

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney



In the Matter of

Sanford Health,
a corporation;

Sanford Bismarck,
a corporation;

and

Mid Dakota Clinic, P.C.,
a corporation.

Docket No. 9376

EXPEDITED MOTION FOR A TWO-MONTH STAY OF ADMINISTRATIVE PROCEEDINGS

Pursuant to Rule 3.41 of the Federal Trade Commission's ("FTC" or "Commission") Rules of Practice, Respondents Sanford Health, Sanford Bismarck (collectively "Sanford") and Mid Dakota Clinic, P.C. ("MDC") move for a two-month postponement of the commencement of the administrative hearing, currently scheduled to begin on November 28, 2017, to commence instead on January 30, 2018. Respondents also move for a corresponding stay of related pre-hearing deadlines. This brief postponement will avoid significant expense and burden as Respondents will abandon the transaction if they do not prevail (either in district court or on appeal) in the parallel proceedings in federal district court on the Commission's and North Dakota Attorney General's ("NDAG") motion for a preliminary injunction in *FTC v. Sanford Health*, No. 1:17-cv-00133-ARS (D.N.D.). See Exhibits A-B (Declarations of Kim J. Patrick, Chief Legal Officer of Sanford and Marvin Lein, CEO of MDC). A four-day evidentiary hearing

on the motion for a preliminary injunction in that proceeding is scheduled to commence on October 30 or 31, 2017.

If the preliminary injunction is granted and Respondents do not prevail on appeal of such injunction, Respondents will abandon the proposed transaction. And under the recent revisions to Rule 3.26, if the preliminary injunction is denied, the administrative proceeding automatically will be stayed or withdrawn on the request of the Respondents. *See also* FTC Revisions to Rules of Practice, 80 Fed. Reg. 15,157, 15,158 (Mar. 23, 2015). Thus, there are two possible scenarios: (1) the preliminary injunction is granted, and Respondents appeal (on an expedited basis) and, should the preliminary injunction be affirmed, then Sanford and MDC will abandon the transaction (*see* Exhibits A-B) thereby rendering the administrative hearing moot, or (2) the preliminary injunction is denied and the administrative hearing is automatically stayed pending disposition by the court of appeals, should the FTC and NDAG seek appellate review. Even if the Commission determines to proceed with the administrative litigation following denial of the preliminary injunction motion (with or without appealing that decision), this brief stay will not hamper the Commission's ultimate ability to obtain relief and will avoid the expenditure of resources by parties (and third parties) on an administrative process that may be moot.

BACKGROUND

In August of 2016, Sanford and MDC agreed that Sanford would acquire MDC. At the time, the parties agreed to make reasonable best efforts to close the transaction by January 1, 2017. In early November of 2016, MDC and Sanford learned that the Federal Trade Commission was investigating the transaction and the parties thereafter agreed to postpone closing the transaction pending the FTC's investigation. In June, Complaint Counsel filed the action in this proceeding and a complaint in the District Court of North Dakota (along with the

NDAG) seeking a preliminary injunction to enjoin the transaction until completion of this administrative proceeding. Sanford and MDC stipulated to the entry of a temporary restraining order which provides that the proposed transaction may not be consummated “until after 11:59 pm eastern time on the fifth business day after the Court rules on the Plaintiffs’ motion for a preliminary injunction.” Order Adopting Stipulated TRO [Docket No. 7], *FTC v. Sanford Health*, No. 1:17-cv-00133-ARS (D.N.D.). A four-day preliminary injunction hearing is scheduled to commence on October 30 or 31, 2017, with proposed findings and conclusions of law due on November 10, 2017.

In the administrative proceeding, fact discovery closed on October 5 and the administrative hearing is scheduled to commence on November 28, 2017. Due to concerns related to the ongoing delay in closing the transaction, Sanford and MDC have agreed that, should they not prevail in the District Court action and any subsequent appeal of a preliminary injunction, they will abandon the transaction. *See* Exhibits A-B. In light of this development, Sanford’s counsel contacted Complaint Counsel to determine if Complaint Counsel would be amenable to filing a joint motion to stay the administrative proceeding. In response, Complaint Counsel conditioned its position on Respondents’ commitment to abandon the transaction without appeal in the event that a preliminary injunction was issued by the District Court.

ARGUMENT

Expedited consideration is appropriate because, unless this brief stay of the administrative proceeding is granted, non-parties will incur unnecessary expenses and inconvenience. Given that proposed findings will not be submitted in the District Court proceeding until November 10, 2017, the hearing in the administrative action will likely commence before a decision issues in the preliminary injunction proceeding, and almost

certainly before the court of appeals can adjudicate any appeal of an injunction, even on an expedited basis. To be clear, while the exact duration of the appeal process is unknowable now, Respondents commit to expediting any appeal to the fullest extent possible.¹

If the Commission grants this motion for a brief stay, then non-parties may avoid the substantial burden of reviewing voluminous documents, performing line-by-line proposed redactions of confidential information, and preparing legal memoranda requesting in camera treatment of those materials. Additionally, Complaint Counsel has identified multiple non-parties as witnesses who may be called live at the administrative hearing. A brief stay will postpone the need for those witnesses to prepare to testify and to travel to Washington, D.C. Moreover, because the administrative hearing may become moot, a temporary stay could save non-parties substantial sums of money in legal fees alone.²

A brief postponement of the administrative hearing will not prejudice Complaint Counsel or the Commission. Given that fact discovery has now concluded, the stay will merely hold the administrative proceeding in abeyance pending resolution of the preliminary injunction proceeding. If the District Court grants the preliminary injunction and that decision is upheld on appeal, the Respondents will abandon their merger and this administrative proceeding will be moot. *See* Exhibits A-B. If the District Court denies the motion for preliminary injunction,

¹ Complaint Counsel's suggestion that Respondents agree to abandon their right to an appeal was presumably proposed in an effort to provide greater clarity to the duration of a potential stay. However, given that the parties will abandon the transaction if the FTC and NDAG obtain a preliminary injunction (and that is affirmed on appeal), there can be no prejudice to the FTC from additional delay during the appeal. Furthermore, a demand which, in effect, forces the parties to choose between incurring additional and unnecessary expenses and giving up their rights to appeal raises the specter of the Commission using the Part III process to influence the result in federal court. *See, e.g.,* [then] Commissioner Ohlhausen, "A SMARTER Section 5" (Sept. 25, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/804511/150925smartersection5.pdf ("I appreciate the concerns that have been raised regarding any increased leverage the FTC gains from the prospect of Part III proceedings and the potential for differing liability standards across the two antitrust agencies.").

² Respondents also note that they face substantial and potentially unnecessary burdens— including legal fees—if a temporary stay is not granted.

Respondents will file a motion pursuant to Rule 3.26 to withdraw the case from adjudication or dismiss the complaint. Rule 3.26(b)-(d). Once such a motion is filed, “the new rule now provides for an automatic withdrawal or automatic stay” of the administrative proceeding, depending on the type of motion. FTC Revisions to Rules of Practice, 80 Fed. Reg. 15,157, 15,158 (Mar. 23, 2015) (emphasis added); *see also* Rule 3.26(c); Rule 3.26(d)(2). Imposing a brief stay now avoids the inefficiency of beginning the presentation of evidence in the administrative hearing only to suspend the proceeding following the ruling by the District Court, without prejudicing the Commission.

RELIEF REQUESTED

For all of the foregoing reasons, Respondents respectfully request that the Commission exercise its discretion under Rule 3.41(b) and/or Rule 3.41(f) to postpone commencement of the administrative hearing until January 30, 2018, or until such later date as may be convenient for the Chief Administrative Law Judge and the Commission. Respondents also request that interim pre-hearing deadlines be stayed for two months.

Dated: October 6, 2017

/s/ Robert M. Cooper

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
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In the Matter of

Sanford Health,
a corporation;

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Docket No. 9376

**[PROPOSED] ORDER GRANTING EXPEDITED MOTION
FOR A TWO-MONTH STAY OF ADMINISTRATIVE PROCEEDINGS**

Good cause having been shown, IT IS HEREBY ORDERED THAT Respondents' Motion for a Two-Month Stay of Administrative Proceedings is GRANTED; and

(1) Commencement of the evidentiary hearing in this matter is moved from November 28, 2017 to January 30, 2018; and

(2) All other proceedings in this matter are stayed for two months or until such later date as may be convenient for the Chief Administrative Law Judge.

By the Commission.

Donald S. Clark
Secretary

ISSUED:

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

**Sanford Health,
a corporation;**

**Sanford Bismarck,
a corporation;**

and

**Mid Dakota Clinic, P.C.,
a corporation.**

Docket No. 9376

DECLARATION OF KIM J. PATRICK

I, Kim J. Patrick, hereby certify the following:

1. I am Chief Legal Officer for Sanford, a North Dakota non-profit corporation;
2. I am authorized to execute this declaration on behalf of Sanford;
3. Sanford Bismarck, a subsidiary of Sanford, has entered into an agreement to acquire Mid Dakota Clinic, P.C. ("MDC") (the "proposed transaction"). Sanford and MDC initially agreed that they would make reasonable best efforts to consummate the proposed transaction by January 1, 2017.
4. Attorneys at the Federal Trade Commission contacted Sanford on or about November 2, 2016 and notified me that they had begun an investigation into the proposed transaction.
5. On June 21, 2017, the Federal Trade Commission filed an administrative complaint seeking to enjoin the proposed transaction as a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act ("administrative proceeding").
6. On June 22, 2017, the Federal Trade Commission and the State of North Dakota filed a complaint in the United States District Court of North Dakota ("District Court") seeking to preliminarily enjoin the proposed transaction until the conclusion of the administrative proceeding ("PI proceeding").

7. On June 22, 2017, the District Court entered a stipulated Temporary Restraining Order that prevents Sanford and MDC from closing the proposed transaction until 5 business days after the District Court rules on the Plaintiffs' motion for a preliminary injunction.
8. Sanford management has discussed the ongoing litigation with management at MDC. For a variety of reasons, including concerns about issues arising from the delay of the transaction, we have agreed that, in the event that the District Court orders a preliminary injunction in the PI proceeding, Sanford and MDC will seek an expedited appeal of that order, but will not seek to further litigate the matter in the administrative proceeding.
9. On the basis of this agreement, Sanford commits to the Federal Trade Commission that, in the event that a preliminary injunction is granted by the District Court and that order is affirmed on appeal, Sanford will abandon the transaction without further litigating the administrative proceeding.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: October 6, 2017



Kim J. Patrick
Chief Legal Officer
Sanford

EXHIBIT B

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**Sanford Health,
a corporation;**

**Sanford Bismarck,
a corporation;**

and

**Mid Dakota Clinic, P.C.,
a corporation.**

Docket No. 9376

DECLARATION OF MARVIN LEIN

I, Marvin Lein, hereby certify the following:

1. I am Chief Executive Officer of Mid Dakota Clinic, P.C. ("MDC").
2. I am authorized to execute this declaration on behalf of MDC.
3. Sanford Bismarck, a subsidiary of Sanford, has entered into an agreement to acquire Mid Dakota Clinic, P.C. ("MDC") (the "proposed transaction"). Sanford and MDC initially agreed that they would make reasonable best efforts to consummate the proposed transaction by January 1, 2017.
4. In early November of 2016, I learned that the Federal Trade Commission had commenced an investigation into the proposed transaction.
5. On June 21, 2017, the Federal Trade Commission filed an administrative complaint seeking to enjoin the proposed transaction as a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act ("administrative proceeding").
6. On June 22, 2017, the Federal Trade Commission and the State of North Dakota filed a complaint in the United States District Court of North Dakota ("District Court") seeking to preliminarily enjoin the proposed transaction until the conclusion of the administrative proceeding ("PI proceeding").

7. On June 22, 2017, the District Court entered a stipulated Temporary Restraining Order that prevents Sanford and MDC from closing the proposed transaction until 5 business days after the District Court rules on the Plaintiffs' motion for a preliminary injunction.
8. MDC management has discussed the ongoing litigation with management at Sanford. For a variety of reasons, including concerns arising from the delay of the transaction, we have agreed that, in the event that the District Court orders a preliminary injunction in the PI proceeding, Sanford and MDC will seek an expedited appeal of that order, but will not seek to further litigate the matter in the administrative proceeding.
9. On the basis of this agreement, MDC commits to the Federal Trade Commission that, in the event that a preliminary injunction is granted by the District Court and that order is affirmed on appeal, MDC will abandon the transaction without further litigating the administrative proceeding.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: October 6, 2017



Marvin Lein
Chief Executive Officer
Mid Dakota Clinic, P.C.

CERTIFICATE OF SERVICE

I certify that on October 6, 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 S. 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:

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Attorneys for Defendant Mid Dakota Clinic, P.C.

Dated: October 6, 2017

By: /s/ Hershel A. Wancjer
Hershel A. Wancjer

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy of the foregoing document sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: October 6, 2017

By: /s/ Hershel A. Wancjer
Hershel A. Wancjer

Notice of Electronic Service

I hereby certify that on October 06, 2017, I filed an electronic copy of the foregoing 2. Respondents' Expedited Motion for Two-Month Stay of Administrative Proceedings (addressed to the Commission), with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
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Washington, DC, 20580

I hereby certify that on October 06, 2017, I served via E-Service an electronic copy of the foregoing 2. Respondents' Expedited Motion for Two-Month Stay of Administrative Proceedings (addressed to the Commission), upon:

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