PUBLIC

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 DENYING COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE

I.

On May 29, 2018, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion *In Limine* to exclude all evidence related to [redacted] certain assets acquired from FIH Group Holdings, LLC ("Freedom"), as part of the merger challenged in this case ("Motion"). Specifically, Complaint Counsel seeks an order precluding Respondent from offering any evidence at trial of [redacted]. Respondent Otto Bock HealthCare North America, Inc. ("Ottobock" or "Respondent") filed an opposition to the Motion on June 8, 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 DENIED, as further explained below.

II.

A.

The Complaint in this matter, issued on December 20, 2017, alleges that the transaction pursuant to which Respondent purchased Freedom, which was consummated on September 22, 2017 (the "Merger"), violated Section 7 of the Clayton Act and Section 5 of the FTC Act.

Complaint ¶ 1. According to the Complaint, the Merger may substantially lessen competition in an alleged market for microprocessor controlled prosthetic knees sold to prosthetic clinics in the United States. Complaint ¶¶ 1, 64-67.

Respondent's Answer to the Complaint, filed January 10, 2018, as amended by filing made February 15, 2018, denied, among other allegations, that the Merger harms consumers or competition and further asserted that the Merger enhances competition, consumer choice, and innovation, and will further improve quality of life for amputees. Amended Answer ¶ 57. Respondent's Answer also included affirmative defenses, including that [redacted]. Amended Answer at 30 (Respondent's Seventh Affirmative Defense) ([redacted]).

On February 13, 2018, Complaint Counsel moved to strike Respondent's Seventh Affirmative Defense, which the Commission denied on April 18, 2018. The Commission construed the Seventh Affirmative Defense as a denial and held that [redacted], while insufficient by itself to defeat all potential liability:

> could potentially be relevant to rebut a showing of likely anticompetitive effects [redacted], and Respondent remains entitled to develop and present relevant evidence regarding [redacted]. Moreover, in support of its denial, Respondent may develop and present relevant evidence regarding the [redacted] for any violation found. Those factual issues are properly addressed in the hearing before Chief Administrative Law Judge Chappell.

Opinion and Order, April 18, 2018 (Slip. Op. at 6).

B.

Based on the Motion, the Opposition, and the exhibits submitted in support, the record shows that on December 13, 2017, just prior to the issuance of the Complaint, Respondent provided Complaint Counsel with a document entitled [redacted].

On February 21, 2018, Respondent produced a [redacted]. In the course of fact discovery, Complaint Counsel obtained discovery

from Respondent and various non-parties, including [redacted]. On March 27, 2018, Soenke Roessing, an executive of Respondent responsible for [redacted] Motion, Exhibit A (Roessing Dep. at 59-62).

Pursuant to the Revised Scheduling Order issued in this case on January 24, 2018, the deadline for completion of fact discovery was April 6, 2018. On May 3, 2018, Complaint Counsel was advised by Respondent that Respondent [redacted].

On May 23, 2018, Respondent provided Complaint Counsel with a report of its proffered expert, David Argue, Ph.D., which included opinions on [redacted] Motion, Exhibit C. On June 1, 2018, Complaint Counsel provided Respondent with a rebuttal report by its proffered expert, Fiona Scott Morton, that [redacted]. Opposition, Exhibit C (Morton Rebuttal Expert Report at 31-32).

The deposition of Dr. Argue is scheduled for June 13, 2018. The Scheduling Order deadline for the completion of expert discovery is June 13, 2018. Trial is scheduled to begin on July 10, 2018.

III.

A.

Complaint Counsel acknowledges that it did not pursue any fact discovery regarding [redacted] but contends that Respondent failed to assert prior to the close of fact discovery that it was [redacted]. Therefore, Complaint Counsel argues, it could not, and did not, conduct discovery about [redacted]. Based on the asserted lack of notice, Complaint Counsel contends that it will be prejudiced if Respondent is permitted to elicit evidence at trial concerning [redacted].

Complaint Counsel further argues that the asserted prejudice cannot be cured by reopening discovery because there is insufficient time to complete the necessary discovery, [redacted]

[redacted], prior to the commencement of trial on July 10, 2018.[1] In addition, Complaint Counsel argues that delaying the hearing will not cure the asserted prejudice because such delay would likely cause irreparable harm to Freedom and to competition. In support of this claim, Complaint Counsel asserts that, notwithstanding the agreement to [redacted] and that further delay will only exacerbate these effects.

Complaint Counsel also asserts that [redacted]. Complaint Counsel argues that, therefore, precluding Respondent from eliciting evidence regarding [redacted] will further the public policy in favor of settlement.

B.

Respondent argues that Complaint Counsel cannot justify its Motion on the grounds of surprise because the December 13, 2017 [redacted] provided Complaint Counsel with notice that Respondent would seek [redacted]. Respondent further points to its Answer as notice to Complaint Counsel that [redacted] would be one of Respondent's defenses. Respondent argues that the Commission's Order denying Complaint Counsel's motion to strike Respondent's [redacted] further confirmed that [redacted]. According to Respondent, any delay in Ottobock's [redacted] which should not be used against Respondent.

Respondent further argues that Complaint Counsel will not be prejudiced by evidence of a [redacted]. Respondent notes that it timely provided Dr. Argue's expert report with his opinions regarding [redacted] and the bases therefor on May 23, 2018, to which Complaint Counsel's proffered expert responded in her June 1, 2018 rebuttal report. Respondent further recites fact discovery obtained by Complaint Counsel including document production by [redacted] and an April 3, 2018 day-long deposition of [redacted]. Respondent further points to deposition questions posed by Complaint Counsel that, Respondent argues, were open-ended enough to elicit [redacted] that would apply to [redacted] generally and not only to [redacted].

Finally, Respondent argues that it is not seeking to admit evidence of [redacted]

[1] Complaint Counsel further asserts that one potential witness with knowledge of the [redacted] resides out of the country and cannot be deposed.

[redacted].

IV.

As stated in the Scheduling Order issued in this case:

> Motions *in limine* are strongly 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.

Additional Provision 9 (Scheduling Order at 6, January 18, 2018).

Complaint Counsel has failed to demonstrate that Respondent should be precluded from offering any evidence concerning [redacted] as requested on either grounds of surprise or likely prejudice. First, the record supports the conclusion that Complaint Counsel knew, or should have known, that Respondent could pursue [redacted]. Mr. Roessing's testimony in March 2018 that Respondent was at that time [redacted] and had therefore not yet expended resources to [redacted] is not properly interpreted as a disavowal or disclaimer of the possibility of [redacted] Complaint Counsel's strategic decision to limit its discovery into Respondent's [redacted] is not a basis for precluding Respondent from eliciting evidence into [redacted].

Second, the record fails to support the conclusion that Complaint Counsel will be prejudiced by all potential evidence concerning [redacted]. Respondent provided the opinions of Dr. Argue as to [redacted] on May 23, 2018. As set forth in Additional Provision 20 of the Scheduling Order:

> An expert witness's testimony is limited to opinions contained in the expert report that has been previously and properly provided to the opposing party. In addition, no opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. . . .

See also 16 C.F.R. § 3.31A(c) (Expert report must contain, *inter alia*, "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data, materials, or other information considered by the witness in forming the opinions; [and] any exhibits to be used as a summary of or support for the opinions . . . "). Furthermore, Complaint Counsel's proffered expert, Ms. Morton, submitted rebuttal opinions and Complaint Counsel is scheduled to depose Dr. Argue on June 13, 2018.

For all the foregoing reasons, the Motion is DENIED.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: June 19, 2018

Notice of Electronic Service

I hereby certify that on June 19, 2018, I filed an electronic copy of the foregoing Order Denying Complaint Counsel's Motion In Limine to Exclude Evidence, with:

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I hereby certify that on June 19, 2018, I served via E-Service an electronic copy of the foregoing Order Denying Complaint Counsel's Motion In Limine to Exclude Evidence, upon:

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