

Counsel has alleged coordinated effects as a theory of anticompetitive harm in its complaint.²

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

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

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 /Sply /SplS

produced from Respondents' files, 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:

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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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