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. 20-cv-18140-JMV-JBC **PUBLIC VERSION**

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE DOCUMENTS AND TESTIMONY ABOUT ALTERNATIVE MERGERS

Englewood had, and continues to have, actual offers on the table from alternative merger partners. These are not "theoretical" or "speculative." And Englewood cannot convert serious offers into mere theory simply by electing to merge with one of its closest competitors. Rather than face the rigorous burden of proving their efficiencies defense, Defendants now ask the Court to ignore the real

and relevant possibility that Englewood could have merged with other health systems. Defendants have not cited, and the FTC cannot find, any decision excluding evidence about alternative merger partners. Instead, it appears that every court to consider this issue has heard evidence and ruled on a factual record. This evidence is admissible to demonstrate that Englewood could have achieved through other means the claimed benefits resulting from its combination with HMH. Thus, this record of concrete alternative merger partners for Englewood is highly probative of whether Defendants have substantiated cognizable efficiencies.[1]

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I. There is No Legal Distinction Between Efficiencies and What Defendants Brand "Procompetitive Effects."

Defendants confuse the issues by attempting to forge a distinction between "efficiencies" and "procompetitive effects." The law makes no such distinction.

Efficiencies, to the extent they are relevant at all, only become relevant after "the Government has established a prima facie case that the merger may substantially lessen competition." *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d

[1] Defendants' efficiencies defense fails for myriad reasons, only one of which is the availability of alternative merger partners. This matter will not waste the Court's, or the parties', limited time in this hearing. Englewood's alternative merger partners do not form the crux of the FTC's case, and the evidence in dispute will account for a fraction of the FTC's case.

327, 347-48 (3d Cir. 2016). At that stage, the burden shifts to Defendants to either disprove any anticompetitive effects or to affirmatively show anticompetitive effects "will be offset by extraordinary efficiencies resulting from the merger." *Hershey*, 838 F.3d at 347.[2]

Claims that a merger will improve quality of healthcare or lower prices are assessed under this efficiencies defense framework.[3] *See, e.g.*, *Hershey*, 838 F.3d at 350 (explaining that the court would assess in its "efficiencies analysis" whether capital savings would result in "lowering prices or improving the quality of services"); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 791-92 (9th Cir. 2015) (rejecting efficiencies defense that the merger would allow the parties to "provide better service to patients"); *FTC v. Sanford Health*, 926 F.3d 959, 965-66 (8th Cir. 2019) (rejecting defense that the merger would produce "quality efficiencies"); *see also Horizontal Merger Guidelines* § 10 (Aug. 19, 2010) ("*Merger Guidelines*") (describing relevant efficiencies as those that "enhance the merged firm's ability and incentive to compete, which may result

[2] Defendants' burden to provide evidence of efficiencies is consistent with the fact that "much of the information relating to efficiencies is uniquely in the possession of the merging parties." *Horizontal Merger Guidelines* § 10 (Aug. 19, 2010).
[3] Defendants' claims that the merger will relieve capacity constraints should also be assessed under the same efficiencies defense framework. *See Hershey*, 838 F.3d at 347-50 (rejecting defendants' efficiencies defense that the merger would relieve capacity constraints); *see also FTC v. Swedish Match*, 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000).

in lower prices, *improved quality*, *enhanced service*, or new products") (emphasis added).[4] If Defendants claim efficiencies, whether in the form of cost savings, improved quality, or enhanced services, they bear the burden to prove those efficiencies and to show they are cognizable.[5]

II. Efficiencies are Merger Specific, and thus Cognizable, if they Cannot Be Achieved by Practical Alternatives.

To be cognizable, Defendants must show that claimed efficiencies are merger specific, meaning they "could not be achieved without the merger." *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011); *Hershey*, 838 F.3d at 348; *FTC v. Wilh. Wilhelmsen Holdings ASA*, 341 F. Supp. 3d 27, 72 (D.D.C. 2018). Otherwise, the claimed efficiencies could "be achieved without the concomitant loss of a competitor." *Hershey*, 838 F.3d at 348; *see also Merger Guidelines* § 10 ("The Agencies credit only those efficiencies likely to be

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[4] Defendants rely on a single out-of-circuit decision as apparent support for treating efficiencies and "procompetitive effects" differently. Mot. at 7-8 (citing *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999)). The FTC does not read *Tenet* to shift the burden on efficiencies from merger defendants to the FTC. To the extent that the decision is in conflict with *Hershey*, the *Merger Guidelines*, and the other precedent cited above, however, *Tenet* should be set aside.

[5] In addition to misunderstanding their own burden, Defendants repeatedly mischaracterize the FTC's burden, claiming it must "prove that the challenged merger *will substantially* lessen competition." Mot. at 1-2 (emphasis added); *see also id.* at 2-3. Section 7 of the Clayton Act makes illegal a merger where the acquisition's effect "*may be* substantially to lessen competition." 15 U.S.C. § 18 (emphasis added). Section 7 deals in "reasonable probability," not certainty. *See United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 175 (1964); *see also FTC v. Advocate Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016).

accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."); Areeda & Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 973 ("Society would be better off if the same or equivalent efficiency gains could be realized without the anticompetitive merger. An efficiency is said to be 'merger-specific' if it is a unique consequence of the merger . . . .").

It is Defendants' burden to account for the availability of "practical" alternatives, meaning "alternatives that are more than 'merely theoretical.'" *United States v. Anthem*, 855 F.3d 345, 356 (D.C. Cir. 2017) (quoting *Merger Guidelines* § 10; *Horizontal Merger Guidelines* § 4 (1997)) *see also St. Luke's*, 778 F.3d at 791 n.15 (noting that defendants bear "the burden of showing that the claimed efficiencies cannot be 'attained by practical alternatives'" (quoting *Merger Guidelines* § 10 n.13)). Practical alternatives may include a party's ability to achieve the efficiency on its own, through a joint venture, by contract or a licensing agreement, or through an alternative merger. *See, e.g.*, *FTC v. Arch Coal*, 329 F. Supp. 2d 109, 151 (D.D.C. 2004) (holding a portion of the merging party's claimed efficiencies "not merger-specific because 'another coal company' without an adjacent mine could achieve it'"); *FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, at *39-40 (N.D. Ohio Mar. 29, 2011) (finding that alleged

efficiencies were not merger specific because, among other things, St. Luke's could achieve many of the same claimed efficiencies "through an affiliation with UTMC" or "by merging with UTMC"); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1094 (N.D. Ill. 2012) ("Moreover, 'a merger or acquisition is not necessary to implement graduate medical education programs,' but rather can be attained by implementing a joint residency program.").

Courts do not credit efficiencies that could be realized without a loss of competition. For example, in *St. Luke's*, the Ninth Circuit affirmed a district court's finding that, although the merger would "improve the delivery of health care," those efficiencies were not merger-specific because improvements could be realized by other means. 778 F.3d at 791. If a practical alternative exists, it is also Defendants' burden to estimate what portion of projected cost savings could have been achieved by other means. *See, e.g.*, *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 85 (D.D.C. 2015) (doubting that the entirety of defendants' claimed cost savings were merger specific where "[b]oth companies prior to the merger already were undertaking" similar cost saving efforts); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 90 (D.D.C. 2011) (explaining that categories of claimed efficiencies—including efficiencies related to IT platform consolidation and bringing outsourced functions in-house—were "unlikely to be wholly merger-specific").

Rather than attempt to demonstrate that this merger is the only available avenue to create "new or improved products," *see Merger Guidelines* § 10, Defendants look to relax the standard and exclude evidence that would demonstrate that Englewood had less anticompetitive alternatives to reach similar goals. The caselaw and the *Merger Guidelines* are clear that benefits that could be achieved by "another means" should not be weighed against the anticompetitive effects of a merger.

III. Englewood's Multiple Acquisition Offers are not Theoretical or Speculative.

Here, there is no need to speculate whether Englewood had less anticompetitive mergers available. It rejected offers from multiple suitors—[redacted].[6]

No fewer than [redacted]—entered

[6] Defendants mischaracterize Dr. Dafny's relevant deposition testimony. Although she testified that, in her opinion, a bidding process on its own would not transform a procompetitive merger into one that is anticompetitive, *see* Mot. at 5, in the same line of questioning Dr. Dafny also distinguished Englewood's situation, where an alternative merger "was very reasonable and likely and more likely than no merger at all." JX0101 at 329; [redacted]

discussions as part of Englewood's partner selection process.[7] Indeed, at least one candidate offered Englewood a larger capital commitment than HMH; [redacted] far above HMH's commitment of $400 million over eight years.[8] Like HMH, [redacted].[9] And evidence will show that [redacted] proposals were competitive on multiple other measures.[10] Englewood chose, though, to merge with HMH, one of its closest competitors and the only suitor with a hospital in Bergen County.[11]

Englewood's merger agreement with HMH has not dampened other health systems' interest in acquiring Englewood. [redacted]

[redacted]

[redacted] This was the most recent in a long line of instances when [redacted] expressed continued interest in Englewood.

Even more recently, [redacted] Englewood received an acquisition proposal [redacted]

[redacted]

Defendants appear to suggest they can unilaterally make "speculative" practical alternatives simply by declining to pursue them. An efficiency is not merger specific just because a party chose not to pursue it independently; likewise, an efficiency is not merger specific just because a party opts to merge with a close competitor and to reject other merger partners. If Defendants wish to argue these alternative mergers would not present the same categories, or quantities, of cost saving efficiencies, they are free to do so. But in the presence of practical alternatives, it is Defendants' burden to make that showing.

IV. Deutsche Telekom AG *Undermines Defendants' Motion.*

New York v. Deutsche Telekom AG supports the FTC's position; the Court may consider evidence of alternative merging partners to determine whether they are practical alternatives. 439 F. Supp. 3d 179 (S.D.N.Y. 2020). In *Deutsche Telekom*, the court admitted and considered evidence that T-Mobile or Sprint "could realize similar efficiencies through a merger with DISH." 439 F. Supp. 3d at 212-13. Based on the factual record, the court concluded that an alternative merger with DISH was "speculative because both companies have previously attempted to negotiate with DISH and failed." *Id.* Specifically, the record showed that DISH had not "seriously considered" a merger, and had "not express[ed] significant interest in a merger with Sprint." *Id.* at 222. Moreover, the court noted "the record evidence that DISH plan[ned] to enter" the alleged relevant product

market with "its own competitive strategy." *Id.* at 213. Upon this factual record, the court concluded that an alternative merger with DISH was too speculative to "appear reasonably practical, especially in the short term." *Id*. Critically, the court made this determination upon findings of fact.

As in *Deutsche Telekom*, the Court may here admit evidence to assess whether alternative merging partners constitute practical alternatives. But unlike that case, the facts will show that Englewood's potential alternative merging partners were anything but speculative. Each expressed serious interest in a merger with Englewood.

V. Conclusion

Defendants are flipping the law on its head, arguing that the Court must ignore evidence of alternative mergers as categorically speculative. Instead, the Court as fact-finder is in the best position to assess whether an alternative merger constitutes a practical alternative or is merely theoretical. The FTC respectfully requests that Defendants' motion be denied.

Dated: May 11, 2021

Respectfully Submitted,

s/ Jonathan Lasken

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2021, a true and correct copy of Plaintiff's Response in Opposition was sent by electronic mail to all counsel of record.

Respectfully submitted,

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