ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
Inova Health System Foundation, a corporation, and	)	**Docket No. 9326**
Prince William Health System, Inc., a corporation.	)	**PUBLIC**

RESPONDENTS' MOTION TO RECUSE
COMMISSIONER J. THOMAS ROSCH AS ADMINISTRATIVE LAW JUDGE

Respondents Inova Health System Foundation and Prince William Health System, Inc. hereby respectfully request, pursuant to 16 C.F.R. §3.42(g)(2), that the Honorable J. Thomas Rosch recuse himself as Administrative Law Judge in the above matter for the following reasons.

BACKGROUND

It is well known that the Federal Trade Commission ("FTC") has lost the last several cases in which it has challenged hospital mergers. It is likewise well known that the FTC's own Administrative Law Judges ("ALJs") have held against the FTC in a series of high profile cases. The normal practice, here, would have been to appoint one of these sitting ALJs to hear this administrative case. But in the aftermath of the events described above, the FTC chose to deviate from standard procedure and instead appointed one of its own Commissioners as ALJ. Although regulations permit the appointment of a Commissioner as an ALJ in appropriate circumstances, such an appointment is highly unusual. The instant appointment raises particularly difficult problems because the appointed Commissioner participated in the underlying two-year investigation that preceded the filing of the complaint.

During the course of a merger investigation, a Commissioner normally reviews materials prepared by staff, has conversations with staff, and perhaps even has conversations with other Commissioners about the investigation and litigation strategy. Indeed, we have been advised by FTC staff that Commissioner Rosch had at least one meeting with the Commission's investigatory staff during the investigation in this case and received staff's written recommendation to bring the complaint. Feinstein Decl. ¶¶ 2 & 3 (FTC staff advised Respondents' counsel that it had briefed the Commissioners about the case and given the Commissioners their recommendation memorandum), attached as Ex. A.

Commissioner Rosch also had a meeting with Respondents less than a month ago. Approximately ten days before the Complaint was filed, attorneys from Arnold & Porter LLP, accompanied by economists retained by Respondents, met with the Commissioner in an attempt to convince him that the Commission should not challenge the proposed transaction. *Id.* at ¶ 4. The meeting covered a broad range of issues, including arguments that Respondents believed staff was advancing as well as evidence Respondents believed would be relevant to staff's arguments. *Id.* No FTC investigative staff was present at the meeting. *Id.* At no time during the meeting did Commissioner Rosch advise Respondents that he anticipated being designated as the Administrative Law Judge in this matter. *Id.* Indeed, the entire purpose of the meeting-- or so Respondents believed -- was for Respondents to present their case to him in his capacity as an FTC Commissioner in an effort to convince him that the FTC should not challenge the proposed transaction.

Commissioner Rosch did not participate in the Commission vote to issue the complaint, evidently because -- in light of the decision to appoint him as ALJ -- this was deemed improper or at least sufficient to create an appearance of impropriety. But there is no meaningful line

between the final act of voting out the complaint and participating in the investigation until the very brink of that vote: the same concerns that preclude the former preclude the latter.

We are aware of only one previous case in recent memory where the Commission has appointed one of its own Commissioners as ALJ -- and that case was dismissed on threshold legal grounds by a federal district court and the administrative case was never adjudicated. The Commissions' explanation here for the extraordinary development of appointing one of its own commissioners as ALJ raises more questions than it answers. To be sure, Commissioner Rosch is a trial lawyer with many years of experience, including "complex competition law cases," Order Designating Administrative Law Judge at 1 (May 9, 2008), but the ALJs he has supplanted are highly experienced in *hearing* complex antitrust cases. There is no showing that any of the FTC's sitting ALJs are unable to take on this matter. Indeed, a review of the listing of adjudicative proceedings on the FTC website shows that this matter is the *only* administrative proceeding pending at this time. The only unresolved matters in the FTC docket have already been litigated to initial decision and are either under review by the full commission or are currently stayed pending federal court review. *See* Federal Trade Commission, Adjudicative Proceedings, *available at* http://www.ftc.gov./os/adjpro/index.shtml (last visited May 22, 2008). There is no possible justification for diverting a case to a Commissioner when the existing ALJs -- who have been hired to adjudicate precisely such cases as this -- are fully available.

Finally, since the appointment of Commissioner Rosch, the staff has acted as if it understands how Commissioner Rosch will rule. For example, in a pending motion in Federal Court regarding the schedule for the preliminary injunction, the staff has argued against the need for early discovery and a settlement conference, by assuring the District Court Judge that the

administrative proceeding is "moving forward on a very expedited basis,"[1] even though there was then, and still is, no schedule, in this proceeding, and there has not even been a scheduling conference. Complaint Counsel's representation creates the appearance that it knows how this tribunal is going to rule on how this case will proceed in advance of that ruling.

It also bears noting that the appointment of Commissioner Rosch as ALJ precludes him from further service in his capacity as a Commissioner with respect to this case. Given the current vacancy at the Commission, this creates the distasteful prospect that approval or disapproval of this merger by the Commission might ultimately be determined by a mere two-person majority of three sitting commissioners.

This constellation of facts cannot help but create an appearance of impropriety and to cast serious doubt on the fairness of the unfolding process in this administrative action. Several commentators have already noted the unusual nature of the appointment of a Commissioner as ALJ in this case.[2] Based on the above facts, and the authorities discussed below, Respondents request Commissioner Rosch to recuse himself as ALJ in this matter.

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[1] FTC Opp'n to Motion for Scheduling Conference at 2, (May 19, 2008), attached as Ex. B. Complaint Counsel also assured the Federal Court that "the administrative trial and the Commission's final decision will come in a fraction of the 18-month period that Defendants took, after the public announcement of their proposed merger, to meet the statutory prerequisites to consummate their merger." *Id* at 5. Again, Complaint Counsel's representation to a federal court about what this tribunal will do can only create the appearance that it knows something Respondents do not.

[2] *See, e.g.*, FTC: Watch, No. 720, at 13-14 (May 19, 2008) (noting appointment of Rosch and adding "for the record" that "four ALJ antitrust decisions over the last six years -- two by Chief Judge Stephen J. McGuire and two by D. Michael Chappell -- disagreed with the arguments made by staff"); Skip Oliva, *FTC Rigs Hospital Merger Trial*, May 10, 2008, *available at* http://www.voluntarytrade.org/joomla15/ (characterizing the appointment of Commissioner Rosch as ALJ in this case as "fishy").

ARGUMENT

COMMISSIONER ROSCH SHOULD RECUSE HIMSELF DUE TO HIS INVOLVEMENT IN THE INVESTIGATION OF THIS CASE UNDER 5 U.S.C. § 554(d)(2) AND TO AVOID ANY APPEARANCE OF IMPROPRIETY

It is well established that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 137 (1955) (noting that "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations."). This guarantee applies to administrative adjudications and is not limited to federal court litigation. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (due process is violated without showing of actual bias when the "special facts and circumstances present in the case" show that "the risk of unfairness is intolerably high.").

These basic principles call for recusal in this case. The facts described above -- the past history of ALJ decisions rejecting positions of the Commission, the involvement of Commissioner Rosch in the investigation that led to this complaint, and the activities of staff since the complaint was filed -- leave the palpable impression of unfairness. Even if, *arguendo*, the FTC were able to prevail in this administrative proceeding, why should it tarnish that achievement with the taint that it did so only after displacing its sitting ALJs with one of its own Commissioners? The integrity of administrative proceedings cannot be served by appointing as ALJ a Commissioner previously involved in the pre-complaint investigation. This can only damage the legitimacy of the Commission's work in the eyes of the antitrust bar, the business community, and the general public.

Respondents request Commissioner Rosch to recuse himself because (1) his previous participation as a Commissioner in the investigation that led to this complaint precludes his service as an ALJ under 5 U.S.C. § 554(d)(2) and (2) the totality of events creates an impermissible and entirely avoidable appearance of impropriety.

1. Recusal is required by Section 554(d)(2) of the Administrative Procedure Act ("APA"), which precludes an agency employee involved in the investigation or prosecution of a case from also adjudicating the case. Prior to the passage of the APA in the 1940's there was a chorus of concern about the anticipated consolidation of investigative, prosecutorial, and adjudicative functions within a single agency. *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1219 (9th Cir. 1980). For that reason, the Act mandated the creation of administrative law judges, as a "separate unit in each agency's organization" and with "no functions other than those of presiding at hearings ... and ... deciding the cases which fall within the agency's jurisdiction." *Report of the Attorney General's Committee on Administrative Procedure* (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 50 (1941) ("AG Rep."):

> "Creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding will, the Committee believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation."

Id. at 56; *Butz v. Economou*, 438 U.S. 478, 513-14 (1978). Accordingly, ALJs were to be cut off from *ex parte* communications concerning the case. 5 U.S.C. § 554(d)(1); *Butz*, 438 U.S. at 513. This strict "separation of functions" was necessary due to the risk that exposure to *ex parte* contacts might infect a person's judgment and because "a man who has buried himself in one side of an issue is disabled from bringing to his decision that dispassionate judgment which Anglo-American tradition demands [of a judge]." AG Rep. at 56.

To further address these concerns and ensure the appropriate separation between the investigative and adjudicative roles, Congress also adopted 5 U.S.C. § 554(d)(2), which provides that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review..." As the Attorney General Report

states, "[i]t is clear that when a controversy reaches the stage of hearing and formal adjudication, the persons who did the actual work of investigating and building up the case should play no part in the decision." AG Rep. at 56; *see also Greenberg v. Bd. of Governors*, 968 F.2d 164, 167 (2d Cir. 1992) (APA is violated "where an individual actually participates in a single case as both a prosecutor and an adjudicator."). Commissioner Rosch was engaged in the investigative aspects of this case while he was acting in it in his capacity as a Commissioner. He was briefed by staff and he met with counsel for Respondents to discuss whether the FTC should bring this lawsuit. Accordingly, unless he is subject to an exception, he may not serve as the ALJ in this case.

There are three exceptions to the Section 554(d)(2) prohibition, but the only one which has even arguable application here is the proviso that the rule "does not apply ... to the agency or a member or members of the body comprising the agency." § 554(d)(2)(C). In the ordinary course, then, the rule would not prevent a Commissioner *acting as a Commissioner* from having dual investigative and adjudicative roles in the same case. The question here is whether Commission Rosch -- in his capacity *as an ALJ* appointed for this case -- qualifies for the exception as a "member of the body comprising the agency." We submit that he does not.

First, it is plain that any ordinary ALJ would be fully covered by Section § 554(d)(2) and would be disqualified from hearing the case had he or she been involved in more than a ministerial fashion in the investigative or prosecuting aspects of the case. *See, e.g., Grolier*, 615 F.2d at 1220-21. Because Commissioner Rosch will be fulfilling the duties of an ALJ in the case (and not those of a Commissioner) he should be fully subject to the rules that govern ALJs. The order of reference states that "[*i*]*n all respects*, Commissioner Rosch will act as an Administrative Law Judge, and will not participate in any appeal from any initial decision." May 9, 2008 Order at 2 (emphasis added). If he is acting "in all respects" as an ALJ, he should

be subject to the proscriptions that apply to ALJs. The mere fact that the Commissioner is authorized to appoint a Commissioner to serve as an ALJ, *see, e.g.*, FTC Rules, 16 C.F.R. § 3.42, does not suggest that it may appoint a Commissioner who has been intimately involved in the underlying investigation and has had *ex parte* contacts with the parties. *See infra.*[3]

Second, the courts have specifically rejected any interpretation of the statute that "would permit an agency employee to become immersed in the investigation of the case, resign from the investigative position, and then be appointed judge to render the decision." *Grolier*, 615 F.2d at 1215 (applying provision to the attorney advisor of a commissioner who was later appointed ALJ). The provision is no less applicable when -- as here -- the "appointed judge" retains the position under which he participated in the investigation but also assumes an additional adjudicatory role as an ALJ.

Third, extending the "agency/Commissioner" exception to a Commissioner's duties as an ALJ appointed *pro hac* for a particular matter is inconsistent with the purpose of the Section 554(d)(2) exception. The exemption "was created only for these positions in which involvement in all phases of a case is dictated 'by the very nature of administrative agencies, where the same authority is responsible for the hearing and decision of cases.'" *Grolier*, 615 F.2d at 1215, *quoting* S. Rep. No. 572, 79th Cong., 1st Sess. 18 (1945); H. Rep. No. 1980, 79th Cong., 1st Sess. 27 (1946). Accordingly, the exception would, for example, allow the Commission itself to consider any initial decision rendered by the ALJ in this case. But far from being "dictated by the very nature of administrative agencies," Commissioner Rosch's appointment as an ALJ is

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[3] It bears noting that the fact findings by an ALJ are treated differently from those made by the Commission. For example, appellate courts frequently vacate agency fact findings that -- without ample justification -- depart from ALJ findings which relied upon credibility determinations or assessment of witness demeanor. *See e.g., Aylett v. HUD*, 54 F.3d 1560 (10th Cir. 1995).

unusual and unnecessary. The FTC's existing ALJs are fully qualified to handle this case and, by all appearance, have ample time to devote to it. The legislative history of the APA makes clear that the board or commission of the agency "should delegate to examiners or boards of examiners at least the initial decision of cases, and should confine their own review to important issues of law or facts." H. Rep. No. 1980. The FTC's decision to bypass that typical procedure here in favor of appointing one of its own Commissioners to hear the case is especially problematic when viewed against the backdrop of the recent occasions when the FTC's ALJs have rejected complaints by the Commission.[4] A neutral observer might interpret the substitution of a Commissioner for the sitting ALJs as a device to search for a potentially more favorable decision maker.

Finally, the Commission's regulations (16 C.F. R. § 3.42(a)) contemplating that a Commissioner may be appointed as an ALJ in no way justifies appointment of a Commissioner who has been involved in the investigation of the case and has had *ex parte* contacts with the parties. Nothing in the statute suggests that Commissioners acting as ALJs are exempt from Section 554(d)(2). The Rules make clear that any Commissioners who preside over hearings in adjudicative proceedings are "sitting as Administrative Law Judges", 16 C.F.R. § 3.42(a) -- not as Commissioners -- and Section 3.42(c) plainly states that the ALJ is obligated to conduct "fair and impartial hearings." If a Commissioner sits as an ALJ, he or she assumes all the obligations of an ALJ, including the prohibition against involvement in both investigation and adjudication of the same matter. Of course, it would be possible to appoint a Commissioner to serve as ALJ

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[4] *Realcomp II* (Dec. 13, 2007; Docket 9321), *available at* www.ftc.gov/opa/2007/12/alj.shtm (McGuire); *Rambus* (Feb. 24, 2004; Docket 9302), *available at* www.ftc.gov/opa/2004/02/rambusid.shtm (McGuire); *see also Union Oil Company* (Nov. 26, 2003, Docket 9305), *available at* www.ftc.gov/opa/2003/11/unionoil.shtm (Chappell); *Schering Plough* (July 2, 2002; Docket 9297), *available at* www.ftc.gov/opa/2002/07/schering.shtm (Chappell).

without first involving that Commissioner in the underlying investigation. In the same way that Commissioner Rosch opted out of the final vote, a Commissioner could opt out of involvement in the investigation if he or she wanted to preserve the option of serving as an ALJ. But that did not happen here.

Since no exception applies, Section 554(d)(2) precludes Commissioner Rosch from adjudicating this case and he should recuse himself.

2. Even apart from Section 554(d)(2), Commission Rosch should step aside to avoid the appearance of impropriety. Section 3.42(g)(2) of the Commission's Rules of Practice for Adjudicative Proceedings authorizes a party to file a motion to disqualify if it "shall deem the Administrative Law Judge for any reason to be disqualified." The FTC recognizes that a judge -- including an ALJ -- should not hear a case if a "reasonable person would have had a reasonable basis for doubting the judge's impartiality." *In the matter of Kellogg Company*, 96 F.T.C. 91 (July 31, 1980) (applying "appearance of impropriety" standard to an ALJ) (citing *Rice v. McKenzie*, 581 F.2d 1114, 1116-17 (4th Cir. 1978)); *see also American Bar Association's Model Code of Judicial Conduct for Federal Administrative Law Judges* ("ABA Model Code"), Canon 3(c) (1989) ("An [ALJ] shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to . . . where (c) the judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy")[5]; *Amos Treat & Co. v. SEC,* 306 F.2d 260, 267 (D.C. Cir. 1962)

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[5] The Model Code was designed as a "reference for [ALJs] in considering their own conduct and for others in considering the Code of Judicial Conduct appropriately applicable to federal administrative law judges." ABA Model Code, at 3. It "reflect[s] the considered judgment of the [National Conference of Administrative Law Judges] on appropriate provisions in adapting the ABA Code [of Judicial Conduct] for federal administrative law judges." *Id.* at 4. Thus,

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("an administrative hearing of such importance and vast political consequences must be attended, not only with every element of fairness, but with the very appearance of complete fairness."). Like any tribunal, the Commission has the inherent authority to regulate the conduct taking place in its tribunals and to protect its processes from unfairness and the appearance of unfairness. *See e.g., Alberio v. Hampton*, 433 F. Supp. 447, 453 (D.P.R. 1977). Indeed, the legitimacy of any adjudicatory system hinges upon its ability to maintain public trust and its success in convincing litigants and the public that it will produce fair and unbiased decisions. *Morgan v. United States*, 304 U.S. 1, 14-15 (1938) ("in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process."); *United States v. Stewart*, 2002 WL 1300059, at *8; No. 02 CR. 396 JGK (S.D.N.Y. June 11, 2002) ("it is important that the procedure adopted in this case

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although the Model Code has not been expressly adopted by the Commission, it provides a good benchmark for practice in this area and for the high standards that the bar and the public expect of ALJs. Although some opinions suggest that the "appearance of impropriety" standard does not apply with full force to administrative law judges, *see, e.g., Greenberg v. Bd. of Governors of Fed. Reserve Sys.*, 968 F.2d 164, 166-67 (2d. Cir.1988), the same policies that support this rule in other adjudicative context equally support it in the context of administrative litigation. Nor has the FTC ever retreated from its application of the "appearance of impropriety" standard to ALJs set forth in *Kellog*. *See also* ABA Informal Opinion No. 86-1522 (noting that the Code of Judicial Conduct "has been recognized as an appropriate guide for evaluating the conduct of federal administrative law judges . . . even though it has not been made specifically applicable to federal administrative law judges"); *Pioneer Hotel, Inc. v. N.L.R.B.*, 182 F.3d 939, 944 (D.C. Cir. 1999) (assuming application of ABA Code of Judicial Conduct to ALJ); *Stone & Webster Eng'g Corp. v. N.L.R.B.*, 510 F.2d 966 (table), 1975 WL 23050 at *1, No. 74-1433 (4th Cir. Jan. 28, 1975) (applying Canon 2 of the Code of Judicial Conduct prohibiting appearance of impropriety to ALJ); *Robinson v. Alternative Commodity Traders*, 2001 WL 741672, at *7, n.96, CFTC No. 00-R080 (C.F.T.C. July 2, 2001) ("The American Bar Association Model Code of Judicial Conduct has been recognized as an appropriate authority for guiding the conduct of federal administrative law judges").

not only be fair but also appear to be fair. The appearance of fairness helps to protect the public's confidence in the administration of justice.").

Placed in context, the appointment of one of the FTC's own Commissioners to adjudicate this case in the first instance creates a distinct appearance of impropriety. It is common knowledge that the FTC has suffered serious litigation setbacks in recent years, not only with respect to hospital mergers[6] but in a number of other areas as well.[7] It is also common knowledge that the sitting ALJs have exercised independence and have rejected the FTC's positions in several highly publicized decisions.[8] There is no legitimate reason to freeze those ALJs out of this case; their empty dockets testify to the ample time they have to dedicate to this case. In contrast to them, the Commissioner now appointed to adjudicate this case was involved in the investigation that led to the complaint. He declined to participate in the Commission vote to issue the complaint, doubtless concluding (rightly) that it would be improper to vote out a complaint and then proceed to serve as the ALJ adjudicating the complaint. But the same concerns that prevent appointment as ALJ of a Commissioner who voted on whether the complaint should be issued extend equally to a Commissioner who was involved in the investigation that led to the complaint and met individually with the parties during the investigation. Finally, as noted, since Commissioner Rosch's appointment, staff counsel have sharply departed from past practice in an attempt to shift matters normally handled by the federal

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[6] *See, e.g., FTC v. Tenet Healthcare Corp.*, 17 F. Supp. 2d 937 (E.D. Mo. 1998), *rev'd* 186 F.3d 1045 (8th Cir. 1999); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121 (E.D.N.Y. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1300-1301 (W.D. Mich. 1996), *aff'd*, 1997-2 Trade Cas. (CCH) ¶ 71,863, 71,867-68 (6th Cir. 1997); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213 (W.D. Mo. 1995), *aff'd*, 69 F.3d 260 (8th Cir.1995); *In re Adventist Health Sys.*, 117 F.T.C. 224 (1994).

[7] S*ee, e.g., FTC v. Garvey*, 383 F.3d 891 (9th Cir. 2004); *California Dental Ass'n v. FTC*, 224 F.3d 942 (9th Cir. 2000); *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

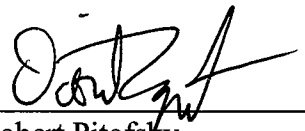
[8] *See supra,* n.4.

district court preliminary injunction proceeding into the jurisdiction of the administrative proceeding now presided over by Commissioner Rosch. This confluence of factors threatens to undercut the legitimacy of any decision that Commissioner Rosch might reach in this case and to erode the credibility of the Commission itself in the legal and business community. The Commissioner should step aside and permit this case to be adjudicated by one of the sitting ALJs to avoid any appearance of impropriety.

CONCLUSION

Respondents respectfully request Commissioner Rosch to recuse himself in order to (1) comply with 5 U.S.C. § 554(d)(2) and (2) to protect and preserve the reputation and integrity of the FTC and avoid any appearance of impropriety.

Respectfully submitted,



Robert Pitofsky
David P. Gersch
David S. Eggert
David B. Bergman
David M. Menichetti

ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004-1206
Telephone: (202) 942-5000
Facsimile : (202) 942-5999
Email: David.Gersch@aporter.com

Counsel for Respondents Inova Health System Foundation and Prince William Health System, Inc.

Dated: May 23, 2008

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
Inova Health System Foundation, a corporation, and	)	**Docket No. 9326**
Prince William Health System, Inc. a corporation.	)	

DECLARATION OF DEBORAH L. FEINSTEIN

I, Deborah L. Feinstein, based upon my personal knowledge concerning matters to which I am competent to testify, hereby declare as follows:

1. I am a partner at the law firm of Arnold & Porter LLP in its Washington D.C. office, practicing law in the Antitrust/Competition and Consumer Protection group at the firm. I have represented Inova Health System Foundation ("Inova") and Prince William Health System, Inc. ("Prince William") in connection with their proposed merger since approximately November 27, 2007.

2. On or around November 27, 2007, I had a conversation with David Wales, Deputy Director of the Bureau of Competition, concerning the Inova/Prince William merger. Mr. Wales informed me that the staff's recommendation had already been submitted to the Commission.

3. On or around November 29, 2007, I met with Matthew Reilly, Assistant Director of the Bureau of Competition. Mr. Reilly informed me that FTC investigative staff had already met with the Commissioners at that point and had provided them with staff's written recommendation concerning the merger.

4. On or around April 30, 2008, I, along with other Arnold & Porter attorneys and outside economists retained by Inova and Prince William had a scheduled meeting with Commissioner Rosch. The purpose of the meeting from our perspective was to attempt to persuade Commissioner Rosch, in his capacity as Commissioner, that the Commission should not challenge the merger nor issue a complaint. At this meeting, we addressed arguments that we believed staff was advancing as well as evidence we believed would be relevant to staff's arguments. Although two representatives from the FTC's office of General Counsel were present, no FTC investigative staff was present at the meeting. At no time did Commissioner Rosch advise me or anyone else representing Inova or Prince Williams that he anticipated being designated as the Administrative Law Judge in this matter.

I declare under penalty of perjury under the Laws of the United States of America that the foregoing is true and correct. Executed this 23rd day of May, 2008, in Washington, District of Columbia.

Deborah L. Feinstein

Deborah L. Feinstein

Arnold & Porter LLP

Exhibit B

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FEDERAL TRADE COMMISSION, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:08-cv-460 -CMH/JFA
	)	
INOVA HEALTH SYSTEM FOUNDATION, *et al.*,	)	
	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR A SCHEDULING ORDER AND AN EXPEDITED STATUS CONFERENCE

Plaintiffs, the Federal Trade Commission (the "Commission") and the Attorney General for the Commonwealth of Virginia, oppose the entry of the Defendants' proposed scheduling order and request for an expedited status conference.

Because the Commission has reason to believe Inova's acquisition of Prince William Health System ("PWHS") will violate the antitrust laws by causing a significant price increase for healthcare services in Northern Virginia, it has filed two actions to prevent the acquisition. The first is an administrative action, with full discovery and a plenary trial on the merits with live witnesses, before Administrative Law Judge ("ALJ") Thomas Rosch. That action was filed May 9, 2008. The second is the collateral preliminary injunction action the Commission and the Virginia Attorney General initiated in this Court on May 12, 2008, pursuant to relevant statutory authority, to maintain the *status quo* while the ALJ hears the full case on the merits, and the Commission reviews the ALJ's decision. Without a preliminary injunction issued by this Court, Inova could acquire PWHS as soon as August 1, 2008.

The administrative action on the merits of the proposed acquisition is moving forward on a very expedited basis. Plaintiffs have proposed to Defendants that there be a full three week administrative trial beginning on September 4, 2008. In addition, the Commission is committed to resolving any appeal of the ALJ's decision on an expedited basis. *See* http://www.ftc.gov/opa/2008/05/inova.shtm. It is in the context of this expedited administrative proceeding that Plaintiffs have sought to work with Defendants in a manner that is consistent with the Federal Rules of Civil Procedure and the Local Civil Rules of this Court, while avoiding delay of the Commission's administrative proceeding on the merits. For example, Plaintiffs have proposed that discovery begin immediately in the administrative proceeding and have agreed with Defendants on protective orders that allow discovery in that proceeding to be used for all purposes in this preliminary injunction proceeding, and vice-versa. Additionally, Plaintiffs have requested that no witness be deposed more than once in the two proceedings – whether that deposition is noticed in this Court or in the Commission's administrative action.

Until Defendants unexpectedly filed their motion for entry of their scheduling order and an expedited scheduling conference, both sides had been largely cooperative. Even though Defendants have not yet even answered the Complaint, the parties had agreed on an approximate time (mid-July) for a preliminary injunction hearing, subject of course to the Court's calendar and wishes. The two sides were also very close to agreement on dates for the exchange of expert reports, briefing on a preliminary injunction motion, and exchange of initial disclosures, among other issues. In fact, Defendants made several new Rule 26(f)(3) proposals and invited Plaintiffs' response only two hours before filing the instant motion. Accordingly, Plaintiffs respectfully request that the Court defer a status conference and issuance of a scheduling order until after the Defendants' Answer is filed and the parties complete discussions regarding topics

which are required to be covered under Rule 26(f). That way, a joint proposal – reflecting both areas of agreement and disagreement – can be submitted in accordance with Rule 26(f)(2).

I. BACKGROUND[1]

A. This Action is Limited in Scope and the Administrative Action is Intended to be the Site of the Full Trial on the Merits.

In unanimously authorizing these proceedings, the Commission and the Attorney General for the Commonwealth of Virginia have reason to believe that the effect of Inova's proposed acquisition of PWHS "may be substantially to lessen competition or to tend to create a monopoly" in the market for general acute care inpatient services sold to commercial health plans in Northern Virginia in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and that a preliminary injunction would be in the public interest. When the Commission makes such a determination under authority granted to it by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), it "may seek a preliminary injunction [in federal district court] to prevent a merger pending the Commission's administrative adjudication of the merger's legality." *FTC v. H. J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1070 (D.D.C. 1997)).

This collateral federal district court preliminary injunction action is inherently limited in scope. As the Fourth Circuit has held, the district court is *not* called upon to reach a final determination on the antitrust issues because "[t]hat adjudicatory function is vested in the FTC in the first instance." *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976). Instead, "[t]he only purpose of a proceeding under Section 13 is to preserve the status quo until the FTC

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[1]Plaintiffs regret the length of the following description of the background of the case made necessary by the one-sided presentation in Defendants' memorandum. *See* Defs. Mem. at 1-2.

can perform its function." *Id.*; *see also FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998) ("The determination of whether the acquisition actually violates the antitrust laws is reserved for the Commission and is, therefore, not before this Court").[2]

The standard applied in determining whether issuance of a preliminary injunction is warranted is similarly limited in scope. Section 13(b) of the FTC Act provides "upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . a temporary restraining order or preliminary injunction may be granted." That "proper showing" is satisfied if the Commission "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the [Commission] in the first instance and ultimately by the Court of Appeals." *Heinz*, 246 F.3d at 714-15; *see also FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991).

The Plaintiffs here seek preliminary relief, so that the full extent of the transaction's anticompetitive effects, as well as the question of how the transaction may affect the quality of general inpatient care at PWHS and in Northern Virginia more generally, can be adjudicated in the full administrative trial on the merits (without interim harm or a limiting of post-trial remedies). Preparations for this administrative trial are ongoing and proceeding quickly, despite

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[2]Defendants claim that the Commission usually seeks a stay in the administrative proceeding while seeking a preliminary injunction in federal court. Defendants cite one case, *In re Arch Coal, Inc.*, FTC Dkt. No. 9316, where the Commission stayed the administrative action. However, during a more recent preliminary injunction proceeding in district court, the administrative proceedings at the Commission were not stayed. *In re Paul L. Foster, et al.*, FTC Dkt. No. 9323.

Defendants' seeming disinterest in that action.[3] Complaint Counsel (the formal name for Commission's litigating staff in the administrative proceeding) voluntarily produced to Defendants last week all declarations obtained from third-party witnesses and substantially all third-party documents the Commission obtained in its investigation of the Defendants' proposed merger. Complaint Counsel have noticed depositions in the administrative action of several of Defendants' employees for early June and served document requests on Defendants. Finally, a scheduling conference with ALJ Rosch is scheduled for May 30, 2008.

Additionally, Complaint Counsel have provided Defendants with a proposed scheduling order calling for the full administrative trial to commence on September 4, 2008. Indeed, the administrative trial and the Commission's final decision will come in a fraction of the 18-month period that Defendants took, after the public announcement of their proposed merger, to meet the statutory prerequisites to consummate their merger.[4]

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[3]While Plaintiffs have promptly and actively discussed scheduling and discovery proposals with Defendants in this preliminary injunction proceeding, Defendants have not reciprocated in the administrative proceeding. In fact, Defendants asked Complaint Counsel to stay the administrative proceeding on the merits entirely. For Complaint Counsel, however, the whole point of the preliminary injunction is to maintain the *status quo* while the administrative proceeding moves forward on an expedited basis. To stay the administrative proceeding under these circumstances would turn the process on its head and subvert the procedure Congress intended. Defendants have not answered the Commission's administrative complaint issued on May 9, 2008, and have declined repeated invitations over the last six days to discuss Complaint Counsel's detailed proposed Joint Case Management Statement in that proceeding. If Defendants simply answer the administrative complaint, they would promptly receive initial disclosures under the Commission's rules of procedure, 16 C.F.R. § 3.31(b).

[4]Although Defendants announced the proposed transaction in April of 2006, they failed to file the routine submissions required by the Hart-Scott-Rodino Act until September 29, 2006. Defendants then chose to take an additional 14 months to comply with the Commission's standard document request – a request that the Commission subsequently modified so that Defendants could search and produce relevant documents from the files of a very small fraction of their employees. Many merging parties, including ones with far more employees to search than the two Defendants here, are able to comply with this document request in a few months,

B. The Acquisition is Anticompetitive and Will Harm Northern Virginia Consumers.

Inova, with five hospitals and 1,900 beds, is the self-described "800 pound gorilla" in the market for general acute care inpatient services in Northern Virginia. It has already acquired two competing hospitals – Alexandria Hospital in 1997 and Loudoun Hospital Center in 2005 – and now proposes to acquire PWHS, one of its few remaining competitors. Complaint at ¶ 31. If successful, Inova's market share would stand at 75-78%, more than eight times that of its largest remaining competitor. *Id.* at ¶¶ 28-31. With the increased leverage it would attain through the proposed acquisition, Inova will be able to extract higher prices from health plans in Northern Virginia – price increases that will be passed on to employers and employees in the form of higher insurance costs for those who continue to purchase health insurance, and reduced coverage or no coverage for those who cannot afford the higher prices caused by Inova's dominant pricing structure. *Id.* at ¶ 36.

What is most striking is that unlike virtually every other merger challenge by the Commission, including hospital merger challenges, the Defendants do not argue that post-merger prices will stay the same or go down. Indeed, there is overwhelming evidence that the price increase that will result from the merger is large. Inova will implement substantial price increases at PWHS because, as might be expected based on its relative bargaining leverage, PWHS is significantly less expensive than the Inova hospitals. Many health plans expect this

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especially when the Commission grants substantial burden-lessening modifications as was done here. Indeed, counsel for the Defendants originally represented that they were going to meet their obligations under the request, and thus, would have been able to force a Commission decision, by the Spring of 2007. Those promises went unfulfilled and the Defendants did not ultimately meet their obligations until mid-November, 2007. At that time, the Defendants chose to retain new counsel, unilaterally postponing the closing of the transaction four more times until May, 2008.

change to result in large price increases at PWHS, reflecting the relative prices of the Inova and PWHS hospitals and the loss of competition that would result from the merger. Thus, far from being speculative, the anticompetitive harm from this merger is clear.

It is indisputable that higher hospital prices to health plans lead directly to higher health care costs to the plans' members. Complaint at ¶ 36. Although those higher prices will harm all consumers, the increases likely will have the largest adverse impact on small employers in Northern Virginia and their employees. Indeed, for a number of small employers in Prince William County, providing health insurance to their employees is already a significant financial burden, and a price increase may prevent them from offering health insurance altogether. *Id.* For other small employers who aspire to offer their employees health insurance, an increase in health care costs will make it even more difficult to offer health benefits after the merger. *Id.* In addition, the underinsured will likely become even more underinsured. As a result of these significant price increases, residents of Northern Virginia will be forced to cut back on health care services, and thus will likely suffer adverse health effects.[5]

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[5]Defendants cite *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999), in support of their claim that the proposed transaction does not raise issues significant enough to warrant issuance of a preliminary injunction pending the completion of the full administrative trial. Defendants, however, ignore the striking differences between this acquisition and the one in *Tenet*. In that case, two independent (*i.e.*, non-system), underutilized hospitals proposed merging in a geographic market where the Eighth Circuit determined there were over a dozen other hospitals competing against the merging parties. The Eighth Circuit further determined that the merger may result in a combined hospital that could compete more effectively against the numerous hospitals in Cape Girardeau and St. Louis, Missouri. By contrast, in this matter, the dominant hospital system in Northern Virginia is attempting to acquire one of its few remaining competitors, resulting in the dominant firm's control of up to 78% of the market. Unlike here, the parties in *Tenet* did not essentially acknowledge the likelihood that prices would rise after the merger. Aside from the fact that both cases involved hospitals, this transaction bears no resemblance to the one in *Tenet*, or, for that matter, other recent federal court hospital merger decisions.

Defendants appear to be advancing a novel defense to this anticompetitive merger: that regardless of what happens to prices post-merger, consumers will still be better off than before. Defs. Mem. At 2. In reality, however, Defendants' arguments are little more than the worn and rejected assertion that, although prices will increase significantly, a dominant firm like Inova, rather than the market and competition, will safeguard consumers' welfare, in this instance, by improving quality at PWHS.[6] In assessing Defendants' quality improvement claims, the Court must be mindful that competition also is an important force to improve clinical quality and other aspects of hospital care quality, and so the merger's potential anticompetitive effects include *reduced* quality from the loss of competition between PWHS and Inova. As the Supreme Court recognized in *National Society of Professional Engineers v. United States*, the antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."[7]

C. Defendants' Efficiencies Defense Fails.

Defendants' memorandum argues that the merger is justified because Inova claims it will invest $200 million at PWHS and share certain expertise it has in managing hospitals, thereby

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[6]Notably, Defendants make no claim that the merger will improve quality for any of the five hospitals and 1,900 beds currently in the Inova system. *See generally* Defs. Memo at 4-5.

[7]435 U.S. 679, 695 (1978). The Court further noted that "[t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain - quality, service, safety, and durability - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Id.* Moreover, there is ample evidence that nonprofit hospitals, including those that have bought out their competitors, have not acted in the best interests of their communities. *See, e.g.,* John Carreyrou and Barbara Martinez, "Nonprofit Hospitals, Once for the Poor, Strike it Rich," The Wall Street Journal (April 4, 2008) at A1.

improving PWHS in a way it could not have improved itself. *See* Defs. Mem. at 1-2, 4. As a factual matter, there is overwhelming reason to doubt Inova's contention that quality at PWHS would be improved by the merger or that any likely improvements in quality would offset the large anticompetitive effects from the merger. PWHS' quality and safety program is well-established and well-funded, has the support of the PWHS board of directors, and is led by a highly qualified expert. As a result, PWHS today is a high quality, award-winning hospital with a successful quality and safety program that enables it to perform as well as, or better than, the Inova hospitals on a wide variety of quality metrics.[8] Thus, it is speculative, at best, to assume that Inova has a unique ability to improve the already exemplary quality levels at PWHS.

Even if it were the case – despite strong evidence to the contrary – that a large capital infusion (the true size of which is smaller than Defendants claim) would eventually enhance the quality of care at PWHS by some verifiable and measurable amount, the reality is that comparable financing is available to PWHS without any attendant anticompetitive effects. The law is clear that efficiencies – including in the form of quality improvements – that could be obtained through means other than the proposed anticompetitive transaction are not specific to the merger and therefore should not be credited against the anticompetitive effects of the merger. *Heinz*, 246 F.3d at 720-22.

Here, PWHS' revenue projections and financial strength clearly show that it is capable of obtaining financing on its own to fund all of the capital expenditures that Inova claims it will

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[8]For example, PWHS' performance on "core measures" equals or exceeds the performance of most Inova hospitals, its performance on risk-adjusted outcome measures (such as overall in-hospital mortality and patient safety indicators) largely equals or exceeds the Inova hospitals' performance, its already low mortality rates are trending downward, and the rate at which PWHS' patients acquire serious hospital infections is generally lower than at the Inova hospitals.

make. Even if PWHS decides not to obtain independent financing for its expansions, it has other financing alternatives short of a merger with Inova. For example, at the same time it zeroed in on a transaction with Inova, it virtually ignored expressions of merger interest from another nonprofit hospital system that, unlike Inova, does not own any hospitals in Northern Virginia. Because the financial resources Inova has stated it will infuse into PWHS are available without PWHS combining with its most significant competitor, Inova's planned capital contribution cannot be characterized as a benefit specific to the merger.

II. THE COURT SHOULD REJECT DEFENDANTS' PROPOSED SCHEDULING ORDER

Despite their languid pace in moving this acquisition forward over many months, it took less than four days from the filing of the Complaint here for Defendants to file their motion seeking an expedited Rule 16(b) conference and entry of a scheduling order. Defendants filed their motion before answering the Complaint, and only shortly after providing Plaintiffs with their initial positions on a number of Rule 26(f) conference issues. The motion arrived – without advance warning – in the middle of what appeared to be ongoing, steadily progressing Rule 26(f) discussions over the timing of expert reports, initial disclosures, and the preliminary injunction motion briefing dates, among other issues. No impasse had been reached on any of those issues, or, at least, no impasse of which Plaintiffs were aware.

Two hours before Defendants filed their motion, Defendants sent Plaintiffs a lengthy e-mail outlining their position on several Rule 26(f) conference issues, and concluded the correspondence by saying "[w]e look forward to hearing back from you all with your proposed dates for the federal court hearing and for your responses to our [attached] suggested schedule

and discovery plan." *See* Ex. 1 attached hereto.[9] Plaintiffs were preparing the response requested by Defendants in an effort to further narrow the gap between the two sides on several issues when Defendants' motion arrived. Defendants' never hinted that they planned to file a motion seeking entry of their proposed scheduling order and discovery plan that they had sent to Plaintiffs for the first time just hours earlier. Defendants never provided Plaintiffs with any meaningful opportunity to respond to their proposed scheduling order and discovery plan. Consequently, Defendants did not satisfy the requirements of Fed. R. Civ. P. 26(f)(2), and the Defendants' motion should be denied as premature so that Rule 26(f) discussions can continue and a joint discovery plan be developed.

If the Court reaches the merits of Defendants' positions, it should also deny the motion. Defendants' proposed schedule in the district court would: (1) have *three days* of live witness testimony at a preliminary injunction hearing; (2) place no limits on the volume or nature of pre-hearing discovery and allow duplicative discovery in two parallel proceedings; and (3) require Plaintiffs – contrary to every merger-related preliminary injunction in recent history – to serve all supporting expert reports or declarations with their initial motion for preliminary injunction. The relief sought in the Complaint makes clear that issuance of Defendants' expedited scheduling order and an expedited status conference is simply not necessary for the Court to effectively manage this collateral preliminary injunction action.

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[9]Many of the Rule 26(f) issues addressed in Defendants' May 16, 2008 correspondence were issues raised for the first time, such as privilege logs and shortened discovery response times. Some Rule 26(f) issues still have not been discussed at all, such as the scope of post-Rule 26(f) conference discovery, including limitations on numbers of depositions, interrogatories and requests for admissions.

A. Preliminary Injunctions Are Routinely Decided On Declarations, Briefs and Oral Argument.

It bears repeating: the only relief sought in this Court is the statutorily-envisioned preliminary injunction to support the full administrative litigation on the merits. Complaint at 1, 17. The preliminary injunction action here is not a full trial on the merits. For this proceeding, Plaintiffs want first and foremost to provide the Court with evidence in the form desired by the Court. Whether the Court decides that live witnesses are warranted is entirely within the Court's discretion. We do note that district courts have often decided preliminary injunctions under Section 13(b) of the Federal Trade Commission Act on the papers and declarations alone without any live witness testimony, let alone the 16 hours of live testimony proposed by Defendants. *See FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002); *FTC v. Harbour Group Investments, L.P.*, 1990 WL 198819 (D.D.C. 1990); *FTC v. Imo Indus. Inc.*, 1989 WL 362363 (D.D.C. 1989); *FTC v. Atlantic Richfield Co.*, 1976 WL 1341 (E.D. Va. 1976). Again, that made sense because live testimony would occur during the full administrative trial to follow.

A preliminary injunction proceeding with live witnesses may be particularly unwarranted in this case given the extensive number of sworn fact witness declarations that both sides have already exchanged, the extended period of time available for the parties to prepare detailed memoranda, and the agreement by both sides that expert reports or declarations will be part of the record here.[10] In addition, Plaintiffs have proposed to Defendants a schedule for the administrative proceeding at the Commission that would include a three-week-long full trial on the merits less than four months from now, at which time the Defendants may call any number

[10]One possibility would be for the parties to brief the preliminary injunction motion, provide the Court with their expert and fact declarations, and let the Court decide at that point whether live witnesses are desirable.

of live witnesses to present testimony after development of a full pre-trial evidentiary record.

B. Plaintiffs Support Full Discovery Through the Administrative Proceeding and Rule 26(f) Procedures.

Defendants falsely depict Plaintiffs as opposing fact discovery for the preliminary injunction. Defs. Mem. at 3. Plaintiffs' discovery proposals have all been designed to provide Defendants with full and fair discovery for this collateral preliminary injunction action while avoiding the burden on third parties – and Defendants themselves – of duplicative discovery in this preliminary injunction proceeding and the full administrative trial on the merits at the Commission.

As an initial matter, contrary to Defendants' representation, Plaintiffs have never raised any objections to Defendants taking post-Rule 26(f) conference document discovery in this case and there has been no discussion at all of any limits on post-Rule 26(f) conference depositions,[11] or on interrogatories or requests for admission. Indeed, the pace at which Defendants have received third-party document discovery in this case is simply extraordinary. Within four days of filing the Complaint, Plaintiffs turned over (or caused to be turned over) to Defendants nearly

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[11]Before Plaintiffs even filed the Complaint, Defendants asked whether Plaintiffs would stipulate, pursuant to Fed. R. Civ. P. 26(d)(1), that Defendants could serve third-party discovery once the Complaint was filed. Under Rule 26(d)(1) a party may not seek discovery from any source before the Rule 26(f) conference absent a stipulation between the parties or a court order. Fed. R. Civ. P. 26(d)(1).

Plaintiffs offered to stipulate to immediate (pre-Rule 26(f) conference) third-party depositions if Defendants would limit such discovery to five depositions that would not be repeated in the administrative proceeding before the Commission. Defendants declined this proposal to obtain pre-Rule 26(f) conference depositions. The parties have not discussed any limits on post-Rule 26(f) conference depositions other than Plaintiffs' proposal that any depositions taken in the administrative proceeding not be duplicated in this preliminary injunction proceeding, and vice-versa. Defendants apparently mistakenly believe that Plaintiffs' offer to stipulate to only five pre-Rule 26(f) conference depositions also applied post-Rule 26(f) conference. If they had not filed their motion prematurely, this misunderstanding could have been corrected in further discussions.

all of the tens of thousands of pages of documents the Commission obtained from third parties in its investigation of Defendants' proposed merger. Defendants therefore already have the vast majority of third-party documents relevant to the preliminary injunction, and certainly the ones most relevant to the case that are not already in their possession. This production of documents was accomplished *prior to*: (a) Defendants' Answer, (b) Plaintiffs' filing of a motion for preliminary injunction,[12] (c) completion of Rule 26(f) conference discussions, (d) Rule 26(a)(1) initial disclosure deadlines, and (e) service of any document requests.

Moreover, in the interest of moving the pre-trial matters in the administrative proceeding as quickly and expeditiously as possible, Complaint Counsel have repeatedly told Defendants that they may immediately take unlimited depositions and serve unlimited document discovery in the administrative proceeding and, pursuant to the interim protective orders agreed to by both sides in both cases, fully use that discovery in this collateral district court proceeding.[13] Indeed, Complaint Counsel have already served deposition notices and document requests on the Defendants in the administrative proceeding. Given these highly atypical immediate voluntary disclosures, and Defendants' full access to unlimited discovery, a district court would be well-justified in denying any additional discovery in a preliminary injunction proceeding. *See United*

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[12]Where no Answer or preliminary injunction motion has been filed, no preliminary injunction hearing is pending, and the party would not be harmed by waiting until after the Rule 26(f) conference, expedited discovery is not reasonable. *See Dimension Data North America, Inc. v. NetStar-1, Inc.*, 226 F.R.D. 528 (E.D.N.C. 2005); *see also Disability Rights Council of Greater Washington v. WMATA*, 234 F.R.D. 4 (D.D.C. 2006) (denying motion for expedited discovery on preliminary injunction motion).

[13]Defendants claim that discovery disputes in the administrative proceeding will be resolved more slowly than they would be in federal district court. Again, Defendants provide no support for this claim. With the plenary trial proposed to begin in early September, ALJ Rosch – who has litigated dozens of antitrust cases over a 40-year career – will be incentivized to resolve discovery disputes as expeditiously as possible.

States v. Columbia Pictures Indus., Inc., 88 F.R.D. 186, 190-191 (S.D.N.Y. 1980) (third-party discovery by Defendants is unnecessary in government's preliminary injunction proceeding where the third-party information that forms the "core" of the government's antitrust case is made available to the Defendants by the government and some degree of additional third-party discovery is available).

C. The Standard Practice in Section 13(b) Actions is to Serve Expert Reports After the Commission Files its Preliminary Injunction Motion.

Defendants argue, without any citation or support, that Plaintiffs' yet-to-be-filed opening motion for a preliminary injunction should be accompanied by all expert opinions that Plaintiffs will rely upon. Defendants' proposal is unprecedented. In no preliminary injunction proceeding in recent history has the Commission been required to submit its expert reports or declarations with its motion for preliminary injunction. Nor will Defendants be prejudiced if expert reports are served after the Plaintiffs file their motion for preliminary injunction. All of the proposals that were under discussion between the parties (when they were interrupted by the instant motion) contemplated that all expert reports on both sides would be served before Defendants file their opposition to Plaintiffs' preliminary injunction motion and supporting memorandum. Thus, Defendants would have access to all expert opinions before responding to Plaintiffs' arguments.

CONCLUSION

For the foregoing reasons, Plaintiffs request that Defendants' motion for entry of their proposed scheduling order and an expedited status conference be denied.

May 20, 2008 Respectfully submitted,

Jeffrey Schmidt
Director, Bureau of Competition

David P. Wales, Jr..
Deputy Director, Bureau of Competition

William Blumenthal
General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

David Everson
Matthew J. Reilly
Thomas J. Lang
Norman Armstrong, Jr.
Albert Kim

Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 326-3665

By: _____/s/_____
Matthew J. Reilly
Federal Trade Commission
Counsel for Plaintiff
601 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 326-3665
Fax: (202) 326-2286
Mreilly@ftc.gov

Gerard Mene
Assistant United States Attorney
Eastern District of Virginia

By:_____/s/_____
Gerard Mene
Assistant U.S. Attorney
Counsel for Plaintiff
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3777
Fax: (703) 299-3983
Gerard.Mene@usdoj.gov

Robert McDonnell
David Irvin
Sarah Oxenham Allen
Attorney General for the
Commonwealth of Virginia

By:_____/s/_____
Sarah Oxenham Allen
Assistant Attorney General
Antitrust & Consumer Litigation
Section
Office of the Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, Virginia 23219
(804) 786-2071
Fax: (804)786-0122
SOAllen@oag.state.va.us

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on the 20th day of May, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Randall K. Miller, Esq.
Nicholas M. DePalma, Esq.
Arnold & Porter LLP
1600 Tysons Boulevard
Suite 900
McLean, Virginia 22102-4865.

I FURTHER CERTIFY that on this date the foregoing was also served on the following counsel via electronic mail:

David P. Gersch
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004-1206
Phone: 202-942-5125
David.Gersch@aporter.com
Counsel for Inova Health System Foundation and
Prince William Health System

_____/s/_____
Gerard Mene
Assistant U.S. Attorney
Counsel for Plaintiff
2100 Jamieson Avenue
Alexandria, Virginia 22314
703-299-3777
Fax: 703-299-3983
Gerard.Mene@usdoj.gov

EXHIBIT 1

Lang, Thomas

From: David_Bergman@aporter.com
Sent: Friday, May 16, 2008 3:52 PM
To: dirvin@oag.state.va.us; SOAllen@oag.state.va.us; Armstrong, Norman; Everson, David; Reilly, Matthew J.; Lang, Thomas
Cc: David_Gersch@aporter.com; David_Fauvre@aporter.com
Subject: PI schedule and discovery

Microsoft Word - _3249424_DOC....

Counsel:

I write to memorialize the issues discussed today on our conference call and to provide our discovery plan and proposed PI schedule.

- Expert Reports

We agreed to a staggered expert report schedule in which plaintiffs would submit expert reports first. Defedants would then serve expert reports ten days thereafter and Plaintiffs would serve rebuttal expert reports five days after that. We just received the dates you proposed and we believe those dates need to be moved up slightly. Would you agree to a June 9, June 19, June 24 schedule?

- Third Party Production

You informed us that the vast majority of the third party documents will arrive at our offices today. You indicated and we agreed that some third parties are dealing with us directly and you informed us that bits of third party material, mostly data, are being withheld subject to further approval from the third parties that produced the data to you. You stated that you will provide more details on this in a cover letter accompanying today's production.

- Production of Witness Statements

You indicated that you were withholding attorney notes and comments regarding third parties or third party statements but that you were not withholding any third party statements or declarations based on any claim of privilege or other basis. You indicated that the gaps in the numbering of third party declarations and statements should not be interpreted to mean that statements or declarations were missing or not produced.

- Protective Order

You stated that you are still in conversations with third parties about granting access to confidential material to Shannon Sinclair and we stated we would consider a provision that permitted discussion on a document-by-document basis for certain material that initially would be withheld from her.

- Ministerial Matters

We asked that material addressed to David Gersch be sent to Arnold & Porter and not to Prince William Hospital, as had occurred on two previous occasions. You agreed to correct the problem. We also

asked to reschedule the May 29th scheduling conference in the Part III proceeding to the morning of May 29th or to June 2nd. You agreed that we could represent to Commissioner Rosch that you consented to our request and that your first choice was the morning of May 29th and your second choice was June 2nd. Thank you for accomodating us on this.

- Part III Case Management Order

You asked for our comments on the revised Part III Joint Case Management Statement. We advised that we were focused on the schedule in the preliminary injunction matter and not in the Part III matter, but that we will get back to you with our comments.

- Rule 26(f) Conference

We discussed scheduling our initial disclosures pursuant to Rule 26(A)(1) and we proposed providing those by May 27, 2008. You stated you would consider it and get back to us.

As directed in Rule 26(f), we discussed the possibilities of settling or resolving the case. We advised that we would be pleased to take any settlement offer to our clients. We concluded that settlement likely is not possible at this time.

We provided you with our position regarding a discovery plan in this matter. We stated that we need third party discovery and discovery of the parties. We proposed closing fact discovery on June 20, 2008 and closing expert discovery on June 30, 2008. We stated our belief that discovery should be permitted of any material relevant pursuant to Rule 26(b)(1). We asked that any electronically stored information be produced in TIFF format with associated text metadata. We proposed that the parties consider exchanging privilege logs by June 6, 2008, but we also agreed to consider a streamlined process for addressing claims of privilege over material that would otherwise be produced. We stated that we believed written discovery was appropriate and that, given the short time-frame, the times in which the parties should be required to respond should be shortened. We asserted our position that we should be permitted to take any depositions of witnesses upon which Plaintiffs plan to rely in support of the preliminary injunction. You reiterated Plaintiffs' position that discovery should not proceed at all in the federal action unless we agreed to take only five depositions.

We agreed to send you our proposed discovery plan. Please find attached a proposed scheduling order, which contains our proposed schedule and our proposed discovery plan. We intend to move the court to adopt our scheduling order promptly.

Commonwealth Access to Depositions

Sarah Allen, representing the Commonwealth of Virginia, asked that we consent to the Commonwealth's participation in any depositions that take place in the administrative proceeding. We advised that we would not consent to the Commonwealth's participation in depositions noticed in the administrative proceeding because the Commonwealth is not a party to that action. Obviously, we have no objection to the Commonwealth's participation in any depositions noticed in the federal court action to which the Commonwealth is a party.

- Scheduling a Hearing with the Court

We asked that you join us in a call to the clerk for the federal judge presiding over your Complaint for a preliminary injunction to

attempt to schedule a time next week for a hearing on a motion for a scheduling order that we plan to file. You would not agree to join us on that call and we advised that we would call the clerk to schedule something next week and advise you of the outcome of that call.

We look forward to hearing back from you all with your proposed dates for the federal court hearing and for your responses to our suggested schedule and discovery plan.

Best regards,

David Bergman

(See attached file: Microsoft Word - _3249424_DOC.pdf)

David Bergman David_Bergman@aporter.com
Arnold & Porter LLP Telephone: 202-942-5474
555 Twelfth Street, NW Fax: 202-942-5999
Washington, DC 20004-1206

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
Inova Health System Foundation, a corporation, and	)	**Docket No. 9326**
Prince William Health System, Inc. a corporation.	)	

ORDER

Upon consideration of Respondents' Motion to Recuse Administrative Law Judge J. Thomas Rosch and all related briefing and authorities cited therein, it is hereby ordered that:

Respondents' Motion is GRANTED.

ISSUED: May ___, 2008

The Honorable J. Thomas Rosch
Administrative Law Judge
Federal Trade Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 23, 2008, I served the attached Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge upon the following:

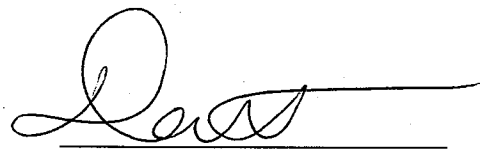
Via Hand-Delivery

Hon. J. Thomas Rosch
Administrative Law Judge
Room H-528
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Via Electronic Mail and Hand-Delivery

Albert Kim
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20580

Donald S. Clark
Secretary of the Commission
Office of the Secretary
Federal Trade Commission
Room H-135
600 Pennsylvania Avenue, N.W.
Washington, DC 20580



David M. Menichetti