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.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE EXPERT TESTIMONY OF DR. ASHISH JHA

Novant Health, Inc. ("Novant") seeks to acquire and revitalize two struggling facilities owned by Community Health Systems, Inc. ("CHS") to raise their quality of care and renew their competitive viability in the Charlotte area. Plaintiff Federal Trade Commission ("FTC") filed its lawsuit to enjoin the transaction, alleging in part that the transaction will "eliminate…competition, likely reducing healthcare investment and improvements to quality of care…" at the hospitals involved.[1] But the FTC seeks to exclude expert testimony from Dr. Ashish Jha that the proposed transaction will have the *opposite* effect, including that it is the "best option to CHS to promote improvements in healthcare quality and outcomes."[2] Despite extensive evidence that healthcare quality is a critical dimension of healthcare competition—including because improved quality can

[1] Dkt. 1 (Complaint) ¶ 6.
[2] Ex. 1 (Jha Initial Report) ¶ 28.

lower the total cost of healthcare—the FTC asserts that "whether Novant 'might provide better service to patients after the merger' [is] *irrelevant*."[3] It moves to exclude Dr. Jha's testimony on the grounds that his opinions regarding the transaction's likely impact on healthcare quality and patient outcomes (but *not* those of the FTC's expert) "fail to address the relevant inquiry."[4]

Dr. Jha is a globally recognized healthcare expert, a practicing physician, and Dean of the Brown University School of Public Health, who recently served as the White House COVID-19 Response Coordinator and previously served as the Special Assistant to the Secretary of the Department of Veterans Affairs under President George W. Bush.[5] He is board certified in Internal Medicine and practices as a hospitalist with the VA. His research focuses on U.S. health policy, particularly on quality and cost of care. He has testified in two prior healthcare merger cases brought by the FTC, both times on behalf of the FTC.[6]

Here, Defendants retained Dr. Jha to analyze "what effect this proposed merger would have on the parties' incentives and ability to improve healthcare safety, quality, and overall population health outcomes for patients receiving care from the facilities involved in the transaction" and "whether there are other viable alternatives to promote these improvements in healthcare quality and outcomes."[7] Dr. Jha concluded, in part, that the proposed merger will help Lake Norman Regional Medical Center ("Lake Norman Regional") pursue improvements in healthcare quality through increased engagement in value-based care contracting and population health management, two areas

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[3] Dkt. 99 (Plaintiff's Reply Brief) at 5 (emphasis added).

[4] Dkt. 116-2 (Plaintiff's Memorandum) at 5.

[5] Ex. 1 (Jha Initial Report) ¶ 1, Appendix A (Dr. Jha's Curriculum Vitae). Dr. Jha received his medical degree from Harvard Medical School in 1997 and his Master's in Public Health from the Harvard School of Public Health in 2004. *Id.*

[6] *FTC v. Advocate Health*, No. 15-c-11473 (N.D. Ill. 2016); *FTC v. Sanford Health*, No. 1:17-cv-133 (D.N.D. 2017).

[7] Ex. 1 (Jha Initial Report) ¶ 8.

in which Novant has a record of success that Lake Norman Regional lacks. Dr. Jha found that Novant's hospitals are higher quality than Lake Norman Regional, and Novant's integrated healthcare system will allow Lake Norman Regional to increase its persistently low volume (currently at 31%), leading to better outcomes for patients. Dr. Jha's testimony explains the beneficial impacts of the transaction that will be felt by real people in the community served by Lake Norman Regional,[8] and is directly relevant to illuminating why this transaction will enhance competition. The FTC's motion would deprive the Court of the benefit of hearing Dr. Jha's testimony, based on a misreading of Dr. Jha's report and its critical relevance to this case. Accordingly, it should be denied.

ARGUMENT

I. DR. JHA'S TESTIMONY IS RELEVANT UNDER RULE 702 AND *DAUBERT*

The FTC's own expert witness on quality of care recognizes that improving quality of care is one of the "major goals of healthcare systems across the country" which "every hospital system professes a desire to achieve… ."[9] Dr. Jha's expert testimony addresses just that issue with respect to Lake Norman Regional specifically, and therefore meets the test of Federal Rules of Evidence 702 and *Daubert v. Merrell Dow*, 509 U.S. 579, 591 (1993), that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."

The FTC applies Rule 702 and *Daubert* backwards by arguing that Dr. Jha's testimony should be excluded because he (1) did not analyze whether the quality benefits he identified were "cognizable efficiencies," (2) did not "show the merger's impact on quality competition," and (3) did

[8] *See, e.g.*, PX3107 (Wyatt) at 9–10 (the town of Troutman supports the transaction because the "region is in need of a quality provider…" and "Novant has a proven track record" of quality care); Ex. 2 (Iredell County Board of Commissioners Letter) at 2 (emphasizing that transaction would likely "improve the quality and expand the availability of services to our community").

[9] PX0002 (Burns Initial Report) ¶ 37.

not show "whether any quality-related, cognizable efficiencies outweigh the anticompetitive effect of the merger."[10] The FTC essentially argues that Dr. Jha should have applied the evidence about quality of care to the law. But that is the province of the Court—not of an expert witness. *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006). *Defendants* may show that the merger's effect will be procompetitive, but an expert does not need to opine on this ultimate issue before the court for his opinions to be relevant to understanding the evidence or determining a *fact* at issue. F.R.E. 702. In fact, an expert *may not* draw legal conclusions, such as opining on whether improved quality of care applies to "efficiencies," "competitive effects," or another legal element. *McIver*, 470 at 562.

In his (proper) role as an expert witness, Dr. Jha assessed the transaction's likely impacts on quality[11] by measuring and analyzing differences between the quality and safety performance of Lake Norman Regional against Novant's hospitals on multiple dimensions.[12] Dr. Jha compared Lake Norman Regional's potential to improve quality without the transaction against Novant's commitments and capabilities.[13] In addition, Dr. Jha analyzed how, post-transaction, Novant would be incentivized to continue to invest in improvements in healthcare quality, in part due to other

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[10] Dkt. 116-2 (Plaintiff's Mem.) at 3–4.

[11] The FTC argues that Dr. Jha did not "verify" and "measure" these impacts, Dkt. 116-2 (Plaintiff's Mem.) at 8, but this is misdirection. The FTC's own expert acknowledges that it is "difficult to quantify incentives related to non-price dimensions," PX0001 (Tenn Initial Report) at n.86, and even though the FTC carries the burden to show that the transaction would have anticompetitive effects, the FTC did not quantify alleged harms to quality of care from the transaction. PX0002 (Burns Initial Report).

[12] These include Leapfrog grades, Ex. 1 (Jha Initial Report) ¶¶ 98–102, CMS Hospital Star Ratings *id.* at Appendix C, CMS Care compare metrics, *id.* ¶¶ 103–114, and CMS MSSP ACO metrics and degree of participation, *id.*, ¶¶ 63–68. Furthermore, Defendants' economic expert, Dr. Lawrence Wu, quantified the value of enhancing competition with Atrium by improving Lake Norman Regional's quality and expanding services in the ways that Dr. Jha analyzed. *See* Ex. 3 (Wu Rebuttal Report) ¶ 257–66.

[13] Ex. 4 (Jha Rebuttal Report) at §VI.B, §VI.B, §VII.C.

health systems servicing the Charlotte area.[14] Contrary to the FTC's claim that Dr. Jha did not "measure" these quality benefits, Dr. Jha's robust analysis of quality of care in the comparative worlds with and without the transaction will "assist the trier of fact to understand the evidence" about the transaction's likely competitive effects. Fed. R. Evid. 702; *Daubert*, 509 U.S. at 591.

II. QUALITY OF CARE IS A CENTRAL ISSUE IN ASSESSING WHETHER THE TRANSACTION MAY SUBSTANTIALLY LESSEN COMPETITION

In this case, the FTC takes the contradictory position that while *reduced* quality is an "anticompetitive effect," *improved* quality is *not* a procompetitive effect or even legally relevant at all. This hypocritical position is not legally or logically supported, and cannot be a basis for excluding the credible, reliable testimony of Defendants' expert. Dr. Jha's expert opinions are directly relevant to the Court's consideration of the "totality-of-the-circumstances…to determine the effects of particular transactions on competition." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984 (D.C. Cir. 1990). The FTC, third-party stakeholders, and both parties' expert witnesses all recognize that quality of care is an essential dimension of healthcare competition. Courts must weigh the procompetitive effects of improved quality of care alongside any other competitive effects to evaluate whether a merger is likely to substantially lessen competition.

A. Health Insurers Value Quality in Healthcare Competition

Health insurers testified that they do not look at unit prices alone in negotiations, but instead at quality, efficiency, utilization, volume, and other factors.[15] Insurers (and their insured members) value hospitals that perform well on quality metrics more than hospitals that do not, because higher

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[14] Ex. 1 (Jha Initial Report) at ¶¶ 28, 36–43, 56–59, 147.

[15] PX[REDACTED] ([REDACTED] at 13:5–14:11; 15:8–13 (total cost of care [REDACTED] [REDACTED]); Ex. 5 (Cigna) at 111:2–113:24 (discussing the impact of quality of care metrics, such as readmission rates and infection rates, on the total cost of care); PX7044 (Aetna) at 35:2–20 (Aetna negotiates with healthcare systems over a "number of factors" other than unit price, including "[REDACTED].").

quality care lowers the total cost of care in the long run.[16] Payors incentivize high quality care through value-based care arrangements.[17] Insurers also recognize that Novant has a track record of achieving high quality care, which leads to shared savings for both payors and providers.[18]

B. Both Parties' Expert Witnesses Acknowledge that Quality is a Central Component of Evaluating the Competitive Effects of the Transaction

The FTC's economic expert, Dr. Steven Tenn, acknowledged in his deposition that "both price and non-price *effects*" (not efficiencies), including quality, are valuable to payors and patients.[19] Dr. Tenn testified that to "assess the overall impact" of the proposed transaction, the "pro-competitive benefit of a cognizable quality increase" would need to be evaluated against other competitive effects.[20] Dr. Tenn himself explained in an FTC working paper analyzing a prior hospital acquisition that "[a] full determination of whether antitrust enforcement was appropriate in this matter *requires analysis of…the merger's impact on hospital quality* . . . ."[21]

Defendants' economic expert, Dr. Lawrence Wu, explained in his testimony that the proposed transaction will enhance competition by improving the quality of care in ways that are unlikely absent the proposed transaction. Specifically, Dr. Wu opined that, "by making Novant a

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[16] PX[REDACTED] ([REDACTED] at 31:14–32:7 ([REDACTED] is willing to pay a higher unit price to hospitals that meet its quality performance scores, because the "overall total cost of care should be going down if these measures are met").

[17] PX[REDACTED] ([REDACTED] at 12:16–13:4 ([REDACTED]); *id.* at 15:20–16:7 ([REDACTED]).

[18] Ex. 5 (Cigna) at 45:25–47:10; 48:9–50:17 (Novant achieves high quality scores in Cigna's programs, and its quality programs "lower the cost of care" for Cigna members); PX[REDACTED] ([REDACTED] ([REDACTED]).

[19] Ex. 6 (Tenn) at 84:10–85:21 (emphasis added); *see also* PX0001 (Tenn Initial Report) ¶ 63 ("location, service offerings, amenities, quality, and reputation" all affect competition).

[20] Ex. 6 (Tenn) at 93:5–95:3.

[21] Ex. 7 (Steven Tenn, "The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction," Fed. Trade Comm'n Bureau of Economics (November 2008)) at n.3.

more attractive, comparable alternative" to Atrium and other competing health systems in the Charlotte area, the transaction "gives payors a more credible threat when negotiating" with those competitors, generating procompetitive effects that far outweigh the FTC's estimate of the transaction's purported anticompetitive effects.[22] Dr. Wu's analysis also shows that any unit price difference between Lake Norman Regional and Novant Huntersville Medical Center reflects a difference in quality, and neither payors nor patients value low-quality care at a lower unit price, as starkly demonstrated by Lake Norman Regional's 31% occupancy rate.[23]

C. The FTC Recognizes the Importance of Quality of Care for Healthcare Competition

Despite the FTC's claims in its motion in *limine*, the FTC has argued throughout its case that the transaction's purported "anticompetitive effects" include alleged impacts on "high-quality care," because hospitals "compete" by offering "high-quality healthcare services."[24] In an article relied on by the FTC's economic expert, FTC economists explained that "[i]n addition to the effect on price, the analysis of hospital mergers also *requires* close attention to likely effects on quality."[25] Because "life and health are very valuable . . . well-supported claims regarding clinical quality tend to be given more weight than other claims of *pro-competitive merger effects*."[26]

D. The FTC's Dismissal of Quality of Care is Inconsistent with the Case Law and Illogical

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[22] Ex. 3 (Wu Rebuttal Report) ¶¶ 257–66 (Novant's "investment[] and improvement in quality and scope of services at Lake Norman will tend to lower the cost of care at Lake Norman and will be, in themselves, increases in competition.").

[23] Ex. 8 (Wu Initial Report) ¶¶ 65; 72–74.

[24] Dkt. 1 (Complaint) ¶ 52; 61; *see also id.* at ¶ 58 (presence of "high-quality hospitals creates important competition"); Dkt. 80 (Plaintiff's Brief) at 3 ("competition between Novant Huntersville and Lake Norman Regional benefits patients through…improved quality of care").

[25] Ex. 9 (Fed. Trade Comm'n, "Economics at the FTC: Hospital Mergers, Authorized Generic Drugs, and Consumer Credit Markets," *Review of Industrial Organization* (October 2011)) at 3 (emphasis added).

[26] *Id.*

The FTC's strained interpretation of the case law would relegate healthcare quality—in a *hospital merger case*—to a legally irrelevant afterthought. But none of the cases the FTC cites held that quality of care is legally irrelevant to evaluating a merger.[27] To the contrary, the courts in those cases evaluated the entirety of the evidence in the record related to the specific transactions in question, which differed in meaningful ways from the proposed transaction here.[28] For example, in several of those cases, the FTC alleged that one or both of the merging parties was already the "dominant" healthcare provider in the state or region.[29] Here, by contrast, Atrium—not either of the merging parties—is the "dominant hospital system in the Charlotte area."[30] Dr. Jha analyzed these potential quality improvements in the context of other area hospital systems, and his testimony is directly relevant to evaluating the transaction's ability to enhance competition with Atrium and other health systems by improving the quality of care at Lake Norman Regional and Davis.

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[27] Moreover, none of the healthcare merger cases excluded experts from testifying on quality of care. The FTC's brazen attempt to prevent this Court from even considering an expert analysis of the potential benefits to quality of care is wholly unsupported by the case law that it cites. *Id.*

[28] Even those cases—none of which are binding on this Court—still recognized and weighed the transactions' potential impacts to quality of care. *See, e.g.*, *FTC v. Hackensack Meridian Health, Inc.*, 2021 WL 4145062 at *26, 30 (D.N.J. Aug. 4, 2021), aff'd, 30 F.4th 160 (3d Cir. 2022) (recognizing that "improvements in quality at either entity" could result in a "procompetitive benefit"); *Saint Alphonsus Med. Ctr. - Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, 2014 WL 407446 at *14 (D. Idaho Jan. 24, 2014), aff'd, 778 F.3d 775 (9th Cir. 2015) (weighing findings about the merged entity's quality of care against anticompetitive effects).

[29] Complaint ¶¶ 1–2, *FTC v. Hackensack Meridian Health, Inc.*, 2:20-cv-18140-JMV-JBC (D.N.J. Dec. 8, 2020) (alleging that the acquiring hospital was the "largest healthcare system in New Jersey" with a "dominant position in Bergen County"); Complaint ¶ 1, *FTC v. Penn State Hershey Med. Ctr.*, 1:15-cv-2362 (Apr. 8, 2016) (alleging that the merging parties were already the "two largest health systems in the greater Harrisburg, Pennsylvania area," and the merger would create a "dominant provider"); Complaint ¶¶ 30, 38, *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 1:12-CV-00560-BLW (Nov. 12, 2012) (St. Luke's was already a "near monopoly" and had a "dominant position…in the Boise area"); *id.* ¶ 18 (describing pre-transaction "dominance" of Saltzer Medical Group).

[30] Competitive Impact Statement at 4, *United States of America and the State of North Carolina v. The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas Healthcare System*, 16-cv-00311 (W.D.N.C. Dec. 4, 2018), Dkt. 89.

Courts have routinely held that procompetitive benefits, including improvements in quality of care, are appropriately evaluated under the totality of effects on competition. In *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054–55 (8th Cir. 1999), the Eighth Circuit reversed the district court's preliminary injunction order and held that "the district court should…have considered evidence of enhanced efficiency in the context of the competitive effects of the merger," because evidence that the merged entity would "provide better medical care" was relevant to showing that "the merged entity may well enhance competition… ." The Court in *United States v. Carilion Health Sys.*, 707 F. Supp. 840, 849 (W.D. Va.), aff'd, 892 F.2d 1042 (4th Cir. 1989) recognized as "relevant… that defendants seek to merge in order to strengthen, rather than reduce, competition," as the transaction would "enable them to offer their services more competitively than ever, to patients' benefit." *See also FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1302 (W.D. Mich. 1996), aff'd sub nom. *FTC v. Butterworth Health Corp.*, 121 F.3d 708 (6th Cir. 1997) (denying injunction because the proposed merger would allow "the combined entity to continue the quest for establishment of world-class health facilities," which "clearly and unequivocally would ultimately be in the best interests of the consuming public as a whole.").

The aftermath of the FTC's cited cases in which it obtained injunctions further underscore the importance of considering the likely future of Lake Norman Regional with and without the transaction. After the FTC successfully enjoined the transaction and obtained a divestiture in *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015), the physician health group that would have been acquired in the merger was forced to close in April 2024 due to "ongoing financial and economic challenges."[31] The hospital that was to be acquired in

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[31] Ex. 10 ("Intermountain-owned physician group Saltzer Health closes," April 1, 2024). "The closure risked ending services at the Treasure Valley region's only 24-7 urgent care, limit[ing]

[Footnote continued on next page]

the transaction enjoined by *FTC v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, at *1 (N.D. Ohio Mar. 29, 2011) was shuttered last year because it could not "overcome [its] historic financial losses."[32] Here, CHS ████████████████████████ if the transaction is enjoined, and ████████████████████████.[33] Dr. Jha's analysis of how the transaction is likely to improve the quality of care at these hospitals will therefore assist the Court in comparing "what may happen if the merger occurs with what may happen if the merger does not occur." *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979).

The FTC asks this Court to cast away any discussion of the impact to healthcare quality in a case about healthcare competition. Instead, the FTC hopes to rest its case on market share and concentration statistics, even though courts have warned that "evidence on only one factor, market concentration, does not negate the breadth of th[e] analysis" required to evaluate the competitive effects of a merger. *Baker Hughes*, 908 F.2d at 984. Under the FTC's interpretation of the case law, even if the impact of the transaction was to expand access to lifesaving care for patients, that would be "irrelevant" to the analysis. Especially because "hospitals are in the business of saving lives," *Butterworth*, 946 F. Supp. at 1302, Dr. Jha's opinions regarding the transaction's likely impact on healthcare quality are squarely relevant to the Court's evaluation of the transaction's effects on competition.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiff's Motion be denied.

[Footnote continued from previous page]
the area's pregnancy care options and…leav[ing] the group's roughly 100,000 annual patients in need of new providers." *Id.*

[32] Ex. 11 ("McLaren Health Care announces plans to close St. Luke's Hospital in Maumee," March 4, 2023).

[33] *See* Dkt. 91 (Defendants' Opposition to Preliminary Injunction) at 8.

Dated: April 22, 2024

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