PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Andrew N. Ferguson, Chairman**
Rebecca Kelly Slaughter
Melissa Holyoak
Mark R. Meador

In the Matter of: **Caremark Rx, LLC;** **Zinc Health Services LLC;** **Express Scripts, Inc.;** **Evernorth Health, Inc.;** **Medco Health Services, Inc.;** **Ascent Health Services LLC;** **OptumRx, Inc.;** **OptumRx Holdings LLC; and** **Emisar Pharma Services LLC,** **Respondents.**	**Docket No. 9437**

RESPONDENTS' MOTION TO STAY DISCOVERY AND SUSPEND THE EVIDENTIARY HEARING DATE PENDING THE COMMISSION'S RESOLUTION OF RESPONDENTS' MOTION TO DISMISS

In the Commission's Order granting Complaint Counsel's motion to lift the stay of this proceeding, the Commission stated that Respondents may seek a stay of discovery pending the Commission's resolution of Respondents' motion to dismiss after that motion is filed. Order Lifting Stay at 2. The Commission stated that it "see[s] no reason to deviate from the Commission's Rules and ordinary practice *in anticipation* of a motion to dismiss that

Respondents have not yet filed." *Id* (emphasis supplied). Respondents filed their motion to dismiss on August 29, 2025, and respectfully request that the Commission issue an order staying discovery in this case and suspending the starting date for the evidentiary hearing until after the Commission renders its decision on Respondents' motion to dismiss, and one or more of the parties to the proceeding moves the Commission to lift the stay. Respondents further request that the Commission order the parties to engage in good faith discussions on any proposed timing on when the stay would be lifted and the ultimate hearing date prior to moving to lift the stay. Finally, Respondents respectfully request that the Commission decide this motion as soon as reasonably practicable. Complaint Counsel has represented to Counsel for Respondents that it will oppose this motion, but has agreed to file its opposition within 24 hours after Respondents serve the motion.[1]

A stay of discovery will spare the parties (including the Commission) and third parties from spending millions of additional dollars on claims brought by the prior administration that are rooted in a legally baseless interpretation of Section 5 of the FTC Act. Prior to August 28, this matter had been stayed in its entirety since April 1, and a stay of discovery pending resolution of Respondents' motion to dismiss simply maintains the status quo that had existed for almost five months. Moreover, a stay of discovery will result in no concrete harm to anyone. Taking the complaint's allegations at face value, each Respondent is already effectively doing

[1] As explained in this motion, Respondents' position is that discovery should be stayed pending the Commission's resolution of Respondents' motion to dismiss. If the Commission denies this motion, however, then Respondents respectfully request that their motion to dismiss be decided by the Commission as soon as reasonably possible to avoid waste of party, nonparty, and Commission resources.

what the complaint demands: low-list price insulin drugs are included on widely-available formularies, and low-cost insulin is readily available to the public.[2]

Respondents acknowledge the Commission's general approach that filing a motion to dismiss does not automatically stay discovery in a Part 3 proceeding. Nevertheless, as the Commission has explained, it has "discretion to order a stay in appropriate cases." *La. Real Est. Appraisers Bd.*, Dkt. No. 9374, at 2 (F.T.C. Jan 12, 2018). This is just such a case—the Commission should evaluate whether it wants to devote enormous taxpayer resources to a case with glaring legal defects.

First, there are threshold legal issues that should be resolved on a motion to dismiss. As explained in detail in Respondents' motion to dismiss, the Commission has never brought—much less won—a similar case. The complaint makes no allegation that Respondents have violated the Sherman or Clayton Acts, colluded with one another, have market power individually or collectively (the complaint fails even to identify a relevant market), or have excluded or foreclosed rivals from competing. The complaint also fails to allege any anticompetitive intent. Furthermore, the complaint labels Respondents' conduct as "unfair" without identifying any legal obligation or public policy that they are supposed to have violated. Likewise, it fails to allege that Respondents plausibly caused the alleged harm or that the alleged harm outweighs the benefits of the conduct (*e.g.*, the complaint acknowledges that the challenged conduct can result in lower premiums and that plan sponsors decide how to design their plan

[2] *See* EXPRESS SCRIPTS INC., 2025 EXPRESS SCRIPTS NATIONAL PREFERRED FORMULARY 1 (2025), https://www.express-scripts.com/art/open_enrollment/Preferred_Members_FormularyRxGuide.pdf; OPTUM RX, 2025 SELECT STANDARD FORMULARY 21 (2025), https://contenthub-aem.optumrx.com/content/dam/contenthub/onboarding/assets/som/Select-Formulary-2025.pdf; CVS CAREMARK, PERFORMANCE DRUG LIST – STANDARD CONTROL 5 (2025), https://www.caremark.com/portal/asset/caremark_recaprxclaimsdruglist.pdf; *see also, e.g.*, "Lilly Insulin Value Program," https://insulinaffordability.lilly.com ("Through the Lilly Insulin Value Program, all Lilly insulins are available for $35 a month whether you have commercial insurance or no insurance.").

benefits). The Commission should consider Respondents' arguments in the motion to dismiss before allowing costly discovery to proceed.

Second, a stay would save significant party, non-party, ALJ, and Commission resources while the motion to dismiss is pending. The Commission's typical administrative complaints target a single or a small number of related (or conspiring) entities with relatively more straightforward legal claims. In such cases, weighing the costs of discovery against the Commission's interest in expediency may well come out differently. But here, the Commission, Respondents, and non-parties have already spent tens of millions of dollars on discovery and face the prospect of spending tens of millions of dollars more if the Commission does not stay discovery.

Discovery is unusually and unnecessarily costly in this case in part because the complaint challenges separate conduct undertaken at different times by multiple independent Respondent groups in a single proceeding, all without alleging that the Respondents have conspired, colluded, or coordinated (even tacitly), or that they are interdependent in any way. By structuring the complaint this way, the prior administration disregarded basic misjoinder principles routinely applied by federal courts. There is no precedent for the Commission engaging in this kind of group pleading—in an administrative adjudication or otherwise. This group pleading dramatically increases the costs and complexity of discovery as parties must pursue and are subject to discovery related to admittedly independent conduct by others. To the extent disputes arise during discovery, a stay would also avoid wasting ALJ resources managing such disputes while the motion to dismiss is pending.

The Supreme Court has long recognized that discovery in an antitrust lawsuit is "a sprawling, costly, and hugely time-consuming undertaking." *Bell Atl. Corp. v. Twombly*, 550

U.S. 544, 560 & n.6 (2007) (admonishing courts not "to forget that proceeding to antitrust discovery can be expensive" in reversing Second Circuit for adopting too lenient an approach on a motion to dismiss). The federal courts, therefore, in sprawling, multi-defendant cases like this one have recognized the efficiency of ruling on a motion to dismiss before allowing the case to proceed to costly and time-consuming discovery. *See e.g.*, *In re Broiler Chicken Grower Litig.*, No. 6:17-CV-00033-RJS, 2017 WL 3841912 (E.D. Okla. Sept. 1, 2017); *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417, 2007 WL 2127577, at *4 (N.D. Cal. Jul. 24, 2007); *In re Copper Tubing Litig.*, No. 04-2771, 2006 WL 8434911, at *4 (W.D. Tenn. Oct. 3, 2006).

In its Motion to Lift the Stay, Complaint Counsel cited several decisions by the Commission in support of its argument that the Commission ordinarily does not stay discovery of an administrative adjudication pending a motion to dismiss. Mot. at 3-4 (citing *In re RagingWire Data Centers, Inc.*, No. 9386, 2020 WL 91293, at *1 (F.T.C. Jan 6, 2020); *In re La. Real Est. Appraisers Bd.*, Dkt. No. 9374, at 3; *In re LabMD*, No. 9357, 2013 WL 6826948 (F.T.C. Dec. 13, 2013)). None of these cases address the factors that make discovery unusually costly and time-consuming in this case: allegations against multiple unrelated respondents with no allegation of a contract, conspiracy, or coordinated activity among them, and an unprecedented standalone unfair-methods-of-competition claim. While "*routine* discovery costs do not outweigh the competing public interest in the efficient and expeditions resolution of litigated matters," *La. Real Est. Appraisers Bd.*, Dkt. No. 9374, at 2 (emphasis supplied), the cases do not address the discovery burdens slated to be borne by all parties and non-parties in this case. Complaint Counsel also cites *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980), for the proposition that discovery expenses "do not constitute irreparable injury." Mot. at

4. That case "present[ed] the question whether the issuance of a complaint by the Federal Trade Commission is 'final agency action' subject to judicial review," 449 U.S. at 233, and says nothing about whether the Commission should stay discovery pending a motion to dismiss in its administrative tribunal. These cases do not bar the Commission from exercising its discretion to stay discovery in this matter.

CONCLUSION

Respondents respectfully request that the Commission issue an order staying discovery in this case and suspending the starting date for the evidentiary hearing until after the Commission decides Respondents' pending motion to dismiss, and one or more of the parties to the proceeding moves the Commission to lift the stay. Respondents further request that the Commission order the parties to engage in good faith discussions on any proposed timing on when the stay would be lifted and the ultimate hearing date prior to moving to lift the stay.

Respectfully submitted,

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CONFERENCE STATEMENT

Counsel for the moving Respondents has conferred with Complaint Counsel in a good faith effort to resolve the issues raised by this motion but has been unable to reach such an agreement.

/s/ Daniel J. Howley

Counsel for Express Scripts, Inc., Evernorth Health, Inc., Medco Health Services, Inc., and Ascent Health Services, LLC

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CERTIFICATE OF SERVICE

I hereby certify that no portion of this filing was drafted by generative artificial intelligence ("AI") (such as ChatGPT, Microsoft Copilot, Harvey AI) and that on September 2, 2025, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of filing to:

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Respectfully submitted,

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COMMISSIONERS: **Andrew N. Ferguson, Chairman**
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[PROPOSED] ORDER ON RESPONDENTS' MOTION TO STAY DISCOVERY AND SUSPEND THE EVIDENTIARY HEARING DATE PENDING THE COMMISSION'S RESOLUTION OF RESPONDENTS' MOTION TO DISMISS

On September 2, 2025, Respondents filed a motion to stay discovery and suspend the evidentiary hearing date pending the Commission's resolution of Respondents' motion to dismiss. Upon consideration of that motion and good cause being shown, it is hereby ordered that the Motion to Stay Discovery and Suspend the Evidentiary Hearing Date is GRANTED.

The Part 3 Adjudicative Proceeding is hereby stayed through the date when the Commission renders its decision on Respondents' Motion to Dismiss and will remain stayed until one or more of the parties to the proceeding moves the Commission to lift the stay. The parties must engage in good faith discussions on any proposed timing on when the stay would be lifted and the ultimate hearing date prior to moving to lift the stay.

By the Commission.

_____
Joel Christie
Acting Secretary

ISSUED:

EXHIBIT A

2017 WL 3841912
Only the Westlaw citation is currently available.
United States District Court, E.D. Oklahoma.

IN RE: BROILER CHICKEN GROWER LITIGATION

Case No. 6:17-CV-00033-RJS
|
Signed 09/01/2017

ORDER GRANTING DEFENDANTS' MOTION TO STAY DISCOVERY PENDING RESOLUTION OF MOTIONS TO DISMISS

ROBERT J. SHELBY, United States District Judge

***1** Before the court in this consolidated action[1] is Defendants' Motion to Stay Discovery Pending Resolution of their Motions to Dismiss.[2] Plaintiffs oppose the Motion.[3] For the reasons discussed below, the court GRANTS Defendants' Motion.[4]

Background

This is a putative class action centering on antitrust claims that broiler chicken growers assert against poultry production companies. The six named Plaintiff growers[5] allege that beginning nearly a decade ago—"at least 2008, and likely earlier"—the twelve Defendant poultry companies[6] engaged in illicit anticompetitive activity in concert with others to artificially suppress grower compensation.[7] The growers contend the poultry companies met this goal by, among other means: 1) sharing detailed compensation and business data through a statistical and research firm called AgriStats, 2) allowing access to each other's production facilities, 3) permitting high-level employees to move to jobs at each other's companies without contractual restrictions, and 4) complying with a "no-poach" agreement under which the poultry companies agreed not to recruit or hire growers from each other.[8]

Some growers initially filed suit in this District against the poultry companies in January 2017.[9] After other growers filed a second, substantially similar case in this District in March 2017,[10] the cases were consolidated.[11] Plaintiffs claim there are thousands of growers who may join them in this action.[12]

After a June 9, 2017 case management hearing, and pursuant a subsequent June 14 order,[13] the grower Plaintiffs jointly filed the now-governing Consolidated Amended Complaint on July 10, 2017.[14] They assert two causes of action: 1) Agreement in Restraint of Trade in Violation of Section I of the Sherman Antitrust Act, 15 U.S.C. § 1; and 2) Unfair Practices in Violation of Section 202 of the Packers and Stockyards Acts of 1921, 7 U.S.C. § 192.[15]

***2** Under the court's June 14 order, the Defendant poultry companies have until September 8, 2017, to file their Motions to Dismiss.[16] The Plaintiffs must file any oppositions by October 23, 2017, and Defendants have until November 22, 2017 to file any reply memoranda.[17] Thus, unless the parties seek and the court permits an extension, briefing on initial Motions to Dismiss will be complete in three months.

In its June 14 order, the court admonished the Defendants to, when possible in view of similar legal and factual positions, file joint submissions rather than individual motions.[18] The Defendants' Motion to Stay Discovery pending the court's determination of the anticipated Motion to Dismiss was filed jointly on July 24.

Since the Defendants filed their Motion to Stay Discovery, Plaintiffs have given notice of their intent to issue preservation subpoenas to twenty-four third party poultry production companies.[19] Each subpoena identically sets forth thirty-three separate categories of requested documents—and some categories have up to ten sub-parts.[20] The subpoenas seek from these third parties documents on a broad range of subjects, including the third parties' own internal management teams; corporate policies; practices with regard to poultry growers—including compensation, economic evaluations, and contracts; use of AgriStats; and personnel information—including entire personnel files for any employee who may have attended a meeting wherein a poultry company discussed a topic relating to growers.[21]

Analysis

Defendants seek a stay of discovery pending the resolution of their anticipated Motions to Dismiss. Their anticipated Motions will be grounded in multiple "threshold" issues upon which this complex antitrust case may be resolved for all or some of the dozen Defendants. Therefore, they argue the burden and expense that immediate discovery would inflict on the them, the court, and third parties far exceeds any prejudice the Plaintiffs may bear if required to wait until the Motions are resolved. Plaintiffs respond that the Defendants will not prevail on their Motions to Dismiss, and that delaying discovery will prejudice them but not the Defendants, the court, and third parties.

The Federal Rules of Civil Procedure are meant to "secure the just, speedy, and inexpensive determination of every action...."[22] The Rules do not provide for discovery stays like the one Defendants seek as a matter of course pending the resolution of dispositive motions.[23] But within this court's discretion to control discovery[24] and its own docket lies the ability to stay discovery.[25] Analogously, Rule 26(c) allows the court to issue an order protecting a party from discovery that will cause "annoyance, embarrassment, oppression, or undue burden or expense...."[26] "The 'good cause' standard of Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise."[27] Thus, while blanket discovery stays pending resolution of dispositive motions are rarely appropriate,[28] and it is not this court's general practice to halt discovery simply because a motion has been filed, particular circumstances may warrant a discovery stay for a period time.

***3** The Tenth Circuit instructs that the determination of whether such circumstances warrant a discovery stay calls "for balancing the competing interests on both sides."[29] Defendants, as the parties seeking a stay, bear the burden to make out a "clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which [they] pray[ ] will work damage to someone else."[30] In balancing the parties' claimed hardships, some district courts in this circuit specifically evaluate the following factors: "(1) plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest."[31] Under these guiding principles, the court concludes that Defendants have established that a general discovery stay is warranted until the court has resolved the anticipated Motions to Dismiss.

1. The Defendants' Anticipated Motions to Dismiss

The court preliminarily reviews the nature of the anticipated Motions to Dismiss as Defendants have generally described in their briefing. This is relevant to the court's analysis because if they seek dismissal of all claims against all or some of the Defendants, then subjecting those Defendants to discovery they might otherwise wholly avoid seems less inviting. Though Defendants have yet to file their Motions, in their briefing they represent that they will move to dismiss the Consolidated Amended Complaint with prejudice on at least the following grounds:

> 1) All Defendants will argue the Consolidated Amended Complaint should be dismissed in its entirety because it fails plausibly to allege conspiracy allegations, and Plaintiffs are unlikely to be able to cure this deficiency;
>
> 2) Some Defendants will move to dismiss for lack of jurisdiction and/or improper venue;
>
> 3) Some Defendants will seek to compel arbitration based on clauses set forth in contracts with growers and to dismiss the claims against them in this action; and
>
> 4) One Defendant will seek to enjoin or dismiss litigation against it based on a confirmation order entered by the U.S. Bankruptcy Court for the Northern District of Texas.[32]

Accordingly, all Defendants will seek dismissal of this action in its entirety, and some Defendants will seek dismissal of all claims against them on the basis of "threshold" issues, including jurisdiction and venue.

The parties spend a good part of their briefing discussing the nature and merits of the Defendants' anticipated Motions to Dismiss. In evaluating whether to stay discovery pending resolution of a dispositive motion, courts often discuss the nature of the defenses asserted in the motion, as this court has done based on Defendants' representations in the briefing on this Motion.[33] Some courts also some delve into a motion's likelihood of success.[34] This court determines in the context of this case that it need not delay a decision on the discovery stay issue until it can evaluate in detail the actual Motions to Dismiss and engage in an in-depth legal analysis—akin almost to a preliminary or advisory ruling on the Motions. The court finds it sufficient that the parties appear to have a significant dispute on the defenses Defendants intend to

assert. The court next turns its attention to the balancing of the competing interests.

2. Plaintiffs' Interests

***4** The court first evaluates Plaintiffs' interests in avoiding a stay, including whether a delay will prejudice or "work damage" to them. After careful review, it appears that any prejudice to Plaintiffs resulting from a relatively brief discovery stay will be minimal in the context of this case and does not weigh strongly against the imposition of a stay.

Like most litigants, Plaintiffs are eager to proceed with their case. Along these lines, they contend that Defendants' proposed discovery stay will harm them by prolonging the damage to their livelihoods occasioned by "Defendants' anticompetitive conduct" and "because prejudgment interest is rarely granted, [therefore] a stay offers Defendants an unearned windfall."[35] They also point out that a delay may cause unspecified evidence to disappear and unidentified witnesses to become unavailable or have memories fade.[36]

The court seeks to move this case to an efficient resolution. But it cannot conclude that these interests Plaintiffs identify will be significantly affected by a limited discovery delay measured in months while the court considers the anticipated Motion to Dismiss.

First, the court cannot conclude a short period of additional time will work significant additional harm to Plaintiffs, particularly in view of the lengthy time this case has been percolating and will take to litigate. The conduct at issue in the Consolidated Amended Complaint began nearly a decade ago. This litigation—a proposed antitrust class action with thousands of potential claimants against twelve large companies and potentially involving thousands of claimants—puts that decade of conduct at issue. There is little doubt these claims will take a substantial amount of time to litigate. In this context, a few months' delay to permit evaluation of initial Motions to Dismiss as this case begins will work only a comparatively small amount of harm to Plaintiffs.[37]

Second, the court finds that a limited discovery stay is unlikely to be the cause of lost evidence, missing witnesses, or significantly faded memories. Defendants are under an obligation to retain evidence; and they state in their briefing that they have preservation holds in place. Plaintiffs have prepared and are able to serve subpoenas to third parties to ensure that they too retain evidence pending the start of discovery. It is unclear to the court from the parties' briefing the witnesses who might become unavailable following a limited discovery stay. Where this is so, and given the complex nature of this proposed antitrust class action, the decade of conduct at issue, and the length of time it will likely take to resolve the action, the court cannot conclude that staying discovery for a short period will notably risk the loss of any witnesses or testimony.

3. Burden on the Defendants

***5** The court next evaluates the alleged burden on the Defendants. They contend that the complex antitrust subject matter of this case necessarily means that discovery will be extremely costly and burdensome to them, and that the wide-ranging allegations concerning a decade of conduct and directed against a dozen Defendants in the Consolidated Amended Complaint only exacerbate these costs and burdens because the breadth of discovery will be very broad. They argue these costs and burdens weigh in favor of a discovery stay to ensure Plaintiffs' pleaded claims are legally plausible and that only those among the dozen Defendants truly subject to suit in this venue are subjected to them. The court agrees that these considerations strongly favor a stay, particularly in light of the minimal prejudice Plaintiffs identify.

Still, Plaintiffs suggest that if the court finds Defendants' position persuasive on this issue, it might permit "preliminary" discovery to begin in steps—a Rule 16 conference, requests and objections, negotiation of a protective order for handling electronically stored information (ESI), and producing certain categories of data. But the court generally agrees with Defendants that the preliminary nature of these steps does little to lessen the discovery burden on the parties, particularly in the time the court will take to resolve the Motions to Dismiss. The steps will be undertaken with uncertainty as to whether all, some, or no Defendants and claims will remain in the case. And even those preliminary steps will require substantial time and money spent in negotiations, planning, document review, preparing and objecting to discovery requests, establishing protocols for ESI disclosures, and resolving possible disputes on these matters.

4. The Court's Convenience and the Public Interest

The court next discusses the "convenience to the court" and public interest factors. The court seeks in all cases to resolve cases both promptly and efficiently. In many, if not most cases, the court would be disinclined to stay discovery simply

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because a dispositive motion were forthcoming or pending. And the court's own convenience is not of primary concern in most instances.

But the careful use of judicial resources—an interest to both the court and the public—has been of significant concern since the inception of this complex antitrust putative class action, involving a decade's worth of allegations against a dozen companies in the poultry industry. To that end the court has, and will continue to work to find ways to make litigation of this case comport with common sense for the benefit of all. The court sua sponte consolidated the two underlying cases and, in its June 14 order, expressly encouraged the Defendant poultry companies to find common ground on legal and factual issues when possible in order to minimize the number filings to which Plaintiffs must separately respond. Defendants appear to have taken this guidance to heart.

Under the particular circumstances in this case, the court concludes that the public interest is furthered by first resolving the initial Motions to Dismiss and determining which claims and Defendants will remain in this case before discovery begins in earnest. This not only may conserve judicial resources by waiting until the court resolves threshold issues before becoming mired in possible discovery disputes; it is also consistent with the court's initial admonishment to Defendants to minimize disparate and costly filings and side-disputes by finding common factual and legal ground. When the court has given answers to the parties as to what claims and Defendants are properly before it, the Defendants will more ably comply with the court's admonishment.

5. The Interests of Non-Parties

The court briefly addresses the interests of non-parties. Though the parties do not squarely address this factor in their initial briefing, the Defendants recently supplied to the court notice of twenty-four subpoenas that Plaintiffs intend to serve on non-party poultry production companies. With thirty-three categories of requested documents, these subpoenas seek a wide range of documents from these companies on their management, finances, and personnel. The burden and expense on these third-party companies in responding to these subpoenas will be significant. The court finds this factor weighs in favor of a limited discovery stay pending the resolution of Defendants' initial Motions to Dismiss.

Conclusion

***6** Based on the foregoing, the court finds Defendants have met their burden to show clear hardship to themselves and third parties warranting a discovery stay in this action pending the resolution of their initial Motions to Dismiss. While Plaintiffs may suffer some delay in litigating their claims, and generally claim that this delay adds to their continuing financial harm—assuming for the moment they are entitled to recover from any Defendant—the court concludes that on balance, a stay should issue. In the context of this complex, putative class antitrust action with potentially thousands of claimants asserting claims of illicit conduct spanning a decade, a limited delay in discovery to resolve threshold issues raised at the outset of litigation will not only prevent potentially unnecessary expenses, it will also serve judicial economy. For these reasons, the court GRANTS Defendants' Motion to Stay Discovery[38] pending resolution of Motions to Dismiss filed on September 8, 2017.[39]

SO ORDERED this 1st day of September, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 3841912

Footnotes

1 This case involves two cases that have been consolidated—this case and Case No. 6:17-cv-00112. The underlying complaints initially filed in these cases have been superseded by the filing of a Consolidated Amended Complaint (Dkt. 137).

2 Dkt. 144.

3 Dkt. 151.

4 Defendants requested oral argument on their Motion. Dkt. 144 at 1 and 21. Upon careful review of the parties' thorough briefing, the court has determined that a hearing on the Motion as Defendants request is unnecessary. *See* LCvR 78.1 ("hearings on motions ... will not be conducted unless ordered by the Court.").

5 The named Plaintiffs are Haff Poultry, Inc.; Nancy Butler; Johnny Upchurch; Jonathan Walters; Myles B. Weaver; and Melissa Weaver. Dkt. 137 (Consolidated Amended Complaint) at 1.

6 Defendants are Tyson Foods, Inc.; Tyson Chicken, Inc.; Tyson Breeders, Inc.; Tyson Poultry, Inc.; Pilgrim's Pride Corporation; Perdue Farms, Inc.; Koch Foods, Inc.; Koch Meat Co., Inc. dba Koch Poultry Co.; Sanderson Farms, Inc.; Sanderson Farms, Inc. (Food Division); and Sanderson Farms, Inc. (Processing Division). *Id.*

7 *Id.* at 17 ¶ 66.

8 *Id.* at 17-23.

9 Dkt. 2.

10 Case No. 6:17-cv-00112.

11 Dkt. 127, Joint Order Following Case Management Hearing.

12 Dkt. 137 at 37.

13 Dkt. 127.

14 Dkt. 137.

15 *Id.* at 38-40.

16 Dkt. 127 at 3.

17 *Id.*

18 *Id.* at 2.

19 Dkt. 187-1.

20 *See, e.g.*, Dkt. 187-1 at 25, Request No. 26.

21 Dkt. 187-1.

22 Fed. R. Civ. P. 1.

23 But, some statutes do provide for automatic stays upon the filing of a motion to dismiss. For example, cases covered by the Private Securities Litigation Reform Act are subject to such automatic stays.

24 Generally, "discovery rulings are within the broad discretion of the trial court." *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1386 (10th 1994) (citations omitted).

25 *Clinton v. Jones*, 520 U.S. 681, 706-07 (noting district court's "broad discretion to stay proceedings as an incident to its power to control its own docket" might justify a stay of "trial or discovery" but finding lengthy and categorical trial stay trial until after President Clinton left office that took no account of the plaintiff's interest in getting to trial was an abuse of discretion) (citations omitted); *see also Landis v. North American Co.*, 299 U.S. 254-55 (1936) (noting "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance.").

26 Fed. R. Civ. P. 26(c)

27 *Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2008).

28 *Commodity Futures Trading Com'n v. Chilcott Portfolio Management, Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (noting the "underlying principle ... that '[t]he right to proceed in court should not be denied except under the most extreme circumstances.' ") (quoting *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971)).

29 *Chilcott Portfolio Management, Inc.*, 713 F.2d at 1484 (citations omitted).

30 *Id.* (quoting *Landis*, 299 U.S. at 255).

31 *String Cheese Incident, LLC v. Stylus Shows, Inc.*, 2006 WL 894955, *2 (D. Colo. Mar. 30, 2006) (citing *FDIC v. Renda*, 1987 WL 348635, *2 (D. Kan. Aug. 6, 1987)); *see also Hernandez v. Asset Acceptance, LLC*, 970 F.Supp.2d 1194 (D. Colo. 2013) (citing the *String Cheese* and *Renda* cases).

32 Defendants also contend in their opening brief that "even if the Complaint withstands dismissal motions, discovery would still be wasteful and unnecessary[ ]" because the Plaintiffs will be unable to succeed in getting their proposed class certified. Dkt. 144 at 9. This argument seems misplaced at this stage of the case, and is unpersuasive. As Plaintiffs note in response, the Defendants' Motion to Stay is premised on awaiting resolution of anticipated motions to dismiss, which will be decided long before the court determines whether to certify a class.

33 The court in *Ciempa v. Jones*, 2012 WL 1565284 (N.D. Okla. May 2, 2012), cited by the Defendants, noted that "[a] stay of discovery until after resolution of a pending dispositive motion is appropriate 'where the case is likely to be finally concluded as a result of the ruling thereon, where the facts sought through uncompleted discovery would not affect the resolution of the motion, or where discovery on all issues of the broad complaint would be wasteful and burdensome.' " The court then granted the defendants' motion to stay discovery pending resolution of their summary judgment motion based on the argument that plaintiff failed to exhaust required administrative remedies, where the discovery plaintiff sought was unrelated to the exhaustion issue and engaging in unrelated discovery would be "wasteful and burdensome." *Id.* at *3. The court did not evaluate the likelihood that the dispositive motion would succeed—but its subject matter was relevant to whether the plaintiff needed to conduct discovery pending the resolution of the motion.

34 For example, in *Hong Leong Finance Ltd. (Singapore) v. Pinnacle Performance Ltd.*, 297 F.R.D. 69 (S.D.N.Y. 2013), the court evaluated whether there was good cause to stay discovery pending resolution of the defendants' motion to dismiss the plaintiff's Lanham Act, fraud, and contract claims. The court noted that district courts in the Second Circuit considered in their analysis the "strength of the motion"—but that some courts interpreted that to mean the motion simply did "not appear to be without foundation in law," while other courts more stringently required a motion to have "substantial grounds." *Id.* at 72-73 (citations omitted). That court determined to apply the "substantial grounds" test.

35 Dkt. 151 at 11.

36 *Id.*

37 And, as Defendants note in their briefing, the harm Plaintiffs claim here—to their livelihoods from Defendants' alleged anticompetitive activity and a possible inability to recover interest that will unfairly remain in Defendants' pockets—all assumes that Plaintiffs will prevail on their claims. This is something that the court cannot clearly evaluate at this time. But if they prevail, they will be able to seek monetary recovery from Defendants their damages to their livelihood and may also seek interest.

38 Dkt. 144.

39 In granting Defendants' Motion, the court does not foreclose any party from requesting permission to conduct discovery that may be needed to respond to forthcoming Motions to Dismiss. Any party may, if necessary, seek leave from the court to conduct such discovery.

2017 WL 3841912

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2006 WL 8434911
Only the Westlaw citation is currently available.
United States District Court, W.D.
Tennessee, Western Division.

IN RE: COPPER TUBING LITIGATION

This document relates to: All Actions

No. 04-2771 DV
|
Signed 10/03/2006

ORDER GRANTING IN PART DEFENDANTS' MOTION TO STAY DISCOVERY UNTIL JURISDICTIONAL ISSUES ARE RESOLVED AND GRANTING DEFENDANTS' TO BIFURCATE CLASS ACTION DISCOVERY AND MERITS DISCOVERY AND ENTRY OF SCHEDULING ORDER

DIANE K. VESCOVO, UNITED STATES MAGISTRATE JUDGE

***1** Before the court is the motion of the defendants, Boliden AB ("Boliden"); Boliden Fabrication AB ("Boliden Fabrication"); Boliden Cuivre & Zinc S.A. ("Boliden Cuivre"); IMI plc ("IMI"); IMI Kynoch Ltd. ("IMI Kynoch"); Yorkshire Copper Tube Ltd. ("Yorkshire Copper Tube"); KME America Inc. ("KME America"); Tréfimétaux S.A. ("Tréfimétaux"); Europa Metalli S.P.A. ("Europa Metalli"); Halcor S.A. ("Halcor"); Mueller Industries, Inc. ("Mueller"); WTC Holding Co. ("WTC Holding"); DENO Holding Co. ("DENO Holding"); Outokumpu Oyj ("Outokumpu"); Outokumpu Copper Products Oy ("Outokumpu Copper"); Outokumpu Copper (U.S.A.), Inc. ("Outokumpu Copper U.S.A."); Wieland Metals, Inc. ("Wieland Metals"); Austria Buntmetall AG ("Austria Buntmetall"); and Buntmetall Amstetten GmbH ("Buntmetall Amstetten") (collectively "the moving defendants"), to stay all discovery until the resolution of pending jurisdictional issues and to defer all merits discovery until after the motion of the plaintiffs, American Copper & Brass, Inc. ("American Copper") and the Bankrupt Estate of Smith & Wofford Plumbing & Industrial Supply, Inc. ("Smith & Wofford"), (collectively "the plaintiffs") for class certification is decided by the court.[1] The plaintiffs filed a brief in opposition to the moving defendants' motions, and the moving defendants filed a reply brief in further support of their motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a class action antitrust suit against sellers of copper plumbing tubes[2] in the United States. The plaintiffs seek to represent a nationwide class of persons who purchased copper plumbing tubes in the United States directly from the named defendants for the time period of July 1, 1988 to March 31, 2001. (Consol. Am. Compl. ¶ 36.)

On September 24, 2004, American Copper filed an initial class action complaint on behalf of itself and others similarly situated against twenty-one defendants, most of whom were European companies. The complaint alleged that the defendants violated antitrust laws of the United States, specifically section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, by conspiring and agreeing on the price at which they would sell copper plumbing tubes in the United States. (Compl. ¶ 49.) American Copper filed an amended complaint on September 30, 2004, adding additional American subsidiaries as defendants. The amended complaint alleged that the defendants engaged in a conspiracy to raise, fix, or maintain the price of copper tubing in the United States from July 1, 1988 to March 31, 2001, the result of which was that American Copper and other putative class members paid more for copper plumbing tubes during the relevant period than they would have in a competitive market. (Am. Compl. ¶¶ 49-56.)

***2** On November 17, 2004, Smith & Wofford filed a similar class action complaint on behalf of itself and others similarly situated against many of the same defendants. (Compl. Bankrupt Estate of Smith & Wofford Plumbing & Indus. Supply, Inc. v. Boliden AB, Civil Case No. 04-2930DV (W.D. Tenn. Nov. 17, 2004.)) The two actions were consolidated on February 7, 2005, by order of the court.

Pursuant to the court's order, the plaintiffs, through court-appointed lead counsel, filed a consolidated amended class action complaint on March 9, 2005, against twenty-three defendants, seventeen of whom are European companies and six of whom are located in the United States. The consolidated amended complaint alleges, like the prior complaints, that the defendants engaged in a conspiracy to raise, fix, or maintain the price of copper tubing in the United States from July 1, 1988 to March 31, 2001, in violation of section 1 of the Sherman Antitrust Law, 15 U.S.C. § 1, the result of which was that American Copper and other putative class

members paid more for copper plumbing tubes during the relevant period than they would have in a competitive market. (Consol. Am. Compl. ¶¶ 61-68.) The factual allegations in the consolidated amended complaint stem, for the most part, from and recite the language of a press release issued by the European Commission ("Commission") in September of 2004 announcing its decision to impose fines against some of the defendants for operating a cartel in the European Economic Area ("EEA") for copper water, heating, and gas tubing from June 1988 to March 2001 in violation of the European Community Treaty Article 81 and EEA Agreement Article 53. (Consol. Am. Compl. ¶¶ 53–59.) The plaintiffs further allege, in a deviation from the press release, that the copper tubing market is global in nature, that the defendants needed to collude in the United States in order to fix prices in Europe, and vice versa, and the conspiracy to fix prices of copper tubing is therefore international in nature. (*Id.* ¶ 60.) Mueller was the only American copper plumbing tube manufacturer with operations in Europe and was the only American manufacturer named in the Commission's decision. (Defs.' Report of Planning Meeting 5.)

One of the named defendants, HME Nederlan BV, has not yet been served. Two of the named defendants, KM Europa Metal AG and Wieland Werke AG, were served but have not yet answered or otherwise responded. (*See* Docket No. 119, listing defendants served and attaching returns of service.)

The other twenty defendants all filed motions to dismiss the consolidated amended complaint on various grounds. On May 6, 2005, six defendants—Mueller, WTC Holding, DENO Holding, KME America, Outokumpu Copper U.S.A., and Wieland Metals—moved to dismiss the consolidated amended complaint in its entirety for failure to state a claim and as barred by the statute of limitations. The court denied the motion to dismiss as to Mueller, KME America, Outokumpu Copper U.S.A., and Wieland Metals. The court granted the motion to dismiss as to WTC Holding and DENO Holding, but subsequently reversed its ruling. Tréfimétaux also moved to dismiss for failure to state a claim, but the court also denied its motion.

The other thirteen defendants sought dismissal on the basis of lack of personal jurisdiction, in addition to failure to state a claim and as barred by the statute of limitations. On September 13, 2006, the court granted the motion of Mueller Europe Ltd. to dismiss for lack of personal jurisdiction, but denied the other twelve of the thirteen defendants' motions. As to the three Boliden defendants—Boliden, Boliden Fabrication, and Boliden Cuivre—the court denied their personal jurisdiction motions with leave to renew their motions after a 90-day jurisdictional discovery period. The remaining nine defendants who sought dismissal for lack of *in personam* jurisdiction have filed motions, which are still pending, for reconsideration and/or certification of the *in personam* jurisdiction issues for appeal to the Sixth Circuit Court of Appeals: (1) Halcor (Docket No. 235); (2) Austria Buntmetall (Docket No. 242); (3) Buntmetall Amstetten (Docket No. 242); (4) Yorkshire Copper Tube (Docket No. 265); (5) Europa Metalli (Docket No. 265); (6) IMI (Docket No. 270); (7) IMI Kynoch (Docket No. 270); (8) Outokumpu (Docket No. 309); and (9) Outokumpu Copper (Docket No. 309). Thus, motions of a total of twelve defendants raising lack of personal jurisdiction are still unresolved.

***3** Mueller, KME America,[3] Outokumpu Copper U.S.A., and Wieland Metals filed answers to the consolidated amended complaint in August of 2005. WTC Holding, DENO Holding, Austria Buntmetall, Buntmetall Amstetten, IMI, and IMP Kynoch filed answers to the consolidated amended complaint in May of 2006. Outokumpu, Outokumpu Copper, Europa Metalli, Tréfimétaux, and Yorkshire Cooper Tube filed answers to the consolidated amended complaint in June of 2006.

The court scheduled a Rule 16(b) scheduling conference for July 27, 2006. In anticipation of the conference, the parties held a Rule 26(f) telephonic planning meeting but were unable to agree on a proposed discovery plan and a proposed joint report of the planning meeting. Consequently the plaintiffs and defendants submitted separate proposed scheduling orders and Rule 26(f) reports.

All the moving defendants propose that discovery, when it commences, should proceed in two stages: (1) class certification discovery and (2) merits discovery. In addition, all the moving defendants ask that all discovery be stayed until after the motions of the twelve foreign defendants who still have *in personam* jurisdictional issues pending are resolved. The plaintiffs oppose a stay of discovery and bifurcation of discovery on the grounds that class and merits issues are closely intertwined, bifurcation would result in unnecessary delay of the litigation, and bifurcation would waste the parties' and the court's resources.

II. ANALYSIS

A. Motion to Stay Discovery Until Jurisdictional Issues Are Resolved

Rule 26(c) of the Federal Rules of Civil Procedure provides in pertinent part that,

> [u]pon motion by a party or by the person from whom discovery is sought ... and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from ... undue burden or expense, including ... that the ... discovery may be had only on specified terms and conditions, including a designation of the time or place.

Fed. R. Civ. P. 26(c). Although Rule 26 does not explicitly authorize the imposition of a stay of discovery, "[i]t is settled that entry of an order staying discovery pending determination of dispositive motions is an appropriate exercise of the court's discretion." *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) (staying discovery pending resolution of defendants' motion to dismiss and summary judgment); *see also Sprague v. Brook*, 149 F.R.D. 575, 578 (N.D. Ill. 1993) (staying discovery pending resolution of motion to dismiss and finding discovery requests irrelevant to pending dispositive motions). Furthermore, Rule 1 states that the Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. "A stay of discovery pending the determination of a dispositive motion 'is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.' " *Chavous*, 201 F.R.D. at 2 (citation omitted).

In determining whether to stay discovery, the court considers the following factors: the type of motion pending; the nature and complexity of the action; whether some or all the defendants join in the motion; the stage of litigation; the extent of the discovery and the complexity of the issues in the case; and other relevant circumstances. *Hachette Distrib., Inc. v. Hudson County News Co.*, 136 F.R.D. 356, 359 (E.D.N.Y. 1991) (denying stay of discovery in antitrust action pending motion to dismiss where some defendants had not made dispositive motions). A stay of discovery is not proper in every circumstance. For example, a stay of discovery "is rarely appropriate when the pending motion will not dispose of the entire case." *Chavous*, 201 F.R.D. at 3 (quoting *Keystone Coke Co. v. Pasquale*, No. Civ. A. 97-6074, 1999 WL 46622, at *1 (E.D. Pa. Jan. 7, 1999)). A trial court also "should not stay discovery which is necessary to gather facts in order to defend against [a] motion [to dismiss]." *Id.* (alteration in original)(quoting *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997)). Furthermore, a trial court must consider whether the party seeking the discovery will be prejudiced by the delay. *See id.* at 3–4; *Johnson v. N.Y.U. Sch. of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (finding that a stay of discovery was proper where plaintiff failed to demonstrate prejudice by a stay).

***4** In this case, there are twelve unresolved motions related to *in personam* jurisdiction. "Challenges to the court's personal or subject-matter jurisdiction should take priority." Manual for Complex Litigation (Fourth) § 11.32 (2004). Several courts have recognized that discovery should be stayed where there is a challenge to the [c]ourt's jurisdiction. *Hachette*, 136 F.R.D. at 358 (recognizing that discovery should be stayed "where a challenge is directed to the court's jurisdiction"); *River Plate Corp. v. Forestal Land, Timber & Ry. Co.*, 185 F. Supp. 832, 835 (S.D.N.Y. 1960) (allowing jurisdictional discovery and staying merits discovery in antitrust action when motions to dismiss for lack of *in personam* jurisdiction were pending); *Bandag, Inc. v. Michelin Retread Techs., Inc.*, 202 F.R.D. 597, 597-98 (S.D. Iowa 2001) (limiting discovery to requisite minimal contacts while jurisdictional motions were pending); *Pyle v. Pyle*, 81 F. Supp. 207, 208 (W.D. La. 1948) (staying discovery until jurisdictional issues determined); *see also* 7 J. Palmer, Cyclopedia of Federal Procedure § 25.86a (3d ed. 1986) (requests for discovery "properly deferred" until determination of jurisdictional issue").

This is a complex antitrust action. Of the twenty-three defendants named in the consolidated amended complaint, seventeen are foreign companies and six are domestic companies. Discovery on the merits will be extensive. As the Ninth Circuit has recognized, a stay of discovery is particularly appropriate in complex antitrust cases when motions to dismiss are pending.

> The purpose of [Rule] 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery. In antitrust cases this procedure especially makes sense because the costs of discovery in such actions are prohibitive. As observed in *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F. 2d 549, 553 (7th Cir. 1980), "if the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." It is sounder practice to

determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery.

Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987) (internal citations omitted). The same is equally true for Rule 12(b)(2) motions to dismiss for lack of personal jurisdiction. If the defendants who are challenging the court's jurisdiction prevail on their Rule 12(b)(2) motions, it would be unfair to put them in the position of disclosing records of their business practices and putting them to the burden and expense of engaging in costly merit discovery. It would be a better practice to dispose of the personal jurisdiction motions before putting the foreign defendants to the expense of discovery in this action.

If the Rule 12(b)(2) motions to dismiss for lack of personal jurisdiction are granted, it would dispose of the entire case to those defendants challenging personal jurisdiction. Not all the defendants have pending jurisdictional motions, however; only twelve of the defendants do. If some or even all of the defendants prevail, it would therefore not result in a termination of the entire lawsuit. Thus, whether or not the jurisdictional motions are granted, discovery will proceed in this case against Mueller, WTC Holding, DENO Holding, KME America, Outokumpu Copper U.S.A., Wieland Metals, and Tréfimétaux, because they do not have personal jurisdictional challenges pending.

None of the parties have demonstrated how they would be prejudiced by a stay of discovery. The plaintiffs have not indicated that additional jurisdictional discovery is needed except as to the three Boliden defendants. The defendants who have not challenged jurisdiction have not claimed they would be prejudiced by a stay of discovery. Indeed, those defendants have joined in the request for the stay of all discovery.

***5** Under the circumstances, the motion to stay discovery is granted as to Boliden, Boliden Fabrication, and Boliden Cuivre, Halcor, Austria Buntmetall, Buntmetall Amstetten, Yorkshire Copper Tube, Europa Metalli, IMI, IMI Kynoch, Outokumpu, and Outokumpu Copper until their jurisdictional issues are resolved or unless otherwise ordered by the court, whichever occurs first. The motion to stay is denied as to Mueller, WTC Holding, DENO Holding, KME America, Outokumpu Copper U.S.A., Wieland Metals, and Tréfimétaux. The plaintiffs may proceed with discovery as to these defendants, and these defendants may proceed with discovery as to the plaintiffs. The court acknowledges that granting the motion to stay as to some defendants and denying the motion to others may result in some duplication of depositions and document production, but believes that the duplication will be minimal. Those defendants challenging personal jurisdiction may be adequately represented in discovery by those who have not contested personal jurisdiction. In addition, counsel for those defendants contesting personal jurisdiction may appear at any depositions but will not be allowed to participate until the issues of personal jurisdiction as to their respective clients are resolved.

B. Motion to Bifurcate Discovery

Having determined that discovery may proceed with respect to some of the defendants, the next issue is the bifurcation of class certification discovery and merits discovery. Whether to bifurcate class certification and merits discovery is within the discretion of the court. *See, e.g., Stewart v. Winter*, 669 F.2d 328, 331-32 (5th Cir. 1982)(finding the district court acted within its discretion in limiting discovery during the pre-certification phase). Rule 23 of the Federal Rules of Civil Procedure mandates that a class certification decision be made "at an early practicable time" after commencement of an action. Fed. R. Civ. P. 23(c)(1)(A). Numerous courts have recognized that allowing class-wide discovery on certification issues and postponing class-wide discovery on the merits is appropriate "to make early class determination practicable and to best serve the ends of fairness and efficiency." *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570–71 (11th Cir. 1992) (citing *Stewart*, 669 F.2d at 331); *see also* Manual for Complex Litigation, *supra*, § 11.213 (recognizing that courts "should ascertain what discovery on class questions is needed for a certification ruling and how to conduct it efficiently and economically"). Indeed, this court has granted bifurcation of discovery in other class actions. *See, e.g., Isabel v. Velsicol Chem. Co.*, No. 04-2297-DV (W.D. Tenn. June 7, 2004) (Vescovo, M.J.) (limiting first phase of discovery to class certification issues), *aff'd*, 2004 U.S. Dist. LEXIS 18057 (W.D. Tenn. Aug. 12, 2004) (Donald, J.) (denying plaintiff's appeal of order bifurcating discovery and finding "substantial authority allows for pre-class certification discovery"); *Bostick v. St. Jude Med., Inc.*, No. 03-2636-BV (W.D. Tenn. Nov. 14, 2003) (Vescovo, M.J.) (limiting initial discovery to issues relevant to class certification). The primary considerations to determine whether bifurcation of class certification discovery from discovery on the merits is fair and efficient are whether merits discovery is intermingled with class discovery and whether the litigation is likely to continue absent class certification. *In re Plastics Additive Antitrust Litig.*, 2004 WL 2743591, at *3

(E.D. Pa. Nov. 29, 2004). *See generally* Manual for Complex Litigation, *supra*, § 21.14.

In this case, class certification issues are distinct from merits discovery issues and can easily be segregated. The consolidated amended class action complaint alleges that all the "[d]efendants engaged in a global conspiracy to artificially inflate the price for copper plumbing tubes sold in the United States to Plaintiffs and the Class." (Pls.' Opp. to Defs.' Mot. for Bifurcation 1.) The moving defendants point out that "this case is highly unusual and perhaps unprecedented in that a large percentage of the product at issue is sold in the United States by companies that are not alleged to have participated in the conspiracy." (Defs.' Report of Planning Meeting 5.) In other words, the complaint alleges that Mueller, the only major U.S. supplier of copper plumbing tubes named as a defendant, conspired with European companies who sold none or small amounts of copper plumbing tubes in the United States, while the other major U.S. suppliers of copper plumbing tubes in the United States are not even named as defendants or alleged to have participated in a conspiracy to fix prices for copper plumbing tubes in the United States. (*Id.*) As a result, the moving defendants insist that the plaintiffs will be unable to demonstrate that common questions of law and fact predominate. (*Id.*)

***6** The moving defendants point out that class certification discovery will focus on competitive conditions in the United States for copper plumbing tubes, local market conditions in various geographic regions, and the number of competitors for the products, among other matters. (*Id.* 8-9.) The moving defendants have listed a number of issues unique to class certification discovery, some of which include:

> 1. The identity and characteristics of the copper plumbing tube products that are sold in the United States;
>
> 2. [T]he identity of the Defendants (if any) from which the named plaintiffs purchased copper plumbing tube[s];
>
> 3. [The e]ffect of sales by U.S. copper plumbing tubes suppliers that are not [named as defendants in this lawsuit];
>
> 4. Competitive conditions in different geographical regions; [and]
>
> 5. List prices, discounts, rebates, price concessions, price negotiations and other promotional techniques used by [sellers of copper plumbing tubes] in the United States.

(*Id.*) The plaintiffs have not identified any specific issues for which class certification discovery would be needed. Rather, the plaintiffs claim that the above class certification discovery issues identified by the moving defendants are actually relevant only to merits discovery. If plaintiffs are correct, then discovery would not be needed into these matters prior to a class certification decision, thus expediting a decision on class certification. At any rate, it appears to the court that the parties can identify what discovery is needed for class certification and that the defendants would not oppose class certification discovery on the issues set forth in their brief, even if those issues are related to merits discovery as the plaintiffs insist.

In contrast, merits discovery would focus on whether the defendants engaged in a conspiracy to fix prices in the United States. Merits discovery would include documents located in Europe and witnesses located abroad, who, for example, could testify to the existence or non-existence of improper agreements between the defendants affecting prices to be charged in the United States.

Bifurcation of class certification discovery and merits discovery will not significantly delay the litigation. Although the consolidated amended class action complaint was filed nearly eighteen months ago, much time and effort has been spent on resolving preliminary jurisdictional issues and dispositive motions. The plaintiffs have not opposed extensions of time to brief the issues and have themselves requested additional time on numerous occasions. Although the court does not necessarily agree, defendants' proposed schedule allows the plaintiffs four months to file their class certification motion and four months from that time for defendants to conduct any needed discovery and file their response. The plaintiffs can, of course, file their motion for class certification sooner.

Accordingly, the defendants' motion to bifurcate discovery is granted.

III. SCHEDULING ORDER

The following are established as final dates for:

1. JOINING PARTIES: Motions to join parties shall be filed on or before October 30, 2006.

2. AMENDING PLEADINGS: Consistent with Fed. R. Civ. P. 15, the parties must seek leave of the court before amending their pleadings.

***7** 3. CLASS CERTIFICATION DISCOVERY: The court finds that dividing discovery into two stages will allow discovery to proceed in an incremental, fair, and efficient manner. Therefore, the initial stage of discovery will be devoted to issues relating to class certification. Class certification discovery may commence October 16, 2006.

a. The issues on which discovery should focus at the class certification state include:

- The identity and characteristics of the copper plumbing tube product(s) that are sold in the United States and that the plaintiffs purport to include in the alleged conspiracy;
- Information regarding the named plaintiffs' purchases of copper plumbing tube, including particularly the identity of the defendants (if any) from which the named plaintiffs purchased copper plumbing tube;
- Price and non-price factors affecting the plaintiffs' copper plumbing tube purchasing decisions;
- Description and/or characteristics of the plaintiffs' business operations and use of the copper plumbing tube purchased from the defendants;
- Effect of sales by United States copper plumbing tube suppliers that are not alleged to be part of the conspiracy on competition for the sale of copper plumbing tube to purported class members;
- Competitive conditions in the sale of copper plumbing tube in different geographical regions of the United States;
- Definition of the relevant product and geographic markets for copper plumbing tube and competitive conditions within those markets (to permit an assessment of whether a uniform injury can be established across the purported class with common proof);
- Geographic location of purchase and geographic location of use of copper plumbing tube sold in the United States;
- Characteristics and dollar volume of copper plumbing tube sold by the defendants in the United States;
- List prices, discounts, rebates, price concessions, price negotiations, and other promotional techniques used by the defendants to sell copper plumbing tube in the United States; and
- Factors affecting the defendants' cost of producing, shipping, and selling copper plumbing tube, and their capacity to do the same, in the United States.

b. The defendants will not be required to produce information or materials concerning the European Commission's copper plumbing tube investigation or the merits of the plaintiffs' allegations of antitrust violations until the court has ruled upon the plaintiffs' class certification motion. If the court certifies a class, the parties will proceed to the second stage of discovery concerning the merits of the plaintiffs' claims.

4. CLASS CERTIFICATION MOTION: The court adopts the following schedule for the filing of the plaintiffs' class certification motion, development of an adequate evidentiary record on class certification, and briefing and disposition of the motion:

a. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION: December 15, 2006

b. PLAINTIFFS' DISCLOSURE OF RULE 26(A)(2) EXPERT WITNESS INFORMATION PERTAINING TO CLASS CERTIFICATION: December 15, 2006

c. DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION: February 16, 2007

d. DEFENDANTS' DISCLOSURE OF RULE 26(A)(2) EXPERT WITNESS INFORMATION PERTAINING TO CLASS CERTIFICATION: February 16, 2007

e. PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE: March 16, 2007

f. COMPLETION DEADLINE FOR CLASS CERTIFICATION DISCOVERY: March 16, 2007

5. MERITS DISCOVERY: Within fifteen (15) days after the court decides the plaintiffs' motion for class certification, the parties shall meet, confer, and submit to the court a proposed scheduling order for merits discovery and other deadlines, if necessary.

***8** 6. OTHER MATTERS:

a. The plaintiffs as a group may notice a maximum of ten (10) depositions, and the defendants as a group may notice a maximum of ten (10) depositions during the class

certification phase of discovery. The plaintiffs as a group may notice a maximum of twenty (20) depositions, and the defendants as a group may notice a maximum of twenty (20) depositions during the merits phase of discovery. Otherwise, the Federal Rules of Civil Procedure shall govern limits on discovery.

b. No depositions may be scheduled to occur after the respective discovery cutoff dates. All motions, requests for admissions, or other filings that require a response must be filed sufficiently in advance of the respective discovery cutoff dates to enable opposing counsel to respond by the time permitted by the Rules prior to that date.

c. Motions to compel discovery are to be filed and served by the discovery deadline or within thirty (30) days of the default of the service of the response, answer, or objection, which is the subject of the motion, if the default occurs within thirty (30) days of the discovery deadline, unless the time for filing of such motion is extended for good cause shown, or the objection to the default, response, answer, or objection shall be waived.

d. The court will schedule a pretrial conference and set a trial date after ruling on the plaintiffs' class certification motion.

e. The parties are reminded that pursuant to Local Rule 11(a)(1)(A), all motions, except motions pursuant to Fed. R. Civ. P. 12, 56, 59, and 60, shall be accompanied by a proposed order.

f. The opposing party may file a response to any motion filed in this matter. Neither party may file an additional reply, however, without leave of the court. If a party believes that a reply is necessary, it shall file a motion for leave to file a reply accompanied by a memorandum setting forth the reasons for which a reply is required.

g. At this time, the parties have not agreed on whether trial may proceed before the magistrate judge.

Absent good cause shown, the scheduling dates set by this order shall not be modified or extended.

IT IS SO ORDERED this 3rd day of October, 2006.

All Citations

Not Reported in Fed. Supp., 2006 WL 8434911

Footnotes

1 At the Rule 16(b) Scheduling Conference on July 27, 2006, the court stated that it would treat the defendants' proposed scheduling order as a motion to stay and to bifurcate discovery.

2 "Copper plumbing tubes" is defined in the complaint as copper water, heating and gas tubes that go into residental and commercial buildings. The term includes both plain and copper plumbing tubes and plastic-coated copper plumbing tubes. (Am. Compl. ¶ 5.) "Copper Tubing" is defined in the consolidated amended complaint as including "plain copper plumbing tubes as well as pastice-coated tubes used for such things as the delivery of water, heating and gas in buildings." (Consol. Am. Compl. ¶ 5.)

3 KME America amended its answer on July 13, 2006.

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Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

In re GRAPHICS PROCESSING UNITS ANTITRUST LITIGATION. This Order Relates To: All Actions.

No. C 06-07417 WHA.
|
MDL No. 1826.
|
July 24, 2007.

Attorneys and Law Firms

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PETRIAL ORDER No. 4

ORDER GRANTING DEFENDANTS' MOTION TO STAY DISCOVERY AND DISCLOSURES

WILLIAM ALSUP, United States District Judge.

INTRODUCTION

***1** In this antitrust multi-district litigation, defendants move to stay discovery and disclosures pending the resolution of their motions to dismiss. Plaintiffs have asked that defendants be required to turn over all documents already produced to the Antitrust Division of the Department of Justice pursuant to its pending and unindicted criminal investigation. Contrary to defendants, Federal Rule of Criminal Procedure 6(e) does not forbid the production of such documents. Also contrary to defendants, the recent *Twombly* decision does not compel a blanket stay of all discovery in antitrust cases pending resolution of motions to dismiss. Defendants have, however, shown that the facts surrounding this case warrant a temporary stay of discovery until the current round of motions to dismiss is resolved. Accordingly, a stay of all discovery and all disclosures is entered. This is without prejudice to revisiting the issue of focused, limited discovery in the event the motions to dismiss are granted.

STATEMENT

Defendants Nvidia Corporation and ATI Technologies, Inc., manufacture, market, sell, and distribute graphics processing units. ATI merged with defendant Advanced Micro Devices, Inc., in October 2006. GPUs are dedictated graphics rendering devices used for displaying computer graphics in computers, game consoles, and mobile devices. Allegedly, there are only two majors players in the GPU market-AMD and Nvidia.

On November 30, 2006, AMD and Nvidia separately announced that they had received subpoenas asking for documents regarding pricing and customer agreements from the Antitrust Division of the United States Department of Justice. AMD later confirmed in SEC filings that the investigation was criminal in nature. Thus far the investigation has not resulted in any indictments.

The first of these civil antitrust actions was filed on December 4, 2006. Many others quickly followed. A majority of the complaints were filed by indirect purchasers of GPUs; the remainder of them were filed by direct purchasers. By order of the Judicial Panel on Multidistrict Litigation, a number of these actions were consolidated for pretrial purposes on April 18, 2007, pursuant to 28 U.S.C. 1407. Other tag-along actions have been transferred and consolidated into this multi-district litigation proceeding.

An initial case management conference was held on May 24, 2007, in which parties first discussed the issue of discovery and its relationship to defendants' anticipated motions to dismiss. A briefing schedule for both the motion to stay and the motions to dismiss was set at the conference. After the conference, an order dated May 30, 2007, appointed interim class counsel for the indirect and direct purchaser plaintiffs.

The motion for a stay of discovery was filed on June 7, 2007, and complaints for both the direct and indirect purchasers were filed on June 14, 2007. The complaints allege that AMD and Nvidia entered into price-fixing agreements in violation of Section 1 of the Sherman Act and various other state-law claims. The motions to dismiss will be heard on September 20, 2007.

***2** A lengthy hearing on the motion to stay discovery was held on July 10, 2007. Attorney Alexandra Shepard appeared specially on behalf of the Antitrust Division of the Department of Justice. She addressed some of the Court's questions regarding the status of the government investigation and stated that the government neither favored nor opposed a stay. Also, parties were invited to submit supplemental briefing on the issue of prejudice to plaintiffs and the effect of the statute of limitations if a blanket stay of discovery were granted.

ANALYSIS

Under Rule 26(c), the Court may, on a showing of good cause, enter an order to stay discovery in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." District courts have broad discretion to stay discovery pending the resolution of dispositive motions, including motions to dismiss under Rule 12(b)(6). *Jarvis v. Regan,* 833 F.2d 149, 155 (9th Cir.1987).

1. Federal Rule of Criminal Procedure 6(e).

Defendants contend that rules governing secrecy during a grand jury proceeding support a stay of all discovery. Grand jury secrecy is governed by Federal Rule of Criminal Procedure 6(e). Under Rule 6(e)(2)(A), "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." In turn, Rule 6(e)(2)(B) states that unless provided otherwise, grand jurors, interpreters, court reporters, operators of recording devices, persons transcribing recorded testimony, and attorneys for the government must not disclose matters occurring before the grand jury. Simply put, defendants are *not* in the Rule 6(e) list. They are free to reveal the subpoena itself as well as all documents produced in response to it. Indeed, a witness appearing before a grand jury is thereafter free to hold a press conference and reveal everything that was asked of him or her and what his or her answers were. The fact of any subpoena and its requests may likewise be published by the recipient. Since defendants are free to volunteer the information, a court may compel a disclosure. Nothing in Rule 6(e) is otherwise.

Defendants next argue that allowing discovery at this time could disrupt the Antitrust Division's ongoing investigation. As stated, however, Attorney Shepard appeared for the government at the hearing and voiced no such objection. She explained that a grand jury had been empaneled on this matter. She also stated that the Antitrust Division had not discussed the pending motion to stay with the parties. The government took no position on the pending motion and presently has no plans to intervene in this action. Since the Antitrust Division appears to believe discovery in this action can coexist with its grand jury investigation, defendants' argument that discovery here would somehow derail the Antitrust Division's efforts fails.

Defendants next argue that Rule 6(e), as interpreted in case law, supports a general policy of not requiring defendants to disclose documents produced in a grand jury investigation. Requiring disclosure, the argument goes, would open up defendants to scandal merely on account of a grand jury investigation that may go nowhere. This argument is overblown. The records will show only what the records will show. If they show antitrust scandal, then they would reveal nothing more than the facts.

***3** Rule 6(e) has not been interpreted as a complete bar on producing documents given to the grand jury. "[I]f a document is sought for its own sake rather than to learn what took place before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release." *United States v. Dynavac,* 6 F.3d 1407, 1411-12 (9th Cir.1993). The Ninth Circuit later explained that "the only exception to *Dynavac* is if the material reveals a secret aspect of the grand jury's workings." *Kersting v. United States,* 206 F.3d 817, 821 (9th Cir.2000). Defendants' policy argument fails because Ninth Circuit decisions reflect a concern in protecting the grand jury proceedings themselves, not the reputations of targets of investigations. Here, plaintiffs do not ask for documents related to any actual proceedings before a grand jury.

Defendants cite *In re Sealed Case,* 801 F.2d 1379, 1381-32 (D.C.Cir.1986), in support of their view. *First,* this decision is not binding here as it is out-of-circuit authority. *Second,* in that decision, the documents sought by the SEC were wide-ranging, and affidavits in connection with the requests failed to establish a need for any specific document. *Id.* at

1382. The D.C. Circuit held that such broad requests were inappropriate. Had the SEC shown particularized need for specific, identifiable documents, the SEC could have possibly received them.

Finally, defendants contend that the decision *In re Sulfuric Acid Antitrust Litigation,* 2004 WL 769376 (N.D.Ill.2004), forbids turning over the documents produced earlier to the Department of Justice. That decision acknowledged that Rule 6(e) does not explicitly allow defendants to resist document production in a civil case, recognizing that civil defendants are not named in the rule. There, a grand jury was in session concurrently with a parallel civil antitrust action. A motion to compel production of *any and all* documents produced to or received from *any* federal or state government entity was denied. *Id.* at *1. Perhaps this was a sound outcome but nothing in Rule 6(e) requires the result.

In short, contrary to defendants, Rule 6(e) simply does not authorize a blanket prohibition on civil production of documents already given to a grand jury. Nor does it bar compliance with a request to make a duplicate set of all documents given to a grand jury.

2. The *Twombly* Decision.

Defendants next argue that a recent Supreme Court decision, *Bell Atlantic Corp. v. Twombly,* --- U.S., ---- 127 S.Ct. 1955 (May 21, 2006), holds by implication that no discovery may proceed in an antitrust action before the complaint is held viable.

The Supreme Court's decision in *Twombly* addressed pleading standards for antitrust complaints alleging conspiracy under the Sherman Act. It noted that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." The decision criticized a common interpretation of the hoary "no set of facts" language from *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Twombly* noted that "[o]n such a focused and literal reading of *Conley'* s 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 1968.

***4** Specific to antitrust actions, the Supreme Court held that merely pleading parallel conduct or interdependence of behavior, even when consistent with antitrust conspiracy, was not sufficient to state a claim for conspiracy. *Id.* at 1964. Stating a claim under Section 1 of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 1965. On the facts in *Twombly,* the defendant telecom companies' behavior could have been conceivably construed as consistent with illegal activity, however, their behavior also supported a conclusion that the telecom companies were merely acting rationally in accordance with past behavior. *Id.* at 1971-73. The plaintiffs had "not nudged their claims across the line from conceivable to plausible," so the complaint was dismissed. *Id.* at 1974.

Twombly also discussed discovery in antitrust actions. The decision noted that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* at 1967 (internal citations omitted). The action involved "a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years." *Ibid.* The Court concluded that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence." *Id.* at 1967.

Defendants' statement that "*Twombly* stands for the proposition that antitrust plaintiffs cannot subject defendants to *any* discovery until the Court determines that the plaintiffs have articulated a 'plausible entitlement to relief' on the face of the complaint" is incorrect (Reply Br. at 2) (emphasis in original). This order does not read *Twombly* to erect an automatic, blanket prohibition on any and all discovery before an antitrust plaintiff's complaint survives a motion to dismiss. Defendants' argument upends the Supreme Court's holding; the decision used concerns about the breadth and expense of antitrust discovery to identify pleading standards

for complaints, it did not use pleading standards to find a reason to foreclose all discovery.

To be sure, to allow antitrust discovery prior to sustaining a complaint would defeat one of the rationales of *Twombly,* at least when the discovery would be burdensome. When, however, the discovery would not be so burdensome, a closer question is presented, a question calling for the exercise of discretion and the balancing of competing factors.

3. Calibrating Discovery in Tandem with the Dismissal Motions.

***5** Having rejected the arguments for an automatic, blanket stay of all antitrust discovery pending identification of a viable claim, the issue remains whether discovery should, on the instant record, be postponed pending the resolution of the motions to dismiss. This order concludes that first resolving the motions to dismiss is the better course. After full ventilation of the viability *vel non* of the complaint, we will all be in a much better position to evaluate how much, if any, discovery to allow. If, among other possible outcomes, the complaint proves to be solid save for perhaps a single soft element for which evidence would normally be outside the reach of plaintiffs' counsel without discovery, then it may be that a narrowly-directed and less burdensome discovery plan should be allowed with leave to amend to follow. If, however, the complaint proves to be so weak that any discovery at all would be a mere fishing expedition, then discovery likely will be denied. Of course, if the complaint is sustained, then discovery will proceed apace. The immediate point is that adjudicating the motions to dismiss will shed light on the best course for discovery.

Our immediate circumstances omit any compelling need for prompt discovery, such as might be the case if provisional relief were being sought or if testimony needed to be preserved due to ill health of a witness. It is true that the Court has indicated that it will try to manage this case so that it will end at least by the end of 2008. The leisurely briefing schedule on the motions to dismiss was recommended by both sides-neither side should now try to capitalize on that schedule to advance or to delay discovery. In sum, we have no urgent need for immediate discovery. We have time enough to critique the complaint and to then consider the best course for discovery.

Nor is this a case where it is almost certain that the complaint is viable, such as is often true where guilty pleas have already been entered in a parallel criminal case. Of course, in such conditions, at least some discovery should ordinarily proceed despite any pending motion to dismiss (unless civil discovery would interfere with a criminal case). Here, there has been no indictment, much less any guilty plea by any defendant. This factor seems to distinguish the circumstances in the unreported decision of Judge Claudia Wilken in the SRAM case where she ordered the records given to the Antitrust Division to be produced to plaintiffs' counsel.

It is true that the discovery sought at this time is the same discovery already gathered, assembled, and produced to the government. Therefore, the incremental cost to produce a duplicate set to plaintiffs' counsel would be minor in the overall picture. Still, there would be the issue of various objections (based, for example, on employee privacy) that might be assertable against plaintiffs that were unasserted against the government. Defendants would be entitled to interpose possibly valid objections that would take time to evaluate. And, regardless of the foregoing, the compelled act of turning records over to the government pursuant to the subpoena does not mean that everyone else has an equal right to rummage through the same records. Defendants have a legitimate interest in maintaining the confidentiality of their records. Without question, this interest may eventually have to yield to civil discovery interests but, for the reason stated, whether and the extent to which this should occur will be best decided after ruling on the Rule 12 motions. All other considerations raised by the parties, including issues of prejudice and burden, may be re-asserted at that time, the foregoing being persuasive and dispositive at this juncture.

CONCLUSION

***6** For all of the above-stated reasons, defendants' motion to stay all discovery and disclosures pending the resolution of the motions to dismiss is **Granted** subject to a new evaluation after the motions to dismiss are decided.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2127577

2020 WL 91293 (F.T.C.)

Federal Trade Commission (F.T.C.)

In the Matter of RagingWire Data Centers, Inc., a corporation, Respondent.

Docket No. 9386
January 6, 2020

***1 COMMISSIONERS:**

Joseph J. Simons, Chairman

Noah Joshua Phillips

Rohit Chopra

Rebecca Kelly Slaughter

Christine S. Wilson

ORDER DENYING STAY AND REFERRAL AND CHANGING HEARING DATE

On December 2, 2019, Respondent RagingWire Data Centers, Inc. filed a Motion to Dismiss Administrative Complaint in this proceeding. In addition to seeking dismissal of the Commission's Complaint in its entirety, that Motion requests that the Commission (1) stay further proceedings pending resolution of the Motion to Dismiss and (2) refer the Motion to Dismiss to the Administrative Law Judge assigned to this proceeding. Complaint Counsel have contested the Motion to Dismiss and oppose the requests for stay and referral. As set forth below, we deny Respondent's requests for stay and referral. We grant in part a separate, uncontested motion by Respondent to delay commencement of the administrative hearing.

I. THE REQUEST FOR A STAY

As to the request for a stay, Commission Rule of Practice 3.22(b) states in relevant part: "A [dispositive] motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders ...." When the Commission first adopted this Rule, it explained that the provision's "purpose .... was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions ...." Rules of Practice; Final Rule, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2009) ("Final Rule"). *See also* Rules of Practice; Proposed Rule, 73 Fed. Reg. 58832, 58836 (Oct. 7, 2008) ("Proposed Rule") (explaining that "[t]he Commission anticipates that new paragraphs [3.22](b) and (e) would expedite cases by providing that proceedings before the ALJ will not be stayed while the Commission considers a motion, unless the Commission orders otherwise ...").

Here, Respondent argues, "a stay will avoid wasting the resources of the Commission, the FTC, and RagingWire." Motion to Dismiss at 6. The expenses at issue, however, are normal consequences of litigation, routinely borne by litigants while dispositive motions are pending. *See In re La. Real Estate Appraisers Bd.*, 2018 FTC Lexis 7 (F.T.C. Jan. 12, 2018), *also available at* https://www.ftc.gov/system/files/documents/cases/d09374_lreab_commission_order_denying_respondents_expedited_motion.pdf. "Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters." *Id.*; *see In re LabMD*, 2013 WL 6826948, at *2-3 (Dec. 13, 2013) (denying a motion to stay proceedings in order to avoid pretrial expenses pending

the Commission's ruling on a motion to dismiss); *N. Carolina Bd. of Dental Exam'rs*, 150 F.T.C. 851 (2010) (same).[1] Here, Respondent has not established that a stay would be appropriate.[2]

II. THE REQUEST FOR REFERRAL TO THE ADMISTRATIVE LAW JUDGE

***2** Respondent seeks referral of its Motion to Dismiss to the administrative law judge assigned to this proceeding. The Commission's Rules of Practice, however, expressly provide that motions to dismiss filed before the evidentiary hearing "shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a). This rule reflects an "inten[tion] to ensure that the Commission is appropriately involved earlier in the adjudicatory process," Proposed Rule, 73 Fed. Reg. at 58834, and a judgment that bringing the Commission's expertise to bear on dispositive motions will "improve the quality of the decisionmaking and ... will expedite the proceeding," Final Rule, 74 Fed. Reg. at 1809; *see also* Proposed Rule, 73 Fed. Reg. at 58836. Respondent's sole reason for requesting referral--that the same Commissioners who voted to issue the Complaint might be unable to dispassionately review the motion--is unsupported by any facts indicating that the Commission cannot fairly and judiciously perform its statutory, adjudicatory duties under 45 U.S.C. § 45(b). Lacking any specific support, Respondent effectively asks the Commission to disregard Rule 3.22(a)'s core determination that, in view of its statutory role as an expert adjudicator, Final Rule, 74 Fed. Reg. at 1806, the Commission should rule upon motions to dismiss. We decline to do so.

III. RESPONDENT'S MOTION TO RESCHEDULE ADMINSTRATIVE HEARING

On December 4, 2019, Respondent filed a motion to reschedule the administrative hearing. Under the current schedule, the hearing will begin on July 7, 2020. Respondent moves that it be postponed until or after the week of August 3, 2020. Respondent suggests that the current date would interfere with the planned family vacation of its lead counsel. Complaint Counsel do not oppose Respondent's motion.

Commission Rule of Practice 3.41(a) provides that the Commission may order a later date for the commencement of an evidentiary hearing "upon a showing of good cause." Respondent's motion cites the fact that that its lead counsel "is scheduled to be absent on a planned family vacation the week immediately prior to the currently scheduled July 7, 2020 start of the administrative hearing." Motion of Administrative Hearing at 2. While that could justify a short delay in the start of the hearing, Respondent has provided no reason why the hearing should be delayed for nearly a month. Consequently, and in view of the public interest in resolving this matter efficiently and expeditiously, we find good cause to grant only a portion of the requested continuance and will reschedule the hearing to commence on July 21, 2020.

***3** Accordingly,

IT IS HEREBY ORDERED that Respondent's request to stay further proceedings in this matter pending resolution of its Motion to Dismiss is **DENIED**;

IT IS FURTHER ORDERED that Respondent's request to refer its Motion to Dismiss to the Administrative Law Judge is **DENIED;**

IT IS FURTHER ORDERED that Respondent's Expedited Motion of Administrative Hearing is **GRANTED IN PART.** The evidentiary hearing shall begin on July 21, 2020, at 10:00 a.m. The Administrative Law Judge retains discretion to adjust any pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order.

By the Commission.

April J. Tabor
Acting Secretary

Seal:

Issued: January 6, 2020

FTC

Footnotes

1 *See* Final Rule, 74 Fed. Reg. at 1805 (explaining that in amending its rules for adjudicative proceedings, the Commission "intended ... to balance three important interests: the public interest in a high quality decisionmaking process, the interest of justice in an expeditious resolution of litigated matters, and the interest of the parties in litigating matters without unnecessary expense").

2 In addition to arguing that a stay would save resources, Respondent asserts that it has acted in good faith and has taken affirmative corrective steps, so that there is no reason to anticipate future non-compliance. Motion to Dismiss at 5. These assertions raise factual issues, which, if relevant, would need to be assessed in the context of evidence developed at trial.

2020 WL 91293 (F.T.C.)

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2013 WL 6826948 (F.T.C.)

Federal Trade Commission (F.T.C.)

In the Matter of LabMD, Inc. a corporation.

Docket No. 9357
December 13, 2013

***1 COMMISSIONERS:**

Edith Ramirez, Chairwoman

Julie Brill

Maureen K. Ohlhausen

Joshua D. Wright

PUBLIC

ORDER DENYING RESPONDENT LABMD'S MOTIONS FOR STAY

In two separate motions, Respondent LabMD, Inc. ("LabMD") has requested that the Commission stay the ongoing proceeding before the Administrative Law Judge in this case. First, as part of its Motion to Dismiss with Prejudice and to Stay Administrative Proceedings, filed on November 12, 2013 ("Motion to Dismiss"), LabMD requested a stay pending our resolution of the merits of that motion. *See* Motion to Dismiss at 29-30. Second, on November 26, 2013, LabMD filed a Motion to Stay Proceedings Pending Review in the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court for the District of Columbia ("Motion for Stay Pending Judicial Review").

For the reasons set forth below, we deny both the stay request incorporated into LabMD's Motion to Dismiss and LabMD's Motion for Stay Pending Judicial Review. In this Order, we do not address the merits of LabMD's Motion to Dismiss.

BACKGROUND

This case concerns allegations that LabMD - a provider of clinical laboratory testing services - failed to implement reasonable and appropriate measures to prevent unauthorized access to consumers' personal data stored on its computer systems. The Complaint initiating this case, issued on August 28, 2013 ("Complaint"), alleges that, as a result of LabMD's inadequate data security practices, identity thieves were able to obtain access to highly sensitive information - including patients' names combined with their dates of birth, social security numbers ("SSNs"), and information about their bank accounts, insurance coverage, or lab test results. *See* Complaint at 2-5 (¶¶ 6-21). The Complaint alleges that LabMD's conduct constituted an "unfair act or practice," in violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a). *See* Complaint at 5 (¶¶ 22-23).

LabMD filed its Answer to the Complaint on September 17, 2013 ("Answer"), and as noted above, filed a Motion to Dismiss on November 12, 2013. Complaint Counsel filed a Response in Opposition to the Motion to Dismiss ("CC Opp. to MTD") on November 22, 2013; and LabMD filed a Reply on December 2, 2013. The deadline for a Commission order resolving the merits

of LabMD's Motion to Dismiss is January 16, 2014. *See* 16 C.F.R. §§ 3.22(a), 4.3(a). Factual discovery in this proceeding is scheduled to close on March 5, 2014, and the evidentiary hearing before the Administrative Law Judge is scheduled to begin on May 20, 2014. *See* Administrative Law Judge's Revised Scheduling Order (issued Oct. 22, 2013).

***2** On November 14, 2013, LabMD filed a Verified Complaint for Declaratory Relief against the Commission in the U.S. District Court for the District of Columbia (docketed as Case No. 1:13-cv-01787-CKK) ("District Court Complaint"). On November 18, 2013, LabMD filed a "Petition for Review of Unlawful Federal Trade Commission Attempt to Regulate Patient-Information" in the U.S. Court of Appeals for the Eleventh Circuit (docketed as Case No. 13-15267) ("11th Circuit Petition"). On November 26, 2013, LabMD filed its Motion for Stay Pending Judicial Review in this proceeding. Complaint Counsel filed an Opposition to the latter motion on December 5, 2013. ("CC Opp. to MSPJR").

ANALYSIS

I. Request for Stay Pending a Decision on the Merits of LabMD's Motion to Dismiss

Our rules provide that, as a general matter, a motion to dismiss filed prior to evidentiary hearings is to be referred directly to the Commission for decision, 16 C.F.R. § 3.22(a), and the fact that such a motion is pending """"shall not stay proceedings before the Administrative Law Judge unless the Commission so orders." *Id*. § 3.22(b). When we most recently revised this rule, we stated that that the "purpose of ... paragraph (b) is to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions, ... [so as] to expedite the proceedings." FTC, *Rules of Practice*, Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804, 1809, 1810 (Jan. 13, 2009).

In deciding whether to grant LabMD's request for a stay of the proceeding pending our resolution of its Motion to Dismiss, we exercise our discretion to oversee this adjudication, comparable to the broad discretion of a court "to stay proceedings[,] ... incidental to the power inherent in every court to control the disposition of the [cases] on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for an exercise of judgment." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). We conclude that there is no good cause for the stay LabMD requests.

LabMD contends that a stay pending resolution of the merits of its Motion to Dismiss is justified, in part, because Complaint Counsel has sought "extensive and abusive discovery" that would impose "ruinous litigation costs" on the company. Motion to Dismiss at 29, 30. Complaint Counsel responds that this argument is no more than a "rehash" of arguments over third-party discovery that are already pending before the Administrative Law Judge. CC Opp. to MTD at 26. Significantly, the Administrative Law Judge recently issued an order resolving pending discovery disputes. *See* Administrative Law Judge's Order on Respondent's Motion for a Protective Order at 7-8 (issued Nov. 22, 2013). By precluding discovery on conduct prior to 2005 and discovery of materials relating to a book by LabMD's CEO, this Order may ameliorate LabMD's burdens and costs to some extent. If further disputes between LabMD and Complaint Counsel emerge during the course of the discovery process, the Administrative Law Judge is well equipped to address them in the first instance.

***3** LabMD further argues that a stay pending resolution of the Motion to Dismiss would be proper because "[f]orcing LabMD to litigate a case that the Commission does not even have jurisdiction to bring is inherently unjust and violates its due process rights." Motion to Dismiss at 30. Without expressing any view on the merits of the Motion to Dismiss, we conclude that the fact that LabMD has challenged the Commission's authority to bring this case does not justify a stay. As discussed above, when we adopted the current version of Section 3.22 of our Rules of Practice, we anticipated that parties might file dispositive pre-hearing motions, but concluded that the public interest in expediting our adjudicatory process supports allowing the proceedings before the Administrative Law Judge to continue notwithstanding the pendency of such motions. Thus, in past adjudications, we have declined to grant motions for stay of pretrial proceedings pending resolution of motions to dismiss.[1] Consistently, reviewing courts have held that litigants must participate fully in the Commission's adjudications even where they "have challenged the very authority of the agency to conduct proceedings against them." *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 739 (D.C. Cir. 1987)

(opinion of Edwards, J.). The Supreme Court has clearly ruled that the "expense and disruption [incurred by the respondent in] defending itself in protracted adjudicatory proceedings" before the Commission do not justify halting those proceedings prior to their conclusion, even where, as here, the respondent "alleged unlawfulness in the issuance of the complaint." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).

II. Motion for Stay Pending Judicial Review

Under our rules, "[t]he pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs." 16 C.F.R. § 3.41(f). The stay of administrative proceedings pending judicial review sought by LabMD, like stays of trial court proceedings pending appellate review in federal court, would be "an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Thus, a party requesting a stay in an administrative adjudication - as in federal court - bears the burden of demonstrating that the applicable criteria are fully satisfied.[2] "The first two factors of the traditional standard" - likelihood of success and irreparable injury - "are the most critical." *Id.* at 434.

***4** Applying this analytical framework, we conclude LabMD has failed to satisfy its burden of showing "good cause" to grant its Motion for Stay Pending Judicial Review.[3]

A. Likelihood of Success on the Merits

A party seeking a stay must "make a strong showing that [it] is likely to succeed on the merits .... [M]ore than a mere 'possibility' of relief is required." *Nken*, 556 U.S. at 434. LabMD has not shown that it is likely to prevail on the merits before the District Court or the Eleventh Circuit. We reach this conclusion without addressing the substantive merits of LabMD's District Court Complaint or 11th Circuit Petition - both of which present issues that substantially overlap the substantive issues LabMD raised in its Motion to Dismiss pending before us, which we are not considering or addressing in this Order. Nonetheless, we conclude that neither the District Court nor the Eleventh Circuit is likely to grant LabMD's request for declaratory or injunctive relief to halt this adjudication.

First, neither the District Court nor the Court of Appeals has jurisdiction to entertain LabMD's premature challenge to this adjudicatory proceeding. The FTC Act sets forth a detailed judicial review scheme that makes clear that a respondent in a Section 5 adjudication may obtain judicial review *only* if it (1) identifies "an order of the Commission" requiring it "to cease and desist from using any method of competition or act or practice;" (2) files "a written petition praying that the order of the Commission be set aside" with one of a specified set of U.S. Courts of Appeals; and (3) does so "within sixty days of the service of such order." 15 U.S.C. § 45(c). The Act also makes clear that this judicial review process implicates the courts' jurisdiction. *See id.* (filing of such petition triggers the court's "jurisdiction"); *id.*, § 45(d) ("[T]he jurisdiction of the [C]ourt of [A]ppeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."). Statutory requirements specifying which courts may review which types of agency decisions - such as provisions limiting judicial review to agency rulings that "are 'final' and 'made after a hearing"DD' - are deemed ""'"central to the requisite grant of subject-matter jurisdiction." *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). Where, as here, it is "fairly discernible" from the text and overall structure of a statute that Congress intended that appeals of agency actions "proceed exclusively through the statutory review scheme," then that statute "precludes ... courts from exercising jurisdiction over [a] pre-enforcement challenge" outside the prescribed procedures, and does not allow parties to "evade the statutory-review process by enjoining the [agency] from commencing enforcement proceedings, as petitioner sought to do here." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 216 (1994); *accord Elgin v. Dept. of Treasury*, 132 S. Ct. 2126, 2132-33 (2012).

***5** Both LabMD's District Court Complaint and its 11th Circuit Petition fail this test. "The District Court is without jurisdiction to enjoin hearings because the power 'to prevent any person from engaging in any unfair practice affecting commerce' has been vested by Congress in the [agency] and in the Circuit Court of Appeals ...." *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 48 (1938).[4] And the Court of Appeals is authorized by the FTC Act to review only an "order of the Commission to cease and desist from using any method of competition or act or practice." 15 U.S.C. § 45(c). *See Texaco, Inc. v. FTC*, 301 F.2d 662, 662 (5th Cir. 1962) (per curiam) ("The jurisdiction of this Court to review an order of the Federal Trade Commission is found in 15 U.S.C. § 45(c). Such jurisdiction arises only from a cease and desist order entered by the Commission."). The Commission has issued no cease and desist order in this proceeding.

LabMD's attempt to short-circuit this adjudicatory proceeding by going straight to court is "at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted [,] .... [even] in cases where, as here, the contention is made that the administrative body lacked power over the subject matter." *Bethlehem Shipbuilding Corp.*, 303 U.S. at 50-51. *See also Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) ("it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified" in instituting such proceedings). The law is clear that a party may not halt a legitimate law enforcement proceeding that a federal agency is conducting against that party by seeking an injunction or declaratory order, provided that the party has a meaningful opportunity to obtain judicial review after the proceeding concludes and a final order is issued. *See, e.g.*, *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927) (where respondents have a "full opportunity to contest the legality of any ... proceeding against them[,] ... they [could] not ... ask relief by injunction"); *cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. at 212-13 (distinguishing *Leedom v. Kyne*, 358 U.S. 184 (1958) and its progeny).

Moreover, LabMD has no probability of success on the merits before either the District Court or the Eleventh Circuit because there is no "final agency action" in this proceeding. The Commission has merely averred "reason to believe" that violations have occurred and found "good cause" to issue a Complaint. "Serving only to initiate the proceedings, the issuance of the complaint has no .... legal or practical effect, except to impose upon [the respondent] the burden of responding to the charges made against it." *Standard Oil Co.*, 449 U.S. at 242. The Eleventh Circuit has found that "the "'final agency action' requirement implicates federal subject matter jurisdiction," *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1240 (11th Cir. 2003), while the D.C. Circuit treats the absence of final agency action as a failure to state a claim upon which relief can be granted. *See, e.g., Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 731-32 (D.C. Cir. 2003). Either way, LabMD loses.

***6** LabMD contends the Commission has already made up its mind, and therefore, further participation in this proceeding would be futile. *See, e.g.*, District Court Complaint at 25-26 (¶¶ 132-37). LabMD is wrong. "Although [respondent] claims that it is highly unlikely that the agency will change its position and that resort to the agency's adjudicatory proceeding would be futile, nothing in the record indicates that the outcome of a hearing, where [respondent] will have the opportunity to present its arguments to the agency, is preordained." *Reliable Automatic Sprinkler Co.*, 324 F.3d at 733. Even assuming, *arguendo*, that the Commission has expressed views in the past about some of the legal and policy issues in this case, that would "not necessarily mean that the minds of its members [are] irrevocably closed on the subject of respondents' ... practices[,]" nor that they are "prejudiced and biased" against LabMD, so that it "could not receive a fair hearing from the Commission." *FTC v. Cement Inst.*, 333 U.S. 683, 700 (1948).[5] The Commission's ultimate ruling in this case "is contingent on a number of factors" - including an assessment of whether the facts alleged in the Complaint actually occurred, and whether those facts are sufficient to sustain a finding that LabMD committed unfair acts and practices. "Under these circumstances, where [a court] can have no idea whether or when [a sanction] will be ordered, the issue is not fit for adjudication." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Toilet Goods Assn., Inc. v. Gardner*, 387 U.S. 158, 163 (1967).

B. Irreparable Harm

A party seeking a stay must show that it "will be irreparably injured absent a stay; simply showing some 'possibility of irreparable injury' fails to satisfy the second factor." *Nken*, 556 U.S. at 434-35. LabMD asserts that, absent a stay, the pendency of this proceeding "damages LabMD's business reputation, causing it to lose customer goodwill and market share," "threaten[s] the very existence of [its] business," and "eviscerates LabMD's due process rights." Motion for Stay Pending Judicial Review at 4-5. To be sure, "[t]he harm to property and business can ... be incalculable by the mere institution of proceedings .... Yet it is not a requirement of due process that that there be judicial inquiry before discretion can be exercised" to commence an adjudication. *Mytinger & Casselberry Inc.*, 339 U.S. at 599. Indeed, "every respondent to a Commission complaint" - and every litigation defendant - "could make the [same] claim[.]" *Standard Oil Co.*, 449 U.S. at 242-43. "Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings. This is a risk of litigation that is inherent in society, and not the type of injury to justify judicial intervention." *Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91 (D.C. Cir. 1972). "[T]he expense and annoyance of litigation is 'part of the social burden of living under government [,]' [and] ... '[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Standard Oil Co.*, 449 U.S. at 244 (quoting *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938), and *Renego. Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

C. Effect on Other Parties and Public Interest

***7** Finally, LabMD fails to satisfy the other relevant factors. Its contention that "[a] stay of this matter will injure no one at all," Motion for Stay Pending Judicial Review at 7, is ably countered by Complaint Counsel's argument that a stay could expose "consumers [to] the risk of identity theft, medical identity theft, and other harms." CC Opp. to MSPJR at 6. And needlessly delaying the pending adjudicatory proceeding could frustrate the public interest in expeditious resolution of adjudicatory matters. We cannot conclude that the stay sought by LabMD would be in the public interest.

Accordingly,

IT IS ORDERED THAT Respondent LabMD, Inc.'s request for a stay of administrative proceedings pending disposition of the merits of its Motion to Dismiss **IS DENIED;** and

IT IS FURTHER ORDERED THAT Respondent LabMD's Motion to Stay Proceedings Pending Review in the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court for the District of Columbia **IS DENIED.**

By the Commission.

Donald S. Clark
Secretary

Seal:

Issued: December 13, 2013

FTC

Footnotes

1 *See, e.g., N.C. State Bd. of Dental Exam'rs*, 150 F.T.C. 851 (2010). The U.S. District Court denied the same respondent's motion to halt the same pending proceeding. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 768 F. Supp. 2d 818, 820 n.1 (E.D.N.C. 2011).

2 Our procedural decisions in administrative adjudications are governed by the FTC Act and our own Rules of Practice, rather than the rules and standards that govern federal courts. The same factors, however, apply to motions for stay pending appeal in both types of fora. *Compare* 16 C.F.R. § 3.56(c) (factors governing stay motions under 15 U.S.C. § 45(g)(2) and 16 C.F.R. § 3.56(a)), *with Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (factors under Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a)). These factors are: "[1] the likelihood of the applicant's success on appeal; [2] whether the applicant will suffer irreparable harm if a stay is not granted; [3] the degree of injury to other parties if a stay is granted; and [4] whether the stay is in the public interest." 16 C.F.R. § 3.56(c). *See also N.C. State Bd. of Dental Exam'rs*, 151 F.T.C. 640 (2011) (denying respondent's motion for stay pending district court review).

3 LabMD's request that the Commission rule on this motion by December 5, 2013 - a day before the due date for Complaint Counsel's response - is now moot. *See* Motion for Stay Pending Judicial Review at 8; 16 C.F.R. § 3.22(d).

4 Although *Myers v. Bethlehem Shipbuilding Co.* concerned the National Labor Relations Act, the Court quoted and relied upon the legislative history of the FTC Act, which revealed Congress' unequivocal intent that this mode of review is exclusive. *See* 303 U.S. at 48 n.5.

5 *See also N.C. State Bd. of Dental Exam'rs*, Opinion Denying Respondent's Motion to Disqualify the Commission, 151 F.T.C. 644, 648-54 (2011) (citing, *inter alia*, *Cement Institute*, *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), and *Am. Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980)).

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