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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.)	

COMPLAINANT 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 argue 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 ~~impossible~~ on all potential grounds.¹ 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 the 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). 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. 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 Networks, Central Region, Ms. Lobe is responsible for managing the contracts that negotiate with all 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 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 about it no fewer than nine times.³ Given these facts, Respondents admit 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. 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 No. 12-2509 (Lobe (United) PI Hr'g Tr. (Feb. 1, 2012)). And finally, Respondents tested Ms. Lobe again in this IL (bse8e e)Tj /T

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

Respondents' contention that Ms. Lobe's 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. 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 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 time or add to the length of the trial,

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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, 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 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

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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:

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

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April 4, 2012

By:
