

Complaint

IN THE MATTER OF

**ADVOCATE HEALTH CARE NETWORK,
ADVOCATE HEALTH AND HOSPITALS
CORPORATION,
AND
NORTHSHORE UNIVERSITY HEALTHSYSTEM**

ADMINISTRATIVE COMPLAINT, ETC. IN REGARD TO ALLEGED
VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION
ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9369; File No. 141 0231

Complaint, December 17, 2015 – Decision, March 20, 2017

This case addresses the \$2.2 billion acquisition by Advocate Healthcare Network of certain assets of NorthShore University HealthSystem. The complaint alleges that the acquisition would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by significantly reducing competition in the market for general acute care inpatient hospital services in the North Shore Area, in northern Cook County and southern Lake County, in Illinois. The Order dismisses the Complaint because the respondents abandoned the proposed merger.

Participants

For the *Commission*: Emily Bowne, Alex Bryson, Timothy Carson, Christopher Caputo, Charles Dickinson, Jamie France, Sean Pugh, Anthony Saunders, Sophia Vandergrift, and Michelle Yost Hale.

For the *Respondents*: Robert McCann and Kenneth Vorrasi, Drinker Biddle & Reath LLP; David Dahlquist, Winston & Strawn LLP.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by the virtue of the authority vested in it by the FTC Act, the Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Respondents Advocate Health Care Network (“AHCN”), Advocate Health and Hospitals Corporation (“AHC,” and together with AHCN,

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“Advocate”), and NorthShore University HealthSystem (“NorthShore”), have executed an affiliation agreement (“Affiliation Agreement”) in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.**NATURE OF THE CASE**

1. Advocate and NorthShore are the two leading providers of general acute care (“GAC”) inpatient hospital services in the northern suburbs of Chicago, Illinois. The proposed transaction between Respondents (“Transaction”) would join these two hospital systems to create by far the largest hospital system in northern Cook County and southern Lake County.

2. The proposed Transaction will substantially lessen competition and cause significant harm to consumers. If Respondents consummate the Transaction, healthcare costs will rise, and the incentive to increase service offerings and improve the quality of healthcare will diminish.

3. Advocate and NorthShore are close, if not each other’s closest, competitors in the North Shore area. A strategy consultant retained by NorthShore concluded that Advocate was the “#1 provider in NorthShore’s service area” and “NorthShore and Advocate are the #1 or #2 players in almost every service line” in NorthShore’s “core service area.” Other NorthShore documents refer to Advocate as its “top,” “key,” “largest,” “main,” and “real” competitor. Moreover, both Advocate and NorthShore have a history of upgrading medical facilities, investing in new technologies, and adjusting their approach to managed care contracting because of competition from each other.

4. The Transaction will substantially lessen competition in the market for GAC inpatient hospital services sold and provided

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to commercial payers (*i.e.*, health plans) and their insured members, respectively (“GAC inpatient hospital services”). The relevant geographic market in which to analyze the effects of the Transaction is the area in northern Cook County and southern Lake County, defined as the “North Shore Area.” The North Shore Area is bounded by six hospitals—NorthShore Evanston Hospital, Swedish Covenant Hospital, Presence Resurrection Medical Center, Northwest Community Hospital, Advocate Condell Medical Center, and Vista Medical Center East—and contains five additional hospitals—NorthShore Glenbrook Hospital, NorthShore Highland Park Hospital, NorthShore Skokie Hospital, Advocate Lutheran General Hospital, and Northwestern Lake Forest Hospital. Collectively, Respondents own and operate more than half the GAC hospitals located within the North Shore Area.

5. Respondents are already the two largest providers, by admissions, of GAC inpatient hospital services in the North Shore Area. Respondents employ and are affiliated with large networks of physicians, offer a vast suite of GAC inpatient hospital services, and operate with additional competitive advantages over other hospitals in the North Shore Area. Post-Transaction, Respondents would control 55% of the GAC inpatient hospital services market, by admissions, in the North Shore Area, while the next largest hospital would have only 15% of this market. The Transaction would significantly increase market concentration and result in such a highly concentrated market that the Transaction is presumptively unlawful under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”).

6. Today, Advocate and NorthShore compete for inclusion in commercial payers’ hospital networks. Without either of these hospital systems, it would be very difficult for commercial payers to market a health plan provider network to employers with employees living or working in the North Shore Area. Competition between Advocate and NorthShore results in lower prices, higher quality, and greater service offerings.

7. By eliminating competition between the parties, the Transaction is likely to increase Respondents’ bargaining leverage with commercial payers, and enhance Respondents’ ability to

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negotiate more favorable reimbursement terms, including reimbursement rates (*i.e.*, prices). Faced with higher rates and other less favorable terms, commercial payers will be forced to pass on those higher healthcare costs to employers and their employees in the form of increased premiums, co-pays, deductibles, and other out-of-pocket expenses. The merged firm will also have a diminished incentive to improve its quality of care or increase its service offerings to patients in the North Shore Area.

8. Entry or expansion by other hospitals will not be likely, timely, or sufficient to counteract the adverse competitive effects that likely will result from the Transaction. Illinois's Certificate of Need regulatory framework makes it difficult for health systems to receive approval to build new hospitals or expand existing facilities. Additionally, potential entrants would need to devote significant time and resources to conduct studies, develop plans, acquire land, and construct and open a competitive hospital. Respondents' combined size and the breadth and depth of the GAC inpatient hospital services they provide make it unlikely that there will be entry on a sufficient scale to counteract or constrain post-Transaction price increases.

9. Respondents' principal efficiency claim—that the merger will enable Respondents to lower costs and participate in a low-price, ultra-narrow network insurance product offered to commercial payers—is neither substantiated nor merger-specific, and ultimately not cognizable. Respondents' other efficiency claims, including their purported claims for improved quality, are likewise not substantiated, not merger-specific, and not cognizable. Even assuming Respondents' purported efficiencies were cognizable, they are insufficient to justify the Transaction in light of its potential to harm competition.

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II.**BACKGROUND****A.****Jurisdiction**

10. Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting “commerce” as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

11. The Transaction constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B.**Respondents**

12. Respondents AHCN and AHHC are Illinois not-for-profit corporations, with AHCN acting as the sole corporate member of AHHC. Together and with other controlled corporations, they constitute and operate Advocate, a not-for-profit health system affiliated with the Evangelical Lutheran Church in America and the United Church of Christ. Headquartered in Downers Grove, Illinois, Advocate operates 11 GAC hospitals and a two-campus Children’s Hospital, all in Illinois. Five of Advocate’s GAC hospitals—Christ Medical Center, Illinois Masonic Medical Center, Lutheran General Hospital, South Suburban Hospital, and Trinity Hospital—are located in Cook County, and two—Condell Medical Center and Good Shepherd Hospital—are located in Lake County. For the fiscal year ending on December 31, 2014, Advocate generated \$5.2 billion in revenue.

13. Advocate is the largest hospital system in the Chicago metropolitan area. Including its 12 hospitals, Advocate has more than 250 healthcare practice sites at which physicians and other clinicians provide clinical health services, with 37 outpatient service locations, 25 imaging facilities, and five outpatient surgical centers. Two of Advocate’s hospitals, Advocate

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Lutheran General Hospital (“Advocate Lutheran General”) and Advocate Condell Medical Center (“Advocate Condell”), are in the North Shore Area. Advocate Lutheran General, Advocate’s second largest hospital with 638 licensed beds, is in Park Ridge, Illinois, a town in northern Cook County, and offers a range of GAC inpatient hospital services. Advocate Lutheran General generated more than \$490 million in inpatient revenue in 2014. Advocate Condell is in Libertyville, Illinois, in southern Lake County. Advocate Condell has 273 licensed beds, and provides a wide range of GAC inpatient hospital services. Advocate Condell’s inpatient revenue in 2014 exceeded \$173 million. Both Advocate Lutheran General and Advocate Condell are Licensed Level I Adult Trauma Centers.

14. Advocate employs approximately 1,375 physicians as part of its employed physician group, the Advocate Medical Group, and clinically integrates with an additional 3,825 non-employed physicians. Advocate Physician Partners (“APP”), a joint venture in which Advocate holds a 50% interest, contracts with commercial payers on behalf of Advocate’s hospitals as well as its employed and clinically integrated non-employed physicians.

15. Respondent NorthShore is an Illinois not-for-profit corporation and health system. Headquartered in Evanston, Illinois, NorthShore owns and operates four GAC hospitals. Three of these GAC hospitals—Evanston Hospital (“NS Evanston”), Glenbrook Hospital (“NS Glenbrook”), and Skokie Hospital (“NS Skokie”)—are in northern Cook County, while the fourth—Highland Park Hospital (“NS Highland Park”)—is in southern Lake County. For the fiscal year ending on September 30, 2014, NorthShore generated \$1.9 billion in revenue.

16. NorthShore’s four hospitals compete with Advocate’s hospitals, particularly Advocate Condell and Advocate Lutheran General, across a wide range of GAC inpatient hospital services. NS Evanston, located in Evanston, Illinois, is NorthShore’s largest hospital, with 354 licensed beds. NS Evanston is a Licensed Level I Adult Trauma Center. NS Evanston’s inpatient revenue for its fiscal year ending in September 2014 surpassed \$243 million. NS Glenbrook is in Glenview, Illinois, and has 173 licensed beds. NS Highland Park, located in Highland Park, Illinois, has 149 licensed beds. NS Skokie is in Skokie, Illinois,

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and has 125 licensed beds. NS Glenbrook, NS Highland Park, and NS Skokie are Licensed Level II Adult Trauma Centers. The inpatient revenues for NS Glenbrook, NS Highland Park, and NS Skokie in the fiscal year ending in September 2014 were approximately \$106 million, \$85 million, and \$91 million, respectively.

17. NorthShore's employed physician group, NorthShore Medical Group, employs approximately 900 physicians and clinically integrates with an additional 1,200 non-employed physicians who are on staff and have admitting privileges at one or more of NorthShore's hospitals. Of these 1,200 non-employed physicians, approximately 520 participate in NorthShore Physician Associates, an independent physician association ("IPA") whose membership also includes employed physicians within NorthShore Medical Group. NorthShore's IPA negotiates contracts with commercial payers on behalf of NorthShore's employed physicians and participating non-employed physicians.

C.

The Transaction

18. In early 2014, NorthShore initiated discussions with Advocate regarding a potential affiliation. On September 11, 2014, Respondents entered into the Affiliation Agreement, according to which AHCN will change its name to Advocate NorthShore Health Partners ("ANHP") and become the sole corporate member of NorthShore, thereby acquiring NorthShore in a transaction valued at \$2.2 billion. The combined entity would operate 15 GAC hospitals in Illinois, 11 of which are located in Cook and Lake Counties. ANHP would be the 11th largest non-profit hospital system in the United States.

III.

THE RELEVANT SERVICE MARKET

19. The relevant service market is GAC inpatient hospital services sold and provided to commercial payers and their insured members, respectively. This service market encompasses a broad cluster of medical and surgical diagnostic and treatment services

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offered by both Advocate and NorthShore that typically require an overnight hospital stay. GAC inpatient hospital services include, but are not limited to, many emergency services, internal medicine services, and surgical procedures offered by both Respondents. Although the Transaction's likely effect on competition could be analyzed separately for each individual inpatient service, it is appropriate to evaluate the Transaction's likely effects across this cluster of GAC inpatient hospital services because these services are offered to residents of the North Shore Area under similar competitive conditions. Thus, grouping the hundreds of individual GAC inpatient hospital services into a cluster for analytical convenience enables the efficient evaluation of competitive effects with "no loss of analytic power."

20. Outpatient services are not included in the GAC inpatient hospital services market because commercial payers and patients cannot substitute outpatient services for inpatient care in response to a price increase on GAC inpatient hospital services. Additionally, outpatient services are offered by a different set of competitors under different competitive conditions than GAC inpatient hospital services.

21. Similarly, the GAC inpatient hospital services market also excludes the most complex and specialized tertiary and quaternary services, such as some major surgeries and organ transplants. These services are offered by a different set of competitors under different competitive conditions than, and are not substitutes for, GAC inpatient hospital services.

22. Finally, the GAC inpatient hospital services market excludes services related to psychiatric care, substance abuse, and rehabilitation services. These services are also offered by a different set of competitors under different competitive conditions than, and are not substitutes for, GAC inpatient hospital services.

IV.**THE RELEVANT GEOGRAPHIC MARKET**

23. The relevant geographic market in which to analyze the effects of the Transaction is no broader than the North Shore Area. The North Shore Area is defined as the area bounded by six

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GAC inpatient hospitals: NS Evanston, Swedish Covenant Hospital, Presence Resurrection Medical Center, Northwest Community Healthcare Hospital, Advocate Condell, and Vista Medical Center East.

24. The North Shore Area is the main area of competition between NorthShore's four hospitals and the two Advocate hospitals with which NorthShore most directly competes—Advocate Lutheran General and Advocate Condell. It also comprises the population center from where these six hospitals draw a significant portion of their patients.

25. The North Shore Area substantially overlaps with NorthShore's primary service area, which NorthShore's ordinary course documents identify as the 51 zip codes that surround the NorthShore hospital system. Approximately 73% of patients residing within the North Shore Area stay there to receive GAC inpatient hospital services.

26. The appropriate geographic market to analyze the Transaction is the area where a hypothetical monopolist of the relevant services could profitably impose a small but significant and non-transitory increase in price ("SSNIP"). If a hypothetical monopolist could impose a SSNIP, the boundaries of that geographic area are an appropriate geographic market.

27. North Shore Area residents strongly prefer to obtain GAC inpatient hospital services close to where they live or work. Indeed, it would be very difficult for a commercial payer to market successfully to patients in the North Shore Area a health plan provider network that excluded all hospitals located within the North Shore Area. Since a significant number of patients within the North Shore Area would not view hospitals outside of that area as practical alternatives, a hypothetical monopolist of all North Shore Area hospitals could profitably impose a SSNIP

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V.

**MARKET STRUCTURE AND THE TRANSACTION'S
PRESUMPTIVE ILLEGALITY**

28. Advocate and NorthShore are the two largest providers, by admissions, of GAC inpatient hospital services in the North Shore Area.

29. The Transaction will create a highly concentrated market that is presumptively illegal under the Merger Guidelines and the relevant case law. Based on commercial GAC inpatient admissions of patients residing within the six-county Chicagoland metropolitan area¹ and seeking care in the North Shore Area, NorthShore's share of GAC inpatient hospital services in the North Shore Area market is 35%, and Advocate's share is 20%. Post-Transaction, Respondents will control 55% of this market. Northwest Community, the third largest competitor in the North Shore Area, has a 15% share of the GAC inpatient hospital services market. No other competitor has more than a 9% share.

30. The Herfindahl-Hirschman Index ("HHI") is commonly used by courts and antitrust agencies to measure market concentration. The HHI is calculated by totaling the squares of the market shares of every firm in the relevant market. A merger or acquisition is presumed likely to create or enhance market power—and is presumptively illegal—when the post-acquisition HHI exceeds 2,500 points and the merger or acquisition increases the HHI by more than 200 points. Here, the market concentration levels far exceed these thresholds. As measured by commercial inpatient admissions from patients residing within the six-county Chicagoland metropolitan area and seeking inpatient care at a hospital within the North Shore Area, the post-Transaction HHI for commercial GAC inpatient hospital services will be 3,517—an increase of 1,423 points. The market shares and HHI figures for commercial GAC inpatient admissions for hospitals in the North Shore Area are summarized in the table below.

¹ The six-county Chicagoland metropolitan area includes Cook, DuPage, Kane, Lake, McHenry, and Will Counties.

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GAC INPATIENT HOSPITAL SERVICES Share of Commercial GAC Inpatient Admissions for Hospitals Within North Shore Area Limited to commercial patients residing in the 6-county Chicagoland metropolitan area		
Hospital	Share of Admissions	
	Pre-Transaction	Post-Transaction
NorthShore Evanston Hospital NorthShore Glenbrook Hospital NorthShore Highland Park Hospital NorthShore Skokie Hospital	35%	55%
Advocate Condell Medical Center Advocate Lutheran General Hospital	20%	
Northwest Community Healthcare Hospital	15%	15%
Swedish Covenant Hospital	9%	9%
Northwestern Lake Forest Hospital	8%	8%
Presence Resurrection Medical Center	7%	7%
Vista Medical Center East	6%	6%
HHI	2,094	3,517
Change in HHI	1,423	

VI.

ANTICOMPETITIVE EFFECTS

A.

Competition Among Hospitals Benefits Consumers

31. Competition between hospitals occurs in two distinct but related stages. First, hospitals compete for inclusion in commercial payers' health plan provider networks. Second, in-

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network hospitals compete to attract patients, including commercial payers' health plan members.

32. In the first stage of hospital competition, hospitals compete to be included in commercial payers' health plan provider networks. To become an in-network provider, a hospital negotiates with a commercial payer and, if mutually agreeable terms can be reached, enters into a contract. The financial terms under which a hospital is reimbursed for services rendered to a health plan's members are a central component of those negotiations, regardless of the payment method.

33. In-network status benefits a hospital by giving it preferential access to the health plan's members. Health plan members typically pay far less to access in-network hospitals than those that are out-of-network. Thus, all else being equal, an in-network hospital will attract more patients from a particular health plan than an out-of-network one. This dynamic motivates hospitals to offer lower rates and other more favorable terms to commercial payers to win inclusion in their networks.

34. From the payers' perspective, having hospitals in-network is beneficial because it enables the payer to create a health plan provider network in a particular geographic area that is attractive to current and prospective members, typically local employers and their employees.

35. Under a fee-for-service payment model, a hospital receives payment (*i.e.*, reimbursement) for the services it provides to a commercial payer's health plan members. Such payment is typically on a per-service, per-diem, or discount-off-charges method. Under a risk-based payment model, a hospital is reimbursed a fixed payment for all services provided to a particular member. As a result, the hospital has an incentive to lower overall utilization of services by patients. Regardless of whether a contract's reimbursement method is based on fee-for-service terms, risk-based terms, or some combination of both, relative bargaining leverage plays a key role in negotiations between commercial payers and hospitals.

36. A critical determinant of the relative bargaining positions of a hospital and a commercial payer during contract negotiations

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is whether other, nearby comparable hospitals are available to the commercial payer and its health plan members as alternatives in the event of a negotiating impasse. The presence of alternative hospitals limits a hospital's bargaining leverage and thus constrains its ability to obtain more favorable reimbursement terms from commercial payers. The more attractive these alternative hospitals are to a commercial payers' health plan members in a local area, the greater the constraint on that hospital's bargaining leverage. Where there are few or no meaningful alternatives, a hospital will have greater bargaining leverage to demand and obtain higher reimbursement rates and other more favorable reimbursement terms.

37. A merger between hospitals that are close substitutes in the eyes of commercial payers and their health plan members therefore tends to lead to increased bargaining leverage for the merged entity and, as a result, more favorable reimbursement terms, because it eliminates an available alternative for commercial payers. This increase in leverage is greater when the merging hospitals are closer substitutes for (and competitors to) each other.

38. Changes in the reimbursement terms negotiated between a hospital and a commercial payer, including increases in reimbursement rates, significantly impact the commercial payer's health plan members. "Self-insured" employers rely on a commercial payer for access to its health plan provider network and negotiated rates, but these employers pay the cost of their employees' healthcare claims directly and thus bear the full and immediate burden of any rate increases in the healthcare services used by their employees. "Fully insured" employers pay premiums to commercial payers—and employees pay premiums, co-pays, and deductibles—in exchange for the commercial payer assuming financial responsibility for paying hospital costs generated by the employees' use of hospital services. When hospital rates increase, commercial payers pass on these increases to their fully insured customers in the form of higher premiums, co-pays, and deductibles.

39. In the second stage of hospital competition, hospitals compete to attract patients to their facilities. Because health plan members often face similar out-of-pocket cost for in-network

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hospitals, hospitals in the same network compete to attract patients on non-price features—that is, by offering better quality of care, amenities, convenience, and patient satisfaction than their competitors. Hospitals also compete on these non-price dimensions to attract patients covered by Medicare and Medicaid, and other patients without commercial insurance. A merger of competing hospitals eliminates that non-price competition and reduces the merged entity's incentive to improve and maintain quality.

B.**The Transaction Would Eliminate Beneficial Price Competition**

40. Advocate and NorthShore are close—if not each other's closest—competitors in the North Shore Area. Indeed, NorthShore considers Advocate to be its “main” and “real” competition for inpatient hospital services. Other NorthShore documents refer to Advocate as its “top,” “key,” and “largest” competitor. NorthShore's strategic advisors point to Advocate as the “#1 provider in NorthShore's service area,” noting further that Advocate's “ACO strategy impacts growth of NorthShore's [primary care physician] base and future profitability.” NorthShore's strategic advisors also find that “NorthShore and Advocate are the #1 or #2 players in almost every service line” in NorthShore's “core service area.” NorthShore has significantly altered its managed care contracting strategy in response to competition from Advocate. NorthShore's ordinary course documents similarly identify Advocate's “approach to risk” and “ACO strategy” as significant competitive threats. Because Advocate and NorthShore are close substitutes, the Transaction would eliminate a significant incentive for the Respondents to compete on price and other reimbursement terms post-merger.

41. Diversion analysis, a standard economic tool that uses data on where patients receive hospital services to determine the extent to which hospitals are substitutes, confirms that Advocate and NorthShore are close competitors. Diversion analysis shows that if NorthShore's four hospitals were not available to Chicago-area patients, approximately 20% of NorthShore's patients would seek care within the Advocate system. Diversion analysis similarly

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45. The growth of “narrow network” health insurance products—which, in contrast to “broad networks,” include less than all of the hospitals in a geographic market—will further increase the merged system’s bargaining leverage with commercial payers. Such networks offer a tradeoff to consumers by including fewer participating hospitals, but at often significantly discounted prices relative to other available provider networks. Hospitals are willing to accept the lower reimbursement terms required to participate in narrow networks with the expectation that fewer providers will ensure that each hospital will gain increased volumes of patients and procedures. Today, commercial payers treat the merging parties as substitutes—typically including one Respondent while excluding the other—when constructing narrow network products for North Shore Area employers. As such, virtually every narrow network marketed to consumers across the North Shore Area will need to include the combined system post-merger.

46. By eliminating competition between Advocate and NorthShore, the Proposed Transaction will give the Respondents leverage to negotiate more favorable terms to participate in narrow networks, including securing higher reimbursement rates. For example, [REDACTED] narrow network product includes [REDACTED] but excludes [REDACTED]. Competition between Advocate and NorthShore allowed [REDACTED] to obtain lower rates.

[REDACTED]

[REDACTED]

C.

The Transaction Would Eliminate Vital Quality and Service Competition

47. Competition drives hospitals to invest in quality initiatives and new technologies to further differentiate themselves from competitors. Advocate and NorthShore compete with one another across other various non-price dimensions. The Transaction would eliminate this competition, which has provided patients in the North Shore Area with higher quality care and more extensive healthcare service offerings. Advocate and NorthShore closely track each other’s quality and brand recognition, and Respondents

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have substantially invested in improving and expanding their services and facilities to compete against one another.

48. For example, NorthShore responded to its strategic advisor's analysis of healthcare competition—which identified Advocate's move to risk-based contracting as a competitive threat to NorthShore—by forming a "Care Transformation Team." The Care Transformation Team has undertaken significant investments to improve NorthShore's health outcomes and quality of care. These investments include enhancements to NorthShore's already well-regarded health information technology and data analytics, advancements in disease management, and strengthening the clinical integration between NorthShore and its physicians

49. NorthShore also created the NorthShore Orthopedic Institute in 2013 in response to a significant loss of volume of orthopedic cases to Advocate Lutheran General. NorthShore also opened six new integrated delivery rooms at NS Highland Park to stem losses in obstetric admissions market share to Advocate Condell. Similarly, NorthShore has heavily invested in upgrading and modernizing NS Skokie, which it acquired in 2009, to attract patients from Advocate Lutheran General.

50. Patients benefit from this direct competition in the quality of care and services offered to them by Respondents. The Transaction will dampen the merged firm's incentive to compete on quality of care and service offerings, to the detriment of all patients who use these hospitals, including commercially insured, Medicare, Medicaid, and self-pay patients.

VII.

ENTRY BARRIERS

51. Neither entry by new market participants nor expansion by current market participants would deter or counteract the Transaction's likely harm to competition for GAC inpatient hospital services in the North Shore Area.

52. New hospital entry or expansion in the North Shore Area would not be likely, timely, or sufficient to offset the

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Transaction's likely harmful competitive effects. Construction of a new GAC hospital or substantial expansion of an existing one involves high costs and serious financial risk, including the time and resources it would take to conduct studies, develop plans, acquire land, obtain regulatory approvals, and construct and open a competitive facility.

53. Even if hospital construction or expansion were likely, such entry would not be timely. Illinois's Certificate of Need ("CON") regulations pose an additional barrier to entry. The CON regulations require hospitals seeking to build new hospitals, add licensed beds or new clinical services to existing hospitals, or purchase medical equipment above a capital threshold to undergo an extensive application process and justify the need for additional hospital beds or an expansion of current facilities. Obtaining CON approval is a time-consuming process. Moreover, construction of a new hospital would take substantially longer than two years from initial planning stages to opening.

54. Potential entry or expansion would also be insufficient to counteract the anticompetitive effects of the Transaction. Entrants would face significant challenges in replicating the competitiveness and reputation of either Advocate or NorthShore, both of whom offer a broad cluster of GAC inpatient hospital services, have multiple hospitals in the relevant market, generate billions of dollars in annual revenue, and provide healthcare services to tens of thousands of inpatients per year.

VIII.**EFFICIENCIES**

55. Respondents' claimed efficiencies are not sufficient to outweigh the Transaction's likely harm to competition. The purported benefits would not enhance competition for GAC inpatient hospital services and fall far short of the cognizable efficiencies needed to outweigh the Transaction's likely significant harm to competition in the North Shore Area.

56. Respondents' principal claim is that the Transaction would result in sufficient cost savings to enable them to participate in a low-price, ultra-narrow network that would be offered by

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commercial payers. However, Respondents have failed to substantiate the cost savings they claim must be achieved for NorthShore to reduce its cost structure sufficiently to participate in such a product at the price necessary for it to be successful. Moreover, NorthShore's willingness to participate in an ultra-narrow network insurance product is not a merger-specific efficiency. Therefore, the purported efficiency is not cognizable.

57. Respondents' other efficiency claims, including those relating to quality improvements, are not substantiated, not merger-specific, and not nearly of the magnitude necessary to justify the Transaction in light of its potential to harm competition. In any event, Respondents' claim that the Transaction will reduce healthcare costs is based on a number of speculative and unsubstantiated assumptions.

IX.

VIOLATION

COUNT I – ILLEGAL AGREEMENT

58. The allegations of Paragraphs 1 through 57 above are incorporated by reference as though fully set forth herein.

59. The Affiliation Agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION

60. The allegations of Paragraphs 1 through 57 above are incorporated by reference as though fully set forth.

61. The Transaction, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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NOTICE

Notice is hereby given to the Respondents that the twenty-fourth day of May, 2016, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

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The Administrative Law Judge shall hold a prehearing scheduling conference no later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Transaction challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the Transaction is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant service and geographic markets, with the ability to offer such products and services as Advocate and NorthShore were offering and planning to offer prior to the Transaction.
2. A prohibition against any transaction between Advocate and NorthShore that combines their businesses in the relevant markets, except as may be approved by the Commission.
3. A requirement that, for a period of time, Advocate and NorthShore provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant

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markets with any other company operating in the relevant markets.

4. A requirement to file periodic compliance reports with the Commission.
5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore NorthShore as a viable, independent competitor in the relevant service and geographic markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this seventeenth day of December, 2015.

By the Commission.

ORDER DISMISSING COMPLAINT

On December 17, 2015, the Commission issued the Administrative Complaint in this matter, alleging that an affiliation agreement among the three Respondents in this administrative proceeding violated Section 5 of the Federal Trade Commission Act, and that the contemplated merger, if consummated, would violate both Section 7 of the Clayton Act and Section 5 of the FTC Act. On December 21, 2015, pursuant to Section 13(b) of the FTC Act and Section 16 of the Clayton Act, the Commission filed a complaint in United States District Court for the Northern District of Illinois seeking a temporary restraining order and a preliminary injunction to prevent Respondents from consummating their proposed merger until final resolution of this administrative proceeding.¹

¹ [Complaint](#), *FTC v. Advocate Health Care Network et al.*, No. 1:15-cv-11473 (N.D. Ill.) (Dec. 21, 2015).

Final Order

On October 31, 2016, the Court of Appeals for the Seventh Circuit reversed the denial of the Commission's motion for a preliminary injunction by the U.S. District Court for the Northern District of Illinois and remanded the case to the District Court.² On March 7, 2017, the District Court issued an Order enjoining consummation of the proposed merger. On March 10, 2017, Respondents signed a Termination Agreement terminating the Affiliation Agreement between Advocate and NorthShore, and Complaint Counsel and Respondents filed a Joint Motion to Dismiss Complaint.³ Respondents have abandoned the proposed merger, and the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation.⁴

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED THAT the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

² *FTC v. Advocate Health Care Network*, 841 F.3d 460 (7th Cir. 2016) ([Opinion](#) and [Final Judgment](#)).

³ See [Joint Motion To Dismiss Complaint](#) (March 10, 2017).

⁴ See, e.g., *In the Matter of The Penn State Hershey Medical Center and PinnacleHealth System*, Docket No. 9368, [Order Dismissing Complaint](#) (Oct. 23, 2016); *In the Matter of Superior Plus Corp. and Canexus Corporation*, Docket No. 9371, [Order Dismissing Complaint](#) (Aug. 2, 2016); *In the Matter of Staples Inc. and Office Depot, Inc.*, Docket No. 9367, [Order Dismissing Complaint](#) (May 18, 2016).

Complaint

IN THE MATTER OF

CARMAX, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4605; File No. 142 3202
Complaint, March 22, 2017 – Decision, March 22, 2017

This consent order addresses CarMax, Inc.'s advertisements on its website for numerous used vehicles that were subject to open recalls for safety issues. The complaint alleges that respondent has represented that used motor vehicles it sells have been subject to rigorous inspection, including for safety issues, but has failed to disclose adequately that some of these vehicles are subject to open recalls for safety issues. The consent order prohibits the respondent from representing that used motor vehicles it offers for sale are safe, have been repaired for safety issues, or have been subject to a rigorous inspection unless the used motor vehicles are not subject to any open recalls for safety issues or the respondent discloses, clearly and conspicuously, in close proximity to such representation, any material qualifying information related to open recalls for safety issues.

Participants

For the *Commission*: Courtney Estep, Michael White and Evan Zullo.

For the *Respondent*: Milo Cividanes and Stu Ingis, Venable LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that CarMax, Inc., a corporation ("Respondent"), has violated provisions of the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Virginia corporation with its principal office or place of business at 12800 Tuckahoe Creek Parkway, Richmond, VA 23238. Respondent has marketed, advertised, offered for sale, and sold used motor vehicles.