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

In the Matter of	**PUBLIC**
OSF Healthcare System, a corporation, and	Docket No. 9349
Rockford Health System, a corporation, Respondents.	Hon. Judge Chappell

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE COORDINATION DOCUMENTS

Motions *in limine* are disfavored in this Court, and for good reason. In a bench trial, there is little justification to exclude relevant evidence because the Court is well-equipped to give it appropriate weight. Yet here, Respondents seek to withhold 13 highly-relevant exhibits (the "Coordination Documents") from the Court's review.[1] The Coordination Documents all have one thing in common: they show a long and consistent history of coordinated activity among Rockford's hospitals. Indeed, they reveal not merely an isolated incident, but a repeated pattern of concerted efforts by the highest levels of management to gather information and use it to ensure that they are "not out of step" with their competitors. Respondents cannot credibly claim that evidence of coordination is not relevant to the question before the Court – *i.e.*, whether the proposed transaction is likely to substantially lessen competition – especially where Complaint

[1] The 13 exhibits referenced as the "Coordination Documents" are attached to Respondents' Motion *In Limine* To Preclude Admission Of Unreliable Materials Expected To Be Offered In An Attempt To Show Coordinated Effects filed with this Court on March 28, 2012.

Counsel has alleged coordinated effects as a theory of anticompetitive harm in its complaint.[2] Instead, Respondents make the baseless assertion that these documents are unreliable, purportedly because the Court will be unable to assign them their proper weight in light of all the evidence. Respondents' latest attempt to sweep relevant evidence under the rug should therefore be rejected.

ARGUMENT

Motions *in limine* should be granted "only when the evidence is clearly inadmissible on *all* potential grounds." *In re Telebrands Corp.*, No. 9313, 2004 FTC LEXIS 270, at *5 (F.T.C. Apr. 26, 2004) (quoting *Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) (emphasis added); *see also In re Basic Research, LLC*, No. 9318, 2006 WL 159736, at *8 (F.T.C. Jan. 10, 2006) (noting that moving party bears burden on motion *in limine*). Such motions are appropriate only in extreme circumstances where they will "eliminate plainly irrelevant evidence" or "needlessly cumulative evidence." *In re Rambus Inc.*, No. 9302, 2003 WL 21223850, at *1 (F.T.C. Apr. 21, 2003). Indeed, this Court has explicitly discouraged motions *in limine* in this case, stating that "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."[3]

[2] *See Compl.* ¶¶ 11, 55-59 (where Complaint Counsel alleges that the reduction in competitors will increase the incentive and ability of the remaining two firms to engaged in coordinated behavior.)
[3] Scheduling Order ¶ 8.

I. THE COORDINATION DOCUMENTS ARE RELEVANT, MATERIAL, AND RELIABLE

A. The Coordination Documents are Highly Relevant and Material

FTC Rule 3.43(b) provides that "relevant, material and reliable evidence shall be admitted." The Federal Rules of Evidence define relevancy to include evidence that has *any* tendency to make a fact of consequence to the determination of the action more or less probable. Fed. R. Evid. 401.[4] And "the federal courts are unanimous in holding that the definition of relevant is expansive and inclusive, and that the standard for admissibility is very low." *Leinenweber v. Dupage County*, No. 08 C 3124, 2011 U.S. Dist. LEXIS 15017, at *4 (N.D. Ill. Feb. 15, 2011) (citations omitted). The Coordination Documents easily surpass that standard.

Notwithstanding Respondents' head-in-the-sand claim that the Coordination Documents contain no evidence of collusion or coordination among the three Rockford hospitals, the history of coordination in this market goes back for decades.[5] For example, as the district court found in *Rockford Memorial*, the Rockford hospitals attempted a group boycott of Blue Cross as far back as the 1980s. 717 F. Supp. 1251, 1286 (N.D. Ill. 1989). The evidence reveals that, since then, coordination has become business as usual in Rockford:

[4] The Federal Rules of Evidence are persuasive authority for FTC adjudicative proceedings. *In re Herbert R. Gibson, Sr.*, No. 9016, 1978 FTC LEXIS 375, at *2 n.1 (F.T.C. May 3, 1978).

[5] Respondents Br. at 1-2.

{ENTIRE CHART *IN CAMERA*}

[6] PX0630-004; *see also* PX0556-003.

[7] PX3151-001.

[8] PX4020-030 to 32; PX0349-001 to 02; PX0350-001 to 02; *see also* PX0462 (Rochelle Community Hospital); PX0463 (KSH Hospital).

[9] PX1265-001; PX4000-019.

[10] PX0704-001.

[11]

[12]

This inappropriate exchange of information and coordination of strategy between competing hospitals can enhance their bargaining leverage and result in increased prices.[13] This is especially true when the communication relates to contract negotiations, as occurs in Rockford.[14]

Moreover, as explained by Judge Posner, "[t]he fewer competitors there are in a market, the easier it is for them to coordinate their pricing," as they have even greater ability and incentive to do so. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1387-92 (7th Cir. 1986); *see also FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905-06 (7th Cir. 1989); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 60-61 (D.D.C. 2009). The proposed Acquisition will enhance the likelihood and efficacy of coordinated behavior in at least three ways by: (i) reducing the number of communication paths required to reach agreement (one instead of three); (ii) making "cheating" more detectable and less profitable; and (iii) enhancing the merged entity's tools to discipline SwedishAmerican.[15] And where, as here, the market has a history of coordination, the remaining competitors are all the more likely to engage in coordination once their number is reduced. *United States v. H&R Block*, No. 11-00948, 2011 U.S. Dist. LEXIS 130219, at *108-109 (D.D.C. Nov. 10, 2011).

Respondents attempt to conceal this evidence by claiming it is irrelevant and immaterial. But it is beyond dispute that these documents are not only relevant, but highly material to the

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13 PX2510-021 to 22, 28.

14 PX2510-021.

15 PX2510-021 to 022; PX2511-031 to 32.

central question before the court – *i.e.*, whether the Acquisition is likely to substantially lessen competition. The Rockford hospitals' propensity for coordinated activity – as reflected in the Coordination Documents – greatly enhances the likelihood that the two remaining firms following the Acquisition will continue to engage in such anticompetitive activity, increasing the Acquisition's likely anticompetitive effects. In fact, Complaint Counsel alleges this theory of anticompetitive harm in its complaint stating "the Acquisition . . . will diminish competition by enabling and encouraging OSF and its sole remaining competitor in the Rockford region, SwedishAmerican, to engage in coordinated interaction."[16] Accordingly, the Coordination Documents easily surpass the relevancy and materiality standards.

B. The Coordination Documents are Reliable

Respondents also blithely assert that the Coordination Documents are unreliable. Of course, Respondents ignore the fact that all but two of the Coordination Documents come from Respondents' own files and were authored by Respondents or their consultants in the ordinary course of their business activities.[17] Such documents are presumed reliable absent evidence to the contrary. *In re Lenox Inc.*, 73 F.T.C. 578, 604 (1968). Yet, aside from unsupported assertions that the Coordination Documents contain hearsay, Respondents offer little more than self-serving testimony in a misguided attempt to demonstrate the unreliability of these documents. Although self-serving testimony is not subject to "automatic discount," as such,

[16] Compl. ¶ 55.

[17] 11 of the 13 Coordination Documents come from Respondents' files and were authored by either Respondents' executives or their consultants: PX0349 (Respondents Br. Ex. A), PX0350 (Ex. B), PX0462 (Ex. C), PX0463 (Ex. D), PX0354 (Ex. E), PX0388 (Ex. F), PX0556 (Ex. G), PX0630 (Ex. H), PX0704 (Ex. I), PX3151 (Ex. L), PX4626 (Ex. M). Only two of the Coordination Documents – an

"when the trial testimony of a strongly self-interested witness conflicts with the same witness's earlier testimony in a more unguarded moment, *with contemporaneous documents* or with statements of less interested witnesses, it is necessary to take account of these alternative versions of the facts." *In re Schering Plough Corp.*, No. 9297, 2003 FTC LEXIS 187, at *85 n.77 (F.T.C. Dec. 8, 2003) (emphasis added). Indeed, as the Commission held in *Schering Plough*, prior documents are more credible than subsequent contradictory, self-serving testimony. *Id*. at *92.

The two remaining exhibits that Respondents seek to exclude – PX1265 and PX4000 – likewise bear strong hallmarks of reliability. **{**

ordinary course business letter and sworn deposition testimony – came from a source other than Respondents or their consultants: PX1265 (Ex. J) and PX4000 (Ex. K).

[18] PX1265.

[19] Respondents' attempt to use **{ }** subsequent testimony as a basis for excluding evidence is misplaced. The Court is well-equipped to assess the weight of his testimony in light of his ongoing business relationships with OSF and RHS.

} Apparently unhappy with the results of that cross-examination, Respondents now hope to hide this damaging evidence from the Court's review. Respondents' attempt to bury this relevant and reliable evidence should be rejected.

II. THE COORDINATION DOCUMENTS ARE NOT HEARSAY AND SHOULD NOT BE EXCLUDED ON HEARSAY GROUNDS

Respondents' unsupported claim that the Coordination Documents contain hearsay simply misses the point. As an initial matter, under Rule 3.43(b), "statements or testimony by a party-opponent, if relevant, *shall* be admitted."[21] So the vast majority of the Coordination Documents should be admitted on that basis alone.

Of course, Rule 3.43(b) does not exclude hearsay evidence. On the contrary, under the Commission's Rules, relevant documents and testimony "shall be admissible and shall not be excluded solely on the ground that they . . . contain hearsay." *In re Polypore Int'l, Inc.*, No. 9327, 2010 WL 3053866, at *2 (F.T.C. July 28, 2010); 18 C.F.R. § 3.43(b). Here, Respondents offer no explanation of why the Court should ignore this well-established rule and exclude highly-relevant evidence. Nor have Respondents identified any meaningful prejudice that could result from the Court considering the Coordination Documents. Respondents will have the opportunity at the administrative proceeding to elicit testimony – both on direct and cross-examination – regarding any statements made in the Coordination Documents and to test their reliability.

Moreover, Respondents fail to provide a single example of any portion of any

[20] PX4000-019, 24.

[21] The Commission's rule mirrors the Federal Rules of Evidence, which also consider statements by party-opponents non-hearsay. Fed. R. Evid. 801(d)(2).

Coordination Document that actually contains hearsay. The vast majority of the Coordination Documents will be offered to show Respondents' state of mind or intent to coordinate with each other and SwedishAmerican, not for the truth of the matters asserted. **{**

} Most, if not all, of the Coordination Documents will be offered in a similar manner, making them non-hearsay.[23]

Accordingly, Respondents have failed to meet their burden of showing that the Coordination Documents are inadmissible on *any* potential grounds, much less all of them.

CONCLUSION

Respondents' motion is a last-ditch effort to conceal unfavorable evidence from this Court. The Coordination Documents not only are highly relevant to the central issue before the Court – whether the Acquisition is likely to substantially lessen competition – but also bear all of the hallmarks of reliability. The overwhelming majority of the Coordination Documents were

[22] PX0630-004; *see also* PX0556-003.

[23] The two potential exceptions to this point – PX1265 and PX4000 – are relevant and reliable documents/testimony that should be admitted even if offered for the truth of the matters asserted. *See supra* pp. 6-7.

produced from Respondents' files, and all were authored in the ordinary course of business or contain sworn testimony subject to cross-examination. Accordingly, Respondents fall far short of meeting their burden on this motion. Complaint Counsel therefore respectfully requests that the Court deny Respondents' motion *in limine* to exclude the Coordination Documents.

Dated: April 6, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

April 6, 2012

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