

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

COMMISSIONERS: **Lina M. Khan, Chair**
 Noah Joshua Phillips
 Rebecca Kelly Slaughter
 Christine S. Wilson

In the Matter of

Hackensack Meridian Health, Inc.,

and

Englewood Healthcare Foundation.

Docket No. 9399

**COMPLAINT COUNSEL’S EXPEDITED MOTION FOR A 60-DAY
CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS**

Pursuant to Rule 3.41 of the Federal Trade Commission (“FTC” or “Commission”) Rules of Practice, Complaint Counsel moves for a 60-day continuance of the commencement of the administrative hearing currently scheduled to begin on April 22, 2022. This continuance is necessary to permit the Commission to consider Complaint Counsel’s contemporaneous motion to withdraw this matter from adjudication and any motion to dismiss that Respondents may file. In the time that it will take for any briefing on these motions to occur (even under an expedited schedule), approximately two dozen non-parties whose confidential information has been designated for use in the administrative trial, Complaint Counsel, and Respondents will all incur significant expense and burden that may ultimately prove unnecessary. Granting this motion will not hamper the Commission’s ultimate ability to obtain relief and Respondents will suffer no prejudice from allowing the Commission time to consider the forthcoming motions.

Complaint Counsel shared this motion with Respondents. Respondents declined to join this motion. Respondents believe that this matter is now moot because they have abandoned their transaction. As a result, Respondents believe the only appropriate next step is a motion to dismiss. Even were the Commission inclined to grant a motion to dismiss, however, this extension would still be necessary because substantial prejudice will be borne by third parties in the time it takes the Commission to decide that motion.

If this motion is not decided shortly, given the April 12 deadlines, third parties will bear the significant and potentially unnecessary expense of attempting to meet the deadline for submission of motions for *in camera* treatment, and Complaint Counsel will bear the significant and potentially unnecessary expense of preparing a pretrial brief. As a result, Complaint Counsel requests that if Respondents are afforded an opportunity to respond, that the Commission order such response be filed no later than April 6 by 3:00 pm.

BACKGROUND

On December 4, 2020, Complaint Counsel filed this action and a complaint in the United States District Court for the District of New Jersey seeking a preliminary injunction to enjoin the proposed transaction between Respondents until completion of this administrative proceeding. Respondents stipulated to the entry of a temporary restraining order in the federal litigation. On August 4, 2021, the district court granted Complaint Counsel's motion for a preliminary injunction. *Federal Trade Commission v. Hackensack Meridian Health*, No. 20-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021). On March 22, 2022, the Third Circuit Court of Appeals affirmed the district court's injunction. *Federal Trade Commission v. Hackensack Meridian Health*, ___ F.4th ___, 2022 WL 840463 (3d Cir. 2022).

The Commission's Fourth Order Continuing the administrative trial set the trial date in this matter for "10:00 a.m. on the first working day that is at least thirty days after the United States Court of Appeals for the Third Circuit renders its judgment on Respondents' appeal of the August 4, 2021 order," which is April 22, 2022. Order, *In the Matter of Hackensack Meridian Health and Englewood Healthcare Foundation*, Dkt. 9399 (FTC July 27, 2021). The first pretrial deadlines in the Administrative Law Judge's scheduling order begin ten days before the trial, on April 12. Order, *In the Matter of Hackensack Meridian Health and Englewood Healthcare Foundation*, Dkt. 9399 (FTC November 16, 2021).

On March 31, 2022, the parties notified Complaint Counsel that they are abandoning their transaction.

ARGUMENT

Under Rule 3.41 of the Commission's Rules of Practice, "[t]he Commission, upon a showing of good cause, may order a later date for the evidentiary hearing to commence." 16 C.F.R. § 3.41(b). Based on the current hearing schedule, parties and third parties will need to expend significant resources on this case before the Commission can determine whether further relief is necessary or further litigation is warranted. Among other things, third parties and respondents will need to file motions for *in camera* treatment on April 12. Complaint Counsel will need to file its pretrial brief on April 12. Respondents' counsel must file its pretrial brief on April 18.

The parties are discussing whether this matter warrants further litigation or relief. Complaint Counsel has filed a motion to withdraw the matter from adjudication to allow the Commission to consider the question whether further relief is warranted based on the facts of this specific case. Respondents are likely to file a motion to dismiss. Here, for nearly identical reasons

upon which the Commission previously granted continuances, good cause exists for a continuance of the commencement of the administrative hearing:

1. The third party and Respondent witnesses who may be called to testify live at the administrative hearing are involved in the healthcare industry in an unprecedented time of a global pandemic. These witnesses include operators of hospitals and clinicians themselves. A brief stay will allow these healthcare providers sufficient time to juggle the demands of their already-disrupted schedules with the needs of this litigation and may even obviate the need to impose any additional burdens should the administrative hearing become moot. “The public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary.” Order Granting 14-Day Continuance, *In the matter of Sanford Health* (Nov. 3, 2017).
2. Absent the continuance, third parties and the Parties will be required to devote significant resources to meeting various interim deadlines between now and April 22, 2022 (the current commencement date for the administrative hearing), including extensive document and data review and redaction, and motion practice. For example, numerous third parties whose confidential material may be used at the hearing will be required to move by April 12, 2022, for *in camera* treatment of any material they do not want presented on the public record. Such motions will address significant volumes of competitively and commercially sensitive documents and data that were produced during the course of the preliminary injunction proceeding and the FTC’s merger review. If the Commission grants this motion for a brief stay, then the third parties may avoid the substantial burden of reviewing voluminous documents, performing line-by-line proposed redactions of confidential

information, preparing legal memoranda requesting *in camera* treatment of those materials, and filing copies of all such materials with the Court.

3. Absent the continuance, third party and party witnesses—virtually all of whom reside outside of the Washington, D.C. area—will need to incur significant expenses, including legal fees, associated with preparation for the administrative hearing and potential travel costs if in-person testimony will be heard. These expenses will be particularly burdensome in the midst of a global pandemic. The Parties have identified approximately twenty-eight third parties as witnesses that may be called live at the administrative hearing. A temporary stay may allow these third parties and the Parties to avoid these additional expenses entirely should the administrative hearing become unnecessary.
4. Absent the requested continuance, the Office of the Administrative Law Judge will be required to devote time and resources to pre-hearing preparation and adjudication of issues for a hearing that it may not have to conduct.

The requested relief will serve the public interest and will not prejudice the Commission's ability to discharge its duties. A brief stay will allow the Commission to consider the question whether further relief is warranted. If such discussions obviate the need for further litigation, a brief stay now avoids the inefficiency of completing all pre-hearing matters and beginning the presentation of evidence in the administrative trial should that trial prove unnecessary. A 60-day continuance is appropriate so that to allow sufficient time for briefing and decision by the Commission as to the next steps in this matter.

RELIEF REQUESTED

For all the reasons foregoing, Complaint Counsel respectfully requests that the Commission exercise its discretion under Rule 3.41(b) to continue commencement of the

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administrative hearing by 60 days, or until such later date as may be convenient for the Chief Administrative Law Judge and the Commission.

Dated: April 5, 2022

Respectfully submitted,

s/ Jonathan Lasken

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**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S EXPEDITED MOTION
FOR A 60-DAY CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS**

Good cause having been shown,

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

- (1) Commencement of the evidentiary hearing in this matter is moved from April 22, 2022, to June 21, 2021, and
- (2) Unless modified by the Chief Administrative Law Judge, all related prehearing deadlines shall be extended by sixty (60) days.

By the Commission.

April J. Tabor
Secretary

ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
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The Honorable D. Michael Chappell
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I also certify that I caused the foregoing document to be served via email to:

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