IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FEDERAL TRADE COMMISSION, Plaintiff, v. **HACKENSACK MERIDIAN HEALTH, INC.,** and **ENGLEWOOD HEALTHCARE FOUNDATION,** Defendants.	Civil Action No. 20-cv-18140-JMV-JBC **PUBLIC VERSION**

MEMORANDUM IN SUPPORT OF FEDERAL TRADE COMMISSION'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Fueled by repeated mergers and acquisitions, Hackensack Meridian Health ("HMH") is the largest health system in New Jersey today. HMH's latest acquisition target is Englewood Health ("Englewood"), HMH's low-cost, high-quality Bergen County neighbor. Englewood is a close, local competitor to HMH's flagship hospital, Hackensack University Medical Center ("HUMC"), and HMH's Pascack Valley Medical Center ("Pascack Valley"), both also located in Bergen County. Upon acquiring Englewood, HMH will be able to increase insurers' rates, including by [redacted]

Vibrant competition between healthcare providers leads to lower prices and higher quality services. The added leverage that will come from rolling Englewood into HMH—solidifying HMH's hold over Bergen County and eliminating important local competition between neighboring hospitals—will allow HMH to extract higher rates from commercial health insurance plans and eliminate important non-price competition, ultimately at the expense of local employers and healthcare consumers. Competition from the three remaining Bergen County hospitals, all community hospitals, will not prevent this harm. Nor will distant competitors in other counties or across the river, none of which provide access to

local, routine inpatient general acute care ("GAC") services that commercial insurers need to sell attractive health insurance plans to Bergen County residents.

At the administrative trial on the merits, the Federal Trade Commission ("FTC") will likely succeed in proving that HMH's acquisition of Englewood ("the Acquisition") violates Section 7 of the Clayton Act, 15 U.S.C. § 18, because it substantially lessens competition in Bergen County for the sale of inpatient GAC services to commercial health insurers and their enrollees. The Acquisition is presumptively illegal. The presumption is bolstered by strong evidence of likely anticompetitive effects in the relevant market (and adjacent ones). And Defendants will not be able to rebut this showing and the presumption. The FTC therefore seeks a preliminary injunction pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, to preserve the status quo pending the full administrative proceeding on the merits, which is scheduled for June 15, 2021. *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016).

BACKGROUND

A. Factual Background

HMH is New Jersey's largest health network, with nearly $6 billion in 2019

revenue.[1] HMH was created by the 2016 merger of two major New Jersey health systems, Meridian Health and Hackensack University Health Network; since that merger, HMH has acquired JFK Health, a multi-hospital system in central New Jersey, and the Carrier Clinic, a behavioral health hospital.[2] HMH now has twelve inpatient GAC hospitals, in addition to two children's hospitals, two rehabilitation hospitals, and one behavioral health hospital, across eight counties in northern and central New Jersey.[3] [redacted][4] [redacted] [redacted].[5]

HMH owns and operates two inpatient GAC hospitals in Bergen County—HUMC, HMH's 691-bed flagship academic medical center providing primary through quaternary services,[6] and Pascack Valley, a community hospital providing primary and secondary medical services.[7] HMH also owns two community

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[1] PX9008.
[2] HMH Answer ¶ 21, ECF No. 64; [redacted]
[3] HMH Answer ¶ 22, ECF No. 64; PX9006.
[4] *E.g.*, [redacted]
[5] *See, e.g.*, [redacted]
[6] Hospital services are often grouped into categories based on complexity. "Primary" services are least complex and "quaternary" are the most complex.
[7] *See* PX7034 at 31; [redacted] partially owns and operates [redacted] as part of a joint venture with [redacted].

hospitals in neighboring counties: Palisades Medical Center ("Palisades"), a formerly independent hospital acquired in 2016, in Hudson County, and Mountainside Medical Center ("Mountainside") in Essex County.[8]

Englewood is an independent health system that owns one inpatient GAC hospital (Englewood Hospital), in addition to a physician network and a health foundation.[9] In 2019, Englewood earned approximately $769 million in revenue.[10] Englewood Hospital, which operates 352 beds, is located between HMH facilities, less than 10 miles from HUMC and Pascack Valley.[11] Englewood provides a broad range of primary through tertiary medical services, including cardiac surgery and care, cancer care, orthopedic surgery, spine surgery, vascular surgery, and obstetrics. Englewood has a Level III NICU and performs advanced procedures such as spinal fusions, heart implants, and transaortic valve replacements.[12] Englewood has received many quality awards, including as a top 6% teaching hospital in 2019 by Leapfrog, a hospital ratings organization, and the highest Leapfrog Hospital Safety Grade in 2020, as well as multiple service-specific

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[8] *See* PX7034 at 31; [redacted].
[9] PX9077-001.
[10] PX9009-001.
[11] PX9009-001; PX9078-001.
[12] *See, e.g.*, [redacted]; [redacted] PX9081; PX9082.

awards.[13] In December, Englewood was awarded the Leapfrog Pandemic Hero of the Year Award for its handling of the COVID-19 crisis.[14]

Bergen County is a populous and affluent suburban county located in northeastern New Jersey. In 2019, Bergen County had an estimated population of 932,202 (the highest in the state) and a median household income of $101,144, well above the New Jersey and national averages.[15] In addition to the HMH hospitals and Englewood, Bergen County is home to three other hospitals: The Valley Hospital ("Valley"), Holy Name Medical Center ("Holy Name"), and Bergen New Bridge Medical Center ("Bergen New Bridge"). Holy Name is a 361-bed, independent inpatient GAC hospital that provides primary and secondary services; Holy Name lacks regulatory approval to provide tertiary services.[16] Valley is a [redacted] GAC hospital in western Bergen County that offers primary, secondary, and tertiary services.[17] Bergen New Bridge is a county-owned safety net hospital that devotes nearly all its 1,074 beds to long-term nursing home care, behavioral health, and substance abuse treatments.[18]

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[13] PX9043-001; PX9029-001-03.
[14] PX9032-002.
[15] PX9080-001-02.
[16] PX5005 ¶¶ 3-4; [redacted].
[17] PX5004 ¶ 3; [redacted]
[18] PX5007 ¶¶ 3-4, 7; PX7022 at 22, 144, 183, 193.

Englewood initiated a search for a large health system partner beginning in [redacted].[19] Englewood engaged with five regional health systems, and, after receiving initial submissions, continued discussions with [redacted].[20] Seeking to extend its service area by acquiring an inpatient facility in Bergen County, [redacted].[21] But Englewood ultimately selected HMH, and the agreement for HMH to acquire Englewood [redacted].[22] Third-party hospital systems' interest in Englewood persists, however, with [redacted].[23]

B. Hospital Competition Background

Competition for hospital services occurs in a two-stage process. *See Hershey*, 838 F.3d at 342; *FTC v. Advocate Health Care Network*, 841 F.3d 460,

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19 [redacted]

20 [redacted]

21 *See* [redacted]

22 [redacted]

23 [redacted]

465 (7th Cir. 2016); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys.*, 778 F.3d 775, 784 n.10 (9th Cir. 2015). In the first stage, "hospitals compete to be included in an insurance plan's hospital network." *Hershey*, 838 F.3d at 342. Hospitals benefit from being in network with an insurer, because in-network status will "[redacted]" to the hospital.[24] Insurers likewise want to offer their members access to a broad network of facilities.[25] Insurers also want to offer their members low costs,[26] however, while hospitals, including HMH, seek "to optimize the revenue for our organization."[27]

Insurers negotiate agreements with hospitals that determine the reimbursement rates the insurer pays when its members use the hospital. *Hershey*, 838 F.3d at 342. These rates are passed on to employers and employees in the form of premiums, coinsurance, and/or copays, depending on the structure of a particular health plan.[28] If a hospital and an insurer cannot agree on reimbursement rates, then the hospital will not be included in the insurer's network, in which case the insurer's members will face significantly higher costs for accessing that hospital.[29] If the insurer needs to include the hospital to offer an attractive network

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[24] [redacted]

[25] [redacted]

[26] *See, e.g.*, [redacted]

[27] PX7026 at 28; [redacted]

[28] [redacted]

[29] PX7026 at 23; [redacted]

to members, it will pay higher rates demanded by the hospital.[30] On the other hand, if the insurer can still market an attractive network by offering members close substitutes to the out-of-network hospital, then it will be able to resist or mitigate the higher rate demand.[31] Thus, the presence of multiple competing, geographically proximate hospitals allows insurers to negotiate better reimbursement rates and other terms, which translate into lower premiums and copays and other benefits for employers and patients.[32] Correspondingly, a merger between hospitals that are close substitutes for a significant number of patients will greatly enhance the merged hospital's bargaining leverage at the expense of insurers, enabling the merged hospital to negotiate higher rates.[33]

In the second stage, "hospitals compete to attract individual members of an insurer's plan." *Hershey*, 838 F.3d at 342; *St. Luke's*, 778 F.3d at 784 n.10. Because patients usually face similar costs when choosing among in-network hospitals, this second stage of competition focuses "primarily on non-price factors like convenience and reputation for quality." *Advocate*, 841 F.3d at 465. As economic studies and the record evidence have shown, competition among

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[30] *See* PX8000 (Dafny Rpt.) ¶¶ 104, 106; *see also,* [redacted].
[31] *See* PX8000 (Dafny Rpt.) ¶ 106; [redacted].
[32] *See, e.g.*, [redacted].
[33] *See* PX8000 (Dafny Rpt.) ¶¶ 107, 155.

multiple hospitals for patients yields benefits in clinical quality and safety, innovation, breadth of services, and patient amenities such as improved wait times and comfort.[34] When closely competing hospitals merge, they lose the incentive to improve quality to win patients from one another.[35]

This is not theoretical. Extensive economic literature has shown that hospital mergers reduce competition and increase insurer reimbursement rates. *See Advocate*, 841 F.3d at 472 (discussing literature and its application to case law); PX8000 (Dafny Rpt.) ¶ 204. Many of these studies have also shown that non-profit hospitals are as likely as for-profit hospitals to exploit their market power by raising reimbursement rates.[36] Academic studies have likewise shown that hospital mergers and acquisitions have had detrimental or neutral effects on patient experiences and on important hospital quality metrics such as mortality and readmission rates.[37]

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[34] *See* PX8000 (Dafny Rpt.) ¶¶ 110-11 ("Overall, more intense competition provides hospitals with a stronger financial incentive to increase its attractiveness on non-price dimensions."); *id.* ¶¶ 206-07 (summarizing economic literature).
[35] *See* PX8000 (Dafny Rpt.) ¶ 111.
[36] *See, e.g.*, PX9084 (Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured*, 134 Q.J. of Econs. 51 (2019)); PX9087 (Leemore Dafny, *Estimation and Identification of Merger Effects: An Application to Hospital Mergers*, 52 J.L. & Econs. 523 (2009)); PX9083 (Cory Capps & David Dranove, *Hospital Consolidation and Negotiated PPO Prices*, 23 Health Affs. 175 (2004)); *see also* PX8000 (Dafny Rpt.) ¶¶ 204-05.
[37] *See, e.g.*, PX9086 (Tamara Hayford, *The Impact of Hospital Mergers on Treatment Intensity and Health Outcomes*, 47 Health Servs. Rsch. 1008 (2011));

ARGUMENT

As described below, the FTC has developed a robust factual record, supported by well-accepted methods of expert analysis, demonstrating that the Acquisition will substantially lessen competition in a properly defined antitrust market for inpatient GAC services in Bergen County. The question for this Court is whether, given this demonstration, it is in the public interest to preserve the status quo "pending an FTC administrative adjudication." *Hershey*, 838 F.3d at 337; *see also FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) ("[A] district court must not require the FTC to prove the merits, because, in a § 53(b) preliminary injunction proceeding, a court is not authorized to determine whether the antitrust laws are about to be violated."). The answer to that question is "yes." The FTC is likely to succeed on the merits at the administrative proceeding by demonstrating that the Acquisition will substantially lessen competition in the market for inpatient GAC services in Bergen County, leading to higher prices and a reduced incentive to compete on quality. The Court should temporarily enjoin the Acquisition to ensure that no such harm occurs and to prevent Defendants from

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PX9085 (Cory Capps, *The Quality Effects of Hospital Mergers*, Discussion Paper, Economic Analysis Group, U.S. Department of Justice, 2005)); PX9088 (Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation—Impact*, The Synthesis Project Policy Brief No. 9 Revised (2012)); *see also* PX8000 (Dafny Rpt.) ¶¶ 206-07; [redacted]

"scrambling the egg," leaving the FTC with no adequate remedy after the administrative proceeding.

I. Legal Standards

Section 7 of the Clayton Act forbids mergers where "the effect . . . may be substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce or in any activity affecting commerce in any section of the country." 15 U.S.C. § 18. "Congress used the words '*may be* substantially to lessen competition' . . . to indicate that its concern was with probabilities, not certainties." *Hershey*, 838 F.3d at 337 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). A "certainty, even a high probability, need not be shown," and any "doubts are to be resolved against the transaction." *Hershey*, 838 F.3d at 337.

A. Preliminary Injunction Standard

If the FTC has reason to believe that a merger will violate Section 7, it may seek a preliminary injunction in federal district court pending a full trial in the FTC's administrative tribunal. 15 U.S.C. § 53(b). Section 13(b) authorizes a district court to issue a preliminary injunction "[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." *Hershey*, 838 F.3d at 349.

To show a likelihood of success on the merits, "the government need only show that there is a reasonable probability that the challenged transaction will

substantially impair competition." *FTC v. Sysco Corp*., 113 F. Supp. 3d 1, 22 (D.D.C. 2015); *see also FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 44 (D.D.C. 2018) (standard met if FTC "rais[es] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance"). As the Third Circuit has explained, "[t]he FTC is not required to *establish* that the proposed merger would in fact violate section 7 of the Clayton Act" at this stage. *Hershey*, 838 F.3d at 337.

After assessing the FTC's likelihood of success on the merits, the district court must weigh the equities to determine whether a preliminary injunction serves the public interest. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). "The public interests to be considered include: (1) the public interest in effectively enforcing antitrust laws; and (2) the public interest in ensuring that the FTC has the ability to order effective relief if it succeeds at the merits trial." *FTC v. Staples, Inc.,* 190 F. Supp. 3d 100, 137 (D.D.C. 2016). Private equities alone do not justify denying a preliminary injunction. *Hershey*, 838 F.3d at 352. In the ordinary case, "a showing of likely success on the merits will presumptively warrant an injunction." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004).

B. The Analytical Framework for Merger Challenges

Courts use a burden-shifting framework to evaluate whether a merger is

likely to harm competition. *Hershey*, 838 F.3d at 337. The FTC establishes its prima facie case by demonstrating that the merger will result in undue concentration for a product or service in a geographic area—in antitrust parlance, a "relevant market." *Hershey*, 838 F.3d at 337-38; *FTC v. Sanford Health*, 926 F.3d 959, 962 (8th Cir. 2019). If made, this showing creates a presumption that the merger is anticompetitive. *Hershey*, 838 F.3d at 346-47; *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). Defendants must then rebut the presumption by presenting evidence "that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition." *Heinz*, 246 F.3d at 715. "'[T]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.'" *Sanford*, 926 F.3d at 963 (quoting *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990)). If Defendants rebut the presumption, "the burden of production shifts back to the Government and merges with the ultimate burden of persuasion, which is incumbent on the government at all times." *Hershey*, 838 F.3d at 337.

II. The Acquisition Should be Preliminarily Enjoined Because the FTC Has Shown a Reasonable Likelihood of Success on the Merits and the Equities Favor Issuance of a Preliminary Injunction

The Court should preliminarily enjoin HMH's acquisition of Englewood. The FTC will likely prevail at the merits trial because this Acquisition meets the standard that it may substantially lessen competition. Once demonstrated,

Defendants will not meet the "difficult task in justifying the nonissuance of a preliminary injunction" because the equities weigh in strong favor of granting preliminary relief. *See Hershey*, 838 F.3d at 352.

A. The FTC is Likely to Succeed in Its Challenge at the Merits Trial

The Acquisition is presumptively illegal based on its effect on market shares and market concentration for the sale of inpatient GAC services to insurers and their members in Bergen County. Additional direct evidence of close competition, recognized by Defendants, other hospitals, and insurers, and confirmed by the economic analysis of the FTC's expert, Dr. Leemore Dafny, strongly supports this presumption. Further, upon acquiring Englewood, [redacted]. All of this buttresses the FTC's likelihood of success on the merits.

1. HMH's Acquisition of Englewood is Presumptively Illegal

A "relevant market is defined in terms of two components: the product market and the geographic market." *Hershey*, 838 F.3d at 338; U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* § 4 (Aug. 19, 2010) ("*Merger Guidelines*"). Firms often compete in multiple markets, some narrower and some broader, and a merger violates Section 7 if it produces anticompetitive effects in "any" of these markets. *Brown Shoe*, 370 U.S. at 337 & n.65. When defining a

market in which to assess merger effects, courts look to narrowly defined markets—often referred to in case law as "submarkets"—"because potential harms to competition will likely be less apparent in a broader, less concentrated market than in a narrower included market." *FTC v. Peabody Energy Corp.*, ___ F. Supp. 3d ___, 2020 WL 5893806, at *11 (E.D. Mo. 2020); *see also Advocate*, 841 F.3d at 472 ("If the analysis uses geographic markets that are too large, consumers will be harmed because the likely anticompetitive effects of hospital mergers will be understated."). Thus, when defining a market, the "circle must be drawn narrowly to exclude" any substitutes "to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 612 n.31 (1953).

a. Inpatient GAC Services Are a Relevant Product Market

An antitrust product market consists of products that are "sufficiently close substitutes to constrain any anticompetitive [] pricing after the proposed merger." *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 55 (D.D.C. 2011); *see also Brown Shoe*, 370 U.S. at 325; *Merger Guidelines* § 4. Inpatient GAC services are a relevant product market in which to analyze the Acquisition. Inpatient GAC services are medical and surgical services that require a hospital admission

(generally, an overnight stay or longer).[38] Inpatient GAC services include both emergency and scheduled services of varying levels of severity, or "acuity," including cardiac procedures, treatments for infection, and a wide range of other services.[39] Although inpatient GAC services comprise medical services that are generally not substitutable for one another,[40] it is efficient and economically appropriate to analyze them together, as a "cluster," when, as here, the competitive conditions are reasonably similar across services. *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565-66 (6th Cir. 2014). Courts routinely hold (and parties concede) that the cluster of inpatient GAC services sold to commercial insurers and their members constitutes a relevant product market. *See, e.g.*, *Hershey*, 838 F.3d at 338; *Advocate*, 841 F.3d at 467-68; *ProMedica*, 749 F.3d at 565-66; *Rockford Mem'l*, 898 F.2d at 1284; *FTC v. OSF Healthcare Sys*., 852 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2012).[41]

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[38] *See* PX8000 (Dafny Rpt.) ¶ 129; [redacted]; PX7030 at 21-23; PX7016 at 217-18.

[39] *See* PX8000 (Dafny Rpt.) ¶¶ 130 & n.284, 683; *see also, e.g.*, [redacted].

[40] Because these services are not substitutable, each one technically constitutes a relevant product market. *See United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990).

[41] *See also* 2 John J. Miles, *Health Care and Antitrust Law* § 12:10 & n.10 (2020) (recognizing that in merger cases, "the many services offered by hospitals, although not substitutable for one another, have generally been 'clustered' into a single relevant product market," and collecting cases).

Here, the relevant service market is the cluster of inpatient GAC services offered by both Englewood and HMH's Bergen County hospitals.[42] There is extensive overlap among the services offered at HMH's Bergen County hospitals (HUMC and Pascack Valley) and Englewood. These overlapping services account for over 97% of the commercial admissions at each hospital, and these services are offered under similar competitive conditions to each other.[43] The inpatient GAC cluster market excludes outpatient services and services provided by specialty hospitals, such as long-term care, behavioral health, and rehabilitation services, because these services are offered by a different set of facilities from inpatient GAC services, and face different competitive conditions. PX8000 (Dafny Rpt.) ¶ 131.

b. Bergen County Is a Relevant Geographic Market

Bergen County is a relevant geographic market in which to analyze the Acquisition. A relevant geographic market is any area "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Philadelphia Nat'l Bank*, 374 U.S. at 357; *see also Advocate*, 841

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[42] While the FTC's market excludes services sold to Medicare Advantage ("MA") and managed Medicaid insurers, those services are likely to also be negatively impacted by the Acquisition.

[43] PX8000 (Dafny Rpt.) ¶¶ 130, 132, 682, Fig. 26 (analyzing overlapping services); [redacted]

F.3d at 469. Geographic markets do not reflect absolute limitations on competition because competition does not come to an abrupt stop at any particular geographic boundary. *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 669 (1974) ("[M]arkets need not—indeed cannot—be defined with scientific precision."); *Advocate*, 841 F.3d at 476 (explaining that geographic markets do "not need to include all of the firm's competitors"). Thus, an element of "fuzziness would seem inherent in any attempt to delineate the relevant geographic market," *Philadelphia Nat'l Bank*, 374 U.S. at 360 n.37, and "[w]hatever the market urged by the FTC, the other party can usually contend plausibly that something relevant was left out, that too much was included, or that dividing lines between inclusion and exclusion were arbitrary." *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 202 (D.D.C. 2018) (quoting 2B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 530d (4th ed. 2014)); *see also Advocate*, 841 F.3d at 476. Ultimately, "the relevant geographic market must be sufficiently defined so that the [c]ourt understands in which part of the country competition is threatened," in order for the FTC to satisfy its burden. *Sysco*, 113 F. Supp. 3d at 48-49; *cf. Merger Guidelines* § 4.

i. Bergen County Is an Important Area of Competition for Defendants and Insurers

The effect of the merger will be direct and immediate for commercial insurers serving members residing in Bergen County because Bergen County is the nexus of competition between the Defendants' hospitals. Both Englewood and

HMH's Bergen County hospitals, HUMC and Pascack Valley, focus on Bergen County patients and competitors. [redacted],[44] [redacted].[45] [redacted] PSAs also focus on Bergen County,[46] and [redacted] documents identify [redacted].[47] [redacted]

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[44] *See, e.g.*, [redacted]

[45] [redacted]; *see also* [redacted]

[46] [redacted]; *see also* [redacted]

[47] *E.g.*, [redacted]

[redacted][48] [redacted] Bergen County inpatient GAC hospitals likewise focus on Bergen County [redacted].[49]

Bergen County has a sizeable and affluent customer base—roughly 12% of New Jersey's commercially insured lives[50]—and thus is an area that insurers cannot and do not ignore.[51] Insurers' perspectives are critical to assessing the relevant geographic market, given they negotiate the terms under which commercial patients access inpatient GAC services. *Hershey*, 838 F.3d at 342; *Advocate*, 841 F.3d at 471. These negotiations are informed by the set of hospitals that residents in a geographic area view as reasonably close substitutes.[52]

Insurers must include access to Bergen County hospitals in their networks because Bergen County residents overwhelmingly prefer to receive inpatient GAC

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[48] P[redacted]; *see also* [redacted]

[redacted] *See* [redacted]

[49] [redacted]; [redacted]; PX7022 at 214-15; PX5007 ¶ 9.

[50] PX8000 (Dafny Rpt.) ¶ 145.

[51] *See, e.g.*, [redacted]; [redacted]; [redacted] at 84; PX8000 (Dafny Rpt.) ¶¶ 144-47.

[52] *See* PX8000 (Dafny Rpt.) ¶ 121; *see also* [redacted]; [redacted] *see also* [redacted]

services close to where they live.[53] Bergen County residents value convenience, are familiar with local hospitals, and wish to receive visits from friends and family during a hospital stay.[54] Bergen County's [redacted], each conducted studies—variously named [redacted]—modeling that volume lost at Bergen County hospitals is overwhelmingly gained at other Bergen County hospitals.[55] [redacted] confirmed that members want

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[53] PX8000 (Dafny Rpt.) ¶¶ 121, 138, Fig. 11 ("Among Bergen County residents, 63 percent of those seeking elective care and 73 percent of those requiring emergency care select a hospital within 20 minutes of their residential zip code."); [redacted] in Bergen County visited Bergen County hospitals for inpatient services); [redacted] percent of our members who live in Bergen County seek care in Bergen County").

[54] [redacted]

[55] [redacted] analysis of opportunities for HMH to [redacted] services [redacted] from local competitors in Bergen County); [redacted] predicting that [redacted] of commercial members [redacted] from [redacted] would visit another Bergen County hospital); [redacted] analysis of where patients would go if [redacted] was [redacted] from its network focused exclusively on three Bergen County hospitals, including [redacted]); [redacted] analysis of where patients would go if [redacted] focused exclusively on Bergen County hospitals); [redacted] analysis of where patients would go if [redacted] focused exclusively on Bergen County hospitals); *see also* [redacted] (During [redacted] negotiations with HMH, [redacted] identified three Bergen County hospitals as the only "alternative facilities" if [redacted] went out-of-network); [redacted] ("Hackensack Meridian has the dominant facility in Bergen County . . . and is under an agreement to purchase Englewood").

"convenience" and the increased ability to access "support from family or friends" that comes with seeking care close to home.[56]

All of this comports with good sense and commercial realities: most Bergen County residents would not accept an insurance plan that requires them to drive either into New York City—braving traffic, tolls, and parking challenges[57]—or into surrounding counties in New Jersey—requiring additional driving time to get to hospitals, many of which are perceived as lower quality[58]—to receive inpatient

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[56] [redacted]

[57] [redacted] ("[t]he toll to get into the City is upwards of 20 bucks now. Trying to navigate Manhattan and park in Manhattan and get the support you need from family and friends in Manhattan is very complex; very, very complex."); [redacted] ("[I]t's just a matter of the hassle factor defined as the commute, the added expense of the bridge, paying for parking possibly, either privately at a garage or at the hospital . . . going down to my local hospital which may be 10 minutes away versus I may have to go into New York City for maybe a 45-minute commute"); [redacted] ("[Y]ou are making me either cross the George Washington Bridge or go down and go through the Lincoln Town tunnel to get to Manhattan, why would I buy that"); [redacted] ("the caliber of services in Bergen County is increased over the years, their preference to stay here as opposed to the hassle of commuting into New York City—which can be pretty tiring, and draining, and time consuming in itself and expensive"), [redacted].

[58] [redacted] ("[t]he Hudson County hospitals are just generally community hospitals, probably with the exception of Jersey City Medical Center . . . they are generally providing a lower level of service than you can get at even the community hospitals in Bergen County . . . they are literally neighborhood hospitals"); *see also* [redacted] ("Jersey City, you could be looking at a 40-, 45 minute drive . . . getting there just to be the challenge, you know, again traffic and tolls and parking"); [redacted].

care.[59] *Cf. Advocate*, 841 F.3d at 476 ("The geographic market question asks, in essence, how many hospitals can insurers convince most customers to drive past to save a few percent on their health insurance premiums? We should not be surprised if that number is very small.").

It is not surprising that Horizon—HMH's joint venture partner and the largest commercial insurer in New Jersey—does not [redacted], and only members that purchase specific benefits plans [redacted].[60] Nor is it surprising that Atlantic, a large northern New Jersey health system with hospitals located in Morris, Sussex, Union, and Warren Counties, draws only about [redacted] of its inpatient admissions from Bergen County,[61] or that RWJ, which similarly lacks hospitals in Bergen County, has [redacted] (about a [redacted] share in Bergen County) and [redacted].[62]

Economic evidence confirms the commercial reality that residents of Bergen County overwhelmingly want access to inpatient GAC hospitals in Bergen County.

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59 [redacted]; see also [redacted]; accord [redacted].

60 [redacted].

61 [redacted].

62 [redacted].

According to Dr. Dafny's analysis, 77% of Bergen County resident hospital discharges were from hospitals in Bergen County.[63] Insurers' analysis of their own data accords.[64] In *Advocate*, when reversing the district court for improperly rejecting the FTC's market as too narrow, the Seventh Circuit explained that the fact that "73 percent of patients living in the plaintiffs' proposed market receive hospital care there" was "strong" evidence supporting the alleged market. 841 F.3d at 474; *see also Saint Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys., Ltd.,* 2014 WL 407446, at *7 (D. Idaho Jan. 24, 2014) (finding that "68% of Nampa residents" get relevant healthcare services in the proposed market).

ii. Bergen County Satisfies the Hypothetical Monopolist Test

"A common method employed by courts and the FTC to determine the relevant geographic market is the hypothetical monopolist test." *Hershey*, 838 F.3d at 338. Under this test, a geographic area is a relevant market if a hypothetical monopolist controlling all relevant services in that area could profitably implement a small but significant and non-transitory price increase ("SSNIP") because the additional profit from customers who remain outweighs the losses from customers

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[63] PX8000 (Dafny Rpt.) ¶ 140, Fig. 12.

[64] [redacted] ("So in the commercial space . . . in the neighborhood of [redacted] members who live in Bergen County seek care in Bergen County."). [redacted]

who leave.[65] *Hershey*, 838 F.3d at 338; *Advocate*, 841 F.3d at 468. In a hospital merger challenge, a market satisfies the hypothetical monopolist test if "payors would accept a price increase rather than excluding *all* of the hospitals in [Bergen County]" from the networks they use to sell insurance to residents of Bergen County. *Hershey*, 838 F.3d at 346; *see also St. Luke's*, 778 F.3d at 785.

Bergen County satisfies this test because [redacted] has testified that it cannot offer a marketable plan in Bergen County that does not include Bergen County hospitals.[66] Consequently, these insurers must accept a SSNIP from a hypothetical monopolist of *all* Bergen County hospitals to compete to sell insurance in Bergen County. The market reflects this commercial reality: no commercial insurer markets a plan in Bergen County without any Bergen County hospital in network today.[67]

Dr. Dafny's econometric analysis confirms that a hypothetical monopolist of Bergen County hospitals could raise price to insurers by at least a SSNIP. Dr. Dafny modeled the value of such a monopolist to insurers' networks and compared

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[65] A 5% price increase is often used in the analysis. *Hershey*, 838 F.3d at 338 n.1.

[66] [redacted]; [redacted]; [redacted].

[67] [redacted] (identifying no plans excluding New Jersey hospitals); [redacted]; [redacted]; [redacted] has always had at least one Bergen County hospital in its plan); *see also* PX8000 (Dafny Rpt.) ¶¶ 80-81, 83-84, 85, 88, 91 (describing commercial insurer networks for plans sold in Bergen County).

that value to the sum of the value of the individual hospitals/hospital systems in Bergen County today. PX8000 (Dafny Rpt.) ¶ 151, Fig. 13. This technique—called "willingness to pay" ("WTP") analysis—is well accepted in economic literature. *See* PX8000 (Dafny Rpt.) ¶ 117. It revealed a 65% increase in WTP for the monopolist's services, which equates to a price increase of far more than 5%, implying that an insurer would likely pay a SSNIP to a hypothetical monopolist of Bergen County hospitals rather than offer a plan that excludes all of them. PX8000 (Dafny Rpt.) ¶ 151, Fig. 13. Thus, Bergen County satisfies the hypothetical monopolist test.

c. Market Shares and Concentration Levels Far Exceed a Presumption of Illegality

Courts use basic metrics—market shares and the Herfindahl–Hirschman Index ("HHI")—to determine whether a merger should be presumed anticompetitive. *See, e.g.*, *Hershey*, 838 F.3d at 347 ("The Government can establish a prima facie case simply by showing a high market concentration based on HHI numbers."). Under these metrics, HMH's acquisition of Englewood easily exceeds the line of presumptive illegality. This remains true even using an approach to calculating market shares and HHIs that is—in this case—conservative and favorable to Defendants. The FTC's expert calculated market shares and HHIs using hospital discharges of Bergen County residents from hospitals both inside

and outside of Bergen County.[68] These metrics account for any hospitals Bergen County residents use, including NYC and other non-Bergen County hospitals by measuring what share of Bergen County residents these hospitals treat. Even using this conservative method, HMH's acquisition of Englewood creates an entity with a market share of roughly 47%.[69] This combined share far exceeds the Supreme Court's 30% market share threshold for a presumption of harm. *Philadelphia Nat'l Bank*, 374 U.S. at 364 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."); *FTC v. Swedish Match,* 131 F. Supp. 2d 151, 166 (D.D.C. 2000) ("[A] post-merger market share of thirty percent triggers the presumption.").

By contrast, in many hospital merger cases, market shares and HHIs are calculated using only discharges from the hospitals geographically located in the relevant market, but including patients residing outside the relevant market. *See, e.g.*, *Hershey*, 838 F.3d at 343. Here, that would mean limiting share calculations to only Bergen County hospitals and would result in HMH having an even higher post-Acquisition market share—over 65%.

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[68] PX8000 (Dafny Rpt.) ¶¶ 161, 163, 166, Fig. 15.
[69] PX8000 (Dafny Rpt.) ¶ 161, Fig. 15.

The Acquisition is also presumptively illegal based on the change in market concentration. Market concentration is a "useful indicator of the likely competitive, or anticompetitive, effects of a merger." *Hershey*, 838 F.3d at 346. Market concentration is measured by the HHI, which is calculated by summing the squares of the individual firms' market shares. *Id.* An acquisition is presumptively anticompetitive if it increases the HHI by more than 200 points and results in a market with a post-acquisition HHI exceeding 2,500. *Id.* Calculating HHIs using the conservative method, the HHI increase from HMH's acquisition of Englewood is 841—over four times the 200-point threshold—and yields a highly concentrated market of 2,835. Limiting the calculation to Bergen County hospital discharges, the HHI increase is 1,510 points, yielding a post-Acquisition HHI of more than 5,000.[70] This dramatic increase in market concentration well exceeds the threshold for triggering the presumption of illegality. *Id.*

[70] PX8000 (Dafny Rpt.) ¶¶ 164-65, 166, Fig. 16. Dr. Dafny also calculated market shares and concentrations based on case-weighted discharges, which place greater weight on more complicated and intensive services. *Id.* ¶ 160. These market shares and concentrations easily establish the presumption as well. *Id.* ¶¶ 161, 166, Figs. 15, 16.

Hospital/System	Market Shares/Concentrations based on Bergen County Residents		Market Shares/Concentrations based on Bergen County Hospitals	
	Pre-merger	Post-merger	Pre-merger	Post-merger
HMH	**35.6%**	**47.4%**	**50.9%**	**65.7%**
Englewood	**11.8%**		**14.8%**	
Valley	21.2%	21.2%	24.2%	24.2%
Holy Name	9.2%	9.2%	9.9%	9.9%
New Bridge	0.2%	0.2%	0.2%	0.2%
All other NJ hospitals	8.2%	8.2%	--	--
All other NY hospitals	13.9%	13.9%	--	--
Pre-merger HHI	1,994		3,492	
Change in HHI	**841**		**1,510**	
Post-merger HHI	**2,835**		**5,002**	

Source: PX8000 (Dafny Rpt.) ¶¶ 161, 166, Figs. 15, 16.

d. Additional Evidence Bolsters the Presumption of Illegality

The presumption of anticompetitive harm arising from post-Acquisition changes in market shares and concentration levels is strengthened by direct evidence and econometric analysis. *See, e.g.*, *Heinz*, 246 F. 3d at 717 ("the FTC's market concentration statistics are bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties"). The direct evidence shows that Defendants vigorously compete today and that HMH will raise prices after the merger. The econometric modeling confirms that the merged entity's increased bargaining leverage will lead to higher prices[71] in future hospital-insurer negotiations. PX8000 (Dafny Rpt.) ¶¶ 168-69.

[71] In antitrust law, the term "higher prices" is shorthand for any extraction of value, whether literally a higher price or some other onerous term. For example, in addition to securing high prices, HMH has used the leverage it already has to strongarm insurers into agreeing to [redacted]

i. The Acquisition Eliminates Close Competition between HMH and Englewood

[redacted] The loss of competition from two close competitors is likely to give the merged firm the ability to raise prices or reduce quality unilaterally. *See ProMedica*, 749 F.3d at 569; *H&R Block,* 833 F. Supp. 2d at 81; *Merger Guidelines* § 6. The reason for this is straightforward. Before an acquisition, each firm must take into account the sales it would lose to the other if it increases price or reduces quality. But after the acquisition, those sales are no longer "lost" because the two firms are one. Thus, the merged firm gains more by increasing price because more customers will remain in the face of a price increase. Anticompetitive effects of this sort are referred to as unilateral effects.[72]

The likelihood of unilateral effects turns on whether the firms are close competitors and thus "[t]he extent of direct competition between . . . the merging parties is central to the evaluation of unilateral effects." *ProMedica*, 749 F.3d at 569. Importantly, however, the firms need not be each other's closest or only competitors—for competitive harm to be likely, the portion of customers who view the merging firms as their top choices must constitute a "significant fraction" but

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[redacted]. *See, e.g.*, *infra* notes 111-14. The fact that an entity may prefer to use its leverage to secure such terms is of no moment to antitrust analysis.

[72] *See* PX8000 (Dafny Rpt.) ¶ 172 n.352.

"need not approach a majority". *Id.*; *see also United States v. Aetna*, 240 F. Supp. 3d 1, 43 (D.D.C. 2017) (substantial lessening of competition can occur "where the merging parties are not the only, or the two largest, competitors in the market").

ii. <u>Defendants View Each Other as Close Competitors</u>

The record is replete with evidence demonstrating that Defendants view their hospitals as close competitors in Bergen County. [redacted] "[redacted]. [redacted]"[73] [redacted][74] [redacted], [redacted][75] [redacted]

73 [redacted]

74 [redacted].

75 [redacted].

[redacted]

[redacted].”[76]

Likewise, when HMH evaluates competition for its Bergen County hospitals, it frequently identifies Englewood as a close competitor. A network-wide market share analysis examining [redacted][77] In 2018, [redacted] prepared a detailed [redacted].[78] Tellingly, [redacted] repeatedly testified [redacted].”[79]

Consistent with these views, [redacted],[80] [redacted],[81] and [redacted],[82] [redacted]

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76 [redacted]

77 [redacted]

78 [redacted].

79 [redacted] *see also* [redacted]

80 *See, e.g.*, [redacted]

81 *See, e.g.*, [redacted] comparing its Leapfrog scores to [redacted] and [redacted];

82 *See, e.g.*, [redacted];

[redacted]. [redacted] monitors even small changes in [redacted]: after [redacted] requested information [redacted][83] [redacted] also closely monitors "[redacted][84] and the source of the [redacted][85] from several service areas. In June 2018, [redacted] expressed concern about [redacted][86]

Defendants also closely each track each other's actions to assess the likely impact and their competitive responses. An [redacted] executive urged more ads for [redacted] in local media because [redacted]"[87] And Englewood opposed HMH's Certificate

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83 [redacted].

84 [redacted]

85 [redacted]; *see also* [redacted]

86 [redacted]; *see also* [redacted] 4; [redacted]

87 [redacted]

of Need ("CON") application to acquire and re-open Pascack Valley because [redacted].[88]

iii. Defendants' Customers View Them as Close Competitors

Insurers and a substantial number of their Bergen County members view the Defendants as close substitutes. The more the merging parties' customers view them as substitutes, the greater the unilateral effects. *ProMedica*, 749 F.3d at 569. Notably, however, "not every consumer in the relevant market must regard the products of the merging firms as her top two choices"; it is enough if a "significant fraction"—which "need not approach a majority"—holds such a view. *Id*.

Insurers looking to assemble health plan networks in Bergen County view HMH and Englewood as close competitors and important alternatives for their Bergen County members. According to [redacted], HMH is Englewood's "closest GAC inpatient competitor in Bergen County" because "HUMC is close to Englewood geographically and offers a similar set of GAC inpatient services."[89] [redacted] ordinary course analysis confirms this conclusion. [redacted] calculated that approximately [redacted] would go to an

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88 [redacted].

89 [redacted] (confirming accuracy of [redacted], and explaining that HMH is Englewood's closest competitor "just from a pure geographical distance perspective"); [redacted]

[redacted] if [redacted] was not in network.[90] [redacted] performed a similar analysis in [redacted], estimating that [redacted] of its inpatient volume at [redacted] would go to [redacted] if [redacted] were not in network.[91] [redacted] also performed [redacted] for [redacted], which assumed that if either of those hospitals were not in network, [redacted] would go to [redacted].[92] Even [redacted] admitted that HMH and Englewood [redacted] and HMH's Bergen County hospitals are [redacted] for Bergen County residents.[93] Defendants are also viewed as close competitors in the adjacent markets for inpatient GAC services sold to MA and managed Medicaid insurers.[94]

Insurers recognize the substitutability of HMH and Englewood in their plan network design. For example, in [redacted], meaning that plan members receive more lower out-of-pocket costs for using

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90 [redacted]

91 [redacted]

92 [redacted]).

93 [redacted] observed that "EHMC is under increased market pressure due to Hackensack University Medical Center's expanded growth.").

94 [redacted].

[redacted].[95] Analyses prepared for [redacted] [redacted] likewise reflect that [redacted] are substitutes.[96]

iv. Economic Analysis Confirms that Defendants are Close Competitors

Dr. Dafny tested the closeness of competition between Defendants by calculating what percentage of patients at each of Defendants' hospitals, if that hospital were no longer available, would turn to the other Defendant's hospitals. Courts routinely use these measures—called diversion ratios—to measure closeness of competition. *See, e.g.*, *Advocate*, 841 F.3d at 466; *H&R Block*, 833 F. Supp. 2d at 86-88; *St. Luke's*, 2014 WL 407446, at *10; *see generally Merger Guidelines* § 6.1.

Dr. Dafny's diversion analysis found that HMH is Englewood's closest substitute by a wide margin for patients in Bergen County. If Englewood were to become unavailable, roughly 45% of its Bergen County patients would seek care at an HMH hospital. PX8000 (Dafny Rpt.) ¶¶ 178, 692, Fig. 32. If HMH became unavailable, more than 17% of HMH's patients would seek care at Englewood, second only to Valley Hospital. *Id.* ¶ 178. Importantly, Dr. Dafny's analysis

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95 [redacted] also has a [redacted] MA network for which [redacted].

96 [redacted]

includes all hospitals where Bergen County patients seek care. Even when looking at all patients residing in a broader, four-county area,[97] HMH remains Englewood's closest substitute by a wide margin. If Englewood were to become unavailable, roughly 39% of its patients in this area would switch to an HMH hospital, with nearly 30% switching to HUMC.[98] Englewood is HMH's second closest substitute (11%), behind Valley Hospital (17%). *Id.* ¶ 177, Fig. 17. These results accord with ordinary course [redacted] analyses created by insurers.[99]

2. The Loss of Head-to-Head Competition Will Lead to Higher Healthcare Costs and Diminished Quality and Services

The Acquisition will eliminate important price and quality competition between Defendants. Defendants compete for inclusion in health insurer networks today, and the outcomes of those negotiations are a function of each party's bargaining leverage. Following the Acquisition, HMH's already substantial bargaining leverage in its negotiations with commercial insurers would increase because insurers would no longer have the option of contracting with Englewood if

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[97] Dr. Dafny conducted a conservative diversion analysis using the four-county area that included Bergen, Essex, Hudson, and Passaic Counties.

[98] PX8000 (Dafny Rpt.) ¶ 177, Fig. 17. The next closest hospitals are Valley and Holy Name, which are estimated to receive roughly 12% and 10% of Englewood's patients, respectively. *Id.* No other facility is predicted to receive even 5% of Englewood's patients. *See id.*

[99] [redacted]

they fail to reach an agreement with HMH, or vice versa.[100] The resulting rate increases from this greater bargaining leverage directly harms employers and their members by increasing their cost of care.[101]

Insurers recognize that the Acquisition will reduce competition and further enhance Defendants' bargaining leverage. Today, insurers that market to employers and individuals in Bergen County have the ability—whether express or implied—to threaten to reject proposals from Englewood if they can agree with HMH, and vice versa.[102] This ability to play HMH and Englewood off each other helps keep prices in check, benefiting employers and their members. *See, e.g.*, *St. Luke's*, 2014 WL 407446, at *10 ("A buyer has leverage if he has acceptable alternatives."). In particular, the Acquisition will permit HMH to demand higher rates from insurers, because a health plan excluding Englewood and the HMH hospitals is unlikely to be marketable to current or potential members, leaving insurers with little choice but to keep the merged entity in network.[103]

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[100] *See* PX8000 (Dafny Rpt.) ¶¶ 115-16, 197, 201.

[101] [redacted]

[102] [redacted] (when [redacted] has "a like facility in a nearby location with a good reputation," the availability of that "viable alternative" hospital would impact negotiations); [redacted] ([redacted] explaining that "the availability of like providers in our network" influences [redacted] negotiating leverage, and Englewood is the closest substitute for HUMC); [redacted].

[103] *See, e.g.*, [redacted]

[redacted] already uses its larger scale and market power to extract favorable rates and terms from insurers; and today [redacted].[104] In [redacted] contract negotiations, [redacted] succeeded in winning a [redacted] from [redacted] well above the [redacted] agreed to for other New Jersey systems like [redacted] (about a [redacted] and [redacted] (a [redacted]).[105] A [redacted] provider negotiation strategy document for [redacted] notes that "[redacted]" and recognizes that [redacted] is the "[redacted]"[106] Although [redacted] tries to limit [redacted] to [redacted], [redacted] was able to secure a [redacted] in its [redacted] contract negotiations. [redacted] also confirm that [redacted] rates are [redacted] than other providers', [redacted].[107]

Dr. Dafny's WTP analysis bolsters the conclusion that the Acquisition will result in increased prices. In addition to her WTP analysis examining a

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Luke's, 2014 WL 407446, at *10 ("The Acquisition adds to St. Luke's market power and weakens [insurers'] ability to negotiate with St. Luke's.").

104 [redacted]; *see also* [redacted]

105 [redacted]

106 [redacted].

107 [redacted].

hypothetical monopolist of Bergen County hospitals, Dr. Dafny calculated the increase in WTP from the Acquisition—i.e., the additional amount that an insurer would be willing to pay to avoid losing the merged entity from its network compared to the sum of the WTP for each merging party separately.[108] Dr. Dafny calculates that the Acquisition will increase the WTP for the merged system by 10.1%.[109] Using peer-reviewed methodologies, Dr. Dafny determined that a 10.1% increase in WTP corresponds to a 5.7% price increase, or a total of $31 million per year in higher claims costs.[110]

[redacted]. Almost every one of [redacted].[111] [redacted] has referred to [redacted] "[redacted]

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[108] PX8000 (Dafny Rpt.) ¶¶ 113, 117, 119, 195-96.
[109] PX8000 (Dafny Rpt.) ¶¶ 196.
[110] PX8000 (Dafny Rpt.) ¶ 197, Fig. 19. This calculation likely understates the Acquisition's harm to insurers and patients in two important respects. First, it is limited to commercial insurers, and therefore does not include harm to insurers offering Medicare Advantage and managed Medicaid plans. [redacted] Further, Dr. Dafny's estimate does not include harm from reductions in quality, and recent studies indicate that hospital mergers tend to diminish quality of care. *See* PX8000 (Dafny Rpt.) ¶¶ 197, 206-07. Indeed, evidence indicates [redacted]. *See, e.g.*,
[111] [redacted]; [redacted]; [redacted].

[redacted][112] [redacted]

[redacted].[113] [redacted] projects that HMH's acquisition of Englewood will have a [redacted], an increase [redacted] [redacted][114] As a second example, [redacted] also projects significant increases.[115]

Harm from the Acquisition is not limited to price increases. HMH and Englewood compete on other, non-price dimensions. This competition spurs innovation, and incentivizes Defendants to improve quality and services to attract more patients. For example, after [redacted] advertised its use of a new heart valve technology [redacted] an [redacted] physician wrote to ask why [redacted] [redacted]," and he expected to [redacted] [redacted].[116] [redacted] purchasing department responded that [redacted] [redacted]. [redacted]. [redacted] [redacted] [redacted] [redacted]

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112 [redacted]

113 [redacted]; [redacted] 2; [redacted]; [redacted] [redacted]; [redacted] [redacted]); [redacted].

114 [redacted]

115 [redacted] *see also* [redacted]

116 [redacted].

[redacted]. The Acquisition eliminates Defendants' incentives to compete to offer new, innovative technologies like these that enhance quality of care.

The importance of this competition was not lost on Defendants when Englewood decided to put itself up for sale. [redacted] merger team posited that [redacted][117] [redacted] and lead Acquisition negotiator wrote in March 2019 that [redacted][118] Similarly, in October 2019, an [redacted] executive sent internal talking points acknowledging [redacted] and [redacted]"[119]

3. Defendants Cannot Rebut the Strong Presumption of Illegality

a. Competition from Other Hospitals Does Not Rebut the FTC's Prima Facie Case

The three remaining inpatient GAC hospitals in Bergen County cannot

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117 [redacted].
118 [redacted].
119 [redacted]

sufficiently constrain HMH. Bergen New Bridge is a county-owned safety net hospital that devotes nearly all its beds to long-term care or behavioral health and substance abuse treatments, and currently has 0.2% market share.[120] Holy Name and Valley together have approximately 30% market share today,[121] and [redacted].[122] Based on past experience with HMH, [redacted].[123] [redacted].[124]

Defendants may claim that hospitals outside of Bergen County will prevent HMH from raising prices after the Acquisition, but these facilities have little to no competitive significance for GAC inpatient services in Bergen County today.[125] Further, even if a small subset of Bergen County residents are willing to travel to hospitals outside of Bergen County, the Third Circuit has already rejected the argument that proof that a minority of patients will "travel to a distant hospital to

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120 [redacted] 7; PX8000 (Dafny Rpt.) ¶¶ 161, 166, Figs. 15, 16.
121 PX8000 (Dafny Rpt.) ¶ 161, Fig. 15.
122 [redacted].
123
124 [redacted].
125 [redacted]; *see also* [redacted]

obtain care significantly constrain[s] the prices that the closer hospital charges to patients who will not travel to other hospitals." *Hershey*, 838 F.3d at 340-41; *see also Advocate*, 841 F.3d at 476 ("[T]he district court's reasoning and the silent majority fallacy share a critical flaw: they focus on the patients who leave a proposed market instead of on hospitals' market power over the patients who remain."). Finally, Dr. Dafny's analyses confirm that distant competition from hospitals outside of Bergen County is limited and will not prevent a meaningful price increase by HMH post-Acquisition.[126]

b. Entry Will Not Be Timely, Likely, or Sufficient to Counter the Harm to Competition

No new entry or expansion by a competitor will offset the harm from the Acquisition. To establish an entry defense, "Defendants bear the burden of demonstrating the ability of other [firms] to 'fill the competitive void' that will result from the proposed merger." *Sysco*, 113 F. Supp. 3d at 80. And they must show that such entry or expansion in response to the merger will be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern." *Sanford*, 926 F.3d at 965 (quoting *Merger Guidelines* § 9). The "relevant timeframe" for consideration is "two to three years." *Wilhelmsen*, 341 F. Supp. 3d at 67. A finding of "high entry barriers

[126] PX8000 (Dafny Rpt.) ¶¶ 161, 177, 221-22, 224-27 Figs. 15, 20-21.

'eliminates the possibility that the reduced competition caused by the merger will be ameliorated by new competition from outsiders and further strengthens the FTC's case.'" *St. Luke's*, 778 F.3d at 788 (quoting *Heinz*, 246 F.3d at 717).

Here, barriers to entry for inpatient GAC services in Bergen County are high, making timely, likely, and sufficient entry infeasible. Hospital construction is exceptionally expensive and time consuming.[127] Further, there are significant regulatory hurdles, including obtaining a CON, to opening an inpatient GAC hospital in New Jersey, which increase the time and cost of entry and may preclude entry entirely.[128] Moreover, even if hospital systems outside Bergen County opened new ambulatory care or outpatient facilities in Bergen County, this would not sufficiently constrain HMH, as such facilities do not to shift meaningful inpatient GAC volume outside of Bergen County.[129] In sum, HMH will not be disciplined in exercising its post-Acquisition bargaining leverage by a fear of entry or expansion.

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[127] [redacted]

[128] *See* PX9018; [redacted]

[129] *See* PX8000 (Dafny Rpt.) ¶¶ 177, 217-22, Figs. 17, 20, App. F; [redacted] explaining that its outpatient facilities in New Jersey do not drive significant "general services" volume to its New York hospitals).

c. Any Potential Efficiencies Are Not Cognizable or Sufficient to Prevent Harm from the Acquisition

The Third Circuit has "never formally adopted the efficiencies defense." *Hershey*, 838 F.3d at 347. "Neither has the Supreme Court." *Id.* Even if an efficiencies defense applies, Defendants cannot meet its stringent requirements. As the Third Circuit explained in *Hershey*:

> In order to be cognizable, the efficiencies must, first, offset the anticompetitive concerns in highly concentrated markets. Second, the efficiencies must be merger specific—meaning, they must be efficiencies that cannot be achieved by either company alone. . . . Third, the efficiencies must be verifiable, not speculative, they must be shown in what economists label real terms. Finally, the efficiencies must not arise from anticompetitive reductions in output or service.

Id. at 348-49; *see also Merger Guidelines* § 10. Here, any potential efficiencies would be neither cognizable nor sufficient to prevent harm from the Acquisition.

Defendants have not identified [redacted][130] Defendants' primary justification for the Acquisition is that [redacted].[131] Even if such a benefit

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[130] *See, e.g.*, [redacted]; PX7020 at 69-70; [redacted]

[131] *But see* [redacted]

were realized, it would not be merger specific. To the extent [redacted], it is part of a large hospital system that has many options [redacted] besides acquiring a close competitor. Finally, Defendants have not substantiated the claims necessary to credit their argument.

Defendants will likewise be unable to demonstrate that the Acquisition will yield non-speculative, merger-specific quality benefits. Englewood is already a high-quality hospital that provides excellent, award-winning tertiary care, often outperforming HMH hospitals on publicly reported metrics.[132] To the extent that Englewood would benefit from greater resources or participation in a broader health system, it does not need this anticompetitive Acquisition. It can achieve the same benefits through a merger with one of its multiple other bidders.[133]

B. The Equities Heavily Favor a Preliminary Injunction

Once the FTC demonstrates a likelihood of success, "the Hospitals face a difficult task in justifying the nonissuance of a preliminary injunction." *Hershey*, 838 F.3d at 352. "Where the FTC has demonstrated a likelihood of success on the

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[132] *See, e.g.*, PX9035-006 (more Englewood patients receive "appropriate care for severe sepsis and septic shock" than HMH patients), -013-15 (fewer Englewood patients get central line infections, catheter-associated infections, surgical site infections, MRSA infections, and C.diff infections than HMH patients); PX9029 (showing Englewood's various awards); PX7020-183-84; PX9042; PX9043.

[133] [redacted].

merits, no court has denied a Section 13(b) motion for a preliminary injunction based on weight of the equities." *Sanford*, 2017 WL 10810016, at *31.

In weighing the equities, the Court must assess "whether the harm that the Hospitals will suffer if the merger is delayed will, in turn, harm the public more than if the injunction is not issued." *Hershey*, 838 F.3d at 352. "The principal equity weighing in favor of issuance of the injunction is the public's interest in effective enforcement of the antitrust laws." *Id.* If the Acquisition is consummated, and the administrative proceeding then rules it unlawful, the FTC's ability to preserve competition will be severely impaired because Defendants will share sensitive information and combine their operations, making it "extraordinarily difficult to unscramble the egg." *Id.* at 352-53; *see also Heinz*, 246 F.3d at 727.

Defendants cannot offer any equities that override the public equities favoring relief. Although "private equities may be considered, they are not to be afforded great weight." *Id.* at 352. Any benefits of the Acquisition identified by Defendants will still be available after the administrative proceeding. There is no reason why, "if the merger makes economic sense now, it would not be equally sensible to consummate the merger following an FTC adjudication." *Id.* at 353.

CONCLUSION

For the reasons set forth above, the FTC respectfully requests that the Court preliminary enjoin HMH's acquisition of Englewood.

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Respectfully Submitted,

s/ Jonathan Lasken

JONATHAN LASKEN
EMILY BOWNE
LINDSEY BOHL
ELIZABETH ARENS
NATHAN BRENNER
CHRISTOPHER CAPUTO
NANDU MACHIRAJU
CHRISTOPHER MEGAW
SUSAN MUSSER
HARRIS ROTHMAN
ANTHONY SAUNDERS
CATHLEEN WILLIAMS

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2604
Email: jlasken@ftc.gov

Attorneys for Plaintiff Federal Trade Commission