UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
Evanston Northwestern Healthcare Corp., a corporation, and	)	Docket No. 9315 **REDACTED FOR PUBLIC FILING**
ENH Medical Group, Inc., a corporation.	)	

MEMORANDUM OF BAIN & CO. IN SUPPORT OF ITS MOTION TO QUASH OR LIMIT COMPLAINT COUNSEL'S SUBPOENA DUCES TECUM AND FOR A PROTECTIVE ORDER LIMITING DEPOSTION DISCOVERY

Pursuant to Section 3.34(c) of the Federal Trade Commission's Rules of Practice, nonparty Bain & Company, Inc. ("Bain") moves to quash, in part, Complaint Counsel's subpoena *duces tecum* dated May 5, 2004 and for a protective order limiting deposition discovery. Bain requests oral argument before the Administrative Law Judge because of the paramount importance of this motion to Bain's business.

INTRODUCTION

Nonparty Bain is in the business of strategic consulting — providing advice at the highest levels of corporate decision making. Affidavit of Charles M. Farkas ("Farkas Aff.") ¶2, (appended hereto as Attachment A). Such consulting often involves the collection of key strategic and competitively sensitive information. *Id.* Bain's clients place substantial weight on its scrupulous confidentiality and Bain enters into confidentiality agreements to protect client confidences. *Id.* ¶ 3. Discussion of client matters is closely restricted within Bain itself. (*Id.* ¶¶ 2 and 3).

This motion concerns the subpoena *duces tecum* that Complaint Counsel has served on

Bain. In addition, Complaint Counsel will issue three subpoenas *ad testificandum* requiring the testimony of two Bain employees and a former employee.[1] These subpoenas purportedly relate to the enforcement action brought by the Commission to challenge the merger of Evanston Northwestern Healthcare ("ENH") with Highland Park Hospital ("Highland Park").

Bain's sole connection to this action is as a fact witness, Bain having consulted to ENH at the time of the merger. Bain has not been retained as an expert witness in this litigation. (Farkas Aff. ¶ 4). Bain does not enter into engagements as an expert witness, for several reasons — including the confidentiality concerns that are implicated by the current subpoena, *i.e.*, the possibility that Bain might be compelled to disclose the confidences of clients who are not parties to the litigation. (*Id.*) Bain clients would become reluctant to discuss their business issues candidly if they believed that their confidential files were subject to subpoena in unrelated matters. (*Id.*)

Bain does not object to the subpoena *duces tecum* insofar as it relates to consulting work performed for ENH. Bain has already provided substantial discovery regarding work done for ENH in connection with the merger and, as is set forth below, Bain does not object to supplementing that discovery to include other work for ENH, which is a party to this action. Nor does Bain object to providing relevant deposition testimony. Bain has already produced Charles M. Farkas, the lead partner on the ENH engagement for a deposition in the investigative phase of this case. He testified at length, and without significant objection, about Bain's work for ENH.

Bain does object to the current subpoenas for two reasons. First, Bain objects to disclosing work performed for other clients. The current subpoena *duces tecum* calls for all work done by Bain during the past fourteen years relating to contract negotiations in the hospital-

[1] Bain's counsel also will represent Kim Ogden, a former Bain employee, who Complaint Counsel intends to serve with a testimonial subpoena.

health plan field. Bain's consulting work for other clients is performed under confidentiality agreements and is unrelated to any ENH engagement. *Id*. ¶ 7. Second, Bain objects to multiple depositions of Bain witnesses called for by the subpoenas *ad testificandum* because such depositions threaten to be cumulative, redundant and irrelevant. Complaint Counsel has so far requested the deposition of three Bain witnesses — the redeposition of Mr. Farkas, and the depositions of Bain partner Phyllis Yale and of Kim Ogden, a former Bain employee who was the case team manager for the ENH engagement. In addition, Complaint Counsel has threatened to take the depositions of nine additional Bain witnesses, including junior consulting staff (none of whom is still employed by Bain), graphics staff and the Bain executive assistants who worked for Mr. Farkas and Ms. Yale.

Bain tried, without success, to negotiate reasonable limits on such discovery in the Section 3.22 conference. (Cohen Aff., ¶ 2, appended hereto as Attachment B).

FACTUAL BACKGROUND

The current subpoena is the second round of discovery issued to Bain in connection with the ENH Highland Park merger. Initially, Bain received a subpoena *duces tecum* in connection with the investigation of the merger. Bain received a broad document subpoena; following negotiation with staff Bain produced, by agreement, two categories of information: 1) the documents most directly related to the merger and 2) documents relating to Bain's work regarding employee expenses. (Cohen Aff. ¶ 2, appended hereto as Attachment C). Staff reviewed these documents and did not seek the production of any additional material.

The current subpoena seeks four categories of documents: 1) documents relating to work performed for ENH in connection with the Highland Park merger; 2) documents providing current home and personal information of the employees who worked on the ENH/Highland

Park merger; 3) documents relating to all Bain work for ENH over the past 14 years; and 4) "[a]ll documents related to any analysis or model Bain developed or prepaid for hospital-health plan contract negotiations including, but not limited to, any analysis or model of negotiations developed for the REDACTED Healthcare System in Boston" (hereafter "REDACTED").[2]

Bain does not object to the production of documents relating to ENH -- ENH is a party to this litigation and can itself move to quash any parts it deems to overreach. Bain does, however, object to Request No. 4, which calls for Bain's work for nonparties.

The slim thread of "relevancy" on which Complaint Counsel seeks to hang such broad and burdensome discovery relating to Bain's other clients is the investigative deposition testimony of Jeffrey H. Hillebrand, the Chief Operating Officer of respondent ENH, that Bain had advised ENH "based on" its "experience with the partner system in Boston in regards to both rationalization of services as well as managed negotiating tasks." (Hillebrand Dep. at 37-38). The broad, general advice that Mr. Hillebrand said that he received from Bain in this regard was: "to work together with the doctors," because "managed care companies try to divide and conquer the physicians in the hospitals." (*Id*.)

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[2] The subpoena provides in pertinent part:

1. All documents relating to any consulting studies, research, analyses, recommendations or other work that the company performed for Evanston Northwestern Healthcare, ENH Medical Group, Highland Park Hospital, or the Northwestern Healthcare Network, including, but not limited to, documents related to the relevant transaction, and all notes, data, interviews reports, work papers, research and back-up documentation of every kind.

2. Documents sufficient to show the current place of employment and personal residence, including any forwarding address and telephone number, of the following present or former Bain employees: Melanie Hogan, Kim Ogden, Andrea Dunlap, Will Fox, Holly Bolderbrook, Chris Merchant, William Foster, Dean Profis, Eve Harmon, and Anthony Lim.

3. All documents relating to the time spent, expenses incurred, and work done by Bain & Company employees for Evanston Northwestern Healthcare, ENH Medical Group, Highland Park Hospital, or the Northwestern Healthcare Network.

4. All 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 the REDACTED Healthcare System in Boston.

As Mr. Farkas makes clear in his attached affidavit, however, Bain did not provide ENH with the consulting advice given to REDACTED or any other healthcare clients, nor did he provide him with any written material from REDACTED, or any other Bain client. (Farkas Aff. ¶ 9). As in the case of any other professional, all of Mr. Farkas' work is informed to some extent by skill or knowledge obtained in past work for other clients. *Id*. The analysis and advice that Bain provided to ENH, however, was specific to the unique facts and circumstances confronting ENH. Bain does not object to producing and disclosing in full the analysis provided to ENH. *Id*. Bain does, however, strongly object to disclosing advice given to other clients who are not parties to this litigation as required by Request No. 4.

In addition to Bain's prior document production, on July 14, 2003 Mr. Farkas testified pursuant to a subpoena *ad testificandum* at a day-long deposition. Mr. Farkas testified fully about the work that Bain has done for ENH, including advice regarding the economic survival of ENH, an academic teaching hospital. He testified specifically about Bain's work for ENH at the time of the Highland Park merger. He also testified about annual meetings that Mr. Farkas and others at Bain had to discuss strategic initiatives, and strategic acquisitions, including Highland Park. He named various other strategic REDACTED that he had discussed with top ENH executives. He also testified concerning the reasons that a merger, either with Highland Park, and/or other hospitals, would significantly enhance ENH's competitive efficiencies. (*See* Investigational Hearing of Charles M. Farkas, July 14, 2003, Tr. at 43-46, appended hereto as Attachment C.) He further testified regarding alternative ways in which ENH could improve its competitive efficiencies.

Now, Complaint Counsel seeks to redepose Mr. Farkas and to take the deposition of a second Bain partner, Phyllis Yale, and of former Bain employee Kim Ogden. In addition,

Complaint Counsel threatens to depose the other nine employees (only two of whom are currently employed by Bain), executive assistants included, who had anything to do with such consulting work. Complaint Counsel has refused to justify the relevancy of such discovery. (Cohen Aff. ¶ 2). Accordingly, Bain moves for a protective order against such discovery, requiring Complaint Counsel to demonstrate to the Commission why such further discovery is necessary.

ARGUMENT

I. THE SUBPOENA *DUCES TECUM*

Complaint Counsel's subpoena should be quashed to the extent that it seeks any documents relating to Bain's work for other clients. As set forth below, such information is not relevant to this proceeding because Complaint Counsel cannot demonstrate that it has a need, much less a substantial need, to justify obtaining such information from a nonparty regarding other nonparties. Moreover, even if such information were relevant, Complaint Counsel is unable to demonstrate that it could not solicit such information from other sources in order to impose less cost and less burden on a nonparty. Finally, the prejudice that Bain — and Bain's clients, who have every legitimate expectation of confidentiality — would suffer as nonparties outweighs any conceivable benefit Complaint Counsel would derive.

A. Request No. 4 Should be Quashed Because of Complaint Counsel's Failure to Explain Why The Information Sought Is Relevant to This Proceeding

FTC Rule of Practice 3.22(f) requires, in part, that each motion to quash filed pursuant to Rule 3.34(c) include a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion. Counsel has had several such discussions with Complaint Counsel. (Cohen Aff. ¶ 2) In each of these discussions, counsel repeatedly asked Complaint Counsel why

Bain's consulting work for other clients, who are all unaffiliated with the Respondent, was relevant to this proceeding. Complaint Counsel never offered counsel even a theory as to why such information would be relevant but rather insisted that "unless" Bain's counsel were "perfectly blind" she "would see the relevance" for herself. (*Id*.)

Complaint Counsel's approach has put nonparty Bain at a substantial disadvantage in attempting to assess the reasonableness of Complaint Counsel's discovery. If Complaint Counsel believed the materials described above were truly relevant, they should have taken appropriate action by explaining their theory instead of putting a nonparty to the substantial cost and burden of submitting this motion in order to preserve its rights. It would be appropriate to deny Complaint Counsel the unfettered and limitless discovery they seek on this ground alone. *Cf. In the Matter of Rambus Incorporated*, Order Denying Complaint Counsel's Motion to Compel An Additional Day of Deposition Testimony of Richard Crisp dated March 12, 2003.

B. Response No. 4 Should be Quashed Because the Information Sought is Not Relevant to This Proceeding

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 defenses 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). *Accord* Fed. R. Civ. P. 26(b)(1) (permitting only production of non-privileged documents that are "relevant to the subject matter" or "reasonably calculated to lead to the discovery of admissible evidence"). The question, therefore, is whether the subpoena seeks information that is reasonably expected to be "generally relevant to the issues raised by the pleadings." *In the Matter of Rambus Incorporated*, 2002 FTC LEXIS 90, *4-*5 *quoting In re Kaiser Aluminum & Chemical Corp.*, 1976 FTC LEXIS 68 at *4 (Nov. 12, 1976). Thus, the

"relevancy of the information sought is determined by laying the subpoena along side" the pleadings. *Id*. at *5.

The complaint challenges the merger between ENH and Highland Park as anticompetitive, alleging that this merger enabled ENH to engage in certain anticompetitive pricing practices in Cook and Lake Counties in Illinois.[3] There are no allegations regarding any acts or practices involving any other party or any other sections of the country outside of these two counties. Putting the subpoena *duces tecum* along side the pleadings demonstrates that Complaint Counsel's subpoena, to the extent it seeks information about work Bain has performed for other clients, may not be reasonably expected to yield relevant information, and therefore fails this test of relevancy. Discovery — even of a party — may be limited where the information sought is not relevant to the allegations of the complaint and therefore is overly broad in subject matter or geographic scope. *E.g., In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19, at *13 ("absent a showing of the relevancy of information pertaining to the geographic area beyond the Dallas-Ft. Worth Metroplex in Texas, Request Number 5 is [hereby] limited to documents comparing the cost or quality of medical services provided in the Dallas-Ft. Worth Metroplex in Texas.") (2004); *see also* 2004 FTC LEXIS 14, at *16 (same): 2004 FTC LEXIS 19, at *14 (same); 2004 FTC LEXIS 20, at *11 (same); *accord Compaq Computer Corp. v. Packard Bell Electronics, Inc.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995). In this case, Complaint Counsel alleges that ENH has violated Section 7 of the Clayton Act and Section 5 of the FTC Act in connection with its activities in parts of Lake County and Cook County, Illinois.

[3] The complaint alleges that the merger was anticompetitive in that it purportedly resulted in price increases to third party providers (¶1); enabled the ENH physician group to fix prices of physician services by negotiating with third party payers for uniform prices for salaried physicians and non-salaried, independent physicians" (¶2); and, following the merger, ENH "conducted negotiations with private payers by offering hospital services and physician services as a package" and "required private payers to accept its terms for both hospital and physician services or the termination of both hospital and physician contracts. (¶3).

Complaint ¶¶ 35-37. Yet, Request No. 4 seeks information about work done by Bain for all of its clients, whether in Boston or anywhere else in the country.

The subpoena seeks highly sensitive and confidential information that goes far beyond the subject of the consulting services that Bain provided to ENH in the two Illinois counties. In such circumstances, the Commission has customarily limited discovery from nonparties. In *North Texas Specialty Physicians,* Respondent sought "all" documents that nonparty insurers had submitted to Texas' Attorney General concerning business relationships with healthcare providers in Texas. Upon the objection of nonparties, the ALJ quashed the request as "over broad in that they seek all documents previously requested by the Office of Attorney General without regard to whether such documents are relevant to this proceeding." *E.g.,* 2004 FTC LEXIS 14, *10-*12.

The services Bain provided to other ENH clients cannot possibly be relevant to Complaint Counsel's case. Bain did not provide information about other clients to ENH. As Mr. Farkas states in his affidavit, "Bain did not provide ENH with the consulting advice given to REDACTED [Healthcare System in Boston] or any other healthcare system." Farkas Aff. ¶ 9. The testimony of Mr. Hillebrand that — Bain had advised ENH based on its experience with the REDACTED' system in Boston in regards to both rationalization of services as well as "managed care negotiating tasks," or that Bain accordingly advised the hospital "to work together with the doctors" to avoid divide and conquer strategies of managed care companies — consists of broad, general statements that give no specifics whatsoever about the work that actually had been done for REDACTED or any other client. This information, therefore, could not have been part of the Commission's decision to find that it had a "reason to believe" that a law violation has occurred with respect to Respondent's acts in the aforementioned Illinois

counties. Indeed, such advice would have no relevance as to whether Respondent's pricing practices in a different part of the country with different market participants was a violation of Section 5 of the FTC Act. Therefore, Request No. 4 should be quashed as irrelevant to the actions allegedly taken and geographic scope of the matters at issue in this proceeding.

C. Request No. 4 Should be Quashed Because Complaint Counsel Has Failed to Demonstrate That it Has a Substantial Need for Such Information

In nonparty subpoenas, relevance is not the only yardstick by which the reasonableness of a discovery request is measured. Courts have traditionally been particularly sensitive to unduly burdensome discovery requests served upon non-parties. *Echostar Communications Corp. v. News Corp.*, 180 F.R.D. 391, 394 (D. Colo. 1998) (*citing American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 738 (Fed. Cir. 1987) ("[T]he status of a person or entity as a nonparty is a factor which weighs against disclosure."). In fact, "[t]he standards for nonparty discovery . . . require a stronger showing of relevance than for simple party discovery." *Lexalt v. McClatchy*, 116 F.R.D. 455, 458 (D. Nev. 1986) (documents deemed irrelevant in the hands of a nonparty); *see also Bio-Vita, Ltd. v. Biopure Corp.*, 138 F.R.D. 13, 17 (D. Mass. 1991) (usual relevance standard does not apply to non-parties). Courts attach greater significance to the implications of sweeping discovery requests on non-parties. *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 48-49 (S.D.N.Y. 1996) (as nonparty to litigation, witness was entitled to consideration regarding expense and inconvenience).

Accordingly, in order to defend against a motion to quash a subpoena to a nonparty seeking proprietary information, the party seeking the information must satisfy a higher standard — the requesting party, in fact, must demonstrate a "**substantial need**" for the requested discovery. *R & D Business Systems v. Xerox Corp.*, 152 F.R.D. 195, 196 (D. Colo. 1993); *Mannington Mills, Inc. v. Armstrong World Indus., Inc.*, 2002 WL 745983 (D. Del. Apr. 25,

2002). Therefore, even if Complaint Counsel was able to articulate a need for these documents, that alone would be insufficient as it must demonstrate a substantial need, which it has failed to do.

In 1991, Congress amended Rule 45(c)(3)(B)(ii) of the Federal Rules of Civil Procedure in 1991 in part to address the type of improper discovery request that the FTC seeks here. See Fed. R. Civ. P. 45(c)(3)(B)(ii) & amend. note. Federal courts accordingly have quashed subpoenas to unretained experts similar to Complaint Counsel's subpoena to Bain in this case. For example, the Ninth Circuit in *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003) recently upheld the quashing of a subpoena in a copyright/trademark case concerning an artist's use of plaintiff Mattel's copyrighted product. Mattel had sought from a museum (which employed the defendant's expert) information on the market for the defendant's work, but the court quashed the subpoena, finding that it improperly sought to obtain what amounted to expert testimony from a non-retained expert. *Id*. at 814. The Court quoted the Advisory Committee Note to the 1991 amendments to the effect that Rule 45 was intended to provide: "appropriate protection for the intellectual property of non-party witnesses. . . . A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts." *Id*. *(quoting* Fed. R. Civ. P. 45 1991 amend. note).

Other courts have done the same, employing the protections provided by Rule 45, when faced with similarly improper discovery requests. *See Statutory Committee of Unsecured Creditors v. Motorola, Inc*., 218 F.R.D. 325, 326-27 (D.D.C. 2003) (finding that subpoena issuer failed to meet threshold showing "substantial need of the testimony or material that cannot otherwise be met without undue hardship," where subpoena issuer could have commissioned its own similar study at its own expense); *Act, Inc. v. Sylvan Learning Systems, Inc*., 1999 U.S. Dist.

7055 (May 14, 1999) (party in antitrust case failed to show substantial need for non-party's market information, where that information could be obtained from its own internal research); *Schering Corp. v. Amgen, Inc*., 1998 U.S. Dist. LEXIS 13452 (Aug. 4, 1998) (subpoena issuer had not met substantial need threshold where it did not show that subpoenaed party was a "unique witness," and it could have retained its own expert to provide the same information). Because the FTC is seeking what amounts to expert testimony from an unretained expert in hospital-health plan contract negotiations — Bain — and because it has not shown a "substantial need" for such material or an "undue hardship" that would result from its denial, this Subpoena should be similarly quashed or limited to prevent such an abuse of discovery.[4]

D. Request No. 4 Should be Quashed Because Complaint Counsel Fails to Show Why It Could Not Obtain This Type of Information from Other Sources

Under Rule of Practice 3.31(c), discovery "shall be limited" if the "discovery sought is … obtainable from some other source that is more convenient, less burdensome or less expensive." 16 C.F.R. § 3.31(c). *See In re James Carpets, Inc.*, 81 F.T.C. 1062 (1972) (ALJ should have considered whether material could be obtained elsewhere).

Any information that Bain may possess regarding healthcare industry practices is not unique to Bain. Complaint Counsel has not demonstrated and cannot demonstrate, as they must under FTC Rule of Practice 3.31(c), that they cannot obtain such general information about the healthcare industry from other sources. Indeed, Complaint Counsel could easily hire one or more industry consultants to obtain such information to the extent such information would in any way be relevant to the complaint allegations. Complaint Counsel's ability to obtain generalized

[4] Indeed, Commission Rule 3.31(c)(3) requires a party seeking discovery materials from a non-testifying retained expert that were prepared *in anticipation of litigation* to demonstrate a substantial need for that discovery. Bain, in contrast, was not retained in this case as a nontestifying expert. Bain does not provide expert testimony precisely so as to avoid the client confidentiality issues implicated here.

information about the healthcare industry through other avenues is another reason Request No. 4 should be quashed.

E. Request No. 4 Should be Quashed Because It Imposes Undue Discovery Burdens on a Nonparty

FTC Rule of Practice 3.31 prohibits discovery requests where "the burden and expense of the proposed discovery outweigh its likely benefit." 16 C.F.R. § 3.31(c)(1). "Even where relevance is established, the right of the requesting party to obtain documents is weighed against the prejudice that might be caused to non-parties in the event that production were ordered." *In the Matter of Schering Plough Corp.*, 2001 FTC LEXIS 199 (2001). This is particularly true where the contemplated depositions and the document requests implicate "the rights of third parties who have complied with investigatory demands and the public interest in minimizing disclosure of confidential documents produced in investigations." *In re Hoechst Marion Roussel*, 2000 FTC LEXIS 134, *13-14 (Aug. 18, 2000) (*citing King v. Department of Justice*, 830 F.2d 210, 233 (D.C. Cir. 1987)); *Black v. Sheraton Corp.*, 564 F.2d 531, 545 (D.C. Cir. 1977). The *Schering-Plough* and *Roussel* cases involved discovery directed to nonparty productions in other open and closed FTC cases or investigations. The prejudice to Bain as a nonparty is greater — the subpoena to Bain seeks, *inter alia*, documents not yet produced in connection with any litigation, as opposed to documents previously produced in other FTC cases or investigations.

Here, Bain is prejudiced for two reasons. First, the immediate physical costs of compliance to Bain outweigh any conceivable benefit. Complaint Counsel demands that Bain review all of its business files during the past 14 years to find documents that relate to analyses or models that Bain may have done concerning hospital-health plan negotiations anywhere in the country. Aside from the tremendous time and energy that such an undertaking would normally

entail, the enormity of this task is further exacerbated because many of Bain's files are stored off-site. The search and the retrieval costs on-site and off-site would be quite substantial. (Farkas Aff. ¶ 8), Even if these documents were relevant, this is a wholly unjustified burden under which to place a nonparty.

But more significantly, the prejudice to Bain's clients outweighs any conceivable benefit. The preservation of client confidences is essential to Bain's ability to attract and retain clients. (*Id*. ¶ 3) Indeed, the risk of subjecting its clients' files to court discovery unrelated to work done for that client is deemed so perilous to its business effectiveness that Bain refuses to undertake expert witness work. (*Id*. ¶ 4) Bain goes to great lengths to protect the confidentiality of such information. (*Id*. ¶ 3)

The confidentiality order entered in this action does not address Bain's concerns. First, disclosure to the parties to this action — Complaint Counsel and Respondent — will adversely impact Bain, because its business clients will become reluctant to retain and confide in Bain, if the confidential business information they supplied to Bain may be reviewed by the government, even where Bain's client is not a party to a government action. In addition, the information sought from Bain not related to this transaction at issue, but rather related to hospital-health plan negotiations generally. Such information is expert information to be obtained from any expert willing to serve. Bain should not be required, in effect, to act as an uncompensated expert for the government.

Although the disclosure of sensitive competitive information is not *by itself* a basis for denying discovery, *e.g., In the Matter of North Texas Specialty Physicians*, 2004 FTC LEXIS 20, the confidential and proprietary nature of the information sought has long been recognized by federal courts as a factor in limiting the scope of discovery that may be sought from a nonparty.

Micro Motion, Inc. v. Kane Steel Co., Inc., 894 F.2d 1318 (Fed. Cir. 1990) ("Confidential commercial information warrants special protection under Rule 26(c)(7)."") (*citing Smith & Wesson v. United States*, 782 F.2d 1074, 1082 (1st Cir.1986)). Courts have quashed subpoenas seeking proprietary information from non-parties in antitrust actions. *See United States v. Serta Assocs., Inc.*, 29 F.R.D. 136 (N.D. Ill. 1961) (quashing defendant's subpoena for pricing arrangements of competitor).

The "district courts have repeatedly resisted efforts to utilize the liberal federal discovery rules for the purpose of gaining access to proprietary, confidential business information from third parties who have no interest in the litigation." *In the Matter of the Application of J.A. Frates*, 1985 WL 2752 (S.D.N.Y. Sept. 25, 1985), at *1 (citing cases). That court quashed a subpoena from defendant Pantry Pride seeking information in a securities case from an investment advisor to plaintiff Revlon, finding the subpoena overbroad because it asked for all documents related to Revlon, containing no limitations on subject matter or time. *Id.* The court found that the investment advisor had a strong interest in its proprietary work of corporate analysis and valuation, and that "[t]o the extent that expert information about the value of Revlon stock in recent years is relevant to Pantry Pride in its defense against Revlon's charges of securities law violations, Pantry Pride cannot expect to get a free ride at petitioner's expense." *Id.* Courts have also strictly limited sweeping subpoenas to non-parties where proprietary information is sought. *Valujet Airlines, Inc. v. Transworld Airlines, Inc.*, 1996 WL 557851 (N.D. Ga. Jul. 12, 1996) (restricting subpoena to nonparty to very limited timeframe and subject matter).

The use of protective orders, such as the one entered in this case, does not negate the risks posed to a nonparty. *Litton Industries, Inc. v. Chesapeake & Ohio Railway Co.*, 129 F.R.D.

528, 531 (E.D. Wis. 1990) ("There is a constant danger inherent in disclosure of confidential information pursuant to a protective order"). Indeed, the concern Bain has that such a broad discovery request could damage its business applies regardless of whether the provisions of the protective order are fully implemented and abided by. That is because there is damage to Bain's business that is caused by the *perception* that the confidentiality of client information is jeopardized through the dissemination of this information beyond Bain, regardless of the safeguards implemented.

Bain recognizes that the Commission depends on certain types of limited information provided by competitors in these kinds of proceeding, *see, e.g., In the Matter of North Texas Specialty Physicians, supra.* This is not the case here. Bain is not a competitor and, as stated above, is only tenuously connected to this proceeding because it has provided some consulting services to ENH in the alleged relevant market. Therefore, even if work done by Bain for its other clients were in some way marginally relevant (which as a nonparty is the most relevant such information could ever be), the Commission's Rules of Practice require that Request No. 4 be quashed because of the potential damage such wholesale discovery may cause to Bain's business.

II. SUBPOENAS *AD TESTIFICANDUM*

As described above, nonparty Bain has already produced Mr. Farkas for an entire day of deposition testimony prior to the issuance of the complaint in this matter. Complaint Counsel now seeks to redepose Mr. Farkas, and to take the deposition of a second Bain partner Phyllis Yale and of former Bain employee Kim Ogden. In addition, Complaint Counsel threatens to depose the other nine employees, executive assistants included, who had anything to do with the ENH consulting work. Complaint Counsel has refused to explain the relevance of such

discovery including whether there are new areas of relevant inquiry that are necessary to justify the additional imposition of a substantial burden on a nonparty. (Cohen Aff. ¶ 2). Absent such an explanation, Bain is concerned that such testimony would be, at best, cumulative and redundant and, at worst, irrelevant and potentially prejudicial to its business. Accordingly, Bain moves for a protective order prohibiting such discovery unless and until Complaint Counsel shows cause as to why such further discovery is necessary and justified when such discovery would place substantial burdens on a nonparty.

In the alternative, nonparty Bain respectfully requests that the Court exercise its authority to impose reasonable limitations on the deposition discovery directed to Bain's present or past employee. Specifically, Bain proposes that the Court limit Complaint Counsel's direct and redirect examinations of each Bain deponent to four hours. *See In the Matter of Textron,* Order Re: Application, 1990 FTC LEXIS 548 (1990), (limiting Complaint Counsel's deposition of a nonparty witness they intended to call at trial to four hours where Complaint Counsel had previously interviewed *but not deposed* this individual). Further, in light of Complaint Counsel's intention to solicit non-relevant documentary information pursuant to its subpoena *duces tecum* to Bain, Bain also requests that the Court limit the subject matter of any testimony solicited through a subpoena *ad tesificandum* directed to a past or present Bain employee to consulting services provided by Bain to ENH.

CONCLUSION

Accordingly, for the foregoing reasons, Bain requests that the Administrative Law Judge limit Complaint Counsel's discovery in the manner described above and enter the attached proposed order.

Dated: May 24, 2004

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