UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and STATE OF MICHIGAN, *Plaintiffs*, v. W.A. FOOTE MEMORIAL HOSPITAL D/B/A ALLEGIANCE HEALTH, *Defendant*.	Case No. 5:15-cv-12311-JEL-DRG Judge Judith E. Levy Magistrate Judge David R. Grand

PLAINTIFFS' REPLY IN SUPPORT OF THE MOTION IN LIMINE TO PRECLUDE DR. SUSAN MANNING FROM OFFERING AT TRIAL OPINIONS ON ANTICOMPETITIVE EFFECTS AND PROCOMPETITIVE BENEFITS AND TO STRIKE THOSE OPINIONS FROM HER REPORT

Plaintiffs seek to exclude specific opinions from Allegiance's economic expert on specific grounds. But rather than refute these grounds, Allegiance confuses issues, cites inapposite cases, and invokes the upcoming bench trial to shield its expert's shortcomings. It cannot, however, escape two fundamental problems. One: under the per se rule, Dr. Manning's effects opinions are not relevant. Two: even if the per se rule is inapplicable, Dr. Manning failed to apply commonly accepted, reliable economic principles and methods to reach her effects opinions. The Court should, therefore, exclude her effects opinions.

A. Dr. Manning's Effects Opinions Are Irrelevant in a Per Se Case

The law is clear that where the per se rule applies, this Court should not consider evidence of the agreement's lack of competitive harm or of procompetitive benefits. *See* Pls.' Br. on Mot. in Limine at 3-5 (ECF No. 87) ("Pls.' Br."); *see also* Pls.' Br. on Cross-Mot. Summ. J. at 23-25 (ECF No. 73). Under a per se analysis, Dr. Manning's effects opinions are thus irrelevant.

Allegiance contends that Dr. Manning's effects opinions may be offered to disprove the existence of the Allegiance-HCHC agreement. Def's. Opp. on Mot. in Limine ("Def.'s Opp.") at 6-8 (ECF No. 94). Plaintiffs do not disagree that economic evidence may, at times, be relevant to whether an agreement exists, but Allegiance's cited authority recognizes that, in a per se case, "[t]he proffered explanatory evidence must be differentiated from the defense of justification,"

which is inadmissible.[1] *Cont'l Baking Co. v. United States*, 281 F.2d 137, 143-44 (6th Cir. 1960). In any event, Dr. Manning testified that her "analysis was not designed to answer the question" of whether her work "disprove[d] the fact of an agreement" and that her "analysis does not go to that inquiry."[2] And even if they are relevant on this question, Dr. Manning's effects opinions are not reliable.

B. Dr. Manning's Effects Opinions Are Not Reliable

Dr. Manning's opinions about the effects and benefits of the Allegiance-HCHC agreement are based on trends in market share (or "output"), quality, and access.[3] Plaintiffs explained the fundamental flaws in Dr. Manning's methods that preclude her from reaching reliable effects opinions. *See* Pls.' Br. at 6-10. Allegiance has not refuted those flaws.

Allegiance asserts that Dr. Manning conducted a before-and-after analysis isolating "the alleged agreement from the other aspects of Allegiance's marketing strategy." Def.'s Opp. at 18. Yet Dr. Manning admitted that her analysis is "informative, but [I] did not use that as the basis to say [what] [Allegiance's] share would have been in that prior period, but for the agreement."[4] Although Dr.

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[1] Plaintiffs' motion does not address the question of whether Dr. Manning may offer *other* testimony as to the existence of an agreement.
[2] Deposition of Susan H. Manning, Ph.D., Dec. 14, 2016 ("Manning Dep.") at 35:1-8; *see also id*. at 15:20-16:2, 33:5-34:6 (excerpted in Exhibit D).
[3] Expert Report of Susan Henley Manning, Ph.D., Nov. 14, 2016 ("Manning Rpt.") ¶¶ 107-62 & Table 15 (excerpted in Exhibit A to Pls.' Br. (ECF No. 87-2)).
[4] Manning Dep. at 171:19-173:5.

Manning conceded that a but-for analysis is important to isolate the effects "[b]ecause you're trying to assess [what the] effect of the agreement is[,]" she "did not do [her] own But-For Analysis."[5]

Allegiance's illustration of how Dr. Manning considered anticompetitive effects—by reviewing Hillsdale County residents' access to free vascular screenings—demonstrates the problem with her approach. Def.'s Opp. at 19-20. Dr. Manning admits she "cannot address whether the alleged agreement resulted in there being too few [vascular screenings] or that it resulted in harm to patients since I cannot estimate how many free vascular screenings there would have been in Hillsdale County but for the alleged agreement."[6] Thus, she cannot conclude that the agreement had no anticompetitive effect.

In its twenty-five-page opposition, Allegiance cites no portion of Dr. Manning's report or deposition testimony showing where she attempted to control for factors impacting her trends analysis. Instead, Allegiance points to cases finding (1) that an expert need not control for *all* possible variables and (2) that if an expert fails to control for particular variables or should have considered others, that issue goes to the weight of the expert's opinion, not its admissibility. *See*

[5] *Id*. at 160:16-19, 241:12-20. Allegiance contends that Dr. Chipty did not perform a but-for analysis. Def.'s Opp. at 22. But whether Dr. Chipty performed a but-for analysis (she did) is not relevant to whether Dr. Manning's opinions on competitive effects are reliable.

[6] Manning Rpt. ¶ 154.

Def.'s Opp. at 15, 21. These legal principles do not apply here.

This is not a case where the Court needs to evaluate whether Dr. Manning successfully controlled for enough factors or different factors, because she testified that she did not control for *any* factors that could influence the market share trends—despite readily acknowledging there were "myriad" such factors.[7] According to Dr. Manning, she did not need to control for any factors, because she did not need to "isolate the effect of one element of competition."[8]

Because Dr. Manning did not even attempt to isolate the effects resulting from the agreement, her opinions about the effects resulting from the agreement are inadmissible. *See Bazemore v. Friday*, 478 U.S. 385, 400 n.10 (1986) (some regressions may be "so incomplete as to be inadmissible as irrelevant"); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir. 2008) ('"*[A]ny* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible.'" (citation omitted)); *see also* Pls.' Br. at 8-10.

C. Dr. Manning's Opinions on the Procompetitive Benefits of a Claimed Marketing Strategy Are Neither Relevant Nor Reliable

Dr. Manning offered two sets of opinions regarding procompetitive benefits;

[7] Manning Dep. at 192:22-193:21 and 206:4-210:6; *see also id*. at 194:7-195:13 and 230:9-231:2. Mr. Margolis, Allegiance's industry expert, and Dr. Chipty, Plaintiffs' economic expert, also identified factors that could influence market share. *See* Deposition of Lawrence Margolis, Dec. 8, 2016, at 92:18-93:10; 94:6-95:16; 96:1-8 (excerpted in Exhibit E); Expert Report of Dr. Tasneem Chipty, Dec. 5, 2016 ¶¶ 15, 39-42, 45 (excerpted in Exhibit F).

[8] Manning Dep. at 208:17-209:14.

Plaintiffs seek to exclude them both. First, Dr. Manning opined in her report as to the "Procompetitive Benefits of Allegiance's Market Strategy."[9] Second, Dr. Manning opined at her deposition about the supposed procompetitive benefits of the Allegiance-HCHC agreement.[10] Both of these opinions rest on Dr. Manning's flawed trend analysis and are inadmissible for the reasons described above. Her opinion as to Allegiance's overall marketing strategy is inadmissible for an additional reason: it is irrelevant.

Allegiance incorrectly claims that Plaintiffs seek to exclude Dr. Manning's testimony because she used "the term 'market strategy' to describe the alleged 'agreement.'" Def.'s Opp. at 8-9. While Allegiance uses the terms interchangeably, *id*., Dr. Manning does not. She used the term "market strategy" in her report "because the restrictions [are] one element of an overall marketing strategy."[11] But her opinion as to any procompetitive benefits of Allegiance's overall marketing strategy—as opposed to the restraint—is irrelevant, and Allegiance offers no basis for the Court to admit it. *Id*. at 8-11.

Allegiance also fails to point to any reliable economic analysis underlying the "market strategy" opinion in Dr. Manning's report. *See* Def.'s Opp. at 14; *supra* at Section B and Pls.' Br. at 5-10. Allegiance cites Dr. Manning's statement

[9] Manning Rpt. ¶¶ 163-73.
[10] Manning Dep. at 235:5-237:15.
[11] *Id*. at 232:13-233:1.

that "[c]reating and maintaining a constructive working relationship with Hillsdale Hospital . . . appears to have been critical for obtaining Hillsdale Hospital's pledge to support Allegiance's open heart program with referrals." Def.'s Opp. at 14 (citing Manning Rpt. ¶ 167). But this is precisely the type of conclusory statement that requires no economic analysis and is thus inadmissible as expert testimony. Pls.' Br. at 11-12. And while Dr. Manning may have reviewed documents and deposition testimony to prepare her report, that review is not, by itself, economic analysis, and is insufficient to justify admitting her testimony. *See* Exhibit C to Def.'s Opp. (ECF No. 94-3) (*United States v. Apple Inc*., No. 12 Civ. 2686 (DLC), (May 23, 2013 S.D.N.Y.), Tr. at 31:2-5 (excluding expert's competitive effects opinion prior to bench trial because expert "has not shown that her opinion . . . is sufficiently rooted in economic theory to be admissible")); *see also* Pls.' Br. at 12.

Lastly, Allegiance purports to identify tension between this motion and Plaintiffs' summary judgment briefing. Def.'s Opp. at 11-12. But Plaintiffs never asserted in their summary judgment motion that Dr. Manning failed to cite record evidence; rather, Plaintiffs argued that the evidence and the opinion she drew from it did not answer the relevant legal question. *See* Pls.' Br. on Cross-Mot. Summ. J. at 33-34. In the instant motion, Plaintiffs explain that the opinion should be excluded because it does not contain any reliable economic analysis.

D. Conclusion

Plaintiffs respectfully request that this Court preclude Dr. Manning from offering opinions on competitive effects at trial and strike those opinions from her report, and that it do so without an evidentiary hearing (*see* Def.'s Opp. at 3 n.2). Because Dr. Manning's report and deposition testimony speak for themselves, no such hearing is necessary.

Dated: March 27, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 5:15-cv-12311-JEL-DRG, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

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