

ORIGINAL

237792  
536173

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.	)	<u>PUBLIC</u>
	)	
	)	

**RESPONDENTS' RESPONSE TO COMPLAINT COUNSEL'S  
MOTION FOR INTERIM PROTECTIVE ORDER**

Respondents Inova Health System Foundation and Prince William Health System, Inc. respond to Complaint Counsel's Motion For Interim Protective Order ("Motion") to correct certain misstatements in Complaint Counsel's Motion and to clarify Respondents' position with respect to certain items addressed in the proposed "Protective Order Governing Discovery Material" attached to the Motion. As Respondents' counsel have made clear in correspondence to Complaint Counsel, although Respondents are certainly amenable to entry of a protective order in this case, and indeed have readily negotiated the provisions of such an order with Complaint Counsel, Respondents cannot agree to entry of the proposed order as drafted because it includes a provision that inappropriately would allow the Virginia Attorney General, who does not represent a party to this action, access to confidential information and materials created and produced in connection with this action.

As a threshold matter, Complaint Counsel incorrectly claims that Respondents "agreed to the proposed interim Protective Order" attached to Complaint Counsel's Motion. Memorandum Of Law In Support Of Complaint Counsel's Motion For Interim Protective Order ("CC Memo.")

at 3. On May 9, 2008, Complaint Counsel circulated draft protective orders for both this action and the federal preliminary injunction action filed by the Commission and the Commonwealth of Virginia in the U.S. District Court for the Eastern District of Virginia. *See* E-mail from T. Lang to D. Gersch, *et al.* (5/9/08) (Ex. 1). On May 12, 2008, Respondents' counsel provided comments and proposed edits to the protective orders, and also noted that "we are agreeable to an interim protective order if that is necessary to facilitate document productions while we work through these issues." E-mail from D. Bergman to M. Reilly, *et al.* (5/12/08) (Ex. 2). Over the next several days, the parties continued to discuss and exchange correspondence regarding the draft protective orders, but did not reach final agreement on the content of the orders. The parties also exchanged certain third-party witness statements and documents during this time frame in connection with the preliminary injunction action, pursuant to an informal understanding that certain materials would be afforded "Confidential" treatment under the agreed-upon provisions of the draft protective order for that action, pending agreement on a final protective order. *See, e.g.,* Letter from D. Fauvre to M. Reilly (5/16/08) (Ex. 3).

Following their exchange of third-party materials, the parties continued to negotiate and discuss the terms of a draft protective order for this action. While the parties were able to reach agreement on most outstanding issues, one issue remained unresolved -- whether the Virginia Attorney General should be allowed access to confidential information, depositions, and related materials from this action. In this regard, Respondents objected to the broad definition of the term "Matter" in Complaint Counsel's proposed protective order, which would allow the Virginia Attorney General access to confidential materials from both the federal preliminary injunction action, where the Commonwealth of Virginia *is* a party, and in this action, where the

Commonwealth of Virginia *is not* a party, on the ground that confidential information related to this proceeding should not be shared with non-parties, including the Commonwealth of Virginia. On May 19, 2008, Respondents' counsel sent an e-mail to Complaint Counsel making this position clear, stating that "*We do not agree that the Virginia AG should have access to confidential information and depositions in the administrative proceeding.*" E-mail from D. Bergman to T. Lang, *et al.* (5/19/08) (Ex. 4) (emphasis added). On May 21, 2008, Respondents' counsel reiterated that position in yet another e-mail exchange discussing the proposed protective order. See E-mail from D. Bergman to T. Lang, *et al.* (5/21/08) (Ex. 5). Respondents expressly stated that, to ensure that non-parties do not have access to Confidential material produced in this administrative proceeding, the definition of "Matter" in the proposed protective order should be changed to read: "'Matter' means the above captioned matter pending before the Federal Trade Commission, and all subsequent administrative, appellate or other review proceedings related thereto." Ex. 5.

Despite these express statements of Respondents' position, Complaint Counsel has now submitted a proposed interim protective order, attached to their Motion, that would give the Commonwealth of Virginia, a non-party to this proceeding, access to Confidential materials, and Complaint Counsel has even represented in the Motion that Respondents "agreed to" the proposed order. CC Memo. at 3. Respondents did *not* agree to this form of proposed order.

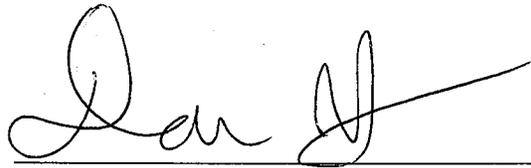
Respondents recognize that entry of a protective order is necessary and appropriate in this case, and agree with Complaint Counsel that an interim protective order should be entered to protect the parties' ability to secure and use confidential information in an appropriate manner and to protect third parties and Respondents against inappropriate disclosure of confidential information. Accordingly, Respondents request that the interim protective order proposed by

Complaint Counsel be modified by deleting the existing definition of "Matter" in Paragraph 10 of the "Definitions" section of the proposed order and replacing it with the following language:

"Matter" means the above captioned matter pending before the Federal Trade Commission, and all subsequent administrative, appellate or other review proceedings related thereto.

This provision will appropriately ensure that the Virginia Attorney General's office, which does not represent a party to this action, will not have access to confidential information, deposition transcripts, and related materials disclosed by Respondents and/or third-parties in connection with this action. Respondents attach hereto as Exhibit 6 a form of the proposed protective order to which they are amenable and that is consistent with the parties' communications about this matter.

Respectfully submitted,



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

Dated: May 28, 2008

ARNOLD & PORTER LLP  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
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.*

# **Exhibit 1**



"Lang, Thomas"  
<tlang@ftc.gov>

05/09/2008 05:05 PM

To <David\_Gersch@aporter.com>,  
<David\_Fauvre@aporter.com>,  
<David\_Bergman@aporter.com>  
cc "Reilly, Matthew J." <MREILLY@ftc.gov>, "Armstrong,  
Norman" <NARMSTRONG@ftc.gov>

bcc

Subject RE:

Thanks David. I'm attaching a revised Part III PO and a proposed PI PO for E.D. Va. On the issue of cross-use of discovery that we discussed, we made clear in the definition of "matter" in each of the POs that it includes the other action and vice versa. We made no other changes to the proposed Part III PO.

Also, We thought we would send you some proposed pre-hearing dates for discussion on our next call. These are proposed subject to approval by our co-plaintiff:

5/26 Plaintiffs file PI motion/brief  
6/23 exchange of expert reports  
7/1 Defendants file Opposition  
7/9 Plaintiffs' file reply

Please let us know what is a good time to call you to discuss.

Thanks.

Tom

-----Original Message-----

From: David\_Gersch@aporter.com [mailto:David\_Gersch@aporter.com]  
Sent: Friday, May 09, 2008 3:44 PM  
To: Lang, Thomas  
Cc: David\_Bergman@aporter.com; David\_Fauvre@aporter.com; Reilly, Matthew J.; Armstrong, Norman  
Subject: Re:

Tom,

Our clients agree not to close their transaction before August 1. This will allow a hearing during the week of July 14 as we discussed earlier today (or thereabouts, depending on the preference of the Court).

David.

"Lang, Thomas"  
<tlang@ftc.gov>

05/09/2008  
03:26 PM

To  
David  
Gersch/Atty/DC/ArnoldAndPorter@A  
PORTER, David

Fauvre/Atty/DC/ArnoldAndPorter@A  
PORTER, David  
Bergman/Atty/DC/ArnoldAndPorter@  
APORTER

cc

"Reilly, Matthew J."  
<MREILLY@ftc.gov>, "Armstrong,  
Norman" <NARMSTRONG@ftc.gov>  
Subject

David and David,

Following up on our last call, as we discussed, we can agree to exchange non-privileged fact witness declarations, statements, and transcripts on Wednesday (May 14) and third party documents on Friday (May 16).

We have not yet seen your e-mail confirmation of the postponement of the closing until after the week of July 14. As we discussed, we need to receive that as soon as possible to stop the trains here on our motion for a May 23rd hearing in E.D. VA.

Thanks.

Thomas J. Lang  
Federal Trade Commission  
(202) 326-3665 (direct)  
tlang@ftc.gov

-----  
This communication may contain information that is legally privileged, confidential or exempt from disclosure. If you are not the intended recipient, please note that any dissemination, distribution, or copying of this communication is strictly prohibited. Anyone who receives this message in error should notify the sender immediately by telephone or by return e-mail and delete it from his or her computer.  
-----

David Gersch  
Arnold & Porter LLP  
555 Twelfth Street, NW  
Washington, DC 20004-1206

David\_Gersch@aporter.com  
Telephone: 202-942-5125  
Fax: 202-942-5999

For more information about Arnold & Porter LLP, click here:  
<http://www.arnoldporter.com>

# **Exhibit 2**

David  
Bergman/Atty/DC/ArnoldAnd  
Porter  
DC - 1180 202-942-5474  
05/12/2008 02:16 PM

To "Reilly, Matthew J." <MREILLY@ftc.gov>, "Armstrong,  
Norman" <NARMSTRONG@ftc.gov>, "Lang, Thomas"  
<tlang@ftc.gov>  
cc David Gersch/Atty/DC/ArnoldAndPorter@APORTER,  
Deborah Feinstein/Atty/DC/ArnoldAndPorter@APORTER,  
David Fauvre/Atty/DC/ArnoldAndPorter@APORTER  
bcc David Fauvre/Atty/DC/ArnoldAndPorter

Subject Inova protective orders

Tom, Matt, and Norman:

Here are some proposed edits to the draft protective orders you provided Friday. The edits below are to the proposed EDVa protective order but they apply equally to the Part III PO.

Para. 2 -- Change both references to five (5) business days to three (3) business days.  
Para. 4 -- Change ten (10) days to five (5) days.  
Para. 5 -- Change three (3) business days to 24 hours.  
Para. 6 -- Change three (3) business days to 24 hours or one (1) business day.  
Para. 8 -- We would like to add the General Counsel of Inova as a person eligible to receive Confidential Discovery Material.  
Para. 10 -- delete both references to "any Expert/Consultant."  
Para. 10 -- Change both references to five (5) business days to 24 hours.  
Para. 11 -- Change five (5) business days to three (3) business days.

Declaration Concerning Protective Order -- delete provision 4.a.

In addition, we would like the protective order to make clear that it reaches all materials marked confidential that Inova and Prince William Hospital produced to the FTC during the investigative proceedings.

As we have discussed, we are agreeable to an interim protective order if that is necessary to facilitate document productions while we work through these issues.

Finally, pursuant to FRCP Rule 26(d), will you please stipulate that the parties may issue third party discovery upon filing of the Complaint?

Thanks,  
David Bergman

----- Forwarded by David Bergman/Atty/DC/ArnoldAndPorter on 05/12/2008 10:25 AM -----



"Lang, Thomas"  
<tlang@ftc.gov>

05/09/2008 05:05 PM

To <David\_Gersch@aporter.com>,  
<David\_Fauvre@aporter.com>,  
<David\_Bergman@aporter.com>  
cc "Reilly, Matthew J." <MREILLY@ftc.gov>, "Armstrong,  
Norman" <NARMSTRONG@ftc.gov>

Subject RE:

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Please let us know what is a good time to call you to discuss.

Thanks.

Tom

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Sent: Friday, May 09, 2008 3:44 PM  
To: Lang, Thomas  
Cc: David\_Bergman@aporter.com; David\_Fauvre@aporter.com; Reilly, Matthew J.; Armstrong, Norman  
Subject: Re:

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David.

"Lang, Thomas"  
<tlang@ftc.gov>

05/09/2008  
03:26 PM

David  
Gersch/Atty/DC/ArnoldAndPorter@A  
PORTER, David  
Fauvre/Atty/DC/ArnoldAndPorter@A  
PORTER, David  
Bergman/Atty/DC/ArnoldAndPorter@  
APORTER

To

cc

"Reilly, Matthew J."  
<MREILLY@ftc.gov>, "Armstrong,  
Norman" <NARMSTRONG@ftc.gov>  
Subject

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Thanks.

Thomas J. Lang  
Federal Trade Commission  
(202) 326-3665 (direct)  
tlang@ftc.gov

-----  
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-----

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<http://www.arnoldporter.com>



PI PO.PDF Part III PO.PDF

# **Exhibit 3**

---

ARNOLD & PORTER LLP

---

David D. Fauvre  
David.Fauvre@aporter.com  
202.942.5041  
202.942.5999 Fax  
555 Twelfth Street, NW  
Washington, DC 20004-1206

May 16, 2008

**VIA HAND DELIVERY**

Matthew J. Reilly, Esq.  
Federal Trade Commission  
Bureau of Competition  
601 New Jersey Avenue, N.W.  
Washington, DC 20580

Re: *Federal Trade Commission, et al. v. Inova Health System Foundation, et al.*, Civ. Action No. 1:08CV460-CMH/JFA

Dear Matt:

On behalf of our clients, Inova Health System Foundation ("Inova") and Prince William Health System ("PWHS"), and per our agreement, please find enclosed our initial production of third-party documents. The enclosed documents bear Bates labels: Inova-PWHS\_00000134 to Inova-PWHS\_00000535.

We have marked all of the enclosed documents "Confidential" pursuant to the interim protective order to which we have agreed.

Sincerely,



David D. Fauvre

Enclosures

Cc (via first class mail):

Sarah Oxenham Allen, Esq.  
Assistant Attorney General  
Office of Attorney General  
Commonwealth of Virginia  
900 E. Main Street  
Richmond, VA 23219

# **Exhibit 4**

David  
Bergman/Atty/DC/ArnoldAnd  
Porter  
DC - 1180 202-942-5474  
05/19/2008 07:25 PM

To "Lang, Thomas" <tlang@ftc.gov>  
cc David\_Fauvre@aporter.com, David\_Gersch@aporter.com,  
"Everson, David" <deverson@ftc.gov>,  
dirvin@oag.state.va.us, "Reilly, Matthew J."  
bcc David Fauvre/Atty/DC/ArnoldAndPorter  
Subject Re: FTC/VA AG v. Inova/PWH

Tom:

With respect to the protective orders, we are amenable to all of the edits you propose below with one exception: We do not agree that the Virginia AG should have access to confidential information and depositions in the administrative proceeding. As I stated on the phone last week, the Virginia AG is not a party to the administrative action; accordingly, there is no basis to give the Virginia AG access to discovery produced in the administrative action or to permit the Virginia AG to participate in depositions, hearings, or other aspects of the administrative proceeding. In addition, and consistent with the above, the protective order for the administrative action needs to be changed so that the reference to the court action in Paragraph 10 is deleted. That is, Paragraph 10 should read: ""Matter" means the above captioned matter pending before the Federal Trade Commission, and all subsequent administrative, appellate or other review proceedings related thereto."

David Bergman

"Lang, Thomas" <tlang@ftc.gov>



"Lang, Thomas"  
<tlang@ftc.gov>

05/14/2008 09:06 PM

To <David\_Gersch@aporter.com>,  
<David\_Fauvre@aporter.com>,  
<David\_Bergman@aporter.com>  
cc <dirvin@oag.state.va.us>, <SOAllen@oag.state.va.us>,  
"Armstrong, Norman" <NARMSTRONG@ftc.gov>, "Everson,  
David" <deverson@ftc.gov>, "Reilly, Matthew J."  
<MREILLY@ftc.gov>  
Subject FTC/VA AG v. Inova/PWH

Gentlemen, following up on our call this afternoon, below is a written summary of our positions on the issues we discussed, as well as responses on the Protective Order issues raised in David Bergman's prior email on the PO.

### **Preliminary Injunction Schedule**

As we explained, we believe the Preliminary Injunction proceeding should unfold as follows (a) plaintiffs file their opening brief for preliminary injunction (without expert reports), (b) then several weeks later plaintiffs serve their expert reports, (c) followed 7-10 days thereafter by defendants serving their expert reports, (d) followed 4-5 days thereafter by plaintiffs alone serving rebuttal/reply expert reports, (e) followed by defendants' opposition to plaintiffs' PI brief, (f) followed by plaintiffs' reply in support of their PI brief, (g) followed by a short PI motion hearing with no live witnesses. Our position is that declarations and deposition/investigational hearing testimony would be cited in, and attached as exhibits to, the briefs. We would also propose that expert reports be provided to the Court at the time they are served.

We would alternatively consider a three step expert report schedule that had the party with the burden of proof on the issue serving their expert report first, followed by the opposition's expert report on that issue,

followed thereafter by a reply expert report served by the side with the burden of proof. We understand, however, that Defendants do not agree with us as to the expert issues on which each side has the burden of proof.

We would also consider our original proposal which was simultaneous exchange of expert reports followed shortly thereafter by simultaneous exchange of rebuttal/reply expert reports.

### **Discovery Issues**

Defendants and the FTC are already voluntarily exchanging third party documents and declarations. Our position is that Defendants and the FTC are also free to serve discovery now -- including unlimited document requests and deposition notices -- in the administrative proceeding and, under the protective orders, use the fruits of that discovery fully in the preliminary injunction proceeding. We informed you that we will begin serving discovery in the administrative proceeding shortly and will be using whatever we obtain in both proceedings.

We would be willing to stipulate that any depositions taken in the administrative proceeding would not be re-noticed and re-taken in the PI proceeding (and vice versa) absent good cause shown in the second proceeding in which they are sought to be taken.

As we stated on the call, it is not our position that there should be no third party discovery in the E.D. Va. Indeed, we have already produced third party declarations, and investigational hearing transcripts to Defendants today and are producing third party documents to Defendants on Friday. All of that discovery is available for use in the E.D. Va. proceeding. In addition, as noted above, Defendants and the FTC may use in the E.D. Va. action the fruits of the depositions and document requests that can be served and taken now in the administrative proceeding. In addition, we would be willing to stipulate that defendants can serve and take a total of five E.D. Va fact witness depositions immediately in the E.D. VA action so long as Defendants agree that those depositions will not be re-noticed and re-taken in discovery in the administrative proceeding.

### **Protective Order**

On paragraph 8 of the PO, as we mentioned on the conference call, we have heard concerns from some third parties about Ms. Sinclair's access to "Confidential" third party information. For discussion purposes only, we would propose providing her access to unredacted "Confidential" draft and final pleadings, briefs, expert reports, and IH and deposition transcripts. Those are the items that would presumably permit her to perform her in-house counsel functions in the litigation without providing her totally unrestricted access to underlying business documents of payers, competing hospitals, etc.

Although we did not discuss the specific items below on the call this afternoon, we note generally that the shortened time periods you propose are significantly shorter than the periods agreed to by defendants in recent PI proceedings where the overall PI proceeding schedules were even shorter than would be the case here. Nevertheless we make some compromise offers below, but without prejudice to reasserting our original position on those items if they are not fully accepted.

Par. 2 - requirement to designate depo transcripts confidential within 5 days (Defs propose 3). Plaintiffs will offer 4 days.

Par. 4 - requirement to designate documents as confidential within 10 days (Defs propose 5) of notice to produce. Plaintiffs believe 10 days is necessary.

Par. 5 - requirement that any party substantiate their confidentiality claim within 3 days (Defs propose 24 hours) if plaintiff or def. seek to challenge. Plaintiffs believe 3 days is bare minimum

Par. 6 - requirement that any party respond to an application to the court for relief within 3 days (Defs

propose 24 hours) to a court if challenged. Plaintiffs believe 3 days is a bare minimum

Par. 10 - notice requirement if documents are to be shared with Experts/Consultants who are current or former employees of Defendants. Plaintiffs position is that notice is necessary otherwise Defendants could call any employee a "consultant" under the broad definition of expert/consultant in the PO and give them access to all confidential documents without Defendants or third parties knowledge.

Par 10 Producing party currently has 5 days to object (Defs propose 24 hours). Plaintiffs will offer 4 days  
Par. 11 - requirement for plaintiffs to give at least 5 days notice (Defs propose 3) prior to disclosing third party material. Plaintiffs will offer 4 days.

Provision 4a of declaration requiring the individual who receives confidential material to keep in an locked room or locked cabinet. Defs want to delete. Plaintiffs agree to delete.

Plaintiffs also agree to add language to the protective order to make clear that it reaches all materials marked confidential that Inova and Prince William Hospital produced to the FTC during the investigative

Proceedings and we would like to make explicit in the POs that the Virginia AG has access to Confidential information and depositions generated in both proceedings.

We also want to edit paragraph 2 to make any of the following stamps acceptable: "Confidential - FTC v. Inova," or "Confidential - FTC and Commonwealth v. Inova," or simply "Confidential" on the upper middle portion of the document.

#### **FTC Administrative Action**

You said we should expect to hear back from you shortly with your proposed changes/additions to the proposed Joint Case Management Statement due in advance of the May 29th Scheduling Conference.

---

We hope to make further progress on these issues and look forward to your response and any counterproposals you may have.

We will talk with you again at 6PM Thursday.

Regards,

Tom

Thomas J. Lang  
Federal Trade Commission  
(202) 326-3665 (direct)  
tlang@ftc.gov

# **Exhibit 5**

David  
Bergman/Atty/DC/ArnoldAnd  
Porter  
DC - 1180 202-942-5474  
05/21/2008 10:22 AM

To "Lang, Thomas" <tlang@ftc.gov>  
cc "Kim, Albert" <AKIM@ftc.gov>,  
David\_Fauvre@aporter.com, David\_Gersch@aporter.com,  
"Everson, David" <deverson@ftc.gov>,  
bcc  
Subject RE: FTC/VA AG v. Inova/PWH

History: This message has been forwarded

Tom:

Our edit to paragraph 10 of the Part III protective order is intentional and is consistent with the position we have taken that the Virginia AG, which is not a party to the administrative proceeding, should not participate in the administrative proceeding. We are perfectly amenable to your proposal that discovery taken in the federal court action be fully useable in the administrative proceeding, and this should adequately address concerns for efficiency and the avoidance of duplicative discovery.

With respect to the documents the FTC has produced, we will continue to treat them in accordance with the proposed protective order. You unilaterally sought to impose a condition on the delivery of certain documents last Friday, asking that we not copy documents that might later be marked confidential. We understand that by this Friday you may add "confidential" designations to certain documents previously produced without that designation, and in the interim we will treat all documents produced as though they have been marked "confidential." Consistent with the proposed protective order, however, we are free to copy confidential documents and we do not accept the additional limitation you have sought to impose.

Best,  
David Bergman

"Lang, Thomas" <tlang@ftc.gov>



"Lang, Thomas"  
<tlang@ftc.gov>

05/20/2008 07:18 PM

To <David\_Bergman@aporter.com>,  
<David\_Fauvre@aporter.com>,  
<David\_Gersch@aporter.com>  
cc "Everson, David" <deverson@ftc.gov>,  
<dirvin@oag.state.va.us>, "Reilly, Matthew J."  
<MREILLY@ftc.gov>, "Armstrong, Norman"  
<NARMSTRONG@ftc.gov>, <SOAllen@oag.state.va.us>,  
"Kim, Albert" <AKIM@ftc.gov>, "Klarfeld, Jonathan"  
<JKLARFELD@ftc.gov>  
Subject RE: FTC/VA AG v. Inova/PWH

David, thanks for your response. We will send you a revised version of the E.D. Va Protective Order with these agreed on items that hopefully we can then promptly file with the Court

You may not have intended this, but your proposed change to the definition of "matter" in paragraph 10 of the Part III protective order could be read to limit the FTC's use of discovery in the Part III action to the Part III action alone -- which obviously is unacceptable. Use of that discovery in both cases is a fundamental part of the interim protective order we all agreed to last week that allowed us to turn over the documents to Defendants.

Also, would you let us know what time tomorrow afternoon works for you for a conference call about our proposed joint case management statement in the Part III action.

Thanks,

Tom

Thomas J. Lang  
Federal Trade Commission  
(202) 326-3665 (direct)  
tlang@ftc.gov

-----Original Message-----

From: David Bergman@aporter.com [mailto:David\_Bergman@aporter.com]  
Sent: Monday, May 19, 2008 7:25 PM  
To: Lang, Thomas  
Cc: David\_Fauvre@aporter.com; David\_Gersch@aporter.com; Everson, David; dirvin@oag.state.va.us; Reilly, Matthew J.; Armstrong, Norman; SOAllen@oag.state.va.us  
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David Bergman

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09:06 PM

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"Armstrong, Norman"  
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David" <deverson@ftc.gov>,

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"Reilly, Matthew J."  
<MREILLY@ftc.gov>

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#### Preliminary Injunction Schedule

As we explained, we believe the Preliminary Injunction proceeding should unfold as follows (a) plaintiffs file their opening brief for preliminary injunction (without expert reports), (b) then several weeks later plaintiffs serve their expert reports, (c) followed 7-10 days thereafter by defendants serving their expert reports, (d) followed 4-5 days thereafter by plaintiffs alone serving rebuttal/reply expert reports, (e) followed by defendants' opposition to plaintiffs' PI brief, (f) followed by plaintiffs' reply in support of their PI brief, (g) followed by a short PI motion hearing with no live witnesses. Our position is that declarations and deposition/investigational hearing testimony would be cited in, and attached as exhibits to, the briefs. We would also propose that expert reports be provided to the Court at the time they are served.

We would alternatively consider a three step expert report schedule that had the party with the burden of proof on the issue serving their expert report first, followed by the opposition's expert report on that issue, followed thereafter by a reply expert report served by the side with the burden of proof. We understand, however, that Defendants do not agree with us as to the expert issues on which each side has the burden of proof.

We would also consider our original proposal which was simultaneous exchange of expert reports followed shortly thereafter by simultaneous exchange of rebuttal/reply expert reports.

#### Discovery Issues

Defendants and the FTC are already voluntarily exchanging third party documents and declarations. Our position is that Defendants and the FTC are also free to serve discovery now -- including unlimited document requests and deposition notices -- in the administrative proceeding and, under the protective orders, use the fruits of that discovery fully in the preliminary injunction proceeding. We informed

you that we will begin serving discovery in the administrative proceeding shortly and will be using whatever we obtain in both proceedings.

We would be willing to stipulate that any depositions taken in the administrative proceeding would not be re-noticed and re-taken in the PI proceeding (and vice versa) absent good cause shown in the second proceeding in which they are sought to be taken.

As we stated on the call, it is not our position that there should be no third party discovery in the E.D. Va. Indeed, we have already produced third party declarations, and investigational hearing transcripts to Defendants today and are producing third party documents to Defendants on Friday. All of that discovery is available for use in the E.D. Va. proceeding. In addition, as noted above, Defendants and the FTC may use in the E.D. Va action the fruits of the depositions and document requests that can be served and taken now in the administrative proceeding. In addition, we would be willing to stipulate that defendants can serve and take a total of five E.D. Va fact witness depositions immediately in the E.D. VA action so long as Defendants agree that those depositions will not be re-noticed and re-taken in discovery in the administrative proceeding.

#### Protective Order

On paragraph 8 of the PO, as we mentioned on the conference call, we have heard concerns from some third parties about Ms. Sinclair's access to "Confidential" third party information. For discussion purposes only, we would propose providing her access to unredacted "Confidential" draft and final pleadings, briefs, expert reports, and IH and deposition transcripts. Those are the items that would presumably permit her to perform her in-house counsel functions in the litigation without providing her totally unrestricted access to underlying business documents of payers, competing hospitals, etc.

Although we did not discuss the specific items below on the call this afternoon, we note generally that the shortened time periods you propose are significantly shorter than the periods agreed to by defendants in recent PI proceedings where the overall PI proceeding schedules were even shorter than would be the case here. Nevertheless we make some compromise offers below, but without prejudice to reasserting our original position on those items if they are not fully accepted.

Par. 2 - requirement to designate depo transcripts confidential within 5 days (Defs propose 3). Plaintiffs will offer 4 days.

Par. 4 - requirement to designate documents as confidential within 10 days (Defs propose 5) of notice to produce. Plaintiffs believe 10 days is necessary.

Par. 5 - requirement that any party substantiate their confidentiality claim within 3 days (Defs propose 24 hours) if

plaintiff or def. seek to challenge. Plaintiffs believe 3 days is bare minimum

Par. 6 - requirement that any party respond to an application to the court for relief within 3 days (Defs propose 24 hours) to a court if challenged. Plaintiffs believe 3 days is a bare minimum

Par. 10 - notice requirement if documents are to be shared with Experts/Consultants who are current or former employees of Defendants. Plaintiffs position is that notice is necessary otherwise Defendants could call any employee a "consultant" under the broad definition of expert/consultant in the PO and give them access to all confidential documents without Defendants or third parties knowledge.

Par 10 Producing party currently has 5 days to object (Defs propose 24 hours). Plaintiffs will offer 4 days

Par. 11 - requirement for plaintiffs to give at least 5 days notice (Defs propose 3) prior to disclosing third party material. Plaintiffs will offer 4 days.

Provision 4a of declaration requiring the individual who receives confidential material to keep in an locked room or locked cabinet. Defs want to delete. Plaintiffs agree to delete.

Plaintiffs also agree to add language to the protective order to make clear that it reaches all materials marked confidential that Inova and Prince William Hospital produced to the FTC during the investigative

Proceedings and we would like to make explicit in the POs that the Virginia AG has access to Confidential information and depositions generated in both proceedings.

We also want to edit paragraph 2 to make any of the following stamps acceptable: "Confidential - FTC v. Inova," or "Confidential - FTC and Commonwealth v. Inova," or simply "Confidential" on the upper middle portion of the document.

FTC Administrative Action

You said we should expect to hear back from you shortly with your proposed changes/additions to the proposed Joint Case Management Statement due in advance of the May 29th Scheduling Conference.

---

We hope to make further progress on these issues and look forward to your response and any counterproposals you may have.

We will talk with you again at 6PM Thursday.

Regards,

Tom

Thomas J. Lang  
Federal Trade Commission  
(202) 326-3665 (direct)  
tlang@ftc.gov

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<http://www.arnoldporter.com>

# **Exhibit 6**

**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.	)	<u>PUBLIC</u>

**PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL**

For the purpose of protecting the interests of the Parties and Third Parties against the improper use and disclosure of confidential information submitted or produced in connection with this Matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Discovery Material (the "Protective Order") shall govern the handling of all Discovery Material in the above captioned Case.

**DEFINITIONS**

For purposes of this Protective Order, the following definitions shall apply:

1. "Inova" means Respondent Inova Health System Foundation, a non-profit health care system organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business at 2990 Telestar Court, Falls Church, Virginia 22042, and its predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures. The system includes the following five acute care hospitals: Inova Fair Oaks Hospital ("IFOH"); Inova Mount

Vernon Hospital (“IMVH”), Inova Alexandria Hospital (“IAH”), Inova Loudoun Hospital (“ILH”), and Inova Fairfax Hospital (“IFH”).

2. “Prince William” means Respondent Prince William Health System, Inc., a non-profit parent company of Prince William Hospital (“PWH”) organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business at 8700 Sudley Road, Manassas, Virginia 20110, and its predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.

3. “Commission” or “FTC” means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for the purposes of this Matter.

4. “Confidential Discovery Material” means all Discovery Material that is confidential or proprietary information produced in discovery. Such material is referred to in, and protected by, section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f); section 4.10(a)(2) of the FTC Rules of Practice, 16 C.F.R. § 4.10(a)(2); and Rule 26(c)(7) of the Federal Rules of Civil Procedure; and precedents thereunder.

Confidential Discovery Material shall include non-public trade secrets or other research, development, or commercial information, the disclosure of which would likely cause commercial harm to the Producing Party or to Respondents in instances where the Producing Party produces information generated by the Respondents. The following is a non-exhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product road maps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-

specific evaluations or data (e.g., prices, volumes, or revenues); sales contracts; system maps; personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer, or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material. Discovery Material will not be considered confidential if it is in the public domain.

5. “Counsel of Record” means counsel who file a notice of appearance in this Matter.

6. “Disclosing Party” means a party that is disclosing or contemplating disclosing Discovery Material pursuant to this Protective Order.

7. “Discovery Material” includes without limitation deposition testimony, exhibits, interrogatory responses, admissions, affidavits, declarations, Documents produced pursuant to compulsory process or voluntarily in lieu thereof, and any other Documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter. Information taken from Discovery Material that reveals its substance shall also be considered Discovery Material.

8. “Document” means the complete original or a true, correct, and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored, or reproduced. “Document” includes, but is not limited to, any writing, letter, envelope, telegraph, e-mail, meeting minute, memorandum, statement, affidavit, declaration, book, record, survey, map, study, handwritten note, working paper, chart, index, tabulation, graph, drawing, chart, photograph, tape, phono record, compact

disc, video tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, organizer, desk pad, telephone message slip, note of interview or communication, and any other data compilation from which information can be obtained, and includes all drafts and all copies of such Documents and every writing or record that contains any commentary, notes, or marking whatsoever not appearing on the original.

9. "Expert/Consultant" means testifying or consulting experts or other persons who are retained to assist Complaint Counsel or Respondents' Counsel in preparation for the hearing or to give testimony at the hearing.

10. "Matter" means the above captioned matter pending before the Federal Trade Commission, and all subsequent administrative, appellate or other review proceedings related thereto.

11. "Outside Counsel" means the law firms that are Counsel of Record for Respondents in this Matter, their partners and associated attorneys, or other persons regularly employed by such law firm(s) including legal assistants, clerical staff, vendors assisting with electronic discovery and information management personnel and temporary personnel retained by such law firm(s) to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter, provided that any attorney associated with Outside Counsel shall not be a director, officer, or employee of Respondents. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.

12. "Party" means either the FTC, Inova, or Prince William.

13. "Person" means any natural person, business entity, corporate entity, sole proprietorship, partnership, association, governmental entity, or trust.

14. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. With respect to Confidential Discovery Material of a Third Party that is in the possession, custody, or control of the FTC, or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided such material to the FTC. The Producing Party shall mean the FTC for purposes of any Document or Discovery Materials prepared by, or on behalf of, the FTC.

15. "Respondents" means Inova and Prince William.

16. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a Party to this Matter and its employees, directors, officers, attorneys, and agents.

#### TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose. Notwithstanding the foregoing, nothing contained in this Protective Order shall prevent the Commission from using any material produced as part of the investigation in this Matter, including any Discovery Material, for any authorized law enforcement purpose, provided that the Commission may only use or disclose Discovery Material as provided by (a) its Rules of Practice, and any cases so construing them, (b) Sections 6(f) and 21 of the Federal Trade Commission Act, and any cases so construing them, and (c) any other legal obligation imposed upon the Commission. The Parties, in conducting discovery from Third Parties,

shall attach to all discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

2. Confidential Discovery Material may be designated as such by (a) placing or affixing on each page of a Document containing such material, in a manner that will not interfere with its legibility, the notation "CONFIDENTIAL - FTC v. Inova Health System," or (b) any Party or Third Party instructing the court reporter, with notice to all Parties, within five (5) business days of the receipt of the transcript, to designate as "Confidential" each page of the deposition transcript containing the Confidential Discovery Material. Such designations constitute a good faith representation by counsel for the Party or Third Party making the designation that the Document or transcript constitutes or contains Confidential Discovery Material. All deposition transcripts shall be treated as Confidential Discovery Material until the expiration of five (5) business days after the receipt of the transcript. A Producing Party shall use reasonable care to avoid designating any Discovery Material as Confidential Discovery Material that is not entitled to such designation.

3. Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter. All such copies or reproductions of the Discovery Material and any documents generated by the Parties containing information drawn from such Discovery Material shall be subject to the terms of this Protective Order. If the duplication process by which copies or reproductions of Confidential Discovery Material are made does not preserve the confidentiality designations that appear on the original

Documents, all such copies or reproductions shall be stamped with the same confidentiality designation as the original.

4. All Documents obtained by compulsory process or voluntarily in lieu of process from any Party or Third Party, regardless of whether designated or marked confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews, or depositions that were obtained before this Protective Order was adopted, shall be treated as Confidential Discovery Material for a period of ten (10) days from the time notice of the intent to produce is given to the Producing Party. At the expiration of that time, this material shall be treated as nonconfidential unless documents or transcripts pages are otherwise designated with specificity by the Producing Party as Confidential Discovery Material.

5. If any Party seeks to challenge a Producing Party's designation of material as Confidential Discovery Material, the challenging Party shall notify the Producing Party and all other Parties of the challenge. Such notice shall identify with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation by providing the challenging Party and all other parties a written statement of the reasons for the designation within three (3) business days of receiving notice of the confidentiality challenge. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Commission providing otherwise.

6. If any conflict regarding a confidentiality designation arises and the Parties involved have failed to resolve the conflict via good-faith negotiations, a Party seeking to disclose Confidential Discovery Material or challenging a confidentiality designation may make written application to the hearing officer for relief. The application shall be served on the Producing Party and the other Parties to this Matter, and shall be accompanied by a certification that good-faith negotiations have failed to resolve the outstanding issues. The Producing Party and any other Party shall have three (3) business days after receiving a copy of the motion to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the hearing officer of the propriety of a requested disclosure or change in designation.

7. The Parties shall not be obligated to challenge the propriety of any designation or treatment of information as Confidential Discovery Material and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to Persons not otherwise entitled to access under the terms of this Protective Order. If Confidential Discovery Material is produced without the designation attached, the material shall be treated as Confidential from the time the Producing Party advises Complaint Counsel and Respondents' Counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked materials.

8. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone except:

- (a) Complaint Counsel and the Commission, as permitted by the Commission's Rules of Practice;
- (b) Outside Counsel;
- (c) Experts/Consultants;
- (d) Court reporters and deposition transcript reporters;
- (e) Judges and other court personnel of any court having jurisdiction over any proceedings involving this Matter;
- (f) Any author or recipient of the Discovery Material; any individual who was in the direct chain of supervision of the author at the time the Discovery Material was created or received; any employee or agent of the entity that created or received the Discovery Material; or anyone representing the author or recipient of the Discovery Material in this Matter; and
- (g) Any other Person(s) authorized in writing by the Producing Party.

9. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant until such person has executed and transmitted to counsel for the party retaining such person a declaration in the form attached as Exhibit "A." Each Party's counsel shall maintain a file of all such declarations for the duration of the litigation.

10. If any Party desires to disclose Confidential Discovery Material to any Persons other than those referred to in paragraph 8 of this Protective Order, the Disclosing Party shall notify the Producing Party and any other Party of its desire to disclose such material. The notice shall identify those materials sought to be disclosed with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) and the specific Person to whom the Confidential Discovery Material is to be disclosed. The Producing

Party may object to the disclosure of the Confidential Discovery Material within five (5) business days of receiving notice of an intent to disclose such material to the Person by providing the Disclosing Party with a written statement of the reasons for objection. If the Producing Party timely objects, the Disclosing Party shall not disclose the Confidential Discovery Material to the identified Person, absent a written agreement with the Producing Party or order of the Court permitting the disclosure. If the Producing Party does not object to the disclosure of Confidential Discovery Material to the identified Person within five (5) business days, the Disclosing Party may disclose the Confidential Discovery Material to the identified Person.

11. If the FTC (a) receives a discovery request that may require the disclosure by it of a Third Party's Confidential Discovery Material, or (b) intends to or is required to disclose, voluntarily or involuntarily, a Third Party's Confidential Discovery Material (whether or not such disclosure is in response to a discovery request), the FTC promptly shall notify the Third Party of the receipt of such request or its intention to disclose such material. Such notification shall be in writing and, if not otherwise done, sent for receipt by the Third Party at least five (5) business days before disclosure, and shall include a copy of this Protective Order and a cover letter that will apprise the Third Party of its rights hereunder.

12. If any Person receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Confidential Discovery Material, the recipient of the discovery request shall promptly notify the Producing Party of receipt of the request. The notification shall be in writing and be received by the Producing Party at least five (5) business days before production in the other proceeding, and shall include a

copy of this Protective Order and a cover letter apprising the Producing Party of its rights. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Protective Order to challenge or appeal an order requiring production of Confidential Discovery Material, to subject itself to any penalties for noncompliance with such an order, or to seek any relief from the Court. The recipient shall not oppose the Producing Party's efforts to challenge the discovery request calling for the production by the recipient of the Producing Party's Confidential Discovery Material. In addition, nothing herein shall limit the applicability of section 4.11(e) of the FTC Rules of Practice, 16 C.F.R. § 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

13. Counsel for the Parties or any Producing Party shall have the right to exclude from oral depositions any person not authorized to receive Confidential Discovery Material, during periods of examination or testimony relating to such material.

14. In the event that any Confidential Discovery Material is contained in any pleading, motion, exhibit, brief, or other paper filed or to be filed with the Commission, the Party filing the papers shall inform the Commission and the papers shall be filed under seal pursuant to Rule 3.22, Rule 3.45(e), and Rule 4.10 of the Commission's Rules. Confidential Discovery Material contained in papers (including Confidential Discovery Material from the Parties and Third Parties) shall remain under seal until further order of the Commission; provided, however, that the papers may be furnished to persons or entities who may receive Confidential Discovery Material pursuant to this Protective Order. After filing any paper containing Confidential Discovery Material, the filing Party must file on the public record a duplicate copy of the paper with the Confidential

Discovery Material deleted, within five (5) business days of the original filing. Further, if the protection for any such material ceases, any Party may file on the public record a copy that also contains the formerly protected material.

15. If counsel for a Party plans to introduce into evidence at trial any Document or transcript containing Confidential Discovery Material produced by a Third Party or any other Party, the counsel shall provide forty-eight (48) hours advance notice before such introduction to the Producing Party and any other Party, or as much notice before the introduction as practicable under the circumstances, for purposes of allowing that Party to seek an order that the Document or transcript be granted *in camera* treatment. Except where an order seeking *in camera* treatment is granted, all Documents and transcripts shall be part of the public record. If *in camera* treatment is granted, a copy of the Document or transcript with the Confidential Discovery Material deleted must be placed on the public record.

16. The inadvertent production or disclosure of (i) material provided to the FTC during its investigation under the Hart-Scott-Rodino Antitrust Improvement Act, 15 U.S.C. § 18a, or (ii) any Discovery Material which a Producing Party claims should not have been produced or disclosed because of a privilege, will not be deemed to be a waiver of any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of such claimed inadvertent production or disclosure, the procedures of Federal Rules of Civil Procedure 26(b)(5)(B) shall apply. The inadvertent production of a privileged document shall not in itself be deemed a waiver of any privilege applicable to any other documents relating to that subject matter.

17. Nothing in this Protective Order shall be construed to conflict with the provisions of Sections 6, 10, and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 50, 57b-2, or with Rules 3.22, 3.45, or 4.11 (b)-(e), 16 C.F.R §§ 3.22, 3.45, and 4.11 (b)-(e). Any Party or Producing Party may move at any time for *in camera* treatment of any Confidential Discovery Material or any portion of the proceedings in this Matter to the extent necessary for proper disposition of this Matter.

18. At the conclusion of this Matter, the Respondents shall (a) return or destroy all Documents obtained in this Matter that contain or refer to Confidential Discovery Material, other than materials that have been made part of the public record in this Matter, and (b) provide the Producing Party with an affidavit of destruction, provided that the provisions of 15 U.S.C. § 18a and § 4.12 of the FTC Rules of Practice, 16 C.F.R. § 4.12, shall govern the retention, return, or destruction of any documents obtained by the FTC prior to the filing of the Complaint to the extent the provisions of that statute or regulation is inconsistent with the provisions of this Protective Order. At the time that any Expert/Consultant or other person retained to assist counsel in the preparation of this Matter concludes participation in this Matter, that person shall return to counsel all copies of Documents or portions thereof designated Confidential Discovery Material that are in the possession of that person, together with all notes, memoranda, or other papers containing Confidential Discovery Material.

19. The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party or further order of the Commission, continue to be binding after the conclusion of this Matter.

20. This Protective Order shall not apply to the disclosure by a Producing Party or its Counsel of its own Confidential Discovery Material.

21. The Parties agree to stipulate to the entry of a protective order substantially similar to this order in any litigation in federal court between the Parties relating to the merger of Respondents.

22. Entry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provision of this Protective Order by application to the Administrative Law Judge for good cause shown.

ISSUED: May \_\_, 2008

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

**EXHIBIT A**  
**TO THE PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL**

**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.	)	<b><u>PUBLIC</u></b>
	)	

**DECLARATION CONCERNING PROTECTIVE**  
**ORDER GOVERNING DISCOVERY MATERIAL**

I, [NAME], hereby declare and certify the following to be true:

1. [Statement of employment]
2. I have read the “Protective Order Governing Discovery Material” (“Protective Order”) issued on [Date] in connection with the above captioned Matter. I understand the restrictions on my access to and use of any Confidential Discovery Material (as that term is used in the Protective Order) in this Matter, and I agree to abide by the Protective Order.
3. I understand that the restrictions on my use of such Confidential Discovery Material include:
  - a. that I will use such Confidential Discovery Material only for the purpose of preparing for this proceeding, and hearing(s) and any appeal of this proceeding and for no other purpose;
  - b. that I will not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order;
  - c. that I will use, store and maintain the Confidential Discovery Material in such a way as to ensure its continued protected status; and
  - d. that, upon the termination of my participation in this proceeding, I will promptly return all Confidential Discovery Material and all

notes, memoranda, or other papers containing Confidential Discovery Material, to Complaint Counsel or Respondents' Outside Counsel, as appropriate.

4. I understand that if I am receiving Confidential Discovery Material as an Expert/Consultant, as that term is defined in this Protective Order, the restrictions on my use of Confidential Discovery Material also include the duty and obligation to:

- a. maintain such Confidential Discovery Material in separate locked room(s) or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;
- b. return such Confidential Discovery Material to Complaint Counsel or Respondents' Outside Counsel, as appropriate, upon the conclusion of my assignment or retention, or upon conclusion of this Matter; and
- c. use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

5. I am fully aware that, pursuant to Section 3.42(h) of the FTC Rules of Practice, 16 C.F.R § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions.

\_\_\_\_\_  
Full Name [Types or Printed]

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 28, 2008, I served the attached Respondents' Response to Complaint Counsel's Motion for Interim Protective Order upon the following:

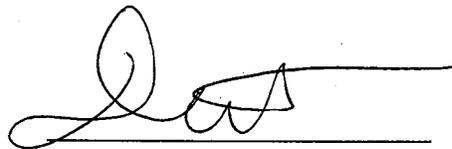
**Via Hand-Delivery**

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

**Via Electronic Mail and Hand-Delivery**

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

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

A handwritten signature in black ink, appearing to read 'David M. Menichetti', written over a horizontal line.

David M. Menichetti