BACKGROUND

As set forth in Complaint Counsel's Memorandum In Support of Motion to Compel Respondents' Production of Documents from Electronic Files dated August 19, 2004, ("Complaint Counsel's Memorandum"), Respondents have maintained a set of electronic storage files, known as "backup tapes," from the operations of Evanston Northwestern Healthcare ("ENH") from June 2001 to present, and from the operations of Highland Park Hospital from roughly January 1999 through May 2001. These backup tapes, which were regularly maintained to record the current electronic computer files of Respondents, contain the contemporaneous communications of Respondents' employees regarding both the merger challenged in this litigation and the price fixing conspiracy of Respondents. Although Respondents estimated that they had approximately [redacted] backup tapes in their possession, Complaint Counsel proposed that Respondents produce the responsive documents from a limited number of backup tapes – perhaps as few as 20 to 30 – to satisfy the Commission's need for discovery but to minimize the cost to Respondents.

On September 2, 2004, Respondents filed their Opposition to Complaint Counsel's Motion to Compel ("Respondents' Opposition"). While Respondents set forth a number of arguments – most of which are irrelevant here[1] – the gist of Respondents' position is that

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[1] For example, Respondents argue that the production of these documents should not be required in this litigation because Complaint Counsel did not pursue this discovery in 2002 during the Commission's Part 2 investigation of the merger. Respondents' Opposition at 17-18. If endorsed, however, this argument would require the Commission to conduct (and private parties to incur the cost of) comprehensive litigation discovery in all Part 2 investigations, most of which are closed without Part 3 litigation.

Similarly, Respondents devote significant time to discussing the hard copy documents and the electronic files that have been produced. Respondents' Opposition at 4-7.

Complaint Counsel's motion to compel should be denied because the discovery would be too expensive.

To support this argument, Respondents rely exclusively on four affidavits, three of which set forth factual assertions regarding Respondents' computer system, file storage practices, and estimates of costs of producing documents from the backup tapes. Based on these factual assertions, Respondents argue that the proposed discovery – even the sampling approach proposed by Complaint Counsel – would cost millions of dollars. However, as set forth below, these facts upon which Respondents rely have not been tested in discovery.

In most instances, Complaint Counsel would simply notice the depositions of the Affiants. However, Respondents filed this brief and these affidavits only eleven days before the close of discovery on September 13, 2004, and Complaint Counsel has had limited time since the filing of Respondents' papers to analyze Respondents' bald factual assertions. Further, in the remaining discovery period, Complaint Counsel and Respondents already had scheduled more than a dozen depositions and, therefore, Complaint Counsel did not have the time to prepare for (or to depose) the Affiants. Therefore, by this motion, Complaint Counsel seeks leave of the Court to depose these three witnesses after September 13, 2004.

This discovery was necessary but, as Respondents acknowledge, Respondents have drawn these materials exclusively from their active files, few if any of which contain materials contemporaneous with the activities challenge in the Complaint.

ARGUMENT

COMPLAINT COUNSEL SHOULD BE GRANTED LEAVE TO TAKE THE DEPOSITIONS OF MIKE PAYNE, BARBARA HANAHAN AND ROB LEKOWSKI AFTER SEPTEMBER 13, 2004

There is a serious question whether Respondents have any legal basis for opposing a well-designed sampling of their backup tapes particularly when, as here, Complaint Counsel has demonstrated the pointed relevance of this discovery. In situations like this, the courts have regularly ordered parties to produce a sampling of the backup tapes. *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001) (as defendant, Department of Justice required to restore its own backup tapes); *In re: Amsted Industries, Inc. ERISA Litigation*, 2002 WL 31844956 (N.D. Ill. 2002). As the court concluded in *Linnen v. A.H. Robins Co.,* 1999 WL 462015 (Mass. Super. 1999):

> While the court certainly recognizes the significant cost associated with restoring and producing responsive communications from these tapes, it agrees with the District Court for the Northern District of Illinois *In re: Brand Name Prescription Drugs Antitrust Litigation* that this is one of the risks taken on by companies which have made the decision to avail themselves of the computer technology now available to the business world. 1995 WL 360526 (N.D. Ill. 1995). *To permit a corporation such as Wyeth to reap the business benefits of such technology and simultaneously use that technology as a shield in litigation would lead to incongruous and unfair results.*

1999 WL 462015 at 14 (emphasis added).

Ultimately, Respondents' opposition to of:-3 -2.353n.[e Pr teF3A1s o2du007 Twil th.4(a)-is added).

[2] Complaint Counsel do not have any specific interest in deposing an employee of Respondents' counsel. As an alternative, though, Complaint Counsel should be granted leave to depose the unidentified employees of Respondents who are responsible for developing the information on which Ms. Hanahan bases the assertions in her affidavit.

[3] *See* Complaint Counsel's Memorandum at 6-7.

the incongruities between Complaint Counsel's proposal and her cost estimates, Ms. Hanahan's affidavit cannot be given any probative weight.

2. Affidavit of Rob Lekowski. Mr. Lekowski is a sales director at a vendor that Respondents are using in this litigation. His affidavit sets forth the basis for Respondents' estimate that it would cost as much as [redacted] to restore even the sample of backup tapes proposed by Complaint Counsel. However, Mr. Lekowski's affidavit assertions rest on such a wide range of factual assumptions that Mr. Lekowski himself discounts his cost estimates as "merely a best guess." Lekowski Aff. ¶ 7.

Mr. Lekowski's guesswork must be subject to cross-examination. For example, Mr. Lekowski's guesstimates expressly rest on the assumption that it would be necessary to process all files on the backup tape.[4] However, Mr. Lekowski does not offer any basis for his conclusion that this processing is necessary, and his approach – and, thus, his cost estimate – is directly contrary to Complaint Counsel's specific proposal that only those files from the exchange server be processed.

3. Affidavit of Mike Payne. Mr. Payne's affidavit sets forth very few facts. Mr. Payne

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If the individual tapes do not include an index of the files contained on the tape, Complaint Counsel is willing to discuss with Respondents other approaches that will maximize the likelihood that Complaint Counsel receive the necessary responsive information but minimize the cost to Respondents. However, absent discovery it is impossible for Complaint Counsel to engage in these discussions.

[4] In making this guesstimate, for example, Mr. Lekowski assumes that this effort must include the processing of all files on the backup tape – which includes expanding all files, publishing the files to a web-based review tool, Prevail, converting the documents to TIFF image, and applying a Bates-stamp number on each page. These steps represent a significant portion of the total cost of producing these files, but they may be unnecessary. *Id.* ¶ 4. Mr. Lekowski does acknowledge that it might be possible to exclude duplicative files, *i.e.,* files that are contained on more than one backup tape.

suggests that [Redacted]. Payne Aff.. ¶ 2.

Mr. Payne indicates [Redacted]

. Payne Aff. ¶ 5.

Mr. Payne says [Redacted]

[Redacted]. Payne Aff. ¶ 4. Then, invoking Mr. Payne's less-than-definitive testimony, Respondents insist that if their hand-selected witness does not have clear-cut knowledge about the contents of the disputed files, Complaint Counsel's discovery efforts obviously must be "speculative." Respondents' Opposition at 13.

Mr. Payne's deposition is particularly important because of the inconsistencies between Mr. Payne's statements and Respondents' own characterization of Mr. Payne's testimony. For example, Mr. Payne specifically acknowledged that – [Redacted]

" Payne Aff. ¶ 4. In contrast, citing Mr. Payne's affidavit, Respondents advise the Court that "Respondents have no backup data pertaining to ENH servers from before June 2001." Respondents' Opposition at 13. These inconsistencies can be clarified only through discovery.

In sum, these Affiants have made factual assertions regarding the content, the processing and the production of the electronic documents Complaint Counsel seek through discovery. Respondents ask the Court to rely on these factual assertions to deny Complaint Counsel's discovery requests. These factual assertions, however, have not yet been tested through discovery. Therefore, a factual investigation, through the depositions of the Affiants, is essential

in consideration of the issues raised by Respondents in opposition to Complaint Counsel's Motion to Compel.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully moves the Court for leave leave to take the depositions of Mike Payne, Barbara Hanahan, and Rob Lekowski after September 13, 2004.

Respectfully submitted,

Dated:____________________

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This is to certify that a copy of the foregoing documents were served on counsel for the respondent by electronic mail and first class mail delivery:

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