PUBLIC

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

Cabell Huntington Hospital, Inc.
a corporation;

and

Pallottine Health Services, Inc.
a corporation;

and

St. Mary's Medical Center, Inc.
a corporation

Docket No. 9366

RESPONDENTS' MEMORANDUM ADDRESSING THE PROPRIETY OF PROCEEDING WITH THE PART 3 TRIAL WHEN RESPONDENTS CANNOT YET CLOSE THE TRANSACTION

During an informal status call on February 26, 2016, held at the Court's request, the Court asked the parties to address the ripeness of this enforcement action in light of several outstanding contingencies that independently prevent the parties from closing the subject Transaction. Respondents Cabell Huntington Hospital, Inc. and St. Mary's Medical Center, Inc. submit this memorandum in response to the Court's inquiry.

The Court's concern regarding the ripeness of the Part 3 trial is well placed and underscores why good cause exists not to proceed with the trial until Complaint Counsel's forthcoming federal lawsuit seeking a preliminary injunction is resolved. *See* 16 C.F.R. §§ 3.21(c), 3.41(b), 3.41(f). If the case *is* ripe, then Complaint Counsel would have observed standard agency practice and brought a complaint for such a preliminary injunction. But Complaint Counsel have not done so, instead attempting to deprive Respondents of an

opportunity for expedited judicial review that would save substantial time and cost prior to the Part 3 trial by standing on certain closing contingencies. If the case is *not* ripe, then neither the Part 3 trial nor the preliminary injunction action should go forward. Certainly as a factual matter, it is clear the parties cannot close the Transaction until two outstanding prerequisites are met, and the fact that they are not met raises serious ripeness concerns. Either way, proceeding with the Part 3 trial at this juncture would be unnecessary, inappropriate, and fundamentally unfair to Respondents.

As the Court has observed, Respondents currently cannot close the Transaction without regard to any injunction. It is therefore unnecessary for the parties to proceed with an expensive and protracted administrative trial regarding a transaction that cannot presently close, as Complaint Counsel insist they do. Proceeding with trial now would be doubly absurd, because if Complaint Counsel's forthcoming preliminary injunction action is permitted to precede the administrative trial, as it does in most merger challenges, the result of that federal court action will almost certainly obviate the need for any trial here at all; the Commission usually abandons its merger challenges if it loses its preliminary injunction case and Respondents will abandon the Transaction if they were to lose that case.

While it would be entirely proper on this record to dismiss the case on ripeness grounds, a narrower remedy may be more appropriate. The trial should either be stayed entirely or the proceedings should be initiated but then continued until such time as the impediments to closing are satisfied. Among other things, this would allow the preliminary injunction to be litigated in federal court. The Part 3 proceeding, if ultimately necessary, could continue thereafter. Such an approach would impose no harm on Complaint Counsel, who would still be able to pursue a Part 3 trial if they lose the preliminary injunction action in federal court and nevertheless choose to go

forward in the administrative forum. It would also address the legal infirmity raised by the Court because any trial in this tribunal will not take place until after the preliminary injunction case is concluded. At that time, the parties will no longer have any impediments to closing, since Complaint Counsel have indicated that they will not even commence the preliminary injunction case until the impediments are removed.

A stay is also appropriate for two additional reasons. First, it is extremely unlikely that any Part 3 trial will ever be needed after the completion of a preliminary injunction action. Respondents will abandon the transaction if they lose in federal court. Therefore, the only conceivable way a Part 3 trial could be necessary is if Complaint Counsel loses in federal court but the Commission nonetheless elects to proceed to a Part 3 trial, which it typically does not do. Finally, a bill already passed by both houses of the West Virginia legislature would eliminate any need for a Part 3 trial. That legislation, once enacted, will provide an avenue for Respondents to obtain State action immunity with respect to this Transaction. Passage into law appears likely, and if the Transaction receives state approval under the regulatory scheme proposed, the immunity issue will make the Part 3 trial unnecessary.

FACTUAL BACKGROUND

A. The Background of the Proposed Transaction.

Cabell is a 303-bed, not-for-profit hospital located in Huntington, West Virginia. Cabell serves as a teaching hospital affiliated with the Marshall University Schools of Medicine and Nursing; the Marshall University Medical Center is on Cabell's campus. St. Mary's is a 393-bed, Catholic-affiliated hospital, also located in Huntington, West Virginia. It is owned and operated by Pallottine Health Services, Inc. ("PHS"). PHS is overseen by the order of nuns that originally founded St. Mary's—the Pallottine Missionary Sisters. St. Mary's was founded in 1924, and over the subsequent 90-plus years has gradually expanded to its current form.

Cabell and St. Mary's propose to enter into the Transaction, in which Cabell will acquire St. Mary's by becoming the sole corporate member and parent entity of St. Mary's. The Transaction followed many months of negotiations between the hospitals. The Transaction promises significant benefits to the communities Cabell and St. Mary's serve. It will create efficiencies that will reduce costs and improve the quality of health care offered to patients in the areas served by the Hospitals.

B. Respondents Have Not Yet Received Necessary Approvals from West Virginia and the Vatican, and Are Thus Unable to Close the Transaction.

As the Court observed during the status call, this case is unusual because there is little more than a month before trial and yet Respondents currently have no legal ability to consummate the Transaction. Two dispositive hurdles – State and Vatican approval – remain, and both hurdles must be cleared before Respondents can close. Moreover, there is no guarantee these approvals will be given. The Transaction is thus wholly contingent on uncertain future events, and no injunction is needed to preclude it.

First, West Virginia law requires that Respondents receive a Certificate of Need (a "CON") from the West Virginia Health Care Authority (the "Authority"). Without that approval, the State will not allow the Transaction to close. The CON procedure is a function of state law, West Virginia Code § 16-2D-1, *et seq*., and jurisdiction over this program is vested in the Authority to determine whether a CON should issue. *Id.* § 16-29B-11. The CON program requires that the Authority review and approve any new institutional health service, such as the one proposed here, before it goes into effect. Cabell's proposed acquisition of the membership interest of St. Mary's constitutes a reviewable new institutional health service because it involves the acquisition of a health care facility and a capital expenditure incurred by Cabell in excess of the expenditure minimum established by the statute. *See id.* § 16-2D-3(b)(3).

The CON proceedings and briefing are now concluded, so the Authority could issue its decision at any time. Nonetheless, as of now there is no certainty about the date of that decision.

State approval of the Transaction in the CON process is merely the first step toward being able to close, however. If Respondents receive that approval, then St. Mary's must also secure authorization from the Catholic Church in the form of official Vatican approval of the Transaction. Respondents informed the FTC that Respondents could not close the Transaction until after the Vatican approves it, if the Vatican elects to give such approval, and Complaint Counsel confirmed its understanding of those contingencies. (*See* Ex. A (Oct. 6, 2015 Ltr.).) Complaint Counsel has emphatically made clear its view that based on this representation, Respondents are precluded from closing the Transaction unless and until the Vatican approves. (Ex. B (Nov. 17, 2015 FTC Ltr. ("Should the Parties attempt to close the Proposed Acquisition prior to fulfilling the obligations under the Timing Agreement [including Vatican approval], the Commission will pursue all available remedies, including rescission of the transaction.").) Based on this view, St. Mary's has affirmed its commitment to notify the FTC when CON and Vatican approval are received, and that the transaction will not close until four days after that notice is provided. (Ex. C (Nov. 20, 2015 Ltr.).)

The Vatican, for its part, has full discretion either to approve or disapprove the Transaction, and Respondents will certainly abide by that ruling. Respondents, however, have no control over when the Vatican — a foreign sovereign — will issue its ruling. While Respondents have guessed that a decision from the Vatican may occur 6-8 weeks after CON

approval based on prior decisions (*see* Ex. B (Nov. 17, 2015 Ltr.)), Respondents have no firm timeline, and the Vatican has not offered one.[1]

C. The FTC Initiated a Part 3 Proceeding but Complaint Counsel Did Not Bring any Preliminary Injunction Action in Federal Court.

In light of the contingencies presented by the CON process and Vatican approval and the notice commitment affirmed by St. Mary's, the FTC has not brought a preliminary injunction action in federal court. Instead, on November 5, 2015, the FTC filed this action.

When it announced the filing of its administrative complaint, the FTC contemporaneously stated that it had also "authorized staff to seek a temporary restraining order and a preliminary injunction in federal court if, and when, necessary to prevent the parties from consummating the acquisition, and to maintain the status quo pending the administrative proceeding." *See* FTC, *FTC Challenges Proposed Merger of Two West Virginia Hospitals* (Nov. 6, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/11/ftc-challenges-proposed-merger-two-west-virginia-hospitals. The FTC determined it could not bring its threatened preliminary injunction action with the Part 3 proceeding because, without CON or Vatican approval, the Transaction could not be consummated and any federal-court action would plainly be unripe. Respondents therefore find themselves in the unusual position of being sued by the FTC in administrative court on a transaction they cannot close, and unable to obtain expedited federal review of the case because Complaint Counsel acknowledge that such a lawsuit is unripe.

[1] Based on the anticipated timing for CON approval, it appears that St. Mary's request for Vatican approval and/or the Vatican's consideration of that request could overlap the Easter holiday and Holy Week. Respondents do not know whether that timing will insert further delay into the Vatican's approval process.

At the December 4, 2015, status conference, this Court inquired "about the nature and status of any ancillary federal action." (Ex. D (Dec. 4, 2015 Hr'g Tr.) at 5:10-16.) Complaint Counsel responded that a federal-court action "is not ripe yet because the parties cannot close their transaction" until Respondents "receive a [CON] from the West Virginia Healthcare Authority and . . . the Catholic Church's approval." (*Id*. at 5:18-6:2.) Complaint Counsel have indicated, however, that they object to delaying the Part 3 trial due to those same outstanding approval requirements.

As shown below, the same ripeness concerns that have prevented the filing of the preliminary injunction action squarely apply in these Part 3 proceedings.

ARGUMENT

The highly unusual posture of this case plainly presents "good cause" for, at a minimum, not proceeding with the Part 3 trial pending completion of the forthcoming federal preliminary injunction case. *See* 16 C.F.R. § 3.41(f); *see also id.* § 3.21(c); *In re Phoebe Putney Health Sys*., *Inc*., No. 9348, 2011 WL 2727137, at *2 (FTC July 7, 2011) (finding good cause to grant respondents' motion for a stay pending the outcome of federal-court proceedings). Any Part 3 trial would be premature because the challenged transaction is contingent on uncertain future events. The Transaction depends on State and Vatican approval, and there is no clear timeline for such approval. These outstanding contingencies make proceeding with the Part 3 trial unnecessary unless and until the contingencies are satisfied and any preliminary injunction case is decided. Ordinary ripeness principles compel that result; but even if they did not compel a stay as a matter of law, they plainly supply very strong grounds for staying the Part 3 trial as a matter of discretion. If, after the preliminary injunction case, the Commission loses but elects to pursue the Part 3 trial (which is the only possible circumstance where a Part 3 trial would ever

take place), it can be resumed without prejudice to either Respondents or Complaint Counsel. But it is highly unlikely that any Part 3 trial will ever be needed if the case is stayed, because the Commission typically does not pursue a Part 3 trial after losing in federal court, and Respondents will abandon the transaction if they lose there.

A. A Stay Is Warranted Because CON and Vatican Approval Are Necessary Contingencies Without Which There Is No Transaction to Challenge.

Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 1999) (internal quotation marks omitted). It requires a "case or controversy" that presents "definite and concrete, not hypothetical or abstract" issues. *Id.* at 1139 (internal quotation marks omitted). As the Supreme Court has explained, an action is "not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Ag. Prods. Co.*, 473 U.S. 568, 580-81 (1985)); *see also Pearson v. Leavitt*, 189 F. App'x 161, 163 (4th Cir. 2006) ("If certain critical facts that would substantially assist the court in making its determination are contingent or unknown, the case is not ripe for judicial review.").

The same ripeness principles that apply in federal courts also govern administrative agency proceedings. As a general matter, "administrative tribunals have employed the prudential doctrine of ripeness [and have concluded that] claims of injuries that are contingent upon the outcome of another litigation are not ripe for adjudication." *Murray v. Cargill, Inc.*, No. 99-R040, 1999 WL 107676, at *3 (C.F.T.C. Mar. 4, 1999). This makes perfect sense, since it would be impractical for agencies to "expend the effort to decide cases where the rights of a party are

undeniably contingent on outside factors." *In re Job Line Constr., Inc*., Contract No. DE-AC-93BP60791, 1994 WL 706148 (EBCA Dec. 8, 1994).

Thus, for instance, the Federal Energy Regulatory Commission has held that the propriety of a possible future index-based rate is unripe for Commission review until the private party at issue actually submits a tariff filing proposing the rates in question. *See In re Chevron Products Co*, 138 FERC ¶ 61115, 61492 (Feb. 16, 2012); *see also, e.g.*, *In the Matter of: J. E. Mc Amis, Inc*., WAB Case No. 92-18, 1992 WL 515943, at *1 (Wage Appeals Bd., Dec. 30, 1992) (granting motion to dismiss on ripeness grounds); *see also Chavez v. Dir., Office of Workers Comp. Programs*, 961 F.2d 1409, 1414 (9th Cir. 1992) ("Administrative adjudicators have an interest in avoiding many of the problems of prematurity and abstractness, presented by unripe claims.") (internal quotation marks omitted).

Numerous decisions have found claims unripe where their validity rested on events that may not occur as anticipated, or occur at all. This is particularly true where the claimed violation of the law will not occur absent some approval or acquiescence by a third party who is not under the control of the parties to the lawsuit.

For instance, one district court recently held that a challenge to an eminent domain plan was not ripe for resolution because the plan was subject to "a number of contingencies," including "approval of the plan" by a city council. *See Bank of N.Y. Mellon v. City of Richmond*, No. 13-cv-03664, 2013 WL 5955699, at *2-3 (N.D. Cal. Nov. 6, 2013). Another applied the same ripeness principles to find unripe a challenge to the issuance of an oil and gas lease where the actual development in question was contingent on uncertain future events including the lessees' submission of an application to an agency and the agency's approval of that application. *See Wy. Outdoor Council v. Bosworth*, 284 F. Supp. 2d 81, 89-91 (D.D.C. 2003). In *Dr.*

Pepper/Seven-Up Cos., Inc. v. FTC, No. 91-cv-21772, 1992 WL 240477, (D.D.C. Jan. 13, 1992), the court ruled that a claim involving an acquisition of licensing rights was not ripe because "the [commission granting the licensing rights] ha[d] yet to grant or deny [plaintiff's] application to acquire these licenses." *Id.* at *1; *see also Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (finding that plaintiff's claim was not ripe because "respondent has not yet obtained a final decision regarding the application of the zoning ordinance").

That is precisely the situation here. Unless and until Respondents are able to obtain both (1) CON approval from the Authority to proceed with the Transaction under West Virginia law and (2) authorization from the Vatican for the Transaction to be allowed to proceed, there is no point in trying the lawfulness of a hypothetical future merger. Nor is it clear that either contingency will be satisfied anytime soon. While Respondents are hoping that a CON decision will be issued fairly quickly, there is no guarantee about that; and the Vatican approval process will not even begin unless and until a CON is approved, and the Vatican process in turn will take an uncertain length of time. Until the last of these two contingencies is resolved in Respondents' favor, the FTC's Part 3 trial is premature and could prove to be an enormous waste of time and money.

Complaint Counsel know all this, but insist on pressing ahead anyway. When the Commission filed this Part 3 proceeding, it issued a press release in which it stated its intent to bring a preliminary injunction action "if" Respondents eventually obtained a right to enter the Transaction. And Complaint Counsel told this Court at the December 4, 2015, status conference, that until Respondents received State and Vatican approvals, "the parties can't close and so the

federal action isn't ripe."[2] (Ex D (Dec. 4, 2015 Hr'g Tr.) at 6:5-7.) St. Mary's has committed to giving the FTC four days' notice once the contingencies are satisfied, and thus the FTC will have ample notice to bring its preliminary injunction action in federal court to seek to block the Transaction.

It therefore makes no sense as a practical matter to try the case now. Complaint Counsel's preliminary injunction action remains unripe and the Part 3 trial threatens to unfairly burden Respondents with massive costs from a multi-week trial with scores of witnesses and thousands of documentary exhibits, and burden the Commission with vast impositions on its own limited resources. That burden would also fall on the Court, which is presiding over other substantial transaction challenges, and could be forced to preside over a lengthy, and likely unnecessary, trial. All of these burdens would be imposed based on a transaction that unquestionably is not presently authorized. This is precisely the sort of situation that ripeness principles are designed to avoid. And even to the extent there is any question about formal ripeness, the same facts warrant a discretionary stay even more strongly. Moreover, the Commission would remain free to try the case in this Court if it lost the preliminary injunction action.

As the Court is well aware, Respondents have invested considerable time and resources in their defense of the Part 3 proceedings, and the fact and expert discovery that has been developed will be used in the preliminary injunction action. But the Part 3 trial should be stayed, or the case dismissed, in light of these unusual circumstances. A stay would adequately resolve

[2] In response to Complaint Counsel's statement, the Court noted that "the pending injunction hearing in the federal court . . . generally hangs like a Sword of Damocles over our proceeding." (Ex. D (Dec. 4, 2015 Hr'g Tr.) at 6:8-11.) "The fact that it's not filed may gum up the works, because once that decision is reached, things usually start happening in our proceeding, either positive or negative." (*Id*. at 6:11-14.)

the ripeness concerns, and would do so without harm to the parties. Complaint Counsel could still pursue its Part 3 trial after the contingencies are resolved and the preliminary injunction action is litigated. Because Respondents will abandon the transaction if they lose the preliminary injunction case, a Part 3 trial would only happen if Complaint Counsel lost in federal court but the Commission nonetheless elects to proceed. Thus, the ripeness concerns, in themselves, provide good cause not to proceed with the Part 3 trial.

B. A Stay Is Also Warranted Because the Preliminary Injunction Action Is Highly Likely to Render the Administrative Hearing Moot.

Even putting ripeness considerations aside, a discretionary stay is warranted in light of the unusual procedural posture of this case.

If Respondents fail to receive approval from either the State or the Vatican, then no preliminary injunction action or Part 3 trial will ever be necessary. If Respondents do receive both State and Vatican approval, Complaint Counsel will bring their federal-court action, regardless of whether the Part 3 trial has begun or is ongoing.

In the latter situation, past practice counsels in favor of delaying the Part 3 trial until the district court issues a decision on Complaint Counsel's preliminary injunction request. If the district court rules for Respondents and denies injunctive relief, Respondents can 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). In that situation, the Commission ordinarily elects not to proceed with merger challenges. As Commissioner Ohlhausen recently noted, "the Commission has not pursued a Part 3 proceeding following a PI loss in federal court for twenty years."[3] If, by contrast, the FTC succeeds in securing injunctive relief, then

[3] Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Remarks to U.S. Chamber of Commerce: A SMARTER Section 5, at 17 (Sept. 25, 2015) ("Ohlhausen Remarks"), *available at* https://goo.gl/ZkjZ0Y.

Respondents will walk away from the challenged combination. This, too, is consistent with the norm in merger challenges.[4] The bottom line is that, regardless of how the federal lawsuit is resolved, it will almost certainly stand as the final word on this matter, and thus the Part 3 trial will be unnecessary.

C. A Stay Is Warranted Due to Likely New Immunity-Authorizing Legislation.

An important feature of this case is that the local community and West Virginia government both strenuously support the Transaction and oppose Complaint Counsel's efforts to block it. Both the State Attorney General and Governor are on record with their support for the transaction. A new bill passed by both the West Virginia Senate and House of Delegates is the latest manifestation of that State support. (*See* Ex. E.[5]) That bill, which purports to immunize certain hospital combinations from federal antitrust scrutiny, is currently being reconciled and will then move on to the Governor for signature.

As currently drafted, the bill confers immunity from federal antitrust law on merging hospitals — like Respondents here — upon the Authority's approval of "cooperative agreements" between those hospitals. W.V. Code § 16-29B-28(a)(2) ("'Cooperative agreement' means an agreement between a qualified hospital which is a member of an academic medical center and one or more other hospitals or other health care providers," including by "consolidation by merger or other combination of assets"); *id.* § 16-29B-28(d)(1) ("A hospital

[4] *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.").

[5] The legislation passed the West Virginia Senate in a slightly different form. *See* Senate Bill 597 (reported on Feb. 17, 2016), *available at*, http://www.legis.state.wv.us/Bill_Text_HTML/2016_SESSIONS/RS/pdf_bills/SB597%20SUB1%20ENG2.pdf.

which is a member of an academic medical center may negotiate and enter into a cooperative agreement with other hospitals or health care providers in the state.").

The bill twice expresses the legislature's clear intention to immunize transactions like this one, if approved, from antitrust scrutiny. It states that "[i]t is the intention of the Legislature that this chapter shall . . . immunize cooperative agreements approved and subject to supervision by the [A]uthority and activities conducted pursuant thereto from challenge or scrutiny under both state and federal antitrust laws." *Id.* § 16-29B-26. The legislature reiterated this express immunity determination in another section of the statute: "When a cooperative agreement, and the planning and negotiations of cooperative agreements, might be anticompetitive within the meaning and intent of state and federal antitrust laws, the Legislature believes it is in the state's best interest to supplant such laws with regulatory approval and oversight by the . . . Authority as set out in this article." *Id.* § 16-29B-28(c). And it provides for extensive post-approval State regulation of cooperative agreements. *See id.* § 16-29B-28.

If this bill becomes law, it would provide yet another strong, independent ground for not proceeding with the Part 3 trial, because it would allow Respondents to seek a powerful threshold immunity that could obviate the need for any Part 3 trial. *See, e.g.*, *In re Phoebe Putney Health Sys*., *Inc*., 2011 WL 2727137, at *2 (granting motion to stay to permit the parties to litigate the issue of state-action immunity in federal court). And, if the bill becomes law, a stay will be necessary to conserve the vast Commission and party resources that would be consumed by a potentially unnecessary Part 3 trial, and to allow the state-action-immunity defense to be litigated and resolved in court. A stay on this ground would be particularly appropriate because the immunity defense presents a discrete, legal issue that does not implicate the broader merits of the Part 3 trial; accordingly, when Complaint Counsel bring their

preliminary injunction lawsuit, the immunity defense will likely be susceptible to resolution on the papers.

CONCLUSION

For the reasons stated above, therefore, any Part 3 trial would be inappropriate until the resolution of contingencies that currently remain outstanding.

Dated: March 9, 2016

Respectfully submitted,

/s/ Geoffrey S. Irwin

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2016, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
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I further certify that I delivered via electronic mail a copy of the foregoing documents to:

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Notice of Electronic Service

I hereby certify that on March 09, 2016, I filed an electronic copy of the foregoing Respondents' Memorandum Addressing the Propriety of Proceeding with the Part 3 Trial When Respondents Cannot Yet Close the Transaction, with:

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I hereby certify that on March 09, 2016, I served via E-Service an electronic copy of the foregoing Respondents' Memorandum Addressing the Propriety of Proceeding with the Part 3 Trial When Respondents Cannot Yet Close the Transaction, upon:

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