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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of )

Inova Health System Foundation, )  
a corporation, and )

) Docket No. 9326

) PUBLIC

a corporation. )

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

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 the protective orders.

[REDACTED]

Commonwealth of Virginia is not a party, on the ground that confidential information related to

this proceeding should not be disclosed.

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

# **Exhibit 1**



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

To <David\_Gersch@aporter.com>,  
<David\_Fauvre@aporter.com>,  
<David\_Rosen@aporter.com>

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,

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

# **Exhibit 2**



David  
Bergman/Atty/DC/ArnoldAnd  
Porter

DC 1180 202 942 5474

To "Reilly, Matthew J." <MREILLY@ftc.gov>, "Armstrong,  
Norman" <NARMSTRONG@ftc.gov>, "Lang, Thomas"  
<tlang@ftc.gov>

cc David.Bergman/Atty/DC/ArnoldAndPorter@APORTER

05/12/2008 02:16 PM

Deborah Feinstein/Atty/DC/ArnoldAndPorter@APORTER,  
David Feinstein/Atty/DC/ArnoldAndPorter@APORTER

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 FDV's protective order but they apply equally to the Part III DO

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

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

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 Thursday (May 15) at 12:00 PM.

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

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# **Exhibit 3**



# **Exhibit 4**



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

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.

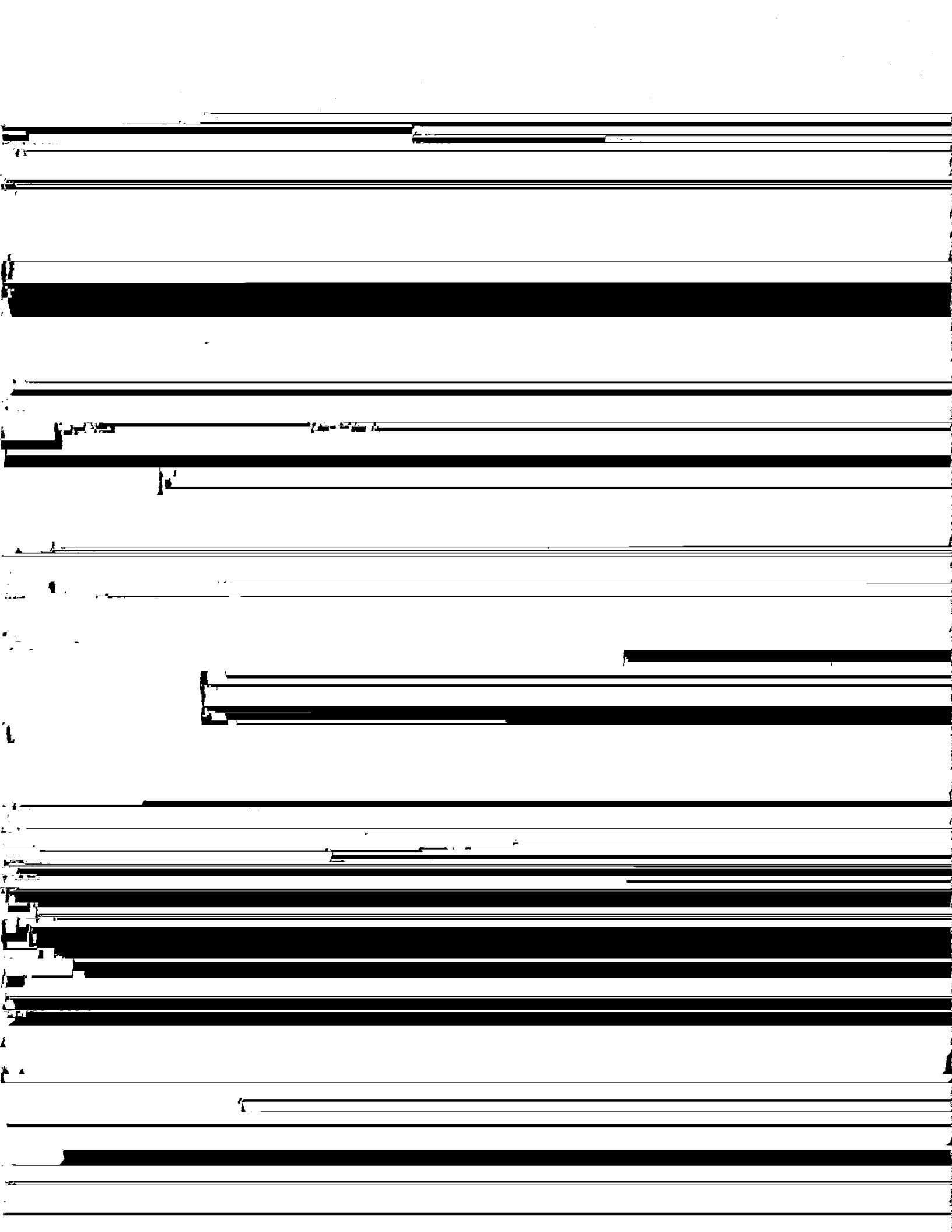
**Discovery Issues**

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 requests in the administrative proceeding and under the protective





# **Exhibit 5**



Also, would you let us know what time tomorrow afternoon works for you

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]

To: Lang, Thomas  
Cc: David\_Fauvre@aporter.com; David\_Gersch@aporter.com; Everson, David.



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

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 present or former employees of Defendants

Plaintiffs position is that notice is necessary otherwise Defendants

expert/consultant in the no and give them access to all confidential

Regards,

Tom

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

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

-----  
David\_Bergman@aporter.com  
Telephone: 202-942-5474  
Fax: 202-942-5999



# **Exhibit 6**

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

\_\_\_\_\_)  
In the Matter of \_\_\_\_\_)

Inova Health System Foundation \_\_\_\_\_)

) Docket No. 9326

\_\_\_\_\_)  
a corporation, and \_\_\_\_\_)

Prince William Health System, Inc. \_\_\_\_\_)  
a corporation. \_\_\_\_\_)

) PUBLIC

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  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

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

? "Prince William" means Respondent Prince William Health System, Inc.

it

specific evaluations or data (e.g., prices, volumes, 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.

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



shall attach to all discovery materials and shall be maintained in confidence.

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

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 Parties Confidential



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

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

Party may object to the disclosure of the Confidential Discovery Material within 30 (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

copy of this Protective Order and a cover letter explaining the Producing Party's 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

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 the following information:

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.

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 that

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

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

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

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

\_\_\_\_\_) )  
\_\_\_\_\_ )

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

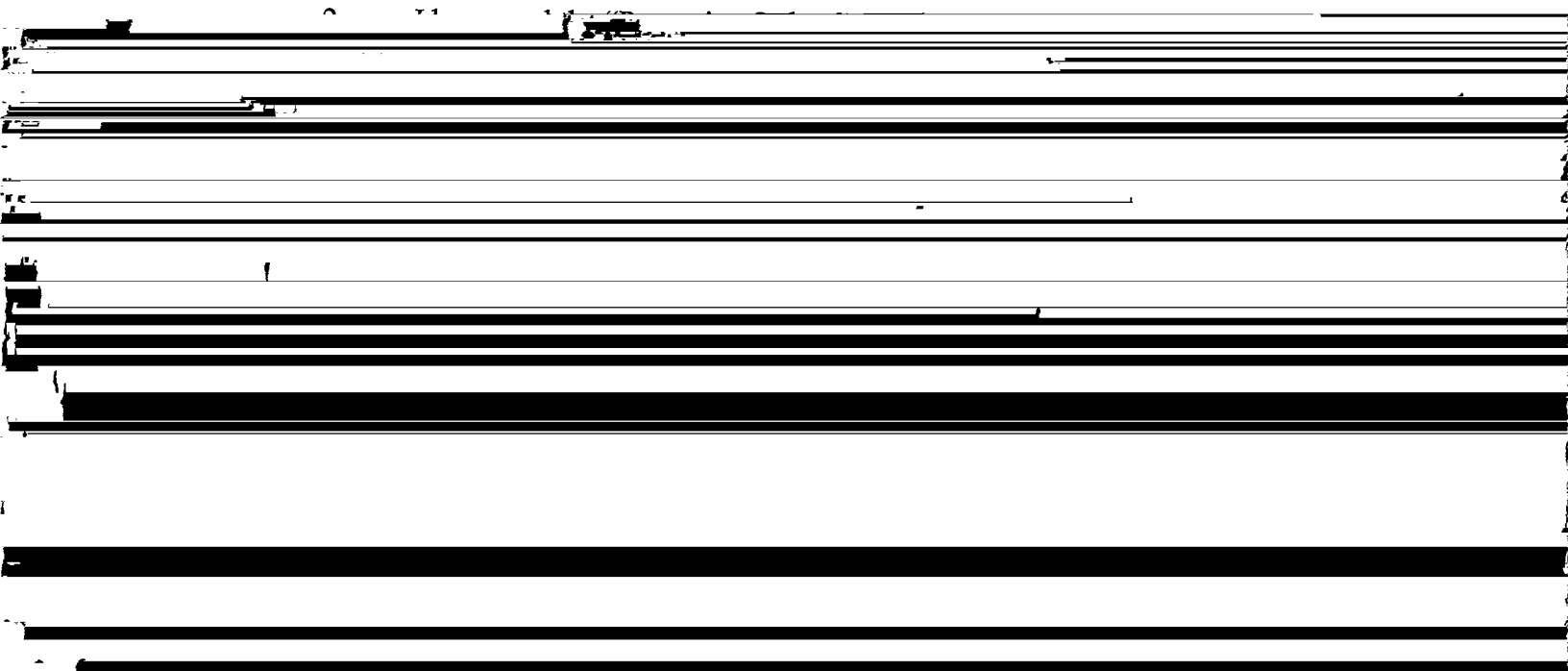
**Prince William Health System, Inc.**  
**a corporation.**

) )  
) **Docket No. 9326**  
) **PUBLIC**  
)  
)  
)

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

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

1. [Statement of employment]





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 accordance with

**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:

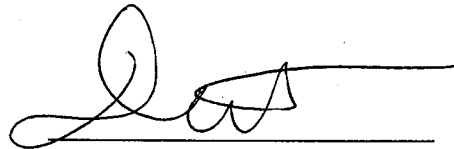
**Via Hand-Delivery**

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

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



David M. Menichetti