

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

OSF HEALTHCARE SYSTEM and ROCKFORD
HEALTH SYSTEM,

Defendants.

Case No.: 11 C 50344

Judge: Frederick J. Kapala

DEFENDANTS' PROPOSED PRELIMINARY INJUNCTION HEARING SCHEDULE

Defendants, OSF HEALTHCARE SYSTEM ("OSF") and ROCKFORD HEALTH SYSTEM ("RHS") submit their proposal for an evidentiary hearing, and a proposed schedule leading to that hearing, to address the Plaintiff's Motion for Preliminary Injunction. Defendants have attempted to negotiate an agreed schedule and preliminary injunction hearing procedure with Plaintiff, but the parties have not been able to reach an agreement.

Defendants believe that the issues raised by the Plaintiff's Motion for Preliminary Injunction are too important to be decided on the papers alone. Defendants believe that an evidentiary hearing is most consistent with due process, and will provide them with the best opportunity to be heard and to challenge through cross examination at least some of the evidence (much of which lacks the requisite foundation for admissibility at trial) that Plaintiff intends to offer against them. Until late last Friday, November 18, 2011, just four days ago, Defendants had not been privy to any material that Plaintiff obtained from third parties during the course of its eight-month investigation including documents, data, declarations, transcripts of investigative hearings, and other documentary materials. Even now, Defendants have only the declarations of various third parties, but do not yet have access to the presumably voluminous documents or data gathered from those and other third parties. Nor has Plaintiff disclosed to Defendants any reports or analyses prepared by its three expert witnesses (an economist, a financial analyst, and a physician).

Plaintiff is asking this Court to find that it has shown a “likelihood of success on the merits,” and that preliminary relief (in the form of an injunction that would block the affiliation, and its procompetitive benefits, for at least twelve and, accounting for appeals, perhaps as long as 24 months) “would be in the public interest.” *See* Memorandum in Support of Motions for Temporary Restraining Order and Preliminary Injunction at 2; 15 U.S.C. § 53(b). Plaintiff desires this Court to do so, however, without having to offer any live testimony to support its burden of proof, and based solely upon declarations and the partial transcript of one investigative hearing witness who was not subject to cross-examination, and other documentary evidence whose authentication, relevance or materiality have not been established. Respectfully, this Court cannot, and should not, make such an important determination on the basis of such a lopsided presentation, coupled only with oral argument. Defendants should be allowed to challenge Plaintiff’s experts and others Plaintiff chooses to call to testify, and to present their own witnesses, who will be subject to cross-examination, at a short evidentiary hearing, following a short period for discovery. Defendants are proposing to depose no more than eight fact witness depositions per side, which will allow them to examine some, but by no means all, of the Plaintiff’s 37 declarants.

Counsel for Defendants do not anticipate a hearing of longer than three days, and can be prepared for that hearing as early as the first week of January 2012. Counsel are willing to accommodate this Court’s busy trial schedule, and to conduct the hearing on non-consecutive days, if necessary.

Recognizing that the Court may not be able to definitively schedule a hearing before mid-February 2012, Defendants can and will be flexible to present evidence at any earlier dates which are or may become available to the Court. As a less desirable alternative to an evidentiary hearing including live testimony, counsel for Defendants suggest they be allowed, at a minimum, to proffer their evidence and make their arguments before the Court over the course of a two-day, nine-hour hearing, with the parties splitting the time equally. There is precedent for that type of hearing. *See*

F.T.C. v. ProMedica Health System, Inc., Case No. 3:11 CV 47 (a copy of the order setting the preliminary injunction schedule and procedure is attached for the Court's reference as Exhibit "A").

Plaintiff's suggestion that there will be plenty of live testimony at the administrative trial is no solution. That separate trial starts in April 2012 before a different adjudicator. Plaintiff is asking this Court to make a decision on a preliminary injunction which could delay closing of the transaction for 24 months or more. This Court should make that decision only after hearing live testimony from witnesses who are subject to cross-examination.

The remainder of Defendants' proposed schedule relating to Plaintiff's Motion for Preliminary Injunction is as follows:

1. Within one business day following the entry of the Plaintiff's Proposed Order Granting Plaintiff's Unopposed Motion to Modify Stipulated Interim Protective Order, the Plaintiff shall produce, for inspection and copying, all investigational hearing transcripts of, and documents, data, and materials provided by, third parties during the investigation of Defendants' affiliation.

2. On December 14, 2011 the Plaintiff and Defendants shall exchange any additional affidavits or declarations from fact witnesses.

3. On December 16, 2011, the Plaintiff and Defendants shall exchange any: (a) additional or supplemental affidavits or declarations from their previously disclosed expert witnesses; and (b) rebuttal affidavits or declarations from previously undisclosed expert witnesses.

4. On December 23, 2011, the Plaintiff and Defendants shall: (a) exchange the investigational hearing testimony excerpts they intend to offer as evidence at the preliminary injunction hearing from those fact witnesses whose investigational hearing the FTC conducted during the course of its investigation; and (b) identify each documentary exhibit they intend to offer as evidence at the preliminary injunction hearing, including those the FTC obtained from third-parties during the course of its investigation.

5. Prior to the preliminary injunction hearing, the Plaintiff and Defendants shall each be entitled to depose the other's expert witness(es) and no more than eight fact witnesses, including third-parties. Depositions of expert witnesses shall be limited to seven hours. Depositions of Defendants' employees (many of whom have been deposed by the Plaintiffs at least once and, in some cases, twice during the investigation) shall be limited to four hours. Depositions of third-party fact witnesses shall be limited to seven hours. If Plaintiff has not previously either deposed or interviewed a third party witness, then the parties shall divide the deposition time evenly. If, however, Plaintiff has previously either interviewed or deposed a third party witness, then Defendants shall have up to five hours and Plaintiff shall have up to two hours to conduct that third party witness deposition.

6. On December 30, 2011, the parties shall exchange the excerpts they intend to offer at the preliminary injunction hearing from the transcripts of the depositions of the expert and fact witnesses whose depositions were taken pursuant to Paragraph 5.

7. At their option, the parties may file supplemental pre-hearing memoranda, not to exceed fifteen pages in length, on December 30, 2011.

8. The Court will conduct a three-day preliminary injunction hearing, to be conducted as early as January 4, 5 and 6, 2012, at United States Courthouse, 211 South Court Street, Rockford, Illinois 61101. The parties shall present evidence, including live witness testimony, during the hearing. Third party witnesses providing testimony may appear in person or via videoconference. The parties shall divide the time allocated for the hearing evenly and disclose the identity of their witnesses on December 30, 2011.

9. The parties shall file post-hearing memoranda, proposed findings of fact and conclusions of law no later than 7 days after the conclusion of the hearing.

10. The parties shall file post-hearing reply memoranda no later than 7 days after filing of the memoranda pursuant to paragraph 9.

Respectfully submitted,

OSF HEALTHCARE SYSTEM

By: s/Michael F. Iasparro
Michael F. Iasparro

Respectfully submitted,

ROCKFORD HEALTH SYSTEM

By: s/David Marx, Jr.
David Marx, Jr.

Alan I. Greene
Matthew J. O'Hara
Kristin Kurczewski
Hinshaw & Culbertson LLP
222 N. LaSalle Street, Suite 300
Chicago, IL 60601-1081
312-704-3000

Michael F. Iasparro
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

Counsel for OSF Healthcare System

David Marx, Jr.
Amy J. Carletti
William P. Schuman
McDermott Will & Emery
227 West Monroe Street
Chicago, IL 60606-5096
312-984-7668

Counsel for Rockford Health Systems

AFFIDAVIT OF SERVICE

The undersigned certifies that on November 22, 2011, a copy of *Defendants' Proposed Preliminary Injunction Hearing Schedule* was electronically served via the U.S. District Court CM/ECF E-Filing System upon the following:

Matthew J. Reilly
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
mreilly@ftc.gov

Monica V. Mallory
United States Attorney's Office
308 West State Street
Suite 300
Rockford, IL 61101
monica.mallory@usdoj.gov

/s/ Rhonda Young

HINSHAW & CULBERTSON LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4900
Fax: (815) 490-4901