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

FEDERAL TRADE COMMISSION	)	
	)	No. 11-cv-50344
Plaintiff,	)	
	)	Hon. Frederick J. Kapala,
v.	)	District Judge
	)	
OSF HEALTHCARE SYSTEM, and	)	Hon. P. Michael Mahoney,
ROCKFORD HEALTH SYSTEM	)	Magistrate Judge
	)	
Defendants.	)	**PUBLIC**

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I. EXECUTIVE SUMMARY[1]

1. OSF Healthcare System ("OSF") is a not-for-profit health system that owns and operates six general acute-care hospitals in Illinois, and a seventh hospital in Michigan. OSF operates St. Anthony Medical Center ("SAMC") in Rockford, Illinois; SAMC has 254 licensed beds. *See infra* Section II.

2. Rockford Healthcare System ("RHS") is a not-for-profit healthcare system that owns and operates one general acute-care hospital, Rockford Memorial Hospital ("RMH"), which has 396 licensed beds, is located approximately seven miles from SAMC, and serves the same Rockford region as SAMC. *See infra* Section II.

3. Under the terms of the Affiliation Agreement ("Agreement") signed on January 31, 2011, OSF will acquire all operating assets of RHS and become the sole corporate member of RHS. OSF will hold reserve powers over the governance and operations of RHS. Absent preliminary relief from this Court, OSF and RHS will be free immediately to close the Acquisition, begin sharing competitively sensitive information, integrating and consolidating services, terminating employees, and jointly negotiating over rates and other terms with commercial health plans. *See infra* Sections II, III.

4. This Court found in 1989 that the proposed merger between RMH and SwedishAmerican Hospital (the third hospital in Rockford) violated Section 7 of the Clayton Act and issued a permanent injunction to enjoin the merger. That decision was affirmed by the U.S. Court of Appeals for the Seventh Circuit. *See infra* Section II.

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[1] For the Court's convenience, the citations to evidence that are underlined indicate that the evidence that was presented to the Court during the three-day Preliminary Injunction hearing.

5. On November 18, 2011, the FTC filed a complaint and the motion now pending before this Court, seeking temporary relief and a preliminary injunction under Sections 13(b) and 16 of the Clayton Act, pending resolution of the administrative trial on the merits of the FTC's Section 7 claim. The FTC and Defendants OSF and RHS voluntarily agreed to hold separate their operations until the conclusion of the preliminary injunction ("PI") hearing and a ruling from this Court. The administrative proceeding is well underway, with discovery ongoing and opening statements scheduled for April 17, 2012. The administrative trial will include up to 210 hours of live testimony. See *infra* Section IV.

6. For purposes of analyzing the competitive effects of the Acquisition, the two relevant markets at issue are general acute-care inpatient hospital services ("GAC") sold to commercial health plans, and primary care physician services ("PCP") sold to commercial health plans. For both relevant services, the relevant geographic market is no broader than an area encompassing Winnebago County, most of Boone County, most of Ogle County, and single zip codes of McHenry, Dekalb, and Stephenson counties (previously referred to by this Court as the "Winnebago-Ogle-Boone" or "WOB Area" market when this Court previously enjoined the merger between two of the three hospitals in Rockford). *See infra* Sections II, VI.

7. The Acquisition increases market shares and market concentration substantially in both relevant markets. Such high levels of market concentration create a presumption in the GAC market that the Acquisition is anticompetitive and unlawful. OSF's post-Acquisition market share is 63.9% for inpatient GAC services and 41.5% for PCP services. In the GAC market – a duopoly after the Acquisition – concentration under the Herfindahl-Hirschman Index ("HHI") rises by 2032 points to 5351; in the PCP market –

a virtual duopoly of health system owned physician groups after the Acquisition – the concentration rises by 696 points to 1925. *See infra* Section VII. The GAC level far exceeds the levels required to create a presumption of illegality, and also exceeds, by a wide margin, levels that have been found by numerous courts to warrant condemning proposed mergers. *See infra* VII.

8. Additional evidence presented by the FTC confirms and strengthens the presumption of competitive harm created by the market concentration figures. The evidence includes testimony presented at the Preliminary Injunction hearing, hundreds of ordinary-course documents from OSF and RHS, the analysis of four expert witnesses, fact-witness testimony from 23 investigational hearings and eight depositions, and 37 sworn declarations from health plans, employers, physicians, and third-party hospitals. The evidence demonstrates that, prior to the Acquisition, OSF SAMC and RHS were close, vigorous competitors. The Acquisition eliminates this competition and the benefits – in price and quality – that flowed from it to Rockford area employers and residents. After the Acquisition, OSF-SAMC becomes a virtual "must-have" health system that will exercise its market power to obtain higher rates from health plans. Moreover, the Acquisition will increase the likelihood of coordinated anticompetitive effects because only two hospital systems will remain in Rockford. Higher rates ultimately are borne by the residents of the Rockford area, who will face higher out-of-pocket costs for healthcare services. Also, some employers will be forced to reduce or eliminate the health insurance they offer employees, and some employees will delay medical care because of the higher costs that will result from the Acquisition. *See infra*. VIII.

9. Entry or expansion will not be timely, likely, or sufficient to counter the anticompetitive effects resulting from the Acquisition. *See infra* Section IX.

10. The Acquisition does not produce cognizable, merger-specific efficiencies that outweigh the competitive harm resulting from the transaction. *See infra* Section X.

11. The Acquisition is unlikely to improve quality of care, and indeed may actually reduce quality of care. *See infra* Section XI.

12. There is no evidence that Rockford cannot support three hospitals. Neither RHS nor SAMC is in any danger of imminent failure, and both are financially viable hospitals. Absent the Acquisition, both hospitals will remain viable independent competitors, notwithstanding the effects of the recession or healthcare reform. *See infra* Section XII

13. Public interest in the effective enforcement of antitrust laws weighs heavily in favor of a preliminary injunction in this case. Absent an order by this Court, OHS and RHS plan to immediately exchange competitively sensitive information, begin to consolidate certain clinical services, and terminate employees. Also, OSF will take over contract negotiations with health plans for RHS. These actions will cause immediate and irreversible harm to the community and, without an order from this Court, it will be extremely difficult to restore competition to the pre-Acquisition levels and repair harm to competition that has occurred in the interim should the FTC ultimately prevail in its administrative challenge. *See infra* Sections XIII and XIV.

II. PARTIES AND BACKGROUND

A. OSF Health System

14. OSF Healthcare System ("OSF"), headquartered in Peoria, Illinois, is owned and operated by The Sisters of the Third Order of St. Francis. OSF owns six general acute

care hospitals in Illinois and one in Michigan. PI Hearing Tr. at 569:20-570:21 (Schertz); OSF Answer [Dkt #46] at ¶ 20; PX 218-006 (McGrew (OSF) IH Tr. 16:11-17:3).

15. OSF is a dominant healthcare system in central Illinois where it owns OSF Saint Francis in Peoria, as well as surrounding hospitals. PI Hearing Tr. at 625:6-13 (Schertz).

16. OSF operates one general acute care hospital in the Rockford area, St. Anthony Medical Center ("SAMC"), which has 254 licensed beds (238 staffed) and is a designated Level 1 Trauma Center. PI Hearing Tr. at 577:2-3 (Schertz); OSF Answer [Dkt #46] at ¶ 20; PX 371-006 (SAMC FY 2012 Operating Plan), *confidential*; PX 2501 at ¶ 17 (Capps Aff.), *confidential - attorneys' eyes only*.

17. If the merger is consummated, OSF-RHS will become the largest provider of healthcare in the Rockford area whether measured by discharges, beds, or patient days, with roughly 60% of the market discharges in the Rockford area. PI Hearing Tr. at 625:23-626:13 (Schertz); PX 2501 at ¶ 164 (Capps), *confidential - attorneys' eyes only*. Thus, the combined entity will become "the largest player in the Rockford area." PI Hearing Tr. at 627:8-10 (Schertz).

18. In 1997, OSF proposed a merger of SAMC with SwedishAmerican, but the merger did not occur. Subsequently, SAMC did not merge with any other hospital and continued to develop higher level services, including neurological services and oncology services. PI Hearing Tr. at 612:13-16, 571:14-572:3 (Schertz).

19. OSF also owns OSF Medical Group, which employs approximately 80 physicians that are on staff at SAMC, including over 30 primary care physicians. PX 2501 at ¶ 17 (Capps Aff.), *confidential - attorneys' eyes only*; PX 684 (OSF Health System - Share of

Physicians in Winnebago, Boone and Ogle Counties (as of 11/3/11)); *see* PI Hearing Tr. at 570:6-12 (Schertz).

20. During fiscal year 2008, OSF had in operating revenue and SAMC generated about of that total. PX 41 at 41 (OSF Healthcare System Partnership Evaluation), *confidential*; PX 2501 at ¶ 18 (Capps Aff.), *confidential - attorneys' eyes only*.

21. On a system-wide basis, OSF maintained overall operating margins of in fiscal year 2007 and in fiscal year 2008. PX 41 at 41, *confidential*; PX 2501 at ¶ 18 (Capps Aff.), *confidential - attorneys' eyes only*.

22. OSF held more than in cash and investments as of the end of fiscal year 2010. PX 2507 at ¶ 39 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*; PX 168-445, *confidential*.

23. In 2009 and 2010, OSF experienced operating losses. The ratings firm Moody's attributed these losses to "significant non-recurring expenses" but recently noted that OSF's financial performance has improved and that it earned an operating margin of 2.4% through June 30, 2011. PX 2501 at ¶ 18 (Capps Aff.), *confidential - attorneys' eyes only*; PX 1504-002 ("Moody's Affirms A3 Rating on OSF Healthcare System").

24. Similarly, through the first three quarters of fiscal year 2011, OSF's SAMC realized a of revenues over expenses. PX 2501 at ¶ 19 (Capps Aff.), *confidential - attorneys' eyes only*; PX 227-060 (Stenerson (OSF) IH Tr. 232:2-9), *confidential - attorneys' eyes only*.

25. Fiscal year 2011 was the second straight year in which SAMC's operating income and operating cash flow improved, and at least the third straight year in which revenues increased. PX 2507 at ¶ 39 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*.

26. OSF management projected SAMC to be above break even for the current year and forecasts an increasing operating profit for each of the next four years. PX 371-029-032 (OSF SAMC Management Plan FYI 2012), *confidential*; PI Hearing Tr. at 633:9-636:25 (Schertz).

27. OSF management projected SAMC admissions and patient days to increase every year from 2010 to 2016. PI Hearing Tr. at 637:19-22 (Schertz); PX 371-032 (OSF SAMC Management Plan FYI 2012), *confidential*.

28. SAMC has implemented a number of procedures and practices to reduce its costs of delivering care, including processes to lower readmission rates, reduce labor costs, and introduce new clinical protocols going forward, including installation of the EPIC medical record system. PI Hearing at 630:1-631:9 (Schertz).

B. Rockford Health System

29. Rockford Health System ("RHS") is based in Rockford, Illinois, and operates one general acute care hospital, Rockford Memorial Hospital ("RMH"), which is a 396-licensed bed hospital located on the west side of Rockford. PI Hearing Tr. at 712:3-15 (Kaatz); PX 691 (Rockford Health System, "Who we are"), *confidential*; PX 2501 at ¶ 20 (Capps Aff.), *confidential - attorneys' eyes only*.

30. Through a partnership with HealthSouth, RHS also operates the Van Matre HealthSouth Rehabilitation Center in Rockford. PI Hearing Tr. at 712:3-15 (Kaatz); PX 688

(Rockford Health System, "Van Matre HealthSouth Rehabilitation Hospital"); PX 2501 at ¶ 20 (Capps Aff.), *confidential - attorneys' eyes only*.

31. RMH operates the only Pediatric Intensive Care Unit and the only Level III Neonatal Intensive Care Unit in the Rockford area. PI Hearing Tr. at 715:19-716:11 (Kaatz); PX 689 (Rockford Health Systems "Neonatal Intensive Care Unit"); PX 2501 at ¶ 21 (Capps Aff.), *confidential - attorneys' eyes only*.

32. RMH offers additional higher level services, including cardiovascular services, neurological services, and Level I trauma services. PI Hearing Tr. at 716:2-7, 737:19-738:4 (Kaatz); PX 687 (Rockford Health Systems, "Medical Programs"); PX 2501 at ¶ 21 (Capps Aff.), *confidential - attorneys' eyes only*.

33. RHS also operates Rockford Health Physicians, which is the largest primary care and specialty physician network in the area. Rockford Health Physicians and RMH together employ approximately 160 physicians. PI Hearing Tr. at 712:22-713:1 (Kaatz); PX 568-001-004 (list of RHS employed physicians), *confidential*; PX 2501 at ¶ 21 (Capps Aff.), *confidential - attorneys' eyes only*.

34. Although RMH is not affiliated with a university, it does provide some faculty to the University of Illinois College of Medicine at Rockford. PX 1509 at 2 (University of Illinois, College of Medicine at Rockford, "Local Hospital Organizations"); PX 2501 at ¶ 21 (Capps Aff.), *confidential - attorneys' eyes only*.

35. RHS is a financially healthy system. PI Hearing Tr. at 772:18-773:16 (Kaatz); PX 2501 at ¶ 22 (Capps Aff.), *confidential - attorneys' eyes only*.

36. RHS's Chief Financial Officer, Mr. Seybold, believes that RHS's financial performance has a been than SAMC's over the last two or three years and that, if

RHS had a bond rating, it would be based on its financial metrics. PX 226-018 (Seybold (RHS) IH Tr. at 64:10-65:11), *confidential - attorneys' eyes only*.

37. In 2010, RHS had positive operating income of approximately $36 million. PI Hearing Tr. at 773:14-16 (Kaatz).

38. According to its Consolidated Financial Statements, RHS's "excess of revenues over expenses" (a nonprofit accounting measure analogous to net income) was million in 2009 and million in 2010. PX 2501 at ¶ 22 (Capps Aff.), *confidential - attorneys' eyes only*; PX 210-025 (Rockford April 1, 2011 Continuing Bond Disclosures), *confidential*.

39. RHS's overall operating margin was in 2009, and in 2010. Board minutes from January 2011 describe 2010 as a year in which RHS's

PX 592-002 (RHS 2011 Board Minutes), *confidential*; PX 2501 at ¶ 22 (Capps Aff.), *confidential - attorneys' eyes only*.

40. As of January 2011, RHS had cash and short-term investments worth approximately million. PX 592-008 (RHS 2011 Board Minutes), *confidential*; PX 2501 at ¶ 22 (Capps Aff.), *confidential - attorneys' eyes only*.

41. RHS has had significant success in improving its quality in recent years, with very aggressive goals that have led to it winning numerous accolades, including a distinguished hospital award for clinical excellence and a distinguished hospital award for patient safety. PI Hearing at 766:8-23 (Kaatz).

42. RHS has undertaken initiatives to improve its coordination of care and to improve patient outcomes, including implementing best practices and other efforts to reduce costs from readmission of patients. PI Hearing at 720:17-722:1, 767:6-19 (Kaatz).

43. Based on HealthGrades information, RMH "came in with the highest number of five stars." Both RMH and SAMC scored above SwedishAmerican Hospital based on HealthGrades information. PI Hearing at 767:23-768:8 (Kaatz).

44. RHS has implemented hundreds of cost savings initiatives over the last several years, including RHS's Lean projects, and will continue with these and other initiatives to reduce costs going forward. PI Hearing Tr. at 722:8-15, 769:16-771:19 (Kaatz).

C. This Court's 1989 Decision - *United States v. Rockford Mem'l Corp.*

45. This Court found in 1989 that the proposed merger of RMH and SwedishAmerican Hospital (the third and only other hospital in Rockford) violated Section 7 of the Clayton Act. At the conclusion of the trial on the merits, this Court issued a *permanent* injunction to enjoin the merger which was subsequently affirmed by the U.S. Court of Appeals for the Seventh Circuit. OSF Answer [Dkt #46] at ¶ 28; RHS Answer [Dkt #47] at ¶ 28; *see generally United States v. Rockford Mem'l Corp.*, 898 F.2d 1278 (7th Cir. 1990); *see also United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989).

46. In 1989, this Court was tasked with determining the ultimate legality of the proposed acquisition. In contrast, today this Court is tasked with the important, but more limited, role of determining whether a preliminary injunction is warranted to maintain the *status quo* while the administrative law judge determines the legality of the acquisition after hearing a full trial on the merits. RHS Answer [Dkt #47] at ¶ 30; OSF Answer [Dkt #46] at ¶ 30.

47. In the 1989 case, this Court defined a relevant geographic market identified as the Winnebago-Ogle-Boone area which is identical to the market alleged by the FTC in this proceeding. Complaint [Dkt. #1] at ¶ 37; OSF Answer [Dkt #46] at ¶ 31; RHS Answer [Dkt #47] at ¶ 31. This Court also defined a relevant product market of general acute care hospital inpatient services, which is identical to one of the markets alleged by the FTC in this proceeding. Complaint [Dkt. #1] at ¶¶ 33, 34; OSF Answer [Dkt #46] at ¶ 31; RHS Answer [Dkt #47] at ¶ 31.

48. This Court concluded in the 1989 case that the merger of two Rockford hospitals "would produce a firm controlling an undue percentage share of the relevant market, thus increasing the likelihood of market dominance by the merged entity or collusion." *Rockford Mem'l,* 717 F. Supp at 1281.

49. This Court in 1989 found that "the barriers to entry in the relevant market reinforce rather than diffuse the likelihood of anti-competitive tendencies marked by a concentrated market." *Rockford Mem'l,* 717 F. Supp at 1282.

50. This Court in 1989 found that "the defendants' 'consumer-aligned' boards and not-for-profit status will not necessarily prevent the defendants from engaging in anti-competitive activity." *Rockford Mem'l,* 717 F. Supp at 1287.

51. Finally, this Court found in 1989 that many of the asserted cost-savings were not merger-specific or verifiable, and even if some of the cost-savings were credited, they would "pale[] in comparison to the likely amount of revenues generated by the defendants in the same five year period." *Rockford Mem'l,* 717 F. Supp at 1291.

III. THE TRANSACTION

52. OSF began its discussion with RHS regarding a potential merger in the Spring of 2009. PI Hearing Tr. at 592:9-593:14 (Schertz); *see* PX 5-009 (OSF Healthcare, Strategic Positioning Access in the Market Place), *confidential*; PX 2501 at ¶ 23 (Capps Aff.), *confidential - attorneys' eyes only*.

53. RHS signed a "letter of intent" to join OSF in May of 2010. PI Hearing Tr. at 592:9-593:14 (Schertz); PX 112-001 (OSF Healthcare, "Rockford Health System Signs Letter of Intent to Join OSF Healthcare"), *confidential*.

54. From May of 2010 "through the summer of 2010, fall, winter and early part of 2011," OSF and RHS engaged in "intensive due diligence," which included counsel. PI Hearing Tr. at 593:11-14, 607:23-608:6 (Schertz). In approximately August 2010, OSF's and RHS's outside antitrust counsel retained consultants FTI and Compass Lexecon. PI Hearing Tr. at 810:2-6, 901:4-8 (Manning); PI Hearing Tr. at 607:23-608:6 (Schertz).

55. At the direction and under the supervision of outside antitrust counsel, and several litigation consultants, OSF and RHS have been preparing an antitrust defense for the proposed acquisition since at least mid-2010. PI Hearing Tr. at 897:4-22, 898:8-16, 899: 9-900:10 (Manning).

56. It was not until January 31, 2011, nearly two years after their initial discussions, that OSF and RHS announced they had entered into a formal Affiliation Agreement. PX 37-001 (Affiliation Agreement), *confidential*; PI Hearing Tr. at 592:9-593:14 (Schertz).

57. Under the terms of the Affiliation Agreement, OSF will acquire all of the operating assets of RHS and will become the sole corporate member of RHS. OSF Answer [Dkt. # 46] at

¶ 25; PX 37-011 (Affiliation Agreement, Article II, § 2.1), *confidential*; PX 2501 at ¶ 23 (Capps Aff.), *confidential - attorneys' eyes only*.

58. OSF will hold reserve powers with respect to the governance and operations of RHS. PX 168-240-243 (Affiliation Agreement, Exhibit E), *confidential*; PX 37 at 16 (Affiliation Agreement, Article III, § 3.3), *confidential*; PI Hearing Tr. at 730:14-17 (Kaatz).

59. OSF's reserve powers will grant it control and ultimate authority over significant business decisions of RHS, including strategic planning, operating and capital budgets, large capital expenditures, and significant borrowing and contracting. PX 168-240-243 (Affiliation Agreement, Exhibit E), *confidential*; OSF Answer [Dkt. # 46] at ¶ 25; RHS Answer [Dkt. # 47] at ¶ 25.

60. OSF will combine its existing Rockford area hospital and physician operations with RHS to create a newly-organized "OSF Northern Region" led by Gary Kaatz, the current RHS Chief Executive Officer, and David Schertz, the current SAMC Chief Executive Officer. PI Hearing Tr. at 606:18-25 (Schertz); PX 37-016 (Affiliation Agreement, Article IV, § 4.1), *confidential*; PX 2501 at ¶ 23 (Capps Aff.), *confidential - attorneys' eyes only*.

61. The Affiliation Agreement requires

PX 37 at 16-17

(Affiliation Agreement, Article V §§ 5.1.1 and 5.1.2), *confidential*; PX 225-062 (Sehring (OSF) IH Tr. at 240:6-241:4), *confidential - attorneys' eyes only*; PI Hearing Tr. at 728:25-729:7 (Kaatz). These levels of capital spending are

PX 3683 at 7, 11 (Rockford Health System 2012 Operating and Capital Budget), *confidential*.

62. The Affiliation Agreement also provides that OSF must continue to operate RMH as a hospital for at least ten years after closing the transaction; however, after five years, OSF can close or convert RMH if 75% of the RHS Board agrees. PX 37 at 18 (Affiliation Agreement, Article V, § 5.3), *confidential*; PX 2501 at ¶ 24 (Capps Aff.), *confidential - attorneys' eyes only*.

63. OSF and RHS have been aware of the antitrust risk from the beginning of their discussions in 2009. PX 4023-024 (McGrew (OSF) Dep. Tr. at 89:23-91:12 ("There was always a question whether the transaction would be, you know, approved when we made the filing for Hart-Scott-Rodino filing," referring to notes indicating that the transaction would reduce Rockford hospitals from three to two.)

64. While there is no "purchase price," the parties reported million as the fair market value of the acquisition in their HSR filings. PX 301 at 3, *confidential*; PX 2501 at ¶ 24 (Capps Aff.), *confidential - attorneys' eyes only*.

65. The Affiliation Agreement required the parties to use all commercially reasonable efforts to close the acquisition by

PX 37 at 72 (Affiliation Agreement, Article XIX, § 19.3), *confidential*.

IV. PROCEDURAL HISTORY

A. Antitrust Investigation

66. OSF and RHS submitted Hart-Scott-Rodino premerger notification reports related to the Acquisition on February 11, 2011, two days after the FTC first received administrative clearance to investigate the proposed transaction.

67. Following the 30-day statutory waiting period, the FTC issued Requests for Additional Information ("Second Requests") to OSF and RHS on March 14, 2011.

68. Defendants did not produce documents and information responsive to the Second Requests until they certified substantial compliance with the Second Requests on October 13, 2011, starting the statutory clock that led to the filing of this action on November 18, 2011.

69. Defendant RHS supplemented its Second Request production on January 20, 2012 by submitting 80,000 previously undisclosed documents responsive to the Second Request.

B. Federal District Court Proceeding

70. On November 17, 2011, by a unanimous vote, the Commission found reason to believe that the Acquisition would violate Section 7 of the Clayton Act by substantially reducing competition in two lines of commerce, and initiated an administrative proceeding. Complaint [Dkt. #1] at ¶ 26.

71. Discovery in the administrative proceeding has been underway since the filing of the Complaint, with fact discovery scheduled to close on February 17, 2012. The plenary administrative trial on the merits will begin on April 17, 2012, before the FTC's Administrative Law Judge ("ALJ"). Complaint [Dkt. #1] at ¶ 26; ALJ Scheduling Order at 1, 4 (filed December 20, 2011), FTC Dkt. # 9349. Under Commission rules, the ALJ will likely issue his decision on the merits in early October 2012, if not sooner.

72. Also on November 17, 2011, the Commission authorized FTC staff to seek preliminary relief in this Court to temporarily and preliminarily enjoin the Acquisition of RHS by OSF to maintain competition, preserve the *status quo*, and prohibit integration of the

entities until the conclusion of the FTC's administrative trial on the merits and any subsequent appeals. Complaint [Dkt. #1] at ¶ 27.

73. On November 18, 2011, the FTC filed this action for a temporary restraining order ("TRO") and preliminary injunction ("PI"), under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The FTC's complaint alleges that the Acquisition "threatens to substantially lessen competition" for general acute care inpatient hospital services sold to commercial health plans and for primary care physician services provided to commercially-insured adults in the area encompassing all of Winnebago County, essentially all of Boone County, the northeastern portion of Ogle County, and single zip codes in McHenry, Dekalb, and Stephenson counties (previously referred to by this Court as the "Winnebago-Olge-Boone market"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint [Dkt. #1] ¶¶ 33, 36, 37.

74. OSF and RHS voluntarily agreed not to consummate the Acquisition pending this Court's consideration of the PI motion, and Plaintiff's Motion for TRO was withdrawn on November 18, 2011. Order Withdrawing Motion for TRO [Dkt. #31].

75. On November 23, 2011, OSF and RHS answered the Complaint [Dkt #1] and filed a Memorandum in Opposition to the FTC's PI Motion. OSF Answer [Dkt #46]; RHS Answer [Dkt# 48]; Defendants' Opposition to Plaintiff's Motion for PI [Dkt #49].

76. Pursuant to the Court's Scheduling Order entered on December 1, 2011, Plaintiff and Defendants conducted expedited discovery, including depositions of eight fact witnesses and expert depositions. In addition, Plaintiff and Defendants, in lieu of opening statements, submitted their respective supplemental pre-hearing memoranda to the Court on January 27, 2012. Scheduling Order [Dkt. #63].

77. On February 1, 2, and 3, 2012, the Court heard approximately 20 hours of live testimony regarding Plaintiff's PI motion. In addition, Plaintiff and Defendants, in lieu of closing arguments, submitted post-hearing briefs, conclusions of law, and these proposed factual findings to the Court on February 14, 2012. Furthermore, pursuant to the Scheduling Order, the parties may submit responses to the post-trial briefs on February 21, 2012. Scheduling Order [Dkt. #63].

C. Related FTC Administrative Litigation

78. The administrative complaint, filed on November 17, 2011, alleges that the Acquisition substantially lessens competition in the market for general acute care inpatient services sold to commercial health plans and primary care physician services provided to commercially-insured adults in the Winnebago-Ogle-Boone market in violation of Section 7 of the Clayton Act, as amended 15 U.S.C. § 18. Admin. Complaint, FTC Dkt. #9349.

79. On December 12, 2011, Respondents OSF and RHS filed their respective answers to the administrative complaint. OSF Answer to Admin. Complaint, FTC Dkt. #9349; RHS Answer to Admin. Complaint, FTC Dkt. #9349.

80. On December 20, 2011, both sides made presentations on the merits at a scheduling conference before ALJ D. Michael Chappell, with a scheduling order entered on December 20, 2011. ALJ Scheduling Order (filed December 20, 2011), FTC Dkt. #9346.

81. The FTC's Complaint Counsel submitted its preliminary witness list (not including experts) to Respondents OSF and RHS on January 2, 2012, and all discovery requests were issued on or prior to January 12, 2012. ALJ Scheduling Order at 1 (filed December 20, 2011), FTC Dkt. #9346. The FTC's Complaint Counsel and Respondents OSF and

RHS will exchange expert witness reports on February 24, 2012 and March 9, 2012, respectively. ALJ Scheduling Order at 1-2 (filed December 20, 2011), FTC Dkt. #9346. All discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits, will conclude on February 17, 2012. ALJ Scheduling Order at 1 (filed December 20, 2011), FTC Dkt. #9346. Moreover, depositions of experts will conclude on March 23, 2012. ALJ Scheduling Order at 3 (filed December 20, 2011), FTC Dkt. #9346.

82. The FTC's Complaint Counsel and Respondents OSF and RHS will file their pre-trial briefs supported by legal authority on April 3, 2012 and April 10, 2012, respectively. ALJ Scheduling Order at 3 (filed December 20, 2011), FTC Dkt. #9346.

83. Final stipulations of law, facts, and authenticity must be filed before April 11, 2012. ALJ Scheduling Order at 3 (filed December 20, 2011), FTC Dkt. #9346.

84. The full administrative trial on the merits will begin on April 17, 2012, and will include up to 210 hours of live testimony. ALJ Scheduling Order at 4 (filed December 20, 2011), FTC Dkt. #9346.

85. ALJ Chappell will likely issue an opinion on the merits and proposed relief in October of this year (if not sooner). FTC Rules of Practice, Part III, 16 C.F.R. § 3.51(a) (the ALJ has 70 days to file an opinion after the last proposed findings or conclusions of law or order is filed).

86. After an initial decision by ALJ Chappell, the Commission will determine the legality of the Acquisition under Section 7 of the Clayton Act, and issue an appropriate remedy if it finds liability. The Commission must issue its decision reviewing the ALJ's initial decision within 100 days from the ALJ's initial decision. FTC Rules of Practice, Part III,

16 C.F.R. § 3.52. Under Section 11(c) of the Clayton Act, 15 U.S.C. § 21(c), Respondents OSF and RHS may appeal an adverse Commission decision directly to any U.S. Court of Appeals within whose jurisdiction Respondents OSF and RHS reside or conduct business.

V. FUNDAMENTALS OF HOSPITAL AND PHYSICIAN COMPETITION AND PRICING

A. Types of Insurance and the Role of Health Plans

87. Most patients treated by hospitals or physicians fall into one of three broad payment categories: government payor (including Medicare and Medicaid); self-pay (or indigent); or commercial insurance. PX 2501 at ¶ 48, Figs. 13 & 14 (Capps Aff.), *confidential - attorneys' eyes only*.

88. The Rockford Metropolitan Statistical Area (MSA) has a smaller uninsured population (as a percentage of total population) than Illinois or the nation. PX 2501 at ¶ 48, Figure 13 (Capps Aff.), *confidential - attorneys' eyes only*.

89. Approximately 64.7% of Rockford MSA residents have some form of private health insurance, while 34.9% are covered by some form of public health insurance. PX 2501 at ¶ 48, Figure 14 (Capps Aff.), *confidential - attorneys' eyes only*.

90. The reimbursement rates that hospitals and physicians receive for government-pay patients are not negotiated. PX 2501 at ¶¶ 69, 72 (Capps Aff.), *confidential - attorneys' eyes only*. These rates are established through administrative processes at federal and state agencies. PX 2501 at ¶¶ 69, 72 (Capps Aff.), *confidential - attorneys' eyes only*.

91. Self-pay patients, including indigent patients, are billed directly at rates set by the hospital's or physician's chargemaster (*i.e.*, list prices), or for those self-pay patients who

cannot afford the full list price, hospitals and physicians often provide indigent and charity care at a discount or at the hospital's or physician's own expense. PX 225-027 (Sehring (OSF) IH Tr. at 99:8-16).

92. Health plans negotiate with hospitals and physicians to determine the scope of coverage and the reimbursement rates for commercially insured patients. PI Hearing Tr. at 338:23-340:5 (Capps); PI Hearing Tr. at 29:10-19; 34:11-35:2 (Lobe); PI Hearing Tr. at 223:8-225:3 (Petersen).

93. All else equal, hospitals and physicians receive higher reimbursements for treating commercially insured patients than for treating government-pay, self-pay, or indigent patients. PI Hearing Tr. at 620:13-24 (Schertz); PX 4044-037 (Capps Dep. Tr. at 141:6-15), *confidential - attorneys' eyes only*; PX 2501 at ¶ 104 (Capps Aff.), *confidential - attorneys' eyes only*.

94. Commercially insured patients are important to a hospital's or physician's bottom line. PX 4044-037 (Capps Dep. Tr. at 141:6-15), *confidential - attorneys' eyes only*.

B. Relationships Between Employees, Employers, Health Plans, and Providers

95. Commercially-insured patients generally obtain health insurance through their employer as part of a compensation package. PX 2501 at ¶ 78 (Capps Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 20:16-21:6 (Lobe); *see generally* PI Hearing Tr. at 333:2-335:14 (Capps).

96. Employers that offer health insurance to their employees, either independently or with the help of an insurance broker, negotiate with health plans and select the combination of rates, benefit structures, and health care provider networks that best meet the needs of the employer and its employees. PX 2501 at ¶ 79 (Capps Aff.), *confidential - attorneys' eyes*

only; PX 280 at ¶¶ 5-6

confidential - attorneys' eyes only; PX 269 at ¶¶ 2-3 (Endsley (C&E Specialties) Decl.).

97. Employers generally do not negotiate directly with hospitals or physicians; instead, employers rely on health plans to do so. PX 2501 at ¶ 79 (Capps. Aff.), *confidential - attorneys' eyes only*; PX 280 at ¶¶ 5-6

confidential - attorneys' eyes only; PX 269 at ¶¶ 2-3 (Endsley (C&E Specialties) Decl.). This is because health plans specialize in the often complex tasks involved in negotiating and administering health benefits. PX 255 at ¶ 7

confidential - attorneys' eyes only.

98. ECOH, the rare exception, is a non-profit organization that develops healthcare provider networks and offers related administrative services to more than 120 northern Illinois and southern Wisconsin companies. PX 254 at ¶ 3 *confidential - attorneys' eyes only*.

99. The commercial health insurance products that health plans offer to employers fall into two broad categories: self-insured and fully-insured. PI Hearing Tr. at 333:2-334:11 (Capps); PI Hearing Tr. at 25:17-26:16 (Lobe); PI Hearing Tr. at 218:11-219:8 (Petersen).

100. Since 2003, the majority of individuals who received coverage through their employers have been enrolled in self-insured plans. PX 2501 at ¶ 80 (Capps Aff.), *confidential - attorneys' eyes only*.

101. Under a self-insured plan, the employer pays the full costs of employees' health care claims and assumes the risk that such costs will exceed the premium collected from

employees. PI Hearing Tr. at 25:17-25; 26:13-16 (Lobe); PI Hearing Tr. at 218:11-24 (Petersen); PI Hearing Tr. at 333:2-334:1 (Capps).

102. An employer with a self-insured plan pays the health plan a fee in exchange for access to the health plan's provider network at the rates negotiated by the health plan and for administration of its employees' claims. PX 2501 at ¶ 79 (Capps. Aff.), *confidential - attorneys' eyes only*; PX 223-014 (Schoeplein (OSF) IH Tr. at 48:9-17).

103. Therefore, under a self-insured plan, an increase in a hospital's or physician's reimbursement rates will immediately and directly increase the employer's health care expenditures for employees who use that provider. PI Hearing Tr. at 27:5-9 (Lobe); PI Hearing Tr. at 218:25-219:4 (Petersen); PI Hearing Tr. at 333:2-335:14 (Capps); PI Hearing Tr. at 660:7-15 (Olson).

104. Under a fully-insured plan, the health plan pays the cost of employees' health care, bearing the risk that health care costs may exceed the premiums collected from employers. PI Hearing Tr. at 218:11-24 (Petersen); PI Hearing Tr. at 333:2-335:14 (Capps).

105. Health plans pass on some or all of an increase in prices for hospital or physician care to their fully-insured customers via an increase in the premium charged to the employer. PI Hearing Tr. at 218:25-219:8 (Petersen); PI Hearing Tr. at 334:2-334:11 (Capps).

106. Therefore, under a fully-insured plan, an increase in a hospital's or physician's reimbursement rates will increase the employer's total health care costs. PI Hearing Tr. at 333:2-334:11 (Capps); PI Hearing Tr. at 218:25-219:8 (Petersen); PI Hearing Tr. at 662:7-19; 693:7-24 (Olson).

107. In the event of an increase in an employer's health care expenditures, the employer can increase the amount its employees must contribute to health insurance benefits or reduce employees' health insurance benefits. PI Hearing Tr. at 334:12-335:14 (Capps); PX 280 at ¶ 8 *confidential - attorneys' eyes only*; PX 277 at ¶ 8 *confidential - attorneys' eyes only*.

108. Ultimately, regardless of the type of plan, the cost of healthcare services are borne by employers and individual members. PI Hearing Tr. at 334:12-335:14 (Capps); PI Hearing Tr. at 662:7-19; 691:13-692:15 (Olson); PX 2501 at ¶ 7 (Capps Aff.), *confidential - attorneys' eyes only*.

C. Rate Negotiations Between Health Plans and Providers

1. Bargaining Dynamics

109. Health plans negotiate with hospitals and physicians to determine the scope of coverage and the reimbursement rates for services on behalf of their customers, whether fully- or self-insured. PI Hearing Tr. at 338:23-340:9 (Capps); PI Hearing Tr. at 223:17-225:24 (Petersen); PI Hearing Tr. at 29:10-15; 34:11-35:2 (Lobe).

110. Rates for physician services, including primary care physician services offered through health systems such as RHS and OSF, are a specific point of negotiation between hospitals or independent physicians and health plans. PI Hearing Tr. at 45:19-46:16 (Lobe); PX 2501 at ¶ 108 (Capps Aff.), *confidential - attorneys' eyes only*.

111. The reimbursement rates over which health plans and providers negotiate determine the compensation that a provider will receive in exchange for treating that health plan's members. PI Hearing Tr. at 34:11-35:2 (Lobe); PX 2501 at ¶ 82 (Capps Aff.),

confidential - attorneys' eyes only; PX 252 at ¶ 14

confidential - attorneys' eyes only.

112. Reimbursement rates for hospital and physician services are determined through the bilateral bargaining process between providers and health plans. PI Hearing Tr. at 34:11-35:2 (Lobe); PI Hearing Tr. at 253:10-17 (Petersen); PI Hearing Tr. at 338:23-340:9 (Capps).

113. This bargaining process typically involves a series of offers and counteroffers, and results in either the inclusion of the provider in a health plan's network or the failure of the health plan and provider to reach an agreement. PI Hearing Tr. at 19:7-16 (Lobe); PX 2501 at ¶ 83 (Capps Aff.), *confidential - attorneys' eyes only*; PX 252 at ¶ 14

confidential - attorneys' eyes only.

114. The rates and contract terms negotiated between a provider and a health plan are a function of each party's bargaining leverage in negotiations. PI Hearing Tr. at 223:17-225:7 (Petersen); PI Hearing Tr. at 338:23-340:9 (Capps); PX 2501 at ¶ 82 (Capps Aff.), *confidential - attorneys' eyes only*.

115. The bargaining leverage of each party, and, therefore, the terms of the agreement, depend principally upon how each party would fare if it failed to reach agreement with the other party. PI Hearing Tr. at 338:23-340:9 (Capps); PX 2501 at ¶ 83 (Capps Aff.), *confidential - attorneys' eyes only*.

116. The success or failure to reach an agreement depends on the provider's and health plan's respective "walk-away" points. PX 2501 at ¶ 83 (Capps Aff.), *confidential - attorneys' eyes only*.

117. If a provider demands rates above a health plan's walk-away point, the health plan will refuse to contract with the provider. PX 2501 at ¶ 83 (Capps Aff.), *confidential - attorneys' eyes only*; PX 213-063 (Breeden (OSF) IH Tr. at 242:8-22).

118. If a health plan demands rates below a provider's walk-away point, the provider will refuse to contract with the health plan. PX 2501 at ¶ 83 (Capps Aff.), *confidential - attorneys' eyes only*.

119. Each party's walk-away point is a function of that party's bargaining leverage. PX 2501 at ¶ 83 (Capps Aff.), *confidential - attorneys' eyes only*.

120. The bargaining leverage of a provider against a health plan depends on the value that the health plan's current and potential members place on having in-network access to that provider. PI Hearing Tr. at 231:14-233:3 (Petersen); PI Hearing Tr. at 338:23-340:9 (Capps); PX 2501 at ¶ 85 (Capps Aff.), *confidential - attorneys' eyes only*.

121. This value is reflected by the number of the health plan's members who use or would use the provider. PI Hearing Tr. at 231:14-233:3 (Petersen); PI Hearing Tr. at 338:23-340:9 (Capps); PX 2501 at ¶ 85 (Capps Aff.), *confidential - attorneys' eyes only*.

122. The more a health plan's members value a provider, the more bargaining leverage the provider possesses in its negotiations with the health plan, because failing to reach an agreement with that provider would make a health plan's network substantially less attractive to the health plan's members. PI Hearing Tr. at 35:24-36:20 (Lobe); PX 253 at ¶¶ 13-14 *confidential - attorneys' eyes only*.

123. The more bargaining leverage a provider has against a health plan, the higher the reimbursement rates that the provider will be able to obtain from the health plan. PI Hearing Tr. at 40:18-41:10 (Lobe); PX 253 at ¶ 14 *confidential*

- *attorneys' eyes only*; PX 4002-049

confidential - attorneys' eyes only.

124. A provider system that employs physicians will have greater bargaining leverage against health plans in that market. PI Hearing Tr. at 223:20-224:7 (Petersen); PI Hearing Tr. at 46:3-16 (Lobe).

125. The fewer close substitutes for a particular provider in a particular market, the harder it would be for health plans to market a viable provider network without that provider and, therefore, the more valuable that provider is to health plans and the greater that provider's bargaining leverage is against health plans. PI Hearing Tr. at 224:8-20 (Petersen); PX 2501 at ¶ 86 (Capps Aff.), *confidential - attorneys' eyes only*; PX 253 at ¶¶ 13-14 *confidential - attorneys' eyes only*.

126. A health plan's bargaining leverage with a provider is determined by how much the provider values being included in the health plan's network. PI Hearing Tr. at 224:21-225:16 (Petersen); PX 215-027 (Dillon (RHS) IH Tr. at 101:15-24), *confidential*; PX 252 at ¶ 15 *confidential - attorneys' eyes only*. This depends largely on the size of the health plan's membership, or the patient volume (and revenue), that the health plan can offer to the hospital. PI Hearing Tr. at 224:21-225:16 (Petersen); PX 222-009 (Schertz (OSF) IH Tr. at 26:19-27:1; PX 252 at ¶ 15

confidential - attorneys' eyes only.

127. The more patient volume that a provider stands to lose if it fails to reach an agreement with the health plan, including the risk of being excluded from the network altogether, the greater the bargaining leverage the health plan will have with the provider. PI Hearing Tr. at 225:4-16 (Petersen); PX 2501 at ¶ 87 (Capps Aff.), *confidential -*

attorneys' eyes only; PX 211-026 (Baker (OSF) IH Tr. at 99:11-100:5), *confidential - attorneys' eyes only*.

2. Health Plans' Criteria for Creating Provider Networks

128. Health plans generally value a broad network of providers, desiring to have in-network access to physicians and hospitals that span the geographic areas in which their members work and reside. PI Hearing Tr. at 222:21-223:7, 227:1-21 (Petersen); PX 2501 at ¶¶ 109-114 (Capps Aff.), *confidential - attorneys' eyes only*.

129. Health plans regularly conduct market research regarding members' preferences in order to maintain marketable and attractive provider networks, thus ensuring that their insurance products appeal to employers and employees. PI Hearing Tr. at 20:16-23 (Lobe); PI Hearing at 215:17-217:17 (Petersen); PX 253 at ¶ 6 *confidential - attorneys' eyes only*.

130. Health plans cannot successfully market insurance products to employers if their provider networks do not include the hospitals and physicians desired by current and potential members. PX 256 at ¶ 5 *confidential - attorneys' eyes only*; PX 253 at ¶¶ 5-6 *confidential - attorneys' eyes only*.

131. A provider's market share, geographic location, and breadth of services are important criteria for inclusion in the health plan's provider network. PI Hearing Tr. at 223:3-224:7 (Petersen); PX 251 at ¶ 13 *confidential - attorneys' eyes only*; PX 2501 at ¶ 85, FN 113 (Capps Aff.), *confidential - attorneys' eyes only*.

132. In deciding whether to add a provider to its network, a health plan balances the value its current and prospective members place on having in-network access to the provider (and the resulting increase in the marketability of the health plan's network) against the costs

of adding that provider to the network. PI Hearing Tr. at 224:8-20 (Petersen); PX 2501 at ¶ 84 (Capps Aff.), *confidential - attorneys' eyes only*.

133. The greater the increase in the competitiveness or marketability of a health plan's products as a result of adding a provider to its network, the higher the reimbursement rates the health plan will be willing to pay to have that provider as an in-network option for its members, and, therefore, the greater the provider's bargaining leverage against the health plan. PX 252 at ¶ 11 *confidential - attorneys' eyes only*; PX 251 at ¶ 13 *confidential - attorneys' eyes only*. Put differently, if a health plan's network is substantially less attractive or less marketable to employers due to the potential exclusion of a provider (*e.g.*, a provider with high market share), that provider will have more leverage to command higher rates for its inclusion in the health plan's network than a less-valued hospital. PI Hearing Tr. at 36:8-20 (Lobe); PX 2501 at ¶ 89 (Capps Aff.), *confidential - attorneys' eyes only*; PX 252 at ¶ 16 *confidential - attorneys' eyes only*.

134. Health plans' provider networks have included only two out of the three hospitals in Rockford, in all possible combinations. PI Hearing Tr. at 368:21-369:24 (Capps); PI Hearing Tr. at 230:17-232:8 (Petersen); PI Hearing Tr. at 33:2-7 (Lobe).

3. Providers Compete for Network Inclusion and for Selection by Health-Plan Members

135. Providers compete with one another on multiple levels. PI Hearing Tr. at 338:23-340:9 (Capps); PX 2501 at ¶¶ 88-89 (Capps Aff.), *confidential - attorneys' eyes only*.

136. Providers compete with one another for inclusion in health plans' provider networks. PI Hearing Tr. at 338:23-340:9 (Capps); PX 223-054 (Schoeplein (OSF) IH Tr. at 211:7-10,

212:11-17); PX 211-026 (Baker (OSF) IH Tr. at 99:11-100:5), *confidential - attorneys' eyes only*.

137. Typically, health plan members have access to in-network hospitals and physicians at rates substantially lower than out-of-network hospitals and physicians. PI Hearing Tr. at 227:13-21 (Petersen); PI Hearing Tr. at 28:25-29:9 (Lobe); PI Hearing Tr. at 685:25-686:4 (Olson).

138. A provider's volume of patients from a specific health plan is determined largely by whether the provider is part of the health plan's provider network. PX 2501 at ¶ 95 (Capps Aff.), *confidential - attorneys' eyes only*; PX 213-011 (Breeden (OSF) IH Tr. at 38:16-20); PX 211-026 (Baker (OSF) IH Tr. at 99:11-100:5), *confidential - attorneys' eyes only*.

139. All things being equal, an out-of-network provider will treat significantly fewer patients from that health plan than an in-network provider, because members bear higher out-of-pocket costs to use out-of-network providers. PI Hearing Tr. at 227:13-21 (Petersen); PX 213-037 (Breeden (OSF) IH Tr. at 141:15-19).

140. Because health plan provider networks historically have included only two out of three hospitals in Rockford, all three hospital systems must compete for two places in health plans networks. PI Hearing Tr. at 231:10-232:8 (Petersen); PI Hearing Tr. at 364:3-365:9 (Capps); PX 255 at ¶ 8 *confidential - attorneys' eyes only*.

141. Because health plans can offer an attractive provider network to Rockford employers with two, but not all three Rockford hospitals in network, health plans can plausibly threaten not to contract with each hospital. PI Hearing Tr. at 224:8-20, 231:10-232:8 (Petersen); PI Hearing Tr. at 367:19-20 (Capps). In sum, three hospitals are bidding for

two "slots" in a health plan's network and must offer attractive pricing to avoid exclusion from a network.

142. Once included in a health plan's network, providers in that network compete with one another to attract the health plan's members. PI Hearing Tr. at 340:10-25 (Capps); PX 223-054 (Schoeplein (OSF) IH Tr. at 211:4-6).

143. Because members generally face little or no out-of-pocket price difference between in-network providers, in-network providers compete for patients primarily on non-price dimensions, such as location, quality of care, patient experience, and other factors. PI Hearing Tr. at 340:10-25 (Capps); PX 2501 at ¶ 88 (Capps Aff.), *confidential - attorneys' eyes only*.

144. The volume of patients treated by one in-network provider versus another depends upon patient preferences, the location and characteristics of the provider, the admitting patterns of physicians, and the location and characteristics of other competing in-network providers. PI Hearing Tr. at 340:10-25 (Capps); PX 2501 at ¶ 88, FN 119 (Capps Aff.), *confidential - attorneys' eyes only*; PX 215-051 (Dillon (RHS) IH Tr. at 197:17-22).

145. Competition among providers benefits actual and potential customers of hospital and physician services by securing lower prices for hospital and physician care, and in turn, lower premiums, higher wages, more healthcare benefits, and increased access to health care. PI Hearing Tr. at 224:8-20 (Petersen); PX 2501 at ¶ 74 (Capps. Aff.), *confidential - attorneys' eyes only*; PX 253 at ¶ 17 *confidential - attorneys' eyes only*.

VI. THE RELEVANT MARKETS

A. General Acute-Care Inpatient Services Sold to Commercial Health Plans Constitutes a Relevant Product Market

146. General acute-care inpatient hospital services sold to commercial health plans ("GAC services") is a relevant product market in which to evaluate the competitive effects of the Acquisition. PI Hearing Tr. at 344:2-9 (Capps); PX 1603-013 (Admin. Proceeding Scheduling Conference Tr. at 47:8-13), *confidential*; *see* PX 2263 at ¶ 22-23 (Noether Aff.), *confidential*; PX 2269 at ¶ 101 (Noether Supp. Aff.), *confidential - attorneys' eyes only*.

147. GAC services are a broad "cluster market" of inpatient surgical, medical, and supporting services provided in a hospital setting to commercially-insured patients. PI Hearing Tr. at 344:2-346:13 (Capps); PX 2501 at ¶ 138 (Capps Aff.), *confidential - attorneys' eyes only*; PX 217-10 *confidential - attorneys' eyes only*; PX 215-54 (Dillon (RHS) IH Tr. at 206:3-207:2).

148. Individual services within the GAC cluster market are not clinical substitutes for each other. PI Hearing Tr. at 344:10-22 (Capps); PX 2501 at ¶ 137 (Capps Aff.), *confidential - attorneys' eyes only*; PX 2263 at ¶ 23 (Noether Aff.), *confidential*. Therefore, each service line is a relevant product market from a demand-side analysis. PX 2501 at ¶ 138 (Capps Aff.), *confidential - attorneys' eyes only*. The cluster market is a tool for analytical convenience – it provides a convenient and efficient way to conduct a competitive analysis across a multitude of different services, instead of evaluating each service separately. PI Hearing Tr. at 344:10-345:20 (Capps); PX 2501 at ¶ 138 (Capps Aff.), *confidential - attorneys' eyes only*.

149. Additionally, the GAC cluster of services corresponds to what most consumers and employers consider when they evaluate the adequacy and quality of a health plan's hospital network. Consumers generally do not know their specific medical needs in advance, and therefore seek to ensure convenient and affordable access to a broad range of hospital services that they may require in the future. PI Hearing Tr. at 345:23-346:13 (Capps); PX 2501 at ¶¶ 139-140 (Capps Aff.), *confidential - attorneys' eyes only*; *see also* PX 271 at ¶ 6 *confidential*; PX 265 at ¶ 6 (Cacciapaglia (AFSCME) Decl.).

150. Analyzing services as part of a cluster market is appropriate when competitive conditions, such as market concentration and entry barriers, are similar across the services. PX 2501 at ¶ 138 (Capps Aff.), *confidential - attorneys' eyes only*. It is not appropriate, and would be misleading, to analyze services as part of the service cluster when such competitive conditions are dissimilar. PX 2501 at ¶ 142 (Capps Aff.), *confidential - attorneys' eyes only*.

151. The GAC product market excludes outpatient services. PI Hearing Tr. at 346:14-347:11 (Capps); PX 2501 at ¶ 141 (Capps Aff.), *confidential - attorneys' eyes only*. Outpatient services are services that do not require an overnight stay in a hospital. PX 252 at ¶ 9 *confidential - attorneys' eyes only*; PX 253 at ¶ 10 *confidential - attorneys' eyes only*.

152. The decision of whether health services are provided on an inpatient or outpatient basis is based on clinical considerations not financial ones. PI Hearing Tr. at 221:1-16 (Petersen); PI Hearing Tr. at 346:14-347:11 (Capps); PX 2501 at ¶ 141 (Capps Aff.), *confidential - attorneys' eyes only*; PX 215-54 (Dillion (RHS) IH Tr. at 207:3-208:6).

153. It would be inappropriate to include outpatient services within the GAC market because outpatient services are offered under different competitive conditions than inpatient services. For example, such services are offered by a different set or mix of market providers than inpatient services. PI Hearing Tr. at 346:14-347:11 (Capps); PX 2501 at ¶ 142 (Capps Aff.), *confidential - attorneys' eyes only*.

154. Defendants' expert does not dispute that GAC services is a relevant market, nor that outpatient services are properly excluded from that relevant market. PX 2269 at ¶ 101 (Noether Supp. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 347:18-23 (Capps).

B. Primary Care Physician Services Sold to Commercial Health Plans Constitute a Relevant Product Market

155. Primary care physician ("PCP") services sold to commercial health plans is a relevant product market in which to evaluate the competitive effects of the Acquisition. PI Hearing Tr. at 420:9-421:9 (Capps); PX 1603-013 (Admin. Proceeding Scheduling Conference Tr. at 47:14-22), *confidential*; PX 2263 at ¶¶ 84-86 (Noether Aff.), *confidential*; PX 2501 at ¶ 286 (Capps Aff.), *confidential - attorneys' eyes only*.

156. PCP services include services provided by physicians (either hospital employed or independent) specializing in family practice, general practice, and internal medicine. PI Hearing Tr. at 175:23-176:7 (Romano); PX 2263 at ¶ 85 (Noether Aff.), *confidential*; PX 284 at ¶ 2 *confidential*.

157. Physician services provided by OB/GYNs and pediatricians are properly excluded from the PCP services market because they provide specialized services to specific patient populations. PX 1603-013 (Admin. Proceeding Scheduling Conference Tr. at 47:14-22),

confidential; PX 2265 at ¶ 3 (RHS RFA), *confidential*; PX 251 at ¶ 21

confidential - attorneys' eyes only.

158. PCP services are separate from and not included within hospital outpatient services. PX 217-012 *confidential - attorneys' eyes only*. Although there is some disagreement regarding the precise type of doctors who are PCPs (*i.e.*, OB/GYNs), Defendants' expert does not contest that PCP services is a relevant product market. PX 4046-015 (Noether Dep. Tr. at 53:7-54:3), *see also* PX 1603-013 (Admin. Proceeding Scheduling Conference Tr. at 47:6-48:1) ("[I]ncludes family practitioners and internists – it's adult – it's adult primary care. It excludes ob-gyns [sic]. It excludes pediatricians."), *confidential*.

C. The Relevant Geographic Market is no Broader than Winnebago, most of Boone, most of Ogle, and small parts of McHenry, DeKalb, and Stephenson Counties

159. The relevant geographic market for both relevant markets (GAC services and PCP services) is no broader than Winnebago, most of Boone, most of Ogle County, and small parts of McHenry, DeKalb, and Stephenson Counties ("WOB Area"), the same geographic market found by this Court in the 1989 case, *United States v. Rockford Mem'l Corp*., 717 F.Supp. 1251 (N.D. Ill. 1989). *See* PX 2263 at ¶ 12 (Noether Aff.), *confidential*.

160. Defendants do not dispute this relevant geographic market definition. PX 1603-013 (Admin. Proceeding Scheduling Conference at 46:16-47:5), *confidential*; Defendants' Pre-Hearing Mem. at 2. A hypothetical monopolist controlling every hospital in the WOB Area could increase the price of inpatient GAC services in the WOB Area by at least 5 to 10 percent, a small but significant amount. PX 2501 at ¶ 157 (Capps Aff.),

confidential - attorneys' eyes only; *see* PX 4046-018 (Noether Dep. Tr. at 66:21-67:3; 67:24-68:6).

161. A narrower geographic market of a 30-minute drive-time radius around Rockford ("30-minute radius"), is also supported by the hypothetical monopolist test. PI Hearing Tr. at 349:18-350:5 (Capps); PX 2501 at ¶¶ 149-150, Figure 19 (Capps Aff.), *confidential - attorneys' eyes only*.

162. Patient-flow data reveals that most residents (85.3 percent) in the WOB Area and nearly all residents (89.7 percent) within a 30-minute radius around Rockford choose a Rockford hospital for GAC services. PX 2501 at ¶ 152; Figure 25 (Capps Aff.), *confidential - attorneys' eyes only*.

163. Defendants' testimony and ordinary course documents identify SAMC, RMH, and SwedishAmerican as the only significant hospital competitors within the WOB Area. PI Hearing Tr. at 774:17-23 (Kaatz); PI Hearing Tr. at 571:14-17 (Schertz); PX 371-043 (SAMC FY 2012 Management Plan), *confidential*; PX 4025-026 (Kaatz (RHS) Dep. Tr. at 99:22-100:13); PX 4023-037 (McGrew (OSF) Dep. Tr. at 144:7-11); PX 210-014 (RHS bond disclosure), *confidential*. Rochelle Community Hospital is also in the WOB Area, but it represents only 0.9 percent of the WOB Area patient admissions. PX 2501 at at ¶ 169; Figure 21 (Capps Aff.), *confidential - attorneys' eyes only*.

164. The precise contours of the relevant geographic market in this case do not significantly affect the market shares or level of market concentration. PX 2501 at ¶ 148 (Capps Aff.), *confidential - attorneys' eyes only*; PX 2269 at ¶ 101 (Noether Supp. Aff.), *confidential - attorneys' eyes only*. The inclusion or exclusion of peripheral zip codes, or even Rochelle Hospital, has no significant effect on market share and concentration

calculations. PX 2501 at ¶ 148, Figures 25 & 26 (Capps Aff.), *confidential - attorneys' eyes only*.

165. The Winnebago-Ogle-Boone area is the primary service area for both RHS and SAMC. OSF Answer at ¶ 40; RHS Answer at ¶ 40; PX 4025-026 (Kaatz (RHS) Dep. Tr. at 100:7-13).

166. SAMC's managed care contracts also recognize the relevant geographic market by requiring health plans to exclude at least one of the two other Rockford hospitals, while placing no restrictions on health plans' ability to contract with other hospitals outside the WOB area. PI Hearing Tr. at 364:8-365:21 (Capps); PI Hearing Tr. at 622:5-9 (Schertz); PX 1025-007 *confidential - attorneys' eyes only*; PX 255 at ¶ 3 *confidential - attorneys' eyes only*.

167. Patients prefer to receive inpatient hospital services close to home. PI Hearing Tr. at 222:2-8 (Petersen); PI Hearing Tr. at 774:21-23 (Kaatz); PI Hearing Tr. at 348:15-349:13 (Capps); PX 216-017 (Kaatz (RHS) IH Tr. at 58:13-22) ("When you're a patient, you're incredibly lonely, and you desire to have as many of your family and friends around you as possible, and the further away you are, the more difficult it is for that to occur.").

168. Health plans all testified that their customers prefer local care and generally do not leave Rockford for hospital services. PI Hearing Tr. at 23:9-15 (Lobe); PI Hearing Tr. at 221:17-222:15 (Petersen); PX 254 at ¶ 11 *confidential - attorneys' eyes only*. Health plans would not be able to market a health care network that did not include any of the hospitals within Rockford. PI Hearing Tr. at 30:24-31:22 (Lobe); PI Hearing Tr. at 222:21-223:7 (Petersen) ("Nobody would buy it.").

169. Rockford residents utilize healthcare services outside of Rockford for complex or specialized services, such as organ transplants, that are generally not available in Rockford. PI Hearing Tr. at 222:9-20 (Petersen); PX 271 at ¶ 3 *confidential*; PX 277 at ¶ 6 *confidential - attorneys' eyes only*; PX 273 at ¶ 6 *confidential*.

170. The small community hospitals outside of Rockford do not view themselves as competitors of the three Rockford hospitals. In fact, many of these community hospitals see themselves as partners with the Rockford hospitals. PX 264 at ¶ 8 (Peterson (Rochelle) Decl.); PX 259 at ¶ 7 *confidential - attorneys' eyes only*; PX 260 at ¶ 7 *confidential*.

171. The relevant geographic market for PCP services is no larger than, and likely smaller than, the relevant geographic market for GAC services. PX 2501 at ¶ 287 (Capps Aff.), *confidential - attorneys' eyes only*; *see* PX 223-047 (Schoeplein (OSF) IH Tr. at 178:10-17); PX 1603-013 (Admin. Proceeding Scheduling Conference at 47:6-22) (PCP relevant geographic market "pretty similar" to GAC), *confidential*. Health plans testified that offering a provider network without PCPs in Winnebago or Boone Counties would be unacceptable to employers and employees in the Rockford area. PI Hearing Tr. at 45:7-18 (Lobe); PX 256 at ¶ 19 *confidential - attorneys' eyes only*; PX 255 at ¶ 18 *confidential - attorneys' eyes only*.

VII. HIGH MARKET CONCENTRATION LEVELS ESTABLISH A STRONG PRESUMPTION OF HARM TO COMPETITION IN BOTH RELEVANT MARKETS

A. Market Structure

1. The Merger Creates a Duopoly for GAC Services in the WOB Area

172. SAMC's and RMH's only significant competitor in the WOB Area is SwedishAmerican. PX 4025-026 (Kaatz (RHS) Dep. Tr. at 99:22-100:13); PX 4023-011, 037 (McGrew (OSF) Dep. Tr. at 38:2-9, 144:7-11); PX 210-014 (RHS bond disclosure), *confidential*.

173. The Acquisition would eliminate RMH as an independent competitor in the GAC service market. OSF Answer at ¶ 9, 62, 64; RHS Answer at ¶ 62, 64.

174. The Acquisition will reduce the number of hospital competitors in the WOB area from three to two, leaving only SwedishAmerican. PI Hearing Tr. at 350:21-351:17 (Capps); OSF Answer at ¶ 42; RHS Answer at ¶ 42. PI Hearing Tr. at 40:18-41:1 (Lobe) ("concern in a merger is that if two of the three merge, there's significant leverage with a single system"); PI Hearing Tr. at 247:7-19 (Petersen) ("essentially it would consolidate from three to two. It would give the merged entity significant negotiating leverage at the negotiating table").

2. The Acquisition Also Leaves Only Two Large Competing PCP Groups, Each Owned by One of the Two Rockford Health Systems

175. The Acquisition will reduce the number of hospital employed physician groups from three to two in Rockford. OSF Answer at ¶ 5, 47; RHS Answer at ¶ 47.

176. Because healthcare is local, and patients generally see their primary care physicians more frequently than any other provider, it is particularly important that health plan members

have access to primary care physicians near where they live and work. PI Hearing Tr. at 45:7-14 (Lobe); PX 2501 at ¶ 287 (Capps Aff.), *confidential - attorneys' eyes only*.

177. Access to primary care physicians is an important feature for health plans, without which they would not be able to attract business in the Rockford area. PI Hearing Tr. at 45:15-18 (Lobe).

178. Indeed, when one local employer, Rockford Acromatic, sought to require its employees to rely on a single hospital network, the change in the breadth of the network drew complaints from employees who had to "give up a longstanding relationship with a primary care physician." PI Hearing Tr. at 685:13-18 (Olson).

179. The merger of two of the three health system employed primary care physician groups affects competition by increasing the leverage of the merged group. Notably, PCP services are a specific point of negotiation during health plan-provider negotiations. PI Hearing Tr. at 45:19-46:16 (Lobe); PX 2501 at ¶ 108 (Capps Aff.), *confidential - attorneys' eyes only*; *See also* PI Hearing Tr. at 253:4-254:5 (Petersen) (Although, negotiation of the "physician deal" is bundled with the "hospital deal," the merger changes contracting leverage for primary care physicians.).

180. The proposed merger would combine two of only three large primary care physician groups in Rockford and increase the market power of the remaining two groups. PI Hearing Tr. at 228:14-229:2 (Petersen) ("frankly, in each local marketplace, hospitals *and* physician groups have market power. You know as it stands, especially in this marketplace, there are only three choices.") (emphasis added).

181. One health plan opined that the combined OSF and RHS would control approximately 60 percent of the primary care physician capacity in Rockford and have significant bargaining power. PI Hearing Tr. at 253:18-254:5 (Petersen).

182. Commercial health plans negotiate rates with physician groups and, because the proposed merger of OSF and RHS would create a single physician group representing more than 40 percent or more of the primary care doctors in the market, the merger would substantially increase the merged entity's bargaining leverage in negotiations. PI Hearing Tr. at 45:15-46:16 (Lobe).

B. Market Shares, Concentration and the Presumption of Competitive Harm

183. The calculation of market concentration is an important tool for performing merger analysis, as it provides important information regarding the current competitive conditions in a market. PX 2501 at ¶ 159 (Capps Aff.), *confidential - attorneys' eyes only*.

184. Defendants admit that after the Acquisition, the combined OSF/RHS system will have the largest market share of any competitor in the WOB Area, whether calculated by discharges, patient days, or admissions. PX 2265 (RHS RFA) at ¶ 10, *confidential*; PX 2264 (OSF RFA) at ¶ 10, *confidential*.

185. The Acquisition significantly increases concentration in the already highly-concentrated GAC services market. The combined OSF/RHS post-Acquisition market share for GAC services in the WOB Area is 64% of patient days or 59% of admissions. The shares do not vary significantly regardless of what metric (patient days or admissions) or geographic area (five different areas analyzed) is used. PI Hearing Tr. at 353:4-355:20 (Capps).

186. The Acquisition also increases the concentration in the PCP services market. The combined OSF/RHS post-Acquisition market share for PCP services is 41.5% in the 30-minute radius around Rockford. PX 2501 at Figure 32 (Capps Aff.), *confidential - attorneys' eyes only*.

187. The Herfindahl-Hirschman Index ("HHI") is a measure of market concentration, calculated as the sum of the squared market shares of the participants in the relevant market. PI Hearing Tr. at 351:18-353:2 (Capps); PX 2501 at ¶ 160, FN 232 (Capps Aff.), *confidential - attorneys' eyes only*; PX 205-021-022 (*Merger Guidelines* § 5.3).

188. Mergers resulting in both high post-merger HHI calculations and substantial increases in the HHI, like the merger of OSF and RHS, are likely (all else equal) to increase market power. PX 2501 at ¶¶ 160-161 (Capps Aff.), *confidential - attorneys' eyes only*.

189. Under the U.S. Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines* ("*Merger Guidelines*"), which guide federal courts in applying antitrust merger analysis, a merger or acquisition is presumed likely to create or enhance market power when the post-merger HHI exceeds 2,500 points and the merger increases the HHI by more than 200 points. PI Hearing Tr. at 356:9-358:10 (Capps); PX 2501 at ¶ 161, FN 234 (Capps Aff.), *confidential - attorneys' eyes only*; PX 205-021-022 (*Merger Guidelines* § 5.3).

190. This Acquisition far exceeds the *Merger Guidelines* concentration thresholds; in the GAC market, concentration rises by 2,032 points to 5,351 as measured by patient days, and by 1,736 points to 5,088 as measured by admissions in the WOB Area. PX 2501 at Figure 21 (Capps Aff.), *confidential - attorneys' eyes only*. Therefore, the Acquisition is presumptively anticompetitive by a wide margin in the GAC services market based on

these high levels of market concentration, and is presumed likely to enhance OSF's market power. PX 205-021-022 (*Merger Guidelines* § 5.3); *see* Plaintiff's Proposed Conclusions of Law at Section III.D.

191. While the HHI concentration levels for the PCP market are lower than for the GAC services market, the Acquisition still raises "significant competitive concerns" under the *Merger Guidelines* with regard to PCP services. The Acquisition results in a moderately-concentrated market with an HHI increase of 859 and a post-Acquisition HHI of 2,227 in the area comprised of a 30-minute drive-time radius around Rockford. PX 2501 at Figure 32 (Capps Aff.), *confidential - attorneys' eyes only*; PX 205-021-022 (*Merger Guidelines* § 5.3). The increase of 859 in HHI is a substantial increase in concentration. PI Hearing Tr. at 424:1-15 (Capps).

192. The strong presumption that the Acquisition is anticompetitive in the GAC market and the significant concerns raised by the PCP market are insensitive to changes or different assumptions regarding the scope of the relevant product and geographic markets. PX 2501 at ¶ 169, Figures 20, 21, 28, 29, 30, 31, 32 (Capps Aff.), *confidential - attorneys' eyes only*; *see* PX 2269 at ¶ 101 (Noether Aff.), *confidential - attorneys' eyes only*.

193. Defendants' own economic expert does not dispute the estimates of market concentration. PI Hearing Tr. at 360:15-22 (Capps). In fact, Defendants' expert did not even define a geographic market. PX 4046-018 (Noether (Def. Expert) Dep. Tr. at 65:1-66:8).

C. SwedishAmerican is the Only Remaining Market Participant

1. SwedishAmerican Operates the Remaining Hospital and Physician Group

194. The only additional health system that SAMC and RHS view as a competitor in the WOB Area is SwedishAmerican Health System ("SAHS"). PX 4025-026 (Kaatz (RHS) Dep. Tr. at 99:22-100:13; PX 4023-011, 037 (McGrew (OSF) Dep. Tr. at 38:2-9, 144:7-11); PX 210-014 (RHS Bond Disclosure), *confidential*.

195. SAHS is an independent non-profit healthcare system based in Rockford, IL. PX 289 at ¶ 2 *confidential - attorneys' eyes only*.

196. SAHS operates SwedishAmerican Hospital ("SwedishAmerican"), a general acute-care hospital in Rockford, IL. PX 289 at ¶ 2 *confidential - attorneys' eyes only*.

197. SwedishAmerican is a 321-bed hospital that offers primary, secondary, and tertiary services including pediatric care, intensive care, obstetrics and gynecology, as well as outpatient services and emergency services. PX 289 at ¶ 3 *confidential - attorneys' eyes only*; PX4000-011 *confidential - attorneys' eyes only*.

198. SAHS has a GAC market share of 35.6% based on patient days, or 40.2% based on admissions in the WOB Area. The combined OSF/RHS system will have a 63.9% (patient days) or 58.9% (admissions) share and will overtake SAHS by a wide margin as the largest hospital system in Rockford. PX 2501 at Figure 21 (Capps Aff.), *confidential - attorneys' eyes only*.

199. SAHS employs approximately 100 physicians. PX 289 at ¶ 45

confidential - attorneys' eyes only. Approximately 41 of these physicians are PCPs who treat patients inside and outside of the hospital. PX 2501 at Appendix H, Figure 31 (Capps Aff.), *confidential - attorneys' eyes only*.

200. SAHS has a PCP market share of 19.4% in the 30-minute area around Rockford. PX 2501 at Figure 32 (Capps Aff.), *confidential - attorneys' eyes only*. After the Acquisition, the combined OSF/RHS system will have a market share of 41.5%, more than double that of SwedishAmerican. PX 2501 at Figure 32 (Capps Aff.), *confidential - attorneys' eyes only*.

2. SwedishAmerican Treats a Disproportionately Large Medicaid Population

201. SwedishAmerican treats a larger number of Medicaid patients than either SAMC or RMH. PX 289 at ¶ 10 *confidential - attorneys' eyes only*.

202. SwedishAmerican's large volume of Medicaid patients qualifies it as a Disproportionate Share Hospital, qualifying it for additional state subsidies.

PX 289 at ¶ 10

confidential - attorneys' eyes only.

203. SAHS believes that treating uninsured and underinsured patients is part of its mission and a service to the Rockford community. PX 289 at ¶ 10

confidential - attorneys' eyes only.

204. One reason for SwedishAmerican's large number of charity and Medicaid patients is its ongoing relationship with Crusader Community Health ("Crusader") in Rockford. PX 289 at ¶ 11 *confidential - attorneys' eyes only*. Crusader is a physician group that focuses on and treats indigent patients, rather than commercially-insured patients. PX 282 at ¶¶ 4-5 *confidential - attorneys' eyes only*. In fact, only of Crusader's patients are commercially insured. PX 282 at ¶ 1 *confidential - attorneys' eyes only*.

3. SwedishAmerican Does Not Offer Level One Trauma Services

205. SwedishAmerican has a Level Two Trauma Department. In order to obtain a Level One Trauma designation like at SAMC and RHM, the hospital would need an anesthesiologist and a trauma surgeon on site at all times, and SwedishAmerican would need approval from the Illinois Department of Public Health ("IDPH"). PX 289 at ¶ 8 *confidential - attorneys' eyes only*.

206.

PX 4000-049

confidential - attorneys' eyes only.

207. Before the IDPH could grant approval for SwedishAmerican to become a Level One Trauma hospital, third parties such as OSF and RHS would be given the chance to object to the proposed expansion.

PX 289 at ¶ 8 *confidential - attorneys' eyes only*; PX 4000-049

confidential - attorneys' eyes only.

208. In March 2010, SAHS began an affiliation with the University of Wisconsin in Madison that facilitates cooperative medial research, telemedicine services, and patient transfers between the two systems for patients requiring a level of service not available in Rockford. PX 289 at ¶ 6 *confidential - attorneys' eyes only*; PX 4000-036 *confidential - attorneys' eyes only*.

209. SwedishAmerican hosts a University of Illinois College of Medicine Residency Program for primary care physicians. Approximately seven residents participate in the program each year. PX 289 at ¶ 7 *confidential - attorneys' eyes only*.

4. SwedishAmerican-Belvidere Hospital Operates Essentially as an Emergency Room

210. SAHS also operates SwedishAmerican Medical Center in Belvidere, IL ("SwedishAmerican-Belvidere"), which offers basic inpatient services, a range of outpatient services, and an emergency department. PX 289 at ¶¶ 2, 4 *confidential - attorneys' eyes only*.

211. Since SwedishAmerican-Belvidere opened, there have been only a few inpatients admitted directly to the facility. PX 4000-048 *confidential - attorneys' eyes only*. There were no inpatient admissions recorded in Illinois state discharge data for fiscal year 2010. PX 2501 at Figure 2 (Capps Aff.), *confidential - attorneys' eyes only*.

212. Patients who present at the SwedishAmerican-Belvidere emergency room are transferred to one of the three hospitals in Rockford (i.e., not solely SwedishAmerican), depending on their needs, preferences, and insurance restrictions. PX 289 at ¶ 4

confidential - attorneys' eyes only; PX 4000-048

confidential - attorneys' eyes only.

213. Although SwedishAmerican-Belvidere is licensed for up to 55 inpatient beds, it operates only staffed beds. PX 289 at ¶ 5 *confidential - attorneys' eyes only*.

214.

PX 289 at ¶ 5

confidential - attorneys' eyes only; PX 4000-048

confidential - attorneys' eyes only.

215. It would take at least to convert SwedishAmerican-Belvidere into a full-functioning inpatient hospital facility. PX 4000-048

confidential - attorneys' eyes only.

D. Surrounding Community Hospitals do not Compete Meaningfully in the Relevant Markets

216. Defendants' testimony and ordinary course documents show that Rochelle Community Hospital ("Rochelle"), despite being withing the WOB area, does not materially compete with the three Rockford hospitals. PX 4025-026 (Kaatz (RHS) Dep. Tr. at 99:22-100:13); PX 4023-011, 037 (McGrew (OSF) Dep. Tr. at 38:2-9, 144:7-11); PX 210-014 (RHS bond disclosure), *confidential*.

217. Rochelle accounts for only 0.9 percent of WOB Area patient admissions. PX 2501 at Figure 21 (Capps Aff.), *confidential - attorneys' eyes only*.

218. Rochelle does not view itself as a competitor to the three Rockford hospitals; rather, it views itself as their partner due to its referral agreements with the Rockford hospitals. PI Hearing Tr. at 350:5-20 (Capps); PX 264 at ¶ 8 (Peterson (Rochelle) Decl.).

219. Other community hospitals outside of Rockford also do not view themselves as competitors to the Rockford hospitals. PX 258 at ¶ 8 *confidential*; PX 263 at ¶ 8 *confidential*; PX 257 at ¶ 6 *confidential*; PX 259 at ¶ 7 *confidential - attorneys' eyes only*; PX 260 at ¶ 8 *confidential*; PX 262 at ¶ 10 *confidential - attorneys' eyes only*; PX 261 at ¶ 7 *confidential*.

220. These community hospitals view themselves as partners with the Rockford hospitals. PX 259 at ¶ 7 *confidential - attorneys' eyes only*; PX 260 at ¶ 7 *confidential*; PX 258 at ¶ 8 *confidential*; PX 257 at ¶ 11 *confidential*.

221. Rockford employers also testified that their employees rarely leave Rockford for hospital care, and generally do not rely on the outlying community hospitals for care. PX 275 at ¶ 7 *confidential - attorneys' eyes only*; PX 273 at ¶ 6 *confidential*; PX 270 at ¶ 8 *confidential*; PX 277 at ¶ 6 *confidential - attorneys' eyes only*; PX 269 at ¶ 6 (Endsley (C&E Specialties) Decl.); PX 280 at ¶ 3 *confidential - attorneys' eyes only*.

222. Health plans have testified that the community hospitals outside of Rockford do not compete with the Rockford hospitals because they are too far away for their Rockford members to travel to and they do not offer the same breadth of services as the Rockford hospitals. PI Hearing Tr. at 31:12-22 (Lobe); PI Hearing Tr. at 350:5-20 (Capps); PX 4007-034 *confidential - attorneys' eyes only*; PX 256 at ¶ 6 *confidential - attorneys' eyes only*; PX 255 ¶ 6 *confidential - attorneys' eyes only*; PX 251 at ¶ 7 *confidential - attorneys' eyes only*; PX 253 at ¶ 8 *confidential - attorneys' eyes only*; PX 254 at ¶¶ 12-13 *confidential - attorneys' eyes only*.

223. also testified that the hospitals in the area outlying Rockford are not significant competitors with the three Rockford hospitals. PX 289 at ¶ 17 *confidential - attorneys' eyes only*.

E. Primary Care Physicians Who Primarily Serve Indigent Patients or Engage in Teaching Are Not Alternatives For Commercial Health Plans

224. Crusader mainly serves patients with no health insurance or government health insurance. Only of their patients have private insurance. PX 282 at ¶ 1 *confidential - attorneys' eyes only*.

225. Crusader is a Federally Qualified Health Center with a mission to provide primary care to all people in need. PX 282 at ¶¶ 1-2 *confidential - attorneys' eyes only*.

226. Crusader is perceived by some patients as

PX 282 at ¶ 5 *confidential - attorneys' eyes only*. Crusader has

PX 282 at ¶ 4 *confidential - attorneys' eyes only*.

227. The University of Illinois College of Medicine at Rockford also provides primary care. However, most of their 26 PCPs do not engage in clinical practice full time. PX 2501 at ¶ 292 (Capps Aff.), *confidential - attorneys' eyes only*; PX 571-001 (Univ. of IL e-mail), *confidential*; PX 683-001 (Univ. of IL employed staff).

VIII. COMPETITIVE EFFECTS

A. The Acquisition is Likely to Result in Unilateral Anticompetitive Harm

1. The Three Hospitals in Rockford Compete for Two Slots in Health Plan Networks

228. Commercial health plan provider networks in Rockford typically include only two of the three hospitals in Rockford. PI Hearing Tr. at 366:16-369:24 (Capps); PI Hearing Tr. at 28:7-15 (Lobe); PI Hearing Tr. at 230:12-16 (Petersen); PX 2501 at ¶¶ 57-68, 194, Figure 23 (Capps Aff.), *confidential - attorneys' eyes only*. In this "first-stage" of competition, hospitals compete to be included in health plan networks. PX 2501 ¶ 89 (Capps Aff.), *confidential - attorneys' eyes only*.

229. Health plans testified that they need two of the three hospitals in Rockford to be in-network in order to have a marketable network that ensures members have at least some choice of hospitals. PI Hearing Tr. at 30:19-23 (Lobe); PI Hearing Tr. at 232:9-233:3 (Petersen); PI Hearing Tr. at 366:16-367:17 (Capps).

230. Health plan members view a single hospital network as "limiting choice too much." PI Hearing Tr. at 242:13-19 (Petersen).

231. When Coventry entered the Rockford market, it had only RMH in its network and failed to be competitive in the market. PI Hearing Tr. at 239:17-240:6 (Petersen). However, when Coventry added a second hospital, SwedishAmerican, to its network, employers began to view Coventry as a "real competitor," and started to look at their products more seriously. PI Hearing Tr. at 240:7-17 (Petersen).

232. A Rockford area health plan called

PX 4764-001, *confidential - attorneys' eyes only*.

233. Employers have also testified that having a choice of at least two Rockford hospitals and hospital-based physician groups is important to their employees. PX 0280 at ¶ 3

confidential - attorneys' eyes only; PX 0267 at ¶ 4 (Williams (Barnes) Decl.); PX 0265 at ¶ 6 (Cacciapaglia (AFSCME) Decl.).

234. RHS and OSF contracting officials recognize that health plans need to contract with more than one Rockford hospital to have a marketable and accessible health plan for residents of the Rockford area. PX 4763-002 (e-mail from Dillon (RHS))

confidential - attorneys' eyes only; PX 213-026 (Breeden (OSF) IH Tr. at 95:4-23) ("to

be marketable you have to have two hospitals in Rockford."); PX 229-024 (Vayr (OSF) IH Tr. at 87:9-88:15) ("they [] always want at least two hospitals in a network.").

235. Each of the three Rockford hospitals is excluded from two or more of the major health plans' hospital networks, indicating that any combination of the three hospitals creates an attractive and marketable provider network. PI Hearing Tr. at 364:3-366:20 (Capps); PX 2501 at ¶¶ 57-68, 194, Figure 23 (Capps Aff.), *confidential - attorneys' eyes only*.

236. The ability to market a health plan to area employers and enrollees with just two of the three Rockford hospitals, in various permutations, shows that health plans are able to substitute SAMC for RMH, and vice versa. PI Hearing Tr. at 365:22-366:15, 367:19-369:6 (Capps); PX 2506 at ¶ 42 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

2. The Acquisition Will Force Health Plans to Contract with a Combined SAMC-RHS in Order to Offer a Two-Hospital Network

237. After the Acquisition, OSF will control two of the three hospitals within Rockford. OSF Answer at ¶¶ 9, 42, 50, 62, 64; RHS Answer at ¶¶ 62, 64.

238. OSF currently employs an

PX 465-003, *confidential - attorneys' eyes only*; PX 321-002 , *confidential - attorneys' eyes only*; PX 252 at ¶ 20

confidential - attorneys' eyes only. There can still be a merger price effect even where a hospital system allows separate bargaining by individual hospitals. PX 2501 at ¶ 90 FN.124 (Capps Aff.), *confidential - attorneys' eyes only*.

239. Health plan executives testified that a single hospital network consisting only of SwedishAmerican is not viable. PI Hearing Tr. at 249:19-251:10 (Petersen); PI Hearing

Tr. at 33:2-15 (Lobe); PX 0254 at ¶¶ 15-16 *confidential - attorneys' eyes only*.

240. Health plans have testified that the combined SAMC-RHS entity would become a

PX 255 at ¶ 8 *confidential - attorneys' eyes only*; PX 0251 at ¶ 18 *confidential - attorneys' eyes only*; PX 256 at ¶ 22 *confidential - attorneys' eyes only*.

241. The combined entity's bargaining leverage will be further enhanced due to Rockford health plans' contracting dynamic of always offering two in-network hospitals. PI Hearing Tr. at 367:19-368:20 (Capps); PX 2501 at ¶¶ 182, 194, Figure 23 (Capps Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 41:14-21, 82:2-83:5 (Lobe); PI Hearing Tr. at 247:7-23 (Petersen).

242. Prior to the Acquisition, RHS's ability to demand supracompetitive prices is limited by a health plan's ability to still offer a two-hospital network that includes SwedishAmerican and OSF. The same is true of OSF's ability to demand supracompetitive prices. PI Hearing Tr. at 369:25-370:23 (Capps); PX 2501 at ¶ 195 (Capps Aff.), *confidential - attorneys' eyes only*; see PI Hearing Tr. at 231:14-232:8 (Petersen).

243. After the Acquisition, the only way health plans will be able to offer a two-hospital network is to accept OSF's rate and other demands in order to contract with the combined entity, which will give the merged entity the bargaining leverage to obtain higher prices. PI Hearing Tr. at 247:7-23 (Petersen); PI Hearing Tr. at 40:18-41:21 (Lobe); PI Hearing Tr. at 624:1-12 (Schertz); PI Hearing Tr. at 369:25-370:23 (Capps).

3. Single Hospital Networks, and Implicitly a SwedishAmerican-only Network, are not a Viable Alternative for Health Plans

244. Nothing has prevented health plans from offering a single hospital network, yet no health plan in the Rockford marketplace has achieved any meaningful success with an attractive single-hospital network. PI Hearing Tr. at 240:25-245:3 (Petersen); *see also* PI Hearing Tr. at 372:6-14 (Capps) (single hospital network "less valuable").

245. Coventry testified that "these narrow network products really don't have legs" and "if you don't have enough choice in your network, the members don't view that as enough value." PI Hearing Tr. at 242:13-245:12 (Petersen); *see also* PI Hearing Tr. at 370:24-371:15 (Capps) ("by definition, a one-hospital network doesn't offer a choice").

246. Rockford area health plans and employers have testified that their employees value choice of the Rockford hospitals. PI Hearing Tr. at 372:6-24 (Capps); PX 256 at ¶ 13 *confidential - attorneys' eyes only*; PX 255 at ¶ 8 *confidential - attorneys' eyes only*; PX 253 at ¶ 20 *confidential - attorneys' eyes only*; PX 279 at ¶ 5 *confidential - attorneys' eyes only*; PX 269 at ¶ 5 (Endsley (C&E Specialties) Decl.); PX 272 at ¶ 4 (Bubp (Eclipse) Decl).

247. With respect to BCBS-IL's HMOI product, which only includes SwedishAmerican in its network, OSF's Senior Vice President of Managed Care testified that "I guess the behaviors show that - to be marketable you have to have two hospitals in Rockford." PX 213-26 (Breeden (OSF) IH Tr. at 95:4-23); *See also* PI Hearing Tr. at 376:14-377:8 (Capps).

a. OSF's DAN network has been unsuccessful

248. OSF Direct Access Network ("DAN") was developed as

PX 3090 at 2, *confidential - attorneys' eyes only*.

249. The OSF DAN network focuses on

PX 4573 at 15, 19-20, 23, *confidential - attorneys' eyes only*.

250. The OSF DAN network relies on an employment model of providers that

PX 3090 at 2, *confidential - attorneys' eyes only*.

251. OSF Dan Network has been available in Rockford since at least 2008 as a single hospital network including SAMC. PI Hearing Tr. at 617:25-618:8 (Schertz); PX 4020-20 (Schertz (OSF) Dep. Tr. at 75:20-23), *confidential*.

252. No employer in Rockford signed up for DAN from 2008-2010. PI Hearing Tr. at 618:9-21 (Schertz).

253. In November 2011, well after the public announcement of the proposed Acquisition, and the commencement of the FTC's investigation, OSF's Direct Access Network (DAN)

PX 4604 at 1 (First DAN Sale Northern Illinois), *confidential - attorneys' eyes only*; PX 4020-20 (Schertz (OSF) Dep. Tr. at 75:5-7).

254. The OSF DAN network's single employer has 88 employees of which about 68 are eligible for health insurance. PI Hearing Tr. at 659:10-14 (Olson).

255. Rockford Acromatic employees represent "substantially lower than 1 percent" of all Rockford employees. PI Hearing Tr. at 373:10-15 (Capps).

256. Rockford Acromatic's Chairman, Mr. Dean Olson, has attempted to encourage other employers to switch to OSF DAN but with no success. PI Hearing Tr. at 698:2-699:12 (Olson).

b. BCBS-IL's HMOI plan is shrinking

257. Blue Cross has approximately members in the Rockford area. PX 252 at ¶ 5 *confidential - attorneys' eyes only*;PX 4005-037 *confidential - attorneys' eyes only*; PX 2501 at ¶ 58 (Capps Aff.), *confidential - attorneys' eyes only*.

258. Blue Cross offers a Preferred Provider Organization ("PPO"), traditional indemnity, and a Health Maintenance Organization ("HMO") plan in Rockford. PX 252 at ¶ 4 *confidential - attorneys' eyes only*; PX 2501 at ¶ 58 (Capps Aff.), *confidential - attorneys' eyes only*.

259. Blue Cross's PPO has approximately members and accounts for of Blue Cross's Rockford membership. PX 4005-037 *confidential - attorneys' eyes only*; PX 252 at ¶ 5 *confidential - attorneys' eyes only*.

260. Blue Cross's Health Maintenance Organization plan, known as "HMOI," includes only SwedishAmerican as an in-network hospital in Rockford. PX 2501 at ¶ 58 FN.76 (Capps Aff.), *confidential - attorneys' eyes only*.

261. Despite its lower rates compared to insurance products with two-hospital networks, HMOI's enrollment in the Rockford area has been declining over time and now may have

as few as 13,000 covered lives. PI Hearing Tr. at 373:16-25 (Capps); PX 2501 at ¶ 58 FN.76 (Capps Aff.), *confidential - attorneys' eyes only*; PX 4046-042 (Noether Dep. Tr. at 162:9-13).

c. United Healthcare's Core Product is a Pilot Project and is Offered Only Alongside other Products with Broader Provider Networks

262. In 2009, United introduced a pilot product called Core in the Chicago area, including the Rockford market. United designed Core to offer small, fully-insured customers a single-hospital option alongside a multiple-hospital option product. PI Hearing Tr. at 38:12-21 (Lobe).

263. United's total membership in the Chicago and Rockford area totals approximately 900,00 members. Of that, PI Hearing Tr. at 39:16-21 (Lobe); PX 4001-0013 *confidential - attorneys' eyes only*.

264. United's Core product includes only SwedishAmerican as an in-network hospital in Rockford. *See also* PX 4001-008 *confidential - attorneys' eyes only*; PX 217-014 *confidential - attorneys' eyes only*; PX 2501 at ¶ 64 FN.85 (Capps Aff.), *confidential - attorneys' eyes only*.

265. United offers both Core and Choice to its fully-insured customers; thus employers can offer a benefit program with broader access, and a program with a single choice of hospital providers. PX 4001-008 *confidential - attorneys' eyes only*.

266. United does not offer a single-hospital provider network for all of its Rockford-area product offerings because "generally one hospital does not satisfy enough of the membership to provide that access needed for an employer group." PI Hearing Tr. at 30:19-23 (Lobe).

267. United has found that its single-hospital network Core product is

PX 217-014

confidential - attorneys' eyes only.

268. Paula Dillon, RHS's manager of MCO contracting

PX 4763 at 2,

confidential - attorneys' eyes only. *See also* PX 213-026 (Breeden (OSF) IH Tr. at 3-25).

269. Even at a differential or discount from the broader hospital network, Core is only acceptable to very small employers in Rockford. PX 217-014

confidential - attorneys' eyes only; *see also* PX 4001-044

confidential - attorneys' eyes only.

4. Other Health Plans Testify that a SwedishAmerican-Only Network is Much Less Attractive Than a Two-Hospital Network

270. Coventry considered a SwedishAmerican-only hospital network as a "worse case scenario." PI Hearing Tr. at 250:8-251:17 (Petersen).

271. Coventry determined that in order for employer groups and individuals even to consider purchasing a one-hospital SwedishAmerican network, "the price advantage was going to

have to be in excess [of] 15 percent better than what our two-network hospital solution looked like." As a result, the discount "was essentially going to force [SwedishAmerican] to lose money on each and every service that they provided for us." PI Hearing Tr. at 250:8-251:10 (Petersen).

272. Because hospital costs represent 50 percent of Coventry's total spend, SwedishAmerican would have to offer an additional 30 percent discount for Coventry in turn to offer employer groups an additional 15 percent discount. PI Hearing Tr. at 226:5-15, 251:24-252:10 (Petersen). SwedishAmercian already provides a discount in excess of 30 percent and so it cannot give the further discount required without losing money on each and every service. PI Hearing Tr. at 251:24-252:10 (Petersen).

273.

PX 4002-039 *confidential - attorneys' eyes only*.

274. testified that a SwedishAmerican-only network would be less attractive to its members, as evidenced by

PX 4004-037

confidential - attorneys' eyes only; *see also* PX 251 at ¶ 15

confidential - attorneys' eyes only.

5. A Wide Array of Evidence Indicates that SAMC and RHS are Close Competitors

275. A diversion ratio is an economically sound method for quantifying the extent of competition between of the merging parties. PI Hearing Tr. at 382:25-383:11 (Capps); PX 2501 at ¶ 185 (Capps Aff.), *confidential - attorneys' eyes only*.

276. A diversion ratio is an estimate of where patients would receive hospital services if one of the three Rockford hospitals were no longer available. PI Hearing Tr. at 383:5-384:20 (Capps); PX 2501 at ¶ 187 (Capps Aff.), *confidential - attorneys' eyes only*. If one hospital becoming unavailable resulted in an alternative hospital experiencing a substantial increase in patient volume, that would indicate the alternative hospital is a close competitor to the unavailable hospital. PI Hearing Tr. at 383:5-18 (Capps); PX 2501 at ¶ 187 (Capps Aff.), *confidential - attorneys' eyes only*.

277. The three Rockford hospitals are close substitutes for each other, but no hospital outside of Rockford is a viable substitute for any of the Rockford hospitals. PI Hearing Tr. at 383:19-384:20 (Capps); PX 2501 at ¶ 188, Figure 22 (Capps Aff.), *confidential - attorneys' eyes only*.

278. For each Rockford hospital, if that hospital were not available, over 85% of the diverted patients would choose one of the other two Rockford hospitals. PI Hearing Tr. at 384:12-20 (Capps); PX 2501 at ¶ 189 (Capps Aff.), *confidential - attorneys' eyes only*.

279. If RMH were unavailable, 35% of the diverted patients would choose SAMC and 52% of the diverted patients would choose SwedishAmerican. If SAMC were unavailable, 34% of the diverted patients would choose RMH and 52% of the diverted patients would choose SwedishAmerican. PI Hearing Tr. at 383:19-385:18 (Capps).

280. A merger of hospitals that are close competitors, even if they are not the closest competitors, will increase the merged entity's bargaining power by making the option of not contracting with the merged health system less attractive to health plans. PX 2501 at ¶ 182 (Capps Aff.), *confidential - attorneys' eyes only*.

281. Post-Acquisition, health plans will no longer have the option of contracting with just one of the two merging hospitals if they fail to reach an agreement with the other. PX 2501 at ¶ 192 (Capps Aff.), *confidential - attorneys' eyes only*.

282. The ability to increase prices post-merger is greater when the merging parties are closer substitutes. PX 2501 at ¶ 185 (Capps Aff.), *confidential - attorneys' eyes only*.

283. A merger between close competitors can still cause competitive harm without the merging parties being the closest substitutes for each other. PI Hearing Tr. at 385:19-386:15 (Capps); PX 4046-041-042 (Noether Dep. Tr. at 160:24-161:9).

284. Health plans have testified that the three Rockford hospitals compete only with each other, and that they are similar in size and offer similar services. PI Hearing Tr. at 220:1-15 (Petersen); PI Hearing Tr. at 28:7-24, 30:24-31:22 (Lobe); PX 254 at ¶ 9

confidential - attorneys' eyes only.

285. Employers in Rockford have testified that the vigorous competition between all three hospitals to attract patients has led to better quality and additional service offerings at the hospitals. PX 271 at ¶ 3 *confidential*; PX 266 at ¶ 2

confidential - attorneys' eyes only; PX 265 at ¶ 2 (Cacciapaglia (AFSCME) Decl.).

286. Mr. Kaatz stated that competition between the three Rockford hospitals for new programs, quality and outcomes is beneficial to patients. PI Hearing Tr. at 775:6-776:6 (Kaatz).

287. SwedishAmerican evaluates

PX 4000-008

confidential - attorneys' eyes only.

288. Hospitals are willing to offer lower rates in exchange for being part of a narrower hospital network (i.e., the exclusion of other hospitals from the network) because hospitals anticipate that narrower networks will result in higher patient volumes. PI Hearing Tr. at 29:16-19 (Lobe); PI Hearing Tr. at 365:22-366:15 (Capps); PX 222-024-025 (Schertz (OSF) IH Tr. at 89:5-90:7); PX 213-025 (Breeden (OSF) IH Tr. at 92:6-24), *confidential - attorneys' eyes only*.

289. OSF's contracts with health plans include a provision that requires health plans to exclude either SwedishAmerican or RHS, with no distinction between the two. PI Hearing Tr. at 364:3-365:21 (Capps); PX 1025 at 7 *confidential - attorneys' eyes only*; PX 375-001, *confidential - attorneys' eyes only*; PX 340-001, *confidential - attorneys' eyes only*. This demonstrates SAMC's view that it will receive a significant volume of additional patients if either RHS or SwedishAmerican is excluded from a health plan's network, further demonstrating close competition between RHS and SAMC. PI Hearing Tr. at 364:3-366:15 (Capps); PX 2506 at ¶ 44 (Capps Reply Aff.), *confidential - attorneys' eyes only*; PX 1025-007 *confidential - attorneys' eyes only*.

290. RHS and SwedishAmerican also have at least some contracts that require health plans to limit their provider networks to two Rockford hospitals in exchange for better rates. PX 3684-001, *confidential*; PX 1102-001, *confidential - attorneys' eyes only*.

6. Willingness-to-Pay Analysis Also Shows the Acquisition Would Increase Market Power and Allow the Merged Firm to Increase Prices

291. Willingness-to-pay ("WTP") is a peer-reviewed econometric approach, accepted by every court that it has been presented to, for measuring a hospital's bargaining power in negotiations with health plans. PI Hearing Tr. at 388:1-389:21 (Capps); PX 2501 at ¶ 197, Appendix I. (Capps Aff.), *confidential - attorneys' eyes only*.

292. Hospitals that are more desirable and face fewer close substitutes will have a higher WTP. A high WTP for a hospital means that a health plan would suffer a greater reduction in the value of its network if that hospital were removed. PI Hearing Tr. at 388:1-389:21 (Capps); PX 2501 at ¶ 197 (Capps Aff.), *confidential - attorneys' eyes only*.

293. Mergers that increase the WTP for the combined entity will be likely to result in higher prices because the value of a health plan network with the combined entity is substantially greater than a health plan network without the combined entity. PI Hearing Tr. at 388:1-389:14 (Capps); PX 2501 at ¶¶ 197, 202 (Capps Aff.), *confidential - attorneys' eyes only*.

294. Prior to the Acquisition, RMH and SAMC have similar WTP values due to their similar size and service offerings. PX 2501 at ¶ 203, Figure 24 (Capps Aff.), *confidential - attorneys' eyes only*.

295. After the Acquisition, the combined system has a WTP 19% greater than the sum of RMH's and SAMC's individual WTP values. PI Hearing Tr. at 389:15-21 (Capps)**;** PX 2501 at ¶ 203, Figure 24 (Capps Aff.), *confidential - attorneys' eyes only*.

296. This means that the Acquisition increases the value that the combined SAMC-RHM adds to a health plan's network by 19% relative to the value each adds pre-merger. The increase is due to the elimination of competition that would continue to exist between

SAMC and RMH absent the merger. PX 2501 at ¶ 203 (Capps Aff.), *confidential - attorneys' eyes only*. In other words, the merged entity will have substantially more bargaining power when the hospitals work together than they do right now as independent competitors. PI Hearing Tr. at 389:15-21 (Capps).

297. Peer-reviewed economic research demonstrates that increases in WTP of this size are associated with an ability to significantly increase prices. PX 2501 at ¶ 203 (Capps Aff.), *confidential - attorneys' eyes only*.

7. Health Plans Benefit from Competition Between the Three Hospitals

298. In 2007, RHS management believed that Blue Cross would use RHS as leverage against OSF during an open bid process. PX 696-006, *confidential*; PX 690-001, *confidential*; PX 556-002 (RHS Finance and Audit Advisory Committee)

confidential - attorneys' eyes only.

299. The three Rockford hospitals compete over the rates under which they will participate in health plan's networks. PI Hearing Tr. at 367:19-369:6 (Capps); PX 2501 at ¶ 88 (Capps Aff.), *confidential - attorneys' eyes only*. Hospital participation in health plan networks are determined by negotiations over hospital rates. PI Hearing Tr. at 223:17-224:20 (Petersen); *see also* PI Hearing Tr. at 28:10-19, 34:11-35:2 (Lobe) (rates and payment methodology are a "major component of the contract" and are together with language "critically important"); PX 251 at ¶¶ 11-12, 17 *confidential - attorneys' eyes only*; PX 253 at ¶¶ 12, 17 *confidential - attorneys' eyes only*; PX 255 at ¶¶ 10-12 *confidential - attorneys' eyes only*. To the extent that there are alternatives in an area, it makes it harder for a hospital to realize the rate it seeks. PX 218-038 (McGrew (OSF) IH Tr. at 145:5-9;

PX 211-026 (Baker (OSF) IH Tr. at 99:11-100:5), *confidential - attorneys' eyes only*; PX 289 at ¶ 19 *confidential - attorneys' eyes only*. runs pricing models for the proposed rates at Rockford against the current negotiated rates and yield for other contracted hospitals. PX 4001-020 *confidential - attorneys' eyes only*.

300. The parties' documents reflect that the three Rockford hospitals compete to be chosen by health plans as one of two network hospitals in Rockford. PX 563-001 *confidential - attorneys' eyes only*; PX 485-001 *confidential - attorneys' eyes only*; PX 556-002 *confidential - attorneys' eyes only*; PX 254 at ¶¶ 17, 22 *confidential - attorneys' eyes only*; PX 252 at ¶ 14 *confidential - attorneys' eyes only*.

B. The Acquisition Will Result in Loss of Non-Price Competition

301. In the second-stage of hospital competition, hospitals compte to attract patients on the basis of non-price dimensions, such as service offerings, amenities, location, quality and reputation. In-network health plan members do not choose hospitals based on price and, as a result, hospitals must compete to attract such patients even if in-network for a health plan. PI Hearing at 340:10-341:12 (Capps). For example, competition from SAMC and SwedishAmerican spurs RHS to offer new programs. PI Hearing Tr. at 775:6-9 (Kaatz).

302. The Acquisition will decrease the incentive for RMH and SAMC to compete in these aspects. PI Hearing Tr. at 332:7-14, 340:10-25 (Capps); PX 2501 at ¶ 191 (Capps Aff.), *confidential - attorneys' eyes only*.

303. Hospital competition on patient outcomes is always beneficial to patients. PI Hearing Tr. at 775:10-12, 776:1-6 (Kaatz).

304. There is emerging quality competition among the three Rockford hospitals. PI Hearing Tr. at 775:13-15 (Kaatz). SAMC and RHS compete on the basis of quality, technology, and service. PX 211-026 (Baker (OSF) IH Tr. at 97:24-99:10), *confidential - attorneys' eyes only*; PX 4-012 (OSF Partnership Evaluation)

confidential; PX 3049-001 (OSF Follow-up JP Morgan Questions)

confidential; PX 3620-001 (Hospital Acquired Conditions Report)

confidential.

305. The hospitals compete "by looking at areas where they have some strength and how to grow that strength. In other cases, they may look at where they have weakness and how to rectify that." PX 4044-018 (Capps Dep. Tr. at 65:13-21).

306. Mr. Kaatz, RHS's CEO, testified that RHS is a "market disrupter" in the sense that it is a first mover in the "implementation of new ideas." PX 4025-012 (Kaatz (RHS) Dep. Tr. at 42:23-43:5); *see also* PX 216-037 (Kaatz (RHS) IH Tr. at 138:7-139:8)

confidential.

C. The Acquisition Will Increase the Likelihood of Coordinated Anticompetitive Effects Because Only Two Hospital Systems Will Remain

307. The Acquisition will increase the risk of coordinated behavior, or softening of competition, between a merged SAMC-RHS entity and SwedishAmerican. PI Hearing Tr. at 390:21-391:14 (Capps).

308. Anticompetitive coordinated effects could include outright collusion, but much more broadly includes behavior that is profitable only if rival firms (or in this case, one rival firm) reciprocates or accommodates the behavior. One example would be an agreement (overt or tacit) not to steal customers from each other. PI Hearing Tr. at 391:15-393:1 (Capps).

309. The proposed merger will reduce the number of hospital competitors in Rockford from three to two, and coordinated behavior will become easier to monitor with only two firms. For example, if two firms agree to not steal each other's customers, they would know immediately if the other firm "cheated" on the agreement. PI Hearing Tr. at 402:23-404:3 (Capps).

310. The fact that contracts between hospitals and health plans are not public and contain numerous terms does not foreclose or prevent anticompetitive coordination; coordination can still occur and need not be "complete" to be effective. PI Hearing Tr. at 395:11-23 (Capps).

311. For example, if hospital A knew whether a competitor hospital B was in contract negotiations with a particular health plan, hospital A could use that information in deciding how aggressively to negotiate against that health plan. PI Hearing Tr. at 396:11-398:6 (Capps).

312. The three hospitals in Rockford have a history of prior interaction, which alone strongly suggests that the conditions under which coordinated interaction is likely still apply in Rockford. PX 2501 at ¶ 207 (Capps Aff.), *confidential - attorneys' eyes only*.

313. Specifically, in 1983 and 1984, the three Rockford hospitals executed a group boycott against the entity then known as Chicago Blue Cross, which sought to negotiate discounts from the Rockford hospitals' list prices. PI Hearing Tr. at 395:24-396:10 (Capps); PX 2501 at ¶ 207 (Capps Aff.), *confidential - attorneys' eyes only*.

314. The specifics of the coordinated action, which was essentially a joint agreement to reject Chicago Blue Cross's attempt to negotiate discounts, are recounted in detail in this Court's opinion in the 1989 decision enjoining the proposed merger of SwedishAmerican and RHS. PI Hearing Tr. at 395:24-396:10 (Capps); PX 2501 at ¶ 207 (Capps Aff.), *confidential - attorneys' eyes only*; *See United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1304-1306 (N.D. Ill. 1989).

315. In 2008,

PX 1265-001,

confidential; PX 4000-019

confidential - attorneys' eyes only.

316. The Defendants' ordinary course of business documents indicate that the Rockford hospitals continue to monitor and respond to one another's strategic actions, including direct communications regarding pricing that would facilitate coordination. PI Hearing Tr. at 394:8-14, 396:11-398:24 (Capps); PX 2501 at ¶ 210 (Capps Aff.), *confidential - attorneys' eyes only*.

317. During

PI Hearing Tr. at 396:11-398:6 (Capps); PX 630-004, *confidential - attorneys' eyes only*.

318. When one hospital is able to learn about another alternative hospital's negotiations with a health plan, it allows the hospital to be more aggressive, *i.e.*, "held out for a higher amount." PI Hearing Tr. at 396:11-398, 401:7-17 (Capps) (incentive to sell services at a lower price reduced as a result of this type of communication).

319. A similar conversation between SAMC and RHS took place when

PI Hearing Tr. at 398:7-24 (Capps); PX 3151-001, *confidential - attorneys' eyes only*.

320. The fact that a hospital is in- or out-of-network for a certain health plan is generally public information; however, pieces of information that disclose one party's intentions in "real time," like whether a hospital is currently negotiating with a health plan, can contribute to coordination, even if that information may eventually be public. PX 4044-025, 027 (Capps Dep. Tr. at 95:4-18, 104:11-23).

321. When he heard about SwedishAmerican opening its Belvidere facility, Mr. Schertz, CEO of SAMC, called Dr. Gorski to request a joint venture rather than having SwedishAmerican compete with that facility. PI Hearing Tr. at 639:12-19 (Schertz).

322. In another recent episode of communication among the Rockford hospitals, in the fall of 2007, SAMC hired the consulting firm Health Care Futures that conducted a series of interviews with the CEOs of RHS, SwedishAmerican, and certain other hospitals, and

shared its notes from those interviews with SAMC. PI Hearing Tr. at 401:18-402:22 (Capps); PX 349 at 1-2, *confidential*.

323. The Health Care Futures interview with

PI Hearing Tr. at 401:18-402:22 (Capps); PX 349 at 1-2, *confidential.*

324. In the summer of 2008,

PX 704-001, *confidential*.

325. In 2010,

PX 4626-002-003, *confidential*.

326. In 2011,

PX 388-001, *confidential*.

327. There is no valid business reason for competitors to discuss ongoing contract negotiations or other competitively sensitive information. PI Hearing Tr. at 401:3-17 (Capps).

328. Information sharing or communications that would facilitate coordinated behavior will be easier with only two hospitals as opposed to three hospitals in Rockford. PI Hearing Tr. at 402:23-403:16 (Capps). Successful coordination among three competing hospitals requires three communication pathways be maintained and monitored (SwedishAmerican-

to-RHS, SwedishAmerican-to-SAMC, and RHS-to-SAMC), whereas successful coordination post-Acquisition requires only one communication pathway – the pathway between the merged firm and SwedishAmerican – to be maintained and policed. PX 2501 at ¶ 218, FN 295 (Capps Aff.), *confidential - attorneys' eyes only*.

329. Inferences play an important role in monitoring the terms of a coordinated agreement. Such inferences become more powerful with only two competitors rather than three. For example, if one hospital deviates from a coordinated agreement in a way that would increase its patient volume, then the other hospital would feel the full effect of that volume loss if there were only two competitors, and could immediately infer that the first hospital deviated from the coordination scheme. This effect would be diluted if there were three competitors. PX 2501 at ¶ 233 (Capps Aff.), *confidential - attorneys' eyes only*; PX 4044-027 (Capps Dep. Tr. at 102:20-103:9).

D. The Combination of Two of the Three Significant Primary Care Physician Groups will Lead to Anticompetitive Effects

330. The same bargaining dynamics that exist among the Rockford hospitals and health plans also apply in the context of physician services. PX 2501 at ¶ 285 (Capps Aff.), *confidential - attorneys' eyes only*; PX 254 at ¶ 32 *confidential - attorneys' eyes only*.

331. If a hospital employs a significant percentage (*e.g.*, 40% or more) of the primary care physicians (PCPs) in an area, its bargaining leverage against the health plans is increased. PI Hearing Tr. at 46:11-16 (Lobe); PI Hearing Tr. at 253:10-254:5 (Petersen); PX 254 at ¶ 32 *confidential - attorneys' eyes only*.

332. Mergers among physician groups that increase their bargaining leverage will give them the ability to increase the price of physician services. PX 2501 at ¶ 285 (Capps Aff.), *confidential - attorneys' eyes only*.

333. The large share of PCP services accounted for by a merged RHS and SAMC would likely give it the ability to increase the prices it charges health plans and their members for PCP services. PX 4001-031 *confidential - attorneys' eyes only*; PX 255 at ¶ 21 *confidential - attorneys' eyes only*; PX 251 at ¶ 24 *confidential - attorneys' eyes only*.

E. Patients and Their Employers will Face Higher Rates if Insurance Company Reimbursement Rates Increase

334. Rapidly escalating healthcare costs remain a top policy challenge facing the United States. PX 2501 at ¶ 123 (Capps Aff.), *confidential - attorneys' eyes only*.

335. Payments to hospitals accounted for about one-third of private sector payments to providers in 2008. PX 2501 at ¶ 123 (Capps Aff.), *confidential - attorneys' eyes only*.

336. National employer health benefits surveys document the ways in which rising healthcare costs are passed on to patients. PX 2501 at ¶ 124 (Capps Aff.), *confidential - attorneys' eyes only*.

337. The effects of increased health insurance premiums are borne primarily by workers which leads to reduced employment, reduced hours, lower wages and costs associated with losing insurance. PI Hearing Tr. at 333:2-335:14 (Capps); PX 2501 at ¶ 125-126 (Capps Aff.), *confidential - attorneys' eyes only*.

338. Health plans, in this case, have testified that the majority of the effects of increased hospital prices will be borne by individuals and employers in the Rockford area. PX 252 at ¶ 26 *confidential - attorneys' eyes only*.

339. Self-insured employers bear the risk of their health insurance costs and pay the hospital rate increases directly and immediately. PI Hearing Tr. at 218:11-219:8 (Petersen); PI Hearing Tr. at 660:4-15, 691:13-692:15 (Olson); PX 2501 at ¶ 81 (Capps Aff.), *confidential - attorneys' eyes only*.

340. Similarly, Rockford area employers will have little choice but to pass on some or all of increased expenses from higher reimbursement rates to their employees. PI Hearing Tr. at 27:5-9 (Lobe); PI Hearing Tr. at 693:7-24 (Olson).

IX. ENTRY

A. Entry or Expansion Will Not be Timely, Likely, or Sufficient

341. Entry into the acute inpatient hospital services market is a costly, multi-year process that requires extensive planning and state regulatory approval. PI Hearing Tr. at 406:21-407:12 (Capps); PX 226-061 (Seybold (RHS) IH Tr. at 236:9-20) *confidential*; PX 285 at ¶ 13 (Constantino (Illinois Department of Health) Decl.).

342. Dr. Capps concluded that new hospital entry in Rockford was "unlikely to occur" and found no evidence that any new entity is contemplating constructing a new hospital facility. PI Hearing Tr. at 406:21-407:12 (Capps).

343. The Illinois Health Facilities Planning Act (20 ILCS § 3960) establishes a Health Facilities Review Board that administers the Illinois Certificate of Need (CON) Program. CONs are essentially permits for the construction, expansion, or modification of

healthcare facilities and the acquisition of major medical equipment. PX 285 at ¶ 2 (Constantino (Illinois Department of Health) Decl.).

344. General acute care hospitals in Illinois must obtain a CON for any construction, expansion, or modification of a facility. General acute care hospitals must also obtain CON approval before they can increase by 20 beds or 10% of current capacity, whichever is less. PX 285 at ¶ 3 (Constantino (Illinois Department of Health) Decl.).

345. Including planning, the CON process, permitting, and construction, it takes five years or more to open a new hospital in Illinois. PX 285 at ¶ 13 (Constantino (Illinois Department of Health) Decl.).

346. There has been no new hospital entry in Rockford in the last 10 years. PI Hearing Tr. at 407:13-15 (Capps).

347. Entry that is both timely and sufficient to replicate the competitive significance of the acquired hospital, RMH, to potentially offset the competitive harm associated with the merger is extraordinarily unlikely. PX 2501 at ¶ 251 (Capps Aff.), *confidential - attorneys' eyes only*.

348. Significant expansion of one of the existing hospitals would also require state regulatory approval under Illinois CON laws. PX 2501 at ¶ 252 (Capps Aff.), *confidential - attorneys' eyes only*; PX 285 at ¶ 2 (Constantino (Illinois Department of Health) Decl.).

349. As the only other hospital in Rockford, SwedishAmerican is the only potential source of expansion or repositioning. PX 2501 at ¶ 252 (Capps Aff.), *confidential - attorneys' eyes only*.

350.

PX 289 at ¶ 5

confidential - attorneys' eyes only; PI Hearing Tr. at 407:16-408:5 (Capps).

351. Expansion of SwedishAmerican's current facilities is likely to be even more expensive and less timely than greenfield construction. PX 2501 at ¶ 252 (Capps Aff.) *confidential - attorneys' eyes only*.

B. No History of Entry by Out-of Market Firms

352. There have been no attempts by any entity since at least 2000 to construct a new general acute care hospital in Rockford. PX 2264 at ¶ 29 (OSF RFA), *confidential*; PX 2265 at ¶ 29 (RHS RFA), *confidential*.

353. There have been no CON applications for the construction of new hospitals in the area around Rockford over the past five years. PX 285 at ¶ 12 (Constantino (Illinois Department of Health) Decl.).

354. There is no evidence that any person or firm has even started the process of entering the hospital services market in the Rockford area. PX 2501 at ¶ 251 (Capps Aff.) *confidential - attorneys' eyes only*.

C. PCP Entry is Unlikely and the Trend is Toward Hospital Employment of PCPs

355. There are very few independent primary care practitioners left in Rockford. PX 282 at ¶ 6 *confidential - attorneys' eyes only*; PX 283 at ¶ 4 *confidential*; PX 284 at ¶ 5 *confidential*.

356. Most previously-independent physicians are now employed by one of the three hospital primary care groups. PX 282 at ¶ 6 *confidential - attorneys' eyes only*; PX 283 at ¶ 4 *confidential*; PX 284 at ¶ 5 *confidential*.

357. OSF and RHS physician contracts contain non-compete clauses that restrict physicians from practicing in Rockford for a specified period of time after they leave employment. PX 284 at ¶ 2 *confidential*; PX 283 at ¶ 6 *confidential*.

358. RHS and OSF are able to use their significant bargaining leverage to obtain higher levels of reimbursement from commercial health plans for PCP services than independent physician groups are able to observe. PX 282 at ¶ 6 *confidential - attorneys' eyes only*; PX 283 at ¶ 4 *confidential*; PX 284 at ¶ 5 *confidential*.

359. PCP physicians are increasingly joining large hospital employed physician groups, instead of independent practices, because the large employed groups relieve physicians from having to directly manage and bear the costs of administration, medical malpractice coverage and claims, and potentially expensive investments in technology and equipment that private physicians simply cannot afford. PX 282 at ¶ 6 *confidential - attorneys' eyes only*; PX 284 at ¶¶ 5-6 *confidential*; PX 256 at ¶ 21 *confidential - attorneys' eyes only*; PX 220-026 (Ruggles (RHS) IH Tr. at 96:25-97:17); PX 283 at ¶ 5 *confidential*.

360. RHS offers primary care physicians signing bonuses and paid relocation expenses to join its employed physician group. PX 220-026 (Ruggles IH Tr. at 94:17-95:6).

361. As more and more previously-independent physicians are employed by the larger Rockford systems, new independent physicians have not entered the Rockford area. PX 282 at ¶ 6 *confidential - attorneys' eyes only*; PX 283 at ¶ 5 *confidential*; PX 220-026 (Ruggles (RHS) IH Tr. at 96:18-24) (no independent entry in the last three years).

362. The expansion of existing independent primary care practices is difficult, because the process of recruiting new physicians to independent practice is time consuming and expensive, as is the process of trying to attract new patients. PX 283 at ¶ 6 *confidential*; PX 284 at ¶ 7 *confidential*.

363. OSF's CEO, Kevin Schoeplein, testified that "[t]he challenge we have as an industry is recruiting and retaining primary care physicians." PX 223-047 (Schoeplein (OSF) IH Tr. at 178:10-17).

X. EFFICIENCIES

A. Defendants' Purported Efficiencies were Made for Litigation

364. The 2010 *Horizontal Merger Guidelines* state that estimates of merger related "efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process." PX 205-033 (*Merger Guidelines* § 10).

365. Plaintiff's and Defendants' experts, Dr. Capps, Mr. Dagen, and Dr. Manning, all claimed to rely on the framework set out in the Merger Guidelines in analyzing the efficiencies alleged to result from the Acquisition. PX 2501 at ¶ 9 (Capps Aff.), *confidential -*

attorneys' eyes only; PX 2502 at ¶ 9 (Dagen Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 811:3-11, 811:18-812:20; 813:1-12 (Manning).

366. Outside antitrust counsel for OSF and RHS hired FTI Consulting Inc. ("FTI")

PX 681-001 (FTI CID Response dated May 11, 2011), *confidential*.

367. The December 14, 2010 "Business Efficiencies Report for the RHS-OSF Affiliation" ("FTI Merger Report") is a summary of the efficiencies analysis done by FTI Consulting, Inc. ("FTI"). PX 34-001, *confidential*. The cover of the FTI Merger Report states:

PX 34-001, *confidential*.

368. Counsel for Defendants stated that "FTI was hired by Hinshaw & Culbertson and McDermott, Will & Emery jointly, and that the work was done in anticipation of litigation." PX 228-008 (Tosino (FTI) IH Tr. at 23:8-11).

369. An RHS ordinary course document indicates that

PX 566, *confidential*.

370.

PX 2100-002, *confidential*. The Managing Director at FTI testified that the FTI Merger Report "was shared with counsel" prior to being presented to RHS or OSF executives. PX 214-009 (Dawes (FTI) IH Tr. at 28:22-29:2). Absent any expected antitrust review, OSF would not have hired FTI to conduct an efficiency analysis of the Acquisition. PX 227-039 (Stenerson (OSF) IH Tr. at 149:10-15)

("We weren't anticipating the retaining of an expert consultant at that point in time, except for this [FTC review] purpose.").

371. RHS had never retained FTI for any purpose prior to this matter, and has no intention to utilize FTI for any purpose after this litigation is over. PI Hearing Tr. at 760:14-16; 761:24-762:2 (Kaatz).

B. Defendants' Horizontal Merger Guidelines Analysis is Ongoing and Not Complete

372. OSF did "no formal deep analysis" of the efficiencies that may result from the proposed transaction. PX 221-056 (Schertz (OSF) IH Tr. at 215:23- 216:5). OSF had Health Care Futures give a "30,000 foot analysis" about the potential benefits of a merger. PI Hearing Tr. at 593:24-594:7 (Schertz).

373. RHS has not done any internal efficiencies analysis of its own, and has instead only reviewed the analysis contained in the December 2010 FTI Merger Report. PI Hearing Tr. at 761:1-14 (Kaatz). Mr. Kaatz, RHS's CEO, testified that he is unaware of any additional efficiencies analysis conducted since the 2010 FTI Merger Report. PI Hearing Tr. at 761:1-14 (Kaatz).

374. The FTI Merger Report is not, and does not purport to be, a Merger Guidelines analysis of the alleged efficiencies PI Hearing Tr. at 905:1-8 (Manning); PX 2264 (OSF RFA) at ¶ 26 *confidential*

375. Defendants' expert Dr. Manning, relied upon the FTI Merger Report in conducting her analysis of the alleged efficiencies. PI Hearing Tr. at 811:3-11 (Manning); PX 2507 at ¶ 7 (Dagen Suppl. Aff.), *confidential - attorneys' eyes only*.

376. Dr. Manning's analysis of the alleged efficiencies is incomplete. PI Hearing Tr. at 915:2-9 (Manning). She has concluded thus far that only $15.2 to $15.6 million of the $42 to $56 million of recurring cost savings identified in the FTI Merger Report are cognizable under the Merger Guidelines. PI Hearing Tr. at 914:16-915:9 (Manning); PX 2268 at Table 1 (Manning Suppl. Aff.), *confidential*.

377. Dr. Manning's analysis is ongoing with respect to approximately two-thirds of the recurring cost savings that were identified in the FTI Merger Report. PI Hearing Tr. at 914:16-915:9 (Manning).

PX 2268 at Table 1 (Manning Suppl. Aff.), *confidential*.

378. For some of the areas identified by FTI where potential cost savings might occur, Dr. Manning has already determined that the purported savings are not cognizable in the context of an antitrust case. PI Hearing Tr. at 915:10-14 (Manning).

379. Dr. Manning expects to conduct a more complete Merger Guidelines analysis of the purported efficiencies for purposes of the ongoing administrative proceeding. PI Hearing Tr. at 824:20-825:9 (Manning) ("I hope to complete my analysis or will complete my analysis before the administrative law judge's hearing, but that analysis is ongoing").

C. The Defendants' Efficiency Claims are Speculative, Unverifiable, and Not Merger-Specific

380. A significant portion of the alleged efficiencies are not cognizable efficiencies, are not merger-specific, or are speculative and unsubstantiated. PX 2502 at ¶ 12 (Dagen Aff.), *confidential - attorneys' eyes only*.

381. Experts for both the Plaintiff and Defendants agree that a Merger Guidelines analysis requires that efficiencies claims be verifiable and requires that the merging parties substantiate any efficiency claims. PI Hearing Tr. at 836:23-837:9 (Manning) ("the merging firms have to substantiate efficiency claims so that the agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency" as well as "how and when each [efficiency] would be achieved."); PI Hearing Tr. at 408:15-409:16 (Capps) (efficiency claims "have to be non-speculative in nature or verifiable or at least the measures required to achieve those cost savings must both be reasonably likely to occur and reasonably likely to succeed."); PX 205-033 (*Merger Guidelines* § 10).

382. The FTI Merger Report is merely an outline of possible savings opportunities; Defendants have not made any decisions to pursue any of the possible savings, thus making the purposed savings speculative. PX 2507 at ¶ 4 (Dagen Suppl. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 908:13-20 (Manning). The FTI Merger Report was finalized over a year ago, and yet no decisions have been made since that time. PX 2507 at ¶ 9 (Dagen Suppl. Aff.), *confidential - attorneys' eyes only*.

383. The FTI Merger Report is merely a "summary of the recommendations that FTI identified during their review where they thought savings could be achieved through the affiliation." PX 4021-040 (Seybold (RHS) Dep. Tr. at 155:7-13).

384. None of the efficiency opportunities identified in the FTI Merger Report have been decided upon or approved by either RHS or OSF. PI Hearing Tr. at 908:13-16 (Manning). OSF and RHS have not yet decided whether to go forward with any of the efficiency recommendations contained in the FTI Merger Report. PI Hearing Tr. at 908:17-20 (Manning); PX 4020-035 (Schertz (OSF) Dep. Tr. at 135:19-136:10). The Defendants' expert acknowledged that she has not concluded OSF and RHS would in fact pursue any of the efficiency opportunities contained in the FTI Merger Report post-Acquisition. PX 4040-038 (Manning Dep. Tr. at 146:18-21).

1. The Defendants' Clinical Consolidations Claims are Speculative and Not Cognizable

385.

PX 34-003 (FTI Merger Report), *confidential*.

PX 4045-040 (Brown Dep. Tr. at 156:3-9); PX 34-003 (FTI Merger Report) *confidential*.

386. OSF and RHS executives testified only that, if the merger proceeds, they plan to

PX 4025-041-042, 048 (Kaatz (RHS) Dep Tr. at 160:23-161:6, 187:7-2) *confidential*; PX 220-016, 038 (Ruggles (RHS) IH Tr. at 56:25-57:3, 142:3-14).

387. Evidence that competitors will merge and then "study" whether and how to combine operations does not constitute a verifiable and cognizable efficiency. PX 2502 at ¶ 56 (Dagen Aff.), *confidential - attorneys' eyes only*.

388. It is possible that no clinical services will consolidated after the Acquisition. PI Hearing Tr. at 749:6-9 (Kaatz). OSF and RHS executives have not yet prepared integration plans for any of the identified clinical consolidations. PX 4040-057 (Manning Dep. Tr. at 221:1-10).

389. Defendants' clinical consolidation claims are speculative and unsubstantiated given the great deal of uncertainty of the timing, and whether they will occur at all. PX 2502 at ¶ 58 (Dagen Aff.), *confidential - attorneys' eyes only*.

390. The purported clinical consolidation efficiency claims are speculative because OSF and RHS have not identified specific services lines that will be consolidated or where they will be consolidated. PI Hearing Tr. at 414:13-415:5 (Capps).

391. Physician and community resistance are significant hurdles to the types of clinical consolidation that Defendants' litigation consultants recommend. PI Hearing Tr. at 119:2-122:2 (Romano); PX 2505 at ¶ 36 (McAnallen Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 911:14-22 (Manning). Mr. Kaatz, RHS's CEO, expressed concern about physician resistance in the community to clinical consolidations. PI Hearing Tr. at 753:17-21(Kaatz); PX 4025-047 (Kaatz (RHS) Dep. Tr. at 183:10-13) *confidential - attorneys' eyes only*. The FTI Business Efficiencies Report identified physician resistance to consolidation as a PX 1-020, 027 (FTI Report), *confidential*.

392. There have been no discussions with physicians about the FTI Merger Report, nor any meetings with physicians to explain to them the changes that could come about as a result of the Acquisition. PX 4020-036-037 (Schertz (OSF) Dep. Tr. at 140:15-141:2); PI Hearing Tr. at 755:1-20 (Kaatz).

393. Leakage describes the number of patients who currently go either to RMH or SAMC but would, following the consolidation of a clinical service line post merger, go to SwedishAmerican rather than the hospital where the services were consolidated. PI Hearing Tr. at 937:10-15 (Manning); PX 2507 at ¶ 9 (Dagen Suppl. Aff.), *confidential - attorneys' eyes only*.

394. An analysis of potential leakage should be undertaken before making the decision to consolidate clinical services. PI Hearing Tr. at 938:1-8 (Manning). Dr. Manning has not conducted an analysis of possible revenue leakage from the consolidation of any clinical services. PI Hearing Tr. at 938:24-939:3 (Manning).

395. Without this leakage analysis, it is unclear whether the merged entity will have the financial incentive to consolidate services. PI Hearing Tr. at 418:23-419:22 (Capps); PI Hearing Tr. at 120:9-121:7 (Romano).

i. Trauma

396. Defendants' experts acknowledge it is possible trauma services will never be consolidated by OSF and RHS. PX 4040-050 (Manning Dep. Tr. at 195:10-14); PX 4045-042 (Brown Dep. Tr. at 164:17-22).

397. RHS and OSF have not yet made any final decisions regarding whether to consolidate trauma services after the Acquisition is consummated, or where such services would be consolidated. PI Hearing Tr. at 756:6-10 (Kaatz); PX 2265 (RHS RFA) at ¶ 18, *confidential*; PX 2264 (OSF RFA) at ¶ 18, *confidential*.

398. If Defendants decide to consolidate trauma services, it could take another 24-36 months from the day that the Acquisition is consummated before trauma services are in fact

consolidated, and both RHS and SAMC could still be offering separate Trauma I services in two years. PI Hearing Tr. at 757:19-25; 756:14-16 (Kaatz).

399. Dr. Manning has not conducted an analysis of possible revenue leakage from the consolidation of trauma services. PI Hearing Tr. at 938:13-18 (Manning). Such an analysis should be undertaken before making the decision to consolidate clinical services. PI Hearing Tr. at 938:1-8 (Manning).

ii. Cardiology

400. Defendants' experts acknowledge it is possible cardiac services will never be consolidated by OSF and RHS. PX 4040-050 (Manning Dep. Tr. at 195:15-21); PX 4045-042-043 (Brown Dep. Tr. at 164:23-165:5).

401. RHS and OSF have not yet made any final decisions regarding whether to consolidate cardiology and cardiac services after the Acquisition is consummated, or where such services would be consolidated. PI Hearing Tr. at 758:1-5 (Kaatz); PX 2265 (RHS RFA) at ¶ 20, *confidential*; PX 2264 (OSF RFA) at ¶ 20, *confidential*.

402. Dr. Manning has not conducted an analysis of possible revenue leakage from the consolidation of cardiology services. PI Hearing Tr. at 938:19-21 (Manning). Such an analysis should be undertaken before making the decision to consolidate clinical services. PI Hearing Tr. at 938:1-8 (Manning).

403. Even if the Acquisition is consummated, OSF and RHS will still have to conduct additional analysis before they can make such a decision. PI Hearing Tr. at 758:1-7 (Kaatz).

iii. Women's and Children's Services

404. Defendants' experts acknowledge it is possible that women's and children's services will never be consolidated by OSF and RHS. PX 4040-050 (Manning Dep. Tr. at 194:3-7); PX 4045-043 (Brown Dep. Tr. at 165:14-17).

405. RHS and OSF have not yet made any final decisions regarding whether to consolidate women's and children's services after the Acquisition is consummated, or where such services would be consolidated. PI Hearing Tr. at 759:12-19 (Kaatz).

406. Dr. Manning has not conducted an analysis of possible revenue leakage from the consolidation of women's and children's services. PI Hearing Tr. at 938:22-23 (Manning). Such an analysis should be undertaken before making the decision to consolidate clinical services. PI Hearing Tr. at 938:1-8 (Manning).

407. Even if women's and children's services are consolidated, both FTI's and Dr. Manning's claimed savings are overstated. PX 2505 at ¶¶ 38-41 (McAnallen Aff.), *confidential - attorneys' eyes only*. Both FTI and Dr. Manning assume that after the merger, RMH's work hours per delivery will decrease to an industry standard, thereby allowing it to reduce the number of FTE's it employs. PX 2505 at ¶ 38 (McAnallen Aff.), *confidential - attorneys' eyes only*. However, Dr. Manning and Mr. Brown of FTI have both failed to show why adding patients at RMH does not require additional staff to meet the additional demand placed on the women's and children's department. PX 2505 at ¶¶ 38, 40 (McAnallen Aff.), *confidential - attorneys' eyes only*. The most likely outcome from moving SAMC's delivery to RMH is that RMH will need to increase its staffing levels, and incur additional labor costs, to account for the added number of deliveries RMH will be performing. PX 2505 at ¶ 40 (McAnallen Aff.), *confidential - attorneys' eyes only*.

2. Claimed Capital Avoidance Savings Relating to Facility Plans are Speculative

408. There is considerable doubt that SAMC would actually construct a bed tower absent the acquisition. PX 2502 at ¶ 33 (Dagen Aff.), *confidential - attorneys' eyes only*; PX 211-057 (Baker (OSF) IH Tr. at 221:2-19), *confidential - attorneys' eyes only*.

409. SAMC has not considered or analyzed whether it actually needs a bed tower since it commissioned a 2008 study, just prior to putting the project on hold. PX 2505 at ¶ 20 (McAnallen Aff.), *confidential - attorneys' eyes only*; PX 4515, *confidential - attorneys' eyes only*. Ms. McAnallen found that to determine whether a bed tower is needed today, OSF needs to complete an in-depth study of current market conditions. PX 2505 at ¶ 20 (McAnallen Aff.), *confidential - attorneys' eyes only*.

410. OSF allocated initial funds to determine if the construction of a new bed tower at SAMC was justified and make the decision about whether to pursue the project. PX 211-024 (Baker (OSF) IH Tr. at 90:3-13) *confidential - attorneys' eyes only*. However, initial funds related to the consideration of the bed tower were never spent and the project was put on hold. PX 227-017 (Stenerson (OSF) IH Tr. at 58:12-59:10), *confidential - attorneys' eyes only*.

411. OSF does not currently – and never has had – any funds allocated for the actual construction of a bed tower at SAMC. PX 211-024 (Baker (OSF) IH Tr. at 89:16 - 90:02), *confidential - attorneys' eyes only*. SAMC has not requested funds for the construction of a bed tower in any of the last three years. PX 227-017 (Stenerson (OSF) IH Tr. at 58:12-15), *confidential - attorneys' eyes only*.

412. OSF's CFO testified:

PX 211-057 (Baker (OSF) IH Tr. at 221:2-19), *confidential*.

413. According to Ms. McAnallen, industry standards relating to needed hospital capacity indicate that a hospital needs roughly 20 to 30 percent excess bed capacity over average daily census. PX 2505 at ¶ 18 (McAnallen Aff.), *confidential - attorneys' eyes only*. Mr. Brown from FTI agreed with Ms. McAnallen's assessment that 30 percent is a reasonable excess capacity for a hospital. PX 4045-014 (Brown Dep. Tr. at 49:4-7).

414. In 2010, SAMC's average daily census was 141. PX 2505 at ¶ 18 (McAnallen Aff.), *confidential - attorneys' eyes only*. Based on industry standards, Ms. McAnallen found that SAMC needs at most only 184 beds given its current census, and therefore the construction of a new bed tower is not needed, even if SAMC converts a portion of its current semi-private rooms to private rooms. PX 2505 at ¶¶ 17-18, 21 (McAnallen Aff.), *confidential - attorneys' eyes only*.

415. There are numerous strategies that a hospital can implement to accommodate peaks in patient volume and still mitigate the need for additional capacity. PX 2505 at ¶ 19 (McAnallen Aff.), *confidential - attorneys' eyes only*; PX 228-037 (Tosino (FTI) IH Tr. at 139:9-141:19). There is no reason why SAMC could not implement strategies to manage its patient census figures and thereby alleviate any current need it may have to build a bed tower. PX 2505 at ¶ 21 (McAnallen Aff.), *confidential - attorneys' eyes only*.

416. Even if SAMC currently requires a bed tower, it is not clear how the merger alleviates the need for the tower. PX 2502 at ¶¶ 35-36 (Dagen Aff.), *confidential - attorneys' eyes only*.

417. OSF and RHS claim that post-merger, services will shift between SAMC and RMH and SAMC can convert its current bed capacity to a configuration of 200 total beds, consisting of about two-thirds private rooms. PX 4045-016 (Brown Dep. Tr. at 59:16-60:13); PX 452-001, *confidential*; PX 2261 at ¶ 123 (Brown Expert Report), *confidential*.

418. OSF and RHS have not presented any study or analysis showing how bed capacity needs at either SAMC or RMH will change after the merger. PX 2502 at ¶ 36 (Dagen Aff.), *confidential - attorneys' eyes only*.

419. Mr. Dagen found that because clinical consolidations between SAMC and RMH are speculative, and because not all clinical consolidations would necessarily move from SAMC to RMH, even if SAMC does require a bed tower today, it would still likely need a similarly sized bed tower post-merger. PX 2502 at ¶ 36 (Dagen Aff.), *confidential - attorneys' eyes only*. In that case, there would be no capital avoidance facilitated by the merger. PX 2502 at ¶ 36 (Dagen Aff.), *confidential - attorneys' eyes only*.

3. Claimed Clinical and Operational Effectiveness/Best Practice Savings are Not Merger-Specific and Overstated

420. Clinical and operational effectiveness refers to clinical information, processes, and practices that impact clinical cost and quality outcomes. PX 2261 at ¶ 42 (Brown Aff.), *confidential*.

421. Hospitals can seek to limit practice variation and reduces costs through benchmarking, either internally or externally, or by hiring consultants to assist hospital medical staff standardize best practices. PX 2505 at ¶ 23 (McAnallen Aff.), *confidential - attorneys' eyes only*.

422. Defendants have identified best practices and improved their quality and cost of care without a merger. PI Hearing Tr. at 769:16-770:22 (Kaatz); PI Hearing Tr. at 630:1-16 (Schertz); PI Hearing Tr. 134:5-21 (Romano).

423. RHS' CEO testified that there is "no magic whatsoever" in achieving cost savings. PI Hearing Tr. at 770:8-10 (Kaatz); PX 216-055 (Kaatz (RHS) IH Tr. at 212:23-25). In fact, RHS has implemented hundreds of costs savings over the last several years. PI Hearing Tr. at 769:16-18 (Kaatz). Mr. Seybold, RHS' CFO, testified that the cost savings programs that RHS "undertook were no different than programs I'm sure many, many other organizations have undertaken." PX 4021-045 (Seybold (RHS) Dep. Tr. at 173:20-25).

424. RHS will continue to improve its operational efficiency without a merger. PI Hearing Tr. at 771:1-19 (Kaatz); PX 4025-016 (Kaatz (RHS) Dep. Tr. at 58:19-59:3).

425. SAMC has implemented a number of procedures to improve its cost of delivering care. PI Hearing Tr. at 630:1-4 (Schertz). Such actions include improving length of stay, improving readmission rates, more efficiently staffing departments, and reducing labor cots. PI Hearing Tr. at 630:5-19 (Schertz).

426. SAMC will continue to improve its operational efficiency without a merger. PI Hearing Tr. at 631:5-13 (Schertz).

427. Dr. Manning's analysis shows that for both SAMC and RMH, opportunities currently exist for physicians to share best practice and lower costs internally without the merger. PX 4040-062-063 (Manning Dep. Tr. at 244:15-245:13).

428. Defendants' expert, Jeffrey Brown, affirmed that RHS has been able to lower its costs of care without a merger. PX 4045-060 (Brown (FTI) Dep. Tr. at 235:13-25) *confidential*.

Mr. Brown also believes that SAMC could lower its cost of care without a merger. PX 4045-061 (Brown (FTI) Dep. Tr. at 237:20-238:2).

429. FTI created separate Performance Opportunity Reports for RHS and SAMC. PX 2000, *confidential*; PX 2001 *confidential*. In these Performance Reports, FTI identified a number of potential savings that both RHS and SAMC could achieve absent any merger. PI Hearing Tr. at 915:24-918:2 (Manning); PX 228-008 (Tosino (FTI) IH Tr. at 25:5-15).

430. The Performance Opportunity Reports created by FTI separately for OSF and RHS suggest that Defendants may even be able to achieve greater clinical and operational effectiveness savings as stand-alone entities than they could achieve through the merger. PX 2502 at ¶ 86 (Dagen Aff.), *confidential - attorneys' eyes only*.

431.

PX 2000-006 (RHS Performance Opportunities Report), *confidential*; PX 2001-006 (OSF SAMC Performance Opportunities Report), *confidential*.

432. Mr. Seybold, RHS's CFO, testified that the Performance Opportunity Report prepared for RHS "went slightly deeper" than the FTI Merger Report because it "identified more specific areas of opportunity than the generic areas of opportunity that they identified within the merger analysis." PX 4021-048 (Seybold (RHS) Dep. Tr. at 186:25-187:15). Mr. Seybold testified that the $10.1 to $15.7 million in recurring savings identified by FTI are "reasonable and achievable" by a standalone RHS. PX 4021-048 (Seybold (RHS) Dep. Tr. at 186:3-6).

433. Dr. Manning testified that her analysis required her to determine to what extent savings alleged to result from the Acquisition were not merger-specific because they could be

achieved by either RHS or OSF without the Acquisition. PI Hearing Tr. at 922:18-923:4 (Manning). However, Dr. Manning did no analysis to determine whether the savings identified in the FTI Performance Opportunities Reports were the same savings identified in the FTI Merger Report. PI Hearing Tr. at 923:5-11 (Manning). In fact, the FTI Performance Opportunities Reports are never mentioned a single time in either of Dr. Manning's declarations. PI Hearing Tr. at 923:12-19 (Manning).

434. The Performance Opportunity Reports also show that clinical and operational effectiveness savings in the FTI Merger Report, even if valid, may be overstated by as much as $6.1 million. PX 2502 at ¶ 87 (Dagen Aff.), *confidential - attorneys' eyes only*.

435. Ms. McAnallen has assisted numerous hospitals improve best practices without the need for a merger. PX 2505 at ¶¶ 26-27 (McAnallen Aff.), *confidential - attorneys' eyes only*. Ms. McAnallen found that the Acquisition does not create anything additive from a clinical and operational effectiveness perspective. PX 2505 at ¶ 25 (McAnallen Aff.), *confidential - attorneys' eyes only*.

436. The Defendants' asserted merger savings relating to clinical and operational effectiveness are not merger-specific. PX 2505 at ¶¶ 23-24 (McAnallen Aff.), *confidential - attorneys' eyes only*; PX 2502 at ¶ 82 (Dagen Aff.), *confidential - attorneys' eyes only*.

437. Many of the purported cost savings are based on the unreasonable assumption that the two hospitals can adopt the lowest-cost best practices without regard as to whether it is practicable to do so. Integrating two separate institutions could result in the higher-cost practice prevailing after the Acquisition. PX 2507 at ¶¶ 26-27 (Dagen Suppl. Aff.), *confidential - attorneys' eyes only*.

438. The District Court assessing the 1989 proposed merger between RHS and SwedishAmerican found that "the standardization of clinical practices does not require a merger." *United States v. Rockford Mem'l Corp.*, 717 F.Supp. 1251, 1291 (N.D. Ill. 1989), *aff'd, United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1286 (7th Cir. 1990).

4. Defendants' Other Claimed Efficiencies are Not Cognizable

439. Defendants' claimed savings relating to oncology are speculative and rest on an incomplete plan to locate within the walls of SAMC an RHS oncology clinic that would flout the intent of the 340B program for disproportionate share hospitals. PX 2502 at ¶¶ 108-109 (Dagen Aff.), *confidential - attorneys' eyes only*. The supposed oncology arrangement would be extremely difficult to complete, involve a number of complex accounting and medical arrangements, and is unlikely to occur. PX 2502 at ¶ 110 (Dagen Aff.), *confidential - attorneys' eyes only*.

440. Service line growth as described in the FTI Merger Report is not a verifiable or merger specific efficiency. PX 2502 at ¶ 115 (Dagen Aff.), *confidential - attorneys' eyes only*. According to Defendants' expert, Mr. Brown,

PX 4045-065 (Brown (FTI) Dep. Tr. at 253:15-254:6) *confidential*. However, FTI does not even recommend the consolidation of three of the four service lines where it asserts the potential for revenue growth exists, and recommends only a partial consolidation of the fourth (cardiology). PX 2502 at ¶ 119 (Dagen Aff.), *confidential - attorneys' eyes only*.

441. Defendants have not produced the required information to verify the savings listed in the FTI Merger Report. PX 2507 at ¶¶ 3-4 (Dagen Suppl. Aff.), *confidential - attorneys' eyes*

only. Without such information and a detailed analysis, such savings are not cognizable under the Merger Guidelines. PX 2502 at ¶ 10 (Dagen Aff.), *confidential - attorneys' eyes only*. By her own admission, Dr. Manning's analysis is ongoing and does not serve to verify the majority of the FTI Merger Report claims. PI Hearing Tr. at 914:16-915:9 (Manning).

D. Defendants Must Still Conduct Extensive Integration Planning But Have Chosen Not To Do So

442. Under the terms of the Affiliation Agreement, RHS and OSF are required to take steps to develop an "Integration Plan" prior to the closing of the Acquisition. PX 37 at 18-19 (Affiliation Agreement § 5.4), *confidential*; PX 226 at 28 (Seybold (RHS) IH Tr. at 104:23-105:10).

443. Integration planning will determine which efficiency opportunities OSF and RHS will in fact pursue once the Acquisition is consummated, such as whether and what clinical services to consolidate. PI Hearing Tr. at 752:1-16 (Kaatz); PX 223-037 (Schoeplein (OSF) IH Tr. at 138:5-18).

444. Extensive integration planning must occur before the defendants can begin implementing any achievable efficiency opportunities. PX 2507 at ¶ 4 (Dagen Suppl. Aff.), *confidential - attorneys' eyes only*.

445. RHS and OSF have not yet begun their integration planning. PX 4021-036 (Seybold (RHS) Dep. Tr. at 139:21-140:10); PX 227-035 (Stenerson (OSF) IH Tr. at 132:6-133:11), *confidential - attorneys' eyes only*.

446. RHS and OSF selected, but did not retain, Deloitte Consulting ("Deloitte") to act as the team lead for the integration planning efforts. PI Hearing Tr. at 749:10-19 (Kaatz).

447.

PX 3069-008-009, *confidential*.

448. Had OSF and RHS retained Deloitte, they could provide sensitive business information to Deloitte allowing Deloitte to begin integration planning at any time, including prior to the end of this litigation. PI Hearing Tr. at 750:16-751:12 (Kaatz).

449.

PX 4020-034 (Schertz (OSF) Dep. Tr. at 131:3-132:8) *confidential*.

450. RHS and OSF delayed integration planning in part because they did not want to incur the financial cost. PI Hearing Tr. at 751:8-21 (Kaatz).

451. Even after a consultant is retained, it would take at least 12 months for OSF and RHS to conduct integration planning. PI Hearing Tr. at 752:1-5 (Kaatz).

452. OSF and RHS need not consummate the Acquisition in order to decide which efficiency opportunities to pursue and how to implement them. It is quite common for merging organizations to conduct detailed and thorough integration planning even while they remain independent, so that they can immediately begin implementing efficiencies once the transaction is consummated. PX 2507 at ¶ 10 (Dagen Suppl. Aff.), *confidential - attorneys' eyes only*.

453. Merging companies in various industries have performed extensive and detailed merger integration planning prior to consummating their transaction. Delay in consummating the Acquisition is not a barrier to integration planning. PX 2507 at ¶¶ 4, 10 (Dagen Suppl. Aff.), *confidential - attorneys' eyes only*.

E. Defendants Have Failed to Show That the Purported Efficiencies Will Benefit Consumers

454. The Merger Guidelines state that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." PX 205-032 (Merger Guidelines § 10).

455. Dr. Manning did not analyze and has no expert opinion on what rates RHS and OSF would charge to commercial health plans if the Acquisition is consummated as compared to if the Acquisition does not occur. PI Hearing Tr. at 941:19-942:14 (Manning); PX 4040-075 (Manning Dep. Tr. at 294:18-295:4). Therefore, Dr. Manning offers no opinion on how price levels for hospital services if the Acquisition occurs would compare to the prices that would prevail if the Acquisition does not occur. PI Hearing Tr. at 942:15-18 (Manning).

456. Dr. Manning has not concluded that absolute levels of reimbursement to OSF or RHS from commercial health plans will go down as a result of the Acquisition. PX 4040 at 75 (Manning Dep. Tr. at 293:16-294:12).

457. Dr. Manning has not performed any quantitative analysis to determine what portion of the Acquisition's cost savings, if any, would be passed through to health plans or employers. PI Hearing Tr. at 943:13-20 (Manning).

458. In contrast, Dr. Capps performed an analysis of the Acquisition's impact on pricing and concluded that the likely effect is increased prices for hospital services in the Rockford area. PI Hearing Tr. at 333:2-334:9 (Capps).

459. Dr. Manning's conclusion that cost savings from the Acquisition may benefit consumers is not based on a "specific analysis" but rather on "economic theory." PI Hearing Tr. at 942:19-943:3 (Manning); PX 4040-078 (Manning Dep. Tr. at 307:8-24). Dr. Manning relied upon literature and what she believes would be the "economic incentives" of the merged firm. PX 4040-078 (Manning Dep. Tr. at 307:25-308:3).

460. To Dr. Manning's knowledge, neither RHS nor OSF has reduced rates charged to commercial health plans. PX 4040-077 (Manning Dep. Tr. at 301:11-302:10). Dr. Manning is unaware of ordinary course documents indicating that RHS or OSF lowered reimbursement rates to a health plan after successfully reducing their operating costs. PX 4040-077 (Manning Dep. Tr. at 302:17-303:12).

461. There have been no decisions to freeze rates or limit rate increases to commercial health plans if the Acquisition is consummated. PI Hearing Tr. at 760:3-9 (Kaatz).

462. Dr. Manning acknowledges that the Merger Guidelines require a balancing of the potential efficiencies of a merger against any likely competitive harm. PI Hearing Tr. at 884:18-885:6 (Manning).

463. However, Dr. Manning did not perform such a balancing for purposes of her analysis of this Acquisition, thus she has not netted out the alleged benefits of the Acquisition against its potential competitive harm. PI Hearing Tr. at 885:7-9; 886:1-3 (Manning).

464. Dr. Manning has no opinion on whether or not, on the whole, the Acquisition is good or bad for consumers. PI Hearing Tr. at 886:4-10 (Manning).

F. Many Purported Efficiencies Could Be Achieved with Another Partner

465. Efficiencies are not merger-specific and should not be credited if another merger partner exists that would have not have comparable anticompetitive effects. PX 205-033 (*Merger Guidelines* § 10); PI Hearing Tr. at 410:11-411:3 (Capps).

466. Defendants admit they could achieve some of the claimed efficiencies independently or through affiliation with other health systems. PX 2262 at ¶ 7 (Manning Aff.), *confidential*

PX 2265 (RHS RFA) at ¶ 26, *confidential*

467. In late 2008, RHS entered into a "Letter of Intent" with Advocate Health and Hospitals Corporation ("Advocate"), a health system headquartered in Oak Brook, Illinois. PI Hearing Tr. at 723:3-7 (Kaatz); PX 3546 (Letter of Intent), *confidential*.

468. RHS executives believed that an affiliation with Advocate had the potential to help RHS reduce its costs, improve its quality, share best practices, improve access to graduate medical education in Rockford, and recruit subspecialists and other physicians. PI Hearing Tr. at 763:15-763:12 (Kaatz).

469. A consultant retained by RHS concluded that potential clinical benefits of an affiliation with Advocate included:

PX 174-032 (Advocate Partnership Evaluation Executive Committee Meeting, February 11, 2009), *confidential*; PX 175-021, 024-025 (Advocate Partnership Evaluation - Progress Update Board of Directors Executive Session, February 26, 2009), *confidential*.

470. The consultant also identified potential back office savings in all major departments, including

PX 174-033; PX 175-021, 024-025, *confidential*.

471. One point of negotiation between RHS and Advocate was the construction of a new hospital at RHS's Riverside campus, a project for which RHS requested from Advocate a capital commitment of hundreds of millions of dollars. PI Hearing Tr. at 764:17-22 (Kaatz); PX 174-015

confidential. RHS never request (or received) this level of capital commitment from OSF.

472. Negotiations ceased "when the market went south and Advocate lost an enormous amount of money off their balance sheet." PI Hearing Tr. at 724:11-16 (Kaatz).

473. RHS did not engage in any additional affiliation discussions with Advocate after RHS began its affiliation discussions with OSF. PI Hearing Tr. at 765:12-15 (Kaatz).

XI. QUALITY

A. Hospital Competition Benefits Patients by Improving Quality of Care

474. In addition to competing on price for inclusion in health plan networks, hospitals also compete for patients on the basis of non-price factors such as quality, service, convenience, inpatient amenities, and reputation. PI Hearing Tr. at 340:10-25; 552:1-11 (Capps).

475. The quality of care of SAMC, RMH, and SwedishAmerican is important to judging their competitive significance. PI Hearing Tr. at 336:22-337:8 (Capps); PI Hearing Tr. at 31:23-32:10 (Lobe) ("In order for us to contract with a hospital in the first place, the hospital is required to meet credentialing criteria, and those criteria do evaluate quality parameters."); *See also* PI Hearing Tr. at 220:1-22 (Petersen) (reviews and considers Medicare medical outcomes data, experience in the marketplace and reputations of the Rockford hospitals in the market).

476. RMH seeks to maintain and improve its quality to compete against the other two Rockford hospitals – SAMC and SwedishAmerican. PI Hearing Tr. at 774:5-12 (Kaatz).

477. Competition on quality of care among the three Rockford hospitals benefits patients because it leads to improved patient experience and outcomes. PI Hearing Tr. at 775:10-776:6 (Kaatz); PX 211-026 (Baker (OSF) IH Tr. at 97:24-99:10), *confidential - attorneys' eyes only*.

478. Testimony of local employers confirms that competition between SAMC and RMH has led to higher quality of care and better health care services for their employees. PX 277 at ¶¶ 5-6 *confidential - attorneys' eyes only*; PX 266 at ¶ 2 *confidential - attorneys' eyes only*; PX 269 at ¶¶ 4,7 (Endsley (C&E Specialties) Decl.).

479. Absent a merger, the three Rockford hospitals will continue competing to improve their quality of care. PI Hearing Tr. at 775:16-25 (Kaatz).

B. The Proposed Acquisition is Highly Unlikely to Improve Quality of Care and May Reduce Quality of Care

480. Economic research and empirical literature provide no basis to presume that hospital mergers and acquisitions will improve quality. In fact, a review of the literature suggests that hospital consolidations can reduce clinical quality. PI Hearing Tr. at 98:8-100:4 (Romano); PX 2503 at ¶¶ 17-19 (Romano Aff.), *confidential - attorneys' eyes only*; PX 2501 at ¶¶ 97-98 (Capps Aff.), *confidential - attorneys' eyes only*.

481. RHS's CEO testified that very little, if anything, has been done to analyze the quality implications of the Acquisition. PI Hearing Tr. at 769:10-12 (Kaatz).

482. No one at RHS has compared clinical outcomes between SAMC and RMH. PI Hearing Tr. at 768:18-24 (Kaatz).

483. No one at RHS has compared the clinical outcomes of the various hospitals in the OSF system. PI Hearing Tr. at 768:25-769:2 (Kaatz). Moreover, RHS's CEO testified that it would concern him if there were unequal levels of quality across OSF's existing hospitals. PI Hearing Tr. at 769:3-9 (Kaatz).

484. Defendants' efficiencies expert's clinical operational effectiveness regression model did not show or suggest that the Acquisition will lead to quality improvements at SAMC or RMH that could not be achieved absent the Acquisition. PI Hearing Tr. at 930:8-16 (Manning).

485. It cannot be presumed based on empirical literature alone that RMH will improve its quality of care simply by joining a multi-hospital system such as OSF, nor that SAMC will necessarily see improved quality by adding an eighth hospital to its system. PX 2503 at ¶

21 (Romano Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 101:12-20 (Romano) ("have to focus on case-specific evidence").

486. RHS's CEO testified that absent the Acquisition, RMH would continue to pursue initiatives and make efforts to improve quality of care, coordination of care, and patient outcomes. PI Hearing Tr. at 767:2-19 (Kaatz).

487. An alternate merger with a hospital not in the relevant geographic market would still offer RMH the ability to achieve quality improvements, including sharing best practices, increasing graduate medical education, and improving physician recruitment in Rockford. PI Hearing Tr. at 763:18-764:12 (Kaatz).

488. Literature shows that there is no empirical evidence that improvements in hospital quality is greater for mergers involving nearby hospitals than for mergers involving distant hospitals. PX 2508 at ¶ 42 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; *See also*, PI Hearing Tr. at 198:17-199:24 (Romano).

C. SAMC and RMH Already Are High-Quality Hospitals

489. Health plan executives testified that SAMC and RMH provide high-quality care. PI Hearing Tr. at 32:6-10 (Lobe); PI Hearing Tr. at 220:16-22 (Petersen); PX 252 at ¶ 10 *confidential - attorneys' eyes only*.

490. Plaintiff's quality of care expert, Dr. Patrick Romano, concludes that both OSF and RHS already are high-quality hospitals and perform well on structure, process, and outcome measures. PX 2503 at ¶ 23 (Romano Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 109:1-8 (Romano).

491. Structural measures describe the condition under which care is provided and include material resources, human resources, and organizational characteristics. PI Hearing Tr. at

106:19-107:3 (Romano); PX 2503 at ¶ 23 (Romano Aff.), *confidential - attorneys' eyes only*.

492. Process measures refer to the content of health care, encompassing providers' activities in screening, diagnoses, pharmacotherapy, surgery, rehabilitation, patient education, and prevention. PX 2503 at ¶ 23 (Romano Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 107:3-7 (Romano). The Joint Commission's Core Measures are widely-accepted process measures. PX 2503 at ¶ 23 (Romano Aff.), *confidential - attorneys' eyes only*.

493. Outcome measures describe changes attributable to health care and include mortality, morbidity, illness, and functional outcomes. PX 2503 at ¶ 23 (Romano Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 107:7-14 (Romano); PX 4043 (Romano Dep. Tr. at 75:3-8).

494. Defendants' efficiencies expert, Dr. Susan Manning, concludes that RMH provides high-quality care, even without the Acquisition. PI Hearing Tr. at 926:24-927:10 (Manning).

495. SAMC and RMH currently have similar quality levels with respect to clinical services. PI Hearing Tr. at 109:1-17 (Romano).

496. Significant heterogeneity exists within the OSF system, with one or more OSF hospitals consistently offering lower levels of quality than the leading OSF hospitals and RMH. PX 2503 at ¶ 23 (Romano Aff.), *confidential - attorneys' eyes only*; PX 2503 at App. A. Figures 1–4, Table 1 (Romano Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 112:8-21 (Romano).

D. OSF's Quality Improvement Claims are Highly Speculative, Unsubstantiated, and Not Merger-Specific

1. Clinical Consolidations

497. Outcomes of certain complex procedures can improve when health care professionals acquire more experience providing such services (*i.e*., a "volume/outcome relationship"). PI Hearing Tr. at 89:16-90:3, 124:9-125:2 (Romano).

498. The existence of a volume/outcome relationship has been demonstrated only for certain, more complex procedures, such as resection of esophageal cancer, pancreatic cancer, and aortic aneurysms. For common procedures, the literature does not support the existence of a volume/outcome relationship. PI Hearing Tr. at 124:9-125:19 (Romano); PX 2503 at ¶ 30 (Romano Aff.), *confidential - attorneys' eyes only*. Dr. Manning's characterization that the literature generally supports the existence of volume/outcome is misleading. PI Hearing Tr. at 126:8-129:1 (Romano).

499. Volume/outcome relationships at a minimum require increasing physician and hospital volumes, not system volumes. PI Hearing Tr. at 116:3-117:25 (Romano); PX 4043-053 (Romano Dep. Tr. at 206:14-23).

500. OSF and RHS have not explained how they would increase the volume of procedures performed by physicians, because they have not revealed any plans to terminate physicians or require only certain physicians to perform certain procedures. PX 2503 at ¶ 33 (Romano Aff.), *confidential - attorneys' eyes only*.

501. Absent consolidation of specific service lines – meaning that one hospital discontinues offering a service – procedure volumes at either hospital will not change significantly due

to the Acquisition. PX 2503 at ¶¶ 13, 26-27 (Romano Aff.), *confidential - attorneys' eyes only*.

502. OSF and RHS have not identified what services, if any, actually will be consolidated, at what location, and in what manner. PI Hearing Tr. at 747:18-749:9, 758:1-759:19 (Kaatz); PI Hearing Tr. at 908:13-909:4, 935:18-939:3 (Manning); PX 4021-034 (Seybold (RHS) Dep. Tr. at 132:9-16); PX 212-033 (Benink (OSF) IH Tr. at 127:8-11).

503. Physician and community resistance are significant hurdles to the types of clinical consolidation that Defendants' litigation consultants recommend. PI Hearing Tr. at 119:2-122:2 (Romano); PI Hearing Tr. at 911:14-22 (Manning); PX 2505 at ¶ 36 (McAnallen Aff.), *confidential - attorneys' eyes only*. Mr. Kaatz, RHS's CEO, expressed concern about physician resistance in the community to clinical consolidations. PI Hearing Tr. at 753:17-25 (Kaatz); PX 4025-047 (Kaatz (RHS) Dep. Tr. at 183:10-13), *confidential*. The FTI Business Efficiencies Report identified physician resistance to clinical consolidation as a

PX 34 at 20, 27, *confidential*.

504. RHS has not involved physicians in any discussions regarding possible post-merger clinical consolidations or alleged quality improvements. PI Hearing Tr. at 772:14-17 (Kaatz).

505. RHS and OSF have not even provided a summary of the FTI findings to any physicians except a select few. PI Hearing Tr. at 755:1-11 (Kaatz).

506. A merger or acquisition is not necessary in order to increase volumes for those procedures where increased volume leads to better outcomes. PI Hearing Tr. at 114:16-115:15 (Romano); PX 2503 at ¶ 34 (Romano Aff.), *confidential - attorneys' eyes only*.

507. Many hospitals enter into arrangements to offer services at one facility or another (without a merger) in order to achieve certain volume thresholds. PX 2503 at ¶ 34 (Romano Aff.), *confidential - attorneys' eyes only*. Dr. Ruggles, RMH's Senior Vice President of Medical and Clinical Affairs, testified that it was possible to increase procedure volumes through a joint venture as opposed to a full merger. PX 220-040 (Ruggles (RHS) IH Tr. at 153:4-12).

2. Centers of Excellence

508. There are two different types of "centers of excellence." PI Hearing Tr. at 129:8-12 (Romano).

509. One type of "center of excellence" involves a designation by national accrediting organizations, such as The Joint Commission, based on an application process and in-depth review of the hospital. PI Hearing Tr. at 129:13-24 (Romano); PX 2508 at ¶ 33 (Romano Supp. Aff.), *confidential - attorneys' eyes only*.

510. A second type of "center of excellence" is a self-designated marketing strategy. PI Hearing Tr. at 130:12-22 (Romano). There is no empirical evidence that self-designation of hospitals' centers of excellence is associated with clinical quality improvement. PX 2508 at ¶ 32 (Romano Supp. Aff.), *confidential - attorneys' eyes only*.

511. OSF and RHS do not identify which type of "centers of excellence" the Acquisition would facilitate. PI Hearing Tr. at 129:8-12 (Romano); PX 2508 at ¶ 30 (Romano Supp. Aff.), *confidential - attorneys' eyes only*.

512. A merger or acquisition is not necessary to achieve either type of "center of excellence" designation. PI Hearing Tr. at 129:25-130:11 (Romano). SAMC and RMH already have several "centers of excellence" of both types. PX 2508 at ¶ 34-35 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; PX 576, *confidential*.

3. Best Practices

513. If hospital mergers generally led to the successful sharing of best practices, then the empirical literature would demonstrate that hospital mergers generally improve quality. But the relevant empirical literature fails to show any such relationship. PX 2508 at ¶ 38 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 131:21-132:8 (Romano).

514. A merger or acquisition is not necessary to identify or implement best practices. PI Hearing Tr. at 132:9-13 (Romano); PI Hearing Tr. at 928:17-24 (Manning).

515. National quality organizations and consultants assist hospitals with implementation of best practices to improve quality. PX 2508 at ¶ 39 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 132:14-133:3 (Romano). State-level organizations, like the Illinois Hospital Association, sponsor programs for hospitals to help improve quality. PX 2508 at ¶ 39 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 132:25-133:3 (Romano). These are evidence-based best practices that are derived from data from hundreds of hospitals. PX 2508 at ¶ 39 (Romano Supp. Aff.), *confidential - attorneys' eyes only*.

516. SAMC and RMH have already identified and implemented numerous best practices without a merger. PI Hearing Tr. at 769:16-770:10 (Kaatz); PI Hearing Tr. at 630:1-23 (Schertz); PX 4025-011 (Kaatz (RHS) Dep. Tr. at 39:10-40:5); PI Hearing Tr. 134:5-21 (Romano); PX 2503 at ¶ 48-49 (Romano Aff.), *confidential - attorneys' eyes only*.

517. RMH and OSF will continue implementing best practices if the merger does not occur. PI Hearing Tr. at 767:2-19 (Kaatz); PI Hearing Tr. at 630:1-631:13 (Schertz); PX 4025-012 (Kaatz (RHS) Dep. Tr. at 41:12-22), *confidential*.

518. OSF and RHS have not identified any specific best practices they intend to implement after the Acquisition, nor have they identified the method for implementation. PI Hearing Transcript 138:11-22 (Romano); PX 2508 at ¶ 44 (Romano Supp. Aff.), *confidential - attorneys' eyes only*.

4. Physician Recruitment

519. There is no foundation in the empirical research or literature for the argument that hospital mergers facilitate recruitment and retention of specialist and subspecialist physicians. PI Hearing Tr. at 140:21-141:3 (Romano).

520. OSF and RHS have not set forth any specific plans for how the Acquisition will facilitate recruiting specialist or subspecialist physicians to Rockford. PX 4025-046 (Kaatz (RHS) Dep. Tr. at 180:20-24), *confidential*; PI Hearing Tr. at 141:3-4 (Romano).

521. Specialized physicians already practice in Rockford. Independent physician groups in Rockford have each recruited a number of high quality specialists and subspecialists to Rockford. PX 289 at ¶ 50-51 *confidential - attorneys' eyes only*. *See* also PX 2508 (Romano Reply Aff) (referring to numerous independent specialist groups in Rockford), *confidential - attorneys' eyes only*.

522. OSF and RHS have not yet explained how the Acquisition will help the two hospitals to "recapture" patients who live in the Rockford area who are migrating out of Rockford to seek specialized clinical services elsewhere. PI Hearing Tr. at 143:17-144:5 (Romano).

523. OSF and RHS have not done any analysis of the impact to the patients' quality of care if the "recaptured" patients stayed at Rockford hospitals to receive specialized care as opposed to going outside of Rockford. PI Hearing Tr. at 144:21-145:7 (Romano).

5. Graduate Medical Education

524. OSF and RHS have not set forth any specific plans for implementing graduate medical education after the Acquisition or established funding for such programs. PX 4025-046 (Kaatz (RHS) Dep. Tr. at 180:2-6), *confidential*; PX 216-045, 046 (Kaatz (RHS) IH Tr. at 173:18-174:2), *confidential*; PX 212-008, 009 (Benink (OSF) IH Tr. at 26:23-27:3, 29:22-30:2); PX 220-038 (Ruggles (RHS) IH Tr. at 143:23-144:7) (no "firm plans").

525. Defendants' proposed residencies – internal medicine, pediatrics, and combined internal medicine/pediatrics – are not the type of graduate medical education shown by the medical literature to increase clinical quality of care. PX 2508 at ¶ 51 (Romano Supp. Aff.), *confidential - attorneys' eyes only*.

526. The Acquisition is not needed to launch internal medicine, pediatrics, and or a combined internal medicine/pediatrics residencies at either SAMC or RHS. PX 2508 at ¶ 51 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr.at 146:1-12 (Romano).

527. Mid-sized hospitals, either independently or together with a partner, frequently operate residency programs. PX 2503 at ¶ 38 (Romano Aff.), *confidential - attorneys' eyes only*. SAMC and RMH host an orthopedic resident from Rush Hospital in Chicago, Illinois to gain experience at the Rockford hospitals' Level 1 trauma centers. PX 216-039 (Kaatz (RHS) IH Tr. at 146:11-147:7), *confidential*; PX 212-007 (Benink (OSF) IH Tr. at 21:17-25).

528. SwedishAmerican implemented a family medicine residency at its hospital without affiliating with another hospital or health care system. PX 2508 at ¶ 51 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 146:13-20 (Romano); PX 289 at

¶ 7

confidential - attorneys' eyes only.

6. Electronic Health Records (Epic)

529. Epic is a type of electronic health record system. PX 2503 at ¶ 50 (Romano Aff), *confidential - attorneys' eyes only*.

530. Epic is already operational at SAMC. PI Hearing Tr. at 586:16-20 (Schertz).

531. RHS is

PX 226-025 (Seybold (RHS) IH Tr. at 91:4-23), *confidential - attorneys' eyes only*. RHS has

PX 226-025 (Seybold (RHS) IH Tr. at 91:4-23), *confidential - attorneys' eyes only*.

532. Non-affiliated hospitals share health data to increase quality or identify best practices through linking separate Epic systems through one common interface. PI Hearing Tr. at 147:10-20 (Romano).

533. Non-affiliated hospitals can also share health data through Health Information Exchanges, which exchange secure information across healthcare organizations. PX 2508 at ¶ 53 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 147:21-148:16 (Romano). The first phase of the Illinois Health Information Exchange is expected to launch in April 2012. PX 2508 at ¶ 53 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 148:9-16 (Romano).

E. No Lack of Financial Resources

534. There is no evidence that either OSF or RHS has failed to make investments in clinical quality. PI Hearing Tr. at 150:2-13 (Romano). RMH will continue to improve quality of care, including best practices and patient outcomes, if it remains independent of OSF. PI

Hearing Tr. at 767:2-19 (Kaatz). SAMC also will continue to implement programs that reduce costs such as targeting improved readmissions, supply costs, and lengths of stay. PI Hearing Tr. at 631:5-13 (Schertz). If one hospital is having trouble making necessary investments to maintain or improve quality, only then might "financial resources" of a merging hospital be helpful. PI Hearing Tr. at 149:14-150:13 (Romano).

F. Health Care Reform

535. Accountable Care Organizations ("ACOs") are designed to bring together complementary, not competitive, health care providers in order to more effectively coordinate patient care. PI Hearing Tr. at 444:6-22 (Capps); PX 2508 at ¶ 56 (Romano Supp. Aff.), *confidential - attorneys' eyes only*.

536. SAMC and RMH each already offer a wide variety of clinical services, ambulatory care facilities, home health care, and dozens of employed physicians across numerous practice areas. PX 2508 at ¶ 58 (Romano Supp. Aff.), *confidential - attorneys' eyes only*. Because they are vertically-integrated health care systems, SAMC and RMH are well-positioned to participate in ACOs today. PI Hearing Tr. at 151:3-21 (Romano).

537. A merger or acquisition is not needed for a hospital to participate in health care reform efforts, such as ACOs. PI Hearing Tr. at 206:13-207:4 (Romano).

538. OSF was designated a Pioneer ACO by the Centers for Medicare and Medicaid Services in 2011. PX 2508 at ¶ 57 (Romano Supp. Aff.), *confidential - attorneys' eyes only*. OSF's Pioneer ACO designation was not related to the Acquisition. PI Hearing Tr. at 206:5-12 (Romano).

539. The Centers for Medicare and Medicaid Services ("CMS") released its final rules and regulations on the Shared Savings Programs on October 20, 2011. PX 2508 at ¶ 59

(Romano Supp. Aff.), *confidential - attorneys' eyes only*. CMS expressly mandated that ACOs should not be used to justify anticompetitive consolidation, which can reduce quality and cost-saving efficiencies. PX 2508 at ¶ 59 (Romano Supp. Aff.), *confidential - attorneys' eyes only*.

G. Potential for Post-Acquisition Quality Decline

540. There is concern at the highest levels of RHS that the Acquisition could negatively impact the culture of RMH. PI Hearing Tr. at 777:9-16 (Kaatz).

541. Executives and physicians at OSF and RHS

PX 216-046 (Kaatz (RHS) IH Tr. at 176:3-177:23), *confidential*; PX 329 at 1 (Haig (OSF) e-mail dated Aug. 5, 2010), *confidential - attorneys' eyes only*; PX 715 at 9 (RHS Physician Perceptions Study)

confidential.

542. The FTI Business Efficiencies Report recommended

PX 34 at 35 (FTI Report), *confidential*; PX 2508 at ¶ 60 (Romano Supp. Aff.), *confidential - attorneys' eyes only*. The number of staff employed in quality improvement generally has a proportional relationship to the number of beds and the volume of a hospital. PI Hearing Tr. at 154:17-155:6 (Romano). Elimination of these quality and patient safety positions could compromise the quality of care at the merging hospitals. PI Hearing Tr. at 154:17-155:6 (Romano).

543. Patient safety staff, including individuals responsible for "reviewing cases where there have been quality problems to try to avoid having those same problems in the future," are

among those to be laid off if the merger is consummated. PI Hearing Tr. at 891:23-892:22 (Manning).

H. Effect of Higher Post-Acquisition Prices on Quality

544. Competition among healthcare providers is an important driver of clinical quality in the broader community. PX 2508 at ¶ 7 (Romano Supp. Aff.), *confidential - attorneys' eyes only*.

545. If the Acquisition results in higher prices for hospital services, this is likely to cause some loss of health insurance coverage among people who will no longer be able to afford to purchase health insurance. PI Hearing Tr. at 334:12-335:14 (Capps); PX2508 at ¶ 7 (Romano Supp. Aff.); PI Hearing Tr. at 156:16-157:8 (Romano).

546. For self-funded employers, any increase in healthcare provider prices falls directly on the employer and its employees. PI Hearing Tr. at 693:25-694:4 (Olson).

547. The empirical literature recognizes that uninsured people receive less health care and inferior health care, which negatively impacts their health and mortality. PX 2508 at ¶ 7 (Romano Supp. Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 157:9-158:24 (Romano).

XII. DEFENSES

A. The Claim that Rockford Cannot Support Three General Acute Care Hospitals in the Long Term is Not Supported and Irrelevant

1. All Three Rockford Hospitals are Financially Viable

548. While Rockford, like many parts of the Midwest, and indeed the country has faced challenging economic conditions since the beginning of the ongoing recession, all three Rockford hospitals have weathered the downturn and are not failing or flailing. PI Hearing

Tr. at 434:19-435, 12, 563:2-7 (Capps); PX 4044-032-033 (Capps Dep. Tr. at 124:13-125:3).

549. RHS and SAMC each have sustainable operating performance, significant cash reserves, and the capability to borrow money, if necessary, to fund future investments. PX 2507 at ¶ 4 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*.

550. The most recent 2012 SAMC Management Plan submitted to the OSF Board of Directors in August 2011, projects strong and improving financial performance through at least 2016. PI Hearing Tr. at 435:18-436:20 (Capps); PX 371 at 29-32, *confidential*; PX 2507 at ¶ 40 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*. Specifically, SAMC's 2012 Management Plan projects

PX 371 at 029-32, *confidential*; PI Hearing Tr. at 635:17-636:10 (Schertz); PI Hearing Tr. 435:18-436:23 (Capps); PX 2507 at ¶ 40 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*; PX 4024-047-048 (Schoeplein (OSF) Dep. Tr. at 184:2-185:5).

551. OSF held more than in cash and investments as of the end of fiscal year 2010, a significant resource for funding capital expenditures, expanding services, and pursuing strategic initiatives. PX 2507 at ¶ 39 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*.

552. At the November 2011 SAMC Advisory Board meeting, SAMC's CFO reported

PX 4603 at 2 (SAMC Advisory Board Meeting), *confidential - attorneys' eyes only*.

553. RHS executives reviewing OSF's financial information during due diligence concluded that OSF is "financially sound" and a "strong, well-endowed organization." PI Hearing Tr. at 435:2-17 (Capps); PX 216-013 (Kaatz (RHS) IH Tr. at 43:6-9); PX 226-016 (Seybold (RHS) IH Tr. at 54:12-15), *confidential* ; PX 2507 at ¶ 40 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*.

554. According to Gary Kaatz, RHS saw "positive signs" from the diligence and hard work of its board members, leadership, physician, and employees, and entered 2011 a much stronger, more viable healthcare system. PX 3590 at 1 (2010 CEO Annual Report), *confidential*.

555. RHS had operating margins of in 2009 and in 2010, and had net income (excess of revenues over expenses) of million in 2009 and million in 2010. PX 2501 at ¶ 22 (Capps Aff.), *confidential - attorneys' eyes only*. RHS had $322.7 million in cash and investments on hand as of December 31, 2010, which was a 40% increase from the two years before. PX 2502 at ¶ 128 (Dagen Aff.), *confidential - attorneys' eyes only*.

556. RHS Board members described 2010 as a year in which RHS's

PX 592 at 2 (RHS 2011 Board Minutes), *confidential*.

557. RHS's 2011

PX 2501 at fn. 23 (Capps Aff.), *confidential - attorneys' eyes only*; PX 592 at 2 (RHS 2011 Board Minutes), *confidential*.

558. Each hospital has implemented the Epic electronic health records (EHR) system. SAMC has fully implemented Epic; RHS is in the midst of implementing Epic. The RHS board approved funding for the project in April 2010, and RHS rolled out the system to its

physician groups throughout the course of 2011. PX 2506 at ¶¶ 30, 31 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

559. RHS plans to have Epic fully implemented at RMH by April 2013, regardless of whether the Acquisition with SAMC goes through. PX 2506 at ¶ 31 (Capps Reply Aff.), *confidential - attorneys' eyes only*; PX 216-12 (Katz (RHS) IH Tr. at 39:9-22), *confidential*; PX 226-25 (Seybold (RHS) IH Tr. at 91:4-92:9), *confidential - attorneys' eyes only*.

560. Jeffrey Brown, an expert retained by OSF's and RHS's antitrust lawyers, estimated that

PX 2261 at ¶ 115 (Brown Aff.), *confidential*.

561. Since 1997, SwedishAmerican has operated successfully as an independent hospital system, with revenues exceeding expenses in of the last years. It remains strong and viable for the long-term despite the effects of the recession and treating more Medicaid patients than any other hospital in Rockford. PX 289 at ¶ 32

confidential - attorneys' eyes only.

562. SwedishAmerican's success during the last decade further reinforces the fact that it is possible for a stand-alone hospital in Rockford to control its own costs and achieve a surge in patient volume and market share. PX 2507 at ¶ 15 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*.

563. SwedishAmerican has also made substantial investments in recent years, investing over in improvements to its campus, including construction of its heart hospital.

PX 4000-011 *confidential - attorneys' eyes only*.

2. The Dire Prediction in 1997 that "At least One" of the Three Hospitals Would Fail Absent a Merger Never Came to Fruition

564. OSF and SwedishAmerican made very similar claims to the U.S. Department of Justice in 1997 in support of their proposed merger (which ultimately did not occur). PX 1254 at 5 (Epstein Becker & Green, P.C., "Memorandum in Support of the Proposed Acquisition of SwedishAmerican Health System Corporation by OSF Healthcare System," September 17, 1997), *confidential - attorneys' eyes only*.

565. The merging parties in 1997 alleged:

PX 1254 at 13, *confidential - attorneys' eyes only*. In 1997, the merging parties also argued that

PX 1254 at 19, *confidential - attorneys' eyes only; See also* PI Hearing Tr. at 611:3-22 (Schertz).

566. After SwedishAmerican abandoned the merger in 1997,

PX 3076 at 2 (OSF Talking Points), *confidential*.

567. Mr. Schertz, CEO of SAMC, testified at the Preliminary Injunction Hearing that the parties to the 1997 proposed merger predicted that either or both SwedishAmerican and SAMC would fail if the merger did not occur. PI Hearing Tr. at 611:3-7 (Schertz).

568. In the decade and a half since, none of these dire predictions has transpired. Neither SAMC nor SwedishAmerican failed; in fact the two hospitals continue to compete effectively today. PX 2507 at ¶ 35 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*.

569. SwedishAmerican made strategic decisions and investments as a stand-alone hospital that paid off by significantly increasing its market share, level of services offered and financial stability. Since the failed merger attempt in 1997, SwedishAmerican implemented its strategic plan, re-invested in its campus, and employed more primary care physicians. PX 2507 at ¶ 35 (Dagen Supp. Aff.), *confidential - attorneys' eyes only*; PX 4000-046-047 *confidential - attorneys' eyes only*; *see also* PX 2263 at ¶ 48 (Noether Decl.), *confidential*; DX 3 at ¶ 8 (Schertz (OSF) Decl.).

3. Absent Either Hospital Failing, Flailing, or Even Struggling, Demographic Factors are Irrelevant

570. The fact that Rockford, like many parts of the United States, has faced challenging economic conditions in recent years, does not indicate that area residents are more able to bear or would be less affected by the effects of an increase in market power. PX 2506 at ¶ 8 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

571. The negative consequences of an increase in hospital prices would likely be more, not less, pronounced in Rockford as a result of adverse economic conditions. PI Hearing Tr. at 437:15-438:12 (Capps); PX 2506 at ¶ 8 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

4. Defendants Significantly Overstate the Negative Demographic Conditions in the Rockford Area

572. From 2000 to 2010, the population of the Rockford MSA (i.e., Winnebago and Boone Counties) grew from 320,204 to 349,431. PX 2501 at ¶¶ 39-40 (Capps Aff.), *confidential - attorneys' eyes only*.

573. Both RHS and SAMC expect the population growth trend in the Rockford area to continue for at least the next several years. PX 371 at 35 (SAMC Management Plan 2012), *confidential*; PX 580 at 8 (RHS Ambulatory Plan Development 2010), *confidential*; PX 2501 at ¶ 39. Figure 5 (Capps Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 634:24-635:2 (Schertz).

574. The manufacturing sector in Rockford is rebounding. For example, Chrysler recently announced the hiring of 2700 more workers in its Belvidere Assembly Plant - located a few miles outside Rockford - to produce its new car, the Dodge Dart. PI Hearing Tr. at 631:14-24 (Schertz); PX 1600. *See also* PX 4006-028-029 (Olson (Rockford Acromatic) Dep. Tr. at 108:4-109:17).

575. From 2007 to 2010, the number of inpatient admissions attributable to patients from the Rockford MSA increased by 2% and the corresponding number of inpatient days increased by 5.4%. PX 2501 at ¶ 47 (Capps Aff.), *confidential - attorneys' eyes only*.

5. The Acquisition Does Not Reduce the Number of General Acute Care Inpatient Hospitals in Rockford

576. The Acquisition simply reduces the number of hospital owners from three to two; it does not reduce the number of hospitals in Rockford. PX 2506 at ¶ 26 (Capps Reply Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 615:24-616:2 (Schertz); PX 4008-040

confidential - attorneys' eyes only. The Acquisition agreement states that "[d]uring the ten year period following the Closing Date [of the Acquisition], OSF shall . . . maintain RMH as a general acute care hospital." PX 2506 at ¶ 26 (Capps Reply Aff.), *confidential - attorneys' eyes only*; PX 37 at 18 (Affiliation Agreement), *confidential*.

577. The CEO of SAMC stated OSF has no plans to close RMH or SAMC after the Acquisition closes. PI Hearing Tr. at 615:18-20 (Schertz).

578. The CEO of RHS stated that OSF and RHS have not discussed closing one of the hospitals, and that nothing about the Acquisition will reduce the number of hospitals in Rockford. PI Hearing Tr. at 615:18-616:2 (Schertz); PX 4025-053 (Kaatz (RHS) Dep. Tr. at 207:2-14), *confidential - attorneys' eyes only*.

579. OSF also has no specific or near-term plans to consolidate RHS's license or medical staff with SAMC's. PX 222-054 (Schertz (OSF) IH. Tr. at 206:13-207:8 (Sept. 7, 2011)).

6. SAMC and RHS are not "Subscale"

580. Despite Defendants' arguments to the contrary, neither SAMC nor RMH are "subscale" (a term not defined by Defendants), whether measured in terms of size or bed occupancy. PI Hearing Tr. at 433:8-434:18 (Capps); PX 2506 at ¶ 16 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

581. Both SAMC and RMH are larger than more than 60% of hospitals in Illinois, even when excluding critical access hospitals. PI Hearing Tr. at 433:12-434:2 (Capps); PX 2506 at ¶ 16 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

582. Rockford is not an overbedded area. The number of beds per 1000 inpatient days in the Rockford MSA is "right in the middle of the pack" among all Illinois hospitals. PI Hearing Tr. at 434:5-18 (Capps).

583. The Rockford area is in line with other metropolitan areas in Illinois in terms of: (1) occupancy rates, (2) hospital capacity relative to size and hospital utilization of the local populations, (3) number of beds per hospital admission, (4) number of beds per inpatient day, and (5) number of beds per severity-adjusted discharge (*i.e.*, beds per "casemix unit"). PX 2506 at ¶¶ 19-20, Figure 4 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

B. The Defendants' Proposed Stipulation Does Not Alleviate Competitive Concern

584. On the eve of the Preliminary Injunction Hearing, Defendants submitted a proposed stipulation apparently designed to address the competitive harm likely to result from the Acquisition. The proposed stipulation has two provisions: (1) that OSF Northern Region (the merged SAMC-RHS entity) will not require any health plan to exclude SAHS from its provider network as a condition for a contract with OSF Northern Region; and (2) that OSF/OSF Northern Region will not require a health plan to contract with OSF on a system-wide basis or any other individual OSF hospital outside of Rockford as a condition for obtaining a contract with OSF Northern Region. PX 2281 (Stipulation).

585. Defendants' proposed stipulation does not address the competitive harm from the Acquisition because it neither addresses the prices nor terms at which OSF Northern Region will contract. PI Hearing Tr. at 431:8-22 (Capps).

586. SAMC's CEO Mr. Schertz admitted that the stipulation says nothing about the rates the combined entity will charge if the Acquisition is consummated. PI Hearing Tr. at 629:13-

19 (Schertz). In fact, Mr. Schertz testified that if a health plan wanted to add SwedishAmerican to its network and also have the other Rockford hospitals, the stipulation does not place any limitation on what OSF can charge such a health plan. PI Hearing Tr. at 629:20-25 (Schertz).

587. OSF could *de facto* exclude SwedishAmerican by charging substantially higher rates to any health plan seeking to include SwedishAmerican in its network. PI Hearing Tr. at 431:8-432:10 (Capps); PI Hearing Tr. at 313:1-19; 318:15-319:4 (Petersen).

588. The stipulation does not promise that a health plan can contract with SAMC or RMH individually. PI Hearing Tr. at 746:8-17 (Kaatz). Thus, it has no impact on the undisputed fact that if a health plan wanted to offer a two-hospital network after the Acquisition is consummated, they must still reach agreement with OSF. PI Hearing Tr. at 432:11-16 (Capps); *see also* PI Hearing Tr. at 624:9-12 (Schertz).

C. The Defendants' Non-Profit Status Is not Relevant and Will Not Prevent OSF from Using Its Leverage To Raise Prices

589. Health plans testified that there is no difference in their experience in negotiating with non-profit and for-profit hospitals. PI Hearing Tr. at 40:5-13 (Lobe); PI Hearing Tr. at 254:17-255:6 (Petersen) ("no margin, no mission").

590. Non-profit hospitals use their leverage to negotiate aggressively and obtain the highest possible rates. PI Hearing Tr. at 255:7-10 (Petersen); PI Hearing Tr. at 428:9-429:11 (Capps); PI Hearing Tr. at 40:14-17 (Lobe); PX 4002-036

confidential - attorneys' eyes only. Non-profit hospitals bargain just as aggressively as for-profit hospitals. PI Hearing Tr. at 254:21-255:10 (Petersen); PI Hearing Tr. at 428:9-429:6 (Capps); PX 4002-043

confidential - attorneys' eyes only; *see also* PX 213-056 (Breeden (OSF) IH Tr. at 216:25-217:4).

591. There is a wealth of academic literature demonstrating the proposition that non-profit hospitals exercise market power. PI Hearing Tr. at 428:9-429:11 (Capps).

D. Healthcare Reform is Not an Antitrust Defense

1. Healthcare reform is premised on continued competition among health providers

592. The Affordable Care Act is ". . . premised on the concept that there will continue to be competition, competition among health insurers and competition among healthcare providers." PI Hearing Tr. at 152:13-18 (Romano).

593. CMS's recently released Final Rule for Accountable Care Organizations ("ACOs") and the accompanying DOJ and FTC Final Policy Statement reflect that all three agencies view competition among providers as beneficial to both the Medicare and Commercial populations. PX 2506 at ¶ 80 (Capps Reply Aff.), *confidential - attorneys' eyes only*; *see also* PX 1579 at 40-43; PX 1581.

594. CMS and DOJ/FTC policies applicable to ACOs embrace rather than eschew competition as a mechanism for improving quality and restraining costs in the healthcare industry. PX 2506 at ¶ 82 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

595. To the extent that the emergence of healthcare reform initiatives such as the Patient Protection and Affordable Care Act (PPACA) encourage provider cooperation, any "coming together" of providers may be addressed through joint ventures, other contractual relationships, and better coordination of care among physicians in existing systems. PX

2506 at ¶ 77 (Capps Reply Aff.), *confidential - attorneys' eyes only*; PI Hearing Tr. at 151:8-21 (Romano).

596. Healthcare reform's benefits, including creating incentives for every hospital to improve its care by working on quality measures such as readmission rates, will exist irrespective of any merger. PI Hearing Tr. at 182:20-25 (Romano); *see also* PI Hearing Tr. at 187:7-18 (Romano) (healthcare reform led to "increased efforts to align physicians and hospitals."); PI Hearing Tr. at 720:17-722:1 (Kaatz) ("it is a full court press").

597. The enhanced coordination engendered by healthcare reform is expected to be between complementary providers of healthcare in a vertical chain (e.g., hospitals and physicians) not horizontal cooperation between competing providers. *See generally* PI Hearing Tr. at 444:6-22 (Capps); PI Hearing Tr. at 150:14-153:5 (Romano).

2. SAMC and RHS are well-positioned to succeed in a post-healthcare reform environment

598. RHS and SAMC are already well-positioned for health reform because they are both vertically integrated health systems that employ a large number of physicians. PI Hearing Tr. at 150:20-151:21 (Romano).

599. OSF already participates as an ACO today even before the Acquisition, and the Acquisition is not the only way for other vertically integrated health systems such as RHS to participate in healthcare reform, including an ACO program. PI Hearing Tr. at 206:5-207:4 (Romano).

600. SAMC and RHS are already undertaking the types of risk-bearing activities that require at least some degree of scale, including bonuses, bundled payment, electronic health records, and pay-for-performance or risk–sharing terms. PX 2506 at ¶ 83 (Capps Reply Aff.),

confidential - attorneys' eyes only; PX 1025 at 2, *confidential - attorneys' eyes only*; PX 227-007 (Stenerson (OSF) IH Tr. at 18:5-19:3; PX 216-012 (Kaatz (RHS) IH Tr. at 39:9-22), *confidential*; DX 3 at ¶¶ 28-29 (Schertz (OSF) Decl.).

601. All three Rockford hospitals exceed the PPACA and CMS thresholds relating to the minimum scale for ACOs necessary to provide care to Medicare enrollees. PX 2506 at ¶ 86 (Capps Reply Aff.), *confidential - attorneys' eyes only*; PX 1579 at 6; PX 1582 at 10, 12.

602. Quality metrics and recommended thresholds used by healthcare groups and government agencies reward hospitals that have a proven record of high quality care. PX 2508 at ¶ 15 and FN.9 (Romano Reply Aff.), *confidential - attorneys' eyes only*. In this regard, both hospitals already provide high quality care. PX 2508 at ¶ 16, 46, 61 (Romano Reply Aff.), *confidential - attorneys' eyes only*.

603. Mr. Kaatz, CEO of RHS, testified that the Acquisition is "not the only way" RHS can deal with the upcoming healthcare reform. PX 4025-054 (Kaatz (RHS) Dep. Tr. at 209:24-210:10). Indeed, RHS has

PX 4691 at 2 (Rockford Health System 2012 Operating and Capital Budget), *confidential*.

3. Some Components of Healthcare Reform will Actually Benefit RHS and SAMC

604. PPACA includes provisions that will increase coverage of the uninsured and increase Medicaid payments for primary care physician services. These changes will benefit SAMC's and RHS's financial positions independent of any consolidation because hospitals currently treating uninsured will get reimbursed for these patients in the future. PI Hearing

Tr. at 443:2-444:5 (Capps) (health reform will "dramatically increase the ranks of the insured population"); *see* PX 2506 at ¶ 87 (Capps Reply Aff.), *confidential - attorneys' eyes only*; PX 1584 at 5.

605. A study by McKinsey for RHS showed that the

PX 4712 at 1, *confidential*; PX 4711 at 1 *confidential*.

606. SAMC's strategic plans incorporate all known impacts from healthcare reform and project net revenue increases every year from 2012 to 2016. PI Hearing Tr. at 634:1-20 (Schertz); PX 4020-014 (Schertz (OSF) Dep. Tr. at 51:5-12).

E. The Presence of Large Health Plans Does Not Alleviate or Diminish Competitive Concerns

607. The size of a health plan's membership in the Rockford metropolitan area determines its bargaining leverage during negotiations. PI Hearing Tr. at 37:8-38:2 (Lobe); PI Hearing Tr. at 224:21-225:9 (Petersen). Thus, the fact that UnitedHealthcare, Aetna, CIGNA, and other health plans serving Rockford are large organizations nationally is irrelevant to the competitive dynamic in Rockford. *See* PI Hearing Tr. at 430:4-431:7 (Capps).

608. BCBS-IL's large local market share does not mean that it would be immune from price effects. BCBS-IL's bargaining leverage is higher than other health plans with fewer enrollees in the Rockford area. This implies that BCBS-IL will be able to negotiate lower rates than other payers, all else equal. BCSB-IL's bargaining leverage, just like the leverage of all health plans, is unchanged by the Acquisition. PX 2506 at ¶ 63 (Capps Reply Aff.), *confidential - attorneys' eyes only*. In contrast, the bargaining leverage of RHS and SAMC increases substantially as a result of the Acquisition, meaning that RHS

and SAMC will be able to obtain higher prices from BCBS-IL and all other payers. BCBS-IL's greater leverage relative to other payers merely means that its prices will be lower than those of other health plans, both before and after all health plans' prices rise due to the Acquisition. PX 4044-042 (Capps Dep. Tr. at 163:25-164:19). But BCBS-IL would still be subject to the same price increases just as all other health plans, regardless of size. PX 2506 at ¶ 65 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

609. BCBS-IL's greater bargaining leverage (relative to other health plans) in no way prevents RHS and SAMC from charging higher prices to other health plans. This is evident from the fact that both RHS and SAMC currently charge health plans significantly different prices. *See* PX 2506 at ¶¶ 62-66 (Capps Reply Aff.), *confidential - attorneys' eyes only*.

F. Defendants' Expert Analysis Should be Discredited

1. Dr. Noether's Analysis Comparing Rockford to other MSAs is Uninformative

610. Dr. Noether's comparison of Rockford to other MSAs in an attempt to demonstrate that the combined OSF-SAMC entity will not be able to exercise market power is seriously flawed. First, several of the MSAs chosen by Dr. Noether are not comparable to Rockford such as Fayetteville, NC where more than 50% of the population is military. This population (unlike the majority of the Rockford population) will have access to the VA system. Second, one of the data points used in Dr. Noether's MSA comparison is clearly erroneous based on publicly available information. PI Hearing Tr. at 439:12-441:17 (Capps). After correcting this error, the results of Dr. Noether's MSA study were reversed. PI Hearing Tr. at 441:18-20 (Capps).

2. Defendants' Expert Analysis of Diversions is Flawed

611. Dr. Noether's diversion calculations are conceptually flawed and inconsistent with market realities. Dr. Noether's analysis results in zero diversion rates, which would indicate no competition whatsoever between RHS and SAMC. This result is simply inconsistent with all the record evidence that RHS and SAMC compete with each other. PI Hearing Tr. at 441:21-442:19 (Capps).

3. Dr. Noether's Pricing Analysis is Fundamentally Flawed and Thus in No Way Discredits Dr. Capps' Willingness-to-Pay Analysis

612. Willingness-to-Pay ("WTP") measures a hospital's bargaining power vis-a-vis health plans. PI Hearing Tr. at 388:1-389:14 (Capps); PX 2501, ¶92 (Capps Aff.), *confidential - attorneys' eyes only*. Thus, WTP – by design – only predicts prices that are the result of negotiations between the hospital and health plan. Assessing whether WTP accurately measures prices requires accurately examining *negotiated* case-mix-adjusted prices.

613.

PX 2269 at ¶¶ 68-71, Appendices A1-A4, and back-up data (Noether Suppl. Aff.), *confidential - attorneys' eyes only*. Prices for out-of-network admissions generally are not negotiated by health plans and hospitals, but rather are determined by the hospital's chargemaster. *See, e.g.*, PI Hearing Tr. at 338:13-21 (Capps). Similarly, prices paid by small, non-contracted payers are also not determined by negotiation between a health plan and the hospital. Because Dr. Noether's pricing analysis co-mingles non-contracted prices with contracted prices, its results cannot be used to discredit Dr. Capps' WTP analysis.

614. Presumably due to flaws with either her methodology or data (or both), the results of Dr. Noether's pricing analysis are wildly inconsistent with record evidence, further rendering her pricing analysis unreliable. First, Dr. Noether admits that the prices she calculates for BCBS-IL at SwedishAmerican PX 2269-31 at ¶ 74 (Noether Suppl. Aff.), *confidential - attorneys' eyes only*. Excluding BCBS-IL – which accounts for approximately of commercial admissions at the three Rockford hospitals – dramatically alters her results. PX 2269 ¶ 74, Appendix A1 (Noether Supp. Aff.), *confidential - attorneys' eyes only*. Second, Dr. Noether's pricing analysis shows SAMC charging than SwedishAmerican. PX 2269 at Appendix A1 (Noether Suppl. Aff.), *confidential - attorneys' eyes only*. However, there is no evidence in the record that

Third, Dr. Noether's pricing analysis shows to SwedishAmerican than RHS. PX 2269 at Appendix A3 (Noehter Suppl. Aff.), *confidential - attorneys' eyes only*. But SwedishAmerican is out-of-network with The record indicates that health plans pay lower rates to in-network providers than out-of-network providers. *E.g.*, PI Hearing Tr. at 29:10-29:19 (Lobe); PI Hearing Tr. at 338:13-22 (Capps).

XIII. PURPORTED EQUITIES

615. A likelihood of success on the merits entitles the FTC to preliminary injunctive relief absent a compelling demonstration by defendants of public equities weighing against such relief. *See* Plaintiff's Proposed Conclusions of Law at ¶ 61. In weighing the equities, public equities are paramount. *See* Plaintiff's Proposed Conclusions of Law at ¶ 63. Given Plaintiff's strong likelihood of success on the merits, this Court must enter a preliminary

injunction unless particularly strong equities favor Defendants. No court has ever denied the FTC preliminary relief after it has raised "serious, substantial questions." *See* Plaintiff's Proposed Conclusions of Law at ¶ 61. In addition, "the greater the plaintiff's likelihood of success on the merits . . . the less harm from denial of a preliminary injunction the plaintiff need show in relation to the harm that the defendant will suffer if the preliminary injunction is granted." *See* Plaintiff's Proposed Conclusions of Law at ¶¶ 61-63. Indeed, Defendants cannot meet this exceedingly high burden here.

616. The principal public equity in Section 13(b) proceedings is the public's interest in the effective enforcement of the antitrust laws. *See* Plaintiff's Proposed Conclusions of Law at ¶ 62.

617. The public's interest will be immediately and irreversibly harmed if the Acquisition is permitted to proceed, which immediately would permit the Defendants to irreversibly "scramble the eggs," allowing the merged entity to begin combining operations and laying off employees. Consummation of the Acquisition during the ongoing administrative proceeding also would lead to serious and irreparable competitive harm, allowing the merged firm to use its enhanced leverage to demand higher rates from health plans, and to share competitively sensitive information that cannot be unshared. Absent a court-ordered preliminary injunction, Defendants will implement these actions immediately and irrevocably reduce competition. *See infra* Section XIV.

618. A preliminary injunction is needed to ensure that adequate relief will remain available should the Acquisition be deemed unlawful following the administrative trial on the merits. *See infra* Section XIV; *see also* Plaintiff's Proposed Conclusions of Law at ¶ 67.

619. Defendants OSF and RHS entered into the proposed Acquisition with full knowledge of the applicable antitrust laws, and a recognition that the Acquisition would likely draw scrutiny from the FTC or DOJ. *See* PX 4023-024 (McGrew (OSF) Dep. Tr. at 89:23-90:8) ("always a question"). For example, by Defendants' own admission, the purported efficiencies were prepared in anticipation of this litigation by FTI Consulting, a firm retained and supervised entirely by outside antitrust counsel before the FTC's investigation even began. PI Hearing Tr. at 897:4-15 (Manning); PX 681-001 (May 11, 2011, Letter of Carla Hine to Katherine Ambrogi), *confidential*; *see also* PX 227-039 (Stenerson (OSF) IH Tr. at 149:2-15), *confidential - attorneys' eyes only*. Accordingly, Defendants have consistently claimed attorney work-product protection over the FTI efficiencies calculations, the underlying data, and even the interactions between Defendants' executives and FTI, acknowledging the work was performed solely in anticipation of potential litigation, not for business reasons. *See generally* PX 228 (Tosino (FTI) IH Tr.) (objecting 19 times to questions on FTI efficiencies on work product grounds); PX 4021 (Seybold (RHS) Dep. Tr.) (objecting five times to questions on FTI efficiencies on work product grounds).

620. Defendants have offered no valid equities weighing against a preliminary injunction. *See* Plaintiff's Proposed Conclusions of Law at ¶ 62. On the contrary, they acknowledge that the benefits of the deal will remain intact well beyond the anticipated conclusion of the administrative trial on the merits. PX 4023-024 (McGrew (OSF) Dep. Tr. 92:3-12). Furthermore, Defendants cannot credibly argue that either OSF or RHS is in financial jeopardy if the merger were held in abeyance during the pending administrative proceeding. *See infra* Section XII. Any contention, therefore, that Defendants are harmed by maintaining the *status quo* for a few more months is surely specious.

621. Given the Plaintiff's strong likelihood of success on the merits, the strong public interest in effective enforcement of the antitrust laws, the need to maintain the *status quo* to enable effective relief later if the FTC succeeds at the administrative proceeding, and the immediate irreversible harm that the local community will suffer in the interim balanced against the lack of harm to Defendants clearly shows that the equities weigh heavily in favor of preliminary injunctive relief.

XIV. PRELIMINARY INJUNCTION IS NEEDED TO PRESERVE THE STATUS QUO DURING THE MERITS TRIAL AND ENSURE THAT ADEQUATE RELIEF CAN BE ORDERED IF IT IS WARRANTED

A. OSF and RHS Plan to Exchange Competitively Sensitive Information, Consolidate Services, and Terminate Employees

622. Absent preliminary relief, OSF and RHS will be free to exchange competitively sensitive information, renegotiate hospital and physician rates, terminate employees, eliminate or restrict access to important clinical services, and otherwise consolidate operations in ways that would be difficult or impossible to undo. PI Hearing Tr. at 748:5-15, 778:1-5 (Kaatz); PX 4024-018 (Schoeplein (OSF) Dep. Tr. at 65:9-66:21).

623. In fact, if the motion for preliminary injunction were denied, OSF and RHS would consummate the merger "within two to four weeks" and OSF and RHS would begin sharing competitively sensitive and confidential information "right away." PI Hearing Tr. at 777:2-778:5 (Kaatz).

624. The CEO of OSF testified that the merged entity would start consolidating ancillary facilities "very quickly" where possible. PX 4024-017 (Schoeplein (OSF) Dep. Tr. at 63:21-64:20).

625. Moreover, the CEO of RHS testified that consolidation of service lines, effectively eliminating some services at each hospital, might very well occur within the first year after the merger is allowed to close. PI Hearing Tr. at 748:5-15 (Kaatz); *see* PX 34-003 (Business Efficiencies Report for the RHS-OSF Affiliation) (identifying services as candidates for consolidation), *confidential*.

626. Unless a preliminary injunction is entered, OSF and RHS also would immediately begin to work jointly to renegotiate health plan contracts as they came up for renewal. PX 4024-018 (Schoeplein (OSF) Dep. Tr. at 65:25-66:21). Some of RHS's contracts are

PX 215-033 (Dillon (RHS) IH Tr. at 125:9-17)

confidential - attorneys' eyes only. In addition,

PX 215-054 (Dillon (RHS) IH Tr. at 212:5-23), *confidential - attorneys' eyes only*.

627. More than 50 employees at RHS or OSF would be terminated if the merger is allowed to close, including individuals responsible for investigating and correcting potential patient safety and quality of care concerns. PI Hearing Tr. at 889:25-892:22 (Manning).

B. OSF Plans to Increase Hospital and Physician Rates

628. Where managed care contracts come up for renewal, OSF will take over the management and negotiation of RHS's contracts with health plans. PX 4024-018 (Schoeplein (OSF) Dep. Tr. at 65:25-66:21).

629. The merger is likely to lead to substantial price increases affecting Rockford area employers and employees. PI Hearing Tr. at 333:2-335:14, 482:3-11; 483:3-7 (Capps); PI

Hearing Tr. at 247:7-19 (Petersen) ("I would expect that prices to insurance companies are going to go up, and prices to the employer groups are going to go up as a result").

630. Without a court order preventing consummation of the merger pending the full administrative trial on the merits, WOB area employers and their employees will suffer substantial, immediate, and irreversible harm from higher healthcare costs resulting from the merger. PX 276 at ¶ 9 *confidential*. After the Acquisition, health plans must agree to OSF's terms and conditions in order to offer a network with two Rockford hospitals. PI Hearing Tr. at 41:14-21 (Lobe); PI Hearing Tr. at 247:20-23 (Petersen). Higher healthcare costs will be borne by WOB area employers and employees, many of whom already are struggling financially. PI Hearing Tr. at 662:7-19 (Olson) (referring to his company's struggle to contain health care costs); PI Hearing Tr. at 673:6-18 (Olson) (referring to the local employer coalition, ECOH's difficulty controlling health care costs). Area employers may reduce healthcare benefits for employees, and some employees may drop their healthcare coverage altogether and/or forgo medical treatment due to higher out-of-pocket expenses. PX 277 at ¶ 8 *confidential - attorneys' eyes only*; PX 269 at ¶ 8 (Endsley (C&E Specialties) Decl.); PX 276 at ¶ 9 *confidential*; PX 255 at ¶ 15 *confidential - attorneys' eyes only*; *see also* PI Hearing Tr. at 691:13-692:15; 693:7-24 (Olson); PX 2501 at § IV.H ¶¶ 123-129 (Capps Aff.), *confidential - attorneys' eyes only*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2012, I served the foregoing on the following counsel via electronic mail:

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