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

FEDERAL TRADE COMMISSION	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 11 -cv- 50344
	)	
OSF HEALTHCARE SYSTEM	)	~~FILED UNDER SEAL~~ unsealed by order dated 12-1-11
	)	
and	)	
	)	
ROCKFORD HEALTH SYSTEM	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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The Federal Trade Commission ("FTC" or "Commission") seeks temporary and preliminary relief to enjoin OSF Healthcare System's ("OSF") proposed acquisition of Rockford Health System ("RHS") ("the Acquisition"). OSF's purchase of close competitor RHS would create a duopoly controlling critical health care services in Rockford, Illinois. If not stopped, the Acquisition threatens to reduce health care quality, and burden patients with higher costs when many are struggling financially. Importantly, Defendants pursued this transaction as a "defens[e] against competitive threats" and "to avert an accelerating medical arms race"– thinly-veiled code for ending competition that benefitted the community for decades.[1]

The matter is hardly one of first impression. This Court already ruled that a nearly identical merger between RHS and the third Rockford hospital, Swedish American Hospital, violated federal antitrust laws because it would "hurt consumers."[2] After a full merits trial, this Court permanently enjoined that merger, and the Seventh Circuit affirmed. The relevant markets, strong competition between the three Rockford hospitals, high barriers to entry, and other key facts that this Court found warranted a *permanent* injunction remain unchanged today.

Today's action differs in one fundamental respect: Plaintiff here, the FTC, seeks only *preliminary* relief under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), a statute not available to the U.S. Department of Justice in the prior action.[3] The Commission has already initiated an administrative proceeding, with up to 210 hours of live testimony, to adjudicate this case under Sections 7 and 11 of the Clayton Act.[4] The administrative trial is scheduled to begin on April 17, 2012. The sole issue before this Court, therefore, is whether to

[1] PX0041-009.
[2] *See United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1278, 1292 (N.D. Ill. 1989), *aff'd*, *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1286 (7th Cir. 1990).
[3] 15 U.S.C. § 53(b) (2011).
[4] 15 U.S.C. §§ 18, 21 (2011).

preserve the *status quo*, and maintain health care competition for Rockford citizens, pending the outcome of the ongoing administrative proceeding. Without such relief, Defendants will be free to consolidate management, reduce services, lay-off employees, renegotiate health plan contracts, and take other steps that would cause immediate and irreversible harm to the community, even while the administrative litigation proceeds. Such actions will frustrate the ability to fashion appropriate relief if the Acquisition ultimately is deemed unlawful at the merits trial.

Section 13(b) authorizes the Court to grant preliminary injunctive relief if, after weighing the equities and considering the FTC's likelihood of success on the merits, it determines that preliminary relief would be in the public interest.[5] These criteria are amply satisfied here. The previous successful challenge before this Court, and the Seventh Circuit, of a merger to duopoly among two of the same three Rockford hospitals is highly instructive. Beyond that controlling precedent, the extraordinary increase in market concentration triggers a strong presumption – under case law and the federal antitrust agencies' *Horizontal Merger Guidelines* – that the Acquisition is anticompetitive and unlawful. Taken together, the precedent, presumption, and overwhelming evidence – including testimony from Defendants, numerous local employers, and every major health plan – firmly establish the FTC's likelihood of success.

No court has denied a preliminary injunction based on claimed efficiencies and not been reversed on appeal, and no court ever has denied the FTC preliminary relief in a merger to duopoly. Defendants may argue that competition is counterproductive in the health care industry, or that the Acquisition may someday generate efficiencies to offset the certain and immediate harm. Such arguments are contrary to law and contradicted by Defendants' own

[5] 15 U.S.C. § 53(b); *see also FTC v. Elders Grain, Inc.*, 868 F.2d 901, 902 (7th Cir. 1989).

documents and testimony.[6] In any event, a full administrative proceeding already is underway, where both sides can conduct discovery and fully litigate these issues.

STATEMENT OF FACTS

Three hospitals – OSF St. Anthony Medical Center ("OSF St. Anthony"), Rockford Memorial Hospital ("Rockford Memorial"), and SwedishAmerican Hospital ("SwedishAmerican") – have served Rockford residents for decades. All three are located within seven miles of each other. All three offer primary, secondary, and some tertiary inpatient services; all three are in strong financial condition; and all three offer high quality care.[7]

OSF, the largest health system in central Illinois, owns seven hospitals in all, including OSF St. Anthony. OSF St. Anthony has a 30% market share (based on patient days) and 33 employed primary care physicians ("PCPs"). Rockford Memorial has a 34% share and 29 employed PCPs. SwedishAmerican has a 35% share and 41 employed PCPs.

The three hospitals have attempted to consolidate for years. A proposed merger of Rockford Memorial and SwedishAmerican was permanently enjoined by this Court in 1989. OSF St. Anthony and SwedishAmerican agreed to merge in 1997, but the transaction was later abandoned. The present action arises from an Affiliation Agreement between OSF and Rockford Memorial signed on January 31, 2011, after nearly two years negotiating and preparing an antitrust defense. Unless this Court acts, OSF will be free to effectively acquire all of RHS's operating assets, including Rockford Memorial, after 11:59 p.m. on November 22, 2011.

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[6] The antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services" and "the statutory policy precludes inquiry into the question whether competition is good or bad." *Nat'l Soc. of Prof'l Eng. v. United States*, 435 U.S. 679, 695 (1978).

[7] *See, e.g.*, PX0173-005; PX0129-049; PX0251 at ¶ 9; PX0253 at ¶ 11; PX0256 at ¶ 25; PX0255 at ¶ 24; PX0283 at ¶ 7; PX0284 at ¶ 8; PX0265 at ¶ 2; PX0217 at 31; PX0559-001; PX0461-001.

ARGUMENT

Section 13(b) authorizes preliminary relief if, upon "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[8] The Commission clearly satisfies these criteria in this case.

I. THE FTC IS LIKELY TO SUCCEED ON THE MERITS OF ITS SECTION 7 CHALLENGE

Section 7 of the Clayton Act provides that an acquisition is unlawful if its effect "*may be* substantially to lessen competition, or to tend to create a monopoly."[9] Congress purposefully used the words "may be" because the Act was designed to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints."[10] For a Section 7 violation, "[a]ll that is necessary is that the merger create an appreciable danger of [higher prices] in the future."[11] Indeed, Section 7 "requires a prediction, and doubts are to be resolved against the transaction."[12] Transactions that result in "undue" concentration in a relevant market are presumed unlawful.[13] Following such a showing, the burden shifts to Defendants to rebut the presumption of illegality arising from the *prima facie* case and market concentration levels.[14]

Because Congress believed the "assistance of an administrative body would be helpful in resolving [antitrust questions]," it vested Section 7 adjudication with the FTC "in the first instance" through its administrative proceeding.[15] At the same time, Congress enacted Section

[8] 15 U.S.C. § 53(b)(2011).
[9] 15 U.S.C. § 18 (2011) (emphasis added).
[10] *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 & n.39 (1962) (discussing legislative history); *see also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362-63 (1963).
[11] *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986).
[12] *Elders Grain, Inc.*, 868 F.2d at 906 (citations omitted).
[13] *Phila. Nat'l Bank*, 374 U.S. at 363; *see also United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120-21 (1975); *Rockford Mem'l Corp.*, 717 F. Supp. at 1279.
[14] *FTC v. Univ. Health Inc.*, 938 F.2d 1206, 1218-19 (11th Cir. 1991).
[15] *Hosp. Corp. of Am.*, 807 F.2d at 1386; *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 788-89 & n.4 (N.D. Ill. 1978).

13(b) to preserve the FTC's ability to order effective final relief, if warranted, after an administrative proceeding, while also protecting consumers in the interim.[16] As such, in a 13(b) proceeding, "[t]he district court is not authorized to determine whether the antitrust laws have been or are about to be violated. . . . The only purpose of a proceeding under Section 13[(b)] is to preserve the *status quo* until the FTC can perform its function."[17] The limited question for this Court under Section 13(b) is whether the FTC "'has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation, and determination by the FTC in the first instance and ultimately by the Court of Appeals.'"[18] While this Court's role is limited to determining whether the FTC raises "serious, substantial" questions, in doing so the Court may rely on the same analytical framework the administrative court will use to assess the merits of the Section 7 claim.

A. The Acquisition is Presumptively Anticompetitive and Unlawful

The Acquisition is presumed unlawful because it would lead to undue concentration in two relevant product markets – general acute-care inpatient hospital services and primary care physician services sold to commercial health plans.[19] A relevant product market is one in which a hypothetical monopolist could increase prices profitably by a "small but significant" amount.[20]

The first relevant market is general acute-care inpatient hospital services, the same

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[16] H.R. REP. No. 93-624 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2523; *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001).
[17] *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976).
[18] *Rhinechem Corp.*, 459 F. Supp. at 789 (quoting *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1091 (S.D.N.Y. 1977)); *see also FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008); *Heinz*, 246 F.3d at 714 (citing *Food Town Stores, Inc.*, 539 F.2d at 1342).
[19] *See Rockford Mem'l Corp.*, 717 F. Supp. at 1281.
[20] PX0205 (*Merger Guidelines*) § 4.1.1; *Heinz*, 246 F.3d at 716 n.9; *Univ. Health Inc.*, 938 F.2d at 1211 n.12; *FTC v. PPG Indus. Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986).

"cluster market" of inpatient services previously analyzed by this Court.[21] This market has been consistently recognized by the Seventh Circuit and other courts reviewing hospital mergers.[22] It excludes complex tertiary and quaternary services because they are not performed by the Rockford hospitals and because market conditions differ substantially for such services. As explained by this Court, the relevant market also excludes outpatient services.[23]

The second relevant market is primary care physician services. Primary care physician services include services provided by physicians specializing in family practice, general practice, and internal medicine,[24] but exclude services provided by pediatricians and OB/GYNs, who provide specialized services to specific patient populations.[25]

The relevant geographic market is not in dispute. The market is no broader than the area this Court previously identified: Winnebago, most of Ogle, most of Boone, and small parts of McHenry, DeKalb, and Stephenson Counties, (referred to by the Court as the "Winnebago-Ogle-Boone area" or the "WOB area").[26] The relevant geographic market is the smallest area in which a hypothetical monopolist could raise prices without triggering a sufficient outflow of customers to providers in other areas to render the price increase unprofitable.[27] Rockford residents do not regard hospitals and physicians outside the area as practical alternatives for general acute-care

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[21] *Rockford Mem'l Corp.*, 898 F.2d at 1284; *Rockford Mem'l. Corp.*, 717 F. Supp. at 1261; *see also FTC v. ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, at *23, 2011-1 Trade Cas. (CCH) P77,395 (N.D. Ohio March 29, 2011).

[22] *See, e.g., Univ. Health Inc.*, 938 F.2d at 1210-11; *Evanston NW Healthcare*, No. 9315, 2007 WL 2286195, at 46 (FTC Aug. 6, 2007).

[23] *Rockford Mem'l. Corp.*, 717 F. Supp. at 1259-61; *see also Evanston NW Healthcare*, 2007 WL 2286195, at 46-48.

[24] *See HTI Health Services, Inc. v. Quorum Health Group, Inc.*, 960 F. Supp. 1104, 1115-17 (S.D. Miss. 1997); *see also* PX0207-097 (*DOJ and FTC Statements of Antitrust Enforcement Policy in Health Care*).

[25] *See, e.g.*, PX0251 at ¶ 21; PX0256 at ¶ 18.

[26] *Rockford Mem'l Corp.*, 898 F. 2d at 1285; *Rockford Mem'l Corp.*, 717 F. Supp. at 1278.

[27] *See* PX0205 (*Merger Guidelines*) § 4.2; *see also ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, at *149; *Evanston NW Healthcare*, 2007 WL 2286195, at 57.

inpatient hospital services and primary care physician services, respectively, and generally would not travel outside the area to obtain such services, even if Rockford prices increased.[28] Outlying hospitals do not compete with or constrain the pricing of Rockford hospitals for these services.[29] Notably, the relevant geographic market's precise contours do not affect the outcome here; the Acquisition is presumed anticompetitive and unlawful in any plausibly-defined market.

The *Merger Guidelines* measure concentration using the post-acquisition Herfindahl-Hirschman Index ("HHI") – the sum of the squares of each firm's market share. An acquisition that increases the HHI by over 200 points in a highly-concentrated market (*i.e.*, where the HHI exceeds 2,500) is presumed likely to enhance market power.[30] Here, the Acquisition increases the general acute-care inpatient services HHI by over 2000 points (more than *ten times* greater than the threshold) and reduces the number of competitors from three to two:[31]

Market	OSF/RHS Market Share	HHI Increase	Post-Acquisition HHI
General Acute Care	63.9%	2032	5351
PCP Services[32]	37.4%	696	1925

The concentration levels here far exceed those found by the Supreme Court to violate Section 7.[33] The presumption is nearly insurmountable in the 13(b) context:

[28] *Rockford Mem'l Corp.*, 898 F. 2d at 1285; *see also* PX0256 at ¶ 6; PX0255 at ¶ 6; PX0254 at ¶ 13; PX0217 at 25-26; PX0284 at ¶ 9; PX0265 at ¶ 3; PX0271 at ¶ 3; PX0272 at ¶¶ 4,6; PX0267 at ¶ 7; PX0273 at ¶ 6; PX0277 at ¶ 6; PX0227 at 211-12; PX0212 at 45; PX0216 at 58; PX0222 at 105-106; PX0282 at ¶ 3. OSF stipulated that the relevant geographic market does not include Beloit, Wisconsin. *See* PX0450 (Letter from A. Greene to K. Field, June 8, 2011).

[29] PX0257 at ¶ 10 ; PX0258 at ¶ 8; PX0259 at ¶ 8; PX0260 at ¶ 8; PX0261 at ¶ 7; PX0262 at ¶ 10; PX0263 at ¶ 8; PX0264 at ¶ 7; PX0286 at ¶ 3.

[30] PX0205 (*Merger Guidelines*) § 5.3.

[31] Source: Illinois and Wisconsin state discharge data for fiscal year 2010.

[32] Due to limitations in available data, PCP shares and HHIs are calculated for a market larger than that alleged here. The concentration figures thus likely *understate* Defendants' competitive significance.

[33] *Phila. Nat'l Bank*, 374 U.S. at 364. Similarly, the Seventh Circuit found that a combined hospital market share of between 64% and 72% was "immense." *Rockford Mem'l Corp.*, 898 F.2d at 1283.

> [A] merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it *must be enjoined* in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[34]

Presumptively unlawful, the Acquisition must be enjoined unless Defendants "clearly show[]" that no anticompetitive effects are likely.[35] Defendants cannot meet that heavy burden.

B. Defendants Cannot Rebut the Strong Presumption of Harm to Competition

Defendants do not dispute that this Acquisition will create a duopoly.[36] Courts deem such transactions presumptively unlawful.[37] The strong structural case here – and the resulting presumption of illegality – creates an insurmountable burden for Defendants at the preliminary injunction stage, and the Court may order relief on this basis alone.[38] But the FTC does not rest on the weight of that presumption. In fact, evidence gathered from Defendants' own files, and the testimony of Rockford employers, other hospitals' executives, and health plans all confirm the strong presumption of illegality.[39] Litigation consultants crafted Defendants' only defense, their purported efficiencies. These alleged benefits are not specific to this Acquisition and are far too speculative to overcome its anticompetitive effects.

1. The Acquisition Will Give Defendants the Ability to Increase Prices

The extraordinary concentration levels in this matter suggest that OSF can and will raise prices after the Acquisition. A health plan's ability to negotiate favorable hospital rates for

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[34] *Phila. Nat'l Bank*, 374 U.S. at 363 (emphasis added).
[35] *Id.*; *Univ. Health Inc.*, 938 F. 2d. at 1218-19.
[36] PX0376-023 ("this affiliation would reduce the competitor hospitals in Rockford from 3 to 2").
[37] *Heinz*, 246 F.3d at 716; *PPG Indus., Inc.*, 798 F.2d at 1503; *United States v. H&R Block, Inc.*, No. 11-00948, 2011 U.S. Dist. LEXIS 130219, at *118 (D.D.C. Nov. 10, 2011); *ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, at *151-52; *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 52-53 (D.D.C. 1998).
[38] *See, e.g.*, *Elders Grain, Inc.*, 868 F.2d at 906; *accord Whole Foods Mkt., Inc.*, 548 F.3d at 1035.
[39] *See* PX0376-023; PX0271 at ¶ 9; PX0266 at ¶ 6; PX0259 at ¶ 11; PX0255 at ¶ 14; PX0251 at ¶ 18.

customers depends, in large part, on the number of alternative hospitals in a local area.[40] By reducing the number of hospitals and eliminating a close competitor, OSF's acquisition of Rockford Memorial will increase OSF's leverage and enable it to demand higher rates.

Today, as Defendants acknowledge, all three Rockford hospitals compete for patients and for access to managed care contracts.[41] Each of the major health plans contracts with two of the three Rockford hospitals. As a result, the three hospitals must bid against each other for the two available spots.[42] Before the Acquisition, OSF, Rockford Memorial, and SwedishAmerican each faced possible exclusion from every plan's network. That fact motivated each hospital to offer its best rates to secure an in-network slot, and the lucrative patient volume that comes with it.[43] The Acquisition would end this important competitive dynamic.

If the Acquisition proceeds, OSF will control two of the three Rockford hospitals, allowing it to raise rates, which are paid directly by or passed down to local employers and employees. The only alternative to accepting such demands would be for a health plan to contract only with SwedishAmerican. But employers and health plans all testify that local residents insist on having a choice of hospitals. Thus, plans must give patients access (at reasonable rates) to at least two local hospitals.[44] Whatever Defendants' antitrust counsel may argue now, OSF's managed care negotiator acknowledged this fact in recent testimony: "to be marketable you have to have two hospitals in Rockford."[45] Because a SwedishAmerican-only network would be unacceptable to employers, Rockford residents, and health plans even at deep

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[40] PX0251 at ¶ 13; PX0252 at ¶ 16; PX0253 at ¶ 14; PX0254 at ¶ 18; PX0256 at ¶ 9.
[41] *See, e.g.*, PX0213 at 126, 164-165; PX0218 at 49-50.
[42] PX0256 at ¶ 11; PX0255 at ¶ 8; PX0254 at ¶ 21; PX0253 at ¶ 15; PX0251 at ¶¶ 16-17.
[43] PX0222 at 166-167; PX0211 at 97-98.
[44] PX0254 at ¶ 21; PX0252 at ¶ 24; PX0255 at ¶ 8; PX0256 at ¶¶ 13-14; PX0281 at ¶ 4; PX0270 at ¶ 7.
[45] PX0213 at 95; *see also* PX0322.

discounts, a combined OSF and Rockford Memorial becomes a virtual "must have" hospital, allowing it to raise rates to employers and employees.[46]

Both OSF and Rockford Memorial seek – and obtain – the highest rates possible in health plan negotiations despite their non-profit status.[47] OSF's contracting strategy directs its negotiators to "make[] every effort to maximize reimbursement."[48] OSF successfully leveraged its market position in Peoria as the self-proclaimed "very dominant player" to exclude its primary rival from key health plans.[49] This Acquisition, boasts OSF St. Anthony's CEO, would allow OSF to "become bigger" and "reclaim some leverage" in rate negotiations. Put simply, he testified: "if we get a little more leverage, that would be a good thing."[50] Undoubtedly, OSF will take full advantage of its enhanced market power.[51]

By reducing the number of competitors from three to two, the Acquisition also increases the risk of anticompetitive coordination. A merger in a highly concentrated market, particularly one "prone to collusion by reason of its history and circumstances[,] is unlawful in the absence of special circumstances."[52] In the past, the three Rockford hospitals jointly refused to negotiate rates with the state's largest health plan, Blue Cross Blue Shield of Illinois ("Blue Cross").[53] The history of coordination continues today. For example, Rockford Memorial, believing it was bidding against SwedishAmerican for Blue Cross's business, contacted SwedishAmerican

[46] PX0287 at ¶¶ 5-7, 9; PX0251 at ¶ 18; PX0253 at ¶¶ 15, 18; PX0254 at ¶¶ 21-23; PX0255 at ¶¶ 13-14; PX0256 at ¶ 14; PX0265 ¶¶ 6, 9; PX0267 ¶¶ 4, 9; PX0271 ¶¶ 6, 9; PX0279 ¶¶ 6, 9; PX0217 at 66-67. To be clear, this is not a reflection of the strength or quality of SwedishAmerican's competitive offerings, but rather, a result of the market requirement that a provider network offer a choice of two hospitals.
[47] PX0254 at ¶ 24; PX0251 at ¶ 26; PX0252 at ¶ 17; *see also Rockford Mem'l Corp.*, 898 F.2d at 1285.
[48] PX0345-001.
[49] PX0222 at 90-91; PX0318-001.
[50] PX0222 at 60, 83.
[51] PX0458-001 (raising rates to maximum because "I don't want to be leaving any money on the table").
[52] *Elders Grain, Inc.*, 868 F.2d at 906; *see also Hosp. Corp. of Am.*, 807 F.2d at 1389; *H&R Block, Inc.*, 2011 U.S. Dist. LEXIS 130219, at *109; *Rockford Mem'l Corp.*, 898 F.2d at 1286.
[53] *Rockford Mem'l Corp.*, 717 F. Supp. at 1286-87.

directly and learned that it was not negotiating with Blue Cross at that time.[54] This back-channel information sharing reduced Rockford Memorial's incentive to offer its best rates. Coordination does not require back room meetings; it can occur by sharing confidential information, boycotting disfavored terms, or delaying new amenities or services to temper the "arms race" known as competition.[55] By reducing the number of competitors, the Acquisition would only increase OSF's and SwedishAmerican's ability and incentive to coordinate.

Local employers and patients, not health plans, bear the burden of rate increases. Most local employees are covered under self-insured plans, meaning that their employer – *not* a commercial health plan – directly pays the cost of each employee's health care. Thus, any rate increase affects these employers directly and immediately.[56] Fully-insured employers also are hit with rate increases because health plans pass the higher costs on to them. Providing health coverage is hugely expensive for all local employers, and employees ultimately shoulder any rate increases through higher premiums, co-pays, and other out-of-pocket expenses.[57] In these difficult economic times, any cost increases will reduce access to care by causing residents to drop health insurance coverage, or to delay or forego much-needed care.[58]

2. Entry Will Not be Timely, Likely, or Sufficient to Preserve Competition

Illinois's Certificate of Need ("CON") statute is a well-recognized "regulatory barrier to entry"[59] that makes it more likely that hospital mergers will cause anticompetitive harm.[60] For

[54] PX0556-003.
[55] *Id.* The hospitals use consultants to obtain confidential and proprietary information. *See, e.g.*, PX0350.
[56] PX0276 at ¶ 9; PX0217 at 18; PX0252 at ¶ 26; PX0254 at ¶¶ 30, 36; PX0256 at ¶ 15; PX0255 at ¶ 15; PX0251 at ¶ 20; PX0253 at ¶¶ 3, 18.
[57] *See, e.g.*, PX0271 at ¶ 12; PX0265 at ¶ 9; PX0278 at ¶ 8; PX0267 at ¶ 9; PX0276 at ¶ 9; PX0279 at ¶ 10; PX0274 at ¶ 9; PX0277 at ¶ 8; PX0268 at ¶ 9; PX0269 at ¶ 8; PX0275 at ¶ 9; PX0280 at ¶ 8.
[58] *Id.*
[59] *Hosp. Corp. of Am.*, 807 F.2d at 1389; *see also Univ. Health*, 938 F.2d at 1219; PX0285 at ¶¶ 9-11.
[60] *Rockford Mem'l Corp.*, 898 F.2d at 1285; *see also* PX0285 at ¶ 9.

that reason, Defendants do not claim that entry will be timely, likely, or sufficient to defeat the competitive harm here.[61] New primary care physician entry in Rockford also is unlikely, particularly on a scale sufficient to replicate one of Defendants' large employed PCP groups.[62]

3. Purported Efficiencies are Not Cognizable and Do Not Outweigh Harm

No court ever has found that efficiencies rescue an otherwise unlawful transaction.[63] Defendants bear a heavy burden to "verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."[64] The made-for-litigation efficiencies claims here do not come close to satisfying these criteria.[65]

High market concentration levels, like those in this case, "require extraordinary 'proof of efficiencies,'" to "ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior."[66] But, under the *Merger Guidelines*, efficiency claims "generated outside of the usual business planning process," are "viewed with skepticism."[67] Defendants' purported efficiencies were prepared by FTI Consulting, a firm retained and supervised by antitrust counsel.[68] FTI alleges savings from avoiding capital investments,

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[61] *See also* PX0222 at 21-22 and PX0216 at 86-87.
[62] *See* PX0205 (*Merger Guidelines*) § 9.3; *see also* PX0282 at ¶ 6; PX0283 at ¶ 5; PX0284 at ¶ 6.
[63] *ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, at *154 (citing *Phila. Nat'l Bank*, 374 U.S. at 371); *see also FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967); *Heinz*, 246 F.3d at 711-12.
[64] *H&R Block, Inc.*, 2011 U.S. Dist. LEXIS 130219, at *142 (citing *Heinz*, 246 F.3d at 720-21); *see also Univ. Health Inc.*, 938 F.2d at 1223; *FTC v. Staples Inc.*, 970 F. Supp. 1066, 1089-90 (D.D.C. 1997); PX0205 (*Merger Guidelines*) § 10.
[65] *Rockford Mem'l Corp.*, 717 F. Supp. at 1289 (Defendants must show "clear and convincing evidence" that claimed efficiencies will "produce a significant economic benefit to consumers.").
[66] *H&R Block, Inc.*, 2011 U.S. Dist. LEXIS 130219, at *142 (citing *Heinz*, 246 F.3d at 720-21).
[67] PX0205 (*Merger Guidelines*) § 10; *ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, at *107.
[68] PX0228 at 23; PX0227 at 149.

consolidating clinical services, and centralizing administrative services.[69] Not only are most claims far too speculative to be credited, but Defendants could likely accomplish many cost-saving measures without this anticompetitive Acquisition.[70] Moreover, Defendants prevented a meaningful review of these claims by cloaking all supporting documentation and analyses under the veil of attorney work product.[71] This Court must discount Defendants' vague, unverified, and speculative efficiencies claims as made-for-litigation.

Remarkably, the benefits alleged today are virtual carbon copies of arguments made to this Court twenty years ago. Just as this Court held then, such claims cannot overcome the likely anticompetitive harm of a hospital merger to duopoly in Rockford.[72]

4. Defendants Cannot Satisfy a Failing or "Flailing" Firm Defense

Defendants do not, and cannot, assert a failing or "flailing" firm defense to justify their anticompetitive Acquisition because both hospitals are financially sound. The defense applies only if one hospital is insolvent, with no recovery possibility, and has no alternative purchaser.[73] Defendants seek to skirt the heavy burdens associated with that established defense, and instead argue that Rockford's poor economic climate makes the long-term survival of three hospitals uncertain. This Court already has rejected these very arguments, first made in 1989, holding that "'failing market'" or the "'writing on the wall'" arguments are "too broad and ungainly" to rescue a Section 7 violation.[74] Once again, in 1997, OSF and SwedishAmerican predicted when attempting to merge, "[i]n fact, if this merger is blocked, it is likely that SwedishAmerican or

[69] PX0001.
[70] PX0211 at 208; PX2000-006; PX2001-006.
[71] *See* PX0681.
[72] *Rockford Mem'l Corp.*, 717 F. Supp. at 1289-1291.
[73] *Citizen Pub. Co. v. United States*, 394 U.S. 131, 136-38 (1969) (citations omitted); *see United States Steel Corp. v. FTC*, 426 F.2d 592, 608 (6th Cir. 1970).
[74] *Rockford Mem'l Corp.*, 717 F. Supp. at 1289.

Saint Anthony will be forced to exit the market."[75] Again, that threat never materialized. The Court should not credit these already-debunked arguments. Tough economic conditions do not rebut Section 7, especially in the 13(b) context. The state of the economy only underscores the need to preserve competition and protect local patients and employers while this matter is litigated.

II. THE EQUITIES HEAVILY FAVOR A PRELIMINARY INJUNCTION

With the FTC's likelihood of success firmly established, Defendants now must demonstrate a balancing of equities in their favor. But no court has denied relief in a 13(b) proceeding where the FTC has demonstrated a likelihood of success.[76] When the FTC shows it likely will succeed on the merits, a "great weight" is assigned to the "potential injury to the public" from lost competition while the merits trial occurs.[77] And in health care markets, the potential harm from lost competition is especially weighty.

The principal public equity in 13(b) matters is the effective enforcement of the antitrust laws, that is, the "interests of consumers in being able to buy . . . services at a competitive price."[78] Preliminary relief will maintain the *status quo* for local patients and employers who face direct and immediate harm if the Acquisition is consummated pending trial.[79] If allowed to close the transaction, Defendants will begin consolidating management, reducing services, laying-off employees, and renegotiating contracts. This "scrambling of the eggs" severely hampers the ability to order effective relief, if warranted, following the administrative trial.[80]

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[75] PX1254-004.
[76] *ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, at *161.
[77] *Rhinechem Corp.*, 459 F. Supp. at 791.
[78] *Elders Grain, Inc.*, 868 F.2d 901 at 904.
[79] *See ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434, at *134-36.
[80] H.R. REP. No. 94-1373 at 5 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2572, 2637; *see also Rhinechem Corp.*, 459 F. Supp. at 791.

The FTC is aware of no valid equities weighing against a preliminary injunction and, in any event, public equities "must 'receive far greater weight.'"[81] Neither hospital is suffering financially and there are no financing contingencies threatening to unsettle the transaction. Although OSF and Rockford Memorial may claim urgency now, neither party showed any haste in the almost three years spent assembling the Acquisition and preparing an antitrust defense.

The Commission's fast-moving administrative proceedings cause very little delay under current rules – taking months, not years. In fact, in a hospital merger challenge earlier this year, the FTC administrative trial was completed within six months of a federal district court ordering a 13(b) injunction. Here, limited relief is needed during the merits proceeding to preserve decades of community-benefitting price and quality competition. The harm to a community that is unable to pay more for health care, simply because Defendants prefer a duopoly to competition, cannot be reversed.

CONCLUSION

What's past is prologue in Rockford. The purported justifications for a merger to duopoly have not changed over the last twenty years, and this Court and the Seventh Circuit held that such claims cannot save an unlawful transaction. In this case, under the "serious, substantial" questions standard of Section 13(b) of the FTC Act, Plaintiff seeks only to preserve the *status quo* while an administrative court fully and quickly adjudicates the merits of this case. For these reasons, the FTC respectfully urges this Court to grant a Temporary Restraining Order and Preliminary Injunction prohibiting the implementation of Defendants' Affiliation Agreement pending completion of the on-going administrative proceeding.

[81] *Elders Grain, Inc.*, 868 F.2d at 908 (citing *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984)) (Ripple, J., concurring).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of November, 2011, I filed the foregoing with the clerk of the court.

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