UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Federal Trade Commission, Plaintiff, vs. Tempur Sealy International, Inc., *et al.*, Defendants.	Civil Action No. 4:24-cv-02508 Judge Charles Eskridge

Defendants' Opposition to the FTC's Motion to Extend Temporary Restraining Order

Although framed as a "routine" request, Mot. 1–2, the FTC's eleventh-hour gambit is really an attempt "to obtain via delay what it could not obtain on the merits." *U.S. v. U.S. Sugar Corp.*, 2022 WL 4535621, at *1 (D. Del. 2022). The FTC baldly asserts that it cannot "obtain full and effective relief" if the parties close the merger before an appeal. Mot. 2, 4. But every appeal involving a vertical merger in at least the last decade (*Microsoft, AT&T,* and *Illumina*) has continued long *after* the parties closed the transaction. The FTC comes nowhere close to justifying its extraordinary request, which would substantially harm Defendants by running out the clock on the merger.

BACKGROUND

Defendants signed their merger agreement in May 2023. The statutory prohibition on closing the merger expired on December 17, 2023—30 days after Defendants substantially complied with the FTC's "second request." 15 U.S.C. § 18a(e). But to give the FTC more time to investigate the merger and ultimately litigate, Defendants—in good faith and upon the FTC's repeated requests—have agreed many times to delay closing.

In July 2024, Defendants and the FTC agreed to a TRO (later entered by the Court) that expires the day after this Court decides the preliminary-injunction motion. ECF No. 42. That is consistent with the purpose of a TRO, which should last "just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Local No. 70*, 415 U.S. 423, 439 (1974). Defendants made clear on December 12, 2024 (before closing argument) that they would not agree to extend the TRO. Ex. A. The FTC made no mention of any potential "extension" at closing argument, where the parties discussed the timing of

the Court's decision. Instead, just last Friday—on the eve of the Court's decision and during an impromptu call about *redactions*—the FTC sprung this last-minute request.

The merger agreement's termination date is Sunday, February 9, which means, as a practical matter, the parties must close on Friday, February 7, and they will have to take various steps before then. And closing a merger of this size has many steps, including calculating stock values and a final payment, agreeing upon a finalized flow-of-funds statement, funding the debt, and filing merger certificates. The FTC's motion asks the Court to extend the TRO to February 7. If granted, that would run out the clock and likely kill this merger, even if this Court decides it does not present an antitrust concern.

ARGUMENT

The FTC claims it has shown "good cause" for an extension of the TRO under Rule 65(b). But the FTC's request distorts the entire purpose of a TRO, which is a temporary measure designed to last "just so long as is necessary to hold a hearing" and decide a preliminary injunction, "and no longer." *Granny Goose Foods*, 415 U.S. at 439. Moreover, Rule 65(b)(2) imposes strict time limits on a TRO. Absent consent of the party to be enjoined, it can last a maximum of 28 days (14 days + a 14-day extension for good cause). *E.g.*, *Licht v. Ling*, 2023 WL 4504585, at *2 (N.D. Tex. 2023). With Defendants' consent, the TRO has already lasted 198 days, but that consent goes no further than the day after the Court decides the preliminary injunction. There is no legal basis to "extend" a TRO to 206 days, especially following the denial of a preliminary injunction.

The FTC's request is properly considered under Rule 62(d), which governs requests for further injunctive relief following the denial of a preliminary injunction. Under this

Rule, the FTC must show (1) a strong likelihood of success on appeal, (2) an irreparable injury without the injunction, (3) that the injunction will not substantially harm Defendants, and (4) that the injunction is in the public interest. *E.g.*, *Next-Era Energy Cap. v. Walker*, 2020 WL 13866485, at *1 (W.D. Tex. 2020). In any event, courts considering whether to grant or extend a TRO likewise consider these same four factors. *E.g.*, *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987) (movant must prove "each of the four elements" before a "temporary restraining order . . . can be granted"); *Xtria v. Int'l Ins. Alliance*, 2009 WL 4756365, at *4–5 (N.D. Tex. 2009) (considering same elements for TRO extension); *Bel Canto Design v. MSS HiFi*, 813 F. Supp. 2d 1119, 1124 (D. Minn. 2011) (same).

The FTC cannot meet this four-part standard or, indeed, *any* standard because the entire premise of its motion (that it cannot achieve effective relief on appeal post-closing) is false. To the contrary, the government regularly challenges mergers post-closing, including on appeal. *FTC v. Microsoft*, No. 23-15992 (9th Cir.); *U.S. v. U.S. Sugar*, 73 F.4th 197 (3d Cir. 2023); *U.S. v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019); *FTC v. Whole Foods*, 548 F.3d 1028 (D.C. Cir. 2008); *see U.S. Sugar Corp.*, 2022 WL 4535621, at *2 (D. Del. 2022) (collecting such challenges). In fact, in all modern *vertical* merger cases—*Microsoft, AT&T,* and *Illumina*—the merger closed well before the circuit court heard the case. *See, e.g.*, *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1045 (5th Cir. 2023).

Notably, in *Microsoft*, the FTC complained, as it does here, that it would be too difficult to secure post-closing relief. 681 F. Supp. 3d 1069, 1100–01 (N.D. Cal. 2023). The court disagreed because the case involved "a vertical acquisition," "Microsoft and Activision will act as parent and subsidiary," and there was "no planned dismantling of

operations." *Id.* Here, too, this is a vertical merger and there is no plan to dismantle Mattress Firm, which will operate as a separate subsidiary. And as in *Microsoft*, the FTC here does "not cite anything specific about this merger" that makes a post-acquisition divestiture (or some other form of relief) ineffective. *See id.* at 1100; *see also U.S. v. AT&T*, 310 F. Supp. 3d 161, 253–54 (D.D.C. 2018) (preemptively rejecting any suggestion closing of the merger should be delayed for an appeal as "manifestly unjust").

The FTC's cited cases involved *horizontal* mergers, which present a concern that the acquired entity could be dismantled post-closing—a concern not presented by this *vertical* merger. *See Microsoft*, 681 F. Supp. at 1100–01.[1] And *FTC v. Weyerhaeuser Co.*, a horizontal merger case where the district court found that the FTC was likely to succeed on the merits, is particularly inapposite here. 665 F.2d 1072, 1074 (D.C. Cir. 1981). If this Court denies the injunction, it will have determined the FTC is unlikely to succeed on the merits and there thus would be no reason to enjoin this vertical merger pending appeal.

That the FTC has not demonstrated any harm (much less *irreparable* harm) to either it or the public is sufficient to deny the motion. The FTC cannot satisfy the other two elements either. *First,* if the Court denies the preliminary injunction, the Fifth Circuit will review that decision for an abuse of discretion and will reverse only in "extraordinary circumstances." *Future Proof Brands. v. Molson Coors Bev. Co.*, 982 F.3d 280, 288 (5th Cir. 2020). That makes the FTC's chances of success on appeal slim.

[1] Even in horizontal mergers, courts have regularly allowed mergers to close before the appeal. *E.g.*, *U.S. Sugar Corp.*, 2022 WL 4535621; *FTC v. Lab'y Corp.*, 2011 WL 1235310 (C.D. Cal. 2011); *FTC v. Equitable Res., Inc.*, 2007 WL 1500046 (W.D. Pa. 2007).

Second, injunctive relief that runs out the clock would substantially harm Defendants, who have spent thousands of hours and tens of millions of dollars complying with the FTC's investigation and would render this entire litigation (and all the effort the parties and the Court put into it) meaningless. *See AT&T*, 310 F. Supp. 3d at 253. Killing the merger through process would be "manifestly unjust" and "undermine the faith in our system of justice of not only the defendants, but their millions of shareholders and the business community at large." *Id.* at 253–54. It would also thwart (not "preserve," Mot. 1) appellate review by mooting the case, which is precisely what happened in *Novant Health*, where an injunction pending appeal caused defendants to abandon the deal after *winning* before the district court. Order, No. 24-1526 (4th Cir. July 24, 2024), ECF No. 27 (dismissing appeal and vacating district court decision).

Finally, the FTC could have and should have raised this request much sooner so the parties and Court could have aligned on a different schedule leaving more time to address any post-opinion motion. By waiting to raise this issue until an impromptu call about redactions on the eve of the preliminary-injunction decision, the FTC has jammed Defendants and this Court, and left itself little time to seek further relief from the Fifth Circuit before the merger would need to close—a fact it now tries to use *against* Defendants.

Injunctions of any stripe are a "matter of equitable discretion." *Winter v. NRDC, Inc.*, 555 U.S. 7, 32 (2008). It would be inequitable to reward the FTC for these tactics and potentially kill this deal through delay, especially considering that Defendants held off closing in good faith for several hundred days longer than Congress required to accommodate the FTC's investigation and this litigation.

Dated: January 29, 2025

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Certificate of Service

I hereby certify that on January 29, 2025, I electronically filed a true and correct copy of the foregoing document using this Court's CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Ryan A. Shores
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