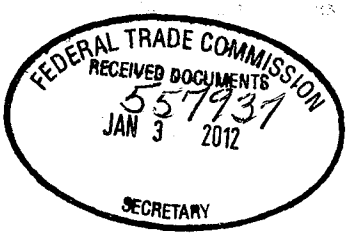
**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

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

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| **In the Matter of** | **PUBLIC** |
| **ProMedica Health System, Inc.**<br>**a corporation** | **Docket No. 9346** |

# COMPLAINT COUNSEL'S APPEAL BRIEF

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Dated: December 29, 2011

## RECORD REFERENCES

Answer – Resp't ProMedica Health Sys., Inc.'s Answer to [Part III] Compl.

CCPFF – Complaint Counsel's Proposed Findings of Fact

Decl. – Declaration

RX – Respondent Exhibit

ID – Initial Decision

IDA – Initial Decision Analysis

IDFF – Initial Decision Findings of Fact

IHT – Investigational Hearing Transcript

JX – Joint Exhibit

PX – Complaint Counsel Exhibit

Resp't Admissions – Resp't ProMedica Health System, Inc.'s Response to Compl. Counsel's Request for Admission

RPTB – Resp't ProMedica Health Sys., Inc.'s Pre-Trial Br.

RPTRB – Resp't ProMedica Health Sys., Inc.'s Post-Trial Reply Br.

## SUBJECT INDEX

## TABLE OF CASES AND AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**

## I. STATEMENT OF THE CASE

> *ProMedica offers "incredible access to outstanding pricing on managed care agreements. Taking advantage of these strengths may not be the best thing for the community in the long run. Sure would make life much easier right now though."*
> – St. Luke's CEO and current President Dan Wakeman (PX01125 at 002)
>
> *"Why ProMedica? Payer System Leverage."*
> – Draft ProMedica Presentation to Potential Hospital Partners (PX00226 at 008)
>
> *"A ProMedica . . . affiliation could still stick it to employers, that is, to continue forcing high rates on employers and insurance companies."*
> – Notes from Due Diligence Meetings, Phase II, by St. Luke's Marketing/Planning Director Scott Rupley, (PX01130 at 005)

To date, Judge David A. Katz of the U.S. District Court for the Northern District of Ohio and Chief Administrative Law Judge D. Michael Chappell have issued resounding decisions in Complaint Counsel's favor on the question of whether ProMedica Health System, Inc.'s ("ProMedica" or "PHS") acquisition of St. Luke's Hospital ("St. Luke's" or "SLH") ("Acquisition") should, respectively, be preliminarily enjoined and be held to violate Section 7 of the Clayton Act and a divestiture ordered. Indeed, Judge Katz and Judge Chappell agreed on the major elements of Complaint Counsel's case: inpatient general acute-care services constitute a relevant service market; the geographic market is Lucas County, Ohio; ProMedica and St. Luke's were significant competitors prior to the Acquisition; the Acquisition eliminated vigorous head-to-head competition between ProMedica and St. Luke's; the Acquisition results in extraordinarily-high market concentration and a presumption of illegality; the Acquisition enables ProMedica to raise reimbursement rates at St. Luke's and its legacy hospitals; post-Acquisition, there are no viable constraints on ProMedica's ability to exercise market power; and

ProMedica has not raised a viable defense, whether based on entry, efficiencies, or a "flailing firm defense."

Indeed, the evidence at trial, memorialized in Judge Chappell's findings of fact, overwhelmingly supports Complaint Counsel's case that the Acquisition substantially lessens competition in violation of Section 7 of the Clayton Act. Thus, Complaint Counsel appeals for the limited yet critical purpose of addressing two aspects of the Initial Decision relating to product market definition that we respectfully submit were decided in error: (1) the inclusion of tertiary services that St. Luke's does not provide in the relevant service market of inpatient general acute-care ("GAC") services, and (2) the failure to recognize inpatient obstetrics ("OB") services as a separate relevant service market.

### A. Introduction

On September 1, 2010, ProMedica, the self-described dominant hospital system in Lucas County, Ohio, substantially lessened competition in Lucas County by acquiring St. Luke's, an independent hospital providing high-quality, low-cost healthcare services to local residents. The Acquisition eliminated critical competition for inpatient GAC services, leaving just two remaining competitors to ProMedica in Lucas County. The Acquisition's impact on competition for inpatient OB services was especially egregious, leaving just one competitor to ProMedica.

Through the Acquisition, ProMedica reaped a post-Acquisition market share of 58.3% in GAC services and an 80.5% market share in OB services in Lucas County. These markets were already highly concentrated before the Acquisition; they are even more highly concentrated after the Acquisition. Indeed, the Acquisition increased concentration in the GAC market by 1078 points, resulting in a post-Acquisition HHI of 4391. IDFF ¶ 368; *see also* IDFF at ¶ 369; IDA at

150-51. The Acquisition increased concentration in the OB market by 1323 points, resulting in a post-Acquisition HHI of 6854. PX02148 (Town, Expert Report) at 034 (¶ 61), 143 (Ex. 6), *in camera*. Under applicable case law and the *Horizontal Merger Guidelines*, the Acquisition is presumed likely to enhance market power and is presumptively illegal under Section 7 of the Clayton Act, 15 U.S.C. § 18. It is not a close call. And voluminous additional evidence confirms that presumption.

The testimony, documents, data, and expert economic analysis in the case confirm that the Acquisition will, as Chief Administrative Law Judge D. Michael Chappell concluded, substantially lessen competition. Prior to the Acquisition, ProMedica and St. Luke's competed head-to-head. Indeed, ProMedica was St. Luke's closest competitor. ProMedica repeatedly sought to take business from St. Luke's and to exclude St. Luke's from the hospital networks of health plans, including ProMedica's own health plan, Paramount Health Care. *See, e.g.*, CCPFF ¶¶ 376-79, 381. In one case, ProMedica contracted with one of the largest health plans in Lucas County to eliminate St. Luke's from its network and continue to exclude St. Luke's from the network unless the health plan paid ProMedica "for the privilege" of adding St. Luke's back into its network. CCPFF ¶ 371. Excluding St. Luke's from this health-plan network to lessen St. Luke's ability to take share from ProMedica was so important that ProMedica described this as the "main deal breaker" and as taking a "huge effort" to accomplish. CCPFF ¶ 372. In 2009, despite ProMedica's sustained competitive focus on St. Luke's, St. Luke's took one-half of the market share lost by ProMedica that year.

By eliminating such a close competitor, dominant ProMedica gained greater size, market share, and, ultimately, negotiating leverage with health plans, further enhancing ProMedica's

dominance. As a result, ProMedica – which already was the highest-priced hospital system in Lucas County and one of the most expensive in all of Ohio – can demand and extract higher reimbursement rates for St. Luke's *and* for its legacy hospitals. Every health plan witness, based on their contracting knowledge and experience dealing with ProMedica and other hospitals and hospital systems, testified that St. Luke's rates will increase significantly due to the Acquisition. No witness – not even Respondent's witnesses – testified that rates will remain unchanged or decrease. St. Luke's own documents explicitly state that, by joining ProMedica, St. Luke's expected to reap significantly more negotiating clout with health plans and planned to exploit that clout to get higher rates. In fact, St. Luke's CEO predicted that sharing in ProMedica's clout would enable St. Luke's rates to "skyrocket." CCPFF ¶ 403.

Lucas County employers and consumers will bear the brunt of the harm wrought by the Acquisition. Self-insured employers, which comprise a large portion of MCOs' commercial insurance business in Lucas County (between 50% to 66% of major MCOs' business) and which pay their employees' healthcare claims directly (approximately 70% of commercially insured employees are covered by self-insured plans), will immediately feel the impact of higher hospital rates. IDFF ¶¶ 134, 154, 169, 186, 216, 654, 658; CCPFF ¶ 84. Meanwhile, health plans will face higher rates and will have to pass along those cost increases to their customers – employers, families, and individuals in Lucas County. In turn, fully-insured employers will be forced to pass along these increased healthcare costs to their employees in the form of higher deductibles, co-pays, or other, higher employee contributions. IDFF ¶¶ 659-662; *see also* IDFF ¶ 663. These are real and substantial out-of-pocket costs for Lucas County employers and employees.

As Judge Chappell's Initial Decision makes clear, Respondent has no viable defense to the overwhelming evidence that the Acquisition is anticompetitive. Respondent's claim that the two remaining GAC competitors and one OB competitor, combined with steering by health plans and physicians, will constrain ProMedica is so lacking in support as to not be credible. These competitors, health plans, and physicians did not constrain ProMedica or prevent it from maintaining the highest prices in Lucas County and among the highest prices in all of Ohio even pre-Acquisition. They certainly will not be able to constrain an even larger, more dominant ProMedica post-Acquisition. Indeed, ProMedica is now *two times* larger than the next largest GAC competitor, more than *four times* larger than its other GAC competitor, and larger than *both combined.* Post-Acquisition, ProMedica is also more than *four times* larger than its lone remaining OB competitor, which does not even offer OB services at all of its Lucas County hospitals. *See* PX02148 (Town, Expert Report) at 143 (Ex. 6), *in camera.*

Respondent's steering argument lacks evidentiary support. Indeed, *no* health plan has ever had a program to steer its commercial customers in Lucas County from high-priced hospitals to lower-priced hospitals, *none* currently has such a steering program for their commercial customers, and *none* has any plans to implement a steering program. The evidence also shows that patients – and the hospitals themselves – dislike and resist steering programs. Likewise, there is no evidence that physicians have ever steered, or will ever steer, Lucas County patients to hospitals based on the rates charged to health plans. Instead, the evidence shows that physicians make hospital-admission decisions based on patients' preferences and medical needs – not price – and that they are not even aware of the rates established in confidential negotiations and contracts between hospitals and health plans. Thus, Judge Chappell appropriately rejected

these purported constraints on ProMedica's ability to exercise market power post-Acquisition. IDA at 176-80.

Respondent's efficiencies defense failed at the administrative trial, like it did in the federal district court proceeding, because the claimed efficiencies are paltry, if not illusory. Respondent's flimsy claims of efficiencies from administrative cost savings, service "rationalization," and potential quality improvements at St. Luke's are vague, speculative, not cognizable, not merger-specific, and not supported by the evidence. To be clear, this is not a case where the Acquisition is defensible based on potential quality improvements at the acquired hospital. Rather, prior to the joinder, St. Luke's was one of the highest-quality hospitals in Lucas County. By contrast, ProMedica had lower quality and, on many rating scales, was near the bottom. ProMedica's own Medical Director wrote *this year* that ProMedica's approach to quality was confusing and out of date. IDFF ¶ 770-71. ProMedica's CEO said that its quality scores were "subpar." PX00153. Indeed, St. Luke's Board and executives had real concerns that the Acquisition would lower quality at St. Luke's. IDFF ¶ 769. So, as Judge Chappell concluded, even if certain efficiency claims are cognizable, they are insufficient to justify the significant anticompetitive effects of the Acquisition. IDA at 192, 203.

Respondent did not, and cannot, put forth an entry defense. The evidence shows that entry is highly unlikely and would not be timely or sufficient to overcome the anticompetitive effects of the Acquisition. Respondent's claim that { } to recruit physicians in southwest Lucas County constitutes non-hospital entry that could constrain ProMedica's hospital system is a novel and unpersuasive quasi-entry story that lacks support under the law and the facts. As such, Judge Chappell properly rejected that defense. IDA at 178.

Respondent's heavy reliance on a "weak-firm" defense – which is among the weakest defenses in antitrust law – was similarly rejected by Judge Chappell, for good reason. IDA at 190. Voluminous and uncontroverted evidence at trial showed that St. Luke's financial condition was *improving* in the time period leading up to the Acquisition. There is no evidence in the record whatsoever to support Respondent's claim that St. Luke's market shares would decrease so significantly as to eliminate the presumption of anticompetitive harm. Rather, before the Acquisition, St. Luke's was, among other measures, *growing* its patient volume, inpatient revenue, outpatient revenues, and its market share.

Judge Chappell issued an Initial Decision decisively holding that the Acquisition violated Section 7 of the Clayton Act. Thus, Complaint Counsel confines this appeal to two limited, yet important aspects of the opinion related to product market definition. The relevant facts relating to the issues on review follow.

## B. Summary of Facts

### 1. The Merging Parties

#### a) ProMedica Health System, Inc.

ProMedica is a not-for-profit healthcare system incorporated under the laws of Ohio. IDFF ¶ 1. With headquarters in Toledo, Ohio, ProMedica provides healthcare services in northwest Ohio, west-central Ohio, and southeast Michigan. IDFF ¶ 1. ProMedica has 11 hospitals in Ohio and Michigan. IDFF ¶ 3. ProMedica also owns and operates Paramount Health Care ("Paramount"), one of the largest commercial health plans in Lucas County. IDFF ¶ 163. ProMedica is the largest employer of physicians in Lucas County. Answer ¶ 8. In 2009, ProMedica generated total revenues of approximately $1.6 billion. Answer ¶ 8.

Prior to the Acquisition, ProMedica operated three general acute-care hospitals in Lucas County, Ohio: The Toledo Hospital ("Toledo Hospital" or "TTH"),[1] Flower Hospital ("Flower"), and Bay Park Community Hospital ("Bay Park"). IDFF ¶ 53. With 550 staffed beds,[2] TTH is the largest general acute-care hospital in Lucas County. *See* IDFF ¶¶ 55, 61, 70, 77, 83, 93, 101, 111. Flower is a community hospital located in Sylvania, Ohio – on the west side of the Maumee River in Lucas County – that has 250 staffed beds. IDFF ¶¶ 60-61, 65. Bay Park is a community hospital located in Oregon, Ohio – on the east side of the Maumee River in Lucas County – that has 86 staffed beds. IDFF ¶¶ 66, 70-71. In addition to primary and secondary GAC services, TTH offers tertiary services; Flower and Bay Park do not. IDFF ¶¶ 56, 63, 68. TTH, Flower, and Bay Park offer inpatient obstetrics services. IDFF ¶¶ 57, 62, 66.

ProMedica's hospitals generally are more expensive and of lower quality than other Lucas County hospitals. PX00153 ("subpar" quality scores); PX01030 at 019 (quality matrix); CCPFF ¶ 22 (quality measures and outcomes); PX02148 (Town, Expert Report) at 145 (Ex. 7), *in camera* (case-mix adjusted prices); PX02072 ({ }, Decl.) ¶ 16 (Flower and Bay Park reimbursement rates are about { } higher than St. Luke's.); PX02067 ({ }, Decl.) ¶ 22 (ProMedica rates are { } higher than St. Luke's.).

Even before the Acquisition, ProMedica had the highest market share – by a significant margin – in Lucas County, whether measured by registered beds, staffed beds, beds-in-use, occupancy, billed charges, or discharges. *See* IDFF ¶¶ 354-360. For example, measured by

[1] ProMedica also operates Toledo Children's Hospital on the campus of TTH.

[2] "Staffed beds" refers to beds that are actually available for use by patients and staffed by nurses, physicians, or other hospital staff. IDFF at ¶ 55 n.2.

patient days, ProMedica's pre-Acquisition GAC market share in Lucas County was nearly 50%.[3] IDFF ¶ 364. This was approximately 20 percentage points (and nearly 50%) higher than the share of its next largest competitor. *See* IDFF ¶ 364. Pre-Acquisition, ProMedica held a dominant OB market share in Lucas County – 71%. PX02148 (Town, Expert Report) at 143 (Ex. 6), *in camera*; PX02150 at 002. This was approximately 50 percentage points (and more than three times) higher than the share of its next largest competitor (now ProMedica's *only* remaining OB competitor). PX02148 (Town, Expert Report) at 143 (Ex. 6), *in camera*; PX02150 at 002.

Indeed, ProMedica repeatedly and unambiguously touted its own market dominance in Lucas County:

- "ProMedica Health System has market dominance in the Toledo MSA" – IDFF ¶ 604
- "As Healthcare evolves it is critical that ProMedica evolves to maintain its competitive dominance in the Region" – PX00221 at 002
- TTH Strengths: "Dominant market share position" – IDFF ¶ 604

*See also* CCPFF ¶ 425 (citing, *inter alia*, PX00320 at 003 (PHS: "Strong integrated delivery system with leading market position within the Toledo metropolitan area and surrounding counties, with dominant market share in oncology, orthopedics and women's services")); PX01936 (Marcus (PHS), Dep.) at 113, 115 (explaining reference to "non-government market share dominance"); PX00473 at 011 (notation referring to PHS's non-government market share dominance); PX02070 ({ }, Decl.) ¶ 8 ("ProMedica is already the dominant health system in the Toledo area").

[3] "Patient days" measures the total number of days that all patients spend in a given hospital or hospital system in a year.

### b) St. Luke's Hospital

Before the Acquisition, St. Luke's was a high-quality, independent, not-for-profit general acute-care community hospital. Answer ¶ 9. St. Luke's is located in Maumee, Ohio, a desirable, growing, and strategically-important suburb of Toledo located in southwest Lucas County. IDFF ¶¶ 472-73; CCPFF ¶ 27. Maumee has a growing population of commercially-insured patients. IDFF ¶ 472. St. Luke's has 178 staffed beds and provides a wide range of general acute-care services. IDFF ¶¶ 73, 77. St. Luke's provides OB services but, other than some high-level cardiac services provided at its Heart Center, it provides no tertiary (or quaternary) services. IDFF ¶¶ 73-74; Resp't Admissions ¶ 2 (St. Luke's "does not perform complex tertiary and quaternary services."); JX00002A ¶ 6 (St. Luke's "performs few, if any, tertiary services"). In 2009, St. Luke's had total revenues of approximately $156 million. CCPFF ¶ 30.

Pre-Acquisition, St. Luke's was a major provider of healthcare services and conducted a significant volume of commerce in Lucas County. In fact, viewing Lucas County hospitals individually (as opposed to hospital systems), St. Luke's was the third-largest hospital based on discharges. IDFF ¶ 462; IDA at 154. Based on patient days, St. Luke's held an 11.5% share in GAC services and a 9.3% share in OB services. IDFF ¶ 364; PX02148 (Town, Expert Report) at 143 (Ex. 6), *in camera*.[4] In the period leading up to the Acquisition, St. Luke's was *growing* its market share, inpatient revenue, and outpatient revenues, among other measures. *See, e.g.*, IDA at 183; CCPFF ¶¶ 911, 913, 915, 916-21.

St. Luke's was recognized as, and proclaimed itself to be, *the* low-cost, high-quality

[4] The source in PX02148, Exhibit 6 mistakenly states that the data is based on discharges when, in fact, it is based on patient days.

hospital in Lucas County. IDFF ¶¶ 758-59, 764; PX01072 at 001 ("St. Luke's Hospital is the lowest cost, highest quality health care provider in the Toledo market. Third-party verifiers . . . consistently recognize St. Luke's accomplishments in quality care and cost control."). Quality-rating organizations frequently recognize St. Luke's as being in the top 10% of hospitals nationally, based on outcomes, cost, and patient satisfaction. IDFF ¶ 763.

**2. The Acquisition**

On May 25, 2010, ProMedica entered into a Joinder Agreement ("Agreement") with OhioCare Health System, Inc. ("OHS"), St. Luke's, and St. Luke's Foundation, Inc. ("SLF") to acquire St. Luke's, SLF, and other affiliates ("OHS Affiliates").[5] IDFF ¶ 9; PX00058. Though styled as a "joinder," the transaction is an acquisition. Before the Acquisition, OHS was the parent company of St. Luke's, SLF, and the OHS Affiliates. *See* IDFF ¶ 10. Under the Agreement, ProMedica became the sole corporate member and shareholder of St. Luke's and the other OHS Affiliates. IDFF ¶ 11. Additionally, the Agreement vests ProMedica with economic, governance, and decision-making control over St. Luke's and the other OHS Affiliates. *See* PX00058 at 016-018; PX01903 (Hanley (PHS), IHT) at 130; PX00223 at 005. Notably, ProMedica has the exclusive right to negotiate contracts with managed care organizations ("MCOs") on behalf of St. Luke's. PX00058 at 025, 058; *see also* PX01905 (Wachsman (PHS), IHT) at 162.[6] ProMedica consummated the acquisition of St. Luke's on September 1, 2010. *See* IDFF ¶ 11.

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[5] The Acquisition was not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. § 18a; PX00057 at 001.

[6] As explained below, however, ProMedica's right to negotiate contracts for St. Luke's was subsequently limited by a Hold-Separate Agreement between ProMedica and FTC staff.

### 3. Other Market Participants

There are only two other GAC competitors in Lucas County: Mercy Health Partners ("Mercy") and the University of Toledo Medical Center ("UTMC").[7] Only one of them, Mercy, provides inpatient obstetrics services.

#### a) Mercy Health Partners

Mercy is a not-for-profit health system in northwestern Ohio. IDFF ¶ 79. In Lucas County, Mercy has three general acute-care hospitals: Mercy St. Vincent Medical Center ("St. Vincent"), Mercy St. Charles Hospital ("St. Charles"), and Mercy St. Anne Hospital ("St. Anne"). IDFF ¶ 81. St. Vincent, located in downtown Toledo, is a GAC hospital and teaching facility with 445 staffed beds.[8] IDFF ¶¶ 82-83, 87. St. Charles is a community hospital located east of the Maumee River in Oregon, Ohio, a suburb of Toledo, that has less than 150 staffed beds. IDFF ¶¶ 98-99, 101. St. Anne is a small community hospital in northwestern Toledo with 96 staffed beds. IDFF ¶¶ 92-93. St. Vincent offers tertiary services; St. Charles and St. Anne do not. IDFF ¶¶ 82, 92, 100. St. Vincent and St. Charles offer OB services; St. Anne does not. IDFF ¶¶ 82, 92, 99.

#### b) University of Toledo Medical Center

UTMC was formed in 2006 when the University of Toledo and the Medical Center of Ohio merged. IDFF ¶ 104. UTMC is a research and teaching hospital with 225 staffed beds. IDFF ¶¶ 105, 111. UTMC provides basic GAC services but focuses on tertiary and quaternary

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[7] Additionally, the major commercial health insurers in Lucas County include ProMedica-owned Paramount, Medical Mutual of Ohio (MMO), Anthem, Aetna, FrontPath, United, and Humana. *See* IDFF ¶¶ 128-233.

[8] St. Vincent also houses a children's hospital on its campus.

services. IDFF ¶¶ 107-109. UTMC does not provide inpatient OB services and has no plans to do so, even if OB prices rise significantly. IDFF ¶ 110; CCPFF ¶ 772.

In 2010, UTMC and ProMedica began a six-year clinical education and research partnership. Under the governing agreement, UTMC provides day-to-day management of academic programs in the ProMedica system. CCPFF ¶ 300. In exchange, UTMC students have expanded opportunities for research, residency, and training at ProMedica facilities. PX02064 (Gold (UTMC), Decl.) ¶ 7.

#### 4. Procedural History

In July 2010, FTC staff and the State of Ohio began investigating the potential anticompetitive effects of ProMedica's acquisition of St. Luke's. ID at 3. The investigation revealed a significant body of evidence demonstrating likely and substantial competitive harm. The evidence included: testimony from sixteen investigational hearings, eight fact-witness depositions and four expert depositions; dozens of declarations from hospitals, health plans, employers, and physicians; and hundreds of company documents that described ProMedica's market dominance, the vigorous competition between ProMedica and St. Luke's, and the likely competitive harm that would result from the Acquisition.

On August 18, 2010, FTC staff and ProMedica entered into a 60-day Hold-Separate Agreement ("HSA") to allow the antitrust investigation to continue and to prevent or minimize interim harm to competition following the consummation of the Acquisition. *See* IDFF ¶¶ 12-13; PX00069. Among other things, the HSA prevented: (1) ProMedica from terminating St. Luke's health-plan contracts (while giving health plans the option to extend their contracts with St. Luke's past the termination date, if a new agreement was not reached); (2) the elimination,

transfer, or consolidation of any clinical service at St. Luke's; and (3) the termination of employees at St. Luke's without cause. IDFF ¶ 13. After an FTC petition to the U.S. District Court for the Northern District of Ohio, Western Division for an order enforcing its pre-complaint subpoenas and civil investigative demands issued to ProMedica and St. Luke's, the HSA was modified by agreement of the parties to remain effective until 15 days after the Respondent's certification of compliance.

On January 6, 2011, the Commission, by a unanimous 5-0 vote, authorized FTC staff to seek preliminary relief in federal district court to require ProMedica to preserve St. Luke's as a viable, independent competitor during the FTC's administrative proceeding and any subsequent appeals. IDFF ¶ 14. On January 7, 2011, the FTC and State of Ohio brought suit in the Northern District of Ohio, seeking a temporary restraining order and preliminary injunction. IDFF ¶ 15. Post-complaint discovery included twelve fact-witness depositions, two sets of expert affidavits, and depositions from three expert witnesses. *See* Order on Prelim. Inj. Hr'g, Dkt. 69, *ProMedica Health Sys., Inc.*, No. 3:11-cv-00047-DAK (N.D. Ohio filed Jan. 25, 2011). On February 10 and 11, 2011, Judge David A. Katz heard oral argument from FTC staff and ProMedica. IDFF ¶ 17.

On March 29, 2011, based on nearly 10 hours of oral argument and hundreds of pages of briefs and exhibits, Judge Katz ruled in favor of the FTC and State of Ohio and granted a preliminary injunction. *FTC v. ProMedica Health Sys., Inc.*, 2011 U.S. Dist. LEXIS 33434, at *3; 2011-1 Trade Cas. (CCH) ¶ 77,395 (N.D. Ohio March 29, 2011). Judge Katz's 164-page opinion ruled in plaintiffs' favor on every substantive aspect of the case. *Id. passim.* Among its findings and conclusions, the court held that:

1. general acute-care inpatient hospital services sold to commercial health plans and inpatient obstetrical services sold to commercial health plans constituted the two relevant service markets;

2. Lucas County was the relevant geographic market for both GAC and OB services;

3. extraordinarily-high market concentration levels establish a strong presumption of harm to competition in both relevant markets;

4. ProMedica and St. Luke's were significant competitors prior to the Acquisition;

5. the Acquisition enables ProMedica to raise rates for services performed at St. Luke's and also at ProMedica's other Lucas County hospitals;

6. remaining hospital competitors, health plans, and physicians with admitting privileges at multiple Lucas County hospitals had not constrained and will not constrain ProMedica post-Acquisition;

7. the Acquisition will eliminate beneficial non-price competition and result in lower quality of care and service levels;

8. there will be no new entry and expansion sufficient to counteract or deter the anticompetitive effects of the Acquisition;

9. the Acquisition produces no credible, merger-specific efficiencies to rebut the presumption of competitive harm;

10. ProMedica cannot meet its burden of showing that St. Luke's is a failing or flailing firm;

11. purported private equities do not outweigh the public interest in effective enforcement of the antitrust laws; *and*

12. a preliminary injunction was necessary to prevent interim harm and to preserve the FTC's ability to restore beneficial pre-acquisition competition.

*Id. passim.* The relief granted was an injunction extending the August 18, 2010 HSA. The key element of the court's order was to continue the pre-Acquisition prohibition on ProMedica's termination of St. Luke's health-plan contracts, while providing health plans the option to extend their existing contracts with St. Luke's if a new contract was not reached. IDFF ¶ 13.

On May 31, 2011, a full administrative trial concerning whether the Acquisition violated Section 7 of the Clayton Act commenced before FTC Chief Administrative Law Judge D. Michael Chappell. After more than 170 hours of live testimony, the trial ended on August 18, 2011. The trial record consists of more than 2,600 exhibits, the testimony of 34 witnesses (either live or by deposition), nearly 8,000 pages of trial transcripts, and 2,350 pages of proposed findings of fact, replies to proposed findings of fact, post-trial briefs, and replies to post-trial briefs. ID at 3.

On December 5, 2011, Judge Chappell issued a 215-page Initial Decision finding that the Acquisition is likely to substantially lessen competition and, therefore, is unlawful under Section 7 of the Clayton Act. ID at 7. For purposes of this appeal, it is important to note that Judge Chappell's conclusions accord with Judge Katz's decision in finding in favor of Complaint Counsel on all the key issues, except with respect to certain aspects of product market definition.[9] Judge Chappell ordered ProMedica to divest St. Luke's. ID at 7; IDA at 215.

### C. Summary of Argument

Although the ultimate conclusion on the merits is correct, the Initial Decision contains two critical errors: (1) the conclusion that the relevant service market of inpatient GAC services includes tertiary services that St. Luke's does not provide, and (2) the conclusion that inpatient OB services is not a separate relevant service market. Applicable case law and the evidence presented at trial thoroughly support an inpatient GAC services market that excludes tertiary services that St. Luke's does not provide, and also supports a distinct relevant service market for inpatient OB services.

[9] Moreover, Judge Chappell also stated that it was unnecessary to delve into the elimination of non-price competition (point #7 above), and, of course, Judge Chappell did not need to decide, like Judge Katz did, whether the equities favored entry of a preliminary injunction and the need for interim relief (points #11 and #12 above).

At the outset, it is important to note that both Complaint Counsel's and Respondent's experts agree that the Acquisition could correctly be analyzed with each inpatient service line constituting a distinct relevant market. Guerin-Calvert, Tr. 7633; Town, Tr. 3666-67. Yet, because hospitals offer hundreds of services, the services that the parties provide are analyzed, for analytical convenience, as a cluster of inpatient GAC services. The cluster, however, should be limited to those services that the parties offer in competition with one another and, thus, not include complex tertiary services that St. Luke's does not provide.

Indeed, as the Initial Decision acknowledges, several courts have excluded tertiary services and other non-overlapping services from the inpatient GAC services market. The Initial Decision, however, gives short shrift to these cases and either misreads or gives undue weight to other cases. Further, as Judge Chappell found, tertiary services are more complex and use different resources than basic GAC services and they are not reasonably substitutable for basic GAC services. Most critically, the record shows that complex tertiary services are not offered under similar market conditions, by the same market participants, or within the same geographic market as other general acute-care services. As such, those complex tertiary services that St. Luke's does not provide should not be considered part of a cluster market and analyzed alongside services offered under different competitive conditions. This is the same basis upon which courts and the Commission have considered outpatient and other services as distinct relevant markets, separate from the inpatient GAC services market. Finally, logic alone compels the conclusion that there cannot possibly be any harm to competition in service lines that St. Luke's does not offer in competition with ProMedica.

Similarly, with respect to inpatient OB services, courts have found markets in prior cases

that were separate and narrower than all GAC services where competitive conditions differed for particular services. Here, the competitive conditions for OB services differ significantly from the competitive conditions for GAC services. Critically, Judge Chappell found that no other hospital services are reasonably interchangeable with inpatient OB services, a fundamental factor in market definition under the case law and the *Merger Guidelines*. A separate OB market is also supported under *Brown Shoe's* practical indicia. Finally, market realities – about which Judge Chappell made specific findings – support this market definition: the parties track separate market shares and other data for OB services, and some hospital contracts with MCOs in Lucas County separately "carve out" OB rates from inpatient GAC rates.

## II. SPECIFICATION OF QUESTIONS INTENDED TO BE URGED

Complaint Counsel raises two questions[10] for the Commission on appeal:

1. Whether the ALJ erred in including tertiary services in the inpatient general acute-care relevant services market.

2. Whether the ALJ erred in concluding that inpatient obstetrics services do not constitute a separate relevant service market.

## III. ARGUMENT

### A. Relevant Product/Service Market Definition Generally

The relevant product or service market "identifies the product[s] and services with which the defendants' products compete." *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009); *see also Merger Guidelines* § 4.1 ("When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the Agencies define a

[10] Complaint Counsel reserves its right to object to statements in the Initial Decision regarding St. Luke's pre-Acquisition prices being below some "competitive level," the Acquisition leading to improvements in St. Luke's post-Acquisition financial condition, and the validity or effectiveness of adopting the *Evanston* remedy in this case, to the extent these statements constitute anything other than dicta, and the contradictory language on the cognizability of capital cost avoidance efficiency claims.

relevant product market around Product A to evaluate the importance of that competition."). Courts generally determine the boundaries of the relevant product market[11] by considering the reasonable interchangeability of use and the cross-elasticity of demand between the product itself and substitutes for the product. *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962); *CCC Holdings*, 605 F. Supp. 2d at 38; *In re Polypore Int'l, Inc.*, No. 9327, 2010 FTC LEXIS 97, at *30-31, 2010-2 Trade Cas. (CCH) ¶ 77,267 (Dec. 13, 2010) (Comm'n Dec.). "Interchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product." *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000) (citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956)); *Polypore*, 2010 FTC LEXIS 97, at *31 (Comm'n Dec.); *In re Evanston Nw. Healthcare Corp.*, No. 9315, 2007 FTC LEXIS 210, at *144, 2007-2 Trade Cas. (CCH) ¶ 75,814 (Aug. 6, 2007) (Comm'n Dec.).

Additionally, courts continue to refer to *Brown Shoe's* "practical indicia" to assess product substitutability and define relevant product markets. *CCC Holdings*, 605 F. Supp. 2d at 38 ("Courts have relied on several 'practical indicia' as aids in identifying the relevant product market[.]") (citations omitted); *Polypore*, 2010 FTC LEXIS 97, at *31 & n.19 (Comm'n Dec.) ("As 'evidentiary proxies for direct proof of substitutability' courts look at 'practical indicia' of market boundaries..."). These indicia include industry or public recognition of the market, the product's particular characteristics and uses, unique production facilities, distinct customers,

[11] For purposes of discussing the relevant market in this case, the terms "relevant product market" and "relevant service market" are used interchangeably.

distinct prices, sensitivity to price changes, specialized vendors, and other factors. *CCC Holdings*, 605 F. Supp. 2d at 38; *Polypore*, 2010 FTC LEXIS 97, at *31 (Comm'n Dec.).

The revised *Merger Guidelines* set forth a similar approach to defining the relevant product market – an approach used by the antitrust agencies and a number of courts. *See Polypore*, 2010 FTC LEXIS 97, at *32 (Comm'n Dec.). The *Merger Guidelines* define a relevant product market by assessing whether a hypothetical monopolist of the proposed relevant market could profitably impose a small but significant and non-transitory increase in price ("SSNIP"). *Merger Guidelines* § 4.1.1; *see also FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1290, 1294 (W.D. Mich. 1996), *aff'd*, 1997 U.S. App. LEXIS 17422, 1997-2 Trade Cas. (CCH) ¶ 71,863 (6th Cir. 1997); *Polypore*, 2010 FTC LEXIS 97, at *32 (Comm'n Dec.).

### B. Relevant Service Market Definition in Hospital Cases Generally

The goal of product-market analysis, of course, is to determine whether a merger may substantially lessen competition in *any* line of commerce. 15 U.S.C. § 18; *Merger Guidelines* § 4 ("First, market definition helps specify the line of commerce ... in which the competitive concern arises."). As such, definition of the relevant market (and overall merger analysis) typically is conducted product-by-product, service-by-service. In other words, relevant markets are typically "built up," product-by-product, depending on market facts and conditions. Again, both Complaint Counsel's and Respondent's experts agree that each inpatient service line could appropriately be analyzed as a distinct relevant market. Guerin-Calvert, Tr. 7633; Town, Tr. 3666-67.

Assessing a general acute-care hospital merger, however, is a different proposition than

assessing a merger of two suppliers who sell a handful of products because such hospitals usually offer hundreds of individual services. Indeed, Complaint Counsel's economic expert's analysis included 347 Diagnosis-Related Groups ("DRGs").[12] PX02148 (Town, Expert Report) at 023 (¶ 40) n.53, *in camera.* There typically is no reasonable interchangeability of use or cross-elasticity of demand for such services (patients cannot and would not substitute neurosurgery in place of orthoscopic knee surgery, even if the price of knee surgery rose 10%). As such, under "standard" merger analysis, there are likely hundreds of potential relevant service markets that would have to be analyzed individually to find the service overlaps, determine the scope of each relevant service market, and then assess the relevant geographic market, competitors, market shares, competitive effects, entry, etc. That approach would be incredibly burdensome generally and particularly unwieldy, if not impossible, at trial.

Therefore, for analytical convenience and efficiency, courts generally use a cluster market approach to analyze hospital mergers – that is, they cluster numerous individual hospital services into one or more relevant service markets. Indeed, a long line of antitrust cases analyzing hospital mergers have held that the cluster of inpatient general acute-care services constitutes a relevant service market. *See, e.g., Butterworth,* 1997 U.S. App. LEXIS 17422, at *5 (6th Cir. July 8, 1997); *FTC v. Univ. Health Inc.*, 938 F.2d 1206, 1210-11 (11th Cir. 1991); *United States v. Rockford Mem'l Corp.,* 898 F.2d 1278, 1284 (7th Cir. 1990) (Posner, J.); *ProMedica,* 2011 U.S. Dist. LEXIS 33434, at * 23-24; *Evanston,* 2007 FTC LEXIS 210, at *151. Judge Chappell here approvingly cited case law holding that inpatient GAC services constitute a relevant service market. IDA at 139.

[12] A DRG is a code used in connection with an event for which a patient is admitted or the service(s) that the patient received. IDFF ¶ 504.

A cluster of products or services can constitute a relevant market, even though the individual components of the cluster are not interchangeable or substitutable. *See United States v. Phila. Nat'l Bank*, 374 U.S. 321, 356 (1963) (cluster of products and services constituting "commercial banking" constituted a relevant market); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997) (relevant market was sale of consumable office supplies through office supply superstores). Respondent agrees that inpatient GAC services constitute a relevant market even though the hundreds of individual services offered by inpatient general acute-care hospitals are not reasonably interchangeable or substitutable for one another. JX00002A ¶ 57. It is important to understand, however, that it is appropriate to include individual services in a single cluster market only where "market shares and entry conditions are similar for each [service]." *Emigra Group, LLC v. Fragomen*, 612 F. Supp. 2d 330, 353 (S.D.N.Y. 2009) (citing Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 157-59 (2007)); 2011 U.S. Dist. LEXIS 33434, at *146; *see also* PX01923 at 012 (Town, Dep. at 45), *in camera* ("the purpose of the cluster market is to formulate aggregates across those products in order to do the analysis in a practical way.").

In other words, the cluster-market approach allows the analysis to be done efficiently, without creating inconsistent or distorted results, precisely because GAC services are offered under similar market conditions, by the same market participants, and within the same geographic market. *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *146-48; *see also* Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51 Law & Contemp. Probs. 93, 137-40 & n.228 (1988) ("Baker Article") (explaining that, consistent with Supreme Court precedent, acute inpatient services cluster market is

appropriate "solely for descriptive and analytic convenience in situations where it will not be misleading"; moreover, "it would be inappropriate to place secondary inpatient care services and tertiary inpatient care services in the same cluster . . . This is evident from the observations that the geographic markets for tertiary care services are generally much larger . . . and that some hospitals offering secondary care services are unable to offer tertiary care.").

Based on the foregoing case law and analytical principles, the evidence presented at trial, and the ALJ's own findings, there are two relevant service markets in this case: (1) inpatient GAC services sold to commercial health plans, excluding complex tertiary services that St. Luke's does not provide, and (2) inpatient obstetrical services sold to commercial health plans. Respectfully, we submit that the ALJ erred in concluding that there was only one relevant service market that consists of *all* primary, secondary, and tertiary inpatient GAC services.

### C. Inpatient GAC Services Market Should Not Include Complex Tertiary Services that St. Luke's Does Not Provide

The parties agree and the ALJ concluded that the relevant service market is inpatient GAC services. *See* IDA at 139; Answer ¶ 12; JX00002A at ¶ 3. Complaint Counsel appeals, however, the ALJ's decision to include tertiary services that St. Luke's does not provide in the inpatient GAC market because St. Luke's does not compete with ProMedica to provide such services and these services are offered under different competitive conditions and in a broader geographic market.

Inpatient hospital services are often categorized on a continuum of intensity from primary to secondary to tertiary to quaternary services. IDFF ¶¶ 20-25. Although the boundaries between these service levels are not precisely defined, it is generally accepted, and the ALJ specifically found, that tertiary services "are more complex and specialized than primary and

secondary services, and are often more invasive and require different technologies and resources." IDFF ¶¶ 23, 26. The Initial Decision also found that tertiary services "generally involve highly-specialized treatments for higher acuity conditions, such as neurosurgery." IDA at 140.

Respondent admits, and the ALJ found, that St. Luke's does not provide complex tertiary services (other than perhaps some cardiac services). Resp't Admissions ¶ 2 ("ProMedica admits that St. Luke's currently does not perform complex tertiary and quaternary services."); JX00002A ¶ 6 ("St. Luke's currently performs few, if any, tertiary services and no quaternary services."); IDFF ¶ 74. Notably, Respondent's Answer to the Part III Complaint admitted that "more sophisticated and specialized tertiary and quaternary services, such as major surgeries and organ transplants, also *are properly excluded from the relevant market* because they are not substitutes for general acute-care inpatient services." *See* Answer ¶ 13 (emphasis added) ("ProMedica admits the allegations in Paragraph 13 [of the Complaint]."). Respondent changed its position at trial, however, to argue that the relevant service market includes "*all* inpatient hospital services." RPTB at 26-27.

The Initial Decision erroneously concludes that the relevant market included all primary, secondary, and tertiary GAC services. IDFF ¶ 299. Applicable legal authority clearly holds that the relevant service market should consist of the services that St. Luke's actually offers in competition with ProMedica. *CCC Holdings*, 605 F. Supp. 2d at 37 (the relevant market "identifies the product[s] and services with which the defendants' products compete."); *Merger Guidelines* § 4.1 ("When a product sold by one merging firm (Product A) competes against one

or more products sold by the other merging firm, the Agencies define a relevant product market around Product A to evaluate the importance of that competition.").

Indeed, courts have frequently excluded tertiary services and other non-overlapping services from a GAC cluster market. *FTC v. Tenet Healthcare Corp.*, 17 F. Supp. 2d 937, 942 (E.D. Mo. 1998) (relevant market is general acute-care inpatient hospital services, "including primary and secondary services, but not including tertiary or quaternary care hospital services"), *rev'd on other grounds*, 186 F.3d 1045 (8th Cir. 1999); *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *23-24; *see Butterworth*, 946 F. Supp. at 1291 (defining the relevant market as inpatient GAC services in part by rejecting "defendants' innovative effort to demonstrate that employers and third-party payors might respond to a price increase for primary and secondary acute care services by steering outpatients and tertiary care patients away from the merged entity so as to inhibit or reverse such a price increase[.]"); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 141-42 (E.D.N.Y. 1997); *United States v. Mercy Health Servs.*, 902 F. Supp. 968, 976 (N.D. Iowa 1995) ("The parties have agreed that the relevant product market is acute care inpatient services *offered by both Mercy and Finley*. . . . This limits the product market to those *services for which Mercy and Finley currently compete* for inpatients.") (emphasis added), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997) (transaction abandoned prior to decision on appeal).

The Initial Decision gives too little weight to the foregoing case law, including the *Butterworth* decision, which was upheld by the Sixth Circuit. The Initial Decision merely refers to the *Tenet* and *Mercy* cases in a footnote, apparently dismissing their holdings on the relevant product market because the parties in those cases agreed that tertiary services were properly

excluded from the product market. IDA at 141 n.14. But those decisions are entitled to particular weight *because* the parties agreed that tertiary services were outside the relevant service market. That agreement shows the parties understood that the product market was properly limited to those primary and secondary services that they provided in competition with one another. That the parties agreed to exclude tertiary services is particularly remarkable because it would have been to the merging parties' benefit to *include* tertiary services in order to broaden the relevant market, minimize their market shares, and lessen the concentration resulting from the transaction. Indeed, the opinions in both *Tenet* and *Mercy* state that there were several hospitals in the surrounding area that provided a greater range of services than the merging parties, yet the parties apparently did not seek to include those other services in the relevant market, presumably because they understood it was improper to do so. *Tenet*, 186 F.3d at 1048; *Mercy*, 902 F. Supp. at 972.

On the other hand, the Initial Decision misinterprets or gives undue weight to other cases. The Initial Decision states that the *Long Island Jewish* court "rejected the Government's 'narrow [product market] definition' and found 'that the Government failed to establish its definition of the relevant product market as anchor hospitals providing primary/secondary services.'" IDA at 141. But it appears that the ALJ mistakenly interpreted this as a rejection of a primary/secondary GAC services-only market. In fact, the *Long Island Jewish* court rejected the plaintiff's limitation of the product market to "anchor hospitals," not the limitation to primary and secondary services. Indeed, the opinion states that the government's "product market is flawed in several key respects. Preliminarily, the Court notes that the plaintiff's definition is unduly restricted to 'anchor' hospitals." *Long Island Jewish*, 983 F. Supp. at 138. The court goes on to

cite several cases, including *Butterworth*, for which it includes a parenthetical specifically noting that one of the relevant markets was (limited to) "primary care inpatient services." *Id.* The court then continues its analysis of the plaintiff's anchor hospital claim for the remainder of the product-market section of the opinion. *Id.* at 138-140.

Critically, the *Long Island Jewish* court later concludes that there are two relevant geographic markets: one for primary and secondary care and a separate one for tertiary care. *Id.* at 141-42. As such, *Long Island Jewish* supports the *exclusion* of tertiary services from the relevant service market, not their inclusion.

The Initial Decision's reliance on *Sutter Health* is similarly misplaced. The Initial Decision quotes *Sutter Health* for the proposition that "the services and resources that hospitals provide tend to be similar across a wide range of primary, secondary, and tertiary inpatient services." IDA at 141. But that is directly contrary to findings in the Initial Decision that tertiary services "are more complex and specialized than primary and secondary services, and are often more invasive and require different technologies *and resources*" and that tertiary services "generally involve highly-specialized treatments for higher acuity conditions, such as neurosurgery." IDFF ¶¶ 23, 26; IDA at 140 (emphasis added). Indeed, throughout the administrative trial, Respondent repeatedly sought to justify ProMedica's higher prices on the ground that tertiary services require higher-cost resources to provide. *See, e.g.*, RPTRB at 37-39. Thus, the quote in *Sutter Health* is simply a gross and incorrect generalization that service and resources that hospitals provide in connection with primary and secondary services are comparable to those provided with tertiary services.

Additionally, the Initial Decision quotes *Sutter Health* for the proposition that the services provided by niche hospitals should be included in a GAC cluster market along with the services provided by full-service hospitals. IDA at 141. Not only is this contradicted by more recent case law and the *Merger Guidelines*, *see CCC Holdings*, 605 F. Supp. 2d at 37; *Merger Guidelines* § 4.1, but taken to its logical conclusion, this principle would lead to perverse results in merger analysis. *See infra* at 34.

The Initial Decision also appears to rely unduly on *Evanston* and *University Health* for the proposition that tertiary services should be included in the GAC cluster. In *Evanston*, the Commission included tertiary services without specifically analyzing the issue, instead focusing on whether outpatient services should properly be included in the relevant inpatient GAC market. *Evanston*, 2007 FTC LEXIS 210, at *146-151 (Comm'n Dec.).[13] The *University Health* opinion cited in the Initial Decision only passingly discusses relevant product market definition in a footnote, noting that "redefinition of the relevant product market would be of no moment" for the case and, most importantly, stating its use of acute-care services in general as the relevant product market merely was "[f]or ease of discussion." *Univ. Health*, 938 F.2d at 1211 n.11.[14]

Turning to the facts here, the Commission should first note that the ALJ found that outpatient services are properly excluded from the inpatient GAC market because outpatient services cannot be substituted for inpatient services and because outpatient services are offered under different competitive conditions, including a different set or mix of market competitors.

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[13] In *Evanston*, moreover, Complaint Counsel and Respondent stipulated prior to trial that tertiary services should be included in the GAC market and, therefore, that was not an issue before the Commission on appeal.

[14] In fairness, courts have split on whether to include tertiary services in the GAC services market; thus, this case provides an opportunity for the Commission to apply the correct analysis regarding which services are included in the relevant service market in hospital mergers.

IDFF ¶¶ 307-308. For the same reasons, tertiary services that St. Luke's does not provide should be excluded from the inpatient GAC market.

Tertiary services are not substitutable for basic inpatient services. The ALJ specifically found that individual services within the inpatient GAC market are not clinical substitutes for one another. IDFF ¶ 302.

Most critically, the evidence in this case shows that complex tertiary services are *not* offered under similar market conditions, by the same market participants, or within the same geographic market as other general acute-care services. First, the hospitals that participate in the Lucas County market for complex tertiary services differ materially from the basic inpatient GAC services market. Specifically, five hospitals that provide basic GAC services in Lucas County – St. Luke's, Flower, Bay Park, St. Anne, and St. Charles – do not provide complex tertiary services. IDFF ¶¶ 63, 68, 74, 92, 100.

Second, patients are willing to travel farther for tertiary services. IDFF ¶ 283; CCPFF ¶ 194 (citing, *inter alia*, Guerin-Calvert, Tr. at 7649-7650). Thus, the geographic market for those services is broader and may include market participants located outside of Lucas County. *See Long Island Jewish*, 983 F. Supp. at 141-142 (finding one relevant geographic market for primary and second care and another relevant geographic market for tertiary care). The trial testimony here uniformly indicates, and Judge Chappell specifically found, that patients are willing to travel farther for tertiary services than for primary and secondary GAC services. IDFF ¶ 283; Gold, Tr. 212-213, 218; Wakeman, Tr. 2708; Guerin-Calvert, Tr. 7650; Shook, Tr. 947-948; Radzialowski, Tr. 633-634, 637-638; Town, Tr. 3676; *see also* PX01900 at 009 ({ }, IHT at 30), *in camera*; Sheridan, Tr. 6679; PX01914 at 007 ({ }, IHT at 19-20), *in camera*).

So, in contrast to primary and secondary GAC services, Lucas County hospitals likely compete with hospitals well outside of Lucas County for tertiary services. Gold, Tr. 212-213 ("For the tertiary and quaternary services, [UTMC] compete[s] with ... the University of Michigan, the Cleveland Clinic, University Hospital in Cleveland, and the Ohio State University."). Therefore, following the same analytical approach used to exclude outpatient services from the inpatient GAC services market, the Commission should exclude tertiary services from that market.

The Initial Decision does not focus on these critical facts but instead focuses on MCOs' demand and contracting for a broad array of primary, secondary, and tertiary services "in a single negotiated transaction." IDA at 142-43. The Initial Decision, however, cites no support for the "single negotiated transaction" approach to product market analysis. Including tertiary services in the relevant market on the ground that MCOs contract for those services at the same time as primary and secondary services is, again, inconsistent with the exclusion of outpatient services and other services. Outpatient services are also contracted for at the same time as other inpatient GAC services. IDA at 172 (citing Resp't Post-Tr. Br. at 55); IDFF ¶ 551. Therefore, that fact alone is not determinative.

Moreover, Complaint Counsel does not disagree that, under the *Merger Guidelines*, product market analysis must concentrate on demand substitution factors, but this section of the Initial Decision fails to consider demand substitution from the ultimate consumers of inpatient GAC services – patients. MCOs are essentially proxies for patient demand for inpatient GAC services. *See, e.g.,* IDFF ¶¶ 276-282; CCPFF ¶ 136; PX02072 ({ }, Decl.)

¶ 12.[15] It is the patients themselves who choose to use or substitute one hospital for another, and their demand drives MCOs' desire and decision to contract with particular hospitals, so it is the patients' demand that ultimately matters. As a result, a health plan cannot offer a viable hospital network without covering all the services its members may need across all the hospitals in its network – not necessarily providing all services at *each* hospital in the network. *See* IDFF ¶¶ 273-74.

Further, including tertiary services that St. Luke's does not provide in the relevant market while excluding quaternary services is analytically inconsistent. Both types of services should be excluded from the inpatient GAC market according to the rationale advanced by Complaint Counsel. Even Respondent's economic expert testified that she excluded quaternary services, which are undoubtedly inpatient services, from her relevant service market. Guerin-Calvert, Tr. 7647-7648, 7651.

Finally, logic alone mandates that the services St. Luke's does not offer should be excluded from the relevant service market. As the *Merger Guidelines* indicate, "market definition helps specify the line of commerce . . . in which the competitive concern arises." *Merger Guidelines* § 4. By definition, the Acquisition does not create or enhance market power for services that ProMedica provides but St. Luke's does not provide. *See Little Rock Cardiology Clinic v. Baptist Health*, 573 F. Supp. 2d 1125, 1146 (E.D. Ark. 2008) (excluding cardiologists' services from market definition because "[defendant] does not compete in the cardiologists' service market; it has no market share and therefore no market power in [that market]."); PX02148 (Town Expert Report) at 021 (¶ 42), *in camera*. If the merging parties do

[15] The exclusive focus on MCOs demand in the product market analysis is also counter to the competitive effects analysis in the Initial Decision, which appropriately recognizes that the "perspectives of both the MCOs and the patients are relevant and are considered." IDA at 156.

not compete to provide certain services, there can be no lessening of competition for such services. Indeed, at trial, Respondent's expert conceded that, if two firms sell products that are not substitutes for each other, a merger between the two firms is unlikely to lessen competition. Guerin-Calvert, Tr. 7657.

For these reasons, the proper relevant service market in which to analyze this transaction is inpatient general acute-care services sold to commercial health plans, which consists of those primary and secondary GAC services provided by St. Luke's in competition with ProMedica.[16]

### D. Case Law and the ALJ's Findings Support a Separate Relevant Market for Inpatient Obstetrical Services

The second error in the Initial Decision is the failure to conclude that inpatient obstetrical services are a separate relevant service market. Again, case law, the *Merger Guidelines*, the evidence presented at trial, and several of Judge Chappell's findings support such a relevant service market.

The "impact of the challenged acquisition must [ ] be measured in *each economically significant market*." *FTC v. Bass Bros. Enters., Inc.*, 1984 U.S. Dist. LEXIS 16122, at *61-62, 1984-1 Trade Cas. (CCH) ¶ 66,041 (N.D. Ohio 1984) (emphasis added). In doing so, multiple relevant product markets may be identified. *Merger Guidelines* § 4.1.

Prior cases, including the district court's opinion in this matter, establish that it is appropriate to find separate, narrower relevant service markets than inpatient GAC services where competitive conditions differ for those particular services. *ProMedica*, 2011 U.S. Dist.

[16] It is important that the Commission define the relevant service market in this way to frame the antitrust analysis correctly, but even including *all* inpatient DRGs, even those that Respondent's economic expert excluded from her analysis, does not materially affect the market structure, market shares, or strength of the presumption of anticompetitive harm. Indeed, the ALJ's Initial Decision shows that, even if the relevant service market is all inpatient GAC services, including tertiary services, the conclusion that the Acquisition is unlawful under Section 7 of the Clayton Act stands firmly intact.

LEXIS 33434, at *23-25 (finding inpatient general acute-care services market and a narrower inpatient obstetrics services market); *Butterworth*, 946 F. Supp. at 1291 (finding separate markets with different market participants for general acute-care inpatient hospital services and for primary care inpatient hospital services); *see also Rockford*, 898 F.2d at 1284 (Posner, J.) ("services are not in the same product market merely because they have a common provider"); *cf.*, *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994) (Section 2 case defining relevant market as "adult cardiac surgery"); *Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1109 (N.D. Ohio 2004) (finding narrower market of anesthesia services in Section 2 case where, *inter alia*, only certain providers performed the service).

The Initial Decision focuses on whether OB services are substitutable with other GAC services and concludes that this fact alone is not a sufficient basis for finding a distinct OB product market. IDFF ¶ 313; IDA at 144. But the Initial Decision failed to apprehend the crux of Complaint Counsel's argument – that is, in this case, the competitive conditions for OB services differ significantly from the competitive conditions for GAC services. Most significantly, two Lucas County hospitals that provide GAC services, UTMC and Mercy St. Anne, do not provide obstetrical services. IDFF ¶¶ 92, 110.[17] As such, the competitive environment for OB services differs substantially from the GAC market. PX02148 (Town Expert Report) at 023-024 (¶ 41), *in camera*; *see* PX01016 at 003, *in camera* (showing significantly different market shares for OB services than GAC services); *see also ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *24. For this fundamental reason alone, OB services should

[17] Additionally, St. Luke's offers some services, such as tubal ligation, that Mercy does not provide at any of its hospitals because it would violate Mercy's ethical and religious directives. Shook, Tr. 1065-1066.

not be "clustered" with other GAC services for purposes of analysis, and instead must be analyzed as a distinct relevant market.

The Initial Decision wholly ignores applicable case law in its analysis of the OB market. IDA at 143-145. Instead, the Initial Decision simply notes that OB services have been included in the GAC market in prior cases, without any apparent consideration of whether competitive conditions in those prior cases warranted separate analysis of inpatient OB services. It is precisely because of these distinct competitive conditions – not something about the nature of OB services – that mandates separate treatment in the instant case. Further, the Initial Decision dismissively states that, "[w]ith the exception of the district court's opinion on the preliminary injunction related to this matter, no hospital merger case has recognized OB services as a separate product market." That is a massive exception. In the first case to actually analyze whether OB is a separate relevant service market because of unique competitive conditions, a federal district court – on the same essential facts put forth in the administrative proceeding – held that OB was a separate relevant market, but the Initial Decision gave that no weight.

The notion that the OB services should be analyzed as part of the inpatient GAC market would, taken to its logical conclusion, lead to perverse results in merger analysis. Consider a merger among a general acute-care hospital that has a 20% share of orthopedic services and a 5% share in an all GAC services market, and a specialty orthopedic hospital with an 80% orthopedic services market share and, because it does not offer any other GAC services, a share of less than 1% of an all inpatient GAC services market. Under the reasoning of the Initial Decision, such a merger would not raise competitive concerns because the combined market share of the parties in an all inpatient GAC services market is less than 6%, even though, when properly limited to

those services that the merging parties provide in competition with one another (orthopedic services), this is a merger to monopoly.

Commercial realities also support a separate OB market. Respondent admits that ProMedica competed with St. Luke's for obstetric services. JX00002A at ¶ 20. Indeed, market participants separately track GAC and OB market shares (and other OB data). IDFF ¶ 314; *see also* Resp't Admissions ¶ 5 ("ProMedica admits that it, and St. Luke's, analyze a variety of data for many different service lines both as a group and as separate services lines, including OB."); PX01016 at 003, *in camera* (GAC and OB market shares in St. Luke's core service area); PX01077 at 003, 005 (OB utilization and market shares); PX01235 at 003, 005 (GAC and OB market shares in St. Luke's core service area); PX01236 at 002, 054 (GAC, OB, and other market shares in St. Luke's primary service area).

For example, Mr. Wakeman gave a presentation to St. Luke's Board of Directors in connection with affiliation discussions that reported separate GAC and OB market shares. PX01016, *in camera*. Scott Rupley, St. Luke's Marketing and Planning Director, who prepared these market shares, testified that OB was the only other service presented in this document because Mr. Wakeman {

} Rupley, Tr. 1978-1981, *in camera*. Another presentation to the St. Luke's board about affiliation partners reported {  } and stated that {

} PX01030 at 017, *in camera*.

Mr. Wakeman testified that the presentation included this statement because ProMedica "already had a pretty significant market share of OB in the greater Northwest Ohio area." Wakeman, Tr.

2695-2696, *in camera.* The foregoing shows that OB is a distinct and economically significant service line, and that the parties themselves recognized the potential for greater competitive harm in this even more highly concentrated market than in a broader GAC market. *Bass Bros.* 1984 U.S. Dist. LEXIS 16122, at *61-62 (the "impact of the challenged acquisition must [ ] be measured in *each economically significant market.*") (emphasis added).

Additionally, as the ALJ acknowledged in findings, several contracts between hospitals and health plans in Lucas County have a distinct rate for OB services, apart from other GAC services. IDFF ¶ 317. In fact, ProMedica's and St. Luke's contracts with health plans often specify different reimbursement rates for inpatient OB services. *See, e.g.*, PX00365 at 030, *in camera*; PX00366 at 030, *in camera*; PX02520 at 003-005, *in camera*; PX00363 at 019, 022; PX00364 at 019, 022; PX01262 at 004, 027. For example, ProMedica's recent contract with { }, specifies a base rate of { } for { } but specifies separate { } rates for obstetrics services { }. PX00365 at 030, *in camera*; PX00366 at 030, *in camera.* This demonstrates that, besides the rates (i.e., prices) themselves, the rate *structure* – or payment methodology – for most GAC services and OB services often differ in these contracts. *See, e.g.*, PX00365 at 030, *in camera*; PX00366 at 030, *in camera*; PX02520 at 003-005, *in camera.* For example, in { } contract with ProMedica, the rate for { } is paid on a { } basis, but the rate for obstetrics services is a { }. PX02520 at 003-005, *in camera.*

Separate OB rates and rate structures (sometimes called "carve-out" rates or case rates) are commonly negotiated by health plans and hospitals. CCPFF ¶ 205. The finding in the Initial Decision that some contracts do not separately carve out OB rates from the GAC rates, IDFF ¶ 316, actually reinforces the point that, whether the OB rate is carved out, how the rate is structured, and what the specific rate is, are all specific and economically significant points of negotiation in hospital-health plan contracts. Indeed, the only health-plan witness Respondent called to testify said that, in its 2010 negotiation with ProMedica, the case rates and per diem rates for obstetrics services were an explicit subject of negotiation. Sheridan, Tr. 6684; *cf.* Radzialowski, Tr. 752. Based on the history of separately contracting for OB services, it would be unsurprising if the dominant OB-services provider, ProMedica, insisted on continuing to separately contract for OB services because it faces only one, much smaller OB competitor post-Acquisition.

Contrary to the suggestion in the Initial Decision, Complaint Counsel does not seek to "carve out" the OB service market from the GAC market. Instead, as discussed at the outset (*supra* Section III.B), under "standard" merger analysis, OB is a stand-alone relevant service market in which to analyze competition in the first instance, as are all the other individual overlapping GAC services offered by ProMedica and St. Luke's. It is simply for analytical convenience that the other GAC services are analyzed as part of a cluster market. The analysis is done in this way because the competitive conditions under which those other separate services are offered are comparable, while the competitive conditions for OB differ significantly. As such, lumping OB in the GAC cluster market is misleading and masks the significantly more anticompetitive and harmful effect of the Acquisition on OB competition.

Judge Chappell incorrectly rejected the OB services market on the faulty view that health plans are protected from an increase in market power for the provision of inpatient obstetrical services because they negotiate for a bundle of inpatient services at the same time. Again, the facts show that OB rates and rate structures are often separately negotiated from other GAC services. Moreover, it is analytically flawed to conclude that a monopolist for one product cannot exercise market power because more than one good is purchased by customers.

In sum, based squarely on case law, practical indicia, the *Merger Guidelines'* analytical framework, the facts, and findings in the Initial Decision, inpatient OB services are a properly defined, distinct relevant service market.

For the foregoing reasons, Complaint Counsel submits that the Initial Decision erroneously included tertiary services that St. Luke's does not provide in the inpatient GAC services market and erroneously failed to find a separate relevant service market for inpatient OB services. Complaint Counsel respectfully urges the Commission to correct these errors but otherwise affirm Judge Chappell's Initial Decision, including its order that ProMedica divest St. Luke's Hospital and to provide other ancillary relief, as set forth in the following Proposed Order.

## IV. PROPOSED ORDER

Complaint Counsel submits the following proposed order:

## ORDER

I.

**IT IS ORDERED** that, as used in this Order, the following definitions shall apply:

A. "ProMedica" means ProMedica Health System, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries (including, but not limited to, ProMedica Health Insurance Corporation), divisions, groups, and affiliates controlled by ProMedica Health System, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "St. Luke's Hospital" means the Acute Care Hospital operated at 5901 Monclova Road, Maumee, Ohio 43537.

C. "Commission" means the Federal Trade Commission.

D. "Acquirer" means the Person that acquires, with the prior approval of the Commission, the St. Luke's Hospital Assets from ProMedica pursuant to Paragraph II, or from the Trustee pursuant to Paragraph VII of this Order.

E. "Acquirer Hospital Business" means all activities relating to general Acute Care Hospital services and other related health care services to be conducted by the Acquirer in connection with the St. Luke's Hospital Assets.

F. "Acute Care Hospital" means a healthcare facility licensed as a hospital, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff, that provides 24-hour inpatient care, that may also provide outpatient services, and having as a primary function the provision of General Acute Care Inpatient Hospital Services.

G. "Direct Cost" means the cost of direct material and direct labor used to provide the relevant assistance or service.

H. "Divestiture Agreement" means any agreement, including all exhibits, attachments, agreements, schedules and amendments thereto, that has been approved by the Commission pursuant to which the St. Luke's Hospital Assets are divested by ProMedica pursuant to Paragraph II, or by the Divestiture Trustee pursuant to Paragraph VII of this Order.

I. "Divestiture Trustee" means the Person appointed pursuant to Paragraph VII of this Order to divest the St. Luke's Hospital Assets.

J. "Effective Date Of Divestiture" means the date on which the divestiture of the St. Luke's Hospital Assets to an Acquirer pursuant to Paragraph II or Paragraph VII of this Order is completed.

K. "General Acute Care Inpatient Hospital Services" means a broad cluster of basic medical and surgical diagnostic and treatment services for the medical diagnosis, treatment, and care of physically injured or sick persons with short term or episodic health problems or infirmities, that includes an overnight stay in the hospital by the patient. General Acute Care Inpatient Hospital Services include what are commonly classified in the industry as primary, secondary, and tertiary services, but exclude: (i) services at hospitals that serve solely military and veterans; (ii) services at outpatient facilities that provide same-day service only; (iii) those services known in the industry as specialized tertiary services and quaternary services; and (iv) psychiatric, substance abuse, and rehabilitation services.

L. "Hospital Provider Contract" means a contract between a Payor and any hospital to provide General Acute Care Inpatient Hospital Services and related healthcare services to enrollees of health plans.

M. "Intangible Property" means intangible property relating to the Operation Of St. Luke's Hospital including, but not limited to, Intellectual Property, the St. Luke's Hospital Name and Marks, logos, and the modifications or improvements to such intangible property.

N. "Intellectual Property" means, without limitation: (i) all patents, patent applications, inventions, and discoveries that may be patentable; (ii) all know-how, trade secrets, software, technical information, data, registrations, applications for governmental approvals, inventions, processes, best practices (including clinical pathways), formulae, protocols, standards, methods, techniques, designs, quality-control practices and information, research and test procedures and information, and safety, environmental and health practices and information; (iii) all confidential or proprietary information, commercial information, management systems, business processes and practices, patient lists, patient information, patient records and files, patient communications, procurement practices and information, supplier qualification and approval practices and information, training materials, sales and marketing materials, patient support materials, advertising and promotional materials; and (iv) all rights in any jurisdiction to limit the use or disclosure of any of the foregoing, and rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation, or breach of any of the foregoing.

O. "Joinder" means the Operation Of St. Luke's Hospital by ProMedica pursuant to the Joinder Agreement.

P. "Joinder Agreement" means the agreement by and among Promedica Health System, Inc., OhioCare Health System, Inc., St. Luke's Hospital, and St. Luke's Hospital Foundation, Inc., dated May 25, 2010, and all subsequent amendments thereto, including, but not limited to the First and Second Amendments, each dated August 18, 2010, the Third Amendment, dated August 31, 2010, and the Side Agreement, dated September 1, 2010.

Q. "Licensed Intangible Property" means Intangible Property licensed to ProMedica or to St. Luke's Hospital from a third party relating to the Operation Of St. Luke's Hospital including, but not limited to, Intellectual Property, software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality-control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property that are licensed to ProMedica or to St. Luke's Hospital ("Licensed Intangible Property" does not mean modifications and improvements to intangible property that are not licensed to ProMedica).

R. "Monitor" means the Person appointed pursuant to Paragraph VI of the Order and with the prior approval of the Commission.

S. "Monitor Agreement" means the agreement ProMedica enters into with the Monitor and with the prior approval of the Commission.

T. "Operation Of St. Luke's Hospital" means all activities relating to the business of St. Luke's Hospital, operating as an Acute Care Hospital, including, but not limited to, the activities and services provided at [outpatient facilities].

U. "Ordinary Course Of Business" means actions taken by any Person in the ordinary course of the normal day-to-day Operation Of St. Luke's Hospital that is consistent with past practices of such Person in the Operation Of St. Luke's Hospital, including, but not limited to, past practice with respect to amount, timing, and frequency.

V. "Paramount" means the family of ProMedica Insurance Corporation insurance companies, including Paramount Insurance Company of Ohio, Paramount Preferred Options, Paramount Care, Inc., and Paramount Care of Michigan. ProMedica Insurance Corporation is a wholly-owned subsidiary of ProMedica Health System, Inc.

W. "Payor" means any Person that purchases, reimburses for, or otherwise pays for medical goods or services for themselves or for any other person, including, but not limited to: health insurance companies; preferred provider organizations; point-of-service organizations; prepaid hospital, medical, or other health-service plans; health

maintenance organizations; government health-benefits programs; employers or other persons providing or administering self-insured health-benefits programs; and patients who purchase medical goods or services for themselves.

X. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

Y. "Physician" means a doctor of allopathic medicine ("M.D.") or a doctor of osteopathic medicine ("D.O.").

Z. "ProMedica Medical Protocols" means medical protocols promulgated by ProMedica, whether in hard copy or embedded in software, that have been in effect at any ProMedica Hospital, excluding St. Luke's Hospital, at any time since Joinder; *provided, however*, that "ProMedica's Medical Protocols" does not mean medical protocols adopted or promulgated, at any time, by any Physician or by any Acquirer, even if such medical protocols are identical, in whole or in part, to medical protocols promulgated by ProMedica.

AA. "Post-Joinder Hospital Business" means all activities relating to the provision of General Acute Care Inpatient Hospital Services and other related healthcare services conducted by ProMedica after Joinder including, but not limited to, all health care services, including outpatient services, offered in connection with the St. Luke's Hospital Business.

BB. "Pre-Joinder St. Luke's Hospital Business" means all activities relating to the provision of General Acute Care Inpatient Hospital Services and other related healthcare services that St. Luke's Hospital was offering as an Acute Care Hospital prior to Joinder.

CC. "Real Property Of St. Luke's Hospital" means all real property interests (including fee simple interests and real property leasehold interests including all rights, easements and appurtenances, together with all buildings, structures, facilities) that ProMedica acquired pursuant to the Joinder Agreement, whether or not located at St. Luke's Hospital or whether or not related to the Operation Of St. Luke's Hospital. Real Property Of St. Luke's Hospital includes, but is not limited to, the assets identified at Appendix 1 to this Order.

DD. "St. Luke's Hospital Assets" means all of ProMedica's right, title, and interest in and to St. Luke's Hospital and all related healthcare and other assets, tangible or intangible, business, and properties, including any improvements or additions thereto made subsequent to Joinder, relating to the operation of the Post-Joinder Hospital Business, including, but not limited to:

1. All Real Property Of St. Luke's Hospital;

2. All Tangible Personal Property, including Tangible Personal Property related to the Operation Of St. Luke's Hospital, whether or not located at St. Luke's Hospital, and Tangible Personal Property located at the Real Property Of St. Luke's Hospital;

3. All consumable or disposable inventory, including but not limited to, janitorial, office, and medical supplies, and at least thirty (30) treatment days of pharmaceuticals;

4. All rights under any contracts and agreements (*e.g.,* leases, service agreements such as dietary and housekeeping services, supply agreements, procurement contracts), including, but not limited to, all rights to contributions, funds, and other provisions for the benefit of St. Luke's Hospital pursuant to the Joinder Agreement;

5. All rights and title in and to use of the St. Luke's Hospital Name and Marks on a permanent and exclusive basis;

6. St. Luke's Medicare and Medicaid provider numbers, to the extent transferable;

7. All Intellectual Property; *provided, however*, that St. Luke's Hospital Medical Protocols do not include ProMedica Medical Protocols;

8. All governmental approvals, consents, licenses, permits, waivers, or other authorizations to the extent transferable;

9. All rights under warranties and guarantees, express or implied;

10. All items of prepaid expense; and

11. Books, records, files, correspondence, manuals, computer printouts, databases, and other documents relating to the Operation Of St. Luke's Hospital, electronic and hard copy, located on the premises of St. Luke's Hospital or in the possession of the ProMedica Employee responsible for the Operation Of St. Luke's Hospital (or copies thereof where ProMedica has a legal obligation to maintain the original document), including, but not limited to:

    a. documents containing information relating to patients (to the extent transferable under applicable law), including, but not limited to, medical records, including, but not limited to, any electronic medical records system,

    b. financial records,

c. personnel files,

d. St. Luke's Hospital Physician Contracts, Physician lists, and other records of St. Luke's Hospital dealings with Physicians,

e. maintenance records,

f. documents relating to policies and procedures,

g. documents relating to quality control,

h. documents relating to Payors,

i. documents relating to Suppliers, and

j. copies of Hospital Provider Contracts and contracts with Suppliers, unless such contracts cannot, according to their terms, be disclosed to third parties even with the permission of ProMedica to make such disclosure.

EE. "St. Luke's Hospital Contractor" means any Person that provides Physician or other healthcare services pursuant to a contract with St. Luke's Hospital or ProMedica (including, but not limited to, the provision of emergency room, anesthesiology, pathology, or radiology services) in connection with the Operation Of St. Luke's Hospital.

FF. "St. Luke's Hospital Physician Contracts" means all agreements to provide the services of a Physician in connection with the Operation Of St. Luke's Hospital, regardless of whether any of the agreements are with a Physician or with a medical group, including, but not limited to, agreements for the services of a medical director for St. Luke's Hospital and "joiner" agreements with Physicians in the same medical practice as a medical director of St. Luke's Hospital.

GG. "St. Luke's Hospital Employee" means any individual who was employed by St. Luke's Hospital prior to Joinder or was employed by ProMedica after Joinder in connection with the Operation Of St. Luke's Hospital, and who has worked part-time or full-time on the premises of St. Luke's Hospital at any time since Joinder, regardless of whether that individual has also worked on the premises of ProMedica.

HH. "St. Luke's Hospital License" means: (i) a worldwide, royalty-free, paid-up, perpetual, irrevocable, transferable, sublicensable, exclusive license under all Intellectual Property owned by or licensed to St. Luke's Hospital relating to operation of the Post-Joinder Hospital Business at St. Luke's Hospital (that is not included in the St. Luke's Hospital Assets) and (ii) such tangible embodiments of the

licensed rights (including, but not limited to, physical and electronic copies) as may be necessary or appropriate to enable the Acquirer to utilize the rights.

II. "St. Luke's Hospital Medical Protocols" means medical protocols promulgated by St. Luke's Hospital, whether in hard copy or embedded in software, that were in effect at any time prior to Joinder with ProMedica.

JJ. "St. Luke's Hospital Medical Staff Member" means any Physician or other healthcare professional who: (1) is not a St. Luke's Hospital Employee and (2) is a member of the St. Luke's Hospital medical staff, including, but not limited to, any St. Luke's Hospital Contractor.

KK. "St. Luke's Hospital Name and Marks" means the name "St. Luke's Hospital" and any variation of that name, in connection with the St. Luke's Hospital Assets, and all other associated trade names, business names, proprietary names, registered and unregistered trademarks, service marks and applications, domain names, trade dress, copyrights, copyright registrations and applications, in both published works and unpublished works, relating to the St. Luke's Hospital Assets.

LL. "Software" means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.

MM. "Supplier" means any Person that has sold to ProMedica any goods or services, other than Physician services, for use in connection with the Operation Of St. Luke's Hospital; *provided, however*, that "Supplier" does not mean an employee of ProMedica.

NN. "SurgiCare" means OhioCare Ambulatory Surgery Center, LLC d/b/a Surgi+Care, a joint venture providing ambulatory surgery services at St. Luke's Hospital.

OO. "Tangible Personal Property" means all machinery, equipment, spare parts, tools, and tooling (whether customer specific or otherwise); furniture, office equipment, computer hardware, supplies and materials; vehicles and rolling stock; and other items of tangible personal property of every kind whether owned or leased, together with any express or implied warranty by the manufacturers, sellers or lessors of any item or component part thereof, and all maintenance records and other documents relating thereto.

PP. "Transitional Administrative Services" means administrative assistance with respect to the operation of an Acute Care Hospital and related health care services, including but not limited to assistance relating to billing, accounting, governmental regulation, human resources management, information systems, managed care contracting, and purchasing.

QQ. "Transitional Clinical Services" means clinical assistance and support services with respect to operation of an Acute Care Hospital and related healthcare services, including but not limited to cardiac surgery, oncology services, and laboratory and pathology services.

RR. "Transitional Services" means Transitional Administrative Services and Transitional Clinical Services.

II.

**IT IS FURTHER ORDERED** that:

A. ProMedica shall:

1. No later than one hundred and eighty (180) days from the date this Order becomes final and effective, divest absolutely and in good faith, and at no minimum price, the St. Luke's Hospital Assets to an Acquirer that receives the prior approval of the Commission and in a manner, including pursuant to a Divestiture Agreement, that receives the prior approval of the Commission;

2. Comply with all terms of the Divestiture Agreement approved by the Commission pursuant to this Order, which agreement shall be deemed incorporated by reference into this Order; and any failure by ProMedica to comply with any term of the Divestiture Agreement shall constitute a failure to comply with this Order. The Divestiture Agreement shall not reduce, limit or contradict, or be construed to reduce, limit or contradict, the terms of this Order; *provided, however,* that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of ProMedica under such agreement; *provided further,* that if any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that ProMedica cannot fully comply with both terms, the Order Term shall determine ProMedica's obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

B. Prior to the Effective Date Of Divestiture, ProMedica shall not rescind the Joinder Agreement or any term of the Joinder Agreement necessary to comply with any Paragraph of this Order.

C. Prior to the Effective Date Of Divestiture, ProMedica shall restore to St. Luke's Hospital any assets of St. Luke's Hospital as of the date of Joinder that were

removed from St. Luke's Hospital at any time from the date of Joinder through the Effective Date Of Divestiture, other than Inventories consumed in the Ordinary Course Of Business. To the extent that:

1. The St. Luke's Hospital Assets as of the Effective Date Of Divestiture do not include (i) assets that ProMedica acquired on the date of Joinder, (ii) assets that replaced those acquired on the date of Joinder, or (iii) any other assets that ProMedica acquired and has used in or that are related to the Post-Joinder Hospital Business, then ProMedica shall add to the St. Luke's Hospital Assets additional assets (of a quality that meets generally acceptable standards of performance) to replace the assets that no longer exist or are no longer controlled by ProMedica;

2. After the date of Joinder and prior to the Effective Date Of Divestiture, ProMedica terminated any clinical service, clinical program, support function, or management function (i) performed by the Pre-Joinder St. Luke's Hospital Business, or (ii) performed by the Post-Joinder Hospital Business, then ProMedica shall restore such service, program, or function (of a quality that meets generally acceptable standards of care or performance), no later than the Effective Date Of Divestiture of the St. Luke's Hospital Assets or any other date that receives the prior approval of the Commission.

*Provided, however*, that ProMedica shall not be required to replace any asset or to restore any service, program, or function described by Paragraphs II.C.1. or II.C.2. of this Order if and only if in each instance ProMedica demonstrates to the Commission's satisfaction: (i) that such asset, service, program, or function is not necessary to achieve the purpose of this Order; and (ii) that the Acquirer does not need such asset, service, program, or function to effectively operate the Acquirer Hospital Business in a manner consistent with the purpose of this Order, and if and only if the Commission approves the divestiture without the replacement or restoration of such asset, service, program, or function.

D. No later than the Effective Date Of Divestiture, ProMedica shall grant to the Acquirer a St. Luke's Hospital License for any use in the Acquirer Hospital Business, and shall take all actions necessary to facilitate the unrestricted use of the St. Luke's Hospital License.

E. ProMedica shall take all actions and shall effect all arrangements in connection with the divestiture of the St. Luke's Hospital Assets necessary to ensure that the Acquirer can conduct the Acquirer Hospital Business in substantially the same manner as St. Luke's Hospital has operated as the Post-Joinder Hospital Business, and in full compliance with the March 29, 2011, order issued by Judge Katz in *Federal Trade Commission, et al. v. ProMedica Health System*, Civil No. 3:11 CV 47, at St. Luke's Hospital, with an independent full-service medical staff capable of providing General

Acute Care Inpatient Hospital Services, and an independent full-service hospital staff and management, including, but not limited to, providing:

1. Assistance necessary to transfer to the Acquirer all governmental approvals needed to operate the St. Luke's Hospital Assets as an Acute Care Hospital;

2. Transitional Services;

3. The opportunity to recruit and employ St. Luke's Hospital Employees; and

4. The opportunity to recruit, contract with, and extend medical staff privileges to any St. Luke's Hospital Medical Staff Member, including as provided in Paragraphs II.I, II.J, and II.K of this Order.

F. ProMedica shall convey as of the Effective Date Of Divestiture to the Acquirer the right to use any Licensed Intangible Property (to the extent permitted by the third-party licensor), if such right is needed for the Operation Of St. Luke's Hospital by the Acquirer and if the Acquirer is unable, using commercially-reasonable efforts, to obtain equivalent rights from other third parties on commercially-reasonable terms and conditions.

G. ProMedica shall:

1. Place no restrictions on the use by the Acquirer of the St. Luke's Hospital Assets;

2. On or before the Effective Date Of Divestiture, provide to the Acquirer contact information about Payors and Suppliers for the St. Luke's Hospital Assets;

3. Not object to the sharing of Payor and Supplier contract terms relating to the St. Luke's Hospital Assets: (i) if the Payor or Supplier consents in writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with ProMedica not to disclose the information to any third party; and

4. With respect to contracts with St. Luke's Hospital Suppliers, at the Acquirer's option and as of the Effective Date Of Divestiture:

   a. if such contract can be assigned without third-party approval, assign its rights under the contract to the Acquirer; and

   b. if such contract can be assigned to the Acquirer only with third-party approval, assist and cooperate with the Acquirer in obtaining:

(1) such third-party approval and in assigning the contract to the Acquirer; or

(2) a new contract.

H. At the request of the Acquirer, for a period not to exceed twelve (12) months from the Effective Date Of Divestiture, except as otherwise approved by the Commission, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission:

1. ProMedica shall provide Transitional Services to the Acquirer sufficient to enable the Acquirer to conduct the Acquirer Hospital Business in substantially the same manner that ProMedica has conducted the Post-Joinder Hospital Business at St. Luke's Hospital; and

2. ProMedica shall provide the Transitional Services required by this Paragraph II.H. at substantially the same level and quality as such services are provided by ProMedica in connection with its operation of the Post-Joinder Hospital Business.

*Provided, however*, that ProMedica shall not (i) require the Acquirer to pay compensation for Transitional Services that exceeds the Direct Cost of providing such goods and services, (ii) terminate its obligation to provide Transitional Services because of a material breach by the Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction, or (iii) include a term in any agreement to provide Transitional Services that limits the type of damages (such as indirect, special, and consequential damages) that the Acquirer would be entitled to seek in the event of ProMedica's breach of such agreement.

I. ProMedica shall allow the Acquirer an opportunity to recruit and employ any St. Luke's Hospital Employee in connection with the divestiture of the St. Luke's Hospital Assets so as to enable the Acquirer to establish an independent, full-service medical staff, hospital staff and management, including as follows:

1. No later than five (5) days after execution of a divestiture agreement, ProMedica shall (i) identify each St. Luke's Hospital Employee, (ii) allow the Acquirer an opportunity to interview any St. Luke's Hospital Employee, and (iii) allow the Acquirer to inspect the personnel files and other documentation relating to any St. Luke's Hospital Employee, to the extent permissible under applicable laws.

2. ProMedica shall (i) not offer any incentive to any St. Luke's Hospital Employee to decline employment with the Acquirer, (ii) remove any contractual impediments that may deter any St. Luke's Hospital Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with ProMedica that

would affect the ability of the St. Luke's Hospital Employee to be employed by the Acquirer, and (iii) not otherwise interfere with the recruitment of any St. Luke's Hospital Employee by the Acquirer, including, but not limited to, by refusing or threatening to refuse to extend medical staff privileges at any ProMedica Acute Care Hospital.

3. ProMedica shall (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer for any St. Luke's Hospital Employee who accepts an offer of employment from the Acquirer no later than thirty (30) days from the Effective Date Of Divestiture and (ii) if the Acquirer has made a written offer of employment to any key personnel, as identified at Confidential Appendix 2, provide such key personnel with reasonable financial incentives to accept a position with the Acquirer at the time of the Effective Date Of Divestiture, including, but not limited to (and subject to Commission approval), payment of an incentive equal to up to three (3) months of such key personnel's base salary to be paid only upon such key personnel's completion of one (1) year of employment with the Acquirer.

4. For a period ending two (2) years after the Effective Date Of Divestiture, ProMedica shall not, directly or indirectly, solicit, hire, or enter into any arrangement for the services of any St. Luke's Hospital Employee employed by the Acquirer, unless such St. Luke's Hospital Employee's employment has been terminated by the Acquirer; *provided, however,* this Paragraph II.I.4 shall not prohibit ProMedica from: (i) advertising for employees in newspapers, trade publications, or other media not targeted specifically at the St. Luke's Hospital Employees, (ii) hiring employees who apply for employment with ProMedica, as long as such employees were not solicited by ProMedica in violation of this Paragraph II.I.4, or (iii) offering employment to a St. Luke's Hospital Employee who is employed by the Acquirer in only a part-time capacity, if the employment offered by ProMedica would not, in any way, interfere with that employee's ability to fulfill his or her employment responsibilities to the Acquirer.

J. ProMedica shall allow the Acquirer an unimpeded opportunity to recruit, contract with, and otherwise extend medical staff privileges to any St. Luke's Hospital Medical Staff Member in connection with the divestiture of the St. Luke's Hospital Assets so as to enable the Acquirer to establish an independent, complete, full-service medical staff, including as follows:

1. No later than the date of execution of a divestiture agreement, ProMedica shall (i) identify each St. Luke's Hospital Medical Staff Member, (ii) allow the Acquirer an opportunity to interview any St. Luke's Hospital Medical Staff Member, and (iii) allow the Acquirer to inspect the files and other documentation relating to any St. Luke's Hospital Medical Staff Member, to the extent permissible under applicable laws.

2. ProMedica shall (i) not offer any incentive to any St. Luke's Hospital Medical Staff Member to decline to join the Acquirer's medical staff; (ii) remove any contractual impediments that may deter any St. Luke's Hospital Medical Staff Member from joining the Acquirer's medical staff, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with ProMedica that would affect the ability of the St. Luke's Hospital Medical Staff Members to be recruited by the Acquirer; and (iii) not otherwise interfere with the recruitment of any St. Luke's Hospital Medical Staff Member by the Acquirer, including, but not limited to, by refusing or threatening to refuse to extend medical staff privileges at any ProMedica Acute Care Hospital.

K. With respect to each Physician who has provided services to St. Luke's Hospital pursuant to any St. Luke's Hospital Physician Contract in effect at any time preceding the Effective Date Of Divestiture ("Contract Physician"), ProMedica shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to St. Luke's Hospital, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer of the St. Luke's Hospital Assets any information relating to the Operation Of St. Luke's Hospital.

L. Except in the course of performing its obligations under this Order, ProMedica shall:

1. not provide, disclose, or otherwise make available any trade secrets or any sensitive or proprietary commercial or financial information relating to the Acquirer or the Acquirer Hospital Business to any Person other than the Acquirer, and shall not use such information for any reason or purpose;

2. disclose trade secrets or any sensitive or proprietary commercial or financial information relating to the Acquirer or the Acquirer Hospital Business to any Person other than the Acquirer (i) only in the manner and to the extent necessary to satisfy ProMedica's obligations under this Order and (ii) only to Persons who agree in writing to maintain the confidentiality of such information;

3. enforce the terms of this Paragraph II.L as to any Person and take such action as is necessary, including training, to cause each such Person to comply with the terms of this Paragraph II.L., including any actions that ProMedica would take to protect its own trade secrets or sensitive or proprietary commercial or financial information.

M. No later than the Effective Date Of Divestiture, ProMedica shall assign to the Acquirer any Hospital Provider Contract for the provision of services in connection

with the Operation Of St. Luke's Hospital that is in effect as of the date the divestiture provisions of this Order become final and effective; *provided, however,* that nothing in this Paragraph II.M. shall preclude ProMedica from completing any post-termination obligations relating to any Hospital Provider Contract.

N. From the date this Order becomes final and effective until one (1) year from the Effective Date Of Divestiture, ProMedica, so long as it offers any Paramount product, shall not terminate any agreement in connection with the Operation Of St. Luke's Hospital between St. Luke's Hospital and Paramount that provides that:

1. St. Luke's Hospital shall become a participating provider in all Paramount products and networks at rates comparable to other member Acute Care Hospitals in the ProMedica Health System, as provided at Section 6.2(i) of the Second Amendment to Joinder Agreement; and

2. SurgiCare shall become a participating provider in all Paramount products and networks at rates comparable to other similarly situated ambulatory surgery centers in the ProMedica Health System, as provided at Paragraph 1 of the Side Agreement.

O. The purpose of the divestiture of the St. Luke's Hospital Assets is to ensure the continued Operation Of St. Luke's Hospital by the Acquirer, independent of ProMedica, and to remedy the lessening of competition resulting from ProMedica's acquisition of St. Luke's Hospital.

III.

**IT IS FURTHER ORDERED** that:

A. From the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein) until the Effective Date Of Divestiture, ProMedica shall not:

1. Sell or transfer any St. Luke's Hospital Assets, other than in the Ordinary Course Of Business;

2. Eliminate, transfer, or consolidate any clinical service offered in connection with the Post- Joinder Hospital Business;

3. Fail to maintain the employment of all St. Luke's Hospital Employees or otherwise fail to keep the Post-Joinder Hospital Business staffed with sufficient employees; *provided, however*, that ProMedica may terminate employees for

cause consistent with the Operation Of St. Luke's Hospital on the day before Joinder (in which event ProMedica shall replace such employees);

4. Modify, change, or cancel any Physician privileges in connection with the Post-Joinder Hospital Business; *provided, however*, that ProMedica may revoke the privileges of any individual Physician consistent with the practices and procedures in place in connection with the Operation Of St. Luke's Hospital on the day before Joinder; or

5. Terminate, or cause or allow termination of any contract between any Payor and St. Luke's Hospital. For any contract between a Payor and St. Luke's Hospital that expires during the term of this Order, ProMedica shall offer to extend such contract at rates for services in connection with the Post-Joinder Hospital Business that shall be increased no more than the highest year-over-year escalator percentage as provided in such contract.

IV.

**IT IS FURTHER ORDERED** that:

A. From the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein) until the Effective Date Of Divestiture, ProMedica shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the St. Luke's Hospital Assets and the Post-Joinder Hospital Business relating to the St. Luke's Hospital Assets. Among other things that may be necessary, ProMedica shall:

1. Maintain the operations of the Post-Joinder Hospital Business relating to the St. Luke's Hospital Assets in the Ordinary Course Of Business and in accordance with past practice (including regular repair and maintenance of the St. Luke's Hospital Assets).

2. Use best efforts to maintain and increase revenues of the Post-Joinder Hospital Business relating to the St. Luke's Hospital Assets, and to maintain at budgeted levels for the year 2010 or the current year, whichever are higher, all administrative, technical, and marketing support for the Post-Joinder Hospital Business relating to the St. Luke's Hospital Assets.

3. Use best efforts to maintain the current workforce and to retain the services of employees and agents in connection with the Post-Joinder Hospital Business relating to the St. Luke's Hospital Assets, including payment of bonuses as necessary, and maintain the relations and goodwill with patients, Physicians, Suppliers, vendors, employees, landlords, creditors, agents, and others having

business relationships with the Post-Joinder Hospital Business relating to the St. Luke's Hospital Assets.

4. Assure that ProMedica's employees with primary responsibility for managing and operating the Post-Joinder Hospital Business relating to the St. Luke's Hospital Assets are not transferred or reassigned to other areas within ProMedica's organization, except for transfer bids initiated by employees pursuant to ProMedica's regular, established job- posting policy (in which event ProMedica shall replace such employees).

5. Provide sufficient working capital to maintain the Post-Joinder Hospital Business relating to the St. Luke's Hospital Assets as an economically viable and competitive ongoing business and shall not, except as part of a divestiture approved by the Commission pursuant to this Order, remove, sell, lease, assign, transfer, license, pledge for collateral, or otherwise dispose of the St. Luke's Hospital Assets.

B. No later than thirty (30) days from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), ProMedica shall file a verified written report to the Commission that identifies (i) all assets included in the St. Luke's Hospital Assets, (ii) all assets originally acquired or that replace assets originally acquired by ProMedica as a result of Joinder, (iii) all assets relating to the Post-Joinder Hospital Business that are not included in the St. Luke's Hospital Assets, and (iv) all clinical services, support functions, and management functions that ProMedica discontinued at St. Luke's Hospital after Joinder (hereinafter "Accounting").

## V.

**IT IS FURTHER ORDERED** that no later than five (5) days from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), ProMedica shall provide a copy of this Order and Complaint to each of ProMedica's officers, employees, or agents having managerial responsibility for any of ProMedica's obligations under Paragraphs II, III, and IV of this Order.

## VI.

**IT IS FURTHER ORDERED** that:

A. At any time after this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), the Commission may appoint a Person ("Monitor") to monitor ProMedica's compliance with its obligations under this Order, consult with Commission staff, and report to the Commission regarding ProMedica's compliance with its obligations under this Order.

B. If a Monitor is appointed pursuant to Paragraph VI.A of this Order, ProMedica shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor ProMedica's compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order and in a manner consistent with the purposes of this Order and in consultation with the Commission or its staff.

2. Within ten (10) days after appointment of the Monitor, ProMedica shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor ProMedica's compliance with the terms of this Order in a manner consistent with the purposes of this Order. If requested by ProMedica, the Monitor shall sign a confidentiality agreement prohibiting the use or disclosure to anyone other than the Commission (or any Person retained by the Monitor pursuant to Paragraph VI.B.5. of this Order), of any competitively-sensitive or proprietary information gained as a result of his or her role as Monitor, for any purpose other than performance of the Monitor's duties under this Order.

3. The Monitor's power and duties under this Paragraph VI shall terminate three (3) business days after the Monitor has completed his or her final report pursuant to Paragraph VI.B.8. or at such other time as directed by the Commission.

4. ProMedica shall cooperate with any Monitor appointed by the Commission in the performance of his or her duties, and shall provide the Monitor with full and complete access to ProMedica's books, records, documents, personnel, facilities, and technical information relating to compliance with this Order, or to any other relevant information, as the Monitor may reasonably request. ProMedica shall cooperate with any reasonable request of the Monitor. ProMedica shall take no action to interfere with or impede the Monitor's ability to monitor ProMedica's compliance with this Order.

5. The Monitor shall serve, without bond or other security, at the expense of ProMedica, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of ProMedica, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses

incurred, including fees for his or her services, subject to the approval of the Commission.

6. ProMedica shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct. For purposes of this Paragraph VI.B.6., the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph VI.B.5. of this Order.

7. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor in the same manner as provided by this Order.

8. The Monitor shall report in writing to the Commission (i) every sixty (60) days from the date this Order becomes final, (ii) no later than thirty (30) days from the date ProMedica completes its obligations under this Order, and (iii) at any other time as requested by the staff of the Commission, concerning ProMedica's compliance with this Order.

C. ProMedica shall submit the following reports to the Monitor: (i) no later than twenty (20) days after the date the Monitor is appointed by the Commission pursuant to Paragraph VI.A., a copy of the Accounting required by Paragraph IV.B. of this Order; and (ii) copies of all compliance reports filed with the Commission.

D. ProMedica shall provide the Monitor with: (i) prompt notification of significant meetings, including date, time and venue, scheduled after the execution of the Monitor Agreement, relating to the regulatory approvals, marketing, sale and divestiture of the St. Luke's Hospital Assets, and such meetings may be attended by the Monitor or his representative, at the Monitor's option or at the request of the Commission or staff of the Commission; and (ii) the minutes, if any, of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of ProMedica.

E. The Commission may, on its own initiative or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

F. The Monitor appointed pursuant to this Order may be the same Person appointed as Divestiture Trustee pursuant to Paragraph II of this Order.

## VII.

**IT IS FURTHER ORDERED** that:

A. If ProMedica has not divested, absolutely and in good faith, the St. Luke's Hospital Assets pursuant to the requirements of Paragraph II of the Order, within the time and manner required by Paragraph II of this Order, the Commission may at any time appoint one or more Persons as Divestiture Trustee to divest the St. Luke's Hospital Assets, at no minimum price, and pursuant to the requirements of Paragraph II of this Order, in a manner that satisfies the requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, ProMedica shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including appointment of a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the ProMedica to comply with this Order.

C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VII, ProMedica shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effect the divestiture pursuant to the requirements of Paragraph II and in a manner consistent with the purposes of this Order.

2. Within ten (10) days after appointment of the Divestiture Trustee, ProMedica shall execute an agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture and perform the requirements of Paragraph II of this Order for which he or she has been appointed.

3. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the agreement described in Paragraph VII.C.2. of this Order to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the Divestiture Trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court appointed Divestiture Trustee, by the court.

4. ProMedica shall provide the Divestiture Trustee with full and complete access to the personnel, books, records, and facilities related to the assets to be divested, or to any other relevant information, as the Divestiture Trustee may request. ProMedica shall develop such financial or other information as the Divestiture Trustee may reasonably request and shall cooperate with the Divestiture Trustee. ProMedica shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by ProMedica shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

5. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, but shall divest expeditiously at no minimum price. The divestiture shall be made only to an Acquirer that receives the prior approval of the Commission, and the divestiture shall be accomplished only in a manner that receives the prior approval of the Commission; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by ProMedica from among those approved by the Commission; *provided, further,* that ProMedica shall select such entity within ten (10) business days of receiving written notification of the Commission's approval.

6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of ProMedica, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of ProMedica, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the ProMedica, and the Divestiture Trustee's power shall be terminated. The Divestiture Trustee's compensation may be based in part on a commission arrangement contingent on the Divestiture Trustee's divesting the assets.

7. ProMedica shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VII.C.7., the term

"Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VII.C.6. of this Order.

8. If the Divestiture Trustee ceases to act or fails to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VII for appointment of the initial Divestiture Trustee.

9. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets to be divested.

10. The Divestiture Trustee shall report in writing to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

D. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

E. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as the Monitor pursuant to Paragraph VI of this Order.

## VIII.

**IT IS FURTHER ORDERED** that:

A. ProMedica shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order (i) no later than thirty (30) days from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), and every thirty (30) days thereafter until the divestiture of the St. Luke's Hospital Assets is accomplished, and (ii) thereafter, every sixty (60) days (measured from the Effective Date Of Divestiture) until the date ProMedica completes its obligations under this Order; *provided, however,* that ProMedica shall also file the report required by this Paragraph VIII at any other time as the Commission may require.

B. ProMedica shall include in its compliance reports, among other things required by the Commission, a full description of the efforts being made to comply with the relevant Paragraphs of this Order, a description (when applicable) of all substantive contacts or negotiations relating to the divestiture required by Paragraph II of this Order, the identity of all parties contacted, copies of all written communications to and from such parties, internal documents and communications, and all reports and recommendations concerning the divestiture, the date of divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission.

## IX.

**IT IS FURTHER ORDERED** that ProMedica shall notify the Commission at least thirty (30) days prior to (1) any proposed dissolution of ProMedica, (2) any proposed acquisition, merger, or consolidation of ProMedica, or (3) any other change in ProMedica that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in ProMedica.

## X.

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice, ProMedica shall permit any duly authorized representative of the Commission:

A. Access, during office hours of ProMedica, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of ProMedica relating to compliance with this Order, which copying services shall be provided by ProMedica at its expense; and

B. To interview officers, directors, or employees of ProMedica, who may have counsel present, regarding such matters.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

Respectfully submitted,

s/ Matthew J. Reilly

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*Counsel Supporting the Complaint*

## CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2011, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that on December 29, 2011, I delivered via electronic mail and hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-110
Washington, DC 20580
oalj@ftc.gov

I further certify that on December 29, 2011, I delivered via electronic mail a copy of the foregoing to:

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*Counsel for Respondent*

**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 or the adjudicator.

s/ Alexis J. Gilman
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