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*.	Civil Action No. 2:20-cv-01113

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INTRODUCTION

At the core of this preliminary injunction proceeding is a subject of utmost importance to the Philadelphia community: continued access to quality healthcare for its most vulnerable residents. After sustaining losses year after year, Albert Einstein Healthcare Network ("Einstein") is on a path to financial failure. Its "flagship" hospital, Einstein Medical Center Philadelphia ("EMCP"), has long served a critical role as a "safety net" in North Philadelphia, treating disadvantaged patients without commercial health insurance. Over 86% of the patients at EMCP – among the highest proportion of any hospital in the nation – rely on Medicare, Medicaid, or other government programs. Patnode Expert Report ¶ 59. This lopsided "payer mix," given the substantially lower rates paid by the government, has led to large annual losses for Einstein, threatening its very survival.

The numbers are bleak. Einstein has had negative operating income every year since 2017, with large annual operating losses of up to $23 million. *Id.* at ¶ 29. Einstein has a large debt load, and its credit rating has been downgraded repeatedly by all credit rating agencies in recent years. *Id.* at ¶ 31. It currently carries junk-bond status with both Moody's and Fitch. *Id*. Its deteriorating financial condition has foreclosed Einstein's access to essential additional capital for necessary facility maintenance and improvement. As Einstein's witnesses will explain, it does not even have the money necessary to maintain its facilities, much less make the strategic investments necessary to keep pace with its competitors. In recent years, Einstein has cut costs and deferred critical maintenance and other mission-critical capital projects. Einstein's only realistic option – other than cutting critical hospital services or closing facilities – is a strategic partner to preserve its services and vital public interest mission.

Einstein's proposed merger with Thomas Jefferson University ("Jefferson") will provide Einstein with access to the resources necessary to continue its mission. In fact, after an exhaustive

search, Jefferson emerged as the *only* viable partner willing to commit to maintaining Einstein's vital services in North Philadelphia. Based on Jefferson's proven track record of integrating health systems and reducing costs, the parties jointly developed a plan that will result in over $58 million in efficiencies and cost-savings *per year* for the combined system, which Einstein could not achieve on its own. And these savings will inure directly to the benefit of the communities that Einstein serves, by allowing Einstein to protect EMCP for future generations and even to expand access to services and quality medical care throughout Philadelphia.

The Federal Trade Commission ("FTC") and Commonwealth of Pennsylvania (collectively, "Plaintiffs") are asking this Court to block this transaction. In essence, Plaintiffs ask the Court to ignore the clear risk to the health and welfare of North Philadelphia residents without commercial health insurance, who depend on EMCP for their hospital services, based on a flawed prediction of a price increase on commercial insurance companies like Independence Blue Cross ("IBC"). Particularly during a year in which our Philadelphia community faces unprecedented economic and public health challenges, the governmental agencies should be working to *help* North Philadelphians, not filing lawsuits to *prevent* non-profit hospitals from fulfilling their public health mandates and not single-mindedly seeking to protect health insurance companies that, the record will show, do not need protection. In contrast to the myopic view of Plaintiffs, this Court must balance the equities when evaluating whether a preliminary injunction should issue, and there are perhaps no greater equities than the health and welfare of thousands of vulnerable Philadelphia residents.

Even if the plight of North Philadelphia residents were not at stake and the balance of the equities did not compel the denial of injunctive relief, a fundamental problem remains with Plaintiffs' case: They cannot establish a "likelihood of success" on their claim that the merger will result in significant price increases to commercial health insurers. The analysis under Section 7 of

the Clayton Act is a simple burden-shifting framework. If the Plaintiffs prove that the transaction would result in high market share and concentration in a properly defined "product market" and "geographic market," the burden shifts to Defendants to rebut that presumption with evidence that the market share and concentration statistics do not accurately capture the effects of the transaction. If Defendants rebut the presumption, the burden shifts back to the Plaintiffs to prove harm through other evidence. Plaintiffs here never get past the first stage in the test.

Plaintiffs rely entirely on a single expert economist – Dr. Loren Smith – to carry their threshold burden of defining product and geographic markets, and calculating market concentration in those markets. But his analyses do not withstand scrutiny. To inflate market share numbers for general acute care ("GAC") services, Dr. Smith has: (a) gerrymandered two geographic markets – Montgomery County and Northern Philadelphia – that exclude real competitors in close proximity to Einstein and Jefferson, such as Doylestown, Grand View, Lankenau, Pottstown, Holy Redeemer, and Nazareth; (b) relied improperly on driving *distance* rather than driving *time* to identify competing hospitals; and (c) ignored the patients within the two alleged markets who use the services of hospitals outside the alleged markets, including all three of the University of Pennsylvania's hospitals (and its brand-new fourth hospital). When these errors in Dr. Smith's analysis are corrected, the resulting market concentration statistics are insufficient to create a presumption of harm in Plaintiffs' two alleged GAC service markets under the FTC's own Horizontal Merger Guidelines. Moreover, historical price data from Jefferson's merger with Aria Health in 2016 further prove that Dr. Smith's methodology for defining geographic markets and predicting price increases is not grounded in reality.

Unlike any other litigated hospital merger case, Plaintiffs also allege an entirely different product market for inpatient acute rehabilitation ("Rehab") services. Despite the lack of precedent, and the enormous stakes of this litigation, Dr. Smith bases his product market for Rehab services

on nothing more than a review of selected testimony and documents, as discussed in the contemporaneously-filed *Daubert* motion. Based on this fact evidence (which is for the Court, and not Dr. Smith, to weigh), Dr. Smith concludes that only Rehab services provided by Inpatient Rehabilitation Facilities ("IRFs") should be included in the Rehab market, even though Defendants' expert has shown empirically that the *same* Rehab services are also provided by certain Skilled Nursing Facilities ("SNFs").

As with his proposed GAC markets, Dr. Smith also gerrymandered his relevant geographic market for Rehab services – based in part on admitted errors in his data processing – to exclude key Rehab competitors like Bryn Mawr Rehab, St. Mary Rehab, and Kessler Marlton. Again, when these errors in Dr. Smith's analysis are corrected, the resulting market concentration statistics are insufficient to create a presumption of harm in the alleged Rehab market. Dr. Smith's "expert" analysis is simply not reliable or robust enough for this Court to draw any reasonable conclusion that the merger is likely to harm competition or result in higher prices in a properly defined market.

In short, the burden never shifts to the Defendants to rebut Plaintiffs' case. But even if it did, nothing else in the record comes close to demonstrating that the merger is likely "substantially to lessen competition" in violation of Section 7 of the Clayton Act. *Numerous* hospitals compete for commercially-insured patients in the Philadelphia area – far more than in many areas of the country – and this provides IBC and the other health insurers with the bargaining leverage to keep prices low. Einstein – with its high Medicare and Medicaid population – does not provide Jefferson with any additional bargaining leverage with commercial health insurers. Plaintiffs' claims also downplay or disregard the $58 million in annual merger-specific cost savings that create strong economic incentives for prices to go *down*, not up.

Issuing a preliminary injunction will effectively kill this merger. Having spent *two years* in an investigation and now litigation defending the transaction, Jefferson and Einstein cannot

afford to wait for a protracted FTC administrative trial. Einstein also cannot continue treading water on its own. Jefferson is willing to preserve EMCP for the benefit of both the current and future generations of North Philadelphians, but it can only do so through a merger with Einstein. The Court should deny Plaintiffs' request for a preliminary injunction.

LEGAL STANDARD

The issuance of a preliminary injunction blocking a merger is "an extraordinary and drastic remedy," because "it may prevent the transaction from ever being consummated." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980); *see also Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (same); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 511 (3d Cir. 1969) (same). Because "the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger," the FTC faces a "substantial burden." *FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 86 (N.D. Ill. 1981) (quoting *Mo. Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir. 1974)) (denying preliminary injunction); *see also FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441, at *51 (D.N.M. May 29, 2007); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) ("[T]he burden on the movant is heavy, in particular where, as here, 'granting the preliminary injunction will give [the movant] substantially the relief it would obtain after a trial on the merits.'" (quoting *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir.1991))). For these reasons, "a court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market forces, bringing about the very ills the antitrust laws were meant to prevent." *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990).

Section 13(b) of the FTC Act authorizes a court to resort to this "extraordinary remedy" only when the FTC has made "a proper showing that, weighing the equities and considering the

Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). Under Section 7 of the Clayton Act, 15 U.S.C. § 18, the FTC must show that "there is a *reasonable probability* that the merger will *substantially* lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (emphasis added); *FTC v. Staples Inc.*, 970 F. Supp. 1066, 1072 (D.D.C. 1997) (same). The court's judgment is independent of the FTC's view of the facts. *Foster*, 2007 WL 1793441, at *51 ("If Congress did not want federal courts to play some meaningful role in the injunction process, it could have given injunction power directly to the FTC.").

In a preliminary injunction proceeding, the district court "first consider[s] the FTC's likelihood of success on the merits and then weigh[s] the equities to determine whether a preliminary injunction would be in the public interest." *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016). The FTC's burden to demonstrate its likelihood of success on its underlying Section 7 claim is a necessary condition: "absent a likelihood of success on the merits, equities alone will not justify an injunction." *FTC v. Arch Coal Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004); *see also FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1073 (N.D. Ill. 2012). The "likelihood of success" analysis and the "public equities" analysis are legally different points and are to be analyzed separately. *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 75 (D.D.C. 2009) ("the 'likelihood of success' analysis and the 'public equities' analysis are legally different points and the latter should be analyzed separately, no matter how strong the agency's case on the former."); *accord FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903-4 (7th Cir. 1989) (same).

ARGUMENT

A. PLAINTIFFS CANNOT PROVE LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs cannot establish a *prima facie* case that the merger of Jefferson and Einstein violates Section 7 of the Clayton Act. Mere proof that the two merging parties compete with one another is not enough to establish a violation of Section 7, which prohibits only those acquisitions that would allow a combined company significantly to raise price or restrict output. *See, e.g.*, *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) (A merger should not be enjoined unless firms can "raise prices above competitive levels for a significant period of time."); *see also Elders Grain*, 868 F.2d at 904 (A merger should not be enjoined if it is "likely to lead to lower prices . . . or other efficiencies will benefit consumers."). Thus, Plaintiffs must prove a "substantial lessening of competition" that is "probable and imminent." *Arch Coal*, 329 F. Supp. 2d at 115. Further, Plaintiffs must prove "not that the merger in question *may possibly* have an anticompetitive effect, but rather that it will *probably* have such an effect." *Great Lakes*, 528 F. Supp. at 86 (emphasis added) (quotations omitted); *see also United States v. Baker Hughes, Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990) (same).

To satisfy their burden, Plaintiffs must prove: (1) the relevant product market in which to assess the merger; (2) the geographic market in which to assess the merger; and (3) the merger's probable effect on competition in the relevant product and geographic markets. *Penn State Hershey*, 838 F.3d at 337-38; *United States v. Sabre Corp.*, -- F. Supp. 3d --, C.A. No. 19-1548-LPS, 2020 WL 1855433, at *32 (D. Del. Apr. 7, 2020); *Arch Coal*, 329 F. Supp. 2d at 117. The Plaintiffs' failure to prove the relevant market is fatal to their claims. *See, e.g.*, *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995); *Arch Coal*, 329 F. Supp. 2d at 116-17. Indeed, proving the relevant markets is "a necessary predicate" to Plaintiffs' *prima facie* case. *United States v. E.I. du Pont De Nemours & Co.*, 353 U.S. 586, 593 (1957); *Penn State Hershey*, 838 F.3d at 338;

Freeman Hosp., 69 F.3d 268 ("Without a well-defined relevant market, an examination of [the merger's] competitive effects would be without context or meaning.").

If Plaintiffs prove a relevant market, Plaintiffs can establish a presumption of effects on competition by showing "that the merger would produce a firm controlling an undue share of the relevant market and would result in a significant increase in the concentration of the market." *Arch Coal,* 329 F. Supp. 2d at 116; *accord Baker Hughes*, 908 F.2d at 982 (same). Upon such a showing, the burden shifts back to Defendants to rebut the presumption with evidence that the Plaintiffs' "market-share statistics produce an inaccurate account of the merger's probable effects on competition in the relevant market." *Arch Coal,* 329 F. Supp. 2d at 116. "If [a] defendant successfully rebuts the presumption [of illegality], the burden of producing additional evidence of anticompetitive effect shifts to the [Plaintiffs], and merges with the ultimate burden of persuasion[.]" *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 715 (D.C. Cir. 2001). The burden of proof "remains with the government at all times.'" *Id.* at 715 (quotation omitted).

Here, Plaintiffs cannot carry even their initial burden. Plaintiffs' expert, Dr. Smith, has defined incorrect product and geographic markets for GAC and Rehab services. As discussed below, when the errors in those market definitions are corrected, Plaintiffs are not entitled to a presumption of harm from the merger under the FTC's own Merger Guidelines.

Nor do Plaintiffs have sufficient additional evidence of harm to carry their burden of proof. Competition for GAC and Rehab services in the Philadelphia area is robust, and the conclusory (and self-serving) statements of health insurers about future price effects cannot overcome those same health insurers' history of consistently squeezing the prices paid to Jefferson and Einstein. Moreover, Plaintiffs' picture of Einstein's future competitive significance is distorted given its weakening finances. Finally, *even if* Plaintiffs were able to carry their threshold burden of proof and demonstrate significant price effects, any such alleged harm is substantially outweighed by

the $58 million in annual, merger-specific efficiencies that will result from the transaction and the enormous benefit of allowing EMCP to continue its mission of serving the underprivileged in North Philadelphia. Ahern Expert Report ¶¶ 45-46, 155. Plaintiffs' requested preliminary injunction should therefore be denied.

1. Plaintiffs' Ill-Defined Geographic Markets for General Acute Care Hospital Services Overstate Market Shares and Market Concentration.

Plaintiffs' proposed geographic markets for GAC hospital services in the Montgomery Area and Northern Philadelphia Area are both divorced from commercial realities. Upon correcting the errors of Plaintiffs' expert, Plaintiffs' market share and concentration statistics are insufficient to support a presumption of harm based on the FTC's own Merger Guidelines.

A relevant geographic market is the area in which consumers *can practicably turn* for services. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 (1963); *see also FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052-53 (8th Cir. 1999) (the evidence "must address where consumers could practicably go, not on where they actually go."). "[T]he relevant geographic market must both correspond to the commercial realities of the industry and be economically significant." *Arch Coal*, 329 F. Supp. 2d at 123 (quotation omitted); *see also Eichorn v. AT&T Corp.*, 248 F.3d 131, 138 (3d Cir. 2001) (same). "A properly defined geographic market includes potential suppliers who can readily offer consumers a suitable alternative to the defendant's services." *Tenet Health*, 186 F.3d at 1052.

Einstein operates three GAC hospitals, including EMCP and Einstein Medical Center-Montgomery ("EMCM"), while Jefferson operates seven GAC hospitals in Pennsylvania, including Thomas Jefferson University Hospital, Abington Hospital, and Abington-Lansdale Hospital. For several key reasons, Dr. Smith's alleged Montgomery Area and Northern Philadelphia Area markets are incorrectly defined to evaluate the merger of these hospitals.

First, Dr. Smith includes both EMCM and Jefferson's two Abington hospitals in Plaintiffs' alleged Montgomery geographic market, even though the Einstein and Jefferson facilities are not close substitutes. Both Abington hospitals in Plaintiffs' Montgomery Area largely draw their patients from different geographic areas than EMCM and compete with different sets of hospitals that Dr. Smith ignores. Capps Expert Report § I.D.2. Defendants' expert, Dr. Cory Capps, shows that EMCM has not drawn a significant number of patients from the Abington hospitals since its 2012 opening. *Id*. at § I.D.4. Indeed, the data show that I-476, cutting through Montgomery County, operates as a natural barrier, with patients west of the interstate gravitating west toward EMCM for care, and patients east of the interstate toward the Abington hospitals for care. *Id*. at § I.D.2. In a similar vein, Dr. Smith incorrectly assumes that Abington Hospital and EMCP are close competitors in the Northern Philadelphia alleged geographic market even though Abington attracts and serves predominantly commercial patients from the high-income area in eastern Montgomery County, whereas EMCP draws predominantly Medicare and Medicaid patients in lower-income North Philadelphia. *Id*. at § I.D.3. Nevertheless, Dr. Smith has constructed proposed geographic markets based on a false premise of close competition between these hospitals.

Second, Dr. Smith excludes from both alleged geographic markets hospitals that *are* close competitors to the Einstein and Jefferson hospitals in Montgomery and Philadelphia counties. He does so, in part, by illogically relying on driving *distances* rather than driving *times* to identify competitors. *Id*. at § I.A.4. Courts, economists, and market participants rely instead on driving time, as it more accurately measures the relative convenience of alternative hospitals. *Id*. at ¶¶ 22, 228-229. And it makes a material difference. Had Dr. Smith relied on driving times to construct his geographic markets, he would have added *at least one* additional hospital in the Montgomery Area and *six* additional hospitals in the Northern Philadelphia Area, including Pottstown, Nazareth,

Children's Hospital of Philadelphia, Thomas Jefferson University Hospital, University of Pennsylvania, Penn Presbyterian, and Pennsylvania Hospital. *Id*. at § V.C.1.

Third, Dr. Smith compounds these problems by calculating market shares based on hospital location as opposed to where the patients reside. If Dr. Smith includes a hospital in his proposed market, then *all* of the hospital's patient volume (discharges) is included in measuring that hospital's market share in his analysis, regardless of where those patients live. Conversely, if a hospital is located just outside Dr. Smith's defined geographic market, then *none* of the patient volume is counted, even if the majority of the hospital's patients reside within the geographic area of that proposed market. As Dr. Capps will explain, Dr. Smith should have considered actual patient locations, which better reflect the approach accepted both by courts and the enforcement agencies. *Id*. at § V.A.2. This error is also material: about 70% of patients who choose a hospital *within* Dr. Smith's geographic markets would choose a hospital *outside* each alleged market as their next best alternative. *Id*. at § V.C.3.b. Yet Dr. Smith's analysis entirely ignores these alternative hospitals – constructing an artificial "wall" around the hospitals he does include as if patients in his area do not (and cannot) seek care beyond it. For example, Holy Redeemer is a mere 11- to 13-minute drive to Jefferson's Abington Hospital, and has publicly stated in its official bond statement that Abington is one of its primary competitors. Yet Dr. Smith fails to include Holy Redeemer in his proposed Montgomery Area market and market share analyses. Dr. Smith's method likewise disregards competition from other important hospitals, including Doylestown, Grand View, Main Line-Lankenau, Pottstown, and Penn's hospitals, which all significantly draw patients from within his proposed geographic market. *Id*. at § V.D.3.a.

Correcting these flaws changes the outcome of Dr. Smith's analysis. Under the Merger Guidelines, a merger that increases the Herfindahl-Hirschman Index ("HHI") of market concentration to above 2,500 creates a rebuttable presumption of enhanced market power. When

just two of Dr. Smith's errors – using driving distance rather than driving time and ignoring patient location – are corrected, the HHI for the Montgomery Area market drops to 2,164 and for the Northern Philadelphia Area drops to 2,215. *Id*. at ¶¶ 24, 237. In short, Plaintiffs cannot rely on the flawed analysis of their expert, Dr. Smith, to establish a *prima facie* case.

2. Plaintiffs' Proposed Product and Geographic Markets for Acute Rehab Services Ignore Significant Sources of Competition and Overstate Market Concentration.

Plaintiffs' proposed market for Rehab services suffers from comparable problems, hinging on similarly flawed methods to define the relevant product and geographic markets for acute rehab services and ignoring the real-world evidence of competition for these services.

a. *Plaintiffs Inappropriately Exclude All Skilled Nursing Facilities from Their Proposed "Cluster" Product Market for Acute Rehab Services.*

Plaintiffs allege that various Rehab services can be combined into a "cluster" of services that together constitute a relevant product market. However, as discussed in Defendants' *Daubert* motion, Plaintiffs' expert Dr. Smith fails to actually analyze whether "competitive conditions" for those Rehab services are similar – a necessary condition of such a "cluster market" approach. Instead, Dr. Smith arbitrarily limits his analysis to the cluster of Rehab services provided at IRFs, even though the *same* services are provided by certain SNFs to patients in the Philadelphia area.

Relevant product markets are "comprised of 'commodities reasonably interchangeable by consumers for the same purposes.'" *Novak v. Somerset Hosp.*, 625 Fed. Appx. 65, 67 (3d Cir. 2015) (quoting *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 394 (1956)). For analytical purposes, courts have accepted aggregating disparate services that would not otherwise be in the same product market into a "cluster" market "'if the cluster is itself an object of consumer demand,'" *Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC*, 950 F.3d 911, 918 (quotation omitted), and if "that combination reflects commercial realities." *United States v. Grinnell Corp*.,

384 U.S. 563, 572-73 (1966). As the FTC has previously persuaded other courts, "a cluster market does not aim to group together substitutable products, but rather groups non-substitutable products that *face similar competitive conditions*." *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 48-49 (D.D.C. 2018) (emphasis added); *see also ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 565-68 (6th Cir. 2014). On this basis, courts have frequently clustered different products into one single relevant product market where "market shares and competitive conditions are likely to be similar" among them. *FTC v. Staples, Inc*., 190 F. Supp. 3d 100, 117 (D.D.C. 2016) (quotation omitted).

Here, however, Plaintiffs and Dr. Smith limit the cluster of Rehab services to those services provided by IRFs, even though product markets are defined based on the *product or service* at issue, and not based on the identity of the *competitors* that happen to sell the product or service. *See, e.g., PSKS, Inc. v. Leegin Creative Leather Prod., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010) (rejecting product market limited to particular seller). Dr. Smith does so based solely on his "weighing" of select testimony and documents produced in discovery, without ever directly analyzing whether overlapping or interchangeable services are provided by SNFs. *See* Defs.' Mot. to Exclude Testimony of L. Smith. While Plaintiffs focus on the immaterial fact that IRFs and SNFs are subject to different regulations – IRFs must meet minimum criteria for intensity of therapy and acuity of patients – ample evidence shows that a variety of "high end" SNFs in the Philadelphia area nevertheless provide the *same* services as IRFs at similar levels of intensity and acuity. Ramanarayanan Expert Report ¶¶ 100-103. Most importantly, unlike Dr. Smith, Defendants' expert economist, Dr. Ramanarayanan, actually evaluated the specific services offered by IRFs and SNFs in the Philadelphia area *empirically* and found that at least six "high end" SNFs – Abramson Residence, Care One, Shannondell, and three Genesis "PowerBack" facilities – offer an even *greater* volume of Rehab services that overlap with IRFs than certain

IRFs included in Dr. Smith's purported market. *Id*. And Dr. Ramanarayanan's analysis is conservative given available data limitations; the actual extent of competition between IRFs and SNFs may be far greater.

Moreover, documents and testimony demonstrate that IRFs and SNFs actively compete for patients discharged from hospitals who need acute rehab care. *Id*. at ¶¶ 41, 47-48, 115. Multiple studies, including by the U.S. Centers for Medicare and Medicaid Services (CMS), demonstrate significant overlap between IRFs and SNFs, both in terms of the types of services provided and in patient outcomes. *Id*. at ¶¶ 89-93. Finally, the extent of overlap between IRFs and SNFs is only increasing as new CMS regulations for Rehab reimbursement seek to eliminate differences in the prices paid to IRFs and SNFs based on the situs of care and instead focus on the conditions and patients at issue. *Id*. at ¶¶ 52-53; *see also* Medicare Payment Advisory Committee ("MedPAC"), *Report to the Congress: Medicare Payment Policy* 225 (March 2020) (reporting that "SNFs were already taking higher acuity patients who otherwise may have gone to inpatient rehab facilities or long term hospitals") (citation omitted).

Dr. Smith's alleged product market fails at the threshold by defining the market not around the product or service at issue, but based on who happens to sell the service – IRFs or SNFs. Plaintiffs cannot carry their burden of defining a relevant product market on that basis.

b. *Plaintiffs' Geographic Market for Acute Rehab Services Fails to Conform to Commercial Realities by Omitting Key Competitors.*

Plaintiffs' proposed Philadelphia market for Rehab services suffers many of the same flaws as their proposed geographic markets for GAC services. As a result, Plaintiffs cannot establish a presumption that the merger will harm competition for Rehab services.

Einstein, operating under the name MossRehab, operates five IRFs in the Philadelphia area and one SNF, including one "standalone" IRF – MossRehab at Elkins Park ("Moss") – and

four IRFs housed within larger GAC hospitals. Jefferson operates two IRFs in the Philadelphia area, including one "standalone" IRF – Magee Rehabilitation Hospital ("Magee") – and a hospital-based IRF at Abington Hospital. While the parties' standalone IRFs, Moss and Magee, serve patients from a geographic area that extends well beyond the five-county metropolitan area, Plaintiffs allege a geographic market limited to portions of Philadelphia and Montgomery counties. In so doing, Plaintiffs have excluded significant competitors from their alleged market, such as Bryn Mawr Rehab, St. Mary Rehab, and Kessler Marlton. Dr. Smith justifies excluding these key competitors by determining that Magee is Moss' closest competitor, and thus he excludes from the geographic market IRFs that happen to be further away from Moss than is Magee, measured by driving distance. Ramanarayanan Expert Report ¶¶ 133-34.

However, Dr. Smith made critical data errors in identifying Magee as Moss' closest competitor. For example, he admittedly misclassified a subset of patients at Magee who received care under Worker's Compensation and Auto insurance policies as being "commercial" insurance patients, while designating such patients as "other" (and not "commercial") for every other rehab provider in the region. *Id*. at ¶¶ 135-37. The effect of this apples-and-oranges data error is to overstate the competitive significance of Magee and to understate the competitive significance of Bryn Mawr Rehab. When these errors are corrected, Dr. Smith's own algorithm shows that Bryn Mawr Rehab and Magee are at least equally close competitors to Moss. *Id*. at ¶¶ 141-42. Again, applying Dr. Smith's own algorithm and including Bryn Mawr Rehab in the geographic market, as well as the other facilities that are geographically closer to Moss than is Bryn Mawr Rehab (including St. Mary Rehab and Kessler Marlton), results in a broader geographic market and far lower market concentration levels. *Id*. at § IV.B.4. In particular, correcting Dr. Smith's data errors and including a narrow subset of SNFs in the relevant market results in a post-merger HHI of 1,994 to 2,292 – well below the 2,500 level necessary to presume competitive harm pursuant

to the FTC's own Merger Guidelines. *Id*. at § IV.C. Indeed, the fact that small corrections to Dr. Smith's errors have such a significant impact on the scope of Plaintiffs' proposed geographic market demonstrates that Dr. Smith's approach is not a robust or reliable basis to find a likelihood of harm from the merger.

For these reasons, like with their alleged GAC markets, Plaintiffs have failed to satisfy their *prima facie* burden of showing that the merger is unlawful based on market share and concentration statistics alone.

c. *Entry Would be Timely, Likely, and Sufficient to Offset any Alleged Harm to Competition from the Merger.*

Merger analysis must account for new entry to assess future competitive conditions. *See, e.g., United States v. Baker Hughes, Inc.,* 908 F.2d 981, 987-88 (D.C. Cir. 1990) (concluding that ease of entry overcame presumption of illegality from concentration). While existing competition for Rehab services is more than sufficient to keep Jefferson and Einstein prices in check, new entrants could easily defeat any effort by a merged firm to increase price. Rehab services are "high-touch" not "high-tech" – the investments of money and time necessary to create a Rehab facility, or convert an existing space into a Rehab facility, are small. Ramanarayanan Expert Report §§ IV.A.5, V.E. This is particularly true given the expansion of SNFs to increasingly serve a greater proportion of overlapping patient conditions with IRFs. As Defendants' expert, Dr. Ramanarayanan, explains, "high-end" SNFs should be considered, at minimum, "rapid entrants" and credited as competitors under the Merger Guidelines, *id*. at ¶ 116, while many additional SNFs should be considered potential entrants able to expand to treat higher intensity and acuity patients in direct competition with IRFs. *Id*. at § IV.A.5.

3. Anticompetitive Effects from the Merger Are Unlikely.

Lacking reliable expert analysis and sufficient market concentration statistics, Plaintiffs must rely on testimony and documents to try to carry their burden under the Clayton Act. But

this is not a case – unlike other litigated mergers – where such documents or testimony suggest the parties' intent to merge in order to increase price. Instead, Plaintiffs rely on self-serving and speculative testimony from certain health insurers that supposedly fear higher rates as a result of the merger. The views expressed by those insurers, which are not substantiated by any economic analysis, fly in the face of commercial realities. The Philadelphia area is saturated with GAC hospitals and Rehab providers. Numerous well-regarded hospitals like Penn Medicine, Main Line Health, Tower Health, Trinity Health, Temple, and Doylestown Hospital, among others, compete with Einstein and Jefferson facilities, as do numerous rehab facilities like Bryn Mawr Rehab, St. Mary Rehab, Good Shepherd Penn Partners, Kessler Marlton, Genesis "PowerBack," and Shannondell, among others. These competing facilities affiliate with providers and strategically place or acquire physician practices and outpatient locations to increase referrals to their inpatient facilities. Plaintiffs failed to sufficiently account for any of them. They prevent Einstein and Jefferson from charging non-competitive prices today, and would prevent it tomorrow.

Einstein is not a "must-have" provider for commercial health insurers, given its large Medicare and Medicaid patient population, and it does not add incremental leverage to Jefferson's bargaining position in health insurer negotiations. Insurers could readily exclude Jefferson and Einstein from their networks rather than accept a significant price increase. Indeed, while IBC professed support for EMCP's mission pre-merger, IBC nevertheless plans to *reduce* Einstein's rates when the transaction with Jefferson goes through. Mergers that result in *lower* prices obviously do not harm competition. As for Rehab services, they are such a small percentage of a health insurer's overall spend that the parties and the insurers treat them as an afterthought in their negotiations. Ramanarayanan Expert Report § 5.A. If it were sufficient for Plaintiffs to preliminarily enjoin hospital mergers on such unsubstantiated health insurer complaints, then *every* hospital merger would be enjoined.

Here, the historical data provide even more reasons to be skeptical of the speculation of Plaintiffs and their insurer witnesses. For example, with respect to GAC services, Defendants' expert, Dr. Capps, conducts a retrospective analysis of Jefferson's 2016 merger with Aria Health applying Dr. Smith's methodology. He shows that Dr. Smith's approach would predict the Jefferson-Aria merger to result in significant market concentration and price increases. Capps Expert Report § I.F., V.B. However, *no such price increases have materialized*. *Id*. at ¶ 471. This real-world example illustrating that Dr. Smith's model predicted a false positive casts significant doubt on the use of that model to predict a price increase and competitive harm for this merger. Similarly, with respect to Rehab services, Defendants' expert, Dr. Ramanarayanan, conducted a merger simulation model – based on Dr. Smith's own "Willingness to Pay" approach – and found that it did not predict any price increases from the transaction. Ramanarayanan Expert Report ¶¶ 173-74. Without a presumption of harm from market concentration statistics, without credible testimony or documents showing anticompetitive harm, and without reliable economic analysis showing price increases for either GAC or Rehab services, Plaintiffs simply cannot carry their burden.

4. Substantial Efficiencies Outweigh Any Potential Harm from the Merger.

Jefferson and Einstein will achieve significant clinical and operational savings by combining their systems. "[A] defendant may rebut the government's *prima facie* case with evidence that the intended merger would create significant efficiencies in the relevant market."[1] *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 146-47 (E.D.N.Y. 1997) (quotation omitted); *see also Arch Coal*, 329 F. Supp. 2d at 150; *New York v. Deutsche Telekom AG* (*T-Mobile/Sprint*), 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020). Efficiencies can also offset

[1] *Merger Guidelines*, § 10 ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service or new products.").

any anticompetitive effects, such as a predicted price increase. *Heinz*, 246 F.3d at 720 (D.C. Cir. 2001) ("[A]nticompetitive effects of the merger will be offset by the efficiencies resulting from the union of the two companies."). "Courts and the Merger Guidelines generally require that claimed efficiencies be both merger-specific and verifiable." *T-Mobile/Sprint*, 439 F. Supp. 3d at 208. Efficiencies are merger-specific when they "cannot be achieved by either company alone" and therefore could not be attained "without the concomitant loss of a competitor." *Penn State Hershey*, 838 F.3d at 348 (quotation omitted).

Defendants developed a detailed plan regarding cost savings to ensure that the merger made financial sense for Jefferson and that Einstein, including EMCP in particular, remains open and continues to provide care to the underserved in North Philadelphia. In fact, Defendants' merger agreement itself includes a provision that allowed either Party to withdraw from the merger should this detailed plan fail to identify enough savings to achieve a specified financial target to help offset the economic challenges faced by Einstein. The Parties spent twenty months, working with hundreds of stakeholders and subject matter experts at each system, to identify and assess the savings opportunities that the two systems could achieve from merging and to develop clinical service rationalization and integration plans. This substantial effort culminated in the parties' Rationalization and Integration Plan, which sets forth in detail the clinical service rationalization and integration plans of the parties and the associated cost savings they can attain as a result of their combination.

The parties' painstaking assessment of the merger efficiencies they can achieve did not end there; Defendants' efficiency expert, Lisa Ahern, analyzed and verified the Parties' clinical rationalization and integration savings estimates, concluding there are over $58 million in procompetitive efficiencies on an annual basis by Year 4 that the parties will realize from merging, which ultimately will sustain the viability of EMCP and preserve its mission in the community it

serves. Ahern Expert Report ¶ 46. These efficiencies are verifiable and merger-specific under the Merger Guidelines, and they could not be achieved by Einstein independently or through alternative transactions. *Id*. § IV.A. These benefits more than offset any plausible alleged anticompetitive effects posited by Plaintiffs and their economic expert.

Einstein has done everything it can to cut costs on its own, but it has reached the outer limit of its ability to do more without sacrificing quality of care or services. Moreover, Einstein has no alternative merger partners with the financial strength to take on its weak balance sheet while keeping EMCP's doors open to the community. Jefferson is the only system—given its scale, geographic proximity, and track record—with which Einstein can partner to achieve savings of a sufficient magnitude to maintain EMCP. Patnode Expert Report § XIII. None of Einstein's "alternatives appear reasonably practical," and on its own, Einstein could never "achieve the level of efficiencies promised by" a merger with Jefferson. *T-Mobile/Sprint*, 439 F. Supp. 3d at 213. Jefferson has a proven track record and a disciplined process to identify and achieve planned integration efforts and cost savings from prior transactions. Ahern Expert Report § VI. Jefferson will bring this experience and approach to bear when integrating Einstein to achieving the verified savings identified from their merger. Merger Guidelines at 30 ("[E]fficiency claims substantiated by analogous past experience are those most likely to be credited.").

Ultimately, Defendants have identified efficiencies that are "sufficiently verifiable and merger-specific to merit consideration as evidence that decreases the persuasiveness of the prima facie case." *T-Mobile/Spring*, 439 F. Supp. 3d at 208.

5. Einstein Is Weakening Competitively and Its Current Market Position Overstates Its Future Competitive Significance.

Einstein's precarious financial condition – and the increasingly weakened competitive position it portends – further undermines any presumption of enhanced market power in this case.

Einstein is a weakened competitor for largely the same reasons that a merger with Jefferson creates such significant merger-specific efficiencies: Einstein's costs simply outstrip its revenues or other access to capital. Patnode Expert Report, ¶¶ 108-118. Left unaddressed, this *status quo* threatens Einstein as a whole, and especially EMCP. Defendants developed a detailed plan to ensure that the merger addresses and resolves these fiscal problems. Defendants' "weakened competitor" defense is the other side of that coin. If the merger *does not* go forward, Einstein's competitive significance will erode as it is forced to cut services or close facilities.

Under the weakened competitor defense, merging parties may rebut the government's *prima facie* case by showing that "the acquired firm's current market shares overstate its future competitive significance due to its weak financial condition." *Arch Coal*, 329 F. Supp. 2d at 153 (D.D.C. 2004) (quotation omitted); *see also United States v. Int'l Harvester Co.*, 564 F.2d 769, 773-79 (7th Cir. 1977); *F.T.C. v. Nat'l Tea Co.*, 603 F.2d 694, 699 (8th Cir. 1979); *T-Mobile/Spring*, 439 F. Supp. 3d at 217 ("Evidence that a merging party is a 'weakened competitor' that cannot compete effectively in the future may serve to rebut a presumption that the merger would have anticompetitive effects."). This defense can be made by showing that: (a) "the acquired firm's weakness . . . would cause that firm's market share to reduce to a level that would undermine the government's prima facie case"; and (b) that weakness "cannot be resolved by any competitive means." *FTC v. University Health*, 938 F.2d 1206, 1221 (11th Cir. 1991); *see also United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017). "Courts have identified a variety of conditions that may render statistical market share evidence misleading, including a firm's lack of resources required to compete long-term, financial difficulties that constrain the firm from improving its competitive position, and poor brand image and sales performance." *T-Mobile/Sprint*, 439 F. Supp. 3d at 217.

Einstein's fiscal problems are significant and getting worse. As illustrated through

Defendants' financial expert, Mr. Todd Patnode, there are no expected near- or long-term opportunities for Einstein to stabilize its finances as a standalone system. Patnode Expert Report ¶¶ 43-55. Many of Einstein's financial problems are exacerbated by its payer mix, which skews heavily toward Medicare, Medicaid, and self-pay patients as expected given the location of EMCP in one of the most economically challenged areas in the country. Medicare and Medicaid rates are insufficient to cover even Einstein's costs, and Einstein does not attract enough commercial patients to cover this shortfall. Einstein has been unable for several years to fund its growing capital needs, much less make strategic investments to compete for new patients. In December 2019, Einstein's management team identified "must do" deferred maintenance and other capital expenditures of $81.3 million to replace aging facilities infrastructure as well as $23.2 million to replace end-of-life clinical equipment. Mr. Patnode opines that Einstein would require an infusion approximately $210 million to $300 million in external cash over the next four years to fund its "must do" capital expenditures and maintain minimally acceptable days of cash on hand. *Id*. at ¶¶ 138-139. On top of that, over $215 million in deferred capital expenditures at EMCP and EMCEP alone for strategic and non-strategic construction projects prevent it from updating outdated facilities and expanding services and access to the vulnerable populations it serves or to compete effectively. *Id*. at ¶ 92. The COVID-19 pandemic has exacerbated the problem, resulting in furloughs, reductions in patient volume, and an even more uncertain future. *See* Nina Feldman and Alan Wu, *Einstein Healthcare Network to Furlough Workers*, WHYY, Apr. 14, 2020, *available at* whyy.org/articles/Einstein-healthcare-network-to-furlough-workers/. Indeed, EMCP has been one of the hardest hit hospitals in the nation with COVID-19 patients, and the end of the crisis is not yet in sight.

The result is that Einstein risks falling into a downward spiral. Its "flagship" acute care hospital, EMCP, is unprofitable, has been for years, and is a financial drain on the entire Einstein

system. Patnode Expert Report ¶ 56. EMCP has aged facilities and equipment that need to be updated or replaced, but Einstein's underfunded core business lacks the capital to do so. *Id*. at ¶ 94. Meanwhile, EMCM, although profitable on a stand-alone basis, cannot strategically expand to address growing demand in its surrounding geography because its profits are diverted to prop up the rest of the system. *Id*. at § IX. As the picture worsens, access to outside capital for necessary investments shrinks even further with downgraded bond ratings, higher interest rates, and debt service, exacerbating the problem. *Id*. at ¶¶ 53-54, 108-116.

To be clear, Einstein is not predicting that it will disappear this year. But every month that goes by with these ongoing financial problems increases the difficultly in avoiding cuts to the essential services provided at EMCP. The financial problems will continue to weaken Einstein's competitive position in each of the markets proposed by Plaintiffs. In the alleged Northern Philadelphia Area, unless EMCP's facility and equipment needs are addressed, it risks losing vital commercial patient volume. In the alleged Montgomery Area, EMCM will be unable to focus its resources on strategic growth while other systems invest in their own facilities to compete for new patients. Moss Rehab will likely suffer a similar fate as EMCM.

After an extensive search, the proposed transaction between Einstein and Jefferson emerged as the only option available for addressing Einstein's weakening position. Although it engaged in an extensive partner search, Einstein was unable to identify any alternative buyer to Jefferson that possessed the financial strength and scale necessary to address Einstein's financial problems. No other potential strategic partners were willing and able to commit to keep EMCP open with its current set of services. *Id*. at § XIII. Einstein "falls squarely within the framework for a weakened competitor." *T-Mobile/Sprint*, 439 F. Supp. 3d at 224. It is "facing the future with relatively depleted resources at its disposal." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501-04 (1974). This strengthens Defendants' assertion that Plaintiffs' structural case

based on market share and market concentrations is overstated and does not "accurately reflect the Proposed Merger's likely effects on competition." *T-Mobile/Sprint*, 439 F. Supp. 3d at 224.

B. THE BALANCE OF EQUITIES FAVORS THE MERGER.

The balance of equities also strongly argues against Plaintiffs. "[T]he 'likelihood of success' analysis and the 'public equities' analysis are legally different points and the latter should be analyzed separately, no matter how strong the agency's case on the former." *CCC*, 605 F. Supp. 2d at 75; *Elders Grain*, 868 F.2d at 903-04 (explaining that plaintiffs improperly "collapse[d] the issue of equity or relative harm into the merits"). Plaintiffs have an independent burden to "show that the equities favor issuing the relief sought." *FTC v. Ill. Cereal Mills, Inc.*, 691 F. Supp. 1131, 1140 (N.D. Ill. 1988); *Arch Coal*, 329 F. Supp. 2d at 160.

Balancing the equities is not a "mechanical" task; Plaintiffs cannot rely on the public interest in "antitrust enforcement" alone. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1081 (D.C. Cir. 1981) ("We do not believe [Section 13(b)'s] deliberate addition of a reference to 'the equities' should be brushed aside as essentially repetitive or meaningless."). Instead, "[t]he question is whether the harm that [Defendants] 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.

"[P]ublic equities" include "the potential benefits, both public and private, that may be lost by enjoining the merger." *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 172 (D.D.C. 2000). "[I]f potential merger partners can present credible evidence that the merged company will lower consumer prices," the merger should not be enjoined. *CCC*, 605 F. Supp. 2d at 75-76. "Public equities include improved quality, lower prices, increased efficiency, realization of economies of scale, consolidation of operations, and elimination of duplication." *FTC v. Lab Corp. of Am.*, SACV 10-1873 AG MLGX, 2011 WL 3100372, at *22 (C.D. Cal. Feb. 22, 2011) (citation omitted). "The public interest in enforcing the antitrust laws" is that of consumers' collective

interest in lower-priced, higher-quality goods and services. *See Elders Grain*, 868 F.2d at 904. "[P]articularly strong equities [that] favor the merging parties" bar injunctive relief. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008). Conversely, "[a]bsent a likelihood of success on the merits, equities alone will not justify an injunction." *Arch Coal*, 329 F. Supp. 2d at 159.

Here, the merger will result in a combined entity that is more efficient and will achieve economies of scale. Significantly, the merged entity also will preserve Einstein's ability to fulfill its mission to continue serving the North Philadelphia uninsured patient population that the Plaintiffs disregard. EMCP's mission is more critical than ever, given the current COVID-19 public health crisis, which disproportionately affects lower-income communities. The proposed merger between Jefferson and Einstein offers an opportunity to safeguard Einstein and its patients through the creation of a new, dynamic hospital system. These pro-competitive public benefits will be lost if the preliminary injunction is granted.

CONCLUSION

For the reasons set forth above, and as they will further demonstrate at the forthcoming hearing in this matter, Defendants respectfully submit that the Court should deny Plaintiffs' Motion for a Preliminary Injunction.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2020, a true and correct copy of the foregoing was filed and served electronically by the Court's CM/ECF system upon all registered users in this action.

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