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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ST. LUKE'S HOSPITAL d/b/a McLaren St. Luke's;
WELLCARE PHYSICIANS GROUP, LLC,

Plaintiffs-Appellees,

v.

PROMEDICA HEALTH SYSTEM, INC.; PROMEDICA
INSURANCE CORPORATION; PARAMOUNT CARE, INC.;
PARAMOUNT CARE OF MICHIGAN, INC.; PARAMOUNT
INSURANCE COMPANY; PARAMOUNT PREFERRED
OPTIONS, INC.,

Defendants-Appellants.

No. 21-3007

Appeal from the United States District Court for the Northern District of Ohio at Toledo.
No. 3:20-cv-02533—Jack Zouhary, District Judge.

Argued: July 29, 2021

Decided and Filed: August 10, 2021

Before: SUTTON, Chief Judge; COLE and READLER, Circuit Judges.

COUNSEL

ARGUED: Douglas E. Litvack, Christopher G. Renner, David M. Gossett, DAVIS WRIGHT TREMAINE, LLP, Washington, D.C., for Appellants. David A. Ettinger, HONIGMAN LLP, Detroit, Michigan, for Appellees. **ON BRIEF:** Douglas E. Litvack, Christopher G. Renner, David M. Gossett, DAVIS WRIGHT TREMAINE, LLP, Washington, D.C., Adam S. Sieff, DAVIS WRIGHT TREMAINE LLP, Los Angeles, California, Mark D. Wagoner, Matthew T. Kemp, Larry J. Obhof, SHUMAKER, LOOP & KENDRICK LLP, Toledo, Ohio, for Appellants. David A. Ettinger, HONIGMAN LLP, Detroit, Michigan, Ron N. Sklar, HONIGMAN LLP, Chicago, Illinois, Denise M. Hasbrook, ROETZEL & ANDRESS, Toledo, Ohio, for Appellees. Amanda L. Wait, Victor J. Domen, Jr., NORTON ROSE FULBRIGHT US LLP, Washington, D.C., Gerald A. Stein, NORTON ROSE FULBRIGHT US LLP, New York, New York, David E. Dahlquist, Kevin P. Simpson, WINSTON & STRAWN LLP, Chicago, Illinois for Amici Curiae.

OPINION

SUTTON, Chief Judge. In phase one of this dispute, our court affirmed the Federal Trade Commission's decision to block a merger of ProMedica Health System and St. Luke's Hospital in Lucas County, Ohio. As part of the unwinding of the merger, ProMedica and St. Luke's signed an agreement in which ProMedica's insurance subsidiary, Paramount, agreed to maintain St. Luke's as a within-network provider. But that contractual obligation came with a caveat: Paramount could drop St. Luke's if ownership of the hospital changed. The qualification came to fruition when a large healthcare company based in Michigan, McLaren Health, merged with St. Luke's. In response, Paramount ended its relationship with St. Luke's, removing the hospital from its provider network.

All of this prompted a second antitrust charge against ProMedica, this one by St. Luke's. It alleged that ProMedica's refusal to do business with it violated the antitrust laws. The district court preliminarily enjoined ProMedica from pulling the plug on the agreement. Because ProMedica had a legitimate business explanation for ending the relationship, St. Luke's is unlikely to show that ProMedica unlawfully refused to continue doing business with it. On top of that, it has little likelihood of establishing an irreparable injury given the option of money damages. For these reasons and those elaborated below, we vacate the preliminary injunction.

I.

A.

Typical economic transactions involve single buyers and single sellers and a straightforward price. Not so in the healthcare market. It includes a diverse cast of players for each treatment and variable, often unknown, prices.

Take account of the many potential sellers: individual doctors, physician practices, pharmacies, hospitals, and others. So too of buyers. Rarely is there just one of them, with state and federal governments, private insurance companies, and individuals all participating. Making

matters more complicated, many players often take on more than one role, with healthcare companies and insurance companies frequently acting as sellers and buyers.

Pricing is unique too. Consumers rarely know the cost of any one procedure. And healthcare providers often charge different rates for care depending on who foots the bill. The federal government, for example, tends to pay less for services and procedures than do private insurance plans. Medicare and Medicaid rarely cover “providers’ actual cost of services.” *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 561 (6th Cir. 2014).

Private health insurance stands in the middle of the healthcare market. Although some patients shop for health insurance on their own, most Americans receive coverage through their employers, a vestige of 1940s wage policies. Atul Gawande, *Is Health Care a Right?*, *The New Yorker*, Oct. 2, 2017, at 48. Employers thus negotiate rates with commercial insurance companies. If an employer is self-insured, it foots the cost of care itself and pays only administrative fees. If not, the insurance company covers the cost of care in exchange for a premium per covered employee.

Health insurance companies in turn contract with providers to set rates and bundle providers into “networks” that they can then market to employers. When insurance companies include as many providers as possible in their network, that adds flexibility and enhanced choice. But it costs more. When insurance companies include only a subset of providers in a narrow network, the opposite usually is true. An insurer “may be able to negotiate lower rates from providers for narrow network plans,” which may then “enable the insurer to offer consumers lower premiums.” R.49 at 11. Because narrow networks funnel more patient traffic to their contracted providers, insurance companies pay less for care and pass some of those savings on to employers and patients.

B.

Anchored by underappreciated Toledo, Lucas County has four main hospital systems: ProMedica, Mercy Hospitals, the University of Toledo Medical Center, and St. Luke’s. *ProMedica*, 749 F.3d at 562. Two-thirds of Lucas County’s patients have insurance through the government. *Id.* at 561. The rest receive insurance through private plans.

ProMedica acts as a healthcare buyer and seller. As a seller, it holds a prominent place in the market. ProMedica's hospital system holds 56% of the county's market for "inpatient general acute care services" that are "offered to commercially insured patients." R.22-4 at 2.

As a buyer, ProMedica has a more modest position. It offers health insurance through a subsidiary, Paramount, which purchases healthcare from providers. Rather than include many hospitals in its network, Paramount employs a narrow-network strategy that steers patients toward ProMedica's hospitals. This vertically integrated approach allows Paramount to lower prices and permits ProMedica to recoup those savings down the line as a provider. Far from dominant in this market, Paramount competes alongside national insurers like Aetna and Anthem and regional insurers like Buckeye Insurance Group and Medical Mutual of Ohio. Paramount has "about 78,000 commercial members and fewer than 20,000 Medicare Advantage members" in the region. R.40 at 6.

St. Luke's, a healthcare seller located southwest of Toledo in the city of Maumee, has a smaller market share. Until recently, it operated as an independent community hospital, capturing roughly 10% of the local commercial market. *ProMedica*, 749 F.3d at 562. Mercy and the University make up the remainder.

Despite its size, St. Luke's has some comparative advantages. It offers premium care at competitive rates. And it operates in the wealthier southwestern portion of Lucas County, attracting a large number of privately insured patients. Those patients represent a critical revenue source for St. Luke's, offsetting the losses incurred from treating patients covered by government plans.

These twin advantages help to explain why ProMedica sought to merge with St. Luke's in 2010. After agreeing to join forces, ProMedica sought to integrate St. Luke's operation by melding back offices and transferring employees. Paramount, ProMedica's insurance arm, contracted with St. Luke's around this time to include the hospital as an in-network provider. The partnership proved lucrative. Paramount won over "major employers in the areas most served by St. Luke's," gaining over 10,000 covered individuals after adding St. Luke's to its

provider network. R.22-7 at 2. ProMedica also continued to work with WellCare, the St. Luke's physician group.

Wary of ProMedica's market dominance and concerned about the downstream effects of market consolidation, the Federal Trade Commission objected to the merger. *ProMedica*, 749 F.3d 559. After an investigation, the Commission ordered ProMedica to divest St. Luke's. *ProMedica Health Sys., Inc.*, 2012-1 Trade Cas. 77840, 2012 WL 1155392, at *48 (F.T.C. Mar. 28, 2012). Our court rejected ProMedica's petition to overturn the order. *ProMedica*, 749 F.3d at 561.

C.

That brings us to the second, perhaps final, phase of this dispute. In 2016, the parties negotiated, and the Commission approved, a divestiture agreement establishing that Paramount would continue contracting with St. Luke's as an in-network healthcare provider. But the provision contained an out. If St. Luke's underwent "a Change in Control," Paramount could "immediately terminate" its contracts with the hospital and its physician group. R.32 at 19.

The arrangement initially worked well, so well that the parties re-upped the "mutually beneficial" contract two years later, extending it through 2023. R.22-8 at 2. For St. Luke's, the agreement guaranteed a steady stream of traffic from patients with Paramount insurance in the wealthier southwestern portion of the county.

Paramount benefited as well in obvious and not-so-obvious ways. The obvious: It could advertise St. Luke's as an in-network provider to private insurance customers, an easy way to boost revenue. The not-so-obvious: ProMedica generated revenue from patients who needed advanced care that St. Luke's could not provide. Keep in mind that not every hospital provides every kind of service. St. Luke's offers just primary and secondary services (think "basic medical and surgical" care), while ProMedica offers more sophisticated tertiary services like cardiothoracic surgeries and advanced cancer care. R.32 at 65. By maintaining St. Luke's as an in-network provider, Paramount could attract members who might go to St. Luke's for basic services but move to ProMedica's hospitals for more complex treatment. St. Luke's also allowed

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