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

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

DEFENDANTS' REPLY TO PLAINTIFF'S SUPPLEMENTAL
POST-HEARING MEMORANDUM

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INTRODUCTION

The FTC's Post-Trial Brief is a plea to the Court for help to which it is not entitled. No matter how the FTC tries to alchemize the record, it has produced no evidence to support its theory that this merger of the two smaller of the three Rockford hospitals in this cost-ravaged healthcare world is likely to harm consumers in Rockford. The FTC asks the Court to defer to the "fast-moving merits" proceeding,[1] where it hopes to accomplish what it failed to do here – present evidence that the affiliation is likely to cause an anticompetitive effect.

But, what has the FTC held back? It investigated the transaction for a year, deposed dozens of persons, solicited dozens of affidavits, received hundreds of thousands of documents, and presented three days of testimony and three thousand exhibits at the preliminary injunction hearing. All the FTC has proved is that "three is more than two," a fact never in dispute.

The FTC has no evidence of likely collusion between OSF Northern Region and SwedishAmerican Health System ("SAH"). Indeed, the FTC's reliance on ancient history highlights its lack of current facts to support its "coordinated effects" theory. Nor is there evidence that OSF Northern Region will engage in anticompetitive or exclusionary conduct. The Defendants' proposed stipulation eliminates that possibility. Rather, the FTC's case rests solely on speculation, divorced from the healthcare market in which the Defendants operate.

Defendants are not asking the Court to "make history" here.[2] Because the FTC has failed to meet its burden in this case, the Court should reject the FTC's request to kick the can down the

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[1] The FTC's assertion that the administrative proceeding will be over this year is wrong. After the ALJ's decision, either party can appeal to the full Commission and then to the Seventh Circuit. These appeals easily can last until the fall of 2013, if not later.

[2] Other courts have denied injunctive relief where the government claimed the transaction would reduce the number of competing hospitals to two or even one competitor in the market, or result in high post-transaction HHI levels. *See, e.g., FTC v. Tenet Health Care*, 186 F.3d 1045 (8th Cir. 1999) (reversed grant of preliminary injunction); *FTC v. Freeman Hosp.*, 69 F.3d 260 (8th Cir. 1995) (affirmed denial of (continued...)

road to the administrative proceeding. That would require the Court to abdicate its responsibility to demand that the FTC meet its evidentiary burden. Because the FTC failed to do so, the Court should deny its motion for a preliminary injunction.

ARGUMENT

I. The FTC Has Failed to Show a Likelihood of Success on the Merits

A. The FTC's Presumption Based on Market Shares and Concentration Ratios Is Insufficient to Show a Likelihood of Success

The FTC relies on outdated case law and exaggerates the role of market shares and concentration ratios in Section 7 cases, citing *United States v. Philadelphia National Bank* to support its presumption of illegality. 374 U.S. 321, 363 (1963); *see also* Pl. Suppl. Mem. 4, 6. In *United States v. Baker Hughes*, the U.S. Court of Appeals for the District of Columbia explained that although *Philadelphia National Bank* and its progeny remain good law, the Supreme Court has "cut them back sharply." 908 F.2d 981, 990 (D.C. Cir. 1990).

For example, in *United States v. General Dynamics Corporation*, the Supreme Court affirmed a determination that defendants had rebutted a *prima facie* case by presenting evidence that undermined the government's statistics. 415 U.S. 486, 498-504 (1976). *General Dynamics* "began a line of decisions differing markedly in emphasis from the Court's antitrust cases of the 1960s" by refusing to accept market shares as "virtually conclusive proof" of market power and "discard[ing] *Philadelphia Bank's* insistence that a defendant 'clearly' disprove anticompetitive effect, and instead described the rebuttal burden simply in terms of 'showing.'" *Baker Hughes*, 908 F.2d at 990-991; *see also United States v. Marine Bancorp.*, 418 U.S. 602, 631 (1974). As the D.C. Circuit explained, "the Supreme Court has at the very least lightened the evidentiary

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preliminary injunction); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121 (E.D.N.Y. 1997) (preliminary injunction denied); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996) (same).

burden on a section 7 defendant." *Baker Hughes*, 908 F.2d at 991. If "the burden of production imposed on a defendant is unduly onerous, the distinction between that burden and the ultimate burden of persuasion . . . disintegrates completely." *Id.* That is particularly true in section 7 cases, where "it is *easy* to establish a *prima facie* case" because the government "can carry its initial burden of production simply by presenting market concentration statistics." *Id.* at 992.

Thus, the FTC's presentation of market concentration statistics does not satisfy its burden of proof. Market share analysis is only the starting point of the inquiry. *See Baker Hughes*, 908 F.2d at 992 ("[t]o allow the government virtually to rest its case at that point, leaving the defendant to prove the core of the dispute, would *grossly inflate* the role of statistics in actions brought under section 7") (emphasis added). The unreliability of HHI computations is especially true in markets like Rockford (and most other metropolitan areas in the country) where any merger of competitors would presumptively violate the Merger Guidelines based solely on HHI criteria. FF ¶¶ 745, 749, 752.

Contrary to the FTC's presentation, the ultimate burden of persuasion remains with the FTC at all times. *See FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 63 (D.D.C. 1998) (explaining that "[d]espite the shifting burdens of production in an antitrust case, the ultimate burden of persuasion always rests with the Government"); *see also Baker Hughes*, 908 F.2d at 991. Although the FTC cannot rest on concentration data alone, it is all the FTC has offered in this case. And that is not enough.

B. Defendants' Evidence Rebuts the Presumption of Illegality

1. The FTC Failed to Show OSF Northern Region Will Be Able to Raise Rates Above Competitive Levels

To support its theory that the merger will confer impermissible market power on OSF Northern Region, the FTC repeats its "merger to duopoly" refrain. The FTC argues that

"[s]imply 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." Pl. Suppl. Mem. 11. But the FTC offers no evidence beyond its "three to two" calculation to support its speculation. The FTC's economist did nothing more than predict an increase in price; he performed no merger simulation to estimate a price effect. FF ¶ 970.

Indeed, the evidence contradicts the FTC's claim and shows that rates are unlikely to be higher in two-hospital markets than in three-hospital markets. Dr. Noether's economic analysis of hospitals in towns of similar size to Rockford revealed that nearly all metropolitan areas of comparable population support at most two substantial hospital systems. FF ¶ 758. Dr. Noether found that in metropolitan areas similarly sized to Rockford, effective competition could exist with only two hospital competitors. FF ¶ 759. Confirming this unsurprising result, [redacted] FF ¶ 762. Indeed, [redacted] FF ¶¶ 764, 768.[3]

The FTC ignores the evidence that in a rapidly changing healthcare world three separate hospital systems in Rockford is both one too many and unsustainable. Currently, no Rockford hospital staffs even close to all of its licensed beds, and occupancy rates of staffed beds range from roughly 55 to 65 percent. FF ¶ 791. In addition to this excess capacity, there is extensive

[3] Defendants here presented precisely the information sought by Judge Posner in *U.S. v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir. 1990). There, Judge Posner sought information regarding "the actual effect of concentration on price in the hospital industry" and whether "other things being equal, hospital prices [are] higher in markets with fewer hospitals." *Id.* at 1286. Here, the data shows that there is effective competition in two-hospital towns.

duplication and triplication of expensive services in Rockford, including, for example: three open-heart surgery programs, two Level I trauma centers, three obstetrics programs, multiple MRI/CT scanners, three pediatric units, and three helicopter services. FF ¶ 802. Expensive equipment is underutilized, wasting precious healthcare dollars that can only be saved through consolidation. FF ¶¶ 796, 800.

The FTC takes testimony entirely out of context in an effort to support its claims that OSF Northern Region "will take full advantage of its newfound market power to increase prices."[4] Pl. Suppl. Mem. 12. Moreover, the FTC's apparent contention that any increase in prices would be anticompetitive is incorrect, for only an increase in prices above competitive levels would violate Section 7. *See United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 136-37 (E.D.N.Y. 1997) (FTC must show a "reasonable probability of substantial impairment of competition by an increase in prices above competitive levels"). The fact of a price increase alone says nothing about competitive conditions in the Rockford market, because hospital costs are increasing as rapidly as Medicare payments to providers are decreasing. FF ¶¶ 202, 204, 1208.

The FTC also distorts the realties of hospital-MCO contracting. Both parties negotiate to obtain the best outcome possible. FF ¶ 522. The affiliation will allow OSF Northern Region to reduce its cost of delivering healthcare services and raise quality, and thereby lower the prices at which it can achieve an acceptable outcome in its negotiations with MCOs.

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[4] *See* Schertz, Tr. 624-625 (Mr. Schertz was using an illustration comparing the leverage of SAMC to BCBS, stating that the affiliation would give SAMC only slightly increased leverage against the powerful MCO); Kaatz, Tr. 759-760 (Mr. Kaatz testified that he was unaware of *any* discussions among competitors that have dealt with rates).

a. SwedishAmerican and MCOs Will Act as Significant Constraints and Prevent OSF Northern Region from Raising Rates Above Competitive Levels

The FTC ignores SAH's role as a significant competitor, Pl. Suppl. Mem. 7-8, a fact which the FTC's expert does not dispute. FF ¶ 817. SAH's market share is growing, and SAH has strategic plans to become an even more formidable competitor. FF ¶¶ 821, 825-828, 831. SAH's presence guarantees the continuation of vigorous competition in Rockford.

The FTC also ignores the evidence demonstrating that MCOs can and will resist rate increases from OSF Northern Region, and that the viability of single-hospital networks will make that resistance easier. The FTC's claim that there exists a "*de facto* requirement" for a two-hospital network is contrary to the evidence. MCOs have successfully offered single-hospital products in Rockford. FF ¶¶ 856, 859, 863, 865; *see also* Defs. Post-Hearing Brief at 11-13. Moreover, were the FTC correct, competition would fail in every two-hospital town, which we know does not happen. Still further, MCOs will have three network configurations to offer employers – a two-system configuration and two one-system configurations which MCOs can offer at different price points. Indeed, the evidence shows that BCBS and the other MCOs have considerable leverage against providers. FF ¶¶ 838-844.

b. The Proposed Stipulation Alleviates Competitive Concerns

The FTC's contention that OSF's and RHS' Proposed Stipulation is of no import impeaches its own arguments about OSF Northern Region's post-affiliation market power. Defendants proposed their Stipulation to alleviate concerns the FTC expressed that OSF Northern Region could force payors to exclude SAH from their network. Schertz, Tr. 628:23-629:6; FF ¶¶ 848-849. The Stipulation debunks the notion that OSF Northern Region could freeze SAH out of the market or otherwise leverage payor access to OSF Northern Region.

The Stipulation will not guarantee rates to MCOs, so it will not satisfy Todd Petersen from Coventry, who admitted that his MCO would prefer to have its cake and eat it too. Petersen, Tr. 321:9-19.[5] But MCOs are not guaranteed rates today; rates have to be negotiated – and neither OSF nor RHS is required to contract with any MCO. Petersen, Tr. 315:16-22; 316:11-21. The FTC has no evidence that the affiliation will cause rates to rise to supracompetitive levels. FF ¶¶ 964-970 (Capps did not estimate the affiliation's price effect); Lobe, Tr. 42:17-43:1 (testifying she "would not be comfortable projecting an amount of change in terms of what the rates would be"). Thus, with respect to the negotiation of rates between OSF or RHS and MCOs, the Proposed Stipulation maintains the *status quo*. As in *Butterworth*, the leaders of the OSF Northern Region made a commitment to this Court to negotiate rates with MCOs in good faith. Schertz, Tr. 647:8-20 (the future COO of OSF Northern Region testified it will negotiate in good faith); Kaatz, Tr. 744:18-745:3 (the future CEO of the OSF Northern Region testified it will "remain a community organization, governed, stewardship provided through our board, and that the last thing that we're going to do is try to manipulate price to the detriment of our community."); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1298 (W.D. Mich. 1996). The Proposed Stipulation allows the Court to hold the Defendants to their commitment and eliminates any concern that the affiliation will jeopardize competition.

c. This Affiliation Is Analogous to the 1997/1998 Proposed Transaction, Not the 1989 Proposed Transaction

The FTC's reliance on the Court's 1989 decision is misplaced. Over the last twenty years, a significant shift in demographics and a substantial decline in economic conditions has affected the competitive dynamic of Rockford's healthcare market. FF ¶¶ 45-68. From 2000 to

[5] The FTC incorrectly cites *Cardinal Health, Inc.*, 12 F. Supp. at 67, for the proposition that the proposed stipulation is evidence that a merger is likely to harm competition. *See* Pl.'s Supp. Mem. at 19. Nothing in *Cardinal Health* comes close to saying any such thing.

2010, Rockford's population grew by less than 2% and its per capita personal income dropped. FF ¶ 41. Rockford has lost over 13,000 manufacturing jobs since 2010 (approximately 33%), and new jobs are primarily in the lower-wage, fewer or no-benefits services sector. FF ¶¶ 48, 51. Unemployment has increased from 4.6% in 2000 to 13% in 2010, reaching a high of 19.7% in January of 2010. FF ¶ 46. At the same time, the percentage of Rockford residents with commercial insurance has declined from about 72% in 2000 to 48% in 2011, and the percentage insured by Medicare has grown from 10% to over 17%. FF ¶ 58. Medicaid now insures almost 20% of the MSA's population, up from approximately 7% in 2000. About 16% of the population is uninsured today, almost a 50% increase since 2000. FF ¶¶ 60-61.

As a result, Rockford's hospital systems are treating increasing numbers of Medicare, Medicaid and charity care patients. Government payors, which reimburse hospitals less than it costs the hospitals to treat their insureds, represented ████ of RMH's inpatient discharges in 2010. FF ¶ 67. SAMC's charity care expenses tripled between 2009 and 2011. FF ¶ 65.

Moreover, the proposed affiliation of OSF and RHS is distinguishable from the 1989 transaction. The 1989 transaction proposed the merger of the two largest hospitals in Rockford. FF ¶ 190. The present case involves the two smallest hospitals in the market. FF ¶¶ 154-155. Significantly, in 1989, there was evidence of collusion among the hospital systems, supporting the concern that the transaction would violate the antitrust laws. No such evidence exists today. (*See* Section I.B.2. *infra*).

Finally, the FTC ignores the fact that, eight years later, OSF and SAH proposed a merger similar to the present affiliation. That proposed merger involved the then two smallest of the three hospitals, the same as the current transaction. The parties' objectives in 1997 were similar to those of OSF and RHS here – to achieve critical cost savings and efficiencies in a declining

economic environment that neither could achieve on its own, for the community's benefit. FF ¶¶ 192-194, 198. The clarion bell is ringing more loudly now, with rising healthcare costs threatening the national economy. Importantly, the Antitrust Division of the U.S. Department of Justice, the same agency that challenged the 1989 transaction, carefully reviewed and approved the proposed merger in 1997. FF ¶ 195.

2. The FTC Has Failed to Show that the Affiliation Will Result in Coordinated Conduct

In what amounts to a confession by the FTC that a full year of exhaustive investigation yielded no evidence of collusion, the FTC cites seven purported instances of "coordinated activity" involving the Rockford hospitals. Pl. Suppl. Mem. 9. However, even modest scrutiny reveals they are utterly without substance. What follows is a point-by-point refutation:[6]

- PX0630 and PX0556 (RHS Finance & Audit Advisory Committee Minutes, October 26, 2005). In addition to being stale, there is nothing coordinated about [redacted] These documents do not establish that RHS and SAH agreed on anything; they demonstrate unilateral conduct. Moreover, despite having the opportunity to question RHS CEO Gary Kaatz (who has been the CEO of RHS for about twelve years) about this document during his investigational hearing testimony, his deposition, or at the preliminary injunction hearing, the FTC never did, apparently because the FTC did not want to know his answer. *See* DX0698; DX0706; Kaatz, Tr. 707-776. Mr. Kaatz and [redacted] both testified unequivocally (along with RHS' current director of managed care) that [redacted] have never exchanged competitively sensitive information. FF ¶¶ 890, 892-93.

- PX3151 (November 3, 2005 email between Carol Stever and Mary Breeden, Senior VP of Managed Care for OSF). First, the statement from this stale email communication upon which the FTC relied, purporting to show that [redacted] contains at least three layers of hearsay. It is completely unreliable. Second, when given

[6] The FTC recently elicited (in connection with discovery relating to the administrative hearing) additional testimony contradicting its allegations here, but to date has failed to amend or correct the false statements it made in its pre-hearing and post-hearing memoranda.

the opportunity to question [redacted] about this document, the FTC again chose not to do so.[7] *See* PX0229.

- PX0349 and PX0350 (notes of OSF's consultant, Health Care Futures ("HCF"), dated November 5, 2007, containing summaries of discussions with [redacted] As David Schertz testified, these notes were created as part of SAMC's management plan building process, which HCF does with all of its clients, and were based upon interviews of other healthcare facilities and systems in the broader service area "to confirm that this is the general direction everybody sees the world moving in." Schertz, Tr. 644:4-14. None of the information in these exhibits contains proprietary information – as a simple review of the documents demonstrates. Schertz, Tr. 644:20-23. The FTC's suggestion that the leaders of Rockford's three health systems would share competitively sensitive information with each other through a hired consultant, in an informal interview setting, is counterintuitive, entirely unsubstantiated and contrary to the credible evidence in this case – no such activity has taken place. FF ¶¶ 890-900.

- PX1265 (September 26, 2008 letter from [redacted] is not attributed to any person at either of those entities and even assuming it had been, it would still constitute at least two layers of hearsay. [redacted] testimony, on which the FTC relies in support of this proposition, itself contains two levels of hearsay. [redacted] attributes this purported episode [redacted] Yet, again, the FTC never asked either CEO about this allegation, despite three chances to ask Gary Kaatz, and four to ask David Schertz. *See* DX0698; DX0706; Kaatz Tr. 707-776; DX0189; DX0394; DX0713; Schertz Tr. 565-651. Moreover, the FTC failed to produce any evidence [redacted] attached as Ex. B.

- PX0704 (July 17, 2008 email chain between RHS CFO Henry Seybold and RHS Director of Managed Care Paula Dillon). This document purportedly shows that [redacted]

[7] During the deposition of [redacted] pursuant to the administrative proceeding, the FTC again avoided this topic except for briefly inquiring if [redacted] ever spoke to [redacted] regarding contracting. [redacted] attached as Ex. A.

Not only does the FTC offer no evidence of what this means, or whether it even occurred, they disingenuously failed to inform this Court that, when they did question the supposed participants during depositions for this proceeding and the administrative proceeding, all three individuals denied that *See* DX0937-044; 02/07/12 Dep. of Henry Seybold, p. 47-48, attached as Ex. C; 02/16/12 Dep. of Paula Dillon, pp. 192-94, attached as Ex. D.

- PX4626 (December 2, 2010 email exchange between The FTC has failed to establish how anything in this email, relating to how out-of-network patients are charged, constitutes "coordinated" activity. Moreover, and again, despite the opportunity, they never questioned either about this document at their investigational hearings. *See* The FTC waited to confront until her deposition in the administrative proceeding. *See* Ex. D at pp. 194-212 After reading her testimony it is easy to see why. She testified that No matter how hard the FTC tried to manipulate This discussion between does not constitute any sort of coordinated activity. *Id.*

- PX0388 (February 28, 2011 email exchange between The FTC flatly misrepresents the information exchanged in these emails. The exchange does not, as the FTC represents, show That language appears nowhere in the email. The email which began the exchange between as shown on the exhibit, was from And, revealingly, as established by the portion of Mr. Seybold's deposition testimony cited by the FTC, when the FTC's counsel asked him about this document, FTC counsel refused to show it to him, despite objections by counsel for RHS. PX04021at 50-51.

Presumably, the FTC has given its best shot, albeit a distorted one. All of the credible evidence confirms the Rockford hospitals have not previously engaged in coordinated activity or exchanged competitively-sensitive information, and have no intent to do so in the future. FF ¶¶ 890-910.

3. The Affiliation Will Result in Substantial Efficiencies and Increased Quality of Services for Rockford Area Residents

The record demonstrates that the affiliation will result in substantial efficiencies that can only be achieved through the affiliation. The FTC's claim that "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" (Pl. Suppl. Mem. 14) is untrue. For example, the district court in *Butterworth* found that the FTC had established a *prima facie* case, but nonetheless denied the government a preliminary injunction because the defendant hospitals rebutted that presumption with evidence of significant efficiencies that would be passed on to consumers. *See Butterworth*, 946 F. Supp. at 1294, 1301.

The affiliation here will result in substantial efficiencies that are cognizable and merger-specific. *See* FF Section IX.B.2. The FTC does not even address, much less challenge, Dr. Manning's expert report and testimony that a majority of the efficiencies and cost-savings identified in the FTI business case are merger specific and cognizable under the Merger Guidelines. FF ¶ 1081. Dr. Manning testified that while her work is ongoing, at least $15.2 to $15.6 million of the annual clinical operations savings identified by FTI are cognizable and merger-specific under the Merger Guidelines. FF ¶ 1081-1082. Dr. Manning explained that these savings result from consolidation of certain service lines, including Level I trauma, women's and children's services, oncology, and cardiac/open heart surgery. FF ¶ 1083. Five years of savings at this level would generate savings in excess of $75 million for the combined OSF Northern Region. FF ¶ 1085.

Dr. Manning also identified one-time capital cost avoidance savings that will result from the affiliation. She explained that avoided capital spending is important in assessing efficiencies from an economic perspective, because redeploying capital that would otherwise be tied up in

redundant expenditures to other projects increases consumer welfare. FF ¶ 1117. Dr. Manning confirmed that $114.1 million of FTI's one-time capital avoidance savings is cognizable and merger-specific under the Merger Guidelines. FF ¶ 1118.

Dr. Manning further testified that the consolidation will help RMH and SAMC achieve quality improvements in patient care. For example, volume-related increases will lead to increased quality in several clinical areas. FF ¶¶ 1140-1165. The two hospitals also will be better able to implement best practices as a result of the consolidation. FF ¶¶ 1140, 1166-1169.

The FTC's argument that it is "possible" (Pl. Suppl. Mem. 14-15) that RMH or SAMC could achieve certain benefits and would continue to improve quality without the merger is beside the point. While anything is "possible," the evidence shows that the merger will result in substantial benefits that the parties could not achieve on their own. FF ¶¶ 1073-1130, 1169. Mr. Kaatz explained that the affiliation is the "best way" for the two hospitals to succeed in the future and provide quality, cost-effective care to the Rockford community. FF ¶¶ 1170.

Moreover, contrary to the FTC's misstatement (Pl. Supp. Mem. 16), the FTI efficiencies study was conducted for a dual purpose – and provided a "business case" for the affiliation. FF ¶¶ 971-973. The FTI study was performed to assist the parties in making a business decision about whether to pursue the affiliation. FF ¶ 973. It showed that the merger was in the best interest of all concerned. The evidence confirms that the merger should be allowed to proceed.

C. <u>The FTC Has Failed to Meet its Burden with Respect to the Primary Care Physician Services Market</u>

The FTC concedes that the market concentration levels in the primary care services market do not exceed the thresholds to establish a *prima facie* case, or raise any presumption, that the affiliation is anticompetitive. (*See* Pl. Suppl. Mem. 1 (arguing only a presumption for the GAC relevant market)). The FTC's post-hearing brief is devoid of any argument or evidence

of any harm to competition that will arise with respect to the primary care physician market. There is none. The record demonstrates that there are no barriers to entry in the primary care physician service market (FF ¶¶ 940-942), that SAH has a clear market advantage with respect to primary care physicians (FF ¶¶ 151, 162, 947), that MCOs, [redacted], have considerable market leverage with respect to the rates they pay for primary care physician services (FF ¶ 943), and that the affiliation will not change any referral patterns (FF ¶¶ 944-948). The FTC has failed to meet its burden with respect to the primary care physician market.

II. The Equities Strongly Weigh in Favor of Denying the Injunction

The evidence shows that the affiliation will generate substantial benefits to the local Rockford community. First, the affiliation and its resulting clinical consolidations, combined best practices, and centers of excellence will result in quality improvements to patient care that will directly benefit Rockford citizens. FF ¶¶ 1140, 1156, 1166. Second, the affiliation will better enable OSF Northern Region to recruit qualified physicians to the Rockford area because physicians are attracted to larger, more stable health systems. FF ¶¶ 1174-1175, 1183. Third, the affiliation will allow OSF Northern Region to develop a graduate medical residency program in Rockford (FF ¶¶ 1191-1192, 1197), which will enhance OSF Northern Region's ability to attract skilled physicians to Rockford. FF ¶¶ 1188-1189. Finally, the affiliation will reduce patient outmigration and allow citizens to receive quality healthcare closer to home. For example, as a result of improving physician recruitment, OSF Northern Region can become a regional referral center capable of supporting subspecialty programs in Rockford. FF ¶ 1199.

The affiliation also enables the parties to better embrace and implement the requirements of healthcare reform than either could do alone. FF ¶ 1202. Indeed, the philosophy underlying healthcare reform encourages hospital consolidation, and the affiliation is the best way for SAMC and RHS to achieve the legislation's goals. FF ¶ 1211. The FTC's mischaracterization

of healthcare reform as a "novel defense" (Pl. Suppl. Mem. 18) is ironic. Healthcare reform is not a defense. It is an undeniable part of the changing competitive dynamic in which the Rockford hospitals operate. The FTC is alone in rejecting the national mandate to find a rational way to control healthcare costs. The FTC has become part of the problem, not the solution, because it is ignoring the evidence that should compel the Court to permit this merger.

An injunction would be particularly harmful to the public in economically struggling areas like Rockford (Pl. Suppl. Mem. 3), where it would deprive citizens of the substantial public benefits the affiliation will generate. FF ¶ 1223 (without the merger, SAMC may close service lines), FF ¶ 1224 (absent the affiliation, [redacted] [redacted]), FF ¶ 1226 (absent the affiliation, tens of millions of dollars are being spent on unnecessary duplication of services), FF ¶ 1228 (the longer the merger is delayed, the longer it will take to realize the savings from clinical consolidations). Both the public and private equities heavily weigh in favor of denying the FTC's motion for preliminary injunction.[8]

CONCLUSION

The FTC has no evidence to support its claim that the affiliation will cause prices paid by commercial MCOs to increase to supracompetitive levels. OSF and RHS have demonstrated that the affiliation will result in substantial efficiencies and cost savings that will benefit the Rockford community. Accordingly, the Court should deny the FTC's motion for preliminary injunction.

[8] Indeed, if this Court denies the injunction, Defendants have the right to seek dismissal or withdrawal of the administrative complaint from the FTC Commissioners, which, if granted, would end any challenge. *See* FTC Rule of Practice for Adjudicative Proceedings § 3.26(c).

Dated: April 19, 2012

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' Reply to Plaintiff's Supplemental Post-Hearing Memorandum, and accompanying exhibits, were 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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Dated: April 19, 2012 /s/ Nicole L. Castle

EXHIBIT A

REDACTED

EXHIBIT B

REDACTED

EXHIBIT C

REDACTED

EXHIBIT D

REDACTED