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 ON COMPLAINT COUNSEL'S MOTION TO COMPEL FTI CONSULTING, INC. TO PRODUCE DOCUMENTS REQUESTED BY SUBPOENA *DUCES TECUM* AND TO ENFORCE SUBPOENA *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* ("Motion"). Non-party FTI filed its Opposition on March 7, 2012. By Order dated March 8, 2012, Complaint Counsel's Motion was denied without prejudice and, because the dispute involved Respondents' actions, Respondents were required to file a response. Respondents filed their Response on March 12, 2012 and Complaint Counsel filed its Reply on March 14, 2012. For the reasons set forth below, Complaint Counsel's Motion is GRANTED in part and DENIED in part.

II.

Non-party FTI was retained jointly by OSF Healthcare System ("OSF") and Rockford Health System ("RHS") ("Respondents") to provide certain advisory and consulting services. As a consultant to Respondents, FTI created the December 14, 2010 Business Efficiencies Report, which Complaint Counsel terms, "the Merger Report," and is referred to herein as the Merger Report. The Merger Report summarizes the efficiencies and cost savings that FTI estimated Respondents could achieve as a result of the merger. When Respondents filed their Hart-Scott-Rodino filing for the proposed affiliation between OSF and RHS ("the Acquisition"), each party voluntarily produced the Merger Report, with an explicit disclaimer that Respondents were not waiving privilege as to the entire subject matter of the document.

Through this Motion, Complaint Counsel seeks "documents and communications that relate to the creation of the Merger Report." Complaint Counsel readily acknowledges that the documents relating to the creation of the Merger Report are protected under the work product doctrine, but argues that this privilege has been waived through Respondents' actions. First, Complaint Counsel asserts that Respondents waived the privilege by using the Merger Report as a sword, while shielding materials needed to evaluate Respondents' asserted efficiency claims. Second, Complaint Counsel asserts that Respondents' testifying expert relies on the Merger Report, but does not understand the information used in calculating the claimed savings listed in his expert report in this case, and instead deferred to others at FTI as persons most knowledgeable about FTI's analyses and savings asserted in the Merger Report.[1]

FTI and Respondents[2] respond, first, that Respondents' voluntary production of the Merger Report did not constitute a waiver of work product privilege with respect to the entire subject matter. FTI and Respondents respond, second, that Complaint Counsel is not entitled to discover documents that were prepared in anticipation of litigation by or for another party's (Respondents') representative, including its consultant (FTI) and now testifying expert witness (Jeffrey Brown from FTI), unless the testifying expert witness considered or relied upon those documents in formulating the opinions about which he will testify.

III.

A. Sword and shield theory

"[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)). Complaint Counsel states that in investigational hearings and depositions, Respondents averred that the savings that FTI claimed in the Merger Report justified the proposed Acquisition and that because Respondents injected the Merger Report into this litigation, any privilege that may have applied to the materials relating to the Merger Report has been waived.

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[1] Complaint Counsel also recites facts indicating that FTI inadvertently disclosed certain privileged documents relating to the Merger Report. However, Complaint Counsel does not assert that the inadvertent disclosure by FTI waived the protections of the work product doctrine. Moreover, FTI promptly took reasonable steps to rectify the error. Thus, FTI's inadvertent disclosure of certain documents does not waive the protections of the work product doctrine. *Accord In re Hoecsht Marion Roussel, Inc.*, 2000 FTC LEXIS 155, at *8-9 (Oct. 17, 2000).

[2] As acknowledged by FTI, Respondents, who retained FTI through their counsel, control the privilege afforded by the attorney work product doctrine over the FTI materials. FTI's counsel is also counsel for Respondents. Accordingly, arguments advanced by either FTI or Respondents will be attributed to Respondents.

The operative case law holds that subject matter waiver occurs only where a party attempts to gain a tactical advantage by "us[ing] the disclosed material for advantage in the litigation but [invoking] the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials." *Lerman v. Turner*, 2011 U.S. Dist. LEXIS 715, at *25-26 (N.D. Ill. Jan. 5, 2011). "Subject matter waiver thus 'is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.'" *Id.* at *26 (citing *Fed. R. Evid. 502* advisory comm. nn. (2007)).

Furthermore, "in the same vein of thought, 'waiver of the attorney client or work product privileges can occur when the privilege holder asserts a claim or affirmative defense which puts the privileged matter directly at issue.' The primary inquiry is whether the party claiming privilege will assert the allegedly protected material in aid or in furtherance of its claims or defenses." *Chevron Corp. v. Stratus Consulting, Inc.*, 2010 U.S. Dist. LEXIS 110023, at *32 (D. Co. Oct. 1, 2010) (citation omitted). "In an adversarial proceeding, a process designed to reach the truth of the matter through the presentation of opposing perspectives, justice does not permit one side to inform and facilitate a damages assessment, purposed for the reliance of the court, without permitting its opponent access to the materials and process underlying the assessment." *Id.* at *33.

Thus, the sword and shield theory applies only if the "sword" is proffered or advanced by Respondents. Although Respondents produced the Merger Report as part of their Hart-Scott-Rodino filing, it is not clear from the Motion papers whether Respondents intend to rely on or advance any part of the Merger Report in this litigation, *i.e.*, whether the Merger Report or any part thereof is "purposed for the reliance of the court." Furthermore, the testimony about the Merger Report by an RHS executive, referred to by Complaint Counsel in the Motion, apparently arose in an investigational hearing deposition, in response to questioning by Complaint Counsel, and not by Respondents. If not asserted in furtherance of Respondents' defenses in the litigation, these disclosures do not constitute a selective or self-serving use of privileged information to gain a tactical advantage in litigation and, thus, do not operate to waive the protections of the work product doctrine. However, to the extent that Respondents or their expert witnesses or other witnesses are advancing any part of the Merger Report or findings or data related to findings or opinions therein in this litigation, Respondents and FTI are required to disclose related, work product protected information. If this is the case, Complaint Counsel is entitled to production of such information, to include documents and communications that relate to the creation and underlying analysis of any part of the Merger Report relied upon or advanced in this case, and to take depositions of FTI employees relating only to such parts of the Merger Report relied upon or advanced by Respondents.

B. Documents relied upon by testifying expert

Respondents identified Mr. Jeffery Brown, FTI team leader for the Merger Report, as a testifying expert in this proceeding and produced his expert report on March 9, 2012. Pursuant to the Scheduling Order agreed to by the parties and entered in this case:

> At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case. Unless otherwise agreed by the parties, the experts' notes and drafts of expert reports need not be produced. Likewise, communications between experts and with counsel or consultants need not be produced unless relied upon by the expert in formulating an opinion in this case.

Scheduling Order ¶ 18(b). In addition, Complaint Counsel and Respondents' counsel agreed that "[c]ommunications (oral, written, and by email) of any expert witness with consulting experts . . . would not be discoverable, unless relied upon by the expert." (Exhibit A to FTI's Opposition). As Respondents assert, that agreement covers internal communications between Mr. Brown (Respondents' testifying expert) and Mr. Brown's colleagues at FTI (Respondents' consulting experts) and is controlling here.

Respondents state that they have produced to Complaint Counsel all of the documents that Respondents and their testifying expert considered or relied upon in formulating Mr. Brown's opinions concerning the efficiencies likely to result from the Acquisition. Complaint Counsel does not dispute whether FTI has turned over everything that Mr. Brown may have relied upon. Instead, Complaint Counsel asserts that Mr. Brown's expert report in this case is nearly identical to the previously produced Merger Report and that Mr. Brown did not actually understand the information used in calculating the claimed savings, but instead deferred to other persons at FTI who were responsible for calculating the claimed efficiencies. Complaint Counsel states further that Mr. Brown produced raw data and files with his report but failed to cite to those sources in his expert report and could not explain the details underlying his analysis. The parties are forewarned that any expert witness who offers an opinion that the expert cannot explain and does not provide the basis for is at risk of having that opinion rejected.

If Mr. Brown used or relied upon any part of the Merger Report in order to formulate his expert report in this case or any opinions therein, FTI must produce all documents and materials relied upon and all documents and materials and underlying data relating to those parts of the Merger Report that support or explain any opinions in Mr. Brown's expert report. In addition, if Mr. Brown relied upon communications with his colleagues at FTI or other persons about the Merger Report in formulating any opinion in this case, FTI must disclose and produce all such communications and allow such FTI employees to be deposed regarding those communications.

As Complaint Counsel acknowledges, the fact that Mr. Brown's expert report is nearly identical to the previously produced Merger Report does not alter the analysis as to whether Respondents waived work product protections for documents and communications relating to the Merger Report. Simply because Respondents' testifying expert could not explain his expert report, if that is the case, does not entitle Complaint Counsel to discovery from Respondents' consulting experts. 16 C.F.R. § 3.31A(d) ("A party . . . may not discover facts known or opinions held by an expert who has been retained or specially

employed by another party in anticipation of litigation or preparation for hearing and who is not listed as a witness for the evidentiary hearing."). Instead, Complaint Counsel is entitled to discovery of such material only if Respondents or Mr. Brown relied on the Merger Report, or parts thereof, as discussed herein.

IV.

For the reasons explained above, Complaint Counsel's Motion is GRANTED in part and DENIED in part. In the event additional document production and disclosures result from this Order that require depositions or follow-up depositions, then the discovery deadline is hereby extended to allow such depositions on dates agreed-to by the parties, but no later than March 28, 2012.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March 19, 2012