IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

FEDERAL TRADE COMMISSION, *Plaintiff,* v. NOVANT HEALTH, INC. and COMMUNITY HEALTH SYSTEMS, INC., *Defendants.*	**CIVIL ACTION NO. 5:24-cv-00028-KDB-SCR** **PUBLIC VERSION OF DOCUMENT FILED UNDER SEAL (ECF #116)**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. ASHISH JHA

Community Health Systems, Inc. ("CHS") chose to sell Lake Norman Regional Medical Center ("Lake Norman Regional") to Novant Health, Inc. ("Novant"), which operates Novant Huntersville—one of Lake Norman Regional's largest competitors, located only 12 miles away. Today, Lake Norman Regional and Novant Huntersville compete to better serve their communities by improving their quality, service offerings, and facilities. In 2018 testimony to Congress, Dr. Ashish Jha—one of Defendants' experts in this case—warned of the impact of health care mergers like this one, explaining that "[b]ased on both fundamental economic theory and a very substantial evidence base, we know that less competitive markets have both higher prices and *lower quality*. The evidence on this is unequivocal."[1]

[1] PX5218 (S. Comm. on Health, Educ., Lab., & Pensions) at 12 (emphasis added).

The evidence here confirms this transaction is no different; it will increase Novant's market share by eliminating competition that spurs quality improvements and drives down prices of inpatient services. Nonetheless, Defendants try to justify an acquisition that will result in a "less competitive market[]," *id.*, by claiming that by becoming part of Novant's health system, Lake Norman Regional will be able to provide better quality of care to patients. *See* Defendants' Opposition to Plaintiff's Request for Preliminary Injunction (ECF 91) (Opp.) 17 & nn.73-74, 76-77. In support of these claims, Dr. Jha's expert reports conclude that the proposed transaction "will help [Lake Norman Regional] pursue improvements in healthcare outcomes and quality," and that the proposed acquisition "is the best option to CHS to promote improvements in healthcare quality and outcomes." *See* Opp. Ex. 2 (Jha Rep.) ¶¶ 20, 28. Defendants' claims—supported by Dr. Jha's analysis— are unmoored from the framework of Clayton Act Section § 7, 15 U.S. Code § 18, which requires such claims to be assessed under the efficiencies defense.

Courts are "skeptical" of claims that an otherwise anticompetitive merger can be saved by efficiencies. *See FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 348 (3d Cir. 2016). Indeed, the Supreme Court has never recognized an efficiencies defense and has instead repeatedly cast doubt on the relevance of efficiencies in merger analysis. *See, e.g.*, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) ("Possible economies cannot be used as a defense to illegality."). The Court explained in *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963), that "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." Thus, to the extent Defendants seek to justify an anticompetitive merger, they bear the burden to meet a "rigorous standard," showing alleged efficiencies are "cognizable," meaning they enhance

competition, are verifiable, and are merger specific.[2] *Hershey*, 838 F.3d at 347-51; *see also Illumina, Inc. v. FTC,* 88 F.4th 1036, 1061 (5th Cir. 2023) ("At bottom, an efficiency defense is very difficult to establish."); *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 176 (3d Cir. 2022); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 791 (9th Cir. 2015); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-23 (D.C. Cir. 2001); 2023 Merger Guidelines § 3.3. To date, no appellate court has found claimed efficiencies adequate to justify an anticompetitive merger. *See, e.g.*, *Illumina*, 88 F.4th at 1059–61; *Hackensack*, 30 F.4th at 176.

Dr. Jha in no way attempts to meet the rigorous standard for efficiencies. As Dr. Jha explained, cognizable efficiencies are those that are "concrete," "verifiable," "not vague," "specific," and "likely to be realized."[3] As Dr. Jha himself testified, he did not analyze whether the purported quality benefits are cognizable efficiencies: "Q. And was your assignment to assess whether or not quality is a cognizable efficiency in this case? A. That is not how I understood my assignment, no."[4] Accordingly, Dr. Jha did not assess the extent to which competition will impact quality (enhance competition);[5] whether Novant's acquisition was necessary for any of the claimed quality improvements at Lake Norman Regional (merger specificity);[6] did not measure

[2] Because asserting efficiencies is Defendants' burden, *Hershey*, 838 F.3d at 348–49, Defendants —not Plaintiffs—must show their purported efficiencies satisfy this strict standard.
[3] PX7064 Jha Dep. at 66:8-18.
[4] PX7064 Jha Dep. at 66:19-24.
[5] *See* PX7064 Jha Dep. at 60:25-61:5 ("I have not done any analysis looking at the impact of quality—of competition on quality in the Charlotte area, yeah.").
[6] *See, e.g.*, PX7064 Jha Dep. at 168:20-169:6, 188:13-19 (When asked whether Dr. Jha's opinion is that the proposed acquisition is "the only way that Lake Norman Regional Medical Center" can enter into the types of value-based contracts that "create stronger incentives for providing more efficient care" and "for doing population health management," Dr. Jha responded: "No, that is not my opinion.").

the extent of claimed quality improvements (verifiability);[7] did not measure the degree specific quality metrics would improve due to each alleged quality improvement (verifiability);[8] and did not analyze the costs of enacting these changes (verifiability).[9] To be clear, the FTC is not contending that quality is irrelevant, but rather that courts have made clear that an analysis of quality in a particular market must be tethered to the inquiry at hand—the potential impact of the merger *on competition*. *St. Luke's*, 778 F.3d at 792 (quality improvements are a "laudable goal, but the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations"). Specifically, Defendants—and Dr. Jha—must show the merger's impact on quality competition and whether any quality-related, cognizable efficiencies outweigh the anticompetitive effect of the merger. Because Dr. Jha's opinions are untethered from either inquiry, his opinions are inadmissible.

LEGAL STANDARD

Under Federal Rule of Evidence 702, an expert witness may testify "if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

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[7] *See, e.g.*, PX7064 Jha Dep. at 57:17-58:7 ("Q. So it's fair to say that you haven't quantified that directionality or effect of the quality impact at Lake Norman Regional Medical Center? A. What I would say is I have looked across a broad range of measures. I have looked at the—the likely impact of—on quality, particularly on things that really matter to patients. I have assessed directionality, including whether those are meaningful gains or not. But I don't have a specific number like 'quality will increase by eight.' Like, that's—it's hard to do that. I don't know what that would mean. And so, of course, I haven't done that.").

[8] *See* PX7064 Jha Dep. at 276:19-277:8 ("It is fair to say that I have assessed how this acquisition will improve quality of care writ large where mortality is a component of that. *But I have not gone measure by measure, metric by metric*, largely because I don't think that's as useful of a— of an exercise. If you think about it from a patient perspective, what patients care about is, overall, am I likely to get better care? And in that context I've tried to look at the broader picture and the broader set of metrics.") (emphasis added).

[9] *See* PX7064 Jha Dep. at 294:23-295:3 ("Q. And have you calculated the cost of—of restoring those services? A. The financial cost of restoring those services? Q. Yes. A. I have not.").

(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case."

Fed. R. Evid. 702. "Rule 702 thus imposes a special gatekeeping obligation on the trial judge to ensure that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (quotations omitted). When an expert's opinion ignores well-established law on the topic on which they opine, it should be excluded because such opinions are "not helpful to the factfinder," *see In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB), 2022 WL 15053250, at *23 (E.D.N.Y. Oct. 26, 2022), and unreliable, *see Bailey v. Allgas, Inc.*, 148 F. Supp. 2d 1222, 1142-46 (N.D. Ala. 2000), *aff'd*, 284 F.3d 1237 (11th Cir. 2002) (excluding as unreliable expert testimony that conflicted with Eleventh Circuit law). An expert's failure to apply the established legal principles of an efficiencies defense is grounds for exclusion. For example, in *United States v. Bertelsmann*, No. 21-02886, the District Court for the District of Columbia excluded defendants' expert testimony on efficiencies in part because he did not attempt to verify those efficiencies. Exhibit A, Tr. of Bench Trial at 2749-772 (Aug. 17, 2022).

ARGUMENT

I. Dr. Jha's opinions should be excluded because they fail to address the relevant inquiry.

Though Defendants have attempted to rebrand their claimed quality enhancements as "procompetitive effects," Opp. 4, 33, courts treat such quality claims as efficiencies, subject to the strict requirements of the efficiencies defense. *See, e.g.*, *Hackensack*, 30 F.4th at 175-79; *FTC v. Sanford Health*, 926 F.3d 959, 965-66 (8th Cir. 2019) (rejecting claimed "quality efficiencies"); *Hershey*, 838 F.3d at 350; *St. Luke's*, 778 F.3d at 791-92. In *Hackensack*, the

merging parties similarly claimed quality improvements at their hospitals as "procompetitive benefits" that must "be weighed in the balance together with anticompetitive effects," arguing that they were "not making an efficiencies defense, thus the stringent standard developed in other circuits need not apply." *Hackensack*, 30 F.4th 160 at 175–76. Both the district court and Third Circuit, however, rejected these arguments, finding that, as in the instant case, defendants were trying to dodge the relevant requirements by dressing up their purported efficiencies in new language: the merging hospitals' "procompetitive benefits" were "merely a different way of saying there would not likely be a substantial lessening of competition because the procompetitive effects offset the anticompetitive effects of the merger . . . . [t]hus, the Hospitals' procompetitive benefits argument is an efficiencies defense." *Id.* at 176. Defendants make the same argument here, and accordingly, the Court should reject Defendants' attempt to backdoor the efficiencies defense through Dr. Jha's opinions, which Dr. Jha admits do not address cognizability.[10] As noted above, to be cognizable, efficiencies must: (1) enhance *competition*, (2) be verifiable, and (3) be merger specific. *Hershey*, 838 F.3d at 347-51; 2023 Merger Guidelines § 3.3; *see also St. Luke's*, 778 F.3d at 791; *Heinz*, 246 F.3d at 720-23. Dr. Jha's opinions fail on all three counts. Accordingly, his opinions do not meet Rule 702's requirements and should be excluded.

A. Dr. Jha did not address how the purported efficiencies will affect competition.

To rebut a plaintiff's prima facie case under Clayton Act § 7, efficiencies must prevent a reduction in competition. *See* Merger Guidelines § 3.3. Thus, any purported benefits that may accrue from the acquisition are only cognizable insofar as they increase competition. *See United*

[10] *See, e.g.*, PX7064 Jha Dep. at 66:19-24 (quoted above).

States v. Anthem, 236 F. Supp. 3d 171, 243 (D.D.C. 2017) (explaining that an acquiring firm's ability to offer its customers products of the acquired firm "is not an 'efficiency' that offsets the competitive harm, even if it would be an attractive aspect of the combination for both the new firm and [the acquiring firm's] customers"); *see also FTC v. Univ. Health*, 938 F.2d 1206, 1222 (11th Cir. 1991) (holding that a defendant seeking to invoke the efficiencies defense "must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit *competition* and, hence, consumers") (emphasis added).

The Ninth Circuit's decision in *St. Luke's* is instructive. There, the court rejected defendants' claim that a merger of health systems would "benefit patients" because defendants did not demonstrate how such benefits affected competition. 778 F.3d at 791–92. The court explained, "It is not enough to show that the merger would allow St. Luke's to better serve patients. The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate." *Id.* at 791. The court continued, "the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations." *Id.* at 792.

Here, Dr. Jha made no attempt to assess how the purported "procompetitive benefits" of alleged quality improvements affect competition. He did not analyze how hospital competition affects healthcare quality in the Charlotte area.[11] Nor did he analyze how the elimination of competition between Novant Huntersville and Lake Norman Regional would impact health care quality.[12] And Dr. Jha agreed that he "didn't do any assessment of how competition will change

[11] *See* PX7064 Jha Dep. at 60:25-61:5 ("I have not done any analysis looking at the impact of quality—of competition on quality in the Charlotte area, yeah.").
[12] *See* PX7064 Jha Dep. at 60:12-23 ("Q. Have you conducted any assessment of the extent of competition between Lake Norman Regional Medical Center and Novant Huntersville? A. I have

pre and post acquisition."[13] Because Dr. Jha neither analyzes how any purported quality enhancements would affect competition nor why the lack of competition between the hospitals would increase quality, his opinion fails to address an essential element of any efficiencies defense. *See Hershey*, 838 F.3d at 349 (because "the Clayton Act speaks in terms of 'competition,' we must emphasize that 'a successful efficiencies defense requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive.") (citation omitted); *see also Illumina*, 88 F.4th at 1060 (where defendant "had no reason" to pass along an efficiency, the efficiency was not cognizable).

B. Dr. Jha did not verify the purported efficiencies.

"Efficiencies are inherently 'difficult to verify and quantify' and 'it is incumbent upon the merging firms to substantiate efficiency claims.'" *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 89 (D.D.C. 2011) (citation omitted); *see also Illumina*, 88 F.4th at 1060 ("[W]hen it comes to efficiencies, 'much of the information relating to efficiencies is uniquely in the possession of the merging firms.'"). Accordingly, to be cognizable, efficiencies must "have been verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents." Merger Guidelines § 3.3; *see also Illumina*, 88 F.4th at 1060 (finding efficiencies of "saved lives" were unverifiable because the merging parties failed to provide "an underlying model, including the assumptions upon which it was based").

Dr. Jha did not attempt to verify any of the putative efficiencies on which he opines. Indeed, Lake Norman Regional already participates in forms of value-based contracts,[14] already

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not. Q. So it's fair to say you have not con— measured any— the extent of competition between Lake Norman Regional Medical Center and Novant Huntersville? THE WITNESS: I have not done any formal analysis of the comp— of the competition of hospitals in the Charlotte area.").

[13] *See* PX7064 Jha Dep. at 327:6-9.

[14] PX7016 DiPace (CHS) IH at 156:4-13.

plans to upgrade its electronic medical record,[15] engages in clinical integration efforts,[16] and has stable patient volumes.[17] Dr. Jha does not measure the differences between the alleged post-merger quality improvements, on the one hand, and the quality improvements Lake Norman Regional is independently implementing today and plans to implement in the future, on the other.[18] As such, Dr. Jha has failed to verify Defendants purported quality claims.

C. Dr. Jha did not establish that the purported efficiencies are merger specific.

Efficiencies must also be merger specific, meaning those "that cannot be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Heinz*, 246 F.3d at 721–22. The proponent of the efficiency has the burden to demonstrate merger specificity. *United States v. Anthem, Inc.*, 855

[15] PX7039 Novak (CHS) Dep. at 33:4-13; 46:12-16 (electronic medical record upgrade was canceled because Lake Norman Regional was a "divestiture candidate[]").
[16] *See* PX7028 Littlejohn (CHS) Dep. at 107:17-108:1 ("Q. Were there any other aspects of Lake Norman Regional's model that you believed was a model that works? A. It had a lot of outpatient -- it was very heavy in the outpatient world. Q. Any other aspects of the model at Lake Norman Regional that come to mind? A. No. Those are the two. Small medical group costs, a lot of independent docs, very heavy on outpatient services.").
[17] *See, e.g.*, PX7028 Littlejohn (CHS) Dep. at 55:3-11 ("Q. A few weeks before the sale of Lake Norman Regional was announced, you informed the Lake Norman Regional board that surgery and emergency volumes were at all-time highs; isn't that right? A. Again, I don't remember that. It is listed in the minutes, though. Q. And you have no reason to believe that that is incorrect, do you? A. No."); *id*. at 57:5-9 ("Q. In February of 2023, did you convey to the Lake Norman Regional board that Lake Norman Regional had been very successful in growing patient volume? A. Based on my interpretation.").
[18] *See* PX7064 Jha Dep. at 208:12-25 ("Again, for the tasks that I had, which was to assess the quality performance of Novant and Lake Norman, and to lay out what I thought were gonna be the quality effects of the acquisition, given that value-based contracts are really just one -- important, but only one, element of a broader strategy for better quality of population health, *I did not do a formal analysis to see what kind of an impact joining a specific ACO program had*.") (emphasis added); *id*. 293:9-13 ("Q. And are you aware that CHS also has a do-no-harm plan? A. I am. Q. Have you compared the two? A. I have not."); *id*. at 271:24-272:3 ("Q. And CHS has various types of telehealth services that it can help provide at the system level; is that right? A. I have not examined the telehealth services that are available more broadly at CHS."); *id*. at 283:23-284:1 (Q. And have you assessed the training that Lake Norman Regional Medical Center currently provides on infection prevention? A. I have not.").

F.3d 345, 356 (D.C. Cir. 2017) (quoting *Heinz*, 246 F.3d at 722). Dr. Jha's main argument in support of merger specificity is that because Lake Norman Regional had not instituted certain changes to date, it could not do so in the future.[19] A firm's failure to achieve an efficiency that its merging partner has realized does not make such an efficiency merger specific. In *Anthem*, for example, the merging parties argued that Anthem had spent "probably a decade" trying to recreate Cigna's integrated wellness approach but could not do so and therefore needed to acquire Cigna to offer a new product that could combine Cigna's superior quality with Anthem's lower provider rates. *Anthem*, 855 F.3d at 358. The Court of Appeals held that this purported efficiency was not merger specific where defendants failed to show that absent the merger Anthem "cannot develop better customer-facing programs," and failed to show "that Anthem would be unable to develop a Cigna-like product without merging." *Anthem*, 855 F.3d at 358, 365; *Heinz*, 246 F.3d at 243. The *Anthem* court focused on whether defendants were able to demonstrate that comparable competitive initiatives were impractical absent the merger. Dr. Jha failed to undertake such an analysis.

CONCLUSION

Dr. Jha does not attempt to satisfy the well-established, "stringent standard" applied to efficiencies claims for purported quality benefits. *Hackensack*, 30 F.4th at 176. As a result, he does not offer a reliable methodology for assessing the purported quality benefits about which he opines and his testimony is thus not relevant. Dr. Jha's testimony should be excluded.

[19] *See, e.g.*, Opp. Ex. 2 (Jha Rep.) ¶ 28 (concluding that "other options are either not viable *or have historically failed to produce meaningful improvements*") (emphasis added). Putting aside the legal standard, this is also factually inaccurate. *See* Mem. in Support of Preliminary Injunction (ECF 80) 26-29; Reply in Support of Preliminary Injunction (ECF 99) 5-7 (explaining that Lake Norman Regional had plans upgrade its electronic medical records program and was already engaging in many of the quality programs touted by Dr. Jha).

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Respectfully submitted,

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