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

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| In the Matter of | ) | |
| OSF Healthcare System, a corporation, and | ) | DOCKET NO. 9349 |
| Rockford Health System, a corporation, Respondents. | ) | |

## ORDER DENYING RESPONDENTS' MOTION FOR SANCTIONS FOR COMPLAINT COUNSEL'S FAILURE TO TIMELY PRODUCE INFORMATION

### I.

On February 22, 2012, Respondents OSF Healthcare System and Rockford Health System ("Respondents") filed a Motion for Sanctions for Complaint Counsel's Failure to Timely Produce Information. ("Motion"). Complaint Counsel filed their Opposition on February 29, 2012. Respondents' Motion is accompanied by a Statement Regarding Meet and Confer, as required by Commission Rule 3.22(g). For the reasons set forth below, Respondents' Motion is DENIED. However, due to the circumstances involved, Respondents will be afforded the relief set forth in Part IV below.

### II.

### A.

Respondents filed their motion pursuant to Rule 3.38(b) of the Federal Trade Commission's Rules of Practice and Paragraphs 4 and 5 of the Scheduling Order. Respondents charge that Complaint Counsel failed to timely produce certain third party managed care organization claims data ("MCO claims data") received during the course of Complaint Counsel's pre-Complaint investigation of this case and that this failure to timely produce the MCO claims data has prejudiced Respondents' ability to present their defense.

In support of their motion, Respondents recite the following:

> Commission Rule 3.31(b)(2) requires Complaint Counsel "within 5 days of receipt of a respondent's answer to the complaint and without awaiting a discovery request" to provide "[a] copy of . . . all documents and electronically stored information . . . in the possession, custody or

control of the Commission . . . that are relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent." 16 C.F.R. § 3.31(b)(2).

Both Respondents filed their Answers to the Complaint on December 12, 2011.

Five business days from December 12, 2011 is December 19, 2011.

Pursuant to the scheduling order entered in the proceeding for a temporary restraining order and preliminary injunction, *FTC v. OSF Healthcare System and Rockford Healthcare System*, No. 3:11-cv-50344 (N.D. Ill.) ("federal district court proceeding"), Complaint Counsel was required to "produce, for inspection and copying, all . . . documents and materials provided by . . . third parties during the investigation of Defendants' affiliations . . ." by December 5, 2011.

Complaint Counsel had requested claims data from numerous MCOs in March 2011.

Complaint Counsel produced materials to Defendants in the federal district court proceeding on November 29, December 5, and December 6, 2011.

Complaint Counsel produced materials in this proceeding on December 19, 2011. In Complaint Counsel's December 19, 2011 letter to Respondents accompanying that document production, Complaint Counsel stated, "the enclosed materials, together with materials previously produced in connection with the Federal District Court matter, constitute Complaint Counsel's full and complete initial disclosures pursuant to Federal Trade Commission Rule 3.31."

Respondents reviewed Complaint Counsel's productions and found claims data from BlueCross BlueShield of Illinois ("BCBS-IL"), but did not locate claims data from Aetna, Cigna, Coventry, ECOH, Humana, or United.

Respondents issued subpoenas in this administrative proceeding to certain MCOs requesting claims data on December 21, 2011.

In response to those subpoenas, certain MCOs informed Respondents on January 6, 2012, that they had previously produced the requested claims data to Complaint Counsel in response to Civil Investigative Demands issued by the FTC as part of their investigation.

> Thereafter, Respondents reviewed the FTC productions again to try to locate the non-BCBS-IL MCO claims data.
>
> On January 31, 2012, Respondents contacted Complaint Counsel to ask where Respondents could locate the MCO claims data within Complaint Counsel's prior productions.
>
> In response, on January 31, 2012, Complaint Counsel produced a hard drive containing MCO claims data.[1]

Respondents assert that the six week delay from the date on which Complaint Counsel was obligated to produce the MCO claims data (December 19, 2011) and the date on which Complaint Counsel did produce the MCO claims data (January 31, 2012) has prejudiced Respondents' ability to review and analyze the MCO claims data as part of preparing their defense, especially given the expedited nature of this proceeding. As a remedy, Respondents seek an Order precluding Complaint Counsel from introducing into evidence any opinions or testimony based upon analysis of any MCO claims data.

**B.**

Complaint Counsel contends that because Respondents found claims data from BCBS-IL, but did not find claims data from other MCOs, and because Complaint Counsel's production also included previously issued Civil Investigative Demands ("CIDs") requesting similar data from other health plans operating in the Rockford-area, Respondents should have been aware, shortly after receiving Complaint Counsel's productions on November 29, December 5, and December 6, 2011, that Complaint Counsel likely possessed such data. In addition, Complaint Counsel points out that Respondents acknowledged that certain MCOs informed Respondents on January 6, 2012, that they had produced claims data to the FTC. Lastly, Complaint Counsel states that Respondents did not contact Complaint Counsel regarding the MCO claims data until January 31, 2012. When Respondents did contact Complaint Counsel about the MCO claims data, Complaint Counsel produced it on the same day.

By letter dated February 15, 2012, Complaint Counsel advised Respondents that Complaint Counsel had reviewed its records regarding Complaint Counsel's productions to Respondents and determined that on November 29, 2011, Complaint Counsel had provided Respondents with all claims data from BCBS-IL, Humana, ECOH, and inpatient claims data from United. Complaint Counsel's February 15, 2012 letter further stated that it could not confirm whether it had previously provided claims data from Aetna, Cigna, and Coventry, and outpatient claims data from United.

Complaint Counsel asserts that because the claims data at issue contains highly sensitive patient health information, it is subject to strict protocols at the FTC that prevent

[1] Respondents fail to explain why, upon receiving confirmation on January 6, 2012 from two MCOs that those MCOs had, in fact, previously produced claims data to Complaint Counsel during the pre-hearing investigation, Respondents did not immediately contact Complaint Counsel to inquire about the missing data.

Complaint Counsel from accessing it directly. Complaint Counsel followed the established protocols and requested that all data be copied and produced as required, and Complaint Counsel believed in good faith that Respondents had timely received all of the data. Thus, Complaint Counsel asserts, its failure to produce all claims data was entirely inadvertent.

Complaint Counsel acknowledges that the MCO claims data is relevant and, once analyzed using econometric techniques, may prove probative to central issues in this matter. Thus, Complaint Counsel urges that the relief Respondents seek - the exclusion of all health plan claims data from the evidentiary record – is extraordinary. Complaint Counsel further argues that exclusion of the MCO claims data would be a particularly drastic sanction in light of the fact that Complaint Counsel's failure to timely produce was inadvertent, was cured as soon as it was brought to Complaint Counsel's attention, and could have be cured sooner if Respondents had brought the matter to Complaint Counsel's attention at the time Respondents were or should have been aware that Complaint Counsel's production likely was incomplete. Complaint Counsel urges an alternative remedy of allowing Respondents additional time to analyze the data.

## III.

The MCO claims data is comprised of the actual claims that Rockford-area hospitals submitted to MCOs for payment for services provided to their members along with the actual reimbursements the MCOs paid for hospitals for those services. MCO claims data is, therefore, relevant to the allegations of the Commission's complaint or to the defenses of the Respondents and thus should have been produced to Respondents by December 19, 2011, pursuant to Commission Rule 3.31(b)(2).

Pursuant to Commission Rule 3.38, if a party fails to comply with any discovery obligation, the aggrieved party may file a motion requesting that the Administrative Law Judge take "action in regard thereto as is just, including but not limited to the following: . . . [r]ule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon . . . the documents or other evidence, or upon any other improperly withheld or undisclosed materials . . . ." 16 C.F.R. § 3.38(b)(4).

Accepting the facts represented by each party summarized above as true, it would not be "just" to issue an order precluding Complaint Counsel from introducing into evidence any opinions or testimony based upon analysis of any MCO claims data. The error appears to have been inadvertent and Complaint Counsel produced the MCO claims data the same day Respondents called the error to Complaint Counsel's attention. Because Respondents had received from Complaint Counsel claims data from BCBS-IL and also received copies of Complaint Counsel's previously issued CIDs, by December 19, 2011, Respondents should have been aware that Complaint Counsel likely possessed other MCO claims data and had failed to produce such data. Certainly, by January 6, 2012, when Respondents were informed by two MCOs that those MCOs had previously produced claims data to Complaint Counsel, Respondents should have been aware that Complaint Counsel had such data, but failed to produce it. Respondents provide no credible explanation for why they made no inquiries to Complaint Counsel prior to January 31, 2012.

A sanction precluding Complaint Counsel from introducing into evidence any opinions based upon analysis of any MCO claims data – including an analysis of claims data from BCBS-IL, which Respondents did have on December 19, 2011 – is overly broad and unreasonable under these circumstances. However, in fairness, Respondents will be allowed additional time to analyze the MCO claims data. Such relief is appropriately tailored to mitigate any prejudice from the delayed production of the MCO claims data at issue.

Respondents contend that they have lost six weeks (from December 19, 2011 to January 31, 2012) in a compressed pre-hearing discovery period, during which they and their experts could have analyzed the voluminous MCO claims data for potential incorporation into their defense. The time between the date on which Respondents should have received the MCO claims data (December 19, 2011) and the date on which Respondents' expert reports are due (March 9, 2012) is 81 days. Eighty-one days from January 31, 2012 is April 23, 2012. Trial in this matter is set to begin on April 17, 2012, and may not be extended by the Administrative Law Judge.[2] Thus, to allow Respondents' expert(s) an additional six weeks that Respondents contend they lost to analyze the MCO claims data is not feasible.

Complaint Counsel has proposed that Respondents be provided with 71 days from January 31, 2012 and that Respondents' expert, Dr. Noether, may submit an additional expert report by April 11, 2012, presenting analyses using any MCO claims data, provided that Complaint Counsel would have an opportunity to depose Dr. Noether for up to two additional hours on the additional report. Complaint Counsel states that this proposal would give Dr. Noether as much time with the data as Complaint Counsel's economic expert, Dr. Cory Capps, will have, and thus directly addresses the prejudice Respondents claim to have suffered.

## IV.

Respondents have not proposed an alternative remedy to their request for an order precluding Complaint Counsel from introducing into evidence any opinions or testimony on any MCO claims data. In order to ameliorate any prejudice to Respondents and to reasonably tailor the remedy to the asserted prejudice, it is hereby ORDERED that:

> Respondents' expert(s) shall have until April 11, 2012, to produce any supplemental reports(s) presenting analyses using MCO claims data;
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> Complaint Counsel shall have an opportunity to depose Respondents' expert(s), limited to any supplemental report(s) and up to two hours in duration, to be scheduled at a time and location convenient for Respondents; and
>
> Complaint Counsel shall not have an opportunity to produce a report in rebuttal to Respondents' expert(s)' supplemental report(s).

[2] Pursuant to Commission Rule 3.41(b), the date for the evidentiary hearing set by the Commission may not be extended except upon order of the Commission.

For the reasons set forth above, Respondents' request for an order precluding Complaint Counsel from utilizing the MCO claims data at trial is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 2, 2012