ORIGIN

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of **ProMedica Health System, Inc.** **a corporation.**	**Docket No. 9346** ***PUBLIC RECORD***

APPLICATION FOR APPROVAL OF PROPOSED DIVESTITURE OF ST. LUKE'S HOSPITAL

I. Introduction

Pursuant to Section 2.41(f) of the Federal Trade Commission's (the "Commission") Rules of Practice and Procedure[1] and Paragraph II.A. of the Final Order,[2] ProMedica Health System, Inc. ("ProMedica") requests the Commission approve the spin-out of the St. Luke's Hospital Assets,[3] re-establishing St. Luke's Hospital ("St. Luke's") as an independent, standalone community hospital. As explained in greater detail below, the proposed spin-out will accomplish the objectives of the Final Order by ensuring the continued operation of St. Luke's, "independent of ProMedica," and "remedy[ing] the lessening of competition resulting from ProMedica's acquisition of St. Luke's Hospital."[4]

II. Background

ProMedica and St. Luke's entered into a Joinder Agreement on May 25, 2010. ProMedica and St. Luke's consummated the transaction described in the Joinder Agreement on August 31, 2010, at which time ProMedica became the sole corporate member of St. Luke's, ProMedica acquired the St. Luke's Hospital Assets and St. Luke's became a participating hospital in ProMedica's Paramount Health Care insurance network (the "Joinder"). The FTC filed an administrative complaint against ProMedica in January 2011 challenging the Joinder. After an administrative proceeding, the ALJ ordered ProMedica to divest St. Luke's. On appeal, the Commission affirmed the ALJ's decision in its Final Order. ProMedica next petitioned the United States Court of Appeals for the Sixth Circuit for review of the Commission's Final Order. The Sixth Circuit denied the petition in April 2014. Finally, ProMedica filed a petition for a writ

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[1] 16 C.F.R. § 2.41(f).

[2] *In the Matter of ProMedica Health System, Inc.*, Docket No. 9346 (FTC Mar. 22, 2012) (Final Order) [hereinafter Final Order].

[3] "St. Luke's Hospital Assets" is defined in the Final Order at I.CC.

[4] Final Order at II.N.

of certiorari in January 2015 which the Supreme Court of the United States denied on May 4, 2015. The Commission's Final Order became final and effective on this date.

III. The Divestiture Agreement Satisfies the Requirements of the Final Order

A. Summary of the Transaction

ProMedica's ownership interest in the St. Luke's Hospital Assets will be divested to St. Luke's Holding Company under the terms of the executed Divestiture Agreement, dated April 22, 2016.[5] This effectuates an unwinding of the Joinder of St. Luke's and ProMedica, returning St. Luke's to its pre-Joinder status as an independent hospital, along with a stronger financial footing, more advanced facilities and equipment, improved IT infrastructure, and more experienced personnel and medical staff. The Divestiture Agreement complies with the terms of the Final Order and will result in the continued operation of St. Luke's as a viable and competitive hospital.[6]

Pursuant to the Divestiture Agreement, [redacted]

Consistent with the terms of the Final Order,[7] ProMedica will assist St. Luke's in providing all services needed to operate as a standalone, independent hospital.[8] St. Luke's will

[5] Divestiture Agreement By and Among ProMedica Health System, Inc., St. Luke's Holding Company, Inc., and St. Luke's Hospital (April 22, 2016) ("Divestiture Agreement") (attached as Appendix A).
[6] "The Final Order... permit[s] an unwinding, with St. Luke's restored to its status as an independent hospital." Opinion of the Commission, *In the Matter of ProMedica Health System, Inc.* (Docket No. 9346) at 59.
[7] Final Order at II.C.
[8] Divestiture Agreement at 2.2-2.42.

hold all governmental licenses, permits, and approvals necessary to operate St. Luke's as an acute-care hospital following Closing.[9]

Consistent with the terms of the Final Order,[10] ProMedica will provide St. Luke's an unimpeded opportunity to recruit, contract with, and extend medical staff privileges to St. Luke's medical staff members so that St. Luke's will have a complete medical staff after divestiture.[11] Moreover, ProMedica's divestiture of the St. Luke's Hospital Assets will include WellCare, St. Luke's employed physician group.[12] ProMedica will not incentivize any St. Luke's employee to decline employment with St. Luke's Holding Company or otherwise interfere with the recruitment of any St. Luke's employee.[13] ProMedica and St. Luke's have also identified those additional ProMedica employees that are necessary for the ongoing operation of St. Luke's following Closing in Schedule 2.1(b).[14] Further, ProMedica will vest all current and accrued pension benefits as of the date of transition of employment with St. Luke's Holding Company for any St. Luke's Hospital employee who accepts an offer of employment from St. Luke's Holding company no later than 30 days from the date of divestiture.[15] The Divestiture Agreement also includes an employee non-solicitation provision, consistent with the Final Order.[16]

In addition to providing St. Luke's with a complete medical staff and sufficient employees to operate post-divestiture, the Divestiture Agreement also provides [redacted]

[9] Divestiture Agreement at 5.6, consistent with the Final Order at II.E.1.
[10] Final Order at II.J.
[11] Divestiture Agreement at 2.13.
[12] Divestiture Agreement at 2.14.
[13] Divestiture Agreement at 2.1, consistent with the Final Order at II.I.
[14] Divestiture Agreement at 2.1
[15] Divestiture Agreement at 2.11, consistent with Final Order at II.I.3.
[16] Divestiture Agreement at 10.3(b), consistent with Final Order II.I.4.

[redacted]

For all of these reasons, the Divestiture Agreement to which ProMedica and St. Luke's have agreed meets the requirements of the Commission's Final Order.

B. Transition Services Agreement

Pursuant to the Final Order,[19] ProMedica and St. Luke's have entered into a Transition Services Agreement ("TSA") so that St. Luke's Holding Company can conduct the St. Luke's hospital business in substantially the same manner as ProMedica conducted the St. Luke's hospital business following the Joinder.[20] Under the terms of the TSA, ProMedica will provide certain transition services to St. Luke's as set out in Exhibit A to the TSA.[21] With the exception of Information Technology ("IT") services, the term of the TSA is twelve months. Due to the complexities involved in migrating a community hospital to a separate IT system, and to avoid disruptions to the provision of care to St. Luke's patients during the interim, ProMedica will provide IT transition services to St. Luke's for a period of eighteen months.

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[17] Divestiture Agreement at 4.2(l).

[18] [redacted]

Final Order at II.E.2, II.H..

[20] Transition Services Agreement between ProMedica Health System, Inc. and St. Luke's Holding Company ("Transition Services Agreement" or "TSA") (provided in Appendix A as Exhibit D to the Divestiture Agreement).

[21] Transition Services Agreement at Exhibit A.

IV. St. Luke's Hospital Will Be an Independent, Effective Competitor

A. St. Luke's Board and Management Are Well-Suited To Maintain St. Luke's Hospital as an Independent Competitor

Prior to the Joinder, St. Luke's experienced significant financial difficulties.[22] According to the Commission, the St. Luke's Board's decision to hire Dan Wakeman prior to the Joinder, a "hospital-turnaround specialist,"[23] was instrumental in helping St. Luke's implement a three-year strategic plan that allowed the hospital achieve inpatient and outpatient revenue growth, improve its market share in its core service area, and increase its occupancy rate by 8 percent in 2010 prior to the Joinder.[24] The Divestiture Agreement allows for reasonable financial incentives for Mr. Wakeman to accept a position with St. Luke's Holding Company and continue working there post-divestiture.[25]

The Divestiture Agreement also provides that St. Luke's will continue to have a local community Board. As members of the community, the St. Luke's Board understands the healthcare needs of Lucas County and is well positioned to oversee St. Luke's efforts to succeed post-Divestiture.

St. Luke's Board and management were able to achieve the above-mentioned gains pre-Joinder despite St. Luke's declining cash reserves and a downgraded bond rating.[26] The Divestiture Agreement provides St. Luke's with a stronger financial footing to compete post-Divestiture than St. Luke's enjoyed pre-Joinder. [redacted]

[22] Opinion of the Commission, *In the Matter of ProMedica Health System, Inc.* (Docket No. 9346) at 10.
[23] *ProMedica Health System, Inc. v. Federal Trade Commission*, No. 12-3583 (Apr. 22, 2014), at 5.
[24] *ProMedica Health System, Inc. v. Federal Trade Commission*, No. 12-3583 (Apr. 22, 2014), at 5, 10-11.
[25] Divestiture Agreement at 2.11.
[26] Opinion of the Commission, *In the Matter of ProMedica Health System, Inc.* (Docket No. 9346) at 10.

[redacted] As described below, St. Luke's will emerge from the divestiture with the necessary financial strength to fund capital expenditures and compete vigorously post-Divestiture.

B. St. Luke's Financial Condition Has Vastly Improved since the Joinder

As mentioned above, prior to the Joinder, St. Luke's experienced significant financial difficulties.[27] [redacted] Additionally, ProMedica has eliminated St. Luke's long term debt. Prior to the Joinder, St. Luke's was in technical default on its long-term bond debt of approximately [redacted].[30] ProMedica consolidated St. Luke's into its Obligated Group, secured the bond debt, and completely paid it off since the Joinder closed.[31]

C. St. Luke's Operating Conditions Have Vastly Improved since the Joinder

Since the Joinder, ProMedica has invested significantly in the improved operation of St. Luke's. For example, St. Luke's has acquired new high-technology medical equipment since the Joinder. including a daVinci Surgical Robot. a surgeon-operated robotic surgical system that enhances surgeon vision, precision, and control. leading to better patient outcomes.[32] ProMedica

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[27] Opinion of the Commission. *In the Matter of ProMedica Health System, Inc.* (Docket No. 9346) at 10.

[28] ProMedica St. Luke's Hospital Divestiture Proposal Plan: Presentation to the Federal Trade Commission, at 18 (Dec. 19, 2014).

[29] Restoration of Independent St. Luke's Hospital: FTC Staff and St. Luke's Hospital Discussion, at 5 (Jan. 29, 2016).

[30] Letter from Stephen Y. Wu. Esq. to Anne R. Schenof, Esq., Compliance Division, Federal Trade Commission (June 18, 2015) (on file with author).

[31] Letter from Stephen Y. Wu, Esq. to Anne R. Schenof, Esq., Compliance Division, Federal Trade Commission (June 18, 2015) (on file with author).

[32] ProMedica Health System. Inc's Accounting Report Pursuant to the Final Order at 5-6. Docket No. 9346 (June 3, 2015).

also supplied St. Luke's heart center with [redacted] cardiovascular X-ray system.[33] [redacted][34]

St. Luke's has also benefitted since the Joinder through ProMedica management initiatives. For example, prior to the Joinder, St. Luke's emergency room diverted patients on a regular basis due to a lack of private rooms.[35] ProMedica obtained Commission staff approval to convert former inpatient rehabilitation beds to private rooms at St. Luke's. This decision benefitted St. Luke's in two ways, by reducing the emergency room diversions to virtually zero[36] and by increasing the number of private rooms at St. Luke's. This latter change improved St. Luke's competitiveness as the "standard of care has changed from semi-private to private rooms."[37]

ProMedica has also invested into information technology platforms to help St. Luke's meet federal Meaningful Use requirements for Electronic Health Records. Meeting Meaningful Use requirements is increasingly important as there are penalties for failure to comply, and ProMedica's investments helped St. Luke's earn all available Meaningful Use incentive payments.

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[33] ProMedica Health System, Inc's Accounting Report Pursuant to the Final Order at 4, Docket No. 9346 (June 3, 2015).
[34] ProMedica Health System, Inc's Accounting Report Pursuant to the Final Order at 4, Docket No. 9346 (June 3, 2015).
[35] Respondent ProMedica Health System, Inc's Proposed Findings of Facts, Conclusions of Law, and Order, Docket at ¶ 1742, No. 9346 (Sept. 20, 2011). *See also*, Initial Decision, *In the Matter of ProMedica Health System, Inc.* at ¶820, No. 9346 (Dec. 12, 2011).
[36] ProMedica Health System, Inc's Accounting Report Pursuant to the Final Order at 9, Docket No. 9346 (June 3, 2015).
[37] Initial Decision, *In the Matter of ProMedica Health System, Inc.* at ¶ 816, No. 9346 (Dec. 12, 2011).

V. The Divestiture Will Restore Competition

A. The Divestiture Will Restore Competition in the Market for General Acute Care Inpatient Services in Lucas County, Ohio

Prior to the Joinder, four providers of general acute care inpatient hospital services existed in the Lucas County, Ohio market: ProMedica, Mercy Health Partners ("Mercy"), The University of Toledo Medical Center ("UTMC"), and St. Luke's.[38] Post-divestiture, the market for general acute care inpatient services in Lucas County, Ohio will have the same four providers, as St. Luke's will operate as a standalone competitor.

B. The Divestiture Will Restore Competition in the Market for Inpatient Obstetrical Services in Lucas County, Ohio

Prior to the Joinder, three providers of inpatient obstetrical services existed in the Lucas County, Ohio market: ProMedica, Mercy, and St. Luke's.[39] Post-divestiture, the market for inpatient obstetrical services in Lucas County, Ohio will have the same three providers, as St. Luke's will operate as a standalone competitor. This "undoing of [the] acquisition [of St. Luke's] is a natural remedy" to preserve and restore competition in the general acute care inpatient services and inpatient obstetrical services in Lucas County, Ohio.[40]

VI. Request for Confidential Treatment

This Application, including the Appendix, contains confidential and competitively-sensitive business information relating to the divestiture of St. Luke's. For example, the Divestiture and Transition Services Agreements, and the schedules thereto, contain commercially sensitive and heavily negotiated terms and sensitive financial information regarding ProMedica

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[38] Opinion of the Commission, *In the Matter of ProMedica Health System, Inc.* (Docket No. 9346) at 26, *aff'd ProMedica Health System, Inc. v. Federal Trade Commission*, No. 12-3583 (Apr. 22, 2014), at 3.
[39] Opinion of the Commission, *In the Matter of ProMedica Health System, Inc.* (Docket No. 9346) at 27, *aff'd ProMedica Health System, Inc. v. Federal Trade Commission*, No. 12-3583 (Apr. 22, 2014), at 3.
[40] *ProMedica Health System, Inc. v. Federal Trade Commission*, No. 12-3583 (Apr. 22, 2014), at 18.

and St. Luke's. Disclosure of such confidential information may prejudice ProMedica, and cause harm to the ongoing competitiveness of St. Luke's. Pursuant to Sections 2.41(f)(4), 4.2(d)(4), and 4.9(c) of the FTC's Rules of Practice and Procedure, 16 C.F.R. §§ 2.41(f)(4), 4.2(d)(4), 4.9(c), ProMedica has redacted such information from the public version of this petition, and requests confidential treatment for such information under Section 4.10(a)(2) of the FTC's Rules of Practice and Procedure, 16 C.F.R. § 4.10(a)(2), and Sections 552(b)(4) and (b)(7) of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(4) and 552(b)(7). In the event that a determination is made that any material marked as confidential is not subject to confidential treatment, ProMedica requests that the FTC provide immediate notice of that determination to the undersigned attorneys and an adequate opportunity to appeal such a decision.

VII. Conclusion

Because the proposed divestiture achieves the purposes of the Final Order, is in the public interest, and will re-establish St. Luke's as a viable competitor, and for the additional reasons above, ProMedica requests the Commission approve the proposed divestiture.

ProMedica desires to complete the proposed divestiture of St. Luke's as soon as possible. Prompt consummation will further the purposes of the Final Order, and is in the interests of the Commission, the public, St. Luke's, and ProMedica. Accordingly, ProMedica requests that the Commission promptly commence the public comment period pursuant to Section 2.41(f) of the Commission's Rules, 16 C.F.R. § 2.41(f), limit the comment period to the customary 30 days, and approve this application for divestiture as soon as practicable after the close of the public comment period.

Dated: April 25, 2016

Respectfully Submitted:

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APPENDIX A TO PROMEDICA HEALTH SYSTEM, INC.'S APPLICATION FOR APPROVAL OF PROPOSED DIVESTITURE OF ST. LUKE'S HOSPITAL

DIVESTITURE AGREEMENT

[REDACTED FROM PUBLIC VERSION]