

Interlocutory Orders, Etc.

IN THE MATTER OF

OTTO BOCK HEALTHCARE NORTH AMERICA, INC.

Docket No. 9378. Order, July 9, 2018

Order denying respondent's motion to withdraw the Matter from adjudication for the purpose of considering a consent settlement.

OPINION AND ORDER OF THE COMMISSION

On December 20, 2017, the Commission issued an administrative complaint alleging that the agreement for Otto Bock HealthCare North America, Inc. ("Otto Bock" or "Respondent") to purchase FIH Group Holdings, LLC ("Freedom") violated Section 5 of the FTC Act, and that consummation of that transaction on September 22, 2017 violated Section 5 of the FTC Act and Section 7 of the Clayton Act. According to the Complaint, the agreement and consummated transaction had the effect of substantially reducing competition in the market for microprocessor-controlled prosthetic knees ("MPK") sold to prosthetic clinics in the United States. In its Answer to the Complaint, Respondent denied that the merger harmed consumers or competition, and asserted affirmative defenses, including, *inter alia*, an averment that Otto Bock's "planned divestiture of the microprocessor controlled prosthetic knee business of Freedom addresses any conceivable anticompetitive effect." Am. Ans. at Seventh Affirmative Defense. Discovery has been completed, and the hearing before the administrative law judge is scheduled to begin on July 10, 2018.

On June 19, 2018, Respondent filed a Motion to Withdraw Matter from Adjudication for Consideration of Proposed Settlement ("Respondent's Motion"). Respondent's Motion contends that an asset purchase agreement to divest Freedom's microprocessor knee business to [REDACTED] would resolve any anticompetitive concerns asserted in the Complaint. Respondent seeks an order withdrawing the matter from adjudication and staying all proceedings before the administrative law judge while the Commission evaluates a proposed consent order based on the proposed asset purchase agreement. Finding that there is a reasonable possibility of settlement, Chief Administrative Law Judge D. Michael Chappell certified Respondent's Motion to the Commission, pursuant to procedures specified in Commission Rule of Practice 3.25(c), 16 C.F.R. § 3.25(c).

Complaint Counsel oppose Respondent's Motion. Complaint Counsel contend that [REDACTED] and would not remedy the effects of the allegedly unlawful merger. Complaint Counsel's Response to Respondent's Motion to Withdraw Matter from Adjudication for Consideration of Proposed Settlement at 2, 6 ("Complaint Counsel's Response"). According to Complaint Counsel, [REDACTED]

Id. at 6.

Moreover, Complaint Counsel maintain, [REDACTED]

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[REDACTED]
[REDACTED] . *Id.* at 7.

Rule 3.25(c) leaves the determination of whether to grant a motion to withdraw to the Commission's discretion. Federal Trade Commission, Rules of Practice, 74 Fed. Reg. 20205, 20206 (May 1, 2009). That discretion is informed in part by the Commission's policy favoring, and the public interest in, expeditious resolution of the Commission's adjudicative proceedings. See Order Denying Respondents' Motion to Stay and Temporarily Withdraw this Matter from Adjudication, *In re Tronox Ltd*, Docket No. 9377 (FTC May 16, 2018) ("Tronox Order"); see also 16 C.F.R. §§ 3.1, 3.11(b)(4), 3.41, 3.46, 3.51-52. When the Commission issued its Complaint, it found reason to believe that Otto Bock and Freedom had executed a merger agreement in violation of the FTC Act, and had consummated a merger in violation of the FTC Act and the Clayton Act, and it is now in the public interest that the allegations in the Complaint be resolved expeditiously.

Here we are not persuaded to withdraw the matter from adjudication. Respondent and Complaint Counsel have very different opinions regarding the adequacy of the current divestiture proposal, and the related factual disputes appear significant. As things currently stand, the potential for quick, successful resolution of remaining issues and acceptance of a consent agreement is not sufficient to warrant withdrawal, particularly given that the hearing before the administrative law judge is set to begin imminently.

Negotiations between Complaint Counsel and Respondent appear to be ongoing. Complaint Counsel state that that they offered a counter-proposal to an earlier [REDACTED] on April 18, but have heard no response. Complaint Counsel's Response at 2. Although Respondent's motion attached a subsequently executed asset purchase agreement, Respondent's Motion suggests the possibility of addressing Complaint Counsel's concerns through a variety of mechanisms including [REDACTED]

[REDACTED]. Respondent's Motion at 8. Under these circumstances, the appropriate next step is further negotiation between Respondent and Complaint Counsel, not withdrawal of the matter from adjudication. As we recently stated in another adjudicative proceeding, "[S]ettlement discussions should be with Complaint Counsel, not the Commission." Tronox Order at 2.

Accordingly,

IT IS HEREBY ORDERED that Respondent's Motion to Withdraw Matter from Adjudication for Consideration of Proposed Settlement is **DENIED**; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence on July 10, 2018, as previously scheduled.

By the Commission.

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IN THE MATTER OF

LOUISIANA REAL ESTATE APPRAISERS BOARD

Docket No. 9374. Order, July 19, 2018

Order staying the proceedings pursuant to an Order of the Court of Appeals for the Fifth Circuit.

ORDER STAYING ADMINISTRATIVE PROCEEDING

On April 10, 2018, the Commission issued an Opinion and Order¹ that denied Respondent's motion to dismiss the complaint, and dismissed Respondent's third and ninth affirmative defenses.² On April 19, 2018, Respondent filed a petition for review of the Commission Opinion and Order with the United States Court of Appeals for the Fifth Circuit. On April 20, 2018, Respondent filed a motion to stay proceedings in this matter pending appellate review of its Petition. On June 6, 2018, the Commission denied that motion.³ On June 11, 2018, Respondent filed a motion to stay this proceeding pending appeal with the Court of

Appeals for the Fifth Circuit. On July 17, 2018, the Court of Appeals for the Fifth Circuit issued the attached Order granting that Motion until further order of that court. Accordingly,

IT IS HEREBY ORDERED that all proceedings before the Commission and the Administrative Law Judge in this matter, including the Oral Argument currently scheduled for August 27, 2018, be, and they hereby are, stayed until further order of the Court of Appeals for the Fifth Circuit and the Commission.

By the Commission.

1 *In the Matter of Louisiana Real Estate Appraisers Board*, Docket No. 9374, Opinion and Order of the Commission (April 10, 2018), at 21, available at https://www.ftc.gov/system/files/documents/cases/d09374_opinion_and_order_of_the_commission_04102018_redacted_public_version.pdf.

2 Answer of Respondent Louisiana Real Estate Appraisers Board to the Complaint (June 19, 2017), at 12, available at <https://www.ftc.gov/system/files/documents/cases/d09374/reabanswer.pdf>. Affirmative Defense No. 3 avers that "[t]he Complaint fails adequately to allege that the Board has a controlling number of active participants in the relevant **residential** appraisal market" (emphasis in original), while Affirmative Defense No. 9 avers that the Respondent "is immune from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943)."

3 Commission Order Denying Stay Pending Appellate Review (June 6, 2018), available at https://www.ftc.gov/system/files/documents/cases/d09374_reab_order_denying_stay_pending_appellate_review_06062018.pdf.