ORIGINAL

UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

	In the matter of Inova Health System Foundation,)		PUBLIC	
·)	Dock <u>et No. 9326</u>		
t					
•					
	e			·	
	<u>л</u>				
	· · · · · · · · · · · · · · · · · · ·	1	į.		
, (
<u>.</u>					
, 1.					
	a corporation.)))			

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS' MOTION FOR **RECUSAL OF COMMISSIONER ROSCH**

In contrast to Complaint Counsel's opposition to Respondents' motion to stay the

1 1 1 1 1 1 1 proceedings could not be clearer. Rule 3.42(a) states plainly that: "Hearings in adjudicative proceedings shall be presided over by a duly qualified Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges[.]" 16 C.F.R. § 3.42(a). Far from being a process created for the instant matter, the rule authorizing the appointment of "one or more members of the Commission" to hear adjudicative proceedings has existed in largely the same form as when it was first implemented more than 40 years ago. *See* Rules of Practice for Adjudicative Proceedings, 32 Fed. Reg. 8,449, 8,451 (June 13, 1967) (codified at 16 C.F.R. § 3.42(a)). Indeed, Respondents do not even attempt to argue that the appointment of a Commissioner as a hearing officer is not expressly authorized under the rules. Rather, they attempt to impose conditions on that appointment that do not exist in the

1.	
•	
\$ 	-

The inappositeness of the sole statutory authority on which Respondents rely for the

<u>advisor</u> as onnosed to a Commissioner is not exempt from the discualification by $5 \amalg S \subset \delta$

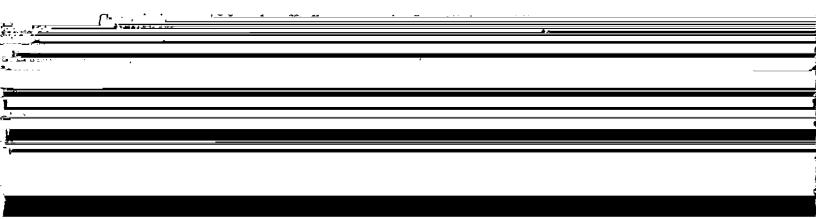
<u>,</u>		
, 	۲	
* ? 		
۷ <u>ــــــــــــــــــــــــــــــــــــ</u>		

issued, he (along with the other Commissioners) would ultimately perform a de novo review of

any resultant administrative proceeding.

	It is appreciate the construction of the second state of the secon
1	
ÌI.	

*	
•	
-	j.
	·
ŀ	
•	· .
-	· ·
5	
• ⁻	
τ	-
<u>.</u>	
	parte communications are then prohibited. 16 C.F.R.§ 4.7(b). This prohibition applies equally
	to ALJs and Commissioners. Id. For this reason, after a Part III complaint is voted out, the

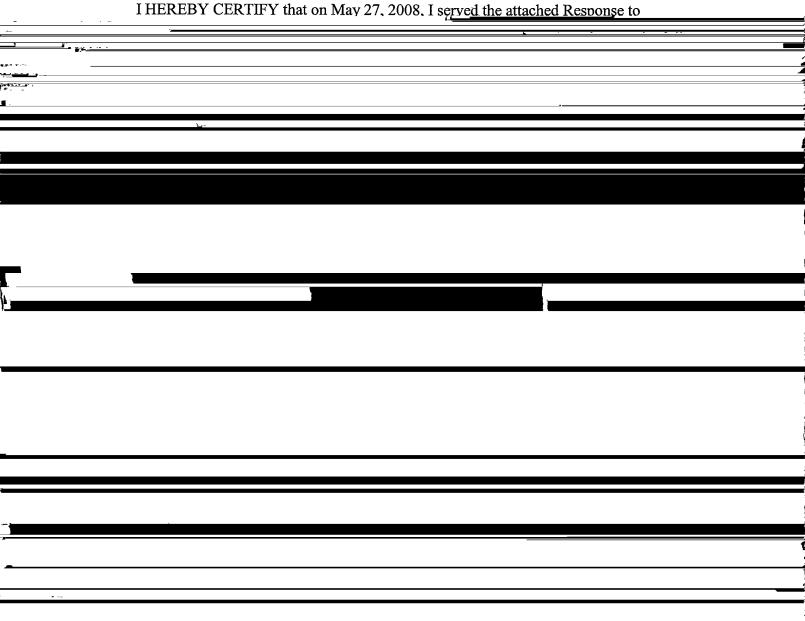


the conflict inherent in every proceeding before the members of an administrative body which both votes out and adjudicates complaints. Unlike in the routine case, where the Commissioners ultimately rule on the complaint they vote out, Commissioner Rosch did not vote on the complaint here. To credit Respondents' arguments, one must disregard a clear and long-standing FTC rule authorizing appointments like this, an explicit exemption for Commissioners from the cited provision of the Administrative Procedure Act, and routine Commission practice. Respondents' arguments do not warrant recusal of Commissioner Rosch in this matter, or any future Commissioner appointed to sit as presiding official in an adjudicative proceeding under

circumstances similar to those presented here.

Respectfully submitted,

Norman Gumbey, Jr Matthew J. Reilly Norman Armstrong Jr. Complaint Counsel Federal Trade Commission 601 New Jersey Ave., N.W. Washington, D.C. 20580 (202) 326-2072



CERTIFICATE OF SERVICE

Office of the Secretary Federal Trade Commission H-159 600 Pennsylvania Avenue, N.W. Washington, DC 20580

Hon Commissioner J Thomas Rosch

Administrative Law Judge H-528