

II.

Complaint Counsel moves for a protective order to limit all Respondents' discovery to a combined total of sixty interrogatories, sixty document requests, and sixty requests for admissions. Motion at 1. Complaint Counsel cites a discussion at the August 10, 2004 prehearing conference regarding whether the discovery limits apply per side or per party. Motion at 3. Complaint Counsel argues that "Respondents have launched an avalanche of irrelevant and repetitive requests and refused to provide information responsive to Complaint Counsel's discovery." Motion at 7. Complaint Counsel also contends that it is entitled to issue sixty identical discovery requests to each Respondent. Motion at 4-5.

Respondent Mowrey cites the Scheduling Order issued on August 11, 2004 which states that "[e]ach party is limited to a total of 60 document requests, 60 interrogatories, and 60 requests for admissions." Mowrey Opposition (quoting Scheduling Order ¶ 6). Mowrey cites the conclusion of the August 10, 2004 prehearing conference discussion of this issue where the Court indicates that it will "determine how to account for the several respondents in this proceeding." Mowrey Opposition, Exhibit B, at 28. Mowrey argues that Complaint Counsel does not meet the applicable burden to justify reconsideration of the Court's Scheduling Order; Complaint Counsel's motion ignores the most salient and relevant portions of the transcript of the prehearing conference; fairness and due process require that the limitations on discovery apply to each party, and not simply to each side; and contrary to Complaint Counsel's argument, Mowrey has not abused the discovery process. Mowrey Opposition at 6-15.

Respondent Dennis Gay contends that the Respondents have "separate and distinct interests and defenses" and notes that he, like other Respondents, has retained separate counsel to represent him. Gay Opposition at 1-2. Gay argues that the Scheduling Order clearly provides that the discovery limits apply to each party; imposing a discovery limitation on Respondents collectively is unfair and prejudicial; and the discovery propounded by Gay is relevant. Gay Opposition at 2-5.

The Corporate Respondents argue that the language of the Scheduling Order is plain and unambiguous; the parties relied on the language; Complaint Counsel waived its right to bring this motion by delaying filing the motion until the conclusion of discovery; and the motion seeks reconsideration rather than clarification of the Scheduling Order. Corporate Opposition at 3-6.

Respondent Friedlander joined and adopted the arguments made by the other Respondents. Friedlander Opposition at 1-2.

III.

Pursuant to Commission Rule of Practice 3.21, the Administrative Law Judge is required to hold a scheduling conference and issue a prehearing scheduling order. 16 C.F.R. §§ 3.21(b), 3.21(c). In this matter, the prehearing conference was held on August 10, 2004 and the Scheduling Order was issued on August 11, 2004. The Scheduling Order includes the following provision, which is at issue:

Each party is limited to a total of 60 document requests, 60 interrogatories, and 60 requests for admissions, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Additional discovery may be permitted only for good cause upon application to and approval by the Administrative Law Judge. Responses and objections to document requests, interrogatories, and requests for admission shall be due within 15 days of service.

Scheduling Order ¶ 6.

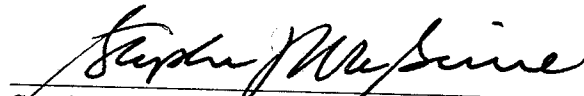
It is clear from reviewing the transcript of the prehearing conference that the question of whether the discovery limits would apply to each party or to each side was not resolved. Motion, Exhibit 3, at 28-31 (concluding that the Court will “determine how to account for the several respondents in this proceeding.”). Rather, the issue was resolved by the plain language of the Scheduling Order which indicates that the discovery limits apply to each party. Scheduling Order ¶ 6.

Complaint Counsel has not requested reconsideration of the Scheduling Order, nor would such reconsideration be appropriate at this late date. Because discovery has already been issued by the parties, limiting the discovery to a collective total at this point benefits the first Respondents to issue discovery requests and could result in some Respondents having none of their document requests, interrogatories, and requests for admissions answered by Complaint Counsel. Accordingly, the plain language of the scheduling Order will control.

IV.

For the above-stated reasons, Complaint Counsel's motion is **DENIED**. Pursuant to the Scheduling Order, Complaint Counsel is limited to sixty document requests, sixty interrogatories, and sixty requests for admissions to each Respondent. Each Respondent is limited to sixty document requests, sixty interrogatories, and sixty requests for admissions to Complaint Counsel.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: November 22, 2004