

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

FEDERAL TRADE COMMISSION et al.,
Plaintiffs,

v.

THOMAS JEFFERSON UNIVERSITY et
al.,

Defendants.

CIVIL ACTION
NO. 20-01113

PAPPERT, J.

December 8, 2020

MEMORANDUM

The Federal Trade Commission and Pennsylvania Office of Attorney General, collectively the Government, seek to preliminarily enjoin a proposed merger between Thomas Jefferson University and the Albert Einstein Healthcare Network pending an administrative determination of whether the combination violates Section 7 of the Clayton Act.

The parties conducted extensive discovery and the Court held six days of evidentiary hearings which included the testimony of twenty witnesses and the presentation of voluminous documentary evidence. The Court also received from the parties and reviewed additional documents, declarations, deposition transcripts and other materials. Following the hearings, the parties submitted proposed findings of fact and conclusions of law and the Court allowed the parties several hours of oral argument.

To obtain the relief it seeks, the Government must define a relevant geographic market—that area where potential buyers look for the goods or services they want—

within which the likely competitive effects of the merger can be evaluated. That market's definition is dependent on the special characteristics of the industry involved and the Court is required to take a pragmatic and factual approach in determining whether the Government has done it correctly. Of greatest importance to this case, the market's geographic scope must "correspond to the commercial realities of the industry at issue." The healthcare industry's market is represented by a "two-stage model of competition." In the first stage, hospitals compete to be included in an insurer's hospital network. In the second, hospitals compete to attract individual members of the insurers' plans.

This means that insurers, not patients seeking and receiving medical care, are the payors—those who will most directly feel the impact of the increased price of care. This is what the Third Circuit Court of Appeals has called the "commercial reality" of the uniquely structured healthcare industry. Patients are not irrelevant to a hospital system merger analysis; their choices and behavior can affect the bargaining leverage that hospitals and insurers possess when they negotiate hospitals' inclusion in insurers' networks and the reimbursement rates insurers agree to pay hospitals. But as the entities bearing the immediate impact of the cost of medical care, the insurers' perspective is extremely important in deciding whether a merger will substantially lessen the competition for healthcare in a proposed geographic market.

The propriety of a relevant geographic market in this industry must therefore be assessed "through the lens of the insurers." To establish its prima facie case, the Government must put forth enough evidence to prove that the insurers would not avoid a price increase in any one of the Government's proposed markets by looking to

hospitals outside those markets.

The Government has not met this burden. It contends that a combination of its expert's econometric algorithm and testimony primarily from two (of the region's four) major commercial insurers shows that its geographic markets correspond to the commercial realities of southeastern Pennsylvania's competitive healthcare industry. But the expert's calculations alone do not do so, and the insurers' testimony is neither unanimous, unequivocal nor supported by the record as a whole. Their conclusory assertions that they would have to succumb to a price increase for services in the Government's proposed markets instead of looking to healthcare providers outside those markets are not credible.

The Court denies the Government's request for a preliminary injunction.

I

A

On September 14, 2018, Jefferson and Einstein signed a System Integration Agreement, (JX0078), pursuant to which Jefferson will become Einstein's sole member and ultimate parent. (Pls.' Proposed Findings of Fact ("FF") ¶ 3); (Defs.' FF ¶ 5.) On February 27, 2020, the FTC initiated an administrative proceeding seeking to permanently enjoin the proposed merger. A merits trial in that action is presently scheduled to begin on March 8, 2021. See Order Granting Continuance, *In re Thomas Jefferson University et al.*, File No. 181 0128, Dkt. No. 9392 (FTC Nov. 6, 2020). Seeking to pause the merger and preserve the status quo pending the administrative proceeding's outcome, the Government filed this lawsuit requesting a preliminary injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 16 of the

Clayton Act, 15 U.S.C. § 26. (Compl. at 1–2, ECF No. 7.) The System Integration Agreement expires on the later of December 31, 2021 or, in the event of an appeal from this decision, sixty days after a final decision by the Court of Appeals. (Pls.’ FF ¶ 3); (JX0078-045.)

B

Jefferson and Einstein operate in a densely populated, major metropolitan region. There are abundant healthcare options in southeastern Pennsylvania, including fifty-one hospitals dedicated to general acute care (“GAC”), children’s specialty care, orthopedics and cancer care. (Capps Rpt. App’x G.1 ¶ 544.) Philadelphia’s healthcare market is less consolidated than others around the country. *See* (Sept. 14, 2020 Hr’g Tr. (Markowitz (Reg’l Director Operations and Mktg., Cigna)) 65:7–24, ECF. No. 250). In 2018, Jefferson and Einstein were just two of thirteen health systems providing inpatient GAC services in the region.¹ (Capps Rpt. App’x G Fig. 41.)

i

Jefferson includes a nonprofit health system operating fourteen hospitals with 2,885 licensed beds in Pennsylvania and New Jersey. (Capps Rpt. ¶ 105.) Jefferson hospitals providing inpatient GAC services include its flagship, Thomas Jefferson University Hospital (“TJUH”) in Philadelphia and Abington Hospital and Abington-Lansdale Hospital in Montgomery County.² (Defs.’ FF ¶ 1.) Jefferson provides

¹ In 2019, American Academic Health System stopped operating after closing Hahnemann University Hospital and selling St. Christopher’s Hospital for Children to Drexel University and Tower Health. (Capps Rpt. App’x G Fig. 41.)

² Jefferson’s system also includes Bucks Hospital, Cherry Hill Hospital (NJ), Frankford Hospital, Jefferson Hospital for Neuroscience, Methodist Hospital, Stratford Hospital (NJ),

inpatient rehabilitation services in a twenty-three-bed unit at Abington Hospital and at the ninety-six-bed freestanding inpatient rehabilitation facility (“IRF”) Magee Rehabilitation Hospital, which is in Philadelphia. *See* (Pls.’ FF ¶ 1); (Defs.’ FF ¶ 1); (Ramanarayanan Rpt. ¶ 64, Ex. 3). Jefferson also operates urgent care centers, outpatient centers, testing and imaging centers and a cancer center.³ (Capps Rpt. ¶ 105.)

ii

Einstein is a non-profit health system which includes three GAC hospitals: its 548-bed Einstein Medical Center Philadelphia (“EMCP”) in North Philadelphia, the sixty-seven-bed Einstein Medical Center Elkins Park (“EMCEP”) in southeastern Montgomery County and its 191-bed Einstein Medical Center Montgomery (“EMCM”) in East Norriton, Montgomery County. *See* (Capps Rpt. ¶¶ 114–128); (Pls.’ FF ¶ 2); (Defs.’ Answer to Compl. ¶ 35, ECF No. 51).

EMCP accounts for seventy percent of Einstein’s revenues. *See* (Sept. 16, 2020 Hr’g Tr. (Freedman (CEO, Einstein)) 106:21–23, ECF No. 252). However, Einstein’s

Torresdale Hospital and Washington Township Hospital (NJ). *See* Jefferson Health, *We Are Jefferson*, at 3 (Jan. 2020), <https://hospitals.jefferson.edu/content/dam/health/PDFs/general/aboutus/We-Are-Jefferson-1-08-20.pdf>. (last visited Dec. 7, 2020).

³ Outpatient services are used by health systems to “feed inpatient services in the total continuum of care.” (JX0034, Buongiorno (EVP and CFO, Main Line Health) Dep. Tr. 159:11–12); *see also* (Sept. 29, 2020 Hr’g Tr. (Meyer (President Jefferson Health, Senior EVP Thomas Jefferson University (“TJU”)) 69:5–13 (explaining hospitals attract inpatients at outpatient locations “through the affiliation purchase or recruitment and employment of primary care doc[tor]s that they place into specific communities”)); (Capps Rpt. ¶ 63 (“[H]ospitals located outside of, but not overly far from, a given geography can attract patients from that area [through] local affiliated or owned medical groups . . . within the geography. These medical groups can act as ‘front doors’ that steer patients to the associated system’s hospital . . .”)); (Sep. 29, 2020 Hr’g Tr. (Klasko) 55:24–25 (“[M]ore, and more, and more, and more things are going to be moving to [an] outpatient environment.”)); (*Id.* at 22:15–25 (“[T]he whole definition of what a hospital is . . . is changing rapidly.”)).

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