

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

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

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In the Matter of)	Docket No. 9346
)	
ProMedica Health System, Inc.)	REDACTED PUBLIC VERSION
a corporation)	
)	
)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission, having reason to believe that Respondent ProMedica Health System, Inc. (“ProMedica”) consummated a joinder agreement (the “Acquisition”) in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I.

NATURE OF THE CASE

1. ProMedica’s acquisition (the “Acquisition”) of St. Luke’s Hospital (“SLH” or “St. Luke’s”) threatens to substantially lessen competition for critical healthcare services in Lucas County, Ohio. This diminished competition will stifle beneficial quality improvements and will result in significant increases in healthcare costs to local residents, many of whom are already struggling to keep up with rising medical expenses.

2. ProMedica effectively acquired and took control of its nearby competitor St. Luke’s upon consummation of a joinder agreement on August 31, 2010. Ordinary course documents reveal that a principal motivation for the Acquisition was to gain enhanced bargaining leverage with health plans and the ability to raise prices for services. Indeed, SLH’s internal strategic plans unambiguously reveal that the Acquisition could allow ProMedica

to [REDACTED]
[REDACTED] Elsewhere, SLH’s documents observe that an [REDACTED]
[REDACTED] and could [REDACTED]
[REDACTED]

3. Rate increases would generate higher profits for the Respondent, but – as SLH’s internal business plans acknowledge – would impose significant burdens on local employers and employees, either directly or through higher health insurance premiums, co-pays, and other out-of-pocket healthcare expenses. These cost increases have real health-related consequences, as they inevitably force some employers to reduce or eliminate health-insurance coverage for their employees, force some families to drop their health insurance altogether, and cause others to delay or forgo checkups and other medical care that they can no longer afford.
4. The Acquisition reduces the number of competitors in Lucas County for general acute-care inpatient hospital services from four to three and, for inpatient obstetrical services, from three to two. After the Acquisition, ProMedica – [REDACTED] – has just two competitors in Lucas County for general acute-care hospital services: Mercy Health Partners (“Mercy”) and University of Toledo Medical Center (“UTMC”). Because UTMC does not offer obstetrical services, there is even less competition for those services; the Acquisition has resulted in a duopoly, with ProMedica facing only Mercy as a competitor.
5. Post-Acquisition, ProMedica now controls nearly 60% of the general acute-care inpatient hospital services market in Lucas County and over 80% of the market for obstetrical services, as measured by patient days. These extraordinarily high market shares and concentration levels render the Acquisition presumptively unlawful *in both relevant markets* – general acute-care services and obstetrics – under the relevant case law and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”). This strong presumption of illegality is independently confirmed and supported by an array of qualitative and quantitative evidence from sources including health plans, local employers, third-party hospitals, and the merged parties themselves.
6. The price and non-price competition eliminated by the Acquisition will not be replaced by other hospitals in the next several years, if ever. Significant barriers to entry and expansion, including regulatory requirements and funding needs, prevent new hospitals from entering the market and prevent existing hospitals from substantially expanding existing services. The cost of opening a new obstetrics department in an existing hospital is also prohibitive. Finally, the Respondent’s purported efficiencies are also insufficient to offset the significant anticompetitive harm likely to result from the Acquisition.

II.

RESPONDENT

7. ProMedica is a not-for-profit healthcare system incorporated under and by virtue of the laws of Ohio. ProMedica is headquartered at 1801 Richard Road, Toledo, Ohio, 43607. ProMedica's healthcare system serves northwestern and west-central Ohio and southeastern Michigan.
8. Excluding St. Luke's, ProMedica operates three general acute-care hospitals in Lucas County, Ohio: The Toledo Hospital ("TTH"); Flower Hospital ("Flower"); and Bay Park Community Hospital ("Bay Park"). ProMedica also owns Paramount Health Care ("Paramount"), a for-profit corporation that operates one of the largest commercial health plans in Lucas County, and Toledo Children's Hospital. ProMedica is by far the largest employer of physicians in Lucas County. In 2009, ProMedica's revenues totaled approximately \$1.6 billion.
9. As of August 31, 2010, ProMedica effectively acquired and took control of St. Luke's, a formerly independent, not-for-profit acute-care community hospital located at 5901 Monclova Road, Maumee, Ohio, 43537. St. Luke's was broadly recognized as a high-quality, low-cost hospital, which generated revenues of approximately \$156 million in 2009.

III.

JURISDICTION

10. ProMedica, through its relevant operating subsidiaries, is, and at all relevant times has been, engaged in commerce or in activities affecting commerce, within the meaning of the Clayton Act. The Acquisition constitutes an acquisition under Section 7 of the Clayton Act.

IV.

THE ACQUISITION

11. By virtue of the joinder agreement consummated on August 31, 2010, ProMedica currently is the sole corporate member of St. Luke's and its affiliated entities, with control and ultimate authority over all significant business decisions at St. Luke's. ProMedica also acquired ownership, including all stock interest, in certain SLH for-profit entities. Thus, ProMedica now controls SLH's strategic planning, operating and capital budgets, large unbudgeted expenditures, and significant borrowing and contracting. Importantly, ProMedica also will negotiate SLH's contracts with commercial health plans.

V.

THE RELEVANT SERVICE MARKETS

A.

General Acute-Care Inpatient Services Market

12. The Acquisition threatens substantial harm to competition in two relevant service markets. The first is general acute-care inpatient hospital services sold to commercial health plans, which encompasses a broad cluster of basic medical and surgical diagnostic and treatment services that include an overnight hospital stay, such as emergency services, internal medicine, and minor surgeries. It is appropriate to evaluate the Acquisition's likely effects across this entire cluster of services, rather than analyzing each service independently, because the group of services is offered by the same competitors under similar competitive conditions.
13. The general acute-care inpatient services market excludes outpatient services because health plans and patients could not substitute outpatient services for inpatient care in response to a price increase. Similarly, more sophisticated and specialized tertiary and quaternary services, such as major surgeries and organ transplants, also are properly excluded from the relevant market because they are not substitutes for general acute-care inpatient services.

B.

Inpatient Obstetrical Services

14. The Acquisition also threatens substantial competitive harm in the market for inpatient obstetrical services. This market encompasses hospital services provided for labor and delivery of newborns. No other hospital services are reasonably interchangeable with inpatient obstetrical services, making this an appropriate relevant market within which to analyze the likely effects of the Acquisition.
15. Within the broader relevant market for general acute-care services, it is appropriate to define a narrower relevant service where it more fully accounts for unique competitive conditions. Here, these unique competitive conditions include that there are fewer hospitals offering inpatient obstetrical services in Lucas County: neither UTMC, one of the two remaining competitors in the market for general acute-care inpatient services, nor Mercy's St. Anne Hospital provide obstetrical services.

VI.

THE RELEVANT GEOGRAPHIC MARKET

16. The relevant geographic market in which to analyze the effects of the Acquisition for each relevant service market is Lucas County, Ohio.
17. The appropriate geographic market is determined by examining the geographic boundaries within which a hypothetical monopolist for the services at issue could profitably raise prices by a small but significant amount.
18. Due to residents' clear preference for local hospital care, health plans must have a strong representation of Lucas County hospitals in their provider networks in order to satisfy employers and their employees. Health plans could not steer members to hospitals outside of Lucas County in response to rate increases at the Lucas County hospitals. Thus, a hypothetical monopolist that controlled *all* of the hospitals, or all obstetrical services, in Lucas County could profitably increase rates by at least a small but significant amount. Hospitals outside of Lucas County do not meaningfully compete with Lucas County hospitals.
19. According to the merged hospitals' own ordinary-course documents, ProMedica and St. Luke's do not regard non-Lucas County hospitals as significant competitors. Instead, ProMedica and St. Luke's have focused their competitive efforts on – and have repeatedly computed market shares based on – hospitals in and around Toledo. Patient discharge data demonstrates that less than three percent of Lucas County residents leave the county for general acute-care or obstetrical services.

VII.

MARKET STRUCTURE AND THE ACQUISITION'S PRESUMPTIVE ILLEGALITY

20. The Acquisition reduces the number of general acute-care competitors in Lucas County from four to three, leaving ProMedica facing only two competitors, Mercy and UTMC. Because UTMC does not provide obstetrical services, the Acquisition reduces the competitors for obstetrical services from three to two, resulting in a duopoly of ProMedica and Mercy.
21. Under relevant case law and the Merger Guidelines, the Acquisition is presumptively unlawful in both relevant service markets. ProMedica's post-Acquisition market share in the general acute-care inpatient services market approaches 60%, as measured by patient days. In the market for inpatient obstetrical services, the post-Acquisition market share exceeds 80%. These extraordinarily high market shares easily surpass levels that have been found presumptively unlawful by the Supreme Court.

22. The Merger Guidelines measure market concentration using the Herfindahl-Hirschman Index (“HHI”). Under that test, a merger or acquisition is presumed likely to create or enhance market power (and presumed illegal) when the post-merger HHI exceeds 2500 points and the merger or acquisition increases the HHI by more than 200 points. The market concentration levels here exceed these thresholds by a wide margin. The post-Acquisition HHI is 4391 in the general acute-care inpatient services market, with an increase of 1078 points. HHI levels are even higher in the obstetrical services market, with a post-Acquisition HHI of 6854 and an Acquisition-related increase of 1323. The HHI figures for each relevant service market are summarized in the following tables.

GENERAL ACUTE-CARE INPATIENT SERVICES		
Hospital/System	Pre-Acquisition Market Share	Post-Acquisition Market Share
ProMedica	46.8%	58.3%
Mercy	28.7%	28.7%
St. Luke’s	11.5%	--
UTMC	13.0%	13.0%
Pre-Acquisition HHI		3312.5
Post-Acquisition HHI		4390.7
HHI Increase		1078.2

OBSTETRICAL SERVICES		
Hospital/System	Pre-Acquisition Market Share	Post-Acquisition Market Share
ProMedica	71.2%	80.5%
Mercy	19.5%	19.5%
St. Luke’s	9.3%	--
Pre-Acquisition HHI		5531.2
Post-Acquisition HHI		6853.7
HHI Increase		1322.5

VIII.

ANTICOMPETITIVE EFFECTS

A.

Increased Bargaining Leverage for ProMedica

23. By eliminating significant, beneficial competition between Respondent ProMedica and St. Luke's, the Acquisition vests ProMedica with an increased ability and incentive to demand supra-competitive reimbursement rates from commercial health plans and their membership.
24. Before the Acquisition, ProMedica and St. Luke's were close competitors in the markets for general acute-care inpatient services and inpatient obstetrical services, in terms of geographic proximity and similarity of service offerings. Indeed, SLH's CEO testified that ProMedica had been SLH's [REDACTED] for inpatient hospital services and obstetrical services in its main service area. For its part, ProMedica was so focused on St. Luke's as a key competitor before the Acquisition that it [REDACTED]
[REDACTED]
[REDACTED] ProMedica's documents also expressly acknowledge that [REDACTED]
[REDACTED]
25. Prior to the Acquisition, St. Luke's had significantly less bargaining leverage than ProMedica, a far more dominant provider system in Lucas County. As a result, St. Luke's negotiated substantially lower rates with health plans than ProMedica did. ProMedica and St. Luke's will now be able to use their enhanced [REDACTED] to raise SLH's rates to levels at least equal to the other ProMedica hospitals in Lucas County. Indeed, SLH's motivation for entering into the Acquisition was [REDACTED]
[REDACTED] An increase in St. Luke's rates merely to the levels of the other ProMedica hospitals could force employers and employees to pay from [REDACTED] more for inpatient services obtained there.
26. With the addition of St. Luke's to its hospital system, ProMedica has become a "must-have" system for health plans seeking to do business in Lucas County, because health plans are no longer able to offer a commercially viable provider network without including ProMedica's hospitals. Health plans no longer have the ability to drop ProMedica from their networks, or even credibly threaten to do so, as before. In fact, in at least the past decade, no health plan has offered a network in Lucas County consisting of only the Mercy hospitals and UTMC, as they would have to do without agreeing to ProMedica's rates today. Thus, health plans in the area now must either reach agreement with ProMedica, likely at substantially higher rates, offer a commercially unattractive

hospital network to their members, or even be forced to exit the Lucas County market altogether.

27. This significant change in the negotiating dynamic gives ProMedica much-enhanced bargaining clout in contract negotiations and the ability to extract higher rates for inpatient services at St. Luke's *and* at its other Lucas County hospitals. ProMedica is widely recognized [REDACTED] as having the highest rates in Lucas County and for making aggressive rate increase demands, relative to other hospitals, and particularly St. Luke's. In fact, ProMedica's CEO acknowledged to other senior executives in 2010 that health plans viewed ProMedica as [REDACTED]. Health plans predict [REDACTED]. Indeed, this ability to demand higher rates was a principal motivation behind the Acquisition.
28. ProMedica's ownership of the for-profit commercial health plan Paramount may further increase its ability and incentive to increase rates. If other health plans must pay higher rates to access ProMedica's hospitals or, worse yet, must exit Lucas County altogether, ProMedica would benefit because Paramount would capture some of the business of its disadvantaged, or departed, health-plan competitors. As a result, ProMedica's ownership of Paramount may render a post-Acquisition price increase even more profitable – and therefore more likely.
29. Price increases resulting from the Acquisition will be passed on to local employers and their employees. In Lucas County, nearly 70% of commercial health-plan membership is self-insured. Self-insured employers rely on health plans only to negotiate rates and provide administrative support; the employers themselves pay the full cost of their employees' healthcare claims. As a result, self-insured employers immediately and directly bear the full burden of higher rates. Fully-insured employers also are inevitably harmed by higher rates, because health plans pass on at least a portion of hospital rate increases to these customers.
30. Employers, in turn, must pass on their increased healthcare costs to their employees, in whole or in part. Employees will bear these costs in the form of higher premiums, higher co-pays, reduced coverage or restricted services. Some Lucas County residents will forgo or delay necessary healthcare services because of the higher costs.

B.

The Loss of Quality Competition

31. The Acquisition also will reduce the quality and breadth of services available in Lucas County.
32. Competition between ProMedica and St. Luke's has spurred both parties to increase quality of care, offer additional services, and has fostered other, non-financial benefits for

the residents of Lucas County. These important elements of competition will be lost after the Acquisition.

33. Before the transaction, St. Luke’s offered the highest quality healthcare service in Lucas County, and did so at the lowest cost. St. Luke’s is consistently recognized by third-party quality-rating organizations as being in the top 10% of hospitals nationally, based on outcomes, cost, and patient satisfaction. The Acquisition of St. Luke’s by ProMedica – a higher-cost, lower-quality competitor – will diminish the quality of care at St. Luke’s. Indeed, SLH’s CEO and Board [REDACTED].

IX.

ENTRY BARRIERS

34. Neither hospital entry nor expansion by the two remaining hospitals will deter or counteract the Acquisition’s likely harm to competition in the relevant service markets.
35. New hospital entry or significant expansion in Lucas County would not be timely. Construction of a new general acute-care hospital would take more than two years from the initial planning stages to opening doors to patients. Significant expansion of services such as obstetrics takes years as well, and requires time-consuming recruitment of additional professional staff.
36. Entry and expansion also are unlikely due to very high construction costs, operating costs, and financial risk, along with significant hospital bed-overcapacity in the Toledo area. Constructing a new obstetrics department in an existing hospital would cost well over \$1 million, with operating costs of tens of millions of dollars a year. Notably, [REDACTED] – even if prevailing rates for general acute-care and obstetrical services increase significantly – and SLH’s strategic documents confirm that [REDACTED].

X.

EFFICIENCIES

37. Extraordinary merger-specific efficiencies are necessary to justify the Acquisition in light of its vast potential to harm competition. Such efficiencies are lacking here.
38. Respondent’s efficiency claims – described by one ProMedica executive as deriving from a mere [REDACTED] – are too speculative to be cognizable. Moreover, the fact that SLH is the lowest cost hospital in the area and, by all accounts, a “lean” operation, suggests any claimed operational cost savings should be viewed with skepticism. Even if the claimed efficiencies were substantiated and achievable, they are not merger-specific, as

St. Luke's could have affiliated with suitable and interested alternative partners – such as UTMC – far less restrictive of competition.

XI.

VIOLATIONS

COUNT I - ILLEGAL ACQUISITION

39. The allegations of Paragraphs 1 through 38 above are incorporated by reference as though fully set forth.
40. The Acquisition may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

NOTICE

Notice is hereby given to the Respondent that the thirty-first day of May, 2011, at 10:00 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the answer is filed by the Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the answer is filed by the Respondent). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondent's answer, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Acquisition challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as ProMedica and St. Luke's were offering and planning to offer prior to the Acquisition.
2. A prohibition against any transaction between ProMedica and St. Luke's that combines their businesses in the relevant markets, except as may be approved by the Commission.
3. A requirement that, for a period of time, ProMedica and St. Luke's provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.
4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to ensure the creation of one or more viable, competitive independent entities to compete against ProMedica and St. Luke's in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this sixth day of January, 2011.

By the Commission.

Donald S. Clark
Secretary

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