IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION

And

STATE OF ILLINOIS,

Plaintiffs,

v.

ADVOCATE HEALTH CARE NETWORK,

ADVOCATE HEALTH AND HOSPITALS CORPORATION,

And

NORTHSHORE UNIVERSITY HEALTHSYSTEM

Defendants.

No. 15-cv-11473
Judge Jorge L. Alonso
Magistrate Judge Jeffrey Cole

FILED UNDER SEAL

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

BACKGROUND 3

ARGUMENT 5

I. The FTC is Likely to Succeed on the Merits of its Section 7 Challenge 7

A. The Acquisition is Presumptively Unlawful 8

1. The Relevant Product Market Is General Acute Care Inpatient Hospital Services 8

2. The Relevant Geographic Market is No Broader Than the North Shore Area 13

a) The North Shore Area 14

b) Patients Strongly Prefer to Receive GAC Services Locally 15

c) Hospitals in the North Shore Area Compete Primarily with Other Hospitals in the North Shore Area 18

d) A Hypothetical Monopolist of North Shore Area Hospitals Could Profitably Impose a SSNIP 19

3. The Merger Would Result in High Market Shares and Market Concentration, Triggering a Strong Presumption of Illegality 20

B. Competitive Effects Evidence Bolsters the Strong Presumption of Harm and Illegality 22

1. The Merger Will Eliminate Close Competition Between Advocate and NorthShore 22

2. The Proposed Merger Would Lead to Higher Health Care Costs and Diminished Quality and Services 26

C. Defendants Cannot Rebut the Strong Presumption of Illegality 30

1. Entry Will Not Be Timely, Likely, or Sufficient to Rescue this Anticompetitive Merger 31

2. Defendants' Purported Efficiencies Are Not Cognizable, and Do Not Outweigh the Competitive Harm 32

II. The Equities Heavily Favor a Preliminary Injunction 37

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 6, 8, 9

FTC v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998).. 20, 21, 33

FTC v. CCC Holdings, 605 F. Supp. 2d 26 (D.D.C. 2009) 12, 33

FTC v. Elders Grain, Inc., 868 F.2d 901 (7th Cir. 1989) 6, 31, 38

FTC v. Food Town Stores, Inc., 539 F.2d 1339 (4th Cir. 1976)... 38

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001) .... *passim*

FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012) .... *passim*

FTC v. PPG Indus., Inc., 798 F.2d 1500 (D.C. Cir. 1986) 21, 37

FTC v. ProMedica Health System, Inc., No. 3:11 CV 47, 2011 WL 1219281
(N.D. Ohio Mar. 29, 2011) .... *passim*

FTC v. Rhinechem Corp., 459 F. Supp. 785 (N.D. Ill. 1978) 38

FTC v. Staples, 970 F. Supp. 1066 (D.D.C. 1997) 7, 8, 21

FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000)... 8, 38

FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015).. *passim*

FTC v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991)... *passim*

FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1085 (D.C. Cir. 1981) 7, 37

FTC v. Whole Foods Mkt., 548 F.3d 1028 (D.C. Cir. 2008) 8, 19

Hosp. Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986) 31

In re Evanston NW Healthcare, 2007 WL 2286195 (FTC Aug. 6, 2007).................................. 14

In the Matter of ProMedica Health Sys., Inc., 2012 WL 1155392 (FTC Mar. 28, 2012)............ 12

In the Matter of ProMedica Health Sys., Inc., Docket No. 9346, 2012 WL 2450574
(F.T.C. June 25, 2012) 12

ProMedica Health Sys. v. FTC, 749 F.3d 559 (6th Cir. 2014) 8, 11, 12, 23, 29

Rockford Mem'l Corp., 717 F. Supp 1251 (N.D. Ill 1989) 31

Saint Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015) 16, 29

Times-Picayune Publ'g Co. v. United States, 345 U.S. 594 (1953) 9

United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975) 31

United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957) 6

United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011) 8, 22, 23, 33

United States v. Marine Bancorp., 418 U.S. 602 (1974) 8

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

United States v. Rockford Mem'l Corp., 898 F.2d 1278 (7th Cir. 1990) 9, 10, 12, 15

Statutes

15 U.S.C. § 18 6

Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b) 1, 5, 6, 38

Other Authorities

U.S. Dep't of Justice & FTC Horizontal Merger Guidelines, § 4.1 (2010) ("Merger Guidelines") .... *passim*

Advocate Health Care Network ("Advocate"), the largest healthcare system in Illinois, seeks to merge with its longtime rival in the northern Chicago suburbs, NorthShore University HealthSystem ("NorthShore") to form Advocate NorthShore Health Partners ("ANHP"). Today, Advocate and NorthShore compete for inclusion in health plans marketed to employers and consumers in the North Shore Area. Commercial payers and their members benefit from this competition in the form of lower reimbursement rates and more favorable terms. As one NorthShore executive explained: [REDACTED] [1] The proposed merger would eliminate this close competition, which not only forces Advocate and NorthShore to compete on price and related terms, but has also spurred each to improve the quality of care and to enhance the services and amenities offered to patients. Accordingly, the Federal Trade Commission ("Commission") and the Illinois Attorney General (collectively "Plaintiffs") seek a preliminary injunction to preserve the *status quo* pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, pending the full administrative proceeding on the merits scheduled to begin on May 24, 2016.

NorthShore and Advocate collectively own six of the eleven general acute care ("GAC") hospitals and are the largest and second largest providers of inpatient GAC services, respectively, in the North Shore Area. While market shares and concentration levels alone suffice to establish Plaintiffs' *prima facie* case—and trigger a presumption that the proposed merger is unlawful—there is voluminous additional compelling evidence that the merger is likely to substantially reduce competition. Documents, testimony, and empirical evidence unequivocally demonstrate that Defendants are close, if not closest, competitors in the relevant

[1] PX05067-001.

market and the first and second choices for a significant fraction of patients in the NorthShore Area.

Advocate is a [REDACTED] to NorthShore and [REDACTED] [REDACTED][2] For its part, Advocate views NorthShore as [REDACTED] [REDACTED].[3] Advocate recognizes that it has the [REDACTED] [REDACTED] for some physicians following a merger with NorthShore.[4] If allowed to proceed, the proposed merger will eliminate this important competition in the market for GAC inpatient hospital services and significantly increase ANHP's leverage in negotiations with the managed care organizations ("MCOs" *i.e.*, commercial payers) serving the North Shore Area. The unavoidable result will be higher healthcare costs for employers and, ultimately, for patients.

Defendants' primary argument in favor of their presumptively unlawful merger is that the proposed merger will generate benefits or "efficiencies" that will offset the strong evidence of likely anticompetitive effects. Defendants cannot show that these purported efficiencies are verifiable and merger-specific, as the case law and the Merger Guidelines require. According to Defendants, the merger will enable them to participate in a new narrow network insurance product offered by payers, which they refer to by the marketing term "high performing network" or "HPN." Defendants argue that that this HPN will only be successful if NorthShore is able to lower its costs by shifting to risk-based reimbursement models and engaging in population health management. According to Defendants, the only way that NorthShore can accomplish these goals is through a merger with Advocate.

---

[2] PX05005-005.
[3] PX04077-014.
[4] PX04228-037.

The flaws in this argument are manifold. First, a merger is not necessary for Defendants to participate in a low-priced, narrow network product. Defendants already participate in low-priced narrow network products independently, and they do not need to merge to create a product that includes both systems. Second, Defendants cannot substantiate any specific cost reduction necessary for NorthShore's participation in an HPN with Advocate and cannot demonstrate that NorthShore is unable to reduce costs to that level absent the merger. Third, Defendants cannot establish that a merger is necessary for NorthShore to engage in more risk-based contracting or in effective population health management. Finally, Defendants cannot demonstrate that the proposed HPN would be sufficiently successful compared to the narrow network products that Defendants already participate in—or could participate in absent the merger—that it would counteract the competitive harm from this transaction. Nor can Defendants point to any verifiable benefit to healthcare consumers specific to the merged entity's proposed HPN. No court has ever found a purported efficiencies defense to be sufficient to overcome a presumption of anticompetitive harm. Here, Defendants' claimed efficiencies do not even withstand scrutiny, let alone warrant breaking new legal ground.

Plaintiffs are highly likely to succeed on the merits at the administrative proceeding and there is no equitable basis for allowing the merger to close before the fast-moving merits proceeding concludes. The paramount equitable consideration before the Court is the public interest in enforcement of the antitrust laws, which favors maintenance of the *status quo* to preserve the availability of effective relief pending the outcome of the Commission's administrative proceeding. Accordingly, preliminary relief is justified and necessary.

BACKGROUND

Advocate is the largest health system in Illinois, boasting eleven GAC hospitals, approximately 85 outpatient facilities, and over 5,000 employed and affiliated physicians.

Advocate operates two GAC hospitals in the northern suburbs of Chicago in close proximity to the four hospitals operated by NorthShore: Advocate Lutheran General Hospital ("Lutheran General") and Advocate Condell Medical Center ("Condell").[5] Lutheran General is a 638 bed GAC hospital located in the northern Cook County town of Park Ridge. The sixth-largest hospital in the Chicago metropolitan area, Lutheran General has a medical staff of 1,270 physicians representing 53 specialties and subspecialties. Condell is a 273 bed GAC hospital in the southern Lake County town of Libertyville.[6] With more than 650 physicians, it is the only Level I trauma center in Lake County.[7]

NorthShore operates four GAC hospitals, all of which are located in the northern suburbs, of Chicago and close to Advocate's Condell and Lutheran General hospitals. NorthShore employs approximately 900 physicians and affiliates with approximately 1,000 additional physicians through its Independent Physician Association.[8] In addition, NorthShore operates approximately 50 physician offices and 30 outpatient facilities in Chicago and its northern suburbs.[9]

NorthShore's Evanston Hospital ("Evanston"), Skokie Hospital ("Skokie"), and Glenbrook Hospital ("Glenbrook") are located in northern Cook County and NorthShore's Highland Park Hospital ("Highland Park") is located in southern Lake County. Highland Park is only a twelve-mile drive from Advocate's Condell hospital. Only one hospital, Northwestern Lake Forest, lies between Condell and Highland Park. From Advocate's Lutheran General, it is

---

[5] Advocate also operates three GAC hospitals in southern Cook County, a children's hospital in Cook County, and two GAC hospitals in counties adjacent to Cook County: Advocate Sherman Hospital in Kane County and Advocate Good Samaritan Hospital in DuPage County. *See* PX06000 Tenn Report Figure 1 (map of party hospitals).
[6] PX08037.
[7] PX08037.
[8] PX08013.
[9] PX08013.

only five miles to NorthShore's Glenbrook, six miles to NorthShore's Skokie, ten miles to NorthShore's Evanston, and sixteen miles to NorthShore's Highland Park.[10] There are no third-party GAC hospitals located between Lutheran General and each of the four NorthShore hospitals.

Advocate and NorthShore began discussing a potential combination in early 2014.[11] On September 11, 2014, Advocate and NorthShore signed an Affiliation Agreement to create ANHP. Post-affiliation, ANHP would have fifteen GAC hospitals in Illinois (eleven in Cook and Lake Counties) and would generate approximately $7.0 billion in revenue by serving three million patients annually.[12] The combined entity would further strengthen Advocate's position as the largest hospital system in Illinois with ANHP becoming the eleventh largest non-profit hospital system in the United States.[13]

ARGUMENT

Where, as here, the Commission has reason to believe that "any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission," including Section 7 of the Clayton Act, it is authorized by Section 13(b) of the FTC Act to "bring suit in a district court of the United States to enjoin any such act or practice." 15 U.S.C. § 53(b). The district court may grant the request for a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." *Id.* Therefore, "in determining whether to grant a preliminary injunction under Section 13(b), a

[10] All reported distances are calculated using Google Maps.
[11] *See, e.g.*, PX04104 [redacted]; PX04107.
[12] PX08043.
[13] PX08044.

district court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities." *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1073 (N.D. Ill. 2012) (quoting *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991)).

To evaluate the Commission's "likelihood of success on the merits," this Court must "measure the probability that, after an administrative hearing on the merits, the Commission will succeed in proving that the effect of the [proposed] merger 'may be substantially to lessen competition, or to tend to create a monopoly' in violation of section 7 of the Clayton Act." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting 15 U.S.C. § 18); *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015). "Section 7 is 'designed to arrest in its incipiency . . . the substantial lessening of competition from the acquisition by one corporation' of the assets of a competing corporation." *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1073 (N.D. Ill. 2012) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957)). Accordingly, "Congress used the words '*may be* substantially to lessen competition' to indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962); *see also FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) ("Section 7 forbids mergers and other acquisitions the effect of which 'may' be to lessen competition substantially. A certainty, even a high probability, need not be shown."). The statute requires "a prediction, and doubts are to be resolved against the transaction." *Elders Grain*, 868 F.2d at 906.

The second prong of Section 13(b) requires the Court to "weigh the equities" to determine whether a preliminary injunction is in the public interest. *Heinz*, 246 F.3d at 726. "The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws." *Id.* Thus, if the Commission

shows a likelihood of success on the merits, the equities necessarily favor a preliminary injunction to prevent Defendants from merging their operations before the administrative proceeding. Absent such relief, it would be extremely difficult, if not impossible, for competition to be restored to its previous state if the Commission ultimately finds the merger unlawful. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085- 86, 1085 n.31 (D.C. Cir. 1981). In fact, "[n]o court has denied relief to the FTC in a [Section] 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *FTC v. ProMedica Health System, Inc.*, No. 3:11 CV 47, 2011 WL 1219281, at *60 (N.D. Ohio Mar. 29, 2011).

I. The FTC is Likely to Succeed on the Merits of its Section 7 Challenge

Courts employ a burden-shifting approach to determine if the FTC has shown a likelihood of success on the merits of its Section 7 claim. *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1074 (N.D. Ill. 2012) (citing *Heinz*, 246 F.3d at 715). "Initially, the FTC must make a *prima facie* showing that the proposed merger would result in 'a firm controlling an undue percentage share of the relevant market,'" consisting of a product market and a geographic market component, as well as "a significant increase in the concentration of firms in that market." *Id.* (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963)). The Supreme Court has explained that a merger with these characteristics "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Phila. Nat'l Bank,* 374 U.S. at 363. Therefore, "[i]f the government makes this [*prima facie*] showing, a presumption of illegality arises." *OSF Healthcare Sys*., 852 F. Supp. 2d at 1074 (quoting *Univ. Health*, 938 F.2d at 1218); *see also FTC v. Staples*, 970 F. Supp. 1066, 1083 (D.D.C. 1997). "By showing that the proposed transaction . . . will lead to undue concentration [for a particular product in a particular geography], the

Commission establishes a presumption that the transaction will substantially lessen competition."). Once Plaintiffs make their *prima facie* showing, in order to rebut the presumption of illegality that arises, "the defendants must produce evidence that shows that the market-share statistics give an inaccurate account of the merger's probable effects on competition in the relevant market." *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1075 (quoting *Heinz*, 246 F.3d at 715); *see also United States v. Marine Bancorp.*, 418 U.S. 602, 631 (1974); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 167 (D.D.C. 2000).

Here, high market share and concentration levels establish a presumption that the merger is unlawful. *See Phila. Nat'l Bank*, 374 U.S. at 363; *FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008). The direct evidence of fierce head-to-head competition between Defendants bolsters that presumption—as well as bolstering the Commission's likelihood of success on the merits. Defendants lack the significant evidence necessary to rebut the strong presumption of illegality and Defendants' attempts to justify the transaction fall far short.

A. The Acquisition is Presumptively Unlawful

1. The Relevant Product Market Is General Acute Care Inpatient Hospital Services

The relevant product market is the "line of commerce" affected by a proposed merger. *Brown Shoe v. United States*, 370 U.S. 294, 324 (1962). "The first principle of market definition is substitutability: a relevant product market must 'identify a set of products that are reasonably interchangeable[.]'" *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 565 (6th Cir. 2014) (quoting U.S. Dep't of Justice & FTC Horizontal Merger Guidelines, § 4.1 (2010) ("Merger Guidelines"));[14] *see also United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 51 (D.D.C. 2011)

[14] Although not binding, courts often rely on the Merger Guidelines (PX08003) as persuasive authority in antitrust cases. *See, e.g., H&R Block*, 833 F. Supp. 2d at 52 n.10; *Staples*, 970 F. Supp. at 1082.

(In construing the product market, "courts look at whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other") (citation omitted); *Brown Shoe*, 370 U.S. at 325 (product market determined by "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it"). As the court recently explained in *Sysco*, "[i]f an increase in the price for product A causes a substantial number of customers to switch to product B, the products compete in the same market." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1 (D.D.C. 2015). Courts are to construe the relevant product market "narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 n.31 (1953).

The relevant product market for analyzing the proposed merger of Advocate and NorthShore is GAC inpatient hospital services sold to commercial payers and provided to their insured members ("GAC Services").[15] GAC Services include a cluster of medical and surgical diagnostic and treatment services that require an overnight or 24-hour hospital stay.[16] When analyzing hospital mergers, the Seventh Circuit, this Court, various other courts, and the Commission have found that GAC Services is a relevant product market. *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990); *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1075-76; *Univ. Health*, 938 F.2d at 1210-11; *ProMedica*, 2011 WL 1219281, at *9 (N.D. Ohio 2011); *In the Matter of Evanston Nw. Healthcare Corp.*, Docket No. 9315, 2007 WL 2286195, *47 (F.T.C. Aug. 6, 2007).

[15] The fees for inpatient services provided to patients covered by Medicare or Medicaid plans are not as likely to be impacted by the proposed merger because the fees for those services are set by the government and are not subject to negotiation. *See* PX06000 Dr. Tenn Report ¶ 63. However, a reduction of competition may still adversely affect non-price benefits such as quality, service, and amenities offered to patients covered by Medicare and Medicaid.

[16] *See* PX06000 Dr. Tenn Report ¶ 58.

GAC Services constitute a relevant product market distinct from outpatient services because outpatient services are not reasonably interchangeable with services that require hospitalization. Whether or not a particular procedure or treatment requires inpatient services

[17] As the Seventh Circuit has explained:

> For many services provided by acute-care hospitals, there is no competition from other sorts of provider. If you need a kidney transplant, or a mastectomy, or if you have a stroke or a heart attack or a gunshot wound, you will go (or be taken) to an acute-care hospital for inpatient treatment. The fact that for other services you have a choice between inpatient care at such a hospital and outpatient care elsewhere places no check on the prices of the services we have listed, for their prices are not linked to the prices of services that are not substitutes or complements. If you need your hip replaced, you can't decide to have chemotherapy instead because it's available on an outpatient basis at a lower price.

Rockford Mem'l, 898 F.2d at 1284 (excluding outpatient services from GAC Services market); *see also ProMedica*, 2011 WL 1219281, at *9 (N.D. Ohio Mar. 29, 2011) ("Patients would not substitute outpatient services in response to price increases for inpatient services, because such substitution is instead based on clinical considerations."). Thus, "[t]he GAC market does not include outpatient services[.]" *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1076.[18]

---

[17] PX03000 ; *see also* PX02013 PX02021 ; PX02011 PX03002 .

Payers also cannot substitute outpatient for inpatient services. *See, e.g.,* PX03000

Each GAC Service could constitute a separate relevant product market because individual services are not substitutes for each other. A patient needing inpatient neurosurgery, for example, cannot substitute an inpatient appendectomy in response to an increase in the price of neurosurgery. However, because analyzing hundreds of individual inpatient services separately would be inefficient and unwieldy, courts have found that it is analytically appropriate and expeditious to cluster a range of inpatient services offered by hospitals into a GAC Services market. *See, e.g.*, *id.* at 1075 (explaining GAC Services constitute "a 'cluster market' of services that courts have consistently found in hospital merger cases, even though the different types of inpatient services are not strict substitutes for one another"); *ProMedica*, 2011 WL 1219281, at *54 (N.D. Ohio Mar. 29, 2011) (collecting cases).

Individual product markets may be clustered for administrative convenience if "the competitive conditions for two markets are similar enough to analyze them together[.]" *ProMedica*, 749 F.3d at 567 (6th Cir. 2014). "The competitive conditions for hospital services include the barriers to entry for a particular service—e.g., how difficult it might be for a new competitor to buy the equipment and sign up the professionals necessary to offer the service—as well as the hospitals' respective market shares for the service and the geographic market for the service." *Id.* at 565. In this case, GAC Services included in the relevant product market are provided by the same competitors and under similar competitive conditions, including entry conditions. Thus, it is appropriate to analyze these GAC Services together. *See, e.g.*, *id.* at 565-66; *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1075-76.

; PX02004

PX02013

.

Outpatient services, however, are provided not only by hospitals, but also by freestanding outpatient facilities, which may include physicians' offices, ambulatory surgical centers, dialysis centers, and walk-in clinics, depending on the type of service.[19] The competitive and entry conditions are thus quite different for GAC Services than for outpatient services and vary greatly among types of outpatient services (e.g., walk-in clinics and ambulatory surgery centers). *See ProMedica*, 749 F.3d at 566 (6th Cir. 2014).[20] Inpatient psychiatric and rehabilitation services are also provided by a different set of firms and are subject to different competitive conditions than the provision of GAC Services.[21] The GAC Services cluster therefore does not include outpatient services or inpatient psychiatric or rehabilitation services.[22] *See OSF Healthcare Sys.*, 852 F. Supp. 2d at 1076 ("The GAC market does not include outpatient services, rehabilitation

---

[19] PX02015 [redacted] PX02013 [redacted]

[20] It does not matter that hospitals provide both inpatient and outpatient services and may derive more revenue from outpatient services. *See, e.g., Rockford Mem'l*, 898 F.2d at 1284 ("If a firm has a monopoly of product X, the fact that it produces another product, Y, for which the firm faces competition is irrelevant to its monopoly[.]"). It also does not matter that MCOs and hospitals negotiate a single contract applicable to both GAC Services and outpatient services. *See In the Matter of ProMedica Health Sys., Inc*., Docket No. 9346, 2012 WL 2450574, at *38 (F.T.C. June 25, 2012) (finding relevant market limited to inpatient general acute care services even though health plans contract for broader set of services); *Evanston Nw.*, 2007 WL 2286195, at *45-47 (same).

[21] For example, [redacted] is a psychiatric and rehabilitative services hospital. PX03016 [redacted]; PX02029 [redacted]. Condell does not provide those services [redacted] PX02020 [redacted].

[22] The GAC Services market also excludes some extremely complex services because those services are either not provided by NorthShore or are not provided by Advocate. "Absent an overlap or potential overlap involving a given service line, there is no substantial lessening of competition, and, thus, no need to include the service in the relevant product market." *In the Matter of ProMedica Health Sys., Inc.,* 2012 WL 1155392, at *21 (FTC Mar. 28, 2012); *see also FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009) ("The 'relevant product market' identifies the product and services with which the defendants' products compete."); Merger Guidelines § 4.1 (explaining that the antitrust Agencies begin market definition when a product of one merging firm competes with a product of the other merging firm).

services, psychiatric services" or certain especially complex services "as these services are offered by a different set of competitors.").

2. The Relevant Geographic Market is No Broader Than the North Shore Area

The relevant geographic market "'is the area in which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition.'" *Id.* at 1076 (quoting *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999)). It must "correspond to the commercial realities of the industry" as determined by a "pragmatic, factual approach" to assessing the industry. *Brown Shoe*, 370 U.S. at 336 (internal quotation omitted); *see also ProMedica*, 2011 WL 1219281, at *55 (N.D. Ohio Mar. 29, 2011) ("Defining the geographic market is a pragmatic undertaking[.]") (internal quotation omitted). While the relevant geographic market "need not be identified with 'scientific precision,'" the court must understand "in which part of the country competition is threatened." *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 49 (D.D.C. 1998) (quoting *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 669 (1974)). "Under the case law and Merger Guidelines, the relevant question to define the geographic market is whether a hypothetical monopolist controlling all … hospitals [in the geographic area] could profitably implement a small but significant non-transitory increase in price ("SSNIP")." *ProMedica*, 2011 WL 1219281, at *55 (N.D. Ohio Mar. 29, 2011) (citing Merger Guidelines § 4.2).

The relevant geographic market here is no broader than the "North Shore Area." This market corresponds with the commercial realities of the GAC Services market in which Defendants compete. Substantial evidence establishes that patients in the North Shore Area prefer to receive GAC Services locally and demand in-network access to local hospitals. Hospitals within the North Shore Area thus view each other as their primary competitors for

GAC Services. For these reasons, and as demonstrated by Plaintiffs' economic expert, Dr. Tenn, a hypothetical monopolist of hospitals within the North Shore Area would find it profitable to raise prices by a small but significant amount.

A narrower market consisting of only NorthShore's four hospitals and Advocate's Condell and Lutheran General hospitals would also satisfy the hypothetical monopolist test and thus be a properly defined market.[23] Defining the market narrowly would be consistent with the evidence and with precedent.[24] To be conservative, however, Dr. Tenn analyzes the transaction—and Plaintiffs show that the merger will result in competitive harm—in the larger North Shore Area.[25] By analyzing the effects of the transaction in the broader area, Plaintiffs conservatively include the market shares and possible competitive constraints imposed by third-party hospitals operating near Defendants' six hospitals.

a) The North Shore Area

The North Shore Area includes NorthShore's four hospitals, Advocate's Condell and Lutheran General hospitals, and five third-party GAC hospitals that compete with both Advocate and NorthShore.[26] The five third-party hospitals in the North Shore Area are: Swedish Covenant Hospital ("Swedish Covenant") and Presence Resurrection Medical Center ("Presence Resurrection") at the south end of the geographic market, Northwest Community Healthcare

[23] PX06000 Dr. Tenn Report ¶¶ 76-79.

[24] For example, in *In re Evanston NW Healthcare*, 2007 WL 2286195 (FTC Aug. 6, 2007), the Commission examined the consummated merger of Highland Park and Evanston Northwestern Healthcare Corporation ("ENH"), NorthShore's predecessor, which owned Evanston and Glenbrook. Relying on evidence of post-merger price increases, the Commission concluded that a hypothetical monopolist that owned the three hospitals could raise prices by a small but significant amount and defined the relevant geographic market as the area including only the Highland Park, Evanston, and Glenbrook hospitals. *Id.* at *49. Evidence in this case, showing that a hypothetical monopolist of only the six Defendant-owned hospitals could profitably impose a SSNIP, confirms that hospital competition in this area continues to be highly localized.

[25] PX06000 Dr. Tenn Report ¶ 78.

[26] *See* PX06000 Dr. Tenn Report ¶ 92; *see also* Attachment A (map of the NorthShore Area).

Hospital ("Northwest Community") to the west, Northwestern Lake Forest Hospital ("Lake Forest") in the northwest, and Vista Medical Center East ("Vista East") at the northern end of the market area. The geographic market has a perimeter of approximately 70 miles and an area of approximately 270 square miles. The North Shore Area has a population of approximately 847,000 people – equivalent to being the eleventh largest city in the United States.[27]

The North Shore Area is largely co-extensive with NorthShore's primary service area ("PSA") used in its ordinary course strategic analyses. NorthShore's PSA consists of a ███ zip code area surrounding its four hospitals.[28] According to analysis commissioned by NorthShore, ██% of the patients admitted to its hospitals reside in its PSA and ██% reside within a ██-mile radius of its hospitals.[29] The primary service area of each NorthShore hospital encompasses ████████████████████████.[30] ████████████████████ serve much of the same area as the NorthShore system and draw many of their patients from the same zip codes.[31]

b) Patients Strongly Prefer to Receive GAC Services Locally

Markets for GAC Services are inherently local because "[p]eople want to be hospitalized near their families and homes[.]" *Rockford Mem'l*, 898 F.2d at 1285. While some patients may be willing to travel farther to reach specialty hospitals or academic medical centers with premium brand recognition, patients overwhelmingly prefer to receive general acute inpatient

[27] PX06000 Dr. Tenn Report ¶ 101.
[28] *See, e.g.*, PX05095; PX02022 ██████████; PX02013 ██████████ (██████████; PX02018 ██████████.
[29] PX07010-034.
[30] PX04032-009.
[31] *See* PX04032-009 ██████████; PX04175-032 ██████████

care locally.[32] It is therefore [33]

Data support the common-sense notion that North Shore Area patients prefer to receive GAC Services close to their homes. Specifically, 73% of the residents of the North Shore Area receive GAC Services from hospitals within the North Shore Area.[34] Half of the patients admitted to North Shore Area hospitals come from within seven miles of the hospital and 75% of patients come from within fourteen miles.[35]

Executives from the merging parties corroborate this data, explaining from their own experience in the market that many patients choose to receive care locally.[36] In particular,

---

[32] *See* PX02029 ; PX02027 PX03002 PX03005 PX03006 PX03041

[33] PX03009 .

[34] PX06000 Dr. Tenn Report ¶ 107.

[35] *Id.* ¶ 104; *see also* PX03008 The fact that a fraction of patients travel outside the area to receive care does not imply that the geographic market should be expanded. *See Saint Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 785 (9th Cir. 2015).

[36] PX02020 ; PX02008

[37] confirms that, for routine inpatient care, patients ."[38] As NorthShore recognizes, its hospital system is ."[39] And NorthShore's ."[40] When marketing its hospitals, NorthShore thus tends to [41]

Because patients prefer to receive inpatient care close to their homes, they require in-network access to local hospitals. As one NorthShore executive explained, when individuals are the direct customers on health insurance exchanges, [42] Employers also require plans with networks that include hospitals that are convenient for their employees.[43] and healthcare consumers ."[44] Commercial payers thus view the inclusion of North Shore Area hospitals

[37] PX02019 .
[38] PX02020 *see also* PX04058-028
PX07010-034; *see also* PX02022
PX02022
PX02000 .
[42] PX05207-001.
[43] PX02029 ;
PX03012 .
[44] PX05207-001.

as critical to the successful marketing of a hospital network to individuals or employers with employees in the North Shore Area.[45]

c) Hospitals in the North Shore Area Compete Primarily with Other Hospitals in the North Shore Area

Documents and testimony establish that hospitals in the North Shore Area view each other as their primary competition for GAC Services, not hospitals outside of the area. In the ordinary course of business, Defendants identify other North Shore Area hospitals, especially each other, as their main competitors:

- In a December 2014 presentation,
- In a document prepared for presentation at a strategy planning meeting,
- A 2013 presentation identifies .
- NorthShore's top competitors .[49]
- In Advocate's analysis, .[50]

[45] PX03002 ; *see also* PX03000 ; PX03001
PX04100-014.
[47] PX04044-004.
[48] PX04175-040.
[49] PX07010-014.
[50] PX04032-041, 050, 059, 068.

Third-party hospitals in the North Shore Area also identify other North Shore Area hospitals as their primary competitors.[51]

d) A Hypothetical Monopolist of North Shore Area Hospitals Could Profitably Impose a SSNIP

Under the Merger Guidelines and the governing case law, a relevant geographic market is defined by asking whether a hypothetical monopolist controlling all hospitals in the candidate market could profitably impose a SSNIP at one or more of those hospitals. Merger Guidelines § 4.2; *ProMedica*, 2011 WL 1219281, at *55 (N.D. Ohio Mar. 29, 2011). As set forth above, North Shore Area patients strongly prefer to receive GAC Services locally. Consistent with this evidence, Plaintiffs' economic expert, Dr. Tenn, found a high level of intra-market diversion between North Shore Area hospitals.[52] That is, the data show that within the North Shore Area, a substantial portion of patients would go to another North Shore Area hospital, rather than to a hospital outside of the North Shore Area, if their chosen hospital were to become unavailable.[53] This high level of intra-market diversion confirms that patients strongly prefer to receive inpatient care locally. As a result, a hypothetical monopolist over all hospitals in the North Shore Area would be able to profitably impose a SSNIP.[54] Accordingly, the North Shore Area is a properly defined geographic market.[55]

---

[51] For example, [redacted] . PX03016 [redacted] PX03006 [redacted] PX03015 [redacted] .

[52] *See* PX06000 Dr. Tenn Report. ¶ 99.

[53] *Id.*

[54] *Id.* ¶ 100.

[55] Although the geographic market here is well-supported by the evidence, market definition is neither "crucial" nor a "threshold matter" for assessing the FTC's likelihood of success on the merits in a 13(b) proceeding. *Whole Foods*, 548 F.3d at1036-37. In light of the direct evidence of close competition

3. The Merger Would Result in High Market Shares and Market Concentration, Triggering a Strong Presumption of Illegality

Plaintiffs prove their *prima facie* case if they establish "that the merged entities will have a significant percentage of the relevant market—enabling them to raise prices above competitive levels." *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 52 (D.D.C. 1998). In *Philadelphia National Bank*, the Supreme Court concluded that a merger resulting in a single firm controlling at least 30% of the relevant market was sufficient to "raise an inference that the effect of the contemplated merger . . . may be substantially to lessen competition[.]" 374 U.S. at 364-65. Here, ANHP's post-merger share of the North Shore Area GAC Services market would be 60%.

Market Shares[56]
(January 2014 - June 2015)

Hospital	Total Admissions	Admission Share
Advocate (Lutheran & Condell)	[redacted]	28.9%
NorthShore (Evanston, Highland Park, Glenbrook, Skokie)	[redacted]	30.8%
Northwest Community	[redacted]	14.3%
Northwestern Lake Forest	[redacted]	5.8%
Presence Resurrection	[redacted]	6.0%
Swedish Covenant	[redacted]	7.7%
CHS Vista Medical Center East	[redacted]	6.4%
Total	104,600	100%
	HHI, Pre-merger	**2,161**
	HHI, Post-merger	**3,943**
	HHI, Change	**1,782**

between the merging parties leading to cost and quality benefits for North Shore Area patients that will be lost if the acquisition is consummated, the FTC is likely to succeed on the merits of its Section 7 claim, regardless of the precise contours of the market at this preliminary stage.

[56] *See* PX06000 Dr. Tenn Report at Table 6.

ANHP's post-merger market share far exceeds the threshold found to be presumptively unlawful in *Philadelphia National Bank* and also exceeds the market shares in other hospital merger cases in which the FTC has established a *prima facie* case. *See, e.g.*, *Univ. Health*, 938 F.2d at 1219 (concluding that the FTC "clearly established a prima facie case" where the merged entity would control approximately 43% of the GAC market); *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1078 (explaining that the court "ha[d] no trouble finding" that the proposed merger was presumptively anticompetitive where merged entity would control 59.4% of the GAC market based on patient admissions); *ProMedica*, 2011 WL 1219281, at *12 (N.D. Ohio Mar. 29, 2011) (finding, "[b]y a wide margin," that the proposed acquisition was "presumptively anticompetitive" where the merged entity would control 58.3% of the GAC Services market).

Market concentration measures also far exceed the thresholds necessary to establish that the merger is presumptively unlawful. Market concentration is measured using the Herfindahl-Hirschman Index ("HHI"). *See, e.g.*, *Univ. Health*, 938 F.2d at 1211 n.12 (HHI is "most prominent method" of measuring market concentration); *FTC v. PPG Indus., Inc.,* 798 F.2d 1500, 1503 (D.C. Cir. 1986); *Cardinal Health*, 12 F. Supp. 2d at 53-54; *Staples*, 970 F. Supp. at 1081-82 & n.12. The HHI level is calculated by summing the squares of the market shares of all firms in the market. A transaction that increases concentration by 200 points or more and results in a highly concentrated market with an HHI of 2,500 or more is presumed likely to enhance market power. Merger Guidelines § 5.3; *see also Sysco Corp.*, 113 F. Supp. 3d at 112.

This merger would increase market concentration significantly, resulting in a post-merger HHI over 3,900 points—an increase of over 1,750 points. According to this Court's precedent, as well as that of other courts, a preliminary injunction is warranted when market share and concentration figures rise to such heights, as the chart below depicts.

Case	Combined Share	Pre-Merger HHI	HHI Increase	Post-Merger HHI	Holding
Rockford Mem'l (N.D. Ill. 1989)	68%	2,789	2,322	5,111	Enjoined
OSF Healthcare Sys. (N.D. Ill. 2012)	59%	3,413	1,764	5,177	Enjoined
Promedica (N.D. Ohio 2011)	58%	3,313	1,078	4,391	Enjoined
Univ Health Inc. (11th Cir. 1991)	43%	2,570	630	3,200	Enjoined
Phila. Nat'l Bank (Supreme Court 1963)	30%	N/A	N/A	N/A	Enjoined
NorthShore/Advocate (GAC Services)	**60%**	**2,161**	**1,782**	**3,943**	**TBD**

B. Competitive Effects Evidence Bolsters the Strong Presumption of Harm and Illegality

Plaintiffs would likely succeed on the merits based on the market shares and concentration levels alone. A wealth of additional, direct evidence also confirms and strengthens the presumption that the proposed merger violates Section 7 and would significantly harm local employers and residents. In light of this evidence, there can be no doubt that Plaintiffs will prevail at the administrative trial.

1. The Merger Will Eliminate Close Competition Between Advocate and NorthShore

The proposed merger would eliminate the vigorous price and quality competition between Advocate and NorthShore that exists today. "The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition" leading to unilateral anticompetitive effects. Merger Guidelines § 6 at 20. "A merger is likely to have unilateral anticompetitive effect if the acquiring firm will have the incentive to raise prices or reduce quality after the acquisition, independent of competitive responses from other firms." *H&R Block*, 833 F. Supp. 2d at 81. "The extent of direct

competition between … the merging parties is central to the evaluation of unilateral effects." *ProMedica Health Sys. v. FTC*, 749 F.3d at 569 (quoting Merger Guidelines § 6.1).[57]

Defendants here regard each other as key competitors—if not closest competitors. Defendants' own documents confirm that they are the two largest providers of GAC Services in the relevant geographic area with a combined market share that dwarfs the next largest competitor.[58] Condell's Vice President of Business Development and Clinical Institutes, an executive who routinely receives and analyzes market share data, [REDACTED] [59] Additionally, [REDACTED].[60]

Within NorthShore's core service area, [REDACTED] [61] In January of 2013, a NorthShore executive observed that [REDACTED]"[62] And NorthShore identifies [REDACTED]"[63]

[REDACTED] NorthShore closely monitors Advocate's competitive activity. For example, in February 2013, NorthShore [REDACTED]

---

[57] The merging parties need not be each other's closest competitor for their merger to lead to unilateral anticompetitive effects. *See, e.g., H&R Block*, 833 F. Supp. 2d at 83 (finding that a merger between H&R Block and TaxACT would likely lead to unilateral effects where Intuit was each company's closest competitor).

[58] *See, e.g.,* PX04217-025, -040 [REDACTED]; PX04182-002 [REDACTED]; PX04032-042, -051, -060, -069 [REDACTED] PX02015 [REDACTED].

[60] *Id.* [REDACTED].

[61] PX05005-28.

[62] PX05106.

[63] PX05126-003.

.[64] In the ordinary course of business, NorthShore analyzes the [65]

Similarly, Advocate views NorthShore as its top competitor in the northern Chicago suburbs where .[66] Advocate's internal assessment of NorthShore's hospitals [67] Advocate routinely compares the performance of [68] And Advocate evaluates its brand equity by comparing

[64] PX05087; *see also* PX07019-00 ; PX07020.
[65] PX05025-005, 020.
[66] PX04044-004.
[67] PX04032-041,-050,-059,-068.
[68] *See, e.g.*, PX04041-011, 015; PX04113.

.[69] Advocate identifies

.[70]

Advocate also strategically monitors and responds to the competitive threat NorthShore poses. For example, Advocate recently

[71] Advocate executives described plans to

.[72]

Payers and employers also view Defendants as close competitors. As

."[73] Likewise,

[74] Employers also

---

[69] *See, e.g.*, PX04119; PX04242; PX04100.
[70] PX04244-022.
[71] PX04058-030
[72] PX04061.
[73] PX03002 ; *see also* PX03004 .
[74] PX03000 .

."[75]

2. The Proposed Merger Would Lead to Higher Health Care Costs and Diminished Quality and Services

MCOs and employers benefit from the direct competition between Advocate and NorthShore. Defendants compete for inclusion in the health plan networks that MCOs market to employers and individuals. The rates and terms of the contracts negotiated between hospitals and MCOs are a function of each party's bargaining leverage in negotiations.[76] Following the merger, the combined entity would gain substantial bargaining leverage because MCOs would no longer have the option of contracting with NorthShore if they fail to reach an agreement with Advocate or vice versa.

---

[75] PX03018 ; *see also* PX03010 ; PX03012 .

[76] *See* PX06000 Tenn Rep. ¶ 36.

[77] A "narrow network" is an insurance product that gives the consumer a limited set of choices for the providers from which he or she might be able to receive care at in-network rates. By definition, a narrow network does not include every provider in a geographic area. Some narrow networks may have only one or several providers while others may include most of the providers in a given area. Providers may accept lower rates to participate in narrow networks because they anticipate that the exclusion of competitors from the network will drive additional patient volume. *See* PX06001 Dr. Jha Report ¶ 52; PX03002 .

[78] PX03002 .

[80]

Business documents likewise indicate

"[81] And NorthShore previously indicated that

[82]

If the proposed merger is consummated, commercial payers will thus lose an important source of bargaining leverage and the lower reimbursement rates it has historically allowed them to secure.[83] Payers are concerned about losing this leverage and worry they would face rate increases if the merger is completed.[84] Payers also anticipate that they will be forced to pass on such rate increases to their health plan members—area employers and residents—in the form of higher premiums, co-pays, and deductibles.[85] Self-insured employers, who pay hospital claims from their own funds, would be directly and immediately impacted by any rate increases.[86]

---

[79] PX05131-001 ; PX03002 .
[80] PX03002 .
[81] PX05116-007.
[82] PX05067-001.
[83] *See* PX03000 .
[84] *See, e.g.,* PX03000 ; PX03002 ; PX03004 .
See, e.g., PX03000 ; PX03002 ; PX03004 .
[86] PX03001 ; *see also* PX03000 ; PX03010 ; PX03014

Dr. Tenn's analysis confirms that a significant number of patients view the merging parties as their first and second choices, and the next best alternative for this group is significantly inferior.[87] Dr. Tenn estimates that, post-merger, prices at Defendants' six North Shore Area hospitals will rise by an average of 8%,[88] resulting in payers, local employers, and individual healthcare consumers paying approximately $45 million more each year for inpatient GAC services at Defendants' hospitals.[89]

[92]

PX03002 ; PX03004 ; PX03003 ; PX03012 .
PX06000 Dr. Tenn Report ¶¶ 133-37, 144-151.
[88] *Id.* ¶ 184.
[89] *Id.*
[90] PX03012 .
[91] *Id.* ¶ 10.
[92] *Id.* ¶ 9.

The merger will also end the intense non-price competition between NorthShore and Advocate that benefits all North Shore Area patients, including patients covered by Medicare and Medicaid.[93] NorthShore competes with other hospitals

[94]

Advocate's executives admit that hospital competition

"[95] As competitors today, NorthShore and Advocate each track the other's health outcomes, patient and physician satisfaction, and community reputation.[96]

Competition between NorthShore and Advocate spurs each to invest in facilities that benefit patients. For example, NorthShore decided to open six new integrated delivery rooms at Highland Park

[93] Because competition between the parties is not limited to the pricing of GAC Services, Defendants' recently proposed remedy is insufficient to maintain competition. *See* PX04243. Under that proposal, ANHP would agree to limit annual payment rate increases for GAC Services that are reimbursed on a fee for service basis. It in no way addresses the substantial lessening of competition to provide better services and achieve better outcomes.

The proposed limitations also would not apply to any other service other than GAC Service or to any risk-based contract with downside risk. For example, ANHP could use its market power to obtain higher per member rates in risk-based contracts.

Moreover, conduct remedies of the kind proposed by Defendants are strongly disfavored. Among other reasons, there are substantial long-term costs associated with monitoring the efficacy of a conduct remedy. *See ProMedica Health Sys. v. FTC*, 749 F.3d at 573. And "conduct remedies risk excessive government entanglement in the market." *St. Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys.*, 778 F.3d 775, 793 (9th Cir. 2015).

[94] PX02007 ; *see also* PX02017 ; PX03000 .

PX02015 .

[96] PX04041 -011, -015 ; PX04113 -009-011, 021-023 ; PX04088-002-4

[97] And Advocate decided to construct a new immediate care center in Glenview, ."[98]

Defendants' internal business analyses demonstrate that competition between the two systems has also spurred NorthShore towards greater pursuit of risk-based contracting and population health management initiatives.[99] NorthShore's strategic consultants identify [100]

Since 2013, when NorthShore created its "Care Transformation Team," it has invested meaningful time and resources to pursue greater value-based care capabilities.[101] Thus, contrary to Defendants' argument that a merger would facilitate NorthShore's development of value-based care, a merger would instead eliminate NorthShore's incentive to innovate to develop value-based care programs superior to Advocate's.[102]

C. Defendants Cannot Rebut the Strong Presumption of Illegality

With the presumption of illegality established, the burden shifts to Defendants to rebut the presumption by "produc[ing] evidence that 'show[s] that the market-share statistics [give] an

---

[97] PX02012 .
[98] PX04061-001.
[99] PX05031-004; *see also* PX05071-001-002; PX05025-004. *See infra.* at nn. 113, 114 (defining "risk-based contracting" and "population health management").
[100] PX05098-003-4; *see also* PX05098-002 ; PX05005-005 *See e.g.*, PX05013-003 ; PX05105-007 .
[102] *See* infra Section II.C.4.

inaccurate account of the [merger's] probable effects on competition in the relevant market.'" *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)

(1975)). Defendants must produce evidence that "clearly shows" that no anticompetitive effects are likely in order to overcome the Commission's *prima facie* case. *Phila. Nat'l Bank*, 374 U.S. at 363; *Univ. Health*, 938 F.2d at 1218; *ProMedica*, 2011 WL 1219281, at *56; *Elders Grain*, 868 F.2d at 906. "[T]he more compelling the *prima facie* case, the more evidence the defendant must present to rebut it successfully." *Heinz*, 246 F.3d at 725 (citation and internal quotation marks omitted); *see also OSF Healthcare Sys.*, 852 F. Supp. 2d at 1078. Defendants cannot meet this heavy burden.

1. Entry Will Not Be Timely, Likely, or Sufficient to Rescue this Anticompetitive Merger

The entry of a new competitor, or the substantial expansion of an existing hospital, in the North Shore Area is extraordinarily unlikely and would not be timely or sufficient to offset the serious consumer harm threatened by the proposed merger. *See* Merger Guidelines §§ 9.1-9.3. The Illinois Certificate of Need ("CON") law provides a "formidable barrier" to firms wishing to enter the GAC Services market. *Rockford Mem'l Corp.*, 717 F. Supp 1251, 1281 (N.D. Ill 1989); *see also Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1387-89 (7th Cir. 1986) (discussing entry barrier posed by Tennessee's CON law); *see also Univ. Health*, 938 F.2d at 1219 (discussing barrier posed by Georgia's CON law). Before a provider adds inpatient beds, it must obtain a CON from the Illinois Health Facility Planning Board (the "Board"). CONs are frequently denied in markets, like the North Shore Area, with excess capacity. For example, when Vista East sought a CON to add beds in Lindenhurst, its application was opposed by incumbent

hospitals, including Advocate.[103] The Board's process is deferential to incumbents and the Board denied Vista East's application.[104] As Advocate's CEO, Jim Skogsbergh, testified, the chances of obtaining a CON to add new beds in the North Shore Area are [105]

Furthermore, in the unlikely event an applicant receives CON approval, it would take significant time and resources to undergo the CON process[106] and construct a new hospital.[107] Advocate's CEO testified that [108] It is highly doubtful this would occur rapidly enough to counteract the anticompetitive effects of the proposed merger.[109] Not surprisingly, many Chicago area providers have testified that they have no current plans to build a new hospital, significantly expand existing hospitals, or increase bed counts.[110]

2. Defendants' Purported Efficiencies Are Not Cognizable, and Do Not Outweigh the Competitive Harm

Defendants' argument that the proposed merger will somehow benefit healthcare consumers cannot save this presumptively unlawful transaction. It is incumbent upon the court to "undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order

---

[103] PX02015 .

[104] *See, e.g.*, PX02019 ; PX02015 .

[105] PX02019 ; *see* also PX03009 .

[106] *See, e.g.*, PX03008 ; PX02003 .

[107] *See, e.g.*, PX03008 .

[108] PX02019 .

[109] *See, e.g.*, PX03000

[110] *See, e.g.*, PX03007 ; PX03015 ; PX03008 ; PX03009 .

to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior." *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1088-89 (quoting *H&R Block*, 833 F. Supp. 2d at 89); *see also Univ. Health*, 938 F.2d at 1223 (explaining that "a defendant [cannot] overcome a presumption of illegality based solely on speculative, self-serving assertions"). Specifically, "the court must determine whether the efficiencies are merger specific—meaning they represent a type of cost saving that could not be achieved without the merger—and verifiable—meaning the estimate of the predicted saving must be reasonably verifiable by an independent party." *Sysco,* 113 F. Supp. 3d at 82 (quoting *H&R Bloc*k, 833 F. Supp. 2d at 89) (internal quotation marks omitted); *see also Cardinal Health*, 12 F. Supp. 2d at 62 ("In light of the anti-competitive concerns that mergers raise, efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger.").

In no case have "merging parties [] successfully rebutted the government's *prima facie* case on the strength of the efficiencies." *Sysco*, 113 F. Supp. 3d at 82 (*citing FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 72 (D.D.C. 2009)); *see also ProMedica*, 2011 WL 1219281, at *57 ("No court in a 13(b) proceeding, or otherwise, has found efficiencies sufficient to rescue an otherwise illegal merger."). Moreover, "[w]here, as in this case, the court finds high market concentration levels, defendants must present proof of extraordinary efficiencies to rebut the government's *prima facie* case." *Sysco*, 113 F. Supp. 3d at 81 (internal quotation and citations omitted); *see also Heinz*, 246 F.3d at 720 (requiring "extraordinary" efficiencies to rebut an HHI increase of 510 points).

Defendants claim as their primary efficiency that their merger will facilitate the ability of MCOs to offer a narrow network insurance product that Defendants refer to as a "high

performing network" or "HPN."[111] Under the HPN, the merged entity would be the sole in-network provider and would accept capitated rates (i.e. per member reimbursement rates) which, Defendants contend, will be lower than the rates Defendants receive in broader networks.[112] According to Defendants, the payment structure will incentivize ANHP to use population health management initiatives to reduce healthcare utilization and therefore lower costs, enabling ANHP to offer its services at a lower price. This lower price will, in turn, allow MCOs to offer the HPN at lower premiums. As Defendants see it, other hospitals will also reduce their costs to compete against the HPN and this competition will be sufficient to offset the anticompetitive effects of the merger. According to Defendants, NorthShore cannot participate in the HPN with Advocate without the merger because NorthShore's costs are too high and NorthShore lacks necessary expertise in population health management ("PHM")[113] and risk-based contracting

[111] "High performing network" is Defendants' marketing term. *See* PX06001 Dr. Jha Report ¶ 53.
[112] PX04243-001.
[113] "Population health management" is "a very broad term that deals with taking care of an entire group or population of individuals both for their immediate healthcare current needs as well as trying to keep them healthy in all aspects of their overall needs." PX02017 [REDACTED]; *see also* PX06001 Dr. Jha Report ¶¶ 12, 28-36; *see also id.* ¶ 10 ("PHM refers to a broad array of activities that aim to improve the health of a population of patients").

"RBC").[114] Defendants' arguments are built upon a series of unsubstantiated and unverifiable assertions and do not withstand scrutiny.[115]

First, it is demonstrably untrue that a merger is necessary for Defendants to participate jointly in a low-priced, narrow network insurance product. Advocate already participates in low-priced narrow network insurance products both on its own and with NorthShore. BlueCare Direct with Advocate is offered by BCBS-IL and includes only Advocate physicians in its network.[116]

---

[114] "RBC" refers to "arrangements between payers and providers where providers agree to shoulder at least some of the risk of healthcare spending." So-called "risk-based" or "value-based" contracts take a variety of forms including shared savings arrangements, where an MCO and a provider agree to split any savings derived from keeping costs below an agreed per-member target, and full capitation, where a provider is reimbursed on a per member per year basis. PX06001 Dr. Jha Report ¶ 24, Figure 1. An increase in a provider's bargaining leverage will increase the payments it receives under both risk-based and traditional fee for service contracts. *See* PX03000 ; PX03004 .

[115] Defendants also claim some cost savings from the merger, including in the areas of labor productivity, facilities management, supply chain, administrative functions, and insurance. Defendants have not conducted any detailed analyses of these purported cost savings, which are unsubstantiated and unverifiable. *See* PX06002 Dagen Report.

[116] PX03000 ; PX06001 Dr. Jha Report ¶¶ 13, 54. Because Advocate's contracted physicians will only refer to Advocate hospitals, the network effectively makes Advocate hospitals the primary hospitals for the product. *See* PX06001 Dr. Jha Report ¶ 13.

[117] PX03000 .

[118] *See* PX02032 .

[119] PX03000 .

.[120] Many other affordable plans currently marketed in Illinois feature networks of non-merged entities.[121]

Second, Defendants cannot substantiate any specific cost reduction necessary for NorthShore's participation in a low priced HPN with Advocate. Even if NorthShore needed to lower its costs to participate in the insurance product, Defendants cannot establish that the merger is necessary to obtain those cost savings. NorthShore has amply demonstrated its ability to reduce its costs independently. [122] [123]

Third, Defendants cannot substantiate their assertion that NorthShore lacks some requisite expertise in PHM or RBC that can only be gained through a merger with Advocate. NorthShore already engages in PHM initiatives and in RBC.[124] And NorthShore .[125] MCOs confirm that NorthShore is fully capable of taking on risk independently and are willing to enter risk-based agreements with NorthShore even if the merger is enjoined.[126] This is because

---

[120] PX03014 .

[121] PX06001 Dr. Jha Report ¶ 58.

[122] *See* PX02014 .

[123] PX02017 ; PX02014 .

[124] *See* PX06001 Dr. Jha Report ¶¶ 65-73, 96-103; *see also* PX PX02018 ; PX05071; PX5196-006.

See PX05225-018 ; PX02017 .

PX03004 PX03002

[127]

Finally, Defendants cannot demonstrate that the proposed HPN would be successful. Only if a significant number of employers and individuals choose this product will it have any benefit at all (much less one that would counter the anticompetitive effects of this transaction). Only a small fraction of healthcare consumers are likely choose the HPN.[128] The majority of healthcare consumers – and even the majority of Defendants' own patients – are unlikely to join the HPN. There is also no guarantee that any MCO will offer the HPN in the future or, if one does, that the product will be offered at a low price point.[129] The purported benefits of the HPN are not merger specific and are far too speculative and unsubstantiated to be cognizable, much less to overcome the strong presumption of illegality.

II. The Equities Heavily Favor a Preliminary Injunction

"No court has denied relief to the FTC in a [Section] 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *ProMedica*, 2011 WL 1219281 at *60; *see also FTC v. PPG Industries*, 798 F.2d 1500, 1508 (D.D.C. 1986) (establishment of a likelihood of success "weighs heavily in favor of a preliminary injunction . . . .") (quoting *FTC v. Weyerhaeuser Co.*, 665 F.2d at 1085). The strong interests weighing in favor of injunctive relief

---

PX05198 at -001 PX05200-001 ; *see also* PX07013-001 ; PX07014 PX03000 .

[128] *See* Dr. Jha Report ¶ 59.

[129] *See, e.g.*, PX02032

include "(i) the public interest in effectively enforcing antitrust laws and (ii) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial." *Sysco,* 113 F. Supp. 3d at 86; *see also Heinz*, 246 F.3d at 726; *Swedish Match*, 131 F. Supp. 2d at 173 ("There is a strong public interest in effective enforcement of the antitrust laws . . . ."). By contrast, private equities "are not proper considerations for granting or withholding injunctive relief under Section 13(b)." *ProMedica*, 2011 WL 1219281 at *60 (citing *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1346 (4th Cir. 1976)); *see also Elders Grain*, 868 F.2d at 903.

Preliminary relief is necessary here because the alternative—allowing the merger to close before the merits proceeding is completed—would irreparably harm the public interest. When the FTC demonstrates that it is likely to succeed on the merits, a "great weight" is assigned to the "potential injury to the public" from lost competition. *FTC v. Rhinechem Corp.*, 459 F. Supp. 785 (N.D. Ill. 1978). Absent a preliminary injunction, Advocate would be free to "scramble the eggs" by immediately consolidating service lines, laying off hospital staff, and renegotiating contracts with area payers, among other operational integration activities. The Commission's ability to fully unwind the transaction and restore the lost competition—if warranted—would be severely frustrated, if not lost altogether. The harm that customers would suffer in the interim would be irreversible.

CONCLUSION

For the reasons described above, the Commission respectfully requests that the Court grant a preliminary injunction to protect consumers from harm during the pendency of the merits trial and to preserve the Commission's ability to order effective relief if the merger is ultimately found unlawful.

Dated: February 26, 2016

Respectfully Submitted,

/s/ J. Thomas Greene
J. THOMAS GREENE, ESQ.
KEVIN HAHM, ESQ.
SEAN P. PUGH, ESQ.
JENNIFER MILICI, ESQ.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3201
Facsimile: (202) 326-2286
Email: tgreene2@ftc.gov
Email: khahm@ftc.gov
Email: spugh@ftc.gov
Email: jmilici@ftc.gov

Counsel for Plaintiff Federal Trade Commission

/s/ Robert W. Pratt
ROBERT W. PRATT, ESQ.
BLAKE HARROP, ESQ.
Office of the Attorney General
State of Illinois
100 West Randolph Street
Chicago, Illinois 60601
Telephone: (312) 814-3000
Facsimile: (312) 814-4209
Email: rpratt@atg.state.il.us
Email: bharrop@atg.state.il.us

Counsel for Plaintiff State of Illinois

ATTACHMENT A

HOSPITALS IN THE NORTH SHORE AREA