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

FEDERAL TRADE COMMISSION

and

COMMONWEALTH OF PENNSYLVANIA

Plaintiffs,

v.

THOMAS JEFFERSON UNIVERSITY

and

ALBERT EINSTEIN HEALTHCARE NETWORK

Defendants.

No. 2:20-cv-1113-GJP

PLAINTIFFS' PRE-HEARING MEMORANDUM

TABLE OF CONTENTS

BACKGROUND 1

I. Jefferson's and Einstein's General Acute Care Hospitals and Inpatient Rehabilitation Facilities 2

II. Competition between Jefferson and Einstein.....2

III. The Strategic Rationale for Jefferson and Einstein's Merger.....4

IV. Procedural Background.....5

ARGUMENT.....5

I. Defendants' merger is likely to substantially lessen competition. 7

A. Inpatient GAC hospital services in the Northern Philadelphia Area and the Montgomery Area sold to commercial insurers and their members each comprise a relevant antitrust market 10

1. Defendants do not appear to dispute that inpatient GAC hospital services sold to commercial insurers and their members comprise a relevant product market 10

2. The Northern Philadelphia Area and the Montgomery Area each comprise a relevant geographic market in which to evaluate the competitive effects of Defendants' merger on the sale of inpatient GAC hospital services to commercial insurers and their members.....10

B. Inpatient acute rehabilitation services in the Philadelphia Area sold to commercial insurers and their members comprise a relevant antitrust market.....12

1. Inpatient acute rehabilitation services sold to commercial insurers and their members comprise a relevant product market. 13

2. The Philadelphia Area is an appropriate relevant geographic market for evaluating the merger's effects on competition for inpatient acute rehabilitation services. 14

C. Defendants' merger will substantially increase market concentration in each of the three relevant antitrust markets.....15

D. Jefferson and Einstein are close competitors whose merger will have substantial anticompetitive effects, including higher prices for healthcare services and reduced innovation 17

II. Defendants cannot rebut Plaintiffs' prima facie case. 18

A. Einstein is not a "weakened competitor."....18

B. Entry and repositioning will neither be timely, likely, nor sufficient to eliminate the anticompetitive effects of Defendants' merger.....19

C. Efficiencies do not outweigh the likely anticompetitive effects that will result from Defendants' merger.....20

III. Defendants are unable to meet their burden of proof under the "failing firm" affirmative defense.....22

IV. The equities weigh in favor of enjoining Defendants' unlawful merger. 24

CONCLUSION.....25

Appendix A: Maps of Relevant Markets A-1

TABLE OF AUTHORITIES

Cases

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 8

Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410 (5th Cir. 2008) 19, 20

Ferring Pharm, Inc. v. Watson Pharm, Inc., 765 F.3d 205 (3d Cir. 2014) 6

FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016) 2, 10

FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998) 17

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001) 6, 18

FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012) 10

FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3rd Cir. 2016) ..... *passim*

FTC v. Sanford Health, Sanford Bismarck, No. 1:17-cv-133, 2017 WL 10810016, (D.N.D. Dec. 15, 2017) ..... *passim*

FTC v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 2001) 17, 22

In re Otto Bock HealthCare N. Am., Inc., Dkt. No. 9378, 2019 WL 5957363 (FTC 2019) 22, 23

ProMedica Health Sys. v. FTC, 749 F.3d 559 (6th Cir. 2014) 10, 17, 19

United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir. 2017) 8, 18

United States v. Baker Hughes Inc., 908 F.2d 981(D.C. Cir. 1990) 6

United States v. Energy Solutions, Inc., 265 F. Supp. 3d 415 (D. Del. 2017) 23

United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974) 19

United States v. H & R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011) 8, 21, 22

United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963) 16, 17

United States v. Rockford Mem'l Corp., 898 F.2d 1278 (7th Cir. 1990) 10

Statutes

15 U.S.C. § 16 6

15 U.S.C. § 18 6

15 U.S.C. § 26 5

15 U.S.C. § 53 5

Other Authority

U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* (Aug. 19, 2010) ..... *passim*

Plaintiffs Federal Trade Commission and Commonwealth of Pennsylvania investigated the proposed merger of Thomas Jefferson University ("Jefferson") and Albert Einstein Healthcare Network ("Einstein") and found reason to believe that the merger violates Section 7 of the Clayton Act with respect to three different markets for vital healthcare services offered in southeastern Pennsylvania. Plaintiffs filed this action to preserve the status quo pending the FTC's administrative trial on the legality of the merger.

The evidence establishes that the merger is presumptively unlawful, by a wide margin, in each of three relevant markets: (1) inpatient general acute care ("GAC") hospital services in the Northern Philadelphia Area; (2) inpatient GAC hospital services in the Montgomery Area; and (3) inpatient acute rehabilitation services in the Philadelphia Area. The economic evidence, testimony from insurers, and Defendants' own testimony and ordinary course documents show that the merged entity would be able to charge higher prices to commercial insurers and their members in each of the three relevant markets. Insurers' members, including local employers and residents, will ultimately pay these higher prices in the form of higher premiums and out-of-pocket costs. The merger also will reduce competition that spurs improved quality and innovation—a development which will harm all patients in southeastern Pennsylvania, not just those with commercial insurance. Defendants cannot overcome the combined weight of this evidence. The public interest in effective antitrust law enforcement outweighs Defendants' private interests in closing the merger before the FTC has had a chance to determine whether the merger should be permanently enjoined.

BACKGROUND

I. Jefferson's and Einstein's General Acute Care Hospitals and Inpatient Rehabilitation Facilities

Einstein operates three GAC hospitals providing inpatient GAC hospital services.

Einstein's flagship GAC hospital is Einstein Medical Center Philadelphia (EMCP), a 485-bed facility located in North Philadelphia. Einstein Medical Center Montgomery (EMCM) is a 191-bed hospital in Montgomery County. Einstein Medical Center Elkins Park (EMCEP) is a GAC hospital located in Elkins Park. Einstein provides inpatient acute rehabilitation services at its nationally renowned MossRehab system of inpatient rehabilitation facilities (IRFs). Einstein's largest MossRehab IRF, with 130 beds, is co-located with EMCEP.

Jefferson operates eleven GAC hospitals at which it provides inpatient GAC hospital services. Jefferson's flagship hospital is Thomas Jefferson University Hospital ("TJUH"), an academic medical center in Center City, Philadelphia. Jefferson's 665-bed Abington Hospital ("Abington") is located in Montgomery County, Pennsylvania, in close proximity to all three Einstein GAC hospitals. Jefferson also operates two IRFs that provide inpatient acute rehabilitation services: the freestanding Magee Rehabilitation Hospital, the most significant competitor to Einstein's MossRehab, and an IRF unit in Abington Hospital.

II. Competition between Jefferson and Einstein

Jefferson and Einstein compete, first, to be included in commercial insurers' health plan provider networks and, second, to attract patients, including commercial insurers' members, to seek care at their GAC hospitals and IRFs. *See, e.g.*, [redacted].[1] *See generally FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 342 (3rd Cir. 2016) (describing hospital competition); *FTC v. Advocate Health Care Network*, 841 F.3d 460, 465 (7th Cir. 2016) (same). This competition benefits insurers; their members who pay for care

[1] Citations to testimony include the witness's institutional affiliation. Plaintiffs are filing the exhibits and testimony cited herein temporarily under seal pursuant to the Stipulated Protective Order (ECF 55) ¶ 21. See Plaintiffs' Motion to File Plaintiffs' Pre-Hearing Memorandum and Documents Referenced Therein Temporarily under Seal, which Plaintiffs are filing contemporaneously with this Memorandum.

through premiums, copays, or coinsurance; employers who pay costs directly; and patients generally. Commercial insurers seek to attract customers by offering patients low-cost access to networks of doctors and healthcare facilities, including hospitals and rehabilitation facilities. To construct provider networks, commercial insurers negotiate multi-year agreements with healthcare providers, such as Defendants, which determine the reimbursements commercial insurers must pay when the insurer's members (*i.e.*, patients) use healthcare services.

If a provider and insurer cannot agree on reimbursement, then the provider will not be included in the insurer's network, in which case the insurer's members would have higher costs for accessing that provider. *See, e.g.*, [redacted]. An insurer cannot successfully market a network to its customers—individuals and their employers—if the network fails to include sufficient access to healthcare providers, including GAC hospitals and IRFs. *See, e.g.*, [redacted].

The current competition between Defendants allows commercial insurers to negotiate, and their members to benefit from, rates for inpatient GAC services and inpatient acute rehabilitation services that reflect Defendants' competition. *See, e.g.*, [redacted]. For example, [redacted] testified that it has been able to obtain lower reimbursement rates for inpatient GAC services during negotiations with Jefferson and Einstein because Defendants' hospitals are good alternatives for [redacted] members. [redacted]. Similarly, in negotiations with [redacted] Einstein offered a greater price concession if [redacted] excluded Abington and Lansdale from a preferred tier of [redacted] tiered network. [redacted].

Defendants' documents confirm that they closely compete to provide both inpatient GAC

hospital services and inpatient acute rehabilitation services. Defendants describe each other in their documents as "primary," "major," and "top" competitors for inpatient GAC services, in large part because Abington competes in the same areas as EMCP and EMCM. Likewise, Jefferson and Einstein executives testified that Magee and MossRehab "compete for the same patients." PX7001 (Esquenazi (Einstein) IH 240:2-5); [redacted]

Economic analysis confirms Jefferson and Einstein's competitiveness with each other. Diversion ratios, an economic measure of the extent to which patients are likely to substitute between competing hospitals, confirm Defendants' close competition. Diversion ratios measure patients' "next best option" of where to receive services if their preferred hospital or IRF is not available. *See, e.g.*, *FTC v. Sanford Health*, No. 1:17-cv-133, 2017 WL 10810016, at *12 (D.N.D. Dec. 15, 2017). Diversion ratios demonstrate that Defendants are close substitutes and thus compete with one another to attract insurers and patients. Abington, in particular, is both EMCP's and EMCM's closest substitute by diversion. PX8000 (Smith Rpt.) tbl. 14. Additionally, Magee Rehabilitation Hospital is MossRehab at Elkins Park's closest substitute by diversion. PX8000 (Smith Rpt.) tbl. 15.

III. The Strategic Rationale for Defendants' Merger

Jefferson's strategic rationale for the merger confirms that the proposed transaction is likely to result in competitive harm. [redacted]

[redacted] Consistent with this strategy, eliminating Einstein as a competitor would give the merged firm substantially greater bargaining leverage with insurers. PX8000 (Smith Rpt.) ¶ 32.

IV. Procedural Background

Jefferson and Einstein executed a System Integration Agreement dated September 14, 2018, whereby Jefferson will become the sole member and ultimate parent entity of Einstein. [redacted] The Agreement does not expire until the later of [redacted] On February 27, 2020, the FTC initiated an administrative proceeding to permanently enjoin the proposed merger, and the FTC and Pennsylvania filed this action seeking a preliminary injunction to maintain the status quo pending the outcome of the FTC's administrative proceeding. *See* Compl. at 2. The FTC administrative proceeding is scheduled to begin on January 5, 2021. Absent an injunction, Defendants may close their transaction, begin consolidating their operations, and begin negotiating with insurers as a combined health system.

ARGUMENT

Section 13(b) of the FTC Act empowers the FTC to file suit to seek a preliminary injunction to prevent a merger where, as here, the Commission has reason to believe that a corporation is violating, or is about to violate, Section 7 of the Clayton Act. *See* 15 U.S.C. § 53(b); *Penn State Hershey*, 838 F.3d at 337 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001)). Section 16 of the Clayton Act authorizes the Commonwealth of Pennsylvania to sue for injunctive relief when there is a threatened antitrust violation. 15 U.S.C. § 26. Plaintiffs are entitled to a preliminary injunction when, as here, the FTC is likely to succeed on the merits in its administrative adjudication of the merger and the equities show that an

injunction would be in the public interest.[2] 15 U.S.C. §§ 16, 53(b); *see Penn State Hershey*, 838 F.3d at 337. "The public interest standard is not the same as the traditional equity standard for injunctive relief." *Penn State Hershey*, 838 F.3d at 337.

The administrative proceeding will determine whether the effect of the merger "may be substantially to lessen competition" in violation of Section 7 of the Clayton Act. 15 U.S.C. § 18. "Congress used the words 'may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties, rendering Section 7's definition of antitrust liability relatively expansive." *Penn State Hershey*, 838 F.3d at 337 (quotation marks and citations omitted). Violations of Section 7 are assessed under a burden-shifting framework: (1) Plaintiffs must establish a prima facie case that the merger is anticompetitive; (2) the burden shifts to Defendants to rebut that showing; and (3) if the Defendants successfully rebut Plaintiffs' prima facie case, the burden of production shifts back to the Plaintiffs and merges with the ultimate burden of persuasion, which always lies with the Plaintiffs. *Id*.; *see also United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990). "At this stage, [Plaintiffs are] not required to establish that the proposed merger would in fact violate section 7 of the Clayton Act. Accordingly, a certainty, even a high probability, need not be shown, and any doubts are to be resolved against the transaction." *Penn State Hershey*, 838 F.3d at 337 (quotation marks and citations omitted).

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[2] The two statutes' standards for preliminary injunctive relief differ. "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." *H.J. Heinz*, 246 F.3d at 714. Section 16 requires the Commonwealth also to show that it is likely to suffer irreparable harm without relief. *Ferring Pharm, Inc. v. Watson Pharm, Inc.*, 765 F.3d 205, 210 (3d Cir. 2014). Both standards are met here because, absent a preliminary injunction, Defendants may consolidate assets, service lines, and facilities while the FTC's administrative proceeding and any appeals are pending.

Defendants' proposed merger would harm competition in each of three different relevant antitrust markets—two for inpatient GAC hospital services and one for inpatient acute rehabilitation services—to such a degree that the merger is presumptively unlawful under the applicable case law and the Merger Guidelines.[3] Direct evidence of harm further shows that Defendants' merger is unlawful. Defendants cannot rebut Plaintiffs' prima facie case because their arguments about entry and expansion in the relevant markets, the supposed efficiencies the merger may generate, and Einstein's purported weakness as a competitor are insufficient as matters of fact and law. Further, Defendants fall well short of proving that Einstein is a "failing firm," an affirmative defense to a concededly anticompetitive merger.

Finally, the equities weigh in favor of granting the preliminary injunction. "The question is whether the harm that the Hospitals will suffer if the merger is delayed will, in turn, harm the public more than if the injunction is not issued." *Penn State Hershey*, 838 F.3d at 352. "Once [the Court] determine[s] that the proposed merger is likely to substantially lessen competition, the Hospitals face a difficult task in justifying the nonissuance of a preliminary injunction." *Id.* (quotation marks omitted). Private equities are afforded little weight, *id.*, especially here where the public interest in enforcing the antitrust laws outweighs Defendants' interest in immediately closing a merger that Defendants agreed need not be completed before [redacted].

I. Defendants' merger is likely to substantially lessen competition.

"To establish a prima facie case, the Government must (1) propose the proper relevant market and (2) show that the effect of the merger in that market is likely to be anticompetitive."

[3] The FTC and U.S. Department of Justice's Horizontal Merger Guidelines "outline the principal analytical techniques, practices, and the enforcement policy" applicable to this merger and are persuasive authority in courts. Merger Guidelines § 1. Competition agencies, states, and the courts use the Merger Guidelines in adjudicating merger cases. *See, e.g.*, *Penn State Hershey*, 838 F.3d at 338 n.2.

Id. at 337-38. "The Government can establish a prima facie case simply by showing a high market concentration . . . ." *Id*. at 347. Evidence of anticompetitive effects beyond market concentration, including economic analysis and qualitative evidence, also is probative. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 81-89 (D.D.C. 2011) (finding that qualitative and quantitative evidence of unilateral effects bolstered conclusion that transaction would lead to anticompetitive harm). Here, Defendants' merger will result in substantial increases in market concentration in each of the three relevant markets. The increases and resulting market concentrations are so high that the merger is presumptively unlawful as to each relevant market. A finding that Plaintiffs are likely to succeed with respect to any of the three relevant markets "provides an independent basis for the injunction, even absent a finding of anticompetitive harm in [another relevant] market." *United States v. Anthem, Inc.*, 855 F.3d 345, 368 (D.C. Cir. 2017).

Each "relevant market is defined in terms of two components: the product market and the geographic market." *Penn State Hershey*, 838 F.3d at 338. Relevant product markets reflect the "reasonable interchangeability of use" or "the cross-elasticity of demand" between products. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). "[C]ourts look at 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." *H & R Block, Inc.*, 833 F. Supp. 2d at 51 (internal citations omitted). "The relevant geographic market is that area in which a potential buyer may rationally look for the goods or services he seeks." *Penn State Hershey*, 838 F.3d at 338 (quotation marks omitted). The relevant geographic market "must 'correspond to the commercial realities of the industry' being considered and 'be economically significant.'" *Id*. (quoting *Brown Shoe Co.*, 370 U.S. at 336-37).

The Third Circuit has held—and the Defendants do not appear to dispute—that the

Merger Guidelines' Hypothetical Monopolist Test ("HMT") is an acceptable method for evaluating a proposed relevant antitrust market. *See Penn State Hershey*, 838 F.3d at 338 (discussing Merger Guidelines § 4). The HMT asks what would happen if a single firm became the sole seller of the services in the proposed geography and raised prices. "If a hypothetical monopolist could impose a small but significant non-transitory increase in price ('SSNIP') in the proposed market, the market is properly defined." *Id*. (footnote omitted). A 5% price increase or more qualifies as a SSNIP. *See id*. at 338 n.1 (citing Merger Guidelines § 4.1.2). The HMT is applied in a proposed market for hospital services "through the lens of the insurers," who reimburse hospitals for such services. *Id*. at 342. More specifically, under the Merger Guidelines, the relevant inquiry is whether a hypothetical monopolist of a set of hospitals located in a given geography could impose a SSNIP for at least one of those hospitals in negotiations with commercial insurers. PX8000 (Smith Rpt.) at 074; Merger Guidelines § 4.2.1. "The Agencies may evaluate a merger in any relevant market satisfying the test." Merger Guidelines § 4.1.1. In accordance with the "smallest market principle," a market defined using the HMT typically does not include all conceivable competitors or alternatives. *Id*.

When, as in this case, the relevant markets are for healthcare services sold to insurers and their members, "the Government [is] not required to show that payors would accept a price increase rather than excluding the merged . . . entity from their networks; it [is] required to show only that payors would accept a price increase rather than excluding *all* of the hospitals in the [proposed geographic] area." *Penn State Hershey*, 838 F.3d at 346. The evidence here shows that insurers would accept a price increase rather than exclude all of the facilities from their networks in three different markets: 1) inpatient GAC hospital services sold to commercial insurers and their members in the Northern Philadelphia Area; 2) inpatient GAC hospital services sold to

commercial insurers and their members in the Montgomery Area; and 3) inpatient acute rehabilitation services sold to commercial insurers and their members in the Philadelphia Area.

A. Inpatient GAC hospital services in the Northern Philadelphia Area and the Montgomery Area sold to commercial insurers and their members each comprise a relevant antitrust market.

1. Defendants do not appear to dispute that inpatient GAC hospital services sold to commercial insurers and their members comprise a relevant product market.

Defendants appear to agree—and courts have routinely accepted—that the cluster of inpatient GAC hospital services sold to commercial insurers and their members constitutes an appropriate relevant product market.[4] PX7062 (Capps (Bates White) Dep. 46:20-47:4); *see* PX8002 (Smith Rebuttal) at 008; *see also, e.g.*, *Penn State Hershey*, 838 F.3d at 338; *Advocate Health Care*, 841 F.3d at 468; *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284 (7th Cir. 1990); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2012).

2. The Northern Philadelphia Area and the Montgomery Area each comprise a relevant geographic market in which to evaluate the competitive effects of Defendants' merger on the sale of inpatient GAC hospital services to commercial insurers and their members.

Economic analysis, testimony from insurers, and Defendants' own testimony and documents are in accord: the Northern Philadelphia Area and the Montgomery Area are each an appropriate geographic market for analyzing the effects of the merger on inpatient GAC hospital services.

The "Northern Philadelphia Area" is shorthand for an area of competition surrounding Einstein's flagship hospital, EMCP, that includes eleven hospitals: Einstein's EMCP and

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[4] Inpatient GAC hospital services do not include outpatient services, rehabilitation services, or psychiatric services because a different set of competitors offers those services. PX8000 (Smith Rpt.) at 055-056, 058; *see generally ProMedica Health Sys. v. FTC*, 749 F.3d 559, 566 (6th Cir. 2014); *OSF Healthcare*, 852 F. Supp. 2d at 1076.

EMCEP, Jefferson's Abington and Frankford Hospitals, and seven third-party hospitals (Temple's Temple University Hospital, Fox Chase Cancer Center, and Jeanes Hospital; Tower's Chestnut Hill Hospital; St. Christopher's Hospital for Children; Prime's Roxborough Memorial Hospital; and CTCA-Philadelphia). PX8000 (Smith Rpt.) at 079-081; *see* Appendix A-1 (map of Northern Philadelphia Area).

The "Montgomery Area" is shorthand for an area of competition surrounding Einstein's EMCM hospital that includes ten hospitals: Einstein's EMCM, Jefferson's Abington and Lansdale hospitals, and seven third-party hospitals (Main Line's Paoli Hospital and Bryn Mawr Hospital; Tower's Phoenixville Hospital and Chestnut Hill Hospital; Prime's Suburban Community Hospital and Roxborough Memorial Hospital; and Physicians Care Surgical Hospital). PX8000 (Smith Rpt.) at 079-083; *see* Appendix A-2 (map of Montgomery Area).

A hypothetical monopolist in the Northern Philadelphia Area or in the Montgomery Area that owned all of the hospitals in either of those markets could profitably raise prices for inpatient GAC hospital services sold to commercial insurers and their members in each market by well over the 5% increase required to satisfy the HMT. PX8000 (Smith Rpt.) at 084. Therefore, each geographic area is an appropriate antitrust market for assessing the competitive effects of this merger.

Testimony from insurers, including [redacted], [redacted] and [redacted] confirms this economic analysis. Insurers have testified that they would find it difficult if not impossible to offer a marketable health plan to customers in an area consistent with the Northern Philadelphia Area if the health plan excluded all local hospitals from their networks. *See, e.g.*, [redacted]. Rather, they would accept a price increase to continue offering

inpatient GAC hospital services in an area consistent with the Northern Philadelphia Area. *See, e.g.*, [redacted]. The same is true for the Montgomery Area. [redacted]. This makes commercial sense because patients tend to prefer going to hospitals near to where they live. [redacted]; PX7037 (Woodward (Trinity) Dep. 224:3-7). Accordingly, insurers could not exclude all GAC hospitals in either of these two areas, as a health plan that did so would lack acceptable GAC hospital options for members who live in those areas. And even though it is not necessary for the government to meet its burden, *see Penn State Hershey*, 838 F.3d at 346, the testimony also demonstrates that insurers also would accept a SSNIP rather than excluding the merged Jefferson/Einstein entity alone from their networks in either the Northern Philadelphia Area or in the Montgomery Area. [redacted].

Defendants recognize that they compete to provide inpatient GAC hospital services in geographic areas very similar to the Northern Philadelphia Area and the Montgomery Area. For example, Einstein's President and CEO, Barry Freedman, testified that "[t]he North Philadelphia market is served predominantly by Einstein Medical Center Philadelphia," while "Einstein Medical Center Montgomery . . . is the principal server of activity in Montgomery County." PX7004 (Freedman IH at 135:5-21).

B. Inpatient acute rehabilitation services in the Philadelphia Area sold to commercial insurers and their members comprise a relevant antitrust market.

The market for inpatient acute rehabilitation services sold and provided to commercial insurers and their members in the Philadelphia Area is a relevant antitrust market for evaluating

this merger.

1. Inpatient acute rehabilitation services sold to commercial insurers and their members comprise a relevant product market.

Inpatient acute rehabilitation services are sufficiently distinct from other kinds of post-acute care rehabilitation services as to constitute a relevant product market. Inpatient acute rehabilitation services are a cluster of post-acute care services provided to patients who require an overnight stay in a hospital setting during their rehabilitation and who require, at a minimum: intensive multi-disciplinary rehabilitation therapies at least three hours a day; therapy five days per week; three face-to-face visits with a physician per week; and 24-hour nursing care. *See, e.g.*, PX7048 (Staback-Haney (St. Mary) Dep. 204:9-205:6); PX7018 (Daley (Good Shepherd) Dep. 144:4-12). These inpatient acute rehabilitation services are provided in hospitals called inpatient rehabilitation facilities or "IRFs." Consistent with federal regulations, commercial insurers have strict medical necessity requirements for preapproval of IRF admissions. These requirements are designed to limit IRF utilization to patients who require and would benefit from the treatment intensity of inpatient acute rehabilitation services provided by IRFs. *See, e.g.*, [redacted]. No other post-acute care settings offer the intensive, multi-disciplinary rehabilitation services of an IRF. *See e.g.*, [redacted].

Providing inpatient acute rehabilitation services requires IRFs to have several characteristics that distinguish them from lower intensity post-acute care settings. For example, IRFs must operate under a state hospital license. PX7018 (Daley (Good Shepherd) Dep. 142:8-144:3); PX7048 (Staback-Haney (St. Mary) Dep. 198:16-199:12); [redacted]. IRF patient admissions are subject to a strict admissions process, including a pre-screening process that generally includes a referral from the GAC hospital or facility that

discharged the patient, pre-certification by the insurer for medical necessity, and a review by the IRF, including a physician, receiving the patient. *See, e.g.*, PX7048 (Staback-Haney (St. Mary) Dep. 195:3-196:19); [redacted]. Insurers reimburse IRFs differently than other providers of rehabilitation services. [redacted] PX7048 (Staback-Haney (St. Mary) Dep 223:5-224:3).

Defendants incorrectly assert that inpatient acute rehabilitation services are reasonably interchangeable with subacute rehabilitation services offered at skilled nursing facilities or "SNFs." SNFs in southeastern Philadelphia do not offer the inpatient acute rehabilitation services of an IRF. *See, e.g.*, [redacted]. IRF admission policies require that a physician rule out less intensive post-acute care settings, like SNFs, as options before admitting a patient to an IRF. *See, e.g.*, PX7013 (Phillips (Bryn Mawr) Dep. 240:10-242:6). Neither patients nor insurers can reasonably substitute away from inpatient acute rehabilitation services to other post-acute care settings. PX7048 (Staback-Haney (St. Mary) Dep. 237:12-239:14); [redacted]. The decision to admit a patient to an IRF is a medical decision that is not affected by cost. [redacted]. Accordingly, insurers would not replace IRFs with SNFs in their networks or otherwise steer patients from IRFs to other post-acute care settings in response to an increase in price. *See e.g.*, [redacted].

2. The Philadelphia Area is an appropriate relevant geographic market for evaluating the merger's effects on competition for inpatient acute rehabilitation services.

The "Philadelphia Area" is shorthand for an area of competition surrounding Einstein's flagship IRF facility, MossRehab at Elkins Park, that includes three Einstein IRFs (Einstein's MossRehab at Elkins Park, MossRehab at EMCP, and MossRehab at Jefferson's Frankford

Hospital), two Jefferson IRFs (Magee and Jefferson's Abington IRF unit), and two third-party IRFs (Penn Rehab and Trinity Nazareth Hospital's IRF unit). PX8000 (Smith Rpt.) at 086-089; *see* Appendix A-3 (map of Philadelphia Area).

This market also passes the HMT. A hypothetical monopolist who owned all of the IRFs in the Philadelphia Area could profitably impose a SSNIP on inpatient acute rehabilitation services sold to commercial insurers and their members. PX8000 (Smith Rpt.) at 088. Therefore, the sale of inpatient acute rehabilitation services in the Philadelphia Area to commercial insurers and their members is a relevant antitrust market. PX8000 (Smith Rpt.) at 086-089.

Commercial insurers' testimony again confirms the economic analysis. Commercial insurers testified that it would be difficult if not impossible to provide a marketable plan in Philadelphia County or Montgomery County without including Jefferson's and Einstein's IRFs, let alone all of the IRFs in the Philadelphia Area. [redacted]. This makes sense because patients who live in or around Philadelphia generally prefer to receive inpatient acute rehabilitation services close to home. *See, e.g.*, [redacted]. Insurers also testified that freestanding IRFs in Chester and Bucks County, for example, Bryn Mawr, are too far away for most patients who reside closer to Jefferson's Magee and Einstein's MossRehab facilities. *See, e.g.*, [redacted].

C. Defendants' merger will substantially increase market concentration in each of the three relevant antitrust markets.

"[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, 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." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); *see also Penn State Hershey*, 838 F.3d at 347. "Market concentration is measured by the Herfindahl-Hirschman Index ('HHI')," which is calculated using firms' market shares in the relevant market. *Penn State Hershey*, 838 F.3d at 346-47. The larger the post-merger HHI and the change in HHI the merger causes, the more likely the merger is to cause anticompetitive harm. "A post-merger market with a HHI above 2,500 is classified as 'highly concentrated,' and a merger that increases the HHI by more than 200 points is 'presumed to be likely to enhance market power.'" *Id.* at 347 (quoting Merger Guidelines § 5.3). If Jefferson merges with Einstein, the resulting market concentrations in each of the three relevant antitrust markets would be high enough to trigger the presumption of "enhance[d] market power," meaning the merger is presumptively unlawful in each market.

First, the merger will cause such high levels of market concentration in each relevant market that it is presumptively unlawful. In the market for inpatient GAC services in the Northern Philadelphia Area, the merger would increase HHI by 1,359 points, resulting in a post-merger HHI of 4,792. The merger would increase HHI in the Montgomery Area market for inpatient GAC hospital services by 887, resulting in a post-merger HHI of 3,827. PX8000 (Smith Rpt.) at 095-097. As for inpatient acute rehabilitation services provided in the Philadelphia Area, the merger would increase HHI by 2,469 points, resulting in a post-merger HHI of 5,819. PX8002 (Smith Rebuttal) at 073. These HHI figures naturally follow from the fact that all three markets are currently highly concentrated, with Jefferson as the leading provider of inpatient GAC hospital services in the Northern Philadelphia and Montgomery Areas and Einstein and Jefferson the respective number one and two providers of inpatient acute rehabilitation services in the Philadelphia Area. Courts have routinely enjoined mergers based on lower concentration

levels than those found here. *See, e.g., FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 n.12 (11th Cir. 2001) (post-merger HHI of 3,200 and increase in HHI over 630); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 53-54 (D.D.C. 1998) (post-merger HHIs between 2,224 and 3,507).

Second, the merged firm's share in each relevant market well exceeds 30%, which the Supreme Court has held sufficient to "threaten undue concentration" and trigger the presumption of illegality. *Phila. Nat'l Bank*, 374 U.S. at 363-64; *see also, e.g., Univ. Health*, 938 F. 2d at 1219 (stating that that the FTC "clearly established a prima facie case of anticompetitive effect" where merged firm had 43% GAC market share). The merged hospital system will have market shares of 64.5%, 49.9%, and 71.6% of commercially insured patient discharges in the markets for inpatient GAC hospital services in the Northern Philadelphia Area, inpatient GAC hospital services in the Montgomery Area, and inpatient acute rehabilitation services in the Philadelphia Area, respectively. PX8000 (Smith Rpt.) at 095-097; PX8002 (Smith Rebuttal) at 054.

D. Jefferson and Einstein are close competitors whose merger will have substantial anticompetitive effects, including higher prices for healthcare services and reduced innovation

The presumption of illegality in each market also accords with a "large body of other evidence—including documents and testimony from the merging parties themselves, testimony from [insurers], and expert testimony . . . confirm[ing] that the merger would have a substantial anticompetitive effect." *ProMedica Health Sys.*, 749 F.3d at 564.

Economic analysis demonstrates that Defendants' combined hospital system will gain substantial bargaining leverage, allowing the combined entity to raise prices. For example, the merger is likely to result in a 6.9% price increase at Einstein's GAC hospitals if they no longer have to compete with Jefferson. PX8000 (Smith Rpt.) at 112-13. The total annual consumer harm resulting from the expected price increase at both Defendants' GAC hospitals is $23.3 million. PX8000 (Smith Rpt.) at 113-14. If the merger closes, prices are also likely to increase by

an average of 9.1% across both Defendants' IRFs, resulting in $2.8 million of annual harm from the merger. PX8002 (Smith Rebuttal) at 089. As shown below, Defendants cannot prove that potential mitigating factors, such as entry or efficiencies, would be sufficient to offset this likely anticompetitive harm.

Freed of their competition, Einstein and Jefferson would have reduced incentives to invest and innovate. Non-price competition benefits all patients that Defendants serve, including those without commercial insurance. PX8000 (Smith Rpt.) at 128-29, 133-36. Courts frequently consider evidence of anticompetitive effects from mergers in areas of non-price competition, like innovation, investment, quality, and reputation. *See, e.g.*, *Anthem*, 855 F.3d at 360-61; *Sanford Health*, 2017 WL 10810016, at *13. As competitors, Defendants have spurred each other to acquire new technology, expand services, and improve access to attract patients and insurers. For example, [redacted].

II. Defendants cannot rebut Plaintiffs' prima facie case.

"The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully." *H.J. Heinz*, 246 F.3d at 725 (quoting *Baker Hughes*, 908 F.2d at 991) (internal alterations omitted). Defendants cannot muster such evidence here for any of the three markets at issue, much less all three as would be necessary to defeat Plaintiffs' request for an injunction.

A. Einstein is not a "weakened competitor."

The "Hail-Mary pass of presumptively doomed mergers," the "weakest ground of all for

justifying a merger," is the so-called "flailing firm" or "weakened competitor" defense. *ProMedica*, 749 F.3d at 572 (quotation marks omitted). Defendants must show that even if Einstein remained in the market, it will be unable to compete effectively for long-term contracts. *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 508 (1974).

The evidence here does not show that Einstein will be unable to compete effectively going forward. Einstein has been competing effectively for years, improving and maintaining its market share for the relevant services in the relevant markets. PX8000 (Smith Rpt.) § VII. Einstein's own projections assume that Einstein will continue operating as a standalone entity through at least 2024, without cutting any service lines. PX7012 (Blaney (Einstein) IH 101:1-103:21, 224:11-14). There is no basis to conclude that Einstein will be unable to compete effectively for long-term contracts or to draw patients to its hospitals if Einstein remains in the market. To the contrary, insurers testified that they expect to continue contracting with Einstein for services in the absence of the merger. *See e.g.*, [redacted].

B. Entry and repositioning will neither be timely, likely, nor sufficient to eliminate the anticompetitive effects of Defendants' merger.

Neither entry nor repositioning by competitors will counteract the harm from Defendants' merger. Such entry or repositioning can save an otherwise anticompetitive merger only if it is "so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger." Merger Guidelines §§ 6.1, 9. "Lack of successful and effective entry in the face of non-transitory increases in the margins earned on products in the relevant market tends to suggest that successful entry is slow or difficult." Merger Guidelines § 9; *see, e.g.*, *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 427 (5th Cir. 2008).

Such entry must be timely, likely, and sufficient to offset the expected anticompetitive harms. Merger Guidelines § 9.

When EMCM opened in 2012, it was the first new GAC hospital in southeastern Pennsylvania in more than a decade. *See* PX7004 (Freedman (Einstein) IH 34:22-35:24). EMCM cost more than $300 million and took more than five years from feasibility study to completed construction. *Id.* at 97:10-98:12, 105:9-20. Einstein's CEO estimated building a new hospital similar to EMCM today would cost $300 to $400 million and take at least five years. *Id.* at 110:14-111:22.

Likewise, entry or expansion of inpatient acute rehabilitation services at IRFs will not eliminate the anticompetitive effects of this merger in the inpatient acute rehabilitation market. It costs millions of dollars and takes years of effort to open an IRF. These costs also explain why SNFs have not repositioned as IRFs able to provide comparable inpatient acute rehabilitation services that only IRFs can provide. *See, e.g.*, [redacted].

Even if entry into the market for services that IRFs provide were "timely" and "likely," it would not be sufficient to overcome the anticompetitive effects. Defendants operate two of the nation's preeminent IRF systems and together would own over 70% of the market for acute inpatient rehabilitation services. "[L]ong-standing dominance in the relevant . . . markets gives [Defendants] a virtually insurmountable advantage over newly entering competitors." *See Chicago Bridge & Iron*, 534 F.3d at 421-22.

C. Efficiencies do not outweigh the likely anticompetitive effects that will result from Defendants' merger.

Defendants' claim that the merger will result in efficiencies that will outweigh the merger's likely anticompetitive effects is meritless. The Third Circuit has "never formally adopted the efficiencies defense [and] [n]either has the Supreme Court." *Penn State Hershey*,

838 F.3d at 347.

Even if the efficiencies defense applied here, Defendants cannot meet its stringent requirements. The Third Circuit explained:

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

Id. at 348-49 (internal quotation marks and citations omitted); *see also* Merger Guidelines § 10. When the merger will result in high degrees of market concentration, as it will here, the claimed efficiencies must be "extraordinary" to prevail under this "rigorous standard." *Penn State Hershey*, 838 F.3d at 349, 350.

First, Defendants' claimed efficiencies do not offset the predicted harm. Of Defendants' claimed efficiencies, less than $50,000 in annual savings are cognizable efficiencies that likely would be passed on to some extent to customers. *See* PX8002 (Smith Rebuttal) at 128-130.

Second, only 28% of Defendants' claimed efficiencies are potentially cognizable. PX8003 (Hammer Rebuttal) ¶ 14. The remaining 72% of Defendants' claimed efficiencies are either not verifiable (as they are based on estimates a third party cannot reasonably verify), or are not merger-specific (as Defendants have not shown the merger is the only practical means to achieve the claimed savings), or are neither verifiable nor merger-specific. PX8003 (Hammer Rebuttal) ¶ 14. For example, a large portion of the claimed efficiencies rest on Defendants' unsupported business judgments. PX8003 (Hammer Rebuttal) ¶¶ 34, 57, 66. "While reliance on the estimation and judgment of experienced executives about costs may be perfectly sensible as a business matter, the lack of a verifiable method of factual analysis resulting in the cost estimates renders them not cognizable by the Court." *H & R Block, Inc.*, 833 F. Supp. 2d at 91; *see also*

Sanford Health, 2017 WL 10810016, at *15 (rejecting efficiencies "based only on Defendants' estimates"). "If this were not so, then the efficiencies defense might well swallow the whole of Section 7 of the Clayton Act because management would be able to present large efficiencies based on its own judgment and the Court would be hard pressed to find otherwise." *H & R Block, Inc.*, 833 F. Supp. 2d at 91; *see also Univ. Health*, 938 F.2d at 1223. Other claimed efficiencies, like clinical rationalization and integration, may result from reductions in output or service. PX8002 (Smith Rebuttal) ¶ 253.

Finally, even fully crediting 100% of Defendants' claimed efficiencies despite contrary precedent and evidence, the claimed cost savings still come up short of the amount necessary to offset the predicted anticompetitive harm to consumers from Defendants' merger. PX8002 (Smith Rebuttal) ¶¶ 247, 250.

III. Defendants are unable to meet their burden of proof under the "failing firm" affirmative defense.

Defendants assert a "failing firm" affirmative defense in their Answers. Einstein Ans. p.15 (Third Defense); Jefferson Ans. at p. 21, ¶ 12. At the administrative hearing on the merits, the FTC will determine whether Defendants have met their burden on this affirmative defense. *See In re Otto Bock HealthCare N. Am., Inc.*, Dkt. No. 9378, 2019 WL 5957363, at *35 (FTC 2019) (citing Merger Guidelines & 11; *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 136-8 (1969)). "The defense is, 'in a sense, a lesser of two evils approach, in which the possible threat to competition resulting from an acquisition is deemed preferable to the adverse impact on competition' from the company's going out of business." *Id.* (quoting *General Dynamics*, 415 U.S. at 507). To meet their burden under this affirmative defense, Defendants must prove that: (1) Einstein would be unable to meet its financial obligations in the near future; (2) Einstein would be unable to reorganize successfully in bankruptcy; and (3) Einstein has made

unsuccessful good-faith efforts to elicit reasonable alternative offers that would prevent its assets from exiting the market and pose a less severe danger to competition than the proposed merger. *Otto Bock HealthCare*, 2019 WL 5957363, at *35; *see also United States v. Energy Solutions, Inc.*, 265 F. Supp. 3d 415, 445 (D. Del. 2017).

Defendants cannot prove Einstein meets *any* of the elements of the failing firm affirmative defense, let alone all of them. First, the evidence does not show that Einstein is unable to meet its financial obligations in the near future. [redacted] PX7012 (Blaney (Einstein) IH 103:16-18, 193:9-12, 204:9-12, 224:2-14); [redacted]. Moreover, Einstein has received almost [redacted] in COVID-19 relief, including [redacted] in grants, which will more than cover the losses suffered during the pandemic to date. PX8003 (Hammer Rebuttal) Updated Ex. 1. While the future impact of COVID-19 remains uncertain, that is all the more reason to enjoin the merger pending the administrative adjudication, which will have the benefit of additional discovery on this issue.

Second, Einstein has not even considered bankruptcy reorganization as an option. PX8001 (Hammer Rpt.) ¶ 216. Accordingly, Defendants have produced no evidence proving that bankruptcy reorganization would be unsuccessful.

Third, Defendants cannot establish that Einstein has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would prevent its assets from exiting the market and pose a less severe danger to competition than the proposed merger. In fact, the evidence is the opposite. Einstein's efforts to find a merger partner focused on Jefferson as a [redacted] strategic option. PX8001 (Hammer Rpt.) ¶ 222. [redacted]

[redacted] PX8003 (Hammer Rpt.) ¶¶ 224-227.

IV. The equities weigh in favor of enjoining Defendants' unlawful merger.

"The Government's showing of likelihood of success creates a presumption in favor of preliminary injunctive relief, [although the Court] must still weigh the equities in order to decide whether enjoining the merger would be in the public interest." *Penn State Hershey*, 838 F.3d at 352 (quotation marks omitted). "The public interest standard is not the same as the traditional equity standard for injunctive relief." *Id.* at 337. "Where the FTC has demonstrated a likelihood of success on the merits, no court has denied a Section 13(b) motion for a preliminary injunction based on weight of the equities." *Sanford Health*, 2017 WL 10810016, at *51.

"The principal equity weighing in favor of issuance of the injunction is the public's interest in effective enforcement of the antitrust laws." *Penn State Hershey*, 838 F.3d at 352 (quotation marks omitted). Here, a preliminary injunction preserves the status quo and the FTC's ability to enjoin the merger permanently if the administrative proceeding concludes that the proposed merger is unlawful. "[S]hould the Hospitals consummate the merger and the FTC subsequently determine that it is unlawful, divestiture would be the FTC's only remedy." *Id.* "At that point, since it is extraordinarily difficult to 'unscramble the egg,' it will be too late to preserve competition if no preliminary injunction has issued." *Id.* at 352-53 (quotation marks omitted). Allowing the merger to close before the FTC adjudication will irreparably harm the public's interest in ensuring enforcement of the antitrust laws, and the Commonwealth's interest in preventing anticompetitive mergers in particular. *See, supra*, at n.2 (describing applicable standards for preliminary injunctive relief).

Private equities, like effects of an injunction on Defendants' business, "are not to be

afforded great weight" and "alone would not suffice to justify denial of a preliminary injunction barring the merger" in light of a finding that Plaintiffs are likely to succeed on the merits. *Penn State Hershey*, 838 F.3d at 352 (quotation marks omitted). There is "no reason why, if the merger makes economic sense now, it would not be equally sensible to consummate the merger following FTC adjudication on the merits that finds the merger lawful." *Id*. at 353. In any event, Defendants' merger agreement demonstrates they will not suffer any harm from a delay, because the agreement does not expire until at least [redacted]. "None of the private equities, or those equities that may have public benefit, on the Hospitals' side of the ledger are sufficient to overcome the public's strong interest in effective enforcement of the antitrust laws." *Penn State Hershey*, 838 F.3d at 353.

CONCLUSION

Defendants' presumptively illegal merger substantially lessens competition in three distinct markets for the provision of vital healthcare services. The Court should preliminarily enjoin the proposed merger pending the outcome of the FTC's administrative adjudication.

Dated: September 2, 2020

Respectfully submitted,

/s/ Mark Seidman

MARK SEIDMAN
CHARLES DICKINSON
JAMES H. WEINGARTEN
RYAN ANDREWS
GUSTAV CHIARELLO
GUIA DIXON
JAMIE FRANCE
CHRISTOPHER HARRIS
ALBERT TENG
JONATHAN WRIGHT

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-3570
mseidman@ftc.gov
cdickinson@ftc.gov
jweingarten@ftc.gov
randrews@ftc.gov
gchiarello@ftc.gov
gdixon@ftc.gov
jfrance@ftc.gov
charris1@ftc.gov
ateng@ftc.gov
jwright1@ftc.gov

Attorneys for Plaintiff Federal Trade Commission

/s/ Abigail Wood

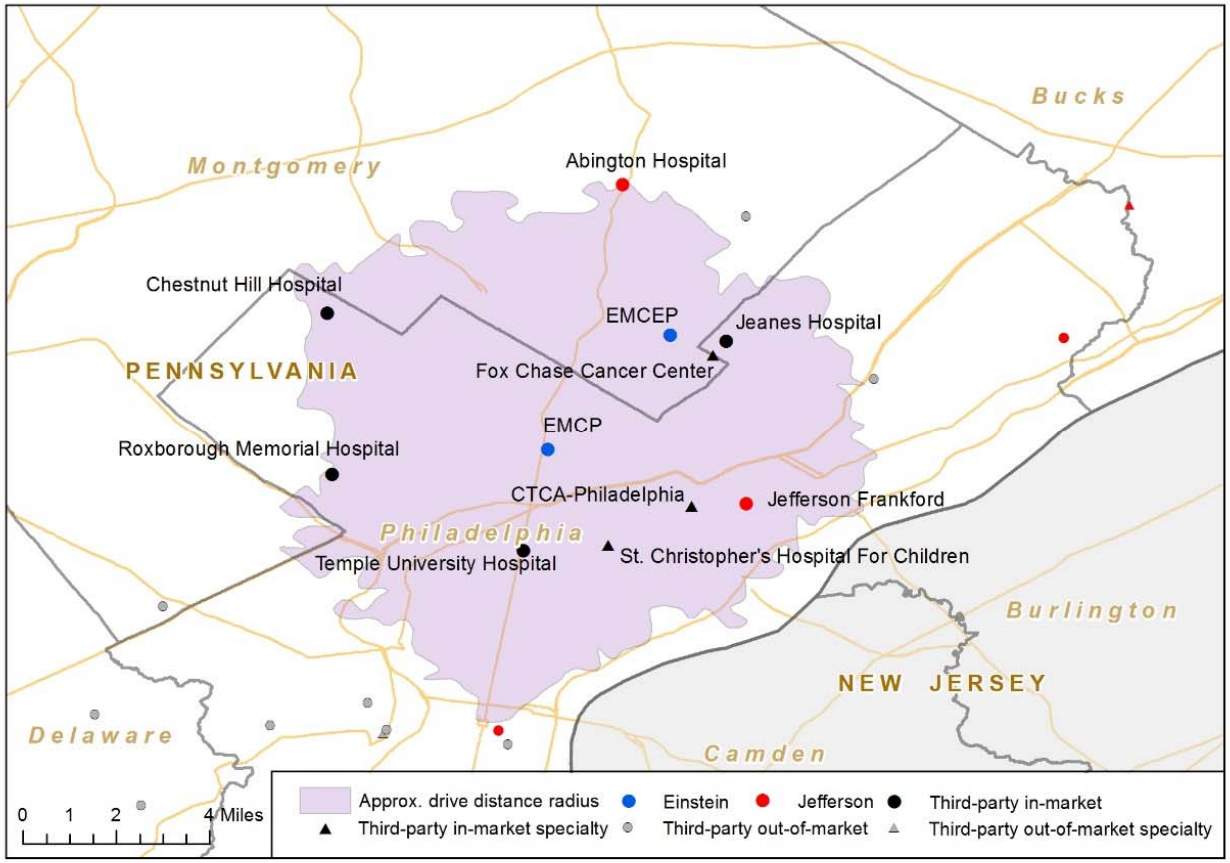
ABIGAIL WOOD, PA 325273
JAMES A. DONAHUE, PA 42624
TRACY WERTZ, PA 69164
JENNIFER THOMSON, PA 89360
STEPHEN KOVATIS, PA 209495
STEPHEN SCANNELL (*pro hac vice*), IL 633307

Office of the Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120
(717) 787-4530
awood@attorneygeneral.gov
jdonahue@attorneygeneral.gov
twertz@attorneygeneral.gov
jthomson@attorneygeneral.gov
skovatis@attorneygeneral.gov
sscannell@attorneygeneral.gov

Attorneys for Plaintiff Commonwealth of Pennsylvania

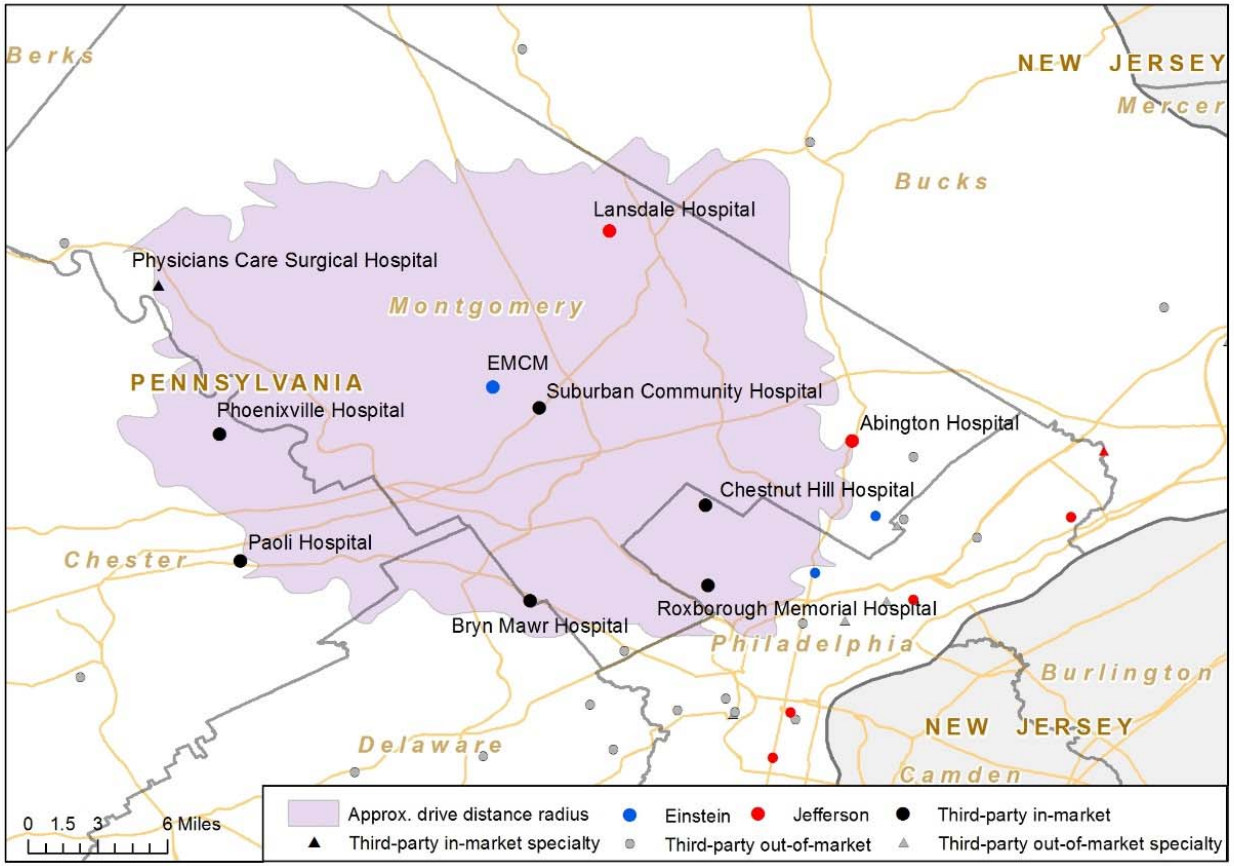
APPENDIX A-1

The Northern Philadelphia Area
for Inpatient GAC Hospital Services Sold to Commercial Insurers and Their Members



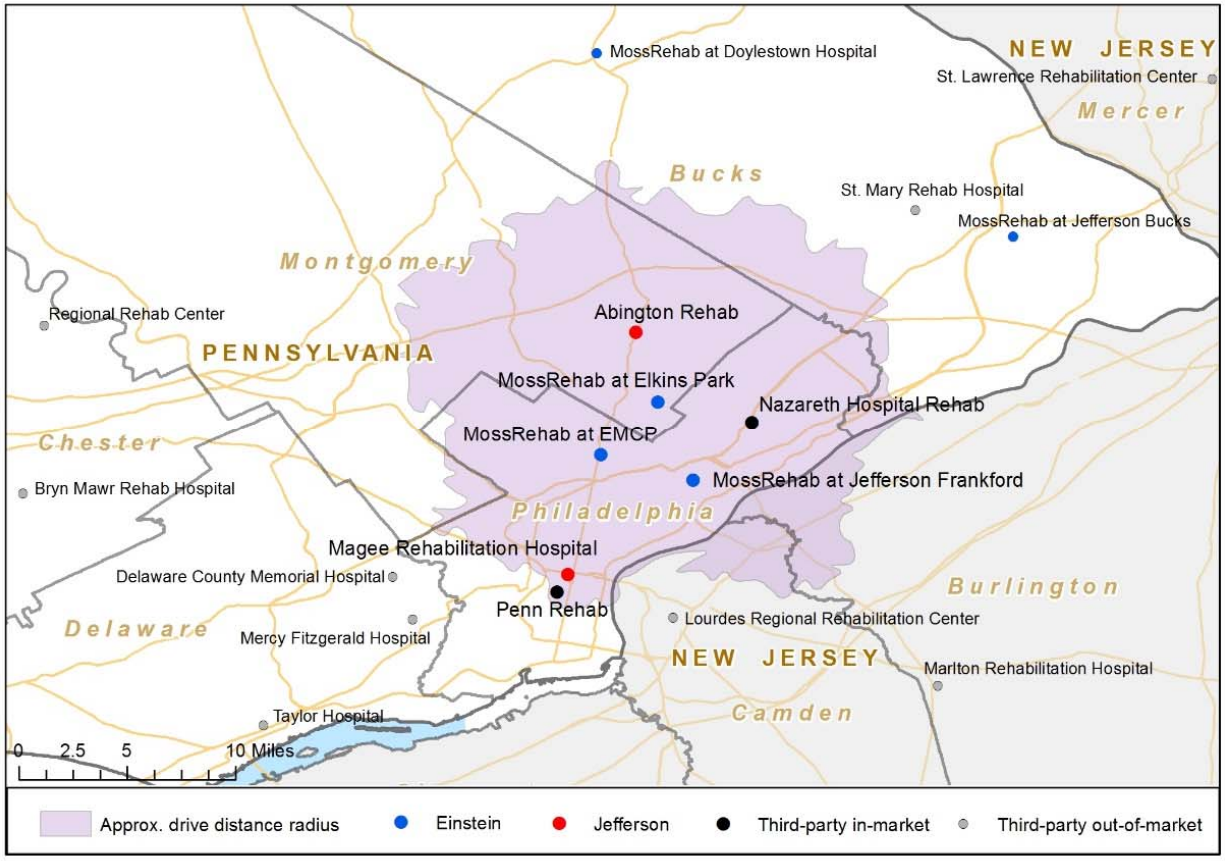
APPENDIX A-2

The Montgomery Area
for Inpatient GAC Hospital Services Sold to Commercial Insurers and Their Members



APPENDIX A-3

The Philadelphia Area for Inpatient Acute Rehabilitation Services Sold to Commercial Insurers and Their Members



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of September, 2020, I served or caused to be served (1) a redacted copy of the foregoing on counsel of record via the Court's ECF system and (2) an unredacted copy of the foregoing on the following counsel via electronic mail:

Paul H. Saint-Antoine
John S. Yi
Faegre Drinker Biddle & Reath LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103
Telephone: (215) 988-2700
Email: paul.saint-antoine@faegredrinker.com
Email: john.yi@faegredrinker.com

Kenneth M. Vorrasi
John L. Roach, IV
Jonathan H. Todt
Alison M. Agnew
Faegre Drinker Biddle & Reath LLP
1500 K Street, NW, Suite 1100
Washington, DC 20005
Telephone: (202) 842-8800
Email: kenneth.vorrasi@faegredrinker.com
Email: lee.roach@faegredrinker.com
Email: jonathan.todt@faegredrinker.com
Email: alison.agnew@faegredrinker.com

Daniel J. Delaney
Faegre Drinker Biddle & Reath LLP
191 N. Wacker Drive, Suite 3700
Chicago, IL 60606
Telephone: (312) 569-1000
Email: daniel.delaney@faegredrinker.com
Counsel for Defendant Thomas Jefferson University

Virginia A. Gibson
Stephen A. Loney, Jr.
Hogan Lovells US LLP
1735 Market St., Floor 23
Philadelphia, PA 19103
Telephone: (267) 675-4600
Email: Virginia.Gibson@hoganlovells.com
Email: Stephen.Loney@hoganlovells.com

Leigh Oliver
Robert Leibenluft
Justin W. Bernick
Kimberly D. Rancour
Katie Hughes
Hogan Lovells US LLP
555 13th Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Email: Leigh.Oliver@hoganlovells.com
Email: Robert.Leibenluft@hoganlovells.com
Email: Justin.Bernick@hoganlovells.com
Email: Kimberly.Rancour@hoganlovells.com
Email: Kathleen.Hughes@hoganlovells.com
Counsel for Defendant Albert Einstein Healthcare Network

Howard Bruce Klein
Law Offices of Howard Bruce Klein, PC
1515 Market Street, Suite 1100
Philadelphia, PA 19102
Email:klein@hbklein.com
Counsel for Defendants Thomas Jefferson University and Albert Einstein Healthcare Network

/s/ James H. Weingarten
James H. Weingarten
Attorney for Plaintiff Federal Trade Commission