

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGE



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**In the Matter of** )

**OSF Healthcare System,** )  
**a corporation, and** )

**Rockford Health System,** )  
**a corporation** )

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**Docket No. 9349**

**Hon. Judge Chappell**

**PUBLIC**

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ MOTION FOR  
SANCTIONS FOR FAILURE TO TIMELY PRODUCE INFORMATION**

Respondents seek an extraordinary sanction – the exclusion of all health plan claims data from the evidentiary record. The data are unquestionably relevant and, once analyzed using econometric techniques, may prove probative to central issues in this matter. Even accepting Respondents’ recitation of the facts related to the data as complete and correct,<sup>1</sup> however, the already-remedied discovery violation they describe is largely of their own creation and falls far short of warranting the drastic sanction of denying the Court access to relevant evidence. Specifically, Respondents admit, as they must, that they (1) received a significant portion of the data at issue more than two weeks before Complaint Counsel was required to produce it in this matter, (2) received *all* of the data at issue on the same day they raised the issue with Complaint

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<sup>1</sup> For example, on January 24, 2012, Respondents claimed that Complaint Counsel had not produced inpatient admission data obtained from SwedishAmerican Health System but Complaint Counsel immediately identified the data for Respondents within the initial disclosure productions. Letter from James Camden to Kenneth Field (Jan. 24, 2012) (attached as Exhibit 1); E-mail from Kenneth Field to James Camden (Jan. 25, 2012) (attached as Exhibit 2).

Counsel for the first time, (3) elected not to raise the issue with Complaint Counsel earlier, even though Respondents had more than sufficient information, ten days before the initial disclosures deadline in this matter, to be aware that Complaint Counsel may have inadvertently not produced some of the data at issue, and (4) had actual notice that Complaint Counsel had inadvertently not produced some of the data, yet elected not to raise the issue with Complaint Counsel for at least 25 more days. Plainly, Respondents failed to take the simple and required step of notifying Complaint Counsel of the issue so that it could be quickly remedied. Respondents cannot be entitled to relief where the prejudice they claim – not having a portion of the data as soon as they were entitled to it – is entirely the result of their own failure to act.

Notwithstanding the fact that Respondents inexplicably failed to raise this issue in a timely way, Complaint Counsel offered Respondents additional time with the data that would fully cure the alleged prejudice. The fact that Respondents rejected this offer highlights that their goal is not to remedy prejudice, but rather to prevent the Court from having access to relevant evidence that they apparently fear will be adverse.<sup>2</sup> The proposed sanction does not serve the Court, is not reasonably tailored to the alleged prejudice, and is not warranted even on the facts alleged by Respondents.

Accordingly, Complaint Counsel respectfully requests that the Court deny Respondents' transparent effort to remove potentially adverse evidence from the record. This result is compelled by the fact that Respondents failed to raise the issue in a timely manner, and also because any potential prejudice was resolved within the discovery period and on the same day it

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<sup>2</sup> Notably, Respondents pursued the same strategy during the preliminary injunction proceeding related to this matter. There, Respondents asked the court to preclude a key witness from testifying to remedy alleged prejudice from an out-of-time production. The Federal District Court decisively and correctly rejected Respondents' transparent effort to silence the witness and ordered the precise relief originally offered – additional deposition time. *See FTC v. OSF Healthcare System and Rockford Health System*, No. 3:11-cv-50344 (N.D. Ill. Filed on Nov. 18, 2011) Dkt. # 159 entered Jan. 30, 2012 (Court's Order of additional deposition time) (attached as Exhibit 3).

was first raised with Complaint Counsel. Should the Court determine that Respondents are entitled to relief, however, Complaint Counsel respectfully requests that the Court order the usual relief to address prejudice associated with late-produced evidence by granting Respondents more time to process and analyze the claims data.

## I. FACTUAL BACKGROUND

Complaint Counsel made timely initial disclosures in the District Court proceeding related to this matter on November 29, December 5, and December 6, 2011. (*Respondents' Memorandum in Support of Motion for Sanctions* (“*Respondents' Memo*”) at 3-4; Castle Decl. ¶ 4 (attached as Exhibit B to *Respondents' Memo*.) Between December 6, 2011 and December 9, 2011, Respondents searched Complaint Counsels' initial disclosures for health plan claims data and found data from BlueCross BlueShield of Illinois (“BCBS-IL”), but failed to find claims data from other health plans in the initial productions.<sup>3</sup> (*Id.*) BCBS-IL is the largest health plan in the Rockford area and, according to counsel for Respondents, accounts for approximately “70 percent[] of the commercially insured patients in Rockford.”<sup>4</sup> Complaint Counsel's production also included previously issued Civil Investigative Demands (“CIDs”) requesting similar data from other health plans operating in Rockford, thus flagging for Respondents that Complaint Counsel likely possessed such data.<sup>5</sup> Nevertheless, Respondents chose not to ask Complaint Counsel for the claims data from the other health plans at that time, and instead Respondents

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<sup>3</sup> Because the claims data at issue contains highly sensitive patient health information, it subject to strict protocols at the FTC that prevent Complaint Counsel from accessing it directly. Complaint Counsel followed the established protocols and requested that all data be copied and produced as required, and Complaint Counsel believed in good faith that Respondents had timely received all of the data.

<sup>4</sup> Sched. Hr'g Tr. at 56:15-18 (Dec. 20, 2011) (attached as Exhibit 4) (“[BCBS-IL] is the largest managed care organization in the market. It represents about 70 percent, about 70 percent, of the commercially insured patients in Rockford[.]”); Complaint Counsel estimates the true percentage to be closer to 50 percent.

<sup>5</sup> *See, e.g.*, Respondents' Memo at 3 (referencing CIDs attached as Exhibit D to Respondents' Memo).

issued subpoenas to the health plans on December 9, 2011, requesting the claims data.

(*Respondents' Memo* at 4; Castle Decl., ¶¶ 6-7.)

Complaint Counsel had until December 19, 2011, to fulfill its initial disclosure obligations and produce the data in this proceeding. 16 C.F.R. §§ 3.31(b)(2); 4.3. (*Respondents' Memo* at 6-7.) Thus, Respondents had ample information to be aware of the deficiency for ten days to two weeks *before* Complaint Counsel was even required to produce the data in this matter. (*Id.* at 4; Castle Decl., ¶ 4 (showing Respondents knew before December 9, 2011, that the claims data had not been produced).) Moreover, Respondents acknowledge that at least two health plans told Respondents on January 6, 2012, that the claims data had already been produced to Complaint Counsel. (*Respondents' Memo* at 4; Castle Decl., ¶ 8-9.) But Respondents still chose not to raise the issue with Complaint Counsel. (*Id.*)

Respondents first asked Complaint Counsel for the additional claims data on January 31, 2011, (*Respondents' Memo* at 5; Castle Decl., ¶ 10), at least 53 days after Respondents first became aware of the alleged deficiency on or before December 9, 2012, and a full 25 days after Respondents were specifically told of the potential deficiency by at least two health plans on January 6, 2012. (*Respondents' Memo* at 4-5; Castle Decl., ¶¶ 8, 10.) On January 31, 2012, *the same day* Respondents first inquired about the data, Complaint Counsel produced to Respondents a hard drive containing new copies of *all* of the claims data (*Respondents' Memo* at 5; Castle Decl., ¶ 11) and thereby immediately cured any alleged deficiency within the discovery period defined by the Court. Under the Scheduling Order issued by this Court, fact discovery did not end until February 17, 2012, thus Respondents received all of the health plan data more than two weeks before the end of fact discovery.

## II. ARGUMENT

Complaint Counsel should not be held responsible for Respondents' unexplained failure to raise the alleged deficiency prior to January 31, 2012. Any prejudice to Respondents is a result of their failure to take reasonable steps to resolve the deficiency, not any inadvertent omission by Complaint Counsel. As described above, Respondents had more than sufficient information to be aware that Complaint Counsel may have inadvertently not produced some of the health plans' admissions data by December 9, 2011, a full ten days *before* Complaint Counsel was even required to produce the claims data in this proceeding. Moreover, even assuming counterfactually that Respondents did not or should not reasonably have known of the alleged deficiency by December 9, 2011, Respondents themselves admit that they were *explicitly notified* of the alleged deficiency by health plans on January 6, 2012. (Castle Decl., ¶ 8-9; *Respondents' Memo* at 4 (citing letters memorializing discussions with health plans attached as Exhibit F to *Respondents' Memo*). Yet still, Respondents chose not to notify Complaint Counsel of the alleged deficiency until 25 days later.

Because Respondents should have known of the inadvertent deficiency yet failed to raise it with Complaint Counsel during the entire time they claim to be prejudiced by not having the data at issue, Respondents are not entitled to relief. Even if Respondents did not discover the inadvertent deficiency until January 6, 2012, Complaint Counsel cannot be blamed for Respondents' failure to raise the deficiency until January 31, 2012. Thus, the maximum period for which Respondents might legitimately claim to have been prejudiced is the 18 days between when Complaint Counsel was first obligated to produce the data in this proceeding on December 19, 2011, (*Respondents' Memo* at 6-7), and the date the health plans notified Respondents of the potential deficiency on January 6, 2012. (*Respondents' Memo* at 4; Castle Decl., ¶ 8-9).

Notwithstanding that Respondents suffered, at most, 18 days of delay, in the interest of resolving this issue without the Court's involvement, Complaint Counsel offered relief that would fully eliminate Respondents' claimed prejudice. Specifically, Respondents claim to be prejudiced because their economic expert, Dr. Monica Noether, had insufficient time to process or work with the claims data from health plans or less time to do those tasks than was available to Complaint Counsel's economic expert, Dr. Cory Capps.<sup>6</sup> Complaint Counsel offered that it would agree that Dr. Noether may submit an additional expert report presenting analyses using any claims data obtained from health plans up until April 11, 2012, provided that Complaint Counsel would have an opportunity to depose Dr. Noether for up to two additional hours on the additional report.<sup>7</sup> This proposal would give Dr. Noether as much time with the data as Complaint Counsel's economic expert, Dr. Cory Capps, will have,<sup>8</sup> and thus directly and completely addresses the prejudice Respondents claim to have suffered.

This proposed relief is entirely consistent with this Court's past orders. Indeed, the Court's February 14, 2012, Order on Respondents' Motion to Compel Documents Requested

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<sup>6</sup> Letter from Jeffrey Brennan to Kenneth Field (Feb.13, 2012) (attached as Exhibit 5).

<sup>7</sup> E-mail from Kenneth Field to Jeffrey Brennan (Feb. 15, 2012) (attached as Exhibit 6).

<sup>8</sup> As reflected in the "Materials Considered" lists for Dr. Capps' affidavits in the preliminary injunction matter, Dr. Capps did not review or begin processing these data before January 11, 2012. *See* PX2056-054 to 60 (Materials Considered List contained in Dr. Capps' January 11, 2012 Affidavit submitted in the preliminary injunction matter is attached as Exhibit 7). In addition, Dr. Capps' team at Bates White had not performed any analysis of these data prior to January 11, 2012. Thus, the amount of time Dr. Capps and his team will have to work with claims data from the health plan can be no more than 68 days (*i.e.*, the time period between January 11, 2012 and March 19, 2012, the date on which his rebuttal report is due pursuant to the Scheduling Order). *See* Sched. Order entered Dec. 20, 2011 at 2 (attached as Exhibit 8). Complaint Counsel offered Dr. Noether 71 days to work with this data (*i.e.*, the time between January 31, 2012, the date on which there is no dispute that Respondents received all health plan claims data from Complaint Counsel, and April 11, 2012, the proposed date for Dr. Noether to submit an additional report). E-mail from Kenneth Field to Jeffrey Brennan (Feb. 15, 2012) (attached as Exhibit 6). Thus, Complaint Counsel's offer would completely remedy the claimed prejudice to Respondents.

from UnitedHealth Group required the (late) production of certain documents and provided for a limited out-of-time deposition of United's witness regarding those documents.<sup>9</sup>

Severe discovery sanctions that have a substantial limiting effect on the evidentiary record available to the Court, such as those requested by Respondents, are generally used only in extreme circumstances.<sup>10</sup> Indeed, in the D.C. Circuit, a discovery sanction barring a party from using evidence generally is not available unless the allegedly aggrieved party first filed a motion to compel and the court entered a production order relating to the evidence at issue.<sup>11</sup>

The fact pattern here simply bears no resemblance to that situation, as Complaint Counsel addressed the issue the same day it was raised and before a motion to compel was even threatened, much less filed, and Respondents obtained the data at issue well within the discovery period. The fact that Respondents declined to accept Complaint Counsel's proposal reveals that they are interested not in remedying the alleged prejudice but rather only in burying evidence that they fear will undermine their defenses.

### **III. RELIEF PROPOSED BY RESPONDENTS AND COMPLAINT COUNSEL**

On the evening of February 14, 2012, Respondents raised the potential motion for sanctions and requested that Complaint Counsel agree not use claims data obtained from *any* health plan as relief from prejudice that Respondents claim to have suffered as a result of the late production of some portion of the data.<sup>12</sup>

The following day, Complaint Counsel responded that any prejudice suffered by Respondents is of their own-making for failing to raise this issue in a timely matter, and that the

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<sup>9</sup> Order on Respondent's Motion to Compel Documents Requested from UnitedHealth entered Feb. 14, 2012 (attached as Exhibit 9).

<sup>10</sup> See e.g., *Klayman v. Judicial Watch Inc.*, 256 F. R. D. 258, 262-63 (D.D.C. 2009) (barring witness testimony where the witness had repeatedly refused to obey discovery orders).

<sup>11</sup> See e.g., *Shepherd v. American Broadcasting Co., Inc.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995).

<sup>12</sup> See E-mail from Kenneth Field to Jeffrey Brennan (Feb. 15, 2011) (attached as Exhibit 6).

requested relief was dramatically overbroad because it would exclude relevant evidence from the Court's consideration entirely, and would prevent even the use of claims data from BCBS-IL that Respondents admit was timely-produced.<sup>13</sup>

Notwithstanding, to resolve this issue without involving the Court, Complaint Counsel offered the proposal described above to completely ameliorate any potential prejudice that Respondents may have suffered.<sup>14</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*



#### IV. CONCLUSION

Respondents' refusal of relief that is complete – and goes far beyond that which to they are entitled due to their failure to raise the issue in a timely way – starkly reveals their ulterior motive of burying evidence they fear will be adverse to their arguments. As such, the Court should deny Respondents' Motion for Sanctions. We respectfully submit that the Court should at most provide Respondents' expert with additional time to process the data, which would completely ameliorate the prejudice that Respondents claim to have suffered.

Respectfully submitted,

Dated: February 29, 2012

/s/ Matthew J. Reilly  
Matthew J. Reilly, Esq.  
Jeffrey H. Perry, Esq.  
Sara Y. Razi, Esq.  
Kenneth W. Field, Esq.  
Richard H. Cunningham, Esq.  
Douglas E. Litvack, Esq.  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Telephone: 202-326-2350  
mreilly@ftc.gov

Complaint Counsel

## CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2012, I filed an electronic copy of the foregoing Response to Respondents' Motion for Sanctions with:

Donald S. Clark  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, H-135  
Washington, DC 20580

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, H-106  
Washington, DC 20580

I hereby certify that on February 29, 2012, I delivered via electronic mail delivery a copy of the foregoing with:

Alan I. Greene  
Hinshaw & Culbertson LLP  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601  
Email: agreene@hinshawlaw.com  
Phone: (312) 704-3536

Counsel for OSF Healthcare System

David Marx, Jr.  
McDermott Will & Emery  
227 West Monroe Street  
Chicago, IL 60606-5096  
Email: dmarx@mwe.com  
Phone: (312) 984-7668

Counsel for Rockford Health System

/s/ Douglas E. Litvack  
Douglas E. Litvack  
Attorney for Complaint Counsel

# Exhibit 1

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan  
Munich New York Orange County Paris Rome Silicon Valley Washington, D.C.

Strategic alliance with MWE China Law Offices (Shanghai)

James B. Camden  
Associate  
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+1 202 756 8255

January 24, 2012

## VIA EMAIL

Ken Field, Esq.  
Federal Trade Commission  
600 Pennsylvania Ave. NW  
Washington, D.C. 20005

Re: In the Matter of Federal Trade Commission vs. OSF Healthcare System and Rockford Health System, Case No. 3:11-cv-50344

Dear Ken:

In response to your email of January 19, 2012, I write to provide you with further information regarding certain documents that counsel for SwedishAmerican Health System ("SwedishAmerican") stated that they provided to the FTC, but which do not appear in the third party production that the FTC produced to Defendants.

In addition to document descriptions, I have provided Bates ranges for representative documents from SwedishAmerican's production to Defendants. At a minimum, the following documents appear to be missing from the FTC's third party production:

- Document detailing SwedishAmerican's average daily census for 2007-2011. (SAH-00005608 – SAH-00005610)
- Document regarding SwedishAmerican's medical staff setting forth physician name, address, date of employment, hospital affiliation, and hospital staff status. (SAH-00005611 – SAH-00005726)
- Documents containing SwedishAmerican inpatient admission data. (SAH-00005727)

Please explain why these documents referenced above were not produced by the FTC to Defendants. Please also inform us whether there are any additional documents that were produced to the FTC by any third parties that were not previously provided to Defendants.

Sincerely,



James B. Camden

January 24, 2012  
Page 2

cc: David Marx, Jr., Esq.  
Alan Greene, Esq.

# Exhibit 2

**From:** Field, Kenneth  
**Sent:** Wednesday, January 25, 2012 12:29 PM  
**To:** Camden, James (Jcamden@mwe.com)  
**Cc:** 'Marx, David'; Alan I. Greene (agreene@hinshawlaw.com); Morrison, Jeremy P.; Ambrogi, Katherine A.  
**Subject:** In the Matter of FTC v. OSF Healthcare System and Rockford Health System, 3:11-cv-50344 [IWOV-DM\_US.FID487495]  
**Attachments:** Letter to K. Field 1.24.2012.pdf

James,

In your letter of January 24, 2012 (attached) you identified three documents Defendants received through discovery from third party SwedishAmerican Hospital. You represented that SwedishAmerican claimed that it produced the three documents to the Federal Trade Commission, and you asked why the Federal Trade Commission did not produce the documents to Defendants.

With regard to the first two documents identified, SAH-00005608 and SAH-00005611, we have no record of receiving those documents from SwedishAmerican until we received a copy of the materials produced to you in response to Defendants' document requests. It appears that the two documents did not exist in our files prior to their simultaneous production to you and to us and, accordingly, we could not and did not produce them to Defendants when we produced all other third party materials to Defendants as required in November.

The third and final document you identified, SAH-00005727, refers to inpatient admission data from SwedishAmerican. Plaintiff produced the SwedishAmerican admissions data to Defendants on November 23, 2011, as required, along with all other data used or relied on by Dr. Cory Capps. The data files we received from SwedishAmerican were not Bates labeled and we produced them to Defendants exactly how we had received them. Accordingly, no document labeled SAH-00005727 was produced by the FTC to Defendants but the document to which that label was later affixed was produced by Plaintiff to Defendants, as required. In fact, the data was cited and relied on by Defendants' expert Monica Noether prior to January 13, 2012. Should you require further help finding SwedishAmerican's inpatient data within your files please see, for example, FTC\_Full\_SwedishAmerican\_Rockford\_2011-08-01.txt.

Please let us know if any other issues arise. It may take us longer to respond as the preliminary injunction nears but we will endeavor to address any legitimate concerns.

Regards,

Ken Field  
U.S. Federal Trade Commission  
601 New Jersey Avenue, NW  
Washington, DC 20001  
Phone: 202.326.2868  
Fax: 202.326.2286  
Email: [kfield@ftc.gov](mailto:kfield@ftc.gov)

---

**From:** Camden, James [<mailto:Jcamden@mwe.com>]  
**Sent:** Tuesday, January 24, 2012 6:56 PM  
**To:** Field, Kenneth  
**Cc:** Marx, David; [agreene@hinshawlaw.com](mailto:agreene@hinshawlaw.com)  
**Subject:** In the Matter of FTC v. OSF Healthcare System and Rockford Health System, 3:11-cv-50344 [IWOV-DM\_US.FID487495]

Counsel,

Please see attached.

Regards,

James B. Camden  
**McDermott Will & Emery LLP**  
600 13th Street, NW Washington, D.C. 20005  
Direct: 202.756.8255 | Fax: 202.478.2986  
[jcamden@mwe.com](mailto:jcamden@mwe.com)

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\*\*\*\*\*  
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# Exhibit 3

**UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 4.2  
Western Division**

Federal Trade Commission

Plaintiff,

v.

Case No.: 3:11-cv-50344

Honorable Frederick J. Kapala

OSF Healthcare System, et al.

Defendant.

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**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Monday, January 30, 2012:

MINUTE entry before Honorable P. Michael Mahoney: Discovery hearing held on 1/30/2012. Pursuant to notice #147, OSF's Motion regarding Blue Cross [143] is withdrawn. OSF's RULE to show cause[145] is granted in part. Telephonic deposition of Mr. Peterson to be held on 1/31/12 from 4:30 pm to 6:30 pm. Mr. Peterson to be last witness at hearing on 2/1/12. It is the Report and Recommendation of the Magistrate Judge that the District Court do what is reasonable based upon circumstances to protect legitimate confidentiality of documents based upon United's motion for protective order [157]. Parties are given fourteen days from service of this order, as calculated under Rule 6 to file objections with Judge Kapala pursuant to FRCP 72. Objections need not be presented as stated in LR.5.3. Mailed notice(glg, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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# Exhibit 4

**In the Matter of:**

**OSF Healthcare System and Rockford Health System**

*December 20, 2011  
Scheduling Conference*

**Condensed Transcript with Word Index**



**For The Record, Inc.  
(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555**

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

In the Matter of: )  
OSF HEALTHCARE SYSTEM, )  
a corporation, ) Docket No. 9349  
and )  
ROCKFORD HEALTH SYSTEM, )  
a corporation. )  
-----)

Tuesday, December 20, 2011  
1:07 p.m.  
SCHEDULING CONFERENCE

BEFORE THE HONORABLE D. MICHAEL CHAPPELL  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C.

Reported by: Josett F. Whalen, RMR-CRR

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9 dmarx@mwe.com  
10 -and-  
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12 NICOLE L. CASTLE, ESQ.  
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20

21 ALSO PRESENT:  
22 VICTORIA ARTHAUD, Attorney Advisor  
23  
24  
25

1 APPEARANCES:  
2  
3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:  
4 JEFFREY H. PERRY, ESQ.  
5 MATTHEW J. REILLY, ESQ.  
6 KENNETH W. FIELD, ESQ.  
7 KATHERINE AMBROGI, ESQ.  
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1 P R O C E E D I N G S  
2 - - - - -  
3 JUDGE CHAPPELL: Let's go on the record,  
4 Docket 9349, OSF Healthcare System and  
5 Rockford Health System.  
6 I'll begin with appearances of the parties.  
7 We'll start with the government.  
8 MR. PERRY: Thank you, Your Honor. Jeff --  
9 JUDGE CHAPPELL: Familiar faces on both sides  
10 out here.  
11 MR. MARX: You think?  
12 JUDGE CHAPPELL: Welcome back, Mr. Marx,  
13 Mr. Reilly.  
14 MR. MARX: Thank you, Your Honor.  
15 MR. REILLY: Thank you, Your Honor.  
16 JUDGE CHAPPELL: And of course --  
17 MR. PERRY: Thank you, Your Honor.  
18 Jeff Perry for complaint counsel.  
19 Obviously you recognize as with me at counsel  
20 table Matthew Reilly.  
21 MR. REILLY: Good afternoon, Your Honor.  
22 MR. PERRY: Ken Field.  
23 MR. FIELD: Good afternoon, Your Honor.  
24 MR. PERRY: And Katherine Ambrogi.  
25 MS. AMBROGI: Good afternoon, Your Honor.

1 JUDGE CHAPPELL: And for respondents?  
 2 MR. MARX: Thank you, Your Honor.  
 3 David Marx from McDermott, Will & Emery, along  
 4 with Jeff Brennan, who is the person next to Alan Greene  
 5 sitting at defense counsel's table, along with  
 6 Nicole Castle and Shauna Barnes, on behalf of  
 7 Rockford Health System.  
 8 Alan Greene and Matthew O'Hara are representing  
 9 OSF Healthcare.  
 10 MR. GREENE: Good afternoon, Your Honor.  
 11 JUDGE CHAPPELL: Good afternoon.  
 12 Now, OSF counsel, are they with the same or a  
 13 different firm?  
 14 MR. GREENE: We are with a different firm. We  
 15 are with Hinshaw & Culbertson.  
 16 JUDGE CHAPPELL: Okay. Thank you.  
 17 I understand there's an ancillary federal  
 18 action. I'd like to hear about the nature and the  
 19 status of that. I'll start with the government.  
 20 Mr. Perry?  
 21 MR. PERRY: Thank you, Your Honor.  
 22 The federal 13(b) action is pending in Rockford,  
 23 Illinois in federal court. We have a preliminary  
 24 injunction hearing set for February 1, 2 and 3.  
 25 JUDGE CHAPPELL: Do you know whose court that's

1 in?  
 2 MR. PERRY: I'm sorry?  
 3 JUDGE CHAPPELL: Whose court is that in,  
 4 please?  
 5 MR. PERRY: It's in Judge Kapala's court.  
 6 We actually had a hearing yesterday,  
 7 Your Honor, in that federal court proceeding before  
 8 Magistrate Judge Mahoney dealing with a few discovery  
 9 issues which I'm happy to describe for the court if  
 10 that would be useful, but, again, that proceeding will  
 11 take place the first few days of February with the  
 12 posttrial briefing concluded on Valentine's Day,  
 13 February 14.  
 14 JUDGE CHAPPELL: Mr. Marx, anything to add to  
 15 that?  
 16 MR. MARX: No, Your Honor. I think there's  
 17 discovery outstanding in that case. Because third  
 18 parties, we plan depositions of eight fact witnesses I  
 19 think on each side along with the designated experts.  
 20 There will be an evidentiary hearing for three days  
 21 there, and I don't recall specifically the dates, but  
 22 I'm sure Mr. Perry got them right for the posttrial  
 23 briefing there. We would expect a decision sometime in  
 24 the end of February, early March I would think.  
 25 JUDGE CHAPPELL: And Mr. Greene, I'm not

1 assuming Mr. Marx speaks for everyone. If you have  
 2 anything to add, feel free.  
 3 MR. GREENE: The only thing I want to add,  
 4 Your Honor, is I believe that posthearing briefing  
 5 actually ends on February 21. There are provision for  
 6 both initial briefs and reply briefs.  
 7 MR. PERRY: Thank you.  
 8 JUDGE CHAPPELL: Did you say you have a hearing  
 9 date?  
 10 MR. PERRY: We do, Your Honor. February 1, 2  
 11 and 3.  
 12 JUDGE CHAPPELL: Okay. Thank you.  
 13 MR. MARX: Four witnesses I think on each --  
 14 for each side at that evidentiary hearing on the 1st,  
 15 2nd and 3rd, Your Honor, time splitting, is my  
 16 recollection.  
 17 JUDGE CHAPPELL: I would like for someone to  
 18 send my office courtesy copies of public versions of  
 19 any dispositive or substantive orders issued in the  
 20 case.  
 21 MR. PERRY: Yes, Your Honor.  
 22 MR. MARX: Of course.  
 23 JUDGE CHAPPELL: Thank you. And you can work  
 24 together on that. I don't need two copies of each, just  
 25 one.

1 MR. PERRY: Understood.  
 2 JUDGE CHAPPELL: Let's talk about the scheduling  
 3 order.  
 4 The dates section of the scheduling order, with  
 5 one exception, all the requested changes in that portion  
 6 of the scheduling order are fine.  
 7 The parties proposed as a deadline for  
 8 complaint counsel to provide expert witness list  
 9 January 16. That is a federal holiday. That deadline  
 10 will instead be the next business day, which is the  
 11 17th. And as a consequence of that, the deadline for  
 12 respondents to provide their expert witness list will  
 13 then be changed from January 23 to 24.  
 14 Under the additional provisions, there was an  
 15 additional paragraph added regarding dates on which  
 16 trial will be held. I'm not going to read those into  
 17 the record.  
 18 I do have a consideration there. I have another  
 19 trial starting on May 15, which won't be news to the  
 20 parties or to the attorneys that have been here before,  
 21 so we are going to have some overlap. And I'm going to  
 22 have to hold off until I have my initial prehearing  
 23 conference in that case before I decide when we're on or  
 24 off trial.  
 25 I am wondering if the reason for the dates that

1 are knocked out, if there's something scheduled for the  
2 attorneys or if you were just picking a week to take  
3 off.

4 MR. MARX: My understanding -- I don't -- I'd  
5 never propose to speak for the -- my understanding is  
6 that the first week that we wanted off is a week that  
7 the government requested based on plans that they had.  
8 The second week that we've requested, which is I think  
9 the week of Memorial Day actually, was a request that we  
10 made for similar reasons.

11 JUDGE CHAPPELL: Do we have an estimate of how  
12 long this hearing or trial is going to take?

13 MR. PERRY: Your Honor, at this point I would  
14 hope we won't need the full 210 hours. The schedule  
15 we've contemplated here and I think the reality is we're  
16 likely to get pretty close to it.

17 If I calculated correctly, the number of days  
18 being proposed in our joint submission to the court, if  
19 you assume six hours a day -- and that may not be the  
20 right assumption -- that gets you to about 192 hours or  
21 so.

22 MR. MARX: We -- when we worked it out, we came  
23 to about 32 trial days, and I think we were estimating  
24 getting pretty close to the full 210 hours, and  
25 depending upon whether or not we're able to work an

1 extra hour here or there if the need arises, I think we  
2 tried to -- we tried to estimate it as close to the  
3 210 as we could. That's how we got to where we ended  
4 up.

5 JUDGE CHAPPELL: Remember that 210 is a limit,  
6 not a goal.

7 MR. PERRY: Understood.

8 MR. MARX: We understand, Your Honor, but we  
9 also are cognizant of the fact that for scheduling  
10 purposes we want to be sure -- we'd rather give you back  
11 some time than ask for more time at the end because that  
12 may create conflicts that are harder to resolve at that  
13 point.

14 JUDGE CHAPPELL: So do we have any what I would  
15 call hard conflicts that week of -- I guess the last  
16 week of May where right now you've blocked that out on  
17 your proposed schedule?

18 MR. PERRY: Not for complaint counsel,  
19 Your Honor.

20 MR. MARX: Not -- not a hard conflict, no,  
21 Your Honor.

22 JUDGE CHAPPELL: This is actually something that  
23 doesn't need to be in an additional provision. I  
24 appreciate the parties letting me know what your  
25 proposed dates are. Let's assume for now that we will

1 go that week.

2 MR. MARX: The week of May 28, we will go that  
3 week?

4 JUDGE CHAPPELL: Yes, we will.

5 MR. MARX: Starting on Tuesday?

6 JUDGE CHAPPELL: Yes.

7 MR. MARX: Okay.

8 JUDGE CHAPPELL: And then any other conflict I  
9 see we'll have to bump up against the other case, which  
10 may or may not go away. Of course this case may or may  
11 not go away, depending on what happens in the district  
12 court. Stranger things have happened.

13 So I will just hold off on letting you know  
14 more than that. For now, we'll proceed on through  
15 May 15.

16 And the days you've set in your additional  
17 provision, those are fine with me.

18 I think you're knocking off a Friday?

19 MR. MARX: Typically --

20 JUDGE CHAPPELL: Which is fine.

21 MR. MARX: Typically, if there wasn't a holiday  
22 on a Monday, we knocked off the Friday based on past  
23 practice, but obviously we tried to -- we tried to set  
24 this up based on what we thought you would prefer.

25 JUDGE CHAPPELL: No. I appreciate that. And

1 that allows everyone concerned to do other business. We  
2 all have things to do other than this case.

3 Okay. Anything further on the scheduling?

4 MR. MARX: Just so that I understand, we're  
5 contemplating adding back in the week of May 28, is that  
6 right, and taking out a week or just --

7 JUDGE CHAPPELL: Well, until I talk to the other

8 parties, what I'm going to do have to do is figure out

9 if they have conflicts, what their plans are, and then

10 perhaps we'll all get on a conference call and talk

11 about scheduling. This is not as brazen a conflict as

12 we had previously with the POM case and Promedica, so I

13 just don't have enough information right now to tell you

14 for sure.

15 I can tell you right now that we will proceed on

16 through -- let me say right now we won't be in trial

17 May 15, so I think it's a safe bet -- and I'm glad you

18 brought that up, Mr. Marx. I'm looking at the calendar

19 for the wrong year here -- I think you can safely knock

20 out that week.

21 MR. MARX: Knock out the week of May?

22 JUDGE CHAPPELL: May 15.

23 MR. MARX: Okay. And so we'll plan on the week

24 of May 29 and then...

25 (Pause in the proceedings.)

1 JUDGE CHAPPELL: Ms. Arthaud brought up a good  
2 point. If the other case goes away, then we could be  
3 here that week.

4 MR. PERRY: That's the week of the 14th,  
5 Your Honor?

6 JUDGE CHAPPELL: Yes.

7 The start of the trial date is set by the  
8 commission. There's no wiggle room, no room to dance,  
9 et cetera, with that date.

10 MR. MARX: I raise the question only because I  
11 know I'm going to be asked the question as soon as I  
12 leave the courtroom, and that is, do we have any idea  
13 when it is that we'll -- that you think you'll be able  
14 to sort this out with the other case so that we can for  
15 planning purposes let our people know what time they  
16 should plan to be available potentially or not? That's  
17 the question I'm going to be asked. And if the answer  
18 is we don't know, that's fine, but any guidance you can  
19 give us would be helpful for me.

20 JUDGE CHAPPELL: Everything based on when an  
21 answer comes in in the new case, the other case. Once I  
22 get the answer, I have X number of days to have a  
23 hearing such as this hearing, and I'll know a lot more  
24 then.

25 MR. MARX: Okay.

1 JUDGE CHAPPELL: For now, let's just make a note  
2 on that week that we probably won't be in this trial  
3 that week. And I know it's difficult to try to plan  
4 ahead, but, you know, once we start, it's best to plan  
5 on being here.

6 MR. PERRY: That's fine, Your Honor. Thank you.

7 JUDGE CHAPPELL: If I had more info, I'd give it  
8 to you.

9 All right. Thank you.

10 Have there been any settlement discussions?

11 MR. PERRY: Your Honor, the one area that we  
12 haven't reached agreement is unfortunately that one, the  
13 overarching issues, so I don't think we're able to  
14 report to the court that there's a possibility or  
15 likelihood of a prompt settlement or resolution to the  
16 matter.

17 MR. MARX: On that issue Mr. Perry and I agree,  
18 and I suspect Mr. Greene agrees, too.

19 MR. GREENE: Yes, sir, I do.

20 JUDGE CHAPPELL: And just so I know the status  
21 as of today, this is a 100 percent unconsummated  
22 merger.

23 MR. GREENE: Correct, Your Honor.

24 JUDGE CHAPPELL: There's an agreement only?

25 MR. GREENE: That's right, Your Honor.

1 JUDGE CHAPPELL: No movement toward merger, no  
2 hold-separate agreement, nothing like that.

3 MR. GREENE: No.

4 MR. PERRY: That's right, Your Honor. We have a  
5 stipulated temporary restraining order in effect through  
6 the federal court.

7 JUDGE CHAPPELL: In many cases such as this,  
8 the attorney in your position, Mr. Marx and Mr. Greene,  
9 a lot of times they will stand there and tell me, if the  
10 merger is blocked, they walk away. You may or may not  
11 believe that, but I hear that in more than half the  
12 cases of a merger that's not consummated.

13 Are you prepared to give me an answer right now  
14 on what your plans are if the district court blocks the  
15 merger?

16 MR. MARX: I think I can speak for --

17 JUDGE CHAPPELL: And again, this is not a  
18 judicial admission.

19 MR. MARX: I can speak for  
20 Rockford Health System. I can tell you that our plan  
21 right now is that if the district court blocks the  
22 merger, we intend to proceed with the trial on the  
23 merits with you. If you rule against us, then we  
24 intend to appeal to the FTC, which is automatic anyway,  
25 and if the FTC affirms your ruling or if you rule for

1 us and the FTC reverses, we're prepared -- I guess if  
2 the FTC rules for us, we don't have to worry about it,  
3 but if the FTC rules against us, as we sit here today,  
4 we're prepared to go to the Seventh Circuit.

5 MR. GREENE: And Your Honor, just very briefly,  
6 that's the same position that OSF Healthcare has.

7 JUDGE CHAPPELL: Okay. Thank you.

8 At this time I'll allow the parties to give me  
9 an overview of their position of the case with a  
10 15-minute limit.

11 MR. PERRY: Thank you, Your Honor.

12 JUDGE CHAPPELL: Mr. Perry?

13 MR. PERRY: Your Honor, we have a short  
14 presentation. I am mindful of the 15-minute limit.  
15 I've given copies to respondents' counsel. I'm also  
16 happy to pass up copies to the court and to your clerk  
17 if that would be useful, Your Honor.

18 JUDGE CHAPPELL: Yes, let her have a copy.  
19 Thank you. I'll look at the screen.

20 MR. PERRY: Thank you, Your Honor.

21 May I proceed?

22 JUDGE CHAPPELL: Go ahead.

23 MR. PERRY: Thank you.

24 Your Honor, as you know, we're here to

25 discuss today the merger of OSF Healthcare with



1 Rockford Health System. Your Honor, this merger would  
2 combine two of only three hospitals in Rockford,  
3 Illinois. This is a merger to duopoly for hospital  
4 general acute care services.

5 And Your Honor, we're going to be here for quite  
6 some time. It sounds like 200 hours or so. But that is  
7 a fact I do not expect to be in serious dispute. This  
8 is a merger to duopoly.

9 You'll also hear of course from a variety of  
10 witnesses, but it's important to note from the start  
11 that the respondents' executives themselves -- and  
12 you'll see here a quote from the CEO of St. Anthony's  
13 Medical Center -- concede that this acquisition was  
14 motivated by a desire to become bigger, to at least  
15 reclaim some leverage against health plans.

16 And you'll hear from health plans in this  
17 proceeding, Your Honor, and you'll hear from the  
18 employers and the residents that they represent. And  
19 what the health plans will tell you is that the  
20 competition that this merger will eliminate is  
21 beneficial competition, it has reaped real benefits in  
22 terms of maintaining competitive rates in Rockford, and  
23 that through this merger and the elimination of that  
24 competition rates will go up and competition will  
25 suffer.

1 Now, interestingly, Your Honor, as you may  
2 know, we're not writing on a clean slate here. Federal  
3 courts previously back in '89 addressed a similar  
4 merger to duopoly among hospitals in Rockford, Illinois.  
5 The same three hospitals that existed and operated in  
6 '89 are the same three hospitals that operate today. We  
7 have a different pairing sitting at the table here but  
8 the same three to two and the same town and the same  
9 services.

10 JUDGE CHAPPELL: Is it the government's  
11 position that these are interchangeable parts, all  
12 three are equal with equal market shares and that  
13 A plus B equals C and that A, B or C are all  
14 interchangeable variables?

15 MR. PERRY: No, Your Honor, it's not our  
16 position that they're interchangeable. But the logic,  
17 the rationale, the reasoning, the holding of the  
18 district court opinion in '89 and Judge Posner's  
19 Seventh Circuit opinion that upheld the district court  
20 opinion make clear there's nothing in those opinions, in  
21 either one, that suggest that the fact that it was  
22 number one and number two merging is what made the  
23 merger unlawful. The discussion you see focuses on the  
24 number of competitors, the market concentration levels,  
25 the significant increase in concentration, the entry

1 barriers, the concerns about collusion. These are all  
2 facts that are the same here today, so --

3 JUDGE CHAPPELL: For people that are concerned  
4 about the numbers, what's your position on the two here  
5 at the table? Are they one and two, one and three, two  
6 and three?

7 MR. PERRY: They are two and three, Your Honor,  
8 based on market share today.

9 Your Honor, we are not -- and I want to make  
10 this clear -- we are not suggesting or implying that  
11 this court is bound by those decisions. We're not  
12 applying our burden goes away or is reduced by the  
13 existence of those decisions. We will gladly accept  
14 and we do gladly accept our evidentiary burden.

15 But the decisions provide some incredibly  
16 helpful context for the proceedings here, and that's  
17 because the critical facts, the ones I mentioned, market  
18 concentration, entry barriers, the number of hospitals,  
19 haven't changed since '89. Years have passed, but those  
20 facts have not changed.

21 And the other thing that hasn't changed,  
22 Your Honor, are the arguments and the defenses that  
23 you'll hear from respondents today. They're the same  
24 arguments, they're the same defenses that were rejected  
25 in '89.

1 And the benefit we have of that merger that  
2 didn't proceed and another merger that didn't proceed  
3 but was proposed in '97 is that we have real-world  
4 facts to tell us whether these dire predictions, what  
5 the respondents or the defendants back then said would  
6 happen if there couldn't be a merger, we have  
7 real-world facts to test whether they happened. And  
8 Your Honor, those predictions, as I'll discuss in a  
9 moment, didn't come true, and there's no more reason to  
10 believe today, frankly, that they will.

11 JUDGE CHAPPELL: You're saying they have the  
12 same defeated and disproven arguments.

13 Are you saying they have similar facts as back  
14 then?

15 MR. PERRY: What I'm saying, Your Honor, is  
16 that some facts have changed, but the facts they rely  
17 upon to defend the merger, namely, Rockford, based on  
18 its size and its economic condition, can't support  
19 three independent hospitals, that argument was made in  
20 '89, that argument was made in '97, and that argument I  
21 think is one you're going to hear again today, so that  
22 has not changed.

23 JUDGE CHAPPELL: By the way, Mr. Marx and  
24 Mr. Greene, when I was asking you if you had decided  
25 what to do if the court blocked the merger, I didn't

1 ask the government what they plan to do because I've  
2 never seen them fail to appeal when a merger is not  
3 blocked.

4 Go ahead.

5 MR. PERRY: Thank you, Your Honor.

6 So, Your Honor, those are facts and arguments  
7 that haven't changed, and of course some things have,  
8 but we have the ability, as I've said, to test these  
9 assertions that they made in '89 and again in '97 that  
10 a merger was necessary in order to thrive, that three  
11 independent hospitals couldn't make it in Rockford, and  
12 we know from history that's not the case.

13 Just a brief moment on the respondents,  
14 Your Honor, by way of background, as you know.

15 OSF is a seven-hospital system, six hospitals in  
16 Illinois, one in Michigan.

17 The hospital at issue in Rockford, Illinois,  
18 right downtown, is St. Anthony's Medical Center. It has  
19 about 250 licensed beds.

20 Rockford Health System is a single-hospital  
21 system operating a hospital, Rockford Memorial, sitting  
22 about seven miles from St. Anthony Medical Center. It's  
23 larger. It has almost 400 beds.

24 And Your Honor, we've talked a bit and you  
25 asked some questions about the arguments we're going to

1 hear, and one of them is the so-called economic  
2 distress in Rockford. But one thing we ought to make  
3 clear from the beginning, I don't think you're going to  
4 hear from anyone at respondents' counsel table that  
5 either of these hospitals is of poor quality, that  
6 either qualifies for a failing firm defense or that  
7 either qualifies for the so-called flailing firm  
8 defense. I don't think you'll hear any of that. And  
9 the reason is because we have two financially solid, two  
10 high-quality hospitals operating in Rockford.

11 Your Honor, in addition to hospitals, I should  
12 mention the employed physicians because that would be a  
13 second product market we're discussing here in this  
14 case, and in addition to the hospitals, you'll see  
15 OSF Healthcare employs 80 physicians in the Rockford  
16 area, Rockford Health System employs 160 physicians.

17 If you look at a map, you'll see -- I'm better  
18 with pictures than with words, Your Honor -- on the left  
19 side of the page you'll see Rockford Memorial Hospital.  
20 As I mentioned, it's seven miles from St. Anthony's  
21 Medical Center.

22 If we plotted SwedishAmerican, which is the only  
23 other hospital in town, it would sit roughly between the  
24 two, Your Honor.

25 And importantly, you could drive for 30 minutes

1 or more in any direction before you got to any other  
2 competitor, any other competitive hospital.

3 JUDGE CHAPPELL: Where's the third hospital that  
4 was involved in the case in the late '80s?

5 MR. PERRY: Thank you, Your Honor.

6 SwedishAmerican Hospital, if we plot it, would  
7 be roughly between the two. These two, the parties'  
8 hospitals, are about seven miles apart. Swedish I think  
9 sits approximately three miles from one and four from  
10 the other. It's between them.

11 Your Honor, the acquisition we're discussing  
12 today, if we focus on the paperwork, the affiliation  
13 agreement was signed about eleven months ago, almost  
14 eleven months ago. That was not the beginning of this  
15 merger.

16 The merger discussions took place and began in  
17 2009, and that is when Rockford and OSF hired outside  
18 antitrust counsel, and that is when the antitrust  
19 counsel hired outside economic experts and efficiencies  
20 consultants not hired by the businesspeople -- this is  
21 important, Your Honor -- not hired by the businesspeople  
22 to drive the transaction, hired by the outside  
23 antitrust lawyers for purposes of this proceeding which  
24 will begin in this courtroom, in your courtroom,  
25 Your Honor. And that's important because of course you

1 will hear from us and you will hear from our experts  
2 about the so-called efficiencies and defenses to the  
3 transaction. It's important to keep that context in  
4 mind, Your Honor.

5 If we could switch the slide, Your Honor, we've  
6 talked a bit about the '88-89 attempted merger, and I  
7 alluded to the subsequent attempt in 1997.

8 In 1997, of the three hospitals, another  
9 pairing, Swedish and St. Anthony's that time around,  
10 proposed to merge, and that merger was proposed to the  
11 Justice Department, and the Justice Department elected  
12 not to take action and challenge it. And you'll hear a  
13 great deal I suspect from respondents about DOJ's  
14 decision not to challenge.

15 Now, of course it could be quite dangerous for  
16 us to guess without a record why some other federal  
17 agency chose not to take action 14 years ago, so I'll  
18 focus just for a minute on the facts.

19 And the facts we know about that 1997 proposal  
20 is that SwedishAmerican and OSF -- and this is a quote  
21 from one of their submissions -- told the  
22 Justice Department that if this merger was blocked, it's  
23 likely that SwedishAmerican or St. Anthony will be  
24 forced to exit the market. And in fact, I think if you  
25 read the whole submission you'll see one or both of

1 those hospitals they predicted would fail because they  
2 said they couldn't survive independently.  
3 Now, Your Honor, I'll assume those  
4 representations were made in good faith, but in the  
5 14 years since then we know for a fact they were false.  
6 It wasn't true. The dire predictions again didn't come  
7 true.

8 In fact, Swedish, who said they would fail  
9 without a merger, will now be I suspect respondents'  
10 primary defense to this transaction, that Your Honor  
11 need not worry about this merger because there's one  
12 competitor left, that that competitor is strong and  
13 they've gained share and they're high quality and  
14 they're efficient. And Your Honor, if all that's true,  
15 what it stands for and what it proves is the proposition  
16 that you don't need to merge with a close competitor to  
17 be efficient and high quality and to succeed in  
18 Rockford.

19 Your Honor, again, we have two relevant product  
20 markets at issue. The first -- I suspect you're  
21 familiar with both. The first I know from personal  
22 experience you're familiar with, general acute care  
23 hospital services. As you know, that is a cluster  
24 market. We will not be alleging that the services  
25 within that market are substitutes for each other. But

1 we do believe and the case law, which you're well  
2 familiar with, supports the ideal that when you have  
3 services that are subject to similar competitive  
4 conditions that it's appropriate to cluster them and  
5 group them for purposes of analysis.

6 And Your Honor, the second product market we'll  
7 be addressing here is primary care physician services,  
8 and we allege, in addition to the general acute care  
9 hospital services, that this merger will reduce  
10 competition and harm consumers and patients in need of  
11 those services as well.

12 JUDGE CHAPPELL: Is it your position that the  
13 cluster market you're alleging includes the primary care  
14 physician services market?

15 MR. PERRY: No, Your Honor. We don't believe  
16 that it's appropriate to lump those services in with  
17 the hospital services cluster because the market  
18 participants are different, entry conditions are  
19 different, market shares are different, and therefore,  
20 if we were to combine those, it's our view, Your Honor,  
21 that that would be a misleading, inappropriate way to  
22 analyze the cluster, so the services we would maintain  
23 should be part of the cluster, the general acute care  
24 hospital services, are the ones for which competitive  
25 conditions are similar.

1 Now, very briefly on geographic market,  
2 Your Honor, I don't believe that this will be an issue  
3 in serious dispute. We allege, Your Honor, that the  
4 geographic market is essentially the same as the  
5 federal courts found in '89. That's supported by an  
6 analysis of patient travel patterns. The geographic  
7 market is essentially the Rockford metropolitan area.  
8 It's a 35-minute -- excuse me -- a 30-minute drive time  
9 from downtown Rockford. And Your Honor, what we'll hear  
10 from in expert testimony is that 95 percent of Rockford  
11 residents travel less than 30 minutes to their chosen  
12 hospital.

13 And of course, as Your Honor knows, for that  
14 geographic market to fail, one would have to conclude  
15 that Rockford and St. Anthony's and Swedish all could  
16 merge, the three hospitals could merge, forming a  
17 hypothetical monopoly, and you'd have to believe that  
18 those three hospitals together couldn't raise prices  
19 and wouldn't raise prices by a small but significant  
20 amount. No one will take the stand, Your Honor, I  
21 believe in your courtroom and suggest that that's the  
22 case.

23 JUDGE CHAPPELL: What's your position on who the  
24 consumer is in this case?

25 MR. PERRY: I'm sorry, Your Honor?

1 JUDGE CHAPPELL: Who's the consumer in this  
2 case?

3 MR. PERRY: The consumer -- the immediate  
4 consumer are commercial health plans who purchase these  
5 services from the hospitals. Now, obviously it's our  
6 strong view and we think the evidence will show that  
7 the harm that results from the reduction of competition  
8 flows directly to the employers and patients, but the  
9 purchasers are the health plans, Your Honor.

10 Your Honor, in terms of market structure, I  
11 won't belabor this. We've mentioned it's a merger to  
12 duopoly. There's one hospital left, one remaining  
13 competitor, and the closest hospitals, which are  
14 35-45 minutes or more away, will testify in this  
15 courtroom that they don't believe they compete with  
16 these hospitals, and I don't suspect that will be an  
17 area of meaningful dispute.

18 Your Honor, beyond the number of hospitals, I  
19 want to take a minute to talk about market  
20 concentration.

21 JUDGE CHAPPELL: Let me get back to -- and  
22 again, my questions and answers, that time doesn't count  
23 toward your 15 minutes.

24 MR. PERRY: I appreciate that, Your Honor.

25 JUDGE CHAPPELL: Since the insurance companies,

1 are we talking about private insurance?

2 MR. PERRY: We are, Your Honor.

3 JUDGE CHAPPELL: We're excluding Medicare and  
4 Medicaid.

5 MR. PERRY: Exactly. We're talking about the  
6 commercial health insurance, the Blue Cross Blue Shields  
7 of the world, United, Aetna.

8 JUDGE CHAPPELL: And I understand this is a  
9 streamlined overview, but as far as who is in the plans,  
10 are these three hospitals generally in all three plans  
11 for these insurance companies?

12 MR. PERRY: That's a very good question,  
13 Your Honor.

14 The dynamic in Rockford is and has been for  
15 years that virtually every plan has two but not three  
16 of the hospitals in network, so the choice they've made,  
17 through talking to the employers, their customers, and  
18 the patients, is that they demand some choice. Patients  
19 don't want to be limited to one-hospital networks in  
20 Rockford, but they have been willing to not go with all  
21 three. They're willing, in exchange for rates that are  
22 at least somewhat more competitive, to offer two but not  
23 three-hospital networks, and that's been the dynamic for  
24 years, Your Honor.

25 Now, Your Honor, again, on market concentration,

1 the numbers we'll show you, if you focus for the first  
2 moment here on general acute care hospital services,  
3 you'll see a combined market share of about 64 percent.

4 I should note that you'll hear a great deal  
5 about the all-powerful health plans and Blue Cross in  
6 particular who respondents will allege as dominant, and  
7 the market share you'll see them ascribe to Blue Cross  
8 I think will be right around the same number,  
9 Your Honor.

10 But focusing on the GAC market shares of market  
11 concentrations, you see HHI increase, just the increase,  
12 of more than 2000 points, ten times the threshold  
13 increase that triggers the presumption of illegality  
14 under the guidelines, and post-acquisition HHIs of over  
15 5000. Your Honor, that's -- for a little bit of  
16 context, that's of course higher than Promedica. It's  
17 higher than Evanston. It's higher than  
18 University Health. It's higher than  
19 Philadelphia National Bank. A case that comes close  
20 notably is the Rockford case from '89, and that's  
21 because market concentrations really haven't changed and  
22 market shares haven't meaningfully changed since that  
23 time.

24 JUDGE CHAPPELL: Do you intend to rest your case  
25 on more than HHI?

1 MR. PERRY: Much more, Your Honor. This would  
2 be much shorter than a 210-hour proceeding if that  
3 weren't the case.

4 And Your Honor, I'll just mention -- I want to  
5 get into evidence very briefly in the time I have  
6 remaining, but primary care physician services I'll  
7 mention just briefly. The concentration levels are  
8 lower, 37 percent market share, post-acquisition HHIs  
9 approaching 2000. But you'll note the HHI increase is  
10 700, about three and a half times greater than the  
11 increase threshold and under the guidelines, that is, of  
12 course reaches the levels that potentially raise  
13 significant competitive concerns that often warrant  
14 scrutiny.

15 And Your Honor, if we flip the page, I want to  
16 answer your question a bit more directly because I want  
17 to make clear we are not resting on the strength of the  
18 presumption. This is a case that's a three-to-two.  
19 The HHIs are through the roof. We believe the case law  
20 makes clear that on that structural basis alone the  
21 merger is presumed unlawful, but we will not stop  
22 there. We intend to bring to bear real-world, direct  
23 evidence from the players that operate in this market,  
24 and that evidence will bolster and will confirm the  
25 presumption.

1 And specifically, Your Honor, you're going to  
2 hear from the health plans. And what they're going to  
3 tell you is about the competitive dynamic, which I  
4 started to describe in response to your question. And  
5 that is, when they sit at the negotiating table with a  
6 hospital, across the table from OSF, for example, what  
7 you'll hear them say is they've heard their members loud  
8 and clear. They know they want choice. They need two  
9 hospitals in network.

10 Now, life would be better for them, competition  
11 would be better if there were four, five, six, seven  
12 hospitals in Rockford, but at least with the three  
13 hospitals competing we have today, those health plans  
14 can look OSF in the eye and they can say, We need a  
15 two-hospital network, and if you don't sharpen your  
16 pencil and if you don't agree to rates that are  
17 competitive, we'll make our two-hospital network with  
18 your two competitors, and you'll be the one left  
19 standing when the music stops.

20 They can tell them that today, and that's the  
21 leverage they have on behalf of the residents and the  
22 employers to demand and try to seek competitive rates.  
23 And that's what the merger changes, Your Honor,  
24 fundamentally, because now, if we can picture for a  
25 second that same negotiation after the merger, where

1 that health plan now says to that same hospital --  
 2 maybe the way to look at it is the hospital saying to  
 3 the health plan, Your Honor, We remember what you told  
 4 us about your members wanting and needing two hospitals  
 5 in network. Well, guess what, if your members want a  
 6 two-hospital network, you have to deal with us.

7 And these health plans postmerger will be left  
 8 with only two choices. They either come to terms with  
 9 the merged entity, agreeing to whatever new rates they  
 10 propose with their newly increased leverage, or they  
 11 try to break history and offer a single-hospital  
 12 network, a SwedishAmerican-only network, that employers  
 13 will tell you is not viable, is not marketable, the  
 14 health plans will tell you is not viable, is not  
 15 marketable, and none of the major health insurance  
 16 products in Rockford have succeeded with a one-hospital  
 17 network. And that, Your Honor, is the fundamental  
 18 change in leverage that this merger causes.

19 JUDGE CHAPPELL: What's your position on the  
 20 medical services offered by the three hospitals in this  
 21 geographic market?

22 MR. PERRY: They're largely redundant,  
 23 Your Honor. The services are overlapping.

24 You'll hear from the respondents that that  
 25 somehow justifies the merger because there is

1 duplication or, a word that's new to my vocabulary from  
 2 respondents, triplication of services, and that that  
 3 somehow justifies allowing the merger to go through.

4 Of course, the reality, Your Honor, is that  
 5 redundancy, quote-unquote, is competition. That's  
 6 hospitals offering services so that the patients have a  
 7 choice of where to get them, that they can get them  
 8 close to their home, so that the hospitals try to offer  
 9 the highest quality for each service, the best amenities  
 10 with each service, and that's the competition that has  
 11 benefited the community.

12 Now, Your Honor, in addition to unilateral  
 13 effects, you're going to hear from complaint counsel  
 14 about the risk of coordination here, and that is an  
 15 independent but equally troubling rationale and reason  
 16 why this merger is problematic, Your Honor.

17 And of course, the first reason is structure,  
 18 but it doesn't end there. And by "structure" I mean  
 19 when you get down to two hospitals of course, unlike  
 20 today where there are three hospitals if they wanted to  
 21 collude that would have to reach agreement, would have  
 22 to monitor the agreement, would have to punish someone  
 23 who deviated from the agreement. After the merger, OSF  
 24 and Swedish each has one competitor to watch, one  
 25 agreement to reach in order to collude, one person to

1 monitor, one person to punish if they break from the  
 2 agreement.

3 And Your Honor, that is extremely troubling,  
 4 and it's troubling more in this particular market in  
 5 this particular area with these particular hospitals,  
 6 and here's why. If you look at the district court and  
 7 the Seventh Circuit opinion from the case in the  
 8 late '80s, what you see is one of the findings is that  
 9 those hospitals, the same ones, the same three, got  
 10 together and colluded and agreed to not discount off of  
 11 their list prices when they dealt with Blue Cross.  
 12 They essentially got together and said, Hey, if one of  
 13 us starts discounting off of these list prices, we're  
 14 all going to have to do it, and let's agree not to do  
 15 that.

16 And that, Your Honor, in a quick summary, is one  
 17 of the real concerns that underlied the '89 case, the  
 18 federal court case.

19 And Your Honor, you'll hear respondents say  
 20 that that's ancient history, that we shouldn't worry  
 21 about that, but of course it's the same people --

22 JUDGE CHAPPELL: This is your one-minute  
 23 warning.

24 MR. PERRY: Thank you, Your Honor -- it's the  
 25 same market structure. And the hospitals you'll see

1 have communicated more recently when it comes to  
 2 negotiations and trying to talk to each other to blunt  
 3 the competitive implications of dealing with health  
 4 plans.

5 Very, very quickly, Your Honor -- and I am  
 6 mindful of the time -- the defenses you'll hear are  
 7 efficiencies and quality. I'm happy to answer  
 8 questions about them, but the key thing we want to  
 9 point out is that these are made for litigation  
 10 arguments.

11 In fact, when we've asked about them in  
 12 investigational hearings, witnesses refused to answer  
 13 on privilege grounds because it's -- the material and  
 14 the defenses have been cloaked as attorney work product.  
 15 Your Honor, not only are they made for litigation, but  
 16 the evidence will show that they are speculative and not  
 17 merger-specific.

18 The last point, Your Honor, when we get to the  
 19 end of the day here, what you're going to find,  
 20 Your Honor, I believe is the defendants -- respondents,  
 21 I should say, cannot meet the established antitrust  
 22 defenses. I don't think they'll allege failing firm. I  
 23 don't think they'll allege failing firm. They won't  
 24 meet the strict and significant burden on efficiencies  
 25 or quality, which I think is part of efficiencies. And

1 instead what you'll hear are generalized arguments that  
2 Rockford can't support three hospitals, that somehow one  
3 competitor is enough, that healthcare markets are  
4 somehow exempt from the antitrust laws.

5 And Your Honor, the closing point I want to  
6 leave you with is that we have established defenses to  
7 the antitrust laws, as you know, for good reason, and  
8 that is because competition provides significant  
9 benefits for consumers, and we don't override and  
10 eliminate those benefits unless the strict elements of  
11 defenses can be met, so we're going to ask the court at  
12 the conclusion of the hearing to listen to the evidence  
13 and to reject an invitation by respondents to accept new  
14 or invent new defenses to the antitrust laws for this  
15 transaction.

16 Your Honor, I'm happy to answer more questions,  
17 but I know I've exhausted my time, and if there's  
18 nothing further, I'm happy to turn over the podium to  
19 Mr. Marx.

20 JUDGE CHAPPELL: Thank you.

21 MR. PERRY: Thank you, Your Honor.

22 JUDGE CHAPPELL: Mr. Marx, will you speak for  
23 respondents?

24 MR. MARX: I will, Your Honor.

25 JUDGE CHAPPELL: Go ahead.

1 MR. MARX: At least for today.

2 Thank you.

3 There are lots of things that the respondents  
4 disagree with complaint counsel about. I'll try and  
5 preview some of those for you and address a couple of  
6 the specific points that Mr. Perry made but preview for  
7 you the arguments that we intend to raise in the defense  
8 of this case.

9 First, a little bit of introduction about  
10 Rockford. I don't know if you've ever been there  
11 before. They have a great Minor League Baseball park  
12 and team in Rockford. I think it's a Double-A team, if  
13 my memory serves me correctly. It's located about two  
14 hours northwest of Chicago in the northwestern corner of  
15 Illinois.

16 Rockford has historically been a three-hospital  
17 town with all three hospitals similarly sized and  
18 offering largely duplicative -- Mr. Perry is right. I  
19 don't know whether it was Mr. Greene or Mr. O'Hara or  
20 somebody else that coined the term "triplicative"  
21 because in essence, as the complaint alleges in this  
22 case, the services that are offered by all three  
23 hospitals are largely overlapping, and with three  
24 hospitals, that would make them I think triplicative.

25 And while that really hasn't changed very much

1 since 1989 or 1997 when the Antitrust Division did  
2 approve the deal between the two smaller of the three  
3 hospitals, like we have here today, the competitive  
4 market dynamic in healthcare and in Rockford in  
5 particular has changed, as I will discuss in a little  
6 bit more detail in a minute.

7 JUDGE CHAPPELL: The deal was approved yet  
8 walked away from; is that correct?

9 MR. MARX: The deal was approved, was between  
10 OSF Healthcare and SwedishAmerican, and for reasons  
11 unrelated to the antitrust issues -- I think it was  
12 their -- culturally they didn't fit very well, they  
13 just did not -- while the deal was approved, it was  
14 subject to Hart-Scott-Rodino, they didn't consummate  
15 it.

16 JUDGE CHAPPELL: So Mr. Greene's client, OSF,  
17 and SwedishAmerican had proposed a merger, DOJ blessed  
18 it, but for nonregulatory reasons the deal was called  
19 off.

20 MR. MARX: That's absolutely right, Your Honor.

21 MR. GREENE: That's correct, Your Honor.

22 JUDGE CHAPPELL: Thank you.

23 MR. MARX: And that deal, as Mr. Perry is right,  
24 we will explain is much more similar to this transaction  
25 than the transaction that was proposed and blocked in

1 1989.

2 The area, the Rockford community, has neither  
3 the population nor the economic vitality for all three  
4 triplicative healthcare systems to individually build  
5 sustainable clinical programs for most specialties.

6 JUDGE CHAPPELL: Are you saying that the area  
7 is, to use a term we've heard before, overbedded?

8 MR. MARX: Well, certainly we are -- I think  
9 the evidence is going to show that there is excess  
10 capacity for general acute care inpatient services, but  
11 it's not just that. It's the economics and the  
12 declining -- it's the demographics that can't support  
13 it. It's the declining economic conditions. And to  
14 put it in terms that I know you'll understand, Rockford  
15 makes Toledo look like a growth area. That's how bad it  
16 is in Rockford. And since -- and it's only gotten  
17 worse.

18 As a practical matter, you know, over the  
19 course of the last twenty years, there's been a shift in  
20 the demographics and a substantial decline in economic  
21 conditions in Rockford that have affected, seriously  
22 affected, the competitive dynamic of Rockford's  
23 healthcare market.

24 For example, just some details -- you'll hear  
25 more about this over the course of the 200-and-some-odd

1 hours that we'll be here -- from 2000 to 2010,  
2 Rockford's population grew by less than 2 percent, from  
3 about 150,000 to 153,000 people over that ten-year  
4 period. And during that same ten-year period,  
5 per capita personal income dropped.

6 Rockford has lost over 12,000 manufacturing  
7 jobs since 1998, the last 13 or so years, which is  
8 almost 30 percent of the manufacturing jobs that were  
9 there in the first place. And the new jobs that have  
10 been created, to the extent that there have been new  
11 jobs created since then, are primarily in the  
12 lower-wage, fewer-benefits services sector.

13 Unemployment. Let's talk about unemployment.  
14 Unemployment has increased from 7.3 percent in  
15 2000 to 16.5 percent in 2010. That's over a  
16 hundred-and-some-odd percent increase during that  
17 ten-year period. And it's well above -- in Rockford,  
18 it's well above the statewide rate of 11.4 percent.

19 Almost 25 percent of Rockford's population is  
20 below the poverty line, and that's double the percentage  
21 that was below the poverty line just 12 years ago in  
22 1999.

23 What does this mean for healthcare and for  
24 healthcare providers? Well, as unemployment has risen,  
25 the percentage of Rockford residents with commercial

1 insurance has declined from about 70 percent in 2000 to  
2 only 48 percent in 2011.

3 Medicaid now insures almost 20 percent of the  
4 metropolitan statistical area's population. Again,  
5 that's almost three times as much as Medicaid insured in  
6 2000 when it was 7 percent. Medicare -- and we know  
7 Medicaid pays less than Medicare, and in Illinois  
8 Medicaid pays not only low but slow. It's a very bad  
9 combination if you're trying to make your financials.

10 Medicare insureds, the other government payer,  
11 has increased from 10 percent in 2000 to almost  
12 17 percent in 2010.

13 That leaves about 15 percent of the population  
14 uninsured, again, a 50 percent increase since 2000.

15 As a result, Rockford's hospital systems are  
16 treating an increasing number of Medicare and Medicaid  
17 and charity care patients. Combined, Medicare and  
18 Medicaid represented about 65 percent of  
19 Rockford Memorial Hospital's patients, but they  
20 represent -- because, as you know, Medicare and Medicaid  
21 reimburses well under the cost of providing care to  
22 those patients, Medicare and Medicaid represented only  
23 50 percent of Rockford Memorial Hospital's net revenues  
24 in 2011.

25 The percentage of Rockford Memorial's net

1 revenue generated from commercial payers has similarly  
2 declined, from about 52 percent in 2007 to 48 percent  
3 in 2010. That's happened as the percentage of  
4 commercially insured discharges has declined as well to  
5 now only 24 percent as of 2011. And again, the primary  
6 reason for that is unemployment. Without employment,  
7 without commercial insurance, you get an increasing  
8 percentage of government-insured and charity care  
9 patients.

10 At St. Anthony's Medical Center, OSF's hospital  
11 in Rockford, the amount of charity care expense has more  
12 than doubled from -- just from 2008 to 2011. And the  
13 proportion of St. Anthony Medical Center's inpatients  
14 who are commercially insured fell from 45 percent,  
15 45 percent in 1997, to 31 percent in 2010.

16 Now, faced with those economic realities and I  
17 think doing the responsible thing, after the decline  
18 of the financial markets in 2008 and given  
19 those deteriorating economic conditions,  
20 Rockford Health System began looking to affiliate with  
21 another hospital or health system. It didn't do it  
22 because it was failing or flailing. It did it because  
23 it was a responsible steward for otherwise scarce  
24 resources.

25 And one of the things that I think we're going

1 to show in this case is that the affiliation between OSF  
2 and Rockford Health System is the best if not the only  
3 way to adapt to the region's changing healthcare needs  
4 and achieve what decades of competition, as the FTC has  
5 described it, among three Rockford healthcare systems  
6 has not, and that is containment of the spiraling cost  
7 of healthcare.

8 There's no suggestion -- Mr. Perry didn't say  
9 anything about the fact that these decades of  
10 competition between SwedishAmerican, the largest and  
11 fastest-growing healthcare system in Rockford -- I'll  
12 come back to that in a minute. I apologize, Josett. I  
13 don't mean to get going so fast, but when I go off  
14 script, that's what happens -- there's no suggestion  
15 from the FTC that when you've had competition between  
16 these three systems for decades that somehow that has  
17 stifled the spiraling cost of healthcare. We have a  
18 system that frankly isn't working very well.

19 And the transaction is going to result -- is  
20 going to change that because it's going to result in  
21 two strong competitors where presently there's only  
22 one -- that's SwedishAmerican -- and it's going to  
23 result in increased competition because the two weaker,  
24 smaller competitors, Rockford Memorial Hospital and  
25 St. Anthony's Medical Center, will be stronger combined

1 because they will be able to generate cost savings and  
2 efficiencies that neither will be able to generate on  
3 their own.

4 JUDGE CHAPPELL: Do you believe there's a  
5 significant difference between pricing and quality among  
6 the three hospitals?

7 MR. MARX: I wouldn't say there's a significant  
8 difference in quality. I think they're all  
9 high-quality hospitals. The question is, the question  
10 is, do they have sufficient scale, sufficient size, to  
11 be able to attract the high-quality specialists that you  
12 need to the area to keep patients from leaving and to  
13 try and recruit and retain the best physicians. And the  
14 answer to that question I think you'll hear at least  
15 from -- I think actually you're probably going to hear  
16 it from all three hospitals -- is no.

17 I mean, even with respect to SwedishAmerican,  
18 interestingly enough -- and I'll provide a little  
19 detail about SwedishAmerican in a minute --  
20 SwedishAmerican has just recently affiliated with the  
21 University of Wisconsin Healthcare in Madison. And in  
22 fact, they've announced that together they're going to  
23 build I think a specialized cancer center in Rockford.

24 What that signifies I think is the recognition  
25 by SwedishAmerican that it can't continue to compete in

1 this new healthcare reform environment all by itself,  
2 that in fact there isn't enough support in Rockford,  
3 given the declining demographics and the declining  
4 economy, to support three full-service primary,  
5 secondary and tertiary care hospitals.

6 That's why -- that's why when the transaction  
7 between SwedishAmerican and OSF didn't -- wasn't  
8 consummated in 1997, now SwedishAmerican looked for  
9 another partner, and they found one in the  
10 University of Wisconsin.

11 And of course, that's the reason why these two  
12 hospitals, Rockford Health System and OSF, are getting  
13 together, to achieve the kind of cost savings and  
14 efficiencies and generate the kind of scale that's  
15 needed to succeed in this new healthcare environment.

16 JUDGE CHAPPELL: What's your position on the  
17 relevant geographic market?

18 MR. MARX: Well, our position on the relevant  
19 geographic market I think is going to be -- I'm always  
20 a little leery of suggesting that we should admit  
21 something in the complaint because I never quite know  
22 how it's going to change as we get to litigation.

23 I think as a general proposition we agree that  
24 the Rockford area is the relevant geographic market. I  
25 don't know exactly how it's going to be contoured once

1 the economists get done with it. But as a general  
2 proposition, I think our position is that there are  
3 three competitors in the relevant geographic market, and  
4 they are the three hospital -- healthcare systems in  
5 Rockford.

6 JUDGE CHAPPELL: And what about the relevant  
7 product market?

8 MR. MARX: With respect to relevant product  
9 market, again, I think we're not going to have  
10 substantial disagreement. It's going to be general  
11 acute care inpatient services for primary, secondary and  
12 tertiary care. I don't think there's going to be  
13 disagreement there.

14 With respect to primary care physicians, also I  
15 think we are -- we don't disagree that to the extent  
16 that there is a separate relevant market for primary  
17 care physicians it includes family practitioners and  
18 internists -- it's adult -- it's adult primary care.  
19 It excludes ob-gyns. It excludes pediatricians. I  
20 think the relevant geographic market that's alleged in  
21 this case is pretty similar for primary care physicians  
22 as it is for general acute care services.

23 We do disagree on the market shares there that  
24 the government has calculated, but as a matter of market  
25 definition, I don't think there's likely to be

1 substantial dispute.

2 JUDGE CHAPPELL: It sounds like I might be  
3 expecting a factual stipulation that will save us all  
4 some time.

5 MR. MARX: It will depend on what we see when  
6 their economist actually specifies which DRGs and  
7 MS-DRGs are in the market, Your Honor, and I haven't  
8 seen that yet, so I'm hopeful that we'll be able to do  
9 that but --

10 JUDGE CHAPPELL: Mr. Perry was looking hopeful.  
11 Mr. Reilly was looking dissatisfied.

12 MR. PERRY: I was ready to sign now,  
13 Your Honor.

14 MR. MARX: So the devil is in the details,  
15 Your Honor. When we have it, then we'll see if we can  
16 get you there. But I suspect that the fundamental  
17 disagreements in this case are not going to be about  
18 relevant market definition.

19 SwedishAmerican -- there are going to be some  
20 fundamental differences about the competitors.

21 SwedishAmerican Health System --

22 JUDGE CHAPPELL: And just so I get a better idea  
23 of the lay of the land here, these are just three  
24 stand-alone hospitals, not a network.

25 MR. MARX: In Rockford, that is true.



1 OSF Healthcare System has seven hospitals, six in  
2 Illinois. One of them is in Rockford. The other --  
3 one of the Illinois hospitals is in Rockford. There's  
4 one in someplace in Michigan, and then there are six --  
5 five other hospitals in Illinois. The mother ship -- no  
6 pun intended -- is in Peoria. OSF Saint Francis  
7 Medical Center is in Peoria, not in the relevant  
8 geographic market here. But OSF also has hospitals in  
9 Bloomington, Galesburg, Pontiac and Monmouth and --  
10 JUDGE CHAPPELL: But those are not part of this  
11 case.

12 MR. MARX: I'm sorry?

13 JUDGE CHAPPELL: Those outlying hospitals are  
14 not part of the case.

15 MR. MARX: Not part of the case in the sense,  
16 Your Honor, that they compete with the hospitals in  
17 Rockford. They will be relevant, however, to the  
18 extent that OSF is a system, and there are certain  
19 system cost savings and efficiencies that it is able to  
20 generate that, for example, Rockford Health System  
21 cannot generate on its own but will be able to generate  
22 as it becomes part of the system here. But otherwise  
23 with respect to the competition between those hospitals  
24 in Rockford, no, they're not relevant.

25 JUDGE CHAPPELL: And I can expect to see photos

1 of these hospitals from one of the parties at least.

2 MR. MARX: Absolutely. We're working on it.  
3 We're going to work on that a little bit faster this  
4 time and get you a little bit better photos.

5 And we will also provide you a photo of  
6 SwedishAmerican Health System, which is what I want to  
7 turn my attention to for a minute. It's a  
8 not-for-profit, tax-exempt, general acute care hospital  
9 providing primary, secondary and tertiary services. It  
10 is the largest and fastest-growing system in Rockford.  
11 It has 321 staffed beds.

12 It also owns SwedishAmerican Medical Center in  
13 Belvidere, which is a small hospital located in nearby  
14 Belvidere, within the relevant geographic market, that  
15 provides emergency medicine, other services, and  
16 presently staffs 9 of its 46 licensed general acute care  
17 inpatient beds, so it has the ability to expand beyond  
18 what it is doing now.

19 Like Rockford Health System and OSF,  
20 SwedishAmerican also employs physicians, primary care  
21 physicians, as well as specialists.

22 And as I said, in March 2010, SwedishAmerican  
23 announced an exclusive affiliation with the  
24 University of Wisconsin Health, an academic medical  
25 center located in Madison, Wisconsin, which, gosh, if I

1 had to guess, I'd guess Madison somebody who is more  
2 familiar with the geography than me will say is  
3 probably about 60 minutes away from Rockford, if I had  
4 to guess.

5 JUDGE CHAPPELL: Speaking of the University of  
6 Wisconsin, are any of these three hospitals considered a  
7 teaching hospital?

8 MR. MARX: Well, that's a good question, which  
9 is not meant to suggest that any of your questions are  
10 not good questions, but -- but not exactly, not an  
11 academic medical center.

12 SwedishAmerican does have the only family  
13 practice residency program that's offered in Rockford.  
14 And interestingly enough, that family practice  
15 residency program serves as a feeder of primary care  
16 physicians for SwedishAmerican Health System, which  
17 employs primary care physicians, and for the community.

18 That's the only teaching aspect that I think we  
19 presently have, and one of the reasons why the parties  
20 are pursuing this transaction is because they would like  
21 to be able to do more of that. But, again, standing by  
22 themselves, neither Rockford Memorial Hospital nor  
23 St. Anthony's Medical Center is in a position to be able  
24 to handle programs like that family practice residency  
25 program in the Swedish case.

1 I've said that SwedishAmerican is the largest  
2 and fastest-growing health system in Rockford, and its  
3 lead over Rockford Memorial hospital, which I think  
4 would be second, and St. Anthony's, which would be  
5 third, is increasing.

6 In 2010, just to provide some perspective,  
7 SwedishAmerican had 42 percent of the discharges in the  
8 market, Rockford Memorial had only 33 percent,  
9 St. Anthony's had 24 percent.

10 If we look at a little different metric -- the  
11 government likes to use patient days. We don't like  
12 patient days because we don't think they really  
13 accurately reflect much of anything. We think  
14 discharges is a generally accepted measure.

15 Staffed beds, SwedishAmerican has 38 percent,  
16 Rockford Memorial 34, St. Anthony's only 27.

17 And interestingly enough, SwedishAmerican has  
18 grown its share in nearly all inpatient services and  
19 now treats the most patients in 17 of the 26 service  
20 lines that all three of the hospitals offer.  
21 Rockford Memorial and St. Anthony's, by contrast, are  
22 first and second in only three of those 26 service  
23 lines, which demonstrates I think -- and the economists  
24 will talk more about this -- that Rockford Memorial  
25 Hospital and St. Anthony's Medical Center are really

1 not each other's closest competitors. The closest  
2 competitor to either of the two hospitals -- and I  
3 don't mean this just geographically, although this also  
4 happens to be true -- is SwedishAmerican Health System.

5 Now, with respect to the transaction, I just  
6 want to provide a couple of details because it's  
7 relevant.

8 In 2008, Rockford Health System approached --  
9 approached Advocate Health System, which is based in  
10 Chicago, a multihospital system, about the possibility  
11 of an affiliation. Ultimately, those discussions did  
12 not come to fruition.

13 As those discussions fell apart, OSF approached  
14 Rockford Health System to initiate discussions about a  
15 potential affiliation, again, both motivated by the  
16 desire to reduce cost but improving healthcare services  
17 through clinical innovation and integration. Both  
18 recognized that Rockford could no longer sustain  
19 high-quality clinical programs on a scale sufficient to  
20 recruit and retain qualified specialists at three  
21 hospitals for most specialties but that an affiliation  
22 between them would create the opportunity to contain the  
23 spiraling cost of healthcare in the area and increase  
24 competition against SwedishAmerican.

25 The parties entered into the affiliation

1 agreement that Mr. Perry mentioned in January 2011,  
2 creating what will be known as OSF Northern Region.  
3 The parties have committed to continue to operate both  
4 hospitals, although they do intend to consolidate and  
5 clinically integrate several of the services between  
6 them, for ten years, and OSF will contribute at least  
7 \$35 million annually for the first eight years  
8 following the affiliation to fund recurring and  
9 replacement capital needs at the two hospitals that are  
10 approved by the local board.

11 I would point out that besides being the  
12 largest and fastest growing, SwedishAmerican is also --  
13 also has the lowest age of plant. It's the newest,  
14 relatively speaking. I think its age of plant is about  
15 eight-point-something years old. On the other hand,  
16 Rockford Memorial and St. Anthony's range at about  
17 12 to 14 to 16 years on average. They're a little old,  
18 and they need a lot of investment, and this transaction  
19 should enable them to do that while at the same time  
20 consolidating services.

21 Let me talk for a couple of minutes if I can --  
22 and I suspect I've already gone over the 15 minutes that  
23 you've allotted to me even with the extra time for  
24 questions.

25 JUDGE CHAPPELL: You have a couple minutes after

1 my next question.

2 Where do people in the Rockford area go for  
3 quaternary care?

4 MR. MARX: Oh, quaternary care. That's a good  
5 question again. They tend not to stay in Rockford  
6 because it's really not offered there. They'll go to  
7 Chicago for quaternary care. They may go up to the  
8 University of Wisconsin at Madison. They may go to  
9 Milwaukee. They may go a little bit west to the  
10 Quad Cities, over towards Iowa, but for the most part I  
11 suspect they're going to Chicago.

12 One of the interesting things that's happened  
13 is, while there are not -- while there are not lots of  
14 hospitals in the region around Rockford that offer the  
15 same range of services that the three hospitals in  
16 Rockford do, those smaller community hospitals that are  
17 out there have increased the level of outpatient  
18 services that they offer, so some of the patients that  
19 used to come into Rockford for treatment are staying  
20 outside, and which of course is affecting -- affecting  
21 the hospitals and one of the reasons why the hospitals  
22 are pursuing this deal, but for quaternary care tend to  
23 go probably to Chicago. They may go up to Minnesota,  
24 too. The Mayo Clinic is not that far away, so I think  
25 that would be a viable option as well.

1 Let me talk for a couple of minutes, the few  
2 minutes that I have remaining, about why it is that  
3 complaint counsel will be unable to meet their burden  
4 to show that the affiliation will result in a  
5 substantial lessening of competition in any relevant  
6 market.

7 You're ultimately going to have to decide  
8 whether OSF Northern Region will be able to raise rates  
9 to commercial payers above competitive levels because  
10 the merger causes OSF Northern Region to become so  
11 powerful that payers have no alternative but to pay  
12 them. Obviously we disagree with the FTC about this  
13 point.

14 One thing to note -- Mr. Perry didn't mention  
15 it; I'm sure he just forgot about it -- Blue Cross  
16 Blue Shield of Illinois is the largest managed care  
17 organization in the market. It represents about  
18 70 percent, about 70 percent, of the commercially  
19 insured patients in Rockford, which gives it pretty  
20 considerable bargaining leverage all by itself. There  
21 are other commercial insurers, but none approach, none  
22 approach, the size of Blue Cross Blue Shield of  
23 Illinois.

24 And so when we talk about the primary care  
25 physician market, for example, the way that Blue Cross

1 Blue Shield of Illinois negotiates with hospitals in  
2 Rockford is it says: These are our rates for primary  
3 care physician services. Take it or leave it. There is  
4 no negotiation.

5 The hospitals, the healthcare systems in  
6 Rockford, are price takers from Blue Cross Blue Shield  
7 for primary care physician services. The likelihood  
8 that rates are going to go up in that market are very,  
9 very low.

10 And I also want to make one other point about  
11 primary care -- two other points about primary care  
12 physician services, and then I'll come back to general  
13 acute care services.

14 I am not familiar with -- and I may have missed  
15 it, but I am not familiar with any case that the  
16 government has brought challenging a transaction where  
17 the post-acquisition HHI is 1925, which is what  
18 Mr. Perry represented it is as it relates to primary  
19 care physicians, and we think that overstates the level  
20 of concentration for primary care physicians by a wide  
21 margin. I'm not aware of any case that the government  
22 has brought -- and maybe they brought one, but I'm not  
23 aware of any one that they've ever won where the  
24 post-acquisition HHI was 1925, and that's what the  
25 government claims it is as it relates to primary care

1 physicians.

2 And the last point about primary care  
3 physicians -- and then I'll come back to general acute  
4 care services -- there are no barriers to entry with  
5 respect to primary care physicians. Physicians are  
6 mobile. You recruit physicians from all over, and  
7 there's absolutely no reason why, if OSF Northern Region  
8 after this transaction tried to raise prices for primary  
9 care physician services, even with -- even with a  
10 37 percent share that we dispute, new primary care  
11 physicians couldn't be attracted easily to constrain  
12 that exercise.

13 Now, with respect to the provider-managed care  
14 organization contracting dynamic --

15 JUDGE CHAPPELL: You have one minute left.

16 MR. MARX: How many?

17 JUDGE CHAPPELL: One minute.

18 MR. MARX: Okay. Okay.

19 As you know, managed care organizations and  
20 healthcare systems negotiate reimbursement rates not  
21 just for general acute care inpatient services but for  
22 the totality of services. There's already steering  
23 going on in Rockford to the extent that -- to the  
24 extent that the managed care organizations negotiate  
25 for two providers in their system out of three, that

1 represents a form of steering.

2 And just so we're clear, you're going to hear  
3 testimony from the people who negotiate the contracts  
4 for both Rockford Health System and from St. Anthony's  
5 and for OSF saying that as a practical matter they  
6 don't take into consideration that who else they might  
7 be trying to contract with the other payers. They don't  
8 even know for the most part. They negotiate their rates  
9 based on their costs but not based on whether or not  
10 they're competing with somebody else for access to those  
11 managed care networks.

12 So we think that when you focus on the  
13 negotiation dynamic, managed care organizations and the  
14 health systems here, what you will find is, number one,  
15 managed care organizations have bargaining leverage on  
16 their own right. SwedishAmerican, as the largest and  
17 fastest growing, will act as a constraint on the ability  
18 of OSF Northern Region to raise prices above competitive  
19 levels. And we think that there will be evidence that  
20 single healthcare system provider networks can succeed  
21 in this marketplace.

22 Now, a final point I want to make is that the  
23 FTC has alluded to the efficiency study that the  
24 parties did conduct in connection with this  
25 transaction.

1 We have identified -- we have identified about  
2 \$130 million in capital cost avoidance and \$41 million  
3 to \$54 million in total annual recurring operating cost  
4 reductions, representing about 8 percent of the parties'  
5 current net operating expenses that will be saved as a  
6 result of this transaction. These are merger-specific,  
7 verifiable cost savings and efficiencies that this  
8 transaction will generate that neither hospital could  
9 have generated on its own.

10 It is true that we have not yet provided the  
11 materials on which our expert witnesses have relied in  
12 making these computations to the government before the  
13 federal rules and the FTC's Part 3 rules require us to  
14 disclose them. We have, however, provided significant  
15 information regarding how those -- how those  
16 calculations were made. And we think as a practical  
17 matter that there are efficiencies and cost savings that  
18 will far exceed any potential for anticompetitive  
19 effects as a result of this transaction. And frankly,  
20 that also explains why it is there is considerable  
21 community support and some payer support for this  
22 transaction as well, and that will come out during the  
23 course of the testimony.

24 In short, Your Honor, we think that the  
25 evidence, once it's fully developed in this case, is

1 going to demonstrate that the affiliation will not  
 2 enable OSF Northern Region to raise prices above  
 3 competitive levels in this case.

4 JUDGE CHAPPELL: Okay. Thank you.

5 MR. MARX: Thanks. And I appreciate your  
 6 indulging my overuse of the time, Your Honor.

7 JUDGE CHAPPELL: Anything further?

8 MR. PERRY: Nothing from complaint counsel,  
 9 Your Honor.

10 MR. GREENE: Mr. Marx has covered the points  
 11 that we would want to make. They are the same points.

12 JUDGE CHAPPELL: Thank you.

13 I will add that if I didn't have another merger  
 14 case coming in four weeks, that was a very good attempt  
 15 at a trial schedule. I would have liked to have  
 16 approved it. I just wanted to let you know that. Good  
 17 work.

18 Until next time, hearing nothing further, we are  
 19 adjourned.

20 (Whereupon, the foregoing scheduling conference  
 21 was concluded at 2:16 p.m.)

22  
 23  
 24  
 25

1 CERTIFICATION OF REPORTER

2

3 DOCKET/FILE NUMBER: 9349

4 CASE TITLE: OSF Healthcare/Rockford Health

5 HEARING DATE: December 20, 2011

6

7 I HEREBY CERTIFY that the transcript contained  
 8 herein is a full and accurate transcript of the notes  
 9 taken by me at the hearing on the above cause before the  
 10 FEDERAL TRADE COMMISSION to the best of my knowledge and  
 11 belief.

12

13 DATED: DECEMBER 21, 2011

14

15

16 JOSETT F. WHALEN, RMR

17

18

19 CERTIFICATION OF PROOFREADER

20

21 I HEREBY CERTIFY that I proofread the transcript  
 22 for accuracy in spelling, hyphenation, punctuation and  
 23 format.

24

25 ELIZABETH M. FARRELL

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# Exhibit 5



February 13, 2012

*VIA E-MAIL*

Kenneth Field, Esq.  
Federal Trade Commission  
Bureau of Competition  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20560

**Re: In the Matter of OSF Healthcare System and Rockford Health System**

Dear Ken:

This responds to your February 9, 2012 e-mail, which I received on the 9th at 5:24 p.m.

You state in your first paragraph that my prior letters “fail to describe any prejudice to [respondents]” resulting from not having received the claims data until the evening of January 31, 2012. I am surprised you do not acknowledge the nature of the prejudice stemming from this delay. At issue are extraordinarily voluminous files of data that track specific patient claims for numerous commercial payors, which we were supposed to have received from complaint counsel at the latest by December 5, 2011. Dr. Capps and his team of supporting economists had access to the data by December 5 – and probably had access much earlier, during the Commission’s pre-complaint investigation. It is impossible for respondents’ expert to recover the lost time between December 5 and January 31.

Analyzing and drawing conclusions from patient-level payor claims data require very time-consuming, upfront, data “cleaning” and testing, for each payor’s data. These are processes that our experts could not commence, of course, until we received the data. Moreover, each payor’s claims data are uniquely structured and require separate processes. In total, the data received January 31 include more than 25 million inpatient claims records. Your oft-repeated statement that the deficiency is “cured” by virtue of our having received the missing volumes some eight weeks after they were due simply is not true. The time is lost, and it is substantial. Nothing in the discovery rules or Judge Chappell’s schedule supports your characterization of this situation.

Your first paragraph refers to complaint counsel’s production as “allegedly deficient” – implying that you do not believe our representation that we did not receive the data until January 31. If you do not believe us, then there is nothing for us to do but seek relief from Judge Chappell. On the other hand, you also argue that Respondents did not suffer undue prejudice “[e]ven if Complaint Counsel’s initial productions were deficient” (paragraph two), and make it a point to

Kenneth Field, Esq.

February 13, 2012

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explain the complexities imposed by the FTC's restrictive policy regarding the handling of sensitive health information for individual patients (paragraph four). The latter implies that you recognize that the production indeed was deficient. Complaint counsel's position appears to be that although (i) you told us that the December 5 production was complete and (ii) we had no way to know this was not true until after the payors responded to our subpoenas much later in January, Respondents nonetheless were obliged on December 6 to alert you to your failure to produce data we had no reason to know you possessed in the first place. Such a position is untenable on its face.

Accordingly, tomorrow, please identify each third party from which complaint counsel received patient claims data, and, as to each third party, please also identify the date you received the data, the scope of the data you received, and when you will confirm that you provided the data to us.

With respect to your reference to "80,000 new documents" that RHS produced January 20, 2012, the declaration from Jon Marshall explains quite clearly that RHS did not know the reason for, or scope of, the problem at the time of the second request production – a problem that did not interfere with the staff's complaint recommendation or the Commission's commencement of litigation to block the transaction. To suggest that RHS acted inappropriately, or that complaint counsel incurred undue prejudice, does not square with the facts. I do not recall hearing before receiving your email that the document production affected your preliminary witness list. As you know, we accommodated your request for more time on the exhibit list when you asked for it. In any event, the production of those documents, and the circumstances under which they were produced and when, is not a defense to complaint counsel's failure timely to produce the payor claims data and unwillingness to acknowledge the undue prejudice that it has imposed on respondents.

Based on our discussions thus far and the parties' respective positions, it appears that we should meet and confer about this issue and potential remedies. Because I must travel tomorrow for matters that will cover the business day, I am not available until 7 pm EST tomorrow night (or later). I am also available this Wednesday, at any time ending by 10 am EST. Please advise if a time in either of those segments would work for you.

Thanks.

Sincerely,



Jeffrey W. Brennan

cc: David Marx, Esq.  
Nicole Castle, Esq.

# Exhibit 6

**From:** Field, Kenneth  
**Sent:** Wednesday, February 15, 2012 6:39 PM  
**To:** 'Jbrennan@mwe.com'; 'NCastle@mwe.com'  
**Cc:** Reilly, Matthew J.; Perry, Jeffrey; Cunningham, Richard  
**Subject:** Proposal Following Meet and Confer

Dear Jeff,

Thank you very much for your time last night.

As an initial matter, we are not certain of the scope of the health plan claims data that you believe you were not provided until January 31, 2012. Your February 8, 2012 letter indicates that you were “unable to locate claims data from MCOs including UnitedHealthcare, Aetna, and CIGNA” and is thus ambiguous regarding whether you believe you were not provided claims data from other health plans.

We have made extensive efforts to review our records regarding our productions to you on or before December 6, 2011 and have records indicating that we provided you with all claims data in our possession from BCBS-IL, Humana, ECOH on November 29, 2011. Our records also indicate that we provided you with inpatient claims data from United at that same time. Correspondingly, the health plan claims data that possessed at that time that may not have been provided to you is data from Aetna, Cigna, and Coventry, and outpatient claims data from United. I say “may not have been provided” in the previous sentence because I cannot determine definitely that we did not produce the data, merely that we do cannot document having done so. Based on your representation that you did not receive all claims data from health plans, we are willing to assume that you did not receive data that we cannot document providing to you.

As described in my February 9, 2012 email, Complaint Counsel’s failure to produce some claims data from health plans was entirely unintentional. Because health plan claims data includes information on healthcare services provided to individuals, it is highly sensitive. The FTC has extensive policies in place to protect the data and attorneys do not have access to it. Pursuant to our security policies, Complaint Counsel formally requested that all claims data be copied and produced to Respondents as part of our initial disclosures and we in good faith believed that it had been delivered to you on November 29, 2011. Moreover, it is undisputed that we addressed the possibility that claims data from some health plans was missing from our productions literally the same day that you raised it.

We cannot be responsible for the fact that you did not raise the issue until January 31, 2012. If data was missing, as you describe, even a superficial review of our productions during late November and early December would have revealed that claims data was present for some health plans and not others. Asking why that was the case would have been the usual practice in a matter such as this one where a very voluminous amount of documents and data has been exchanged. Indeed, we have exchanged dozens of emails and letters relating to the scope of discovery. Moreover, you and your colleagues are very familiar with the FTC’s discovery practices in hospital matters and are aware that we seek and have used claims data from health plans.

Also, you state in your February 8, 2012 letter that you learned from health plans that they had produced data to the FTC that was not included in our productions to you. Your letter includes no information regarding when you learned this from health plans, but is undisputed that you issued discovery requests to these health plans in early December, had discussions with them regarding discovery throughout December and January, and deposed their representatives during mid-January. Given the timing of these conversations, presumably you learned about the claims data at issue before January 31, 2012 when you first raised this issue with us. Indeed, your letter refers to your efforts to re-review our productions after learning about claims data from health plans. We cannot be responsible for your choice to do that rather than simply raise the issue with us.

Thus, to the extent that Respondents are prejudiced by not having access to some of the claims data from health plans, that prejudice is due to your failure to raise this issue in a timely way despite having information that put you on notice that the initial productions to you may not have included some claims data from health plans.

Based on our conversation last night, I understand you to request that Complaint Counsel agree not use claims data from obtained from any health plan as relief from prejudice that you believe Respondents have suffered as a result of not having some portion of that data on or before December 6, 2011. The relief that you request is overbroad and dramatically disproportional to any legitimate prejudice that Respondents may have suffered.

First, the relief that you request would prevent the use of claims data from BCBS-IL, Humana, ECOH, and United that you have had since before December 6, 2012, the earliest data before which you were entitled to this information.

Second, as described above, any prejudice that you have suffered is due to your failure to raise this issue in a timely way.

Third, as proposed below, any prejudice you have suffered may be cured in a manner that does not involve precluding the court from having access to evidence.

Specifically, although we do not believe that any relief is appropriate due to Respondents' failure to raise this issue in a timely way, in the interest of resolving this issue without involving Judge Chappell, Complaint Counsel is willing to agree that Respondents' expert Dr. Noether may submit an additional report presenting analysis(es) using claims data obtained from health plans up until April 11, 2012, provided that Complaint Counsel has an opportunity to depose Dr. Noether for up to 2 additional hours on the additional report.

This proposal would give Dr. Noether and her team an extra four-plus weeks to work with that data, curing the prejudice that you describe in your February 13, 2012 letter of Dr. Noether having insufficient time, or less time than Dr. Capps and his team, to work with this data that you describe in your February 13, 2012 letter.

As reflected in the 'Documents Considered' list appended to Dr. Capps' initial and reply affidavits in the preliminary injunction matter, Dr. Capps did not review or begin processing this data before January 11, 2012. In addition, Dr. Capps' team at Bates White had not performed any analysis of this data prior to January 11, 2012. Thus the amount of time Dr. Capps and his team will have to work with claims data from the health plan can be no more than 68 days (i.e., the time period between January 11, 2012 and March 19, 2012, the date on which his rebuttal report is due pursuant to Judge Chappell's scheduling order). Pursuant to our proposal, Dr. Noether would have 71 days to work with this data (i.e., the time between January 31, 2012, the date on which there is no dispute that Respondents received all health plan claims data from Complaint Counsel, and April 11, 2012, the proposed date for Dr. Noether to submit an additional report).

We continue to believe that the parties can work together to resolve these, and any other, outstanding discovery issues without the need to involve Judge Chappell. To that end, I remain available at your convenience to discuss these issues.

Kind regards,  
Ken

----- Original Message -----

From: Brennan, Jeffrey [mailto:Jbrennan@mwe.com]  
Sent: Tuesday, February 14, 2012 07:45 PM  
To: Field, Kenneth  
Subject: Meet-Confer

Ken --

Are you available tomorrow morning at 9 am? If not, can you propose an alternative time? Could do tonight but not til about 10:30 pm ET. Thanks.

Jeff

Jeffrey W. Brennan  
McDermott Will & Emery  
202-756-8127

\*\*\*\*\*  
\*\*\*\*\*

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\*\*\*\*\*  
\*\*\*\*\*

Please visit <http://www.mwe.com/> for more information about our Firm.

# Exhibit 7

**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, Inc.	)	<b>FILED UNDER SEAL</b>
	)	
and	)	
	)	
Rockford Health System	)	
	)	
Defendants.	)	

**REPLY AFFIDAVIT OF CORY S. CAPPS, PHD**

**January 11, 2011**



## **Appendix A. Materials considered**

### **A.1. Previously cited documents**

(92) I incorporate by reference all sources cited in my initial affidavit.

### **A.2. Expert Reports**

- \*Expert Report of Monica Noether, November 23, 2011
- \*Expert Report of Jeffrey Brown, November 22, 2011
- \*Declaration of Susan Manning, November 23, 2011
- \*PX2501, Affidavit of Cory Capps, November 23, 2011
- \*PX2502, Affidavit of Gabriel Dagen, November 23, 2011
- \*PX2503, Affidavit of Dr. Patrick Romano, November 23, 2011

### **A.3. Depositions**

- \*PX4000, Deposition of Richard Walsh, January 6, 2012

### **A.4. Investigational Hearing**

- \*PX0212, Investigational Hearing of Eric Benick, August 18, 2011
- \*PX0216, Investigational Hearing of Gary Kaatz, September 1, 2011
- \*PX0221, Investigational Hearing of David Schertz, July 12, 2011
- \*PX0222, Investigational Hearing of David Schertz, September 7, 2011
- \*PX0223, Investigational Hearing of Kevin Schoeplein, August 31, 2011
- \*PX0224, Investigational Hearing of Susan Schrieber, August 17, 2011
- \*PX0225, Investigational Hearing of Robert Sehring, August 15, 2011
- \*PX0226, Investigational Hearing of Henry Seybold, August 24, 2011
- \*PX0227, Investigational Hearing of David Stenerson, August 22, 2011
- PX0228, Investigational Hearing of Clair Tosino, October 20, 2011

## **A.5. Declarations**

### **A.5.a. Employers**

- Declaration of Andy Benson (Benson Stone), n.d., December 2011
- Declaration of Greg Bubp (Eclipse), January 5, 2012
- Declaration of Joe Castrogiovanni (Giovanni's), December 11, 2011
- Declaration of Jeffrey Flemming (Rockford Associates), December 6, 2011
- Declaration of Frank Gambino (Gambino Realtors), November 30, 2011
- Declaration of John Griffin (Kelley Williamson Co.), November 8, 2011
- Declaration of Darwyn Guler (Guler Appliance), December 20, 2011
- Declaration of Julie Hansberry (Cincinnati Tool Steel Company), December 30, 2011
- DX020, Declaration of David Koch (Production Toll and Supply), November 15, 2011
- Declaration of Mike LaMonica (LaMonica Beverages), November 21, 2011
- Declaration of Kathy Lundy (Chem Processing, Inc.), January 9, 2012
- DX021, Declaration of Thomas Muldowney (Savant Capital Management), November 16, 2011
- Declaration of Dean Olson (Aircraft Gear Corp), November 9, 2011
- Declaration of Doug Price (Midwest Mail Works), December 30, 2011
- Declaration of Steve Schmeling (Schmeling Construction), December 1, 2011
- Declaration of Steve Schmeling (Schmeling Construction), January 3, 2012

### **A.5.b. Health Plans**

- Jeffery Ingrum (Health Alliance), November 17, 2011
- \*PX0251, Declaration of Suzanne Hall (Aetna), September 26, 2011
- \*PX0255, Declaration of Robert Hitchcock (Humana), June 30, 2011

### **A.5.c. Hospitals**

- Declaration of Edward Andersen (CGH Medical Center), December 22, 2011
- Declaration of Gregory K. Britton (Beloit Health Systems), January 9, 2012
- Declaration of Lynn Klein (Mendota Community Hospital), December 15, 2011
- Declaration of Michael Perry (FHN Memorial Hospital), December 27, 2011

- Declaration of Bruce Peterson (Rochelle Community Hospital), December 22, 2011
- Declaration of Dave Schreiner (Katherine Shaw Bethea Hospital), December 22, 2011

#### **A.5.d. Physicians**

- Declaration of David Cable (Rockford Surgical Service), n.d, November 2011
- Declaration of Joseph Vicari (Rockford Gastroenterology), November 29, 2011
- Declaration of Mark Hiser (Rockford Cardiovascular Assoc.), November 23, 2011
- Declaration of Stephen Bradley (Rockford Surgical Service), November 18, 2011
- DX018, Declaration of Robert Hodge (Perryville Surgical Associates), November 16, 2011
- \*PX0283, Declaration of Steven Diamond (Independent PCP), July 15, 2011
- \*PX0284, Declaration of James Phoenix (Independent PCP), June 7, 2011

#### **A.5.e. OSF SAMC Counsel and/or Board Members**

- Declaration of John Danis (Absolute Fire Protection), November 15, 2011
- DX016, Declaration of Rebecca Epperson (PR Etc.), November 15, 2011
- DX017, Declaration of James Hansberry (Rockford Bank and Trust), November 18, 2011
- DX019, Declaration of Kris Keiper (YWCA), November 11, 2011

#### **A.5.f. Other**

- Declaration of Gary Jury (Winnebago County Board), November 21, 2011
- Declaration of Brad Long (Northwestern IL. Building and Constr. Trade Council), November 29, 2011
- Declaration of Lawrence Morrissey (Mayor of the City of Rockford, IL), December 7, 2011
- Declaration of Joe Sosnowski (State Rep. 69th Legislative Dist. Of IL), November 28, 2011
- Declaration of Maryjane Wurth (Illinois Hospital Association), December 16, 2011

#### **A.5.g. Parties' Employees**

- DX001, Declaration of Kevin Schoeplein (OSF), November 23, 2011
- \*DX002, Declaration of Sister Diane Marie McGrew (OSF), November 22, 2011
- \*DX003, Declaration of David Schertz (OSF), November 23, 2011 (plus exhibits)

- \*DX004, Declaration of Gary Kaatz (RHS), November 22, 2011 (plus exhibits)
- \*DX006, Declaration of Henry Seybold (RHS), November 21, 2011 (plus exhibits)
- DX007, Declaration of Paula Dillon (RHS), November 21, 2011
- DX008, Declaration of Mary Breedon (OSF), November 22, 2011

## A.6. Documents

### A.6.a. Party Documents

- \*PX0001 (OSF 4c-18), Business Efficiencies Report for RHS-OSF Affiliation from FTI
- \*PX0037 (RHS001\_0030162), Affiliation agreement
- PX0124 (OSF01746700), SAMC Reimbursement Report, August 02, 2010
- \*PX0129 (SAMC 000237), SAMC FY 2011 Management Plan
- \*PX0210, Rockford April 1, 2011 Continuing Bond Disclosures
- \*PX0373 (OSF01192611), SAMC Reimbursement Report, June 06, 2011
- PX0385 (OSF01758536), FY2009 Profitability by Payor
- \*PX0592 (RHS002\_0255866), RHS BOD minutes January 27, 2011
- \*PX0630 (RHS017\_0066809), Finance & Audit Advisory Committee minutes, October 26, 2005
- PX3121 (OSF00010006), SAMC Payer Volume and Profitability, March 22, 2010
- PX3126 (OSF00718417), Humana Contract May 2008
- PX3136 (OSF00514661), SAMC FY 2012 Management Plan
- PX3138 (OSF00721609), Aetna Contract September 2009
- PX3139 (OSF01769500), ECOH Contract October 2010
- PX3140 (OSF01769499), email cover letter for ECOH contract
- \*PX3677 (RHS002\_0010194), 2010 Community Physician Need Assessment

### A.6.b. Other

- \*Bowman, Ward S. Jr. "Tying Arrangements and the Leveraging Problem," *Yale Law Journal*, 67, no. 19 (1957): 19–36
- \*Willig, Robert D. "Merger Analysis, Industrial Organization Theory, and Merger Guidelines," *Brookings Papers on Economic Activity – Microeconomics* (1991): 281–332.

- \*Interview of Paul Brand and William Pocklington, Executive Director and Director of Provider Services, respectively, Employers' Coalition on Health ("ECOH"), October 20, 2011
- \*PX0168, Illinois Health Facilities Planning Board Application for Exemption for the Change in Ownership for an Existing Health Care Facility
- \*PX0205, DOJ/FTC Horizontal Merger Guidelines, 2010
- \*PX1025 (BCBSIL00000118), Compilation of Documents including 2010 OSF/BCBS Contract Amendment
- \*PX1254, SwedishAmerican/OSF White Paper given to DOJ supporting 1997 deal
- \*PX1504, Bonds Online- Moody's Affirms A3 Rating on OSF Healthcare System's (IL) \$761 Million of Outstanding Rated Debt; Outlook Remains Stable
- \*PX1518, CMS.gov- Department of Health and Human Services- Certification and Compliance: Critical Access Hospitals
- \*PX1570, U.S. Census Metropolitan and micropolitan statistical areas and Components, Dec 2009, Last Updated September 2010.
- \*PX1571, U.S. Census, Population Division: Metropolitan Area and Components, July 1999, Last Updated January 28, 2002
- \*PX1572, CMS- Disproportionate Share Hospital (DSH) Acute Inpatient PPS
- \*PX1573, DSH Adjustment Percentages for Quarter 4 (July through September) 2011
- \*PX1574, CMS- Overview Acute Inpatient PPS
- \*PX1575, HFRSB- Hospital Profile CY 2010
- \*PX1576, NBER- Business Cycle
- \*PX1577, NBER- Economic Output 2
- \*PX1578, CMS- FY 2010 Final Rule Table 5
- \*PX1579, Department of Health and Human Services: Federal Register V 76, No 212, November 2, 2011
- \*PX1580, Department of Health and Human Services: Federal Register V 76, No 67, April 7, 2011
- \*PX1581, Department of Health and Human Services: Federal Register V 76, No 209, October 28, 2011
- \*PX1582, CMS- MA State- County Penetration File

- \*PX1583, DHHS CMMS- Methodology for Determining Shared Savings and Losses under the Medicare Shared Savings Program
- \*PX1584, Congressional Research Service- PPACA: A Brief Overview of the Law, Implementation, and Legal Challenges, March 2, 2011
- \*PX1585, HealthCare.gov- Creating Jobs and Increasing the Number of Primary Care Providers
- \*PX1586, HealthCare.gov- Children's Health Insurance Program
- \*PX1587, HealthCare.gov- Lifetime and Annual Limits
- \*PX1588, rrstar.com – Some upgrade cost reimbursed for Rock River Valley hospitals, October 31, 2011
- \*PX1589, KSB Hospital- Robert Bandera, MD Profile
- \*PX1590, Provena.org- Gilbert Egekeze, MD Profile
- \*PX1591, Rockford Cardiovascular- Tara Atta, MD Profile
- \*PX1592, Saint Francis Hospital- David H. Moore, MD Profile
- \*PX1593, OSF Medical Group- Azra Ali, MD Profile
- \*PX1594, RHS- George Beranek, MD Profile
- \*PX1595, Department of Justice news release – Court Accepts British Airways/Korean Air Lines Plea, August 23, 2007
- \*PX1596, Department of Justice news release – British Airways PLC and Korean Air Lines Co. Ltd. Agree to Plead Guilty and Pay Criminal Fines Totaling \$600 Million for Fixing Prices on Passenger and Cargo Flights, August 1, 2007
- \*PX2000, Rockford Health System Performance Opportunities presentation from FTI, February 2011
- \*PX2001, OSF SAMC Performance Opportunities presentation from FTI, February 2011
- PX3122, OSF Healthcare press release – Pioneer ACO, December 19, 2011
- \*PX3148, OSF Connections Magazine: Keeping the OSF Family Connected, November 6, 2009

## A.7. Court Cases

- *\*In re Evanston Northwestern Healthcare Corp.*, No. 05-9315 (Opinion of the Commissioners)
- *\*In re Inova Health Sys. and Prince William Health Sys., Inc.*, Complaint, FTC Docket No. 9326, available at <http://www.ftc.gov/os/adjpro/d9326/index.shtm>

- *\*In re ProMedica Health Sys., Inc.*, Initial Decision, FTC Docket No. 9346 (Fed. Trade Comm'n Dec. 12, 2011)
- *\*United States v. AT&T Inc.*, Second Amended Complaint, No. 11-01560 (U.S.D.C. Sept. 30, 2011), available at <http://www.justice.gov/atr/cases/f275700/275756.pdf>
- *\*United States v. British Airways*, Criminal No. 07-183-JDB (D.D.C. August 23, 2007), available at <http://www.justice.gov/atr/cases/f225500/225523.htm>
- *\*United States v. H & R Block, Inc.*, 2011 WL 5438955 (DDC Nov. 10, 2011)
- *\*United States v. Korean Air Lines*, Criminal No. 07-184-JDB (D.D.C. August 24, 2007), available at <http://www.justice.gov/atr/cases/f225500/225524.htm>

# Exhibit 8





designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

- March 9, 2012 - Deadline for Respondents' Counsel to provide expert witness reports. Respondents' expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
- March 13, 2012 - Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions or designated portions thereof, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondents' basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.
- Respondents' Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- March 13, 2012 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).
- March 16, 2012 - Deadline for filing "[m]otions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision" pursuant to Rule 3.22(a).
- March 19, 2012 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).

- March 20, 2012 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- March 23, 2012 - Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
- March 23, 2012 - Exchange deposition transcript counter-designations.
- March 27, 2012 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
- March 28, 2012 - Deadline for filing motions *in limine* to preclude admissions of evidence
- April 2, 2012 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists.
- April 2, 2012 - Exchange objections to the designated testimony to be presented by deposition and counter designations.
- April 3, 2012 - Complaint Counsel files pretrial brief supported by legal authority.
- April 4, 2012 - Deadline for filing responses to motions *in limine* to preclude admissions of evidence.
- April 6, 2012 - Exchange proposed stipulations of law, facts, and authenticity.
- April 10, 2012 - Respondents' Counsel files pretrial brief supported by legal authority.
- April 11, 2012 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
- April 12, 2012 - Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits and any designated deposition testimony. To the extent the parties stipulate to certain issues, the parties shall prepare a Joint Exhibit which lists the agreed stipulations.

Counsel may present any objections to the final proposed witness lists and exhibits, including to any designated deposition testimony. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a Joint Exhibit which lists the exhibits to which neither side objects. Any Joint Exhibit will be signed by each party with no signature for the judge required.

April 17, 2012 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

### ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: [oalj@ftc.gov](mailto:oalj@ftc.gov). The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. The [oalj@ftc.gov](mailto:oalj@ftc.gov) email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. **The subject line of all submissions to [oalj@ftc.gov](mailto:oalj@ftc.gov) shall set forth only the Docket Number and the title of the submission.** Service by email shall be followed promptly by delivery of one hard copy by the next business day. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges. The parties are reminded that all filings with the Office of the Secretary, including electronic filings, are governed by the provisions of Commission Rule 4.3(d), which states: "Documents must be received in the Office of the Secretary of the Commission by 5:00 p.m. Eastern time to be deemed filed that day. Any documents received by the agency after 5:00 p.m. will be deemed filed the following business day."

2. The parties shall serve each other by electronic mail and shall include "Docket 9349" in the re line and all attached documents in .pdf format. Complaint Counsel and Respondents' Counsel agree to waive their rights to Service under 16 C.F.R. § 4.4(a)-(b).

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each

motion to compel or determine sufficiency pursuant to § 3.38(a), each motion for sanctions pursuant to § 3.38(b), the required signed statement must also “recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference.” Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. Motions for *in camera* treatment for evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000) and 2000 FTC LEXIS 138 (Sept. 19, 2000); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

8. Motions *in limine* are discouraged. Motion *in limine* refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, \*18-20 (April 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm’n v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at \*5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving

undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

9. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs.

10. Each party is limited to 50 document requests, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 50 requests for admissions including all discrete subparts except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

11. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition. No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.

12. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the deposition date is scheduled.

13. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within three business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition as agreed to by all parties involved.

14. The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary witness lists previously exchanged unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

15. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

16. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

17. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

18. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert.

(b) At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case. Unless otherwise agreed by the parties, the experts' notes and drafts of expert reports need not be produced. Likewise, communications between experts and with counsel or consultants need not be produced unless relied upon by the expert in formulating an opinion in this case.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel (i) a list of all commercially-available computer programs used by the expert in the preparation of the report; (ii) a copy of all data sets used by the expert, in native file format and processed data file format; and (iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

19. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

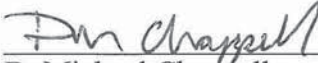
20. The parties shall provide one another, and the Administrative Law Judge, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

21. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

22. Complaint Counsel's exhibits shall bear the designation CX and Respondents' exhibits shall bear the designation RX or some other appropriate designation. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

23. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. Additional exhibits may be added after the final prehearing conference only by order of the Administrative Law Judge upon a showing of good cause. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: December 20, 2011



# Exhibit 9

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

\_\_\_\_\_) )  
In the Matter of ) )  
 ) )  
OSF Healthcare System, ) )  
a corporation, and ) )  
 ) )  
Rockford Health System, ) )  
a corporation, ) )  
Respondents. ) )  
\_\_\_\_\_)

DOCKET NO. 9349

**ORDER ON RESPONDENTS' MOTION TO COMPEL DOCUMENTS  
REQUESTED FROM UNITEDHEALTH GROUP AND  
TO ENFORCE SUBPOENA *AD TESTIFICANDUM***

**I.**

Respondents OSF Healthcare System and Rockford Health Systems (“Respondents”) filed a Motion to Compel UnitedHealth Group to Produce Documents Requested by Subpoena *Duces Tecum* and to Enforce Subpoena *Ad Testificandum* (“Motion”) on February 6, 2012. Third party UnitedHealth Group, Inc. (“United”) submitted an Opposition on February 13, 2012. For the reasons set forth below, Respondents’ Motion to Compel is DENIED IN PART and GRANTED IN PART.

**II.**

Respondents state that they served a subpoena on United requesting certain documents for the period from January 1, 2007 to present, to be produced for inspection on January 10, 2012. Respondents assert that the following five Subpoena requests are at issue: (1) Subpoena Request No. 7, which seeks member surveys, studies, or analyses; (2) Subpoena Request No. 12, which seeks communications between physician network personnel and sales personnel regarding health plan management; (3) Subpoena Request No. 15, which seeks documents relating to competition between health plans; (4) Subpoena Request No. 18, which seeks documents relating to United’s negotiations with providers of general acute care inpatient hospital services in the Rockford area; and (5) Subpoena Request No. 19, which seeks documents relating to pricing models that compare rates for hospitals services.

In addition, Respondents state that they served a subpoena *ad testificandum* for the deposition of United’s Vice Regional President for Network Management, Ms.

Michelle Lobe, on January 23, 2012. Respondents further recite the negotiations it engaged in with United and attached a Certificate of Conference, as required by Commission Rule 3.22(g).

United argues that the requests are overly broad and that United has already expended significant time and resources locating, gathering, and producing responsive documents. United further argues that Ms. Lobe has already been deposed twice and provided live testimony during a preliminary injunction hearing and thus should not be compelled to provide additional deposition testimony.

### III.

With respect to Request Numbers 7 and 15, United asserts that United has conducted a reasonable search and has not located any documents responsive to these requests. Respondents' Motion does not provide a basis for not accepting United's representation with respect to Request Numbers 7 and 15. Therefore, Respondents' Motion is DENIED as to Request Numbers 7 and 15.

With respect to Request Number 12, United asserts that the request is overly broad and that Respondents have not advanced a specific argument showing why the requested documents are relevant. United states, as an example, that the request for communications relating to "proposed or desired changes to the provider network" will likely encompass communications that have nothing to do with the issues raised in this action and that communications relating to member or employer feedback would more than likely require United to search for customer complaints about issues relating to the timeliness of processing health claims.

In agency actions, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *In re Polypore*, 2009 FTC LEXIS 41, at \*10 (Jan. 15, 2009); *Federal Trade Commission v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at \*13 (D.D.C. 1977). "The burden of showing that the request is unreasonable is on the subpoenaed party." *In re Polypore*, 2009 FTC LEXIS 41, at \*10 (Jan. 15, 2009); *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at \*13 (D.D.C. 1977). "Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Id.* (enforcing subpoena served on non-party by the respondent). See *In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, at \*19-20 (Nov. 12, 1976) ("Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.").

However, subpoena requests that seek documents "concerning" or "relating to" have been found to lack the reasonable particularity required by Commission Rule 3.34(b) (a subpoena *duces tecum* "shall specify with reasonable particularity the material to be produced"). *E.g.*, *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19,

\*12 (Feb. 4, 2004) (limiting request seeking “[a]ll internal and external correspondence, memoranda, and messages concerning or relating to” the respondent). Consumer complaints about the timeliness of processing health claims are not relevant to the issues in this case.

Accordingly, Respondents’ motion to compel documents responsive to Request Number 12 is GRANTED IN PART. Request Number 12 is hereby narrowed as follows:

12. Documents describing or reflecting any communications between individuals responsible for managing your hospital and physician networks and individuals in your sales group regarding your health plan networks in the Relevant Area, including but not limited to discussions of employer feedback, marketability or quality of the network, proposed or desired changes to the provider network, and product pricing, but excluding communications, not otherwise responsive to this Subpoena, that describe or reflect consumer complaints about the timeliness of processing health claims.

With respect to Request Number 18, United asserts that the request is overly broad and imposes a substantial burden. In addition, United asserts that to comply with Request Number 18, as written, would require United to search and produce documents that Respondents already have in their possession. United further asserts that it has already produced its contracts with Respondents and that Respondents have failed to show why United should be required to search for and produce communications relating to its contract negotiations with hospitals in the Rockford area.

Discovery shall be limited if Administrative Law Judge determines that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. 16 C.F.R. § 3.31(c)(2)(i). To the extent that Request Number 18 seeks documents that Respondents already possess, the Motion is DENIED. However, documents consisting of United’s communications in its contract negotiations with hospitals in the Rockford area are relevant and a request for such documents is not overly broad.

Accordingly, Respondents’ motion to compel documents responsive to Request Number 18 is GRANTED IN PART. Request Number 18 is hereby narrowed as follows:

18. Documents describing or reflecting your negotiations with providers of the Relevant Services in the Relevant Area from January 1, 2005 to the present, including but not limited to contract proposals, drafts, and communications between you and providers of Relevant Services in the Relevant Area; documents identifying key or “must-have” hospitals, outpatient facilities, or primary care physicians in the Relevant Area; documents analyzing the geographic coverage of providers; documents, information, and data relied upon during contract negotiations (such as quality measures, member utilization patterns, and employer or member feedback regarding your provider network or product offerings); documents relied upon to determine whether proposed reimbursement rates are

comparable to those you pay to other providers of Relevant Services in the Relevant Area; documents reflecting whether to include or exclude any hospital or hospital system, or physician or physician organization in your provider network, communications regarding any provider's desire to exclude any other providers from a health plan; and copies of the final provider contracts, including any amendments or modifications, for Relevant Services in the Relevant Area.

With respect to Request Number 19, United asserts that the request seeks documents beyond the Relevant Area and is not limited to a specific time period. United further asserts that because it has produced its contracts and Respondents know the terms of its contracts with other insurance companies and payors, Respondents have the information they seek in this request.

Absent a showing of the relevance of information pertaining to the geographic area alleged in the Complaint or asserted in the Answer, a document request served on a third party will be limited to the relevant geographic area. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19, \*13 (Feb. 4, 2004). Unless a more limited time has already been agreed to by Respondents, the specific time period shall be limited to the period requested in Subpoena Instruction Number 6, January 1, 2007 to present.

Documents generated by United in their ordinary course of business in which United compares the rates that United is charged by Respondents to the rates United is charged by SwedishAmerica are highly relevant to this proceeding and may be more dispositive than a document generated by Respondents' counsel or experts creating such comparisons from the documents received in litigation.

Accordingly, Respondents' motion to compel documents responsive to Request Number 19 is GRANTED IN PART. Request Number 19 is hereby narrowed as follows:

19. Documents describing or reflecting pricing models that compare the rates of the Relevant Hospitals for Relevant Services and outpatient services to any hospital or provider in the Relevant Area, including documents that you use to determine how actual or proposed contracts with the Relevant Hospitals compare to each other and how those contracts compare to contracts they have with other insurance carriers.

#### IV.

Respondents also seek to enforce the subpoena *ad testificandum* for the deposition of United's Vice Regional President for Network Management, Ms. Michelle Lobe. Respondents state that Ms. Lobe testified on January 10, 2012 in response to a subpoena to testify in the Northern District of Illinois proceeding, *Federal Trade Commission v. OSF Healthcare System and Rockford Health System* (Case No 11-cv-50344) ("related federal proceeding") ("January 10, 2012 deposition"). Respondents further state that since Ms. Lobe's testimony, United has produced additional documents responsive to Respondents' subpoena requests on January 19, 2012, January 20, 2012, and February 3,

2012. Respondents then assert that they intend to depose Ms. Lobe on documents produced after the January 10, 2012 testimony.

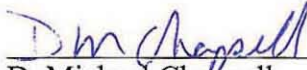
United asserts that Ms. Lobe has already provided testimony on the following three instances: (1) on September 27, 2011, in an investigational hearing conducted by Complaint Counsel in connection with the FTC's investigation into the proposed merger; (2) at the January 10, 2012 deposition; and (3) on February 1, 2012, by providing testimony at the preliminary injunction. United asserts that Respondents made the choice to depose Ms. Lobe on January 10, 2012, and should not be entitled to another deposition.

Although Respondents deposed Ms. Lobe on January 10, 2012 in the related federal proceeding, in advance of her testimony at the preliminary injunction in that matter, Respondents have since received additional documents in this proceeding on which they wish to question Ms. Lobe. Thus, Respondents have provided a sufficient reason to take a deposition of Ms. Lobe in this matter. However, such deposition is allowed only on the limited basis of questioning Ms. Lobe about documents produced after January 10, 2012. Accordingly, in this respect, Respondents' Motion is GRANTED.

V.

The close of discovery in this case is February 17, 2012. That deadline is hereby extended to February 23, 2012 for the limited purpose of allowing United to produce documents and to February 27, 2012 for the limited purpose of allowing United to take the deposition of Ms. Lobe as required by this order.

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: February 14, 2012