

Complaint

IN THE MATTER OF

**THE PENN STATE HERSHEY MEDICAL
CENTER
AND
PINNACLEHEALTH SYSTEM**

COMPLAINT AND FINAL ORDER IN REGARD TO ALLEGED
VIOLATIONS OF SECTION 5 OF THE FEDERAL TRADE COMMISSION
ACT AND SECTION 7 OF THE CLAYTON ACT

Docket No. 9368; File No. 141 0191

Complaint, December 7, 2015 – Order, October 23, 2016

This case addresses the merger of certain assets of The Penn State Hershey Medical Center and PinnacleHealth System. The complaint alleges that a merger agreement between the Respondents to combine Penn State Hershey Medical Center and Pinnacle Health System violated Section 5 of the Federal Trade Commission Act, and, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by significantly reducing competition in the market for general acute care inpatient services in the Harrisburg, Pennsylvania, area. The order dismisses the Complaint without prejudice on the ground that the Respondents have ended their efforts to pursue the proposed merger and the Hart-Scott-Rodino filing for the proposed merger has expired.

Participants

For the *Commission*: Ryan Harsch, Jared P. Nagley, Jonathan Platt, Gerald Stein, GERALYN J. Trujillo, Nancy Turnblacer, and Theodore Zang.

For the *Respondents*: Ken Field and Toby Singer, Jones Day.

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 “Merger”), in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which, if

Complaint

consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

I.**NATURE OF THE CASE**

1. Hershey and Pinnacle, the two largest health systems in the greater Harrisburg, Pennsylvania area, intend to merge. If allowed to proceed, the Merger would 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 surrounding communities, leading to increased healthcare costs and reduced quality of care for over 500,000 local residents and patients.

2. Today, Hershey owns and operates one GAC hospital in the Harrisburg area, while Pinnacle operates three GAC hospitals. Hershey and Pinnacle operate the only three hospitals located in Dauphin County. Both Hershey and Pinnacle are high-quality health systems that, with limited exceptions, offer an overlapping range of GAC inpatient hospital services (“GAC services”), including primary, secondary, tertiary, and quaternary services.

3. Hershey and Pinnacle are close competitors for GAC services in the Harrisburg area. Hershey and Pinnacle vigorously compete on price, quality of care, and services provided, both for inclusion in commercial health plan networks and to attract patients from one another. The rivalry between Hershey and Pinnacle has benefited local patients with lower healthcare costs and increased quality of care. The Merger would eliminate this significant head-to-head competition between Hershey and Pinnacle and its related benefits.

Complaint

4. The Merger would substantially lessen competition in the market for GAC services sold to commercial health plans in an area roughly equivalent to a four-county region comprised of the Harrisburg Metropolitan Statistical Area (Dauphin, Cumberland, and Perry Counties) plus Lebanon County (the “Harrisburg Area”).

5. The only significant competitor of the Respondents in the Harrisburg Area is Holy Spirit Hospital (“Holy Spirit”), which is a smaller community hospital located in eastern Cumberland County that offers a more limited range of services than Hershey or Pinnacle. There are two other hospitals located on the outskirts of the Harrisburg Area. They are even smaller community hospitals that offer a more limited range of services than Holy Spirit and a much more limited range of services than the Respondents. Neither of these hospitals meaningfully constrains Hershey or Pinnacle.

6. Post-Merger, the combined entity will account for approximately 64% of all GAC services in the Harrisburg Area. Using the Herfindahl-Hirschman Index (“HHI”) to measure market concentration, the post-Merger HHI would be approximately 4,500 with an increase of approximately 2,000 points. This high market share and corresponding high concentration level render the Merger presumptively unlawful under the relevant case law and likely to increase market power—by a wide margin—under the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”).

7. The Merger would substantially increase the combined entity’s bargaining leverage in negotiations with commercial health plans. The combined entity would be able to exercise market power by raising prices and reducing quality and services, ultimately harming Harrisburg Area residents and patients.

8. Entry or expansion by other providers of the relevant services is unlikely to occur, much less in a manner that is timely, likely or sufficient to deter or mitigate the loss of price and non-price competition in the near future.

Complaint

9. Finally, the Respondents' efficiency claims are overstated, speculative, unverifiable, not merger-specific, or result from an anticompetitive reduction in output, quality, or services, and are largely non-cognizable. Any cognizable efficiency claims are insufficient to offset the substantial competitive harm the Merger is likely to cause.

II.**BACKGROUND****A.****Jurisdiction**

10. The Respondents, and each of their relevant operating entities and parent entities are, and at all relevant times have been, engaged in commerce or in activities affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

11. The Merger constitutes a transaction subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

B.**The Respondents**

12. Respondent Hershey is a not-for-profit healthcare system headquartered in Hershey, Pennsylvania in Dauphin County. The system includes the Milton S. Hershey Medical Center ("Hershey Medical Center"), a GAC academic medical center affiliated with the Penn State College of Medicine, and the Penn State Hershey Children's Hospital (located on the Hershey Medical Center campus and the only children's hospital in the Harrisburg Area).

13. The Hershey Medical Center has 551 licensed beds (125 of which are located at the Children's Hospital). It employs approximately 804 physicians. Hershey offers a full range of GAC services, from primary care to quaternary services. It offers quaternary services such as heart transplants and operates a state-

Complaint

designated Level I Trauma Center for pediatrics and adults. In fiscal year 2014, on a system-wide basis, Hershey generated approximately \$1.4 billion in revenue and had approximately 29,000 inpatient discharges.

14. Respondent Pinnacle is a not-for-profit healthcare system headquartered in Harrisburg, Pennsylvania. Pinnacle operates three GAC hospitals in the Harrisburg Area. Pinnacle's Harrisburg Hospital and Community General Osteopathic Hospital are located in Dauphin County and Pinnacle's West Shore Hospital, which opened in May 2014, is located in eastern Cumberland County.

15. Pinnacle's combined system has 662 licensed beds, which are divided among its three GAC hospitals. Pinnacle offers a full range of GAC services, from primary care to quaternary services, excluding only a limited number of quaternary services. Harrisburg Hospital, which is Pinnacle's flagship teaching hospital, has a Level III neonatal intensive care unit and performs high-level services such as kidney transplants. Pinnacle's CardioVascular Institute is considered one of the leading cardiology programs in Pennsylvania. In 2014, Pinnacle generated approximately \$850 million in revenue and had more than 35,000 inpatient discharges.

C.

The Proposed Merger

16. In June 2014, Hershey and Pinnacle signed a letter of intent pursuant to which they agreed to explore the possibility of combining their assets. In March 2015, the Respondents' boards approved moving forward with the transaction. Although the final merger documents have not yet been signed, pursuant to the letter of intent, the transaction would be structured as a membership substitution by which the new entity would become the sole member of both Hershey and Pinnacle, and Hershey and Pinnacle will have equal representation on the new entity's board of directors.

Complaint

III.**THE RELEVANT SERVICE MARKET**

17. The relevant service market in which to analyze the effects of the Merger is GAC inpatient hospital services sold to commercial health plans and their members. This service market encompasses a broad cluster of medical and surgical diagnostic and treatment services offered by both Hershey and Pinnacle that require an overnight hospital stay.

18. Although the Merger's likely effect on competition could be analyzed separately for each of the hundreds of affected medical procedures and treatments, it is appropriate to evaluate the Merger's likely effects across this cluster of services because the services are offered to Harrisburg Area patients under similar competitive conditions, by similar market participants. There are no practical substitutes for this cluster of GAC services.

IV.**THE RELEVANT GEOGRAPHIC MARKET**

19. The relevant geographic market in which to analyze the effects of the Merger is the Harrisburg Area, which is an area roughly equivalent to the Harrisburg Metropolitan Statistical Area (Dauphin, Cumberland, and Perry Counties) and Lebanon County.

20. The appropriate geographic market in which to analyze the Merger is the area in which consumers can practicably find alternative providers of the service. The test from the Merger Guidelines used to determine the boundaries of the geographic market is whether a hypothetical monopolist of the relevant services within that geographic area could profitably negotiate a small but significant and non-transitory increase in price (here, reimbursement rates for GAC services). If so, the boundaries of that geographic area are an appropriate geographic market.

21. In general, patients choose to seek care close to their homes or workplaces for their own convenience and that of their families because it takes less time to travel to a hospital that is

Complaint

nearby and it is easier to arrange for transportation and visitation. Residents of the Harrisburg Area strongly prefer to, and do, obtain GAC services locally. Moreover, residents of the Harrisburg Area who require emergency hospital services seek such services within the Harrisburg Area. They would not travel outside of the Harrisburg Area for such emergency services without jeopardizing their health and well-being.

22. Evidence from multiple sources shows that an overwhelming percentage of commercially insured residents of the Harrisburg Area seek GAC services within the Harrisburg Area.

23. Hospitals outside the Harrisburg Area, such as those in York and Lancaster Counties, [REDACTED] are not, meaningful competitors of Hershey, Pinnacle, or other hospitals in the Harrisburg Area for the provision of GAC services to residents of the Harrisburg Area because they draw very few patients from the Harrisburg Area.

24. Health plans that offer health care networks in the Harrisburg Area do not consider hospitals outside of the Harrisburg Area to be viable substitutes for Harrisburg Area hospitals. Very few of their members leave the Harrisburg Area to obtain GAC services, even for tertiary and quaternary care.

25. Because residents of the Harrisburg Area strongly prefer to obtain GAC services in the Harrisburg Area, a health plan that did not have Harrisburg Area hospitals in its network would be very difficult to successfully market a network to employers and consumers in the area. Accordingly, a health plan would not exclude from its network a hypothetical monopolist of hospital services in the Harrisburg Area in response to a small but significant price increase.

Complaint

V.

**MARKET STRUCTURE AND THE MERGER'S
PRESUMPTIVE ILLEGALITY**

26. Hershey currently accounts for approximately 26% of the relevant market. Pinnacle currently accounts for approximately 38% of the market. A combined Hershey/Pinnacle would own by far the largest GAC hospital system within the Harrisburg Area. Defendants' post-Merger market share would be overwhelming at approximately 64% of the relevant market.

27. Of the three other hospitals that provide GAC services to residents in the Harrisburg Area, only one – Holy Spirit Hospital – is of any competitive significance. Holy Spirit currently accounts for approximately 15% of the relevant market. The remaining two hospitals are Carlisle Regional Medical Center (in central Cumberland County), which accounts for approximately 5% of the market, and WellSpan Good Samaritan Hospital (in central Lebanon County), which accounts for approximately 6% of the market. These two hospitals are small community hospitals with limited service offerings and little appeal to residents of the Harrisburg Area. They do not compete to any significant degree with the Respondents. No other hospital accounts for more than 3% of the relevant market. Accordingly, the proposed Merger would reduce the number of meaningful competitors in the Harrisburg Area from three to two.

28. Under the relevant case law, including U.S. Supreme Court precedent and recent litigated hospital merger cases, the Merger is presumptively unlawful by a wide margin, as it would significantly increase concentration in an already highly concentrated market.

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.

Complaint

30. Here, the market concentration levels far exceed those HHI thresholds. The post-Merger HHI in the GAC services market will be over 4,400, an increase of approximately 2,000 points. The approximate HHI figures and market shares for the GAC services market in the Harrisburg Area are summarized in the table below.

GENERAL ACUTE CARE INPATIENT HOSPITAL SERVICES		
Hospital System	Pre-Merger Market Share	Post-Merger Market Share
Penn State Hershey Medical Center	26%	64%
PinnacleHealth System	38%	
Holy Spirit Health System – A Geisinger Affiliate (Cumberland County)	15%	15%
WellSpan Good Samaritan Hospital (Lebanon County)	6%	6%
Carlisle Regional Medical Center (Cumberland County)	5%	5%
Other (<3% share each)	10%	10%
HHI	2,500	4,500
Change in HHI	+2,000	

Complaint

VI.**ANTICOMPETITIVE EFFECTS****A.****Hospital Competition Yields Lower Prices and Higher Quality**

31. Competition between hospitals occurs in two distinct but related dimensions. First, hospitals compete to be selected as in-network providers for commercial health plans' members. Second, hospitals compete with each other on the basis of non-price features (*e.g.*, quality, amenities, etc.) to attract patients, including health plan members, to their facilities.

32. In the first dimension of hospital competition, hospitals compete to be included in health plan networks. To become an in-network provider, a hospital negotiates with a health plan and, if mutually agreeable terms can be reached, enters into a contract. Reimbursement rates (*i.e.*, prices), which the hospital charges to a health plan for services rendered to a health plan's members, are the primary contractual terms negotiated.

33. In-network status benefits the hospital by giving it preferential access to the health plan's members. Health plan members typically pay far less to access in-network hospitals than out-of-network hospitals. Thus, all else being equal, an in-network hospital will attract more patients from a particular health plan than an out-of-network hospital. This dynamic motivates hospitals to offer lower rates to health plans to win inclusion in their networks.

34. From the health plan's perspective, having hospitals in-network is beneficial because it enables the health plan to create a healthcare provider network in a particular geographic area that is attractive to current and prospective members, typically local employers and their employees.

35. A critical determinant of the relative bargaining positions of a hospital and a health plan during negotiations is whether other, nearby comparable hospitals are available to the health plan

Complaint

and its members as alternatives in the event of a negotiating impasse. The presence of alternative hospitals limits a hospital's bargaining leverage and thus constrains its ability to obtain higher reimbursement rates from health plans. The more attractive these alternative hospitals are to a health plan's members in a local area, the greater the constraint on that hospital's bargaining leverage. Where there are few or no meaningful alternatives, a hospital will have greater bargaining leverage to demand and obtain higher reimbursement rates.

36. A merger between hospitals that are close substitutes from the perspective of health plans and their members therefore tends to produce increased bargaining leverage for the merged entity and, as a result, higher negotiated rates, because it eliminates a competitive alternative for health plans.

37. Increases in the reimbursement rates negotiated between a hospital and a health plan significantly impact the health plan's members. "Self-insured" employers rely on a health plan for access to its provider network and negotiated rates. These employers pay the cost of their employees' health care claims directly and thus bear the full and immediate burden of any rate increases in the healthcare services used by their employees. "Fully-insured" employers pay premiums to health plans—and employees pay premiums, co-pays, co-insurance and/or deductibles—in exchange for the health plan assuming financial responsibility for paying hospital costs generated by the employees' use of hospital services. When hospital rates increase, health plans pass on these increases to their fully-insured customers in the form of higher premiums, co-pays, co-insurance and/or deductibles.

38. In the second dimension of hospital competition, hospitals compete to attract patients to their facilities by offering higher quality care, amenities, convenience, and patient satisfaction than their competitors. This competition can be significant because health plan members often have a choice of in-network hospitals where they face similar out-of-pocket costs. Hospitals also compete on these non-price dimensions to attract patients covered by Medicare and Medicaid, as well as other patients without commercial insurance. A merger of competing hospitals

Complaint

eliminates that non-price competition and reduces their incentive to improve and maintain quality.

B.**The Merger Would Eliminate Close Competition between Hershey and Pinnacle**

39. Hershey and Pinnacle are vigorous competitors in the relevant market due to the similarity in services that they both offer and their geographic proximity. The Merger would eliminate direct and substantial competition between the Respondents and create a dominant health system that could increase reimbursement rates and/or reduce service levels for GAC inpatient services. Close competition in the relevant market is evident from a wide variety of evidence, including econometric analysis of the Respondents' patient draw data, ordinary-course documents, testimony, and information from health plans.

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

Complaint

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.”

[REDACTED]

43. In addition, Pinnacle has been expanding its service offerings and [REDACTED] that would further enhance its competition with Hershey.

44. Pinnacle’s ordinary course documents and business plans

[REDACTED]

While Holy Spirit competes in the Harrisburg Area, Pinnacle’s documents reveal that [REDACTED]

[REDACTED]

Complaint

[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.

[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]

Complaint

C.

The Merger Would Eliminate Price Competition and Increase the Merged Entity's Bargaining Leverage

49. Because the Merger would eliminate direct competition between Pinnacle and Hershey, a combined Hershey/Pinnacle would have increased bargaining leverage, allowing it to raise rates for GAC inpatient services in the Harrisburg Area. This increased leverage could manifest itself in multiple ways including through an increase in rates across the entire combined hospital system or by raising Pinnacle's rates [REDACTED]. Such leverage could negatively affect agreements with traditional fee-for-service arrangements and/or new reimbursement models such as risk sharing, by, for example, allocating more risk to the health plan and less risk to a combined Hershey/Pinnacle.

50. Currently, health plans in the Harrisburg Area can negotiate lower rates by threatening to exclude Hershey or Pinnacle from their networks because the other hospital serves as a close alternative for patients living in the Harrisburg Area. [REDACTED]

51. If Hershey and Pinnacle were to merge, health plans could no longer threaten to exclude the combined Hershey/Pinnacle from their networks or otherwise use competition between Hershey and Pinnacle to negotiate better reimbursement rates. In fact, one of Pinnacle's [REDACTED]

52. Moreover, [REDACTED] a provider network that lacked the combined Hershey/Pinnacle would be very difficult, if not impossible, to market to Harrisburg Area residents. [REDACTED]

Complaint

[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]

[REDACTED]

54. [REDACTED], the Harrisburg Area currently benefits from competition between Hershey and Pinnacle and [REDACTED]

[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-

Complaint

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]

An internal Hershey document about Pinnacle's Cancer Center notes [REDACTED]

[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

Complaint

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]
[REDACTED] Would Not Prevent Competitive Harm**

63. The Respondents have [REDACTED]

[REDACTED] The [REDACTED] agreements were designed to forestall opposition to the Merger.

[REDACTED] Accordingly, these [REDACTED] 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 [REDACTED]

Complaint

agreements do not alleviate the anticompetitive effects of the Merger.

64. First, the [REDACTED] agreements are limited to only [REDACTED]. The Respondents have not entered into similar agreements with other [REDACTED] 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 [REDACTED] 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, [REDACTED]

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 [REDACTED] 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 [REDACTED] When they terminate, the Respondents will no longer be subject to any purported commitment to maintain the [REDACTED]. Accordingly, the combined Hershey/Pinnacle would be able to use its enhanced bargaining leverage to demand higher prices or better terms from the [REDACTED] without any constraints, when negotiating both traditional fee-for-service contracts as well as contracts with newer reimbursement models.

Complaint

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 harmful effects. Construction and operation of a new GAC inpatient hospital involves high costs and serious financial risk. The construction of a new hospital also would take much more than two years from the initial planning stage to opening, as evidenced by the significant time and expense involved in the building of Pinnacle's West Shore Hospital and Hershey's Children's Hospital.

70. Even if new hospital entry did occur, it likely would not be sufficient to offset the Merger's harm because a new hospital could not achieve the scale required to offer the broad cluster of GAC services comparable to those offered by the Respondents. Hershey and Pinnacle are both large, high-quality health systems, which offer a full range of GAC services and employ a significant number of physicians. Their service capabilities, strong reputations, and significant share of the relevant market present significant barriers to entry and would be extremely challenging for a new entrant to replicate in a manner sufficient to counteract the likely anticompetitive effects of the Merger.

71. [REDACTED]

[REDACTED] In fact, the Respondents are the only healthcare providers that have constructed new hospitals in the relevant area (one each) in over a decade.

Complaint

VIII.**EFFICIENCIES**

72. No court ever has found, without being reversed, that efficiencies rescue an otherwise illegal transaction. Here, in order to rebut the presumption that the Merger is unlawful, Respondents would need to present evidence that extraordinary merger-specific efficiencies, which will be passed on to consumers, outweigh the Merger's likely significant harm to competition in the Harrisburg Area. However, Respondents' efficiency claims are overstated, speculative, unverifiable, not merger-specific, or result from an anticompetitive reduction in output, quality, or services, and are largely non-cognizable. Overall, Respondents' efficiency claims, to the extent they are cognizable, are insufficient to offset the substantial competitive harm the Merger is likely to cause.

73. Respondents have claimed that Hershey is at capacity and the Merger will allow the Respondents to transfer patients suffering from less severe illnesses from Hershey to Pinnacle, which has the capacity to treat them. Respondents further claim that this will allow Hershey to avoid constructing a new inpatient bed tower to alleviate its capacity issues.

74. However, Hershey could alleviate its capacity constraints in a timely manner without the Merger. Moreover, the Respondents' alleged efficiency plans would result in competitive harm. Respondents' plans would force patients to go to a different hospital than the one they originally chose. Respondents' plans would also reduce output, capacity, and service compared to the but-for world without the Merger, thereby denying patients the benefits of new inpatient rooms at Hershey. Accordingly, these claims are not cognizable under the law.

75. The Respondents have also claimed that the Merger may achieve other operational efficiencies. However, these efficiency claims are speculative, overstated, and have not been substantiated by the Respondents.

Complaint

IX.**VIOLATION****COUNT I – ILLEGAL AGREEMENT**

76. The allegations of Paragraphs 1 through 75 above are incorporated by reference as though fully set forth.

77. The merger agreement constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL MERGER

78. The allegations of Paragraphs 1 through 75 above are incorporated by reference as though fully set forth.

79. The Merger, if consummated, may substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and is an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the seventeenth day of May, 2016, at 10 a.m., is hereby fixed as the time, and the Federal Trade Commission offices at 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place, when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in

Complaint

which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the Respondents file their answers. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the Respondents' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the Respondents file their answers). Rule 3.31(b) obligates counsel for each Respondent, within five (5) days of receiving the Respondents' answers, to make certain initial disclosures without awaiting a discovery request.

Complaint

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Merger challenged in this proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, the Commission may order such relief against the Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. A prohibition against any transaction between Hershey and Pinnacle that combines their businesses in the relevant markets, except as may be approved by the Commission.
2. If the Merger is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant markets, with the ability to offer such products and services as Hershey and Pinnacle were offering and planning to offer prior to the Merger.
3. A requirement that, for a period of time, Hershey and Pinnacle provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant markets with any other company operating in the relevant markets.
4. A requirement to file periodic compliance reports with the Commission.
5. Any other relief appropriate to correct or remedy the anticompetitive effects of the transaction or to restore Pinnacle and Hershey as viable, independent competitors in the relevant markets.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this seventh day of December, 2015.

Final Order

By the Commission.

ORDER DISMISSING COMPLAINT

On December 7, 2015, the Commission issued an administrative complaint alleging that a merger agreement between the Respondents to combine Penn State Hershey Medical Center and Pinnacle Health System violated Section 5 of the Federal Trade Commission Act, and, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act. Complaint Counsel and Respondents now jointly seek dismissal of the Complaint, on the ground that the Respondents have ended their efforts to pursue the proposed merger and the Hart-Scott-Rodino filing for the proposed merger has expired.

The Commission has determined to dismiss the Complaint without prejudice in light of the foregoing. Respondents would not be able to effectuate the proposed merger without a new HSR filing. Dismissal of the Complaint would therefore be in accordance with the public interest.¹ Accordingly,

IT IS ORDERED THAT the Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

¹ See, e.g., *Superior Plus Corp.*, Docket No. 9371, Order Dismissing Complaint (August 2, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160803superiorcanexuscmpt.pdf>; *Staples Inc.*, Docket No. 9367, Order Dismissing Complaint (May 18, 2016), available at <https://www.ftc.gov/system/files/documents/cases/160519staplesrorder.pdf>.

Complaint

IN THE MATTER OF

WARNER BROS. HOME ENTERTAINMENT INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4595; File No. 152 3034**Complaint, November 17, 2016 – Decision, November 17, 2016*

This consent order addresses Warner Bros. Home Entertainment Inc.’s use of social media influencers to advertise the video game, *Middle Earth: Shadow of Mordor*. The complaint alleges that Warner Bros., through its ad agency, Plaid Social Labs, LLC, hired individuals who had earned reputations as video game enthusiasts on YouTube (“YouTube influencers”) for hundreds of dollars to tens of thousands of dollars to post positive videos promoting *Shadow of Mordor* on YouTube, which did not necessarily reflect the independent experiences of the individual YouTube influencers. The complaint further alleges that, in numerous instances, YouTube influencers did not disclose or adequately disclose that Warner Bros., through Plaid Social, offered compensation to the influencers in exchange for creating and uploading gameplay videos as part of a *Shadow of Mordor* advertising campaign. The consent order prohibits Warner Bros., in connection with the advertising of any home entertainment product or service, from misrepresenting in any influencer campaign that an influencer or endorser of such product or service is an independent user or ordinary consumer of the product or service.

Participants

For the *Commission*: Linda K. Badger, Matthew D. Gold, and Evan Rose.

For the *Respondents*: Kelly DeMarchis, Leonard Gordon, and Stuart Ingis, Venable LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Warner Bros. Home Entertainment Inc., a corporation (“respondent”), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Warner Bros. Home Entertainment Inc. (“WBHE”) is a Delaware corporation with its principal office or