

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

**RESPONDENTS' MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF
EXPEDITED MOTION TO STAY THE ADMINISTRATIVE HEARING**

Pursuant to Commission Rule 3.22(d), Respondents Sanford Health, Sanford Bismarck (collectively "Sanford") and Mid Dakota Clinic, P.C. ("MDC") request leave to file a reply brief. Rule 3.22(d) permits reply pleadings with leave of the Commission where such reply would draw the Commission's attention to "recent important developments or controlling authority that could not have been raised earlier in the party's principal brief." A reply is warranted here to address Complaint Counsel's misleading descriptions of the proceedings in *In the matter of Advocate Health Care Network*, Docket No. 9369, and *In the matter of The Penn State Hershey Medical Center*, Docket No. 9368. These issues could not have been raised in our principal brief (filed on October 6, 2017) because there was no basis to anticipate that Complaint Counsel would cite these cases while leaving out critical facts about those proceedings that, if anything, further demonstrate that the motion for stay is straightforward, consistent with past proceedings

and should be granted. Accordingly, good cause exists to grant this motion. Respondents respectfully request that the Commission receive and file the proposed reply brief attached as Attachment A. *See* Rule 3.22(d) (“The reply may be conditionally filed with the motion seeking leave to reply.”).

Dated: October 13, 2017

/s/ Robert M. Cooper

Robert M. Cooper
Richard A. Feinstein
Hershel A. Wancjer
Nicholas A. Widnell
Boies Schiller Flexner LLP
1401 New York Avenue, NW
Washington, DC 20005
T: (202) 237-2727
F: (202) 237-6131
rcooper@bsflp.com
rfeinstein@bsflp.com
hwancjer@bsflp.com
nwidnell@bsflp.com

Counsel to Sanford Health and Sanford Bismarck

/s/ Loren Hansen

Loren Hansen
ND Bar No. 08233
Gregory R. Merz
Gray, Plant, Mooty, Mooty & Bennett, P.A.
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 632-3208
loren.hansen@gpmlaw.com
gregory.merz@gpmlaw.com

Counsel to Mid Dakota Clinic, P.C.

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Docket No. 9376

**PROPOSED ORDER GRANTING RESPONDENTS' MOTION
FOR LEAVE TO FILE A REPLY IN SUPPORT OF
EXPEDITED MOTION TO STAY THE ADMINISTRATIVE HEARING**

Good cause having been shown, IT IS HEREBY ORDERED THAT Respondents' Motion for Leave to File a Reply in Support of Expedited Motion to Stay the Administrative Hearing, is GRANTED; and it is further

ORDERED that the Reply in Support of Expedited Motion to Stay the Administrative Hearing, contained in Attachment A to Respondents' Motion, be deemed filed as of the date of this Order.

By the Commission.

Donald S. Clark
Secretary

ISSUED:

ATTACHMENT A

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Docket No. 9376

**RESPONDENTS' REPLY IN SUPPORT OF
EXPEDITED MOTION TO STAY THE ADMINISTRATIVE HEARING**

Respondents seek to file a reply in this matter because Complaint Counsel omits critical facts regarding *In the matter of Advocate Health Care Network*, Docket No. 9369, and *In the matter of The Penn State Hershey Medical Center*, Docket No. 9368 that are important to bring to the Commission's attention as it considers the expedited stay motion. As described in Respondents' initial motion, a stay should be granted here because Respondents have confirmed that they will not pursue the proposed transaction if the federal court grants the preliminary injunction and it is upheld on appeal. Contrary to Complaint Counsel's selective retelling of the facts of *Advocate* and *Penn State Hershey*, the proceedings in both cases *confirm* that a stay should be granted under these circumstances.

First, in *Advocate*, a motion for a stay was filed without initially committing to abandon the transaction in the event the respondents failed to prevail in the preliminary injunction action.

In a motion for leave to file a reply after Complaint Counsel filed its opposition, *Advocate* subsequently made such a commitment.¹ The Commission denied *Advocate*'s motion to stay without prejudice as *premature* (because it was filed 108 days before the scheduled hearing)² and later *granted* a subsequent joint motion to stay.³ In contrast, in this case, the hearing is just 43 days away, and Respondents submitted with their stay motion declarations from both Sanford and MDC officers unequivocally stating that the parties will abandon the transaction if they do not prevail in the preliminary injunction proceeding or any appeal thereof.⁴ Complaint Counsel fails to address these facts, which make clear that the proceedings in *Advocate* demonstrate that a stay should be granted here.

Second, in *Penn State Hershey*, respondents filed a motion in February to stay a hearing scheduled for mid-May, but did not seek to change any of the immediate discovery dates in the Part III proceeding, thereby obviating the need for an immediate decision.⁵ The Commission relied on this fact and denied the motion without prejudice, again as *premature*.⁶ And again, the Commission *granted* a subsequent joint motion to stay seven weeks later.⁷ Here, fact discovery ended on October 5, 2017 (the day before the stay motion was filed), Respondents seek a stay of

¹ *In the matter of Advocate Health Care Network*, Docket No. 9369, Motion for Leave to File Reply (Feb. 24, 2016).

² *Advocate*, Commission Order Denying Motion to Stay the Administrative Hearing. In *Advocate*, Respondents filed their stay motion on February 5 and the hearing was scheduled for May 24. Here, the administrative hearing is scheduled to commence on November 28, 2017, less than 7 weeks from now.

³ *Advocate*, Order Granting Continuance, at 2 (May 6, 2016) (noting Respondents' commitment to abandon the transaction if the FTC prevailed in federal court).

⁴ Respondents' Motion to Stay, Exhibits A & B.

⁵ *In the matter of The Penn State Hershey Medical Center*, Docket No. 9368, Complaint Counsel Opposition, at 5-6 (Mar. 3, 2016).

⁶ *Penn State Hershey*, Commission Order Denying Motion to Stay the Administrative Hearing (March 21, 2016).

⁷ *Penn State Hershey*, Commission Order Granting Continuance (May 12, 2016).

all remaining deadlines, and the administrative hearing is scheduled to commence in less than seven weeks.⁸ The proceedings in *Penn State Hershey* thus similarly confirm that a stay should be granted here. Complaint Counsel fails to address any of these facts.

Third, in both *Advocate* and *Penn State Hershey*, the Respondents and Complaint Counsel subsequently filed joint motions asserting that a stay was appropriate given the burden and unnecessary expenses to third parties resulting from proceeding with an administrative hearing that almost certainly never would be completed. *Advocate*, Joint Expedited Motion for 22-Day Stay of Administrative Proceedings at 3-4 (Apr. 26, 2016); *Penn State Hershey*, Joint Expedited Motion for Continuance of Administrative Proceedings at 2-3 (May 4, 2016). In both cases, the Commission granted the joint motions. *Advocate*, Commission Order Granting Continuance at 2 (May 6, 2016) (identifying concerns with “the burden and cost associated with preparing witnesses to testify and filing motions for in camera treatment of their confidential materials”); *Penn State Hershey*, Commission Order Granting Continuance (May 12, 2016). Here, Respondents already have raised the same issues—yet another fact Complaint Counsel fails to address.

Complaint Counsel’s citation of *Advocate* and *Penn State Hershey* also inadvertently illuminates a profound concern with how they have approached Respondents’ motion. As indicated, in both cases Complaint Counsel ultimately *joined* the Respondents in seeking a stay to avoid the potentially unnecessary expenditure of considerable resources and inconveniencing of third parties. Here, by contrast, Complaint Counsel has used the stay as a sword to coerce Respondents into abandoning their right to appeal an adverse decision in federal court. Respondents’ stay motion explained that Complaint Counsel indicated they would not oppose the

⁸ Respondents Motion to Stay, at 1, 3.

motion if Sanford and MDC agreed not to appeal in the event the district court issues a preliminary injunction. *See* Motion for Stay at 4 n.1 (“[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.”). By virtue of its opposition, this is now Complaint Counsel’s public position.

The Commission should not sanction a tactic that compels a respondent to give up its right to appeal in exchange for obtaining a stay that would avoid unnecessary costs and prejudice no one. If the Commission truly wishes to defend the use of the Part III process regarding unconsummated mergers as fair and impartial, it cannot have it both ways. It cannot assert that preliminary injunction actions in federal court brought pursuant to Section 13(b) of the FTC Act, 15 USC § 53(b), are fundamentally no different than those brought by the Department of Justice in federal court while, at the same time, condoning Complaint Counsel’s actions here. Imposing unnecessary costs on respondents who decline to relinquish their absolute right to appeal a preliminary injunction is a quintessential demonstration of leveraging the Part III process to affect the outcome in federal court. Moreover, Complaint Counsel’s willingness to impose unnecessary expenses on third parties to facilitate its tactics against Respondents is highly improper.

For all of the foregoing reasons, and the reasons set forth in the expedited motion to stay the administrative hearing, the motion should be granted.

Dated: October 13, 2017

/s/ Robert M. Cooper

Robert M. Cooper
Richard A. Feinstein
Hershel A. Wancjer
Nicholas A. Widnell
Boies Schiller Flexner LLP
1401 New York Avenue, NW
Washington, DC 20005
T: (202) 237-2727
F: (202) 237-6131
rcooper@bsfllp.com
rfeinstein@bsfllp.com
hwancjer@bsfllp.com
nwidnell@bsfllp.com

Counsel to Sanford Health and Sanford Bismarck

/s/ Loren Hansen

Loren Hansen
ND Bar No. 08233
Gregory R. Merz
Gray, Plant, Mooty, Mooty & Bennett, P.A.
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 632-3208
loren.hansen@gpmlaw.com
gregory.merz@gpmlaw.com

Counsel to Mid Dakota Clinic, P.C.

CERTIFICATE OF SERVICE

I certify that on October 13, 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

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:

Thomas Dillickrath, Esq.
Kevin Hahm, Esq.
Chris Caputo, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
tdillickrath@ftc.gov
khahm@ftc.gov
ccaputo@ftc.gov

Attorneys for Plaintiff Federal Trade Commission

Gregory R. Merz, Esq.
Loren Hansen, Esq.
Gray Plant Moody
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 632-3208
gregory.merz@gpmlaw.com
loren.hansen@gpmlaw.com

Attorneys for Defendant Mid Dakota Clinic, P.C.

Dated: October 13, 2017

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

Notice of Electronic Service

I hereby certify that on October 13, 2017, I filed an electronic copy of the foregoing Respondents' Motion for Leave to File a Reply in Support of Expedited Motion to Stay the Administrative Hearing, with:

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

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on October 13, 2017, I served via E-Service an electronic copy of the foregoing Respondents' Motion for Leave to File a Reply in Support of Expedited Motion to Stay the Administrative Hearing, upon:

Emily Bowne
Attorney
Federal Trade Commission
ebowne@ftc.gov
Complaint

Alexander Bryson
Attorney
Federal Trade Commission
abryson@ftc.gov
Complaint

Christopher Caputo
Attorney
Federal Trade Commission
ccaputo@ftc.gov
Complaint

Stephanie Cummings
Attorney
Federal Trade Commission
srcummings@ftc.gov
Complaint

Jamie France
Attorney
Federal Trade Commission
jfrance@ftc.gov
Complaint

Kevin Hahm
Attorney
Federal Trade Commission
khahm@ftc.gov
Complaint

Melissa Hill
Attorney
Federal Trade Commission

mchill@ftc.gov
Complaint

Laura Krachman
Attorney
Federal Trade Commission
lkrachman@ftc.gov
Complaint

Rohan Pai
Attorney
Federal Trade Commission
rpai@ftc.gov
Complaint

Neal Perlman
Attorney
Federal Trade Commission
nperlman@ftc.gov
Complaint

Cathleen Williams
Attorney
Federal Trade Commission
cwilliams@ftc.gov
Complaint

Gregory Merz
Attorney
Gray Plant Mooty
gregory.merz@gpmlaw.com
Respondent

Loren Hansen
Attorney
Gray Plant Mooty
loren.hansen@gpmlaw.com
Respondent

Robert Cooper
Partner
Boies Schiller Flexner LLP
rcooper@bsfllp.com
Respondent

Richard Feinstein
Partner
Boies Schiller Flexner LLP
rfeinstein@bsfllp.com
Respondent

Samuel Kaplan
Partner
Boies Schiller Flexner LLP
skaplan@bsfllp.com
Respondent

Hershel Wancjer
Counsel

Boies Schiller Flexner LLP
hwancjer@bsfllp.com
Respondent

Nicholas Widnell
Counsel
Boies Schiller Flexner LLP
nwidnell@bsfllp.com
Respondent

James Kraehenbuehl
Associate
Boies Schiller Flexner LLP
jkraehenbuehl@bsfllp.com
Respondent

Amarachukwu Osisima
Associate
Boies Schiller Flexner LLP
aosisima@bsfllp.com
Respondent

Amanda Strick
Associate
Boies Schiller Flexner LLP
AStrick@BSFLLP.com
Respondent

Sean Johnson
Associate
Boies Schiller Flexner LLP
sjohnson@bsfllp.com
Respondent

Matthew Vigeant
Associate
Boies Schiller Flexner LLP
mvigeant@bsfllp.com
Respondent

Cynthia Christian
Partner
Boies Schiller Flexner LLP
cchristian@bsfllp.com
Respondent

David Owyang
Attorney
Federal Trade Commission
dowyang@ftc.gov
Complaint

Thomas Dillickrath
Attorney
Federal Trade Commission
tdillickrath@ftc.gov
Complaint

Hershel Wancjer
Attorney