

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

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

In the Matter of

**Meta Platforms, Inc.,
a corporation,**

**Mark Zuckerberg,
a natural person,**

And

**Within Unlimited, Inc.,
a corporation.**

Docket No. 9411

PUBLIC

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT META
PLATFORMS, INC.’S MOTION TO STAY THIS ADMINISTRATIVE PROCEEDING**

Complaint Counsel respectfully opposes the motion to stay submitted by Respondent Meta Platforms, Inc. (“Meta”). Meta contends that good cause exists to stay this administrative proceeding (1) because there is a parallel district court proceeding to decide the Commission’s request for a preliminary injunction and (2) because Meta objects to Chair Khan’s participation in this administrative proceeding. Mot. at 3-4. Meta is wrong. Granting a stay under these circumstances would be contrary to the Commission’s regulations and precedents. Moreover, Meta’s assertions about what might happen after the district court hearing (which is not even scheduled to begin for three months) are irrelevant and speculative. The Commission should deny Meta’s motion to stay these proceedings.

1. Under the Part 3 Rules and Past Precedent, Respondents Must Show “Good Cause” for a Stay of the Proceeding.

“[T]o the extent practicable and consistent with requirements of law, the Commission’s policy is to conduct [adjudicative] proceedings expeditiously.” *In re Phoebe Putney Health Sys.*, Docket No. 9348, 2013 WL 1151917, *2 (F.T.C. Mar. 14, 2013) (alteration in original) (quoting 16 C.F.R. § 3.1). In furtherance of this policy, Commission Rules of Practice disfavor staying administrative proceedings. “The 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) (emphasis added); *see also* 16 C.F.R. § 3.22(b) (no stay for dispositive motions unless “the Commission so orders or unless otherwise provided by an applicable rule”). The Commission adopted these and other measures in 2009 in response to criticism that “the Commission’s Part 3 adjudicatory process [is] too protracted.” 73 Fed. Reg. 58832 (Oct. 7, 2008) (proposed rules) (citing district court, circuit court, private practitioner, and American Bar Association sources). “The default rule is, thus, that the pendency of a collateral proceeding in federal court does not constitute a

basis to stay the administrative proceeding.” *In re Axon Enterprise, Inc.*, Docket No. 9389, 2020 WL 1041712, *2 (F.T.C. Feb. 27, 2020).

Although the Commission retains its inherent authority to stay a Part 3 proceeding, it does so exceedingly infrequently: only a handful of times in the 13 years since the Commission modified its rules. In *Ardagh Group S.A.*, the Commission stayed an administrative hearing because a settlement was imminent, the parties jointly requested a stay, and the parties had stipulated to a preliminary injunction.¹ In *Phoebe Putney Health System, Inc.*, the Commission granted the respondents’ unopposed motion to stay the administrative proceedings, while the Eleventh Circuit reviewed, on an expedited basis, the district court’s decision denying the motion for a preliminary injunction based on the state action doctrine. Docket No. 9348, 152 F.T.C. 1035, 2011 WL 11798466 (F.T.C. July 15, 2011). None of the circumstances in which the Commission granted a stay in the past are present here.²

Indeed, the very cases Meta cites show that the Commission has granted stays in circumstances very different than found here. *In re Sanford Health*, Docket No. 9376, 2017 WL 5845596 (F.T.C. Nov. 21, 2017); *In re RAG-Stiftung*, Docket No. 9384, 2020 WL 91294 (F.T.C.

¹ See Order, *In re Ardagh Group S.A.*, Docket No. 9356, 2013 WL 6826957 (F.T.C. Dec. 18, 2013).

² Those circumstances have included when: (1) Complaint Counsel and Respondent jointly moved the Commission; (2) the preliminary injunction hearing and post-hearing filings had concluded in federal district court; (3) the parties stated that they would abandon the proposed transaction if the court granted the preliminary injunction; and (4) imminent deadlines in the administrative schedule that imposed undue burden on third parties (e.g., motions for *in camera* treatment due within days for 23 third parties). See *In re RAG-Stiftung*, Docket No. 9384, 2020 WL 91294, *1-2 (F.T.C. Jan. 2, 2020). The Commission also granted joint motions for stays during the height of the COVID-19 pandemic. See Second Order Regarding Scheduling in Light of Public Health Emergency, *In re Thomas Jefferson University*, Docket No. 9392 (F.T.C. Apr. 13, 2020), available at https://www.ftc.gov/system/files/documents/cases/d09392_commission_order_ext_staying_evidentiary_hearingpublic.pdf.

Jan. 2, 2020); and *In re Hackensack Meridian Health, Inc.*, Docket No. 9399, 2021 WL 2379546 (F.T.C. May 25, 2021) all involved joint motions to delay administrative proceedings when the district court preliminary injunction hearing had already concluded. In *Sanford*, the Commission granted “a limited continuance” due to “the present circumstances, where the district court has concluded its hearing and has stated a goal to provide an opinion shortly.” 2017 WL 5845596 at *1. See also *RAG-Stiftung*, 2020 WL 91294 at *1 (“The preliminary injunction hearing and post-hearing filings ha[d] concluded in the federal district court action” when the parties filed their joint motion); *Hackensack*, 2021 WL 2379546 at *1 (“The preliminary injunction hearing concluded on May 18, 2021”). Moreover, the Commission favors stays of limited duration. See *In re Sanford Health*, Docket No. 9376, 2017 WL 5623692, at *1 (F.T.C. Nov. 3, 2017) (denying motion for a two-month stay and instead entering a two-week stay because “the Commission has committed to moving forward as expeditiously as possible with administrative hearings on the merits”). Here, by contrast, no district court decision is pending and Meta has not requested a narrow stay with any clear, short-term endpoint. Rather, Meta requests a stay of indeterminate duration more than three months before the district court preliminary injunction hearing is slated to begin.

2. The Preliminary Injunction Proceeding in Federal District Court Does Not Constitute Good Cause to Stay This Administrative Proceeding.

The mere fact that there is a preliminary injunction proceeding in the Northern District of California does not constitute good cause to stay this proceeding. The Commission has repeatedly, and consistently, rejected arguments that parallel federal proceedings can provide the basis for a stay of an administrative proceeding. See, e.g., *In re Penn State Hershey Med. Ctr.*, Docket No. 9368, 2016 WL 1239232, *1 (F.T.C. Mar. 21, 2016) (“Respondents rest their motion to stay on the suggestion that the district court may not rule on the preliminary injunction request

until after the administrative hearing begins on May 17, 2016. Respondents’ conjecture, however, is not a basis for delaying the administrative hearing.”); *In re Advocate Health Care Network*, Docket No. 9369, 2016 WL 1130010, *1 (F.T.C. Mar. 18, 2016) (same). Meta argues that parallel proceedings are “unnecessarily burdening not only Meta, but the Commission and third parties” and “will expend unnecessary resources,” Mot. at 4, but avoidance of ordinary litigation expenses is not sufficient to make a showing of good cause. *In re RagingWire Data Ctrs., Inc.*, Docket No. 9386, 2020 WL 91293, *1 (F.T.C. Jan. 6, 2020) (collecting cases and denying stay during pendency of dispositive motion); *In re La. Real Estate Appraisers Bd.*, Docket No. 9374, 2018 WL 2949560, *2 n.3 (F.T.C. June 6, 2018) (“Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters.”).

Meta further asserts that a stay is warranted because the outcome in district court is “likely” dispositive, but Meta provides no basis for that assertion. Indeed, Meta has steadfastly refused to state that it will abandon the merger if it loses in the federal court proceeding. *Compare* Mot. at 3 (“if the court grants the FTC’s motion for a preliminary injunction, the transaction will likely be unable to close by the contractual deadline of April 22, 2023”), *with Sanford*, 2017 WL 5845596 at *1 (granting joint motion to stay where “Respondents reiterate[d] that if, after all appeals in the injunction proceedings are exhausted they are enjoined from consummating the acquisition, they will abandon the transaction”). Moreover, even if Meta were to make such a representation, that still would not constitute good cause for staying this administrative proceeding. *In re Wilh. Wilhelmsen Holding ASA*, Docket No. 9380, 2018 WL 3046376, *1 (F.T.C. June 13, 2018) (rejecting argument “that a parallel action brought by the Federal Trade Commission in federal district court . . . will likely obviate the need for an

administrative hearing” and granting continuance solely because “the hearings in [another Part 3 adjudication] and in this matter are likely to clash”). Meta also incorrectly contends that “if the court denies the FTC’s motion for a preliminary injunction, decades of FTC practice indicate it will not pursue this proceeding further.” Mot. at 3. Meta ignores the Commission’s long track record of appealing district court orders denying preliminary injunctions.³ Moreover, contrary to Meta’s claim, it is not and has never been “FTC practice” to simply abandon merger challenges following adverse district court rulings on preliminary injunctions. Instead, the Commission’s practice is to conduct a searching inquiry to determine whether the public interest requires maintaining the administrative litigation. *See* 16 CFR § 3.26. For example, in the *Whole Foods* litigation, the FTC failed to obtain a preliminary injunction in district court; the Commission determined to proceed with an appeal; Complaint Counsel pursued the administrative litigation; and the case ultimately settled (with a divestiture agreed) shortly before the administrative hearing was scheduled to commence. *See In re Whole Foods Mkt., Inc.*, Docket No. 9324, 2008 WL 5369556 (F.T.C. Dec. 19, 2008) (denying motion to stay administrative proceedings after “[t]he Court of Appeals in reversing the district court’s denial of a preliminary injunction determined that the Commission had established a likelihood of success on the merits”); 2009 WL 1557334 (F.T.C. May 29, 2009) (Decision & Order approving divestiture).

3. Meta’s Objections to Chair Khan’s Participation Do Not Constitute Good Cause to Stay This Administrative Proceeding.

Meta further contends that “there is good cause for a stay because Meta has objected to Chair Khan’s participation in these proceedings as a violation of Meta’s due process rights.”

³ *See, e.g., FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008); *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016).

Mot. at 4. The Commission will undoubtedly consider Meta’s objections in due course, but Meta raising objections does not in and of itself constitute good cause to stay the administrative proceeding. Otherwise, any respondent’s “objection” to a Commissioner’s participation would be sufficient to stay administrative proceedings. The Commission rejected a similar argument that a supposed inability to adjudicate constituted good cause in *In re LabMD, Inc.*, Docket No. 9357, 2013 WL 6826948 (F.T.C. Dec. 13, 2013). LabMD argued for a stay on the grounds that forcing it to litigate when the Commission allegedly lacked jurisdiction was inherently unjust and “violate[d] its due process rights.” *Id.* at *3 (quotation marks omitted). The Commission disagreed and concluded “that the fact that LabMD has challenged the Commission’s authority to bring this case does not justify a stay.” *Id.*

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission deny Respondent Meta Platforms, Inc.’s Motion to Stay this Administrative Proceeding.

Dated: September 6, 2022

Respectfully submitted,

s/ Abby L. Dennis

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I caused the foregoing document to be served via email to:

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