

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman  
J. Thomas Rosch  
Edith Ramirez  
Julie Brill

In the Matter of	)	
	)	
OSF Healthcare System	)	Docket No. 9349
a corporation, and	)	
	)	
Rockford Health System	)	
a corporation.	)	
	)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission (“Commission”), having reason to believe that Respondents OSF Healthcare System (“OSF”) and Rockford Health System (“RHS”), having executed an affiliation agreement (the “Acquisition”) which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. OSF’s acquisition of RHS’s assets (the “Acquisition”) would substantially lessen competition for critical health care services in the Rockford, Illinois area. By ending decades of competition between OSF and RHS that has benefitted the community, the Acquisition threatens to increase total health care costs and reduce the quality of care and range of health care choices for employers and residents in the Rockford region.
2. The Acquisition, by Respondents’ own admission, is a merger to duopoly for general acute-care inpatient hospital services in the Rockford region. The Acquisition will eliminate vigorous competition between OSF and RHS, and leave the Rockford region



9. The fact that the merged entity would still face at least some competition from one meaningful competitor, SwedishAmerican, is not sufficient to render the Acquisition lawful under Section 7. This conclusion is compelled by the antitrust laws which condemn more than just mergers to monopoly and also by the market realities in the Rockford region. Specifically, after the Acquisition, the merged system will be a virtual “must-have” for health plans seeking to offer insurance to Rockford employers and employees. This fact and the greater leverage the merged firm will enjoy as a result stems from the inability of commercial health plans after the Acquisition to offer an attractive provider network without contracting with the combined system.
10. Health plans must offer at least two of the Rockford hospitals to be marketable to local residents. As a result, every major health plan network in the Rockford region includes two, but not all three, of the Rockford hospitals. After the Acquisition, no health plan could continue to offer a multi-hospital network in Rockford without facing the substantially higher rates that will be demanded by the merged OSF and RHS.
11. The Acquisition also increases the incentive and ability for the only remaining competitors in Rockford, SwedishAmerican and OSF, to engage in anticompetitive coordinated behavior. Such coordination could include directly or indirectly sharing sensitive information related to commercial health plan contracts and negotiations, or it could involve deferring competitive initiatives that otherwise would benefit the Rockford community.
12. Unless prevented, the Acquisition will substantially lessen competition and greatly enhance Respondents’ market power. The Acquisition’s likely anticompetitive effects will directly increase health care costs for Rockford residents, as well as lower the quality of care that they receive. Respondents’ speculative efficiency and quality-of-care claims are insufficient to offset the significant anticompetitive harm likely to result from the Acquisition.

## II.

### BACKGROUND

#### A.

##### Jurisdiction

13. OSF and RHS are, and at all relevant times have been, engaged in commerce or in activities affecting commerce, within the meaning of the Clayton Act. The Acquisition constitutes an acquisition under Section 7 of the Clayton Act.

B.

Respondents

14. Respondent OSF is a not-for-profit health care system incorporated under and by virtue of the laws of Illinois. OSF is headquartered in Peoria, Illinois. OSF owns and operates six acute care hospitals in Illinois, and a seventh hospital in northwestern Michigan. In Rockford, OSF operates St. Anthony Medical Center ("OSF St. Anthony"), which has 254 licensed beds and serves the Rockford region. OSF also owns and operates OSF St. Anthony's employed physician group, OSF Medical Group ("OSFMG"), which employs approximately 80 physicians in the Rockford region. During fiscal year 2010, OSF generated \$1.7 billion in operating revenue, with OSF St. Anthony generating approximately \$325 million of that total.
15. Respondent RHS is a not-for-profit health care system incorporated under and by virtue of the laws of Illinois. RHS is headquartered in Rockford, Illinois. RHS owns and operates one acute care hospital, Rockford Memorial Hospital ("Rockford Memorial"), which is located in Rockford, Illinois and serves the Rockford region. Rockford Memorial has 396 licensed beds. RHS also owns and operates Rockford Health Physicians ("RHPH"), which employs approximately 160 physicians in the Rockford region. During fiscal year 2010, RHS generated \$441 million in operating revenue.

C.

Employers and Health Plans

16. Competition between hospitals occurs in two "stages." In the first stage, hospitals compete to be selected as in-network providers.

self-insured, its health plan acts as its agent and by extension acts on behalf of its employees in creating provider networks that offer convenience, high quality of care, and negotiated reimbursement rates.

18. In the second stage of competition, hospitals and their employed physicians compete with other in-network providers to attract patients. Health plans typically offer multiple in-network hospitals with similar out-of-pocket costs and those hospitals compete in this second stage to attract patients by offering better services, amenities, convenience, quality of care, and patient satisfaction than their competitors offer.

#### D.

#### The Acquisition

19. Under the terms of the affiliation agreement signed on January 31, 2011, OSF will acquire all operating assets of RHS and become the sole corporate member of RHS. OSF will hold reserve powers over the governance and operations of RHS. OSF's reserve powers will grant it control and ultimate authority over all significant business decisions of RHS, including strategic planning, operating and capital budgets, large capital expenditures, and significant borrowing and contracting.

#### E.

#### Prior Holding by District Court of Illinois and Seventh Circuit Court of Appeals that Merger of Two Rockford Hospitals Would Violate the Antitrust Laws

20. The United States District Court for the Northern District of Illinois, Western Division ("District Court") found in 1989 that the proposed merger of Rockford Memorial and SwedishAmerican violated Section 7 of the Clayton Act. After holding a full trial on the merits, the District Court issued a permanent injunction to stop the merger and the U.S. Court of Appeals for the Seventh Circuit, in a decision written by Judge Posner, affirmed the District Court's finding of liability and upheld the permanent injunction.
21. In the 1989 case, the District Court defined a relevant geographic market identical to the market alleged in this Complaint. The District Court also defined a relevant product market general acute-care hospital inpatient services identical to a market alleged in this Complaint. In fact, the District Court described a market structure, levels of market concentration, and entry conditions in the earlier case that are strikingly similar to those alleged in this Complaint and, on that basis, concluded that the merger of two Rockford hospitals would "produce a firm controlling an undue percentage share of the relevant market, thus increasing the likelihood of market dominance by the merged entity or collusion."
22. Following a full hearing on the merits, and on facts very similar to the facts alleged in this case, the District Court issued a permanent injunction blocking the merger of two of

the three Rockford hospitals. Given that the only meaningful difference between the 1989 merger and the Acquisition is the re-shuffling of the parties to the transaction, the District Court's ruling in 1989 informs this Court's assessment under Section 7 of the Clayton Act of this proposed merger of two of the three Rockford hospitals.

### III .

#### THE RELEVANT SERVICE MARKETS

##### A.

##### General Acute-Care Inpatient Services Market

23. The Acquisition threatens substantial harm to competition in the market for general acute-care inpatient hospital services sold to commercial health plans ("general acute-care services"). General acute-care services encompass a broad cluster of medical and surgical diagnostic and treatment services that include an overnight hospital stay, including, but not limited to, many emergency services, internal medicine services, and surgical procedures. It is appropriate to evaluate the Acquisition's likely effects across this entire cluster of services, rather than analyzing each inpatient service independently, because the group of services is offered to Rockford region residents by the same set of competitors and under similar competitive conditions.
24. The general acute-care services market does not include outpatient services (those not requiring an overnight hospital stay) because such services are offered by a different set of competitors under different competitive conditions. Further, health plans and patients could not substitute outpatient services for inpatient services in response to a price increase. Similarly, the most complex and specialized tertiary and quaternary services, such as certain major surgeries and organ transplants, also are not part of the relevant cluster of

and younger. This relevant market also excludes physician services provided by obstetricians and gynecologists ("OB/GYN") because those services generally complement, rather than substitute for, general primary care physician services.

#### IV.

#### THE RELEVANT GEOGRAPHIC MARKET

27. The relevant geographic market in which to analyze the effects of the Acquisition in the general acute-care inpatient hospital services market is no broader than the geographic market defined by the District Court in its 1989 opinion: an area encompassing all of Winnebago County, essentially all of Boone County, the northeast portion of Ogle county, and single zip codes in McHenry, DeKalb, and Stephenson counties (referred to by the District Court as the "Winnebago-Ogle-Boone" market). Today, as was the case in 1989, this relevant geographic market accounts for 87% of the inpatient admissions of the merging parties. Notably and in contrast to other previous hospital mergers, the precise contours of the relevant geographic market do not alter in any meaningful way the number of competitors, the market share statistics, or the ultimate conclusion that the Acquisition is likely to lead to competitive harm.
28. The appropriate geographic market is determined by examining the geographic boundaries within which a hypothetical monopolist for the services at issue could profitably raise prices by a small but significant amount.
29. Rockford region residents have a clear preference for obtaining hospital and primary care physician services locally. As a result, health plans must include hospitals and primary care physicians from the Rockford region in their provider networks in order to meet their members' needs. Patients do not and would not go to hospitals or primary care physicians outside of the Rockford region in response to rate increases within the region. Thus, a hypothetical monopolist that controlled all of the hospitals or all of the primary care physicians in the Rockford region could profitably increase rates by at least a small but significant amount.
30. In the ordinary course OSF and RHS treat only their Rockford counterparts as meaningful competitors, and both hospitals focus their competitive efforts on providers located in Rockford. OSF and RHS define their primary service areas no broader than the Winnebago-Ogle-Boone area. Patient flow data maintained in the ordinary course by both OSF and RHS indicates that nearly all of their inpatients originate from the Winnebago-Ogle-Boone area.
31. The relevant geographic market in which to analyze the market for primary care physician services provided to commercially-insured adults is similarly no broader than the Winnebago-Ogle-Boone area defined by the District Court in 1989, and may be significantly more narrow. Patients are no more willing to travel to obtain primary care services than they are to obtain acute-care inpatient hospital services. Indeed, because

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<sup>1</sup> The only other provider within the relevant geographic market, Rochele Community Hospital (“Rochele”), is located in Rochele, Illinois, a small community 30







Rockford hospitals as close substitutes for one another due to their proximity and similar scope of services. Residents benefit from the competition between the three hospitals.

42. Rockford residents strongly prefer to have a choice of where they receive their health care services. As a result, every major health plan serving the Rockford region features a provider network with two of the three local hospitals as preferred providers. While health plans and their members might prefer to have access to all three Rockford hospitals, the hospitals provide discounts to health plans for contracting with only two Rockford hospitals.
43. Currently, the three Rockford hospitals must compete vigorously – often through a competitive bidding process – to be included in each health plan’s provider network. Due to the similarity and close substitutability of the three Rockford hospitals, health plans today believe they can build a marketable network with any two of the hospitals. As a result, the three Rockford hospitals compete for just two spots in each health plan’s network, each hospital being forced to provide competitive rates or else risk exclusion from a health plan’s network.
44. Nothing about the Acquisition will change the high value and importance that Rockford residents place on being able to choose their doctors and hospitals. Residents will continue to demand health plan provider networks that include at least two of the three Rockford hospitals, as they have for decades.
45. After the Acquisition, no health plan will be able to offer its members access to more than one of the Rockford hospitals without first agreeing to whatever terms the merged OSF and RHS may demand. As a result, the merged system will become even more important to health plans serving the Rockford region and thus become a virtual “must have.” Health plans will no longer be able to play the three Rockford hospitals against one another. They will have to choose between contracting only with SwedishAmerican,

forgo or delay necessary health care services because of the higher costs, and others may drop their insurance coverage altogether.

48. OSF could also exercise its newly acquired market power after the Acquisition by preventing health plans from including SwedishAmerican in their provider networks. The effect would be to eliminate entirely the ability of Rockford residents who want access to either OSF or RHS from also utilizing SwedishAmerican without incurring higher out-of-network costs. In Peoria, a market south of Rockford where OSF is already a self-acclaimed “dominant player,” OSF has successfully leveraged its market position to exclude its primary competitor from key health plans.
49. Respondents’ documents created in the ordinary course of business indicate that the managed care strategies of the parties encourage “capturing market share,” with the ultimate goal to “build leverage” and become a “must have” system to health plans. Party executives concede that one motivation for the Acquisition was “to become bigger, to at least reclaim some leverage” against the health plans.
50. Although SwedishAmerican will continue to act as a meaningful competitor in the Rockford region, the presence of SwedishAmerican will not prevent a post-Acquisition exercise of market power by OSF whether it is in the form of a rate increase or exclusionary conduct. Because Rockford residents demand health plan networks that offer at least two Rockford hospitals, a network comprised exclusively of SwedishAmerican would be highly undesirable to employers and thus unlikely to have commercial success. Recent history confirms this: virtually every attempt by a health plan to market a provider network consisting of just one Rockford hospital including one exclusive to SwedishAmerican has failed.
51. The Acquisition also will significantly increase OSF’s ability to unilaterally increase rates for primary care physician services. Hospitals and health plans engage in bilateral negotiations to create networks of physicians much like they do to create networks of hospitals. Similar competitive factors dictate the outcomes of negotiations over physician services as dictate the outcomes of negotiations over hospital services. As is the case with the three Rockford hospitals, Rockford residents consider the primary care physician groups of the three local hospitals as close substitutes for each other. Therefore, the Acquisition will strengthen OSF’s bargaining leverage against health plans when it is negotiating the terms of including OSFMG and RHPH physicians in the health plans’ provider networks.

B.

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The Acquisition will Reduce Competition Over Quality, Service

hospital competitors. The acquisition of RHS by OSF, the latest proposed merger to duopoly in the Rockford region, is no less likely to result in coordinated interaction.

- 59. OSF and Swedish American would have the incentive and ability to coordinate their managed care contracting strategies post-Acquisition, for example, by communicating confidential information related to health plan negotiations, either by directly contacting each other or by otherwise signaling their intentions. The two remaining hospitals could also defeat competitive initiatives, such as scaling amenities or expanding services, which would otherwise benefit Rockford residents. Indeed, Respondents' ordinary course documents suggest that hospital executives in the Rockford region communicate directly and indirectly in order to exchange sensitive information about strategic initiatives and health plan negotiations.

VII.

ENTRY BARRIERS

- 60. Neither hospital entry nor expansion by the sole remaining hospital competitor will deter or counteract the Acquisition's likely harm to competition in the relevant service markets.

Exhibit 6674068.000001 of N8D2000.0908000(000)T1000000000000000000

- 61. New hospital entry or significant expansion in the Rockford region is unlikely to occur because Illinois

64. New competition from currently-employed Rockford physicians who leave to open a private practice is unlikely to occur, and in any event would not be timely to deter or prevent competitive harm, in part because all three Rockford hospitals require their employed physicians to sign non-compete agreements that prohibit them from practicing in or around Rockford for at least two years.

## VIII.

### EFFICIENCIES

65. Respondents' alleged benefits of the Acquisition fall well short of the substantial, merger-specific, well-founded, and competition-enhancing efficiencies that would be necessary to outweigh the Acquisition's significant harm to competition in Rockford. No court ever has found, without being reversed, that efficiencies rescue an otherwise illegal transaction. Relevant caselaw indicates that "extraordinary" efficiencies are required to justify an acquisition, such as this one, with vast potential to harm competition.
66. The alleged efficiencies are unfounded and unreliable. Respondents have refused to answer questions or reveal underlying data and analysis in support of their claims on the grounds that such material was prepared under the direction of antitrust counsel in anticipation of litigation, and thus constitutes attorney work product. The merger-for-litigation efficiency claims, therefore, were unambiguously "generated outside of the usual business planning process." Even an analysis based on the information available to date reveals that Respondents' efficiency claims are speculative, exaggerated, and contradicted by the testimony of party executives.
67. Many of the alleged efficiencies also are not merger-specific because they could be accomplished unilaterally without any merger or acquisition, or through an affiliation with an alternative purchaser. The same litigation consultants who generated the estimates of the savings that may result from the Acquisition produced two separate reports detailing tens of millions of dollars in annual savings that RHS and OSF could accomplish on their own.
68. Any claim that the Acquisition is necessary for the parties to survive or continue to compete as full-service independent hospitals is speculative and unsupported by market realities. In fact, RHS and Swedish American made similar claims to the District Court in 1989, and OSF and Swedish American repeated them again during an effort to merge in 1997. Despite their repeated dire predictions, OSF, RHS, and Swedish American have continued to compete successfully over the course of the last two decades and, today, each remains a financially stable, full-service hospital providing high-quality care to the community.

IX.

VIOLATION

COUNT I - ILLEGAL ACQUISITION

69. The allegations of Paragraphs 1 through 68 above are incorporated by reference as though fully set forth.
70. The Acquisition, if consummated, would substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

NOTICE

Notice is hereby given to the Respondents that the seventh day of April, 2012, at 10 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Avenue N.W., Room 532, Washington, D.C. 20580 as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourth (14



The Administrative Law Judge shall hold a pre-hearing scheduling conference not later than ten (10) days after the answers are filed by the Respondents. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the answer is filed by the Respondents). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answer, to make certain initial disclosures without awaiting a discovery request.

#### NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Acquisition is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as OSF and RHS were offering and planning to offer prior to the Acquisition.
2. A prohibition against any transaction between OSF and RHS that