UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of	)	
PROMEDICA HEALTH SYSTEM, INC. a corporation.	)	Docket No. 9346

RESPONDENT'S ANSWERING BRIEF TO
COMPLAINT COUNSEL'S APPEAL

Counsel for Respondent:

McDermott Will & Emery LLP
227 West Monroe Street, Suite 4400
Chicago, IL 60606
Telephone: (312) 372-2000
Facsimile: (312) 984-7700

600 13th Street, NW
Washington, DC 20005
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. COMPLAINT COUNSEL BEAR THE BURDEN OF PROVING A RELEVANT PRODUCT MARKET 2

II. THE ALJ PROPERLY CONCLUDED THAT THE RELEVANT PRODUCT MARKET IN WHICH TO ANALYZE ST. LUKE'S JOINDER WITH PROMEDICA IS GAC SERVICES SOLD TO COMMERCIAL HEALTH PLANS, INCLUDING TERTIARY AND INPATIENT OB SERVICES 2

A. The ALJ Properly Included Tertiary Services in the Relevant Product Market by Focusing on How MCOs Negotiate and Contract With Hospitals 5

B. The ALJ Properly Declined to Carve Out a Separate Market for Inpatient OB Services 7

III. COMPLAINT COUNSEL'S APPROACH TO DEFINING A RELEVANT PRODUCT MARKET IS FLAWED AND INCORRECT AS A MATTER OF LAW AND FACT 10

A. Complaint Counsel's Approach Is Not Based on Demand-Side Factors 10

B. Complaint Counsel's Assertion that the Relevant Product Market Cannot Include Services Not Offered by Some of the Market Participants Is Contrary to Precedent and the Weight of the Evidence 11

1. Complaint Counsel Improperly Seek To Exclude Tertiary Services from the Relevant Product Market 12

2. Complaint Counsel Improperly Seek To Carve Out a Separate Inpatient OB Services Market 15

C. The Case Law upon which Complaint Counsel Relies Is Either Inapposite or Readily Distinguishable 17

CONCLUSION 22

TABLE OF CASES AND AUTHORITIES

Cases

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 2, 14, 21

California v. Sutter Health Sys., 130 F. Supp. 2d 1109 (N.D. Cal. 2001) 3, 4, 8, 12, 13, 15, 16

Defiance Hosp., Inc. v. Fauster-Cameron, Inc., 344 F. Supp. 2d 1097 (N.D. Ohio 2004) 20, 21

Emigra Group, LLC v. Fragomen, 612 F. Supp. 2d 330 (S.D.N.Y. 2009) 19, 20

Forsyth v. Humana, Inc., 114 F.3d 1467 (9th Cir. 1997) 4

FTC v. Butterworth Health Corp., 946 F. Supp. 1285 (W.D. Mich. 1996) 2, 5, 18

FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998) 2, 11

FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26 (D.D.C. 2009) 19

FTC v. Lundbeck, Inc., 650 F.3d 1236 (8th Cir. 2011) 2, 9, 11, 21

FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) 3

FTC v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999) 14, 18

FTC v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991) 3, 4, 12, 13

In re Evanston Nw. Healthcare Corp., No. 9315, 2007 FTC LEXIS 210, at *146-49 (Aug. 6, 2007) 3, 12, 13

In re R.R. Donnelley & Sons Co., No. 9243, 1995 FTC LEXIS 215 (July 21, 1995) 17

Little Rock Cardiology Clinic, P.A. v. Baptist Health, 573 F. Supp. 2d 1125 (E.D. Ark. 2008) 20

United States v. Grinnell Corp., 384 U.S. 563 (1966) 1, 3, 11, 12, 13, 14, 16

United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121 (E.D.N.Y. 1997) 2, 6, 11

United States v. Mercy Health Servs., 902 F. Supp. 968 (N.D. Iowa 1995) 18

United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963) 3

United States v. Rockford Memorial Corp., 898 F.2d 1278 (7th Cir. 1990) 21

Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981) 17

Other Authorities

U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines* (2010) 3, 7, 11, 14

TABLE OF ABBREVIATIONS

The following abbreviations and citation forms are used in this Appeal Brief:

CCAB	Complaint Counsel's Appeal Brief
CCPF	Complaint Counsel's Proposed Findings of Fact
CCBR	Complaint Counsel's Post-Trial Brief
CCRBR	Complaint Counsel's Post-Trial Reply Brief
ID	Initial Decision
IDFOF	Findings of Fact in Initial Decision
PX	Complaint Counsel's Exhibit
RPF	Respondent's Proposed Findings of Fact
RBR	Respondent's Post-Trial Brief
RRBR	Respondent's Post-Trial Reply Brief
RCCPF	Respondent's Replies to Complaint Counsel's Proposed Findings of Fact
RX	Respondent's Exhibit

INTRODUCTION

The Administrative Law Judge ("ALJ") correctly concluded based on applicable precedent and "reliable, probative, and substantial evidence" that the relevant product market in which to analyze the effects of the joinder of St. Luke's Hospital ("St. Luke's") and ProMedica Health System, Inc. ("ProMedica') is general acute care inpatient hospital ("GAC") services, including tertiary and inpatient obstetrical ("OB") services. (ID 137-145). Settled case law and the Commission's own *Horizontal Merger Guidelines* state that product market definition focuses *solely* on demand substitution – that is, analysis of what consumers, here the managed care organizations ("MCOs") that actually negotiate and contract for hospital services on behalf of their members, demand and view as reasonably interchangeable substitutes. The record evidence on that issue shows that MCOs in this market do not differentiate tertiary and inpatient OB services from other services that they contract to purchase from hospitals as part of the GAC cluster.

Complaint Counsel's appeal of the product market determination, by contrast, seeks to turn product market definition upside down by focusing on supply-side factors, namely what services only some of the market participants actually provided to commercially-insured patients. Complaint Counsel do this in a transparent attempt to improperly narrow the GAC services market to just the primary and secondary services St. Luke's provided and to carve out a separate inpatient OB services market, so as to increase St. Luke's apparent competitive significance in their alleged relevant markets. The Supreme Court has made clear in its discussion of cluster markets that the Commission need not resort to Complaint Counsel's backwards approach just because every participant in the proper relevant product market does not offer each and every service in the cluster of GAC services that MCOs demand. *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966). The Commission should, therefore, reject Complaint Counsel's appeal

and affirm the ALJ's properly considered and supported conclusion that the only relevant product market in which to analyze the joinder is GAC services sold to commercial health plans, including tertiary and inpatient OB services.

ARGUMENT

I. Complaint Counsel Bear the Burden of Proving a Relevant Product Market

Complaint Counsel have the burden of proving the relevant product market by a preponderance of the evidence. *FTC v. Lundbeck, Inc.*, 650 F.3d 1236, 1239 (8th Cir. 2011); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 137 (E.D.N.Y. 1997). Complaint Counsel have alleged, and ProMedica agrees, that the proper relevant product market is a cluster market consisting of general acute care inpatient services sold to MCOs. (ID 139). The parties disagree, however, about the inclusion of certain services – tertiary and inpatient OB services – in that relevant product market.

II. The ALJ Properly Concluded that the Relevant Product Market in which to Analyze St. Luke's Joinder with ProMedica Is GAC Services Sold to Commercial Health Plans, including Tertiary and Inpatient OB Services

A relevant product market is properly defined by examining demand-side substitution factors. Specifically, "[t]he outer boundaries of a product market can be identified by the reasonable interchangeability, or cross-elasticity of demand, between the product and possible substitutes for it." *Lundbeck*, 650 F.3d at 1240 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)); *Long Island Jewish*, 983 F. Supp. at 136 (a relevant market "includes potential suppliers who can readily offer consumers a suitable alternative to defendants' services") (citing *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1290 (W.D. Mich. 1996)); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) (explaining that products are reasonably interchangeable if consumers treat them as acceptable substitutes). Similarly, the *Horizontal Merger Guidelines* state that market definition must focus "solely" on

demand-side substitution, rather than supply-side factors. U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 4 (2010).

In some cases, a cluster of products may constitute a relevant product market, even where each individual product is not necessarily interchangeable for another. *See e.g., Grinnell*, 384 U.S. at 573 (central station alarm services including burglar and fire alarm services); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 326 n.5, 356 (1963) ("commercial banking" products and services, such as personal and business loans, checking accounts, and trust administration); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997) (consumable office supplies sold through office superstores). In the hospital context, courts have consistently held that a cluster market comprised of general acute care inpatient services sold to MCOs constitutes a proper relevant market. *See e.g., California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1119 (N.D. Cal. 2001); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211-12 (11th Cir. 1991); *In re Evanston Nw. Healthcare Corp.*, No. 9315, 2007 FTC LEXIS 210, at *146-49 (Aug. 6, 2007).

Courts examining hospital mergers have consistently reached this conclusion because the cluster markets include myriad services for which MCOs and hospitals negotiate and contract at the same time, even though they are not interchangeable. For example, in *Sutter*, the court explained that "[w]hile the treatments offered to patients within this cluster of services are not substitutes for one another (for example, one cannot substitute a tonsillectomy for heart bypass surgery)," courts have nonetheless "consistently recognized the cluster of services comprising acute inpatient services as the appropriate product market in hospital merger cases." 130 F. Supp. 2d at 1119. The Commission reached the same conclusion in *Evanston*, where it determined that a cluster market was appropriate even though it acknowledged that there is no substitutability between different types of acute inpatient hospital services. 2007 FTC LEXIS 210, at *149 n.66.

Moreover, courts have made it clear that the cluster market includes all services for which the MCOs and hospitals in the geographic market typically negotiate as a package, even if some of those services are not offered by a particular hospital. For example, in *Sutter*, the court determined that the relevant product market included not only services provided by the hospitals that offered a full range of general acute inpatient services, but also services available from "niche" hospitals that competed by providing only part of the cluster of services that constituted general acute inpatient care. 130 F. Supp. 2d at 1119 (citing *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1477 (9th Cir. 1997) ("Specialty shops which offer only a limited range of goods are generally considered in the same market with larger, more diverse, 'one-stop shopping' centers.")); (ID 141-142). Similarly, in *University Health*, the court of appeals upheld the district court's definition of the relevant product market as inpatient services by acute care hospitals, even though the two merging hospitals did not compete in every acute-care service. 938 F.2d at 1211. The court further explained that it did not appear that the district court intended to limit its market definition solely to the 19 major diagnostic categories in which the merging hospitals offered overlapping services. 938 F.2d at 1211 & n.11; (ID 142).

The ALJ properly applied that established caselaw to the facts of this case to determine that the relevant product market consists of GAC services, including tertiary and inpatient OB services, sold to MCOs. (ID 145). In doing so, the ALJ correctly focused solely on demand-side substitution factors; in other words, he focused on what MCOs demanded in their negotiations with hospitals, rather than whether hospitals provided each and every service. (ID 137-138 ("[t]he relevant market is defined by identifying competitors who could provide defendants' customers with alternate sources for defendants' services in the event defendants, as the merged

entity, attempted to exercise their market power by raising prices above competitive levels") (citing *Butterworth*, 946 F. Supp. at 1290)).

A. The ALJ Properly Included Tertiary Services in the Relevant Product Market by Focusing on How MCOs Negotiate and Contract With Hospitals

To examine demand-side substitution, the ALJ correctly considered the demands of the relevant consumers, MCOs, when they contract with hospitals and he expressly concluded that MCOs contract for primary, secondary, and tertiary services together. (ID 142-143 ("MCOs contract for a broad array of primary, secondary, and tertiary inpatient services from hospitals in a single negotiated transaction")). Indeed, MCOs, not employers or patients, negotiate and contract for GAC services from hospitals. (IDFOF 234, 248). More importantly, the evidence shows that MCOs negotiate with and purchase from hospitals an array of inpatient hospital services including primary, secondary, and tertiary services. (ID 142-143; IDFOF 304; RPF 1010, 1020). Executives from leading MCOs in Lucas County, including Aetna, Anthem Blue Cross Blue Shield ("Anthem"), Humana, and Medical Mutual of Ohio ("MMO"), all testified that when they negotiate a hospital provider contract they negotiate reimbursement rates for all types of inpatient services at the same time. (*See e.g.*, Radzialowski, Tr. 750-751; Pugliese, Tr. 1550; McGinty, Tr. 1240; Pirc, Tr. 2287). Not surprisingly, the MCOs' hospital provider contracts contain reimbursement rates for all types of inpatient services, even services that a given hospital may not provide. (*See e.g.*, PX02385 at 032-033, *in camera*; RX-305 at 000020-000022, *in camera*; RX-329 at 000005, *in camera*; RX-1785 at 000004-000006, *in camera*; RX-1884 at 000003, *in camera*; RX-1888 at 000003, *in camera*; Radzialowski, Tr. 751).

The ALJ also properly concluded that the evidence showed that no MCO contracted for only that subset of services that St. Luke's and ProMedica both provided (i.e., the product market that Complaint Counsel propose here). (*Compare* ID 143 ("To narrow the product market to

only those services that both St. Luke's and ProMedica actually provide is not what MCOs demand or contract to purchase") *with Long Island Jewish Med. Ctr.*, 983 F. Supp. at 140 (explaining that product market definition must take into consideration economic realities and "the dynamics of the marketplace")). As the ALJ found, limiting the product market to only those services that both St. Luke's and ProMedica actually provide is *not* what MCOs demand or contract to purchase from ProMedica, Mercy, or UTMC. (ID 143). In other words, Complaint Counsel advanced a relevant product market definition that did not comport with the evidence in the record about what MCOs actually purchase to serve their members' needs. Indeed, Complaint Counsel can point to no evidence in the record that shows that MCOs contract for only "the primary and secondary GAC services that St. Luke's provided." (RX-71(A) at 000017, *in camera*).

The same market realities that led the ALJ to include tertiary services also show why the ALJ was correct to exclude outpatient and quaternary services. Contrary to Complaint Counsel's suggestion, the exclusion of those services from the GAC market does not reveal an inconsistency in the ALJ's product market definition. Rather, commercial realities show that MCOs negotiate and contract for those services differently than they do for other GAC services. As the ALJ correctly found, the prices that MCOs negotiate for outpatient and quaternary services are "distinct from the prices for GAC inpatient services." (ID 143). For example, reimbursement methods for inpatient and outpatient services generally differ, with MCOs reimbursing hospitals for inpatient services using per diem and DRG rates (RPF 569-576), and fee-for-service rates for outpatient services (RPF 581). (*See also* Wachsman, Tr. 4900) ("then on the outpatient side there's a whole another set of reimbursement methodologies that we talk about"). MCOs and hospitals frequently exclude quaternary services altogether from their

contracts for GAC services or they contract for them separately, unlike tertiary services which are included in MCOs' contracts with hospitals along with other GAC services. (Guerin-Calvert, Tr. 7191-7192; ID 142-143). Therefore, commercial realities demonstrate that tertiary services are properly included in the relevant product market, while outpatient and quaternary services are not.

B. The ALJ Properly Declined to Carve Out a Separate Market for Inpatient OB Services

The ALJ also appropriately concluded that inpatient OB services are part of the GAC cluster. (ID 143-145). The record evidence shows that negotiations between hospital providers and MCOs for inpatient services cover the full range of services that a MCO's members may need, including inpatient OB services. (IDFOF 315, ID 144). Contrary to Complaint Counsel's suggestion, ProMedica does not "separately contract for OB services" (CCAB 37), and no MCOs testified at trial that they negotiated separately for inpatient OB services; rather, they testified that they negotiate for the full scope of inpatient services. (IDFOF 315, ID 144).

Moreover, to delineate a separate inpatient OB services market in accordance with the *Horizontal Merger Guidelines*, Complaint Counsel was required to offer evidence that hospitals can or do price discriminate for inpatient OB services. *Horizontal Merger Guidelines*, § 4.1.4. ("*If* a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a [small but significant and non-transitory increase in price].") (emphasis added). But, as the ALJ recognized, the record lacks any evidence of such price discrimination. (IDFOF 319 ("Hospitals have not price-discriminated for inpatient OB services and there is no basis on which hospitals could price-discriminate for inpatient OB services.")). Indeed, the record reflects that for high-risk inpatient

OB services, prices are competitive, even though only two hospitals – The Toledo Hospital (ProMedica) and St. Vincent Hospital (Mercy) – offer them. (RPF 1022). The record also reflects that when MCOs had only one provider of high-risk OB services in their networks, there was no evidence that the hospitals could price discriminate, charge higher prices or that prices were any different than what cost, quality and competition would have dictated. (RPF 1024). In their appeal, Complaint Counsel do not – because they cannot – point to any evidence that hospitals can price discriminate for inpatient OB services. The reason Complaint Counsel's assertion that inpatient OB services constitute a separate market finds no support in the record is that inpatient OB services are provided in conjunction with other services, and the terms and conditions on which they are negotiated by MCOs and hospitals are very similar. (IDFOF 320, ID 144-145). Put another way, MCOs testified at trial that they negotiate for the full scope of inpatient services, including inpatient OB services. (IDFOF 315, ID 144). There is no record evidence to the contrary.

The ALJ also correctly rejected the assertion that, because no other inpatient hospital services can substitute for them, inpatient OB services must be a separate market. (ID 144). That argument would apply equally to inpatient cardiac surgery, inpatient knee surgery and inpatient gastro-intestinal services, yet disentangling each of these non-interchangeable services would totally defeat the purpose of alleging that all general acute care inpatient services constitute a "cluster" market and "would be contrary to the logic upon which the inpatient services 'cluster market' rests." (ID 144, (citing *Sutter*, 130 F. Supp. 2d at 1119 (explaining that "[w]hile the treatments offered to patients within this cluster of services are not substitutes for one another (for example, one cannot substitute a tonsillectomy for heart bypass surgery), the services and resources that hospitals provide tend to be similar across a wide range of primary,

secondary, and tertiary inpatient services. Accordingly, courts have consistently recognized the cluster of services comprising acute inpatient services as the appropriate product market in hospital merger cases.")).[1] Indeed, even Complaint Counsel concede that such an approach would be inappropriate. (ID 144).

Finally, the ALJ correctly rejected Complaint Counsel's contention that "industry recognition" supports their separate inpatient OB services product market definition, because the record evidence failed to establish that inpatient OB services are somehow unique and should be treated differently from any other general acute care inpatient services. (ID 144). Complaint Counsel argued that inpatient OB services comprise their own separate relevant market because market participants separately track market shares for general acute care inpatient services and inpatient OB services. (CCAB 18, 35). However, this "practical indicia" does not definitively support a separate market for inpatient OB services, because St. Luke's and ProMedica analyze their market shares for a variety of services, of which inpatient OB services is just one example. (IDFOF 314, Response to RFA at ¶ 5; PX01077 at 004 (also tracking cardiac cases); PX00009 at 022 (tracking heart, orthopedics, and cancer services). Therefore, this 'industry recognition" is not dispositive when defining a relevant product market. *See Lundbeck*, 650 F.3d at 1242. The intellectual inconsistency of Complaint Counsel's position is further exposed by their failure to segregate the other services for which St. Luke's and ProMedica separately track shares from their general acute care inpatient services market.

In sum, the ALJ's product market definition was consistent with all of the prior hospital merger cases that have held that a relevant product market in which to analyze the competitive

[1] If Complaint Counsel's position as to inpatient OB services were truly consistent with its position that services that St. Luke's does not provide should be excluded from the relevant product market, then not one, but *two* separate inpatient OB markets must exist, because it is undisputed that St. Luke's does not offer the high-risk inpatient OB services that both ProMedica and Mercy do. (RPF 122).

effects of a hospital merger, like the joinder of ProMedica and St. Luke's, is general acute care inpatient services, including inpatient OB services. The ALJ correctly concluded that Complaint Counsel have failed to prove that a separate relevant product market exists for inpatient OB services. Accordingly, the Commission should affirm the ALJ's finding that inpatient OB services do not constitute a separate relevant market.

III. Complaint Counsel's Approach To Defining a Relevant Product Market Is Flawed and Incorrect as a Matter of Law and Fact

In contrast to the ALJ's straightforward application of settled precedent, Complaint Counsel ask the Commission in their appeal to adopt an approach to product market definition that is flawed and incorrect both as a matter of law and fact. First, despite well-settled rules resting product market definition on demand-side analysis, Complaint Counsel inexplicably asks the Commission to adopt a supply-side analysis here. Second, Complaint Counsel's assertion that the relevant product market cannot include services not offered by some of the market participants flies directly in the face of Supreme Court precedent and the weight of the evidence. Third, the case law on which Complaint Counsel rely to exclude both tertiary and inpatient OB services from the proper relevant product market is either inapposite or distinguishable.

A. Complaint Counsel's Approach Is Not Based on Demand-Side Factors

Complaint Counsel's attack on the ALJ's product market definition advances the novel proposition that defining a relevant product market involving a cluster of services turns on identifying the lowest common denominator of services *supplied* by one of the merging parties, here the "primary and secondary GAC services provided by St. Luke's," and ignoring all other offerings from other market participants. (CCAB at 24-32). Here, even though Complaint Counsel facially agree that "product market analysis must concentrate on demand substitution factors," (CCAB at 30), they would have the Commission ignore commercial reality. They ask

the Commission to overlook the fact that the proper consumers to consider – MCOs – negotiate and contract for the primary, secondary, and tertiary services that hospitals in Lucas County offer, not just for the primary and secondary services that St. Luke's provides to commercially-insured patients. Complaint Counsel's position is contrary to the case law and the *Horizontal Merger Guidelines* which hold that proper product market definition depends solely on analyzing what consumers *demand*, not what competitors *supply*. *Lundbeck*, 650 F.3d at 1240; *Long Island Jewish*, 983 F. Supp. at 136; *Cardinal Health*, 12 F. Supp. 2d at 46; *Horizontal Merger Guidelines*, § 4.

B. Complaint Counsel's Assertion that the Relevant Product Market Cannot Include Services Not Offered by Some of the Market Participants Is Contrary to Precedent and the Weight of the Evidence

Complaint Counsel's novel attempt to artificially limit the relevant product market to just the "primary and secondary GAC services provided by St. Luke's in competition with ProMedica" and to carve out a separate market for just inpatient OB services is contrary to the law and the facts. (CCAB at 32). Indeed, the Supreme Court has found cluster markets broad enough to include sellers that did not provide each and every service within the cluster "where that combination reflects commercial realities." *Grinnell*, 384 U.S. at 572 (holding that the market for central alarm station services constituted a relevant market even though not all firms offered the same menu of alarm services). Complaint Counsel would nevertheless have the Commission exclude from the relevant product market any service St. Luke's did not actually provide to a commercially-insured patient and find a separate inpatient OB services market. (CCAB at 32). But that is not how the courts and the Commission have defined cluster markets in the past.

1. Complaint Counsel Improperly Seek To Exclude Tertiary Services from the Relevant Product Market

Courts have long examined the cluster of services consumers have demanded and included those services within the cluster market even though not all market participants provide each and every service. *Grinnell*, 384 U.S. at 572. That is true in the hospital merger context as well. *See Sutter*, 130 F. Supp. 2d at 1119; *Univ. Health*, 938 F.2d at 1211 n.11 (upholding market definition that was not limited solely to the 19 major diagnostic categories in which the merging hospitals offered overlapping services).

Moreover, Complaint Counsel's position in this case – that the product market definition should include only overlapping services – is inconsistent with their position in the last fully litigated hospital merger challenge in *Evanston*. There, Complaint Counsel alleged that the relevant product market was "general acute-care hospital services, including primary, secondary, *and tertiary* services, sold to MCOs." *Evanston*, 2007 FTC LEXIS 210, at *146 (emphasis added); (ID 142). Complaint Counsel alleged this even though the smaller acquired hospital there, similar to St. Luke's here, did not provide the tertiary services provided by the acquiring hospital. *Evanston*, 2007 FTC LEXIS 210, at *197. For those reasons, Complaint Counsel's rationale for excluding tertiary services from the relevant product market – because not all Lucas County hospitals offer them – is legally incorrect.[2] (CCAB at 29). Thus, Complaint Counsel's argument that not all Lucas County hospitals provide tertiary services (CCAB at 29) should not impede the definition of a cluster market that includes tertiary services and hospitals with both a

[2] Complaint Counsel's position on appeal is also contrary to the general acute-care inpatient services market it alleged in the Complaint, which makes no mention of limiting the services in the market to *only* those that St. Luke's and ProMedica actually provided to commercially-insured patients. (Complaint ¶¶ 12-13).

full-range and more limited service offerings.[3] *Grinnell*, 384 U.S. at 572 n.6; *Univ. Health*, 938 F.2d. at 1211 n.11; *Sutter*, 130 F. Supp. 2d at 1119; *Evanston*, 2007 LEXIS 210, at *146, *197.

Complaint Counsel also improperly rely upon the purported preferences of patients as opposed to the actions of the MCOs to support their gerrymandered market definition. (CCAB 29-30). The only evidence in the record pertinent to patients is the testimony of the employers who offer employees health insurance benefits. And that testimony only reinforces that MCOs are the proper consumers to consider when defining the relevant market. Employers do not negotiate with hospitals; they rely on brokers or MCOs for that, and the employers uniformly testified that they did not know what hospitals their employees used or for what services. (IDFOF 248-249, 258; Neal, Tr. 2151, 2155; Buehrer, Tr. 3088-3089; Lortz, Tr. 1738). Patients are a further step removed from the negotiations between a hospital and an MCO and, therefore, lack any foundation to answer the question of what services fall within the relevant product market. (IDFOF 248-249).

The overly restrictive nature of Complaint Counsel's proffered product market definition is also revealed by their attempt to limit the relevant product market not just to those GAC services St. Luke's makes *available* to commercially-insured patients, but only to those GAC services that St. Luke's and ProMedica both actually *provided* to commercially-insured patients. (CCAB at 32) ("the proper relevant market in which to analyze this transaction is inpatient general acute-care services sold to commercial health plans, which consists of those primary and

[3] The hollowness of Complaint Counsel's position that the relevant product market should exclude tertiary services is further revealed by the fact that Complaint Counsel never explicitly define what constitutes a tertiary service. They avoid doing so perhaps because the record evidence demonstrates that no bright line exists dividing tertiary services from primary and secondary services. (*See e.g.*, IDFOF 20 ("[t]here is a continuum of different levels of intensity of inpatient hospitals services"); IDFOF 26 ("the dividing line between the various levels of service is not precisely defined and may even differ from patient to patient, depending on the patient's health and medical history. What is a primary or secondary level procedure for one person may be a tertiary level procedure for another patient.")). Complaint Counsel, therefore, fail to provide the Commission with any principled means to define the tertiary services they seek to exclude in this case or may seek to exclude in any future case.

secondary GAC services St. Luke's *provided* in competition with ProMedica.") (emphasis added). This means that Complaint Counsel would exclude from the relevant product market competition from ProMedica, Mercy, and UTMC for GAC services that St. Luke's did not provide to commercially-insured patients, but could have (e.g., GAC services St. Luke's provided to patients with either no insurance or government insurance, but not to commercially-insured patients). (RX-71(A) at 000017-000018, *in camera*). As the ALJ correctly found, the evidence in this case "establishes that MCOs contract for a broad array of primary, secondary, and tertiary services from hospitals together in a single negotiated transaction."[4] (ID 142-143). It is this commercial reality of what consumers demand that courts have held drives the market definition inquiry. *Grinnell*, 384 U.S. at 572.

Likewise, Complaint Counsel's attempt to justify the exclusion of tertiary services from the relevant product market because the geographic market for them may be broader than for other GAC services (CCAB at 29) improperly conflates product market definition (which focuses solely on what services consumers demand and consider substitutes, *Brown Shoe*, 370 U.S. at 325) with geographic market definition (which identifies the area of competition and what firms supply the relevant product or service, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999) ("A properly defined geographic market includes potential suppliers who can readily offer consumers a suitable alternative to the defendant's services.")). That patients may be willing to travel further to receive tertiary services (CCAB at 29-30) does not answer the question of whether MCOs demand tertiary services separately from other GAC

[4] Complaint Counsel's approach is also wrong as a matter of law because the *Horizontal Merger Guidelines* would treat St. Luke's as a "rapid entrant" and, hence, a market participant for the services that it provided to non-commercially insured patients and did not, but could, provide to commercially-insured patients. *Horizontal Merger Guidelines*, § 5.1. Moreover, Complaint Counsel's position is both factually inconsistent, because St. Luke's does perform some tertiary services, and contrary to the work of Complaint Counsel's own economic expert, who included some tertiary services in his market analysis. (IDFOF 74; Guerin-Calvert, Tr. 7212).

services when they negotiate and contract with hospitals. Here, however, the record evidence shows that MCOs negotiate and contract for tertiary services together with primary and secondary GAC services. (IDFOF 304; RX-71(A) at 000017, *in camera*). Therefore, it is inappropriate to make a geographic market, the area "to which consumers can practically turn for alternative sources of the product," the determinant of what *products or services* MCOs want and view as substitutes. *Sutter*, 130 F. Supp. 2d at 1120.

Complaint Counsel's argument that including tertiary services in the relevant market is at odds with excluding both outpatient and quaternary services (CCAB at 28-29, 31) is similarly unavailing because commercial realities establish that MCOs negotiate and contract for those services differently than they do for other GAC services. (ID 142-143; RPF 569-576, 581; Guerin-Calvert, Tr. 7191-7192; *supra* at pp. 6-7). For these reasons, the Commission should reject Complaint Counsel's appeal as to the exclusion of tertiary services from the relevant product market.

2. Complaint Counsel Improperly Seek To Carve Out a Separate Inpatient OB Services Market

Complaint Counsel's position on appeal that inpatient OB services constitute a separate relevant product market also lacks legal and evidentiary support. (ID 144). No hospital merger case has recognized inpatient OB services as a separate relevant product market, and Complaint Counsel have not cited a single case in which the court defined an inpatient hospital OB services market separate from other GAC services. Indeed, inpatient OB services have been included in the general acute care inpatient services market in hospital merger cases (ID 143, 145), and Complaint Counsel have presented no reason to abandon that precedent in this case.

Complaint Counsel principally argues that inpatient OB services comprise a separate relevant market because the competitive conditions under which they are provided differ from

the competitive conditions for other GAC services (CCAB 18, 33) and that two of the eight Lucas County hospitals do not provide them. (CCAB 33). Specifically, Complaint Counsel contend that UTMC's and St. Anne's lack of OB services affects the competitive environment for GAC services in Lucas County. (CCAB 33). Complaint Counsel's justification for defining a separate inpatient OB services product market, however, is neither persuasive nor intellectually honest. Several factors compel that conclusion.

First, the fact that every hospital in Lucas County does not provide all of the services that Complaint Counsel include in their general acute care inpatient services market does not preclude the inclusion of those services in the relevant market. *See Grinnell*, 384 U.S. at 573; *Sutter*, 130 F. Supp. 2d at 1119. To the contrary, not all Lucas County hospitals provide all the services Complaint Counsel include in their GAC services market, but Complaint Counsel do not seek to carve out those services from the broader market. (Guerin-Calvert, Tr. 7234-7236; Town, Tr. 3966-3967; RX-2073).

Second, the real reason that Complaint Counsel want to define a separate product market for inpatient OB services is to proclaim that the joinder represents a "merger to duopoly." But, the undisputed testimony in this case has established that St. Luke's provides only low-risk OB services; and with respect to higher-risk or complex inpatient OB services, there have always been and continue to be only two hospital providers – ProMedica and Mercy – and the joinder does not change that. (RPF 1022).

Third, Complaint Counsel cite no evidence indicating that UTMC's and St. Anne's lack of inpatient OB services has had any effect on MCOs' price negotiations for the bundle of services provided by hospitals offering inpatient OB services. Indeed, the ALJ found "no evidence that hospitals can price-discriminate for inpatient OB services because inpatient OB

services are provided in conjunction with other services, and the terms and conditions on which they are negotiated are very similar." (ID 144, IDFOF 320).

Finally, Complaint Counsel's position is contrary to their own economic expert's analysis. Professor Town found the allegedly different competitive conditions between inpatient OB services and general acute care services to be so irrelevant that he performed his competitive effects analysis across all services, combining inpatient OB services with all other general acute care services. (Town, Tr. 4294 (Q: "Well, in fact, you do not analyze the impact of the joinder on price on that market separately – the OB services market separately, do you?" A: "In the willingness to pay analysis, I group them. So no, I do not separate that analysis in the willingness-to-pay work.")). Professor Town's inclusion of OB services in his price analysis, "willingness to pay" model and merger simulation analysis of general acute care inpatient services is inconsistent with and undermines Complaint Counsel's position that inpatient OB services constitute a separate relevant market.

C. The Case Law upon which Complaint Counsel Relies Is Either Inapposite or Readily Distinguishable

The cases that Complaint Counsel cited in their Appeal Brief are either inapposite or readily distinguishable. As an initial matter, Complaint Counsel improperly rely upon Judge Katz's decision in the preliminary injunction proceeding related to this case. (CCAB 14-15, 25). That is inappropriate because, as the Commission itself has held, a court's decision on a motion for preliminary injunction has no precedential effect on the administrative proceeding addressing the merits. *In re R.R. Donnelley & Sons Co.*, No. 9243, 1995 FTC LEXIS 215, at *17 (July 21, 1995) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394-95 (1981)).

The other cases that Complaint Counsel cite as support for excluding tertiary services from the relevant product market are readily distinguishable because they excluded tertiary

services based on agreement by the parties. (CCAB 25-26); *see FTC v. Tenet Healthcare Corp.*, 17 F. Supp. 2d 937, 942 (E.D. Mo. 1998) ("The parties agree that the product market is general acute care in-patient hospital services, including primary and secondary services, but not including tertiary or quaternary care hospital services."), *rev'd on other grounds*, 186 F.3d 1045 (8th Cir. 1999); *United States v. Mercy Health Servs.*, 902 F. Supp. 968, 976 (N.D. Iowa 1995) ("The parties have agreed that the relevant product market is acute care inpatient services offered by both Mercy and Finley. This definition excludes inpatient psychiatric care, substance abuse treatment, rehabilitation services, and open heart surgery."), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997) (transaction abandoned prior to decision on appeal). Moreover, in *Mercy Health*, neither hospital offered tertiary care. *Id.* at 996. Here, St. Luke's does offer some tertiary services, though not as many as other competitors (IDFOF 74) and, of course, the parties do contest the inclusion of tertiary services in the relevant market.

The *Butterworth* case is also distinguishable because the parties there contested the inclusion of outpatient services in the general acute care cluster market, not the inclusion of tertiary services. *FTC v. Butterworth*, 946 F. Supp. at 1290-91. The parties here agree that outpatient services are appropriately excluded from the relevant market. (IDFOF 306). That is because MCOs and hospitals negotiate and contract for outpatient services separately from inpatient services. (*See e.g.*, PX02385 at 032-033, *in camera*; RX-329 at 000005, *in camera*; RX-1785 at 000004-000006, *in camera*; RPF 581; ID 143; Wachsman, Tr. 4900). The record here also demonstrates that MCOs reimburse hospitals for outpatient services using different methodologies than they do for inpatient services. (RPF 569-576, 581; Wachsman, Tr. 4900). Complaint Counsel's selective citation of *Butterworth*, therefore, is misleading. (CCAB 25).

Similarly, *CCC Holdings* does not buttress Complaint Counsel's position (CCAB 24) because *CCC Holdings* was neither a hospital merger nor a cluster market case. *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009). Rather, *CCC Holdings* involved software products used to estimate the cost of automobile collision repair or the value of replacement for automotive insurance companies and repair shops. *Id.* at 30. The issue in *CCC Holdings* was whether total loss valuation software sold by three major competitors represented a separate market from other methods of total loss valuation. *Id.* at 40. That required the court to analyze what products and methodologies customers treated as appropriate substitutes for valuing automobile damage. *Id.* at 42-43. Here, on the other hand, the parties do not contest whether an appendectomy is an appropriate substitute for knee surgery. The issue, rather, is what services are appropriate to include in a cluster market comprised of general acute care inpatient services, a question the court in *CCC Holdings* did not consider. *CCC Holdings*, therefore, is distinguishable and irrelevant to this case.

Complaint Counsel's legal reasoning as to a separate inpatient OB market also has no support in the case law, and their attempt to persuade the Commission otherwise is misguided. Complaint Counsel claim that prior cases establish that "it is appropriate to find separate, narrower relevant service markets than GAC services where competitive conditions differ for those particular services" (CCAB 32). However, the cases Complaint Counsel cite are inapposite and distinguishable, and none can be read to support the assertion that inpatient OB services should be excluded from the general acute care services cluster market.

Emigra Group, LLC v. Fragomen, 612 F. Supp. 2d 330 (S.D.N.Y. 2009), concerned the alleged monopolization of a market for immigration services. While *Emigra* cited, by way of illustration, the logic behind the cluster market approach employed in the context of hospital

cases, cluster market analysis was not applicable in *Emigra* because the case involved a dispute over one competitor's hiring of another competitor's employee that was simply "dressed in the raiment of an antitrust case." *Id.* at 337. In that case, the plaintiff attempted to define the relevant market as a broad array of immigration services available to customers worldwide, a definition that was so broad and unsupported by admissible evidence that the court found that the plaintiff failed to properly define a relevant market. *Id.* at 359.

Little Rock Cardiology Clinic, P.A. v. Baptist Health, 573 F. Supp. 2d 1125 (E.D. Ark. 2008) *aff'd*, 591 F.3d 591 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 3506 (2010), which also did not involve a hospital merger, is similarly distinguishable. In that case, the plaintiffs complained of an alleged exclusion from a provider network and claimed that inpatient services offered by a hospital and services offered by a cardiologist to hospitalized cardiology patients were in the same product market for the purposes of antitrust analysis. *Id.* at 1131, 1143. The court rejected the plaintiffs' alleged relevant product market because the services provided by the cardiologists and the hospital were complements, not substitutes for one another. *Id.* at 1143-1144.

Defiance Hosp., Inc. v. Fauster-Cameron, Inc., 344 F. Supp. 2d 1097 (N.D. Ohio 2004), which is also not a hospital merger case, is inapposite as well. In *Defiance*, the plaintiff hospital alleged that the defendant physician practice monopolized and attempted to monopolize the market for anesthesia services and defined the product market as inpatient and outpatient anesthesia services. *Id.* at 1109. In response, the defendant claimed that the relevant market included all physician services. *Id.* The court rejected the defendants' proffered definition of the relevant market because from the hospital's perspective no other services were reasonably interchangeable with anesthesia services, which are provided only by anesthesiologists and other professionals, such as Certified Registered Nurse Anesthetists who compete with

anesthesiologists. *Id.* at 1104-05, 1109. The case nowhere considered the role of MCOs, and therefore is not instructive here, because the case turned on what services the plaintiff hospital could substitute for the defendant's anesthesia services, not how MCOs negotiated and contracted for them. In other words, the proper "consumer" at issue in *Defiance* was a hospital, not an MCO.

Complaint Counsel's contention that *Brown Shoe's* "practical indicia" of a potential market, such as "industry or public recognition," "the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors," support a finding of a separate inpatient OB services is also misguided. (CCAB 18) (citing *Brown Shoe*, 370 U.S. at 325). While those factors may have general relevance to product market definition, modern cases have held that *Brown Shoe*'s "practical indicia" are not dispositive when defining a relevant market. *See Lundbeck*, 650 F.3d at 1239. Rather, what matters most is whether the products or services at issue are viewed as reasonably interchangeable by the relevant consumers. *Id.*

Finally, Complaint Counsel's citation to *United States v. Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir. 1990), misses the mark, as that case states that *inpatient* and *outpatient* services are not necessarily in the same product market, an issue not disputed in the present case. ("Hospitals can and do distinguish between the patient who wants a coronary bypass and the patient who wants a wart removed from his foot; these services are not in the same product market merely because they have a common provider."). *Id.* at 1284.

Accordingly, Complaint Counsel lack legal support for narrowing the relevant product market just to the "primary and secondary services St. Luke's provided in competition with ProMedica" and for carving out a separate inpatient OB services market. This is because the

authorities they cite are either inapposite or readily distinguishable from the present case where the commercial realities, reflected by the evidence in the record, support the ALJ's finding that the relevant market is GAC services sold to commercial health plans, including both tertiary and inpatient OB services.

CONCLUSION

Complaint Counsel's attempt to define a cluster market based on supply-side factors, namely the lowest common denominator of services provided by one of the market participants, is contrary to the case law and the *Merger Guidelines* and refuted by the record evidence which shows that the relevant consumers, MCOs, negotiate and contract for all general acute care inpatient hospital services, including tertiary and inpatient OB services. The Commission, therefore, should reject Complaint Counsel's appeal as to the relevant product market definition and affirm the ALJ's conclusion, which was supported by "reliable, probative and substantial evidence," that the proper relevant market in which to analyze the competitive effects of the ProMedica/St. Luke's joinder is general acute care inpatient hospital services sold to commercial health plans, including tertiary and inpatient OB services.