United States of America
FEDERAL TRADE COMMISSION
Northeast Region

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May 12, 2016

The Honorable Judge John E. Jones III
Ronald Reagan Federal Bldg. & U.S. Courthouse
228 Walnut Street
Harrisburg, PA 17101

Re: FTC, et al. v. Penn State Hershey Medical Center, et al.
Civil Action No.: 1:15-cv-02362

Dear Judge Jones:

We write on behalf of all parties to inform the Court that, prior to the issuance of your Honor's order dated May 12, 2016 (Doc. 138), Plaintiffs filed this morning in the Third Circuit an Emergency Motion for an Injunction Pending Appeal and to Expedite Appeal, seeking, *inter alia*, an order to enjoin pending appeal the merger between Penn State Hershey Medical Center and PinnacleHealth System. We attach for the Court's convenience a copy of the Plaintiffs' motion.

Respectfully submitted,

Gerald A. Stein

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION and COMMONWEALTH OF PENNSYLVANIA, Plaintiffs-Appellants, v. PENN STATE HERSHEY MEDICAL CENTER and PINNACLEHEALTH SYSTEM, Defendants-Appellees.	No. 16-2365

EMERGENCY MOTION
OF THE FEDERAL TRADE COMMISSION
AND THE COMMONWEALTH OF PENNSYLVANIA
FOR AN INJUNCTION PENDING APPEAL
AND TO EXPEDITE APPEAL

The Federal Trade Commission and the Commonwealth of Pennsylvania ("the Government") ask the Court to enjoin pending appeal a merger between the two largest health systems in the Harrisburg, Pennsylvania area—the Penn State Hershey Medical Center and PinnacleHealth System. FRAP 8(a) and 3d Cir. LAR 8.1 and 27.7. We also ask the Court to expedite this appeal. In the absence of temporary injunctive relief, defendants may consummate their merger at 12:01 a.m. on Friday, May 13, 2016. The Government sought an injunction pending appeal from the district court, but that court has not yet ruled on the motion. Given the timing, we must now seek relief from this Court.

The merger will eliminate hospital competition in the area surrounding Harrisburg, Pennsylvania. Together, the two hospital systems will control nearly 80 percent of the market in that area. That dominance will increase their bargaining power over insurance companies and enable them to raise rates and forego improvements in patient care and service.

If the merger proceeds, the Government will be irreparably harmed by losing the right to meaningful relief and the public will be harmed by a decrease in competition. The hospitals will be able to share sensitive information about their competitive pricing strategies, lay off employees, consolidate services, and make other changes that can make it impossible to rewind the clock and restore effective competition. By contrast, defendants will not be substantially injured by a brief

stay pending appeal since there is no expiration date on their merger.

The Government is likely to prevail on the merits of this appeal. The district court clearly erred when it held that the Government had not properly defined the relevant geographic market. The court ignored the economic reality of the healthcare marketplace when it failed to analyze the geographic market from the perspective of the rate-negotiation process between insurance company customers and hospitals. By utterly disregarding that central economic relationship, the court fundamentally erred in defining the geographic market. That error then infected the court's assessment of the equities, which plainly favor an injunction.

Had the court properly analyzed the geographic market, it would have determined that the combination of the two hospital systems was presumptively unlawful in light of their market dominance, which creates an overwhelming advantage in price negotiations. Unless this Court enjoins the merger, insured patients and their families ultimately will bear the consequences.

JURISDICTION

The FTC sought a preliminary injunction to preserve the status quo under 15 U.S.C. § 53(b) while it examines in an administrative adjudication whether the merger is unlawful; Pennsylvania sought an injunction under 15 U.S.C. § 26. This Court has jurisdiction because the order under review is final, 28 U.S.C. § 1291, and because the lower court denied an injunction, 28 U.S.C. § 1292(a)(1).

BACKGROUND

1. THE PROPOSED MERGER.

Hershey and Pinnacle operate the two largest hospital systems in the Harrisburg area. Hershey owns the Penn State Milton S. Hershey Medical Center, which has a 36 percent share of the market for general-acute-care inpatient services ("GAC services") sold by hospitals in the Harrisburg area to commercial insurers. Op. 6. GAC services include the gamut of inpatient hospital procedures ranging from appendectomies to organ transplants. Pinnacle operates three area hospitals that together command 40 percent of the Harrisburg GAC services market. In March 2015, the hospitals decided to combine into a single system (Op. 3) that would control 76 percent of the total GAC services market in the Harrisburg area.

For patients who live in the four counties surrounding Harrisburg (Dauphin, Cumberland, Perry, and Lebanon counties), Hershey and Pinnacle are close rivals. The two hospitals provide essentially the same range of services. Hrg. 334:18-21; PX01062 (Wilson Rpt.) at 131.[1] Pinnacle, like Hershey, is a sophisticated health system with a teaching hospital that offers the "most complex surgeries" and innovative medical technology. Hrg. 523:15-530:12; PX0280-002. One Pinnacle document identified Hershey as "our main competitor." PX00527-001. Another

[1] "Hrg." refers to the transcript of the preliminary injunction hearing. "PX" refers to plaintiffs' numbered exhibits. The most important supporting materials are included in the separately filed sealed appendix.

stated that the two systems "aggressively compete." PX00037-008. No other hospital in the area has anywhere near the market clout of Hershey and Pinnacle. The next largest, Holy Spirit Hospital in Cumberland County, has a 15 percent market share, and two others have shares of 5 percent or less. PX1062 at 116.

2. ECONOMICS OF THE COMMERCIAL HEALTHCARE MARKET.

Understanding the unique competitive dynamics of the healthcare market is essential to assessing the competitive effects of the merger. The analysis turns on how the transaction changes the relative bargaining strengths of the hospitals and their insurance company customers with which they negotiate their prices.

a. Unlike a typical market with one buyer and one seller, commercial healthcare markets have four participants: insured patients; their employers, who select the policies offered to them; healthcare providers; and insurance companies, which directly pay for services. Hrg. 305:5-306:20. Because the insurers pay the bulk of the healthcare costs of their policy holders and negotiate the prices of services, they are the direct customers. PX01062 (Wilson Rpt.) at 59-60; Hrg. 492:2-10, 306:11-13.

Insurers sell policies in a competitive market and must make them attractive to patients and their employers. One critical selling point is the insurer's network, the group of healthcare providers (including hospitals) that have agreed to treat the insurer's policyholders at negotiated rates. An insurer's hospital network therefore

must take into account the preferences of its customers, who typically demand that the network include hospitals that are geographically convenient, provide quality care, and offer necessary services. Hrg. 305:14-22, 306:15-20, 308:1-5; PX01062 (Wilson Rpt.) at 65; PX01424 (Wilson Rebuttal) at 61.

Hospitals compete with each other to be included in insurance networks, which are important sources of patients. Competition for inclusion both fosters improved quality of care and enables insurers to negotiate lower reimbursement rates, which lead to lower costs for patients and employers. Conversely, less competition leads to higher rates and consumer costs and lower quality of care. Hrg. 306:1-308:9; PX01062 (Wilson Rpt.) at 59, 66-67.

b. The amount an insurer reimburses a network participant for healthcare services is established in a contract negotiation. Like any business deal, the negotiation turns on the relative bargaining strength of the insurer and the hospital. Each side has some leverage. Hospitals need inclusion in networks to attract patients. Insurers need hospitals to participate in a network to make it marketable to policyholders. Whichever side has the stronger bargaining position achieves more favorable rates. *See ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 562 (6th Cir. 2014); *St. Alphonsus Medical Center v. St. Luke's Health System*, 778 F.3d 775, 784-785 (9th Cir. 2015).

The presence of nearby comparable alternatives increases an insurer's

bargaining power and constrains a hospital's ability to negotiate higher rates. PX01062 (Wilson Rpt.) at 56, 65-66. If an insurer can form a marketable network without a given hospital, then the insurer can reject demands from that hospital for high rates. PX01062 (Wilson Rpt.) at 65-66; Hrg. 309:14-25; *see ProMedica*, 749 F.3d at 562.

Without alternative hospital providers valued by policyholders in a given area, however, an insurer's bargaining strength is significantly diminished. Then, a dominant hospital provider's superior bargaining position forces the insurer to accede to its demand for higher reimbursement rates or risk being left with a network it cannot successfully market. PX01062 (Wilson Rpt.) at 66-67; *see also ProMedica*, 749 F.3d at 562. Higher rates are borne by employers and policyholders via increased premiums. PX01062 (Wilson Rpt.) at 73-74.

3. THE HARRISBURG MARKET.

Patients in the Harrisburg area overwhelmingly demand hospital care close to their homes. Hrg. (Wilson) 314:12-317:20, 320:11-321:12; Hrg. (Hillemeier) 474:7-10; Hrg. (Pugh) 521:19-522:6. More than 90 percent of commercially insured patients in the Harrisburg area seek GAC services in that area. Their median travel time to a GAC hospital is 15-minutes. A survey defendants conducted concluded that convenient location was the most important factor in selecting a hospital. PX01360-036. The vast majority of Harrisburg area residents

reported that defendants were either their first or second choice hospital. PX01360-033. The nearest large hospitals outside the Harrisburg area (in York and Lancaster counties), which are 30 to 45 minutes away, collectively provide care to less than 2 percent of Harrisburg area patients. PX01062 (Wilson Rpt.) at 43, 122.

Before the proposed merger, competition between Hershey and Pinnacle for inclusion in networks constrained their demands for higher reimbursement rates from insurers. For example, in 2014, one of the area's largest insurance companies successfully resisted Pinnacle's demand for substantial price increases by threatening to form a network that included only Hershey and Holy Spirit. PX00701 ¶18.

The merger will dramatically alter the insurers' previously favorable bargaining position because they will no longer be able to use the separate existence of the hospitals to their advantage in contract negotiations. Any viable network must contain either Pinnacle or Hershey, as proven by the experience of one small area health plan. For more than a decade, the insurer successfully sold policies in the Harrisburg area using a network that included Pinnacle and Holy Spirit but not Hershey. PX00704 ¶10; Hrg. 208:25-209:11. In 2014, Pinnacle terminated its participation in the network, PX01533; Hrg. 209:18-210:13, and the health plan attempted to market its policies with a network that included Holy Spirit and numerous hospital systems outside the Harrisburg area. PX01542. Despite offering a substantial discount, however, the network was unattractive to

customers, half of whom switched carriers. PX01542; PX01608; Hrg. 223:20-226:19; PX01610; PX00704 ¶10. Brokers opined that the network without Hershey or Pinnacle was unmarketable at any price point. PX00704 ¶10; PX00708 ¶¶ 7-13; Hrg. 225:15-226:19.

Large Harrisburg area insurers recognized that they too could face a similar problem, because without Hershey or Pinnacle "for all intents and purposes there would be no network." PX01236 at 48:17-22. One large insurer predicted that a network without defendants' hospitals would lose half its membership in Dauphin County. To avert that commercial disaster, a company witness stated, the insurer would have no realistic alternative but to pay rates 25 percent higher. PX01236 at 144:6-16. Another large area insurer explained that it would need to include the combined Hershey/Pinnacle to successfully market its network, and the merger increase the hospitals' bargaining power, rendering the insurer "not … able to negotiate . . . appropriate pricing and terms." PX00804 at 49:8-15, 91:16-25, 64:13-20; PX00378-002.

4. THE DISTRICT COURT'S ORDER

The FTC is about to undertake an administrative adjudication to determine whether the Hershey/Pinnacle merger violates the Clayton Act, 15 U.S.C. § 18. Congress recognized that administrative proceedings can take time, and it therefore granted the FTC authority to seek a court order enjoining a merger pending

completion of the agency's determination. 15 U.S.C. § 13(b). An injunction is appropriate where "weighing the equities and considering the Commission's likelihood of ultimate success," stopping the merger would be "in the public interest." *Id*.

The district court denied the Government's request for an injunction. It determined that the Government had not shown the four-county Harrisburg area to be a properly defined antitrust geographic market, which was "dispositive to the outcome" of the proceeding. Op. 8. The court's decision turned almost entirely on the statistic that 43.5 percent of Hershey's patients come from outside the Harrisburg area and half of them travel 30 minutes to an hour to get there. Op. 10. In the court's view, Hershey and Pinnacle's prices would be constrained by that customer base. If the combined hospital systems raised prices, the court believed, it would lose those patients to closer hospitals.

The court also found it "extremely compelling" for purposes of market definition that the hospitals have entered into long-term contracts with two large insurers that maintain existing rates. Op. 10-11. The court appeared to view those contracts as proof that a monopolist hospital system could not increase prices and as an antidote to the increased bargaining power of the combined hospital.

Despite its denial of an injunction for failure to prove a geographic market, the court went on to address the equities and determined that the hospitals

"presented ample evidence demonstrating that anticompetitive effects would not arise" from their merger. Op. 12. It found that the merger would alleviate Hershey's need to enlarge its facilities because patients could be transferred to Pinnacle. Op.14-19.

ARGUMENT

In determining whether to grant an injunction pending appeal, the Court considers: (1) likelihood of success on the merits of the appeal; (2) irreparable injury; (3) substantial harm to other parties; and (4) the public interest. *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991). Those factors favor the grant of an injunction to maintain the status quo pending appeal.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS.

Section 7 of the Clayton Act prohibits mergers that "may" substantially lessen competition "in any section of the country." 15 U.S.C. § 18. The FTC need not show that anticompetitive effects *will* result from a challenged acquisition. Congress's "concern was with probabilities, not certainties." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 658 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Similarly, when the FTC seeks to preliminary enjoin a merger under Section 13(b) of the FTC Act, it need not definitively prove that the merger is unlawful, but only that it *likely* is unlawful. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998).

The Government is likely to succeed on its claim that the district court improperly denied the preliminary injunction. We presented abundant evidence that the relevant geographic market is the Harrisburg area. If that geographic market is correct, there is no dispute that the merged hospitals would control 76% of the GAC services market. The market would also undergo a substantial increase in concentration—nearly 15 times what the FTC and Department of Justice's *Merger Guidelines* deem anticompetitive as measured by the Herfindahl-Hirschman Index. *See* U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 5.3 (Aug. 19, 2010), available at http://www.ftc.gov/os/2010/08/100819hmg.pdf; PX01062 at 115-116 & Table 5 (post-merger HHI will increase by 2,852 points; a 200-point increase is presumed anticompetitive). Those figures render the transaction presumptively unlawful. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963).

A. The District Court Misapplied The Test For Defining A Geographic Market.

An antitrust geographic market is "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984) (citation omitted). The inquiry is not where "the seller attempts to sell its product, but rather . . . the area where his customers would look to buy such a product." *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 726 (3d Cir. 1991). In antitrust analysis,

"economic realities rather than a formalistic approach must govern." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005).

When the district court rejected the four-county Harrisburg area as the relevant geographic market, it turned a blind eye to the economic realities of the healthcare market generally and Harrisburg in particular. Ignoring, without any explanation, the testimony of industry and expert witnesses on how prices for hospital services are determined, the court instead relied almost entirely on a single fact—where Hershey's patients live— that does not address the question of where insurers, the direct customers at issue, realistically turn for hospital services. That was reversible error.

The court also disregarded a principal tool of geographic market definition. The hypothetical monopolist test is an accepted (and here uncontested) definitional method. It asks whether a "hypothetical monopolist" in the proposed market could impose a small but significant (about 5 percent) non-transitory increase in price (a "SSNIP") without losing enough customers to make the increase unprofitable. If the monopolist could impose a SSNIP from at least one of its locations, then the market is properly defined for antitrust purposes. *See Merger Guidelines* §§ 4.1.2, 4.2.

Both expert and fact evidence showed that a monopoly hospital system in the Harrisburg area could demand a SSNIP from the most pertinent customers—

insurance companies. The Government's expert economist described at length the operation of the insurer/hospital bargaining process discussed above. He testified that, given the demand for local health care and insurers' needs for commercially viable networks, a monopolist hospital in the Harrisburg area could successfully demand a sizeable rate increase. Hrg. 314:12-21. In short, the Harrisburg area is a proper antitrust market because that is where insurance companies look to buy healthcare services.

Fact witnesses confirmed the economic theory. One witness responsible for provider contracting for a large area insurer testified that without Hershey or Pinnacle in a network, "for all intents and purposes there would be no network." PX01236 at 48:17-22. Without those two hospitals, he explained, his company "would probably lose about 50 percent of our membership in Dauphin County." *Id*. at 144:6-16. It thus would pay a 25 percent increase—five times a SSNIP—to avoid that result. *Id*. at 49:8-15, 91:16-25, 144:6-16. Indeed, as described above, the network of one small insurer without Hershey or Pinnacle was essentially unmarketable at any price.

The hospitals' own documents likewise confirm that they view the four-county area as a distinct market. When they conducted a joint survey, both hospitals' marketing directors agreed that the "primary" market was the immediate Harrisburg area. PX00373-002. The survey concluded that defendants' hospitals

were Harrisburg area residents' most preferred hospitals and that more than 90 percent of those surveyed would seek care at either the closest or a very convenient hospital. PX01360-024. Hershey's strategic plan identified the Harrisburg area as a distinct region that needed a unique approach. PX00885-002. Pinnacle's CFO testified that its primary service area was Harrisburg and identified its closest competitors as Hershey and Holy Spirit, both in the Harrisburg area. Hrg. 537:4-10.

The court below totally ignored all of this evidence. It found instead that the market encompassed an area far larger than the four counties based almost entirely on a single data point: that 43.5 percent of Hershey's patients come from outside the Harrisburg area. Op. 9. The court speculated, without citation to record evidence, that these patients would go to other, closer hospitals in the event of a small price increase at Hershey, thereby constraining the hospitals' prices. Op. 10.

That determination was clear error because it "bears no rational relationship" to the way healthcare markets work. *Shire U.S., Inc. v. Barr Labs., Inc.*, 329 F.3d 348, 352 (3d Cir. 2003). By focusing on how patients outside the market would supposedly respond to a price increase, the court fundamentally misunderstood the economics of the healthcare marketplace. To begin with, as both sides agreed in this case (and the district court itself recognized, Op. 6), it is the insurer that bargains over prices and pays directly for services. The patients on which the

district court hinged its analysis do not directly bear price increases (the increase filters back to consumers indirectly through higher premiums). Thus, a price increase by Pinnacle or Hershey would be unlikely to cause patients to use other hospitals and there would be no price discipline. Indeed, the evidence showed that only 2 percent of survey respondents considered out of pocket cost to be a factor when choosing a hospital. PX01360-036. As the Ninth Circuit recently recognized, commercially-insured patients "would not change their behavior in the event of a SSNIP" because "the impact of a SSNIP likely would not register." *St. Luke's*, 778 F.3d at 785. [2]

Moreover, the court disregarded the evidence from insurers, impermissibly reading their role—and with it the hypothetical monopolist test—out of the rate-negotiation process entirely. In particular, the court ignored testimony about insurers' concern that prices would increase if the merger occurs. *E.g.*, PX01200 at 34:8-20. Such concerns would not arise if hospitals outside the Harrisburg area

[2] By defining the geographic market based on patient in-flow, the district court essentially applied the discredited "Elzinga-Hogarty" test, which has been rejected for use in analyzing hospital mergers by the FTC and by its own creator. The test was created for markets like coal and accounts for neither the role of the insurer in setting prices nor the price-insensitivity of patients. *See In re Evanston NW Healthcare Corp.*, 2007 WL 2286195 at **64-66 (F.T.C. Aug. 6, 2007); PX01062 (Wilson Rpt.) at 110-115. Recent judicial decisions recognize that health care mergers are properly analyzed by scrutinizing the relative bargaining power of healthcare providers and insurers. *See St. Luke's*, 778 F.3d at 784-85; *ProMedica*, 749 F.3d at 562-63; *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1083-84 (N.D. Ill. 2012).

could constrain prices. The court thus overlooked the "particular structure and circumstances" of the healthcare market. *Verizon Comms. v. Trinko*, 540 U.S. 398, 411 (2004). For that reason alone, the geographic market analysis was fatally flawed. The court's further failure to address unrebutted testimony from insurers that they would pay more than a SSNIP to keep defendants in their networks renders its decision "completely devoid of a credible evidentiary basis" and therefore clearly erroneous. *See Shire*, 329 F.3d at 352.

The court made a second, equally fundamental error by failing to consider whether a hypothetical monopolist could impose a SSNIP at Pinnacle alone. Under Section 4.2.1 of the *Merger Guidelines*, the Harrisburg area is a properly defined geographic market if a combined Hershey/Pinnacle could raise prices "*from at least one location*." Even if it were plausible that Hershey's patient base from outside the Harrisburg area could constrain prices, no evidence supports such a conclusion as to Pinnacle, which draws patients from a smaller area. PX01424 (Wilson Rebuttal) at 68-71. Hershey's own CEO testified to the concern of area insurers that Pinnacle's post-merger prices would increase. PX00801 at 103:24-104:21; *see also* PX00614-001; PX00612-003.

Those basic flaws in the district court's analysis are not salvaged by its reliance on defendants' temporary rate protection agreements with two insurers. Op. 10-11. To the contrary, reliance on those agreements is a reversible analytical

error in its own right. Defendants' private contracts with two insurers to retain current prices is simply not relevant to defining a geographic market. The hypothetical monopolist test is just that—hypothetical—and it is used to determine whether a monopolist *could* impose a SSNIP on customers or whether those customers would instead turn to suppliers outside the proposed market as substitutes. Contractual price agreements demonstrate nothing about an antitrust market; at most they amount to temporary promises not to exercise market power. Indeed, "the mere fact that such representations had to be made strongly supports the fears of impermissible monopolization." *Cardinal Health*, 12 F. Supp. at 67.

Moreover, defendants have *not* entered into similar agreements with other insurers in the Harrisburg area, who would be subject to rate increases as a result of defendants' enhanced bargaining power. And even as to the two companies subject to price agreements, the agreements apply only to fee-for-service agreements and not to other payment methods. Of course, as one of the two largest insurers confirmed, once the agreements expire, Hershey and Pinnacle will be free to raise their prices as they wish. PX01236 at 49:8-15, 91:16-25, 144:6-16.

Finally, by even relying on price cap agreements as an element of the geographic market analysis, the district court committed a grave error that undermines the integrity of the antitrust laws. Under the court's approach, a plaintiff could never successfully prove a geographic market if the defendant enters into

rate protection agreements with its customers. That outcome would allow unlawfully merging parties, monopolists, and other antitrust violators to escape antitrust scrutiny, notwithstanding the acquisition or preservation of market power.

B. The District Court Erroneously Assessed The "Equities."

Because the district court concluded that its geographic market analysis was "dispositive," Op. 8, it did not analyze whether the merger would lead to offsetting cognizable efficiencies. The court nonetheless credited defendants' alleged efficiencies in the guise of "equities," finding that they favored the merger. Op. 12-13. The court's erroneous assessment of the geographic market fatally infected its assessment of the purported benefits of the merger because it led the court to excuse defendants from their burden to establish the cognizability of their claims. As a result, the court did not rigorously analyze whether defendants' efficiency claims were verifiable, achievable, and merger-specific, as required by precedent and Section 10 of the *Merger Guidelines*. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001).

For example, the district court particularly erred when it uncritically accepted the claim that the merger would benefit the Harrisburg area by allowing Hershey to avoid construction of additional patient care facilities. Far from benefiting the community, the canceled construction project is in fact a restriction in output—a classic example of market power that raises prices. Section 10 of the

Merger Guidelines expressly rejects "anticompetitive reductions in output" as a cognizable merger efficiency. Moreover, a nearly identical claim was specifically rejected by a federal district court enjoining a hospital merger. *FTC v. ProMedica Health Sys., Inc.*, WL 1219281 at *36 (N.D. Ohio Mar. 29, 2011). In fact, Hershey's expansion would likely lead to more competition and lower prices. Hrg. 342:3-7; 988:16-990:1.

Equally wrong, the district court asserts without citation that the merger is made necessary by the Affordable Care Act. In fact, regulations issued by the Department of Health and Human Services set forth that "competition in the marketplace … can accelerate advancements in quality and efficiency." 76 Fed. Reg. 67802, 67841 (Nov. 2, 2011). Nothing in the ACA compels anticompetitive consolidation among competing hospitals.

II. THE REMAINING STAY FACTORS STRONGLY FAVOR AN INJUNCTION PENDING APPEAL.

If the merger goes forward the Government and the public will likely suffer irreparable injury. It will be difficult to obtain adequate relief if this Court overturns the district court's refusal to enjoin the merger. Constructing and enforcing an effective divestiture order after merging parties have combined their operations can be difficult or even impossible. *See, e.g.*, *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008). Such concerns are

particularly acute here, because defendants may immediately alter their operations and share their strategic information (including data on one another's separate and ongoing rate negotiations), likely making it impossible to restore competition. Hrg. 819:25-820:4.

Defendants, by contrast, will not be substantially injured by the grant of an injunction pending an expedited appeal. Indeed, they began to pursue the merger in October 2013, and we are aware of no firm deadline for its conclusion. Any effect of delay on defendants' plans pales in comparison to the harm to the public that would result from eliminating competition between these hospitals.

Granting an injunction pending appeal would promote the strong public interest in the effective enforcement of the antitrust laws. Because defendants would control 76 percent of the GAC services market and their merger would dramatically increase market concentration, it is presumptively anticompetitive. PX01062 at 115-116 & Table 5. As health insurers are forced to pay higher rates, patients will suffer higher insurance premiums. The public interest favors preserving Hershey and Pinnacle as independent competitive entities while this Court assesses the merits of the district court's decision.

CONCLUSION

For the foregoing reasons, the Court should grant an injunction pending an expedited appeal.

Respectfully submitted,

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May 12, 2016

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CERTIFICATE OF SERVICE

I certify that on May 12, 2016, I electronically filed with the Court's CM/ECF system the foregoing Emergency Motion for Injunction Pending Appeal. The counsel for defendants-appellees listed below will be served by the CM/ECF system. I further certify that I also emailed an electronic copy of the pleading to each of the lawyers below at the listed email addresses. I further certify that FTC counsel has alerted lead opposing counsel to this Motion by telephone.

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s/ Michele Arington

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION and COMMONWEALTH OF PENNSYLVANIA, Plaintiffs, vs. PENN STATE HERSHEY MEDICAL CENTER and PINNACLEHEALTH SYSTEM, Defendants.	Civil Action No.: 1:15-cv-2362 Hon. John E. Jones III

MEMORANDUM OPINION AND ORDER

May 9, 2016

Before the Court is a motion by Plaintiffs, Federal Trade Commission ("FTC") and the Commonwealth of Pennsylvania, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), for a preliminary injunction enjoining Defendants, Penn State Hershey Medical Center ("Hershey") and PinnacleHealth System ("Pinnacle") (collectively, "the Hospitals"), from taking any steps towards

consummating their proposed merger pending the completion of the FTC's administrative trial on the merits of the underlying antitrust claims. For the reasons that follow, the Motion for Preliminary Injunction shall be denied.

I. BACKGROUND[1]

Penn State Hershey Medical Center is a 551-bed hospital located in Hershey, Pennsylvania. It is a leading academic medical center ("AMC") and the primary teaching hospital of the Penn State College of Medicine. (DX1160-009). Hershey offers a broad array of high-acuity services, and tertiary and quaternary care, including bone-marrow transplants, neurosurgery, and specialized oncologic surgery.[2] Hershey operates central Pennsylvania's only specialty children's hospital, one of the Commonwealth's three Level I trauma centers, and the only heart-transplant center outside Philadelphia and Pittsburgh. (DX0190-005; DX0527-010; DX1160-009; DX0803-002).

PinnacleHealth System is a not-for-profit health system with 646 licensed beds across three campuses: Harrisburg Hospital and Community General Osteopathic Hospital, both in Harrisburg, and West Shore Hospital in Cumberland

[1] Citations to the record are identified in the following ways: (1) documents already on file with the Court are cited as "Doc." followed by the docket number and any further pinpoint citation; (2) references to testimony from the evidentiary hearing are cited as "Tr." followed by the specific page numbers; and (3) exhibits are cited to by reference to their marked number, and where applicable, further pinpoint citation to the specific page, paragraph, or section.

[2] Tertiary care is sophisticated, complex, or high-tech care that includes, for example, open heart surgery, oncology surgery, neurosurgery, high-risk obstetrics, neonatal intensive care and trauma services. Quaternary care is even more sophisticated and includes organ transplants.

County, Pennsylvania. (DX0196-001-002). All three of Pinnacle's hospitals are community hospitals focused on cost-effective acute care, although Pinnacle offers some higher-level services including open-heart surgery, kidney transplants, chemotherapy and radiation oncology. (Tr., pp. 523:15-525:22).

The Hospitals signed a Letter of Intent of their proposed merger in June of 2014, and received final board approval in March of 2015. (PX00643). In April of 2015, the Hospitals notified the FTC of their proposed merger and executed a "Strategic Affiliation Agreement" one month later. (PX00390-011; PX01338).

Following an investigation, on December 7, 2015, the FTC issued an administrative complaint alleging that the Hospitals' proposed merger violates Section 7 of the Clayton Act and Section 5 of the FTC Act. A merits trial in the FTC administrative proceeding is scheduled to commence on May 17, 2016. On December 9, 2015, Plaintiffs filed their Complaint in this action. (Doc. 4). The Hospitals filed their Answer on January 11, 2016. (Doc. 41). The instant Motion for Preliminary Injunction was filed on March 7, 2016 and was subsequently briefed by the parties. (Docs. 82, 96, and 102).

Following a period of expedited discovery, the Court conducted a five-day evidentiary hearing commencing on April 11, 2016. The Court heard testimony from 16 witnesses, including two economists, and admitted thousands of pages of

exhibits into evidence. Following the hearing, both sides filed post-hearing briefs. (Docs. 129 and 130). This matter is thus fully ripe for our review.

II. ANALYSIS

A. Standard of Review for Preliminary Injunctive Relief

When the FTC has reason to believe that "any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission," including Section 7 of the Clayton Act, it is authorized by § 13(b) of the FTC Act to "bring suit in a district court of the United States to enjoin any such act or practice." 15 U.S.C. § 53(b). The district court may grant a request for preliminary injunctive relief "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." *Id*. Therefore, "in determining whether to grant a preliminary injunction under section 13(b), a district court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities." *FTC v. United Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991); *see also FTC v. Click4Support*, 2015 U.S. Dist. LEXIS 153945, *12-13 (E.D.Pa. Nov. 10, 2015) (noting that while the Third Circuit has not expressly adopted this standard, several other circuits have done so, as well as the District of New Jersey); *FTC v. Millennium Telecard, Inc.*, 2011 U.S. Dist. LEXIS 74951, *6-7 (D.N.J. Jul. 12, 2011).

B. Section 7 of the Clayton Act

Section 7 of the Clayton Act prohibits mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Section 7 is "designed to arrest in its incipiency . . . the substantial lessening of competition from the acquisition by one corporation" of the assets of a competing corporation. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957). To be sure, "Congress used the words 'may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties." *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). "Ephemeral possibilities" of anticompetitive effects are not sufficient to establish a violation of Section 7, *United States v. Marine Bancorp., Inc.*, 418 U.S. 602, 623 (1974) (quotation marks omitted), nor will "a fair or tenable chance of success on the merits . . . suffice for injunctive relief." *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999) (citation omitted).

The first step in a Clayton Act analysis is "[t]he determination of the relevant market." *E.I. du Pont*, 353 U.S. at 593. "A relevant market consists of two separate components: a product market and a geographic market." *Id.* (citing *Morgenstern v. Wilson*, 29 F.3d 1291, 1296) (8th Cir. 1994). "Without a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning." *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir.

1995). Thus, "[i]t is . . . essential that the FTC identify a credible relevant market before a preliminary injunction may properly issue," because a merger's effect cannot be properly evaluated without a well-defined relevant market. *Tenet Health*, 186 F.3d at 1051. Courts have observed that "[a] monopolization claim often succeeds or fails strictly on the definition of the product or geographic market." *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075 (N.D. Ill. 2012) (quoting *Tenet Health*, 186 F. 3d at 1052); *see also Morgenstern,*29 F. 3d at 1296. The FTC bears the burden of defining a valid market. *See FTC v. Lundbeck, Inc.*, 650 F. 3d 1236, 1239-40 (8th Cir. 2011).

A relevant product market is a "line of commerce" affected by a proposed merger, *see Brown Shoe Co.*, 370 U.S. at 324, and is defined by determining "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other." *U.S. v. H&R Block,*, 883 F. Supp. 2d 36, 51 (D.D.C. 2011) (citations and quotations omitted). In the matter *sub judice*, the parties agree that the relevant product market is general acuity services ("GAC") sold to commercial payors. GAC services comprise a broad cluster of medical and surgical services that require an overnight hospital stay. (Doc. 82, pp. 7-8; Doc. 96, p. 7).

"The relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Hanover 3201 Realty,*

LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 183-84 (3d Cir. 2015) (quoting *Eichorn v. AT&T Corp.*, 248 F.3d 131, 147 (3d Cir. 2001) (citing *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984)). Determination of the relevant geographic market is highly fact sensitive. *Tenet Health*, 186 F. 3d at 1052 (citing *Freeman Hosp.*, 69 F.3d at 271, n. 16). "This geographic market must 'conform to commercial reality,'" *Eichorn*, 248 F.3d at 147 (quoting *Acme Mkts., Inc. v. Wharton Hardware & Supply Corp.*, 890 F. Supp. 1230, 1239 (D.N.J. 1995)(citing *Brown Shoe Co.*, 370 U.S. at 336)), and can be determined "only after a factual inquiry into the commercial realities faced by consumers." *Tenet Health*, 186 F.3d at 1052 (citing *Flegel v. Christian Hosp. Northeast-Northwest*, 4 F.3d 682, 690 (8th Cir. 1993). Further, the Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines* "provides guidance" in defining a geographic market. *Atl. Exposition Servs. Inc. v. SMG*, 262 F. App'x 449, 452 (3d Cir. 2008) The most recent version of the *Merger Guidelines* defines a relevant geographic market as the smallest area in which a hypothetical monopolist could profitably raise prices by a "small but significant amount" for a meaningful period of time (referred to as a "SSNIP"). *See* U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines*, §§ 4.1, 4.2 (2010).

C. Relevant Geographic Market

The FTC contends that the relevant geographic market for purposes of our analysis is the "Harrisburg Area," which is "roughly equivalent to the Harrisburg Metropolitan Statistical Area (Dauphin, Cumberland and Perry Counties) and Lebanon County." (Doc. 82, pp. 8-9). The FTC contends that geographic markets for GAC services are inherently local because people want to be hospitalized near their families and homes. To support this contention, the FTC posits that patients who live in the Harrisburg Area overwhelmingly utilize hospitals close to home, primarily Hershey and Pinnacle, and very few patients travel to hospitals outside of the Harrisburg Area. The FTC further contends that the two main commercial health insurance payors in the Harrisburg Area, Capital Blue Cross ("CBC") and Highmark recognize the Harrisburg Area as a distinct market and would not exclude the proposed merged entity from their networks. The Hospitals heartily disagree, arguing that the FTC's four county relevant geographic market is far too narrowly drawn and is untethered to the commercial realities facing patients and payors. It is the resolution of this threshold dispute that is dispositive to the outcome of the instant Motion.

"Properly defined, a geographic market is a geographic area 'in which the seller operates, and to which . . . purchaser[s] can practicably turn for supplies.'" *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591 (8th Cir. 2009)

(quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)); *see also Morgenstern*, 29 F.3d at 1291. "Broken down, the test requires a court to first determine whether a plaintiff has alleged a geographic market that includes the area in which a defendant supplier draws a sufficiently large percentage of its business – 'the market area in which the seller operates,' its trade area." *Id*. (citing *Morgenstern*, 29 F.3d at 1296). "A court must then determine whether a plaintiff has alleged a geographic market in which only a small percentage of purchasers have alternative suppliers to whom they could practicably turn in the event that a defendant supplier's anticompetitive actions result in a price increase." *Id*. "The end goal in this analysis is to delineate a geographic area where, in the medical setting, "'few' patients leave. . . and 'few' patients enter." *Id.* (quoting *U.S. v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1267 (N.D. Ill. 1989), aff'd 898 F.2d 1278 (7th Cir. 1990)).

Of particular import to our analysis is the uncontroverted fact that, in 2014, 43.5% of Hershey's patients, 11,260 people, travel to Hershey from outside of the FTC's designated Harrisburg Area, and several thousand of Pinnacle's patients reside outside of the Harrisburg Area. (DX1698-0048). Further, half of Hershey's patients travel at least thirty minutes for care, and 20% travel over an hour to reach Hershey, resulting in over half of Hershey's revenue originating outside of the Harrisburg area. (DX 1698-0034-36; DX1698-0049). These salient facts

controvert the FTC's assertion that GAC services are "inherently local," and strongly indicate that the FTC has created a geographic market that is too narrow because it does not appropriately account for where the Hospitals, particularly Hershey, draw their business.

Next, the FTC presents a starkly narrow view of the amount of hospitals patients could turn to if the combined Hospitals raised prices or let quality suffer. There are 19 hospitals within a 65 minute drive of Harrisburg, and many of these hospitals are closer to patients who now come to Hershey. Thus, if a hypothetical monopolist such as the combined Hospitals imposed a SSNIP, these other hospitals would readily offer consumers an alternative. Further, given the realities of living in Central Pennsylvania, which is largely rural and requires driving distances for specific goods or services, it is our view that these 19 other hospitals within a 65 minute drive of Harrisburg provide a realistic alternative that patients would utilize. Thus, the relevant geographic market proffered by the FTC is not one in which "'few' patients leave. . . and 'few' patients enter." *Little Rock Cardiology*, 591 F. 3d at 591.

Finally, during the evidentiary hearing, the Court heard hours of economic expert testimony regarding the hypothetical monopolist's ability to impose a SSNIP in the context of this proposed merger. The Court finds it extremely compelling that the Hospitals have already taken steps to ensure that post-merger

rates do not increase with CBC and Highmark, central Pennsylvania's two largest payors, representing 75-80% of the Hospitals' commercial patients. (DX 1166-01; DX 1167-003; DX 1698-0120-0124). To wit, the Hospitals have executed a 5-year contract with Highmark and a 10-year contract with CBC that not only require the Hospitals to contract with these payors for those periods, but to maintain existing rate structures for fee-for-service contracts and preserve the existing rate-differential between the Hospitals. The result of these agreements is that the Hospitals cannot walk away from these payors and that rates cannot increase for at least 5 years. (DX 0095 ¶ 14). The Court simply cannot be blind to this reality when considering the import of the hypothetical monopolist test advanced by the *Merger Guidelines*. Thus, the FTC is essentially asking the Court prevent this merger based on a prediction of what might happen to negotiating position and rates in 5 years. In the rapidly-changing arena of healthcare and health insurance, to make such a prediction would be imprudent, and as such, we do not find that the outcome of the hypothetical monopolist test aids the FTC in this matter.

In sum, we find based on the hours of testimony and thousands of pages of exhibits presented by the parties and considered by this Court, that the FTC's four county "Harrisburg Area" relevant geographic market is unrealistically narrow and does not assume the commercial realities faced by consumers in the region. Because the Government has failed to set forth a relevant geographic market, it

cannot establish a *prima facie* case under the Clayton Act. Therefore, the FTC's request for injunctive relief must be denied because it has not demonstrated a likelihood of ultimate success on the merits. *See Tenet Health*, 186 F.3d at 1053-55 (denying a preliminary injunction on the grounds of failure to provide sufficient evidence of a relevant geographic market); *Freeman Hosp.*, 69 F.3d at 268-72 (same); *California v. Sutter Health Sys.*, 130 F. Supp.2d 1109, 1132 (N.D. Cal. 2001) (same).

D. **Equities**

The FTC's impermissibly narrow interpretation of the relevant geographic market has caused this Court to determine that the FTC has not established a likelihood of success on the merits. Had the FTC demonstrated a likelihood of ultimate success, however, the burden of proof would have shifted to the Hospitals to "clearly" show that their combination would not cause anticompetitive effects. *U.S. v. Citizens & S. Nat. Bank*, 422 U.S. 86, 120 (1975) (explaining that once the Government plainly made out a *prima facie* case establishing a violation of Section 7, it "was incumbent upon [the defendants] to show that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition."). As a precaution, then, the Hospitals presented ample evidence demonstrating that anticompetitive effects would not arise through the merger of Hershey and

Pinnacle. This evidence warrants consideration in our weighing of the equities here.

As noted in the Standard of Review, *see* Section II.A, along with consideration of the FTC's likelihood of success, a weighing of the equities present in this case is required to determine whether enjoining the merger would be in the best interests of the public. *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) ("Section 13(b) provides for the grant of a preliminary injunction where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits."). "Absent a likelihood of success on the merits, however, equities alone will not justify an injunction." *F.T.C. v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 159 (D.D.C. 2004) (citing *F.T.C. v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C. Cir. 1986)). The Seventh Circuit has adopted a "sliding scale" approach to a consideration of the equities: "[t]he greater the plaintiff's likelihood of success on the merits . . . the less harm from denial of the preliminary injunction the plaintiff need show in relation to the harm that the defendant will suffer if the preliminary injunction is granted." *F.T.C. v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989); *OSF Healthcare Sys.*, 852 F.Supp.2d at 1094-95 (also utilizing the sliding-scale standard). The inverse has also been adopted; where a defendant can demonstrate that a preliminary injunction would inflict "irreparable harm," a ruling

that a plaintiff would likely succeed on the merits is less probable. *Elders Grain*, 868 F.2d at 903 ("[T]he sliding scale approach just sketched is appropriate . . . in cases where defendants are able to show that a preliminary injunction would do them irreparable harm."). Because of this relationship, once a court has made a determination of the likelihood of success, discussions on equitable considerations are often scant. *See OSF*, 852 F.Supp.2d at 1094-95; *Arch Coal*, 329 F.Supp.2d at 159-60. However, as alluded to in the rationale above, there are several important equitable considerations that merit further elucidation here.

1. Hershey's Capacity Constraints

"The Supreme Court has not sanctioned the use of an efficiencies defense in a case brought under Section 7 of the Clayton Act. However, 'the trend among lower courts is to recognize the defense."' *Arch Coal*, 329 F.Supp.2d at 150 (internal citations omitted) (quoting *Heinz*, 246 F.3d at 720); *see FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality."). Here, the Hospitals have presented a compelling efficiencies argument in support of the merger, in that the merger would alleviate some of Hershey's capacity constraints. As we have already found the merger to be legal, this argument is not relevant as a defense to illegality. However, the efficiencies wrought by the merger would nonetheless provide beneficial effects to

the public, such that equitable considerations weigh in favor of denying the injunction.

Though the exact range is contested, both parties concur that a hospital's optimal occupancy rate is approximately 85%.[3] During the evidentiary hearing on this matter, Ms. Sherry Kwater, former Chief Nursing Officer at Hershey Medical Center, testified extensively to her experience with the overcrowding and capacity problems rampant at Hershey. (Tr., pp. 688-89). Specifically, Ms. Kwater testified that the average capacity percentage at Hershey in the last several years had hovered at approximately 89% during the daily midnight census,[4] and routinely climbed to as high as 112-115% occupancy during midday.[5] (Tr., p. 688). Ms. Kwater also testified to a variety of ongoing renovation projects at Hershey designed to procure more beds, including those in the maternity ward and in the emergency room, as well as a project to convert a large storage room into space for observation beds. (Tr., pp. 671-72, 675-76, 679, 685). Ultimately, however, Hershey's Chief Executive Officer Craig Hillemeier and Chief Operating

[3] (Doc. 96, p. 18 ("The consensus in medical literature is that a hospital's optimal occupancy rate is 80-85%.")); (Doc. 129, pp. 24-25).

[4] Efficiencies expert Brandon Klar later testified that an occupancy review excluding the pediatric beds and focusing only on the remaining adult beds yielded a midnight occupancy rate averaging 90.5%. (Tr., p. 737:25-738:1-7).

[5] Ms. Kwater's testimony indicates that a hospital may be at over 100% capacity by placing patients in beds that were not designed for inpatient care. (Tr., p. 689:3-6). Obviously, this overcrowding results in negative consequences for patients at Hershey, who may not be comfortable placed in the hallway beds described, or 4- and 6- bedded rooms. (Tr., p. 684:17-23).

Officer Robin Wittenstein both testified that the renovation projects have not been sufficient to keep pace with the demand for care. (Tr., pp. 443:15-20; 579:12-19). Thus, without the merger, Hershey intends to build a new bed tower, costing approximately $277 million and generating 100 inpatient beds (yielding a total net gain of 70-80 new beds after renovations are complete). (Doc. 130, p. 21); (Tr., p. 579:12-19 ("[W]e will immediately begin moving forward on the construction of a new bed tower.")).

In response, the FTC assembled a series of arguments designed to rebut Hershey's stated need to build the bed tower. Evidence was introduced indicating that as few as two and as many as thirteen beds could alleviate Hershey's capacity constraints, and that Hershey would need a total of just thirty-six (36) beds in five years to relieve its capacity issues. (Doc. 129, p. 26). Under this reasoning, Plaintiffs suggest that Hershey would not need to build a bed tower at all. (*Id*.). Furthermore, Plaintiffs argue that even if it were built, Hershey has artificially inflated the cost of constructing the bed tower, and the cost would not ultimately be passed on to patients as the tower would be funded by grants or by existing funds in Hershey's fixed cost budget. (Tr., pp. 779-82, 989:4-8 ("Such a capital expense [as the building of a bed tower] . . . is properly understood as a fixed cost. As such, economic theory would not predict that it would be passed on in the form of higher prices.")).

This line of reasoning defies logic. Even if the cost of the bed tower has been partially overstated, its construction would undoubtedly strain Hershey's financial resources, resulting in either increased charges for services or less investment in quality improvements. (Doc. 130, p. 23 (citing to testimony by Defendants' expert economic witness, Dr. Willig)). Both outcomes would negatively impact patients at least until the bed tower could be completed, fully paid for, and operational. By contrast, the merger would immediately make additional capacity available to Hershey, causing near instantaneous benefits to Hershey's patients. (*See* Tr., pp. 819:25-820:4 ("[T]he merger will immediately make more effective capacity available to alleviate Hershey's capacity problem. That's a relatively immediate, maybe instantly, but certainly within a few months, impact of the merger.")).

Further, for the Court to expect Hershey to rely on assumptions of grants for the construction would be to expect a reliance on unsound business practice, as the FTC has presented no evidence that such grants would definitively be forthcoming. (Tr., pp. 779:24-781:10 (cross examination of Brandon Klar, noting that the FTC's prediction of philanthropic donations is only assumed, and not guaranteed, and that donations for a bed-tower with no designated specialty like a children's ward or cancer facility are unlikely to accumulate in any great frequency)).

Finally, Plaintiffs impermissibly ask the Court to second guess Hershey's business decision in building the tower. It is not within our purview to question the CEO and COO's determination of this need, and their sworn testimony that they will embark upon this project absent the merger is sufficiently reliable. Further, as our nation's population continues to age and increasingly demand more complex and numerous medical treatments, it is entirely reasonable that Hershey would decide that, absent a merger, construction of a large bed tower is in its best interest.

Hershey has also presented testimony of the capital avoidance that will occur if the combination with Pinnacle is allowed to go forward and the bed tower is not built. Pinnacle has sufficient capacity available such that Hershey may transfer its lower-acuity patients to Pinnacle, simultaneously allowing both hospitals' physicians to treat more people while Hershey's capacity constraints are alleviated. (Tr., pp. 732-33, 748:13-18). Further, Hershey's facilities will be able to admit more high-acuity patients who will benefit from Hershey's greater offering of complex treatments and procedures. (*Id*. p. 737)[6]; (Doc. 96, p. 29). Of course, the ability of both hospitals to treat more patients at the locations best suited to their

[6] Here, Mr. Klar explained that "[site-of-service adjustments] will allow [Hershey] to reduce their occupancy rate . . . to 80 percent, which will allow space for patients that are currently being denied access within Central Pennsylvania to get the available access that they need locally and close to home." (Tr., p. 737:1-13).

healthcare needs will also generate more revenue.[7] Finally, the merger will prevent the outpouring of capital for the construction of the tower, allowing Hershey to forego this expenditure, serve more patients, and generate downward pricing pressure that greater efficiencies and a larger supply of services typically facilitates.[8]

Where, as here, "an injunction would deny consumers the procompetitive advantages of the merger," courts have found that the equities may weigh in favor of allowing the combination to go forward. *See Heinz*, 246 F.3d at 726-27 (citing *FTC v. Pharmtech Research, Inc*., 576 F.Supp. 294, 299 (D.D.C. 1983)). We find

[7] This increase in revenue was discussed in detail during the Hospitals' testimony, and relates primarily to a two-step savings process. First, because Pinnacle handles on average, lower-acuity care patients, there is an average price differential of $3,400 per case at Pinnacle as compared to Hershey. (Tr., p. 749:12-24). This, multiplied by the expected 2,000-3,000 cases that will be transferred over the next five years, yields a great deal of the expected savings, between approximately $31.3 and $46.2 million. (*Id*.). Second, because the patients transferred from Hershey to Pinnacle will be replaced by primarily higher-acuity care patients, the income that Hershey will generate from providing their treatment will drastically increase, by as much as $17,000 per case (Hershey stresses that other AMCs are routinely reimbursed at even higher commercial rates for high-acuity care procedures—approximately 15 percent higher). (*Id*., pp. 750:18-751:5). This two-step increase in revenue was presented as one of the main reasons for the Hospitals' desire to pursue the merger. It was also cited as a reason for why the Hospitals would have no need to impose a SSNIP on Harrisburg area payors, even if they could do so. While we certainly acknowledge the merit of the efficiencies argument, we find this secondary rationale regarding the SSNIP unpersuasive, as in the Court's experience it is rare that a company decides it has made enough money already, such that it does not need more. *See In the Matter of ProMedica Health Sys., Inc*., Docket No. 9346, 2012 WL 2450574, at *21 (F.T.C., June 25, 2012) (describing the lower court's holding that the evidence did not support that "excess hospital bed capacity in Toledo, repositioning by competitors, and steering patients away from high-priced hospitals . . . would constrain post-Joinder price increases."). Rather, it is for the reasons discussed *supra* that we feel the Hospitals are unlikely to be able to unreasonably raise costs for payors.

[8] (Doc. 96, p. 29 (noting that the adjustments will save patients and payors $49.5-82.7 million over five years); (Tr., pp.732-34 (same)).

that the efficiencies evidence overwhelmingly indicates that procompetitive advantages would be generated for the Hospitals' consumers such that the equities favor the denial of injunctive relief.

2. Repositioning by Competitors Will Constrain Hershey and Pinnacle

The 2010 *Horizontal Merger Guidelines* advise that "[i]n some cases, non-merging firms may be able to reposition . . . to offer close substitutes for the products offered by the merging firms." 2010 *Horizontal Merger Guidelines*, §6.1. "A merger is unlikely to generate substantial unilateral price increases if non-merging parties offer very close substitutes." *Id.* Where, as here, firms are already present in the market but are repositioning, that "[r]epositioning . . . is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency." *Id.* Courts weighing the anticompetitive effects of a merge have considered such repositioning as a factor in whether to give great weight to predictions of a combined entity's ability to control the marketplace. *See ProMedica Health*, 2012 WL 2450574, *64-65 (discussing hospitals' competitors and concluding that they did not possess the significant competitive ability necessary to constrain the merged entity).

In the case *sub judice*, the market that Hershey and Pinnacle exist within has already been subject to extensive repositioning. Competition, in the form of

nearby hospitals' growing ability to offer close substitutes for Hershey and Pinnacles' advanced care, is escalating. Specifically, Geisinger Health System recently acquired Holy Spirit Hospital, with the intent to create a "regional referral center and tertiary care hospital" (DX0090-002); WellSpan Health has acquired Good Samaritan Hospital—with the specific goal of taking patients from Hershey (DX 0095 ¶ 6; DX0851); the University of Pennsylvania partnered with Lancaster General Hospital to "take more volume away from Hopkins, Hershey, and Philadelphia competitors" (DX0136-232; *see also* DX0095 ¶ 7); and Community Health Systems acquired Carlisle Regional Hospital. (Tr., p. 80:23-25). Notably, this repositioning would not happen in response to the combination of Hershey and Pinnacle—it has already occurred. Thus, in terms of a timeliness and likelihood analysis, there is no delay here that other courts have found to be a significant concern in a competitor's ability to constrain a merged entity. *ProMedica Health*, 2012 WL 2450574, *64-65 (expressing concern that a rival hospital, Mercy, had no location chosen or deadline implemented for the construction of its outpatient facility, which "casts doubt on whether Mercy is likely to accomplish such repositioning and suggests that its . . . strategy will not provide a timely constraint.").

Furthermore, this repositioning represents a direct and concerted effort to erode both hospitals', but mainly Hershey's, patient base. Far from being isolated

from service, other hospitals have realized and begun to capitalize on the large market of patients in the Harrisburg area.[9] The Office of the Attorney General cites to these hospitals, not as small community hospitals, but as "dominant providers" that demand high prices for their services. (Tr., p. 42:15-19). It neglects, however, to emphasize that these providers are located in York, Lancaster, Reading and Danville[10]—well within driving distance from the "Harrisburg Area." (Tr., p. 487:4-15). Rather than monopolizing a geographic space, merging allows Hershey and Pinnacle to remain competitive in a climate where nearby hospitals are routinely partnering to assist each other in achieving growth and dominance. The rival hospitals'' competitive strength will result in a meaningful constraint on competition, benefitting Harrisburg area residents in a manner consistent with the analysis set forth in the Guidelines.

3. Risk-Based Contracting

Over the course of the five-day hearing, a substantial amount of testimony on the increase in risk-based contracting was presented. Risk based contracting

[9] For example, Geisinger has already committed to invest $100 million in Holy Spirit to open a children's hospital and a Level II trauma center that Charles Chiampi, director of contracting for Highmark, submits shall directly compete with Hershey for complex emergency trauma care. DX0095-0001, ¶ 5. Further, the partnership between Geisinger and Holy Spirit allows for Geisinger to more easily refer higher-acuity patients from its Harrisburg location out to its larger facility in Danville. (Tr. 938:16-939:7).

[10] (Tr., p. 42:15-19). The Attorney General's Office simply cannot have its cake and eat it too. These hospitals cannot both be examples of behemoth institutions that have negatively impacted the Central Pennsylvania patient base but also be too small to meaningfully compete with a combined Hershey and Pinnacle entity.

"begins to introduce new concepts and terms that begin to transfer the risk for the cost of care for the individual to the provider." (Tr., 493:18-25). Over the ensuing three years, the government and various private payors intend to evoke a shift towards risk-based forms of contracting, and the payors with which Hershey and Pinnacle contract are no exception. (Tr. 254:17-255:3; Tr., p. 939:19-21 ("these agreements . . . between the payers and the hospitals . . . include a strong mutual assurance of movement toward . . . risk-based forms of contracting, and framework for doing that cooperatively.")). In fact, the government intends to shift 50-80% of payments into risk based contracts by 2018. (Tr., p. 498: 6-14). In order to perform best under risk-based contracting, hospitals must offer a "total continuum of care." (Doc. 130, p. 30). Though we agree with the FTC that Hershey and Pinnacle independently are capable of continuing to operate under the risk-based model, we find the testimony of Hershey CEO Craig Hillemeier to be persuasive in that "there will be some advantages in terms of size of scale, in terms of being able to spread of costs [sic] of the infrastructure of population health over a larger health care system." (Tr. 445:21-446:4). This adaptation to risk-based contracting will have a beneficial impact. One persuasive benefit involves Hershey's ability to continue to use its revenue to operate its College of Medicine and draw high-quality medical students and professors into the region. (*Id.*, 448:13-15 ("[P]art of the purpose of the Medical Center is, indeed, to support the College of Medicine . .

. . If patients don't fill the beds, then we can't do it.")). Particularly as the payment models continue to shift, the local populace has a continued interest in seeing its most closely situated medical center remain competitive.

4. Public Interest in Effective Enforcement of Antitrust Laws

"The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws. The Congress specifically had this public equity consideration in mind when it enacted Section 13(b)." *Heinz*, 246 F.3d at 726 (internal citations omitted). However, where an injunction would deny consumers the procompetitive advantages of the merger, this equity is no longer as compelling. These advantages have now been discussed at length, above. Further, though the FTC is correct to caution that "unscrambling" the assets of two merged entities is made more difficult after the combination has been completed, *see F.T.C. v. Univ. Health, Inc.*, 938 F.2d 1206, 1216 n. 23 ("once an anticompetitive acquisition is consummated, it is difficult to "unscramble the egg"), it is by no means unheard of that a merged entity would be asked to divest the assets of the previously separate institution. *See ProMedica Health*, 2012 WL 2450574, *66 ("Divestiture is the most appropriate remedy to restore the competition eliminated by the Joinder.").

Further we note that the parties have not emphasized, and we do not credit, any argument that "an injunction would 'kill this merger,'" as courts in the past

have found this line of reasoning to be unpersuasive and "at best a 'private' equity which does not affect [an] analysis of the impact on the market." *Heinz*, 246 F.3d at 726-27; *but see Freeman Hosp.*, 69 F.3d at 272 ("[A] district court may consider both public and private equities.").

After a thorough consideration of the equities in play, we find that the majority of these factors weigh in the public interest. The patients of Hershey and Pinnacle stand to gain much from a combined entity that is capable of competing with a variety of other merged and already growing hospital systems in the region. This decision further recognizes a growing need for all those involved to adapt to an evolving landscape of healthcare that includes, among other changes, the institution of the Affordable Care Act, fluctuations in Medicare and Medicaid reimbursement, and the adoption of risk-based contracting. Our determination reflects the healthcare world as it is, and not as the FTC wishes it to be. We find it no small irony that the same federal government under which the FTC operates has created a climate that virtually compels institutions to seek alliances such as the Hospitals intend here. Like the corner store, the community medical center is a charming but increasingly antiquated concept. It is better for the people they treat that such hospitals unite and survive rather than remain divided and wither.

III. CONCLUSION

Based on the foregoing analysis, the Court finds that the FTC failed to meet its burden to show a likelihood of ultimate success on the merits of their antitrust claim against the Hospitals. Accordingly, the Plaintiffs' Motion for a Preliminary Injunction shall be denied.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Plaintiffs' Motion for Preliminary Injunction (Doc. 82) is **DENIED**.

s/ John E. Jones III
John E. Jones III
United States District Judge