

Opening Statement Proposed Merger of Advocate and NorthShore

Federal Trade Commission & State of Illinois v.
Advocate Health Care Network and Advocate Health and Hospital
Corporation and NorthShore University Health System

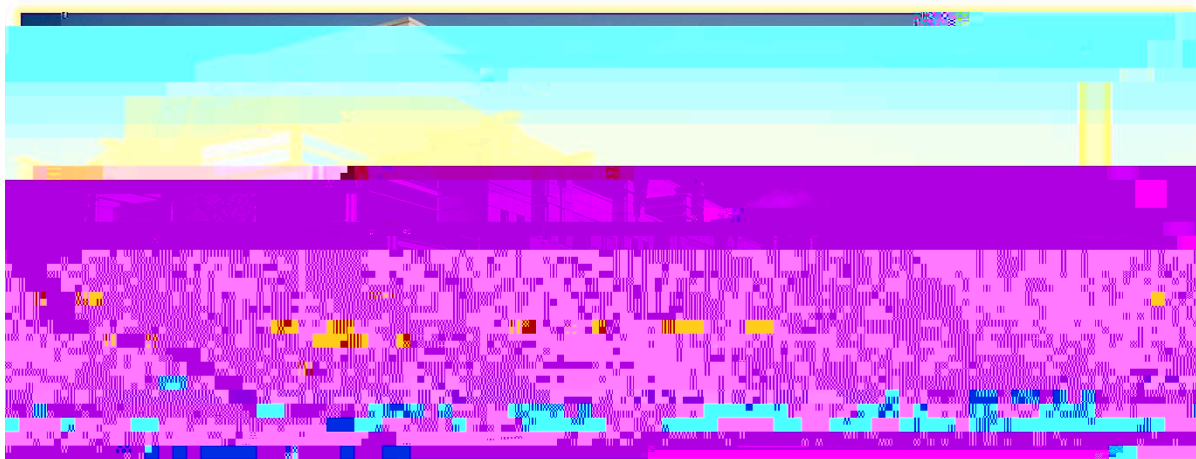
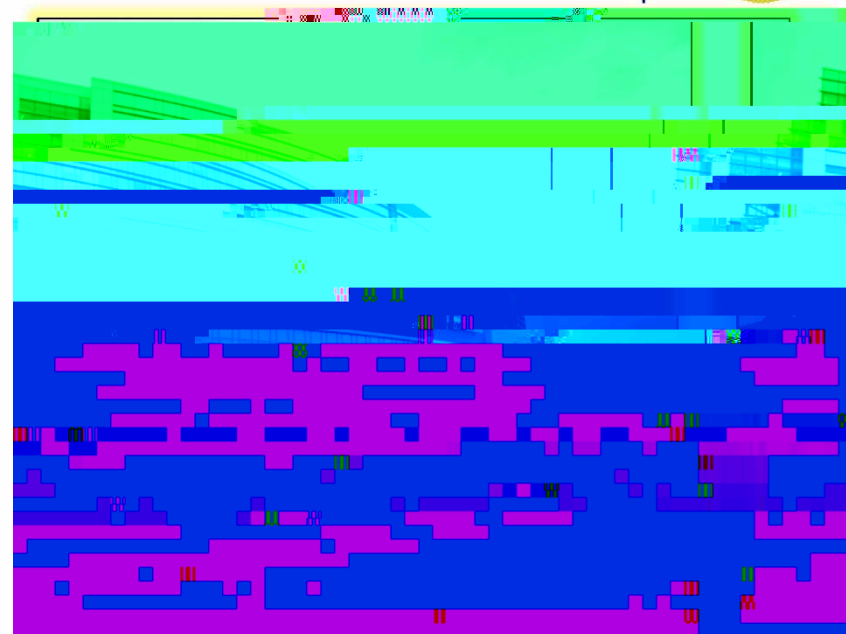
April 11, 2016



Advocate

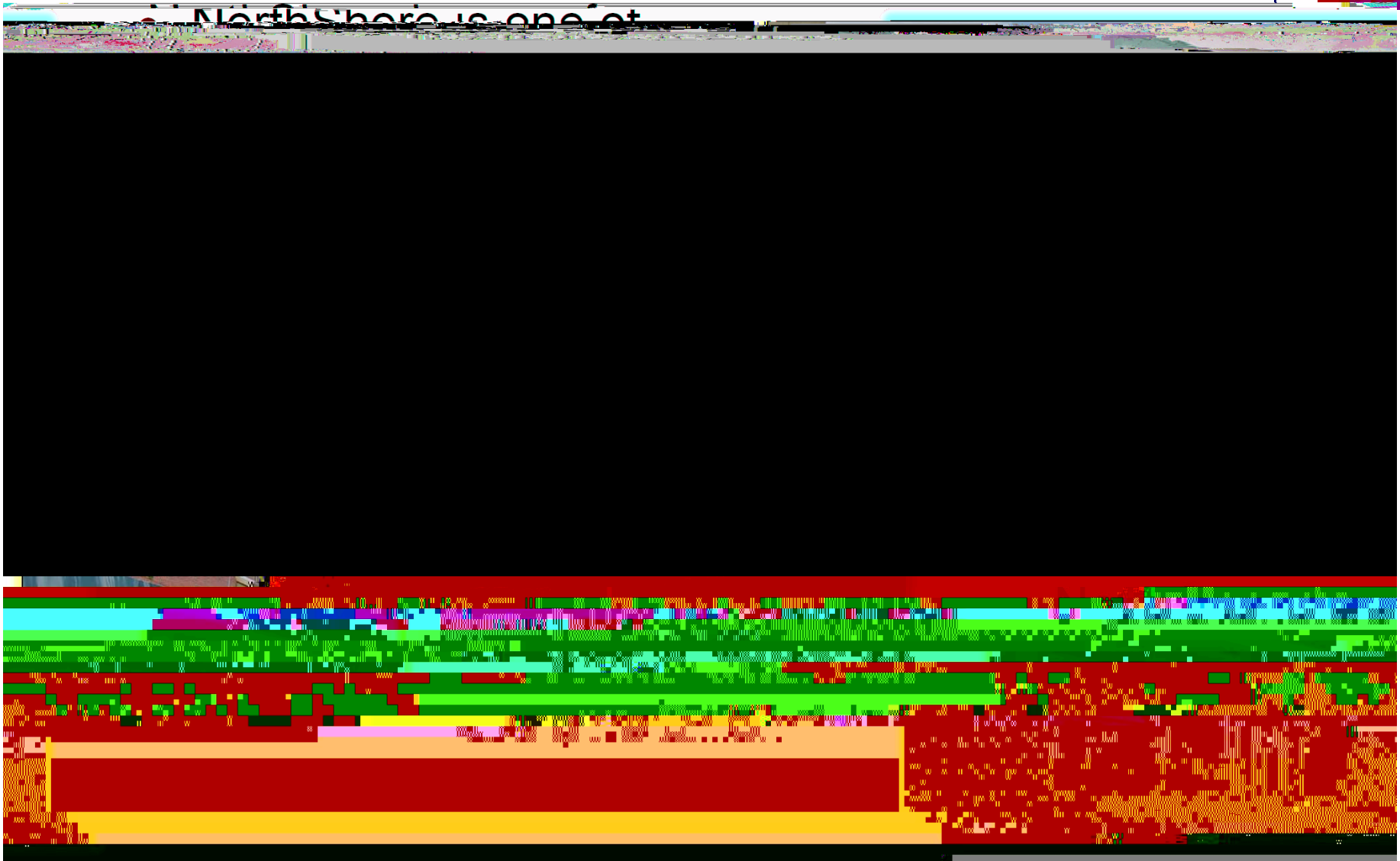


- z Advocate is the largest health system in Illinois with 11 GAC hospitals and one Children's hospital
- z Advocate's Lutheran General Hospital and Condell Medical Center are both in the relevant geographic market



- z Advocate generated \$5.2 billion in revenue for FY2014

NorthShore



Merger Would Create a Healthcare “Behemoth”

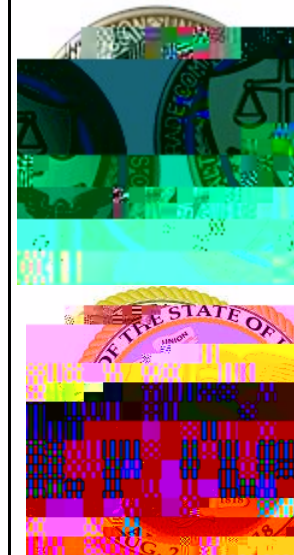


“...would create a \$7 billion academic-suburban behemoth”

- The Defendants valued the transaction at \$2,200,000,000
- The Combined System would:
 - Have \$7 billion in revenue
 - Employ 2275 physicians and affiliate with an additional 5025 physicians
 - Operate 15 GAC Hospitals, 11 of which would be located in Cook and Lake Counties
- The Combined System would be:
 - Largest Health System in Illinois
 - 11th Largest Non-Profit Health System in the United States

Governing Law

High market shares and concentration levels in the relevant market create a strong presumption of illegality



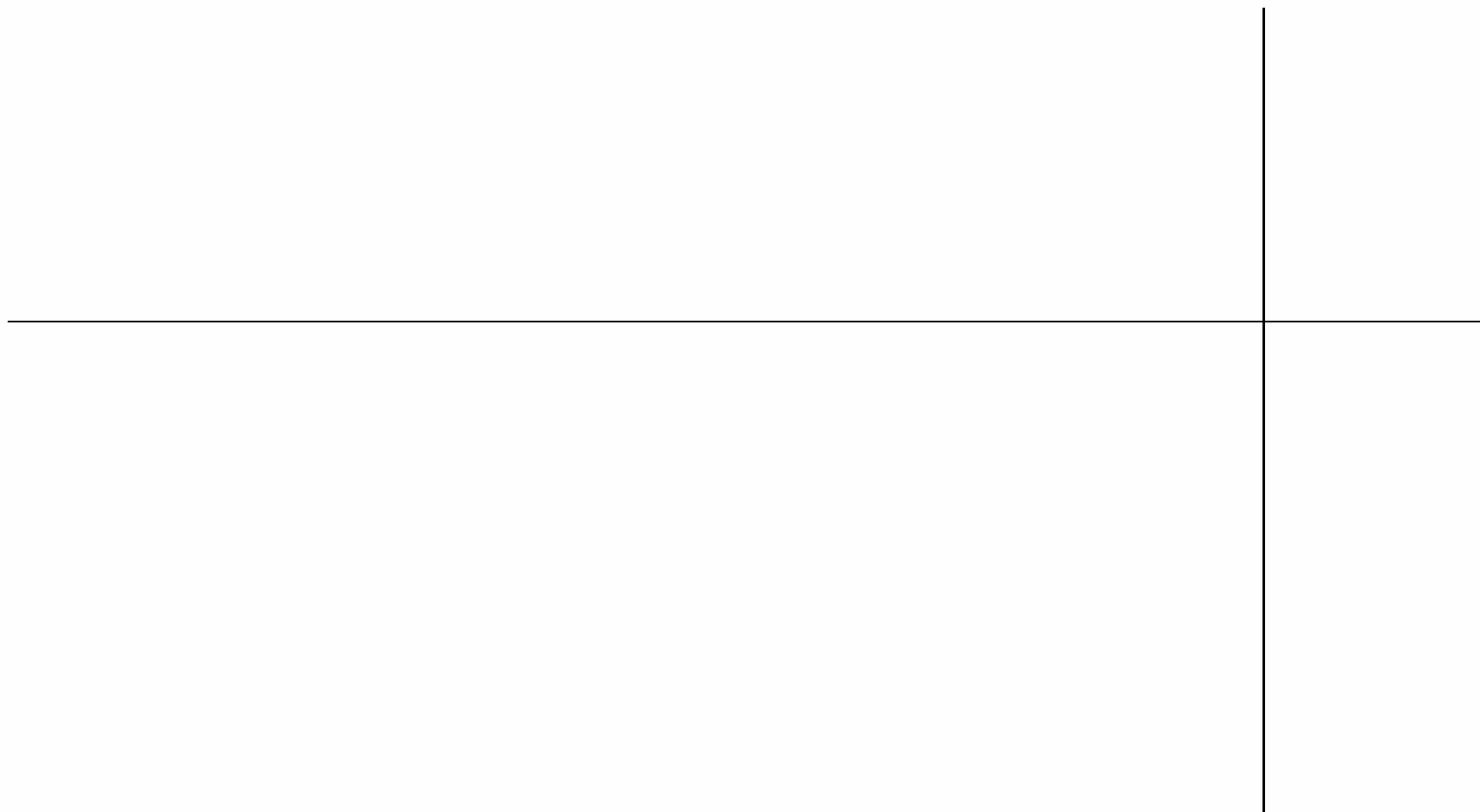
Standards for Granting a Preliminary Injunction under § 13(b)



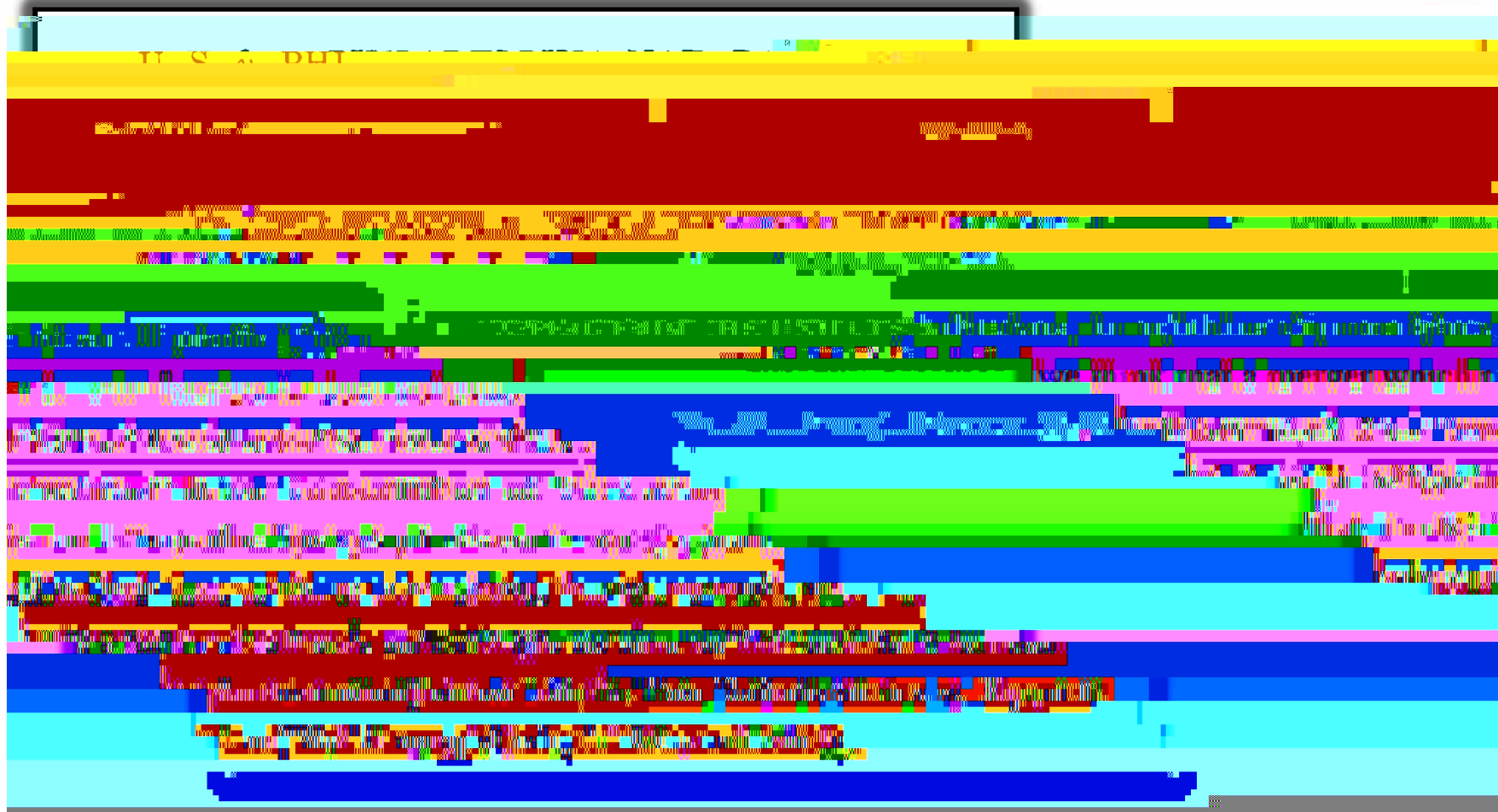
Preliminary injunction under § 13(b) of the FTC Act warranted when in the public interest –

1. Considering the Commission's likelihood of success on the merits; and
2. Weighing the equities.

“No court has denied relief to the FTC in a 13(b) proceeding in which the FTC has demonstrated a likelihood of success on the merits.” *FTC v. OSF Healthcare Sys.*,



Philadelphia Nat'l Bank Presumption Governs Merger Analysis



United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963); see also United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1285 (7th Cir. 1990) (Posner, J.)

The Relevant Market

Relevant Product Market
Relevant Geographic Market



Well-Recognized Product Market: General Acute Care Inpatient Services



- z United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1284 (7th Cir. 1990) (Posner, J.)
- z ProMedica , J.)

The North Shore Area Is a Relevant Geographic Market



- z Patients want local hospitals



Advocate's CEO Agrees that Patients Want Care Close to Home



“I think, in general, convenience is an important factor for patients. And I think, generally, patients would like to receive care close to home.”

Defendants' Experts Agree that Patients Prefer GAC Care Close to Home

- z “For most hospitals, you know, the people who come to you are the people who are near.” Dudley Depo. Tr. at 238:1-18.
 - “And that just reflects that people tend to go nearby. And life experience and people that you talj15 -19 Twectsn /oe8>0.ym 79.2 Tm 0g’



Payers Need Local Hospitals

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Geographic Market Definition

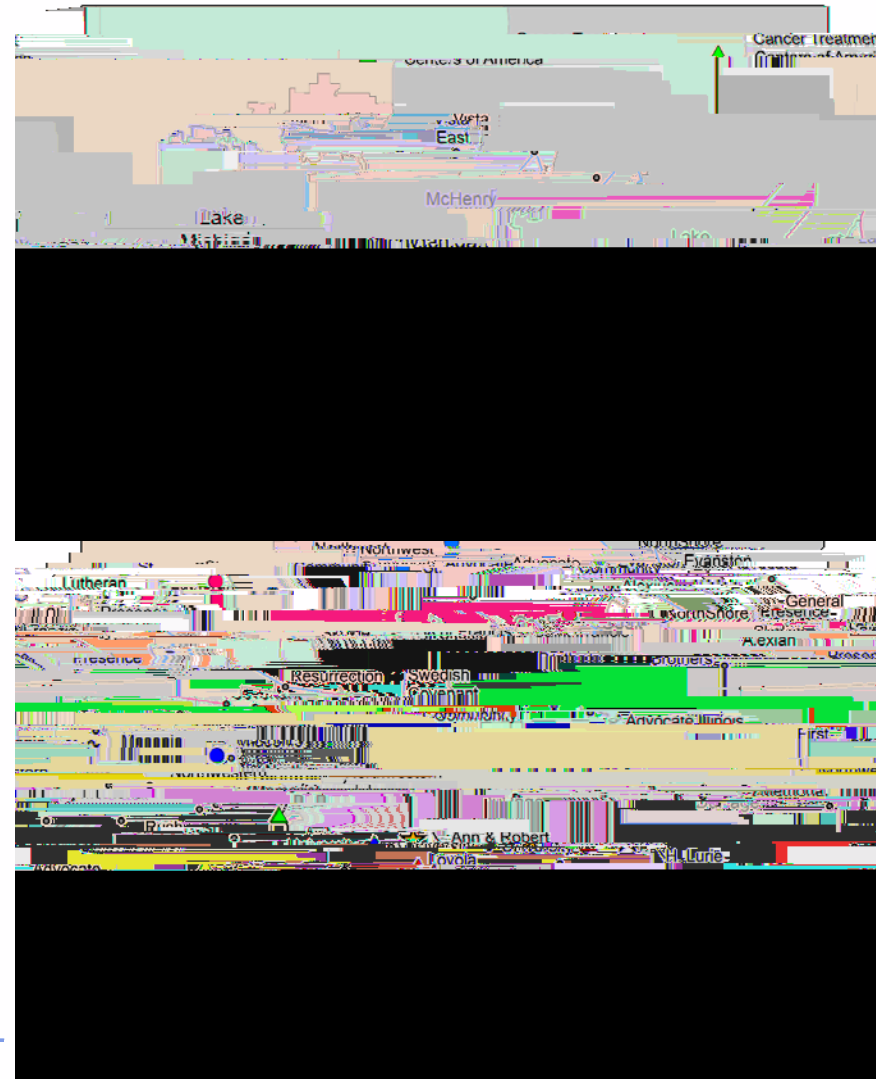




The North Shore Area Is a Relevant Geographic Market – a Monopolist Could Impose a SSNIP

- z Hospitals: 11
- z Population: 847,000
- z Area: 270 square miles

- Denver, CO – 663,862 (153 sq. mi.)
- Atlanta, GA – 456,002 (133 sq. mi.)
- New Orleans, LA – 384,230 (169 sq. mi.)

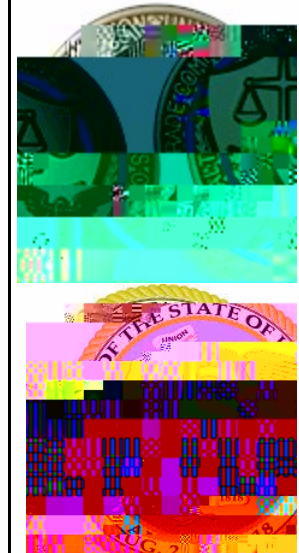


U.S. Census Bureau population estimate as of 7/1/2014;
land area as of 1/1/2014

https://en.wikipedia.org/wiki/List_of_United_States_cities_by_population

Market Share and Concentration

Market share and HHIs exceed thresholds for presumptive illegality by a wide margin



Generally Accepted Market Concentration Thresholds

- z “High levels of concentration raise anticompetitive concerns, and the HHI calculation provides one way to identify mergers that are likely to invoke these concerns.”
 - z FTC v. OSF Healthcare Sys., 852 F.Supp. 2d 1069, 1079 (N.D. Ill. 2012).

- z “[A] merger that increases HHI by more than 200 points, to a total number exceeding 2500, is presumptively anticompetitive.”
 - z ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 568 (6th Cir. 2014).

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Concentration Levels Far Exceed Anticompetitive Thresholds



- z Post-merger HHI and delta far exceed Merger Guidelines presumptions for market power
- z Post-merger HHI is 3,943
- z The change in HHI is 1,782

The Burden Shifts to Defendants After FTC Makes its Prima Facie Case



- z Once the FTC makes its prima facie showing based on market shares and concentration, the burden shifts to Defendants
- z Defendants can attempt to rebut the presumption by producing evidence showing that the merger will not cause competitive harm or through evidence that the merger would generate significant efficiencies
- z If Defendants successfully rebut the presumption, the burden of producing additional evidence shifts to the government and merges with the burden of persuasion

Anticompetitive Effects

Evidence confirms the acquisition's
likely competitive harm



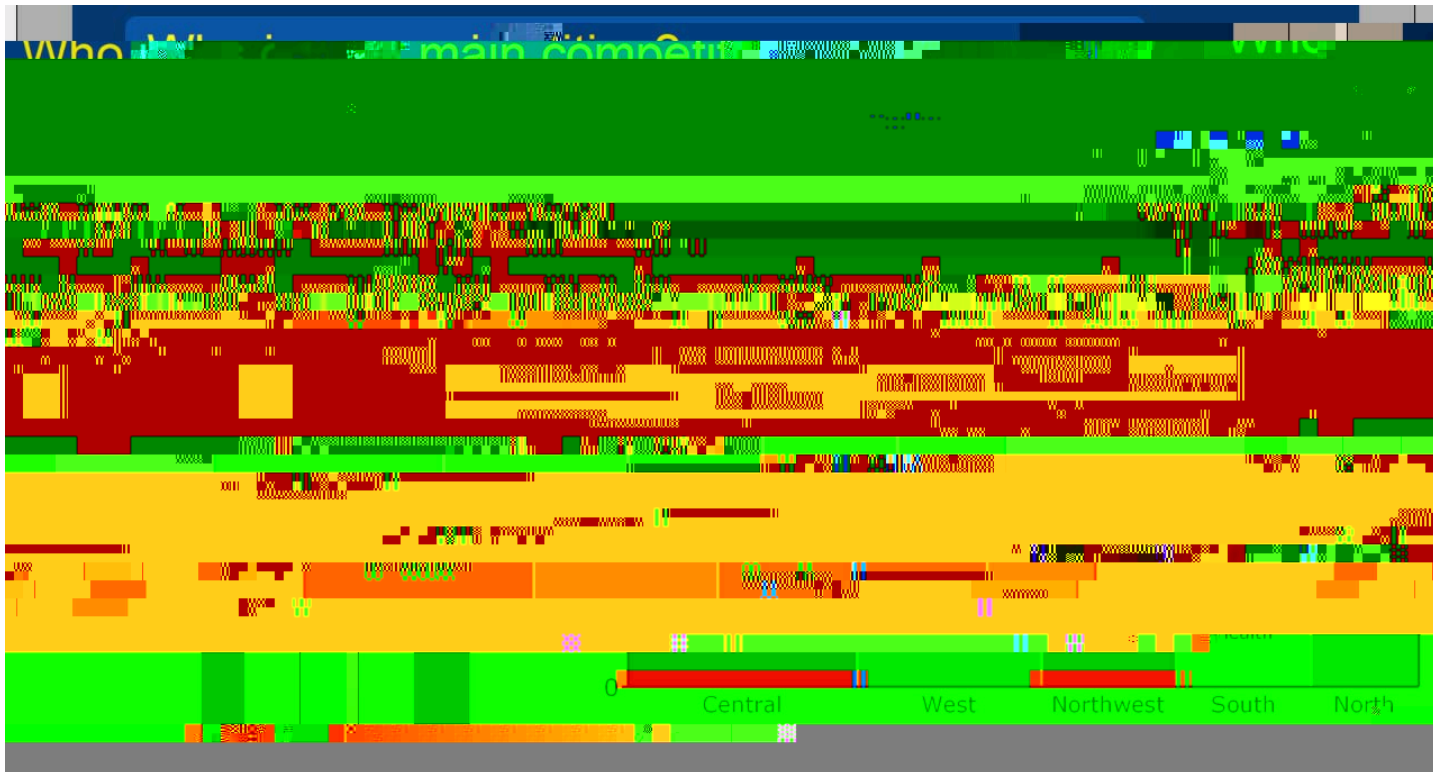


- “As a general rule, the merger of two closely substitutable hospitals will increase the combined system's bargaining leverage because the alternative ... of not contracting becomes less attractive from the perspective of health plans.” *FTC v. OSF Healthcare Sys.*, 852 F. Supp.2d 1069, 1075-76 (N.D. Ill. 2012) (quotations and citations omitted).
- “Courts have recognized that a merger that eliminates head-to-head competition between close competitors can result in a substantial lessening of competition.” *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 60 (D.D.C. 2015).
- *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000) (finding a likelihood of unilateral price increase where merger would eliminate one of Swedish Match's “primary direct competitors”)
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Unilateral Competitive Effects



- Advocate and NorthShore are close, if not closest, competitors



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Unilateral Competitive Effects



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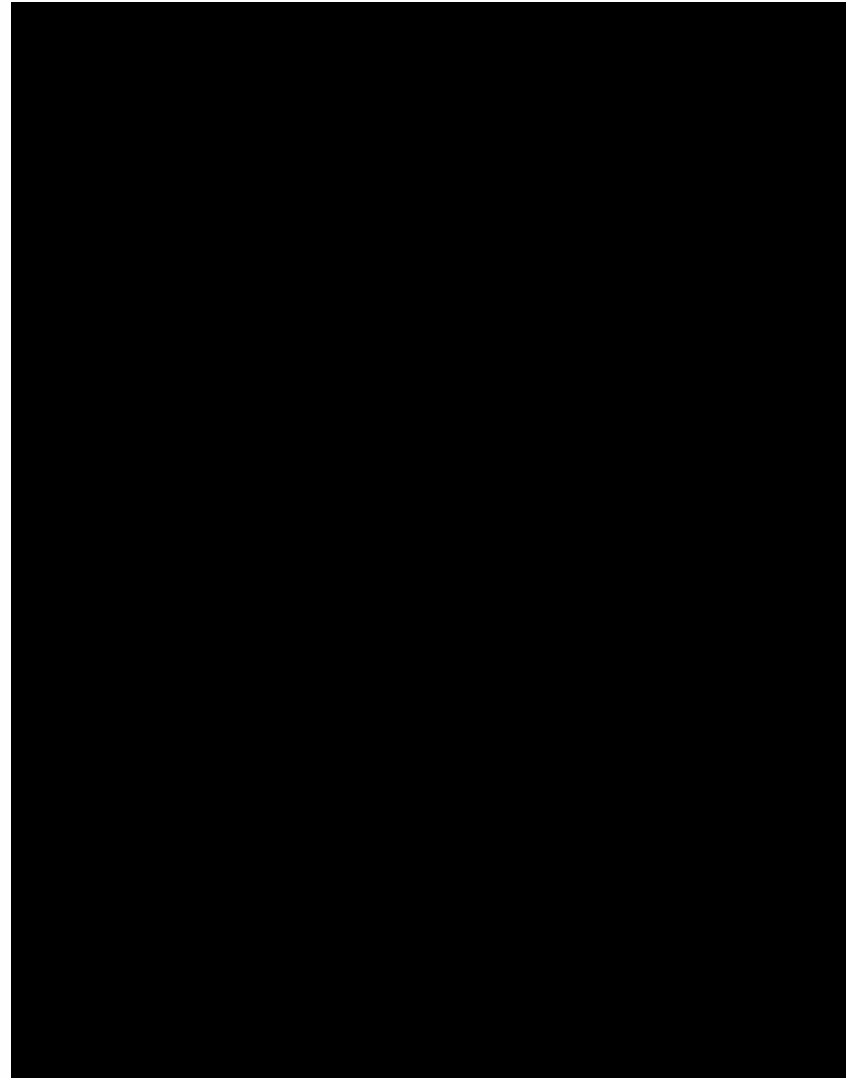
Advocate and NorthShore are Head-to-



Patients View NorthShore and Advocate as Substitutes

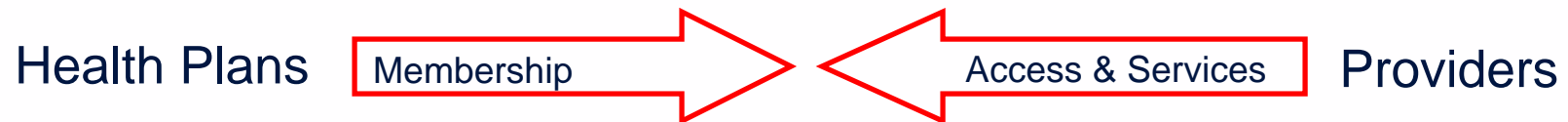


- z A significant fraction of patients in the North Shore Area view Advocate or NorthShore as their first or second choice



Bargaining Leverage Overview

- z Bargaining Leverage: Health Plans vs. Providers
 - Health plans and providers determine rates through bilateral negotiations
 - Each side's leverage is determined by the other side's "outside option"



- z The acquisition makes health plans' outside options much less attractive

Payers Cannot Offer a Marketable Product
without Advocate or NorthShore

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Payers Say the Merger Will Deny Them Adequate Alternatives



proposed reimbursement rates

“...it would be difficult, if not impossible, to 63mnmin.001T /2 TI

less favorable to Cigna

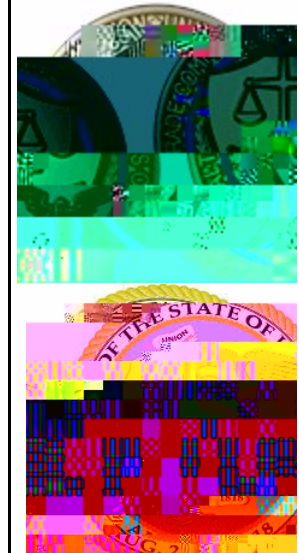
Increased Bargaining Leverage Will Increase Price



“The average predicted price change is 8% across the six party hospitals contained in the delineated market, the four NorthShore hospitals and

Defendants Cannot Rebut the Strong Presumption of Illegality

Defendants fail to carry their burden on entry or efficiencies



Entry & Expansion

Entry will not offset the acquisition's anticompetitive effects







Entry is Highly Unlikely

- z Entry is restricted by Illinois Certificate-of-Need (“CON”) requirements for hospital construction
 - CON process is lengthy and costly
 - Applications are routinely disapproved, e.g. Advocate’s application for a new hospital at Round Lake

- z Hospital construction is costly and takes significant time

- z Outpatient/physician offices are not hospitals

Defendants Fail to Demonstrate “Extraordinary” Efficiencies



- z “High market concentration levels require proof of extraordinary efficiencies , . . . and courts generally

Efficiencies Must Be Verifiable and Merger-Specific



Verifiable

“The court must undertake a rigorous analysis . . . to ensure that those ‘efficiencies’ represent more than mere speculation and promises”

- United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 89 (D.D.C. 2011)

“Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.”

- Horizontal Merger Guidelines, § 10

Merger-Specific

“[E]fficiencies must be ‘merger-specific’ to be cognizable as a defense.”

- FTC v. H.J. Heinz Co., 246 F.3d 708, 721-22 (D.C. 2001) “The efficiencies must be merger-specific.”

Claimed Cost Savings are Vague, Speculative, and Unverifiable

- z Claim: merger will generate cost savings
 - Overwhelming majority in category “All other (tbd).”
- z Claim: Advocate’s cost of care is lower than NorthShore’s and merger will lower NorthShore’s cost of care.
 - No evidence that Advocate’s total cost of care is lower.
 - No plan to lower NorthShore’s costs.

The Equities Weigh Heavily in Favor of Grant



Overwhelming Public Interests At Stake



z Two public interests:

- (i) effective enforcement of antitrust laws
 - “Congress’s specific public equity consideration in enacting the provision” *FTC. v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1094 (N.D. Ill. 2012)(quoting *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035(D.C. Cir. 2008))
- (ii) effective relief after the merits proceeding
 - “[T]he difficulty of unscrambling merged assets often precludes an effective order of divestiture.” *FTC. v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1095 (N.D. Ill. 2012)(quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n.5 (1967)).

Adding Subscribers to an Insurance Product is Not a Public Interest

z Defendants' argument:

- No access to large group market for Advocate-only insurance product.
- A managed care organization could market a NorthShore-Advocate product to large groups.

z Defendants must show through credible evidence that the merger will lower prices or improve quality.

- FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1095 (N.D. Ill. 2012) (equities favor injunction “because defendants have not

Other Narrow Network Products are Available



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The HPN is Old Wine in a New Bottle



- z “The product will be an HMO...”
 - BlueCare Direct with Advocate Healthcare, “Key Deal Terms,” PX04200-026.
- z ““We call it a high-performing network,’ said Dr. Sacks. ‘It was a term we stole from a consultant a year ago to kind of get away from the negative connotations of narrow [HMO] network.’”
 - Reed Abelson, Trying to Revive H.M.O.’s, but Without Those Scarlet Letters, N.Y. Times, Feb. 28, 2016, see also Sacks (Advocate) Depo. at 238:14-22.

Get Less; Pay Less

- z Blue Cross Advantage/Precision
 - “BlueAdvantage HMO offers one of the largest provider networks of primary care physicians (PCPs) and hospitals in the state.”
- z BlueCare Direct with Advocate
 - No choice
- z The HPN product can only be sold at a discount of 10-15%.
 - PX04200 at AHC01213587

Including NorthShore in the HPN Will Not Lower Costs or Improve Quality



- z Defendants claim that the merger will bring NorthShore

NorthShore is Already Engaged in Risk-Based Contracts, and is Seeking More

- z NorthShore has a partial capitation contract for physician services for two BlueCross products. Washa (NorthShore) Depo at 77:9-13; 115: 6-22.
- z NorthShore entered into a commercial ACO agreement with BlueCross in 2014. PX05171-008.
- z NorthShore has approached payors to discuss participating in a global risk product. PX07014-001-2, PX07013-001
- z

Conclusion

A Preliminary Injunction
Should Issue



Conclusion



- z Market share of 60% and post-merger HHI of 3,943 creates a legal presumption that this merger will have anticompetitive consequences
- z Testimony, documents, and empirical evidence confirm the acquisition's likely anticompetitive effects
- z There are no verifiable, merger-specific efficiencies that justify taking the risk of this acquisition
- z The evidence warrants issuance of a preliminary injunction under § 13(b) of the FTC Act