PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **Hackensack Meridian Health, Inc., a corporation,** **and** **Englewood Healthcare Foundation, a corporation.**	**Docket No. 9399**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

Complaint Counsel opposes Respondents' motion to dismiss. The Commission should instead grant Complaint Counsel's motion to withdraw this matter from adjudication. If the Commission then determines that further relief is unnecessary, the motion to dismiss can be granted at that time. Complaint Counsel states the following in support of its position.

Respondents mistakenly contend that the Commission lacks jurisdiction to proceed because "no justiciable controversy" remains after respondents abandoned their transaction. Mot. at 3-4. The Commission already rejected this argument in *In the Matter of the Coca-Cola Company*, 117 F.T.C. 795 (F.T.C. 1994). There, the parties argued that the Commission's "jurisdiction lapsed when the parties announced their intention to abandon the transaction." *Id.* at 907. But, as the Commission explained, its "subject-matter jurisdiction depends on the nature of the alleged illegal conduct, and not on whether it is ongoing at any particular point during the trial." *Id.* at 909 (quoting *In the Matter of Warner Commc'ns, Inc.*, 105 F.T.C. 342 (1985)). "To hold otherwise would mean that a Commission law enforcement action could be brought to a halt at any time by an abandonment, even a temporary one, of the challenged conduct." *Id.* "Voluntary

cessation of unlawful activity is not a basis for halting a law enforcement action." *Id.* *See also R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir. 1989) (suit to enjoin merger not automatically mooted by abandonment of merger).

Rather, a "case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012). And, as Respondents concede, Mot. at 4-5, the Complaint seeks relief that abandonment does not provide. The notice of contemplated relief states in full:

> 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, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:
>
> 1. If the Proposed Transaction is consummated, divestiture or reconstitution of all associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with the ability to offer such products and services as HMH and Englewood were offering and planning to offer prior to the Proposed Transaction.
>
> *2. A prohibition against any transaction between HMH and Englewood that combines their businesses in the relevant market, except as may be approved by the Commission.*
>
> *3. 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.*
>
> *4. A requirement to file periodic compliance reports with the Commission.*
>
> *5. Any other relief appropriate to correct or remedy the anticompetitive effects of the Proposed Transaction or to restore Englewood as viable, independent competitor in the relevant market.*

Complaint, 11-12 (emphasis added). The Commission can proceed for the purpose of securing this additional relief if circumstances merit it.

Respondents' jurisdictional argument primarily relies on inapposite decisions in *United States v. Sabre Corp.*, No. 20-1767, 2020 WL 4915824, at *1 (3d Cir. July 20, 2020) and *United States v. Mercy Health Servs.*, 107 F.3d 632 (8th Cir. 1997). In *Mercy Health*, the case was rendered moot because "the United States has been given all of the relief *it has sought* by its party opponents' decision to abandon the merger." *Id.* at 637 (emphasis added). Not so here. For example, the parties' decision to abandon the merger does not require them to "for a period of time . . . 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, 12. *Sabre Corp.*, for its part, involved a dispute over application of the *Munsingwear*[1] doctrine, 2020 WL 4915825, at * 1, which requires vacatur of a lower court decision "when 'mootness results from unilateral action of the party who prevailed below.'"[2] *Sabre Corp.*, 2020 WL 4915824, at *1 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994)). *Sabre Corp.* did not involve a dispute over whether the case was moot—both parties agreed that Defendants' decision to abandon their transaction despite prevailing at the District Court mooted the case, and the Antitrust Division never contended that it was seeking relief beyond blocking the transaction.[3]

The fact that the Commission has the power to order additional relief does not answer the question whether more relief is warranted based on the facts of this case. As Respondents note, Mot. at 4 (collecting joint motions to dismiss), and *Sabre Corp.* itself reflects, there are circumstances where an antitrust agency may conclude that no further relief is warranted once the

[1] *United States v. Munsingwear*, 340 U.S. 36 (1950).
[2] Since neither party is seeking vacatur of prior decisions in this matter, *Munsingwear* has no application. But even were *Munsingwear* relevant, it would still be inapplicable since Respondents did not prevail in Federal court.
[3] In *Sabre Corp.*, Defendants abandoned their transaction because the United Kingdom's Competition and Markets Authority blocked the transaction. *See* Press Release, Sabre Corp., Sabre Corporation Issues Statement on its Merger Agreement with Farelogix (May 1, 2021) *available at* https://www.sabre.com/insights/releases/sabre-corporation-issues-statement-on-its-merger-agreement-with-farelogix/.

challenged transaction has been terminated. By granting Complaint Counsel's motion to withdraw the matter from adjudication, the Commission will be able to determine whether further relief or dismissal is the best course.

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission grant the motion to withdraw the matter from adjudication and either deny or defer consideration of Respondents' motion to dismiss, so that the Commission may consult with Complaint Counsel and Respondents when considering whether the facts of this case merit further relief or dismissal.

Dated: April 13, 2022

Respectfully submitted,

s/ Jonathan Lasken

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CERTIFICATE OF SERVICE

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