

**STATE OF INDIANA  
INDIANA CIVIL RIGHTS COMMISSION**

CHAPELLE LESTER,

Complainant,

vs.

PHARMAKON LONG TERM CARE  
PHARMACY, INC., D&D PHARMA LTC,  
LLC, and D&D PHARMA LTC, LLC d/b/a  
MEDSCRIPT,

Respondents.

ICRC NO.: EMha16071334

EEOC NO.: 24F-2016-01389

**DATE FILED**

**JUN 23 2020**

**ICRC  
COMMISSION**

**FINAL ORDER**

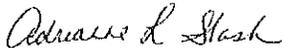
On April 28, 2020, Hon. Caroline A. Stephens Ryker, who was the Administrative Law Judge ("ALJ") assigned to this matter, issued her Order on Complainant's Motion for Amendment of Case Management Plan and Stay of All Deadlines; Order on Respondent D&D Pharma LTC, LLC's and Respondent D&D Pharma LTC, LLC d/b/a Medscript's Successor Liability; and Initial Findings of Fact, Conclusions of Law, and Order ("Order"). The Parties had opportunity to object to the Order; no objects were filed. With no objections or an intent to review on record, the Commission shall affirm the Orders. IC 4-21.5-3-29. After consideration of the record in this matter and the Orders, **THE COMMISSION HEREBY ORDERS:**

1. The findings of fact and conclusions of law as stated in the Order, a copy of which is attached hereto, are incorporated herein by reference. IC 4-21.5-3-28.
2. The Order is AFFIRMED under IC 4-21.5-3-29 and hereby becomes the Final Order disposing of the proceedings. IC 4-21.5-3-27(a).

Either party to a dispute filed under IC 22-9 may, not more than thirty (30) days after the date of receipt of the Commission's final appealable order, appeal to the court of appeals under the same terms, conditions, and standards that govern appeals in ordinary civil actions. IC 22-9-8-1.

SO ORDERED by the majority vote of 4 Commissioners on June 19, 2020

*Signed this June 23, 2020*



Chair Adrienne L. Slash

Certificate of Service

Served this 23rd day of June, 2020 by Certified Mail on the following:

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and personally served on the following attorney of record:

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ICRC NO.: EMha16071334

EEOC NO.: 24F-2016-01389

**DATE FILED**

APR 28 2020

**OFFICE OF THE  
ADMINISTRATIVE JUDGE**

**ORDER ON COMPLAINANT'S MOTION FOR AMENDMENT OF CASE  
MANAGEMENT PLAN AND STAY OF ALL DEADLINES;  
ORDER ON RESPONDENT D&D PHARMA LTC, LLC'S AND RESPONDENT D&D  
PHARMA LTC, LLC D/B/A MEDSCRIPT'S SUCCESSOR LIABILITY; AND INITIAL  
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Beginning in October of 2018, Respondent D&D Pharma LTC, LLC, Respondent D&D Pharma LTC, LLC d/b/a Medscript (collectively "D&D"), Respondent Pharmakon Long Term Care Pharmacy Inc. ("Pharmakon") (collectively "Respondents"), and Complainant have filed various briefs and motions concerning the appropriateness of Respondent D&D's participation in this matter as a Party to which liability can be attached with the undersigned Administrative Law Judge ("ALJ"), Hon. Caroline A. Stephens Ryker, for the Indiana Civil Rights Commission ("ICRC"). Specifically, the following briefs and motions have been filed: 1) Complainant's Notice to Administrative Law Judge on Issue Pertaining to Successor Liability ("Notice"), 2) D&D's Memorandum of Law of D&D Pharma Regarding Successor Liability ("Memo"), 3) D&D's Reply Brief of D&D Pharma Regarding Successor Liability ("Reply"), 4) Complainant's Motion for Amendment of Case Management Plan and Stay of All Deadlines ("Motion"), and 5) D&D's Response to Motion for Amendment of Case Management Plan and Stay of All Deadlines ("Response"). All deadlines for motions and briefs on this issue have now passed. Accordingly, the undersigned ALJ took this matter under advisement. Having carefully considered the evidence and being duly advised in the premises, the presiding ALJ for the ICRC proposes that the Commission enter the following findings of fact, conclusions of law, and order.

## FINDINGS OF FACT

### Procedural Posture

1. On July 21, 2016, Complainant filed a complaint with the ICRC against Respondent Pharmakon in which Complainant alleged that Respondent Pharmakon discriminated against her on the basis of disability during her employment.
2. Only Respondent Pharmakon participated in the investigation of Complainant's ICRC complaint. (Memo at Ex. C, Ex. D, and Ex. E.)
3. On March 29, 2017, the ICRC issued a Notice of Finding in which the ICRC determined that there was probable cause to believe that unlawful discrimination occurred as alleged by Complainant.
4. The Notice of Finding was issued against Respondent Pharmakon only.
5. On September 24, 2018, prior to the appointment of an ALJ in this matter, Complainant amended her complaint to include Respondent D&D as a Party.
6. On September 28, 2018, Complainant moved that an ALJ be appointed, and on October 25, 2018, the undersigned ALJ was appointed to preside over this matter.
7. During two (2) prehearing conferences, occurring on February 28, 2019 and on June 7, 2019, both Complainant and Respondent D&D requested that the issue of successor liability be resolved prior to conducting discovery on the issue of disability discrimination. In the related prehearing orders, the ALJ set a deadline for conducting discovery on the sole issue of successor liability as well as set simultaneous briefing and reply briefing deadlines.
8. Prior to the expiration of the discovery and briefing deadlines, Complainant requested a 180 day stay of deadlines as a result of staffing changes. The stay was granted on August 5, 2019 in an order that included new discovery deadlines, simultaneous briefing deadlines, and simultaneous reply briefing deadlines.
9. On March 6, 2020, Attorney Richardson entered her appearance for Complainant. She was the first ICRC Attorney to enter an appearance in this matter after the 180 day stay took effect.
10. Complainant did not file a brief or reply brief.
11. Complainant has requested that the simultaneous reply brief deadline be reset and stayed, pending another staffing change concerning an ICRC Attorney who did not enter an appearance in this matter. (Motion.)

12. Respondent objected to Complainant's Motion based on the longevity of Complainant's knowledge concerning the reply brief deadline. (Response.)

#### Successor Liability

13. Respondent D&D purchased only the assets of Respondent Pharmakon on December 30, 2016 as memorialized in the Respondents' Asset Purchase Agreement ("Agreement"). (Memo at Ex. A.)

14. Prior to the sale of Respondent Pharmakon's assets, Respondent Pharmakon was aware of Complainant's ICRC complaint. (Memo at Ex. C and Ex. D.) Specifically, Respondent Pharmakon participated in ICRC's investigation of Complainant's ICRC complaint, including filing an Agreement to Begin Mediation with the ICRC on August 9, 2016 and filing a Position Statement with the ICRC on October 14, 2016. *Id.*

15. During at least August, September, and October of 2016, Respondent Pharmakon had the ability to and opportunity to provide Complainant with relief. *Id.*

16. Respondents' Agreement explicitly details the liabilities that Respondent D&D assumed upon the purchase of Respondent Pharmakon's assets. (Memo at Ex. A.) Complainant's ICRC complaint was not listed among the liabilities to be assumed by Respondent D&D upon the completion of the sale. *Id.*

17. The Agreement included a disclosure of lawsuits pending against Respondent Pharmakon at the time of the sale. *Id.* Respondent Pharmakon disclosed that it was facing a pending "IDOCR claim" in which the EEOC's and the "IDOCR's" deadline to take action had lapsed. *Id.*

18. Respondent Pharmakon's disclosure lacked the following information: 1) the full names of the agency or agencies with which the complaint had been filed, 2) any explanation of the relationship between the "IDOCR" and the EEOC, 3) the names of the Parties to the complaint, 4) any associated case numbers, and 5) any description of the allegations. *Id.*

19. The disclosure made by Respondent Pharmakon was insufficient to provide Respondent D&D with notice of Complainant's ICRC complaint prior to purchasing the assets of Respondent Pharmakon, especially given that Respondent D&D did not have the information needed to research the existence of the claim or the truth of Respondent Pharmakon's representation concerning the expiration of deadlines. *Id.*

20. After the sale of Respondent Pharmakon's assets was complete, Respondent D&D operated its own, unique business. (Memo at Ex A and Ex. B.)
21. A limited number of Respondent Pharmakon's employees did continue to work for Respondent D&D after the sale; however, none of the employees who were named in the Notice of Finding were among those shared employees. (Memo at Ex. A and Ex. B.)
22. Respondent D&D hired new managers and leadership to oversee its business, with only one notable, short-lived exception: Respondent D&D retained Respondent Pharmakon's Chief Operating Officer for five (5) months after the sale. (Memo at Ex. A and Ex. B.)
23. Similarly, Respondents had no owners in common, prior to or after the completion of the sale. (Memo at Ex. A and Ex. B.)
24. However, upon completing the sale, Respondent D&D operated its business, which is similar in nature to Respondent Pharmakon's prior business, out of Respondent Pharmakon's previous address, after Respondent D&D's parent company purchased Respondent Pharmakon's assets, including the property and equipment located there. (Memo at Ex. A and Ex. B.)
25. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such.

### CONCLUSIONS OF LAW

#### Procedural Posture

1. Complainant requests that the deadline for filing simultaneous reply briefs be reset and stayed. However, Complainant has not filed a brief on the issue of successor liability, which would form the basis of Complainant's position advanced in a reply brief.
2. In practice, resetting the simultaneous reply brief deadlines would allow Complainant to advance a position on successor liability for the first time, to which Respondent D&D would not have the opportunity to respond, unless additional deadlines are set.
3. Additionally, Complainant's request is premised on a staffing change concerning an attorney who has not appeared in this matter. It also follows closely on the heels of a 180 day stay specifically granted to allow Complainant time to re-assign an attorney to this matter.
4. Complainant has had notice of these deadlines since August of 2019.
5. An ALJ has the discretion to grant or deny continuances. *Strutz v. McNaghy*, 558 N.E.2d 1103, 1108 (Ind. Ct. App. 1990).

6. Complainant has not identified good cause for resetting the deadline for filing a reply brief or for staying any deadlines in this matter.

#### Successor Liability

7. The ICRC has jurisdiction over sufficiently complete complaints of employment discrimination based on the protected category of disability. IND. CODE § 22-9-1-2; IND. CODE § 22-9-1-6(d); IND. CODE § 22-9-1-3(o); IND. CODE § 22-9-1-3(p).
8. The ICRC has jurisdiction over the Parties because Complainant is an employee and Respondents are employers. IND. CODE § 22-9-1-3(a), (h), and (i); IND. CODE § 22-9-5-9; IND. CODE § 22-9-5-10.
9. As required by the Indiana Administrative Code, Complainant's amended complaint, which added Respondent D&D to this matter, was filed prior to the issuance of a notice of initial prehearing conference. 910 IAC 1-2-8; 910 IAC 1-7-1.
10. Respondent D&D requests that it be dismissed from this matter because it is not a proper successor in liability to Respondent Pharmakon. (Memo.)
11. Under the Indiana Administrative Orders and Procedures Act, Respondent D&D, as the Party requesting that the ALJ take action, has the burden of demonstrating that dismissal is appropriate. IND. CODE § 4-21.5-3-14.
12. While Indiana courts rely on federal law for guidance on the burden-shifting analysis used in discrimination cases, Indiana's own case law governs the applicability of successor liability. *Gaff v. Indiana-Purdue Univ. of Fort Wayne*, 51 N.E.3d 1163, 1166 (Ind. 2016).
13. Generally, "...where one corporation purchases the assets of another, the buyer does not assume the debts and liabilities of the seller." *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1233 (Ind. 1994).
14. Indiana recognizes four (4) exceptions to this general rule: "...(1) an implied or express agreement to assume the obligation; (2) a fraudulent sale of assets done for the purpose of escaping liability; (3) a purchase that is a *de facto* consolidation or merger; and (4) instances where the purchaser is a mere continuation of the seller." *Id.*
15. Because Respondents' Agreement concerned only assets, Respondent D&D will only be a successor in liability to Respondent Pharmakon if one of the four (4) exceptional circumstances recognized by Indiana exist.

16. However, Respondent D&D has demonstrated that each of the four (4) exceptions recognized by Indiana are inapplicable to Respondents' Agreement.
17. The terms of Respondents' Agreement provide evidence that the first exception, an agreement to assume an obligation, is inapplicable to Respondent D&D's purchase of Respondent Pharmakon's assets. *Id.*
18. In this instance, Respondents' Agreement very clearly articulates which liabilities Respondent D&D assumed after the sale, and Complainant's ICRC complaint was not listed as a liability to be assumed by Respondent D&D. *Cooper Indus., LLC v. City of S. Bend*, 899 N.E.2d 1274, 1287-1288 (Ind. 2009). Accordingly, Respondents did not have an express or implied agreement that Respondent D&D would assume liability for Complainant's ICRC complaint.
19. The second exception, the fraudulent sale of assets, may be used to apply successor liability when evidence demonstrates that the parties to a sale of assets used the sale as a scheme to avoid liability. *Lee's Ready Mix & Trucking, Inc. v. Creech*, 660 N.E.2d 1033, 1037-1039 (Ind. Ct. App. 1996).
20. Given the limited number of employees shared between Respondents, the lack of common owners, and the extent of the consideration exchanged, the circumstances surrounding the sale of Respondent Pharmakon's assets do not support the inference that the sale was used to fraudulently escape potential liability stemming from Complainant's ICRC complaint. *Id.* Accordingly, the second exception is inapplicable to Respondents' Agreement.
21. Circumstances supporting the applicability of the third exception, the *de facto* consolidation of entities, exist when the sale of one entity's assets to another entity results in the intermingling of their operations to such a degree that the sale of assets serves as a consolidation of the entities. *Cooper Indus., LLC*, 899 N.E.2d at 1288-1290. Evidence of consolidation includes the continued employment of managers, the continued use of equipment, and the assumption of all debts necessary for the continuation of the business. *Id.*
22. Despite Respondent D&D's continued use of at least some of Respondent Pharmakon's equipment and assumption of at least some of Respondent Pharmakon's debts needed to maintain operations, the Respondents' Agreement does not amount to a *de facto* consolidation of the entities because Respondent D&D operates its business without the

involvement of or employment of Respondent Pharmakon's former managers and owners. Again, the third exception does not apply to Respondents' Agreement.

23. Finally, the fourth exception, continuity, focuses on whether the entity purchasing the assets is in actuality a reincarnation of the entity selling the assets. *Id.* at 1290-1291.
24. Even given Respondents' similarity in location and purpose, Respondent D&D's is not merely a reincarnation of Respondent Pharmakon because Respondent D&D has taken great strides to divorce itself from Respondent Pharmakon's former owners, managers, and employees. As with the previous exceptions, the fourth exception is inapplicable to Respondents' Agreement.
25. Ultimately, Respondent D&D is not a viable successor in liability to Respondent Pharmakon under Indiana's case law because Respondent D&D purchased only the assets of Respondent Pharmakon and the circumstances of the sale do not support a finding that any of the four (4) exceptions to Indiana's general rule on successor liability apply.
26. Even if the federal rule, which is more liberally construed in favor of applying successor liability, were applied to Respondents' Agreement, the application of successor liability to Respondent D&D would still be inequitable.
27. Federal courts apply successor liability when three (3) criteria are met: (1) the successor had notice of the claim prior to the sale, (2) the previous employer was and is unable to provide relief to the Complainant, and (3) the business operations of the predecessor were continued by the successor. *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1236-1237 (7th Cir. 1986).
  - a. With respect to the first factor, Respondent D&D was not notified of and could not with due diligence find Complainant's ICRC complaint prior to the purchase of Respondent Pharmakon's assets.
  - b. With respect to the second factor, Respondent Pharmakon was able to provide relief to Complainant prior to the finalization of the sale of assets as evidenced by Respondent Pharmakon's participation in the ICRC investigation of Complainant's ICRC complaint.
  - c. With respect to the third and final factor, Respondent D&D has not continued the business operations of Respondent Pharmakon, as evidenced by a lack of common owners and managers, Respondent D&D's unique hiring practices, and the limited

overlap in used equipment. A similar address and mission does not overcome these distinctions.

28. Accordingly, Respondent D&D has met its burden on establishing it is not a successor in liability to Respondent Pharmakon. Therefore, the Commission must dismiss Respondent D&D from this matter. IND. CODE § 22-9-6(1).
29. Administrative review of this initial decision may be obtained by filing objections with the Commission that state with reasonable particularity each basis for each objection within 15 days after service of this initial decision. IND. CODE § 4-21.5-3-29(d).
30. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

### ORDER

1. Complainant's Motion for Amendment of Case Management Plan and Stay of All Deadlines is DENIED.
2. Complainant's ICRC complaint against D&D Pharma LTC, LLC is DISMISSED, with prejudice.
3. Complainant's ICRC complaint against D&D Pharma LTC, LLC d/b/a Mescript is DISMISSED, with prejudice.
4. This order becomes a final order disposing of the proceedings immediately upon affirmation by the Commission. IND. CODE § 4-21.5-3-29.

### Default

A Party who fails to attend or participate in a prehearing conference, hearing, or other later stage of the proceeding may be held in default or have a proceeding dismissed. IND. CODE § 4-21.5-3-18(d)(8); IND. CODE § 4-21.5-3-24.

### Resolution of the Matter

**Parties must notify the Presiding Officer of a settlement.** If a hearing has not been set, the filing of a written, Notice of Withdrawal by Complainant is immediately effective in closing the matter; however, if a joint motion to dismiss or request for withdrawal is made after the case has been set for hearing, the written consent of a majority of the Commissioners must be obtained. 910 IAC 1-2-6. **Notification of a settlement will not result in the closure of the complaint or staying of deadlines unless accompanied by a written motion for dismissal, withdrawal, or staying of deadlines.**

**Filing**

Subject to Indiana Code 4-21.5-3-1, the filing of a document in proceedings before the ICRC's Administrative Law Judge or Commission can be completed by mail, personal service, fax, or electronic mail to:

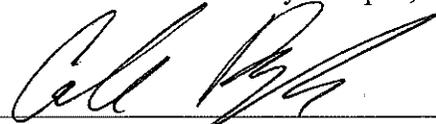
**Docket Clerk**  
**c/o Indiana Civil Rights Commission**  
**100 North Senate Avenue, N300**  
**Indianapolis, IN 46204**  
**Fax: 317-232-6580**  
**Email: docketclerk@icrc.in.gov**

**A Party shall serve copies of any filed item on all Parties.** IND. CODE § 4-21.5-3-17(c).

**Contact Information**

The name, official title, and mailing address of the Presiding Officer and Commission as well as a telephone number through which information concerning schedules and procedures may be obtained, is included below. **However, all *ex parte* contacts –direct or indirect communications regarding any issue in the pending proceeding without notice and opportunity for all Parties to participate in the communication – are forbidden by law.** Repeat: a Party shall serve copies of any filed item on **all Parties.** IND. CODE § 4-21.5-3-17(c). The attached Certificate of Service includes the names and mailing addresses of all known Parties and other persons to whom notice is being given. IND. CODE § 4-21.5-3-18(d)(1).

SO ORDERED this 28<sup>th</sup> day of April, 2020



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Hon. Caroline A. Stephens Ryker  
Administrative Law Judge  
Indiana Civil Rights Commission  
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Certificate of Service

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