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

In the Matter of	)	**PUBLIC**
OSF Healthcare System, a corporation, and	)	**Docket No. 9349**
Rockford Health System, a corporation	)	**Hon. Judge Chappell**

COMPLAINT COUNSEL'S MOTION TO COMPEL COMPLIANCE WITH THE COURT'S MARCH 19, 2012 ORDER AND FOR LEAVE TO CONDUCT NARROWLY-TAILORED DERIVATIVE DISCOVERY

On March 19, 2012, this Court issued an order stating that "to the extent that Respondents or their expert witnesses or other witness are advancing any part of the [FTI] Merger Report or findings or data related to findings or opinions therein in this litigation, Respondents and FTI are required to disclose related, work product protected information." *In the Matter of OSF Healthcare System & Rockford Health System*, Dkt. No. 9349, Order on Complaint Counsel's Motion to Compel FTI Consulting, Inc. to Produce Documents Requested by Subpoena *Duces Tecum* and to Enforce Subpoena *ad Testificandum* (March 19, 2012) ("March 19 Order"). Presumably because Respondents plan to advance the Merger Report as probative evidence through their expert, employee, or other witnesses, Respondents produced documents on March 28-30, 2012 from FTI, the consulting firm retained by Respondents' attorneys to create the Merger Report. Respondents have also agreed to make relevant FTI employees available for deposition testimony. The recently-produced documents previously were withheld as work product. To date, however, Respondents still have not produced

documents relating to the Merger Report from the files of McDermott Will & Emery ("MWE") or Hinshaw Culbertson ("Hinshaw"). MWE and Hinshaw are Respondents' attorneys who hired and managed FTI throughout the process that led to the Merger Report. Accordingly, MWE and Hinshaw likely possess a substantial number of documents and correspondence relating to the Merger Report. Because this Court's March 19 Order specifically contemplates discovery of work product information "that relate[s] to the creation and underlying analysis of any part of the Merger Report," and there is evidence that FTI did not retain all documents relating to the Merger Report, Complaint Counsel respectfully requests the Court to order Respondents to produce non-duplicative documents relating to the Merger Report from the files of MWE and Hinshaw.

In addition, Complaint Counsel has identified numerous documents among Respondents' production from FTI's files that bring to light new facts regarding the role of Henry Seybold, the CFO of Rockford Health System ("RHS"), Dr. Susan Manning, an expert economist scheduled to testify on behalf of Respondents, and Mr. Jeffrey Brown, an industry expert scheduled to testify on behalf of Respondents, in creating the Merger Report. However, Respondents have refused to make these witnesses available for deposition in spite of the Court's order. Complaint Counsel respectfully requests leave to conduct limited additional deposition with each of these witnesses to understand the meaning and context of the recently-produced documents and the new information contained therein. Absent such relief, by failing to produce such material prior to the close of discovery, Respondents will have succeeded in avoiding any discovery into such issues in advance of the merits trial.

Background

This Court's March 19, 2012, Order stated that:

> [T]o the extent that Respondents or their expert witnesses or other witnesses are advancing any part of the Merger Report or findings or data related to findings or opinions therein in this litigation, Respondents and FTI are required to disclose related, work product protected information. If this is the case, Complaint Counsel is entitled to production of such information, to include documents and communications that relate to the creation and underlying analysis of any part of the Merger Report relied upon or advanced in this case, and to take depositions of FTI employees relating only to such parts of the Merger Report relied upon or advanced by Respondents.

Although Respondents still refuse to specifically indicate whether they intend to advance the Merger Report through their expert, employee, or other fact witnesses,[1] they have produced documents from FTI's files that they previously withheld on the basis that they constituted work product or privileged material. Thus, Respondents' actions indicate an apparent intent to advance the Merger Report as evidence at the upcoming merits hearing.

Consistent with Respondents' representations in their Response in Opposition to Complaint Counsel's Motion to Compel, the documents produced from FTI's files demonstrate that FTI's work was directed and reviewed by MWE and Hinshaw. *See, e.g.*, PX 3763 (FTI00086887) (email correspondence in which Hinshaw and MWE attorneys provide numerous comments and instructions on a draft of the Merger Report) (attached as Exhibit B); PX 3779 (FTI00090719) **({**

}) (attached as Exhibit C). Clearly, MWE and Hinshaw attorneys played a critical, if not gate-keeping, role in determining the content and scope of the Merger Report.

[1] Letter from Alan Greene to Jeremy Morrison, March 21, 2012 (attached as Exhibit A).

Within 24 hours of receiving the last production of documents from Respondents, Complaint Counsel emailed Respondents' attorneys to notify Respondents that the production did not appear to contain any documents from the files of MWE and Hinshaw. Respondents' counsel's response did not confirm or deny that their production omitted documents from MWE and Hinshaw's files, *see* email correspondence between Kenneth Field and Alan Greene, March 30, 2012 (attached as Exhibit D), but after an extensive search, Complaint Counsel has been unable to identify any such files among Respondents' production.

Among the Merger Report-related documents produced from FTI's files in response to the March 19 Order are documents authored by and relating to Mr. Seybold, Dr. Manning, and Mr. Brown. As described in detail below, these newly-produced documents bring to light new facts regarding the substantive involvement in the creation of the Merger Report of Mr. Seybold, Dr. Manning, and Mr. Brown, and in many cases contradict prior testimony. As explicitly envisioned by the Court's March 19 Order, "the additional document production and disclosures…require depositions or follow-up depositions."

- Henry Seybold (RHS's CFO) Recently-produced documents reveal Mr. Seybold's comments and questions on the Merger Report during its creation. *See* PX 3791 (FTI00093742), PX 3792 (FTI00093743), PX 3865 (RHS044-0004224) (attached as Exhibits E, F, & G, respectively). **{**

  }

  Prior to obtaining these documents, Complaint Counsel had no specific information regarding the questions and comments that Mr. Seybold had regarding the Merger Report. Indeed, when asked about his questions relating to the creation of the Merger Report at deposition, Mr. Seybold was instructed by counsel not to answer. PX 4201-46 (Seybold PI Depo. Tr. 155-56 (1/10/12)) (Q. What was your role vis-à-vis FTI in the process leading up to the merger presentation in December 2010? MR. BRENNAN: I'm going to object for the reasons I stated earlier. It's attorney work product. I'm going to instruct you not to answer . . . MR. HERRICK: So you're instructing the witness not to answer any questions about the back-and-forth he had with FTI; is that correct? MR. BRENNAN: Yes.) (attached as Exhibit H)

- Dr. Susan Manning (scheduled as one of Respondents' testifying expert witnesses) **{**

  }PX 3833 (FTI00113677) (attached as Exhibit I); *see also* PX 3777 (FTI00090533) (attached as Exhibit J). These documents appear flatly inconsistent with Dr. Manning's prior testimony: "Q: Did you have any input into the FTI business case report? A: No." PX 4040-011 (Manning PI Depo. Tr. 39 (1/23/12)) (attached as Exhibit K).

- Jeffrey Brown (scheduled as one of Respondents' testifying expert witnesses) Documents in the production include numerous examples of Mr. Brown – the FTI employee managing the project – corresponding with Respondents' counsel and FTI employees about the project. **{**

  , *see* PX 3833 (FTI00113677) (**{**
  }) (attached as Exhibit I),

  }, *see* PX 3789 (FTI00093684) (attached as Exhibit L), and, in some cases, contradict Mr. Brown's previous testimony. *Compare* PX 4101-013 (Brown P3 Dep. Tr. 46 (3/28/12)) **(** {

  }) (attached as Exhibit M) *with* PX 3763 FTI00086887 **({**
  }) (attached as Exhibit B). Prior to receiving the production in response to the Court's March 19 Order, Complaint Counsel had no supporting documents and evidence surrounding the specific actions of Mr. Brown and his staff at FTI that put together the Merger Report. In fact, FTI and Respondents produced the first of three sets of documents *during* Mr. Brown's deposition.

Statement of Meet and Confer

On April 4, 2012, at approximately 2:45PM EST, Richard Cunningham and Jeremy Morrison, representatives of Complaint Counsel, had a telephone conference with Alan Greene and Kristin Kurczewski, attorneys representing Respondents, to confer in good faith to resolve the issues raised by this motion. Complaint Counsel outlined the basis for the requested relief and expressed willingness to compromise by limiting the requested relief in order to avoid having to raise these issues with the Court. Respondents' attorneys indicated that they disputed the basis for this motion and were unwilling to provide any of the relief requested herein.

Discussion

A. Merger Report-related Documents Contained in MWE's and Hinshaw's Files

Respondents have no basis to withhold documents relating to the Merger Report that are contained in MWE and Hinshaw files. As a preliminary point, it is virtually inconceivable that MWE and Hinshaw's files do not contain documents relating to the Merger Report. As the documents cited above vividly depict, MWE and Hinshaw attorneys directed FTI's work and provided extensive comments and edits to the Merger Report itself. Moreover, documents relating to the Merger Report are plainly relevant to issues in dispute in this litigation. Notwithstanding substantial issues regarding its reliability, the Merger Report purports to address a key area of dispute in this matter – whether the proposed acquisition of RHS by OSF is likely to result in merger-specific, cognizable efficiencies. Any claim that MWE and Hinshaw are beyond the reach of the Court's March 19 Order or the discovery requests issued to Respondents by Complaint Counsel is similarly without merit. The Court's March 19 Order specifically references "Respondents," and MWE and Hinshaw are Respondents' agents, subject to Respondents direction and control.[2] Finally, the fact that documents relating to the Merger Report in MWE and Hinshaw's files would be protected by the work product doctrine if the Merger Report were not being advanced as evidence by Respondents is immaterial. This Court's March 19 Order specifically ordered the production of work product protected information if Respondents intend to rely on the Merger Report as evidence. Thus far, Respondents' actions

[2] In addition, the *Subpoenas Duces Tecum* issued by Complaint Counsel to Respondents RHS and OSF in this matter specifically define RHS and OSF to include "agents and representatives" and specifically request documents relating to integration plans and efficiencies. *See* Definition A and Specifications 8 & 9 of Complaint Counsel's Request for Production of Documents Issued to OSF Healthcare System and Complaint Counsel's Request for Production of Documents Issued to Rockford Healthcare System (attached as Exhibit N). Modifications to these *Subpoenas* are not relevant because all modifications agreed to by Complaint Counsel are premised on full compliance with the *Subpoenas* as modified, and, among other reasons, the production of the FTI documents occurred two months after Respondents' responses to the *Subpoenas* were due.

indicate they intend to do so based on the March 19 Order. ("Respondents and FTI are required to disclose related, work product protected information . . .")

The only legitimate basis for Respondents to withhold Merger Report-related documents contained in the files of MWE and Hinshaw would be if such documents were entirely duplicative of the documents produced from FTI's files. Indeed, this does not appear to be the case. There is evidence that FTI did not retain all documents related to the Merger Report. Specifically, in recent deposition testimony, Jeff Brown, the FTI employee who oversaw the FTI team working on the Merger Report who is also scheduled to serve as an expert witness testifying on behalf of Respondents, stated that: **{**

} *See* PX 4101-013 (Brown P3 Depo. Tr. 22-23, 49-50 (3/28/12)) (attached as Exhibit M). Finally, Respondents' attorneys have declined to make a specific representation that their files do not contain documents or correspondence relating to the Merger Report that were not included in the production from FTI's files. *See* email from Alan Greene to Kenneth Field, March 31, 2012 and letter from Carla Hine to Kenneth Field, April 5, 2012 (attached as Exhibit D). Thus, it is extremely likely that MWE and Hinshaw files contain previously-withheld documents relating to the Merger Report that were not included in the production of documents pulled from FTI's files.

B. Newly Unearthed Information Relating to Messrs. Seybold and Brown and Dr. Manning's Involvement in the Creation of the Merger Report

Pursuant to this Court's Scheduling Order, fact discovery ended on February 17, 2012, expert discovery closed on March 23, 2012, and depositions are presumptively limited to one seven hour day. For these reasons, Complaint Counsel must show good cause in order to obtain additional deposition time with Messrs. Seybold and Brown and Dr. Manning. *See* Rule 3.21(c)(2). It is well established that the receipt of new information constitutes valid grounds or good cause to obtain additional deposition testimony from a witness. *See e.g., Floyd-Mayers v. American Cab Co., Inc.,*1990 WL 116831 *2 (D.D.C. 1990) (allowing a second deposition of a witness limited to new issues not addressed at the previous deposition) (attached as Exhibit O); *Christy v. Pennsylvania Turnpike Com'n,* 160 F.R.D. 51, 53 (E.D.Pa 1995) (stating that "[s]everal courts faced with similar situations have granted a party the right to take a second deposition, but have limited that deposition to matters not addressed in the first deposition").[3]

Here, the new information at issue, which is described above in detail, relates to the role of Mr. Seybold, Mr. Brown, and Dr. Manning in the creation of the Merger Report, and their contemporaneous views regarding its contents. Again, the relevance of this information is unquestionable because the Merger Report is a key component of Respondents' efficiency defense and Mr. Seybold, Mr. Brown, and Dr. Manning are all included on Respondents' Final Witness List and described as likely to provide testimony relating to cost savings/efficiencies. Because Respondents produced the documents containing this information beginning on March 28, 2012, Complaint Counsel only became aware of this information *after* the close of fact

[3] *Compare Jones v. Cunningham*, No. 99-20023, 2009 U.S. Dist. LEXIS 101713 (Oct. 20, 2009) (denying motion for leave to take second deposition where movant failed to allege existence of new evidence or legal theories) (attached as Exhibit P); *see also In the Matter of Intel Corp.*, Dkt. No. 9341, Order Denying Motion of Non-Parties Hewlett-Packard Co., Jeff Groudan, Louis Kim and Joseph Lee to Quash Subpoenas *ad Testificandum* Issued by Intel Corporation (F.T.C. May 20, 2010) (stating in dicta that "[e]ven in the same case, a deponent may be subjected to more than one deposition in certain circumstances, such as the passage of time or the addition of new or different claims") (attached as Exhibit Q).

discovery, and *after* depositions with these witnesses had already taken place. Moreover, Complaint Counsel raised these issues with Respondents immediately after receiving the newly-produced documents.

The fact that Complaint Counsel could not have been previously aware of the new, highly relevant information contained in Respondents' March 28, 2012 production constitutes good cause for leave to conduct additional deposition with Messrs. Seybold and Brown and Dr. Manning that is limited in time (to two hours per witness) and scope (to the newly unearthed documents' contents and context). Indeed, if Complaint Counsel is unable to explore these newly-produced documents in deposition in advance of the trial, Complaint Counsel would be in the untenable position of having to ask about these documents – and the apparent inconsistencies between their content and the witnesses' prior testimony in the case of Dr. Manning and Mr. Brown – for the first time in open court entirely because Respondents did not produce these documents until ordered to do so by the Court after fact and expert discovery closed.

Conclusion

The MWE and Hinshaw files very likely contain information that is discoverable under this Court's March 19, 2012 Order and that is within the scope the *Subpoena Duces Tecum* issued to Respondents. For this reason, Complaint Counsel respectfully requests the Court to compel Respondents to either: (1) make a specific representation that MWE's and Hinshaw's files do not contain non-duplicative documents relating to the Merger Report; or (2) produce all such documents immediately.

The Merger Report-related documents produced by Respondents contain new information relating to the involvement Messrs. Seybold and Brown and Dr. Manning in creating the Merger Report and their views of its contents. Complaint Counsel respectfully requests leave

to conduct additional deposition with these three witnesses that is narrowly tailored to the newly-discovered – and previously undiscoverable – information.

Dated: April 10, 2012

Respectfully submitted,

_s/ Matthew J. Reilly_____
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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 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 a copy of the foregoing document to:

The Honorable D. Michael Chappell
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CERTIFICATE FOR ELECTRONIC FILING

I 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 10, 2012

By: s/ Sarah Swain
Attorney for Complaint Counsel

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

In the Matter of	)	
	)	**Docket No. 9349**
OSF Healthcare System, a corporation, and	)	**Hon. Judge Chappell**
Rockford Health System, a corporation	)	

[PROPOSED] ORDER

Upon consideration of Complaint Counsel Federal Trade Commission's Motion to Compel Compliance with the Court's March 19, 2012 Order and for Leave to Conduct Narrowly-Tailored Derivative Discovery, and any opposition thereto,

IT IS HEREBY ORDERED that Complaint Counsel's Motion is GRANTED.

IT IS FURTHER ORDERED that Respondents shall immediately (1) make a specific representation that MWE's and Hinshaw's files do not contain non-duplicative documents relating to the Merger Report; OR (2) produce all such documents immediately.

IT IS FURTHER ORDERED that Respondents shall immediately take all necessary steps toward scheduling the requested depositions of Messrs. Seybold and Brown and Dr. Manning regarding the Merger Report, their roles in its creation, and their views of its contents.

_____
D. Michael Chappell
Administrative Law Judge

DATED this ___ day of _____, 2012

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Non-Public Exhibit A

Letter from Alan Greene to Jeremy Morrison,
(March 21, 2012)

REDACTED IN ENTIRETY

Non-Public Exhibit B

PX 3763 (FTI00086887)

REDACTED IN ENTIRETY

Non-Public Exhibit C

PX 3779 (FTI00090719)

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Non-Public Exhibit D

Email correspondence between Kenneth Field and Alan Greene (March 30, 2012)
&
Letter to Kenneth Field from Carla A. R. Hine (April 5, 2012)

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Non-Public Exhibit E

PX 3791 (FTI00093742)

REDACTED IN ENTIRETY

Non-Public Exhibit F

PX 3792 (FTI00093743)

REDACTED IN ENTIRETY

Non-Public Exhibit G

PX 3865 (RHS044-0004224)

Public Exhibit H

PX 4021 PI Deposition Testimony
of Henry Seybold (1/10/12)

In the Matter of:

Federal Trade Commission v. OSF/Rockford

January 10, 2012
Henry Seybold, Jr. (Confidential - Attorney's Eyes Only)

Condensed Transcript with Word Index

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A. It would not be appropriate to share that with OSF.

Q. Is the information relating to potential cost savings the kind of information that RHS would view as competitively sensitive?

A. I would not share that information with a competitor.

Q. Currently OSF is a competitor; right?

A. Correct.

Q. Based on that analysis, FTI believed that RHS could achieve between 10 and $15 million in annual savings even without the proposed merger; is that correct?

MR. BRENNAN: Objection. No foundation.

A. I believe that that number is an appropriate range.

MR. HERRICK: I'm going to introduce PX2000. It's a presentation entitled Rockford Health System Performance Opportunities, February 2011.

(Exhibit No. 6, Rockford Health System Performance Opportunities, January 10, 2012, was marked for identification.)

BY MR. HERRICK:

Q. Before you take a look at the inside of the document, I just want to ask you one quick question

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about it. Then you can have a moment to review it.

Just looking at the cover but before opening the document, can you recall whether this is the FTI presentation we were just talking about from February 2011?

A. I'm only looking at the cover page. I can't tell you that.

Q. Feel free to open the report, then.

A. Okay.

MR. HERRICK: Just one quick follow-up question on the cost savings that we were discussing a few minutes ago. If you're still reviewing the document, I'll wait. Go ahead.

MR. BRENNAN: Is there a question pending? I'd like to talk to my cocounsel for a second.

MR. HERRICK: I just want to get this question out. It will take two seconds. It doesn't have to do with the document.

BY MR. HERRICK:

Q. Did RHS engage any consultants in connection with the cost savings initiatives we just discussed for RMH?

A. The ones back in 2007?

Q. 2006-2007.

A. Yes.

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Q. Who were those consultants?

A. We contracted with a company called CSC on the supply chain. I think it's just their name. Then we consulted with a company called Compass to help us with the productivity.

MR. BRENNAN: Can I have a minute?

MR. HERRICK: Let's go off the record.

(An off-the-record discussion was had.)

MR. HERRICK: Back on the record.

BY MR. HERRICK:

Q. Earlier you testified -- and again, I don't want to put words in your mouth, but I believe you testified that you reviewed FTI's work for the Merger Report; is that correct?

A. Yes.

Q. Can you just explain for the record specifically what that review process entailed?

MR. BRENNAN: You're asking what his review process was?

MR. HERRICK: His review process -- let me rephrase.

BY MR. HERRICK:

Q. What was your role vis-a-vis FTI in the process leading up to the merger presentation in December 2010?

MR. BRENNAN: I'm going to object for the

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reasons I stated earlier. It's attorney work product. I'm going to instruct you not to answer.

MR. HERRICK: Mr. Seybold testified that he participated in a review process.

Are you objecting to any questions about that?

MR. BRENNAN: If you're inquiring about the extent to which and what he did with respect to FTI pursuant to their analysis, yes.

If you're asking what he did independently over that time period that didn't involve working with FTI, then I wouldn't.

But as I understand the question, you're asking what involvement did he have with FTI specifically pursuant to its work leading up to that report, and that is work product, as we have said and adhered to since Day 1.

So if I'm misunderstanding the question you're asking, then you'll tell me that because that's what I understand you were asking him to respond to.

MR. HERRICK: So you're instructing the witness not to answer any questions about the back-and-forth he had with FTI; is that correct?

MR. BRENNAN: Yes.

BY MR. HERRICK:

Q. Turning back to PX2000, do you know the

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Non-Public Exhibit I

PX 3833 (FTI00113677)

REDACTED IN ENTIRETY

Non-Public Exhibit J

PX 3777 (FTI00090533)

Public Exhibit K

PX 4040 PI Deposition Testimony
of Dr. Susan Manning (January 23, 2012)

In the Matter of:

FTC v. OSF Healthcare System and Rockford Health System

January 23, 2012
Susan Henley Manning (Confidential - Attorneys' Eyes Only)

Condensed Transcript with Word Index

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A. There's probably 150 or so people at FTI that participate in the leadership. Yes.
Q. How many times have you met with Jeff Brown as part of your leadership role at FTI or Compass?
A. I would -- to venture a guess I would say maybe ten times or so.
Q. Do you consider Jeff Brown a friend of yours?
A. I consider him a very nice colleague of mine. Yes. I mean, we don't get together outside of the office, but yes, I have a great deal of respect for Mr. Brown.
Q. Putting aside your work with Mr. Dawes in the past, have there been other times when you have worked with individuals from FTI, meaning outside of Compass but part of FTI?
A. On substantive work for clients; is that what you're asking me?
Q. Yes.
A. I can't think of any right now, but I don't want to preclude myself from saying that that has not happened.
Q. Do you have an equity stake in Compass Lexecon?
A. I do not.
Q. Is your compensation tied to the financial performance of Compass Lexecon in any way?

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A. In some respect, yes.
Q. How so?
A. I receive, as everyone in my firm does, a bonus at the end of the year based on the performance of -- the general performance of Compass Lexecon.
Q. Is your bonus based in any way on the performance of FTI rather than Compass?
A. No. I don't believe so.
Q. As far as you know, your financial compensation is in no way tied to the performance of FTI other than the Compass Lexecon subsidiary?
A. As far as I know, my bonus compensation is determined within -- has to do with the performance of Compass Lexecon itself, not FTI.
Q. Do you have any understanding as to how Jeff Brown is compensated or Phillip Dawes?
A. I have no clue.
Q. Did you have any input into the Compass Lexecon business case report?
MR. GREENE: Objection. I think you may have -- not an objection, but I think you may have misspoken. You said "the Compass Lexecon business report."
MR. PERRY: It will be the first of many. Let me try it again.

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BY MR. PERRY:
Q. Did you have any input into the FTI business case report?
A. No.
Q. Did you provide any edits?
A. No.
What I provided in that instance was -- the information was actually flowing from FTI up to us. FTI was asked to keep us informed on their progress and what they were finding.
I mean, there may be occasion where we suggested, you know, you need to document something or whatever, but there was no substantive discussion.
Q. You had no substantive input into the FTI business case report; is that accurate?
A. As far as the quantification of numbers or the cost savings that they were identifying, I would say we were informed of them, but I would not say that we influenced them, no.
Q. I'm asking about the report itself, the business case report.
Did you have any input into the development of that report?
A. I do not recall having any input into that. Did I see it -- did I see that report? The answer is yes, I

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did see the report.
Q. Did you see the report before it was finalized?
A. I believe so. Yes.
Q. Did you provide any edits or suggestions before the report was finalized?
A. I mean, it's possible that I may have. I just do not recall.
Q. After the time when the FTI report was finalized -- when was that, December 2010?
A. I believe so. Yes.
Q. -- have you had ongoing communications with anyone from FTI since that time?
A. I had conversations with FTI following their finalization of that report in that December-January time frame.
Q. What was, generally speaking, the substance of those conversations?
A. Before Paul Anderson and I went to speak with the board of directors about the process by which the agencies would undertake an antitrust review and application of the Merger Guidelines, we had several phone calls with Mr. Dawes, and I believe probably some members of his team, to make sure we had a better understanding of how it was that they did their -- how they identified the cost savings that were contained in

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Non-Public Exhibit L

PX 3789 (FTI00093684)

REDACTED IN ENTIRETY

Non-Public Exhibit M

PX 4101 P3 Deposition Testimony of Jeffrey Brown (March 28, 2012)

REDACTED IN ENTIRETY

Non-Public Exhibit N

Complaint Counsel's Request for Documents Issued to OSF Healthcare System
&
Complaint Counsel's Request for Documents Issued to Rockford Health System

Public Exhibit O

Floyd-Mayers v. American Cab Co., Inc.,1990 WL 116831 *2 (D.D.C. 1990)

Not Reported in F.Supp., 1990 WL 116831 (D.D.C.)
(Cite as: 1990 WL 116831 (D.D.C.))

H

Only the Westlaw citation is currently available.

United States District Court, District of Columbia.
Yvonne FLOYD–MAYERS, et al., Plaintiffs,
v.
AMERICAN CAB CO., INC., et al., Defendants.

CIV. A. No. 89–1777(CRR).
July 30, 1990.

ORDER

CHARLES R. RICHEY, District Judge.

***1** The defendant James Jones has moved this Court for an order compelling the plaintiff Olivia Bonner to appear for a deposition, and the plaintiff Karen Jennings–Crooms has moved for a protective order preventing the defendant from taking her deposition. Bonner objects to the defendant's proposed deposition because she lives in West Virginia and has already undergone considerable burden and expense in travelling to Washington, D.C. to be deposed by American Cab Co. ("American"), another defendant in this case. Similarly, Jennings–Crooms objects to the defendant Jones' proposed deposition because American has deposed her already and because she works every weekday from 9:30 a.m. to 7:45 p.m. and attends evening classes three nights each week. Moreover, both plaintiffs argue that the defendant Jones, who received notice of their prior depositions but did not exercise his right to question them then, should not be permitted to now have a "second bite at the apple."

The Court would agree wholeheartedly with the plaintiffs' arguments but for: (1) the fact that the defendant, who is now represented by counsel, was proceeding *pro se* at the time of American's prior depositions of the plaintiffs Bonner and Jennings–Crooms and (2) the defendant's contention that he seeks to depose the plaintiffs on issues not covered previously in American's two depositions. Although the plaintiffs correctly point out that Jones received notice of American's depositions, nothing on the face of those notices would indicate to a lay person proceeding *pro se* that he had a right to attend the depositions, let alone the right to ask his own questions. Moreover, represented by able and experienced counsel, the plaintiffs knew that the defendant Jones was proceeding *pro se* at the time of these depositions.

The Court is reluctant to hamper this defendant's defense by binding him inextricably to his acts or omissions that occurred while he was not represented by counsel, especially where, as here, he allegedly seeks to ask questions on issues not covered by the previous depositions. The Court therefore recognizes that this defendant has a *qualified* right to take these two depositions.

In addition to covering only new issues, the one qualification revolves around who should bear the burden of these second depositions. The only vigorous objection that the plaintiff Bonner raises to the defendant's request for another deposition is based on the burdensome expense of making the seven-hour bus trip to Washington, D.C. from West Virginia and missing three days of work. On the one hand, the Court could envision requiring the plaintiff Bonner to bear this expense because she voluntarily elected to participate as a plaintiff in this lawsuit and then moved to West Virginia. On the other hand, the Court is loathe to saddle her with the entire expense of this second deposition on the ground of unspecified new issues merely because the defendant did not obtain counsel until recently.

***2** Similarly, the plaintiff Jennings–Crooms, who lives in Washington, D.C., objects to another deposition because she would have to miss a day of work at a job where she has started so recently that she has not yet accumulated any vacation or personal days. Again, perhaps she should have to bear the burden of a second deposition by virtue of having elected to participate in this lawsuit, but the defendant is also partly at fault because he failed to

attend her first deposition.

In view of the foregoing considerations, the Court will grant the defendant Jones' motion to compel and deny the plaintiff Jennings–Crooms' motion for protective order with some caveats. The defendant Jones may depose the plaintiff Bonner only as to new issues not previously addressed in the American deposition and only if the defendant agrees in advance to pay half of her reasonable expenses (including travel, meals, lodging, and lost pay). While the Court leaves the logistics to the parties and their counsel, it encourages them to consider and work out alternatives that would minimize the expense to Bonner (and thus also to Jones), including, but not limited to, scheduling the deposition on a weekend if possible so that the plaintiff Bonner does not again miss three days work. Also, the defendant Jones may depose the plaintiff Jennings–Crooms only as to new issues not previously addressed in the American deposition and only if the defendant agrees to schedule the deposition on a Saturday or Sunday so that she will not miss a day of work.

Accordingly, it is, by the Court, this 30 day of July, 1990,

ORDERED that the defendant James Jones' Motion to Compel Olivia Bonner's Attendance at Deposition shall be, and hereby is, GRANTED in large part; and it is

FURTHER ORDERED that, if the defendant Jones agrees in advance to pay half of the plaintiff Bonner's expenses as discussed above, she shall appear at a deposition, within thirty (30) days of the date of this Order at a date, time, and location agreeable to both parties, to answer any proper questions not covered in her deposition taken previously by American Cab Company; and it is

FURTHER ORDERED that the Plaintiff Karen Jennings–Crooms' Motion for Protective Order shall be, and hereby is, DENIED in large part; and it is

FURTHER ORDERED that, if the defendant Jones agrees to a deposition on a Saturday or Sunday, the plaintiff Jennings–Crooms shall appear at a deposition, within thirty (30) days of the date of this Order at a date, time, and location agreeable to her, to answer any proper questions not covered in her deposition previously taken by American Cab Company.

D.D.C.,1990.
Floyd-Mayers v. American Cab Co., Inc.
Not Reported in F.Supp., 1990 WL 116831 (D.D.C.)

END OF DOCUMENT

Public Exhibit P

Jones v. Cunningham, No. 99-20023, 2009 U.S. Dist. LEXIS 101713 (Oct. 20, 2009)

RODNEY WAYNE JONES, Plaintiff, v. CORRECTIONAL OFFICER J. CUNNINGHAM, ET AL., Defendants.

Case No.: C 99-20023 RMW (PVT)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

2009 U.S. Dist. LEXIS 101713

October 20, 2009, Decided
October 20, 2009, Filed

COUNSEL: [*1] For Rodney Wayne Jones, Plaintiff: Kim-Lien Thi Dang, LEAD ATTORNEY, Latham & Watkins LLP, Menlo Park, CA; Sara Terese Wickware, LEAD ATTORNEY, Latham Watkins, Menlo Park, CA.

For J. Cunningham, Correctional Sergeant, E. Moore, Correctional Officer, J.J. Hughes, Correctional Officer, Defendants: Scott John Feudale, LEAD ATTORNEY, California Attorney General's Office, Correctional Law Section, San Francisco, CA.

For W. Faulkner, Correctional Officer, Defendant: Dolores M. Donohoe, LEAD ATTORNEY, Edrington, Schirmer & Murphy, Pleasant Hill, CA; Timothy Patrick Murphy, LEAD ATTORNEY, Edrington Schirmer & Murphy The Terraces, Pleasant Hill, CA; Scott John Feudale, California Attorney General's Office, San Francisco, CA.

JUDGES: PATRICIA V. TRUMBULL, United States Magistrate Judge.

OPINION BY: PATRICIA V. TRUMBULL

OPINION

ORDER DENYING DEFENDANT FAULKNER'S MOTION FOR LEAVE TO TAKE A SECOND DEPOSITION

[Docket No. 147]

Pursuant to *Rule 30(a)(2)(B)*, defendant W. Faulkner moves for leave to take a second deposition of plaintiff. [1] Plaintiff Rodney Wayne Jones opposes the motion. Pursuant to Civ. L.R. 7-1(b), the motion is taken under submission without oral argument. The hearing scheduled to be held on November 3, 2009 is vacated. [*2] Having reviewed the papers and considered the arguments of counsel,

> 1 In the moving papers, defendant Faulkner moves for leave to take a second deposition pursuant to *Rule 30(a)(2)(B)*. However, *Rule 30(a)(2)(B)* relates to a party seeking leave to take a deposition "if the deponent is confined in prison." Although plaintiff Jones is presently incarcerated, it appears that based on the motion, defendant Faulkner moves for leave pursuant to *Rule 30(a)(2)(A)(ii)*.

IT IS HEREBY ORDERED that defendant Faulker's motion is denied. [2]

> 2 The holding of this court is limited to the facts and particular circumstances underlying the present motion.

Defendant Faulker moves for leave to take a second deposition of plaintiff on the grounds that almost eight years have passed since the time he was first deposed on November 9, 2001. In addition, defendant Faulkner's present counsel was not engaged until April 6, 2005.

In further support of his motion, defendant Faulkner notes that plaintiff Jones has served "evasive and nonresponsive answers" to previously propounded interrogatories. Plaintiff Jones later served amended responses to the interrogatories, which defendant Faulkner also characterizes as "evasive [*3] and nonresponsive."

Plaintiff Jones (now represented by counsel) opposes the motion for leave to take a second deposition for several reasons, including that the discovery sought is patently cumulative and duplicative, that defendant Faulkner's subsequent engagement of private counsel following the November 9, 2001 deposition has no bearing on the instant motion, and that defendant Faulkner may move to compel further interrogatory responses, if necessary, and defendant Faulkner may propound additional written discovery to identify the "full nature and extent of [plaintiff Jones's] injuries."

"A party must obtain leave of court [if the deponent has already been deposed in the case], and the court must grant leave to the extent consistent with *Rule 26(b)(2)*." *Fed. R. Civ. P. 30(a)(2)(A)(ii)*.

Rule 26(b)(2) provides that the court may alter the length of deposition under *Rule 30*. *Fed. R. Civ. P. 26(b)(2)(A)*. However, "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, [*4] or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C).

Further deposition of plaintiff is not warranted here. Deputy Attorney General Barbara Sutliffe first sought to depose plaintiff on July 6, 2001. However, the deposition was continued because plaintiff wanted an opportunity to consult with counsel. After the district court denied defendants' motion to dismiss for failure of plaintiff to cooperate in deposition, plaintiff Jones proceeding *pro se* was deposed for approximately three hours. During that time, he answered all of the questions posed to him. At the conclusion of the November 9, 2001 deposition, defendants did not indicate that leave for further deposition would be sought.

During the November 9, 2001 deposition of plaintiff, defendant Faulkner was represented by the Attorney General's Office. [*5] Aside from the subsequent engagement of new counsel and the vintage of plaintiff's deposition, defendant Faulkner has not shown good cause to take a further deposition of plaintiff. Moreover, defendant Faulkner has not stated that the motion for leave to take further deposition stems from the development of new evidence or new theories. *See, e.g., Graebner v. James River Corp., et al., 130 F.R.D. 440, 441, 127 F.R.D. 532 (N.D. Cal. 1990)*(" . . . repeat depositions are disfavored except in certain circumstances, [including] long passage of time with new evidence, new theories to the complaint, etc."). Therefore, the court finds that a second deposition of plaintiff would be duplicative and that defendant Faulkner has had ample opportunity to obtain discovery by deposition. Accordingly, defendant Faulkner's motion for leave to take a second deposition is denied. Pursuant to *Rule 37(a)(3)(B)(iii)*, defendant Faulkner may move to compel further interrogatory responses.

IT IS SO ORDERED.

Dated: October 20, 2009

/s/ Patricia V. Trumbull

PATRICIA V. TRUMBULL

United States Magistrate Judge

Public Exhibit Q

In the Matter of Intel Corp., Dkt. No. 9341
Order Denying Motion to Quash Subpoenas *Ad Testificandum* (F.T.C. May 20, 2010)

Public

ORIGINAL

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

In the Matter of	)	
INTEL CORPORATION, Respondent.	)	DOCKET NO. 9341

ORDER DENYING MOTION OF NON-PARTIES HEWLETT-PACKARD COMPANY, JEFF GROUDAN, LOUIS KIM AND JOSEPH LEE TO QUASH SUBPOENAS *AD TESTIFICANDUM* ISSUED BY INTEL CORPORATION

I.

On May 13, 2010, non-parties Hewlett-Packard Company ("HP"), Jeff Groudan ("Groudan"), Louis Kim ("Kim"), and Joseph Lee ("Lee") (collectively, the "Non-parties") submitted a Motion to Quash Subpoenas *Ad Testificandum* issued to Groudan, Kim, and Lee by Respondent Intel Corporation ("Intel"). Intel submitted its opposition to the motion on May 20, 2010. Having fully considered the motion and opposition, and for the reasons set forth below, the motion to quash is DENIED. In addition, the Non-parties' alternative requests, for reimbursement of costs and expenses for complying with the deposition subpoenas and/or for an order limiting the subject areas for questioning, are also DENIED, as further explained below.

II.

The Non-parties contend that the deposition subpoenas should be quashed because they are duplicative, unduly burdensome, and harassing. In support of this claim, the motion states that Groudan, Kim, and Lee are current HP employees, each of whom was previously deposed in prior private antitrust litigation brought against Intel by Advanced Micro Devices, Inc. ("AMD") and class action plaintiffs (the "AMD litigation"). The Non-parties assert that: the claims in the instant case regarding central processing units ("CPU") and microprocessors are substantively the same as those in the AMD litigation; Intel questioned Groudan, Kim, and Lee at the prior depositions in the AMD litigation; Groudan, Kim, and Lee have little relevant knowledge; and neither Groudan, Kim, nor Lee has acquired any new knowledge since their depositions, which occurred approximately one year ago.

In opposing the Non-parties' motion, Intel asserts that Groudan, Kim, and Lee have all been identified by Complaint Counsel as trial witnesses in this litigation. Moreover, Intel contends that the instant litigation is much broader than the AMD litigation, and involves different parties, different causes of action, different legal theories, many different facts, and different remedies. According to Intel, Complaint Counsel has taken depositions in this litigation of individuals who were deposed in the AMD litigation. Therefore, Intel argues, Intel will be at a disadvantage if it is denied the same opportunity. Intel further argues that the Non-parties have failed to meet their burden of demonstrating that the depositions will be duplicative, unduly burdensome, or harassing. In this regard, Intel also notes that the Scheduling Order entered in this case contemplates retaking depositions taken in the AMD litigation and that the Scheduling Order limits depositions to a single, 7-hour day.

III.

A.

Pursuant to Commission Rule 3.33, "[a]ny party may take a deposition of any named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under § 3.31(c)(1) . . ." 16 C.F.R. § 3.33(a). The scope of discovery encompasses any discovery that "may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1).

The Non-parties do not argue that the proposed deponents lack any relevant, discoverable information. Their conclusory assertions, unsupported by affidavits, that the deponents possess only limited relevant knowledge, are unpersuasive. Moreover, the fact that Complaint Counsel intends to call Groudan, Kim, and Lee as witnesses at trial in this matter clearly indicates that each of these individuals has knowledge relevant to the claims and/or defenses in this case. Therefore, pursuant to Rule 3.31(c), Intel has the right to discover that knowledge.

B.

The Commission Rules authorize the Administrative Law Judge to grant a motion to preclude a deposition:

> upon a determination that such deposition would not be reasonably expected to meet the scope of discovery set forth under § 3.31(c), or that the value of the deposition would be outweighed by the considerations set forth under § 3.43(b) [unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence].

16 C.F.R. § 3.33(b); *see* 16 C.F.R. § 3.43(b). Because each of the proposed deponents was previously deposed in the AMD litigation, the Non-parties contend that depositions in this case would produce cumulative evidence, and be harassing and unduly burdensome. Accordingly, the Non-parties seek an order quashing the deposition subpoenas.

"The burden of showing that [a subpoena] is unreasonable is on the subpoenaed party." *FTC v. Dresser Indus.*, No. 77-44, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. April 26, 1977). That burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested discovery is relevant to that purpose. *See Id.* (enforcing document subpoena served on non-party by the respondent). *See also In re Kaiser Alum. & Chem. Corp.*, No. 9080, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976) ("Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding."). In agency actions, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13.

The Non-parties fail to cite any authority for the proposition that a party should be precluded from taking a deposition because the proposed deponent had previously been deposed in a separate case. Even in the same case, a deponent may be subjected to more than one deposition in certain circumstances, such as the passage of time or the addition of new or different claims. *See Collins v. International Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999). *Compare Jones v. Cunningham*, No. 99-20023, 2009 U.S. Dist. LEXIS 101713 (Oct. 20, 2009) (denying motion for leave to take second deposition where movant failed to allege existence of new evidence or legal theories); *Graebner v. James River Corp.*, 130 F.R.D. 440 (N.D. Cal. 1989) (granting protective order against taking second deposition where claims had not broadened since first deposition). In the present case, the prior depositions occurred in separate litigation which, among other things, involved a narrower set of claims, legal theories, and facts, as well as different prosecuting parties. Accordingly, the fact that the Non-parties were deposed in the AMD litigation is not a sufficient basis for concluding that requiring depositions in the present case would be unduly burdensome, duplicative, or harassing. In addition, paragraph 8 of the additional provisions of the Scheduling Order entered in this case limits depositions to "a single, seven-hour day, unless otherwise agreed by the parties or ordered by the Administrative Law Judge." This time limitation further helps ensure that the Non-parties will not be unduly burdened by appearing for deposition in this case.[1]

[1] Intel notes that paragraph 21 of the Scheduling Order's additional provisions permits retaking depositions of deponents from the AMD litigation. That paragraph provides that AMD depositions shall be included as part of the record in this proceeding but that "nothing in this paragraph in any way limits either party from taking discovery in this proceeding, including discovery duplicative of that taken in the AMD Delaware litigation . . ." As non-parties, HP, Groudan, Kim, and Lee are not bound by this provision.

C.

The Non-parties request in the alternative that, if the depositions are permitted, then Intel should be precluded from questioning Groudan, Kim, and Lee on any subject about which the deponent testified at his AMD deposition. The request is denied. Such a restriction on the scope of the deposition appears more likely to create further disputes, which is not in the interests of the deponents, the parties, or the proceedings. Moreover, Intel will necessarily be mindful of the seven-hour time limitation, which is likely to encourage Intel to be efficient in its questioning and discourage Intel from duplicating prior lines of questioning.

The Non-parties further request that, if the depositions are to proceed, that Intel should be required to reimburse HP, Groudan, Kim, and Lee for "all of their costs (including attorneys' fees) incurred in preparing for and providing any such depositions." Motion to Quash at 7. This request is also denied. The Commission Rules do not provide for reimbursement of costs or expenses in connection with taking depositions. With respect to compliance with document subpoenas, however, the Commission has held that a "subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable." *In re Int'l Tel. & Tel. Corp.*, No. 9000, 1981 FTC LEXIS 75, at *3 (March 13, 1981); *see In re North Tex. Specialty Physicians*, Docket No. 9312, 97 F.T.C. 202, 2004 FTC LEXIS 18, at *7 (Feb. 4, 2004) (denying cost reimbursement because the subpoena did not impose an undue burden on the non-party); *In re R.R. Donnelley & Sons Co.*, No. 9243, 1991 FTC LEXIS 268, at *1-2 (June 6, 1991) (holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena").

To determine whether expenses are "reasonable," the Administrative Law Judge "should compare the costs of compliance in relation to the size and resources of the subpoenaed party." *In re Int'l Tel. & Tel. Corp.*, No. 9243, 1981 FTC LEXIS 75, at *3 (March 13, 1981) (*citing SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979)). The Non-parties have offered no information on their resources or the estimated costs of complying with the deposition subpoenas. Moreover, Groudan, Kim, and Lee are employees of HP, and are being deposed in connection with their knowledge as employees of HP. It is reasonable to assume that their costs are properly borne by HP in the first instance, and according to Respondent, HP had sales of over $114 billion last year. In summary, there is no basis for concluding that the costs to Groudan, Kim, and Lee, or to HP, in connection with these depositions are unreasonable.

IV.

For the reasons stated herein, the Motion of Non-parties HP, Groudan, Kim, and Lee to Quash Subponeas *Ad Testificandum* issued by Intel, and their alternative requests

for a limitation on the questioning and for reimbursement of costs, are DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 28, 2010