No. 17-3783

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FEDERAL TRADE COMMISSION; STATE OF NORTH DAKOTA,

Plaintiffs-Appellees,

v.

SANFORD HEALTH; SANFORD BISMARCK; MID DAKOTA CLINIC, P.C.,

Defendants-Appellants,

Appeal from the United States District Court for the District of North Dakota
Case No. 1:17-cv-00133-ARS, Hon. Alice R. Senechal

REPLY BRIEF OF APPELLANTS SANFORD HEALTH, SANFORD BISMARCK, AND MID DAKOTA CLINIC, P.C.

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SUMMARY OF ARGUMENT

The Government seeks to enjoin a pro-competitive transaction that will not give Sanford the ability to increase price or decrease quality. Instead, it will catalyze competition in the relevant service areas between Sanford and one of the largest (and growing) hospital systems in the country. Additionally, it will bring MDC's patients substantial healthcare advances that MDC would not offer on its own.

The Government asks this Court to ignore the District Court's express imposition of an erroneous "clear showing" standard on Defendants that the Government expressly asked the District Court to apply but now does not defend. It also misconstrues the Clayton Act burden-shifting framework, leaving nothing left of the Government's burden of persuasion. And it fails to defend the Court's application of other erroneous legal standards in evaluating asserted anti-competitive effects, pro-competitive synergies, and MDC's prospects that conflict with its own Merger Guidelines and governing precedent.

As importantly, the Government does not account for the realities of the North Dakota healthcare market and fails even to address:

- [redacted]

- unrebutted evidence that BCBS-ND's statewide pricing reflects its high bargaining power and would be irrational without it;
- the District Court's clear misstatement of the testimony of both expert economists as to the relationship between bargaining power, bargaining leverage, and price; and
- the majority of the pro-competitive synergies discussed in Defendants' Opening Brief.

The Government also invents new findings that the District Court did not make and that contradict the record, including as to Medica, CHI entry, and synergies. Because the Government cannot defend the District Court's decision, and for the reasons stated in Defendants' Opening Brief, the District Court's order must be reversed.

ARGUMENT

I. Sanford And MDC Rebutted The Government's Prima Facie Case, And The Government Cannot Meet Its Burden Of Persuasion.

A. The District Court Applied The Wrong Legal Standards In Evaluating Defendants' Rebuttal Case.

1. The District Court Erroneously Applied A "Clear Showing" Standard.

The Government argues that the District Court did not apply the erroneous "clear showing" standard that it said it applied. Gov't Br. 31. But this was no stray quote. The District Court's analysis of Defendants' rebuttal case begins by stating that Defendants must "produce evidence that *clearly shows* that no anticompetitive effects are likely in order to overcome the plaintiffs' prima facie case." Add.-062 (emphasis added).

Moreover, the Government *specifically sought application of this standard* in its proposed conclusions of law: "Defendants must produce evidence that 'clearly show[s]' that no anticompetitive effects are likely in order to overcome Plaintiffs' *prima facie* case." RSA010-11.[1]

As the D.C. Circuit explained, a "defendant required to produce evidence 'clearly' disproving future anticompetitive effects must essentially persuade the trier of fact on the ultimate issue in the case—whether a transaction is likely to lessen competition substantially." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990). This is particularly true in Clayton Act cases because "it is easy to establish a prima facie case" by "simply [ ] presenting market concentration statistics" such that "[r]equiring a 'clear showing' in this setting would move far toward forcing a defendant to rebut a probability with a certainty." *Id*. at 992. The Government nowhere explains what is left of its ultimate burden of persuasion if defendants must make a "clear showing" as to the "ultimate issue."

The Government asserts that the District Court "obviously followed" *Baker Hughes* because it cited it once elsewhere in the opinion. Gov't Br. 31. It therefore ignores that the District Court expressly applied the wrong standard and nowhere acknowledged *Baker Hughes*' extensive discussion of why that standard is wrong. Relatedly, the Government's argument that the erroneous standard was

[1] "RSA###" refers to Appellants' Supplemental Appendix.

not "meaningful" here confuses its view of the strength of its evidentiary showing with the applicable legal burdens. While a litigant's difficulty in meeting its burden will depend on how "compelling" the opponent's evidence is, "more compelling" evidence does not change the applicable burden itself. Here the District Court applied the wrong burden. *See United States v. Anthem, Inc.*, 855 F.3d 345, 350 (D.C. Cir. 2017) ("because the burden of persuasion ultimately lies with the plaintiff, the burden to rebut" the presumption created by the Government's concentration-based prima facie case "must not be 'unduly onerous.'").[2]

2. The Government Misstates The Nature Of Its Prima Facie Case And What Must Be Shown To Rebut It.

The Government does not directly address the District Court's second legal error—requiring Defendants to show "that no anticompetitive effects are likely," Add.-065, rather than only to produce evidence showing that the market-concentration statistics do not reliably predict competitive effects, Opening Br. 16-17. It appears to argue, however, that Defendants can only "overcome the Government's prima facie case" by proving an absence of anticompetitive effects

[2] Recent scholarship demonstrating the economic unsoundness of the presumption further emphasizes the importance of ensuring that the burden to rebut it is not "unduly onerous." *See, e.g.*, Douglas H. Ginsburg and Joshua D. Wright, *Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 377 (2015).

on "the totality of [the] evidence" presented during the hearing. Gov't Br. 33. *See also id*. at 33, 41, 43 (framing each issue as to whether Sanford and MDC "rebutted" the Government's showing).

The Government's proposed standard ignores Supreme Court precedent and, like the "clear showing" standard, eliminates its ultimate burden of persuasion. As shown previously, Opening Br. 16-17, under the Clayton Act framework, market-share statistics form the basis for the prima facie case. *United States v. Philadelphia National Bank*, 374 U.S. 321, 363 (1963). *See also Baker Hughes*, 908 F.2d at 990 ("statistics alone establish a prima facie case"); Add.-064 ("Based on the HHI evidence of market concentration, the proposed transaction is presumptively unlawful."); Gov't Br. 15-16; RSA007-8. Defendants rebut the presumption by producing evidence "show[ing] that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition." *United States v. Citizens & S. Nat. Bank*, 422 U.S. 86, 120 (1975). *See also* Opening Br. 17 (collecting appellate decisions explaining that presumption is rebutted by undermining "predictive value" of concentration statistics).

The Government may of course produce additional non-statistical evidence to establish potential anticompetitive effects and/or undermine the credibility of the rebuttal case, but that additional evidence affects only whether the Government has met its ultimate burden of persuasion. It is not something defendants must

disprove to overcome the initial, concentration-based presumption. *See F.T.C. v. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (quoting *Baker Hughes*, 908 F.2d at 983) (Government burden of producing "additional evidence" beyond the statistics showing a "significant increase in the concentration" "merges with the ultimate burden of persuasion which remains with the government at all times"). Any other approach impermissibly shifts the burden of persuasion to defendants "to prove the core of the dispute," *Baker Hughes*, 908 F.2d at 992—*i.e.*, whether the transaction is anticompetitive—leaving nothing left of the Government's burden of persuasion.

The Government, citing a Fifth Circuit decision, states that the Government typically "puts in all of its evidence at once." Gov't Br. 32; *Chicago Bridge & Iron Co. v. F.T.C.*, 534 F.3d 410, 424 (5th Cir. 2008). This confuses the mechanics of the physical presentation of evidence with the substantive framework under which that evidence is analyzed.

The Government's error is further illustrated by the analogous burden-shifting framework used in employment-discrimination cases. *See Kaiser Aluminum & Chemical Corp. v. F.T.C.*, 652 F.2d 1324, 1340 n.12 (7th Cir. 1981) (explaining the frameworks are analogous); *Baker Hughes*, 908 F.2d at 992 (same). In such cases, the plaintiff makes a prima facie case of discrimination, which establishes a presumption of illegality. *Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir. 1997) (*en banc*). The defendant then must "produce evidence of a legitimate,

nondiscriminatory reason for the plaintiff's discharge." *Id.* "This is a burden of production, not persuasion, and it requires no credibility assessment." *Hudson v. United Sys. of Arkansas, Inc.*, 709 F.3d 700, 704 (8th Cir. 2013) (quotations omitted). If the defendant carries "this burden, the legal presumption of unlawful discrimination drops out of the picture," and the "trier of fact proceeds to decide the ultimate question: whether plaintiff has proven" discrimination. *Ryther*, 108 F.3d at 836 (quotations omitted). To do so, "the plaintiff must show *both* that the proffered reason was false, and that discrimination was the real reason." *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1057 (8th Cir. 1997) (emphasis in original).

A plaintiff in an employment-discrimination case typically puts in all of its evidence at once, but that does not require the defendant to prove it did not discriminate or disprove all of the plaintiff's evidence. The same is true under the Clayton Act where defendants must produce evidence that calls into question the predictive value of the market-share statistics, not shoulder the burden to prove the ultimate issue or disprove all of the Government's evidence. Because the District Court required Defendants to do both here, it erred as a matter of law.

3. The District Court's Flawed Legal Standard Pervades Its Analysis.

The Government argues that Defendants seek to transform factual findings into legal determinations. Gov't Br. 30. That is incorrect. The District Court expressly applied the wrong legal standard to determine whether Defendants met

their burden of production, and its conclusion that Defendants failed to meet that burden formed the basis for the injunction. It also made various other legal errors that similarly permeated its analysis of Defendants' rebuttal case. *See* Opening Br. 28-30, 34, 43, 50, 51.

Moreover, the District Court never determined that the Government met its overall burden of persuasion. Thus, the opinion necessarily rests on errors of law. *Heinz*, 246 F.3d at 713 ("If our review of the district court order reveals that it rests on an erroneous premise as to the pertinent law, however, we must examine the decision in light of the legal principles we believe proper and sound.").

B. Under The Correct Legal Standard, Defendants Rebutted The Presumption Of Illegality, And The Government Failed To Carry Its Ultimate Burden Of Persuasion.

1. Defendants' Pricing Evidence Rebutted The Presumption.

a. The Government Has No Credible Response To The Demonstrated Absence Of Relationship Between Price And Concentration in North Dakota.

Professor Town demonstrated there is no relationship between concentration and prices paid by BCBS-ND. Opening Br. 18-19 (citing A0390; A1234; A1408). Dr. Sacher, the Government's expert, meanwhile admitted that he "did not" "perform any empirical analysis of the relationship between HHI measurements and physician reimbursement in North Dakota." A0255. There was no dispute as to the lack of relationship, nor did the District Court conclude otherwise.

Unable to dispute the absence of a relationship, the Government instead tries to explain why no such relationship exists. It asserts that the lack of any relationship between price and provider concentration should be disregarded because it results from BCBS-ND's use of statewide pricing. Gov't Br. 35. This ignores that the very ability to impose statewide pricing reflects BCBS-ND's high bargaining power. As explained by Professor Town with no contrary evidence from the Government, only a payer with high bargaining power could impose statewide rates at a level that would be economically rational because otherwise it would have to pay everyone the rate of the highest-leverage provider. *See* Opening Br. 25-26. Moreover, BCBS-ND's own records explain that it adopted statewide rates "to *offset* the leverage associated with lack of competition in our market"—not to (irrationally) pay everyone the highest possible rate. *Id*. And as discussed in greater detail below, notwithstanding high concentration in various parts of North Dakota, [redacted].[3] The Government ignores all of this evidence.

[3] The Government also argues that Professor Town examined only a single point in time. Gov't Br. 34-35. This misses the point—namely, the inability of high-concentration providers, which indisputably existed at that point in time, to obtain higher rates. Further, Professor Town testified that he "also looked at other years, but it wasn't—there wasn't any difference." RSA059. By contrast, the

The Government also argues that Professor Town's regression analysis did not account for Medica, Gov't Br. 34, which has an 8% share in North Dakota and a less than 5% share in Bismarck-Mandan, A1219; A0180. We address Medica in Section I.B.1.d. *See also* Opening Br. 32-35. Regardless, showing that concentration is not predictive of price for [redacted] of commercial insurance in North Dakota demonstrates that "the statistics do not accurately depict competitive conditions." *Kaiser*, 652 F.2d at 1340 n.12.[4]

b. The Government Ignores The Demonstrated Inability Of High Concentration Providers To Obtain Increases In Statewide Rates from BCBS-ND.

The Government's assertion that Sanford and MDC will be able to force BCBS-ND to increase statewide rates post-transaction, Gov't Br. 38, additionally ignores that:

- North Dakota already exhibits high concentration, both with respect to hospitals and in the relevant service areas, Opening Br. 19, 25 (citing A1234; A0407; A1438-44);
- [redacted]

Government's expert did not examine the relationship at all, and the Government ignores the other evidence discussed below.

[4] The Government does not argue that Sanford would increase rates on SHP, its own insurance plan, which accounts for 31% of the market (almost entirely due to a single large contract with the North Dakota Public Employees Retirement System and Sanford's own employees). A1219-20. The remaining collective share of insurers in North Dakota is less than 1%. *Id.*

[redacted], *id.* at 25; and

- [redacted], *id.* (citing A0212).

The Government has no answer to this evidence. It does not explain why, if providers with particularly high concentration have the ability to issue a credible ultimatum to "force price increases even on Blue Cross," [redacted]. Gov't Br. 38. [redacted]. Opening Br. 25 (citing A0212).

[redacted]. Gov't Br. 36-37. [redacted]. Opening Br. 31-32 (citing A0213, A0215; A0429). *Cf. Baker Hughes*, 908 F.2d at 986 (affirming the denial of a preliminary injunction in part because "the trial judge found that concentration has existed for some time in the [relevant market] but

there is no proof of overpricing, excessive profit or any decline in quality, service or diminishing innovation").

c. The Government Ignores The Experts' Testimony And The District Court's Misstatements As To Its Content.

By generally proclaiming itself the victor of "the 'battle of the experts,'" the Government seeks to avoid the specific errors made by the District Court in evaluating the experts' testimony. Gov't Br. 33-34. As discussed, there is no disagreement between the experts that, in North Dakota, there is no relationship between provider concentration and BCBS-ND prices. *See* Section I.B.1.a, *supra*. Further, neither the District Court nor the Government address [redacted]. *See id*.

Moreover, the Government does not defend the District Court's clearly erroneous assertion that both experts "agreed" on a critical proposition that *neither* expert advocated and that was the subject of a significant portion of Professor Town's testimony—*i.e.*, the relationship between bargaining leverage, bargaining power, and price. *See* Opening Br. 26-27. Because the Government does not even address this clearly erroneous finding, we respectfully refer the Court to the Opening Brief. *Id*.

d. The Transaction Will Not Substantially Lessen Competition With Respect To Medica.

Defendants showed that the transaction will not substantially lessen competition with respect to Medica because of a [redacted] rate agreement, the basic facts of the relationship, CHI's entry, and the *de minimis* nature of any price increase even absent entry that would be overwhelmingly offset by the transaction's pro-competitive impact. Opening Br. 32-35. The Government first argues the Medica agreement should be ignored, Gov't Br. 39-40, citing two inapposite cases. *F.T.C. v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 344, 351-52 (3d Cir. 2016), held only that private agreements were irrelevant to market definition—not the assessment of competitive effects—and also found that any potential entry or repositioning to counter potential anti-competitive effects had already occurred. *F.T.C. v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 65 (D.D.C. 1998), found that a promise not to raise prices did not alleviate concern because competition had previously resulted in a steady *lowering* of prices. Here, by contrast, the transaction would catalyze entry, there is no evidence of past price declines, and the Medica agreement will govern the pricing relationship with Sanford regardless of the transaction.

The Government speculates the Medica agreement will not protect against post-transaction rate increases because Sanford could increase fees that are calculated from its "charge master"—*i.e.*, list rates—or use referrals to increase

costs. Gov't Br. 40; A0176-77 (standard rates are set through a "charge master"). The District Court, however, made no such finding, concluding only that the agreement would not protect against rate increases after its term ends. Add.-047. Further, the Government ignores unrebutted testimony cited by the District Court that such changes cannot circumvent the percentage increase limitations in the agreement and that Sanford's control over list rates has nothing to do with the transaction. Add.-046-47.[5] It also ignores the District Court's finding (contradicting the Government's referral speculation) that there is "no evidence that, post-merger any MDC physician or any Sanford physician would make decisions about patient referrals based on a patient's insurance coverage." Add.-046.

The Government also argues that Professor Town concluded that Sanford "would ultimately force Medica to pay [redacted] more" (when the agreement expires [redacted]) and that the *de minimis* nature of a potential price increase is legally irrelevant. Gov't Br. 41. This is wrong on the facts and law. On the former, the cited estimate does not, *inter alia*, take account of the impact of intervening entry by CHI as reflected in CHI's own estimates. *See* Section I.B.2

[5] As the District Court recognized, the Sanford witness who testified about the agreement was actually involved in its negotiation. Add.-046-47. By contrast, Medica's witness had "no role in negotiating the agreement." RSA037-38.

infra. Nor does it account for the testimony of Medica's witness that (i) the relevant services in Bismarck-Mandan represent a tiny fraction of the Sanford-Medica relationship and (ii) there already are "a number of other communities where Sanford is a critical provider" from Medica's perspective. RSA042-43. *See also* Opening Br. 33. In light of these facts, there is no reason to believe the transaction would have any meaningful impact on the Sanford-Medica relationship.

Similarly, the Government is wrong (and provides no support for the proposition) that the *de minimis* nature of an econometric model's predicted price increase is legally irrelevant. As noted previously without response from the Government, its own Merger Guidelines recognize efficiencies and synergies are most important when potential harm is *de minimis*. Opening Br. 34. Moreover, as also discussed, the Clayton Act contains the word "substantially" for a reason. *Id*. The Government's attempt to separate the size of an econometric model's predicted potential price effect from whether competition has been "substantially" lessened makes no sense. Potential price impact is what econometric models measure, and such impact is a critical determinant for assessing a transaction's likely competitive effects. Indeed, the Government's assertion, if credited, would condemn all horizontal mergers because, as observed by the current nominee for

FTC chairman, economic models used to assess merger effects always predict a price increase absent efficiencies.[6]

Concern over the reliability of economic models when potential price effects are small is why DOJ announced a safe harbor following the promulgation of the 2010 Guidelines. This was based upon the view that small price effects predicted by econometric models across a market are "unlikely, at the end of the day, to correspond to any actual post-merger price increase."[7] Here, the modeled potential price effect pointed to by the Government is not market-wide but only for Medica, which represents less than 5% of the Bismarck-Mandan Area. A0180. Thus, even ignoring CHI's own entry estimates, the basic facts of the Sanford-Medica relationship, and synergies, the modeled price impact is well under [redacted] for the market as a whole ([redacted] modeled increase for 5% of the market).

Finally, the Government's argument that the transaction would "tend to create a monopoly" ignores the improperly defined market, impact of entry, the facts of the Sanford-Medica relationship, and the definition of monopoly—*i.e.*, "'the power to control prices or exclude competition,'" *Concord Boat Corp. v.*

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[6] *See* Joseph J. Simons and Malcolm B. Coate, Upward Pressure On Price (UPP) Analysis: Issues And Implications For Merger Policy at 7 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1558547.

[7] Carl Shapiro, Update from the Antitrust Division (November 18, 2010) (available at https://www.justice.gov/atr/file/518246/download).

Brunswick Corp., 207 F.3d 1039, 1060 (8th Cir. 2000) (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)), neither of which Sanford would acquire as a result of the transaction.

2. Defendants Demonstrated CHI's Ability And Intent To Compete In The Relevant Service Areas.

The Government attempts to sidestep Sanford and MDC's strong evidence of probable and timely entry, including estimates from the Government's own witness, by pointing to an estimate of CHI's CEO that while it would take, at most, [redacted] to recruit the doctors and establish practices in the service areas, it could take [redacted] to "establish the name and reputation of those providers to a similar extent as Sanford and Mid Dakota Clinic." Gov't Br. 45.[8] It then asserts that "[w]ithout this patient base, CHI will not be attractive to insurers and thus cannot serve as a sufficient fallback option for insurers negotiating with Sanford/MDC." *Id*. First, the Government does not address Sanford and MDC's argument that the Court improperly shifted the burden by requiring Defendants to prove there are enough patients to incentivize CHI to enter despite CHI's own

[8] The Government also points to asserted barriers such as the inhospitable climate, but these were cited by CHI's CEO when reaching his estimates that sufficient physicians in all four practice areas could be recruited [redacted]. Opening Br. 36. The Government provides no basis for disregarding those estimates.

estimates and admitted need and intent to recruit physicians in all of those areas. Opening Br. 37-41.

Second, nothing supports the Government's contention that CHI needs [redacted], and an equivalent "name," "reputation", and "patient base," to be a "sufficient fallback option" for insurers. Gov't Br. 45. The District Court made no such finding, and the Government provides no citation for it. Instead, as noted previously without response from the Government, the conclusions of the BCBS-ND representative concerning the Sanford-MDC transaction assume that CHI "will remain as is for now" with "regard to physician numbers." A0201. The assertion that insurers do not view new doctors as an alternative also is at odds with case-law finding low barriers to entry in primary care. *See* Opening Br. 36-37 (citing cases). Further, the Government's proposed markets were based upon the purportedly unique skills of all physicians within each of the four specified practice areas, not the "name," "reputation," or "patient base" of individual physicians. Add.-018-24. If anything, available capacity of new physicians would strengthen their value as providers that a payer could offer as an alternative to Sanford/MDC. The Government thus does nothing to undermine Defendants' showing that payers would have alternatives to a post-merger Sanford in each of the practice areas, and that Sanford's incentives to compete in other ways would be amplified by enhanced competition from CHI. Moreover, once evidence has been produced

showing that there will be entry by a major competitor (such as CHI's own estimates), it is the Government's burden to prove such entry will be ineffective, not Defendant's burden to disprove the Government's unsubstantiated speculation. *See* Section I.A.2 *supra*.

The District Court also nowhere purported to credit CHI's self-serving [redacted] figure, even assuming it were relevant. In fact, ample unrebutted evidence establishes:

- CHI's 132 year history in the community and loyalty of many Bismarck-Mandan residents to it, RSA030, 33-34; A0225; A0891; A1127; A1310;
- [redacted] A0166-68; A1193;
- [redacted], A0227;
- that OB-GYNs frequently refer patients to pediatricians, RSA052;
- CHI's already established primary care presence in Mandan, A0162;
- CHI's recent opening of a primary care clinic in Bismarck, A0165; and
- that a patient's choice of general surgeon is based not on patient knowledge, but on referrals by a primary care provider and/or arrival at an emergency room for emergency surgery, RSA055-56.

3. The Transaction Would Increase, Not Substantially Lessen, Non-Price Competition.

The Government argues that the transaction will substantially lessen non-price competition, but provides no evidence for this conclusion. Gov't Br. 42-43. Even if substantial non-price competition currently exists between MDC and Sanford, the Government and District Court offer no basis for concluding that this incentive would be meaningfully reduced with a competitor as large, motivated, and well-resourced as CHI entering the relevant service areas. Opening Br. 39-40. If anything, entry by a major health system such as CHI will intensify such competition as it opens new clinic locations and otherwise seeks to attract patients. Indeed, almost all of the examples of prior purported non-price competition offered by the Government involve MDC matching Sanford, something CHI will have an equal, if not greater, ability and incentive to do.[9]

Further, the District Court found there was "no evidence that the quality of patient care provided by any MDC physician or by any Sanford physician would

[9] The Government's only example of supposedly MDC-driven technology competition (a $15,000 piece of equipment allowing certain procedures to occur in an office setting rather than the O.R.) was also justified by factors other than MDC competition—namely, to "free up the O.R. and generate revenue within our clinic" and because the procedure in the O.R. was not covered by insurers. RSA045; A1284. Further, Sanford already offered that technology in Sioux Falls and Fargo and was ordering it for "seven sites within the system," not just for Bismarck. RSA047; A1284.

decline as a result of the proposed transaction." Add.-032.[10] Sanford also presented substantial, unrefuted evidence that the District Court did not address that Sanford's technology and service standards are established system-wide, not through local competition.[11]

4. The Transaction Will Generate Important Synergies That Outweigh Any Potential *De Minimis* Competitive Effects.

Sanford and MDC discussed five merger-specific synergies in the Opening Brief that significantly outweigh any potential *de minimis* competitive effects without even accounting for the pro-competitive impact of catalyzing competition with CHI. The Government ignores three entirely: (1) expansion of Sanford's Imagenetics program, (2) giving MDC's patients access to over 75 Sanford cancer trials and treatments, and (3) moving MDC onto Sanford's EPIC electronic medical records system. *See* Opening Br. 47-48. There was no dispute that these benefits (as well as the other two synergies) would result in improved quality of

[10] The Government does not dispute that the Court ignored Professor Town's regression analyses demonstrating an absence of relationship between quality and concentration in North Dakota. Opening Br. 19; Gov't Br. 42. The Government's experts asserted Professor Town also could have run regressions for other health measures but never disputed the importance of the measures he analyzed, performed their own regressions for other factors, or suggested doing so would yield a different result. *See* SA157-58. His results also are consistent with academic literature. A1293.

[11] *See* A1277-1286; A0297, 0301; A0332-33, 0338-39, 0340, 0342; A0467, 476; A0505; A0514; A0521-22, 534; A0799; A0847.

care for Bismarck-Mandan patients. Add.-038 (finding that such benefits were undisputed).[12]

With respect to other synergies, such as integrated behavioral health, the Government ignores its own Merger Guidelines' standard that a synergy is merger-specific if it is "'likely to be implemented with the proposed merger and unlikely to be accomplished'" in the merger's absence. Opening Br. 43 (quoting Merger Guidelines § 10). The Government does not dispute that the synergies it addresses meet this standard. Instead, it asserts that Defendants must also show that a synergy "'cannot be achieved by either company alone.'" *See* Gov't Br. 51 (quoting *H.J. Heinz*, 246 F.3d at 722).

The Government provides no basis for adding an element to its own standard for merger-specificity. *See also* IVA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶973b (4th ed. 2016) (question is whether the alternative way of achieving an efficiency "is likely to occur if the merger route is prohibited by law"). Nor would such a requirement be consistent with the Clayton Act, which examines the likely competitive impact of a merger, including its likely benefits.

[12] In a section that did not purport to address merger-specificity, the Government asserts that MDC's Chair "prefers" its current EMR system. *See* Gov't Br. 50 n.9 (citing SA201). In fact, Dr. Seifert testified that older doctors hoped to delay having to learn a new system. *See id*. She did not dispute the benefits of MDC moving to the EPIC system or suggest that MDC could or would achieve them without the transaction.

See F.T.C. v. Tenet Health Care Corp., 186 F.3d 1045, 1051, 1054 (8th Cir. 1999) (holding that "§ 7 deals in probabilities, not ephemeral possibilities" and that the District Court in the case should "have considered evidence of enhanced efficiency in the context of the competitive effects of the merger"). The relevant question in assessing merger specificity is whether a merger benefit likely would be achieved without the transaction in the ordinary course—not whether it is theoretically possible. *See* Merger Guidelines § 10 ("The Agencies do not insist upon a less restrictive alternative that is merely theoretical."). If not, then the lost benefit is a cost of blocking the merger that must be considered in assessing overall competitive effects.

The Government seeks to apply its newfound criterion to disregard the benefits of MDC's access to Sanford's highly successful, award-winning system-wide program rooted in five years of development and testing that integrates behavioral health into primary care. Opening Br. at 45-47. MDC has no behavioral-health therapists and has taken no steps to develop such a program, and there are no indications that it will have the inclination or ability to do so in the foreseeable future. *Id*. Indeed, MDC's Chair explained that MDC was particularly excited about Sanford's program in part because it has had difficulty securing quality mental healthcare for its patients and that mental healthcare generally in North Dakota is in the lowest third nationally. *Id*. at 46. The Government asserts

that some practices outside of North Dakota have integrated behavioral health into primary care, but points to nowhere in North Dakota—outside of Sanford—where that has occurred. MDC's theoretical ability to develop such a program is of no benefit to its patients if it is not likely actually to do so absent the transaction. There is accordingly no basis for ignoring the benefits that Sanford's program would bring to MDC patients.

The Government also argues that the benefits from the proposed transaction are "speculative," but admits that the District Court reached no such conclusion and offers no basis for making such a finding on appeal. Gov't Br. 49.[13] Instead, the unrebutted evidence established that Sanford has *already developed and implemented each of these improvements on a system-wide basis* and would bring them to MDC. Opening Br. 45-46.

By attempting to eliminate consideration of the transaction's benefits, the Government avoids weighing their substantial value against the, at most, *de minimis* potential price effects of the transaction (even assuming no entry by CHI)—here, a [redacted] for less than 5% of the population starting no earlier than 2020. It asserts only that the "one merger-

[13] The Government misleadingly asserts that "Sanford's Executive Vice President described synergy efficiencies as 'conjecture.'" Gov't Br. 50 (quoting SA182). The testimony addressed a specific synergy related to certain "capital commitments," not those addressed in the District Court and Opening Brief.

specific benefit the district court found does not suffice to justify a merger to monopoly." Gov't Br. 52. It therefore (i) ignores the many other merger-specific synergies and (ii) fails to weigh any (much less all) of those synergies in light of the competitive realities of this transaction, rather than an inaccurate and generalized reference to "merger to monopoly." *See* Opening Br. 50-51.

5. The Government Mischaracterizes And Fails To Address Defendants' Argument on MDC's Future Viability.

The Government does not defend the District Court's errors in addressing MDC's future prospects in the absence of the transaction. The Government asserts, citing only cases from other circuits, that the "weakened competitor defense" is difficult to establish and repeats the District Court's conclusion that Defendants had not made a "sufficient showing" for that defense. Gov't Br. 52-54; Add.-053. But Defendants are neither asserting a "weakened competitor defense," nor arguing that MDC's difficulties could alone justify the transaction. Instead, as in *National Tea*, Defendants pointed to MDC's future prospects as "merely another factor going into the conclusion that the FTC was ultimately unlikely to succeed on the merits," not as a freestanding defense sufficient by itself to justify the transaction. Opening Br. 51-52.

Further, the Government addresses none of the trends that prompted MDC's concern for its longer-term viability. *See id*. The District Court's only finding relating to these trends credited testimony that "MDC has experienced a decrease

in physician productivity." Add.-052. Finally, evidence cited by the District Court and the Government that MDC doctors wanted to obtain maximum value for their equity reflected the expectation that the value of that equity will *decline* over time if MDC continues to stand alone. *See* SA215 (cited in Gov't Br. 53) (testimony that doctors decided to "cash in equity" rather than face a situation where "in two or three years" doctors would "have no equity value"); *see also* A0577 (discussed in Opening Br. 52).

II. Market Definition Requires An Assessment Of Cross-Elasticity.

The Government does not dispute that Dr. Sacher failed to examine cross-elasticity and relied on evidence similar to that found to be unpersuasive in *Freeman* and *Tenet.* Opening Br. 54-56. By contrast, Professor Town showed that, for BCBS-ND, there is no relationship between concentration and prices in North Dakota. Opening Br. 56; *see also* Section B.1.a-b. The Government thus failed to show that a hypothetical monopolist could impose a "Small but Significant Non-transitory ***Increase in Price***" ("SSNIP") on the commercial payer with the vast majority of the volume in the Government's proposed market. *Id*. at 55-56.

The Government argues that examination of *Brown Shoe* criteria unrelated to cross-elasticity suffices to define a relevant market, but never actually identifies or applies those criteria to define relevant markets here. Gov't Br. 54. Instead, the

District Court and Government define the markets by purporting to apply the SSNIP test, *id*. at 12-14; Add.-059-61, which *requires* showing the hypothetical monopolist could raise prices, *F.T.C. v. Advocate Health Care Network*, 841 F.3d 460, 468 (7th Cir. 2016) (explaining that the hypothetical monopolist test turns on whether a "hypothetical monopolist could profitably raise prices above competitive levels").

The Government also asserts that the "hypothetical monopolist test" may disregard actual market realities. Gov't Br. 59. To the contrary, the test envisions a hypothetical monopolist, not a hypothetical market. The Government's claim to the contrary contradicts the FTC's own positions in past merger litigation. *See also F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1075-76 (D.D.C. 1997) (market evidence found to be compelling for purposes of defining the relevant market); *F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1039-40 (D.C. Cir. 2008) (assessing market definition by analyzing whether the presence of the acquired retailer in local markets depressed Whole Foods's margins significantly).[14]

[14] The Government asserts that Defendants have waived this argument. Gov't Br. 57-59. In fact, Defendants argued below and in their Opening Brief that the Government misapplied the test by never analyzing "whether a hypothetical monopolist would be able to impose a SSNIP on the payers." RSA024. *See also* Opening Br. at 56 (Government erred by failing to show "the ability of a hypothetical monopolist to impose a SSNIP."). Cross-elasticity is simply a more technical phrasing of the concept Defendants have consistently raised—*i.e.*, the customer's likely response to a price increase and the seller's corresponding ability

III. The Amicus Brief Does Not Account For The Realities Of The North Dakota Healthcare Market.

The amicus brief of certain state attorneys general demonstrates that generalized assertions cannot substitute for close examination of the realities of the specific markets involved. The brief's broad statements about mergers to monopoly and efficiencies ignore why this specific transaction will not adversely impact price or quality, the significant health benefits that will be lost without it, and the fact that far from creating a "monopoly," the transaction will catalyze competition with one of the largest healthcare systems in the country.

Similarly, the unremarkable observation that states with a large commercial payer also have smaller payers ignores the circumstances of the smaller payers at issue here. *See also supra* Section I.B.1.a & n.4; Section I.B.1.d; Opening Br. 32-35. Finally, articles about quality competition among hospitals elsewhere (thus, in different markets) not subject to adversarial testing or expert scrutiny do not inform the analysis here where, for example, there is no reason to believe that Sanford will compete less vigorously with CHI than it competed with MDC. *See also* Section I.B.2, *supra*; A1286-93 (Professor Town addressing the literature far more comprehensively and performing his own quality-regression analyses).

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or inability to impose a SSNIP. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 (1992) (defining "cross-elasticity of demand"); *F.T.C. v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 120 (D.D.C. 2004) (explaining the relationship between cross-elasticity and the SSNIP test).

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Respectfully,

Dated: March 22, 2018

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No. 17-3783

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FEDERAL TRADE COMMISSION *et al.*,

Plaintiffs-Appellees,

v.

SANFORD HEALTH *et al.*,

Defendants-Appellants,

Appeal from the United States District Court for the District of North Dakota
Case No. 1:17-cv-00133-ARS, Hon. Alice R. Senechal

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Federal Rule of Appellate Procedure 25(c) and Circuit Rule 25A, that on January 18, the Redacted Version of the Reply Brief of Appellants Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C. was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter.

Respectfully,

January 18, 2019

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