

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

FEDERAL TRADE COMMISSION)	
)	
Plaintiff,)	
v.)	
)	No. 11-cv-50344
OSF HEALTHCARE SYSTEM)	
)	Hon. Frederick J. Kapala
and)	
)	
ROCKFORD HEALTH SYSTEM)	
)	
Defendants.)	

**PLAINTIFF FEDERAL TRADE COMMISSION'S
PROPOSAL FOR PRELIMINARY INJUNCTION HEARING**

Plaintiff the Federal Trade Commission (the “Commission”) respectfully moves the Court for a scheduling order governing any hearing in this matter to consider Plaintiff’s pending Motion for Preliminary Injunction under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b).¹ Plaintiff brings this action to delay, preliminarily, the consummation of Defendants’ proposed merger, which would create a duopoly of two firms controlling more than 99% of acute-care inpatient hospital services in the Rockford area.² The acquisition, which is presumed unlawful by virtue of the extraordinarily high market shares and market concentration levels, threatens to substantially reduce competition for hospital and physician services, immediately and irreversibly harming local employers and patients. The merits of Plaintiff’s

¹Plaintiff withdrew its Motion for Temporary Restraining Order following Defendants’ agreement to delay consummation of the proposed merger until at least December 2, 2011.

²In 1989 this Court *permanently* enjoined the merger of two of the three hospitals in Rockford, ruling that the transaction would substantially lessen competition in violation of the Clayton Act. *U.S. v. Rockford Mem’l Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989). This Court’s decision was upheld by the U.S. Court of Appeals for the Seventh Circuit. *U.S. v. Rockford Mem’l Corp.*, 898 F.2d 1278 (7th Cir. 1990).

challenge are the subject of an ongoing administrative proceeding, with opening statements in the merits trial scheduled for April 17, 2012. The merits trial will afford all parties full opportunity to conduct fact and expert discovery, and to present a total of 210 hours of live witness testimony. From this Court, Plaintiff seeks limited, but important, relief to maintain the *status quo* pending the outcome of the administrative proceeding. Such relief is necessary to prevent the immediate harm that otherwise would occur as a result of the consummation of the acquisition. Further, preliminary relief will preserve the Commission's ability, if necessary, to fashion appropriate relief following the merits trial, without the need to unscramble the eggs by potentially unwinding a consummated merger.

A. Federal District Courts Generally Have Not Held Hearings with Live Witness Testimony in Section 13(b) Preliminary Injunction Actions

The Commission has sought a preliminary injunction under Section 13(b) in each of the three hospital merger challenges it has brought in the last five years. In every case, the Federal District Court heard the motion without live witness testimony.³ There is no reason for the Court to depart from established precedent in this matter.

In the most recent matter, from earlier this year, the U.S. District Court for the Northern District of Ohio granted the Commission's request for a preliminary injunction following a hearing that had no live witness testimony because, among other reasons, "[t]he Administrative Law Judge has scheduled over 200 hours beginning May 31, 2011, for a trial and will have the opportunity to hear live testimony and judge the credibility of witnesses, both fact and expert." *FTC v. ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 3343, at *1-2, 2011-1 Trade Cas. (CCH)

³Another recent Section 13(b) proceeding involving the health care industry (though not a hospital merger) was also resolved with no live testimony. *See FTC v. Laboratory Corporation of America*, No. 8:10-cv-1873-AG, Docket No. 55 (C.D. Cal. filed December 16, 2010).

P77,395 (N.D. Ohio March 29, 2011). Also this year, the U.S. District Court for the Middle District of Georgia ruled on a Section 13(b) motion following a short hearing with no live testimony. *See FTC v. Phoebe Putney Health System*, No. 1:11-cv-58, Docket No. 91 (M.D. Ga. filed June 27, 2011). Prior to these matters, the Commission's next most recent Section 13(b) motion in a hospital merger challenge had been filed before Judge Hilton in the U.S. District Court for the Eastern District of Virginia, who determined that a preliminary injunction hearing should not include live testimony, stating:

I believe that defendant's motion here, while it's called a scheduling order and expedited status conference, is an invitation for me to get involved in trying this case. That is an invitation I am going to decline.

This case needs to be tried before the Commission. The issue before me is a very narrow one, as to whether or not a preliminary injunction should be issued . . . As far as live witnesses are concerned, I find that is not necessary. You can present to me by declaration and exhibits whatever evidence you want to present[.]

FTC v. Inova Health Sys., No. 1:08-cv-460 (E.D. Va. filed May 30, 2008). Presented with the same narrow legal issue faced by those three courts – each sitting in a different judicial district – this Court should also reject Defendants' request to unnecessarily delay these proceedings and burden the witnesses by presenting live testimony at this stage.⁴

B. Live Witness Testimony Is Unnecessary and Inappropriate in a Hearing For Plaintiff's Motion For Preliminary Injunction

This Court, like the earlier courts, will have a robust and ample record upon which to decide the narrow issue before it – namely whether the Commission has raised “serious,

⁴Any witness called to testify at a preliminary injunction hearing would almost certainly be deposed again and called to testify again at the merits trial beginning in April, 2012. Indeed, during the recent ProMedica hospital merger trial – in front of the same Administrative Law Judge who will evaluate this merger – several fact witnesses spent multiple days on the stand.

substantial” questions warranting preliminary relief to maintain the *status quo* during the administrative proceeding on the merits. Specifically, the evidence and argument presented to this Court are expected to include: (1) written declarations from 50 or more fact witnesses; (2) numerous declarations and rebuttal declarations from at least six expert witnesses; (3) excerpts of sworn party and third-party testimony from twenty pre-complaint “investigational hearings”; (4) excerpts of party and third-party testimony taken from depositions conducted by Plaintiff and Defendants in this Section 13(b) proceeding; (5) thousands of pages of documentary exhibits; (6) to the extent ordered by this court, several hours of oral argument, permitting a full opportunity to present the relevant evidence and answer this Court’s questions; and (7) hundreds of pages of pre- and post- hearing briefs, proposed findings of fact, and proposed conclusions of law submitted by the parties.

Plaintiff respectfully submits that this substantial body of evidence is more than sufficient for this Court to decide the Motion for Preliminary Injunction without the need for live witness testimony. The relevant issues can be fully analyzed and considered without live testimony, whether on the papers or through a hearing providing each party up to two hours to present argument. A short hearing would permit each party to efficiently summarize the voluminous body of evidence before this Court and to answer its questions regarding the factual and legal issues raised by the Motion for Preliminary Injunction.

Live testimony at the hearing is unnecessary and inappropriate because: (1) up to 210 hours of live testimony will be heard in the Commission’s administrative trial scheduled to begin on April 17, 2012; (2) the limited, but important, role of this Court – to maintain the *status quo* if the Plaintiff raises “serious, substantial” questions – obviates the need to provide a second forum for the presentation of live testimony; (3) the primary substantive issues in dispute do not

implicate questions of witness credibility – rather, the relevant evidence can be presented most efficiently in the form of ordinary course documents and written factual and expert testimony; (4) judicial economy and the interests of Rockford residents are best served by the prompt resolution of these issues and by avoiding, to the fullest extent possible, overlapping proceedings in two different courts; and (5) the burden on third party witnesses will be reduced substantially by eliminating the requirement that these witnesses testify twice, first in this hearing and then again in the Commission’s imminent administrative trial.

Plaintiff understands that the earliest time this Court may be available to conduct a preliminary injunction hearing, should the Court deem such a hearing necessary, is the middle of February, 2012. The Commission is fully prepared to present its evidence and argument at that time, or any time the court is available, and respectfully requests the opportunity to do so at this Court’s earliest opportunity. Because discovery will soon begin in the administrative proceeding to determine the merits of the Commission’s case, a prompt resolution of these preliminary proceedings will help to minimize any waste of judicial, government, and private party resources associated with the simultaneous litigation of these two related proceedings.

Dated: November 22, 2011

Respectfully submitted,

s/ Matthew J. Reilly

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of November, 2011, I served the foregoing on the following counsel via electronic mail:

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