



not being distributed to the public at this time and will not be distributed during the pendency of the stay. Prehearing conference, July 29, 2004.

Complaint Counsel argues that the stay is not necessary because the criminal action is not collateral to this administrative action; that no extraordinary circumstances have been presented to support delay of the proceedings; that Respondent Chhabra may continue to assert his Fifth Amendment rights after the stay ends; and that an assertion of Fifth Amendments rights does not warrant a stay of Section 5 actions. Opposition at 2-5. Complaint Counsel also contends that the public interest is best served by expeditious handling of this matter because Respondents currently sell dietary supplements other than those that are the subject of the Complaint. Prehearing conference, July 29, 2004; Motion at 4.

### III.

#### A.

Commission Rule 3.42 authorizes the Administrative Law Judge (“ALJ”) to “conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order” in each case. 16 C.F.R. § 3.42(c). “An administrative law judge has both the authority and the duty to control an adjudicative proceeding so as to ensure a fair and impartial hearing.” *In re Intel Corp.*, 1999 FTC LEXIS 206 (Mar. 2, 1999). ALJs should “exercise their discretion in regulating the course of adjudicative proceedings in a manner that expedites proceedings, consistent with due process considerations.” 61 Fed. Reg. 50640, 50641 (Sept. 26, 1996).

A “court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions ‘when the interests of justice seem[] to require such action, sometimes at the request of the prosecution, . . . sometimes at the request of the defense[.]’” *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980) (quoting *US v. Kordel*, 397 U.S. 1, 12 n.27 (1970)). A noncriminal proceeding, if not deferred, “might undermine the party’s Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.” *Dresser*, 628 F.2d at 1376. “If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.” *Dresser*, 628 F.2d at 1376. “A court must decide whether to stay civil proceedings in the face of criminal proceedings in light of the particular circumstances and competing interests involved in the case.” *Federal Savings and Loan Inc. Corp v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). In *Dresser*, the factors that weighed against staying the administrative proceeding and allowing discovery to proceed were that no indictment had been returned; no Fifth Amendment privilege was threatened; Rule 16(b) had not come into effect; and the subpoena at issue did not require the Defendant to reveal the basis for its defense. *Dresser*, 628 F.2d at 1376.

In this case, the factors that weigh in favor of granting the stay are that a criminal indictment has been filed; trial in the criminal case is imminent; the duration of the stay is limited; discovery in this case may involve facts related to the criminal charges; the products at issue are no longer being sold to the public; and there has been no demonstration that discovery will be adversely impaired by a delay.

**B.**

FTC Rule of Practice 3.51(a) states in relevant part that the “pendency of any collateral federal court proceeding that relates to the administrative adjudication shall toll the one-year deadline for filing the initial decision. The ALJ may stay the administrative proceeding until resolution of the collateral federal court proceeding.” 16 C.F.R. § 3.51(a). This part of Rule 3.51(a) was promulgated as part of the 1996 amendments. FTC Rules of Practice Amendments, 61 Fed. Reg. at 50,642.

Complaint Counsel argues that “the term ‘collateral’ action refers to one ‘brought by the Commission to challenge some or all of the same conduct at issue in the administrative proceeding.’” Opposition at 3. This argument is based upon comments to the 1996 amendments to Rule 3.11 of the FTC Rules of Practice. See Opposition at 3 (citing 61 Fed. Reg. at 50641). The comments to the 1996 amendments indicate that “Rule 3.11A is being added to establish an alternative ‘fast track’ schedule that respondents in certain administrative proceedings may elect if a federal district court has granted a preliminary injunction in a collateral federal court proceeding brought by the Commission.” 61 Fed. Reg. at 50644, see also 61 Fed. Reg. at 50641. Rule 3.11A states, in relevant part, that “[o]nly administrative proceedings challenging conduct that has been preliminarily enjoined by a federal court in a collateral proceeding brought by the Commission shall be subject to the fast track schedule.” 16 C.F.R. § 3.11A. Rule 3.11A does not define “collateral” but rather indicates which collateral actions would be subject to the fast track provisions. See 16 C.F.R. § 3.11A. The case at bar is not a fast track case and not subject to the limitations of Rule 3.11A.

To the contrary, Rule 3.51(a) specifically and explicitly allows the ALJ the discretion to stay administrative proceedings until resolution of a collateral federal court proceeding. 16 C.F.R. § 3.51(a). Although Rule 3.51(a) has most often been employed pursuant to Section 13(b) of the FTC Act whereby the Commission seeks to preliminarily enjoin a proposed merger or acquisition while it proceeds with an administrative action analyzing the potential anticompetitive effects of the proposed transaction, the Rule 3.51(a) is not limited exclusively to those situations. See *In re Rambus, Inc.*, Docket 9302 (July 18, 2002). Moreover, given the circumstances of this case, Respondent has demonstrated sufficient good cause for the Court, in the interests of justice, to stay the administrative proceeding pending trial on the criminal matter.

IV.

For the reasons set forth above, Respondents' motion for stay is **GRANTED**.

ORDERED:



Stephen J. McGuire  
Chief Administrative Law Judge

August 2, 2004