

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



OSF Healthcare System, )  
a corporation, and )  
 )  
Rockford Health System, )  
a corporation, )  
Respondents. )  
 )

DOCKET NO. 9349

**ORDER ON COMPLAINT COUNSEL'S MOTION TO COMPEL  
FTI CONSULTING, INC. TO PRODUCE DOCUMENTS  
REQUESTED BY SUBPOENA *DUCES TECUM* AND TO  
ENFORCE SUBPOENA *AD TESTIFICANDUM***

I.

On February 29, 2012, Complaint Counsel filed a Motion to Compel FTI Consulting, Inc. ("FTI") to Produce Documents Requested by Subpoena *Duces Tecum* and to Enforce Subpoena *Ad Testificandum* ("Motion"). Non-party FTI filed its Opposition on

Through this Motion, Complaint Counsel seeks “documents and communications that relate to the creation of the Merger Report.” Complaint Counsel readily acknowledges that the documents relating to the creation of the Merger Report are protected under the

work product doctrine, but argues that this privilege has been waived through

The operative case law holds that subject matter waiver occurs when a party

attempts to gain a tactical advantage by “us[ing] the disclosed material for advantage in the litigation but [invoking] the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials.” *Lerman v. Turner*, 2011 U.S. Dist. LEXIS 715, at \*25-26 (N.D. Ill. Jan. 5, 2011). “Subject matter waiver thus ‘is reserved for those unusual situations in which fairness requires a further disclosure of related material.’”

At the time an expert report is produced, the producing party shall provide

the expert in formulating an opinion in this case. Unless otherwise agreed by the parties, the experts' notes and drafts of expert reports need not be produced. Likewise, communications between experts and with counsel or consultants need not be produced unless relied upon by the expert in formulating an opinion in this case.

Scheduling Order ¶ 18(b). In addition, Complaint Counsel and Respondents' counsel agreed that "[c]ommunications (oral, written, and by email) of any expert witness with consulting experts . . . would not be discoverable, unless relied upon by the expert." (Exhibit A to FTI's Opposition). As Respondents assert, that agreement covers internal communications between Mr. Dwyer (D. 13-cv-00111) and Mr. Dwyer

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

**IV.**

For the reasons explained above, Complaint Counsel’s Motion is GRANTED in part and DENIED in part. In the event additional document production and disclosure