

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

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Maureen K. Ohlhausen
 Terrell McSweeney



 In the Matter of)

The Penn State Hershey)
 Medical Center,)
 a corporation,)

and)

PinnacleHealth System,)
 a corporation.)
 _____)

Docket No. 9368

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

Pursuant to Rule 3.41 of the Federal Trade Commission’s (“FTC” or “Commission”) Rules of Practice, 16 C.F.R. § 3.41(b), Complaint Counsel and Respondents The Penn State Hershey Medical Center (“Hershey”) and PinnacleHealth System (“Pinnacle”) jointly move on an expedited basis for a 21-day continuance of the commencement of the administrative hearing, currently scheduled to begin on May 17, 2016, to June 7, 2016, as well as a corresponding extension of all pre-trial deadlines.

A brief continuance of the administrative trial is appropriate in the interest of efficiency and to reduce or eliminate unnecessary burden on nonparties. In a parallel proceeding in federal district court, *FTC, et al. v. Penn State Hershey Medical Center, et al.*, No. 1:15-cv-02362 (JEJ) (M.D. Pa.), the hearing on the Commission’s motion for a preliminary injunction concluded on April 15, 2016. In that proceeding, the Honorable Judge John E. Jones III committed, to the best

of his ability, to issue an order on Plaintiffs' motion for preliminary injunction prior to the commencement of the administrative trial.¹ The outcome of that proceeding may render the administrative trial moot. If the preliminary injunction is granted, Respondents intend to abandon the proposed transaction. If the preliminary injunction is denied, the administrative proceeding will be automatically stayed or withdrawn at the request of Respondents under the recent revisions to Rule 3.26 of the Commission's Rules of Practice. Granting a brief continuance would avoid imposing significant expense and burden on the numerous non-parties whose confidential information has been designated for use in the administrative trial and who may appear to testify at the trial. Because the Commission's ability to discharge its duties would not be prejudiced, Complaint Counsel and Respondents respectfully request that a continuance be granted.

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).² Complaint Counsel and Respondents respectfully submit that good cause exists to grant a brief continuance of the administrative trial for several reasons.

First, granting a continuance will substantially reduce or eliminate the burden on non-parties. Expedited consideration of this motion is appropriate because, unless this brief continuance is granted, numerous non-parties that have been notified that their confidential

¹ See Ex. A, Hearing Tr. at 995:6-10 (Apr. 15, 2016) ("It is my intention to and I'll make every effort to render a determination by the start of the – the scheduled start of the administrative proceeding. I understand that that's important to everybody, and so I'm going to make every attempt to do that.").

² In addition, pursuant to Rule 3.41(f), "the pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding: (i) Unless ... the Commission, for good cause, so directs...." 16 C.F.R. § 3.41(d).

material may be used at the trial are required to move by May 9, 2016 for *in camera* treatment of any material they do not want presented on the public record.³ Such motions will address competitively and commercially sensitive documents, data, and testimony that were provided by 53 separate non-parties during the course of the District Court proceeding and the FTC's investigation of the proposed transaction. If the Commission grants this motion for a brief continuance, then these non-parties may avoid the substantial burden of reviewing voluminous documents, performing proposed redactions of confidential information, preparing legal memoranda requesting *in camera* treatment of those materials, and filing copies of all such materials with the Chief Administrative Law Judge. Additionally, the Parties have identified 66 non-party witnesses who may be called to testify at the administrative trial. If the continuance is granted, these witnesses may avoid the need to adjust their schedules, make travel arrangements, and prepare to testify at an administrative trial that could become moot. As a result, a temporary continuance could spare these non-parties significant inconvenience and legal fees.⁴

A brief postponement of the administrative trial will also serve the interests of efficiency but will not prejudice the Commission. Respondents have previously stated that they intend to abandon their proposed transaction if the District Court grants the preliminary injunction. As counsel for Respondents represented at the District Court hearing, "[a]n injunction would force

³ See Ex. B (Order Granting Joint Motion to Amend the Scheduling Order and Revised Scheduling Order) at 2. Simultaneously with this motion, the Parties moved the Chief Administrative Law Judge to amend the Scheduling Order to give non-parties an additional eight days in which to file their motions.

⁴ Respondents would also face substantial and potentially unnecessary burdens, including legal fees, if a temporary continuance is not granted.

Pinnacle and Hershey to abandon the combination.”⁵ If the District Court denies the preliminary injunction, Respondents will file a motion pursuant to Rule 3.26 to withdraw the case from adjudication or dismiss the complaint. 16 C.F.R. § 3.26(b)-(d). Once a respondent files such a motion, “the new rule now provides for an automatic withdrawal or automatic stay” of the administrative proceeding, depending on the type of motion. FTC Revisions to Rules of Practice, 80 Fed. Reg. 15,157,15,158 (Mar. 23, 2015); *see also* 16 C.F.R. § 3.26(c), 3.26(d)(2). Therefore, regardless of whether the District Court grants or denies the injunction, the administrative proceeding will likely either be rendered moot or will be stayed.

Imposing a brief continuance now avoids the inefficiency, for both the Chief Administrative Law Judge and the Parties, of beginning the presentation of evidence in the administrative trial only to suspend the proceeding following the ruling by the District Court. This continuance would not prejudice the Commission, because even if the Commission determines to proceed with the administrative litigation in the event the preliminary injunction motion is denied, a continuance would not hamper the Commission’s ultimate ability to obtain relief. It would, however, avoid starting the trial -- as well as requiring non-parties and parties alike to satisfy interim filing deadlines -- only to have the proceeding likely stayed pursuant to Rule 3.26.

RELIEF REQUESTED

For all of the foregoing reasons, Complaint Counsel and Respondents jointly and respectfully request that the Commission exercise its discretion under Rule 3.41(b) and/or Rule 3.41(f) to postpone the commencement of the administrative hearing by 21 days, or until such

⁵ *See* Ex. C, Hearing Tr. at 70:18-19 (Apr. 11, 2016). In Respondents’ prior motion to stay the proceedings filed with the Commission on February 22, 2016, they stated “If the court instead enjoins the transaction, Respondents have no intention of pursuing the combination, barring extraordinary circumstances.” *See* Ex. D.

later date as may be convenient for the Chief Administrative Law Judge and the Commission.

Complaint Counsel and Respondents also request an extension of all interim pre-trial deadlines for 21 days.

Dated: May 4, 2016

Respectfully Submitted,

/s/ Adrian Wager-Zito

Adrian Wager-Zito

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Julie E. McEvoy

Christopher N. Thatch

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Counsel for Respondents Penn State

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Counsel Supporting the Complaint

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

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Maureen K. Ohlhausen
 Terrell McSweeney

In the Matter of)

The Penn State Hershey)
 Medical Center,)
 a corporation,)

and)

PinnacleHealth System,)
 a corporation.)

Docket No. 9368

**[PROPOSED] ORDER GRANTING JOINT EXPEDITED MOTION FOR
CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS**

Good cause having been shown,

IT IS HEREBY ORDERED THAT Complaint Counsel's and Respondents' Joint
 Expedited Motion For Continuance of Administrative Proceedings is **GRANTED**; and

(1) Commencement of the administrative hearing in this matter is moved from May 17, 2016
 to June 7, 2016; and

(2) All other proceedings in this matter are continued for 21 days from the date of this order.

By the Commission.

Donald S. Clark
 Secretary

ISSUED:

EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION and	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiffs	:	
	:	Case No. 1:15-CV-02362
vs.	:	
	:	(Judge Jones)
PENN STATE HERSHEY MEDICAL	:	
CENTER and PINNACLEHEALTH	:	
SYSTEM,	:	
Defendants	:	

TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS
BEFORE THE HONORABLE JOHN E. JONES, III
UNITED STATES DISTRICT COURT JUDGE
APRIL 15, 2016; 9:01 A.M.
HARRISBURG, PENNSYLVANIA

MORNING AND AFTERNOON SESSIONS
PAGES 804 THROUGH 996

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Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 and we will ask for accelerated submissions, the plaintiffs'
2 by -- I believe it's the 25th, I think, of April, which is the
3 Monday following this coming Monday, and then we'll give an
4 equal amount of time, unless filed sooner, for the defense, a
5 submission, no reply. We just don't have time for that.

6 It is my intention to and I'll make every effort to
7 render a determination by the start of the -- the scheduled
8 start of the administrative proceeding. I understand that
9 that's important to everybody, and so I'm going to make every
10 attempt to do that.

11 I want to say publicly that I've been living with this
12 case not quite as long as all of you have, but for quite some
13 time. And it is important to note that counsel in this case
14 have conducted themselves with the highest degree of
15 professionalism, each and every one of you.

16 It was a pleasure, it is a pleasure having you on my
17 docket. The collaborative, collegial spirit in a legal world
18 where you don't see that, unfortunately, every day was really
19 heartening to me to watch.

20 This is a very, very important case from the public
21 standpoint, from the standpoint of the hospitals. I understand
22 that. It falls to me to make a very difficult decision. But
23 this case demonstrates what I have seen in some of the
24 toughest, most contentious cases, which is that lawyers can
25 fight hard and professionally -- and you have, and you will,

EXHIBIT B

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of)

The Penn State Hershey Medical Center,)
a corporation,)

and)

PinnacleHealth System,)
a corporation,)

Respondents.)

DOCKET NO. 9368

**ORDER GRANTING JOINT MOTION TO AMEND THE
SCHEDULING ORDER AND REVISED SCHEDULING ORDER**

On April 22, 2016, Federal Trade Commission (“Commission”) Complaint Counsel and Respondents Penn State Hershey Medical Center and PinnacleHealth System (collectively, “the Parties”) filed a Joint Motion to Amend the Scheduling Order (“Joint Motion”). Trial in this matter is scheduled to begin on May 17, 2016.

In their Joint Motion, the Parties state as follows:

On December 9, 2015, the Commission filed a complaint in the United States District Court for the Middle District of Pennsylvania seeking a temporary restraining order and a preliminary injunction to prevent Respondents from consummating the transaction that is the subject of this case. *FTC et al. v. Penn State Hershey Med. Ctr. et al.*, No. 1:15-cv-2362-JEJ (M.D. Pa.) (Dec. 9, 2015). The preliminary injunction hearing commenced on Monday, April 11, before Judge John E. Jones III, and was completed on Friday, April 15. Judge Jones has committed, to the best of his ability, to issue an opinion on the preliminary injunction motion before the administrative hearing begins: “It is my intention to and I’ll make every effort to render a determination by the start of the – the scheduled start of the administrative proceeding. I understand that that’s important to everybody, and so I’m going to make every attempt to do that.” *Id.*, Hearing Transcript at 995:6-10, Apr. 15, 2016.

In light of Judge Jones' statement, the Parties ask for amendments to the remaining deadlines in the Scheduling Order. The Parties have not previously sought any extensions to other deadlines in the Scheduling Order, issued on January 13, 2016. Revising the remaining deadlines in the Scheduling Order will avoid costly and resource-intensive work that may ultimately be unnecessary.¹ Based on the foregoing, there is good cause for the requested extensions. 16 C.F.R. § 3.21(c)(2).

Accordingly, the Joint Motion is GRANTED. The Scheduling Order is hereby revised as follows:

- | | | |
|--------------|---|--|
| May 9, 2016 | - | Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondents). |
| May 9, 2016 | - | Deadline for filing motions <i>in limine</i> to preclude admission of evidence. |
| May 9, 2016 | - | Deadline for filing motions for <i>in camera</i> treatment of proposed trial exhibits. |
| May 9, 2016 | - | Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits. |
| May 10, 2016 | - | Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. |
| May 10, 2016 | - | Complaint Counsel files pretrial brief supported by legal authority. |
| May 11, 2016 | - | Deadline for filing responses to motions <i>in limine</i> to preclude admissions of evidence. |

¹ In a motion to stay the proceedings, filed with the Commission on February 2, 2016, Respondents stated that the decision by the District Judge in *FTC et al. v. Penn State Hershey Med. Ctr. et al.*, No. 1:15-cv-2362-JEJ (M.D. Pa.) "will almost certainly have the effect of mooted the hearing: If the district court denies relief, history indicates that the Commission is likely to abandon the administrative complaint, as it has done following every denial of injunctive relief in the past two decades. If the court instead enjoins the transaction, Respondents have no intention of pursuing the combination, barring extraordinary circumstances. Thus, regardless of what the district court decides, its holding is likely to be case-dispositive, and the Part III hearing will accomplish little more than unnecessarily consuming the Commission's – and Respondents' – limited resources."

- May 11, 2016 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
- May 11, 2016 - Exchange proposed stipulations of law, facts, and authenticity.
- May 13, 2016 - Respondents' Counsel file pretrial brief supported by legal authority.
- May 13, 2016 - By 1:00 p.m., file final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
- May 16, 2016 - Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits.

To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects.

Any Joint Exhibit will be signed by each party. (Do not include a signature line for the ALJ.)

- May 17, 2016 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

All of the Additional Provisions in the January 13, 2016 Scheduling Order shall remain in effect.

ORDERED:


 D. Michael Chappell
 Chief Administrative Law Judge

Date: April 25, 2016

EXHIBIT C

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

3 FEDERAL TRADE COMMISSION and :
4 COMMONWEALTH OF PENNSYLVANIA, :
 Plaintiffs :
5 :
 vs. :
6 PENN STATE HERSHEY MEDICAL :
 CENTER and PINNACLEHEALTH :
 SYSTEM, :
7 Defendants :

 Case No. 1:15-CV-02362
 (Judge Jones)

8
9 TRANSCRIPT OF PRELIMINARY INJUNCTION PROCEEDINGS
10 BEFORE THE HONORABLE JOHN E. JONES, III
11 UNITED STATES DISTRICT COURT JUDGE
 APRIL 11, 2016; 9:25 A.M.
 HARRISBURG, PENNSYLVANIA

12
13 MORNING SESSION
14 PAGES 1 THROUGH 75

15
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19
20
21 Lori A. Shuey, RMR, CRR
22 Federal Official Court Reporter
 United States Courthouse
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 (717)215-1270
24 lori_shuey@pamd.uscourts.gov

25 Proceedings recorded by mechanical stenography; transcript
 produced by computer-aided transcription.

1 has gone to great lengths to suggest that you need only
2 rubber-stamp their motion for preliminary injunction because
3 this case is going to proceed to an administrative hearing in
4 Washington, but that's not the law.

5 The government bears the burden of establishing that
6 the combination must be enjoined, and they are entitled to this
7 relief only if they can show that this -- only if they can show
8 that this substantial lessening of competition as a result of
9 the combination is not merely possible but is sufficiently
10 probable and imminent. Contrary to what the government might
11 say, that is not a low bar, nor should it be, given what's at
12 stake here.

13 And the question before this court is not simply
14 whether to maintain the status quo, whether to press "pause"
15 until an administrative law judge holds a second hearing on the
16 same issues that you'll consider this week. To the contrary,
17 if the court were to enjoin the combination, it would
18 effectively be pressing "stop" and not "pause." An injunction
19 would force Pinnacle and Hershey to abandon the combination.

20 The parties can't wait the year it would take the
21 administrative proceeding to work its way through, as well as
22 significant time after that for what would invariably be two
23 appeals, nor can they continue to invest the substantial
24 financial recourses in litigation to try this case a second
25 time.

EXHIBIT D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

The Penn State Hershey Medical Center,
a corporation,
and
Pinnacle Health System,
a corporation.

Docket No. 9368

PUBLIC DOCUMENT



RESPONDENTS' MOTION TO STAY THE ADMINISTRATIVE HEARING

In accordance with Commission Rules 3.21(c) and 3.41(f), Respondents Penn State Hershey Medical Center (“Hershey”) and Pinnacle Health System (“Pinnacle”; collectively, “Respondents”) respectfully request a stay of the administrative hearing in this matter until sixty days after the ruling on the Federal Trade Commission’s (“FTC’s” or “the Commission’s”) complaint seeking a preliminary injunction in the United States District Court for the Middle District of Pennsylvania in *FTC v. Penn State Hershey Medical Center*, No. 1:15-cv-2362. Respondents do not seek a stay of any other deadlines leading up to the hearing.

As required by Rule 3.41(f), there is “good cause” for granting a stay here. The district court will have held a weeklong hearing and received full post-hearing briefing in this matter just over two weeks before the Part III hearing is set to begin, and that court is exceedingly likely to issue its decision well before any ruling in the Part III hearing. That decision will almost certainly have the effect of mooted the hearing: If the district court denies relief, history indicates that the Commission is likely to abandon the administrative complaint, as it has done following *every* denial of injunctive relief in the past two decades. If the court instead enjoins the transaction, Respondents have no intention of pursuing the combination, barring extraordinary circumstances. Thus, regardless of what the district court decides, its holding is likely to be case-dispositive, and the Part III hearing will accomplish little more than unnecessarily consuming the Commission’s—and Respondents’—limited resources.

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2016, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Adrian Wager-Zito
Toby Singer
Kenneth W. Field
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*Counsel for Respondents Penn State Hershey Medical Center and
Pinnacle Health System*

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: May 4, 2016

By: s/ Gerald A. Stein
Gerald A. Stein

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2016, 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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Administrative Law Judge
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*Counsel for Respondents Penn State Hershey Medical
Center and Pinnacle Health System.*

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

May 4, 2016

By: s/ Gerald A. Stein