



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

In the Matter of)
)

OSF Healthcare System,)
a corporation, and)

Rockford Health System,)
a corporation.)

Docket No. 9349
PUBLIC

**FTI CONSULTING, INC.'S RESPONSE IN OPPOSITION TO COMPLAINT
COUNSEL'S MOTION TO COMPEL**

Complaint Counsel admits that FTI, Inc., which Respondents OSF Healthcare System (OSF) and Rockford Health System (RHS) initially retained to consult and later identified as an expert witness in this proceeding and parallel federal court litigation,¹ prepared, in its consultant's role, the December 14, 2010 Business Efficiencies Report (what Complaint Counsel call the "Merger Report") "to aid Respondents' antitrust counsel in expected antitrust litigation" surrounding the transaction. (Mem. at 6.) Complaint Counsel also acknowledges that the work product doctrine applies to the FTI materials they seek.² Complaint Counsel omits from its motion any reference to the fact that, in compliance with Rule 26 of the Federal Rules of Civil Procedure and in advance of its deposition of Jeffrey Brown, FTI's testifying expert in the Federal Proceeding, Respondents produced all documents and other written materials he

¹ *Federal Trade Commission v. OSF Healthcare System and Rockford HealthSystem*, case No. 11-cv-50344 (the Federal Proceeding), in which the FTC is seeking a preliminary injunction to prevent consummation of the proposed affiliation pending the completion of this proceeding, currently is pending before the U.S. District Court for the Northern District of Illinois.

² Respondents, who retained FTI through their counsel, control the privilege afforded by the attorney work-product doctrine over the FTI materials. *See Sara Lee Corp. v. Kraft Foods, Inc.*, 2011 U.S. Dist. LEXIS 35389 at *7-10 (N.D. Ill. Apr. 1, 2011). FTI's counsel is also counsel for Respondents.

considered in forming the opinions expressed in his expert report in the Federal Proceeding and the Merger Report, which underlies those opinions.

Notwithstanding Respondents' unchallenged compliance with FRCP 26, and in derogation of Rule 3.31A(e) of the FTC's Rules of Practice (Commission's Rules), Paragraph 18(e) of this Court's December 20, 2011 Scheduling Order (Scheduling Order), and the parties' letter agreement regarding the scope of expert discovery (Expert Agreement) (Exhibit A), Complaint Counsel seeks to compel the production of documents and testimony to which it is not entitled. Because Respondents explicitly stated that their voluntary production of the Merger Report (with their premerger notification submission) did not constitute a waiver of the work product privilege with respect to the entire subject matter of the Merger Report, and FTI's counsel promptly sought the return of the five privileged excerpts of documents that were inadvertently produced in response to Complaint Counsel's civil investigative demand (CID) to FTI, Respondents have not waived the work product privilege that protects certain documents and information that FTI generated in connection with its retention as a consultant to prepare the Merger Report.

Complaint Counsel's motion is a transparent attempt to circumvent the well established rule that a party (Complaint Counsel) may not discover documents that were prepared in anticipation of litigation by or for another party's (Respondents') representative, including its consultant (FTI) and now expert witness (Jeffrey Brown from FTI), unless the witness considered or relied upon those documents in formulating the opinions about which he will testify. Because Respondents have produced all those documents, and Respondents have not waived the work product privilege with respect to any other FTI consulting materials relating to the Merger Report, this Court should deny Complaint Counsel's unfounded motion.

BACKGROUND

In July 2010, Respondents' counsel jointly retained FTI on behalf of Respondents "to provide certain advisory and consulting services." (Exhibit B). That 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.

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. At no time since then have Respondents stated otherwise. Indeed, FTI's and Respondents' counsel have repeatedly objected to Complaint Counsel's attempts to pierce the privilege afforded by the work-product protection. *See, e.g.*, FTI's Responses to the FTC's CID (collectively, Exhibit C); FTI Letters dated Nov. 14, 2011 and Feb. 7, 2012 (collectively, Exhibit D); FTI's Responses and Objections to Complaint Counsel's Subpoena *Duces Tecum* (Exhibit E); Schertz IH Transcript (Exhibit F); Dawes IH Transcript (Exhibit G); Tosino IH Transcript (Exhibit H).

On September 23, 2011, FTI inadvertently produced privileged excerpts contained within five documents responsive to the CID. When counsel for FTI and Respondents first learned of that inadvertent production, on October 20, 2011, they took steps to retrieve the documents, including transmittal of a letter requesting that Complaint Counsel return or destroy them. (Exhibit I). Although Complaint Counsel refused to return the documents, it apparently sequestered them and has used redacted versions of them since receiving the October 20, 2011 letter – a tacit admission that the five documents were both privileged and inadvertently produced. Complaint Counsel's memorandum in support of its motion is conspicuously silent

about the efforts of FTI's and Respondents' counsel to correct the inadvertent production on which Complaint Counsel now predicates its motion.

On January 11, 2012, Respondents produced Jeffrey Brown's testifying expert report in the Federal Proceeding. The Merger Report was a precursor to that expert report, which considered the business efficiencies the proposed affiliation could generate. Consistent with their obligations under the Federal Rules of Civil Procedure, Respondents produced the materials considered by Mr. Brown in forming the expert opinions expressed in his expert report.

Respondents have identified Mr. Brown as a testifying expert in this proceeding. His expert report is not due until March 9, 2012, when Respondents will produce all expert materials to which Complaint Counsel is entitled under the Commission Rules, Scheduling Order, and Expert Agreement (that have not already been produced in the Federal Proceeding).

ARGUMENT

A. FTI Has Not Waived the Privilege Attached to the FTI Materials

Complaint Counsel concedes that the work-product doctrine applies to the discovery it seeks. (Mem. at 6-7).³ Because FTI has not waived this protection, the FTI materials are protected from disclosure. The Commission's Rules provide that the disclosure of privileged information does *not* operate as a waiver if "(A) [t]he disclosure is inadvertent; (B) [t]he holder of the privilege or protection took reasonable steps to prevent disclosure; and (C) [t]he holder promptly took reasonable steps to rectify the error, including notifying any party that received the information or communication of the claim and the basis for it." 16 C.F.R. § 3.31(g)(1).

This Court has held that inadvertent disclosure of privileged information does not constitute a

³ Despite Complaint Counsel's claim to the contrary (Mem. at 6), the Merger Report was created both in anticipation of litigation and to evaluate the proposed merger from a business perspective. *See, e.g.*, Schertz IH Tr. 60:6-9, 217:5-218:7 (Exhibit F); PI Tr. 594:23-595:18, 608:22-609:11 (Exhibit J); Kaatz IH Tr. 189:24-190:1 (Exhibit K); Green Dep. 109:1-6, 114:20-115:8 (Exhibit L).

waiver when the disclosing party undertook reasonable procedures for the review and production of documents, promptly requested return of the privileged information upon discovery of the disclosure, and where “considerations of fairness and the policy behind the privilege weigh in favor of finding that the privilege was not waived.” *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, at *9-10 (F.T.C. Oct. 17, 2000).

Complaint Counsel does not dispute that FTI’s counsel satisfied the requirements of Rule 3.31 and the governing case law. Counsel for FTI received documents potentially responsive to the CID on September 13, 2011, and produced responsive documents to Complaint Counsel ten days later. FTI’s counsel learned of the inadvertent production of privileged excerpts contained within five documents on October 20, 2011, and promptly informed Complaint Counsel of the disclosure and sought the return or destruction of the privileged materials. (Exhibit I). FTI’s inadvertent disclosure of these privileged excerpts was minimal relative to the volume of pages FTI produced in response to the CID in a ten-day period. (Exhibit M). Complaint Counsel’s sequestration of the five documents and subsequent use of redacted versions of them constitutes an admission that they were privileged, inadvertently produced, and properly clawed back.⁴

While Respondents voluntarily produced the Merger Report, they did not waive the privilege protection of other FTI materials containing attorney-client communications and work product. When they produced the Merger Report, Respondents expressly stated that they waived the privilege only as to that document, and not as to the entire subject matter of the Merger Report. (Exhibits N and O). Respondents never stated otherwise. And when FTI inadvertently

⁴ The result would be the same if the inadvertent production had occurred during this Part 3 proceeding, as to which Commission Rule 3.31(g)(2) applies because, among other reasons, Respondents did not intentionally waive the attorney work product privilege with respect to non-disclosed communications or information on the same subject matter.

produced privileged portions of certain documents in response to the CID, FTI's counsel promptly took reasonable steps to claw them back. (Exhibit I).

Complaint Counsel's assertion that Respondents have waived the privilege applicable to the FTI materials by inserting the issue into the case is unfounded. The operative case law holds that subject matter waivers occur 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." *See Lerman v. Turner*, 2011 U.S. Dist. LEXIS 715, at *25-26 (N.D. Ill. Jan. 5, 2011) (internal citations omitted); *see also In re Aftermarket Filters Antitrust Litig.*, 2010 U.S. Dist. LEXIS 117719, at *29-30 (N.D. Ill. Nov. 4, 2010) (same). That is not the case here. To the contrary, Respondents voluntarily produced the Merger Report in their premerger notifications.

Complaint Counsel asserts that Respondents' witnesses have self-servingly referred to the Merger Report in testimony; however, this testimony arose through questioning by Complaint Counsel, not by a selective or self-serving use of privileged information by Respondents or their witnesses. Moreover, testimony about the Merger Report by an OSF or RHS executive in response to Complaint Counsel's questions about it does not constitute a waiver of the non-produced privileged communications and work product that were not relied upon or considered in forming the opinions expressed in it.

The cases that Complaint Counsel cites regarding subject matter waiver are distinguishable from the facts in this case. In *U.S. v. Nobles*, a criminal armed robbery case, the defendant sought to impeach the prosecution's witnesses through the testimony of an investigator that relied on statements made in a report, which the defendant did not produce. 422 U.S. 225,

231-32 (1975). Thus, the defendant waived the privilege as to the investigator's report when it presented the investigator as a witness. *Id.* at 239-40. In the present case, Respondents produced Mr. Brown's first expert report and all of the required materials incident to it, and will do the same with his expert report in this proceeding. Complaint Counsel is entitled to nothing more.⁵

Although not controlling in this proceeding, FRCP 26 provides helpful guidance for evaluating the work product privilege. Rule 26 protects from disclosure documents that "can fairly be said to have been prepared or obtained because of the prospect of litigation." *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983). Respondents' counsel retained FTI as a consulting and testifying expert to assist and advise them in their merger analysis and litigation. Materials generated in both capacities are protected as privileged. Accordingly, the "studies, research, analyses, recommendations, plans and other work," as well as the "final and draft reports, supporting notes, communications, correspondence, data compilations and analysis and recommendations" requested by Complaint Counsel are non-discoverable work product under Rule 26(b)(3) and Rule 26(b)(4)(B). *See Sara Lee Corp.*, 2011 U.S. Dist. LEXIS 35389 at *6. Selective waiver of the Merger Report does not constitute a general waiver of the remaining, indisputably privileged materials.

⁵ The other cases upon which Complaint Counsel rely are also distinguishable. In *Abbott Labs.*, the plaintiff waived attorney work product protection by placing the subject of attorney conduct in a class action litigation at issue, which required the disclosure of privileged materials to evaluate the plaintiff's claims. *Abbott Labs. v. Alpha Therapeutic Corp.*, 200 F.R.D. 401, 410-411 (N.D. Ill. 2001). In *Lorenz v. Valley Forge Ins. Co.*, an attorney testified as to settlement negotiations related to an insurance claim. 815 F.2d 1095, 1098 (7th Cir. 1987). The court found the privilege waived as to certain materials because the attorney testified as a witness. *Id.* at 1099. Complaint Counsel's reliance on *In re Int'l Harvester's Disposition of Wis. Steel*, 1987 U.S. Dist. LEXIS 10912, at *9-11 (N.D. Ill. Nov. 19, 1987) is also misguided. *Int'l Harvester's* states that the scope of subject matter waiver "depends on the use the party has made of the otherwise confidential material." *Id.* at *10. In that case, International Harvester used the attorney-client privileged materials it sought to withhold from production. *Id.* Here, Respondents have not attempted to use any privileged materials that they have not already disclosed.

B. Complaint Counsel Is Not Entitled to Additional Discovery

Complaint Counsel received in the Federal Proceeding those FTI materials to which it was entitled and will receive in this proceeding discoverable FTI materials consistent with the Commission's Rules, the Scheduling Order, and the Expert Agreement. Complaint Counsel characterized Mr. Brown's expert report as "largely a recitation of the Merger Report," and acknowledges that it deposed Mr. Brown on January 20, 2012 regarding his expert report. Complaint Counsel will get to depose Mr. Brown again in this proceeding. Through expert discovery and Mr. Brown's impending deposition, Complaint Counsel will have ample opportunity to examine and test the merger efficiencies Mr. Brown identified.

In addition, Rule 3.31A(e) and Paragraph 18(e) of the Scheduling Order prohibit discovery, by deposition or any other means, from anyone other than Respondents' testifying expert, Mr. Brown. Those provisions state: "[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." Therefore, discovery of any "facts known or opinions held" from FTI employees other than Mr. Brown is inappropriate and violates Rule 3.31A(e) and the Scheduling Order. Further, Complaint Counsel and Respondents' Counsel previously 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." That Agreement covers internal communications between Mr. Brown and his colleagues at FTI and is controlling here. (Exhibit A).

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
CHICAGO, ILLINOIS

CONCLUSION

Complaint Counsel's request for all FTI materials exceeds what Complaint Counsel is permitted to receive under the Commission's Rules, the Scheduling Order, and the Expert Agreement. Accordingly, FTI requests this Court deny Complaint Counsel's motion to compel.

Dated: March 7, 2012

Respectfully submitted,

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*Attorneys for Non-Party FTI Consulting,
Inc.*

CERTIFICATE OF SERVICE

I, Carla A. R. Hine, hereby certify that I served a true and correct copy of the foregoing Public Version of Expert FTI Consulting Inc.'s Response in Opposition to Complaint Counsel's Motion to Compel upon the following individuals by hand on March 7, 2012:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room 172
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I, Carla A. R. Hine, hereby certify that I served a true and correct copy of the foregoing Public Version of Expert FTI Consulting Inc.'s Response in Opposition to Complaint Counsel's Motion to Compel upon the following individuals by electronic mail on March 7, 2012:

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Dated: March 7, 2012

Carla A. R. Hine

Carla A. R. Hine
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EXHIBIT A



Bureau of Competition
Mergers IV Division

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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Email: mreilly@ftc.gov

December 15, 2011

VIA ELECTRONIC MAIL

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Chicago, IL 60601

**RE: FTC v. OSF Healthcare System and Rockford Health System,
3:11-cv-50344**

Dear David and Alan:

As discussed, on behalf of staff at the Federal Trade Commission, we are prepared to enter into an agreement with OSF Healthcare System and Rockford Health System concerning experts that either party may use before the FTC's administrative court or in a preliminary injunction hearing in federal court.

We propose the following agreement:

1. For the purposes of any federal court preliminary injunction action or a Part III trial before the FTC's administrative court, the parties agree to narrow the scope of the disclosures required under the Federal Rules of Civil Procedure ("FRCP") 26(a)(2)(B)(ii) and the corresponding provision in the FTC's Rules of Practice 3.31(A)(c) such that each party must produce only the data or other information relied upon by the expert witness in forming his/her opinions, and need not produce, pursuant to FRCP 26(a) or Rule 3.31(A), data or information considered, but not relied upon, by the expert witness in forming his/her opinion.

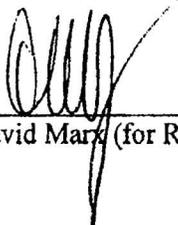
2. Communications (oral, written, and by email) of any expert witness with counsel for the party retaining that expert (including comments on draft reports) would not be discoverable, unless relied upon by the expert. The expert's report should include a list of all materials the expert considered in connection with the preparation of the expert's report.
3. Communications (oral, written, and by email) of any expert witness with consulting experts (including comments on draft report) would not be discoverable, unless relied upon by the expert.
4. Communications (oral, written, and by email) of any expert witness with any other expert witness retained by the same party (including comments on draft reports) would not be discoverable, unless relied upon by either expert.
5. Draft reports would not be discoverable.

Please indicate your agreement by countersigning below.

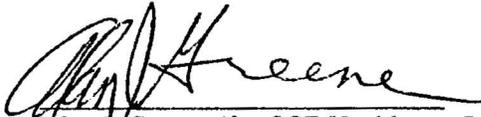
Sincerely,



Matthew J. Reilly



David Mark (for Rockford Health System)



Alan I. Greene (for OSF Healthcare System)

cc: Jeffrey Brennan, Esq.
Carla A. R. Hine
Kenneth Field, Esq.

EXHIBIT B

FILED
IN CAMERA

EXHIBIT C

FILED
IN CAMERA

EXHIBIT D

McDermott Will & Emery

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Strategic alliance with MWE China Law Offices (Shanghai)

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November 14, 2011

VIA E-MAIL *JMORRISON@FTC.GOV*

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Mergers IV Division
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Washington, DC 20580

Re: Response to Civil Investigative Demand Issued to FTI Consulting, Inc. (FTC File No. 111-0102)

Dear Jeremy:

I write in response to your letter dated October 24, 2011 regarding our request to the Federal Trade Commission ("FTC") to return or destroy privileged documents inadvertently produced in response to the FTC's Civil Investigative Demand No. 111-0102 issued to FTI Consulting, Inc. ("FTI") on April 8, 2011 ("CID").¹ We disagree with the Staff's position that the documents at issue are not privileged, or in the alternative, that the privilege has been waived. We believe that the documents we seek to clawback, as set forth in my letter dated October 20, 2011, are privileged under the attorney work-product doctrine and remain privileged because that privilege has not been waived.

A. The Documents at Issue are Protected as Privileged Attorney-Client Communications and Attorney Work-Product

FTI has continuously asserted the privileged nature of materials it prepared in connection with the proposed affiliation between OSF Healthcare System ("OSF") and Rockford Health System ("RHS") (collectively, the "Parties").² A brief description of the background of these documents sets forth the basis for FTI's privilege claim. Hinshaw & Culbertson LLP ("Hinshaw") and McDermott Will & Emery, LLP ("MWE") jointly retained FTI, on behalf of their respective clients, OSF and RHS, as a consulting expert to assist and advise the firms in their merger analysis in preparation for potential litigation. In doing so, OSF and RHS, and their counsel,

¹ Redacted copies of the inadvertently produced documents were first provided to the FTC on November 3, 2011. At the FTC's request, FTI provided redacted copies of the inadvertently produced documents in color on November 7, 2011 (FTI00305-FTI00855).

² See FTI's May 11, 2011 response to the CID, and letter from C. Hine dated May 31, 2011.

viewed a merger investigation to be likely in light of the FTC's recent scrutiny of hospital mergers. Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure prohibits disclosure of a consulting expert's documents prepared in anticipation of litigation or for trial by or for a party or its representative, including the party's attorney or consultant. Subpart B of the same Rule further protects a consulting expert's communications from disclosure. The FTC is not entitled to discover documents prepared in anticipation of litigation by or for the parties or their representatives, including attorneys or consultants. The work-product doctrine and Federal Rule of Civil Procedure 26 protect from disclosure documents that "can fairly be said to have been prepared or obtained because of the prospect of litigation."³ Therefore, FTI's "studies, research, analyses, recommendations, plans and other work" as well as the "final and draft reports, supporting notes, communications, correspondence, data compilations and analysis and recommendations" requested by the FTC are non-discoverable work-product.⁴

B. Certain Protected Documents Were Inadvertently Disclosed

Counsel for FTI inadvertently produced the protected portions of certain documents to the FTC in response to the CID. The production was a mistake and, therefore, should be considered inadvertent under Federal Rule of Evidence 502(b)(1). Federal courts in Illinois use an intent-based test to determine whether a disclosure was inadvertent.⁵ As stated by FTI counsel in a letter dated October 20, 2011, less than a month after production of the protected documents, "[t]hese inadvertently produced documents contain attorney-client communications and attorney work-product protected from disclosure, and were inadvertently produced to the FTC." Nor did FTI intend to produce these documents with the protected content.

Counsel for FTI took reasonable steps to prevent the disclosure, pursuant to Federal Rule of Evidence 502(b)(2). Counsel for FTI obtained the documents responsive to the CID, loaded them into a database for review, and reviewed them several times before producing them less than two weeks later to the FTC. As a result of that review, counsel for FTI withheld similar documents relating to the Merger Efficiencies Study from production as privileged and protected from disclosure as attorney-client communication and/or attorney work-product, and the remaining responsive and non-privileged documents were produced to the FTC. Federal courts have found similar procedures to be reasonable.⁶

Counsel for FTI also took reasonable steps to rectify the disclosure, pursuant to Federal Rule of Evidence 502(b)(3). Counsel for FTI first learned of the inadvertent production when the FTC

³ *Binks Mfg. Co. v. Nat'l Preso Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983).

⁴ *Sara Lee Corp. v. Kraft Foods, Inc.*, 2011 U.S. Dist. LEXIS 35389, at *6 (N.D. Ill. Apr. 1, 2011); Fed. R. Civ. P. 26(b)(4)(B).

⁵ See *Coburn Group, LLC v. Whitecap Advisors, LLC*, 640 F. Supp.2d 1032, 1038 (N.D. Ill. 2009) (this test "ask[s] whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake").

⁶ See, e.g., *Laethem Equip. Co. v. Deere & Co.*, 2008 U.S. Dist. LEXIS 107635 (E.D. Mich. Nov. 21, 2008) (reasonable procedure included copying and reviewing the documents prior to disclosing them to opposing party).

attempted to ask questions about the inadvertently produced and protected content during an investigational hearing on October 20, 2011. Counsel for FTI immediately followed up on her objections during the investigational hearing by sending a formal clawback letter later that evening.⁷ Federal courts have found similar responses to be reasonable.⁸

Finally, counsel for FTI did not delay in requesting that the FTC return or destroy the inadvertently produced privileged documents. Counsel for FTI received the documents at issue from FTI on September 13, 2011 and produced them to the FTC just 10 days later on September 23, 2011. Counsel for FTI only learned of the inadvertent production on October 20, 2001 and sent a formal clawback letter the same evening.

C. Neither FTI Nor The Parties Have Waived the Privilege

OSF and RHS previously disclaimed any waiver of privilege as to the entire subject matter at issue here. Specifically, OSF and RHS's HSR Notifications expressly disclaimed the waiver of privilege as to the entire subject matter as a result of the disclosure of any privileged materials.⁹

Parties may waive privilege of a document without waiving privilege as to the whole subject matter. Federal Rule of Evidence 502(a), with regard to disclosures made in a federal proceeding or to a federal office or agency, provides that a waiver extends to an undisclosed communication or information *only if* (1) the waiver is intentional, (2) the disclosed and undisclosed communications or information concern the same subject matter, and (3) they ought in fairness to be considered together. The commentary notes to Federal Rule of Evidence 502(a) explain that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver *only of the communication or information disclosed*. Applied here, OSF and RHS waived privilege only for FTI's December 14, 2010 Business Efficiencies Report for the RHS-OSF Affiliation (identified as Attachment 4(c)(28) to RHS's HSR notification, and previously identified by the FTC as PX0034) (the "Merger Efficiencies Study"), and not for any background materials, or the documents that counsel for FTI now seeks to clawback. Specifically, when producing the Merger Efficiencies Study, OSF and RHS expressly stated that they waived the privilege only as to that document, and they explicitly noted that they were not waiving the privilege or protection as to the entire subject matter of the Merger Efficiencies Study. At no time since has either OSF or RHS stated otherwise.

⁷ See letter dated October 20, 2011 from C. Hine.

⁸ See *Coburn Group LLC v. Whitecap Advisors, LLC*, 640 F. Supp.2d 1032, 1041 (N.D. Ill. 2009) (no waiver where disclosing party immediately objected to the use of a privileged communication during a deposition and followed up with a written request the next day); see also *Heriot v. Byrne*, 2009 U.S. Dist. LEXIS 22552 (N.D. Ill. Mar. 20, 2009) (disclosure was inadvertent where party disclosing the privileged items acted promptly to request that opposing party destroy them); cf. *Harmony Gold USA v. FASA Corp.*, 1996 U.S. Dist. LEXIS 16583, at *15 (N.D. Ill. Nov. 6, 1996) (waiting two weeks after discovering the disclosure was unreasonable).

⁹ See RHS's HSR Notification, Response to Item 4(c), at page 10 ("Pursuant to Federal Rule of Evidence 502, the disclosure of any privileged materials does not constitute a waiver of privilege as to the entire subject matter"); see also FTI's May 11, 2011 response to the CID, at 2 ("subject to and without waiving their claims of privilege ... produced to the FTC FTI's Business Efficiencies Report for the RHS-OSF Affiliation").

Case law reserves subject matter waivers for situations where a party tries to obtain 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.”¹⁰ That is not the case here. Rather, OSF and RHS voluntarily produced the Merger Efficiencies Study as part of their HSR filings. In other words, OSF and RHS did not produce the Merger Efficiencies Study for tactical advantage. You implied in your letter that witnesses self-servingly referred to the Merger Efficiencies Study in testimony; however, this testimony arose through the questioning by the FTC Staff only, and not by way of a selective or self-serving disclosure of information by these witnesses. Moreover, the fact that an OSF or RHS executive may have known about or seen the Merger Efficiencies Study does not constitute a selective waiver of the privileged communications and work product underlying that document. Given the preliminary status of this case, where the FTC has not yet filed a complaint and discovery is not yet underway, any suggestion of withholding documents for tactical advantage is improper and does not justify the attempt to get access to privileged materials.

Similarly, the fairness prong is not met in this case. The protected materials may only be relevant and discoverable during the expert discovery phase of a litigation – a phase of litigation that this case has not reached.¹¹ Producing work product and materials relied upon or generated by potential expert witnesses at this juncture of the investigation is premature and not required under any fairness consideration.

The cases that FTC Staff cites regarding subject matter waiver are also distinguishable from the facts here. *In re Int'l Harvester's Disposition of Wis. Steel*, 1987 U.S. Dist. LEXIS 10912, at *9-11 (N.D. Ill. Nov. 19, 1987), is distinguishable because the party seeking to protect certain information from discovery was simultaneously using certain attorney-client communications for its own advantage. That is not the case here, where counsel for OSF and RHS voluntarily produced just the Merger Efficiencies Study, and are not presently using any other otherwise-privileged materials for their defense in this matter. *U.S. v. Nobles*, 422 U.S. 225, 239-240 (1975), is distinguishable because the respondent waived any privilege when it sought to present an investigator as a witness. OSF and RHS did not produce any witnesses to testify in support of the Merger Efficiencies Study, which was not the subject of the 30(b)(6) deposition notice sent to FTI, and any expert discovery related to the Merger Efficiencies Study is not yet timely. Finally, *Hollins v. Powell*, 773 F.2d 191 (8th Cir. 1985), is distinguishable because the attorney failed to object when a witness answered certain questions revealing privileged communications. Here, however, FTI's counsel objected during the investigational hearing at which the privileged portions of the documents were introduced and followed up on her objection with a written clawback letter that same day.

¹⁰ See *Lerman v. Turner*, 2011 U.S. Dist. LEXIS 715, at *25-26 (N.D. Ill. Jan. 5, 2011) (internal citations omitted); see also *In re Aftermarket Filters Antitrust Litig.*, 2010 U.S. Dist. LEXIS 117719, at *29-30 (N. D. Ill. Nov. 4, 2010) (same).

¹¹ See Fed. R. Civ. P. 26.

D. District of Columbia Rules of Professional Conduct Requires Adherence to Counsel's Instructions for Disposition of Materials

The District of Columbia Bar's Rules of Professional Conduct Rule 4.4(b) ("Rule 4.4(b)") states

A lawyer who received a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

To date, FTI has not provided the FTC any documents or materials related to the Merger Efficiencies Study besides the Merger Efficiencies Study itself. In FTI's May 11, 2011 response to the CID, FTI clearly asserted that any materials related to the Merger Efficiencies Study "are protected by privilege, the attorney work-product doctrine under Rule 26(b)(3) of the Federal Rules of Civil Procedure, and Rule 23(b)(4)(B) of the Federal Rules of Civil Procedure," and, accordingly, it would not produce those protected materials. In providing its supplemental response to the CID on September 23, 2011, FTI did not deviate from its position that materials related to the Merger Efficiencies Study were protected by privilege and the attorney work-product doctrine, and continued to withhold documents relating to the Merger Efficiencies Study from production. The unintentional production of the documents FTI presently seeks to clawback is anomalous to FTI's consistent position, and indicates that the production of these documents was inadvertent.

Provided FTI's unwavering assertion with respect to materials related to the Merger Efficiencies Study, FTC Staff should have recognized that the production of these documents related to the representation of a client and was inadvertent. Accordingly, FTC Staff was obligated under Rule 4.4(b) to not examine the protected portions of the documents, and not attempt to use the protected material during the investigational hearing of Clair Tosino on October 20, 2011.¹² Further, FTC Staff should have notified FTI counsel of the inadvertent production and should now abide by counsel's instructions to return or destroy the unredacted versions of these documents.

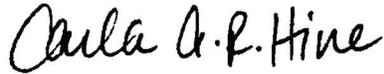
Therefore, counsel for FTI again requests that the FTC return or destroy the documents set forth in my letter of October 20, 2011 because they are privileged as attorney-client communications and as attorney work-product, and were inadvertently produced to the FTC. If you choose to destroy the documents instead of returning them, I request that you verify in writing that the FTC and its agents and employees have destroyed any and all hard and electronic copies of these documents, and the FTC will not use these documents for any purposes whatsoever in the above-referenced matter.

¹² Commentary to Rule 4.4(b) states that the receiving lawyer is prohibited "from reading or using the material."

Jeremy P. Morrison, Esq.
November 14, 2011
Page 6

Please let me know if you have any further questions, and thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Carla A. R. Hine".

Carla A. R. Hine

cc: Alan I. Greene, Esq.
Kenneth W. Field, Esq.

DM_US 30621025-4.046498.0021

McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan
Munich New York Orange County Paris Rome Silicon Valley Washington, D.C.
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Carla A. R. Hine
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February 7, 2012

VIA E-MAIL JMORRISON@FTC.GOV

Jeremy P. Morrison, Esq.
Federal Trade Commission
Bureau of Competition
Mergers IV Division
601 New Jersey Avenue, N.W.
Washington, DC 20580

Re: Subpoenas *Ad Testificandum* Issued to FTI Consulting, Inc. In the Matter of OSF
Healthcare System and Rockford Health System (FTC Docket No. 9349)

Dear Jeremy:

I write in response to your email of January 31, 2012 requesting “a letter describing (1) what information FTI [Consulting, Inc.] (“FTI”) believes is subject to the work product doctrine, and why, and (2) what information FTI believes is not subject to work product protection, and which FTI agrees to discuss during the depositions” pursuant to the subpoenas *ad testificandum* issued to Tad Schweikert, Phillip Dawes, Clair Tosino, and Mark Herbers. To date, FTI has consistently stated its position regarding what material it believes is subject to work product protection. For example, FTI’s responses to the Federal Trade Commission’s (“FTC”) Civil Investigative Demand (FTC File No. 111-0102) dated May 11, 2011, May 31, 2011, September 13, 2011, September 23, 2011, and October 20, 2011, FTI’s November 14, 2011 letter responding to your October 24, 2011 letter, and FTI’s January 30, 2012 Responses and Objections to Complaint Counsel’s Subpoena *Duces Tecum* In the Matter of OSF Health System and Rockford Health System (FTC Docket No. 9349) describe the information that FTI believes to be privileged and subject to the work product doctrine. As we discussed previously, FTI does not believe that information regarding the February 2011 Performance Opportunity presentations (previously identified as PX2000 and PX2001) is subject to work product protection to the extent it does not address the work related to the December 14, 2010 Business Efficiencies Report for the RHS-OSF Affiliation (previously identified as PX0034). Conversely, and as noted in prior communications to the FTC, FTI believes that any information related to PX0034 is subject to the work product doctrine.

Separate and apart from the issue of privilege or attorney work product protection, discovery relating to work performed in connection with PX0034, which is the subject of an expert opinion in this case, from anyone other than the testifying expert in this matter violates Rule 3.31A of the

U.S. practice conducted through McDermott Will & Emery LLP.

600 Thirteenth Street, N.W. Washington D.C. 20005-3096 Telephone: +1 202 756 8000 Facsimile: +1 202 756 8087 www.mwe.com

Jeremy P. Morrison, Esq.
February 7, 2012
Page 2

FTC's Rules of Practice for Adjudicative Proceedings, as well as Judge Chappell's December 20, 2011 Scheduling Order. The work represented in PX0034 was a precursor to the expert report presented by testifying expert Jeff Brown. Jeff Brown – a testifying expert – prepared PX0034, and therefore PX0034 is more properly the subject of expert, and not lay, discovery. Rule 3.31A(e) states, "A party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for hearing and who is not listed as a witness for the evidentiary hearing." Further, Paragraph 18(e) of the Additional Provisions to Judge Chappell's Scheduling Order issued December 20, 2011 echoes Rule 3.31A(e) by stating, "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 this litigation or preparation for hearing and who is not designated by a party as a testifying witness."

All of the work relating to PX0034 falls within the expert opinions offered in this matter, is subject to these expert discovery provisions, and is not properly discoverable from anyone other than the testifying expert in this matter. Put differently, any discovery of "facts known or opinions held" by Tad Schweikert, Phillip Dawes, Clair Tosino, or Mark Herbers relating to their work in connection with PX0034, including how that work may have been incorporated or used in connection with PX2000 and PX2001, is not only an improper subject of discovery, but also violates Rule 3.31A and Judge Chappell's explicit instructions in his Scheduling Order. Respondents are not seeking to completely block discovery regarding the foundation for Jeff Brown's expert report, but simply confine it to the appropriate channels (*i.e.*, Jeff Brown as the testifying expert in this matter).

If the depositions of Tad Schweikert, Phillip Dawes, Clair Tosino, or Mark Herbers go forward, we will instruct these witnesses to not answer any questions related to their work on PX0034. Their work in connection with PX0034 is subject to work product protection and is beyond the scope of Rule 3.31A and Judge Chappell's Scheduling Order.

Sincerely,

/s/
Carla A. R. Hine

EXHIBIT E

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
OSF Healthcare System, a corporation, and)	Docket No. 9349
)	
Rockford Health System, a corporation.)	

**FTI CONSULTING, INC.'S RESPONSES AND OBJECTIONS TO
COMPLAINT COUNSEL'S SUBPOENA *DUCES TECUM***

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.31 and 3.34, and the Scheduling Order entered by Chief Administrative Law Judge Chappell on December 20, 2011 (the "Scheduling Order"), FTI Consulting, Inc. ("FTI"), by and through its counsel, provides its objections and responses to Complaint Counsel's Subpoena Duces Tecum to FTI Consulting (the "Subpoena").

GENERAL OBJECTIONS

FTI makes the following General Objections to the Subpoena, which are incorporated by reference into each of FTI's individual responses:

1. FTI objects generally to the Subpoena to the extent that it purports to impose obligations beyond those set forth in the Rules of Practice for Adjudicative Proceedings (the "Rules") and/or any order entered in this action.
2. FTI objects to the Subpoena as overly broad, oppressive, or unduly burdensome to the extent it seeks documents that are neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence.
3. FTI objects to the Subpoena to the extent it is vague and ambiguous such that FTI cannot determine with particularity the documents that are sought.

4. FTI objects to the Subpoena to the extent it seeks documents containing proprietary or confidential business information, trade secrets, medical, personal, or other sensitive information. To the extent any documents containing non-privileged, proprietary or confidential information, trade secrets, medical, or other sensitive or protected information is responsive to the Subpoena and not otherwise objected to, FTI will produce such documents subject to the provisions of the FTC's November 18, 2011 Protective Order Governing Discovery Material.

5. FTI objects to the Subpoena to the extent it seeks documents protected by the attorney-client privilege, joint defense privilege, common interest doctrine, work-product doctrine, or any other statutory or common-law privilege, prohibition, limitation, or immunity, including any protection provided by the Health Insurance Portability and Accountability Act of 1996, or any state law pertaining to the protection of confidential patient information. Any inadvertent production of privileged or protected documents shall not constitute a waiver, in whole or in part, of any such privilege. Any documents subject to a privilege, if inadvertently produced, shall be returned immediately. Complaint Counsel shall not use in any manner any information derived solely from inadvertently produced privileged or protected documents.

6. FTI objects to the Subpoena to the extent it seeks to require FTI to do more than use reasonable diligence in preparing its responses based on an examination of those files that reasonably may be expected to yield responsive documents. FTI further objects to each and every specification to the extent, as drafted, it is overly broad, unduly burdensome, and oppressive, or seeks to impose upon FTI an undue expense or burden that properly should be borne by Complaint Counsel.

7. FTI objects to the Subpoena to the extent it calls for production of “all” documents as overly broad and oppressive where a reasonable quantity of documents or information would suffice to show the pertinent information. In producing documents in response to this Subpoena, FTI will produce a reasonable quantity of documents sufficient to show the information sought.

8. FTI objects to the Subpoena to the extent the discovery sought by any specification is unreasonably cumulative or duplicative, has been previously produced in response to the FTC’s Civil Investigative Demand No. 111-0102 received on April 8, 2011 (the “CID”), or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

9. FTI objects to the Subpoena to the extent it seeks to require FTI to produce documents not currently in its possession, custody, or control, on the grounds that its specifications seek to require more of it than any obligation imposed by law, would subject it to unreasonable and undue annoyance, oppression, burden, and expense, or would seek to impose upon it an obligation to investigate or discover information or materials from third parties or sources that are equally accessible to the Complaint Counsel.

10. FTI objects to Complaint Counsel’s definitions to the extent they are vague, confusing, and overbroad. FTI will interpret the Subpoena reasonably and in good faith in accordance with common English usage.

11. FTI objects to the Subpoena to the extent that it seeks information and/or documents that are not relevant to the claims or defenses in this action and/or are not reasonably calculated to lead to the discovery of admissible evidence.

12. FTI reserves all objections to the admissibility, authenticity, and relevance of any documents produced in response to any specification. Identification or production of any documents does not constitute an admission by FTI that those documents are relevant or material to this proceeding. FTI also reserves the right to object to further inquiry with respect to any subject matter.

13. FTI's responses and objections to the Subpoena are based on information presently available to FTI and its counsel. It is possible that future discovery and investigation may supply additional facts, information or documents, add meaning to known facts, and establish entirely new factual conclusions and contentions, all of which may lead to additions to, changes in, and variations from the responses set forth herein. FTI reserves the right to supplement or amend its objections and responses if it appears at any time that inadvertent errors have been made, if additional or more accurate information becomes available, or if FTI discovers additional grounds for objection.

14. These General Objections are incorporated into each answer set forth below. To the extent that specific objections are cited in response to a specification, those specific citations are provided because they are believed to be particularly applicable to the specification, and shall not be construed as a waiver of any general objections applicable to information falling within the scope of the Subpoena.

OBJECTIONS TO COMPLAINT COUNSEL'S DEFINITIONS AND INSTRUCTIONS

1. FTI objects to Complaint Counsel's definitions of "the Company" and "FTI Consulting" as vague and ambiguous, overly broad, and unduly burdensome to the extent this definition seeks information that is not reasonably calculated to lead to the discovery of admissible evidence.

2. FTI objects to Complaint Counsel's definition of "Rockford Health System" as vague and ambiguous, overly broad, and unduly burdensome to the extent this definition includes entities not specifically named as a respondent in this matter, including any affiliates, parents, subsidiaries, accountants, attorneys, and other third parties. FTI further objects to the definition of "Rockford Health System" to the extent this definition seeks information regarding entities that is not reasonably calculated to lead to the discovery of admissible evidence.

3. FTI objects to Complaint Counsel's definition of "OSF Healthcare System" as vague and ambiguous, overly broad, and unduly burdensome to the extent this definition includes entities not specifically named as a respondent in this matter, including any affiliates, parents, subsidiaries, accountants, attorneys, and other third parties. FTI further objects to the definition of "OSF Healthcare System" to the extent this definition seeks information regarding entities that is not reasonably calculated to lead to the discovery of admissible evidence.

4. FTI objects to the definition of "documents" to the extent it exceeds the requirements of Rules 3.31A and/or 3.37(a) of the Rules or otherwise renders the Subpoena overly broad or unduly burdensome.

5. FTI objects to the definitions "each," "any," and "all" as unduly burdensome and oppressive, and as imposing obligations beyond those required by the Rules.

6. FTI objects to the definition of "entity" as overly broad and unduly burdensome, and as imposing obligations beyond those required by the Rules.

7. FTI objects to the definition of "plans" as overly broad and unduly burdensome.

8. FTI objects to Complaint Counsel's Instruction G as unduly burdensome and oppressive, and as imposing obligations beyond those required by the Rules, and to the extent it

exceeds the requirements of Rules 3.31A and/or 3.37(a) of the Rules or otherwise renders the Subpoena overly broad or unduly burdensome.

9. FTI objects to Complaint Counsel's Instruction O as unduly burdensome and oppressive to the extent it exceeds the requirements of Rule 3.31A of the Rules or otherwise renders the Subpoena overly broad or unduly burdensome.

10. FTI objects to Complaint Counsel's Instruction R as imposing obligations beyond those required by the Rules and to the extent it exceeds the requirements of Rules 3.31A and/or 3.37(a) of the Rules or otherwise renders the Subpoena overly broad or unduly burdensome.

SPECIFIC OBJECTIONS AND RESPONSES

Subject to and without waiving any of its General Objections or Objections to Complaint Counsel's Definitions and Instructions, FTI responds to Complaint Counsel's Subpoena *Duces Tecum* to FTI Consulting as follows:

Specification No. 1:

All documents relating to (a) any consulting studies, research, analyses, recommendations, plans, or other work that the Company performed for OSF Healthcare System, including, but not limited to, all final and draft reports, supporting notes, communications, correspondence, data compilations and analysis and recommendations made by the Company; and (b) any engagement letters between the Company and OSF Healthcare System.

Response:

FTI objects to this specification to the extent it seeks the disclosure of information protected by privilege, including the attorney-client privilege or the attorney work-product doctrine of Federal Rule of Civil Procedure 26(b)(3) or Rules 3.31 and/or 3.31A of the Rules (collectively, "Privileged Documents"). Hinshaw & Culbertson LLP ("Hinshaw") and McDermott Will & Emery ("MWE") jointly retained FTI and its subsidiary Compass Lexecon on behalf of their respective clients, OSF Healthcare System ("OSF") and Rockford Health System ("RHS"), to perform work in anticipation of any pre-merger investigation by the United

States antitrust enforcement agencies or the Attorney General of the State of Illinois. Hinshaw and MWE retained FTI as a consulting expert to assist and advise the firms in their merger analysis in preparation for potential litigation. OSF, RHS, and their counsel reasonably viewed a merger investigation likely in light of the FTC's recent scrutiny of hospital mergers. Federal Rule of Civil Procedure 26(b)(3)(A) forbids disclosure of a consulting expert's documents prepared in anticipation of litigation or for trial by or for a party or its representative, including the party's attorney or consultant. Federal Rule of Civil Procedure 26(b)(4)(B) further protects a consulting expert's communications from disclosure. FTI objects to this request to the extent it seeks disclosure of documents and materials in violation of the Federal Rules of Civil Procedures, and/or Rules 3.31 or 3.31A of the Rules.

FTI further objects to this Request as unreasonably cumulative and duplicative of what it previously produced in response to the CID. Without waiving its objections, FTI states that it has produced non-privileged documents in its possession, custody, or control responsive to this Request. FTI further states that OSF and RHS, subject to and without waiving their claims of privilege, previously produced to the FTC FTI's Business Efficiencies Report for the RHS-OSF Affiliation. (*See* Attachment 4(c)(28) to RHS's Hart-Scott-Rodino Premerger Notification and Report Form, filed February 11, 2011.)

Specification No. 2:

All documents relating to (a) any consulting studies, research, analyses, recommendations, plans, or other work that the Company performed for Rockford Health System, including, but not limited to, all draft reports, supporting notes, communications, correspondence, data compilations and analysis and recommendations made by the Company; and (b) any engagement letters between the Company and Rockford Health System.

Response:

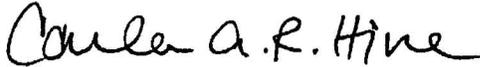
FTI objects to this specification to the extent that it seeks the disclosure of Privileged Documents. Hinshaw and MWE jointly retained FTI and its subsidiary Compass Lexecon on

behalf of their respective clients, OSF and RHS, to perform work in anticipation of any pre-merger investigation by the United States antitrust enforcement agencies or the Attorney General of the State of Illinois. Hinshaw and MWE retained FTI as a consulting expert to assist and advise the firms in their merger analysis in preparation for potential litigation. OSF, RHS, and their counsel reasonably viewed a merger investigation likely in light of the FTC's recent scrutiny of hospital mergers. Federal Rule of Civil Procedure 26(b)(3)(A) forbids disclosure of a consulting expert's documents prepared in anticipation of litigation or for trial by or for a party or its representative, including the party's attorney or consultant. Federal Rule of Civil Procedure 26(b)(4)(B) further protects a consulting expert's communications from disclosure. FTI objects to this request to the extent it seeks disclosure of documents and materials in violation of the Federal Rules of Civil Procedures, and/or Rules 3.31 or 3.31A of the Rules.

FTI further objects to this Request as unreasonably cumulative and duplicative of what it previously produced in response to the CID. Without waiving its objections, FTI states that it has produced non-privileged documents in its possession, custody, or control responsive to this Request. FTI further states that OSF and RHS, subject to and without waiving their claims of privilege, previously produced to the FTC FTI's Business Efficiencies Report for the RHS-OSF Affiliation. (*See* Attachment 4(c)(28) to RHS's Hart-Scott-Rodino Premerger Notification and Report Form, filed February 11, 2011.)

Dated: January 30, 2012

Respectfully submitted,



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Attorneys for FTI Consulting, Inc.

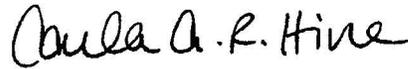
CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2012, I served the foregoing FTI Consulting, Inc. Responses and Objections to Complaint Counsel's Subpoena *Duces Tecum* upon the following counsel via electronic mail:

Matthew J. Reilly, Esq.
Jeffrey H. Perry, Esq.
Kenneth W. Field, Esq.
Richard Cunningham, Esq.
Katherine A. Ambrogi, Esq.
Jeremy P. Morrison, Esq.
Andrea Zach, Esq.
Jeanne Liu, Esq.
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sreynolds@ftc.gov
tlau@ftc.gov

Attorneys for Complaint Counsel

Dated: January 30, 2012



Carla A. R. Hine
Counsel for FTI Consulting, Inc.

EXHIBIT F

FILED
IN CAMERA

EXHIBIT G

FILED
IN CAMERA

EXHIBIT H

FILED
IN CAMERA

EXHIBIT I

McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan
Munich New York Orange County Paris Rome Silicon Valley Washington, D.C.
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Carla A. R. Hine
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October 20, 2011

VIA E-MAIL *JMORRISON@FTC.GOV*

Jeremy P. Morrison, Esq.
Federal Trade Commission
Bureau of Competition
Mergers IV Division
601 New Jersey Avenue, N.W.
Washington, DC 20580

Re: Response to Civil Investigative Demand Issued to FTI Consulting, Inc. (FTC File No. 111-0102)

Dear Jeremy:

On behalf of FTI Consulting, Inc. ("FTI"), I request that you return or destroy certain documents that FTI produced on September 23, 2011 in response to the Federal Trade Commission's ("FTC") Civil Investigative Demand No. 111-0102 received on April 8, 2011. These inadvertently produced documents contain attorney-client communications and attorney work product protected from disclosure, and were inadvertently produced to the FTC.

We will provide you with redacted versions of these documents. In the meantime, I respectfully request that you return or destroy the following documents, including any duplicates of these documents that are in the possession of the FTC and any authorized employee or agent of the FTC.

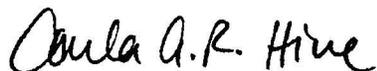
- FTI00190
- FTI00200
- FTI00204
- FTI00207
- FTI00211

If the FTC does not return the documents noted above, but rather destroys these documents, please verify in writing that the FTC and its agents and employees have destroyed any and all hard and electronic copies of these documents, and that the FTC will not use these documents for

Jeremy P. Morrison, Esq.
October 20, 2011
Page 2

any purpose in the above-referenced matter. Please let me know if you have any questions, and thank you very much for your attention to this matter.

Sincerely,

Handwritten signature of Carla A. R. Hine in cursive script.

Carla A. R. Hine

cc: Alan I. Greene, Esq.

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EXHIBIT J

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF ILLINOIS
 3 WESTERN DIVISION
 4 FEDERAL TRADE COMMISSION,) Docket No. 11 C 50344
 5 Plaintiff,) Rockford, Illinois
 6 v.) Thursday, February 2, 2012
 7) 9:00 o'clock a.m.
 8 OSF HEALTHCARE SYSTEM)
 9 and ROCKFORD HEALTHCARE)
 10 SYSTEM,)
 11 Defendants.)
 12 VOLUME 2
 13 TRANSCRIPT OF PROCEEDINGS
 14 BEFORE THE HONORABLE FREDERICK J. KAPALON
 15 APPEARANCES:
 16 For the Plaintiff: U.S. FEDERAL TRADE COMMISSION
 17 (600 Pennsylvania Avenue, NW,
 18 Washington, D.C. 20580) By
 19 MR. MATTHEW J. REILLY
 20 MR. JEFFREY H. PERRY
 21 MR. RICHARD CUNNINGHAM
 22 For the Defendant OSF: Hinshaw & Culbertson
 23 (100 Park Avenue,
 24 Rockford, IL 61101) By
 25 MR. MICHAEL F. IASPARRO
 26 Hinshaw & Culbertson
 27 (222 N. LaSalle Street,
 28 Suite 300,
 29 Chicago, IL 60601) By
 30 MR. MATTHEW J. O'HARA
 31 MR. ALAN I. GREENE
 32 MS. KRISTIN M. KIRZEWSKI
 33 For Defendant RHS: MC DERMOTT WILL & EMERY LLP
 34 (227 W. Monroe Street,
 35 Suite 4400,
 36 Chicago, IL 60606) By
 37 MR. DAVID MARX
 38 MR. WILLIAM P. SCHUMAN

1 For Defendant RHS (cont.): MC DERMOTT WILL & EMERY LLP
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 3 Washington, D.C. 20005) by
 4 MS. NICOLE L. CASTLE
 5 Court Reporter: Mary T. Lindbloom
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 7 Rockford, Illinois 61101
 8 (815) 987-4486
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1 THE COURT: Good morning.
 2 MR. REILLY: Good morning, your Honor.
 3 THE COURT: Ready for the next witness?
 4 MR. REILLY: Yes, we are, your Honor. The
 5 plaintiff FTC calls Dr. Cory Capps to the stand.
 6 Your Honor, I have a copy of the
 7 demonstratives that we will be using for Dr. Capps'
 8 direct. We also put together -- I know you don't
 9 want any more binders, but seeing how you were
 10 looking for documents yesterday, we have two binders
 11 that reference all of the documents in the
 12 demonstrative, so . . .
 13 THE COURT: Great.
 14 (Witness duly sworn.)
 15 THE COURT: Please take a seat at the
 16 witness stand.
 17 MR. MARK: Your Honor, if I might just
 18 before Mr. Reilly begins with Professor --
 19 Dr. Capps, just so the record is clear with respect
 20 to this PowerPoint presentation that Mr. Reilly and
 21 Dr. Capps are going to use, the defendants do not
 22 stipulate to its admissibility, so it's a
 23 demonstrative exhibit not to be admitted into
 24 evidence as far as we're concerned. So you had
 25 wanted us to identify any exhibits that might be

1 used that we're objecting to, this is one of those.
 2 THE COURT: So we're talking about the --
 3 MR. MARK: What you've got in your hand.
 4 THE COURT: Right. And what appears on
 5 the screen.
 6 MR. REILLY: And we're not trying to get
 7 them into evidence, your Honor.
 8 THE COURT: It's just evidence?
 9 MR. REILLY: No.
 10 THE COURT: It's just demonstrative --
 11 MR. REILLY: Yes.
 12 THE COURT: -- in order to aid me to
 13 understand the testimony of the doctor?
 14 MR. REILLY: That's correct.
 15 THE COURT: We're clear.
 16 MR. MARK: Thank you.
 17 CORY CAPPS, PLAINTIFF'S WITNESS, SWORN
 18 DIRECT EXAMINATION
 19 BY MR. REILLY:
 20 Q. Good morning, Dr. Capps.
 21 A. Good morning.
 22 Q. Could you please introduce yourself to the
 23 court.
 24 A. Sure. My name is Cory Capps, and I'm an
 25 economist at Bates, White Economic Consulting.

Schertz - Direct

1 In '97 we didn't employ nearly as many specialists as
2 we do now. Why do I bring that up. It's very costly.
3 Illinois, the state of Illinois, was in much better financial
4 condition in 1997. But Illinois is also a very litigious state.
5 It's very hard to get specialists to Illinois unless you pay
6 their way to employ them and insure them. It's a very expensive
7 proposition and one that we did not experience to any great
8 extent in 1997.

9 **Q. Let's talk about the proposed affiliation that brings us to
10 this courtroom today. What was the genesis of the affiliation?**

11 A. The genesis. Well, certainly the economic conditions, and,
12 quite frankly, the realization -- I've been here over 15,
13 16 years, and knowing what's coming or seeing what's coming, the
14 best way to deal with it would be to try and find a way to bring
15 two institutions in Rockford together.

16 At that time, spring of 2009, Rockford Health Systems
17 was in discussions with Advocate Healthcare about possible
18 affiliation. Those discussions concluded in April of 2009. I
19 had known Gary Kaatz about nine years by then, and he and I,
20 interacting in many community forums -- we were both on the IHA
21 board of trustees -- we kind of looked at the circumstance of
22 the economic environment in Rockford and kind of saw things the
23 same way. He and I have both worked in a number of other
24 healthcare markets outside of Rockford. So, we brought those
25 perspectives also.

Schertz - Direct

1 But I had asked him would you like to go have lunch.
2 We had lunch, and I put forward the thought that now that you're
3 done with Advocate, would you consider maybe aligning with OSF
4 Healthcare. We came to a point of mutual agreement that was
5 worth investigating. We took it back to our respective boards,
6 and that started a small discussion group composed of a small
7 group from Rockford Health Systems, a small group from OSF.
8 Those discussions went on and were successfully completed in May
9 of 2010, at which time we announced a letter of intent had been
10 executed.

11 From then through the summer of 2010, fall, winter, and
12 early part of 2011, we performed intensive due diligence, and
13 that led to our announcement about this time last year that we
14 had come to agreement, an affiliation agreement.

15 **Q. You mentioned in the course of your answer that you saw what
16 was coming. Were you referring to the economy, something else?
17 What were you referring to?**

18 A. I think that was about the time that the Accountable Care
19 Act was being debated nationwide, but you could also see the
20 debt building, and you knew that actually whether it was a
21 Democratic administration or a Republican administration, there
22 were going to be reductions in Medicare. There are going to
23 have to be reductions in Medicare reimbursement.

24 **Q. You mentioned a series of steps. Before the letter of
25 intent was signed, did Saint Anthony take any steps to**

Schertz - Direct

1 **investigate what sort of benefits it might achieve by the
2 affiliation?**

3 A. We utilized a consultant that works frequently with OSF,
4 Health Care Futures, and using what they knew about OSF and
5 publicly available data, they put together a 30,000 foot
6 analysis about potential benefits of Rockford Health Systems
7 joining OSF.

8 **Q. And what did that show?**

9 A. It showed it was worth pursuing.

10 **Q. Okay. Subsequently after you signed the letter of intent,
11 did you have further analysis made of efficiencies and cost
12 savings?**

13 A. Yes. The due diligence phase required that we bring in --
14 that a third-party be brought in, a consultant, to do a more
15 in-depth analysis of both organizations. Obviously, OSF
16 couldn't look at proprietary data of Rockford Health Systems and
17 vice versa. So, the third-party was responsible for
18 investigating, analyzing, interviewing, and developing a set of
19 findings that would be shared with both parties.

20 **Q. Did those findings -- by the way, what was the organization
21 that you brought in?**

22 A. FTI was the consulting firm that conducted the work.

23 **Q. Did FTI's findings play any role in the decision of OSF to
24 want to move forward?**

25 A. They provided confirmation of what we thought was there or

Schertz - Direct

1 was there.

2 **Q. And when you say confirmation of what you thought was there,
3 what do you mean?**

4 A. Well, they found an estimated annual savings from operations
5 ranging from 42 million annually to 56 million, that range.
6 They also found capital savings of over a hundred million
7 dollars.

8 Now, why do we think that is there? Well, quite
9 frankly, two reasons. 42 million at the low end of the range,
10 that's 5 percent of the operating costs of the combined entity.
11 More importantly, we're going to have to probably cut
12 20 percent, given what's coming in Medicare. So, it confirmed
13 what we thought was there.

14 **Q. And as the CEO and president of Saint Anthony, do you
15 believe that the efficiencies and savings forecast by FTI are
16 achievable?**

17 A. Yes, they are achievable. I believe they're conservative.
18 We have to go far beyond that.

19 **Q. By the way, when Dr. Romano testified, did you hear him say
20 that rather than merging, hospitals can just close down some
21 service lines?**

22 A. Yeah, I do remember hearing that.

23 **Q. What's your response to that testimony as it applies to
24 Saint Anthony?**

25 A. Well, I mean, we're here today because there's opposition

Schertz - Cross

- 1 Q. I'm sorry. Go ahead.
- 2 A. I said a consultant was retained. I didn't say who by. I
- 3 said --
- 4 Q. And your consultant FTI was retained by your antitrust
- 5 lawyers, weren't they?
- 6 A. By legal counsel.
- 7 Q. By your antitrust counsel.
- 8 A. Legal counsel. I'll use that term.
- 9 Q. And FTI --
- 10 THE COURT: Mr. Schertz, I'm having trouble picking up
- 11 what you're saying.
- 12 THE WITNESS: I'm sorry.
- 13 THE COURT: I need you to use the amplification system.
- 14 It's a big room. Your voice can get lost. And the longer you
- 15 talk, the softer you get.
- 16 THE WITNESS: Right.
- 17 THE COURT: So, pretend you're talking to somebody in
- 18 the back of the courtroom, and we'll be able to hear you much
- 19 better.
- 20 THE WITNESS: Yes, sir.
- 21 BY MR. REILLY:
- 22 Q. And your legal counsel hired FTI to do the efficiency report
- 23 in anticipation of the FTC investigation; isn't that correct?
- 24 A. No. FTI was hired to confirm what we believed was there in
- 25 potential savings.

Schertz - Cross

- 1 Q. FTI was hired because of the FTC process, weren't they?
- 2 A. Well, we have to demonstrate that there is savings that
- 3 result from the merger.
- 4 Q. And you had to demonstrate it to the FTC or this court;
- 5 isn't that correct?
- 6 A. Yes.
- 7 Q. Because if OSF had hired FTI to do an evaluation of the
- 8 efficiencies, Hinshaw wouldn't have been involved at all; isn't
- 9 that right?
- 10 A. Something of this magnitude I believe legal counsel would be
- 11 involved regardless.
- 12 Q. Legal counsel's not going to hire a consulting firm to look
- 13 at efficiencies for you, are they, absent an antitrust
- 14 investigation?
- 15 A. I don't know. I'll have to -- give me another circumstance.
- 16 Q. Sure, I will. Has Hinshaw been involved in your looking at
- 17 who is going to be your integration consultants? For example,
- 18 hiring Deloitte?
- 19 A. Yes, they have.
- 20 Q. They've been involved in the contracting, but what about the
- 21 actual decision to hire Deloitte? Who is hiring Deloitte, OSF
- 22 or Hinshaw?
- 23 A. Well, since they haven't been hired yet, I'm not sure which
- 24 entity is going to take care of that.
- 25 Q. OSF is going to hire Deloitte, aren't they, Mr. Schertz?

Schertz - Cross

- 1 A. I'll let you know when they're hired.
- 2 Q. Is there any chance that Hinshaw is going to hire Deloitte
- 3 to do the integration planning?
- 4 MR. GREENE: Objection. Argumentative.
- 5 THE COURT: I don't believe so. I'll allow the
- 6 question to stand.
- 7 BY THE WITNESS:
- 8 A. Do you want to repeat the question?
- 9 MR. REILLY: Could you read it, please?
- 10 (The pending question was read by the reporter.)
- 11 BY THE WITNESS:
- 12 A. I guess that would depend on what time that occurs.
- 13 BY MR. REILLY:
- 14 Q. So, there is a chance that your antitrust counsel may hire
- 15 the consulting firm to do integration planning following the
- 16 merged entity?
- 17 A. I'm sure there's some possibility that might happen.
- 18 Q. Mr. Greene also asked you about whether OSF and
- 19 SwedishAmerican presented efficiencies to the Department of
- 20 Justice in 1997; is that right?
- 21 A. I believe so, yes.
- 22 Q. And you answered yes?
- 23 A. Yes.
- 24 Q. Did OSF and SwedishAmerican also present to DOJ a prediction
- 25 that one or both of those hospitals would likely fail if that

Schertz - Cross

- 1 merger didn't happen? Do you recall that?
- 2 A. I believe it was in previous testimony.
- 3 Q. And so, you presented efficiencies to DOJ, but you also
- 4 presented a prediction that either or both SwedishAmerican or
- 5 Saint Anthony would fail if the 1997 merger didn't go through;
- 6 is that right?
- 7 A. Right.
- 8 Q. Did SwedishAmerican fail when that merger didn't go through
- 9 in 1997?
- 10 A. No.
- 11 Q. Did Saint Anthony's fail when that merger didn't go through
- 12 in 1997?
- 13 A. No.
- 14 Q. And SwedishAmerican has done very well since 1997, haven't
- 15 they?
- 16 A. Yes.
- 17 Q. And who did they merge with to have such a strong financial
- 18 performance?
- 19 A. I'm not aware of any merger other than their affiliation
- 20 with the University of Wisconsin.
- 21 Q. Which was recent. Which was a recent affiliation.
- 22 A. Several years ago.
- 23 Q. And since 1997 Saint Anthony's has been profitable for many
- 24 of the years to date; isn't that true?
- 25 A. I'd have to go back and look. There were some slim years.

Schertz - Redirect

- 1 A. Well, we don't duplicate costs at Saint Anthony's. Between
2 the two entities, there are many duplicative costs that can be
3 part of the cost reduction equation. You can't do that as a
4 single entity.
- 5 **Q. Can you give an example of when you talk about duplication?**
- 6 A. I mean, we run two of everything. I mean, that leads to
7 inherent inefficiency. You can't keep something running all the
8 time or at a high levels of productivity in many circumstances.
9 If you're able to combine certain aspects of operation, you
10 create greater efficiency, and that reduces your cost per unit
11 of service.
- 12 **Q. What is your view as to whether the combined OSF Northern
13 Region will be a stronger, weaker, or equal competitor to what
14 the two hospitals are individually today vis-a-vis
15 SwedishAmerican?**
- 16 A. Well, it will be a stronger competitor.
- 17 **Q. Has DAN been actively marketed in the Rockford area?**
- 18 A. No.
- 19 **Q. With respect to managed care contracting, do you delegate
20 responsibility for involvement in what corporate is doing to
21 anyone on your staff?**
- 22 A. My chief financial officer.
- 23 **Q. Okay. And do you know yourself what input he has to the
24 corporate managed contracting people?**
- 25 A. Well, he provides input on the conditions on the ground in

Schertz - Redirect

- 1 Rockford, where our cost picture is at, what we hope to see out
2 of a contract negotiation as it affects Saint Anthony Medical
3 Center, but in most cases that then becomes the function of the
4 corporate managed care office.
- 5 **Q. Let me ask you a couple questions about FTI.**
- 6 A. Sure.
- 7 **Q. Was FTI the only consultant that was looked at for that
8 project?**
- 9 A. There were several consultants looked at.
- 10 **Q. And what was the process to choose FTI?**
- 11 A. Much of it was based upon the presentation they made, what
12 they brought to the table, and, most importantly, checking on
13 references of organizations that had used them in the past.
- 14 **Q. You referred to presentations. What were these
15 presentations?**
- 16 A. Basically they showed their methodology, and they showed
17 their track record. They showed results. They presented
18 themselves as an incredibly credible organization in terms of
19 this type of analysis.
- 20 **Q. Are you talking from personal knowledge of the
21 presentations?**
- 22 A. In terms of the selection process?
- 23 **Q. You referred to some presentations. Were you there?**
- 24 A. I was there for some of them.
- 25 **Q. Were other people from OSF Healthcare System there?**

Schertz - Redirect

- 1 A. Yes.
- 2 **Q. Were representatives of Rockford Memorial there?**
- 3 A. At some point, yes.
- 4 **Q. And those presentations were made to executives of both
5 organizations?**
- 6 A. Yes.
- 7 **Q. And there were also some attorneys present?**
- 8 A. Yes.
- 9 **Q. And was FTI hired only because of the threat of possible
10 action by the FTC?**
- 11 A. No, they were hired because we needed somebody to show us
12 the business case for doing this.
- 13 **Q. And did you, in fact, take what FTI showed you into account
14 in making the business decision to proceed with the definitive
15 agreement?**
- 16 A. Yes.
- 17 **Q. One last -- well, two last questions. Prior to testifying
18 under oath today, did you testify under oath previously in
19 connection with the investigation?**
- 20 A. I've had three depositions where I've had to testify under
21 oath.
- 22 **Q. And in those three prior testimonies and in your testimony
23 today, was anything you said affected by the fact that you would
24 receive a bonus if this deal goes through?**
- 25 A. No. I've been here for 16 years, and I see what a mess this

Schertz - Redirect

- 1 town is. I want to do this.
- 2 **Q. That's all I have. Thank you.**
- 3 MR. REILLY: Nothing further, your Honor.
- 4 THE COURT: You may step down, sir. Thank you.
- 5 THE WITNESS: Thank you.
- 6 (Witness excused.)
- 7 THE COURT: All right. We're adjourned. 9:00 o'clock.
8 Before we leave, are we on track for finishing up tomorrow?
- 9 MR. REILLY: Absolutely. We appreciate your generosity
10 in giving us some more time. They have three more witnesses.
- 11 MR. MARX: Yes. We've got three more witnesses
12 tomorrow, your Honor. We'll run a total on the time to see how
13 we're allocated, and we'll work it out so that we can be done
14 tomorrow.
- 15 THE COURT: All right. Good.
- 16 MR. MARX: Thank you.
- 17 MR. REILLY: Thank you, your Honor.
- 18 THE COURT: Have a good night.
- 19 (Whereupon, the within trial was adjourned to Friday,
20 February 3, 2012, at 9:00 o'clock a.m.)
21
22
23
24
25

EXHIBIT K

In the Matter of:

OSF Healthcare System and Rockford Health System

September 1, 2011

Gary Kaatz

Condensed Transcript with Word Index



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1

1 FEDERAL TRADE COMMISSION
 2 I N D E X
 3
 4 WITNESS: EXAMINATION:
 5 GARY KAATZ 5
 6
 7 EXHIBITS DESCRIPTION FOR ID
 8 Number FTI Report 188
 9 PX0034
 10 Number Physicians Perception Study 170
 11 PX0058
 12 Number Board Retreat 11/19/09 182
 13 PX0132
 14 Number Kaufman Hall Report 62
 15 PX0172
 16 Number RHS/Advocate Executive 130
 17 PX0174 Committee Meeting, 2/11/09
 18 Number Advocate Partnership 97
 19 PX0175 Evaluation
 20
 21
 22
 23
 24
 25

3

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2

1 FEDERAL TRADE COMMISSION
 2
 3 OSF HEALTHCARE,)
 4 a corporation,)
 5 and) Matter No.
 6 ROCKFORD HEALTH SYSTEM,) 111-0102
 7 a corporation.)
 8 -----)
 9
 10 Thursday, September 1, 2011
 11
 12 Room 5201
 13 Federal Trade Commission
 14 601 New Jersey Avenue, N.W.
 15 Washington, D.C. 20580
 16
 17 The above-entitled matter came on for
 18 investigational hearing, pursuant to notice, at
 19 9:35 a.m.
 20
 21
 22
 23
 24
 25

4

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PROCEEDINGS

Whereupon--

GARY KAATZ

a witness, called for examination, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. MORRISON:

Q. Good morning, Mr. Kaatz.

A. Good morning.

Q. My name is Jeremy Morrison, I'm an attorney with the Federal Trade Commission. I'm going to be conducting your investigational hearing today. Just to make a few introductions, I'm going to go down this side of the table. To my right is Katie Ambrogi, she's a colleague of mine here at the FTC, next to her is Bob Pratt, an attorney with the Illinois Attorney General's Office, and all the way down is Deepak Chandra, he's a financial analyst here.

Can you please state your name for the record.

A. My name is Gary Emmett Kaatz.

Q. And who is your current employer?

A. Rockford Health System.

Q. Have you ever provided testimony under oath before, Mr. Kaatz?

A. I've provided deposition.

Q. Can you just generally describe those circumstances?

A. The depositions were in the middle of contest, legal situations with regard to cases that my employers were in the middle of.

Q. What kind of cases were these, and if you can just kind of walk me back through a couple of them.

A. One was an employment case -- two were -- they were both employment cases.

Q. And who was the employer that you were with?

A. One was Rockford Health System, and one was Forum Health.

Q. I'm going to go through just a few preliminaries here before we get under way. Are you taking any medications or have any condition that might prevent you from providing accurate, complete and truthful testimony today?

A. No.

Q. As you know, this conversation is going to be transcribed, so it's important that we speak clearly and slowly so that Sally can get everything down. Do you understand?

A. I do.

Q. As we go through today, it's important, because

this is being transcribed, that we finish our responses. So, let me finish a question before you answer and I'll try to let you answer before I move on to my next question, okay?

A. Fine.

Q. If at any point you don't understand a question that I ask you, you're not sure of a phrase or the question in general, just ask me to explain it or clarify and I will go ahead and do that, okay?

A. Okay.

Q. And breaks, we'll try to take them about every hour and a half, we will probably take one this morning before lunch, but if at any point you need to take a break, just let me know and we'll try to accommodate.

A. I will.

Q. Other than documents that your attorneys provided you, did you look at anything to prepare for today's hearing?

A. No.

Q. Okay. Did you speak with anybody other than your attorneys about today's hearing?

A. I let my staff know that I was out here, and that was it.

Q. Didn't talk to them about what you were going to say or the substance?

A. No.

Q. Can you provide me with your current title?

A. I am the president and chief executive officer of Rockford Health System.

Q. What are your responsibilities?

A. I am responsible for all facets of the organization.

Q. And by all facets, can you just describe generally what those facets are?

A. Quality of care, community service, financial performance, regulatory compliance.

Q. Under Rockford Health System, my understanding is that there's a few subdivisions, Rockford Memorial, the Visiting Nurses Association, do all of those fall under your purview?

A. They do.

Q. Okay. As far as dividing your time up on a daily basis, and I know I'm asking you for a very general answer, and so I'm not going to hold you to the specifics, but about how much of your time is devoted between the different subsets? How much are you focused on Rockford Memorial versus VNA versus Rockford Health Physicians?

A. Oh, as you would know, it varies. I would say that I probably spend 20 to 30 percent of my time on

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1 **Q. And what is this document?**

2 A. I understand this to be the report that FTI
3 produced as their final report.

4 **Q. And what was the purpose of having this report
5 done?**

6 A. We engaged FTI to come back and study the
7 potential realm of efficiencies that could be gained
8 from bringing the merger together.

9 **Q. And how did you become aware of FTI?**

10 A. I don't know.

11 **Q. Does FTI regularly do work for RHS?**

12 A. No.

13 **Q. Who hired FTI?**

14 A. It's my understanding that we, that Rockford
15 Health System hired them, and that also, OSF hired them.

16 **Q. Did counsel, was counsel involved in that
17 decision?**

18 A. Perhaps counsel hired them. I don't know. I
19 don't know.

20 **Q. Would FTI have been brought in if there were no
21 antitrust investigation going on into this potential
22 transaction?**

23 A. Could you please repeat the question?

24 **Q. Would you have hired FTI if there were no
25 antitrust investigation occurring?**

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1 A. Yes.

2 **Q. Did you consider using any other companies
3 besides FTI to conduct an efficiencies analysis?**

4 A. Yes.

5 **Q. Who did you consider?**

6 A. I can't recall. I -- others were making that
7 decision.

8 **Q. Others within the --**

9 A. I was an interviewee, but I can't recall the
10 names of the firms.

11 **Q. Others within the RHS organization made the
12 decision?**

13 A. And the OSF organization.

14 **Q. Who were the people making that decision?**

15 A. Henry Seybold was a point person for us, I
16 don't -- I don't know who on the OSF side.

17 **Q. Do you know generally what sort of information
18 went into the FTI analysis and what FTI looked at?**

19 A. From a very high level, I'm somewhat familiar
20 with it.

21 **Q. And what information was provided to FTI?**

22 A. I think they applied best practices from a
23 source. I think that they -- I think that they were
24 using internal financial data from both organizations
25 that would allow us to benchmark how we were doing.

1 **Q. Were documents provided to FTI? Do you know?**

2 A. It's my understanding they were, yes.

3 **Q. And you've mentioned that FTI interviewed you,
4 correct?**

5 A. Yes.

6 **Q. Do you know who else within the organization FTI
7 interviewed? Within RHS?**

8 A. I don't. I don't specifically know.

9 **Q. During the processes FTI was putting this report
10 together, did they provide regular updates to you or
11 anyone else at RHS?**

12 A. They only provided -- I only -- I can only
13 recall me being part of two meetings with them. It's my
14 understanding that they did other updates for the
15 integration team that was responsible for this from
16 RHS's side.

17 **Q. Who from RHS do you recall was present for those
18 updates?**

19 A. I can only know that Henry Seybold was there. I
20 just cannot specifically recall who else was there in
21 addition to him. I know there were others there, but I
22 can't specifically state who they were. I just don't
23 recall.

24 **Q. Do you recall, was there a January 2011 report
25 on potential efficiencies that RHS could achieve absent**

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1 **this merger without a merger with OSF?**

2 A. I don't recall that.

3 **Q. Do you recall any report that FTI put together
4 about potential efficiencies that RHS could receive
5 without a merger?**

6 A. I recall there being something that was worked
7 up that identified what could be achieved without a
8 merger with OSF, but I just can't recall -- I can't
9 recall any of the specifics behind it.

10 **Q. You don't know the number or the value of
11 savings that could be achieved?**

12 A. I don't. I don't.

13 **Q. Do you remember or do you know who at FTI worked
14 on putting this report together?**

15 MR. MARX: Just can we get clarification, you're
16 talking about PX0034?

17 BY MR. MORRISON:

18 **Q. Yes, PX0034, excuse me.**

19 A. I do not know the names of the individuals from
20 FTI that put this together.

21 **Q. Do you know if there were physicians working at
22 FTI that helped put this report together?**

23 A. I can't recall.

24 **Q. Do you know if there were nurses or anyone in
25 the health care field or practicing healthcare medicine**

48 (Pages 189 to 192)

EXHIBIT L

In the Matter of:

OSF Healthcare System and Rockford Health System

February 16, 2012
Paul Green (Confidential)

Condensed Transcript with Word Index



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1

1 I N D E X
2 PAUL GREEN

3 EXAMINATION
4 BY MR. TABAS: 4:10

5 EXHIBITS

6 NO.: DESCRIPTION: PAGE:

7 For Federal Trade Commission:

8 PX699 Rockford Memorial Development Foundation
9 Board of Director Meeting
10 Referenced 39:21

11 PX590 Rockford Health System Current Areas of
12 Focus in 2011
13 Referenced 55:17

14 PX3678 Rockford Health System 2011 Operating
15 Objectives
16 Referenced 69:4

17 PX4688 2011 Annual Report, Paul Green, Chairman,
18 Rockford Health System Board of Directors
19 Referenced 84:21

20 PX3611 Rockford Health System Executive Committee
21 Minutes, March 30, 2009
22 Referenced 88:17

23 PX2281 Proposed Stipulation
24 Referenced 142:5
25

3

1 APPEARANCES:
2 ON BEHALF OF THE FEDERAL TRADE COMMISSION:
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9 ON BEHALF OF RESPONDENT ROCKFORD HEALTH SYSTEM:
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1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION
3 OFFICE OF ADMINISTRATIVE LAW JUDGES

4 OSF HEALTHCARE SYSTEM,)
5)
6 a corporation,)
7 and) Docket No. D9349
8 ROCKFORD HEALTH SYSTEM,)
9)
10 a corporation,)
11 Respondents.)

12 _____
13 Thursday, February 16, 2012

14 McDermott Will & Emery LLP
15 227 West Monroe Street
16 Chicago, Illinois 60606-5096

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22
23 The above-entitled matter came on for deposition,
24 pursuant to notice, at 9:00 a.m.
25

4

1 MR. TABAS: Good morning Mr. Green.
2 THE WITNESS: Good morning.
3 P R O C E E D I N G S
4
5 Whereupon--
6 PAUL GREEN,
7 a witness, called for examination, having been first
8 duly sworn, was examined and testified as follows:
9 EXAMINATION
10 BY MR. TABAS:
11 Q. Can you state and spell your name for the
12 record, please?
13 A. Paul, P-a-u-l, Green, G-r-e-e-n.
14 MR. TABAS: I introduced myself off the record;
15 but for these purposes, my name is Matt Tabas. I'm an
16 attorney with the Federal Trade Commission, and I
17 represent complaint counsel in this matter.
18 BY MR. TABAS:
19 Q. Are you currently employed?
20 A. Yes, I am.
21 Q. By whom?
22 A. Wells Fargo Advisors.
23 Q. What is your current title with Wells Fargo
24 Advisors?
25 A. Managing Director, Investments.

5

1 **Q. Have you ever given testimony before?**
 2 A. No.
 3 MR. TABAS: Before we get started, I'd like to
 4 go over a couple ground rules just to make the process
 5 go smoothly.
 6 Because the court reporter is here making a
 7 record of everything that is said, it's important that
 8 you speak clearly and slowly. Most importantly, you
 9 should provide oral responses to the questions because
 10 the court reporter will not be able to record a shake or
 11 a nod of the head. You must answer verbally.
 12 Is that okay?
 13 THE WITNESS: Yes.
 14 MR. TABAS: Let's try not to speak over each
 15 other. Please allow me to finish my questions before
 16 you respond, and I'll try to extend you the same
 17 courtesy. That way we'll be able to understand each
 18 other, and the court reporter will be able to make a
 19 clear record.
 20 Is that okay?
 21 THE WITNESS: Yes.
 22 MR. TABAS: If at any point you don't understand
 23 a question, please ask me to explain or clarify my
 24 question. I'll do my best to clarify it. If you don't
 25 ask me to clarify or explain the question, I'll assume

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1 you understood the question.
 2 Is that okay?
 3 THE WITNESS: Yes.
 4 MR. TABAS: If at any point during today's
 5 deposition you need a break, please let me know and I'll
 6 do my best to accommodate you.
 7 THE WITNESS: Okay.
 8 MR. TABAS: The only thing I ask is that if
 9 there's a question pending, that you answer the question
 10 before we take a break.
 11 THE WITNESS: Okay.
 12 BY MR. TABAS:
 13 **Q. What did you do to prepare for today's**
 14 **deposition?**
 15 A. I met with counsel yesterday.
 16 **Q. Aside from your attorneys, did you talk with**
 17 **anyone else about your deposition?**
 18 A. I had mentioned I would be deposed. I hadn't
 19 gotten any details about it.
 20 **Q. Who did you speak with about the fact that you**
 21 **would be deposed?**
 22 A. Colleagues about why I would be gone, family.
 23 **Q. Did you review any documents in preparation for**
 24 **your deposition today?**
 25 A. Yes.

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1 **Q. Was this on your own or with your attorneys?**
 2 A. With counsel.
 3 **Q. Did you review any documents on your own?**
 4 A. No.
 5 **Q. How long did you meet with counsel for?**
 6 A. Most of the day yesterday.
 7 **Q. So eight hours or so?**
 8 A. Seven, something like that.
 9 **Q. You previously served as the chairman of the**
 10 **Board of Directors for RHS; is that right?**
 11 A. That's correct.
 12 **Q. How long did you hold that position?**
 13 A. It was supposed to be a two-year term, and it
 14 wound up being extended for one additional year.
 15 **Q. Why was it extended for that additional year?**
 16 A. There was a hope and expectation that our
 17 Affiliation Agreement would be consummated. So it
 18 didn't seem like it would make sense to continue our
 19 normal rotation of officers.
 20 As this process has extended, now it did make
 21 sense to go back to our normal procedures.
 22 **Q. Who is the current chairperson of RHS?**
 23 A. Eleanor Doar.
 24 **Q. Could you give me an overview of your**
 25 **responsibilities as chairman of the Board of Directors**

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1 **for RHS?**
 2 A. Well, the Board of Directors is really the
 3 community's representative of the Health System, being
 4 that it's a community hospital and system. Our role is
 5 to provide general guidance to management, to oversee
 6 big-picture strategy, and to make sure we're comfortable
 7 with executive management.
 8 As chairman, I conducted meetings and served on
 9 several of the committees.
 10 **Q. Which committees did you serve on?**
 11 A. I served on the Quality Committee; I chaired
 12 the Investment Committee; the Executive Committee; the
 13 Negotiating Committee; I believe I was an invited guest
 14 on the Finance Committee; and I attended quarterly
 15 Foundation meetings. I believe I'm also an ex facto
 16 member of the Foundation Board as chairman. I am no
 17 longer.
 18 **Q. If you could just walk me through each of those**
 19 **committees and what purpose they serve.**
 20 **The first one you mentioned was the Quality**
 21 **Committee?**
 22 A. Correct.
 23 **Q. What's the purpose of that committee?**
 24 A. To oversee quality initiatives for the Health
 25 System from a board level, not from an implementation

1 **Q. Who made the decision to hire FTI?**
 2 A. I don't recollect who that was. It may have
 3 been counsel. I don't remember, but it was certainly
 4 embraced by the board because we did want to see some
 5 hard numbers that showed that there really was
 6 opportunity here to reduce cost.
 7 **Q. You're not sure who made the decision to hire**
 8 **FTI?**
 9 A. Not offhand.
 10 **Q. It wasn't the board's decision to hire FTI, was**
 11 **it?**
 12 A. The board certainly was not in conflict with
 13 that decision. It was agreed that a consultant to
 14 evaluate efficiency was something that would be an
 15 important element to this whole process. I don't
 16 recollect how we concluded FTI would be the firm to do
 17 it.
 18 **Q. Has Rockford Health System ever worked with FTI**
 19 **prior to this transaction?**
 20 A. Not that I'm aware.
 21 **Q. You've discussed that there was the need to see**
 22 **this sort of analysis.**
 23 **Why was FTI selected specifically for this**
 24 **project?**
 25 A. I don't know that I'd say "need." I'd say that

1 **make on its own absent the transaction?**
 2 A. There was nothing that FTI reported to us, that
 3 I'm aware of, that said, "This is what you can do
 4 without the merger that would reduce costs."
 5 **Q. We've discussed in broad terms the purpose of**
 6 **FTI's report.**
 7 **Do you know if they came to any conclusions**
 8 **regarding the proposed merger?**
 9 A. Conclusions in what way?
 10 **Q. Well, what did the presentation to you include?**
 11 A. My recollection was that there was an initial
 12 savings of a significant amount of money, which I don't
 13 remember that number, and that there were ongoing
 14 opportunities to reduce costs somewhere, I believe, in
 15 the \$50,000,000 range a year. That's my recollection.
 16 **Q. Do you remember any of the specific items that**
 17 **they presented you with as possible efficiencies?**
 18 A. They were just line by line of various service
 19 lines and how much they felt could be achieved in each
 20 of those service lines. So I couldn't possibly remember
 21 what those numbers were without looking at the document.
 22 **Q. Did you review any of the underlying analysis?**
 23 A. No. It was more -- it's been months and months
 24 and months. It was a summary document based on what
 25 their work output was.

1 it made us feel comfortable getting that validation.
 2 Why FTI versus some other consultant, I don't have an
 3 answer for that.
 4 **Q. Are you aware of any relationship between**
 5 **Rockford Health System employees and FTI prior to the**
 6 **transaction?**
 7 A. No, I'm not.
 8 **Q. You've been affiliated with Rockford Health**
 9 **System for a number of years.**
 10 **Are you aware if Rockford Health System has ever**
 11 **hired FTI to do any planning prior to a transaction of**
 12 **any sort?**
 13 A. To my knowledge, I've never heard of the firm
 14 prior to this transaction.
 15 **Q. Did FTI present any analyses to Rockford Health**
 16 **System that identified ways RHS could reduce costs or**
 17 **improve efficiencies without the merger?**
 18 A. The content of the presentation, to my
 19 recollection, was the various lines of service that we
 20 offer that are similar to Saint Anthony's and the
 21 opportunity set of reducing the cost of that.
 22 Since they were not hired to evaluate just us,
 23 it doesn't seem likely they would have presented that
 24 kind of material.
 25 **Q. So nothing related to improvements RHS could**

1 **Q. When did FTI complete its analysis?**
 2 A. I don't recollect.
 3 **Q. Was it in 2010?**
 4 A. Almost certainly because everything had been
 5 finalized by then, but I don't recollect specifically
 6 when.
 7 **Q. Do you know if they've done anything to update**
 8 **their analysis with more recent data?**
 9 A. I don't know.
 10 **Q. So as far as you know, FTI's analysis doesn't**
 11 **include anything with data since the end of 2010?**
 12 A. As far as I know.
 13 **Q. Does that concern you at all?**
 14 A. It hasn't been that long, so no.
 15 **Q. Do you have any reason to believe that FTI's**
 16 **analysis was limited in any way?**
 17 A. I have no reason to believe that.
 18 **Q. What challenges would they have faced in**
 19 **performing their analysis?**
 20 A. You'd have to ask them.
 21 I know we were very -- other management was
 22 happy and would give them any information they
 23 requested. I don't know how that business works, so I
 24 really couldn't opine on that.
 25 **Q. So you're not aware of any challenges that they**

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1 would have faced?
 2 A. No. I don't know how they compile their
 3 information.
 4 Q. Do you agree 100 percent with all of FTI's
 5 analysis?
 6 A. I agree that they are a recognized expert in
 7 their field and that, to the best of their ability, they
 8 gave us their best estimate of what those cost savings
 9 would be.
 10 Q. Do you agree with those estimates?
 11 A. I have no reason not to agree with them. They
 12 are presumably an expert in their field, and they did
 13 the work. So I have no basis to disagree with them.
 14 Q. Has anyone at Rockford Health System confirmed
 15 the estimates that they presented?
 16 A. Management believed that those were an accurate
 17 opportunity set of numbers that could be achieved.
 18 Of course, since nothing has been done, there's no way
 19 to prove that it's accurate at this point.
 20 Q. There's nothing that you're skeptical about in
 21 their report?
 22 A. There's nothing that leads me to believe it's
 23 inaccurate.
 24 Q. Do you have any plans to use FTI going forward?
 25 A. No plans to use or not use them going forward.

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1 It's not something that's been contemplated.
 2 Q. You don't have any plans to use FTI going
 3 forward?
 4 A. That is correct, but that doesn't mean we would
 5 not use them.
 6 Q. Let me ask my question again.
 7 Sitting here today, do you have any plans to use
 8 FTI going forward?
 9 A. At this point we have no reason to use FTI, but
 10 that doesn't mean we would not. I'm not trying to be
 11 argumentative.
 12 To me the question suggests: Is there a bias or
 13 reason why we would or would not use them? The answer
 14 is that if we had a need for those services, there's no
 15 reason why we wouldn't consider them.
 16 At this point I don't know that we have a need
 17 for those services. So, therefore, we have no
 18 inclination or intent to hire them for any project at
 19 this time.
 20 Q. If the FTC were not reviewing the transaction,
 21 would you have used FTI to conduct an efficiencies
 22 analysis?
 23 A. I don't know. I imagine that we probably would
 24 have.
 25 But since we knew that this would be a

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1 transaction that would be evaluated by the Federal Trade
 2 Commission, it was easy to make a decision to move
 3 forward because it would answer both our questions -- or
 4 validate our assumptions as well as also be data that
 5 can be supplied to the Federal Trade Commission.
 6 Since they do not operate in a vacuum, those two
 7 goals, it's hard to really answer would we or would we
 8 not have.
 9 Q. Has Rockford Health System used FTI to conduct
 10 an efficiencies analysis for any previous transaction
 11 that it has engaged in?
 12 A. To my knowledge, we have never used FTI for any
 13 other project.
 14 MR. TABAS: Why don't we go off the record.
 15 (A brief recess was taken.)
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1 AFTERNOON SESSION
 2 Thursday, February 16, 2012
 3 12:48 p.m.
 4 -----
 5 MR. TABAS: Back on the record.
 6 Good afternoon, Mr. Green. I remind you that
 7 you're still under oath after lunch.
 8 THE WITNESS: Okay.
 9 BY MR. TABAS:
 10 Q. Do you agree that if OSF and Rockford Health
 11 System don't merge, Rockford Health System isn't in any
 12 danger of closing its doors anytime soon?
 13 A. I would say there is not imminent financial
 14 disaster in the event that we do not consummate this
 15 deal.
 16 Q. Why is that?
 17 A. Currently we have a good balance sheet, and an
 18 institution can't possibly deteriorate that rapidly.
 19 That is not to say that there would not be any negative
 20 consequences over the next many years to the Rockford
 21 community and to our institution.
 22 Q. I think I've asked you this before, but there
 23 are no plans today, if the merger doesn't go through, to
 24 cut any service lines at Rockford Memorial Hospital?
 25 A. Not that I'm aware of.

EXHIBIT M

McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan
Munich New York Orange County Paris Rome Silicon Valley Washington, D.C.

Strategic alliance with MWE China Law Offices (Shanghai)

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November 14, 2011

VIA E-MAIL *JMORRISON@FTC.GOV*

Jeremy P. Morrison, Esq.
Federal Trade Commission
Bureau of Competition
Mergers IV Division
601 New Jersey Avenue, N.W.
Washington, DC 20580

Re: Response to Civil Investigative Demand Issued to FTI Consulting, Inc. (FTC File No. 111-0102)

Dear Jeremy:

I write in response to your letter dated October 24, 2011 regarding our request to the Federal Trade Commission ("FTC") to return or destroy privileged documents inadvertently produced in response to the FTC's Civil Investigative Demand No. 111-0102 issued to FTI Consulting, Inc. ("FTI") on April 8, 2011 ("CID").¹ We disagree with the Staff's position that the documents at issue are not privileged, or in the alternative, that the privilege has been waived. We believe that the documents we seek to clawback, as set forth in my letter dated October 20, 2011, are privileged under the attorney work-product doctrine and remain privileged because that privilege has not been waived.

A. The Documents at Issue are Protected as Privileged Attorney-Client Communications and Attorney Work-Product

FTI has continuously asserted the privileged nature of materials it prepared in connection with the proposed affiliation between OSF Healthcare System ("OSF") and Rockford Health System ("RHS") (collectively, the "Parties").² A brief description of the background of these documents sets forth the basis for FTI's privilege claim. Hinshaw & Culbertson LLP ("Hinshaw") and McDermott Will & Emery, LLP ("MWE") jointly retained FTI, on behalf of their respective clients, OSF and RHS, as a consulting expert to assist and advise the firms in their merger analysis in preparation for potential litigation. In doing so, OSF and RHS, and their counsel,

¹ Redacted copies of the inadvertently produced documents were first provided to the FTC on November 3, 2011. At the FTC's request, FTI provided redacted copies of the inadvertently produced documents in color on November 7, 2011 (FTI00305-FTI00855).

² See FTI's May 11, 2011 response to the CID, and letter from C. Hine dated May 31, 2011.

viewed a merger investigation to be likely in light of the FTC's recent scrutiny of hospital mergers. Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure prohibits disclosure of a consulting expert's documents prepared in anticipation of litigation or for trial by or for a party or its representative, including the party's attorney or consultant. Subpart B of the same Rule further protects a consulting expert's communications from disclosure. The FTC is not entitled to discover documents prepared in anticipation of litigation by or for the parties or their representatives, including attorneys or consultants. The work-product doctrine and Federal Rule of Civil Procedure 26 protect from disclosure documents that "can fairly be said to have been prepared or obtained because of the prospect of litigation."³ Therefore, FTI's "studies, research, analyses, recommendations, plans and other work" as well as the "final and draft reports, supporting notes, communications, correspondence, data compilations and analysis and recommendations" requested by the FTC are non-discoverable work-product.⁴

B. Certain Protected Documents Were Inadvertently Disclosed

Counsel for FTI inadvertently produced the protected portions of certain documents to the FTC in response to the CID. The production was a mistake and, therefore, should be considered inadvertent under Federal Rule of Evidence 502(b)(1). Federal courts in Illinois use an intent-based test to determine whether a disclosure was inadvertent.⁵ As stated by FTI counsel in a letter dated October 20, 2011, less than a month after production of the protected documents, "[t]hese inadvertently produced documents contain attorney-client communications and attorney work-product protected from disclosure, and were inadvertently produced to the FTC." Nor did FTI intend to produce these documents with the protected content.

Counsel for FTI took reasonable steps to prevent the disclosure, pursuant to Federal Rule of Evidence 502(b)(2). Counsel for FTI obtained the documents responsive to the CID, loaded them into a database for review, and reviewed them several times before producing them less than two weeks later to the FTC. As a result of that review, counsel for FTI withheld similar documents relating to the Merger Efficiencies Study from production as privileged and protected from disclosure as attorney-client communication and/or attorney work-product, and the remaining responsive and non-privileged documents were produced to the FTC. Federal courts have found similar procedures to be reasonable.⁶

Counsel for FTI also took reasonable steps to rectify the disclosure, pursuant to Federal Rule of Evidence 502(b)(3). Counsel for FTI first learned of the inadvertent production when the FTC

³ *Binks Mfg. Co. v. Nat'l Preso Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983).

⁴ *Sara Lee Corp. v. Kraft Foods, Inc.*, 2011 U.S. Dist. LEXIS 35389, at *6 (N.D. Ill. Apr. 1, 2011); Fed. R. Civ. P. 26(b)(4)(B).

⁵ See *Coburn Group, LLC v. Whitecap Advisors, LLC*, 640 F. Supp.2d 1032, 1038 (N.D. Ill. 2009) (this test "ask[s] whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake").

⁶ See, e.g., *Laethem Equip. Co. v. Deere & Co.*, 2008 U.S. Dist. LEXIS 107635 (E.D. Mich. Nov. 21, 2008) (reasonable procedure included copying and reviewing the documents prior to disclosing them to opposing party).

attempted to ask questions about the inadvertently produced and protected content during an investigational hearing on October 20, 2011. Counsel for FTI immediately followed up on her objections during the investigational hearing by sending a formal clawback letter later that evening.⁷ Federal courts have found similar responses to be reasonable.⁸

Finally, counsel for FTI did not delay in requesting that the FTC return or destroy the inadvertently produced privileged documents. Counsel for FTI received the documents at issue from FTI on September 13, 2011 and produced them to the FTC just 10 days later on September 23, 2011. Counsel for FTI only learned of the inadvertent production on October 20, 2011 and sent a formal clawback letter the same evening.

C. Neither FTI Nor The Parties Have Waived the Privilege

OSF and RHS previously disclaimed any waiver of privilege as to the entire subject matter at issue here. Specifically, OSF and RHS's HSR Notifications expressly disclaimed the waiver of privilege as to the entire subject matter as a result of the disclosure of any privileged materials.⁹

Parties may waive privilege of a document without waiving privilege as to the whole subject matter. Federal Rule of Evidence 502(a), with regard to disclosures made in a federal proceeding or to a federal office or agency, provides that a waiver extends to an undisclosed communication or information *only if* (1) the waiver is intentional, (2) the disclosed and undisclosed communications or information concern the same subject matter, and (3) they ought in fairness to be considered together. The commentary notes to Federal Rule of Evidence 502(a) explain that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver *only of the communication or information disclosed*. Applied here, OSF and RHS waived privilege only for FTI's December 14, 2010 Business Efficiencies Report for the RHS-OSF Affiliation (identified as Attachment 4(c)(28) to RHS's HSR notification, and previously identified by the FTC as PX0034) (the "Merger Efficiencies Study"), and not for any background materials, or the documents that counsel for FTI now seeks to clawback. Specifically, when producing the Merger Efficiencies Study, OSF and RHS expressly stated that they waived the privilege only as to that document, and they explicitly noted that they were not waiving the privilege or protection as to the entire subject matter of the Merger Efficiencies Study. At no time since has either OSF or RHS stated otherwise.

⁷ See letter dated October 20, 2011 from C. Hine.

⁸ See *Coburn Group LLC v. Whitecap Advisors, LLC*, 640 F. Supp.2d 1032, 1041 (N.D. Ill. 2009) (no waiver where disclosing party immediately objected to the use of a privileged communication during a deposition and followed up with a written request the next day); see also *Heriot v. Byrne*, 2009 U.S. Dist. LEXIS 22552 (N.D. Ill. Mar. 20, 2009) (disclosure was inadvertent where party disclosing the privileged items acted promptly to request that opposing party destroy them); cf. *Harmony Gold USA v. FASA Corp.*, 1996 U.S. Dist. LEXIS 16583, at *15 (N.D. Ill. Nov. 6, 1996) (waiting two weeks after discovering the disclosure was unreasonable).

⁹ See RHS's HSR Notification, Response to Item 4(c), at page 10 ("Pursuant to Federal Rule of Evidence 502, the disclosure of any privileged materials does not constitute a waiver of privilege as to the entire subject matter"); see also FTI's May 11, 2011 response to the CID, at 2 ("subject to and without waiving their claims of privilege ... produced to the FTC FTI's Business Efficiencies Report for the RHS-OSF Affiliation").

Case law reserves subject matter waivers for situations where a party tries to obtain 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.”¹⁰ That is not the case here. Rather, OSF and RHS voluntarily produced the Merger Efficiencies Study as part of their HSR filings. In other words, OSF and RHS did not produce the Merger Efficiencies Study for tactical advantage. You implied in your letter that witnesses self-servingly referred to the Merger Efficiencies Study in testimony; however, this testimony arose through the questioning by the FTC Staff only, and not by way of a selective or self-serving disclosure of information by these witnesses. Moreover, the fact that an OSF or RHS executive may have known about or seen the Merger Efficiencies Study does not constitute a selective waiver of the privileged communications and work product underlying that document. Given the preliminary status of this case, where the FTC has not yet filed a complaint and discovery is not yet underway, any suggestion of withholding documents for tactical advantage is improper and does not justify the attempt to get access to privileged materials.

Similarly, the fairness prong is not met in this case. The protected materials may only be relevant and discoverable during the expert discovery phase of a litigation – a phase of litigation that this case has not reached.¹¹ Producing work product and materials relied upon or generated by potential expert witnesses at this juncture of the investigation is premature and not required under any fairness consideration.

The cases that FTC Staff cites regarding subject matter waiver are also distinguishable from the facts here. *In re Int'l Harvester's Disposition of Wis. Steel*, 1987 U.S. Dist. LEXIS 10912, at *9-11 (N.D. Ill. Nov. 19, 1987), is distinguishable because the party seeking to protect certain information from discovery was simultaneously using certain attorney-client communications for its own advantage. That is not the case here, where counsel for OSF and RHS voluntarily produced just the Merger Efficiencies Study, and are not presently using any other otherwise-privileged materials for their defense in this matter. *U.S. v. Nobles*, 422 U.S. 225, 239-240 (1975), is distinguishable because the respondent waived any privilege when it sought to present an investigator as a witness. OSF and RHS did not produce any witnesses to testify in support of the Merger Efficiencies Study, which was not the subject of the 30(b)(6) deposition notice sent to FTI, and any expert discovery related to the Merger Efficiencies Study is not yet timely. Finally, *Hollins v. Powell*, 773 F.2d 191 (8th Cir. 1985), is distinguishable because the attorney failed to object when a witness answered certain questions revealing privileged communications. Here, however, FTI's counsel objected during the investigational hearing at which the privileged portions of the documents were introduced and followed up on her objection with a written clawback letter that same day.

¹⁰ See *Lerman v. Turner*, 2011 U.S. Dist. LEXIS 715, at *25-26 (N.D. Ill. Jan. 5, 2011) (internal citations omitted); see also *In re Aftermarket Filters Antitrust Litig.*, 2010 U.S. Dist. LEXIS 117719, at *29-30 (N. D. Ill. Nov. 4, 2010) (same).

¹¹ See Fed. R. Civ. P. 26.

D. District of Columbia Rules of Professional Conduct Requires Adherence to Counsel's Instructions for Disposition of Materials

The District of Columbia Bar's Rules of Professional Conduct Rule 4.4(b) ("Rule 4.4(b)") states

A lawyer who received a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

To date, FTI has not provided the FTC any documents or materials related to the Merger Efficiencies Study besides the Merger Efficiencies Study itself. In FTI's May 11, 2011 response to the CID, FTI clearly asserted that any materials related to the Merger Efficiencies Study "are protected by privilege, the attorney work-product doctrine under Rule 26(b)(3) of the Federal Rules of Civil Procedure, and Rule 23(b)(4)(B) of the Federal Rules of Civil Procedure," and, accordingly, it would not produce those protected materials. In providing its supplemental response to the CID on September 23, 2011, FTI did not deviate from its position that materials related to the Merger Efficiencies Study were protected by privilege and the attorney work-product doctrine, and continued to withhold documents relating to the Merger Efficiencies Study from production. The unintentional production of the documents FTI presently seeks to clawback is anomalous to FTI's consistent position, and indicates that the production of these documents was inadvertent.

Provided FTI's unwavering assertion with respect to materials related to the Merger Efficiencies Study, FTC Staff should have recognized that the production of these documents related to the representation of a client and was inadvertent. Accordingly, FTC Staff was obligated under Rule 4.4(b) to not examine the protected portions of the documents, and not attempt to use the protected material during the investigational hearing of Clair Tosino on October 20, 2011.¹² Further, FTC Staff should have notified FTI counsel of the inadvertent production and should now abide by counsel's instructions to return or destroy the unredacted versions of these documents.

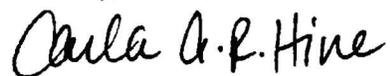
Therefore, counsel for FTI again requests that the FTC return or destroy the documents set forth in my letter of October 20, 2011 because they are privileged as attorney-client communications and as attorney work-product, and were inadvertently produced to the FTC. If you choose to destroy the documents instead of returning them, I request that you verify in writing that the FTC and its agents and employees have destroyed any and all hard and electronic copies of these documents, and the FTC will not use these documents for any purposes whatsoever in the above-referenced matter.

¹² Commentary to Rule 4.4(b) states that the receiving lawyer is prohibited "from reading or using the material."

Jeremy P. Morrison, Esq.
November 14, 2011
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Please let me know if you have any further questions, and thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Carla A. R. Hine". The signature is written in a cursive, flowing style.

Carla A. R. Hine

cc: Alan I. Greene, Esq.
Kenneth W. Field, Esq.

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EXHIBIT N

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IN CAMERA

EXHIBIT O

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