UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

FEDERAL TRADE COMMISSION, *Plaintiff*, v. NOVANT HEALTH, INC. and COMMUNITY HEALTH SYSTEMS, INC., *Defendants*.	Case No. 5:24-cv-00028-KDB-SCR **REDACTED VERSION OF DOCUMENT FILED UNDER SEAL (ECF NO. 91)**

DEFENDANTS' AMENDED OPPOSITION TO PLAINTIFF'S REQUEST FOR PRELIMINARY INJUNCTION

At stake in these proceedings is Novant Health Inc.'s ("Novant's") proposal to acquire and revitalize two struggling hospitals affiliated with Community Health Systems, Inc. ("CHS") in North Carolina: Lake Norman Regional Medical Center ("Lake Norman Regional") and Davis Regional Medical Center ("Davis"). The proposed transaction seeks to raise Lake Norman Regional's and Davis's quality of care, restore vital healthcare services to the communities served, and strengthen healthcare competition in the Charlotte area.

The Federal Trade Commission ("FTC") seeks a preliminary injunction pending a multi-year administrative process, which will effectively quash this transaction that the community strongly supports. The FTC's arguments are premised on a distorted and artificially narrow view of healthcare competition in the Charlotte area. For example, the FTC alleges that CHS's lone acute care hospital in North Carolina is the competitive counterweight to Novant in the purported "Eastern Lake Norman Area," a geographic construct gerrymandered specifically to exclude

Novant's most important competitors. The FTC then bases its case on inaccurate estimates of market shares within that contrived "market," which it claims make the transaction presumptively anticompetitive. The FTC recently deployed this same tactic in a failed attempt to enjoin another hospital merger. *See FTC v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522, 528 (E.D. Pa. 2020). Here too, the FTC cannot carry its burden of (a) defining a relevant market that corresponds to commercial realities or (b) proving that the transaction is likely to substantially lessen competition.

As a prime illustration of the extent to which the FTC's case distorts commercial realities, the FTC ascribes zero percent market share to Atrium Health ("Atrium"), which is by far the largest healthcare provider in the Charlotte area, asserting that Atrium will become a competitor only once it opens a hospital in the "Eastern Lake Norman Area" next year. But, as the United States of America and the State of North Carolina recently alleged in an antitrust monopolization case, Atrium is already the "dominant hospital system in the Charlotte area."[1]

[redacted] And it will become an even more significant competitor with the forthcoming opening of its new hospital in Cornelius ("Atrium Lake Norman"), situated directly between the two hospitals on which the FTC myopically focuses: Lake Norman Regional and Novant Health Huntersville Medical Center ("Novant Huntersville"). In the FTC's telling, Atrium has a zero percent share today and will become only a "small" competitor once that new hospital is opened.

[1] Competitive Impact Statement at 4, *United States of America and the State of North Carolina v. The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System*, 16-cv-00311 (W.D.N.C. Dec. 4, 2018), Dkt. 89.

In the FTC's counterfactual world, it is Lake Norman Regional, not Atrium, that is the source of "vibrant" and "vigorous[]" competition against Novant.[2] The evidence contradicts this core premise of the FTC's case. Contrary to the FTC's assertion that competition from Lake Norman Regional constrains Novant Huntersville's rates, [redacted]

The few "examples" of supposed competition that the FTC raises merely confirm that CHS has minimal and diminishing competitive significance in North Carolina. At Davis, CHS terminated all hospital services, except behavioral health, in 2022, but it continues to lose money. CHS has concluded it will need to [redacted] if the transaction is blocked. Lake Norman Regional has a low and declining occupancy rate—its average occupancy is just 31 percent today. It faces severe challenges with staffing key service lines and scores poorly on quality metrics compared to other hospitals in the Charlotte area, as well as CHS hospitals in other regions of the country. Because Lake Norman Regional is just one hospital operating on its own in a marketplace marked by much larger and healthier hospital systems, CHS cannot successfully implement the quality initiatives and programs it has employed in other markets where it has a viable health system to support its hospitals. Particularly in light of Atrium's impending expansion with a new hospital on its doorstep, Lake Norman Regional's future, absent the transaction, [redacted]

[2] FTC Memorandum ("FTC Mem.") at 2, 26.

Finally, and most significantly, the FTC dismisses the significant procompetitive effects this transaction will generate, which will outweigh any purported competitive harms. The proposed transaction is the only realistic path to [redacted] turn around Lake Norman Regional, maintain and expand services at both Lake Norman Regional and Davis, and improve the quality of care offered to the community. And while the FTC complains about speculative increases in unit prices, the evidence will show that the transaction will generate opportunities for *decreases* in the cost of care through superior cost controls and improved quality of care when the isolated Lake Norman Regional is included within Novant's integrated healthcare system. The transaction also will strengthen Novant's ability to compete vigorously against Atrium and other healthcare systems in the Charlotte area.

Recognizing the weaknesses of its factual case, the FTC attempts to diminish the significance of the Court's role in evaluating the FTC's likelihood of success on the merits. FTC Mem. at 6. But the stark reality is that the outcome of these federal court proceedings will decide the fate of this transaction, just as it has in nearly every other similar case in recent history. Courts recognize that "[n]o substantial business transaction could ever survive the glacial pace of an FTC administrative proceeding," *FTC v. Foster,* 2007 WL 1793441, at *51 (D.N.M. May 29, 2007) (quotation omitted), and that a Section 13(b) injunction is deemed "an extraordinary and drastic remedy" precisely because "it may prevent the transaction from ever being consummated," *FTC v. Microsoft Corp.*, __ F. Supp. 3d __, 2023 WL 4443412 at *8 (N.D. Cal. Jul. 10, 2023) (quoting *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980)).

BACKGROUND[3]

Novant is a not-for-profit healthcare system based in North Carolina. It operates seven general acute care hospitals in the Charlotte area, but none in Iredell County. CHS is a for-profit, multi-state health system based in Tennessee. It operates only one general acute care hospital, Lake Norman Regional, and one behavioral health facility, Davis, in North Carolina. Lake Norman Regional is a 123-bed hospital located in Mooresville, in Iredell County. Davis, in Statesville, now operates a handful of behavioral health beds, with the rest of the facility shuttered. CHS is one of the smallest healthcare systems in the Charlotte area, and it lacks the patient base and physician network of other health systems. Lake Norman Regional therefore struggles to deliver the breadth of services, patient experience, and quality of care that other systems provide, and CHS has been unable to implement the quality-improvement programs it has implemented elsewhere. Novant agreed to acquire Lake Norman Regional and Davis from CHS in February 2023 to revitalize those facilities and raise the quality of care for the patients that they serve.

A. Lake Norman Regional Is Not a Meaningful Competitor

Lake Norman Regional, small and declining, lacks the network and resources to be a viable competitive option for patients in the Charlotte area. It has the smallest number of licensed acute-care beds (123) among all healthcare systems in the Charlotte area.[4] Ominously,

---

[3] To facilitate the Court's review of these materials, Defendants have cited to the exhibits the FTC filed, *see* Dkt. 80-02, where possible. Those exhibits use the prefix "PX" (i.e., PX1234). Documents not filed by the FTC are identified with the prefix "Ex." (i.e., Ex. 1), and are attached to the contemporaneously filed declaration of Carol J. Pruski. One exhibit, Dr. Wu's rebuttal report, is due on Monday, so we will provide a copy to the Court thereafter. Finally, this brief does not purport to include all support in the record to date; it is intended instead to give the Court an overview of what evidence it will hear.

[4] Ex. 1 (Wu Rpt.) Wu Ex. 3. For comparison, Atrium has 2,688 licensed acute care beds in the Charlotte area. *Id*.

only 38 of those beds, or 31 percent, are in use on an average day—one of the lowest occupancy rates among all hospitals in the Charlotte area,[5] despite Mooresville being a thriving community. Lake Norman Regional employs only 11 physicians, limiting the number of referrals it receives, the range of services it offers, and its ability to provide a high quality of care.[6] Compared to Novant, and to other CHS hospitals, Lake Norman Regional's quality metrics are poor and declining.[7] Its Leapfrog Hospital Safety Grade[8] stands at a "C" as of 2023, down from a "B" rating in 2022.[9] And it ranked below the national average in several key categories related to patient safety and experience, such as safety for patients experiencing collapsed lungs and blood clots.[10] When rated against other CHS hospitals, Lake Norman Regional ranks in the bottom quartile for "Overall Quality" and in the bottom ten hospitals for "Patient Experience" and "Service Lines Quality."[11]

By contrast, all of Novant's facilities in the Charlotte area received a Leapfrog Grade of "A" in fall 2023. Novant Huntersville, for example, performed above average on many of the metrics for which Lake Norman Regional performed below average.[12] And while the FTC focuses solely on pricing—ignoring quality of care and safety issues that are critically important to patients and insurers alike, *infra* p. 33—Novant has performed exceptionally well in *reducing*

---

5 *Id.* Wu Exs. 9, 10D.

6 Wu Ex. 14 (11 specialist physicians on active medical staff); *see also* Wu Ex. 3 (25 physicians at all CHS's North Carolina facilities). For comparison, [redacted]

7 Ex. 2 (Jha Rpt.) ¶ 100.

8 *Id.* ¶ 99. The Leapfrog Hospital Safety Grades for CHS and Novant's facilities in North Carolina are available at https://www.hospitalsafetygrade.org.

9 *Id.* ¶ 100. Davis also received a "C" grade in the four periods before it was converted to a behavioral health facility. *Id*. ¶ 101.

10 *Id.* ¶ 100.

11 Ex. 1 (Wu Rpt.) ¶ 54.

12 Ex. 2 (Jha Rpt.) ¶ 101.

the cost of care at its facilities. Those programs, which Novant will extend to Lake Norman Regional, have saved many millions of dollars per year. *Infra* pp. 18–19.

The FTC is right that CHS has *tried* to improve Lake Norman Regional's offerings, including its cardiology services.[13] But the failure of these efforts—which the FTC ignores—is a "prime example"[14] not of competition, but of its inability to meaningfully improve in the future, absent this transaction. Since 2018, Lake Norman Regional has aspired to expand its coverage for ST-elevation myocardial infarction ("STEMI," the highest-risk type of heart attack) from its existing hours of 8 a.m. to 5 p.m., five days a week, to 24/7 service.[15] However, it concluded that 24/7 STEMI coverage is "not sustainable due to cardiology turnover."[16] In May 2022, Lake Norman Regional attempted to expand to a more modest goal of providing after-hours coverage from 8 a.m. to midnight, five days a week,[17] but even these efforts failed in June 2023—the hospital only treated four after-hours STEMI patients from the first part of 2023 through May.[18] Lake Norman Regional continues to face cardiology staffing challenges,[19] and, without the transaction, has no feasible path to providing crucial STEMI care for any patient experiencing a heart attack after-hours, including on weekends. Novant, in contrast, can use its extensive physician network to fill those gaps immediately.

---

13 FTC Mem. at 26–29.
14 *Id.* at 26.
15 Ex. 3 (CHS) at 26.
16 PX7021 (CHS) at 85:15–20.
17 PX7024 (CHS) at 122:3–6.
18 Ex. 4 (CHS) at 1; *see also* Ex. 5 (CHS) at 2.
19 Out of the ten cardiac physicians who treated patients at Lake Norman Regional in 2023, only four were employed by CHS, and only two remain on its roster today. Ex. 1 (Wu Rpt.) Wu Exs. 10G, 14. As a result, Lake Norman Regional must rely on independent providers to fill its staff, which leaves it vulnerable to staffing shocks.

Lake Norman Regional's future competitive viability is even less promising. CHS carries $11.5 billion in debt and owes $1 billion in debt payments in every year but one between 2026 and 2032.[20] Its debt exceeds its earnings by a factor of eight.[21] Its S&P rating is a CCC+, which carries junk bond status.[22] CHS has therefore limited its capital investment to areas with growth potential, such as Indiana and Texas, and away from states like North Carolina in which its performance is weak and declining.[23] [redacted] The imminent opening of Atrium Lake Norman and CaroMont Belmont, *infra* pp. 12–13, will accelerate its downward trajectory, [redacted]

In short: CHS [redacted] if the transaction is blocked, as it cannot afford to continue sustaining losses [redacted][27] Although Lake Norman Regional remains technically "profitable" today—a metric that is inflated by its limited investments in the facility—CHS considers the hospital's future prospects to be [redacted][28] And there is no buyer

---

20 PX5042 (CHS) at 95.
21 Ex. 6 (CHS) at 65:18–66:7.
22 Ex. 1 (Wu Rpt.) ¶ 35.
23 *Id.*
24 *Id.* Ex. 3.
25 *Id.*
26 [redacted]
27 Ex. 6 (CHS) at 168:1–21; Ex. 8 (CHS).
28 Ex. 6 (CHS) at 110:3–20. CHS has already made the difficult decision to close other similarly situated hospitals over the past few years. Ex. 1 (Wu Rpt.) ¶ 36.

waiting in the wings to rescue these hospitals; [redacted][29]

B. Lake Norman Regional Is Not a Constraint on Novant's Pricing

Health insurers do not see Lake Norman Regional as a competitive alternative to Novant. They view Lake Norman Regional "as a lower tiered facility" that is not "a market mover,"[30] and [redacted][31] with a "limited footprint"[32] in North Carolina.[33] [redacted] for example, testified that its negotiations with Lake Norman Regional have no "meaningful impact on [redacted] unit cost in North Carolina."[34] In Novant's negotiations with insurers, Lake Norman Regional does not even come up.[35]

With its small size and lower quality of care, Lake Norman Regional also is not a viable alternative to Novant for inclusion in insurers' health plan networks. Insurers [redacted][36] Instead, [redacted][37]

---

[29] PX7015 (CHS) at 150:3–151:8. Two entities cited concern about [redacted] in deciding not to bid. *Id.* Another chose not to bid because Lake Norman Regional [redacted] *id.*, underscoring the system-level resources that bolster a hospital's competitive viability in North Carolina.

[30] [redacted] at 30:22–31:7.

[31] [redacted] at 67:7–9.

[32] Ex. 33 (WellCare) at 44:20–44:25.

[33] *See also* PX7005 (Aetna) at 57:14–19 (CHS is "smaller health system [in a] very localized part of the state"); [redacted] Ex. 37 (CCH) at 40:23–41:17 (CHS is a "challenged" system).

[34] [redacted] at 10:17–21; *see also* [redacted] at 30:22–31:7 [redacted]

[35] *See* PX7032 (Novant) at 146:24–148:6; [redacted] at 53:2–13; Ex. 9 (CCH) at 17:7–19; [redacted] at 77:20–78:18.

[36] [redacted] at 52:8–24; [redacted] at 78:2–7; *see also* PX7042 (United) at 52:3–7 [redacted]

[37] *See, e.g.*, [redacted] at 29:23–30:1, 57:10–12, 59:2–4; [redacted] at 30:15–19, 31:11–32:9.

C. Competition Occurs on a System-Wide Level Across the Charlotte Area

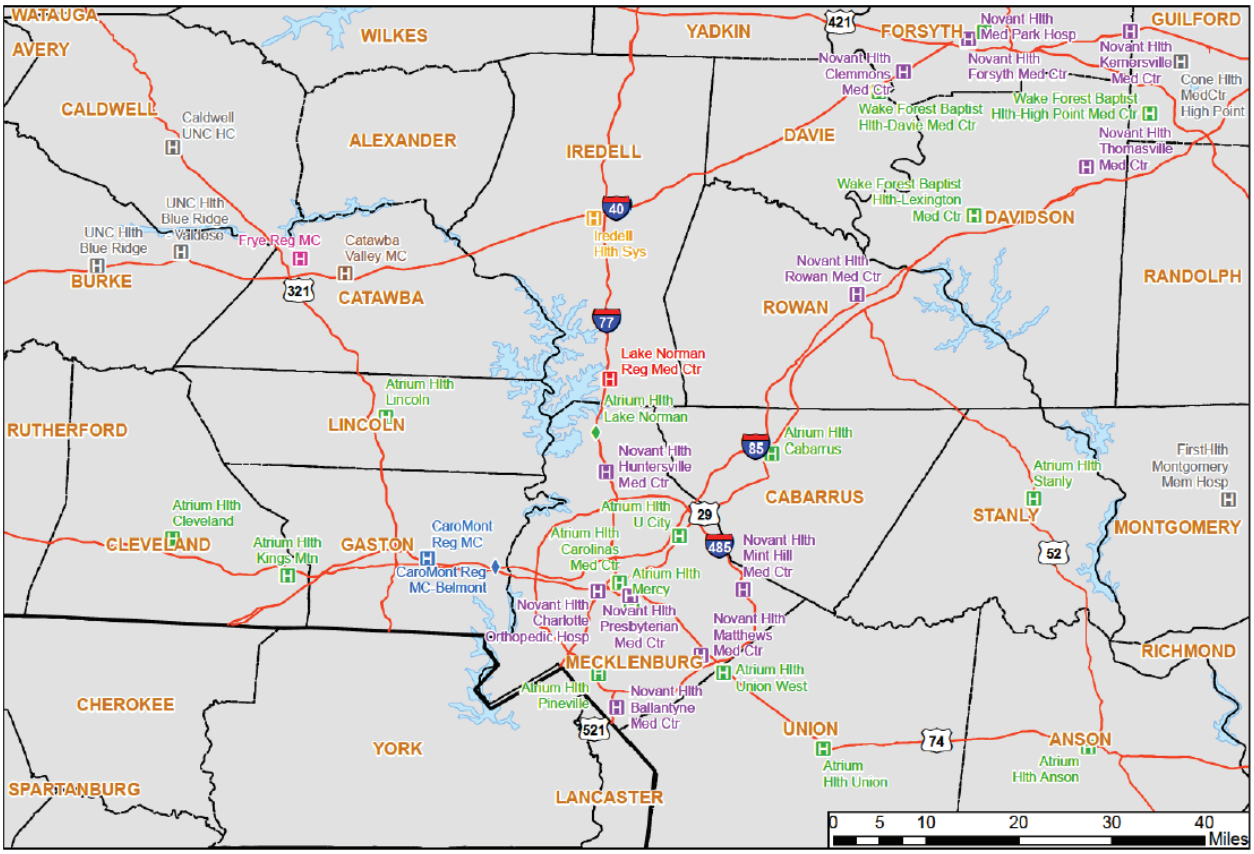
The FTC's counter-factual attempt to paint Lake Norman Regional as a "close competitor[]" to Novant Huntersville[38] ignores how competition for inclusion in health insurance networks works in practice. The healthcare industry has a "two-stage" model of competition: "In the first stage, hospitals compete to be included in an insurer's hospital network. In the second, hospitals compete to attract individual members of the insurers' plans." *Jefferson*, 505 F. Supp. 3d at 528. Competition [redacted][39] In other words, Novant Huntersville does not negotiate terms as a standalone entity; rather, Novant negotiates with insurers for all of its hospitals, facilities, and physicians.[40] In these negotiations, Novant competes intensely with Atrium, CaroMont, and other systems; it does not compete with Lake Norman Regional. For example, [redacted][41] Novant offered [redacted][42] CHS, however, is never the counterweight to secure lower rates. Novant's ordinary-course documents also demonstrate its strategic focus on system- or region-level competition with Atrium.[43] [redacted] References to Lake Norman Regional in Novant's documents are rare.[45]

---

38 FTC Mem. at 19.
39 PX7044 (Aetna) at 26:7–12; [redacted] at 35:13–18.
40 [redacted] at 72:2–11; [redacted] at 49:3–16.
41 Ex. 11 (United); PX7042 (United) at 49:10–50:8, 50:20–52:2.
42 [redacted] at 77:23–78:11, 142:19–143:15.
43 *See, e.g.*, Ex. 12 (Novant); Ex. 13 (Novant); Ex. 14 (Novant).
44 *See, e.g.*, [redacted]
45 Out of six years of business records, the FTC points to two physicians both parties recruited, and quotes one phrase taken out of context from a document. FTC Mem. at 29.

D. Novant Faces Robust Competition in the Charlotte Area from Atrium, CaroMont, and Other Integrated Systems

Atrium and CaroMont are Novant's largest competitors in the Charlotte area and will, along with Iredell and others, continue to exert "substantial competitive pressure" on Novant after the transaction. *United States v. Carilion Health Sys.*, 892 F.2d 1042, 1989 WL 157282, at *3 (4th Cir. 1989). The following map shows the acute care hospitals in the Charlotte area.[46]



Atrium. [redacted]

[redacted] Atrium operates 17 hospitals [redacted]

---

46 Hospitals with a diamond are opening in the next year. *See* Ex. 1 (Wu Rpt.) Wu Ex. 19B.

47 [redacted] Atrium enjoys immunity from antitrust damages, due to its status as a governmental entity. *See Benitez v. Charlotte-Mecklenburg Hosp. Auth.*, 992 F.3d 229, 231 (4th Cir. 2021).

[redacted][49]

Atrium already has a commanding presence in the FTC's so-called "Eastern Lake Norman Area," even before it opens a hospital there next year. [redacted] And Atrium has developed a sophisticated infrastructure to transfer patients across their facilities.[53] [redacted] This fact alone highlights how out of touch the FTC's expert is with the Charlotte area's commercial realities, as his models attribute a zero percent share to Atrium in this area. *Infra* pp. 29–30.

Atrium's presence in this area will only grow stronger. Atrium Lake Norman will open next year and is licensed initially for 30 inpatient beds, with an additional eight observation beds

---

48 Ex. 1 (Wu Rpt.) Wu Ex. 3; [redacted] Ex. 18 (NC DHHS) at 118.

49 Ex. 1 (Wu Rpt.) ¶ 21.

50 [redacted]

51 [redacted]

53 Ex. 21 [redacted] at -934, -938, -939 [redacted]; *see also* PX7029 [redacted] at 136:19–137:21.

54 [redacted]

[redacted][55] Even at its initial 30 beds, Atrium Lake Norman can serve as nearly as many patients as Lake Norman Regional does on an average day.[56] And it is poised to quickly grow that hospital, following a playbook it has perfected elsewhere.[57] [redacted] The current 30-bed license will not constrain this growth: Mecklenburg County has identified a need for 50-150 new inpatient beds each year for the past five years, and Atrium has applied for every one of those new beds every year.[60]

CaroMont. CaroMont Health is the third-largest health system in the Charlotte area and many times larger than Lake Norman Regional in number of beds [redacted][61] In addition to its hospitals, [redacted][62] [redacted][63]

55 [redacted] at 205:10–12, 212:3–12. [redacted] *Id*. 202:15–203:2.
56 Ex. 1 (Wu Rpt.) Wu Ex. 10D.
57 [redacted]
58 [redacted] at 117:1–10, 144:3–145:2.
59 [redacted] at 246:2–5, 289:16–19.
60 Ex. 23 (NC DHHS) at 164:24–165:9.
61 Ex. 1 (Wu Rpt.) ¶ 27.
62 *Id.* Ex. 3.
63 *Id.* ¶ 28.

Iredell Health. Iredell Health is located in Statesville, north of Lake Norman Regional. It is the sixth largest health system in the Charlotte area, [redacted] Iredell Health offers a variety of integrated services throughout Iredell and Mecklenburg Counties, [redacted]

E. Novant Has Committed To Investing In and Expanding Services at Lake Norman Regional and Davis

In contrast to CHS—which has proven unable to turn Lake Norman Regional into a viable competitor [redacted]—Novant has specific, feasible plans to improve both hospitals. Novant committed to these plans in writing to the North Carolina Attorney General.[66] For example, should the transaction go through, Novant will invest millions in capital aimed at immediately improving the quality of care at both facilities, while also expanding access and reducing the overall cost of care. These efforts will include restoring and expanding neonatal intensive care, cardiac, surgical, and telemedicine services at Lake Norman Regional; continuing and/or expanding the behavioral health services currently offered at Davis Regional; and restoring emergency services in the Statesville area.

LEGAL STANDARD

The FTC pretends that a "merits proceeding" lies ahead before the FTC's Administrative Law Judge, if only the Court will punch the preliminary-injunction ticket.[67] But courts recognize that, win or lose, a merger—and the underlying administrative action—ends with the conclusion of the federal court proceedings. *FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 86 (N.D.

---

64 *Id.* ¶ 31.
65 *Id.* ¶¶ 31–32.
66 PX1258 (Novant).
67 FTC Mem. at 7.

Ill. 1981) ("[T]he grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.") (citation omitted); *Foster,* 2007 WL 1793441, at *51 (recognizing deals do not survive the "glacial pace" of the administrative process).

Section 13(b) permits preliminary injunctions *only* when the FTC shows a "substantial likelihood" that it will ultimately demonstrate an antitrust violation, and "the equities" favor an injunction. *FTC v. Atl. Richfield Co.*, 549 F.2d 289, 291–92 (4th Cir. 1977). It is not enough for the FTC to raise "mere questions or speculations supporting its likelihood of success." *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892, 911 (N.D. Cal. 2023); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (preliminary injunctions do not issue "whenever the FTC provides some threshold evidence"). The FTC's burden is "heavy," as it should be when the fate of the transaction hangs in the balance. *Foster*, 2007 WL 1793441, at *51; *see also id.* at *50 (standard is not "near automatic," "easily met," or "highly preferential to the FTC"); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004) ("[T]he FTC's burden is not insubstantial."). Indeed, a Section 13(b) injunction is "an extraordinary and drastic remedy" precisely because "it may prevent the transaction from ever being consummated." *Microsoft*, 2023 WL 4443412 at *8 (quotation omitted).

Statistics are "not conclusive indicators of anticompetitive effects," *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974), nor is market share "virtually conclusive proof." *Baker Hughes*, 908 F.2d 981, 990 (D.C. Cir. 1990) (Thomas, J.). "[O]nly a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38 (1962). As then-Judge Thomas put it: "The Herfindahl–Hirschman Index cannot guarantee litigation victories." *Baker Hughes*, 908 F.2d at 992.

If the FTC clears this hurdle, the Court must balance the equities, giving "serious consideration" to the "private injuries" an injunction would cause. *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984) (per curiam). If the FTC fails to carry its burden on the merits, however, "equities alone will not justify an injunction." *Arch Coal*, 329 F. Supp. 2d at 159.

In short, Section 13(b) does not "authorize automatic preliminary injunctions," *Great Lakes Chem. Corp.*, 528 F. Supp. at 99, and this Court is no "rubber stamp," *FTC v. Freeman Hosp.*, 69 F.3d 260, 267 (8th Cir. 1995) (quotation omitted); *see also Whole Foods*, 548 F.3d at 1035 (same). The Court's gatekeeping function demands "rigorous analysis" of all the evidence, *Microsoft*, 2023 WL 4443412, at *8, "from the defendants as well as from the FTC," *Meta*, 654 F. Supp. 3d at 911 (quotation omitted).

ARGUMENT

I. THE FTC IS UNLIKELY TO SUCCEED ON THE MERITS

A. The Transaction Will Enhance, Not Lessen, Competition

To meet its burden of showing a likelihood of success on the merits, the FTC must prove that the transaction is likely to "substantially . . . lessen competition." 15 U.S.C. § 18 (Section 7 of the Clayton Act); *Baker Hughes*, 908 F.2d at 982–83 (under Section 7, the "ultimate burden of persuasion . . . remains with the government at all times"). In evaluating this central question, "a court must necessarily compare what may happen if the merger occurs with what may happen if the merger does not occur." *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979).

In this case, Novant's acquisition of Lake Norman Regional and Davis will "improve the quality of health care," "reduce its cost," and "strengthen competition" among Novant, Atrium, and other healthcare systems. *United States v. Carilion Health Sys.*, 707 F. Supp. 840, 846 (W.D. Va.), *aff'd*, 892 F.2d 1042 (4th Cir. 1989). Lake Norman Regional is an insignificant

competitor today because it delivers a limited scope of services in one standalone facility and, despite its repeated efforts, has not been able to improve its quality of care. Novant's acquisition of CHS's North Carolina assets, however, will revitalize Lake Norman Regional, improve the quality of care the hospital provides, and restore services at both Lake Norman Regional and Davis. Community members express enthusiastic support for this transaction and its potential to improve the quality of care at Lake Norman Regional.[68] That support matters because, as courts recognize, the interests of "health care intermediaries" such as insurers—whom the FTC seeks to protect with this misguided lawsuit—"pale in comparison [to] those of the actual health care consuming public, whose interests . . . would ultimately be best served by granting defendants freedom to proceed with the merger." *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1302 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997). The FTC has not identified a single employer or community member that supports its case.

Not only was Novant [redacted] but Novant is in the best position to revive Lake Norman Regional. Novant "needs more space" to compete vigorously against Atrium, whereas CHS's "occupancy has declined"[69] and "needs more patients." *Carilion*, 707 F. Supp. at 845. Novant seeks to reverse this decades-long decline to ensure that patients continue to have an option in Mooresville—and an improved one—through expanded service lines, increased quality of care, and more healthcare staff at Lake Norman Regional.[70] By also

---

[68] The Iredell County Board of Commissioners has announced its support, as has the Charlotte Regional Business Alliance, and numerous educators, doctors, community leaders, and employers. *See, e.g.*, Ex. 24 (Iredell County Board); Dkt. 86 (Professor of Nursing); Dkt. 89 (President of Mitchell Community College); Ex. 25 (Dr. Sturgess), Ex. 26 (Dr. Korrapati), Ex. 38 (Troutman Town Manager); Ex. 39 (CRBA).

[69] Ex. 1 (Wu Rpt.) Wu Ex. 10C.

[70] PX1258 (Novant).

guaranteeing that [redacted][71]

Particularly in hospital mergers, the appropriate lens to assess competitive effects is whether the transaction is likely to promote higher *value* healthcare, which includes both cost and quality, not simply unit prices. The FTC ignores important dimensions of this inquiry. Instead of examining the quality and cost of care, the FTC focuses narrowly on reimbursement rates—*i.e.*, the per-unit price for a specific service provided in a hospital. It ignores how the transaction will enable Novant to [redacted][72] If [redacted][73] Novant consistently earns high marks for its success in reducing the total cost of healthcare by managing patient populations to improve healthcare outcomes and reduce the need for more expensive procedures.[74] Indeed, even insurers recognize that Novant's superior quality-of-care programs may result in *reduced* cost of care at Lake Norman Regional, *even if* one assumes (contrary to the evidence) that unit prices go up.[75]

---

71 *Id.*; Ex. 6 (CHS) at 168:1–21.

72 [redacted] at 54:20–56:2; PX7044 (Aetna) at 72:3–13; PX7032 (Novant) at 143:19–146:1; [redacted] at 112:17–113:24.

73 [redacted] at 54:20–55:12; Novant Huntersville has had lower overall readmission rates than Lake Norman Regional in four of the last five years of available data. Ex. 2 (Jha Rpt.) fig. 11; *see also* Ex. 40 (Wu Reply Rpt. ¶ 268).

74 Ex. 2 (Jha Rpt.) ¶¶ 55–57, 64–67, 101; PX7044 (Aetna) at 82:19–83:6 (Novant achieves "high marks on quality" that lead to cost savings).

75 PX7044 (Aetna) at 91:11–93:2; [redacted] at 119:6–121:5.

Modern healthcare has embraced this concept, spurring new payment structures designed to improve quality while decreasing overall cost.[76] Specifically, health systems now enter into risk-sharing arrangements with insurance companies, a model known as value-based care ("VBC"). Those who are unable to participate in such arrangements struggle to attract patients and remain financially viable.[77] That has been Lake Norman Regional's experience, though not for lack of effort. [redacted] Lake Norman Regional has also been unable to participate in VBC arrangements with other insurers.[79] By contrast, Novant participates successfully in a number of VBC arrangements, [redacted][80] The very premise of VBC programs is that more effective, higher-quality care *lowers* the overall cost of care, even where per-unit costs are higher.[81] Novant has a proven track record of achieving such savings,[82] which it will use to achieve similar results at Lake Norman Regional. *See Carilion*, 707 F. Supp. at 849.

---

76 Ex. 2 (Jha Rpt.) ¶¶ 12, 52, 58, 78.

77 Ex. 2 (Jha Rpt.) ¶ 12.

78 [redacted] at 153:6–169:8. When it tried to use an aggregator, that entity concluded its capabilities were [redacted] at 57:16–59:7, 62:21–63:5.

79 *See* [redacted] at 64:17–65:2 [redacted]

80 [redacted] at 28:1–10. [redacted] at 86:22–24; [redacted] at 117:3–7; [redacted] at 64:5–7.

81 PX7044 (Aetna) at 72:3–13; [redacted] at 116:25–117:2, 119:24–120:7.

82 PX7044 (Aetna) at 82:19–83:11; [redacted] at 50:2–17; PX7037 (BCBS) at 25:21–28:10.

In addition, Novant has made substantial, measurable, and concrete commitments to the North Carolina Attorney General, whose office has elected not to join this lawsuit. Novant has publicly committed, at a minimum, to the following steps that will directly benefit patients and the community: (1) invest a minimum of $6.5 million on capital improvements at Lake Norman that CHS has been unable to provide; (2) replace Lake Norman Regional's outdated medical records systems; (3) deploy its quality programs to raise the quality of care; (4) enhance physician coverage and recruiting; (5) restore and expand neonatal intensive care, cardiac, surgical, and telemedicine services at Lake Norman Regional; (6) continue offering, or expand, the behavioral health services currently offered at Davis; and (7) restore emergency services in the Statesville area, which Davis has stopped offering.[83]

Novant also has committed to extend its generous charity care policy and financial assistance programs for patients and its "living wage" for Lake Norman Regional and Davis employees.[84] And to avoid any doubt, [redacted][85] These commitments reinforce that the merger provides significant benefits and enhances competition. *See FTC v. Butterworth Health Corp.*, 121 F.3d 708, 1997 WL 420543, at *2 (6th Cir. 1997) (per curiam) (upholding district court's recognition of "a serious

[83] PX1258 (Novant) at 2–4; *see also* Ex. 24 (Iredell County Board) (stating that Novant's public commitments address "exactly the types of services that will benefit our community"). The FTC criticizes the pledge to keep Lake Norman open for five years, but this is a guaranteed minimum, not a termination point. Novant has no plans to shut Lake Norman Regional down after five years. [redacted]

[84] PX1258 (Novant) at 5.

[85] *Id.* at 4–5.

commitment by the defendants . . . to refrain from exercising market power in ways injurious to the consuming public").

B. The FTC Fails To Define a Relevant Antitrust Market

It is the FTC's burden to establish the relevant market, *United States v. Du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957), which it must define "in terms of both product and geography." *FTC v. Rag-Stiftung*, 436 F. Supp. 3d 278, 287 (D.D.C. 2020). "Identification of a proper market is a necessary predicate to the Government's task of demonstrating a likelihood of success on the merits." *Jefferson*, 505 F. Supp. 3d at 557 (internal quotations omitted). "The proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers." *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999).

Here, the FTC proposes a gerrymandered market that fails because it contradicts commercial realities. *See Jefferson*, 505 F. Supp. at 522, 557–58; *Tenet*, 186 F.3d at 1053. By drawing a line around an area that includes only the merging parties and one other facility—excluding every other meaningful competitor—the FTC asserts it has met its statistical burden and declares victory. But that is not how markets are properly defined. This fundamental error infects every aspect of the FTC's case and requires that its motion be denied.

1. The FTC Does Not Propose a Plausible Geographic Market

"A geographic market is the area in which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *Tenet*, 186 F.3d at 1052; *see also E. I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 439 (4th Cir. 2011). A properly defined geographic market "must both 'correspond to the commercial realities of the industry and be economically significant.'" *Arch Coal*, 329 F. Supp. 2d at 123 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336–37 (1962)); *see also Jefferson*, 505 F. Supp.

3d at 540 (E.D. Pa. 2020). Therefore, if patients would readily travel for care to other hospitals in the Charlotte area—indeed, *if they already do so*—then the purported "Eastern Lake Norman Area" "is not a relevant market." *Jefferson*, 505 F. Supp. 3d at 540 (internal quotation marks and citation omitted); *see also Carilion*, 707 F. Supp. at 844 (where a "significant number of patients from the areas that those hospitals serve choose to go to the Roanoke hospitals," which had "superior" services, those areas are relevant to competition). The FTC's proposed market fails to "correspond with commercial realities," *Jefferson*, 505 F. Supp. 3d at 542–43, of how other hospitals, insurers, the merging parties, and employers view the competitive landscape, and of how patients behave. The FTC cannot meet its *prima facie* burden, as its "failure to prove its relevant geographic market is fatal to its motion." *Tenet*, 186 F.3d at 1053; *see also Rag-Stiftung*, 436 F. Supp. 3d at 303 (same).

First, the FTC claims that patients located in its so-called "Eastern Lake Norman Area," "prefer to receive inpatient GAC services" in that area.[86] But the FTC's proposed market excludes *fourteen* hospitals that are around the same drive time from Novant Huntersville as Iredell Memorial (a participant in the alleged market).[87] And the majority of residents of the alleged "Eastern Lake Norman Area" already seek care in hospitals *excluded* from the FTC's geographic market.[88] That such a sizeable segment of patients travel outside of the alleged market is evidence that it is not correctly defined. *Jefferson*, 505 F. Supp. 3d at 541; *see also Tenet*, 186 F.3d at 1053 (district court erred by "improperly discount[ing] the fact that over twenty-two percent of people in the most important zip codes already use hospitals outside the FTC's proposed market"); *accord Carilion*, 707 F. Supp. at 844.

---

[86] FTC Mem. at 11.
[87] Ex. 1 (Wu Rpt.) ¶ 172.
[88] *Id.* Exs. 22A, 22B.

Second, the FTC's claim that insurers cannot "market a health plan throughout the Eastern Lake Norman Area without any of the market's four hospitals in their network,"[89] is contradicted by record evidence and therefore does not make the "Eastern Lake Norman Area" a relevant geographic market. In most hospital merger cases, the question of whether insurers could offer a marketable plan that excludes both merging parties is purely theoretical. *See, e.g., Jefferson*, 505 F. Supp. 3d at 552 (FTC's proposed market did not "correspond to the commercial realities" of region when employer "said its employees would be fine with a health plan excluding the two [merging] systems"). Here, it is not: insurers *today* exclude both Novant and Lake Norman Regional from plans successfully marketed in the Charlotte area.[90] That insurers already exclude both merging parties, even before Atrium Lake Norman opens, confirms that they are not beholden to the parties in their negotiations to form hospital networks.

Third, courts look to the geographic area in which prices are negotiated to ascertain the relevant market. *See, e.g.*, *E. I. du Pont*, 637 F.3d at 441–42; *Jefferson*, 505 F. Supp. 3d at 528. Here, insurers negotiate contracts [redacted][91] They have never negotiated [redacted] When asked [redacted] tried to explain to

---

89 FTC Mem. at 12.

90 [redacted] at 58:22–59:4, 61:18–62:8, 63:3–14 [redacted] *id.* at 65:10–66:1 [redacted]

91 [redacted] at 72:2–11; [redacted] at 49:3–16; [redacted] at 23:21–24:23, 25:14–18; [redacted] at 33:24–34:7, 62:3–7.

the FTC: "Lake Norman is part of Charlotte. I probably wouldn't separate the two."[92] [redacted] [redacted][93] This dynamic is opposite from cases in which the FTC has alleged a relevant market that is an "economically significant area for insurers." *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 167 (3d Cir. 2022).

Fourth, the evidence contradicts the FTC's claim that "Defendants and non-party hospitals treat the Eastern Lake Norman Area as a distinct market."[94] Novant and [redacted][95] So do insurers.[96] In fact, so did the United States of America and the State of North Carolina, which alleged the "Charlotte area" was the relevant geographic market when they sued Atrium.[97]

---

92 [redacted] at 62:18–19.

93 [redacted] at 54:21–55:6; *see also id.* at 54:3–55:6 [redacted] PX7006 (United) at 65:7–9 (testifying that [redacted] Community members agreed that there is no common understanding of the term "Eastern Lake Norman Area." PX7026 (Wyatt) at 113:7–14 (testifying that he had never "heard the term 'Eastern Lake Norman Area'" in his fifty years of living in Iredell County).

94 FTC Mem. at 12–14. The FTC also claims that both Atrium and Novant focus on a "north" submarket. *Id.* at 13. But even those areas—which are too narrow to constitute a relevant antitrust market—are much broader than the FTC's "Eastern Lake Norman Area." Novant's loosely defined "north sub-market" for example, has included areas to the west of Lake Norman (Denver, Lincolnton, Mount Holly, and Gastonia), south of I-485 (Atrium Health University City), and east of Iredell County (Cabarrus and Rowan Counties).

95 [redacted] at 15:16–22, 17:3–9; PX7032 (Novant) at 80:3–81:5.

96 [redacted] at 33:24–34:7, 62:3–7; [redacted] at 23:21–24:23, 25:14–18.

97 Complaint at 6–7, *United States of America and the State of North Carolina v. The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System*, 16-cv-00311 (W.D.N.C. June 9, 2016), Dkt. 1 (defining the "Charlotte area" as a collection of the twelve counties around Mecklenburg).

Fifth, [redacted] [98] The FTC ignores this commercial reality by minimizing Atrium's impact throughout its case—excluding its existing hospitals from the market and attributing to them no share; ignoring its freestanding emergency department in Huntersville and dozens of physician clinics in the areas that [redacted] and discounting the imminent Atrium Lake Norman hospital that will operate just a few miles from each of Lake Norman Regional and Novant Huntersville.

Finally, the FTC's claim that its proposed market definition passes the hypothetical monopolist test[99] relies on a flawed application of that test by its economic expert, Dr. Tenn, that fails to "correspond to the commercial realities" of the Charlotte area's healthcare industry. *Jefferson*, 505 F. Supp. 3d at 553. When those errors are corrected, the FTC's proposed "market" does not pass the hypothetical monopolist test.[100]

The FTC's passing reference to an alternative alleged market it calls "Center City/Northern Charlotte"[101] does not save its case. That "market" is gerrymandered to purposefully exclude Atrium and CaroMont hospitals that are much closer to Novant Huntersville and Lake Norman Regional than the Center City hospitals are.[102] It is improper for the FTC to cherry-pick locations within a region to achieve a presumption of illegality when

---

98 Ex. 40 (Wu Reply Rpt. ¶¶ 139– 140); *see also* [redacted] Ex. 31 (CHS) at 8 (noting that "market share migrat[ion] to Atrium" caused a three-year decline in Lake Norman Regional's share of emergency services).

99 FTC Mem. at 14–15.

100 Ex. 40 (Wu Reply Rpt.) ¶¶ 91–104.

101 FTC Mem. at 18.

102 Ex. 40 (Wu Reply Rpt.) ¶ 118.

analyzing that market does not "address, much less answer, the relevant antitrust question." *Jefferson*, 505 F. Supp. 3d at 543.

2. The FTC Does Not Propose a Plausible Product Market

The FTC also alleges a gerrymandered product market of "inpatient general acute care ('GAC') services sold to commercial insurers and their members."[103] A market may consist of different services "where that combination reflects commercial realities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966). That is not the case here, for several reasons.

First, the FTC limits its market to overlapping inpatient services provided by Lake Norman Regional and Novant Huntersville, which ignores the commercial reality that hospitals and [redacted] Even among inpatient services, negotiations and contracts are not limited to the subset of overlapping services between individual hospitals in a region; [redacted][104]

Second, the FTC's alleged product market ignores the porous boundary between inpatient and outpatient services. Many patients require inpatient and outpatient care for the same condition, particularly high-risk patients, and modern hospitals seek to closely integrate both types of care.[105] Increasingly, "a significant number of problems could be treated on an in or outpatient basis," so that "evaluating the reasonableness of the merger as a whole, and not just

[103] FTC Mem. at 9.
[104] PX7016 (CHS) at 81:1–14 (contracting with payors for inpatient and outpatient services occurs together).
[105] PX2227 (CHS) at -005; Ex. 2 (Jha Rpt.) ¶ 48.

for a single type of service" may naturally lead to the inclusion of both inpatient and outpatient services in the relevant product market. *Carilion*, 892 F.2d at 1042 (quotation omitted).

Third, the FTC artificially distinguishes between commercial and non-commercial insurers and insured patients.[106] Hospitals do not provide separate services to commercially insured patients from government-insured patients. By focusing only on services sold to commercial insurers, the FTC sidelines the interests of Medicare and Medicaid-insured patients and gives disproportionate credence to the testimony of commercial insurers, whose claims of anticompetitive harm have been viewed with skepticism by courts as "potentially self-serving." *Jefferson*, 505 F. Supp. 3d at 547; *Tenet*, 186 F.3d at 1054 (identifying the "suspect" nature of insurer testimony due to payors' "economic interests" in keeping their own rates down).

Finally, even by its own definition of commercial insurers—payors that negotiate reimbursement rates with hospital systems—the FTC excludes relevant payors, including Medicare and Medicaid Advantage payors, that also negotiate rates with hospitals and whose members represent a growing and important patient base. The FTC cannot claim that the merger will result in non-price harms that will affect commercially insured and non-commercially insured patients alike,[107] then seek to define away those "non-commercially insured" patients and disregard the benefits that will accrue to them. "Non-commercial" insurers have testified to those benefits, explaining that the merger presents an opportunity to "improve the level of care that the members are getting," given Novant's reputation as a "high quality" system able to turn

[106] FTC Mem. at 9.
[107] FTC Mem. at 30–31.

around CHS's "challenges from a quality standpoint."[108] Those insurers further testified that they do not expect the transaction to lead to higher rates for its Medicaid members.[109]

C. The FTC Cannot Show the Merger Is Likely To Substantially Lessen Competition

The FTC's failure to define a cognizable market alone dooms its case. *See Tenet*, 186 F.3d at 1051; *Jefferson*, 505 F. Supp. 3d at 539. But even in its made-for-litigation market, the FTC cannot show that the transaction is likely to "substantially . . . lessen competition." 15 U.S.C. § 18. The FTC: (1) invokes market share and market concentration statistics; and (2) alleges a decrease in "head-to-head competition" between the merging parties.[110] These claims contravene commercial realities and ignore the substantial procompetitive effects this transaction will generate.

1. The FTC's Statistical Measures of Market Share Are Unreliable

The FTC appears to hope that the Court will begin and end its inquiry with the distorted statistical models presented by its expert economist. But the Supreme Court has warned that "statistics concerning market share and concentration, while of great significance, [are] not conclusive indicators of anticompetitive effects." *Gen. Dynamics Corp.*, 415 U.S. at 498; *Baker Hughes*, 908 F.2d at 984 ("[M]arket concentration simply provides a convenient starting point for a broader inquiry into future competitiveness."); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 982 (2d Cir. 1984) ("[A] substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect[s]."). Courts recognize that defendants can rebut the government's *prima facie* case by showing that the government's

[108] Ex. 37 (CCH) at 40:16–41:17, 54:15–25.
[109] *Id*. at 55:1–56:1 ("I don't think they would see any impact," other than "potentially…higher quality"); Ex. 33 (WellCare) at 55:16–55:22 (WellCare is "not anticipating an impact" of the merger on Medicaid patients).
[110] FTC Mem. at 15–17; 18–20.

"market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975). In multiple ways, the FTC's model artificially inflates the parties' competitive significance and distorts commercial realities.[111]

The FTC assigns shares only to hospitals physically located in its alleged relevant market. Although Lake Norman Regional is not a meaningful competitor, the FTC's economic expert, Dr. Tenn, asserts that the hospital commands a robust 22.4 percent of the "Eastern Lake Norman" market.[112] Even if there were such a market, Dr. Tenn could arrive at a 22.4 percent share only by assigning 100 percent of the market to the four hospitals physically located in the alleged "Eastern Lake Norman Area"—Novant Huntersville, Lake Norman Regional, Iredell Memorial, and a modest share to Atrium Lake Norman—and giving all other hospitals a share of zero. In reality, the majority of patients leave the so-called "Eastern Lake Norman Area" to go to those other hospitals, *supra* p. 12; assigning them a share of zero distorts reality.[113]

The FTC excludes the hospitals its own expert says are the most likely substitutes. Economists calculate "diversion ratios" to identify which hospitals patients would choose, and in what proportion, if their first choice is not available. A high diversion ratio means more patients see a hospital as a closer substitute for their first choice; a lower diversion ratio means fewer

[111] The FTC relies on the 2023 Merger Guidelines, *see* FTC Mem. at 18, which are non-binding and have not been blessed by any court. They were issued months after the FTC reviewed the deal, after the parties agreed to an extension of time, and just before the FTC sued here. The FTC also argues that a combined market share of 30 percent creates a presumption of antitrust harm. *Id*. at 16. But given that no market share percentage is conclusive on its own, courts have rejected such a presumption based on even higher percentages. *See, e.g.*, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1123 (N.D. Cal. 2004) ("A presumption of anticompetitive effects from a combined share of 35% in a differentiated products market is unwarranted.").

[112] PX0001 (Tenn Rpt.) ¶ 142.

[113] Ex. 1 (Wu Rpt.) Wu Exs. 22A, 22B; Ex. 40 (Wu Reply Rpt.) ¶¶ 139– 140.

patients see a hospital as their next-best choice. The diversion ratios calculated by the FTC's Dr. Tenn show that were Novant Huntersville unavailable, [redacted] [114] Yet the FTC and Dr. Tenn [redacted]

The FTC's calculations understate Atrium Lake Norman's competitive significance in two ways. First, Dr. Tenn understates the diversion to Atrium Lake Norman by assuming its capacity will remain 30 beds [redacted] Second, Dr. Tenn ignores that the impact of Atrium Lake Norman will not be limited to its nominal bed count; [redacted] [115]

The FTC minimizes the significance of Lake Norman Regional's downward trajectory. From 2004 to 2023, Lake Norman Regional's inpatient discharges dropped by 56 percent.[116] Lake Norman Regional's occupancy rate has also declined over time, down to 31 percent last

[114] PX0001 (Tenn Rpt.) Tbl. 7A. [redacted]

[115] [redacted] would be significantly higher. [redacted]

[116] Ex. 1 (Wu Rpt.) Wu Ex. 10A.

year.[117] Its market share has dwindled by more than 50 percent over the same time.[118] And that will only be exacerbated by the entry of Atrium's and CaroMont's new facilities. *Supra* pp. 12–13. Yet, the FTC's purported market shares and HHIs rely on data that is too old to be instructive, ignore quality by relying on discharges rather than revenue, and do not even try to take account of Lake Norman Regional's pronounced downward trajectory.[119] If the transaction is enjoined, Lake Norman Regional's competitive viability will continue to trail the FTC's purported market share figures that rely on historical data. When presented with similar facts, the Supreme Court has directed courts to look beyond historical and stagnant market share statistics because they are "misleading as to actual future competitive effect" of the transaction. *Waste Mgmt., Inc.*, 743 F.2d at 982 (citing *Gen. Dynamics*, 415 U.S. at 501–04). Where, as here, the acquired firm has declining performance and quality, fails to compete at historical levels, and has "no convincing prospects for improvement," *Arch Coal, Inc.*, 329 F. Supp. 2d at 157,[120] "market share statistics do not accurately reflect the proposed transaction's likely effects on competition," *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 224 (S.D.N.Y. 2020).[121]

---

[117] Ex. 1 (Wu Rpt.) Wu Ex. 10D (showing a decline in occupancy rate from 70 percent in 2004 to 31 percent in 2023).

[118] Ex. 1 (Wu Rpt.) Wu Ex. 12A.

[119] Ex. 1 (Wu Rpt.) ¶¶ 167–68; 181–84 (explaining that FTC's overreliance on historical market shares fails to accurately capture downward trend or account for quality of care).

[120] *See also Arch Coal, Inc.*, 329 F. Supp. 2d at 157 (concluding FTC's claims of firm's "past and future competitive" significance "has been far overstated").

[121] *See also Deutsche Telekom*, 439 F. Supp. 3d at 179 (setting aside market share statistics where Sprint's network was weak, low quality, and it had financial constraints); *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 699–700 (8th Cir. 1979) (finding effects of transaction not anticompetitive where acquired firm had a "poor image among consumers" and "lost substantial amounts of money" despite attempts to revitalize); *Baker Hughes*, 908 F.2d at 985 (listing cases).

2. Lake Norman Regional Is Not a Constraint on Novant Pricing Today

Insurers and in-house negotiators alike testified that Lake Norman Regional is not a factor in Novant's payor negotiations.[122] Insurers, who have expressed opposition to hospital mergers in other cases, acknowledged here that the merger will not increase Novant's bargaining leverage. For example, [redacted] 30(b)(6) representative did not believe the transaction would increase the combined entity's reimbursement rates.[123] Aetna's 30(b)(6) witness testified that he did not expect the transaction to increase Novant's bargaining leverage.[124] That the insurer testimony has been "neither unequivocal nor unanimous" about the potential impact, "reflects the competitive provider dynamic" in the Charlotte area. *Jefferson*, 505 F. Supp. 3d at 546.

The FTC's claim that the transaction will enhance Novant's leverage also ignores the comparative bargaining leverage of insurers. Most notably, insurers can threaten to exclude a health system from their plans entirely, which is much costlier for the hospital system than the insurer. In 2023, for example, [redacted][125] Such a threat is certainly not empty where Novant faces ubiquitous competition from a much larger system, Atrium. Indeed, insurers already offer networks that exclude Novant (and CHS) in favor of Atrium hospitals. *Supra* p. 23. And [redacted][126]

---

[122] *See* PX7032 (Novant) at 126:24–128:6; [redacted] at 10:17–21, 53:2–13; Ex. 9 (CCH) at 17:7–19; [redacted] at 77:20–78:18.

[123] [redacted] at 71:17–72:5.

[124] PX7005 (Aetna) at 99:13–18. Other insurers echoed these sentiments. *See, e.g.*, Ex. 37 (CCH) at 44:15–25, 55:1–56:1 (CCH does not believe the transaction will increase rates for its Medicaid members, but could increase quality of care); Ex. 33 (WellCare) at 54:11–55:22 (WellCare is "not anticipating an impact" on its members from the merger).

[125] [redacted] at 95:10–98:4, 121:1–127:16.

[126] [redacted] at 74:8–23, 125:3–127:8; [redacted] at 155–57.

Finally, the FTC's myopic focus on unit prices obscures that, even if Lake Norman Regional has a lower *unit price* than other hospitals, it is often a *higher cost* option. Lake Norman Regional's lower quality, inferior safety record, and lack of care-management programs result in higher total costs.[127] Novant, by contrast, can offer higher quality care at a lower total cost.[128] Even when looking at unit costs, Novant has committed to give payors the option to (i) maintain existing rates at Lake Norman and Davis, or (ii) apply annual reimbursement rate escalators that are capped at the lesser increase in the medical CPI or general inflation, through the end of 2026 (well after Atrium Lake Norman is slated to open).[129]

3. The Transaction Will Generate Substantial Efficiencies

In addition to the procompetitive effects described above, the transaction will lead to "significant efficiencies benefiting consumers," which must be analyzed as part of "the acquisition's overall effect on competition." *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1222 (11th Cir. 1991). Those efficiencies—separate from the procompetitive benefits—will exceed the Complaint's claimed $5 million in increased costs.[130] Converting Lake Norman Regional from its current for-profit status to Novant's non-for-profit status alone provides approximately $2 million in tax-related savings, offsetting 40 percent of the FTC's alleged cost harm.[131] The transaction will unlock further efficiencies and savings opportunities, such as by enabling Lake Norman Regional to access Novant's lower cost pricing on supplies and purchased services (*e.g.*,

---

[127] The hospital with the lowest unit price does not always have the lowest cost, given factors such as utilization, efficiency, and acuity of service. PX7044 (Aetna) at 35:21–39:14.

[128] Payors testified that a [redacted] *See, e.g.*, PX7044 (Aetna) at 35:21–38:7, 91:11–18; [redacted] at 54:5–56:2; [redacted] at 14:14–15:19; *see also* PX7032 (Novant) at 142:16–148:6.

[129] PX1258 (Novant) at 4.

[130] Compl. ¶ 78, Dkt. 2.

[131] Ex. 40 (Wu Reply Rpt.) ¶ 282.

laundry and food services), which will generate an additional $2.6 million in year-one cost savings, increasing thereafter to $5.4 million in annual recurring savings opportunities.[132]

Contrary to the FTC's assertions, these savings have nothing to do with canceling expansion projects at Novant Huntersville.[133] Instead, Novant has committed to *continue* expanding its Huntersville campus, whether the transaction is completed or not.[134]

II. THE BALANCE OF EQUITIES FAVORS DENIAL

"Section 13(b) requires the FTC to demonstrate that the harm to the parties and the public that would flow from an injunction is outweighed by the harm to competition that would occur in the period between the injunction's denial and a final judgment on the merits." *FTC v. Freeman Hosp.*, 911 F. Supp. 1213, 1227–28 (W.D. Mo.), *aff'd*, 69 F.3d 260 (8th Cir. 1995). To evaluate whether granting an injunction is in the public interest, the court may consider both the public interest in effective enforcement of the antitrust laws, *Jefferson*, 505 F. Supp. 3d at 558, and "the potential benefits, public and private, that may be lost" if the injunction is granted, *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981).

Here, Novant has committed to cap rates at Lake Norman Regional through 2026, which ameliorates any hypothetical interim harm. *Microsoft*, 2023 WL 4443412, at *22. And Novant will immediately invest in restoring and expanding services at both Lake Norman Regional and Davis, which will benefit near-term competition. Even if the transaction were ultimately determined to be unlawful, these investments will facilitate CHS's ability to find an alternative buyer for these hospitals, [redacted] *See FTC v. Lab'y Corp. of Am.*, 2011 WL

---

[132] *Id*.

[133] FTC Mem. at 30. Novant never planned to build the bed tower, parking deck, or engage in other expansions that the FTC claims Novant only put on hold because of the present transaction. *See* Ex. 36 (Novant) at 57:14–19.

[134] *See, e.g.*, PX1258 (Novant) at 2 & n.2; PX7038 (Novant) at 139:20–141:15 (identifying potential expansion opportunities irrespective of the outcome of the transaction).

3100372, at *23 (C.D. Cal. Mar. 11, 2011) ("Courts have routinely permitted integration of certain assets where such assets would preserve the potential for divestiture in the future.").

CHS has [redacted] Novant, on the other hand, will turn around these hospitals. The transaction is Lake Norman Regional's [redacted] to reverse its downward trajectory and [redacted] "Whatever weakened equities the Government could argue cannot justify enjoining this transaction given its failure to show a likelihood of success on the merits." *Jefferson*, 505 F. Supp. 3d at 558.

CONCLUSION

The Court should deny Plaintiff's request for a preliminary injunction.

Dated: April 11, 2024

Respectfully Submitted,

/s/ Heidi K. Hubbard

Heidi K. Hubbard (admitted *pro hac vice*)
Jonathan B. Pitt (admitted *pro hac vice*)
Beth A. Stewart (admitted *pro hac vice*)
Carol J. Pruski (admitted *pro hac vice*)
J. Liat Rome (admitted *pro hac vice*)
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, SW Washington, DC 20024
Tel: (202) 434-5000
Email: hhubbard@wc.com
Email: jpitt@wc.com
Email: bstewart@wc.com
Email: cpruski@wc.com
Email: lrome@wc.com

Brian S. Cromwell (N.C. Bar No. 23488)
Caroline B. Barrineau (N.C. Bar No. 51571)
PARKER POE ADAMS & BERNSTEIN LLP
Bank of America Tower
620 S. Tryon Street, Suite 800
Charlotte, NC 28202
Tel: (704) 372-9000
Fax: (704) 334-4706
Email: briancromwell@parkerpoe.com
Email:
carolinebarrineau@parkerpoe.com

Alexis James Gilman (admitted *pro hac vice*)
CROWELL & MORING LLP
1001 Pennsylvania Avenue NW Washington,
DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
Email: agilman@crowell.com

Counsel for Defendant Novant Health, Inc.

/s/ Michael J. Perry

Michael J. Perry (admitted *pro hac vice*)
Jamie E. France (admitted *pro hac vice*)
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Tel: (202) 887-3558
Email: mjperry@gibsondunn.com
Email: jfrance@gibsondunn.com

Adam K. Doerr (N.C. Bar No. 37807)
Kevin R. Crandall (N.C. Bar No. 50643)
Robinson, Bradshaw & Hinson, P.A.
101 N. Tryon St. #1900
Charlotte, North Carolina 28246
Tel: (704) 377-8114
Email: adoerr@robinsonbradshaw.com
Email: kcrandall@robinsonbradshaw.com

Counsel for Defendant Community Health Systems, Inc.