

Plaintiffs' Opening Statement

***Federal Trade Commission
& State of North Dakota
v.
Sanford Health, Sanford Bismarck
& Mid Dakota Clinic, P.C.***

October 30, 2017



Overview

- Illegal merger to near-monopoly of two physician services groups
- Under well-established precedent, the merger is presumptively unlawful
- The presumption cannot be rebutted
- Under the applicable legal standard (FTC Act section 13(b)), the Court can—and should—preserve competition pending resolution of the hearing on the merits

Why are we here?

- Protect consumers in the Bismarck-Mandan area
- Preserve existing competition in the market for four physician services
- Allow opportunity for full hearing on the merits in administrative proceeding set to begin on November 28, 2017
- Prevent the immediate reduction in competition and resultant harm (increasing prices and reduced quality competition) to consumers

Who are the Defendants Merging to Monopoly?

- Sanford Health/Sanford Bismarck
 - ***“The monster that gobbles communities”*** (MDC Executive)
 - 40 hospitals and 250 clinics nationwide
 - About 160 physicians in the Bismarck-Mandan area, including 36 adult PCPs
 - Sanford also has its own health plan
 - Largest private employer in Bismarck-Mandan area
 - Sanford revenues over \$4.2b



Who are the Defendants Merging to Monopoly?

- Mid Dakota Clinic, P.C.
 - ***“The doctors you know and trust”***
 - Largest multi-specialty physician group in North Dakota, operating since 1971
 - Over 60 physicians, including 23 adult PCPs
 - Facilities throughout Bismarck
 - 12th-largest private employer in Bismarck-Mandan area
 - MDC is roughly 7x larger than the next largest independent physicians group in the Bismarck-Mandan area



This Merger Raises Serious Antitrust Concerns



Defendants Seek to Enter Into a Merger to Monopoly

- The merger would eliminate competition in four different physician services markets in Bismarck-Mandan
- Sanford wants to acquire its closest competitor and only meaningful rival in those physician services lines
- Effect--raise prices and eliminate non-price competition

Defendants Agree: Monopolies are “bad”

REDACTED

Defendants Agree: Monopolies are "bad"

Sanford Health and Mid Dakota Clinic
Bury, M.D. 5/12/2017

113 115

1 retire, but I will not work for Sanford.
2 Q. Will you receive money for your shares
3 of Mid Dakota Clinic and Mid Dakota Medical
4 Building Partnership if Sanford acquires Mid
5 Dakota Clinic?
6 A. I will receive a portion of the real
7 estate part but I will not receive the other
8 personal, what they call Blue Sky payment.
9 Q. I think I have seen references in some
10 of the documents to \$729,000 for shares of Mid
11 Dakota Clinic.
12 Does that sound correct to you?
13 A. That's approximate, yes.
14 Q. Would you receive more money if you
15 signed an employment agreement with Sanford?
16 A. Yes.
17 Q. And you started to speak about this a
18 little bit already, but why have you decided to
19 work for CHI instead of Sanford?
20 MR. MERZ: Asked and answered.
21 THE WITNESS: Because I am loyal to the
22 hospital that I have worked all my life, and
23 I'm loyal to my patients that are also loyal to
24 that institution.
25 And, again, I don't feel like I want to

1 care.
2 Q. Did you consider alternatives to working
3 for CHI or to going to Sanford?
4 A. No.
5 Q. Did you ever consider retiring instead
6 of going to CHI?
7 A. I would have happily gone to CHI, but --
8 and I did not consider retirement then. But if I
9 could not work out a relationship with CHI, and
10 my only other option would have been retirement
11 then that's what I would have done.
12 Q. When you were considering your options
13 if the transaction between Sanford Bismarck and
14 Mid Dakota Clinic goes through, did you consider
15 opening an OB/GYN practice anywhere, like in
16 Bismarck or Mandan, such as Dickinson or Minot?
17 A. No.
18 Q. Why not?
19 A. No, because I have no intention of
20 moving out of this community. I'm home. I have
21 kids and grandkids here and I'm not going to go
22 at this point in my life and start off on a new
23 business endeavor in a different community.
24 Q. Did you consider opening an independent
25 practice in Bismarck or Mandan?

114 116

1 drop to a mediocre standard of care, after
2 working my whole life to build a good reputation.
3 I don't want to be just good enough. I want to
4 be good and competitive. And I think that
5 monopoly in health care is not a good thing.
6 Q. Do you think the transaction would cause
7 such a monopoly in health care?
8 A. Yes.
9 Q. And do you think that would influence
10 the quality of health care services available in
11 Bismarck or Mandan?
12 A. Yes.
13 Q. And you mentioned a mediocre standard of
14 care. What do you mean by that?
15 A. I mean that when there is one place to
16 work, if there is one place, whether it is health
17 care, business, you name it, competition we all
18 know is good. Competition keeps people striving
19 to be better and keeps people honest.
20 And when we remove that competition,
21 then all of a sudden mediocre is good enough
22 because people don't get a choice. And I feel
23 like having some competition keeps us striving to
24 be better, to do better for our patients, and to
25 allow them a choice in who they see for health

1 A. No.
2 Q. Okay. And why not?
3 A. Again, I'm, you know, I'm at the end of
4 my career. If I were starting a career I might
5 be brave enough to do that. But as a one-person
6 show there is no way I could do that without
7 being on call 24/7, 365 days a year, with no
8 purses, and I can't do that.
9 Q. Have you discussed employment with
10 anyone from CHI?
11 A. Yes, I have.
12 Q. And when did you begin speaking with CHI
13 about employment?
14 A. Oh, I can't give you an exact date but
15 it was shortly after it was determined that the
16 clinic was going to fully get into negotiations
17 with Sanford.
18 Q. Who from CHI had you spoken with about
19 employment?
20 A. Mainly Kurt, Kurt Schley, Chris Jones,
21 who is no longer there, and Dewey Schlittenhard.
22 Q. Have you spoken with anyone else at CHI
23 about employment?
24 A. Well, those were the three that I talked
25 to about contract stuff. I have been working

29 (Pages 113 to 116)

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JX00014-030

"Monopoly in health care is not a good thing"

"When we remove competition, then all of a sudden mediocre is good enough because people don't get a choice"

JX00014 Bury (MDC) at 114

Defendants Agree: Monopolies are “bad”

SANFORD ISSUES:

- > Sanford has a good package, that will probably exceed what we can pay most of our docs the next few years. I am astounded by how much they are offering.
 - ~ It would be pretty brave to turn down such a financial windfall.
- > That being said, selfishly I hope we don't sell because our really great staff and myself have enjoyed being a part of this ride the past many years and will be very sad to see MDC go away after 45 years. Also, I feel it will be bad for our community and many of our patients.

SALE ISSUES:

- > Can I clean out cash at Y-E if sold? What will be available on the Balance Sheet at closing. This would include A/R.
- > Will the MDRP be able to declare an annual Dividend?
- > Do we need to buy D & O Tail coverage in case of a sale?
- > MDRP Assets should probably be more clearly defined

LOI ITEMS:

- > Stock Sale
- > 70% of all physicians sign on to new contract. Those that don't go to Sanford only get Book value of stock?
- > Purchase Price higher of new Valuation (after it is reviewed). Valuation determined using Wipfli method of average of Asset Cost, Market approach & Discounted future cash flows methods.
- > Purchase Price payment: 50% on 1/1/16 and 50% on 1/1/18 for physicians still employed
- > MDRP purchase price is appraised building plus cost of other assets: \$21,750,000 + \$2,000,000 = \$23,750,000
- > Physician contracts: 117% of Existing Benchmarks (Conversion Factor) for 3 years - approximates 90% of W2.
- > Non physician EE's retained at commensurate salary & PTO levels plus they get a Sanford jacket (a good LL Bean one, not like the crappy ones CHI got - I want to be able to wear mine to the Theatre).
- > Physicians can work at St A's until Sanford has facilities to fully support them.
- > MDC will use athena until 10/1/17 - when contract expires.
- > Laborist?
- > Strongly recommend that if at all possible Sanford operate the MDC, PC as a subsidiary which will make it easier to transition our Docs into their system on above terms, satisfy surgeons/OB issues, make for easier Sanford acctg[?], plus allow Sanford to achieve Economies of Scale in the exiting MDC operations enhancing their Cash Flow from Day 1 of their investment, Allow our Docs to swallow change incrementally.

~ Does operating MDC as a subsidiary enable it to take better advantage of the Stock Sale rules; they get to utilize NOL
 ~ Also, have some things that will be delicate & lengthy to unwind from St A's: shared E-mail, PAC's, Utilitie], EMR etc.
 May get more votes (E-pending retiree's), Above Plan may help with AO's office, help community adapt to the change?

- > Board representation of existing personnel as outlined in the original Sanford proposal.

Merger will be “bad for our community and many of our patients”

2016=	130%
2015=	140%
2014=	147%
2013=	138%

139%
125%

7/11/16 PRESENTATION ISSUES:

- > PSP generated via DPT-1215. They broke out Nutrition & Audio also and allocated Admin expenses to all depts.
- > They have a separate line item for Ancillary revenue & PSP income is considerably less in \$\$ and RVU value.
- > wRVU's they recalculated. We should use ours or at least provide an accounting of the differential between our numbers?
 - ~ Need to show Drs the per RVU payment and/or the % of median
 - ~ Need to see their CF's
- > Do they have an Excel Table showing their data elements so I can compare to ours?
- > Retention Bonuses: these are being added to get the GROSS payroll up to past year levels (Do they have to be \$100k for each)?

Sanford.xlsx
 Issues

PX05119-006

PX05119 at 006 Schaaf (MDC)

Defendants Have Only One Real Argument

- BCBS-ND is really big!!
 - Defendants' arguments are premised on erroneous factual bases and flawed economic analysis
 - Defendants' exclusive focus on BCBS-ND ignores market realities
- Defendants' other arguments fail to overcome presumption that this merger is anticompetitive
 - Entry not timely, likely, and sufficient
 - Efficiencies not substantiated or merger-specific
- Powerful buyers improperly conflated with market definition

Legal Standard

High market shares and concentration levels in the relevant market create a strong presumption of illegality



Section 7 of the Clayton Act

- “No person shall acquire, directly or indirectly . . . the assets of one or more persons engaged in commerce . . . ***where in any line of commerce*** or in any activity affecting commerce ***in any section of the country***, the effect of such acquisition . . . ***may be substantially to lessen competition***, or to tend to create a monopoly.”

Preliminary Injunction Standard

- Preliminary injunctions are decided under the ***Public Interest Standard***
 - Likelihood of success on the merits
 - Court determines if FTC is likely to demonstrate that effect of the merger “may be to lessen competition.”
 - Weighing of the equities
 - “The equities will often **weigh in favor of the FTC**” because “effective enforcement of the antitrust laws was Congress’s specific public equity consideration in enacting Section 13(b)”. *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009)
 - “**No court has denied relief** to the FTC in a 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits.” *FTC v. OSF Holdings, Inc.*, 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012)

Section 7 Analysis Looks to Likely Effect of the Merger

- The Clayton Act requires only, even at the merits trial, a showing that the effects of the transaction “**may be** substantially to lessen competition.” 15 U.S.C. § 18
 - “Congress used the words *may be* . . . to indicate that its concerns were with probabilities, not certainties.” *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 323 (1962)
 - “[T]o establish a violation of section 7, the FTC need not show that the challenged merger *will* lessen competition, but only that the loss of competition is a ‘sufficiently probable and imminent’ result of the merger or acquisition.” *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 25, 35 (D.D.C. 2009)

Philadelphia Nat'l Bank Presumption Governs Merger Analysis

U. S. v. PHILADELPHIA NAT. BANK. 321

Syllabus.

UNITED STATES v. PHILADELPHIA NATIONAL
BANK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 83. Argued February 20-21, 1963.

behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. See *United States v. Koppers Co.*, 202 F.Supp. 437 (D.C.W.D.Pa.1962).

United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963)

Plaintiffs are Likely to Succeed on the Merits Here

- Plaintiffs may demonstrate rebuttable presumption
 - Define relevant market
 - Assess concentration levels and change in HHI
 - If threshold is met, merger is presumptively unlawful under Clayton Act § 7
- Burden shifts to Defendants to rebut presumption
 - Demonstrate that entry/expansion are timely, likely, and sufficient
 - Demonstrate that efficiencies are verifiable or merger specific

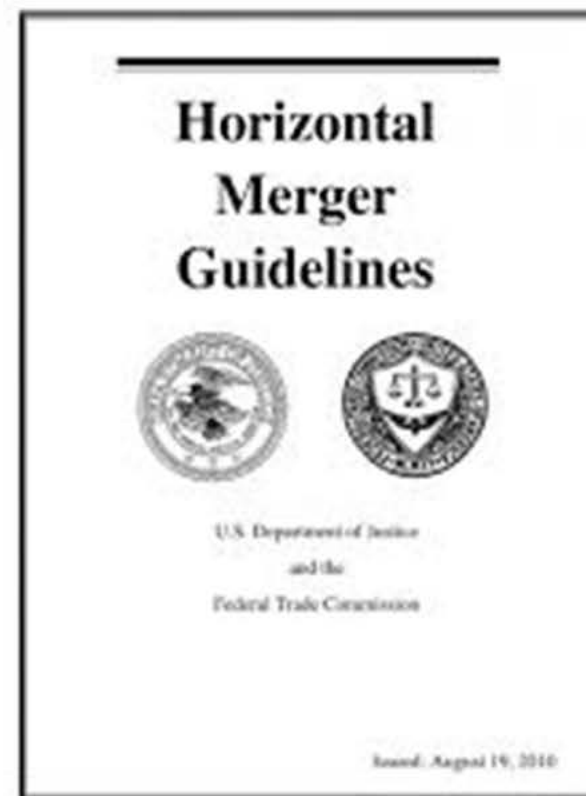
Antitrust Market Definition

Standard antitrust analysis demonstrates relevant market for four physician services in the Bismarck-Mandan Area



Horizontal Merger Guidelines

- HMG provides analytic framework for merger analysis
 - Method to properly determine relevant market (Hypothetical Monopolist Test)
 - Concentration levels for presumption
 - Standard to assess potential rebuttal to presumption
 - Powerful buyer
 - Entry
 - Efficiencies



JX00094

Relevant Markets: Two Components

Product



Geography



How do you Determine Relevant Markets

- Merger Guidelines: Apply “Hypothetical Monopolist Test”
 - Uses an iterative process to define market
 - Start with possible market (e.g. physician service)
 - Can a hypothetical monopolist profitably impose a SSNIP above measure of price to its customers (e.g. insurers)?
 - If yes, that is the relevant market
 - If no, continue by adding the next closest candidate and run the SSNIP analysis again

Defining Relevant Markets



Product Markets are Well Defined

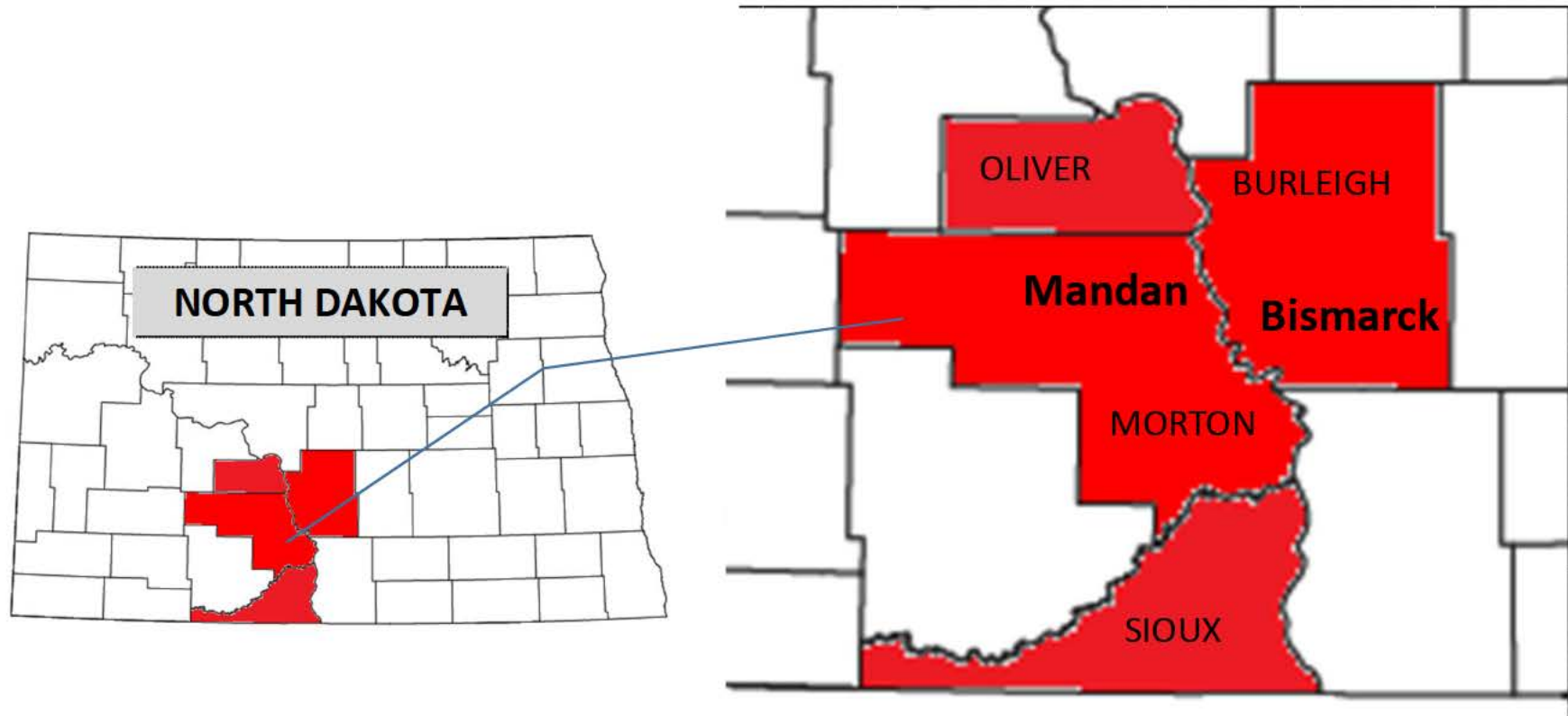
- Four distinct physician service lines
 - Adult Primary Care Physicians
 - Pediatricians
 - OB/GYN
 - General Surgeons
- No meaningful substitutes allowing an insurer to avoid a SSNIP

Plaintiffs' Geographic Markets are Well Defined

- The Bismarck-Mandan four-county area is a relevant geographic market
 - Strong patient preferences for local physician services
 - Testimony from Defendants, other market participants, insurers, employers
 - Patient data
 - Insurers confirm difficult to market a plan lacking adequate coverage in Bismarck-Mandan area

Relevant Geographic Market

Bismarck, ND Metropolitan Statistical Area



Defendants' "Actual Monopolist Test" Leads to Absurd Results

- Defendants identified no alternative geographic market
- Based on Defendants' methodology, market would be boundless
 - Sanford could acquire every healthcare provider in North Dakota
- Defendants' analysis stops before it gets started
 - Never addresses "competition"

Defendants' "Actual Monopolist Test" is Uninformative

- Defendants' economist applied test comparing prices in Minot and Grand Forks ("monopoly" markets) to Bismarck-Mandan to show similar prices
 - Not sound application of the Merger Guidelines
 - Circular Reasoning

Concentration Levels Establish Presumption of Anticompetitive Harm



What will the Market Look Like After the Merger?

SERVICE	SANFORD	MID DAKOTA	COMBINED
Adult PCP	34%	51%	86%
Pediatrician	34%	64%	99%
OB/GYN	24%	75%	85%*
General Surgery	41%	58%	100%
			* Combined share incorporates tentative plan of one MDC OB/GYN signing employment agreement with CHI post-merger

Post-Merger Concentration Levels Far Exceed Presumption

Product Market	Pre-Merger HHI	Post-Merger HHI	Change in HHI	Post-Merger Share (%)
Presumption		>2500	>200	
Adult PCP	3,891	7,422	3,531	85.7%
Pediatricians	5,333	9,726	4,393	98.6%
OB/GYN	6,211	7,363	1,152	84.6%
General Surgery	5,362	9,964	4,602	99.8%

- HHI measures market concentration pre- and post-merger
- Presumption:
 - Post-merger HHI over 2500, and
 - Post-merger change in HHI over 200

What is the Ultimate Consequence of Allowing this Merger?

- As noted, prices may rise and quality and other forms of non-price competition may be reduced
- Choice for consumers eliminated
- If Defendants' theory is correct, Sanford would be able to acquire every health care provider in the state without raising competitive concerns

Supporting Evidence Confirms the Presumption of Anticompetitive Harm



Quantitative Evidence Shows that Defendants are Each Other's Closest Competitor

Service	Diversion from MDC to Sanford	Diversion from Sanford to MDC
Adult PCP	71%	76%
Pediatric	95%	96%
OB/GYN	64%	78%
General Surgery	96%	97%

- Diversion ratios measure closeness of competition
- Where do patients go where first choice is no longer available?
- Overwhelming majority would turn from one Defendant to the other

Diversion Ratios in this Case Dwarf Those in Other Successfully-Challenged Mergers

Transaction	Low-end Diversion	High-end Diversion
Sanford/MDC	64%	97%
OSF/Rockford (N.D. Ill.)	34%	35%
St. Luke's/Saltzer (9 th Cir.)	33%	50%
Advocate/Northshore (N.D. Ill.)	20%	25%
Penn State Hershey/Pinnacle (3 rd . Cir.)	30%	40%

There are No Credible Alternatives to Defendants

- Fewer adult PCPs in rest of Bismarck-Mandan area than practice at MDC
 - CHI has five adult PCPs (located in Mandan)
 - Handful of independent practices and UND residency clinic
- Two pediatricians
- One OB/GYN
- No general surgeons

Defendants Compete with Each Other on Quality

- Competition to acquire new technology
 - 3D Mammography
 - Tower-free hysteroscopy
- Competition to improve patient access and convenience
 - Longer hours
 - Same-day appointments
 - More facilities

**Insurers Confirm that the Defendants
are Crucial in their Networks**

REDACTED

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REDACTED

Insurers are Concerned that the Merger Would Result in Increased Prices

17. The merger would substantially increase Sanford's leverage when negotiating contracts with Medica. As a result, Medica expects that Sanford's acquisition of MDC will likely

Confidential Information Redacted

FTC and ND v. Sanford

17. The Merger would substantially increase Sanford's leverage when negotiating contracts with Medica. As a result, Medica expects that Sanford's acquisition of MDC will likely enable the combined system to demand more favorable reimbursement terms, including rates, and other contractual terms than they do today.

18. The merger will likely increase the combined system's leverage when negotiating contracts with Medica. As a result, Medica expects that Sanford's acquisition of MDC will likely enable the combined system to demand more favorable reimbursement terms, including rates, and other contractual terms than they do today.


enable the combined system to demand more other contractual terms than they do today.

18. The merger will likely increase the combined system's leverage when negotiating contracts with Medica. As a result, Medica expects that Sanford's acquisition of MDC will likely enable the combined system to demand more favorable reimbursement terms, including rates, and other contractual terms than they do today.

Based on Medica's experience, the proposed acquisition is unlikely to generate meaningful cost savings, nor do providers typically pass on any cost savings from mergers to our members.

This declaration is being provided to the Federal Trade Commission voluntarily in lieu of a subpoena, and I hereby request that my identity, my company's identity, and the contents of this declaration be kept confidential and exempt from public disclosure as provided by applicable law.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.


MICHAEL LENZ

Signed on this 15 day of June, 2017.

PX03016-003,004 Lenz (Medica) Declaration

**Insurers are Concerned that the Merger Would
Result in Increased Prices**

REDACTED

Defendants Acknowledge Closeness of Competition

- “Mid Dakota Clinic...is Sanford’s main clinical competitor in Bismarck.” (Sanford internal email PX04018)

REDACTED

- MDC is “Sanford’s major competitor for primary care in Bismarck.” (PX04019 at 001)

REDACTED

Defendants Cannot Rebut Plaintiffs' Strong Presumption of Anticompetitive Effect



Defendants' Arguments Do Not Even Begin to Move the Needle

- BCBS-ND “Bargaining Power” argument is factually wrong, ill-conceived, and misapplied in any event
- Defendants’ secondary arguments strain credulity
 - Entry
 - Efficiencies

Both Sides Agree: This Merger Will Increase Defendants' Bargaining Leverage

- Bargaining leverage is the relative value to each party of reaching an agreement versus failing to reach an agreement.
 - This merger will raise Sanford/MDC's bargaining leverage relative to insurers
 - A post-merger increase in leverage means that Sanford/MDC can extract higher rates or other favorable contract terms from insurers

Defendants Ignore the Facts in Claiming that Sanford Cannot Exercise its Bargaining Leverage

- Defendants' expert economist claims that BCBS-ND's "bargaining power" is so strong that Defendants cannot exercise its bargaining leverage
 - Ignores BCBS-ND declining share of market
 - Ignores growth of other insurers—including Sanford Health Plan
 - Ignores meaningful impact of provider feedback on BCBS-ND

Statewide Pricing Does Not Equal “Bargaining Power”

- Defendants claim that BCBS-ND’s statewide pricing means they have “all the bargaining power”
- Leads to absurd conclusion: Sanford can legally buy all healthcare providers

STATEWIDE PRICING = PRICING SAME
ACROSS STATE

Defendants Wrongly Claim They Cannot Impose a Price Increase

- Defendants claim their regression analysis demonstrates that they cannot impose a price increase
 - Flawed, circular economic reasoning
 - Plaintiffs' expert demonstrates that sound economic theory predicts a significant price increase to insurers resulting from Defendants' undisputed increased bargaining leverage

Defendants Cannot Dismiss Harm to 

REDACTED

Defendants Cannot Show Entry Would be Timely, Likely, and Sufficient

- Testimony from providers make clear that it will take years for existing market participants to even approach the size/scale of the combined Sanford/MDC in physician services
- Small independents are not in a position to expand; *de novo* entry is unlikely

Defendants Fail to Show Their Purported Cost and Quality Efficiencies are Verifiable and Merger Specific

- Legal standard is clear:
 - “Extraordinary efficiencies” needed to offset “high market concentration levels” *U.S. v. H&R Block*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011)
 - “No court . . . has found efficiencies sufficient to rescue an otherwise illegal merger.” *FTC v. ProMedica Health Sys.*, No. 3:11-CV-47, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011)
- Most of Defendants’ purported cost savings are in cancer care and have nothing to do with Sanford’s acquisition of the four relevant services
- Purported quality efficiencies are speculative and can be accomplished without the merger

Plaintiffs' Witnesses Can Speak to the Entire Market



Plaintiffs' Witnesses Cover All Aspects of the Marketplace

- Testimony from all market participants
 - Insurers
 - Providers/Physicians
 - Employers
- Expert testimony
 - Antitrust economist
 - Quality
 - Cost Efficiencies

Defendants' Witnesses are Sanford and Mid Dakota's Executives and Physicians

- Defendants will parade their own executives to spin their version of the facts
- There are no insurers, non-Defendant providers, employers, or other non-Defendant members of the local community appearing at trial
- Defendants' sole expert departs from well-established economic principles to present ill-conceived "tests" and theories inapplicable here

Why are we here?

- Overwhelming evidence points towards presumption of anticompetitive effect of illegal merger
- Defendants cannot even approach the high bar of rebutting this presumption:

The Court Should Enjoin this Anticompetitive Merger

- Relief is only to preserve the status quo pending merits proceeding set to begin in less than one month
- The Court can protect consumers in the Bismarck-Mandan area from the serious and immediate harms that would arise if this illegal merger proceeds before the administrative process is complete