

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of)
)
OSF Healthcare System,)
a corporation, and)
)
Rockford Health System,)
a corporation.)
)
)
)

Docket No. 9349
PUBLIC

**NON-PARTY UNITEDHEALTH GROUP, INC.'S RESPONSE IN OPPOSITION TO
ROCKFORD HEALTH SYSTEM'S MOTION TO COMPEL**

Non-Party UnitedHealth Group, Inc. ("United"), pursuant to Rule 3.38 of the Federal Trade Commission's Rules of Adjudicative Practice, hereby submits this response in opposition to Rockford Health System's ("RHS") Motion to Compel.

INTRODUCTION

RHS seeks to compel United to produce documents in response to a number of overly broad requests and to require Michelle Lobe, United's Regional Vice-President for Network Management, to testify about this acquisition for the fourth time. Given the burden and expense on United to comply with the requests in light of the asserted nature of RHS's defenses, and because Ms. Lobe has been deposed twice and provided live testimony during a preliminary injunction hearing, RHS's motion should be denied.

On December 21, 2011, RHS served a subpoena *duces tecum* on United, a non-party to this action, seeking the production of 25 categories of documents (not including sub-parts). United has already expended significant time and resources locating, gathering and producing

responsive documents.¹ As explained below, United and its counsel would need to review thousands of documents which reside in numerous email accounts to comply with the objected to requests.

ARGUMENT

I. SUBPOENA DUCE TECUM

Rule 3.31(c)(1) of the Commission's Rules of Practice ("Rules") states that "parties 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). Moreover, discovery shall be limited "if it determined 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." *In re POM Wonderful LLC*, 2011 FTC LEXIS 42, *6-7 (Mar. 16, 2011). Additionally, the Administrative Law Judge "may deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding." *In re Lab. Corp of Am.*, 2011 FTC LEXIS 31, *4-5 (Feb. 28, 2011).

RHS seeks to compel United to produce documents in response to 5 categories of documents. Each of RHS's requests is addressed below.

A. Request No. 7

United has conducted a reasonable search and has not located any documents responsive to this request.²

¹ In addition, United provided documents to the FTC relating to the proposed merger prior to the issuance of the Subpoena.

B. Request No. 12

RHS seeks “documents relating to any communications between individuals responsible for managing [United’s] hospital and physician networks and individuals in [United’s] sales group regarding [United’s] health plan networks in the Relevant Area, including but not limited to discussions regarding member or employer feedback, marketability or quality of the network, proposed or desired changes to the provider network, and product pricing.” (Subpoena, Request No. 12.)³ The problem with this scatter-shot document request is two-fold: (1) it is so broad that United cannot determine what documents RHS is really looking for; and (2) RHS has not advanced a specific argument why whatever it is trying to obtain here has any bearing on its defenses. Additionally, requests for documents “concerning” or “relating to,” have been found to lack the “reasonable particularity” required by the Rules. *See In the Matter of North Texas Specialty Physicians*, 2004 FTC LEXIS 19, *12 (Feb. 4, 2004) (limiting request to seeking “[a]ll internal and external correspondence, memoranda, and messages concerning or relating to” the respondent).

Rather than explaining the specific need for these documents, RHS merely states, in conclusory fashion, that the requested information will somehow “rebut the Commission’s allegation that the acquisition will adversely affect competition for inclusion in each health plan’s provider network.”⁴ That is not enough to overcome the significant time and expense involved to comply with this request. For example, communications relating to “proposed or desired changes to the provider network” will likely encompass communications that have

² On December 23, United advised RHS that it did not have any documents responsive to this request. As such, RHS’s motion is unnecessary with respect to this request. (See December 23, 2011 letter from James Gardner to Rachael Lewis attached as Exhibit B to the motion to compel).

³ A copy of the Subpoena is attached as Exhibit A to RHS’s motion to compel.

⁴ Indeed, RHS does not even set forth a specified time period in connection with this Request.

nothing to do with the issues raised in this action. Similarly, communications relating to member or employer feedback would more than likely require United to search for documents relating to customer complaints about issues relating to the timeliness of processing health claims. Such communications simply have no bearing on the claims at issue in this matter. Contrary to RHS's assertion, this is not an instance where the request is narrowly tailored to seek limited information. Instead, this request goes to the heart of United's everyday business – development and creation of “provider networks” and “product pricing.”

To comply with Request No. 12, United would have to spend countless hours searching literally thousands of emails. As set forth in the Declaration of Michelle M. Lobe (attached hereto as Exhibit A), there are approximately 41 individuals who may have documents responsive to this request. (Declaration of Michelle M. Lobe, ¶ 3.)⁵ Once those custodians are identified, United would need to conduct searches of these individuals' email accounts. United's counsel would then need to conduct a comprehensive review to ensure that the documents/communications are responsive and not privileged. This would impose an undue and costly burden on United. (Declaration of David Yerich, ¶¶ 1-9.)⁶ Given that RHS has utterly failed to provide a cogent explanation why the requested documents are relevant to “rebut the Commission's allegations,” RHS's motion to compel relating to Request No. 12 should be denied.

C. Request No. 15

United has conducted a reasonable search and has not located any documents responsive to this request.

⁵ The Declaration of Michelle M. Lobe is attached hereto as Exhibit A.

⁶ The Declaration of David Yerich is attached hereto as Exhibit B.

D. Request No. 18

RHS seeks the production of documents relating to United's negotiations with providers of general acute care inpatient hospital services in the Rockford area, including Winnebago, Ogle, and Boone counties in Illinois."⁷ (Mot., p. 3.) As with Request No. 12, Request No. 18 is overly broad and would impose a substantial burden on United if it was required to search for responsive documents.⁸

United has engaged in contract negotiations with both hospital systems seeking to merge. It has a contract with RHS and has been in contract negotiations with OSF for the last several years. RHS and OSF have communications that have taken place between them and United. Nonetheless, to comply with Request No. 18, as written, United would be required to search for and produce documents that both RHS and OSF already have in their possession.

As with Request No. 12, the production of documents responsive to Request No. 18 would impose an undue burden on United which far outweighs any relevance of potentially responsive documents. United's contract negotiations with providers are complex processes involving numerous individuals – this is a key component of United's everyday business. United would be required to search thousands of e-mails and files (from 8 custodians) which would result in an unreasonable and costly burden.⁹ (Declaration of Michelle M. Lobe, ¶ 4.) Once again, as set forth above with respect to Request No. 12, this would impose a substantial burden

⁷ In fact, Request No. 18 is much broader than RHS's posits in its motion to compel. (See Request No. 18.)

⁸ Additionally, RHS fails to explain why it would need such communications for the period January 1, 2005 to the present – a seven year time frame.

⁹ At no point has RHS offered to reimburse United in connection with any of the documents produced in connection with the Subpoena.

and cost on United. (Declaration of Michelle M. Lobe, ¶ 5; Declaration of David Yerich, ¶¶ 1-9.)

United has already produced its contracts with RHS and SwedishAmerican (the third hospital in Rockford). Information that RHS may need to support any of its defenses in this action is more than likely contained in those contracts. RHS has failed to put forth a specific argument why United should be required to search for and produce the potentially thousands of communications relating to its contract negotiations with hospitals in the Rockford area.

Finally, because RHS chose to draft Request No. 18 in such a broad manner, it should not be allowed to attempt to rewrite the request in its motion to compel. And, in any event, the redrafted request is still overly broad and would impose a substantial burden on United if it had to search for, review and produce documents relating to its contract negotiations. Accordingly, RHS's motion with respect to Request No. 18 should be denied.

E. Request No. 19

Request No. 19 seeks the following documents/information:

Documents relating to pricing models that compare the rates of the Relevant Hospitals for Relevant Services and outpatient services to any hospital or provider in the Relevant Area or in Illinois, including documents that you use to determine how actual or proposed contracts with the Relevant Hospitals compare to each other and how those contracts compare to contracts they have with other insurance carriers.

The request seeks documents beyond the Relevant Hospitals and beyond the Relevant Area – e.g. “any hospital or provider in the Relevant Area *or in Illinois*” – and is not limited to specific time period. United has produced its contracts with SwedishAmerican and RHS, and RHS knows the terms of its contracts with other insurance companies and payors. Accordingly, RHS has the information it seeks in this request.

However, in the spirit of compromise, United will produce its recent pricing models relating to RHS and Swedish American.

II. SUBPOENA AD TESTIFICANDUM DEPOSITION

Michelle Lobe, Regional Vice-President for Network Management for UnitedHealthcare of Illinois, Inc., has been deposed twice and testified during the preliminary injunction hearing in the United States District Court for the Northern District of Illinois (*FTC v. OSF Healthcare System, et al.* (Case no. 3:11-cv-50344)). Now, RHS seeks to compel Ms. Lobe to be subject to examination a fourth time.

On September 27, 2011, Ms. Lobe was deposed by the FTC in connection with its investigation into the proposed merger.¹⁰ (Declaration of Michelle M. Lobe, ¶ 6.) On January 10, 2012, Ms. Lobe was deposed by counsel for RHS in the preliminary injunction action. (Declaration of Michelle M. Lobe, ¶ 7.) On February 1, 2012, Ms. Lobe testified at the preliminary injunction hearing. (Declaration of Michelle M. Lobe, ¶ 8.)

RHS argues that it now needs to depose Ms. Lobe in connection with documents produced by United after her January 10, 2012 deposition. However, as of January 10, 2012, United had not yet produced any documents in response to the Subpoena *Duces Tecum*. Nonetheless, RHS chose to go forward with her deposition at that time. RHS made a calculated choice to depose Ms. Lobe when it did, and it should not be entitled to another deposition.

CONCLUSION

For the reasons set forth herein, United respectfully requests that RHS's motion to compel be denied and United be awarded such other and further relief as is just and appropriate.

¹⁰ RHS was provided with a copy of the transcript prior to Ms. Lobe's January 10, 2012 deposition.

Dated: February 13, 2012

UNITEDHEALTH GROUP, INC.

By: James K. Gardner / with permission
One of Its Attorneys *Mary Winters*

James K. Gardner
Athanasios Papadopoulos
NEAL, GERBER & EISENBERG LLP
Two North LaSalle Street, Suite 1700
Chicago, Illinois 60602
(312) 269-5982
(312) 429-3575 Fax
jgardner@ngelaw.com
tpapadopoulos@ngelaw.com

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true and correct copy of the foregoing was served on the following individuals by hand-delivery on February 13, 2012:

Donald S. Clark
Secretary
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW, Room 172
Washington, DC 20580

Hon. D. Michael Campbell
Administrative Law Judge
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW
Washington, DC 20580

The undersigned further certifies that a true and correct copy of the foregoing was served on the following attorneys by electronic mail on February 13, 2012:

Complaint Counsel

Matthew J. Reilly (mreilly@ftc.gov)
Jeffrey H. Perry (jperry@ftc.gov)
Kenneth W. Field (kfield@ftc.gov)
Jeremy P. Morrison (jmorrison@ftc.gov)
Katherine A. Ambrogio (kambrogio@ftc.gov)
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW
Washington, DC 20580

Counsel for OSF Healthcare System

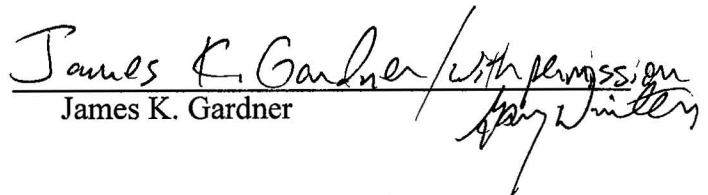
Alan I. Greene (agreeene@hinshawlaw.com)
Matthew J. O'Hara (mohara@hinshawlaw.com)
Kristin M. Kurczweski (kkurczweski@hinshawlaw.com)
HINSHAW & CULBERTSON LLP
222 N. LaSalle St., Suite 300
Chicago, IL 60601

Michael Iasparro (miasparro@hinshawlaw.com)
HINSHAW & CULBERTSON LLP
100 Park Ave.
Rockford, IL 61101

Counsel for Rockford Health System

David Marx, Jr. (dmarx@mwe.com)
William P. Schuman (wshuman@mwe.com)
Amy J. Carletti (acarletti@mwe.com)
McDERMOTT WILL & EMERY LLP
227 W. Monroe Street
Chicago, IL 60606

Jeffrey W. Brennan (jbrennan@mwe.com)
Carla A.R. Hine (chine@mwe.com)
Nicole L. Castle (ncastle@mwe.com)
Rachael V. Lewis (rlewis@mwe.com)
Daniel G. Powers (dgpowers@mwe.com)
James B. Camden (jcamden@mwe.com)
McDERMOTT WILL & EMERY LLP
600 13th St., N.W.
Washington, DC 20005-3096


James K. Gardner

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)

OSF Healthcare System,)
a corporation, and)

Rockford Health System,)
a corporation.)
)

Docket No. 9349
PUBLIC

**NON-PARTY UNITEDHEALTH GROUP, INC.'S RESPONSE IN OPPOSITION TO
ROCKFORD HEALTH SYSTEM'S MOTION TO COMPEL**

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
OSF Healthcare System,)	Docket No. 9349
a corporation, and)	PUBLIC
)	
Rockford Health System,)	
a corporation.)	
)	

DECLARATION OF MICHELLE M. LOBE

Michelle M. Lobe, being duly sworn on oath, deposes and states as follows:

1. My name is Michelle M. Lobe. I am of sound mind, over the age of eighteen years, capable of making this Declaration and fully competent to testify as to the matters averred herein. All testimony provided by me in this Declaration is true and all facts asserted herein are within my personal knowledge.

2. I am employed as Regional Vice-President, Network Management of UnitedHealthcare of Illinois, Inc. ("UHC") and have held this position since July, 2010. I have been continuously employed by UHC in various capacities since April, 2006. UnitedHealthcare of Illinois, Inc. is a subsidiary of UnitedHealth Group, Inc.

3. I have reviewed Request No. 12 of the Subpoena *Duces Tecum* dated December 21, 2011 ("Subpoena") which was served on UnitedHealth Group, Inc. in connection with the above-captioned matter. There are approximately 125 employees at UHC's Chicago Office. To properly search for documents that may be responsive to Request No. 12 of the Subpoena, UHC would need to perform searches on approximately 41 UHC employees' email accounts and review thousands of e-mail communications.

4. I have reviewed Request No. 18 of the Subpoena. To properly search for documents that may be responsive to Request No. 18 of the Subpoena, UIIC would need to perform searches on approximately 8 UHC employees' email accounts and review thousands of e-mail communications.


5. To undertake a review of email communications which may be responsive to Request Nos. 12 and 18 of the Subpoena would cause a disruption in UHC's business, be time-consuming for UHC and be extremely costly.

6. On September 27, 2011, I was deposed by attorneys for the Federal Trade Commission pursuant to a subpoena issued in connection with the above-captioned action.

7. On January 10, 2012, I was deposed by counsel for Rockford Health System pursuant to a subpoena issued by the United States District Court for the Northern District of Illinois in *Federal Trade Commission v. OSF Healthcare System, et al.* (Case No. 3:11-cv-50344).

8. On February 1, 2012, I testified during the preliminary injunction hearing pursuant to a subpoena issued by the United States District Court for the Northern District of Illinois in *Federal Trade Commission v. OSF Healthcare System, et al.* (Case No. 3:11-cv-50344).

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on February 13, 2012 at Chicago, Illinois.


Michelle M. Lobe
Regional Vice-President, Network Management
UnitedHealthcare of Illinois, Inc.

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
OSF Healthcare System, a corporation, and)	Docket No. 9349
)	PUBLIC
Rockford Health System, a corporation.)	
)	
)	
)	

DECLARATION OF DAVID YERICH

David Yerich, being duly sworn on oath, deposes and states as follows:

1. My name is David Yerich. I am of sound mind, over the age of eighteen years, capable of making this Declaration and fully competent to testify as to the matters averred herein. All testimony provided by me in this Declaration is true and all facts asserted herein are within my personal knowledge.
2. I am employed by UnitedHealthcare ("United") as the Director of eDiscovery. As part of my duties, I am responsible for the collection of electronically stored information related to litigation matters. I have reviewed the subpoena served on United in this matter.
3. In order to gather responsive documents relating to Request Nos. 12 and 18 would require searching for and through electronic information, including email. United does not have a systematic way to search electronic information, including email. It is not possible to search across all employees (a general search), but instead data must be collected and searched based on individual employees.
4. The amount of time it takes to collect individuals' email folders or other documents and then run searches to return the emails or other documents that will require

manual review depends on the number of custodians; how readily available their data is; and the degree to which an electronic search process can accurately narrow the field of potentially responsive documents. The amount of time it takes to review the potentially relevant documents and identify them as described above will vary based on the data returned. The amount of data to be reviewed is only known after initial search terms and date range culling have been applied. It is not uncommon to have an average of 4 Gigabytes (GB) of expanded data per custodian after searching.

5. Assuming there are 49 custodians whose electronic documentation needs to be gathered, searched and reviewed for potentially responsive documents – and that their files are available, rather than located on back-up tapes, it would take approximately 6 man hours per custodian for a total estimate of 294 man hours. The expense associated with these man hours is approximately \$14,000. It would easily take 4-8 weeks to gather the electronic information. Once the information is gathered it must be searched. It will take approximately 40 man hours to set up and initiate several key word searches, review and investigate the error exception, and export the results to a format that can be exported to a review tool. The expense associated with these man hours is approximately \$2,000 and it would take approximately 3-4 business days to set up and complete the appropriate initial key word searches, but multiple searches over many more days would be run in order to allow for collection and review of the data on a rolling basis.

6. The typical cost of loading the data into a review tool is approximately \$395 per GB. A GB of data typically contains approximately 5000 documents, but can range anywhere between 3000-7000 documents. For 49 custodians with 4 GB of data each (196 GB would be approximately 980,000 documents), that would be approximately \$77,000 to load into a review tool. It generally takes approximately 2-4 weeks to send the data to a vendor; have the data

loaded; develop review criteria; and staff and train the review team. This does not include what it would cost United to perform a manual review of potentially responsive documents.


7. The average rate for somebody to review documents is approximately 60 documents per hour at \$45 per hour. Based on initial estimates of the number of custodians and the number of documents (approximately 980,000 documents), would require 16,333 review hours, which could cost approximately \$730,000 for a first level review. This process would take many months to complete.

8. The foregoing estimation does not include costs associated with retrieving information that may only be housed on back-up tapes. At this time, it is not known if any responsive information is housed only on back-up tapes. Searches of back-up tapes would result in significant additional expense.

9. The cost estimates provided above do not include any amounts for data housing; quality assurance reviews; review by outside counsel; redaction; or ultimate production. The cost estimates provided for herein are based on past and current work United has done with various vendors.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on February 13, 2012 at 2:25, PM.

Dated: February 13, 2012



David Yerich
Director of eDiscovery
UnitedHealthcare