

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Terrell McSweeney

In the Matter of)
)
)
The Penn State Hershey)
Medical Center,)
a corporation)
)
and)
)
PinnacleHealth System,)
a corporation.)
_____)

Docket No. 9368
PROVISIONALLY REDACTED
PUBLIC VERSION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by the Act, the Federal Trade Commission (“Commission”), having reason to believe that the Penn State Hershey Medical Center (“Hershey”) and PinnacleHealth System (“Pinnacle”) (collectively the “Respondents”), having executed a letter of intent to enter into a merger agreement (the “

pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 1 Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. Hershey and Pinnacle intend to create a dominant provider of general acute care (“GAC”) inpatient hospital services in the Harrisburg area. The Merger is likely to substantially lessen

competition for healthcare services in Harrisburg, Pennsylvania, and its

29. The Herfindahl-Hirschman Index (“HHI”) is used to measure market concentration under the Merger Guidelines. A merger or acquisition is presumed likely to create or enhance market power under the Merger Guidelines, and thus, is presumed illegal under relevant case law, when the post-merger HHI exceeds 2,500 points and the merger or acquisition increases the HHI by more than 200 points.
30. Here, the market concentration levels far exceed those HHI thresholds. The post-Merger HHI in the GAC

36. A merger between hospitals that are close substitutes

40. A standard economic analysis of the closeness of competition known as diversion analysis, which is based on data about where patients receive hospital services, confirms that Hershey and Pinnacle are very close competitors. More specifically, Pinnacle is the only significant competitor of Hershey and Hershey is the only significant competitor of Pinnacle other than Holy Spirit Hospital. Diversion analyses show that if Hershey were no longer available, over 40% of its patients would seek GAC services at Pinnacle. Similarly, if Pinnacle were no longer available to patients, over 30% of its patients would seek GAC services at Hershey. The diversions between the Respondents are higher than those present in recent hospital merger cases where courts have found that the transaction at issue would substantially lessen competition and, therefore, violated the Clayton Act.
41. Hershey and Pinnacle offer a wide range of overlapping GAC inpatient service lines, from primary to higher-end tertiary and quaternary care, with the limited exceptions of major organ transplants and high-end trauma care, which are provided by Hershey but not by Pinnacle. Data show that the services offered by each of the Respondents substantially overlap with one another. Diagnosis-related groups (“DRGs”) are categories of diagnoses used by Medicare and health plans to set reimbursement rates. 98% of Hershey’s patients are in DRGs that are offered by Pinnacle. Similarly, 97% of Pinnacle’s patients are in DRGs offered by Hershey.
42. According to the Respondents’ documents, Pinnacle and Hershey “aggressively compete with one another in many areas” and view each other as close competitors. For example, in 2011, Hershey hired a consulting firm to conduct a detailed service line analysis, which concluded that Pinnacle was Hershey’s most significant, and often the “dominant,” local competitor in numerous key services lines, including neurosciences, heart and vascular, orthopaedics, obstetrics and gynecology (“OB/GYN”), spine, and pediatrics. The analysis also states that within the local market, Hershey had increased its market share in orthopedic services by “taking away market share from Pinnacle.” The same analysis also notes that Hershey is the “dominant player” in pediatrics while Pinnacle is the “second dominant player.”
43. In addition,

44. Pinnacle's ordinary course documents and business plans [REDACTED]
[REDACTED]
[REDACTED] While Holy Spirit competes in the Harrisburg Area, Pinnacle's documents reveal that [REDACTED]
[REDACTED]
45. Similarly, Hershey's internal documents reveal that Hershey identifies Pinnacle as being one of its principal competitors. Hershey focuses significant attention on Pinnacle's strategy, while focusing its own competitive strategies on capturing market share from Pinnacle.
46. The Respondents are also close competitors because of their geographic proximity. Competition between Hershey and Pinnacle is particularly intense in Dauphin County, where Hershey and Pinnacle operate the only GAC hospitals and the only emergency departments (where the Respondents draw approximately half of their inpatient admissions), and both draw more patients from Dauphin County than any other county. Post-Merger, the Respondents will operate the only two emergency rooms in Dauphin County and two of only three emergency rooms within 25 miles of downtown Harrisburg.
47. Competition between Hershey and Pinnacle also extends into Cumberland and Lebanon Counties. Hershey has expanded its primary care services in Cumberland County to drive referrals to Hershey Medical Center following Pinnacle's opening of West Shore Hospital in Cumberland County in 2014. Pinnacle has expanded its primary care services in Lebanon County, near Hershey Medical Center, in order to compete with Hershey and drive referrals to Pinnacle hospitals. Both Pinnacle and Hershey have both expanded their oncology services in Cumberland County.
48. [REDACTED] Hershey and Pinnacle are large health systems that compete closely against one another by offering very similar services and high levels of quality. [REDACTED]
[REDACTED]
[REDACTED]

53. Numerous health plans have expressed concern that the proposed Merger will eliminate competition and result in price increases. For example, a representative of [REDACTED] health plan in the Harrisburg Area, sent an email to the Respondents which stated that [REDACTED]
54. [REDACTED], the Harrisburg Area currently benefits from competition between Hershey and Pinnacle and [REDACTED]
55. Post-Merger, the transaction would eliminate this beneficial competition and create a dominant health system in the Harrisburg Area. Accordingly, if allowed to proceed, the Merger would substantially increase the combined entity's bargaining leverage in negotiations and result in higher rates.

D.

The Merger Eliminates Vital Quality Competition

56. In addition to price competition, Hershey and Pinnacle compete extensively on non-price dimensions, including expansion of services, quality of care, and the use of state-of-the-art facilities and technology. Patients in the Harrisburg Area have benefitted from this competition.
57. In order to further compete with Hershey, Pinnacle has expanded its tertiary services in recent years. For example, Pinnacle has expanded and modernized its facilities, and introduced new advanced service lines [REDACTED] all to the benefit of Harrisburg Area residents. Pinnacle recently renovated Harrisburg Hospital and its other hospitals to modernize, increase the number of private rooms, and add clinical space. Pinnacle has also expanded its service line offerings and implemented numerous operational improvements and best practices to improve its quality metrics and patient satisfaction. These improvements were driven by Pinnacle's desire to improve the patient experience and attract additional patients to Pinnacle and away from Hershey.

58. Competition between Pinnacle and Hershey is particularly evident in their efforts to improve and expand their respective oncology services. Pinnacle’s strategic plan for its new state-of-the-art Ortenzio Cancer Center in Cumberland County states that [REDACTED].
[REDACTED]. An internal Hershey document about Pinnacle’s Cancer Center notes [REDACTED].
59. Pinnacle also has improved the quality of care at its hospitals to attract more patients from the Harrisburg Area. Pinnacle’s internal documents show that it implemented operational improvements and best practices in order to improve its quality metrics and patient satisfaction.
60. Hershey has begun to [REDACTED] expand its network of primary care practices and to construct a new outpatient ambulatory facility to increase access for patients in the Harrisburg Area and to compete with Pinnacle. It expanded outpatient services in Cumberland County to drive referrals to Hershey Medical Center and [REDACTED].
61. Hershey’s documents also show its recognition that it needs to reduce costs and improve its quality and efficiency to remain competitive with Pinnacle and other competitors. It is “working to improve operational and cost performance” with specific initiatives on “quality & safety” and “cost efficiency.”
62. The Merger would eliminate this beneficial competition between Hershey and Pinnacle on these vital non-price factors, thereby reducing incentives to improve quality, implement new medical technologies, and expand services in the Harrisburg Area. In addition, the Respondents intend, post-Merger, to move low acuity cases from Hershey to Pinnacle and high acuity cases from Pinnacle to Hershey. Such plans will further reduce the combined Hershey/Pinnacle’s incentive to continue to invest in tertiary services at Pinnacle, and reduce costs and improve efficiency at Hershey. Losing these important benefits would affect all patients in the Harrisburg Area.

E.

**Respondents’ Recent [REDACTED] Agreements With [REDACTED]
Would Not Prevent Competitive Harm**

63. The Respondents have [REDACTED].
[REDACTED]

████████████████████ The ██████████ agreements were designed to forestall opposition to the Merger. ██████████

Accordingly, these ██████████ agreements are strong evidence that the payors believe that the Merger would result in anticompetitive increases in reimbursement rates to health plans imposed by the combined Hershey/Pinnacle. However, these ██████████ agreements do not alleviate the anticompetitive effects of the Merger.

64. First, the ██████████ agreements are limited to only ██████████. The Respondents have not entered into similar agreements with other ██████████ in the Harrisburg Area. Accordingly, the combined Hershey/Pinnacle would be able to use its enhanced bargaining leverage to demand higher prices or better terms, without any constraints, when negotiating with these other health plans.
65. Second, the ██████████ agreements foreclose the possibility that, absent the Merger, competition could lead to rates that increase less quickly or even decrease. Similarly, they do not address that the change in bargaining dynamics due to the merged entity's increased leverage would also apply to different types of agreements, such as risk-sharing arrangements, ██████████. Under such newer reimbursement arrangements, the health plan and the provider must negotiate over the level of risk that each party bears. Here, the combined entity could use its increased bargaining leverage post-Merger to the detriment of health plans (and ultimately their members) when negotiating risk-sharing or value-based agreements.
66. Third, the ██████████ agreements do nothing to preserve the service and quality competition between Pinnacle and Hershey that has benefitted Harrisburg Area residents and patients and that the Merger would eliminate.
67. Finally, ██████████. When they terminate, the Respondents will no longer be subject to any purported commitment to maintain the ██████████. Accordingly, the combined Hershey/Pinnacle would be able to use its enhanced bargaining leverage to demand higher prices or better terms from the ██████████ without any constraints, when negotiating both traditional fee-for-service contracts as well as contracts with newer reimbursement models.

VII.

ENTRY BARRIERS

- 68. Neither entry by new healthcare providers into the relevant service market nor expansion by existing market participants will deter or counteract the Merger's likely serious competitive harm in the relevant service market.
- 69. New hospital entry in the Harrisburg Area would not be likely, timely, or sufficient to offset the Merger's ~~adverse effects on competition in the relevant service market.~~

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