

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. Commissioners 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 the transaction." Mot. at 34. The Commission already rejected this argument 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." 907. But, as the Commission explained, "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 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 effective 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, 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 associated and necessary assets, in a manner that restores two or more distinct and separate, viable and independent businesses in the relevant market, with and S:

Respondents' jurisdictional argument primarily relies on inapposite decisions. *United States v. Sabre Corp.*, No. 2067, 2020 WL 4915824, at *1 (3d Cir. July 20, 2020); *United States v. Mercy Health Servs.*, 407 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 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* 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 before Sabre Corp.", 2020 WL 4915824, at *1 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall Prop.*, 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 was precluding at the

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 warrant relief or dismissal

Dated: April 13, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2022, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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Federal Trade Commission
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I also certify that I caused the foregoing document to be served via email to:

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