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**

REPLY MEMORANDUM IN SUPPORT OF FEDERAL TRADE COMMISSION'S MOTION FOR SUMMARY JUDGMENT

Respondents Louisiana Children's Medical Center ("LCMC") and HCA Healthcare, Inc.'s ("HCA") (together, the "Hospitals") Opposition to the Federal Trade Commission's ("FTC") Motion for Summary Judgment ("Hosp. Opp."), Dkt. 78, confirms they have no legal basis for their refusal to comply with the filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). There is no dispute that the Hospitals' transaction satisfied the financial thresholds for filing under the HSR Act and that the HSR Act applies to private corporations like the Hospitals. And there is no meaningful dispute that the Hospitals fail to qualify for an exemption to the HSR Act. Accordingly, the Court should grant the FTC's Motion for Summary Judgment.

The Hospitals essentially rest their entire argument on a purported "clear statement" rule, relying on cases in which courts addressed statutory ambiguity and conflicts between federal and state law. Not only does no such conflict exist here, but even if there were a conflict, the language of the HSR Act unambiguously applies to the Hospitals' transaction.

The Hospitals put the cart before the horse by asking the Court to find not only that the state action doctrine applies to the HSR Act generally, but also that their transaction satisfies the elements of a state action defense. The Hospitals' position contradicts multiple circuit court decisions making clear that the state action doctrine is not an immunity from investigation or suit, but rather an affirmative defense to liability for anticompetitive conduct (which the FTC does not allege here). FTC Mem. in Supp. of Mot. for Summ. J. ("FTC Mot."), Dkt. 71-1, at 15-17. The Hospitals' position also contradicts multiple circuit court decisions holding that the target of an antitrust investigation cannot preempt that investigation by raising a defense to the underlying conduct. *Id.* at 17-19.

The Hospitals' argument overlooks that by design the HSR Act intentionally operates *more broadly* than Section 7 of the Clayton Act—enabling the FTC and the U.S. Department of Justice ("DOJ") to be notified of *all* transactions that satisfy certain financial thresholds and are not subject to a statutory or regulatory exemption, regardless of whether they are anticompetitive or subject to a defense. It thus fails to differentiate the Hospitals from other entities that believe their transaction would not violate Section 7 of the Clayton Act.

A ruling in favor of the Hospitals would have far-reaching consequences for federal antitrust enforcement. It would encourage private parties to self-characterize their transactions—some of which may be anticompetitive and fail to meet the requirements of the state action doctrine—as "state-approved" mergers, and to consummate their transactions and commingle their assets before the federal government has the opportunity to investigate the transaction. It would then require the FTC or DOJ to rush into court in an effort to pause further integration only once it becomes aware of such mergers, potentially after illegal competitive harm has been suffered. That is precisely the scenario Congress enacted the HSR Act to prevent.

The FTC's Proposed Order to Compel HSR Act Notifications, Dkt. 71-3, and Proposed Order to Maintain Assets, Dkt. 71-4, are narrowly tailored to address the Hospitals' failure to comply with the HSR Act. This Court should grant the FTC's requested relief, which accords with the HSR Act's text and purpose.

ARGUMENT

I. The HSR Act applies to the Hospitals' transaction.

Unable to establish a statutory or regulatory state action exemption to the HSR Act, the Hospitals double down on a proposed "clear statement" rule that does not apply here, distorting Supreme Court precedent along the way.[1] The Hospitals continue to attempt to manufacture ambiguity in interpreting the text of the HSR Act and a purported conflict between the HSR Act and Louisiana's COPA law. But the HSR Act does not interfere with Louisiana's COPA law and the applicability of the HSR Act to the Hospitals' transaction is unambiguous. Accordingly, the "clear statement" rule serves no purpose here, and the Court need not consider it.

A. There is no conflict between the HSR Act and Louisiana's COPA law.

There is no need to apply a "clear statement" rule in this case because the Hospitals have demonstrated no conflict between the application of the federal HSR Act and Louisiana's COPA law. *See Salinas v. United States*, 522 U.S. 52, 59 (1997) (rejecting reliance on "clear statement" principles where the Court was not "confronted [with] a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers"). The Hospitals themselves concede there must be a conflict between federal and state

[1] The Hospitals assert incorrectly, for example, that the Supreme Court has "applied that clear statement rule to the same term, 'persons,' in Section 7 of the Clayton Act[.]" Hosp. Opp. at 9 (citing *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 222-25 (2013)). In fact, nowhere did the Supreme Court in *Phoebe Putney* even mention a "clear statement" rule or evaluate the term "person." 568 U.S. at 222-25.

law before the "clear statement" rule is even implicated. Hosp. Opp. at 9-10 ("federal courts must 'be certain of Congress' intent *before finding that federal law overrides' the 'usual balance of federal and state powers*'") (citations omitted) (emphasis added).

This is illustrated by the cases on which the Hospitals rely, each of which posed unavoidable conflicts between federal and state law that are not present here. In *Parker v. Brown*, the Supreme Court encountered a direct conflict between the Sherman Act and a California law through which state officials regulated sales of agricultural commodities "so as to restrict competition among the growers and maintain prices in the distribution of their commodities"—conduct that would violate the Sherman Act if undertaken purely by private companies. 317 U.S. 341, 346 (1943). Similarly, in *Southern Motor Carriers Rate Conference v. United States*, the Supreme Court considered whether the Sherman Act conflicts with state laws that permit, but do not require, common carriers to engage in collective ratemaking—which would constitute illegal price fixing in violation of the Sherman Act if undertaken absent state regulation and approval. 471 U.S. 48, 59-60 (1985). Likewise, in *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish*, enforcing the Sherman Act would have prevented the agent of a state-owned hospital from entering into exclusive contracts with health plans. 171 F.3d 231, 235 (5th Cir. 1999). The Hospitals' own cases show that a prerequisite for the application of a "clear statement" rule is a conflict between federal and state law that would require a court to look for an indication of how Congress intended to resolve such a conflict.

In contrast, here, the HSR Act does not conflict with the Louisiana COPA statute. Nothing about the requirements of the HSR Act precludes Louisiana's COPA regime, and the HSR Act has no bearing on the legality of the Hospitals' transaction. At most, it pauses the merger so that the federal government may investigate the transaction before integration, exactly

as Congress intended. The Proposed Order to Maintain Assets is designed merely to preserve the status quo during the pendency of the FTC's investigation. Further, any "conflict" the Hospitals may claim now was deliberately manufactured by the Hospitals; they had ample time to comply with the HSR Act before consummating their transaction and they chose not to do so. *See* FTC Opp. to Hospitals' Mot. for Summ. J. ("FTC Opp. to Hosp."), Dkt. 77, at 11-12.

B. The text of the HSR Act is unambiguous.

Regardless of whether the Court should apply a "clear statement" rule, the search for a "clear statement" would begin and end with the first lines of the HSR Act:

> **Except as exempted** pursuant to subsection (c), **no person** shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons . . . **file notification** pursuant to rules under subsection (d)(1) and the **waiting period** described in subsection (b)(1) has **expired**[.] 15 U.S.C. § 18a(a) (emphasis added).

Congress could not have been clearer about what transactions the HSR Act covers. "[W]here the statutory language is plain, 'the sole function of the court is to enforce it according to its terms.'" *Matter of Greenway*, 71 F.3d 1177, 1180 (5th Cir. 1996) (citation omitted).[2]

The Hospitals do not dispute that the HSR Act and regulations define "person" to include private corporations like the Hospitals. *See* Hosp. Opp. at 11. Confronted with the clarity of the HSR Act, the Hospitals maintain the statute does not address whether "state-controlled mergers are exempt." *Id.* at 11-12.[3] While the contours of the definition of the Hospitals' invented phrase "state-controlled merger" remain unclear, the HSR Act plainly covers the Hospitals and their

[2] The Hospitals cite exemptions in Section 7 of the Clayton Act, Hosp. Opp. at 14-15, but fail to address that the HSR Act explicitly applies "[e]xcept as exempted pursuant to subsection (c)." 15 U.S.C. § 18a(a).

[3] The Hospitals imply that the HSR Act's implementing regulations apply to the Clayton Act. *See* Hosp. Opp. at 12 (describing "person" under the Clayton Act and "[t]he regulation"). They do not. *See* 16 C.F.R. § 801.1 (cataloguing definitions "when used in the act"); *id.* § 801.1(m) (defining "the act" as the HSR Act).

transaction. "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas*, 522 U.S. at 60. The text of the HSR Act thus resolves the question.

The Hospitals' plea for a "clear statement" rule wrongly suggests that such a rule is the starting point for analysis. Their own cases show otherwise. *See, e.g.*, *Sackett v. EPA*, 143 S. Ct. 1322, 1336 (2023) ("We start, as we always do, with the text of the [Clean Water Act ("CWA")]."). In *Sackett*, the Supreme Court addressed the "nagging question about the outer reaches of the [CWA]," in particular the meaning of the ambiguous phrase "waters of the United States." *Id.* at 1329. In *Bond v. United States*, the Supreme Court explained that "it is appropriate to refer to basic principles of federalism embodied in the Constitution *to resolve ambiguity* in a federal statute." 572 U.S. 844, 859 (2014) (emphasis added). There is no such ambiguity in the HSR Act and its clear text is sufficient to evaluate whether the Hospitals qualify for any exemptions (which they do not).

Moreover, the Hospitals' argument for applying the state action doctrine to the HSR Act continues to rely on a false comparison with *Parker*. In *Parker*, the Supreme Court found "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 351. In stark contrast, the HSR Act expressly mentions states; it exempts from its reach "transfers to or from a Federal agency or a State or political subdivision thereof." 15 U.S.C. § 18a(c)(4). The Hospitals even admit the HSR Act contains a "clear statement [] that States are *exempt* under the regulation." Hosp. Opp. at 12. The HSR Act does not, however, exempt transactions between private corporations, which the Hospitals indisputably are. *See* Resp. to FTC Statement of Material Facts, Dkt. 78-1, ¶¶ 1, 3.

With no exemption applicable to their transaction, the Hospitals assert that "[m]ergers attributable to a State are 'exempt' from 'the federal antitrust laws.'" Hosp. Opp. at 10. But, as the FTC previously explained, a state action defense—even if valid—does not convert private parties like the Hospitals into a state or political subdivision thereof. FTC Mot. at 9; *see also La. Real Est. Appraisers Bd. v. FTC*, 976 F.3d 597, 604 (5th Cir. 2020) (holding that although a private party was entitled to defend itself under the state action doctrine, it invoked the doctrine only "as a private party," not as a state agency); *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 293 (5th Cir. 2000) ("status as a private defendant [asserting a state action defense] does not implicate these [sovereign immunity] concerns").

C. The Hospitals overread decisions referring to "federal antitrust laws."

The Hospitals' continued argument that because some cases applying the state action doctrine to the Sherman Act and Clayton Act used the generalized phrase "federal antitrust laws," the state action doctrine must therefore also extend to the HSR Act, *see, e.g.*, Hosp. Opp. at 10, is an unsupported logical leap. As previously explained, nowhere in the Hospitals' cited cases is there a rationale for extending the state action doctrine to the HSR Act merely because they use the phrase "federal antitrust laws." FTC Opp. to Hosp. at 13-15 (explaining that the state action doctrine was raised only as a potential defense to challenged anticompetitive conduct in *FTC v. Phoebe Putney Health Sys. Inc.*, 568 U.S. 216 (2013), *Motor Carriers*, and *Hunnicutt v. Tafoya-Lucero*, 2022 WL 832566 (D.N.M Mar. 21, 2022), not the HSR Act). Nor would such an extension make any sense; the text of the HSR Act is completely different, and the purpose of the HSR Act is to ensure notification of large transactions to provide the federal antitrust agencies the opportunity to engage in orderly investigation of antitrust concerns and potential defenses. The HSR Act does not impose or presume antitrust liability.

The Hospitals' argument is particularly inapt given several courts' acknowledgement that state action cases use terms inconsistently and imprecisely. Several courts have observed that courts evaluating the state action doctrine use different language to describe the doctrine ("immunity" and "defense"), even within the same opinion. *See, e.g.*, *SmileDirectClub, LLC v. Battle*, 4 F.4th 1274, 1280 (11th Cir. 2021). This Court should not accept the Hospitals' invitation to expand the state action doctrine to the HSR Act based solely on the phrase "federal antitrust laws," particularly given the Supreme Court's admonition that the state action defense is "disfavored." *Phoebe Putney*, 568 U.S. at 225.

In any event, simply labeling the HSR Act an "antitrust law" does not answer the question of whether the state action doctrine could exempt the Hospitals from their requirements under the HSR Act. The doctrine protects specific acts of anticompetitive conduct from antitrust liability where the requirements of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), are met; it is not an exemption from antitrust laws generally. *See* FTC Opp. to Hosp. at 13-15. The Hospitals' failure to make an HSR Act filing, while a violation of the HSR Act, is not itself anticompetitive, meaning there is no anticompetitive conduct to which the state action doctrine could apply.

II. This Court should grant relief consistent with the HSR Act.

In opposing the FTC's requested relief, the Hospitals rely on the wrong legal standard for granting relief under the HSR Act. Rather than accepting the Hospitals' unprecedented suggestion to apply a four-pronged test, this Court should grant relief designed to fulfill the text and function of the HSR Act.

After the government proves a violation of a federal statute, the Court should grant statutorily sanctioned relief that effectuates the functioning of the relevant act—here, the HSR

Act—using the statutory text as its guide. *See* FTC Opp. to Hosp. at 22-25.[4] When a statute's grant of relief is "'open-ended' on its face, what relief is 'appropriate' is 'inherently context dependent.'" *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (quoting *Sossamon v. Texas*, 563 U.S. 277, 286 (2011)); *see also Mack v. Yost*, 63 F.4th 211, 222 (3d Cir. 2023) (same); *Doster v. Kendall*, 54 F.4th 398, 427 (6th Cir. 2022) (same); *Sanchez v. AG United States*, 997 F.3d 113, 120-21 (3d Cir. 2021) (same); *Romero v. Barr*, 937 F.3d 282, 292-94 (4th Cir. 2019) (same).

The FTC's request for relief targets the two central functions of the HSR Act. First, the HSR Act seeks to provide the federal government with specific types of information in order to investigate mergers for potential antitrust violations. *See* FTC Mot. at 2-4. Because the Hospitals failed to provide any information required by HSR notification forms *and* consummated the transaction, this case represents the clearest and strongest scenario for the Court to exercise its discretion and compel compliance with the HSR Act as quickly as possible.

Second, the FTC's request for an Order to Maintain Assets is "necessary or appropriate"[5] under 15 U.S.C. §18a(g)(2)(C) to prevent the Hospitals from irreversibly commingling their assets during the HSR review. Further, the FTC's proposed order is limited in scope and narrowly tailored, *see* FTC Mot. at 20; FTC Opp. to Hosp. at 24, and far short of the broader forms of equitable relief available (e.g., rescission or a broad "hold separate" order preventing all integration).

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[4] Contrary to the Hospitals' position, Hosp. Opp. at 21, the FTC's Motion for Summary Judgment demonstrates that there is no state action exemption to the HSR Act and that the Act supplies the Court with the necessary authority and standards to enter the injunction sought by the FTC. Whether the Hospitals can satisfy the state action doctrine's requirements is irrelevant and premature.

[5] *See* FTC Opp. to Hosp. at 22-23 (discussing cases implementing "appropriate" relief in federal enforcement actions).

Tellingly, neither of the Hospitals' cited cases involving a federal agency uses their purported four-pronged standard.[6] In *FTC v. Lake*, 181 F. Supp. 3d 692, 701-04 (C.D. Cal. 2016), the court granted the FTC an injunction permanently barring the violator from selling mortgage-related products without any discussion of balancing harms or public equities. And in *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009), the court assessed only the two factors in Section 13(b) of the FTC Act—likelihood of success on the merits and equities—in granting the FTC's requested injunction. *See* 15 U.S.C. § 53(b).

CONCLUSION

The FTC respectfully requests that the Court grant the FTC's Motion for Summary Judgment, Dkt. 71, and enter the proposed orders accompanying the Motion.

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Respectfully submitted,

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[6] The FTC's request for a narrowly tailored remedy while it reviews the Hospitals' HSR Act filings would meet even the Hospitals' proposed four-pronged injunction standard because: (1) the FTC has proven an HSR Act violation; (2) the HSR Act establishes irreparable harm from consummating transactions before FTC review; (3) the harms from disentangling a problematic transaction outweigh the effects of subjecting even a non-problematic transaction to a brief waiting period; and (4) the public interest is served by ensuring an orderly investigation and resolution of antitrust concerns before irreparable integration.