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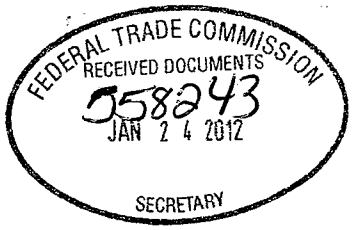

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

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Dated: January 24, 2012

RECORD REFERENCES

Answer – Respondent ProMedica Health Sys., Inc.'s Answer to [Part III] Complaint

CCAB – Complaint Counsel's Appeal Brief

CCPFF – Complaint Counsel's Proposed Findings of Fact

CCPTB – Complaint Counsel's Post-Trial Brief

CCPTRB – Complaint Counsel's Post-Trial Reply Brief

Decl. – Declaration

ID – Initial Decision

IDA – Initial Decision Analysis

IDFF – Initial Decision Findings of Fact

IHT – Investigational Hearing Transcript

JSLF – Joint Stipulations of Law and Fact (JX00002A)

JX – Joint Exhibit

PX – Complaint Counsel Exhibit

RAB – Respondent's Appeal Brief

Resp't Admissions – Respondent ProMedica Health System, Inc.'s Response to Complain Counsel's Request for Admission

RPTB – Respondent ProMedica Health Sys., Inc.'s Pre-Trial Brief

RPTRB – Respondent ProMedica Health Sys., Inc.'s Post-Trial Reply Brief

RX – Respondent Exhibit

Tr. – Trial Transcript

SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES

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INTRODUCTION

Based squarely on applicable law and the evidence in this case, there are two relevant markets: (1) inpatient general acute-care ("GAC") services, which do not include tertiary services that St. Luke's does not provide in competition with ProMedica, and (2) obstetrics ("OB") services. Without adequate legal or factual support for its contrary positions, Respondent's Answering Brief reveals a strategy of repeating hollow and inaccurate arguments about the product market hoping repetition will make Respondent's arguments valid. It does not.

ARGUMENT

I. THE GAC CLUSTER MARKET PROPERLY CONSISTS OF OVERLAPPING INPATIENT GENERAL ACUTE-CARE SERVICES

One relevant service market consists of the overlapping GAC services over which ProMedica and St. Luke's compete. Tertiary services are properly excluded for two reasons: (1) St. Luke's generally does not provide these services, so the Acquisition causes no lessening of competition with respect to them, and (2) they are offered and consumed under different competitive conditions, so the competitive-effects analysis for tertiary services differs materially from that for the GAC cluster market. Indeed, in its Answer to the Part III Complaint and Opening Argument, Respondent admitted tertiary services, like outpatient and quaternary services, properly are excluded from the relevant market. Answer ¶ 13; Marx Opening Argument, Tr. 99. At trial and now, however, Respondent reverses course and argues that tertiary services should be included in the GAC cluster market, despite the analytical inconsistency of excluding outpatient and quaternary services. Respondent's flip-flop is contradicted by applicable legal authority, evidence, and pure logic.

A. Market Definition Begins With the Competing Individual Services of the Merging Firms

Fundamentally, product-market definition begins by identifying the overlapping services over which the merging parties compete. *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009) (the relevant market "identifies the product[s] and services with which the defendants' products compete."); *Merger Guidelines* § 4.1 ("When a product sold by one merging firm (Product A) competes against one or more products sold by the other merging firm, the Agencies define a relevant product market around Product A to evaluate the importance of that competition."). In other words, a prerequisite to finding a relevant product market is an actual overlap in products that the parties offer in competition with one another.

Once an overlap is found, the relevant service market is "built up" around each individual overlapping service line. In other words, service-by-service, the analysis proceeds to determine which, if any, other services are reasonably interchangeable with or substitutable for the merging parties' overlapping services. *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962); *CCC Holdings*, 605 F. Supp. 2d at 38; *In re Polypore Int'l, Inc.*, No. 9327, 2010 FTC LEXIS 97, at *30-31; 2010-2 Trade Cas. (CCH) ¶ 77,267 (Dec. 13, 2010) (Comm'n Dec.). Many courts use the *Merger Guidelines'* hypothetical-monopolist test as an analytical tool to evaluate the boundaries of the relevant market.

This analytical process repeats for each set of overlapping products offered by the merging parties. *See FTC v. Bass Bros. Enters., Inc.*, 1984 U.S. Dist. LEXIS 16122, at *61-62, (N.D. Ohio June 6, 1984) (the "impact of the challenged acquisition must [ ] be measured in each economically significant market."). As such, multiple relevant product markets may be identified. *Merger Guidelines* § 4.1. In this case, both Complaint Counsel's and Respondent's

experts agree that each inpatient service line could appropriately be analyzed as a distinct relevant market. Guerin-Calvert, Tr. 7633; Town, Tr. 3666-67.

The touchstone of reasonable interchangeability and cross-elasticity of demand is "customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change[.]" *Merger Guidelines* § 4. In this case and other hospital-merger cases, the relevant "customer" for purposes of determining demand substitutability is the patient, or individual commercial health-plan member, because these individuals – not the MCOs – ultimately determine which hospitals they will utilize for particular services. That the merging parties compete over multiple services that are in the same industry or that are somehow related to one another does not mean those services are in the same relevant market. *See, e.g., United States v. Rockford Mem'l Corp.,* 898 F.2d 1278, 1284 (7th Cir. 1990) (Posner, J.) ("services are not in the same product market merely because they have a common provider"); *CCC Holdings*, 605 F. Supp. 2d at 38-44 (finding separate markets for estimatics software and total-loss valuation software). The reason for this, of course, is that, if reasonable interchangeability is absent between such services, they are not in the same relevant market.

Fundamentally, the purpose of defining a relevant market is "to specify the line of commerce . . . in which the competitive concern arises." *Merger Guidelines* § 4; *see also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 355 (1963) ("statutory test is whether the effect of the merger 'may be substantially to lessen competition' 'in any line of commerce in any section of the country."). By definition, if the merging parties do not compete by providing overlapping, substitutable services, there can be no competitive harm. *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]."). Indeed, at trial, Respondent's economic expert conceded the unremarkable proposition that, if two firms sell products that are not substitutes for each other, a merger between the two firms is unlikely to lessen competition. Guerin-Calvert, Tr. 7657.

Two examples prove the point. First, if Merging Party A sells cars and Merging Party B sells pharmaceuticals, no competitive overlap exists and no competitive concern arises. Second, if Merging Party A sells a cholesterol drug and an erectile-dysfunction ("ED") drug and Merging Party B only sells a cholesterol drug, competitive concern only would arise with respect to the combination of the merging parties' cholesterol drugs. Even though all the products are pharmaceutical products, no concern arises with respect to ED drugs because Merging Party B does not sell such a drug or, more precisely, does not sell a drug that is interchangeable with an ED drug. Thus, the relevant product market would be defined around the overlapping cholesterol drugs and would not include the non-overlapping product (much less the cluster of *all* pharmaceutical products) because the ED drug is not reasonably interchangeable with or substitutable for the products that actually overlap.

A hypothetical-monopolist analysis confirms the foregoing. Moreover, adding non-overlapping products "violates the principle that the relevant product market should ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test." *United States v. H&R Block, Inc.*, No. 11-00948, 2011 U.S. Dist. LEXIS 130219, at *51-52 (D.D.C. Nov. 10, 2011) (citing *Merger Guidelines* § 4.1.1). In sum, non-overlapping and non-interchangeable services (here, tertiary services not offered by St. Luke's) have no place in the relevant product market analysis.

B. Clustering Is Analytically Convenient, But Proper Only Where Competitive Effects Are Similar

Again, each individual hospital service could appropriately be analyzed as a distinct relevant market (Guerin-Calvert, Tr. 7633; Town, Tr. 3666-67) because there is no reasonable interchangeability of use or cross-elasticity of demand among individual GAC services (i.e., appendectomies and knee surgery are not interchangeable (JSLF ¶ 57)) *from the perspective of patients*. If this were a merger of hospitals providing a single medical service, only that overlapping service would constitute the relevant market – not the cluster of all medical services. Indeed, the Commission previously issued a complaint alleging separate relevant markets for outpatient imaging and outpatient surgery, which exist within a broader cluster of outpatient services, finding them appropriately defined markets under the *Merger Guidelines*. *See* Administrative Complaint, *In re Carilion Clinic*.[1]

But conducting the relevant-market and overall merger analysis service-by-service here, as in any GAC-hospital merger, would be unwieldy and inefficient, particularly at trial. GAC hospitals offer hundreds of individual services, and, thus, there are likely to be hundreds of individual relevant markets. *See* PX02148 ¶ 40 n.53, *in camera* (Complaint Counsel's economic expert's analysis included 347 Diagnosis-Related Groups ("DRGs")). Therefore, in GAC-hospital mergers, a cluster-market approach is used instead. *See, e.g., FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1291 (W.D. Mich. 1996), *aff'd*, 1997 U.S. App. LEXIS 17422, at *5 (6th Cir. July 8, 1997); *FTC v. Univ. Health Inc.*, 938 F.2d 1206, 1210-11 (11th Cir. 1991); *Rockford*, 898 F.2d at 1284; *FTC v. ProMedica Health Sys., Inc.*, 2011 U.S. Dist. LEXIS 33434, at * 23-24 (N.D. Ohio Mar. 29, 2011); *In re Evanston Nw. Healthcare Corp.*, No. 9315, 2007 FTC LEXIS 210, at *151; 2007-2 Trade Cas. (CCH) ¶ 75,814 (Aug. 6, 2007).

[1] Available at www.ftc.gov/os/adjpro/d9338/090724carilioncmpt.pdf.

Respondent admits "the cluster market is used 'as a matter of analytical convenience [because] there is no need to define separate markets for a large number of individual services . . . *when market shares and entry conditions are similar for each.*" JSLF ¶ 57 (emphasis added) (citing *Emigra Group, LLC v. Fragomen*, 612 F. Supp. 2d 330, 353 (S.D.N.Y. 2009), in turn citing Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 157-59 (2007)). In other words, where services are offered and consumed under similar competitive conditions, using a cluster market is appropriate. Where competitive conditions differ, however, using a cluster market would lead to misleading results and, thus, would not be appropriate. *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *146-48; *see also* Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51 LAW & CONTEMP. PROBS. 93, 138-40 (1988) (explaining that, consistent with Supreme Court precedent, the acute inpatient services cluster market is appropriate "solely for descriptive and analytic convenience in situations where it will not be misleading"); *cf. Little Rock Cardiology Clinic*, 573 F. Supp. 2d at 1146; PX02148 ¶ 42, *in camera.*

In this case, the vast majority of overlapping inpatient GAC services (i.e., primary and secondary GAC services) are offered and consumed under similar competitive conditions: the universe of competitive substitutes available to patients is the same (ProMedica, St. Luke's, Mercy, and UTMC); patients' willingness to travel for these services is the same; the availability of substitute service offerings is the same; and entry conditions are substantially the same.

This is not true for non-overlapping tertiary services, for which consumer demand differs from that for primary and secondary GAC services.[2] Patients are willing to travel farther for

[2] Respondent grouses that Complaint Counsel never explicitly defines tertiary services, but such criticism is unavailing. No bright line divides basic GAC services from tertiary services (IDFF ¶ 26) and, regardless, that is not fatal. *Merger Guidelines* § 4 ("Relevant markets need not have precise metes and bounds."). Respondent itself – which owns St. Luke's – could not even consistently state whether St. Luke's offered tertiary services. *Compare*

tertiary services than for basic GAC services. IDFF ¶ 283; *see also United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 141-42 (E.D.N.Y. 1997) (finding second, broader geographic market for tertiary services because patients were willing to travel farther for those services).[3] As such, the individual markets for these services include competitive offerings from a different group of providers. Gold, Tr. 212-213 ("For the tertiary and quaternary services, [UTMC] compete[s] with ... the University of Michigan, the Cleveland Clinic, University Hospital in Cleveland, and the Ohio State University."); *cf. Long Island Jewish*, 983 F. Supp. at 136 ("properly defined market includes potential suppliers who can readily offer consumers a suitable alternative to the defendants' services."). Finally, tertiary services are not substitutable for primary and secondary GAC services. *See* JSLF ¶ 57; *cf. Butterworth*, 946 F. Supp. at 1291.

Quite clearly, the competitive conditions for tertiary services differ greatly from primary and secondary GAC services; St. Luke's does not provide tertiary services in competition with ProMedica, meaning that, from the perspective of a patient, one cannot choose between St. Luke's and ProMedica to receive tertiary care; and tertiary services are not substitutable for primary and secondary GAC services. As such, it is inappropriate to include tertiary services that St. Luke's does not provide in the GAC cluster market.

Notably, courts have repeatedly excluded tertiary services and other non-overlapping services from a GAC cluster market. *FTC v. Tenet Healthcare Corp.*, 17 F. Supp. 2d 937, 942 (E.D. Mo. 1998) (relevant market is GAC inpatient 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); *see Butterworth*, 946 F. Supp. at 1291 (defining

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Resp't Admissions ¶ 2 ("St. Luke's currently does not perform complex tertiary [ ] services.") *with* JSLF ¶ 6 ("St. Luke's currently performs few, if any, tertiary services . . .").

[3] Contrary to Respondent's suggestion, Complaint Counsel does not conflate product and geographic market analysis. Rather, since demand-substitution analysis focuses on consumers' ability to substitute products beyond those offered by the merging firms, patient willingness to travel is a key consideration.

the relevant market as GAC inpatient hospital services in part by rejecting "defendants' innovative effort to demonstrate that employers and third-party payors might respond to a price increase for primary and secondary acute care services by steering outpatients and tertiary care patients away from the merged entity so as to inhibit or reverse such a price increase," and finding separate market with different market participants for primary care inpatient hospital services); *ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *23-25; *Long Island Jewish*, 983 F. Supp. at 141-42; *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 limits the product market to those *services for which Mercy and Finley currently compete* for inpatients.") (emphasis added), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997) (transaction abandoned prior to decision on appeal).

Respondent, like the ALJ, gives short shrift to these cases, particularly the cases where the parties did not provide tertiary services and agreed to exclude tertiary services from the relevant market. But those cases are perhaps the most relevant because it was against the merging parties' interest to voluntarily agree to exclude tertiary services from the relevant market, which, by declining to argue for a broader relevant market, increased their market shares and post-merger concentration in a narrower market.

Instead, Respondent mistakenly relies on four cases – *Grinnell*, *Sutter Health*, *University Health*, and *Evanston* – to argue that a broader relevant market may be found, even where not all the firms offer the services in that cluster market. In *Grinnell*, a Section 1 and 2 case, the court found a relevant market consisting of central station alarm services, which included various protective services such as burglar- and fire-alarm services, but did so because "the combination

reflects commercial realities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966).[4] The commercial realities found by the Court included that "there is here *a single basic service* – the protection of property through use of a central service station" and that "customers utilize different services [i.e., burglar-alarm, fire-alarm, etc. services] *in combination*." *Id.* at 572, 573 (emphasis added). That is not the case here: GAC services are not considered a single basic service, and patients do not typically use different services in combination – they do not go to a hospital for a combination of a knee replacement, a baby delivery, and neurosurgery.

Moreover, *Grinnell*, which is not a hospital-merger case,[5] has been distinguished, questioned, and ignored by cases that reject a broader market definition consisting of products that at least one of the merging parties does not provide. *See, e.g.*, *SmithKline Corp. vs. Eli Lilly and Co.*, 575 F.2d 1056, 1064-1065 (3d Cir. 1978) ("the relevant product market, the market where there is true economic rivalry because of product similarity," was composed of a particular type of antibiotic, as opposed to the broader cluster market alleged by defendants of "all antibiotics"); *United States v. Mrs. Smith's Pie Co.*, 440 F. Supp. 220, 229-230 (E.D. Pa. 1976) (rejecting the broad, all-dessert product market proposed by the defendants, finding that the relevant product market was comprised of the products over which the parties competed, namely frozen desert pies); *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at *25-26, 36-55 (finding the relevant market was digital do-it-yourself tax software, which H&R Block and TaxACT provided in competition with one another, and rejecting a broader market including other tax-preparation methods, which H&R Block provided but TaxACT did not.

[4] The Court said that for protective-service providers simply to "complete effectively, they must offer all or nearly all types of services." *Grinnell*, 384 U.S. at 572.

[5] Respondent tries to distinguish certain of Complaint Counsel's cases on the ground that they are not hospital-merger cases (Resp't Answering Br. at 20) but, as health-services industry cases, they are no doubt more analogous and relevant here than *Grinnell*.

Reliance on *Sutter Health* is similarly misplaced. *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001). First, *Sutter Health*'s claim that the services and resources provided in the GAC cluster "tend to be similar across a wide range of primary, secondary, and tertiary inpatient services" is inaccurate here and, thus, inapposite. The uncontroverted evidence shows, and the ALJ specifically found, that tertiary services "are more complex and specialized than primary and secondary services, and are often more invasive and *require different technologies and resources*," and "generally involve highly-specialized treatments for higher acuity conditions, such as neurosurgery." IDFF ¶¶ 23, 26; IDA at 140 (emphasis added). In fact, Respondent repeatedly tried to justify ProMedica's higher prices on the ground that tertiary services require higher-cost resources to provide. *See, e.g.*, RPTRB at 37-39.

Moreover, *Sutter Health* does not hold that a cluster market includes products the parties do not provide in competition with one another. Rather, the case holds that the relevant market includes services provided by niche competitors "*that compete with [the merging parties] in providing only part of the 'cluster of services'* that constitute general acute inpatient care." *Sutter Health*, 130 F. Supp. 2d at 1119. Thus, the court did not say that the cluster was *broader* than services provided by the parties in competition with one another but that it includes services *within* the cluster of overlapping products that are offered by niche providers that compete with the merging parties by providing only some of those services.[6]

Reliance on *University Health* is unwarranted because the court of appeals did not analyze the product market. Rather, in a footnote, the court stated that: (1) it did not "appear" that the district court intended to limit the product market to the overlap services, (2) "redefinition of the relevant product market would be of no moment" for the case, and (3) the

[6] The court stated that Alta Bates provided "a wide range of primary, secondary, and tertiary services" and that Summit "also offers a wide range of inpatient and outpatient services" without specifying whether or not Summit also provided tertiary services. *Id.* at 1112.

court would treat acute-care services in general as the relevant product market merely "[f]or ease of discussion." *Univ. Health*, 938 F.2d at 1211 n.11.

Finally, Respondent relies on *Evanston* for the proposition that tertiary services should be included in the relevant GAC market. Notably, complaint counsel in that case specifically excluded tertiary services from the GAC market alleged in its complaint and only added tertiary services to the GAC market after its economic expert, "reviewing all the evidence," concluded that those services should be included. Answering and Cross Appeal Br. of Compl. Counsel at 37 n.37, *In re Evanston*.[7] Prior to trial, counsel in that case stipulated that tertiary services should be included in the GAC market. Therefore, tertiary services were included in the GAC market based on the particular facts in that case and by agreement of complaint counsel and respondent. The issue of including tertiary services in the GAC market was not considered by the Commission on appeal. Instead, the Commission focused on whether outpatient services should be included in the inpatient GAC market. *Evanston*, 2007 FTC LEXIS 210, at *146-151. Indeed, because the evidence of post-acquisition price effects was so apparent in *Evanston*, neither the parties nor the Commission had to focus on product-market definition.

C. Demand-Side Analysis Is Not Performed On Cluster As A Whole

As discussed above, when defining *individual* product markets, it is necessary to analyze consumer demand and the products to which consumers could turn in the face of a price increase. *See FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000); *Merger Guidelines* § 4. This focus on demand-side substitution, however, is only relevant when analyzing individual services. By contrast, when analyzing cluster markets, demand-side substitution analysis is not necessary or even applicable. Indeed, the *Merger Guidelines* do not mention, nor do they appear

[7] Available at www.ftc.gov/os/adjpro/d9315/060210ccattachmntpursuantrule.pdf.

to MCOs] *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." Resp't Answering Br. at 3 (emphasis added). In fact, there is no case law whatsoever supporting that proposition. For example, *Sutter* and *Evanston* discuss the lack of interchangeability of individual GAC services but say nothing about basing cluster market definition on the fact that MCOs negotiate over myriad services. *See* Resp't Answering Br. at 3-4. In fact, nowhere do those cases ever mention that the GAC market definition was based on MCOs being the only relevant customers and that MCOs negotiate with hospitals for a full spectrum of GAC services, including tertiary services, at the same time. *See Sutter Health*, 130 F. Supp. 2d at 1118-1120; *Evanston*, 2007 FTC LEXIS 210, at *143-51. Nor does any other hospital case cited in this proceeding, whether the court includes or excludes tertiary services from the GAC market.[8]

In fact, *Evanston* (discussing outpatient services) specifically rejected Respondent's theory that MCOs' contracting with hospitals for multiple services simultaneously justifies the inclusion of services in the same relevant market. *Evanston*, 2007 FTC LEXIS 210, at *149. The same is true of tertiary services and basic GAC services. In sum, Respondent's argument, and the Initial Decision's conclusion, that the GAC market should include tertiary (or OB) services because they are negotiated for at the same time by MCOs as other GAC services finds no support in the law.

Moreover, it is analytically inconsistent to exclude outpatient, quaternary, and other inpatient services from the relevant GAC market yet include tertiary services, as the ALJ did and as Respondent advocates. For example, the ALJ found that outpatient services are properly

[8] *See Tenet*, 17 F. Supp. 2d at 942, *rev'd on other grounds*, 186 F.3d 1051-52 (8th Cir. 1999); *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1283-84 (7th Cir. 1990); *Long Island Jewish*, 983 F. Supp. at 137-40; *Mercy Health Servs.*, 902 F. Supp. at 976; *Butterworth*, 946 F. Supp. at 1290-91, *aff'd*, 1997 U.S. App. LEXIS 17422, at *5; *FTC v. Freeman Hosp.*, 911 F. Supp. 1213, 1217 (W.D. Mo. 1995), *aff'd*, 69 F.3d 260, 268 (8th Cir. 1995); *FTC v. Hosp. Bd. of Dir. of Lee County*, 1994 WL 362226 (M.D. Fla. 1994), *aff'd*, 38 F.3d 1184 (11th Cir. 1994).

excluded from the inpatient GAC market because they cannot be substituted for inpatient services and because outpatient services are offered under different competitive conditions, including a different set or mix of market competitors. IDFF ¶¶ 307-308. The same is true of tertiary services. IDFF ¶¶ 63, 68, 74, 92, 100; 302; Gold, Tr. 212-213.

Remarkably, Respondent attempts to exclude outpatient services from the GAC market while including tertiary services because "MCOs negotiate and contract for those [outpatient] services differently than they do for other GAC services." At trial, however, Respondent went to great lengths to show that a single negotiation and a single contract between an MCO and a hospital covered inpatient and outpatient services (and other services that are not included in the GAC cluster market) and that inpatient and outpatient rates were interdependent. *See, e.g.*, Marx Opening Argument, Tr. 134, 137; *see also* Marx Closing Argument, Tr. 140.

II. OVERLAPPING OBSTETRICS SERVICES CONSTITITE A RELEVANT MARKET, WHICH SHOULD NOT BE INCLUDED IN THE GAC CLUSTER MARKET

The foregoing analysis also compels the conclusion that OB services are a distinct relevant product market. OB services are not interchangeable with other GAC services, a hypothetical monopolist could profitably raise the price of OB services, there are distinct commercial realities and practical indicia, and the competitive conditions under which OB services are offered and consumed differ from GAC services.

At the outset, we correct two misstatements by Respondent. First, Respondent alleges that Complaint Counsel seeks a separate OB market "so as to increase St. Luke's apparent competitive significance in [this] relevant market." Resp't Answering Br. at 1. Not true. In fact, St. Luke's OB market share is *lower* than its GAC market share – so St. Luke's has less significance in the OB market. PX02148 at 143 (Ex. 6), *in camera*. Additionally, including OB

in the GAC market, as Respondent advocates, only increases ProMedica's post-Acquisition GAC market share and heightens market concentration. Clearly, Respondent simply hopes to avoid defending an OB merger-to-duopoly.

Second, Respondent says that "[n]o hospital merger case has recognized inpatient OB services as a separate relevant product market." This ignores the district court's decision in *ProMedica* specifically holding so. Crucially, before this case, OB had never been presented to any court as a separate market because the OB market structure typically is similar to the GAC market structure. Notably, no case has ever rejected an OB market, and the one case to consider whether OB was a separate market, *ProMedica*, held that it was.

Respondent misleadingly cites to *R.R. Donnelley* for the proposition that the district court's opinion in the §13(b) case has no precedential value here. In *R.R. Donnelley*, complaint counsel lost the preliminary-injunction hearing but won the trial on the merits before the ALJ. Respondent argued on appeal that the Commission was precluded from adjudicating the question of product-market definition. The Commission rejected that argument, stating that a "party thus is not required to prove his case in full at a preliminary injunction hearing . . . and the findings of fact and conclusions of law made by a court granting a preliminary-injunction are not binding at trial on 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)). Thus, the Commission did not say that a district court's opinion is of no value or not persuasive authority – only that the Commission is not strictly bound by such decisions. Respondent's assertion that "no court" has found a separate OB market is wholly inaccurate. It is illogical for Respondent to argue that the Commission should give more weight to an alarm-system case decided nearly 50 years ago than a recent case involving the same transaction and the same markets.

A. OB Services Constitute A Relevant Market

Again, market definition begins with identifying overlapping services and considering which other services are reasonably interchangeable or substitutable. *See Brown Shoe*, 370 U.S. at 325; *CCC Holdings*, 605 F. Supp. 2d at 37-38; *Polypore*, 2010 FTC LEXIS 97, at *30-31. Here, it is undisputed that no other services are interchangeable with OB services. IDFF ¶¶ 302, 313; Admissions ¶ 4. Thus, under the case law, and for the same reason that outpatient services are excluded from the GAC market, OB services are an appropriate relevant market.

Indeed, if two merging hospitals only provided OB services, the inevitable conclusion would be that OB services constitute the only relevant market. No court would conclude that GAC services was the relevant market. Doing so would lead to significantly skewed results: For example, a GAC hospital with a 20% share of OB services and a 5% share in an all GAC services market proposes to merge with a specialty OB hospital with an 80% OB services market share and, because it does not offer any other GAC services, a share of less than 1% of an all inpatient GAC services market. Under the reasoning of the Initial Decision, such a merger would not raise competitive concerns because the combined market share of the parties in an all inpatient GAC services market is less than 6%, even though, when properly limited to those services that the merging parties offer to consumers in competition with one another (OB services), this is a merger to monopoly.

An analysis under the *Merger Guidelines* confirms that OB is a relevant market. Indeed Respondent's economic expert testified that if Mercy no longer offered OB services – which would result in ProMedica having a monopoly for OB services in Lucas County – prices of OB services would likely increase. Guerin-Calvert, Tr. at 7679-7680. As such, a hypothetical

monopolist could, undoubtedly, profitably raise the price of inpatient OB services by a SSNIP and likely more. PX02148 ¶ 41, *in camera.*

Practical indicia confirm that OB is a properly defined relevant market.[9] The healthcare industry and general public recognize obstetrics as a separate field of medicine; there are distinct providers of OB services (obstetricians); there are distinct customers (pregnant mothers and their partners); and there are distinct prices for OB services (described below).

"Commercial realities," which Respondent repeatedly states are critical to market analysis, also support this conclusion. Respondent separately tracks GAC and OB market shares (and other OB data). IDFF ¶ 314; *see also* Resp't Admissions ¶ 5. Two sets of market-share documents specifically provide inpatient shares – *excluding* newborn, neonatology, and burns – and obstetrics shares separately, much as Complaint Counsel alleges the market should be analyzed. PX01235; PX01236 at 001-004, 053-056. St. Luke's specifically contemplated that obstetrics would be analyzed as a separate market because the competitive effects of the Acquisition are even more significant in OB than for the vast majority of GAC service. PX01030 at 017, *in camera.* Contracts with health plans specifically "carve out" different OB rates and rate structures from GAC services. *See, e.g.*, PX00365 at 030, *in camera*; PX00366 at 030, *in camera*; PX02520 at 003-005, *in camera*; PX00363 at 019, 022; PX00364 at 019, 022; PX01262 at 004, 027.

Respondent and the ALJ dismissed these commercial realties as not dispositive, but it is error not to give them any weight. "When determining the relevant product market, courts often

[9] Respondent, citing *Lundbeck*, claims that "modern cases" hold that practical indicia "are not dispositive when defining a relevant market." *Lundbeck* itself, however, recognizes that industry recognition is a factor in product-market definition, *FTC v. Lundbeck, Inc.*, 650 F.3d 1236, at *1242 (8th Cir. 2011), and several modern cases – including *the most recent* – consider practical indicia in their product-market analysis. *See, e.g., H&R Block*, 2011 U.S. Dist. LEXIS 130219, at *27, 37, 40; *CCC Holdings*, 605 F. Supp. 2d at 38; *Polypore*, 2010 FTC LEXIS 97, at *31 & n.19.

pay close attention to the defendants' ordinary course of business documents." *H&R Block*, 2011 U.S. Dist. LEXIS 130219, at *31 (internal citations omitted). Indeed, the *H&R Block* court found that the parties' documents "are strong evidence that DDIY is the relevant product market." *Id.* at *34. Moreover, "[d]istinct pricing is also a consideration in determining the relevant product market." *Id.* at *40 (internal quotation, citation omitted). As such, Respondent's ordinary course market-share documents, HHI assessment, and contract pricing are strong evidence that OB is a separate product market.

B. OB Services Do Not Belong In the GAC Cluster

Both economic experts in this case agree that individual services could be analyzed one-by-one, and indeed that would be the process in standard merger analysis. Thus, Respondent and the ALJ incorrectly characterize Complaint Counsel's analysis as an attempt to gerrymander the relevant product market. Rather, we begin our analysis with OB services, which, as described above, constitute a separate market based on the lack of interchangeability with other services, a hypothetical monopolist test, practical indicia, and commercial realities. The next analytical step is to determine whether OB services should be clustered along with other GAC services.

It is true that other individual services, like OB, are not interchangeable with the other GAC services, and a hypothetical monopolist test, practical indicia, and commercial realities would support their standing as separate relevant markets, as well. We cluster other GAC services but not OB because, again, a cluster market is only appropriate where it would not lead to misleading results, meaning it consists of services that are offered and consumed under similar competitive conditions. Competitive conditions for OB differ significantly from those for other GAC services. Specifically, two Lucas County hospitals that provide GAC services – UTMC and Mercy St. Anne – do not provide obstetrical services. IDFF ¶¶ 92, 110. That means the

competitive environment and the availability of substitutes, or competitive alternatives, for consumers of OB services differ substantially from other GAC services – and market shares bear that out. PX02148 ¶ 41, 143 (Ex. 6), *in camera*; *see* PX01016 at 003, *in camera*; *see also ProMedica*, 2011 U.S. Dist. LEXIS 33434, at *24-25. Therefore, it would be misleading to analyze the effects of the Acquisition on competition in the OB market by looking at a GAC cluster market that included OB services. Specifically, doing so would substantially understate the competitive harm in the OB market. Accordingly, OB services should not be included within the GAC cluster market.

C. Respondent's Price-Discrimination Argument Is a Red Herring

Respondent argues that OB cannot stand as a separate market because Complaint Counsel "was required to offer evidence that hospitals can and do price discriminate for OB services." In fact, there is no such requirement, as neither the *Merger Guidelines* nor case law impose such an evidentiary burden on Complaint Counsel. More importantly, Respondent's reliance on Section 4.1.4 of the *Merger Guidelines* is wholly misplaced. That provision prescribes the need for successful price discrimination targeting a subset of customers *within an individual relevant product market*, not a cluster market. The *Merger Guidelines* specifically give the example of a submarket within the glass-container product market for customers (baby-food manufacturers) who, unlike other customers, would not switch from glass containers to plastic or metal bottles in response to a price increase. In that way, relevant markets may be as narrow as individual customers. *Merger Guidelines* § 4.1.4.

That analytical framework is inapplicable to the OB product market here. There is no claim that some subset of OB customers may be price discriminated against. Rather, the claim is that OB is its own market that, for valid analytical and competitive reasons, should not be

clustered with other GAC services. Neither is the analysis performed by taking a subset of GAC customers and defining an OB submarket based on price discrimination. In other words, the analysis does not reach Section 4.1.4 of the *Merger Guidelines*; instead, Section 4.1.1-4.1.3 of the *Merger Guidelines* sets forth the appropriate analysis. Indeed, with a post-Acquisition market share of 80% in OB, *all* OB patients will be forced to pay higher rates, not just some subset.

D. Respondent's Flawed Analysis of Cases

Respondent's analysis of applicable legal authority is flawed. None of the prior hospital cases that considered a GAC market that included OB services, which Respondent relies on, rejected, or even apparently considered, a separate OB market. Those cases were decided on different facts. The one court that specifically considered whether OB was a separate market – the district court here – found OB to be a separate market.

Respondent's attempt to distinguish cases relied on by Complaint Counsel, showing that courts often find narrower markets, is also flawed and actually serves to buttress Complaint Counsel's analysis. For example, Respondent tries to distinguish *Defiance Hospital*, where the court rejected an all-physicians service market in favor of an anesthesia-services market, by explaining that the court did so because no other services were interchangeable with anesthesia services, which are provided only by anesthesiologists and other professionals. That is the same lack of substitutability and commercial realties/practical indicia that apply to OB services.

Respondent improperly tries to distinguish *Butterworth* by ignoring the relevant portion finding separate markets for an inpatient GAC market and a narrower market. Instead, Respondent would have the Commission focus on *Butterworth's* finding outpatient was excluded from the GAC cluster market because, like here, outpatient services are negotiated and separately

contracted for, apart from GAC services. Of course that is also true with respect to OB: OB rates and rate structures often are separately negotiated, apart from the cluster of GAC services. *See, e.g.*, PX00365 at 030, *in camera*; PX00366 at 030, *in camera*; PX02520 at 003-005, *in camera*; PX00363 at 019, 022; PX00364 at 019, 022; PX01262 at 004, 027.

In sum, the weight of the law and facts clearly show that tertiary and OB services should be excluded from the GAC market. Even if the Commission ultimately disagrees, the Acquisition is patently illegal under Section 7, regardless of how the product market is defined. *See* IDFF ¶ 370; *see also* IDFF ¶¶ 354-369; CCPTB at 33-37 & Appendix (Tables 4-8).

Respectfully submitted,

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I also certify that on January 24, 2012, I delivered *via* electronic mail and hand delivery a copy of the foregoing document to:

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I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

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