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-01113-GJP

PLAINTIFFS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs Federal Trade Commission ("FTC" or "Commission") and the Commonwealth of Pennsylvania respectfully request that the Court grant an injunction pursuant to Fed. R. Civ. P. 62(d) enjoining the proposed transaction between Defendants Thomas Jefferson University ("Jefferson") and Albert Einstein Healthcare Network ("Einstein") pending appellate review of the Court's Memorandum Opinion (ECF 277, hereinafter "Op.") and Order (ECF 278) dismissing Plaintiffs' Complaint For Preliminary Injunction. Alternatively, Plaintiffs respectfully request that the Court temporarily enjoin the proposed 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 if necessary.

Under the Court's February 28, 2020 temporary restraining order (ECF 11), Defendants may consummate their proposed merger seven calendar days after the Court's ruling on Plaintiffs' requested relief: after 11:59 p.m. on Tuesday December 15, 2020. Absent an injunction pending appeal, Plaintiffs understand that Defendants will consummate their proposed merger at that time.

Plaintiffs respectfully submit that the Court's denial of Plaintiffs' requested relief raises serious, substantial legal issues for the Court of Appeals to resolve. Specifically, the appellate court should have the opportunity to review the Court's application of the hypothetical monopolist test. Plaintiffs believe it was legal error to reject the undisputed results in favor of an amorphous "commercial realities" standard beyond that prescribed in the relevant Supreme Court and Third Circuit case law.

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, as the Court recognized, 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. Op. 61-62. An injunction would enable the Government to obtain effective relief if it were to prevail before the Court of Appeals. Because consummation of the merger would likely make such relief impossible, an injunction is necessary to prevent immediate irreparable harm to consumers and competition. By contrast, Defendants will not be substantially injured by a stay pending appeal because the merger agreement will not expire until the later of December 31, 2021, or 60 days after a final decision by a U.S. Court of Appeals. For these reasons, Plaintiffs seek to enjoin the consummation of this merger temporarily while the Court of Appeals resolves issues vital to competition in the health care industry in southeastern Pennsylvania and beyond.

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, a 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). Requiring a strong showing of success is particularly unwarranted when a district court considers whether 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 Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977). Thus, "[w]hen 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." *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998). Instead, "the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Id.* Accordingly, courts have often granted injunctions pending appeal of district court decisions denying an FTC challenge to a hospital merger. *See, e.g.*, *FTC v. Penn State Hershey Med. Ctr.*, No. 16-2365 (3d Cir. May 24, 2016); *FTC v. Advocate Health Care Network*, No. 15-cv-11473-JLA (N.D. Ill. Jun. 17, 2016); *FTC v. Freeman Hosp.*, 1995 WL 155237 (8th Cir. Mar. 1, 1995).

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 the Government has made a strong showing of likelihood of success on the merits that the proposed merger is unlawful under Section 7 of the Clayton Act. Just as in *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016), "the District Court, the Hospitals, and the Government all agreed that the hypothetical monopolist test was the proper standard to apply." *See id.* at 345; Op. 26-27. When applying the hypothetical monopolist test ("HMT"), courts must do so through the lens of commercial insurers. *See Penn State Hershey*, 838 F.3d at 342-43; *FTC v. Advocate Health Care Network*, 841 F.3d 460, 470-71 (7th Cir. 2016); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784-85 (9th Cir. 2015); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 562-63 (6th Cir. 2014). Properly viewed in this context, the relevant question is not whether Jefferson or Einstein compete with hospitals located outside the relevant antitrust markets, but rather whether commercial insurers would pay a small but significant nontransitory increase in price (a "SSNIP") in order to maintain access to a hypothetical monopolist of all hospitals in any one of the markets. *See Penn State Hershey*, 838 F.3d at 342-43.

Here, the FTC's economic expert, Dr. Loren Smith, answered precisely the question required by *Penn State Hershey* and other recent appellate precedents: "whether a hypothetical monopolist of all hospitals in the candidate market could profitably increase prices at [Einstein's hospitals] by a SSNIP of at least [five percent] *in negotiations with insurers*." *See* Op. 30 (emphasis in original). It is undisputed then, that "the geographic market boundaries which arise from Dr. Smith's calculations result in SSNIP values that satisfy the HMT" and that the geographic markets proposed by Plaintiffs pass the HMT in the context of negotiations with *insurers*. Op. 31. Accordingly, Plaintiffs' proposed geographic markets satisfy the HMT and constitute relevant antitrust markets.

Respectfully, the Court erred by giving contradictory treatment to Dr. Smith's hypothetical-monopolist analysis. After the Court recognized that Dr. Smith tested whether a hypothetical monopolist could force a price increase "*in negotiations with insurers,*" Op. 30 (emphasis in original), the Court found that Dr. Smith failed to "address, much less answer, the relevant antitrust question, which is whether a hypothetical monopolist could profitably impose a SSNIP without insurance companies turning to providers outside the geographic markets," Op. 31. As shown below, the Court overlooked the passages of Dr. Smith's report and testimony addressing precisely that issue.

Dr. Smith outlined the "standard model of hospital-insurer bargaining in the economics literature," which provides that the greater the share of patients who prefer to be treated within the geographic market (*i.e.*, the aggregate diversion ratio), the greater a hypothetical monopolist's ability to force a post-merger price increase on commercial health insurers.

PX8000 ¶¶ 138, 286-87; Sept. 15, 2020 Hr'g Tr. 95:16-96:9, 98:12-21, 99:15-100:15. This principle makes sense because insurers compete based on their ability to offer patients and employers a broad and attractive network of hospital options. *See* Op. 25-26 (discussing *Penn State Hershey*, 838 F.3d at 342).

The Court rejected the Government's undisputed showing that its markets satisfy the hypothetical market test by citing "commercial realities" suggesting that insurers can defy a price increase because of vigorous competition elsewhere in southeastern Pennsylvania. Op. 31, 36-37. This, too, was error. "The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 357 (1963). The Third Circuit held that courts must consider "commercial realities" when "*formulat[ing]* and *apply[ing]* the hypothetical monopolist test," *Penn State Hershey*, 838 F.3d at 344-45 (emphasis added), not that trial courts can reject the test simply because they disagree with its undisputed outcome.

Here, the Court rejected the outcome of the hypothetical monopolist test because it believed that the testimony of insurers was "not unanimous or unequivocal" on whether they would accept a price increase rather than offer plans without any hospitals in the relevant markets. Op. 33-34. Importantly, the Court did not find that insurers would successfully *defeat* a price increase in this manner. When the Court discounted the standard economic tools for evaluating hospital mergers because it found the witness testimony "equivocal," it controverted the basic legal principles governing merger cases. When deciding whether to grant a preliminary injunction against a proposed merger, "doubts are to be resolved *against* the transaction," and "[a] certainty, even a high probability [of illegality] need not be shown." *Penn State Hershey*, 838 F.3d at 337 (cleaned up, emphasis added). In this case, the Court improperly resolved doubts *in favor* of the transaction and required "unequivocal" (Op. 33) proof of illegality. This is reversible legal error.

Finally, the Court improperly discarded the results of the hypothetical monopolist test for Acute Rehab Services by holding that because "[r]elatively few health plan members" ever need these services, an insurer would never accept a price increase in order to secure access to them. Op. 55-60. This reasoning would bless mergers to complete monopoly in the market for IRFs or any other medical service required by a small number of insured patients, such as the treatment of rare diseases. That is not the law. The Clayton Act does not require that a product market be sufficiently large as to affect competition in a much broader sphere. Instead, "if anticompetitive effects of a merger are probable in 'any' significant market, the merger—at least to that extent—is proscribed." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (quoting 15 U.S.C. § 18). The Court's analysis would insulate anticompetitive mergers of competing products whenever their sellers are sufficiently large that they can bundle that product with others that would mask the effects of increased market power in an otherwise well-defined antitrust market.

The merger in this case is manifestly anticompetitive in the three geographic markets established by the hypothetical monopolist test. The merger would result in a combined entity that controls over 64% of the market for inpatient general acute care services sold to commercial insurers and their members ("GAC Services") in the Northern Philadelphia Area and over 49% of the market for GAC Services in the Montgomery Area. Further, the merger would combine Philadelphia's only two nationally renowned inpatient rehabilitation facilities, creating a firm controlling over 71% of the market for inpatient acute rehabilitation services sold to commercial insurers and their members ("Acute Rehab Services") in the Philadelphia Area. Under controlling precedent, these combined market shares and the resulting increases in market concentration easily render the transaction presumptively unlawful in each of the alleged markets. *See Phila. Nat'l Bank*, 374 U.S. at 363-64 (finding that a 30% combined market share threatens undue concentration). Plaintiffs supported this presumption by showing that the merger would eliminate close competition between Jefferson and Einstein and substantially increase Defendants' bargaining leverage in contract negotiations with commercial insurers, leading to higher prices for GAC Services and Acute Rehab Services. These issues deserve full and thorough consideration by the Court of Appeals before the merger is consummated.

Plaintiffs respectfully submit that, at a minimum, they have raised substantial questions about whether the Court's application of the HMT was an error of law. Accordingly, an injunction pending resolution of this issue by the Third Circuit Court of Appeals is warranted.

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

If this injunction is denied, Defendants will be free to consummate the merger after 11:59 p.m. on Tuesday, December 15, 2020. 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. Courts have recognized that constructing and enforcing an effective divestiture order after merging parties have combined their operations has historically been exceedingly difficult. *Penn State Hershey*, 838 F.3d at 352-53; *see also FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508-09 (D.C. Cir. 1986); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984).

These concerns are particularly acute in this case because Defendants plan to fundamentally alter their respective assets, making it very difficult, if not impossible, to restore competition to pre-merger levels. Absent injunctive relief, Defendants would be able to execute their plans to consolidate assets and service lines, including shuttering Einstein's Elkins Park general acute care hospital and the inpatient rehabilitation facilities at Abington and Jefferson Frankford Hospitals. Defendants would also immediately be able to share competitively sensitive price and strategic information (including information about each other's separate and ongoing insurer negotiations), consolidate certain clinical operations, and lay off employees. The cumulative impact of these actions would require the FTC to take onerous measures to "unscramble the eggs" at a later date, if such "unscrambling" would even be possible.

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. 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 over three years ago and their agreement does not expire until the later of December 31, 2021, or 60 days after a final decision by a U.S. Court of Appeals. There is "no reason why, if the merger makes economic sense now, it would not be equally sensible to consummate the merger following a FTC adjudication on the merits that finds the merger lawful." *Penn State Hershey*, 838 F.3d at 353. The small impact this brief delay will have on Defendants' plans is far outweighed by the substantial public interest in maintaining competitive markets for patients in southeastern Pennsylvania during the pendency of an appeal to the Third Circuit.

V. AN INJUNCTION IS IN THE PUBLIC INTEREST.

"[S]ince it is extraordinarily difficult to 'unscramble the egg,'" denial of an injunction pending appeal would undermine the strong public interest in effective enforcement of the antitrust laws by denying the public—specifically residents of Philadelphia and Montgomery Counties—full and complete relief should the Commission ultimately prevail. *See Penn State Hershey*, 838 F.3d at 353 (internal citation omitted); Op. 61-62. Substantial harm to competition would likely occur during the pendency of the appeal, the administrative proceeding, and any subsequent appeals. Jefferson may execute its plans to close inpatient general acute care and rehabilitation facilities and relocate services. Because of the deficiencies inherent in effectuating a divestiture after Defendants have merged, it is in the public interest to preserve Jefferson and Einstein 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 dismissing Plaintiffs' Complaint For 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: December 9, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Mark Seidman, HEREBY CERTIFY that, on the 9th of December, 2020, I served or caused to be served a copy of the foregoing on counsel of record via the Court's electronic case filing (ECF) system.

/s/ Mark Seidman
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Attorney for Plaintiff Federal Trade Commission

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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-01113-GJP

[PROPOSED] ORDER

AND NOW, this __ day of December, 2020, it is **ORDERED** that, upon consideration of Plaintiffs' Emergency Motion for Injunction Pending Appeal, the motion is **GRANTED**.

The Court, having fully considered the matter, concludes that:

1. In the absence of an injunction pending appeal, Defendants Thomas Jefferson University and Albert Einstein Healthcare Network would be free to consummate their planned transaction (the "Transaction") after 11:59 p.m. on December 15, 2020;
2. Entry of an injunction pending appeal is in the public interest and is appropriate and necessary to enable the Court of Appeals to address the substantial issues raised in this case;

3. If the Transaction is consummated, Plaintiffs and the public interest will be irreparably injured because the Government will be hindered in its ability to order effective relief should the Transaction be found to violate the antitrust laws following the Commission's administrative proceeding;
4. Defendants will not be substantially injured by the relief afforded by this Order; and
5. The questions raised in this case are sufficiently serious, substantial and difficult to warrant the relief afforded by this Order.

IT IS THEREFORE ORDERED, that pending the appeal of this Court's Order dismissing Plaintiffs' Complaint For Preliminary Injunction pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, Defendants Thomas Jefferson University and Albert Einstein Healthcare Network, or any of their affiliates, are restrained and enjoined from taking any steps, either directly or indirectly, toward consummation of the Transaction or otherwise effecting a combination of the Defendants or their assets, pending the issuance of the mandate by the United States Court of Appeals for the Third Circuit in this matter.

IT IS FURTHER ORDERED that Defendants maintain the *status quo* pending the issuance of the mandate by the United States Court of Appeals for the Third Circuit in this matter.

IN THE ALTERNATIVE, IT IS THEREFORE ORDERED, that pending a final decision and order 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, Defendants Thomas Jefferson University and Albert Einstein Healthcare Network, or any of their affiliates, are restrained and enjoined from taking any steps, either directly or indirectly, toward consummation of the Transaction or otherwise effecting a combination of the Defendants or their assets.

BY THE COURT:

____

GERALD J. PAPPERT, J.