

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

FEDERAL TRADE COMMISSION	)	
	)	No. 3:11-cv-50344
Plaintiff,	)	
	)	Hon. Frederick J. Kapala,
v.	)	District Judge
	)	
OSF HEALTHCARE SYSTEM, and	)	Hon. P. Michael Mahoney,
ROCKFORD HEALTH SYSTEM	)	Magistrate Judge
	)	
Defendants.	)	<b>PUBLIC</b>

**PLAINTIFF'S SUPPLEMENTAL POST-HEARING MEMORANDUM  
IN SUPPORT OF PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ARGUMENT ..... 4

I. PLAINTIFF LIKELY WILL SUCCEED ON THE MERITS..... 4

    A. The Relevant Markets Are Undisputed and Conclusively Established ..... 5

    B. The Acquisition Is Presumptively Illegal ..... 6

II. DEFENDANTS CANNOT OVERCOME THE STRONG PRESUMPTION AND EVIDENCE OF HARMFUL ANTICOMPETITIVE EFFECTS ..... 7

    A. The Acquisition Will Eliminate Significant Competition ..... 7

    B. The Acquisition Will Enhance the Risk of Coordination ..... 8

    C. The Acquisition Will Likely Lead to Higher Prices ..... 11

    D. The Acquisition Will Harm Local Employers and Residents..... 12

    E. Defendants Offer No Cognizable Defenses in Support of the Acquisition ..... 13

III. THE EQUITIES HEAVILY FAVOR A PRELIMINARY INJUNCTION ..... 19

CONCLUSION..... 20

**TABLE OF AUTHORITIES**

**CASES**

*Brown Shoe Co., Inc. v. United States*,  
370 U.S. 294 (1962). . . . . 6

*Citizen Publ’g Co. v. United States*,  
394 U.S. 131 (1969). . . . .16

*In re Evanston Nw. Healthcare*,  
No. 9315, 2007 WL 2286195 (F.T.C. Aug. 6, 2007). . . . . 5

*FTC v. Cardinal Health, Inc.*,  
12 F. Supp. 2d 34 (D.D.C. 1998). . . . . 2, 7, 19

*FTC v. CCC Holdings Inc.*,  
605 F. Supp. 2d 26 (D.D.C. 2009). . . . . *passim*

*FTC v. Elders Grain, Inc.*,  
868 F.2d 901 (7th Cir. 1989). . . . . *passim*

*FTC v. Food Town Stores, Inc.*,  
539 F.2d 1339 (4th Cir. 1976). . . . . 20

*FTC v. Foster*,  
No. Civ. 07-352, 2007 U.S. Dist. LEXIS 47606 (D.N.M. May 29, 2007). . . . . 7

*FTC v. H.J. Heinz Co.*,  
246 F.3d 708 (D.C. Cir. 2001). . . . . 14

*FTC v. ProMedica Health Sys.*,  
No. 3:11-CV-47, 2011 U.S. Dist. LEXIS 33434 (N.D. Ohio Mar. 29, 2011). . . . . *passim*

*FTC v. Rhinechem Corp.*,  
459 F. Supp. 785 (N.D. Ill. 1978). . . . . 4, 19

*FTC v. Staples, Inc.*,  
970 F. Supp. 1066 (D.D.C. 1997). . . . . 14

*FTC v. Tenet Health Care Corp.*,  
17 F. Supp. 2d 937 (E.D. Mo. 1998). . . . . 15

*FTC v. Univ. Health Inc.*,  
938 F.2d 1206 (11th Cir. 1991) ..... *passim*

*FTC v. Whole Foods Mkt., Inc.*,  
502 F. Supp. 2d 1 (D.D.C. 2007)..... 15

*FTC v. Whole Foods Mkt., Inc.*,  
548 F.3d 1028 (D.C. Cir. 2008)..... 4, 7, 19, 20

*Hosp. Corp. of Am. v. FTC*,  
807 F.2d at 1381 (7th Cir. 1986)..... 10, 17

*Kaiser Aluminum & Chem. Corp. v. FTC*,  
652 F.2d 1324 (7th Cir. 1981) ..... 16

*In re ProMedica Health Sys.*,  
No. 9346, 2011 FTC LEXIS 294 (F.T.C. Dec. 12, 2011) ..... 2, 5, 6, 7

*United States v. Baker Hughes, Inc.*,  
908 F.2d 981 (D.C. Cir. 1990)..... 7, 14

*United States v. Citizens & S. Nat’l Bank*,  
422 U.S. 86 (1975)..... 4

*United States v. H&R Block, Inc.*,  
No. 11-00948, 2011 U.S. Dist. LEXIS 130219 (D.D.C. Nov. 10, 2011) .....5, 10, 14, 18

*United States v. Phila. Nat’l Bank*,  
374 U.S. 321 (1963).....4, 6, 13

*United States v. Rockford Mem’l Corp.*,  
898 F.2d 1278 (7th Cir. 1990).....5, 6, 12, 17

*United States v. Rockford Mem’l Corp.*,  
717 F. Supp. 1251 (N.D. Ill. 1989)..... *passim*

**STATUTES**

15 U.S.C. § 53(b) (2006).....4

**OTHER AUTHORITIES**

H.R. REP. No. 94-1373 at 5 (1976)..... 19

## INTRODUCTION

Defendants ask this Court to make history. No court has ever denied relief in a 13(b) proceeding involving a merger to duopoly in a market with significant entry barriers. Of course, the proposed Acquisition before the Court fits that description, but it would be even more pernicious than an ordinary merger to duopoly. Not only would it reduce the number of competitors from three to two, but testimonial and documentary evidence also reveals that the lone remaining competitor is not a viable stand-alone option for purchasers – *i.e.*, health plans and employers – because of the *de facto* requirement that hospital networks offer access to at least two Rockford hospitals. The result: the Acquisition, if allowed to close, would create a virtual “must have” with enormous leverage and a greatly enhanced ability to raise prices.<sup>1</sup> Plaintiff respectfully asks the Court not to let that happen while the merits trial proceeds to a rapid conclusion.

The key questions before the Court in this preliminary proceeding are largely undisputed. Defendants essentially concede each element of Plaintiff’s *prima facie* case:

- GAC Services and PCP Services are appropriate relevant product markets;
- The WOB Area is an appropriate geographic market in which to analyze the Acquisition’s likely competitive effects; and
- The market concentration levels in GAC Services far exceed the thresholds needed to establish Plaintiff’s *prima facie* case and a presumption that the Acquisition is illegal under Clayton Act § 7.

With nothing more than those uncontroverted facts, Plaintiff meets its *prima facie* burden and establishes a strong presumption that the Acquisition should be preliminarily enjoined. This is

---

<sup>1</sup> See PI Hr’g Tr. 624:1-12 (Schertz); see also PI Hr’g Tr. 247:3-23 (Petersen). For the Court’s convenience, documents and testimony introduced or referenced during the hearing are underlined. All defined terms in this Memorandum have the same meaning as in Plaintiff’s Supplemental Memorandum. Appendix C lists the confidentiality designations for documents cited in this Memorandum.

true even if the Court finds that Plaintiff has met its burden in only one of the two alleged relevant product markets; if Plaintiff meets its burden in *either* relevant market, a full-stop preliminary injunction is warranted.<sup>2</sup>

Plaintiff could rest on the strong presumption of illegality alone, shifting a heavy burden to Defendants. But live hearing testimony, deposition testimony, and Defendants' own documents all confirm and strengthen the presumption that the merger will harm competition. Indeed, substantial additional evidence makes plain that the Acquisition will likely eliminate vigorous competition between OSF and RHS, enhance the risk of coordination, lead to price increases, and harm local employers and patients.

In response, Defendants fall far short of meeting their burden. They do not claim that either OSF or RHS qualifies as "failing" or even "flailing," as each is prospering despite the Rockford area's economic challenges. Nor do they allege that entry would offset the likely anticompetitive harm in GAC Services resulting from the Acquisition. Instead, they claim deeply flawed, speculative, made-for-litigation, and non-merger-specific efficiencies, while advancing several creative "defenses" that no court has ever accepted, even at the merits trial stage. Defendants also proffer a hollow stipulation that purportedly addresses the Acquisition's likely anticompetitive effects but in reality provides no meaningful protections for employers and patients from unilateral rate increases or ongoing coordination among Rockford's hospitals.

Defendants likewise offer no discernible equitable basis for allowing the merger to close

---

<sup>2</sup> See, e.g., *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 50-51, 66-67 (D.D.C. 1998) (finding that FTC had not met its burden on all alleged markets but granting motion for preliminary injunction); *In re ProMedica Health Sys.*, No. 9346, 2011 FTC LEXIS 294, at \*\*11-12 (F.T.C. Dec. 12, 2011) (initial decision) (granting relief even though FTC met its burden with respect to only one of two alleged relevant markets); cf. *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009) (stating that FTC need only meet its burden on one theory of harm in order for 13(b) relief to be granted).

while the fast-moving merits proceeding is underway. Of course, no court has ever denied relief in a 13(b) proceeding on equitable grounds where, as here, the FTC has demonstrated a likelihood of success on the merits.<sup>3</sup> To the extent Defendants advance any equities in their pre-hearing brief, they seem to suggest that their claimed efficiencies should be factored into the equities equation. But even assuming counterfactually that their efficiencies are cognizable and could properly constitute equities, the question before the Court at this preliminary injunction stage is not whether Defendants should *ever* be allowed to take advantage of those efficiencies. Rather, the question is whether the status quo should be maintained while the merits trial – where Defendants will have a full opportunity to present their efficiencies claims – quickly moves forward. The answer to that question is undeniably “yes,” particularly in light of Defendants’ own testimony that any plausible efficiencies will remain achievable well beyond the date the administrative court makes its ruling on the merits later this year.

By contrast, if the Acquisition closes, the risk of immediate and lasting harm to local employers and patients is substantial. At a minimum, information sharing between the merging parties – including access to each hospital’s most sensitive information, pricing, and forward-looking plans – would start “right away.” So the Acquisition’s anticompetitive effects would impact Rockford employers and patients from day one of the new entity’s existence. In economically struggling areas, even improving ones like Rockford, employers and patients are ill-equipped to endure the diminished competition and higher prices that would likely result from this Acquisition. In other words, this is not the time – or the case – to make history.

---

<sup>3</sup> *FTC v. ProMedica Health Sys.*, No. 3:11-CV-47, 2011 U.S. Dist. LEXIS 33434, at \*161 (N.D. Ohio Mar. 29, 2011).

## ARGUMENT

### I. PLAINTIFF LIKELY WILL SUCCEED ON THE MERITS

Section 13(b) of the FTC Act authorizes this Court to grant a preliminary injunction if, upon “weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”<sup>4</sup> Defendants agree that the question before the Court is whether Plaintiff “has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation, and determination by the FTC in the first instance and ultimately by the Court of Appeals.”<sup>5</sup>

Transactions – like the one here – that result in “undue” concentration in a relevant market are presumed unlawful.<sup>6</sup> Plaintiff establishes its *prima facie* case – and a presumption of illegality – “by showing that the acquisition at issue would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market.”<sup>7</sup> Defendants do not dispute that the extraordinarily high concentration in at least one of the undisputed relevant product markets establishes Plaintiff’s strong *prima facie* case.<sup>8</sup> The burden therefore shifts to Defendants to rebut the presumption of

---

<sup>4</sup> Federal Trade Commission Act, 15 U.S.C. § 53(b) (2006); *see also* *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989).

<sup>5</sup> *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 789 (N.D. Ill. 1978) (quotations omitted); *see also* *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008); *ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, at \*143; Defs.’ Pre-Hr’g Br. at 4.

<sup>6</sup> *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 363 (1963); *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975); *United States v. Rockford Mem’l Corp.*, 717 F. Supp. 1251, 1279 (N.D. Ill. 1989).

<sup>7</sup> *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991) (brackets and quotations omitted).

<sup>8</sup> PX1603-013; *see also* PX4046-013, 21. Of course, even if there were any meaningful disagreement, Section 7 “requires a prediction, and doubts are to be resolved against the transaction.” *Elders Grain*, 868 F.2d at 906 (citations omitted).



illegality.<sup>9</sup> As set forth below, Defendants fail to meet their burden, and the Acquisition should be preliminarily enjoined.

**A. The Relevant Markets Are Undisputed and Conclusively Established**

A showing of undue concentration in only one relevant market is sufficient to meet Plaintiff's *prima facie* burden.<sup>10</sup> There is no dispute that both GAC Services and PCP Services are appropriate relevant markets.<sup>11</sup> In addition, this Court has already recognized GAC Services as an appropriate relevant product market that excludes outpatient services.<sup>12</sup> And, while the same bargaining dynamic that exists between providers and health plans for GAC Services also exists in PCP Services, PCP Services constitute a separate relevant market because a monopolist of all PCP Services in an area could profitably impose a small but significant non-transitory increase in price ("SSNIP").<sup>13</sup>

Likewise, there is no material dispute concerning the appropriate geographic market.<sup>14</sup> The geographic market is no broader than the one previously identified by this Court – *i.e.*, the WOB Area.<sup>15</sup> There can be no doubt that a hypothetical monopolist controlling just the hospitals in Rockford – Rockford Memorial Hospital ("RMH"), OSF St. Anthony Medical Center

---

<sup>9</sup> *Univ. Health*, 938 F.2d at 1218-19.

<sup>10</sup> See, e.g., *ProMedica Health Sys.*, 2011 FTC LEXIS 294, at \*\*11-12; *CCC Holdings*, 605 F. Supp. 2d at 67; PI Hr'g Tr. 347:12-17 (Capps); see also PX2263 ¶¶ 22-23 (GAC Services); PX1603-013 (GAC and PCP Services).

<sup>11</sup> PX1603-013; PX2263 ¶¶ 12, 22.

<sup>12</sup> *Rockford Mem'l*, 717 F. Supp. at 1261; *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990); see also Univ. Health, 938 F.2d at 1210-11; *In re Evanston Nw. Healthcare*, No. 9315, 2007 WL 2286195, at \*\*46-47 (F.T.C. Aug. 6, 2007); PI Hr'g Tr. 344:2-346:13, 346:14-347:11 (Capps).

<sup>13</sup> See PI Hr'g Tr. 420:11-17 (Capps); PX2501 ¶¶ 285-86; PX0205 § 4.2; see also United States v. H&R Block, Inc., No. 11-00948, 2011 U.S. Dist. LEXIS 130219, at \*\*29-30 (D.D.C. Nov. 10, 2011); *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at \*149; *Evanston Nw. Healthcare*, 2007 WL 2286195, at \*48.

<sup>14</sup> PI Hr'g Tr. 349:14-17 (Capps); PI Hr'g Tr. 54:14-24 (Marx); see also generally Defs.' Pre-Hr'g Br.

<sup>15</sup> PI Hr'g Tr. 348:15-349:13, 349:18-350:4 (Capps); PX2263 ¶¶ 12, 23; PX2269 ¶ 101; *Rockford Mem'l*, 898 F.2d at 1285; *Rockford Mem'l*, 717 F. Supp. at 1273; PX1603-013.

(“SAMC”), and SwedishAmerican Hospital System (“SAHS”) – let alone the entire WOB Area, could profitably raise prices by a SSNIP.<sup>16</sup>

### **B. The Acquisition Is Presumptively Illegal**

The Acquisition presumptively violates Clayton Act § 7 because it would lead to undue concentration in at least one relevant product market under any plausible geographic market. Where, as here, a merger increases the Herfindahl-Hirschman Index (“HHI”) by over 200 points in a highly-concentrated market (*i.e.*, where the HHI exceeds 2,500), it is presumed likely to enhance market power and to be illegal even in a merits trial.<sup>17</sup> As the Supreme Court explained:

a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is *so inherently likely to lessen competition substantially* that it must be enjoined in the absence of evidence *clearly* showing that the merger is not likely to have such anticompetitive effects.<sup>18</sup>

As shown in Appendix A, even under the most conservative measure, the proposed merger to duopoly in GAC Services – with a combined market share of 58.9%, a 1736-point change in HHI, and a post-merger HHI of 5,088 – far surpasses the concentration levels for a presumptively unlawful merger.<sup>19</sup> In PCP Services, the Acquisition would lead to a post-merger share of 41.5 percent for the combined firm, an 859-point change in HHI (more than four times the threshold), and a post-merger HHI of 2,227, meaning the Acquisition potentially raises

---

<sup>16</sup> PX1603-013; *see also* PX4025-026; PI Hr’g Tr. 221:21-223:7 (Petersen); PI Hr’g Tr. 348:22-350:20 (Capps); PX0216-011; PX0213-034; *Rockford Mem’l*, 898 F.2d at 1285; PX4020-006; PX0222-028, 29; PX0259 ¶ 5.

<sup>17</sup> PI Hr’g Tr. 357:3-358:10 (Capps); PX0205 § 5.3; *see also ProMedica Health Sys.*, 2011 FTC LEXIS 294, at \*329.

<sup>18</sup> *Phila. Nat’l Bank*, 374 U.S. at 363 (emphasis added); *see also Brown Shoe Co., Inc., v. United States*, 370 U.S. 294, 343 n.70 (1962).

<sup>19</sup> *App. A*; PI Hr’g Tr. 358:11-19 (Capps); PX2501-087 (Fig. 20), *App. G* (Figs. 29, 30); *Phila. Nat’l Bank*, 374 U.S. at 364. These GAC Services market share and HHI calculations are based on patient admissions in the same geographic market this Court identified in *Rockford Mem’l*. 717 F. Supp. at 1280; *see also* PI Hr’g Tr. 348:15-21 (Capps); PX2501-090 (Fig. 21); *App. A*.

significant competitive concerns in that market as well.<sup>20</sup> But even if the Court finds that Plaintiff has met its burden only in GAC Services, and not PCP Services, the Acquisition still carries a strong presumption of illegality and should be enjoined.<sup>21</sup>

## **II. DEFENDANTS CANNOT OVERCOME THE STRONG PRESUMPTION AND EVIDENCE OF HARMFUL ANTICOMPETITIVE EFFECTS**

Because Plaintiff has made an undisputed *prima facie* showing that the Acquisition likely violates Clayton Act § 7, Plaintiff could rest there, and the burden would shift to Defendants.<sup>22</sup> Indeed, Defendants seemingly assumed in their pre-hearing brief that Plaintiff would do just that.<sup>23</sup> But as shown during the hearing, substantial documentary and testimonial evidence confirms that the Acquisition will lead not only to greater market power in the hands of OSF, but also an enhanced risk of coordination, likely higher prices, and harm to local employers and patients.<sup>24</sup> In response, Defendants offer little more than self-serving testimony from their own employees and statements from purported third parties, many of whom are affiliated with OSF or paid litigation consultants.<sup>25</sup> Defendants do not – and cannot – meet their burden, and the Acquisition should be preliminarily enjoined to maintain the status quo.

### **A. The Acquisition Will Eliminate Significant Competition**

Defendants compete with each other and with SAHS throughout the WOB Area for

---

<sup>20</sup> PI Hr'g Tr. 423:5-25, 425:14-20 (Capps) (noting that combined share of two remaining systems would be slightly over 60 percent in PCP Services); PX0205 § 5.3; PX2501-167 to 68.

<sup>21</sup> See PI Hr'g Tr. 358:11-19 (Capps); see also Cardinal Health, 12 F. Supp. 2d at 50-51, 66-67; *ProMedica*, 2011 FTC LEXIS 294, at \*\*11-12.

<sup>22</sup> *See, e.g., Elders Grain*, 868 F.2d at 906; *accord Whole Foods*, 548 F.3d at 1035.

<sup>23</sup> Defs.' Pre-Hr'g Br. at 1, 5-6, 15. Notably, every case cited by Defendants in support of their argument that the FTC cannot rely solely on the presumption concerned markets that – unlike GAC Services – had low or no barriers to entry. *See, e.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990); *FTC v. Foster*, 2007 U.S. Dist. LEXIS 47606, at \*147 (D.N.M. May 29, 2007).

<sup>24</sup> See PI Hr'g Tr. 370:25-371:15, 377:11-380:19, 390:21-391:14, 402:23-404:3 (Capps).

<sup>25</sup> *See, e.g., DX0015 ¶ 2; DX0016 ¶ 2; DX0017 ¶ 2; DX0021 ¶ 4; <http://www.osfsaintanthony.org/foundation/council.html> (listing OSF Saint Anthony 2011 Foundation Council members, including at least seven of Defendants' purported third-party declarants) (last visited Feb. 10, 2012).*

patients and access to managed care contracts, leading to better pricing, service offerings, quality, and patient outcomes.<sup>26</sup> As the future CEO of OSF Northern Region, Gary Kaatz, testified at the hearing, competition among the three Rockford hospitals is beneficial to patients, spurring the hospitals to offer new programs and improve quality and outcomes.<sup>27</sup> The Acquisition eliminates that competition between RHS and OSF.<sup>28</sup>

In addition, as shown in Appendix B, each of the major health plans in Rockford contracts with two of the three Rockford hospitals, forcing the three hospital systems to bid against each other for two available in-network slots.<sup>29</sup> OSF, RHS, and SAHS face possible exclusion from each plan's network, so each has a strong incentive to offer its best rates to secure – or keep – an in-network slot, and the patient volume that comes with it.<sup>30</sup> The Acquisition would eliminate that competitive dynamic, as any health plan hoping to offer a two-hospital network in Rockford would have to contract with OSF Northern Region.<sup>31</sup> Of course, even assuming one-hospital networks were marketable in Rockford, or even the norm, the merger would still harm competition, just as a typical merger to duopoly would, as health plans would have greater leverage playing three hospital systems off one another rather than merely two.<sup>32</sup>

## **B. The Acquisition Will Enhance the Risk of Coordination**

<sup>26</sup> PI Hr'g Tr. 367:19-369:6 (Capps); see also, e.g., PX0371-043; PX4025-026 to 29; PX0213-034, 43; PX4021-051; PX0210-014; PX0289 ¶¶ 13-14, 16, 26, 33; PX0218-014 to 018; PX4020-005.

<sup>27</sup> PI Hr'g Tr. 773:24-776:6 (Kaatz).

<sup>28</sup> PI Hr'g Tr. 776:7-10 (Kaatz); 369:25-370:23 (Capps).

<sup>29</sup> See PI Hr'g Tr. 231:14-232:8, 242:13-19 (Petersen); 364:3-366:20, 367:19-368:20 (Capps); PX1025-007; see also Appendix B; PX0289 ¶ 21; PX0256 ¶ 11; PX0255 ¶ 8; PX0254 ¶ 21; PX0253 ¶ 15; PX0251 ¶¶ 16-17; PX4004-014; PX0482-002; PX0485-001; PX0556-002; PX0623-001.

<sup>30</sup> PI Hr'g Tr. 368:21-369:6 (Capps); 224:8-20, 231:14-232:8 (Petersen); PX0289 ¶ 19; PX0222-044; PX0211-026; PX4008-035; PX0482-002; PX0556-002.

<sup>31</sup> PI Hr'g Tr. 369:25-370:23 (Capps); 247:20-23 (Petersen). A one-hospital network is much less attractive than a two-hospital network, so the availability of that option would not prevent OSF from extracting much higher rates post-merger. PI Hr'g Tr. 232:9-20 (Petersen); PX4023-011.

<sup>32</sup> PI Hr'g Tr. 377:9-380:19 (Capps); 224:8-20 (Petersen).

Notwithstanding Defendants’ head-in-the-sand claim that there is no evidence of collusion or coordination among the three Rockford hospitals, the long history of coordination in this market goes back for decades.<sup>33</sup> For example, as this Court found, the Rockford hospitals attempted a group boycott of BCBS as far back as the 1980s.<sup>34</sup> The evidence reveals that, since then, coordination has become business as usual in Rockford:

Year	Notable Coordinated Activity
2005	<ul style="list-style-type: none"> <li>RHS – believing it is bidding against rival SAHS for Blue Cross’s business – contacts SAHS’s Managed Care Director and confirms that SAHS is “not in a bid process with Blue Cross.”<sup>35</sup></li> <li>SAMC’s Director of Strategic Planning contacts his counterpart at RHS to assess RHS’s negotiation status with BCBS-IL, and is “told . . . that RMH [is] terminating ALL BCBS Agreements – including ‘Commercial.’”<sup>36</sup></li> </ul>
2007	<ul style="list-style-type: none"> <li>SAMC hires a consultant to interview and gather non-public information on RHS and SAHS to “validate that our view of the world is consistent with other healthcare providers in the region” and “make sure we’re not out of step.”<sup>37</sup></li> </ul>
2008	<ul style="list-style-type: none"> <li>OSF and RHS jointly tell a local health plan that if the health plan wants to contract with either OSF or RHS, it must contract with both of them and agree <i>not</i> to contract with SAHS.<sup>38</sup></li> <li>RHS’s CFO and its Director of Managed Care plan a “pick each others [sic] brains meeting[.]” with OSF’s Director of Managed Care.<sup>39</sup></li> </ul>
2010	<ul style="list-style-type: none"> <li>RHS’s Director of Managed Care solicits “[b]est practice[s]” from SAMC’s health plan negotiator on how to charge out-of-network patients because RHS is having “some debate with a payor about this issue.”<sup>40</sup></li> </ul>
2011	<ul style="list-style-type: none"> <li>RHS’s CFO and OSF’s CEO of Ambulatory Services let each other know that neither system intends to pursue potential cost savings that a consultant believes each system could achieve independently – <i>i.e.</i>, without the Acquisition.<sup>41</sup></li> </ul>

As Dr. Capps explained, this inappropriate exchange of information and coordination of strategy

<sup>33</sup> PI Hr’g Tr. 396:11-398:6, 401:18-402:22 (Capps).

<sup>34</sup> *Rockford Mem’l*, 717 F. Supp. at 1286.

<sup>35</sup> PX0630-004; *see also* PX0556-003.

<sup>36</sup> PX3151-001.

<sup>37</sup> PX4020-030 to 32; PX0349-001 to 02; PX0350-001 to 02.

<sup>38</sup> PX1265-001; PX4000-019.

<sup>39</sup> PX0704-001.

<sup>40</sup> PX4626-002 to 03.

<sup>41</sup> PX0388-001; PX4021-050 to 51.

between competing hospitals can enhance their bargaining leverage and result in increased prices.<sup>42</sup> This is especially true when the communication relates to contract negotiations, as occurs in Rockford.<sup>43</sup>

Moreover, as explained by Judge Posner, “[t]he fewer competitors there are in a market, the easier it is for them to coordinate their pricing,” as they have even greater ability and incentive to do so.<sup>44</sup> As Dr. Capps testified, reducing the number of hospital systems in Rockford will enhance the likelihood and efficacy of coordinated behavior in at least three ways by: (i) reducing the number of communication paths required to reach agreement (one instead of three); (ii) making “cheating” more detectable and less profitable; and (iii) enhancing the combined SAMC/RHS’s tools to discipline SAHS.<sup>45</sup> And where, as here, the market has a history of coordination, the remaining competitors are all the more likely to engage in coordination once their number is reduced.<sup>46</sup>

Defendants attempt to head off this evidence by claiming that their enhanced ability to exclude SAHS from health plan contracts cannot be reconciled with a heightened risk of coordination. But, as Dr. Capps explained during the hearing, rather than being contradictory, one of the merged firm’s key disciplinary “tools” will be its unilateral threat of exclusion of SAHS – either explicit or *de facto* – from health plan networks to ensure that SAHS does not stray from any overt or tacit agreement to coordinate.<sup>47</sup>

---

<sup>42</sup> PI Hr’g Tr. 402:23-404:3 (Capps).

<sup>43</sup> PI Hr’g Tr. 401:4-17 (Capps).

<sup>44</sup> *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1387-92 (7th Cir. 1986); *see also Elders Grain*, 868 F.2d at 905-06; *CCC Holdings Inc.*, 605 F. Supp. 2d at 60-61.

<sup>45</sup> PI Hr’g Tr. 402:23-404:3, 405:12-406:2 (Capps); 776:24-777:8 (Kaatze); CCC Holdings, 605 F. Supp. 2d at 60; *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at \*105-06.

<sup>46</sup> *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at \*108; PX0205 § 7.2.

<sup>47</sup> PI Hr’g Tr. 404:20-406:2 (Capps); see also CCC Holdings, 605 F. Supp. 2d at 67-68.

### C. The Acquisition Will Likely Lead to Higher Prices

Following the merger, the heightened risk of coordination, high market concentration levels, OSF's dominant position, and the reduced number of competitors all strongly suggest that OSF Northern Region can – and will – raise prices. A key element in health plans' negotiations with providers is the number of competing hospital systems in the local area.<sup>48</sup> Simply by reducing the number of competing hospital systems in Rockford from three to two, the Acquisition will increase the combined entity's leverage and enable it to demand higher rates.<sup>49</sup>

On top of that, as testimony and documents presented at the hearing repeatedly showed, the Acquisition will leave health plans with little realistic choice but to accept OSF Northern Region's demands. Either health plans accede to OSF Northern Region's contract requirements, or they must attempt to market an SAHS-only network that has proven not to be competitively workable.<sup>50</sup> For example:

- As Coventry of Illinois's CEO testified during the hearing, Coventry “*would not be a viable product offering in the marketplace with just SwedishAmerican.*”<sup>51</sup>
- Or, as a health plan told RHS's Director of Managed Care, “*you need two of the three hospitals to achieve any real measure of success in Rockford.*”<sup>52</sup>
- Or, as OSF's managed care negotiator put it: “*to be marketable you have to have two hospitals in Rockford.*”<sup>53</sup>

The facts bears these statements out in the declining membership of BCBS's single-hospital HMO program (despite having lower prices) and OSF's Direct Access Network, which has only

---

<sup>48</sup> PI Hr'g Tr. 224:8-20, 242:13-19, 247:7-23 (Petersen); PX0289 ¶ 19; PX0251 ¶ 13; PX0252 ¶ 16; PX0253 ¶ 14; PX0254 ¶ 18; PX0256 ¶ 9; PX4002-034, 39; PX4008-047; PX4004-024.

<sup>49</sup> PX4004-021 to 22, 40; PX4002-042 to 43; PX0251 ¶ 19.

<sup>50</sup> PI Hr'g Tr. 369:25-372:24 (Capps); PX4000-018, 44; PX4025-057; PX0256 ¶ 14; PX0251 ¶ 19; PX0289 ¶ 21; PX4002-030; PX4008-055, 57.

<sup>51</sup> PI Hr'g Tr. 248:20-249:6 (Petersen) (emphasis added).

<sup>52</sup> PX4764-001; PI Hr'g Tr. 376:22-377:8 (Capps).

<sup>53</sup> PX0213-026; see also PX0322-001; PX4763-002; PX4002-029.

one employer enrolled in Rockford (despite being available here for years).<sup>54</sup> Following the merger, no two-hospital network will be possible in Rockford without OSF Northern Region, making it a virtual “must have” and enhancing Defendants’ negotiating leverage.<sup>55</sup>

The merged entity will take full advantage of its newfound market power to increase prices.<sup>56</sup> As SAMC’s CEO (and the future COO of OSF Northern Region), David Schertz, testified, rates will go up after the merger.<sup>57</sup> Likewise, Mr. Kaatz testified that he is unaware of any plans to freeze or lower rates charged to health plans following the Acquisition.<sup>58</sup> This is entirely consistent with past practices, as both OSF and RHS admittedly pursue the highest rates possible in health plan negotiations.<sup>59</sup> Indeed, in hopes of achieving that end,

## REDACTED

<sup>60</sup> If past is prologue, health plans and local employers can expect more of the same following the Acquisition.

### **D. The Acquisition Will Harm Local Employers and Residents**

Local employers and residents will bear the brunt of any price increases resulting from

---

<sup>54</sup> PI Hr’g Tr. 372:15-373:25 (Capps); 617:18-619:16 (Schertz).

<sup>55</sup> PI Hr’g Tr. 369:25-370:23 (Capps); 624:1-12 (Schertz); PX0287 ¶¶ 5-7, 9; PX0289 ¶¶ 39-40; PX0251 ¶ 18; PX0253 ¶¶ 15, 18; PX0254 ¶¶ 21-23; PX0255 ¶¶ 13-14; PX0256 ¶ 14; PX0265 ¶¶ 6, 9; PX0267 ¶¶ 4, 9; PX0271 ¶¶ 6, 9; PX0279 ¶¶ 6, 9; PX0217-019; PX4002-029, 40.

<sup>56</sup> PI Hr’g Tr. 428:9-430:3 (Capps); 625:2- 626:13 (Schertz); PX4021-013; PX0458-001; PX4002-036, 49.

<sup>57</sup> PI Hr’g Tr. 625:2-5 (Schertz).

<sup>58</sup> PI Hr’g Tr. 759:20-760:9 (Kaatz).

<sup>59</sup> PI Hr’g Tr. 611:18-20 (Schertz); PX4021-007; PX4002-036; see also PX4726; PX0345-001; PX0289 ¶ 22; PX0254 ¶ 24; PX0251 ¶ 26; PX0252 ¶ 17. Nonprofits exercise market power, so there is no basis to believe that the merged entity would not capitalize on its ability to extract higher rates. PI Hr’g Tr. 428:9-429:6 (Capps); 254:21-255:10 (Petersen); Rockford Mem’l, 898 F.2d at 1285. Indeed, Defendants admit that they have strong incentives to raise rates to cover services purportedly provided below cost to government-insured patients. Defs.’ Pre-Hr’g Br. at 3; see also PI Hr’g Tr. 582:9-21 (Schertz).

<sup>60</sup> PX4596-006; PX4595-006; PX0222-017, 23 (Mr. Schertz testifying that Acquisition would allow OSF to “reclaim some leverage,” and that “would be a good thing”); see also PX4021-011.



the Acquisition.<sup>61</sup> Self-insured employers directly pay the cost of their employees' health care and immediately suffer the impact of higher rates.<sup>62</sup> Fully insured employers also ultimately feel the force of rate increases through higher premiums.<sup>63</sup> While Mr. Schertz may assert that "price is becoming irrelevant" in health care, not a single local business has testified that rate increases do not impact their bottom lines or their employees' deductibles, co-pays, and other out-of-pocket costs.<sup>64</sup> Moreover, any increase in rates will likely reduce access to care as some employers will have little choice but to reduce healthcare coverage or pass along those increases to their employees.<sup>65</sup>

**E. Defendants Offer No Cognizable Defenses in Support of the Acquisition**

**i. Defendants' Purported Efficiencies Are Speculative, Unreliable, and Lack Merger-Specificity**

Even if Plaintiff were to rely solely on its *prima facie* case, Defendants have utterly failed to rebut the presumption that the Acquisition violates Clayton Act § 7 or "clearly show[]" that no anticompetitive effects are likely.<sup>66</sup> To the extent Defendants offer any potential defense for the Acquisition in their pre-hearing brief, they attempt to shoehorn efficiencies into their equities claims. But Defendants' heavy burden requires that they "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to

---

<sup>61</sup> PI Hr'g Tr. 27:5-9 (Lobe); 218:25-219:8 (Petersen); 333:2-334:11 (Capps); PX0289 ¶ 40.

<sup>62</sup> PI Hr'g Tr. 27:5-9 (Lobe); 218:11-219:8 (Petersen); 333:16-334:1 (Capps); *see also* PI Hr'g Tr. 693:25-694:4 (Olson); PX4001-011; PX0276 ¶ 9; PX0217-007; PX0252 ¶ 26; PX0254 ¶¶ 30, 36; PX0256 ¶ 15; PX0255 ¶ 15; PX0251 ¶ 20; PX0253 ¶¶ 3, 18.

<sup>63</sup> PI Hr'g Tr. 218:11-219:8 (Petersen); 334:2-11 (Capps); PX4004-031 to 32, 41-42; PX4006-011 to 12.

<sup>64</sup> PX4020-009; PX0289 ¶ 40; PX4006-009 to 10; PX0265 ¶ 9; PX0278 ¶ 8; PX0267 ¶ 9; PX0276 ¶ 9; PX0279 ¶ 10; PX0274 ¶ 9; PX0277 ¶ 8; PX0268 ¶ 9; PX0269 ¶ 8; PX0275 ¶ 9; PX0280 ¶ 8.

<sup>65</sup> PI Hr'g Tr. 333:2-335:14 (Capps); *see also, e.g.*, PX0271 ¶ 12; PX0265 ¶ 9; PX0278 ¶ 8; PX0267 ¶ 9; PX0276 ¶ 9; PX0279 ¶ 10; PX0274 ¶ 9; PX0277 ¶ 8; PX0268 ¶ 9; PX0269 ¶ 8; PX0275 ¶ 9; PX0280 ¶ 8.

<sup>66</sup> *Phila. Nat'l Bank*, 374 U.S. at 363; *Univ. Health*, 938 F.2d at 1217-19; *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at \*152; *Elders Grain*, 868 F.2d at 906.

compete, and why each would be merger-specific.”<sup>67</sup> Of course, no court has ever found a purported efficiencies defense to be sufficient to overcome a presumption of anticompetitive harm in the context of a 13(b) proceeding.<sup>68</sup> Here, Defendants’ claimed efficiencies do not withstand scrutiny, let alone warrant breaking new legal ground.<sup>69</sup>

First, Defendants’ efficiency claims are virtually identical to the efficiencies this Court rejected twenty years ago.<sup>70</sup> Second, Defendants significantly overstate the Acquisition’s purported efficiencies, ignoring documents and testimony from their own executives discounting their likely value.<sup>71</sup> Third, Defendants’ claimed efficiencies are not merger-specific.<sup>72</sup> For example, Mr. Kaatz admits that RHS could achieve key components of Defendants’ efficiencies claims, including cost savings, quality improvements, reduced patient out-migration, and better physician recruitment, without this anticompetitive Acquisition.<sup>73</sup> Indeed, without the merger, Defendants would continue to improve quality, implement best practices, and lower costs independently.<sup>74</sup> In other words, Defendants do not need this anticompetitive Acquisition to achieve their claimed efficiencies.

---

<sup>67</sup> *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at \*142; *see also Univ. Health*, 938 F.2d at 1223-24; *FTC v. Staples Inc.*, 970 F. Supp. 1066, 1089-90 (D.D.C. 1997); PX0205 § 10.

<sup>68</sup> *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at \*154; *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001). Defendants’ reliance on *Baker Hughes* is misplaced; that case did not concern a 13(b) proceeding. *See Baker Hughes*, 908 F.2d at 982.

<sup>69</sup> PI Hr’g Tr. 408:15-411:3, 411:6-15 (Capps); *see also generally* PX0001; PX0034 (same); PX2263 ¶¶ 68-70; PX2501 ¶¶ 9, 260-61; PX0205 § 10; PX2502 ¶¶ 16, 36, 47, 53, 56-63, 70, 72, 80-81, 91, 99-100; *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at \*142; *Univ. Health*, 938 F.2d at 1223; *Staples*, 970 F. Supp. at 1089-90.

<sup>70</sup> *Rockford Mem’l*, 717 F. Supp. at 1289-91.

<sup>71</sup> PI Hr’g Tr. 756:20-761:11 (Kaatz); 411:9-15, 413:24-415:5 (Capps); PX4021-051; PX0313.

<sup>72</sup> PI Hr’g Tr. 412:24-413:21 (Capps); PX2501 ¶¶ 253-62; PX2506 ¶¶ 34-37; PX2502 ¶¶ 19, 62, 69, 78, 84-87, 97-98, 101; PX2505 ¶¶ 24-26, 33-36, 39-40.

<sup>73</sup> PI Hr’g Tr. 763:15-764:12, 766:1-7 (Kaatz); 412:24-413:21 (Capps); PX4021-039, 42, 46, 48; PX2000-006; PX4025-054; PX2265-010; PX0211-053; PX2001-006; PX2505 ¶¶ 12-13, 23-24, 39; PX4048-012.

<sup>74</sup> PI Hr’g Tr. 767:2-19, 771:3-10 (Kaatz); 630:1-631:13 (Schertz); *see also* PI Hr’g Tr. 770:8-10 (Kaatz) (testifying that there is “no magic whatsoever” to achieving cost savings RHS has achieved on its own).

Fourth, the merger's cost savings and other benefits, such as improved quality, are at best speculative. Defendants' claimed quality improvements are wholly theoretical and unsubstantiated.<sup>75</sup> And, as Mr. Kaatz explained at the hearing, the key components of Defendants' claimed efficiencies remain highly uncertain:

- Defendants have no timeline for consolidating service lines following the merger;
- Defendants "have not made any decisions on the relocation or location of [their] clinical areas;"
- Defendants have yet to retain an integration consultant, and the consultant they are considering retaining has yet to prepare an integration plan or do any work because Defendants do not want to spend the money;
- Once an integration consultant has been retained, it will take another 12 months to create an integration plan; and
- It is possible that not a single service line will be consolidated following the merger.<sup>76</sup>

Defendants have intentionally deferred all final decisions on what consolidating the two systems might entail, including any specific integration planning, until well after the Acquisition is consummated.<sup>77</sup> While such planning is commonplace well ahead of closing,<sup>78</sup> Defendants will not even begin planning the integration while any uncertainty about the merger remains – as it will during the administrative trial.<sup>79</sup> In that trial, Plaintiff's (*i.e.*, Complaint Counsel's) proposed relief includes unwinding the Acquisition, if consummated. While denying a

---

<sup>75</sup> PI Hr'g Tr. 95:7-17, 113:21-117:25, 131:15-133:3 (Romano); 416:18-419:22 (Capps); 769:10-12 (Kaatz).

<sup>76</sup> PI Hr'g Tr. 748:18-25, 749:1-5, 749:18-23, 752:1-5 756:6-15, 758:1-14 (Kaatz); *see also* PI Hr'g Tr. 118:8-119:1 (Romano). Assuming Defendants' most significant service line consolidation – trauma – eventually occurs, it would take approximately 24 to 36 months from the date the merger is consummated. PI Hr'g Tr. 759:19-25 (Kaatz).

<sup>77</sup> PI Hr'g Tr. 413:24-415:5 (Capps); PX4021-035 to 37; PX4025-041, 43, 44, 48 to 52; PX4023-026; PX4020-035; PX4024-017; PX2507 ¶¶ 4, 9-12.

<sup>78</sup> *See, e.g., CCC Holdings*, 605 F. Supp. 2d at 73 (citations omitted); *FTC v. Whole Foods Mkt., Inc.*, 502 F. Supp. 2d 1, 12-13, 48 (D.D.C. 2007); *FTC v. Tenet Health Care Corp.*, 17 F. Supp. 2d 937, 948 (E.D. Mo. 1998); *see also* PX4021-030.

<sup>79</sup> PI Hr'g Tr. 734:9-11, 751:15-21, 754:7-14 (Kaatz); PX4766-001.

preliminary injunction will result in immediate harm and make effective relief more challenging, it will not remove any uncertainty relating to whether the merger will ultimately stand. So, even assuming Defendants' hypothetical clinical consolidations will eventually occur, they are unlikely to do so for two to three years.<sup>80</sup>

And fifth, Defendants' efficiency claims were "generated outside of the usual business planning process" and therefore must be "viewed with skepticism."<sup>81</sup> FTI Consulting, a firm retained and supervised by outside antitrust counsel, generated Defendants' purported efficiencies.<sup>82</sup> Throughout the FTC's investigation and this litigation, Defendants have claimed attorney work product protection over FTI's efficiencies work, conceding that it was performed solely in anticipation of potential litigation and served no business purpose.<sup>83</sup> In contrast, Defendants have not claimed attorney work product protection when it comes to FTI's calculations of tens of millions of dollars in cost savings SAMC and RHS could achieve independently, *i.e.*, without the Acquisition.<sup>84</sup>

## **ii. Defendants' Other "Defenses" Are Without Merit**

Defendants do not claim that either firm is failing or flailing; nor could they.<sup>85</sup> Executives from both OSF and RHS admit that the two systems are financially sound.<sup>86</sup> Nor do Defendants assert that entry will be timely, likely, or sufficient to defeat the competitive harm

---

<sup>80</sup> PX4025-043 to 44, 49; *see also* PX4023-027.

<sup>81</sup> PX0205 § 10; *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at \*107.

<sup>82</sup> PI Hr'g Tr. 762:14-17 (KaatZ); PX0681-001; *see also* PX0228-008; PX0227-039.

<sup>83</sup> *See generally* PX0228; PX4021.

<sup>84</sup> PI Hr'g Tr. 630:1-631:13 (Schertz); PX2000; PX2001; PX2262 (failing to mention Performance Reports); PX4021-041 to 42 (RHS CFO acknowledging millions in savings for RHS without Acquisition).

<sup>85</sup> *Citizen Publ'g. Co. v. United States*, 394 U.S. 131, 136-38 (1969) (citations omitted). The "flailing" firm defense is strongly disfavored as the weakest of all antitrust defenses. *See, e.g., Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1339 (7th Cir. 1981).

<sup>86</sup> PI Hr'g Tr. 772:18-773:16 (KaatZ); 636:7-21 (Schertz); PX4021-018, 25, 27; PX0371-029, 31, 35; PX0226-016, 18; PX4023-015; PX4603-002; PX4020-013 to 14.

here in GAC Services.<sup>87</sup>

Rather than face the heavy burdens associated with proving such established defenses, Defendants cite the Rockford area's economic condition and the Rockford hospitals' purported financial deterioration.<sup>88</sup> Of course, this Court already rejected these same arguments.<sup>89</sup> But Defendants now seemingly suggest that this Court's 1989 ruling and the permanent injunction blocking a nearly identical merger to duopoly in Rockford are no longer relevant.<sup>90</sup> The reality, however, is that the dynamics of hospital competition in the WOB Area, and the market structure, competitors, and entry conditions, all have remained largely unchanged in the intervening years since then. As much as Defendants may prefer otherwise, this Court's analysis in 1989 remains highly relevant today.

Instead, Defendants hope to direct the Court's attention to a 1997 proposed merger of OSF and SAHS that was never consummated. In so doing, they seemingly argue that a proposed merger involving "the two smaller" hospitals in Rockford cannot possibly be anticompetitive and should be allowed to proceed.<sup>91</sup> In other words, in Defendants' view, because the Acquisition would arguably not be the *worst* conceivable hospital system merger in Rockford, it must be

---

<sup>87</sup> PI Hr'g Tr. 406:21-407:15 (Capps); *see also, e.g.*, PX0222-007 to 08; PX0289 ¶ 44. In addition, Illinois's Certificate of Need statute is a well-recognized regulatory barrier to entry. *Rockford Mem'l*, 898 F.2d at 1281; *Univ. Health*, 938 F.2d at 1219; *see also Hosp. Corp. of Am.*, 807 F.2d at 1389; PX0285 ¶¶ 9-11; PX0289 ¶ 44. Notably, meaningful PCP Services entry in Rockford – *i.e.*, entry significant enough to match either of Defendants' employed PCP groups – is also unlikely. PI Hr'g Tr. 425:21-426:19 (Capps); *see also* PX2506 ¶ 90; PX0205 § 9.3; PX0282 ¶ 6; PX0283 ¶ 5; PX0284 ¶ 6.

<sup>88</sup> PX2263 ¶¶ 7, 26, 29, 80, 87. Defendants also compare Rockford with other cities and towns to suggest this merger to duopoly is somehow benign. Defs.' Pre-Hr'g Br. at 15. But their expert's comparison includes cities that bear little resemblance to Rockford and a clear error, the correction of which diametrically changes the results of her analysis. PI Hr'g Tr. at 439:12-441:20 (Capps).

<sup>89</sup> *Rockford Mem'l*, 717 F. Supp. at 1289.

<sup>90</sup> Defs.' Pre-Hr'g Br. at 13-14.

<sup>91</sup> *Id.* Notably, in 1997, OSF and SAHS also made dire predictions of imminent financial decline, which never materialized. PI Hr'g Tr. 611:3-612:16 (Schertz); PX1254-004.

okay. Courts have soundly rejected that argument, even at the merits trial stage.<sup>92</sup>

Defendants also attempt to advance a novel “healthcare reform” defense. But their argument is undone by their own documents and testimony demonstrating that they do not expect healthcare reform to prevent them from continuing to be profitable while offering high quality services.<sup>93</sup> Moreover, even if healthcare reform were a legitimate threat to Defendants’ businesses, the proposed Acquisition is *not* the only way to address healthcare reform going forward, as Mr. Kaatz acknowledged during the hearing.<sup>94</sup> Nor is this preliminary proceeding the proper forum to consider such a novel defense or exception to well-established law.

Defendants’ proposed stipulation amounts to a thinly veiled attempt to mask the competitive harm from the Acquisition.<sup>95</sup> The proposed stipulation makes no mention of rates and lacks any limitation on OSF Northern Region’s use of its increased bargaining leverage to extract higher prices from health plans.<sup>96</sup> The proposed stipulation likewise imposes no limits on the merged entity’s ability to *de facto* exclude SAHS by demanding significantly higher rates from any health plan that includes SAHS in its network.<sup>97</sup> Without any limits on OSF’s rates or negotiating leverage, the proposed stipulation has no effect on the anticompetitive harm arising from the merger, leaving health plans to either accept OSF Northern Region’s demands or risk

---

<sup>92</sup> See, e.g., *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at \*\*125-26.

<sup>93</sup> PX0371-010, 32 (projecting dramatic profit growth for SAMC without merger); PI Hr’g Tr. 637:19-638:10 (Schertz).

<sup>94</sup> PI Hr’g Tr. 765:16-19 (Kaatz).

<sup>95</sup> See DX0938.

<sup>96</sup> PI Hr’g Tr. 747:1-17 (Kaatz); 629:13-19 (Schertz); 256:5-257:14 (Petersen); 431:8-432:16 (Capps).

This is in stark contrast with the one case cited by Defendants in support of the proposed stipulation, which concerned a stipulation with strong protections on price. See Defs.’ Pre-Hr’g Br. at 10.

<sup>97</sup> PI Hr’g Tr. 431:23-432:10 (Capps).

hemorrhaging membership by offering a far less attractive product.<sup>98</sup> Courts have rejected far more substantive stipulations than the one offered by Defendants and indeed have found them to be evidence that a merger is likely to harm competition.<sup>99</sup> Accordingly, the proposed stipulation should be ignored.

### **III. THE EQUITIES HEAVILY FAVOR A PRELIMINARY INJUNCTION**

Because Plaintiff has demonstrated a strong likelihood of success on the merits, Defendants again must ask the Court to ignore established precedent and make history.<sup>100</sup> But there is no basis in the evidence to support such an extraordinary outcome. On the contrary, the evidence shows that closing the Acquisition risks immediate and lasting harm to competition. As Mr. Kaatz testified during the hearing, Defendants will begin sharing sensitive business information “right away” upon closing.<sup>101</sup> Once that information has been shared, there is no way to “unring that bell,” and Defendants will carry it with them even if the merits court ultimately orders divestment. Defendants also will begin making joint strategic decisions, laying off staff, consolidating management, and using their increased clout in negotiations with health plans, making it difficult, if not impossible, to make local employers and patients whole again.<sup>102</sup> Just those initial steps alone would alter the competitive landscape in Rockford for years to come and impede the Commission’s ability to order effective relief, if warranted.<sup>103</sup>

On the other hand, Defendants have offered no valid reason to deny preliminary relief to

---

<sup>98</sup> PI Hr’g Tr. 256:5-257:14, 257:19-260:9 (Petersen). The proposed stipulation also lacks any means of monitoring or enforcing its provisions. See PI Hr’g Tr. 629:13-19 (Schertz).

<sup>99</sup> *See, e.g., Cardinal Health*, 12 F. Supp. 2d at 67.

<sup>100</sup> No court has ever denied relief in a 13(b) proceeding where the FTC demonstrated a likelihood of success. *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at \*161; *see also Whole Foods*, 548 F.3d at 1034-35.

<sup>101</sup> PI Hr’g Tr. 778:1-5 (Kaatz).

<sup>102</sup> See e.g., PX4764-001; *see also* PX4765-001; PX4024-018.

<sup>103</sup> H.R. REP. No. 94-1373 at 5 (1976); *see also Rhinechem Corp.*, 459 F. Supp. at 790-91.

maintain the status quo and protect competition while the merits trial proceeds.<sup>104</sup> Defendants have failed to identify a single equitable consideration weighing against a preliminary injunction, let alone any public equities that would offset the competitive harm from consummating the Acquisition.<sup>105</sup> As noted, they cannot credibly argue that either OSF or RHS is in financial jeopardy if the merger were held in abeyance for a few more months.<sup>106</sup> They still have identified no financing contingencies that could unsettle the transaction. And while they appear to claim that efficiencies should be considered in the Court's equities calculus, they have no intention of spending the money to move forward on integration while any uncertainty about the merger remains (as it would during the merits trial), and they admit that their claimed efficiencies will remain achievable well beyond the date the merits trial will be completed.<sup>107</sup> Of course, even if Defendants' equities (or efficiencies) claims could somehow offset the equities weighing strongly in favor of a preliminary injunction, the question before the Court is not whether Defendants should *ever* be allowed to take advantage of their claimed efficiencies; rather, the question is whether the status quo should be maintained while the fast-moving merits trial proceeds.<sup>108</sup> The answer to that question is indisputably "yes."

### CONCLUSION

For the foregoing reasons, the FTC respectfully requests that this Court grant a Preliminary Injunction prohibiting the implementation of Defendants' Affiliation Agreement pending completion of the ongoing administrative proceeding.

---

<sup>104</sup> See *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at \*\*134-37.

<sup>105</sup> See *Elders Grain*, 868 F.2d at 903-04.

<sup>106</sup> See, e.g., PX4021-016 to 18.

<sup>107</sup> PX4023-024, 25.

<sup>108</sup> *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976); accord *Whole Foods*, 548 F.3d at 1035, 1050 (Tatel, J., concurring); see also Defs.' Pre-Hr'g Br. at 4.



Dated: February 14, 2012

Respectfully submitted,

/s/ Matthew J. Reilly

MATTHEW J. REILLY  
JEFFREY H. PERRY  
KENNETH W. FIELD  
PETER C. HERRICK  
DOUGLAS E. LITVACK  
Attorneys  
Federal Trade Commission  
Bureau of Competition  
600 Pennsylvania Ave., N.W.  
Washington D.C. 20580  
Telephone: (202) 326-2350  
Facsimile (202) 326-2286  
Email: mreilly@ftc.gov

RICHARD A. FEINSTEIN  
Director  
NORMAN A. ARMSTRONG, JR.  
Deputy Director  
Federal Trade Commission  
Bureau of Competition

WILLARD K. TOM  
General Counsel  
Federal Trade Commission

*Attorneys for Plaintiff Federal Trade Commission*

## Appendix A

**Results of Market Share Calculations Are  
Substantially Insensitive to Metric and Geographic Area**

Geographic area	Hospitals	DRGs offered in Rockford				SAMC and RMH overlapping DRGs			
		Admissions		Patient days		Admissions		Patient days	
		Share	HHI	Share	HHI	Share	HHI	Share	HHI
30-minute drive-time radius	Swedish	40.6%	5,179	35.8%	5,406	40.5%	5,182	35.7%	5,408
	SAMC + RMH	59.4%		64.2%		59.5%		64.3%	
Winnebago County	Swedish	40.6%	5,179	35.8%	5,406	40.5%	5,182	35.7%	5,408
	SAMC + RMH	59.4%		64.2%		59.5%		64.3%	
Winnebago and Boone	Swedish	40.6%	5,179	35.8%	5,406	40.5%	5,182	35.7%	5,408
	SAMC + RMH	59.4%		64.2%		59.5%		64.3%	
Winnebago, Boone, and Ogle	Swedish	40.2%	5,088	35.6%	5,351	40.1%	5,091	35.5%	5,352
	SAMC + RMH	58.9%		63.9%		59.0%		64.0%	
Area defined by this Court in 1989	Swedish	40.2%	5,088	35.6%	5,351	40.1%	5,091	35.5%	5,352
	SAMC + RMH	58.9%		63.9%		59.0%		64.0%	

Source: PX2501-164 (Capps Initial Aff., Figure 28).

## Appendix B

### Most WOB Area Health Plan Networks Include Two of the Three Rockford Hospitals

Health plan	Swedish	RMH	SAMC	Note
BCBS of Illinois	Y	N	Y	<ul style="list-style-type: none"> <li>RHS is not in-network with BCBS-IL but does waive additional out-of-network co-payments for BCBS-IL enrollees that select RMH.</li> <li>BCBS-IL offers an HMO product that includes only SwedishAmerican.</li> </ul>
UnitedHealthcare	Y	Y	N	<ul style="list-style-type: none"> <li>In 2010, United introduced a pilot narrower network PPO product, “UnitedHealthcare Core,” that it offers in Northern Illinois and Northwest Indiana. In Rockford, this product includes only SwedishAmerican.</li> </ul>
Coventry / PersonalCare	Y	Y	N	
Humana	N	Y	Y	
ECOH—Network Plan	Y	N	Y	
ECOH—River Valley Plan	Y	Y	N	<ul style="list-style-type: none"> <li>ECOH’s River Valley Plan is offered solely or primarily in conjunction with its Network Plan.</li> </ul>
Cigna	Y	Y	N	<ul style="list-style-type: none"> <li>Cigna administers a self-funded plan on behalf of the State of Illinois that includes all three Rockford hospitals.</li> </ul>
Aetna	N	Y	Y	

Source: PX2501-101 (Capps Initial Aff., Figure 23).

### Appendix C

#### Documents Cited in Plaintiff's Supplemental Post-Hearing Memorandum<sup>109</sup>

<b>Exhibit No.</b>	<b>Begin Bates No.</b>	<b>Date</b>	<b>Description</b>	<b>Confidentiality Designation</b>
<b>DX0015</b>	N/A	11/15/2011	Declaration of John Danis (Absolute Fire Protection, Inc.)	Not Confidential
<b>DX0016</b>	N/A	11/15/2011	Declaration of Rebecca Epperson (PR, Etc.)	Not Confidential
<b>DX0017</b>	N/A	11/18/2011	Declaration of James M. Hansberry (Wealth Management of Rockford Bank & Trust)	Not Confidential
<b>DX0021</b>	N/A	11/16/2011	Declaration of Thomas A. Muldowney (Savant Capital Management, Inc.)	Not Confidential
<b>DX0938</b>	N/A	Undated	FTC v. OSF/Rockford, Proposed Stipulation	Not Confidential
<b>PX0001</b>	N/A	12/14/2010	FTI Healthcare Presentation: Business Efficiencies Report for the RHS-OSF Affiliation	Confidential
<b>PX0034</b>	N/A	12/14/2010	FTI Healthcare Presentation: Business Efficiencies Report for the RHS-OSF Affiliation	Confidential
<b>PX0205</b>	N/A	8/19/2010	Horizontal Merger Guidelines of the U.S. Department of Justice and the Federal Trade Commission, Issued: August 19, 2010	Not Confidential
<b>PX0210</b>	N/A	4/1/2011	Letter to Kuo (Fiduciary Communications Company) from Seybold Sr. (SVP Finance & CFO of RHS) re: RHS April 1, 2011 Bond Disclosure	Confidential
<b>PX0211</b>	N/A	8/23/2011	Daniel Baker (OSF) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)

<sup>109</sup> When Defendants produced documents and materials to the Federal Trade Commission, they requested confidential treatment under the Federal Trade Commission Act § 21, 15 U.S.C. § 57b-2, the Commission's Rules of Practice 4.10-11, 16 C.F.R. §§ 4.10-11, and the Hart-Scott-Rodino Antitrust Improvements Act, as amended, 15 U.S.C. § 18A(h). Defendants also requested that the Commission treat their documents as exempt from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. § 552(b). Accordingly, for purposes of this Memorandum, Plaintiff is treating all materials submitted by Defendants as Confidential under the Protective Order in this matter, unless otherwise designated as Not Confidential or Confidential – Attorneys' Eyes Only.

<b>Exhibit No.</b>	<b>Begin Bates No.</b>	<b>Date</b>	<b>Description</b>	<b>Confidentiality Designation</b>
<b>PX0213</b>	N/A	9/19/2011	Mary Breeden (OSF) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX0216</b>	N/A	9/1/2011	Gary Kaatz (RHS) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX0217</b>	N/A	9/27/2011	Michelle Mary Lobe (UHC) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX0218</b>	N/A	8/16/2011	Sister Diane Marie McGrew (OSF) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX0222</b>	N/A	9/7/2011	David A. Schertz (OSF) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX0251</b>	N/A	9/26/2011	Declaration of Suzanne Hall (Aetna)	Confidential - Attorneys' Eyes Only
<b>PX0252</b>	N/A	8/9/2011	Declaration of Joseph Arango (BCBS-IL)	Confidential - Attorneys' Eyes Only
<b>PX0253</b>	N/A	10/25/2011	Declaration of Thomas Goliass (CIGNA)	Confidential - Attorneys' Eyes Only
<b>PX0254</b>	N/A	7/6/2011	Declaration of William Pocklington (ECOH)	Confidential - Attorneys' Eyes Only
<b>PX0255</b>	N/A	6/30/2011	Declaration of Robert Hitchcock (Humana)	Confidential - Attorneys' Eyes Only
<b>PX0256</b>	N/A	7/8/2011	Declaration of Todd Petersen (Personal Care/Coventry)	Confidential - Attorneys' Eyes Only
<b>PX0259</b>	N/A	6/1/2011	Declaration of Michael Perry (FHN Hospital/Northern IL Health Plan)	Confidential - Attorneys' Eyes Only

<b>Exhibit No.</b>	<b>Begin Bates No.</b>	<b>Date</b>	<b>Description</b>	<b>Confidentiality Designation</b>
<b>PX0265</b>	N/A	6/6/2011	Declaration of Gary Cacciapaglia (American Federation of State, County, and Municipal Employees, Local 1058)	Confidential
<b>PX0267</b>	N/A	4/5/2011	Declaration of Nancy Williams (Barnes International, Inc.)	Confidential
<b>PX0268</b>	N/A	3/26/2011	Declaration of Andy Benson (Benson Stone Co.)	Confidential
<b>PX0269</b>	N/A	9/20/2011	Declaration of Chad Endsley (C&E Specialties)	Confidential
<b>PX0271</b>	N/A	5/9/2011	Declaration of Julie A. Hansberry (Cincinnati Tool Steel Company)	Confidential
<b>PX0274</b>	N/A	3/30/2011	Declaration of Lorenzo Orlando (Ingersoll Machine Tools)	Confidential - (Paragraphs 2, 3, 4, 6 & 7)
<b>PX0275</b>	N/A	7/27/2011	Declaration of Jeffrey J. Kaney (Kaney Aerospace)	Confidential - Attorneys' Eyes Only
<b>PX0276</b>	N/A	4/4/2011	Declaration of Brian Peterson (Liebovich Brothers, Inc.)	Confidential
<b>PX0277</b>	N/A	3/28/2011	Declaration of Larry Bridgeland (Mid-City Office Products)	Confidential - Attorneys' Eyes Only
<b>PX0278</b>	N/A	5/6/2011	Declaration of Doug Price (Midwest Mail Works)	Confidential
<b>PX0279</b>	N/A	4/1/2011	Declaration of Lisa Petersen (NCO Financial Systems)	Confidential - Attorneys' Eyes Only
<b>PX0280</b>	N/A	11/2/2011	Declaration of Shantina Davenport (Rockford Public Schools District)	Confidential - Attorneys' Eyes Only
<b>PX0287</b>	N/A	11/16/2011	Supplemental Declaration of Todd Petersen (PersonalCare/Coventry)	Confidential - Attorneys' Eyes Only
<b>PX0289</b>	N/A	1/13/2012	Declaration of William Gorski (SwedishAmerican)	Confidential - Attorneys' Eyes Only
<b>PX0322</b>	OSF00140883	5/31/2011	Email to Mary Breedon from David Stenerson: re: FW: State FY 2012 Benefits Choice	Confidential - Attorneys' Eyes Only

<b>Exhibit No.</b>	<b>Begin Bates No.</b>	<b>Date</b>	<b>Description</b>	<b>Confidentiality Designation</b>
<b>PX0345</b>	OSF00050616	Undated	OSF Contracting Process for Facilities, Ancillary Services, OSF Medical Group Providers and OSF-Owned Specialist Physician Corporations	Confidential - Attorneys' Eyes Only
<b>PX0349</b>	OSF01589566	11/5/2007	OSF Summary of Discussions with Rockford Health System	Confidential
<b>PX0350</b>	OSF01589581	11/5/2007	OSF Summary of Discussions with Swedish American Health System	Confidential
<b>PX0371</b>	OSF01161828	8/18/2011	OSF SAMC Management Plan Fiscal Year 2012	Confidential
<b>PX0388</b>	OSF00027752	2/28/2011	Email to Sehring, Baker and Kaatz from Seybold: re: Draft Proposal for Updated	Confidential
<b>PX0458</b>	OSF00036450	8/14/2009	Email from Mary Breeden: re: Charge Master Increases	Confidential - Attorneys' Eyes Only
<b>PX0482</b>	OSF01160300	10/7/2005	Email from Rosenberg: re: FW: Information	Confidential - Attorneys' Eyes Only
<b>PX0485</b>	OSF00505817	5/6/2011	Email from Hohulin to Schoeplein: re: FW: Clarification on question #64	Confidential - Attorneys' Eyes Only
<b>PX0556</b>	RHS002_0224570	11/14/2005	Rockford Health System Finance and Audit Advisory Committee Meeting Agenda	Confidential - Attorneys' Eyes Only
<b>PX0623</b>	RHS015_0001594	1/3/2011	Email to Brooks, Dilts, Evans et al. from Dillon: re: 2011 ECOH negotiations	Confidential - Attorneys' Eyes Only
<b>PX0630</b>	RHS017_0066809	10/26/2005	Finance & Audit Advisory Committee Minutes	Confidential - Attorneys' Eyes Only
<b>PX0681</b>	N/A	5/11/2011	Letter from Hine to Ambrogi RE: FTI's Responses and Objections to FTC's CID	Confidential
<b>PX0704</b>	RHS006_0036065	7/17/2008	Email from Seybold to Dillon: re: Followup	Confidential
<b>PX1025</b>	BCBSIL00000118 FTC-RKM	8/13/2010	Amendment to the Blue Cross PPO Hospital Contract for Saint Anthony Medical Center - Rockford	Confidential - Attorneys' Eyes Only
<b>PX1254</b>	SWH-0000001	9/17/1997	Memorandum in Support of the Proposed Acquisition of SwedishAmerican by OSF (1997 White Paper)	Confidential - Attorneys' Eyes Only

<b>Exhibit No.</b>	<b>Begin Bates No.</b>	<b>Date</b>	<b>Description</b>	<b>Confidentiality Designation</b>
<b>PX1265</b>	FTC-ROPE-004153	9/26/2008	Letter to Brand from Lutes re: Contracting with Hospitals in Rockford area	Not Confidential
<b>PX1603</b>	N/A	12/20/2011	In re: OSF Healthcare and Rockford Health System, Scheduling Conference Transcript	Confidential
<b>PX2000</b>	FTI00743	Feb. 2011	FTI Presentation: Rockford Health System Performance Opportunities	Confidential
<b>PX2001</b>	FTI00422	Feb. 2011	FTI Presentation: OSF SAMC Performance Opportunities	Confidential
<b>PX2262</b>	N/A	11/23/2011	Declaration of Susan Manning (Compass Lexicon)	Confidential
<b>PX2263</b>	N/A	11/22/2011	Expert Report of Monica Noether (Charles River Associates)	Confidential
<b>PX2269</b>	N/A	1/11/2012	Supplemental Expert Report of Monica Noether (Charles River Associates)	Confidential - Attorneys' Eyes Only
<b>PX2501</b>	N/A	11/23/2011	Affidavit of Cory Capps, Appendix A	Confidential - Attorneys' Eyes Only
<b>PX2502</b>	N/A	11/23/2011	Affidavit of Gabriel Dagen	Confidential
<b>PX2505</b>	N/A	1/11/2012	Affidavit of Nancy McAnallen	Confidential - Attorneys' Eyes Only
<b>PX2506</b>	N/A	1/11/2012	Reply Affidavit of Cory Capps	Confidential - Attorneys' Eyes Only
<b>PX2507</b>	N/A	1/11/2012	Supplemental Affidavit of H. Gabriel Dagen	Confidential - Attorneys' Eyes Only
<b>PX3151</b>	OSF00101071	11/3/2005	Email to Harbaugh from Breeden re: BCBS "Hot" Issue in Rockford - FYI	Confidential - Attorneys' Eyes Only
<b>PX4000</b>	N/A	1/6/2012	Deposition Transcript of Richard Walsh (SwedishAmerican)	Confidential
<b>PX4001</b>	N/A	1/10/2012	Deposition Transcript of Michelle Lobe (United)	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4002</b>	N/A	1/13/2012	Deposition Transcript of Robert Hitchcock (Humana)	Confidential - Attorneys' Eyes Only (designated portions)



<b>Exhibit No.</b>	<b>Begin Bates No.</b>	<b>Date</b>	<b>Description</b>	<b>Confidentiality Designation</b>
<b>PX4004</b>	N/A	1/19/2012	Deposition Transcript of Suzanne Hall (Aetna)	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4006</b>	N/A	1/11/2012	Deposition Transcript of Dean Olson (Rockford Acromatic Products)	Not Confidential
<b>PX4008</b>	N/A	1/11/2012	Deposition Transcript of Thomas Golias (Cigna)	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4020</b>	N/A	1/10/2012	Deposition Transcript of David Schertz (OSF)	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4021</b>	N/A	1/10/2012	Deposition Transcript of Henry Seybold (RHS)	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4023</b>	N/A	1/17/2012	Deposition Transcript of Sister Diane Marie McGrew (OSF)	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4024</b>	N/A	1/18/2012	Deposition Transcript of Kevin Schoeplein (OSF)	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4025</b>	N/A	1/12/2012	Deposition Transcript of Gary Kaatz (RHS)	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4046</b>	N/A	1/20/2012	Deposition Transcript of Monica Noether	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4048</b>	N/A	1/22/2012	Deposition Transcript of Nancy McAnallen Vol 2	Confidential - Attorneys' Eyes Only (designated portions)
<b>PX4595</b>	OSF04737499	8/3/2005	OSF SAMC FY2006 Management Plan	Confidential
<b>PX4596</b>	OSF04090056	8/3/2006	OSF SAMC FY2007 Management Plan	Confidential

<b>Exhibit No.</b>	<b>Begin Bates No.</b>	<b>Date</b>	<b>Description</b>	<b>Confidentiality Designation</b>
<b>PX4603</b>	OSF03439276	11/10/2011	OSF Health System OSF Saint Anthony Medical Center Advisory Board Meeting	Confidential - Attorneys' Eyes Only
<b>PX4626</b>	RHS031_0008641	12/2/2010	Email from Davit to Dillon: re: RE: Out of Network	Confidential
<b>PX4726</b>	OSF05631675	1/3/2012	Speadsheet: FY2011 Profitability by payor split by IP/OP	Confidential
<b>PX4763</b>	RHS031_0009060	9/23/2009	Email to Dillon from Hill re: Information on United Healthcare Proposal	Confidential
<b>PX4764</b>	RHS031_0007283	1/4/2010	Email to Dillon from Seybold re: HFN Platinum Network	Confidential
<b>PX4765</b>	OSF01897893	11/22/2011	Memo to OSF Saint Anthony Medical Center and Rockford Health System Physicians and Employees	Confidential
<b>PX4766</b>	OSF01897902	11/22/2011	OSF/RHS Affiliation Moves Forward	Confidential

**CERTIFICATE OF SERVICE**

I hereby certify that on April 19, 2012, I delivered *via* electronic mail a copy of the foregoing to:

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

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

Kristin M. Kurczewski  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3000  
kkurczewski@hinshawlaw.com

Michael F. Iasparro  
100 Park Avenue  
P.O. Box 1389  
Rockford, IL 61105  
815-490-4945  
miasparro@hinshawlaw.com

Rita Mahoney  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3000  
rmahoney@hinshawlaw.com

Paula Jordan  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
312-704-3000  
pjordan@hinshawlaw.com

*Counsel for OSF Healthcare System*

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

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

Jeffrey W. Brennan  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
jbreannan@mwe.com

Carla A. R. Hine  
McDermott Will & Emery  
600 13<sup>th</sup> Street, NW  
Washington, DC 20005  
202-756-8000  
chine@mwe.com

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

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

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

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

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

*Counsel for Rockford Health System*

/s/ Douglas E. Litvack  
Douglas E. Litvack  
Attorney for Plaintiff Federal Trade Commission