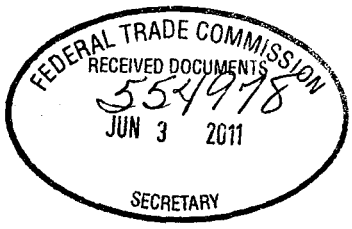
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Mergers IV Division

ORIGINAL



June 3, 2011

VIA HAND DELIVERY

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580

Dear Judge Chappell:

Enclosed please find a corrected copy of Complaint Counsel's Public Pre-Trial Brief, originally filed on May 24. The enclosed copy contains additional *in camera* designations to conform with this Court's Order Granting Complaint Counsel's Motion for *In Camera* Treatment dated May 25, 2011, Order on Respondent's Renewed Motion for *In Camera* Treatment dated May 25, 2011, Orders on Non-Parties' Motion for *In Camera* Treatment, dated May 25, 2011 and June 2, 2011, and Order on Respondent's Supplemental Motion for *In Camera* Treatment, dated June 2, 2011.

A copy is being hand-delivered to the Office of the Secretary and delivered via electronic mail to Respondent.

Sincerely,

Jeanne Liu

Jeanne Liu

cc: Donald S. Clark
David Marx, Jr., Esq.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

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Dated: May 24, 2011

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INTRODUCTION

ProMedica offers "incredible access to outstanding pricing on managed care agreements. Taking advantage of these strengths may not be the best thing for the community in the long run. Sure would make life much easier right now though."
– **St. Luke's CEO and current President Dan Wakeman (PX01125 at 002)**

"A ProMedica . . . affiliation could still stick it to employers, that is, to continue forcing high rates on employers and insurance companies."
– St. Luke's Marketing/Planning Director Scott Rupley, Due Diligence Meeting Notes (PX01130 at 005)

"Why ProMedica? Payer System Leverage."
- ProMedica Presentation to Potential Hospital Partners (PX00226 at 008)

On August 31, 2010, the self- proclaimed "dominant" hospital system in Lucas County, Ohio acquired one of its closest and last-remaining competitors. For years, the dominant hospital system and the independent hospital had taken aim at each other, competing directly and vigorously. Local employers, and the health plans that negotiate on their behalf, attest to the substantial benefits they reaped from this long-standing competition. Rather than continue to endure this rivalry, however, the independent hospital chose to join forces with the dominant hospital system because it had "the greatest potential for higher hospital rates," despite serious concerns that doing so would increase prices and costs to the community. The dominant hospital system seized the opportunity to eliminate its rival, strengthen its bargaining leverage, and raise reimbursement rates to health plans and employers. Indeed, just as the independent hospital predicted, the dominant, high-priced hospital system already has begun raising rates, even while the acquisition remains under judicial scrutiny.

ProMedica Health System, Inc.'s ("ProMedica" or "PHS") acquisition ("Acquisition") of St. Luke's Hospital ("St. Luke's" or "SLH") eliminated the close competition between them for vital general acute-care and obstetrics services in Lucas County. Post-Acquisition, ProMedica

faces only two competitors for general acute-care services and only one competitor for obstetrics services in all of Lucas County. And ProMedica has expanded its substantial leverage over health plans, cementing its ability to demand – and obtain – even higher prices (reimbursement rates). These higher reimbursement rates will fall on the backs of local employers and employees in Lucas County, many of whom already are struggling with rising healthcare costs. Neither competitors nor health plans nor physicians have been able to constrain ProMedica's high prices in the past; now, they have even less ability to do so. The Acquisition also eliminated beneficial competition to improve hospital quality and expand services in Lucas County. In short, the Acquisition, if allowed to stand, will have serious consequences for the residents of Lucas County.

Based on well-settled law and the overwhelming body of evidence presented here and during the upcoming trial on the merits, the Acquisition substantially lessens competition in two lines of commerce, in violation of Section 7 of the Clayton Act. 15 U.S.C. § 18. ProMedica's claims in defense of the Acquisition fall far short of rescuing the Acquisition from Section 7 condemnation. This fact was recognized by Judge David A. Katz of the Northern District of Ohio, who – after hearing two days of argument, reviewing thousands of documentary exhibits and examining the written testimony from dozens of fact and expert witnesses – issued a 115-page opinion finding that the FTC was likely to succeed in this administrative challenge. On that basis, Judge Katz issued a preliminary injunction, which remains in force during these proceedings, requiring ProMedica to take certain actions designed to minimize interim harm to competition and ensure the viability of relief if Complaint Counsel prevails in this proceeding.

For these reasons, Complaint Counsel respectfully submits that divestiture and related ancillary relief are warranted.

I. FACTUAL BACKGROUND

A. The Merging Parties

1. ProMedica Health System, Inc.

ProMedica is a not-for-profit healthcare system incorporated under the laws of Ohio. Answer at ¶ 7. With headquarters in Toledo, Ohio, ProMedica's healthcare system provides services in northwest Ohio, west-central Ohio, and southeast Michigan. *Id.* In 2009, ProMedica generated total revenues of approximately $1.6 billion. *Id.* at ¶ 8.

Prior to the Acquisition, ProMedica operated three general acute-care hospitals in Lucas County, Ohio: The Toledo Hospital ("Toledo Hospital" or "TTH"),[1] Flower Hospital ("Flower"), and Bay Park Community Hospital ("Bay Park").[2] *Id.* With 641 staffed beds, TTH is the largest general acute-care hospital in the area. *See* PX02148 (Town, Expert Report) at ¶ 8; PX02122 (Guerin-Calvert, Decl.) at ¶ 4c. Flower is a community hospital located in Sylvania, Ohio – on the west side of the Maumee River in Lucas County – that has 292 staffed beds. *See* PX02148 (Town, Expert Report) at ¶ 8; PX01902 ({ }, IHT) at 23:20-24:01. Bay Park is a community hospital located in Oregon, Ohio – on the east side of the Maumee River in Lucas County – that has 72 staffed beds. *See* PX02148 (Town, Expert Report) at ¶ 8; PX01902 ({ }, IHT) at 23:20-24:01. TTH, Flower, and Bay Park offer inpatient obstetrics services. PX01906 (Oostra (PHS), IHT) at 184:16-21. ProMedica's hospitals generally are more expensive and of lower quality than other Lucas County hospitals. PX00153; PX01030 at 019; PX02148 (Town, Expert Report), Exhibit 7; PX02072 ({

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[1] ProMedica also operates Toledo Children's Hospital on the campus of TTH.

[2] Outside of Lucas County, ProMedica owns several other hospitals: Bixby Medical Center in Adrian, MI; Defiance Regional Medical Center in Defiance, OH; Fostoria Community Hospital in Fostoria, OH; Herrick Medical Center in Tecumseh, MI; and Lima Memorial Hospital in Lima, OH. PX02122 (Guerin-Calvert, Decl.) at ¶ 4 n.1.

}, Decl.) at ¶ 16 (Flower and Bay Park reimbursement rates are about { } percent higher than St. Luke's.); PX02067 ({ }, Decl.) at ¶ 22 (ProMedica rates are { } higher than St. Luke's.).

ProMedica also owns and operates Paramount Health Care ("Paramount"), one of the largest commercial health plans in Lucas County. Answer at ¶ 8; PX00270 at 024. Finally, ProMedica is the largest employer of physicians in Lucas County. Answer at ¶ 8.

Even before the Acquisition, ProMedica was by far the largest hospital system in Lucas County. In general acute-care services ("GAC"), ProMedica had a nearly 50 percent market share in Lucas County, as measured by patient days.[3] PX02148 (Town, Expert Report), Exhibit 6[4]; PX02150 at 001. This was approximately 20 percentage points (and nearly 50 percent) higher than the share of its next largest competitor. *Id.* In obstetrics services ("OB"), ProMedica held an even greater market share, 71 percent, in Lucas County. PX02148 (Town, Expert Report), Exhibit 6; PX02150 at 002. This was approximately 50 percentage points (and more than three times) higher than the share of its next largest competitor. *Id.*

Whatever it may argue now about the purportedly serious competitive constraints it faces, before this litigation commenced, ProMedica repeatedly and unambiguously touted its own market "dominance" in Lucas County. PX00270 at 025 ("ProMedica Health System has market dominance in the Toledo MSA"); PX00221 at 002 ("As Healthcare evolves it is critical that ProMedica evolves to maintain its competitive dominance in the Region"); PX00319 (TTH Strengths: "Dominant market share position"); PX01936 (Marcus (PHS), Dep.) at 113:01-

[3] "Patient days" measures the total number of days that all patients spend in a given hospital or hospital system in a year.

[4] The source in this Exhibit mistakenly states that the data is based on discharges when, in fact, it is based on patient days.

113:18, 115:02-05 (describing PHS's); PX00473 at 011; *see also* PX00320 at 003 (PHS: "Strong integrated delivery system with leading market position within the Toledo metropolitan area and surrounding counties, with dominant market share in oncology, orthopedics and women's services"); PX02070 ({ }, Decl.) at ¶ 8 ("ProMedica is already the dominant health system in the Toledo area").

2. St. Luke's Hospital

Before the Acquisition, St. Luke's was a high-quality, independent, not-for-profit general acute-care community hospital. Answer at ¶ 9. St. Luke's is located in Maumee, Ohio, a growing and strategically-important suburb of Toledo located in southwest Lucas County. PX01911 (Wakeman (SLH), IHT) at 53:14-20 ( ); PX01906 (Oostra (PHS), IHT) at 117:06-13, 118:03-05 ( ); PX01917 ({ }, Dep.) at 61:07-62:17, 76:05-18. Maumee is home to a growing population of commercially-insured patients. PX01911 (Wakeman (SLH), IHT) at 53:25-55:24; PX02065 ({ }, Decl.) at ¶ 8. St. Luke's has 178 staffed beds and provides a full range of general acute-care services and some tertiary cardiac services through its Heart Center. PX01322; PX01909 (Dewey (SLH), IHT) at 109:01-12; PX01022 at 005. In 2009, St. Luke's had total revenues of approximately $156 million. PX01006 at 005.

St. Luke's was a major provider of healthcare services and conducted a significant volume of commerce in Lucas County before ProMedica acquired it. In fact, of the eight hospitals in Lucas County, St. Luke's was the third-largest based on discharges. PX02148 (Town, Expert Report), Exhibit 16 (total patient days, third quarter 2009 to first quarter 2010 data). In 2009, St. Luke's admitted { } inpatients, performed { } outpatient surgeries, had { } emergency-department visits, and had { } patient days. PX01149 at 009;

PX02148 (Town, Expert Report), Exhibit 16 (total patient days, third quarter 2009 to first quarter 2010 data). Based on patient days, St. Luke's held an 11.5 percent share in GAC services and a 9.3 percent share in obstetrics services. PX02148 (Town, Expert Report), Exhibit 6. In the period leading up to the Acquisition, St. Luke's was *increasing* in competitive significance, as demonstrated by increasing market share, and growing inpatient and outpatient revenues, among other measures. PX00170 at 001, 004, 007; PX01920 (Wakeman (SLH), Dep.) at 30:07-31:23; PX01235 at 003.

St. Luke's was recognized as, and proclaimed itself to be, *the* low-cost, high-quality hospital in Lucas County. PX01072 at 001 ("St. Luke's Hospital is the lowest cost, highest quality health care provider in the Toledo market. Third-party verifiers . . . consistently recognize St. Luke's accomplishments in quality care and cost control."); PX01030 at 019; PX01914 ({ }, IHT) at 55:17-56:02; PX02065 ({ }, Decl.) at ¶ 8; *see also* Answer at ¶ 9. Quality-rating organizations frequently recognize St. Luke's as being in the top 10 percent of hospitals nationally, based on outcomes, cost, and patient satisfaction. PX00390.

B. The Acquisition

On May 25, 2010, ProMedica entered into a Joinder Agreement ("Agreement") with OhioCare Health System, Inc. ("OHS"), St. Luke's, and St. Luke's Foundation, Inc. ("SLF") to obtain ownership of St. Luke's, SLF, and other affiliates ("OHS Affiliates").[5] PX00058. Before the Acquisition, OHS was the parent company of St. Luke's, SLF, and the OHS Affiliates. *Id.* at 006. The Agreement required ProMedica to provide St. Luke's with {

[5] The Acquisition was not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. 15 U.S.C. § 18a; PX00057 at 001.

} PX00058 at 021-022,

056; *see also* PX00140 at 001. The Agreement also required ProMedica to {

} PX00058 at 022-023. ProMedica consummated the acquisition of St. Luke's on August 31, 2010. S*ee* Answer at ¶ 2, 9.

Though styled as a "joinder," the transaction is an acquisition. Under the Agreement, ProMedica became the sole corporate member or shareholder of St. Luke's and the other OHS Affiliates. PX00058 at 009; Answer at ¶ 9. Additionally, the Agreement vests ProMedica with economic and decision-making control over St. Luke's and the other OHS Affiliates. PX01903 (Hanley (PHS), IHT) at 130:01-08; *see also* PX00223 at 005.[6] Notably, ProMedica has the exclusive right to negotiate contracts with managed care organizations on behalf of St. Luke's. PX00058 at 025, 058; *see also* PX01905 (Wachsman (PHS), IHT) at 162:02-09.[7]

The Agreement allows ProMedica to make significant changes at St. Luke's. For example, although the Agreement requires ProMedica to maintain St. Luke's as an acute-care hospital providing six general categories of services in its current location for ten years, it does not require ProMedica to maintain or provide any other services at St. Luke's that are not specified in the Agreement – such as oncology, cardiology, orthopedics, spinal neurosurgery, pediatrics, or diabetes care – and does not require minimum service levels for *any* service.

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[6] Subject only to certain limited qualifications, ProMedica also has the right to: (a) appoint ProMedica nominees to the boards of directors of St. Luke's and the other OHS Affiliates; (b) approve St. Luke's nominees to the boards of St. Luke's and the other OHS Affiliates; (c) remove members from the boards of St. Luke's and the other OHS Affiliates; (d) adopt and approve strategic plans and annual operating and capital budgets for St. Luke's and the other OHS Affiliates; (e) authorize and approve non-budgeted operating expenses and capital expenditures above certain amounts for them; (f) authorize and approve the incurrence or assumption of debt above certain amounts; (g) authorize and approve contracts for expenditures above certain amounts; (h) authorize and approve any merger, consolidation, sale, or lease of St. Luke's and the other OHS Affiliates; and (i) appoint and remove the President, Secretary, and Treasurer of St. Luke's and the other OHS Affiliates. PX00058 at 016-018.

[7] As explained below, however, ProMedica's right to negotiate contracts for St. Luke's was subsequently limited by a Hold-Separate Agreement between ProMedica and FTC staff.

PX00058 at 023, 045-046; PX02102 (Wakeman (SLH), Decl.) at ¶ 5 (identifying SLH's current services); *see also* PX01920 (Wakeman (SLH), Dep.) at 152:05-153:20. And although the Agreement prohibited ProMedica from terminating OHS Affiliates' employees for 90 days after consummation of the Acquisition, this obligation has since expired, allowing ProMedica to terminate St. Luke's staff. PX00058 at 046.[8]

C. Other Market Participants

There are only two other general acute-care hospital competitors in Lucas County: Mercy Health Partners ("Mercy") and the University of Toledo Medical Center ("UTMC"). However, only one of them, Mercy, provides inpatient obstetrics services.

1. Mercy Health Partners

Mercy is a not-for-profit health system providing inpatient and outpatient hospital services in northwestern Ohio and southeastern Michigan. In Lucas County, Mercy has three general acute-care hospitals: Mercy St. Vincent Medical Center ("St. Vincent"), Mercy St. Charles Hospital ("St. Charles"), and Mercy St. Anne Hospital ("St. Anne"). PX02068 (Shook (Mercy), Decl.) at ¶¶ 2-3. St. Vincent, located in downtown Toledo, is a 445-bed critical-care regional referral and teaching center that provides tertiary services.[9] PX02068 (Shook (Mercy), Decl.) at ¶¶ 3-4, 9. St. Charles is a 294-bed community hospital located across the Maumee River in Oregon, Ohio, an eastern suburb of Toledo. PX02068 (Shook (Mercy), Decl.) at ¶¶ 5, 8. St. Anne is a small community hospital with 100 beds located in northwestern Toledo. PX02068

[8] However, ProMedica's right to terminate employees of St. Luke's was subsequently limited by the Hold-Separate Agreement between ProMedica and FTC staff.

[9] St. Vincent also houses a children's hospital on its campus.

(Shook (Mercy), Decl.) at ¶ 6. Unlike St. Vincent and St. Charles, St. Anne does not provide obstetrics services. PX02068 (Shook (Mercy), Decl.) at ¶ 8.

2. University of Toledo Medical Center

UTMC was formed when the University of Toledo and the Medical Center of Ohio merged in 2006. PX02064 (Gold (UTMC), Decl.) at ¶ 1. UTMC is an academic medical center that provides general acute-care services as well as tertiary and quaternary hospital services. PX02064 (Gold (UTMC), Decl.) at ¶¶ 1-3. UTMC does not provide inpatient obstetrical services. PX02064 (Gold (UTMC), Decl.) at ¶ 9.

In 2010, UTMC and ProMedica began a {

} By agreement, UTMC provides {

} In exchange, UTMC {

} PX02064 (Gold (UTMC), Decl.) at ¶ 7.

II. PROCECURAL HISTORY

In July 2010, the FTC and the State of Ohio staff began an investigation into the potential anticompetitive effects of ProMedica's acquisition of St. Luke's that unearthed a significant body of evidence demonstrating likely competitive harm. The evidence included: testimony from sixteen investigational hearings, eight fact-witness depositions and four expert depositions; and dozens of declarations from hospitals, health plans, employers and physicians, and hundreds of company documents that describe ProMedica's market dominance, the vigorous competition between ProMedica and St. Luke's, and the likely competitive harm that will result from the Acquisition.

On August 18, 2010 – before the Acquisition was consummated – the FTC and ProMedica entered into a 60-day Hold-Separate Agreement ("HSA"), to allow the FTC investigation to continue and prevent harm to competition. Among other things, the HSA prevented: (1) ProMedica's termination of St. Luke's health-plan contracts (while allowing health plans the option to extend their contracts with St. Luke's past the termination date, if a new agreement was not reached); (2) the elimination, transfer, or consolidation of any clinical service at St. Luke's; and (3) the termination of employees at St. Luke's without cause. PX00069 at ¶¶ 1-5. Following an FTC petition to the U.S. District Court for the Northern District of Ohio, Western Division for an order enforcing its pre-complaint subpoenas and civil investigative demands issued to ProMedica and St. Luke's, *see FTC v. ProMedica Health Sys.*, No. 3:10-cv-02340-DAK (N.D. Ohio filed Oct. 13, 2010), the HSA was modified by court order to remain effective until 15 days after the Respondent's certification of compliance.

On January 6, 2011, after considering the full weight of this evidence, the Commission, by a unanimous 5-0 vote, found reason to believe that the Acquisition would violate Section 7 of the Clayton Act by substantially reducing competition in two lines of commerce in Lucas County, Ohio: general acute-care inpatient hospital services and inpatient obstetrical services. The Commission therefore issued a complaint to initiate this administrative proceeding, and authorized FTC staff to seek preliminary relief in the U.S. District Court for the Northern District of Ohio to require ProMedica to preserve St. Luke's as a viable, independent competitor during this administrative proceeding and any subsequent appeals. Press Release, *FTC and Ohio Attorney General Challenge ProMedica's Acquisition of St. Luke's Hospital*, available at www.ftc.gov/opa/2011/01/promedica.shtm.

On January 7, 2011, the FTC and State of Ohio brought suit in the Northern District of Ohio, seeking a temporary restraining order ("TRO") and preliminary injunction. *FTC and State of Ohio v. ProMedica Health Sys.*, No. 3:11-cv-00047-DAK (N.D. Ohio filed January 7, 2011). Post-complaint discovery consisted of twelve fact-witness depositions, two sets of expert affidavits and depositions from three expert witnesses, document discovery, and two days of oral argument before the district court. *See* Order on Preliminary Injunction Hearing, Dkt. 69, *ProMedica Health Sys.*, No. 3:11-cv-00047-DAK. On March 29, 2011, based on nearly 10 hours oral argument and hundreds of pages of briefs and exhibits, Judge Katz of the Northern District of Ohio ruled in favor of plaintiffs and granted a preliminary injunction. *FTC v. ProMedica Health Sys., Inc.*, 2011 U.S. Dist. LEXIS 33434; 2011-1 Trade Cas. (CCH) P77,395, at *3 (N.D. Ohio March 29, 2011). Judge Katz's 115-page decision consists of findings of fact and conclusions of law, and rules in plaintiffs' favor on every substantive aspect of the case. *Id.*

Among its findings and conclusions, the court held that:

- general acute-care inpatient hospital services sold to commercial health plans and inpatient obstetrical services sold to commercial health plans constituted the two relevant services markets;
- Lucas County was the relevant geographic market for both GAC and obstetric services;
- extraordinarily-high market concentration levels establish a strong presumption of harm to competition in both relevant markets;
- ProMedica and St. Luke's were significant competitors prior to the Acquisition;
- the Acquisition enables ProMedica to raise rates for services performed at St. Luke's and also at ProMedica's other Lucas County hospitals;
- remaining hospital competitors, health plans, and physicians with admitting privileges at multiple Lucas County hospitals had not constrained and will not constrain ProMedica post-Acquisition;
- the Acquisition will eliminate beneficial non-price competition and result in lower quality of care and service levels;

- there will be no new entry and expansion significant enough to counteract or deter the anticompetitive effects of the Acquisition;
- the Acquisition produces no credible, merger-specific efficiencies to rebut the presumption of competitive harm;
- ProMedica cannot meet its burden of showing that St. Luke's is a failing or flailing firm;
- purported private equities do not outweigh the public interest in effective enforcement of the antitrust laws; *and*
- a preliminary injunction was necessary to prevent interim harm and to preserve the FTC's ability to restore beneficial pre-acquisition competition.

Id. passim.

The relief granted was an extension of the August 18, 2010 HSA. The key element of the extension was to continue the pre-Acquisition prohibition on ProMedica's termination of St. Luke's health-plan contracts, while providing health plans the option to extend their existing contracts with St. Luke's if a new agreement was not reached. PX00069 at ¶ 5. In sum, this provision continues to prevent ProMedica from exercising its increased leverage to obtain higher reimbursement rates pending the conclusion of this administrative trial.

III. RELEVANT SERVICE MARKETS ARE INPATIENT GENERAL ACUTE CARE SERVICES AND INPATIENT OBSTETRICAL SERVICES

The relevant product market "identifies the products and services with which the Respondents' products compete." *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009). Federal court and Commission decisions rely on the Horizontal Merger Guidelines ("Merger Guidelines") to define a relevant product market by assessing whether a hypothetical monopolist could profitably impose a small but significant and non-transitory increase in price ("SSNIP"). *See, e.g., FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008); *Chicago Bridge & Iron Co. v. FTC,* 534 F.3d 410, 431 n.11 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246

F.3d 708, 716 n.9 (D.C. Cir. 2001); *FTC v. Univ. Health Inc.*, 938 F.2d 1206, 1211 n.12 (11th Cir. 1991); *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *144-45; *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1290, 1294 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708, 1997 WL 420543 (6th Cir. 1997); *In re Polypore Int'l, Inc.*, 2010 FTC LEXIS 97, at *32 (FTC Dec. 13, 2010).

Here, there are two relevant markets in which to assess the effects of the Acquisition: general acute-care inpatient services and inpatient obstetrical services.

A. General Acute Care Inpatient Hospital Services Sold to Commercial Health Plans

The first relevant market is general acute-care inpatient hospital services sold to commercial health plans ("GAC"). The GAC market includes a broad cluster of basic medical and surgical diagnostic and treatment services that include an overnight hospital stay, such as emergency services, internal medicine, and minor surgeries.[10] Federal courts and the Commission consistently hold that general acute-care inpatient services constitute a relevant product market. *See, e.g., FTC v. Butterworth*, No. 96-2440, 1997 U.S. App. LEXIS 17422, at *2 (6th Cir. July 8, 1997); *United States v. Rockford Mem'l Hosp.*, 898 F.2d 1278, 1284 (7th Cir. 1990); *Univ. Health Inc.*, 938 F.2d at 1210-11; *ProMedica*, 2011 U.S. Dist. LEXIS 33434 at * 23-24, at *23; *Evanston*, No. 9315, 2007 WL 2286195, at *40. ProMedica admits that general acute-care inpatient services sold to commercial health plans "constitutes a valid service market." Resp't ProMedica Health System, Inc.'s Response to Complaint Counsel's Request for Admission at 5 (¶ 1) (hereinafter "ProMedica Admissions").

The hundreds of inpatient medical and surgical services included in the GAC market are clustered together even though each is a distinct product market (or is likely to be). Knee-

[10] ProMedica admits that outpatient procedures are not included in the general acute-care inpatient services product market. ProMedica Admissions at 5-6 (¶ 3).

surgery, for example, cannot be substituted for heart surgery in response to a price increase.[11] However, as a matter of "analytical convenience," it is appropriate and efficient to group together these services in a single cluster market because "market shares and entry conditions are similar for each." *Emigra Group v. Fragomen*, 612 F. Supp. 2d 330, 353 (S.D.N.Y. 2009) (citing Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 157-59 (2007)); *see also* PX01923 (Town, Dep.) at 45:03-11; *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *23, 146. Here, the competitive effects of the Acquisition on hundreds of distinct medical and surgical services offered by St. Luke's and ProMedica can be analyzed together in a single GAC market without creating inconsistent or distorted results, because they are characterized by similar market conditions and are offered by the same market participants within the same geographic market. *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *146-48; *see also* Attachment A, Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51 LAW & CONTEMP. PROBS. 93, 138-40 (1988) ("Baker Article") (explaining that, consistent with Supreme Court precedent, acute inpatient services cluster market appropriate "solely for descriptive and analytic convenience in situations where it will not be misleading").

However, it would not be appropriate to include in the GAC market any services that St. Luke's does not offer, including the most complex tertiary and quaternary services, because those services are *not* offered by the same market participants, within the same geographic market, or under similar market conditions. *See generally* PX01910 (Randolph (PHS), IHT) at 92-95; PX01903 (Hanley (PHS), IHT) at 78; PX02067 ({ }, Decl.) at ¶ 7;

[11] Under the *Merger Guidelines*, market definition "focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service." Merger Guidelines § 4.

PX02064 ({ }, Decl.) at ¶¶ 3-4; ProMedica Admissions at 5 (¶ 2) (admission as to services that St. Luke's does not perform). The competitive conditions surrounding sophisticated tertiary and quaternary services are very different from those for GAC services. Because patients are willing to travel farther for these services, the market is geographically broader and typically includes more market participants. PX01900 ({ }, IHT) at 30:12-24; PX01902 ({ }, IHT) at 28:08-16; PX01914 ({ }, IHT) at 19:10-20:01; PX01903 (Hanley (PHS), IHT) at 47:22-25; PX01917 ({ }, Dep.) at 26:05-13. And the entry barriers facing potential entrants also differ substantially. Courts have repeatedly excluded tertiary services from a general acute-care services product market. *See United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 141-42 (E.D.N.Y. 1997); *United States v. Tenet Healthcare Corp.*, 17 F. Supp. 2d 937, 942 (E.D. Mo. 1998); *see also* Attachment A, Baker Article at n.228 ("[I]t would be inappropriate to place secondary inpatient care services and tertiary inpatient care services in the same cluster . . . This is evident from the observations that the geographic markets for tertiary care services are generally much larger . . . and some hospitals offering secondary care services are unable to offer tertiary care.").

It is also illogical to include services that St. Luke's does not offer in the GAC market, because the Acquisition – by definition – does not create or enhance market power for those services. To include such services in the analysis leads to misleading results. *See Little Rock Cardiology Clinic v. Baptist Health*, 573 F. Supp. 2d 1125, 1146 (E.D. Ark. 2008) (excluding cardiologists' services from market definition because "[defendant] does not compete in the cardiologists' service market; it has no market share and therefore no market power in [that market]."); PX02148 (Town, Expert Report) at ¶ 42.

B. Inpatient Obstetrical Services Sold to Commercial Health Plans

The second relevant service market is inpatient obstetrical services sold to commercial health plans ("OB"). Inpatient obstetrical services are a cluster of procedures relating to pregnancy, labor, and post-delivery care provided to patients for the labor and delivery of newborns. *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *24-25 (citing PX02075 ({ }, Decl.) at ¶ 4; PX02081 ({ }) at ¶ 3. No other hospital services are reasonably interchangeable with inpatient obstetrical services. *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *24-25 (citing PX02124 (Town, Decl.) at ¶ 30; PX02075 ({ }) at ¶ 4; PX02081 ({ }) at ¶ 3; PX01914 ({ }, IHT) at 65:19-66:09).

The facts make clear that OB services should be analyzed as a separate relevant product market. Most significantly, two Lucas County hospitals, the University of Toledo Medical Center ("UTMC") and Mercy St. Anne, do not provide obstetrical services. PX02064 ({ }, Decl.) at ¶ 9; PX02068 ({ }, Decl.) at ¶¶ 6, 8, 11. As such, the competitive environment for OB services differs substantially from the GAC market. PX02148 (Town, Expert Report), Exhibit 6; *see also* PX01016 at 003. Commercial realities also support a separate OB market. For example, market participants separately track GAC and OB market shares. ProMedica Admissions at 6 (¶ 5); PX01016 at 003; PX01077 at 003, 005; PX01235 at 003, 005; PX01236 at 002, 054. And ProMedica and St. Luke's often "carve out" (negotiate separate rates for) OB services from GAC rates. PX00365 at 030; PX00366 at 030; PX00363 at 019, 022; PX00364 at 019, 022; PX01262 at 004, 027.[12] Complaint Counsel's economic expert

[12] Respondent's expert argues that the separate listing of case rates for OB services in health plan contracts does not necessarily indicate that these OB rates were negotiated separately. RX-71 (Guerin-Calvert, Expert Report) at ¶ 73. However, common sense dictates that the OB rate, if not included within the general inpatient-services rate, must be negotiated separately – Respondent's expert does not explain by what other mechanism the parties could arrive at

also concluded that OB services constitute a separate market. PX02148 (Town, Expert Report) at ¶ 41.

Indeed, courts have been willing to find separate, narrower product markets where competitive conditions differ. *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *24-*25 (finding general acute-care services market and obstetrics services market); *Butterworth*, 946 F.Supp. at 1291 (finding separate markets for general acute care inpatient hospital services and primary care inpatient hospital services with different market participants:); *see generally Rockford Mem'l Hosp.*, 898 F.2d at 1284 (Posner, J.) ("[S]ervices are not in the same product market merely because they have a common provider."); *cf.*, *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994) (Section 2 case defining relevant market as "adult cardiac surgery"); *Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F.Supp. 2d 1097, 1109 (N.D. Ohio 2004) (finding narrower market in Section 2 case of anesthesia services where, *inter alia*, only certain providers perform the service); *Little Rock Cardiology Clinic v. Baptist Health*, 573 F.Supp. 2d 1125, 1140-41 (E.D. Ark. 2008).

IV. RELEVANT GEOGRAPHIC MARKET IS LUCAS COUNTY, OHIO

The relevant geographic market for both relevant product markets is Lucas County, Ohio. The geographic market is defined by the "practical alternative sources to which consumers of [the relevant service] would turn if the merger were consummated and the merged entity raised prices beyond competitive levels." *Butterworth,* 946 F. Supp. at 1291; *Polypore*, 2010 FTC LEXIS 97, at *48; Merger Guidelines § 4.2. Under the case law and *Merger Guidelines*, the relevant question is whether a hypothetical monopolist controlling *all* Lucas County hospitals

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the final figure reflected in the contracts. This shows that hospitals and health plans recognize that OB is distinct from other GAC services. Furthermore, the way the OB rate is structured – as a case rate, *per diem* or some other basis – can itself be the subject of negotiation.

could profitably implement a small but significant non-transitory increase in price ("SSNIP"). *Butterworth,* 946 F. Supp. at 1292; Merger Guidelines § 4.2.

Respondent concedes that Lucas County is the relevant geographic market for GAC services. ProMedica Admissions at 7 (¶ 7).[13] Yet for the OB services market, Respondent claims that the geographic market includes Wood County Hospital (outside of Lucas County), undoubtedly to avoid the overwhelming presumption of illegality that a merger-to-duopoly creates. In fact, patient-flow data reveal that far *fewer* patients (0.6%) leave Lucas County for OB services than for GAC services (2.1%). PX02148 (Town, Expert Report) at ¶ 46, Exhibit 10. In other words, 99.4 percent of OB patients residing in Lucas County receive care inside Lucas County. PX02148 (Town, Expert Report) at ¶ 46, Exhibit 10. Thus, the data directly rebut Respondent's claim that patients are more willing to travel outside Lucas County for OB services than for GAC services.

Other data and evidence from local employers, health plans, physicians, and third-party hospitals further confirm that Lucas County constitutes the relevant geographic market for both relevant services. For example, data show that the average drive time for GAC and OB services is approximately 11.5 minutes, and 95 percent of Lucas County residents travel 24.5 minutes or less for those services. PX02148 (Town, Expert Report) Exhibit 5. Notably, Wood County Hospital is approximately 28 minutes (25 miles) from Toledo and Fulton County Health Center is more than 50 minutes (40 miles) from Toledo.[14] Testimony from health plans, third-party

[13] Respondent's expert nonetheless suggests that Cleveland Clinic and Wood County Hospital are "fringe competitors" in the GAC market because they "draw a number of patients from the area." RX-71 (Guerin-Calvert, Expert Report) at n.21. Of course, some patients will always seek treatment at more-distant hospitals, for a variety of reasons, including the hospital's reputation. This does not mean that far-flung hospitals are in the relevant geographic market, any more than instances of patients seeking treatment at the Mayo Clinic or Johns Hopkins would mean that Minnesota and Baltimore are in the relevant geographic market.

[14] Calculated using Google Maps' directions function from each hospital to central Toledo.

hospitals, physicians, and employers all confirm that residents in the Toledo area strongly prefer to stay close to home for care, will not travel outside Lucas County, and, generally do not view Wood County Hospital or Fulton County Hospital as practical alternatives. *See, e.g.,* PX02056 ({ }, Decl.) at ¶ 4; PX02057 ({ }, Decl.) at ¶ 7; PX02067 ({ }, Decl.) at ¶ 10; PX02068 ({ }, Decl.) at ¶¶ 7, 13, 14; PX02052 ({ }, Decl.) at ¶ 3; PX02070; PX02075 ({ }) at ¶ 6-8. Health plans also analyze the market as being limited to Lucas County. *See, e.g.*, PX02210 at 003. And finally, Respondent's own documentary and testimonial evidence likewise supports Lucas County as the geographic market. PX01016 at 003; PX01077 at 002-003; PX01904 (Steele (PHS), IHT) at 132:24-133:02; PX01903 (Hanley (PHS), IHT) at 72:20-73:15.

V. THE ACQUISITION VIOLATES SECTION 7 OF THE CLAYTON ACT

A. Legal Standard Under Clayton Act Section 7

Section 7 of the Clayton Act prohibits any acquisition "where in any line of commerce . . . the effect of such acquisition *may be* substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). "Congress used the words 'may be' . . . to indicate that its concern was with probabilities, not certainties" and to "arrest restraints of trade in their incipiency and before they develop into full-fledged restraints." *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 323 & n.39 (1962) ("requirement of certainty . . . of injury to competition is incompatible" with Congress' intent of "reaching incipient restraints."); *see also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 355, 367 (1963); *Chicago Bridge*, 534 F.3d at 423; *CCC Holdings*, 605 F. Supp. at 35 (a "fundamental purpose of amending § 7 was to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger[.]"). Thus, to establish a § 7 violation, "the FTC need not show that

the challenged merger *will* lessen competition, but only that the loss of competition is a 'sufficiently probable and imminent' result of the merger or acquisition." *CCC Holdings*, 605 F. Supp. at 35.

Courts generally analyze Section 7 cases under a burden-shifting framework. *See, e.g.*, *Chicago Bridge*, 534 F.3d at 423; *Heinz*, 246 F.3d at 715; *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990); *Polypore*, 2010 FTC LEXIS 97, at *25. Under this framework, Complaint Counsel can establish a *prima facie* case of a Section 7 violation by showing that the transaction will result in undue concentration in the relevant market(s). *Chicago Bridge*, 534 F.3d at 423; *Baker Hughes*, 908 F.2d at 982-83; *Polypore*, 2010 FTC LEXIS 97, at *25. Undue concentration in a relevant market leads to the presumption that the transaction substantially lessens competition. *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120-121 (1975); *Phila. Nat'l Bank*, 374 U.S. at 363; *Chicago Bridge*, 534 F.3d at 423; *United States v. Dairy Farmers of Am.*, 426 F.3d 850, 858 (6th Cir. 2005). Complaint Counsel can establish a *prima facie* case quantitatively or qualitatively, and further support its *prima facie* case with evidence that anticompetitive effects are likely. *Butterworth,* 946 F. Supp. at 1289 (FTC may make *prima facie* case with statistical showing of post-merger control of "undue percentage" of relevant market and a "significant increase in concentration"); *Polypore*, 2010 FTC LEXIS 97, at *25-26 ("qualitative evidence regarding pre-acquisition competition between the merging parties can in some cases be sufficient to create a prima facie case . . . .") (citing *Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1053 (2002)).

Once a *prima facie* case is established, the burden shifts to Respondent to rebut the presumption of illegality by producing sufficient evidence to show that Complaint Counsel's evidence inaccurately predicts the likely competitive effects of the transaction. *United States v.*

Marine Bancorporation, 418 U.S. 602, 631 (1974); *Chicago Bridge*, 534 F.3d at 423; *FTC v. Univ. Health Inc.*, 938 F.2d 1206, 1218-19 (11th Cir. 1991); *Polypore*, 2010 FTC LEXIS 97, at *26. The stronger the *prima facie* case, the greater the Respondent's burden of production on rebuttal. *Polypore*, 2010 FTC LEXIS 97, at *26 (citing *Heinz*, 246 F.3d at 725; *Baker Hughes*, 908 F.2d at 991). If the Respondent meets its burden, the burden of production shifts back to Complaint Counsel, who also retains the ultimate burden of persuasion. *Chicago Bridge*, 534 F.3d at 423 (citations omitted); *Polypore*, 2010 FTC LEXIS 97, at *27.

In this case, the quantitative evidence undeniably demonstrates enormous increases in concentration in two markets that already were highly concentrated before the Acquisition. This undue concentration makes the Acquisition presumptively unlawful; the presumption is only strengthened and bolstered by a vast array of additional, qualitative evidence from other market participants and the merging hospitals themselves.

B. The Acquisition is Presumptively Unlawful Based on Increases in Market Concentration

1. Pre-Acquisition Market Structure Already Highly Concentrated

Even before the Acquisition, the Lucas County markets for general acute-care and obstetrics services were highly concentrated. In the GAC market, there were only four competitors in Lucas County: ProMedica, St. Luke's, Mercy, and UTMC. ProMedica Admissions at 7 (¶ 8). Based on patient days, ProMedica held 46.8 percent of the market; St. Luke's had an 11.5 percent share; Mercy's share was 28.7 percent; and UTMC's share was 13 percent. PX02148 (Town, Expert Report) Exhibit 6.[15] These shares give rise to a pre-

[15] Regardless of whether market share is calculated based on the number of registered beds, beds-in-use, or occupancy, ProMedica had the highest share among Lucas County hospitals. ProMedica Admissions at 15 (¶ 37).

Acquisition HHI in the GAC market of 3313, far exceeding the *Merger Guidelines* threshold of 2500 for highly concentrated markets. PX02148 (Town, Expert Report) Exhibit 6.

The relevant market for OB services is even more highly concentrated. Pre-Acquisition, there were only three competitors in Lucas County: ProMedica, St. Luke's, and Mercy (and one Mercy hospital, St. Anne, does not provide OB services). ProMedica Admissions at 7-8 (¶ 10); PX02068 ({ }, Decl.) at ¶ 8. Based on patient days, ProMedica held *a pre-Acquisition* market share of 71.2 percent; St. Luke's had 9.3 percent of the market; and Mercy's share was 19.5 percent, representing a pre-Acquisition HHI of 5531.2 – more than double the Merger Guidelines' threshold for a highly-concentrated market.[16] PX02148 (Town, Expert Report) Exhibit 6.

2. Acquisition is Presumptively Unlawful Based on Market Shares, Concentration, and Increase in Concentration

The Acquisition results in tremendous concentration in the already highly-concentrated Lucas County markets for GAC and OB services; it is, as such, presumptively unlawful. *Phila. Nat'l Bank*, 374 U.S. at 363. In both the GAC and OB services markets, the post-Acquisition market shares and HHIs and the increase in concentration far exceed the levels found in cases to create a presumption of illegality. *Phila. Nat'l Bank*, 374 U.S. at 364; (enjoining acquisition with 30 percent combined share and where many competitors remained); *Univ. Health*, 938 F.2d at 1211 n.12, 1219 (holding *prima facie* case established where merger reduced competitors from five to four, combined share of 43 percent, HHI increase of 630, and a post-merger HHI of 3200); *FTC v. Bass Bros. Enters., Inc.*, No. C84-1304, 1984 U.S. Dist. LEXIS 16122, at *18

[16] ProMedica's economic expert devotes a portion of her expert report and several exhibits to data regarding the number of hospitals and beds in the Toledo MSA compared to other metropolitan areas, suggesting that Lucas County has too many hospitals and patient beds. Those data, however, are irrelevant for the antitrust analysis in this case and, in any event, the enormous HHIs in the GAC and OB markets clearly rebut that contention.

(N.D. Ohio June 6, 1984) (enjoining two mergers resulting in 200 and 300 point HHI increases). Here, ProMedica and St. Luke's combined share is 58.3 percent in the GAC market, and only two competitors remain. PX02148 (Town, Expert Report) Exhibit 6. In OB, where only one competitor remains, the parties' combined market share is 80.5 percent. PX02148 (Town, Expert Report) Exhibit 6.[17]

Under the *Merger Guidelines*, a transaction that increases concentration by 200 points and results in a highly concentrated market, with HHI over 2,500, is presumed likely to enhance market power. Merger Guidelines § 5.3. The Acquisition far exceeds these thresholds. As summarized in Table 1 below, in GAC, concentration rises 1,078 points to an HHI of 4,391. PX02148 (Town, Expert Report) Exhibit 6. In OB, concentration rises 1,323 points to an HHI of 6,854. PX02148 (Town, Expert Report) Exhibit 6. Thus, there is an overwhelming presumption of illegality in *both* relevant markets. Indeed, for the OB market, there is "by a wide margin, a presumption that [a three-to-two] merger will lessen competition . . . ." *Heinz*, 246 F.3d at 716; *PPG*, 798 F.2d at 1505; *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 52-53 (D.D.C. 1998).

[17] ProMedica's beds and beds-in-use market shares (Guerin-Calvert, Appendix to Expert Report at 85) greatly understate the parties' shares because they include the shares of out-of-market hospitals (Fremont Memorial Hospital, H.B. Magruder Memorial, WCH, and FCHC). To get to get to Fremont Memorial, one would need to drive about 37 miles and 50 minutes; to get to get to H.B. Magruder, one would need to drive about 47 miles and just under one hour. The data are also questionable. For example, Fulton County Health Center has 25 inpatient beds (and 10 psychiatric beds) (PX02057 (Beck (FCHC), Decl.) at ¶ 4), not 45, as indicated in ProMedica's expert report.

Table 1: Market Shares and HHIs

General Acute-Care Inpatient Services		
Hospital/System	**Pre-Acquisition Market Share**	**Post-Acquisition Market Share**
ProMedica	46.8%	58.3%
Mercy	28.7%	28.7%
St. Luke's	11.5%	--
UTMC	13.0%	13.0%
Pre-Acquisition HHI		3312.5
Post-Acquisition HHI		4390.7
HHI Increase		1078.2

Obstetrical Services		
Hospital/System	**Pre-Acquisition Market Share**	**Post-Acquisition Market Share**
ProMedica	71.2%	80.5%
Mercy	19.5%	19.5%
St. Luke's	9.3%	--
Pre-Acquisition HHI		5531.2
Post-Acquisition HHI		6853.7
HHI Increase		1322.5

C. Evidence of Likely Anticompetitive Effects Bolsters the Already Strong Presumption of Harm and Illegality

Beyond its *prima facie* case, Complaint Counsel's additional evidence – including voluminous historical, current, and forward-looking documents and testimony from ProMedica, St. Luke's, health plans, employers, physicians, and experts – significantly strengthens the presumption that the Acquisition harms competition.[18]

1. The Acquisition Eliminated Significant Competition Between ProMedica and St. Luke's

The evidence of vigorous competition between ProMedica and St. Luke's is striking. For years, ProMedica was St. Luke's most significant competitor. PX01911 (Wakeman (SLH), IHT) at 245:23-246:23; PX01909 (Dewey (SLH), IHT) at 172:10-19; PX01076 at 021-023. St. Luke's executives were aware of ProMedica's aggressive efforts to compete against St. Luke's or to end the competition by acquiring it. PX01152 at 001 ("ProMedica . . . is continuing an aggressive strategy to take over St. Luke's or put us out of business"); PX01127 at 001. From 2001 until the Acquisition, ProMedica's health-plan subsidiary Paramount excluded St. Luke's from its provider network. Paramount refused at least one major customer's request to add St. Luke's to its network, because ProMedica hospitals would lose a significant number of patients to St. Luke's if it did. PX00224 at 002. St. Luke's even considered an antitrust suit against ProMedica. PX01207 at 003; PX01144 at 003.

[18] The evidence includes approximately a thousand exhibits taken from millions of ordinary-course documents from the merging parties and third parties, multiple expert reports, 16 investigational hearings, 17 employer declarations, four third-party hospital declarations, five physician declarations, six health-plan declarations, and several fact-witness and expert depositions.

Similarly, ProMedica faced substantial competition from St. Luke's. In the first nine months of 2009, St. Luke's (not Mercy or UTMC) picked up half of the market share that had been lost by ProMedica. PX00159 at 012. In fact, ProMedica was concerned enough about competition from St. Luke's to pressure health plans to exclude St. Luke's from their networks.[19] PX02267 at 001 ({ }: "ProMedica would like to see St. Luke's out of the { } network – ProMedica indicated that this would be an advantage to them[.]"); PX00407 at 001 (ProMedica: "Explore opportunities to . . . take St. Luke's out [of { } provider network]."). ProMedica even successfully demanded that { }, a large health plan, exclude St. Luke's from its network for 18 months, and eliminated a significant rate discount "for the privilege" of adding St. Luke's back in. PX00295 ("St. Lukes [sic] is out until at least 7/1/09. PHS rates go up percent if they are added. This has been the main deal breaker all along. Getting the 18 months was a huge effort . . ."); PX00231 at 015; PX00380 at 001 ("{ } cannot sign up st. lukes [sic] until 7/1/09 and will have to pay PHS for the privilege.").

It is clear why ProMedica offered a discount to exclude St. Luke's from Paramount's network. ProMedica wanted to make up for the millions of dollars in revenues and margins it would lose if St. Luke's were added to { } network. *See* PX00385 at 007 (2008 ProMedica document showing it would lose {

[19] The facts belie the notion that St. Luke's was of minor competitive significance in Lucas County. St. Luke's operations represent an enormous value and volume of commerce. *See supra* at pp. 6-7. Indeed, St. Luke's total discharges and outpatient visits exceed those of UTMC, Bay Park, Flower, St. Anne's, and St. Charles (individually). PX01920 (Wakeman (SLH), Dep.) at 49:11-51:13. The suggestion that St. Luke's offers no "unique" services only validates the GAC and OB overlap between St. Luke's and ProMedica. And Respondent's own executives admit that St. Luke's is located in a strategically important geographic area of Lucas County. PX01911 (Wakeman (SLH), IHT) at 53:07-55:24 (favorable demographics); PX01906 (Oostra (PHS), IHT) at 117:06-13, 118:03-05.

} in gross margin annually if { } added St. Luke's to its provider network); PX00333 at 002. Similarly, ProMedica stood to lose millions of dollars in revenue and thousands of patients each year if St. Luke's were added to Paramount's network. PX00385 at 007; PX00040 at 007 (St. Luke's inclusion in Paramount would cause ProMedica to lose {

}).

Not surprisingly, health plans recognized St. Luke's importance to competition in Lucas County. PX02073 ({ }, Decl.) at ¶¶ 11, 15; PX02067 ({ }, Decl.) at ¶ 21. And St. Luke's was equally aware of its significant role in maintaining a competitive marketplace. PX01144 at 003 ("The reason [MCOs] should care is that an independent St. Luke's Hospital keeps the systems a little more honest. The MCOs lose clout if St. Luke's is no longer independent."); PX01152 at 001 ("The Toledo healthcare marketplace needs competition and needs St. Luke's as an independent alternative to the two systems. – Cleveland has only two systems and problems are starting."). The Acquisition eliminates St. Luke's as an independent competitor to ProMedica, which substantially lessens competition, to the detriment of Lucas County employers and residents.

2. The Acquisition Enables ProMedica to Raise Reimbursement Rates at St. Luke's and ProMedica's Other Hospitals

A primary objective and consequence of the Acquisition is significantly higher prices. As St. Luke's considered potential acquirers, a key factor was whether the suitor could help it obtain higher reimbursement rates. PX01168 (

); *see also* PX01018 at 019. By this measure, ProMedica was the clear choice. ProMedica marketed itself to potential targets as offering "payer system leverage," an obvious

reference to higher rates. PX00226 at 008. And ProMedica's own documents repeatedly tout its market dominance. *See, e.g.,* PX00221 at 002; PX00270 at 025.

Clearly, St. Luke's knew that ProMedica had enormous bargaining leverage with health plans, and justifiably understood that ProMedica's "negotiating clout" meant that a deal with ProMedica had "the greatest potential for higher hospital rates." PX01030 at 020. Again and again, documents show that St. Luke's expected to have greater leverage and obtain substantial rate hikes after the Acquisition:

- "If we go over to the dark green side [ProMedica] . . . we may pick up as much as { } in additional { }, and Paramount fees." PX01231.
- An affiliation with ProMedica will cause St. Luke's rates to "skyrocket." PX01229.
- ProMedica offers "incredible access to outstanding pricing on managed care agreements. Taking advantage of these strengths may not be the best thing for the community in the long run. Sure would make life much easier right now though." PX01125 at 2.

See also PX00168 at 001; PX00169 at 002; PX01113 at 001. In fact, St. Luke's chose to join ProMedica even though it concluded that the Acquisition could "stick it to employers, that is, to continue forcing high rates on employers and insurance companies." PX01130 at 005; PX01016 at 023.

No one – not even the Respondent – has disputed that prices at St. Luke's will increase dramatically after the Acquisition. Local health-plan executives testified that, even before the Acquisition, ProMedica had substantial bargaining leverage and its prices were significantly higher than St. Luke's. PX02067 ({ }, Decl.) at ¶¶ 19, 21-22; PX02072 ({ }, Decl.) at ¶ 16; PX01902 ({ }, IHT) at 62:06-19; PX01914 ({ }, IHT) at 61:06-23; PX02073 ({ }, Decl.) at ¶ 15. Post-Acquisition, St. Luke's rates are expected to rise significantly, at least to the levels of

ProMedica's other Lucas County hospitals, because St. Luke's will enjoy the fruits of ProMedica's substantial leverage with the health plans. *Id.*

Prices are also likely to increase at ProMedica's *other* hospitals. Health plans testified that it becomes much harder to "walk away" from ProMedica with St. Luke's included in its system, because it will be extraordinarily difficult, if not impossible, to market a viable hospital network without ProMedica *and* St. Luke's (i.e., a network of just Mercy and UTMC) to Lucas County residents. PX02073 ({ }, Decl.) at ¶ 14; PX01902 ({ }, IHT) at 63:02-19; PX02067 ({ }, Decl.) at ¶ 21.[20] Indeed, it appears that no health plan in Lucas County has offered a hospital network that excluded both ProMedica and St. Luke's in at least the last ten years. ProMedica Admissions at ¶ 14. Health plans expect that they will lose members if they try to offer such a network. PX02073 ({ }, Decl.) at ¶ 15; PX02067 ({ }, Decl.) at ¶ 21, 24; PX01902 ({ }, IHT) at 63:02-64:25; PX01919 ({ }, Dep.) at 56:04-06, 56:09-11; PX01917 ({ }, Dep.) at 86:05-20. As a result, health plans must either accept higher rates, with the increased costs passed on to local employers and employees, or offer an undesirable and possibly unmarketable network. PX02067 ({ }, Decl.) at ¶ 26; PX02073 ({ }, Decl.) at ¶ 16; PX01914 ({ }, IHT) at 15:07-20; PX01900 ({ }, IHT) at 39:07-40:14; PX01902 ({ }, IHT) at 60:20-61:10; PX02072 ({ }, Decl.) at ¶ 20; PX02070 ({ }, Decl.) at ¶ 8.

[20] Further, ProMedica's ownership of Paramount exacerbates the competitive risk. PX02067 ({ }, Decl.) at ¶ 24; PX01917 ({ , Dep.) at 49:06-13; PX01914 ({ }, IHT) at 62:19-65:05.

Local employers anticipate harmful consequences from the Acquisition, including higher healthcare costs that they and their employees ultimately will bear. PX02070 ({ }, Decl.) at ¶ 8; PX02051 ({ }, Decl.) at ¶ 9; PX02062 ({ }, Decl.) at ¶ 8. Higher hospital rates are passed on from health plans to their fully-insured customers. PX02061 ({ }, Decl.) at ¶ 6; PX02053 ({ }, Decl.) at ¶ 5. Self-insured employers, who pay their employees' healthcare claims, will immediately and directly bear the full impact of such increases. PX02070 ({ }, Decl.) at ¶ 8; PX02069 ({ }, Decl.) at ¶¶ 2, 8. In all cases, employers must pass on these higher costs to their employees in the form of higher premiums, co-payments, and other out-of-pocket expenses. PX02051 ({ }, Decl.) at ¶ 9; PX02061 ({ }, Decl.) at ¶ 6; PX02063 ({ }, Decl.) at ¶ 7. Higher healthcare costs may force employees to forgo or delay necessary medical treatment. PX02063 ({ }, Decl.) at ¶ 7; PX02054 ({ }, Decl.) at ¶ 8; PX02058 ({ }, Decl.) at ¶ 7. And contrary to Respondent's assertions, employers testify that they cannot contain costs by offering a health plan that excluded ProMedica *and* St. Luke's because such a network would not be acceptable to their employees. PX02070 ({ }, Decl.) at ¶ 8; PX02062 ({ }, Decl.) at ¶ 8; PX02069 ({ }, Decl.) at ¶ 8.

Complaint Counsel's economic expert, Dr. Town evaluated the foregoing evidence and concluded that the Acquisition likely substantially lessens competition. Dr. Town's analysis shows that Lucas County hospitals with higher market shares charge higher rates and that ProMedica has the highest rates of all. PX02148 (Town, Expert Report) at ¶¶ 65-68, 70-72. In fact, ProMedica's reimbursement rates were on average percent higher than St. Luke's rates

prior to the Acquisition. PX02148 (Town, Expert Report) at ¶ 66.[21] Dr. Town determined that ProMedica will be able to use its already-high market power to charge substantially higher prices at St. Luke's for GAC and OB services and also raise prices at its other Lucas County hospitals. PX02148 (Town, Expert Report.) at ¶¶ 73-110.

Higher rates are not a remote and theoretical possibility, but a strategically-planned and already-realized fact. Ordinary course documents show that a top strategic goal for Respondent in 2011 was to obtain a substantial rate hike for St. Luke's. PX01113; PX00169 at 002. St. Luke's modeled a { } percent rate increase for two health plans in 2011 that it hoped to obtain "with [ProMedica's] help."[22] PX00168 at 001. And ProMedica is certain to exercise fully its enhanced market power. Documents and testimony from ProMedica's leaders, and even from its expert, make clear that ProMedica *always* seeks to *maximize* its rates. PX01906 (Oostra (PHS), IHT) at 259:22-24, 260:20-22 (when it comes to reimbursement rates, "[w]e would always like more."); PX01918 (Oostra (PHS), Dep.) at 60:18-61:09 (post-Acquisition, ProMedica will strive to achieve margins higher than it ever has in the past); PX00270 at 054 ("Improved profitability continues as a key objective for the System."); PX01925 at 220:02-12 (admitting ProMedica seeks highest rates possible); *see* PX00233 (ProMedica annualized cost-coverage ratios over { } percent).

Respondent attempts to justify rate increases by arguing that St. Luke's rates were below "equilibrium rates" such that, even if rates skyrocket, they will not rise to supracompetitive

[21] Based on the case-mix adjusted price differential between ProMedica and St. Luke's. Notably, Respondent's expert did not estimate the price differential between ProMedica and St. Luke's or any other Lucas County hospital, even though she had access to the same data.

[22] Indeed, soon after the Acquisition was consummated, ProMedica approached certain health plans to obtain higher reimbursement rates. PX02295; PX01918 (Oostra (PHS), Dep.) at 33:25-35:12. ProMedica already has re-negotiated two of St. Luke's contracts with health plans that include rate increases. RX-71 (Guerin-Calvert, Expert Report) at ¶¶ 100-101. These rate increases, though substantial, were negotiated under the spotlight of the current legal proceedings, with rate protections provided by the Hold Separate Agreement, and so do not represent the full exercise of ProMedica's market power.

levels. ProMedica thus asks this Court to find that the market was under-compensating St. Luke's for its services. "But the normal assumption in examining assertions of market power is that the current price is *at least* the competitive price." *CF Indus., Inc. v. Surface Transp. Bd.*, 255 F.3d 816, 824 (D.C. Cir. 2001) (citing IIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ("AREEDA") ¶ 537b, at 200 (1995)). As the leading antitrust treatise states: "In the typical merger case . . . the market is presumably behaving competitively, or at least nearly so, prior to the merger. *The concern is whether the merger may lead to a further price increase above current levels.*" IIB AREEDA, ¶ 539a2 (2009) (emphasis added). Thus, the relevant question is not whether rates will rise above a theoretical "equilibrium" level, but whether the Acquisition allows ProMedica profitably to raise rates above current market prices – and it does.[23] PX01113; PX00169 at 002; PX02295; PX01918 (Oostra (PHS), Dep.) at 33:25 -35:12.

Moreover, ProMedica's argument is a slippery-slope invitation to the Court to analyze pre-merger pricing and determine that a dominant firm should be permitted to acquire a rival and increase prices, so long as the price increases do not exceed some hypothetical (and, in reality, unknowable) equilibrium price. Accepting such an argument gives every firm seeking to achieve market power by acquiring a rival license to argue that it should be permitted to enhance its market power and raise prices to make up for pre-merger prices that are "too low" and "not fair." *See ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *158 ("The Court declines Defendant's invitation to delve into whether St. Luke's current prices are 'subcompetitive' or otherwise unreasonable in some way.") Nothing in the Merger Guidelines or the relevant case law supports

[23] Of course, it is appropriate for *St. Luke's* to negotiate aggressively to obtain higher rates, if it chooses. But the fact that the dominant firm, ProMedica, could obtain much higher rates for St. Luke's does not mean that St. Luke's pre-Acquisition, freely-negotiated (though perhaps poorly-negotiated) rates are not at equilibrium levels. *See ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *158.

this result. Rather, as the Supreme Court stated in a recent antitrust merits case, "[c]ourts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" *Pacific Bell Tel. Co. v. linkLine Communs., Inc.*, 129 S.Ct. 1109, 1121 (2009) (quoting *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283 (6th Cir. 1898) (Taft, J.) (inquiring into the reasonableness of prices is to "set sail on a sea of doubt."), *aff'd*, 175 U.S. 211 (1899).

ProMedica also suggests that its enhanced ability to raise rates should be ignored because St. Luke's rates were below cost and needed to be increased due to its financial condition. As discussed in detail below (Section VI.D.6), St. Luke's financial condition was, at the time of the Acquisition, sound and significantly improving – a fact admitted by the expert witness who was tasked by Respondent with analyzing St. Luke's financial health. PX01951 (Den Uyl (Responent's Expert), Dep.) at 249:04-19.

ProMedica's argument is misplaced for several additional reasons. First, the notion that St. Luke's rates were below cost is controverted by the evidence. *See* PX02147 (Dagen, Expert Report) at ¶ 24. The evidence also clearly shows that St. Luke's did not need to be acquired by ProMedica to obtain modestly-higher rates. Prior to the Acquisition, health plans had shown a willingness to increase St. Luke's rates by reasonable amounts. PX01016 at 12-13; PX02275; *see also* PX01146.[24] Indeed, ProMedica's economic expert highlights a pre-Acquisition contract

[24] Incidentally, *for ten years*, St. Luke's failed to seek higher rates or avail itself of annual rate increases totaling nearly { } from at least one health plan. PX02267.

that St. Luke's negotiated on its own, which resulted in rate increase and a profitable cost-coverage ratio of more than { }. RX-71 (Guerin-Calvert, Expert Report) at ¶ 103.[25]

Finally, ProMedica points to post-Acquisition contracts with two health plans, { }, to show purportedly-modest or reasonable price increases and an inability to exercise market power. Such post-Acquisition evidence is highly suspect:

> "[T]he probative value of [post-acquisition] evidence was found to be extremely limited . . . The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending."

Chicago Bridge, 534 F.3d 410 at 434-35 (citing and quoting *General Dynamics*, 415 U.S. at 504-0605). The value of such evidence is limited when it is subject to manipulation or even when it could arguably be subject to manipulation. *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986) (Posner, J.) ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight."); *Chicago Bridge*, 534 F.3d 410 at 435. Given the spotlight of the then-pending preliminary-injunction case and the imminent administrative trial, ProMedica obviously had an incentive to temper the rates it demanded and extracted from health plans. Equally critically, these contracts were negotiated within the confines of the Hold-Separate Agreement, which limited ProMedica's leverage by allowing health plans to extend their contract with St. Luke's under existing rate terms. To the extent these rate increases – which are substantial – are not the result of St. Luke's enhanced leverage as part of a dominant hospital system, that is due to the legal proceedings and the HSA, not a lack of market power.

[25] Of course, even if it were true that St. Luke's was in poor financial condition and needed to raise rates, that does not immunize a transaction that otherwise violates Section 7, unless Respondent can meet its burden under a clearly-articulated antitrust defense, such as failing-firm.

3. The Acquisition Will Result in Lower Quality of Care and Service Levels at St. Luke's

The Acquisition also eliminated beneficial competition between ProMedica and St. Luke's to improve quality and expand services in Lucas County. St. Luke's is generally regarded as one of the highest-quality hospitals in Lucas County. PX01018 at 012; PX01172; PX01904 (Steele (PHS), IHT) at 131:13-18; PX01910 (Wakeman (SLH), Dep.) at 90:08-91:32. Third-party rating agencies and qualitative evidence bear this out. PX00548 at 005-007; PX02157; PX02156. By contrast, ProMedica struggles on many quality measures. PX01030 at 018-019; PX00153 (January 2009 e-mail re: ProMedica's "subpar quality scores"); PX01904 (Steele (PHS), IHT) at 129:10-15 (TTH struggled to be patient-centered). ProMedica admitted to St. Luke's that it needed to improve its quality. PX01030 at 018; *see also* PX01920 (Wakeman (SLH), Dep.) at 92:14-93:09. But as recently as January 2011, ProMedica's Chief Medical Officer observed that ProMedica's approach to quality is "out of date" and leaves employees "very confused." *See* PX02148 (Town, Expert Report) at ¶ 107 (citing PM_SL_01265891).

Because of the disparity between the organizations, St. Luke's Board of Directors and senior executives were deeply concerned that the Acquisition with ProMedica would adversely impact St. Luke's reputation for quality. PX01920 (Wakeman (SLH), Dep.) at 92:08-94:07; PX01130 at 002 ("Some of ProMedica's quality outcomes/measures are not very good. Would not want them to bring poor quality to St. Luke's."); PX01016 at 006, 023. Local employers and physicians have also expressed concern that the Acquisition may diminish St. Luke's quality of care and patient-centered approach. PX02074 ({ }, Decl.) at ¶ 9; PX02058 ({ }, Decl.) at ¶ 5; PX02077 ({ }, Decl.) at ¶¶ 7-8; PX02082 ({ }, Decl.) at ¶ 13; PX02081 ({ }, Decl.) at ¶¶ 10-

13; PX02075 ({ }, Decl.) at ¶¶ 11-14. In fact, ProMedica already plans to reduce staffing levels at St. Luke's. PX00020 at 015.

In sum, the evidence overwhelmingly demonstrates that the Acquisition will harm Lucas County employers and residents by both increasing hospital reimbursement rates and lowering the quality of care and service levels.

D. Respondent Cannot Rebut Evidence of Competitive Harm

Having established a strong *prima facie* case demonstrating the Acquisition's illegality under Section 7, ProMedica bears a heavy burden to rebut the presumption of competitive harm. Its rebuttal will fall short of overcoming this burden. In particular, any made-for-litigation arguments to the contrary, neither the remaining hospitals nor health plans nor physicians can constrain anticompetitive price increases by ProMedica following the Acquisition.

1. Remaining Competitors

Mercy and UTMC, the remaining competitors in Lucas County, will not be able to constrain ProMedica from exercising its enhanced market power post-Acquisition.

First, ProMedica is a considerably more powerful and competitively significant system than Mercy and UTMC. ProMedica's market share is substantially higher than that of Mercy or UTMC. *See* PX02148 (Town, Expert Report) at 142-43 (GAC market share was 63 percent higher than Mercy's and 260 percent higher than UTMC's, and OB share was 266 percent higher than Mercy's). The Acquisition only exacerbates this disparity. *See* PX02148 (Town, Expert Report) at 142-43.

Second, ProMedica's prices are significantly higher than either Mercy's or UTMC's. PX02148 (Town, Expert Report) at 144-45. ProMedica's average severity-adjusted prices were

{ } percent higher than Mercy's, { } percent higher than UTMC's, and { } percent higher than St. Luke's. PX02148 (Town, Expert Report) at ¶ 68; *see also* PX00153.

Third, there are meaningful geographic differences between ProMedica and its remaining competitors. ProMedica's hospitals each lie to the west or south of each Mercy hospital, thus putting them geographically closer to St. Luke's. *See* PX02148 (Town, Expert Report) at 158-59; *see also* PX02068 ({ } at ¶¶ 6, 8, 11. This is meaningful to competition in Lucas County. In the critical area of southwest Lucas County, where health plans require effective coverage, ProMedica and St. Luke's have the largest and second-largest market shares, while Mercy's and UTMC's shares are substantially lower. PX02148 (Town, Expert Report) at 160-61.

Fourth, ProMedica offers OB at all of its Lucas County hospitals, while Mercy does not (and UTMC does not provide OB services). Mercy does not offer OB services at St. Anne Hospital, and thus it does not have an inpatient OB facility in western Lucas County. PX02068 ({ }, Decl.) at ¶ 8. Mercy's two hospitals that do provide OB services are tucked into the northeastern part of Lucas County, and thus are less convenient for residents of southwestern Lucas County. In fact, the only hospitals on the western-side of Lucas County that provide OB services are ProMedica's Flower Hospital and St. Luke's. *See* PX02148 (Town, Expert Report) at ¶ 159. Respondent has conceded that the Acquisition has left no alternatives to ProMedica for patients seeking inpatient OB services in the western half of Lucas County. PX01904 (Steele (PHS), IHT) at 132:24-133:11.

Because hospital location is critical to patients (particularly expectant mothers), it is not surprising that the vast majority of western Lucas County residents go either to ProMedica or St. Luke's for OB services. In St. Luke's "core" service area, {

} ProMedica's share is {

} than Mercy's { PX02148 (Town, Expert Report) at 160-61. The only hospital stopping ProMedica from owning – literally and figuratively – the entire southwestern portion of the Lucas County OB market was St. Luke's. The Acquisition changes that: it gives ProMedica an even larger market share – 80.5 percent – and greatly increases its dominance across Lucas County generally and southwestern Lucas County in particular. PX02148 (Town, Expert Report) at 142-43.

And finally, unlike Mercy and UTMC, ProMedica controls one of the largest commercial health plans in Lucas County – its for-profit subsidiary, Paramount. Answer at 4 (¶ 8). ProMedica can and does use Paramount to its competitive advantage. *See* PX02148 (Town, Expert Report) at ¶¶ 86, 95-96, 99, 106.

Moreover, even if Mercy and UTMC have excess capacity – which remains unclear (PX02316),[26] ProMedica's claim that this will constrain ProMedica's rates in the future is conclusively disproven by market realities. Foremost, history shows that Mercy and UTMC – despite alleged excess capacity – have not constrained ProMedica to date. If they could have, healthcare costs in Lucas County would not be among the highest in Ohio. PX02315 at 007 (showing average gross charges in Toledo are the highest in Ohio). And ProMedica's rates would not be the highest in Lucas County by far. PX02148 (Town, Expert Report) at ¶¶ 68, 113, 119, pp. 144-45 (ProMedica's average severity-adjusted prices were { } percent higher than Mercy, { } percent higher than UTMC and { } percent higher than St. Luke's); *see also* PX00153. And ProMedica's margins would not be at record levels. PX01918 (Oostra (PHS),

[26] Generally, 80 percent or greater utilization represents full capacity in hospitals.

Dep.) at 59:16-24, 60:10-61:09; PX01906 (Oostra (PHS), IHT) at 131:03-132:24. The fact that St. Luke's has not always been at full capacity, despite its low rates and high quality, further belies this argument. As Dr. Town concludes, excess capacity, while perhaps necessary to constrain ProMedica, clearly is *not sufficient* to do so. PX02148 (Town, Expert Report) at ¶ 177.

Therefore, the notion that Mercy and UTMC will be able to constrain ProMedica post-Acquisition – when ProMedica has even greater dominance and bargaining leverage – simply is not credible. PX02148 (Town, Expert Report) at ¶ 119. Under the Respondent's novel theory, a merger – even a merger to duopoly – would not violate Section 7 of the Clayton Act as long as merely some competition remains. To the contrary, Section 7 of the Clayton Act does not ask whether *any* competitor remains, but whether competition is *substantially lessened*, as it is here. *See Evanston*, No. 9315, 2007 WL 2286195, at 17 ("The issue is not whether other hospitals competed with the merging parties, but whether they did so to a sufficient degree to offset the loss of competition caused by the merger.")

2. Health Plans

Nor can health plans constrain an anticompetitive price increase by ProMedica, either through their own leverage or by steering patients to other hospitals. The leverage that health plans possess has not been sufficient to constrain ProMedica to date and the Acquisition only further diminishes health plans' ability to do so. Health plans' leverage is considerably reduced because few attractive alternatives to ProMedica remain in Lucas County. As ProMedica has conceded, *no health plan in the last ten years, if ever, has offered a network in Lucas County consisting of just Mercy and UTMC.* ProMedica Admissions at 9 (¶ 14); *see also* PX01927 (Wachsman (PHS) Dep.) at 69:03-06. Even when limited-access networks were common, no Mercy-UTMC-only network existed. Health plans and employers testified that such a narrow

network would not be viable or attractive. PX02073 ({ }, Decl.) at ¶ 15; PX02067 ({ }, Decl.) at ¶ 21; PX02070 ({ }, Decl.) at ¶ 8; PX02069 ({ }, Decl.) at ¶ 8; PX02062 ({ }, Decl.) at ¶ 8; PX02058 ({ }, Decl.) at ¶ 7.

History and the evidence also show that health plans cannot constrain ProMedica by steering members to lower-cost hospitals. No health plan has ever implemented a steering plan that has constrained ProMedica, as evidenced by ProMedica's dominant market share and unusually high rates prior to the Acquisition. Immediately before the Acquisition, ProMedica's prices to commercial health plans were significantly higher than those of the other hospital systems in Lucas County. PX02148 (Town, Expert Report) at 144-45. If steering were a practicable means to discipline hospital rate increases, health plans would have been steering members to these lower-cost alternatives, and particularly to St. Luke's, arguably the lowest-cost, highest-quality hospital in Lucas County. *See, e.g.,* PX01018 at 012. Yet health plans do not currently implement any steering programs that directly incent a significant portion of their Lucas County membership to use certain in-network hospitals over others. PX02067 ({ }, Decl.) at ¶ 17; PX01917 ({ }, Dep.) at 65:08-69:11; PX01944 ({ }, Dep. at 81:22-82:23; PX01919 ({ }, Dep.) at 12:04-14:17; PX01938 ({ }, Dep. at 21:22-24).[27] Moreover, health plans have testified that they face substantial impediments to steering their members among the hospitals in Lucas County. First, members dislike steering programs, preferring open-access networks. PX01917 ({ }, Dep.) at 68:21-25; PX01944 ({), Dep.) at 82:24-83:06; PX01942 ({ }, Dep. at 122:13-123:02). Employer

[27] { PX01944 ({ }), Dep.) at 107:22-108:05.

testimony also suggests that attempts to steer members away from ProMedica and St. Luke's would seriously harm the marketability of health plans' insurance products. PX02070 ({ }, Decl. at ¶ 8); PX02062 ({ }, Decl. at ¶ 8); PX02069 ({ }, Decl. at ¶ 8). Additionally, large hospital systems with strong bargaining leverage, such as ProMedica, are able to use this bargaining leverage to resist or avoid steering. PX01917 ({ } Dep.) at 67:04-15; PX01944 ({ }), Dep.) at 84:12-16. In fact, ProMedica has negotiated anti-steering provisions into its contracts with { }, including the current { } contract that it negotiated for St. Luke's (the previous contract, negotiated by an independent St. Luke's, did not contain such a provision). PX01944 ({ }), Dep. at 84:21-85:03, 85:11-86:23, 87:13-87:19).[28] Therefore, Respondent's arguments regarding the disciplining effects of health plan steering provide little, if any, comfort with respect to the Acquisition's likely anticompetitive effects.

3. Physicians

Respondent's economic expert claims that physicians with admitting privileges at multiple hospitals could constrain ProMedica by shifting patients to Mercy and UTMC, RX-71 (Guerin-Calvert, Expert Report) at ¶¶ 32-39, 107-108, but the evidence shows otherwise. History shows that physicians have not constrained ProMedica despite the significant price differential that existed prior to the Acquisition. If physicians with admitting privileges at multiple Lucas County hospitals could constrain Respondent, ProMedica would not have maintained this price differential *and* a markedly-higher market share than Mercy and UTMC.

"Physician steering" does not work for several reasons. First, physician steering is inconsistent with how doctors actually make hospital-admission decisions. Dr. Salvador Peron,

[28] It is also worth noting that none of { } contracts with other Lucas County hospitals contain anti-steering provisions, and neither { } has requested such provisions. PX01944 (, Dep. at 87:20-88:06).

the Medical Director at St. Luke's ancillary surgery center (Surgi+Care), testified that doctors generally make hospital-admission decisions primarily based on what is best for the patient clinically. PX01948 (Peron (SLH), Dep.) at 119:06-08, 120:05-09, 159:24-160:05. To constrain post-Acquisition price increases would require that doctors steer patients to particular hospitals based on cost rather than clinical need, which the evidence does not support. Additionally, there is no evidence that physicians are aware of, much less track, the information – such as hospital pricing, health-plan reimbursement by patient (or class of patient), hospital capacity by department, etc. – needed for physicians to effectively steer patients to lower-cost hospitals. PX01948 (Peron (SLH), Dep.) at 165:20-166:21.

Second, many physicians actually limit the number of hospitals at which they maintain admitting privileges. *See* PX01850 (Town, Rebuttal Report) at ¶15, n.20 (citing testimony from { } ("I've chosen to focus my practice [at St. Luke's] . . . It's more a call coverage situation in addition to the fact that I'm employed by WellCare as part of St. Luke's Hospital."), ({ } ("I decided to maintain admitting privileges at a limited number of hospitals . . . I currently only admit my obstetrics patients to either TTH or St. Luke's."), ({ } Decl.) at ¶ 2 ("I can admit patients to TTH and St. Luke's for obstetrics") and { }. For some physicians, this is simply a matter of practical necessity or convenience. PX02081 ({ }, Decl.) at ¶ 5 ("I found that it was unproductive, time-consuming, and exhausting to have privileges at so many hospitals because I was required to drive across town between each hospital to perform surgeries, deliver babies, follow-up with patients, and perform call coverage."); *see also* PX01850 (Town, Rebuttal Report at ¶ 15, n.21 (citing PX01935 (Read

(SLH), Dep.) at 21:19-22:07). Thus, while physicians may have admitting privileges at multiple hospitals, those hospitals may be St. Luke's and ProMedica.[29]

Third, patients prefer to go to closely-located hospitals for general acute-care services. PX02065 ({ }, Decl.) at ¶ 9; PX01917 ({ }, Dep.) at 26:20-27:05; PX02082 ({ }, Decl.) at ¶ 5. The notion that doctors will readily admit patients to patients' non-preferred hospital ignores patients' role in healthcare decisions and what physicians actually do. *See* PX01850 (Town, Rebuttal Report) at ¶14, n.17 (citing Dr. ("The model that I always followed and the model my group follows now is that we go where the patients go. . . . I can't think of a time where I've ever told a patient I don't want you to go there, I want you to go here.") and Dr. ("the patient is going to decide" where they are admitted). Indeed, health plan testimony indicates that such physician steering would not be well-received by patients. PX01917 ({ }, Dep.) at 97:12-23 ("Q: Would 's members be impacted by losing their preferred hospital from the network despite the fact that their physician may continue to maintain admitting privilege at another hospital? A: [] I think members would be unhappy that they would lose access to a hospital, even if their physician had admitting privileges elsewhere.") Fully realizing the importance of the patient's preferences in hospital selection, hospitals in Lucas County conduct patient surveys, advertise and market their facilities to employers and individuals, and focus on boosting quality and patient satisfaction in order to increase admissions. *See, e.g.,* PX01607 at 004-012 (results of 2008 phone study by St. Luke's to determine effectiveness of advertising campaign); PX00602

[29] In fact, St. Luke's documents noted that, among physicians who regularly admit to St. Luke's and another hospital, { } PX01505. This is not surprising since ProMedica is the largest employer of physicians in Lucas County. Answer at 4 (¶ 8). This physician overlap means that it is more likely that patients would stay within the combined ProMedica-St. Luke's system post-Acquisition because most physicians would refer patient to one or the other – which was another advantage seen in a deal with ProMedica. PX01937 (Rupley (SLH), Dep.) at 95:21-97:01, 98:01-07.

(presentation of St. Luke's outreach strategies for growth); PX02532 (Mercy-commissioned study of "brand" awareness); PX02534 (Mercy-commissioned marketing study); PX00271 at 003 (identifying need to as the top strategic priority for ProMedica, as of April 2010).

4. Respondent Cannot Demonstrate that Purported Efficiencies Outweigh Competitive Harm

Respondent's efficiency claims are not cognizable, and they certainly are not sufficient to overcome the significant anticompetitive harm caused by the Acquisition. To overcome such high concentration levels – and the significant additional evidence that Complaint Counsel presents – Respondent must prove the Acquisition results in "*significant* economies and that these economies ultimately would *benefit competition and, hence, consumers*." *Univ. Health*, 938 F.2d at 1223 (emphasis added); *see also Butterworth*, 946 F. Supp. at 1300. A respondent's "proof of *extraordinary efficiencies*" must be "more than mere speculation and promises about post-merger behavior." *FTC v. H.J. Heinz, Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001) (emphasis added). Under the *Merger Guidelines*, efficiencies must be merger-specific (*i.e.*, likely to be achievable only by *this* transaction), substantiated, and of such a character and magnitude that the transaction is not likely to be anticompetitive. Merger Guidelines § 1; *see also* IVA Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, at ¶ 976d.3.c (3d ed. 2010).

Respondent's claimed efficiencies do not come close to meeting this high burden. Remarkably, its expert has not even conducted an efficiencies analysis. PX01925 (Guerin-Calvert (Respondent's Expert), Dep.) at 41:01-42:24. Many efficiency claims involved little or no analysis or input by key St. Luke's employees, and in some cases actually are disputed by St.

Luke's executives. PX01915 (Wagner (SLH), IHT) at 173:01-18, 198:12-200:07, 202:21-204:25, 209:15-21; PX01908 (Deacon (SLH), IHT) at 191:16-194:03; PX01912 (Akenberger (PHS), IHT) at pp. 122:13-124:21; PX01904 (Steele (PHS), IHT) at 13:25-14:14; *see also* PX01905 (Wachsman (PHS), IHT) at 194:01-195:11; PX02147 (Dagen, Expert Report) at ¶¶ 105, 128.

Many of Respondent's claimed efficiencies could be achieved without the Acquisition or with other partners. For example, ProMedica claims that St. Luke's benefits from inclusion in Paramount, but that could have been achieved without the Acquisition. *See also* PX02203 at 003-004; PX02205 at 001 (St. Luke's-UTMC affiliation intended to create significant efficiencies); PX01916 (Gold (UTMC), Dep.) at pp. 64:23-68:16; PX01918 (Oostra (PHS), Dep.) at 76:21-83:02 (potential for ProMedica-St. Luke's efficiencies without joinder); PX02147 (Dagen, Expert Report) ¶¶ 149, 155, 158, 161, 162, 164.

In many cases, the efficiency claims are flawed, unsubstantiated, and speculative. PX01906 (Oostra (PHS), IHT) at 291:16-25, 299:03-18 (efficiency analyses were "initial plan" and ; PX01903 (Hanley (PHS), IHT) at 206:14-207:03 ("gut feeling"); PX00020 at 003 (estimates "are preliminary and subject to further analysis, revision, and substantiation."); PX02147 (Dagen, Expert Report) at 044-083. ProMedica's CEO even testified, "So, if we don't find those efficiencies, we will find other efficiencies." PX01906 (Oostra (PHS), IHT) at 294:24-25.

Notably, the efficiency claims also appear to have been crafted and inflated for litigation purposes. PX01136 at 001 ("Haven't accomplished enough in savings. . . . We will need to be more aggressive with a timeline of the first 3-5 years. FTC discounts the value of each year the farther out you go.").

Many of Respondent's claims, moreover, are based, at least implicitly, on the unremarkable notion that a large, high-priced system has more money to spend than a single, independent hospital. Accepting this "efficiency" would justify virtually any acquisition of an independent hospital by a large system.

The vast majority of Respondent's purported efficiencies are dubious claims of avoided capital costs from ProMedica { } PX00020 at 006-007. After owning the site for a decade, however, ProMedica { } and the ordinary course evidence makes clear that ProMedica had no near-term plans to follow through with either project. PX01903 (Hanley (PHS), IHT) at 240:06-14, 248:04-249:17; PX00175 at 004; PX02147 (Dagen, Expert Report) ¶¶ 86-94. Indeed, ProMedica's CEO has not even discussed { } for two to four years. PX01906 (Oostra (PHS), IHT) at 92:17-95:12. And, to the extent that ProMedica does not invest in needed services, acquiring a competitor rather than investing in these services may be anticompetitive, not procompetitive. PX01903 (Hanley (PHS), IHT) at 240:06-14, 248:04-249:17; PX00175 at 004; PX02147 (Dagen, Expert Report) ¶¶ 86-94.

5. Respondent Cannot Demonstrate that Entry Is Timely, Likely, or Sufficient

Expansion by in-market competitors, or new entry by out-of-market firms, would not constrain ProMedica's exercise of market power. Entry or expansion must be timely, likely, and sufficient in magnitude and scope to deter or counteract the competitive harm from an acquisition. *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229, 240 (2d Cir. 2003); *Cardinal Health*, 12 F. Supp. 2d at 55-58; Merger Guidelines

§ 9. Respondents must show that entry is *likely* – meaning both technically possible and economically sensible – and that it will *replace* the competition that existed prior to the merger. *See Cardinal Health*, 12 F. Supp. 2d at 56; *Chicago Bridge*, 138 F.T.C. at 1071 (noting "new entrants and fringe firms" might not replace lost competition). The higher the barriers to entry, as in this case, the less likely it is that the "timely, likely, and sufficient" test can be met. *Visa U.S.A.*, 163 F. Supp. 2d at 342.

Evidence from market participants, including St. Luke's and other hospitals in or near Lucas County, shows that entry and expansion are unlikely. PX02068 (Shook (Mercy), Decl.) at ¶¶ 19, 24-26; PX02064 (Gold (UTMC), Decl.) at ¶¶ 9-11; PX02056 (Korducki (WCH), Decl.) at ¶ 8 ("WCH has no plans to build a hospital in Lucas County"); PX02057 (Beck (FCHC), Decl.) at ¶ 10 ("FCHC has no plans to expand into Lucas County."); PX01016 at 024 (

; PX01018 at 006

({

}); PX01166 at 002 (

).

Although { } planned years ago to build a small specialty hospital in southwest Lucas County as part of a { }, legislative changes now prohibit such an arrangement, thus killing that plan. PX02068 (Shook (Mercy), Decl.) at ¶ 24. In fact, {

}:

{ {

at ¶¶ 19, 24; *see also id.* at ¶ 23.

{ }:

PX02064 (Gold (UTMC), Decl.) at ¶¶ 10, 11.

Further, the high cost of entry or expansion also makes it unlikely. Mr. Oostra testified that it would cost { } or more in today's market to build a hospital with 300 licensed beds similar to St. Luke's. PX01906 (Oostra (PHS), IHT) at 86:13-22. Charles Kanthak, SLH's Facilities Services Director, estimated that to build a new hospital identical to St. Luke's in northwest Ohio in 2009 would cost { } PX01257 at 001. In the early 2000s, it cost Mercy more than { } to build 72-bed St. Anne Hospital. PX02068 (Shook (Mercy), Decl.) at ¶ 25. According to UTMC, building an OB unit and neonatal intensive care unit would cost { } and would need to { } PX02064 (Gold (UTMC), Decl.) at ¶ 10; *see also* PX02068 (Shook (Mercy), Decl.) at ¶¶ 19-20.[30]

The history of entry "is a central factor in assessing the likelihood of entry in the future." *Cardinal Health*, 12 F. Supp. 2d at 56; *Polypore*, No. 9327 at 33; Merger Guidelines § 9. Notably, Respondent can point to no GAC entry in Lucas County by out-of-market firms in decades.

Even if entry or expansion were likely, it would not be timely. As ProMedica's CEO testified, building even a small hospital the size of Bay Park – which has approximately 72

[30] Moreover, if there is as much excess capacity as Respondent's economic expert claims (RX-71 at ¶ 109-111), entry or expansion is even less likely given the patient volumes and revenues needed to recoup the investment.

staffed beds and is far smaller than St. Luke's – would be a "several-year project." PX01906 (Oostra (PHS), IHT) at 92:17-97:02. Indeed, it took Mercy more than two years to build and open 72-bed St. Anne Hospital. PX02068 (Shook (Mercy), Decl.) at ¶ 25. St. Luke's assessment was that entry was unlikely in the near future. PX01120 at 002. {

}, despite having owned land to do so for many years, demonstrates that timely entry is unlikely.

Even if entry or expansion occurred, it would not be sufficient. Here, there is no evidence that any GAC or OB expansion or new entry is on the horizon for Lucas County, much less entry sufficient to replicate St. Luke's offerings. If, contrary to their sworn testimony, { } reversed course and built a new hospital as it once considered, it would only be a {

} – hardly sufficient to replace St. Luke's 302-licensed-bed, full-service hospital in the marketplace. PX02068 (Shook (Mercy), Decl.) at ¶ 24 (34-bed medical/surgical hospital without OB among other services). Moreover, the suggestion by Respondent's economic expert that { } constitutes entry sufficient to replace St. Luke's as a provider of GAC and OB services lacks any support in the record. For at least a year, {

}, but { } testified that little progress has been made to achieve this; that the strategy is not "concrete," not "developed" and not "approved;" targets have been missed already; and there is no "current timeline" at all. PX01940 ({ } Dep.) at 28:18-20, 42:08-16; PX01922 ({ }) at 55:04-16, 90:17-92:15. This clearly falls short of the requirements for demonstrating cognizable entry under the *Merger Guidelines*. Merger Guidelines at § 9.3 (requiring entry or expansion to be of the scale and strength of one of the merging firms to be sufficient); *see* RX-71 (Guerin-Calvert, Expert Report) at ¶¶ 117-118.

Based on the evidence, Complaint Counsel's expert concluded that entry would not deter or constrain competitive harm caused by the Acquisition. PX02148 (Town, Expert Report) at ¶¶ 162-169. In short, ProMedica will fail to meet its burden of showing purported entry or expansion does not ameliorate the Acquisition's competition harm.

6. A "Flailing Firm" Defense is Meritless

In light of the facts, ProMedica concedes that St. Luke's was not a failing firm.[31] ProMedica Admissions at 16 (¶ 42). The facts also disprove ProMedica's claim that St. Luke's was a "flailing firm," that is, that St. Luke's financial condition was so compromised that its future competitive significance is overstated by current market shares. *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 506-08 (1974); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 153 (D.D.C. 2004).[32] Although ProMedica positions St. Luke's financial condition as one of the central arguments in defense of the Acquisition, "[f]inancial weakness . . . is probably the weakest ground of all for justifying a merger [and it] certainly *cannot be the primary justification* of a merger."[33] *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1339 (7th Cir. 1981))

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[31] The first prong of the defense is not met here because St. Luke's was not at dire risk of imminent failure. PX01920 (Wakeman (SLH), Dep.) at 141:25-143:05, 145:03-146:19, 150:14-151:01; PX01918 (Oostra (PHS), Dep.) at 45:19-24; PX02147 (Dagen, Supp. Decl.) at ¶¶ 12, 49. On the contrary, St. Luke's CEO, Mr. Wakeman, testified that St. Luke's could have continued to operate for at least { . PX01920 (Wakeman (SLH), Dep.) at 141:25-143:05. The second prong is not met because there were likely alternative partners available: St. Luke's search was cursory, PX01909 (Dewey (SLH), IHT) at 204:06-08, 206:01-13, 212:22-213:10, 219:09-220:11; PX01911 (Wakeman (SLH), IHT) at 192:21-198:11, and, most importantly, at least one other hospital was interested in affiliating with St. Luke's: { }. PX01911 (Wakeman (SLH), IHT) at 227:03-12; PX01916 { }, Dep.) at 69:05-18; PX02064 ({ }, Decl.) at ¶ 8.

[32] Notably, both *General Dynamics* and *Arch Coal* involved the coal industry. This case is markedly different. For example, in contrast to this case, the *Arch Coal* transaction did not reduce the number of competitors (five), the flailing firm's competitive fate was sealed due to its dependence on a finite natural resource (coal reserves) with no chance of recovery, and the *prima facie* statistical case "just barely" raised competitive concerns, which the court found "much weaker" than other FTC cases and "less-than-compelling." 329 F. Supp. 2d 124, 128-30, 155-56.

[33] Additionally, though ProMedica now argues that the Acquisition was motivated by an effort to save a purportedly-flailing St. Luke's, the reality, as acknowledged by ProMedica's CEO, is that ProMedica has been PX01906 (Oostra (PHS), IHT) at 117:24-118:02; PX01918 (Oostra (PHS), Dep.) at 75:15-76:07.

(emphasis added); *see also FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). Courts have strongly disfavored "a weak company defense" because it "would expand the failing company doctrine, a defense which has strict limits." *Warner Commc'ns*, 742 F.2d at 1164 (internal quotations omitted).

Consequently, the flailing firm defense requires a "*substantial showing* that the acquired firm's weakness, *which cannot be resolved by any competitive means*, would cause that firm's market share to reduce to a level that would undermine the government's *prima facie* case." *FTC v. Univ. Health*, 938 F.2d 1206, 1221 (11th Cir. 1991) (emphasis added). Here, to fall below the presumption of competitive harm established in Complaint Counsel's *prima facie* case, Respondent must show that St. Luke's market share was set to imminently drop from 11.5 percent to 2 percent or less in GAC, and from 9.3 percent to 1.3 percent or less in OB. The evidence flatly contradicts this possibility.

In fact, before the Acquisition, St. Luke's was *gaining* significant market share, at ProMedica's expense. PX01235 at 003, 005. Indeed, prior to the Acquisition, ProMedica observed that acquiring St. Luke's "would 'recapture' a substantial portion of recent [market share] losses," half of which had gone to St. Luke's. PX00159 at 005, 012. As such, St. Luke's market shares understate, not overstate, its future competitiveness.

Furthermore, before the Acquisition, St. Luke's financial condition was *improving* – hardly the hallmark of a "flailing firm." In 2008, St. Luke's new CEO, Dan Wakeman, initiated an impressive financial turnaround known as the "Three-Year Plan." St. Luke's marked financial improvement is reflected by numerous objective criteria. S*ee, e.g.,* PX02147 (Dagen, Expert Report) at ¶¶ 49-55; PX01911 (Wakeman (SLH), IHT) at 159:06-162:21; PX01359 at 043; PX01294; PX01295; PX01202. In the period leading up to the Acquisition, investment

returns, inpatient and outpatient revenue and volumes, EBITDA, and market share all increased substantially. PX01920 (Wakeman (SLH), Dep.) at 7:19-8:12, 10:01-11:07, 13:13-15, 14:18-15:13, 30:07-32:25, 49:11-53:07; PX00170 at 007; PX01911 (Wakeman (SLH), IHT) at 159:06-161:25; PX02147 (Dagen, Expert Report) at ¶¶ 13, 16, 49-54, 65. Indeed, patient volumes increased so much that St. Luke's experienced capacity constraints. PX00170 at 001, 006-007; PX01360 at 001; PX01292 at 003; PX01086 ("surge" in OB patients).[34] As of August 31, 2010, the day before consummating the Acquisition, St. Luke's had improved its cash-flow margin from { } in 2009 to { }, and had cash and reserves totaling more than { }. *See* PX02129 at 002; PX01920 (Wakeman (SLH), Dep.) at 51:14-17, 52:14-53:07; PX01273 at 001. Even Respondent's financial expert acknowledges St. Luke's tremendous progress and upward trend in virtually every meaningful parameter. PX01961 (Den Uyl (Respondent's Expert), Dep.) at 213:01-21. 220:04-221:04, 222:01-222:16.

On September 24, 2010, St. Luke's CEO sent a "Monthly Report" to the St. Luke's Board of Directors that contained the very last assessment of St. Luke's performance as an independent hospital. PX00170. Mr. Wakeman advised the Board that:

- "[I]n the past three years . . . [w]e went from an organization with declining activity to near capacity." PX00170 at 007.
- "Our leadership status in quality, service and low cost stayed firmly in place." PX00170 at 007.
- "In the past six months our financial performance has improved significantly. The volume increase and awareness of expense control were key." PX00170 at 007.

[34] The notion that St. Luke's lost money on every patient admitted is contradicted by the evidence. *See* PX01920 (Wakeman (SLH), Dep.) at 140:20-141:24; PX01925 (Guerin-Calvert, Dep.) at 162:19-168:12; *see also* PX02136 (Guerin-Calvert, Supp. Decl.) at ¶¶ 58, 60, 62, 63, Tables 8-11 (showing "direct costs" are variable costs, "indirect costs" are fixed costs, and positive "contribution" results because revenue exceeds direct costs). It is also directly contradicted by St. Luke's CEO, who stated in September 2010, "[A] positive margin confirms that we can run in the black *if activity stays high*." PX00170 at 001 (emphasis added).

- "Inpatient, (up 7.5%) and outpatient, (up 6.1%), activity was running hot all month . . . [I]npatient capacity is limited except for weekends." PX00170 at 001.

- "[A] positive margin confirms that we can run in the black if activity stays high. After much work, we have built our volume up to a point where we can produce an operating margin and keep our variable expenses under control." PX00170 at 001.

- "Even with our increased activity, the patient satisfaction scores improved . . . ." PX00170 at 004.

- "If there was one pillar we attained a high level of success in our strategic plan in the past two years, it would be growth. The hard numbers prove that out, and almost every service." PX000170 at 006.

Prior to the Acquisition, St. Luke's was improving on every important metric. Nonetheless, in the face of this litigation, ProMedica has resorted to claiming that a parade of horribles – unfunded pension liabilities, crediting rating downgrades, inability to invest in IT and meet health care reform requirements, inability to make facility upgrades, and salary and hiring freezes – plagues St. Luke's future growth. The evidence, however, shows that ProMedica's allegations are wholly without merit.

a) *Pension Plan*

Although St. Luke's defined benefit pension plan experienced funding issues when the stock market plummeted during the 2008 financial crisis, those issues have been addressed and ameliorated. First, St. Luke's switched from a defined benefit plan to a defined contribution plan, which mitigates the risk of future funding problems and which St. Luke's expects will reduce its pension costs. PX02147 (Dagen, Expert Report) at ¶ 46; *see also* PX02146 (Brick, Expert Report) at ¶ 14 n.18. Second, in the same way that the stock market decline negatively affected pension funding, the market's significant rebound has improved St. Luke's pension plan funding levels. PX02147 (Dagen, Expert Report) at ¶ 44. In fact, prior to the Acquisition, St. Luke's pension plan funding levels had rebounded to levels on par with major corporations like

Exxon, Mobil, and CBS. PX02147 (Dagen, Expert Report) at ¶ 45. As such, St. Luke's is not at risk of failing to meet pension-payment obligations in the short term and, given its cash on hand, would be able to meet pension-payment obligations for the next decade or longer. PX02147 (Dagen, Expert Report) at ¶ 45.

b) *Bond Debt*

ProMedica claims that St. Luke's bond debt and credit-rating dip would have prevented St. Luke's from accessing capital markets and making necessary investments despite evidence showing neither weighed significantly on St. Luke's competitiveness. With respect to the bond debt, St. Luke's was paying this debt (and other bills) on time, and it had never missed a single bond payment. PX01920 (Wakeman (SLH), Dep.) at 100:13-18. For a hospital of St. Luke's size, its debt load was low. A few months before signing the Joinder Agreement, St. Luke's debt consisted of { }. PX02146 (Brick, Expert Report) at ¶ 13. To put this in perspective, St. Luke's cash-to-debt ratio was approximately { } while the median for Moody's-rated not-for-profit hospitals was 102 percent. PX02146 (Brick, Expert Report) at ¶ 13. Indeed, St. Luke's executives likened this debt to a "car payment" and noted that St. Luke's had sufficient funds to defease the entire debt. PX01920 (Wakeman (SLH), Dep.) at 100:03-25, 107:04-06; PX01204 at 011.

The suggestion that St. Luke's bond-rating dip was competitively crippling is also baseless. Prior to the Acquisition, Moody's rated St. Luke's credit Baa2 (moderate rating). PX02146 (Brick, Expert Report) at ¶ 9. A Baa2 rating is investment-grade. PX02146 (Brick, Expert Report) at ¶ 9. In fact, 28 percent of Moody's-rated hospitals have this rating, and similarly-rated hospitals successfully borrowed $2.6 billion from January 2010 to January 2011. PX02146 (Brick, Expert Report) at ¶ 9. Therefore, St. Luke's was in the same position as other

hospital-borrowers around the country and St. Luke's bond rating would not have prevented it from accessing the debt markets if necessary. PX02146 (Brick, Expert Report) at ¶¶ 9-10. Moreover, St. Luke's financial improvements may well have resulted in a higher credit rating absent the Acquisition. PX02146 (Brick, Expert Report) at ¶ 18.

c) *IT/EMR*

The evidence also contradicts the claim that St. Luke's financial condition prevented it from making IT investments to install hospital electronic medical records ("EMR"). Prior to the Acquisition, St. Luke's already had budgeted { } for IT. PX01908 (Deacon (SLH), IHT) at 189:20-190:09. In fact, St. Luke's had negotiated with a vendor to start a complete overhaul of its IT infrastructure and install an EMR system. PX02147 (Dagen, Expert Report) at ¶ 96. St. Luke's executives testified that the hospital intended to implement an EMR system at the start of 2010, but delayed these plans due to the Acquisition. PX01908 (Deacon (SLH), IHT) at 213:09-12 (discussing PX00058); PX01282 at 001.

d) *Health Care Reform*

The evidence rebuts the claim that healthcare reform mandates and reimbursement changes would have doomed St. Luke's. What will ultimately be required of hospitals under healthcare reform is not yet determined. PX00597 at 026 ("The impact of the Health Care Reform Act on [ProMedica Health System] cannot be predicted at this time, and the uncertainty of that impact is likely to continue for the foreseeable future..."); *see also* PX01920 (Wakeman (SLH), Dep.) at 111:24-112:01, 114:08-09, 114:17-20. Indeed, some federal courts have struck down parts or all of the new law. PX00597 at 027. Moreover, while ProMedica claims that healthcare reform can only hurt St. Luke's, a ProMedica bond disclosure statement refers to the

potential "long-term benefits" of health care reform for hospitals, including "a large pool of newly insured individuals" and a "possible reduction of charity care and bad debt write-offs." PX00597 at 025, 026. Even so, most notably, St. Luke's stated that it was "uniquely positioned for a smooth transition to expected health care reform." PX01072 at 001.

e) *Salary, Wage, and Spending "Freeze"*

The claim that St. Luke's financial recovery should be ignored because it required a temporary freeze on wages, hiring, and spending is inaccurate. During the financial crisis, St. Luke's continued hiring employees (PX01920 (Wakeman (SLH), Dep.) at 22:21-23:09; PX01384; PX01386) and making capital investments in "big ticket" items and equipment (PX01920 (Wakeman (SLH), Dep.) at 18:18-22:12; PX01361; PX00397; PX02147 (Dagen, Expert Report) at ¶ 63). Even to the extent it is accurate, countless organizations and hospitals across the country took these same, unremarkable steps in response to economic pressures in recent years. In fact, ProMedica and Mercy did so. PX01918 (Oostra (PHS), Dep.) at 46:20-50:09; PX00398 at 007; PX00409 at 013; PX01906 (Oostra (PHS), IHT) at 257:12-21; PX02293 at 005; PX01922 (Shook (Mercy), Dep.) at 86:17-88:11. And even with such cost-control measures, St. Luke's maintained high quality and high patient satisfaction while hitting all-time growth records. PX01920 (Wakeman (SLH), Dep.) at 17:15-24, 53:25-54:07, 55:09-18, 90:21-91:02; *see also* PX01018 at 012; PX01072 at 001.

In short, if St. Luke's – in the midst of a significant and verifiable financial turnaround, and with substantial financial resources on hand – fits within the narrow confines of the flailing firm defense, this narrow defense would be expanded virtually without limit.[35]

[35] Any claim that St. Luke's would have cut service lines and employees without the joinder because of St. Luke's financial condition is undermined by ProMedica's plan to cut (outright or by transfer to ProMedica hospitals) services and staff from St. Luke's (PX01918 (Oostra (PHS), Dep.) at 98:05-09, 100:25-101:06, 106:01-11;

VI. DIVESTITURE IS NEEDED TO RESTORE AND PROTECT COMPETITION

Once Complaint Counsel has established a violation of Section 7, "all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). The Commission has broad discretion to select a remedy so long as it bears a "reasonable relation to the unlawful practice found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946). Here, the "principal purpose of relief is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger." *In re: B.F. Goodrich Co.*, 110 F.T.C. 207, 345 (1988) (internal quotation omitted). To that end, "[d]ivestiture is the usual and proper remedy where a violation of Section 7 has been found." *In the Matter of Polypore Int'l, Inc.*, D-9327 (Initial Decision filed March 1, 2010), at *8 (Chappell, J.).

In the Notice of Contemplated Relief, Complaint Counsel has specifically requested: (1) a divestiture or reconstitution of assets to restore St. Luke's as a distinct and viable hospital; (2) assignment, transfer, modification, or termination of health-plan and other contracts to ensure stability and viability of St. Luke's; (3) a prohibition against any future combination of ProMedica and St. Luke's without approval of the Commission; (4) notification to the Commission of any contemplated acquisitions or other combinations by ProMedica or St. Luke's for a period of time; and (5) periodic filing of compliance reports. Until the day the Acquisition was consummated, consumers in Lucas County benefited significantly from having St. Luke's as an independent competitor. Only a divestiture will restore this competition and consumer

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PX00396 at 002-003, 006, 008-010; PX00020 at 011, 015, 017). ProMedica cannot have it both ways. In any event, the evidence shows that St. Luke's would not have cut services and staff absent the joinder.
(PX01018 at 008;
(*see* PX01016; PX01457 at 004-005). Regardless, St. Luke's could have been profitable without cutting services and employees. PX02147 (Dagen, Expert Report) at ¶¶ 65-76.

benefit, ensuring that St. Luke's competes in Lucas County as a viable hospital and offering the same services as it would have absent the Acquisition. The latter three requests will assist the Commission in ensuring that competition is restored in Lucas County and that the divestiture or reconstitution of the St. Luke's assets is conducted in good faith.

Additionally, the remedy may require ProMedica to assist St. Luke's to implement an electronic medical records system, which St. Luke's would have implemented on its own absent the Acquisition. The remedy should also allow St. Luke's an opportunity to hire ProMedica employees without interference, in order to recover employees who have transferred to ProMedica post-Acquisition.

Additional ancillary relief is likely needed and may include, but is not limited to: (1) the replacement of any acquired assets that no longer exist and restoration of services that have been terminated or consolidated to other locations since the Acquisition; (2) the provision of certain services to St. Luke's for a transitional period of time, including services that are currently provided by ProMedica to St. Luke's; (3) assistance to St. Luke's to enter into contracts and to employ certain individuals currently employed by, or associated with, ProMedica; and (4) the distribution of a final order in this matter to certain persons and the periodic filing of compliance reports to the Commission. This requested remedy is "reasonably calculated to eliminate the anti-competitive effects" of the acquisition and is similar to the one affirmed by the Fifth Circuit in *Chicago Bridge & Iron*, 534 F.3d at 442.

VII. CONCLUSION

For the foregoing reasons, which will be supported by evidence at trial, ProMedica's acquisition of St. Luke's violated Section 7 of the Clayton Act. Therefore, we respectfully suggest that necessary and appropriate relief should be entered to prevent consumer harm.

Respectfully submitted,

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