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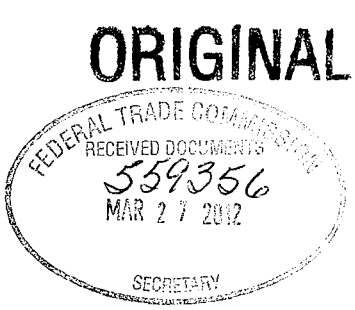

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

ORDER DENYING RESPONDENTS' MOTION TO COMPEL DEPOSITION AND DOCUMENTS FROM COMPLAINT COUNSEL

I.

On March 15, 2012, Respondents OSF Healthcare System and Rockford Health System ("Respondents") filed a Motion to Compel Deposition and Documents from Complaint Counsel ("Motion"). Complaint Counsel filed an Opposition to the Motion on March 23, 2012 ("Opposition"). Having fully considered the Motion and Opposition, and as further explained below, the Motion is DENIED.

II.

Respondents contend that Complaint Counsel failed to preserve, and failed to produce in response to Respondents' previous discovery requests, certain documents constituting or relating to communications with third-party managed care organizations ("MCOs"), which were requested, acquired, or created during the pre-Complaint investigation. Respondents state that Complaint Counsel failed to produce approximately 289 relevant communications with third-parties, which took place in July and September 2011, including transmitted drafts or other sample declarations and sample deposition testimony from other cases. According to Respondents, such communications between Complaint Counsel and MCO representatives, who are likely to testify at trial in this matter, are relevant to show potential bias, and to impugn the credibility of MCO testimony, by showing the "close collaborative" relationship between the MCO witnesses and Complaint Counsel. As an example, Respondents note that other MCO draft declarations transmitted by Complaint Counsel were ultimately signed by representatives of the MCOs and submitted in connection with the related Federal District Court proceeding between the FTC and Respondents.[1] Respondents state that, when questioned about missing

[1] *See FTC v. OSF Healthcare System and Rockford Healthcare System*, No. 3:11-cv-50344 (N.D. Ill.).

communications believed to exist, Complaint Counsel denied any obligation to have preserved such documents.

Respondents further argue that Complaint Counsel acquired a legal and ethical obligation to preserve documents concerning the subject communications no later than mid-March 2011, at which time Complaint Counsel issued Civil Investigative Demands ("CIDs"), issued a "second request" to Respondents in connection with their January 31, 2011 Hart-Scott-Rodino ("HSR") filings, and had retained outside expert witnesses. Complaint Counsel's obligation to preserve documents attached at this point in time, according to Respondents, because Complaint Counsel had launched a full-phase investigation and knew that there was a credible probability that litigation would ensue. Moreover, according to Respondents, Complaint Counsel must have recognized the obligation to preserve the third-party communications by such time because it produced some of the subject documents dating as early as February 17, 2011.

Respondents assert that they are prejudiced because they do not know and cannot presently determine the potential scope and identity of the documents that Complaint Counsel failed to preserve. For example, Respondents note, Complaint Counsel produced some documents reflecting communications with MCO United Health Care ("United"), but asserted it had no duty to preserve and produce an additional 122 documents regarding communications with United occurring between April and October 2011. Respondents request an order compelling Complaint Counsel to: (1) produce all documents constituting or discussing communications by Complaint Counsel with third-parties during its investigation of this matter, including internal communications between Complaint Counsel pursuant to Respondents' previous discovery requests; and (2) to produce a witness for deposition to testify regarding all steps Complaint Counsel took to preserve, collect and produce documents in this matter. According to Respondents, this relief is narrowly tailored to determine what documents were withheld and why, and enable Respondents subsequently to request more specific relief and remedies to redress any resulting prejudice from Complaint Counsel's actions, including sanctions under Commission Rule of Practice 3.38(b)(4), 16 C.F.R. § 3.38(b)(4).[2]

Complaint Counsel does not contest the assertion that it failed to preserve documents as claimed by Respondents. Complaint Counsel denies it had any obligation to implement a "litigation hold" at the time alleged by Respondents, because litigation was not "reasonably forseeable" at such time. Specifically, Complaint Counsel asserts that neither the initiation of a "full-phase" investigation into an acquisition, nor collection of information from third-parties, means that litigation is reasonably foreseeable. Complaint Counsel further asserts that its actions comply with judicially recognized document management practices and FTC policy. In support of the foregoing, Complaint Counsel submits the sworn declaration of Richard A. Feinstein, Director of the FTC Bureau of Competition. Exhibit 1 to Opposition (hereafter, "Feinstein Affidavit"). Mr. Feinstein's responsibilities include supervising Bureau of Competition staff in their investigations of proposed mergers to determine whether they may violate the antitrust laws

[2] Rule 3.38(b)(4) provides in pertinent part that if a party fails to comply with any discovery obligation, upon motion, the ALJ may order sanctions, including: "that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery." 16 C.F.R. § 3.38(b)(4).

and warrant recommending to the Commission that enforcement action be taken. Feinstein Decl. ¶ 1.

Complaint Counsel further argues that the evidence that Respondents claim was not preserved is not relevant, and its absence is not prejudicial to the claims and defenses in this case. Lastly, Complaint Counsel argues that Respondents' requested relief is extreme and threatens to allow discovery of staff's internal communications, in violation of Rule 3.31(c)(2), 16 C.F.R. § 3.31(c)(2).[3]

III.

It is well established that the duty to preserve evidence arises when a party knows or should know that certain evidence is relevant to pending or future litigation. *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008); *Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011); *Ashton v. Knight Transportation, Inc.*, 772 F. Supp. 2d 772, 800 (N.D. Tex 2011); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). The duty to preserve extends to the period before litigation once that litigation is reasonably foreseeable. *FTC v. Lights of Am. Inc.*, 2012 U.S. Dist. LEXIS 17212, at *10-12 (C.D. Cal. Jan. 20, 2012). "'[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.'" *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010) (citation omitted). It has been held that "reasonable anticipation of litigation," "is such time when a party is on notice of a credible probability that it will become involved in litigation." *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 2012 N.Y. App. Div. LEXIS 559 (N.Y. App. Div. 1st Dep't Jan. 31, 2012).

On the material issue of whether the investigative steps taken in this case as of mid-March 2011 show that Complaint Counsel "reasonably anticipated" litigation at that time, Mr. Feinstein states as follows:

> After receiving an HSR filing, staff may investigate by seeking issuance of Requests for Additional Information ("Second Requests"), and may also ask the Commission to allow the staff to issue Civil Investigative Demands (CIDs) to enable discovery through compulsory process. Feinstein Decl. ¶ 2.
>
> Out of the thousands of HSR filings each year, very few lead to litigation. There were 7,100 HSR filings from 2008 through 2010, but only three administrative complaints issued. This reflects approximately 5 percent of those HSR filings in connection with which there were Second Requests, and one-tenth of one percent of all HSR filings. Feinstein Decl. ¶ 2.

[3] Complaint Counsel further argues that Respondents' Motion is untimely under Additional Provision 9 of the Scheduling Order in this case. That provision requires that "[a]ny motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests, or within 20 days after the close of discovery, whichever first occurs." The close of discovery was February 17, 2012, resulting in an outermost deadline of March 8, 2012 for the filing of a motion to compel. Although Respondents' Motion, filed on March 15, 2012, exceeds the deadline in Additional Provision 9, under the circumstances presented, it is an appropriate exercise of discretion to consider the motion, nonetheless.

> Tasks that staff engage in when investigating a proposed merger include: (1) seeking declarations from market participants, to develop testimony which will inform staff's recommendations to the Commission and the Commission's decision as to whether and what action to take; (2) reviewing documents gathered through subpoenas or Second Requests; (3) reviewing data and information obtained through CIDs; and (4) eliciting testimony from parties and third parties through investigational hearings. Feinstein Decl. ¶ 3.
>
> The question of whether to recommend litigation, or to actually litigate, cannot be analyzed until the investigatory tools (above) are used and produce relevant evidence. Feinstein Decl. ¶ 4.
>
> The Commission's determination whether to vote to issue an administrative complaint is also influenced by recommendations from the Bureau of Competition management, the Bureau of Economics, and Office of General Counsel. Feinstein Decl. ¶ 4.
>
> Staff often gathers affidavits from third parties, hires experts to analyze proposed transactions and takes live testimony, but may still recommend closing an investigation. Feinstein Decl. ¶ 5.
>
> Staff made its recommendation to the Commission on or about October 31, 2011 and a litigation hold was put in place November 1, 2011. Feinstein Decl. ¶ 8.

The foregoing facts directly contradict Respondents' assertion that, by seeking declarations from third-parties, issuing CIDs and hiring experts, Complaint Counsel knew that litigation was reasonably foreseeable or a "credible probability." In addition, in *FTC v. Lights of America Inc.*, 2012 U.S. Dist. LEXIS 17212, the federal district court, faced with similar facts, denied the defendant's motion for sanctions based on spoliation of evidence. The court held that the duty to preserve evidence did not arise upon a "full-phase" investigation or upon the issuance of a CID to the defendant because these events did not show that the FTC "reasonably anticipated" litigation. 2012 U.S. Dist. LEXIS 17212, at *10-12. The court stated:

> Commencement of an internal investigation does not, per se, put an institution on notice of potential litigation. *See Kitsap Physicians Serv.*, 314 F.3d at 1001 (9th Cir. 2002) (finding that a health care provider's initiation of an internal investigation did not put the provider on notice of a "specific, future . . . lawsuit," and thus the provider's failure to keep records from that point on did not constitute spoliation). The duty to preserve relevant documents attaches when future litigation is "probable," which means "more than a possibility." *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 264 F.R.D. 517, 524 (N.D. Cal. 2009). In this case, the FTC issued a CID to LOA [Lights of America] to determine whether LOA could substantiate its claims regarding its LED products. At oral argument, LOA argued that this CID should have triggered the FTC's own internal litigation hold because it was a "pre-litigation, discovery CID," and not

> an "investigatory CID"; however, a sworn FTC declaration makes clear that the FTC uses CIDs to obtain information "in furtherance of" its investigations. (Declaration of Robert S. Kaye "Kaye Decl." ¶ 3, Docket No. 139-37.) After receiving information in response to a CID, the FTC evaluates that data to determine whether an investigation warrants enforcement action. (Id.) In LOA's case, the FTC needed to evaluate LOA's response to the CID to determine whether LOA's claims were substantiated before it could decide whether the investigation warranted enforcement action. Because many FTC investigations [that] involve the use of a CID conclude without litigation, the issuance of a CID does not make litigation "probable." . . . The FTC needed to obtain information from LOA, in response to the CID, before it could determine whether LOA substantiated its claims. In sum, litigation was not "probable" at the time the FTC issued the CID.

2012 U.S. Dist. LEXIS 17212, at *10-12 (C.D. Cal. Jan. 20, 2012).

Similar to *Lights of America*, the Feinstein Declaration, summarized above, shows that that the FTC issues CIDs, seeks declarations from third-parties, and issues HSR "second requests" to obtain information in furtherance of its investigations; that such data must be analyzed to determine whether enforcement action is warranted; and that the vast majority of cases in which second requests are issued do not result in litigation. Accordingly, based on the facts presented and analogous legal precedent, Respondents have failed to prove their claim that Complaint Counsel "reasonably anticipated litigation" no later than mid-March, 2011. Respondents seek to distinguish *Lights of America* on the basis that, unlike in that case, Complaint Counsel in this case took additional investigative steps beyond issuing CIDs. Complaint Counsel's additional investigative steps in this case, however, were nonetheless "investigative" in nature, and, based upon the Feinstein Declaration, do not support a finding that litigation was "reasonably anticipated." Respondents' effort to distinguish *Lights of America* on this basis, therefore, is unavailing.

Moreover, Respondents have failed to cite persuasive authority that the duty to preserve evidence should attach at such time as Complaint Counsel issued a second request, sought declarations from third-parties, issued CIDs and hired experts. *Voom*, *supra*, upon which Respondents rely, was a state appellate court case involving a contract dispute in which the court held that the defendant's obligation to preserve documents arose on the date it sent a letter to the plaintiff demanding an audit and threatening termination of the contract, particularly because the defendant knew that the plaintiff would sue if the defendant in fact terminated the agreement. In *United Medical Supply v. United States*, 77 Fed. Cl. 257 (Fed. Cl. 2007), also cited by Respondents, the government did not contest that a duty to preserve evidence attached on or about the time that the plaintiff filed for an equitable adjustment claim under the Contract Disputes Act. Rather, the issue in *United Medical Supply* was whether, and to what extent, the government should be sanctioned under Fed. R. Civ. P. 37, because documents were destroyed, and continued to be destroyed over an extended period of time, notwithstanding the acknowledged litigation hold, under circumstances indicating "at the least, the reckless disregard

of its duty to preserve relevant evidence." 77 Fed. Cl. at 265, 273-74. Both *Voom* and *United Medical Supply* are facially inapposite to this case.

IV.

Respondents have failed to meet their burden of demonstrating that Complaint Counsel's duty to preserve evidence attached at the point in time asserted by Respondents in their Motion. Having fully considered Respondents' Motion and Complaint Counsel's Opposition, and for the reasons set forth above, Respondents' Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 27, 2012