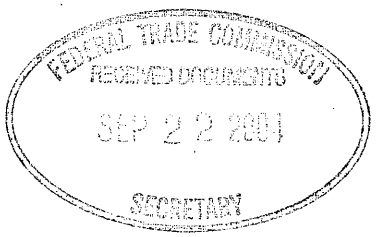
**UNITED STATES OF AMERICA**
**FEDERAL TRADE COMMISSION**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

**ORDER ON COMPLAINT COUNSEL'S MOTIONS TO COMPEL RESPONDENTS' PRODUCTION OF DOCUMENTS FROM ELECTRONIC FILES AND FOR LEAVE TO TAKE DISCOVERY AND STAY CONSIDERATION OF MOTION TO COMPEL**

**I.**

On August 19, 2004, Complaint Counsel filed a motion seeking an order compelling Respondents Evanston Northwestern Healthcare Corporation ("ENH") and ENH Medical Group to produce all documents responsive to Complaint Counsel's discovery requests that are contained on electronic backup tapes ("Motion to Compel") at Respondents' expense. On September 2, 2004, Respondents filed their opposition ("Opposition").

On September 8, 2004, Complaint Counsel filed a motion seeking leave to take discovery after the September 13, 2004 discovery cut-off date and to stay consideration of the motion to compel ("Motion to Stay"). On September 20, 2004, Respondents filed their opposition ("Opposition to Motion to Stay").

As set forth below, Complaint Counsel's motion to compel production of documents is **DENIED**. As further set forth below, Complaint Counsel's motion to take discovery and stay the motion to compel is **DENIED**.

## II.

Complaint Counsel's motion to compel production of documents seeks an order compelling Respondents to produce documents that are contained on quarterly backup tapes for the exchange server of Highland Park Hospital, the exchange server of ENH, and the backup tapes that contain the files of six named individuals. Motion to Compel at 21-22. Complaint Counsel asserts that the discovery of a limited number of backup tapes sought by Complaint Counsel is reasonably calculated to lead to the discovery of admissible evidence and that Respondents must bear the cost of producing documents on a select group of backup tapes.

Respondents argue that production of the requested discovery would be overly burdensome and would outweigh any benefits; that Complaint Counsel refuses to share any of the costs associated with production of electronic documents; that the request would impede preparations for the trial in this matter; and that the request would violate Respondents' due process rights. Opposition at 1-3, 7-27. Moreover, Respondents assert that they have produced a significant amount of electronic documents for which they have borne the entire expense. Opposition at 4-7.

Complaint Counsel, in its motion to stay, seeks leave to take depositions of the three witnesses who provided affidavits in support of Respondents' opposition to the motion to compel and moves to stay consideration of the motion to compel until completion of this discovery. Motion to Stay at 1. Complaint Counsel asserts that there is not sufficient time to complete the depositions of these individuals prior to the September 13, 2004 discovery cut-off date. Motion to Stay at 3.

Respondents oppose the motion to stay, arguing that there is no good cause for extending the discovery deadline. Opposition to Motion to Stay at 4-6. Respondents further assert that the requested discovery will not aid the Court in deciding the motion to compel and would materially delay the hearing. Opposition to Motion to Stay at 6.

## III.

### A.

Pursuant to Rule 3.31(c)(1) of the Commission's Rules of Practice: "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). However, the Administrative Law Judge shall limit discovery upon a determination that the "burden and expense of the proposed discovery outweigh its likely benefit." *Id.* Here, the requested discovery has the potential to yield information relevant to the proceedings, although the amount of data that would be relevant and not duplicative is contested. The issue to be decided in the motion to compel is whether the burden and expense of producing the electronic data outweigh the likely benefit of the production.

Electronic records are no less subject to disclosure than paper records. *Rowe Entm't v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002). In contrast to traditional paper discovery, the discovery of electronic data may be vastly more expensive depending on how the electronic data is stored. *Wiginton v. CB Richard Ellis, Inc.*, 2004 U.S. Dist. LEXIS 15722, *11 (N.D. Ill. 2004); *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003). In particular, backup tapes are expensive to search because they sacrifice accessibility for storage capacity. *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 2004 U.S. Dist. LEXIS 16310, *17-19 (E.D.Wis. 2004). Where the expense of producing electronic files is found, the remedy is generally a cost-shifting order rather than an order precluding the discovery entirely. *See Rowe*, 205 F.R.D. at 428.

Current case law regarding the discovery of electronic data is evolving and there is no clearly defined standard nor controlling legal authority for determining when cost-shifting is appropriate. The various tests, which build upon and refine each other, were recently identified in *Wiginton* as follows:

> First, under the marginal utility approach, the more likely it is that the search will discover critical information, the fairer it is to have the responding party search at its own expense. Next, the court in *Rowe* created eight factors for consideration in the cost-shifting analysis, one of which incorporated the marginal utility test. Finally, the court in *Zubulake* [] modified the *Rowe* test to account for the fact that it interpreted the *Rowe* test as generally favoring cost-shifting, which had ignored the presumption that the responding party pays for discovery.

*Wiginton*, 2004 LEXIS 15722, *12-13 (citing *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001); *Rowe*, 205 F.R.D. at 429; *Zubulake*, 217 F.R.D. at 320).

The court in *Zubulake* identified factors which incorporate the marginal utility and *Rowe* factors. The *Zubulake* factors are: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. *Zubulake*, 217 F.R.D. at 322. The court in *Wiginton* modified the *Zubulake* factors, adding a factor that considers the importance of the requested discovery in resolving the issues of the litigation. *Wiginton*, 2004 LEXIS at *13-15.

Regardless of the test used, in this case various factors weigh in favor of cost-shifting for discovery of the backup data. The first two *Zubulake* factors, which comprise the marginal utility test, are the most important. *Zubulake*, 217 F.R.D. at 323. Complaint Counsel proposes limiting their request to fifteen to twenty of the six thousand backup data tapes focusing on specific people and time periods; argues that the request is specifically tailored to discover relevant information; and further argues that this information is not available from other sources. Motion to Compel at 2, 15-17. Respondents indicate that Complaint Counsel has identified no

document which has not already been produced; that the request is not narrowly tailored; and that some of the information may be available from non-parties with an interest in the litigation who have not been asked to produce information from backup files. Opposition at 18, 20-21. The Court determines that factor one weighs slightly in favor of cost-shifting because the request is not, and based on the lack of indices for the disks cannot be, narrowly tailored. Factor two, however, weighs in favor of not shifting costs because some information sought by Complaint Counsel relative to the merger and alleged price-fixing may not be available from any other source. Thus, the marginal utility factors do not weigh in favor of nor against cost-shifting.

The next set of *Zubulake* factors address cost issues. The cost estimate provided by Respondents' vendor demonstrate that the costs of production are significant, as would be expected. Opposition at 1-2. Moreover, Respondents voluntarily and at their own expense have already produced electronic documents available from 98 gigabytes of active files, including the data on hard drives, home directories, and email accounts; department shared drives; and large access databases. Motion to Compel at 5; Opposition at 6, 23. Thus, Respondents have already shouldered the not insubstantial burden of searching through all of their active electronic files. Because Respondents have borne the costs to this point, Respondents have had ample incentive to control costs. The cost factors thus weigh in favor of cost-shifting.

The additional *Wiginton* factor and the last two *Zubuleke* factors focus on the potential impact of the discovery on the litigation. Complaint Counsel argues that this action serves the public interest and that the information at issue is particularly important to the government's case. Motion to Compel at 20-21. Respondents argues that these factors should be given little weight, as is recognized by case law. *See Wiginton*, 2004 U.S. Dist. LEXIS 15722 at *28-31. No reason has been demonstrated to give any of these factors significant weight.

Upon consideration of the arguments of the parties and all of the relevant factors, further production of electronic files in the form of backup data would be subject to cost-shifting. Complaint Counsel has indicated that they are unwilling or unable to bear any of this cost. Motion at 14-15. The motion to compel is therefore treated as a motion to compel production at Respondents' expense. Thus, there is no need to apportion the costs.

**B.**

Complaint Counsel also moves for leave to take additional discovery and to stay consideration of its own motion to compel. Complaint Counsel seeks to depose Barbara Hanahan, litigation support project manager for Respondents' counsel; Rob Lekowski, sales director of Respondents' vendor, Fios, Inc.; and Mike Payne, ENH's Director of Network Services. Respondents argue that the motion for leave to take additional discovery should be denied because Complaint Counsel could have taken the requested discovery at least one month before the close of fact discovery and the requested discovery would not assist the court in deciding the motion to compel and would materially delay the hearing.

Complaint Counsel has not demonstrated good cause for failing to depose the proposed deponents prior to the close of discovery. Complaint Counsel was aware of the deponents and/or the substance of their affidavits though correspondence in August of 2004, as demonstrated by the correspondence attached to their Motion. Motion, attachments. Had Complaint Counsel required additional information regarding the costs of producing the documents or the documents available on the disks, that information could have been determined through due diligence.

**IV.**

For the reasons set forth above, Complaint Counsel's motion to compel production of documents is **DENIED**. Complaint Counsel's motion for discovery and to stay the motion to compel is also **DENIED**

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: September 22, 2004