

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the matter of

WILH. WILHELMSSEN HOLDING ASA,
WILHELMSSEN MARITIME SERVICES AS,
RESOLUTE FUND II, L.P.,
DREW MARINE INTERMEDIATE II B.V.,
and
DREW MARINE GROUP, INC.

Docket No. 9380

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

Pursuant to Commission Rule 3.22(d), Respondents hereby 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." First, Respondents' reply is warranted to address that Complaint Counsel ignores the important fact that Wilhelmsen Ships Service President Bjoerge Grimholt, on behalf of the Wilhelmsen Respondents, submitted a declaration that "Wilhelmsen Maritime Services AS will abandon the transaction without further litigating the administrative proceeding,"¹ if the District Court grants a preliminary injunction. In cases, including those cited by Complaint Counsel, the Commission has found good cause to stay administrative proceedings during the pendency of the federal court

¹ Respondents' Expedited Motion for Continuance of Admin. Hr'g at 2 (May 15, 2018), Ex. A. (Decl. of B. Grimholt) ¶6.

action, relying on similar commitments by other respondents. Second, Respondents' reply is warranted to address Complaint Counsel's selective rendition of the facts of *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. At the time Respondents filed their principal brief, they could not have known that Complaint Counsel would cite to cases, without including critical facts that would demonstrate motions for continuance of proceedings have been granted in circumstances similar to the facts at issue in the present proceeding. As such, the requisite good cause is present for the Commission to grant this motion. Rule 3.22(d) provides that the "reply may be conditionally filed with the motion seeking leave to reply." As such, Respondents respectfully request that the Commission receive and file the proposed reply brief attached hereto as Attachment A.

Dated: May 30, 2018
Washington, DC

Respectfully submitted,

/s/ Corey W. Roush

Corey W. Roush

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**[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 **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:

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of

WILH. WILHELMSSEN HOLDING ASA,
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Docket No. 9380

**RESPONDENTS' REPLY IN SUPPORT OF RESPONDENTS' EXPEDITED MOTION
FOR CONTINUANCE OF ADMINISTRATIVE HEARING**

Respondents hereby submit this reply in support of its expedited motion for continuance of the administrative hearing.

First, Complaint Counsel ignores that Wilhelmsen Ships Service President Bjoerge Grimholt, on behalf of the Wilhelmsen Respondents, submitted a declaration that “Wilhelmsen Maritime Services AS will abandon the transaction without further litigating the administrative proceeding”¹ if the District Court grants a preliminary injunction. In cases, including those cited by Complaint Counsel, the Commission has found good cause to stay administrative proceedings during the pendency of the federal court action, relying on similar commitments by respondents. Complaint Counsel also ignores caselaw where the Commission has found good cause to stay administrative proceedings during the pendency of the federal court action. In *In the Matter of*

¹ Respondents’ Expedited Motion for Continuance of Admin. Hr’g at 2 (May 15, 2018), Ex. A. (Decl. of B. Grimholt) ¶6.

Sanford Health, Docket No. 9376 (“*Sanford Health*”) the Commission stayed proceedings when the respondents in that action moved unilaterally for a stay of the administrative proceedings because the respondents confirmed that they would abandon the transaction if they were enjoined from consummating the transaction.² The Commission later granted a *joint* motion by complaint counsel and respondents, based in part on the respondents’ reiteration of their intention to abandon the transaction if enjoined from consummating the transaction.³ Respondents in this present action have also shown good cause to stay the proceeding because they will abandon the transaction if the District Court enters a preliminary injunction.⁴

The Commission has previously concluded that “the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary.”⁵ Respondents believe that a continuance to postpone commencement of the administrative hearing by 90 days, or until such later date as may be convenient for the Chief Administrative Law Judge and the Commission, 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 July 24, 2018, the current commencement date for the administrative hearing.
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 especially burdensome considering some will have to travel from outside of the United States, including from Canada, Norway, and Singapore.

² *In the Matter of Sanford Health*, Order Granting 14-Day Continuance (Nov. 3, 2017).

³ *In the Matter of Sanford Health*, Order Granting Further Continuance of Admin. Proceedings (. Nov. 21, 2017).

⁴ Respondents’ Expedited Motion for Continuance of Admin. Hr’g at 2 (May 15, 2018), Ex. A. (Decl. of B. Grimholt) ¶6.

⁵ *In the Matter of Sanford Health*, Order Granting 14-Day Continuance (Nov. 3, 2017).

3. 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.

Accordingly, good cause exists to grant Respondents' motion for a continuance.

Second, Compliant Counsel's selective rendition of the facts of *In the Matter of Advocate Health Care Network*, Docket No. 9369 ("*Advocate Health*"), and *In the Matter of The Penn State Hershey Medical Center*, Docket No. 9368 ("*Penn State Hershey*") must be addressed. The respondents in *Advocate Health* filed a motion to stay without stating their commitment to abandon the transaction if the federal court granted a preliminary injunction, but later filed a reply with such a commitment.⁶ In addition, the Commission later granted a joint motion to stay, noting the respondents' commitment to abandon the transaction.⁷ Unlike the respondents in *Advocate Health*, Respondents in this action submitted a declaration with their initial motion stating their intention to abandon the transaction if they fail to prevail in the federal court action.⁸ As such, the facts of *Advocate Health* make clear that a continuance should be granted in these present proceedings.

The respondents in *Penn State Hershey* filed their motion for a stay approximately four months before the scheduled hearing date, but did not seek to amend the immediate discovery dates in the administrative proceedings, which resulted in the Commission ruling that the motion was premature.⁹ However, the Commission granted a subsequent *joint* motion to stay seven weeks later, based on the parties' assertion that a stay was appropriate given the burden and unnecessary expenses to third parties resulting from proceeding with an administrative hearing

⁶ *In the Matter of Advocate Health Care Network*, Respondents' Mot. for Leave to File A Reply ISO Respondents' Mot. to Stay the Admin. Hr'g (Feb. 24, 2016).

⁷ *In the Matter of Advocate Health Care Network*, Order Granting Continuance, at 2 (May 6, 2016).

⁸ Respondents' Expedited Mot. for Continuance of Admin. Hr'g at 2 (May 15, 2018), Ex. A.

⁹ *In the Matter of The Penn State Hershey Medical Center*, Order Denying Mot. to Stay the Admin. Hr'g (Mar. 21, 2016).

that almost certainly never would be completed.¹⁰ In this present action, Respondents filed a motion for continuance with a request to extend discovery deadlines. The motion was filed on May 15, 2018, 10 days before the deadline for issuing document requests, interrogatories, and subpoenas (except for discovery purposes of authenticity/admissibility of exhibits), and approximately 10 weeks before the scheduled hearing date. The complete history of proceedings in *Penn State Hershey*, where a stay was subsequently granted, demonstrates that Respondents' motion for a continuance should be granted.

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.

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¹⁰ *In the Matter of The Penn State Hershey Medical Center*, Order Granting Continuance (May 12, 2016).

Dated: May 30, 2018
Washington, DC

Respectfully submitted,

/s/ Corey W. Roush

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CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy 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 documents that is available for review by the parties and the adjudicator.

Dated: May 30, 2018

By: /s/ Corey W. Roush

Notice of Electronic Service

I hereby certify that on May 30, 2018, I filed an electronic copy of the foregoing Respondents' Motion For Leave To File A Reply In Support Of Respondents' Motion To Stay Administrative Hearing, with:

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

Donald Clark
600 Pennsylvania Ave., NW
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I hereby certify that on May 30, 2018, I served via E-Service an electronic copy of the foregoing Respondents' Motion For Leave To File A Reply In Support Of Respondents' Motion To Stay Administrative Hearing, upon:

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