

**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' REPLY IN SUPPORT OF THEIR  
MOTION TO DISMISS COMPLAINT**

In opposing Respondents Hackensack Meridian Health, Inc. and Englewood Healthcare Foundation's Motion to Dismiss, Complaint Counsel does not dispute that Respondents have abandoned their transaction, prior to any administrative trial on the merits, or that an adjudication over an abandoned transaction would amount to a substantial expenditure of time and resources by both the parties and third parties. Nor has Complaint Counsel articulated any possible relief under the present circumstances that would warrant such an adjudication or such a substantial expenditure of time and resources. As noted in their opening brief, both Respondents have formally withdrawn their HSR Act filings, and any theoretical attempt to revive the same or a similar transaction, which even Complaint Counsel has not posited, would trigger the existing notification requirements of the HSR Act. Thus, there is no public interest to be served by a trial on the merits before the Administrative Law Judge and no reason to delay the resolution of this matter. Accordingly, Respondents respectfully submit that the Commission should dismiss the Complaint.

## ARGUMENT

### **I. The Complaint Is Moot as There Is No Reasonable Expectation the Controversy Will Recur, and the Commission Has Obtained the Non-Duplicative Relief It Seeks.**

Complaint Counsel does not dispute that the genesis of the Complaint was the affiliation agreement between HMH and Englewood and the allegation that the contemplated merger, if consummated, would violate Section 5 of the FTC Act and Section 7 of the Clayton Act. *See* Complaint at 1, § IX. Nor does Complaint Counsel dispute that the parties' affiliation agreement has been terminated.<sup>1</sup> Thus, the "Proposed Transaction," as defined in the Complaint, will never be consummated. *See* Mot. at 3. The merits of the Complaint, which have yet to be adjudicated by the Administrative Law Judge, are now moot. *Id.* at 3-4.

In opposing dismissal, Complaint Counsel relies on *In re Coca-Cola Co.*, arguing that the Commission retains jurisdiction to adjudicate "almost consummated acquisition[s]." 117 F.T.C. 795, 910 (1994). In that case, the FTC and the merging parties spent almost a decade litigating a transaction that had been abandoned, "[s]pending countless hours and dollars to convince a court to impose [a] remedy when there is nothing left to remediate."<sup>2</sup> That case is distinguishable. As in *R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989), there was record evidence in *Coca-Cola* of a "reasonable expectation" or "demonstrated probability" that the same or a "functionally equivalent" transaction would recur. As such, there was at least a colorable argument, not present here, that the proceedings were not mooted by abandonment of the

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<sup>1</sup> In addition to the steps described in their Motion to Dismiss on April 5, 2022, Respondents have issued public statements regarding their abandonment of the transaction. *See, e.g.*, Marissa Plescia, *Hackensack Meridian, Englewood withdraw merger plans*, Becker's Hosp. Review (Apr. 11, 2022), <https://www.beckershospitalreview.com/hospital-transactions-and-valuation/hackensack-meridian-englewood-withdraw-merger-plans.html>; Heather Landi, *Hackensack Meridian, Englewood call off merger after legal and regulatory roadblocks*, Fierce Healthcare (April 13, 2022), <https://www.fiercehealthcare.com/providers/hackensack-meridian-englewood-health-call-merger-after-legal-and-regulatory-roadblocks>.

<sup>2</sup> Dissenting Statement of Commissioners Christine S. Wilson & Noah Joshua Phillips regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders at 8 (Oct. 29, 2021).

transaction. *See In re Coca-Cola*, 117 F.T.C. at 917-19; *R.C. Bigelow*, 867 F.2d at 106-07 (abandonment of transaction was “timed to head off an adverse determination on the merits”).

Here, there is simply no evidence that, after the Third Circuit Court of Appeals affirmed the District Court’s preliminary injunction and Respondents terminated their merger agreement and withdrew their HSR filings, HMH and Englewood will pursue the same transaction again—and Complaint Counsel posits none, either. *See, e.g., Fed. Trade Comm’n v. H.J. Heinz Co.*, 164 F. Supp. 2d 659, 660 (D.D.C. 2001) (controversy mooted where merger “cannot reasonably be expected to recur” “after a publicly held company has publicly abandoned merger plans after a unanimous appellate opinion as to which it did not seek further review”); *United States v. Mercy Health Servs.*, 107 F.3d 632, 636 (8th Cir. 1997) (controversy mooted where “genesis of this case is not any allegedly anticompetitive conduct that Mercy and Finley have actually engaged in, but the alleged threat that their proposed merger posed to competition. . . . Mercy and Finley have obviated the threat of illegal conduct by abandoning their proposed merger.”).

Complaint Counsel also argues that the matter is not moot because the Commission has not obtained *all* of the relief sought in the Complaint. In particular, without explaining *why* any further relief “is warranted based on the facts of the case,” *see* Opp. at 3, Complaint Counsel points to a possible requirement that Respondents “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.” Opp. at 3 (quoting Complaint at 12). But Complaint Counsel ignores that this relief is *already available* under the HSR Act, as Respondents observed in their opening papers. Mot. at 5-6. In short, Complaint Counsel is asking the Commission to leave open the possibility of a trial on the merits—over a transaction that has now been terminated—for relief it effectively already has.

**II. An Adjudicative Proceeding Over a Terminated Acquisition Is Not in the Public Interest and Would Amount to a Waste of Resources.**

Complaint Counsel does not deny that any additional relief the Commission may seek can only be obtained after a full adjudicative proceeding. As made clear in the Complaint, additional relief is only available “[s]hould 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. But, as discussed above, there is no longer a “Proposed Transaction.” And requiring the Administrative Law Judge, the parties, and numerous third-parties to proceed through an adjudicative proceeding over an abandoned transaction is a pointless exercise, a waste of resources for all involved, and not in the public interest. *See* Mot. at 4-5. Tellingly, Complaint Counsel itself does not argue that the public interest would be served by a trial on the merits over this abandoned transition.

The Commission need not decide now whether and to what extent there might ever be any circumstances that warrant a departure from its past practice of dismissing administrative complaints—not merely withdrawing them—after parties have abandoned their transactions. *See* Mot. at 4. But the Commission should dismiss the Complaint here—not merely withdraw it—because Complaint Counsel has not articulated in this instance any further relief that would warrant a trial on the merits or any public interest that would be served by such an adjudication.

**CONCLUSION**

For the reasons set forth above and in their initial motion papers, Respondents respectfully submit that the Commission should dismiss the Complaint and deny Complaint Counsel’s Motion to Withdraw the Matter from Adjudication.

Dated: April 20, 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 Opposition was electronically filed using the FTC's administrative e-filing system, causing the document to be served on the following registered participants:

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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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