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

FEDERAL TRADE COMMISSION Plaintiff, v. OSF HEALTHCARE SYSTEM and ROCKFORD HEALTH SYSTEM Defendants.	Case No. 3:11cv50344 Hon. Frederick J. Kapala Hon. P. Michael Mahoney, Magistrate Judge **PUBLIC (REDACTED)**

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INTRODUCTION

After a year of intense investigation and civil discovery,[1] the FTC's evidence that the proposed affiliation between OSF Healthcare System ("OSF") and Rockford Health System ("RHS") violates Clayton Act Section 7 rests on a single, undisputed fact: three hospitals are more than two. Based upon that, the FTC computes market shares and HHI concentrations, and "presumes" the affiliation will be anticompetitive. But the FTC has no *facts* to add to this mere presumption; it proffers only economic theory, disconnected from the realities of a rapidly changing healthcare world, and rank speculation to support its prediction that the affiliation will cause prices to rise by an unspecified amount. The FTC ignores the substantial cost-savings and quality enhancements that the affiliation will generate and offers no concrete facts – other than two rival hospital systems is less than three – to support its claim of likely competitive harm. The FTC ignores Defendants' showing that the affiliation is "the best way" for OSF and RHS to deliver economic, efficient, high quality healthcare services to the citizens of Rockford.

The facts presented over the three-day evidentiary hearing confirm that the affiliation of OSF and RHS will not substantially lessen competition for general acute care inpatient services or for primary care physician services in the Rockford area. To the contrary, a preliminary injunction would continue to deprive the Rockford community of the proposed merger's substantial procompetitive benefits. The FTC presented no evidence of likely collusion between OSF Northern Region and SwedishAmerican Health System ("SAH") or exclusion of SAH by OSF Northern Region. When the Court weighs the FTC's failure to make a factual showing against the transaction's procompetitive, healthcare-enhancing benefits, it must conclude that the

[1] The parties filed their Hart-Scott-Rodino filings with the Federal Trade Commission and the Department of Justice, Antitrust Division on February 11, 2011. FF ¶ 651.

FTC failed to meet its burden of proof to obtain a preliminary injunction. Accordingly, the Court should deny the FTC's request for injunctive relief.

LEGAL STANDARD

This Court may grant a preliminary injunction pursuant to FTC Act Section 13(b), only if it determines that (1) plaintiff is likely to ultimately prevail on the merits of its underlying claim, and (2) after weighing the equities, an injunction is in the public interest. 15 U.S.C. § 53(b).

The FTC has the burden of showing it is likely to prevail on the merits. *See FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999). That is, the FTC must "raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair grounds for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Id.* (citation omitted). The FTC's burden under Section 13(b) is not insubstantial. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004). Merely "showing . . . a fair or tenable chance of success on the merits will not suffice for injunctive relief," *Tenet*, 186 F.3d at 1051, because the district court may not "rubber-stamp an injunction whenever the FTC provides some threshold evidence." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008). In other words, a showing of three to two, without more, is not enough. Here, the FTC has no more.

To show that a transaction is likely to violate Clayton Act Section 7, the FTC must show a "reasonable probability of substantial impairment of competition by an increase in prices above competitive levels." *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 136-37 (E.D.N.Y. 1997) (citation omitted). Showing only "[a] mere possibility" of an impairment of competition is insufficient, *FTC v. Foster*, 2007 U.S. Dist. LEXIS 47606, at *131 (D.N.M. May 29, 2007) (citation omitted), because "section 7 is concerned with the loss of competition that is sufficiently probable and imminent, not with possibilities." *Id.* Thus, Section 7 demands "that a

plaintiff demonstrate that the substantial lessening of competition will be sufficiently probable and imminent to warrant relief." *Arch Coal*, 329 F. Supp. at 115 (citation omitted).

The FTC claims that its allegations create a presumption of illegality, but its "supporting" facts are nothing more than a calculation of market shares and HHI concentration levels. Even when a significant increase in market concentration establishes a presumption of anticompetitive effects, that does not end the inquiry. Defendants can "rebut the presumption by producing evidence that market-share statistics produce an inaccurate account of the merger's probable effects on competition." *Arch Coal,* 329 F. Supp. 2d at 116. Recognizing that market shares may inaccurately represent the competitive stature of a post-merger company, the Supreme Court has admonished that the history and probable future of the market are equally as important. *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498, 503-04 (1976). If a defendant successfully rebuts the presumption, then "the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion which remains with the government at all times." *Arch Coal,* 329 F. Supp. 2d at 116 (citation omitted). The ultimate burden remains on the FTC "on every element . . . and a failure of proof in any respect will mean the transaction should not be enjoined." *Id.*

Under Section 13(b), even if the FTC makes out a *prima facie* case of a violation, it also must show that the equities favor granting an injunction. The FTC must prove that "harm to the parties and to the public that would flow from a preliminary injunction is outweighed by the harm to competition, if any, that would occur in the period between denial of a preliminary injunction and the final adjudication of the merits of the Section 7 claim." *FTC v. Lab. Corp. of Am.*, 2011 U.S. Dist. LEXIS 20354, at *55 (C.D. Cal. Feb. 22, 2011) (citations omitted). When weighing the equities, the Court may consider both public and private equities. *FTC v. Elders*

Grain, 868 F.2d 901, 903 (7th Cir. 1989). Public equities include "improved quality, lower prices, increased efficiency, realization of economies of scale, consolidation of operations, and elimination of duplication," all of which enhance competition and may result from a merger. *Lab. Corp.*, 2011 U.S. Dist. LEXIS 20354, at *57 (citation omitted). "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." U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 10 (2010). As a result, courts have denied preliminary injunctive relief where the merger will result in efficiencies that benefit consumers. *See Lab. Corp.*, 2011 U.S. Dist. LEXIS 20354, at *61-62.

In no line of commerce is it more important than in the delivery of healthcare – where hemorrhaging, out of control costs threaten the entire economy – that this Court hold the FTC to the strict requirements of Section 13(b), lest a critical opportunity to maximize consumer welfare be lost. Here, the evidence has demonstrated that the affiliation will provide the Rockford community with substantial benefits that cannot be achieved without the merger. As a result, both the equities and analysis of potential competitive harm, require denial of the motion for a preliminary injunction.

ARGUMENT

I. THE FTC HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

Apart from the fact that the affiliation will reduce the number of hospital systems in Rockford from three to two, the FTC failed to offer any, much less sufficient, evidence of anticompetitive effects to rebut Defendants' evidence that the proposed affiliation will yield substantial efficiencies and community benefits. Consequently, the FTC did not carry its burden under Section 13(b).

A. The FTC Cannot Meet Its Burden Solely with Market Concentration Data

Throughout its Complaint, pre-hearing submissions, and during the preliminary injunction hearing, the FTC, wearing blinders to block out the rest of the story, argues that the affiliation is a "merger to duopoly" and the computation of market shares and HHI levels create a "presumption of illegality." *See* Dkt. 1, Compl. at ¶¶ 2, 5, 33-35; Dkt. 5-1, Pl. Mem. at 2, 4-5; FF ¶ 968.[2] The essence of the FTC's evidence reduces to a single, undisputed fact: while three independent hospital systems currently compete in Rockford, after the affiliation, only two will remain. That does not entitle the FTC to a preliminary injunction.

Courts have frequently denied the government an injunction in hospital mergers resulting in high post-transaction HHI levels and even, as here, a "three-to-two" combination. *See, e.g., FTC v. Freeman Hosp.*, 69 F.3d 260, 262 (8th Cir. 1995) (denied preliminary injunction in a three-to-two merger); *FTC v. Tenet Health Care Corp.*, 17 F. Supp. 2d 937, 946 (E.D. Mo. 1998), *rev'd* 186 F.3d 1045, 1047 (8th Cir. 1999) (reversed grant of preliminary injunction where the only two hospitals in Poplar Bluff, MO merged, the resulting market share was 84%, and the post-merger HHI would be 6,000 to 7,000); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1294 (W.D. Mich. 1996) (denied preliminary injunction where merging parties would control 47 to 65% of the general acute care hospital services market and the post-merger HHI would be 2,767 to 4,521); *Long Island Jewish Med. Ctr.*, 983 F. Supp. 121 (denied preliminary injunction where merging hospitals had 100% of the market alleged by the government).

These cases reflect the fundamental principle that market shares are merely a starting point for an inquiry into the likely competitive effects of a transaction. *See United States v.*

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[2] Plaintiff's Memorandum in Support of Its Motions for Temporary Restraining Order and Preliminary Injunction (Dkt. 5-1) is cited at "Pl. Mem. at __." Defendants' Proposed Findings of Fact and Conclusions of Law, filed with this brief, are cited as "FF ¶ __" or "FF Section __."

Baker Hughes, Inc., 908 F.2d 981, 984, 992 (D.C. Cir. 1990) (explaining that "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness" because the HHI "cannot guarantee litigation victories"). Market share analysis is just the beginning, not the end, of the Court's "broad inquiry." *Foster*, 2007 U.S. Dist. LEXIS 47606, at *138. The government agrees. *See Horizontal Merger Guidelines* at § 5.3 ("Market shares may not fully reflect the competitive significance of firms in the market or the impact of a merger."). This is because "[s]tatistics concerning market share and concentration are not conclusive indicators of anti-competitive effects." *Foster*, 2007 U.S. Dist. LEXIS 47606, at *138. Defendants may produce "nonstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991) (citation omitted).[3]

Instead, assessment of the likely competitive effects of a merger requires an "examination of a particular market, its structure, history, and probable future." *Gen. Dynamics*, 415 U.S. at 498 (citation omitted). "Hence, antitrust theory and speculation cannot trump facts." *Arch Coal*, 329 F. Supp. 2d at 116. Were it otherwise, the Court would be stripped of its responsibility to determine whether the likelihood of success outweighs the equities that will result from the transaction. *See Foster*, 2007 U.S. Dist. LEXIS 47606, at *129-30. Nowhere is a naked application of HHI thresholds a more misleading indicator of public welfare than in the healthcare services market. Here, Defendants' evidence rebuts – indeed entirely unwinds – the

[3] Indeed, if a high level of market concentration alone was enough to make a merger impermissibly anticompetitive under the antitrust laws, mergers among competitors would be *per se* unlawful in most MSAs around the country because hospital ownership is already concentrated. FF ¶¶ 744-755. As the FTC's economist, Dr. Capps, testified, 70% of MSAs in the United States are highly concentrated and have more than one hospital. FF ¶ 749. Where the MSA constitutes the geographic market (as the Complaint in this case essentially alleges), every proposed merger of competing hospitals would result in a presumptively unlawful Merger Guidelines violation based on the HHI thresholds. FF ¶ 752. Reliance on that presumption would be misplaced because, as Defendants' economist, Dr. Noether, demonstrates, margins are not systematically higher in two-hospital markets than they are in three-hospital markets. FF ¶¶ 758-760.

FTC's *prima facie* case and demonstrates that the affiliation is in the public interest and will not enable OSF Northern Region to increase prices to supracompetitive levels in the market for either general acute care inpatient services or primary care physician services. *See* FF Sections VIII.D. and X.

B. Defendants Have Successfully Rebutted Any Presumption of Illegality Based Upon Market Shares with Proof of Substantial, Merger-Specific Efficiencies

The evidence presented at the hearing demonstrates that OSF Northern Region will be a more sustainable and higher quality healthcare delivery system than RHS or SAMC could be independently. *See* FF Section IX.C. Rockford area residents will realize a significant number of benefits from the affiliation of RHS and OSF that could not be achieved by either hospital alone. *See* FF Sections IX. and X.

The affiliation will promote greater patient access to integrated primary, secondary and tertiary healthcare services. FF ¶¶ 1170-1184, 1199-1201. It will also allow the consolidation of several services [redacted], which will enable OSF Northern Region to create Centers of Excellence. FF ¶¶ 1156-1165. For many services, neither RHS nor SAMC independently meets the generally-accepted, minimum patient volume thresholds associated with improved outcomes. FF ¶¶ 1161-1162, 1165. By combining patient volumes, the proposed affiliation will enable OSF Northern Region to meet or exceed these threshold patient volumes. FF ¶¶ 1156-1165. As Mr. Katz testified, this will allow OSF Northern Region to become a regional referral center and enhance OSF Northern Region's ability to recruit talented specialist and sub-specialty physicians to Rockford, thereby resulting in fewer patients having to leave the community to receive treatment. FF ¶ 1199. The affiliation also will allow the merging hospital systems to combine best practices to improve their quality. FF ¶¶ 1166-1169. For example, the affiliation will afford physicians the ability to share

techniques, procedures, and tools to become more efficient and deliver higher-quality outcomes. FF ¶ 1157.

The affiliation will enable OSF Northern Region to achieve efficiencies and substantial cost-savings in the delivery of healthcare that neither hospital system could achieve on its own. *See* FF Section IX.B. FTI Consulting's ("FTI") business efficiencies review – and its development of a supporting business case – identified significant efficiencies and cost savings that can be attained through the affiliation of SAMC and RHS. *See* FF Section IX.A. These savings include at least $131.6 million in one-time capital cost avoidance savings, and $42.3-56.2 million in annual recurring operating cost reductions (FF ¶¶ 982, 1049), representing 8% of the parties' current net operating expenses. By combining underutilized or complementary assets, the affiliation will allow the parties to more productively deploy capital resources in the community. FF ¶ 984.

During the evidentiary hearing, Dr. Susan Manning testified that she reviewed FTI's business case analysis and determined which efficiencies that FTI identified were merger-specific and cognizable under the Merger Guidelines. FF ¶¶ 1073-1081. As Dr. Manning explained, the Merger Guidelines create a two-prong test: (1) the savings must be likely to be accomplished with the proposed merger and unlikely to be accomplished either on a stand-alone basis without the merger or by some other means; and (2) the savings and efficiencies must be shown to not arise from any type of anticompetitive reduction in output or services. FF ¶ 1077. Applying this test, Dr. Manning confirmed that at least $15.2-15.6 million in annual, recurring operational cost-savings were cognizable and merger-specific. FF ¶ 1082. She also testified that $114.1 million of the one-time capital cost avoidance savings identified by FTI are merger-specific and cognizable under the Merger Guidelines. FF ¶ 1118. These cost savings ($190

million over the first five years) will permit Defendants to more efficiently provide quality care to the Rockford community and greatly restrain the upward spiral of healthcare costs, while providing valuable resources, support programs, and services that neither system presently can afford on its own. FF ¶¶ 1085, 1117-1118, 1185-1219.

These efficiencies rebut – indeed, reverse – any presumption of illegality arising from the post-affiliation HHIs and increases in market concentration. *See Butterworth Health Corp.*, 946 F. Supp. at 1302 (concluding that defendants rebutted the government's *prima facie* case with evidence of, among other things, substantial efficiencies). The burden, therefore, shifts back to the FTC to prove that the affiliation will have anticompetitive effects.

C. The FTC Failed to Meet its Burden that the Affiliation Will Likely Have an Anticompetitive Effect in the Relevant Market

After measuring a merger's impact on market concentration, the court must examine the history and probable future of the market to assess whether anticompetitive effects are likely, notwithstanding relatively high post-merger concentration. *Gen. Dynamics,* 415 U.S. at 498. The issue in this case is whether the FTC has established a likelihood of success by showing that the proposed affiliation will cause rates that managed care organizations ("MCOs") pay to the Rockford hospitals to increase substantially more, and to supracompetitive levels, than they otherwise would absent the affiliation. Besides showing that the number of independent rivals will decline from three to two, the FTC (and each MCO witness on whom the FTC relies) only speculates that the proposed affiliation will result in anticompetitive effects. Testimony from the FTC's economist and MCO witnesses amounts to little more than conjecture about this central issue.

The facts contradict the FTC's speculation about anticompetitive harm. First, robust competition between SAH and OSF Northern Region will exist and act as a competitive

constraint in the market, just as it does in two-hospital markets throughout the country where competition flourishes. *See* FF Section VIII.D.1. SAH admitted that it will "compete successfully" for patients and market share in the post-affiliation world. FF ¶ 815. Second, the FTC's claim ignores the ability of powerful BlueCross BlueShield of Illinois ("BCBS") and the other MCOs, which are large, sophisticated insurance companies, to defeat any attempt by OSF Northern Region to exercise market power, and to offer "narrow" networks of full-service hospital providers that would prevent unmerited price increases. *See* FF Sections VIII.D.2., VIII.D.4. The FTC's economist did not provide evidence to overcome these flaws in the FTC's case. *See* FF Section VIII.G. Rather, Dr. Capps admitted that he did not calculate an actual price effect from the proposed affiliation; he only speculates about what general effect the affiliation may have on prices. FF ¶¶ 964-970. The Court must disregard that speculation when weighing the actual *evidence* presented.

1. The FTC Has No Fact-Based Evidence that OSF Northern Region Will Charge Supracompetitive Prices for General Acute Care Inpatient Services or Primary Care Physician Services

a. **The FTC Incorrectly Discounts the Competitive Constraint that SAH Will Exert on OSF Northern Region**

Dr. Capps admitted that SAH is a very strong competitor. FF ¶ 817. SAH is the largest and fastest growing hospital in the Rockford area. FF ¶¶ 154-156. It has invested [redacted], and is aggressively expanding its services following an affiliation with the University of Wisconsin. FF ¶¶ 157, 166-172. SAH also has sufficient inpatient bed capacity to treat additional patients if MCOs increasingly choose to offer a health plan product consisting of SAH as the only in-network hospital provider. FF ¶¶ 792, 820. Simply put, SAH will effectively

constrain any attempt by OSF Northern Region to raise reimbursement rates above competitive levels. FF ¶¶ 814-837.

SAH is the closest competitor to both RHS and SAMC. FF ¶¶ 771-784. Dr. Capps' diversion analysis confirms this. FF ¶ 781. Dr. Capps found that if RHS were no longer available, more patients would choose to be admitted at SAH than SAMC. FF ¶ 783. Likewise, were SAMC no longer available, more patients would elect SAH than RHS. FF ¶ 784. This evidence confirms that SAH is well positioned as a strong competitor to constrain OSF Northern Region from raising its rates above competitive levels and is inconsistent with the FTC's theory that OSF Northern Region could unilaterally increase rates above competitive levels.

b. **The FTC's Theory of Supracompetitive Pricing Ignores MCOs' Incentive and Proven Ability to Resist Price Increases**

The FTC's theory that OSF Northern Region will impose anticompetitive price increases rests on the counter-intuitive and counter-factual speculation that large, sophisticated insurance companies like BCBS, UnitedHealth Group ("United"), and Coventry Health Care ("Coventry") will be helpless if OSF Northern Region tries to increase its rates. The FTC's concern is predicated upon a misunderstanding of the dynamics in negotiations between MCOs and providers in the Rockford area, and the unfounded speculation of Dr. Capps.

First, the evidence demonstrated that MCOs such as BCBS, United, and Coventry are large, sophisticated companies with significant bargaining leverage. FF ¶¶ 838-844. BCBS holds 63% of the commercial health-insurance market in the Chicago area through health maintenance and preferred-provider products, FF ¶ 257, and is by far the largest MCO in Rockford. FF ¶¶ 131, 226, 258-259. United is one of the largest U.S. commercial health insurers and the second-largest in Illinois; it has approximately one million insureds in Illinois

and 22,500 in the Rockford area. FF ¶ 419. Coventry is the fifth- or sixth-largest U.S. health insurer with over five million covered lives and annual revenues of $13 billion. FF ¶ 398.

The FTC also ignores the history of payor contracting in the Rockford area and the realities that: narrow provider networks are an increasingly common, employer-accepted response to spiraling healthcare costs (FF ¶¶ 850-855); unfettered, buffet-style consumer choice is unsustainable; and, the creation of efficiencies is essential in a healthcare system undergoing reform. The combination of these factors will empower and enable MCOs to defeat any threatened price increase by OSF Northern Region by refusing to contract with OSF Northern Region and marketing a health insurance product with SAH as the only in-network hospital provider. *See* FF Section VIII.D.4.

One example of such a network is United's new health insurance product called "Core," which has only one hospital, SAH, as its in-network provider. FF ¶ 865. This "Core" product is part of United's pilot program to develop narrow network opportunities. FF ¶ 866. United's Core product provides a [redacted] relative to United's other health insurance products. FF ¶ 438. Since it was launched in 2010, United's Core product has exceeded expectations in membership volume, and is considered a success. FF ¶¶ 439-440. United plans to [redacted] and expects it to continue to grow in Rockford. FF ¶¶ 441, 866.

Similarly, BCBS offers a HMO network that includes only one Rockford-area provider, SAH. FF ¶ 863. This product has [redacted]. FF ¶¶ 258, 402, 864. Other MCOs also offer or have considered offering single-hospital networks in the Rockford area. FF ¶ 862 [redacted]; FF ¶ 859

[redacted]. This offering by MCOs of products with narrow provider networks is not unique to Rockford; it is a nationwide trend. FF ¶¶ 868-879.

Single-hospital networks appeal to Rockford-area employers as they try to reduce the financial pressures caused by escalating healthcare costs. FF ¶ 853. As Dean Olson, CEO of Rockford Acromatic Products ("Rockford Acromatic"), a self-insured Rockford employer, testified, his company moved to SAMC's one-hospital Direct Access Network for its employees' health insurance coverage to stem its escalating healthcare costs. *See* FF Section III.B.1. None of Rockford Acromatic's employees dropped their health insurance coverage at open enrollment after transitioning to SAMC's Direct Access Network, and the company received no complaints from its employees regarding the limited hospital network. FF ¶ 634. Rockford Acromatic expects to save approximately 20-25% on its healthcare costs by switching to a single hospital network. *Id.*

Therefore, the evidence shows that narrow provider networks are viable, marketable options that represent an alternative to two- or three-hospital networks. *See* FF Section VIII.D.4. The ability of MCOs to market a one-hospital network in Rockford will constrain OSF Northern Region from attempting to impose an anticompetitive price increase.

Finally, RHS and SAMC's proposed stipulation eviscerates any concern that OSF Northern Region would be able to require the exclusion of SAH from payor networks or force payors to contract with all OSF hospitals as a condition to contracting with the OSF Northern Region. FF ¶¶ 845-849. RHS and SAMC have agreed that upon consummation of the affiliation, OSF Northern Region will not require any MCO to exclude SAH from its provider network as a condition for contracting with OSF Northern Region. FF ¶ 845. They also agreed

that neither OSF Healthcare nor OSF Northern Region will require a MCO to contract with OSF Healthcare on a systemwide basis or any other individual OSF hospital outside of OSF Northern Region as a condition for obtaining a contract with the OSF Northern Region hospitals. FF ¶ 846. As representatives from United and Coventry testified, this will provide MCOs the ability to offer three different network options, at potentially different price points: (1) a single-provider network with SAH; (2) a single-provider network with OSF Northern Region; or (3) a network with both SAH and OSF Northern Region. FF ¶ 848. OSF and RHS have publicly committed they will not engage in conduct which the FTC claims, but OSF and RHS do not concede, is anticompetitive. FF ¶¶ 891-892. The Court, through its contempt power, can enforce that promise by including the stipulation in its order denying the preliminary injunction. Courts have relied on precisely this kind of assurance in refusing to enjoin hospital mergers. *See Butterworth Health Corp.*, 946 F. Supp. at 1298.

c. The FTC's Expert, Dr. Capps, Did No Analysis to Determine the Actual Price Effect of the Proposed Affiliation

The FTC's case rests largely on the flawed analyses of Dr. Capps, who admitted that he did not estimate a price effect from the affiliation. *See* FF Section VIII.G. Rather, as Dr. Capps testified, his "opinion" that the affiliation would result in a significant price increase, is speculation:

[redacted]

FF ¶ 968. Dr. Capps never performed a merger simulation. FF ¶ 966. His "analysis" that "there are three hospitals now" and there will be only two post-affiliation, merely re "Capps" the FTC's mantra that "three-is-more-than two;" it is not expert analysis. Dr. Capps' guess that the increase

[redacted] (FF ¶ 969) amounts to a mere possibility, with which Section 7 is not concerned. *See Foster*, 2007 U.S. Dist. LEXIS 47606, at *131. Moreover, Dr. Capps' *directional* estimation of prices (FF ¶ 970) is insufficient to show a "substantial lessening of competition [that] will be sufficiently probable and imminent to warrant relief." *Arch Coal*, 329 F. Supp. 2d at 115 (citations omitted).

2. The FTC Has No Evidence that the Affiliation Will Result in Unlawful Coordination

The FTC also lacks evidence to support its claim that OSF Northern Region and SAH will impermissibly coordinate their competitive activities in the future. *See* FF Section VIII.E. As an initial matter, the FTC's simultaneous assertion that the Rockford area hospitals will impermissibly *exclude* and *collude* exposes the absence of facts supporting either theory, for the presence of facts supporting one would make the other implausible.

As for the FTC's purported evidence of likely collusion, all of its cited "facts" are stale, involve publicly available information, and are unreliable. *See* FF Section VIII.E.4. None of the purportedly shared information would allow the Rockford area hospitals to coordinate or impermissibly monitor their competitive activities in the future. FF ¶¶ 904-906. Indeed, monitoring one another's service line offerings, recruitment, and capital expenditures is consistent with competition, not coordination. FF ¶¶ 895-900.

Moreover, executives from all three hospitals testified that they have not, cannot, and do not intend in the future to coordinate their competitive activities. FF ¶¶ 891-892, 907-909.

[redacted]. FF ¶ 890. [redacted]

[redacted]. FF ¶¶ 908-909.

Similarly, SAMC's CEO testified that in the 16 years he has led SAMC, he has never been involved in discussions with other hospitals in Rockford about dividing services lines, coordinating or discussing prices, rates charged to MCOs, or potential boycotts of MCOs. FF ¶ 891. Likewise, Mr. Kaatz testified that he was not aware of any coordination among the hospitals in Rockford, and, as the future CEO of OSF Northern Region, he would not permit any such coordination. FF ¶ 892.

Dr. Capps conceded that he was not aware of any evidence that Paula Dillon, RHS' director of managed care contracting, knew the terms of payor contracts involving SAMC or SAH. FF ¶ 893. He acknowledged the same regarding Mary Breeden, OSF's head of managed care contracting. FF ¶ 894. At the hearing, the FTC's witnesses confessed that they have no evidence, and do not expect, that OSF President, Sister McGrew, would allow OSF Northern Region to act unlawfully or anticompetitively. FF ¶ 910. In sum, the FTC's charge that the affiliation will result in anticompetitive coordination is baseless.

D. The FTC Has Failed to Meet Its Burden With Respect to Primary Care Physicians

The FTC has also failed to meet its burden with respect to the second relevant market it alleged – primary care physician services.[4] Dr. Capps admitted that the affiliation would

[4] At the hearing on February 3, 2012, the Court asked the parties' to address the consequences if the Court determines that the FTC has met its burden for only one of its two alleged product markets. If the Court finds that the FTC has met its burden for only one of the two product markets (the FTC has failed to meet its burden with respect to either), the Court could deny the motion as to one product market and grant the motion as to the other. As a practical matter, however, granting the motion as to one market likely precludes the Defendants from consummating the transaction and proceeding to implement the affiliation. Defendants currently operate two systems each of which intertwine several services, including general acute care inpatient services and primary care physician services. It would be not practical to merge their operations with respect to just one of the alleged product markets. Only an affiliation allowing coordination and integration across the two integrated systems will allow the

(continued...)

increase concentration in the alleged primary care physician market "to a much lower extent than in the acute inpatient hospital services market," and, using the FTC's own unreliable and inflated numbers, would result in a combined market share of only [redacted]. FF ¶ 937. Dr. Capps asserts that the primary care physician services market he defines [redacted] FF ¶ 938. (emphasis added). But neither Defendants nor Dr. Capps have found any case in which the FTC has obtained, or even sought, a preliminary injunction where the post-merger HHIs are less than 1,930, as the FTC alleges for primary care physician services in this case. FF ¶ 939.

The record evidence confirms that, post-affiliation, anticompetitive effects in the primary care physician services market are unlikely. First, MCOs have substantial bargaining leverage over physician service contracts. FF ¶ 943. For example, [redacted] dictates prices for physician services in Rockford, allowing no negotiations. *Id.* Second, entry into the primary care physician services market is easy. FF ¶¶ 940-942. Primary care physicians are recruited nationally, not locally. FF ¶¶ 944-946 (SAH, SAMC, and RMH all recruit their primary care physicians from all over the country). Moreover, SAH, which has Rockford's largest primary care physician group, also has Rockford's only family residency program. FF ¶¶ 941, 1185. Thus, entry is facilitated through the family residency program, as well as through independent primary care physicians, physicians who practice at the Crusader Clinic, and national recruitment of primary care physicians. FF ¶¶ 940-942. Third, most physicians admit to only one hospital, and for those who admit to two hospitals, the two are usually not [redacted]. FF ¶ 948. Accordingly, the transaction will not change physician referral patterns.

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parties to achieve the valuable, merger-specific cost savings and efficiencies. Thus, granting a preliminary injunction on either count would enjoin the affiliation from being consummated.

In sum, the consolidation of the SAMC and RHS physician practices will not change the competitive landscape for the physician services offered by the hospitals. The FTC has failed to meet its burden with respect to this alleged relevant market.

II. THE EQUITIES WEIGH STRONGLY IN FAVOR OF THE AFFILIATION

A. The Affiliation Will Result in Substantial Efficiencies and Benefits to the Rockford Community that Cannot Be Accomplished Without the Merger

The analyses of the likelihood of success and the public equities are legally distinct, "and the latter should be analyzed separately, no matter how strong the agency's case on the former." *Lab. Corp.*, 2011 U.S. Dist. LEXIS 20354, at *54 (citation omitted). Further, "even if the Court finds that the FTC demonstrated a likelihood of success on the merits, 'particularly strong equities [that] favor the merging parties' will bar a preliminary injunction." *Id.* at *56 (*citing Whole Foods*, 548 F.3d at 1035). Therefore, even if the Court were to find, *arguendo*, that the FTC met its burden with respect to likelihood of success on the merits of its Section 7 claim, the Court must separately consider the equities before granting a preliminary injunction. Here, the harm an injunction would cause to Rockford residents, by depriving them of the significant efficiencies resulting from the affiliation, would substantially outweigh any benefits arising from the proposed injunction. *See* FF Section X. As Dr. Manning testified, these merger-specific savings will permit the parties to redeploy capital (that otherwise would be spent on redundant expenditures) to improve and expand medical services. This capital redeployment will increase consumer welfare. FF ¶¶ 984, 1117.

Additionally, the affiliation will result in substantial efficiencies and benefits to the Rockford community, including improving access to medical services, consolidating programs and services, allowing for care of patients at a single site, and improving quality. *See* FF Sections IX.C., X.A. The affiliation will also benefit the Rockford community by creating the

opportunity to reduce costs and clinically integrate and enhance services to be provided locally . *See* FF Section X.C. These benefits outweigh any anticompetitive effects and rebut any presumption resulting from an alleged decrease in competition. As a result, the Court should deny the FTC's motion for an injunction. *See Butterworth Health*, 946 F. Supp. at 1301-02 (court denied preliminary injunction even where FTC had shown that merged entity would have substantial market power because the overall benefit to the public of allowing merged entities to pursue efficiencies was ultimately "in the best interests of the consuming public as a whole"); *Lab. Corp.*, 2011 U.S. Dist. LEXIS 20354, at *61-62 (denying preliminary injunction because balancing the equities favored defendants).

B. The Affiliation Is Essential to Meet the Needs of the Rockford Community in the New World of Healthcare Reform in Which Efficient Delivery of Quality Healthcare Services Must Be Given Primacy

The affiliation will also best meet the needs of the Rockford community given the current economic climate and the challenges of healthcare reform, which require transformative, economical, efficient delivery of high quality healthcare. *See* FF Section X.D. The declining Rockford economy and increase in unemployment has caused the percentage of commercially-insured in the Rockford MSA to decline from approximately 72% in 2000 to about 48% in 2011. FF ¶ 58. The percentage of the MSA that is insured by Medicaid has increased from 7% in 2000 to approximately 20% in 2011, while Medicare coverage has increased from 10% of the population in 2000 to 17% in 2010. FF ¶¶ 58, 60. Moreover, 16% of the population is currently uninsured, almost a 50% increase from 2000. FF ¶ 61. Neither Medicare nor Medicaid cover the costs of providing healthcare services for either RHS or SAMC. FF ¶¶ 202, 204. This deficit makes it even more important for the hospitals to reduce their costs. FF ¶¶ 455-472.

Healthcare reform also requires hospitals to change the way they deliver healthcare services, making it essential that they become more efficient to respond to changes in the way

the government compensates for healthcare delivered to government-insured patients. *See* FF Section X.D. As Mr. Kaatz testified, the affiliation with OSF is "the best way" to address the challenges of healthcare reform, reduce costs going forward, combat out-migration, attract and recruit sub-specialists, and support graduate medical education in Rockford. FF ¶ 1170. Given the primacy of cost savings, efficient and improved delivery of services is particularly important in the unique world of healthcare, where less must provide more. The evidence showed that OSF is a leader in this effort, as the federal government itself acknowledged by designating OSF a Pioneer Accountable Care Organization, thereby recognizing it as a "nation's leader[] in health systems innovation, providing highly coordinated care for patients at lower costs." FF ¶¶ 79-80. RHS can join this effort through its merger with OSF. *Id.* The FTC's attempt to enjoin the proposed affiliation is at cross purposes with the government's own goals for healthcare reform and with OSF's and RHS' efforts to enhance the public interest by their combination.

CONCLUSION

The FTC's argument in support of its request for a preliminary injunction consists of nothing but speculation, market share and concentration data, and the naked claim that reducing the number of hospitals in Rockford from three to two must be anticompetitive. OSF and RHS have demonstrated, with real evidence, that the affiliation will result in substantial efficiencies and cost savings that will benefit the Rockford community. This evidence rebuts the FTC's presumption. The FTC has no evidence, other than speculation and theory, to support its claim that the affiliation will cause prices paid by commercial MCOs to increase to supra-competitive levels. The FTC has ignored the reality of the new healthcare world and, as a consequence, has failed to meet its burden to show both a likelihood of ultimate success on the merits, and that the equities favor an injunction. The Court should, therefore, deny the FTC's motion for preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2012, a copy of the Public (Redacted) version of Defendants' Post-Hearing Brief was filed electronically under seal through the Court's CM/ECF System. Notice of this filing was served on the following counsel by electronic mail:

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