UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of	)	
Sanford Health,	)	**Docket No. 9376**
a corporation;	)	
Sanford Bismarck,	)	
a corporation;	)	
and	)	
Mid Dakota Clinic, P.C.,	)	
a corporation.	)	

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' MOTION TO STAY

Respondents Sanford Health and Sanford Bismarck (collectively, "Sanford"), and Mid Dakota Clinic, P.C. ("MDC") have moved to stay the administrative hearing in this case,

Respondents' motion to stay should therefore be denied.

ARGUMENT

I. A Pending Preliminary Injunction Proceeding Does not Constitute "Good Cause" for a Stay of the Part 3 Proceeding.

The Part 3 Rules, as amended in 2009, establish a schedule for administrative hearings. Under Rule 3.11(b)(4), the administrative hearing is scheduled five months after the issuance of the complaint in any case involving a merger which the Commission has sought to preliminarily enjoin under §13(b) of the FTC Act, 15 U.S.C. § 53(b). Rule 3.41(b) expressly provides that, "The hearing will take place on the date specified in the notice accompanying the complaint pursuant to § 3.11(b)(4) . . . ." And, Rule 3.41(f) provides that Part 3 proceedings will not be stayed due to the pendency of a collateral federal court action unless "the Commission *for good cause* so directs . . . ." (emphasis added).

This five-month rule was part of a "comprehensive and systematic" set of 2009 revisions

ruled on the preliminary injunction motion pending in federal court. The Commission denied that motion, explaining:

already indicated that they will appeal an adverse district court decision – acknowledge that, "the exact duration of the appeal process is unknowable . . . ."[7]

Finally, Respondents themselves are responsible for delaying the federal court proceeding, which will now occur only one month prior to the start of the administrative proceeding. After filing a Complaint for Temporary Restraining Order and Preliminary Injunction in the District of North Dakota on June 22, 2017, Complaint Counsel requested that the preliminary injunction proceeding start on September 27, 2017 to "facilitate resolution of the Plaintiffs' forthcoming PI motion before the start of a parallel administrative proceeding on the merits." Exhibit A (ECF No. 44, Plaintiffs' Requested PI Schedule). Respondents, on the other hand, sought to delay the preliminary injunction proceeding until October 30, 2017, dismissing concerns that such a late date would conflict with the administrative proceeding. Exhibit B (ECF No. 45, Defendants Letter re PI Schedule) ("[A]s a practical matter in most FTC merger cases the issues (including appeals) are resolved in federal court and the administrative trial never occurs"). The federal court adopted Respondents' proposed schedule, and the preliminary injunction hearing will begin on October 30, 2017. *See* Exhibit C (ECF No. 58, Preliminary Injunction CMSO).[8] Having previously dismissed concerns about overlapping proceedings, Respondents can hardly raise those concerns now.

[7] Respondents' Motion to Stay at 3. In *Penn State*, the appeals process took three and a half months before the Third Circuit reversed and entered the preliminary injunction, and in *Advocate*, the appeals and remand process took eight and a half months before the Seventh Circuit reversed and the district court entered the preliminary injunction.
[8] The CMSO specified a start date of October 31, 2017. However, the start of the preliminary injunction proceeding was moved to October 30, 2017 to accommodate courtroom availability in Bismarck. *See* Exhibit D (ECF No. 76, Order Setting Trial in Bismarck).

CONCLUSION

Respondents have failed to demonstrate the good cause—or indeed, *any* cause—necessary to justify a stay in this proceeding, as required by Rules 3.41(b) and 3.41(f). Absent such a demonstration, Respondents' motion for stay of the Part 3 hearing should be denied.

Dated: October 12, 2017

Respectfully Submitted,

/s/ Thomas J. Dillickrath

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EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

The Honorable Alice R. Senechal
United States Magistrate Judge
United States District Court for the District of North Dakota
655 1st Avenue North, Suite 440
Fargo, ND 58102-4952

July 25, 2017

Re: *FTC and State of North Dakota v. Sanford Health, et al., 17-cv-133*

Dear Magistrate Judge Senechal:

On behalf of Plaintiffs Federal Trade Commission and the State of North Dakota, we write to set forth Plaintiffs' request for a preliminary injunction ("PI") hearing in the above-captioned proceeding in either Fargo or Bismarck[1] that (1) lasts no more than two days, and (2) begins no later than September 27, 2017. Plaintiffs' position allows both sides to present their arguments to this Court in order to facilitate resolution of the Plaintiffs' ap8D47-te write to

This Court thus will be able to prevent interim consumer harm and preserves the Commission's ability to order effective relief should the merger be found unlawful. In addition to live hearing testimony, the record before this Court will include: (1) expert reports; (2) depositions of Defendants and non-parties taken during discovery; (3) sworn testimony obtained during the investigation from Defendants' executives and physicians as well as from fact witnesses; (4) documentary exhibits; (5) pre-hearing briefs and proposed findings of fact and conclusions of law; and (6) oral argument.

The structure of this proceeding need not deviate from schedules adhered to in past PI proceedings in merger cases. In seven of the PI proceedings brought by the FTC (some joined by state attorneys general) in the past 10 years, the federal court scheduled a hearing within 12 weeks of the complaint, and the hearing lasted no more than three days.[2] For example, the federal courts in both *OSF* (hospital merger) and *Steris* set 3-day hearings where both sides put on four witnesses each. In *ProMedica* (hospital merger) and *Phoebe* (hospital merger) the federal courts set 2-day and 1-day hearings, respectively, with no live witnesses. Defendants' proposed four-day hearing would increase the likelihood that non-parties might need to testify three times (at deposition, at the PI proceeding, and at the administrative proceeding), thereby increasing their expense and burden. Plaintiffs intend to present testimony from a limited number of fact and expert witnesses and a 2-day hearing would minimize the burden on non-parties. Defendants' proposed four-day hearing would increase the likelihood that non-parties might need to testify three times (deposition, PI proceeding, and administrative proceeding), thereby increasing their expense and burden.

A three-month window between the June 22, 2017, filing of the complaint and the start of a short PI proceeding is consistent with recent practice and provides ample time for the parties to complete discovery, which is already ongoing. The parties agreed that discovery would commence immediately following complaint, and Plaintiffs served discovery requests on Defendants the following week. Defendants received Plaintiffs' complete non-privileged investigatory files by June 27, but inexplicably did not issue any discovery until three weeks later on July 19. In fact, Plaintiffs and Defendants originally exchanged preliminary proposals in which Defendants proposed a PI hearing in mid-October (Plaintiffs proposed mid-September), and Plaintiffs' current proposal is an attempt to compromise. Further, given the narrow scope of the issues and relief requested, and Plaintiffs' willingness to accommodate additional limitations on discovery, discovery should be neither burdensome nor time-consuming.[3]

Given these considerations, Plaintiffs respectfully request a two-day evidentiary hearing starting on September 27, 2017.

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[2]

Case	Hearing	Post-Complaint
FTC v. Steris Corp., 15-cv-01080, ECF Nos. 19, 24 (N.D. Ohio 2015)	3 days	2.5 months
FTC v. Ardagh Group, S.A., 13-cv-1021, ECF Nos. 3, 29 (D.D.C. 2013)	3 days	3 months
FTC v. OSF Healthcare Sys., 11-cv-50344, ECF No. 1, 42 (N.D. Ill. 2011)	3 days	2.5 months
FTC v. Phoebe Putney Health Sys., Inc., 11-cv-00058, ECF Nos. 2, 81 (M.D. Ga. 2011)	1 day	2 months
FTC v. ProMedica Health Sys., Inc., 11-cv-00047, ECF Nos. 1, 101-02 (N.D. Ohio 2011)	2 days	1 month
FTC v. Lab. Corp. of Am., 10-cv-01873, ECF Nos. 3, 140 (C.D. Cal. 2010)	1 day	2 months
FTC v. Whole Foods Mkt., Inc., 07-cv-01021, ECF No. 3, Minute Entry July 31, 2007, Minute Entry Aug. 1, 2007 (D.D.C. 2007)	2 days	2 months

Several recent PI proceedings with slightly longer hearings (8-9 days) involved more contested and broad-reaching markets

Respectfully submitted,

/s/ Kevin K. Hahm
Thomas J. Dillickrath
Parrell D. Grossman

Counsel for Plaintiffs

PLAINTIFFS' [PROPOSED] CASE MANAGEMENT SCHEDULE

Federal Trade Commission and State of North Dakota v. Sanford Health, et al., 17-cv-00133-ARS (D.N.D.)

Event	[Proposed] Deadline
Simultaneous Exchange of Preliminary Fact Witness Lists	August 3
Close of Fact Discovery	August 30
Simultaneous Exchange of Initial Expert Report(s)	September 1
Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction	September 5
Simultaneous Exchange of Rebuttal Expert Report(s)	September 11

EXHIBIT B

BOIES SCHILLER FLEXNER

July 25, 2017

Filed Via ECF

The Honorable Alice R. Senechal
United States District Court (D.N.D.)
655 1st Avenue North, Suite 440
Fargo, ND 58102-4952

Re: *FTC et al. v. Sanford Health et al.*, Case No. 1:17-cv-00133-ARS (D.N.D.)

Dear Judge Senechal:

PUBLIC

BOIES SCHILLER FLEXNER

The Honorable Alice R. Senechal
United States District Court (D.N.D.)
July 25, 2017

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

A. **TEMPORARY RESTRAINING ORDER.** The Court adopted the Stipulation for Temporary Restraining Order on June 22, 2017 (ECF No. 7). Under the terms of that Temporary Restraining Order, the Defendants cannot consummate their transaction, or otherwise effect a combination of Sanford and Mid Dakota Clinic, until after 11:59 pm Eastern time on the fifth business day after the Court rules on Plaintiffs' motion for preliminary injunction.

B. **ANSWER.** Defendants answered Plaintiffs' Complaint on July 5, 2017.

C. **DISCOVERY.**

1. Initial Disclosures. Each side completed initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1) by June 29, 2017. If one side needs to supplement or correct their Rule 26(a)(1) disclosures during the pendency of this action, they will do so pursuant to Federal Rule of Civil Procedure 26(e).
2. Fact Discovery. Fact discovery commenced on June 22, 2017. Fact discovery shall conclude by September 15, 2017. All discovery requests must be served to leave sufficient time to respond before the close of discovery.
3. Pre-Trial Discovery Conference. This Scheduling Order relieves all parties of their duty under Federal Rule of Civil Procedure 26(f) to confer about scheduling and a discovery plan.
4. Requests for Production.
    a) There shall be no limit on the number of requests for production the parties may serve. The parties shall serve any objections to document requests within ten (10) calendar days after the date of service of the document request(s) to which objections are asserted. Within three (3) business days of service of any such objections, the parties shall meet and confer in a good faith effort to

contains subparts. For interrogatories served after entry of the Scheduling Order that are not contention interrogatories, the parties shall serve objections and responses to interrogatories no later than ten (10) calendar days after the date of service. The timing of objections and responses to non-contention interrogatories served before entry of the Scheduling Order are subject to the Federal Rules of Civil Procedure. For any interrogatories that are contention interrogatories, the parties shall serve objections and responses no later than

party fact witness declaration or affidavit may be submitted as evidence in this proceeding if it is executed or served after August 31, 2017.

9.

the transcripts are in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced;

ii. A list of all commercially available computer programs used by the expert in the preparation of the reports;

iii. A copy of all data sets used by the expert, in native file format and processed data file format;

iv. All customized computer programs used by the expert in preparation of the report or necessary to replicate the findings on which the expert report is based;

v. All documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 10(b), except that documents and materials already produced in the case need only be listed by Bates number; and

vi. For any calculations appearing in the report, all data and programs underlying the calculation, including all programs and codes necessary to recreate the calculation from the initial ("raw") data files.

b) Neither side must preserve or disclose, including in expert deposition testimony, the following documents or materials:

i. Any form of communication or work

b) *Final Fact Witness Lists:* The parties shall simultaneously exchange final fact witness lists by 6 p.m. Eastern time on October 16, 2017, or such other time as the parties may agree. Each side shall jointly submit one list. Final fact witness lists shall summarize the general topics of each witness's anticipated testimony. The final fact witness list shall identify all witnesses the producing side expects it may present live at the evidentiary hearing, other than solely for impeachment. No more than seven (7) individuals may appear on either side's final fact witness list. Final fact witness lists may be amended after October 16, 2017, only by agreement of the parties or with leave of the Court for good cause shown.

12. Depositions.

a) Number of Depositions. There shall be a limit of 10 depositions that each side can take, including depositions noticed to third parties. A deposition shall be counted only against the party first noticing the deposition. To the extent any witnesses are added to the preliminary fact witness list described in paragraph 11(a) and replace an existing witness who has already been deposed, that replacement witness may be deposed without counting against the ten (10) deposition limit. If any party puts forth a declaration, affidavit, or letter of support subsequent to August 3, 2017, that declarant may be deposed without counting against the ten (10) deposition limit set forth in this paragraph. The parties also agree that any deposition notice withdrawn less than 48 hours prior to the agreed-upon date for that deposition *will* count against the ten (10) deposition limit,

2. Non-party Rule 30(b)(6) witnesses. Non-party fact witnesses who are noticed in their individual capacity and also serve as a non-party's Rule 30(b)(6) corporate representative shall sit for a deposition only once and shall be subject to the same time allocations as memorialized in Paragraph 12.d of this agreement.

3. Non-party witnesses retained by Defendant(s). For non-party witnesses retained by Defendant(s) in connection with the proposed transaction, including, but not limited to, Deloitte LLP, Plaintiffs will have the opportunity to use the full seven hours for the deposition.

4. All other non-party fact witnesses. For all other non-party fact witnesses, the maximum time for that individual's deposition shall be allocated evenly between the sides.

e) Notice. Neither side may serve an initial deposition notice with fewer than seven (7) business days' notice, and any cross-deposition notice may not be served with fewer than three (3) business days' notice. Each side shall consult with the other side prior to confirming any deposition to coordinate the time and place of the deposition. For any subpoena served after the entry of this order, if one side serves a non-party subpoena for the production of documents or electronically stored information and a subpoena commanding attendance at a deposition, the deposition date must be at least seven (7) business days after the original return date for the document subpoena. In the event a sworn declaration or affidavit is

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In the event the volume of served materials is too large for email and requires electronic data transfer by file transfer protocol or a similar technology, or overnight delivery if agreed by the parties, the serving party will telephone or email the other side's principal designees when the materials are sent to provide notice that the materials are being served. For purposes of calculating discovery response times under the Federal Rules of Civil Procedure, electronic delivery shall be treated the same as hand delivery.

22. Nationwide Service of Process. Good cause having been shown in view of the geographic dispersion of potential witnesses in this action, the parties will be allowed nationwide service of process of discovery and trial subpoenas pursuant to Federal Rule of Civil Procedure 45 and 15 U.S.C. § 23, to issue from this Court. The availability of nationwide service of process, however, does not make a witness who is otherwise "unavailable" for purposes of Federal Rule of Civil Procedure 32 and

Federal Rule of Evidence 804 available under those rules regarding the use at trial of a deposition taken in this action.

23. Non-party Confidential Information. The Order Granting Motion for Protective Order Governing Confidential Materials (ECF No. 9) ("Protective Order") shall govern discovery and production of Confidential Information. Any party serving discovery requests, notices, or subpoenas to a non-party shall provide the non-party with a copy of the Protective Order.

24. Privilege and Privilege Logs. Nothing in this Scheduling Order requires the production of any party's attorney work-product, confidential attorney-client communications, or materials subject to the deliberative-process privilege or any other privilege. The parties agree that the following privileged or otherwise protected communications may be excluded from disclosure and privilege logs:

    (a) documents or communications sent solely between outside counsel for Defendants (or persons employed by or acting on behalf of such counsel) or sent solely between counsel for Plaintiffs (or persons employed by or acting on behalf of such counsel);

    (b) documents or communications sent solely between Defendants' outside counsel (or persons employed by or acting on behalf of such counsel) and Defendants' internal counsel;

    (c) documents or communications sent solely between Defendants' outside counsel (or persons employed by or acting on behalf of such counsel) and Defendants' employees or agents;

    (d) documents or communications shared between outside counsel for Defendants (or persons employed or acting on behalf of such counsel) or

by counsel for the Federal Trade Commission or Plaintiff State of North Dakota (or persons employed by the Federal Trade Commission or Plaintiff State of North Dakota), and a testifying or consulting expert retained in anticipation of this litigation;

(e) documents that were authored by Defendants' outside counsel or persons employed by the Federal Trade Commission or Plaintiff State of North Dakota, and not directly or indirectly furnished to any non-party, such as notes and memoranda; and

(f) all privileged or work-product documents created on or after June 22, 2017.

25. Inadvertent Production of Privileged Material. In accordance with Federal Rule of Civil Procedure 16(b)(3)(B)(iv) and Federal Rule of Evidence 502(d), inadvertent production of documents or communications containing privileged information or attorney work product shall not be a basis for loss of privilege or work product of the inadvertently produced material, provided that the producing party notifies the receiving party within three (3) business days of learning of the inadvertent production. When a party determines that it has inadvertently produced such material, it will notify other parties, who will promptly return, sequester, or delete the protected material from their document management systems. Within two (2) business days of identifying inadvertently produced information or documents(s), the party seeking clawback of such materials shall provide a revised privilege log for the identified information or documents. A party may move the Court for an order compelling production of the material, but su

the privilege must file its opposition under seal and submit a copy of the material in question for *in camera* review.

26. Electronically Stored Information. The parties agree as follows regarding the preservation and production of electronically stored information ("ESI")

    a) All parties have established litigation holds to preserve ESI that may be relevant to the expected claims and defenses in this case. In addition, the parties have taken steps to ensure that automatic deletion systems will not destroy any potentially relevant information.

    b) All parties agree that the use of Technology Assisted Review tools may assist in the efficienct production of ESI. However, if a party desires to use such technologies, it shall meet and confer with the other side and negotiate in good faith on the reasonable use of such technology.

    c) All parties will request ESI in the form or forms that facilitate efficient review of ESI. In general, the parties will produce ESI according to the same ESI technical specifications used by Defendants in the FTC's or State of North Dakota's pre-complaint investigation.

27. Evidentiary Presumptions.

    a) Documents produced by non-parties from the non-parties' files shall be presumed authentic within the meaning of Federal Rule of Evidence 901. Any good-faith objection to a document's ad

resolve any objections that are not resolved through this means or through the discovery process.

b) All documents produced by a Defendant either in response to document requests in this litigation, or in the course of the FTC's investigation of the proposed transaction between Defendants, FTC File No. 171-0019, or in the course of Plaintiff State of North Dakota's investigation of the proposed transaction, are presumed to be authentic.

c) Any party may challenge the authenticity or admissibility of a document for good cause shown, and if necessary may take discovery related solely to authenticity or admissibility of documents.

28. Video Deposition Designations. Each side may play the deposition video of no more than two (2) fact witnesses per side at the evidentiary hearing, unless the witness is unavailable to testify at the evidentiary hearing or for purposes of impeachment. If one side intends to show excerpts of a video deposition at the evidentiary hearing, then (a) the side intending to use the video shall designate the video deposition excerpts that the side intends to show at the evidentiary hearing at least ten (10) business days before the start of the evidentiary hearing; (b) the opposing side shall be permitted to counter-designate video excerpts of that witness five (5) business days after receiving notice of the other side's designation of video excerpts; and (c) at trial,

particular exhibits or statements are too untrustworthy or too unreliable to have

Event	Deadline Date(s)
Close of Expert Discovery	October 20, 2017
Objections to Exhibits	October 23, 2017
Plaintiffs' Reply to Defendants' Opposition to Preliminary Injunction Motion	October 23, 2017
Pre-Hearing Conference	
Evidentiary Hearing Begins	October 31, 2017
Proposed Findings of Fact and Conclusions of Law	November 10, 2017

Dated: August 18, 2017

Respectfully Submitted,

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EXHIBIT D

IN THE 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.	)	Case No. 1:17-cv-133 **ORDER**

An August 1, 2017 order scheduled a four-day hearing on a motion for a preliminary injunction to begin October 31, 2017, stating that the hearing would be held in either Bismarck or Fargo, depending on courtroom availability. Via email correspondence on September 5, 2017, the parties were advised that the hearing would likely be held in Fargo.

The State of North Dakota, via email correspondence of September 14, 2017, and at an October 4, 2017 status conference, objected to conducting the hearing in Fargo, asserting this is a matter of great concern to the Bismarck/Mandan area and that it is in the public's interest to hold the hearing in Bismarck.

Via email correspondence of October 4, 2017, the court proposed a possible alternative schedule, with the hearing to be held in Bismarck beginning October 30, 2017. The court conducted a status conference with counsel on October 6, 2017, to discuss that possible alternative. Defendants objected to that alternative, asserting that they had made substantial arrangements based on the Fargo location, that the Fargo court facilities are better suited for accommodating the hearing, that the case had engendered limited newspaper coverage in Bismarck to date, that significant portions of