IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FEDERAL TRADE COMMISSION, Plaintiff, v. HACKENSACK MERIDIAN HEALTH, INC. and ENGLEWOOD HEALTHCARE FOUNDATION, Defendants.	Civil Action No. 2:20-cv-18140-JMV-JBC **FILED UNDER SEAL**

DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE DOCUMENTS AND TESTIMONY ABOUT THEORETICAL ALTERNATIVE MERGERS

Defendants Hackensack Meridian Health, Inc. ("HMH") and Englewood Healthcare Foundation ("Englewood") (collectively, "Defendants") move *in limine*, pursuant to Federal Rules of Evidence 401, 402, and 403, to exclude Plaintiff Federal Trade Commission ("FTC" or "Plaintiff") from introducing documents or eliciting testimony about theoretical alternative merger partners because that evidence is irrelevant as a matter of law and a waste of the limited (and valuable) time that is available for the preliminary injunction hearing.

The relevant issue for this Court is whether there is a reasonable probability that the proposed merger being challenged—between HMH and Englewood—will

substantially lessen competition. That controlling issue requires the Court to determine whether the FTC has shown that such a lessening of competition is likely to occur, after all procompetitive and anticompetitive effects of **this** real-world merger have been accounted for. Instead of devoting its trial time to proving the competitive effects of the only transaction before the Court, the FTC seeks to present testimony and documents in support of its claim that a theoretical, alternative merger could achieve the same procompetitive effects as the proposed merger between Englewood and HMH. But that speculative possibility is irrelevant. Defendants do not have the burden to prove that the procompetitive effects of their merger cannot alternatively be achieved through some other hypothetical transaction that the FTC might prefer.

To be cognizable, the efficiencies from a merger must be "merger specific" in the sense that they could not be achieved by "either company alone." *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 348 (3d Cir. 2016) (internal quotations omitted). There is no legal requirement in this Circuit—or any other—that it must also be shown that such procompetitive benefits could not alternatively be achieved by a theoretical merger with a third party that is not before the Court. This conclusion follows from the plain text of Section 7 of the Clayton Act, which requires the FTC to prove that the challenged merger will "substantially lessen

competition," without any reference to the parties to the merger having to prove that a more pro-competitive, alternative merger could not possibly occur in its place.

The FTC attempts to confuse the analysis by the Court on the competitive effects of a merger, for which the FTC bears the burden of proof, with an "efficiencies" defense, for which Defendants bear the burden of proof. But that distinction is of no consequence for purposes of this motion because there is no burden on Defendants at *any* stage to demonstrate that the procompetitive benefits of their merger could not be achieved by a hypothetical merger.

The only merger for the Court to consider is that between HMH and Englewood. Theoretical alternative mergers are irrelevant to whether the proposed merger may substantially lessen competition, and documents, testimony, and expert opinions regarding any such transactions should therefore be excluded. *See* Fed. R. Evid. 401. Further, it would be a waste of limited and valuable hearing time for the parties to have to litigate over the speculative possibility of hypothetical transactions, which have no bearing on the issue of whether the actual proposed merger between Englewood and HMH will have a procompetitive or anticompetitive effect.

ARGUMENT

I. The Only Relevant Issue Before the Court Is Whether the *Proposed* Merger Is Procompetitive or Anticompetitive, Without Regard to Theoretical Alternative Transactions with Third Parties

In assessing whether a proposed merger is procompetitive or anticompetitive under Section 7 of the Clayton Act, Courts require that any efficiencies be merger specific. *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 208 (S.D.N.Y. 2020) (internal citations omitted).[1] The FTC argues that this "merger-specific" test means that Defendants must prove that any procompetitive effects could not alternatively be achieved by a different, hypothetical merger transaction. But this is not what the law requires. As the Third Circuit has held: "merger-specific" means only that the procompetitive effects "'cannot be achieved by either company alone.'" *Penn State*, 838 F.3d at 348 (quoting *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 722 (D.C. Cir. 2001)); *Deutsche Telekom AG,* 439 F. Supp. 3d at 210 (S.D.N.Y. 2020). Moreover, although the Defendants have the burden of production in demonstrating any procompetitive effects of the merger to rebut the FTC's prima facie case, the burden of persuasion always lies with the FTC. *Penn State*, 838 F.3d at 337.

There is thus no need for this Court to make any determination as to whether the procompetitive effects shown by Defendants could also be achieved in some

[1] There is no legal requirement that the procompetitive effects and benefits be "merger specific"—those effects are weighed as part of the Court's analysis of

alternative transaction. Nor do Defendants have any burden to prove such an impossibly speculative "negative": that there is no hypothetical transaction that might be more procompetitive than the actual merger that has been agreed to by the parties. The FTC's expert, Dr. Leemore Dafny, admits as much, conceding that a proposed merger that is *pro*competitive does not suddenly become *anti*competitive just because an alternative merger partner might hypothetically enter into a different transaction with one of the Defendants that could theoretically achieve the same procompetitive benefits. *See* Deposition of Dr. Leemore Dafny ("Dafny Dep."), Tr. at 329:22-330:14 [redacted]. Because the competitive effects of any theoretical alternative transactions are not relevant to the legal or

whether the merger *as a whole* is anticompetitive, as even the FTC's own Horizontal Merger Guidelines acknowledge. *See* Horizontal Merger Guidelines ("Guidelines") § 2 (investigating "likely competitive effects" of a merger); *compare id. with* § 10 (considering efficiencies). Theoretical alternative mergers are legally irrelevant at any stage of analysis, should not be considered as part of either (1) the competitive-effects analysis performed by Defense expert Gautam Gowrisankaran; or (2) the substantial efficiencies analysis submitted by Defense expert Lisa Ahern.

economic questions before the Court, any evidence regarding such speculative possibilities should be excluded from the hearing under Federal Rule 401.

Despite the above, the FTC has offered exhibits for trial, elicited testimony, submitted expert opinions, and argued in its pre-trial briefing that the procompetitive benefits of the merger between Englewood and HMH should be disregarded because the FTC argues that the Defendants have the burden of proving that Englewood could not "achieve the same benefits through a merger with one of its multiple other bidders." Dkt. 146 at 53; *see also* Dkt. 228 at 25-26. All of this irrelevant evidence should be excluded so that the Court and Defendants do not have to waste valuable hearing time on issues that have no bearing on assessing the competitive effects of the only merger before the Court.

The FTC will no doubt cite Section 10 of its own Horizontal Merger Guidelines as purportedly requiring Defendants to disprove the existence of alternative transactions capable of achieving the procompetitive benefits of the merger between Englewood and HMH. Guidelines §10 n.13; Dafny Report ¶ 106. But the FTC's own Guidelines do not support their position. First, the Guidelines are not part of the Clayton Act; they merely provide "guidance" on the circumstances in which the enforcement authorities (the Department of Justice and the FTC) will, or will not, seek to enjoin a merger as a matter of enforcement discretion. The FTC may employ any criteria it chooses for determining which mergers to challenge, but

it does not have any authority to impose burdens on Defendants which the Clayton Act does not embody. *See, e.g.*, *Fed. Trade Comm'n v. Thomas Jefferson Univ.*, 2020 WL 7227250, at *11 n.7 (E.D. Pa. Dec. 8, 2020) (stating expressly that the Merger Guidelines "are not binding"); *H.J. Heinz,* 246 F.3d at 716 n.9 (same).

Second, Section 10 of the Guidelines only applies to merging parties asserting an "efficiencies" defense. Here, the FTC is arguing that the burden of proof imposed on the merging parties by Section 10 applies to procompetitive effects – such as improvements in the quality of health care – that are not part of any "efficiency" defense but are instead part of the broader analysis of whether a merger will or will not substantially lessen competition. The FTC's own expert, Dr. Dafny, agreed that improvements in the quality of health care attributable to a merger would be part of the economic analysis of the competitive effects of the transaction. Dafny Dep., Tr. at 253:16-255:6 (testifying that quality improvements could be a procompetitive benefit). For this reason, the "efficiencies" section of the Guidelines should not be applied to procompetitive benefits, and the FTC at all times bears the burden of persuasion on the issue of procompetitive effects as part of its overall burden to prove a substantial lessening of competition. *See, e.g.*, *F.T.C. v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999) (reversing district court's preliminary injunction because "although [the defendant's] efficiencies defense may have been properly rejected by the district court, the district court should nonetheless have

considered evidence of enhanced efficiency in the context of the competitive effects of the merger").[2]

Third, even if Section 10 of the Guidelines were applicable, the Guidelines on their face do not require the merging parties to offer any evidence about "theoretical" alternative transactions. Guidelines §10 ("The Agencies do not insist upon a less restrictive alternative that is *merely theoretical*.") (emphasis added). That is precisely the situation here, where it is undisputed that no one knows what the deal terms or the competitive effects would be of a hypothetical merger between Englewood and another hospital because no such transaction has ever been negotiated and agreed to, and its merger terms would thus be entirely speculative and theoretical. Dafny Dep., Tr. at 317:14-318:12 (testifying that she does not know the final terms of what would be [redacted] and therefore could not [redacted] whether an alternative merger would be procompetitive or anticompetitive).

Aside from the Guidelines, the FTC relies on a single case, decided 15 years ago, in a different Circuit, as purported support for its argument that Defendants bear the burden of proving that the procompetitive benefits of their merger could not be

[2] *See also* 1 Antitrust Adviser § 4:26, Assessing merger efficiencies (5th ed.) (Dec. 2019) ("It is important . . . to differentiate between procompetitive efficiencies used as an affirmative defense (i.e., to excuse an otherwise anticompetitive merger) and those used as a negative defense (i.e., to show that there is no anticompetitive impact from the merger in the first place).").

achieved through a hypothetical alternative transaction. *Federal Trade Commission v. Arch Coal Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). But *Arch Coal* does not support the FTC's unprecedented position that Defendants have the burden of proving that a hypothetical alternative merger would not be able to achieve the same procompetitive effects. Although there is brief reference in *Arch Coal* to the existence of "another potential purchaser," *id.* at 152, that fact was not the basis of its decision that numerous merger-specific efficiencies rebutted the FTC's prima facie case of a violation of the Clayton Act. *Id* at 152-53. Instead, the court in *Arch Coal* applied the same standard as other courts apply to determine whether any efficiencies claimed by the defendants are "merger-specific"—that is, whether the merging company could achieve the claimed efficiencies "on its own accord, independent of the merger." *Id.* at 151. That test does not impose any burden on Defendants to prove that there is no possible alternative transaction that could generate the same procompetitive benefits, and all of the FTC's evidence in support of this proposition should be excluded as being irrelevant under Rule 401.

Indeed, when assessing the competitive effects of a merger, it is well-established that a Court must not "second guess the business judgments of [the merging party's] able executives." *Penn State*, 838 F.3d at 350; *see also Omnicare, Inc. v. UnitedHealth Grp., Inc.,* 594 F. Supp. 2d 945, 964 (N.D. Ill. 2009), *aff'd*, 629 F.3d 697 (7th Cir. 2011) ("Generally, courts will not second-guess business

judgments made by a private actor."). Here, it is undisputed that it was the business judgment of the Board of Englewood that the transaction it found to be in the hospital's best interest was the merger negotiated with HMH. There is no basis to impose a requirement for Englewood to prove that it could not achieve similar benefits through another transaction which its Board, exercising its business judgment, chose not to pursue. And it would be pure speculation for the Court to consider whether Englewood's Board would ever agree to such a theoretical alternative merger in the future if the merger between HMH and Englewood were enjoined.

II. The Evidence Should Also Be Excluded, under Rule 403, Because It Is Hypothetical, Speculative, And A Waste of Limited Hearing Time

Even were the Court to consider the evidence presented by the FTC regarding hypothetical mergers to be marginally relevant, it still should be excluded as hopelessly speculative and a waste of judicial time. Indeed, even Section 10 of the Merger Guidelines state that there is no need for the parties to address "a less restrictive alternative that is merely theoretical." Guidelines § 10; *Deutsche Telekom AG,* 439 F. Supp. 3d at 211.

Despite the FTC's representation during the Court's Final Pre-Trial Conference that "we're not talking about hypothetical mergers here," the FTC seeks to spend valuable hearing time litigating exactly such speculative possibilities. *See* 5/7/2021 Conf. Tr. at 20:1-2. Both of the FTC's experts have admitted at their

depositions that they have no way of knowing the conditions of any alternative merger, and thus cannot offer any opinions on the competitive or health care quality effects of such speculative possibilities. *See, e.g.*, Dafny Dep., Tr. at 317:14-318:12 (does not know final terms of theoretical alternative merger); Deposition of Dr. Patrick Romano, Tr. at 97:2-15, 100:7-17 (has not seen or does not know how patient reallocation would be done in a theoretical alternative merger or whether there would be greater savings to payors in such a hypothetical alternative merger).

In a recent challenge to a merger between T-Mobile and Sprint, the court expressly declined to entertain the argument that T-Mobile or Sprint "could realize similar efficiencies through a merger with [another alternative company]." *Deutsche Telekom AG,* 439 F. Supp. 3d at 212. Instead, the court found that the argument was "speculative," as the merging parties had tried and failed to reach a merger agreement with the alternative company in the past such that the court "simply cannot presume that [the other supposed merger partner] would inevitably agree to a merger with [either party] . . . ." *Id.* at 212-13. Likewise, here, it is undisputed that Englewood could not, and did not, reach a merger agreement with any of the alternative merger partners whom the FTC wants to litigate about. It thus would be pure speculation for the court to make any finding or presumption that such an alternative transaction would ever be agreed to, or on what terms.

Under Rule 403, this Court should exclude any evidence sought to be introduced by the FTC on speculative alternative transactions, which would only waste the time of the Court. There is simply no basis for any findings to be made on the terms or possible competitive effects of theoretical mergers that have never been agreed to and are unlikely to ever take place.

CONCLUSION

For all the reasons set forth above, Defendants respectfully move this Court *in limine* to preclude the introduction of documents or testimony regarding theoretical alternative mergers on the grounds that it is legally irrelevant, would be speculative and confuse the issues, and be a waste of limited time at the preliminary injunction hearing. *See* Fed. R. Evid. 401, 402, 403.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2021, a true and correct copy of the foregoing was filed and served electronically by the Court's CM/ECF system upon all registered users in this action.

s/ James Bucci
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