

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina Khan, Chair
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson**

In the Matter of

Hackensack Meridian Health, Inc.,

and

Englewood Healthcare Foundation.

Docket No. 9399

RESPONDENTS' MOTION TO DISMISS COMPLAINT

Respondents Hackensack Meridian Health, Inc. (“HMH”) and Englewood Healthcare Foundation (“Englewood”) respectfully move pursuant to Rule 3.22(a), 16 C.F.R. § 3.22(a), to dismiss the Administrative Complaint (“Complaint”) in the above-captioned matter. After the U.S. District Court for the District of New Jersey granted the Federal Trade Commission’s (“FTC”) motion for a preliminary injunction pending an administrative trial on the merits in this action, and the U.S. Court of Appeals for the Third Circuit affirmed that decision, Respondents have jointly agreed to terminate their merger agreement and abandoned HMH’s proposed acquisition of Englewood. Accordingly, Respondents respectfully request that the Commission dismiss the Complaint because this administrative action is moot and no further adjudicative proceedings are necessary, appropriate, or in the public interest.

BACKGROUND

On December 4, 2020, Complaint Counsel filed this action as well as a complaint in the U.S. District Court for the District of New Jersey seeking a preliminary injunction to enjoin the

proposed transaction between Respondents until completion of this administrative proceeding. Respondents stipulated to the entry of a temporary restraining order (“TRO”) in the federal litigation pending the outcome of the federal action. Stipulated Temporary Restraining Order [Dkt. 4], *FTC v. Hackensack Meridian Health, Inc.*, No. 20-18140 (D.N.J).

In the District Court, a seven-day preliminary injunction hearing concluded on May 18, 2021, the Parties filed proposed findings of fact and conclusions of law on May 28, 2021, and the District Court heard closing arguments on June 2, 2021. On August 4, 2021, the District Court granted the FTC’s request for a preliminary injunction, finding certain procompetitive benefits and efficiencies would result from the transaction but concluding that the FTC showed a likelihood of success on the merits in a relevant market defined as inpatient general acute care services in Bergen County. *FTC v. Hackensack Meridian Health, Inc.*, No. 20-18140, 2021 WL 4145062 (D.N.J. Aug. 4, 2021).

Respondents appealed the District Court’s decision to the U.S. Court of Appeals for the Third Circuit on August 25, 2021 and moved to expedite the appeal. The Third Circuit partially granted the motion. The appeal was fully briefed as of November 12, 2021, and the Third Circuit heard oral argument on December 7, 2021. On March 22, 2022, the Third Circuit affirmed the District Court’s grant of the preliminary injunction pending an administrative trial on the merits, ruling that the FTC had established there is a reasonable probability that the Respondents’ merger will substantially impair competition. *FTC v. Hackensack Meridian Health, Inc.*, No. 21-2603, 2022 WL 840463 (3d Cir. Mar. 22, 2022).

On March 24 and 30, 2022, the Respondents’ respective Board of Trustees voted to terminate the merger agreement. On March 31, 2022, Respondents notified Complaint Counsel that they were abandoning their proposed transaction. On April 5, Respondents mutually

terminated their merger agreement, executing an Agreement of Mutual Termination. That same day, Respondents withdrew their Hart-Scott-Rodino (“HSR”) Notification and Report Forms with the Premerger Notification Office for the proposed transaction.

Also on April 5, 2022, Complaint Counsel moved to withdraw the matter from adjudication temporarily so the Commission may “evaluate whether further relief is warranted,” despite the Respondents’ abandonment of the transaction that is the subject of this action. Complaint Counsel’s Motion to Withdraw Matter from Adjudication (April 5, 2022).

ARGUMENT

I. The Complaint Is Moot and Therefore Must Be Dismissed.

The Complaint in this matter alleges that Respondents’ “affiliation agreement [is] in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, which *if consummated* would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act.” Complaint at 1; *id.* ¶¶ 1, 23 (defined in the Complaint as the “Proposed Transaction”). Respondents have since terminated the affiliation agreement—thereby abandoning the “Proposed Transaction” that is the subject of the Complaint in this matter. In light of their mutual termination, Respondents also have withdrawn their respective HSR Notification and Report Forms. The “Proposed Transaction” will never be “consummated.”

Because there is no longer an affiliation agreement or “Proposed Transaction” between the Respondents, the Complaint is moot. *Cf. United States v. Sabre Corp.*, No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. July 20, 2020) (vacating proceeding because “Sabre Corporation mooted the parties’ dispute by terminating its acquisition of Farelogix, Inc.”); *United States v. Mercy Health Servs.*, 107 F.3d 632, 636 (8th Cir. 1997) (vacating proceeding as moot because merging parties “have obviated the threat of illegal conduct by abandoning their proposed merger”). Accordingly, the Commission should dismiss the Complaint because there is no

justiciable controversy.

In recent matters, the Commission has granted joint motions to dismiss similar administrative complaints that contemplate the precise additional relief requested here, because the complaints, like this one, were moot after the parties had abandoned their transactions and withdrawn their HSR filings. *See, e.g.*, Complaint (Feb. 17, 2022), Joint Motion to Dismiss Complaint (Feb. 28, 2022), & Order Dismissing Complaint (Mar. 2, 2022), *In re Lifespan Corp.*, FTC Dkt. 9406 (granting joint motion to dismiss as moot complaint seeking additional relief); Complaint (Nov. 13, 2020), Joint Motion to Dismiss Complaint (Dec. 23, 2020) & Order Dismissing Complaint (Dec. 29, 2020), *In re Methodist Le Bonheur Healthcare*, FTC Dkt. 9396 (same); Complaint (Dec. 8, 2020), Joint Motion to Dismiss Complaint (Jan. 6, 2021) & Order Dismissing Complaint (Jan. 8, 2021), *In re Proctor & Gamble Co.*, FTC Dkt. 9400 (same); *see also* Complaint (Jan. 26, 2022) & Joint Motion to Dismiss Complaint (Feb. 14, 2022), *In re Lockheed Martin Corp.*, FTC Dkt. 9405. In each of these, the Commission did not pursue any additional relief by litigating the merits of the terminated transaction. There is no basis for the Commission to depart from prior practice here.

II. An Adjudicative Proceeding Over a Terminated Acquisition Is Unnecessary and Would Waste the Resources of the Commission, the Respondents, and Numerous Third Parties.

In its Motion, Complaint Counsel suggests that the Commission may seek “further relief.” However, any additional relief the Commission may seek from the Respondents here—where there is no consent decree or other settlement—would require a full adjudication and evidentiary hearing on the merits with respect to a proposed transaction that no longer exists.

The Complaint in this matter sets forth various forms of contemplated relief that the Commission *may* order “should the Commission *conclude from the record developed in any adjudicative proceedings in this matter* that the Proposed Transaction challenged in this

proceeding violates Section 5 of the Federal Trade Commission Act, as amended, and/or Section 7 of the Clayton Act, as amended.” Complaint at 11 (emphasis added).

As expressly stated in the Complaint, such relief is only sought *after* an adjudicative proceeding and full hearing on the merits, and only *if and when* the Commission concludes, from an evidentiary record, that the “Proposed Transaction” is unlawful. Adjudicating a transaction that no longer exists would impose significant burden and expense on approximately two dozen non-parties whose confidential information has been designated for use in the administrative trial, Complaint Counsel, and Respondents. In addition, proceeding with an evidentiary hearing would require the Office of the Administrative Law Judge to devote significant time and resources to pre-hearing preparation and adjudication of issues that are not justiciable in the first instance and cannot and will not have any merit—as there is no pending transaction at issue. Adjudicating the lawfulness of a terminated transaction is unnecessary and not in the public interest in these circumstances.

III. There Is No Need for Any Additional Relief.

In their Motion to Withdraw, Complaint Counsel only seeks to withdraw the matter in order to “evaluate” whether “further relief” is needed. It does not articulate what “further relief” is contemplated—nor is there any further relief needed, because the transaction has been abandoned.

In discussions with Complaint Counsel, the only potential additional relief mentioned was a notice requirement for future mergers in the relevant market. Among the relief contemplated in the Complaint is a “requirement that, for a period of time, HMH and Englewood provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating in the relevant market.” Complaint at 12.

But this relief is already available under the HSR Act without any adjudication of the claims asserted in the Complaint. The FTC alleges a relevant market of inpatient general acute care services sold and provided to insurers and their enrollees in an area no broader than Bergen County, New Jersey. Complaint ¶¶ 25, 30. Any combination by HMH or Englewood with another provider of inpatient general acute care services operating in Bergen County would exceed current HSR thresholds and therefore require notification. Therefore, any pre-notification relief that could be granted by the Commission following an adjudicative proceeding over a terminated transaction would be duplicative of the HSR Act’s notification requirements, or potentially an unauthorized expansion of the powers granted to the Commission by Congress under the HSR Act.¹ For this additional reason, the Commission should dismiss the Complaint

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Commission dismiss the complaint.

¹ As Commissioner Wilson has previously noted, imposing a prior notice requirement—here, on parties that are no longer merging and are therefore not entering into a consent decree—could “facilitate a massive end-run around Hart-Scott-Rodino filing requirements.” Commissioner Christine S. Wilson, Oral Remarks at the Open Commission Meeting on July 21, 2021, at 10 (July 21, 2021); *see also* Commissioner Noah Joshua Phillips, Dissenting Statement regarding the Commission’s Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021).

Dated: April 5, 2022

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer was electronically filed using the FTC's administrative e-filing system, causing the document to be served on the following registered participants:

The Honorable D. Michael Chappell
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I further certify that I have served via electronic mail a copy of the foregoing on the following:

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[PROPOSED] ORDER TO DISMISS COMPLAINT

This matter comes before the Commission on Respondents' Motion to Dismiss the Complaint. Having considered the motion and any oppositions or replies thereto, it is hereby

ORDERED:

Respondents' Motion to Dismiss the Complaint is **GRANTED**; and

The Complaint is **DISMISSED** with prejudice.

By the Commission.

Date: _____

April Tabor
Secretary