UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Civil Action No. C94-1023
	)	
v.	)	Hon. Michael J. Melloy
	)	
MERCY HEALTH SERVICES and FINLEY TRI-STATES HEALTH GROUP, INC.,	)	
	)	
Defendants.	)	

Motion To Strike Defendants' (i) Improper and Untimely Affirmative Deposition Designations and (ii) Untimely Deposition Objections and Counter-Designations

The Government moves the Court for an order striking the defendants' "affirmative" deposition designations and their late objections and counter-designations to the Government's deposition designations. We object to the defendants' affirmative deposition designations on three grounds: (i) they include designations for people on behalf of whom defendants may not properly offer designations (e.g., the defendants' present and former officers and Dr. Noether); (ii) they are counter to defendants' position in response to motion in limine no. 7 and, hence, the law of the case; and (iii) their submission after trial would be unfairly prejudicial. We object to the defendants' additional objections and counter-designations as untimely.

On October 4, 1994, the defendants faxed us what they described as "Defendants' Affirmative Deposition Designations." These were designations from the depositions of Mercy Health Services Vice President and Chief Financial Officer James Combes and former Mercy Health Center Chief Operating Officer Steven Maxwell (Attachment 1). On October 13, 1994, just before 6:00 P.M., we

received the "Defendants' Affirmative Deposition Testimony Designations" containing designations from the depositions of four people: Mercy Health Services Executive Vice President Milford Grotnes; former Finley President Stephen Hanson; former Mercy Health Center Chief Financial Officer Steven Maxwell; and economic expert Monica Noether (Attachment 2).[1] The October 13 fax also revised slightly the affirmative designations of Messrs. Maxwell's and Combes' testimony. On October 13, the defendants also attempted to make additional objections to the Government's deposition designations (Attachment 3).

The Affirmative Designations

1. **Improper Designations**. The defendants have no right to make affirmative designations of these witnesses' depositions. The depositions are hearsay. They are inadmissible unless they fall within a hearsay exception, such as admissions of a party-opponent "offered against" (but not for) that party. See United States' motion in limine no. 7; Fed. R. Evid. 801(d)(2); Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 722 (8th Cir. 1981). The defendants have not asserted any hearsay exceptions. While the Government may designate Mercy and Finley officials' depositions as party admissions, the defendants may not make affirmative designations from their transcripts. Dr. Noether, of course, is not a party, and the defendants had a full opportunity to cross-examine her at trial. Likewise,

[1] For the Court's convenience, we have typed our objections to the Defendants' October 13 Affirmative Deposition Designations on a copy of that document in the right-hand margin.

defendants had a full and fair opportunity to call any of the Mercy and Finley officials to examine them at trial if they wished.[2]

2. **Law of the Case**. The Government's motion in limine no. 7 raised the possibility of defendants' improperly designating depositions such as these. In response to that motion, defendants wrote, "the Hospitals do not plan to introduce any affidavits, declarations, or depositions of available witnesses at trial" (Attachment 4). Consequently, the Court declared the motion to be moot. Thus, these "affirmative" designations are directly counter to their own earlier position in this case.

3. **Untimeliness**. On September 19, 1994, the defendants had most of the Government's designations of deposition testimony. By September 21, 1994, the defendants had all of them, except for those of Messrs. Maxwell and Combes, who were deposed late in the discovery period. We designated these on September 25. Hence, the Government provided the defendants with all of our designations before the beginning of trial on September 26.

By contrast, the defendants did not give us their initial designations of Messrs. Maxwell's and Combes' depositions until October 4. These were not counter-designations which the defendants could not make until after they received the Government's designations. Rather, by the defendants' own description, they are "affirmative" designations which could have been submitted before trial. Likewise, the defendants failed to designate the remaining witnesses' transcripts until almost a week after the close of trial and 22 days after we gave them our designations.

It is fundamentally unfair for the defendants to attempt to make designations **after** trial. Obviously, there is no longer any opportunity to examine these people in court on the subjects raised

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[2] Although former Finley President Hanson lives in New York, he was represented by defense counsel at his deposition. Moreover, Section 13 of the Clayton Act provides for nationwide service of subpoenas. 15 U.S.C. § 13. Consequently, defendants cannot argue at this late date that he was unavailable for trial.

by these designations. What defendants are doing here is engaging in a one-sided post-trial proceeding.

Untimely Objections

On October 13, the defendants made several new objections to the Government's deposition designations of Mercy and Finley representatives and several new counter-designations. These transcripts were designated by the Government in large part on September 19 and completely by September 21 (with the exception of Messrs. Combes and Maxwell). The defendants had a full opportunity to make their objections then. (These depositions were taken between April 6 and September 2, 1994.) But like the affirmative deposition designations, the defendants waited until six days **after** trial to make these new objections and counter-designations. Hence, they are untimely and should be stricken.

Conclusion/Relief Requested

Defendants were afforded a full opportunity to put their case in. At some point, the taking of evidence must come to an end. That point passed long ago--especially in light of the defendants' response to motion in limine no. 7. There is no warrant for this conduct. It also would be unfairly

prejudicial and contrary to the rules of procedure governing depositions. An order should be entered striking these designations and new objections.

October 14, 1994

Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 14, 1994, I caused copies of the foregoing to be served

By Fax and overnight courier on:
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Howard B. Iwrey, Esquire
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Jessica N. Cohen