

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

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

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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 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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**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*

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.

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

Dated: October 13, 2017

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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:

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Gregory R. Merz, Esq.

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
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Donald Clark
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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:

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