No. 21-3007

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ST. LUKE'S HOSPITAL, d/b/a MCLAREN ST. LUKE'S and
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; and PARAMOUNT PREFERRED OPTIONS, INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Ohio, Case No. 3:20-cv-02533-JZ

BRIEF FOR APPELLANTS

Mark D. Wagoner
Matthew T. Kemp
SHUMAKER, LOOP & KENDRICK LLP
1000 Jackson Street
Toledo, Ohio 43604
Tel: 419.321.1412

Douglas E. Litvack
Counsel of Record
Christopher G. Renner
David M. Gossett
DAVIS WRIGHT TREMAINE LLP
1301 K Street NW, Suite 500 East
Washington, DC 20005
Tel: 202.973.4200

Adam S. Sieff
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, Suite 2400
Los Angeles, California 90017
Tel: 213.633.6800

Counsel for Defendants-Appellants

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-3007 Case Name: St. Luke's Hosp. v. ProMedica Health

Name of counsel: Douglas E. Litvack

Pursuant to 6th Cir. R. 26.1, ProMedica Health System Inc., et al.,
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on February 22, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Douglas E. Litvack
Davis Wright Tremaine LLP
Counsel for Appellants

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal presents important questions about when a private company has a duty to deal with a competitor under the antitrust laws pursuant to the Supreme Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), and the extent to which the Federal Trade Commission's prior approval of the company's refusal to deal affects the antitrust analysis. This Court has not addressed these questions since *Trinko*, and a discussion of them may substantially assist the Court. And the District Court's decision has significantly affected the healthcare insurance markets in northwest Ohio. ProMedica therefore respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and 6th Cir. R. 34(a).

Consumers usually have the opportunity to switch health insurance plans every fall. Insurers therefore typically notify members about changes to their provider network before open-enrollment season begins. On February 2, ProMedica moved to expedite the adjudication of this appeal, requesting an oral argument not later than the Court's July 2021 sitting, to give the Court sufficient time to decide the appeal by September 2021 and thereby allow ProMedica and McLaren St. Luke's to timely notify Paramount members of changes to the provider networks for 2022. The Clerk's Office granted the motion in part, specifying that the case "will be submitted at the earliest practicable date that the court's schedule will permit," but reserving to the panel whether to hold oral argument or expedite issuance of a decision. *See* Dkt. 20-2.

STATEMENT OF JURISDICTION

The District Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. On December 29, 2020, the court granted Appellees' motion for a preliminary injunction. Appellants timely filed their notice of appeal on January 4, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUES

This appeal presents the following issues:

1. Whether the District Court erroneously granted a preliminary injunction that enjoined ProMedica's insurance company subsidiary, Paramount, from exercising contractual rights to terminate provider contracts with Plaintiffs' hospital and physicians, thereby imposing a duty on ProMedica to deal with a competitor that the antitrust laws do not require.
2. Whether the District Court erroneously entered a preliminary injunction without considering ProMedica's request for a bond.

INTRODUCTION

The District Court's preliminary injunction has forced a private company to share its customers and investments with a multi-billion dollar competitor under the auspices of the antitrust laws. By disregarding the only expert testimony offered, the District Court applied an improper antitrust analysis and preliminarily enjoined free-market competition that would have benefitted consumers in the form of lower prices, more choices, and increased innovation. Among its many errors, the District Court ignored the prevailing rule that, absent extraordinary circumstances not present here, the antitrust laws do not require a private business to deal with a competitor. This Court should reverse, permitting the type of competition that the antitrust laws promote.

Appellant ProMedica is a vertically-integrated health system primarily serving the Toledo metro area and southeast Michigan. It operates hospitals, employs physicians, and—through its Paramount subsidiary—offers health insurance. The commercial and Medicare Advantage health insurance markets in the Toledo metro area are competitive. Consumers choose among dozens of health plans, including plans operated by national insurers. Paramount is a small regional health plan, with a 17% commercial insurance share, and a 21% Medicare Advantage share in the Toledo metro area. ProMedica's insurance products are unlike those offered by its competitors: Paramount offers low insurance premiums to consumers who prefer healthcare services primarily from ProMedica. This "narrow network" approach strategically limits Paramount's commercial and Medicare Advantage provider networks to ProMedica and other affiliated providers that complement ProMedica's offerings. In so doing, ProMedica recoups reduced revenues in the insurance markets (from offering low-cost insurance plans) through increased patient volume for ProMedica's providers.

Vertically-integrated health systems, like ProMedica, commonly use narrow networks to capitalize on efficiencies inherent in vertical integration, such as increased volume, lower costs, and improved quality. This model is common—the Kaiser Permanente system, for example, is a vertically-integrated system that offers low-cost care through a narrow network of Kaiser Foundation hospitals, Permanente Group physicians, and Kaiser health insurance. This contracting strategy is procompetitive. It has no connection with the anticompetitive acquisition, exercise, or maintenance of market power. Indeed, inclusion of competing health systems in a narrow network could undermine the efficiencies, resulting in higher insurance premiums. To preserve the viability of its narrow-network contracting strategy, Paramount does not contract with large, full-service health systems that consumers would view as a substitute, rather than a complement, to ProMedica's offerings.

In 2010, ProMedica acquired St. Luke's Hospital and added St. Luke's—like other hospitals in ProMedica's system—to Paramount's provider networks. But after extensive antitrust litigation with the Federal Trade Commission, ProMedica divested St. Luke's in 2016. As part of the divestiture, the FTC required ProMedica to help transition St. Luke's to being an independent hospital. This mandatory assistance included keeping St. Luke's and its WellCare physicians in all Paramount provider networks for a period of time, subject to a change-in-control provision. This provision allowed Paramount to terminate these contracts if another entity acquired St. Luke's, mitigating the risk that Paramount might inadvertently find itself contractually obliged to support a different system with its narrow network. The FTC approved ProMedica's change-in-control termination rights.

On October 1, 2020, McLaren Health Care Corporation—a multi-billion dollar vertically-integrated health system—acquired St. Luke's. McLaren St. Luke's no longer needed ProMedica's support because it now had the backing of a financially sound system. And ProMedica no longer had reason to include McLaren St. Luke's and the WellCare physicians in Paramount's narrow networks because those entities now had the incentive to refer their most complex cases to McLaren, not ProMedica. ProMedica thus notified McLaren that, pursuant to the change-in-control provisions, ProMedica would terminate the contracts at issue on December 31, 2020.

Plaintiffs sued, alleging violations of the antitrust laws, and sought a preliminary injunction requiring ProMedica to include McLaren St. Luke's and its physicians in Paramount's narrow-network plans. The District Court erroneously granted the preliminary injunction by misapplying the antitrust laws and the legal test for granting a preliminary injunction. And to compound its error, the District Court did not consider

ProMedica's request for a bond, which would have mitigated some of the damage from its decision.

In granting the preliminary injunction the District Court made three distinct errors:

- It imposed on ProMedica a duty to include Plaintiffs in Paramount's narrow-network plans contrary to the Supreme Court's decision in *Trinko*. Instead of abandoning a prior course of dealing and sacrificing short-term profits to drive a competitor out of business, ProMedica exercised contractual rights to advance its own legitimate business interests—reasons that under *Trinko* defeat liability.
- It failed to engage in the required antitrust analysis, making no attempt to identify antitrust injury, conducting an incomplete and unsupported market analysis, and inappropriately rejecting ProMedica's immunity defenses.
- It misapplied the remaining *Winter* factors, concluding that Plaintiffs demonstrated irreparable injury based only on lost revenue, minimizing the harm to ProMedica from forcing it to include a formidable competitor in its narrow-network plans, and finding harm to consumers even though they had the opportunity to switch insurers and those who stayed in Paramount may now pay higher insurance prices.

The District Court's decision threatens the policies that antitrust laws intend to promote. The court ignored Supreme Court precedent that cautions against court-imposed duties to deal, and failed to undertake the proper analysis that settled precedent requires. Under the proper legal analysis, the District Court would have found that the challenged conduct promotes competition. Indeed, the anticipated contract terminations spurred new entry into the local insurance and provider markets: In just months, Plaintiffs introduced their own McLaren Health Plan to compete with Paramount, and added new physicians. But the District Court glossed over this undisputed evidence, instead ordering a mandatory course of dealing that never before existed between McLaren and ProMedica. By misapplying antitrust law, the Order has lessened competition and harmed the health insurance markets in the Toledo metro area. This Court should reverse, permitting the unfettered competition between ProMedica and McLaren that will drive innovation, spur investment, and benefit consumers.

STATEMENT OF THE CASE

A. Background

1. Four competitors provide hospital services in the Toledo metro area: ProMedica, Mercy Health, McLaren St. Luke's, and the University of Toledo Medical Center ("UTMC"). Webb Decl., Sealed RE 41 ¶¶ 16-17. ProMedica offers a full range of primary, secondary, and tertiary inpatient services. Until recently, only Mercy offered the same range of services in the Toledo metro area, and therefore is ProMedica's most significant competitor. Jensen Decl., Sealed RE 45 ¶ 5. Historically, St. Luke's has not offered the full range of tertiary services, allowing ProMedica to offer some of those

services on St. Luke's campus. Webb Decl., Sealed RE 41 ¶¶ 28-29. McLaren recently acquired St. Luke's, however, and does offer tertiary services that compete directly with ProMedica's services. *Id*. ¶ 30. The fourth competitor is UTMC, an independent 267-bed hospital in South Toledo. *Id.* ¶ 18. The University of Toledo owns UTMC, and the University of Toledo College of Medicine ("UTCOM") has an academic affiliation agreement with ProMedica that provides UTCOM faculty access to ProMedica facilities. As part of their close working relationship, ProMedica includes UTMC in Paramount's narrow networks. Martin Decl., Sealed RE 42 ¶ 7.

2. One way ProMedica competes is through Paramount, which offers low-priced Medicare and commercial insurance products. Wilson Decl., Sealed RE 48 ¶ 4; Johnston Decl., Sealed RE 40 ¶¶ 17-21. Paramount can offer low prices because of its integration with ProMedica and its ability to drive increased patient volume to ProMedica providers, which increases revenue for ProMedica that offsets the revenues lost through lower prices from Paramount. Johnston Decl., Sealed RE 40 ¶¶ 22, 25-26; Wilson Decl., Sealed RE 48 ¶¶ 7-8; Dranove Decl., Sealed RE 49 ¶¶ 39-41. To realize these efficiencies, Paramount offers a "narrow network" of providers for its commercial and Medicare plans. Wilson Decl., Sealed RE 48 ¶¶ 4, 7-8; Johnston Decl., Sealed RE 40 ¶¶ 22, 25-26; Dranove Decl., Sealed RE 49 ¶ 20. These narrow networks currently include ProMedica hospitals, UTMC, and (temporarily) McLaren St. Luke's. Wilson Decl., Sealed RE 48 ¶ 12; Dranove Decl.,

Sealed RE 49 ¶ 20. Paramount offers one of the few narrow-network plans in the area. Johnston Decl., Sealed RE 40 ¶ 26; Hr'g Tr. at 30:10-11, Sealed RE 72 at 1743.

Vertically-integrated health systems frequently use narrow networks to compete, which generate efficiencies and have no necessary connection with the acquisition, exercise, or maintenance of market power. Dranove Decl., Sealed RE 49 ¶¶ 26-30, 35-38; Wilson Decl., Sealed RE 48 ¶ 9. Inclusion of competing health systems in the Paramount narrow networks would undermine their benefits by driving patient volume *away* from ProMedica. Cavanaugh Decl., Sealed RE 43 ¶ 15; Johnston Decl., Sealed RE 40 ¶ 35; Dranove Decl., Sealed RE 49 ¶ 58. This lost patient volume would undermine Paramount's ability to offer low prices, putting pressure on Paramount to increase prices. *Id.* For this reason, Paramount's narrow networks have not included Mercy since at least 2000 and did not include St. Luke's Hospital before ProMedica acquired it in 2010. Johnston Decl., Sealed RE 40 ¶ 23; Wilson Decl., Sealed RE 48 ¶ 12; Martin Decl., Sealed RE 42 ¶¶ 6-7.

Local consumers have many choices of health insurance products. Commercial plan sponsors choose among national and regional insurers—including Anthem, Aetna, Cigna, Humana, United, Paramount, and Medical Mutual of Ohio. Wilson Decl., Sealed RE 48 ¶ 5; Dranove Decl., Sealed RE 49 ¶ 12. St. Luke's, for example, participates in at least 30 different health plans. PI Mot. Ex. Q, RE 22-18. Medicare Advantage is also a competitive market. Wilson Decl., Sealed RE 48 ¶ 10. Subscribers choose among Aetna, Anthem, United, Medical Mutual of Ohio, and many others. *Id.* In the Toledo metro area, Paramount has a 17% share for commercial enrollees, and 21% for Medicare Advantage enrollees. Martin Decl., Sealed RE 42 ¶ 5.

3. St. Luke's Hospital joined Paramount's narrow networks after ProMedica acquired it in 2010. At the time, St. Luke's had substantial financial difficulties, so Paramount gave St. Luke's above-market reimbursement rates to bolster St. Luke's bottom line. *See In re ProMedica Health Sys.*, 2011 WL 11798464, at *99, *136-37 (F.T.C. Dec. 5, 2011).

In 2011, the FTC filed suit to unwind ProMedica's acquisition of St. Luke's. After securing a preliminary injunction in the Northern District of Ohio, the FTC held administrative proceedings in which the FTC's Chief Administrative Law Judge ("ALJ") found that ProMedica's acquisition of St. Luke's violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and required ProMedica to divest St. Luke's. The ALJ specifically rejected the FTC staff's request to impose a continuing obligation on ProMedica to include St. Luke's in Paramount's provider networks, reasoning that under *Trinko* there is no general duty to deal with competitors or to share with a competitor the source of a competitive advantage (such as access to Paramount's customers). *In re ProMedica Health Sys., Inc.*, 2011 WL 11798464, at *166-67. On appeal, the FTC Commissioners similarly rejected the FTC staff's request to impose an ongoing obligation on ProMedica to include St. Luke's in Paramount's provider networks.[1] Instead, the Commission required only that ProMedica divest St. Luke's to an approved buyer. *In re ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *50 (F.T.C. Mar. 28, 2012), *aff'd sub nom. ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559 (6th Cir. 2014).

Closely supervised by FTC staff, ProMedica and St. Luke's held protracted, arms-length negotiations over the terms of a divestiture. The FTC preferred another large system acquire St. Luke's, but St. Luke's insisted on independence. FTC staff acquiesced to St. Luke's request, but required ProMedica to offer extraordinary—but temporary—support to St. Luke's to enhance its viability while it regained its footing as an independent competitor. Krueger Decl., Sealed RE 46 ¶¶ 4-12. In particular—and consistent with the remedial purpose of the Final Order—ProMedica agreed to allow St. Luke's to remain in Paramount's provider networks for a limited period of time. *Id.* ¶ 5; Wilson Decl., Sealed RE 48 ¶ 19. But consistent with the longstanding logic of Paramount's narrow-network contracting strategy and those remedial purposes, ProMedica insisted on—and the FTC and St. Luke's both agreed to—a change-in-control provision authorizing ProMedica to remove St. Luke's from Paramount's networks immediately if another entity acquired St.

[1] Complaint Counsel's Appeal Brief, *In re ProMedica Health Sys., Inc.*, F.T.C. No. 9346 at 52 (F.T.C. Jan. 3, 2012).

Luke's. Webb Decl., Sealed RE 41 ¶ 30.[2] The Divestiture Agreement required ProMedica to include Plaintiffs in Paramount's provider networks for at least three years, subject to a change-in-control provision. Litvack Decl. Ex. A, Sealed RE 32 at 11-12.

The FTC placed ProMedica's application to divest St. Luke's on the public record for a thirty-day comment period. *See* Litvack Decl. Ex. B, RE 31-2 at 683-93. One public comment—from competitor Mercy—specifically asked the FTC to ensure that the divestiture would provide "St. Luke's [with] the opportunity to participate [as a provider in] Paramount." *Id.* at 692. The FTC nonetheless unanimously approved the divestiture—with the change-in-control termination right—concluding that it "ensure[d] the continued operation of St. Luke's Hospital" as a viable independent entity. *In re ProMedica Health Sys., Inc.*, 2012 WL 1155392, at *56. Addressing Mercy's comment, the FTC explained that the Divestiture Agreement—which included the change-in-control provision—"is consistent with" and "would effectuate the remedial competitive purposes" of the Final Order. *See* Litvack Decl. Ex. D, RE 31-4 at 699.

Shortly thereafter, in June 2016, ProMedica spun off St. Luke's, which began to operate as an independent hospital. Litvack Decl. Ex. A, Sealed RE 32 at 2.

[2] Paramount commonly employs change-in-control provisions to protect ProMedica from having to deal with a different competitor on terms it would not have originally accepted. Martin Decl., Sealed RE 42 ¶ 8.

4. In 2018, ProMedica and St. Luke's agreed that ProMedica would open a cancer center on St. Luke's campus. Hammerling Decl. Sealed RE 44 ¶¶ 6-10. ProMedica sought a five-year lease for the new cancer center. *Id.* ¶¶ 11-12. St. Luke's insisted that ProMedica also agree to extend the Paramount contracts, which expired in 2019, through the term of the new cancer center lease. *Id.* ¶¶ 11-12. ProMedica agreed. *Id.* ¶ 13; Johnston Decl., Sealed RE 40 ¶ 31. Significantly, ProMedica retained the change-in-control termination right to avoid a contractual duty to continue the relationship with a very different competitor that could reduce Paramount's profitability to ProMedica. *Id.*

5. St. Luke's eventually abandoned its plan to operate as an independent hospital. On October 1, 2020, McLaren—a multi-billion-dollar, vertically-integrated health system with a strong balance sheet—acquired St. Luke's. PI Mot. Ex. D ¶ 4, RE 22-5 at 308. McLaren has committed to spend hundreds of millions of dollars revitalizing St. Luke's (and in turn, competing against ProMedica hospitals). *Id.* McLaren St. Luke's will be a different competitor to ProMedica than the former independent-community hospital, with a wider range of inpatient services, its own integrated health plan, and deep pockets. Cavanaugh Decl., Sealed RE 43 ¶¶ 4-6; Webb Decl., Sealed RE 41 ¶ 30.

This McLaren acquisition also changed the profitability for ProMedica of including Plaintiffs in Paramount's narrow provider networks. Cavanaugh Decl., Sealed RE 43 ¶¶ 4-6; Buskey Decl., Sealed RE 47 ¶¶ 17-24; Hammerling Decl., Sealed RE 44 ¶¶ 14-16; Wilson Decl., Sealed RE 48 ¶ 13; Dranove Decl., Sealed RE 49 ¶¶ 11, 39-41. Because

McLaren St. Luke's will offer a broader range of inpatient and physician services than independent St. Luke's did, the inclusion of Plaintiffs in Paramount's narrow networks will divert revenues that today go to ProMedica and its physicians to Plaintiffs. Cavanaugh Decl., Sealed RE 43 ¶¶ 4-6; Buskey Decl., Sealed RE 47 ¶¶ 17-24; Hammerling Decl., Sealed RE 44 ¶¶ 14-16; Wilson Decl., Sealed RE 48 ¶ 13. Plaintiffs will no longer refer patients that need high-acuity services to ProMedica facilities; instead they will refer those patients to McLaren. And ProMedica expected McLaren—known for its Karmanos Cancer Institute—to provide cancer services near the St. Luke's campus, which eliminates the rationale for ProMedica's willingness to extend the Paramount contracts beyond 2019. Hammerling Decl., Sealed RE 44 ¶¶ 14-16; Johnston Decl., Sealed RE 40 ¶ 34.

With these legitimate concerns in mind, ProMedica notified McLaren on October 2, 2020, that it would terminate Plaintiffs (pursuant to the change-in-control provision) from Paramount's narrow-network plans—i.e., Medicare Advantage and commercial plans—on December 31, 2020. Johnston Decl., Sealed RE 40 ¶¶ 36-41; Wilson Decl., Sealed RE 48 ¶ 15.[3] Shortly thereafter, McLaren's insurance affiliate, the McLaren Health Plan, entered the local health insurance markets and began offering its own health insurance products to

[3] Unlike Paramount's narrow networks, Paramount's Medicaid network includes all hospitals and physicians in the Toledo metro area, so ProMedica did not terminate Plaintiffs from that network. Cavanaugh Decl., Sealed RE 43 ¶ 9; Johnston Decl., Sealed RE 40 ¶ 24.

compete with Paramount. Hr'g Tr. at 35:14-17, Sealed RE 72 at 1748; MTD Opp., RE 51 at 1463.

B. Procedural history

Plaintiffs initiated this lawsuit on November 10, 2020, challenging ProMedica's attempt to exercise contractual rights to terminate various contracts—including the commercial and Medicare Advantage Paramount contracts—with McLaren affiliates. Compl., RE 1. Shortly thereafter, Plaintiffs moved for a preliminary injunction to prevent termination of the Paramount contracts. PI Mot., RE 22. ProMedica moved to dismiss the complaint, arguing that Plaintiffs failed to allege any antitrust violation under the Sherman Act, 15 U.S.C. §§ 1-2, or the Valentine Act. MTD, RE 31. ProMedica also opposed the preliminary injunction motion, arguing that Plaintiffs were unlikely to succeed on the merits; that McLaren St. Luke's did not face irreparable harm; and that the equities disfavored an injunction. PI Opp., RE 39.

The District Court held oral argument on both motions on December 21, 2020. On December 29, 2020, the District Court denied ProMedica's motion to dismiss, Order, RE 66, and granted Plaintiffs' preliminary injunction motion, Order, RE 68.

The District Court held that Plaintiffs were likely to succeed on the merits of their antitrust claims. *See* Order, RE 68 at 1701-06. In so holding, the District Court—relying on inapposite findings from the very different ProMedica-St. Luke's merger litigation with the FTC—analyzed a relevant market from that case (general acute care inpatient services sold to commercial plans in Lucas County) even though Plaintiffs' claims challenge the termination of the Paramount contracts, which involve completely different markets: the highly competitive commercial and Medicare Advantage health insurance markets. *Id.* at 1701-02. The District Court then concluded ProMedica likely has market power in the commercial inpatient services market based solely on the out-of-date findings from the FTC merger case and two affidavits of Plaintiffs' employees—neither of whom were tendered as experts. *Id.* at 1702-03. Ultimately, the District Court held that the *existence* of the change-in-control provision in the Paramount contracts (which the FTC approved) likely qualified as an unreasonable restraint of trade in violation of Sherman Act § 1. *Id.* at 1700, 1703-04. Exacerbating all these errors, the District Court then relied on *Aspen Skiing v. Aspen Highlands Skiing*, 472 U.S. 585 (1985)—a case the Supreme Court considers an outlier limited to its facts, *Trinko*, 540 U.S. at 409—to conclude that ProMedica's exercise of its contractual right to terminate the relevant Paramount contracts constituted anticompetitive conduct. Order, RE 68 at 1704-06.

On the other preliminary injunction factors, the District Court found (1) Plaintiffs would suffer irreparable harm from the "immediate loss of revenue"; (2) ProMedica could not suffer harm because it had previously agreed to include St. Luke's—not McLaren St. Luke's—in Paramount's narrow networks, and thus that inclusion must be mutually beneficial; and (3) the injunction preserves competition and prevents patients from losing access to their preferred physicians. *Id.* at 1706-09. Finally, the District Court ignored

ProMedica's request for an opportunity to alter the reimbursement rates Paramount pays Plaintiffs pursuant to those contracts, or for a bond pursuant to Rule 65(c).

After ProMedica filed this appeal, the District Court *sua sponte* stayed the litigation.

SUMMARY OF ARGUMENT

Plaintiffs did not carry their burden to obtain a preliminary injunction under *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). The District Court erred by holding otherwise.

1. The District Court erroneously found Plaintiffs were likely to succeed on the merits of their antitrust claims by misapplying binding legal precedent and failing to undertake the proper legal analysis. Under the Sherman Act and Ohio antitrust law, Plaintiffs must show that ProMedica has market power in a properly defined relevant market and engaged in unreasonable or exclusionary conduct that produces antitrust injury, i.e., harms Plaintiffs and competition. Plaintiffs provided no evidence showing a likelihood of success on any element of their claims, and invited the District Court to commit reversible errors.

a. The District Court misapplied the law to find ProMedica's refusal to deal with a competitor qualified as actionable anticompetitive conduct. Under Supreme Court precedent, ProMedica has no antitrust duty to deal with Plaintiffs. ProMedica therefore could not violate the antitrust laws when it obtained the contractual right to terminate the Paramount contracts if another entity acquired St. Luke's, nor when it exercised those rights. The District Court applied the wrong legal standard, misunderstanding the ways that *Trinko* expressly limits *Aspen*. Under the correct legal standard, the record could not support imposing a duty to deal because:

- Paramount never had a contract with independent St. Luke's without the ability to terminate the contract upon a change in ownership; thus this course of dealing was always qualified.
- Paramount never voluntarily included McLaren St. Luke's—a very different competitor than St. Luke's—in its narrow-network plans.
- ProMedica exercised its termination rights after St. Luke's underwent a change-in-control to maintain the value of its narrow-network plans.
- Plaintiffs offered no evidence that ProMedica's decision irrationally sacrificed short-term system-wide profits; indeed, the only expert testimony showed the opposite.
- ProMedica had legitimate business justifications for the terminations, namely to avoid free-riding and protect the efficiencies inherent in vertical integration.

b. The District Court next failed to evaluate the antitrust-injury requirement. Had it, the court would have seen that the refusal to deal did not harm *competition*, even if it might temporarily harm Plaintiffs. But antitrust laws protect competition, not the narrow interests of a single competitor. As the only expert testimony demonstrated, Paramount is too small a player in the insurance markets to serve as a tool whereby ProMedica could exclude competition in any market. Plaintiffs' own exhibits flaunt the dozens of insurers that include McLaren St. Luke's, including McLaren's own health plan. The District Court glossed over Plaintiffs' admissions showing that the conduct they challenge actually enhanced competition by spurring new entry into the insurance and provider markets.

c. The District Court further erred by conducting an incomplete and factually unsupported market analysis. It mistakenly relied on the nearly decade-old ProMedica-St. Luke's merger case and Plaintiffs' two lay witnesses to assess *ProMedica's* market power in a healthcare-provider market. But, as the only expert testimony explained, that market is irrelevant to Plaintiffs' claims, which involve the competitive effects of *Paramount's* refusal to include Plaintiffs in its narrow-network plans. Unlike the prior merger case, these claims do not involve any exercise of market power in the provider markets. Thus, the District Court needed to assess whether Paramount has market or monopoly power in the commercial and Medicare Advantage insurance markets. Plaintiffs did not present competent evidence to establish that ProMedica has market let alone monopoly power in any relevant market. These failures are fatal to all Plaintiffs' claims.

d. Finally, the Order conflicts with the FTC's Final Order in the ProMedica-St. Luke's merger case because the District Court found the existence, and exercise of, a contractual provision in a FTC Order likely violated the antitrust laws. That finding is improper under three separate antitrust-immunity doctrines.

2. In addition to garbling the merits analysis, the District Court misapplied the remaining *Winter* elements. It is well-established that lost revenues cannot constitute irreparable harm except in an extraordinary case. Nothing in the record demonstrates any extraordinary circumstance—such as a threat to put McLaren St. Luke's out of business—to justify a departure from that rule. If anything, the injunction manifestly harms ProMedica by permitting McLaren St. Luke's to siphon patients and free-ride on ProMedica's low-cost Paramount insurance. And the District Court invented the factual finding that this injunction protects the public's access to their preferred physicians. The record included no such evidence.

3. The District Court erred when it ignored ProMedica's request for a bond. The court should have entered a bond because including Plaintiffs in Paramount's narrow networks will depress ProMedica's earnings and deprive it of other efficiencies inherent to vertical integration, such as improved quality and lower costs of care. Paramount should be able to recover its financial losses incurred from the improvidently entered injunction.

The District Court's multiple legal errors require reversal.

STANDARD OF REVIEW

On appeal of an order entering a preliminary injunction, this Court reviews a district court's legal conclusions—including its conclusion as to the movant's likelihood of success—de novo. *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017). To the extent a district court made findings of fact, the Court reviews them for clear error. *Id.* The Court reviews a district court's explanation, if any, for how it weighed the preliminary injunction factors for an abuse of discretion. *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005).

ARGUMENT

A preliminary injunction "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion" on the familiar four elements: (1) likelihood of success on the merits, (2) likelihood of suffering irreparable harm absent preliminary relief, (3) the balance of equities tipping in its favor, and (4) an injunction being in the public interest. *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 536, 539 (6th Cir. 2020) (citing *Winter*, 555 U.S. at 20). The "burden of proof" on each element is "more stringent than the proof required to survive a summary judgment motion." *Id.* at 539 (citation omitted). The District Court committed reversible error at each step of the analysis.

I. The District Court Erroneously Concluded That Plaintiffs Are Likely To Prevail On The Merits.

Plaintiffs contend that ProMedica violated the Sherman Act and the Ohio Valentine Act by negotiating for, and subsequently exercising, garden-variety contractual provisions that the FTC approved. According to Plaintiffs, the agreed-to change-in-control provisions conferring the termination rights at issue violate Sherman Act § 1 and the Valentine Act, and ProMedica's exercise of those contractual termination rights violated Sherman Act § 2.

To prevail on each claim, Plaintiffs must establish (1) ProMedica has market power in a properly defined relevant market, (2) ProMedica has engaged in unreasonable or exclusionary conduct, and (3) Plaintiffs suffered antitrust injury. *Erie Cty. v. Morton Salt, Inc.*, 702 F.3d 860, 867 (6th Cir. 2012); *Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 574 (6th Cir. 1986). Plaintiffs failed to establish any of these elements. *First*, ProMedica has no antitrust duty to include Plaintiffs in Paramount's narrow provider networks. *See* Part I.A, *infra*. *Second*, Plaintiffs failed to demonstrate antitrust injury from the existence, or exercise of, the change-in-control provisions. *See* Part I.B, *infra*. *Third*, the District Court conducted an incomplete and factually unsupported market analysis, and Plaintiffs did not present competent evidence to establish that ProMedica or Paramount possesses market power in any relevant market. *See* Part I.C, *infra*. *Finally*, ProMedica has immunity from antitrust liability because the District Court's injunction conflicts with the express terms of the FTC Final Order. *See* Part I.D, *infra*.

A. The District Court erroneously determined that ProMedica's refusal to deal with Plaintiffs was actionable anticompetitive conduct.

The District Court erred by finding that the change-in-control provisions in Plaintiffs' Paramount contracts, or the exercise of those contractual rights, qualified as actionable anticompetitive conduct. *See* Order, RE 68 at 1704-06. Relying on an expansive misreading of *Aspen*—a decision at the "outer boundary" of antitrust liability, *Trinko*, 540 U.S. at 409—the District Court held that ProMedica's refusal to deal was anticompetitive. The District Court's analysis turns the Supreme Court's refusal-to-deal jurisprudence on its head.

1. *Trinko* mandates rejection of Plaintiffs' claims.

The Supreme Court's decision in *Trinko* governs whether ProMedica's refusal to deal constitutes anticompetitive conduct. *Trinko* affirmed the default rule that businesses have "no duty to aid competitors" under the antitrust laws. 540 U.S. at 408-11. The *Trinko* Court recognized that judicially imposed duties to deal with competitors harm consumers by creating perverse incentives that encourage new entrants to free ride on the investments of their competitors. The Court accordingly cautioned lower courts against "[e]nforced sharing" that "requires antitrust courts to act as central planners," and strictly "limited" the circumstances in which a lower court may impose a duty to deal. *Id.* at 407-09.

The sole exception to the prohibition against refusal-to-deal antitrust liability derives from *Aspen*, 472 U.S. at 610-11. But the *Trinko* Court explained that this "limited exception" falls at the "outer boundary" of antitrust liability, and exists only where a monopolist discontinues a voluntary, long-standing, pre-existing "*and thus presumably profitable*" business relationship with a competitor without any valid business justification. *Trinko*, 540 U.S. at 409; *see also Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009).

As then-Judge Gorsuch explained in *Novell, Inc. v. Microsoft Corp.*, after *Trinko*, a plaintiff must establish three key "features" from *Aspen* before a court may "invoke

Aspen's limited exception" to the rule that refusals to deal do not violate the antitrust laws: (i) a pre-existing voluntary and therefore presumably profitable course of dealing between the defendant and the plaintiff; (ii) evidence that the defendant's termination of that course of dealing forsakes enterprise-wide short-term profits to recoup monopoly profits in the long run; and (iii) the absence of any rational business justification for the termination, even if the first two factors are proven. 731 F.3d 1064, 1074-75 (10th Cir. 2013). Although the Sixth Circuit has not yet addressed this issue, nearly every other circuit to address a refusal-to-deal antitrust claim after *Trinko* has adopted this same analytic framework.[4] And it is the same approach Judge Posner adopted in the immediate aftermath of *Aspen*. *See Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.) (stating that *Aspen* "is narrowly written," doubting whether "it stands for any principle that goes beyond its unusual facts").

The District Court turned this framework on its head, limiting *Trinko* to its facts and applying the much earlier decision in *Aspen* as if it were broad, prescriptive authority. Order, RE 68 at 1704-06. Rejecting ProMedica's argument that "*Aspen* must be viewed

[4] *See, e.g.*, *F.T.C. v. Qualcomm Inc.*, 969 F.3d 974, 993-94 (9th Cir. 2020); *Power Analytics Corp. v. Operation Tech., Inc.*, 820 F. App'x 1005, 1016 (Fed. Cir. 2020); *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016); *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 135 (2d Cir. 2014); *Duty Free Americas, Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1266 (11th Cir. 2015); *ASAP Paging Inc. v. CenturyTel of San Marcos Inc.*, 137 F. App'x 694, 698 (5th Cir. 2005); *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.*, 507 F.3d 117, 124-25 (2d Cir. 2007); *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004).

'through the lens' of … *Trinko*," *id.*, the District Court stressed "the existence of a regulatory structure designed to deter and remedy anticompetitive harm" in *Trinko*, and concluded that the absence of a similar regulatory structure here meant *Trinko* did not apply. *Id.* at 1705. That is incorrect. The Second Circuit rejected this precise reasoning, explaining that the presence of a regulatory scheme was "not essential to *Trinko*'s holding" and not a predicate to its application. *In re Elevator Antitrust Litig.*, 502 F.3d 47, 53 (2d Cir. 2007).

Instead of rigorously applying the *Trinko* factors, the District Court substituted an amorphous, unstructured analysis of ProMedica's supposed motive and intent in terminating the Paramount contracts. In so doing, the District Court misdiagnosed healthy rivalry as actionable anticompetitive conduct. Order, RE 68 at 1704-06. True, ProMedica terminated the Paramount contracts because it did not wish to subsidize the entry of another vertically-integrated health system with a full range of directly competitive services and its own health plan. But that is merely evidence that ProMedica seeks to compete with Plaintiffs. A firm's hope to best a rival is the essence of competition; it does not transform a refusal to deal into anticompetitive conduct. "When courts consider the 'intent' of a firm charged with monopolization, they look not to whether the firm intended to achieve or maintain a monopoly, but to whether the underlying purpose of the firm's conduct was to enable the firm to compete more effectively." *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1481 (7th Cir. 1991). "Hard-nosed intent to undo rivals" and even "intent to harm a competitor alone" is not "the marker of antitrust liability." *Novell*, 731 F.3d at 1078); *see also Olympia*, 797 F.2d at 379 ("That Western Union wanted to 'flush these Turkeys' tells us nothing about the lawfulness of its conduct."); *Qualcomm*, 969 F.3d at 994 n.15 (error to "conflate[] the desire to maximize profits with an intent to 'destroy competition itself'").

Under the correct legal standard from *Trinko*, neither the existence of garden-variety change-in-control termination rights in a contract between competitors, nor the subsequent exercise of that right, is actionable anticompetitive conduct.

2. No relevant voluntary prior course of dealing.

There is no relevant prior course of dealing between Plaintiffs and Defendants that could satisfy *Aspen*. Paramount has never contracted with McLaren St. Luke's, and had not contracted with St. Luke's for decades before the 2010 merger. And when Paramount did contract with St. Luke's in connection with the 2016 divestiture, it did so only within the context of an FTC enforcement proceeding, and only with the protection of the change-in-control provision. *See* Krueger Decl., Sealed RE 46 ¶¶ 4-25; Martin Decl., Sealed RE 42 ¶¶ 7-8; Johnston Decl., Sealed RE 40 ¶ 23; Wilson Decl., Sealed RE 48 ¶ 12; Cavanaugh Decl., Sealed RE 42 ¶¶ 4-6. Thus, the course of dealing between them was always subject to a change-in-control provision. ProMedica's decision to exercise its contractual termination rights when the change in control came to pass does not demonstrate a *reversal* of a prior course of dealing, but conduct *consistent* with that course of dealing. As this

Court explained, "antitrust law is not a negotiating tool for a plaintiff seeking better contract terms." *CBC Cos. v. Equifax, Inc.*, 561 F.3d 569, 573 (6th Cir. 2009) (citing *Trinko*).

In a closely analogous case, the Tenth Circuit dismissed refusal-to-deal claims based on the exercise of a negotiated termination right between the defendant and the plaintiff. That Circuit found that a prior *qualified* course of dealing could not establish a duty to deal under *Aspen*. *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1197 (10th Cir. 2009). In *Christy*, the defendant dealt with the plaintiff subject to a right to terminate the relationship pursuant to a restrictive covenant. When the defendant later terminated the ongoing relationship, the plaintiff sued, claiming the prior course of dealing established a duty to deal under *Aspen*. The Tenth Circuit disagreed, stating "by using the restrictive covenant DVRC had explicitly informed its competitors from the beginning that the relationship could change at any time. Unlike the competitor in *Aspen Skiing*, Christy should have been aware that the relationship was temporary and subject to DVRC's business judgment." *Id.*; *see also Tyntec Inc. v. Syniverse Techs.*, 2020 WL 2786873, at *2 (M.D. Fla. May 29, 2020) (defendants' prior course of dealing with plaintiff's corporate predecessor did not establish an actionable prior course of dealing under *Aspen*).

So too here. ProMedica never had an unqualified, voluntary course of dealing with Plaintiffs that could support the *Aspen* exception to *Trinko*. It only had an expressly qualified course of dealing whereby the parties knew ProMedica could terminate the contracts, precisely as it did here. But without a prior course of dealing that satisfies *Aspen*, the refusal to deal cannot be anticompetitive conduct.

3. Termination of the Paramount contracts would enhance ProMedica's system-wide profits.

Before a refusal to deal can become actionable anticompetitive conduct, Plaintiffs must show that ProMedica irrationally scarified short-term profits. *Trinko*, 540 U.S. at 409; *Novell*, 731 F.3d at 1075. Not only did Plaintiffs fail to introduce evidence of a system-wide profit sacrifice, they failed even to allege this necessary element. Plaintiffs' claims would not survive summary judgment, let alone meet the "more stringent" burden of proof that *Winter* requires. *Enchant*, 958 F.3d at 539.

Instead, the District Court improperly allowed Plaintiffs to carry their burden solely based on favorable (and unreasonable) inferences rather than evidence. But it is "the party moving for a preliminary injunction that bears the burden of establishing a likelihood of success on the merits" and "[t]his cannot be accomplished merely by asking the Court to draw inferences in its favor rather than demonstrating the existence of meaningful facts supporting its claim." *Citizens of Ebey's Reserve for a Healthy, Safe & Peaceful Env't v. U.S. Dep't of Navy*, 122 F. Supp. 3d 1068, 1083 (W.D. Wash. 2015); *see also Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 293 (4th Cir. 2011). Specifically, the District Court improperly inferred that the terminations likely involved a profit sacrifice because ProMedica renewed those contracts in 2018. Order, RE 68 at 1705. But, as demonstrated above, ProMedica renewed those contracts with the ability to terminate them if another entity acquired St. Luke's. And ProMedica *never* agreed to contract with *McLaren* St. Luke's. As all the testimony (lay and expert) explained, ProMedica would maximize system profits—and increase competition—if it did not include Plaintiffs in Paramount's narrow-network plans. In holding otherwise, and excusing Plaintiffs from their burden under *Winter*, the District Court committed legal error.

The only evidence in the record—i.e., expert testimony from ProMedica's economist, Professor David Dranove,[5] and unrebutted lay testimony—demonstrated that ProMedica terminated the Paramount contracts to *increase*, not sacrifice, its overall short- and long-term system-wide profits. *See* Cavanaugh Decl., Sealed RE 43 ¶¶ 7-9; Martin Decl., Sealed RE 42 ¶¶ 9-11; Johnston Decl., Sealed RE 40 ¶¶ 28-35, 42-45; Wilson Decl., Sealed RE 48 ¶ 14; Webb Decl., Sealed RE 41 ¶¶ 32-33; Dranove Decl., Sealed RE 49 ¶¶ 35-37, 42-51, Ex. 1. But the District Court arbitrarily dismissed this evidence in favor of its own unsupported inferences. The court refused to credit ProMedica's declarations since they lacked contemporaneous planning calculations generated in the ordinary course of business. It also dismissed Professor Dranove's testimony because he was "hired for this litigation" (as is virtually every expert economist in an antitrust case) and because McLaren

[5] Professor Dranove is Professor of Health Industry Management at the Kellogg School of Management, and has testified in healthcare antitrust enforcement actions. Dranove Decl., Sealed RE 49 ¶¶ 1-6.

objected to his calculations (ignoring that McLaren offered no calculations of their own). Order, RE 68 at 1705. This, too, was error.

Plaintiffs lack any evidence of the profit sacrifice that *Trinko* mandates. The record confirms that ProMedica would not sacrifice system-wide profits when it attempted to terminate the Paramount contracts. The District Court had no basis to conclude otherwise, and under *Trinko*, committed reversible error.

4. Valid business justifications supported termination.

The final criterion for an actionable refusal to deal is that the refusal must lack any valid business justification. *Aspen* itself acknowledges that a refusal to deal does not violate the antitrust laws if "valid business reasons exist for th[e] refusal." 472 U.S. at 597. And *Trinko* underscores that a refusal to deal only crosses the line into actionable anticompetitive conduct when, in addition to the elements above, the refusal to deal seeks "an anticompetitive end." 540 U.S. at 409. Courts therefore require a plaintiff to prove that the challenged refusal is "irrational but for its anticompetitive effect." *Novell*, 731 F.3d at 1075 (citing P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 772 (3d ed. 2008)).

The District Court did not even consider this necessary element, which alone requires reversal. *Great Lakes Brewing*, 860 F.3d at 849. The record showed ProMedica's planned terminations served a legitimate business purpose: to maximize ProMedica's system-wide profits (short and long-term) and to preserve the integrity of Paramount's narrow-network plans. *E.g.*, Dranove Decl., Sealed RE 49 ¶¶ 28-30, 35-37, 41, 58;

Johnston Decl., Sealed RE 40 ¶¶ 22, 25, 35. ProMedica understood that including Plaintiffs in Paramount's narrow-network plans would encourage members to obtain care at Plaintiffs or *other McLaren providers*, rather than at ProMedica. ProMedica's lost patient volume would reduce its provider revenues, forcing Paramount to increase premiums. This "free-riding"—allowing a competitor to benefit from ProMedica's investments in low-cost insurance without incurring the costs of those investments—would reduce ProMedica's revenue. It also would harm competition and consumers in the insurance markets by preventing ProMedica from continuing to offer low cost insurance plans and obtain the other efficiencies from its narrow-network business model. *Id*.

The avoidance of free-riding is a valid business justification that defeats antitrust liability here. Allowing Plaintiffs to free ride deprives ProMedica of business, and harms consumers by suppressing the incentives of both the free rider (McLaren Health) and the free rider's victim (ProMedica) to invest, innovate, and expand. *Trinko*, 540 U.S. at 407-08. The Eleventh and Seventh Circuits have rejected refusal-to-deal claims for precisely this reason. *See Morris*, 364 F.3d at 1295-96, 1298 ("prevention of free-riding … provides a valid business justification" for a refusal to deal); *Olympia*, 797 F.2d at 377-78 (rejecting duty to deal because plaintiff "had no right under antitrust law to take a free ride on its competitor's sales force").

ProMedica's refusal to deal also protects the efficiencies from ProMedica's vertically-integrated narrow networks, which is another valid justification for a refusal to deal. Vertical integration, even by a monopolist, has the potential for efficiencies. Accordingly, this Court has concluded that "a refusal to deal designed to accomplish vertical integration, without more, should not be a basis for imposing liability." *Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir. 1979). Consistent with *Byars*, other circuits have uniformly held that a vertically-integrated defendant's refusal to deal with its former suppliers or distributors does not violate the antitrust laws when those refusals seek the legitimate efficiency benefits of vertical integration. *See, e.g.*, *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984) (Posner, J.); *Paschall v. Kansas City Star Co.*, 727 F.2d 692, 697 (8th Cir. 1984) (en banc); *Port Dock*, 507 F.3d at 124.

This rationale applies equally to an already vertically-integrated company that seeks to protect the efficiencies from its vertically-integrated narrow network plans. Thus in *Christy Sports*, the Tenth Circuit held that a vertically-integrated defendant's contract termination had a valid business purpose when it permitted the defendant to select the "blend of vertical integration and third party competition [that] will produce the highest return." 555 F.3d at 1195.

The District Court overlooked ProMedica's legitimate business justifications to terminate Plaintiffs from Paramount's narrow-network plans. Under *Trinko*, these reasons preclude liability.

5. *Trinko* also disposes of Plaintiffs' Section 1 and Valentine Act claims.

Although *Trinko* directly addressed a Section 2 claim challenging a defendant's unilateral refusal to deal with a competitor, courts routinely and appropriately apply the same analysis to evaluate a challenge to the same conduct under Section 1 and state law. *E.g.*, *Qualcomm*, 969 F.3d at 991, 993-94 (noting that "courts often review claims under each section simultaneously" and doing so). For both types of claims, courts must assess the reasonableness of the challenged conduct. *Id.* Here, Plaintiffs' Section 1 claim, like their Section 2 claim, turns upon ProMedica's refusal to deal.[6] Plaintiffs specifically allege that the existence of the change-in-control provision in the FTC-approved Divestiture Agreement violated Section 1 and the Valentine Act because ProMedica had an unconditional duty under the antitrust laws to include St. Luke's and its physicians in Paramount narrow networks. The FTC already rejected this claim multiple times relying on *Trinko*. *Supra* at 11-13. The District Court should have dismissed these claims too.

*****

This case illustrates why courts are ill-suited to play the role of central planner. ProMedica's termination of the Paramount contracts was procompetitive. It preserved the efficiencies and low prices of Paramount's narrow-network plans, while spurring McLaren

[6] Plaintiffs' Valentine Act claim is identical to, and stands or falls with, their Section 1 claim. *Erie Cty.*, 702 F.3d at 867.

Health Plan's rapid entry into the Toledo metro area. This is competition at work: ProMedica's actions enhanced output and consumer choice. Conversely—as *Trinko* warned and Professor Dranove explained—imposing a duty to deal here would facilitate free-riding that would diminish the incentives of McLaren and ProMedica alike to invest and expand. 540 U.S. at 407-08; Dranove Decl., Sealed RE 49 ¶¶ 55-58. And as *Trinko* cautioned, courts should especially disfavor duties to deal when a government enforcer acting "as effective steward of the antitrust function" blessed the challenged conduct, as the FTC did here. 540 U.S. at 411, 413; *see* Part I.D, *infra*.[7]

Worse, the injunction raises precisely the problem that led the Supreme Court to eschew duties to deal, namely, the need for federal judges to sit as price regulators. *Trinko*, 540 U.S. at 408. The Paramount contracts with Plaintiffs do not reflect the market-based reimbursement rates that ProMedica would agree to after an arms-length negotiation with McLaren St. Luke's—a very different competitor than independent St. Luke's. Johnston Decl., Sealed RE 30 ¶ 41; Wilson Decl., Sealed RE 49 ¶ 19. The injunction either unfairly conscripts ProMedica into subsidizing its now-powerful competitor by paying above-market reimbursement rates, or requires the District Court to oversee the formation of a new price term in these contracts. Neither is appropriate under *Trinko*.

[7] The leading treatise explains that *Trinko* thus calls for a "soft immunity" in refusal-to-deal cases like this that involve "market situation[s] where regulation is already in effect." Areeda, ¶ 242(b)(5).

This Court must vacate the injunction because the District Court erred in finding ProMedica has an antitrust duty to deal.

B. The District Court did not require Plaintiffs to show antitrust injury.

Plaintiffs must show antitrust injury for all their claims. *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000). The Clayton Act imposes the antitrust-injury requirement upon private plaintiffs to prevent competitors from misusing the antitrust laws to complain about increased competition and purely private injuries. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (en banc) ("[O]ne competitor may not use the antitrust laws to sue a rival merely for vigorous or intensified competition."). To show antitrust injury, the plaintiff must show that "the alleged violation tended to reduce competition overall," and that its "injury was a consequence of the resulting diminished competition." *J.B.D.L. Corp. v. Wyeth–Ayerst Labs., Inc.*, 485 F.3d 880, 887 (6th Cir. 2007).

Here, Plaintiffs needed to show that (1) the Paramount contract terminations would substantially foreclose their access to customers, and (2) this foreclosure would harm competition by meaningfully reducing their ability to compete. *Indeck*, 250 F.3d at 977-78. Plaintiffs made neither showing. In fact, the reverse is true: Paramount's actions led McLaren to enter the Toledo-metro-area health-insurance markets with its own health plan.

The District Court's decision does not discuss the antitrust injury requirement. Instead, the District Court merely concluded that the termination of the Paramount contracts would cause the "erosion of [McLaren St. Luke's] market share." Order, RE 68 at 1703-04. The District Court reasoned that this "erosion" would have anticompetitive effects because the FTC in 2012 found that St. Luke's provided patients with "the next best substitute" to ProMedica and operated as a low-cost, high-quality competitor. *Id.* But even if hypothetically true,[8] a single competitor's alleged foreclosure from a set of customers does not diminish competition unless the exclusion also harms that competitor's *ability to compete* for those or alternative customers. *See Indeck*, 250 F.3d at 977-78.

In *Indeck*, an energy seller alleged a competitor violated the antitrust laws by temporarily excluding the plaintiff from 80% of the relevant market's buyers. *Id.* at 975. This Court dismissed those claims on antitrust injury grounds, holding that losing immediate access to as much as 80% of the market's buyers did not prevent plaintiff from competing for those buyers in the future. *Id.* at 977-78. In *NicSand*, an en banc panel of this Court applied *Indeck* to reach the same conclusion, holding that the plaintiff failed to allege antitrust injury where it had the ability to compete for the lost business in the future, and also *before* it lost the business. 507 F.3d at 455-56.

Plaintiffs did not (and cannot) prove antitrust injury. As in *NicSand*, Plaintiffs admit they had the opportunity to compete for Paramount's members after they received the notice of terminations on October 2, 2020, including introducing their own health plan to

[8] E.g., nothing established that McLaren St. Luke's today is a low-cost competitor.

the Toledo metro area. For example, on October 28, 2020, Plaintiffs published an open letter to the community: "As open enrollment season begins, we urge you to consider choosing a plan that includes our hospital and physicians in its network. McLaren St. Luke's and WellCare Physician Group remain in network with more than 30 insurance plans, including the major carriers." PI Mot. Ex. Q, RE 22-18; *see also* Johnston Decl., Sealed RE 40 ¶¶ 45, 47; Wilson Decl., Sealed RE 48 ¶ 17; Martin Decl., Sealed RE 42 ¶ 10. The free market will correct any perceived problem of meeting customer demand for healthcare services. If a consumer enrolled in Paramount desires access to Plaintiffs for in-network services post-termination, for example, then that customer will move away from Paramount to another plan that includes Plaintiffs to meet her individual preferences. Because Plaintiffs had (and will have) the opportunity to compete for the Paramount patients, they would not suffer antitrust injury from the terminations, even if they would have lost short-term market share. Dranove Decl., Sealed RE 49 ¶¶ 12, 32, 52-53.

As in *Indeck*, moreover, Plaintiffs adduce no evidence showing how the Paramount terminations would diminish their ability to compete for customers in the future. Plaintiffs do not dispute that they would have the opportunity to compete again for all customers during the 2021 open enrollment season. *Indeck*, 250 F.3d at 977-78 (no antitrust injury when exclusion is "of limited duration" and buyers are "free to seek other" suppliers in the future). Plaintiffs' unfettered ability to compete for future patients confirms the absence of antitrust injury.

Indeck was a harder case, as the plaintiff there faced a higher risk of exclusion than Plaintiffs face here. The *Indeck* plaintiff alleged exclusion from 80% of the buyer's market. Here, Plaintiffs acknowledge that Paramount subscribers comprise a small portion of Plaintiffs' customer base, and more importantly, an even smaller portion of the overall market. PI Mot. Ex. D ¶ 5, RE 22-5 at 309. Plaintiffs remains in-network at "more than 30" separate health plans, including every major carrier. *See* PI Mot. Ex. Q, RE 22-18. Unlike the *Indeck* plaintiff, the evidence here showed that Plaintiffs have already benefitted from the rapid entry of McLaren Health Plan and will continue to do so, further discounting any harm from lost access to Paramount's members.

Had the District Court addressed this issue, it could not have found that Plaintiffs suffered antitrust injury.

C. The District Court conducted an incomplete and unsupported market analysis.

Antitrust plaintiffs must establish that the defendant possesses market or monopoly power in a relevant antitrust market where the defendant's business conduct allegedly harms competition. *Ky. Speedway, LLC v. NASCAR, Inc.*, 588 F.3d 908, 919 (6th Cir. 2009). Relying on the markets from the ProMedica-St. Luke's merger in 2010, the District Court identified the general acute care inpatient hospital services sold to commercial health plans in Lucas County, Ohio as the relevant antitrust market, and found "a strong likelihood" that Plaintiffs would show ProMedica possessed market power there. Order, RE 68 at 1701. But that is the incorrect market in which to assess the competitive effects of terminating the Paramount contracts, and in any event, Plaintiffs failed to demonstrate that ProMedica or Paramount have market power in any relevant market. This error independently warrants reversal.

1. The District Court should have analyzed the health insurance markets where Paramount competes.

Plaintiffs' claims concern ProMedica's alleged anticompetitive scheme to cut off Plaintiffs—competing healthcare providers—from access to Paramount's insurance customers. The relevant markets for these allegations are the *health insurance* markets in which Paramount competes, not the *healthcare provider* markets in which ProMedica hospitals and physicians compete.

Plaintiffs led the District Court astray by offering neither expert testimony, nor any kind of substantiated economic analysis, to support the proposed market definition the District Court accepted. Instead, Plaintiffs relied on various materials from the FTC merger case, as well as unsubstantiated lay employee testimony purporting to identify the current relevant markets and shares. PI Mot., RE 22 at 268-69.

In response, ProMedica submitted unrebutted expert testimony from Professor Dranove,[9] who explained that ProMedica's alleged market power in a provider market (i.e., commercial inpatient services) is irrelevant to whether ProMedica can harm competition

---

[9] Despite instruction that expert testimony is necessary, *Kentucky Speedway*, 588 F.3d at 919, the District Court dismissed Professor Dranove's opinions because he is "an expert hired for this litigation." Order, RE 68 at 1705.

by foreclosing Plaintiffs' access to Paramount's insurance customers. To determine that question, a court must analyze the competitive conditions in the *insurance* markets where *Paramount* competes because ProMedica's ability to use Paramount to harm competing providers depends on the size and importance of Paramount. Neither Plaintiffs nor the District Court undertook any of this required analysis. *Cf.* Order, RE 68 at 1701-02.

The District Court's misguided focus highlights why this Court requires plaintiffs to use expert analysis to prove the existence of, and a defendant's power in, a relevant market. *Ky. Speedway*, 588 F.3d at 919. Indeed, the District Court's failure to require Plaintiffs to demonstrate the relevant market by expert testimony is itself an error that warrants reversal. *Id.* But even with their armchair economics, Plaintiffs' theory of anticompetitive conduct is completely different from the anticompetitive conduct identified by the FTC in its litigation to enjoin the ProMedica-St. Luke's merger. There, the FTC alleged that ProMedica's acquisition of St. Luke's substantially lessened competition in the commercial inpatient market in Lucas County by reducing competing providers from four to three. But that tells us nothing about the competitive effects of terminating the Paramount insurance contracts, which eliminates no providers or insurance companies. That termination will not necessarily affect other insurance providers, and—depending on Plaintiffs' contracts with the plethora of other insurers—may also have no effect on competition in any healthcare-provider market. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 570 (5th ed. 2020). The loss of access to Paramount's narrow networks "is immaterial" for the competitive viability of Plaintiffs so long as other insurers "remain willing and able to supply them." *Id.* ¶ 570a. The District Court should have analyzed competition in the insurance markets to determine the effect Paramount's contract terminations would have on Plaintiff's ability to compete in any provider market. ProMedica's alleged market power in provider markets had no relevance to this inquiry.

2. Plaintiffs failed to demonstrate that ProMedica has market power in any relevant market.

After properly defining a relevant market, an antitrust plaintiff must demonstrate that the defendant has market power in that market. Market power may either be inferred indirectly from proof of a high market share plus barriers to entry, or proven directly by evidence "showing the exercise of actual control over prices or the actual exclusion of competitors." *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) (citation omitted). Here, too, the District Court erred.

Plaintiffs did not attempt to demonstrate Paramount's market dominance in the relevant insurance markets. Nor could they. Paramount has only a 17% share in commercial insurance, and 21% in Medicare Advantage, in the Toledo metro area. *See* Martin Decl., Sealed RE 42 ¶ 5. These shares fall below the minimum threshold courts apply to find market power. *Byars*, 609 F.2d at 850 (75-80% is the "starting point" for monopoly power under Section 2); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984) (30% share required for market power under Section 1). And the District Court overlooked the ease with which McLaren Health Plan successfully entered into those insurance markets. Just months after receiving ProMedica's termination notices, Plaintiffs launched their own health insurance plan in the Toledo metro area. Hr'g Tr. at 35:14-17, Sealed RE 72 at 1748; MTD Opp., RE 51 at 1463. The rapid entry of McLaren Health Plan belies the claim that Paramount has market power.

But even in the putative commercial inpatient market from the FTC merger case, the District Court erroneously concluded that Plaintiffs had demonstrated "a strong likelihood" of showing ProMedica has market power today. The District Court relied almost exclusively on the out-of-date FTC merger-case findings to analyze market power in that market. That reliance was legally impermissible and factually unsupportable.

Pursuant to Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), findings of fact from FTC administrative proceedings have no evidentiary value *at all* in subsequent litigation. *Hynix Semiconductor Inc. v. Rambus Inc.*, 2008 WL 11408435, at *3-4 (N.D. Cal. Jan. 9, 2008) (Section 16(a), "[w]hile convoluted," precludes a private antitrust plaintiff from according even *prima facie* weight to the FTC's findings in prior administrative litigation) (citations omitted). The District Court therefore could not rely on the FTC administrative findings to define ProMedica's market power.

The District Court also erred because it ignored significant changes in the commercial inpatient market during the past decade. ProMedica introduced undisputed evidence that competition in that market has increased, new entry has occurred, expansion is ongoing, and reimbursement rates are falling (as they would if providers lack market power). Webb Decl., Sealed RE 41 ¶¶ 19-27. The most dramatic change concerns McLaren's entry, revitalizing St. Luke's as a stronger rival with a broader range of services. In addition, Mercy Health opened a brand new hospital only three miles from St. Luke's—but outside the FTC's market definition that the District Court accepted—since the merger case. Beyond these new entrants, ProMedica and its competitors have started offering new and different services at new locations; growth in outpatient care has changed the ways and places that ProMedica and its competitors deliver medical services; and competitors' shares of the market have shifted. PI Opp., RE 39 at 1217-19. Those changed conditions "belie[] whatever inference" might have been drawn from earlier assessments of the methods and boundaries with and within which ProMedica and its rivals compete. *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982).

Compounding the above errors, the District Court erroneously enjoined two contracts for inpatient services sold to Medicare Advantage plans and three contracts for physician services, even though Plaintiffs made no attempt to show ProMedica has market power in any relevant market for those distinct services. The District Court incorrectly excused Plaintiffs from the requisite proof for these separate claims under the "inextricably intertwined doctrine" applied in *Province v. Cleveland Press Publishing Co.*, 571 F. Supp. 855, 866-67 (N.D. Ohio 1983). Order, RE 68 at 1702. But that is an unrelated *antitrust standing* doctrine that governs whether a private plaintiff has suffered the requisite type of injury to assert antitrust claims. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 484 (1982).

The doctrine does not allow a plaintiff to establish, without an evidentiary showing, different antitrust violations occurring in different relevant markets. *See United States v. Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir. 2001) (requiring separate proof for each claim). The District Court needed to "analyze the various issues individually" before concluding that Plaintiffs had "proved a violation of section 1 or section 2 of the Sherman Act" as to the Medicare Advantage and WellCare contracts. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1367 (Fed. Cir. 1999) (citation omitted). Its misapplication of the law requires reversal.

*****

The District Court's holding that Plaintiffs were likely to succeed on the merits rested on an incomplete market definition and an unsupported finding of market power. This legal error applied to all Plaintiffs' claims, and mandates reversal.

D. The District Court erroneously rejected ProMedica's immunity defenses.

Plaintiffs challenge conduct that the FTC authorized, so three different antitrust immunity doctrines prohibit their claims. The District Court erroneously rejected ProMedica's immunity defenses in its order denying ProMedica's motion to dismiss (Order, RE 66 at 1683-84).

First, Plaintiffs' Section 1 claim challenges the inclusion of the change-in-control provision in Paramount's contracts. Order, RE 66 at 1684. The *Noerr-Pennington* doctrine bars this claim because ProMedica presented the change-in-control provision to the FTC, which the FTC reviewed and approved. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Supreme Court held that a defendant cannot have antitrust liability for petitioning government action even when those efforts would eliminate competition. And in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the Court held that "'where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." 486 U.S. 492, 499 (1988) (citing *Noerr*, 365 U.S. at 136). Here, the change-in-control provision could not have existed without government action—FTC approval—and thus cannot provide a basis for antitrust liability.

Second, ProMedica has immunity from all Plaintiffs' claims pursuant to the federal instrumentality immunity doctrine. In *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*, the Court reasoned that immunity applies to conduct that is "compelled" or "approved by any governmental regulatory body." 452 U.S. 378, 389 (1981). The Eleventh Circuit, in a similar case, affirmed a finding of immunity for a defendant because the Federal Energy Regulatory Commission authorized the alleged wrongful conduct in a settlement. *Gas Utils. Co. of Ala., Inc. v. S. Nat. Gas Co.*, 825 F. Supp. 1551, 1573 (N.D. Ala. 1992), *aff'd*, 996 F.2d 282 (11th Cir. 1993). So, too, did the Second and Third Circuits. *See Name.Space, Inc. v. Network Sols., Inc.*, 202 F.3d 573, 581-83 (2d Cir. 2000); *Byers v. Intuit, Inc.*, 600 F.3d 286, 295 (3d Cir. 2010). Here, the FTC approved ProMedica's right to terminate St. Luke's from the Paramount plans should St. Luke's undergo a change in control after considering a request to deny that right. *See supra* at 11-13. Plaintiffs do not dispute that McLaren's acquisition of St. Luke's constituted precisely the type of change that the FTC's approval anticipated.

Third, ProMedica has immunity under the implied immunity doctrine because the imposition of private antitrust liability would conflict with the FTC's reasoned determination about how to promote competition. *See United States v. NASD, Inc.*, 422 U.S. 694, 725, 728-30 (1975); *Gordon v. N.Y.S.E., Inc.*, 422 U.S. 659, 675-76, 685-86, 689 (1975). The Supreme Court identified four factors to determine the application of implied immunity under *Gordon* and *NASD*: (1) "existence of regulatory authority" to "supervise the activities in question"; (2) "evidence that the responsible regulatory entities exercise that authority"; (3) "risk" of producing "conflicting guidance, requirements, duties, privileges, or standards of conduct" if immunity does not apply; and (4) possibility that "conflict affected practices … lie squarely within" the regulated area. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 275-76 (2007). The FTC's enforcement and oversight of the challenged conduct satisfies each *Credit Suisse* factor. To impose liability, a court would have to second-guess and overturn the FTC's expert determinations—exercised through six years of actual antitrust litigation that the change-in-control provision was appropriate. *Id.*

The District Court misapplied the law when it rejected these defenses. Contrary to its reasoning (Order, RE 66 at 1683), no statutory provision precludes immunity. The FTC regulatory action generating the immunity here arose under the Clayton Act. The Clayton Act provision on which the District Court relies, 15 U.S.C. § 2, preserves only parallel private claims against the *same conduct already challenged by the FTC*. The clause would, for example, have permitted a lawsuit challenging the ProMedica-St. Luke's merger in 2011 notwithstanding the parallel FTC challenge. But the clause does not bar immunity for future conduct undertaken in conformity with FTC orders following those challenges.

The District Court also erred in finding that this case would not be "plainly repugnant" to the FTC's regulatory objectives. Order, RE 66 at 1684. The Order condemns conduct the FTC expressly included in its comprehensive plan to facilitate competition in the Toledo metro area. PI Opp., RE 39 at 1212-13. The injunction is plainly repugnant to the FTC's regulatory objectives to promote competition. The Supreme Court found plain repugnancy in *NASD*, *Gordon*, and *Credit Suisse* on less compelling facts involving non-antitrust regulators, unexercised authority, and in the case of *Gordon*, actual disapproval of the challenged conduct. *NASD*, 422 U.S. at 728; *Gordon*, 422 U.S. at 689; *Credit Suisse*, 551 U.S. at 279, 285. This case presents an even stronger case for implied immunity because the challenged conduct received "actual agency approval." Areeda, ¶ 244a. Failing to credit these defenses was legal error.

Finally, the District Court erred when it relied on *United States v. Borden Co.*, 347 U.S. 514, 518-19 (1954). Order, RE 66 at 1683. That case stands for the limited and distinct proposition that a consent decree entered following private antitrust litigation does not displace the government from seeking its own injunction. 347 U.S. at 519. It is not relevant here.

ProMedica's antitrust immunity supplies a complete defense to all claims, mandating reversal.

*****

"[A] preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed." *Great Lakes Brewing*, 860 F.3d at 849. Plaintiffs cannot prevail on their claims as a matter of law, so the Court must vacate the injunction.

II. The Remaining *Winter* Factors Do Not Support Injunctive Relief.

Even if Plaintiffs had demonstrated a likelihood of success on the merits, the remaining *Winter* factors would preclude preliminary injunctive relief. The District Court committed multiple legal errors when analyzing these *Winter* factors, too.

A. The District Court erroneously concluded that Plaintiffs would suffer irreparable harm through lost revenue.

To obtain a preliminary injunction, Plaintiffs needed to clearly show that, absent an injunction, they would suffer irreparable injury not capable of redress by money damages. *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 579 (6th Cir. 2002). The District Court concluded that Plaintiffs made this showing based solely on the (possible) loss of revenue from the terminations, which they asserted would amount to $25 million. PI Mot., RE 22 at 261-62. The District Court concluded that this lost revenue would impede McLaren from investing in McLaren St. Luke's. Order, RE 68 at 1706.

This was error. Lost revenue is presumptively not irreparable harm because it is compensable by money damages. *Overstreet*, 305 F.3d at 579; *accord Nat'l Viatical, Inc. v. Universal Settlements Int'l, Inc.*, 716 F.3d 952, 957 (6th Cir. 2013). A limited exception exists when the loss of revenue is enterprise-threatening. *See Beaute Craft Supply Co. v. Revlon, Inc.*, 402 F. Supp. 385 (E.D. Mich. 1975). But the District Court did not conclude that the expected loss of revenue from Paramount subscribers threatened to put Plaintiffs out of business—it held that the anticipated loss would only "impede" McLaren's "plans" to make "immediate investments." Order, RE 68 at 1706. In fact, the District Court explicitly disregarded the "enterprise threatening" standard, stating that it need not find that lost revenues would "completely eliminate" Plaintiffs to find the anticipated lost revenue constituted irreparable harm. *Id.*

Plaintiffs' asserted losses—even if credited—cannot constitute irreparable harm. The record shows that McLaren is a multi-billion-dollar company, contractually committed to investing hundreds of millions of dollars in Plaintiffs and paying off Plaintiffs' debt. Compl. ¶¶ 2, 78-79, RE 1 at 2, 24; PI Mot., RE 22 at 261-62. McLaren also has brought its McLaren Health Plan to the Toledo metro area and recruited new physicians to support Plaintiffs. Compl. ¶ 82, RE 1 at 25. Plaintiffs also belong to at least 30 other health plans, including all major insurers. PI Mot. Ex. Q, RE 22-18. They face no risk of going out of business, or shutting down service lines from any anticipated lost revenue from the contract terminations.

The District Court erroneously relied on *Barron v. Vision Service Plan*, 575 F. Supp. 2d 825 (N.D. Ohio 2008). That case involved enterprise-threatening harm because a single independent practitioner would have lost his "single largest source" of personal income absent an injunction. *Id.* at 829. Unlike *Barron*, Plaintiffs have the financial support of a multi-billion-dollar parent entity and do not need income from Paramount to remain a viable competitor. Compl. ¶¶ 2, 78-79, RE 1 at 2, 24; PI Mot., RE 22 at 261-62; PI Mot. Ex. Q, RE 22-18.

The District Court misapplied black-letter law by finding non-enterprise threatening lost revenue constituted irreparable harm. That requires reversal.

B. The District Court mistakenly minimized the harm to ProMedica from the injunction.

The balance of equity factor focuses on how an injunction would impact ProMedica. *Winter*, 555 U.S. at 24. The District Court held that ProMedica would suffer no harm from "the continuation of the preexisting mutually-beneficial relationship." Order, RE 68 at 1707-08. This was erroneous. The District Court ignored the undisputed fact that McLaren St. Luke's is a very different competitor than independent St. Luke's. Including McLaren in ProMedica's Paramount narrow networks harms ProMedica, even if the inclusion of an independent St. Luke's in those networks did not. *See* Parts I.A.2-4, *supra*. This court-imposed duty to deal causes ProMedica to lose additional provider-side revenues, defeats the efficiencies of ProMedica's narrow networks, would result in tertiary patient referrals to McLaren not ProMedica, and permits McLaren to free-ride on ProMedica's investment in Paramount's low-cost insurance plans. *Id*. Even if a relationship between ProMedica and independent St. Luke's were "mutually beneficial" in 2018, that has no analytical relevance to the effects on ProMedica of including the newly formed entity, McLaren-St. Luke's, in Paramount's narrow networks. *Id.*

C. The District Court erroneously held that an injunction serves the public interest.

The public interest disfavors injunctions that enjoin *procompetitive* conduct since they necessarily harm competition. *NHLPA v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 720 n.4 (6th Cir. 2003). The District Court ignored this warning by issuing an injunction that solely promotes the narrow business interests of a single competitor.

The District Court concluded that an injunction would protect members of the public from losing access to their preferred doctors and hospitals. Order, RE 68 at 1708. But it based this conclusion on raw speculation, not evidence. Paramount members received notice of the terminations from ProMedica *and from Plaintiffs* in early October, and had ample opportunity to switch insurance plans and maintain access to Plaintiffs during the open-enrollment season. PI Mot. Ex. Q, RE 22-18. Many did precisely that. *See* Johnston Decl., Sealed RE 40 ¶¶ 45, 47; Wilson Decl., Sealed RE 48 ¶ 17; Martin Decl., Sealed RE 42 ¶ 10. Plaintiffs presented no evidence—despite carrying the burden of proof, *Enchant*, 958 F.3d at 539—to suggest that any current Paramount subscribers who did not switch would have preferred access to Plaintiffs despite electing to remain in the Paramount networks. And that makes sense: These members presumably remained because of the low cost and their satisfaction with the remaining network of providers. The injunction was unnecessary to protect them, and serves only to advance Plaintiffs' interests.

In fact, the injunction affirmatively *harms* consumers. The injunction hamstrings one of the only narrow-network insurance plans available in the Toledo metro area. Dranove Decl., Sealed RE 49 ¶¶ 28-30, 35-37, 41, 58; Johnston Decl., Sealed RE 40 ¶¶ 22, 25, 35. The inability to offer a truly narrow network would impel Paramount to raise insurance prices, increasing consumers' insurance costs and depriving them of a competitive alternative to the more expensive open-access health plans that other insurers offer. *Id.*

The injunction raises all the concerns that *Trinko* instructed lower courts to avoid. It forces sharing that will reduce ProMedica's incentives to invest in, promote, and expand Paramount because McLaren will reap the rewards of those investments. *Trinko*, 540 U.S. at 407-08. And the injunction will diminish McLaren's incentives to compete because it gives Plaintiffs patients for which they would otherwise have to compete for with lower prices or better services. *Id.* The Court should vacate the injunction to encourage competition that the antitrust laws promote.

*****

None of the *Winter* elements support the injunction. It must be vacated.

III. The District Court Failed To Consider ProMedica's Request For Bond.

A district court "errs when it fails to expressly consider the question of requiring a bond when the issue has been raised." *Appalachian Reg'l Healthcare, Inc. v. Coventry Health & Life Ins. Co.*, 714 F.3d 424, 431 (6th Cir. 2013) (cleaned up). ProMedica requested that Plaintiffs post bond before the District Court enter any preliminary injunction because an improvidently granted injunction would harm (and now has harmed) ProMedica in the form of lost profits, added administrative costs, and reputational harm. PI Opp., RE 39 at 1244. The District Court erred by not considering that request.

The District Court should have entered a bond because the injunction depresses ProMedica's earnings and deprives it of the other efficiencies inherent to vertical integration, e.g., higher quality and lower costs of care. *See* Part § I.A.3-4, *supra*. If the injunction remains, ProMedica requests an order directing the District Court to enter a bond, or alternatively, instructing the District Court to consider ProMedica's request.

CONCLUSION

The preliminary injunction must be vacated. The injunction solely promotes the narrow business interests of a single competitor, while restricting healthy competition that benefits consumers. The proper application of the antitrust laws should not achieve such a perverse outcome.

Respectfully submitted,

By: /s/ Douglas E. Litvack

Douglas E. Litvack
Counsel of Record
Christopher G. Renner
David M. Gossett
DAVIS WRIGHT TREMAINE LLP
1301 K Street NW, Suite 500 East
Washington, DC 20005
Tel: 202.973.4200

Adam S. Sieff
DAVIS WRIGHT TREMAINE LLP
865 South Figueroa Street, Suite 2400
Los Angeles, California 90017
Tel: 213.633.6800

Mark D. Wagoner
Matthew T. Kemp
SHUMAKER, LOOP & KENDRICK LLP
1000 Jackson Street
Toledo, Ohio 43604
Tel: 419.321.1412

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 12,887 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Local Rule 32(b)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Respectfully submitted on February 22, 2021 at Washington, D.C.

/s/Douglas E. Litvack
Douglas E. Litvack
Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I certify that on February 22, 2021, I served the foregoing document on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/Douglas E. Litvack
Douglas E. Litvack
Counsel for Defendants-Appellants

ADDENDUM

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), ProMedica has designated the following docket entries from N.D. Ohio Docket No. 3:20-cv-02533-JZ.

DOCKET ENTRY NUMBER	DESCRIPTION OF ITEM	FILING DATE	PAGE ID #
1	Complaint with jury demand against Paramount Care of Michigan, Inc., Paramount Care, Inc., Paramount Insurance Company, Paramount Preferred Options, Inc., ProMedica Health System, Inc., ProMedica Insurance Corporation	11-10-20	1-63
22	Motion for Preliminary Injunction	11-19-20	247-286
22-1	Index of Exhibits to Motion for Preliminary Injunction	11-19-20	287-288
22-2	Exhibit A – Declaration of Jennifer Montgomery	11-19-20	289-299
22-3	Exhibit B – Declaration of Gregory Stang	11-19-20	300-303
22-4	Exhibit C – Declaration of Nancy List	11-19-20	304-306
22-5	Exhibit D – Declaration of Michael Lacusta	11-19-20	307-317
22-6	Exhibit E – Declaration of Daniel Wakeman	11-19-20	318-326
22-7	Exhibit F – Declaration of Dale Seymour	11-19-20	327-328
22-8	Exhibit G – February 28, 2018 Letter Agreement between St. Luke’s Hospital and Paramount	11-19-20	329-331
22-9	Exhibit H – Academic Affiliation Agreement between ProMedica Health System, Inc. and the University of Toledo	11-19-20	332-386

DOCKET ENTRY NUMBER	DESCRIPTION OF ITEM	FILING DATE	PAGE ID #
22-10	Exhibit I – Article: University of Toledo Announces Next Steps for UTMC, The University of Toledo (April 13, 2020)	11-19-20	387-389
22-11	Exhibit J – Offering Memorandum ProMedica 2018 Bond Issue Series A	11-19-20	390-393
22-12	Exhibit K – Dr. Daniel Rapport letter to FTC	11-19-20	394-396
22-13	Exhibit L – Change in Control provision of April 22, 2016 Divestiture Agreement between ProMedica and St. Luke's	11-19-20	397-402
22-14	Exhibit M – Article: ProMedica Terminates in-network status with St. Luke's, The Blade (October 22, 2020)	11-19-20	403-410
22-15	Exhibit N – Declaration of Jill Trosin	11-19-20	411-417
22-16	Exhibit O – Declaration of Kathleen Kendall	11-19-20	418-431
22-17	Exhibit P – Talking Points and Q/A for ProMedica Employee Health Plan Members	11-19-20	432-434
22-18	Exhibit Q – Open letter from St. Luke's: What ProMedica's Decisions Means for Paramount Health Plan Members	11-19-20	435-437
22-19	Exhibit R – Press Release: ProMedica Announces Plan for a Freestanding Emergency Department and More (May 14, 2020)	11-19-20	438-442
22-20	Exhibit S – May 14, 2020 Hicks email chain with Parikh re New ProMedica Toledo Hospital Freestanding Emergency Department	11-19-20	443-445

DOCKET ENTRY NUMBER	DESCRIPTION OF ITEM	FILING DATE	PAGE ID #
22-21	Exhibit T – Paramount Insurance Company Administrative Services Agreement for Self-Funded Health Benefit Plan	11-19-20	446-451
22-22	Exhibit U – Declaration of Richard Carr	11-19-20	452-455
31	Motion to Dismiss for Failure to State a Claim	12-4-20	654-680
31-1	Affidavit of Douglas E. Litvack to Motion to Dismiss for Failure to State a Claim	12-4-20	681-682
31-2	Exhibit B – Comment Letters filed in In re ProMedica Health Sys., Inc.	12-4-20	683-693
31-3	Exhibit C – Approval Letter filed in In re ProMedica Health Sys., Inc.	12-4-20	694-695
31-4	Exhibit D – Responses filed in In re ProMedica Health Sys., Inc.	12-4-20	696-703
31-5	Exhibit E – Monitor Approval Letter filed in In re ProMedica Health Sys., Inc.	12-4-20	704
31-6	Exhibit F – Final Order filed in In re ProMedica Health Sys., Inc.	12-4-20	705-729
31-7	Exhibit G – Plaintiffs Position Letter on Motion to Dismiss	12-4-20	730-733
31-8	SIGNATURE PAGE [added 12/7/20]	12-4-20	1109-1111
32	**SEALED Document:** Exhibit A to Litvack Declaration to Motion to Dismiss	12-4-20	
39	Opposition to Motion for Preliminary Injunction	12-11-20	1208-1245
40	**SEALED Document:** Johnston Declaration to Opposition to Motion for Preliminary Injunction	12-11-20	

DOCKET ENTRY NUMBER	DESCRIPTION OF ITEM	FILING DATE	PAGE ID #
41	**SEALED Document:** Webb Declaration to Opposition to Motion for Preliminary Injunction	12-11-20	
42	**SEALED Document:** Martin Declaration to Opposition to Motion for Preliminary Injunction	12-11-20	
43	**SEALED Document:** Cavanaugh Declaration to Opposition to Motion for Preliminary Injunction	12-11-20	
44	**SEALED Document:** Hammerling Declaration to Opposition to Motion for Preliminary Injunction	12-11-20	
45	**SEALED Document:** Jensen Declaration to Opposition to Motion for Preliminary Injunction, and Ex. 1 to Jensen Decl. (Metro Hospitals IP/OP Volumes June 25)	12-11-20	
46	**SEALED Document:** Krueger Declaration to Opposition to Motion for Preliminary Injunction, and Ex. 1 to Krueger Decl. (23rd Compliance Report), Ex. 2 to Krueger Decl. (ProMedica Understanding of Restoration Guidelines), Ex. 3 to Krueger Decl. (17th Compliance Report), and Ex. 4 to Krueger Decl. (Restoration Costs Flow Chart)	12-11-20	
47	**SEALED Document:** Buskey Declaration to Opposition to Motion for Preliminary Injunction, and Ex. 1 to Buskey Decl. (Toledo Metro Hospital IP/OP Data Aug. 6), and Ex. 2 to Buskey Decl. (Metro Southwest ProMedica Strategy presentation)	12-11-20	

DOCKET ENTRY NUMBER	DESCRIPTION OF ITEM	FILING DATE	PAGE ID #
48	**SEALED Document:** Wilson Declaration to Opposition to Motion for Preliminary Injunction	12-11-20	
49	**SEALED Document:** Dranove Declaration to Opposition to Motion for Preliminary Injunction, and Ex. 1 to Dranove Decl. (Sample Profit Calculation)	12-11-20	
51	Opposition to motion to dismiss for failure to state a claim	12-14-20	1449-1476
63	Questions for Hearing on Monday, December 21, 2020	12-18-20	1598-1600
66	Order denying motion to dismiss	12-29-20	1682-1685
68	Corrected order granting motion for preliminary injunction	12-29-20	1698-1709
69	Notice of Appeal	1-04-21	1710-1711
72	Transcript of Oral Argument held on December 21, 2020	1-5-21	1714-1793