IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

LOUISIANA CHILDREN'S MEDICAL CENTER, d/b/a LCMC HEALTH, **Plaintiff,** **v.** **ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,** **Defendants.**	**CASE NO. 2:23-cv-01305-LMA-MBN** **c/w 23-cv-1311** **c/w 23-cv-1890** **JUDGE LANCE M. AFRICK SECTION I** **MAGISTRATE JUDGE** **MICHAEL B. NORTH** **DIVISION 5** **REF CASE NO. 2:23-cv-01890**

FEDERAL TRADE COMMISSION'S REPLY TO INTERVENOR STATE OF LOUISIANA'S OPPOSITION TO FEDERAL TRADE COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Respondent LCMC Health ("LCMC") and Respondent HCA Healthcare Inc. ("HCA") (together, the "Hospitals") failed to comply with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") before consummating their transaction on January 1, 2023. Petitioner Federal Trade Commission ("FTC") filed a Motion for Summary Judgment, Dkt. 71-1 ("FTC Mot."), to remedy this failure. Intervenor Louisiana Attorney General's ("Louisiana AG") Opposition to the FTC's motion confirms that there is no genuine dispute as to any material fact and that the FTC is entitled to summary judgment as a matter of law. Dkt. 79 ("LA AG Opp.").[1]

There is no dispute that the Hospitals did not satisfy the notification and waiting period requirements under the HSR Act. Although the HSR Act spells out the conditions that trigger these requirements, the Louisiana AG remains steadfast in its unwillingness to engage with the

[1] The Hospitals separately filed an opposition to the FTC's Motion for Summary Judgment. Dkt. 78 ("Hospital Opp."). The FTC's Reply to the Hospitals' Opposition to its Motion for Summary ("FTC Reply to Hospitals") is hereby incorporated by reference.

text of the HSR Act. The Louisiana AG's refusal is unsurprising. The plain language leaves no room for any genuine dispute on whether the Hospitals were subject to the notification and waiting period requirements of the HSR Act with which they indisputably failed to comply.

As the FTC explained in its opening brief, the HSR Act's notification and waiting period requirements plainly apply to "persons" who are parties to a transaction that meet certain financial thresholds unless they satisfy an exemption under the statute. There is no dispute that the Hospitals' transaction met the HSR Act financial thresholds. And the Louisiana AG does not address—much less dispute—that each Hospital is a private corporation and thus a "person" under the HSR Act. The clear text of the HSR Act thus resolves the issue, unless the Louisiana AG meets its burden to establish that the Hospitals were subject to an exemption. *See* FTC Mot. at 7 (citing *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)). The Louisiana AG, however, does not assert that any statutory or regulatory exemption applies. Ignoring the text of the statute altogether, the Louisiana AG relies on ad hoc citations to legislative history and cursory references to various canons of statutory interpretation to support its position. But the legislative history on which the Louisiana AG relies actually supports the FTC's plain-language explanation of the statute. And the Louisiana AG fails to show how any of the canons it references squares with a straightforward reading of text of the HSR Act.

The Louisiana AG's remaining arguments are unsubstantiated, unpersuasive, or, for the most part, irrelevant. In what can only be construed as an attempt to inject policy disagreements into a case of statutory interpretation, the Louisiana AG devotes several pages of its opposition to a discussion of recent FTC policy decisions that have no relevance whatsoever to this case. *See* LA AG Opp. at 8-12. Relying primarily on materials that do not even discuss the HSR Act or exemptions to its notification and waiting period requirements, the Louisiana AG cannot

manufacture a change in the FTC's policy on the reportability of so-called "COPA transaction[s,]" LA AG Opp. at 7, because there was none. At bottom, the Louisiana AG's misunderstanding of the FTC's enforcement history illustrates the important difference between reportability under the HSR Act and the FTC's enforcement of Section 7 of the Clayton Act: it is precisely the ability to *be notified of and investigate* a merger and determine whether the state action doctrine has been satisfied that guides the FTC's subsequent law enforcement decisions. The FTC's current action against the Hospitals seeks to protect that critical first notification and investigatory step.

The FTC respectfully requests that the Court grant its Motion for Summary Judgment and remedy the Hospitals' violation of the HSR Act by granting the FTC's requested relief.

ARGUMENT

I. The Louisiana AG does not and cannot identify an exemption for state action under the HSR Act.

Each of the Hospitals is a "person" as defined in the HSR Act and thus subject to its notification and waiting period requirements; moreover, no exemption to those requirements applies here. *See* FTC Mot. at 7-12. Rather than address the HSR Act's text, the Louisiana AG takes a scattershot approach: pointing to selective excerpts of legislative history and principles of statutory interpretation that fail to support its interpretation of the HSR Act, *see* LA AG Opp. at 3-5; citing a non-existent FTC policy concerning the application of the HSR Act to "a COPA transaction[,]" *id.* at 7; and relying on the word "scrutiny" taken out of context from inapplicable case law, *see id.* at 14. Although this Court need not consider the Louisiana AG's arguments given the textual clarity of the HSR Act, *see* FTC Mot. at 12 (citing *In re Greenway*, 71 F.3d 1177, 1180 (5th Cir. 1996)), the Louisiana AG's Opposition confirms there is no genuine dispute

that the Hospitals were subject to—and violated—the notification and waiting period requirements of the HSR Act.

A. The Louisiana AG's opposition ignores the text of the HSR Act.

There is no dispute that the Hospitals' transaction met the financial thresholds triggering the HSR Act's notification and waiting period requirements. *See* Louisiana AG's Response to FTC's Statement of Undisputed Facts, Dkt. 79-1 ("LA AG Response to SUF") at ¶ 8. There is also no dispute that the Hospitals did not file the required notifications. *Id.* at ¶ 9. The Louisiana AG likewise does not dispute that each Hospital is a "person" under the HSR Act. *See* FTC Mot. at 9, n.3. Finally, the Louisiana AG does not identify an applicable exemption, and therefore fails to meet its burden to establish that the Hospitals were exempt from these requirements based on the text of the statute. *See* FTC Mot. at 7-12 (discussing why neither Hospital satisfied the exemptions under 15 U.S.C §§ 18a(c)(4) and (5)).

Instead of addressing the plain language of the HSR Act, the Louisiana AG relies on general principles that do not apply here. The Louisiana AG suggests that the FTC must show that the HSR Act includes an "affirmative expression" of "Congressional intent to displace a state's ability to regulate its own commerce[,]" LA AG Opp. at 5, but that principle is inapposite. The HSR Act does not displace the ability of Louisiana—or any other state—to regulate its own commerce. *See* FTC Mot. at 16-17 (explaining how the goals of the state action doctrine are not implicated by the HSR Act). The Louisiana AG has not identified any conflict between federal and state law, nor any ambiguity in the statute, because there is none. *See* FTC Reply to Hospitals at 3-7 (discussing clear statement rule).

The "other basic principles of statutory construction," LA AG Opp. at 4, on which the Louisiana AG relies likewise do not support its argument. The Louisiana AG fails to explain how Congress's "presumed ... knowledge[]" about the state action doctrine when it passed the HSR

Act supports its interpretation of the statute. *Id.* (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 176 (1988)). Congress *did* contemplate whether a state would be subject to the HSR Act, as evidenced by the HSR Act itself. *See* FTC Mot. at 8 (discussing 15 U.S.C §18a(c)(4), which exempts "transfers to or from a Federal agency or a State or political subdivision thereof"). If Congress had intended to include an exemption from the notification and waiting period requirements under the HSR Act for private parties that may raise a state action defense to a violation of Section 7 of the Clayton Act, it would have done so. *See* FTC Mot. at 13 (quoting *Parada v. Garland*, 48 F.4th 374, 377 (5th Cir. 2022)). To evaluate Congress's intent in light of the state action doctrine, the Court need look no further than the HSR Act itself; it is crystal clear. *See* FTC Mot. at 15.

B. The Louisiana AG's citations to the HSR Act's legislative history do not establish an implied exemption to the HSR Act for claimed state action.

The Louisiana AG misconstrues the excerpts of the HSR Act's legislative history on which it relies. The statement that "[m]any transactions that are literally subject to the reporting requirements are not within the intent of Section 7,"[2] LA AG Opp. at 3 (quoting S. Rep. 94-803, pt. 1, at 68), makes its plain that Congress *understood* that the HSR Act would require reporting of a broader set of transactions than those that may be subject to a substantive challenge under the Clayton Act. *See* FTC Opp. to LA AG at 17 ("There are mergers subject to the HSR Act that do not violate the antitrust laws, and there are mergers that are not subject to the HSR Act that violate the antitrust laws."). Further, as the Louisiana AG acknowledges, the legislative history reflects that Congress provided the FTC with rulemaking authority to exempt "classes of

[2] In its Opposition, the Louisiana AG adds the words "of the HSR Act" in brackets to the end of the quotation, LA AG Opp. at 3, but Section 7 would have referred to then-existing Section 7 of the Clayton Act, since the HSR Act created a separate Section 7A of the Clayton Act. *Compare* 15 U.S.C. § 18 *with* 15 U.S.C. §18a.

persons," "businesses," or "transactions." LA AG Opp. at 3 (citing S. Rep. No. 94-803, pt. 1, at 67-68). The FTC has done so; the HSR Act's implementing regulations contain more than two dozen additional exemptions. 16 C.F.R. §§ 802.1-80. Acquisitions by private parties that claim a "state action" defense is not one of them. Accordingly, the Louisiana AG's claims that the legislative history "contains no reference suggesting that rulemaking could be used to regulate State action" and that the FTC would need to strike a "proper balance," LA AG Opp. at 3, are not relevant here. This is an action brought under the HSR Act to enforce its requirements, not a policy debate about what exemptions the Louisiana AG believes the FTC should promulgate.[3]

C. The Louisiana AG's argument that the FTC's action constitutes an expansion of the FTC's authority is immaterial and wrong.

The Louisiana AG's claim that the FTC has somehow changed its policy about the HSR Act notification and waiting period requirements for COPA-approved mergers is both factually wrong and irrelevant. *See* LA AG Opp. at 5-12. The Louisiana AG does not cite any evidence of the FTC policy it alleges or its curious claim that the FTC has been "aware" of a "prevailing belief" about such a policy among practitioners. LA AG Opp. at 5. This is unsurprising because the FTC has no such awareness of any belief about this non-existent policy. Simply put, no such policy has ever existed, nor has there been a change in FTC policy. *See* FTC Opp. to LA AG at 15-18.

At best, the Louisiana AG's discussion of this supposed FTC policy confuses the reportability of mergers under the HSR Act with the FTC's enforcement of Section 7 of the Clayton Act. The Louisiana AG claims—without citation—that the "widespread belief" that state

[3] The Louisiana AG argues the HSR Act's legislative history shows that FTC-promulgated rules would require "notice and submission of views" under the Administrative Procedure Act ("APA"), *see* LA AG Opp. at 3, but the Louisiana AG does not claim that the FTC failed to comply with the APA, nor has the Louisiana AG demonstrated any connection between this action, brought under 15 U.S.C. § 18a(g)(2), and the APA.

regulation would "obviate" the need to file under the HSR Act has arisen from a supposed policy of avoiding "enforcement actions in circumstances potentially implicating the state action doctrine." LA AG Opp. at 8. Nothing could be further from the truth. For decades, the FTC has pursued enforcement against entities incorrectly claiming state action protection, *see, e.g.*, *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494 (2013); *Ky. Household Goods Carriers Ass'n v. FTC*, 2006 WL 2422843 (6th Cir. Aug. 22, 2006); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992), including specifically for hospital mergers, *see FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013).

As it did previously, *see* FTC Opp. to LA AG at 16 (addressing Donahue Decl., Dkt. 74-4, Exs. 1-13), the Louisiana AG cites mostly materials that do not even discuss the HSR Act, LA AG Opp. at 8-12 (citing Donahue Decl., Dkt. 79-2, Exs. A-H). The two exhibits on which the Louisiana AG relies that actually mention the HSR Act do not support the existence of a policy that the HSR Act does not apply to mergers that have received state-level regulatory approval. The Louisiana AG apparently misunderstands the letter that the FTC sent to former Senator Orrin Hatch in 1993. *See* LA AG Opp. at 8 (discussing Donahue Decl., Dkt. 79-2, Ex. A). The quoted portion of the letter makes clear that reportability under the HSR Act and liability under Section 7 of the Clayton Act are distinct analyses, and the letter also explains the unremarkable—and, for this case, irrelevant—point that the existence of state regulation may impact the FTC's analysis of the anticompetitive effects of a hospital merger. *See* LA AG Opp. at 8. With a similar misunderstanding of context, the Louisiana AG cites a statement from former Commissioners Noah Phillips and Christine Wilson about a policy announcement on early terminations of the HSR Act waiting period that had no bearing on whether any specific merger would be reportable under the HSR Act. *See* LA AG Opp. at 9 (discussing Donahue Decl., Dkt.

79-2, Ex. C). The policy debate about "early termination" does not have even tangential relevance to the FTC's current action against the Hospitals. Likewise, the citation to an FTC brief in *Phoebe Putney*, *see* LA AG Opp. at 7-8, illustrates the lack of a nexus between the HSR Act exemptions and applicability of a state action defense to Section 7 of the Clayton Act, *see* FTC Opp. to LA AG at 16-17. In short, none of the cited materials reflects or otherwise suggests an FTC policy on exemptions to, or enforcement of, the HSR Act.

D. Even where properly invoked, the state action doctrine does not provide immunity from all scrutiny.

The Louisiana AG selectively pulls the words "antitrust scrutiny" out of context from case law discussing the state action defense to apparently argue that the Hospitals were (and are) exempt from any federal law concerning antitrust, including investigation altogether. *See* LA AG Opp. at 14 (listing citations to the word "scrutiny"). As previously discussed, the case law does not support such a sweeping interpretation. *See* FTC Opp. to LA AG at 8-11; *see also Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm.*, 197 F.3d 560, 563 (1st Cir. 1999) (While a "state may itself regulate in an 'anticompetitive' fashion," it may not "effectively exempt *private* parties from obeying the antitrust laws.") (emphasis in original). Indeed, in two of the cases that the Louisiana AG cites in support of this proposition, the Supreme Court did, in fact, scrutinize the conduct that allegedly violated a federal antitrust law and concluded that defendants were not entitled to a state action defense, which leaves no doubt that "scrutiny"—as the Louisiana AG uses the term—was appropriate. *See* FTC Opp. to LA AG at 8-10 (discussing *Phoebe Putney*, 568 U.S. at 225 and *Patrick v. Burget*, 486 U.S. 94, 98 (1988)).[4] By emphasizing

[4] Moreover, the Hospitals themselves have conceded that the state action doctrine does not exempt them from federal antitrust investigation altogether. *See* Hospital Opp. at 20 ("As the Hospitals have always agreed, the state-action doctrine does not render parties immune from administrative subpoenas.").

words out of context, the Louisiana AG fails to heed the Supreme Court's caution to avoid the "tyranny of labels[,]" particularly while analyzing the state action doctrine. *SmileDirectClub v. Battle*, 4 F.4th 1274, 1280-81 (11th Cir. 2021) (en banc) (discussing the Supreme Court's varied language concerning the state action doctrine, noting that "the 'immunity' phrasing is not conclusive," and holding that the state action doctrine is a defense instead of an exemption or immunity from trial) (internal citation and omitted).

E. The Court should ignore the Louisiana AG's attempts to inject irrelevant policy disagreements into this case.

The Louisiana AG infuses its Opposition with policy issues that have no relevance to the FTC's action against the Hospitals. Specifically, the Louisiana AG points to the administration change in 2021 and a series of policy statements from Republican commissioners in an apparent attempt to frame the FTC's action against the Hospitals as politically motivated. *See* LA AG Opp. at 9-12. Even a cursory review of the cited statements, however, shows their complete irrelevance to the current action, the Hospitals' transaction, or whether that transaction was reportable under the HSR Act.

II. The Louisiana AG's arguments concerning the FTC's proposed relief lack merit.

The FTC has shown that the Hospitals violated the notification and waiting period requirements of the HSR Act and, as such, that this Court should grant the FTC's request for relief. *See* FTC Reply to Hospitals at 8-10 (discussing how the FTC's requested remedy comports with the relief available under 15 U.S.C. §§ 18a(g)(2)(A) and (C)). The HSR Act itself sanctions the relief that the FTC seeks, and the Louisiana AG does not even attempt to explain how this relief fails to comport with the statute. Nor could it, as the requested relief simply seeks to effectuate the notification and waiting period requirements that the Hospitals ignored. *See id.* Rather, the Louisiana AG continues to ignore the text of the HSR Act, by pointing to case law

that discusses an incorrect legal standard. LA AG Opp. at 15-16.[5] This Court should not endorse the Louisiana AG's last-ditch effort to excuse the Hospitals from compliance with a Congressional mandate.

CONCLUSION

The FTC respectfully requests that the Court grant the FTC's Motion for the Summary Judgment, Dkt. 71, and enter the FTC's Proposed Orders, Dkts. 71-4, 71-5.

Dated: August 23, 2023

Respectfully submitted,

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[5] In any event, the FTC has shown that its requested relief *does* meet the inapplicable four-prong injunction standard, *see* FTC Reply to Hospitals at 10 n.6, and the Louisiana AG cannot explain how any "time, money, and effort" that it, or the Hospitals, "devoted to the COPA process[,]" *see* LA AG Opp. at 16, has any bearing on the evaluation of the relief that the FTC seeks—even under its incorrect legal standard.