

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 COMPLAINT COUNSEL'S MOTION TO COMPEL FTI CONSULTING,
INC. TO PRODUCE DOCUMENTS REQUESTED BY SUBPOENA *DUCES TECUM*
AND TO ENFORCE SUBPOENAS *AD TESTIFICANDUM***

I.

On February 29, 2012, Complaint Counsel filed a Motion to Compel FTI Consulting, Inc. ("FTI") to Produce Documents Requested by Subpoena *Duces Tecum* and to Enforce Subpoena *Ad Testificandum*. Non-party FTI filed its Opposition on March 7, 2012. Complaint Counsel's Motion is accompanied by a Statement Regarding Meet and Confer, as required by Commission Rule 3.22(g). For the reasons set forth below, Complaint Counsel's Motion is DENIED WITHOUT PREJUDICE.

II.

Non-party FTI states that it was retained by OSF Healthcare System ("OSF") and Rockford Health System ("RHS") ("Respondents") jointly to provide certain advisory and consulting services. FTI further states that the consulting engagement culminated in the creation of the "Merger Report," which summarized the efficiencies and cost savings that FTI estimated Respondents could achieve as a result of the merger. FTI further asserts that Respondents have identified Mr. Jeffery Brown, FTI team leader for the Merger Report, as a testifying expert in this proceeding.

Complaint Counsel states the following:

When Respondents filed their Hart-Scott-Rodino filing for the proposed affiliation between OSF and RHS ("the Acquisition"), each party submitted the Merger Report, which on its front page, includes the language: "Prepared for by FTI Healthcare for Counsel. Priviledged [sic] and Confidential."

On April 8, 2011, the Federal Trade Commission issued a Civil Investigative Demand (“CID”) to FTI requesting the production of documents relating to all work FTI created for OSF and RHS, including work relating to the Acquisition.

In response, FTI asserted that, other than a limited number of documents including the Merger Report, FTI did not possess any non-privileged documents responsive to the CID.

On August 24, 2011, Commission Staff (“Staff”) conducted an investigational hearing of RHS CFO Henry Seybold who informed Staff that in addition to the Merger Report, FTI created a Performance Report for RHS identifying savings that FTI could help RHS achieve without the proposed Acquisition.

On December 30, 2011, Complaint Counsel sent a Subpoena *Duces Tecum* (“SDT”) to FTI. FTI responded to the SDT on January 30, 2012, asserting privilege over all materials relating to the Merger Report.

On January 27, 2012, Complaint Counsel sent Subpoenas *Ad Testificandum* to four SDT employees. On February 7, 2012, FTI confirmed it would instruct FTI employees not to respond to Complaint Counsel’s questions relating to the Merger Report.

Non-party FTI asserts that on February 11, 2011, when Respondents submitted their premerger notifications, they voluntarily produced the Merger Report, with an explicit disclaimer that despite disclosure of any specific privileged materials, Respondents were not waiving privilege as to the entire subject matter of the document. Non-party FTI further asserts that on January 11, 2012, Respondents produced Mr. Jeffrey Brown’s testifying expert report 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.), and that at that time, Respondents also produced the materials considered by Mr. Brown in forming the expert opinions expressed in his expert report. Respondents’ expert reports in this proceeding are due on March 9, 2012. FTI states that on March 9, 2012, Respondents will produce all expert materials to which Complaint Counsel is entitled.

III.

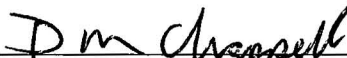
Complaint Counsel expressly states that it “does not dispute that the sole purpose behind the creation of the Merger Report was to aid Respondents’ antitrust counsel in expected antitrust litigation surrounding the Acquisition and that, based on that fact, the work-product doctrine is applicable to the FTI materials.” However, Complaint Counsel argues that “[b]ased on Respondents’ subsequent actions, . . . any work-product protections underlying the Merger Report have been waived.” Motion at 6 (emphasis added). Complaint Counsel further contends that “the repeated attempts by Respondents to use this information offensively – and selectively

– to advance an efficiencies defense, while at the same time claiming attorney work-product privilege, violates both the letter of the law and the spirit of open discovery.” Motion at 1.

According to FTI, Respondents explicitly stated that their voluntary production of the Merger Report did not constitute a waiver of the work-product privilege with respect to the entire subject matter of the Merger Report. Respondents are entitled to do so. However, “a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.” *In re Motor Up Corp., Inc.*, 1999 FTC LEXIS 262, *5 (Aug. 5, 1999) (citing *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998)). It is unclear from the pleadings whether Respondents’ actions have waived the work-product protection.

The Motion raises issues that involve, and should concern, Respondents. In order to determine whether Respondents’ actions constitute a waiver of the work-product privilege, Respondents shall file a response to Complaint Counsel’s motion to compel. Respondents shall file such response no later than March 12, 2012. Complaint Counsel shall file a reply to FTI’s Opposition and to Respondents’ response no later than March 14, 2012. Because Complaint Counsel’s Motion and its Proposed Order do not sufficiently describe the requested documents, in its Reply, Complaint Counsel shall indicate with greater specificity the documents that are in dispute.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 8, 2012