

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



ORIGINAL

In the Matter of)
)
)
 Sanford Health,)
 a corporation;)
)
 Sanford Bismarck,)
 a corporation;)
)
 and)
)
 Mid Dakota Clinic, P.C.,)
 a corporation.)
)
 Respondents.)

Docket No. 9376

JOINT MOTION TO AMEND THE SCHEDULING ORDER

Complaint Counsel and Respondents, Sanford Health and Sanford Bismarck (collectively, “Sanford”), and Mid Dakota Clinic, P.C. (“MDC”), jointly move to amend the Scheduling Order in the above-referenced matter.

On June 23, 2017, the Commission filed a complaint in the United States District Court for the District of North Dakota, Western Division, seeking a temporary restraining order and a preliminary injunction to prevent Respondents from consummating the transaction that is the subject of this case. *FTC et al. v. Sanford Health et al.*, No. 1:17-cv-00133-ARS (D.N.D.) (Dec. 23, 2017). The parties stipulated to the entry of the temporary restraining order, which issued on June 22, 2017. The preliminary injunction hearing before Magistrate Judge Alice R. Senechal commenced on October 30, 2017 and concluded on November 3, 2017. Although the District Court has not yet issued its ruling, Judge Senechal stated at the conclusion of the preliminary

injunction hearing that “[i]t will be my goal to get you a decision before Thanksgiving, but it’s sure not going to be much before that.” Exhibit A, PI Hearing Transcript Vol. 4 at 251.

On November 3, 2017, the Commission ordered a fourteen-day continuance of the administrative hearing and all remaining pre-hearing deadlines. Exhibit B, Order Granting 14-Day Continuance. In its order, the Commission noted that “the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary.” Exhibit B, Order Granting 14-Day Continuance, at 2. Therefore, the administrative hearing is currently scheduled to begin on December 12, 2017.

In light of the forthcoming ruling on the motion for preliminary injunction, Complaint Counsel and Respondents respectfully request that the Scheduling Order be amended to move the deadlines for filing motions and responses to motions for *in camera* treatment of proposed trial exhibits. Concurrently, Complaint Counsel and Respondents are filing a motion with the Commission to delay the start of the administrative hearing until January 17, 2018. In particular, amending the Scheduling Order will avoid significant burden and expense for third parties, who would need to file motions for *in camera* treatment of proposed trial exhibits by November 27, 2017, the Monday following Thanksgiving. Following are the proposed amendments to the Scheduling Order:

Action	Current Deadline	Proposed Deadline
Deadline for filing motions for <i>in camera</i> treatment of proposed trial exhibits	November 27, 2017	December 5, 2017
Deadline for filing responses to motions for <i>in camera</i> treatment of proposed trial exhibits.	November 30, 2017	December 7, 2017
Complaint Counsel files pretrial brief supported by legal authority.	November 30, 2017	December 5, 2017
Respondents’ Counsel files pretrial brief supported by legal authority	December 6, 2017	December 11, 2017

If the Commission does not move the trial date, these amended pre-trial deadlines will still enable the Parties to commence the trial as scheduled, on December 12, 2017. In the event that the Commission grants the requested motion to delay the start of the hearing until January 17, 2018, the parties intend to request further modification of the Scheduling Order.

A Proposed Order is attached.

Dated: November 14, 2017

Respectfully Submitted,

/s/ Thomas J. Dillickrath
Thomas J. Dillickrath
Kevin K. Hahm
Christopher Caputo
Melissa Hill
Rohan Pai
Federal Trade Commission
Bureau of Competition
Mergers IV Division
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3680
Facsimile: (202) 326-2286
tdillickrath@ftc.gov
khahm@ftc.gov
ccaputo@ftc.gov
mchill@ftc.gov
rpai@ftc.gov

Attorneys for Complaint Counsel

/s/ Robert M. Cooper
Robert M. Cooper
Richard A. Feinstein
Samuel C. Kaplan
Nicholas A. Widnell
Hershel Wancjer
BOIES, SCHILLER FLEXNER LLP
1401 New York Ave, NW
Washington, D.C. 20005

Telephone: (202) 237-2727
Facsimile: (202) 237-6131
rcooper@bsfllp.com
rfeinstein@bsfllp.com
skaplan@bsfllp.com
nwidnell@bsfllp.com
hwancjer@bsfllp.com

*Attorneys for Respondent Sanford Health and
Sanford Bismarck*

/s/ Loren Hansen

Loren Hansen (ND Atty No. 08233)
Gregory Merz
GRAY PLANT MOOTY
500 IDS Center
80 South 8th Street
Minneapolis, Minnesota 55402
Telephone: (612) 632-3000
Facsimile: (612) 632-4444
loren.hansen@gpmlaw.com
gregory.merz@gpmlaw.com

Attorneys for Respondent Mid Dakota Clinic P.C.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Federal Trade Commission,)
and State of North Dakota,)
)
Plaintiffs,)
)
vs.)
)
Sanford Health, Sanford)
Bismarck and Mid Dakota)
Clinic, P.C.,)
)
Defendants.)

File No. 1:17-cv-133

TRANSCRIPT OF PRELIMINARY INJUNCTION
VOLUME IV

Taken at
United States Courthouse
Bismarck, North Dakota
November 3, 2017

BEFORE THE HONORABLE ALICE R. SENECHAL
-- UNITED STATES DISTRICT COURT MAGISTRATE JUDGE --

1 closing argument presented. What's your --

2 MR. DILLICKRATH: Your Honor, we would like to
3 present closing argument.

4 THE COURT: Okay. And --

03:54

5 MR. COOPER: As would we.

6 THE COURT: Okay. And how much time do you
7 anticipate for each side?

8 MR. DILLICKRATH: About 20 minutes on our end,
9 Your Honor.

03:54

10 THE COURT: Okay.

11 MR. COOPER: I agree.

12 THE COURT: Can we take five minutes before we begin?

13 MR. COOPER: Sure.

14 MR. DILLICKRATH: Thank you, Your Honor.

03:54

15 THE COURT: All right. We'll reconvene at 4:00.

16 (A recess was taken from 3:54 p.m. to 4:00 p.m., the
17 same day.)

18 THE COURT: Before we do the closings, let's just
19 revisit a few housekeeping kinds of things. During the course
20 of ruling on some of the pretrial motions, there was some
21 mention of the possibility of keeping the record open. Am I
22 hearing any request to do that?

04:00

23 MR. DILLICKRATH: No, Your Honor, not from the
24 Federal Trade Commission.

04:00

25 MR. COOPER: Nor from us.

1 THE COURT: All right.

2 MR. DILLICKRATH: I'll speak on behalf of the state
3 of North Dakota as well.

04:00

4 THE COURT: Thank you. Then your proposed findings
5 and conclusions of law will be due on November 13th. And I
6 would expect that both of you are going to want to file those
7 under seal with some redactions, is that correct?

8 MR. COOPER: Yes, Your Honor.

9 MR. DILLICKRATH: Yes, Your Honor.

04:01

10 THE COURT: Okay. Well, we'll just presume that
11 they'll be under seal. And as soon after that date as you can
12 confer with each other and agree on some redactions, please do
13 that and we can get that taken care of.

04:01

14 It will be my goal to get you a decision before
15 Thanksgiving, but it's sure not going to be much before that.
16 I know that doesn't give you much time, but that will be my
17 goal. And, again, there will be some issues with redaction, I
18 expect, that we'll have to deal with, but we'll figure that
19 out.

04:01

20 MR. COOPER: Your Honor, literally as Dr. Jha and I
21 were speaking a few moments ago, the FTC just released an order
22 extending or staying or continuing - I'm not sure what word
23 they used - delaying the start of the administrative proceeding
24 from November 27th, 28th to --

04:02

25 MR. DILLICKRATH: Fourteen days.

1 MR. COOPER: Fourteen days, December 12th.

2 THE COURT: Oh, well, all kinds of time then. Okay.
3 I will do my best to do it as quickly as possible.

04:02

4 MR. COOPER: And I also noted, as Mr. Feinstein just
5 said, the possibility of seeking further stays, so --

6 THE COURT: Okay.

7 MR. COOPER: -- we'll keep the Court informed of that
8 process.

04:02

9 THE COURT: I appreciate that. And I expect that
10 there will be some portions of that that might be need to be
11 redacted as well, so I'll deal with that. And it might even be
12 the case that you get a very brief order initially, with a
13 memorandum opinion to follow, but I haven't decided that yet.

04:02

14 Do you have any other questions or any other
15 housekeeping matters that you would like to address?

16 MR. COOPER: Not for us, Your Honor.

17 MR. DILLICKRATH: Not for us, Your Honor.

18 THE COURT: All right. Then you may proceed,
19 Mr. Dillickrath.

04:02

20 MR. DILLICKRATH: All right. So thank you, Your
21 Honor. May it please the Court. First --

22 (The court reporter reminded Mr. Dillickrath to put
23 his microphone on.)

24 MR. DILLICKRATH: Oh, I'm sorry.

04:03

25 well, thank you again, Your Honor. And may it please

EXHIBIT B

Commission Rule 3.41(f) provides, in relevant part, that a pending “collateral federal court action that relates to the administrative adjudication shall not stay the proceeding . . . [u]nless a court of competent jurisdiction, or the Commission for good cause, so directs.” 16 C.F.R. § 3.41(f). The administrative hearing is scheduled to begin November 28, 2017. The proposed findings of fact for the preliminary injunction hearing are due to be filed on November 10, 2017, and a decision is expected sometime thereafter. Presently, it is not clear whether the two proceedings will in fact overlap.

As reflected in its Rules of Practice, the Commission has committed to moving forward as expeditiously as possible with administrative hearings on the merits. *See, e.g.*, 16 C.F.R. §§ 3.1, 3.11(b)(4), 3.41, 3.46, 3.51-3.52. A two-month delay of the long-scheduled administrative hearing would interfere with that objective in a manner not warranted by present circumstances. At the same time, the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary. Under the circumstances presented, we find that a short continuance is justified. Deferring the start of trial by fourteen days – to December 12, 2017 – and extending remaining pre-hearing deadlines by the same fourteen-day interval – provide additional time for resolution of the district court action without materially delaying the Commission proceeding. We have granted similar, short continuances under comparable circumstances in the past. *See In re Advocate Health Care Network*, 2016 WL 2997850 (F.T.C. May 6, 2016) (granting continuance when “the district court hearing on the Commission's motion for preliminary injunction ha[d] yet to conclude”). Respondents and/or Complaint Counsel, of course, may seek extension of this continuance based on future circumstances. Accordingly,

IT IS HEREBY ORDERED that Respondents’ Expedited Motion for a Two-Month Stay of Administrative Proceedings is **GRANTED IN PART**; and

IT IS FURTHER ORDERED that the evidentiary hearing in this proceeding shall commence on December 12, 2017, and that, unless modified by the Chief Administrative Law Judge, all related pre-hearing deadlines shall be extended by 14 days.

By the Commission.

Donald S. Clark,
Secretary

SEAL:

ISSUED: November 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2017, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Robert Cooper, Esq.
Richard A. Feinstein, Esq.
Boies Schiller Flexner LLP
1401 New York Avenue, NW
Washington, DC 20005
Telephone: (202) 237-2727
rcooper@bsfllp.com
rfeinstein@bsfllp.com

Ronald H. McLean, Esq.
Serkland Law Firm, P.C.
10 Roberts Street North
Fargo, ND 58108
Telephone: (701) 232-8957
rmclean@serklandlaw.com

Counsel for Respondents Sanford Health and Sanford Bismarck

Gregory Merz, Esq.
Loren Hansen, Esq.
Gray Plant Mooty
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 632-3000

gregory.merz@gpmlaw.com
loren.hansen@gpmlaw.com

Attorneys for Respondent Mid Dakota Clinic, P.C.

November 14, 2017

By: /s/ Emily Bowne
Emily Bowne, Attorney

Counsel Supporting the Complaint