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

FEDERAL TRADE COMMISSION	)	
Plaintiff,	)	Case No. 3:11cv50344
v.	)	
	)	Hon. Frederick J. Kapala
OSF HEALTHCARE SYSTEM, and ROCKFORD HEALTH SYSTEM	)	
	)	Hon. P. Michael Mahoney
Defendants.	)	Magistrate Judge

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR CLARIFICATION OF PRELIMINARY INJUNCTION HEARING SCHEDULE

The FTC's motion in essence asks the Court to deny defendants their fundamental right under the Federal Rules of Civil Procedure to serve reasonably tailored document requests and interrogatories on plaintiff and subpoenas duces tecum on eight third parties. Each of the eight third parties provided the FTC with a declaration or other support for its motion for preliminary injunction. The FTC does not argue that defendants' propounded discovery is not relevant. Rather, it argues that the Court's Scheduling Order, although silent on the subject, prohibits all discovery except through depositions. The FTC's motion has no merit and should be denied.

Background Facts

On November 30, 2011, defendants and plaintiff jointly moved the court for entry of a proposed Preliminary Injunction Hearing Schedule (Doc. 59) ("Agreed Motion"). Attached to the Agreed Motion was the parties' jointly negotiated proposed schedule (Doc. 59-1) ("Proposed Schedule"), which, on December 1, 2011, the Court entered (Doc. 63) ("Scheduling Order"). The Scheduling Order primarily relates to how the parties will interact with each other through

the hearing: when the FTC must produce its investigatory file to defendants (¶ 1), when the parties must identify experts and fact witnesses and exchange applicable reports and declarations (¶¶ 2-6, 9), when the parties must identify certain trial evidence (¶¶ 7, 10, 11), the number and length of depositions (¶ 8), and hearing and post-hearing briefing rules (¶ 12). It does not prohibit or limit prehearing activities that are not explicitly addressed in the Scheduling Order.

Following entry of the Scheduling Order, on December 9, 2011, defendants served the FTC, under Fed. R. Civ. P. 33 and 34, with a set of interrogatories and request for production of documents. On December 9 and 12, defendants also served eight third parties with a subpoena duces tecum under Fed. R. Civ. P. 45. Defendants also intend to serve subpoenas for appearance at deposition on named employees from the aforementioned third parties.

1. Defendants' Discovery Complies with the Scheduling Order

Although the FTC asserts that defendants' propounded discovery is "outside the scope of the Scheduling Order" (Motion at 1), a plain reading shows that the FTC's assertion is incorrect. The Scheduling Order specifies certain limitations and deadlines for specific identified pre-hearing activities. Interrogatories and document requests to the FTC and subpoenas duces tecum to third parties are not restricted activities. The Scheduling Order is silent regarding these fundamental discovery rights. To suggest that they are nonetheless "outside the scope" of the Scheduling Order is not credible.

The FTC's position with respect to third party discovery is especially unfounded. Defendants are entitled under the Scheduling Order to take eight fact witness depositions and have issued subpoenas duces tecum to eight third parties. With respect to the subpoenas duces tecum, defendants, in lieu of document discovery by that method, could seek the identical

documents by attaching a document request to the Rule 45 deposition subpoena to be served on the employee from each third party to be called for deposition. The Scheduling Order does not limit the parties' rights to require deposition witnesses to produce relevant documents. The FTC's position, therefore, makes no sense.

The discovery to the FTC consists of two interrogatories (plus subparts) and six document requests directed to the FTC's lengthy pre-complaint investigation. The sought materials will assist defendants in their defense of the motion for preliminary injunction before this Court.

2. Defendants' Discovery is Consistent with Prehearing Negotiations with the FTC

The FTC seeks support for its position with a statement in the Agreed Motion that the parties "have agreed upon all aspects of a pre-hearing discovery schedule." (Motion at 1, 3, 5, 6) According to the FTC, because the Scheduling Order is silent about all discovery except depositions, this statement evidences an agreement to abandon all discovery except depositions. The FTC's argument is illogical and incorrect. Had it been the parties' intent to waive all rights to non-deposition discovery, they would have incorporated such a highly significant limitation into the Proposed Schedule – not leave it to the interpretation of an ambiguous statement in the motion for entry of the Proposed Schedule.

The FTC admits that defendants "conferred and in fact agreed in good faith to a proposed discovery plan," but complains that it did not realize that defendants would seek discovery through methods in addition to depositions. (Motion at 4) Had it realized this, says the FTC, it would have negotiated differently regarding the prehearing schedule. (Motion at 4-5 n.1) It is difficult to believe that the FTC did not expect defendants to exercise their fundamental

discovery rights – particularly in an accelerated proceeding like this, where the FTC has a decided information advantage by virtue of the lengthy non-public investigation it conducted prior to filing the complaint. In any event, in negotiations with defendants over the prehearing schedule, the FTC admits that it never raised, let alone proposed making, this severe change to the discovery rules. Its argument that the Court should nevertheless interpret the Scheduling Order to deny these fundamental discovery rights to defendants has no merit.

3. Defendants' Right to Discovery is Fundamental Under Section 13(b) of the FTC Act

Where, as here, the FTC seeks a preliminary injunction under section 13(b) of the Federal Trade Commission Act to block a proposed transaction, its burden is to show, among other things, a likelihood of success on the merits – and this burden is "not insubstantial." *FTC v. Arch Coal, Inc*., 329 F. Supp. 109, 116 (D.D.C. 2004). Indeed, the district court may not "rubber stamp an injunction whenever the FTC provides some threshold evidence." *FTC v. Whole Foods Market, Inc*., 548 F.3d 1028, 1035 (D.C. Cir. 2008). Rather, defendants in section 13(b) cases have the right to present evidence to the court to rebut the FTC's prima facie case. *FTC v. Laboratory Corporation of America*, 2011 U.S. Dist. LEXIS 20354, *36 (C.D. Cal. Feb. 22, 2011).

Defendants' discovery requests to the FTC and to the eight third parties are reasonable efforts to obtain evidence for this purpose. The FTC is relying substantially on hearsay that is contained in declarations obtained from numerous third parties. Defendants have the right under Fed. R. Civ. P. 26 to discover through documents as well as deposition testimony whether a declarant's out of court statements have a factual foundation. The FTC opines that defendants do not need this discovery, asserting that "the ample but tailored discovery permitted by the

Scheduling Order [as the FTC interprets it] is entirely appropriate for this limited preliminary injunction proceeding." (Motion at 2) It takes the position – apparently for no reason other than because it says so – that documents that the FTC collected in its investigation and produced to defendants are sufficient for defendants in this proceeding. *Id*. at 2-3.

This is another example of the FTC's apparent view that the federal court action is a mere formality prior to the FTC's administrative hearing, and that defendants and the Court have a very limited role. The FTC unsuccessfully argued to Judge Kapala that he should decide the motion for preliminary injunction without live testimony and based only on declarations, a partial investigational hearing transcript by a witness not subject to cross examination, other documentary evidence not shown to be authentic and relevant, and because there would be an administrative trial on the complaint the FTC had issued. *See* Plaintiff Federal Trade Commission's Proposal for Preliminary Injunction Hearing (Doc. 35). Defendants argued in response that the Court should not make this important determination on the basis of such a lopsided presentation, coupled only with oral argument. *See* Defendants' Proposed Preliminary Injunction Hearing Schedule (Doc. 36). Judge Kapala agreed with defendants and ordered a three-day hearing with live witnesses (Doc. 42).

With respect to the FTC's motion for clarification of the Scheduling Order, the Court should similarly reject the FTC's effort to marginalize this proceeding by denying defendants their fundamental discovery rights. The FTC argues as a justification for its position that "[f]ull discovery will commence in the administrative proceeding in less than two weeks" (Motion at 2), adding that "[l]ayering 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." (*Id*. at 3) These arguments have no merit.

Defendants agree that discovery in this case will be relevant in the administrative case – but that does not obviate defendants' need for discovery in this case. To the extent the eight third parties produce documents responsive to defendants' subpoenas duces tecum, defendants will not seek production of the same documents a second time in the administrative case. Thus, there will be no "duplicative" discovery. Moreover, third parties that produced responsive documents to the FTC during the investigation will not need to produce the same documents to defendants (because the FTC already has). Indeed, third party discovery in this case – commencing two weeks before discovery starts in the administrative case – actually benefits third parties, insofar as it provides them with an earlier (and prior to the holidays) understanding of the nature of documents that defendants are seeking to discover from them.

Conclusion

Defendants' subpoenas duces tecum to eight third parties and interrogatories and requests for production of documents to the FTC are reasonably tailored, and fully in compliance with the Scheduling Order and with the Federal Rules of Civil Procedure. Accordingly, the FTC's motion has no merit and should be denied.

Dated: December 14, 2011

Respectfully submitted,

/s/ David Marx, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2011, I served the foregoing Defendants' Opposition to Plaintiff's Motion for Clarification of Preliminary Injunction Hearing Schedule upon the following counsel via certified mail and electronic mail:

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