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 CORP., and NORTHSHORE UNIVERSITY HEALTHSYSTEM, *Defendants*.	Case No.: 1:15-cv-11473 Judge Jorge L. Alonso Mag. Judge Jeffrey Cole

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL

Advocate Health Care Network, Advocate Health and Hospitals Corp. ("Advocate") and NorthShore University HealthSystem ("NorthShore") (collectively, "Defendants"), hereby oppose Plaintiffs' Motion for Injunction Pending Appeal.

INTRODUCTION AND SUMMARY

Plaintiffs failed to meet their burden for a preliminary injunction under Section 13(b) of the Federal Trade Commission Act (15 U.S.C. §53(b)(2)), and yet now ask the Court to give them the very remedy that it just denied – a preliminary injunction pending appeal under Fed. R. Civ. P. 62(c), a form of relief to which an even *more* rigorous standard applies, given the Rule's additional requirement that the requestor show irreparable harm. Indeed, Plaintiffs request an

"extraordinary remedy," *FTC v. Foster*, CIV 07-352 JB/ACT, 2007 WL 1827098, at *2 (D.N.M. May 30, 2007) – yet fail even to acknowledge that the relief they seek is highly disfavored and "should be granted sparingly," *Sierra Forest Legacy v. Rey*, 691 F. Supp. 2d 1204, 1207 (E.D. Cal. 2010), and that they "bear a very heavy burden of persuasion" in seeking such "anomalous relief." *FTC v. Equitable Res., Inc.*, 07CV0490, 2007 WL 1500046, at *1 (W.D. Pa. May 21, 2007).

Courts are "considerabl[y] reluctan[t]" to grant "an injunction pending appeal when to do so, in effect, is to give the appellant the ultimate relief being sought." 11 Charles Wright & Arthur Miller, *Federal Practice & Procedure*, § 2904, Injunction Pending Appeal (3d ed. 2016). That is all the more true where, as here, the injunction pending appeal is essentially the same relief the Court denied after holding six full days of live testimony and after reviewing thousands of pages of evidence and two rounds of briefing on Plaintiffs' motion for a preliminary injunction.

Hard on the heels of this Court's considered ruling, Plaintiffs have ricocheted back to this Court. Once again they seek to enjoin Defendants from merging so that they can attempt to convince another tribunal – the Seventh Circuit, which will review this Court's decision with considerable deference, *see Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015) – to issue a favorable ruling. Meanwhile, Defendants would face additional delays over a transaction they sought to enter almost *two years* ago that will provide enormous benefits to Chicagoland consumers.

Plaintiffs' "any port in the storm" approach elides the basic conclusion this Court already reached: Plaintiffs are unlikely to succeed on the merits of their claim because the record evidence fails to support their alleged geographic market. Absolutely nothing has changed in that

regard since this Court denied Plaintiffs' prior request for an injunction two days ago. It should reject this latest attempt as well.

LEGAL STANDARD

"An injunction pending appeal is an extraordinary remedy." *Foster*, 2007 WL 1827098, at *2. It "should be granted sparingly." *Sierra Forest Legacy*, 691 F. Supp. 2d at 1207. Courts consider four factors when evaluating a motion to grant an injunction pending an appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "[T]he movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

In the Seventh Circuit, "all of the *Hilton*-prescribed factors must be considered." *ADT Sec. Services Inc. v. Lisle-Woodridge Fire Protection Dist.*, 807 F. Supp. 2d 742, 745 (N.D. Ill. 2011). Courts, however, do not weigh all four factors equally. The likelihood of success carries the most weight and "[i]f an appeal has no merit at all, an injunction pending the appeal should of course be denied." *Cavel Intern Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007). In addition, "because a movant's arguments on the merits will have already been evaluated by the time the movant requests a Rule 62(c) injunction, the movant 'must make a stronger threshold showing of likelihood of success to meet its burden'" and "must 'demonstrate a *substantial* showing of likelihood of success, not merely the possibility of success.'" *Peterson v. Village of Downers Grove, Illinois*, No. 14 C 09851, 2016 WL 427566 (N.D. Ill. Feb. 4, 2016) (quoting *Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997)) (emphasis added). If an appeal has "some" merit, courts evaluate the remaining factors under a "'sliding scale' ap-

proach" which "weight[s] harm to a party *by the merit of his case*." *Cavel*, 500 F.3d at 547 (emphasis added).

Critically, the FTC's burden in seeking an injunction pending an appeal is higher than the burden that it had in attempting to obtain an injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). *Cf. Fullmer v. Michigan Dep't. of State Police*, 207 F. Supp. 2d 663, 664 (E.D. Mich. 2002) (finding that an applicant seeking a stay will have more difficulty establishing a likelihood of success on the merits, due to the difference in procedural posture); *see also, FTC v. Lab. Corp. of Am.*, No. SACV-10-1873-AG (MLGx), 2011 WL 135310, at *1 (C.D. Cal. Feb. 25, 2011) ("The standard now is higher than for the preliminary injunction previously sought by the FTC because to obtain the stay, the FTC must demonstrate likelihood of irreparable harm, which is not a requirement under Section 13(b) of the FTC Act, 15 USC § 53(b).").

ARGUMENT

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

Plaintiffs are exceedingly unlikely to succeed on the merits of their appeal. The Court's June 14, 2016 Memorandum Opinion and Order denying Plaintiffs' Motion for a Preliminary Injunction [Dkt. #473] (the "Order") – which was grounded in a thorough assessment of voluminous record evidence – is entirely correct. The Court made factual determinations that Plaintiffs failed to present evidence supporting their method of constructing a proposed relevant geographic market. Those findings are subject to a deferential clear error standard of review by the Court of Appeals and are particularly unlikely to be reversed.

In a merger case, "[t]he FTC's failure to sufficiently define the relevant geographic market can be grounds to deny the requested injunction." *FTC v. Cardinal Health Inc.*, 12 F. Supp. 2d 34, 39 (D.D.C. 1998). Establishing a relevant geographic market is an inherently fact-bound

analysis: it proceeds in "a pragmatic and factual" manner and must "correspond to the commercial realities of the industry." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962).

On appeal from the denial of an injunction, the Seventh Circuit reviews a trial court's findings of fact for clear error. *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013). It will only find such clear error where it is "left with the definite and firm conviction that a mistake has been committed" by the trial court. *Furry v. United States*, 712 F.3d 988, 992 (7th Cir. 2013) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). It arrives at that "definite and firm conviction" only where "the trial judge's interpretation of the facts is implausible, illogical, internally inconsistent or contradicted by documentary or other extrinsic evidence." *Furry*, 712 F.3d at 992, (quoting *EEOC v. Sears Robuck & Co.*, 839 F.2d 302, 309 (7th Cir. 1988)). However, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

The Court's evaluation of Plaintiffs' proposed geographic market in this case did not resolve a dispute regarding two "permissible" views of the evidence. Rather, the Court found that Plaintiffs failed to elicit *any* evidence in support of several crucial assumptions they made in constructing their proposed geographic market and instead assumed the outcome at issue under controlling Supreme Court precedent.[1] Order at 9. According to the Court, these exclusions ignored "the commercial realities of th[is] industry." *Brown Shoe*, 370 U.S. at 336; *see also* Order at 11. Plaintiffs understand the significance of those findings, and they have little to offer against them; indeed, tellingly, Plaintiffs' have not filed a motion for the Court to reconsider its decision

[1] Contrary to Plaintiffs' assertions, the controlling law requires courts to look at where customers can "practicably turn to for supplies," *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 (1963); *see also Brown Shoe*, 370 U.S. at 324 (determination of the relevant market is a "necessary predicate") to construct a relevant geographic market. Instead, Plaintiffs demand that the Court adopt the FTC's interpretation of its own Merger Guidelines as the law, which it simply is not.

in light of particular facts it may have failed to adequately note. Even their present Motion fails to identify any specific facts that contradict the Court's conclusions – while conveniently ignoring the facts and evidence that contradict their contentions. For example, Plaintiffs contend that there was "unrebutted evidence from commercial payers" about hospitals outside the North Shore Area not being a "realistic alternative" (Motion at 6), despite testimony that payers in fact do see Northwestern Memorial Hospital as such an alternative and the Court's findings that the payer testimony cited by Plaintiffs was contradicted by the record and biased. *See* Order at 9 n.3; Defendants' Proposed Findings of Fact ("DPFOF") ¶¶ 179, 181-183 [Dkt. No. 459].

Instead of offering any fair assessment of the evidence, Plaintiffs misconstrue their *own* arguments at trial in order to invent nonviable appellate issues. According to Plaintiffs, "no hospital was excluded from [their] proposed geographic market based on purportedly flawed selection criteria" because "[a] smaller candidate market satisfied the hypothetical monopolist test, making it unnecessary to add those hospitals to the proposed market." Motion at 5. In other words, Plaintiffs now imply that they *first* attempted to construct a relevant geographic market purportedly using a SSNIP test and only then *confirmed* that they need not include additional hospitals – such as "destination" hospitals or those that constrain Advocate or NorthShore, but not both – because the Plaintiffs already had proven a relevant market.

Plaintiffs' view of the facts is entirely contrary to their own claims at trial and the testimony of their witnesses. In fact, Plaintiffs' economic expert, Dr. Steven Tenn, wrote in his own expert report that he applied his three exclusion criteria to his candidate market *before* adding hospitals and conducting the SSNIP test. *See, e.g.*, PX06000, Tenn Report ¶¶ 85, n.175, 87, 89 ("I select the *candidate* geographic market by identifying the set of local competitors that draw patients from the same areas as both NorthShore and the relevant Advocate hospitals.") (emphasis added). Stated differently, Dr. Tenn's selection criteria – which this Court found to be unsub-

stantiated – were an integral part of Plaintiffs' method of constructing their proposed geographic market using the Hypothetical Monopolist Test.

With that in mind, the Seventh Circuit is highly unlikely to form the "definite and firm conviction" that the Court simply missed crucial factual evidence that supported Plaintiffs' claims. *Furry*, 712 F.3d at 988. This Court did not miss a thing. Plaintiffs thus are unable to satisfy the first prong of the *Hilton* test. Their appeal has no substantive merit and "an injunction pending the appeal should of course be denied." *Cavel*, 500 F.3d at 547.

II. PLAINTIFFS ARE NOT IRREPARABLY HARMED.

Plaintiffs spend precisely one paragraph on the contention that they will be irreparably harmed in the absence of an injunction pending appeal. What little they do offer is far from compelling. Rather than attempt any demonstration of irreparable harm, Plaintiffs argue only that, if Defendants are permitted to consummate their merger, subsequently separating them would be difficult. But the *Hilton* standards require a showing of *irreparable* harm, not harm that is reparable with some effort. Despite Plaintiffs' protestations, the FTC has repeatedly taken these supposedly onerous measures in order to separate merged entities – including merged hospitals. *See, e.g., In re ProMedica Health Sys., Inc.*, 2012 WL 2450574 (F.T.C. 2012) (ordering divestiture); *In re Whole Foods Market, Inc.*, 2008 WL 5724689 (F.T.C. 2008) (same, post appeal); *FTC v. St. Luke's Health Sys. Ltd.*, Case No. 13-cv-00116-BLW, 2014 WL 407446 (D. Idaho Jan. 24, 2014). Plaintiffs cannot show that the FTC was irreparably harmed in those cases, nor can they explain how they would be irreparably harmed by taking similar measures here in the unlikely event that they prevail.

III. AN INJUNCTION PENDING APPEAL WOULD SUBSTANTIALLY HARM DEFENDANTS.

Plaintiffs cannot deny that an injunction will substantially harm Defendants. Instead, they imply that further delay is not likely to cause significant additional damage to them. But the

fact that Plaintiffs have already delayed Advocate and NorthShore from merging for almost two years is not a proper basis to delay this merger even further.

In fact, pursuant to the terms of the Court's December 22, 2015 temporary restraining order [Dkt. No. 28], Plaintiffs fully intend to close on their proposed merger this coming Tuesday, June 21, 2016. Just a few weeks or months of more delay could foreclose the Defendants from introducing their new low cost, high performing insurance product (*i.e.*, the "HPN") to employer groups (*i.e.*, to over 4.8 million Chicagoland consumers) by an entire calendar year. Enrollment periods for employer group plans typically occur no more than once a year and Defendants need sufficient lead time in order to work with health insurers to finalize the product and bring it to market. Additional delay in consummation of the merger puts the introduction of the HPN for the employer market for the 2017 calendar year into significant jeopardy. Enrollment in Affordable Care Act plans for individuals and qualified small employer groups for all of 2017 are also similarly threatened by even a short delay in this merger.

Additionally, Defendants' competitors continue to expand in order to attract patients, and any delay in finalizing the proposed transaction provides these competitors a significant advantage over Defendants. As shown during trial, Northwestern and Centegra have agreed to merge, and Northwestern is also making significant investments in its Lake Forest hospital, as well as expanding its marketing efforts in the northern suburbs. Defendants remain hampered in responding to these and other competitive maneuvers while they wait for Plaintiffs to acknowledge basic market realities here.

IV. PUBLIC INTERESTS ARE SERVED BY THE MERGER CLOSING AS QUICKLY AS POSSIBLE.

The public interest favors consummation of Defendants' proposed merger without delay, both because of the substantial and tangible consumer benefits inherent in the HPN, and because

of other substantial cost savings consumers are likely to obtain.[2] An injunction pending appeal needlessly defers these tangible public benefits.

Since 2010, Advocate has pursued the restructuring and re-alignment of its resources in pursuit of population health management ("PHM") and payment-for-value arrangements. As the evidence at the hearing demonstrated, a PHM approach to the delivery of health care is in the long-term best interests of patients and will reduce the total cost of care. Advocate and NorthShore intend through the merger to create an HPN that incorporates a PHM approach *and* that can be sold successfully to Chicagoland employers. Among other things, introduction of the HPN will result in substantial consumer savings. Defendants' expert, Dr. David Eisenstadt, estimated that the premium savings from the HPN would be $284 to $1,426 per person per year. DPFOF ¶ 275. Plaintiffs did not rebut these findings. Dr. Lee Sacks, Advocate's Chief Medical Officer, estimated that the aggregate of these premium savings to Chicagoland consumers would exceed $210 million annually, and realistically may be $500 million. DPFOF ¶ 277.

The merger also will lead to immediate price savings for consumers – even those who do *not* participate in the HPN. Dr. Sacks testified that Advocate will move NorthShore's physicians to Advocate's lower physician reimbursement rates upon merging, in accordance with rights retained by payers under their contracts with Defendants. DPFOF ¶ 318. According to Dr. Eisenstadt, this migration will result in an overall price savings of $30.2 million annually. DPFOF

[2] Plaintiffs assert, as they do in virtually every case, that this factor favors an injunction because of some inchoate public interest in effective law enforcement. Motion at 9. This bare, self-serving, and circular assertion assumes that Plaintiffs will prevail on their appeal, which they will not. *See*, *supra*, Part I. Indeed, courts routinely deny motions from the FTC for an injunction pending appeal, and in so doing have rejected this basis as supporting the public interest in the FTC's favor. *See, e.g.*, *Equitable Res.*, 2007 WL 1500046, at *7 ("much overlap exists between the interests of defendants and . . . the public interest," and "the public interest would be harmed by granting the requested injunction.").

¶ 320. These savings – unrebutted by Plaintiffs – constitute an immediate merger-related benefit to consumers. Plaintiffs' Motion does not even mention these consumer benefits.

Plaintiffs failed to rebut these substantial consumer benefits at trial, and now seek to further delay their receipt by Chicagoland consumers pending their appeal. But any further delay simply harms the public interest, and together with all the other factors, counsels against an injunction.

CONCLUSION

For the reasons explained above, Defendants Advocate Health Care Network, Advocate Health and Hospitals Corp. and NorthShore University HealthSystem respectfully request that the Court deny Plaintiffs' Motion for Injunction Pending Appeal, and for such other and further relief as the Court deems to be just and proper.

Dated: June 16, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2016 I caused a copy of the foregoing Defendants' Opposition to Plaintiffs' Motion for Injunction Pending Appeal to be filed and served on all counsel of record for Plaintiffs via electronic mail.

/s/ John L. Roach IV
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