IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,
600 Pennsylvania Ave., N.W.
Washington, DC 20580

Petitioner,

v.

LOUISIANA CHILDREN'S MEDICAL CENTER,
1100 Poydras St.
New Orleans, LA 70163

and

HCA HEALTHCARE, INC.,
One Park Plaza
Nashville, TN 37203

Respondents.

Case No.:

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S MOTION FOR ORDER PURSUANT TO SECTION 7A(g)(2) OF THE CLAYTON ACT AND SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT

This case concerns a transaction consummated in defiance of Respondents' statutory obligation to notify the federal government—then wait—before completing the transaction. Under the Hart-Scott-Rodino amendments to the Clayton Act, 15 U.S.C. § 18a *et seq.* ("HSR Act"), parties to transactions of a certain size must provide the Federal Trade Commission ("FTC") and Department of Justice Antitrust Division ("DOJ") advance notice to afford the opportunity to investigate whether the transaction may violate the antitrust laws. The parties must then wait 30 days to consummate their transaction while the agencies conduct an initial review. If the FTC or DOJ believes the transaction requires closer scrutiny, the agency can

request additional information from the parties, which continues the waiting period until 30 days after the merging parties comply with that request. This waiting period is crucial because it ensures that the FTC can investigate, and if necessary, seek to enjoin the transaction pre-consummation and thereby avoid the difficulty associated with unwinding an acquisition of two already integrated companies.

Here, Respondent Louisiana Children's Medical Center ("LCMC") announced that it had acquired three hospitals from Respondent HCA Healthcare, Inc. ("HCA"), a national for-profit hospital chain, for $150 million. LCMC and HCA did not notify the FTC and the DOJ in advance of closing the transaction as required under the HSR Act. Instead, LCMC's chief executive officer announced that LCMC plans to "integrate operations" with its three newly acquired hospitals. According to public reporting, this integration involves closing one of the three former HCA hospitals and transferring its services to two of LCMC's nearby hospitals. Consummating a transaction and integrating the assets *before* the antitrust agencies have had an opportunity to investigate the deal is precisely what Congress sought to prevent in passing the HSR Act.

This action follows to require LCMC and HCA to comply with the HSR Act by (1) providing the statutorily required notice and information to the FTC, and (2) enjoining Respondent LCMC from further combining the former HCA hospitals with LCMC's hospitals while the FTC conducts its investigation.

I. Statement of Facts

A. Congress has tasked the FTC with investigating potentially illegal transactions

Among other statutes, the FTC enforces the Clayton Act's prohibition on transactions that would "substantially lessen competition or tend to create a monopoly" and the FTC Act's

prohibitions on unfair methods of competition. 15 U.S.C. § 18, as amended; 15 U.S.C. § 45, as amended. To assist the FTC in investigating potentially illegal acquisitions, Congress passed the HSR Act to require certain parties to a transaction to submit information to the FTC before they are allowed to merge.

Allowing the FTC to complete its investigation before the acquisition closes is crucial because, if the transaction is determined to be illegal, then unwinding the acquisition can present more challenges than halting it in the first place. Preserving the opportunity to effectuate any necessary relief requires that the companies be blocked from further integrating their separate assets. In contrast, if the FTC can complete its investigation before closing, it can seek preliminary relief under Section 13(b) of the FTC Act to maintain the status quo pending a full trial on the merits. Taking the HSR Act and the FTC Act together, Congress has provided a path for the FTC to investigate potentially unlawful deals and then sue to block them before the parties are permitted to consummate their transaction.

The HSR Act created a process through which the FTC may request information necessary for its investigation while preventing a transaction from closing. First, the HSR Act requires parties to a transaction over a minimum monetary threshold[1], and where the parties are sufficiently large[2], to notify the FTC (and the DOJ) of their plans to merge and include certain relevant information in this notice. 15 U.S.C. § 18a(a); 16 C.F.R. § 803.1. The HSR Act then prevents the parties from closing their transaction for 30 days after submitting the notice, during which time the FTC can review the submission and decide whether to (1) investigate further or

[1] In 2022, reportable transactions are mergers or acquisitions that exceed $101 million in voting securities or assets. This threshold applies to the transaction at issue here.
[2] In 2022, the size of person test required the parties to file notice when one party had more than $202 million in annual net sales or total assets and the other party had more than $20.2 million in annual net sales or total assets.

(2) allow the transaction to close without taking further action. The statute refers to this 30-day window as the "waiting period." 5 U.S.C. § 18a(b).

The HSR Act exempts certain types of transactions from the premerger notification requirements and allows the FTC to exempt additional transactions or types of parties to a transaction from the HSR premerger notification requirements. 15 U.S.C. § 18a(c). The FTC accordingly promulgated rules exempting 29 additional categories from the premerger notification filing requirements. 16 C.F.R. § 802. The HSR Act and the FTC rules do not include any exemption for transactions that are approved by state or local governments. Similarly, the HSR Act and the FTC rules do not exempt parties from filing based on their belief that their transaction does not violate the antitrust laws.

If a nonexempted party refuses to file the required notice or comply with the waiting period, then Section 7A(g)(2) of the HSR Act allows the FTC to seek judicial intervention to direct the merging party to comply. 15 U.S.C. § 18a(g)(2). In response to such an action, the district court "may order compliance." However, the grant of the basic relief contemplated under Section 7A(g)(2)—extension of the waiting period—is mandatory: the court "shall extend the waiting period specified . . . until there has been substantial compliance." Finally, the court "may grant such other equitable relief as the court in its discretion determines necessary or appropriate."

B. The parties and the transaction

LCMC operates a network of six hospitals in southern Louisiana: Children's Hospital, East Jefferson General Hospital, New Orleans East Hospital, Touro, University Medical Center New Orleans, and West Jefferson Medical Center. Petrizzi Decl. ¶ 5, Ex. 2.According to a report

from the investigative news service ProPublica, in 2021 LCMC made over $2.2 billion in revenues and had over $3.7 billion in total assets. Petrizzi Decl. ¶ 12, Ex. 3.

HCA is a for-profit corporation that operates 182 hospitals nationwide, with revenues totaling $60.2 billion in 2022. Petrizzi Decl. ¶ 12, Ex. 4. Until selling them to LCMC earlier this year, HCA operated three hospitals in the greater New Orleans area: Tulane Medical Center, Tulane Lakeside, and Lakeview Regional Medical Center. Petrizzi Decl. ¶ 1. Following the sale of these three hospitals to LCMC, HCA no longer operates any hospitals in the greater New Orleans area.

On or about January 3, 2023, LCMC announced that it acquired HCA's stake in Tulane Medical Center, Tulane Lakeside, and Lakeview Regional Medical Center. Petrizzi Decl. ¶ 13. LCMC does not plan to maintain services at all three hospitals. Instead, LCMC will transition "the majority of services" from Tulane Medical Center over to LCMC's East Jefferson General Hospital and University Medical Center New Orleans over the next two years. Petrizzi Decl. ¶ 14, Ex. 5. In a press release on January 3, 2023, LCMC's chief executive officer, Gregory Feirn, emphasized this plan to "integrate our operations." Petrizzi Decl. ¶ 14, Ex. 5. Based on these public reports, it appears likely that LCMC will transfer the services currently available at Tulane Medical Center and continue to combine its premerger assets with the three former HCA hospitals.

II. Argument

A. The Legal Standard for Enforcement

The HSR Act provides a straightforward process to allow the FTC and DOJ to investigate whether a reportable transaction violates the antitrust laws. If the transaction meets the relevant financial thresholds and does not fall within any exception, the parties to the transaction must (1)

notify the FTC and DOJ that they plan to consummate the transaction and then (2) wait 30 days before consummating the transaction. If the FTC or DOJ do not take further action, the parties may merge once the 30-day waiting period expires. Put simply, submitting a notice of a pending transaction provides the FTC the opportunity to begin investigating a potentially illegal transaction before it is consummated.

HCA's sale of the hospitals to LCMC meets the HSR Act's financial threshold requirements and does not fit within any exception. Based on public reporting, the acquisition price was $150 million, which exceeds the minimum transaction threshold by $49 million. While the parties to the transaction have not provided additional information about the structure of the deal, it appears that HCA and LCMC meet the size of person threshold as well. HCA had over $60 billion in revenues in 2022, meaning that LCMC only needs to have more than $20.2 million in net sales or assets. Petrizzi Decl. ¶ 12, Ex. 4. According to a 2021 IRS filing published by ProPublica, LCMC had over $2.2 billion in revenues. Petrizzi Decl. ¶ 12, Ex. 3. Similarly, the transaction does not appear to meet any of the statutory or rule-based exemptions to the HSR Act. In conferences before the filing of this application, neither LCMC or HCA contended that the transaction was not reportable because it fell within a statutory or rule-based exemption or that it did not meet the relevant financial thresholds.

Although LCMC and HCA do not dispute that the transaction meets the HSR Act's filing thresholds, LCMC and HCA failed to notify the FTC before consummating the transaction. Instead, Respondents sought only state approval for their transaction and consummated their deal once they received approval from the Louisiana Attorney General. After the FTC discovered the failure to file, FTC staff repeatedly warned LCMC and HCA that they had violated the HSR Act and requested that LCMC hold the assets separate pending the FTC's investigation. LCMC and

HCA, however, maintained that their state regulatory approval absolved them of the requirement to file and LCMC continued to combine the assets—stymying the FTC's investigation and complicating its ability to obtain effective relief. This presents exactly the circumstance that the HSR Act's premerger notification requirements are intended to prevent: the combination of assets to the point that the FTC would face the "especially daunting" task of unwinding the transaction if it determined the transaction violated the law. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 87 (D.D.C. 2015).

B. The state action doctrine does not excuse LCMC and HCA from filing under the HSR Act

Respondents LCMC and HCA have argued to the Commission that they do not need to comply with the HSR Act because the Louisiana Attorney General approved the transaction pursuant to state law—a reference to the "state action" defense to federal antitrust liability. In a series of cases beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), the Supreme Court held, addressing the Sherman Act, that "'state action'" lies "outside the reach of the antitrust laws." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (citations omitted); *see FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). The state-action doctrine thus reflects the Supreme Court's interpretation of the federal antitrust laws' substantive reach. *See Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc). Conduct that is properly attributable to a state is not prohibited by the federal antitrust laws.

Respondents have argued to FTC staff that the state action defense prevents the FTC from investigating under the HSR Act whether their transaction violates the antitrust laws. But this misstates the scope of the state action defense. It is not akin to Eleventh Amendment immunity or qualified immunity, which immunize a defendant from suit. *S.C. State Bd. of*

Dentistry v. F.T.C., 455 F.3d 436, 446 (4th Cir. 2006) (holding that the state action "exemption critically differs from both qualified and sovereign immunity."). Instead, the state action defense "is no more a protection from litigation itself than is any other ordinary defense, affirmative or otherwise, and constitutionally grounded or not." *SmileDirectClub LLC v. Battle*, 4 F.4th 1274, 1281 (11th Cir. 2021) (cleaned up) (citing cases). While the HSR Act establishes a specific process for merger investigations, it is no different from other investigations that may begin with the issuance of a subpoena or other forms of compulsory process. Because the state action defense does not immunize a merging party from being investigated, Respondents cannot use it to shield themselves from filing under the HSR Act.

Further, any request for the Court to decide the merits of their state action defense would be premature. At this point, the FTC is investigating (albeit without any information from Respondents) whether the transaction raises legal concern, including whether the state action defense may apply. At this stage of the inquiry, the "FTC may investigate either to develop the existence of a violation or to assure itself that none exists." *FTC v. Texaco, Inc.*, 555 F.2d 862, 875 (D.C. Cir. 1977) (citation omitted); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."). For this reason, it is improper to "contest substantive issues in an enforcement proceeding, when the agency lacks the information to establish its case, [because] administrative investigations would be foreclosed or at least substantially delayed." *Texaco*, 555 F.2d at 879.

D. Equitable relief is appropriate under Section 7A(g)(2) of the Clayton Act and Section 13(b) of the FTC Act.

Confronted by a party's failure to comply with the HSR Act, the FTC may rely on two sources of statutory authority to seek judicial intervention to enjoin further integration of the merging companies and permit the FTC to complete its premerger review. Section 7A(g)(2) of the Clayton Act permits courts to order compliance with the notice requirements, directs courts to extend the HSR waiting period until the party submits the requisite notice, and allows the court to award additional equitable relief as it deems necessary or appropriate. 15 U.S.C. § 18a(g)(2). For the reasons stated above, LCMC and HCA have failed to comply with the HSR Act, and the Commission is entitled to relief under this section.

Alternatively, Section 13(b) of the FTC Act provides that the court may grant a permanent injunction (*i.e.,* an injunction on the merits) upon a showing "that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission." Here, too, the Commission is entitled to relief. The legal issues before the Court in this action are straightforward, and the Commission has shown here that Respondents failed to meet their obligations under the HSR Act and the implementing regulations.

The equities also balance in favor of the Commission.[3] Courts have long recognized a strong public interest in effective antitrust enforcement. *FTC v. University Health, Inc.*, 938 F.2d 1206, 1224-25 (11th Cir. 1991); *FTC* v. *Exxon Corp.,* 636 F.2d 1336, 1344-45 (D.C. Cir. 1980). This public interest is particularly important in premerger reviews because of the demonstrated

[3] Equitable considerations are, of course, relevant to the grant of any temporary relief, and are also relevant to the extent that the Court bases any relief granted on Section 7A(g)(2)(C), regarding the "grant [of] such other equitable relief as the court in its discretion determines necessary or appropriate." However, the grant of the basic relief contemplated by Section 7A(g)(2) - extension of the waiting period - is *mandatory* under Section 7A(g)(2)(B).

failure of post-merger review to protect the public from harmful effects of illegal transactions. *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 217 (D.D.C. 2018) ("Divestitures may not succeed at restoring competition to the post-merger market."); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 87 (D.D.C. 2015) (same). In contrast, Respondents point to no countervailing public interest that would counsel against filing the requisite information with the Commission and waiting the limited period while the FTC conducts its review. In general, private equities cannot overcome the strong public interest served by the Commission. *University Health*, 938 F.2d at 1224-25; *FTC v. Weyerhauser,* 665 F.2d 1072, 1083 (D.C. Cir. 1981) ("Private equities do not outweigh effective enforcement of the antitrust laws."); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1346 (4th Cir. 1976).

Under both Section 13(b) of the FTC Act and Section 7A(g)(2) of the HSR Act, the Court may award additional equitable relief as appropriate. In addition to seeking an injunction to direct the parties to comply with the HSR Act and stop combining their assets during the investigation and any potential litigation, the FTC also seeks an order requiring LCMC to provide prior notice to the FTC before acquiring any hospital or other medical facility, either directly or indirectly, in the State of Louisiana for the duration of the hold separate order. This equitable relief will help to ensure that the parties cannot avoid the HSR Act's requirements and will help the Commission analyze competition problems that could be exacerbated as a result of the Acquisition of the Acquired Hospitals with other hospital or other medical facility acquisitions during the limited hold separate period.

III. Conclusion

For the reasons stated above, the Commission respectfully requests that the Court grant,

prior to 10:59 p.m. EST on April 21, 2023, Petitioner's request for a temporary restraining order against LCMC preventing it from further combining the former HCA hospitals with LCMC's hospitals while the Court decides the merits of this application.

The Commission further requests that the Court order Respondents to comply with filing requirements under the HSR Act and any applicable waiting period by enjoining LCMC from further combining the former HCA hospitals with LCMC's hospitals until (1) 30 days after filing the required notice, (2) or in the event that the FTC requires the submission of additional information pursuant to 15 U.S.C. § 18a(e)(1), 30 days after Respondents comply with that request, or (3) in the event that the FTC sues to enjoin this transaction because it is illegal, until the conclusion of that litigation. Finally, Petitioner requests that the Court order LCMC to provide the FTC notice before acquiring any hospital or other medical facility, either directly or indirectly, in the State of Louisiana for the duration of the hold separate order