558972

Dated: March 5, 2012

Respectfully submitted,

s/ Matthew J. Reilly__________

MATTHEW J. REILLY
JEFFREY H. PERRY
SARA Y. RAZI
JEREMY P. MORRISON
KENNETH W. FIELD
RICHARD CUNNINGHAM
Attorneys
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.

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

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

[PROPOSED] ORDER

Upon consideration of Complaint Counsel Federal Trade Commission's Motion to Compel FTI Consulting, Inc. to Produce Documents Requested by Subpoena and to Enforce Subpoena *A* *a*□, and any opposition thereto,

IT IS HEREBY ORDERED that Complaint Counsel's Motion is GRANTED.

IT IS FURTHER ORDERED that FTI Consulting, Inc. shall immediately take all necessary steps towards producing to Complaint Counsel all subpoenaed documents responsive to Complaint Counsel's Subpoena issued on December 30, 2011 within ______ days from the issuance of this Order.

IT IS FURTHER ORDERED that FTI Consulting, Inc. shall immediately take all necessary steps toward scheduling the requested depositions of FTI's representatives and will not object to questioning relating to the FTI merger analysis on privilege grounds. The deposition shall be scheduled to take place no later than March 23, 2012.

____
D r e s e < /

Respondents replied via email on February 1, 2012, regarding why FTI would not produce documents with a follow-up letter on February 7, 2012. (**Exhibit T**).

On February 28, 2012 at 10:41 a.m., Complaint Counsel emailed Respondents to see if further discussions surrounding the production of documents and witnesses would be fruitful. Respondents replied via email at 4:55 p.m. on February 28, 2012, expressing the belief that Respondents had met all their discovery obligations. Complaint Counsel emailed Respondents again on February 28, 2012 at 5:37 p.m. reiterating Complaint Counsel's views. As of 3:30 p.m. on February 29, 2012, Respondents have not replied. Given the failure to reply, Complaint Counsel believes that further discussions would not be fruitful and that it and Respondents are unable to reach an agreement on the outstanding issues raised in the foregoing Motion.

Dated: March 5, 2012

Respectfully submitted,

s/ Matthew J. Reilly

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 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
Washington, DC 20580

I also certify that I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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William P. Schuman
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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 or the adjudicator.

s/ Sarah Swain______________
Sarah Swain
Attorney for Plaintiff
Federal Trade Commission

Factual Background

REDACTED

Specifically, Mr. Seybold informed Staff that in addition to the Merger Report, FTI created a (previously undisclosed) Performance Report for RHS identifying savings that FTI could help RHS achieve the proposed Acquisition. (PX0226-030, Seybold IH) (**Exhibit F)**).

REDACTED

REDACTED

On January 11, 2012, Respondents produced an expert report from Jeffrey Brown, FTI team leader for the Merger Report. (PX2261, Brown Report (**Exhibit M**)). Mr. Brown's report

On December 30, 2011, Complaint Counsel sent a Subpoena to FTI relating to this matter ("SDT"). (**Exhibit Q**). FTI responded to the SDT on January 30, 2012, again asserting privilege over all materials relating to the Merger Report. (FTI Response to SDT, **Exhibit R**). On January 27, 2012, Complaint Counsel sent Subpoenas to FTI employees Schweikert, Dawes, Tosino, and Herbers. (**Exhibit S**). On February 7, 2012, FTI confirmed it would instruct FTI employees not to respond to Complaint Counsel's questions relating to the Merger Report. (Letter from Hine, Feb. 7, 2012 (**Exhibit T**)). Based on that representation, Complaint Counsel cancelled the depositions scheduled for the FTI employees.

<u>Argument</u>

A. The FTI Merger Report Was Created for Litigation Purposes

FTI asserts that the Merger Report "can fairly be said to have been prepared or obtained because of the prospect of litigation." (**Exhibit C**). Respondents clearly assert that the sole purpose underlying the creation of the Merger Report was not to aid OSF and RHS in analyzing or assessing the Acquisition, but rather to achieve antitrust clearance. (**Exhibits C and D**). If it were not the case that FTI was hired solely in anticipation of litigation, such communications would undoubtedly not be subject to work-product protections, and disclosure would have been required many months ago. Complaint Counsel does not dispute that the purpose behind the creation of the Merger Report was to aid Respondents' antitrust counsel in expected antitrust litigation surrounding the Acquisition and that, based on that fact, the work-product doctrine is applicable to the FTI materials. Based on Respondents' subsequent actions, however, any work-product protections underlying the Merger Report have been waived.

B. FTI Waived Any Privilege that May Have Attached to the FTI Materials

Although the FTI materials may at one time have been protected by the work-product doctrine, “[t]he privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived.” *a* . , 422 U.S. 225, 239 (1975). The justification for work-product protections no longer exists in this case as Respondents have thrust the Merger Report into center stage in this litigation. In so doing, FTI is now compelled to produce all documents and testimony relating to the Merger Report.

When a party “inject[s] a new factual or legal issue into [a] case” that party has waived any privilege that may once have applied. . *a* . *C* ., 815 F.2d 1095, 1098 (7th Cir. 1987). “Most often, this occurs through the use of an affirmative defense.” . (citations omitted). As the Supreme Court has found, a party “can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify on his own behalf and thereafter assert [Fifth Amendment privilege]….” , 422 U.S. at 239. When a party injects an issue or testimony into a case, partial disclosure of privileged communications results in full disclosure of those materials so as to prevent the fact-finder from being confused, misled, or presented with an incomplete evidentiary picture. *A* *a* . . *A* *a* *a* *C* ., 200 F.R.D. 401, 410 (N.D. Ill. 2001) (“This is also a matter of common sense as it would be entirely unfair for a case to turn on an issue upon which one party has no knowledge and is barred from access to the necessary information while the other party is able to use the information to establish its claim while shielding it from disclosure.”); *a* , 422 U.S. at 232.

Respondents submitted the Merger Report in their initial HSR filings. In subsequent investigational hearings, depositions, and the preliminary injunction hearing, Respondents averred that the savings that FTI claimed in its report justified the proposed Acquisition. PX0221-017, Schertz IH) (**Exhibit U**); PX0216-049 (Kaatz IH) (**Exhibit V**); PX4084-031 (Schoeplein Dep.) (**Exhibit W**); PX4056-014-015 (Sehring Dep.) (**Exhibit X**)). In fact, during the Preliminary Injunction Hearing in this matter, the CEO of OSF SAMC testified that he believed the savings outlined in the Merger Report are achievable and in fact "conservative." (PX2510, PI Hearing (Schertz) (**Exhibit Y**)). In addition to the numerous times Respondents cited the Merger Report in testimony, Phillip Dawes from FTI testified without objection from counsel about the background and the underlying analysis behind the Merger Report. (*a*, **Exhibit I**).

Respondents have, throughout this case, asserted an affirmative defense that the potential efficiencies that FTI identified in the Merger Report outweigh the competitive harm resulting from the Acquisition. As such, Respondents have injected the Merger Report into this litigation and any privilege that may once have applied has been waived. , 815 F.2d at 1098. Respondents' and FTI's assertions that they can testify about the legitimacy of the Merger Report, while simultaneously denying Complaint Counsel access to highly relevant evidence that only FTI has access to—such as interview notes and an explanation of FTI's analysis—is exactly the type of action that the Supreme Court and numerous other courts have rejected. To allow otherwise would "turn a privilege from a defensive protection into an offensive weapon, by using it to reveal only those portions of confidential matters favorable to its case while hiding portions which might be harmful." *a* , 1987 WL 20408 (N.D. Ill. Nov. 20, 1987) (citations omitted). Thus, all documents and FTI employees that implicate the Merger Report are subject to discovery.

C. Rule 26 Does Not Protect the Materials from Disclosure

FTI also asserts it is entitled to protections under Federal Rules of Civil Procedure

Dated: March 5, 2012

Respectfully submitted,

s/ Matthew J. Reilly____________

MATTHEW J. REILLY
JEFFREY H. PERRY
SARA Y. RAZI

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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C [illegible] *a* [illegible]

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 or the adjudicator.

s/ Sarah Swain
Sarah Swain
Attorney for Plaintiff
Federal Trade Commission

EXHIBIT A

CONFIDENTIAL

REDACTED IN ENTIRETY

EXHIBIT B

EXHIBIT C

CONFIDENTIAL

REDACTED IN ENTIRETY

EXHIBIT D

CONFIDENTIAL

REDACTED IN ENTIRETY

EXHIBIT E

CONFIDENTIAL

REDACTED IN ENTIRETY

EXHIBIT F

CONFIDENTIAL

REDACTED IN ENTIRETY

EXHIBIT G

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EXHIBIT H

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EXHIBIT K

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EXHIBIT L

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REDACTED IN ENTIRETY

EXHIBIT N

CONFIDENTIAL

REDACTED IN ENTIRETY

EXHIBIT O

CONFIDENTIAL

REDACTED IN ENTIRETY

EXHIBIT P

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

OSF Healthcare System,
a corporation, and

Rockford Health System,
a corporation.

RESPONDENTS' EXPERT WITNESS LIST

Respondents OSF Healthcare System and Rockford Health System ... following expert witnesses to testify in this matter ... Monica G. Noether, Ph.D.; William M. Sage, M.D., J.D.

Pursuant to Paragraph 18 of Judge Chappell's December 20, 2011 Scheduling Order ... transcripts of prior testimony ...

Chicago, IL 60601
Telephone: (312) 704-3000
Facsimile: (312) 704-3001
[redacted]
reene@hirsch...law.com
law.com mehuna@hirsch...
sch...wlaw.com kkurczewski@hir...

lichael Ja...

CERTIFICATE OF SERVICE

I, Nicole L. Castle, hereby certify that I served a true and correct copy of the fo

Matthew J. Reilly, Esq.
Jeffrey H. Perry, Esq.
Kenneth W. Field,
Katherine A. Ambrogi, Esq.
Jeremy P. Morrison, Esq.
Andrea Zach, Esq.
Jeanne Liu, Esq.
Stephanie Reynolds, Esq.

Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, DC 20001

mre
jperry@ftc.gov
kfield@ftc.gov

EXHIBIT Q

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

)

In the Matter of

ventures, and all directors, officers, employees, agents and representatives of the foregoing. The terms “subsidiary”, “affiliate” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between the Company and any other person.

B. The term “Rockford Health System” means Rockford Health System, its domestic and foreign parents, predecessors, divisions, subsidiaries (including but not limited to Rockford Memorial Hospital), affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing. The terms “subsidiary”, “affiliate” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between Rockford Health System and any other person.

C. The term “OSF Heathcare System ” means OSF Healthcare System, its domestic and foreign parents, predecessors, divisions, subsidiaries (including, but not limited to OSF St. Anthony’s Medical Center), affiliates, partnerships and joint ventures, and all directors, officers, employees, agents and representatives of the foregoing. The terms “subsidiary”, “affiliate” and “joint venture” refer to any person in which there is partial (25 percent or more) or total ownership or control between OSF Healthcare System and any other person.

D. The term “documents” means all computer files and written, recorded, and graphic materials of every kind in the possession, custody or control of the Company. The term “documents” includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that person’s files; and copies of documents the originals of which are not in the possession, custody, or control of the Company.

1. Unless otherwise specified, the term “documents” excludes: (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature; (b) architectural plans and engineering blueprints; and (c) documents solely relating to environmental, tax, human resources, OSHA, or ERISA issues.

2. The term “computer files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Company should produce documents that exist in machine-readable form, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If the Company believes that the required search of backup disks and tapes and archive disks and

tapes can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss a possible modification to this instruction with the Commission representatives identified on the last page of this Request. The Commission representative will consider modifying this instruction to:

(a) exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Company;

(b) limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Commission representatives; or

(c) include other proposals consistent with Commission policy and the facts of the case.

D. The term "person" includes the Company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.

F. The term "relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

G. The terms "and" and "or" have both conjunctive and disjunctive meanings.

H. The terms "each," "any," and "all" mean "each and every."

I. The term "entity" means any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such.

J. The term "plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.

K. All references to year refer to calendar year. Unless otherwise specified, each of the specifications calls for documents and/or information for each of the years from January 1, 2009, to the present.

L. This SDT shall be deemed continuing in nature and shall be supplemented in the event that additional documents responsive to this request are created, prepared, or received between the time of the Company's initial response and trial.

M. To protect patient privacy, the Company shall mask any Sensitive Personally Identifiable Information ("PII") or Sensitive Health Information ("SHI"). For purposes of this SDT, PII means an individual's Social Security Number alone; or an individual's name or address or phone number in combination with one or more of the following: date of birth, Social Security Number, driver's license number or other state identification number or a foreign country equivalent, passport number, financial account numbers, credit or debit card numbers. For purposes of this SDT, SHI includes medical records or other individually identifiable health information. Where required by a particular specification, the Company shall substitute for the masked information a unique patient identifier that is different from that for other patients and the same as that for different admissions, discharges, or other treatment episodes for the same patient. Otherwise, the Company shall redact the PII or SHI but is not required to replace it with an alternate identifier.

N. <u>Forms of Production:</u> The Company shall submit documents as instructed below absent written consent.

1. Documents stored in electronic or hard copy format in the ordinary course of business shall be submitted in electronic format provided that such copies are true, correct, and complete copies of the original documents:

    (a) Submit Microsoft Access, Excel, and PowerPoint in native format with extracted text and metadata;

    (b) Submit all other documents other than those identified in subpart (1)(a) in image format with extracted text and metadata; and

    (c) Submit all hard copy documents in image format accompanied by OCR.

2. For each document submitted in electronic format, include the following metadata fields and information:

    (a) For loose documents stored in electronic format other than email: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, creation date and time, modification date and time, last accessed date and time, size, location or path file name, and MD5 or SHA Hash value;

(b) For emails: beginning Bates or document identification number, ending

(a) Shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the Company's files and shall not be shuffled or otherwise rearranged. For example:

i. If in their original condition hard copy documents were stapled, clipped or otherwise fastened together or maintained in file folders, binders, covers or containers, they shall be produced in such form, and any documents that must be removed from their original folders, binders, covers or containers in order to be produced shall be identified in a manner so as to clearly specify the folder, binder, cover or container from which such documents came; and

ii. If in their original condition electronic documents were maintained in folders or otherwise organized, they shall be produced in such form and information shall be produced so as to clearly specify the folder or organization format;

(b)

and any sub[(aitduced so acify the folder, binder,).0009 Tw 9 Tw 3 -rlBlla like-3 l sstephe submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request.

O. If any documents are withheld from production based on a claim of privilege, provide a statement of the claim of privilege and all facts relied upon in support thereof, in the form of a log (hereinafter "Complete Log") that includes each document's authors, addressees, date, a description of each document, and all recipients of the original and any copies. Attachments to a document should be identified as such and entered separately on the log. For each author, addressee, and recipient, state the person's full name, title, and employer or firm, and denote all attorneys with an asterisk. The description of the subject matter shall describe the nature of each document in a manner that, though not revealing information itself privileged, provides sufficiently detailed information to enable Commission staff, the Commission, or a court to assess the applicability of the privilege claimed. For each document withheld under a claim that it constitutes or contains attorney work product, also state whether the Company asserts that the document was prepared in anticipation of litigation or for trial and, if so, identify the anticipated litigation or trial upon which the assertion is based. Submit all non-privileged portions of any responsive document (including non-privileged or redactable attachments) for which a claim of privilege is asserted (except where the only non-privileged information has already been produced in response to this instruction), noting where redactions in the document have been made. Documents authored by outside lawyers representing the Company that were not directly or indirectly furnished to the Company or any third-party, such as internal law firm memoranda, may be omitted from the log.

P. If the Company is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.

Q. If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy, but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify persons having knowledge of the content of such documents.

R. In order for the Company's response to this SDT to be complete, the attached certification form must be executed by the official supervising compliance with this SDT, notarized, and submitted along with the responsive materials.

Any questions you have relating to the scope or meaning of anything in this SDT or suggestions for possible modifications thereto should be directed to Jeremy Morrison at 202-326-3149. The response to the SDT shall be addressed to the attention of Jeremy Morrison, Federal Trade Commission, 601 New Jersey Avenue, NW, Washington, DC 20580, and delivered between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission.

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena , has been prepared by me or under my personal supervision from records of FTI Consulting, Inc, and is complete and correct to the best of my knowledge and belief.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete copies of the original documents. If Complaint Counsel uses such copies in any court or administrative proceeding, FTI Consulting, Inc will not object based upon Complaint Counsel not offering the original document.

______________________________	______________________________
(Signature of Official)	(Title/Company)
______________________________	______________________________
(Typed Name of Above Official)	(Office Telephone)

SUBPOENA DUCES TECUM

Provided by the Secretary of the Federal Trade Commission, and

1. TO	2. FROM
FTI Consulting, Inc. c/o David Marx McDermott Will & Emery 227 West Monroe Street Chicago, IL 60606-5096	UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- ( ) *in person.*
- (•) *by registered mail.*
- ( ) *by leaving copy at principal office or place of business, to wit:*

[redacted]

on the person named herein on:

(Month, day and year)

EXHIBIT R

[redacted]

Munich New York Orange County Paris Rome Silicon Valley Washington, D C

[redacted]

Associate
chine@mwe.com

January 30, 2012

VIA E-MAIL ***JMORRISON@FTC.GOV***

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

Re: In the Matter of OSF Healthcare System and Rockford Health System before the [redacted]

[redacted]

product doctrine and Rule 26 protect from disclosure documents that "can fairly be said to have been prepared or obtained because of the prospect of litigation." *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983).

[redacted]

merger analysis, making FTI's "studies, research, analyses, recommendations, plans and other work," as well as the "final and draft reports, supporting notes, communications, [redacted]

UNITED STATES OF AMERICA /
BEFORE THE FEDERAL TRADE COMMISSION /

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

FTI CONSULTING, INC. S RESPONSES AND OBJECTIONS TO /
<u>COMPLAINT COUNSEL S SUBPOENA DUCES TECUM</u>.

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 Administ

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, 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.

2. FTI objects to Complaint Counsel•s definition of •Rockford Health SystemŽ as

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 analyses 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 litigation 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,

David Marx, Jr.
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[redacted]

Attorneys for FTI Consulting, Inc.

EXHIBIT S

SUBPOENA AD TESTIFICANDUM
DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

1. TO	2. FROM
Phillip A. Dawes, Jr. (FTI Consulting, Inc.) c/o David Marx, Jr., Esq. McDermott Will & Emery LLP 227 West Monroe Street Chicago, IL 60606	UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF DEPOSITION	4. YOUR APPEARANCE WILL BE BEFORE

[redacted]

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: *(check the method used)*

- ( ) *in person.*
- (•) *by registered mail.*
- ( ) *by leaving copy at principal office or place of business, to wit:*

on the person named herein on:

January 27, 2012

(Month, day, and year)

Andrea Zach

(Name of person making service)

Attorney

(Official title)

SUBPOENA AD TESTIFICANDUM
DEPOSITION

1. TO	2. FROM
Mark C. Herbers (FTI Consulting, Inc.)	

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: *(check the method used)*

○ *in person.*

☑ *by registered mail.*

○ *by leaving copy at principal office or place of business, to wit:*

____

____

____

____

on the person named herein on:

January 27, 2012

(Month, day, and year)

Andrea Zach

(Name of person making service)

Attorney

(Official title)

SUBPOENA AD TESTIFICANDUM DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

1. TO	2. FROM
James Tad Schweikert (FTI Consulting, Inc.) c/o David Marx, Jr., Esq. McDermott Will & Emery LLP 227 West Monroe Street Chicago, IL 60606	UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION

This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF DEPOSITION	4. YOUR APPEARANCE WILL BE BEFORE
Place to be determined Washington, D.C. United States of America	Court reporter to be determined 5. DATE AND TIME OF DEPOSITION February 6, 2012 at 9:00 am

6. SUBJECT OF PROCEEDING

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

7. ADMINISTRATIVE LAW JUDGE	8. COUNSEL AND PARTY ISSUING SUBPOENA
Honorable D. Michael Chappell Chief Administrative Law Judge Federal Trade Commission Washington, D.C. 20580	Jeffrey Perry Federal Trade Commission 601 New Jersey Ave, NW, Suite 5243 Washington, DC 20001 (202) 326-2331

DATE SIGNED	SIGNATURE OF COUNSEL ISSUING SUBPOENA
January 27, 2012	

GENERAL INSTRUCTIONS

APPEARANCE

TRAVEL EXPENSES

I hereby certify that a duplicate original of the within subpoena was duly served: *(check the method used)*

- ( ) in person.
- (•) by registered mail.
- ( ) by leaving copy at principal office or place of business, to wit:

____

____

____

____

[redacted]

SUBPOENA AD TESTIFICANDUM DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: *(check the method used)*

- [ ] *in person.*
- [x] *by registered mail*

EXHIBIT T

Carla A. R. Hine
Associate
chine@mwe.com
+1 202 756 8095

February 7, 2012

VIA E-MAIL *JMORRISON@FTC.GO*

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

Re: Subpoenas *A* *a* 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 *a* *a* 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 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

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 (. ., 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

DM_US 31713450-1.046498.0021

EXHIBIT W

CONFIDENTIAL

REDACTED IN ENTIRETY

EXHIBIT X

CONFIDENTIAL

REDACTED IN ENTIRETY

EXHIBIT Y

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

FEDERAL TRADE COMMISSION,)Docket No. 11 C 50344
)
Plaintiff,)Rockford, Illinois
)Thursday, February 2, 2012
v.)9:00 o'clock a.m.
)
OSF HEALTHCARE SYSTEM
and ROCKFORD HEALTHCARE)
SYSTEM,)
)
Defendants.)

VOLUME 2
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE FREDERICK J. KAPALA

APPEARANCES:

For the Plaintiff: U.S. FEDERAL TRADE COMMISSION
(600 Pennsylvania Avenue, NW,
Washington, D.C. 20580) By
MR. MATTHEW J. REILLY
MR. JEFFREY H. PERRY
MR. RICHARD CUNNINGHAM

For the Defendant OSF: Hinshaw & Culbertson
(100 Park Avenue,
Rockford, IL 61101) By
MR. MICHAEL F. IASPARRO

Hinshaw & Culbertson
(222 N. LaSalle Street,
Suite 300,
Chicago, IL 60601) By
MR. MATTHEW J. O'HARA
MR. ALAN I. GREENE
MS. KRISTIN M. KURCZEWSKI

For Defendant RHS: MC DERMOTT WILL & EMERY LLP
(227 W. Monroe Street,
Suite 4400,
Chicago, IL 60606) By
MR. DAVID MARX
MR. WILLIAM P. SCHUMAN

For Defendant RHS (cont.): MC DERMOTT WILL & EMERY LLP
(600 13th Street NW,
Washington, D.C., 20005) by
MS. NICOLE L. CASTLE

Court Reporter: Mary T. Lindbloom
211 South Court Street
Rockford, Illinois 61101
(815) 987-4486

THE COURT: Good morning.
MR. REILLY: Good morning, your Honor. /
THE COURT: Ready for the next witness?/
MR. REILLY: Yes, we are, your Honor. The/ plaintiff FTC calls Dr. Cory Capps to the stand./
Your Honor, I have a copy of the/ demonstratives that we will be using for Dr. Capps'/ direct. We also put together -- I know you don't/ want any more binders, but seeing how you were/ looking for documents yesterday, we have two binders that reference all of the documents in the demonstrative, so...
THE COURT: Great.
(Witness duly sworn.)
THE COURT: Please take a seat at the witness stand.
MR. MARX: Your Honor, if I might just before Mr. Reilly begins with Professor -; Dr. Capps, just so the record is clear with respect

used that we're objecting to, this is one of those./
THE COURT: So we're talking about the -;
MR. MARX: What you've got in your hand./
THE COURT: Right. And what appears on/ the screen./
MR. REILLY: And we're not trying to get/ them into evidence, your Honor./
THE COURT: It's just evidence?/
MR. REILLY: No.
THE COURT: It's just demonstrative -;
MR. REILLY: Yes.
THE COURT: -- in order to aid me to understand the testimony of the doctor?
MR. REILLY: That's correct.
THE COURT: We're clear.
MR. MARX: Thank you.
CORY CAPPS, PLAINTIFF'S WITNESS, SWORN
DIRECT EXAMINATION
BY MR. REILLY: