UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Federal Trade Commission and **Commonwealth of Pennsylvania**, Plaintiffs, v. **Penn State Hershey Medical Center** and **PinnacleHealth System**, Defendants.	Case No. 1:15-cv-02362-JEJ (Hon. John E. Jones III)

Defendants' Opposition To
Plaintiffs' Motion For An Injunction Pending Appeal

The Government did not satisfy the two-part standard required for an injunction under Section 13(b) of the Federal Trade Commission Act (15 U.S.C. § 53(b)(2)), and it cannot satisfy the even more rigorous four-part standard required for the extraordinary remedy of an injunction pending appeal. Accordingly, the Government's request that this Court issue an injunction pending appeal should be denied.

In the alternative, the Government states that it will seek an injunction from the Court of Appeals, and asks for a temporary injunction until that court rules on its request. The Hospitals have informed the Government that they would not oppose a two-week extension of the existing temporary restraining order (Dkt. No. 14) if the Government files its motion with the Court of Appeals today and briefing is completed by Thursday, May 19—a full week before the extended TRO would expire. Limiting any extension of the TRO to two weeks should give the Court of Appeals enough time to decide the motion, while accounting for the Hospitals'

compelling interest in closing the transaction now that this Court has ruled. But because the Government has not agreed to limit any extension of the TRO to two weeks, the Hospitals are submitting this Opposition to briefly explain why a broader injunction pending appeal is not warranted.

An injunction pending appeal "is an extraordinary remedy." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419, *1 (3d Cir. Feb. 8, 2013); *see also, e.g.*, *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 622 (D.N.J. 2010) ("The burden on the movant [under Rule 62(c)] is a heavy one."). To secure this remedy, the Government must establish: (1) a "strong showing" that it is likely to succeed on the merits; (2) that it would be "irreparably injured" absent an injunction; (3) that granting the injunction will "substantially injure" the Hospitals and other interested parties; and (4) that the public interest favors such relief. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). And the Government bears the burden of "produc[ing] evidence sufficient to convince the district court that *all four factors* favor preliminary relief." *N.J. Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995) (emphasis added). Here, however, the Government cannot show that *any* of the factors support its request.

Likelihood Of Success. To make the requisite "strong showing" of a likelihood of success on the merits, the Government must establish not just that the Court's decision is flawed, but "that there is a likelihood of reversal," resulting in the issuance of a preliminary injunction. *Dehainaut v. California Univ. of Pennsylvania*, No. 2:10-cv-899, 2011 WL 3810132, *2 (W.D. Pa. Aug. 29, 2011)

(quoting *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991)). The Government cannot make this showing. The Court's thorough decision—which is grounded in the Court's assessment of five days of live testimony, thousands of pages of exhibits, and two rounds of briefing—is entirely correct. And that decision will, of course, be entitled to deference on appeal. *See, e.g.*, *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013) ("The ultimate decision to grant or deny [a preliminary] injunction is reviewed for abuse of discretion.").

In an effort to find a way around that deference, the Government attempts to conjure up legal errors in the Court's assessment of the Government's proposed geographic market. Mem. 6. But these supposed errors reflect nothing more than the Government's continued insistence on considering only the facts that fit its narrow assumptions, while ignoring the strong evidence that refutes those assumptions and supports the Court's decision.

First, the Government argues that the Court erred by considering patients outside the Government's proposed market in assessing the validity of that market. Mem. 6-7. Of course, the Government does not want the Court to disregard patients entirely, as it once again emphasizes the behavior of patients *within* the Harrisburg Area. Mem. 7. The Government instead asks the Court to disregard only those "patients [who] enter the Harrisburg Area from outside" (Mem. 6)—namely, the nearly 15,000 individuals who refute the Government's "patients prefer local care" mantra. Op. 9-10; Defs.' Post-Hearing Br. 3-4.

The Government's position remains incorrect for all the reasons the Hospitals have detailed throughout this litigation. Defs.' Post-Hearing Br. 3-14; Defs.' Pre-Hearing Br. 7-13. The Government has not offered the Court any support for its radical position that only certain patients—those within its preferred market—matter for purposes of defining the market. To the contrary (and as the Hospitals have explained), courts have concluded that this approach inevitably results in "gerrymander[ed]" markets that are "obviously too narrow." *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 599 (8th Cir. 2009); *see also* Defs.' Post-Hearing Br. 5, 9-11; Defs.' Pre-Hearing Br. 8-13. It is thus unsurprising that the Government cannot identify a single decision endorsing—much less mandating—its approach of considering only patients within a predefined market, but not patients that travel into that market from elsewhere.

Moreover, in assailing the Court's market analysis, the Government does not even attempt to account for the evidence confirming that patients' behavior is "intimately linked" to payors' bargaining positions (as the Government's own economist recognized). Defs.' Post-Hearing Br. 9-11. This means the hypothetical monopolist would have to consider the possibility that its patients would end up at other hospitals if it tried to impose a SSNIP in bargaining with payors. *Id.* The Court was correct to take these "commercial realities" into account. *FTC v. OSF Healthcare Sys.,* 852 F. Supp. 2d 1069, 1076-77 (N.D. Ill. 2012).[1]

[1] The Government fares no better in arguing that the Court "essentially applied the discredited 'Elzinga-Hogarty' test"—a test that neither the Hospitals nor the Court ever invoked. Mem. 6. In reality, the Court relied on decisions—all

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Second, according to the Government, "the Court incorrectly held that [the rate-protection agreements] precluded a finding that a hypothetical monopolist could impose a SSNIP in the Harrisburg Area." Mem. 7-8. But that is not what the Court said. Instead, the Court said that, "when considering *the import* of the hypothetical monopolist test," one "simply cannot be blind to th[e] reality" that the Hospitals will be unable to increase rates for at least 5 years. Op. 11. The Court again was correct in recognizing that the Government cannot simply make points that it believes are helpful to its case, while ignoring key facts that refute those points.

For these reasons, the Government cannot show that the Court erred in its geographic-market analysis—let alone that the Court's decision is likely to be reversed on this basis. And the Government does not even address the many other considerations—wholly apart from market definition—that the Court relied upon as additional grounds for denying injunctive relief. As the Court recognized, "the Hospitals presented ample evidence demonstrating that anticompetitive effects would not arise through" the combination, and that the combination in fact will "provide beneficial effects to the public." Op. 12, 14-15. Among other things, the combination will: alleviate Hershey's capacity constraints and "simultaneously allow[] both hospitals' physicians to treat more people" (Op. 18); free Hershey

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of which remain good law—recognizing the common-sense proposition that patients within *and* outside a proposed market are relevant to an analysis of that market's validity. The Court was entirely correct to consider this well-supported and entirely valid body of caselaw.

from spending $277 million on a new bed tower (an expenditure that "undoubtedly" would "negatively impact patients") (Op. 17); strengthen the Hospitals "to remain competitive in a climate where nearby hospitals are routinely partnering to assist each other in achieving growth and dominance" (Op. 22); and better position the Hospitals to "adapt[]" as risk-based contracting gains prominence (Op. 23). The Government says nothing of these tremendous benefits, all of which bolster the Court's decision and further confirm that the Government is exceedingly unlikely to succeed in securing that decision's reversal.

Irreparable Harm To The Government. The Government effectively concedes that it will not be irreparably harmed in the absence of an injunction pending appeal. Instead, it says only that, if the Hospitals are permitted to begin combining, subsequently separating them would be "very difficult" and "onerous." Mem. 9. But the standard requires *irreparable* harm, not harm that is reparable with some effort. And in any event, the Court has already recognized that "it is by no means unheard of" for the Government to take these supposedly onerous measures in order to separate merged entities. Op. 24; *see also, e.g.*, *In re ProMedica Health Sys., Inc.*, 2012 WL 2450574 (F.T.C. 2012) (ordering divestiture); *In re Whole Foods Market, Inc.*, 2008 WL 5724689 (F.T.C. 2008) (same). The Government cannot show that it was irreparably harmed in those cases, nor can it explain how it would be irreparably harmed by taking similar measures here.

Harm To The Hospitals. The Government cannot deny that an injunction pending appeal will substantially harm the Hospitals. It asserts that because the

Hospitals "began their pursuit of the merger in October of 2013," an injunction "will cause little, if any, damage." Mem. 10. But this claim is utterly backwards: the fact that the Government has already delayed the combination for over a year (through its investigation and this litigation) counsels *against* allowing it to further delay the combination—particularly given that the Court has now held that the Government is unlikely to succeed in its challenge to the combination. With every day of delay, the Hospitals irretrievably lose out on the benefits that are the very reason for the combination, and instead face disruption and uncertainty resulting from their inability to consummate this major transaction.

The Government also entirely overlooks the real harms to patients that continue every day the combination is delayed. As the Court recognized, Hershey's severe and persistent capacity constraints "[o]bviously … result[] in negative consequences for patients." Op. 15 n.5. Allowing the combination to proceed, however, will "immediately make additional capacity available to Hershey, causing near instantaneous benefits to Hershey's patients." Op. 17. The Court should not allow the Government to continue delaying those benefits.

Public Interest. Finally, the Government cannot show that an injunction is in the public interest. Indeed, the Court has already rejected the Government's position on this issue: "[a]fter a thorough consideration of the equities in play, we find that the majority of these factors weigh in the public interest." Op. 25. The Government makes no attempt at showing why the Court was incorrect in reaching this determination. Instead, it claims that "[s]ubstantial harm" will result if the combination is not enjoined pending appeal because "health insurers will likely be

forced to pay higher reimbursement rates." Mem. 10. This argument once again demonstrates the Government's penchant for ignoring all evidence it finds unhelpful. As the Court has already concluded, the Hospitals' agreements with the region's two largest commercial payors—which take effect only if the combination occurs—will ensure that "rates *cannot increase* for at least 5 years." Op. 11. And all of the Government's other claims of possible harm similarly fail in light of the Court's recognition of the combination's many procompetitive benefits. Simply put, the public should reap those benefits as soon as possible. As the Court concluded, "[t]he patients of Hershey and Pinnacle stand to gain much" from allowing the combination to proceed. Op. 25. The public interest thus weighs heavily in favor of denying the Government's request for an injunction.

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For all of these reasons, the Court should deny the Government's motion for an injunction pending appeal. The Hospitals would not, however, be opposed to a two-week extension of the existing TRO.

Dated: May 12, 2016

Respectfully submitted,

/s/ Adrian Wager-Zito

Adrian Wager-Zito
Julie E. McEvoy
Toby G. Singer
Christopher N. Thatch
William D. Coglianese
Jon G. Heintz
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
adrianwagerzito@jonesday.com
T: (202) 879-3939
F: (202) 626-1700

James P. DeAngelo (Bar #62377)
MCNEES WALLACE & NURICK LLC
100 Pine Street
Harrisburg, PA 17101
jdeangelo@mwn.com
T: (717) 237-5470
F: (717) 260-1679

Counsel for Defendants
Penn State Hershey Medical Center and
PinnacleHealth System

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2016, I filed the foregoing document with the Clerk of the Court via the Case Management and Electronic Case Filing (CM/ECF) system, which will send a notice of electronic filing to all counsel of record.

/s/ William D. Coglianese

Counsel for Defendants
Penn State Hershey Medical Center
and PinnacleHealth System