PUBLIC[1]

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

In the Matter of	)	
Otto Bock HealthCare North America, Inc.,	)	Docket No. 9378
a corporation,	)	
Respondent.	)	

ORDER GRANTING MOTION TO EXCLUDE WITNESS

I.

On June 4, 2018, Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed a Motion to Exclude Testimony from Rob Burcham ("Motion"). Respondent Otto Bock HealthCare North America, Inc. ("Respondent" or "Ottobock") filed an opposition to the Motion on June 14, 2018 ("Opposition").

Based on full consideration of the Motion, the Opposition, the exhibits submitted in support thereof, and the entire record in the case, the Motion is GRANTED, as further explained below.

[1] Complaint Counsel and Respondent each filed a Confidential Version of their pleadings, in which the parties redacted the name of the proposed witness. Rule 3.45(e) of the Commission's Rules of Practice provides that if a party includes specific information that is subject to confidentiality protections of a protective order, that party shall file two versions: (1) a complete version, marked "Subject to Protective Order," wherein such material is marked in a conspicuous matter; and (2) an expurgated version of the document, marked "Public Record," wherein such material is redacted. 16 C.F.R. § 3.45(e). The Protective Order defines "confidential material" as "any document or portion thereof that contains privileged information, competitively sensitive information, or sensitive personal information." 16 C.F.R. § 3.31(d) Appendix A. Unless there are compelling circumstances, not present here, the parties' witness lists do not constitute "confidential material."

II.

A.

The Complaint in this matter, issued on December 20, 2017, challenges a merger between Ottobock and FIH Group Holdings, LLC ("Freedom") and involves a product referred to as microprocessor controlled prosthetic knees ("MPKs").

The evidentiary hearing is currently scheduled to begin on July 10, 2018. Under the applicable Scheduling Order,[2] the parties conducted fact discovery, which was required to be completed by April 6, 2018. The parties have exchanged expert witness reports and the deadline for completion of expert discovery was June 13, 2018. In addition, the parties have exchanged Preliminary Witness Lists and Final Proposed Witness Lists, in accordance with the deadlines in the Scheduling Order entered in the case.

On May 29, 2018, Respondent submitted its Final Proposed Witness List, listing Rob Burcham as a potential witness. Motion Exhibit E at 10. Respondent identifies Burcham as "a transfemoral amputee, and a licensed prosthetist," who might provide testimony about "topics related to the lower-limb prosthetics market, the selection of prosthetic components from the perspective of a transfemoral amputee and a licensed prosthetist," and about "any documents or data . . . or any other matters as to which it is determined that he has [relevant] knowledge." Motion Exhibit E at 10.

On May 30 and 31, 2018, Complaint Counsel and Respondent's counsel exchanged emails with regard to Respondent's listing of Burcham. Motion Exhibit F. Complaint Counsel objected that listing Burcham violated Additional Provision 15 of the Scheduling Order because Burcham's name was not listed on either Respondent's Preliminary Witness List, provided February 13, 2018, or Respondent's Revised Preliminary Witness List, provided March 9, 2018, and Respondent had not obtained Complaint Counsel's consent or a court order allowing such additional witness. Respondent took the position that it had identified Burcham by including in its Preliminary Witness List a listing for anyone identified on Complaint Counsel's Initial Disclosures, because Complaint Counsel's Initial Disclosures included a category for "current and former employees, board members, officers, agents, consultants, and representatives of Otto Bock HealthCare" and Burcham is an Ottobock employee. Respondent offered to make Burcham available by deposition, in person or by phone, prior to trial. The parties did not resolve their dispute. *See also* Motion Statement Regarding Meet and Confer. Complaint Counsel's Motion followed.

B.

In support of the Motion, Complaint Counsel argues that Respondent failed to name Burcham as a potential witness prior to naming him in Respondent's Final Proposed Witness List, without consent and without leave of court, in violation of Additional Provision 15 of the Scheduling Order. Complaint Counsel further argues that, as Burcham's employer, Respondent

[2] The initial Scheduling Order, issued on January 18, 2018, was revised four times, in response to extensions ordered by the Commission or jointly requested by the parties.

knew or should have known about Burcham and the potential relevance of his testimony from the outset of the case. Complaint Counsel also contends that reopening discovery to take Burcham's deposition at this point in the proceedings will defeat the purposes of Additional Provision 15 and reward Respondent's conduct, while unfairly imposing costs and burdens on Complaint Counsel at a time when it should be preparing for trial. Accordingly, Complaint Counsel concludes, Respondent should be precluded from calling Burcham at trial.

In its Opposition, Respondent argues that it identified Burcham in its Preliminary Witness List by its cross-listing to the category listed in Complaint Counsel's Initial Disclosures for unnamed "employees" of Respondent. Respondent further argues that any prejudice to Complaint Counsel from allowing Burcham to testify can be cured by reopening discovery and allowing Complaint Counsel to take Burcham's deposition prior to trial. In addition, Respondent asserts that it "first became aware of the need for" Burcham's testimony after reviewing the May 8, 2018 Expert Report of Complaint Counsel's proffered expert, Fiona Scott Morton. Opposition at 4.

III.

A.

Additional Provision 15 of the Scheduling Order states:

> 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 or supplemental 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.

January 18, 2018 Scheduling Order at 7. It is undisputed that Respondent did not seek Complaint Counsel's consent before listing Burcham on Respondent's Final Proposed Witness List. In addition, Respondent did not seek an order allowing the addition of Burcham.

It does not appear that Respondent named Burcham as a person "likely to have discoverable information," as part of any Initial Disclosures provided to Complaint Counsel at the outset of the case. 16 C.F.R. § 3.31(b)(1) (requiring parties within five days of the filing of a respondent's answer to the complaint to disclose, among other things, "[t]he name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent . . ."). The record further shows that Respondent did not name Burcham as a potential witness in Respondent's Preliminary Witness List, provided to Complaint Counsel on February 13, 2018, pursuant to the Scheduling Order. Motion Exhibit B. In addition, on March 9, 2018, Respondent provided Complaint Counsel with a Revised

Preliminary Witness List, which added a significant number of witnesses, but did not name Burcham. Motion Exhibit C.

Respondent's contention that it effectively listed Burcham on its Preliminary Witness List through a "catch-all" categorical cross-listing to the "catch-all" category used in Complaint Counsel's Initial Disclosures for unnamed "[c]urrent and former employees, board members, officers, agents, consultants, and representatives of Otto Bock Health Care," Opposition Exhibit C at 48, is rejected. As a preliminary matter, Respondent's Preliminary Witness List cross-listed "[i]ndividuals [i]dentified" by Complaint Counsel. Motion Exhibit B at 7; Motion Exhibit C at 12. However, Complaint Counsel did not individually identify Burcham, but only listed a vague group of people affiliated with Respondent. Moreover, Respondent's contention is inconsistent with the plain language of Additional Provision 15, which refers to disclosure of "witnesses," implying individual witnesses rather than broad categories of persons.

Furthermore, Respondent's contention is inconsistent with the purpose of discovery. Initial Disclosures made at the start of a case are intended to identify the overall universe of persons potentially having discoverable knowledge. *See* 16 C.F.R. § 3.31(b). The purpose of the Scheduling Order's additional requirement of preliminary witness lists "is to further discovery by identifying the universe of *potential* witnesses, based upon the universe of those identified in the initial disclosures as having 'discoverable knowledge.' . . . These later [revised and final witness] lists are designed to refine, as necessary, the preliminary list." *In re The Dun & Bradstreet Corporation*, 2010 WL 2966796, at *2 (Jul. 15, 2010) (emphasis in original). Thus, Respondent's categorical cross-referencing to Complaint Counsel's catch-all category for "persons with knowledge" does not suffice to identify a likely witness at trial, and does not further the purposes of the Scheduling Order in general, or Additional Provision 15 in particular, which are to facilitate timely completion of discovery and enable timely commencement of the evidentiary hearing. 16 C.F.R. § 3.21(c)(1) (Scheduling Order shall be entered that "establishes a schedule of proceedings that will permit the evidentiary hearing to commence on the date set by the Commission, including a plan of discovery . . ."); Additional Provision 15 ("Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order.").[3]

Accordingly, for the foregoing reasons, Respondent's naming of Burcham for the first time in its Final Proposed Witness List, without having obtained the consent of Complaint Counsel or leave of court, constitutes a violation of Additional Provision 15 of the Scheduling Order.

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[3] *In re Basic Research, LLC*, 2005 FTC LEXIS 157 (Dec. 7, 2005), upon which Respondent relies, is inapposite. In that case, the Administrative Law Judge denied complaint counsel's motion to strike a witness listed on the respondent's final witness list, where *the respondent's* preliminary witness list included a listing for "yet to be identified representatives" of the witness' company and the witness at issue was president of the company. *Id.* at *3. In the instant case, there is no contention that Respondent categorically listed its own employees on any of its witness lists; rather, Respondent relies on a categorical listing made by Complaint Counsel.

B.

Respondent makes two arguments in support of its contention that it did not become aware of the need for Burcham's testimony until receipt of Ms. Morton's May 8, 2018 expert report, neither of which are convincing. First, Respondent relies on paragraphs of Ms. Morton's report describing types of MPKs and their characteristics. However, these asserted facts are based on deposition testimony and documents adduced during fact discovery, which had already been developed by the parties and would not constitute new information. Opposition Exhibit B at 13-20. Indeed, allegations concerning MPKs are a focal point of the Complaint. *See, e.g.*, Complaint ¶¶ 18-30. Second, Respondent contends that the expert report included an opinion that there was a relevant market consisting of MPKs of only Ottobock and Freedom. However, the relevant paragraphs of the expert report state the expert's opinion that, although she discusses two narrower markets, including a market of MPKs sold only by Ottobock and Freedom, "the most appropriate relevant market in which to analyze the effects of this acquisition is the manufacture and sale of microprocessor knees to prosthetic clinics in the United States. . . ." This opinion is consistent with the allegations of the Complaint. Complaint ¶ 17 ("The relevant market in which to analyze the effects of the Merger is no broader than the manufacture and sale of microprocessor prosthetic knees to prosthetic clinics in the United States."). Respondent fails to explain why Burcham's assertedly unique knowledge regarding MPKs only arises in connection with the narrower market. Moreover, to the extent Burcham's knowledge would have been just as relevant to the broader market alleged in the Complaint, Respondent should have known early in the case that its own employee had relevant knowledge. In addition, to the extent Respondent determined a need to respond to or rebut an opinion in an expert report, this is more the responsibility of Respondent's own retained expert witnesses, than that of a fact witness.

Indeed, if the evidentiary value of Burcham's potential testimony is as strong as Respondent contends, it begs the question why, in the exercise of due diligence, Respondent would not have been able to identify him (its own employee) as a potential witness for either Respondent's Preliminary or Revised Witness Lists. *See In re Chicago Bridge & Iron Co.*, 2002 FTC LEXIS 69, at *8 (Oct. 23, 2002) (holding that "[s]imply claiming" a party did not learn the importance of witness until "late in the discovery process" does not demonstrate good cause for failure to timely designate a witness "since diligence is required in pursuing discovery").

Finally, even if Respondent believed that the May 8, 2018 expert report raised issues necessitating the addition of a new witness, then, assuming no consent, Respondent could have moved for an order permitting the late designation, asserting the expert report as good cause. Additional Provision 15. Respondent does not explain its failure to do so.

In summary, Respondent's claim that it was unaware prior to reviewing the May 8, 2018 expert report that, Burcham, its own employee, could provide helpful testimony is unconvincing.[4] At a minimum, the record supports the conclusion that Respondent should have been aware of any potential value of Burcham as a witness by the time of exchanging

[4] The fact that Respondent did not make this claim during meet and confer discussions with Complaint Counsel, but raised it for the first time in its Opposition to the Motion, further undermines the credibility of the claim.

Preliminary or Revised Witness Lists. Accordingly, Respondent's violation of Additional Provision 15 is unexcused.

C.

As detailed above, Respondent inexcusably failed to name Burcham as a witness until May 29, 2018, nearly two months after the April 6, 2018 fact discovery cutoff, after the exchange of expert reports, and only seven weeks prior to the July 10, 2018 commencement of trial. Thus, Burcham has not been deposed and Complaint Counsel's experts were unable to consider Burcham's testimony in connection with forming their opinions.

It is arguable that any prejudice to Complaint Counsel resulting from Respondent's late witness designation could be remedied by reopening discovery to take Burcham's deposition and, if good cause is subsequently shown by motion, to amend expert reports.[5] However, this result would unnecessarily disrupt preparation for trial. *In re Basic Research, LLC*, 2005 FTC LEXIS 167, at *6-7 (Dec. 14, 2005) (holding that allowing depositions was not a cure for unjustified delay in naming witness because it "would likely disrupt the orderly and efficient trial of the case"). *See also Aldrich v. Indus. Cooling Solutions*, No. 14-03206, 2016 U.S. Dist. LEXIS 29503, at *10 (D. Colo. Mar. 7, 2016) (granting motion to strike witness and holding that "default remedy of last-minute depositions" would "undermine the very objectives underlying the disclosure and supplementation requirements built into the Federal Rules").[6]

Furthermore, reopening discovery to allow the deposition of late-disclosed witnesses necessarily imposes costs at a point when trial preparation and strategies have been, or are being, finalized. *See Aldrich*, 2016 U.S. Dist. LEXIS 29503, at *10. Respondent has failed to demonstrate that Burcham's testimony is sufficiently material to justify imposing such additional costs and time burdens on Complaint Counsel. Moreover, ordering the reopening of discovery would effectively reward Respondent's unexcused failure to name Burcham in a timely fashion and thereby undermine the purposes of the Scheduling Order. *See In re Basic Research, LLC*, 2005 FTC LEXIS 158, at *3 (Dec. 7, 2005) ("A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.") (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992).

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[5] Respondent claims that amending expert reports would be unnecessary because Burcham's testimony would not be of the type upon which an expert would rely, which seems contradictory to Respondent's claim that the relevance of Burcham's testimony was only revealed to Respondent because of Ms. Morton's expert report.

[6] The prohibition against the addition of witnesses who were not previously identified during discovery, absent consent or a showing of good cause, as provided under Additional Provision 15, is consistent with federal practice. Rule 37 of the Federal Rules of Civil Procedure provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), that party is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless." *See also* 16 C.F.R. § 3.38(b)(4) (providing that upon motion demonstrating a discovery violation, the Administrative Law Judge may "[r]ule that the party may not introduce into evidence or otherwise rely upon . . . improperly withheld or undisclosed materials, information, witnesses, or other discovery").

IV.

Accordingly, for all the foregoing reasons, Complaint Counsel's Motion is GRANTED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 27, 2018