

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



In the Matter of)
)
)

EVANSTON NORTHWESTERN HEALTHCARE)
CORPORATION,)
)

and)

ENH MEDICAL GROUP, INC.,)
Respondents.)
_____)

Docket No. 9315

**ORDER ON BAIN & COMPANY, INC.'S MOTION TO QUASH OR LIMIT
COMPLAINT COUNSEL'S SUBPOENA *DUCES TECUM* AND FOR A
PROTECTIVE ORDER LIMITING DEPOSITION DISCOVERY**

I.

On May 24, 2004, non-party Bain & Company, Inc. ("Bain") filed a Motion to Quash or Limit Complaint Counsel's Subpoena *Duces Tecum* and for a Protective Order Limiting Deposition Discovery ("Motion to Quash"). On June 2, 2004, Complaint Counsel filed its opposition to the motion ("Opposition"). For the reasons set forth below, Bain's motion is **GRANTED IN PART** and **DENIED IN PART**. Bain's request for oral argument is **DENIED**.

II.

Non-party Bain moves to quash or limit request number four in Complaint Counsel's subpoena *duces tecum* dated May 5, 2004. Bain argues that this request should be quashed because of Complaint Counsel's failure to explain why the information sought is relevant to this proceeding; because the information sought is not relevant to this proceeding; because Complaint Counsel has failed to demonstrate that it has a substantial need for such information; because Complaint Counsel fails to show why it could not obtain this type of information from other sources; and, because it imposes undue discovery burdens on a non-party. In addition, Bain seeks a protective order limiting deposition discovery against past and present Bain employees, asserting that the depositions impose a substantial burden on a non-party. In the alternative, Bain requests that the length of the depositions be limited.

Complaint Counsel contends that the subpoena *duces tecum* is reasonably tailored to request relevant information; that Bain's advice on hospital-health plan contract negotiations is directly relevant to the core issues in this proceeding; that the document request is not unduly burdensome; that the current protective order adequately protects Bain's confidentiality concerns; and, that the depositions of Bain's employees and former employees are warranted.

III.

A. Subpoena *duces tecum*

Request number four of Complaint Counsel's May 5, 2004 subpoena to Bain seeks "[a]ll documents related to any analysis or model Bain developed or prepared for hospital-health plan contract negotiations including, but not limited to, any analysis or model of negotiations developed for" another client. Motion at 4. Bain represents that it has no objection to the production of documents relating to ENH. Motion at 4. Bain objects, however, asserting that information about other clients in different geographic regions is not relevant to this case.

Discovery sought in a proceeding before the Commission must be "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." 16 C.F.R. § 3.31(c)(1); *Federal Trade Commission v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). However, discovery may be limited if the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive, or if the burden and expense of the proposed discovery outweighs its likely benefit. 16 C.F.R. § 3.31(c)(1). Further, the Administrative Law Judge may limit discovery to preserve privileges. 16 C.F.R. § 3.31(c)(2).

Complaint Counsel asserts that the requested discovery is relevant because Bain provided advice and recommendations to ENH on its negotiations with payers and those negotiations with payers are directly related to allegations in the Complaint. Opposition at 3-4 (and testimony cited therein which is marked confidential). Complaint Counsel argues that "[u]nderstanding the evolution of Bain's recommendations on hospital contract negotiations, including analysis of leveraging increased market clout, informs the evaluation of the recommendations given to and adopted by ENH." Opposition at 5. Complaint Counsel asserts that the information may illuminate why Bain made specific negotiating strategy recommendations to ENH and potential negotiating leverage motivations behind the ENH merger. Opposition at 5.

The Complaint alleges violations against ENH, not Bain. While Bain's recommendations to ENH are relevant to ENH's actions, the motivations behind Bain's recommendations are not relevant to ENH's actions. The advice provided to and models developed and prepared for Bain's other clients in other geographic regions are not relevant to this action unless they were conveyed to ENH. To the extent that any analysis or model developed by Bain was developed or prepared on behalf of ENH or was provided to ENH, they are relevant and must be disclosed.

Analysis or models not developed or prepared for ENH and not provided to ENH need not be disclosed.

B. Subpoenas *ad testificandum*

Complaint Counsel may take the depositions of witnesses with relevant information during the discovery phase of a Part III adjudication where Complaint Counsel has previously conducted investigational hearings of those witnesses prior to the filing of a complaint. *In re Piedmont Health Alliance*, Docket 9314 (April 7, 2004); *In re Schering-Plough Corp.*, Docket 9297 (Nov. 7, 2001); *Hoechst Marion Roussel, Inc.*, Docket 9293, 2000 WL 33596436 (Oct. 12, 2000).


In *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the Supreme Court distinguished the Commission's investigatory power to obtain information from the judicial power to summon evidence in the course of litigation. *Id.* at 642; *see also Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it."). In *All-State Indus.*, 72 F.T.C. 1020, 1023-24, 1967 FTC LEXIS 159, *6-10 (Nov. 13, 1967), the Commission explained the different purposes of pre-complaint investigation versus post-complaint discovery procedures pursuant to the rules for adjudicatory proceedings. "[C]omplaint counsel may properly find, particularly after the issues are refined in a prehearing conference, that some additional documentation may be required to *round out, extend, or supply further details* for the particular transactions to be pursued. *Id.* (emphasis in original).

Complaint Counsel will be permitted to take depositions of witnesses with relevant information, even if the witnesses were questioned previously in investigational hearings. The depositions taken in the Part III adjudication are not duplicative because they are being taken in a different proceeding and for a different purpose. *In re Piedmont Health Alliance*, Docket 9314 (April 7, 2004). Moreover, absent evidence of discovery abuse during depositions, limitations on the duration of the depositions are not warranted. *See In re Schering-Plough Corp.*, Docket 9297 (Nov. 7, 2001).

IV.

For the reasons set forth above, Bain's motion to quash or limit Complaint Counsel's subpoena *duces tecum* is **GRANTED IN PART** and **DENIED IN PART**. Request number four of Complaint Counsel's May 5, 2004 subpoena to Bain will be limited to any analysis or models developed or prepared for ENH or provided to ENH. For the reasons set forth above, Bain's motion for a protective order limiting deposition discovery is **DENIED**.

ORDERED:

A handwritten signature in cursive script, reading "Stephen J. McGuire". The signature is written in black ink and is positioned above a horizontal line.

Stephen J. McGuire
Chief Administrative Law Judge

Date: June 15, 2004