

ORIGINAL

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



In the Matter of _____
ProMedica Health System, Inc. _____
a corporation. _____

Docket No. 9346
PUBLIC

**COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT’S MOTION TO SET HEARING LOCATION**

I. INTRODUCTION

On March 7, 2011, two full months after Respondent was put on notice that the hearing for this matter would be held in Washington, D.C., Respondent submitted a Motion To Set Hearing Location, at least in part, in Toledo, Ohio or northwestern Ohio. Respondent has not produced any evidence that it is impracticable, generally, to hold the hearing in Washington, D.C. or that it is impracticable for its party witnesses or third-party witnesses to attend the hearing in Washington, D.C. In fact, it would be much more difficult, costly, and time-consuming, we respectfully submit, for the Administrative Law Judge (“ALJ”), several witnesses, and Complaint Counsel to attend a hearing in Toledo or northwest Ohio.

Accordingly, Respondent’s Motion should be denied.

II. BOTH LEGAL AND EQUITABLE PRINCIPLES SUPPORT HOLDING THE ENTIRE HEARING IN WASHINGTON, D.C.

Commission Rule 3.41(b), states that “[h]earings shall proceed with all reasonable expedition, and insofar as practicable, shall be held at one place . . .” 16 C.F.R. § 3.41(b). As Your Honor has noted in other recent matters, a key consideration in holding a hearing in one

place is “administrative efficiency.”¹ For administrative efficiency, the Commission almost always sets Washington, D.C. as the place of the hearing, as it has in the present matter.

Holding the hearing in Washington, D.C. is administratively efficient because the ALJ, the Commission’s headquarters, its usual hearing room, Complaint Counsel, its support staff, and many of Respondent’s outside counsel are located in Washington, D.C. Further, conducting the hearing in Washington, D.C. ensures that the ALJ has access to a courtroom equipped with the necessary technology at a relatively-inexpensive cost to the Commission. Holding the hearing in Washington, D.C. also allows the ALJ to attend to obligations in other pending Part III matters, a concern that is particularly acute in light of the current caseload before this Court.

Holding the hearing at more than one place would be inefficient for the ALJ and unnecessarily expensive for the Commission. It would require the ALJ to travel, potentially multiple times, between northwest Ohio and Washington, D.C. to preside over the northwest Ohio hearing and proceedings in other matters. This unnecessary travel also would impose significant financial burdens on the Commission, which already is working diligently to curtail spending and reduce costs whenever possible. For these reasons, it is neither practical, cost-effective, or expeditious for all or part of the hearing to be held in a location other than Washington, D.C.

A. Greater Convenience for Certain Witnesses Is Not a Sufficient Reason to Relocate All or Part of the Hearing to Ohio

Despite the custom of holding hearings in Washington, D.C., Respondent notes that the FTC Act allows the ALJ to “order hearings at more than one place.” 16 C.F.R. § 3.41(b)(1).

¹ *In the Matter of The North Carolina Board of Dental Examiners*, Dkt. No. 9343 (Jan. 25, 2011) (Chappell, ALJ) (Interlocutory Order); *In the Matter of Laboratory Corp. of America et al.*, Dkt. No. 9345 (Jan. 19, 2011) (Chappell, ALJ) (Interlocutory Order).

Respondent requests that part of the hearing be held in Toledo, Ohio or some other location in northwest Ohio, contending that having the hearing in Washington, D.C. will be less convenient and more burdensome, disruptive, and expensive for ProMedica's executives and some third-party witnesses. Even if these considerations were relevant, Respondent's arguments fail.

Although many of the potential witnesses who are likely to provide testimony are located in northwest Ohio, there are many witnesses (and their counsel) that are located hundreds of miles away from northwest Ohio. Potential witnesses reside or work in locations as far away as Plano, Texas; Louisville, Kentucky; Decatur, Illinois; and New York, New York. In addition, several potential witnesses – including two of Respondent's experts and one of Complaint Counsel's experts – reside or work in Washington, D.C., making it much more convenient for them to attend the hearing locally. Imposing additional travel requirements for these expert witnesses will impose financial costs on all parties involved, and will require the Commission (and the taxpayers) in particular, to incur substantial additional expense.

Respondent's claim that a hearing in Washington, D.C. will be expensive for ProMedica's executives is not compelling. The mere expense of attending a hearing in Washington, D.C. is not an adequate reason to change the hearing location. Indeed, "[e]very trial involves expenses which the parties would prefer not to incur."²

Respondent's argument that hearings in Washington, D.C. will be extremely disruptive to ProMedica – and particularly St. Luke's, putting its business operations at risk – is hyperbole. In fact, thirteen ProMedica and St. Luke's executives and board members already traveled to Washington, D.C. for investigational hearings in this matter, and there is no evidence that their

² *In re Automotive Breakthrough Sciences, Inc.*, Nos. 9275-77, 1996 FTC LEXIS 336 (July 15, 1996) (Parker, ALJ) (Interlocutory Order).

businesses suffered from their brief periods of absence.³ Additionally, several board members, executives, and other representatives of ProMedica and St. Luke's – specifically Randall Oostra, ProMedica's CEO, Larry Peterson, ProMedica's Chairman of the Board, Jamie Black, St. Luke's Chairman of the Board, Jeffrey Kuhn, ProMedica's Chief Legal Officer, and Priya Bathija, ProMedica's Associate General Counsel – recently took time away from their offices to travel to West Palm Beach, Florida to observe the two-day preliminary injunction hearing in the related federal district court proceeding. These executives and in-house counsel were not required to attend this two-day hearing, at which no live testimony was presented, making it clear that they were not concerned that the time and expense involved in traveling to and attending this hearing would negatively impact their businesses. In short, Respondent has presented no evidence that attending a hearing for a brief period of time in Washington, D.C. will detrimentally impact ProMedica's business operations.

Even assuming that it would be more convenient for Respondent's witnesses to attend a hearing in northwest Ohio, that is not a consideration in the Commission's Rules. Respondent argues for multiple hearing locations on the ground that this matter is "Toledo-centered" and any merger effects would be felt primarily in the Toledo, Ohio area. But unlike 28 U.S.C. § 1404(a), the federal statute controlling change of venue, the Commission's Rule relating to hearing location does not consider the convenience of the witnesses and the parties or the locus of

³ These witnesses included Randall Oostra, ProMedica's CEO; Daniel Wakeman, St. Luke's CEO; Larry Peterson, ProMedica's Chairman of the Board; Barbara Machin, St. Luke's former Chairman of the Board and current Board member; Dennis Wagner, St. Luke's Acting VP and Treasurer; Kathleen Hanley, ProMedica's CFO; Gary Akenberger, ProMedica's Senior VP of Finance; David Dewey, St. Luke's VP of Business Development; Douglas Deacon, St. Luke's VP of Professional Services; Barbara Steele, ProMedica's President of Acute Care; Lee Hammerling, ProMedica's Chief Medical Officer and President of ProMedica Physicians and Continuum Services; Ronald Wachsman, ProMedica's Senior VP of Managed Care, Reimbursement and Revenue Cycle Management; and Jack Randolph, President of ProMedica's Paramount Health Care.

operative facts.⁴ If such factors were relevant in deciding where to hold a Part III hearing, such hearings would often be held outside Washington, D.C., but this is not the case. Indeed, it is hardly ever the case that FTC administrative hearings are held outside Washington, D.C.

B. *In re North Texas Specialty Physicians* Inapposite: Circumstances Distinguishable

Respondent notes that, in one matter before Your Honor, *In re North Texas Specialty Physicians*, Docket No. 9312 (“NTSP”), a majority of the hearing was held in Fort Worth, Texas, rather than Washington, D.C. The NTSP matter is distinguishable from the instant matter on numerous grounds. That matter presented a rare situation where *all* fact witnesses, as well as respondent’s counsel, were located in or near Fort Worth; both complaint counsel and respondent agreed to hold the hearing there; *and* the ALJ’s obligations in other pending Part III cases permitted a change in hearing location. The circumstances in this matter are quite different.

Here, not all likely fact witnesses are in Toledo, or even northwest Ohio. The majority of Respondent’s outside counsel are located in Washington, D.C., with a few others located in Chicago, Illinois, making it more convenient for Respondent’s counsel to attend a hearing in Washington, D.C., rather than northwest Ohio. All of Complaint Counsel are in Washington, D.C. and Complaint Counsel does not agree to hold the hearing in Toledo or northwest Ohio.

Respondent suggests that northwest Ohio may be a suitable hearing location because the FTC has a regional office in Cleveland, Ohio and has used that office before in this matter in connection with three investigational hearings of third parties. This is unpersuasive. *All* of

⁴ *In the Matter of Laboratory Corp. of America*, Dkt. No. 9345 (Jan. 19, 2011) (Chappell, ALJ) (Interlocutory Order). *See also D.H. Blair & Co., v. Gottdiener*, 462 F.3d 95, 106-07 (2nd Cir. 2006).

Complaint Counsel's attorneys and support staff are located in Washington, D.C., clearly making that location the most convenient for them.⁵ Although the FTC has a regional office in Cleveland, it takes approximately two hours to drive from that office to Toledo, Ohio, or other locations in northwest Ohio – hardly making it a convenient location for Complaint Counsel to conduct work for and attend the hearing. Its use of that office for the three investigational hearings was a limited exception for the convenience of the third parties, an inconvenience for Complaint Counsel, and presents much different facility and logistical requirements than a Part III hearing.

If the hearing is moved to northwest Ohio, Complaint Counsel would be forced to locate and obtain secure, electronically-interconnected, adequate hearing-preparation space, equipment, and material; locate and book extended-stay hotel space for its counsel and support staff; relocate its staff for potentially several weeks or even months; and perform myriad other transition tasks while simultaneously conducting crucial and time-consuming hearing preparation activities.

Presently, the Commission – and indeed, the entire federal government – is on an extremely constrained budget and must limit costs wherever possible. Conducting the hearing in northwest Ohio would impose an unnecessary financial burden on the Commission, and ultimately, the taxpayers.

In addition, it is unclear whether Toledo's federal courthouse (or another federal office in northwest Ohio) has a courtroom available for this matter's hearing. Respondent has not provided any information about the courtroom's availability, size, location, accessibility,

⁵ And, of course, the ALJ himself is located in Washington, D.C.

security, cost, and technology and whether it would be comparable to the Commission's courtroom in Washington, D.C.

III. CONCLUSION

Holding even part of this matter's hearing in northwest Ohio would be inefficient, impractical, and logistically burdensome to the ALJ and Complaint Counsel, as well as financially burdensome to the Commission. Respondent has produced no evidence or other compelling reason that the hearing cannot be held as scheduled in Washington, D.C. Thus, Respondent has not met its burden under Commission Rule 3.41 to justify relocation of all or part of this administrative proceeding. For these reasons, Complaint Counsel respectfully requests that Respondent's Motion to Set Hearing Location be denied.

Dated: March 16, 2011

Respectfully submitted,

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**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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**[PROPOSED] ORDER DENYING RESPONDENT’S MOTION
TO SET HEARING LOCATION**

Upon consideration of the points raised in Respondent’s Motion to Set Hearing Location and Complaint Counsel’s Opposition thereto,

IT IS HEREBY ORDERED, that Respondent’s Motion is DENIED.

IT IS FURTHER ORDERED, that the Hearing in this matter will commence on May 31, 2011, in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2011, I filed *via* hand a paper original and a true and correct electronic copy of the foregoing COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO SET HEARING LOCATION, with:

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The Honorable D. Michael Chappell
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I hereby certify that on March 16, 2011, I delivered *via* electronic mail delivery a copy of the foregoing with:

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