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

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs Federal Trade Commission ("FTC" or "Commission") and the Commonwealth of Pennsylvania ("OAG") respectfully request that the Court grant an injunction pursuant to Fed. R. Civ. P. 62(c) enjoining the proposed transaction between Defendants Penn State Hershey Medical Center ("Hershey") and PinnacleHealth System ("Pinnacle") pending appellate review of the Court's

Memorandum Opinion and Order denying Plaintiffs' Motion For Preliminary Injunction (the "Order") (Doc. No. 131). Alternatively, Plaintiffs respectfully request that the Court temporarily enjoin the transaction pending a determination by the United States Court of Appeals for the Third Circuit on an emergency application for an injunction pending appeal that Plaintiffs intend to file.

Under the Court's December 9, 2015 temporary restraining order (Doc. No. 14), Defendants may consummate their proposed merger three business days following the Court's ruling on Plaintiffs' Motion For Preliminary Injunction, or at 12:01 AM on Friday, May 13, 2016. Absent an injunction pending appeal, Plaintiffs understand that Defendants will immediately consummate at that time.

As the Court recognized at the preliminary injunction hearing, this is a "very, very important case from the public standpoint," which forced the Court to make a "very difficult decision." Hrg. Tr. at 995:20-22. Plaintiffs respectfully submit that the Court's denial of Plaintiffs' motion raises serious, substantial legal issues for the Court of Appeals to resolve. An injunction pending appeal is necessary to preserve the *status quo*, which would otherwise be irreparably altered if the merger occurs while appellate review proceeds. Indeed, courts have recognized that it would be difficult for the FTC to "unscramble the egg," *i.e.*, unwind a consummated transaction once the merging parties begin to consolidate operations. An injunction will enable the FTC to obtain effective relief if it were

to ultimately prevail before the Court of Appeals. Moreover, an injunction would prevent immediate irreparable injury to consumers and competition. By contrast, Defendants will not be substantially injured by a brief stay pending appeal, particularly given that the proposed transaction has been considered since October 2013. For these reasons, the Court should temporarily enjoin the consummation of this merger while issues vital to competition in the health care industry in central Pennsylvania and beyond are resolved by the Court of Appeals.

ARGUMENT

I. THE APPLICABLE LEGAL STANDARD

Courts have traditionally considered four factors when determining whether to grant an injunction or stay an order to maintain the *status quo* pending an appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *See also Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991); *Butamax Advanced Biofuels LLC v. Gevo, Inc.*, Civ. No. 11-54-SLR, 2012 WL 2675232, at *1 (D. Del. Jul. 6, 2012) (granting motion for injunction pending appeal after denying plaintiff's motion for preliminary injunction). In applying these factors, courts use

a balancing test and "must weigh and measure each factor against the other factors and against the form and magnitude of the relief requested." *Butamax,* 2012 WL 2675232, at *1 (quoting *Honeywell Intern., Inc. v. Universal Avionics Sys. Corp.*, 397 F.Supp. 2d 537, 548 (D. Del. 2005)).

With respect to the first prong, when "the harm to applicant is great enough, the court will not require a 'strong showing' that applicant is 'likely to succeed on the merits.'" *Butamax*, 2012 WL 2675232, at *1 (quoting *Hilton,* 481 U.S. at 776); *see also McSurely v. McClellan,* 697 F.2d 309, 317 (D.C. Cir. 1982). The impropriety of requiring a strong showing of success is particularly apparent when a district court is asked to stay its own decision. Strict adherence to such a requirement would preclude a trial court from ever entering a stay unless it believed its own decision was likely incorrect. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 844-45 (D.C. Cir. 1977); *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998) ("When the request for a stay is made to a district court, common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal. Rather, with regard to the first prong … the movant need only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear.").

Here, each of the relevant factors weighs in favor of granting an injunction to maintain the *status quo* pending appeal.

II. PLAINTIFFS HAVE MADE A STRONG SHOWING OF LIKELIHOOD OF SUCCESS ON THE MERITS.

Granting an injunction pending appeal is proper because Plaintiffs have made a strong showing of likelihood of success on the merits that the proposed transaction is unlawful under Section 7 of the Clayton Act. Plaintiffs presented abundant evidence in their motion and at the hearing that the relevant geographic market is the four-county Harrisburg Area consisting of Dauphin, Cumberland, Perry, and Lebanon Counties. There is no dispute that, if Plaintiffs' proposed geographic market is correct, then the merger would result in a combined entity that would control a 76% market share for general acute care inpatient hospital ("GAC") services sold to commercial health plans. Under controlling precedent, this combined market share and the resulting increase in market concentration would render the transaction presumptively unlawful if Plaintiffs prevail on appeal. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963). Plaintiffs also showed that the merger would eliminate close competition between Hershey and Pinnacle and substantially increase Defendants' bargaining leverage in contract negotiations with commercial payors, leading to higher prices for GAC services. These issues deserve full and thorough consideration by the Court of Appeals before the merger is allowed to be consummated.

With respect to the issue at the heart of the Court's decision, defining the geographic market, Plaintiffs respectfully submit that the Court erred in several key respects. First, and most fundamentally, the Court incorrectly focused on the geographic location of some of Hershey's patients. Order at 9-10. In fact, the relevant customers are not patients themselves (who are largely insensitive to price) but commercial payors, as the Defendants agreed. Doc. No. 96 at 8; Order at 6. By looking at the extent to which patients enter the Harrisburg Area from outside to seek GAC services, the Court essentially applied the discredited "Elzinga-Hogarty" test, which has been rejected in the context of hospital mergers by its own inventor. *See In re Evanston NW Healthcare Corp.*, No. 9315, 2007 WL 2286195, at **64-66 (F.T.C. Aug. 6, 2007).

Recent judicial and administrative decisions recognize that health care mergers must be analyzed through the lens of contract negotiations between health care providers and commercial health plans. *See Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784-85 (9th Cir. 2015) (concluding that FTC properly defined geographic market because a hypothetical monopolist could impose a SSNIP on commercial insurers); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 562-63 (6th Cir. 2014) (recognizing that hospital rates are set through negotiations with payors and dictated by hospitals' and

payors' relative bargaining leverage); *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.

Properly viewed in this context, the relevant question is not where Hershey's patients live but whether *commercial payors* would pay a small but significant non-transitory increase in price (a "SSNIP") in order to maintain access to a hypothetical monopolist of all GAC services in the Harrisburg Area. *See St. Luke's*, 778 F.3d at 784-85. The unrebutted evidence from commercial payors establishes that hospitals outside the Harrisburg Area do not offer health plans a realistic or practical alternative to hospitals within the Harrisburg Area in creating their provider networks. That is because Harrisburg Area residents strongly prefer to seek care locally – 91% of them obtain GAC services within the Harrisburg Area. As a result, employers overwhelmingly demand access to Harrisburg Area hospitals, and health plans that do not offer that access are essentially unmarketable. In fact, payors indicated that they would pay in excess of a SSNIP to maintain in-network access to just a combined Hershey/Pinnacle (much less a hypothetical monopolist of all Harrisburg Area hospitals). Plaintiffs have thus made a strong showing that the Court's geographic market ruling is likely to be overturned on appeal.

Second, the Court incorrectly held that Defendants' temporary rate protection agreements with Capital BlueCross ("CBC") and Highmark precluded a

finding that a hypothetical monopolist could impose a SSNIP in the Harrisburg Area. Order at 10-11. Defendants themselves did not even advance that claim, which mixes apples and oranges. The hypothetical monopolist test is just that – hypothetical – and its purpose is to determine whether a monopolist *could* impose a SSNIP on customers or whether those customers would instead turn to other suppliers as substitutes. Whether the Defendants would impose a post-merger price increase on two payors as a result of private contractual provisions is simply not relevant to how the geographic market should be defined.

Plaintiffs respectfully submit that, at a minimum, they have raised substantial questions that the Court's methodology on an important question of law was incorrect. Accordingly, an injunction pending resolution of this issue by the Third Circuit Court of Appeals is warranted.

Since the Court concluded that resolution of the geographic market issue was "dispositive," Order at 8, the Court did not undertake an analysis to determine whether Defendants had met their burden and established cognizable efficiency claims. Order at 13-14. However, because Plaintiffs properly defined a relevant geographic market and established a likelihood of success on the merits, the Court erroneously credited Defendants' claims and concluded that the equities favor Defendants.

III. PLAINTIFFS WILL BE IRREPARABLY HARMED IF THE MERGER IS ALLOWS TO PROCEED.

If this injunction is denied, Defendants will be free to consummate the merger on May 13, 2016. As the Court recognized in its Order, Order at 24, Plaintiffs would then be prejudiced in their ability to obtain adequate relief if the transaction is found to be illegal in the administrative proceeding commenced by the Commission. Constructing and enforcing an effective divestiture order after merging parties have combined their operations has historically been exceedingly difficult. *See, e.g., FTC v. PPG Indus., Inc.,* 798 F.2d 1500, 1508-09 (D.C. Cir. 1986); *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008).

These concerns are particularly acute in this case, because Defendants will immediately take steps that will fundamentally alter their respective assets, making it very difficult to restore competition to pre-merger levels. Absent injunctive relief, the Defendants will immediately be able to share competitively sensitive price and strategic information (including information about each other's separate and ongoing payor negotiations), consolidate certain clinical operations, and lay off employees. Hrg. Tr. at 819:25-820:4 (claiming that parties will begin to transfer cases from Hershey to Pinnacle "within a few months"). The cumulative impact of these actions would require the FTC to take onerous measures to "unscramble the eggs" at a later date.

IV. DEFENDANTS WILL NOT BE SUBSTANTIALLY INJURED BY THE ENTRY OF AN INJUNCTION PENDING APPEAL.

Defendants will not be substantially injured by the brief delay from Plaintiffs' appeal of this Court's Order. Plaintiffs will seek an expedited appeal from the Court of Appeals. Accordingly, any incremental delay from the grant of injunctive relief will cause little, if any, damage, especially in light of the fact that Defendants began their pursuit of the merger in October of 2013. The small impact this brief delay will have on Defendants' plans is far outweighed by the substantial public interest in maintaining a competitive hospital market for patients in the Harrisburg Area.

V. AN INJUNCTION IS IN THE PUBLIC INTEREST.

Denial of an injunction pending appeal would undermine the strong public interest in the effective enforcement of the antitrust laws by denying the public – specifically Harrisburg Area residents –full and complete relief should the Commission ultimately prevail. Substantial harm to competition will likely occur during the pendency of the appeal, the administrative proceeding, and any subsequent appeals. Patients will not have the ability to choose Hershey or Pinnacle, health insurers will likely be forced to pay higher reimbursement rates in a noncompetitive market and will pass on those increases in the form of higher premiums charged to employers and higher out-of-pocket expenses charged to patients. Because of the risk to competition and the deficiencies inherent in

effectuating a divestiture after Defendants have merged, it is clearly in the public interest to preserve Hershey and Pinnacle as independent competitive health systems while the Court of Appeals assesses the merits of this Court's decision.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant an injunction pending appeal of this Court's Order denying Plaintiffs' motion for a preliminary injunction. Alternatively, Plaintiffs respectfully request that the Court grant a brief injunction pending the resolution by the Court of Appeals of an emergency motion by Plaintiffs for an injunction pending appeal.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of May, 2016, I served the foregoing document on the following counsel via electronic mail:

Adrian Wager-Zito
Julia E McEvoy
Christopher Thatch
Toby G. Singer
Kenneth W. Field
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001
adrianwagerzito@jonesday.com
jmcevoy@jonesday.com
cthatch@jonesday.com
tgsinger@jonesday.com
kfield@jonesday.com
Tel: (202) 879-3939

James P. DeAngelo
McNees Wallace & Nurick LLC
100 Pine Street
Harrisburg, PA 17101
jdeangelo@mwn.com
Tel: (717) 237-5470

Counsel for Penn State Hershey Medical Center and PinnacleHealth System

/s/ Ryan F. Harsch

Attorney for Plaintiff
Federal Trade Commission