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

In the Matter of	)	
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION,	)	
and	)	Docket No. 9315
ENH MEDICAL GROUP, INC., Respondents.	)	

ORDER ON ABBOTT AND TOWERS MOTION TO QUASH AND RESPONDENTS' MOTION FOR A LIMITED EXTENSION OF THE DISCOVERY DEADLINE

I.

On September 10, 2004, non-parties Abbott Laboratories ("Abbott") and Towers Perrin ("Towers") moved to quash or limit subpoenas *duces tecum* and a subpoena *ad testificandum* served by Evanston Northwestern Healthcare Corp. ("ENH") and ENH Medical Group ("Respondents"). On September 20, 2004, Respondents filed their opposition.

On September 13, 2004, Respondents filed a motion for leave to finish document discovery with Abbott and Towers and to conduct depositions of three employees of Abbott or Towers. On September 14, 2004, Complaint Counsel filed an opposition to depositions of fact witnesses occurring after September 30, 2004, but otherwise not opposing Respondents' motion for extension. On September 23, 2004, Respondents filed a motion for leave to file a reply and on that same date filed a reply. Respondents' motion for leave to file a reply is **GRANTED**.

II.

Abbott and Towers argue that even as voluntarily narrowed by Respondents, the subpoenas *duces tecum* are overly broad, unduly burdensome, and seek information that is available from other sources. Motion at 3. Abbott and Towers argue that the requests are geographically broad because they include three counties not described in the Complaint; that the time period of January 1, 1999 to the present is overly broad; that with respect to subpoenas issued to non-parties, the requesting party must demonstrate a substantial need for the requested discovery; that the requested information is available from other sources and Respondents cannot demonstrate a substantial need for the information; and that the subpoena *ad testificandum* is unnecessary and should be quashed. Motion at 4-9.

Respondents assert that the subpoenas seek relevant discovery through depositions of Towers employees Thomas Kuhlman and Elizabeth Shelley and Abbott's employee Lois Laurie who are identified as potential witnesses in Complaint Counsel's revised witness list. Respondents further contend that the discovery dispute centers around Towers' Drill Down Reports which were written for Abbott, provided to Complaint Counsel, and are mentioned in Complaint Counsel's revised witness list; that Respondents are entitled to the depositions because the witnesses at issue are on Complaint Counsel's witness list; that disputed requests in Respondents' subpoenas *duces tecum* are reasonably calculated to lead to the discovery of admissible evidence; and that Respondents are not seeking free expert discovery. Opposition at 2-13.

III.

A.

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). 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 outweigh 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).

Laying the subpoena along side the pleadings demonstrates that Respondents' subpoenas *duces tecum* seek documents that may be reasonably expected to yield relevant information. The Complaint and Answer clearly raise the issue of the relevant geographic market. Complaint ¶ 17; Answer ¶ 17. It is reasonable for Respondents to request information regarding a limited number of counties not identified in the Complaint. Respondents voluntarily agreed to limit the time period of the request to January 1, 1999 to the present. As limited, this request is reasonably relevant to the allegations of the Complaint which specifically allege actions from 1999 to 2003 and generally allege that the "merger of ENH and Highland Park enabled ENH to raise its prices to private payers above the prices that the hospitals would have charged absent the merger" without identifying a time limitation. Complaint ¶¶ 31, 32; Answer ¶¶ 31, 32.

In addition, information related to the Drill Down Reports, relied upon by Complaint Counsel, are clearly relevant. The argument of Abbott and Towers that the discovery requests are cumulative, duplicative, or available from some other source is undermined by their objection to request number eight regarding "[a]ll documents, information, materials and statistics used, cited, or relied upon in the preparation or drafting of the 'Health Care Drill Down' reports by Towers Perrin dated in November and December, 2001 and distributed to Abbott Laboratories." Motion, Ex. 1, ¶ 8; Opposition, Ex. C, ¶ 1. This information, as well as the other information requested, may not be available from other sources and is not duplicative.

Abbott and Towers bear the burden to show that compliance with the discovery requests would seriously disrupt its business operations. The burden of showing that the request is unreasonable is on the subpoenaed party. *In re Rambus Inc.*, 2002 FTC LEXIS 90, *9 (Nov. 18, 2002). Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. *Id.* Breadth alone is not sufficient justification to refuse enforcement of a subpoena. *Id.* Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business. *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). The burden is no less for a non-party. *In re Flowers Industries, Inc.*, 1982 FTC LEXIS 96, *14 (Mar. 19, 1982). Abbott and Towers, therefore, must put forth specific evidence that demonstrates such a disruption; a "general, unsupported claim [of burden] is not persuasive." *Kaiser Aluminum*, 1976 LEXIS FTC 68, *18.

Abbott and Towers have failed to meet their burden. Abbott and Towers rely on mere assertions that compliance would require "significant time and expense" and may require retrieval of files from off-site locations. Motion at 7. This is insufficient to support a limitation of the subpoena. *Kaiser Aluminum*, 1976 LEXIS FTC 68, *18. Moreover, Respondents have voluntarily agreed to limit the subpoena and have attempted to alleviate the burden through compromise. Opposition, Ex. C.

B.

The subpoena *ad testificandum* at issue seeks the deposition of Lois Laurie, an employee of Abbott, and a witness listed on Complaint Counsel's revised witness list. Opposition, Ex. A at 6. Respondents have demonstrated that the deposition is reasonably expected to yield relevant information. Respondents noticed the deposition on August 24, 2004, in sufficient time to meet the close of discovery deadline of September 13, 2004. Accordingly, Respondents will be permitted to take Laurie's deposition.

C.

Respondents will require a limited extension of the discovery deadline to complete the depositions of Lois Laurie, Thomas Kuhlman, and Elizabeth Shelley which were timely noticed prior to the close of fact discovery. In addition, Respondents will require additional time to receive the documents provided pursuant to the subpoenas *duces tecum* timely served on Abbott and Towers.

IV.

For the above stated reasons, the motion to quash or limit subpoenas filed by Abbott and Towers is **DENIED**. Abbott and Towers shall provide documents responsive to the subpoenas *duces tecum* as limited by Respondents in their Opposition at Ex. C, ¶ 1 on or before October 15, 2004. In addition, Abbott shall make Lois Laurie available for deposition on or before October 22, 2004. Respondents' Motion for a limited extension of the discovery deadline is **GRANTED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: September 28, 2004