IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 5:24-cv-00028-KDB-SCR

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

NOVANT HEALTH, INC.

and

COMMUNITY HEALTH SYSTEMS, INC.,

Defendants.

PUBLIC VERSION OF DOCUMENT FILED UNDER SEAL (ECF #113)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE OF MADE-FOR-LITIGATION EFFICIENCIES ADVOCACY

In their opposition to the FTC's request for a preliminary injunction, Defendants seek to justify their anticompetitive transaction by countering that the "Transaction Will Generate Substantial Efficiencies." Among these purported efficiencies, Defendants point to "$2 million in tax-related savings" and "$2.6 million in year-one cost savings, increasing thereafter to $5.4 million in annual recurring savings opportunities."[1]

[1] Defendants' Opposition to Plaintiff's Request for Preliminary Injunction (ECF 91) ("Opp.") 33–34. Defendants' purported tax-related efficiency—eliminating taxes CHS pays to Iredell County today as owner of Lake Norman Regional, because of Novant's not-for-profit corporate structure—is not an efficiency at all, but rather represents the immediate loss of Iredell County's seventh-largest taxpayer and corresponding revenue for local government, programs, and services. PX0005 (Tenn Rebuttal Rep.) ¶ 242; PX0006 (Burns Rebuttal Rep.) ¶ 248; *see also* Areeda & Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 970 (2022) ("Merely private or pecuniary economics such as tax savings are not considered and generally cannot form the basis for an efficiencies defense to an otherwise unlawful merger.").

As evidence of these savings, Defendants rely on a single, made-for-litigation advocacy piece generated by the consulting firm Deloitte at the request of defense counsel (the "Deloitte Advocacy").[2] During discovery, Defendants prevented the FTC from exploring the basis for the Deloitte Advocacy by asserting attorney-client and attorney work product privilege as to underlying communications, materials, and analysis.[3] Having prevented scrutiny of the basis or reliability of Deloitte's analysis, Defendants now seek to back-door the Deloitte Advocacy's conclusions into the case as fact by providing it to their experts to reference in their reports.[4]

The Deloitte Advocacy should be excluded for several reasons. First, fairness precludes Defendants from using privilege as a sword and a shield to prevent the FTC from examining the foundations of the Deloitte Advocacy while relying on its conclusions. Second, Defendants have likened the Deloitte Advocacy to an expert's work product, but have disregarded the procedures for submitting expert opinions. Nor can Defendants back-door the inadmissible Deloitte Advocacy into the case simply by referencing it in their testifying experts' reports. On the other hand, the circumstances of the Deloitte Advocacy's creation reflect that it is unreliable, made-for-litigation material susceptible to manipulation, and thus its meager probative value is

[2] *See* PX4004 at 42–76 (Deloitte Advocacy).
[3] *E.g.*, PX7027 (Ehtisham) at 191:7–19 ("[Defense Counsel:] The position that Novant has consistently asserted is the same position I'm asserting here. . . . The ultimate end product, so-called efficiency study I believe that you all have, the privilege is being asserted because that underlying work was done at the direction of counsel, that communications about that underlying work and that underlying work itself is, I believe, what the privilege is being asserted over, thinking about it in the same way as communications with an expert."); Letter from S. Foley, Deloitte, to A. Sunkara, FTC (Mar. 5, 2024) (Stebinger Dec., Ex. B) ("[W]e were informed that our client [Novant's counsel] is assorting attorney-client privilege and work-product privilege. Accordingly, we do not have any documents or information related to the Engagement to produce in response to the Subpoenas that would not be subject to a claim of privilege.").
[4] *See* Opp. 33–34 (citing Wu Rebuttal Rep.); Opp. Ex. 40 (Wu Rebuttal Rep.) (ECF 95-2) at 23 & n.31, 25, 161–62 (citing Deloitte Advocacy); Opp. Ex. 2 (Jha Report) (ECF 91-3) at 60 n.219 (same).

outweighed by the danger of unfair prejudice and confusion of the issues. Finally, even taking the Deloitte Advocacy at face value, its conclusions do not support cognizable efficiencies in the antitrust context, and are not relevant to the issues in dispute.

I. DEFENDANTS USE PRIVILEGE AS A SWORD AND A SHIELD

Defendants rely upon the Deloitte Advocacy in their papers[5] while asserting privilege to prevent discovery of the underlying communications, materials, and analysis.[6] However, the "sword and shield" principle prevents litigants from asserting privilege to shield material from discovery while also using that material to their advantage. *E.g.*, *Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 892–94 (M.D. Tenn. 2010); *Galaxy Computer Servs., Inc. v. Baker*, 325 B.R. 544, 559–60 (E.D. Va. 2005) (citing *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir. 1991)). Where a party seeks to rely on a report or document, this principle equally prevents them from using privilege to shield the underlying facts and material from scrutiny. *E.g.*, *Reitz*, 680 F. Supp. 2d at 892–94; *Ahern v. Pac. Gulf Marine, Inc.*, 2007 WL 9723901, at *3–4 (M.D. Fla. Nov. 8, 2007).

Here, Defendants had a choice: they could have "1) waive[d] the privilege, or 2) refrain[ed] from introducing such evidence in support of [their] defense." *Tropical Paradise Resorts, LLC v. Rockhill Ins. Co.*, 2020 WL 13880656, at *2 (S.D. Fla. Aug. 30, 2020). Having chosen to stand on their privilege objections and prevent discovery into the underpinnings of the Deloitte Advocacy, fairness requires that Defendants not be allowed to now raise the conclusions in the Deloitte Advocacy in their defense. *See id.*; *It's Just Lunch Int'l LLC v. Nichols*, 2009 WL 10674210, at *2 (C.D. Cal. Aug. 31, 2009). To allow Defendants to rely on the conclusions of

[5] *See* Opp. 33–34 (citing Wu Rebuttal Rep.); Opp. Ex. 40 (Wu Rebuttal Rep.) (ECF 95-2) at 23 & n.31, 25, 161–62 (citing Deloitte Advocacy); Opp. Ex. 2 (Jha Report) (ECF 91-3) at 60 n.219 (same).

[6] PX7027 (Ehtisham) at 191:7–19; Letter from S. Foley, Deloitte, to A. Sunkara, FTC (Mar. 5, 2024) (Stebinger Dec., Ex. B); Letter from M. Ciani, Katten, to R. Maddock, FTC, at 3 (Feb. 26, 2024) (Stebinger Dec., Ex. A).

the Deloitte Advocacy would unfairly and severely prejudice the FTC, which was prevented from being able to challenge the facts, methods, and assumptions underlying the Deloitte Advocacy by Defendants' claims of privilege.

II. DEFENDANTS SEEK TO CIRCUMVENT THE REQUIREMENTS FOR EXPERT TESTIMONY TO PRESENT MADE-FOR-LITIGATION ADVOCACY AS FACT

In relying on the Deloitte Advocacy to support their efficiencies claims, Defendants seek to introduce what is functionally a made-for-litigation expert report without subjecting it to the safeguards that accompany the introduction of expert evidence.

Defense counsel commissioned the Deloitte Advocacy to present specialized financial analysis in support of Defendants' proposed transaction.[7] The individuals working on the Deloitte advocacy had no firsthand knowledge of Defendants' operations, and relied on information channeled through defense counsel.[8] In this sense, the Deloitte Advocacy is functionally an expert report. *See* Fed. R. Evid. 701–03; *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214–15 (10th Cir. 2011). Novant's counsel themselves likened communications with Deloitte to communications with an expert witness when they asserted privilege to prevent inquiry into Novant's communications with Deloitte:[9]

However, Defendants failed to follow any of the procedures established for submitting expert opinions or testimony into evidence. The Federal Rules and this Court's Case Management Order provide clear procedures to ensure reliability and fairness of expert evidence, including disclosing all documents relied upon by an expert and communications from counsel

[7] PX7027 (Ehtisham) at 191:7–19; PX7053 (Deloitte) at 14:1–8; Letter from S. Foley, Deloitte, to A. Sunkara, FTC (Jan. 4, 2024) (Stebinger Dec., Ex. C); *see generally* Deloitte Advocacy.
[8] PX7053 (Deloitte) at 19:18–27:22.
[9] PX7027 (Ehtisham) at 191:7–19.

that form the basis for an opinion, assumption, or fact stated in the expert's report.[10] Not only have Defendants wholly disregarded these procedures; they have actively opposed discovery necessary to establish that the conclusions of the Deloitte Advocacy are based on sufficient facts or data, the product of reliable principles and methods, and reflect a reliable application of those principles and methods to the facts, such as would be required to admit expert testimony under Fed. R. Evid. 702. Under these circumstances, the proper remedy is exclusion of the Deloitte Advocacy, as well as any testimony or expert opinions or reports based on the Deloitte Advocacy. *See* Fed. R. Civ. P. 37(c); *James River Ins. Co.*, 658 F.3d at 1214–16.

III. DEFENDANTS CANNOT USE EXPERT REPORTS OR TESTIMONY TO BACK-DOOR OTHERWISE INADMISSIBLE DELOITTE ADVOCACY INTO EVIDENCE

Defendants attempt to place the conclusions of the Deloitte Advocacy into the record by providing it to their retained experts to reference in their reports.[11] However, a party cannot inject otherwise inadmissible material into a case simply by referencing it in an expert's report or testimony. *E.g.*, *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1374–75 (Fed. Cir. 2021) (collecting cases); *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013). Though an expert may in certain circumstances base their analysis on hearsay or otherwise inadmissible materials, they may not reference inadmissible material to establish the truth of the statements in that material. *Wi-LAN Inc.*, 992 F.3d at 1374–75. Nor may an expert serve as a mere conduit for the work of another expert without attempting to assess the validity of the opinions relied upon. *E.g.*, *Schoen v. State Farm Fire & Cas. Co.*, 638 F. Supp. 3d 1323, 1335 (S.D. Ala. 2022).

[10] Case Management Order at 8–9 (ECF 48); Fed. R. Civ. P. 26(a)(2) & advisory committee's comment to 1993 amendment.
[11] Opp. Ex. 40 (Wu Rebuttal Rep.) (ECF 95-2) at 23 & n.31, 25, 161–62; Opp. Ex. 2 (Jha Report) (ECF 91-3) at 60 n.219

Here, neither of Defendants' experts, Dr. Wu and Dr. Jha, does more than parrot the conclusions of the Deloitte Advocacy. They do not assess the Deloitte Advocacy's validity or apply their own analysis to its conclusions,[12] nor could they given that Defendants have shielded the underlying documents and analysis from disclosure. As such, Dr. Wu's and Dr. Jha's reference to the Deloitte Advocacy is an impermissible attempt to interject inadmissible material into evidence by incorporating it into expert reports, as well as improper and uncritical reliance by a testifying expert on what is functionally the opinion of a non-testifying expert. *See Wi-LAN Inc.*, 992 F.3d at 1374–75; *Schoen*, 638 F. Supp. 3d at 1335. All references to the Deloitte Advocacy in Dr. Wu's and Dr. Jha's opinions, reports, and testimony should be excluded.

IV. THE DELOITTE ADVOCACY SHOULD BE EXCLUDED AS UNRELIABLE AND PREJUDICIAL UNDER FED. R. EVID. 403

The Deloitte Advocacy further lacks any probative value, while the danger of confusion of the issues and unfair prejudice resulting from admission of this untested material is high. The Deloitte Advocacy thus should also be excluded under Federal Rule of Evidence 403, which allows the Court to exclude evidence if its probative value is substantially outweighed by a danger of unfair prejudice or confusion of the issues.

The Deloitte Advocacy was created in anticipation of litigation by a retained third party, rather than by anyone with personal knowledge of the facts in the document or in the ordinary course of Defendants' business.[13] In antitrust litigation, courts have long recognized the "extremely limited" value of evidence created while a lawsuit was "threatened or pending."

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[12] *See* Opp. Ex. 40 (Wu Rebuttal Rep.) (ECF 95-2) at 23 & n.31, 25, 161–62; Opp. Ex. 2 (Jha Report) (ECF 91-3) at 60 n.219; PX7063 (Wu) at 283:13-284:12, 285:22-287:16, 290:6-12.

[13] *E.g.*, PX7053 (Deloitte) at 11:8–16, 14:1–8, 22:22–25:9; Letter from S. Foley, Deloitte, to A. Sunkara, FTC (Jan. 4, 2024) ("The client discussed that we were retained by counsel under privilege in anticipation of litigation and the documents we created were created at the direction of counsel.") (Stebinger Dec., Ex. C). Indeed, Deloitte's designee could not even recall who provided the documents and data Deloitte relied upon. PX7053 (Deloitte) at 70:19–71:19.

Chicago Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 434-35 (5th Cir. 2008) (quoting *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504-05 (1974)). To determine whether such evidence lacks probative value, courts ask whether it "*could arguably* be subject to manipulation"; if so, the evidence should be accorded little or no weight. *Id.* (emphasis in original); *see also FTC v. Hackensack Meridian Health, Inc*., 2021 WL 4145062, at *23 (D.N.J. Aug. 4, 2021), *aff'd*, 30 F.4th 160 (3d Cir. 2022); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 79–80 (D.D.C. 2017).

Here, there is little question that the Deloitte Advocacy was subject to manipulation. According to Deloitte's Fed. R. Civ. P. 30(b)(6) designee, Deloitte went through multiple drafts while preparing the Deloitte Advocacy.[14] Defendants' counsel commented on those drafts.[15] When asked whether Deloitte incorporated counsel's comments into their drafts, Deloitte's designee refused to answer based on a privilege objection from Novant's counsel.[16] Despite having been designated to testify to precisely these issues,[17] Deloitte's designee asserted repeatedly that she could not recall how the efficiencies in the Deloitte Analysis were identified.[18] When asked whether defense counsel identified the categories of efficiencies for Deloitte, Novant's counsel instructed the witness not to answer on the basis of privilege.[19]

The Deloitte designee's remaining testimony further undercuts the reliability of the Deloitte Advocacy, as she responded despite being designated to testify on these topics under Fed. R. Civ. P. 30(b)(6) that she did not know or recall the answers to numerous other questions

[14] PX7053 (Deloitte) at 30:13-24.
[15] *Id.* at 30:25-31:21.
[16] *Id.* at 31:7-17.
[17] *See* PX4016 at 4 (30(b)(6) topics).
[18] PX7053 (Deloitte) at 35:23-37:7.
[19] *Id.* at 35:3-21.

about the Deloitte Advocacy's creation, including whether any of Defendants' businesspeople provided comments for the document,[20] how many drafts of the document were created,[21] the meaning of certain specific text in substantive portions of the document,[22] whether Deloitte relied on documents other than those referenced in the Deloitte Advocacy to arrive at its conclusions,[23] whether Deloitte based its analysis on assumptions not reflected in the final product,[24] whether the list of Novant employee interviews that appears in the Deloitte Advocacy was exhaustive,[25] whether anyone at Deloitte took notes of their interviews with Defendants' employees,[26] and so on. Further, as discussed *infra* in section V, the efficiencies set forth in the Deloitte Advocacy are not cognizable, and thus the Deloitte Advocacy is not competent evidence of efficiencies in the antitrust context. The probative value of the Deloitte Advocacy is nil.

On the other hand, admitting the Deloitte Advocacy threatens unfair prejudice and confusion of the issues. As discussed in section I, *supra*, Defendants have claimed privilege to foreclose examination of the accuracy or reliability of the methods and materials underlying the Deloitte Advocacy. It would severely and unfairly prejudice the FTC in its ability to respond to Defendants' contentions relating to efficiencies to allow Defendants to rely on a document that they have immunized from scrutiny by the use of privilege. Further, allowing such uncontested,

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[20] *Id.* at 31:22-32:6.
[21] *Id.* at 32:7-10.
[22] *Id.* at 39:4-13.
[23] *Id.* at 43:9-44:2.
[24] *Id.* at 44:3-10.
[25] *Id*. at 44:17-45:5. Novant further has asserted privilege over the substance of Deloitte's interviews with Novant employees. Letter from M. Ciani, Katten, to R. Maddock, FTC, at 3 (Feb. 26. 2024) ("As an agent of Novant's counsel, Deloitte's communications with others at Novant relating to Deloitte's specific engagement by counsel were also protected by attorney-client privilege and the work product doctrine.") (Stebinger Dec., Ex. A); *see also, e.g.*, PX7027 (Ehtisham) at 190:22-192:21.
[26] PX7053 (Deloitte) at 46:3-47:9.

made-for-litigation material into evidence would threaten to confuse the issues by importing unreliable and potentially inaccurate information into the record, increasing the likelihood of an incorrect decision on the ultimate issues. For these reasons, the Court should exclude the Deloitte Advocacy, as well as any testimony and expert reports or opinions based on the Deloitte Advocacy, under Fed. R. Evid. 403.

V. THE INFORMATION IN THE DELOITTE ADVOCACY IS UNVERIFIABLE AND CANNOT SUPPORT ANTITRUST EFFICIENCIES

Finally, the Deloitte Advocacy should be excluded because it not competent evidence of antitrust efficiencies. Courts have questioned whether efficiencies can ever provide a legal defense under section 7 of the Clayton Act—the basis for the FTC's challenge to Defendants' transaction in the underlying administrative proceeding—for an otherwise anticompetitive transaction. *United States v. Anthem*, 855 F.3d 345, 353–56 (D.C. Cir. 2017) (collecting cases). Nevertheless, even courts assuming the viability of an efficiencies defense require a defendant to establish that such efficiencies be verifiable, merger specific, and likely to be passed through to consumers. *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1059 (5th Cir. 2023); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 790–91 (9th Cir. 2015).[27]

"Verifiable" in the antitrust context means that evidence of alleged efficiencies must be supported by the underlying facts, documents, and model—including assumptions—used to arrive at the efficiencies, so that the claimed efficiencies can be independently verified by a third party. *Illumina, Inc.*, 88 F.4th at 1060 (citing *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 91 (D.D.C. 2011)); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1089–90 (D.D.C. 1997). Here, Defendants themselves have prevented verification of the efficiencies discussed in the Deloitte

[27] In his rebuttal report, Defendants' economic expert, Dr. Wu, appears to flip this burden and incorrectly suggests that the FTC, rather than Defendants, must establish the effect of any efficiencies. *See* Opp. Ex. 40 (Wu Rebuttal Rep.) (ECF 95-2) at ¶¶ 282–85.

Advocacy by asserting privilege over much of the underlying factual material and methodology. However, the testimony of Deloitte's 30(b)(6) designee removes any doubt that might have remained as to verifiability of the efficiencies raised in the Deloitte Advocacy. While verifiable efficiencies must be supported by reliable methodology and assumptions, Deloitte's designee was able to testify only vaguely about how Deloitte itself sought to verify the conclusions in the Deloitte Advocacy, and ultimately was unable to identify any study or scientific methodology supporting its approach.[28] Nor did the designee know whether all of Deloitte's assumptions were reflected in the Deloitte Advocacy, or whether Deloitte relied on documents other than those referenced its final product to arrive at its conclusions.[29]

Because Defendants have asserted privilege over many of the inputs for the Deloitte Advocacy and even Deloitte's corporate designee can offer only vague generalizations about the methodology, assumptions, documents, and process that resulted in the Deloitte Advocacy,[30] the efficiencies within the document are impossible to verify. Further, Defendants do not even attempt to establish that the efficiencies in the Deloitte Advocacy are merger specific or will be passed through to consumers. *Cf. Illumina, Inc.*, 88 F.4th at 1059. Because the Deloitte Advocacy is not competent evidence of antitrust efficiencies, it is not relevant to any matter at issue in this case, and should be excluded. *See* Fed. R. Evid. 401 & 402.

VI. CONCLUSION

For the foregoing reasons, Plaintiff FTC requests that the Court exclude the Deloitte Advocacy, as well as all testimony, expert opinions, and portions of expert reports based on, relying on, or incorporating Deloitte's work, analysis, or conclusions.

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[28] PX7053 (Deloitte) at 48:22-52:6.
[29] *Id.* at 43:9-44:10.
[30] *See* section IV, *supra*.

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Respectfully submitted,

/s/ Nicolas Stebinger

Nicolas Stebinger (N.Y. Bar No. 4941464)
Federal Trade Commission
600 Pennsylvania Avenue
Washington, DC 20580
Tel.: (202) 326-2688
Email: nstebinger@ftc.gov
Attorney for Plaintiff Federal Trade Commission

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following counsel on June 5, 2024, by CM/ECF:

Heidi Hubbard
Beth Stewart
CJ Pruski
Liat Rome
Kaitlin Beach
Altumash Mufti
Williams & Connolly LLP
680 Maine Avenue, SW
Washington, DC 20024
Tel.: (202) 434-5451
hhubbard@wc.com
bstewart@wc.com
cpruski@wc.com
lrome@wc.com
kbeach@wc.com
amufti@wc.com

Brian S. Cromwell
Caroline B. Barrineau
Parker Poe Adams & Bernstein LLP
Bank of America Tower
620 S. Tryon Street, Suite 800
Charlotte, NC 28202
Tel: (704) 372-9000
Fax: (704) 334-4706
Briancromwell@parkerpoe.com
Carolinebarrineau@parkerpoe.com

Counsel for Defendant Novant Health, Inc.

Michael Perry
Jamie France
Scott Hvidt
Thomas Tyson
Logan Billman
Connie Lee
Connor Leydecker
David Lam
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
Tel: (202) 887-3558
mjperry@gibsondunn.com
jfrance@gibsondunn.com
shvidt@gibsondunn.com
ttyson@gibsondunn.com
lbillman@gibsondunn.com
clee2@gibsondunn.com
cleydecker@gibsondunn.com
dlam@gibsondunn.com

Adam K. Doerr
Kevin R. Crandall
Robinson, Bradshaw & Hinson, P.A.
101 N. Tryon St. #1900
Charlotte, North Carolina 28246
Tel: (704) 377-8114
adoerr@robinsonbradshaw.com
kcrandall@robinsonbradshaw.com

Counsel for Defendant Community Health Systems, Inc.

Respectfully submitted,

/s/ Nicolas Stebinger

Nicolas Stebinger (N.Y. Bar No. 4941464)
Federal Trade Commission
600 Pennsylvania Avenue
Washington, DC 20580
Tel.: (202) 326-2688
Email: nstebinger@ftc.gov
Attorney for Plaintiff Federal Trade Commission