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

PLAINTIFFS' MOTION
TO STRIKE DEFENDANTS' NOTICE OF OFFER OF JUDGMENT

On April 4, Defendants filed a Notice of Offer of Judgment (the "Notice") with the Court, attaching to the Notice a proposed "final judgment" that Defendants made to the FTC on March 23. (Dkt. 320.) The FTC had not accepted the offer pursuant to Federal Rule of Civil Procedure 68 at the time of Defendants' filing, and the offer has since expired. While it is proper for litigants to discuss resolving litigation without further court intervention under Rule 68, what is not proper is Defendants' tactic of filing an unaccepted offer of judgment with the Court. Defendants' Notice of an unaccepted Rule 68 offer is inadmissible, as required by Rule 68's express terms; a "legal nullity," as the Supreme Court put it earlier this year; and an "improper" filing designed to unduly influence this Court, as multiple authorities explain. Furthermore, Defendants' Notice conflates the current preliminary injunction proceedings before this Court with the full merits proceeding. In doing so, Defendants ask this Court to upset a carefully crafted merits review process that federal law gives to an administrative law judge and the Commission in the first instance, and then to the Courts of Appeal. Finally, even if Defendants' Notice were properly before this Court, which it is not, on its own terms it is wholly inadequate to replace the fundamental national economic policy of competition. Defendants have offered an inadministrable system of price caps and audits that does little to protect consumers or provide any of the actual benefits created by vigorous, head-to-head competition. Defendants' Notice should therefore be stricken from the record.

I. DEFENDANTS' IMPROPER NOTICE IS A LEGAL NULLITY UNDER RULE 68

The Court should strike Defendants' Notice from the record, as it is an unsubtle attempt to sway this Court with an improper, inadmissible document purporting to be filed pursuant to Rule 68. Rule 68(a) states that "[a]t least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms,

with the costs then accrued," and provides the opposing party 14 days to accept the offer or let it expire. The next subsection governs unaccepted offers, and is explicit that "*[e]vidence of an unaccepted offer is not admissible* except in a proceeding to determine costs." Fed. R. Civ. P. 68(b) (emphasis added). This near-total prohibition on admissibility makes sense: "As every first-year law student learns," the Supreme Court recently explained, "[a]n unaccepted settlement offer [under Rule 68]—like any unaccepted contract offer—is a legal nullity, with no operative effect." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 (2016).

Defendants nonetheless filed this inadmissible legal nullity with the Court. Multiple courts in this district, other district courts in this circuit, and the two leading treatises of civil procedure all conclude that such a gambit is improper and should be stricken.[1] As the Sixth Circuit explained in a related circumstance, the entire purpose of Rule 68's prohibition on admitting unaccepted offers is to avoid biasing the fact finder:

> The rule contemplates that that whether jury or judge tries the case the decisionmaker will be unaware of the extraneous fact that an offer of judgment has been made. This ensures that the trier of fact will not be influenced in its evaluation of the case by any knowledge of a rejected offer or the consequences thereof.

Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 295 (6th Cir. 1989); *see also Estate*

[1] *Labuda v. Schmidt*, No. 04 C 1281, 2005 WL 2290247, at *2-3 (N.D. Ill. Sept. 19, 2005) ("Because plaintiffs never accepted the offer, however, it should never have been filed.… Accordingly, the improperly filed offer of judgment is stricken."); *Webb v. James*, 172 F.R.D. 311, 312 n.1 (N.D. Ill. 1997) ("In addition to serving Plaintiff's counsel with the Offer of Judgment, Defendants' counsel also filed the offer with the Clerk of the Court. This clearly was improper." (record citation omitted)); *Lorio v. Cartwright*, No. 88 C 5576, 1991 WL 134211, at *1 (N.D. Ill. July 12, 1991) (an unaccepted offer of judgment filed at the time it was served on plaintiffs "was not filed in compliance with Rule 68 and will be stricken"); *Kason v. Amphenol Corp.*, 132 F.R.D. 197, 197 (N.D. Ill. 1990) (striking an unaccepted Rule 68 offer sua sponte because "Rule 68 is really unambiguous" that "no filing is permitted at the time of tender"); *see also Estate of Enoch v. Tienor*, No. 07-C-376, 2008 WL 3244230, at *1 (E.D. Wis. Aug. 6, 2008) (striking an unaccepted offer of judgment from the record because "[t]he clear implication [of Rule 68] is that an offer of judgment must not be filed with the Court unless it is accepted"); 13-68 Moore's Federal Practice § 68.05[2][a] ("It is improper for a defendant to file an unaccepted Rule 68 offer of judgment with the court" except to determine costs.); 12 Charles Alan Wright et al., Federal Practice & Procedure § 3002 (2d ed. 2015) ("The defendant should not file the [Rule 68] offer with the court, but if that is done … the remedy is to strike the offer from the court's files." (footnotes omitted)).

of Enoch, 2008 WL 3244230, at *1 (adopting *Hopper*'s logic in striking improperly filed unaccepted Rule 68 offer from record so as "to prevent undue influence upon the Court"). Filing such an improper offer with the Court therefore "seriously undermines the goal of unbiased evaluation of the merits of cases" and, if anything, "*lessens* the possibility for settlement." *Hopper*, 867 F.2d at 295 (emphasis added). This Court should therefore reject Defendants' thinly-veiled effort to influence its decision and strike the inadmissible, inoperative Notice from the record.

II. DEFENDANTS' NOTICE IMPERMISSIBLY CONFLATES A MOTION FOR A PRELIMINARY INJUNCTION WITH A TRIAL ON THE MERITS

Beyond violating Rule 68, Defendants' Notice suffers from a second, independent flaw in that it confuses the instant proceeding for a preliminary injunction with a full trial on the merits. Plaintiffs have petitioned the Court pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, for a preliminary injunction "to prevent competitive harm and maintain the *status quo* during the pendency of an administrative proceeding on the merits." (Dkt. 14, at 1-2.) Nonetheless, Defendants appear to be asking this Court to transform the instant proceeding and enter a "final judgment" on the merits. (Dkt. 320-1, at 1-2.) But it is bedrock law that the two proceedings "are significantly different" and that "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 393, 395 (1981).

The concerns raised in *Camenisch* are even more applicable where, as here, the ultimate factfinder is an administrative body. The FTC's administrative complaint against Defendants will be adjudicated after a full trial on the merits, which is scheduled to begin on May 24, 2016. (Dkt. 14, at 2.) Under the governing statutes and FTC rules, an administrative law judge ("ALJ") will hear both fact and expert evidence and then render an opinion on whether the transaction violates

Section 7 of the Clayton Act. 16 C.F.R. §§ 3.31A, 3.43, 3.51. The ALJ's decision will be automatically reviewed by the full Commission, *id.* § 3.52(a), which may adopt, modify, or set aside the ALJ's findings and conclusions, *id.* § 3.54(b); *see also* 15 U.S.C. §§ 21(b), 45(b). The Commission's decision is then appealable directly to a federal Court of Appeals. 15 U.S.C. §§ 21(c), 45(c). Defendants' Notice short-circuits this procedure, asking this Court to exercise a power—rendering final judgment on the merits of whether the effect of a merger "may be substantially to lessen competition," 15 U.S.C. § 18—that federal law gives to the Commission and then to the Courts of Appeal. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) ("'The district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" (quoting *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976))). The Notice should thus be struck from the record and not considered further.

III. DEFENDANTS' PROPOSED REMEDY WILL NOT CURE THE ANTICOMPETITIVE EFFECTS CAUSED BY DEFENDANTS' MERGER

Even if the Court were to consider Defendants' Notice—which, for the reasons explained above, it should not—the offer of judgment is fatally flawed on the merits, because the cumbersome auditing regime it proposes fails to substitute for the intense competition that occurs between competing hospitals. Defendants offer to limit price increases "under any Fee-For-Service Contract" to "the greater of (i) the rate increase of the CPI-U [the Consumer Price Index For All Urban Consumers calculated by the United States Bureau of Labor Statistics] for [a given year] or (ii) 1.0%" for the next seven years. (Dkt. 320-1, at 5.) Defendants propose to make annual certifications with this requirement (*id.* at 5-6), but if Defendants breach this requirement then Defendants and a complaining Payor—but not a class of Payors and not the FTC—can enter into private arbitration (*id.* at 7-8). Simultaneously with this procedure, Defendants offer to allow

the FTC to inspect their books and records and interview their employees (*id.* at 6-7), although Defendants' offer is silent as to whether Defendants would be required to agree to any recommendation by the FTC to secure unspecified "compliance" with the Final Judgment (*id.*). Instead, Defendants ask this Court to make itself available "at any time" to issue "further orders and directions as may be necessary or appropriate to carry out or construe" the proposed judgment. (*Id.* at 8.) This is a far cry from the "fundamental national economic policy" of competition that the Supreme Court has endorsed as "the only alternative to the cartelization or governmental regimentation of large portions of the economy." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 372 (1963).

Unsurprisingly, other courts that have been presented with similar self-imposed commitments to fix prices for a limited period of time have rejected such offers as insufficient to cure anticompetitive concerns. Another court in this district recently considered a similar proposal in a hospital merger case, and found "that it does not rebut the FTC's prima facie case" showing anticompetitive effects because, "while the propos[al] … does provide some minimal constraints on the market power of the combined entity, it does not eliminate the concern about potential anticompetitive effects." *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1085-86 (N.D. Ill. 2012). Numerous other courts are in accord. *See, e.g., 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 mergers would likely result in anti-competitive prices."); *Commonwealth v. Partners Healthcare Sys., Inc.*, No. SUCV2014-02033-BLS2, 2015 WL 500995, at *1, 22-23 (Mass. Supp. Ct., Suffolk Cnty. Jan. 30, 2015) (rejecting proposed settlement agreement in hospital merger case involving

"price caps" because they were "limited in time" and did "not reasonably or adequately address the harm that is almost certain to occur as a consequence of the anticompetitive conduct by Partners that the Complaint describes").[2]

Just as in these cases, Defendants' offer here fails to address the many elements of lost competition that go beyond limiting price increases to the rate of inflation. For example:

- **Competition For Lower Prices Is Not Protected**: Defendants' proposal may address what happens when prices *rise* faster than inflation, but it says nothing about what is to occur when prices *fall*. There have been numerous efforts in recent years to "bend the cost curve,"[3] but the proposed price caps do nothing to encourage Defendants to compete by passing these savings on to payors and patients. The risk that payors and patients will not receive a benefit from falling prices is further heightened by Defendants' requirement that price negotiations above Defendants' self-imposed limits occur in one-on-one private arbitration (Dkt. 320-1, at 7-8), as opposed to a free market where a payor can compare prices. As one court summarized when considering a similar promise not to raise prices, "[i]n the absence of real competition, [the Court] is concerned that the prices set today could in effect become the floor tomorrow." *Cardinal Health*, 12 F. Supp. 2d at 65.

- **Competition For Contracts Other Than Fee-For-Service Is Not Protected**: By its terms, Defendants commits to limit rate increases "under any Fee-For-Service Contract." (Dkt. 320-1, at 5.) Yet Defendants have admitted elsewhere that while NorthShore "is still focused on the old fee-for-service model" (Dkt. 198, at 31), "Advocate has taken the leap into the boat of risk-based payment," as will the proposed new merged hospital system (*id.* at 37). Defendants' proposal to cap prices is therefore illusory since by its terms it does not apply to any of the

[2] Plaintiffs expect Defendants to rely on a decision denying the FTC's motion for a preliminary injunction based in part on a "Community Commitment" from defendants in that case to limit prices for a period of time, despite that court's concern that "[i]t is difficult to conceive of any commitment of this nature that would provide failsafe assurances to the community." *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1298 (W.D. Mich. 1996). Time has unfortunately proven those concerns correct, as once the Community Commitment's price caps expired, the parent hospital system immediately raised prices by 12 percent, and prices have continued to increase faster than inflation. *See* Mark Sanchez, *Spectrum Hikes Charges 12 Percent*, Grand Rapids Business Journal, June 4, 2004, *available at* http://www.grbj.com/articles/63939; Sue Thoms, *Spectrum Health Plans Another Significant Rate Hike at Grand Rapids Hospitals*, mlive.com, June 7, 2011, *available at* http://www.mlive.com/business/west-michigan/index.ssf/2011/06/spectrum_health_plans_8_percen.html.

[3] *See, e.g.*, 2013 Atlas of CKD & ESRD, U.S. Renal Data System at 326-27 (2013), *available at* http://www.usrds.org/2013/pdf/v2_ch11_13.pdf (describing how a 2011 shift by Medicare to bundled payment for dialysis treatments led to a 20% reduction in the use of expensive biologic drugs over the course of a single year, and an additional 39% reduction in the subsequent year, which "translate[d] directly into savings for dialysis providers").

contracts in which the merged entity would be engaged.

- **Competition For Quality Of Service Is Not Protected**: Defendants' proposal is silent as to any quality of service issues, even though competition often results in competitors increasing the quality of their services. As explained in more detail the FTC's memorandum in support of its motion for a preliminary injunction, Advocate's executives admit that hospital competition "does benefit the patient in that there is continual effort to improve services at each site," and Defendants directly compete on quality, tracking each other's health outcomes, patient and physician satisfaction, and community reputation. (Dkt. 154, at 29 & nn.94-96 (quotation marks omitted).) Under their proposal, Defendants are free to eliminate all of these efforts to continually improve quality.

- **Competition To Serve New Patients Is Not Protected**: Defendants' proposal also does not provide any incentive for Defendants to continue to expand their facilities in order to compete against each other. If anything, Defendants' commitment to cap prices for seven years for any Fee-For-Service Contract *discourages* any incentive to expand. With prices so limited, Defendants would have no incentive to invest in new facilities, such as NorthShore's decision to open six new integrated delivery rooms at Highland Park in an effort to recapture market share in obstetrics, or for Advocate to construct a new immediate care center in Glenview as a "defensive move" against Northshore. (Dkt. 154, at 29-30 & nn.97-98.) These very concerns, that a merged firm "could … limit the availability of [its services] to consumers by marketing it more selectively and less vigorously," drive courts to reject similar price caps. *H&R Block*, 833 F. Supp. 2d at 82.

Finally, Defendants' proposal suffers from serious administrability concerns. Rather than compete, Defendants envision this Court being available for the next seven years to continually monitor their attempts to negotiate prices with payors throughout the North Shore Area and to provide unspecified "further orders and directions" should there be any dispute between Defendants, the FTC, or a Payor. (Dkt. 320-1, at 8.) But "[c]ourts are ill suited to act as central planners, identifying the proper price, quantity and other terms of dealing." *Pac. Bell Tel. Co. v. Linkline Comms., Inc.*, 555 U.S. 438, 452 (2009) (quotation marks omitted). Asking the Court to oversee and enforce negotiations of hundreds of contracts involving thousands of products and services is precisely the role that the Supreme Court has encouraged courts to abjure.

CONCLUSION

For the reasons stated above, this Court should strike Defendants' Notice of Offer of Judgment from the record.

Dated: April 13, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the April 13, 2016, I filed and served the foregoing on all counsel of record via the Court's electronic filing system.

/s/ Daniel J. Matheson
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