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 #169)**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE PORTIONS OF EXPERT TESTIMONY OF DR. STEVEN TENN

Defendants seek to exclude certain parts of Dr. Steven Tenn's testimony under the guise of a concern that he impermissibly offers legal conclusions.[1] However, Dr. Tenn's opinions relate to economic analyses and calculations. Where helpful, Dr. Tenn also identifies how his economic analyses and calculations fit within the FTC and Department of Justice's current Merger Guidelines (the "*Merger Guidelines*").[2] Dr. Tenn does not offer his own opinion about the legality of the proposed transaction between Novant Health, Inc. and Community Health

[1] *See generally* ECF No. 118-2 ("Defs. Memo.") 2-3.
[2] Defendants claim that Dr. Tenn "analyz[ed]" the "'presumptive illegality'" of the market shares and market concentrations he calculated, and that this "analysis" was "based solely on his interpretation" of the *Merger Guidelines*. Defs. Memo. 7. However, Dr. Tenn was clear in his deposition that when he discussed the *Merger Guidelines*, he "offer[ed] them as a reference as potentially useful to the judge in the matter" and that he was just describing "what the guidelines say" and explaining whether his "shares and concentrations meet those presumptions." ECF No. 118-4 (Defs. Memo. Ex. 1 (Tenn Depo. Tr.)) 126:9-17.

Systems, Inc. To the extent Dr. Tenn's report could be construed as offering legal conclusions (which it plainly does not), the FTC agrees that no such legal conclusions should be elicited at the hearing by either side's economic experts. Accordingly, Defendants' motion is moot and should be denied.

Defendants also use their motion to raise extraneous concerns about the structural presumptions enshrined in the *Merger Guidelines*. Those arguments are misplaced in this case. Structural presumptions are embodied in decades of case law and Defendants' own expert, Dr. Lawrence Wu, cites them approvingly. Defendants' only quibble is with the *Merger Guidelines*' return to past levels of market concentration that trigger a presumption of illegality. Under Dr. Tenn's analysis, however, the proposed transaction exceeds the thresholds described in *both* the previous (2010) and current (2023) *Merger Guidelines*—and used by courts across the country.[3] The proposed transaction is therefore presumptively unlawful regardless of what market concentration levels this Court applies.

BACKGROUND

The Supreme Court has long encouraged the use of "simplif[ied] test[s]" to assess the anticompetitive effects of a merger. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963). This is because, when a merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market," such a merger is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have

[3] *Compare* U.S. Dep't of Justice & Fed. Trade Comm'n, *Merger Guidelines* § 2.1 (2023), *available at* https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf, *and* U.S. Dep't of Justice & Fed. Trade Comm'n, *Merger Guidelines* § 5.3 (2010), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf, *with* PX0001 (Tenn Initial Report), at ¶¶ 145-146.

such anticompetitive effects." *Id.* at 363; *see also FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1344 (4th Cir. 1976) (indicating that a merger is unlawful when it would result in "a firm controlling an undue share of the market and increase[d] concentration").

Presumptions related to market shares and concentration are commonly used by courts to assess whether a merger may substantially lessen competition in ways that contravene the antitrust laws. *See, e.g.*, *Liggett & Myers, Inc. v. FTC*, 567 F.2d 1273, 1275 (4th Cir. 1977) (finding that "concentration and its tendency to increase comprise the touchstone for appraising the threat from a merger"). One way courts analyze market concentration is to compare post-merger combined market share to a market share threshold set out by the Supreme Court in *Philadelphia National Bank*. *See, e.g.*, *FTC v. IQVIA Holdings Inc.*, 2024 WL 81232, at *32 (S.D.N.Y. Jan. 8, 2024) (applying a 30% combined-firm threshold, which was "first set out in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).").[4]

Courts also commonly utilize a market concentration test referred to as the Herfindahl-Hirschman Index ("HHI") and identify presumptions based on post-merger HHI changes and levels. *See, e.g.*, *IQVIA*, 2024 WL 81232, at *32 (describing the HHI as "a tool commonly used to measure changes in market concentration"); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (finding that a post-merger HHI increase of 510 points "creates, by a wide margin, a presumption that the merger will lessen competition in the domestic jarred baby food market"); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986) (explaining that "[m]arket power or lack of it is often measured by the HHI"). The HHI helps courts by "evaluat[ing] market

[4] Defendants referred to the *Merger Guidelines'* 30% post-merger combined market share threshold as a "propose[d] . . . new threshold," Defs. Memo. 4, despite its emergence in the Supreme Court's 1963 decision in *Philadelphia National Bank*. 374 U.S. at 364 (noting that, "[w]ithout attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat").

concentration through a formula that accounts for the relative size and distribution of the firms in a particular market." *Burlington Indus., Inc. v. Edelman*, 666 F. Supp. 799, 804 (M.D.N.C. 1987). The HHI was not created by the *Merger Guidelines*; rather, it is a "widely used and accepted market concentration index that existed well before the *Merger Guidelines*."[5]

The *Merger Guidelines* describe the agencies' view that mergers may substantially lessen competition when (1) the merger increases the HHIs by more than 100 points and the combined market share exceeds 30%, or (2) the merger increases HHIs by more than 100 points and the post-merger HHI exceeds 1800.[6] These levels are consistent with presumptions adopted by various courts. *See, e.g.*, *AlliedSignal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 574 & n.3 (7th Cir. 1999) (district court did not abuse discretion by finding likely Section 7 violation based on HHIs above 1800); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 n.12 (11th Cir. 1991) (comparing a proposed merger's HHI increase and total to the 100 change and 1800 total thresholds); *PPG Indus.*, 798 F.2d at 1503 (finding that, based on the 1800 threshold, the relevant market was "already highly concentrated" and "the effect of the acquisition would be a dramatic increase in concentration") (internal citation omitted).

Courts in the Fourth Circuit have similarly held that changes in concentration above the thresholds identified in the *Merger Guidelines* raise concerns. *See, e.g.*, *Burlington Indus., Inc. v. Edelman*, 666 F. Supp. 799, 804 (M.D.N.C. 1987) (HHI increased 472 points to 1973, "indicat[ing] an unacceptable change in the HHI"), *aff'd*, No. 87-1622(L), 1987 WL 91498 (4th Cir. June 22, 1987); *Energy Mktg. Servs., Inc. v. Columbia Gas Transmission Corp.*, 2009 WL 778778, at *12-13 (S.D.W. Va. Mar. 17, 2009) (denying motion to exclude expert testimony

[5] *See* PX0001 (Tenn Initial Report), at ¶ 143.
[6] *Merger Guidelines* § 2.1. Guideline 2 separately discusses how mergers can violate the law when they eliminate substantial competition between companies. *Id.* § 2.2.

based in part on argument that the expert "evaluated concentration in accordance with the HHI thresholds" in the *Merger Guidelines*).

Although the 2010 Horizontal Merger Guidelines (the "2010 *Merger Guidelines*") proposed higher thresholds than adopted by courts and used in prior iterations of the Guidelines,[7] the 2010 *Merger Guidelines* did not negate the prior case law using lower thresholds. Nor do Defendants cite any support for their suggestion that economics has somehow changed since courts applied the lower thresholds.[8] Regardless, even relying on the higher thresholds that appear in the 2010 *Merger Guidelines*—which Defendants do not appear to contest[9]—both Dr. Tenn and Dr. Wu calculate market concentrations that far surpass the thresholds.[10]

LEGAL STANDARD

Expert testimony is admissible under Rule 702 if it "both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993); *see also Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021). To assess reliability, "the district court must ensure that the proffered expert opinion is 'based on scientific, technical, or other specialized knowledge.'" *Nease v. Ford Motor Co.*, 848 F.3d 219, 229 (4th Cir. 2017) (quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999)). Expert testimony is relevant if it has "a valid scientific connection to the pertinent inquiry" that will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 509 U.S. at 580, 592; *see also Sardis*, 10 F.4th 268, 281 (4th Cir. 2021).

[7] *See Merger Guidelines* § 2.1 n.15 (explaining the reversion of the HHI thresholds to earlier versions of the *Merger Guidelines*).
[8] *See* Defs. Memo. 4 n.14.
[9] *See generally* Defs. Memo. 3-4.
[10] *See infra* at 8-10.

ARGUMENT

I. Dr. Tenn Offers Opinions Based on Commonly Used Economic Concepts, Not Legal Conclusions

Dr. Tenn is an economist with decades of experience evaluating and testifying in competition matters. To help the Court understand whether the proposed transaction "may substantially lessen competition," *Food Town*, 539 F.2d at 1344, Dr. Tenn utilizes "widely accepted economic theory and methods, as well as the robust factual record" that includes "empirical datasets and qualitative evidence."[11] Based on his analysis, Dr. Tenn identifies three markets as relevant geographic markets in which to evaluate the proposed transaction, for which he then calculates market shares using patient discharge data.[12] He also analyzes changes to market concentration levels by calculating pre- and post-merger HHIs in each relevant geographic market,[13] an approach commonly used by economists to assess whether a transaction raises competitive concerns—something Defendants' expert concedes.[14]

Defendants do not dispute that Dr. Tenn's opinions apply commonly accepted economic methods. They nonetheless assert that his opinions should be excluded to the extent they could be construed as weighing in on the "presumptive illegality" of the merger under the *Merger Guidelines*.[15] Dr. Tenn does no such thing. Instead, to help put his conclusions in context, Dr. Tenn explains that his analysis is *consistent with* principles described in the *Merger Guidelines*

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[11] PX0001 (Tenn Initial Report) at ¶¶ 9, 11.
[12] *See, e.g.*, PX0001 (Tenn Initial Report) at ¶¶ 12, 142.
[13] PX0001 (Tenn Initial Report) at ¶¶ 143-46.
[14] *See, e.g.*, PX7063 (Wu Dep. Tr.) at 52:22-53:8 ("Q. Is it fair to say the HHI is a measure of market concentration that is commonly used to evaluate the structural change in the market that might result from a proposed transaction? . . . A. Yes. Over the years, obviously, there have been many measures of market concentration, but the HHI seems to be the one that has survived over the years."); *see also IQVIA*, 2024 WL 81232, at *32 (noting that the FTC's market share and HHI calculations were "set out in the reports and testimony of" the FTC's expert).
[15] Defs. Memo. 7.

and that the post-merger concentrations he calculates "exceed the thresholds that the *Merger Guidelines* define as rendering a merger as presumptively illegal."[16] Nowhere does Dr. Tenn offer his *own* opinion about the legality of the conduct at issue in this case. In any event, if there were any remaining doubt, the FTC agrees that neither side's experts may offer legal conclusions at the hearing about the proposed transaction, which should resolve Defendants' motion.

II. Defendants' Own Expert Analyzes the Potential Anticompetitive Effects of the Proposed Transaction Using Methods Identified in the *Merger Guidelines*

Defendants imply that Dr. Tenn's reference to the *Merger Guidelines* renders certain of his opinions as impermissible legal conclusions. But the *Merger Guidelines* are not legal opinions that are binding on courts. Instead, they incorporate economic tools and principles that are informative in assessing market definition and concentration, which in turn can inform legal determinations of market concentration.[17] *See, e.g.*, *Heinz*, 246 F.3d at 716 n.9 (quoting *PPG Indus.*, 798 F.2d at 1503 n.4) (recognizing that, "[a]lthough the Merger Guidelines are not binding on the court, they provide 'a useful illustration of the application of the HHI'"). Courts in the Fourth Circuit have likewise relied on operative versions of the *Merger Guidelines*, identifying them as a "helpful tool" for analyzing mergers. *See, e.g.*, *Steve and Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 704 (4th Cir. 2021) (quoting *United Stated v. Anthem, Inc.*, 855 F.3d 345,349 (D.C. Cir. 2017)).

Defendants' own expert, Dr. Wu, relies on both the 2010 and current *Merger Guidelines*

[16] PX0001 (Tenn Initial Report) at ¶ 11.
[17] Dr. Wu himself "cite[s] the merger guidelines to highlight the well-accepted economic concepts that are used in merger analysis." PX0003 (Wu Initial Report) at ¶ 18 n.60. He also acknowledged that "the economic principles in the 2010 Horizontal Merger Guidelines are very much part of the 2023 Merger Guidelines." PX7063 (Wu Dep. Tr.) at 50:1-12.

when preparing and presenting his opinions in this case.[18] Dr. Wu's opinions confirm that it is well within the province of experts to calculate market shares and concentrations levels. Like Dr. Tenn, Dr. Wu calculates and offers opinions regarding post-transaction market shares as part of his analysis of the proposed transaction.[19] Dr. Wu also calculates HHIs[20] and has done so in past cases as well.[21] As Dr. Wu explained, for him, calculating HHIs has "always been a starting point for the competitive analysis."[22] In *Hackensack*, for example, the "[d]efendants rel[ied] on a number of calculations performed by Dr. Wu to demonstrate that different candidate markets lead to very different competitive effect results," and Dr. Wu compared "post-merger HHIs" for the case. *FTC v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at *21 (D.N.J. Aug. 4, 2021), *aff'd*, 30 F.4th 160 (3d Cir. 2022). Dr. Wu's opinions in this case demonstrate that there is nothing improper with Dr. Tenn's calculations or references to the *Merger Guidelines*.

III. Both Experts Calculate Market Shares and Concentration that Exceed the Thresholds Identified in both the 2010 and Current Merger Guidelines

Defendants spend a significant portion of their motion criticizing the lower HHI thresholds in the *Merger Guidelines*. As explained above, however, those thresholds are grounded in court decisions around the country.[23] Regardless, the revised thresholds are irrelevant to this case because the proposed transaction would result in market shares and

[18] PX7063 (Wu Dep. Tr.) at 12:11-18; 14:17-22; *see also, e.g.*, PX0003 (Wu Initial Report) at ¶¶ 111, 161, 176; PX0007 (Wu Rebuttal Report) at ¶¶ 16, 18. Dr. Wu also discusses the thresholds presented in both the 2010 and current *Merger Guidelines* in his reports. *See, e.g.*, PX0003 (Wu Initial Report ¶¶ 188, 192-94; PX0007 (Wu Rebuttal Report) ¶¶ 156-62.
[19] *See, e.g.*, PX0007 (Wu Rebuttal Report) at ¶ 5; Exhibits 11A-E.
[20] *See, e.g.*, PX0007 (Wu Rebuttal Report) at ¶ 5; Exhibits 11A-E.
[21] PX7063 (Wu Dep. Tr.) at 53:13-15 ("If you're asking me whether I have calculated the HHI given certain market definitions, then yes, I have.").
[22] PX7063 (Wu Dep. Tr.) at 54:17-55:3.
[23] *Supra* at 4-5.

concentration levels that exceed *both* the 2010 and current *Merger Guidelines* in at least one relevant market.

Based on commonly used and relied upon methods for calculating market shares and concentration, Dr. Tenn calculates that, in the Eastern Lake Norman Area, the proposed transaction would result in an HHI increase of 1,994, resulting in a post-merger HHI of 5,046, with the combined firm having a 67% share of the market.[24]

Using this same approach, Dr. Tenn calculates that, in the Eastern Lake Norman Area plus Center City area, the proposed transaction would result in an HHI increase of 537, resulting in a post-merger HHI of 4,541, with the combined firm having a 50.6% share of the market.[25] In the Center City/Northern Charlotte region, Dr. Tenn calculates that the proposed transaction would result in an HHI increase of 288, resulting in a post-merger HHI of 4,886, and a combined share of 37.0%.[26] In all three relevant geographic markets, Dr. Tenn's results exceed the levels that the *Merger Guidelines* define as presumptively illegal.

Defendants' own analyses show similar results. For the Eastern Lake Norman Area—even when failing to limit the analysis to overlapping services—Dr. Wu calculates that the proposed transaction would result in an HHI change of between 814 and 1,640, resulting in a post-transaction HHI of between 3,565 and 4,636, with the combined firm having between a 42.9% and 62.7% share of the market.[27] These levels far exceed the thresholds in both the 2010 and current *Merger Guidelines*.

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[24] PX0005 (Tenn Rebuttal Report) at Table 5.
[25] PX0005 (Tenn Rebuttal Report) at Table 5.
[26] PX0005 (Tenn Rebuttal Report) at Table 5.
[27] The ranges reflect Dr. Wu's calculations using patient-based versus hospital-based shares. PX0007 (Wu Rebuttal Report) at Exhibit 11A. Dr. Wu's calculations are simulations that assume Atrium Lake Norman is open and operating 30 beds and CaroMont Belmont is open and operating 54 beds. *See* PX7063 (Wu Dep. Tr.) at 237:18-238:13.

Expanding the relevant geographic market does not change Dr. Wu's results. For the Center City/Northern Charlotte region, the largest relevant market Dr. Tenn identified, Dr. Wu calculates that the proposed transaction would result in an HHI increase of between 260 and 345, resulting in a post-transaction HHI of between 4,575 and 4,577, with the combined firm having between a 33.3% and 43.9% share of the market.[28] These levels trigger the presumption of illegality no matter what thresholds this Court applies.

In sum, almost every one of the market share and concentration calculations by both Drs. Tenn and Wu, using the criteria set out by Dr. Tenn, exceed *both* the 2010 and current *Merger Guidelines'* thresholds, and in many instances far exceed the thresholds. Defendants' efforts to quibble about differences between the 2010 and current *Merger Guidelines* are therefore not relevant to the Court's ultimate analysis.

CONCLUSION

None of Dr. Tenn's opinions or testimony impermissibly "rely upon" legal standards or guidance; they rely upon accepted economic analyses. To the extent Dr. Tenn has explained how his analyses fit into the analytical framework presented by the Merger Guidelines, as Defendants' own expert did, Dr. Tenn does not draw his own conclusions about legality. Regardless, the FTC agrees that none of Dr. Tenn's prior expert testimony or opinions should be construed as conveying legal conclusions or opinions and agree not to elicit legal conclusions or opinions from Dr. Tenn at the preliminary injunction hearing.

[28] The ranges reflect Dr. Wu's calculations using patient-based versus hospital-based shares. PX0007 (Wu Rebuttal Report) at Exhibit 11A

Dated: April 22, 2024

Respectfully submitted,

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