Closing Statement
Proposed Merger of
Advocate and NorthShore

Federal Trade Commission & State of Illinois v.
Advocate Health Care Network, Advocate Health and Hospitals Corporation, and NorthShore University HealthSystem

May 25, 2016

Plaintiffs Are Likely to Succeed on the Merits

Plaintiffs Met Their Burden

- Inpatient GAC services sold and provided to commercial payers and their members is a distinct product market
- The North Shore Area is a relevant geographic market
- Market shares (60%) and high concentration create a strong presumption of illegality

Plaintiffs Bolstered the Presumption of Anticompetitive Effects

- Effects analysis confirms that this merger would eliminate competition between close competitors and lead to price increases

Defendants Failed to Meet Their Burden

- Entry not timely, likely, or sufficient
- Claimed efficiencies are not merger-specific and not verifiable by any credible evidence

Defendants' Case Suffers from Fatal Contradictions

Advocate	vs.	Competitors
• Advocate suggests it must have local facilities to support the HPN in the North Shore "gap"		• But Advocate claims competitors can constrain the merged entity from anywhere in Chicago
• Advocate suggests it cannot build clinics or doctors' offices to support HPN in the "gap"		• But Advocate claims competitors can build clinics in the "gap"

Governing Law

High market shares and concentration levels in the relevant market create a strong presumption of illegality and likelihood of success on the merits

Governing Law

- **Section 7** of the Clayton Act is the governing law
- U.S. Supreme Court established presumption in *Philadelphia Nat'l Bank*
- Presumption of illegality based on a "significant increase in the concentration of firms"

United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963); *see also United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990) (Posner, J.).

Plaintiffs Met Their Burden

Inpatient GAC services sold and provided to commercial payers and their members are a distinct product market

Well-Recognized Product Market: General Acute Care Inpatient Services

- No serious dispute on relevant product market

- Experts agree
  - McCarthy PI Hrg. Tr. at 1270:1-6; Tenn PI Hrg. Tr. at 441-442.

- Precedent
  - *United States v. Rockford Mem'l Corp*., 898 F.2d 1278 (7th Cir. 1990).
  - *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).
  - *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012).

Plaintiffs Met Their Burden

The North Shore Area is a relevant geographic market

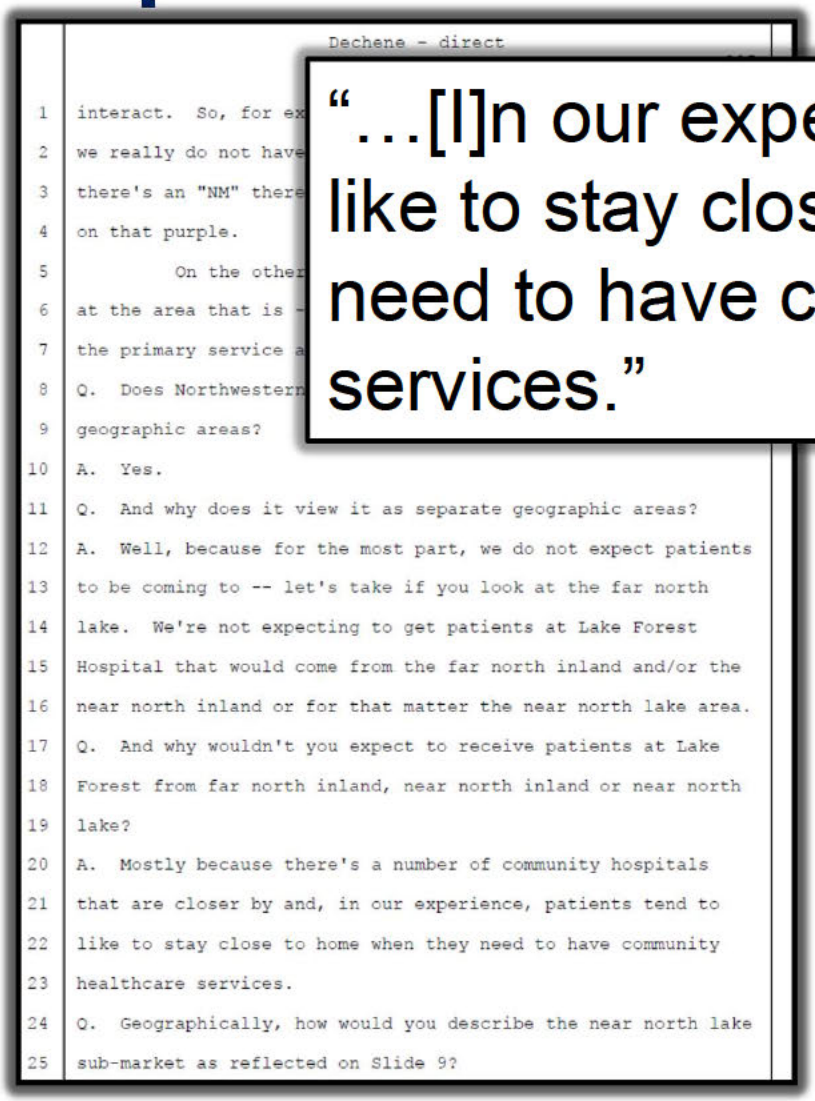
Relevant Geographic Market

- Geographic market definition identifies "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate."
  - *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 357 (1963)
- "[N]eed not be identified with 'scientific precision,'" but 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)
- "[C]orrespond to the commercial realities of the industry" as determined by a "pragmatic, factual approach" to assessing the industry.
  - *Brown Shoe Co. v. United States,* 370 U.S. 294, 336 (1962)

Plaintiffs' Approach is Consistent With:

- Practical preferences of patients
  - Want to receive inpatient care locally
- Commercial realities faced by payers
  - Must offer access to local hospitals to attract enrollees
- Case law
- The Merger Guidelines
- Modern economics

Patients Strongly Prefer Inpatient Care at Local Hospitals



Dechene - direct

interact. So, for ex
we really do not have
there's an "NM" there
on that purple.
On the other
at the area that is -
the primary service a
Q. Does Northwestern
geographic areas?
A. Yes.
Q. And why does it view it as separate geographic areas?
A. Well, because for the most part, we do not expect patients to be coming to -- let's take if you look at the far north lake. We're not expecting to get patients at Lake Forest Hospital that would come from the far north inland and/or the near north inland or for that matter the near north lake area.
Q. And why wouldn't you expect to receive patients at Lake Forest from far north inland, near north inland or near north lake?
A. Mostly because there's a number of community hospitals that are closer by and, in our experience, patients tend to like to stay close to home when they need to have community healthcare services.
Q. Geographically, how would you describe the near north lake sub-market as reflected on Slide 9?

"…[I]n our experience, patients tend to like to stay close to home when they need to have community healthcare services."

Dechene (Northwestern) PI Hrg. Tr. at 305.

Employees strongly prefer to receive inpatient care locally.

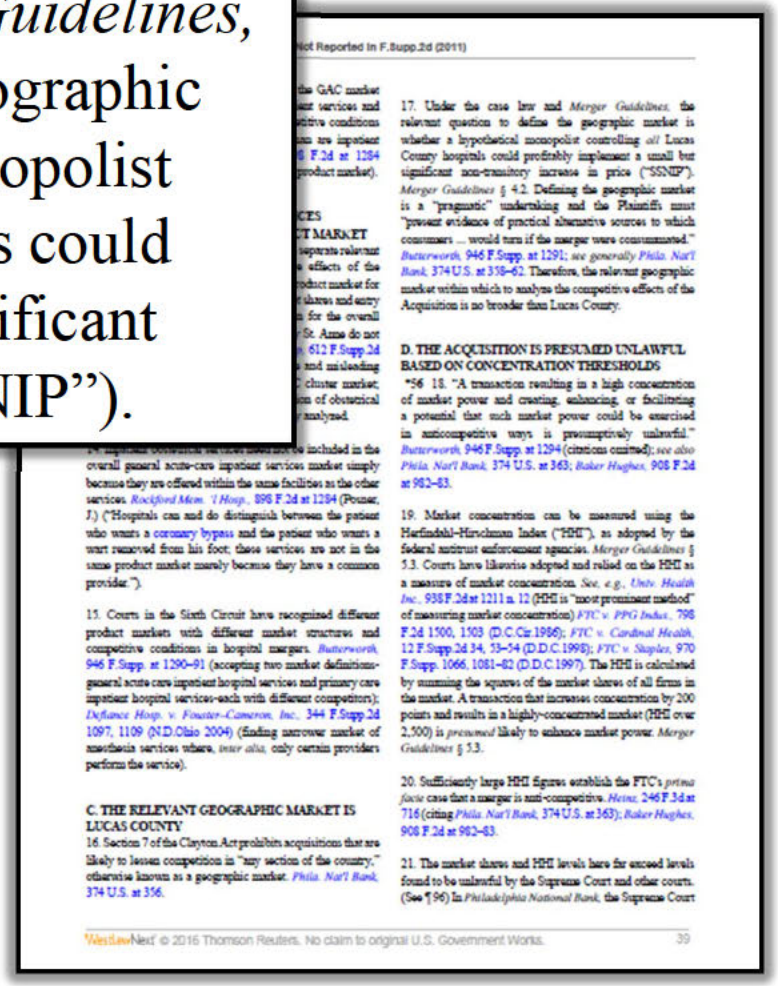
- JX00016 Hodge (Albertsons) Dep. Tr. at 134-137.
- JX00026 Stanton (Astellas) Dep Tr. at 225-227.
- JX00001 Abrams (Medline) Dep. Tr. at 58.

"Commercial Reality": Payers Must Offer Local Hospitals to Meet Patients' Needs

- "Typically people get most routine care close to where they live. So the ability for them or requirement of them to travel downtown would not be an attractive option for them."
  - Hamman (HCSC) PI Hrg. Tr. at 158.
- Payers could not market a health plan with only downtown hospitals, like Northwestern Memorial, to employers and individuals in the northern suburbs.
  - Norton (Cigna) PI Hrg. Tr. at 84.

Hypothetical Monopolist Test

17. Under the case law and *Merger Guidelines*, the relevant question to define the geographic market is whether a hypothetical monopolist controlling *all* Lucas County hospitals could profitably implement a small but significant non-transitory increase in price ("SSNIP").



Not Reported in F.Supp.2d (2011)

17. Under the case law and *Merger Guidelines*, the relevant question to define the geographic market is whether a hypothetical monopolist controlling *all* Lucas County hospitals could profitably implement a small but significant non-transitory increase in price ("SSNIP"). *Merger Guidelines* § 4.2. Defining the geographic market is a "pragmatic" undertaking and the Plaintiffs must "present evidence of practical alternative sources to which consumers ... would turn if the merger were consummated." *Butterworth*, 946 F.Supp. at 1291; *see generally Phila. Nat'l Bank*, 374 U.S. at 358–62. Therefore, the relevant geographic market within which to analyze the competitive effects of the Acquisition is no broader than Lucas County.

D. THE ACQUISITION IS PRESUMED UNLAWFUL BASED ON CONCENTRATION THRESHOLDS

*56 18. "A transaction resulting in a high concentration of market power and creating, enhancing, or facilitating a potential that such market power could be exercised in anticompetitive ways is presumptively unlawful." *Butterworth*, 946 F.Supp. at 1294 (citations omitted); *see also Phila. Nat'l Bank*, 374 U.S. at 363; *Baker Hughes*, 908 F.2d at 982–83.

19. Market concentration can be measured using the Herfindahl-Hirschman Index ("HHI"), as adopted by the federal antitrust enforcement agencies. *Merger Guidelines* § 5.3. Courts have likewise adopted and relied on the HHI as a measure of market concentration. *See, e.g., Univ. Health Inc.*, 938 F.2d at 1211 n. 12 (HHI is "most prominent method" of measuring market concentration) *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C.Cir.1986); *FTC v. Cardinal Health*, 12 F.Supp.2d 34, 53–54 (D.D.C.1998); *FTC v. Staples*, 970 F.Supp. 1066, 1081–82 (D.D.C.1997). The HHI is calculated by summing the squares of the market shares of all firms in the market. A transaction that increases concentration by 200 points and results in a highly-concentrated market (HHI over 2,500) is *presumed* likely to enhance market power. *Merger Guidelines* § 5.3.

20. Sufficiently large HHI figures establish the FTC's *prima facie* case that a merger is anti-competitive. *Heinz*, 246 F.3d at 716 (citing *Phila. Nat'l Bank*, 374 U.S. at 363); *Baker Hughes*, 908 F.2d at 982–83.

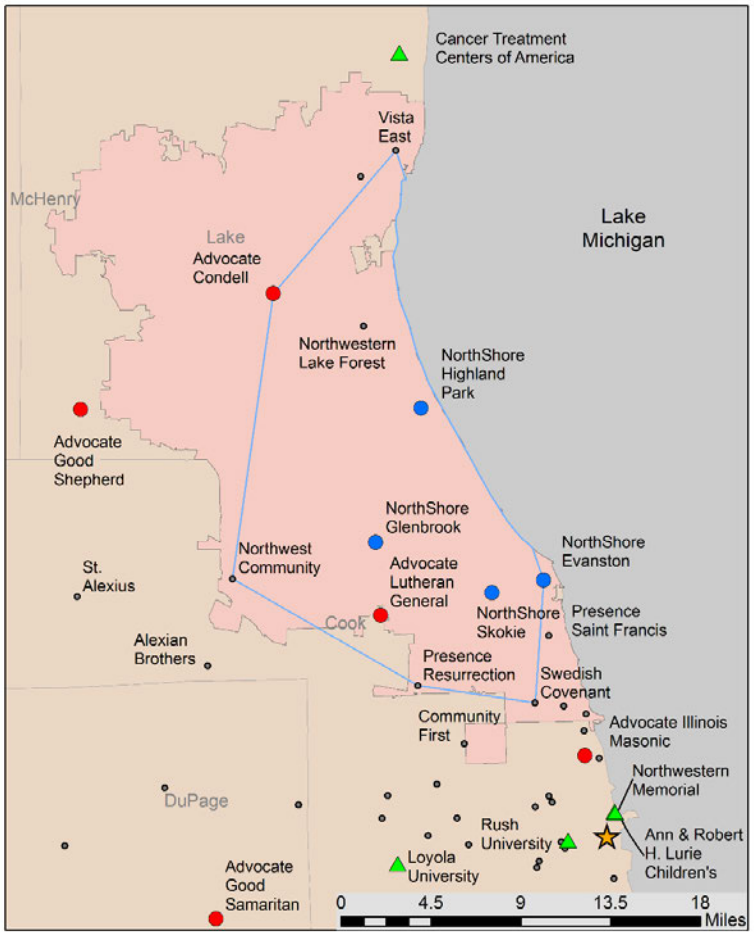
21. The market shares and HHI levels here far exceed levels found to be unlawful by the Supreme Court and other courts. (See ¶ 96) In *Philadelphia National Bank*, the Supreme Court

C. THE RELEVANT GEOGRAPHIC MARKET IS LUCAS COUNTY

16. Section 7 of the Clayton Act prohibits acquisitions that are likely to lessen competition in "any section of the country," otherwise known as a geographic market. *Phila. Nat'l Bank*, 374 U.S. at 356.

FTC v. ProMedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281, at *55 (N.D. Ohio Mar. 29, 2011).

The 11 North Shore Area Hospitals Constitute a Relevant Geographic Market



Advocate Hospital | Destination Hospital | NorthShore's Service Area | Downtown Chicago

NorthShore Hospital | Other Hospital | North Shore Area

Sources: PX05095, AHA Hospital Data

- Dr. Tenn concludes that a hypothetical monopolist of the 11 North Shore Area hospitals could raise rates by more than 5%

Dr. Tenn's Analysis is Sound and Conservative

Dr. Tenn's analysis is conservative:

- Six party hospitals also pass the SSNIP test

It accounts for commercial realities:

- North Shore Area includes five other local hospitals

It is confirmed by robustness checks

Defendants' Criticisms of the North Shore Area Fail

- Defendants try to attack Plaintiffs' geographic market definition by:
  - Ignoring the role of payers in the SSNIP test
  - Creating confusion about the importance of diversion ratios to hospitals outside of the market
  - Using patient flow data inappropriately
- Each of Defendants' arguments fails

The SSNIP Test Focuses on Payers' Alternatives

- The test asks whether payers could "practicably turn" to hospitals other than those owned by the hypothetical monopolist to avoid a SSNIP

- By construction, the hypothetical monopolist test accounts for competition from every hospital

- Payers negotiate with hospitals and need networks that provide access to local hospitals
  - Hamman (HCSC) PI Hrg. Tr. at 157-158; Norton (Cigna) PI Hrg. Tr. at 84, 93; Nettesheim (Aetna) PI Hrg. Tr. at 1170; Beck (United) PI Hrg. Tr. at 1130-1131.

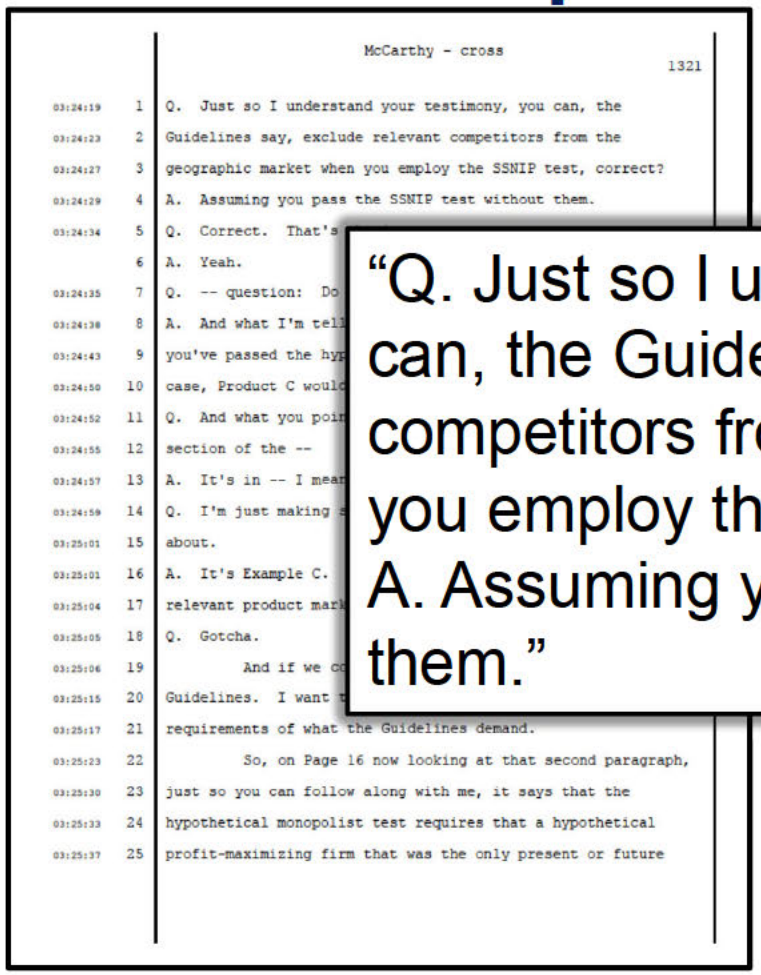
Diversion to Other Hospitals Does Not Undermine the SSNIP Test

- Dr. Tenn found that a hypothetical monopolist could impose a SSNIP even with substantial diversion to hospitals outside of the market
  - Tenn PI Hrg. Tr. at 485-486, 1646:2-7; Tenn Report ¶¶ 96-100.

- "Destination" and other non-local hospitals are not an option for payers constructing networks to sell in the northern suburbs
  - Hamman (HCSC) PI Hrg. Tr. at 157-158; Norton (Cigna) PI Hrg. Tr. at 84, 93; Beck (United) PI Hrg. Tr. at 1131; Tenn PI Hrg. Tr. at 609-610, 1637; Tenn Rebuttal Report ¶¶ 79-80.

- Payers would pay a SSNIP rather than try to market a network without the North Shore Area hospitals

Dr. McCarthy Agrees the SSNIP Test is the Right Approach and Not All Hospitals Are In



McCarthy - cross

1321

Q. Just so I understand your testimony, you can, the Guidelines say, exclude relevant competitors from the geographic market when you employ the SSNIP test, correct?

A. Assuming you pass the SSNIP test without them.

Q. Correct. That's

A. Yeah.

Q. -- question: Do

A. And what I'm tel

you've passed the hyp

case, Product C would

Q. And what you poi

section of the --

A. It's in -- I mean

Q. I'm just making

about.

A. It's Example C.

relevant product mark

Q. Gotcha.

And if we co

Guidelines. I want t

requirements of what the Guidelines demand.

So, on Page 16 now looking at that second paragraph, just so you can follow along with me, it says that the hypothetical monopolist test requires that a hypothetical profit-maximizing firm that was the only present or future

"Q. Just so I understand your testimony, you can, the Guidelines say, exclude relevant competitors from the geographic market when you employ the SSNIP test, correct?
A. Assuming you pass the SSNIP test without them."

McCarthy PI Hrg. Tr. at 1321.

Payers Confirm Northwestern Memorial Could Not Prevent a SSNIP

19 A. Just looking at utilization data and typical health care
20 consumption patterns.
21 Q. Could Blue Cross construct a network of only downtown
22 hospitals, let's say, academic medical centers, for members
23 that reside in that area?
24 A. No, we would not –
25 Q. And why is that?

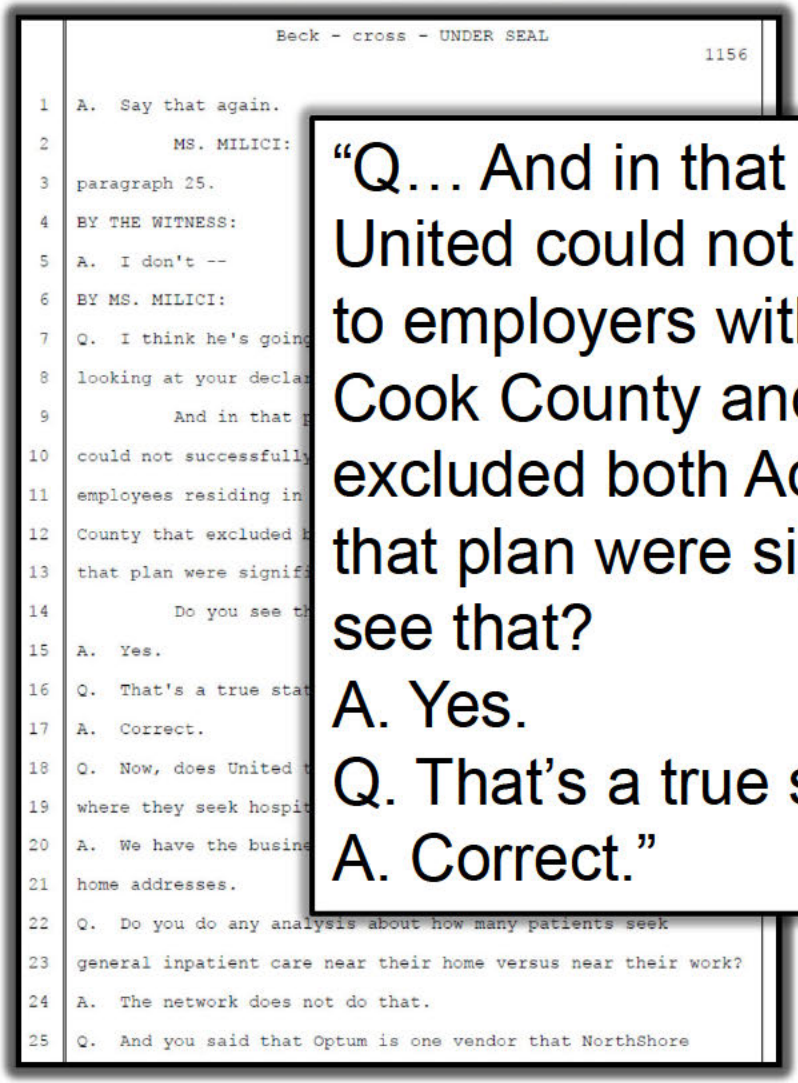
"Q. Could Blue Cross construct a network of only downtown hospitals, let's say, academic medical centers, for members that reside in that area? A. No, we would not . . . ."

Ham

1 A. Typically people get most routine care close to where they
2 live. So the ability for them or requirement of them to
3 travel downtown would not be an attractive option for them.
4 Q. Could you offer it to employers?
5 A. Likewise, we could offer it. It would not be popular.
6 They're looking for broader access than just one particular
7 small geography of hospitals.
8 Q. What about a network that included Northwestern Memorial,
9 which is downtown, as well as Northwestern Lake Forest, would
10 that be an attractive product?

Hamman (HCSC) PI Hrg. Tr. at 157-158.

Payers Confirm Northwestern Memorial Could Not Prevent a SSNIP



Beck - cross - UNDER SEAL
1156

A. Say that again.
MS. MILICI:
paragraph 25.
BY THE WITNESS:
A. I don't --
BY MS. MILICI:
Q. I think he's going
looking at your declar
And in that p
could not successfully
employees residing in
County that excluded h
that plan were signifi
Do you see th
A. Yes.
Q. That's a true stat
A. Correct.
Q. Now, does United t
where they seek hospit
A. We have the busine
home addresses.
Q. Do you do any analysis about how many patients seek
general inpatient care near their home versus near their work?
A. The network does not do that.
Q. And you said that Optum is one vendor that NorthShore

"Q… And in that paragraph, you say, I believe that United could not successfully market a health plan to employers with employees residing in northern Cook County and southern Lake County that excluded both Advocate and NorthShore, even if that plan were significantly less expensive. Do you see that?
A. Yes.
Q. That's a true statement, correct?
A. Correct."

Beck (United) PI Hrg. Tr. at 1156.

Everyone Agrees Patient Flow Analyses Are Inappropriate

- Dr. Elzinga himself discredited the Elzinga-Hogarty test. *In re Evanston Nw. Healthcare Corp.*, No. 9315, 2007 WL 2286195, at *64 (F.T.C. Aug. 6, 2007).

- Dr. McCarthy agrees Dr. Tenn's approach is "widely considered to be superior to previous approaches that relied on various measures of patient flows . . . ." McCarthy Report ¶ 40.

- Even counsel admits that "Defendants here do not assert that in-migration and out-migration statistics define the relevant market." Defendants' Post-Hearing Brief at 9 n.6.

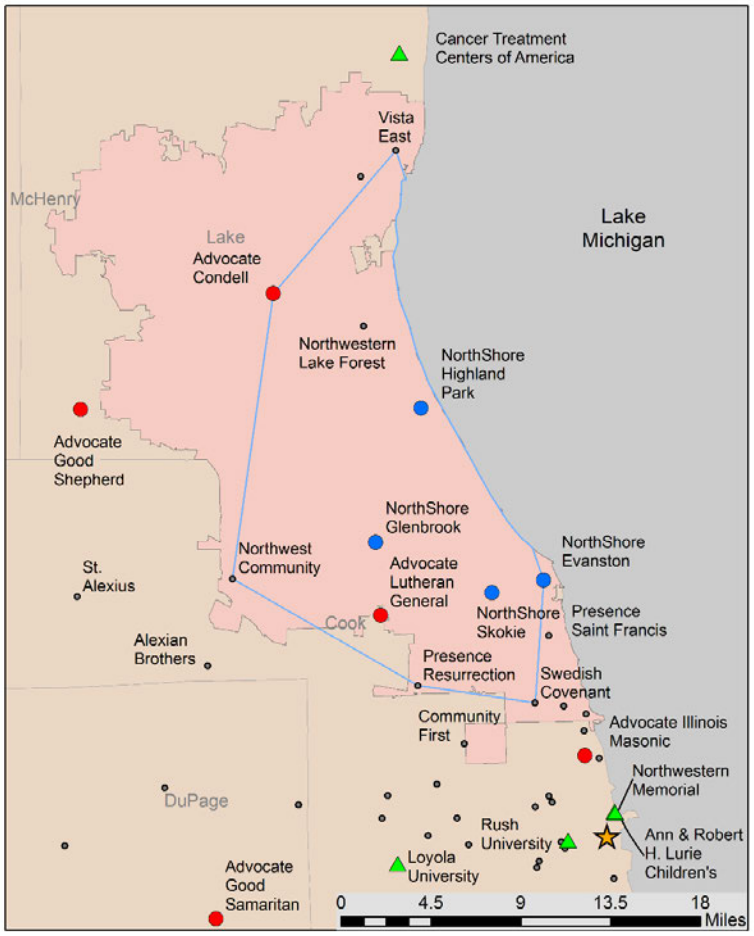
Penn State Is Not Binding or Persuasive

- Incorrectly stated "[t]he end goal . . . is to delineate a geographic area where, in the medical setting, 'few patients leave . . . and few patients enter.'"
  - *FTC, et al. v. Penn State Hershey Med. Ctr., et al.*, Civil Action No. 1:15-cv-2362, Mem. Op. & Order at 9 (M.D. Penn. May 9, 2016).

- Applied the wrong standard
  - Relied on discredited Elzinga-Hogarty test
  - Misapplied the hypothetical monopolist test by ignoring the role of payers
  - Ignored recent case law (*Evanston*, *ProMedica*, *OSF, St. Luke's*)

- Third Circuit has granted an injunction pending appeal

Defendants' Other Criticisms Are Easily Rebutted



Advocate Hospital · Destination Hospital · NorthShore's Service Area · Downtown Chicago
NorthShore Hospital · Other Hospital · North Shore Area

Sources: PX05095, AHA Hospital Data

- Hospital locations are what matter
- Lines only for exposition
- More hospitals than *OSF*, *ProMedica*, or *Evanston*
- Very large population lives near these 11 hospitals

Defendants' Approach is Flawed and Leads to Absurd Results

- Dr. McCarthy never performs a SSNIP test on any candidate market

- BUT somehow concludes 20 hospitals must be included in the geographic market

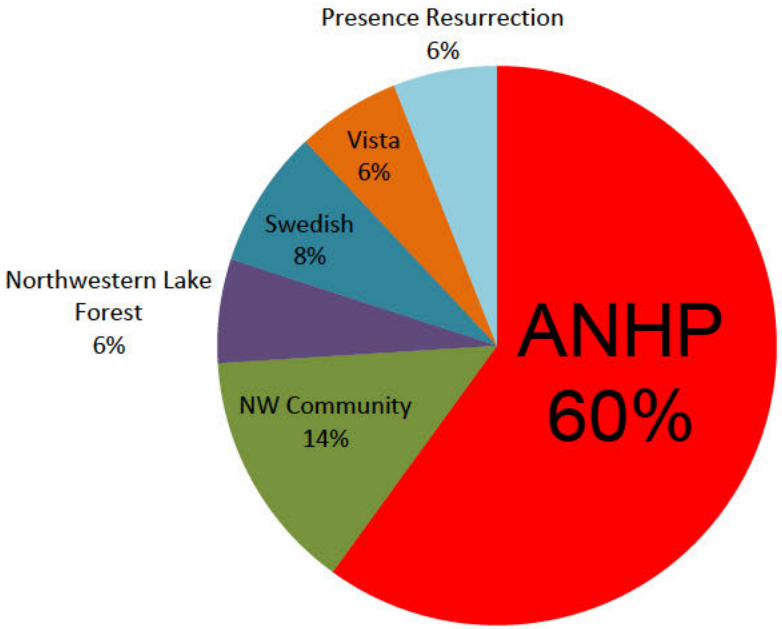
- Leads to absurd result that a hypothetical monopolist of 19 hospitals – but not Univ. of Chicago Med. Ctr. – could not impose a SSNIP

Plaintiffs Met Their Burden

Market shares (60%) and high concentration create a strong presumption of illegality

Market Shares and Concentration Levels Trigger the Presumption of Illegality

Post-Merger

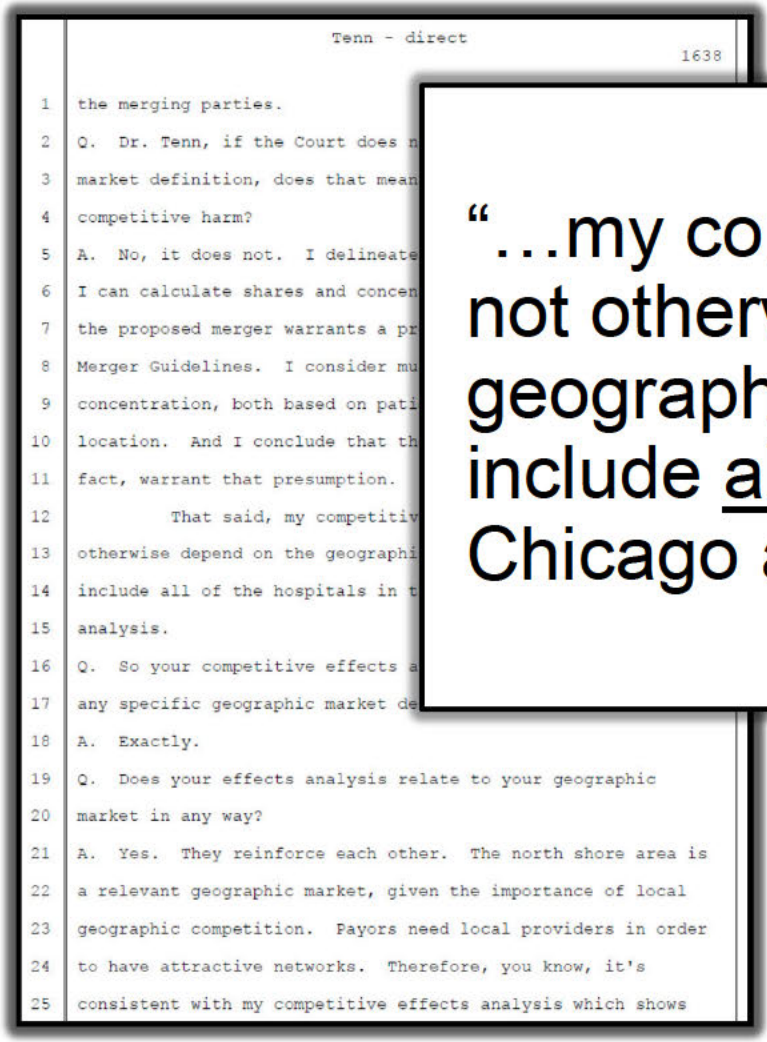


- Post-merger HHI is **3,943**
- The change in HHI is **1,782**

Plaintiffs Bolstered the Presumption of Anticompetitive Effects

Effects Analysis Confirms That Merger Would Eliminate Competition Between Close Competitors and Lead to Price Increases

Effects Analysis Includes All Hospitals in the 6-County Chicago Area



Tenn - direct

1638

the merging parties.
Q. Dr. Tenn, if the Court does n
market definition, does that mean
competitive harm?
A. No, it does not. I delineate
I can calculate shares and concen
the proposed merger warrants a pr
Merger Guidelines. I consider mu
concentration, both based on pati
location. And I conclude that th
fact, warrant that presumption.
That said, my competitiv
otherwise depend on the geographi
include all of the hospitals in t
analysis.
Q. So your competitive effects a
any specific geographic market de
A. Exactly.
Q. Does your effects analysis relate to your geographic
market in any way?
A. Yes. They reinforce each other. The north shore area is
a relevant geographic market, given the importance of local
geographic competition. Payors need local providers in order
to have attractive networks. Therefore, you know, it's
consistent with my competitive effects analysis which shows

"…my competitive effects analysis does not otherwise depend on the geographic market delineation since I include all of the hospitals in the greater Chicago area in my analysis."

Tenn PI Hrg. Tr. at 1638; *see also* Tenn Rebuttal Report ¶ 90.

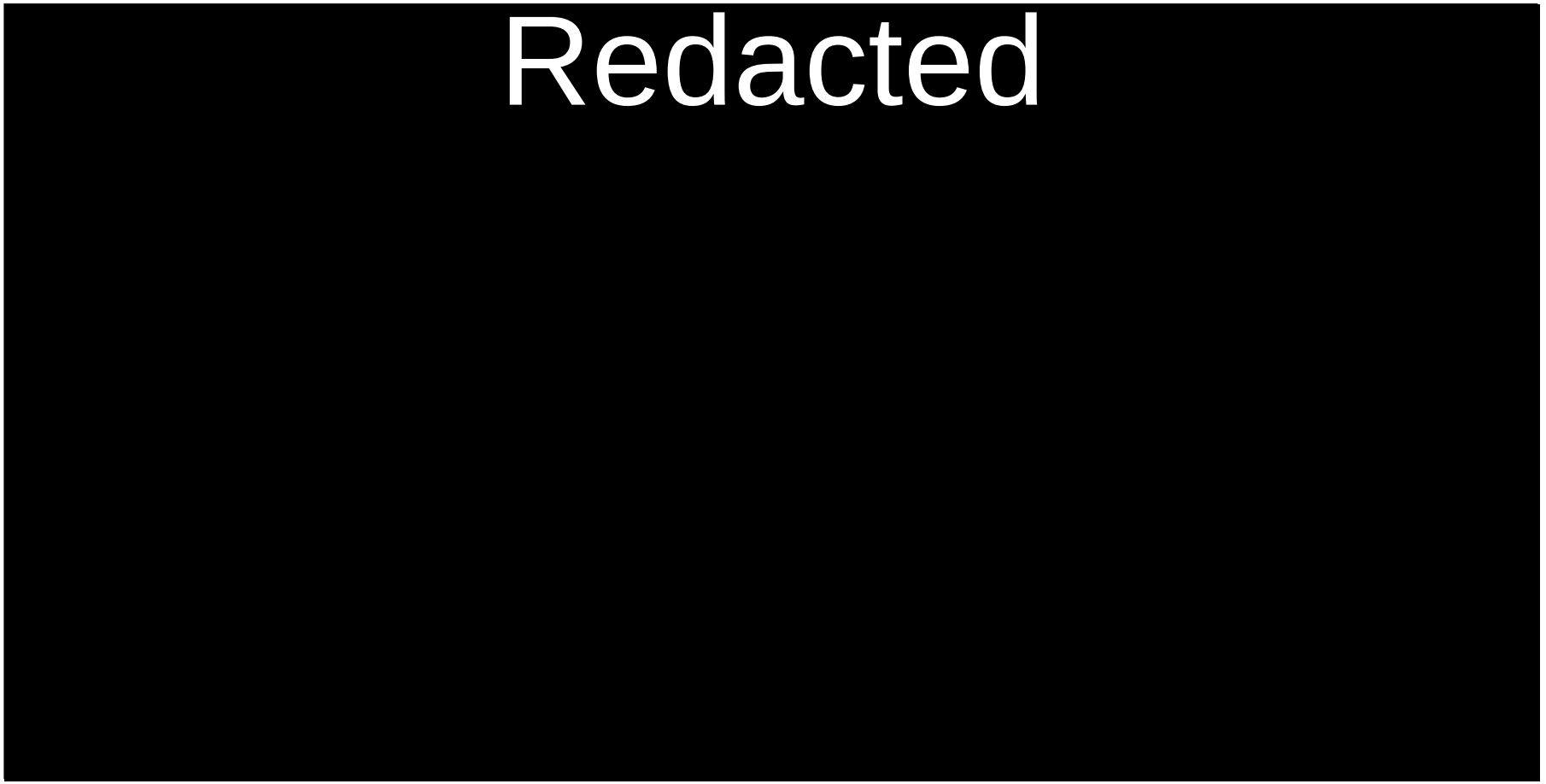
Eliminating Close Competitors Matters

- "As a general rule, the merger of two closely substitutable hospitals will increase the combined system's bargaining leverage." *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1083 (N.D. Ill. 2012) (quotations and citations omitted).

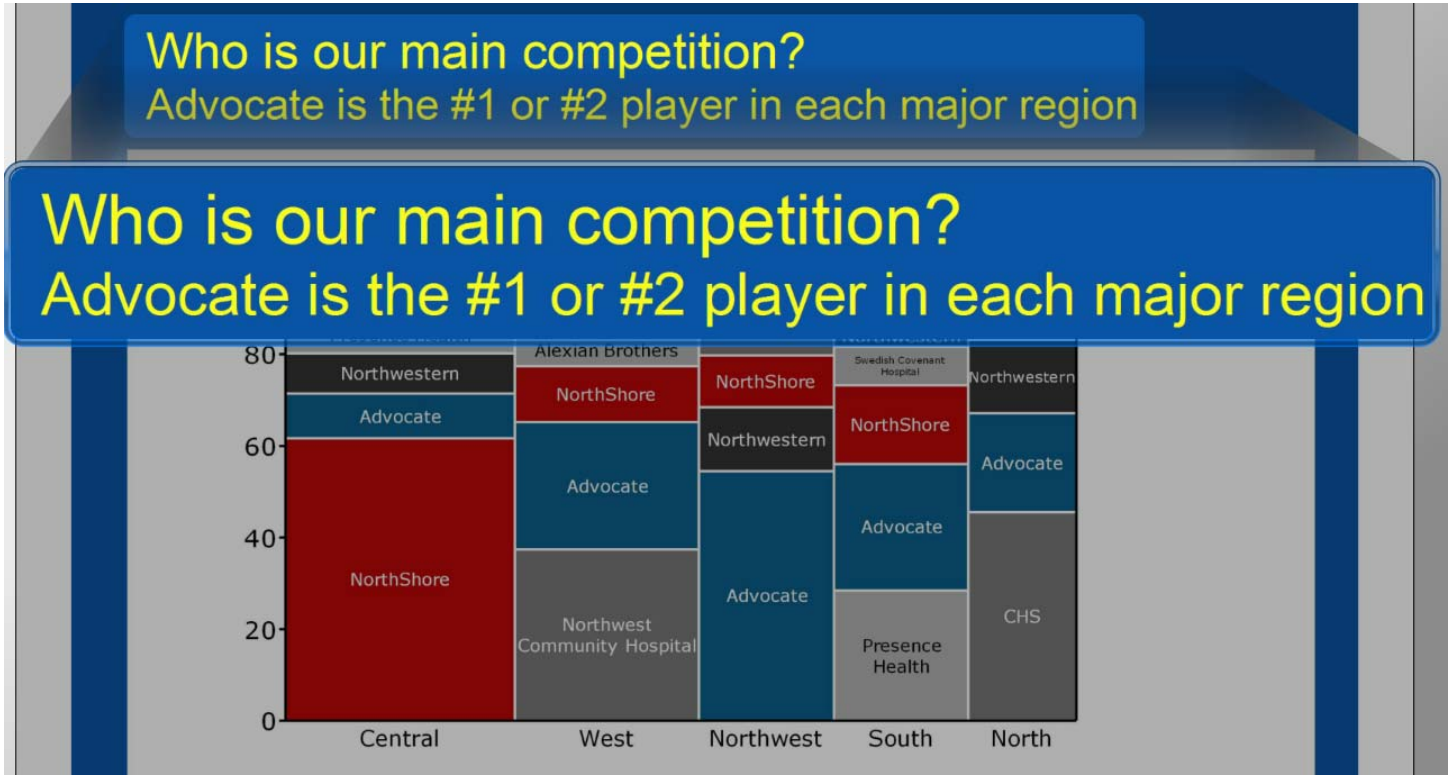
- "Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition." *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 61 (D.D.C. 2015).

- Defendants need not be the closest competitors to have anticompetitive effects. *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 83 (D.D.C. 2011).

Unilateral Competitive Effects – Advocate and NorthShore are Close Competitors

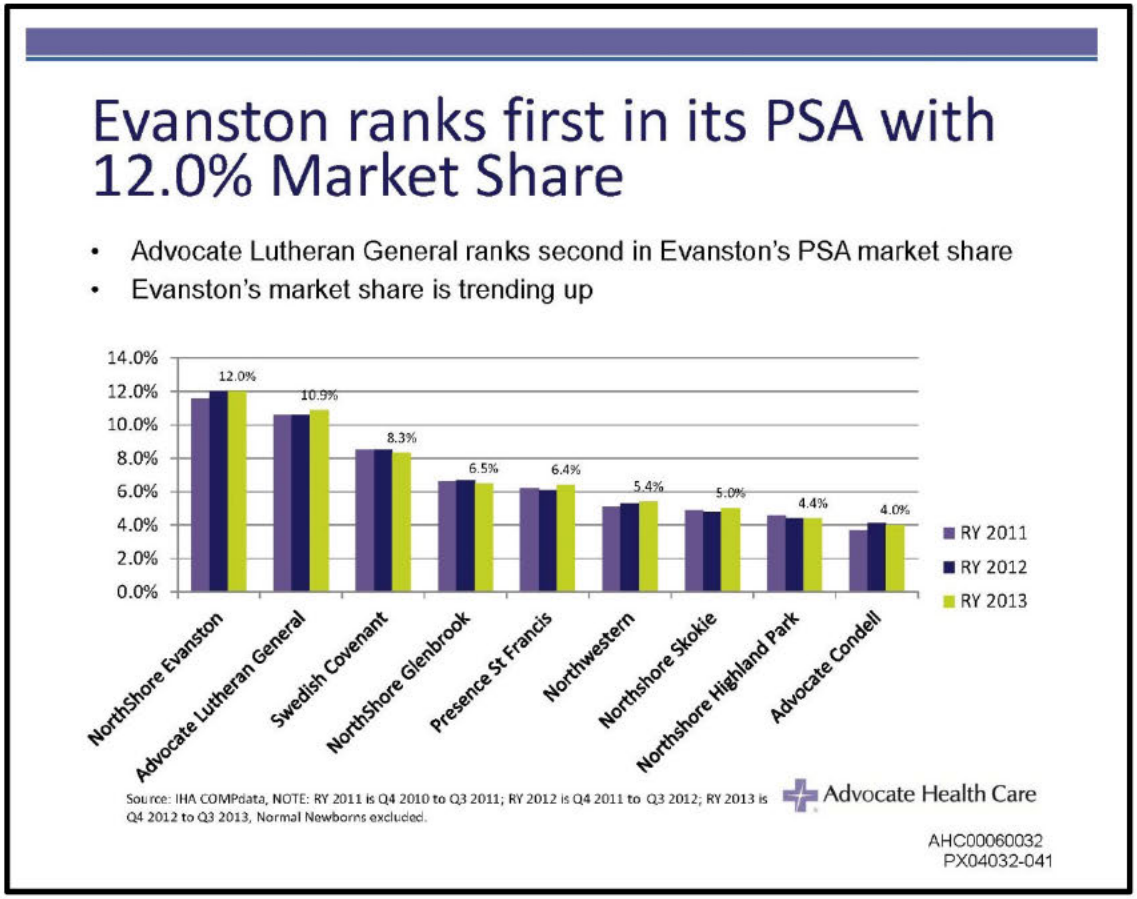


Unilateral Competitive Effects – Advocate and NorthShore are Close Competitors



Unilateral Competitive Effects – Advocate and NorthShore are Close Competitors

- And Northwestern is very small . . . 5.4% market share



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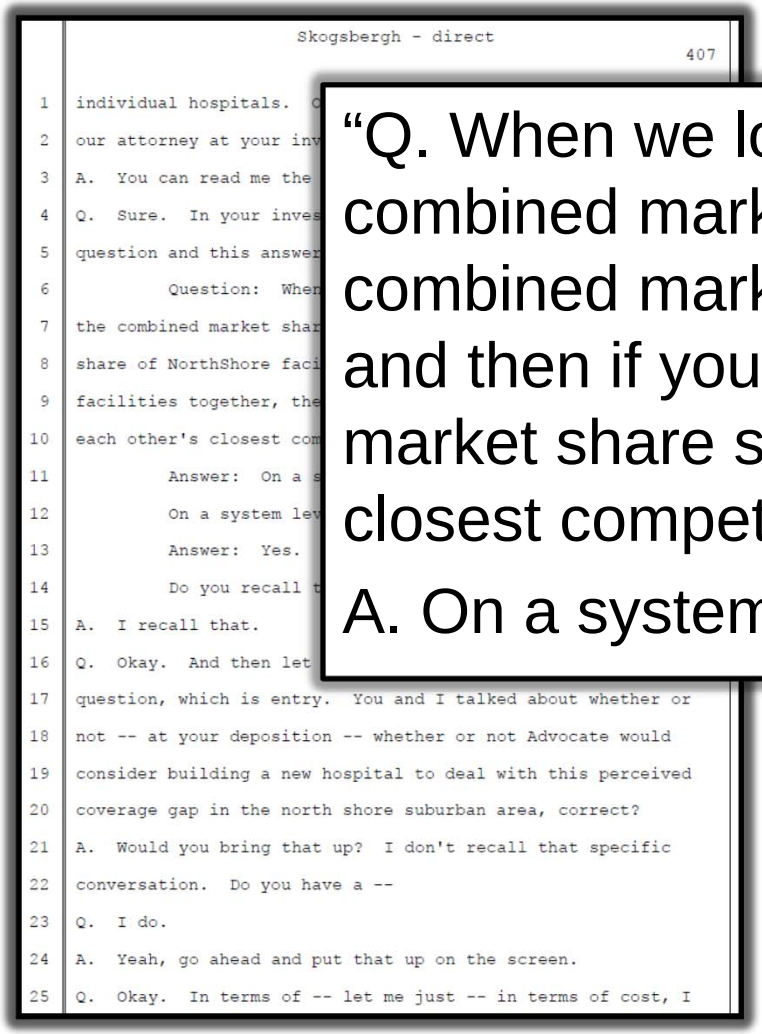
Unilateral Competitive Effects – Advocate and NorthShore are Close Competitors



Skogsbergh - direct
407

individual hospitals. C
our attorney at your inv
A. You can read me the
Q. Sure. In your inves
question and this answer
Question: When
the combined market shar
share of NorthShore faci
facilities together, the
each other's closest com
Answer: On a s
On a system lev
Answer: Yes.
Do you recall t
A. I recall that.
Q. Okay. And then let
question, which is entry. You and I talked about whether or
not -- at your deposition -- whether or not Advocate would
consider building a new hospital to deal with this perceived
coverage gap in the north shore suburban area, correct?
A. Would you bring that up? I don't recall that specific
conversation. Do you have a --
Q. I do.
A. Yeah, go ahead and put that up on the screen.
Q. Okay. In terms of -- let me just -- in terms of cost, I

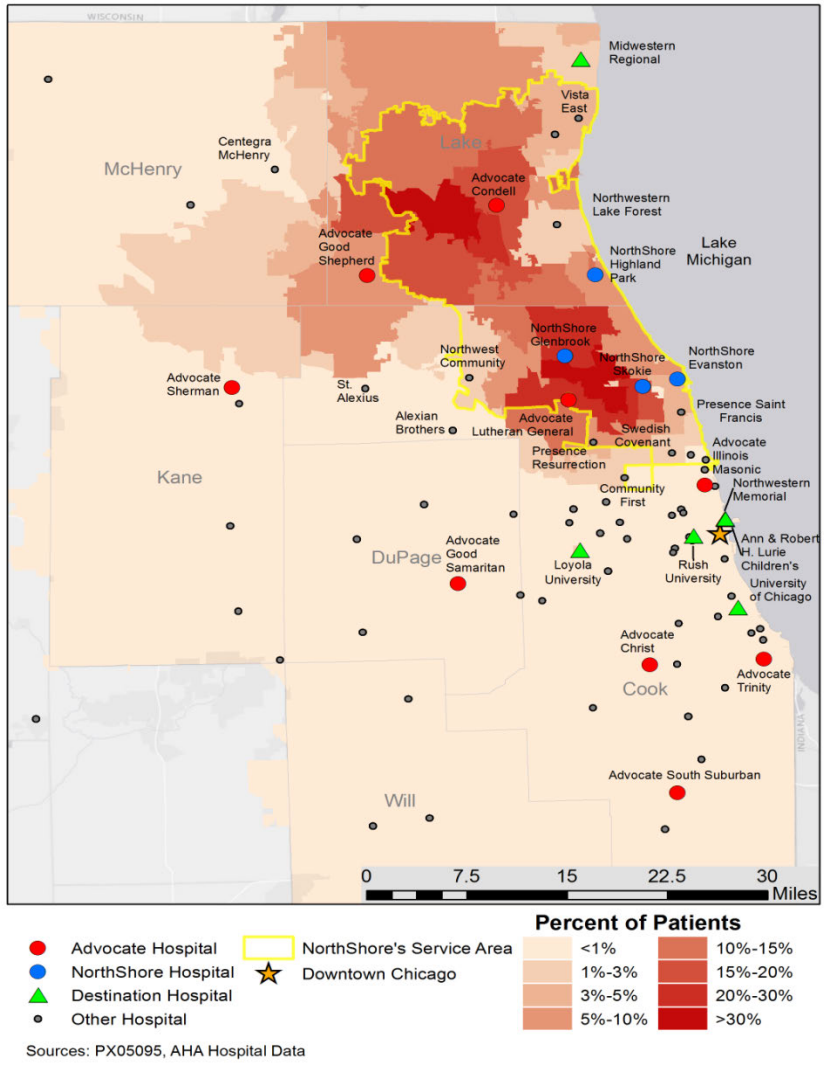
"Q. When we look at the—at a system level, the combined market share of Advocate and the combined market share of NorthShore facilities, and then if you add all of the facilities together, the market share suggests that they were each other's closest competitors in those PSAs, right?

A. On a system level, yes."

Skogsbergh (Advocate) PI Hrg. Tr. at 407; *see also* McCarthy Report ¶ 95 ("two systems are good substitutes for each other").

Unilateral Competitive Effects – Advocate and NorthShore are Close Competitors

- A significant fraction of patients in the North Shore Area view Advocate or NorthShore as their first and second choice



Tenn Report Fig. 8.

All 3 Economic Experts Agree: WTP Will Increase Significantly

12	A. So, my analysis shows two things. So, one, it shows that
13	the post-merger increase in willingness to pay is
14	approximately eight percent. And this is within the range of
15	the willingness to pay change for other hospital mergers that
16	courts have found to be anticompetitive. This is a
17	significant increase in willingness to pay.

Tenn PI Hrg. Tr. at 488.

McCarthy PI Hrg. Tr. at 1259.

20	So what we have is, we have basically an eight
21	percent change in willingness to pay. It's really -- it's
22	slightly lower than that, and if we correct it for the margin
23	issues, it would be more like 6.8 percent. But, nonetheless,
24	seven, eight percent.

19	Q. I think you came up with a 7.2 percent figure?
20	A. In terms of the percentage increase in willingness to pay
21	from the transaction compared to Dr. Tenn's estimate of about
22	8 percent.

Eisenstadt PI Hrg. Tr. at 1553.

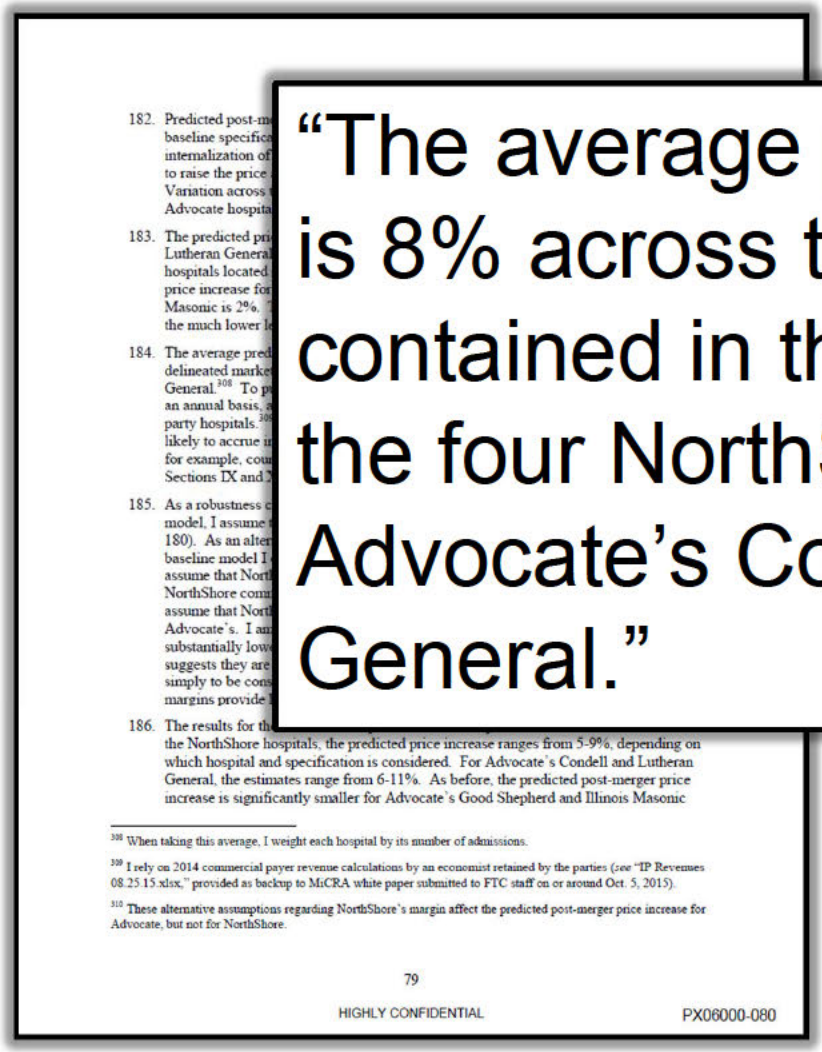
The Combined Advocate and NorthShore Would Have Greater Leverage

- "[I]f Advocate and NorthShore were able to combine in a merged entity, we would not have alternatives in a particular geography within the Chicagoland area…" Norton (Cigna) PI Hrg. Tr. at 92.

- "So if you have neither NorthShore and you have neither Advocate, you have neither in the product, I think very few people would buy it…" Levin (Aon) Dep. Tr. at 156.

- "The combined entity of Advocate-NorthShore would have a much greater bargaining leverage in negotiations…[which] would manifest itself in higher prices." Hamman (HCSC) PI Hrg. Tr. at 167.

Increased Bargaining Leverage Will Increase Price



182. Predicted post-me
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to raise the price
Variation across
Advocate hospita

183. The predicted pri
Lutheran General
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price increase for
Masonic is 2%.
the much lower le

184. The average pred
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General.[308] To p
an annual basis, a
party hospitals.[309]
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185. As a robustness c
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180). As an alter
baseline model I
assume that Nort
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Advocate's. I am
substantially low
suggests they are
simply to be cons
margins provide

186. The results for th
the NorthShore hospitals, the predicted price increase ranges from 5-9%, depending on which hospital and specification is considered. For Advocate's Condell and Lutheran General, the estimates range from 6-11%. As before, the predicted post-merger price increase is significantly smaller for Advocate's Good Shepherd and Illinois Masonic

[308] When taking this average, I weight each hospital by its number of admissions.

[309] I rely on 2014 commercial payer revenue calculations by an economist retained by the parties (*see* "IP Revenues 08.25.15.xlsx," provided as backup to MiCRA white paper submitted to FTC staff on or around Oct. 5, 2015).

[310] These alternative assumptions regarding NorthShore's margin affect the predicted post-merger price increase for Advocate, but not for NorthShore.

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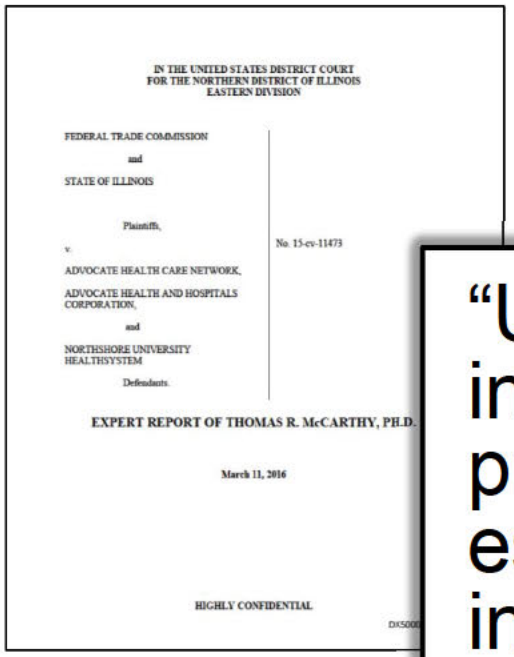
"The average predicted price change is 8% across the six party hospitals contained in the delineated market, the four NorthShore hospitals and Advocate's Condell and Lutheran General."

Tenn Report ¶ 184.

Dr. McCarthy's Margin Criticisms Are Wrong and Do Not Change Conclusions



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

FEDERAL TRADE COMMISSION
and
STATE OF ILLINOIS

Plaintiffs,

v.

No. 15-cv-11473

ADVOCATE HEALTH CARE NETWORK,
ADVOCATE HEALTH AND HOSPITALS CORPORATION,
and
NORTHSHORE UNIVERSITY HEALTHSYSTEM

Defendants.

EXPERT REPORT OF THOMAS R. McCARTHY, PH.D.

March 11, 2016

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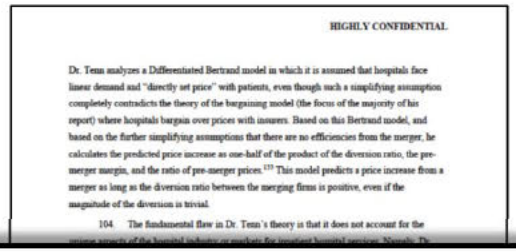

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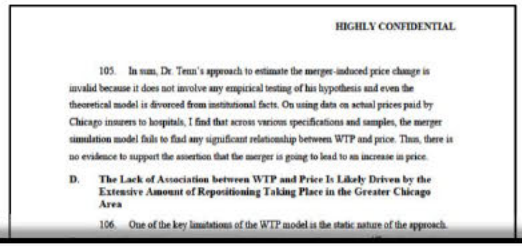
Dr. Tenn analyzes a Differentiated Bertrand model in which it is assumed that hospitals face linear demand and "directly set price" with patients, even though such a simplifying assumption completely contradicts the theory of the bargaining model (the focus of the majority of his report) where hospitals bargain over prices with insurers. Based on this Bertrand model, and based on the further simplifying assumptions that there are no efficiencies from the merger, he calculates the predicted price increase as one-half of the product of the diversion ratio, the pre-merger margin, and the ratio of pre-merger prices.[159] This model predicts a price increase from a merger as long as the diversion ratio between the merging firms is positive, even if the magnitude of the diversion is trivial.

104. The fundamental flaw in Dr. Tenn's theory is that it does not account for the



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105. In sum, Dr. Tenn's approach to estimate the merger-induced price change is invalid because it does not involve any empirical testing of his hypothesis and even the theoretical model is divorced from institutional facts. On using data on actual prices paid by Chicago insurers to hospitals, I find that across various specifications and samples, the merger simulation model fails to find any significant relationship between WTP and price. Thus, there is no evidence to support the assertion that the merger is going to lead to an increase in price.

D. **The Lack of Association between WTP and Price Is Likely Driven by the Extensive Amount of Repositioning Taking Place in the Greater Chicago Area**

106. One of the key limitations of the WTP model is the static nature of the approach.

"Using these revised margin numbers in Dr. Tenn's calculation of predicted price change yields a slightly lower estimate of the post-merger price increase of 6.9 percent for Dr. Tenn's baseline model."

McCarthy Report ¶ 104 n.159

Dr. Tenn's Conclusions are Consistent with the Record

Dr. Tenn	Evidentiary Record
Advocate and NorthShore are close competitors that constrain each other today	Defendants' ordinary course documents. PPFOF 58-62. Dr. McCarthy's analysis. PPFOF 56-57. Payer testimony. PPFOF 64.
Merger would significantly increase combined entity's bargaining leverage	Payer testimony . PPFOF 74; PI Hrg. Tr. at 92, 167, 1154. Testimony from Aon. PPFOF 75.
WTP will increase by ~8%	Dr. McCarthy and Dr. Eisenstadt. *"I think Dr. Tenn is 7.8, and I think we're 7.7 or vice-versa."* PPFOF 68; PI Hrg. Tr. at 1347.
Increased bargaining leverage from the merger will lead to higher rates	Payer testimony. PPFOF 74.

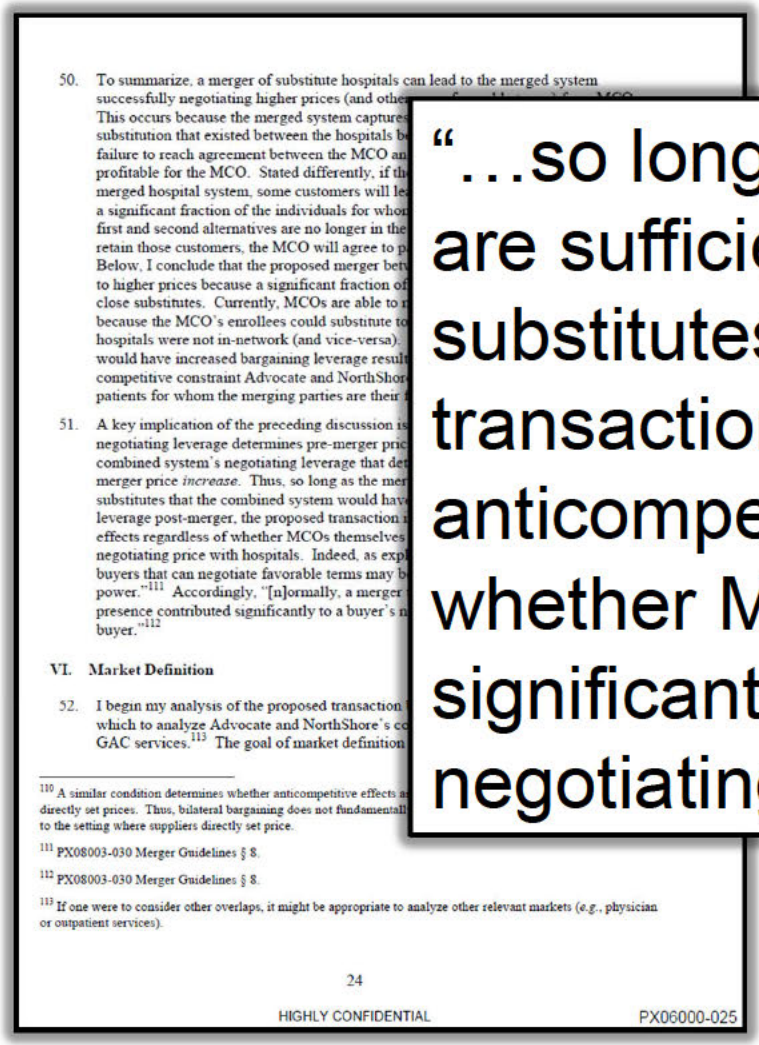
Defendants' Criticisms of Dr. Tenn's Analysis Have No Merit

Defendants' Criticism	Truth
Always predicts a price increase	No or low diversions or margins result in zero or minimal predicted price effects.
Should not be used to predict merger price effects	Economic literature clearly supports using Dr. Tenn's merger simulation model, with other evidence, to predict merger effects.
Does not follow the "FTC approach"	No "cookie cutter" approach. Economists employ different models.
Does not account for bargaining leverage or assumes hospitals have "all" bargaining leverage	Assumes Nash bargaining. Leverage split between hospitals and payers. Equivalent to other bargaining models used to evaluate hospital mergers.

Defendants' Effects Analysis is at Odds With Economics and Evidence

- Defendants' experts admit finding of negative relationship between WTP and price is inconsistent with economic theory and literature
  - McCarthy PI Hrg. Tr. at 1346; Eisenstadt PI Hrg. Tr. at 1559.
- Inconsistent with payer and employer testimony about practical effects of increased bargaining leverage
- Analysis leads to absurd results that every merger would result in *price decreases*, regardless of efficiencies

BCBSIL's Size Does Not Preclude Increased Rates



50. To summarize, a merger of substitute hospitals can lead to the merged system successfully negotiating higher prices (and othe
This occurs because the merged system capture
substitution that existed between the hospitals b
failure to reach agreement between the MCO an
profitable for the MCO. Stated differently, if th
merged hospital system, some customers will le
a significant fraction of the individuals for whor
first and second alternatives are no longer in the
retain those customers, the MCO will agree to p
Below, I conclude that the proposed merger betw
to higher prices because a significant fraction of
close substitutes. Currently, MCOs are able to r
because the MCO's enrollees could substitute to
hospitals were not in-network (and vice-versa).
would have increased bargaining leverage result
competitive constraint Advocate and NorthShor
patients for whom the merging parties are their f

51. A key implication of the preceding discussion is
negotiating leverage determines pre-merger pric
combined system's negotiating leverage that det
merger price *increase*. Thus, so long as the mer
substitutes that the combined system would hav
leverage post-merger, the proposed transaction
effects regardless of whether MCOs themselves
negotiating price with hospitals. Indeed, as expl
buyers that can negotiate favorable terms may b
power."[111] Accordingly, "[n]ormally, a merger
presence contributed significantly to a buyer's n
buyer."[112]

VI. Market Definition

52. I begin my analysis of the proposed transaction
which to analyze Advocate and NorthShore's co
GAC services.[113] The goal of market definition

[110] A similar condition determines whether anticompetitive effects a
directly set prices. Thus, bilateral bargaining does not fundamentall
to the setting where suppliers directly set price.

[111] PX08003-030 Merger Guidelines § 8.

[112] PX08003-030 Merger Guidelines § 8.

[113] If one were to consider other overlaps, it might be appropriate to analyze other relevant markets (*e.g.*, physician or outpatient services).

24

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"…so long as the merging parties are sufficiently close substitutes…the proposed transaction is likely to have anticompetitive effects regardless of whether MCOs themselves have significant leverage when negotiating price with hospitals."

Tenn Report ¶ 51; *see also Merger Guidelines* § 8.

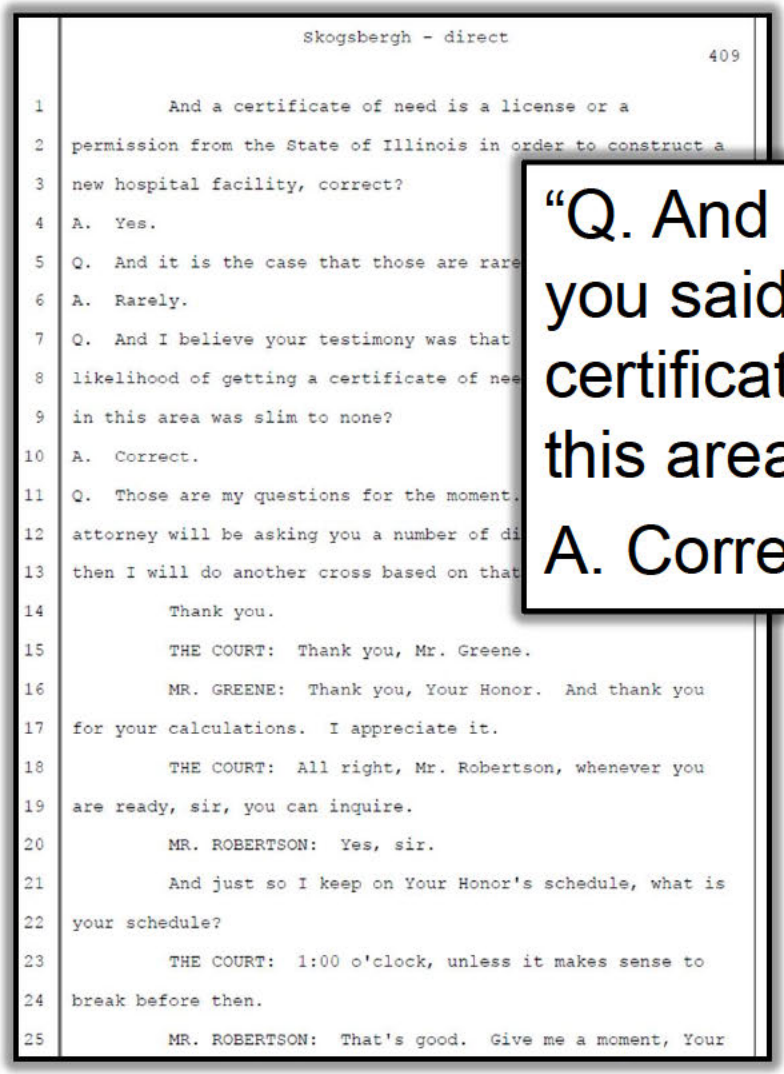
Defendants' Proposed Price Cap Not a Substitute for Competition

- Requires court to regulate prices
  - Pricing commitments are highly difficult to administer and enforce
- Defendants can extract higher prices through a variety of forms
  - Limited to fee-for-service contracts; merged firm can raise price on other services or un-fixed terms
- Does not address competition on quality
  - Large body of literature indicates that price regulation can have an adverse impact on healthcare quality
- Temporary

Defendants Failed to Meet Their Burden

Entry Not Timely, Likely, or Sufficient

Entry is Highly Unlikely



Skogsbergh - direct 409

And a certificate of need is a license or a permission from the State of Illinois in order to construct a new hospital facility, correct?
A. Yes.
Q. And it is the case that those are rare
A. Rarely.
Q. And I believe your testimony was that likelihood of getting a certificate of nee in this area was slim to none?
A. Correct.
Q. Those are my questions for the moment. attorney will be asking you a number of di then I will do another cross based on that
Thank you.
THE COURT: Thank you, Mr. Greene.
MR. GREENE: Thank you, Your Honor. And thank you for your calculations. I appreciate it.
THE COURT: All right, Mr. Robertson, whenever you are ready, sir, you can inquire.
MR. ROBERTSON: Yes, sir.
And just so I keep on Your Honor's schedule, what is your schedule?
THE COURT: 1:00 o'clock, unless it makes sense to break before then.
MR. ROBERTSON: That's good. Give me a moment, Your

"Q. And I believe your testimony was that you said that the likelihood of getting a certificate of need for a new hospital in this area was slim to none?

A. Correct."

Skogsbergh (Advocate) PI Hrg. Tr. at 409.

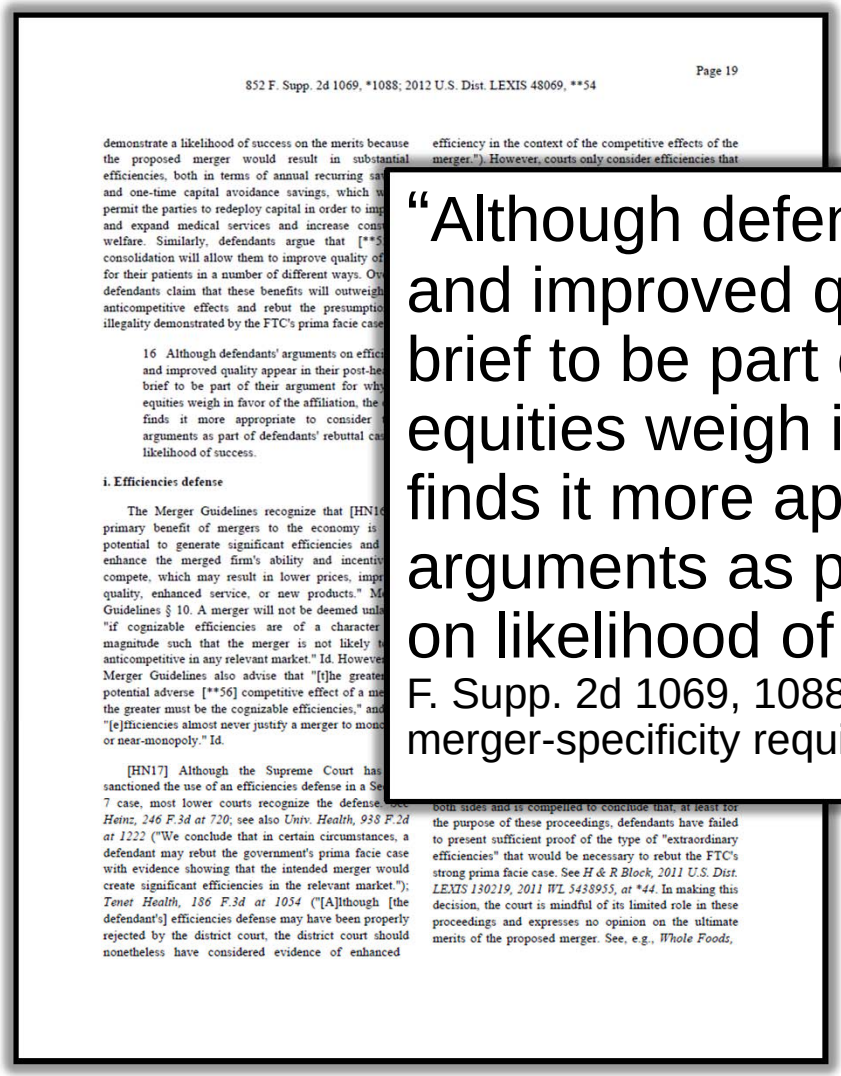
Repositioning Would Not Defeat a Price Increase

- Outpatient repositioning is not new hospital entry
- Replacement hospitals are not new hospital entry
- No evidence that future outpatient clinic entry will affect payers' needs for local hospitals in-network

Defendants Failed to Meet Their Burden

Supposed Efficiencies are Not Merger-Specific and Not Verifiable by Any Credible Evidence

Defendants' "Public Equities" Claims Are Just Efficiency Arguments



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852 F. Supp. 2d 1069, *1088; 2012 U.S. Dist. LEXIS 48069, **54

demonstrate a likelihood of success on the merits because the proposed merger would result in substantial efficiencies, both in terms of annual recurring sa and one-time capital avoidance savings, which w permit the parties to redeploy capital in order to imp and expand medical services and increase cons welfare. Similarly, defendants argue that [**5 consolidation will allow them to improve quality of for their patients in a number of different ways. Ov defendants claim that these benefits will outweigh anticompetitive effects and rebut the presumptio illegality demonstrated by the FTC's prima facie case

16 Although defendants' arguments on effici and improved quality appear in their post-he brief to be part of their argument for wh equities weigh in favor of the affiliation, the finds it more appropriate to consider arguments as part of defendants' rebuttal ca likelihood of success.

i. Efficiencies defense

The Merger Guidelines recognize that [HN1 primary benefit of mergers to the economy is potential to generate significant efficiencies and enhance the merged firm's ability and incentiv compete, which may result in lower prices, impr quality, enhanced service, or new products." M Guidelines § 10. A merger will not be deemed unl "if cognizable efficiencies are of a character magnitude such that the merger is not likely t anticompetitive in any relevant market." Id. Howeve Merger Guidelines also advise that "[t]he greate potential adverse [**56] competitive effect of a me the greater must be the cognizable efficiencies," and "[e]fficiencies almost never justify a merger to mono or near-monopoly." Id.

[HN17] Although the Supreme Court has sanctioned the use of an efficiencies defense in a Se 7 case, most lower courts recognize the defense. See *Heinz, 246 F.3d at 720*; see also *Univ. Health, 938 F.2d at 1222* ("We conclude that in certain circumstances, a defendant may rebut the government's prima facie case with evidence showing that the intended merger would create significant efficiencies in the relevant market."); *Tenet Health, 186 F.3d at 1054* ("[A]lthough [the defendant's] efficiencies defense may have been properly rejected by the district court, the district court should nonetheless have considered evidence of enhanced efficiency in the context of the competitive effects of the merger."). However, courts only consider efficiencies that

both sides and is compelled to conclude that, at least for the purpose of these proceedings, defendants have failed to present sufficient proof of the type of "extraordinary efficiencies" that would be necessary to rebut the FTC's strong prima facie case. See *H & R Block, 2011 U.S. Dist. LEXIS 130219, 2011 WL 5438955, at *44*. In making this decision, the court is mindful of its limited role in these proceedings and expresses no opinion on the ultimate merits of the proposed merger. See, e.g., *Whole Foods,*

"Although defendants' arguments on efficiency and improved quality appear in their post-hearing brief to be part of their argument for why the equities weigh in favor of their affiliation, the court finds it more appropriate to consider these arguments as part of defendants' rebuttal case on likelihood of success." *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069, 1088 n.16 (N.D. Ill. 2012) (applying verifiability and merger-specificity requirements to equity claims).

Efficiencies Must Be Merger-Specific and Verifiable

- "[E]fficiencies must be 'merger-specific' to be cognizable as a defense."
  - *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 721-22 (D.C. Cir. 2001); *see also Merger Guidelines* § 10.

- "The court must undertake a rigorous analysis . . . to ensure that those 'efficiencies' represent more than **mere speculation and promises** . . . ."
  - *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011*); see also Merger Guidelines* § 10.

Only "Extraordinary" Efficiencies Can Rescue an Otherwise Illegal Merger

- "High market concentration levels require proof of ***extraordinary efficiencies***, . . . and courts generally have found inadequate proof of efficiencies to sustain a rebuttal of the government's case."
  - *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1089 (N.D. Ill. 2012); *see also FTC v. H.J. Heinz Co.,* 246 F.3d 708, 721-22 (D.C. Cir. 2001); *Merger Guidelines* § 10.

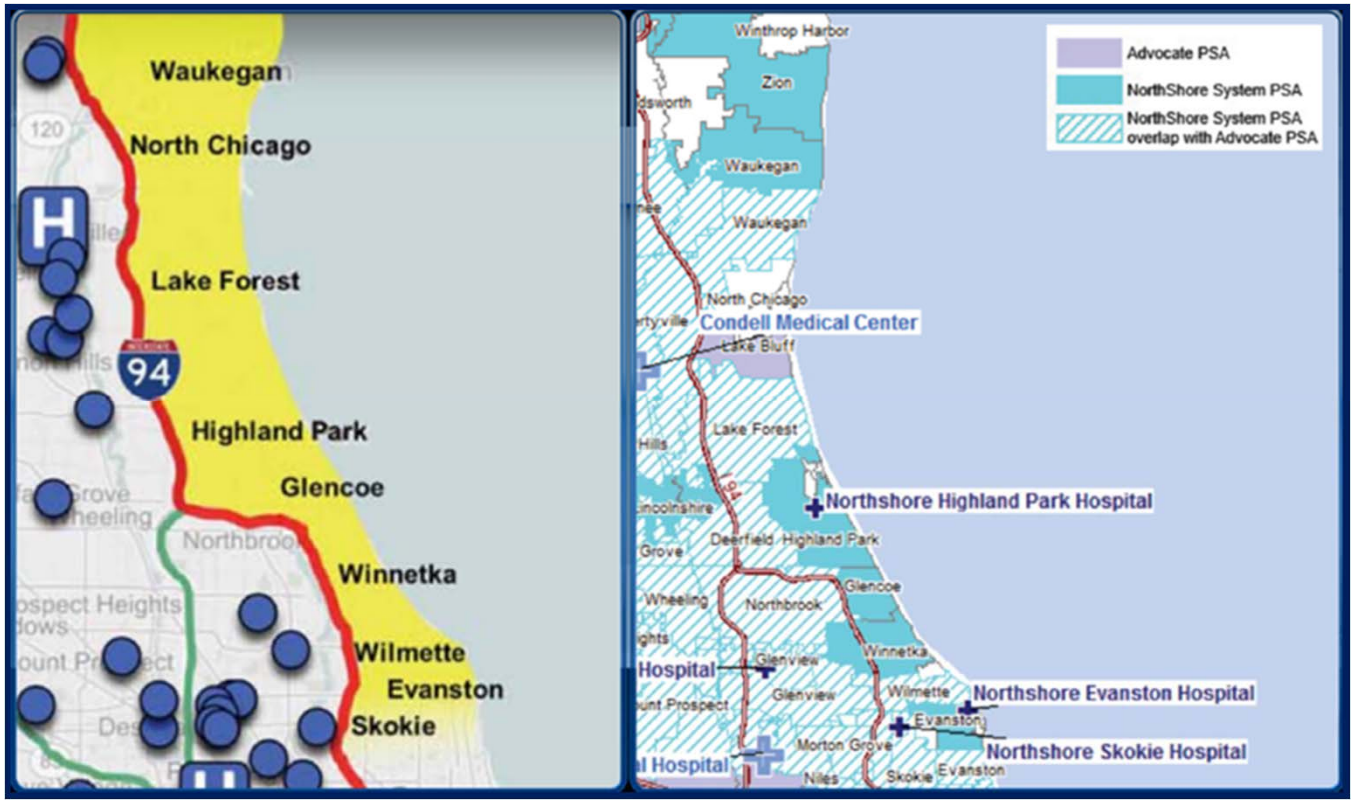
- "**No court** . . . has found efficiencies sufficient to rescue an otherwise illegal merger."
  - *FTC v. ProMedica Health Sys.*, No. 3:11 CV 47, 2011 WL1219281, at *57 (N.D. Ohio Mar. 29, 2011).

What *Is* Needed for the HPN?

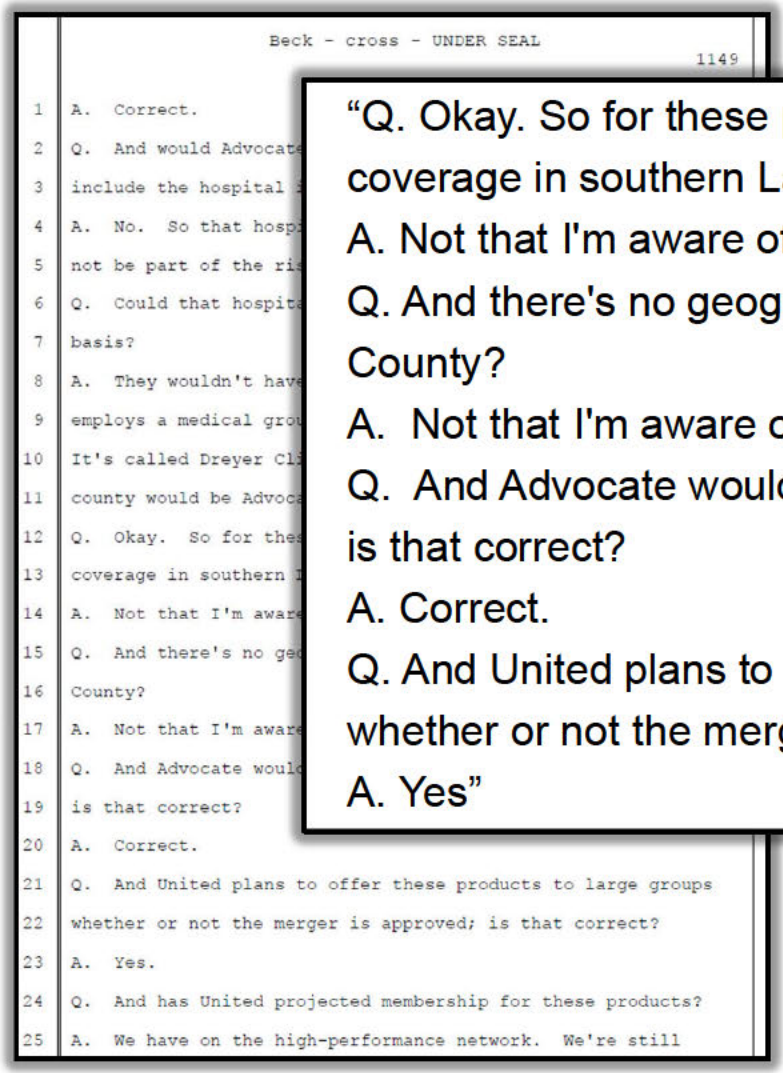
- On the one hand, Defendants have said . . .
  - "This consumer benefit [i.e., the HPN] cannot be achieved without a merger. . . Must integrate NorthShore into Advocate to extend capabilities in clinical integration, population health and full risk contracts." Defs' Opening Slides at 24 (Apr. 11, 2016).
    - *See also* Defs' Opp'n Brief at 33-34 (Mar. 18, 2016).
- On the other hand, Defendants have said . . .
  - "Although Defendants intend all of these outcomes [i.e., engaging in population health management, achieving quality objectives, and managing insurance risk] to result from the merger, none of them is necessary to create or sell the HPN to employer groups. . . ." Defs' Post-Hrg. Mem. at 3 (May 18, 2016).
    - *See also* Defs' Post-Hrg. Brief at n.28 (May 18, 2016).

Defendants' "Geographic Gap" Claims Contradict Reality

- Claim: Advocate lacks geographic access east of I-94
- Reality: Advocate already draws patients from this alleged "gap"
  - Sacks (Advocate) PI Hrg. Tr. at 1445:3-1449:7.



United Testified There is No "Gap" that Advocate Must Fill to Market the HPN



Beck - cross - UNDER SEAL

1149

A. Correct.
Q. And would Advocate
include the hospital
A. No. So that hospi
not be part of the ris
Q. Could that hospit
basis?
A. They wouldn't have
employs a medical grou
It's called Dreyer Cli
county would be Advoca
Q. Okay. So for thes
coverage in southern
A. Not that I'm aware
Q. And there's no geo
County?
A. Not that I'm aware
Q. And Advocate would
is that correct?
A. Correct.
Q. And United plans to offer these products to large groups
whether or not the merger is approved; is that correct?
A. Yes.
Q. And has United projected membership for these products?
A. We have on the high-performance network. We're still

"Q. Okay. So for these products, there's no geographic gap in coverage in southern Lake County that you're aware of?
A. Not that I'm aware of.
Q. And there's no geographic gap in coverage in northern Cook County?
A. Not that I'm aware of.
Q. And Advocate would be the only provider in those counties; is that correct?
A. Correct.
Q. And United plans to offer these products to large groups whether or not the merger is approved; is that correct?
A. Yes"

Beck (United) PI Hrg. Tr. at 1149; *see also* Hamman (HCSC) PI Hrg. Tr. at 183-184.

Defendants' HPN Benefit Claims Contradict Reality

- Claim: HPN creates substantial consumer gains
- Reality: Only source is Dr. Sacks's guesstimate
  - Sacks (Advocate) PI Hrg. Tr. at 1461.

- What do we know about Dr. Sacks's "back-of-the-envelope" analysis?
  - Never produced to Plaintiffs
  - Not listed among Defendants' exhibits
  - No expert corroborates
  - Based on numerous unfounded assumptions
  - Fails to account for enrollment in Advocate-only HPN product

Testimony From Payers that Defendants Claim "Support" the Merger

- United: Merger not necessary to offer HPN to large employers
- Aetna: Merger not necessary for NorthShore to participate in narrow network ACO product sold to large employers
- Land of Lincoln: Merger is not necessary to create a narrow network Advocate/NorthShore product
- Humana: Merger may provide greater bargaining leverage

Beck (United) Hrg. Tr. at 1147-1149; Nettesheim (Aetna) Hrg. Tr. at 1201-1202; Montrie (Land of Lincoln) Dep. Tr. at 133, 147-148; Maxwell (Humana) Decl. at ¶ 20.

Purported Price Savings on Physician Services

- Defendants now contend $30 million in price savings will result from moving NorthShore physicians to Advocate contracts
- First offered on April 20, 2016 – the **last day** of the Defendants' case-in-chief and over objection
  - Eisenstadt PI Hrg. Tr. at 1517-1519
- Not offered in any expert report
- Not merger specific
- No basis and not verifiable

Conclusion

A Preliminary Injunction Is Warranted

Standards for Granting a Preliminary Injunction under § 13(b)

Preliminary injunction under § 13(b) of the FTC Act warranted when in the public interest –

1. Considering the Commission's likelihood of success on the merits; and
2. Weighing the equities.

"No court has denied relief to the FTC in a 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits." *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1094-95 (N.D. Ill. 2012).

To Find for Defendants, the Court Would Have to

- Ignore:
  - Commercial realities faced by payers
  - Strong patient preferences for local care
  - Ordinary course assessments of competition by Defendants and others
  - Reliable and robust analysis from Plaintiffs' experts
  - Case law and Merger Guidelines
- Uncritically Accept:
  - Self-serving testimony of Defendants' Executives
  - Defendants' contradictory arguments
  - Defendants' absurd economic conclusions