UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of **Evanston Northwestern Healthcare Corporation,** a corporation, and **ENH Medical Group, Inc.,** a corporation.	Docket No. 9315 **(Public Record Version)**

RESPONDENTS' OPPOSITION TO
COMPLAINT COUNSEL'S MOTION TO COMPEL

Respondents Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group, Inc., by counsel, hereby oppose Complaint Counsel's Motion to Compel Respondent's Production of Documents From Electronic Files.

INTRODUCTION

Complaint Counsel seeks an order that would require Respondents to spend **REDACTED** in search of electronic correspondence that may not even exist. Complaint Counsel makes three primary assertions to support such extraordinary relief: First, requiring Respondents to spend whatever it costs to produce documents from "three dozen" electronic document back-up tapes would not be "unduly burdensome on Respondents given the magnitude of this case." Mot. at 12, 17. Second, "core information central to this case" is stored on Respondents' backup tapes. Mot. at 2. Finally, Respondents must shoulder the entire financial burden associated with restoring, processing, publishing, reviewing and producing backup data "given the Commission's budget limitations." Mot. at 13. None of these assertions withstand scrutiny.

As demonstrated in the attached affidavit from undersigned counsel's vendor retained in this litigation to assist with the production of electronic documents, it will cost Respondents **REDACTED** to comply with Complaint Counsel's request that Respondents produce relevant documents from "three dozen" of its backup tapes. Indeed, Complaint Counsel proffers no evidence to dispute that Respondents must spend **REDACTED** to provide Complaint Counsel with pertinent data *from a single backup tape.* Respondents already have spent **REDACTED** concerning their ongoing production of electronic data. Any order requiring Respondents to incur additional expense certainly would violate 16 C.F.R. § 3.31(c)(1), which provides, in relevant part, that the Court "shall" limit discovery that is unduly burdensome. Indeed, Complaint Counsel's motion, if granted, would rise to the level of an unprecedented, pre-trial punitive award against Respondents that violates due process.

The burden of restoring, processing, publishing and searching for responsive documents from backup tapes substantially outweighs the purported value that any responsive documents found as a result of such search would bring to this case. In fact, the "core information central to this case" referred to by Complaint Counsel already has been produced in this litigation. To date, more than 1.2 million pages of documents have been produced and 45 witnesses have been deposed (with 23 witnesses scheduled to be deposed in the final two weeks of fact discovery). Moreover, Respondents are in the process or producing active electronic documents that may provide Complaint Counsel with the very type of correspondence it seeks from backup data. Significantly, Complaint Counsel has identified no specific non-produced document or set of documents that exists in the dozens of backup tapes it asks to have restored at Respondents' expense. Instead, Complaint Counsel merely surmises that this burdensome

exercise will reveal additional relevant correspondence. Such speculation is insufficient to warrant **REDACTED** "fishing expedition."

Complaint Counsel's refusal to contribute a dime to restoring, processing, publishing, reviewing and producing backup data belies its purported need for such information. The costs of restoring backup tapes is routinely shifted to the party seeking the production of such data. Complaint Counsel, however, summarily asserts that it should incur *none* of the cost of restoring dozens of backup tapes due to its purported "limited budget." This unsupported claim is dubious given that, to date, eleven attorneys have noticed appearances on Complaint Counsel's behalf in this litigation, these attorneys have noticed dozens of depositions in this case – including persons not specifically identified on any witness list – and Complaint Counsel has retained the service of *five* expert witnesses. In truth, Complaint Counsel hopes to devote all of its financial resources to prosecuting its claims while, at the same time, improperly diverting Respondents' time and financial resources from defending the allegations against them.

Finally, Complaint Counsel's motion should be denied because it was filed without any valid excuse on the eve of the September 13, 2004, close of fact discovery. The motion ignores the practical reality that the relief requested by Complaint Counsel would require an extension of this deadline by several months and, consequently, a significant delay in the hearing. The governing Rules do not permit such undue delay under these circumstances.

BACKGROUND

This is not a typical federal court proceeding in which the discovery period alone spans a year or more. Instead, this litigation has proceeded at an expedited pace consistent with the pertinent Rules. *See, e.g.*, 16 C.F.R. § 3.51. Non-expert discovery essentially began in mid-April and will close only five months later in mid-September. The scope of permissible discovery must be viewed in this context.

Complaint Counsel's motion coveys the misimpression that discovery during this five-month period has been extremely limited, and that pertinent correspondence "[f]rom January 1999 through December 2002" has not been produced. Mot. at 1. In reality, however, Respondents have incurred considerable expense and devoted substantial attorney time to review countless boxes of documents and produce in this litigation more than 258,000 pages of potentially relevant hard copy documents pertaining to 41 custodians. (This production supplemented the more than 85,000 pages of documents produced by Respondents during the underlying two-year investigation.) Complaint Counsel, in turn, has produced more than 535,000 pages of documents gathered over a two-year period from numerous third parties in the underlying investigation. And third parties have produced more than 346,000 additional pages of documents during the litigation. Most of these documents concern what Complaint Counsel has identified as the pertinent period, *i.e.*, January 1999 through December 2002. At this point, just six business days before the close of fact discovery, the parties have received all, or virtually all, documents pertaining to the claims and defenses in this action – including electronic documents.[1]

I. Respondents' Good Faith Efforts To Review And Produce Electronic Data.

The parties have resolved multiple discovery disputes without Court intervention, and without acrimonious exchanges all too typical in complex litigation. Both parties understand that the tight deadlines imposed by the Court render compromise mutually advantageous. To ensure as complete a production as reasonably possible, Respondents attempted to work with Complaint Counsel concerning the review and production of electronic documents. This task has been extremely challenging, to say the least, given that there are hundreds of thousands, if not

[1] Respondents have already denied the material allegations in the complaint, and also take issue with Complaint Counsel's additional unsupported factual assertions set forth in the motion.

millions, of electronic documents on Respondents' servers and the hard drives of its employees. The total amount of potentially relevant data exceeds 98 gigabytes ("GB") of material.[2] 12 GB of data are clearly "custodian specific," 33 GB are "Access" databases, and 53 GB are "loose files" or data stored in department shared drives. This significant amount of material is comprised only of what is currently on Respondents' servers and does not include archived information from backup tapes.

Respondents retained the services of an independent vendor **REDACTED**, which was chosen after a competitive bidding process, to discern the most efficient manner to process, review and produce electronic data given the confines of the expedited discovery schedule in this case. **REDACTED** at ¶¶ 4-5 (Ex. 1). Respondents and Fios derived a protocol that balances the parties' needs for relevant information with Respondents' right to avoid discovery requests that are unduly burdensome and unnecessarily cumulative (objections raised by Respondents to Complaint Counsel's requests for production). Respondents already have processed and reviewed a vast amount of electronic data – **REDACTED**. **REDACTED**, ¶ 9 (Ex. 2). Respondents also have retained temporary contract attorneys for the sole purpose of reviewing electronic documents – **REDACTED**. **REDACTED** at ¶ 3 (Ex. 3). This ongoing review of "active" (*i.e.*, non backup) electronic documents, when completed, will thus cost Respondents **REDACTED**, not to mention the cost of having undersigned counsel oversee this process and coordinate with Complaint Counsel on this issue.

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[2] As a guideline, each megabyte ("MB") of material is about 75 pages. Therefore, each GB to be reviewed is broadly estimated to be the equivalent of 75,000 pages of material.

As discussed in the letter dated August 11, 2004, from C. Klein to T. Brock ("Klein August 11 Letter"),[3] Respondents currently are reviewing their electronic data under three approaches. First, the "custodian specific" material is being reviewed by hand, document by document, and has been, and will continue to be, produced on a rolling basis in anticipation of upcoming depositions. Responsive, non-privileged documents in each custodian's email, hard drive, and home directory will be produced as quickly as possible (the process is almost complete) and grouped together under a Bates-range specific to that custodian. Respondents reasonably limited their searches of files to those custodians deemed most likely to have responsive and relevant material. This list of custodians has been provided to Complaint Counsel, which has raised no objection.

Second, the 33 GB of Access database materials will be reviewed for relevance and privilege. It is unclear at this point whether *any* of these materials are responsive to Complaint Counsel's requests for production. Respondents have agreed to confer with Complaint Counsel if and when responsive Access database materials are discovered.

Finally, the largest amount of material is "loose files" stored on hospital department shared drives. Because of the way documents are filed, it is impossible to search and compartmentalize the data by custodian. Therefore, the only way to review effectively this information – a great deal of which is likely non-responsive or duplicative of documents that otherwise have been, or will be, produced – is through electronic term searches, a process not objected to by Complaint Counsel. Respondents have generated a list of terms likely to distill relevant documents and is running them against the "loose files" in an attempt to find responsive

[3] Unless otherwise indicated, the letters from counsel addressed in this brief are all attached to Complaint Counsel's motion.

material. Such material will be reviewed and produced to Complaint Counsel as quickly as possible.

Respondents have voluntarily agreed to undertake this expensive and time-consuming review of electronic documents even though, at the end of the day and after the expenditure of **REDACTED**, it may be determined that all materially responsive documents had been previously produced in discovery. This exercise thus fully balances Complaint Counsel's blanket request for computer files "stored in, or accessible through, computer or other information retrieval systems" with Respondents' right to avoid unduly burdensome discovery. Mot. at 3.

II. Complaint Counsel's Insistence On The Burdensome Production Of Backup Tape Data.

Complaint Counsel has identified no specific document relevant to this litigation that purportedly has not been produced, or will not be produced pursuant to the ongoing electronic discovery protocol described above. Nor has Complaint Counsel identified any specific request for production that purportedly has not been satisfied. Complaint Counsel nonetheless claims to have the right to compel Respondents to undertake the enormously burdensome effort (both in terms of cost and time) of restoring archived data stored on backup tapes based on speculation that such data contains relevant information.

Respondents, like many companies, backup their servers in case of an emergency. Such backup tapes are rarely accessed in the ordinary business of corporate America or, for that matter, in litigation. In fact, Complaint Counsel cites no prior decision of this Court or the Commission in which the respondent was required to restore and review backup data. Respondents nonetheless carefully contemplated reviewing and producing material stored on backup tapes and investigated the scope and cost of such a review. Based on information from

its vendor, Respondents concluded that any backup restoration would necessarily be unduly burdensome. **REDACTED** at ¶¶ 7-10 (Ex. 1).

Respondents have roughly 7,000 backup tapes in its archives. There is no way for Respondents to determine where or what files are on any backup tape without restoring that entire tape. Therefore, to collect a complete set of documents pertaining to a particular custodian for the date range of the existing backup tapes, Respondents would have to restore all of the tapes to be sure the entirety of that person's data was collected. *Id.* at ¶ 7.

Respondents and Fios estimated that it would take between 3-5 hours to restore each tape and the total cost just to restore the material would be **REDACTED**. *Id.* at ¶ 8. These time and cost estimates do not include the enormous expense of processing and publishing restored data into a readable format, or the attorney time necessary to review the vast amount of material stored on the tapes to locate responsive material for production. *See* **REDACTED** at ¶¶ 4-8 (Ex. 2).

Due to the exorbitant cost and attorney time necessary to make the tapes available for review, Respondents refused to restore its backup tapes wholesale. This undertaking is clearly unduly burdensome, and this task could not reasonably be completed by Respondents within the tight discovery deadlines of this expedited litigation. Complaint Counsel tacitly acknowledged as much by not requesting in its motion that Respondents restore *all* of their backup tapes.

In response to the Klein August 11 Letter, Complaint Counsel asked Respondents (both orally and in writing) to look into the cost of producing data from a select number of backup tapes. *See, e.g.*, Letter dated Aug. 12, 2004, from T. Brock to C. Klein. Respondents did, in fact, look into this compromise, but determined that restoring even one backup tape would

be unduly burdensome. The letter dated August 13, 2004, from C. Klein to T. Brock ("Klein August 13 Letter") enclosed an estimate from **REDACTED** dated August 11, 2004 **REDACTED** stating that it would cost Respondents **REDACTED** to restore, process and publish for attorney review *a single backup tape*. **REDACTED** at ¶ 6 & Ex A (Ex. 2). This estimate, of course, does not include the attorney time involved in reviewing and producing pertinent restored data.[4] Complaint Counsel's proposal in its motion that Respondents restore and process "three dozen" backup tapes would cost Respondents well **REDACTED** in vendor fees alone. *Id.* at ¶ 8.

ARGUMENT

Complaint Counsel's motion is based on the erroneous assertion that Respondents have an absolute duty to conduct a virtually limitless search for all documents that are potentially relevant to this action – regardless of the cost involved in such a "fishing expedition." *See* Mot. at 17 ("[E]ven if the cost of responding to [Complaint Counsel's] discovery requests is large, it is not unduly burdensome on Respondents given the magnitude of this case."). This position, of course, improperly renders the universally acknowledged unduly burdensome limitation on discovery meaningless in complex litigation. *See, e.g., McPeek v. Ashcroft*, 202 F.R.D. 31, 33

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[4] Complaint Counsel misleads the Court when it purports to criticize the **REDACTED.** Mot. at 16. Complaint Counsel is well aware that the original estimate addressed merely the cost of restoring backup data, whereas the **REDACTED** to restore *as well as process and publish* data on a single backup tape into a usable format – a point explained orally to Complaint Counsel before it filed the motion. The Klein August 11 Letter accurately represents that it would cost **REDACTED** to "*restore* each [of the roughly 7,000 backup] tape[s]." (Emphases added.) **REDACTED**. The Klein August 11 Letter, however, did not estimate the cost of processing or publishing restored backup data because **REDACTED** had not provided an estimate of such cost at the time the Klein August 11 Letter was sent to Complaint Counsel. **REDACTED**. *See* **REDACTED** at ¶ 6 & Ex. A (Ex. 2). The discrepancy between the two estimates is thus easily explained. Complaint Counsel offers no declaration or proffer from a vendor suggesting that the **REDACTED** to restore, *process and publish* backup tapes is unreasonable.

(D.D.C. 2001); *Cognex Corp. v. Electro Scientific Indus.*, 2002 WL 32309413, at *4 (D. Mass. 2002) ("There is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case.").[5] As demonstrated below, Complaint Counsel's request that Respondents spend **REDACTED** to retrieve backup data that is likely to reveal information cumulative of that already produced conflicts with the discovery Rules, the Rule requiring an expedited hearing, and Respondents' due process rights.[6]

I. Complaint Counsel's Motion Should Be Denied Under The Discovery Rules.

The pertinent discovery Rule, 16 C.F.R. § 3.31(c)(1), provides in relevant part that "discovery methods otherwise permitted under these rules *shall* be limited by the Administrative Law Judge if he determines that (i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) The burden and expense of the proposed discovery outweigh its likely benefit."[7] (Emphasis added.)

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[5] This case along with all other unpublished cases cited in this brief is being provided to the Court in an addendum.

[6] As Complaint Counsel acknowledges, federal cases construing the pertinent Federal Rules of Civil Procedure "may be consulted for guidance and interpretation." Mot. at 7 n.10; *see also* FTC Operating Manual § 10.7.

[7] The similar balancing test in Rule 26 of the Federal Rules of Civil Procedure applies with equal force even when the underlying claim seeks equitable relief. *Cf. United States v. Duke Energy Corp.*, 214 F.R.D. 392, 394 (M.D.N.C. 2003) (United States brought action for equitable relief to enforce electric utility's obligation to obtain permits under the Clean Air Act, yet court ordered protective order precluding discovery of documents from the Department of Energy where "the relevance, if any, of Duke Energy's modified discovery requests seeking communications from DOE files, is outweighed by the burden of production."). Complaint Counsel, which concedes that Rule 3.31(c) is modeled after this federal balancing test, curiously asserts that Rule 3.31(c)(1)'s limits on discovery do not apply when "equitable relief is sought." Mot. at 7-8. The Commission – which is tasked with, among things, federal merger enforcement – itself adopted this rule without creating any exception that would allow Complaint Counsel to issue unduly burdensome and unreasonably cumulative discovery requests on public policy grounds.

As demonstrated below, Complaint Counsel's request that Respondents incur the exorbitant cost of restoring, processing, publishing, reviewing and producing archived data on backup tapes should be rejected under this Rule because the incredible burdens imposed by the requested relief far outweigh the probable benefits of such exercise. The motion also should be denied because Complaint Counsel has refused to incur any backup restoration costs.

A. The Motion Should Be Summarily Denied Because Complaint Counsel's Requested Relief Would Impose A Facially Unreasonable Burden On Respondents.

This Court needs to look no further than the Declaration of **REDACTED** to deny Complaint Counsel's motion. As that declaration from a **REDACTED** establishes, the order proposed by Complaint Counsel would require Respondents to incur vendor expenses of **REDACTED**. **REDACTED** at ¶ 8 (Ex. 2). This estimate, of course, does not include the cost of temporary and full-time attorneys necessary to review and produce potentially relevant documents from backup tapes – **REDACTED**.

This **REDACTED** burden is facially excessive and, therefore, Complaint Counsel's motion should be summarily denied on this basis alone. Pertinent precedent belies Complaint Counsel's unsupported argument that Respondents are entitled to incur any cost, no matter how exorbitant, so long as the case is complex and there is a possibility that the effort will reveal a limited number of documents with potential relevance to the underlying action.[8] Indeed, Complaint Counsel's request for such extraordinary relief is unprecedented.

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[8] *See, e.g., Wright v. AmSouth Bancorp*, 320 F.3d 1198, 1205 (11th Cir. 2003) ("The information sought must be relevant and not overly burdensome to the responding party."); *Cognex Corp. v. Electro Scientific Indus.*, 2002 WL 32309413 (D. Mass. 2002) (holding that the burden and expense of the proposed discovery outweighed its likely benefit, even though the court conceded that there would be documents on the backup tapes that had not been already produced, and the plaintiffs agreed to pay the cost of the search); *McPeek v. Ashcroft*, 202 F.R.D. 31, 33-34 (D.D.C. 2001) (noting that backup tapes were not intended to be used as archives, and that there was only a "theoretical possibility" that the search would yield relevant information: "The less likely it is [that the tapes contained relevant information], the more unjust it would be to make the agency search at its own expense."); *see also Medtronic Sofamor Danek, Inc. v. Sofamor Danek Holding, Inc.*, 2003 U.S. Dist. LEXIS 14447 (W.D. Tenn.

B. The Motion Also Should Be Denied On The Merits Because The Burden And Expense Of The Proposed Discovery Far Outweigh Its Likely Benefit.

Complaint Counsel's motion should be denied even if the Court found it necessary to weigh the burden of restoring and processing backup data against the likely benefits of such extraordinary effort (an exercise that, as demonstrated above, is unnecessary because the burden itself is facially unacceptable). As indicated above, the discovery Rules *require* this Court to limit discovery when "[t]he burden and expense of the proposed discovery outweigh its likely benefit." 16 C.F.R. § 3.31(c)(1). The circumstances underlying this case reveal that discovery must be limited to exclude backup tapes under this standard.

1. The Requested Review Of Backup Tapes Is Unlikely To Reveal Non-Cumulative "Core Information Central To This Case."

a. All, Or Virtually All, "Core Information" Has Been Produced Or Will Be Produced During The Ongoing Electronic Discovery Review.

As discussed above, more than 1.2 million pages of documents have been produced in this litigation, including a large amount of electronic correspondence and other documents. As detailed in Complaint Counsel's Answers and Objections to Respondents' First Set of Interrogatories (particularly the answers to interrogatories 1, 2, 9, 12, 17, 18), many of these documents purport to reflect "core information" pertaining to the claims in this lawsuit. In addition, Respondents are continuing the production process by reviewing hundreds of thousands of additional non-backup electronic documents. *Significantly, this ongoing production of electronic documents could provide Complaint Counsel with the very type of correspondence*

2003) (court held that production of backup data as a whole would be burdensome to the plaintiff and, therefore, shifting a portion of the discovery costs to the defendant); *Byers v. Ill. State Police*, 2002 WL 1264004, at *12 (N.D. Ill 2002) (holding that due to the cost of the proposed search and the plaintiffs' failure to establish that the search will likely uncover relevant information, the plaintiffs are entitled to the archived e-mails only if they are willing to pay for part of the cost of production); *Rowe Entertainment Inc. v. William Morris Agency*, 2002 WL 975713 (S.D.N.Y. 2002) (shifting costs of email production to the plaintiffs); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 U.S. Dist. LEXIS 3196 (E.D. La 2002) (ordering that cost of backup tape production be shifted).

sought in its motion. For example, most of the emails discussed in Complaint Counsel's motion were sent to or received from Dr. Joseph Golbus. Mot. at 9, 11. His electronic documents (which date back to January 24, 2000) are currently being reviewed and will be produced shortly. Complaint Counsel, therefore, has no basis to represent to the Court that they will lack "core information central to this case" absent an expensive and expansive review of backup data. Mot. at 2.

Complaint Counsel also glosses over the fact that it is highly questionable that *any* pertinent emails contemporaneous with the January 1, 2000, merger and the contract negotiations during 2000 even exist on Respondents' backup tapes. As discussed in the Klein August 11 Letter, *Respondents have no backup data pertaining to ENH servers from before June 2001. See* Klein Aug. 11 Letter at 3, 5; **REDACTED** at ¶ 3 (Ex. 4). In fact, because electronic information pertaining to former employees generally is deleted 90-days after termination of employment, Respondents' ENH backup tapes may not contain any information pertaining to witnesses such as **REDACTED**. Although Highland Park Hospital ("Highland Park") backup tapes exist from January 1, 1999, through May 2001, it is unclear who at ENH used the Highland Park server after the merger of the hospitals. *Id.* at ¶ 5. It is thus completely speculative as to whether the expensive process of restoring, processing, publishing, reviewing and producing archived backup data will reveal any *additional*, non-cumulative relevant documents pertaining to the first 1 ½ years after the merger under scrutiny.

Complaint Counsel thus seeks to require Respondents to spend **REDACTED** pertaining to backup tape discovery because there is a *chance* that the tapes *might* turn up pertinent documents that have not already been produced. Although Complaint Counsel cites to several documents that purport to shed light on internal communications concerning

contract negotiations at the time of the merger, it does not necessarily follow from this evidence that restoring backup tapes will yield similar documents or, for that matter, *any* additional document with potential relevance to this litigation. *See Medtronic Sofamor Danek, Inc. v. Michelson*, 2003 U.S. Dist. LEXIS 14447, at *14 (W.D. Tenn. 2003) (finding that defendant offered little evidentiary support for his implication that the plaintiff's "e-mail archives are replete with relevant communications."). Complaint Counsel makes no mention of any testimony or other evidence identifying specific documents that exist only on Respondents' backup tapes. For example, one might have expected Complaint Counsel to refer to testimony from Respondents' employees concerning particular correspondence that was not produced in discovery and should be on backup tapes. Instead, Complaint Counsel merely surmises that emails of a nature similar to the ones mentioned in the motion can be found among reams of backup data. This is pure conjecture.

Finally, Complaint Counsel's motion cites no authority to support its view that casual comments from Respondents' employees concerning contract negotiations constitute "core information" that is "central" to ultimate issues in this case. Indeed, it appears that Complaint Counsel is focusing, "[i]n particular," on backup information to support the price-fixing allegations in Count III. Mot. at 18. Complaint Counsel cannot seriously assert that Respondents need to incur costs of **REDACTED** to restore backup tapes so that Complaint Counsel can adequately prosecute the secondary charge of a purported "price fixing conspiracy." Mot. at 11. The premise of Complaint Counsel's theory in Count III is that ENH Medical Group's negotiation with third-party payors of certain contracts, known as "fee for service" contracts, was unlawful under Section 5 of the FTC Act. Unlike "classic" price-fixing claims, however, there is no allegation that the challenged activities were conducted in secret. To the

contrary, the negotiations in question generally were conducted face-to-face with the payors. While ENH Medical Group is prepared to defend the lawfulness of these negotiations at trial,[9] it is worth noting that it advised payors in writing before the litigation even began that it no longer wished to negotiate fee for service contracts and offered the payors the opportunity to cancel existing fee for service contracts without penalty. Nevertheless, FTC Staff has not only opted to proceed with the wasteful claim in Count III, it has engaged in extensive discovery concerning this claim and now demands the costly production of backup tape data.[10] To be sure, requiring Respondents to spend **REDACTED** in discovery to enable Complaint Counsel to prosecute a claim that essentially is moot would raise serious due process concerns.

b. No Authority Supports Complaint Counsel's "Fishing Expedition" For Additional Correspondence That May Not Even Exist.

Complaint Counsel believes it has the right to go on a "fishing expedition" at Respondents' expense. But neither the discovery Rules nor the Federal Rules of Civil Procedure authorize such an outing. *See, e.g., In re N. Am. Philips Corp.*, 1987 FTC LEXIS 72, at *3-*4 (1987) ("[I]nstead of using a rod and reel, or even a reasonably sized net, [the party seeking discovery] would drain the pond and collect the fish from the bottom. This exercise goes beyond the bounds set by the discovery rules.") (citation omitted); *Tolliver v. Fed. Republic of Nigeria*, 265 F. Supp. 2d 873, 880 (W.D. Mich. 2003) ("The mere hope that additional discovery may give rise to winning evidence does not warrant the authorization of wide-ranging fishing expeditions.").

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[9] It is not necessary at this time for ENH Medical Group to outline the wealth of evidence supporting its defense of Count III.

[10] The fact that Complaint Counsel is actively pursuing the wasteful allegations in Count III belies its assertion of a "limited budget" pertaining to this litigation.

The district court in *Cognex Corp. v. Electro Scientific Indus.*, 2002 WL 32309413 (D. Mass. 2002), rejected a similar "fishing expedition" invitation. There (like here), the defendant already produced both paper and electronic files from every current employee who worked on the disputed project, as well as all files that could be found of former employees who worked on the project. *Id.* at *1. The defendant also searched central paper and electronic repositories identified by employees, as well as off-site storage. *Id.* This production yielded more than fifty boxes of responsive documents. *Id.* Still, the plaintiff wanted the defendant to produce responsive documents on the defendant's 820 backup tapes, and (unlike here) was even willing to bear the cost of the production. *Id.* at *3. The district court, noting that the defendant's production "has already . . . exceeded any traditional standard for reasonableness," denied the plaintiff's motion to compel the production of backup tapes. *Id.* The court even conceded that a search of the backup tapes would most likely produce documents not already produced. *Id.* at 4. The court's ultimate holding rings true here: *"At some point, the adversary system needs to say 'enough is enough' and recognize that the costs of seeking every relevant piece of discovery is not reasonable."* *Id.* at 5 (emphasis added).

Similarly, Respondents already have produced (during an expedited discovery schedule) over 289,600 pages of hard copy and electronic documents, most of which cover the merger time-frame. And more electronic documents, including email, will be produced shortly. Now that we are near the close of fact discovery, Complaint Counsel asks this Court to require Respondents to incur extraordinary expense to comb archived data on backup tapes for additional potentially relevant correspondence. As succinctly put in *Cognex Corp.*: "[E]nough is enough." *Id.*

2. Complaint Counsel Had Ample Opportunity To Obtain The Information Sought.

As discussed above, the discovery Rules require this Court to limit discovery when, among other things: "The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought." 16 C.F.R. § 3.31(c)(1). This is the situation here.

Complaint Counsel could have required, but did not require, the production of the electronic information from the period at issue during the underlying investigation. During that investigation, Complaint Counsel served on ENH a subpoena *duces tecum* that requested various hard copy and electronic documents. That subpoena was modified in a letter dated October 3, 2002, from Paul Nolan, Esq. to T. Mark McLaughlin, Esq. ("Nolan October 3 Letter"). *See* Ex. 5. The end of that letter memorializes the parties' agreement to forgo the production of archived data on backup tapes and focus on non-backup electronic data on ENH's servers: "With respect to E-mail, we agree that you will provide only what is available presently and on-line in ENH's E-mail system." *Id.* at 3.[11]

Pursuant to the Nolan October 3 Letter, ENH produced electronic information during the investigation, as evidenced by the emails referenced in Complaint Counsel's motion – all of which were produced during the Part II investigation, not Part III discovery. To the extent Staff was dissatisfied with ENH's production of electronic documents during the underlying investigation, it could have sought the production of such information at that time – when it was more likely that emails from the pertinent period identified in the motion (*i.e.*, January 1999 through December 2002) could be found in active files on ENH's servers as opposed to solely on

[11] Complaint Counsel appears to have forgotten about this letter because it represents in its motion that it "is uncertain why even a few electronic documents for periods prior to June 2001 were produced, either during the Part II investigation or in the Part III discovery." Mot. at 10 n.11.

backup tapes. Complaint Counsel has known of the existence of backup tapes for two years. Now that fact discovery is about to close, it is far too late for Complaint Counsel to revisit that option and require Respondents to turn to archived backup data at their expense.

3. Third Parties With An Interest In This Litigation Are Not Restoring Backup Tapes.

Complaint Counsel also has provided no basis, in logic or parity, to support its view that Respondents alone carry the burden of incurring the extraordinary expense of searching backup tapes. Given the tight discovery schedule in this matter, third party payors with a clear "interest in the outcome" of this litigation (as found by this Court in its order dated July 7, 2004, denying Great-West Healthcare's Motion for Cost Reimbursement) have not, to Respondents' knowledge, produced any data from backup tapes. Nor have Respondents sought to compel any third party to produce such information. In fact, Respondents are still waiting to receive "active" electronic documents from most payors. Complaint Counsel has provided the Court with no authority to support its position that Respondents should be held to a different standard than other parties with a clear interest in this lawsuit. *Cf. Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992) (Where nonparty from which documents were sought had an interest in the outcome of the litigation, it would be required to bear some of the burden of the total cost of producing documents subpoenaed.).

C. The Motion Also Should Be Denied Because Complaint Counsel Refuses To Incur Any Of The Cost Of Restoring, Processing And Publishing The Backup Data At Issue.

1. The General Presumption That The Producing Party Bears The Cost Of Production Does Not Apply In The Electronic Discovery Context.

Federal courts addressing electronic discovery have explained that when a motion to compel the production of backup data is not denied outright, "courts generally shift all or part of the cost of production to the discovering party. . . . Requiring the plaintiffs to pay part of the

cost of producing the e-mails will provide them with an incentive to focus their requests." *Byers v. Ill. State Police*, 2002 WL 1264004 (N.D. Ill. 2002). Even if the Court were to order Respondents to produce backup data, Complaint Counsel should bear the burden of "all or part of the cost of [such] production." *Id.* Complaint Counsel's motion should be denied given that it refuses to bear such burden.

Complaint Counsel places undue reliance on the traditional premise in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), that the producing party should bear the cost of production. This premise has been substantially relaxed in the context of electronic discovery:

> [E]ven if this principle [articulated in *Oppenheimer Fund*] is unassailable in the context of paper records, it does not translate well into the realm of electronic data. The underlying assumption is that the party retaining information does so because that information is useful to it, as demonstrated by the fact that it is willing to bear the costs of retention. That party may therefore be expected to locate specific data, whether for its own needs or in response to a discovery request. With electronic media, however, the syllogism breaks down because the costs of storage are virtually nil. Information is retained not because it is expected to be used, but because there is no compelling reason to discard it. And, even if data is retained for limited purposes, it is not necessarily amenable to discovery.

Rowe Entertainment Inc. v. William Morris Agency, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

In *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001), the plaintiff asked the district court to order the defendant to search backup systems, at significant expense, for deleted data (emails, for example) that might be relevant to his claim. The district court applied a "marginal utility" analysis, under which it balanced the cost of the search against the likelihood that it would yield relevant evidence, and held that the moving party must be willing to contribute financially to the search effort:

> [E]conomic considerations have to be pertinent if the court is to remain faithful to its responsibility to prevent "undue burden or expense." If the likelihood of finding something was the only criterion, *there is a risk that someone will have to spend hundreds of thousands of dollars to produce a single e-mail. That is an awfully expensive needle to justify searching a haystack.* It must be recalled that ordering the producing party to restore backup tapes upon a showing of likelihood that they will contain relevant information in every case gives the plaintiff a gigantic club with which to beat his opponent into settlement.

Id. at 34 (emphasis added). The Court is thus free to decide that cost-shifting in this instance is appropriate (assuming, for the sake of argument, that retrieving backup data is not unduly burdensome) and deny Complaint Counsel's motion so long as Complaint Counsel refuses to contribute to the cost of restoring backup tape data for attorney review.

2. Costs Pertaining To Backup Data Discovery Should Be Shifted Under The Test Applied By Complaint Counsel.

Complaint Counsel relies primarily on *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), for the appropriate test to determine cost-shifting in the context of "inaccessible" electronic documents on backup tapes. *Id.* at 319-20. Even assuming, for the sake of argument, that *Zubulake* sets forth the appropriate seven-part cost-shifting test,[12] Complaint Counsel still should bear the burden of any production of backup data. *See id.* at 320 ("[O]f the handful of reported opinions that apply [a modification of this test], *all of them* have ordered the cost of discovery to be shifted to the requesting party.") (emphasis in original).

a. Tailored Discovery Requests

The less specific the requesting party's discovery demands, the more appropriate it is to shift the costs of production to that party. *See Gen. Instrument Corp.*, 1999 WL at *6.

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[12] The method used in *Zubulake* has been criticized. *Multitechnology Servs. L.P. v. Verizon Southwest F/K/A GTE Southwest Inc.*, 2004 WL 1553480, at *1 (N.D. Tex. 2004) ("*Zubulake* is a district court opinion without binding authority."). Indeed, "nothing in *Zubulake* purports to interfere with the court's authority to enter any appropriate protective order in the discovery process." *Id.*

(denying motion to compel production of emails where requesting parties "have not identified any specific factual issue for which additional discovery would help them prove their case."). When a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the expense. *Rowe*, 205 F.R.D. at 430.

Here, Complaint Counsel asserts that it "has proposed limiting the discovery" to about "three dozen" backup tapes. Mot. at 12, 14. This requested relief, however, is hardly narrowly tailored. Complaint Counsel has identified no specific document on those backup tapes that has not already been produced. And, most significantly, the vendor costs alone to review data on three dozen backup tapes will likely cost **REDACTED**. **REDACTED** at ¶ 8 (Ex. 2).

b. Availability Of Such Information From Other Sources

Zubulake and other cases require courts to examine the availability of the requested information from other sources. *See also*, *Medtronic*, 2003 U.S. Dist. LEXIS 14447; *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 U.S. Dist. Lexis 3196 (E.D. La. 2002). As demonstrated above, most, if not all, of the "core" data sought by Complaint Counsel already has been produced in discovery, or will be produced as part of the ongoing electronic discovery production. Complaint Counsel makes the logical leap that because witnesses have been unable to recall details of events from four years ago, those details necessarily will be revealed by the onerous review of backup data kept by Respondents for emergency purposes only. *See Murphy Oil,* 2002 U.S. Dist. Lexis at *9 ("A party that happens to retain vestigial data for no current business purposes, but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it.").

c. Total Cost Of Production, Compared To The Amount In Controversy

As demonstrated above, the cost of restoring, processing, publishing, reviewing and producing backup data is extraordinary. Again, Complaint Counsel makes no effort to challenge **REDACTED**. This Court should accept Respondents' estimate as reasonable in the absence of any contrary evidence from Complaint Counsel. *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 U.S. Dist. Lexis 3196 (E.D. La. 2002).

Complaint Counsel offers only two unpersuasive arguments in response **REDACTED**. First, Complaint Counsel asserts that it "cannot offer the Court a meaningful assessment of the cost of this discovery because, until now, Respondents have been unwilling to schedule a meeting between the information technology experts for the Commission and Respondents which is necessary to make a meaningful estimate of the costs." Mot. at 16. This argument ignores the facts that: (1) Respondents have no obligation under the Rules to agree to such "a meeting"; (2) as indicated in the correspondence attached to the underlying motion, Respondents have voluntarily answered in writing information technology questions posed by Complaint Counsel; and (3) such "a meeting" would add nothing to Complaint Counsel's ability to assess the cost of its requested discovery because Respondents' "information technology experts" will defer to the Fios Estimate.

Second, Complaint Counsel asserts that Respondents must incur **REDACTED** because "the Commission is seeking the divestiture of an acquired company to which the State of Illinois imputed a value of **REDACTED**." Mot. at 17. This argument (which is inconsistent with Complaint Counsel's earlier point that this case seeks equitable relief and thus cannot be valued in monetary terms, Mot. at 7-8 & 18) misses the point. Respondents do not dispute that this is a complex case. Accordingly, Respondents already have spent about **REDACTED**.

REDACTED at ¶ 10 (Ex. 1); **REDACTED** at ¶ 3 (Ex. 3). Complaint Counsel cites no authority to support its view that Respondents need to do more. *See, e.g., Medtronic*, 2003 U.S. Dist. LEXIS 14447, at *24 ("Although the cost could be less than 2% of the amount at issue in this suit, the cost is substantial. The court therefore finds it undue.").

d. Total Cost Of Production, Compared To The Resources Available To Each Party

As Complaint Counsel points out, *Zubulake* recognizes that "the focus should be on the total cost of production as compared to the resources available to each party." 217 F.R.D. at 321. Complaint Counsel steadfastly refuses to contribute a dime to the production of information on backup tapes based solely on a summary assertion that it is subject to a "limited budget in this litigation." Complaint Counsel has provided the Court with no support for this proposition, such as the budget itself. The "limited budget" assertion is facially suspect given that, as indicated above, eleven attorneys have noticed appearances on Complaint Counsel's behalf in this litigation, these attorneys have noticed dozens of depositions in this case, and Complaint Counsel has retained the service of five expert witnesses.

Under these circumstances, Complaint Counsel's cries of poverty should fall on deaf ears. To the extent Complaint Counsel claims to need backup data, it should have to pay for, or at least contribute to, the enormous cost of such task instead of boldly claiming that Respondents need to divert **REDACTED** from its defense to Complaint Counsel's "fishing expedition."

e. The Ability Of Each Party To Control Costs, And Its Incentive To Do So

Complaint Counsel maintains that the Respondents would have no incentive to keep the costs of production under control if the costs were shifted to Complaint Counsel. But a subsequent decision in the *Zubulake* case recognized that "once [a] vendor is selected, costs are

not within the control of either party." *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280, 288 (S.D.N.Y. 2003). Again, Respondents have retained the services of an independent vendor that was chosen after a competitive bidding process. There is no reason to believe that Respondents will improperly monitor costs ordered to be paid by Complaint Counsel.[13] Accordingly, Complaint Counsel's position fails to support its view that it pay *none* of the costs pertaining to the production of backup data.

f. The Importance Of The Issues At Stake In The Litigation

Zubulake noted that the importance of the litigation could influence whether costs are shifted. 217 F.R.D. at 322. According to Complaint Counsel, Respondents must shoulder **REDACTED** electronic discovery costs because the Commission purports "to serve the public interest in promoting competition in the delivery of healthcare by seeking a divestiture of Highland Park." Mot. at 18. This reasoning, of course, is circular. Under Complaint Counsel's analysis, every case brought by the Commission would warrant shifting enormous electronic discovery costs to the respondent. Such precedent would grant Complaint Counsel improper (and, unconstitutional) leverage in that it could use electronic discovery as a "gigantic club with which to beat [its] opponent into settlement." *McPeek*, 202 F.R.D. at 34. Even the court in *Zubulake* recognized that this factor "is one that will rarely be invoked." 217 F.R.D. at 321.

g. The Relative Benefits To The Parties Of Obtaining The Information

As *Zubulake* held, "the last factor – (7) the relative benefits of production as between the requesting and producing parties – is the least important because it is fair to presume that the response to a discovery request generally benefits the requesting party. But in the

[13] In fact, Respondents would have an "incentive to keep the costs under control" if those costs were shared by both parties.

unusual case where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh against shifting costs." *Zubulake*, 217 F.R.D. at 323. Complaint Counsel makes no claim that the production would benefit Respondents, especially considering the duplicative nature of the documents in question.

II. Complaint Counsel's Motion Should Be Denied Because The Requested Relief, If Ordered, Would Burden The Parties And The Court With Significant Disruptions To The Scheduling Order Deadlines.

Complaint Counsel waited until the end of fact discovery to file its motion to compel an extremely onerous and time-consuming review and production of backup data. Even assuming, for the sake of argument, that the Court rules on the motion before the September 13, 2004, close of fact discovery, it would be impossible for Respondents to restore, process, publish, review and produce *any* backup data by that deadline. Consequently, there is no possibility that Complaint Counsel will have sufficient time to review a backup tape production and take depositions before the close of fact discovery. *See, e.g., In re Gen. Instrument Corp. Secs.*, 1999 WL 1072507 at *6 ("[T]he technical matter of retrieving the documents from backup tapes would be just the start of the process. Defense counsel would then have to read each e-mail, assess whether the e-mail was responsive, and then determine whether the e-mail contained privileged information. Given that the volume of e-mail at issue here is potentially very large, the court finds that the burden of reviewing the requested documents would be heavy.").

According to Complaint Counsel, it should have the right to reopen depositions and to notice new depositions after the close of discovery based on the production of electronic documents on backup tapes. It appears that Complaint Counsel seeks to use its motion as an excuse to significantly postpone the remaining deadlines in the Second Revised Scheduling Order and thus substantially disrupt the smooth administration of the case as set forth in that schedule – a schedule to which Complaint Counsel agreed. Indeed, it would be ambitious to

believe that, if the proposed relief were granted, the parties would have sufficient time before the new year to adequately restore, review, produce and, if necessary, take depositions concerning the enormous amount of backup data requested in Complaint Counsel's motion.

Respondents are not willing to agree to an extension of the current fact discovery deadline for this purpose. Regardless, the extension necessary to accommodate Complaint Counsel's position would run afoul of the strict requirement of an expedited hearing in 16 C.F.R. § 3.51(a). In short, Complaint Counsel's motion comes far too late given that fact discovery is almost over. That motion should be denied, and this litigation should proceed to the expert discovery phase as scheduled.

III. Complaint Counsel's Motion Should Be Denied Because The Punitive Relief Requested In That Motion, If Granted, Would Violate Respondents' Due Process Rights.

As discussed above, Respondents would be required to incur expenses (not including attorney time) of **REDACTED** to comply with the order proposed by Complaint Counsel. Such an order, if entered, clearly would be punitive in nature and, therefore, give rise to serious due process concerns. *See McClelland v. Andrus*, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979) (stating that the FTC "is bound to ensure that its procedures meet due process requirements") (citing *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (noting that "a fair trial . . . is a basic requirement of due process" and "[t]his applies to administrative agencies which adjudicate as well as courts") (quotations and citations omitted)).

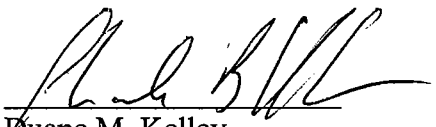
ENH is a not-for-profit hospital that provides health care services to the Chicago North Shore community. Requiring Respondents here to spend **REDACTED** in search of the proverbial "needle" in the backup tape "haystack" could result in increased healthcare costs for consumers – the precise result this litigation purportedly is designed to remedy.

CONCLUSION

For the foregoing reasons, Respondents request that this Honorable Court deny Complaint Counsel's Motion to Compel Respondent's Production of Documents From Electronic Files.

September 2, 2004

Respectfully Submitted,



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Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2004, a copy of the foregoing ***Respondents' Opposition to Complaint Counsel's Motion to Compel*** was served by email and first class mail, postage prepaid, on:

The Honorable Stephen J. McGuire
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Washington, DC 20580
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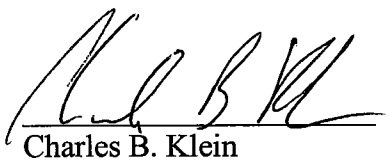


Charles B. Klein

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
	)	
Evanston Northwestern Healthcare Corporation,	)	
a corporation, and	)	Docket No. 9315
	)	
ENH Medical Group, Inc.,	)	
a corporation.	)	

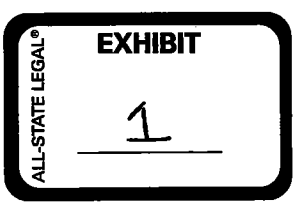
ORDER

Upon consideration of Complaint Counsel's Motion to Compel Respondent's Production of Documents From Electronic Files ("Motion") and Respondents' opposition thereto, and the Court being fully informed, it is this _____ day of _____, 2004 hereby

ORDERED, that the Motion is DENIED.

The Honorable Stephen J. McGuire
CHIEF ADMINISTRATIVE LAW JUDGE
Federal Trade Commission

REDACTED



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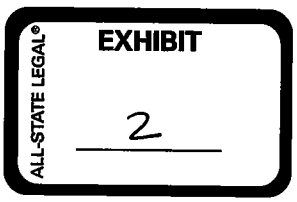

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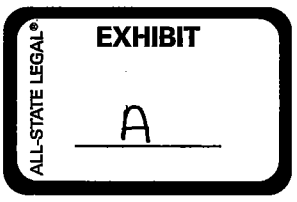

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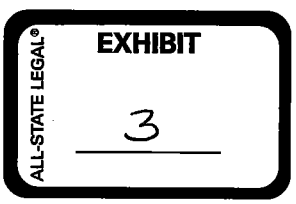

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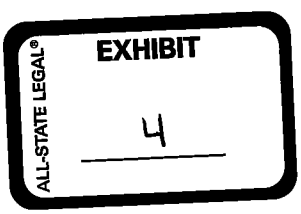

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