No. 20-3499

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellant, and

COMMONWEALTH OF PENNSYLVANIA

Plaintiff

v.

THOMAS JEFFERSON UNIVERSITY and
ALBERT EINSTEIN HEALTHCARE NETWORK,

Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of Pennsylvania, 2:20-cv-0113-GJP (Hon. Gerald J. Pappert)

APPELLEES' OPPOSITION TO THE EMERGENCY MOTION OF THE FEDERAL TRADE COMMISSION FOR AN INJUNCTION PENDING APPEAL

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TABLE OF CONTENTS

INTRODUCTION

After a six-day evidentiary hearing, the District Court denied the FTC's motion to enjoin the merger of Jefferson and Einstein under Section 13(b) of the Federal Trade Commission Act (15 U.S.C. § 53(b)(2)).[1] In its 62-page opinion, the District Court ruled that the FTC failed to establish a prima facie case that the merger is likely to substantially lessen competition for inpatient general acute care ("GAC") services and acute rehabilitation services. Op. 1-2. As the District Court explained, "identification of a proper market is a 'necessary predicate' to the Government's task of demonstrating a likelihood of success on the merits," and the FTC "has not identified a single relevant market to make its prima facie case." Op. 60. The District Court further ruled that the FTC failed to demonstrate a "credible threat of harm to competition during the time between the denial of this preliminary injunction and the final adjudication of the merits." Op. 62. Shortly thereafter, the District Court denied the FTC's Emergency Motion for an Injunction Pending Appeal, pursuant to the Parties' agreement to extend, through December 21, 2020, a TRO previously entered by consent. [E.D. Pa. Dkt. 285.]

Having been denied a preliminary injunction in the District Court, the FTC now asks this Court for the "extraordinary remedy" of enjoining Appellees' merger

[1] The Commonwealth of Pennsylvania was also a Plaintiff in the District Court, but has not yet filed a notice of appeal or joined in the FTC's Emergency Motion before this Court.

under Fed. R. App. 8(a)(2).[2] *Donald J. Trump for President*, *Inc. v. Sec'y of Penn.*, No. 20-3371, 2020 WL 7012522, at *7 (3d Cir. Nov. 27, 2020) (quoting *Winter v. Nat'l Res. Def. Council*, *Inc.*, 555 U.S. 7, 24 (2008)). Such relief—which would prevent Appellees from taking *any* step towards closing a merger that has been pending for nearly three years—is not warranted here. The District Court faithfully applied this Court's precedent, and the FTC does not take issue with the District Court's findings. Instead the FTC misstates and misreads the District Court's opinion in an attempt to manufacture error where none exists. That attempt, and the motion itself, should be rejected.

BACKGROUND

The greater Philadelphia area is home to 51 hospitals and 13 health systems providing inpatient GAC services. Op. 4. Jefferson and Einstein, two non-profit health systems operating in the area, agreed on September 14, 2018 to merge, with Jefferson becoming the sole member of Einstein. Op. 3.

In early 2020, the FTC sued to block the merger. For GAC services, the FTC proposed two geographic markets: [1] a "Northern Philadelphia Area,"

[2] Although the FTC uses the terms "stay" and "injunction" interchangeably, it plainly seeks an injunction pending appeal. A request for this Court to issue an injunction pending appeal "demands a significantly higher justification than a request for a stay, because unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010).

encompassing parts of Philadelphia and eastern Montgomery County including Einstein Medical Center Philadelphia and Jefferson's Abington hospital—but leaving out all of Penn Medicine's Philadelphia hospitals and Holy Redeemer Hospital, Op. 16; and [2] a "Montgomery Area," spanning from Einstein Medical Center Montgomery in East Norriton to Jefferson's Abington hospital—but leaving out Lankenau Hospital, Pottstown Hospital, Grand View Hospital, Doylestown Hospital, and all Penn Medicine facilities. Op. 16-17. The FTC also alleged a product market for inpatient "Acute Rehabilitation Services," a first-of-its-kind product market, which the FTC alleged could be provided only at inpatient rehabilitation facilities ("IRFs"), in a geographic market it called the "Philadelphia Area" but which left out IRFs at Bryn Mawr Rehab, St. Mary Rehab, and Kessler Marlton. Op. 18-19.

The District Court found the FTC failed to meet its burden of proof on each of its proposed geographic markets. The court explained that defining the geographic market "is dependent on the special characteristics of the industry involved," requiring "a pragmatic and factual approach." Op 2. The court emphasized that "[o]f greatest importance" is the principle that "the market's geographic scope must correspond to the commercial realities of the industry at issue." *Id.* (quotation marks omitted).

In its attempt to "show[] that its geographic markets corresponded to the commercial realities of southeastern Pennsylvania's competitive healthcare industry," the FTC relied on "its expert's econometric algorithm" and "testimony primarily from two (of the region's four) major commercial insurers" that they would accept a price increase from a hypothetical monopolist of the FTC's proposed markets rather than utilize the numerous other hospitals just outside the alleged markets. Op. 3. The District Court concluded "the expert's calculations alone" did not meet the FTC's burden. *Id*. Specifically, the District Court found that neither the FTC's calculations nor the testimony on which it relied was consistent with the "commercial realities of the area with several alternative hospitals that the FTC excluded from its proposed markets. *Id.* According to the Court, the two insurers' testimony was "neither unanimous, unequivocal nor supported by the record as a whole," and thus, was "not credible." *Id.* The court accordingly denied an injunction. *Id.*

SUMMARY OF ARGUMENT

After a thorough evaluation of the evidentiary record, the District Court found that the proposed geographic markets did not "correspond to the commercial realities of southeastern Pennsylvania's competitive healthcare industry," Op. 3, as required under this Court's precedent. *See Fed. Trade Comm'n v. Penn State Hershey Medical Center*, 838 F.3d 327, 336-37 (3d Cir. 2016). The District Court found that the FTC's expert's use of an econometric test—the hypothetical monopolist test ("HMT")—"alone" did not satisfy the FTC's prima facie burden of properly defining relevant markets because the results of that test were inconsistent with the testimony presented by the FTC at trial. Op. 3.

In particular, the District Court found that testimony from the subset of insurers supporting the FTC's case was contradicted by other evidence of the "commercial realities" of the market and therefore was not credible. Op. 3.

The FTC now tries to salvage its case through a strawman argument, claiming that the District Court "rejected the results of the hypothetical monopolist test on the ground that the Commission had not proven that insurers' conduct is 'correlated' with patients' preference for local care." Mot. 14. That is not what happened. While the District Court explained the limitations of relying solely on a statistical test, the District Court never "rejected" that test or its results. *See* Op. 31.[3] To the contrary, the Court explained that the FTC's "[e]conometric evidence can be powerful evidence, but it is not the only evidence that courts consider in defining the relevant market." *Id*. The District Court proceeded to analyze that additional evidence, just as this Court did in *Hershey*, and concluded it failed to support the FTC's alleged geographic markets.

[3] The FTC claims Appellees conceded that its alleged relevant markets satisfy the hypothetical monopolist test. That is not correct; Appellees disputed inputs used by the FTC's expert. But these flaws were not the basis of the District Court's decision.

Despite conceding that "the geographic market which passes the HMT must correspond with commercial realities," Op. 31, the FTC appears to argue now that the *only* evidence the District Court was permitted to consider was the *result* of its expert's econometric analysis, and it was legal error for the District Court to consider any other single piece of evidence that was presented during a six-day evidentiary hearing. That is not the law, and for good reason: If it were, the FTC could obtain a preliminary injunction automatically based on mere statistical evidence weeks after beginning an investigation without the need for any factual inquiry by a district court. But as the District Court properly recognized, defining a relevant geographic market is not simply a "statistical exercise," Op. 28-29, and "Section 13(b) was not enacted to authorize automatic preliminary injunctions." Op. 62 (quoting *FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 99 (N. D. Ill. 1981)); *see generally Brown Shoe Co. v. United States*, 370 U.S. 294, 226-337 (1962). Indeed, the FTC's expert himself "relie[d] on insurer testimony;" the District Court simply found that testimony to be "unsupported by the record as a whole." Op. 34; *see also* Op. 28, 38 n.10, 54. This reveals the heart of the matter: The District Court's opinion rests on the evidentiary record as a whole and on credibility determinations which the FTC strains to characterize as legal errors. *See* Mot. 18 (asserting that the District Court committed "legal error" by "finding that the Commission's insurer witnesses were not credible"). There was no error at all.

On the equities, the FTC fails to support its claimed harms with specific evidence, let alone evidence that any such harm is irreparable. The FTC also ignores the reality that further delay of Jefferson's and Einstein's integration efforts will likely cause continued deterioration of Einstein's financial condition, risking further harm to the communities Einstein serves.

The motion should be denied.

ARGUMENT

"Injunctions pending appeal, like preliminary injunctions, are 'extraordinary remed[ies] never awarded as of right.'" *Donald J. Trump for President*, 2020 WL 7012522, at *7. In order to obtain an injunction pending appeal, the FTC must show, as the most critical factors, "both (1) a 'strong' likelihood of success on the merits and (2) irreparable injury absent a stay or injunction." *Id.* (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see Nken v. Holder*, 556 U.S. 418, 434 (2009). After assessing these two factors, courts also balance "(3) whether a stay or injunction will injure other interested parties (also called the balance of equities) and (4) the public interest." *Id.* (citing *Hilton*, 481 U.S. at 776; *In re Revel AC, Inc.*, 802 F.3d 558, 568-571 (3d Cir. 2015)). Such relief is "rarely granted, because in [the Third Circuit] the bar is set particularly high." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013). None of the four factors here favors "taking th[e] extraordinary step" of an injunction pending appeal. *Donald J. Trump for President*, 2020 WL 7012522, at *7.

I. THE FTC CANNOT SHOW A STRONG LIKELIHOOD OF REVERSAL.

Where, as here, the determination of the "relevant geographic market" depends on its "special characteristics," market definition is a "factual question" reviewed for clear error. *Hershey*, 838 F.3d at 335. If, on the other hand, "a district court applies an incomplete economic analysis or an erroneous economic theory to those facts that make up the relevant geographic market, it has committed legal error subject to plenary review." *Id.* at 336.

The District Court here applied the correct economic analysis and even accepted the FTC's expert's hypothetical monopolist test. *See* Op. 33-34 ("As a matter of academic econometric analysis, Dr. Smith could be correct, but relying on that simple principle is insufficient."); *see also id.* 3, 27, 30-31. But it found ample evidence of "commercial realities" undercutting the FTC's three proposed markets—precisely the kind of "factual finding[]" regarding the "'special characteristics' of the healthcare market" subject to review only for clear error. *Hershey*, 838 F.3d at 335.

A. The District Court Correctly Rejected the FTC's Alleged Relevant Geographic Markets Based on Well-Supported Factual Determinations.

The District Court's analyses of the FTC's alleged relevant geographic markets and the factual evidence are entirely consistent with *Hershey*. As this Court explained:

> The relevant geographic market is that area in which a potential buyer may rationally look for the goods or services he seeks. Determined within the specific context of each case, a market's geographic scope must *correspond to the commercial realities of the industry being considered and be economically significant*. . . . A common method employed by courts and the FTC to determine the relevant geographic market is the hypothetical monopolist test. . . . [I]f a hypothetical monopolist could impose a small but significant non-transitory increase in price ("SSNIP") in the proposed market, the market is properly defined. If, however, consumers [insurers] would respond to a SSNIP by purchasing the product from outside the proposed market, thereby making the SSNIP unprofitable, the proposed market definition is too narrow.

Hershey, 838 F.3d at 338 (internal quotations omitted) (emphasis added). The District Court followed this analysis to the letter. *See, e.g.*, Op. 2-3, 26-27, 30-32, 36-37, 51 n.13.

In *Hershey*, to determine whether the Government met its burden, this Court looked to the "extensive evidence showing that insurers would have no choice but to accept a price increase from a combined Hershey/Pinnacle in lieu of excluding the Hospitals from their networks," including the testimony of "two of Central Pennsylvania's largest insurers." *Hershey*, 838 F.3d at 345. This Court found significant support for that testimony in the "natural experiment" that occurred when another insurer attempted to exclude both of the merging parties, and lost half its membership. *Id.* at 345-346. And this Court found persuasive that insurers "consider[ed] the Harrisburg area" to be a "distinct market." *Id.* at 346.

The District Court went through the same steps here and found that the evidence did not support such a conclusion. Op. 35-37. Unlike in *Hershey*, the insurer testimony on which the FTC relied here—that of Independence Blue Cross ("IBC") and Cigna—was not supported by any actual internal analysis. In fact, this testimony was contradicted by those same insurers' ordinary-course documents, business decisions, and contrary testimony on cross-examination, which showed that insurers have plenty of nearby hospitals to which they do and could turn instead of accepting a price increase. Op. 34-50. Also unlike *Hershey*, testimony from the other health plans in the Philadelphia area (Aetna and United) undercut IBC and Cigna's testimony, and there was no "natural experiment" supporting their professed fear of the Jefferson-Einstein merger. Op. 38-39, 51.

Further distinguishing *Hershey*, the FTC failed to put forward *any* employer testimony; the only such testimony in the record showed that employers would have alternatives besides Jefferson and Einstein, as the District Court noted (and the FTC ignores). *Compare* Op. 51 *with Hershey*, 838 F.3d at 345 ("Employers in the area [ ] stated that they would have a difficult time marketing a health plan without the

Hospitals after the merger.”). And unlike *Hershey*, no insurer (or employer, provider, or patient for that matter) testified that the proposed markets the FTC drew around parts of Montgomery County and North Philadelphia represented a “distinct market.” *See, e.g.*, Op. 39, 50. The District Court reached a different result than *Hershey* not because of any difference in approach or economic theory, but because the evidence is dramatically different in this case.

In an attempt to cast the District Court’s analysis as legal error, the FTC misreads the District Court’s opinion. The FTC claims that, because the District Court looked at evidence beyond the “aggregate diversion ratio” analysis presented by the FTC’s expert, the District Court “rejected the results of the hypothetical monopolist test” and “advanced its own economic theory.” Mot. 14-15. It did not. Rather, the District Court acknowledged, consistent with this Court’s precedent—not to mention the FTC’s own Horizontal Merger Guidelines—that the results of a hypothetical-monopolist exercise based on diversion ratios (which are “statistical estimates,” Op. 58) do not end the inquiry; they are only part of it.

Start with precedent. In explaining the FTC’s burden to prove its markets “correspond to the commercial realities of the industry being considered,” this Court in *Hershey* “emphasize[d]” that its “holding [was] narrow” so as not to “suggest[] that the hypothetical monopolist test is the only test that the district courts may use in determining whether the Government has met its burden to properly define the relevant geographic market." 838 F.3d at 338, 345. The Court's analysis did not start and end with diversion ratios—in fact, it never mentioned diversion ratios. Rather, the Court in *Hershey* engaged in an analysis of the record evidence (including insurer and employer testimony and ordinary-course documents), just as the District Court did here. *See id.* at 345-346.

The Guidelines likewise state that "the hypothetical monopolist test ensures that markets are not defined *too narrowly*, but it does not lead to a single relevant market. The agencies may evaluate a merger in any relevant market satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects." Horizontal Merger Guidelines 4.1.1 (emphasis added).

The District Court properly applied these principles, evaluating whether the statistical results of the FTC's expert's hypothetical-monopolist test were consistent with commercial realities when viewed through the "lens of the insurers." Op. 29 (citing *Hershey*, 838 F.3d at 342). Those "commercial realities" show that insurers could turn to other hospitals besides Jefferson and Einstein—hospitals the FTC ignores—to defeat a price increase. Op. 38-51.

The FTC now asks this Court to ignore all other evidence considered by the District Court and accept a statistical test as the *only* relevant evidence needed to define a relevant geographic market. Mot. 9-10, 15-17. That approach would contradict this Court's (and the Supreme Court's) commands that "a market's geographic scope must 'correspond to the commercial realities of the industry,'" and that "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Hershey*, 838 F.3d at 335, 338 (quoting *Brown Shoe*, 370 U.S. at 336). As the District Court recognized, "econometric evidence can be powerful evidence, but it is not the only evidence that courts consider when defining the relevant market." Op. 31 (quoting *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 39 (D.D.C. 2017)).

The FTC pays lip service to these authorities with conclusory assertions that its expert's statistical exercise "already incorporate[s]" commercial realities. Mot. 16, 18. This is a brazen attempt to replace the careful fact-finding of a District Court judge with unbridled deference to the FTC's chosen economist. That is not the law. As Appellees' expert, Dr. Cory Capps, explained, even if an alleged relevant geographic market passes the HMT as a technical matter, "some markets can pass the HMT and be more logical with respect to competitive realities and others can be less so." Op. 31. It is the District Court's job to make this determination based on the factual record before it. The fact that the District Court weighed the evidence differently than the FTC's economist is not legal error, and the FTC does not attempt to show it was clear factual error.

The FTC makes two additional arguments. Both fail. The FTC suggests at one point that the merger is presumptively unlawful in the three alleged geographic markets based on raw market share statistics. Mot. 10-11. That is putting the cart before the horse. The FTC contends that "all [] it has to show" is that "once any geographic market which can be drawn passes the HMT, it can move to the next step and calculate market share." Op 31. But measuring shares in a "market" requires that the FTC has properly defined a relevant geographic market consistent with commercial realities in the first place. The District Court properly held that the FTC failed to satisfy its burden of proof on that critical first step.

The FTC also argues (Mot. 17) that the District Court "ignored" a "willingness to pay" analysis performed by Dr. Smith. But the FTC did not rely on that analysis in support of its geographic market definition in its post-trial briefing (which barely mentioned that analysis at all). *See* App. 51 (Pls.' Prop. Findings of Fact ¶¶ 66-67). Any such argument now is waived and certainly cannot be raised *post hoc* to support the extraordinary remedy the FTC now seeks.

B. The District Court Applied the Correct Standards of Proof.

The FTC next tries to find an error in the burden of proof it was required to carry. There was none. The FTC argues that, by finding certain witness testimony "equivocal," the District Court somehow held the FTC to an improper standard and improperly "resolved doubts *in favor* of the transaction" and required unequivocal proof of illegality. Mot. 18-19. The FTC once again misstates the District Court's ruling, which found that the testimony of the two main insurer witnesses was not only equivocal, but undermined by contrary testimony and not "supported by the record as a whole." The court explained in detail the reasons why in its factual findings. Op. 3-4, 33, 43, 50.

The FTC is also wrong to suggest that "equivocal" testimony is sufficient on its own to block a merger. The principle that "doubts" should be resolved against a transaction is not a license for the FTC to block a merger on the basis of testimony the District Court found to be not credible. It is simply a corollary to the principle that Section 7 of the Clayton Act is concerned "with probabilities, not certainties." *Hershey*, 838 F.3d at 337 (quoting *Brown Shoe*, 370 U.S. at 323). The FTC cites no authority suggesting that its evidence must be taken as true.

The FTC even faults the District Court for noting the lack of "past examples" of insurers unsuccessfully marketing plans without Jefferson and Einstein and other evidence from "past merger challenges." Mot. 19-20 nn.4 & 5. The District Court "derived such criteria" (*id.*) directly from this Court's decision in *Hershey*, as explained above. *See supra* pp. 9-11. It hardly erred in doing so. And it did not "construe[]" each piece of evidence discussed in *Hershey* "as an separate evidentiary burden" as the FTC contends; rather, it noted that it "lacked the benefit" of the "natural experiment" evidence this Court relied on in *Hershey*, and that the FTC here "has not put forth *anything like* the 'extensive evidence' discussed" in *Hershey*. Op. 37, 51. The FTC does not and cannot dispute that.

In fact, the FTC faced no higher burden than required under this Court's precedent. The District Court asked "whether 'enough insurers, in the face of a [SSNIP], would avoid the price increase by looking to hospitals outside the proposed geographic market . . . .'" Op. 31-32 (alterations in original) (quoting *Hershey*, 838 F.3d at 342). The District Court found the evidence showed insurers would do just that. For instance, when IBC considered terminating Jefferson from its network, "IBC's own evaluation of suitable alternatives to Jefferson hospitals . . . identified HUP, Pennsylvania Hospital, St. Mary Medical Center and Holy Redeemer" as redirection hospitals, and the FTC excluded *all* of those hospitals from *all* of its proposed markets. Op. 44. And an internal analysis from United "demonstrate[ed] the company believes a broad range of alternative providers" to Einstein and Jefferson are available, including hospitals outside the FTC's proposed geographic markets, such as Pottstown Hospital, Penn Medicine's three hospitals, and Lankenau Hospital. Op. 39. These alternatives show the FTC's proposed markets are "too narrow" and were properly rejected. *Hershey*, 838 F.3d at 342.

C. The FTC Misstates the District Court's Reason for Rejecting the Alleged Market for Acute Rehab Services.

The FTC's arguments that it will succeed in reversing the District Court's ruling on its Acute Rehab Services market fare no better. The FTC contends that the

District Court "discarded the undisputed economic analysis" because the market for Acute Rehab Services is significantly smaller than the market for GAC services, employing reasoning that "would bless mergers to complete monopoly" over services "required by 'relatively few' insured patients." Mot. 21. The District Court did no such thing, and made that quite clear:

> The Court is not suggesting that insurers would never accept a price increase from a hypothetical monopolist for a product that represents a small overall percentage of provider care. There may well exist a small cluster of, or even individual, healthcare services so significant to members and a geographic area that insurers would pay higher reimbursement rates to keep them in their networks. On the facts of this case, Acute Rehabilitation Services in the Philadelphia Area is not among them.

Op. 59 n.16. And the District Court explained why: The FTC did not show that its proposed market "corresponds with commercial realities." Op. 52.

There was nothing "economically incoherent" (Mot. 22) about this conclusion. Once again, the FTC's expert relied principally on a statistical test to construct a candidate market for Acute Rehab Services, but failed to consider the evidence that undercut that candidate market. Op. 53-54. The District Court simply considered evidence the FTC would rather ignore. It discussed the evidence that, whatever their volume, Acute Rehab Services are not a focus of contracting negotiations, Op. 55-56, and also explained why the conclusory assertions of two insurers (again, IBC and Cigna) that they would have to accept a post-merger price increase for Acute Rehab Services did not validate the FTC's proposed geographic market. Op. 56-60; *see also* Op. 55 ("The Government's lack of evidence that insurers would pay higher prices in the Government's proposed Philadelphia Area is even more pronounced when it comes to Acute Rehabilitation Services."). For example, the District Court discussed the amount of competition among providers of Acute Rehab Services in the Philadelphia area, including those outside the FTC's proposed geographic market. Op. 6-11. The District Court's analysis is, again, consistent with (indeed required by) *Hershey*, and its conclusion is supported by the record. The FTC does not attempt to show otherwise.

* * * * *

Ultimately, the FTC fails in demonstrating that the District Court should have employed a different legal or economic analysis. There is simply no "strong showing" that the District Court's decision will be reversed. *In re Revel AC*, 802 F.3d at 568.

II. THE FTC WILL NOT SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION PENDING APPEAL.

The FTC baldly states that, without an injunction, it and the public will suffer irreparable harm because Appellees "plan to shutter" certain facilities and "will [ ] be able to share sensitive information about pricing strategies and lay off employees." Mot. 2-3, 23. But the FTC nowhere demonstrates that these things will actually occur during the pendency of its appeal.[4]

Indeed, Appellees do not intend to "shutter" facilities at all, but instead plan to shift and rationalize certain services across certain facilities (e.g., to consolidate complex transplant procedures in a central location) to reduce costs and improve quality. *See* App. 36 (Defs.' Prop. Findings of Fact ¶¶ 117-131); App. 24 (Sept. 29 Hr'g Tr. 93:1-11 (Meyer, Jefferson)). The FTC completely ignores the uncontroverted testimony from Jefferson's CEO (Dr. Stephen Klasko) that there is "zero question" that Jefferson is committed to maintaining Einstein's facilities. App. 24 (Sept. 29, Hr'g Tr. 34:14-20); *see also* App. 9 (Sept. 16 Hr'g Tr. 177:23-178:6 (Freedman, Einstein)). The FTC thus falls well short of its burden to demonstrate that "irreparable injury is *likely*," meaning "more apt to occur than not," "not merely possible." *In re Revel AC*, 802 F.3d at 569 (brackets and quotations omitted).

The FTC claims that, if it manages to succeed on appeal, it will be "*difficult*" to address an already-consummated merger. Mot. 23 (emphasis added). But the FTC does not explain *why* it could not be afforded full relief if successful on appeal, *i.e.*, what integration efforts are likely to take place in the time it takes this Court to decide the FTC's appeal, and which of those could not be undone (and why not). It

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[4] Checking the FTC's cites reveals that the plans to consolidate rehab units referenced in its motion are not "finalized"—they have been "contemplate[ed]." App. 24 (Sept. 29 Hr'g Tr. 91:14-21 (Meyer, Jefferson)).

is the FTC's burden to make this showing, *Donald J. Trump for President*, 2020 WL 7012422, at *7, and it simply makes no attempt.

Moreover, "[o]nly in a rare case [is] a transaction [ ] truly irreversible." *Fed. Trade Comm'n v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1033 (D.C. Cir. 2008). The FTC wholly ignores the numerous instances where it has ultimately ordered the separation of merged entities, including cases involving merged hospitals, even after an appeal. *See, e.g.*, *In re ProMedica Health Sys., Inc.*, Docket No. 9346, 2012 WL 2450574 (F.T.C. June 25, 2012) (ordering divestiture); *In re Whole Foods Mkt., Inc.*, Docket No. 9324, 2008 WL 5724689 (F.T.C. Sept. 8, 2008) (same, post appeal); *Fed. Trade Comm'n v. St. Luke's Health Sys. Ltd.*, Case No. 13-cv-00116-BLW, 2014 WL 407446 (D. Idaho Jan. 24, 2014). Whatever "harm" the FTC asserts is *possible* from closing the merger or trying to unwind a consummated transaction, it is far from "irreparable."

III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST WEIGH AGAINST AN INJUNCTION PENDING APPEAL.

The remaining equities only reinforce that the FTC's motion should be denied. The FTC severely minimizes the harm to Appellees, asserting that, because it has already delayed the combination for several years, there is no harm in delaying it further. Mot. 23-24. Yet the FTC ignores the extensive evidence and testimony regarding the mounting strain on Einstein's finances, especially in the COVID-19 pandemic. *See* App. 36 (Defs.' Prop. Findings of Fact ¶¶ 138-153). This merger is

Einstein's only hope of reversing its declining financial condition, and an additional delay to the start of Appellees' plans risks the further deterioration of Einstein's facilities and competitive position. *Id.* at 2-4. Indeed, there was unrefuted testimony that without this transaction, Einstein would need to reduce its service offerings soon to stem its financial losses, and this will certainly be true if an injunction pending appeal is issued. App. 9 (Sept. 16 Hr'g Tr. 134:12-135:5 (Freedman, Einstein); *id.* 206:6-24 (Lefton, Einstein); *id.* 256:8-16, 285:16-23, 297:8-298:13 (Patnode, Deloitte)). Visiting those risks upon Einstein and its patients would hardly serve the public interest. That risk also far outweighs the FTC's claimed public interest in "the effective enforcement of antitrust laws," Mot. 24, especially because, as the District Court found, there is no "credible threat of harm to competition" during the pendency of the appeal. Op. 62.

The FTC further suggests that the public interest may be harmed because, post-closing, health insurers might be "forced to pay [ ] higher *predicted* rates" and patients would be "forced to pay higher insurance premiums and out-of-pocket costs." Mot. 24. These econometric *predictions* of higher prices post-merger are disputed by Appellees, and the FTC does nothing to show that such predictions will come to pass during the pendency of its appeal. Indeed, negotiations with health insurers take many months and often years, and renegotiations of Jefferson's and Einstein's agreements with insurers (which often run for three to five years) may not occur for some time, undercutting the FTC's vague claims of imminent harm. *See, e.g.*, App. 3 (Sept. 14 Hr'g Tr. 128:25-130:1 (Staudenmeier, IBC)); App. 31 (Sept. 30 Hr'g Tr. 50:10-51:3 (McTiernan, Einstein)). Where, as here, "the merits, balance of harms, and public interest favor the stay opponent—a stay should be denied." *In re Revel AC*, 802 F.3d at 569.

CONCLUSION

The FTC's motion should be denied.

Dated: December 15, 2020

Respectfully Submitted,

<u>/s/ Catherine E. Stetson</u>
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing complies with the type-volume limitations of Fed. R. App. 27(d)(2) because it contains 5,168 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), and this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and L. App. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system to prepare this certificate.

Dated: December 15, 2020

/s/ Paul H. Saint-Antoine
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CERTIFICATE OF SERVICE

I, Paul H. Saint-Antoine, certify that a true and correct copy of the foregoing Opposition to the Emergency Motion of the Federal Trade Commission for An Injunction Pending Appeal was electronically filed and served on Appellant's counsel using the Court's CM/ECF System.

Dated: December 15, 2020

/s/ Paul H. Saint-Antoine
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