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

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs Federal Trade Commission ("FTC" or "Commission") and the State of Illinois (collectively "Plaintiffs") respectfully request that the Court grant an injunction pursuant to Fed. R. Civ. P. 62(c) enjoining the proposed transaction between Defendants Advocate Health Care Network and Advocate Health and Hospitals Corporation ("Advocate") and NorthShore University HealthSystem ("NorthShore") pending appellate review of the Court's Order (Doc. No. 472) and Memorandum Opinion and Order (Doc. No. 473) denying Plaintiffs' Motion For Preliminary Injunction (collectively, the "Order"). Alternatively, Plaintiffs respectfully request

that the Court temporarily enjoin the transaction pending a ruling by the Court of Appeals on an emergency application for an injunction pending appeal that Plaintiffs intend to file.

Under the Court's December 22, 2015 temporary restraining order (Doc. No. 28), Defendants may consummate their proposed merger four business days following the Court's ruling on Plaintiffs' Motion For Preliminary Injunction, or at 12:01 AM on Monday, June 20, 2016. Absent an injunction pending appeal, Plaintiffs understand that Defendants will immediately consummate at that time.

Plaintiffs respectfully submit that the Court's denial of Plaintiffs' motion raises serious, substantial legal issues for the Court of Appeals to resolve. An injunction pending appeal is necessary to preserve the *status quo*, which would otherwise be irreparably altered if the merger occurs during appellate review. Indeed, courts have recognized that it would be difficult, if not impossible, for the FTC to "unscramble the eggs," *i.e.*, unwind a consummated transaction once the merging parties begin to consolidate operations. An injunction will enable the FTC to obtain effective relief if it were to ultimately prevail. Moreover, an injunction would prevent immediate irreparable injury to consumers and competition. By contrast, Defendants and other parties will not be substantially injured by a brief stay pending appeal, and an injunction is in the public interest. For these reasons, the Court should temporarily enjoin the consummation of this merger while the Court of Appeals resolves issues vital to competition in the health care industry in the northern Chicago suburbs.

ARGUMENT

I. THE APPLICABLE LEGAL STANDARD

In deciding whether to issue an injunction pending appeal under Federal Rule of Civil Procedure 62(c), the district court must consider: (1) the likelihood of the appellants prevailing

on the merits of the appeal; (2) whether the parties seeking the injunction will be irreparably injured absent an injunction; (3) whether issuance of the injunction will substantially injure other parties interested in the proceeding; and (4) where the public interest lies. *See Peterson v. Village of Downers Grove*, 2016 WL 427566, at *3 (N.D. Ill. Feb. 4, 2016); *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Graff v. City of Chicago*, 800 F. Supp. 584, 585 (N.D. Ill. 1992); *Highway J Citizens Grp. v. U.S. Dep't of Transp.*, 2005 WL 1421489, at *1 (E.D. Wis. June 16, 2005). In determining whether to grant the injunction pending appeal, the court must use the same "sliding scale" approach that governs an application for a preliminary injunction. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547-48 (7th Cir. 2007). Once the threshold requirements are met, the Court weighs the equities, balancing each party's likelihood of success against the potential harms. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). The more the balance of harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to show that it will ultimately prevail. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992).

These factors strongly weigh in favor of granting an injunction to maintain the *status quo* pending appeal.

II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THE APPEAL

Granting an injunction pending appeal is proper because Plaintiffs are likely to prevail on appeal. With respect to the issue at the heart of the Court's decision, defining the geographic market, Plaintiffs respectfully submit that the Court erred by failing to properly formulate or apply the appropriate test. Expert economists on both sides of the case agreed that the appropriate economic test for defining the geographic market is the "hypothetical monopolist test" outlined in the Horizontal Merger Guidelines and applied by Courts. Hrg. Tr. at 451:24-

452:24, 1316:2-18; PX06000 Tenn Report ¶ 75; *see also* Merger Guidelines § 4.1; *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784-85 (9th Cir. 2015) (concluding that FTC properly defined geographic market because a hypothetical monopolist could impose a SSNIP on commercial insurers); *FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, at *55 (N.D. Ohio Mar. 29, 2011) (relevant question in defining the appropriate geographic market is whether a hypothetical monopolist could profitably implement a SSNIP).

The hypothetical monopolist test outlined in the Merger Guidelines and corresponding case law asks whether a firm owning all of the hospitals in a candidate market could profitably impose a small but significant and nontransitory increase in price (a "SSNIP") on commercial payers. Defendants' expert, Dr. McCarthy, explained in his report that, "[t]he basic objective to defining a relevant geographic market is to identify the *smallest region* over which a hypothetical monopolist could impose and sustain a SSNIP." DX5000 (McCarthy Report) ¶ 38 (emphasis added). The test is thus initially applied to a small proposed market (also called a candidate market) and additional hospitals are added until the market is just large enough that a hypothetical monopolist owning all of the hospitals in the market could profitably impose a SSNIP. DX5000 McCarthy Report ¶ 38, Hrg. Tr. at 459:13-17, 1319:1-15. If a candidate market satisfies the hypothetical monopolist test, it is a relevant geographic market for antitrust purposes.

The Court erred by basing its geographic market determination on an analysis of how the candidate market was constructed rather than whether it satisfied the hypothetical monopolist test. According to the Court, the criteria employed by Plaintiffs' expert in choosing a candidate market was flawed and resulted in a market that was too narrow. Yet the Court did not identify

any error in Plaintiffs' application of the hypothetical monopolist test to the North Shore Area or question the conclusion that a hypothetical monopolist of all North Shore Area hospitals could profitably impose a SSNIP. Because the North Shore Area satisfies the hypothetical monopolist test, it is a relevant market for antitrust purposes regardless of the criteria used to identify the hospitals in the candidate market.

Contrary to the Court's framing of the geographic market issue, no hospital was excluded from Plaintiffs' proposed geographic market based on purportedly flawed selection criteria. Hospitals outside of the North Shore Area, including downtown "destination hospitals," are not added to Plaintiffs' proposed geographic market because a hypothetical monopolist of the North Shore Area hospitals could profitably impose a SSNIP on commercial payers without owning those other hospitals. Likewise, hospitals were not excluded from the proposed geographic market because they competed with only Advocate or NorthShore. A smaller candidate market satisfied the hypothetical monopolist test, making it unnecessary to *add* those hospitals to the proposed market.

As this Court recognized in its order denying Defendants' *Daubert* motion, the "hypothetical monopolist analysis accounts for competition from all area hospitals, not just those that are included in [a] proposed geographic market." (Doc. No. 334 at 2). A candidate market only satisfies the hypothetical monopolist test if the hospitals outside of the market are unable to prevent a hypothetical monopolist from profitably imposing a SSNIP. The hypothetical monopolist test accounts for diversions to out-of-market hospitals. If the diversions to out-of-market hospitals were sufficient to constrain a SSNIP in the North Shore Area, then Plaintiffs' candidate geographic market would not have passed the hypothetical monopolist test. But it did.

Plaintiffs respectfully submit that the Court erred in relying on diversions to hospitals outside of the proposed market to reject a geographic market that satisfies the hypothetical monopolist test.

Further, the relevant question is not whether some fraction of patients travel to hospitals outside the North Shore Area, but whether *commercial payers* would pay a SSNIP in order to maintain access to a hypothetical monopolist of all inpatient GAC services in the North Shore Area. *See Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health Sys., Ltd*., 778 F. 3d 775, 784-85 (9th Cir. 2015) (concluding that FTC properly defined geographic market because a hypothetical monopolist could impose a SSNIP on commercial insurers); *see also ProMedica Health Sys., v. FTC*, 749 F.3d 559, 562-63 (6th Cir. 2014) (recognizing that hospital rates are set through negotiations with payers and dictated by hospitals' and payers' relative bargaining leverage); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1083-84 (N.D. Ill. 2012); *In re Evanston*, 2007 WL 2286195, at *51-53.

The unrebutted evidence from commercial payers establishes that hospitals outside the North Shore Area do not offer these payers a realistic or practical alternative to hospitals within the North Shore Area when creating their provider networks. That is because North Shore Area residents, regardless of where they work, strongly prefer health plans that include local hospitals – over 50% of North Shore Area patients travel 7 miles or less, or less than 12 minutes, to obtain GAC services. Hrg. Tr. at 455:4-8; PX06000 Tenn Report ¶ 104, Figures 3-4. As a result, employers overwhelmingly demand access to North Shore Area hospitals, and health plans that do not offer that access are essentially unmarketable.[1]

[1] The Court also erred in improperly assessing the provision of outpatient services in its analysis of the relevant geographic market. Order at 11-12. As the Court correctly noted, the relevant product market—inpatient GAC services sold to commercial payers and their insured members—is not in dispute. Memo Op. and Order at 5. The proper inquiry in assessing the relevant geographic market, therefore, should have focused on the provision of inpatient GAC services and not on outpatient services. *See W.H. Brady*

Plaintiffs respectfully submit that they have established a likelihood of success on appeal and, at a minimum, have raised substantial questions about the Court's formulation and application of the framework for geographic market definition. Accordingly, an injunction pending resolution of this issue by the Seventh Circuit Court of Appeals is warranted.

III. PLAINTIFFS WILL BE IRREPARABLY HARMED IF THE MERGER IS ALLOWED TO PROCEED

If this injunction is denied, Defendants will be free to consummate the merger on June 20, 2016. Constructing and enforcing an effective divestiture order after merging parties have combined their operations has historically been exceedingly difficult or even impossible. *See, e.g., FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508-09 (D.C. Cir. 1986); *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008). The FTC has had particularly unfortunate experiences trying to unwind unlawful healthcare mergers. For example, in *FTC v. Phoebe Putney Health System*, 133 S. Ct. 1003 (2013), the district court denied a request for preliminary injunctive relief, which was affirmed by an appeals court, allowing the merger to close. Although the FTC ultimately prevailed before the Supreme Court, two years later, divestiture remained too difficult to achieve, and the FTC allowed the parties to remain merged.[2] In *St. Alphonsus*, divestiture still

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Co. v. Lem Products, Inc., 659 F. Supp. 1355, 1370 (N.D. Ill. 1987) ("A relevant geographic market is the area in which the parties compete for the sale of the products that comprise the relevant product market."); *Unity Ventures v. County of Lake*, 631 F. Supp. 181, 192 (N.D. Ill.) (same).

Likewise, the Court erred when it concluded that outpatient services constituted "a key driver of hospital admissions." Order at 11. As the Merger Guidelines state, proper application of the hypothetical monopolist test focuses on producers of "the *relevant product(s)* located in the region." Merger Guidelines § 4.2.1 (emphasis added). But evidence that some producers provide non-relevant products within the relevant region does not impact the hypothetical monopolist test, because, to the extent providing outpatient services within the North Shore Area results in inpatient admissions at hospitals outside the North Shore Area, that is accounted for in the diversion ratios used to perform the hypothetical monopolist test.

[2] *See* https://www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf.

has not yet occurred well over a year after the Ninth Circuit upheld a finding that the merger was unlawful. If a temporary injunction is not issued, the same concerns are likely to arise here because Defendants will be free to immediately alter their operations (including laying off staff and combining facilities) and share their strategic information (including data on ongoing rate negotiations), making it nearly impossible to restore competition.

IV. DEFENDANTS WILL NOT BE SUBSTANTIALLY INJURED BY THE ENTRY OF AN INJUNCTION PENDING APPEAL

Defendants will not be substantially injured by the brief delay from Plaintiffs' appeal of this Court's Order. Plaintiffs will seek an expedited appeal from the Court of Appeals. Additionally, Defendants have conducted minimal integration planning, and thus expect it could take two to three years for the two systems to fully integrate. Hrg. Tr. at 912:14-22; PX06001 Jha Report ¶¶ 162-163. Accordingly, any incremental delay from the grant of injunctive relief will cause Defendants little, if any, damage. The small impact this brief delay will have on Defendants' plans is far outweighed by the substantial public interest in maintaining a competitive hospital market in the North Shore Area.

V. OTHER INTERESTED PARTIES WILL NOT BE SUBSTANTIALLY INJURED BY THE ENTRY OF AN INJUNCTION PENDING APPEAL

Other interested parties will not be substantially injured by a brief delay from Plaintiffs' appeal of this Court's Order. Instead, maintaining the status quo during the pendency of the appeal will be beneficial to interested parties, such as payers, that contract with Defendants' hospital systems. Without injunctive relief, Defendants will immediately be able to share competitively sensitive price information and jointly engage in managed care contract negotiations with payers.

VI. AN INJUNCTION IS IN THE PUBLIC INTEREST

Denial of an injunction pending appeal 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 – of full and complete relief should the Commission ultimately prevail. Substantial harm to competition will likely occur during the pendency of the appeal, the administrative proceeding, and any subsequent appeals. Patients will not have the ability to choose between Advocate or NorthShore, health insurers will likely be forced to pay higher reimbursement rates in a noncompetitive market and will eventually pass on those increases in the form of higher premiums charged to employers and higher out-of-pocket expenses charged to patients. Because of the risk to competition and the deficiencies inherent in effectuating a divestiture after Defendants have merged, it is clearly in the public interest to preserve Advocate and NorthShore as independent competitive health systems while the Court of Appeals assesses the merits of this Court's decision.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant an injunction pending appeal of this Court's Order denying Plaintiffs' Motion For Preliminary Injunction. Alternatively, Plaintiffs respectfully request that the Court grant an injunction pending a ruling by the Court of Appeals of an emergency motion Plaintiffs intend to file in that Court for an injunction pending appeal.

Date: June 16, 2016

Respectfully Submitted,

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