

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



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to Rule 3.26, if the preliminary injunction is denied, the administrative proceeding automatically will be stayed or withdrawn on the request of the Respondents.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 the District Court 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.

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.<sup>1</sup>

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<sup>1</sup> 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](https://www.ftc.gov/system/files/documents/public_statements/804511/150925smartersection5.pdf) ("I appreciate

If the motion for a brief stay is granted, 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.<sup>2</sup>

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, 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

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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.”).

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

administrative hearing only to suspend the proceeding following the ruling by the District Court, without prejudicing the Commission.

In the event that the Commission grants the requested motion to delay the start of the hearing until January 30, 2018, Respondents request modification of the Scheduling Order. The Chief Administrative Law Judge entered the Scheduling Order in this matter on July 14, 2017. This is the first motion by a Party to modify the Scheduling Order. Respondents hereby request the following amendments detailed below:

Event	Current Deadline	Proposed Deadline
Deadline for simultaneous exchange of expert witness reports (to be provided by 5 p.m. ET).	October 17, 2017	December 18, 2018
Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists.  Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.	October 25, 2017	December 27, 2018
Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists.  Respondents' Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.	November 2, 2017	January 4, 2018
Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).	November 2, 2017	January 4, 2018

Event	Current Deadline	Proposed Deadline
Deadline for simultaneous exchange of rebuttal expert report(s) (to be provided by 5 p.m. ET).	November 3, 2017	January 5, 2018
Deadline for filing motions <i>in limine</i> to preclude admission of evidence.	November 13, 2017	January 15, 2018
Deadline for filing motions for <i>in camera</i> treatment of proposed trial exhibits.	November 13, 2017	January 15, 2018
Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.	November 14, 2017	January 16, 2018
Exchange and serve courtesy copy on ALJ of objections to final proposed witness lists and exhibit lists.	November 14, 2017	January 16, 2018
Complaint Counsel files pretrial brief supported by legal authority.	November 16, 2017	January 18, 2018
Deadline for filing responses to motions <i>in limine</i> to preclude admission of evidence.	November 16, 2017	January 18, 2018
Deadline for filing responses to motions for <i>in camera</i> treatment of proposed trial exhibits.	November 16, 2017	January 18, 2018
Exchange proposed stipulations of law, facts, and authenticity.	November 16, 2017	January 18, 2018
Respondents' Counsel files pretrial brief supported by legal authority.	November 22, 2017	January 24, 2018
Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.	November 27, 2017	January 29, 2018
Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC	November 28, 2017	January 30, 2018

Dated: October 6, 2017

/s/ Robert M. Cooper

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
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In the Matter of

Sanford Health,  
a corporation;

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

Docket No. 9376

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

On October 6, 2017, Respondents Sanford Health, Sanford Bismarck (collectively “Sanford”) and Mid Dakota Clinic, P.C. (“MDC”) filed an Expedited Motion for Two-Month Stay of Administrative Proceedings. The Hearing in this matter is scheduled to begin on November 28, 2017. In its motion, Respondents state as follows:

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.). . . . 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.

In light of the forthcoming ruling in the preliminary injunction proceeding, Respondents request that the Scheduling Order be amended to move certain deadlines. Respondents state that revising the Scheduling Order will avoid significant burdens and expenses on third parties.

Respondents have not previously sought any extensions to other deadlines in the Scheduling Order, issued on July 14, 2017. Revising the remaining deadlines in the Scheduling Order will avoid costly and resource-intensive work that may ultimately be unnecessary. Based on the foregoing, there is good cause for the requested extensions. 16 C.F.R. §3.21(c)(2).

Accordingly, the Joint Motion is GRANTED. The Scheduling Order is hereby revised and the remaining deadlines are as follows:

Event	Current Deadline	Proposed Deadline
Deadline for simultaneous exchange of expert witness reports (to be provided by 5 p.m. ET).	October 17, 2017	December 18, 2018
Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists.  Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.	October 25, 2017	December 27, 2018
Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists.  Respondents' Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.	November 2, 2017	January 4, 2018
Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).	November 2, 2017	January 4, 2018
Deadline for simultaneous exchange of rebuttal expert report(s) (to be provided by 5 p.m. ET).	November 3, 2017	January 5, 2018
Deadline for filing motions <i>in limine</i> to preclude admission of evidence.	November 13, 2017	January 15, 2018
Deadline for filing motions for <i>in camera</i> treatment of proposed trial exhibits.	November 13, 2017	January 15, 2018
Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.	November 14, 2017	January 16, 2018

Exchange and serve courtesy copy on ALJ of objections to final proposed witness lists and exhibit lists.	November 14, 2017	January 16, 2018
Complaint Counsel files pretrial brief supported by legal authority.	November 16, 2017	January 18, 2018
Deadline for filing responses to motions in <i>limine</i> to preclude admission of evidence.	November 16, 2017	January 18, 2018
Deadline for filing responses to motions for <i>in camera</i> treatment of proposed trial exhibits.	November 16, 2017	January 18, 2018
Exchange proposed stipulations of law, facts, and authenticity.	November 16, 2017	January 18, 2018
Respondents' Counsel files pretrial brief supported by legal authority.	November 22, 2017	January 24, 2018
Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.	November 27, 2017	January 29, 2018
Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC	November 28, 2017	January 30, 2018

All of the Additional Provisions in the July 14, 2017 Scheduling Order shall remain in effect.

ORDERED:

\_\_\_\_\_  
Chief Administrative Law Judge

Date:

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  
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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.*

PUBLIC

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 Respondents' Expedited Motion for Two-Month Stay of Administrative Proceedings (addressed to Judge Chappell), 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 Respondents' Expedited Motion for Two-Month Stay of Administrative Proceedings (addressed to Judge Chappell), upon:**

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