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
	)	

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

Plaintiff filed a Motion for Clarification of Preliminary Injunction Hearing Schedule in order to move the Court to clarify that its December 1, 2011 Scheduling Order remains in effect and unmodified, and that Defendants' broad discovery requests to Plaintiff and third parties was beyond the scope of the Scheduling Order.[1]

Despite the allegations in Defendants' Opposition, Plaintiff does not "marginalize this proceeding" nor seek to deny Defendants their rights to test the reliability of third party declarations. (Opposition at 4, 5). Defendants suggest that it is inconceivable that the Parties would intend the Scheduling Order to eliminate certain "fundamental discovery rights." (Opposition at 3, 4). But Defendants ignore that every limit on discovery contained in the agreed-to Scheduling Order, such as the limit on the number of fact depositions for each party to eight, denies a "fundamental discovery right" that Defendants may have absent agreeing to the

[1] Defendants served document requests, interrogatories, and subpoenas duces tecum— none of which are contemplated by the Scheduling Order—on Plaintiff and eight third parties.

Scheduling Order. The fact that the Scheduling Order limits discovery rights is axiomatic, and certainly is not proof that the Scheduling Order does not cover "all aspects" of discovery as Defendants stated in the joint motion to the Court seeking entry of the Scheduling Order.

Defendants now wish the Court to re-extend discovery rights that Defendants negotiated away in favor of other rights, no matter what the costs to third parties and irrespective of how little utility may be gained from their broader discovery requests. Plaintiff respectfully requests that the Court hold Defendants to their obligations under the Scheduling Order, in the interest of judicial economy and, most importantly, in order to protect third parties from the burden and confusion of juggling the demands of two parallel proceedings.

A. Enforcing the Scope and Terms of the Scheduling Order is Necessary to Protect the Important Interests of Third Parties and Judicial Economy

The Section 13(b) proceeding is, as Defendants attest, an important one. But Defendants' "right to present evidence to the court" does not trump the need for an efficient adjudication of this proceeding, nor does it necessarily or completely trump the legitimate interests of third parties seeking to moderate the substantial burden imposed on them by the proceeding. (Opposition at 4). Exacerbating the burden that Defendants' broad discovery requests impose on third parties is the fact that an FTC administrative proceeding has already begun and will continue to run parallel to this preliminary injunction proceeding. Discovery in the FTC's merits trial— which presents virtually limitless opportunities to obtain documents and depose third parties— will begin less than a week from today. As the attached Draft Scheduling Order shows, the Parties will likely face a January 12, 2012 deadline for issuing discovery requests, though the Parties are permitted to begin requesting and receiving fact discovery responses well before then.

Because this preliminary injunction proceeding and the FTC's merits trial will occur simultaneously, Defendants' broad discovery requests will put each third party in the difficult and confusing position of responding to subpoenas and document requests in two different proceedings that are before two different judges and held in two different cities at virtually the same time. Third parties, in particular those seeking relief from the discovery requests, would have to endure burdensome logistics and incur additional legal costs. Further, significant confusion could occur if the Court in this proceeding and the FTC Administrative Law Judge ("ALJ") make inconsistent rulings that leave a third party in limbo between the requirements of two different jurisdictions. One need only imagine the confusion that would result, for example, if a third party requested limitations to the scope or return date of a document request, and obtained different relief from the Court in this proceeding than it did from the ALJ. Clearly, the harm to third parties that could result from permitting Defendants to issue their broad discovery requests simultaneously in two fora goes well beyond the burden of "production of the same documents." (Opposition at 6). Judicial resources also would be unnecessarily wasted as a result of this Court and the ALJ assuming duplicative roles and responsibilities in overseeing discovery.

B. Defendants Exaggerate Their Need for Additional Discovery

It is precisely for these reasons—the ongoing FTC merits trial, third party interests, and the interests of judicial economy—that Plaintiff has interpreted the mutually-agreed Scheduling Order by its terms, which do not contemplate limitless discovery in this preliminary injunction proceeding. In fact, all Parties appeared in agreement on this point when they jointly represented to the Court that the motion for the preliminary injunction hearing schedule "agreed upon *all aspects* of 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).

Defendants' counsel now finds it "difficult to believe that the FTC did not expect defendants" to pursue their "fundamental right" to issue discovery requests to Plaintiff and third parties. (Opposition at 1, 3). Defendants already waived at least one of their allegedly fundamental rights, however, when they did not pursue initial disclosures within fourteen days of the Parties' Rule 26(f) scheduling conference. Fed. R. Civ. P. 26(a). Further, in the most recent Section 13(b) proceeding, Defendants' outside counsel–who represented a different hospital at the time–did not pursue any discovery that was not expressly stated in the scheduling order. *FTC v. ProMedica Health System*, No. 3:11-cv-47, Docket No. 69 (N.D. Ohio filed January 25, 2011).

Duplicative discovery in the two overlapping proceedings will provide minimal incremental benefit to the Parties or to the Court, given that the heart of the expansive discovery process in the FTC's merits trial will occur simultaneously with the limited discovery phase of this preliminary injunction proceeding. Plaintiff does not object, and in fact it assumes, that the Parties may use in the present proceeding any evidence that they obtain through the discovery process of the FTC's merits trial. Fact discovery in the FTC administrative proceeding is likely to commence on December 20, 2011, meaning that the Parties in all likelihood will be requesting and receiving responses to fact discovery in that proceeding while the briefing and hearing in this preliminary injunction proceeding are ongoing. As a result, any discovery in the present proceeding that is duplicative of discovery done in the FTC's merits trial is unlikely to materially affect the evidentiary record available to the Parties and the Court.

Relatedly, Plaintiff has yet to experience the "decided information advantage" that

Defendants allege entitles them to additional discovery in this proceeding. (Opposition at 4). In reality, it is Defendants that: (1) for years have prepared with antitrust counsel for this litigation; (2) hired a consultant that completed a made-for-litigation expert report on alleged efficiencies *before the FTC even was aware of this proposed acquisition*, let alone initiated its investigation; (3) had exclusive and unfettered access to over a dozen party executives who submitted to the Court hundreds of pages of declarations; and (4) held onto millions of pages of party documents–despite months of ongoing investigational hearings–before dumping them all in the course of a few days in the hopes that Plaintiff had access to them for the statutory minimum of 30 days before the Commission would be forced to vote on whether or not to issue a complaint in this proceeding.

Conclusion

Defendants' discovery requests would result in judicial waste and impose substantial costs on third parties, yet they would not meaningfully aid either party in its litigation and would not likely result in development of a more complete evidentiary record upon which the Court could base its decision. Plaintiff respectfully requests that the Court grant its Motion for Clarification of Preliminary Injunction Hearing Schedule and order that discovery beyond its scope is not permitted in this proceeding.

Dated: December 15, 2011

Respectfully submitted,

s/ Matthew J. Reilly

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of December, 2011, I served the foregoing on the following counsel via electronic mail. Please note that the foregoing was filed without the exhibits cited within due to pending court approval of Plaintiff's Motion to File Exhibits Under Seal. Copies of the exhibits were sent via electronic mail to the following counsel and sent via FedEx to Hon. P. Michael Mahoney, Magistrate Judge.

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

In the Matter of	)	
OSF Healthcare System, a corporation, and	)	DOCKET NO. 9349
Rockford Health System, a corporation, Respondents.	)	

DRAFT

SCHEDULING ORDER

January 5, 2012	-	Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
January 12, 2012	-	Deadline for issuing document requests, requests for admission, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
January 19, 2012	-	Respondents' Counsel provides preliminary witness lists (not including experts) with a brief summary of the proposed testimony.
January 23, 2012	-	Complaint Counsel provides expert witness list.
January 30, 2012	-	Respondents' Counsel provides expert witness list.
February 17, 2012	-	Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
February 24, 2012	-	Deadline for Complaint Counsel to provide expert witness reports.
March 6, 2012	-	Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists, including depositions or designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related

exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

March 9, 2012 - Deadline for Respondents' Counsel to provide expert witness reports. Respondents' expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).

March 13, 2012 - Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions or designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondents' basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Respondents' Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

March 13, 2012 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).

March 16, 2012 - Deadline for filing "[m]otions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision" pursuant to Rule 3.22(a).

March 19, 2012 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).

March 20, 2012 - Exchange deposition transcript counter-designations.

March 20, 2012 - Deadline for filing motions for *in camera* treatment of proposed

trial exhibits.

March 23, 2012	-	Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
March 27, 2012	-	Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
April 2, 2012	-	Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists.
April 2, 2012	-	Exchange objections to the designated testimony to be presented by deposition and counter designations.
April 3, 2012	-	Complaint Counsel files pretrial brief supported by legal authority.
April 6, 2012	-	Exchange proposed stipulations of law, facts, and authenticity.
April 10, 2012	-	Respondents' Counsel files pretrial brief supported by legal authority.
April 11, 2012	-	File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
April 12, 2012	-	Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations. Counsel may present any objections to the final proposed witness lists and exhibits, including to any designated deposition testimony. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects. Any Joint Exhibit will be signed by each party with no signature for the judge required.
April 17, 2012	-	Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. The oalj@ftc.gov email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. **The subject line of all submissions to oalj@ftc.gov shall set forth only the Docket Number and the title of the submission.** Service by email shall be followed promptly by delivery of one hard copy by the next business day. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges. The parties are reminded that all filings with the Office of the Secretary, including electronic filings, are governed by the provisions of Commission Rule 4.3(d), which states: "Documents must be received in the Office of the Secretary of the Commission by 5:00 p.m. Eastern time to be deemed filed that day. Any documents received by the agency after 5:00 p.m. will be deemed filed the following business day."

2. The parties shall serve each other by electronic mail and shall include "Docket 9349" in the re line and all attached documents in .pdf format. Complaint Counsel and Respondents' Counsel agree to waive their rights to Service under 16 C.F.R. § 4.4(a)-(b).

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

> All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply

> in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

8. Motions *in limine* are discouraged. Motion *in limine* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (April 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence. In addition, motions *in limine* will not be considered unless filed sufficiently in advance of trial to enable a timely response and a decision, in accordance with Rule 3.22, no later than the first day of the evidentiary hearing.

9. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs.

10. Each party is limited to 50 document requests, including all discrete subparts;

25 interrogatories, including all discrete subparts; and 50 requests for admissions including all discrete subparts except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

11. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition. No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.

12. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum,* the party seeking the deposition shall consult with the other parties before the deposition date is scheduled.

13. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within three business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition as agreed to by all parties involved.

14. The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

15. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

16. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

17. Witnesses not properly designated as expert witnesses shall not provide

opinions beyond what is allowed in F.R.E. 701.

18. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert.

(b) At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case. Unless otherwise agreed by the parties, the experts' notes and drafts of expert reports need not be produced. Likewise, communications between experts and with counsel or consultants need not be produced unless relied upon by the expert in formulating an opinion in this case.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel (i) a list of all commercially-available computer programs used by the expert in the preparation of the report; (ii) a copy of all data sets used by the expert, in native file format and processed data file format; and (iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

19. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

20. The parties shall provide one another, and the Administrative Law Judge, no

later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

21. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

22. Complaint Counsel's exhibits shall bear the designation CX and Respondents' exhibits shall bear the designation RX or some other appropriate designation. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

23. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. Additional exhibits may be added after the final prehearing conference only by order of the Administrative Law Judge upon a showing of good cause. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date: