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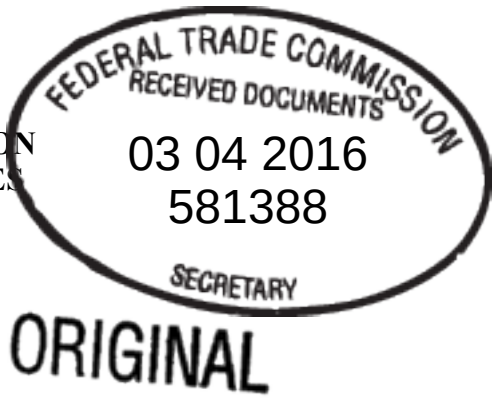

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

Cabell Huntington Hospital, Inc.
a corporation;

and

Pallottine Health Services, Inc.
a corporation;

and

St. Mary's Medical Center, Inc.
a corporation

Docket No. 9366

ORAL ARGUMENT REQUESTED

RESPONDENTS' MOTION TO STAY THE PART 3 TRIAL OR, IN THE ALTERNATIVE, DISMISS THE CASE

Respondents Cabell Huntington Hospital, Inc. and St. Mary's Medical Center, Inc. move to stay the administrative hearing until 60 days after entry of a ruling on the Federal Trade Commission's threatened complaint for preliminary injunctive relief to be filed in federal district court. In the alternative, Respondents move the Court to dismiss the case as unripe.

On February 26, 2016, this Court asked the parties to address the ripeness of the FTC's enforcement action in light of two outstanding contingencies that independently prevent Respondents from closing the subject transaction. The Court's concerns regarding ripeness are well-founded; unless and until the outstanding contingencies are satisfied, Respondents cannot close the transaction. Should those contingencies be satisfied, the FTC has promised to bring a preliminary injunction action to enjoin the Transaction in federal district court. Litigation of that action will likely obviate the need for the Part 3 proceeding. And legislation pending in the West

Virginia legislature could allow a threshold State action immunity defense that would require dismissal of the case without the need for any trial.

Good cause therefore exists to stay the proceedings. In the alternative, the case should be dismissed as unripe.

Dated: March 4, 2016

Respectfully submitted,

/s/ Geoffrey S. Irwin

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Cabell Huntington Hospital, Inc. a corporation; and Pallottine Health Services, Inc. a corporation; and St. Mary's Medical Center, Inc. a corporation	Docket No. 9366 ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO STAY THE PART 3 TRIAL OR, IN THE ALTERNATIVE, DISMISS THE CASE

During an informal status call on February 26, 2016, held at the Court's request, the Court asked the parties to address the ripeness of this enforcement action in light of several outstanding contingencies that independently prevent the parties from closing the subject Transaction. Respondents Cabell Huntington Hospital, Inc. and St. Mary's Medical Center, Inc. submit this memorandum of law in support of their motion to stay the Part 3 trial or, in the alternative, dismiss the case, in response to the Court's inquiry.

The Court's concern regarding the ripeness of the Part 3 trial is well-placed and underscores why good cause exists to stay the trial pending the resolution of Complaint Counsel's forthcoming federal lawsuit seeking a preliminary injunction. *See* 16 C.F.R. §§ 3.21(c), 3.41(b), 3.41(f). If the case *is* ripe, then Complaint Counsel would have observed standard agency practice and brought a complaint for such a preliminary injunction. But

Complaint Counsel have not done so, instead attempting to deprive Respondents of an opportunity for expedited judicial review that would save substantial time and cost prior to the Part 3 trial by standing on certain closing contingencies. If the case is *not* ripe, then neither the Part 3 trial nor the preliminary injunction action should go forward. Certainly as a factual matter, it is clear the parties cannot close the Transaction until two outstanding prerequisites are met, and the fact that they are not met raises serious ripeness concerns. Either way, proceeding with the Part 3 trial at this juncture would be unnecessary, inappropriate, and fundamentally unfair to Respondents.

As the Court has observed, Respondents currently cannot close the Transaction without regard to any injunction. It is therefore unnecessary for the parties to proceed with an expensive and protracted administrative trial regarding a transaction that cannot presently close, as Complaint Counsel insist they do. Proceeding with trial now would be doubly absurd, because if Complaint Counsel's forthcoming preliminary injunction action is permitted to precede the administrative trial, as it does in most merger challenges, the result of that federal court action will almost certainly obviate the need for any trial here at all; the Commission usually abandons its merger challenges if it loses its preliminary injunction case and Respondents will abandon the Transaction if they were to lose that case.

While it would be entirely proper on this record to dismiss the case on ripeness grounds, and Respondents have requested such relief in the alternative, a narrower remedy may be more appropriate. The case should be stayed so that, if the impediments to closing are satisfied, the preliminary injunction can be litigated in federal court and, if necessary, the Part 3 proceeding can continue thereafter. Such a stay would impose no harm on Complaint Counsel, who would still be able to pursue a Part 3 trial if they lose the preliminary injunction action in federal court

and nevertheless choose to go forward in the administrative forum. A stay will likewise address the legal infirmity raised by the Court because any trial in this tribunal will not take place until after the preliminary injunction case is concluded. At that time, the parties will no longer have any impediments to closing, since Complaint Counsel have indicated that they will not even commence the preliminary injunction case until the impediments are removed.

A stay is also appropriate for two additional reasons. First, it is extremely unlikely that any Part 3 trial will ever be needed after the completion of a preliminary injunction action. Respondents will abandon the transaction if they lose in federal court. Therefore, the only conceivable way a Part 3 trial could be necessary is if Complaint Counsel loses in federal court but the Commission nonetheless elects to proceed to a Part 3 trial, which it typically does not do. Finally, a bill pending in the West Virginia legislature could, if passed, eliminate any need for a Part 3 trial, as it professes to provide an avenue for Respondents to obtain State action immunity with respect to this Transaction. If passed into law, and if the Transaction is approved for immunity, it will certainly be litigated by the parties as soon as the case is ripe and Complaint Counsel files its preliminary injunction complaint. No evidentiary hearing in administrative or federal court will be needed to resolve this dispositive issue.

Therefore, Respondents request that the Court stay the trial until sixty days after entry of a ruling on the Commission's forthcoming complaint for a preliminary injunction, or alternatively dismiss the case as unripe.

FACTUAL BACKGROUND

A. The Background of the Proposed Transaction.

Cabell is a 303-bed, not-for-profit hospital located in Huntington, West Virginia. Cabell serves as a teaching hospital affiliated with the Marshall University Schools of Medicine and Nursing; the Marshall University Medical Center is on Cabell's campus. St. Mary's is a 393-

bed, Catholic-affiliated hospital, also located in Huntington, West Virginia. It is owned and operated by Pallottine Health Services, Inc. ("PHS"). PHS is overseen by the order of nuns that originally founded St. Mary's—the "Pallottine Missionary Sisters." St. Mary's was founded in 1924, and over the subsequent 90-plus years has gradually expanded to its current form.

Cabell and St. Mary's propose to enter into the Transaction, in which Cabell will acquire St. Mary's by becoming the sole corporate member and parent entity of St. Mary's. The Transaction followed many months of negotiations between the hospitals, and significant oversight for over a year by West Virginia authorities vested with the responsibility of ensuring that the proposed Transaction complies with State and federal antitrust laws. The Transaction promises significant benefits to the communities Cabell and St. Mary's serve. It will create efficiencies that will reduce costs and improve the quality of health care offered to patients in the areas served by the Hospitals.

B. Respondents Have Not Yet Received Necessary Approvals from West Virginia and the Vatican, and Are Thus Unable to Close the Transaction.

As the Court observed at the status conference, this case is unusual because there is little more than a month before trial and yet Respondents currently have no legal ability to consummate the Transaction. Two dispositive hurdles – State and Vatican approval – remain, and both hurdles must be cleared before Respondents can close. Moreover, there is no guarantee these approvals will be given. The Transaction is thus wholly contingent on uncertain future events, and no injunction is needed to preclude it.

First, West Virginia law requires that Respondents receive a Certificate of Need (a "CON") from the West Virginia Health Care Authority (the "Authority"). Without that approval, the State will not allow the Transaction to close. The CON procedure is a function of state law, West Virginia Code § 16-2D-1, *et seq*., and jurisdiction over this program is vested in

the Authority to determine whether a CON should issue. *Id.* § 16-29B-11. The CON program requires that the Authority review and approve any new institutional health service, such as the one proposed here, before it goes into effect. Cabell's proposed acquisition of the membership interest of St. Mary's constitutes a reviewable new institutional health service because it involves the acquisition of a health care facility and a capital expenditure incurred by Cabell in excess of the expenditure minimum established by the statute. *See id.* § 16-2D-3(b)(3).

The CON proceedings and briefing are now concluded, so the Authority could issue its decision at any time. Nonetheless, as of now there is no certainty about the date of that decision.

State approval of the Transaction in the CON process is merely the first step toward being able to close, however. If Respondents receive that approval, then St. Mary's must also secure authorization from the Catholic Church in the form of official Vatican approval of the Transaction. Respondents informed the FTC that Respondents could not close the Transaction until after the Vatican approves it, if the Vatican elects to give such approval, and complaint counsel confirmed its understanding of those contingencies. (*See* Ex. A (Oct. 6, 2015 Ltr.).) Complaint Counsel has emphatically made clear its view that based on this representation, Respondents are precluded from closing the Transaction unless and until the Vatican approves. (Ex. B (Nov. 17, 2015 FTC Ltr. ("Should the Parties attempt to close the Proposed Acquisition prior to fulfilling the obligations under the Timing Agreement [including Vatican approval], the Commission will pursue all available remedies, including rescission of the transaction.").) Based on this view, St. Mary's has affirmed its commitment to notify the FTC when CON and Vatican approval are received, and that the transaction will not close until four days after that notice is provided. (Ex. C (Nov. 20, 2015 Ltr.).)

The Vatican, for its part, has full discretion either to approve or disapprove the Transaction, and Respondents will certainly abide by that ruling. Respondents, however, have no control over when the Vatican — a foreign sovereign — will issue its ruling. While Respondents have guessed that a decision from the Vatican may occur 6-8 weeks after CON approval based on prior decisions (*see* Ex. B (Nov. 17, 2015 Ltr.)), Respondents have no firm timeline, and the Vatican has not offered one.[1]

C. The FTC Initiated a Part 3 Proceeding but Complaint Counsel Did Not Bring any Preliminary Injunction Action in Federal Court.

In light of the contingencies presented by the CON process and Vatican approval and the notice commitment affirmed by St. Mary's, the FTC has not brought a preliminary injunction action in federal court. Instead, on November 5, 2015, the FTC filed this action.

When it announced the filing of its administrative complaint, the FTC contemporaneously stated that it had also "authorized staff to seek a temporary restraining order and a preliminary injunction in federal court if, and when, necessary to prevent the parties from consummating the acquisition, and to maintain the status quo pending the administrative proceeding." *See* FTC, *FTC Challenges Proposed Merger of Two West Virginia Hospitals* (Nov. 6, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/11/ftc-challenges-proposed-merger-two-west-virginia-hospitals. The FTC determined it could not bring its threatened preliminary injunction action with the Part 3 proceeding because, without CON or Vatican approval, the Transaction could not be consummated and any federal-court action would plainly be unripe. Respondents therefore find themselves in the unusual position of being sued

[1] Based on the anticipated timing for CON approval, it appears that St. Mary's request for Vatican approval and/or the Vatican's consideration of that request could overlap the Easter holiday and Holy Week. Respondents do not know whether that timing will insert further delay into the Vatican's approval process.

by the FTC in administrative court on a transaction they cannot close, and unable to obtain expedited federal review of the case because Complaint Counsel acknowledge that such a lawsuit is unripe.

At the December 4, 2015 status conference, this Court inquired "about the nature and status of any ancillary federal action." (Ex. D (Dec. 4, 2015 Hr'g Tr.) at 5:10-16.) Complaint Counsel responded that a federal-court action "is not ripe yet because the parties cannot close their transaction" until Respondents "receive a [CON] from the West Virginia Healthcare Authority and . . . the Catholic Church's approval." (*Id*. at 5:18-6:2.) Complaint Counsel have indicated, however, that they object to delaying the Part 3 trial due to those same outstanding approval requirements.

As shown below, the same ripeness concerns that have prevented the filing of the preliminary injunction action squarely apply in these Part 3 proceedings.

ARGUMENT

The highly unusual posture of this case plainly presents "good cause" for, at a minimum, staying the Part 3 trial pending completion of the forthcoming federal preliminary injunction case. *See* 16 C.F.R. § 3.41(f); *see also id.* § 3.21(c); *In re Phoebe Putney Health Sys*., *Inc*., No. 9348, 2011 WL 2727137, at *2 (FTC July 7, 2011) (finding good cause to grant respondents' motion for a stay pending the outcome of federal-court proceedings). Any Part 3 trial would be premature because the challenged transaction is contingent on uncertain future events. The Transaction depends on State and Vatican approval, and there is no clear timeline for such approval. These outstanding contingencies provide ample ground for the Court to stay the Part 3 trial until after any preliminary injunction case is decided. Ordinary ripeness principles compel that result; but even if they did not compel a stay as a matter of law, they plainly supply very

strong grounds for staying the Part 3 trial as a matter of discretion. If, after the preliminary injunction case, the Commission loses but elects to pursue the Part 3 trial (which is the only possible circumstance where a Part 3 trial would ever take place), it can be resumed without prejudice to either Respondents or Complaint Counsel. But it is highly unlikely that any Part 3 trial will ever be needed if the case is stayed, because the Commission typically does not pursue a Part 3 trial after losing in federal court, and Respondents will abandon the transaction if they lose there.

A. A Stay or Dismissal Is Warranted Because CON and Vatican Approval Are Necessary Contingencies Without Which There Is No Transaction to Challenge.

Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 1999) (internal quotation marks omitted). It requires a "case or controversy" that presents "definite and concrete, not hypothetical or abstract" issues. *Id.* at 1139 (internal quotation marks omitted). As the Supreme Court has explained, an action is "not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Ag. Prods. Co.*, 473 U.S. 568, 580-81 (1985)); *see also Pearson v. Leavitt*, 189 F. App'x 161, 163 (4th Cir. 2006) ("If certain critical facts that would substantially assist the court in making its determination are contingent or unknown, the case is not ripe for judicial review.").

The same ripeness principles that apply in federal courts also govern administrative agency proceedings. As a general matter, "administrative tribunals have employed the prudential doctrine of ripeness [and have concluded that] claims of injuries that are contingent upon the outcome of another litigation are not ripe for adjudication." *Murray v. Cargill, Inc.*, No. 99-

R040, 1999 WL 107676, at *3 (C.F.T.C. Mar. 4, 1999). This makes perfect sense, since it would be impractical for agencies to "expend the effort to decide cases where the rights of a party are undeniably contingent on outside factors." *In re Job Line Constr., Inc*., Contract No. DE-AC-93BP60791, 1994 WL 706148 (EBCA Dec. 8, 1994).

Thus, for instance, the Federal Energy Regulatory Commission has held that the propriety of a possible future index-based rate is unripe for Commission review until the private party at issue actually submits a tariff filing proposing the rates in question. *See In re Chevron Products Co*, 138 FERC ¶ 61115, 61492 (Feb. 16, 2012); *see also, e.g.*, *In the Matter of: J. E. Mc Amis, Inc*., WAB Case No. 92-18, 1992 WL 515943, at *1 (Wage Appeals Bd., Dec. 30, 1992) (granting motion to dismiss on ripeness grounds); *see also Chavez v. Dir., Office of Workers Comp. Programs*, 961 F.2d 1409, 1414 (9th Cir. 1992) ("Administrative adjudicators have an interest in avoiding many of the problems of prematurity and abstractness, presented by unripe claims.") (internal quotation marks omitted).

Numerous decisions have found claims unripe where their validity rested on events that may not occur as anticipated, or occur at all. This is particularly true where the claimed violation of the law will not occur absent some approval or acquiescence by a third party who is not under the control of the parties to the lawsuit.

For instance, one district court recently held that a challenge to an eminent domain plan was not ripe for resolution because the plan was subject to "a number of contingencies," including "approval of the plan" by a city council. *See Bank of N.Y. Mellon v. City of Richmond*, No. 13-cv-03664, 2013 WL 5955699, at *2-3 (N.D. Cal. Nov. 6, 2013). Another applied the same ripeness principles to find unripe a challenge to the issuance of an oil and gas lease where the actual development in question was contingent on uncertain future events including the

lessees' submission of an application to an agency and the agency's approval of that application. *See Wy. Outdoor Council v. Bosworth*, 284 F. Supp. 2d 81, 89-91 (D.D.C. 2003). In *Dr. Pepper/Seven-Up Cos., Inc. v. FTC*, No. 91-cv-21772, 1992 WL 240477, (D.D.C. Jan. 13, 1992), the court ruled that a claim involving an acquisition of licensing rights was not ripe because "the [commission granting the licensing rights] ha[d] yet to grant or deny [plaintiff's] application to acquire these licenses." *Id.* at *1; *see also Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (finding that plaintiff's claim was not ripe because "respondent has not yet obtained a final decision regarding the application of the zoning ordinance").

That is precisely the situation here. Unless and until Respondents are able to obtain both (1) CON approval from the Authority to proceed with the Transaction under West Virginia law and (2) authorization from the Vatican for the Transaction to be allowed to proceed, there is no point in trying the lawfulness of a hypothetical future merger. Nor is it clear that either contingency will be satisfied anytime soon. While Respondents are hoping that a CON decision will be issued fairly quickly, there is no guarantee about that; and the Vatican approval process will not even begin unless and until a CON is approved, and the Vatican process in turn will take an uncertain length of time. Until the last of these two contingencies is resolved in Respondents' favor, the FTC's Part 3 trial is premature and could prove to be an enormous waste of time and money.

Complaint Counsel know all this, but insist on pressing ahead anyway. When the Commission filed this Part 3 proceeding, it issued a press release in which it stated its intent to bring a preliminary injunction action "if" Respondents eventually obtained a right to enter the Transaction. And Complaint Counsel told this Court at the December 4, 2015 status conference,

that until Respondents received State and Vatican approvals, "the parties can't close and so the federal action isn't ripe."[2] (Ex D (Dec. 4, 2015 Hr'g Tr.) at 6:5-7.) St. Mary's has committed to giving the FTC four days' notice once the contingencies are satisfied, and thus the FTC will have ample notice to bring its preliminary injunction action in federal court to seek to block the Transaction.

It therefore makes no sense as a practical matter to try the case now. Complaint Counsel's preliminary injunction action remains unripe and the Part 3 trial threatens to unfairly burden Respondents with massive costs from a multi-week trial with scores of witnesses and thousands of documentary exhibits, and burden the Commission with vast impositions on its own limited resources. That burden would also fall on the Court, which is presiding over other substantial transaction challenges, and could be forced to preside over a lengthy, and likely unnecessary, trial. All of these burdens would be imposed based on a transaction that unquestionably is not presently authorized. This is precisely the sort of situation that ripeness principles are designed to avoid. And even to the extent there is any question about formal ripeness, the same facts warrant a discretionary stay even more strongly. Moreover, the Commission would remain free to try the case in this Court if it lost the preliminary injunction action.

As the Court is well aware, Respondents have invested considerable time and resources in their defense of the Part 3 proceedings, and the fact and expert discovery that has been developed will be used in the preliminary injunction action. But the Part 3 trial should be stayed,

[2] In response to Complaint Counsel's statement, the Court noted that "the pending injunction hearing in the federal court . . . generally hangs like a Sword of Damocles over our proceeding." (Ex. D (Dec. 4, 2015 Hr'g Tr.) at 6:8-11.) "The fact that it's not filed may gum up the works, because once that decision is reached, things usually start happening in our proceeding, either positive or negative." (*Id*. at 6:11-14.)

or the case dismissed, in light of these unusual circumstances. A stay would adequately resolve the ripeness concerns, and would do so without harm to the parties. Complaint Counsel could still pursue its Part 3 trial after the contingencies are resolved and the preliminary injunction action is litigated. Because Respondents will abandon the transaction if they lose the preliminary injunction case, a Part 3 trial would only happen if Complaint Counsel lost in federal court but the Commission nonetheless elects to proceed. Thus, the ripeness concerns, in themselves, provide good cause to issue a stay of the Part 3 trial.

B. A Stay Is Also Warranted Because the Preliminary Injunction Action Is Highly Likely to Render the Administrative Hearing Moot.

Even putting ripeness considerations aside, the Court should exercise its discretion and find that a stay is warranted in light of the unusual procedural posture of this case. *In re Ardagh Grp. S.A.*, No. 9356, 2013 WL 6826957, at *1 (FTC Dec. 18, 2013) ("[T]he Commission has determined, in exercising its discretion to oversee this adjudicative proceeding, that there is good cause to stay this proceeding and reschedule the evidentiary hearing.").

If Respondents fail to receive approval from either the State or the Vatican, then no preliminary injunction action or Part 3 trial will ever be necessary. If Respondents do receive both State and Vatican approval, Complaint Counsel will bring their federal-court action, regardless of whether the Part 3 trial has begun or is ongoing.

In the latter situation, past practice counsels in favor of delaying the Part 3 trial until the district court issues a decision on Complaint Counsel's preliminary injunction request. If the district court rules for Respondents and denies injunctive relief, the FTC will likely abandon the administrative proceeding. Indeed, in that situation, the Commission is affirmatively required to reconsider its decision to pursue administrative relief. *See* Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741, 39,743 (Aug. 3,

1995) ("The Commission's guiding principle is that the determination whether to proceed in administrative litigation following the denial of a preliminary injunction and the exhaustion or expiration of all avenues of appeal must be made on a case-by-case basis."). And in past cases where the Commission engaged in this reconsideration, its decisions have been uniform; as Commissioner Ohlhausen recently noted, "the Commission has not pursued a Part 3 proceeding following a PI loss in federal court for twenty years."[3] If, by contrast, the FTC succeeds in securing injunctive relief, then Respondents will walk away from the challenged combination. This, too, is consistent with the norm in merger challenges.[4] The bottom line is that, regardless of how the federal lawsuit is resolved, it will almost certainly stand as the final word on this matter, and thus the Part 3 trial will be unnecessary.

C. A Stay Warranted Is Due to Possible New Immunity-Authorizing Legislation.

An important feature of this case is that the local community and West Virginia government both strenuously support the Transaction and oppose Complaint Counsel's efforts to block it. Both the State Attorney General and Governor are on record with their support for the transaction. A new bill pending in the West Virginia legislature is the latest manifestation of that State support. (*See* Ex. E.) That bill, which purports to immunize certain hospital combinations

[3] Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Remarks to U.S. Chamber of Commerce: A SMARTER Section 5, at 17 (Sept. 25, 2015) ("Ohlhausen Remarks"), *available at* https://goo.gl/ZkjZ0Y.

[4] *See, e.g., In re Sysco Corp*., No. 9364, Order Dismissing Comp. (June 30, 2015) ("Respondents have abandoned their proposed merger."); *In re OSF Healthcare Sys*., No. 9349, Order Dismissing Comp. (Apr. 13, 2012) ("Respondents are abandoning the proposed affiliation.").

from federal antitrust scrutiny, has already passed the West Virginia Senate,[5] and is currently pending in the West Virginia House of Representatives.

As currently drafted, the bill confers immunity from federal antitrust law on merging hospitals — like Respondents here — upon the Authority's approval of "cooperative agreements" between those hospitals. *Id.* § 16-29B-28(a)(2) ("'Cooperative agreement' means an agreement between a teaching hospital which is a member of an academic medical center and one or more other hospitals, or other health care providers," including by "consolidation by merger or other combination of assets"); *id.* § 16-29B-28(d)(1) ("A hospital which is a member of an academic medical center may negotiate and enter into a cooperative agreement with other hospitals or health care providers in the state.").

The bill twice expresses the legislature's clear intention to immunize transactions like this one, if approved, from antitrust scrutiny. It states that "[a]ny actions of hospitals and health care providers" in connection with approved cooperative agreements, "shall be exempt from antitrust action under state and federal antitrust laws." *Id.* § 16-29B-26. The legislature reiterated this express immunity determination in another section of the statute: "When a cooperative agreement, and the planning and negotiations of cooperative agreements, might be anticompetitive within the meaning and intent of state and federal antitrust laws, the Legislature believes it is in the state's best interest to supplant competition with regulatory oversight by the . . . Authority."). *Id.* § 16-29B-28(c). And it provides for extensive post-approval State regulation of cooperative agreements. *See id.* § 16-29B-28.

[5] *See* Senate Bill 597 (reported on Feb. 17, 2016), *available at*, http://www.legis.state.wv.us/Bill_Text_HTML/2016_SESSIONS/RS/pdf_bills/SB597%20SUB1%20ENG2.pdf.

If this bill becomes law, it would provide yet another strong, independent ground for staying the trial, because it would allow Respondents to obtain a powerful threshold immunity issue that could obviate the need for any Part 3 trial. *See, e.g.*, *In re Phoebe Putney Health Sys*., *Inc*., 2011 WL 2727137, at *2 (granting motion to stay to permit the parties to litigate the issue of state-action immunity in federal court). And, if the bill becomes law, a stay will be necessary to conserve the vast Commission and party resources that would be consumed by a potentially unnecessary part 3 trial, and to allow the state-action-immunity defense to be litigated and resolved in court. A stay on this ground would be particularly appropriate because the immunity defense presents a discrete, legal issue that does not implicate the broader merits of the Part 3 trial; accordingly, when Complaint Counsel bring their preliminary injunction lawsuit, the immunity defense will likely be susceptible to resolution on the papers.

CONCLUSION

For the reasons stated above, therefore, any Part 3 trial would be inappropriate until the resolution of contingencies that currently remain outstanding. Respondents therefore ask the Court to stay the Part 3 trial until sixty days after the conclusion of the FTC's forthcoming action for preliminary-injunctive relief or, in the alternative, to dismiss the case as unripe.

Dated: March 4, 2016

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of Cabell Huntington Hospital, Inc. a corporation; and Pallottine Health Services, Inc. a corporation; and St. Mary's Medical Center, Inc. a corporation	Docket No. 9366

[PROPOSED] ORDER ON RESPONDENTS' MOTION TO STAY THE PART 3 TRIAL OR, IN THE ALTERNATIVE, DISMISS THE CASE

On March 4, 2016, Respondents filed a motion seeking to stay the Part 3 trial or, in the alternative, to dismiss the case.

Respondents' motion is **GRANTED**. [The Part 3 trial is stayed until sixty days after the conclusion of the FTC's forthcoming action for preliminary-injunctive relief.] **OR** [The case is dismissed as unripe.]

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2016, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing documents to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Rm. H-110
Washington, D.C. 20580-0001

Thomas H. Brock
Alexis Gilman
Tara Reinhart
Mark D. Seidman
Michelle Yost
Elizabeth C. Arens
Jeanine Balbach
Stephanie R. Cummings
Melissa Davenport
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Counsel for Respondents
Pallottine Health Services, Inc.
and St. Mary's Medical Center

/s/ Benjamin B. Menker

Counsel for Respondent
Cabell Huntington Hospital, Inc.

EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Mergers IV Division

October 6, 2015

VIA E-MAIL

Ken W. Field, Esq.
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001

David Simon, Esq.
H. Holden Brooks, Esq.
Foley & Lardner LLP
3000 K Street, NW
Suite 600
Washington, DC 20007

Re: **Proposed Merger of Cabell Huntington Hospital and St. Mary's Medical Center**

Dear Counsel:

This letter sets forth the understandings between the Federal Trade Commission (the "Commission"), Cabell Huntington Hospital ("Cabell"), and St. Mary's Medical Center ("St. Mary's") (collectively, "the Parties") in connection with the proposed acquisition of St. Mary's by Cabell (the "Proposed Acquisition"), pursuant to the November 7, 2014, Agreement between Pallottine Health Services, Inc., St. Mary's, and Cabell. The Proposed Acquisition is the subject of Requests for Additional Information and Documentary Material issued by the Commission on January 22, 2015. The Parties and the Commission agree as follows:

I. Timing and Communication

a. Computing Time

In computing any period specified in this Agreement, exclude the day of the act, event, or default that triggers the period. Count every day, including intermediate Saturdays, Sundays, and legal holidays from the day that triggers the period. Include the final day of the period; however, if the final day is a Saturday, Sunday, or legal holiday, the period continues to run until

the end of the next day that is not a Saturday, Sunday, or legal holiday. The last day of a time period ends at 11:59 pm Eastern time. Any material received by the Commission after 5:00 p.m. Eastern Time shall be deemed received on the next business day.

b. Timing

FTC staff and the Parties agree to extend the timing agreement from October 23, 2015 to provide that the Parties shall not consummate the Proposed Acquisition until November 6, 2015, or later. We understand that the parties cannot consummate the Proposed Acquisition until first receiving a Certificate of Need from the West Virginia Health Care Authority and then receiving approval from the Vatican. Based on our discussions, we understand from you that the Parties expect the CON process may last several months, and that Vatican approval may take another several weeks thereafter. Accordingly, the Parties agree to give written notice to FTC staff once both the CON and Vatican conditions have been satisfied, and the Parties agree not to consummate the Proposed Acquisition until four days after giving such written notice.

If you agree to the terms set forth in this letter, please indicate your agreement by countersigning below and returning to FTC staff.

Sincerely,

Michelle M. Yost

Agreed to By:

Ken W. Field, Esq.
Counsel for Cabell Huntington Hospital

10/6/15
Date

David Simon, Esq.
Counsel for St. Mary's Medical Center

10/7/15
Date

EXHIBIT B

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

November 17, 2015

VIA E-MAIL

Kenneth W. Field, Esq.
Jones Day LLP
51 Louisiana Avenue NW
Washington, DC 20001

David Simon, Esq.
Foley & Lardner LLP
Washington Harbour
3000 K Street NW
Suite 600
Washington, DC 20007

Re: Proposed Acquisition of St. Mary's Medical Center by Cabell Huntington Hospital

Dear Ken and David:

We write to memorialize our discussion on Friday, November 13, 2015, regarding the position of Cabell Huntington Hospital ("Cabell") and St. Mary's Medical Center ("St. Mary's") (collectively, the "Parties"), stated in your November 9 letter, that the Parties need not abide by the Timing Agreement you both signed as counsel for your clients on October 6 and 7, 2015 ("Timing Agreement"). In our discussion, you stated that your position that the Parties' obligations under the Timing Agreement terminated on November 6 remains unchanged. You further stated that you would not provide any legal or factual basis for not abiding by the Timing Agreement because of the pending litigation. And you stated that the Parties are exploring all options and that the Parties will close at the "earliest possible opportunity." Further, in our discussion, David confirmed that the November 9 letter, signed by Ken, also reflected the position of St. Mary's.

With respect to abiding by the Timing Agreement and the possibility that the Parties may close Cabell's proposed acquisition of St. Mary's (the "Proposed Acquisition") before receiving a Certificate of Need ("CON") from the West Virginia Health Care Authority (the "Authority") and Vatican approval, the Parties have, on numerous occasions and in a number of statements to the Federal Trade Commission (the "Commission"), other governmental authorities, and the public, represented that they could not close the Proposed Acquisition until receiving a CON and

Vatican approval. Any attempt to close the Proposed Acquisition prior to receiving CON and Vatican approval would directly contradict these representations. For example:

- In Cabell's December 23, 2014 filing pursuant to the Hart-Scott-Rodino Act, 16 C.F.R. § 803.12, Monte Ward declared under penalty of perjury that "Cabell presently has the good-faith intention to consummate the transaction as reflected in the Definitive Agreement and the attached notification." Under Item 3(a) of the associated premerger notification form, Cabell states that "[t]he transaction is subject to, among other things, consent and approval of the Roman Catholic Church to the transaction, and the satisfaction of customary closing conditions set forth in the Agreement . . . ."

- Article III, paragraph 1(a) of the November 7, 2014 acquisition agreement (the "Agreement") between the Parties states that closing the Proposed Acquisition is conditioned on "[a]ll necessary regulatory approvals, including any certificate of need . . . approval. . . ." Paragraph 1(b) states that "[e]ach of the Parties shall have obtained all third party approvals and consents that may be required in connection with the transaction . . . ." Paragraph 1(c) states that, before closing, "Transferors shall have obtained the consent and approval of the Roman Catholic Church to the transaction."

- In Cabell's July 31, 2015 written responses to the Commission's Request for Additional Information and Documentary Material issued on January 22, 2015 (the "Second Request"), wherein Cabell certified substantial compliance with the Second Request, Cabell represented in response to Specification 30(a) that "pursuant to the Agreement . . . the parties have agreed to certain customary closing conditions that must be satisfied in order for the parties to close. . . . These closing conditions include third party regulatory approvals. . . . The parties expect review by the Authority to take between 3 and 6 months."

- In St. Mary's August 3, 2015 written responses to the Second Request, wherein St. Mary's certified substantial compliance with the Second Request under penalty of perjury, St. Mary's stated in response to Specification 31(a) that "pursuant to the Agreement . . . the parties have agreed to certain customary closing conditions that must be satisfied in order for the parties to close. These closing conditions include third party regulatory approvals. . . . The parties expect review by the Authority to take between three and six months. The Transaction must also be given approval by the Catholic Church."

- On October 1, 2015, counsel for Cabell stated in a telephonic discussion with Commission staff that the Parties needed CON approval, followed by approval from the Catholic Church, in order to close the Proposed Acquisition. Counsel stated that the Parties expected the process of seeking approval from the Catholic Church to take 6-8 weeks. All told, counsel represented that Cabell would not be able to close the Proposed Acquisition for 3-4 months, "on the conservative side."

- In an October 1, 2015 email, counsel for Cabell wrote to the Deputy Director of the Bureau of Competition regarding the "WV CON timeline," confirming that the hearing before the Authority regarding Cabell's contested request for a CON was scheduled for November 18, 2015, after which a transcript would issue (taking "a couple of weeks"), followed by "routinely required" briefing filed "3-4 weeks after receipt of the transcript," reply briefs filed "usually 2 weeks later," and deliberation by the Authority "at its discretion" that could take "from one to three months." The email also described an appeals process that could be initiated by "[a]ny party adversely affected by the decision."

- In the Timing Agreement between the Parties and Commission staff, the Parties confirmed that they "cannot consummate the Proposed Acquisition until first receiving a Certificate of Need from the West Virginia Health Care Authority and then receiving approval from the Vatican. . . . Accordingly, the Parties agree to give written notice to FTC staff once both the CON and Vatican conditions have been satisfied, and the Parties agree not to consummate the Proposed Acquisition until four days after giving such written notice."

- In an October 29, 2015 letter, Cabell requested that the Authority "continue the public hearing currently scheduled for November 18, 2015," and represented to the Authority that "[Cabell] will not consummate the proposed transaction with [St. Mary's] prior to the issuance by the Health Care Authority of a decision on the application following the to-be-scheduled hearing in this matter, nor will [Cabell] enter into a management agreement with [St. Mary's] in the interim."

- In a November 6, 2015 press release, Cabell stated that "[i]n addition to the FTC, remaining government and regulatory processes that must take place before closing the transaction include the West Virginia Healthcare Authority review as part of the Certificate of Need process and the Roman Catholic Church."

We maintain that the Timing Agreement remains in effect, that the Parties must still give Commission staff notice after these necessary conditions to close have been satisfied, and that the Parties are prohibited by the Timing Agreement from closing until four days after giving such notice. Should the Parties attempt to close the Proposed Acquisition prior to fulfilling the obligations under the Timing Agreement, the Commission will pursue all available remedies, including rescission of the transaction.

We also need to stress that attempting to withdraw from the existing Timing Agreement—and in particular any attempt to close the transaction without giving proper notice—is a potentially serious breach of your professional obligations to the Commission. To operate effectively, the Commission must have confidence that attorneys and law firms practicing before the agency will honor the commitments they make on behalf of their clients. Withdrawing from the Timing Agreement or failing to abide by its terms may warrant

disciplinary action pursuant to Section 4.1(e) of the Commission's rules of practice, 16 CFR § 4.1(e).

We remain hopeful that this issue can be resolved without additional Commission or court action. Accordingly, we request that the Parties confirm that they will abide by the terms of the Timing Agreement.

Sincerely,

Alexis Gilman
Assistant Director
Mergers IV
Bureau of Competition
Federal Trade Commission

Tara L. Reinhart, Esq.
Chief Trial Counsel
Bureau of Competition
Federal Trade Commission

EXHIBIT C

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PUBLIC

November 20, 2015

Via E-Mail

Alexis Gilman, Esq.
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Re: Proposed Acquisition of St. Mary's Medical Center by Cabell Huntington Hospital

Dear Alexis and Tara:

At the outset, I am disappointed by the tone of your November 17th letter. We do not consider it productive or appropriate to accuse one another of bad faith or unethical conduct whenever we have a disagreement.

On our telephone call last Friday (for which I was given 20 minutes advance notice), CHH advised the Commission that the parties intend to close the proposed transaction at the earliest possible date, and that they are exploring all of their options to accomplish this end. I expressed my agreement with that comment, and the "exploring all options comment" was particularly apropos in light of the fact that I had not at the point even had a chance to discuss the Commission's complaint with my client.

At present St. Mary's does not believe that it can close the proposed transaction until both a Certificate of Need and Vatican approval are received. St. Mary's representations to that effect (including those made "under penalty of perjury") have been and continue to be entirely true. St. Mary's also remains willing to provide the Commission with the advanced notices described in the October 6th timing letter. If, however, St. Mary's subsequently determines that the proposed transaction can close without receiving a Certificate of Need and/or Vatican approval, or if Certificate of Need or Vatican approval are received on an earlier schedule than was originally envisioned, then St. Mary's will agree to give the Commission at least four days' notice before closing.

For the record, however, St. Mary's does not consider that the timing agreement was ever intended to govern post-investigation proceedings. Based on discussions between CHH's counsel and Staff, St. Mary's understanding has always been that the purpose of the October 6th letter was simply to ensure that the parties would not close the proposed transaction prior to November 6th without giving advanced notice to the Commission. Moreover, the second sentence of the October 6th timing letter references the Requests for Additional Information and Documentary

FOLEY

FOLEY & LARDNER LLP

Materials that were served on the parties in connection with the Commission's investigation of the proposed acquisition. Thus framed, the October 6th letter (and the previous timing agreement, which the October 6th letter modifies) is therefore most reasonably understood as a simple agreement to modify the thirty-day statutory waiting period that would otherwise apply after the parties complied with the second requests. *See* 15 U.S.C. § 18a(e)(2). If the Commission considered the October 6th timing letter to govern the time period that *followed* the expiration of this waiting period, then the second sentence of the letter is gratuitous and makes no sense.

Sincerely,

David W. Simon

cc: Kenneth W. Field, Esq.

EXHIBIT D

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:	)	
CABELL HUNTINGTON	)	
HOSPITAL, et al.,	)	Docket No. 9366
Respondents.	)	

PRETRIAL CONFERENCE
DECEMBER 4, 2015
PUBLIC SESSION

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Administrative Law Judge

Reported by: Susanne Bergling, RMR-CRR-CLR

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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MICHELLE YOST HALE, ESQ.
MARK SEIDMAN, ESQ.
TARA REINHART, ESQ.
Federal Trade Commission
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ON BEHALF OF RESPONDENT CABELL HUNTINGTON HOSPITAL:

GEOFFREY S. IRWIN, ESQ.
KERRI L. RUTTENBERG, ESQ.
TARA LYNN R. ZURAWSKI, ESQ.
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ON BEHALF OF RESPONDENT ST. MARY'S HOSPITAL CENTER AND PALLOTTINE HEALTH SERVICES:

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P R O C E E D I N G S

- - - - -

JUDGE CHAPPELL: Have a seat.

Okay, let me call to order Docket 9366. I'll start with the appearances of the parties, the Government first.

MR. GILMAN: Good afternoon, Your Honor. Alexis Gilman representing Complaint Counsel. With me at the table is Mark Seidman.

MR. SEIDMAN: Good afternoon, Your Honor.

MR. GILMAN: Michelle Yost Hale.

MS. HALE: Good afternoon.

MR. GILMAN: And Tara Reinhart.

MS. REINHART: Good afternoon, Your Honor.

JUDGE CHAPPELL: I thought I saw the name Thomas Brock on the pleadings.

MR. GILMAN: Mr. Brock is here, Your Honor.

MR. BROCK: Good afternoon, Your Honor.

JUDGE CHAPPELL: Okay. And for Respondents?

MR. IRWIN: Good afternoon, Your Honor. Geoff Irwin from Jones Day on behalf of Cabell Huntington Hospital, and with me today from Jones Day is my partner Kerri Ruttenberg, and here in the back, Tara Zurawski, Doug Litvak, and Joe Cardosi.

I'll allow Ms. Brooks to introduce herself.

JUDGE CHAPPELL: Okay.

MS. BROOKS: Good afternoon, Your Honor. Holden Brooks from Foley & Lardner on behalf of Respondents, Pallottine Health Services, Inc. and St. Mary's Hospital Center.

JUDGE CHAPPELL: So, it's "Pallottine"?

MS. BROOKS: It is, named for St. Vincent Pallotti.

JUDGE CHAPPELL: Thank you.

We will get to the proposed changes to the scheduling order shortly. For now I'll note that one of the party's proposals to the additional provisions in the scheduling order refers to "any federal action." I'd like to hear now about the nature and status of any ancillary federal action. I'll start with the Government.

MR. GILMAN: Thank you, Your Honor.

Yes, the Commission has authorized Complaint Counsel to pursue a federal action when it becomes timely. That suit is not ripe yet because the parties cannot close their transaction. The parties have previously represented to us -- and it continues to be our understanding -- that they cannot close the transaction until they receive a certificate of need from the West Virginia Healthcare Authority and that

they cannot close until they receive the Catholic Church's approval.

Our understanding is those approvals are forthcoming -- perhaps Respondents have an update on that -- but until those approvals are obtained, the parties can't close and so the federal action isn't ripe.

JUDGE CHAPPELL: So, the pending injunction hearing in the federal court, sometimes down the street, generally hangs like a Sword of Damocles over our proceeding. The fact that it's not filed may gum up the works, because once that decision is reached, things usually start happening in our proceeding, either positive or negative.

And you have no idea? It's dependent on the CoN?

MR. GILMAN: The CoN and Vatican approval. At this time, that's our understanding of the conditions that must be satisfied before they close. We don't know if that is a matter of weeks or months.

JUDGE CHAPPELL: But the Government fully intends to file an injunction proceeding if those things happen.

MR. GILMAN: If those things happen before there is a decision in this case, yes, it would be our intent

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: 9366

CASE TITLE: CABELL/ST. MARY'S

DATE: DECEMBER 4, 2015

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 12/10/2015

SUSANNE BERGLING, RMR-CRR-CLR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

SARA J. VANCE, CMRS

EXHIBIT E

SB597 H H&HR AM #2

Roskovensky 3338

The Committee on Health and Human moved to amend the bill on page 1, by striking everything after the enacting clause and inserting in lieu thereof the following:

"That §16-29B-26 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new section, designated §16-29B-28, all to read as follows:

ARTICLE 29B. HEALTH CARE AUTHORITY.

§16-29B-26. Exemptions from antitrust laws.

Actions of the board shall be exempt from antitrust action ~~as provided in section five, article eighteen, chapter forty-seven of this code~~ under state and federal antitrust laws. Any actions of hospitals and health care providers under the board's jurisdiction, when made in compliance with orders, directives, rules, approvals or regulations issued or promulgated by the board, shall likewise be exempt.

It is the intention of the Legislature that this chapter shall also immunize cooperative agreements approved and supervised by the authority and activities conducted pursuant thereto from challenge or scrutiny under both state and federal antitrust law.

§16-29B-28. Review of Cooperative agreements.

(a) *Definitions.* — As used in this section the following terms have the following meanings:

(1) "Academic medical center" means an accredited medical school, one or more faculty practice plans affiliated with the medical school or one or more affiliated hospitals which meet the requirements set forth in 42 C. F. R. 411.355(e)(2).

(2) "Cooperative agreement" means an agreement between a teaching hospital which is a member of an academic medical center and one or more other hospitals or other health care providers. The agreement shall provide for the sharing, allocation, consolidation by merger or other combination of assets, or referral of patients, personnel, instructional programs, support services and facilities or medical, diagnostic, or laboratory facilities or procedures or other services traditionally offered by hospitals or other health care providers.

(3) "Commercial health plan" means a plan offered by any third party payor that negotiates with a party to a cooperative agreement with respect to patient care services rendered by health care providers.

(4) "Health care provider" means the same as that term is defined in section three of this article.

(5) "Teaching hospital" means a hospital or medical center that provides clinical education and training to future and current health professionals.

(6) "Qualified hospital" means a teaching hospital, which meets the requirements of 42 C. F. R. 411.355(e)(2)(iii) and which has entered into a cooperative agreement with one or more hospitals or other health care providers but is not a critical access hospital for purposes of this section.

(b) *Findings.* —

(1) The Legislature finds that the state's schools of medicine, affiliated universities and teaching hospitals are critically important in the training of physicians and other healthcare providers who practice health care in this state. They provide access to healthcare and enhance quality healthcare for the citizens of this state.

(2) A medical education is enhanced when medical students, residents and fellows have access to modern facilities, state of the art equipment and a full range of clinical services and that, in many instances, the accessibility to facilities, equipment and clinical services can be achieved more economically and efficiently through a cooperative agreement among a teaching hospital and one or more hospitals or other health care providers.

(c) *Legislative purpose.* — The Legislature encourages cooperative agreements if the likely benefits of such agreements outweigh any disadvantages attributable to a reduction in competition. When a cooperative agreement, and the planning and negotiations of cooperative agreements, might be anticompetitive within the meaning and intent of state and federal antitrust laws the Legislature believes it is in the state's best interest to supplant competition with regulatory oversight by the Health Care Authority as set out in this article. The authority has the power to review, approve or deny cooperative agreements, ascertain that they are beneficial to citizens of the state and to medical education, to ensure compliance with the provisions of the cooperative agreements relative to the commitments made by the qualified hospital and conditions imposed by the Health Care Authority.

(d) *Cooperative Agreements.* —

(1) A hospital which is a member of an academic medical center may negotiate and enter into a cooperative agreement with other hospitals or health care providers in the state:

(A) In order to enhance or preserve medical education opportunities through collaborative efforts and to ensure and maintain the economic viability of medical education in this state and to achieve the goals hereinafter set forth; and

(B) When the likely benefits outweigh any disadvantages attributable to a reduction in competition that may result from the proposed cooperative agreement.

(2) The goal of any cooperative agreement would be to:

(A) Improve access to care;

(B) Advance health status;

(C) Target regional health issues;

(D) Promote technological advancement;

(E) Ensure accountability of the cost of care;

(F) Enhance academic engagement in regional health;

(G) Preserve and improve medical education opportunities;

(H) Strengthen the workforce for health-related careers; and

(I) Improve health entity collaboration and regional integration, where appropriate.

(3) A qualified hospital located in this state may submit an application for approval of a proposed cooperative agreement to the authority. The application shall state in detail the nature of the proposed arrangement including the goals and methods for achieving:

(A) Population health improvement;

(B) Improved access to health care services;

(C) Improved quality;

(D) Cost efficiencies;

(E) Ensuring affordability of care;

(F) Enhancing and preserving medical education programs; and

(G) Supporting the authority's goals and strategic mission, as applicable.

(4) (A) If the cooperative agreement involves a combination of hospitals through merger, consolidation or acquisition, the qualified hospital must have been awarded a certificate of need for the project by the authority, as set forth in article two-d of this chapter prior to submitting an application for review of a cooperative agreement.

(B) In addition to a certificate of need, the authority may also require that an application for review of a cooperative agreement as provided in this section be submitted and approved prior to the finalization of the cooperative agreement. If the cooperative agreement involves the merger, consolidation or acquisition by a qualified hospital located within a distance of twenty-five highway miles of the main campus of the qualified hospital, and the authority shall have determined that combination is likely to

produce anti-competitive effects due to a reduction of competition. Any such determination shall be communicated to the parties to the cooperative agreement within seven days from approval of a certificate of need for the project.

(C) In reviewing an application for cooperative agreement, the authority shall give deference to the policy statements of the Federal Trade Commission.

(D) If an application for a review of a cooperative agreement is not required by the authority, the parties to the agreement may then complete the transaction following a final order by the authority on the certificate of need as set forth in article two-d of this code. The qualified hospital may apply to the authority for approval of the cooperative agreement either before or after the finalization of the cooperative agreement.

(E) A party who has received a certificate of need prior to the enactment of this provision during the 2016 regular session of the Legislature may apply for approval of a cooperative agreement whether or not the transaction contemplated thereby has been completed.

(F) The complete record in the certificate of need proceeding shall be part of the record in the proceedings under this section and information submitted by an applicant in the certificate of need proceeding need not be duplicated in proceedings under this section.

(e) *Procedure for review of cooperative agreements. —*

(1) Upon receipt of an application, the authority shall determine whether the application is complete. If the authority determines the application is incomplete, it shall notify the applicant in writing of additional items required to complete the application. A copy of the complete application shall be provided by the parties to the Office of the Attorney General simultaneous with the submission to the authority. If an applicant believes the materials submitted contain proprietary information that is required to remain confidential, such information must be clearly identified and the applicant shall submit duplicate applications, one with full information for the authority's use and one redacted application available for release to the public.

(2) The authority shall upon receipt of a completed application, publish notification of the application on its website. The public may submit written comments regarding the application within ten days following publication. Following the close of the written comment period, the authority shall, review the application as set forth in this section. Within thirty days of the receipt of a complete application that authority may:

(i) Issue a certificate of approval which shall contain any conditions the authority finds necessary for the approval;

(ii) Deny the application; or

(iii) Order a public hearing if the authority finds it necessary to make an informed decision on the application.

(3) The authority shall issue a written decision within seventy-five days from receipt of the completed application or at the conclusion of the public hearing, if one is held. The authority may request additional information in which case they shall have an additional fifteen days following receipt of the supplemental information to approve or deny the proposed cooperative agreement.

(4) Notice of any hearing shall be sent certified mailed to the applicants and all persons, groups or organizations who have submitted written comments on the proposed cooperative agreement. Any individual, group or organization who submitted written comments regarding the application and wishes to present evidence at the public hearing shall request to be recognized as an affected party as set forth in article two-d of this chapter. The hearing shall be held no later than forty-five days after receipt of the application. The authority shall publish notice of the hearing on the authority's website fifteen days prior to the hearing.

(5) Parties may file a motion for an expedited decision.

(f) *Standards for review of cooperative agreements.* —

(1) In its review of an application of a cooperative agreement submitted pursuant to this section, the authority may consider the proposed cooperative agreement and any supporting documents submitted by the applicant, any written comments submitted by any person and any written or oral comments submitted, or evidence presented, at any public hearing.

(2) The authority shall approve a proposed cooperative agreement and issue a certificate of approval if it determines that the benefits likely to result from the proposed cooperative agreement outweigh the disadvantages likely to result from a reduction in competition from the proposed cooperative agreement.

(3) In evaluating the potential benefits of a proposed cooperative agreement, the authority shall consider whether one or more of the following benefits may result from the proposed cooperative agreement:

(A) Enhancement and preservation of existing academic and clinical educational programs;

(B) Enhancement of the quality of hospital and hospital-related care, including mental health services and treatment of substance abuse provided to citizens served by the authority;

(C) Enhancement of population health status consistent with the health goals established by the

authority;

(D) Preservation of hospital facilities in geographical proximity to the communities traditionally served by those facilities to ensure access to care;

(E) Gains in the cost-efficiency of services provided by the hospitals involved;

(F) Improvements in the utilization of hospital resources and equipment;

(G) Avoidance of duplication of hospital resources;

(H) Participation in the state Medicaid program; and

(I) Constraints on increases in the total cost of care.

(4) The authority's evaluation of any disadvantages attributable to any reduction in competition likely to result from the proposed cooperative agreement shall include, but need not be limited to, the following factors:

(A) The extent of any likely adverse impact of the proposed cooperative agreement on the ability of health maintenance organizations, preferred provider organizations, managed health care organizations or other health care payors to negotiate reasonable payment and service arrangements with hospitals, physicians, allied health care professionals or other health care providers;

(B) The extent of any reduction in competition among physicians, allied health professionals, other health care providers or other persons furnishing goods or services to, or in competition with, hospitals that is likely to result directly or indirectly from the proposed cooperative agreement;

(C) The extent of any likely adverse impact on patients in the quality, availability and price of health care services; and

(D) The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition likely to result from the proposed cooperative agreement.

(5) (A) After a complete review of the record, including, but not limited to, the factors set out in subsection (e) of this section, any commitments made by the applicant or applicants and any conditions imposed by the authority, if the authority determines that the benefits likely to result from the proposed cooperative agreement outweigh the disadvantages likely to result from a reduction in competition from the proposed cooperative agreement, the authority shall approve the proposed cooperative agreement.

(B) The authority may reasonably condition approval upon the parties' commitments to:

(i) Achieving improvements in population health;

(ii) Access to health care services;

(iii) Quality and cost efficiencies identified by the parties in support of their application for approval of the proposed cooperative agreement; and

(iv) Any additional commitments made by the parties to the cooperative agreement.

Any conditions set by the authority shall be fully enforceable by the authority. No condition imposed by the authority, however, shall limit or interfere with the right of a hospital to adhere to religious or ethical directives established by its governing board.

(6) The authority's decision to approve or deny an application shall constitute a final order or decision pursuant to the West Virginia Administrative Procedure Act (§ 29A-1-1, *et seq.*). The authority may enforce commitments and conditions imposed by the authority in the circuit court of Kanawha County or the circuit court where the principal place of business of a party to the cooperative agreement is located.

(7) The authority may consult with the Attorney General of this state regarding his or her assessment of whether or not to approve the proposed cooperative agreement.

(g) *Enforcement and supervision of cooperative agreements.* — The authority shall enforce and supervise any approved cooperative agreement for compliance.

(1) The authority shall promulgate emergency rules pursuant to the provisions of section fifteen, article three, chapter twenty-nine-a of this code to accomplish the goals of this section. These rules shall include, at a minimum:

(A) An annual report by the parties to a cooperative agreement. This report is required to include:

(i) Information about the extent of the benefits realized and compliance with other terms and conditions of the approval;

(ii) A description of the activities conducted pursuant to the cooperative agreement, including any actions taken in furtherance of commitments made by the parties or terms imposed by the authority as a condition for approval of the cooperative agreement;

(iii) Information relating to price, cost, quality, access to care and population health improvement;

(iv) Disclosure of any reimbursement contract between a party to a cooperative agreement approved pursuant to this section and a commercial health plan or insurer entered into subsequent to the finalization of the cooperative agreement. This shall include the amount, if any, by which an increase in the average rate of reimbursement exceeds inpatient services for such year, the increase in the Consumer Price Index for all Urban Consumers for hospital inpatient services as published by the Bureau of Labor Statistics for such year and, with respect to outpatient services, the increase in the Consumer Price Index for all Urban Consumers for hospital outpatient services for such year; and

(v) Any additional information required by the authority ensure compliance with the cooperative agreement.

(B) If an approved application involves the combination of hospitals, disclosure of the performance of each hospital with respect to a representative sample of quality metrics selected annually by the authority from the most recent quality metrics published by the Centers for Medicare and Medicaid Services. The representative sample shall be published by the authority on its website.

(C) A procedure for a corrective action plan where the average performance score of the parties to the cooperative agreement in any calendar year is below the fiftieth percentile for all United States hospitals with respect to the quality metrics as set forth in (B) of this subsection. The corrective action plan is required to:

(i) Be submitted one hundred twenty days from the commencement of the next calendar year; and

(ii) Provide for a rebate to each commercial health plan or insurer with which they have contracted an amount not in excess of one percent of the amount paid to them by such commercial health plan or insurer for hospital services during such two-year period if in any two consecutive-year period the average performance score is below the fiftieth percentile for all United States hospitals. The amount to be rebated shall be reduced by the amount of any reduction in reimbursement which may be imposed by a commercial health plan or insurer under a quality incentive or awards program in which the hospital is a participant.

(D) A procedure where if the excess above the increase in the Consumer Price Index for all Urban Consumers for hospital inpatient services or hospital outpatient services is two percent or greater the authority may order the rebate of the amount which exceeds the respective indices by two percent or more to all health plans or insurers which paid such excess unless the party provides written justification of such increase satisfactory to the authority taking into account case mix index, outliers and extraordinarily high cost outpatient procedure utilizations.

(E) The ability of the authority to investigate, as needed, to ensure compliance with the cooperative agreement.

(F) The ability of the authority to take appropriate action, including revocation of a certificate of approval, if it determines that:

(i) The parties to the agreement are not complying with the terms of the agreement or the terms and conditions of approval;

(ii) The authority's approval was obtained as a result of an intentional material misrepresentation;

(iii) The parties to the agreement have failed to pay any required fee; or

(iv) The benefits resulting from the approved agreement no longer outweigh the disadvantages attributable to the reduction in competition resulting from the agreement.

(G) If the authority determines the parties to an approved cooperative agreement have engaged in conduct that is contrary to state policy or the public interest, including the failure to take action required by state policy or the public interest, the authority may initiate a proceeding to determine whether to require the parties to refrain from taking such action or requiring the parties to take such action, regardless of whether or not the benefits of the cooperative agreement continue to outweigh its disadvantages. Any determination by the authority shall be final. The authority is specifically authorized to enforce its determination in the circuit court of Kanawha County or the circuit court where the principal place of business of a party to the cooperative agreement is located.

(H) Fees as set forth in subsection (h).

(2) Until the promulgation of the emergency rules, the authority shall monitor and regulate cooperative agreements to ensure that their conduct is in the public interest and shall have the powers set forth in subdivision (1) of this subsection, including the power of enforcement set forth in paragraph (G), subdivision (1) of this subsection.

(h) *Fees.* — The authority may set fees for the approval of a cooperative agreement. These fees shall be for all reasonable and actual costs incurred by the authority in its review and approval of any cooperative agreement pursuant to this section. These fees shall not exceed $75,000. Additionally, the authority may assess an annual fee not to exceed $75,000 for the supervision of any cooperative agreement approved pursuant to this section and to support the implementation and administration of the provisions of this section.

(i) *Miscellaneous provisions.* —

(1) (A) An agreement entered into by a hospital party to a cooperative agreement and any state official or state agency imposing certain restrictions on rate increases shall be enforceable in accordance with its terms and may be considered by the authority in determining whether to approve or deny the application. Nothing in this chapter shall undermine the validity of any such agreement between a hospital party and the Attorney General entered before the effective date of this legislation.

(B) At least ninety days prior to the implementation of any increase in rates for inpatient and outpatient hospital services and at least sixty days prior to the execution of any reimbursement agreement with a third party payor, a hospital party to a cooperative agreement involving the combination of two or

more hospitals through merger, consolidation or acquisition which has been approved by the authority shall submit any proposed increase in rates for inpatient and outpatient hospital services and any such reimbursement agreement to the Office of the West Virginia Attorney General together with such information concerning costs, patient volume, acuity, payor mix and other data as the Attorney General may request. Should the Attorney General determine that the proposed rates may inappropriately exceed competitive rates for comparable services in the hospital's market area which would result in unwarranted consumer harm or impair consumer access to health care, the Attorney General may request the authority to evaluate the proposed rate increase and to provide its recommendations to the Office of the Attorney General. The Attorney General may approve, reject or modify the proposed rate increase and shall communicate his or her decision to the hospital no later than 30 days prior to the proposed implementation date. The hospital may then implement the increase approved by the Attorney General. Should the Attorney General determine that a reimbursement agreement with a third party payor is likely to produce anti-competitive effects resulting in consumer harm, the Attorney General may reject the reimbursement agreement and communicate such rejection to the parties thereto together with the rationale therefor in a timely manner.

(2) The authority shall maintain on file all cooperative agreements the authority has approved, including any conditions imposed by the authority.

(3) Any party to a cooperative agreement that terminates its participation in such cooperative agreement shall file a notice of termination with the authority thirty days after termination.

(4) No hospital which is a party to a cooperative agreement for which approval is required pursuant to this section may knowingly bill or charge for health services resulting from, or associated with, such cooperative agreement until approved by the authority. Additionally, no hospital which is a party to a cooperative agreement may knowingly bill or charge for health services resulting from, or associated with, such cooperative agreement for which approval has been revoked or terminated.

(5) By submitting an application for review of a cooperative agreement pursuant to this section, the hospitals or health care providers shall be deemed to have agreed to submit to the regulation and supervision of the authority as provided in this section."

Adopted

Rejected

Notice of Electronic Service

I hereby certify that on March 04, 2016, I filed an electronic copy of the foregoing Respondents' Motion to Stay the Part 3 Trial or, In the Alternative, Dismiss the Case, with:

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Chief Administrative Law Judge
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Donald Clark
600 Pennsylvania Ave., NW
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I hereby certify that on March 04, 2016, I served via E-Service an electronic copy of the foregoing Respondents' Motion to Stay the Part 3 Trial or, In the Alternative, Dismiss the Case, upon:

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