

RESOLUTION AGREEMENT

I. Recitals

1. Parties. The Parties to this Resolution Agreement (“Agreement”) are:

A. The United States Department of Health and Human Services, Office for Civil Rights (“HHS”), which enforces the Federal standards that govern the privacy of individually identifiable health information (45 C.F.R. Part 160 and Subparts A and E of Part 164, the “Privacy Rule”), the Federal standards that govern the security of electronic individually identifiable health information (45 C.F.R. Part 160 and Subparts A and C of Part 164, the “Security Rule”), and the Federal standards for notification in the case of breach of unsecured protected health information (45 C.F.R. Part 160 and Subparts A and D of 45 C.F.R. Part 164, the “Breach Notification Rule”). HHS has the authority to conduct compliance reviews and investigations of complaints alleging violations of the Privacy, Security, and Breach Notification Rules (the “HIPAA Rules”) by covered entities and business associates, and covered entities and business associates must cooperate with HHS compliance reviews and investigations. *See* 45 C.F.R. §§ 160.306(c), 160.308, and 160.310(b).

B. Sandor Mark Jacobson (“Receiver”), acting on behalf of Filefax, Inc. (“Filefax”) as court appointed Receiver of, which was a medical records moving and storage company in Northbrook, Illinois, and was a business associate, as defined at 45 C.F.R. § 160.103,. On November 18, 2016, the Receiver was appointed by the Circuit Court of Cook County, Illinois, in Case No. 2015 D 9931, and charged with the responsibility of liquidating all of Filefax’s assets. Pursuant to his appointment the Receiver sold certain real estate owned by Filefax (the “Commercial Property”) and is currently holding the net proceeds from the sale of the Commercial Property (the “Net Sale Proceeds”). Filefax is no longer operating, and was involuntarily dissolved by the Illinois Secretary of State on August 11, 2017.

HHS and the Receiver shall together be referred to herein as the “Parties.”

2. Factual Background and Covered Conduct.

On February 10, 2015, OCR received an anonymous complaint alleging that on February 6 and 9, 2015, a “dumpster diver” brought medical records obtained from Filefax to a shredding and recycling facility to exchange for cash. OCR opened an investigation, which confirmed that an individual had left medical records of approximately 2,150 patients at the shredding and recycling facility, and that these medical records contained the patients’ protected health information (PHI).

OCR’s investigation indicated that the following Covered Conduct occurred:

Between January 28, 2015, and February 14, 2015, Filefax impermissibly disclosed the PHI of 2,150 individuals by leaving the PHI in an unlocked truck in the Filefax

parking lot, or by granting permission to a person to remove the PHI from Filefax and leaving the PHI, unsecured, outside the Filefax facility for her to collect.

3. No Admission. This Agreement is not an admission of Filefax's liability by the Receiver.

4. No Concession. This Agreement is not a concession by HHS that Filefax did not violate the HIPAA Rules and is not liable for civil money penalties.

5. Intention of Parties to Effect Resolution. This Agreement is intended to resolve OCR Transaction Number 15-203786 and any violations of the HIPAA Rules related to the Covered Conduct specified in paragraph I.2 of this Agreement. In consideration of the Parties' interest in avoiding the uncertainty, burden, and expense of litigation the Parties agree to resolve this matter according to the Terms and Conditions below.

II. Terms and Conditions

6. Payment. HHS has agreed to accept, and the Receiver has agreed to pay HHS, the amount of \$100,000 ("Resolution Amount"). The Receiver agrees to pay the Resolution Amount on the Effective Date of this Agreement, as defined in paragraph II.14. Payment shall be made by automated clearing house transaction pursuant to written instructions to be provided to the Receiver by HHS.

7. Corrective Action Plan. The Receiver has entered into and agrees to comply with the Corrective Action Plan ("CAP"), attached as Appendix A, which is incorporated into this Agreement by reference. If the Receiver breaches the CAP, and fails to cure the breach as set forth in the CAP, then the Receiver will be in breach of this Agreement and HHS will not be subject to the Release set forth in paragraph II.8 of this Agreement.

8. Release by HHS. In consideration of and conditioned upon the Receiver's performance of its obligations under this Agreement, HHS releases Filefax from any actions it may have under the HIPAA Rules arising out of or related to the Covered Conduct identified in paragraph I.2 of this Agreement and, as a consequence, the Receiver is not subject to any priority claim related to OCR's unpaid claims under 31 U.S.C. § 3713. HHS does not release Filefax or the Receiver from, nor waive any rights, obligations, or causes of action other than those arising out of or related to the Covered Conduct and referred to in this paragraph. This release does not extend to actions that may be brought under section 1177 of the Social Security Act, 42 U.S.C. § 1320d-6.

9. Agreement by Released Parties. The Receiver shall not contest the validity of his obligation to pay, nor the amount of, the Resolution Amount or any other obligations agreed to under this Agreement. On behalf of Filefax, the Receiver waives all procedural rights granted under Section 1128A of the Social Security Act (42 U.S.C. § 1320a- 7a) and 45 C.F.R. Part 160 Subpart E, and HHS claims collection regulations at 45 C.F.R. Part 30, including, but not limited to, notice, hearing, and appeal with respect to the Resolution Amount.

10. Binding on Successors. This Agreement is binding on the Receiver and Filefax, and their successors, heirs, transferees, and assigns.

11. Costs. Each Party to this Agreement shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

12. No Additional Releases. This Agreement is intended to be for the benefit of the Parties only, and, except where indicated, the Parties do not release any claims against or by any other person or entity.

13. Effect of Agreement. This Agreement constitutes the complete agreement between the Parties. All material representations, understandings, and promises of the Parties are contained in this Agreement. Any modifications to this Agreement shall be set forth in writing and signed by all Parties.

14. Execution of Agreement and Effective Date. The Agreement shall become effective (*i.e.*, final and binding) upon the date of signing of this Agreement and the CAP by the last signatory (Effective Date).

15. Tolling of Statutes of Limitations. Pursuant to 42 U.S.C. § 1320a-7a(c)(1), a civil money penalty (“CMP”) must be imposed within six years from the date of the occurrence of the violation. The Receiver agrees that the time between the Effective Date of this Agreement and the date the Agreement may be terminated by reason of the Receiver’s breach, plus one-year thereafter, will not be included in calculating the six-year statute of limitations under 42 U.S.C. § 1320a-7a(c)(1) applicable to the violations which are the subject of this Agreement, or under jurisprudence applying the same statute of limitations to claims under 31 U.S.C. § 3713. The Receiver, on behalf of Filefax, waives any statute of limitations, laches, or similar defenses to any administrative action relating to the Covered Conduct identified in paragraph I.2 that is filed by HHS within the time period set forth above, except to the extent that such defenses would have been available had an administrative action been filed on the Effective Date of this Agreement. The Receiver, on his own behalf, waives any statute of limitations, laches, or similar defenses to any action for unpaid claims under 31 U.S.C. § 3713.

16. Disclosure. HHS places no restriction on the publication of the Agreement. In addition, HHS may be required to disclose material related to this Agreement to any person upon request consistent with the applicable provisions of the Freedom of Information Act, 5 U.S.C. § 552, and its implementing regulations, 45 C.F.R. Part 5.

17. Execution in Counterparts. This Agreement may be executed in counterparts, each of which constitutes an original, and all of which shall constitute one and the same agreement.

18. Authorizations. The individuals signing this Agreement represent and warrant that they are authorized to execute this Agreement.

The Receiver

Sandor Mark Jacobson
Court appointed Receiver of Filefax, Inc.

Date

For United States Department of Health and Human Services

Steven Mitchell
Acting Regional Manager, Midwest Region
Office for Civil Rights

Date

Appendix A
CORRECTIVE ACTION PLAN
BETWEEN THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES
AND
SANDOR MARK JACOBSON,
AS COURT APPOINTED RECEIVER OFFILEFAX, INC.

I. Preamble

Sandor Mark Jacobson (“Receiver”), on behalf of Filefax, Inc., (“Filefax”) hereby enters into this Corrective Action Plan (“CAP”) with the United States Department of Health and Human Services, Office for Civil Rights (“HHS”). Contemporaneously with this CAP, the Receiver is entering into a Resolution Agreement (“Agreement”) with HHS, and this CAP is incorporated by reference into the Resolution Agreement as Appendix A. The Receiver enters into this CAP as part of consideration for the release set forth in paragraph II.9 of the Agreement.

II. Contact Persons and Submissions

A. Contact Persons

The Receiver has identified the following individual as its authorized representative and contact person regarding the implementation of this CAP and for receipt and submission of notifications:

Chester H. Foster, Jr.
Foster Legal Services, PLLC
16311 Byron Dr.
Orland Park, IL 60462
Phone: (708) 403-3800
chf@fosterlegalservices.com

HHS has identified the following individual as its authorized representative and contact person with whom Filefax is to report information regarding the implementation of this CAP:

Steven Mitchell
Acting Regional Manager
U.S. Department of Health and Human Services
Office for Civil Rights – Midwest Region
601 E. 12th Street, Suite 353
Kansas City, MO 64106
Phone: (816) 426-7278
Steven.Mitchell@hhs.gov

The Receiver and HHS agree to promptly notify each other of any changes in the contact persons or the other information provided above.

B. Proof of Submissions. Unless otherwise specified, all notifications required by this CAP may be made by any means, including certified mail, overnight mail, or hand delivery, provided that there is proof that such notification was received. For purposes of this requirement, internal facsimile confirmation sheets do not constitute proof of receipt.

III. Effective Date and Term of CAP

The Effective Date for this CAP shall be calculated in accordance with paragraph II.14 of the Agreement (“Effective Date”). The period for compliance (“Compliance Term”) with the obligations assumed by the Receiver under this CAP shall begin on the Effective Date of this CAP and end on such date that the Receiver attests that he has disposed of all documents in his possession per this Agreement.

IV. Time

In computing any period of time prescribed or allowed by this CAP, all days referred to shall be calendar days. The day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days.

V. Corrective Action Obligations

In connection with his duties as the Receiver for Filefax, the Receiver has caused certain medical records that were previously stored at the Commercial Property (the “Remaining Medical Records”) to be removed and placed into storage with Iron Mountain Information Management, LLC (“Iron Mountain”). The Receiver intends to (a) formulate a plan to dispose of the Remaining Medical Records (the “Records Disposition Plan”) and (b) seek authorization from the Court that appointed him the Receiver of Filefax (the “Appointing Court”) to implement the Records Disposition Plan. In connection with the Remaining Medical Records the Receiver agrees to the following:

- A. The Receiver has instructed Iron Mountain to catalogue the Remaining Medical Records and will provide HHS with a copy of this inventory (“Remaining Medical Records Inventory”) within seven (7) days of the Effective Date..
- B. Prior to presenting the Records Disposition Plan to the Appointing Court, the Receiver will send it to HHS for review and approval. Upon receiving notice of any required changes to the Records Disposition Plan from HHS, the Receiver shall revise the Records Disposition Plan accordingly. This process shall continue until HHS approves the Records Disposition Plan, and the Receiver will not present the Records Disposition Plan to the Appointing Court until HHS has approved it.

- C. Within seven (7) days of the Effective Date the Receiver shall provide HHS with an affidavit, signed under oath, detailing where and when the Remaining Medical Records were found by him or his representative; the steps taken after their discovery to secure them, including their transference to Iron Mountain; and the process undertaken to catalogue the records. The affidavit shall also authenticate the Remaining Medical Records Inventory referenced in V.A, above.
- D. Upon final disposal of all Remaining Medical Records, the Receiver shall attest that all PHI in its possession was properly disposed of as outlined in the Records Disposition Plan.

The Receiver

Sandor Mark Jacobson
Court appointed Receiver of Filefax, Inc.

Date

For United States Department of Health and Human Services

Steven Mitchell
Acting Regional Manager, Midwest Region
Office for Civil Rights

Date