

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

COMMISSIONERS: **Lina M. Khan, Chair**
 Rebecca Kelly Slaughter
 Alvaro M. Bedoya
 Melissa Holyoak
 Andrew N. Ferguson

In the Matter of

<p>Tempur Sealy International, Inc.</p> <p>and</p> <p>Mattress Firm Group Inc.</p>	<p>Docket No. 9433</p> <p>Public</p>
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**RESPONDENTS' CORRECTED MOTION TO
CONTINUE EVIDENTIARY HEARING**

Pursuant to Rule 3.41, Respondents Tempur Sealy International Inc. and Mattress Firm Group Inc. request that the Commission continue the administrative hearing from December 4, 2024, to February 9, 2025.¹ That will give the federal court time to decide the FTC's requested preliminary injunction before the administrative hearing is set to begin and reduce burdens on the parties, third parties, and counsel.

ARGUMENT

Tempur Sealy, a mattress manufacturer and retailer, has agreed to purchase Mattress Firm, a mattress retailer. On July 2, 2024, after an investigation lasting

¹ Respondents file this motion to preserve their rights and in the interest of reaching a solution with the FTC. Respondents do not concede that the Part 3 proceedings are proper or that the FTC may conduct the administrative hearing consistent with the Constitution. *See* Compl., *The Kroger Co. v. FTC*, No. 24-cv-00438 (S.D. Ohio. Aug. 19, 2024).

nearly two years, the FTC filed an Administrative Complaint challenging that transaction. The same day, the FTC filed a Complaint in federal court seeking a preliminary injunction. Compl., *FTC v. Tempur Sealy Int'l, Inc.*, No. 24-cv-02508 (S.D. Tex.), ECF No. 1.

The preliminary-injunction hearing is set to begin in Houston, Texas on November 12, 2024, and to end no later than November 26, 2024.² The administrative hearing is set to begin in Washington, D.C. on December 4, 2024—a mere eight days afterwards. Those eight days include Thanksgiving and a weekend.

Good cause exists for a brief postponement of the administrative hearing, with no prejudice to the Commission. Starting the administrative hearing on December 4 will needlessly burden the parties, third parties, and counsel for both the FTC and Respondents. Merger litigation is “unlike any other litigation.”³ It “monopolizes the resources of everyone involved” as parties and attorneys litigate what is essentially a full federal antitrust case in only a few months. *See* Holyoak Dissent 1. Here, the burden will be needlessly multiplied by beginning the administrative hearing so close to the end of the preliminary-injunction hearing. While the preliminary-injunction hearing is ongoing, counsel for each side will need to be simultaneously preparing witnesses, producing expert rebuttal reports, conducting expert depositions,

² To accommodate the federal court’s schedule, the hearing will occur across non-sequential days. *See* Minute Order, *FTC v. Tempur Sealy Int'l, Inc.*, No. 24-cv-02508 (S.D. Tex. Sept. 12, 2024), ECF No. 127. The hearing may also end earlier than November 26, depending on the parties’ needs. *See id.*

³ Dissenting Statement of Commissioner Melissa Holyoak at 1, *In the Matter of The Kroger Company & Albertsons Companies, Inc.*, No. 9428 (May 29, 2024) (“Holyoak Dissent”).

addressing confidentiality concerns for trial exhibits, filing motions *in limine*, responding to motions *in limine*, exchanging expert-related exhibits, proposing final witness lists, exchanging proposed stipulations, and preparing pretrial briefs. *See* Scheduling Order (July 19, 2024). Likewise, while the administrative hearing is ongoing, counsel for each side will likely be simultaneously preparing proposed findings of fact and conclusions of law in the federal district court litigation. *See* Amend. Scheduling Order 3, *FTC v. Tempur Sealy Int'l*, No. 24-cv-02508 (S.D. Tex. Aug. 21, 2024), ECF No. 107 (setting deadline for those filings 14 days from end of preliminary-injunction hearing). Moreover, the current schedule will require witnesses and counsel, including third parties, who were just in a multiweek preliminary-injunction hearing in Houston to, as soon as four business days later, attend a likely multiweek administrative hearing in Washington. *See also* Holyoak Dissent 2 (emphasizing the travel burdens).

Continuing the administrative hearing would facilitate significant streamlining of the parties' hearing presentation after submission of the proposed findings of fact in the preliminary-injunction hearing and will allow more orderly preparation for the administrative proceeding. In doing so, it will minimize the expense and burden on both the parties and non-parties.

Continuing the administrative hearing will not only avoid the burdens on everyone—parties and non-parties alike—of preparing for and attending hearings so closely scheduled, but it may also avoid the need for an administrative hearing altogether. As Commissioners Holyoak and Ferguson have recently explained, the

preliminary-injunction decision almost always obviates the need for further administrative proceedings. Holyoak Dissent 3. But the current schedule does not give the federal court time to issue a decision before the administrative hearing begins. Put differently, the FTC has asked Judge Eskridge for a preliminary injunction, insisting that extraordinary relief is a necessary predicate for the administrative hearing. Having made that request, the FTC should wait for the court's decision before proceeding with a time-consuming and burdensome administrative hearing that has historically been unnecessary.

At the July 19, 2024, status conference, Judge Chappell noted that, if the litigation schedule ultimately did not allow for a preliminary-injunction decision before the administrative hearing—as is the case—“the best way to deal with [it] is to . . . file a joint motion to request a delay.”⁴ Unfortunately, Complaint Counsel has refused to join this motion, calling it “premature.” To the contrary, the issue is ripe now. The administrative hearing has been scheduled, the preliminary-injunction hearing has been scheduled, and the burdens imposed by those schedules are known.

CONCLUSION

The Commission has asked Judge Eskridge for a preliminary injunction. It should give Judge Eskridge the time needed to decide that request before proceeding with a potentially unnecessary administrative hearing that will significantly burden parties, third parties, and counsel.

⁴ July 19, 2024, Status Conf. Tr. 7:25–8:11.

The Commission should continue the administrative hearing from December 4, 2024, to February 9, 2025.

Dated: October 3, 2024

/s/ D. Bruce Hoffman

D. Bruce Hoffman
 Ryan A. Shores
 Daniel P. Culley
 Matthew I. Bachrack
 Blair W. Matthews
 Jacob M. Coate
 Gabriel J. Lazarus
 CLEARY GOTTlieb STEEN & HAMILTON
 LLP
 2112 Pennsylvania Ave., NW
 Washington, D.C. 20037
 202-974-1500
 bhoffman@cgsh.com
 rshores@cgsh.com
 dculey@cgsh.com
 mbachrack@cgsh.com
 bmatthews@cgsh.com
 jcoate@cgsh.com
 glazarus@cgsh.com

Heather S. Nyong'o
 CLEARY GOTTlieb STEEN & HAMILTON
 LLP
 650 California St.
 San Francisco, CA 94108
 415-796-4400
 hnyongo@cgsh.com

Lina Bensman
 CLEARY GOTTlieb STEEN & HAMILTON
 LLP
 One Liberty Plaza
 New York, NY 10006
 212-225-2000
 lbensman@cgsh.com

Respectfully submitted,

/s/ Sara Y. Razi

Sara Y. Razi
 N. Preston Miller
 Lindsey C. Bohl
 Avia Gridi
 Geoffrey I. Schmelkin
 SIMPSON THACHER & BARTLETT LLP
 900 G Street, N.W.
 Washington, D.C. 20001
 Tel: (202) 636-5500
 Fax: (202) 636-5502
 sara.razi@stblaw.com
 preston.miller@stblaw.com
 lindsey.bohl@stblaw.com
 avia.gridi@stblaw.com
 geoffrey.schmelkin@stblaw.com

Counsel for Mattress Firm Group

*Counsel for Tempur Sealy International,
Inc.*

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**[PROPOSED] ORDER GRANTING RESPONDENTS' MOTION TO
CONTINUE EVIDENTIARY HEARING**

Having considered Respondents' motion to continue the evidentiary hearing and finding good cause for a continuance, the motion is GRANTED. The evidentiary hearing shall be continued until February 9, 2024.

By the Commission.

April J. Tabor
Secretary

Date: _____

Certificate of Service

I hereby certify that, on October 3, 2024, I caused the foregoing to be electronically filed with the Secretary of the Commission using the Federal Trade Commission's e-filing system, causing the document to be served on the following registered participants.

April J. Tabor
Secretary of the Federal Trade Commission
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Office of Administrative Law Judges
Federal Trade Commission
600 Pennsylvania Ave., NW,
Washington, D.C. 20580

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

Allyson Maltas, amaltas@ftc.gov
Noel Miller, nmiller2@ftc.gov
Stephen Rodger, srodger@ftc.gov
Ethan Stevenson, estevenson1@ftc.gov
Adam Pergament, apergament@ftc.gov
Jeanette Pascale, jpascale@ftc.gov
Isiah Albright, ialbright@ftc.gov
Devon Allen, dallen1@ftc.gov

Sara Razi, sara.razi@stblaw.com
Lindsey Bohl,
lindsey.bohl@stblaw.com
Preston Miller,
preston.miller@stblaw.com

*Counsel for Mattress Firm Group,
Inc.*

Counsel Supporting the Complaint

/s/ D. Bruce Hoffman
D. Bruce Hoffman

Certificate for Electronic Filing

I hereby 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.

October 3, 2024

/s/ D. Bruce Hoffman
D. Bruce Hoffman

Statement Regarding Conferral

Pursuant to Paragraph 4 of the Scheduling Order, Respondents represent that Counsel for Respondents have conferred with Complaint Counsel in a good-faith effort to resolve the issues raised by this motion. As noted above, Complaint Counsel has declined to join this motion.

October 3, 2024

/s/ D. Bruce Hoffman
D. Bruce Hoffman