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In the Matter of , a corporation, and , a corporation.	Docket No. 9368 PUBLIC DOCUMENT

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 mooting 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.

This unnecessary consumption of resources would counsel in favor of a stay in any circumstances. But the propriety of a stay is even greater here, given that the Part III hearing is set to occur at a time that the Commission's docket is already historically full. This hearing is scheduled to begin one week *after* a separate Part III hearing involving the world's largest office-supplies seller, and one week *before* another hospital-merger hearing—in addition to a third hospital-merger hearing set to begin the month before these three cases. And all four hearings will be presided over by the Chief Administrative Law Judge ("Chief ALJ"). Staying this hearing will ensure that the other hearings will be unconstrained by this case's presence on the docket. On top of all this, granting a stay would further the interests underlying currently pending legislation seeking to protect entities from any pressure associated with the pendency of Part III hearings, and would not cause any harm.

For all of these reasons, a stay is warranted—as the Chief ALJ recognized when he advised the parties to consider jointly seeking a stay "so that we don't end up trying a case that becomes moot a week after we start." Sched. Conf. Tr. at 5:18-23 (Jan. 13, 2016) (excerpt attached as Ex. A). Notwithstanding the Chief ALJ's suggestion, complaint counsel has informed undersigned counsel that they oppose a stay. As explained below, however, all relevant considerations lead to the conclusion that a stay is warranted here.

The FTC initiated this administrative proceeding on December 8, 2015. A day later, it filed a companion suit for preliminary-injunctive relief in the District Court for the Middle District of Pennsylvania. *Fed. Trade Comm'n v. Hershey Med. Ctr.*, No. 1:15-cv-2362-JEJ (Dec. 9, 2015), ECF No. 1. Discovery in both matters has already progressed significantly.

The district court has set the preliminary-injunction hearing to begin on April 11, 2016. Stip. Case Mgmt. Order at 10 (Jan. 19, 2016), ECF No. 44. The hearing is to "be held over no more than five (5) days," and will conclude no later than April 15. *Id.* Afterwards—by April 29—the parties will file their respective Proposed Findings of Fact and Conclusions of Law. *Id.*,

Ex. A (Proposed Schedule for District Court Proceeding). The court will then rule on the FTC's motion for a preliminary injunction, though it has not indicated any timeline for its decision.

Meanwhile, the administrative hearing in this matter is set to begin on May 17—just eighteen days after the parties submit their Proposed Findings of Fact and Conclusions of Law to the district court. Sched. Order at 4 (Jan. 13, 2016). And once the hearing commences, the Commission's Rules of Practice require the hearing to "proceed with all reasonable expedition, and, insofar as practicable, … continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded." 16 C.F.R. § 3.41(b). The hearing has no set end date, other than the 210-hour limit set forth in the Rules of Practice. *Id.* Assuming the average hearing day lasts seven hours (resulting in a possible 30 days of trial), the hearing could run until late June—or even later, if the Chief ALJ finds it necessary to pause the proceedings for "brief intervals," as contemplated by Rule 3.41(b). And given the urgency of

Health Care Network.[1] Accordingly, under the current schedule, the Chief ALJ would face a choice between adhering to the presumption that proceedings "shall continue … without suspension," 16 C.F.R. § 3.41(b)—which would result in each of the hearings receiving far less than the allowable 210 hours—or repeatedly pausing the hearing in one matter to attend to the hearing in another.

There is "good cause" for staying the Part III hearing. 16 C.F.R. § 3.41(f). The district court's decision is all but certain to be the last word on this matter. And given the congested state of the Chief ALJ's docket, there is simply no reason to maintain the hearing date on the remote off-chance that the district court's decision is *not* dispositive—which, again, would be contrary to two decades of FTC dismissals in cases where courts deny injunctive relief, and to Respondents' intention (barring extraordinary circumstances) to walk away from the combination if the court grants a preliminary injunction.[2]

First, there is a substantial likelihood that this matter will be rendered moot before or during any administrative hearing. As the Chief ALJ recognized during the scheduling conference in this matter, once the district court rules on the Commission's motion for injunctive relief, it is exceedingly unlikely that the losing party will press its case any further:

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[1] The Respondents in *Advocate* have similarly moved for a stay of their administrative hearing. Resps.' Mot. to Stay Admin. Hearing (Feb. 9, 2016). That motion currently remains pending.

[2] Previously, the Rules of Practice authorized ALJs to grant stays pending the resolution of federal-court proceedings. The Commission amended this rule as part of a broader set of revisions in 2009, granting itself exclusive authority to stay hearings upon a showing of "good cause." 74 Fed. Reg. 1804, 1821 (Jan. 13, 2009). In introducing this set of amendments, the Commission explained its "belie[f] that any adjudicative process should balance three factors: the public interest in a high quality decisionmaking process; the interests of justice in an expeditious resolution of litigated matters; and the very real interest of the parties in litigating matters economically without unnecessary expense." 73 Fed. Reg. 58,832, 58,833 (Oct. 7, 2008). Respondents file this motion precisely because of their "very real interest" in litigating this matter "without unnecessary expense," and neither of the other objectives the Commission identified would counsel against granting a stay specifically sought by the merging entities.

> Based on what I've heard today and my experience in similar cases, the odds are pretty good that our trial may become moot, because generally, the Respondents tend to walk away when there's an injunction, and the Government tends to withdraw the case if it's not granted, especially ultimately on any appeal, by not getting an injunction."

Sched. Conf. Tr. at 5:11-17 (Jan. 13, 2016) (Ex. A).

The Chief ALJ's observation was, of course, well-founded. History demonstrates that if the district court rules for Respondents and denies injunctive relief, the FTC will probably choose not to pursue this administrative proceeding. Indeed, in that situation, the Commission is affirmatively required to reconsider its decision to pursue administrative relief: "The Commission's guiding principle is that the determination whether to proceed in administrative litigation following the denial of a preliminary injunction and the exhaustion or expiration of all avenues of appeal must be made on a case-by-case basis." Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741, 39,743 (Aug. 3,

Moreover, wholly separate from the Commission's deliberative process, the Rules of Practice give respondents who prevail in district court two means of staying an administrative hearing. *First*, within 14 days of a ruling denying injunctive relief, Respondents could "move that the adjudicative proceeding be withdrawn from adjudication in order to consider whether the public interest warrants further litigation." 16 C.F.R. § 3.26(c). The Secretary would then be required to "issue an order withdrawing the matter from adjudication 2 days after such a motion is filed." *Id.* At that point, the parties would be free to "present their views to the Commission informally" as to whether the Part III hearing should go forward. Debbie Feinstein, *Changes to Commission Rule 3.26 re: Part 3 Proceedings Following Federal Court Denial of a Preliminary Injunction* (Mar. 16, 2015), https://goo.gl/bDFX3a. *Second*, Respondents could move "to dismiss the administrative complaint on the basis that the public interest does not warrant further litigation." § 3.26(d)(1). A motion to dismiss automatically "stay[s] the proceeding until 7 days following the disposition of the motion by the Commission, and all deadlines established by these rules shall be tolled for the amount of time the proceeding is so stayed." § 3.26(d)(2). Either of these alternatives would automatically stay the Part III hearing and related deadlines, freeing the Commission to enter into the deliberative process that has for two decades unfailingly resulted in the termination of administrative proceedings. And Respondents have every intention of utilizing one of these options in the event that the court rules in their favor.

If, by contrast, the FTC succeeds in securing injunctive relief, the upshot is the same as far as this proceeding is concerned: in that event, Respondents intend to walk away from the challenged combination barring extraordinary circumstances. This, too, is consistent with the norm in merger challenges.[5] The bottom line is that, regardless of how the district court rules, its decision will almost certainly stand as the final word on this matter.

[5] *See, e.g.*, *In re Sysco Corp.*, No. 9364, Order Dismissing Comp. (June 30, 2015) ("Respondents have abandoned their proposed merger."); *In re OSF Healthcare Sys.*, No. 9349, Order Dismissing Comp. (Apr. 13, 2012) ("Respondents are abandoning the proposed affiliation.").

Second, even if the presumably dispositive effect of the district court's ruling were not itself sufficient reason to stay the hearing in this matter, the historically crowded state of the Chief ALJ's docket establishes "good cause" for doing so. It is bad enough that an administrative hearing is unlikely to have any impact on the ultimate resolution of this matter; it is even worse that this hearing would occur at a time that the Chief ALJ will be presiding over as many as three other substantial merger challenges. Even if the Commission grants the motion to stay the *Advocate* matter, the hearing in this matter is set to begin one week after the *Staples* hearing, a major dispute involving "the world's largest seller of of

anticompetitive," and that "preliminary injunction cases typically involve several-day hearings with extensive prior briefing, live witnesses, and expert testimony." *S. 2102, The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015": Hearing Before the S. Comm. On the Judiciary, Subcomm. On Antitrust, Competition Policy and Consumer Rights* at 13 (Oct. 7, 2015) (Prepared Statement of FTC, presented by Edith Ramirez, FTC Chairwoman), https://goo.gl/3xLkXJ.[7] But the fact that the parties will already have put on "extensive" presentations of their respective cases only underscores why there is no need to immediately pivot to a second airing of the same evidence and arguments—particularly given the likelihood that the party who is defeated in court will ultimately choose to walk away from this litigation.

Finally, granting a stay will not cause any harm whatsoever. Should the non-prevailing party in the district court choose to pursue this litigation after the court's decision, the Part III hearing would simply go forward. And unlike in other cases in which the Commission has denied stays,[8] Respondents are not seeking to stay any deadlines other than the hearing itself,

Dated: February 22, 2016

Respectfully submitted,
/s/ Adrian Wager-Zito

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In the Matter of:

The Penn State Hershey Medical Center, et al.

January 13, 2016
Scheduling Conference

Condensed Transcript with Word Index

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:)
The Penn State Hershey)
Medical Center,)
a corporation,)
and) Docket No. 9368
PinnacleHealth System,)
a corporation,)
Respondents.)

SCHEDULING CONFERENCE
January 13, 2016, 2:00 p.m.
PUBLIC SESSION

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Administrative Law Judge

Reported by: Susanne Bergling, RMR-CRR-CLR

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P R O C E E D I N G S
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We would have to confer and consider that.
JUDGE CHAPPELL: What about Respondents? Are you prepared to tell us what your plans are if the injunction is granted?
MS. WAGER-ZITO: Not at this time, Your Honor. Our clients will have to weigh their options at that time.
JUDGE CHAPPELL: Okay. Pursuant to Commission Rule 3.41(f), a pending collateral federal court action

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