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

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

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

Plaintiffs Exhibits are cited as "PX."

Defendants Exhibits are cited as "DX."

Deposition Testimony is cited as "(DX0000, (XX, Dep. at xx))."

Confidential – Attorneys' Eyes Only Deposition Testimony is cited as "(DX0000, (XX, Dep. at xx, *confidential –attorneys' eyes only*))."

Confidential Deposition Testimony is cited as "(DX0000, (XX, Dep. at xx, *confidential*))."

Investigational Hearing Testimony is cited as "(DX0000, (XX, IHT at xx))."

Confidential – Attorneys' Eyes Only Investigational Hearing Testimony is cited as "(DX0000, (XX, IHT at xx, *confidential –attorneys' eyes only*))."

Confidential Investigational Hearing Testimony is cited as "(DX0000 ,(XX, IHT at xx, *confidential*))."

Preliminary Injunction Hearing Testimony is cited as "(XX, Tr. xx)."

Plaintiff's Complaint is cited as "Compl. at xx."

Plaintiff's Memorandum in Support of Its Motion for Temporary Restraining Order and Preliminary Injunction is cited as "Pl. Mem. at xx."

Defendants' Proposed Findings of Fact and Conclusions of Law are cited as "FF ¶ xx."

For the Court's convenience, references to material that has been designated as either Confidential or Confidential – Attorneys' Eyes Only under the Protective Order have been placed in **{bold}**.

As the Court requested at the Preliminary Injunction Hearing, attached as Exhibit A to Defendants' Proposed Findings of Fact and Conclusions of Law is a copy of Defendants' Exhibit List. The Exhibit List has been updated to reflect the Exhibits that are referenced in Defendants' Post-Hearing Brief and/or Defendants' Proposed Findings of Fact and Conclusions of Law as well as the Exhibits used during the Preliminary Injunction Hearing.

In addition, the Defendants cite to the following documents contained in Plaintiff's Exhibit List: PX0012; PX0251; PX0254; PX0255; PX0256; PX0287; PX0301; PX0464; PX0819; PX0827; PX0831; PX0840; PX0848; PX1265; PX2051; PX2268; PX2501; PX2504.

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FINDINGS OF FACT

I. BACKGROUND

A. Executive Summary

1. OSF Healthcare System ("OSF") owns and operates seven general acute care hospitals, one of which is located in Rockford, Illinois, Saint Anthony Medical Center ("SAMC"). (*See infra* Section I.F.1).

2. Rockford Health System ("RHS") owns and operates one general acute care hospital in Rockford, Illinois, Rockford Memorial Hospital ("RMH"). (*See infra* Section I.F.2).

3. A third hospital in Rockford, Illinois is SwedishAmerican Hospital ("SwedishAmerican"), the largest and fastest growing general acute care hospital in the Rockford area. (*See infra* Section I.F.3).

4. OSF and RHS entered into an affiliation agreement on January 31, 2011, providing that OSF would become the sole member of RHS, RHS would join the OSF system, and the combined entity of OSF Rockford area facilities and RHS would be known as OSF Northern Region. The OSF Northern Region would become a locally governed organization, under the leadership of Gary Kaatz, the current CEO of RHS. (*See infra* Section V).

5. On November 18, 2011, the FTC issued an administrative complaint alleging that the affiliation of OSF and RHS would violate Clayton Act Section 7, 15 U.S.C. § 7, and authorized the FTC staff to seek a preliminary injunction in federal district court to enjoin consummation of the affiliation pending the completion of the administrative proceedings. On November 18, 2011, the FTC filed a complaint in this Court requesting a preliminary injunction to prevent the consummation of the affiliation of OSF and RHS. (*See infra* Section IV).

6. Following discovery, the court conducted a three-day evidentiary hearing relating to the FTC's complaint and the FTC's request for a preliminary injunction. (*See infra* Section IV).

7. The FTC failed to prove that the affiliation of OSF and RHS is likely to cause anticompetitive effects. The record evidence shows that OSF Northern Region will not be able to raise its rates to supracompetitive levels. (*See infra* Section VIII).

8. SwedishAmerican is a strong competitor and will act as a competitive constraint against OSF Northern Region following the transaction. In addition, SwedishAmerican is both RHS and SAMC's closest competitor. (*See infra* Section VIII.D.1).

9. Commercial health insurance plans, or managed care organizations ("MCOs"), are large, powerful companies that are well positioned to defeat any attempt by OSF Northern Region to raise prices above competitive levels. Further, MCOs already market narrow,

single-hospital networks in the Rockford area and can continue to do so following the affiliation. (*See infra* Section VIII.D.2).

10. RHS and SAMC will stipulate that after the consummation of the Affiliation Agreement, the OSF Northern Region: (1) will not demand the exclusion of SwedishAmerican as a condition to contracting with OSF Northern Region; and (2) neither OSF nor OSF Northern Region will require an MCO to contract with OSF or any other OSF hospital as a condition to contracting with OSF Northern Region. (*See infra* Section VIII.D.3).

11. RHS' and SAMC's proposed stipulation, which provides that OSF Northern Region will not require the exclusion of SwedishAmerican from a MCO's provider network as a condition for a contract with OSF Northern Region, alleviates any concerns about OSF Northern Region requiring exclusivity when contracting with MCOs in the future. (*See infra* Section VIII.D.3).

12. The FTC's economist did not calculate a price effect from the affiliation and, therefore, his testimony about the potential for future rate increases by OSF Northern Region provides no basis to conclude that the affiliation will result in supracompetitive prices. (*See infra* Section VII.G).

13. The FTC has no factual basis for their claim that the affiliation will increase the likelihood of coordinated effects between OSF Northern Region and SwedishAmerican. (*See infra* Section VII.E).

14. The FTC failed to show that the affiliation will result in anticompetitive effects with respect to the alleged primary care physician market because there are no barriers to entry in that market and MCOs have even more bargaining leverage with respect to primary care physicians than they do with respect to general acute care inpatient services. (*See infra* Section IX).

15. Substantial, merger-specific efficiencies will result from the affiliation. For example, the affiliation will allow for consolidation of certain services that will result in more cost-effective and efficient operations, and higher quality outcomes. In addition, the affiliation will allow OSF Northern Region to achieve greater operating efficiencies and cost savings, generating approximately $114 million in capital cost avoidance savings, and at least $15 million in annual, recurring cost-savings that could not be achieved by either SAMC or RHS alone. (*See infra* Section IX).

16. The affiliation of OSF and RHS will benefit consumers of healthcare services in the Rockford area and is in the public interest. (*See infra* Section X).

B. Medical/Hospital Services

17. General acute care hospitals compete on the range of services they offer, the quality of those services, and the level of service they provide to patients. (DX0184, (Seybold, IHT at 232); DX0698, (Kaatz, IHT at 45-56); DX0005 at 009, *confidential*, 035, *confidential*).

18. Inpatient services are those hospital services that require an overnight stay at a hospital. (DX0183, (Dillon, IHT at 206-07); DX0197, (Breeden, IHT at 117)).

19. There is a continuum of different levels of intensity of inpatient hospital services. This continuum is typically described with reference to various levels or types of services. (DX0698, (Kaatz, IHT at 53-56)).

20. Primary services relate to medical conditions that occur regularly in the community and are of mild to moderate severity, including internal medicine, pediatrics, trauma and family practice. (DX0183, (Dillon, IHT at 191); DX0185, (Schreiber, IHT at 104); DX0698, (Kaatz, IHT at 53)).

21. Secondary services are more complex than primary services, require some specialization and greater resources, and tend to involve a two organ complication. (DX0698, (Kaatz, IHT at 53)).

22. Tertiary services are more complex and specialized than secondary services, and are often more invasive and require different technology and resources. (DX0698, (Kaatz, IHT at 53-54)).

23. Quaternary services are the most complex and are highly specialized; they include procedures such as transplants and tend to require very specific technologies. (DX0698, (Kaatz, IHT at 54-56)).

24. Outpatient services include services like same-day surgery, lab services, x-ray and diagnostic services. Outpatient services may be provided at hospitals, ambulatory surgery centers, satellite facilities, or in physician offices. (DX0197, (Breeden, IHT at 23-24); DX0712, (Pocklington, Dep. at 67, *confidential – attorneys' eyes only*)).

25. Inpatient services are the least frequently used service in the healthcare spectrum. More patients are treated on an outpatient basis than an inpatient basis. (DX0197, (Breeden, IHT at 153, *confidential – attorneys' eyes only*); Petersen, Tr. 228).

26. Inpatient services are becoming even less important because an increasing number of services can be and are provided on an outpatient basis. (DX0195, (Vayr, IHT at 28); PX0254 at 003, *confidential – attorneys' eyes only*).

27. [redacted] (DX0005 at 012, *confidential*).

28. The relative (and declining) importance of inpatient services is borne out in hospital revenue data. The proportion of hospital revenue derived from outpatient services has been increasing for many years. In 2000, for example, the split of net revenue at SAMC was [redacted]. By 2010, however, the percentage of inpatient revenue had dropped to [redacted]. (DX0005 at 009, *confidential*).

29. The decision whether a patient will be treated in an inpatient or outpatient setting starts with the physician. (DX0714, (Schertz, Dep. at 38, *confidential – attorneys' eyes only*)).

30. MCOs have significant influence over whether a patient should be treated as an inpatient or outpatient. (DX0714, (Schertz, Dep. at 38, *confidential – attorneys' eyes only*)).

31. MCOs determine whether a patient meets their criteria for treatment as an inpatient and may not pay for the treatment of patients who are treated in the wrong setting. (DX0197, (Breeden, IHT at 120-21)).

C. Physician Services

32. There is generally no accepted definition of primary care physician services. Some MCOs consider family practitioners, internists and obstetricians/gynecologists to be primary care physicians. (DX0005 at 006, *confidential*; Petersen, Tr. 263).

33. Others include pediatricians as primary care physicians. (DX0371 at 001).

34. The FTC, for the purposes of this case, has excluded specialty physician services, obstetricians/gynecologists, and pediatricians from its definition of primary care physician services. (Compl. at 001)

35. Specialty care physician services include, among others, pediatric surgery, urological gynecology, neurology and perinatology. (DX0005 at 031, *confidential*).

D. Factors Patients Consider when Choosing a Hospital or Primary Care Physician

36. Patients consider a variety of factors when choosing a hospital for inpatient services, including whether their physician has [redacted]. (DX0005 at 006, *confidential*).

37. [redacted] (DX0005 at 031, *confidential*).

38. Patients will select a more distant hospital if their insurance does not cover the hospital closest to them or if the closest hospital would not provide them the best care. (DX0361 at 002).

E. The Rockford, Illinois Area

39. While it was once the second largest city in Illinois with a thriving manufacturing economy, that is no longer true. Today, Rockford is a town with slow population growth, a depressed economy, high unemployment, and substantial poverty. (DX0003 at 004, *confidential*).

1. Demographic Trends Point to an Aging and Stagnant Population

40. Demographically, the Rockford area is marked by geographic imbalances. For example, the western side of Rockford is characterized by a more elderly and indigent population; whereas the majority of growth in the region is to the north and east of town. (DX0185, (Schrieber, IHT at 21, *confidential – attorneys' eyes only*); DX0026 at 002, *confidential*; DX0050 at 011, *confidential*).

41. Rockford's population is also projected to decline or remain stagnant. (DX0096 at 001).

42. From 2000 to 2010, the population in Rockford grew less than 2% and its per capita personal income figures decreased. (DX0004 at 004, *confidential*; DX0005 at 014, *confidential*).

43. People have migrated out of the Rockford region due to the lack of jobs in the area. (DX0193, (Stenerson, IHT at pg. 235, *confidential – attorneys' eyes only*)).

44. As a result, in recent years the population has actually declined in several counties surrounding Rockford, including Ogle, Lee, Whiteside, Stephenson, Winnebago, and LaSalle Counties. (DX0096 at 001; DX0050 at 012, *confidential*).

2. Economic Conditions: Poverty, Dismal Unemployment Figures, and Factors Limiting Growth Prospects

45. The economic conditions in Rockford have worsened substantially since the late 1990s. (DX0710, (Noether, Dep. at 188, *confidential*)).

46. Over just the past ten years, the unemployment rate in Rockford has increased from 4.6% in 2000 to 13.0% in 2010, reaching a high of 19.7% in January of 2010. (DX0004 at 005, *confidential*; DX0059 at 001, *confidential*).

47. As of November 2011, unemployment was 13% in Winnebago County and 13.5% in Boone County, while the unemployment rate for the Rockford metropolitan statistical area ("MSA") was 15.1%. (DX0394, (Schertz, IHT (9/7/11) at 172); DX0003 at 004-005, *confidential*).

48. Between 2001 and 2010, Rockford lost over 13,000, or 33% of its manufacturing jobs. (DX0005 at 014, *confidential*).

49. Based on the significantly declining economy, Rockford has the unenviable distinction of having the highest unemployment rate in Illinois and one of the highest in the nation. (DX0005 at 015, *confidential*; DX0698, (Kaatz, IHT at 134); DX0191, (McGrew, IHT at 74); DX0712, (Pocklington, Dep. at 45-46, *confidential – attorneys' eyes only*); DX0394, (Schertz, IHT (9/7/11) at 93); DX0050 at 014, *confidential*; DX0056 at 003, *confidential*; DX0003 at 004-005, *confidential*); DX0717, (Walsh, Dep. at 20-21, *confidential – attorneys' eyes only*); DX0706, (Kaatz, Dep. at 202-03)).

50. As of September 2011, Rockford also had an underemployment rate of about 14.9%. (DX0394, (Schertz, IHT (9/7/11) at 172)).

51. There has also been a shift in the type of available jobs in Rockford from manufacturing jobs to service sector jobs. Service sector jobs generally pay less than manufacturing jobs and offer reduced or no healthcare benefits. (DX0003 at 004-005, *confidential*).

52. Rockford suffers from other factors that also limit growth. For example, crime rates in Winnebago County are the highest in the State of Illinois, and have been for almost 15 years. (DX0050 at 017, *confidential*).

53. Rockford's high school graduation rate is below 50%. (DX0706, (Kaatz, Dep. at 203)).

54. Rockford's per capita income is one of the lowest in the State of Illinois. (DX0706, (Kaatz, Dep. at 203); DX0005 at 015, *confidential*).

55. From 2000 to 2005, the poverty rate increased in every county in Rockford's MSA. (DX0050 at 015, *confidential*).

56. One in six Winnebago County residents received food stamps in 2009. (DX0056 at 003, *confidential*).

3. Rockford's Demographic and Economic Trends Have Negatively Impacted the Payor Mix at Rockford Hospitals

57. The economic and demographic challenges Rockford is experiencing directly impacts the payor mix for the hospitals in Rockford. After unemployed individuals' health insurance from a previous employer runs out, they often become Medicaid and charity care patients. (DX0190, (Sehring, IHT at 95, *confidential – attorneys' eyes only*)).

58. As Rockford's population declines, the number of commercially insured patients also declines. The percentage of commercially-insured residents has declined from about 72% in 2000 to about 48% in 2011, while the percentage of the population that is ensured by Medicare has grown from 10% to 17% over the same time period. (DX0005 at 015-016, *confidential*).

59. The shift of coverage by government payors from commercial payors negatively impacts hospitals, as it requires them to provide more services at the government-insured reimbursement rate, which does not cover the hospital's total costs of treating their patients. (DX0005 at 015-016, *confidential*).

60. The percentage of the Rockford MSA's population that is insured by Medicaid has increased from seven percent in 2000 to approximately 20% in 2011. (DX0005 at 015, *confidential*).

61. As of November 2011, approximately 16% of the Rockford population was uninsured, an increase of 50% from 2000. (DX0005 at 015, *confidential*).

62. As a result, across the three Rockford hospitals, the percentage of inpatient discharges that were commercially insured fell from [redacted] in 1997 to [redacted] during the first half of 2011. (DX0005 at 018, *confidential*).

63. Some medical service lines are impacted by the payor mix changes more than others. For example, Medicaid currently pays for more than half of all births in Winnebago County. (DX0004 at 005, *confidential*).

64. Changes in payor mix impact hospital performance. [redacted] (DX0190, (Sehring, IHT at 95, *confidential – attorneys' eyes only*)).

65. The cost to SAMC of providing charity care tripled between 2009 and 2011. (Schertz, Tr. 581).

66. During the same 2009-2011 period, SAMC's percentage of Medicaid activity doubled. (Schertz, Tr. 581).

67. RMH also has a very high percentage of Medicare and Medicaid patients; these patients represented approximately [redacted] percent of RMH's inpatient discharges in 2010. (DX0005 at 016, *confidential*).

68. The economic downturn, and its resulting effect on unemployment, also affected SAMC's decisions about whether to offer new services or pursue projects that would have resulted in jobs. (DX0190, (Sehring, IHT at 98)).

F. Healthcare Providers in Rockford, Illinois

1. OSF Healthcare

69. OSF is an organization of more than 13,000 individuals. (Schertz, Tr. 569).

70. OSF is an integrated system that includes not only hospitals but ancillary providers, including home health, hospice, infusion, pharmacy, durable medical equipment, a skilled nursing facility and also physicians. (DX0197, (Breeden, IHT at 16)).

71. OSF is owned and governed by the Sisters of the Third Order of Saint Francis. (Schertz, Tr. 570).

72. OSF is based in Peoria, Illinois, but the Sisters have operated a hospital in Rockford since 1899. (DX0189, (Schertz, IHT (7/12/11) at 9)).

73. The mission of OSF is to serve persons with the greatest care and love in a community that celebrates the gift of life. This mission is transmitted to its employees through a number of different venues. (Schertz, Tr.570-71).

74. OSF operates seven acute care facilities: OSF St. Francis Medical Center & Children's Hospital in Peoria, Illinois; OSF St. James in Pontiac, Illinois; OSF St. Joseph Medical Center in Bloomington, Illinois; OSF St. Mary Medical Center in Galesburg, Illinois; OSF Holy Family Medical Center in Monmouth, Illinois; OSF Saint Anthony Medical Center in Rockford, Illinois; and OSF St. Francis Hospital in Escanaba, Michigan. (DX0001 at 002-003).

75. OSF also consists of a physician organization, OSF Medical Group; two Colleges of Nursing, including one located in Rockford, Illinois; OSF Home Care Services; the Saint Clare Home long term care facility in Peoria Heights, Illinois; OSF Saint Francis, Inc; OSF Aviation, LLC; OSF Lifeline Ambulance, LLC; and OSF Healthcare Foundation. (DX0001 at 003).

76. OSF also owns several ambulatory care facilities in the Rockford area, including Rock Cut, Guilford Square, and Southridge. Rock Cut is the largest of these facilities and is located eight miles north of SAMC. (DX0190, (Sehring, IHT at 50-51)).

77. Prior to 1999, OSF operated St. Joseph's Hospital in Belvidere, Illinois. [redacted] (DX0005 at 007, *confidential*; DX0196, (Schoeplein, IHT at 96-98)).

78. OSF is one of the original 32 Pioneer Accountable Care Organizations ("ACOs") selected by the Center of Medicare & Medicaid Services ("CMS"). ACOs are groups of doctors, hospitals and other healthcare providers who collaborate together to share responsibility for healthcare costs and improved quality of care. (DX0904 at 001; Romano, Tr. 184-85).

79. OSF was one of 32 hospital systems in the country selected by the federal government based on its commitment to be a leader in reducing healthcare delivery costs while improving quality of care. RHS can join this initiative as a result of the affiliation. As a Pioneer ACO, OSF was recognized as a "nation's leader [] in health systems innovation, providing highly coordinated care for patients at lower costs." (DX0904 at 001; Romano, Tr. 184-85; Schertz, Tr. 588).

80. The Pioneer ACO initiative was born of the Affordable Care Act and will reward ACOs based on how well they are able to improve the health of Medicare patients while lowering their healthcare costs through coordinated care. (DX0904 at 001, *confidential*; DX0550 at 001; DX0551 at 001; DX0902 at 001-038, *confidential*; DX0905 at 001-002, *confidential*; Romano, Tr. 182, 84-85).

81. The Health Alliance, Caterpillar Inc., and Humana all supported OSF in its application to become a Pioneer ACO program participant. (DX0558 at 001; DX0559 at 001-002; DX0560 at 001-002).

a. OSF Saint Anthony Medical Center

82. SAMC is a full-service hospital located in Rockford, Illinois and is licensed to be a 254-bed hospital. (DX0189, (Schertz, IHT (7/12/11) at 39-40); DX0394, (Schertz, IHT (9/7/11) at 64-65, *confidential – attorneys' eyes only*).

83. SAMC currently serves an average daily census of approximately [redacted] patients, with an occupancy rate of [redacted]. (DX0005 at 007, *confidential*).

84. Approximately [redacted] of SAMC's employed physicians are primary care physicians, and approximately [redacted] are specialists. (DX0005 at 007, *confidential*).

85. SAMC's estimated market share of all discharges within its primary service area is approximately [redacted]. (DX0005 at 021, *confidential*; DX0185, (Schrieber, IHT at 19)).

86. Based on its admissions and discharges, SAMC places third among the three Rockford hospitals. (DX0193, (Stenerson, IHT at 31)).

(i) SAMC's Services

87. Twenty to twenty-five percent of SAMC's total discharges are high-end, complex tertiary services. (DX0394, (Schertz, IHT (9/7/11) at 96)).

88. SAMC offers many tertiary services including burn care, complex neurosurgery, and complex orthopedics. (Schertz, Tr. 571; DX0197, (Breeden, IHT at 118)).

89. SAMC operates a Level 1 Trauma Center as designated by the State of Illinois. However, SAMC has not achieved a Level 1 Trauma designation from the American College of Surgeons due to insufficient volume and research capabilities. (DX0192, (Benink, IHT at 94-96)).

90. SAMC has an American College of Surgeons Certified Oncology Center. SAMC must have a certain number of research programs and patients that enroll in the research programs to maintain its certification. SAMC participates in approximately 50-75 research programs during the course of a year. (DX0192, (Benink, IHT at 15-17)).

91. Most of SAMC's research programs are done in conjunction with other hospitals. Research programs are beneficial because they provide information to the community and enable patients to participate in experimental treatments. (DX0192, (Benink, IHT at 15-17)).

92. SAMC does not provide children's neonatal intensive care, pediatric intensive care, in-hospital pediatrics, or high-risk perinatology services. (DX0186, (Ruggles, IHT at 41); DX0193, (Stenerson, IHT at 33, *confidential – attorneys' eyes only*)).

93. Both SwedishAmerican and RMH provide more comprehensive women's and children's services than SAMC. (DX0193, (Stenerson, IHT at 31-32)).

(ii) **Outdated Physical Plant and Limited Private Rooms**

94. SAMC's average age of plant was [redacted]. (DX0005 at 028, *confidential*).

95. Only 33% of SAMC's beds are private; however, close to 90% of the rooms at RMH and SwedishAmerican are private. (Manning, Tr. 865).

(iii) **Physician Recruitment Difficulties**

96. In the last three to five years, [redacted] (DX0714, (Schertz, Dep. at 182, *confidential – attorneys' eyes only*)).

97. [redacted] (DX0714, (Schertz, Dep. at 183, *confidential – attorneys' eyes only*)).

(iv) **Financial Status of SAMC**

98. [redacted] (DX0191, (McGrew, IHT at 73-74, *confidential – attorneys' eyes only*); DX0196, (Schoeplein, IHT at 115-16, *confidential – attorneys' eyes only*)).

99. SAMC's combined campus operations suffered an operating loss of approximately [redacted] million in 2009, and [redacted] million in 2010, and [redacted] million in 2011. (DX0189, (Schertz, IHT (7/12/11) at 29, *confidential – attorneys' eyes only*); Schertz, Tr. 584).

100. [redacted] (DX0364 at 022, *confidential – attorneys' eyes only*).

101. In 2010, Moody's downgraded OSF's bond rating from A3 to A2. [redacted] (DX0194, (Baker, IHT at 104-06, *confidential – attorneys' eyes only*)).

102. [redacted] (DX0194, (Baker, IHT at 72, *confidential – attorneys' eyes only*)).

103. In the spring of 2011, SAMC was $2.7 million over its budgeted expenses for charity care. (Schertz, Tr. 584).

2. Rockford Health System

104. RHS is a community-based, non-profit healthcare system and the oldest healthcare organization in Rockford. (Kaatz, Tr. 711, 714).

105. RHS consists of four entities: Rockford Memorial Hospital, Rockford Health Physicians, the Visiting Nurses Association of Rockford, and Rockford Memorial Development Foundation. (DX0183, (Dillon, IHT at 32)).

106. Rockford Health Physicians is the employed physician group within RHS. Rockford Health Physicians employs approximately [redacted] offering service from several locations throughout the region. (DX0005 at 006, *confidential*).

107. The Visiting Nurses Association is RHS' ancillary home care agency that provides skilled nursing, therapy and other services for follow-up care. (DX0183, (Dillon, IHT at 32-33)).

108. The Rockford Memorial Development Foundation is RHS' philanthropic arm. (Kaatz, Tr. 712).

109. RHS also operates a [redacted]. (DX0005 at 006, *confidential*).

110. RHS' Board of Directors is comprised of between 13 and 21 members of the community, five of whom are physicians. It is a community board, governed by local community members. (Kaatz, Tr. 711-14, 725).

a. Rockford Memorial Hospital

111. RMH is the flagship facility of RHS. (DX0183, (Dillon, IHT at 32)).

112. RMH is a not-for-profit, tax-exempt, general acute care hospital that has been serving the Rockford region since 1885. (DX0183, (Dillon, IHT at 32)).

113. RMH has 396 licensed beds, of which 292 are staffed, and an average daily census of [redacted]. (DX0005 at 006, *confidential*; DX0028 at 011, *confidential*)

114. RMH is located on the west side of Rockford in an area of town characterized by a more elderly and indigent population. (DX0185, (Schrieber, IHT at 21, *confidential – attorneys' eyes only*)).

(i) RMH's Services

115. RMH's market share within its primary service area, based upon total discharges, is approximately [redacted] percent. RMH's share has been declining in recent years. (DX0185, (Schrieber, IHT at 19); DX0026 at 001, *confidential*; DX0005 at 021, *confidential*).

116. RMH has a state-designated perinatal center. A perinatal center requires a Level III neonatal intensive care unit, hourly OB/GYN coverage, and subspecialists in pediatrics. (DX0186, (Ruggles, IHT at 54); DX0191, (McGrew, IHT at 122-23)).

117. In addition to its Level III neonatal intensive care unit, RMH also has a Level I trauma center and a pediatric critical care unit. (Kaatz, Tr. 715-16).

118. RMH has a da Vinci robot which helps perform urological surgery and [redacted]. (DX0193, (Stenerson, IHT at 36, *confidential – attorneys' eyes only*)).

119. RMH has a new Women's Center located approximately six miles to the east of RMH's campus. (DX0184, (Seybold, IHT at 13)).

120. The new Women's Center provides round-the-clock anesthesiology, perinatology, neonatology and surgical specialists in the case of high risk pregnancies. (Kaatz, Tr. 735-36).

(ii) Aging Physical Plant

121. RMH is an [redacted]. Its age of plant is [redacted] years, well above the median national age of plant for non-profit hospitals of 8.65 years. (DX0005 at 013, *confidential,* 028, *confidential*).

122. [redacted] (DX0122 at 008, *confidential*).

(iii) Difficulties with Physician Recruitment and Access to Pharmaceuticals

123. [redacted] (DX0034 at 14, *confidential*; DX0035 at 003, *confidential*; DX0718, (Golias, Dep. at 50-51, *confidential – attorneys' eyes only*)).

124. In addition, [redacted]. (DX0706, (Kaatz, Dep. at 65-66, *confidential*)).

(iv) **Financial Status of RHS**

125. [redacted] (DX0698, (Kaatz, IHT at 21, *confidential*)).

126. RHS' financial performance is very uneven. While 2009 and 2010 were good financial years, RHS did not have a positive operating income in 2011. (Kaatz, Tr. 772-73).

127. [redacted] (DX0194, (Baker, IHT at 91-92, *confidential – attorneys' eyes only*); DX0047 at 002, *confidential*).

128. RHS may need to cut services in order to remain financially stable. However, the less profitable health provider services are often the services most needed by the community. (DX0186, (Ruggles, IHT at 26-27)).

129. [redacted] (DX0706, (Kaatz, Dep. at 60-63, *confidential*)).

130. RMH has a disproportionate share of Medicare and Medicaid patients. Combined, Medicare and Medicaid represented approximately [redacted] percent of RMH's inpatient discharges in 2010. (DX0005 at 016, *confidential*).

131. [redacted] (DX0184, (Seybold IHT at 26, *confidential – attorneys' eyes only*); DX0032 at 001, *confidential*).

132. Medicare, Medicaid, and Workers' Compensation comprise over [redacted] of RHS' patient volume, and the government will be reducing payment to RHS for all three categories in 2012. (DX0145 at 001, *confidential*).

133. In addition, Rockford Health Physicians has experienced [redacted]. (DX0186, (Ruggles, IHT at 110-11, *confidential – attorneys' eyes only*)).

3. SwedishAmerican Health System

134. SwedishAmerican Health System ("SwedishAmerican") is a health system comprised of SwedishAmerican Hospital, SwedishAmerican Medical Center Belvidere, SwedishAmerican Medical Group, SwedishAmerican Home Health Care and the SwedishAmerican Foundation. (DX0005 at 007 -008, *confidential*; DX0184, (Seybold, IHT at 63)).

135. In March of 2010, SwedishAmerican signed an affiliation with the University of Wisconsin at Madison ("UW-Madison"). (DX0717, (Walsh, Dep. at 137-38, *confidential – attorneys' eyes only*); DX0005 at 026, *confidential*).

136. In 2009, SwedishAmerican opened a second hospital in Belvidere, just east of Rockford. (DX0717, (Walsh, Dep. at 11-12, *confidential – attorneys' eyes only*); DX0003 at 003-004).

137. SwedishAmerican's Belvidere facility provides emergency medicine, outpatient therapy, imaging, sleep disorder, pharmacy and lab services. (DX0005 at 007, *confidential*).

138. Across both facilities, the SwedishAmerican system has [redacted]. (DX0005 at 008, *confidential*).

139. SwedishAmerican is licensed for [redacted] beds, of which approximately [redacted] are staffed. (DX0005 at 008, *confidential*).

140. [redacted] (DX0717, (Walsh, Dep. at 12-13, *confidential – attorneys' eyes only*)).

141. SwedishAmerican operates an average daily census of [redacted], translating into an average occupancy rate of approximately [redacted] percent across both SwedishAmerican Hospital and SwedishAmerican Medical Center at Belvidere. (DX0005 at 007-008, *confidential*).

142. SwedishAmerican Medical Group is SwedishAmerican's multi-specialty physician group practice, with [redacted] (DX0005 at 008, *confidential*).

143. SwedishAmerican offers a large obstetrics program, orthopedics, and mental health services. SwedishAmerican also offers a cardiac program and new heart hospital. (Schertz, Tr. 572).

144. SwedishAmerican has a Level II Trauma Unit that far exceeds the minimum level of services necessary for a Level II center, and is considering entry into perinatal/neonatal services and Level I Trauma services. (DX0028 at 006, *confidential*; Capps, Tr. 460-61; DX0193, (Stenerson, IHT at 34, *confidential – attorneys' eyes only*); DX0050 at 029, *confidential*).

145. SwedishAmerican's Level II Trauma Unit far exceeds the minimum services required for a Level II center. (PX2051 at 019; Capps, Tr. 461).

146. SwedishAmerican is a high quality hospital and has been recognized as such. (DX0005 at 022-023, *confidential*).

147. For example, SwedishAmerican has received Top 100 hospital recognition. (DX0192, (Benink, IHT at 92)).

148. SwedishAmerican was recently reaffirmed as an A-rated organization. It has a good financial rating and is financially stable. (DX0184, (Seybold, IHT at 63)).

149. SwedishAmerican has a very new facility that includes mostly private rooms. (DX0026 at 004, *confidential*).

a. **SwedishAmerican is Largest Hospital Provider in Rockford and Has Been Growing Steadily**

150. SwedishAmerican is the most centrally located hospital in Rockford. (Capps, Tr. 469).

151. SwedishAmerican also employs the largest number of primary care physicians in Rockford. (Capps, Tr. 479).

152. SwedishAmerican defines its primary service area as [redacted] (DX0717, (Walsh, Dep. at 15, *confidential – attorneys' eyes only*)).

153. Within its primary service area, [redacted] (DX0717, (Walsh, Dep. at 16-17, *confidential – attorneys' eyes only*)).

154. SwedishAmerican's market share within its primary service area, based upon total discharges, is approximately [redacted] percent. [redacted] (DX0005 at 021, *confidential*).

155. SwedishAmerican has been growing its patient base over the last several years, and has maintained its volume of managed care discharges better than either RMH and SAMC. (DX0710, (Noether, Dep. at 88-89)).

156. SwedishAmerican's increased market share can be attributed to a variety of factors, including a strong base of primary care physicians it has established throughout the region. (DX0185, (Schrieber, IHT at 20); DX0020 at 003; DX0003 at 003, *confidential*; DX0717, (Walsh, Dep. at 38-39, *confidential – attorneys' eyes only*)).

157. Another factor that has contributed to SwedishAmerican's growing market share is its implementation of specific investment strategies. For example, since 1997, SwedishAmerican has invested over [redacted] (DX0717, (Walsh, Dep. at 38-39, 128-29, *confidential – attorneys' eyes only*); DX0005 at 022, *confidential*).

158. SwedishAmerican's new heart hospital has all private rooms. (DX0189, (Schertz, IHT (7/12/11) at 41)).

159. [redacted] (DX0714, (Schertz, Dep. at 106-108, *confidential – attorneys' eyes only*)).

160. The Illinois Provider Tax is an agreement between the federal government and the State of Illinois in which the federal government provides matching dollars to the state for

treatment of Medicaid patients to help account for shortfalls in reimbursement. Hospitals in Illinois with a higher utilization of Medicaid patients receive a higher provider tax. (DX0698, (Kaatz, IHT at 185-86)).

161. SwedishAmerican receives a [redacted] (DX0003 at 004, *confidential*).

162. SwedishAmerican also operates the University of Illinois College of Medicine family practice residency program. This is the only residency program in Rockford. (DX0714, (Schertz, Dep. at 106-108, *confidential – attorneys' eyes only*); DX0192, (Benink, IHT at 17-18); DX0548 at 002, *confidential – attorneys' eyes only*).

163. The addition of the Belvidere facility has also strengthened SwedishAmerican. State regulations require that ambulances carry patients in a "medical distress condition" to the nearest emergency room. (Schertz, Tr. 573-74).

164. Because of this regulation, [redacted]. (DX0717, (Walsh, Dep. at 13, *confidential – attorneys' eyes only*); DX0003 at 004, *confidential*).

165. SAMC's inpatient admissions have declined by 300 to 500 patient admissions annually from Belvidere and Boone County since the opening of SwedishAmerican's Belvidere campus. (Schertz, Tr. 574; DX0714, (Schertz, Dep. at 115, *confidential – attorneys' eyes only*); DX0003 at 004, *confidential*).

b. **SwedishAmerican's Affiliation with UW-Madison Further Expands its Capabilities in the Rockford Market**

166. SwedishAmerican signed its affiliation agreement with UW-Madison in early 2010. (DX0193, (Stenerson, IHT at 33, *confidential – attorneys' eyes only*); DX0189, (Schertz, IHT (7/12/11) at 30); DX0717, (Walsh, Dep. at 137-38, *confidential – attorneys' eyes only*); DX0202 at 001).

167. [redacted] (DX0717, (Walsh, Dep. at 135-36, *confidential – attorneys' eyes only*)).

168. [redacted] (DX0717, (Walsh, Dep. at 151-52, *confidential – attorneys' eyes only*)).

169. As a result of the affiliation with the UW-Madison, SwedishAmerican announced in December 2011 its intention to open a new cancer facility on Bell School Road in Rockford, Illinois. (Schertz, Tr. 572-73; DX0203 at 001; DX0202 at 001, *confidential – attorneys' eyes only*).

170. Media coverage has indicated the affiliation will extend to more than just cancer services. (DX0193, (Stenerson, IHT at 33, *confidential – attorneys' eyes only*)).

171. The affiliation also [redacted]. (DX0003 at 003, *confidential*).

172. The University of Wisconsin recently opened an electronic intensive care unit in Freeport, which is located 30 miles west of Rockford. Through this center, physicians from the University of Wisconsin-Madison will monitor patients in Freeport. If a problem arises in Freeport, the University is connected through telecommunications to nurses or doctors at Freeport who can provide oversight direction on patient management. SwedishAmerican expects to offer a similar program in Rockford. (Schertz, Tr. 573).

c. **SwedishAmerican has the Newest Facility in Rockford with Private Rooms**

173. SwedishAmerican's average age of plant was [redacted] years in 2010. (DX0005 at 028-029, *confidential*).

174. Approximately 90 percent of SwedishAmerican's staffed beds are private rooms. (DX0717, (Walsh, Dep. at 77)).

d. **SwedishAmerican is Financially Strong**

175. SwedishAmerican's operating income for the twelve months ending May 31, 2011 was [redacted] (DX0364 at 022, *confidential – attorneys' eyes only*).

4. Other Providers

176. Not all Rockford area patients receive care at Rockford hospitals. Approximately 12-15% of Rockford area patients out-migrate to other healthcare providers. This percentage has increased slightly in recent years. (DX0185, (Schrieber, IHT at 22-23)).

177. Rockford patients seek more complex tertiary or quaternary services in hospitals located in Chicago or Wisconsin. (DX0193, (Stenerson, IHT at 205-06)).

178. At the same time, Chicago, Wisconsin and Quad Cities hospital systems are expanding their reach by opening satellite offices or ambulatory care centers closer to Rockford. They draw from the same patient base that used to receive care from the three Rockford hospitals. (Schertz, Tr. 575-77; DX0003 at 005, *confidential*).

179. For example, Freeport has an affiliation with Alexian Brothers in Chicago for stroke referrals. Rochelle Community Hospital is connected to Central DuPage Hospital for stroke referrals. Kishwaukee Medical Center has a relationship with Loyola in Chicago for cancer referrals. CGH in Sterling-Rock Falls now refers cardiac patients to Genesis Health in Davenport, Iowa. (Schertz, Tr. 575-76; DX0003 at 005, *confidential*).

180. This expansion by Chicago, Wisconsin and Quad Cities hospitals is particularly detrimental to the Rockford-based hospitals because the patients the Rockford hospitals are losing [redacted] (DX0003 at 005-006, *confidential*).

181. [redacted] (DX0003 at 005-006, *confidential*).

182. [redacted] (DX0003 at 006, *confidential*).

183. Ten years ago, none of the neighboring community hospitals offered cardiac catheterization lab services. Instead, those services, and any resulting services, would be referred to the Rockford hospitals. However, now, almost all neighboring community hospitals provide cardiac catheterization lab services, [redacted]. (DX0003 at 006, *confidential*; DX0717, (Walsh, Dep. at 18-19, *confidential – attorneys' eyes only*)).

184. Centegra Health System ("Centegra") operates hospitals in McHenry and Woodstock, Illinois. [redacted] (DX0363 at 001, *confidential*).

185. Beloit Memorial Hospital ("Beloit") is located only 14 miles north of Rockford. This facility is not a small community hospital – it performed 70 open heart surgeries in 2011 alone. (Schertz, Tr. 575).

186. Beloit also established a large ambulatory care center in northern Winnebago county, which is ten miles north of SAMC. It is using this center to attract patients to its hospital in Wisconsin. (Schertz, Tr. 575-76).

187. Rochelle Community Hospital and Mercy Harvard hospital are two small critical access hospitals in the surrounding Rockford area with less than 25 beds. (Capps, Tr. 465).

188. Katherine Shaw Bethea Hospital and Freeport Community Hospital are larger, non-critical access community hospitals with more than 25 beds. (Capps, Tr. 463).

G. Previous Rockford-Area Hospital Merger Attempts

1. 1987 Proposed Merger Between RHS and SwedishAmerican

189. In 1987, RHS and SwedishAmerican signed a Memorandum of Understanding to form a new corporation that would become the sole member of and control RHS and SwedishAmerican. (DX0935 at 002).

190. At the time, RHS and SwedishAmerican were the number one and two hospitals in Rockford in terms of market share. (DX0396 at 007).

2. 1997-98 Proposed Merger Between OSF Healthcare and SwedishAmerican

191. [redacted] (DX0717, (Walsh, Dep. at 92, *confidential – attorneys' eyes only*)).

192. OSF was looking for an opportunity to build a sustainable healthcare model in Rockford, by being able to recruit and retain physicians, reduce costs and duplication, and invest in clinical infrastructure. (DX0196, (Schoeplein, IHT at 74-75); DX0132 at 001).

193. At the time, SAMC and SwedishAmerican were the number two and number three hospitals in Rockford, by market share, behind RHS. (DX0196, (Schoeplein, IHT at 75); DX0717, (Walsh, Dep. at 101-02, *confidential – attorneys' eyes only*)).

194. [redacted] (DX0717, (Walsh, Dep. at 102, *confidential – attorneys' eyes only*); DX0374 at 006, *confidential – attorneys' eyes only*).

195. The OSF and SwedishAmerican transaction was approved by the State of Illinois and the federal government. (Schertz, Tr. 590; DX0189, (Schertz, IHT (7/12/11) at 31); DX0133 at 001).

196. The transaction ultimately was not consummated due to cultural issues. (DX0191, (McGrew, IHT at 114, *confidential – attorneys' eyes only*); DX0196, (Schoeplein, IHT at 103-04)).

197. [redacted] (DX0717, (Walsh, Dep. at 96, *confidential – attorneys' eyes only*)).

198. OSF and SwedishAmerican's objectives in that transaction were similar to those of OSF and RHS here – to achieve cost savings and efficiencies that neither could achieve on their own, particularly as the smaller two hospitals in a three hospital town. (DX0935 at 0038-39).

H. Health Insurers

199. Hospitals receive reimbursement for their services from various sources. Patients can be classified according to their primary means of payment: government insurance (Medicare and Medicaid), private commercial insurance, self-pay, and charity or indigent care. (DX0005 at 009, 011, 015-16, *confidential*).

1. Government Health Insurers

200. Medicare and Medicaid are the two main health insurance programs administered by the government. (DX0007 at 002, *confidential*).

201. Medicare reimbursement rates have been declining in recent years. (DX007 at 002, *confidential*).

202. Medicare reimbursement rates do not cover the cost of providing service to Medicare patients at either SAMC or RHS. (DX0007 at 002, *confidential*; Schertz, Tr. 582; DX0716, (Seybold, Dep. at 24, *confidential*)).

203. Reimbursement rates provided by Medicaid are even lower than those provided by Medicare. (DX0714, (Schertz, Dep. at 203-04, *confidential – attorneys' eyes only*)).

204. The reimbursement rates provided by the State of Illinois for Medicaid patients also do not cover the cost of providing care to those patients. (DX0007 at 002, *confidential*).

205. In fiscal year 2010, the State of Illinois only reimbursed [redacted] percent of SAMC's costs of treating Medicaid patients. (Schertz, Tr. 582; DX0003 at 008, *confidential*).

206. The State of Illinois provides a very low Medicaid reimbursement rate in comparison to other states, and has not increased its inpatient rates in over 20 years. (DX0194, (Baker, IHT at 25-26, *confidential – attorneys' eyes only*)).

207. In fact, Medicaid's reimbursement rates decreased most recently as of July 1, 2011. (DX0698, (Kaatz, IHT at 73-74, *confidential*)).

208. As of July 1, 2011, the State of Illinois also lengthened the reimbursement cycle for Medicaid patients. The state had been required to reimburse providers within 30 days for treatment of Medicaid patients, but now has lengthened the reimbursement cycle to approximately nine months. (DX0698, (Kaatz, IHT at 72-73); DX0706, (Kaatz, Dep. at 72, *confidential – attorneys' eyes only*)).

209. The State of Illinois also narrowed the scope of "outlier" cases (i.e., certain cases which require resources that exceed the average recourse utilization rates) which qualify for Medicaid coverage, and lowered the reimbursement rate for those outlier cases which do qualify. The cost burden for providing resources for these outlier cases has now been shifted to the healthcare provider. [redacted] (DX0003 at 008-09, *confidential*).

210. The Medicaid changes implemented by the State of Illinois strongly impact hospitals in Rockford, which has a high Medicaid and charity population. (DX0194, (Baker, IHT at 25-26, *confidential – attorneys' eyes only*)).

211. At RMH, Medicare and Medicaid represented approximately [redacted] percent of RMH's patients, but only [redacted] of RMH's total net revenue in 2010. (DX0004 at 005, co*nfidential*).

212. The share of charity care patients and patients covered by Medicare and Medicaid is even higher at SAMC. (Schertz, Tr. 585). Moreover, the trends are not encouraging: for example, the share of net revenue represented by Medicaid at RHS has increased by [redacted] percent since 2008, while the share represented by commercial payors has declined by [redacted] percent. (DX0007 at 003, *confidential*).

213. [redacted] (DX0003 at 008, *confidential*).

214. The State of Illinois was $8 billion in debt as of February 2012. It is ranked 50th in the nation in terms of economic performance. (Schertz, Tr. 582).

2. Managed Care Organizations

215. MCOs include companies that negotiate contracts with hospitals to provide care to the MCO's insureds or members through the MCO's provider network and offer health insurance products with employers. (DX0005 at 010, *confidential*).

216. MCOs may also act as a third party administrator ("TPA") and provide claims-handling services as part of an administrative services only contract with self-insured employers. (Lobe, Tr. 23-24).

217. MCOs may be variously referred to as "payors," "health insurance plans," or "health insurance companies." The terms are used interchangeably. (Capps, Tr. 540-43).

a. Aetna

218. Aetna is a publicly traded MCO that offers both commercial and government health insurance products nationwide. (DX0703, (Hall, Dep. at 24-26, *confidential*); DX0183, (Dillon, IHT at 170-71, *confidential – attorneys' eyes only*)).

219. Aetna's hospital and physician contracting in the Rockford, Illinois area is handled by a division within the company that covers the [redacted] markets. (DX0703, (Hall, Dep. at 6, 11-17, *confidential*)).

220. Aetna considers the Rockford area to include [redacted] counties. (DX0703, (Hall, Dep. at 11, *confidential*)).

221. Aetna has [redacted] in Rockford and [redacted] contracting team [redacted]. (DX0703, (Hall, Dep. at 19, *confidential*)).

(i) **Membership**

222. Aetna has approximately [redacted] participating in its commercial products in the Rockford area. (PX0251 at 001, *confidential – attorneys' eyes only*).

223. [redacted] (DX0703, (Hall, Dep. at 83-84, *confidential – attorneys' eyes only*)).

224. Aetna's Illinois market share has been [redacted]. (DX0370 at 001, *confidential – attorneys' eyes only*).

225. Aetna's sales team does not [redacted] on Rockford as a [redacted]. (DX0370 at 001, *confidential – attorneys' eyes only*).

(ii) **Competitors**

226. [redacted] Aetna's largest competitor in the Rockford area. (DX0703, (Hall, Dep. at 40-41, *confidential – attorneys' eyes only*)).

227. Aetna considers [redacted] (DX0703, (Hall, Dep. at 41, *confidential – attorneys' eyes only*)).

(iii) **Products**

228. In the Rockford area, [redacted] (DX0703, (Hall, Dep. At 26, 59, *confidential*)).

229. [redacted] (DX0183, (Dillon, IHT at 157, *confidential – attorneys' eyes only*)).

230. Aetna's commercial and non-commercial products can include different participating hospitals. For example, while [redacted] participate in Aetna's commercial [redacted] products, Aetna's [redacted]. (DX0703, (Hall, Dep. at 59, *confidential*, 93, *confidential*)).

231. Aetna has contracted with [redacted]. (DX0392 at 001, *confidential – attorneys' eyes only*).

232. [redacted] became a participating in-network provider for Aetna in [redacted]. (DX0193, (Stenerson, IHT at 253, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 93-94, *confidential*)).

233. Aetna contracts with [redacted] for services at [redacted]. Each hospital has a [redacted] structure. (DX0703, (Hall, Dep. at 109, *confidential – attorneys' eyes only*); DX0197, (Breeden, IHT at 31, *confidential – attorneys' eyes only*)).

234. Aetna projected [redacted] percent as a result of its [redacted]. (DX0382 at 001, *confidential – attorneys' eyes only*; DX0383 at 002, *confidential – attorneys' eyes only*).

235. The commercial health insurance products that Aetna offers to employers in the Rockford area also include [redacted] as participating providers. These hospitals include the [redacted]. (DX0703, (Hall, Dep. at 92, *confidential*)).

236. Aetna markets its commercial health insurance products to both employers and individuals. (DX0703, (Hall, Dep. at 9, *confidential*)).

237. In the Rockford area, approximately [redacted] of Aetna's [redacted] commercially covered lives – roughly [redacted] – participate in self-insured plans. (PX0251 at 001, *confidential – attorneys' eyes only*).

238. [redacted] (DX0703, (Hall, Dep. at 138, *confidential – attorneys' eyes only*)).

239. [redacted] (DX0703, (Hall, Dep. at 138-39, *confidential – attorneys' eyes only*)).

240. [redacted] (DX0703, (Hall, Dep. at 161, *confidential – attorneys' eyes only*)).

241. [redacted] (DX0703, (Hall, Dep. at 141, *confidential – attorneys' eyes only*)).

(iv) **Negotiations with SwedishAmerican**

242. [redacted] (DX0703, (Hall, Dep. at 110, *confidential – attorneys' eyes only*); DX0251 at 002, *confidential – attorneys' eyes only*).

243. Feedback from [redacted] in early 2008 indicated that SwedishAmerican [redacted]. (DX0389 at 003, *confidential – attorneys' eyes only*).

244. RMH was also perceived by Aetna members in early 2008 as [redacted] (DX0389 at 003, *confidential – attorneys' eyes only*).

245. Several Aetna employers [redacted] prior to 2009. (DX0393 at 001-003, *confidential –*

attorneys' eyes only; DX0251 at 003, *confidential – attorneys' eyes only;* DX0391 at 002, *confidential – attorneys' eyes only*).

246. Some of Aetna's employers offered [redacted] with Aetna. (DX0393 at 001-003, *confidential – attorneys' eyes only*).

247. In its negotiations with Aetna, SwedishAmerican sought [redacted] If a [redacted] Aetna's network, SwedishAmerican [redacted] with Aetna. (DX0387 at 001, *confidential – attorneys' eyes only*; DX0388 at 001, *confidential – attorneys' eyes only*).

248. [redacted] (DX0703, (Hall, Dep. at 112, *confidential – attorneys' eyes only*)).

249. [redacted] (DX0703, (Hall, Dep. at 112, *confidential – attorneys' eyes only*)).

250. [redacted] (DX0703, (Hall, Dep. at 113, *confidential – attorneys' eyes only*)).

(v) **Hall Testimony**

(a) **Ms. Hall Lacks Basic Familiarity with the Rockford Area**

251. Suzanne Hall, Vice President of Network Management at Aetna, testified as follows:

a. [redacted] (DX0703, (Hall, Dep. at 17-18, *confidential*)).

b. [redacted] (DX0703, (Hall, Dep. at 48, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0703, (Hall, Dep. at 55, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0703, (Hall, Dep. at 55, *confidential – attorneys' eyes only*)).

e. [redacted] (DX0703, (Hall, Dep. at 25, *confidential*)).

f. [redacted] (DX0703, (Hall, Dep. at 25, *confidential*)).

g. [redacted] (DX0703, (Hall, Dep. at 39-40, *confidential – attorneys' eyes only*)).

h. [redacted] (DX0703, (Hall, Dep. at 32, *confidential*)).

i. [redacted] (DX0703, (Hall, Dep. at 32-33, *confidential*)).

j. [redacted] (DX0703, (Hall, Dep. At 33, *confidential*)).

k. [redacted] (DX0703, (Hall, Dep. at 33, *confidential*)).

l. [redacted] (DX0703, (Hall, Dep. at 41-42, *confidential*)).

m. [redacted] (DX0703, (Hall, Dep. at 42, *confidential*)).

n. [redacted] (DX0703, (Hall, Dep. at 59, *confidential*)).

o. [redacted] (DX0703, (Hall, Dep. at 44, *confidential*)).

p. [redacted] (DX0703, (Hall, Dep. at 47, *confidential*)).

q. [redacted] (DX0703, (Hall, Dep. at 47, *confidential*)).

r. [redacted] (DX0703, (Hall, Dep. at 116-17, *confidential*)).

s. [redacted] (DX0703, (Hall, Dep. at 117, *confidential*)).

t. [redacted] at 136, *confidential – attorneys' eyes only*)).

u. [redacted] (DX0703, (Hall, Dep. at 137, *confidential – attorneys' eyes only*)).

v. [redacted] (DX0703, (Hall, Dep. at 121, *confidential – attorneys' eyes only*)).

w. [redacted] (DX0703, (Hall, Dep. at 121-22, *confidential – attorneys' eyes only*)).

(b) **Aetna Has Conducted No Surveys or Analyses to Support Ms. Hall's Views of the Proposed Transaction**

252. Suzanne Hall, Vice President of Network Management at Aetna, also testified as follows:

a. [redacted] (DX0703, (Hall, Dep. at 49-50, *confidential – attorneys' eyes only*)).

b. [redacted] (DX0703, (Hall, Dep. at 50-51, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0703, (Hall, Dep. at 53, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0703, (Hall, Dep. at 57, *confidential – attorneys' eyes only*)).

e. [redacted] (DX0703, (Hall, Dep. at 52-53, *confidential – attorneys' eyes only*)).

f. [redacted] (DX0703, (Hall, Dep. at 53, *confidential – attorneys' eyes only*)).

g. [redacted] (DX0703, (Hall, Dep. at 163, *confidential – attorneys' eyes only*)).

h. [redacted] (DX0703, (Hall, Dep. at 162, *confidential – attorneys' eyes only*)).

i. [redacted] (DX0703, (Hall, Dep. at 143, *confidential – attorneys' eyes only*)).

j. [redacted] (DX0703, (Hall, Dep. at 143, *confidential – attorneys' eyes only*)).

k. [redacted] (DX0703, (Hall, Dep. at 144, *confidential – attorneys' eyes only*)).

l. [redacted] (DX0703, (Hall, Dep. at 145, *confidential – attorneys' eyes only*)).

m. [redacted] (DX0703, (Hall, Dep. at 149-50, *confidential – attorneys' eyes only*)).

n. [redacted] (DX0703, (Hall, Dep. at 150, *confidential – attorneys' eyes only*)).

(c) Aetna's Concerns Regarding Inpatient Services in Rockford Are Based on Conjecture

253. Suzanne Hall, Vice President of Network Management at Aetna, also testified that:

a. [redacted] (DX0703, (Hall, Dep. at 39, *confidential – attorneys' eyes only*)).

b. [redacted] (DX0703, (Hall, Dep. at 45-46, *confidential*)).

c. [redacted] (DX0703, (Hall, Dep. at 109-10, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0703, (Hall, Dep. at 110, *confidential – attorneys' eyes only*)).

e. [redacted] (DX0703, (Hall, Dep. at 91, *confidential – attorneys' eyes only*)).

b. The Alliance

254. The Alliance is a regional MCO comprised primarily of Wisconsin employers. RHS' contract with the Alliance is a PPO. (DX0184, (Seybold, IHT at 24-25)).

255. [redacted] (DX0195, (Vayr, IHT at 95-96, *confidential – attorneys' eyes only*)).

c. BlueCross BlueShield of Illinois

(i) Membership

256. [redacted] (DX0699, (Arango, Dep. at 73, *confidential – attorneys' eyes only*)).

257. BCBS dominates the health-insurance market in the Chicago area, holding a 63% share of that market for medical care through its health maintenance and preferred-provider organization products. (DX0015 at 003).

258. [redacted] (DX0699, (Arango, Dep. at 142, *confidential – attorneys' eyes only*)).

(ii) **Products**

259. BCBS is the [redacted] in Rockford. (DX0005 at 017, *confidential*).

260. [redacted] (DX0699, (Arango, Dep. at 15-16, *confidential – attorneys' eyes only*)).

261. [redacted] (DX0699, (Arango, Dep. at 15-16, *confidential – attorneys' eyes only*)).

262. [redacted] (DX0699, (Arango, Dep. at 15-16, *confidential – attorneys' eyes only*)).

263. [redacted] (DX0699, (Arango, Dep. at 15-16, *confidential – attorneys' eyes only*)).

264. [redacted] (DX0699, (Arango, Dep. at 17 *confidential – attorneys' eyes only*)).

265. [redacted] (DX0699, (Arango, Dep. at 142, *confidential – attorneys' eyes only*)).

266. [redacted] (DX0699, (Arango, Dep. at 22, *confidential – attorneys' eyes only*)).

267. [redacted] (DX0699, (Arango, Dep. at 127, *confidential – attorneys' eyes only*)).

(a) **RMH's "In-Plan, Out-of-Network" Status**

268. RMH has been [redacted] the BCBS PPO network [redacted]. (DX0699, (Arango, Dep. at 94-95, *confidential – attorneys' eyes only*)).

269. BCBS still [redacted] are all in-network providers for BCBS. (DX0183, (Dillon, IHT at 90-91, *confidential – attorneys' eyes only*)).

270. [redacted] provider for BCBS. (DX0183, (Dillon, IHT at 90-91, *confidential – attorneys' eyes only*); DX0184, (Seybold, IHT at 27-28, *confidential – attorneys' eyes only*)).

271. Though RHS and BCBS have been unable to negotiate an "in-plan, in-network" contract, RHS [redacted]. (DX0184, (Seybold, IHT at 30-32, *confidential – attorneys' eyes only*); DX0029 at 002; DX0036 at 005, *confidential*).

272. [redacted] (DX0184, (Seybold, IHT at 198-99, *confidential – attorneys' eyes only*); DX0005 at 012, *confidential*).

273. [redacted] (DX0005 at 017, *confidential*).

(b) **Contracting with OSF**

274. BCBS contracts with OSF for services at all system hospitals. (DX0197, (Breeden, IHT at 31)).

275. [redacted] (DX0699, (Arango, Dep. at 55, *confidential – attorneys' eyes only*)).

276. BCBS is OSF's [redacted]. (DX0197, (Breeden, IHT at 32, *confidential – attorneys' eyes only*); DX0194, (Baker, IHT at 34)).

277. BCBS accounts for approximately [redacted] of OSF's contracted commercial business. That equates to approximately [redacted] of its commercial inpatient revenue in 2010. (DX0197, (Breeden, IHT at 32-33, *confidential – attorneys' eyes only*); DX0714, (Schertz, Dep. at 28, *confidential – attorneys' eyes only*); DX0005 at 017, *confidential*).

278. BCBS considers it an [redacted]. (DX0699, (Arango, Dep. at 89-90, *confidential – attorneys' eyes only*)).

(c) **Contracting with SwedishAmerican**

279. [redacted] (DX0699, (Arango, Dep. at 22, 127, *confidential – attorneys' eyes only*).

280. BCBS [redacted]. (DX0699, (Arango, Dep. at 84, *confidential – attorneys' eyes only*)).

281. SwedishAmerican was aware [redacted] (DX0699, (Arango, Dep. at 88, *confidential – attorneys' eyes only*)).

(iii) **Quality of Care**

282. Both OSF and BCBS [redacted]. (DX0699, (Arango, Dep. at 74, *confidential – attorneys' eyes only*)).

283. [redacted] (DX0699, (Arango, Dep. at 75, *confidential – attorneys' eyes only*)).

284. BCBS offers the [redacted] (DX0699, (Arango, Dep. at 59-60, *confidential – attorneys' eyes only*)).

285. BCBS offers the [redacted] (DX0699, (Arango, Dep. at 61, *confidential – attorneys' eyes only*)).

286. BCBS also offers [redacted] (DX0699, (Arango, Dep. at 62, *confidential – attorneys' eyes only*)).

287. [redacted] (DX0699, (Arango, Dep. at 62, *confidential – attorneys' eyes only*)).

288. [redacted] (DX0699, (Arango, Dep. at 75, *confidential – attorneys' eyes only*)).

(iv) **Arango Testimony**

(a) **BCBS is Neither For Nor Against the Affiliation**

289. Joseph Arango, Divisional Vice President of Provider Contracting and Strategy for BCBS, testified that:

a. [redacted] (DX0699, (Arango, Dep. at 101-02, *confidential – attorneys' eyes only*)).

b. [redacted]

[redacted] (DX0699, (Arango, Dep. at 102-03, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0699, (Arango, Dep. at 104, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0699, (Arango, Dep. at 104, *confidential – attorneys' eyes only*)).

(b) **Many of Mr. Arango's Concerns are Only Theoretical in Nature**

290. Joseph Arango, Divisional Vice President of Provider Contracting and Strategy for BCBS, testified as follows:

a. [redacted] (DX0699, (Arango, Dep. at 105, *confidential – attorneys' eyes only*)).

b. He admits that [redacted] (DX0699, (Arango, Dep. at 107, *confidential – attorneys' eyes only*)).

c. He admits that [redacted] (DX0699, (Arango, Dep. at 107, *confidential – attorneys' eyes only*)).

d. He [redacted] (DX0699, (Arango, Dep. at 132, *confidential – attorneys' eyes only*)).

d. **CIGNA**

291. CIGNA is a health insurance company that provides [redacted] (DX0718, (Golias, Dep. at 34, *confidential – attorneys' eyes only*, 67-68, *confidential – attorneys' eyes only*)).

292. [redacted] (DX0718, (Golias, Dep. at 35-36, *confidential – attorneys' eyes only*)).

293. [redacted] (DX0718, (Golias, Dep. at 74, *confidential – attorneys' eyes only*)).

294. CIGNA defines the "Rockford area" as [redacted]. (DX0718, (Golias, Dep. at 18-19, *confidential – attorneys' eyes only*)).

295. [redacted] (DX0718, (Golias, Dep. at 12-13, *confidential – attorneys' eyes only*, 15, *confidential – attorneys' eyes only*)).

(i) **Membership**

296. CIGNA covers approximately [redacted] individuals in the Rockford area. (DX0718, (Golias, Dep. at 106, *confidential – attorneys' eyes only*)).

297. CIGNA's membership has [redacted] in the Rockford area since 2008. (DX0718, (Golias, Dep. at 106-107, *confidential – attorneys' eyes only*)).

298. CIGNA has a marketing group consisting of [redacted] who are responsible for selling CIGNA products. (DX0718, (Golias, Dep. at 110-112, *confidential – attorneys' eyes only*)).

(ii) **Competitors**

299. [redacted] (DX0718, (Golias, Dep. at 76, *confidential – attorneys' eyes only*)).

300. [redacted] (DX0718, (Golias, Dep. at 77-78, *confidential – attorneys' eyes only*)).

(iii) **Products**

301. [redacted] (DX0718, (Golias, Dep. at 37-38, *confidential – attorneys' eyes only*)).

302. CIGNA's PPO product provides [redacted] (DX0718, (Golias, Dep. at 24, *confidential – attorneys' eyes only*)).

303. [redacted] (DX0718, (Golias, Dep. at 117-118, *confidential – attorneys' eyes only*)).

304. [redacted] (DX0718, (Golias, Dep. at 172, *confidential – attorneys' eyes only*)).

305. Currently, CIGNA has contracts with [redacted]. CIGNA will not negotiate for [redacted] like those offered by the [redacted]. (DX0183, (Dillon, IHT at 157-58, *confidential – attorneys' eyes only*, 173, *confidential – attorneys' eyes only*)).

306. CIGNA accounted for [redacted]. (DX0005 at 017, *confidential*).

307. CIGNA also has a [redacted]. (DX0718, (Golias, Dep. at 30, *confidential – attorneys' eyes only*); DX0937, (Breeden, Dep. at 46-47, *confidential – attorneys' eyes only*)).

308. In contracting with CIGNA to provide services to State of Illinois employees on behalf of SAMC, [redacted]. (DX0937, (Breeden, Dep. at 47, *confidential – attorneys' eyes only*)).

309. [redacted] of CIGNA's customers in the Rockford area are self-insured. (DX0718, (Golias, Dep. at 69, *confidential – attorneys' eyes only*)).

310. Self-funded employers purchase stop-loss insurance to insure against catastrophic cases. [redacted] (DX0718, (Golias, Dep. at 70-71, *confidential – attorneys' eyes only*)).

311. CIGNA generates revenue [redacted]. (DX0718, (Golias, Dep. at 112, *confidential – attorneys' eyes only*)).

312. The per-employee, per-month charges are generally in the [redacted]. (DX0718, (Golias, Dep. at 113-114, *confidential – attorneys' eyes only*)).

313. [redacted] CIGNA's [redacted] because of these factors. (DX0718, (Golias, Dep. at 112-13, *confidential – attorneys' eyes only*)).

(iv) **Golias Testimony**

314. Thomas Golias, Director of Provider Contracting for CIGNA, testified that:

a. [redacted] (DX0718, (Golias, Dep. at 15-16, *confidential – attorneys' eyes only*)).

b. [redacted] (DX0718, (Golias, Dep. at 31-32, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0718, (Golias, Dep. at 28, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0718, (Golias, Dep. at 29, *confidential – attorneys' eyes only*)).

e. [redacted] (DX0718, (Golias, Dep. at 30, *confidential – attorneys' eyes only*)).

f. [redacted] (DX0718, (Golias, Dep. at 79-81, *confidential – attorneys' eyes only*)).

g. [redacted] (DX0718, (Golias, Dep. at 92, *confidential – attorneys' eyes only*)).

h. [redacted] (DX0718, (Golias, Dep. at 91-92, *confidential – attorneys' eyes only*, 161, *confidential – attorneys' eyes only*, 177-178, *confidential – attorneys' eyes only*, 186-188, *confidential – attorneys' eyes only*)).

i. The [redacted]. (DX0718, (Golias, Dep. at 172, *confidential – attorneys' eyes only*)).

j. [redacted] (DX0718, (Golias, Dep. at 49-50, *confidential – attorneys' eyes only*)).

k. [redacted] (DX0718, (Golias, Dep. at 230-31, *confidential – attorneys' eyes only*)).

e. Employers' Coalition on Health

315. The Employers' Coalition on Health ("ECOH"), is a coalition of local employers from northern Illinois and southern Wisconsin who developed their own health insurance provider networks as a means of controlling their healthcare costs. (DX0712, (Pocklington, Dep. at 16, *confidential – attorneys' eyes only*, 19-20, *confidential – attorneys' eyes only*); PX0254 at 001, *confidential – attorneys' eyes only*; DX0183,

(Dillon, IHT at 45); DX0193, (Stenerson, IHT at 243-44, *confidential – attorneys' eyes only*)).

316. ECOH perceives its mission to include [redacted]. As a result, in its negotiations with healthcare providers, it is [redacted]. (DX0712, (Pocklington, Dep. at 11, *confidential – attorneys' eyes only*, 19-20, *confidential – attorneys' eyes only*, 101, *confidential – attorneys' eyes only*)).

317. [redacted] (DX0712, (Pocklington, Dep. at 36, *confidential – attorneys' eyes only*)).

318. ECOH also ensures that claims incurred by its enrollees are repriced according to the [redacted]. (DX0712, (Pocklington, Dep. at 32-33, *confidential – attorneys' eyes only*); DX0711, (Olson, Dep. at 34)).

319. ECOH does not itself [redacted], but instead [redacted]. (DX0712, (Pocklington, Dep. at 33, *confidential – attorneys' eyes only*)).

320. ECOH does not determine the [redacted]. (DX0712, (Pocklington, Dep. at 39-40, *confidential – attorneys' eyes only*)).

321. ECOH does not independently [redacted]. (DX0712, (Pocklington, Dep. at 111, *confidential – attorneys' eyes only*)).

322. ECOH reviews the [redacted], but does not actively [redacted] in regard to the three Rockford hospitals. (DX0712, (Pocklington, Dep. at 111, *confidential – attorneys' eyes only*)).

323. [redacted] (DX0712, (Pocklington, Dep. at 16, *confidential – attorneys' eyes only*)).

324. [redacted] (DX0712, (Pocklington, Dep. at 16, *confidential – attorneys' eyes only*)).

325. [redacted] (DX0712, (Pocklington, Dep. at 16, *confidential – attorneys' eyes only*)).

(i) **Governance**

326. [redacted] (DX0712, (Pocklington, Dep. at 35-36, *confidential – attorneys' eyes only*)).

327. [redacted] (DX0712, (Pocklington, Dep. at 13, *confidential – attorneys' eyes only*)).

328. [redacted] (DX0712, (Pocklington, Dep. at 150, *confidential – attorneys' eyes only*)).

329. [redacted] (DX0712, (Pocklington Dep. at 8, *confidential – attorneys' eyes only*)).

330. [redacted] (DX0712, (Pocklington Dep. at 6, *confidential – attorneys' eyes only*)).

331. [redacted] (DX0712, (Pocklington Dep. at 7, *confidential – attorneys' eyes only*)).

332. [redacted] (DX0712, (Pocklington Dep. at 190, *confidential – attorneys' eyes only*)).

(ii) **Membership**

333. [redacted] (DX0712, (Pocklington Dep. at 36, *confidential – attorneys' eyes only*, 41-42, *confidential – attorneys' eyes only*)).

334. ECOH describes the employees who receive their healthcare benefits from a member employer's health plan as [redacted]. (DX0712, (Pocklington, Dep. at 41-42, *confidential – attorneys' eyes only*)).

335. ECOH describes [redacted] together with their covered dependents as [redacted] or [redacted]. (DX0712, (Pocklington, Dep. at 41-42, *confidential – attorneys' eyes only*)).

336. [redacted] (DX0712, (Pocklington, Dep. at 34, *confidential – attorneys' eyes only*, 42, *confidential – attorneys' eyes only*)).

337. [redacted] (DX0712, (Pocklington, Dep. at 42, *confidential – attorneys' eyes only*)).

338. [redacted] (DX0712, (Pocklington, Dep. at 48, *confidential – attorneys' eyes only*)).

339. [redacted] (DX0712, (Pocklington Dep. at 81, *confidential – attorneys' eyes only*)).

340. [redacted] (DX0712, (Pocklington, Dep. at 42, *confidential – attorneys' eyes only*)).

341. ECOH estimates that each covered employee translates into [redacted] (DX0712, (Pocklington, Dep. at 42-43, *confidential – attorneys' eyes only*)).

342. ECOH estimates that it currently has approximately [redacted] (DX0712, (Pocklington, Dep. at 43, *confidential – attorneys' eyes only*)).

343. ECOH has experienced a [redacted] in its membership totals in the past several years. (DX0712, (Pocklington, Dep. at 42, *confidential – attorneys' eyes only*, 48, *confidential – attorneys' eyes only*, 163, *confidential – attorneys' eyes only*); DX0195, (Vayr, IHT at 55, *confidential – attorneys' eyes only*)).

344. Five to six years ago, ECOH's membership totals were [redacted] their current levels, with upwards of [redacted] and a total of approximately [redacted]. (DX0712, (Pocklington Dep. at 48-49, *confidential – attorneys' eyes only*)).

345. [redacted] (DX0712, (Pocklington, Dep. at 43-45, *confidential – attorneys' eyes only*)).

346. [redacted] (DX0712, (Pocklington, Dep. at 45-46, *confidential – attorneys' eyes only*)).

347. [redacted] (DX0712, (Pocklington, Dep. at 43-44, *confidential – attorneys' eyes only*)).

348. [redacted] (DX0712, (Pocklington, Dep. at 44-45, *confidential – attorneys' eyes only*)).

349. [redacted] (DX0712, (Pocklington, Dep. at 37, *confidential – attorneys' eyes only*); PX0254 at 001-002, *confidential – attorneys' eyes only*).

350. [redacted] (DX0711, (Olson, Dep. at 44-45)).

351. [redacted] (DX0712, (Pocklington, Dep. at 45-46, *confidential – attorneys' eyes only*)).

352. [redacted] (DX0712, (Pocklington, Dep. at 47, *confidential – attorneys' eyes only*)).

(iii) **Competitors**

353. [redacted] (DX0712, (Pocklington, Dep. at 55-57, *confidential – attorneys' eyes only*)).

354. [redacted] (DX0712, (Pocklington, Dep. at 55, *confidential – attorneys' eyes only*, 179, *confidential – attorneys' eyes only*)).

355. [redacted] (DX0712, (Pocklington, Dep. at 59-61, *confidential – attorneys' eyes only*)).

356. [redacted] (DX0712, (Pocklington, Dep. at 60-62, *confidential – attorneys' eyes only*)).

(iv) **Products**

357. [redacted] (DX0712, (Pocklington, Dep. at 6, *confidential – attorneys' eyes only*); DX0184, (Seybold, IHT at 37-38); DX0193, (Stenerson, IHT at 243-44, *confidential – attorneys' eyes only*)).

358. Approximately [redacted] of ECOH enrollees receive their insurance through a self-insured employer. (DX0712, (Pocklington, Dep. at 35, *confidential – attorneys' eyes only*)).

359. [redacted] (DX0712, (Pocklington, Dep. at 35, *confidential – attorneys' eyes only*)).

360. [redacted] (DX0712, (Pocklington, Dep. at 38, *confidential – attorneys' eyes only*)).

361. [redacted] (DX0712, (Pocklington, Dep. at 49, *confidential – attorneys' eyes only*)) .

362. ECOH employers can offer their employees a [redacted]. (DX0712, (Pocklington, Dep. at 91-92, *confidential – attorneys' eyes only*)).

363. [redacted] (DX0712, (Pocklington, Dep. at 49, *confidential – attorneys' eyes only*); DX0184, (Seybold, IHT at 39); DX0193, (Stenerson, IHT at 243-44, *confidential – attorneys' eyes only*)).

364. [redacted] (DX0712, (Pocklington, Dep. at 49, *confidential – attorneys' eyes only*)).

365. [redacted] (PX0254 at 002, *confidential – attorneys' eyes only*; DX0040 at 011, *confidential*).

366. [redacted] (DX0712, (Pocklington, Dep. at 51, *confidential – attorneys' eyes only*, 53, *confidential – attorneys' eyes only*)).

367. [redacted] (DX0712, (Pocklington, Dep. at 50, *confidential – attorneys' eyes only*)).

368. [redacted] (DX0717, (Walsh, Dep. at 172-73, *confidential – attorneys' eyes only*)).

369. The number of enrollees in ECOH's River Valley plan [redacted]. (DX0712, (Pocklington, Dep. at 50, *confidential – attorneys' eyes only*)).

370. [redacted] (DX0712, (Pocklington, Dep. at 67-69, *confidential – attorneys' eyes only*)).

371. Individuals enrolled in ECOH's networks [redacted]. (DX0712, (Pocklington, Dep. at 71, *confidential – attorneys' eyes only*)).

372. [redacted] (DX0712, (Pocklington, Dep. at 67-69, *confidential – attorneys' eyes only*, 116, *confidential – attorneys' eyes only*)).

(v) **Pocklington Testimony**

(a) **ECOH Has Not Conducted Any Studies or Analyses to Support Its Opinions About the Proposed Transaction**

373. ECOH has [redacted]. (DX0712, (Pocklington, Dep. at 75, *confidential – attorneys' eyes only*)).

374. ECOH has [redacted]. (DX0712, (Pocklington, Dep. at 75, *confidential – attorneys' eyes only*)).

375. ECOH has [redacted]. (DX0712, (Pocklington, Dep. at 75-76, *confidential – attorneys' eyes only*)).

376. Specifically, ECOH [redacted]. (DX0712, (Pocklington, Dep. at 89, *confidential – attorneys' eyes only*, 149, *confidential – attorneys' eyes only*)).

377. ECOH has [redacted]. (DX0712, (Pocklington, Dep. at 120, *confidential – attorneys' eyes only*)).

378. ECOH has [redacted] in the Rockford area. (DX0712, (Pocklington, Dep. at 120, *confidential – attorneys' eyes only*)).

379. ECOH has [redacted]. (DX0712, (Pocklington, Dep. at 148-49, *confidential – attorneys' eyes only*)).

(b) **ECOH's Membership Can Be Effectively Served By Two Hospital Systems**

380. William Pocklington, ECOH's Director of Provider Services, testified that:

a. He does [redacted]. (DX0712, (Pocklington, Dep. at 71, *confidential – attorneys' eyes only*)).

b. He does [redacted] is necessary. (DX0712, (Pocklington, Dep. at 72, *confidential – attorneys' eyes only*)).

c. He [redacted]. (DX0712, (Pocklington, Dep. at 73, *confidential – attorneys' eyes only*)).

d. He [redacted]. (DX0712, (Pocklington, Dep. at 73, *confidential – attorneys' eyes only*)).

(c) ECOH's Concerns Regarding Inpatient Services in Rockford Are Based on Conjecture

381. William Pocklington, ECOH's Director of Provider Services, testified that:

a. [redacted]. (DX0712, (Pocklington, Dep. at 86-87, *confidential – attorneys' eyes only*)).

b. He does [redacted]. (DX0712, (Pocklington, Dep. at 69, *confidential – attorneys' eyes only*)).

c. He does [redacted]. (DX0712, (Pocklington, Dep. at 69-70, *confidential – attorneys' eyes only*)).

d. He does [redacted]. (DX0712, (Pocklington, Dep. at 52, *confidential – attorneys' eyes only*)).

e. He does [redacted]. (DX0712, (Pocklington, Dep. at 52-53, *confidential – attorneys' eyes only*)).

f. He does [redacted]. (DX0712, (Pocklington, Dep. at 75, *confidential – attorneys' eyes only*)).

g. He does [redacted]. (DX0712, (Pocklington, Dep. at 74, *confidential – attorneys' eyes only*)).

h. He does [redacted] at SwedishAmerican. (DX0712, (Pocklington, Dep. at 74, *confidential – attorneys' eyes only*)).

i. He does [redacted]. (DX0712, (Pocklington, Dep. at 74, *confidential – attorneys' eyes only*)).

j. He does [redacted]. (DX0712, (Pocklington, Dep. at 115, *confidential – attorneys' eyes only*)).

k. He is [redacted]. (DX0712, (Pocklington, Dep. at 152, *confidential – attorneys' eyes only*)).

l. [redacted] (DX0712, (Pocklington, Dep. at 189-90, *confidential – attorneys' eyes only*)).

f. **Humana**

382. Humana is a large, national, MCO that offers a diverse set of commercial and government health insurance products, including HMO, PPO, and point of service products. (DX0183, (Dillon, IHT at 14-15)).

(i) **Membership**

383. Humana has [redacted]. (DX0704, (Hitchcock, Dep. at 86, *confidential – attorneys' eyes only*)).

384. [redacted] (DX0704, (Hitchcock, Dep. at 123, *confidential – attorneys' eyes only*)).

(ii) **Products**

385. [redacted] (DX0183, (Dillon, IHT at 160-61, *confidential – attorneys' eyes only*)).

386. Humana contracts with OSF for [redacted]. (DX0197, (Breeden, IHT at 31); DX0193, (Stenerson, IHT at 243, *confidential – attorneys' eyes only*)).

387. [redacted] (DX0704, (Hitchcock, Dep. at 80-81, *confidential – attorneys' eyes only*)).

(iii) **Hitchcock Testimony**

(a) **Mr. Hitchcock Has No Responsibility for Humana's Commercial Health Insurance Products.**

388. Robert T. Hitchcock, Vice President of the Western Division, Medicare Market Operations for Humana, testified that:

a. [redacted] (DX0704, (Hitchcock, Dep. at 8, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0704, (Hitchcock, Dep. at 33, *confidential – attorneys' eyes only,*49- 50, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0704, (Hitchcock, Dep. at 34, *confidential – attorneys' eyes only*)).

e. [redacted] (DX0704, (Hitchcock, Dep. at 57, *confidential – attorneys' eyes only*)).

f. [redacted] (DX0704, (Hitchcock, Dep. at 105, *confidential – attorneys' eyes only*)).

g. [redacted] (DX0704, (Hitchcock, Dep. at 42, *confidential – attorneys' eyes only*)).

h. [redacted] (DX0704, (Hitchcock, Dep. at 88, *confidential – attorneys' eyes only*)).

[redacted]

389. Robert T. Hitchcock, Vice President of the Western Division, Medicare Market Operations for Humana, testified that:

a. [redacted] (DX0704, (Hitchcock, Dep. at 18-19, *confidential – attorneys' eyes only*, 21-22, *confidential – attorneys' eyes only*)).

b. [redacted] (DX0704, (Hitchcock, Dep. at 18-19, *confidential – attorneys' eyes only*, 21-22, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0704, (Hitchcock, Dep. at 74, *confidential – attorneys' eyes only*, 76, *confidential – attorneys' eyes only*)).

(c) **Mr. Hitchcock Had No Knowledge or Opinion of the Merger Prior to the FTC Contacting Him**

390. Robert T. Hitchcock, Vice President of the Western Division, Medicare Market Operations for Humana, testified that:

a. [redacted] (DX0704, (Hitchcock, Dep. at 26, *confidential – attorneys' eyes only*)).

b. [redacted] (DX0704, (Hitchcock, Dep. at 31-32, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0704, (Hitchcock, Dep. at 54, *confidential – attorneys' eyes only*, 56, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0704, (Hitchcock, Dep. at 62-63, *confidential – attorneys' eyes only*)).

e. [redacted] (DX0704, (Hitchcock, Dep. at 70, *confidential – attorneys' eyes only*)).

(d) **Humana Has Conducted No Studies or Analysis to Support Mr. Hitchcock's Views of the Proposed Transaction**

391. Robert T. Hitchcock, Vice President of the Western Division, Medicare Market Operations for Humana, testified that:

a. [redacted] (DX0704, (Hitchcock, Dep. at 149, *confidential – attorneys' eyes only*)).

b. [redacted] (DX0704, (Hitchcock, Dep. at 150, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0704, (Hitchcock, Dep. at 173, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0704, (Hitchcock, Dep. at 163, *confidential – attorneys' eyes only*)).

e. [redacted] (DX0704, (Hitchcock, Dep. at 168, *confidential – attorneys' eyes only*)).

f. [redacted] (DX0704, (Hitchcock, Dep. at 173, *confidential – attorneys' eyes only*)).

g. Northern Illinois Health Plan

392. Northern Illinois Health Plan was formerly known as the Freeport Health Plan. The plan is administered by Freeport Health Network (FHN), a healthcare system based in Freeport, Illinois. (DX0193, (Stenerson, IHT at 250-51)).

393. Northern Illinois Health Plan offers a product that includes all three Rockford hospitals. (DX0183, (Dillon, IHT at 203)).

h. PersonalCare

394. PersonalCare was acquired by Coventry Healthcare, Inc. ("Coventry") in 2003. (Petersen, Tr. 212).

395. [redacted] (DX0719, (Petersen, Dep. at 5, *confidential – attorneys' eyes only*)).

396. Coventry Healthcare of Illinois ("PersonalCare") is a health insurance company that distributes fully insured health insurance products, provides third-party administrative services for self-funded employers, and distributes Medicare Advantage and Medicare Supplement products. (Petersen, Tr. 218).

397. PersonalCare is a direct subsidiary of Coventry, a public, for-profit company whose stock is traded on the New York Stock Exchange. (Petersen, Tr. 269-70).

398. Coventry is the fifth or sixth largest health insurance company in the United States, with revenues of approximately $13 billion annually. Coventry's net income in 2010 was $438 million. (Petersen, Tr. 269-70).

399. PersonalCare's revenue was approximately $350 million in 2011 and $330 million in 2010. (Petersen, Tr. 270-71).

(i) Membership

400. Coventry insures in excess of 5 million covered lives throughout the United States. (Petersen, Tr. 270).

401. [redacted] (DX0719, (Petersen, Dep. at 54, *confidential – attorneys' eyes only*)).

402. PersonalCare has approximately 90,000 covered lives in its commercial health insurance products throughout the State of Illinois. Of these, approximately 13,500 are in the Rockford area, evenly split between fully-insured and self-insured products. PersonalCare has 4,000 Medicare members in Rockford. (DX0719, (Petersen, Dep. at 58, *confidential – attorneys' eyes only*); Petersen, Tr. 219).

(ii) **Competitors**

403. PersonalCare's largest competitors for commercially insured business in Illinois are [redacted]. (DX0719, (Petersen, Dep. at 95-96, *confidential – attorneys' eyes only*)).

404. [redacted] (DX0719, (Petersen, Dep. at 102-03 , *confidential – attorneys' eyes only*)).

405. PersonalCare estimates that it has [redacted]. (DX0719, (Petersen, Dep. at 100-02, *confidential – attorneys' eyes only*)).

406. [redacted] (DX0719, (Petersen, Dep. at 102, *confidential – attorneys' eyes only*)).

(iii) **Products**

407. PersonalCare offers [redacted]. (DX0719, (Petersen, Dep. at 58, *confidential – attorneys' eyes only*)).

408. PersonalCare signed its first contract with RHS in [redacted]. Currently, PersonalCare has provider contracts with [redacted] for inpatient and outpatient services at [redacted]. PersonalCare also has contracts with [redacted]. (DX0183, (Dillon, IHT at 158, *confidential – attorneys' eyes only*); Petersen, Tr. 230).

409. PersonalCare signed a contract with SwedishAmerican in 2005 for SwedishAmerican to be an in-network provider. (Petersen, Tr. 230).

410. [redacted] (DX0719, (Petersen, Dep. at 102, *confidential – attorneys' eyes only*)).

411. On March 1, 2009, the exclusivity provision [redacted]. (DX0193, (Stenerson, IHT at 255, *confidential – attorneys' eyes only*)).

412. [redacted] (DX0193, (Stenerson, IHT at 255, *confidential – attorneys' eyes only*)).

413. PersonalCare currently offers two Medicare Advantage products in Rockford with different network configurations. Its Medicare PPO product provides a two-hospital configuration, consisting of SwedishAmerican and RMH. Its Medicare HMO product

offers a one-hospital configuration, consisting of SwedishAmerican. (DX0719, (Petersen, Dep. at 79-80, *confidential – attorneys' eyes only*); Petersen, Tr. 301-02).

(iv) **Todd Petersen Testimony**

414. Todd Petersen, Chief Executive Officer of PersonalCare Insurance of Illinois, Inc., admitted that it is in Coventry's economic interest to block the transaction between RHS and OSF. (Petersen, Tr. 273).

(a) **Petersen's "Study" of the Feasibility of One-Hospital Networks**

415. Todd Petersen, Chief Executive Officer of PersonalCare, testified as follows:

a. He alleges [redacted]. (DX0719, (Petersen, Dep. at 109-11, *confidential – attorneys' eyes only*)).

b. [redacted] (DX0719, (Petersen, Dep. at 15, 18-20, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0719, (Petersen, Dep. at 15-17, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0719, (Petersen, Dep. at 110, 117, *confidential – attorneys' eyes only*)).

e. [redacted] (DX0719, (Petersen, Dep. at 112-13, *confidential – attorneys' eyes only*)).

(b) **Petersen Lacks Any Direct Knowledge of the Rockford Market**

416. Todd Petersen, Chief Executive Officer of PersonalCare, testified as follows:

a. [redacted] (DX0719, (Petersen, Dep. at 61-62, *confidential – attorneys' eyes only*)).

b. [redacted] (DX0719, (Petersen, Dep. at 75, *confidential – attorneys' eyes only*)).

c. PersonalCare also has no contracting staff based in Rockford. Since 2004, only four employees at PersonalCare have been involved with any hospital negotiations in Rockford. Three of those persons no longer work with the company. The remaining employee is based in Champaign, Illinois. (DX0719, (Petersen, Dep. at 61-63, *confidential – attorneys' eyes only*); Petersen, Tr. 274).

d. [redacted] (DX0719, (Petersen, Dep. at 62-65, *confidential – attorneys' eyes only*)).

(c) **Healthcare Reform is Prompting Consolidations Among Providers and Payors Alike**

417. Todd Petersen, Chief Executive Officer of PersonalCare, testified as follows:

a. [redacted] (DX0719, (Petersen, Dep. at 108, *confidential – attorneys' eyes only*)).

b. [redacted] (DX0719, (Petersen, Dep. at 109, *confidential – attorneys' eyes only*)).

c. [redacted] (DX0944, (Petersen, at 238, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0944, (Petersen, at 231, *confidential – attorneys' eyes only*)).

(d) **Todd Petersen's Declaration and Supplemental Declaration**

418. Todd Petersen, Chief Executive Officer of PersonalCare, testified as follows:

a. [redacted] (DX0719, (Petersen, Dep. at 46-47, *confidential – attorneys' eyes only*)).

b. He originally estimated that only 200 seniors in the entire Rockford area would select PersonalCare's SwedishAmerican-only Medicare Advantage product before the end of the enrollment period. In fact, PersonalCare was actually able to obtain over 300 enrollees for this brand-new product. (Petersen, Tr. 243).

c. [redacted] (DX0944, (Petersen, at p. 256-259, *confidential – attorneys' eyes only*)).

i. **UnitedHealthcare**

419. UnitedHealthcare ("United") is one of the largest health insurance companies in the country and the second largest in Illinois. United has approximately one million members in Illinois and 22,500 members in the Rockford area. (Lobe Tr. 21-23).

(i) **Competitors**

420. United competes with BCBS, Aetna, Humana, Cigna, and third party administrators. United estimates its market share to be fifteen percent in Illinois and the Rockford area. (DX0234, (Lobe, IHT 13-14, *confidential - attorneys' eyes only*); DX0707, (Lobe, Dep. at 48, *confidential - attorneys' eyes only*); Lobe, Tr. 22).

(ii) **Membership**

421. [redacted] (DX0707, (Lobe, Dep. at 23, *confidential - attorneys' eyes only*)).

422. [redacted] (DX0707, (Lobe, Dep. at 40-41, *confidential - attorneys' eyes only*)).

423. [redacted] (DX0234, (Lobe, IHT at 35, *confidential - attorneys' eyes only*)).

424. [redacted]

[redacted] (DX0707, (Lobe, Dep. at 52-53, *confidential - attorneys' eyes only*)).

425. [redacted] (DX0707, (Lobe, Dep. at 135-37, *confidential - attorneys' eyes only*)).

(iii) **Products**

426. RHS and SwedishAmerican are the in-network hospital providers in Rockford for United. (DX0193, (Stenerson, IHT at 254, *confidential - attorneys' eyes only*); DX0190, (Sehring, IHT at 210-11, *confidential - attorneys' eyes only*); Lobe, Tr. 28-29).

427. [redacted] (DX0193, (Stenerson, IHT at 254, *confidential - attorneys' eyes only*)).

428. [redacted] (DX0197, (Breeden, IHT at 28-30, *confidential - attorneys' eyes only*)).

429. United offers different health insurance products including HMO, PPO, and point-of-service products. United also sells third party administration services through a subsidiary of United. (DX0234, (Lobe, IHT at 14-15, *confidential - attorneys' eyes only*); DX0707, (Lobe, Dep. at 25-26, *confidential - attorneys' eyes only*); Lobe, Tr. 24).

430. [redacted] (DX0234, (Lobe, IHT at 16-17, *confidential - attorneys' eyes only*); DX0707, (Lobe, Dep. at 26, *confidential - attorneys' eyes only*)).

431. [redacted] (DX0234, (Lobe, IHT at 17, *confidential - attorneys' eyes only*)).

432. [redacted] (DX0234, (Lobe, IHT at 15-16, *confidential - attorneys' eyes only*); DX0707, (Lobe, Dep. at 36, *confidential - attorneys' eyes only*)).

433. United does not offer any plans in Rockford that provide [redacted]. (DX0707, (Lobe, Dep. at 93-94, *confidential - attorneys' eyes only*)).

434. [redacted] in the Rockford area participate in self-insured plans. (DX0234, (Lobe, IHT at 18, *confidential - attorneys' eyes only*); DX0707, (Lobe, Dep. at 37 *confidential - attorneys' eyes only*)).

435. United sells its health insurance products through [redacted]. (DX0707, (Lobe, Dep. at 30, *confidential - attorneys' eyes only*, 49, *confidential - attorneys' eyes only*)).

(a) **United's Newly Launched Core Product Successfully Utilizes a One-Hospital Network**

436. United is offering a new health insurance product in Rockford called "Core" which has one Rockford hospital, SwedishAmerican, as its in-network provider. (DX0234, (Lobe, IHT at 48, *confidential - attorneys' eyes only*); DX0707, (Lobe, Dep. at 27-29, *confidential - attorneys' eyes only*, 151-52, *confidential - attorneys' eyes only*)).

437. The "Core" product is part of United's pilot program designed to develop narrow network opportunities. (DX0707, (Lobe, Dep. at 29, *confidential - attorneys' eyes only*); Lobe, Tr. 38-39).

438. United's Core product provides [redacted] (DX0707, (Lobe, Dep. at 171, *confidential - attorneys' eyes only*)).

439. United's Core product exceeded expectations in terms of membership volume since it was launched in 2010. (Lobe, Tr. 74-76; DX0707, (Lobe, Dep. at 46-47, *confidential - attorneys' eyes only*)).

440. United considers the launch of the Core product [redacted]. (DX0707, (Lobe, Dep. at 46-47, *confidential - attorneys' eyes only*)).

441. [redacted] (DX0707, (Lobe, Dep. at 47-48, *confidential - attorneys' eyes only*)).

442. [redacted] (Lobe, Tr. 40; DX0707, (Lobe, Dep. at 170, *confidential - attorneys' eyes only*)).

443. United works with organizations such as [redacted]. (DX0707, (Lobe, Dep. at 60-61, *confidential - attorneys' eyes only*)).

(iv) **Negotiations with Providers**

444. United's [redacted] are both [redacted]. (DX0707, (Lobe, Dep. at 66, *confidential - attorneys' eyes only*)).

445. [redacted] (DX0234, (Lobe, IHT at 43,

confidential - attorneys' eyes only); DX0707, (Lobe, Dep. at 71-74, *confidential - attorneys' eyes only*); Lobe, Tr. 18-19).

446. [redacted] (DX0707, (Lobe, Dep. at 110, *confidential - attorneys' eyes only*)).

(v) **United has No Basis for Concern with Respect to the Proposed Affiliation**

447. [redacted] (DX0707, (Lobe, Dep. at 33-34, *confidential - attorneys' eyes only*)).

448. [redacted] (DX0707, (Lobe Dep. at 116, *confidential - attorneys' eyes only*)).

j. **Health Alliance Medical Plans**

449. Health Alliance Medical Plans ("Health Alliance") is a provider-sponsored health plan administering health plans for more than 325,000 members in Illinois and Iowa. (DX0009 at 001).

(a) **Network**

450. [redacted] (DX 0705, (Ingrum, Dep. at 25-29, *confidential- attorneys' eyes only*)).

(b) **Jeffrey Ingrum Testimony**

451. Jeffrey Ingrum, CEO of Health Alliance, testified as follows:

a. [redacted] (DX 0705, (Ingrum, Dep. at 39, *confidential- attorneys' eyes only*)).

b. [redacted] (DX0705, (Ingrum, Dep. at 112-13, *confidential – attorneys' eyes only*)).

c. [redacted]

[redacted] (DX0705, (Ingrum, Dep. at 138-39, *confidential – attorneys' eyes only*)).

d. [redacted] (DX0705, (Ingrum, Dep. at 147, *confidential – attorneys' eyes only*)).

e. [redacted] (DX 0705, (Ingrum, Dep. at 160-61, *confidential – attorneys' eyes* only, 172, *confidential- attorneys' eyes only*)).

f. [redacted] (DX0705, (Ingrum, Dep. at 184- 85, *confidential- attorneys' eyes only*)).

g. [redacted] (DX0705, (Ingrum, Dep. at 185-86, *confidential- attorneys' eyes only*)).

3. Wrap Networks

452. Some companies operating in the Rockford area, including Beech Street, HFN, and PHCS/Multiplan, create provider networks that they market to other MCOs. (DX0197, (Breeden, IHT at 36-37)).

453. An MCO may contract for access to a "wrap network" when they need to provide coverage for employers that have facilities in scattered geographic locations or employees that travel frequently. The MCO negotiates contracts for its own core service area and then contracts for access to a wrap network in any other geographic locations where it requires coverage. (DX0197, (Breeden, IHT at 37)).

454. The companies that create wrap networks typically contract with all providers at minimal discounts. (DX0197, (Breeden, IHT at 37)).

II. PROVIDER/MCO CONTRACTING

A. All Hospitals, For Profit and Not-for-Profit, Must Earn a Margin Above Their Direct and Indirect Costs to Stay in Business

455. [redacted] (DX0183, (Dillon, IHT at 119, *confidential – attorneys' eyes only*)).

456. OSF and RHS treat all individuals needing healthcare services, regardless of their ability to pay. (DX0190, (Sehring, IHT at 100); DX0397 at 014, *confidential*).

457. [redacted] percent of SAMC's patients are charity cases who pay nothing for the care they receive. (DX0394, (Schertz, IHT (9/7/11) at 60-61, *confidential – attorneys' eyes only*)).

458. In 2009 and 2010, RHS spent approximately [redacted] on charity care. (DX0397 at 014, *confidential*).

459. The cost for hospitals to provide healthcare services has risen in recent years. (DX0717, (Walsh, Dep. at 119-21, *confidential – attorneys' eyes only*)).

460. [redacted] is the primary measure of revenue in hospitals. (DX0194, (Baker, IHT at 22-23, *confidential – attorneys' eyes only*)).

461. At the same time, reimbursement for primary care services has been declining. (DX0186, (Ruggles IHT at 96-97)).

462. The Dartmouth Atlas, which tracks cost per Medicare beneficiaries, indicates that costs in Rockford are higher than other communities around Rockford. (DX0714, (Schertz, Dep. at 98, *confidential – attorneys' eyes only*)).

463. Hospitals that cannot close the gap between rising costs and declining revenues may be forced to reduce services. RHS has, for example, considered cutting services to counter lower reimbursement and increased medical expenses projected in the future. (DX0186, (Ruggles IHT at 29-30)).

B. Medicare and Medicaid Reimburse Hospitals Below Their Total Cost of Care, Requiring Cost-Shifting to the MCOs

464. Reimbursements from government payors like Medicare and Medicaid do not cover the cost of providing services and this requires healthcare providers to shift the burden of covering costs to commercial MCOs. (DX0197, (Breeden, IHT at 62); DX0698, (Kaatz, IHT at 20, *confidential*); DX0196, (Schoeplein, IHT at 59-60); DX0712, (Pocklington, Dep. at 102, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 70-72, *confidential – attorneys' eyes only*); DX0234, (Lobe, IHT at 45-46, *confidential*); DX0001 at 005; DX0717, (Walsh, Dep. at 52-54, *confidential – attorneys' eyes only*)).

465. For example, at SAMC, Medicare reimbursed only approximately [redacted] of the costs the hospital incurred to treat Medicare inpatients and outpatients; Medicaid covered only approximately [redacted] of SAMC's costs. (DX0005 at 015-016, *confidential*).

466. At RMH, Medicare reimbursed approximately [redacted] of RMH's patient care costs, while Medicaid reimbursed approximately [redacted] of its costs. (DX0005 at 015-016, *confidential*).

467. Recently, the percentage of patients covered by Medicaid increased dramatically. [redacted]

[redacted] (DX0193, (Stenerson, IHT at 101, *confidential – attorneys' eyes only*)).

468. In 2010, SAMC's combined Medicare and Medicaid share of inpatient discharges was approximately [redacted] while commercially insured patients represented [redacted] of inpatient discharges in 2010 and [redacted] in the half of 2011. (DX0005 at 016-17, *confidential*).

469. At RMH, Medicare and Medicaid represented approximately [redacted] of RMH's patients in 2010 and inpatient discharges of commercially insured patients represented only [redacted] in 2010 and [redacted] in the first half of 2011. (DX0005 at 016, co*nfidential*).

470. Within the past year, the already below-cost Medicaid reimbursement rates have been cut further by the State of Illinois and the State has delayed payments. (DX0698, (Kaatz, IHT at 723-74, *confidential*); DX0197, (Breeden, IHT at 62); DX0001 at 005).

471. The projected future state of public payor reimbursement is sobering. Projections of SAMC's Medicare reimbursements over the [redacted] show that by [redacted] SAMC will be receiving [redacted] in Medicare reimbursement annually. [redacted] (DX0394, (Schertz, IHT (9/7/11) at 65, *confidential – attorneys' eyes only*)).

472. Healthcare providers have typically looked to employers and commercial payors to help subsidize the shortfall from below-cost payments by Medicare and Medicaid. However, commercial payors are strongly resisting additional cost shifting, which further accelerates the need to reduce costs. (DX0001 at 005).

C. Dynamics of Payor/MCO Contracting

1. MCOs Contract with Healthcare Providers to Create Provider Networks

473. MCOs contract with physicians, hospitals, and ancillary providers to create a network. (DX0197, (Breeden, IHT at 140-41)).

474. "In-network" refers to physicians and hospitals that are part of an MCO's network and hold contracts with the MCO. (DX0183, (Dillon, IHT at 16-18)).

475. Members can always use any provider, but they receive the highest level of benefits when using "in-network" healthcare providers. (DX0197, (Breeden, IHT at 140-41); DX0712, (Pocklington, Dep. at 121, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 88); DX0718, (Golias, Dep. at 37-38, *confidential – attorneys' eyes only*)).

476. [redacted] (DX0197, (Breeden, IHT at 34, *confidential – attorneys' eyes only*)).

477. Hospitals expect to serve more patients when they are contracted "in-network" providers than when they are non-contracted "out-of-network" providers. (DX0197, (Breeden, IHT at 141)).

478. OSF's commercial business includes approximately [redacted] contracted business and [redacted] non-contracted business. (DX0197, (Breeden, IHT at 34, *confidential – attorneys' eyes only*)).

2. Common MCO-Provider Contracting Terminology and Provisions

479. Contract negotiations cover a wide variety of rate-related and non-rate terms. Rate-related terms include reimbursement rates themselves as well as provisions like reimbursement methodologies, outlier clauses, chargemaster limiters, carveouts, and escalator clauses. (DX0007 at 004).

480. A "chargemaster" is a list of services that a hospital provides with a corresponding list charge for each service. (Petersen, Tr. 234).

481. A "discount off charges" refers to the effective discount an MCO receives off a chargemaster. (Petersen, Tr. 235).

482. Contracts with MCOs may vary in length. Some are single-year contracts, while others are multi-year contracts. (DX0007 at 008).

483. An "evergreen" contract remains in effect for a specified term, but includes provisions that allow the contract to renew automatically unless one party decides to terminate the agreement. (DX0007 at 008; DX0718, (Golias, Dep. at 24, *confidential – attorneys' eyes only*)).

484. Multi-year agreements typically include rate "escalator" clauses that both sides negotiate as well. (DX0007 at 008).

485. An "outlier" clause is a provision that limits a healthcare provider's exposure to the risk that the cost of a patient's care will exceed the reimbursement provided by fixed pricing methodologies like per diems or DRGs. (DX0007 at 006).

486. Outlier provisions can provide for "first dollar" coverage or "second dollar" coverage. "First dollar coverage" means that if the cost of a patient's care hits the negotiated threshold level, the entire claim reverts to a negotiated percent of charge reimbursement. "Second dollar coverage" means that for patients whose cost of care exceeds the negotiated threshold level, the hospital is paid the negotiated DRG rate for that service plus a negotiated percentage of all charges in excess of the agreed threshold level. (DX0197, (Breeden, IHT at 79)).

3. Reimbursement Methodologies

487. There are several different possible reimbursement methodologies that are used in provider contracts, including DRGs, per diems, fee schedules, case rates, fixed rates, and

discount off charges. (DX0703, (Hall, Dep. at 67, *confidential – attorneys' eyes only*); DX0008 at 003; DX0717, (Walsh, Dep. at 56-57, *confidential – attorneys' eyes only*); DX0005 at 010-011, *confidential*; DX0707, (Lobe, Dep. at 100, *confidential - attorneys' eyes only*); DX0234, (Lobe, IHT at 39, *confidential – attorneys' eyes only*)).

488. Historically, providers were paid by MCOs under a fee-for-service system, meaning each separate service had its own rate, so the more services they provided, the more the providers were paid. (DX0001 at 005-006).

489. [redacted] (DX0703, (Hall, Dep. at 75-76, *confidential – attorneys' eyes only*); DX0005 at 10, *confidential*).

490. [redacted] (DX0005 at 0011, *confidential*).

491. MCOs prefer contracts that utilize fixed-rate reimbursement methodologies because these methodologies provide them pricing predictability. (DX0703, (Hall, Dep. at 75, *confidential – attorneys' eyes only*); (Lobe, Tr. 35)).

492. The fixed-rate DRG methodology is employed in many Rockford hospital contracts. (DX0197, (Breeden, IHT at 60, *confidential – attorneys' eyes only*); DX0712, (Pocklington, Dep. at 95, *confidential – attorneys' eyes only*); DX0557 at 001; DX0699, (Arango, Dep. at 55, *confidential – attorneys' eyes only*)).

a. **Diagnostic Related Groups ("DRG")**

493. The inpatient DRG-based reimbursement methodology relies upon the Diagnostic Related Groups ("DRG") defined by Medicare. (DX0008 at 003).

494. DRGs are categories that group together certain hospital services based on a patient's diagnosis. (DX0007 at 005).

495. There are more than 900 DRGs and these are grouped into approximately 50 medical diagnosis classifications ("MDC"). (DX0197, (Breeden, IHT at 46-47)).

496. CMS assigns each DRG a relative weight that relates to the expected resources required for a patient's treatment. These weights are published and not negotiated by the contracting parties. (DX0712, (Pocklington, Dep. at 95-96, *confidential – attorneys' eyes only*); DX0007 at 005).

497. [redacted] (DX0712, (Pocklington, Dep. at 95, *confidential – attorneys' eyes only*); DX0717, (Walsh, Dep. at 57, *confidential – attorneys' eyes only*)).

b. **Per Diems**

498. Per diems are similar to DRGs in that a base daily reimbursement rate applies for the inpatient admission. (DX0717, (Walsh, Dep. at 57, *confidential- attorneys' eyes only*); DX0008 at 004).

499. However, with per diems, the base daily reimbursement rate is multiplied by the number of days the patient stayed in the hospital in order to determine the total reimbursement due to the hospital. (DX0008 at 004).

c. **Percent of Charge**

500. A percentage-of-charges reimbursement methodology involves a discount that reduces the billed charge for each procedure and for each associated service provided to the patient. (DX0008 at 004).

501. The charges of all services provided are totaled and a negotiated percentage is deducted, resulting in the reimbursement due to a hospital for a patient's treatment. (DX0717, (Walsh, Dep. at 57, confidential – *attorneys' eyes only*); DX0008 at 004).

d. **Each Reimbursement Methodology Apportions Risk Differently**

502. Each of these reimbursement methodologies apportions risk differently between the parties. (DX0007 at 006).

503. For example, the per diem and DRG-based methodologies lock in a certain rate for the entire term of the contract. With these reimbursement methodologies, the hospital assumes the risk that the reimbursement rate will cover the total cost of care; however, if there are cases of unexpected duration or intensity of care, the hospital will be exposed to the risk that the reimbursement rate will not cover the total cost of care. (DX0007 at 006).

504. The per diem and DRG-based methodologies also shift the burden of cost increases to the hospital, which during the term of the contract is unable to change its rates to account for any increases in its costs. (DX0007 at 006).

505. The percentage of charge methodology, on the other hand, may allow a hospital to adjust its chargemaster rate, within the chargemaster limiter, to account for cost increases during the term of the contract. (DX0007 at 006).

506. Because of these risks and uncertainties, other contractual provisions beyond the rates and reimbursement methodologies are very important in the negotiations that hospitals conduct with the MCOs. (DX0007 at 006).

507. For example, hospitals [redacted]

[redacted]. (DX0007 at 006).

508. In some cases, due to the complexity or duration of the case, however, actual charges may exceed the contractually specified DRG or per diem reimbursement rate. (DX0007 at 006).

509. In those cases, rather than requiring the hospital to absorb all of the costs that exceed the DRG or per diem reimbursement limit, the contract may provide that the MCO will pay a certain additional percentage of costs after a certain threshold is reached. (DX0005 at 010-111, *confidential*; DX0007 at 006).

510. MCOs may seek a chargemaster cap or limit for services subject to a percent-of-charge methodology. (DX0007 at 007).

e. **Methodology Trends: Quality- and Value-Based Contracting**

511. Recently, MCOs have also moved to a more risk shifting payment model, following the lead of Medicare and Medicaid. They have done this by focusing on value-based reimbursement models through pay-for-performance programs, shared savings, shared risk programs, and capitated or full provider risk programs. (DX0001 at 006).

512. [redacted] (DX0704, (Hitchcock, Dep. at 159, *confidential – attorneys' eyes only*)).

513. [redacted] (DX0699, (Arango, Dep. at 122, *confidential – attorneys' eyes only*)).

4. MCO Approach to Provider Contracting

514. MCOs negotiate with healthcare providers for the provision of healthcare services on behalf of their fully-insured and self-insured members. (Lobe, Tr. 57; DX0718, (Golias, Dep. at 122-123, *confidential – attorneys' eyes only*)).

a. **MCOs Leverage Access to Data that Providers Cannot Obtain**

515. In preparing for contract negotiations with a hospital provider, MCOs consider a wide range of data, including, for example, their current reimbursement rates for inpatient and outpatient services and the active customer population. MCOs also consider how a contract is performing compared to other hospitals in like areas and its competitors in the area. (DX0703, (Hall, Dep. at 35, *confidential – attorneys' eyes only*, 61, *confidential – attorneys' eyes only*, 63, *confidential – attorneys' eyes only*); (Lobe, Tr. 69-70)).

516. MCOs also consider the number of physicians with admitting privileges to the hospital, the service lines provided by the hospital, the location of the hospital, the hospital's cost structure, and other factors. (Lobe, Tr. 57-58).

517. The data the MCOs review prior to a negotiation can be gathered internally and may include coordination of benefits data. (DX0703, (Hall, Dep. at 58, *confidential – attorneys' eyes only*, 64-65, *confidential – attorneys' eyes only*)).

518. MCOs also may purchase market analyses from external vendors. (DX0703, (Hall, Dep. at 35, *confidential – attorneys' eyes only*)).

519. Much of the data the MCOs review and employ is not accessible to hospital providers. (DX0937, (Breeden, Dep. at 60, *confidential – attorneys' eyes only*)).

520. [redacted] (DX0704, (Hitchcock, Dep. at 108, *confidential – attorneys' eyes only*)).

b. **MCOs Focus on the Total Cost of Healthcare**

521. [redacted]. (DX0712, (Pocklington, Dep. at 105, *confidential – attorneys' eyes only*, 169, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 74, *confidential – attorneys' eyes only*); DX0005 at 018-019, *confidential*).

522. [redacted]. (DX0703, (Hall, Dep. at 70, *confidential – attorneys' eyes only*); DX0719, (Petersen, Dep. at 165, *confidential – attorneys' eyes only*)).

523. [redacted] (DX0703, (Hall, Dep. at 69-70, *confidential – attorneys' eyes only*)).

524. Many MCOs operating in Rockford are publicly held companies that are accountable to shareholders for financial results, but even a non-profit payor like ECOH recognizes that its rates must remain competitive with the rates of other payors for it to remain a viable business. (DX0712, (Pocklington, Dep. at 101, *confidential – attorneys' eyes only*); DX0718, (Golias, Dep. at 175, *confidential – attorneys' eyes only*); DX0703 (Hall, Dep. at 24); DX0707, (Lobe, Dep. at 22, *confidential – attorneys' eyes only*); DX0704, (Hitchcock, Dep. at 9, *confidential – attorneys' eyes only*)).

525. However, MCOs, and their self-insured employers, also recognize that [redacted]. (DX0197, (Breeden, IHT at 39-40); DX0190, (Sehring, IHT at 207, *confidential – attorneys' eyes only*); DX0712, (Pocklington, Dep. at 63, *confidential – attorneys' eyes only*)).

526. Consequently, MCOs are not just focused on rates in negotiations. Many different terms and provisions are negotiated during contract negotiations. (DX0712, (Pocklington, Dep. at 98, *confidential – attorneys' eyes only*, 101, *confidential – attorneys' eyes only*, 103-

04, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 72, *confidential – attorneys' eyes only*); DX0234, (Lobe, IHT at 46-47, *confidential – attorneys' eyes only*); DX0707, (Lobe, Dep. at 98-99, *confidential – attorneys' eyes only*); DX0717, (Walsh, Dep. at 59-60, *confidential – attorneys' eyes only*)).

527. Indeed, United believes that the language of the contract is critically important, because such non-rate terms can impact the total healthcare cost that United has to pay for its members at hospitals. (Lobe, Tr. 34-35, 62).

528. [redacted] (DX0712, (Pocklington, Dep. at 168-69, *confidential – attorneys' eyes only*)).

5. Providers' Approach to MCO Contracting

a. Providers Approach MCO Negotiations with a System Focus

529. Hospital systems like RHS and OSF offer patients an integrated, coordinated system of care and, in negotiations with MCOs, their negotiators focus [redacted]. (DX0183, (Dillon, IHT at 31, 140-41, *confidential – attorneys' eyes only*); DX0197, (Breeden, IHT at 16, 21-22, 153, *confidential – attorneys' eyes only*); DX0712, (Pocklington, Dep. at 103, *confidential – attorneys' eyes only*)).

530. Even though OSF focuses on [redacted] (DX0190, (Sehring, IHT at 212, *confidential – attorneys' eyes only*)).

531. For some MCOs that operate only in the Rockford area, [redacted] does not contract with the MCO for [redacted]. (DX0197, (Breeden, IHT at 133, *confidential – attorneys' eyes only*)).

b. Providers Consider Many Factors When Negotiating With an MCO

532. [redacted] (DX0183, (Dillon, IHT at 50-51, *confidential – attorneys' eyes only*, 54, *confidential – attorneys' eyes only*, 61-63, *confidential – attorneys' eyes only,* 74, *confidential – attorneys' eyes only*, 113, *confidential,* 178); DX0197, (Breeden, IHT at 96, *confidential – attorneys' eyes only,* 97); DX0190, (Sehring, IHT at 208, 209-10, *confidential – attorneys' eyes only*, 213-14, *confidential – attorneys' eyes only*); DX 0705, (Ingrum, Dep. at 68-70, *confidential-attorneys' eyes only*); DX0716, (Seybold, Dep. at 46-47, *confidential*)).

533. [redacted] (DX0183, (Dillon, IHT at 61, *confidential – attorneys' eyes only*, 67-68, *confidential –attorneys' eyes only,* 74, *confidential – attorneys' eyes only*, 170, *confidential – attorneys' eyes only,* 178-79, *confidential – attorneys' eyes only*); DX0197, (Breeden, IHT at 28-29, *confidential – attorneys' eyes only*); DX0712, (Pocklington, Dep. at 121, *confidential – attorneys' eyes only*); DX0716, (Seybold, Dep. at 46-47, *confidential*)).

534. For example, [redacted]. (DX0066 at 003, *confidential attorneys' eyes only*).

535. [redacted] (DX0183, (Dillon, IHT at 140-41, *confidential – attorneys' eyes only*)).

536. [redacted] (DX0183, (Dillon, IHT at 90, *confidential – attorneys' eyes only*); DX0195, (Vayr, IHT at 55-56, *confidential – attorneys' eyes only*, 59, *confidential – attorneys' eyes only*)).

537. [redacted] (DX0183, (Dillon, IHT at 83, *confidential – attorneys' eyes only*, 90, *confidential – attorneys' eyes only*)).

538. [redacted] (DX0183, (Dillon, IHT at 51, *confidential – attorneys' eyes only*, 83, *confidential – attorneys' eyes only*, 114, *confidential – attorneys' eyes only*)).

539. Hospitals may also evaluate [redacted] (DX0195, (Vayr, IHT at 55-56, *confidential – attorneys' eyes only*, 59, *confidential – attorneys' eyes only*)).

540. [redacted] (DX0195, (Vayr, IHT at 54-56, *confidential – attorneys' eyes only*)).

c. Providers Focus on their Own Systems When Negotiating with MCOs

541. Providers focus on their own systems when negotiating with an MCO. Providers do not, for example, seek [redacted] of one commercial MCO [redacted]. Negotiations are based upon the [redacted] (DX0197, (Breeden, IHT at 223-24, *confidential – attorneys' eyes only*)).

542. When negotiating rates with payors, OSF only negotiates rates based upon OSF facilities. OSF does not consider the capacity of non-OSF providers. (DX0197, (Breeden, IHT at 241)).

543. [redacted] with payors, so it is not a consideration for [redacted] in contract negotiations. (DX0937, (Breeden, Dep. at 112, *confidential – attorneys' eyes only*)).

d. Providers Emphasize Long-Term Relationships with MCOs Rather than Short-Term Gains

544. [redacted] (DX0197, (Breeden, IHT at 216-17, *confidential – attorneys' eyes only*); DX0937, (Breeden, Dep. at 125-26, *confidential – attorneys' eyes only*)).

545. [redacted] (DX0937, (Breeden, Dep. at 74, *confidential – attorneys' eyes only*)).

546. Providers must negotiate in good faith to be sure that payors are satisfied with the outcome of negotiations, or they risk losing the MCO as a customer. It is not in a provider's interest to alienate any payor. (Schertz, Tr. 647).

e. Providers are Increasingly Focused on Quality and Outcomes

547. Due to the changes in the industry caused by healthcare reform, providers [redacted]. (DX0705 (Ingrum, Dep. at 68-70, *confidential – attorneys' eyes only*)).

548. As payors and providers head into the future, they are focused on [redacted] coordinating care, and getting people healthy. Hospitals are not pursuing this model for just one payor; rather, they are transitioning patient care into a new model. (DX0937, (Breeden, Dep. at 126, *confidential – attorneys' eyes only*)).

549. As part of its evaluation of MCO contract proposals, OSF considers whether [redacted]. (DX0197, (Breeden, IHT at 67-68, *confidential – attorneys' eyes only*)).

550. [redacted] (DX0197, (Breeden, IHT at 67-68, *confidential – attorneys' eyes only*)).

6. Negotiations are Complex and Involve More than Just Inpatient Hospital Rates

a. Negotiations Between Providers and MCOs are Complex and Time-Consuming

551. [redacted] (DX0183, (Dillon, IHT at 79, *confidential – attorneys' eyes only*)).

552. On the MCO side, the number of products the MCO offers has a direct impact on the complexity of the negotiation. MCOs may offer employers a portfolio of multiple products. (DX0197, (Breeden, IHT at 37-38); (DX0712, (Pocklington, Dep. at 6, *confidential – attorneys' eyes only*)).

553. The various products offered to employers by an MCO may have differences in terms of the network and benefit design that is offered. (DX0197, (Breeden, IHT at 38); DX0712, (Pocklington, Dep. at 39, *confidential – attorneys' eyes only*, 49-50, *confidential – attorneys' eyes only*); DX0234, (Lobe, IHT at 15-17, *confidential – attorneys' eyes only*)).

554. Differences in the network composition and benefit design for each product affect the rates that are negotiated with providers and the premiums that are charged to members. (DX0197, (Breeden, IHT at 37-38)).

555. On the provider side, negotiations with hospital systems operating in different geographies may add complexity. (DX0703, (Hall, Dep. at 60-61, *not confidential*)).

556. [redacted] (DX0197, (Breeden, IHT at 17-18, *confidential – attorneys' eyes only*)).

557. The structure of prior and assigned contracts may also complicate negotiations. [redacted]

[redacted] (DX0197, (Breeden, IHT at 17-18, *confidential – attorneys' eyes only*)).

558. Negotiations take time because both parties exchange multiple proposals. In negotiations with MCOs, hospitals may ask for [redacted]. (DX0197, (Breeden, IHT at 86, *confidential – attorneys' eyes only*)).

559. Likewise, MCOs launch negotiations [redacted]. (DX0197, (Breeden, IHT at 149, *confidential – attorneys' eyes only*)).

560. Both sides expect to negotiate back and forth [redacted]. (DX0197, (Breeden, IHT at 149, *confidential – attorneys' eyes only*)).

561. Ultimately, negotiations may take [redacted] months or longer. (PX0254 at 005, *confidential – attorneys' eyes only*; (DX0703, (Hall, Dep. at 60, *confidential – attorneys' eyes only*)).

b. Negotiations Focus on the Full Range of Provider Services and Cover More than Just Rates

(i) MCOs Contract for the Provider's Full Range of Inpatient, Outpatient and Ancillary Services

562. Most MCOs negotiate for inpatient, outpatient, and ancillary services together as part of the same negotiations with hospital systems. (DX0197, (Breeden, IHT at 21); DX0183, (Dillon, IHT at 85-86, *confidential – attorneys' eyes only*); DX0184, (Seybold, IHT at 215, *confidential – attorneys' eyes only*); DX0712, (Pocklington, Dep. at 103, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 73-74, *confidential – attorneys' eyes only*); DX0707, (Lobe, Dep. at 19-20, *confidential - attorneys' eyes only*); DX0717, (Walsh, Dep. at 49, 51, *confidential – attorneys' eyes only*); DX0716, (Seybold, Dep. at 40, 42, *confidential*, 46-47, *confidential*)).

563. One exception is [redacted] which separates hospital and physician contracting as it does not actually negotiate physician rates with providers; instead it sets a statewide fee schedule that is not subject to negotiation. (DX0197, (Breeden, IHT at 20)).

564. [redacted] also has [redacted] with systems like RHS. (DX0183, (Dillon, IHT at 158, *confidential – attorneys' eyes only,* 173, *confidential – attorneys' eyes only*)).

565. Typically, the majority of a hospital's revenue is generated by outpatient services. Focusing on inpatient services alone is misleading, [redacted]. (DX0699, (Arango, Dep. at 79, *confidential – attorneys' eyes only*)).

566. Negotiations for inpatient services [redacted] (DX0712, (Pocklington, Dep. at 103-04, *confidential – attorneys' eyes only*)).

567. An exception to this practice is [redacted] (DX0712, (Pocklington, Dep. at 103-04, *confidential – attorneys' eyes only*)).

(ii) **Non-Rate Provisions are Critically Important to Evaluating a Contract's Total Financial Impact**

568. The reimbursement rates that MCOs pay to hospital providers are the result of negotiations between the MCOs and the hospital providers. (DX0197, (Breeden, IHT at 15)).

569. However, fair and reasonable rates for the full range of hospital services offered are only one element of the contract that hospitals and the MCOs negotiate. (DX0007 at 008).

570. [redacted] (DX0183, (Dillon, IHT at 79-80, *confidential – attorneys' eyes only*, 122-24, *confidential*); DX0197, (Breeden, IHT at 103, *confidential – attorneys' eyes only*, 148, *confidential – attorneys' eyes only*); DX0190, (Sehring, IHT at 205-06, *confidential – attorneys' eyes only*, 207); DX0712, (Pocklington, Dep. at 98, *confidential – attorneys' eyes only*, 101, *confidential – attorneys' eyes only*, 103-04, *confidential – attorneys' eyes only*); DX0039 at 001-002, *confidential*).

571. Non-rate contractual provisions are [redacted] (DX0183, (Dillon, IHT at 79-80, *confidential – attorneys' eyes only*, 88-89, *confidential – attorneys' eyes only*, 141, *confidential – attorneys' eyes only*, 178-79, *confidential*); DX0197, (Breeden, IHT at 28-29, *confidential – attorneys' eyes only*); DX0716, (Seybold, Dep. at 40, 42, *confidential*, 46-47, *confidential*)).

572. Even if an MCO agreed to pay 100% of billed charges, providers would still have to carefully analyze non-rate provisions because if the contract cannot be enforced or the payor will not pay what it has agreed to, then the rates negotiated are meaningless. (DX0007 at 010).

573. In addition, some non-rate provisions may be very labor intensive to comply with and these terms increase the hospital's cost of providing services. (DX0195, (Vayr, IHT at 70, *confidential – attorneys' eyes only*)).

574. [redacted] (DX0183, (Dillon, IHT at 147, *confidential – attorneys' eyes only*)).

575. Non-rate terms negotiated by MCOs and providers include contract provisions such as, for example, [redacted]

[redacted] (DX0183, (Dillon, 79-80, *confidential – attorneys' eyes only*); DX0197, (Breeden, IHT at 101-03, *confidential – attorneys' eyes only*); DX022 at 013-014, *confidential*; DX0039 at 001-004, *confidential*; DX0707, (Lobe, Dep. at 98-99, *confidential - attorneys' eyes only*,101-03, *confidential - attorneys' eyes only*)).

576. [redacted] (DX0183, (Dillon, IHT at 123-26, *confidential – attorneys' eyes only*); DX0197, (Breeden, IHT at 101-02, *confidential – attorneys' eyes only*); DX0712, (Pocklington, Dep. at 96-98, *confidential – attorneys' eyes only*; 104, *confidential – attorneys' eyes only*, 108, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 76, *confidential – attorneys' eyes only*)).

577. Contracts may also include provisions related to the steering of patients. (DX0183, (Dillon, IHT at 127, *confidential – attorneys' eyes only*); DX0197, (Breeden, IHT at 99-100)).

(a) Quality-Related Contract Provisions Are Increasingly Important

578. MCOs want high quality organizations in their networks. High-quality providers keep members and employers happy. The MCOs want to ensure the provider is safe and providing good care to lessen the risk of lawsuits. (DX0937, (Breeden, Dep. at 71, *confidential – attorneys' eyes only*)).

579. MCOs may look to [redacted]. (DX0190, (Sehring, IHT at 231, 232-33, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 79-80); DX0005 at 013-014, *confidential*).

580. To encourage quality performance, MCOs may also seek to negotiate pay for performance provisions as part of the provider contract. (DX0197, (Breeden, IHT at 40); DX0712, (Pocklington, Dep. at 27, *confidential – attorneys' eyes only*); DX0717 (Walsh, Dep. at 65-66, *confidential – attorneys' eyes only*)).

581. Pay for performance provisions may include [redacted]. (DX0197, (Breeden, IHT at 41-42, *confidential – attorneys' eyes only*)).

582. For example, [redacted] negotiated pay for performance provisions in their last contract that permit increases to inpatient reimbursements of up to [redacted] if certain performance metrics are met. (DX0197, (Breeden, IHT at 41, *confidential – attorneys' eyes only*, 44, *confidential – attorneys' eyes only*); DX0196, (Schoeplein, IHT at 60-61)).

583. [redacted] negotiated pay for performance provisions with [redacted]. (DX0197, (Breeden, IHT at 42, *confidential – attorneys' eyes only*)).

584. Pay-for-performance provisions entail [redacted]. (DX0197, (Breeden, IHT at 40-42, *confidential – attorneys' eyes only*); DX0717, (Walsh, Dep. at 65-66, *confidential – attorneys' eyes only*)).

585. Even once the metrics are identified, the parties must negotiate [redacted]. For example, the parties may agree to [redacted]. (DX0197, (Breeden, IHT at 46)).

(b) **Administrative Provisions Can Impact a Contract's Overall Financial Value**

586. Some non-rate terms may exist outside the formal contract. An MCO provider contract may, for example, incorporate by reference the policies and procedures contained within its provider manual. Such manuals may be subject to change on limited notice. Providers must then determine whether they have the ability to modify their systems, procedures or other workflows accordingly. (DX0183, (Dillon, IHT at 80-81, *confidential – attorneys' eyes only*); DX0007 at 009-010).

587. [redacted] (DX0183, (Dillon, IHT at 80-81, *confidential – attorneys' eyes only*)).

588. Before negotiating with the MCOs, the providers consider whether a particular payor performed under and demonstrated compliance with the administrative provisions of their previous contracts. For example, RHS and SAMC consider whether a MCO ensured timely and accurate processing and payment of claims. (DX0007 at 009).

589. As part of this evaluation, RHS and SAMC consider a variety of metrics [redacted]. (DX0007 at 009; DX0716, (Seybold, Dep. at 40, 42, *confidential*, 46-47, *confidential*)).

590. RHS and SAMC also consider [redacted] (DX0007 at 009; DX0716, (Seybold, Dep. at 40, 42, *confidential*, 46-47, *confidential*)).

(iii) Both MCOs and Providers Are Focused on the Total Financial Impact of their Agreement and Make Trade-Offs Between Provisions to Achieve Desired Results

591. As part of their system-wide approach to negotiations, hospitals like OSF and RHS anticipate making trade-offs that involve the different services for which they are negotiating. For example, hospitals are willing to, and do, [redacted]. (DX0197, (Breeden, IHT at 21-22, *confidential – attorneys' eyes only*)).

592. [redacted] (DX0183, (Dillon, IHT at 87, *confidential – attorneys' eyes only*)).

593. MCOs also expect to make similar trade-offs during negotiations. In negotiations with healthcare providers, MCOs [redacted] (DX0712, (Pocklington, Dep. at 105, *confidential – attorneys' eyes only*); DX0386 at 001, *confidential – attorneys' eyes only*; DX0005 at 010, *confidential*).

594. [redacted] considers the total provider reimbursement to include inpatient, outpatient and the [redacted] In negotiations, [redacted] looks at the total package, [redacted]. (DX0699, (Arango, Dep. at 55-56 and 123, *confidential – attorneys' eyes only*)).

595. [redacted] (DX0699, (Arango, Dep. at 56, *confidential – attorneys' eyes only*)).

596. In [redacted] (DX0197, (Breeden, IHT at 83-84, *confidential – attorneys' eyes only*)).

597. Trade-offs are not limited to balancing in-patient and outpatient rates. [redacted] (DX0719, (Petersen, Dep. at 163, *confidential – attorneys' eyes only*)).

598. MCOs also proactively target rates for certain services in an attempt to encourage shifts in member utilization. For example, they may also focus on [redacted]

[redacted]. (PX0819 at 011, *confidential – attorneys' eyes only*).

599. [redacted] (DX0703, (Hall, Dep. at 78, *confidential – attorneys' eyes only*)).

III. Obtaining Health Insurance in Rockford

A. Employers Provide Health Insurance Benefits to Employees

600. Employers provide health insurance benefits to their employees in order to remain competitive and attract high quality talent. (DX0016 at 003).

601. [redacted] (DX0703, (Hall, Dep. at 122, *confidential – attorneys' eyes only*)).

602. [redacted] of the Rockford area population has employer based health insurance. Some of those employers have purchased health plans that create a [redacted]. (DX0193, (Stenerson, IHT at 212)).

603. [redacted] (DX0703, (Hall, Dep. at 157, *confidential – attorneys' eyes only*)).

604. As health insurance premiums have continued to rise, a number of employers have stopped providing health insurance coverage benefits. (Romano, Tr. 156-57).

605. One Rockford employer explained that she is forced to budget for 33-35% increases every year to account for rising healthcare costs. (DX0016 at 003).

B. Fully-Insured versus Self-Insured Employers

606. Employers have the option to provide fully-insured or self-insured plans to its employees. (Lobe, Tr. 25-26; Olson, Tr. 660-61).

607. For fully-insured employers, the insurer bears the risk for the cost of the healthcare services provided. The employer pays a premium, and if the cost of medical care is above that premium value, the risk is borne by the insurance carrier. (Lobe, Tr. 26; Olson, Tr. 660-61).

608. A self-insured employer bears the risk for the cost of all medical services provided, unless there is a stop-loss provision in the self-insured employer's agreement with a health plan. (Lobe, Tr. 26; Olson, Tr. 660).

609. A self-insured employer essentially operates a small insurance company of its own – it directly pays the costs of healthcare provided to its employees and its employees' dependents. (Olson, Tr. 660, 691).

610. Self-insured employers may also use reinsurance to reduce risk. Reinsurance works as a very high deductible insurance policy, thereby spreading the risk of catastrophic losses to a third-party in exchange for a premium. (Olson, Tr. 661-62).

C. Rockford Acromatic Products

611. Rockford Acromatic Products ("Rockford Acromatic") is an industrial company that makes parts for the automotive aftermarket. (Olson, Tr. 657).

612. It operates two facilities in the Rockford area and employs 88 people. (Olson, Tr. 658).

613. Rockford Acromatic provides health insurance benefits for all employees who have worked for the company for at least ninety days and work over 30 hours a week. (Olson, Tr. 659).

614. All of Rockford Acromatic's employees who are eligible to enroll in the group plan have chosen to enroll. (Olson, Tr. 659).

615. Rockford Acromatic pays the premium for the health insurance coverage of its employees. This means that its employees are not required to pay a weekly or monthly premium for their health insurance. (Olson, Tr. 659-60).

616. Rockford Acromatic's employees are only responsible for the copayment when they receive services at a healthcare provider. (Olson, Tr. 691).

617. Rockford Acromatic has been in Rockford since at least the 1940s. Dean Olson, Rockford Acromatic's Chairman and CEO, has lived in Rockford since 1948. (Olson, Tr. 655-56).

618. Prior to 1993, Rockford Acromatic was a fully insured company that received its health insurance benefits from BCBS. (Olson, Tr. 661).

619. In 1993, Rockford Acromatic explored becoming a self-insured company and joined the predecessor to ECOH, the Rockford Council for Affordable Healthcare, in an attempt to control healthcare costs. (Olson, Tr. 661-63).

620. The CEO and chairman of the board of Rockford Acromatic, Dean Olson, served on the board of ECOH from 1993 to 2011. (Olson, Tr. 665).

621. During that time, Olson and Rockford Acromatic contracted with ECOH to provide healthcare services. ECOH provided healthcare services to Rockford Acromatic that had been purchased from healthcare providers on a discounted fee-for-service basis. These services were purchased by ECOH at a discount from a provider's regularly established price schedule, or charge master. (Olson, Tr. 673-74).

622. Around 2005, Olson became concerned with ECOH's ability to provide a cost-effective healthcare solution to Rockford Acromatic. Olson was primarily disenchanted with the notion of a fee-for-service contract, because a provider could unilaterally raise the rates on their price sheets and therefore raise prices for the employers. (Olson, Tr. 674-75).

623. Accordingly, in 2011, Rockford Acromatic dropped its membership with ECOH and turned to the large national network provider HFN to contract for healthcare services. (Olson, Tr. 676).

624. Under its contract with HFN, Rockford Acromatic continued to be self-insured. (Olson, Tr. 676).

625. The HFN product included all three of the Rockford hospitals. (Olson, Tr. 676).

626. The HFN purchasing agreement was similar to the ECOH purchasing agreements, however, by offering only a discounted fee-for-service contract. (Olson, Tr. 677).

627. Olson then turned to SwedishAmerican to see if his company could enter into a direct relationship with SwedishAmerican to provide coverage for Rockford Aromatic's employees. (Olson, Tr. 677).

628. Rockford Acromatic thought that if it approached a healthcare provider directly, it would induce the provider to offer an alternative pricing methodology that was not a discounted fee-for-service and would be more affordable to Rockford Acromatic. (Olson, Tr. 677-78).

629. SwedishAmerican rejected Rockford Acromatic's offer. (Olson, Tr. 679).

630. Olson and Rockford Acromatic then turned to SAMC's CEO, David Schertz, and asked him whether it would be possible to enter into a one-hospital direct contract with SAMC. (Olson, Tr. 679).

631. Ultimately, Rockford Acromatic joined the OSF Direct Access Network. This network offered a direct, exclusive relationship with SAMC and operated on a reference price for both hospitalization and outpatient services. In other words, Rockford Acromatic was able to develop a plan that pegged the discounted price for hospital services to a third-party list provided by Medicare, instead of a list provided by SAMC. (Olson, Tr. 679-80).

632. Rockford Acromatic's plan with OSF Direct Access Network providers coverage for approximately 68 employees with a total of 150-200 covered lives. (Olson, Tr. 659, 682).

633. Olson testified that if SwedishAmerican offered Rockford Acromatic the same terms that OSF offered, a PPO network with only one hospital provider, that offer would have been acceptable to Olson and Rockford Acromatic. (Olson, Tr. 690).

634. None of Rockford Acromatic's employees dropped their health insurance coverage during the open enrollment period after the company transitioned to OSF's Direct Access Network, and the company received no complaints from its employees about the one-hospital network. Based on modeling, Rockford Acromatic expects to save approximately 20-25 percent on its healthcare costs as a result of moving to OSF's Direct Access Network. (Olson, Tr. 681-82, 687).

635. Under this network, Rockford Acromatic's employees can still go to RMH or SwedishAmerican for out-of-network treatment. (Olson, Tr. 685-86).

D. Components of Healthcare Costs

636. The amount a hospital charges for the treatment of a patient is only one of the costs that is factored into a self-insured employer's or MCO's total medical expense for covering an employee or member. (Lobe, Tr. 73-74).

637. For example, the number of employees and family members covered under an employer's plan can affect the cost of medical coverage, as can the benefit design offering, product type, the demographic mix of the covered members, and the number of inpatient and outpatient visits per episode of care, among others. (Lobe, Tr. 73-74).

E. Factors Employers Consider When Choosing a Health Plan

638. Employers differ on the importance of particular plan benefits – some employers care more about the composition of the physician network or hospital network, while others are concerned with the fees of a network plan. (Capps, Tr. 518; Olson, Tr. 697).

639. Over the past few years as employers have struggled in the Rockford economic environment, employers have become more focused on [redacted] (DX0712, (Pocklington, Dep. at 155, *confidential – attorneys' eyes only*)).

640. In response to continually escalating healthcare costs, many Rockford-area employers are trying to reduce costs by offering health plans with fewer provider choices to their employees, or contracting directly with the hospitals in Rockford for healthcare services. (DX0010 at 002; DX0711, (Olson, Dep. at 62-64)).

641. Employers would be interested in a single-hospital or narrow network if an MCO offered it at a low price. (Petersen, Tr. 303-04; DX0197, (Breeden, IHT at 106)).

642. Employers in Rockford have already adopted such single-network plans in an effort to curb rising healthcare costs while still providing health insurance benefits to their employees. (Olson, Tr. 677-86).

643. The structure to support one hospital provider networks is already in place. For example, OSF offers a Direct Access Network to employers in Rockford, that includes SAMC as the sole in-network hospital provider. (DX0710, (Noether, Dep. at 161)).

644. [redacted] (DX0234, (Lobe, IHT at 48, *confidential – attorneys' eyes only*); DX0707, (Lobe, Dep. at 27-29, *confidential – attorneys' eyes only*, 151-52, *confidential – attorneys' eyes only*)).

645. [redacted] (DX0699, (Arango, Dep. at 127, *confidential – attorneys' eyes only*)).

646. Claims by MCOs that narrow networks are neither viable nor marketable are unsubstantiated, as [redacted] has conducted any market surveys or analyses testing the viability or marketability of a single-provider network in the Rockford area. (DX0712, (Pocklington, Dep. at 89, *confidential – attorneys' eyes only*, 115-16, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 50-53, *confidential – attorneys' eyes only*, 145, *confidential – attorneys' eyes only*); DX0707, (Lobe, Dep. at 151-152); DX0719, (Petersen, Dep. at 109-113)).

F. Employers Rely on MCOs to Negotiate Directly With Hospitals

647. Employers usually do not negotiate directly with hospitals; instead, they generally rely on health insurance companies to establish a plan on their behalf. (DX0711, (Olson, Dep. at 42-43)).

648. Employers also rely on MCOs to develop the network of providers that members can access. (Capps, Tr. 517-18).

G. Employers' Negotiations With MCOs

649. The formation of payor networks reflects a complex bargaining process between payors, providers, and employers. The payor's choice of providers for its network will influence the cost of an employer's health insurance plan, and the value of a hospital to an employer may influence the employer's choice of payor. Likewise, an employer's selection of payor may be based upon the payor's physician network, or the payor hospital's network. (Capps, Tr. 516-17).

IV. PROCEDURAL HISTORY

650. OSF and RHS entered into an Affiliation Agreement on January 31, 2011. (DX0617 at 001).

651. On February 11, 2011, the parties filed their Hart-Scott-Rodino filings with the government. (PX0301 at 001; PX0464 at 002).

652. On March 14, 2011, the FTC issued a "Second Request" for documents and information. (PX0301 at 001).

653. The Illinois Health Facilities and Services Review Board approved the Certificate of Exemption application of OSF and RHS on May 10, 2011. (DX0108 at 001; PX0464 at 005).

654. On November 18, 2011, the FTC filed an administrative complaint alleging that the potential affiliation violates Section 7 of the Clayton Act, as amended 15 U.S.C. § 18. (PX2504 at 0101).

655. On November 18, 2011, the FTC also filed a Complaint for a Temporary Restraining Order and Preliminary Injunction in the United States District Court for the Northern District of Illinois, arguing that a Temporary Restraining Order and Preliminary Injunction were necessary to maintain the *status quo* during the pendency of the FTC's administrative proceeding. (Compl. at 001).

656. The parties conducted limited fact discovery and this Court held a three-day evidentiary hearing on the Plaintiffs' Motion for a Preliminary Injunction on February 1 through February 3, 2012. (Dkt. 042, 062, 063, 170-173).

V. THE AFFILIATION

A. RHS Considered Several Potential Partners Before Seeking an Affiliation with OSF

657. [redacted] (DX0184, (Seybold, IHT at 71-72, *confidential – attorneys' eyes only*); DX0041 at 014, *confidential*).

658. RHS determined that it needed to "actively pursue partnerships to optimize the use of limited resources in a market that cannot afford 3 health systems long-term." (DX0041 at 014).

659. RHS recognized that it needed to seek an affiliation partner given the economic conditions in Rockford and the changing landscape of healthcare. (DX0050 at 035-037, *confidential*).

660. [redacted] (DX0184, (Seybold, IHT at 72, *confidential – attorneys' eyes only*); DX0004 at 007; DX0706, (Kaatz, Dep. at 147-49, *confidential*); DX0698, (Kaatz, IHT at 89-93)).

661. [redacted] (DX0698, (Kaatz, IHT at 90-91, *confidential*); DX0004 at 007).

662. [redacted] (DX0706, (Kaatz, Dep. at 148-49, *confidential*)).

663. In 2008, Advocate approached RHS regarding a potential affiliation. (Kaatz, Tr. 722-23; DX0698, (Kaatz, IHT at 89-90, 93-97, *confidential*); DX0706, (Kaatz, Dep. at 126-27, *confidential*)).

664. In December 2008, RHS signed a Letter of Intent with Advocate and began the due diligence process. (Kaatz, Tr. 723; DX0004 at 006, *confidential*).

665. Ultimately, in the spring of 2009, discussion between RHS and Advocate ended with both sides mutually concluding that an affiliation between the two systems was not in either party's best interests. (DX0698, (Kaatz, IHT at 147, *confidential*); DX0004 at 006).

666. [redacted] (DX0184, (Seybold, IHT at 73-77, *confidential – attorneys' eyes only*); DX0698, (Kaatz, IHT at 93-97, *confidential*); DX0089 at 001; DX0095 at 001, *confidential*).

667. Additionally, RHS was concerned that Advocate was pursuing the affiliation because of a management-directed growth strategy, whereas RHS was motivated by a desire to provide a demonstrated benefit to the community. (Kaatz, Tr. 723-24; DX0698, (Kaatz, IHT at 104-05); DX0095 at 001, *confidential*).

668. [redacted] (DX0698, (Kaatz, IHT 101-02, *confidential*)).

669. [redacted] (DX0706, (Kaatz, Dep. at 127-28, *confidential*, 131-32, *confidential*)).

670. [redacted] (DX0698, (Kaatz, IHT at 106-07, *confidential*); DX0095 at 001, *confidential*).

671. Partnering with an entity outside of Rockford would not change the dynamic in the immediate market where there are three hospital systems all duplicating or triplicating programs. (DX0186, (Ruggles, IHT at 24)).

672. [redacted] (DX0184, (Seybold, IHT at 73, *confidential – attorneys' eyes only*)).

B. Affiliation Discussions Between RHS and OSF

673. In mid-2009, Gary Kaatz met with Dave Schertz, the President and CEO of SAMC. (Schertz, Tr. 592-93; Kaatz, Tr. 725).

674. Schertz asked Kaatz whether RHS would be interested in speaking with OSF regarding a potential affiliation. (Schertz, Tr. 593; Kaatz, Tr. 725; DX0698, (Kaatz, IHT at 148, *confidential*); DX0196, (Schoeplein, IHT at 109-10); DX0189, (Schertz, IHT (7/12/11) at 22-23); DX0129 at 001).

675. [redacted] (DX0698, (Kaatz, IHT at 149-50, *confidential*)).

676. [redacted] (DX0698, (Kaatz, IHT at 151, *confidential*)).

677. However, OSF determined that a joint operating agreement would not fit with their mission, and that it would only be interested in a full integration with RHS. (DX0002 at 008).

678. In particular, OSF did not think a joint operating agreement would be successful at fully achieving the necessary cost savings and efficiencies desired by both entities because of the limitations of those arrangements. (DX0002 at 008).

679. [redacted] (DX0698, (Kaatz, IHT at 151, *confidential*); DX0191, (McGrew, IHT at 105-08); DX0002 at 008).

680. OSF also believed that a joint operating agreement would leave open the door for the agreement to end. Therefore, each party would maintain a desire to keep all services operating so that if the agreement failed, each party could walk away having a general acute care facility. (DX0002 at 008).

681. OSF determined that in order to achieve the cost savings and efficiencies from a true collaboration, a full affiliation was necessary. (DX0002 at 008).

682. RHS agreed to full integration, provided that there would be local governance. (Kaatz, Tr. 725-28).

683. OSF and RHS signed a Letter of Intent in May 2010. (Schertz, Tr. 593; PX0012 at 001, *confidential*).

684. After a period of due diligence, OSF and RHS entered into an affiliation agreement on January 31, 2011. (DX0698, (Kaatz, IHT at 152-53, *confidential*); DX0189, (Schertz, IHT (7/12/11) at 21-23); DX0190, (Sehring, IHT at 89, *confidential – attorneys' eyes*

only); DX0194, (Baker, IHT at 142, *confidential – attorneys' eyes only*); DX0617 at 001).

685. The OSF board of directors voted unanimously in favor of signing the affiliation agreement. (DX0190, (Sehring, IHT at 123-24)).

C. Rationale

1. OSF's Rationale for the Affiliation

686. OSF is very committed to the Rockford area, having had a presence in Rockford since the late 1800s. OSF desired to affiliate in order to maintain its presence in Rockford, maintain SAMC's financial stability, and provide more opportunities for the Rockford community. (DX0191, (McGrew, IHT at 109-10, *confidential – attorneys' eyes only*); DX0002 at 007).

687. OSF believes that the affiliated organization will be more efficient and will be able to provide better access and affordability to healthcare services within the Rockford community. (DX0715, (Schoeplein, Dep. at 48); DX0190, (Sehring, IHT at 78-79)).

688. The transaction was motivated by a desire to consolidate services, gain efficiencies, and reduce costs. (DX0709, (McGrew, Dep. at 34)).

689. With continued reductions in Medicare and Medicaid reimbursement combined with the demands under healthcare reform for improved quality, SAMC will need to cut approximately 20% of its costs. The affiliation is the best solution to begin to reduce costs without diminishing access to care. (Schertz, Tr. 585, 595, 597).

690. Healthcare costs in Rockford are high also because all three Rockford hospitals currently provide the same services for a population that can only support two hospitals. The affiliation would address that problem. (DX0191, (McGrew, IHT at 111)).

691. In addition, OSF felt there were limitations on the potential benefits of entering into a partnership with a hospital system outside of Rockford. (DX0192, (Benink, IHT at 42-45)).

692. By merging with RHS, the affiliated entity will be able to improve access to broader populations, to consolidate programs and services allowing for care of patients at a single site, and to be more efficient in terms of cost structure. (DX0715, (Schoeplein, Dep. at 59 and 129)).

693. Bringing RHS and OSF together will [redacted]. (DX0190, (Sehring, IHT at 93, *confidential – attorneys' eyes only*)).

694. An affiliation between RHS and OSF also allow the combined entity to improve quality and to build centers of excellence. (DX0394, (Schertz, IHT (9/7/11) at 91)).

695. The affiliation will also increase SAMC's ability to attract and recruit subspecialty physicians in Rockford. (DX0191, (McGrew, IHT at 75-76, *confidential – attorneys' eyes only*)).

2. RHS' Rationale for the Affiliation

696. RHS entered into the affiliation in order to benefit the Rockford community by creating the opportunity to reduce costs and clinically integrate and enhance services that could be provided locally in Rockford. (DX0004 at 006).

697. RHS determined that it needed major changes in how its organization was structured in order to survive and thrive in the future. (DX0186, (Ruggles, IHT at 18)).

698. [redacted] (DX0698, (Kaatz, IHT at 152, *confidential*, 153-55, *confidential*)).

699. RHS believes there is a lot of common interest and common good that can result from the affiliation including: quality improvement, additional clinical programs, improved clinical programs, and reduced costs generated by the efficiencies of consolidating programs and back office infrastructure. (DX0186, (Ruggles, IHT at 17, 20-21); DX0698, (Kaatz, IHT at 157, *confidential*)).

700. RHS was also concerned that [redacted] and that it [redacted]. (DX0186, (Ruggles, IHT at 25-30); DX0050 at 0037, *confidential*; DX0710, (Noether, Dep. at 112, *confidential*)).

701. RHS does not have sufficient resources to [redacted] on its own. (DX0186, (Ruggles, IHT at 25-26, 42); DX0050 at 037, *confidential*); DX0710, (Noether, Dep. at 112, *confidential*)).

702. This affiliation will provide access to capital that RHS requires to build programs and increase volume. (DX0186, (Ruggles, IHT at 21-22); DX0698, (Kaatz, IHT at 153-54, *confidential*)).

D. Terms of the Affiliation Agreement

703. Under the terms of the affiliation agreement, RHS will become a subsidiary of OSF, by establishing OSF as the sole corporate member of RHS at closing. (DX0617 at 011; DX0190, (Sehring, IHT at 138-40); DX0698, (Kaatz, IHT at 164, *confidential*)).

704. The combined entity will be known as OSF Northern Region. (DX0617 at 012).

705. The affiliation agreement defines the Northern Region as the "geographic area bounded by the Fox River and Illinois Route 31 on the east, the Mississippi River on the west, the Wisconsin border on the north, and Interstate 80 on the South. It also includes the

Wisconsin counties of Green, Grant, Lafayette, Rock and Walworth. (DX0190, (Sehring, IHT at 126); DX0189, (Schertz, IHT (7/12/11) at 14-17)).

706. The Northern Region will include the ambulatory facilities of Rock Cut, Guilford Square, and Southridge. It also includes RMH and SAMC. (DX0190, (Sehring, IHT at 129-30)).

707. As part of the affiliation agreement, OSF committed to creating a fiduciary board, the OSF Northern Region Board, to govern the Northern Region. It will be responsible for running the Northern Region, granting physician privileges for RMH and SAMC, handling the budget process for the Northern Region, and approving large contracts for the Northern Region. (DX0184, (Seybold, IHT at 55-56, *confidential – attorneys' eyes only*); DX0698, (Kaatz, IHT at 162-67, *confidential*); DX0196, (Schoeplein, IHT at 153); DX0189, (Schertz, IHT (7/12/11) at 14-17)).

708. The OSF Northern Region board will be a self-governed community board. (Kaatz, Tr. 727).

709. The affiliation agreement requires that seven of the board members of the OSF Northern Region board be residents of the Rockford community. The balance of board members will be comprised of two representatives appointed by OSF, two representatives appointed by Rockford Memorial Development Foundation, and four locally-based physicians. (DX0184, (Seybold, IHT at 55-57, *confidential – attorneys' eyes only*); DX0190, (Sehring, IHT at 143-44, *confidential – attorneys' eyes only*)).

710. OSF has committed to provide a minimum of $35 million per year for eight years in capital investment to the OSF Northern Region as part of the Affiliation Agreement. (DX0184, (Seybold, IHT at 100-01, *confidential – attorneys' eyes only*); DX0698, (Kaatz, IHT at 165-66, *confidential*)).

711. The OSF Northern Region Board will determine how the $35 million per year will be spent. However, as part of the agreement, priority will be given to the needs of RHS' Rockton Avenue campus and SAMC's State Street campus. (DX0190, (Sehring, IHT at 152, 162-63, *confidential – attorneys' eyes only*)).

712. [redacted] (DX0190, (Sehring, IHT at 173, *confidential – attorneys' eyes only*)).

713. [redacted] (DX0190, (Sehring, IHT at 150, *confidential – attorneys' eyes only*)).

714. OSF will also retire $100 million of RHS' debt as part of the transaction. (DX0189, (Schertz, IHT (7/12/11) at 18-19)).

715. Under the terms of the affiliation agreement, OSF has committed to maintain RMH as a general acute care hospital for at least ten years. (DX0184, (Seybold, IHT at 103, *confidential – attorneys' eyes only*); DX0190, (Sehring, IHT at 169, 170, *confidential – attorneys' eyes only* , 171, 172, *confidential – attorneys' eyes only*)).

716. After five years, the OSF Northern Region board could choose to cease operating the RMH campus as a general acute care hospital only if approved by 75 percent of the OSF Northern Region board. (DX0189, (Schertz, IHT (7/12/11) at 19)).

717. As part of the affiliation agreement, SAMC and RHS must also maintain current medical staff status and privileges. (DX0190, (Sehring, IHT at 185)).

718. Post-closing, Gary Kaatz, the current CEO of RHS, will serve as CEO of the OSF Northern Region. (Kaatz, Tr. 729; Schertz, Tr. 598; DX0706, (Kaatz, Dep. at 5, 12)).

719. David Schertz will serve as the Chief Operating Officer for OSF Northern Region. (Schertz, Tr. 597-98; DX0714, (Schertz, Dep. at 6, *confidential – attorneys' eyes only*)).

720. After the parties merge, the OSF Northern region board will negotiate local managed care contracts for both RMH and SAMC. OSF would negotiate national managed care contracts on behalf of both RMH and SAMC. (DX0190, (Sehring, IHT at 188)).

721. The OSF Northern Region will be operated by RHS pursuant to a management agreement. (DX0617 at 013).

VI. THE RELEVANT PRODUCT MARKET

722. The FTC alleges two relevant product markets in its complaint. (Compl at 012).

723. The FTC defines "general acute care inpatient services" as a broad cluster of medical and surgical diagnostic and treatment services that include an overnight stay, including emergency services, internal medical services, and surgical procedures. (Compl. at 012).

724. The FTC defines "primary care physicians" as physicians practicing internal medicine, family medicine and general practice. The FTC excludes pediatrics and OB/GYN from this definition. (Compl. at 013).

725. [redacted] (DX0005 at 013, *confidential*).

726. MCOs do not universally use the term "general acute care inpatient services" in the ordinary course of their business and do not agree on a single definition of the term. (DX0712, (Pocklington, Dep. at 64-65); DX0703, (Hall, Dep. at 42-43, *confidential*)).

727. For example, [redacted] do not use the term "general acute care inpatient services" [redacted]. (DX0712, (Pocklington, Dep. at 64, *confidential – attorneys' eyes only*)).

728. [redacted] (DX0712, (Pocklington, Dep. at 183-84, *confidential – attorneys' eyes only*)).

729. In contrast, [redacted] considers "general acute care inpatient services" to cover [redacted] (DX0703, (Hall, Dep. at 43); PX0251 at 002, *confidential – attorneys' eyes only*).

730. MCOs also have differing definitions of the term "primary care physician." (DX0712, (Pocklington, Dep. at 17-18, *confidential – attorneys' eyes only*); DX0703, (Hall, Dep. at 114-15)).

731. [redacted] (DX0712, (Pocklington, Dep. at 17-18, *confidential – attorneys' eyes only*)).

VII. THE RELEVANT GEOGRAPHIC MARKET

732. In its complaint, the Plaintiff alleged that the relevant geographic market is the geographic area encompassing all of Winnebago County, Boone County, the northeast portion of Ogle County and single zip codes in McHenry, DeKalb and Stephenson counties. (Compl. at 013).

733. In 1989, this Court in *United States v. Rockford Memorial Corporation* also defines the relevant geographic market the same way. (Compl. at 013; DX0935 at 0011-29).

734. OSF defines its primary service area as the geographic region from which it receives [redacted] of hospital admissions. OSF's tertiary service area encompasses the primary service area, the secondary service area, and stretches as far south as [redacted] miles away. (DX0193, (Stenerson, IHT at 236, *confidential – attorneys' eyes only*); DX0189, (Schertz, IHT (7/12/11) at 194)).

735. RHS defines its primary service areas as the counties of Winnebago, Boone and Ogle. Approximately [redacted] of total discharges, irrespective of service line, come from individuals living in these three counties. (DX0184, (Seybold, IHT at 192); DX0185, (Schrieber, IHT at 19, *confidential – attorneys' eyes only*); (DX0184, (Seybold, IHT at 192); DX0698, (Kaatz, IHT at 14, *confidential*)).

736. [redacted] (DX0714, (Schertz, Dep. at 11-12, *confidential – attorneys' eyes only*)).

737. RHS and SAMC compete with Chicago and Madison hospitals and health systems for [redacted] services. (Schertz, Tr. 571-72; DX0193, (Stenerson, IHT at 205-06, *confidential – attorneys' eyes only*); DX0191, (McGrew, IHT at 49-51); DX0706, (Kaatz, Dep. at 97-100)).

738. SAMC competes with RHS and SwedishAmerican, as well as with the community hospitals in Sterling, Dixon, and DeKalb for [redacted]

[redacted] services. (DX0193, (Stenerson, IHT at 205-06, *confidential – attorneys' eyes only*); DX0191, (McGrew, IHT at 49-51)).

739. [redacted] (DX0193, (Stenerson, IHT at 32, *confidential – attorneys' eyes only*)).

740. Some of the smaller community hospitals like Kishwaukee, DeKalb, and Rochelle are expanding the services they provide and are beginning to compete with the services that SAMC and RHS provide. (Schertz, Tr. 575-77; DX0191, (McGrew, IHT at 50-51); DX0003 at 005, *confidential*).

741. Specifically, Kishwaukee is growing its clinical capabilities each year, and is approaching some of the same level of service offered at the three Rockford hospitals. (DX0196, (Schoeplein, IHT at 216)).

VIII. THE PROPOSED TRANSACTION WILL NOT SUBSTANTIALLY LESSEN COMPETITION

A. Market Shares and Concentration Are Unreliable Indicators of Anticompetitive Effects

742. Not all transactions where the market goes from three firms to two firms post-affiliation are anticompetitive. (Capps, Tr. 452).

743. More than just the post-affiliation market share must be considered to determine whether an affiliation is anticompetitive. (DX0701, (Capps, Dep. at 79)).

1. HHI Calculations Are Misleading in Concentrated Markets

744. Under the 2010 Horizontal Merger Guidelines, an HHI of 2500 indicates a highly concentrated market. The HHI for a market of four equally sized firms is 2500. (Capps, Tr. 524-25).

745. HHIs can also be highly concentrated in a market with more than four firms if one or more of those firms has a higher market share and one or more of them has a lower market share. (Capps, Tr. 525).

746. Hospital ownership in the majority of MSAs in the United States is characterized as "highly concentrated," as they have HHIs in excess of 2500. (Capps, Tr. 525).

747. In 2009, hospital ownership was highly concentrated in approximately 80% of MSAs. (Capps, Tr. 526).

748. As of 2009, one in ten metropolitan areas had a single hospital. (Capps, Tr. 526).

749. Seventy percent of MSAs in the country are highly concentrated with respect to hospital ownership and also have two or more hospitals. (Capps, Tr. 527).

750. Only two in ten MSAs were moderately concentrated or unconcentrated in 2009. (Capps, Tr. 527).

751. In 2009, less than ten percent of the MSAs in the country were in the unconcentrated range with respect to hospital ownership. (Capps, Tr. 530).

752. For any merger of two hospitals in the 70% of MSAs in the highly concentrated range for hospital ownership, that merger would result in a presumptive violation of the Merger Guidelines based on HHI thresholds, assuming the market was defined as the MSA. (Capps, Tr. 531).

753. Four in ten MSAs in the country have HHIs in excess of 5000 with respect to hospital ownership. (Capps, Tr. 532).

754. Three in ten MSAs have two to four equally sized hospital systems with an HHI between 2500 and 5000. (Capps, Tr. 533-34).

755. Therefore, 30% of all MSAs in the United States are structured similar to Rockford with a pre-merger HHI between 2500-5000 with respect to hospital ownership. (Capps, Tr. 533-34).

2. Evidence Shows that Rates Are Unlikely to be Higher in Three-Hospital Communities as Opposed to Two-Hospital Communities

756. Dr. Capps has not studied whether rates for general acute care inpatient services have been rising faster in markets with two hospitals than they have in markets with three hospitals. (Capps, Tr. 457).

757. Dr. Capps did not conduct an economic analysis of the operations of hospitals in any city outside of Rockford. Nor did he compare service lines in hospitals in cities other than Rockford. (Capps, Tr. 459).

758. On the other hand, Dr. Noether did conduct an economic analysis of hospitals in similarly sized towns. She found that [redacted]. (DX0364 at 013, *confidential – attorneys' eyes only*).

759. Dr. Noether also found that for MSAs the size of Rockford, [redacted]. (DX0364 at 015-016, *confidential – attorneys' eyes only*).

760. Dr. Noether also found that mean operating margins for hospitals in MSAs comparable in size to Rockford were [redacted] and median operating margins were [redacted]. (DX0364 at 016, *confidential – attorneys' eyes only*).

761. MCOs have been able to negotiate competitive rates in surrounding areas where fewer than three hospitals compete. (DX0712, (Pocklington, Dep. at 117, *confidential – attorneys' eyes only*)).

762. The record verifies this. [redacted]. (DX0705, (Ingrum, Dep. at 138-39, *confidential- attorneys' eyes only*)).

763. [redacted] (DX0705, (Ingrum, Dep. 127, *confidential- attorneys' eyes only*)).

764. [redacted] (DX0705, (Ingrum, Dep. at 147, *confidential- attorneys' eyes only*)).

765. [redacted] (DX0705, (Ingrum, Dep. at 149-50, *confidential- attorneys' eyes only*)).

766. [redacted] (DX0705, (Ingrum, Dep. at 160-63, *confidential- attorneys' eyes only*)).

767. [redacted] (DX0705, (Ingrum, Dep. at 164-65, *confidential- attorneys' eyes only*)).

768. [redacted] (DX0705, (Ingrum, Dep. at 172, *confidential- attorneys' eyes only*)).

769. [redacted] (DX0712, (Pocklington, Dep. at 116-17, *confidential – attorneys' eyes only*)).

770. [redacted] (DX0712, (Pocklington, Dep. at 174, *confidential – attorneys' eyes only*)).

B. RHS and OSF Are Not Each Other's Closest Competitors

771. Residents of Rockford do not perceive RMH and SAMC to be particularly close substitutes. [redacted] (DX0005 at 018, *confidential*).

772. [redacted]

[redacted] (DX0005 at 018, *confidential*).

773. RHS, with the only Level 3 Neonatal Intensive Care Unit, attracted [redacted] of obstetric cases in 2010 across the three hospitals, while SAMC handled about [redacted] of the cases. SwedishAmerican, with just a level 2 NICU, handled [redacted] of all obstetric cases in 2010. (DX0005 at 019, *confidential*).

774. For neonatology, RHS handled [redacted] of all cases in Rockford in 2010, while OSF only treated [redacted]. (DX0005 at 019, *confidential*).

775. Conversely, SAMC is better known for tertiary services. (DX0195, (Vayr, IHT at 30)).

776. In 2010, SAMC provided [redacted] of the cardiac surgery cases performed in Rockford, relative to only [redacted] by RHS. SwedishAmerican, which recently opened a state-of-the-art heart hospital, provided the remaining [redacted]. (DX0005 at 019, *confidential*).

777. [redacted] (DX0005 at 021-022, *confidential*; DX0364 at 024, *confidential – attorneys' eyes only*).

778. From a geographic perspective as well, [redacted]. RHS is located on the west side of the Rock River and draws many of its patients from west of the Rock River. Conversely, SAMC draws most of its patients from the eastern part of Rockford, where it is located. SwedishAmerican, located in between RHS and SAMC near the center of Rockford, draws patients from the entire greater Rockford area. (DX0005 at 019, *confidential*).

779. SAMC and RHS obtained the [redacted]. Thus, there are almost no zip codes where SAMC and RHS are the first and second choice hospitals. (DX0005 at 019-020, *confidential*).

780. Rockford-area physicians tend to practice exclusively at a single hospital, regardless of whether they are employed by the hospital or practice independently. However, among the Rockford-area physicians for whom admitting patterns is available, those physicians with privileges at two Rockford hospitals tend to [redacted]. (DX0005 at 020, *confidential*).

1. A Diversion Analysis Confirms that SwedishAmerican Is a Closer Competitor to Both RMH and SAMC

781. The diversion analysis conducted by the FTC's economist, Dr. Capps, confirms that SwedishAmerican is a closer substitute to both RMH and SAMC than RMH and SAMC are to each other. (Capps, Tr. 384).

782. [redacted] (PX2501 at 095, *confidential – attorneys' eyes only*).

783. [redacted] (PX2501 at 097, *confidential – attorneys' eyes only*).

784. [redacted] (PX2501 at 097, *confidential – attorneys' eyes only*).

C. The Rockford Market Can No Longer Support Three Independent Hospital Systems

785. Rockford cannot sustain three independent high quality hospitals long-term. (DX0196, (Schoeplein, IHT at 93); DX0709, (McGrew, Dep. at 32-33)).

786. [redacted] (DX 0705, (Ingrum, Dep. at 115, *confidential – attorneys' eyes only*, 117, *confidential – attorneys' eyes only*, 121, *confidential- attorneys' eyes only*)).

787. [redacted] (DX 0705, (Ingrum, Dep. at 117-18, *confidential- attorneys' eyes only*)).

788. [redacted] (DX0705, (Ingrum, Dep. at 121, 158, *confidential- attorneys' eyes only*)).

789. Providers, employers, and MCOs alike know that Rockford is unable to support three hospitals, as they understand the changing demographics and socioeconomic status of the Rockford population. (DX0016 at 003; DX0017 at 002).

1. Rockford Suffers from Excess Capacity and Overbedding

790. Not surprisingly, with the slow population growth and the deteriorating economy in Rockford, none of the Rockford hospitals are operating at capacity. (DX0003 at 005).

791. No hospital in Rockford currently staffs all of its licensed beds, and occupancy rates range from [redacted] based on staffed beds alone. (DX0005 at 009, *confidential*).

792. [redacted] has excess capacity, and is running at about [redacted] of inpatient capacity. (DX0717, (Walsh, Dep. At 82, confidential – attorneys' eyes only)).

793. The Illinois Department of Public Health reports that between the three hospital systems in Rockford, there will be an excess of medical-surgical and pediatric beds in 2018 based on a slightly larger population than what exists today. (Schertz, Tr. 578-79; DX0694 at 068).

794. On the basis of bed count, Rockford looks more like a one- or two-hospital system MSA than it does like a three- or four-system MSA. (DX0710, (Noether, Dep. at 125-26)).

795. [redacted] (DX0189, (Schertz, IHT (7/12/11) at 114-15, *confidential – attorneys' eyes only*)).

2. Underutilized Services

796. There are several underutilized services at SAMC and RHS. For example, [redacted]. (DX0012 at 057, *confidential*).

797. RMH currently has a da Vinci robot, which performs robot-assisted laparoscopic, thoracoscopic, and endoscopic surgery for the treatment of various cancers, kidney disorders, gynecological maladies, and coronary artery disease. In 2011, the da Vinci robot operated at a capacity utilization rate of [redacted]. (DX0012 at 060, *confidential*).

798. [redacted] (DX0012 at 060, *confidential*).

799. If the affiliation is not consummated, [redacted]. (DX0012 at 060, *confidential*).

800. Currently, SAMC has [redacted] available excess capacity for its PET/CT machines. Post-affiliation, the available excess capacity will support both RHS and SAMC's use of the machine. (DX0012 at 062, *confidential*).

3. The Three Hospitals in Rockford Provide Duplicative Services

801. [redacted] (DX0184, (Seybold, IHT at 235, *confidential – attorneys' eyes only*); DX0194, (Baker, IHT at 45, 109, *confidential*, 133, *confidential*); DX0698, (Kaatz, IHT at 106-19, *confidential*); DX0189, (Schertz, IHT (7/12/11) at 101-04, *confidential – attorneys' eyes only*)).

802. For example, Rockford is home to three open heart surgery programs, two Level I trauma centers, three OB programs, multiple MRI/CT scanners, infusion centers, cancer

programs, and three general pediatric units. (DX0698, (Kaatz, IHT at 107-08, 118-19 *confidential*); DX0196, (Schoeplein, IHT at 91-92)).

803. In addition, OSF and RHS each have a helicopter program with transport teams, nurses, and doctors with sufficient excess capacity resulting in the need for only one helicopter program for both hospitals. (DX0366 at 017-18, *confidential*; DX0196, (Schoeplein, IHT at 145)).

804. [redacted] (DX0709, (McGrew, Dep. at 150-154, *confidential- attorneys' eyes only*); DX0394, (Schertz, IHT (9/7/11) at 29)).

4. Changing Demographics

805. At its highest, unemployment in Rockford was in excess of 20% during the recession. (DX0190, (Sehring, IHT at 96, *confidential – attorneys' eyes only*)).

806. The unemployment rate in Rockford is currently between 12-13%, a rate considerably higher than the national and state average and highest in Illinois. (DX0190, (Sehring, IHT at 97); DX0191, (McGrew, IHT at 74)).

807. The declining Rockford economy and increase in unemployment [redacted]. Some employers have [redacted]. As a result, the Rockford hospitals have seen more and more charity care patients. (DX0191, (McGrew, IHT at 74); DX0717, (Walsh, Dep. at 66-67, 111-12, 125-27, *confidential – attorneys' eyes only*)).

808. [redacted] (DX0190, (Sehring, IHT at 96, *confidential – attorneys' eyes only*); Kaatz, Tr. 718).

809. [redacted] (DX0712, (Pocklington, Dep. at 45-46, *confidential – attorneys' eyes only*)).

810. While patients may seek to avoid some elective work if they do not have health insurance, patients without insurance will still go to a hospital if they are sick or in an accident. (DX0190, (Sehring, IHT at 98)).

811. Not all individuals who lose their jobs and insurance transition to Medicaid. If they do not qualify, they become self-pay and are responsible for their own bills. Because of the high cost of care, these self-pay individuals typically tend to become charity care. (DX0190, (Sehring, IHT at 99-100)).

D. The Affiliation Will Not Enable OSF Northern Region to Raise Rates Above Competitive Levels

812. The Rockford hospital market [redacted]. (DX0561 at 002, *confidential – attorneys' eyes only*).

813. Hospitals compete for patients on quality, range of service, level of technological innovation, and inpatient amenities. (Capps, Tr. 552; DX0005 at 035, *confidential*).

1. SwedishAmerican Has the Incentive and Ability to Respond Competitively

814. After the consolidation of SAMC and RHS, SwedishAmerican will remain a strong competitor, able effectively to undermine any anti-competitive price increase or quality decrease that the combined entity attempted. (DX0005 at 020, *confidential*).

815. [redacted] (PX0289 at 009, *confidential – attorneys' eyes only*).

816. [redacted] (PX0289 at 009, *confidential – attorneys' eyes only*).

817. Dr. Capps, Plaintiff's expert, admits that SwedishAmerican is a very strong competitor. (Capps, Tr. 376).

818. SwedishAmerican is the market leader, and half the market has already decided that they are the hospital of choice. (DX0394, (Schertz, (9/7/11) at 134)).

819. SwedishAmerican is currently the largest facility in the Rockford area based on inpatient discharges, inpatient beds, net patient revenue, and primary care physician count. (DX0005 at 020-021, *confidential*).

820. [redacted] (DX0717, (Walsh, Dep. at 36, *confidential – attorneys' eyes only*); DX0241, *confidential – attorneys' eyes only*).

821. [redacted] (DX0710, (Noether, Dep. at 145, *confidential – attorneys' eyes only*)).

822. In 2010, SwedishAmerican was the top provider for the [redacted]

[redacted] (DX0005 at 021, *confidential*).

823. SwedishAmerican was also the top provider for [redacted] service lines in Rockford in 2010, which represented nearly [redacted] of all discharges. (DX0005 at 021-022, *confidential*).

824. In 2005, SwedishAmerican [redacted] (DX0005 at 021-22, *confidential*).

825. [redacted] (DX0717, (Walsh, Dep. at 38, *confidential – attorneys' eyes only*)).

826. In 2006, SwedishAmerican opened a new $50 million Heart Hospital. (DX0005 at 022, *confidential*).

827. [redacted] (DX0005 at 007, *confidential*).

828. With its Belvidere facility, SwedishAmerican now operates the furthest east emergency department, when SAMC used to hold that title. (Schertz, Tr. 574).

829. According to state regulation, ambulances are required to transport a patient in medical distress to the nearest emergency room. Once the patient is stabilized, this regulation no longer applies and the patient can be transferred to another facility with a higher level of care. Therefore, before SwedishAmerican opened the Belvidere facility, SAMC would receive those patients coming from the east. But since the opening of the Belvidere facility, SAMC has experienced a significant decrease of approximately 350 admissions of Boone County residents . (Schertz, Tr. 573-74).

830. In March of 2010, SwedishAmerican signed an affiliation with UW-Madison. (DX0717, (Walsh, Dep. at 137-38, *confidential – attorneys' eyes only*); DX0005 at 026, *confidential*).

831. [redacted] (DX0717, (Walsh, Dep. at 78-80, 138-39, 153-54, *confidential – attorneys' eyes only*)).

832. [redacted] (DX0717, (Walsh, Dep. at 91, *confidential – attorneys' eyes only*)).

833. [redacted] (DX0717, (Walsh, Dep. at 166-67, *confidential – attorneys' eyes only*)).

834. RHS believes that SwedishAmerican's affiliation with UW-Madison will enhance the competition between SwedishAmerican and RHS because the affiliation will allow SwedishAmerican to provide services that RHS is presently unable to provide. In addition, UW-Madison's reputation as an academic medical center will help SwedishAmerican differentiate itself in the market. (Kaatz, Tr. 716-17).

835. SwedishAmerican enjoys the largest single reimbursement per bed in the State of Illinois, which totals about $17 million per year. SAMC, by contrast, gets slightly under $1 million. (DX0394, (Schertz, IHT (9/7/11) at 130)).

836. SwedishAmerican has a relationship with the University of Illinois College of Medicine in Rockford for a family practice residency program, allowing them to have a much closer working relationship with future primary care doctors to be recruited from that program. (Schertz, Tr. 575).

837. SwedishAmerican has also utilized its relationship with Crusader Clinic, a federally-sponsored primary care facility, to its advantage. The majority of the Crusader babies are delivered at SwedishAmerican. (Schertz, Tr. 575).

2. Large MCOs Have Market Leverage and Substantial Bargaining Power to Resist Any Attempts to Increase Prices Above Competitive Levels

838. MCOs have considerable market power, influence, and bargaining leverage when negotiating with hospital providers. (DX0013 at 003; DX0716, (Seybold, Dep. 37, *confidential*); DX0098 at 001, *confidential;* DX0372 at 001).

839. [redacted] (DX0704, (Hitchcock, Dep. at 16, *confidential – attorneys' eyes only*)).

840. Even the smaller MCOs have considerable leverage against providers. For example, [redacted] (DX0101 at 001-002, *confidential – attorneys' eyes only*).

841. MCOs also have considerable leverage when implementing contracts. For example, [redacted]. (DX0038 at 001, *confidential*).

842. Providers cannot take a tough negotiating stance without fear of reprisal from MCOs. For example, when [redacted] (DX0080 at 001, *confidential*).

843. BCBS generally negotiates more favorable rates because BCBS is a larger organization and can bring more lives to a specific provider and as such can demand a lower rate. (DX0394, (Schertz, IHT (9/7/11) at 26-27)).

844. Hospitals in Rockford need the large MCOs more than the MCOs need them. For example, BCBS could drop SAMC from its network and still be marketable within the primary service area. (DX0394, (Schertz, IHT (9/7/11) at 123-24)).

3. RHS and SAMC's Proposed Stipulation Alleviates Concerns that MCOs or SwedishAmerican Might Have about the Transaction

845. RHS and OSF have agreed that upon consummation of the affiliation, OSF Northern Region will not require any MCO to exclude SwedishAmerican from its provider network as a condition to contract with OSF Northern Region. (Schertz, Tr. 601; Kaatz, Tr. 742).

846. RHS and OSF also agreed that following consummation of the affiliation of OSF and RHS, neither OSF nor OSF Northern Region will require a MCO to contract with OSF on a system wide basis or any other individual OSF hospital outside of OSF Northern Region as a condition for contracting with the Northern Region hospitals. (Schertz, Tr. 601; Kaatz, Tr. 742).

847. This stipulation will allow health plans to contract directly with the Northern Region without having to contract with the rest of the OSF system. (Schertz, Tr. 602).

848. As a result of the stipulation, following the affiliation between OSF and RHS, both United and PersonalCare could offer employers in Rockford a choice between a plan that included SwedishAmerican as the only provider at one rate, a different plan that included OSF Northern Region at rates negotiated with that entity, and a third plan that included both SwedishAmerican and OSF Northern Region at rates it negotiated with both entities. (Lobe, Tr. 77-79; Petersen, Tr. 316-18).

849. As Lobe testified, this stipulation alleviates United's concerns about the potential ability of OSF Northern Region to force the exclusion of SwedishAmerican from United's network in Rockford. (Lobe, Tr. 56; DX0944, (Petersen, Dep. (1/31/12/) at 258-59, *confidential*).

4. MCOs Can Offer a Viable Network Without OSF or RHS

a. Narrow Hospital Networks Are Growing in Popularity

850. Narrow provider networks are becoming more popular amid current pressures to control healthcare costs. (DX0364 at 002, *confidential – attorneys' eyes only*).

851. A PPO network with only one hospital is, and would be, marketable to employers and their employees because of their lower costs. (DX0009 at 002; DX0010 at 003).

852. A PPO-model plan with only one Rockford in-network hospital is a practical and marketable alternative for Rockford area employers and their employees. Such a model will lessen the financial stress of providing health insurance to local companies, helping to ensure their continued financial stability. (DX0010 at 003; DX0018 at 003).

853. Single hospital networks are especially attractive to employers who are price-sensitive and looking for low-cost options in healthcare benefits. (DX0197, (Breeden, IHT at 106-07); DX0710, (Noether, Dep. at 163)).

854. Single-hospital networks are less expensive to employers than a two-hospital network. (Petersen, Tr. 245).

855. As a result of the affiliation, MCOs will have the ability to offer three different network options, at potentially different price points: (1) a single network with SwedishAmerican; (2) a single network with OSF Northern Region; or (3) a network with both SwedishAmerican and OSF Northern Region. (Lobe, Tr. 56, 67-69, 77; Petersen, Tr. 314-18).

b. One-Hospital Networks Have Been Successful in Rockford

(i) ECOH's Experience with a One-Hospital Network in Rockford

856. Some MCOs have offered networks that consist of a single Rockford hospital. For example, prior to 2010, ECOH's River Valley product only included RMH. (DX0183, (Dillon, IHT at 47)).

857. [redacted] (DX0712, (Pocklington, Dep. at 91, *confidential – attorneys' eyes only*)).

858. In 2008, when ECOH was considering realigning its provider networks, SwedishAmerican informed ECOH's leadership [redacted]. (DX0377 at 002, *confidential – attorneys' eyes only*).

859. As part of its proposal for participation in ECOH's realigned networks in 2008, [redacted] ECOH's Executive Committee found the [redacted] and [redacted] by ECOH's full board of directors. (PX0840 at 002, *confidential – attorneys' eyes only*).

860. In its 2009 contract negotiations with ECOH, [redacted]. (PX0819 at 002, *confidential – attorneys' eyes only*).

861. [redacted]

[redacted] (DX0712, (Pocklington, Dep. at 85-88, *confidential – attorneys' eyes only*)).

862. [redacted] (DX0712, (Pocklington, Dep. at 163, *confidential – attorneys' eyes only*)).

(ii) **BCBS Successfully Offers a One-Hospital Network in Rockford**

863. BCBS offers an HMO product that is a single hospital network product with SwedishAmerican as the sole in-network hospital. (DX0197, (Breeden, IHT at 105-06); DX0717, (Walsh, Dep. at 62, *confidential – attorneys' eyes only*); DX0710, (Noether, Dep. at 161)).

864. [redacted] (DX0699, (Arango, Dep. at 142, *confidential – attorneys' eyes only*)).

(iii) **United's Launch of its One-Hospital Network in Rockford has Been a Success**

865. [redacted] (DX0710, (Noether, Dep. at 161); (Lobe, Tr. 38)).

866. United's Core product was introduced in 2009 as a pilot program, marketed solely to United's fully insured members. The Core product now represents approximately seven percent of United's membership in the Chicago area. United plans to expand the Core product to administrative services-only business in Rockford, where it expects the product to continue to grow. (Lobe, Tr. 76-77).

(iv) **Coventry Offers a Single-Hospital Medicare**

859. [redacted] (DX0710, (Noether, Dep. at 161)).

(v) **OSF's Direct Access Network**

867. [redacted] (DX0710, (Noether, Dep. at 161)).

c. **Narrow Networks Have Been Successful in Other Communities Too**

868. HHI calculations show that, in 80% of the MSAs in the country, MCOs have experience dealing with relatively few hospital participants and in some cases only with a single hospital. (Capps, Tr. 537-38).

869. [redacted] (DX0718, (Golias, IHT at 22, *confidential – attorneys' eyes only*)).

870. Several towns of similar size, with economic and demographic scenarios similar to those in Rockford have only two hospitals. For example, in Champaign-Urbana, a Provena System hospital, Covenant Hospital, consolidated with Burnham Hospital. The only other hospital in Champaign-Urbana is Carle Foundation Hospital. (DX0009 at 004-005).

871. In Champaign-Urbana, Coventry and other MCOs have varying PPO configurations to cover the hospitals. Coventry offers a one-hospital PPO network for its fully-insured PPO product. It also offers another PPO product that includes both Champaign-Urbana hospitals in its network. (Petersen, Tr. 295-96).

872. During the time period from 2005 to 2007, [redacted]. (DX0719, (Petersen, Dep. at 137, *confidential – attorneys' eyes only*)).

873. Likewise, in Springfield, Illinois, there were three hospitals until ten years ago – St. John Hospital, Memorial Hospital, and Doctors Hospital. Doctors Hospital closed ten years ago, leaving only St. John and Memorial Hospitals. (DX0009 at 004-005).

874. In Decatur, Illinois, the market only contains two hospitals: Decatur Memorial and St. Mary's. Coventry offers a PPO with both hospitals, as does BCBS and Health Alliance. In this market, Coventry's cost position is comparable with both BCBS and Health Alliance. (Petersen, Tr. 296-97).

875. Two health systems operate in Bloomington-Normal, Illinois: Advocate Bromenn and an OSF hospital. (Petersen, Tr. 299-300; DX0719, (Petersen, Dep. at 125-26, *confidential – attorneys' eyes only*); DX0009 at 004-006).

876. [redacted] (Petersen, Tr. 300; DX0719, (Petersen, Dep. at 125-27, *confidential – attorneys' eyes only*)).

877. In all of these markets with only two hospitals, the two hospitals compete vigorously for the business of commercial payors, and there is still significant and deep discounting in contracting with MCOs. (DX0009 at 006).

878. Even in one-hospital markets where there is no close alternative for primary hospital care services, payors are still able to negotiate favorable rates. For example, the towns of Charleston, Illinois and Mattoon, Illinois have a combined population of 40,000 people

and only one hospital, Sarah Bush Lincoln Medical Center. The next closest hospital is 20-30 miles away, but charge levels are not out of line with what hospitals in larger two-hospital markets charge, and in some cases, the charge levels are lower. (DX0009 at 006).

879. Charleston, Illinois, is another one-hospital market. [redacted]. (DX0719, (Petersen, Dep. at 138, *confidential – attorneys' eyes only*)).

5. MCOs and Employers Can Create Incentives for Patients to Use Certain Providers and Not Others

880. [redacted] (DX0703, (Hall, Dep. at 126, *confidential – attorneys' eyes only*); DX0717, (Walsh, Dep. at 60-61, *confidential – attorneys' eyes only*)).

881. [redacted] (DX0703, (Hall, Dep. at 129, *confidential – attorneys' eyes only*, 30, *confidential*)).

882. "Tiering" is a term used to describe a benefits design that provides for a higher level of benefit when a member uses an in-network provider that is designated as belonging to a preferred tier as opposed to other in-network providers on a secondary tier. (DX0703, (Hall, Dep. at 127, *confidential – attorneys' eyes only*); DX0717, (Walsh, Dep. at 61, *confidential – attorneys' eyes only*)).

883. For example, [redacted]. (DX0717, (Walsh, Dep. at 73-74, *confidential – attorneys' eyes only*)).

884. [redacted] (DX0703, (Hall, Dep. at 127-28, *confidential – attorneys' eyes only*)).

885. [redacted] (DX0703, (Hall, Dep. at 122-23, *confidential – attorneys' eyes only*)).

886. [redacted] (DX0703, (Hall, Dep. at 122, *confidential – attorneys' eyes only*)).

887. [redacted] (DX0703, (Hall, Dep. at 125-26, *confidential – attorneys' eyes only*)).

888. [redacted] (DX0707, (Lobe Dep. at 155-56, *confidential - attorneys' eyes only*, 189-90, *confidential - attorneys' eyes only*); DX0718, (Golias, Dep. at 55-56, *confidential – attorneys' eyes only*)).

889. Beyond activity by the MCO, employers can alter their individual health benefit's plan design in order to adopt tiering or steerage methods that direct employees to preferred providers. (DX0703, (Hall, Dep. at 130); DX0717, (Walsh, Dep. at 60-61, 73-74, *confidential – attorneys' eyes only*)).

E. The Affiliation Will Not Facilitate the Unlawful Coordination of Competitive Activities by OSF/RHS and SwedishAmerican

1. There Is No Evidence that Any of the Rockford Hospital Systems Have Coordinated on Price Terms Over the Last 30 Years

890. [redacted] (DX0717, (Walsh, Dep. at 159, *confidential – attorneys' eyes only*)).

891. The CEO of SAMC testified under oath that in the 16 years he has lead SAMC, he has never been involved in discussions with the other two hospitals in Rockford about dividing service lines, coordinating or discussing prices, rates charged to MCOs, or potential boycotts of MCOs, and that to his knowledge, no one else at SAMC has had such discussions. (Schertz, Tr. 602-03).

892. The CEO of RHS similarly testified that to his knowledge, no one from the hospital systems in Rockford has exchanged any competitively sensitive information. (Kaatz, Tr. 743-44).

893. The FTC has no evidence that Paula Dillon, the director of managed care contracting at RHS, knows the terms of the contracts between SAMC or SwedishAmerican and the payors with which SAMC or SwedishAmerican contracts. (Capps, Tr. 553-54).

894. The FTC has no evidence that Mary Breeden, who is responsible for managed care contracting for OSF, knows the terms of contracts between RHS or SwedishAmerican and the health plans with which RHS or SwedishAmerican contracts. (Capps, Tr. 554-56).

2. Monitoring Other Hospital Systems Is Expected and Consistent with Competition, Not Coordination

895. The fact that hospital systems monitor each other's service line offerings, recruitment and capital expenditures is consistent with competition, not coordination. (DX0717, (Walsh Dep. at 74-77)).

896. Each hospital system makes its own decisions regarding investments, services and amenities independently to fulfill its mission to provide quality healthcare to the community, based on its perception of the best interest of the Rockford community. (DX0717, (Walsh, Dep. at 74-85)).

897. CEOs or CFOs monitor other hospital systems because they need to know the competitive environment when negotiating rates and want to know that they are being reasonable in their markets. (DX0197, (Breeden, IHT at 157, *confidential – attorneys' eyes only*)).

898. SAMC monitors what the other hospitals in Rockford are doing in terms of their service offerings by watching TV or reading the newspaper. This helps the hospitals maintain a competitive posture. (Schertz, Tr. 602).

899. [redacted] (DX0706, (Kaatz, Dep. at 47, *confidential*)).

900. [redacted] (DX0706, (Kaatz, Dep. at 100-01, *confidential*)).

3. Plaintiffs Offered No Evidence that SwedishAmerican and OSF Northern Region Would Coordinate on Non-Price Terms Post-Affiliation

901. It would be exceedingly difficult for OSF Northern Region and SwedishAmerican to monitor or enforce any attempt to coordinate their competitive behavior in connection with MCO contracts (the terms of which are not public) or the quality of services they offer. (DX0005 at 035, *confidential*).

902. Contracting between hospitals and MCOs has become very complex. [redacted] (DX0364 at 037, *confidential – attorneys' eyes only*).

903. [redacted] (DX0364 at 038-39, *confidential – attorneys' eyes only*).

904. For example, [redacted] (DX0364 at 039, *confidential – attorneys' eyes only*).

905. [redacted] (DX0364 at 039, *confidential – attorneys' eyes only*).

906. [redacted] (DX0364 at 040, *confidential – attorneys' eyes only*).

907. SAMC and RHS executives stated under oath that they would not coordinate with SwedishAmerican post-affiliation. (Schertz, Tr. 603-04; Kaatz, Tr. 744).

908. [redacted] (DX0717, (Walsh, Dep. at 156-57, *confidential – attorneys' eyes only*)).

909. [redacted] (DX0717, (Walsh, Dep. at 159-60, *confidential – attorneys' eyes only*)).

910. Capps and Lobe, Plaintiff's witnesses, concede that Sister Diane Marie McGrew and the other Sisters on the governing board of OSF would not knowingly allow wrongful anticompetitive conduct to occur. (Capps, Tr. 556; Lobe, Tr. 79-80).

4. After a Year of Investigation, the FTC Points to Only Four Communications Between Parties, None of Which Indicate Unlawful Coordination

911. The FTC only alleges four instances in the last twenty years in which information was allegedly exchanged between hospitals. (Capps, Tr. 547; DX0701, (Capps, Dep. at 94-96)).

a. SAMC and RHS Did Not Jointly Coordinate to Exclude SwedishAmerican from ECOH's Network

912. [redacted]

[redacted] (DX0376 at 001, *confidential – attorneys' eyes only*).

913. [redacted] (DX0376 at 001, *confidential – attorneys' eyes only*).

914. [redacted] (DX0376 at 001, *confidential – attorneys' eyes only*).

915. [redacted] (DX0376 at 001, *confidential – attorneys' eyes only*; PX0827 at 002, *confidential – attorneys' eyes only*; DX0377 at 002, *confidential – attorneys' eyes only*; PX0831 at 002, *confidential, attorneys' eyes only*).

916. [redacted] (PX0827 at 002, *confidential – attorneys' eyes only*).

917. [redacted] (DX0377 at 002, *confidential – attorneys' eyes only*).

918. [redacted] (PX0831 at 002, *confidential – attorneys' eyes only*).

919. [redacted] (PX0831 at 002, *confidential – attorneys' eyes only*).

920. [redacted] (PX0840 at 001, *confidential – attorneys' eyes only*).

921. [redacted] (PX0840 at 002-003, *confidential – attorneys' eyes only*).

922. [redacted]

[redacted] (PX0840 at 002-003, *confidential – attorneys' eyes only*).

923. [redacted] (PX0840 at 002, *confidential – attorneys' eyes only*).

924. [redacted] (DX0379 at 001, *confidential – attorneys' eyes only*).

925. [redacted] (DX0379 at 001, *confidential – attorneys' eyes only*).

b. **SAMC Did Not Engage in Anticompetitive Communications with SwedishAmerican Regarding Charity Care Income Limits**

926. [redacted] (PX2501 at 108, *confidential – attorneys' eyes only*).

927. [redacted] (DX0701, (Capps, Dep. at 95); DX0364 at 404, *confidential – attorneys' eyes only*).

c. **RHS Did Not Coordinate with SwedishAmerican About its Negotiations with BCBS**

928. RHS' board meeting minutes in 2005 contain a reference to the fact that SwedishAmerican was not engaged in a bid process with BCBS. (Capps, Tr. 547; PX2501 at 108, *confidential – attorneys' eyes only*).

929. However, Capps did not know whether the information SwedishAmerican allegedly told RHS was true at the time the statement was made. (Capps, Tr. 548-50).

930. Had SwedishAmerican actually been in a bid negotiation with BCBS, it would have been advantageous for it to tell RHS that it was not. (DX0701, (Capps, Dep. at 100)).

931. Finally, RHS did not reach a deal with BCBS after allegedly receiving this information. (Capps, Tr. 549).

d. SAMC Did Not Engage in Anticompetitive Communications by Hiring Health Care Futures to Gather Public Information about Other Healthcare Providers

932. The fourth allegation of exchanged information was reflected in a document prepared by Health Care Futures, a consultant, who interviewed several other hospitals in Rockford area. (Capps, Tr. 550).

933. Capps could not verify the veracity of the information contained in Health Care Futures' report. (Capps, Tr. 550).

934. Capps acknowledged that at least some of the information compiled by Health Care Futures was public. With respect to the remaining information, Capps could not verify whether the information was public or not. (Capps, Tr. 550).

935. Schertz also testified that most of the information in the Health Care Futures report was common knowledge. (Schertz, Tr. 641-42).

F. The Affiliation Will Not Result in Anticompetitive Effects in the Primary Care Physician Services Market

1. The Post-Merger Market Concentration and HHI Levels Are Low for the Primary Care Physician Services Market

936. [redacted] (PX2501 at 168, *confidential – attorneys' eyes only*).

937. [redacted] (PX2501 at 168, *confidential – attorneys' eyes only*).

938. [redacted] (PX2501 at 168, *confidential, attorneys' eyes only*).

939. Capps is aware of no case where a preliminary injunction was sought where the post-merger HHIs are less than 1,930, as the FTC alleges to be the level for primary care services in this case. (Capps, Tr. 451-52).

2. No Barriers to Entry Exist for Primary Care Physicians

940. No barriers to entry exist to enable primary care physicians to exercise market power. Many independent primary care physicians practice in Rockford presently who [redacted] They could [redacted] without having to relocate their practices. (DX0005 at 036, *confidential*).

941. Existing primary care physician groups can also expand. For example, [redacted]. (DX0717, (Walsh, Dep. at 84-87, *confidential – attorneys' eyes only*)).

942. In addition, [redacted]. (DX0717, (Walsh, Dep. at 84-87, *confidential – attorneys' eyes only*)).

3. MCOs Have Significant Bargaining Leverage Over Physician Service Contracts

943. Already, with respect to physician contracting, large MCOs like [redacted] are able to set statewide fee schedules and providers are unable to negotiate for higher rates. (DX0197, (Breeden, IHT at 20); DX0716, (Seybold, Dep. 37, *confidential*); DX0008 at 006).

4. The Affiliation Would Not Affect Physician Referral Patterns

944. Primary care physicians are recruited nationally, not locally. For example, [redacted] (DX0717, (Walsh, Dep. at 84, *confidential – attorneys' eyes only*); DX0184, (Seybold, IHT at 177)).

945. For example, most of RHS' physician recruits come from outside the Rockford area. (DX0184, (Seybold, IHT at 177)).

946. SAMC recruits physicians from outside the local area as well. (DX0193, (Stenerson, IHT at 214-15)).

947. Moreover, [redacted]. (DX0242 at 016).

948. In addition, most physicians admit to [redacted], and for those who admit [redacted], the [redacted] are not usually [redacted]. (DX0005 at 020, *confidential*).

G. The FTC, Through Its Expert, Has Not Met Its Burden of Showing Anticompetitive Effects

1. Capps' Willingness-to-Pay Model Is Flawed

949. A "willingness to pay" model ("WTP") evaluates hospital choice based on which hospitals a patient chooses and that payor's provider network configuration. The WTP for a hospital is the difference between the value of a network that includes the hospital and one that does not. (Capps, Tr. 491-92).

950. The WTP cannot show whether a merger is anticompetitive. (Capps, Tr. 536).

951. A high WTP can come from a variety of factors, including convenient location, the variety of the hospital's services, reputation, and quality. These factors are unlikely to change after a merger. (Capps, Tr. 493-94).

952. Capps' WTP analysis is flawed, because [redacted]. (DX0364 at 026027, *confidential –attorneys' eyes only*).

953. Capps' WTP is also flawed because it assumes that the price to patients of choosing an out-of-network hospital is infinite. (Capps, Tr. 494-95).

954. Most PPO plans reimburse an insured for most but not all of the covered medical expenses incurred in connection with the treatment as an out-of-network hospital. (Capps, Tr. 497).

955. By assuming that the price of an out-of-network hospital is infinite, Capps is understating the value of the alternative network in his WTP. (Capps, Tr. 498).

956. Capps' WTP model also [redacted]. (DX0364 at 028-029, *confidential – attorneys' eyes only*).

957. Capps admitted that he did not perform any empirical analysis to validate that his WTP accurately reflects the bargaining power of hospitals in Rockford. (Capps, Tr. 498).

958. Capps' WTP model [redacted]. (DX0364 at 033, *confidential – attorneys' eyes only*).

959. Capps' WTP model is also an unreliable predictor of current hospital prices. [redacted] (DX0364 at 30, *confidential – attorneys' eyes only*, 030-031, *confidential – attorneys' eyes only*).

2. Capps Inappropriately Dismisses the Potential Quality Benefits of the Transaction

960. Capps recognizes that an increase in price could be due to higher quality or increased costs. (Capps, Tr. 546).

961. Not all post-merger price changes are anticompetitive. Price, cost and quality are relevant to the question of whether or not a post-merger price increase is anticompetitive. (Capps, Tr. 512, 546).

962. Post-merger, a hospital may improve its cost efficiency, quality, and breadth of services. This can then have an effect on the extent to which a hospital changes its prices. (Capps, Tr. 512-13).

963. Capps' WTP analysis, however, does not account for any changes in quality of service post-merger. (Capps, Tr. 505-06).

3. Capps Has Done No Analysis to Quantify the Price Effect of the Affiliation

964. Capps did not estimate the price effect of the affiliation. (Capps, Tr. 481-82).

965. To quantify the predicted price effect of the affiliation in either a dollar amount or a percentage, Capps would have had to conduct a full merger stimulation. (Capps, Tr. 482).

966. Capps did not conduct a merger simulation analysis. (Capps, Tr. 482).

967. Capps testified that he would [redacted]. (DX0701, (Capps, Dep. at 45-47, *confidential – attorneys' eyes only*)).

968. [redacted] (DX0701, (Capps, Dep. at 45-47, *confidential – attorneys' eyes only*)).

969. Plaintiff's expert [redacted] (DX0701, (Capps, Dep. at 45-47, *confidential – attorneys' eyes only*)).

970. Capps only projects the direction of the price effect after the affiliation. (Capps, Tr. 483).

IX. THE PROPOSED TRANSACTION WILL RESULT IN SUBSTANTIAL EFFICIENCIES

A. FTI's Business Efficiencies Report Shows Substantial Efficiencies to be Gained from the Transaction

1. FTI Was Hired to Conduct a Business Efficiencies Review

971. SAMC and RHS' legal counsel hired FTI Healthcare ("FTI") to conduct a business efficiencies review – with the development of a supporting business case for use by OSF and RHS executives – which considered significant operational business efficiencies to be created by the merger of SAMC and RHS into one healthcare system. (DX0011 at 005, *confidential*; (Schertz, Tr. 593)).

972. FTI was hired because the parties could not exchange sensitive competitive data amongst themselves; they needed a third party to analyze the data for them. (Schertz, Tr. 594).

973. The parties also wanted someone to make the business case for the affiliation, so that each party could make a business decision of whether or not to go forward with the affiliation. (Schertz, Tr. 650).

974. FTI was responsible for investigating, analyzing, and developing findings to be shared by both parties. (Schertz, Tr. 594).

975. [redacted] (DX0011 at 005, *confidential*).

976. [redacted] (DX0011 at 006, *confidential*).

977. [redacted] (DX0011 at 006, *confidential*).

978. In total, FTI conducted more than [redacted] and gathered more than [redacted] to support its analyses and merger efficiency opportunities presented. (DX0011 at 006, *confidential*).

979. [redacted] (DX0011 at 007, *confidential*).

2. Cost Savings Identified by FTI

980. FTI identified substantial efficiencies for the parties, [redacted]. (DX0011 at 006-007, *confidential*).

981. The FTI merger efficiency study [redacted]. (DX0714, (Schertz, Dep. at 162, *confidential – attorneys' eyes only*)).

982. In total, the savings identified by FTI included an estimated annual recurring savings from operations ranging from $42.3 million to $56.2 million. (DX0011 at 007, *confidential*; Schertz, Tr. 595).

983. FTI also identified one-time capital cost avoidance savings of over $131.6 million. (DX0011 at 007, *confidential*; Schertz, Tr. 595).

984. [redacted] (PX2268, at 008, *confidential*).

985. FTI estimated that the annual recurring savings could be achieved in total within [redacted]. (DX0700, (Brown, Dep. at 109, *confidential*)).

986. [redacted] (DX0700, (Brown, Dep. at 126-27, *confidential – attorneys' eyes only*)).

987. David Schertz, the CEO and president of SAMC, testified that the efficiencies and savings forecast by FTI are achievable. He also believes the number is a conservative estimate. (Schertz, Tr. 595).

3. Business Efficiency Opportunities Identified by FTI

a. Trauma Services

988. [redacted]. (DX0011 at 011, *confidential*).

989. RMH and SAMC both have Level I trauma designations. (DX0011 at 011, *confidential*).

990. The area that both hospitals serve is the only area in the state of Illinois outside of Chicago that has more than one Level I trauma service currently operating. (DX0011 at 011, *confidential*; Capps, Tr. 462).

991. SwedishAmerican offers a Level II trauma center with more than the minimum level of services necessary. (Capps, Tr. 460-61).

992. Many cities have either one Level I trauma center or no Level 1 trauma centers, including Champaign-Urbana, Springfield, Danville, and Peoria. (Capps, Tr. 461-62).

993. Maintaining a Level I trauma service designation requires tremendous specialty logistical services and equipment support, which is financially burdensome. (DX0011 at 012, *confidential*).

994. To receive a Level 1 trauma designation from the State of Illinois, a hospital is required to spend significant capital. For example, it must have a trauma surgeon on the premises 24 hours a day, 7 days a week. It must also have other surgeons available within 30-60 minutes in case of an emergency. This is a very expensive capital outlay, as hospitals must pay the physicians to be on call at all hours. (Manning, Tr. 843-45).

995. [redacted] (DX0011 at 012, *confidential*).

996. [redacted] (DX011 at 012, *confidential*).

997. [redacted] (DX0011 at 012-013, *confidential*).

998. [redacted] (DX0011 at 015, *confidential*).

999. [redacted] (DX0011 at 015, *confidential*).

1000. [redacted] (DX0011 at 015, *confidential*).

b. **Oncology Services**

1001. [redacted] (DX0011 at 018-019, *confidential*).

1002. [redacted] (DX0011 at 018, *confidential*).

1003. SAMC has a comprehensive oncology program that includes a cancer center where medical and radiation oncology physicians, staff and treatments are located. (DX0011 at 018, *confidential*).

1004. [redacted] (DX0011 at 018, *confidential*).

1005. [redacted] (DX0011 at 019, *confidential*).

1006. [redacted] (DX0011 at 019, *confidential*).

1007. [redacted] (DX0011 at 019, *confidential*).

1008. [redacted] (DX0189, (Schertz, IHT (7/12/11) at 196-97, *confidential*, 199-200, *confidential*)).

1009. [redacted] (DX0366 at 028, *confidential*).

1010. [redacted] (DX0011 at 019, *confidential*).

1011. [redacted] (DX0011 at 019-020, *confidential*).

c. **Cardiovascular Services**

1012. [redacted] (DX0011 at 021, *confidential*).

1013. [redacted] (DX0011 at 021, *confidential*).

1014. [redacted] (DX011 at 022, *confidential*).

1015. [redacted] (DX0011 at 022, *confidential*).

1016. [redacted] (DX0011 at 022, *confidential*).

1017. [redacted] (DX0011 at 023, *confidential*).

1018. [redacted] (DX0700, (Brown, Dep. at 161, *confidential – attorneys' eyes only*)).

1019. [redacted] (DX0011 at 024, *confidential*).

d. **Women's and Children's Services**

1020. While both RMH and SAMC offer obstetrics and pediatric services, RMH has a larger volume of both OB and pediatric patients. RMH is also the regional high risk perinatal center and has a Level III neonatal intensive care unit ("NICU"), which is the highest level of neonatal care a hospital can provide, and a pediatric intensive care unit ("PICU"). SAMC has only an intermediate neonatal care unit and does not have 24/7 neonatologist coverage. (DX0011 at 025, *confidential*).

1021. Maintaining a modern women's and children's program requires dedicated support by specialty services, staff and equipment, [redacted]. (DX0011 at 026, *confidential*).

1022. [redacted] (DX0011 at 026, *confidential*).

1023. In addition, RMH has a da Vinci robot for gynecological surgery [redacted] (DX0011 at 027, *confidential*).

1024. [redacted] (DX0011 at 027, *confidential*).

1025. [redacted] (DX0700, (Brown, Dep. at 197-98, *confidential – attorneys' eyes only*)).

1026. [redacted] (DX0011 at 029, *confidential*).

1027. RMH has sufficient capacity to support increased volumes and would require limited additional capital to support the consolidation of the two OB services, which will produce merger-related savings in labor and supplies, as well as potentially increasing quality as a result of higher volumes of patients for the physicians practicing in these services. (DX0021 at 027).

1028. [redacted] (DX0011 at 027, *confidential*).

1029. [redacted] (DX0011 at 028, *confidential*).

e. **Ambulatory/Physician Practices Operations**

1030. [redacted] (DX0011 at 040, *confidential*).

1031. Both RHS and OSF have large physician practice enterprises comprised of multispecialty practice groups that cover the Northern Illinois region. (DX0011 at 040, *confidential*).

1032. [redacted] (DX0011 at 040, *confidential*).

1033. [redacted] (DX0011 at 040, *confidential*).

1034. [redacted] (DX0011 at 040, *confidential*).

1035. [redacted] (DX0011 at 040, *confidential*).

1036. [redacted] (DX0011 at 042, *confidential*).

1037. [redacted] (DX0011 at 042, *confidential*).

1038. [redacted] (DX0011 at 042, *confidential*).

1039. [redacted] (DX0011 at 042-043, *confidential*).

1040. [redacted] (DX0011 at 043, *confidential*).

f. **Laboratories**

1041. [redacted] (DX0011 at 049, *confidential*).

1042. [redacted] (DX0011 at 050, *confidential*).

g. Additional Efficiencies and Recurring Cost Savings

1043. Additional efficiencies can be gained from the merger by consolidating the parties' [redacted] (DX0194, (Baker, IHT at 92-97, *confidential-attorneys' eyes only*); DX0011 at 056-117, *confidential*).

1044. Other efficiencies to be gained from the affiliation include consolidated [redacted]. (DX0189, (Schertz, IHT (7/12/11) at 133-35, *confidential*); DX0011 at 056-117, *confidential*).

1045. [redacted] (DX0011 at 059, *confidential*).

1046. [redacted] (DX0011 at 070, *confidential*).

1047. [redacted] (DX0011 at 077, *confidential*).

1048. [redacted] (DX0011 at 078, *confidential*).

h. One-Time Capital Avoidance Savings

1049. The parties also have the potential to achieve capital spending avoidance as a result of the merger. FTI identified one-time capital cost avoidance savings totaling approximately $131.6 million as a result of the merger. (DX0011 at 092, *confidential*).

(i) The Parties Can Save $101M in Capital Avoidance Savings Associated with SAMC's Planned Construction of a New Bed Tower

1050. The affiliation will result in $101M in one-time capital avoidance savings associated with SAMC's planned construction of a new bed tower. (DX0011 at 092, *confidential*).

1051. [redacted] Patients desire more privacy while in the hospital. In addition, private rooms are key for preventing infection and disease and for assisting recovery. However, SAMC does not have sufficient space within the campus to provide more private rooms without building a new facility or bed tower. (DX0190, (Sehring, IHT at 163-64); DX0191, (McGrew, IHT at 83, *confidential – attorneys' eyes only*); DX0196, (Schoeplein, IHT at 218-20, 222-23, *confidential*); DX0189, (Schertz, IHT (7/12/11) at 40-41, 129-31, *confidential – attorneys' eyes only*); DX0710, (Noether, Dep. at 116, *confidential*)).

1052. Private rooms are very important in the hospital market, as they are desired by patients and also help reduce the incidence of infectious disease. Private rooms are also necessary for privacy purposes and for HIPAA regulations. (Manning, Tr. 863).

1053. The only reason SAMC has not built a new bed tower is because it does not have sufficient funds, due to the economic downturn. (DX0190, (Sehring, IHT at 164, *confidential – attorneys' eyes only*); DX0189, (Schertz, IHT (7/12/11) at 40)).

1054. The most cost effective way for SAMC to increase the number of private beds is to merge with RHS and try to re-allocate activity between the two campuses. (DX0189, (Schertz, IHT (7/12/11) at 41)).

1055. [redacted] (DX0189, (Schertz, IHT (7/12/11) at 37-38, *confidential – attorneys' eyes only*, 117-18, 128-29, *confidential*); DX0005 at 028, *confidential*).

1056. [redacted] (DX0700, (Brown, Dep. at 72-73, *confidential – attorneys' eyes only*); DX0011 at 092, *confidential*; DX0572 at 002).

(ii) **Additional Cost Avoidance Savings Can Be Attributed to the Avoidance of Replacing RMH's Helicopter**

1057. [redacted] (DX0011 at 015, *confidential*; DX0193, (Stenerson, IHT at 169, *confidential – attorneys' eyes only*); DX0196, (Schoeplein, IHT at 145); DX0189, (Schertz, IHT (7/12/11) at 43, *confidential – attorneys' eyes only*)).

1058. [redacted] (DX0011 at 015, *confidential*).

1059. SAMC currently has two helicopters: a primary helicopter and one that is only used in case of equipment failure. SAMC's primary helicopter runs 24 hours a day, 7 days a week. (DX0193, (Stenerson, IHT at 169, *confidential – attorneys' eyes only*); DX0196, (Schoeplein, IHT at 145); DX0189, (Schertz, IHT (7/12/11) at 43, *confidential – attorneys' eyes only*)).

(iii) **Additional Capital Cost Avoidance Savings Can Be Generated From RHS' Implementation of an EMR Platform**

1060. FTI also noted one-time capital cost avoidance savings of [redacted] for RHS' implementation of an Electronic Medical Records ("EMR") platform. (DX0011 at 078, *confidential*; Schertz, Tr. 587-88).

1061. RHS and OSF will be able to share electronic medical records as a result of the affiliation. (Schertz, Tr. 587).

1062. [redacted] (DX0190, (Sehring, IHT at 240, *confidential – attorneys' eyes only*); DX0189, (Schertz, IHT (7/12/11) at 183-84, *confidential*)).

1063. If the parties wait too long, and RHS is too far into the implementation process, both hospitals will have the same electronic medical records program, EPIC, but the two programs will not be compatible with one another, and it will be very expensive to make them compatible after the fact. (Schertz, Tr. 587-88).

(iv) **Additional Capital Cost Avoidance Savings Will Result from the Elimination of Redundant Primary Care Facilities**

1064. [redacted] (DX0011 at 043, *confidential*).

1065. [redacted] (DX0011 at 043-45, *confidential*).

1066. [redacted] (DX0011 at 045, *confidential*).

(v) **Additional Capital Cost Avoidance Savings Will Result from Elimination of Redundant Capital Spend**

1067. [redacted] (DX0011 at 019, *confidential*).

1068. [redacted] (DX0011 at 019, *confidential*).

1069. In addition, [redacted]. (DX0189, (Schertz, IHT (7/12/11) at 122, *confidential – attorneys' eyes only*)).

1070. [redacted] (PX2268, at 038, *confidential*).

(vi) **Additional Miscellaneous Savings Can Also be Generated by the Parties**

1071. FTI noted an additional one-time cost avoidance savings opportunity of [redacted]. (DX0011 at 001-043, *confidential*).

1072. Of this number, [redacted] in savings can be attributed to the parties avoided expenditure of replacing beds. (DX0189, (Schertz, IHT (7/12/11) at 124-25, *confidential – attorneys' eyes only*)).

B. Many of the Efficiencies in the FTI Business Efficiencies Review Are Merger-Specific and Cognizable under the Merger Guidelines

1. Dr. Manning's Analysis of FTI's Business Case Analysis

1073. Dr. Susan Manning of Compass Lexecon was hired to review FTI's business case analysis. (Manning, Tr. 810).

1074. Dr. Manning examined the business case efficiency merger study conducted by FTI, which identified potential efficiencies as a result of the merger, and evaluated the claimed efficiencies under the guidance of Section 10 of the Merger Guidelines to determine which of those efficiencies were merger-specific and cognizable. (Manning, Tr. 811).

1075. Dr. Manning verified the efficiencies contained in the FTI business case study by analyzing the documents supporting FTI's identified savings. Dr. Manning then interviewed executives and business people at each hospital to gain further knowledge.

Dr. Manning also reviewed additional information on capitalization, current FTEs, and current compensation. (Manning, Tr. 838).

1076. Dr. Manning also analyzed the method by which the savings would be achieved and considered whether there were any costs associated with the implementation of the efficiencies. Dr. Manning then examined how the efficiencies would help the affiliated hospitals compete in the market place. Finally, she applied the merger specificity standards to determine whether the efficiencies met the standards under the Guidelines. (Manning, Tr. 838).

1077. The Merger Guidelines require a two-prong test to determine whether savings are merger specific. First, the savings must be likely to be accomplished with the proposed merger and unlikely to be accomplished either on a stand-alone basis without the merger or by some other means. Second, the savings and efficiencies must be shown to not arise from any type of anticompetitive reduction of output or services. (Manning, Tr. 834).

1078. Dr. Manning's analysis differs from FTI's analysis because FTI's analysis includes all cost savings whether they are merger-specific or not that can result from the affiliation. (Manning, Tr. 816-17).

1079. Dr. Manning's analysis, on the other hand, analyzed the potential cost savings against the Merger Guidelines and noted which savings were merger-specific and cognizable. (Manning, Tr. 817).

1080. Dr. Manning, as part of her analysis, considered whether the two hospitals could achieve cost savings on their own. She then recognized specific areas where the parties could achieve their own cost savings and deducted that from her calculation of total savings. (Manning, Tr. 945-46).

1081. Dr. Manning validated a majority of the efficiencies and cost savings identified in the business case for the proposed transaction as merger specific and cognizable under the Merger Guidelines. (DX0708, (Manning, Dep. at 173-74, *confidential – attorneys' eyes only*); Manning, Tr. 814).

2. Dr. Manning Verified Substantial Efficiencies That Are Merger-Specific and Cognizable Under the Merger Guidelines

a. Clinical Operations Savings

1082. Of the clinical operations savings identified by FTI, Manning has already confirmed $15.2 – 15.6M in annual recurring cost savings as to be cognizable and merger specific under the Merger Guidelines. When her analysis is completed, she expects that additional cost savings will be identified as merger-specific and cognizable and quantified under the Merger Guidelines. (DX0708, (Manning, Dep. at 171-72, *confidential – attorneys' eyes only*); Manning, Tr. 820-21, 827, 874).

1083. These savings result from the service lines FTI recommended for consolidation, including Level 1 trauma, women's and children's services, oncology, and cardiac/open heart surgery. (Manning, Tr. 840).

1084. Dr. Manning estimates that these savings would take approximately three years to implement fully and realize, with most of the savings taking place by the end of the second year, and 100% of the savings in place by the end of the third year. (Manning, Tr. 821).

1085. These savings would be realized each year into the foreseeable future. Just five years of savings at this level would generate savings in excess of $75 million for the combined OSF Northern Region entity. (Manning, Tr. 821-22, 874).

(i) **Trauma**

1086. Dr. Manning verified FTI's report and found substantial merger-specific, cognizable savings that would result from a consolidation of Level 1 trauma services post-affiliation. (Manning, Tr. 841).

1087. The distance by helicopter to reach one hospital instead of the other would only add approximately three minutes to the total transport time. (Manning, Tr. 841-42).

1088. Dr. Manning identified savings beyond the labor savings stemming from the consolidation of Level 1 trauma at either RMH or SAMC. She also described savings stemming from the elimination of a trauma helicopter service at one of the locations and additional savings that can be achieved by consolidating the location. (DX0012 at 006-007; Manning, Tr. 845-46).

1089. [redacted] (DX0364 at 017-018, *confidential*).

1090. [redacted] (DX0364 at 024, *confidential*).

1091. Dr. Manning has so far estimated savings of $3.2 – 3.6 million a year in recurring merger-specific, cognizable savings under the Merger Guidelines from the consolidation of the Level 1 trauma centers. (DX0012 at 006-007; Manning, Tr. 845-46).

1092. Dr. Manning anticipates additional savings that could be achieved through this consolidation if additional patients were to be diverted to SwedishAmerican, as additional FTEs would not be needed. (Manning, Tr. 846-47).

(ii) **Oncology**

1093. For oncology savings, Dr. Manning incorporated information from RHS and OSF through calendar year 2011. Where possible and appropriate, she included information relating to budgets for fiscal year 2012 for both parties in her analysis as well. (Manning, Tr. 822-23).

1094. As of the date of the Preliminary Injunction hearing, Dr. Manning was able to verify $2.6 million a year in recurring cost savings that could be obtained from consolidation of oncology services by the parties post-affiliation. (Manning, Tr. 849; DX0366 at 028, *confidential*).

1095. Dr. Manning performed extensive analysis and determined that these savings were both merger-specific and cognizable efficiencies under the Merger Guidelines. (Manning, Tr. 850).

1096. These annual savings would save the parties $13 million over the course of five years. (Manning, Tr. 849).

1097. Dr. Manning verified FTI's anticipated savings in oncology based on SAMC becoming a 340B program participant. Dr. Manning conducted extensive due diligence and ascertained that SAMC could become a participant in this program through the affiliation, but that it could not participate absent it. (Manning, Tr. 849-50).

(iii) **Cardiovascular Services**

1098. In addition to verifying FTI's findings for oncology service consolidation, Dr. Manning also verified substantial efficiencies that could be gained if the parties were to consolidate cardiac surgery. (Manning, Tr. 850).

1099. Unlike FTI, however, Dr. Manning embedded these savings into a category called "clinical effectiveness," and did not break out the cardiovascular savings on their own. The merger-specific, cognizable savings under the Merger Guidelines identified in the clinical effectiveness category was estimated by Dr. Manning as $7.8 million a year. (Manning, Tr. 850-51).

1100. Clinical effectiveness primarily deals with the application of best practices and protocols and administrative functions of the clinical areas across the broader hospital. (Manning, Tr. 820).

(iv) **Women's and Children's Services**

1101. Dr. Manning also verified $1.6 million of FTI's total annual recurring savings in women's and children's service line consolidation as merger-specific and cognizable under the Merger Guidelines. (Manning, Tr. 851-52).

1102. FTI recommended that women's and children's services be consolidated at RMH. Because RMH is the regional perinatal center that delivers more than 1500 babies a year,

moving SAMC's alternate birthing center to RMH would generate substantial labor savings. (Manning, Tr. 851-52).

1103. However, RMH would still need to expand some of its staffing to accommodate that volume, and Dr. Manning incorporated those expenditures into her analysis. (Manning, Tr. 852).

1104. To verify the numbers, Dr. Manning met with the director of the women's and children's center at RMH, as well as the chief nursing executive at RMH, to determine the appropriate level of staffing necessary to properly run the labor and delivery and postpartum care departments for the combined RMH and SAMC volume. (Manning, Tr. 852; DX0366 at 030, *confidential*).

1105. Because RMH is a high-intensity care facility for high-risk deliveries and high-risk babies, the level of staffing necessary to run the center is slightly higher than what would occur at typical birth facility. Dr. Manning included this fact in her calculations. (Manning, Tr. 852-53).

1106. Considering the net savings from consolidations, the costs of accommodating additional volume at RMH, and the cost of hiring or retaining additional staff, Dr. Manning still verified at least $1.6 million in merger-specific and cognizable savings under the Merger Guidelines. (Manning, Tr. 853; PX2268, at 032, *confidential*).

(v) Ambulatory/Physician Practices Services

1107. Dr. Manning identified three categories of savings that can be achieved through a consolidation of ambulatory/physician practices services. (Manning, Tr. 855).

1108. First, she identified savings that can be achieved due to physician redundancies. Second, she noted savings that can be reached because of redundancies in physician administration staffing within the local ambulatory and physician practice clinics. Third, she identified savings through eliminating redundancies by managing the entire program at one hospital. (Manning, Tr. 855).

1109. At this time, Dr. Manning has not verified whether these savings are merger specific, though she believes there will be some cognizable savings in this category. She does anticipate, however, that the merger-specific savings under the Merger Guidelines will be less than what was outlined in the FTI business case. (Manning, Tr. 856-57).

(vi) Other Savings

1110. Dr. Manning identified additional categories included in the FTI report that might include merger-specific, cognizable savings under the Merger Guidelines. For example, Dr. Manning identified savings in "revenue cycle." Dr. Manning describes revenue cycle as those functions including patient registration, patient access, patient collections of reimbursements, verification of insurance, and accounts receivable. Dr. Manning expects that there will be merger-specific cognizable savings in this category, but she has not validated them yet. (Manning, Tr. 856-57).

1111. Dr. Manning has also identified $7.8 million of annual recurring savings that are merger-specific and cognizable under the Merger Guidelines for Clinical and Operating Effectiveness functions. (Manning, Tr. 859-60).

1112. These savings stem primarily from the consolidation of labor functions between RHS and SAMC. (Manning, Tr. 859).

1113. Dr. Manning noted that the redundancies in quality assurance do not relate to persons who provide patient care. (Manning, Tr. 860).

1114. In addition, Dr. Manning has identified some savings that may occur from consolidation of laboratory services. Opportunities for savings include standardization of testing and protocols in the lab, consolidation of equipment in the laboratory, consolidation of non time-sensitive equipment, consolidation of management, and the integration and standardization of administrative procedures. Dr. Manning also identified purchasing from third parties that could be consolidated and where volume discounts should be available. Finally, Dr. Manning identified opportunities for savings in the consolidation of courier services. (Manning, Tr. 857-58).

1115. All of these items are likely to result in significant merger specific efficiencies. (Manning, Tr. 858).

1116. Dr. Manning has identified additional savings opportunities in Operational Support and General and Administrative savings; however, at this time, she has not conducted the necessary empirical analysis to give a number for the merger-specific, cognizable savings. At this time, however, she believes there is considerable redundancy between the two hospitals in these categories that will lead to cognizable and merger-specific savings under the Guidelines. (Manning, Tr. 861-62).

b. One Time Capital Cost Avoidance Savings

1117. Dr. Manning also identified one-time capital cost avoidance savings as a result of the affiliation. Avoided capital spending is important in assessing efficiencies from an economic perspective because the ability to redeploy capital that was otherwise tied up in redundant expenditures to other types of projects creates a very important increase in consumer welfare. (Manning, Tr. 833).

1118. Dr. Manning confirmed $114.1 million of FTI's one-time capital cost avoidance savings as cognizable and merger-specific under the Merger Guidelines. (DX0708, (Manning, Dep. at 212, *confidential – attorneys' eyes only*); Manning, Tr. 824).

1119. Dr. Manning identified significant savings that will result because SAMC will not be required to construct a bed tower in order to be able to offer a larger percentage of their beds as private rooms. (Manning, Tr. 863).

1120. Dr. Manning believes that $100.7 million in capital cost avoidance savings associated with the bed tower are merger-specific and cognizable. OSF's executives began significant planning for the bed tower prior to signing the affiliation agreement. Based

on Dr. Manning's conversations with OSF's business executives, she determined that the bed tower is more likely to be built than not if the affiliation is not consummated. (Manning, Tr. 863-64).

1121. Dr. Manning based her analysis on her review of SAMC data that showed it would cost $145 million to build a bed tower. (Manning, Tr. 864; DX0355 at 43-45, *confidential*).

1122. Assuming the affiliation occurs, the parties would be able to shift patient volume to RMH, allowing SAMC to convert its rooms to private rooms. The cost of this renovation is likely to be in the range of $44-45 million, which Dr. Manning subtracted from the total cost of the bed tower to achieve her estimated $100.7 million in savings. (Manning, Tr. 865; DX0355 at 43-45, *confidential*).

1123. In addition to the merger-specific, cognizable capital cost avoidance savings gained from SAMC abandoning its plans to build a bed tower, Dr. Manning also noted $2.4 million in cognizable capital avoidance savings stemming from consolidation of the parties use of intensity modulated radiation therapy (IMRT). (Manning, Tr. 865-66).

1124. Both hospitals have the IMRT technology, which is used to treat cancer. Some of this equipment is aged and must be replaced. With the affiliation, this need can be satisfied jointly using the existing IMRT equipment. (Manning, Tr. 866).

1125. Dr. Manning also identified $4 million of merger-specific, cognizable savings stemming from the consolidated use of RMH's da Vinci robot. This technology is primarily used to treat cancer. (Manning, Tr. 866-67).

1126. Dr. Manning conducted significant due diligence to determine that SAMC is likely to purchase a da Vinci robot if the merger does not go through. She interviewed the parties to determine the volume of patients they would lose by not purchasing the machine. She also applied this data to the likelihood that the technology would be used in a broader context in the future, allowing her to conclude that the technology would be necessary for SAMC to procure in the foreseeable future. (Manning, Tr. 866-68).

1127. If SAMC and RMH affiliate, SAMC would be able to use RMH's da Vinci robot, allowing significant cost savings. (Manning, Tr. 867-68).

1128. Dr. Manning also identified a one-time, merger-specific, cognizable capital avoidance cost savings of $7 million in helicopter replacement costs as a result of the consolidation of Level 1 trauma services. (Manning, Tr. 868-69).

1129. If the parties consolidate trauma, the new SAMC helicopter could be used, regardless of the location of the trauma center, and would eliminate RMH's need to purchase a new helicopter. (Manning, Tr. 869).

1130. In addition, Dr. Manning identified an additional recurring savings of $40,000 per month based on the consolidation of the helicopter services. SAMC is replacing its current two-blade helicopter with a four-blade helicopter. The four-blade helicopter is too large to be stored on the SAMC campus and would require SAMC to expend $40,000 per month to

store the helicopter at the Rockford Airport. However, after the affiliation, SAMC can store the four-blade helicopter at RHS which does have a hangar which is large enough to accommodate the four-blade helicopter. (DX0366 at 37).

3. Mr. Dagen's Analysis is Flawed

1131. [redacted] (DX0702, (Dagen, Dep. at 22-24, 95, *confidential – attorneys' eyes only*)).

1132. [redacted] (DX0702, (Dagen, Dep. at 22-24, *confidential – attorneys' eyes only*)).

1133. [redacted] (DX0702, (Dagen, Dep. at 116, *confidential – attorneys' eyes only*)).

1134. [redacted] (DX0702, (Dagen, Dep. at 82, *confidential – attorneys' eyes only*)).

1135. [redacted] (DX0702, (Dagen, Dep. at 83-84, *confidential – attorneys' eyes only*)).

1136. [redacted] (DX0702, (Dagen, Dep. at 91-99, *confidential – attorneys' eyes only*)).

1137. [redacted] (DX0702, (Dagen, Dep. at 44-45, *confidential – attorneys' eyes only*)).

1138. [redacted] (DX0702, (Dagen, Dep. at 22-24 *confidential – attorneys' eyes only*)).

1139. [redacted] (DX0702, (Dagen, Dep. at 37, *confidential – attorneys' eyes only*)).

C. Clinical Consolidation through the Affiliation Will Enhance and Improve Quality of Care in Rockford

1140. Clinical consolidation will also help RMH and SAMC achieve quality improvements in patient care. There are several potential forms of clinical quality improvements stemming from the merger. First, volume related increases will lead to increased quality in certain clinical areas. Second, the two hospitals will be able to implement best practices as a result of the consolidation. (Manning, Tr. 870).

1. Increased Volume from Consolidation Will Lead to Increased Quality

a. Clinical Consolidation Will Lead to Increased Quality

1141. Studies have shown a positive relationship between increased volumes of procedures at hospitals and improved clinical outcomes. (Manning, Tr. 870-72; PX2268, at 011, *confidential*; DX0192, (Benink, IHT at 37-38); DX0191, (McGrew, IHT at 154, *confidential – attorneys' eyes only*)).

1142. Studies have also shown that the healthcare community benefits by having large volumes of Level 1 and Level 2 medical patients at one facility, as high volumes may result in superior patient outcomes. (Manning, Tr. 844-45).

1143. One way to achieve this increased volume is for a hospital to consolidate with its competitors, especially where hospitals are not already exceeding the volume threshold necessary to retain or recruit physicians. (Romano, Tr. 194-95).

1144. Quality is defined as access to care, for patients in need, making the appropriate tests to make the appropriate diagnosis with the appropriate treatment plans and procedures for the right reasons at the right cost. (DX0192, (Benink, IHT at 113-114)).

1145. [redacted] (DX0714, (Schertz, Dep. at 14, *confidential – attorneys' eyes only*)).

1146. Large pre-merger differences in quality are not necessary for there to be quality increases as a result of a merger. (Romano, Tr. 201).

1147. Physician skill levels increase with the more procedures a physician performs. (DX0003 at 006-007; DX0013 at 003).

1148. Certain procedures are very complex and only physicians who perform a sufficient number of these procedures can achieve high quality. (DX0186, (Ruggles, IHT at 34-35)).

1149. Hospital systems that perform a higher number of procedures have less error, better outcomes, and less complication. (DX0186, (Ruggles, IHT at 21-22)).

1150. Volume can also positively impact treatment for complicated, less common procedures, such as difficult baby deliveries. (DX0186, (Ruggles, IHT at 21-23)).

1151. Patients may also consider the volume of procedures performed by a hospital when choosing a hospital for surgery. (DX0192, (Benink, IHT at 93-94, 110-12)).

1152. There is a statistical correlation between improvements in quality and higher volume of heart surgeries. (DX0186, (Ruggles, IHT at 140-41); DX0717, (Walsh, Dep. at 112, *confidential – attorneys' eyes only*)).

1153. For example, with respect to coronary care, studies have found positive relationships between hospital volumes and improved mortality for cardiac surgery. Low surgical volumes were a major contributor to the outlier status of hospitals with significantly higher mortality rates than expected in performing coronary artery bypass surgery. This suggests improved delivery of cardiac surgery outcomes with the consolidation of cardiac surgery at RMH or SAMC. (PX2268, at 014, *confidential*; Manning, Tr. 870-71).

1154. [redacted] (PX2268, at 015, *confidential*).

1155. Additionally, RMH currently has 16 pediatric subspecialty services, which includes a wide-spectrum of leading developments in care. Combining a smaller volume center with a larger center that has better infrastructure and clinical outcomes will enhance emotional outcomes as well. (Kaatz, Tr. 735).

b. **Increased Volumes Will Allow OSF Northern Region to Develop Centers of Excellence**

1156. The affiliation will also help RMH and SAMC become regional centers of excellence. A hospital must perform a certain amount of procedures each year to become a center of excellence. Volume and centers of excellence are key to improving quality. (DX0192, (Benink, IHT at 94-95, 121, 123-126); DX0698, (Kaatz, IHT at 161, *confidential*)).

1157. [redacted] (DX0700, (Brown, Dep. at 248-49, *confidential – attorneys' eyes only*)).

1158. [redacted] (DX0700, (Brown, Dep. at 252, *confidential – attorneys' eyes only*)).

1159. [redacted] (DX0192, (Benink, IHT at 94-95, 121-22); DX0011 at 047, *confidential*).

1160. [redacted] (PX2268, at 027, *confidential*).

1161. The American College of Surgeons advises that a Level I trauma program should have a minimum of 1,500 visits a year in order to ensure ideal patient outcomes. [redacted] (DX0698, (Kaatz, IHT at 111-12, *confidential*)).

1162. Similarly, the Society of Thoracic Surgeons advises that a cardiac surgery center should perform between 250 and 400 surgeries in order to achieve ideal outcomes. [redacted] (DX0698, (Kaatz, IHT at 108-09, *confidential*)).

1163. Quality can improve through increased access to the da Vinci robot, as well. While exceedingly difficult to perform, robotic treatment for prostate cancer allows patients to go home the day after surgery with minimal additional drugs and a complication rate of less than one percent, compared to additional days in the hospital and a complication rate of four percent with traditional surgery. (Kaatz, Tr. 736-37).

1164. Reducing the triplication of services will permit specialists practicing in Rockford to increase the volume of patients they see and treat, thereby improving the quality of the treatment they offer. (DX0013 at 002-003).

1165. [redacted] (DX0011 at 022, *confidential*).

2. OSF Northern Region Will Be Able to Implement Best Practices and Protocols that Will Improve Quality Across Both Hospitals

1166. The merger will allow the two hospital systems to combine best practices in order to improve quality in the OSF Northern Region. (DX0192, (Benink, IHT at 72-73); Kaatz, Tr. 735-37).

1167. Because the physicians for both hospitals are close in proximity to one another, they will be able to work together jointly to achieve and implement best practices for the new affiliated entity. (Manning, Tr. 870).

1168. These quality improvements for physicians will be easier and more likely achievable due to the close proximity of the hospitals; if the hospitals were hundreds of miles apart, the physicians would not be able to work together on a day-to-day basis to implement best practices and protocols. (Manning, Tr. 870; DX0193, (Stenerson, IHT at 190-91, *confidential – attorneys' eyes only*); DX0698, (Kaatz, IHT at 209-11, *confidential*); DX0189, (Schertz, IHT (7/12/11) at 134-39, *confidential – attorneys' eyes only*)).

1169. Without the proposed merger, it will be [redacted]. Physicians rely on evidence and the opportunity to visualize and interact with others that are offering leading practices. [redacted] Additionally, the one-time savings of [redacted] would not be able to be achieved without the merger. (DX0700, (Brown, Dep. at 125-27, *confidential*)).

X. THE PROPOSED AFFILIATION WILL ALSO RESULT IN SIGNIFICANT COMMUNITY BENEFITS

1170. The affiliation is the best way to confront the challenges of healthcare reform, reduce costs going forward, combat out-migration, attract and recruit subspecialists, support graduate medical education in Rockford and provide a higher quality of service to the Rockford community. (DX0706, (Kaatz, Dep. at 210-11); Kaatz, Tr. 719).

1171. [redacted] (DX0194, (Baker, IHT at 46, *confidential – attorneys' eyes only*)).

1172. [redacted] (DX0714, (Schertz, Dep. at 103-04, *confidential – attorneys' eyes only*)).

1173. [redacted] (DX 0705, (Ingrum, Dep. at 166-67, *confidential- attorneys' eyes only*)).

A. Clinical Consolidation Will Lead to Increased Sub-Specialty Recruiting in Rockford, Providing Significant Community Benefits

1174. [redacted] (DX0184, (Seybold, IHT at 86-87, *confidential – attorneys' eyes only*); DX0698, (Kaatz, IHT at 158-59, *confidential*)).

1175. It has become increasingly difficult to recruit physicians to Rockford. For example, Rockford has a limited number of urologists and other specialties in comparison to other geographic areas. (DX0718, (Golias, Dep. at 50, *confidential – attorneys' eyes only*); DX0186, (Ruggles, IHT at 93-94)).

1176. [redacted] (DX0184, (Seybold, IHT at 174-77, *confidential – attorneys' eyes only*)).

1177. [redacted] (DX0184, (Seybold, IHT at 176, *confidential – attorneys' eyes only*)).

1178. [redacted] (DX0698, (Kaatz, IHT at 81-82, *confidential*)).

1179. SAMC similarly has problems recruiting certain specialists and subspecialists to the community because SAMC currently lacks access to a population size that sustains the program. (DX0715, (Schoeplein, Dep. at 38-39)).

1180. SAMC has experienced trouble recruiting a stroke neurologist, neurosurgeon, dermatologist, emergency medicine, and a hospitalist. (DX0192, (Benink, IHT at 30-31, 33-34, 38-39, 100-01); DX0196, (Schoeplein, IHT at 124)).

1181. One of the main reasons SAMC and RMH currently have trouble recruiting physicians is because certain specialties do not perform enough procedures to attract quality physicians. (DX0192, (Benink, IHT at 33-35)).

1182. To support subspecialists, a hospital must have the tools, technology, and the patients to support them. [redacted] (DX0191, (McGrew, IHT at 129, 154, *confidential – attorneys' eyes only*, 155-56); DX0196, (Schoeplein, IHT at 123-28, 155-56, 170, 179-80); DX0189, (Schertz, IHT (7/12/11) at 146-49, *confidential – attorneys' eyes only*)).

1183. RHS believes that physician recruitment is likely to improve as a result of the affiliation because physicians, and in particular specialty physicians, are attracted to more stable and larger organizations. (DX0186, (Ruggles, IHT at 144); DX0698, (Kaatz, IHT at 153-54, *confidential*); DX0706, (Kaatz, Dep. at 81, *confidential*)).

1184. Physicians who work at RHS are supportive of the merger because of the potential stability, efficiencies, and high-quality subspecialty program additions. (Schertz, Tr. 596-97; DX0186, (Ruggles, IHT at 62); DX0170 at 001, *confidential*).

B. The Affiliation Will Allow RHS and SAMC to Devote Freed Capital to the Development of a Graduate Medical Residency Program in Rockford

1185. An additional difficulty in physician recruitment and retainment is the lack of teaching opportunities at SAMC and RHS. Highly skilled specialists and subspecialists are drawn

to facilities in which they can pass along their skills to new physicians. Unfortunately, the only residency program in Rockford is for family medicine and that program places residents almost exclusively at SwedishAmerican. (DX0003 at 007).

1186. Rockford is the fourth largest city in Illinois and, aside from the family practice residency operated by SwedishAmerican, does not have graduate medical education programs. (Kaatz, Tr. 731).

1187. A residency program provides opportunities for medical students to be exposed to more medicine, cases, and literature. (DX0192, (Benink, IHT at 27-29)).

1188. Hospital systems with medical residency programs have greater access to research, innovation, advanced technologies, advanced equipment, advanced procedures, and volume. (DX0192, (Benink, IHT at 110-11, 120, 143)).

1189. A hospital with a medical school and residency program also has the ability to attract good physicians and build quality within the hospital. (DX0192, (Benink, IHT at 25-26)).

1190. The top hospitals according to the U.S. News & World Report are committed to graduate medical education. (DX0192, (Benink, IHT at 108-10)).

1191. [redacted] (DX0698, (Kaatz, IHT at 154-55, *confidential*)).

1192. SAMC and RMH plan to use freed-up capital created through the affiliation to establish an internal medicine residency program with the University of Illinois College of Medicine, Rockford. This will help attract more specialists who can participate in the training of residents. (DX0003 at 007; Kaatz, Tr. 731).

1193. The FTC's expert testified that larger number of hospital beds and increased volumes are needed to support an internal medicine residency program, as the OSF Northern Region hopes to operate post-affiliation. (Romano, Tr. 146).

1194. The opportunity to bring additional medical residency programs into Rockford will both enhance the level of medicine practices and provide a pipeline for future recruitment for difficult to recruit subspecialties. (Kaatz, Tr. 731).

1195. Prior to seeking the affiliation with RMH, SAMC explored creating additional residency programs at its location; however, due to the costs to compete against the other two hospitals in Rockford, it cannot afford one at this time. (DX0192, (Benink, IHT at 23-24); DX0003 at 007).

1196. In addition, SAMC does not currently have the volume of patients, type of faculty (department chairmen, residency directory, and core faculty), or types of rotations necessary to support a residency program. (DX0192, (Benink, IHT at 18-19, 46-48); DX0698, (Kaatz, IHT at 172-74, *confidential*)).

1197. The affiliation will combine the patient populations of the two hospital systems which could help them establish a graduate medical education program. (DX0192, (Benink, IHT at 17-20); DX0698, (Kaatz, IHT at 157, *confidential*)).

1198. The three residency programs OSF would like to establish after the merger are internal medicine residency, pediatric residency, and med peds residency. It would take OSF approximately five years for residency programs to be fully functioning, however, the programs would be able to start within the next two years and would provide long-term benefits. (DX0192, (Benink, IHT at 146-47)).

C. The Affiliation Will Reduce Patient Outmigration, Allowing Rockford Citizens to Receive Healthcare Treatment Closer to Home

1199. By improving physician recruitment of subspecialists, the affiliation will improve access to tertiary care in Rockford. It will therefore allow the OSF Northern Region to become a regional referral center, capable of recruiting and supporting subspecialty physicians in Rockford. (Kaatz, Tr. 731-32).

1200. The affiliation also has the possibility of establishing Rockford as a viable alternative to Chicago for healthcare. (DX0360 at 001).

1201. The affiliation will also help the OSF Northern Region develop additional service lines, improving clinical quality. For example, RHS would like to offer gynecologic oncology and orthopedic oncology but currently does not because there is insufficient volume at RHS. (DX0186, (Ruggles, IHT at 36)).

D. The Affiliation Enhances the Parties' Ability to Respond to Healthcare Reform

1202. The affiliation provides the best way for RHS and SAMC to prepare for healthcare reform's effects on the provision of healthcare in Rockford. (DX0706, (Kaatz, Dep. at 210-11); Kaatz, Tr. 719, 765).

1203. RMH views the component parts of healthcare reform, the Patient Care Accountability Act, to be improvements for individuals around the country. However, the reforms will require hospitals to rework their business models. (Kaatz, Tr. 719).

1204. It is generally recognized that in order to "bend the cost curve" effectively, providers can no longer be reimbursed for the number of services they deliver; rather, payment will be based on cost-effective quality outcomes. As such, healthcare reform is shifting the provision of healthcare from a volume-based, reimbursement system to value-based, high-quality output with efficient research utilization. (DX0186, (Ruggles IHT at 102); DX0196, (Schoeplein, IHT at 45-48); DX0362 at 002; DX0372 at 001; DX0706, (Kaatz, Dep. at 107)).

1205. Such a model will require hospitals to document "excellence" in all facets of its functions. For example, if a hospital is able to reduce infection rates, it will receive

reimbursement for its services. However, if a hospital is unable to meet specific quality or outcome-related goals, it will likely have to make a penalty payment. (Kaatz, Tr. 720).

1206. Healthcare reform will be applied to both the governmental and commercial segments of healthcare. (DX0009 at 007).

1207. As part of healthcare reform, half a billion dollars will be removed from Medicare funding to fund other parts of the Patient Care Accountability Act. (Schertz, Tr. 583).

1208. Healthcare reform will force hospitals to operate their entire system on reduced Medicare reimbursement costs alone. For OSF, this represents between [redacted] less than current reimbursement levels. [redacted] (DX0194, (Baker, IHT at 24-25, *confidential – attorneys' eyes only*); DX0163 at 012, *confidential*).

1209. Healthcare reform will also require increased collaboration across hospitals and hospital systems. (Kaatz, Tr. 719).

1210. Healthcare reform will [redacted]. (DX0190, (Sehring, IHT at 193, *confidential – attorneys' eyes only*)).

1211. Components of the healthcare reform law encourage hospital consolidation. For example, initiatives within healthcare reform that make providers accountable for the cost and quality of the care they deliver create a need to consolidate. (DX0005 at 031, *confidential*; DX0163 at 012, *confidential*; DX0009 at 007).

1212. The FTC's expert, Dr. Romano, admitted that healthcare reform has led to increased efforts to align physicians and hospitals. Sometimes these alignments take the form of hospital acquisitions. (Romano, Tr. 187).

1213. All hospitals in Rockford are affected by healthcare reform. [redacted] (DX0717, (Walsh, Dep. at 149-50, *confidential – attorneys' eyes only*)).

1214. [redacted] (DX0717, (Walsh, Dep. at 98, *confidential – attorneys' eyes only*)).

1215. In light of the healthcare reform laws, [redacted] (DX0712, (Pocklington, Dep. at 164, *confidential – attorneys' eyes only*)).

1216. [redacted] (DX0717, (Walsh, Dep. at 143-44, *confidential – attorneys' eyes only*)).

1217. [redacted] (DX0717, (Walsh, Dep. at 144-45, *confidential – attorneys' eyes only*)).

1218. Payment system reforms will reward hospitals that become more efficient. (DX0712, (Pocklington, Dep. at 160, *confidential – attorneys' eyes only*)).

1219. [redacted] (DX0190, (Sehring, IHT at 194, *confidential – attorneys' eyes only*)).

E. The Local Board for the OSF Northern Region Is Dedicated to the Rockford Community and the Affiliation Is the Best Way for RMH and SAMC to Continue Providing for the Rockford Community

1220. It was very important for RHS to affiliate with an organization that would allow them to have a local board or local governance. (Kaatz, Tr. 723-24).

1221. RHS exists for the benefit of the greater Rockford area. It is a non-profit community asset governed by the RHS board. As a locally governed institution that is part of the Rockford community, local governance is at the core of its mission. (Kaatz, Tr. 725-26).

1222. As such, RHS fought hard in its negotiations with OSF to maintain a local governing board. (Kaatz, Tr. 725).

1223. The affiliation is the best way for SAMC to continue providing for the Rockford community. Without the merger, SAMC may close service lines. This would lead to the end of the hospital, as only full service hospitals can compete in the Rockford marketplace. If SAMC were to start to eliminate services, the credibility of the institution would be brought into question and lead to further decline. (Schertz, Tr. 596).

1224. The affiliation is the best way for RMH to continue providing for the Rockford community. [redacted] (DX0706, (Kaatz, Dep. at 86-87, *confidential*)).

1225. SAMC is strongly committed to providing charity care to the community. (DX0193, (Stenerson, IHT at 38, *confidential – attorneys' eyes only*)).

1226. The merger would provide OSF with the opportunity to free up tens of millions of dollars that it is now currently spending on unnecessary technology duplication to provide more charity care to the Rockford community. (DX0189, (Schertz, IHT (7/12/11) at 25)).

1227. [redacted] (DX0714, (Schertz, Dep. at 139, *confidential – attorneys' eyes only*)).

1228. [redacted] (DX0700, (Brown, Dep. at 128-29, *confidential – attorneys' eyes only*)).

CONCLUSIONS OF LAW

I. THE CLAYTON ACT §13(B) STANDARD

1. To obtain a preliminary injunction under Federal Trade Commission Act Section 13(b), the Federal Trade Commission ("FTC") must show that "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b).

2. The FTC has the burden of showing it is likely to prevail on the merits. *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008).

3. That burden is not insubstantial. *See FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004). Merely "showing . . . a fair or tenable chance of success on the merits will not suffice for injunctive relief," *Tenet*, 186 F.3d at 1051, because the district court may not "rubber-stamp an injunction whenever the FTC provides some threshold evidence." *Whole Foods*, 548 F.3d at 1035.

4. To show a likelihood of ultimate success, the FTC must "raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair grounds for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Tenet*, 186 F.3d at 1051 (*citing FTC v. Freeman Hosp.*, 69 F.3d 260, 267 (8th Cir. 1995)).

5. The district court's role in determining whether or not to grant an injunction is particularly important in Section 7 cases because "[i]f Congress did not want federal courts to play some meaningful role in the injunction process, it could have given injunction power directly to the FTC. Congress did not structure the process that way. Despite Congress' lessening of what the FTC must show to secure a preliminary injunction, the FTC's burden remains heavy, because the granting of any injunction by a federal court is an 'extraordinary and drastic remedy.'" *FTC v. Foster*, 2007 U.S. Dist. LEXIS 47606, at *129-130 (D.N.M. May 29, 2007) (citation omitted).

II. THE FTC HAS FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS

6. To show a likelihood of success on the merits of a Clayton Act Section 7 claim, the FTC must show a "reasonable probability of substantial impairment of competition by an increase in prices above competitive levels." *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 136-37 (E.D.N.Y. 1997) (citation omitted).

7. Section 7 demands "that a plaintiff demonstrate that the substantial lessening of competition will be sufficiently probable and imminent to warrant relief." *Arch Coal*, 329 F. Supp. 2d at 115 (citation omitted). Further, "it is well settled in the case law that for the government to succeed, 'it must show a reasonable probability that the proposed transaction would substantially lessen competition in the future.'" *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998) (citations omitted).

8. Showing only "'[a] mere possibility'" of an impairment of competition is insufficient, *Foster*, 2007 U.S. Dist. LEXIS 47606, at *131 (citation omitted), because "Section 7 is concerned with the loss of competition that is sufficiently probable and imminent, not with possibilities." *Id.*

A. The FTC Cannot Rely Solely on Market Concentration to Meet Its Burden

9. The FTC is not automatically entitled to injunctive relief solely because the merger will result in an increase of concentration in the market. Courts have denied the government an injunction in hospital merger cases involving three-to-two mergers, *see, e.g., Freeman Hosp.*, 69 F.3d at 262 (denied preliminary injunction in a three-to-two merger), and in cases resulting in high post-merger HHI levels. *See, e.g., FTC v. Tenet Health Care Corp.*, 17 F. Supp. 2d 937, 946 (E.D. Mo. 1998), *rev'd* 186 F.3d 1045, 1047 (8th Cir. 1999) (appellate court reversed grant of preliminary injunction where the only two hospitals in Poplar Bluff, Missouri merged, the resulting market share for general acute care was 84%, and the post-merger HHI would be 6,000 to 7,000); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1294 (W.D. Mich. 1996) (denied preliminary injunction where merging parties would control 47 to 65% of the general acute care inpatient hospital services market and the post-merger HHI would be 2,767 to 4,521); *Long Island Jewish Med. Ctr.*, 983 F. Supp. 121 (denied preliminary injunction where merging hospitals had 100% of the market alleged by the government).

10. The FTC must show more than market concentration because "[s]tatistics concerning market share and concentration are not conclusive indicators of anti-competitive effects." *Foster*, 2007 U.S. Dist. LEXIS 47606, at *138; *see also Arch Coal,* 329 F. Supp. 2d at 130. Further, defendants may produce "nonstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991) (citation omitted).

11. The Supreme Court has cautioned that market concentration statistics may inaccurately represent the competitive stature of a post-merger company. *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498, 503-504 (1976). The Supreme Court also explained that "only examination of a particular market, its structure, history, and probable future, can provide the appropriate setting for judging the probable anticompetitive effects of a merger." *Id.* at 498.

12. Relying on market shares to analyze competitive effects is "especially problematic" when the transaction involves differentiated products, like general acute care inpatient services. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1122 (N.D. Cal. 2004).

13. Accordingly, "antitrust theory and speculation cannot trump facts." *Arch Coal*, 329 F. Supp. 2d at 116.

14. Therefore, "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness," *United States v. Baker Hughes*, 908 F.2d 981, 984 (D.C. Cir. 1990), but it is not the end of the inquiry.

B. The FTC Has Failed to Prove Likelihood of Anticompetitive Effects

15. Beyond "market shares," the court must examine the "structure, history and probable future" of the market to determine whether high market shares indicate there are likely to be anticompetitive effects from the transaction. *Gen. Dynamics,* 415 U.S. at 498 (1974).

16. In the hospital merger context, courts have routinely denied injunctions due to the industry's market dynamics. In *Long Island Jewish Medical Center*, the district court denied the government an injunction because the government's case overlooked market dynamics including a number of nearby competitors offering the same services, possibility of entry, existence of excess capacity in the market, and likely payor responses to a possible price increase. 983 F. Supp. at 143-45. Similarly, here the evidence shows that MCOs can reject any attempt by OSF Northern Region to increase prices above competitive levels. MCOs have significant bargaining leverage over the hospitals in Rockford because the hospitals need the MCOs more than the MCOs need them. FF ¶¶ 838-844. In addition, some MCOs already offer narrow networks consisting of single-hospital products. FF ¶¶ 856-857, 863-866.

17. RHS and SAMC are not each other's closest substitutes, a fact which dooms the FTC's unilateral effects case. *See Oracle*, 331 F. Supp. 2d at 1172 (finding plaintiffs failed to prove unilateral effects as a result of a merger because they failed to prove that there were a significant number of customers who regarded the merging companies as first and second choices); *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1129-32 (N.D. Cal. 2001) (using diversion analysis to support finding that patients would turn to other hospitals in the face of a price increase). Here, the evidence shows that SwedishAmerican is the closest substitute for both RHS and SAMC. FF ¶¶ 771, 778-784. The evidence further shows that SwedishAmerican is a viable, marketable alternative to OSF Northern Region, and SwedishAmerican will serve to constrain any attempt by OSF Northern Region to raise its rates above competitive levels. FF ¶¶ 814-819. SwedishAmerican has sufficient inpatient bed capacity to handle additional patients if MCOs choose to offer a product with SwedishAmerican as the only in-network hospital in Rockford to steer patients away from OSF Northern Region. FF ¶ 792.

18. OSF and RHS have stipulated that they will not demand the exclusion of SwedishAmerican as a condition to contracting with OSF Northern Region, and neither OSF or OSF Northern Region will require an MCO to contract with OSF systemwide or any other OSF hospital as a condition to contracting with OSF Northern Region. FF ¶¶ 845-847. This stipulation enables MCOs to negotiate alternative rates from SwedishAmerican and OSF Northern Region.

19. The FTC has no evidence to support its claim that OSF Northern Region and SwedishAmerican will coordinate their competitive conduct after the affiliation. Instead, the evidence shows that each hospital system makes its own decisions regarding investments, services and amenities independently to fulfill its mission to provide quality healthcare to the Rockford community. FF ¶ 896. Further, executives from SwedishAmerican, SAMC, and RHS testified that the Rockford hospital systems have not exchanged competitively sensitive information with one another. FF ¶¶ 890-892.

Moreover, monitoring of a competitor's service line offerings, recruitment, and capital expenditures is consistent with competition, not coordination. FF ¶¶ 895-898.

20. There is no evidence to support the FTC's claim that the affiliation will cause primary care physician rates to increase to supra-competitive levels. That is because MCOs have even greater leverage over the hospitals for physician services than they do for general acute care inpatient services. FF ¶ 943. Moreover, there are no barriers to entry in this market. FF ¶¶ 940-942.

III. THE EQUITIES WEIGH IN FAVOR OF THE AFFILIATION

21. Even if the FTC makes out a prima facie case of a Section 7 violation, it also must show that the equities favor granting an injunction. *See Butterworth Health Corp.*, 946 F. Supp. at 1301-02 (court denied preliminary injunction even where FTC had shown that merged entity would have substantial market power because the overall benefit to the public of allowing merged entities to pursue efficiencies was ultimately "in the best interests of the consuming public as a whole").

22. That is because the likelihood of success analysis and public equities analysis are legally distinct inquiries "and the latter should be analyzed separately, no matter how strong the agency's case on the former." *FTC v. Lab. Corp. of Am.*, 2011 U.S. Dist. LEXIS 20354, at *54 (C.D. Cal. Feb. 22, 2011) (citation omitted).

23. To sustain its burden, the FTC must present evidence and make an actual showing that the equities favor enjoining the transaction. *See Whole Foods*, 548 F.3d at 1049-50; *Arch Coal*, 329 F. Supp. 2d at 160 (finding that the evidence presented by the FTC on equities was insufficient).

24. To do so, the FTC must prove that "the harm to the parties and to the public that would flow from a preliminary injunction is outweighed by the harm to competition, if any, that would occur in the period between denial of a preliminary injunction and the final adjudication of the merits of the Section 7 claim." *Lab. Corp.*, 2011 U.S. Dist. LEXIS 20354, at *55 (citations omitted).

25. When weighing equities, the Court may consider both public and private equities. *See FTC v. Elders Grain*, 868 F.2d 901, 903 (7th Cir. 1989).

26. Public equities include "improved quality, lower prices, increased efficiency, realization of economies of scale, consolidation of operations, and elimination of duplication." *Lab. Corp.*, 2011 U.S. Dist. LEXIS 20354, at *57 (citation omitted).

27. The 2010 Merger Guidelines state that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products." U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 10 (2010).

28. Evidence of merger-specific efficiencies may be considered to rebut a plaintiff's *prima facie* case. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001); *Butterworth Health Corp.*, 946 F. Supp. at 1302 (concluding that defendants rebutted the government's *prima facie* case with evidence of, among other things, substantial efficiencies). Courts should consider "evidence of enhanced efficiency in the context of the competitive effects of the merger." *Tenet*, 186 F.3d at 1054.

29. "Even if the Court finds that the FTC demonstrated a likelihood of success on the merits, 'particularly strong equities [that] favor the merging parties' will bar a preliminary injunction." *Lab. Corp.*, 2011 U.S. Dist. LEXIS 20354, at *56 (*citing Whole Foods*, 548 F.3d at 1035).

30. Courts have denied injunctive relief where the defendant has established that the merger will result in efficiencies that benefit consumers. *See Lab. Corp.*, 2011 U.S. Dist. LEXIS 20354, at *61-62.

31. This Court likewise denies injunctive relief here because the evidence shows that Rockford residents will realize a number of significant benefits from the affiliation, and those benefits outweigh the likelihood of anticompetitive harm. For example, OSF Northern Region will be a more sustainable and higher quality health care system than its predecessor hospital systems. FF ¶¶ 1170, 1174, 1202. The affiliation will also allow consolidation of certain services and adoption of best practices which will result in clinical excellence and higher quality. FF ¶¶ 1140-1141, 1156, 1166. The evidence also shows that OSF Northern Region will achieve greater efficiency and more cost-savings than its predecessor hospital systems could have achieved on their own. FF ¶ 1169. The savings include at least $114 million in capital cost avoidance and approximately $15 million in annual recurring clinical operations savings. FF ¶¶ 1082, 1118.

32. Given the difficult condition of the healthcare system in this country, the need for hospitals to find ways to deliver better care more efficiently and effectively, and the announced intention of the federal government through healthcare reform law, to facilitate, and indeed mandate, these goals, it is most appropriate to give primacy to the efficiencies and savings that will be achieved by the merger in the balancing of interests required by the Court in considering the FTC's motion for preliminary injunction.

IV. CONCLUSION

The FTC has failed to meet its burden of proving both of the elements necessary to obtain the preliminary injunctive relief it requests. The FTC has not shown an ultimate likelihood of success on the merits of the Clayton Act Section 7 violation alleged in its administrative complaint. And the FTC has not shown that entry of the preliminary injunction it requests is in the public interest. On the other hand, OSF and RHS have shown that their affiliation will

generate substantial community benefits. For those reasons, the Court denies the FTC's motion for preliminary injunction.

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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' Revised Proposed Findings of Fact and Conclusions of Law was 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