IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION

And

STATE OF ILLINOIS

Plaintiffs,

v.

ADVOCATE HEALTH CARE NETWORK,

ADVOCATE HEALTH AND HOSPITALS CORPORATION,

And

NORTHSHORE UNIVERSITY HEALTHSYSTEM

Defendants.

No. 15-cv-11473
Judge Jorge L. Alonso
Magistrate Judge Jeffrey Cole

PUBLIC VERSION

PLAINTIFFS' POST-REMAND REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Table of Contents

Table of Authorities

Cases

Glossary of Abbreviated Terms

Abbreviations used in Plaintiffs' Post-Remand Reply Brief in Support of Plaintiffs' Motion for

INTRODUCTION

The Seventh Circuit made two "central" findings about the commercial realities of hospital competition in Chicago's northern suburbs:

history of post-merger price increases proves that even mergers involving a small number of hospitals in large urban areas can significantly harm consumers.

No court has ever found that a presumptively unlawful merger would generate efficiencies sufficient to outweigh its anticompetitive effects. Defendants have not come close to establishing such extraordinary efficiencies here. They continue to rely on grandiose and unsubstantiated assertions about a "high performing network," but, as Plaintiffs have repeatedly shown, to the extent that there are any consumer benefits associated with the HPN, the merger is not necessary to achieve them. Nor is the merger necessary for NorthShore to reduce its physician rates.

Faced with a presumptively unlawful merger, and the lack of significant cognizable efficiencies, the Court should enjoin the merger pending a full administrative hearing. Plaintiffs are likely to succeed on the merits and the equities weigh in favor of maintaining the current competition between Defendants during the administrative proceedings. Without a preliminary injunction, it is unlikely that Plaintiffs could obtain complete and effective relief after those proceedings conclude. Defendants' speculative claims about the HPN are not equities weighing against a preliminary injunction; any merger-specific benefits would still be available if Defendants prevail in the administrative proceedings.

ARGUMENT

I. Defendants Ignore the Seventh Circuit's Rulings

The Seventh Circuit found the evidence unequivocal on issues central to the commercial realities, including patient preference for local hospitals and insurers' need to include at least some of the merging firms' hospitals in networks

commercial realities or, alternatively, ignore the commercial realities and focus on an alleged "battle of the experts." To the extent that Defendants take issue with the Seventh Circuit's decision, however, they should have sought rehearing or filed a petition for certiorari; they cannot relitigate issues th

testimony, supported by the record as a whole, shows that such a network would *not* be attractive to employers. Op. at 23.

The geographic market must correspond to these commercial realities. *See* Op. at 10. But, instead of contending in a meaningful way with the Seventh Circuit's findings, Defendants attack Dr. Tenn's model. This Court does not, however, need to resolve any alleged "battle of the experts" to grant Plaintiffs' motion. Congress "prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Id.* (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962)). While expert testimony is often useful in defining a market, Defendants are wrong to suggest that market definition always turns on expert analysis. In *Penn State Hershey*, for example, the Third Circuit relied on insurer testimony to find that the proposed geographic market satisfied the hypothetical monopolist test and did not cite the extensive expert testimony on that issue.[1] *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338-46 (3rd Cir. 2016); *cf FTC v. Penn State Hershey Med. Ctr.*, 185 F. Supp. 3d 552, 557 (M.D. Pa. 2016); *see also FTC. v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1086 (N.D. Ill. 2012) ("defendants have cited no authority indicating that a merger simulation is required in order to obtain a preliminary injunction").

II. Dr. Tenn's Testimony is Reliable and Consistent with the Seventh Circuit's Decision

Although evidence other than Dr. Tenn's testimony clearly establishes that Plaintiffs have met our burden, Dr. Tenn's analysis is reliable and consistent with the weight of the evidence.

[1] Defendants argue that *Penn State Hershey* is distinguishable because the Third Circuit found it "significant" that insurers viewed the Hershey area as a "distinct market" and testified that the merged entity could extract a price increase from them. D's Supp. Br. at 15. But nowhere in the *Penn State Hershey* decision does the court refer to those facts as "significant." Rather, the court expressly relied on the testimony of insurers that they could not market health plans that excluded the merging firms to find that the proposed market satisfied the hypothetical monopolist test. *See Penn State Hershey*, 838 F.3d at 345-46. And, in any event, the record here shows that market participants view the northern Chicago suburbs as a distinct

Dr. Tenn found that 48% of the patients admitted to one of the eleven hospitals in the North Shore Area would substitute to another hospital in that market if their first-choice hospital were not available. PX06000 ¶ 99. Dr. Tenn used an approach that is consistent with the economic literature and with the Horizontal Merger Guidelines to analyze how combining all of the North Shore Area hospitals into a single entity would impact bargaining between hospitals and insurers. He concluded that it would be profitable for a hypothetical monopolist to demand a small but significant price increase from insurers, who would be willing to pay a little more to avoid excluding all North Shore Area hospitals from their networks and risk a large reduction in membership.[2] *Id.* at ¶ 110.

Defendants' criticisms of Dr. Tenn's analysis fail because they ignore or misstate the Seventh Circuit's findings. For example, Defendants argue that Dr. Tenn erred by relying on diversion ratios which, according to Defendants, the appellate court found to be "inadequate" and "insufficient." D's Supp. Br. at 1, 5. But the Seventh Circuit did *not* hold that it is inappropriate to consider patient-level diversions; it criticized how Defendants interpreted those diversions. On appeal, Defendants had argued (as they did to this Court) that "diversion ratios

erred by overlooking the market power created by the remaining patients' preferences"). Dr. Tenn does not make Defendants' error. His analysis examines the hypothetical monopolist's market power over insurers, which is informed, in part, by the preferences of patients who are reluctant to leave the North Shore Area for inpatient care. *See* Op. at 15-16 ("insurers respond to both prices and patient preferences"); *Penn State Hershey*, 838 F.3d at 342.

Defendants argue that the specific model Dr. Tenn employed is unreliable for a variety of reasons. They made the same arguments to the appellate court.[3] *See* D's App. Br. at 14, 46, 51-53; *see also* OA Tr. 44:17-21. The Seventh Circuit nonetheless concluded that Plaintiffs have made a "strong case" that the market contains a "very small" number of hospitals. Op. at 26.

That Dr. Tenn's model is reliable is evident from its results, which are fully consistent with the commercial realities. P's PH Br. at 6, 8; *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 37 (D.D.C. 2015) (finding plaintiffs' expert persuasive because his conclusions were consistent with business realities). In contrast, while Dr. McCarthy agrees with Dr. Tenn that, "when two hospitals merge, there's a change in the willingness to pay because now it's more valuable to have this hospital in your network," his model predicts that an *increase* in a hospital's value to insurers would lead to that hospital receiving *lower* reimbursement rates. McCarthy PI Hrg. Tr. 1255:21-23; P's FOFs ¶¶ 82-86; P's PH Br. at 15. Dr. McCarthy's implausible results are inconsistent with economic theory and with the overwhelming weight of the evidence. *See* McCarthy PI Hrg. Tr. 1360:20-1361:2; P's FOFs ¶¶ 70, 74, 85; P's PH Br. at

[3] Defendants also argue that Dr. Tenn's model is flawed because it always predicts a price increase. As Dr. Tenn testified, if the diversions and margins are small, his model would predict a trivial price increase and the proposed market would fail the hypothetical monopolist test. Tenn PI Hrg. Tr. 589:16-20. In this case, however, the intra-market diversions are high and, given applicable margins and prices, the predicted price increase is over 5%. Tenn PI Hrg. Tr. 489:24-490:1, 493:2-9. Defendants also attack the margin information Dr. Tenn used, but using Dr. McCarthy's margin calculation in the model does not change the prediction that a hypothetical monopolist could profitably raise prices by more than 5%. *See* DX5000 McCarthy Report ¶ 104, n. 159 (using alternative margins in Dr. Tenn's model leads to an estimated price increase of over 5% from a merger of only Defendants' hospitals)

diversion ratios indicate, those hospitals are options for some patients. No insurer testified that an out-of-market hospital would be an adequate substitute for the merging firms in a commercially viable network.[5]

Moreover, Defendants made the same arguments (and cited much of the same evidence) on appeal. *See* D's App. Br. at 12, 14-16, 21, 27-29, 41-42; OA Tr. 28:3-10, 32:22-33:4. Yet the Seventh Circuit held that, even if Northwestern Memorial were a close substitute for NorthShore from the perspective of insurers, and even if it were appropriate to add that hospital to the proposed market, it would not affect the outcome of this case because "there is no comparable evidence" about other hospitals. Op. at 25 n.5. Defendants have conceded their merger is presumptively unlawful even if the relevant geographic market includes the eleven North Shore Area hospitals and Northwestern Memorial. *Id.* In fact, Defendants have admitted that even if one were to add *both* Presence St. Francis and Northwestern Memorial to the proposed geographic market, their merger would meet the presumption. *See* PI Hrg. Tr. 1890:24-1891:8.

III. Defendants' Merger Is Anticompetitive

Defendants do not dispute that, if the North Shore Area is a relevant geographic market, their merger is presumptively unlawful. The presumption is buttressed by overwhelming evidence showing that Advocate and NorthShore are close competitors, that consumers benefit from their head-to-head competition, and that the merger would allow Defendants to raise their reimbursement rates. *See* P's FOFs ¶¶ 57-74. Defendants have not produced any evidence sufficient to overcome the presumption.

[5] Defendants cite testimony from Aetna about the purported interchangeability of NorthShore and Northwestern Memorial. D's Supp. Br. at 13. But, under pointed questioning from the appellate court, Defendants admitted that the cited testimony concerned state regulatory requirements, not commercial viability. OA Tr. 28:11-30:23.

Defendants cite insurer support as evidence that their merger would not have anticompetitive effects, but the insurers admitted that they lacked a factual basis for the statements Defendants cite. *See, e.g.*,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of January, 2017, I filed and served the foregoing on all counsel of record via the Court's electronic filing system.

/s/ Christopher Caputo

Christopher Caputo
Attorney for Plaintiff Federal Trade Commission