

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney



ORIGINAL

In the Matter of

Sanford Health,
a corporation;

Sanford Bismarck,
a corporation;

and

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

Docket No. 9376

**JOINT EXPEDITED MOTION FOR FURTHER
CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS**

Pursuant to Rule 3.41 of the Federal Trade Commission’s (“FTC” or “Commission”) Rules of Practice, Complaint Counsel, Respondents Sanford Health, Sanford Bismarck (collectively “Sanford”) and Mid Dakota Clinic, P.C. (“MDC”) jointly move for a further continuance of the commencement of the administrative hearing in the above-captioned matter, currently scheduled to begin on December 12, 2017, to commence instead on January 17, 2018. Complaint Counsel and Respondents also move for a corresponding stay of related pre-hearing deadlines.

ARGUMENT

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. On June 23, 2017, Complaint Counsel and the North Dakota Attorney General ("NDAG") filed the action in this proceeding and a complaint in the District Court of North Dakota, Western Division, 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 concluded on November 3, 2017, and proposed findings of fact and conclusions of law were filed on November 13, 2017. At this point, the parties do not know when the District Court will issue its decision on the FTC's and NDAG's motion for a preliminary injunction, although 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." PI Hearing Transcript Vol. 4 at 251. [Exhibit 1].

On November 3, 2017, the Commission issued an Order Granting 14-Day Continuance in this proceeding ("Nov. 3 Order") [Exhibit 2]. The Commission noted that Respondents have represented—in declarations from Sanford's Chief Legal Officer and MDC's CEO—"that if, after all appeals in the injunction proceeding are exhausted, they are enjoined from consummating the transaction, they will abandon the transaction." Nov. 3 Order at 1 (citing Respondents' October 6, 2017 Expedited Motion for a Two-Month Stay of Administrative Proceedings at 2-3, Exhibits A-B). In addition, the Commission stated: "Respondents and/or

Complaint Counsel, of course, may seek an extension of this continuance based on future circumstances.” *Id.* at 2.

Complaint Counsel and Respondents believe that an extension of the continuance until January 17, 2017 is warranted for several reasons:

1. Absent an extension of the continuance, the parties—and, importantly, third parties—will be required to devote significant resources to meeting various interim deadlines between now and December 12, 2017 (the current commencement date for the administrative hearing), including extensive document and data review and redaction, and motion practice relating to the *in camera* treatment of commercially sensitive information, much of which comes from non-parties to this matter.
2. Absent an extension of the continuance, non-party witnesses (as well as party witnesses)—virtually all of whom reside outside of the Washington, D.C. area—will need to incur significant expenses, including legal fees, associated with preparation for the administrative hearing and travel costs, which will be particularly burdensome given that the timing of the administrative trial is scheduled to overlap with holiday-related travel and disruptions.
3. Many non-party (and Respondents’) witnesses who may be called to testify live are practicing physicians. A brief stay will provide sufficient time for them to reschedule patient care and/or secure alternative coverage.
4. Absent an extension of the continuance, the Office of the Administrative Law Judge will be required to devote time and resources to pre-hearing preparation and adjudication of issues for a hearing that is unlikely to materialize.

With respect to the imposition of burdens on parties and non-parties, the Commission already has noted that “the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary.” Nov. 3 Order at 2 [Exhibit 2].

With respect to the prospects for the administrative hearing materializing, Respondents reiterate that 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* Respondents’ October 6, 2017 Expedited Motion for a Two-Month Stay of Administrative Proceedings at 2-3, Exhibits A-B. Moreover, under the existing schedule the administrative hearing might commence before the District Court issues its opinion, and is certain to commence before the Eighth Circuit Court of Appeals can adjudicate any appeal of an injunction, even on an expedited basis. For avoidance of doubt, Respondents also reiterate that they will seek expedited treatment of any appeal should an injunction issue.

Granting this motion will not prejudice anyone, given that Complaint Counsel can seek a stay pending appeal should the motion for a preliminary injunction be denied. Indeed, that is the very reason for the five-day “waiting period” that is embodied in the TRO. It is also consistent with prior Commission decisions to stay administrative proceedings in *In the matter of Advocate Health Care Network*, Docket No. 9369, Order Granting Continuance, at 2 (May 6, 2016) (noting Respondents’ commitment to abandon the transaction if the FTC prevailed in federal court) and *In the matter of The Penn State Hershey Medical Center*, Docket No. 9368, Commission Order Granting Continuance (May 12, 2016). As here, both the *Advocate* and *Penn State Hershey* continuance orders were issued in the wake of joint expedited motions.

RELIEF REQUESTED

For all of the foregoing reasons, Complaint Counsel and Respondents respectfully request that the Commission exercise its discretion under Rule 3.41 to postpone commencement of the administrative hearing until January 17, 2018, or until such later date as may be convenient for the Chief Administrative Law Judge and the Commission. Complaint Counsel and Respondents also request that interim pre-hearing deadlines be stayed for the same period of time. A proposed order is attached.

Dated: November 14, 2017

/s/ Thomas Dillickrath

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
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Mid Dakota Clinic, P.C.,)	
a corporation.)	
)	

[PROPOSED] ORDER GRANTING JOINT EXPEDITED MOTION FOR FURTHER CONTINUANCE OF ADMINISTRATIVE PROCEEDINGS

Good cause having been shown,

IT IS HEREBY ORDERED THAT Complaint Counsel’s and Respondents’ Joint Expedited Motion for Further Continuance of Administrative Proceedings is **GRANTED**; and

- (1) Commencement of the evidentiary hearing in this matter is moved from December 12, 2017 to January 17, 2018; and
- (2) All other interim pre-hearing deadlines be stayed for the same period of time.

By the Commission.

Donald S. Clark
Secretary

ISSUED:

EXHIBIT 1

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.

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.

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.

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.

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.

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

EXHIBIT 2

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 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:

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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
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Washington, DC 20580

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

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Dated: November 14, 2017

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