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**

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

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INTRODUCTION

Defendants appear to live in a fantasy world. In Defendants' world, Plaintiff provided the Court with no evidence of the Acquisition's likely competitive harm in three days of live testimony; 65 pages of briefing; 630 proposed findings of fact; 23 depositions; 19 investigational hearings; 380 pages of expert reports; 39 declarations from health plans, third-party hospitals, physicians, and local employers; and more than 1,700 other exhibits. In Defendants' world, their executives and third parties did not give testimony and create documents demonstrating that the Acquisition will eliminate competition between OSF and RHS, allow OSF to raise prices unilaterally, enhance the risk of coordination, and harm local employers and patients. In Defendants' world, the Court would pretend that none of that evidence exists and instead accept Defendants' absurd claim that Plaintiff's case boils down to a one-page chart summarizing market shares. But the reality that Defendants do not want to face – and they hope this Court will ignore – is that the evidence of likely competitive harm here is overwhelming and goes far beyond the strong presumption that the Acquisition violates Section 7 of the Clayton Act.[1]

Indeed, the uncontroverted facts here provide more than ample grounds for the Court to preliminarily enjoin the Acquisition. For example, Defendants do not dispute that:

- No court has ever denied relief in a 13(b) proceeding involving an undisputed merger to duopoly in a market with significant entry barriers, such as the Acquisition;
- GAC Services and PCP Services are appropriate relevant markets;
- The WOB Area is an appropriate geographic market;
- The market concentration in GAC Services far surpasses the threshold for a presumptively anticompetitive merger, both in terms of the extraordinary post-merger

[1] 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 prior memoranda. Appendix E lists the confidentiality designations for documents cited in this Memorandum.

market concentration and the change in concentration caused by the Acquisition;

- The market concentration in PCP Services exceeds the threshold for potentially raising significant competitive concerns, and the change in concentration for that market is more than four times the *Merger Guidelines* threshold;

- Plaintiff has met its *prima facie* burden in the GAC Services market;

- Plaintiff meets its likelihood of success burden if it raises "serious, substantial" questions;

- If the Court finds that Plaintiff has met its burden with respect to GAC Services but not PCP Services, a preliminary injunction blocking the entire Acquisition is the appropriate remedy;[2]

- Every health plan testified that a one-hospital network is not competitive in Rockford;

- Following the Acquisition, health plans must agree to OSF Northern Region's terms in order to offer a two-hospital network in Rockford;

- 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;[3]

- Defendants' efficiencies defense was created under the control and supervision of outside antitrust counsel, not by business executives. Defendants have claimed attorney work product protection over FTI's efficiencies work, acknowledging that it was performed solely in anticipation of litigation, not for business purposes;

- Neither OSF nor RHS is failing or "flailing," and both project strong financial performance going forward absent the merger;

- Entry is unlikely and will not be timely or sufficient to offset the competitive harm in GAC Services;

- No court has ever accepted any of Defendants' novel "defenses," such as the "healthcare reform" defense, the "hospitals should not be required to compete" defense, or the "merger does not eliminate *all* competition" defense;

- No court has ever denied relief in a 13(b) proceeding on equitable grounds when the FTC has established a likelihood of success on the merits;

- If preliminary relief is granted, neither OSF nor RHS will be in financial jeopardy;

[2] *Accord* Defs.' Post-Hr'g Br. at 16 n.4.
[3] *FTC v. ProMedica Health Sys.*, No. 3:11-CV-47, 2011 U.S. Dist. LEXIS 33434, at *154 (N.D. Ohio Mar. 29, 2011); *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001).

- If preliminary relief is granted, there are no financing contingencies that would unsettle the Acquisition, as Defendants have vowed to pursue the Acquisition through the conclusion of the administrative merits trial;
- If preliminary relief is granted, Defendants' claimed efficiencies will still be achievable beyond the date the administrative court will issue its merits ruling; and
- If preliminary relief is denied, Defendants will begin the irreversible process of sharing sensitive business information "right away."

Defendants would have the Court ignore these undisputed facts. They downplay the unprecedented nature of what they ask the Court to do, relying on misleading citations to case law and omissions from the record. But, no matter how many times Defendants insist there is no evidence that the Acquisition will cause competitive harm, that does not make it so. As shown during the hearing, in deposition testimony, and in Defendants' own documents, the weight of the evidence inexorably leads to one conclusion: the Acquisition should be preliminarily enjoined to protect competition and preserve the possibility for effective relief – without having to unwind the merger – after the merits trial concludes later this year.

ARGUMENT

I. PLAINTIFF HAS INDISPUTABLY MET ITS *PRIMA FACIE* BURDEN

Defendants ask the Court to disregard every other litigated merger to duopoly in history. But the truth remains that no court has ever denied 13(b) relief in a merger to duopoly with significant entry barriers. Such a merger is presumptively unlawful, as there is "by a *wide margin*, a presumption that [a three-to-two] merger will lessen competition."[4]

What is more, Defendants do not dispute any element of Plaintiff's *prima facie* case. They accept that GAC Services is a relevant market, that the WOB Area is an appropriate

[4] *Heinz*, 246 F.3d at 716 (emphasis added, citations omitted); *see also United States v. H&R Block*, No. 11-00948, 2011 U.S. Dist. LEXIS 130219, at **117-18 (D.D.C. Nov. 10, 2011).

geographic market, and that the market concentration levels in GAC Services establish a strong presumption of illegality. So finding for Defendants here not only would be unprecedented, but would also require (i) that there be no additional evidence of competitive harm (which exists in abundance here); and (ii) never-before-seen evidence of overwhelming procompetitive benefits (which does not exist here) to overcome that presumption.

While Plaintiff does not merely rely on the exceedingly strong presumption, that presumption alone would be sufficient in light of the weakness of Defendants' rebuttal. Rather than taking on Plaintiff's *prima facie* case and the significant evidence of competitive harm, Defendants misleadingly cite a series of inapposite cases to imply that permitting this merger to duopoly would be nothing out of the ordinary. But what Defendants do not say about those cases is enlightening:

Case	What Defendants Say	What Defendants Do Not Say
Arch Coal	"Defendants can 'rebut the presumption by producing evidence that market-share statistics produce an inaccurate account of the merger's probable effects on competition.'"	• The HHIs in *Arch Coal* were less than half the HHI for GAC Services here, and the change in HHIs was a small fraction of the change in HHIs here. • Thus, there was only a "fairly weak" presumption of harm. • The court accepted the defendants' "flailing" firm defense.[5]
Butterworth	"[D]enied preliminary injunction where merging parties would control 47 to 65% of the general acute care hospital services market and the post-merger HHI would be 2,767 to 4,521."	The *Butterworth* court relied on: • The false assumption that a nonprofit hospital was unlikely to raise prices,[6] a notion that has been repeatedly rejected in this Circuit.[7] • A stipulation freezing prices for three years and limiting increases after that.[8]

[5] Defs.' Post-Hr'g Br. at 3; *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 125, 157-58 (D.D.C. 2004). The *Arch Coal* concentration levels would not qualify for the presumption under the current *Merger Guidelines*. See PX0205 § 5.3.

[6] Defs.' Post-Hr'g Br. at 5; *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1302 (W.D. Mich. 1996).

Case	What Defendants Say	What Defendants Do Not Say
Lab Corp	"[C]ourts have denied preliminary injunctive relief where the merger will result in efficiencies that benefit consumers."	• FTC did not establish its alleged product market, geographic market, or its *prima facie* case. • Court found that blocking the merger could "financially devastate or destroy" one of the merging parties.[9]
Freeman	"[D]enied preliminary injunction in a three-to-two merger."	• FTC did not meet its *prima facie* burden on geographic market, so it was not a "three-to-two merger."[10]
Long Island Jewish Med. Ctr.	"[D]enied preliminary injunction where merging hospitals had 100% of the market alleged by the government."	• DOJ did not meet its *prima facie* burden on product market, so the alleged market structure and market shares did not apply.[11]
Tenet	Reversed grant of preliminary injunction where the post-merger market share was 84% with HHI of 6,000 to 7,000.	• FTC did not meet its *prima facie* burden on geographic market, so the alleged market shares and HHI did not apply.[12]

None of the reasons those courts found in the defendants' favor apply here. Plaintiff's *prima facie* case – and the strong presumption of competitive harm – are not even in dispute, so citing cases where courts rejected the government's *prima facie* allegations does nothing to inform the Court. Moreover, as set forth below, Defendants' proposed stipulation provides local employers and patients with no meaningful protection against that competitive harm. And Defendants have not even suggested, let alone shown, that either firm is failing or "flailing."

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[7] *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1390-91 (7th Cir. 1986); *United States v. Rockford Mem'l Corp.,* 898 F.2d 1278, 1285 (7th Cir. 1990); *see also* PI Hr'g Tr. 428:9-429:6 (Capps); 254:21-255:10 (Petersen).

[8] *Butterworth,* 946 F. Supp. at 1298. Here, of course, Defendants' proposed stipulation has no such price component. PI Hr'g Tr. 629:13-19 (Schertz); 747:1-17 (Kaatz).

[9] Defs.' Post-Hr'g Br. at 4; *FTC v. Lab. Corp. of Am.*, No. 10-1873, 2011 WL 3100372, at **6-7, 12, 17, 21 (C.D. Cal. Mar. 11, 2011).

[10] Defs.' Post-Hr'g Br. at 5; *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995); *FTC v. Freeman Hosp.,* 911 F. Supp. 1213, 1221-22 (W.D. Mo. 1995).

[11] Defs.' Post-Hr'g Br. at 5; *United States v. Long Island Jewish Med. Ctr.,* 983 F. Supp. 121, 140 (E.D.N.Y. 1997).

[12] Defs.' Post-Hr'g Br. at 5; *FTC v. Tenet Health Care Corp.,* 186 F.3d 1045, 1053-54 (8th Cir. 1999).

Accordingly, Defendants' cited cases should be disregarded.[13]

II. DEFENDANTS FALL FAR SHORT OF REBUTTING THE STRONG PRESUMPTION OF ILLEGALITY, LET ALONE OVERCOMING THE SUBSTANTIAL ADDITIONAL EVIDENCE OF COMPETITIVE HARM

A. Defendants Bear a Heavy Burden to Overcome the Strong Presumption That the Acquisition Violates Clayton Act § 7

An acquisition that causes undue market share and significantly increases market concentration "is *so inherently likely to lessen competition substantially* that it must be enjoined in the absence of evidence *clearly* showing that [it] is not likely to have such anticompetitive effects."[14] Indeed, the "more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully."[15] Here, Plaintiff has established an indisputably compelling *prima facie* case, shifting a heavy burden to Defendants.

If, and only if, Defendants come forward with evidence sufficient to rebut the presumption, "the burden of producing additional evidence of anticompetitive effect shifts to the government."[16] Here, in response to Plaintiff's *prima facie* case, Defendants offer only one recognized defense – purported efficiencies from the Acquisition. The extremely high market concentration levels here "require 'proof of extraordinary efficiencies,'" to "ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."[17] Defendants do not come close to establishing that defense, let alone proving the extraordinary

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[13] Defendants also misleadingly suggest that the FTC has never sought a preliminary injunction where the post-merger HHIs are less than 1930. Of course, as set forth in Appendix D, this overlooks numerous cases brought by the federal government – *e.g.*, *Philadelphia National Bank* – that predated the use of HHIs, and cases like *Cardinal Health*, where the *post*-merger market shares were no higher than 40 percent. *See* App. D.
[14] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963) (emphasis added, citation omitted).
[15] *Heinz*, 246 F.3d at 725 (quotation omitted); *see also FTC v. Elders Grain*, 868 F.2d 901, 903 (7th Cir. 1989).
[16] *H&R Block,* 2011 U.S. Dist. LEXIS 130219, at *22 (quotation omitted).
[17] *Id.* at **142-43; *see also FTC v. Univ. Health, Inc.,* 938 F.2d 1206, 1223-24 (11th Cir. 1991); *FTC v. Staples*, *Inc.,* 970 F. Supp. 1066, 1089-90 (D.D.C. 1997); PX0205 § 10.

efficiencies needed to overcome the strong presumption of anticompetitive harm in this case.

B. Defendants' Purported Efficiencies are Deeply Flawed and Unreliable

As previously noted, Defendants' ostensible efficiencies are virtual clones of the efficiencies rejected by this Court twenty years ago.[18] But, as set forth below, even notwithstanding that fact, the claimed efficiencies do not satisfy Defendants' heavy burden.

i. Defendants' purported efficiencies can be achieved without this anticompetitive Acquisition.

There can be no dispute that Defendants could achieve key components of their efficiencies claims without this anticompetitive Acquisition. Indeed, as this Court previously found in *Rockford Memorial*, "the standardization of clinical practices does not require a merger."[19] Consistent with that conclusion, RHS has achieved substantial cost savings, quality improvements, reduced patient out-migration, and better physician recruitment on its own.[20] And without the merger, Defendants would continue to improve quality, implement best practices, and lower costs independently.[21]

Beyond those undisputed facts, Defendants pick and choose the facts that they like, and ignore the rest. Most notably, they turn a blind eye to their own efficiencies consultant's analyses of cost savings that each Defendant could achieve on its own – without the Acquisition – which were presented in "Performance Reports" separately to each Defendant.[22] Defendants fail to mention the Performance Reports anywhere in their briefs. Dr. Manning never mentioned

[18] *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1289-91 (N.D. Ill. 1989).
[19] *Id.* at 1291.
[20] 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.
[21] PI Hr'g Tr. 767:2-19, 770:8-10, 771:3-10 (Kaatz); 630:1-631:13 (Schertz). Moreover, even assuming that this Acquisition might be the "best way" to achieve cost savings, that is not the standard. *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 72 (D.D.C. 2009); PX0205 § 4.
[22] PI Hr'g Tr. 915:24-918:2 (Manning); PX0228-008.

the Performance Reports in either of her declarations or bothered to evaluate whether the cost savings identified in those Reports could impact the efficiencies purportedly achievable through the merger.[23] Yet, in creating the Performance Reports, FTI relied on the exact same data it collected for its merger efficiencies analysis.[24] Indeed, RHS's CFO testified that the RHS Performance Report "went slightly deeper" than the FTI Merger Report and identified savings for RHS that are "reasonable and achievable" without the merger.[25] Perhaps most tellingly, the FTI Performance Reports estimated more than **REDACTED** that the parties could achieve independently, *without* the Acquisition.[26] Notably, Dr. Manning has purportedly verified only about $15 million in annual savings *with* the Acquisition.[27]

ii. Defendants' claimed efficiencies are speculative, overstated, unverified, and unreliable.

Defendants have made no meaningful decisions on the centerpiece of their efficiencies defense – *i.e.*, which, if any, clinical service lines will be consolidated following the Acquisition.[28] Thus, all that exists today are the un-adopted recommendations of an outside consulting firm retained and supervised by antitrust counsel.[29] If that is enough to overcome the strong presumption of harm and substantial evidence condemning this Acquisition, nearly every merging party could mount such a defense and render Clayton Act § 7 virtually unenforceable.[30]

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[23] PI Hr'g Tr. 923:5-19 (Manning).
[24] PX2000-005; PX2001-005; PX4021-038 to 39.
[25] PX4021-048.
[26] PX2000-006; PX2001-006; *see also* PX2502 ¶ 86.
[27] Defs.' Post-Hr'g Br. at 8.
[28] *See* Pl.'s Post-Hr'g Br. at 15-16.
[29] PI Hr'g Tr. 762:14-17 (Kaatz); *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *107 (Efficiencies claims "generated outside of the usual business planning process" are "viewed with skepticism."); *see also* PX0205 § 10; PX0681-001; PX0228-008; PX0227-039.
[30] *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at **148-49.

Defendants also significantly overstate the Acquisition's purported efficiencies.[31] For example, according to Dan Baker (OSF's CFO), Henry Seybold (RHS's CFO) "only accepted half of the FTI projected savings" from the merger, and Mr. Baker "probably reinforced his feelings on that."[32] Not surprisingly, Defendants' own expert, Dr. Manning, has "confirmed" only about one-third of Defendants' ongoing efficiencies claims.[33] But, as Mr. Dagen explained in his report and as testimony at the hearing revealed, even Defendants' purportedly confirmed efficiencies are at best unreliable:

- The capital cost avoidance claims are speculative because there is no evidence that Defendants would have made the claimed purchases absent the merger;[34]
- Clinical and operating effectiveness efficiencies are non-merger-specific because they involve cost savings that, as Defendants' executives admit, there is "no magic whatsoever" to achieving independently;[35] and
- The clinical consolidations remain highly uncertain, as Defendants' executives admitted during the hearing.[36]

And, as Dr. Romano explained at the hearing, Defendants' quality arguments are speculative and unsupported.[37] Dr. Romano's testimony remains unrebutted by Defendants to this day.

C. Defendants Pay No Heed to the Facts in Their Other Arguments

Defendants advance several other arguments that fail to account for the record before the Court. First, Defendants would have the Court rely on SAHS as the white knight to protect Rockford's employers and patients from supra-competitive rates. In essence, Defendants argue

[31] PI Hr'g Tr. 756:20-761:11 (Kaatz); 411:9-15, 413:24-415:5 (Capps); PX4021-051; PX0313.
[32] PX0313-001. The Court need not decide here whether Defendants' business people sincerely hope that efficiencies will occur. *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at **148-49.
[33] Defs.' Post-Hr'g Br. at 8-9; *see also* PI Hr'g Tr. 915:10-14 (Manning) (Dr. Manning has already concluded that some purported savings identified by FTI are not cognizable under antitrust laws).
[34] PX2502 ¶¶ 12, 58.
[35] PI Hr'g Tr. 770:8-10 (Kaatz); PX2502 ¶ 82.
[36] PI Hr'g Tr. 416:18-419:22 (Capps); 769:10-12 (Kaatz); PX2502 ¶ 58.
[37] PI Hr'g Tr. 95:7-17, 113:21-117:25, 131:15-133:3 (Romano).

that the Acquisition would not eliminate *all* competition in Rockford, so it must be permissible.[38] In so doing, they ignore both the law and the facts. No court has ever held that a merger must eliminate *all* competition to be enjoined. Indeed, merging parties need not even be each other's closest substitutes for a merger to have anticompetitive unilateral effects (let alone raise "serious, substantial" questions that warrant preliminary relief).[39] This is particularly noteworthy here, given that the very same analysis on which Defendants rely to show that SAHS is their closest competitor *also* shows that the merger would eliminate significant head-to-head competition between SAMC and RHS.[40] Defendants would have the Court ignore not only that evidence, but also the fact that OSF Northern Region will undeniably have greater negotiating leverage after the merger, regardless of SAHS's success.[41]

Second, in a similar vein, Defendants argue that single-hospital networks can overcome the competitive harm from the Acquisition. But again, the facts tell a different story. Defendants' contention flies in the face of repeated testimony from health plans and Defendants' own documents establishing that single-hospital networks are not competitively viable in Rockford.[42] Indeed, both Defendants' managed care negotiators acknowledged as much.[43] And, as Coventry of Illinois's CEO testified during the hearing, Coventry "would not be a viable

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[38] Defs.' Post-Hr'g Br. at 11. Defendants also make the baseless claim that there are "two-hospital markets throughout the country where competition flourishes" but provide zero factual support for that assertion. Defs.' Post-Hr'g Br. at 10. As noted in Plaintiff's post-hearing brief, Defendants' suggestion that the geographic market here should be compared with other MSAs likewise ignores the facts. *Compare* Defs.' Post-Hr'g Br. at 6 n.3, *with* PI Hr'g Tr. 439:12-441:20 (Capps).
[39] *See, e.g.*, *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at **125-26 (citations omitted).
[40] PX2506 ¶¶ 45-51.
[41] PI Hr'g Tr. 367:19-368:20 (Capps); PX2501 ¶¶ 182, 199, Fig. 23.
[42] 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.
[43] PX4764-001; PX0213-026.

product offering in the marketplace with just SwedishAmerican."[44] This evidence is entirely consistent with Rockford's history of single-hospital network failures.[45]

Notwithstanding all of that evidence, Defendants tout three single-hospital networks in Rockford as the solution to the Acquisition's competitive harm. Unfortunately, even those three examples highlight the unattractiveness of single-hospital networks. For instance, OSF's Direct Access Network has a grand total of one enrolled employer in Rockford, despite being available here since at least 2008.[46] Defendants have yet to identify one other employer willing to testify that a single-hospital network would be acceptable to its employees.

Similarly, Defendants offer no evidence that United's "Core" product has been successful in Rockford, **REDACTED** [47] Instead, they misleadingly claim that "United's Core product has exceeded expectations in membership volume, and is considered a success;" what they fail to mention is that the witness to whom they ascribe that characterization was actually testifying about the Chicagoland area, not Rockford.[48] Defendants' reliance on BCBS's HMO product is also misplaced. Despite its lower price point, that product's enrollment has been in steady decline.[49] In contrast, BCBS's PPO product – which offers a two-hospital network – **REDACTED** [50]

Defendants also point to three hypothetical post-merger health plan networks to suggest

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[44] PI Hr'g Tr. 248:20-249:6 (Petersen); *see also* PX4764-001; PI Hr'g Tr. 376:22-377:8 (Capps); PX0213-026; PX0322-001; PX4763-002; PX4002-029.

[45] PI Hr'g Tr. 239:17-240:17, 250:8-251:17 (Petersen) (describing SAHS-only network as "worse case scenario" for Coventry); *see also* PX4004-037; PX0251 ¶ 15; PX0254 ¶ 5.

[46] That lone employer, Rockford Acromatic, accounts for only about 220 covered lives, which constitutes less than one tenth of one percent of the commercially insured patients in the Rockford area. *Compare* PX4006-005, *with* PX2501-037 (Fig. 14).

[47] *Compare* PX4001-013, *with* Defs.' Post-Hr'g Br. at 12.

[48] Defs.' Post-Hr'g Br. at 12; PX4001-013.

[49] PI Hr'g Tr. 373:16-25 (Capps); PX2501 ¶ 58 n.76; PX4046-042.

[50] PX4005-037; PX0252 ¶ 5.

that a plethora of options will be available to health plans and local employers: (i) a single-hospital network with SAHS; (ii) a two-hospital network with the merged entity; or (iii) a network that includes all three Rockford hospitals.[51] Of course, each of those networks is currently available today, along with a host of others. And the critical fact remains: after the Acquisition, the number of available networks and bidders for those networks will be reduced, eliminating health plans' ability to credibly threaten to walk away from negotiations with OSF Northern Region, and likely leading to higher rates for each potential network.[52]

But perhaps most importantly, even assuming counterfactually that a successful single-hospital network in Rockford were possible, that would not mean the Acquisition will lack anticompetitive effects.[53] On the contrary, that assumption merely makes the Acquisition a more conventional merger to duopoly. Employers and patients face harm regardless of whether they pay OSF Northern Region's higher rates or are forced to switch to an incontrovertibly less attractive option – *i.e.*, a single-hospital network. Either way, employers and patients lose, and Defendants still ask the Court to make history.

Third, Defendants claim that they will not be able to negotiate "unmerited" price increases from purportedly large, sophisticated health plans. This bald assertion, of course, overlooks the simple fact that OSF Northern Region's negotiating leverage will indisputably increase vis-à-vis health plans, regardless of their size, and lead to higher rates.[54] Moreover, OSF Northern Region's leverage is enhanced even further by the fact that *any* health plan that hopes to compete in Rockford – *i.e.*, by offering a two-hospital network – would have to contract

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[51] Defs.' Post-Hr'g Br. at 14.
[52] *See* PI Hr'g Tr. 625:2-5 (Schertz); PX0465-003; PX0321-002; PX0252 ¶ 20; PX0255 ¶ 8; PX0251 ¶ 18; PX0256 ¶ 22.
[53] PI Hr'g. Tr. 370:24-372:5 (Capps); *see also* PX2506 ¶¶ 45-51.
[54] PX2506 ¶ 63; PI Hr'g Tr. 625:2-5 (Schertz).

with it following the Acquisition.[55] That dynamic makes OSF Northern Region a virtual "must have," with a resulting ability to obtain even higher rates than would otherwise be possible.[56]

Fourth, Defendants' suggestion that Dr. Capps should have conducted a merger simulation at this preliminary stage is at best disingenuous. Of course, Defendants cite no case suggesting that a merger simulation is required and fail to mention that no expert has ever conducted such a simulation in a 13(b) proceeding for a hospital merger.[57] Nevertheless, as set forth in Dr. Capps' expert reports, deposition testimony, and live testimony at the hearing, there is substantial evidence of a price effect (as well as non-price harm) in this case. Indeed, notwithstanding Defendants' attempt to mischaracterize Dr. Capps's testimony, that evidence unambiguously demonstrates that the "lower bound" – *i.e.*, the smallest – likely price effect from the Acquisition is five percent, so at a bare minimum, prices will increase by a SSNIP.[58]

And fifth, Defendants seemingly suggest that as non-profits they will act more benignly than for-profit institutions. As noted above, this argument has been soundly rejected by the Seventh Circuit.[59] And with good reason – it is perfectly rational and legal for non-profit hospitals to seek the highest rates possible.[60] And OSF will continue to do so with or without the Acquisition, as ample evidence has demonstrated.[61]

D. Defendants' Self-Serving Denials of Coordinated Activity Do Not Square with the Evidence and Should Be Disregarded

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[55] PI Hearing Tr. 40:18-41:21(Lobe); 247:7-23 (Petersen); 369:25-370:23 (Capps); 624:1-12 (Schertz).
[56] PI Hearing Tr. 40:18-41:21(Lobe); 247:7-23 (Petersen); 369:25-370:23 (Capps); 624:1-12 (Schertz).
[57] Indeed, just last year, RHS's defense counsel was lead counsel in *ProMedica*, so Defendants are well aware that the *ProMedica* district court granted a preliminary injunction without such a simulation.
[58] Defs.' Post-Hr'g Br. at 14-15; *see also* PX4044-013; PX2501 ¶¶ 192-203.
[59] *Rockford Mem'l Corp.,* 898 F.2d at 1285 *see also Univ. Health*, 938 F.2d at 1224; *Hosp. Corp. of Am.* 807 F.2d at 1390-91.
[60] Pl.'s Post-Hr'g Br. at 12 n.59.
[61] *See, e.g.*, PI Hr'g Tr. 631:10-13 (Schertz).

Defendants mischaracterize the significant history and continued coordinated activity in this market, as shown by the Rockford hospitals' repeated efforts to share sensitive information and coordinate their activities.[62] Moreover, as explained in *CCC Holdings*, a finding of outright collusion is not necessary to establish coordinated effects, particularly at this preliminary stage, because "[w]ith only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom."[63]

E. Defendants Overlook Testimony and Basic Facts Showing That the Stipulation Fails to Address the Acquisition's Likely Competitive Harm

Defendants' claim that their proposed stipulation "eviscerates" the anticompetitive effects from the Acquisition borders on preposterous. For example, the stipulation says nothing about: (i) limiting Defendants' ability to raise rates in any way; (ii) giving health plans the option of negotiating separately with RMH or SAMC; (iii) preventing Defendants from imposing vastly higher rates on health plans that include SAHS in their networks or that refuse to contract with the entire OSF system; or (iv) stopping Defendants from imposing other onerous terms, which they claim are all part of their negotiations with health plans.[64] That silence speaks volumes.[65]

III. DEFENDANTS STILL FAIL TO IDENTIFY A SINGLE EQUITABLE BASIS FOR DENYING PRELIMINARY RELIEF

Defendants again fail to articulate any legitimate equitable basis for denying preliminary relief. As an initial matter, Defendants' reliance on a district court case from the Ninth Circuit

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[62] *See e.g.,* PX0630-004; PX3151-001; PX0349-001 to 02; PX0350-001 to 02; PX4000-019; PX4021-050 to 51; PX0556-003; PX4020-030 to 32; PX1265-001; PX0704-001; PX4626-002 to 03; PX0388-001.
[63] *CCC Holdings,* 605 F. Supp. 2d at 67; *see also* PI Hr'g Tr. 394:18-396:10 (Capps).
[64] PI Hr'g Tr. 747:1-17 (Kaatz); 629:13-24 (Schertz).
[65] Of course, even if Defendants' stipulation contained all of these provisions – which it does not – it still would not fully replicate competition.

for the appropriate equities standard ignores the law in this Circuit. The law here requires a sliding-scale approach to weighing the equities: the stronger Plaintiff's likelihood of success, the greater Defendants' burden of showing the equities outweigh the likely harm to competition.[66]

Defendants offer no explanation of why any of their purported equities would be jeopardized by preliminary relief while the merits trial proceeds. They cite healthcare reform and Rockford's economic challenges but fail to make clear how those challenges should weigh in favor of a merger that will reduce competition and lead to higher prices. If anything, the evidence shows that healthcare reform and the Rockford economy provide little, if any, support for Defendants' claims. Indeed, their own financial projections clearly show those factors will not impede their ability to flourish for years to come – without this anticompetitive Acquisition.

CONCLUSION

Plaintiff respectfully seeks this Court's assistance for a very limited purpose. Defendants have been contemplating the Acquisition for over two years, and they are committed to litigating the merits trial and any appeals. Plaintiff asks the Court only to delay consummation for eight more months so that the administrative court can issue its opinion on the merits. A mere deferral will not jeopardize the Acquisition at all or have any effect on the alleged efficiencies. Denying preliminary relief, however, makes effective relief, if warranted, much more difficult. Defendants admittedly plan to begin sharing competitively sensitive information immediately upon closing – not to mention making joint strategic decisions, laying off staff, consolidating management, and using their increased clout in negotiations with health plans – making it all but impossible to "unscramble the eggs" later or make local employers and patients whole again.

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[66] *Elders Grain,* 868 F.2d at 903.

Dated: February 21, 2012

Respectfully submitted,

/s/ Matthew J. Reilly

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Appendix D[67]

Notable Litigated Mergers with Lower Market Shares and HHIs

Case	Post-Merger Market Share	Pre-Joinder HHI	HHI Increase	Post-Joinder HHI	Holding
Phila. Nat'l Bank (Supreme Court 1963)[68]	30%	N/A	N/A	N/A	Enjoined
Von's Grocery Co. (Supreme Court 1966)[69]	8%	N/A	N/A	N/A	Divestiture Ordered
Univ. Health Inc. (11th Cir. 1991)[70]	43%	2570	630	3200	Enjoined
Cardinal Health, Inc. (D.D.C. 1998)[71]	37% 40%	1648	1431	3079	Enjoined
ProMedica (N.D. Ohio 2011)[72]	58%	3313	1078	4391	Enjoined
Proposed Acquisition of RHS by OSF (N.D. Ill. 2012)[73]	**59%**	**3352**	**1736**	**5088**	**TBD**

[67] To avoid any confusion with Appendices A, B, and C from Plaintiff's post-hearing brief, the Appendices to this Memorandum begin with Appendix D.
[68] *Phila. Nat'l Bank,* 374 U.S. at 364-65.
[69] *United States v. Von's Grocery Co.,* 384 U.S. 270, 272, 279 (1966).
[70] *Univ. Health,* 938 F.2d at 1211, 1219.
[71] *FTC v. Cardinal Health, Inc.,* 53-54 12 F. Supp. 2d 34, 53 (D.D.C. 1998).
[72] *ProMedica,* 2011 U.S. Dist. LEXIS 33434, at *32.
[73] 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.

Appendix E

Documents Cited in Plaintiff's Post-Hearing Reply Memorandum[74]

Exhibit No.	Begin Bates No.	Date	Description	Confidentiality Designation
PX0205	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
PX0211	N/A	8/23/2011	Daniel Baker (OSF) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)
PX0213	N/A	9/19/2011	Mary Breeden (OSF) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)
PX0216	N/A	9/1/2011	Gary Kaatz (RHS) Investigational Hearing Transcript	Confidential - (designated portions)
PX0227	N/A	8/22/2011	David Stenerson (OSF) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)

[74] 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.

Exhibit No.	Begin Bates No.	Date	Description	Confidentiality Designation
PX0228	N/A	10/20/2011	Clair Tosino (FTI) Investigational Hearing Transcript	Confidential - Attorneys' Eyes Only (designated portions)
PX0251	N/A	9/26/2011	Declaration of Suzanne Hall (Aetna)	Confidential - Attorneys' Eyes Only
PX0252	N/A	8/9/2011	Declaration of Joseph Arango (BCBS-IL)	Confidential - Attorneys' Eyes Only
PX0254	N/A	7/6/2011	Declaration of William Pocklington (ECOH)	Confidential - Attorneys' Eyes Only
PX0256	N/A	7/8/2011	Declaration of Todd Petersen (Personal Care/Coventry)	Confidential-Attorneys' Eyes Only, Confidential with Redactions Required
PX0289	N/A	1/13/2012	Declaration of William Gorski (SwedishAmerican)	Confidential - Attorneys' Eyes Only
PX0313	OSF00031135	11/19/2010	Email to Schertz, Sehring, and Schoeplein from Baker re: Anybody hear anything yet?	Confidential
PX0321	OSF00135337	Undated	OSF Healthcare System Strategic Areas of Focus Feedback: Managed Care	Confidential - Attorneys' Eyes Only
PX0322	OSF00140883	5/31/2011	Email to Mary Breeden from David Stenerson: re: FW: State FY 2012 Benefits Choice	Confidential - Attorneys' Eyes Only
PX0349	OSF01589566	11/5/2007	OSF Summary of Discussions with Rockford Health System	Confidential

Exhibit No.	Begin Bates No.	Date	Description	Confidentiality Designation
PX0350	OSF01589581	11/5/2007	OSF Summary of Discussions with Swedish American Health System	Confidential
PX0388	OSF00027752	2/28/2011	Email to Sehring, Baker and Kaatz from Seybold: re: Draft Proposal for Updated	Confidential
PX0465	OSF00119558	10/28/2010	OSF Presentation: Payer Contracting Leadership Discussion	Confidential - Attorneys' Eyes Only
PX0556	RHS002_0224570	11/14/2005	Rockford Health System Finance and Audit Advisory Committee Meeting Agenda	Confidential - Attorneys' Eyes Only
PX0630	RHS017_0066809	10/26/2005	Finance & Audit Advisory Committee Minutes	Confidential - Attorneys' Eyes Only
PX0681	N/A	5/11/2011	Letter from Hine to Ambrogi RE: FTI's Responses and Objections to FTC's CID	Confidential
PX0704	RHS006_0036065	7/17/2008	Email from Seybold to Dillon: re: Followup	Confidential
PX1265	FTC-ROPE-004153	9/26/2008	Letter to Brand from Lutes re: Contracting with Hospitals in Rockford area	Confidential
PX2000	FTI00743	Feb. 2011	FTI Presentation: Rockford Health System Performance Opportunities	Confidential
PX2001	FTI00422	Feb. 2011	FTI Presentation: OSF SAMC Performance Opportunities	Confidential
PX2262	N/A	11/23/2011	Declaration of Susan Manning (Compass Lexicon)	Confidential
PX2265	N/A	1/3/2011	RHS Response to FTC's Request for Admissions	Confidential - Attorneys' Eyes Only

Exhibit No.	Begin Bates No.	Date	Description	Confidentiality Designation
PX2501	N/A	11/23/2011	Affidavit of Cory Capps, Appendix A	Confidential - Attorneys' Eyes Only
PX2502	N/A	11/23/2011	Affidavit of Gabriel Dagen	Confidential – Attorneys' Eyes Only
PX2505	N/A	1/11/2012	Affidavit of Nancy McAnallen	Confidential - Attorneys' Eyes Only
PX2506	N/A	1/11/2012	Reply Affidavit of Cory Capps	Confidential - Attorneys' Eyes Only
PX3151	OSF00101071	11/3/2005	Email to Harbaugh from Breeden re: BCBS "Hot" Issue in Rockford - FYI	Confidential - Attorneys' Eyes Only
PX4000	N/A	1/6/2012	Deposition Transcript of Richard Walsh (SwedishAmerican)	Confidential – Attorneys' Eyes Only (designated portions)
PX4001	N/A	1/10/2012	Deposition Transcript of Michelle Lobe (United)	Confidential - Attorneys' Eyes Only (designated portions)
PX4002	N/A	1/13/2012	Deposition Transcript of Robert Hitchcock (Humana)	Confidential - Attorneys' Eyes Only (designated portions)
PX4005	N/A	1/20/2012	Deposition Transcript of Joseph Arango (BCBS)	Confidential - Attorneys' Eyes Only (designated portions)

Exhibit No.	Begin Bates No.	Date	Description	Confidentiality Designation
PX4006	N/A	1/11/2012	Deposition Transcript of Dean Olson (Rockford Acromatic Products)	Not Confidential
PX4008	N/A	1/11/2012	Deposition Transcript of Thomas Golias (Cigna)	Confidential - Attorneys' Eyes Only (designated portions)
PX4020	N/A	1/10/2012	Deposition Transcript of David Schertz (OSF)	Confidential - (designated portions)
PX4021	N/A	1/10/2012	Deposition Transcript of Henry Seybold (RHS)	Confidential - (designated portions)
PX4025	N/A	1/12/2012	Deposition Transcript of Gary Kaatz (RHS)	Confidential - Attorneys' Eyes Only (designated portions)
PX4044	N/A	1/18/2012	Deposition Transcript of Cory Capps	Confidential - Attorneys' Eyes Only (designated portions)
PX4048	N/A	1/22/2012	Deposition Transcript of Nancy McAnallen, Vol. 2	Confidential - Attorneys' Eyes Only (designated portions)
PX4626	RHS031_0008641	12/2/2010	Email from Davit to Dillon: re: RE: Out of Network	Confidential
PX4763	RHS031_0009060	9/23/2009	Email to Dillon from Hill re: Information on United Healthcare Proposal	Confidential
PX4764	RHS031_0007283	1/4/2010	Email to Dillon from Seybold re: HFN Platinum Network	Confidential

CERTIFICATE OF SERVICE

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

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