

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 of 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 **r** **e**

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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

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.

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~~s~~ 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

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All documents and communications between FTI and consultants that FTI hired to assist

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
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Washington, DC 20580

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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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 san7n5us01in talyses took

- 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.

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EXHIBIT B

CONFIDENTIAL - REDACTED IN ENTIRETY

EXHIBIT C