

# Exhibit K

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA and  
STATE OF MICHIGAN,

*Plaintiffs,*

v.

HILLSDALE COMMUNITY HEALTH  
CENTER, W.A. FOOTE MEMORIAL  
HOSPITAL D/B/A ALLEGIANCE HEALTH,  
COMMUNITY HEALTH CENTER OF  
BRANCH COUNTY, and  
PROMEDICA HEALTH SYSTEM, INC.,

*Defendants.*

Case No. 5:15-cv-12311-JEL-DRG  
Judge Judith E. Levy  
Magistrate Judge David R. Grand

Expert Report of Dr. Tasneem Chipty

October 27, 2016

**CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER  
IN CASE NO. 5:15-cv-12311-JEL-DRG (E.D. MICH.)**

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#### IV. General Acute Care Hospitals Typically Compete with Each Other for Patients through Outreach and Marketing Aimed at Both Patients and Physicians

13. It is universally understood that firms selling substitute products to the same set of customers compete with each other for business. It is this competition among rival firms that is the engine for lower prices, higher quality (including both better outcomes and better customer experience), and innovation. Competition among hospitals is no different, even though hospital and physician services are different from many standard goods in some important ways, which I describe below.

14. A key feature of the healthcare marketplace is that there are two stages of competition.<sup>25</sup> In the first stage, hospitals compete on price and quality to be included in commercial insurers' hospital networks. In the second stage, hospitals compete to attract patients. Because patients covered by some form of insurance, including Medicare and Medicaid, are largely insensitive to healthcare prices, competition in the second stage has historically relied upon marketing activities aimed at educating patients and their physicians about the availability and quality of services.<sup>26</sup> Thus, marketing is a central competitive tool hospitals use to compete for patients in the second stage.

15. Hospitals that provide the same services and serve the same patient populations routinely compete with each other through a variety of marketing activities designed to increase sales of their services.<sup>27</sup> Hospitals make investments in traditional advertising on billboards, in newspapers, on radio, and TV, as well as digital media.<sup>28</sup> These activities are aimed both at patient populations that may require different types of healthcare and at physicians who refer patients for specialty care, including general acute care inpatient services.

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<sup>25</sup> Vistnes, Gregory, "Hospitals, Mergers, and Two-Stage Competition," *Antitrust Law Journal*, 2000, Vol. 67, pp. 671-672 (hereafter "Vistnes").

<sup>26</sup> See Vistnes, p. 682.

<sup>27</sup> It is widely understood in the academic literature and in the business community that firms engage in marketing activities with the promise of expanding demand for the firm's product. See for example, Kyle Bagwell, "The Economic Analysis of Advertising," Columbia Discussion Paper No. 0506-01, 2007, p. 7, for an overview of the different models of advertising in the economics literature. As described by the author, Edward Chamberlin in his seminal work explained that advertising affects demand through two different mechanisms: (a) it conveys information to consumers "with regard to the existence of sellers and the price and qualities of products in the marketplace," and (b) it alters consumer preferences.

<sup>28</sup> Society for Healthcare Strategy and Market Development, *By the Numbers: Benchmarking Study on Healthcare Marketing/Communications*, 2014, 5<sup>th</sup> Edition (Chicago, IL: SHSMD).

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- *Marketing to Patients:* Hospitals typically engage in two categories of direct-to-patient marketing activities designed to attract patient volume: (a) promoting awareness; and (b) providing free health benefits.<sup>29</sup> Hospitals promote awareness by publicizing the availability and advantages of their services and brand as a whole. Examples of such activity include the use of media campaigns to promote “cutting-edge technology,” quality rankings like a “five-star award” and a “center of excellence” designation, or the availability of “expert physicians.” Hospitals provide free health benefits by making valuable services available for free or on a subsidized basis. Examples of such activity include free educational seminars by physicians, free or subsidized health screenings, educational mailings, health fairs, and giveaways of items such as first aid kits. Hospital marketing involving the provision of free services and health education can provide direct health benefits to consumers, regardless of whether or where those consumers seek care.
- *Marketing to Physicians:* Hospitals also engage in marketing and relationship-building with referring physicians who influence patients’ choices of hospitals and other types of specialty care.<sup>30</sup> Physician outreach is typically handled by physician liaisons who are trained relationship managers. Their primary function is to advance the hospital’s relationship with the physician through “the provision of educational programming, professional development, shared resources and networking opportunities.”<sup>31</sup>

<sup>29</sup> Brownlee, Shannon, “Direct Marketing and Deep Discounts Come to Health Care,” *Time*, February 13, 2012, available at <http://ideas.time.com/2012/02/13/direct-marketing-and-deep-discounts-come-to-health-care/>, *site visited* October 25, 2016; American Hospital Association, “Improving Community Health,” available at <http://www.aha.org/advocacy-issues/initiatives/facilitators.shtml>, *site visited* October 25, 2016; Turpel, Suzy, and Chris Bevolo, “Leveraging Content Marketing to Drive Growth,” *Spectrum, Society for Healthcare Strategy & Market Development*, March/April 2014, available at <http://www.shsmd.org/newsletters/maraprpreview.pdf>, *site visited* October 6, 2016, pp. 1-2; and Sarro, Dave, “Four New Rules for Effective Hospital Marketing,” available at <http://www.healthcarebusinesstech.com/effective-hospital-marketing/>, *site visited* October 6, 2016.

<sup>30</sup> Deloitte Center for Health Solutions, “2011 Survey of Health Care Consumers in the United States: Key Findings, Strategic Implications,” available at [http://www.statecoverage.org/files/Deloitte\\_US\\_CHS\\_2011ConsumerSurveyinUS\\_062111.pdf](http://www.statecoverage.org/files/Deloitte_US_CHS_2011ConsumerSurveyinUS_062111.pdf), *site visited* October 24, 2016, p. 15 and Figure 14. *See also*, Barnett, Michael, *et al.*, “Reasons for Choice of Referral Physician Among Primary Care and Specialist Physicians,” *Journal of General Internal Medicine*, 2011, Vol. 27(5), pp. 506-512; and Forrest, Christopher, *et al.*, “Family Physicians’ Referral Decisions: Results from the ASPN Referral Study,” *The Journal of Family Practice*, 2002, Vol. 51(3), pp. 215-222.

<sup>31</sup> American Association of Physician Liaisons, “AAPL Mission Statement,” available at <http://www.physicianliaison.com/Mission-Statement-Bylaws-Charter>, *site visited* October 18, 2016.

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16. [REDACTED]

**V. Allegiance and HCHC Agreed to Restrict an Important Form of Competition in Which They Would Have Otherwise Engaged**

17. Hospitals, including Allegiance, regularly engage in marketing activities to compete for patient volume. There is ample evidence that Allegiance would have engaged in additional marketing efforts in Hillsdale County but for its Agreement with HCHC. First, Allegiance

<sup>32</sup> Allegiance Health, “Account Detail, June 2012 to June 2014,” ALL-DOJ-MIAG0000589-594. In its CID response, Allegiance noted that this document is “sufficient to show Allegiance’s advertising and marketing budget for each fiscal year from January 1, 2011 to the present.” See also “Allegiance Health’s Response to United States Department of Justice, Antitrust Division,” CID No. -27636, p. 6.

<sup>33</sup> “Allegiance Health’s Objections and Answers to Plaintiffs’ First Set of Interrogatories,” *United States of America and State of Michigan v. Hillsdale Community Health Center, et al*, Case No.: 5:15-cv-12311-JEL-DRG, October 15, 2015, pp. 5-7.

<sup>34</sup> “Allegiance Health’s Objections and Answers to Plaintiffs’ First Set of Interrogatories,” *United States of America and State of Michigan v. Hillsdale Community Health Center, et al*, Case No.: 5:15-cv-12311-JEL-DRG, October 15, 2015, pp. 9-10. See also Deposition of Georgia Fojtasek, September 20, 2016 (hereafter “Fojtasek September Deposition”), pp. 157-158 (“Q: What does Allegiance do for health fairs? A: We offer a variety of screenings, ranging from weight, tools to assess your body fat. You can visit with physical therapist, respiratory therapist, you can do a test to see if you may have emphysema, just whatever services we are trying to promote, and then there’s promotional material.”).

<sup>35</sup> [REDACTED]

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believed that Hillsdale County would have been a fruitful area in which to market. According to Allegiance’s Ms. Fojtasek, Hillsdale was attractive to Allegiance because of Hillsdale County’s “geographic proximity, the volume of the population, and the proclivity to use Jackson for other things, like shopping, entertainment, et cetera....”<sup>36</sup> Consistent with these observations, Allegiance’s consultants advised it to compete for market share in Hillsdale County.<sup>37</sup> Internal exchanges and actual attempts to market suggest that Allegiance physicians and marketing specialists wanted to engage in more marketing in Hillsdale County.<sup>38</sup> However, Allegiance instructed its employees and physicians not to engage in certain types of marketing in Hillsdale County because of its Agreement with HCHC.<sup>39</sup> Allegiance developed regional marketing guidelines to help it avoid marketing in Hillsdale County.<sup>40</sup> Allegiance communicated with HCHC to ensure that its outreach to HCHC physicians would not violate the Agreement.<sup>41</sup> Moreover, because Allegiance’s marketing initiatives are visible, deviations from the Agreement, when they occurred, were detected by HCHC and resolved by Allegiance through

<sup>36</sup> Deposition of Georgia Fojtasek, December 12, 2014 (hereafter “Fojtasek December Deposition”), pp. 7-8.

<sup>37</sup> Navigant Healthcare, “Allegiance Health: Regional Planning – Hillsdale Strategy Development,” May 7, 2012, ALLDOJMIAG-AG-00006283-308, at 288-299.

<sup>38</sup> See Turpel, Suzette, Email to Anthony Gardner, Subject: Hillsdale and Marshall email string, October 3, 2013, AH000396819-822, at 820; and Turpel, Suzette, Email to Gerald Grannan, Subject: RE: response requested – speaking opportunity, January 6, 2014, ALLDOJMIAG-ST-00005338-343, at 338.

<sup>39</sup> See Turpel, Suzette, Email to Gerald Grannan, Subject: RE: response requested – speaking opportunity, January 6, 2014, ALLDOJMIAG-ST-00005338-343, at 338 (Ms. Turpel, now Vice President of Marketing at Allegiance, asks “[w]ho do you think is the person to explain to Dr. Ekpo [an orthopedic surgeon at Allegiance] our restrictions in Hillsdale?”); Anderson-Meier, Dawn, Email to Gardner, Anthony – cc: Turpel Suzette, Subject: onc marcom, Attachment: Oncology Services MarCom FY12, FY13.doc. “Oncology Services MarCom Plan,” November 4, 2011, AH000442389-391, at 391 (A document describing Allegiance’s oncology marketing plan explains, “due to an agreement with the CEO of Hillsdale community Health Center, Duke Anderson, marketing activity will not include Hillsdale County.”); Scholten, Shannon, Email to Timothy Keener and Anthony Gardner, Subject: Report to the Community – Update, November 11, 2009, AH000437523 (Mr. Scholten, a communications representative at Allegiance, describes an outreach plan as “being sent to approximately 123,000 homes in our service area (excluding several zips in the Hillsdale region based on our agreement to not market there)”); and Gardner, Anthony, Email to Suzette Turpel, Subject: FW: Urgent, March 6, 2009, AH000980691-692, at 691 (Ms. Fojtasek explains “we specifically agreed to screen out Hillsdale zip codes”).

<sup>40</sup> Allegiance Health, “Regional Marketing Guidelines,” September 21, 2012, AH000974228-230.

<sup>41</sup> Email Exchange between Michael Houttekier of Allegiance and Duke Anderson of HCHC, Subject: Status Report, December 12, 2008, HILL SUBPOENA-DOJ -000003 (From Mr. Andersen to Mr. Houttekier: “Regarding the general surgery issue, I would respectfully ask that you not market the aforementioned procedure to Hillsdale docs. I have discussed this matter with our surgeons and they are confident that they are able to cover this procedure locally, granted that our volumes are not extremely high. Thank you for asking though.” From Mr. Houttekier to Mr. Andersen: “I will continue to provide you with updates periodically and continue to seek your approval prior to meeting with any of your physicians.”). See also Deposition of Michael Houttekier, June 13, 2016, p. 84.

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behavior correction and apology.<sup>42,43</sup> This evidence indicates that but for the Agreement, Allegiance would have engaged in additional marketing in Hillsdale County.

## VI. The Agreement Is a Form of Customer Allocation that Harms Competition

18. Generally speaking, collusion occurs when competing firms agree upon and implement practices that insulate each other from some degree of competition that would have otherwise taken place.<sup>44</sup> Through collusive agreements, competitors act in concert with one another in hopes of earning greater profits than they would have by competing.<sup>45</sup> This coordination is sometimes accomplished by the use of agreements to restrict output or fix prices and other times by agreements to follow certain tailored rules, like rules designed to split customers, products, or territories. In this case, Allegiance and HCHC have agreed to certain marketing restrictions in order to allocate customers: specifically, the agreement not to solicit certain customers residing in Hillsdale County had the effect of allocating to HCHC Hillsdale County patients who, as a result of Allegiance’s marketing in Hillsdale County, would have considered going to Allegiance for competing services.<sup>46</sup> In return, Allegiance hoped to receive patient volume for certain types of care not offered by HCHC.

19. Agreements to split customers through marketing restrictions are a form of “market allocation” known as customer allocation.<sup>47</sup> As explained by Professors Lande and Marvel:<sup>48</sup>

<sup>42</sup> Gardner, Anthony, Email to Suzette Turpel, Subject: FW: Urgent, March 6, 2009, AH000980691-692; Gardner, Anthony, Letter to Dr. Barry Collins – cc: Duke Anderson, March 13, 2009, HIL-DOJ 003916; and Gardner, Anthony, Handwritten note to Duke Anderson, HIL-DOJ 003920.

<sup>43</sup> As explained by a leading textbook on the economics of cartels: “Firms have incentives to both form cartels and to cheat on the cartel agreement.... Individual firms have an incentive to cheat on a cartel agreement because they can make higher profits by increasing output or undercutting the cartel price. A cartel can maintain its agreement only if cheating can be detected and adequately punished.... When cartels succeed...there is loss of consumer surplus.” Carlton, Dennis and Jeffrey Perloff, *Modern Industrial Organization*, Boston, MA: Addison-Wesley, 2005, 4th edition (hereafter “Carlton and Perloff”), pp. 152-154.

<sup>44</sup> Marshall, Robert C., and Leslie Marx, *The Economics of Collusion: Cartels and Bidding Rings*, MIT Press, Cambridge, April 2012 (hereafter “Marshall and Marx”), Preface (explaining that collusion is “an agreement among competitors that relies on interfirm communication and/or transfers to suppress rivalry”).

<sup>45</sup> The fact that the hospitals are “non-profit” hospitals does not change the incentives. See Dranove, David and Richard Ludwick, “Competition and Pricing by Nonprofit Hospitals: A Reassessment of Lynk’s Analysis,” *Journal of Health Economics*, 1999, Vol. 18(1), pp. 87-98.

<sup>46</sup> The fact that Allegiance serves patients that seek its services despite suppression of certain forms of marketing is not inconsistent with this customer allocation scheme.

<sup>47</sup> Marshall and Marx, p. 121.