

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



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

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

Complaint Counsel Federal Trade Commission (Complaint Counsel” or “FTC”) respectfully submit this Motion to Compel FTI Consulting, Inc. (“FTI”) to Produce Documents Requested by Subpoena *Duces Tecum* and to Enforce Subpoena *Ad Testificandum*, pursuant to Rule 3.38(a) of the Federal Trade Commission’s Rules of Adjudicative Practice and Paragraphs 4 and 5 of the Scheduling Order.

Complaint Counsel have attempted to confer in good faith with counsel for FTI in an effort to obtain the requested documents and schedule depositions without the Court’s intervention. Complaint Counsel and FTI have been unable to reach an agreement. Therefore, Complaint Counsel respectfully moves the Court for an Order requiring the immediate production of documents and scheduling of depositions for the reasons set forth in Complaint Counsel’s accompanying Memorandum in support of this motion.

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.  
Washington D.C. 20580  
Telephone: (202) 326-2350  
Facsimile (202) 326-2286  
Email: [mreilly@ftc.gov](mailto:mreilly@ftc.gov)

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<b>In the Matter of</b>	)	<b>PUBLIC</b>
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<b>OSF Healthcare System, a corporation, and</b>	)	<b>Docket No. 9349</b>
	)	
<b>Rockford Health System, a corporation</b>	)	
_____	)	

**[PROPOSED] ORDER**

Upon consideration of Complaint Counsel Federal Trade Commission's Motion to Compel FTI Consulting, Inc. to Produce Documents Requested by Subpoena *Duces Tecum* and to Enforce Subpoena *Ad Testificandum*, 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 *Duces Tecum* 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. Michael Chappell  
Administrative Law Judge

DATED this \_\_\_\_ day of \_\_\_\_\_, 2012

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<b>Rockford Health System,</b> )	
<b>a corporation</b> )	
_____ )	

**STATEMENT REGARDING MEET AND CONFER  
PURSUANT TO 16 C.F.R. § 3.22(g)**

On October 24, 2011, Commission Staff sent a letter to FTI Consulting, Inc. (“FTI”) expressing Staff’s belief that privilege had been waived over all materials relating to the FTI Merger Report, and requested that FTI either produce the materials or explain why it believed it had not waived privilege. (**Exhibit K**). On November 14, 2011, FTI replied to Staff’s October 24 letter explaining that FTI believed that it had not waived privilege and refusing to produce the requested documents. (**Exhibit L**).

On December 30, 2011, Complaint Counsel issued a Subpoena *Duces Tecum* to FTI. Respondents replied to Complaint Counsel by letter dated January 30, 2012, again asserting privilege over all documents not already produced to Complaint Counsel. On January 31, 2012, Complaint Counsel emailed Respondents requesting “a letter describing (1) what information 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 is therefore subject to discovery.

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  
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.  
Washington D.C. 20580  
Telephone: (202) 326-2350  
Facsimile (202) 326-2286  
Email: [mreilly@ftc.gov](mailto:mreilly@ftc.gov)

## 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:

Alan I. Greene  
Hinshaw & Culbertson LLP  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3536  
[agreene@hinshawlaw.com](mailto:agreene@hinshawlaw.com)

Matthew J. O'Hara  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3246  
[mohara@hinshawlaw.com](mailto:mohara@hinshawlaw.com)

Kristin M. Kurczewski  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3000  
[kkurczewski@hinshawlaw.com](mailto:kkurczewski@hinshawlaw.com)

Michael F. Iasparro  
100 Park Avenue  
P.O. Box 1389  
Rockford, IL 61105  
815-490-4945  
[miasparro@hinshawlaw.com](mailto:miasparro@hinshawlaw.com)

Rita Mahoney  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3000  
[rmahoney@hinshawlaw.com](mailto:rmahoney@hinshawlaw.com)

Paula Jordan  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3000  
[pjordan@hinshawlaw.com](mailto:pjordan@hinshawlaw.com)

*Counsel for OSF Healthcare System*

David Marx, Jr.  
McDermott Will & Emery  
227 West Monroe Street  
Chicago, IL 60606-5096  
312-984-7668  
[dmarx@mwe.com](mailto:dmarx@mwe.com)

William P. Schuman  
McDermott Will & Emery  
227 W. Monroe Street  
Chicago, IL 60606  
312-372-2000  
[wschuman@mwe.com](mailto:wschuman@mwe.com)

Jeffrey W. Brennan  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[jbrennan@mwe.com](mailto:jbrennan@mwe.com)

Carla A. R. Hine  
McDermott Will & Emery

600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[chine@mwe.com](mailto:chine@mwe.com)

Nicole L. Castle  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[ncastle@mwe.com](mailto:ncastle@mwe.com)

Rachel V. Lewis  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[rlewis@mwe.com](mailto:rlewis@mwe.com)

Daniel G. Powers  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[dgpowers@mwe.com](mailto:dgpowers@mwe.com)

James B. Camden  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[jcamden@mwe.com](mailto:jcamden@mwe.com)

Pamela Davis  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[pdavis@mwe.com](mailto:pdavis@mwe.com)

*Counsel for Rockford Health System*



**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

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_____	)	

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S MOTION TO  
COMPEL FTI CONSULTING, INC. TO PRODUCE DOCUMENTS AND TESTIMONY  
REQUESTED BY SUBPOENA *DUCES TECUM* AND SUBPOENAS *AD  
TESTIFICANDUM***

**Executive Summary**

Complaint Counsel respectfully requests that the Court compel FTI Consulting, Inc. (“FTI”) to produce withheld documents and testimony central to Respondents’ efficiency defense to the proposed merger. The repeated attempts by Respondents to use this information offensively—and selectively—to advance an efficiencies defense, while at the same time claiming attorney work-product privilege, violates both the letter of the law and the spirit of open discovery.

There is no legitimate dispute that FTI’s analysis is part of Respondents’ litigation preparation and strategy; FTI’s efficiencies report in this matter—misleadingly entitled a “Business Efficiencies Report”—in reality served no legitimate business purpose whatsoever. (PX0001, “Merger Report” (**Exhibit A**)). Indeed, FTI was retained and supervised in this matter solely by outside antitrust counsel for Respondents OSF Healthcare System (“OSF”) and

Rockford Health System (“RHS”) and is a consulting firm never-before used by either of the Respondents in the ordinary course of business. To date, FTI has asserted work-product protections over the withheld materials, and refuses to allow its employees to answer deposition questions about FTI’s underlying analysis, thereby preventing Complaint Counsel from examining and testing FTI’s Merger Report. At the same time, however, Respondents and FTI have strategically made selective disclosures and privilege waivers in an attempt to use the very same “privileged” analysis as an offensive tool supporting an efficiencies defense for the proposed merger. In light of such selective disclosures, FTI should be compelled to produce the highly-relevant materials that it (and only it) has in its possession. As the Advisory Committee on the Rules of Federal Procedure has succinctly explained:

“Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery *or unnecessary use of defensive weapons or evasive responses.*” Fed. R. Civ. P. 26 advisory comm. nn. (1983) (emphasis added).

Through the use of privilege as both a sword and a shield, Respondents and FTI seek to have their cake and eat it too. Respondents and FTI impermissibly seek to use discovery tools as “tactical weapons rather than to expose the facts and illuminate the issues....”

REDACTED

### **Factual Background**

On February 8, 2011, Respondents each filed a Hart-Scott-Rodino filing (“HSR Filing”) for the proposed affiliation between OSF and RHS (“Acquisition”). In their initial HSR filings, each party submitted the Merger Report. **(Exhibit A)**.<sup>1</sup> The front page of the Merger Report includes the language: “Prepared by FTI Healthcare for Counsel. Privileged [sic] and Confidential.” **(Exhibit A)**.

REDACTED

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<sup>1</sup> To limit the size of this Motion, Complaint Counsel has only included the OSF 4(c) document; the document is the same for both OSF and RHS.

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 *without* 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 was largely a recitation of the Merger Report, (*compare* (**Exhibit A**), *with* (**Exhibit M**)). On January 20, 2012, Staff deposed Mr. Brown. (PX4045, Brown Dep. (**Exhibit N**)). During his deposition, Mr. Brown deferred to others at FTI, or in some cases outside consultants that FTI hired, as the persons most knowledgeable about FTI's analyses and the savings asserted in his report. (**Exhibit N**; **Exhibit O**).

On December 30, 2011, Complaint Counsel sent a Subpoena *Duces Tecum* 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 *Ad Testificandum* 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.

### Argument

#### **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. (See **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 *sole* 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.” *United States v. Nobles*, 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. *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987). “Most often, this occurs through the use of an affirmative defense.” *Id.* (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]. . . .” *Nobles*, 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. *See Abbott Labs. v. Alpha Therapeutic Corp.*, 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.”); *see also Nobles*, 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. (*See generally* **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. *See Lorenz*, 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.” *In re Int’l Harvester’s Disposition of Wis. Steel*, 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 (“FRCP”) 26(b)(3) and 23(b)(4)(B), as well as Rules 3.31 and 3.31A of the Commission’s Rules of Practice for Adjudicative Proceedings. However, FRCP Rule 26 and Commission Rule 3.31 do nothing but extend the same work-product protections to the FTI materials that Respondents and FTI already waived. Because Complaint Counsel does not dispute that work-product protections once applied to the materials sought, it is unnecessary to delve into Respondents’ red-herring. Put differently, Respondents’ apparent reliance on FRCP 26 does nothing to change the facts and legal analysis above: work-product protections have been waived.

### **D. Conclusion**

By intentionally, strategically, and selectively disclosing relevant information and testimony, Respondents and FTI have waived any protections that once applied to the material and analysis underlying the Merger Report. As such, FTI is required to produce all materials relating to the Merger Report. Had Respondents not asserted that the Merger Report provides the rationale for the proposed Acquisition, then such a finding may not be necessary. Had executives for Respondents not continually testified that the Merger Report represents a valid justification for the transaction, such a finding may not be necessary. Had FTI not permitted Phillip Dawes to testify about the Merger Report, such a finding may not be necessary. Had Respondents not selectively waived privilege over only the information it wanted Commission Staff to see, such a finding may not be necessary. However, Respondents and FTI did all of these things. As such, any work-product protections have been waived and FTI must produce all materials it has in its possession. Only this result will permit the full and fair evaluation of Respondents’ asserted efficiencies defense to the proposed Acquisition.

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.

Washington D.C. 20580

Telephone: (202) 326-2350

Facsimile (202) 326-2286

Email: mreilly@ftc.gov

## 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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Hinshaw & Culbertson LLP  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3536  
[agreene@hinshawlaw.com](mailto:agreene@hinshawlaw.com)

Matthew J. O'Hara  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3246  
[mohara@hinshawlaw.com](mailto:mohara@hinshawlaw.com)

Kristin M. Kurczewski  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3000  
[kkurczewski@hinshawlaw.com](mailto:kkurczewski@hinshawlaw.com)

Michael F. Iasparro  
100 Park Avenue  
P.O. Box 1389  
Rockford, IL 61105  
815-490-4945  
[miasparro@hinshawlaw.com](mailto:miasparro@hinshawlaw.com)

Rita Mahoney  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3000  
[rmahoney@hinshawlaw.com](mailto:rmahoney@hinshawlaw.com)

Paula Jordan  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3000  
[pjordan@hinshawlaw.com](mailto:pjordan@hinshawlaw.com)

*Counsel for OSF Healthcare System*

David Marx, Jr.  
McDermott Will & Emery  
227 West Monroe Street  
Chicago, IL 60606-5096  
312-984-7668  
[dmarx@mwe.com](mailto:dmarx@mwe.com)

William P. Schuman  
McDermott Will & Emery  
227 W. Monroe Street  
Chicago, IL 60606  
312-372-2000  
[wschuman@mwe.com](mailto:wschuman@mwe.com)

Jeffrey W. Brennan  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[jbrennan@mwe.com](mailto:jbrennan@mwe.com)

Carla A. R. Hine  
McDermott Will & Emery

600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[chine@mwe.com](mailto:chine@mwe.com)

Nicole L. Castle  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[ncastle@mwe.com](mailto:ncastle@mwe.com)

Rachel V. Lewis  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[rlewis@mwe.com](mailto:rlewis@mwe.com)

Daniel G. Powers  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[dgpowers@mwe.com](mailto:dgpowers@mwe.com)

James B. Camden  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[jcamden@mwe.com](mailto:jcamden@mwe.com)

Pamela Davis  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
[pdavis@mwe.com](mailto:pdavis@mwe.com)

*Counsel for Rockford Health System*

**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

CONFIDENTIAL

REDACTED IN ENTIRETY

# EXHIBIT C

CONFIDENTIAL

REDACTED IN ENTIRETY

# EXHIBIT D

CONFIDENTIAL

REDACTED IN ENTIRETY

# EXHIBIT E

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# EXHIBIT N

CONFIDENTIAL

REDACTED IN ENTIRETY

# EXHIBIT O

CONFIDENTIAL

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# EXHIBIT P

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

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

**RESPONDENTS' EXPERT WITNESS LIST**

Respondents OSF Healthcare System and Rockford Health System plan to call the following expert witnesses to testify in this matter: Jeffrey Brown, Susan Henley Manning, Ph.D., Monica G. Noether, Ph.D., William M. Sage, MD, JD.

Pursuant to Paragraph 18 of Judge Chappell's December 20, 2011 Scheduling Order, the curriculum vitae of Drs. Manning, Noether, and Sage as well as Jeffrey Brown are attached. The transcripts of prior testimony provided by Dr. Noether are also attached. Excluded from this production is Dr. Noether's deposition testimony in *Darlery Franco et al. v. Connecticut General Life Insurance Co, Cigna Corp and Cigna Health Corp.*, Civil No. 07-6039, which was filed under seal and cannot be disclosed.

Dated: January 24, 2012

/s/ David Marx, Jr.

\_\_\_\_\_  
By: David Marx, Jr.  
William P. Schuman  
Amy J. Carletti  
McDermott Will & Emery LLP  
227 West Monroe Street  
Chicago, Illinois 60606  
Telephone: (312) 372-2000  
Facsimile: (312) 984-7700  
Email: dmarx@mwe.com

*Attorneys for Respondent Rockford Health  
System*

Alan I. Greene  
Matthew J. O'Hara  
Kristin M. Kurczewski  
Hinshaw & Culbertson LLP  
222 N. LaSalle Street, Suite 300



Chicago, IL 60601  
Telephone: (312) 704-3000  
Facsimile: (312) 704-3001  
agreene@hinshawlaw.com  
mohara@hinshawlaw.com  
kkurczewski@hinshawlaw.com

Michael Iasparro  
Hinshaw & Culbertson LLP  
100 Park Avenue  
Rockford, IL 61105  
Telephone: (815) 490-4900  
Facsimile: (815) 490-4901  
miasparro@hinshawlaw.com

*Attorneys for Respondent OSF Healthcare  
System*

## CERTIFICATE OF SERVICE

I, Nicole L. Castle, hereby certify that I served a true and correct copy of the foregoing document upon the following individuals by electronic mail on January 24, 2012:

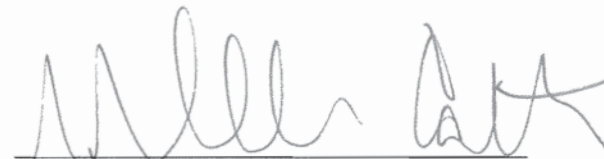
Matthew J. Reilly, Esq.  
Jeffrey H. Perry, Esq.  
Kenneth W. Field, Esq.  
Richard Cunningham, Esq.  
Katherine A. Ambrogi, Esq.  
Jeremy P. Morrison, Esq.  
Andrea Zach, Esq.  
Jeanne Liu, Esq.  
Stephanie Reynolds, Esq.  
Theresa Lau

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

mreilly@ftc.gov  
jperry@ftc.gov  
kfield@ftc.gov  
rcunningham@ftc.gov  
kambrogi@ftc.gov  
jmorrison@ftc.gov  
azach@ftc.gov  
jliu@ftc.gov  
sreynolds@ftc.gov  
tlau@ftc.gov

*Attorneys for Complaint Counsel*

Dated: January 24, 2012



Nicole L. Castle  
*Counsel for Respondent  
Rockford Health System*

# EXHIBIT Q

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

	)		
<b>In the Matter of</b>	)		
	)		
<b>OSF Healthcare System, and</b>	)	<b>Docket No. 9349</b>	
<b>Rockford Health System</b>	)	<b>PUBLIC VERSION</b>	
	)		
	)		

**COMPLAINT COUNSEL’S SUBPOENA *DUCES TECUM* TO  
FTI CONSULTING**

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, Complaint Counsel hereby requests that FTI Consulting produce the following in accordance with the Definitions and Instructions set forth below:

1. Submit 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.
  
2. Submit 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.

**DEFINITIONS AND INSTRUCTIONS**

For the purposes of this Subpoena Duces Tecum (“SDT”), the following definitions and instructions apply:

- A. The term “the Company” or “FTI Consulting” means FTI Consulting, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, 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 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 Healthcare 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. Forms of Production: 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 Bates or document identification number, page count, custodian, to, from, CC, BCC, subject, date and time sent, Outlook Message ID (if applicable), child records (the beginning Bates or document identification number of attachments delimited by a semicolon);
  - (c) For email attachments: 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, parent record (beginning Bates or document identification number of parent email), and MD5 or SHA Hash value; and
  - (d) For hard copy documents: beginning Bates or document identification number, ending Bates or document identification number, page count, and custodian.
- 3. If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this SDT, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this SDT.
- 4. Submit electronic files and images as follows:
  - (a) For productions over 10 gigabytes, use IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in USB 2.0 external enclosure;
  - (b) For productions under 10 gigabytes, CD-R CD-ROM and DVD-ROM for Windows-compatible personal computers, and USB 2.0 Flash Drives are also acceptable storage formats; and
  - (c) **All documents produced in electronic format shall be scanned for and free of viruses. The Commission will return any infected media for replacement, which may affect the timing of the Company's compliance with this SDT.**
- 5. All documents responsive to this SDT, regardless of format or form and regardless of whether submitted in hard copy or electronic format:



- (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) If written in a language other than English, shall be translated into English, with the English translation attached to the foreign language document;
- (c) Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any document (*e.g.*, a chart or graph), makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-colored photocopy, or a JPEG format image);
- (d) Shall be marked on each page with corporate identification and consecutive document control numbers;
- (e) Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct and complete copies of the original documents; and
- (f) Shall be accompanied by an index that identifies: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents, and if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that Commission representatives determine prior to

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 *Duces Tecum* 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  
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO FTI Consulting, Inc. c/o David Marx McDermott Will & Emery 227 West Monroe Street Chicago, IL 60606-5096	2. FROM  <p style="text-align: center;"><b>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</b></p>
---	--

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 the proceeding described in Item 6.

3. PLACE OF PRODUCTION  Federal Trade Commission 601 New Jersey Ave, NW Suite 5155 Washington, DC 20001	4. MATERIAL WILL BE PRODUCED TO Jeremy Morrison or other designated counsel  5. DATE AND TIME OF PRODUCTION
--	--

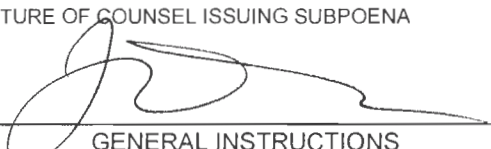
6. SUBJECT OF PROCEEDING

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

7. MATERIAL TO BE PRODUCED

Please See Attachment

8. ADMINISTRATIVE LAW JUDGE  Chief Administrative Law Judge D. Michael Chappell  Federal Trade Commission Washington, D.C. 20580	9. COUNSEL AND PARTY ISSUING SUBPOENA  Jeffrey Perry Federal Trade Commission 601 New Jersey Ave, NW Suite 5243 Washington, DC 20001 (202) 326-2331
---	---

DATE SIGNED  12/30/11	SIGNATURE OF COUNSEL ISSUING SUBPOENA  
-----------------------------	---

**GENERAL INSTRUCTIONS**

APPEARANCE	TRAVEL EXPENSES
<p>The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.</p> <p style="text-align: center;"><b>MOTION TO LIMIT OR QUASH</b></p> <p>The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.</p>	<p>The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.</p> <p>This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.</p>

### 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:*

(Month, day, and year)

(Name of person making service)

Attorney

(Official title)

# EXHIBIT R

# 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)

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

January 30, 2012

VIA E-MAIL [JMORRISON@FTC.GOV](mailto: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 Federal Trade Commission, Docket No. 9349

Dear Jeremy:

Enclosed please find FTI Consulting Inc.'s ("FTI") response to Complaint Counsel's Subpoena *Duces Tecum* to FTI Consulting issued December 30, 2011 (the "Subpoena").

FTI does not possess any non-privileged documents that are responsive to Specifications Nos. 1 and 2 of the Subpoena that it has not already provided to the Federal Trade Commission ("FTC") in response to its Civil Investigative Demand No. 111-0102 received on April 8, 2011 (the "CID"), which included identical specifications to those contained in the Subpoena. The documents the Subpoena requests that are not already in the FTC's possession are protected by privilege, including the attorney-client privilege, the attorney work-product doctrine under Federal Rules of Civil Procedure 26(b)(3) and 23(b)(4)(B), as well as Rules 3.31 and 3.31A of the FTC's Rules of Practice for Adjudicative Proceedings. The only exception to this is FTI's Business Efficiencies Report for the RHS-OSF Affiliation, which, subject to and without waiving its claims of privilege, the parties previously produced to the FTC. (*See* Attachment 4(c)(28) to RHS's Hart-Scott-Rodino Premerger Notification and Report Form, filed February 11, 2011.)

As you know, 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 authorities.

The FTC may not discover documents prepared in anticipation of litigation by or for the parties or their representatives, including attorneys or consultants. OSF, RHS, and their counsel viewed a merger investigation likely in light of the FTC's recent scrutiny of hospital mergers. The work



Jeremy P. Morrison  
January 30, 2012  
Page 2

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).

Hinshaw and MWE retained FTI as a consulting expert to assist and advise the firms in their merger analysis, making 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 non-discoverable work product under Rule 26(b)(4)(B). *See Sara Lee Corp. v. Kraft Foods Inc.*, 2011 U.S. Dist. LEXIS 35389 at \*6 (N.D. Ill. Apr. 1, 2011).

Producing a privilege log listing every single document responsive to the Subpoena in FTI’s possession would be unduly burdensome and costly. FTI reserves the right to supplement or amend its objections and responses as necessary.

Sincerely,



Carla A. R. Hine

Enclosure

cc: Alan Greene, Esq.

DM\_US 31612342-1.046498.0021

**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  
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

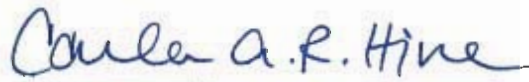


behalf of their respective clients, OSF and RHS, to perform work in anticipation of any pre-merger investigation by the United States antitrust enforcement agencies or the Attorney General of the State of Illinois. Hinshaw and MWE retained FTI as a consulting expert to assist and advise the firms in 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,



David Marx, Jr.  
William P. Schuman  
Amy J. Carletti  
McDermott Will & Emery LLP  
227 West Monroe Street  
Chicago, IL 60606  
Telephone: (312) 372-2000  
Facsimile: (312) 984-7700  
dmarx@mwe.com  
wschuman@mwe.com  
acarletti@mwe.com

Jeffrey W. Brennan  
Carla A. R. Hine  
Nicole L. Castle  
Rachael V. Lewis  
Daniel G. Powers  
James B. Camden  
Shauna A. Barnes  
McDermott Will & Emery LLP  
600 13th Street, N.W.  
Washington, D.C. 20005-3096  
Telephone: (202) 756-8000  
Facsimile: (202) 756-8087  
jbrennan@mwe.com  
chine@mwe.com  
ncastle@mwe.com  
rlewis@mwe.com  
dgpowers@mwe.com  
jcamden@mwe.com  
sabarnes@mwe.com

*Attorneys for FTI Consulting, Inc.*

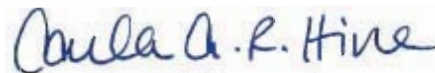
**CERTIFICATE OF SERVICE**

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.  
Stephanie Reynolds, Esq.  
Theresa Lau  
Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20001  
mreilly@ftc.gov  
jperry@ftc.gov  
kfield@ftc.gov  
rcunningham@ftc.gov  
kambrogi@ftc.gov  
jmorrison@ftc.gov  
azach@ftc.gov  
jliu@ftc.gov  
sreynolds@ftc.gov  
tlau@ftc.gov

*Attorneys for Complaint Counsel*

Dated: January 30, 2012



---

Carla A. R. Hine  
*Counsel 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)

<p>1. TO</p> <p>Phillip A. Dawes, Jr. (FTI Consulting, Inc.) c/o David Marx, Jr., Esq. McDermott Will &amp; Emery LLP 227 West Monroe Street Chicago, IL 60606</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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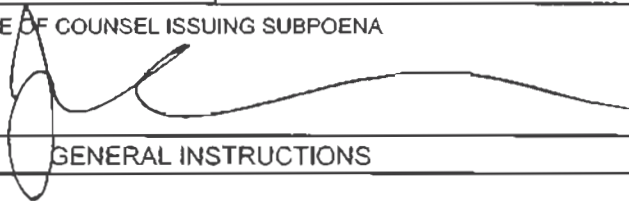
This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF DEPOSITION</p> <p>Place to be determined Washington, D.C. United States of America</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Court reporter to be determined</p> <hr/> <p>5. DATE AND TIME OF DEPOSITION</p> <p>February 7, 2012 at 9:00 am</p>
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6. SUBJECT OF PROCEEDING

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

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

<p>DATE SIGNED</p> <p>January 27, 2012</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
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### GENERAL INSTRUCTIONS

#### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

#### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

#### TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**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:*

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-----

*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)

<p>1. TO</p> <p>Mark C. Herbers (FTI Consulting, Inc.) c/o David Marx, Jr., Esq. McDermott Will &amp; Emery LLP 227 West Monroe Street Chicago, IL 60606</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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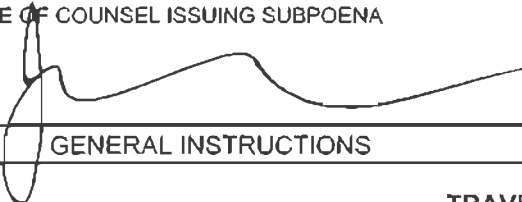
This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF DEPOSITION</p> <p>Place to be determined Washington, D.C. United States of America</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Court reporter to be determined</p> <hr/> <p>5. DATE AND TIME OF DEPOSITION</p> <p>February 17, 2012 at 9:00 am</p>
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6. SUBJECT OF PROCEEDING

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

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

<p>DATE SIGNED</p> <p>January 27, 2012</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
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### GENERAL INSTRUCTIONS

#### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

#### MOTION TO LIMIT OR QUASH

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This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**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:*

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*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)

<p>1. TO</p> <p>James Tad Schweikert (FTI Consulting, Inc.) c/o David Marx, Jr., Esq. McDermott Will &amp; Emery LLP 227 West Monroe Street Chicago, IL 60606</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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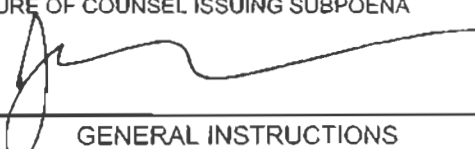
This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

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

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

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

<p>DATE SIGNED</p> <p>January 27, 2012</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
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### GENERAL INSTRUCTIONS

#### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

#### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

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This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**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:*

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*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)

<p>1. TO</p> <p>Clair Tosino (FTI Consulting, Inc.) c/o David Marx, Jr., Esq. McDermott Will &amp; Emery LLP 227 West Monroe Street Chicago, IL 60606</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
---	---

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.

<p>3. PLACE OF DEPOSITION</p> <p>Place to be determined Washington, D.C. United States of America</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Court reporter to be determined</p> <hr/> <p>5. DATE AND TIME OF DEPOSITION</p> <p>February 6, 2012 at 2:00 pm</p>
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6. SUBJECT OF PROCEEDING

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

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

<p>DATE SIGNED</p> <p>January 27, 2012</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
--	---

### GENERAL INSTRUCTIONS

#### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

#### MOTION TO LIMIT OR QUASH

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*on the person named herein on:*

January 27, 2012

-----  
(Month, day, and year)

Andrea Zach

-----  
(Name of person making service)

Attorney

-----  
(Official title)

# EXHIBIT T

# 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)

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

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

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 U

CONFIDENTIAL

REDACTED IN ENTIRETY



# EXHIBIT V

CONFIDENTIAL

REDACTED IN ENTIRETY

# EXHIBIT W

CONFIDENTIAL

REDACTED IN ENTIRETY

# EXHIBIT X

CONFIDENTIAL

REDACTED IN ENTIRETY

# EXHIBIT Y

323

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   ) Thursday, February 2, 2012  
7           v.   ) 9:00 o'clock a.m.

8           **OSF HEALTHCARE SYSTEM**  
9           **and ROCKFORD HEALTHCARE**  
10           **SYSTEM,**                                 )  
11           Defendants.                                 )

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

11 **APPEARANCES:**

12 For the Plaintiff:   **U.S. FEDERAL TRADE COMMISSION**  
13                                 (600 Pennsylvania Avenue, NW,  
14                                 Washington, D.C. 20580) By  
15                                 **MR. MATTHEW J. REILLY**  
16                                 **MR. JEFFREY H. PERRY**  
17                                 **MR. RICHARD CUNNINGHAM**

18 For the Defendant OSF:   **Hinshaw & Culbertson**  
19                                 (100 Park Avenue,  
20                                 Rockford, IL 61101) By  
21                                 **MR. MICHAEL F. IASPARRO**  
22                                 **Hinshaw & Culbertson**  
23                                 (222 N. LaSalle Street,  
24                                 Suite 300,  
25                                 Chicago, IL 60601) By  
                                  **MR. MATTHEW J. O'HARA**  
                                  **MR. ALAN I. GREENE**  
                                  **MS. KRISTIN M. KURZEWSKI**

22 For Defendant RHS:   **MC DERMOTT WILL & EMERY LLP**  
23                                 (227 W. Monroe Street,  
24                                 Suite 4400,  
25                                 Chicago, IL 60606) By  
                                  **MR. DAVID MARX**  
                                  **MR. WILLIAM P. SCHUMAN**

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1 For Defendant RHS (cont.): **MC DERMOTT WILL & EMERY LLP**  
2                                 (600 13th Street NW,  
3                                 Washington, D.C., 20005) by  
4                                 **MS. NICOLE L. CASTLE**

5 Court Reporter:         **Mary T. Lindbloom**  
6                                 211 South Court Street  
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. MARX:** 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

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1 used that we're objecting to, this is one of those.  
2           **THE COURT:** So we're talking about the --  
3           **MR. MARX:** 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. MARX:** 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