

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



_____)	PUBLIC
In the Matter of)	
)	Docket No. 9349
OSF Healthcare System,)	
a corporation, and)	Hon. Judge Chappell
)	
Rockford Health System,)	
a corporation)	
_____)	

**COMPLAINT COUNSEL’S REPLY TO FTI CONSULTING, INC.’S
OPPOSITION AND RESPONDENTS’ RESPONSE TO COMPLAINT COUNSEL’S
MOTION TO COMPEL FTI CONSULTING, INC. TO PRODUCE DOCUMENTS AND
TESTIMONY**

Executive Summary

Neither FTI Consulting, Inc. (“FTI”) nor Respondents OSF Healthcare System (“OSF”) and Rockford Health System (“RHS”) (jointly “Respondents”) can justify the continued use of privilege as both a sword and shield. Respondents’ actions continue to obfuscate the issues before the Court. Both FTI and Respondents failed to address in their responses the fact that throughout Commission Staff’s investigation, the federal court proceeding, and indeed in this matter, Respondents have continually cited the misleadingly titled Business Efficiencies Report (“Merger Report”) as justification for the proposed acquisition, while asserting privilege over the underlying materials necessary to evaluate their claims. Respondents’ admission that they waived “the privilege as to the Merger Report,” coupled with their continued use of the Merger Report as affirmative evidence of efficiencies, and a justification for the transaction, is exactly the type of discovery shenanigans that the law prohibits.

As detailed below, Complaint Counsel is requesting only those documents and communications that relate to the creation and underlying analysis of the Merger Report—materials that go to the heart of the affirmative defense Respondents have asserted in support the proposed transaction. Complaint Counsel is not requesting documents created after October 2011, when Mr. Brown was hired as a testifying expert, or documents that relate solely to the creation of Mr. Brown’s expert report.

Complaint Counsel respectfully reiterates its request that the Court order FTI to produce the withheld documents, and compel FTI to provide testimony central to Respondents’ efficiency defense to the proposed merger. The time has come for Respondents to reveal the full set of facts and evidence so that the Court can fully evaluate their primary defense.

Background

Respondents’ outside counsel sought to create an efficiencies report that they could use to justify this merger to duopoly. Yet they found themselves in a predicament: if Respondents’ assertions were ever tested, their claims might collapse and jeopardize the transaction. So, Respondents schemed to assert an affirmative defense but shield from disclosure the full body of evidence needed to evaluate that defense. To do so, Respondents’ outside counsel commissioned the Merger Report and intentionally waived privilege over that report, while at the same time, claiming to maintain privilege over the evidence and information that would allow the report to be tested. When the time came, Respondents found a testifying expert (Mr. Brown) to repackage the assertions in the Merger Report and present those claims as his expert opinion. (*See* Respondents’ Response in Opposition to Complaint Counsel’s Motion to Compel FTI Consulting, Inc., at 2 [*hereinafter* Respondents’ Reply].) However, because Mr. Brown concedes that he does not actually know the details underlying many of the savings asserted in

the Merger Report (*see* Ex. A.), there was no way he could ever be subject to cross-examination about the underlying facts or analyses, and FTI would never have to produce the full body of evidence. Respondents' creative attempt to selectively waive privilege and offer an untestable defense for the transaction must be rejected for at least one critical reason: Respondents cannot use the Merger Report offensively in this matter, and as the primary basis for Mr. Brown's report, and still shield from discovery the materials underlying their affirmative defense. To permit this would run contrary to both the spirit and letter of the law. Thus, FTI must now comply with its discovery obligations.

Argument

Respondents do not deny that their primary defense of this proposed merger to duopoly is the claimed efficiency savings derived from the Merger Report. In fact, in Respondents' *first* Answers to the Complaint, both OSF and RHS cite the proposed efficiencies derived from the Merger Report as justification for the proposed transaction. (OSF Answer at 1, *In re OSF Healthcare System and Rockford Health System*, Docket No. 9349 (Dec. 12, 2011); RHS Answer at 1, *In re OSF Healthcare System and Rockford Health System*, Docket No. 9349 (Dec. 12, 2011).) Respondents placed the Merger Report and its underlying analysis "at issue by raising defenses which assert reliance on information contained in these documents." *In re Motor Up Corp., Inc.*, 1999 FTC LEXIS 262, *5 (Aug. 5, 1999) (citing *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 395, 704 (10th Cir. 1998)).

Respondents seek to muddy the waters with their continued reference to Mr. Brown's expert report. To be clear, the Merger Report is a separate document from Mr. Brown's expert report. The Merger Report was finalized in December 2010. Mr. Brown was not even retained as a testifying expert in this proceeding until October 2011, and his expert report was not

finalized until November 2011. Respondents seek to shield the Merger Report from expert discovery, but the Merger Report was created almost a full year before Mr. Brown was hired to testify, and almost a year before Mr. Brown created his expert report by repackaging the Merger Report. These machinations do not change the facts and legal analysis surrounding documents relating to the Merger Report: work-product protections have been waived.

While Respondents claim that Complaint Counsel cannot sufficiently describe the requested documents (a statement contradicted in the last section of this motion), any lack of detail surrounding the types of documents that Complaint Counsel requests is of FTI's own doing. Despite numerous requests, FTI has continually refused to produce a privilege log, or even inform Complaint Counsel of the types or volume of documents it has withheld from discovery on the basis of these dubious privilege claims. (Complaint Counsel's Motion to Compel FTI Consulting, Inc. at 3-4 [*hereinafter* "Complaint Counsel's Initial Motion"].)

A. Respondents Have Waived Privilege by Using the FTI Merger Report as a Sword while Shielding the Materials Needed to Evaluate the Asserted Efficiency Claims

As this Court has found, "a litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion." *In re Motor Up Corp., Inc.*, 1999 FTC LEXIS 262, *5 (Aug. 5, 1999) (citing *Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 395, 704 (10th Cir. 1998)). Respondents' Reply does not address any of the legal analysis set forth in Complaint Counsel's Initial Motion; Respondents merely claim in one sentence that this Court's decision in *In re Motor Up Corp., Inc.* is distinguishable, with no explanation about why or how. (Respondents' Reply at 6.)

In fact, Respondents' actions in this case are materially indistinguishable from those in *In re Motor Up Corp., Inc.* In that case, Respondents placed "documents at issue by raising defenses which assert reliance on information contained in [the purportedly privileged] documents." 1999 FTC LEXIS 262, *5. And, "Complaint Counsel [could not] obtain from any other source the substantial equivalent of what information Respondents relied upon as substantiation for Respondents' claim." *Id.*

The salient facts are no different here. Respondents hired FTI as a consultant in preparation for litigation, and the materials in FTI's possession ordinarily would be shielded from discovery. Respondents used the information contained in the documents, materials, and communications that Complaint Counsel is requesting to create the Merger Report. Respondents then asserted the efficiencies claims set forth in the Merger Report as an affirmative defense in support of the proposed acquisition. (Complaint Counsel's Initial Motion at 7-8.) By doing so, Respondents "inject[ed] a new factual or legal issue into [the] case," and thus waived any privilege that may once have applied to the materials relating to the Merger Report. *See Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987). Respondents seek to selectively waive privilege to "prove a point but then invok[e] the privilege to prevent" Complaint Counsel from challenging the assertions set forth in the Merger Report. *See In re Motor Up Corp., Inc.* 1999 FTC LEXIS 262, *5. Only by having access to all backup materials, including notes, communications discussing FTI's analyses, and other documents that underlie the Merger Report, can Complaint Counsel fully assess Respondents' claims. Additionally, once the documents are produced, Complaint Counsel should be allowed to depose those individuals from FTI who are knowledgeable about FTI's analysis of the proposed merger.

B. Respondents' Expert, Mr. Brown, Relies on the Merger Report but Lacks a Thorough Understanding of FTI's Analysis

Mr. Brown was hired in October 2011 as a testifying expert. (PX4045-09 to 10 (Brown Dep. Tr.) (Ex. B).) Prior to that, in 2010, Mr. Brown oversaw the creation of the Merger Report. (*Id.*) However, Mr. Brown was not one of the day-to-day leaders of the team that created the Merger Report. (*Id.* at 23.) Rather, it was Phillip Dawes, also at FTI, who aggregated and finalized the Merger Report (as well as the draft reports) before sending it to Respondents' outside antitrust counsel. (*Id.*) Moreover, Mr. Brown testified that others at FTI, or in some cases outside consultants that FTI hired, were responsible for calculating the claimed efficiencies, and that the information was compiled at FTI by Mr. Dawes or Tad Schweikert. (*Id.* at 23, 39-40.) Mr. Brown further testified that he participated in only about ten of the fifty or more variants of the efficiencies analyses considered in creating the final efficiency claims asserted in the Merger Report. (*Id.* at 31.)

Complaint Counsel does not dispute that FTI turned over everything that Mr. Brown may have relied on. Of course, Mr. Brown did not actually understand the information used in calculating the claimed savings listed in his expert report, which calls into question the reliability and credibility of his report. (*See* Ex. A.) But, more importantly for purposes of this motion, Mr. Brown's expert report is distinct from the Merger Report. Mr. Brown produced raw data and files with his report but failed to cite to those sources in his report and could not explain the details underlying his analyses. (Brown Expert Report (Ex. C).) So, it is at best unclear whether the materials ostensibly relied on by Mr. Brown for his report includes more than a fraction of the documents, data, and other information used by FTI in connection with the Merger Report. Accordingly, Respondents' willingness to provide materials Mr. Brown purportedly relied on

does nothing to relieve FTI of its obligation to disclose the materials that relate to the creation of the Merger Report.

Once again, the fact that Mr. Brown produced an expert report that is nearly identical to the previously produced Merger Report does not alter the analysis. By repeatedly pointing to the Merger Report as affirmative evidence, Respondents injected the Merger Report into this litigation and have waived any privilege that once applied to the materials that underlie that report. Therefore, FTI should be required to comply with the Subpoena *Duces Tecum* issued to it by Complaint Counsel and to produce any documents and communications that relate to the creation of the Merger Report.

C. Documents Requested by Complaint Counsel

Due to FTI's repeated refusal not only to produce relevant, discoverable material, but also a privilege log, it is difficult for Complaint Counsel to describe with particularity the documents that it seeks. However, there are a number of categories to which Complaint Counsel is entitled. Complaint Counsel has reason to believe that FTI has in its possession and should produce to Complaint Counsel the following categories of documents:

- FTI interview notes of OSF and RHS employees;¹
- Mr. Brown's notes from preparing the Merger Report;²
- Documents and communications between FTI and OSF and RHS employees that relate to the Merger Report;
- Documents and communications between FTI and Respondents' counsel that relate to the Merger Report;
- All internal FTI documents and communications that relate to the Merger Report;³ and

¹ Exhibit C of Brown Expert Report, (Ex. C).

² PX4045-19, Brown Dep. Tr. (Ex. B) (testifying that he has notes in notepads that he did not produce).

³ *Id.* (noting that there are emails relating to the Merger Report between Mr. Brown and others at FTI).

- All documents and communications between FTI and consultants that FTI hired to assist it in creating or developing the Merger Report.⁴

To further assist the Court, Complaint Counsel notes that it is not requesting *all* documents that FTI has in its possession relating to efficiencies. Complaint Counsel is not requesting FTI documents or communications created after October 2011, when Mr. Brown was retained as Respondents' testifying expert, or any documents that relate solely to the creation of Mr. Brown's expert reports.

In addition to the documents listed above, Complaint Counsel believes it is entitled to depose FTI employees to review and test the analyses that underlie the Merger Report.⁵

D. Conclusion

By intentionally, strategically, and selectively disclosing relevant information and testimony, Respondents and FTI waived any protections that may once have applied to the material and analysis underlying the Merger Report. Neither FTI's nor Respondents' responses change the analysis set forth in Complaint Counsel's Initial Motion. Additionally, neither FTI nor Respondents seem to disagree with the material facts as described in Complaint Counsel's initial motion. Only by allowing Complaint Counsel to access and review all of the materials relating to the Merger Report, which Respondents assert as a justification for this transaction, will the Court have a full and fair evaluation of Respondents' asserted efficiencies defense.

⁴ *Id.* at 39 to 40, Brown Dep. Tr. (Ex. B) (testifying that Susan Lix was hired to assess potential laboratory savings, but he did not recall the specialists who reviewed pharmacy savings as well as the IT savings).

⁵ Ultimately, Complaint Counsel prefers to conduct such depositions following the production of documents. If the Court requires that FTI produce the documents that it has withheld for many months, Complaint Counsel may also ask the Court for leave to supplement its exhibit list or submit revised expert materials. Additionally, if the Court requires that FTI submit its employees to depositions, Complaint Counsel will work in good faith with Respondents to determine a date by which both Complaint Counsel and Respondent can designate any new and relevant testimony.

Dated: March 14, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
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I also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

March 14, 2012

By: s/ Sarah Swain
Attorney

EXHIBIT A

Exhibit A

Brown Deposition (PX4045) Excerpts—References to Subject-Matter Specialists

- 79:10-18—Brown testified that multiple specialists that contributed to the writing of his expert report.
- 87:6-16—Brown testified that Dawes and Schweikert were the “day-to-day” leaders of the efficiencies report.
- 97:14-98:4—Brown testified that he primarily relied on analytics provided to him by subject-matter experts in various areas.
- 116:2-8—Brown testified that subject-matter experts would bring him data that he would review using broader analyses tools.
- 116:17-117:14—Brown testified that he personally participates in anywhere from four or five to ten or twelve analyses per engagement, and that greater than 50 analyses took place to determine the ultimate FTI savings in the 2010 merger report.
- 138:8-15—Brown deferred to Clair Tosino on the issue of consolidation of oncology departments.
- 139:20-140:6—Brown deferred to his subject-matter experts in response to questions about hospitals moving under one provider number.
- 140:14-23—Brown deferred to Clair Tosino when asked if FTI took into account CMS and HHS regulations regarding 340B pricing.
- 152:15-153:9—Brown testified that Susan Lix was hired as a laboratory services expert, whose analyses were reviewed not by Brown but by Tad Schweikert.
- 153:13-23—Brown testified that he does not recall the specialist who reviewed pharmacy savings, but that Tad Schweikert led such an effort as a project manager.
- 153:19-23—Brown testified that he does not recall the subject-matter expert who determined potential IT savings.
- 173:8-16—Brown testified that Clair Tosino led FTI’s effort in trauma consolidation.
- 186:11-23—Brown testified that Mark Herbers was the subject-matter expert whose analysis led to the listing of the purchase of a gamma knife as a capital avoidance.
- 188:2-11—Brown deferred to Mark Herber on the issue of whether or not the gamma knife should be listed as a capital avoidance.

- 234:14-235:12—Brown deferred to Dr. Chuck Peck, a physician subject-matter expert, when asked about merger impacts on medical staff.
- 237:2-11—Brown deferred to Dr. Peck when asked how RHS was able to lower cost per care without entering an affiliation with another health system.
- 239:21-240:6—Brown testified that he did not work on the FTI performance reports to RHS and OSF in February 2011, but that Phillip Dawes and Tad Schweikert did.

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT B

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT C