



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
Office of Administrative Law Judges

In the Matter of)
)
)
Evanston Northwestern Healthcare)
Corporation,)
a corporation, and)
)
ENH Medical Group, Inc.,)
a corporation.)

Docket No. 9315

PUBLIC VERSION

**COMPLAINT COUNSEL’S MEMORANDUM IN RESPONSE
TO RESPONDENTS’ MOTION TO QUASH**

On September 8, 2004, Complaint Counsel noticed the deposition of David Loveland, ENH’s Senior Vice President of Corporate Relations, for September 13, 2004, the last day of discovery. This was no surprise to Respondents. Complaint Counsel had notified Respondents that Mr. Loveland was a potential witness in their Preliminary Witness List dated April 13, 2004. In addition, Complaint Counsel had notified Respondents that Mr. Loveland was a potential witness in their Revised Witness List dated August 6, 2004. Nevertheless, Respondents insist that they have not had adequate notice that Mr. Loveland might be deposed and that Complaint Counsel has acted “inexcusably.”¹

Respondents’ motion to quash Mr. Loveland’s deposition, however, was surprising in light of the cooperation between the parties to date. Faced with numerous depositions, both

¹ See Respondents’ Memorandum in Support of Motion to Quash Complaint Counsel’s Notice of Deposition, dated September 9, 2004.

parties have scheduled (with leave of the Court) a limited number of depositions after the September 13, 2004, discovery cut-off date. Respondents did not even consider Complaint Counsel's proposal to do the same with respect to Mr. Loveland's deposition,² even though they recognized that "... the tight deadlines imposed by the Court render compromise mutually advantageous."³

Respondents' motion to quash is unwarranted. Complaint Counsel's notice of Mr. Loveland's deposition was prompted, *inter alia*, by the testimony of Jeffrey H. Hillebrand who -- at his deposition only six days earlier, on September 1 and 2, 2004 -- testified that Mr. Loveland was responsible for keeping the minutes of the meeting of the Evanston Northwestern Healthcare Board of Directors on February 3, 2000. *E.g.*, Hillebrand Dep. at 318, 319, 386, 404, 405, 428-29, 430-31. In the minutes of these meetings, Mr. Hillebrand explicitly linked Respondents' price increases to the merger: "Mr. Hillebrand commented on the recent renegotiation of managed care contracts and the *"added value" as a result of combining the medical staffs and hospitals.*" See Hillebrand Dep. at 427 (italics added).

As a witness who had been overly-prepared for his deposition, [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

² Indeed, Respondents did not even mention this alternative in their moving papers.

³ Respondents Opposition to Motion to Compel dated September 2, 2004, at 4.

[REDACTED]

Hillebrand Dep. at 427-28 (italics added). Mr. Hillebrand then criticized Mr. Loveland's ability to keep good records:

[REDACTED]

[REDACTED]

Hillebrand Dep. at 428 - 429 (italics added).

Finally, Mr. Hillebrand went so far as to label Mr. Loveland's work "nonsensical":

[REDACTED]

Hillebrand Dep. at 435 - 437 (italics added). Under these circumstances, Mr. Loveland's

deposition is clearly appropriate.

Second, under these circumstances, Complaint Counsel's notice was not untimely. The Commission's Rules require the parties to give "reasonable notice" of a deposition, *see* Rule 3.33(a), but the Rules do not set a specific time limit. Similarly, Rule 30(b)(1) of the Federal Rules of Civil Procedure – which are properly considered here for guidance, *see* FTC Operating Manual § 10.7 – does not set a fixed time limit, either. Here, Complaint Counsel noticed Mr. Loveland's deposition three business days after completing Mr. Hillebrand's deposition. Under the circumstances, this constituted "reasonable notice."

Absent any specific time limits in the applicable rules, Respondents insist that it is appropriate for them to import the fixed time limits in the local rules that a few federal district courts have adopted for practice before those courts. Obviously, it is novel to suggest that the Court should adopt fixed time limits for noticing depositions that are not contained in the Commission's own Rules or the Federal Rules. In any event, these district courts have adopted time requirements that are very flexible.⁴ Further, these standards are not uniform: other federal courts, such as the Southern District and the Eastern District of New York,⁵ do not any establish specific time limits for noticing depositions. Finally, in the cases cited by Respondents, the courts realized that "what is reasonable depends on the circumstance of the case." *In re:*

⁴ Further, the local rules cited by Respondents are not absolute; they recognize that shorter notice periods are regularly appropriate. *E.g.*, D.D.C Local Rule 30.1 (shorter notice period for good cause show); D. Kan. Local Rule 30.1 (same); D.Del Local Rule 30.1 (five days "unless otherwise ordered by the court"). In this light, now that Respondent have, through the filing of the motion to quash, gained the purportedly necessary time to prepare for Mr. Loveland's deposition, Complaint Counsel should be permitted to proceed with the discovery.

⁵ <http://www.nysd.uscourts.gov/rules/rules.pdf>

Stratosphere Corp. Sec. Litigation, 183 F.R.D. 684 (D. Nev. 1999).

Here, Respondents knew that Mr. Loveland was a potential witness and that his deposition might be necessary. Further, Complaint Counsel promptly noticed Mr. Loveland's deposition upon receiving the testimony of Mr. Hillebrand. Thus, the six day notice was reasonable under the circumstances of this case.

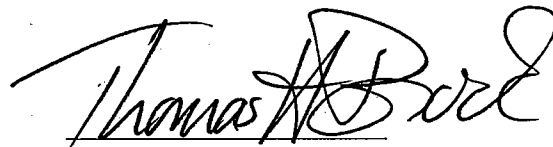
CONCLUSION

For the foregoing reasons, Respondents' motion to quash the notice of deposition of David Loveland should be denied.

Respectfully submitted,

Dated: _____

9/14/04



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing documents were served on counsel for the respondents by electronic mail and first class mail delivery:

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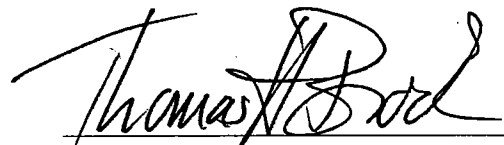
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