IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

St. Luke's Hospital, et al.,

Plaintiffs,

-vs-

ProMedica Health System, Inc., et al.,

Defendants.

Case No. 3:20 CV 2533

CORRECTED ORDER
GRANTING PRELIMINARY INJUNCTION

JUDGE JACK ZOUHARY

INTRODUCTION

Plaintiffs St. Luke's Hospital, d/b/a McLaren St. Luke's ("St. Luke's"), and Wellcare Physicians Group, LLC. ("Wellcare"), bring this action for injunctive relief and damages against Defendants ProMedica Health System, Inc. ("ProMedica") and their wholly-owned health-insurance subsidiaries ("Paramount"). ProMedica sent notices of termination of insurance and Medicare Advantage contracts with St. Luke's and its physicians, effective January 1, 2021 (Doc. 1 at 3). These and eight other contracts with St. Luke's were simultaneously terminated by ProMedica on the heels of the acquisition of St. Luke's by McLaren Health Care Corporation ("McLaren") (*id.*). St. Luke's alleges these actions violate antitrust laws and will cause immediate and irreparable harm (*id.*).

Plaintiffs move for a preliminary injunction (Doc. 22); Defendants oppose (Doc. 39). This Court held oral argument on December 21, 2020 (Docs. 63–65).

BACKGROUND

There are four major hospital systems in Lucas County -- ProMedica, Mercy Health, St. Luke's, and the University of Toledo Medical Center ("UTMC"). ProMedica is the largest of these organizations and briefly grew even larger when it acquired St. Luke's in 2010. The Federal Trade

Commission ("FTC") successfully challenged that transaction on antitrust grounds. *In the Matter of ProMedica Health Sys., Inc.*, 2012 WL 1155392 (F.T.C. 2012); *F.T.C. v. ProMedica Health Sys., Inc.*, 2011 WL 1219281 (N.D. Ohio 2011); *ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559 (6th Cir. 2014). After the acquisition, but before the merger litigation was resolved, ProMedica took steps to eliminate much of St. Luke's back-office operations, transfer St. Luke's employees responsible for these operations to ProMedica, scale back clinical services at St. Luke's, and recruit physicians away from St. Luke's (Doc. 22-6 at 2–4). The FTC mandated a divestiture of St. Luke's, after which ProMedica offered to sell St. Luke's to Capella Health -- a company with a weak balance sheet and a track record of shifting newly acquired hospitals to a "bare bones" operation, often leasing those hospitals back to an operating entity at a steep cost (*id.* at 4–5). St. Luke's protested the planned sale and, following negotiations, ProMedica agreed not to sell to Capella if St. Luke's agreed to proposed terms in the divestiture agreement (*id.*). These terms included paying $35 million to ProMedica for investments made to St. Luke's following the acquisition, and a "Change in Control" provision which allowed Paramount to immediately terminate its agreements with St. Luke's if it was later acquired by another entity (*id.* at 5–6).

Partly due to the onerous terms of the divestiture agreement, but also due to ProMedica neglecting its obligations under the agreement, St. Luke's was left in a precarious financial situation following the divestiture (*id.* at 6–7). St. Luke's successfully sought acquisition by McLaren -- who agreed to make a substantial investment in St. Luke's (*id.*). Immediately following the acquisition, Defendants terminated nearly all their longstanding service agreements with both St. Luke's and McLaren, many of which predated the divestiture (*id.* at 7). Following the cancellation of the Paramount commercial-insurance and Medicare Advantage contracts at issue here, Defendants promptly issued letters to Paramount customers informing them that St. Luke's and its doctors were

now out of network, and identified other hospitals and doctors those patients could utilize (*id.*). St. Luke's then initiated this lawsuit (Doc. 1), including a request for preliminary injunctive relief (Doc. 22).

LEGAL STANDARD

To determine whether to grant a preliminary injunction, courts generally consider four factors:

(1) whether the movant has a strong likelihood of success on the merits;

(2) whether the movant would suffer irreparable injury without the injunction;

(3) whether issuance of the injunction would cause substantial harm to others; and

(4) whether the public interest would be served by issuance of the injunction.

Ne. Ohio Coal. for Homeless v. Husted, 696 F.3d 580, 590–91 (6th Cir. 2012) (citation omitted). Each factor will be discussed in turn.

Strong Likelihood of Success on the Merits

Plaintiffs must demonstrate they have a "strong likelihood of success on the merits" to satisfy the first factor. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 543 (6th Cir. 2007) (citation omitted). This does not mean Plaintiffs must prove their case in full, but rather "it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997).

Plaintiffs base their claims on two primary grounds. First, they allege the "Change in Control" provision is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act and the Ohio Valentine Act (Doc. 22 at 21). Establishing an unreasonable restraint of trade requires proof of a contract, combination, or conspiracy which either harms competition, or is engaged in by an entity

with market power and has the potential to harm competition. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 827 (6th Cir. 2011). The same legal standard applies under the Ohio Valentine Act. *Erie Cty. v. Morton Salt, Inc.*, 702 F.3d 860, 867 (6th Cir. 2012).

Next, Plaintiffs allege the Paramount termination notices are part of a scheme of monopolization or attempted monopolization in violation of Section 2 of the Sherman Act (Doc. 22 at 21). Monopolization requires the possession of monopoly power and the willful maintenance or enhancement of that power through exclusionary conduct. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966); *Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 574 (6th Cir. 1986). "An attempted monopolization occurs when a competitor, with a 'dangerous probability of success,' engages in anticompetitive practices the specific design of which are, to build a monopoly or exclude or destroy competition." *Id.* (citing *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 627 (1953)). This Court must therefore review whether Plaintiffs meet these necessary elements.

Relevant Market

Plaintiffs must first establish the relevant market within which their claims may be assessed. There is a strong likelihood Plaintiffs will be able to show, at minimum, "general acute care inpatient hospital services sold to commercial health plans, excluding tertiary and quaternary services," in Lucas County, is one of the relevant markets (Doc. 22 at 22). This is the same conclusion reached by the FTC, Judge David Katz, and the Sixth Circuit in the antitrust merger litigation between ProMedica and St. Luke's. *In the Matter of ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *20–23; *F.T.C. v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, at *54–55; *ProMedica Health Sys., Inc.*, 749 F.3d at 568. The data shows that very few patients leave Lucas County for these services, further supporting the argument that this is a relevant market (Doc. 22-4 at 3). Also, actions involving St. Luke's or ProMedica's wholly-owned subsidiaries -- such as Wellcare and Paramount -- can

likewise be the subject for injunctive relief if they are also targets of a conspiracy, under the "inextricably intertwined doctrine." *See Providence v. Cleveland Press Pub. Co.*, 571 F. Supp. 855, 866–67 (N.D. Ohio 1983). Additional relevant markets may be further defined pending discovery.

Market Power

Plaintiffs have shown that ProMedica has the requisite market power necessary to sustain these claims at this stage. In the merger litigation, the FTC concluded that, even before its merger with St. Luke's, "ProMedica, as the dominant hospital system in Lucas County, had significant bargaining leverage which allowed it to command among the highest rates, not only in Lucas County but also the entire state of Ohio," which the Commission attributed to its "market power." *In the Matter of ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *32. These higher prices are unlikely attributed to better services, given that several of its quality scores were found to be "subpar." (*id.* at *7).

Plaintiffs provide additional evidence that, since the merger litigation, ProMedica's market share has only grown stronger, while competitors such as St. Luke's and UTMC have weakened (Doc. 22-4 at 2–3). Such evidence suggests, in the market consisting of inpatient general acute-care services (not including tertiary or quaternary services), offered to commercially insured patients by hospitals located in Lucas County, ProMedica has a 56 percent market share (*id.*). This is sufficient to establish at least an attempted monopolization claim. *Defiance Hosp. v. Fauster-Cameron, Inc.*, 344 F. Supp. 2d 1097, 1112, 1116–17 (N.D. Ohio 2004) ("[M]onopoly power requires proof of more than sixty percent market power . . . courts will generally find a dangerous probability of success where the defendant has a market share of fifty percent or more . . . [and firms] with market shares between thirty and fifty percent may be found to have a dangerous probability of success if other factors are present."); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1443 (6th Cir. 1990);

Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 490–91 (5th Cir. 1984) ("[A] share of less than the fifty percent generally required for actual monopolization may support a claim for attempted monopolization if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present.").

The FTC found during its analysis in the merger litigation that "the record makes clear that a network which does not include a hospital provider that services half the county's patients in one relevant market . . . would be unattractive to a huge swath of potential members," concluding, "in this market . . . ProMedica's prices -- already among the highest in the state -- are explained by *bargaining power*." *ProMedica Health Sys., Inc.*, 749 F.3d at 570 (emphasis in original). There is little reason to believe that Defendants' market power has changed dramatically since the merger litigation.

True, Defendants provide some evidence that Mercy Health may have gained a small market share in the interim (Docs. 45 at 3; 41 at 7). Plaintiffs, however, point out that both UTMC and St. Luke's have experienced declining market shares, noting that the only new hospital opened in Lucas County in the past ten years is a ProMedica facility (Docs. 22-4 at 3; 22 at 26). The new Mercy hospital in Perrysburg, pointed to by Defendants, is on the edge but outside the defined relevant market of Lucas County (Doc. 65 at. 51). At this stage, it is highly likely Plaintiffs will be able to demonstrate that Defendants continue to have the required market power to sustain Plaintiffs' claims.

Unreasonable Restraint of Trade

Under the rule of reason, a plaintiff must show either "actual detrimental effects" or market power plus "the potential for genuine adverse effects on competition." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986). Plaintiffs have shown a high likelihood of proving either one of these elements. As discussed above, evidence has been provided to show market power in the Section 2 context -- and the market-power threshold is even lower in the Section 1 context. *Jefferson Parish*

Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (holding that 30 percent market share is the minimum required); *Collins Inkjet Corp. v. Eastman Kodak Co*., 2014 WL 11516553, at *10 (S.D. Ohio 2014), *aff'd*, 781 F.3d 264 (6th Cir. 2015) (same).

Not only have Plaintiffs shown a "potential" for genuine effects on competition, but they likely may establish actual detrimental effects as well. The FTC noted that "St. Luke's was the next best substitute for a substantial and important fraction of ProMedica's patients, stemming from St. Luke's advantageous location in southwest Lucas County" -- a fact which has not changed since the merger litigation. *In the Matter of ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *39. This, in conjuncture with St. Luke's being a low-cost, high-quality competitor, demonstrates than an erosion of its market share would very likely have detrimental effects on competition.

Exclusionary Conduct

There is little doubt that ProMedica's conduct was exclusionary. Immediately following the acquisition of St. Luke's by McLaren, Defendants cancelled eight longstanding service agreements with Plaintiffs (Doc. 22-15 at 2), pressured ProMedica surgeons to stop practicing at St. Luke's (Doc. 22-3 at 4), cancelled commercial insurance and Medicare Advantage contracts with Plaintiffs (Doc. 22-2 at 2), and terminated its Michigan hospitals' agreements with McLaren Health Plan (Doc. 22-16 at 2). It can be inferred that many, if not all, of these relationships were profitable to both parties given that they were voluntarily extended as recently as 2018 (Doc. 22-8 at 2). If the motives behind Defendants' actions were not clear based on their actions alone, ProMedica executives themselves admitted the motivation behind their decision to cancel the agreements was the presence of a more formidable St. Luke's in the market (Docs. 22-2 at 3; 22-16 at 2–3; 22-17 at 2).

The facts here are strikingly similar to those in *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985), where the Supreme Court found the dominant ski facility's termination of

longstanding profitable agreements with its competitor was unlawful because the actions were "not motivated by efficiency concerns and [defendant] was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610–11. This type of exclusionary conduct is a well-established exception to the general rule that there is no duty to deal with competitors. *Id.* at 601. The Supreme Court noted that "[i]f a firm has been 'attempting to exclude the rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* at 605. So too here. ProMedica has "made a deliberate effort to discourage its customers from doing business with its smaller rival." *Id.* at 610.

ProMedica insists *Aspen* must be viewed "through the lens of" *Verizon Communications Inc. v. Trinko, LLP*, 540 U.S. 398 (2004) (Doc. 65 at 11). But that case is not this one. There, the Supreme Court emphasized, "[o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small . . ." *Trinko*, 540 U.S. 398 at 412. Unlike the regulatory schemes dictating how telecommunication firms interact with their competitors, there is no such structure in place regulating the conduct of the healthcare parties here.

Further, ProMedica's attempts to distinguish *Aspen* are unpersuasive. They argue that, unlike *Aspen*, the decision taken by ProMedica to cancel contracts with Plaintiffs would be profitable to ProMedica system-wide, even if unprofitable to their wholly-owned subsidiary Paramount (Doc. 39 at 22). Their evidence for this assertion is the opinion of Dr. Dranove -- an expert hired for this litigation -- and declarations from ProMedica officials, not internal planning calculations generated in the ordinary course of business (*id.*). Plaintiffs' counsel raised concerns regarding Dr. Dranove's calculations, specifically the lack of explanation for how he reached many of his conclusions (Doc. 65 at 17–20). As noted by Judge Katz in the merger litigation, "[p]rojections of efficiencies may be

viewed with skepticism, particularly if they are generated outside of the usual business planning process." *F.T.C. v. ProMedica*, 2011 WL 1219281 at *40. ProMedica's argument is further undermined by ProMedica officials' own statements indicating their decision was motivated by McLaren's acquisition of St. Luke's (Docs. 22-2 at 3, 22-5 at 10, 22-16 at 2), as well as their voluntary agreement to extend the relationship between Paramount and St. Luke's to 2023 (Doc. 22-8 at 2).

Attempt to Monopolize

Attempt to monopolize, unlike monopolization, requires specific intent. *Aspen Skiing*, 472 U.S. at 602. As previously noted, Defendants' actions and words demonstrate specific intent here (Docs. 22-2 at 3; 22-16 at 2–3; 22-17 at 2). Further, Defendants' actions towards UTMC, as detailed in the Complaint (Doc. 1 at 21–24), lend additional support to the claim that Defendants have taken actions since the merger litigation to erode the market share of competitors in Lucas County. These actions, in addition to the general trends in respective market shares (Doc. 22-4 at 2–3), indicate Plaintiffs have a high likelihood of showing a dangerous probability that ProMedica will succeed in monopolizing one or more relevant markets.

Irreparable Injury

St. Luke's provides evidence to support several distinct and significant irreparable injuries that will occur absent an injunction. *Aspen Skiing* makes clear that the harm done by an action need not completely eliminate the targeted party, but rather, "conduct which unnecessarily excludes or handicaps competitors" can be enough. 472 U.S. at 597. Paramount represents almost 20 percent of St. Luke's commercially insured business, and more than 30 percent of its Medicare Advantage business (Doc. 22 at 11). The immediate loss of this revenue would impede St. Luke's plans to make immediate investments in its business and expand services to patients in Lucas County, particularly

given the amount of debt St. Luke's currently faces as a result of the divestiture agreement with ProMedica (*id.* at 11, 19).

Further, given the short notice on which the termination of the contracts was given, many patients will be locked into a Paramount plan that does not include the doctors or hospitals they desire (*id.*; Doc. 22-2 at 9–11). In *Barron v. Vision Service Plan*, 575 F. Supp. 2d 825 (N.D. Ohio 2008), this Court found that the termination of an insurance network affiliation with an optometrist would result in irreparable harm given that, "it is unlikely that many patients would see a non-network optometrist when they could see a network optometrist for significantly less." *Id.* at 837. Here, Defendants have already assigned numerous patients new primary-care physicians (Doc. 22-2 at 9–11). Once patients switch to a new doctor or hospital, it is likely many will become accustomed to their new providers and few would go through the effort to switch again at a later date. *See Barron,* 575 F. Supp. 2d at 837; Doc. 22 at 19; Doc. 65 at 32–33). This aspect of the injury would be permanent. *See Barron,* 575 F. Supp. 2d at 837; *Beaute Craft Supply Co. v. Revlon, Inc.*, 402 F. Supp. 385, 389 (E.D. Mich. 1975). Plaintiffs have met their burden of showing irreparable injury.

Substantial Harm to Others

This is a case where there would likely be little-to-no harm to Defendants if the preliminary injunction is issued -- and certainly not substantial harm. Defendants voluntarily engaged in this relationship with Plaintiffs and amicably maintained it for several years, with their first agreement with Wellcare beginning in 2008 (Doc. 22 at 12). The harmonious nature of the relationship between St. Luke's and Paramount was acknowledged by Paramount's President himself, who stated, "the addition of St. Luke's to Paramount's network made Paramount more attractive to employers in southwestern Lucas County and had a positive impact on Paramount." *In the Matter of ProMedica*

Health Sys., Inc., 2012 WL 1155392, at *47. As recently as 2018, St. Luke's and Paramount voluntarily agreed to extend these agreements and continue their "mutually beneficial relationship" through the end of 2023 (Doc. 22-8 at 2). Taking these actions and statements into account, it is abundantly clear that Defendants would not suffer harm from a short-term continuation of these agreements. *See Brandeis Mach. & Supply Corp. v. Barber-Greene Co.*, 1973 WL 852, at *6 (W.D. Ky. 1973), *aff'd*, 503 F.2d 503 (6th Cir. 1974) (no substantial harm found where defendant had to "continue to supply plaintiffs with all of the types of equipment plaintiffs customarily have purchased from defendant"). Here, if anything, the continuance of the agreements will likely remain profitable for both parties.

Defendants' claims that a temporary injunction would "eliminate [] competition and give McLaren St. Luke's a free ride on ProMedica investments" are not well taken (Doc. 65 at 34). Given the likelihood of success on the merits, as explained above, competition will be *improved* by the granting of this Motion, not harmed. Likewise, the continuation of the preexisting mutually-beneficial relationship cannot be accurately described as a "free ride."

Public Interest

The public has an interest in quality, low-cost healthcare and access to the doctors and hospitals they desire and with which they are familiar. For many, the abrupt termination of the relationship between Paramount and St. Luke's likely came as a surprise, leaving them with a new doctor with whom they had no prior relationship (Doc. 22-2 at 9–11). For the rest of the public in Lucas County, a dominant player in the healthcare market unlawfully consolidating power and market share would likely result in lower-quality care, higher prices, or both. *In the Matter of ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *24. Market share for St. Luke's has waned over the past ten years, declining from 12.8 percent of the relevant market to 9.6 percent (Doc. 22 at 11). The harm

posed by the abrupt cancellation of the agreements between Paramount and St. Luke's risks further diminishing ProMedica's primary rival in southwest Lucas County, and one of their only three rivals in Lucas County overall. *In the Matter of ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *39. This would certainly not be in the public interest.

CONCLUSION

Plaintiffs have satisfied each of the factors to support a preliminary injunction. The Motion for Preliminary Injunction (Doc. 22) is granted. Defendants are enjoined from terminating the contracts at issue between Paramount and Plaintiffs (Doc. 22-5 at 11) until further Order of this Court. Defendant shall promptly notify all appropriate Paramount customers of this change.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

December 29, 2020