent to the filing of this motion. *Id.* at § 3.26(c)

ARGUMENT

Rule 3.26 of the Commission's Rules of Practice sets forth a process by which Respondents may seek to withdraw matters from adjudication following the denial of preliminary injunctive relief. 16 C.F.R. § 3.26. The Rule explains that "[f]ollowing denial of court relief as specified in paragraph (b) of this section, respondents may 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 specified denials of relief outlined in Paragraph (b) are after:

- (1) A district court has denied the Commission's request for a preliminary injunction, if the Commission has not filed a motion for relief pending appeal with the court of appeals within 7 days following the district court's denial of a preliminary injunction; or
- (2) A court of appeals has denied a Commission motion for relief pending appeal.

16 C.F.R. § 3.26(b). A motion for withdrawal from adjudication under one these scenarios must be filed within 14 days of the occurrence of the above-listed event. 16 C.F.R. § 3.26(b). "The secretary *shall* issue an order withdrawing the matter from adjudication 2 days after such a

motion is filed,” unless Complaint Counsel file an objection that the conditions set forth in Rule 3.26(b) have not been met. 16 C.F.R. § 3.26(c) (emphasis added).

The conditions for withdrawing this matter from adjudication have been satisfied. The District Court denied Plaintiffs’ request for a preliminary injunction on December 8, 2020 after concluding the Plaintiffs failed to show a likelihood of success on the merits. Memorandum Opinion [E.D. Pa. Dkt. 277]. Plaintiffs filed an Emergency Motion for Injunction Pending Appeal in the District Court on December 9, 2020, [E.D. Pa. Dkt. 279], and on December 11, 2020, the FTC filed an Emergency Motion for an Injunction Pending Appeal in the Third Circuit, [3d Cir. Dkt. 5-1]. On December 14, 2020, the District Court denied the FTC and the Commonwealth of Pennsylvania’s Emergency Motion for Injunction Pending Appeal. Order [E.D. Pa. Dkt. 285]. On December 21, 2020, the Third Circuit denied the FTC’s Emergency Motion for an Injunction Pending Appeal. Order [3d. Cir. Dkt. 16]. Because the requirements of Rule 3.26(b) have been satisfied, the grounds for withdrawal under Rule 3.26(c) are met.

Respondents, as required under Rule 3.26(b), timely file this motion within 14 days of the Third Circuit’s denial of the FTC’s Emergency Motion for an Injunction Pending Appeal. Respondents respectfully request that the Secretary therefore withdraw this matter from adjudication within two days, as required under Rule 3.26(c).

CONCLUSION

For the reasons set forth above, Respondents' motion for withdrawal of the matter from adjudication under Rule 3.26(c) should be granted.

Dated: December 31, 2020

Respectfully submitted,

/s/ Leigh L. Oliver

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2020, a true and correct copy of the foregoing was filed via hand delivery on the following:

April J. Tabor
Acting Secretary, Office of the Secretary
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I also certify that I caused a true and correct copy of the foregoing to be served via email to:

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**[PROPOSED] ORDER GRANTING RESPONDENTS'
MOTION TO WITHDRAW MATTER FROM ADJUDICATION**

Upon consideration of Respondents' Motion to Withdraw Matter from Adjudication and any opposition thereto,

IT IS HEREBY ORDERED, that Respondents' Motion is GRANTED.

IT IS FURTHER ORDERED, pursuant to Commission Rule 3.26(c), that this matter in its entirety be, and hereby is, withdrawn from adjudication.

By the Commission, Chairman Simons recused.

April J. Tabor
Acting Secretary

Date: _____