

("Motion to Stay"), setting forth Respondents' position that there should be no discovery or other proceedings in this case until resolution of the preliminary injunction action filed by the Commission in the U.S. District Court for the Eastern District of Virginia (*Federal Trade*

Commission v. Inova Health System Foundation et al. Civ. Action No. 1:08-cv-460-CM/HFA

pendency of the preliminary injunction proceeding, as evidenced by the numerous deposition notices (one for nearly every business day in the first three weeks of June), requests for production, and requests for inspection served on Respondents over the last several days, is wasteful and counter-productive. It denies the parties the opportunity to make use of the record

in the preliminary injunction proceeding to frame additional discovery and proceedings in this case, the process wisely envisioned by the FTC's Rules of Practice. It also burdens two non-profit hospitals, one of which is operating at a loss, and non-parties, including the very insurance

unnecessary discovery, and threatens to interfere with the focus of the preliminary injunction

Inova will acquire PWS. The Commission issued an administrative complaint on May 7, 2008 alleging that Inova's acquisition of PWS violates the antitrust laws. The complaint alleges that a relevant product market is general, acute care inpatient hospital services sold to managed care organizations (MCOs) and that the relevant geographic market is no larger than Northern Virginia, defined as Fairfax, Arlington, Loudoun, Prince William and Fauquier counties, and including the independent cities of Alexandria, Fairfax, Falls Church, Manassas and Manassas Park.

Respondents have not yet answered the Complaint but dispute the Commission's contention that the merger of the Hospitals would violate federal antitrust laws. Respondents further dispute the product market and geographic market alleged by the Commission

3. Legal Issues. The principal legal issues in this case are as follows:

- a. Complaint Counsel alleges that the acquisition of PWS by Inova may substantially lessen competition or tend to create a monopoly, in violation of section 7 of the Clayton Act, 15 U.S.C. § 18.
- b. Respondents have not yet filed their answers in this case, which are not due until June 2, 2008. However, without waiving their right to further respond to Complaint Counsel's allegations and assert any and all applicable defenses thereto at the appropriate time, Respondents dispute the allegations contained in the

Rosch As Administrative Law Judge (“Motion to Recuse”).

Respondents contend that, in light of these pending motions, there should be no further proceedings in this case, much less entry of a comprehensive scheduling order or related orders.

at least until these motions are resolved.

5. Amendment of the Pleadings. Complaint Counsel and Respondents do not currently

admissions will be permitted only for good cause.

b. Document Documents. There shall be no limitation on the number of documents submitted.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

notice.

[Respondents' Proposal] Respondents have moved to stay discovery and all other proceedings in this case pending resolution of the preliminary injunction action that the Commission and the Commonwealth of Virginia filed in federal court. As discussed in Respondents' Motion to Stay,

Respondents and is contrary to the FTC Policy Statement, the FTC Rules of Practice, and past practices of the Commission in other similar situations, where 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) as in the first case

their energies and resources to developing the record in the preliminary injunction proceeding. After that proceeding has concluded, then, as the FTC Policy Statement and Rules of Practice contemplate, the parties and this tribunal can review the record to determine whether this action should proceed and, if so, the nature and scope of any further proceedings.

during the pendency of the preliminary injunction proceeding, as evidenced by the numerous deposition notices (one for nearly every business day in the first three weeks of June), requests for production, and requests for inspection served on Respondents over the last several days, is wasteful and counter-productive. It denies the parties the opportunity to make use of the record in the preliminary injunction proceeding to frame additional discovery and proceedings in this case, the process wisely envisioned by the FTC's rules. It also burdens two non profit hospitals, one of which is operating at a loss, and non-parties, including the very insurance companies and

and the Attorney General of the Commonwealth of Virginia seek a preliminary injunction

opposing Inova's acquisition of DWTS and its first decision in this administrative litigation.

A hearing on Defendants' Motion for a Scheduling Order and an Expedited Status Conference is set for May 30, 2008 at 10:00 a.m. in front of the Honorable Claude Hilton.

[Complaint Counsel's Proposal] Because the discovery schedules in this proceeding and the

June 2, 2008

Exchange preliminary witness list (not including comments) with

description of proposed testimony.

June 2, 2008

Non-expert depositions can begin.

June 16, 2008

Exchange preliminary witness list (not including comments) with

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Respondents' Proposal] Respondents object to the entry of a Scheduling Order in this action until the federal preliminary injunction action has been resolved and they have stated that any

[Redacted]

[Redacted]

[Redacted]

[Redacted]

notices (one for nearly every business day in the first three weeks of June), requests for production, and requests for inspection served on Respondents over the last several days, is wasteful and counter-productive. It denies the parties the opportunity to make use of the record in the preliminary injunction proceeding to frame additional discovery and proceedings in this case, the process wisely envisioned by the FTC's rules. It also burdens two non profit hospitals, one of which is operating at a loss, and non-parties, including the very insurance companies and employers that Complaint Counsel says it seeks to protect, with potentially unnecessary

discovery, and therefore to interfere with the Commission's ongoing investigation.

electronic mail (formatted in Adobe Acrobat) except in those instances where service by electronic mail is not technically possible, and three days shall be added to the time for any responsive action, consistent with the provisions of Fed.

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means permitted by Fed. R. Civ. P. 30. Depositions shall be taken by stenographic means unless the party seeking the deposition notifies the deponent and the other party of its intention to record the deposition by other than stenographic means at least two (2) days in advance of the deposition

- e. No deposition of a non-party shall be scheduled between the time of production in response to a subpoena *duces tecum* and three (3) days after copies of the production are provided to the non-issuing party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, the documents are not produced until the time of the deposition, or as agreed to by all parties involved.

h. The preliminary and revised witness lists shall represent the parties' good faith designation of all potential witnesses the parties reasonably expect may be called at the hearing. A party shall notify the other parties promptly of changes in preliminary and revised witness lists to facilitate completion of discovery within

witness lists additional witnesses may be added only (a) by order of the

Applications for the issuance of subpoenas commanding a person to attend and

give testimony at the hearing must comply with FTC Rules of Practice § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel. Oppositions to applications for issuance of subpoenas shall be due within three (3) business days after the service of the

bear a consecutive control number. Additionally, all exhibit numbers must be accounted for, even if a particular number is not actually used at the hearing.

- m. At the final pre-hearing conference, the parties shall introduce all exhibits they intend to introduce at the hearing. The parties further shall give the originals of exhibits to the court reporter, which the court reporter will maintain as part of the record.
- n. The parties shall endeavor to resolve any discovery disputes quickly and efficiently. If the parties are unable to reach an agreement resolving the disputes they should bring them promptly to the Commission's attention by calling the offices of Commissioner Thomas Rosch and arranging for a telephonic hearing on the dispute.

[Respondents' Proposal] In light of their pending Motion to Stay and Motion to Recuse, and the related issues discussed above, Respondents contend that it is neither appropriate nor necessary to address the specific matters outlined in Complaint Counsel's proposals at this time, many of which simply restate applicable provisions of the FTC Rules of Practice as applied to case-related events that Respondents contend should not take place until the federal preliminary injunction proceedings are resolved. At the very least, these issues should not be addressed until Respondents' pending motions have been resolved. Without waiving these objections, Respondents anticipate that, at the appropriate time, they will be able to work with Complaint

Report of the Commission

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