

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



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

DOCKET NO. 9349

**ORDER ON RESPONDENTS' MOTION TO COMPEL DOCUMENTS
REQUESTED FROM CONNECTICUT LIFE INSURANCE COMPANY**

I.

Respondents OSF Healthcare System and Rockford Health Systems ("Respondents") filed a Motion to Compel Connecticut Life Insurance Company to Produce Documents Requested by Subpoena *Duces Tecum* ("Motion") on February 3, 2012. Third parties CIGNA Corporation and Connecticut General Life Insurance Company ("CIGNA") filed an Opposition on February 10, 2012. For the reasons set forth below, Respondents' Motion to Compel is DENIED WITHOUT PREJUDICE IN PART and GRANTED IN PART.

II.

Respondents state that they served a subpoena on CIGNA requesting certain documents for the period from January 1, 2007 to present, to be produced for inspection on January 10, 2012. Respondents recite the negotiations it engaged in with CIGNA and attach a Certificate of Conference, as required by Commission Rule 3.22(g). Respondents state that the following four Subpoena requests are at issue: (1) Subpoena Request No. 1, which seeks CIGNA's communications with the FTC or the Illinois Attorney General's office regarding the transaction that is the subject of the instant proceeding; (2) Subpoena Request No. 6, which seeks documents showing the number of covered lives in each of CIGNA's health plan products; (3) Subpoena Request No. 18, which seeks documents relating to CIGNA's negotiations with providers of general acute care inpatient hospital services in the areas served by Respondents' hospitals; and (4) Subpoena Request No. 19, which seeks documents relating to pricing models that compare rates for hospitals services.

CIGNA urges that the Motion is untimely. Next, CIGNA asserts that the time for compliance is unreasonable. CIGNA also argues that Respondents' motion should be denied as moot, as CIGNA has produced responsive documents. Finally, CIGNA argues Respondents' Motion should be denied as to Request Numbers 18 and 19.

III.

As an initial matter, CIGNA urges that the Motion be denied as untimely. Paragraph 9 of the Scheduling Order entered in this case provides: "Any 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." CIGNA, by letter dated December 23, 2011, objected to the Subpoena. As demonstrated in the Exhibits attached to the Motion and to the Opposition, Respondents and CIGNA engaged in several negotiations to narrow the scope of the Subpoena. CIGNA's last letter objecting to the subpoena is dated February 3, 2012. Thus, Respondents' Motion, filed on February 3, 2012 at the time negotiations on the subpoena apparently reached an impasse, is not untimely and is not denied on that ground.

With respect to CIGNA's argument that the Motion should be denied as moot, CIGNA asserts that it produced documents responsive to Request Numbers 1 and 6 on the afternoon of February 3, 2012. CIGNA also asserts that it produced documents responsive to Request Numbers 18 and 19 since before January 25, 2012.

With respect to Request Numbers 1 and 6, if CIGNA produced responsive documents on the afternoon of February 3, 2012, this would be at or around the same that Respondents filed the instant Motion. If CIGNA has indeed produced all documents responsive to Request Numbers 1 and 6, then Respondents' Motion would be moot with respect to Request Numbers 1 and 6. The Motion is hereby DENIED WITHOUT PREJUDICE as to Request Numbers 1 and 6. Respondents may renew their motion with respect to Request Numbers 1 and 6 if the documents they received on February 3, 2012 do not fully comply with their requests. Any such motion shall be filed no later than February 15, 2012 and any opposition to such motion shall be filed no later than February 17, 2012.

With respect to Request Numbers 18 and 19, CIGNA urges, first, that it produced responsive documents before January 25, 2012; and second, that Request Numbers 18 and 19 lack the requisite particularity and seek documents that Respondents already possess. Unlike the timing relating to production of documents responsive to Request Numbers 1 and 6, it appears that Respondents had CIGNA's document production in response to Request Numbers 18 and 19 prior to filing their Motion and yet dispute that CIGNA has properly or completely produced documents in response to Request Numbers 18 and 19. Thus, the arguments made with respect to these requests are addressed as follows.

Request Number 18 seeks, *inter alia*, documents "relating to" CIGNA's contract negotiations and documents "relating to" contract proposals, drafts, and communications

between CIGNA and the providers. Similarly, Request Number 19 seeks documents “relating to” pricing models. Subpoena requests that seek documents “concerning” or “relating to” have been found to lack the reasonable particularity required by Commission Rule 3.34(b) (a subpoena *duces tecum* “shall specify with reasonable particularity the material to be produced”). *E.g., In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19, *12 (Feb. 4, 2004) (limiting request seeking “[a]ll internal and external correspondence, memoranda, and messages concerning or relating to” the respondent).

CIGNA further argues that Request Numbers 18 and 19 are overly broad because they impermissibly seek production of documents beyond the relevant geographic area. Absent a showing of the relevance of information pertaining to the geographic area alleged in the Complaint or asserted in the Answer, a document request served on a third party will be limited to the relevant geographic area. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19, *13 (Feb. 4, 2004). Therefore, these requests will be narrowed, as specified below.

CIGNA argues additionally that Respondents are already in possession of documents sought by Request Numbers 18 and 19 and to require CIGNA to provide those same documents would be “unreasonably cumulative or duplicative.” *See* Commission Rule 3.31 (c)(2)(i) (discovery shall be limited if Administrative Law Judge determines that: the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive). To the extent that Request Numbers 18 and 19 seek documents that Respondents already possess, the Motion is DENIED.

However, the documents CIGNA seeks to withhold may not all be in Respondents’ possession. For example, CIGNA asserts that because Respondents have received CIGNA’s contracts and amendments, Respondents can compare for themselves the rates they charge CIGNA for relevant services with those rates charged by SwedishAmerica. This assertion is rejected. Documents generated by CIGNA in their ordinary course of business in which CIGNA compares the rates that CIGNA is charged by Respondents to the rates CIGNA is charged by SwedishAmerica are highly relevant to this proceeding and may be more dispositive than a document generated by Respondents’ counsel or experts creating such comparisons from the documents received in litigation. In this regard, Respondents’ Motion is GRANTED.

IV.

In accordance with the foregoing, Document Request Number 18 is limited as follows:

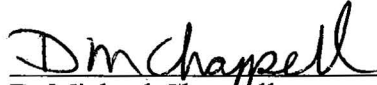
18. Documents describing or reflecting your negotiations with providers of the Relevant Services in the Relevant Area from January 1, 2005 to the present, including but not limited to contract proposals, drafts, and communications between you and providers of Relevant Services in the Relevant Area; documents identifying key or “must-have” hospitals, outpatient facilities, or primary care

physicians in the Relevant Area; documents analyzing the geographic coverage of providers; documents, information, and data relied upon during contract negotiations (such as quality measures, member utilization patterns, and employer or member feedback regarding your provider network or product offerings); documents relied upon to determine whether proposed reimbursement rates are comparable to those you pay to other providers of Relevant Services in the Relevant Area; documents reflecting whether to include or exclude any hospital or hospital system, or physician or physician organization in your provider network, communications regarding any provider's desire to exclude any other providers from a health plan; and copies of the final provider contracts, including any amendments or modifications, for Relevant Services in the Relevant Area.

19. Documents describing or reflecting 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, 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 close of discovery in this case is February 17, 2012. That deadline is hereby extended to February 22, 2012 for the limited purpose of allowing CIGNA to produce documents as required by this order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 13, 2012