



parties have made initial disclosures and participated in a scheduling conference to discuss, among other things, limitations on, and a schedule for, discovery.

**I. Discovery In This Action Should Be Stayed Pending Resolution Of The FTC's Motion For Preliminary Injunction In Federal Court**

Where, as here, the Commission seeks a preliminary injunction in federal court, both the Commission's established policies and procedures, as well as the FTC Rules of Practice, provide that the federal case takes priority. The FTC's Policy Statement expressly *requires* the Commission to consider the evidentiary record developed in the preliminary injunction proceeding, and the decision of the federal court denying a preliminary injunction, *before* determining whether to move forward with an administrative action.<sup>1</sup> See Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 160 Fed. Reg. 39,741, 39,743 (1995). Similarly, the FTC Rules of Practice provide that expedited, fast-track procedures in the administrative action may be implemented only *after* a federal court has ruled on the preliminary injunction. 16 C.F.R. § 3.11A(b)(1). These FTC policies and rules requiring the Commission to use the results of the judicial preliminary injunction action to inform the nature, scope, and advisability of the administrative proceeding make perfect sense and should be honored here.

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<sup>1</sup> Since 1995, the FTC has opted to dismiss the administrative complaint in every single case where a preliminary injunction was not issued by the federal court. See *In re Foster*, Docket No. 9323, Statement of the Commission Concerning Dismissal of the Administrative Complaint (Oct. 3, 2007); *In re Arch Coal Inc.*, Docket No. 9316, Statement of the Commission (June 13, 2005); *In re Tenet Healthcare Corp.*, Docket No. 9289, Order Dismissing Complaint (Dec. 23, 1999); *In re Butterworth Health Corp.*, Docket No. 9283, Order Granting Motion to Dismiss (Sept. 25, 1997); *In re Freeman Hospital*, Docket No. 9273, Order Dismissing Complaint (Nov. 30, 1995); but see *In re Whole Foods Market Inc.*, Docket No. 9324, Order Staying Administrative Proceedings (Aug. 7, 2007) (preliminary injunction denied by the District Court but appeal still pending).

The FTC Rules of Practice recognize that, in cases where the Commission chooses to seek a preliminary injunction in federal court, a stay of the administrative action is appropriate. Indeed, Rule 3.51(a) expressly states that such federal proceedings toll the deadline for resolution of the administrative action, noting that “[t]he pendency of any collateral federal court proceeding that relates to the administrative adjudication shall toll the one-year deadline for filing the initial decision.” 16 C.F.R. § 3.51(a). Moreover, although Complaint Counsel seeks unilaterally to impose an expedited administrative procedure here, it is only Respondents, not Complaint Counsel, that have the right to elect expedited, “fast-track” treatment, and that “fast-track” election is effective only *after* the preliminary injunction action has concluded. The rules providing for “fast-track” procedures make clear that, where the FTC has chosen to seek a preliminary injunction in federal court, the administrative action as a whole will generally proceed only *after* the preliminary injunction motion is resolved. *See* 16 C.F.R. § 3.11A(c) (noting that court’s issuance of preliminary injunction is a “triggering event” for fast-track proceedings and setting forth deadlines for respondent’s answer and initial scheduling conference *following issuance* of preliminary injunction).

The FTC Rules of Practice also expressly provide that the FTC should consider the evidentiary record developed in a judicial preliminary injunction proceeding when determining the scope of discovery appropriate for the administrative proceeding. *See* 16 C.F.R. § 3.11A(b)(1)(ii) (requiring the Commission, in cases where a preliminary injunction is denied, to determine whether “the Federal court proceeding *has resulted* in an evidentiary record that is likely materially to facilitate resolution of the administrative proceeding”) (emphasis added). Thus, the FTC Rules clearly provide that the judicial preliminary injunction proceeding should run its course before the administrative proceeding moves forward.

This has been the regular practice followed by the Commission in other similar cases where it has sought a preliminary injunction in federal court. In these cases, recognizing the principles discussed above, the Commission has typically delayed even filing the administrative complaint until the preliminary injunction motion has been decided (and in some cases has never even filed an administrative complaint)<sup>2</sup> or, in the few cases where it did file an administrative complaint, has either failed to oppose or affirmatively sought an administrative stay.<sup>3</sup> Indeed, in one recent case, Complaint Counsel argued that a stay was appropriate because the outcome of the preliminary hearing would affect both the scope of discovery needed and the need for further administrative action, noting that “[t]his Court, as well as the parties themselves, . . . will be in a substantially better position to determine the remaining discovery needs for this proceeding at the conclusion of the federal court hearing.” *In re Arch Coal, Inc.*, Docket No. 9316, Complaint Counsel’s Reply In Support Of Motion To Stay This Proceeding Or, In The Alternative, To Stay Discovery (May 25, 2004) at 1-2. We are aware of no instance in which the parties have engaged in substantial discovery in an FTC administrative proceeding while also litigating a preliminary injunction action in federal court.<sup>4</sup>

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<sup>2</sup> See, e.g., *F.T.C. v. Libbey, Inc.*, 211 F.Supp.2d 34 (D.D.C. 2002); *F.T.C. v. H.J. Heinz Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000), *rev’d* by 246 F.3d 708 (D.C. Cir. 2001); *F.T.C. v. Swedish Match*, 131 F.Supp.2d 151 (D.D.C. 2000); *F.T.C. v. Tenet Healthcare Corp.*, 17 F. Supp. 2d 937 (E.D. Mo. 1998), *rev’d* by 186 F.3d 1045 (8th Cir. 1999); *F.T.C. v. Cardinal Health, Inc.*, 12 F.Supp.2d 34 (D.D.C. 1998); *F.T.C. v. Staples, Inc.*, 970 F.Supp. 1066 (D.D.C. 1997); *F.T.C. v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996).

<sup>3</sup> See, e.g., *In re Whole Foods Market Inc.*, Docket No. 9324, Order Staying Administrative Proceedings (Aug. 7, 2007); *In re Arch Coal, Inc.*, Docket No. 9316, Complaint Counsel’s Motion To Stay This Proceeding Or, In The Alternative, To Stay Discovery (May 12, 2004).

<sup>4</sup> In recent federal court briefing, Complaint Counsel sought to cite precedent for moving forward with the administrative proceeding while the parties litigate the preliminary injunction. The case Complaint Counsel cited, *In re Paul L. Foster*, Docket No. 9323, is completely inapposite. In that matter, the FTC filed its administrative complaint three weeks after filing its complaint for preliminary injunction in federal court and did not even attempt to serve any discovery on respondents in the administrative action. The federal court denied the FTC’s motion for a preliminary injunction just a few days after respondents filed their answers in the

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It is plainly correct that the FTC's federal court action for a preliminary injunction must take priority over any administrative action. The FTC's preliminary injunction action seeks emergency relief and an expedited process. Within the constraints of these time exigencies, the federal court is to assess the facts and the law based on an evidentiary record that the parties must develop. The legislative history of Section 13(b) of the Federal Trade Commission Act, along with federal case law and the FTC's own practices in merger cases throughout the last decade, make clear that the federal court must be afforded the opportunity to make its own independent judgment, based on as much discovery as is practicable, without interference from the administrative proceeding adjudicating the merits of the case.<sup>5</sup>

In sum, there is no reasonable basis or precedent in the Rules of Practice, FTC and federal case law, or past Commission practice in similar cases that could justify conducting discovery in the administrative proceeding while the preliminary injunction action is pending. The proper course, as established by the Rules of Practice and decades of established

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administrative action and before an initial scheduling conference had been conducted by the ALJ. It is not surprising, therefore, that a potential stay of the administrative proceedings was never raised or discussed by the parties in the administrative action.

<sup>5</sup> See, e.g., H.R. Conf. Rep. 93-624 at \*2533 (1973) ("The inclusion of this new language is to define the duty of the courts to exercise independent judgment on the propriety of issuance of a temporary restraining order or a preliminary injunction.") (citing *FTC v. Sterling Drug Inc.*, 317 F.2d 669, 677 (2d Cir. 1963) ("[n]ot even the Commission contends that in a proceeding under [the FTC Act] the judge is merely a rubber stamp, stripped of the power to exercise independent judgment"); see also *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 6-8 (D.D.C. 2007) ("[t]he FTC's burden is not insubstantial. . . antitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the market and its probable future"); *FTC v. Foster*, No. CIV 07-352-JBACT, 2007 WL 1793441, at \*50-51 (D.N.M. May 29, 2007) (noting that "[i]f Congress did not want federal courts to play some meaningful role in the injunction process, it could have given injunction power directly to the FTC"); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1302 (W.D. Mich. 1996) (denying preliminary injunction after the Court "toured each of the would-be merging hospitals . . . received considerable testimony from the witness stand in which the Court actively participated through its own questioning of witnesses . . . duly considered the voluminous exhibits introduced by the parties . . . [and] carefully considered the arguments of able counsel on both sides of the case").

Commission conduct, is to stay discovery in this action until the federal court has resolved the preliminary injunction motion. After the federal court has ruled on the emergency action that the FTC initiated there, the Commission must consider whether to continue with the administrative proceeding. If it decides to do so, then the Hospitals will have the option to elect fast-track treatment in the administrative proceeding, and the parties and the presiding ALJ can determine what discovery is appropriate in the administrative proceeding in light of the evidentiary record the parties have developed in the federal court action.

## **II. In All Events, The FTC's Discovery Here Is Premature**

Complaint Counsel's service of discovery in this action, before Respondents have answered the complaint and before the parties have exchanged initial disclosures and participated in a scheduling conference, is contrary to the procedures envisioned in the FTC's Rules of Practice. The Rules of Practice contemplate that all discovery-related matters originate with, and proceed based on, a distinct timeline following the filing of the answer. Five days after the filing of the answer, the parties are required to submit initial disclosures. 16 C.F.R. § 3.31(b). Then, "[n]ot later than fourteen (14) days *after* the answer is filed by the last answering respondent," there is to be a scheduling conference in which "a schedule of proceedings" and "possible limitations on discovery" are addressed. 16 C.F.R. § 3.21(b) (emphasis added). The parties are to meet and confer in advance of the scheduling conference to discuss, among other things, their claims and defenses and a proposed discovery schedule. 16 C.F.R. § 3.21(a). The complaint in this action was served on Respondents on May 12, 2008; under Rules 3.12 and 4.4(a), Respondents' answers are due on June 2, 2008. 16 C.F.R. §§ 3.12(a), 4.4(a). Initial disclosures have not yet been exchanged, and the rules provide that the meet and confer in advance of the

scheduling conference (during which the parties are to discuss claims *and defenses*) will be held *after* the answer has been filed.<sup>6</sup>

Complaint Counsel's attempt to initiate and pursue discovery at this stage of the administrative proceedings is plainly premature and contrary to the staging of discovery described in the FTC's Rules of Practice.

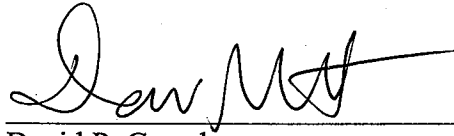
### CONCLUSION

For the foregoing reasons, it would be prejudicial and unfair to force the Hospitals simultaneously to engage in expedited proceedings in two different fora. Accordingly, the Hospitals respectfully request that discovery in this action, and all other aspects of this administrative proceeding, be stayed pending resolution of the preliminary injunction complaint brought by the FTC and the Commonwealth of Virginia in the U.S. District Court for the Eastern District of Virginia.

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<sup>6</sup> Complaint Counsel incorrectly claims that the parties have already engaged in discovery in the administrative action. To the contrary, the parties' exchange of certain third-party witness statements and documents in recent days in connection with the preliminary injunction proceeding does *not* establish that the discovery process has already started in this matter or that the Hospitals have somehow consented to same. Counsel for the Hospitals have made clear in correspondence regarding this third-party discovery that such discovery is being provided in the federal court action, not the administrative action.

Respectfully submitted,



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*Counsel for Respondents Inova Health  
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Health System, Inc.*

Dated: May 23, 2008



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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**In the Matter of**

**Inova Health System Foundation,  
a corporation, and**

**Prince William Health System, Inc.  
a corporation.**  
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) **Docket No. 9326**  
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**PUBLIC**  
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**ORDER**

Upon consideration of Respondents' Motion To Stay Discovery And All Other Aspects Of This Proceeding Pending Resolution Of Preliminary Injunction Action, and all related briefing and authorities cited therein, it is hereby ordered that:

1. Respondents' Motion is GRANTED; and
2. Discovery in this action, and all other aspects of this administrative proceeding, are immediately STAYED pending resolution of the preliminary injunction action brought by the Commission and the Commonwealth of Virginia in the United States District Court for the Eastern District of Virginia, Case No. 1:08CV460-CMH/JFA.

ISSUED: May \_\_, 2008

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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 Stay Discovery and all other Aspects of This Proceeding Pending Resolution of Preliminary Injunction Action upon the following:

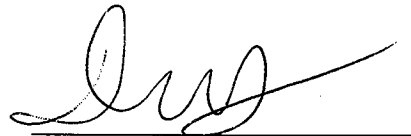
**Via Hand-Delivery**

Hon. J. Thomas Rosch  
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