**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

**PUBLIC**

**PLAINTIFFS' POST-REMAND BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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## Glossary of Abbreviated Terms

Abbreviations used in Plaintiffs' Post-Remand Brief in Support of Plaintiffs' Motion for Preliminary Injunction have the following meanings:

### 1. *Record*

| | |
|---|---|
| D's App. Br. | Brief of Defendants-Appellees, *FTC v. Advocate Health Care Network,* 841 F.3d 460 (7th Cir. 2016) (No. 16-2472) (Aug. 1, 2016, App. Doc. No. 79) |
| D's FOF | Defendants' Proposed Findings of Fact and Conclusions of Law (May 18, 2016, Doc. No. 459) |
| D's Opp. Br. | Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction (Mar. 18, 2016, Doc. No. 199) |
| D's PH Br. | Defendant's Post-Hearing Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction (May 18, 2016, Doc. No. 458) |
| PI Hrg. Tr. | Transcript of Proceedings – Preliminary Injunction Hearing (Apr. 11, 2016 through May 25, 2016) |
| P's FOF | Plaintiffs' Proposed Findings of Fact and Conclusions of Law (May 18, 2016, Doc. No. 446) |
| P's Mot. to Strike | Plaintiffs' Motion to Strike Defendants' Notice of Offer of Judgment (Apr. 13, 2016, Doc. No. 418) |
| P's PH Br. | Plaintiffs' Post-Hearing Brief (May 18, 2016, Doc. No. 445) |
| P's Reply Br. | Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction (Apr. 1, 2016, Doc. No. 302) |

### 2. *Names*

| | |
|---|---|
| Aetna | Aetna, Inc. |
| BCBS | Blue Cross Blue Shield of Illinois |
| Cigna | Cigna Corp. |
| United | United HealthCare |

## INTRODUCTION

This case is back before the Court on remand from the Seventh Circuit ((Opinion of the United States Court of Appeals for the Seventh Circuit, Oct. 31, 2016 (Doc. No. 543) ("Op.") at 26)). The Federal Trade Commission (the "Commission") and the Illinois Attorney General (collectively "Plaintiffs") ask the Court to preliminarily enjoin the merger of Advocate Health Care Network ("Advocate"), the largest healthcare system in Illinois, and NorthShore University HealthSystem ("NorthShore") (collectively "Defendants"), its close competitor in the northern suburbs of Chicago. Combined, the two hospital chains would command 60 percent of the North Shore Area market for inpatient services and could use that market clout to impose anticompetitive price increases on insurers. The Court should preliminarily enjoin the merger pending a full administrative hearing.

In its initial ruling, this Court found that Plaintiffs had not proven that the North Shore Area was a relevant geographic market and denied the injunction. The Seventh Circuit reversed that decision, and its opinion leaves no room for doubt that the North Shore Area is a relevant antitrust market. It held that Plaintiffs "have made a strong case" that the relevant geographic market is "very small" and need not include downtown academic medical centers. The court pointed both to "overwhelming" evidence that patients demand hospital care close to home and the "unanimous" and "unequivocal[]" testimony from insurers that they must include either NorthShore or Advocate hospitals in their networks in order to offer policies that are attractive to employers with employees in the northern suburbs. In light of these findings, this Court must conclude that a hypothetical monopolist owning the eleven North Shore Area hospitals could profitably impose a small price increase on insurers, and consequently, that those hospitals are a relevant market.

Given the undisputed market concentration figures in the North Shore Area, including an increase in concentration eight times higher than the level that triggers a presumption of illegality, it necessarily follows that this merger presumptively violates the antitrust laws. And beyond the presumption drawn from market concentration, Plaintiffs presented evidence that consumers currently benefit from head-to-head competition between Advocate and NorthShore and their merger will lead to anticompetitive price increases. Indeed, as the Seventh Circuit noted, the prior merger of just three of the same hospitals at issue here (into the entity now known as NorthShore) already led to substantial price increases.

Because Plaintiffs have made a prima facie case, this Court has only two remaining issues to decide: first, whether Defendants have rebutted the presumption of unlawfulness; and second, whether an injunction would serve the public interest. On the first question, Defendants have not come close to rebutting the presumption. Overcoming the presumption is a difficult hurdle to clear in any case; here, given the extremely high concentration levels and the direct evidence of likely anticompetitive effects, it is virtually insurmountable. To begin with, Defendants cannot clearly show that the merger is unlikely to have anticompetitive effects. Neither the addition of new outpatient clinics nor the existing bargaining power of insurers changes the fact, accepted by the Seventh Circuit, that insurers cannot successfully market networks that exclude both merging firms' hospitals. They would pay a price increase rather than try to do so.

Defendants further contend that "efficiencies" generated by their merger will offset its anticompetitive effects. Courts differ on the existence of an efficiency defense, but all agree that the standard for such a defense is strict. Defendants must produce clear evidence showing extraordinary efficiencies that are merger-specific, verifiable, and non-speculative. Indeed, in

the history of antitrust law, no court has ever found a presumptively illegal merger salvaged by asserted efficiencies.

Defendants' central claimed efficiency is that some consumers will save insurance costs by switching from their existing plans to a so-called "high performing network" or "HPN." In fact, the HPN does not offer a meaningful benefit to consumers—although it would be cheaper than other insurance products, it would also provide more restricted coverage. In any event, the HPN already exists as an Advocate-only product, and there is no reason that NorthShore could not participate in the HPN without the merger. And Defendants' calculations about the supposed benefits of the merger are not reliable or independently verifiable.

Defendants' other "efficiencies" argument is that the merger will generate savings because Advocate will move NorthShore's physicians to Advocate's lower reimbursement rates. This argument—raised for the first time on the final day of the hearing —is untimely, and meritless in any event. Even if there were some short-term savings as a result of Advocate's lower physician reimbursement rates (and Defendants have not adequately shown any such savings), the savings would be time-limited; the merged firm would have the leverage to demand higher rates in future negotiations.

Since Defendants cannot overcome the presumption of illegality, the Court must decide whether an injunction will serve the public interest. No court has ever declined to preliminarily enjoin a merger where the Commission has shown a likelihood of success on the merits. This case warrants no exception. If the merger is consummated, the public will likely suffer interim harm. Worse, there may be no effective remedy should the merger ultimately be found unlawful. When the Commission found the prior merger of the three NorthShore hospitals unlawful, the hospitals were already too intertwined to divest. By contrast, Defendants have failed to identify

any harm that the public would suffer if the merger is postponed. Any merger-specific and verifiable benefit associated with the HPN will still be available should the merger be found lawful after the conclusion of the administrative proceeding.

**ARGUMENT**

Defendants' proposed merger should be enjoined pending a full administrative hearing to determine whether the merger violates the antitrust laws. Plaintiffs allege that the merger violates Section 7 of the Clayton Act, which prohibits mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. "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). Under Section 7, mergers that create an appreciable danger of competitive harm are unlawful, and any doubts are resolved against the transaction. *See* Op. at 8 (quoting *Ekco Products Co. v. FTC*, 347 F.2d 745, 752 (7th Cir. 1965) (The Act "deal[s] with probabilities," not "absolute certainties")); *id.* at 8-9 (quoting *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) ("All that is necessary is that the merger create an appreciable danger of such consequences in the future")); *id.* at 9 (quoting *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989) ("[D]oubts are to be resolved against the transaction")).

A district court may issue a preliminary injunction under Section 13(b) of the Federal Trade Commission Act "[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." 15 U.S.C. § 53(b). Under this framework, the court first considers the probability that the Commission will be able to prove that the proposed merger violates Section 7 following a full hearing on the merits. The court then considers whether it would be in the public interest to enjoin the merger pending the outcome of the administrative proceedings. In making that

assessment, the court weighs the harm the public would suffer if the merger is delayed against the harm that the public would suffer if the parties consummate their merger before the legality of the merger is decided in the administrative proceedings. *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327, 353 (3rd Cir. 2016); *see also see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). Where, as here, the purported benefits of the merger would still be available after the conclusion of the administrative proceedings, and the Commission is likely to succeed on the merits, it is in the public interest to issue a preliminary injunction.

## I. PLAINTIFFS HAVE ESTABLISHED A PRIMA FACIE CASE

To succeed on the merits of their Section 7 claim, Plaintiffs "must make a prima facie showing that the proposed merger would result in a firm controlling an undue percentage share" of the market for a particular product in a particular area, as well as "a significant increase in the concentration of firms in that market." *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1074 (N.D. Ill. 2012) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963)). Here, there is no dispute that the relevant product market is general acute care services sold to commercial health plans and provided to their members ("GAC Services"). *See* Op. at 10. In light of the Seventh Circuit's decision, there also can be no reasonable dispute that Plaintiffs have defined the relevant geographic market and made a prima facie case.

### A. <u>The Relevant Geographic Market is No Broader than the North Shore Area</u>

The Seventh Circuit's findings conclusively establish that the relevant geographic market is no broader than the North Shore Area.[1] Geographic markets are defined using the hypothetical monopolist test, which "asks what would happen if a single firm became the sole seller in a

[1] The "North Shore Area" includes NorthShore's four hospitals, Advocate's Condell and Lutheran General Hospitals, and five third-party GAC hospitals (Swedish Covenant, Presence Resurrection Medical Center, Northwest Community Healthcare Hospital, Northwestern Lake Forest Hospital, and Vista Medical Center East). *See* P's FOF ¶ 22.

proposed region." Op. at 2. "If such a firm could profitably raise prices above competitive levels, that region is a relevant geographic market." *Id.* In hospital cases, the "geographic market question is … most directly about the likely response of insurers, not patients, to a price increase." Op. at 16 (quoting *St. Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 (9th Cir. 2015)) (internal quotation marks omitted). If insurers would pay a small price increase to avoid excluding *all* of the hospitals in a region from their networks, that area is a properly defined geographic market. *Penn State Hershey*, 838 F.3d at 346.

The Seventh Circuit found that Plaintiffs have made a "strong case" that the relevant market here contains a "very small" number of hospitals. Op. at 26. The "overwhelming weight of the evidence" shows "(1) the large proportion of patients who prefer hospitals close to their homes and (2) the resulting need for insurers to offer networks that include community hospitals close to their customers' homes." Op. at 24, n.4. In particular, the record contains "strong, not equivocal" evidence that patients generally choose hospitals close to their homes (Op. at 22), including evidence that 73% of patients living in the North Shore Area receive hospital care there, and that 80% of patients drive less than 20 minutes or 15 miles to their chosen hospital. Op. at 22. As the Seventh Circuit noted, "because most patients prefer to go to nearby hospitals, there are often only a few hospitals in a geographic market." Op. at 14.

As established by insurer testimony, the preference for local care means that insurers cannot successfully market health plans to employers with employees in Chicago's northern suburbs without including at least some of the merging hospitals in their networks. Op. at 3. On appeal, Defendants argued that this testimony should be disregarded because two insurers were purportedly biased against them and because some insurance plans exclude both NorthShore's and Advocate's hospitals. D's App. Br. at 20, 38-39. The Seventh Circuit explicitly rejected

those arguments, finding that the testimony from insurers was "unanimous," "unequivocal[]," and supported by "[t]he record as a whole." Op. at 4, 22-23. That record shows, among other things, that there is "no evidence that a network has succeeded with employers without one or the other of the merging parties in its network." Op. at 23; *see also id.* at 4. Only one company offers a network that excludes both of the merging parties and its product has not been successful in the North Shore Area. *See id.* at 23; P's FOF ¶ 77. Instead, "that network's membership is overwhelmingly individuals rather than employers . . . [a]nd fewer than two percent of those individual members live near NorthShore's hospitals." Op. at 23. Any rational insurer would rather pay a higher price than attempt to sell an unmarketable policy.

The Third Circuit confronted similar evidence in its recent decision concerning a proposed merger of Penn State Hershey Medical Center ("Hershey") and Pinnacle Health System ("Pinnacle") that plaintiffs alleged would substantially lessen competition in the Harrisburg, Pennsylvania area. *Penn State Hershey*, 838 F.3d at 345-46.[2] The district court found that the Harrisburg area was not a properly defined market and denied plaintiffs' motion for a preliminary injunction. The Third Circuit reversed. As the Third Circuit explained, "payors repeatedly said that they could not successfully market a plan in the Harrisburg area without Hershey and Pinnacle." *Id.* at 343. Indeed, a payor that had attempted to market a plan without the merging parties lost half of its members.[3] *Id.* The Third Circuit found that this evidence

[2] The Harrisburg area included one Hershey-owned hospital, three Pinnacle-owned hospitals and three hospitals owned by third parties. *See* Complaint at ¶¶ 2, 33, *FTC v. Penn State Hershey Med. Ctr.*, 2016 WL 2622372 (M.D. Pa. May 9, 2016) (No. 15-cv-02362), *rev'd*, 838 F.3d 327 (3d Cir. 2016) (*available at* https://www.ftc.gov/system/files/documents/cases/160408pinnacleamendcmplt.pdf).

[3] Specifically, from 2000 until 2014, a payor was able to market a viable network in Harrisburg that included Pinnacle and one third-party Harrisburg area hospital. When Pinnacle terminated its agreement with the payor, the network lost half of its members even though it still included

satisfied the hypothetical monopolist test, which poses the "less burdensome question" of "whether payors would be able to successfully market a plan without *any* Harrisburg area hospital." *Id.* By establishing that payors could not successfully market plans that exclude *only* the merged firm, and therefore would pay higher prices rather than try to sell such a plan, the plaintiffs necessarily had established that a hypothetical monopolist owning *all* of the hospitals in the Harrisburg area could profitably impose a small price increase. *Id.* at 343, 345-46. Based on this evidence, the Third Circuit determined that the Harrisburg area was a properly defined relevant geographic market. *Id.* at 346.

The same logic applies here. The unequivocal and unanimous testimony of insurers, supported by the record as a whole, that it would be difficult or impossible to successfully market a network that excluded just the merged firm's six North Shore Area hospitals necessarily answers the broader question posed by the hypothetical monopolist test. If an insurer could not successfully market a network that excludes just the merged firm's hospitals, that insurer also could not successfully market a network that excluded the merged firm's hospitals *and* also excluded other local hospitals. It is impossible to conclude, consistent with the Seventh Circuit's findings, that the relevant geographic market is any broader than the North Shore Area.

### B. High Market Shares and High Market Concentration Establish Plaintiffs' Prima Facie Case

Undisputed evidence shows that the merged firm would control 60% of the North Shore Area GAC Services market and that the merger would significantly increase concentration in that market. *See* P's PH Br. at 12. Market concentration is measured using the Herfindahl-Hirschman Index ("HHI") and, under the Merger Guidelines, a transaction that increases

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one hospital in Harrisburg and several large hospitals in the surrounding communities of York and Lancaster. *Penn State Hershey*, 838 F.3d at 345-46.

concentration by 200 points or more and results in a highly concentrated market with an HHI of 2,500 or more is presumptively anticompetitive. U.S. Dep't of Justice & FTC Horizontal Merger Guidelines, § 5.3 (2010) ("Merger Guidelines"). Here, the presumption is met by a wide margin—Defendants' proposed merger would increase HHIs in the North Shore Area by 1,782 points to 3,943.[4] P's FOF ¶ 45. Plaintiffs have thus made a prima facie case. *See, e.g.*, *Penn State Hershey,* 838 F.3d at 346-47 ("The Government can establish a prima facie case simply by showing a high market concentration based on HHI numbers"); *St. Alphonsus*, 778 F.3d at 788 ("The extremely high HHI on its own establishes the prima facie case"); *Heinz*, 246 F.3d at 716.

## II. DEFENDANTS CANNOT REBUT PLAINTIFFS' PRIMA FACIE CASE

With the presumption of illegality established, the burden shifts to Defendants to rebut it. Defendants can meet that burden only by producing evidence that *clearly* shows that (1) no anticompetitive effects are likely, or (2) that the anticompetitive effects will be offset by extraordinary efficiencies resulting from the merger. *Penn State Hershey*, 838 F.3d at 347; *see also Phila. Nat'l Bank*, 374 U.S. at 363 ( "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects"). Defendants must "demonstrate that the prima facie case portrays inaccurately the merger's probable effects on competition." *Penn State Hershey*, 838 F.3d at 349

[4] The findings of the Seventh Circuit establish that the market is "very small." *See* Op. at 26. However, even if four additional local hospitals were added to the proposed North Shore Area market, the merger would be presumptively unlawful. In that 15 hospital market the merger would increase HHIs by 1049 to 2631. PX06000 Tenn Report ¶ 116; *see also* P's FOF ¶ 37. Defendants also conceded, both in this Court and on appeal, that the merger would be presumptively unlawful if the geographic market included the 11 hospitals in the North Shore Area and Northwestern Memorial Hospital. Op. at 25 n.5.

(quoting *St. Alphonsus*, 778 F.3d at 790). "[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; *see also OSF Healthcare Sys.*, 852 F. Supp. 2d at 1082.

### A. Defendants Have Not Clearly Shown a Lack of Competitive Effects

High concentration levels in the relevant market establish a presumption that the merger is likely to substantially harm competition. In this case, the presumption is bolstered by direct evidence of anticompetitive effects. As the Seventh Circuit explained, there is "conclusive evidence that mergers of independent hospitals can lead to large increases in area prices." Op. at 18 (quoting Leemore S. Dafny, *Estimation and Identification of Merger Effects: An Application to Hospital Mergers* 26 (Nat'l Bureau of Econ. Research, Working Paper No. 11673, 2005)); *see also id.* (quoting Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation—Update*, Technical Report (Robert Wood Johnson Foundation/The Synthesis Project, Princeton, N.J.), June 2012, at 2 ("Hospital mergers in concentrated markets generally lead to significant price increases.")).

NorthShore's own history demonstrates that even small hospital mergers can lead to large price increases. As the Seventh Circuit explained, NorthShore was created by a merger of three hospitals in 2000. Op. at 19. The Commission challenged the merger, alleging that NorthShore "substantially and immediately raised its prices after the merger." *Id.* (quoting *Evanston Northwestern Healthcare Corp.*, F.T.C. No. 9315, 2007 WL 2286195, at *53 (Aug. 6, 2007)). "NorthShore's own expert found price increases of nine to ten percent above price increases of a control group of hospitals" and, after a hearing before an administrative law judge, the Commission found that the merger violated the Clayton Act. *Id.* (citing *Evanston Northwestern*, 2007 WL 2286195, at *4,*21, *76).

Plaintiffs produced substantial direct evidence demonstrating that Defendants' merger is in fact likely to substantially harm competition. The direct evidence of anticompetitive effects includes, in addition to the unequivocal testimony from insurers discussed above, testimony that pre-merger competition between Advocate and NorthShore has led to lower prices. For instance, [redacted] currently receives significantly discounted reimbursement rates from [redacted] in return for excluding [redacted] from its [redacted]. P's FOF ¶ 65. And the parties' documents show that the merger will eliminate substantial head-to-head competition between them in the North Shore Area. *See* P's FOF ¶¶ 57-62; P's PH Br. at 13.

In their post-hearing brief, Defendants argued that "repositioning" by competitors would prevent any post-merger price increase. D's PH Br. at 22. According to Defendants, the repositioning by competitors in the North Shore Area is "similar to the repositioning dynamic found to be underway in central Pennsylvania" (*Id.* at 22) and includes "pursuing physician and outpatient strategies to capture inpatient admissions." *Id.* at 22-23. But the Third Circuit in *Penn State Hershey* directly rejected that very reasoning, holding instead that such outpatient "repositioning" cannot constrain post-merger inpatient pricing because insurers would still need the merged firm's hospitals to offer attractive networks. *See Penn State Hershey*, 838 F.3d at 352 (rejecting defendants' arguments about repositioning in light of the extensive testimony from insurers that they cannot market networks that exclude the merged firm); *see also* P's FOFs ¶¶ 88-94; P's PH Br. at 16-17.

Defendants have also previously argued that insurers, particularly BCBS, have greater bargaining power than hospitals and thus could defeat any post-merger price increase. D's PH Br. at 17. As the Third Circuit explained in *Penn State Hershey*, however, the insurers' leverage remains unaffected by the merger; only the merging hospitals' leverage will change. *Penn State*

*Hershey*, 838 F.3d at 346. The relevant question is "whether the merger will cause such a significant increase in the *[h]ospitals'* bargaining leverage that they will be able to profitably impose" a price increase. *Id.*; *see also* Merger Guidelines § 8 ("Even buyers that can negotiate favorable terms may be harmed by an increase in market power.")

Finally, Defendants have argued that their merger is unlikely to harm competition because they have offered not to raise prices. D's PH Br. at 19. That offer means little because it applies only to fee-for-service contracts, is limited in time and scope, fails to address many of the elements of lost competition that will result from the merger (including quality competition), and proposes to replace the intense competition between Defendants with a cumbersome auditing regime that would require continuous monitoring by the Commission and by this Court. *See* P's Mot. to Strike at 4-7. Such a regime would do nothing to maintain or restore the intense competition that existed before the merger. Not surprisingly, courts presented with similar self-imposed commitments have found them insufficient to rebut a prima facie case. *See, e.g., OSF Healthcare Sys.*, 852 F. Supp. 2d at 1085-86; *United States v. H&R Block, Inc.,* 833 F. Supp. 2d 36, 82 (D.D.C. 2011) (pledge to maintain prices for three years "cannot rebut a likelihood of anticompetitive effects in this case"); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 64 (D.D.C. 1998) ("[E]ven with such guarantees [not to raise prices], the merger[] would likely result in anti-competitive prices.").

**B. <u>Defendants Have Not Shown that the Anticompetitive Effects of the Merger Will Be Offset By Extraordinary Efficiencies</u>**

Defendants also argue that the merger will generate efficiencies that offset the anticompetitive effects of the merger. Although some courts have recognized an efficiencies defense, *see, e.g., FTC v. Univ. Health, Inc.*, 938 F.2d. 1206, 1222 (11th Cir. 1991), other courts have expressed skepticism about accepting such a defense. *See*, e.g., *Penn State Hershey*, 838

F.3d at 348; *St. Alphonsus*, 778 F.3d at 789-90. The Seventh Circuit has not yet weighed in on this issue. To the extent an efficiencies defense is recognized, however, courts uniformly agree that it is very narrow, and the Merger Guidelines reinforce this point. *See* Merger Guidelines § 10 ("only those efficiencies . . . unlikely to be accomplished in the absence of . . . the proposed merger" will be credited and "[e]fficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means"); *see also Penn State Hershey,* 838 F.3d at 350; *St. Alphonsus*, 778 F.3d at 790. Where, as here, a merger will result in a firm with a large percentage of the market and high HHI numbers, the merger is so likely to be anticompetitive that "extraordinarily great cognizable efficiencies [are] necessary to prevent the merger from being anticompetitive." *Penn State Hershey*, 838 F.3d at 350 (quoting *Merger Guidelines* § 10 at 31). No court has *ever* found efficiencies sufficient to offset the harm of a presumptively unlawful merger.

The Third Circuit's recent *Penn State Hershey* decision reiterated the rigorous standard that applies to efficiencies. *See Penn State Hershey*, 838 F.3d at 350. Courts "require that the [defendants] provide *clear evidence* showing that the merger will result in efficiencies that will offset the anticompetitive effects" of the merger. *Id.* (emphasis added). Efficiencies must be "merger specific, meaning, they must be efficiencies that cannot be achieved by either company alone." *Id.* at 348 (quoting *H.J. Heinz*, 246 F.3d at 722) (internal citations and quotation marks omitted). Otherwise, "the merger's . . . benefits [could] be achieved without the concomitant loss of a competitor." *Penn State Hershey*, 838 F.3d at 348 (quoting *H.J. Heinz*, 246 F.3d at 722). In addition, efficiencies "must be verifiable, not speculative." *Penn State Hershey*, 838 F.3d at 348 (quoting *St. Alphonsus*, 778 F.3d at 791) and they "must be shown in what

economists label 'real' terms." *Penn State Hershey*, 838 F.3d at 349 (*quoting Univ. Health,* 938 F.2d at 1223).

Defendants asserted two efficiencies in their post-hearing brief: (1) savings to consumers who switch from their existing insurance plans to a "high performing network," and (2) savings to insurers that would pay NorthShore's physicians at Advocate's contracted physician rates post-merger.[5] Defendants have not shown that these savings can only be obtained through the merger and have not provided any independently verifiable evidence of either the existence or magnitude of any merger-specific savings.

1. The HPN Is Not a Cognizable Efficiency

Defendants' principal efficiencies argument is that the merger will allow them to participate in what they call a "high performing network," or HPN, sold by insurers to consumers.[6] As Defendants describe it, the HPN is an ultra-narrow network product that only covers care provided by Advocate or, if the merger is consummated, by the merged firm. D. FOF ¶¶ 265, 267, 271. The product would be cheaper than other forms of insurance (such as PPO plans) but would also significantly restrict patients' choice of providers. According to Defendants, an Advocate-only HPN cannot successfully be sold to *employers*, who make up the

[5] Defendants made a variety of efficiencies arguments early in this litigation related to cost synergies and the purported benefits of bringing Advocate's experience in population health management and risk-based contracting to NorthShore. *See, e.g.,* D's Op. Br. at 30-32. As Plaintiffs demonstrated in their prior briefing, and as the evidence shows, those alleged efficiencies are neither merger-specific nor independently verifiable. *See* P's PH Br. at 24-26, 30-31; P's Reply Br. at 20-21, 23-24; P's FOF ¶¶ 119-157. In their post-hearing brief, Defendants affirmatively disavowed the argument that bringing population health management or risk-based contracting to NorthShore is necessary to achieve any alleged efficiency and omitted any reference to cost synergies. *See* D's PH Br. at 3, 24 n.28. To the extent that Defendants seek to revive any of these speculative efficiency arguments post-remand, their arguments fail for the reasons previously demonstrated.

[6] The HPN is an insurance product that can only be sold by licensed insurers; Defendants cannot sell the HPN to consumers. P's FOF ¶ 95.

majority of the insurance market, because the network is too narrow. D's FOF ¶ 264. The benefit of the merger, in Defendants' view, is that NorthShore would be included in the HPN, which would allow it to be successfully sold by insurers to employers. D's FOF ¶¶ 271, 281.

Defendants have not established that an Advocate-NorthShore HPN would offer any benefits to consumers. Although consumers might pay less for the HPN, they also get less in return.[7] It is improper to count the price difference between the HPN and other products as consumer cost savings. *See* P's PH Br. at 28; *see also* Merger Guidelines § 10 ("[P]urported efficiency claims based on lower prices can be undermined if they rest on reductions in product quality or variety that customers value.") In any event, Defendants have failed to establish that any alleged benefits of the HPN are merger-specific, independently verifiable, or sufficient to offset the likely competitive harm of the merger.

*First*, the HPN already exists and thus is not a merger-specific efficiency. D's FOF ¶ 264. The HPN is sold to individuals and small groups on the public exchange and could be sold to employer groups. At the hearing, an executive from [redacted] testified that it was prepared to offer the existing Advocate-only HPN to employers, but Advocate declined to go forward with the product after learning that [redacted]. *See* P's FOF ¶ 97; Sacks (Advocate) PI Hrg. Tr. 1455:12-21; [redacted] believes that an Advocate-only HPN would be successful in the employer group market and that [redacted]. An executive from [redacted] fully corroborated that testimony. [redacted] analyzed a potential Advocate-only network and determined that there was no coverage gap that

[7] As Defendants themselves argue, because consumers prefer plans with broad access to hospitals and physicians, the HPN must be offered at a significant discount to existing products to attract customers. D's FOF ¶ 270; *see also* D's PH Br. at 28.

would render the plan unmarketable to employer groups. *See* P's FOF ¶ 98; [redacted]. In fact, [redacted] planned to market an HPN to employers whether or not Defendants merge. *Id.*

*Second*, Defendants repeatedly credit as merger-specific efficiencies *all* alleged cost-savings associated with an HPN offered to employer groups, not just cost-savings *incremental* to those that could be realized with an Advocate-only HPN. Defendants calculate efficiencies by (1) estimating the cost difference between the existing HPN and other products on the exchange market, and (2) multiplying that dollar amount by a rough estimate of the number of consumers in the employer group market who might switch from their existing plans to an Advocate-NorthShore HPN. D's PH Br. at 26; D's FOF ¶ 277. But the benefit of the merger, to the extent that there is one at all, is that NorthShore would be added to an existing Advocate-only HPN, not that an HPN would be created in the first instance.

Defendants argue that customers would "save hundreds of dollars, per year, by switching to the HPN from other higher-priced products," relying on Dr. Eisenstadt's testimony. D's FOF ¶ 274. But Dr. Eisenstadt wrongly assumed that an *Advocate-only* HPN product would be unmarketable to employer groups and thus improperly credited all of the cost savings of the *Advocate/NorthShore* HPN to the merger. P's FOF ¶¶ 98-100. He did not attempt to measure whether adding NorthShore to an available Advocate-only HPN would generate incremental cost savings or consumer benefits.[8] P's FOF ¶ 100. Without such an analysis, Defendants cannot

[8] According to Defendants, an Advocate/NorthShore HPN would be offered at the same price point as the existing Advocate-only HPN. D's FOF ¶ 274. Therefore, if a customer could save "hundreds of dollars" by switching from an existing plan to the HPN post-merger, that customer could save the same amount by switching to an Advocate-only HPN today. If the merger has any consumer benefit, that benefit would be the difference in value between an Advocate-only

show, in real terms, that the *merger* will generate a verifiable and non-speculative consumer benefit.

*Third*, Defendants have repeatedly argued that creating an HPN for the group insurance market is a principal objective of the proposed merger; yet, they have inexplicably failed to produce *any* projections regarding enrollment in that product. Defendants have never themselves made any formal projections concerning either an Advocate/NorthShore HPN or an Advocate-only HPN sold to employer groups; did not obtain any projections from insurers regarding an Advocate/NorthShore HPN;[9] and did not ask any of their five experts to project enrollment in an HPN offered on the employer group market. Instead, Defendants retained Dr. Van Liere to measure "interest" in the HPN. Dr. Van Liere did not "offer[]any opinion that says a specific percent of people would . . . buy this product" and his survey "didn't specifically measure purchase intentions." Van Liere PI Hrg. Tr. 1083:6-10, 1100:2-7.

The *only* enrollment "projections" cited in Defendants' Proposed Findings of Fact were provided verbally by Dr. Sacks at the hearing.[10] *See* D's FOF ¶ 277; *see also* D's PH Br. at 26. Such efficiency claims "generated outside of the usual business planning process" are generally "viewed with skepticism." *FTC v. ProMedica Health Sys.*,Inc 2011 WL 1219281, at *40 (N.D. Ohio Mar. 29, 2011); Merger Guidelines § 10. Moreover, "[w]hile reliance on the estimation

HPN and an Advocate/NorthShore HPN, not the difference between the price of the HPN (which is unaffected by the merger) and the price of competing products.

[9] [redacted] projected enrollment in an Advocate-only HPN but did not make any projections concerning an Advocate/NorthShore HPN. [redacted] also did not make any projections related to the Advocate/NorthShore HPN. [redacted]. And Ms. Nettesheim of Aetna testified that she is not familiar with any projections made by Aetna. Nettesheim (Aetna) PI Hrg. Tr. 1203:1-7.

[10] Dr. Sacks testified that, to his knowledge, his back-of-the-envelope estimate constitutes the only projection ever made of enrollment in an Advocate/NorthShore HPN. Sacks (Advocate) PI Hrg. Tr. 1461:9-13.

and judgment of experienced executives . . . may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the . . . estimates renders them not cognizable by the Court." *H&R Block*, 833 F. Supp. 2d at 91.

Dr. Sacks did not conduct anything resembling a rigorous analysis. *See* P's PH Br. at 27-30. According to Dr. Sacks's various unfounded assumptions, the Advocate/NorthShore HPN could attract over a million users or it could attract as few as 210,000 users. Sacks (Advocate) PI Hrg. Tr. at 1428:4-6, 1431:1-5. Leaving aside the many flaws in Dr. Sacks's back-of-the-envelope calculations (which were never produced in written form),[11] Dr. Sacks wrongly attributed the entire estimated enrollment in the HPN to the merger. Dr. Sacks did not estimate the likely enrollment in an Advocate-only HPN offered to employer groups. Nor did he consider whether Advocate could independently take steps to make an Advocate-only product more attractive to consumers by, for example, improving its facilities or services, hiring physicians, or opening new outpatient facilities. Any savings experienced by consumers who would enroll in an Advocate-only HPN today, or who would enroll if Advocate made investments or improvements independently, are not merger-specific savings.

Dr. Van Liere's survey suffers from the same fundamental flaw as Dr. Sacks's "projections." Dr. Van Liere asked survey respondents if they would be interested in an Advocate-NorthShore HPN if one were available. Van Liere PI Hrg. Tr. 1026:6-23. He did not ask respondents if they would be interested in an Advocate-only HPN and did not ask whether Advocate could make some incremental improvements to its facilities or services that would

[11] Dr. Sacks testified that he wrote down his projections, gave the written version to counsel, and carried a copy to court in his briefcase the day of his testimony. Sacks (Advocate) PI Hrg. Tr. 1458:8-17. Yet Defendants have never been able to produce a written version of Dr. Sacks's calculations and relied solely on Dr. Sacks's oral testimony in their post-hearing submissions.

cause them to be interested in an Advocate-only HPN. DX8100 Van Liere Report ¶¶ 19-21, Exhibit C. To the extent that Dr. Van Liere measured "interest" in the HPN, there is no evidence that the "interest" is only in an HPN that includes Advocate *and* NorthShore.

*Fourth*, the HPN cannot be merger-specific because, as multiple insurers testified, NorthShore could join the HPN even if NorthShore were not owned by Advocate. *See, e.g.*, (NorthShore could participate in the HPN as an independent entity if it reached terms with ; Nettesheim (Aetna) PI Hrg. Tr. 1201:18-25 ("[I]t is technically correct that to put those products in the market, they don't have to merge."); *see also* P FOFs ¶¶ 101-104. The HPN therefore does not justify the loss of a competitor in this market.

Despite this testimony, Defendants argued in their post-hearing submissions that NorthShore is unable to participate in the HPN without the merger because NorthShore cannot lower its rates enough for insurers to offer the HPN at a price acceptable to consumers.[12] D's PH Br. at 28-29; D's FOF ¶¶ 301-315. The evidence cited by Defendants, however, shows only that NorthShore has been *unwilling* to lower its rates in the past and says nothing about NorthShore's *ability* to lower its rates in the future. *See* D's FOFs ¶¶ 304, 307, 315. As the record amply demonstrates, NorthShore is fully capable of lowering its costs and reducing its rates independently. *See* P's FOF ¶ 124; P's Reply Br. at 20. Accordingly, even if one were to

[12] Defendants have also argued that the merger is necessary for NorthShore and Advocate both to participate in the HPN on a full-risk basis. D's PH Br. at 29-30. This is inaccurate. *See, e.g.*, Jha PI Hrg. Tr. at 861:19-24; PX06001 Jha Report ¶¶ 52, 82. But, in any event, there is no evidence in the record comparing the cost savings achievable through an HPN in which both Advocate and NorthShore participate on a full-risk basis and the cost savings that could be achievable through an ultra-narrow network product in which the insurer maintains some level of risk. Any cost savings achievable through a narrow network product in which both Defendants participate as independent entities are not merger-specific efficiencies.

*assume* that some unspecified number of customers would enroll in an Advocate/NorthShore HPN (but not an Advocate-only HPN), and even if one were to *assume* that those same customers would experience some unspecified amount of cost savings from switching, it would be improper to credit those cost savings to the merger.

2. Applying Advocate's Contractual Physician Rates to NorthShore's Physicians Is Not a Cognizable Efficiency

In their post-hearing brief, Defendants argued that their merger would generate $30.2 million in physician rate savings because, upon merging, Advocate will move NorthShore's physicians to Advocate's lower reimbursement rates. D's PH Br. at 23. These purported savings do not appear in Defendants' Opposition Brief,[13] or in any of the five expert reports submitted by Defendants. Defendants raised the issue for the first time on the final day of the hearing, and they cited the specific $30.2 million figure only in their closing arguments.[14] Thus, while Defendants characterize the savings as "unrebutted" in their post-hearing submissions, it would be more accurate to call the savings "undisclosed."

Because Defendants did not identify this supposed $30.2 million in savings prior to the hearing, their calculations were not tested through discovery or reviewed by Plaintiffs' experts. In their closing arguments, Defendants' counsel insisted that the number did not come "out of nowhere" but is "from this BCBS analysis." PI Hrg. Tr. 1875:11-15. The BCBS analysis cited by counsel, however,

[13] In their opposition to Plaintiffs' PI Motion, Defendants claimed that Advocate provides *hospital services* at a lower per-unit rate than NorthShore. D's Opp. Br. at 31. Defendants argued that the price difference meant that the merger could lead to unspecified cost savings or could be cost-neutral. *Id.* at 31-32. Prior to their post-hearing briefing, however, none of Defendants' written submissions mentioned any cost-savings derived from differences in the contracted rates for *physician services*.

[14] In their Findings of Fact, Defendants cite a page from the hearing transcript and a slide from a demonstrative exhibit, neither of which mention $30.2 million in savings. *See* D's FOF ¶ 320, n.409.

[REDACTED] It does not provide verifiable evidence of an efficiency.

Even if Advocate's physician rates are lower than NorthShore's in some private contracts, however, any savings associated with those contracts cannot be weighed against the long-term anticompetitive effects of the merger.[15] Among other reasons, the contracts between insurers and Defendants are time-limited and subject to renegotiation. *See, e.g.*, Norton (Cigna) PI Hrg. Tr. 93:1-8 (stating that in 2015, Advocate "came back to us and pretty much reopened that agreement . . . "). When evaluating the anticompetitive effects of a merger, the Court must consider what effect the merger will have on *future* negotiations. *See Penn State Hershey*, 838 F.3d at 344; *Phila. Nat'l Bank*, 374 U.S. at 362, (noting that the question "whether the effect of the merger 'may be substantially to lessen competition' in the relevant market" requires a "prediction of [the merger's] impact upon competitive conditions in the future"). And here, the evidence shows that the merged firm will be able to raise prices post-merger.

Finally, Defendants have not shown that NorthShore is incapable of reducing its physician reimbursement rates independently. *See St. Alphonsus*, 778 F.3d at 791 n.15 ("[I]n Clayton Act § 7 cases, after a plaintiff has made a prima facie case that a merger is anticompetitive, the burden of showing that the claimed efficiencies cannot be attained by practical alternatives . . . is properly part of the defense.") (internal quotation marks and citation omitted). Nowhere in their post-hearing briefing do Defendants even argue these alleged savings are merger-specific. *See* D's PH Br. at 23; *see also* D's FOF ¶¶ 317-21. Any physician reimbursement rate savings are therefore not cognizable efficiencies.

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[15] Defendants do not claim that the merger will lead to lower costs or some other long-term benefit, but rely solely on an alleged difference between the reimbursement rates in existing NorthShore and Advocate contracts.

## III. THE EQUITIES FAVOR AN INJUNCTION

In light of the Seventh Circuit's findings, the Commission is very likely to succeed on the merits of its Section 7 claim. Defendants therefore "face a difficult task in justifying the nonissuance of a preliminary injunction." *Penn State Hershey*, 838 F.3d at 352 (quoting *Univ. Health*, 938 F.2d at 1225). In fact, "[n]o 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." *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1094-95 (citation omitted).

Under Section 13(b), courts are required to consider the Commission's likelihood of success and weigh the "equities" in determining whether to grant a preliminary injunction. In conducting that inquiry, courts must consider "whether the *injunction,* not the *merger*, would be in the public interest." *Penn State Hershey*, 838 F.3d at 353 (emphasis in original). As the Seventh Circuit has explained, the relevant question is "who would be helped and who would be hurt by allowing . . . a challenged acquisition to go through before . . . administrative proceedings are completed." *Elders Grain*, 868 F.2d at 904.

Where, as here, "the acquisition seems anticompetitive, then failing to stop it during the administrative proceedings will deprive consumers and suppliers of the benefits of competition *pendente lite* and perhaps forever." *Id.* Denying an injunction would undermine the strong public interest in the effective enforcement of the antitrust laws by denying the public – specifically consumers of health care services from NorthShore and Advocate – full and complete relief should the Commission ultimately prevail on the merits. As the court here recognized in granting an injunction pending appeal, "restoring competition . . . would be very difficult, if not impossible, to do" post-merger. Motion for Injunction Pending Appeal Hrg. Tr. 21:23-25 (June 17, 2016). Constructing and enforcing an effective divestiture order after merging parties have combined their operations has historically been exceedingly difficult or

even impossible. Op. at 19 n.3 (noting that in *Evanston*, the merged parties, who had significantly raised prices following their merger, were too entwined to order divestiture); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508-09 (D.C. Cir. 1986); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008). If the Court does not issue a preliminary injunction, Defendants will be free to immediately alter their operations (including laying off staff and combining facilities), jointly negotiate contracts with health plans, and share their strategic information (including data on ongoing rate negotiations), making it nearly impossible to restore lost competition if the Commission ultimately prevails in the administrative proceeding.

Defendants have offered no evidence establishing that the public will be harmed if their merger is delayed until the conclusion of the administrative proceedings.[16] Instead, Defendants have repeatedly repackaged their efficiencies claims as equities. *See, e.g.*, D's Opp. Br. at 27-38; PI Hrg. Tr. at 55:3-15. Time and again, Defendants have insisted that the alleged benefits of the HPN are public benefits that the Court must weigh against the strong public interest in effective enforcement of the antitrust laws. Advocate Closing Sides at 41; D's Opp. Br. 29; D's PH Br. at 23-24. This is inappropriate because "[e]fficiencies are not the same as equities." *Penn State Hershey*, 838 F.3d at 349. If the HPN has any merger-specific benefits, those benefits would still be available to consumers if the Court granted an injunction and Defendants ultimately prevailed at the administrative hearing. The benefits of the HPN, if they exist at all, are therefore not equities weighing against an injunction. *See id.* at 353; *see also OSF Healthcare Sys*, 852 F. Supp. 2d at 1095 (stating that efficiencies are not equities where, "despite their obvious desire to

[16] To the extent that Defendants' *private* interests are harmed by a delay, those interests are entitled to little weight. *Penn State Hershey*, 838 F.3d at 353; *Univ. Health*, 938 F.2d at 1225.

proceed with the merger immediately, defendants admit that the efficiencies they hope to gain can be achieved whenever the merger is allowed to proceed, even if that does not occur until after the FTC makes its final ruling"); *ProMedica*, 2011 WL 1219281, at *60 ("[I]f the benefits of a merger are available after the trial on the merits, they do not constitute public equities weighing against a preliminary injunction."). To the extent that Defendants claim that they would abandon their merger if an injunction is granted, "the result—that the public would be denied the procompetitive advantages of the merger—would be the [Defendants] doing." *Penn State Hershey*, 838 F.3d at 353. Defendants have presented "no reason why, if the merger makes economic sense now, it would not be equally sensible to consummate the merger following a FTC adjudication on the merits that finds the merger lawful." *Id.*

**CONCLUSION**

For the foregoing reasons, the Court should grant Plaintiffs' Motion for a Preliminary Injunction.

Dated: December 14, 2016

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December, 2016, I filed and served the foregoing on counsel for all parties via the Court's electronic filing system and electronic mail.

/s/ Christopher Caputo
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