IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

FEDERAL TRADE COMMISSION	)	
	)	
Plaintiff,	)	
	)	No. 11-cv-50344
v.	)	
	)	Hon. Frederick J. Kapala,
OSF HEALTHCARE SYSTEM, and	)	District Judge
ROCKFORD HEALTH SYSTEM	)	
	)	Hon. P. Michael Mahoney,
Defendants.	)	Magistrate Judge

PLAINTIFF'S MOTION FOR CLARIFICATION OF
PRELIMINARY INJUNCTION HEARING SCHEDULE

On December 1, 2011, this Court entered a Scheduling Order adopting the Parties' joint plan governing "all aspects" of discovery in this limited preliminary injunction proceeding. The joint plan resulted from negotiations between all parties to this proceeding. Because Defendants issued broad discovery requests outside the scope of the Scheduling Order to Plaintiff and several third parties, we respectfully move the Court to clarify that its Scheduling Order remains in effect and unmodified, and that discovery beyond the scope of the Scheduling Order is not permitted in this proceeding.

Under Local Rule 37.2, the parties attempted in good faith to resolve this discovery dispute on a telephone conference on December 12, 2011, between Alan Green at Hinshaw & Culbertson LLP (attorney for Defendant OSF Healthcare System), and Kenneth Field and Katherine Ambrogi (attorneys for Plaintiff), and again in an email exchange between Alan Green, as well as David Marx and Jeffrey Brennan at McDermott, Will & Emery LLP (attorneys for Defendant Rockford Health System), and were unable to reach an accord.

A. Limited Discovery is Consistent with This Preliminary Injunction Proceeding

Plaintiff here seeks a preliminary injunction under Section 13(b) of the FTC Act, to preserve the *status quo* during a full administrative trial on the merits set to begin on April 17, 2012. Full discovery will commence in the administrative proceeding in less than two weeks. On December 1, 2011, this Court entered a Scheduling Order adopting the joint discovery plan agreed to by all parties to this proceeding. The ample but tailored discovery permitted by the Scheduling Order is entirely appropriate for this limited preliminary injunction proceeding. In managing this hearing, a district court exercises considerable discretion. The court may consider hearsay and affidavits, *Securities and Exchange Commission v. Cherif*, 933 F.2d 403, 412 n. 8 (7th Cir. 1991); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997), and may also limit the number of witnesses heard. *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 577 (7th Cir. 1999). As the Supreme Court found:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (citations omitted).

Thus, because the current Scheduling Order provides robust discovery by any standard, it is certainly sufficient for this limited preliminary injunction.

The agreed-to discovery set forth in the Scheduling Order is particularly extensive in the context of this proceeding, where Defendants have obtained substantial evidence, both through Plaintiff's complete compliance with the Scheduling Order and evidence-gathering outside formal discovery. Plaintiff, acting in good faith under the Scheduling Order, produced to

Defendants all documents and data that Plaintiff collected from third parties during its pre-complaint investigation. As a result, Defendants already received many thousands of pages of materials from third parties and Commission staff and, in any event, every piece of relevant factual material available to Plaintiff. Notwithstanding that Defendants have the entire body of factual evidence in Plaintiff's possession, Defendants still have many materials available only to them, including unfettered access to OSF Healthcare System and Rockford Health System employees, Defendants' communications with third parties relating to the acquisition, and materials relied on by their efficiencies expert hired by antitrust counsel years ago.

Moreover, the Parties are on the eve of extensive and overlapping discovery for a full administrative merits trial. The administrative proceeding's rules allow virtually unlimited depositions and subpoenas from the same third parties served with discovery in this proceeding; requests for admission; extensive interrogatories; and up to 210 hours of live hearing testimony. A full discovery schedule will issue within two weeks. Thus, discovery in the related merits trial will begin well before this Court's preliminary injunction hearing. Layering additional, unanticipated, and duplicative discovery onto third parties who are subject to the extensive discovery in the administrative proceeding will merely increase their already-significant burden.

B. The Scheduling Order Adopted the Parties' Joint Plan Governing "All Aspects" of Discovery

The Parties jointly established a comprehensive pre-hearing discovery plan that, by its explicit terms, contemplates no additional discovery beyond that contained in the Court's Scheduling Order of December 1, 2011. The Federal Rules of Civil Procedure require such a plan, and subsequent Scheduling Order, to ensure that discovery is "conducted most efficiently

and economically." Fed. R. Civ. P. 26 Advisory Committee Notes, 1993 Amendments, Subdivision (f).

Rule 26(b) governs the permissible scope of discovery, including limitations on the frequency and extent of discovery. Fed. R. Civ. P. 26(b). In determining the metes and bounds of discovery, Rule 26(f) requires that parties confer to attempt in good faith to agree on a proposed discovery plan, and provide the court with a written report outlining such a plan. Fed. R. Civ. P. 26(f). Courts then, upon receiving such reports, are authorized to set a schedule limiting the time to file motions and to complete discovery. *See Wollenburg v. Comtech Mfg. Co.*, 201 F.3d 973, 978 (7th Cir. 2000); Fed. R. Civ. P. 16(b). These court-issued scheduling orders contain provisions that indeed may "modify the extent of discovery." Fed. R. Civ. P. 16(b)(3)(B)(ii).

In this matter, consistent with our obligations under Rule 26(f), the Parties conferred and in fact agreed in good faith on a proposed discovery plan. This plan outlined, as Rule 26(f) provides for, changes in timing, form, or requirement for disclosures; when discovery should be completed; and what changes should be made in the limitation on discovery. It also modified a wide range of discovery under the Federal Rules of Civil Procedure. For example, the Parties agreed on up to sixteen fact witness depositions; various time limits on depositions; specific deadlines to exchange affidavits, declarations, witness lists, and expert reports; and page limits on briefings. This proposed discovery plan represented a negotiated agreement between Plaintiff and Defendants.[1]

[1] Significant negotiations occurred before the Parties finally agreed on party and third party discovery, spanning several telephone conferences and numerous exchanges of draft schedules. Had Plaintiff realized that Defendants would seek additional pre-hearing discovery beyond the Scheduling Order, we

As a result, once an agreement was reached, the Parties represented to the Court that the joint motion for the preliminary injunction hearing schedule "agreed upon *all aspects* of a pre-hearing discovery schedule." Agreed Motion for Entry of Preliminary Injunction Hearing Schedule, *FTC v. OSF Healthcare System*, 11-cv-50344 (N.D. Ill. Nov. 30, 2011) (emphasis added). Indeed, Defendants' counsel drafted the joint motion, explicitly informing the Court of the comprehensive nature of the joint discovery plan. Accordingly, under Rule 16(b), this Court granted the Parties' proposed schedule and issued a Scheduling Order adopting the joint plan on December 1, 2011.

But nine days later, Defendants served document requests, interrogatories, and subpoenas duces tecum – none of which are contemplated by the Scheduling Order governing discovery – on Plaintiff and several third parties. Defendants failed to raise such discovery requests during the Parties' Rule 26(f) discovery conference and subsequent negotiations. Nor did Defendants ever seek to add such additional discovery to the Parties' Rule 26(f) report. Notably, Defendants could have been guided by Illustrative Civil Form 52, published on this Court's web site, which identifies that such reports should include interrogatories and document requests if sought.

C. Clarification of the Scheduling Order Will Ensure Equitable Discovery

Rather than objecting to Defendants' discovery, Plaintiff requests clarification that the Scheduling Order remains in effect and that discovery beyond its terms may be obtained only with leave of court after a showing of good cause to provide clarity to third parties and prevent an inequitable discovery process. Defendants' discovery requests issued to third parties are

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would not have agreed to the discovery parameters identified in the joint plan. Plaintiff made several important concessions, including limiting the number of depositions, precisely because the plan contained no additional Party or third party discovery.

substantial – indeed, the subpoena duces tecum issued to three third-party health plans includes 29 specifications (to each third party) and commands a response in just 21 calendar days. Absent clarification of the Scheduling Order, third parties are forced to either 1) comply with unreasonable and overbroad discovery requests, or 2) pay attorneys to move to quash the subpoena or draft objections.

Clarification that the Scheduling Order is in effect and that discovery beyond its scope, absent leave of this Court, is off-limits also will prevent an inequitable discovery process. If this Court finds that discovery beyond the agreed-to Scheduling Order is appropriate for whatever reason, Plaintiff will issue subpoenas duces tecum to certain third parties from whom Defendants' have obtained testimony or other evidence and requests for documents and information to Defendants. Because Plaintiff assumed the agreed-to Scheduling Order contained the full scope of discovery, Plaintiff has not taken these steps, which would mirror Defendants' recent actions. The Court's ruling on this Motion for Clarification will either clarify that Defendants' recently-issued discovery is beyond the scope of the Scheduling Order or allow Plaintiff to issue discovery to Defendants and certain third parties. The Court's ruling will thus prevent a lopsided discovery process where Defendants are able to obtain documents and information that are unavailable to Plaintiff.[2]

D. Conclusion

As Defendants themselves represented to this Court, the joint plan adopted by the Scheduling Order contemplated "all aspects" of discovery in this limited preliminary injunction proceeding. Once approved by this Court, the Scheduling Order may be amended only for good

[2] If this Court is unable to address these issues in short order, considering the Court's full schedule, Plaintiff will issue discovery requests pending a ruling.

cause. Fed. R. Civ. P. 16(b)(4); U.S. District Court, Northern District of Illinois, Standing Order Establishing Pretrial Procedure, No. 3. This rule is grounded in sound policy, that such protection is warranted because "scheduling orders are at the heart of case management. If they can be disregarded without a specific showing of a good cause, their utility will be severely impaired." *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3rd Cir. 1986). Defendants chose to skirt the joint discovery plan, negotiated in good faith and memorialized in the Scheduling Order, which provides substantial discovery in this matter. As a result, Plaintiff respectfully requests that this Court grant its Motion for Clarification of Preliminary Injunction Hearing Schedule and Order that its Scheduling Order remains in effect and unmodified, and that discovery beyond the scope of the Scheduling Order is not permitted in this proceeding.

Dated: December 12, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December, 2011, I served the foregoing on the following counsel via electronic mail:

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