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.	)	**PUBLIC**

SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

It is no secret that Rockford employers and residents have been hit hard by the recent economic downturn and ever-increasing healthcare costs. Under these circumstances, protecting healthcare competition – not reducing it – should be paramount. Indeed, vibrant competition leads to lower prices, more choice, higher quality products and services, and greater innovation. But by combining two of the three hospitals in Rockford, Defendants propose a merger to duopoly that will indisputably eliminate vigorous healthcare competition. They admit that they compete head-to-head to attract patients and gain access to health plan networks, spurring them to offer lower prices and new and higher quality services. Health plans agree, recognizing that the merger will end much-needed competition and leave them with little choice but to accept the merged entity's demands for higher rates.

Evidence of extraordinary market concentration and likely anticompetitive effects gathered thus far more than satisfies Plaintiff's burden here. Defendants do not dispute that post-merger market concentration would far exceed the levels needed to establish a presumption of anticompetitive harm. So, they find themselves in the unenviable position of asking this Court to make history. But unfortunately for Defendants, no court has ever:

- Denied relief in a 13(b) proceeding when faced with a merger to duopoly in a market with entry barriers, such as the case here;
- Denied relief in a 13(b) proceeding where, as here, the FTC has met its likelihood-of-success burden by raising "serious, substantial" questions;
- Found a purported efficiencies defense to be sufficient to overcome a presumption of anticompetitive harm; or
- Accepted any of Defendants' novel defenses, such as the "bad economy" defense, the "healthcare reform" defense, the "hospitals should not be required to compete" defense, or the "merger does not eliminate *all* competition" defense.

Even if Defendants were not asking this Court to enter uncharted territory, their defenses would fall far short of rescuing this merger to duopoly. Their claimed efficiencies are not only too speculative to be cognizable, but also admittedly achievable by means other than this anticompetitive Acquisition. Nor can they avail themselves of either the "failing" or "flailing" firm defense, as both OSF and RHS are financially sound organizations with bright futures.

Moreover, Defendants' purported justifications for the Acquisition are nothing new. In fact, they have changed little since 1989, when this Court rejected the very same defenses and imposed a permanent injunction – which remains in effect today – to block a nearly identical merger to duopoly. Although a different pair of the same three hospitals now proposes to merge, the critical market players and market facts have not changed. Likewise, just last year, in *FTC v. ProMedica Health System*, both a federal district court and an administrative law judge (who also will preside over the impending merits trial in this case) rejected many of the same arguments Defendants make here.

The Court's task here is a limited but important one. FTC Act § 13(b) 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."[1] The narrow question for this Court under Section 13(b) is whether the FTC "'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

[1] 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) ("The greater the plaintiff's likelihood of success on the merits . . . the less harm from denial of a preliminary injunction the plaintiff need show in relation to the harm that the defendant will suffer if the preliminary injunction is granted.").

and ultimately by the Court of Appeals.'"[2] And "[t]he only purpose of a proceeding under § 13 is to preserve the *status quo* until [the] FTC can perform its function."[3]

A preliminary injunction from this Court is needed to ensure that meaningful relief will still be available, if warranted, after the fast-moving merits trial is completed in a matter of months. If the Acquisition is permitted to proceed, it will irreversibly "scramble the eggs," allowing the merged entity to begin combining operations and laying off employees. Consummation of the Acquisition during the ongoing administrative proceeding also would lead to serious and irreparable competitive harm, allowing the merged firm to use its enhanced leverage to demand higher rates from health plans, and to share competitively sensitive information that cannot be unshared. There would be no harm to Defendants from a minimal delay, as their own executives have acknowledged that the Acquisition's ostensible benefits will remain intact well beyond the date the merits trial will conclude. Accordingly, Plaintiff respectfully requests that the Court grant its Motion for a Preliminary Injunction.

ARGUMENT

I. PLAINTIFF LIKELY WILL SUCCEED ON THE MERITS

Transactions that result in "undue" concentration in a relevant market – like the one now before the Court – are presumed unlawful.[4] Once the FTC has made such a showing, the burden shifts to Defendants to rebut the presumption of illegality arising from the *prima facie* case and

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[2] *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 789 (N.D. Ill. 1978) (citation omitted); *see also FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008); *FTC v. ProMedica Health Sys.*, No. 3:11-CV-47, 2011 U.S. Dist. LEXIS 33434, at *143 (N.D. Ohio Mar. 29, 2011).

[3] *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).

[4] *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).

market concentration levels.[5] Defendants essentially concede that the extraordinarily high concentration in the undisputed relevant markets establishes Plaintiff's strong *prima facie* case.[6] But even if there were any meaningful disagreement, Section 7 "requires a prediction, and doubts are to be resolved against the transaction."[7]

A. The Relevant Markets Are Conclusively Established

The first relevant market is general acute care inpatient hospital services sold to commercial health plans ("GAC Services"). The Seventh Circuit, this Court, and other courts have consistently held in cases analyzing hospital acquisitions that GAC Services is a relevant market.[8] As explained by this Court, this relevant market excludes outpatient services.[9] Defendants do not dispute that this is an appropriate relevant market in this case.[10]

Nor do Defendants dispute that primary care physician services sold to commercial health plans ("PCP Services") is an appropriate relevant market.[11] PCP Services include services provided by physicians specializing in family practice, general practice, and internal medicine, but exclude services offered by pediatricians and OB/GYNs, who provide specialized services to specific patient populations.[12] The distinct market structures and competitive conditions in PCP Services, and legal precedent, dictate that it be a separate relevant market from GAC Services.[13]

Likewise, there is no material dispute concerning the appropriate geographic market.

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[5] *FTC v. Univ. Health Inc.*, 938 F.2d 1206, 1218-19 (11th Cir. 1991).
[6] PX1603-013; *see also* PX4046-013, 21.
[7] *Elders Grain*, 868 F.2d at 906 (citations omitted).
[8] *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990); *Univ. Health*, 938 F.2d at 1210-11; *In re Evanston Nw. Healthcare*, No. 9315, 2007 WL 2286195, at *46-47 (FTC Aug. 6, 2007).
[9] *Rockford Mem'l*, 717 F. Supp. at 1261; *see also Rockford Mem'l*, 898 F.2d at 1284.
[10] PX1603-013; PX2263-012, 22.
[11] PX1603-013; PX2263-012, 22.
[12] *See HTI Health Servs., Inc. v. Quorum Health Group, Inc.*, 960 F. Supp. 1104, 1115-17 (S.D. Miss. 1997); *see also* PX0251 ¶ 21; PX0256 ¶ 18; PX0207-097; PX1603-013.
[13] *See, e.g.*, *Rockford Mem'l*, 898 F.2d at 1284; *Rockford Mem'l*, 717 F. Supp. at 1261; *Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1109 (N.D. Ohio 2004).

Here, the geographic market is no broader than the one previously identified by this Court: Winnebago, most of Ogle, most of Boone, and small parts of McHenry, DeKalb, and Stephenson Counties (the "WOB Area").[14] Under the case law and *Merger Guidelines*, the relevant question for geographic market definition is whether a hypothetical monopolist controlling *all* hospitals in that market could profitably implement a small but significant non-transitory increase in price ("SSNIP").[15] Here, there can be no doubt that a monopolist controlling Rockford Memorial Hospital ("RMH"), OSF St. Anthony Medical Center ("SAMC"), and SwedishAmerican Hospital could profitably raise prices by a SSNIP.[16] WOB Area residents do not regard hospitals and physicians outside this area as meaningful alternatives for GAC Services or PCP Services and generally would not travel outside the area if a hypothetical monopolist imposed a SSNIP.[17]

B. The Acquisition Is Presumptively Illegal

The Acquisition presumptively violates Clayton Act § 7 because it would lead to undue concentration in the two relevant product markets – GAC Services and PCP Services – under any plausible geographic market. The FTC 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."[18]

Where, as here, an acquisition increases the Herfindahl-Hirschman Index ("HHI") by

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[14] *Rockford Mem'l*, 898 F.2d at 1285; *Rockford Mem'l*, 717 F. Supp. at 1273; PX1603-013; PX2263-012.
[15] PX0205 § 4.2; *see also United States v. H&R Block, Inc.*, 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.
[16] PX1603-013; *see also* PX4025-026; PX4020-006. As noted in Plaintiff's opening brief, the significant hospitals in the WOB Area are SAMC, RMH, and SwedishAmerican Hospital. Rochelle Community Hospital is also in the WOB Area but has only 0.9% of the WOB Area patient admissions. PX2501-090.
[17] *Rockford Mem'l*, 898 F.2d at 1285; PX0216-011; PX0222-028, 29; PX0213-034; PX0259 ¶ 5.
[18] *Univ. Health*, 938 F.2d at 1218 (brackets and quotations omitted).

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.[19] In *Philadelphia National Bank*, the Supreme Court found that a post-merger combined market share of 30% with many remaining competitors violated the Clayton Act.[20] Here, the Acquisition creates a duopoly in GAC Services, far surpassing the HHI levels other courts have found sufficient to warrant injunctive relief:[21]

Case	Combined Share	Pre-Joinder HHI	HHI Increase	Post-Joinder HHI	Holding
Phila. Nat'l Bank (Supreme Court 1963)	30%	N/A	N/A	N/A	Enjoined
Univ. Health Inc. (11th Cir. 1991)	43%	2570	630	3200	Enjoined
Cardinal Health, Inc. (D.D.C. 1998)	37% 40%	1648	1431	3079	Enjoined
Rockford Mem'l (GAC) (N.D. Ill. 1989)	68%	2789	2322	5111	Enjoined
ProMedica (GAC) (N.D. Ohio 2011)	58%	3313	1078	4391	Enjoined
Proposed Acquisition of RHS by OSF (GAC) (N.D. Ill. 2012)[22]	**59%**	**3352**	**1736**	**5088**	**TBD**

Thus, the Acquisition is presumptively illegal by a wide margin. Accordingly, the Acquisition should be enjoined unless Defendants "clearly show[]" that no anticompetitive effects are likely or that the equities weigh in their favor.[23] Simply put, Defendants cannot do so.

[19] PX0205 § 5.3; *see also In re ProMedica Health Sys.*, No. 9346, 2011 FTC LEXIS 294, at *329 (FTC Dec. 5, 2011) (initial decision).
[20] 374 U.S. at 364.
[21] Defendants do not dispute that the Acquisition would create a duopoly in GAC Services. SAMC and RMH would have a combined 37.4% market share in PCP Services. (Pl.'s TRO/PI Br. at 3.)
[22] For ease of comparison, the market shares for the Acquisition in this table are based on patient admissions in the same geographic market this Court used in *Rockford Mem'l*. *See* PX2501-090; *see also Rockford Mem'l*, 717 F. Supp. at 1277. Under any plausible measure, the Acquisition far exceeds the thresholds for a presumptively unlawful merger. *See* PX2501-087, 97, App. G.
[23] *Phila. Nat'l Bank*, 374 U.S. at 363; *Univ. Health*, 938 F.2d at 1217-19; *ProMedica*, 2011 U.S. Dist.

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

A. The Evidence Confirms That the Acquisition Will Eliminate Significant Competition and Likely Lead to Higher Prices

At this preliminary stage, Plaintiff could rest on the strength of the presumption alone.[24] But a substantial body of evidence, including ordinary course documents from market participants and the merging parties themselves, only strengthens that presumption and confirms that the Acquisition will: (i) eliminate significant competition between OSF and RHS; (ii) increase the risk of anticompetitive coordination; (iii) likely lead to substantially higher rates charged to health plans and local employers; and (iv) harm WOB Area employers and residents.

i. The Acquisition Will Eliminate Significant Competition and Enhance the Risk of Coordination

Defendants compete with each other and with SwedishAmerican throughout the WOB Area for patients and access to managed care contracts, leading to better pricing, service offerings, quality, and patient outcomes.[25] Currently, 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.[26] OSF, RHS, and SwedishAmerican each 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.[27] The Acquisition would eliminate that competitive constraint, forcing health plans to accept OSF's

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LEXIS 33434, at *152; *Elders Grain*, 868 F.2d at 902.

[24] *See, e.g.*, *Elders Grain*, 868 F.2d at 906; *accord Whole Foods*, 548 F.3d at 1035.

[25] *See, e.g.*, PX0289 ¶¶ 13-14, 16, 26, 33; PX0213-034, 43; PX0218-014 to 018; PX4025-026 to 29; PX4020-005; PX4021-051; PX4008-017; PX4023-037; PX0482-002.

[26] PX0289 ¶ 21; PX0256 ¶ 11; PX0255 ¶ 8; PX0254 ¶ 21; PX0253 ¶ 15; PX0251 ¶¶ 16-17; PX4004-014; PX0482-002; PX0485-001; PX0556-002; PX0623-001.

[27] PX0289 ¶ 19; PX0222-044; PX0211-097 to 98; PX4008-035; PX0482-002; PX0556-002.

rate demands in order to offer a two-hospital network.[28] Of course, even if a health plan believed – contrary to the evidence and history of the market – that it could offer a competitively viable one-hospital network in Rockford, the Acquisition still causes competitive harm by reducing the number of bidders on such a network from three to two.

The Acquisition also increases the remaining competitors' ability and incentive to coordinate their actions to the detriment of local employers and patients.[29] In 1989, this Court concluded that a proposed merger of two of the three hospitals in Rockford would increase the likelihood of collusion.[30] Since then, little has changed, as the same three Rockford hospitals have demonstrated an ongoing propensity for coordination. For example, just in the past several years, Defendants have unabashedly coordinated with each other and SwedishAmerican on health plan negotiations and strategic outlook:

- In 2005, RHS – believing it was bidding against rival SwedishAmerican for Blue Cross's business – contacted the Managed Care Director at SwedishAmerican and confirmed that SwedishAmerican is "not in a bid process with Blue Cross;"[31]
- In 2007, SAMC hired a consultant to interview and gather non-public information on its primary competitors 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;"[32] and
- In 2008, RHS and OSF jointly told a local health plan that if the health plan wanted to contract with either RHS or OSF, it must contract with both of them and agree *not* to contract with SwedishAmerican.[33]

The Acquisition will only enhance this type of coordinated activity.

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[28] *See* PX4023-011. A one-hospital network would be 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.
[29] *Elders Grain*, 868 F.2d at 905-06; *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 60-61 (D.D.C. 2009).
[30] *Rockford Mem'l*, 717 F. Supp. at 1286-87.
[31] PX0556-003.
[32] PX4020-030 to 32; *see also* PX0350-001 to 02; PX0388-001; PX4626-002 to 03; PX0704-001.
[33] PX1265-001; PX4000-019.

ii. The Acquisition Will Likely Lead to Higher Prices

In addition to the heightened risk of coordination between the two remaining hospital competitors in Rockford, the high market concentration levels and small number of competitors strongly suggest that OSF/RHS can and will raise prices after the Acquisition. A health plan's ability to negotiate favorable hospital rates for customers depends, in large part, on the number of alternative hospitals in a local area.[34] By reducing the number of providers in the WOB Area and eliminating a close competitor, the Acquisition will increase the combined entity's leverage and enable it to demand higher rates.[35]

The Acquisition will leave health plans with a Hobson's choice. They must either accept OSF/RHS's demands or attempt to market a SwedishAmerican-only network that has repeatedly proven not to be competitively viable.[36] Indeed, even OSF's managed care negotiator acknowledged that "*to be marketable you have to have two hospitals in Rockford*."[37] 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."[38] Following the merger, no two-hospital network will be available in Rockford that does not include OSF/RHS, making it a virtual "must have" and further enhancing Defendants' already significant negotiating leverage.[39]

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[34] PX0289 ¶ 19; PX0251 ¶ 13; PX0252 ¶ 16; PX0253 ¶ 14; PX0254 ¶ 18; PX0256 ¶ 9; PX4002-034, 39; PX4008-047; PX4004-024.
[35] PX4004-021 to 22, 40; PX4002-042 to 43; PX0251 ¶ 19.
[36] PX0256 ¶ 14; PX0251 ¶ 19; PX0289 ¶ 21; PX4002-030; PX4008-055, 57; PX4000-044; PX4025-057.
[37] PX0213-026 (emphasis added); *see also* PX0322-001; PX4763-002; PX4002-029.
[38] PX4764-001.
[39] PX0289 ¶¶ 39-40; PX0287 ¶¶ 5-7, 9; 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.

The combined OSF/RHS will take full advantage of its enhanced market power.[40] Despite being non-profits, both OSF and RHS seek – and get – the highest rates possible in health plan negotiations.[41] For example, OSF – with more than REDACTED in reserves – has leveraged its market position in Peoria as the self-described "very dominant player" to exclude its primary rival from key health plans.[42] That exercise of market power is by no means limited to Peoria, as SAMC similarly seeks to "leverag[e] its negotiating position by linking SAMC, OSF Medical Group physicians and other OSF Healthcare facilities" to give SAMC a "stronger negotiating position" with health plans.[43] The Acquisition would allow OSF to "reclaim some leverage;" as SAMC's CEO said, "if we get a little more leverage, that would be a good thing."[44]

iii. Area Employers and Residents Will Be Harmed by This Acquisition

Local employers and residents will immediately and directly bear the brunt of any price increases resulting from the Acquisition.[45] Most WOB Area employees get their health plan coverage from self-insured employers, who directly pay the cost of their employees' health care and immediately feel the impact of higher rates.[46] Fully insured employers likewise receive the full force of rate increases, as health plans pass along higher prices to them through higher premiums.[47] Notwithstanding SAMC's CEO's startling claim that "price is becoming irrelevant" in health care, those prices directly impact local businesses' bottom lines as well as their

[40] PX0458-001; *see also* PX4021-013; PX4002-036, 49.
[41] PX4021-007; PX4002-036; *see also* PX4726; PX0345-001; PX0289 ¶ 22; PX0254 ¶ 24; PX0251 ¶ 26; PX0252 ¶ 17; *see also Rockford Mem'l*, 898 F.2d at 1285.
[42] PX0222-025; PX0318-001.
[43] PX4596-006; PX4595-006 (same).
[44] PX0222-017, 23; *see also* PX4021-011.
[45] PX0289 ¶ 40.
[46] PX4001-011; PX0276 ¶ 9; PX0217-007; PX0252 ¶ 26; PX0254 ¶¶ 30, 36; PX0256 ¶ 15; PX0255-006 to 07 ¶ 15; PX0251 ¶ 20; PX0253 ¶¶ 3, 18.
[47] PX4004-031 to 32, 41; PX4006-011 to 12.

employees' deductibles, co-pays, and other out-of-pocket costs.[48] Indeed, any increase in rates will likely reduce access to care as some employers will be forced to reduce healthcare coverage, or pass along those increases to their employees through higher deductibles.[49]

B. Defendants' Purported Efficiencies Are Not Cognizable or Merger-Specific

Defendants' claimed efficiencies – primarily from avoiding capital investments, consolidating clinical services, improving quality, and centralizing administrative services – simply do not hold water.[50] 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 compete, and why each would be merger-specific."[51] Here, the high market concentration levels "require extraordinary 'proof of efficiencies'" to "ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."[52] No court has held that efficiencies were sufficient to save an otherwise unlawful transaction.[53]

First, Defendants' made-for-litigation efficiency claims are near carbon copies of the efficiencies claimed by the parties – and rejected by this Court – twenty years ago.[54] Second, the

[48] 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.
[49] *See, 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.
[50] *See generally* PX0001; *see also* PX2263 ¶¶ 68-70; PX2262 ¶¶ 13-14; PX2501 ¶¶ 9, 260-61; PX2502 ¶¶ 16, 36, 47, 53, 56-63, 70, 72, 80-81, 91, 99-100.
[51] *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at *142; *see also Univ. Health*, 938 F.2d at 1223; *FTC v. Staples Inc.*, 970 F. Supp. 1066, 1089-90 (D.D.C. 1997); PX0205 § 10.
[52] *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at *142.
[53] *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).
[54] *Rockford Mem'l*, 717 F. Supp. at 1289-91.

Acquisition's supposed benefits and cost savings are not merger-specific.[55] For example, RHS and its key witnesses admit that RHS could achieve some of the same cost savings without this anticompetitive Acquisition – *e.g.*, through "[a]nother affiliation" or independently through "[d]ramatic cost reductions."[56]

Third, their claimed cost savings and merger benefits, such as improved quality, are at best speculative. For example, 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.[57] Indeed,

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[8] While Defendants may claim that they cannot make final decisions or more specific integration plans, prior mergers in a wide range of industries, including healthcare, demonstrate that they have fallen well short of even basic levels of pre-merger integration planning.[59] Of course, even if the merger were to close today, Defendants would not be in a position to take advantage of any purported benefits or efficiencies for months, or longer.[60] Indeed, Defendants' hypothetical clinical consolidations will not occur for two to three years, assuming they ever do.[61] "Delayed benefits . . . are less proximate and more difficult

[55] PX2502 ¶¶ 19, 62, 69, 78, 84-87, 97-98, 101; PX2505. ¶¶ 24-26, 33-36, 39-40.
[56] PX4021-042; *see also id.* at 39, 46, 48; PX4025-054; PX2265-010; PX0211-053; PX2000-006; PX2001-006; *see also* PX2505 ¶¶ 12-13, 23-24, 39; PX4048-012.
[57] PX4023-026; PX4021-035 to 37; PX4025-041, 43, 44, 48 to 52; PX4020-035; PX4024-017; PX2507 ¶¶ 4, 9-12.
[58] PX4766-001; *see also* PX4765-001.
[59] *See, e.g., CCC Holdings*, 605 F. Supp. 2d at 73; *Whole Foods*, 502 F. Supp. 2d at 12-13, 48; *FTC v. Tenet Health Care Corp.*, 17 F. Supp. 2d 937, 948 (E.D. Mo. 1998); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213, 1224 (W.D. Mo. 1995); *see also* PX4021-030.
[60] PX4025-043, 49; *see also* PX4023-027.
[61] PX4025-043 to 44, 49.

to predict," and thus are entitled to little weight.[62]

And fourth, where, as here, efficiency claims have been "generated outside of the usual business planning process," they are "viewed with skepticism."[63] Defendants' purported efficiencies were prepared by FTI Consulting, a firm retained and supervised by outside antitrust counsel.[64] Defendants have consistently claimed attorney work product protection over the FTI efficiencies calculations, the underlying data, and even the interactions between Defendants' executives and FTI, acknowledging the work was performed solely in anticipation of potential litigation, not for business reasons.[65]

C. Neither OSF Nor RHS Is in Financial Distress, Let Alone Failing

Defendants cannot avail themselves of either the "failing" or "flailing" firm defense to justify the Acquisition. The failing firm defense applies only if one of the merging hospitals is insolvent, with no possible recovery, and has no alternative purchaser.[66] Here, executives from both OSF and RHS admit that the two systems are flourishing.[67] Instead of accepting the heavy burdens associated with an established defense, however, Defendants cite Rockford's overall economic outlook and the three Rockford hospitals' supposed long-term financial decline.[68]

But this Court has already rejected these very same arguments, holding in 1989 that such

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[62] *CCC Holdings*, 605 F. Supp. 2d at 73; *see also* PX0205 § 10 n.15.
[63] PX0205 § 10; *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *107.
[64] PX0681-001; *see also* PX0228-008; PX0227-039.
[65] *See generally* PX0228 (objecting 19 times to questions on FTI efficiencies on work product grounds); PX4021 (objecting five times to questions on FTI efficiencies on work product grounds).
[66] *Citizen Pub. Co. v. United States*, 394 U.S. 131, 136-38 (1969) (citations omitted); *see United States Steel Corp. v. FTC*, 426 F.2d 592, 608 (6th Cir. 1970). Likewise, the "flailing" firm defense is strongly disfavored as the weakest of all antitrust defenses. *See generally United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).
[67] PX4021-018, 25, 27; PX4023-015; PX0371-029; PX4603-002; PX4020-013 to 14.
[68] PX2263 ¶¶ 7, 26, 29, 80, 87.

assertions of a "failing market" or "writing on the wall" are "too broad and ungainly" to salvage a Section 7 violation.[69] In 1997, OSF and SwedishAmerican again predicted that, if their proposed merger were "blocked, it is likely that SwedishAmerican or Saint Anthony will be forced to exit the market."[70] More than a decade later, that fear has yet to materialize.

D. Entry Is Unlikely to Be Timely or Sufficient to Preserve Competition

Defendants do not claim that entry will be timely, likely, or sufficient to defeat the competitive harm here in GAC Services.[71] Indeed, there have been no efforts to build a new hospital in Rockford in decades.[72] PCP Services entry in Rockford sufficient to replicate either of Defendants' employed PCP groups is also unlikely.[73]

III. THE EQUITIES HEAVILY FAVOR A PRELIMINARY INJUNCTION

Plaintiff has demonstrated a strong likelihood of success on the merits, so Defendants must show that the equities weigh heavily in their favor.[74] When the FTC demonstrates that it likely will succeed on the merits, a "great weight" is assigned to the "potential injury to the public" from lost competition.[75] The principal public equity in 13(b) matters is the effective enforcement of the antitrust laws – *i.e.*, the "interests of consumers in being able to buy . . . services at a competitive price."[76] No court has ever denied relief in a 13(b) proceeding where

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[69] *Rockford Mem'l*, 717 F. Supp. at 1289 (quotations omitted).
[70] PX1254-004.
[71] *See e.g.* PX0222-007 to 08. In addition, Illinois's Certificate of Need statute is a well-recognized "regulatory barrier to entry." *Univ. Health*, 938 F.2d at 1219; *see also Hosp. Corp. of Am.*, 807 F.2d at 1389; *Rockford Mem'l*, 898 F.2d at 1285; PX0285 ¶¶ 9-11; PX0289 ¶ 44.
[72] PX0289 ¶ 44.
[73] *See* PX0205 § 9.3; *see also* PX0282 ¶ 6; PX0283 ¶ 5; PX0284 ¶ 6.
[74] *See Elders Grain*, 868 F.2d at 903.
[75] *Rhinechem Corp.*, 459 F. Supp. at 791.
[76] *Elders Grain*, 868 F.2d at 904.

the FTC demonstrated a likelihood of success.[77]

Here, preliminary relief will maintain the status quo and protect competition – and the local employers and patients who benefit from it – while the merits trial proceeds.[78] If allowed to close the transaction on the eve of the merits trial, Defendants will begin sharing sensitive business information, making joint strategic decisions, laying off staff, consolidating management, and using their increased clout in negotiations with health plans.[79] Even those initial steps would change the competitive dynamic in Rockford for the foreseeable future, and such "scrambling of the eggs" would greatly hinder the Commission's ability to order effective relief, if appropriate, after the merits trial.[80]

Defendants have offered no valid equities weighing against a preliminary injunction.[81] They acknowledge that their claimed efficiencies will remain intact well beyond the date the fast-moving merits trial will be completed;[82] 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;[83] and they have identified no financing contingencies that could unsettle the transaction.

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.

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[77] *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *161; *see also Whole Foods*, 548 F.3d at 1034-35.
[78] *See ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *134-36.
[79] *See* PX4764-001; *see also* PX4765-001; PX4024-018.
[80] H.R. REP. No. 94-1373 at 5 (1976); *see also Rhinechem Corp.*, 459 F. Supp. at 790-91.
[81] Even if they had, public equities "must 'receive far greater weight.'" *Elders Grain*, 868 F.2d at 908 (Ripple, J., concurring).
[82] PX4023-024, 25.
[83] *See, e.g.*, PX4021-016 to 18.

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Respectfully submitted,

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