No. 16-2365

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION *et al.*,
Appellants,

v.

PENN STATE HERSHEY MEDICAL CENTER *et al.*,
Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
No. 1:15-cv-2362 Hon. John E. Jones III

BRIEF OF THE FEDERAL TRADE COMMISSION AND THE COMMONWEALTH OF PENNSYLVANIA

BRUCE L. CASTOR, JR.
Solicitor General

BRUCE BEEMER
First Deputy Attorney General

JAMES A. DONAHUE, III
Executive Deputy Attorney General

TRACY W. WERTZ
Chief Deputy Attorney General

JENNIFER THOMSON
AARON SCHWARTZ
Attorneys
PENNSYLVANIA OFFICE OF THE
ATTORNEY GENERAL
Harrisburg, PA 17120

DAVID C. SHONKA
Acting General Counsel

JOEL MARCUS
Director of Litigation

DEBORAH L. FEINSTEIN
MICHELE ARINGTON
WILLIAM H. EFRON
JARED P. NAGLEY
GERALYN J. TRUJILLO
RYAN F. HARSCH
JONATHAN W. PLATT
PEGGY BAYER FEMENELLA
Attorneys

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3157

TABLE OF CONTENTS

Table of Authorities ... iii

Glossary ... vi

Jurisdiction ... 1

Question Presented ... 1

Statement of Related Cases and Proceedings ... 2

Statutes and Regulations ... 2

Statement of the Case ... 2

A. The Proposed Merger ... 3

B. Economics Of Insurer/Hospital Price Negotiations ... 5

C. The Harrisburg Market ... 9

D. Presumption That The Merger Is Anticompetitive ... 19

E. The District Court's Order ... 21

Summary of Argument ... 24

Standard of Review ... 29

Argument ... 31

I. The Government Is Likely To Succeed On The Merits ... 33

A. The District Court Failed To Properly Formulate And Apply The Test For Defining A Geographic Market. ... 35

1. The District Court Ignored The Commercial Reality Of The Hospital Market. ... 36

2. The District Court Failed To Assess Whether Pinnacle Could Impose A SSNIP ... 42

3. The District Court Improperly Based Its Geographic Market Analysis On Defendants' Temporary Price Protection Agreements with Two Insurers. 43

B. The District Court's Assessment Of The "Equities" Cannot Justify The Merger. 47

1. Defendants' Plan to Reduce Capacity By Foregoing Construction Of Additional Facilities Is Neither An Efficiency Nor An "Equity." 49

2. The District Court Improperly Analyzed Defendants' Risk-Based Contracting Claim. 52

3. "Repositioning" By Other Hospitals Will Not Negate The Anticompetitive Effects Of The Merger. 54

4. The Affordable Care Act Does Not Justify Anticompetitive Mergers. 56

5. The District Court Regarded Healthy Hospitals As If They Were Failing Firms. 57

II. The Equities Favor An Injunction 58

Conclusion 62

Certificate Of Compliance

Certificate of Identical Compliance of Briefs

Certificate of Performance of Virus Check

Certificate of Service

TABLE OF AUTHORITIES

CASES

A.J. Canfield Co. v. Honickman,
808 F.2d 291 (3d Cir. 1986)....................31

Allen-Myland, Inc. v. International Business Machines Corp., 33 F.3d 194 (3d Cir. 1994)....................30

American Home Prods. Corp. v. Barr Labs., Inc.,
834 F.2d 368 (3d Cir. 1987)....................30

Atlantic Exposition Servs. Inc. v. SMG,
262 F. App'x 449 (3d Cir. 2008)....................17

Borough of Lansdale v. Phila. Elec. Co.,
692 F.2d 307 (3d Cir. 1982)....................30

Boulware v. Nevada, 960 F.2d 793 (9th Cir. 1992)....................57

Brown Shoe Co., Inc. v. United States,
370 U.S. 294 (1962).................... 31, 35, 37

California v. American Stores Co., 495 U.S. 271 (1990)....................31

FTC v. Arch Coal, 329 F. Supp. 2d 109 (D.D.C. 2004).................... 54, 55, 59

FTC v. Cardinal Health,
12 F. Supp. 2d 34, 67 (D.D.C. 1998)....................44

FTC v. CCC Holdings, Inc.,
605 F. Supp. 2d 26 (D.D.C. 2009).................... 54, 56, 59

FTC v. Elders Grain, Inc., 868 F.2d 901 (7th Cir. 1989).................... 32, 46

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001)...... 23, 32, 33, 48, 58, 59, 61

FTC v. OSF Healthcare Sys.,
852 F. Supp. 2d 1069 (N.D. Ill. 2012).................... 36, 40, 58, 61

FTC v. ProMedica Health Sys., Inc.,
No. 3:11-CV-47, 2011 WL1219281....................58

FTC v. ProMedica Health Sys., Inc.,
WL 1219281 (N.D. Ohio Mar. 29, 2011)....................50

FTC v. Swedish Match,
131 F. Supp. 2d 151 (D.D.C. 2000) 55

FTC v. Sysco, 113 F. Supp. 3d 1 (D.D.C. 2015) 55

FTC v. Univ. Health, 938 F.2d 1206 (11th Cir. 1991) 59

FTC v. Whole Foods Market, Inc.,
548 F.3d 1028 (D.C. Cir. 2008) 59

In re Evanston, 2007 WL 2286195 .... 36, 40

Lame v. U.S. Department of Justice,
767 F.2d 66 (3d Cir. 1981) 30

Little Rock Cardiology Clinic PA v. Baptist Health,
591 F.3d 591 (8th Cir. 2009) 22

McTernan v. City of York, 577 F.3d 521 (3d Cir. 2009) 30

Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010) 30

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 57

Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pa., 745 F.2d 248 (3d Cir. 1984) 35

ProMedica Health Sys., Inc. v. FTC,
749 F.3d 559 (6th Cir. 2014) 7, 8, 36

Queen City Pizza v. Domino's Pizza,
124 F.3d 430 (3d Cir. 1997) 45

Sabinsa Corp. v. Creative Compounds, LLC,
609 F.3d 175 (3d Cir. 2010) 31

Shire U.S., Inc. v. Barr Labs., Inc.,
329 F.3d 348 (3d Cir. 2003) 30, 37, 39

St. Alphonsus Medical Center v. St. Luke's Health System, 778 F.3d 775 (9th Cir. 2015) 7, 17, 36, 37, 40, 41, 48

United States v. 6.45 Acres of Land,
409 F.3d 139 (3d Cir. 2005) 30

United States v. Dentsply Int'l, Inc.,
399 F.3d 181 (3d Cir. 2005) 35

United States v. El Paso Natural Gas Co.,
376 U.S. 651 (1964) 31

United States v. H & R Block, Inc.,
833 F. Supp.2d 36 (D.D.C. 2011) 48

United States v. Philadelphia Nat'l Bank,
374 U.S. 321 (1963) 6, 20, 35

United States v. Roman, 121 F.3d 136 (3d Cir. 1997) 30

Verizon Comms. v. Law Offices of Curtis V. Trinko,
540 U.S. 398 (2004) 37

White & White, Inc. v. American Hospital Supply Corp.,
723 F.2d 495 (6th Cir. 1983) 31

STATUTES

15 U.S.C. § 18 .... 2, 24, 31

15 U.S.C. § 26 .... 1, 32

15 U.S.C. § 53(b) 1, 3, 24, 32

28 U.S.C. § 1291 1

28 U.S.C. § 1292 1

42 U.S.C. § 18118 57

OTHER AUTHORITIES

U.S. Dep't of Justice & Federal Trade Commission,
Horizontal Merger Guidelines 17, 20, 37, 42, 45, 48, 50, 54, 58

RULES

Local Appellate Rule 28.1(b) 30

GLOSSARY

For ease of reference, the following abbreviations and citation forms are used in this brief:

App.	Appellants' appendix
PX	Plaintiffs' exhibit
Hrg.	Transcript of testimony from preliminary injunction hearing

JURISDICTION

The district court had jurisdiction over the FTC's request for a preliminary injunction to preserve the status quo under 15 U.S.C. § 53(b), and over Pennsylvania's request for a preliminary injunction under 15 U.S.C. § 26. The district court entered the order under review on May 9, 2016 (App. 4), and the Government plaintiffs filed a notice of appeal the following day (App. 1). This Court has jurisdiction because the order under review is final and disposed of all issues presented, 28 U.S.C. § 1291, and because the lower court denied an injunction, 28 U.S.C. § 1292(a)(1).

QUESTION PRESENTED

The Government plaintiffs sought a preliminary injunction blocking the merger of the two largest health systems in the Harrisburg, Pennsylvania area while the FTC conducts an administrative adjudication to determine whether the merger violates the antitrust laws. The hospitals are close rivals for inclusion in insurance company healthcare networks, and together they would control nearly 80 percent of the market for general acute care inpatient services sold to commercial health insurers in the Harrisburg area. The questions presented are:

1. Whether the district court improperly determined that the Government did not show that the four-county area around Harrisburg is a proper antitrust geographic market; and

2. Whether the district court improperly assessed the "equities" of the merger in declining to preliminarily enjoin it.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before the Court previously. An administrative proceeding challenging the merger and related directly to this case is pending before the Federal Trade Commission in FTC Docket No. 9368.

STATUTES AND REGULATIONS

Pertinent materials are attached.

STATEMENT OF THE CASE

This is an antitrust case under Section 7 of the Clayton Act, 15 U.S.C. § 18, involving the merger of the two largest hospital systems in the area around Harrisburg, Pennsylvania. The hospitals have long been close competitors, but in 2015 they decided to stop competing and agreed to combine into a single economic entity. The Federal Trade Commission found reason to believe that the merger would significantly reduce competition in the Harrisburg-area hospital market, and its Commissioners voted unanimously to issue an administrative complaint to block the merger. That matter will be tried before an agency administrative law judge later this year.

In the meantime, the FTC and the Commonwealth of Pennsylvania asked the district court below to issue a preliminary injunction preventing the merger from closing before the administrative adjudication is complete. Recognizing the need

to protect consumers from competitive harm until the adjudication is finished and to preserve the FTC's ability to secure effective relief if the merger is held unlawful, Congress authorized district courts to grant preliminary injunctions temporarily barring mergers in this type of case. 15 U.S.C. § 53(b).

The Government alleged that the merger will substantially lessen competition in the market for general acute care inpatient hospital services sold to commercial insurers in the Harrisburg, Pennsylvania area. The combined hospital systems would control 76% of the market, dramatically increasing their bargaining power over health insurers and enabling them to raise prices and reduce output, while reducing their incentives to improve patient care and service.

After a five-day hearing, at which 15 witnesses testified and numerous exhibits were introduced, the district court denied the Government's request for a preliminary injunction. The FTC and Pennsylvania appeal from that order. On May 24, 2016, this Court granted the Government's motion for an injunction pending appeal.

A. The Proposed Merger

Hershey and Pinnacle operate the two largest hospital systems in the four county area surrounding Harrisburg, which includes Dauphin, Cumberland, Perry, and Lebanon counties. Those counties have a combined population of almost

700,000. PX01062-37-38.[1] Hershey, which commands a 36 percent share of inpatient hospital services in the four-county area, owns the Penn State Milton S. Hershey Medical Center in Dauphin County, a 551-bed facility. Pinnacle, with a 40 percent share, operates three hospitals in the Harrisburg area, including two in Dauphin County, with a combined 646 beds. Defendants operate the only hospitals in Dauphin County, where the city of Harrisburg is located. The next largest hospital, Holy Spirit, located in Cumberland County, has a 15 percent market share. Each of the two remaining hospitals in the four-county area has a share of 5 percent or less. PX01062-21, 28, 116.

Pinnacle and Hershey offer an extensive range of inpatient hospital treatment and provide almost entirely overlapping services. PX01062-127-131. Approximately 98% of Hershey's patients could be treated at Pinnacle, and nearly all of Pinnacle's patients could be treated at Hershey. PX01062-131; Hrg. 334:17-21 (App. 81). Both hospitals are sophisticated health systems with teaching hospitals that offer highly complex treatments and innovative medical technology. Hrg. 523:15-530:12; PX00280-002; PX00027-081; PX00030-128; PX00253-009; PX00379-002-06.

[1] PX01062 is the report of the Government's expert economist, Dr. Nathan Wilson. PX01424 is his Rebuttal Report.

B. Economics Of Insurer/Hospital Price Negotiations

1. Understanding the competitive dynamics of hospital markets is essential for assessing the competitive effects of a hospital merger. Unlike the typical two-party market, the market for hospital services has four participants: *hospitals*, which provide healthcare services; *health insurance companies*, which negotiate the prices of hospital services and market health plans to employers and their employees; *employers*, who select among the competing health plans offered by insurance companies; and *employees*, who are the ultimate consumers of service and decide which hospital to use.[2]

Those four participants engage in a complex relationship. Because insurers compete with one another to sell policies, they must offer attractive health plans. Whether a policy is attractive depends not only on its price, but also on the desirability of the service providers, including hospitals, in the insurance "network." The network is the group of healthcare providers that have agreed to treat the insurer's policyholders at negotiated prices. Those prices are usually significantly lower than the prices charged by providers outside of the insurer's network. Insurers thus strive to assemble a desirable network at the lowest cost.

---

[2] We refer to employees as "policyholders," "consumers," and "patients" interchangeably. Insurance companies were referred to below as "payors."

Hrg. 305:12-22, 306:14-20 (App. 65-66); PX01062-55, 58-60, 65, 75; PX01424-061.

Because insurers rather than policyholders negotiate prices, they are the hospitals' direct customers. PX01062-59-60; Hrg. 306:10-13 (App. 66). Once the price that an insurer will pay a hospital for service has been established, policyholders who need hospital care typically face no significant price difference between in-network hospitals. PX01062-59-60. Instead, hospitals compete for their business on the basis of quality and convenience. In particular, patients typically demand access to local care. A hospital's proximity to policyholders therefore is a core consideration for insurers when assembling their provider network. PX01062-64-65, 93; PX01424-61; Hrg. 315:13-20, 320:11-22 (App. 72, 76). The Supreme Court has recognized that "in most service industries, convenience of location is essential to effective competition." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 358 (1963).

At the same time, hospitals compete to be included in insurance company networks. Insured patients rarely choose providers outside their health plan's network. Health plans typically either do not cover the cost of out-of-network care at all or require patients to bear a significantly larger share of it. Thus, a hospital that is not included in an insurance company's network is likely to lose access to virtually all of that insurer's policyholders. Competition between hospitals leads to

both lower prices (as described immediately below) and to improvements in quality of care and service to patients. PX01062-55,68-69; Hrg. 305:23-306:09, 309:03-06 (App. 65-67).

2. Prices are negotiated between each hospital and health insurance company. Like any business deal, both sides have some amount of bargaining power, or "leverage," and the agreement reached depends on the relative strengths of that leverage. Leverage ultimately is a function of a party's ability to walk away from the negotiation and refuse to do business with its negotiating partner. Thus, in bargaining over hospital prices, if the hospital demands too high a price and the insurer abandons the negotiation, the hospital will lose access to most of that insurer's members. Hrg. 309:12-25 (App. 67). Conversely, if the insurer insists on an unacceptably low price and the hospital walks away, the insurer will be unable to include the hospital in its network and must offer a policy that does not cover the hospital. A hospital's leverage thus depends on how important it is to the insurer's network, which reflects both patient preferences for the hospital and the availability of desirable alternative substitute hospitals. PX01062-65-67; Hrg. 309:12-311:20 (App. 67-69). *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).

Greater hospital competition leads to lower hospital prices. The more hospitals that compete for inclusion in insurance networks, the more an insurer can plausibly substitute one hospital for the other when forming its network and the stronger its ability to resist price increases. PX01062-067-71; Hrg. 309:22-310:11 (App. 67-68); *see ProMedica*, 749 F.3d at 562. Competition between hospitals thus constrains their prices, which allows insurers to charge lower premiums, co-payments, and deductibles to employers and their employees. PX01062-55. And, as mentioned, competition between hospitals also spurs them to improve quality of care.

But less competition among hospitals for inclusion in insurance networks increases the hospital's leverage, leading to higher prices, higher policy costs, and lower quality of care. Hrg. 339:19-341:6 (App. 82-84); PX01062-73-76. An insurer facing a hospital with superior bargaining leverage will agree to pay higher prices because doing so is preferable to marketing a network that lacks the hospital. When hospitals that formerly competed for inclusion in the network merge, it diminishes the insurer's bargaining position. PX01062-65-67.

3. The record showed that the bargaining model described above accurately depicts the commercial reality of the Harrisburg market. Through sworn declarations and deposition testimony, area insurers repeatedly confirmed that the outcome of price negotiations turns on their relative bargaining leverage with

hospitals. The declaration of one area insurer, for example, stated that a hospital's leverage "is largely determined by the extent to which [policyholders] demand to receive care at that hospital." PX00701 ¶¶15-17 (App. 268-269). The insurer's leverage in turn depends on "how many competing providers are located in a particular area." *Id.* ¶15. Where alternatives are limited, "a [hospital] is generally able to negotiate higher reimbursement rates … because [it] could credibly threaten to terminate its contract with [insurer], which would result in [insurer] having a significantly less attractive network to offer to members." *Id.* ¶17. Other insurance company executives testified to the same effect. PX00700 ¶5; PX00704 ¶¶4-5; PX01062-076-78; PX01236, 38:10-40:15 (App. 490). One testified that the availability of competing hospitals affects a hospital's leverage because it determines the credibility of an insurer's threat "to walk away from a negotiation and yet still market an attractive network at competitive rates." PX00707 ¶16. Defendants do not disagree. *See* PX01382-004 (App. 515) (discussed in greater detail at page 15 below).

C. The Harrisburg Market

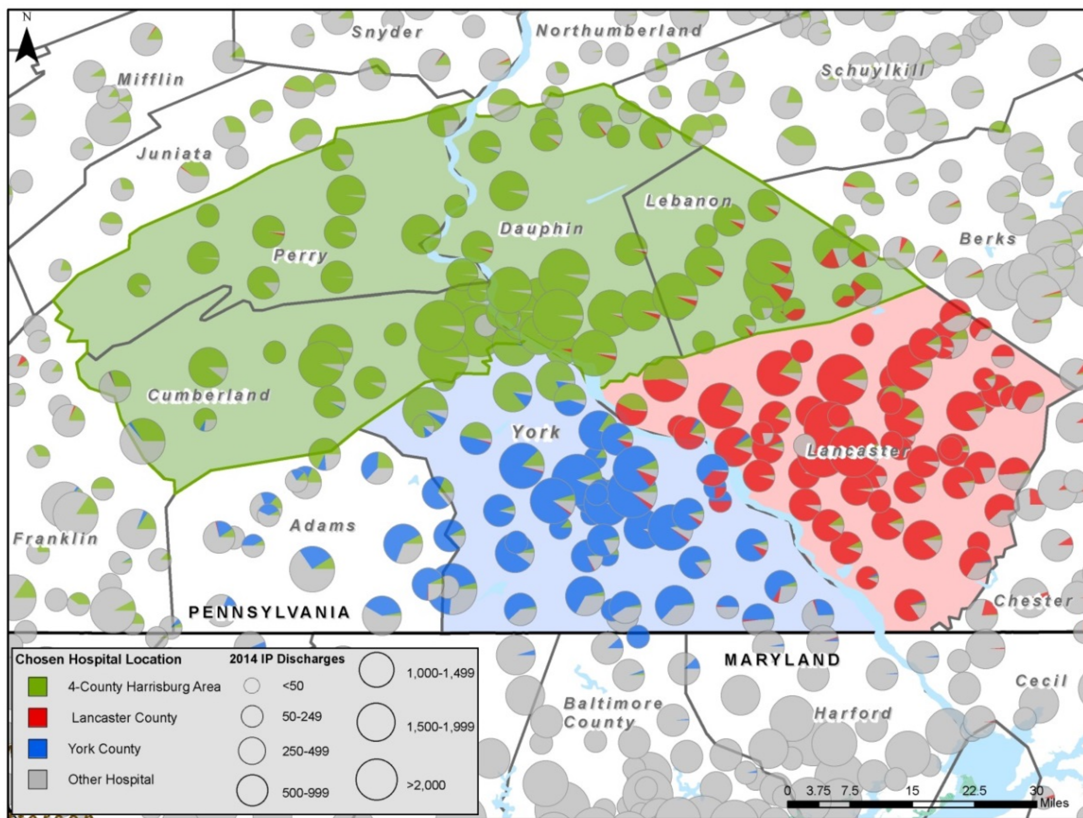
Hershey and Pinnacle compete against each other both for patients and for inclusion in insurers' hospital networks. Pinnacle's CFO testified that they compete closely on quality, price, and range of services offered. Hrg. 537:7-10, 540:17-541:8, 541:20-542:4 (App. 116-119). Indeed, Pinnacle identified Hershey

as "our main competitor," PX00527-001, and Hershey described Pinnacle as a "primary competitor," PX00140-008. Pinnacle indicated that the two systems "aggressively compete." PX00037-008. Other of defendants' documents and testimony show aggressive competition across a wide range of services including cancer treatment, PX00039-006; heart surgery, PX00940-001; breast surgery, PX00327-001-2; PX01473-001; and kidney transplants, PX01202, 74:5-13. As the hospitals' own expert testified, the evidence showed a "local rivalry" for cancer treatment and kidney transplants that is "particularly hot." PX01232, 252:25-255:18.

1. The two hospitals are especially close rivals in the Harrisburg area because consumers in the Harrisburg area overwhelmingly demand hospital care close to their homes. The evidence showed that 91% of Harrisburg area patients sought care at hospitals located in the four-county area, with a median travel time of 15 minutes. Hrg. 315:12-20, 319:22-320:22 (App. 72, 75-76); PX01062-97-102, 120. By contrast, the largest hospitals in York and Lancaster counties, which are each 30 to 45 minutes away, collectively provide care to fewer than 2 percent of Harrisburg area patients. PX01062-043, 122.

An economic analysis performed by the Government's expert graphically shows the strong preference of Harrisburg area patients for local hospitals. The chart below shows by color where patients who live within a given zip code go for

hospital care (each circle represents one zip code, and its size indicates the insured population). It indicates clearly that patients living in the Harrisburg area (shown in green) overwhelmingly prefer to receive care in hospitals inside the area. Similarly, residents of York (shown in blue) and Lancaster (shown in red) counties overwhelmingly receive care at hospitals in their own home counties.



Source: 2014 commerical discharges from the Pennsylvania Health Care Cost Containment Council (PHC4) and the Maryland Health Services Cost Review Commission (MD HSCRC).

PX01062-99-101. Put simply, patients use hospitals close to home.

Defendants' own analyses reached the same conclusion. A survey they conducted showed that 92% of Central Pennsylvania residents would go either to the closest or to a very convenient hospital to receive non-life threatening care, and

that convenient location was consumers' most important factor in selecting a hospital. Hrg. 320:16-321:16 (App. 76-77); PX01360-024 (App. 511).

Similarly, Hershey's CEO testified that the desire for local care is a "big determinant in people's choice of health care." Hrg. 474:7-10 (App. 100). Pinnacle's CFO testified likewise. Hrg. 521:17-522:6 (App. 106-107). Indeed, the President of PinnacleHealth's Medical Group said in an email that most Central Pennsylvania patients would not travel more than 10 miles or 20 minutes from home to receive hospital care. PX01277-001.

Area insurers also consistently affirmed that residents in the Harrisburg area strongly prefer to go to local hospitals. The director of provider contracting for one insurer stated that most of its Dauphin County policyholders used either Pinnacle or Hershey "[b]ecause of the proximity of these two quality health systems," and that "very few members who live in Dauphin County travel outside the county for general acute services." More broadly, "the vast majority of [insurer's] members in the four-county Harrisburg area utilize health systems locat[ed] within this area, with few members leaving for general acute care." PX00701 ¶¶7-8 (App. 266); *see also* PX00707 ¶9; PX00700 ¶¶12-13. The demand for local hospital care was further confirmed by the testimony of a former Harrisburg area hospital CEO explaining that most patients in Dauphin County receive care at either Pinnacle or Hershey. Hrg. 90:11-16 (App. 36).

The strong preference among Harrisburg-area residents for Hershey and Pinnacle specifically was confirmed by defendants' own brand study, which concluded that Pinnacle's Harrisburg Hospital "leads or is second to Penn State Hershey in the Primary market," which the study defined as the Harrisburg area. PX01360-11 (App. 510).

2. Because Harrisburg residents demand local hospital service, insurance company networks are marketable to them only if the network provides access to Harrisburg-area hospitals. Employers in the Harrisburg area provided sworn declarations that both they and their employees will consider using a health plan only if its provider network includes local hospitals.[3] Insurance company representatives recognize this strong preference and consistently affirmed the need to include local hospitals in their networks. PX00704 ¶¶6-8, 11; PX00707 ¶4; PX00701 ¶¶7-8 (App. 266-267).

A natural experiment described at the hearing vividly illustrates the need for either Hershey or Pinnacle in an insurance network marketed to Harrisburg-area employers. For more than a decade, one small insurer successfully marketed policies to those employers that included Pinnacle and Holy Spirit, but not Hershey, in the network. PX00704 ¶10; Hrg. 208:25-209:11 (App. 51-52). In

[3] PX00708 ¶¶5, 9; PX00717 ¶¶8, 13; PX00718 ¶¶5, 7, 10; PX00719 ¶¶5, 11; PX00720 ¶4.

2014, Pinnacle terminated its participation in the insurer's network. PX01533-001; Hrg. 209:18-210:13 (App. 52-53). Once Pinnacle withdrew, half of its commercial policyholders switched to other insurers even though its network included Holy Spirit and large hospitals in York and Lancaster counties and the insurer offered a substantial discount. PX01542; PX01608; Hrg. 223:20-226:19 (App. 54-57); PX01610; PX00704 ¶10. Brokers opined that the network without Hershey and Pinnacle was unmarketable at any price point. PX00704 ¶10; PX00708 ¶¶ 7-13; Hrg. 225:15-226:19 (App. 56-57).

The experience of that small insurer was confirmed by the two largest ones in the Harrisburg area. Their representatives testified at depositions that they too could not successfully market a network without either Hershey or Pinnacle. One stated that without the two hospitals, "[f]or all intents and purposes there would be no network." PX01236, 48:17-22 (App. 491). He predicted that a network without defendants' hospitals would lose half its membership in Dauphin County. PX01236, 144:6-16 (App. 494).

His counterpart at the other large insurer testified similarly. Asked, "When you market a plan in the Harrisburg area, would you need to include a combined Hershey and Pinnacle in your network to successfully market it?" he answered simply, "Yes." PX00804, 64:13-20 (App. 317). That testimony establishes that

even the largest insurers in the Harrisburg area would not try to sell a network that includes neither Hershey nor Pinnacle.

3. The evidence showed that competition between Hershey and Pinnacle for inclusion in insurers' networks has constrained their prices and that eliminating the competition would lead to increased prices. A real-world example demonstrates the constraint. In 2014, Pinnacle demanded a substantial price increase from one of the area's largest insurance companies. When the insurer responded by threatening to exclude Pinnacle from its network and instead rely on a network that included only Hershey and Holy Spirit, Pinnacle relented. PX00701 ¶18 (App. 269).

Defendants have explicitly acknowledged in this litigation how the separate existence of Hershey and Pinnacle has benefitted insurers in contract negotiations. Indeed, they sought (unsuccessfully) to keep Pinnacle's price capitulation, which was described in the Government's complaint, under seal. They argued that

> If this information is made public, health plans will learn that a competitor was able to resist Pinnacle's request for a rate increase by threatening to exclude Pinnacle from its network. As a result, health plans will have increased leverage in resisting future requests by Pinnacle for reasonable rate increases. Similarly, if other hospitals learn about this, they will know that health plans may be able to exclude Pinnacle from their networks, and those hospitals could thus seek to negotiate better deals for themselves by proposing plans that exclude Pinnacle.

PX01382-004 (App. 515).

Evidence from insurers likewise showed that the merger would eliminate this favorable bargaining dynamic and allow the combined entity to demand a price increase. An executive of one of the two largest area insurers emailed that the Harrisburg market "has been a very fortunate market" that has benefitted from competition among health systems, but he was concerned that a combined Hershey/Pinnacle "would ultimately have too much leverage and [the insurer] would not be able to negotiate market appropriate pricing and terms." PX00378-002 (App. 221); *accord* PX01200, 34:8-20 (App. 458). The executive responsible for hospital contracting at the other large area insurer testified at his deposition that if the merged hospitals demanded a price increase, his company "wouldn't have a whole lot of choice," but to pay it. PX01236, 49:3-19 (App. 492). He estimated that the company would have no realistic alternative but to pay prices 25 percent higher to keep them in the network. PX01236, 91:16-25,144:6-16, 48:23-49:19 (App. 491-494); *see also* PX01201, 70:21-71:18. Finally, in sworn declarations, other area insurers explained their concerns that the merger would increase defendants' bargaining leverage, resulting in higher prices for these insurers and their policy holders. PX00700 ¶19; PX00704 ¶14.

Hershey's own CEO acknowledged at his deposition that insurers had "a lot of anxiety" that defendants would increase prices post-merger and were particularly concerned that the merger would allow defendants to raise prices at

Pinnacle, whose prices are lower than Hershey's. PX00801, 103:24-105:9. A representative from one of the two largest area insurers, who analyzed the potential financial impact of the merger, estimated substantial price increases if defendants increased Pinnacle's prices. PX00612-003.

Pinnacle too recognized the potential for post-merger price increases. One of its stated "objectives" for the merger was to "establish a health care provider that is a 'must have' for [insurers]." PX00463-010. A Pinnacle executive even queried whether it would "make sense to put a charge increase in now while we can without it looking like we completed the merger, then raised charges?" PX00301-001.

4. The Government's expert testified that for antitrust purposes the four-county Harrisburg area is a relevant geographic market. Principally, the expert applied the "hypothetical monopolist" test, a standard tool of market definition used by economists, antitrust agencies, and courts. *See* U.S. Dep't of Justice & Federal Trade Commission, *Horizontal Merger Guidelines*, §§ 4.1.2, 4.2; *see Atlantic Exposition Servs. Inc. v. SMG*, 262 F. App'x 449, 452 (3d Cir. 2008); *see also St. Luke's Health Sys.*, 778 F.3d at 784-785. The test asks whether a hypothetical monopolist in a proposed geographic market—*i.e.*, a single owner of every hospital in that area—could profitably impose a small but significant (about 5 percent) non-transitory price increase (called a "SSNIP"). If the hypothetical

monopolist could profitably impose a SSNIP from at least one location of the merging firms, then the market is properly defined for antitrust purposes. The analysis showed that a monopolist in the four-county Harrisburg area could impose a SSNIP, which means that the Harrisburg area is a proper antitrust geographic market. PX01062-84-86, 91-92; Hrg. 313:17-314:21 (App. 70-71).

As shown above, insurers testified that, post-merger, they would pay a combined Hershey/Pinnacle in excess of a SSNIP in order to keep those hospitals in their network. Thus, as the Government's expert explained, a hypothetical monopolist of just these two Harrisburg area hospital systems could demand a SSNIP. PX01264-64-65; Hrg. 386:19-24 (App. 91). By necessary implication, a hypothetical monopolist of all Harrisburg-area hospitals would therefore also be able to demand a SSNIP. PX01062-092.

Additional fact witness testimony confirmed as much. Insurers uniformly view the Harrisburg area as a distinct market.[4] Indeed, when one large insurer calculated the financial impact of the merger, it measured defendants' post-merger market shares only in the four-county Harrisburg area and a narrower two-county Dauphin/Cumberland area. PX00613-002.

---

[4] PX00700 ¶¶2, 8; PX00704 ¶¶6-8, 11; PX00707 ¶4; PX00701 ¶¶3, 8; PX00804, 16:21-17:2 (App. 314-315); PX01201, 6:22-17:8; PX00784-004; PX01027-006; PX01062-101-06 (quoting the consistent views of market participants that the Harrisburg area is a distinct market).

The hospitals' own contemporaneous business documents show that they too see the Harrisburg area as a distinct market. Hershey's Chief Marketing Officer and Pinnacle's Director of Marketing agreed that the "[p]rimary" market for defendants' brand survey should be limited to the four counties in the Harrisburg area. PX00373-002. Hershey's COO testified that defendants' agreement with one large insurer defined their "Core Service Area" as the Harrisburg area and granted exclusive rights and competitive restrictions solely within this area. Hrg. 591:24-595:20; PX00029-008. Hershey identified the Harrisburg area as a distinct region reflecting "natural referral patterns" and requiring its own strategic plan. PX01198-001; PX00881-004; Hrg. 599:2-600:24. Pinnacle's CFO stated that Pinnacle's primary service area fell within the Harrisburg area and identified its closest competitors to be Hershey and Holy Spirit. Hrg. 537:4-10 (App. 116); PX00802, 63:9-13; PX00380-037; PX00006-001; PX00251-009.

D. Presumption That The Merger Is Anticompetitive

A merger that substantially increases market concentration in an already concentrated market is presumptively anticompetitive and unlawful. *See Philadelphia Nat'l Bank*, 374 U.S at 363. The *Merger Guidelines* measure market concentration using the "Herfindahl-Hirschman" Index ("HHI"), which is calculated by summing the squares of market share percentages. A transaction that increases the HHI by more than 200 points in a market that is already highly

concentrated (over 2,500) is presumed likely to enhance market power. *Merger Guidelines* § 5.3. Currently, the HHI of the Harrisburg market is 3,132—highly concentrated. The post-merger HHI would be 5,984, an increase of 2,852 points, which is *nearly fifteen times* greater than the *Merger Guidelines*' threshold for a presumptively anticompetitive merger. PX01062-115-16; Hrg. 323:22-324:10 (App. 79-80). That increase reflects the enormous 76 percent market share of the combined hospitals. *See Philadelphia Nat'l Bank*, 374 U.S. at 364 (30 percent market share unlawfully concentrated).

Consistent with the increase in market concentration, the Government's economic expert showed that the merger would likely allow the combined hospitals to raise their prices. Using common econometric techniques, the Government's expert concluded that the merger was likely to result in substantial price increases up to $178 million per year and insurance premium increases of as much as 33 percent. Hrg. 339:19-23 (App. 82); PX01062-148; PX01424-36. These estimates of harm were consistent with those provided by a large insurer. PX00612-003.

The Government's expert also testified that competition would be harmed by Hershey's cancellation of its plan to expand its facility by building a new "bed tower" should the merger take place. The bed tower would increase Hershey's ability to serve patients, and the increased capacity would lower prices. Hrg.

341:16-342:7 (App. 84-85), 988:16-990:1. Canceling the project would amount to a reduction in output, which would constrain supply and increase prices. Hrg. 341:5-15 (App. 84); PX01062-154-157. Defendants' own economic expert largely agreed that capacity expansion by Hershey would likely lower prices at both Hershey and Pinnacle. PX01232, 112:15-116:18.

Finally, the Government presented evidence that the merger would eliminate substantial competition between Hershey and Pinnacle on non-price dimensions such as quality of care and expanding access to services. For example, a Pinnacle document stated with respect to oncology services that "[i]n order for Pinnacle to be competitive we will have to assure that the patient experience is superior" to Hershey's. PX00039-006.

E. The District Court's Order

The district court denied the Government's request for an injunction. The parties had agreed that the relevant *product* market is general acute care services sold to commercial payors. App. 9. The court found 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. App. 11. The court believed the Government's proposed market to be a "starkly narrow view of the amount of hospitals patients could turn to if the combined Hospitals raised prices or let quality suffer." *Id*. at 13. It concluded that "19 other

hospitals within a 65 minute drive of Harrisburg provide a realistic alternative that patients would utilize." *Id*. at 12. The court based that conclusion on the fact that 43.5% of Hershey's patients travel to Hershey from outside the Harrisburg area. Because those patients travel to the Harrisburg area to receive care, the court held, the Government had failed to proffer a geographic market in which "'few' patients leave…and 'few' patients enter." *Id*. at 10 (quoting *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 598 (8th Cir. 2009)).

The court also found it "extremely compelling" for purposes of geographic market definition that the hospitals have entered into long-term contracts with two large insurers that "maintain existing rate structures." App. 13-14. The court elaborated that, in applying the hypothetical monopolist test, it "simply cannot be blind to [the] reality" that defendants cannot increase prices to these two insurers for at least five years. *Id*. at 14. The court declined to make a "prediction" of what might happen to prices in 5 years, stating that doing so would be "imprudent." *Id*.

At no point in its analysis did the court discuss how hospital prices are established or describe the bargaining dynamic between hospitals and insurance companies. Nor did the court mention how insurers create their provider networks or what consumers require when they chose insurance networks and use hospital care. Instead, the court rested its consideration of the geographic market entirely on Hershey's out-of-area patients and the two temporary price agreements.

Because the court determined that the Government had not established a likelihood of success on the merits of its case, it did not engage in the ordinary antitrust burden-shifting regime. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). It therefore did not require the defendants to prove that the proposed transaction would not cause anticompetitive effects. The court nevertheless went on to address the "equities," stating that the hospitals "presented ample evidence demonstrating that anticompetitive effects would not arise" from their merger. App. 15. Although the court recognized that defendants' claimed efficiencies are not a "defense to illegality," it nevertheless found the merger "would provide beneficial effects to the public, such that equitable considerations weigh in favor of denying the injunction." App. 17-18.

That "weighing of the equities" considered several factors. First, the court found that the merger would alleviate capacity constraints at Hershey because patients could be shifted from Hershey to Pinnacle. That, in turn, would allow Hershey to avoid construction of the bed tower. Second, the court found that "repositioning" by other nearby hospitals—*i.e.*, their association with large hospital systems in an attempt to attract patients—"has already occurred" and will result in a meaningful constraint on prices. Third, the district court found that the merger would beneficially affect the defendants' ability to engage in "risk-based contracting," a method of payment in which the hospital accepts some of the risk

ordinarily borne by the insurer. The court reached that determination even though it also found that "Hershey and Pinnacle independently are capable of continuing to operate under the risk-based model." App. 26.

The FTC and the Commonwealth of Pennsylvania appeal from that decision. On May 24, 2016, a panel of this Court enjoined the merger pending appeal.

SUMMARY OF ARGUMENT

Hershey and Pinnacle are by far the two largest hospital systems in the Harrisburg area. Their merger will eliminate competition between them and result in a single dominant hospital system with a 76 percent market share. Insurers will be unable to successfully market a network without the merged hospitals, which will therefore enjoy greatly enhanced bargaining power. The upshot will be substantial price increases and lower incentives to improve quality of care.

The Clayton Act prohibits mergers that "*may* ... substantially lessen competition." 15 U.S.C. § 18 (emphasis added). Section 13(b) of the FTC Act authorizes a court to enjoin a merger pending an administrative adjudication where the Government is "likely" to prove a merger unlawful. The Government satisfied both statutes here, and the district court therefore committed error when it declined to enjoin the merger.

1. The Government showed that the four-county Harrisburg area is a proper antitrust geographic market. The district court committed errors of both law and fact when it rejected that proposed market.

A geographic market is the area where buyers may "rationally look" to purchase services. Determining the relevant geographic market in an antitrust case must be grounded in the commercial realities faced by the relevant customers—here, insurers. Insurers bargain with hospitals over prices and they pay the bills directly. Defendants do not dispute this. The evidence clearly showed that insurers that wish to sell policies in the four-county Harrisburg area must purchase hospital services in that area because area residents overwhelmingly use Harrisburg-area hospitals and require policies that include local hospitals. As a result, insurers cannot rationally look to hospitals outside of the area if they wish to have a marketable product.

As the parties and the district court acknowledge, geographic markets are properly assessed using the "hypothetical monopolist test" set forth in the *Horizontal Merger Guidelines*. As that test applies here, the relevant question is whether a hypothetical owner of all Harrisburg area hospitals (*i.e.*, the monopolist) could successfully demand a price increase from insurers. If so, then the Harrisburg area is a properly defined antitrust market.

The Government submitted overwhelming evidence, including testimony from Central Pennsylvania's two largest insurers, that insurers would pay a demanded price increase rather than market a network without Harrisburg area hospitals. Nevertheless, the district court rejected the Harrisburg area as an antitrust market. In doing so, the district court committed three independent legal errors, all stemming from its failure to consider the commercial realities of the hospital marketplace and to properly formulate and apply the hypothetical monopolist test. Any one of those errors would justify reversal.

First, the court completely ignored both the role of insurers in negotiating hospital prices and the bargaining process through which hospital prices are set. Erasing the role of insurers in turn led the court to disregard the critical and conclusive evidence that an insurance network that does not include Harrisburg-area hospitals is not marketable to Harrisburg-area employers, and that an insurer would rather pay more than create a network without them. Instead, the district court based it analysis of the geographic market on the fact that a subset of Hershey's patients travel to Hershey from outside the area. The preferences of those patients have no bearing on the central question whether insurers can market a network to Harrisburg area employers without area hospitals. The district court's focus on out-of-area patients, rather than on the relevant insurance company

buyers, was unmoored from the "commercial reality" of the hospital marketplace, a basic error of law.

Second, the court misapplied the hypothetical monopolist test. The *Merger Guidelines* require analysis of whether the hypothetical monopolist could raise prices at *any* of the merging firms' hospitals. The court therefore should have asked whether a hypothetical monopolist of Harrisburg area hospitals could raise prices at either Hershey or Pinnacle. But the court completely failed to examine whether prices could be raised at Pinnacle. That too was legal error.

Third, the district court committed yet another fundamental error of law when it based its application of the hypothetical monopolist test on private price agreements between the hospitals and two large insurance companies. Such agreements have no proper place in the inquiry, as established by legal precedent. The insurers sought these agreements as protection from what they perceived as the likely price increases from the merger. Thus, if anything, the agreements prove that the Harrisburg area is a proper geographic market. Insurers would not need price protection if hospitals outside the Harrisburg area could constrain prices inside the area. Reliance on the agreements is also fundamentally inconsistent with the hypothetical monopolist test, which assumes that buyers actually face a price increase and asks how they would react. Insurers testified as to what they would

do if faced with a price increase demand from a combined Hershey and Pinnacle: they would accept it.

Reliance on such private agreements in defining a geographic market has troubling implications that go beyond this case. Under the district court's approach, merging parties with presumptively unlawful market shares would be able to stymie a proposed geographic market merely by privately agreeing not to raise prices

2. In light of the court's errors in assessing the geographic market, its consideration of the "equities" provides no independent basis to affirm its denial of the injunction. Had the court not erred about the market, it necessarily would have found the merger presumptively unlawful, and defendants would then have faced the heavy burden of proving either that the merger clearly was not anticompetitive or that it was nevertheless justified by extraordinary efficiencies. The court's cursory review of defendants' claimed benefits of the merger under the guise of equities in no way justifies the merger.

The principal efficiency defense examined by the court was defendants' claim that the merger would relieve overcrowding at Hershey by allowing it to shift patients to Pinnacle. The hospitals claimed that doing so would enable Hershey to avoid building a new 100-bed facility costing $277 million. But under the law, canceling the construction of a new facility is not an efficiency at all; it is

a reduction in output and therefore an anticompetitive harm. Moreover, the court did not undertake the rigorous analysis needed to evaluate and verify an efficiency claim. Instead, the court uncritically relied on the testimony of two of defendants' own executives that they would build the bed tower absent the merger. Such "speculation and promises about post-merger behavior" are badly insufficient under a proper antitrust analysis.

The court also wrongly analyzed defendants' "repositioning" defense. Defendants claim that affiliations between other hospitals in Central Pennsylvania and larger health care systems from out of the area will negate the anticompetitive effects of this merger. Much of the repositioning on which the district court relied has already occurred, however, yet the evidence showed that insurers *still* could not defeat a price increase demanded by a combined Hershey/Pinnacle. Repositioning therefore cannot possibly alleviate the price consequences of this merger. This merger is substantially likely to lessen competition in violation of the Clayton Act, and it should have been enjoined until the adjudicative process has run its course.

STANDARD OF REVIEW

This Court reviews a district court's denial of a preliminary injunction under three standards: findings of fact for clear error; conclusions of law de novo; and the ultimate decision to grant or deny the preliminary injunction for abuse of

discretion. *Miller v. Mitchell*, 598 F.3d 139, 145 (3d Cir. 2010) (*citing McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir. 2009)). "Factual findings are clearly erroneous if the findings are unsupported by substantial evidence, lack adequate evidentiary support in the record, are against the clear weight of the evidence or where the district court has misapprehended the weight of the evidence." *United States v. 6.45 Acres of Land*, 409 F.3d 139, 145 n.10 (3d Cir. 2005) (quoting *United States v. Roman*, 121 F.3d 136, 140 (3d Cir. 1997)); *see also Lame v. U.S. Department of Justice*, 767 F.2d 66, 70-71 (3d Cir. 1981). A district court also commits clear error when its finding of fact is "completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting data." *Shire U.S., Inc. v. Barr Labs., Inc.*, 329 F.3d 348, 352 (3d Cir. 2003) (quoting *American Home Prods. Corp. v. Barr Labs., Inc.*, 834 F.2d 368, 370-71 (3d Cir. 1987)).

A district court's definition of an antitrust geographic market is typically regarded as a question of fact reviewed for clear error. *E.g.*, *Borough of Lansdale v. Phila. Elec. Co.*, 692 F.2d 307 (3d Cir. 1982). But review is de novo where the lower court is alleged to have erred "in formulating or applying legal principles," including analytical flaws. *Allen-Myland, Inc. v. International Business Machines Corp.*, 33 F.3d 194, 201-204 (3d Cir. 1994). *See* L.A.R. 28.1(b) (Court engages in "plenary review" where the district court "erred in formulating or applying a legal precept"). Thus, the Court will review de novo when a district court does not

"apply the correct legal standard" to analyze a case. *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 307 (3d Cir. 1986); *accord Sabinsa Corp. v. Creative Compounds, LLC*, 609 F.3d 175, 182 (3d Cir. 2010); *see also White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495, 499-500 (6th Cir. 1983) (in antitrust cases, court will "freely review[] … as a matter of law" district court's "formulation of the market tests").

As set forth below, the district court failed to properly formulate and apply the test used to define a relevant geographic market, and that determination should be reviewed de novo. But even if the Court determines to review under a more lenient standard, the district court clearly erred in its assessment of the market and the equities.

ARGUMENT

Section 7 of the Clayton Act prohibits mergers that "may" substantially lessen competition or tend to create a monopoly. 15 U.S.C. § 18. Congress used the word "may" deliberately, for its "concern was with probabilities, not certainties." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 658 (1964); *accord Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 323 (1962). The Clayton Act thus creates an "expansive definition of antitrust liability." *California v. American Stores Co.*, 495 U.S. 271, 284 (1990).

Congress vested principal responsibility for enforcement of Section 7 with the FTC through an administrative adjudication. *See Heinz*, 246 F.3d at 714. But it recognized that agency proceedings take time and thus provided a mechanism to maintain the status quo pending the administrative process, thereby preventing interim harm to competition and preserving the Commission's ability to fashion effective relief. Specifically, Section 13(b) of the FTC Act authorizes a federal district court to grant 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." 15 U.S.C. § 53(b)(2); *Heinz*, 246 F.3d at 714 n.5.[5]

The Government met both prongs of that test, and this Court should either enjoin the merger itself or direct the district court to do so. In seeking a preliminary injunction, the Government is "not required to *establish* that the proposed merger would in fact violate Section 7." *Heinz*, 246 F.3d at 714 (emphasis in original). Rather, Section 13(b) requires only that the Government show a *likelihood* that the merger ultimately will be found unlawful. "[D]oubts are to be resolved against the transaction." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989).

---

[5] Section 16 of the Clayton Act also permits a State to seek injunctive relief against a threatened antitrust violation. 15 U.S.C. § 26.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

The Government demonstrated that the merger will likely be found unlawful in the administrative adjudication. Setting aside for the moment the validity of the Government's proposed geographic market, the evidence shows that the combined hospital system would have a 76 percent market share and extraordinarily high HHI figures. Such concentration is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Philadelphia Nat'l Bank*, 374 U.S at 363.

Had the district court properly found the Harrisburg area to be a relevant geographic market, it necessarily would have found the merger to be presumptively illegal. At that point, defendants would have borne the burden to "clearly show that their combination would not cause anticompetitive effects," App. 15, or to show "extraordinary efficiencies," *Heinz*, 246 F.3d at 720-21. The district court did not seriously assess these issues, but the record is clear that defendants would not have met their heavy burden. In the administrative adjudication, they are unlikely to overcome the presumption that the merger is unlawful.

The district court reached none of these issues because it found that the Government had not shown the four-county Harrisburg area to be a proper antitrust

geographic market. We show below that the court committed multiple fundamental errors in reaching that determination. In particular, it ignored entirely the commercial reality of the hospital market and the bargaining process by which prices are set.

The Government presented overwhelming evidence that the relevant geographic market is the Harrisburg area. As the Government's expert explained at the hearing, the relevant question to ask in determining the relevant geographic market is whether the direct purchasers—insurers—would pay a higher price to one of defendants' hospitals rather than attempt to market a network to Harrisburg-area consumers that includes no Harrisburg-area hospitals. Hrg. 306:11-13, 313:23-314:04 (App. 66, 70-71). The evidence conclusively established that because patients demand access to Harrisburg area hospitals, insurers could not offer a viable network without them. Insurers thus would pay at least a SSNIP to a Harrisburg area hypothetical monopolist rather than attempt to market a network with no Harrisburg area hospitals. In fact, the Government presented clear evidence that a hypothetical monopolist of defendants' hospitals alone would be able to impose a SSNIP on insurers, indicating that the Government's alleged geographic market is conservative.

A. The District Court Failed to Properly Formulate and Apply 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). As this Court has recognized, "economic realities rather than a formalistic approach must govern." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005); *see Brown Shoe*, 370 U.S. at 336 (market definition must reflect "commercial reality"); *see also Philadelphia Nat'l Bank*, 374 U.S. at 357 (geographic market is "the area of competitive overlap" where "the effect of the merger on competition will be direct and immediate").

The district court committed three independent errors when it rejected the Government's proposed geographic market. Any of them would be sufficient in itself to overturn the ruling on review. First, and most basic, it utterly ignored the commercial reality of the hospital marketplace and how prices are set. Instead, by focusing on patients who live outside the Harrisburg area, it relied on an analysis untethered from market reality. Second, the court failed to assess whether, post-merger, the combined hospital system could raise prices at Pinnacle's hospitals. The unrebutted evidence showed that they could. Third, the court improperly rested its geographic market analysis on defendants' temporary price protection

agreements with two insurers. Such agreements play no proper role in a market determination.

1. The District Court Ignored the Commercial Reality of the Hospital Market.

The district court fundamentally erred by turning a blind eye to the role of the buyer when it rejected the Government's geographic market. There is no genuine dispute that the direct buyer in the market for hospital services is the insurance company. The parties agreed (and the district court found) that the product market was defined as general acute care services "*sold to commercial payors*." App. 9 (emphasis added). Defendants admitted in their opposition to the Government's motion for a preliminary injunction that insurers are the "relevant customers" in analyzing the markets for general acute care services. Dkt. No. 96 at 8.[6]

Yet in defining the area where buyers turn for services, the district court wholly ignored the role of the relevant buyers—insurers. Analyzing the geographic market without considering the relevant buyers was a basic error of

[6] Recent judicial and administrative decisions similarly recognize that health care mergers must be analyzed through the lens of contract negotiations between health care providers and health insurers. *See St. Luke's Health Sys.*, 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); *In re Evanston*, 2007 WL 2286195, at *51-53. Even though insurers are the direct purchasers, individual consumers also suffer the adverse consequences of anticompetitive healthcare mergers.

law. In the face of considerable uncontested evidence about how insurers and hospitals negotiate prices, the role of provider networks, and the economic necessity of accommodating consumer demand for local care, the court said exactly nothing. The court thus wholly overlooked the "particular structure and circumstances" of the hospital market, *Verizon Comms. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004), and utterly ignored "commercial reality," *Brown Shoe*, 370 U.S. at 336.

Nor can the district court's ruling withstand factual scrutiny, because it "bears no rational relationship" to the evidence. *Shire*, 329 F.3d at 352. Both sides agreed that the market should be defined using the hypothetical monopolist test, which asks whether a buyer would pay a SSNIP to a monopoly provider in the proposed geographic area. *See Merger Guidelines* § 4.2.1; *St. Luke's Health Sys.*, 778 F.3d at 784-85. The district court seemingly agreed. App. 10. The Government presented considerable expert and fact evidence that any rational insurer would agree to pay 5 percent (or more) to keep a hypothetical Harrisburg-area monopolist in its network. Yet the court's geographic market determination is totally unmoored from both the proper analytical framework and any of that evidence.

In particular, the district court ignored the uncontested deposition testimony of Central Pennsylvania's two largest insurers that, without defendants' hospitals,

they could not successfully market a network to employers. PX01236, 48:17-22 (App. 491); PX00804, 64:13-20 (App. 317). The court ignored unrebutted testimony of one of these insurers that it would have no realistic alternative but to pay well in excess of a 5 percent increase to retain the defendants' hospitals (much less to retain a monopolist of all Harrisburg area hospitals). PX01236, 144:6-16 (App. 494); *see also* PX01201, 70:21-71:18. The court ignored unrebutted testimony of the other large insurer that it was concerned about post-merger price increases due to the defendants' increased bargaining leverage. PX00378-002 (App. 221). It also ignored deposition testimony from one of those large insurers that without either Hershey or Pinnacle in its network, it would lose half its membership in Dauphin County—and a natural experiment proving that would in fact happen. PX01236 (App. 494), 144:6-16; PX00704 ¶10. Indeed, the insurer that attempted to market a network without either Hershey or Pinnacle lost half of its customers even though its network contained many of the very hospitals outside the Harrisburg area that the district court deemed to be within a proper market. PX00704 ¶10; PX01542-002. The undisputed testimony that insurers, even the largest ones, were concerned that the merger would force them to pay increased prices, *e.g.*, PX01200, 34:8-20 (App. 458), cannot be reconciled with the court's view of the geographic market. Defendants' merger would have caused no consternation if hospitals outside the Harrisburg area could readily substitute in

insurer networks for Hershey and Pinnacle and thereby constrain their prices. All of these failures to address unrebutted evidence from the relevant customers affected by the merger render the court's decision "completely devoid of a credible evidentiary basis." *Shire*, 329 F.3d at 352.

Those basic analytical errors are not salvaged by the court's reliance on the statistic that 43.5 percent of Hershey patients reside outside of the Harrisburg area and travel up to an hour to get there. App. 13. In the court's view, those patients would go elsewhere if Hershey and Pinnacle raised prices post-merger, and the merged firm therefore would be constrained. But the court cited no record evidence that these patients would use other hospitals if Hershey and Pinnacle raised their prices, and there is none. The court's central conclusion is no more than sheer speculation.

To the contrary, the court's conclusion cannot be squared with the economic functioning of the insurance market. First, although Hershey attracts patients from Lancaster, Pittsburgh, and other distant places, its doing so does not alter the "commercial reality" that insurers wishing to sell policies to the substantial population of the four-county Harrisburg area must have Harrisburg-area hospitals in their networks—and would pay significantly increased prices in order to keep them. Harrisburg-area consumers demand local care and would not purchase an insurance policy that required them to drive 65 minutes away for hospital

treatment. Hrg. 314:12-316:4 (App. 71-73); 415:7-416:15; 474:7-10; 521:17-522:6 (App. 106-107); PX01277-001. Far beyond a mere SSNIP, one of the largest insurers in Central Pennsylvania testified that it would have no realistic alternative but to pay prices up to 25 percent higher rather than attempting to sell a policy without Hershey or Pinnacle in the network. PX01236, 91:16-25, 144:6-16 (App. 493-494).[7]

Furthermore, the district court was wrong that price increases at "a hypothetical monopolist such as the combined Hospitals" would cause consumers to seek care at other hospitals within the court's broader geographic market. App. 13. In fact, price plays little role when patients choose between in-network hospitals. Rather, insured patients pay roughly the same amount to go to any in-network hospital. PX01062-55; PX01424-061. As the Ninth Circuit thus recognized in directly analogous circumstances, the marketplace reality is that patients "would not change their behavior in the event of a SSNIP" because "the

---

[7] 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 with posted prices like coal and accounts for neither the role of the insurer in setting prices nor the price-insensitivity of patients. *See In re Evanston*, 2007 WL 2286195 at **64-66; PX01062-110-115. No recent court has used the analysis; to the contrary 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 Health Sys.*, 778 F.3d at 784-85; *ProMedica*, 749 F.3d at 562-63; *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1083-84.

impact of a SSNIP likely would not register." *St. Luke's Health Sys.*, 778 F.3d at 785.

Even though consumers demand local care and insurers thus require local hospitals in their networks, the court's geographic market analysis leads inevitably to an absurdly large geographic market encompassing Harrisburg, Lancaster, York, and even more distant places. But unrebutted evidence (including the chart reproduced at page 11 above) showed that 91 percent of Harrisburg area residents seek care in the four-county area and that fewer than 2 percent of them go to the largest hospitals in Lancaster and York counties. PX01062-120-122. Similarly, residents of Lancaster and York overwhelmingly use hospitals in their own home counties. PX01062-100. Indeed, insurers testified that hospitals in York and Lancaster are able to demand higher prices because they face limited local competition. PX00704 ¶13; PX00701 ¶17 (App. 268); PX00700 ¶17; PX00804, 34-35, 102-103 (App. 316, 319); PX01201, 142:19-144:25. This commercial reality is undisturbed by the fact that some subset of patients have travelled beyond their local area for hospital care. *See Houser v. Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1229-1230 n.10 (3d Cir. 1988) ("evidence that a minority of customers might travel to Harrisburg, Lancaster or even Philadelphia to attend a picture unavailable in Lebanon" does not show that "the relevant geographic market should be expanded to include those cities as a matter of law").

2. The District Court Failed To Assess Whether Pinnacle Could Impose A SSNIP

The court committed a second, and independent, error of law when it failed to apply the hypothetical monopolist test to Pinnacle's hospitals. The test requires an inquiry into whether the monopolist could impose a SSNIP "from at least one location" of the merging firms. *Merger Guidelines* § 4.2.1. As applied here, the geographic market is properly defined as the four-county Harrisburg area if a hypothetical monopolist of Harrisburg-area hospitals could profitably impose a post-merger SSNIP at *any* of Pinnacle's hospitals *or* at Hershey. The district court plainly did not engage in this analysis with respect to Pinnacle, which is barely mentioned in the opinion.

The failure to consider price increases at Pinnacle is especially striking in light of unrebutted evidence that: (a) insurers were specifically concerned that the merger would allow defendants to substantially raise prices at Pinnacle, PX00612-003; (b) one insurer successfully defeated Pinnacle's demand for a large price by threatening to construct a network that included Hershey but not Pinnacle; and (c) Pinnacle overwhelmingly draws its patients from within the Harrisburg area. PX01062-26-27. The linchpin of the district court's reasoning—that patients who currently travel long distances to Hershey will choose not to do so if it raises prices—therefore does not apply to Pinnacle. Even if the district court were right about Hershey (which it was not), the court's theory would not support a finding

that Pinnacle's prices will be constrained by hospitals closer to patients outside the Harrisburg area.

3. The District Court Improperly Based Its Geographic Market Analysis On Defendants' Temporary Price Protection Agreements with Two Insurers.

The court committed yet a third independent error of law when it based its analysis of the geographic market on private price agreements between defendants and two large insurers.

As described above, the proposed merger raised alarm among area insurers that the merged hospitals could successfully demand a price increase. In exchange for the promise of the two largest insurers not to complain to the FTC about the merger, defendants entered into contracts with those insurers promising limited price increases for several years. PX00029-001-02; PX00503-004; PX01000-001; PX01011-002; PX00664-001; PX00804, 77:23-78:8 (App. 318). Specifically, the agreements maintain the price differential between Hershey and the lower-cost Pinnacle and limit price increases to stated amounts for at least 5 years.

The court relied on the price agreements in its geographic market analysis. After reciting that it "heard hours of economic expert testimony regarding the hypothetical monopolist's ability to impose a SSNIP," the court stated it found the protection agreements to be "extremely compelling" evidence to the contrary. App. 13. The court reasoned that because the agreements restrict defendants from

raising prices for at least 5 years, it "simply cannot be blind to this reality when considering the import of the hypothetical monopolist test." *Id.* 14. The court then concluded that in light of the agreements, the relevant time period for performing the hypothetical monopolist test would be five years from now. *Id.* Yet the court refused to examine that time period, finding it speculative to do so. It then added that it did "not find that the outcome of the hypothetical monopolist test aids the FTC in this matter." *Id.*

That reasoning suffers from multiple serious flaws. To begin with, the court failed to acknowledge that the very existence of the price protection agreements reveals that insurers do not view hospitals outside the Harrisburg area as "realistic alternatives" to the defendants that would allow them to defeat a SSNIP. If they did, they would have had no need to enter into such agreements, but would have been able to constrain Hershey and Pinnacle's prices by threatening to use non-Harrisburg area hospitals in their networks. The insurers' need to enter into post-merger price protections is an admission of anticompetitive concern that "strongly supports the fears of impermissible monopolization." *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 67 (D.D.C. 1998).

More fundamentally, the price protection agreements have no proper place in a geographic market analysis. The hypothetical monopolist test is just that—hypothetical—and it asks how customers would react to a SSNIP. The court,

however, assumed that the agreements prevented the monopolist from imposing a SSNIP, App. 14, thus defeating the whole purpose of the inquiry, which *necessarily* assumes that customers face the SSNIP, unprotected by a contract. This assumption is explicit in the *Merger Guidelines*, which hinge market definition "solely on demand substitution factors, *i.e.*, on customers' ability and willingness to substitute away from one product to another in response to a price increase." *Merger Guidelines* § 4. The record is clear about how the two largest insurers would react to a SSNIP: one testified it would have no realistic alternative but to pay well in excess of a SSNIP (PX01236, 91:16-25,144:6-16 (App. 493-494)); and the other testified it could not successfully market a network without the merged firm and estimated substantial potential price increases as a result of the merger. PX00612-003; PX00613-001.

This Court has recognized the irrelevance of private contracts to antitrust market determination. In *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 438-439 (3d Cir. 1997), the Court held that a plaintiff's particular contractual restraints did not alter the determination of a product market, which turns on whether the products are interchangeable. It explained that in making a market determination the Court does not "look[] … to the contractual restraints assumed by a particular plaintiff." The Court recognized that "no court has defined a relevant product

market with reference to the particular contractual restraints of the plaintiff." *Id.* at 438-439.

The court's refusal to assess a hypothetical monopolist's ability to impose price increases after the price agreements expire because doing so would be "imprudent" was also error. App. 14. The record was again clear about what would happen on expiration. One of the two insurers testified that at that point it would have no realistic choice but to give in to price increase demands. Indeed, the witness suggested that to keep the merged hospitals in its network, the company would be willing to pay as much as 25 percent more—five times higher than a SSNIP. PX01236, 91:16-25, 144:6-16 (App. 493-494). The future may be unpredictable, but the risk of anticompetitive price increases is not. The court's ruling thus cannot be squared with the underlying thrust of the Clayton Act that courts should protect against the *likelihood* of anticompetitive effects and that "doubts are to be resolved against the transaction." *Elders Grain*, 868 F.2d at 906.

The court's reliance on the price agreements is erroneous in several additional ways. It fails to consider the effect of the merger on insurers in the Harrisburg area that are *not* covered by the price agreements. Those companies would be immediately subject to price increases as a result of defendants' enhanced bargaining power. It fails to consider the limited scope of the agreements, which cover fee-for-service prices but do not apply to other types of

payment contracts, which the court viewed as becoming increasingly important in the modern era. App. 26. With respect to those prices, the hospitals are free to demand any increase they wish. And it fails to consider the harm to patients when hospitals no longer compete over quality of care.

Beyond mere error, the court's reliance on private price agreements to define a geographic market marks an unprecedented departure from legal precedent and from the standard framework of antitrust analysis employed by the nation's antitrust enforcers. The district court's ruling has troubling implications beyond this case, for it would empower merging parties with presumptively unlawful market shares to stymie a proposed geographic market by privately agreeing not to raise prices.

B. The District Court's Assessment Of The "Equities" Cannot Justify The Merger.

Defendants argued in response to the Government's motion for injunction pending appeal that the district court's determination of the "equities" supports its decision. Not so. Nothing about the court's discussion of the equities offers an independent basis to affirm its denial of the preliminary injunction. In fact, the court's erroneous assessment of the geographic market fatally infected its subsequent analysis. Had the court properly found the Harrisburg area to be a relevant geographic market, it necessarily would have found the merger to be presumptively illegal. The burden then would have shifted to defendants either to

"'clearly' show that their combination would not cause anticompetitive effects," App. 15, or to show "extraordinary efficiencies." *Heinz*, 246 F.3d at 720-21. The court never put defendants to the burden of crossing that hurdle. On the record before the district court, they could not have met that burden. Indeed, no court has ever found a presumptively unlawful merger to be saved by efficiencies.

An efficiency defense requires antitrust defendants to prove four elements. First, they must prove "extraordinary efficiencies" that offset the anticompetitive concerns in highly concentrated markets. *St. Luke's Health Sys.*, 778 F.3d 790 (citing *Heinz*, 246 F.3d at 720-22). Second, they must demonstrate that the claimed efficiencies are "merger-specific," *i.e.*, they can be achieved only via the merger. *St. Luke's Health Sys.*, 778 F.3d at 790 (citing *United States v. H & R Block, Inc.*, 833 F. Supp.2d 36, 89–90 (D.D.C. 2011)). Third, they must show that the efficiencies are "verifiable" and not "speculative." *St. Luke's Health Sys.*, 778 F.3d at 791. The analysis of those factors must be "rigorous" to ensure that alleged efficiencies "represent more than mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721. Fourth, claimed efficiencies must "'not arise from anticompetitive reductions in output or service'." *H&R Block, Inc.*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines* § 10).

Because the district court found the geographic market issue dispositive of the Government's case, it did not engage in an efficiencies analysis, under which

defendants would have borne the substantial burden of proving each element of the defense. Instead of performing the rigorous inquiry required for an efficiencies defense, the court transformed it into a gratuitous discussion of the "equities" that lacked any analytical rigor.

Similarly, the district court failed to properly assess defendants' argument that repositioning by hospitals outside the Harrisburg area would fill the "competitive void" created by the merger and "clearly" prevent the likely anticompetitive harm.

1. Defendants' Plan to Reduce Capacity By Foregoing Construction Of Additional Facilities Is Neither An Efficiency Nor An "Equity."

Defendants claimed below that patient demand for service at Hershey exceeds the number of beds available, and that the merger increase its capacity, allowing Hershey to avoid construction of an expensive bed tower. The district court accepted those claims and determined that "the Hospitals have presented a compelling efficiencies argument … in that the merger would alleviate some of Hershey's capacity constraints." App. 17. The court also found that Hershey's avoidance of a large capital outlay to construct the new facility would also benefit consumers. App. 21-22.

As an initial matter, the court's analysis turns antitrust law on its head by converting a reduction in output—an anticompetitive *harm*—into a *benefit* of the

merger. A merging entity's pledge to cancel a planned capacity expansion as the result of the merger is not an "efficiency" that can somehow justify the deal. It is a classic reduction in output that will lead to higher prices. For that reason, a nearly identical claim was specifically rejected as non-cognizable 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); *see Merger Guidelines* § 10. Investment in businesses serve to "enhance consumer welfare" and when "competition-driven investments are 'avoided,' consumers are generally left worse off." *ProMedica*, *supra*. Yet the district court did not even consider that dimension of the issue, although the Government squarely raised it.

If Hershey and Pinnacle do not merge and Hershey constructs the bed tower, it will have both the additional ability to serve the public and the incentive to fill the new beds, in part by competing with Pinnacle on price and quality of care. Both outcomes would result in substantial consumer benefits. By contrast, if the hospitals merge and the tower project is canceled, there will be fewer beds to serve the public and a reduced incentive to lower prices and compete on quality. Consumers will be worse off. Hrg. 341:5-342:7 (App. 84-85).

Moreover, the district court's conclusion that the merger will add bed capacity is plainly wrong. The merger merely combines two existing facilities; it cannot add a single bed to the supply now available in the Harrisburg area. If

Hershey is currently full, it can refer patients to Pinnacle, where the vast majority of them can receive the very same high-quality treatments they seek at Hershey. Hrg. 716:7-15, 717:1-718:9.

In any event, the district court could not properly have found the bed tower claim to be a "compelling efficiencies argument" because the court failed to engage in the rigorous efficiencies analysis. The Government presented overwhelming evidence that defendants' capital avoidance claim failed because there is no relationship between Hershey's actual bed need and defendants' claim that Hershey could solve any capacity issues only by building a $277 million, 100-bed tower.[8]

Yet the court relied on the very sort of "speculation and promises about post-merger behavior" that *Heinz* rejected. It uncritically accepted the self-serving statements of defendants' executives that they would build the bed tower absent the merger. The court even chastised the Government for "impermissibly" asking it to "second guess Hershey's business decision in building the tower." App. 21. And although the court admitted that Hershey may have "partially overstated" the

[8] Defendants' efficiencies expert admitted that Hershey needs only 13 beds to alleviate its capacity constraints today, and only 36 beds in five years. PX01343-069; Hrg. 767:15-21. Defendants' contention that this modest need can be remedied only through the construction of a 100-bed tower or merger with Pinnacle cannot withstand scrutiny. *See*, *e.g.*, PX00258; PX00754-059; PX01238, 279:18-22.

cost of alleviating its capacity issues, it failed to make any attempt to determine the magnitude of that overstatement. App. 20. Indeed, the court wrongly stated that it was not within its "purview to question" these statements and concluded that defendants' testimony on this issue "is sufficiently reliable." *Id*. That is not the way a proper antitrust efficiency analysis is conducted.

The court's insistence that it must accept defendants' business decision to build a bed tower has troubling implications similar to its reliance on temporary rate agreements to find against the Government on geographic market. If the court's deference were proper, then any defendant could proffer any efficiency justification for a merger without having to show that it meets the strict requirements of an efficiency defense. That approach would upend decades of merger law.

2. The District Court Improperly Analyzed Defendants' Risk-Based Contracting Claim.

Risk-based contracting is a developing payment model in which healthcare providers bear some financial risk and share in financial upside based on the quality and value of the services they provide. Hrg. 128:13-20. It is an alternative to the traditional fee-for-service model in which the hospital receives a payment for every service performed and the insurer bears the risk. The district court found that the merger enhanced the hospitals' efforts to engage in risk-based contracting to the benefit of the public.

The district court found "persuasive" the testimony of Hershey's CEO 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." App. 26. But the court did not analyze whether such a claim was verifiable—and it could not have done so since it relied not on extrinsic evidence but only on the self-interested testimony of Hershey's own chief executive.

Nor does the evidence support the claim that risk-based contracting is an "equity" that weighed against an injunction. The evidence showed that hospitals and insurers engage in the same bargaining process for risk-based contracts that they do for traditional ones. PX01422-016-017 (McWilliams Rebuttal Report); PX01062-065. The merger will enable the combined hospital system to use its market power to obtain higher reimbursement from insurers under a risk-based approach for the very same reasons it can obtain higher fee-for-service prices. Hrg. 348:21-349:6 (App. 86-87); PX01236, 165:21-166:2 (App. 495). Thus, allowing the creation of a near-monopoly hospital system no more serves "equity" with respect to risk-based contracting than it does with any other form of business dealing.

The court speculated that changing from fee-for-service to risk-based contracting would have a "beneficial impact" because it would allow Hershey to "continue to use its revenue to operate its College of Medicine and draw high-

quality medical students and professors into the region." App. 26. It then assumed, without any analysis, that additional post-merger revenue to Hershey from risk-based contracting would inure to the benefit of consumers. But for the reasons explained above, the combined hospitals will be able to obtain higher prices—and consumers will ultimately bear the increase. Hrg. 348:21-349:6 (App. 86-87); PX01236, 165:21-166:2 (App. 495). That is not an "equity."

3. "Repositioning" By Other Hospitals Will Not Negate The Anticompetitive Effects Of The Merger.

The district court stated in passing that "the Hospitals presented ample evidence demonstrating that anticompetitive effects would not arise through the merger of Hershey and Pinnacle." App. 15-16. But the only evidence it cited for this conclusion had to do with the affiliation of hospitals in and around the Harrisburg area with large outside health systems and a trauma center being developed at one hospital. App. 26-28. That evidence does not support the court's conclusion.

In antitrust law, "repositioning" refers to a response by competitors that is sufficient to deter or counteract the anticompetitive effects of a merger. *Merger Guidelines* § 6.1. *FTC v. Arch Coal*, 329 F. Supp. 2d 109, 148-150 (D.D.C. 2004). To be credited as "repositioning," the expansion or development should be "equivalent to new entry" and "greatly reduce[] the anticompetitive effects of a merger." *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 57 (D.D.C. 2009)

(citing *Arch Coal*, 329 F. Supp. 2d at 148). Antitrust defendants therefore must show that repositioning will be timely, likely, and sufficient to constrain market power. *Merger Guidelines* § 6.1; *see also FTC v. Sysco*, 113 F. Supp. 3d 1, 80 (D.D.C. 2015) (defendants bear the burden of demonstrating the ability of other competitors to "fill the competitive void" that will result from the proposed merger) (citing *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000)).

First, the court credited as "repositioning" developments that had *already* occurred. But overwhelming evidence from insurers showed that, even considering all of the recent developments, they could not defeat a price increase if Hershey and Pinnacle merge. The district court ignored that evidence, which defeats any possible claim that past repositioning will constrain hospital prices in the Harrisburg area.

Indeed, although the court pointed to a number of affiliations, such as Geisinger's purchase of Holy Spirit Hospital, it failed to ask the critical question whether such "repositioned" hospitals could replace Pinnacle or Hershey *in an insurer's network* for Harrisburg area residents. For all the reasons discussed above, they plainly cannot. *See also* PX1201, 255:7-18 (deposition testimony of a large insurer explaining "we don't believe that we could create a Holy Spirit-centric product, we don't believe their scope of services is broad enough"). The court's analysis was also infected by its error in defining the geographic market.

Believing that the market included places outside the Harrisburg area, the court considered the repositioning of hospitals in places like Lancaster. Such hospitals could not replace Hershey or Pinnacle in an insurance network marketed to Harrisburg-area residents.

Second, the district court did not seriously consider whether future repositioning by hospital systems inside the Harrisburg area would be sufficient to counteract anticompetitive effects from the merger. For example, the court noted Holy Spirit's plans to develop a Level II trauma center, but it did not assess whether the trauma center would make Holy Spirit a suitable post-merger replacement for a combined Hershey/Pinnacle in an insurer network. It also ignored unrebutted evidence that the trauma center would have a negligible impact on competition with the merged parties (*see*, *e.g.*, PX01221, 56:25-59:3, 96:16-98:1). Repositioning by Holy Spirit would not have the constraining power of "new entry." *CCC Holdings*, 605 F. Supp. 2d at 57. The court also again ignored evidence from a large area insurer that it did not believe it would be able to defeat a substantial price increase five years from now if the combined entity raised rates –indicating future repositioning will not be sufficient to constrain defendants.

4. The Affordable Care Act Does Not Justify Anticompetitive Mergers.

The district court stated that its decision was informed by "a growing need" for hospitals "to adapt to an evolving landscape of health care that includes … the

institution of the Affordable Care Act." App. 28. The court found that the ACA "has created a climate that virtually compels institutions to seek alliances such as the Hospitals intend here." *Id.* In other words, the court determined that the perceived needs of the healthcare system must take precedence over the antitrust laws. That conclusion was legal error.

The Clayton Act contains no healthcare exception. To the contrary, the Supreme Court determined long ago that Congress declined to provide antitrust exceptions "for specific industries" and rejected the notion that "monopolistic arrangements will better promote trade and commerce than competition." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689-90 (1978). The antitrust laws thus "apply to hospitals in the same manner that they apply to all other sectors of the economy." *Boulware v. Nevada*, 960 F.2d 793, 797 (9th Cir. 1992). Indeed, Congress recognized as much in the Affordable Care Act itself, which provides that it "shall not be construed to modify, impair, or supersede the operation of any of the antitrust laws." 42 U.S.C. § 18118(a) (2010).

5. The District Court Regarded Healthy Hospitals As If They Were Failing Firms.

In passing, at the very end of its opinion, the district court surmised that "it is better for the people they treat that such hospitals unite and survive rather than remain divided and wither." App. 28. Instead of properly viewing the combination as a near-monopoly of the two close rivals, the court appears to have

incorrectly perceived Hershey and Pinnacle as embattled survivors hanging on for life.

Antitrust law recognizes a "failing firm" defense under which parties may undertake an otherwise unlawful merger if one of them is likely to go out of business anyway. *See Merger Guidelines* § 11. But defendants never asserted that the merger was necessary for their survival or that failure of either hospital system was imminent (or even likely), as the failing firm defense requires. Nor could they have. Both Pinnacle and Hershey enjoy success and robust financial health, and both continue to expand. PX01062-27, 31. Indeed, Pinnacle recently constructed West Shore Hospital, which opened in May of 2014 and has over 100 inpatient beds. They are precisely the type of firms that should be competing to the benefit of consumers, not merging to their detriment. The district court's perception of them as enfeebled underscores its deep misunderstanding of this case.

II. THE EQUITIES FAVOR AN INJUNCTION

An FTC showing of a likelihood of success on the merits creates "a presumption in favor of preliminary injunctive relief." *Heinz*, 246 F.3d at 726. No court has ever denied an injunction under Section 13(b) where the FTC has demonstrated a likelihood of success on the merits. *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1094-95 (quoting *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-CV-47, 2011 WL1219281, at *60).

For the reasons set forth above, the district court improperly found the FTC unlikely to succeed in the administrative adjudication. The court's analysis of the equities was thus fatally flawed from the outset, because the court took no account of the strong "public interest in effective enforcement of the antitrust laws." *Id.*; *see FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008); *Arch Coal*, 329 F. Supp. 2d at 116. Instead, the court examined defendants' purported efficiencies as equities (and as shown above, its analysis was faulty there too) with no counterbalance.

"Congress enacted section 13(b) to preserve [the] status quo until [the] FTC can perform its function" in the adjudicative proceeding. *Heinz*, 246 F.3d at 726 (citation omitted). Thus, where the Government shows a likelihood of success on the merits in the adjudication, parties should not merge unless they show "public equities" that would "benefit their customers" "despite the likely anticompetitive effects of their proposed merger." *CCC Holdings*, 605 F. Supp. 2d at 75-76 (emphasis added).

The equities favor enjoining this merger pending the completion of the administrative adjudication. If "the merger is ultimately found to violate section 7 of the Clayton Act, it will be too late to preserve competition if no preliminary injunction has issued." *Heinz*, 246 F.3d at 727; *FTC v. Univ. Health,* 938 F.2d 1206, 1217 n.23 (11th Cir. 1991).

Indeed, the FTC has recently had unfortunate experiences trying to unwind recent unlawful healthcare mergers. In *Phoebe Putney*, the FTC attempted to enjoin the merger, but the courts denied an injunction. Two years later, after the Supreme Court ruled that the FTC could challenge the transaction, divestiture remained too difficult to achieve, and the FTC allowed the parties to remain merged. *See* https://www.ftc. gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf. In *St. Luke's*, divestiture has not yet occurred well over a year after the court of appeals found the merger unlawful—and nearly four years after the district court denied a preliminary injunction.

Granting preliminary relief therefore will both protect Harrisburg area residents who will otherwise face immediate competitive harm and enable the FTC to fashion any suitable remedy ultimately required. By contrast, if the district court's decision stands, and the merger is allowed to close, defendants will be free to integrate operations, share competitively sensitive information, and reorganize human and physical resources. It will be difficult, if not impossible, for the FTC to "unscramble the egg" and fashion effective relief to restore competition following the merits trial.

Hershey and Pinnacle showed little on the other side of the ledger. The district court characterized the purported efficiencies of the transaction as "public equities." App. 15-28. Even apart from the district court's errors in its assessment

of the alleged efficiencies, the law is clear that efficiencies cannot be deemed public equities unless there is reason to believe that they "will not still exist when the FTC completes its work." *Heinz*, 246 F.3d at 726-27; *see OSF Healthcare Sys.*, 852 F. Supp. 2d at 1088 n.16. Here, any of the alleged benefits of this merger will be available after the trial on the merits. The purported efficiencies therefore "do not constitute public equities weighing against a preliminary injunction." *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1095 (quotation marks and citation omitted). As the D.C Circuit put it, "[i]f the merger makes economic sense now," then absent specific evidence to the contrary, there is "no reason why it would not do so later." *Heinz*, 246 F.3d at 726.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and enjoin the proposed merger between Hershey and Pinnacle pending the outcome of the administrative adjudication.

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel

/S/ Joel Marcus
JOEL MARCUS
Director of Litigation

DEBORAH L. FEINSTEIN
MICHELE ARINGTON
WILLIAM H. EFRON
JARED P. NAGLEY
GERALYN J. TRUJILLO
RYAN F. HARSCH
JONATHAN W. PLATT
PEGGY BAYER FEMENELLA
Attorneys
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3350
JMarcus@FTC.gov

BRUCE L. CASTOR, JR.
Solicitor General

BRUCE BEEMER
First Deputy Attorney General

JAMES A. DONAHUE, III
Executive Deputy Attorney General
Public Protection Division

TRACY W. WERTZ
Chief Deputy Attorney General

JENNIFER THOMSON
AARON SCHWARTZ

PENNSYLVANIA OFFICE OF THE ATTORNEY GENERAL
14th Floor, Strawberry Square
Harrisburg, PA 17120

June 1, 2016

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,495 words.

II. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14-point Times New Roman.

/s/ Joel Marcus

June 1, 2016

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

I certify that the text of the electronically filed brief is identical to the text of the original copies that were sent on June 1, 2016, to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

/s/ Joel Marcus

June 1, 2016

CERTIFICATE OF PERFORMANCE OF VIRUS CHECK

I certify that on June 1, 2016, I performed a virus check on the electronically filed copy of this brief using Symantec Endpoint Protection Version 12.1.6867.6400 (last updated May 31, 2016). No virus was detected.

/s/ Joel Marcus

June 1, 2016

CERTIFICATE OF SERVICE

I certify that on June 1, 2016, I filed the foregoing Brief for the Federal Trade Commission and the Commonwealth of Pennsylvania via the Court's electronic filing system. All parties have consented to receive electronic service and will be served by the ECF system.

/s/ Joel Marcus

STATUTORY APPENDIX

Contents:

Clayton Act § 7, 15 U.S.C. § 18
Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b)

United States Code Annotated
Title 15. Commerce and Trade
Chapter 1. Monopolies and Combinations in Restraint of Trade (Refs & Annos)

15 U.S.C.A. § 18

§ 18. Acquisition by one corporation of stock of another

Effective: February 8, 1996
Currentness

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier

 © 2016 Thomson Reuters. No claim to original U.S. Government Works.

from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

CREDIT(S)

(Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125; Sept. 12, 1980, Pub.L. 96-349, § 6(a), 94 Stat. 1157; Oct. 4, 1984, Pub.L. 98-443, § 9(l), 98 Stat. 1708; Dec. 29, 1995, Pub.L. 104-88, Title III, § 318(1), 109 Stat. 949; Feb. 8, 1996, Pub.L. 104-104, Title VI, § 601(b)(3), 110 Stat. 143.)

15 U.S.C.A. § 18, 15 USCA § 18
Current through P.L. 114-143. Also includes P.L. 114-145, 114-146, 114-148, and 114-151 to 114-154.

End of Document © 2016 Thomson Reuters. No claim to original U.S. Government Works.

15 U.S.C.A. § 53(b) (Section 13(b))

§ 53. False advertisements; injunctions and restraining orders

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe--

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public--

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

CREDIT(S)

(Sept. 26, 1914, c. 311, § 13, as added Mar. 21, 1938, c. 49, § 4, 52 Stat. 114; amended Nov. 16, 1973, Pub.L. 93-153, Title IV, § 408(f), 87 Stat. 592; Aug. 26, 1994, Pub.L. 103-312, § 10, 108 Stat. 1695.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-2365

FEDERAL TRADE COMMISSION and
COMMONWEALTH OF PENNSYLVANIA,
Appellants,

v.

PENN STATE HERSHEY MEDICAL CENTER and
PINNACLEHEALTH SYSTEM,
Appellees.

APPENDIX VOLUME 1, Pages 1 - 29

Contents: **Page:**

Notice of Appeal 1
Memorandum Opinion and Order.. 4

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-02362 Hon. John E. Jones III

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs Federal Trade Commission and the Commonwealth of Pennsylvania appeal to the United States Court of Appeals for the Third Circuit from an Order of the United States District Court for the Middle District of Pennsylvania, entered on May 9, 2016 (Doc. No. 131), denying Plaintiffs' Motion For Preliminary Injunction in the above-captioned proceeding.

Dated: May 10, 2016

Respectfully submitted,

/s/ William H. Efron
WILLIAM H. EFRON
Director, Northeast Region

JARED P. NAGLEY
GERALYN J. TRUJILLO
RYAN F. HARSCH
JONATHAN W. PLATT
NANCY TURNBLACER
THEODORE ZANG
GERALD A. STEIN
PEGGY BAYER FEMENELLA
LYNDA LAO
Attorneys

Bureau of Competition
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
Telephone: (212) 607-2829
Fax: (212) 607-2832
Email: wefron@ftc.gov

DEBORAH L. FEINSTEIN
Director
Bureau of Competition
Federal Trade Commission

DAVID C. SHONKA
Acting General Counsel
Federal Trade Commission

Attorneys for Plaintiff Federal Trade Commission

BRUCE L. CASTOR, JR.
Solicitor General

BRUCE BEEMER
First Deputy Attorney General

JAMES A. DONAHUE, III
Executive Deputy Attorney General
Public Protection Division

/s/ Tracy W. Wertz
TRACY W. WERTZ
Chief Deputy Attorney General
Antitrust Section

JENNIFER A. THOMSON
Senior Deputy Attorney General

AARON SCHWARTZ
Deputy Attorney General

Pennsylvania Office of the Attorney General
Antitrust Section
14th Floor, Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-4530
Email: twertz@attorneygeneral.gov

Attorneys for Plaintiff
Commonwealth of Pennsylvania

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