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 [redacted]

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

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

[redacted]

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, [redacted]

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 246,000 additional pages

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

[redacted]

information from backup tapes.

[redacted]

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 [redacted]

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 review of [redacted]

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

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

[redacted]

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

[redacted]

(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

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

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

[redacted]

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.

[redacted]

Complaint Counsel therefore has no basis to represent to the Court that they will lack "some

contract negotiations at the time of the merger, it does not necessarily follow from this evidence

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

[redacted]

Complaint Counsel believes it has the right to go on a "fishing expedition" at

The district court in *Cooper 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,"

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

[redacted]

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,

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

[redacted]

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:

[redacted]

[E]conomic considerations have to be pertinent if the court is to

expense." If the likelihood of finding something was the only

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

(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 [illegible]

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).

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

[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

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,

unusual case where production will also provide a tangible or strategic benefit to the responding

[redacted]

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.

[redacted]

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

[redacted]

§ 3.51(a). In short, Complaint Counsel's motion comes far too late given that fact discovery is [redacted]

CONCLUSION

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

[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2004, a copy of the foregoing *Respondents'*

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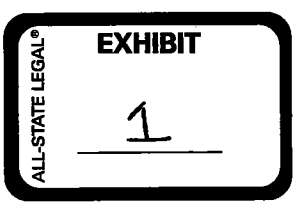
ORDER

Upon consideration of Complaint Counsel's Motion to Compel Respondent's Production [redacted] ("Motion") and Respondents' opposition thereto, and the

Court being fully informed, it is this _____ day of _____, 2004 hereby

REDACTED



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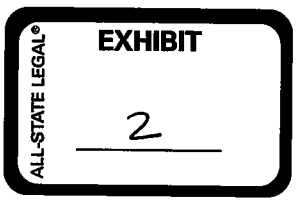

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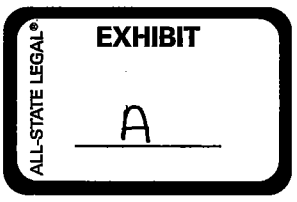

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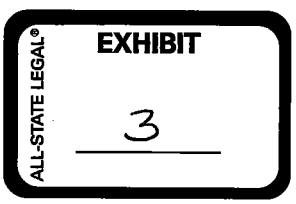

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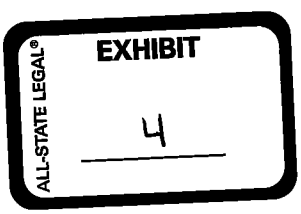

REDACTED

EXHIBIT