

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



_____)
In the Matter of)
)
OSF Healthcare System,) DOCKET NO. 9349
a corporation, and) Hon. Judge Chappell
)
Rockford Health System,) PUBLIC
a corporation,)
Respondents.)
_____)

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ MOTION *IN LIMINE*
TO EXCLUDE INVESTIGATIONAL HEARING TRANSCRIPT OF MICHELLE LOBE**

Yet again, Respondents ask the Court to ignore relevant and reliable evidence. After unsuccessfully charging bias and spoliation in a misguided motion to compel, Respondents now attempt to rehash the same arguments through a groundless motion *in limine*, claiming that the Court should exclude sworn testimony from United Healthcare’s (“United”) Michelle Lobe. In fact, despite multiple opportunities to examine Ms. Lobe regarding her credibility and the bases for her testimony, Respondents have failed to neutralize her testimony that the proposed Acquisition will likely harm hospital competition in Rockford. As a last-ditch effort, Respondents now move to exclude Ms. Lobe’s testimony altogether, ignoring the fact that Ms. Lobe’s investigational hearing (“IH”) testimony meets all the basic standards of admissibility. As explained below, Ms. Lobe’s IH testimony is relevant, material, reliable, and thus admissible. Respondents’ motion to exclude this highly probative evidence should be denied.

ARGUMENT

Motions *in limine* are discouraged in this Court. (Scheduling Order ¶ 8.) As the Court explained in its Scheduling Order, “[e]vidence should be excluded in advance of trial on a

motion *in limine* only when the evidence is clearly inadmissible on all potential grounds.” (*Id.* (emphasis in original)); *see also In re Telebrands Corp.*, No. 9313, 2004 FTC LEXIS 270, at *5 (F.T.C. Apr. 26, 2004); *In re Basic Research, LLC*, No. 9318, 2006 WL 159736, at *8 (F.T.C. Jan. 10, 2006) (noting that moving party bears burden on motion *in limine*). Such motions are appropriate only in extreme circumstances where they will “eliminate plainly irrelevant evidence” or “needlessly cumulative evidence.” *In re Rambus Inc.*, No. 9302, 2003 WL 21223850, at *1 (F.T.C. Apr. 21, 2003). Indeed, “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.” (Scheduling Order ¶ 8.)

I. MS. LOBE’S IH TESTIMONY IS RELEVANT, MATERIAL, AND RELIABLE

Under Commission Rule 3.43(b), “[r]elevant, material, and reliable evidence shall be admitted.” 16 C.F.R. § 3.43(b).¹ The Federal Rules of Evidence define relevancy to include evidence that has *any* tendency to make a fact of consequence to the determination of the action more or less probable. Fed. R. Evid. 401.² And “the federal courts are unanimous in holding that the definition of relevant is expansive and inclusive, and that the standard for admissibility is very low.” *Leinenweber v. Dupage County*, No. 08 C 3124, 2011 U.S. Dist. LEXIS 15017, at *4 (N.D. Ill. Feb. 15, 2011) (citations omitted). Ms. Lobe’s testimony more than satisfies that standard.

As the Regional Vice President for United’s Networks, Central Region, Ms. Lobe is responsible for managing the contract teams that negotiate with the Rockford hospitals. As such, Ms. Lobe’s IH testimony provides critical insight into, among other things, the Acquisition’s

¹ While Respondents do not overtly argue that Ms. Lobe’s IH testimony is not relevant (*see* Respondents’ Br. at 2), Complaint Counsel nevertheless addresses relevance here to put its probative value in context.

² The Federal Rules of Evidence are persuasive authority for FTC adjudicative proceedings. *In re Herbert R. Gibson, Sr.*, No. 9016, 1978 FTC LEXIS 375, at *2 n.1 (F.T.C. May 3, 1978).

likely anticompetitive effects, product and geographic market definition, patient willingness to travel for general acute care services, the dynamics of hospital and health plan contract negotiations, barriers to entry, and healthcare quality. Ms. Lobe's IH testimony is therefore highly relevant, probative, and material to the question of whether the Acquisition will likely harm competition.

Respondents' assertion that Ms. Lobe's testimony is unreliable does not hold water. Ms. Lobe testified during her IH under oath with independent counsel present. That alone is sufficient under Rule 3.43(b) to make her testimony reliable and admissible. But perhaps more importantly, Respondents have repeatedly tested Ms. Lobe's testimony, more so than virtually any other third-party witness in this proceeding. Respondents have examined Ms. Lobe three separate times – twice in depositions and once on the witness stand in federal district court – for a total of more than ten hours on the record. Time and again, Respondents have attempted unsuccessfully to challenge Ms. Lobe's reliability and credibility, repeatedly cross-examining her about her IH preparation and communications with FTC staff. For example, just in Ms. Lobe's first deposition, Respondents' counsel questioned Ms. Lobe for over three hours, introducing Ms. Lobe's IH transcript as an exhibit and asking her about it no fewer than nine times.³ Given these facts, Respondents' claim that they had no opportunity to “contemporaneously cross-examine” Ms. Lobe is at best disingenuous.⁴

³ See, e.g., PX4001 at 35:8-10, 60:2-12, 72:15-17, 94:24-95:4, 106:17-20, 138:12-18, 142:13-16, 150:18-151:8, 156:11-15 (Lobe (United) Dep. Tr. (Jan. 10, 2012)). Subsequently, on February 1, 2012, Respondents cross-examined Ms. Lobe under oath for approximately another hour on the stand before a federal district court judge during the hearing in the related federal court proceeding. See PX2509 (Lobe (United) PI Hr'g Tr. (Feb. 1, 2012)). And finally, Respondents deposed Ms. Lobe yet again in this proceeding on February 24, 2012. See PX4088 (Lobe (United) Dep. Tr. (Feb. 24, 2012)).

⁴ Respondents' Br. at 3-4.

Moreover, Respondents' claim that Ms. Lobe's IH testimony is unreliable cannot be squared with their own use of it in defense of the Acquisition. Notably, Respondents' expert, Monica Noether, Ph.D., quotes Ms. Lobe's IH testimony in her expert report and includes the transcript on her Materials Considered list.⁵ Respondents also designated numerous portions of Ms. Lobe's IH transcript for use in this proceeding. Respondents' dependence on Ms. Lobe's IH transcript speaks volumes about its reliability.

II. MS. LOBE'S IH TESTIMONY PRESENTS NO DANGER OF PREJUDICE, INNACURACY, OR CONFUSION

Respondents also claim that they face unfair prejudice if Ms. Lobe's IH testimony is introduced at trial because they have ostensibly been stripped "of the opportunity to establish the unreliability [and bias] of [Ms. Lobe's] testimony."⁶ They argue that Ms. Lobe's IH testimony is "nothing more than the declaration she was asked to sign."⁷ Of course, this is untrue. As noted, Ms. Lobe testified under oath in a setting explicitly presumed to be admissible under Rule 3.43(b).⁸ Since then, Respondents have had multiple, exhaustive opportunities to test Ms. Lobe's credibility, alleged bias, and the reliability of her IH testimony. And they will have yet another

⁵ DX1210 (Noether Expert Report (Mar. 9, 2012)) at ¶ 67 ("Michelle Lobe of UHC testified that, 'hospitals are willing to work with us on providing some form of discount to us . . . as long as they can receive steerage of members to them,' and that UHC could get the largest discount by agreeing to use one hospital exclusively in Rockford." (quoting PX0217 (Lobe (United) IH Tr.) at 47:8-24)).

⁶ Respondents' Br. at 4. In a footnote, Respondents make the outrageous and baseless claim that Complaint Counsel "deliberately destroyed . . . communications with United . . . likely with the hope that Respondents would never know how closely Complaint Counsel and United had collaborated on Ms. Lobe's investigation hearing testimony and subsequent support for Complaint Counsel's position in this case." Respondents' Br. at 4 n.3. This accusation is particularly contemptible in light of this Court's order denying Respondents' motion to compel on the very same subject on March 27, 2012, *i.e.*, the day *before* Respondents filed this motion *in limine*.

⁷ Respondents' Br. at 4.

⁸ Rule 3.43(b) (IH testimony "shall not be excluded solely on the ground that [it is] or contain[s] hearsay").

chance to do so before the Court in the upcoming trial.⁹ Given those myriad opportunities to question a third-party witness, Respondents cannot credibly claim prejudice at this point.

Respondents' contention that Ms. Lobe's IH testimony creates confusion of the issues likewise falls flat. It is well-settled law that in a bench trial, such as the pending one here, courts are capable of understanding the issues and evaluating witnesses' testimony without the danger of unfair prejudice or confusion present in a jury trial. *See, e.g., Abbott Labs. v. TorPharm, Inc.*, No. 97 C 7515, 2003 WL 22462614, at *20 (N.D. Ill. Oct. 29, 2003). Indeed, this Court is more than capable of assigning Ms. Lobe's IH testimony the appropriate weight, particularly having recently evaluated and weighed testimony from health plan witnesses, like Ms. Lobe, in a recent hospital merger trial. Accordingly, Respondents' claims of prejudice and potential confusion of the issues are specious.

III. MS. LOBE'S IH TESTIMONY WILL NOT CAUSE ANY UNDUE DELAY, WASTE OF TIME, OR NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE

Respondents' assertion that evidence may be excluded if its probative value is outweighed by "considerations of undue delay, waste of time, or needless presentation of cumulative evidence" similarly ignores the setting of this trial. None of these considerations is a concern here. In fact, Respondents provide no basis for their claim that admitting Ms. Lobe's IH testimony into evidence will cause undue delay or waste of time or add to the length of the trial, nor could they. Indeed, as Respondents are aware, the parties will likely move every other investigational hearing transcript, preliminary injunction deposition transcript, and Part III

⁹ Respondents fail to mention that Commission Rule 2.8(c) expressly prohibits anyone other than the witness's counsel, FTC staff, and a court reporter from being present during the FTC's investigational hearings. Rule 2.8(c).

deposition transcript into evidence in this proceeding. Including Ms. Lobe's IH transcript with that evidence will have no impact on the speedy resolution of this matter.

Likewise, Respondents' claim that Ms. Lobe's IH transcript is needlessly cumulative lacks any basis. In fact, the transcript contains unique, non-repetitive testimony – which Respondents apparently believe undermines their defense of the Acquisition – that Respondents did not revisit or challenge during her subsequent deposition and hearing testimony. For example, in her IH, Ms. Lobe testified about the lack of duplicative services in Rockford-area hospitals,¹⁰ but that testimony was not repeated in her later depositions or at the hearing. It is critical that Ms. Lobe's IH transcript be admitted as evidence so that the Court has a comprehensive evidentiary record to consider.

CONCLUSION

Respondents have utterly failed on *all* potential grounds to meet their burden of showing that Ms. Lobe's IH testimony is inadmissible. Ms. Lobe's testimony is highly relevant to the central issue before the Court – *i.e.*, whether the Acquisition will likely substantially lessen competition. Given Respondents' repeated opportunities to examine Ms. Lobe, her testimony is indisputably both reliable and non-prejudicial; moreover, there is no danger of confusion of the issues or needlessly cumulative evidence. Accordingly, Respondents' Motion *In Limine* to Exclude the Investigational Hearing Transcript of Michelle Lobe should be denied.

¹⁰ PX0217 (Lobe (United) IH Tr.) at 87:2-3 (“A. I am not aware of any major duplication in services in that community.”).

Dated: April 4, 2012

Respectfully submitted,

/s/ Matthew J. Reilly

MATTHEW J. REILLY
JEFFREY H. PERRY
SARA Y. RAZI
KENNETH W. FIELD
PETER C. HERRICK
STEPHANIE L. REYNOLDS
DOUGLAS E. LITVACK
Attorneys
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington D.C. 20580
Telephone: (202) 326-2350
Facsimile (202) 326-2286
Email: mreilly@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark Secretary
Federal Trade Commission
600 Pennsylvania Ave.,
NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Alan I. Greene
Hinshaw & Culbertson LLP
222 North LaSalle Street, Suite 300
Chicago, IL 60601
(312) 704-3536
agreene@hinshawlaw.com

Matthew J. O'Hara
Hinshaw & Culbertson LLP
222 North LaSalle Street, Suite 300
Chicago, IL 60601
(312) 704-3246
mohara@hinshawlaw.com

Kristin M. Kurczewski
Hinshaw & Culbertson LLP
222 North LaSalle Street, Suite 300
Chicago, IL 60601
(312) 704-3475
kkurczewski@hinshawlaw.com

Michael F. Iasparro
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105
(815) 490-4945
miasparro@hinshawlaw.com

Rita Mahoney
Hinshaw & Culbertson LLP
222 North LaSalle Street, Suite 300
Chicago, IL 60601
(312) 704-3000
rmahoney@hinshawlaw.com

Paula Jordan
Hinshaw & Culbertson LLP
222 North LaSalle Street, Suite 300
Chicago, IL 60601
(312) 704-3000
pjordan@hinshawlaw.com

Counsel for OSF Healthcare System

David Marx, Jr.
McDermott Will & Emery LLP
227 West Monroe Street
Chicago, IL 60606-5096
(312) 984-7668
dmarx@mwe.com

William P. Schuman
McDermott Will & Emery LLP
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000
wschuman@mwe.com

Jeffrey W. Brennan
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000
jbrennan@mwe.com

Carla A. R. Hine
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000
chine@mwe.com

Nicole L. Castle
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000
ncastle@mwe.com

Rachel V. Lewis
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000
rlewis@mwe.com

Daniel G. Powers
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000
dgpowers@mwe.com

James B. Camden
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000
jcamden@mwe.com

Pamela Davis
McDermott Will & Emery LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 756-8000
pdavis@mwe.com

Counsel for Rockford Health System

CERTIFICATE FOR ELECTRONIC FILING

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

April 4, 2012

By:

/s/ Douglas E. Litvack
Douglas E. Litvack
Attorney for Complaint Counsel