UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

FEDERAL TRADE COMMISSION Plaintiff, v. LOUISIANA CHILDREN'S MEDICAL CENTER and HCA HEALTHCARE, INC. Defendants.	CIVIL ACTION NO. 23-1305 c/w 23-311 c/w 23-1890 REF: 23-1890 SECTION I

INTERVENOR, THE STATE OF LOUISIANA'S REPLY MEMORANDUM IN SUPPORT OF INTERVENOR'S MOTION FOR JUDGMENT ON THE PLEADINGS OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

In its Opposition ("Opposition") to Intervenor State of Louisiana's ("State") Motion for Judgment on the Pleadings or, alternatively, Motion for Summary Judgment ("Motion"), the Federal Trade Commission ("FTC") attempts to sidestep the decades of Supreme Court precedent, and in doing so, definitively establishes that injunctive relief is not warranted in this case. For the reasons set forth below, the State respectfully requests dismissal of the FTC's enforcement action.

A. The FTC Ignores the Overall Statutory Scheme of the Federal Antitrust Laws

The FTC's Opposition initially criticizes the State's Motion for not confining its arguments solely to the text of the HSR Act. [Doc. 76] at p. 5. This argument ignores entirely the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *See FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (citation omitted). Thus, when interpreting statutory language, a court is required to construe provisions in the context of "a symmetrical and

coherent regulatory scheme," and to "fit, if possible, all parts into an harmonious whole." *Id.,* quoting *FTC v. Mandel Brothers, Inc.,* 359 U.S. 385, 389 (1959). It is therefore inappropriate to construe a single statute, or even an act of Congress, in isolation as the FTC's Opposition suggests, since "the meaning of one statute may be affected by other Acts." *Id.* (citations omitted).

The particular nature of the federal antitrust laws provides added justification for rejecting the FTC's invitation for the Court to limit its analysis to the text of 15 U.S.C. § 18a. As other courts have found, there can be no reasonable dispute that the HSR Act is one of the "antitrust laws" referenced throughout Title 15 of the United States Code. *See United States v. Blavatnik,* 168 F.Supp.3d 36, 41 (2016). While the HSR Act was enacted after the original Clayton Act of 1914, the premerger notification and waiting period provisions were inserted into the Clayton Act by amendment. *Id.,* citing Pub. L. No. 94-435, § 201. The Clayton Act, in turn, defines "antitrust laws" to include, among other laws, the Clayton Act itself. *Id.,* citing 15 U.S.C. § 12(a).

The insertion of the HSR Act's relevant provisions into the Clayton Act accords with Congress' long history of amending and supplementing the federal antitrust laws to fashion a single coherent regulatory scheme. To be sure, the passage of the Clayton Act itself, "as its title and the history of its enactment discloses, was intended to supplement the purpose and effect of other anti-trust legislation." *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U.S. 346, 355 (1922). When Congress later passed the Robinson-Patman Act in 1936, it was similarly "for the purpose of 'strengthening the Clayton Act provisions.'" *United States v. Nat'l Dairy Prod. Corp.,* 372 U.S. 29, 33–34 (1963) (citation omitted). As with the Clayton Act, the full title of the HSR Act – the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and its legislative history, establish that the provisions of the law were not meant to stand in isolation, but rather to supplement the existing provisions of the regulatory scheme embodied in the federal antitrust laws.

As a result, there can be no doubt that analysis of the HSR Act's provisions *cannot* be performed without taking into consideration the larger body of federal antitrust law. *See e.g. F.T.C. v. Univ. Health, Inc.,* 938 F.2d 1206, 1216 (11th Cir. 1991) ("[t]hus, to understand section 7, we should first look to the Clayton Act as a whole").

B. Decisions Construing Other Federal Antitrust Laws Apply Equally to the HSR Act

The FTC's assertion that the "plain text" of the HSR Act establishes Congress' intent to subject individuals and transactions otherwise beyond the reach of the federal antitrust laws to the provisions of the HSR Act fails to account for another peculiarity of these laws. Namely, Congress has never intended the text of the federal antitrust laws to "delineate the full meaning" of these laws, or their "application in concrete situations." *Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 643 (1981) (citations omitted). Instead, the legislative history of these enactments "makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition" and by "refer[ence] to the existing law." *Id.* In the words of one commentator, federal antitrust law is the proverbial "judicial oak which has grown from little more than a legislative acorn." *See Antitrust Federalism, Preemption, and Judge-Made Law,* 133 Harv.L.Rev. 2557, 2570 (2020).

The same Congressional expectation reflected in the legislative history of the Sherman Act is also plainly evident in the HSR Act's legislative history. *See* [Doc. 74-1] at p. 13 (identifying Senate committee report statement that "[m]any transactions that are literally subject to the [HSR Act's] reporting requirements are not within the intent" of the law). Congress' express statement that it did not intend the text of the HSR Act to be interpreted literally is wholly consistent with the approach taken in drafting other federal antitrust laws. As stated by the Supreme Court in *National Society of Professional Engineers*:

> One problem presented by the language of § 1 of the Sherman Act is that it cannot

> mean what it says. The statute says that "every" contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.

435 U.S. 679, 687–688 (1978).

The FTC's Opposition lays bare the pitfalls of the agency's self-imposed tunnel vision when interpreting the HSR Act's provisions. Rather than heeding Congress' instruction to not interpret the HSR Act's language literally, the FTC does just that, arguing that the statement referenced above constitutes an "express acknowledge[ment]" by Congress "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." [Doc. 76] at p. 6. The FTC fails, however, to provide any support for its assertion that federal agencies can somehow exercise authority that Congress never intended them to have.

C. There Is No Evidence of Congressional Intent to Subject State Regulated Transactions to the Federal Antitrust Laws

Despite the FTC's arguments to the contrary, the threshold inquiry when analyzing a federal agency's assertion of statutory authority is "whether Congress has ***directly*** spoken to the ***precise*** question at issue." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000) (emphasis added). When viewed under this standard, it is abundantly clear that the FTC's feeble attempt to identify evidence of Congress' intent to abrogate the state action immunity doctrine falls woefully short of its mark.

In an effort to dispute the State's assertion that Congress expressed no intent to displace the states' role in regulating their domestic commerce in either the text of the HSR Act or its legislative history, the FTC curiously points out that "the HSR Act expressly exempts 'transfers to or from a Federal agency or a State or political subdivision thereof.'" [Doc 76] at p. 7, citing 15

U.S.C. § 18a(c)(4). Not only does the identified language fail to support the FTC's proposition, it clearly demonstrates Congress' intent *not* to subject state action to the provisions of the HSR Act, further undermining the agency's position. The FTC then steps fully through the looking glass to assert that evidence of the HSR Act's applicability to state regulated transactions can be found in the regulations promulgated by the agency itself. [Doc. 76] at p. 7. Any suggestion that Congressional intent can somehow be discerned from agency regulations that Congress played no role in promulgating is simply absurd, and the FTC has completely failed to identify anything to suggest that Congress intended the HSR Act to be applied in the manner it proposes.

D. The State Action Immunity Doctrine Does Not Preclude Antitrust Investigations

While acknowledging that its characterizations do not accurately reflect the contents of the State's Motion, the FTC's Opposition asserts that the State "apparently" argues that the state action immunity doctrine could be used to avoid administrative subpoenas and "appears" to equate the state action immunity doctrine with Eleventh Amendment immunity. [Doc. 76] at p. 10. The FTC's argument once again ignores the arguments actually presented in the State's Motion. The State has never contended that an assertion of state action immunity cannot be challenged or that transactions subject to the doctrine are immune from investigation. This does not, however, indicate any flaw in the State's logic.

What the FTC's baseless argument fails to appreciate is that the agency is also required to establish the limits of its statutory in order for any administrative subpoena it issues to be judicially enforceable. *See Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.,* 903 F.3d 456, 459 (5th Cir. 2018). Furthermore, under the FTC's logic, while the agency bears the burden of establishing its authority in an action to enforce an administrative subpoena, the burden rests with the defendant in an enforcement action seeking injunctive relief to establish the agency has exceeded its authority. Given the disparate impacts of the different procedures upon the

individuals targeted individual, the FTC's argument makes little sense.

More importantly, the undisputed availability of alternative means the FTC could have used to obtain the same information included in an HSR Act premerger notification counsels strongly against granting injunctive relief. Noticeably absent from the FTC's Opposition is any attempt to address the elements that must be established to justify injunctive relief, which are: (1) actual success on the merits; (2) a substantial threat of immediate and irreparable harm for which it has no adequate remedy at law; (3) that greater injury will result from denying the injunction than from its being granted; and (4) that an injunction will not disserve the public interest. [Doc. 74-1] at p. 6, citing *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987).

The FTC's voluntary decision to forego available means of obtaining information that would allow the agency to evaluate antitrust concerns and potential deficiencies in the State's supervision of LCMC and HCA demonstrates that the FTC does not truly believe there is any substantial threat of immediate or irreparable harm. The FTC has also failed to present any argument or evidence from which the Court could determine that greater injury would result from denying the requested injunction than would inevitably result from granting the FTC's request. Finally, the injunction the FTC seeks would clearly disserve the public interest, as the State has already determined that the subject transaction will benefit the health, safety, and welfare of Louisiana citizens, and the FTC has presented no argument or evidence that calls this determination into question.

E. The FTC Cannot Avoid Application of the State Action Immunity Doctrine By Naming Only Private Parties as Defendants

Throughout its Opposition, the FTC attempts to distinguish the State's issuance of a COPA and unilateral imposition of terms and conditions from the hospitals' merger, asserting that only the hospitals' actions are at issue, not the State's. *See e.g.* [Doc. 76] at pp. 2, 11, 15, 19. 21

(asserting that the State's arguments "conflate" its own actions with those of LCMC and HCA). Such an argument is by no means novel, and it has been rejected by the Supreme Court on numerous occasions. In *Hoover v. Ronwin,* for example, the Court addressed the dissent's assertion that the state action immunity doctrine was inapplicable because the plaintiff had sued only the members of a bar admissions committee, and not the Arizona Supreme Court. In rejecting the dissent's logic, the majority noted that, "[t]he dissent does not acknowledge that, conspire as they might, the committee could not reduce the number of lawyers in Arizona," since Arizona law vested that authority solely in the court. 466 U.S. 558, 575-576 (1984).

An even better example appears in *Southern Motor Rate Carriers Rate Conference*, where after noting the US DOJ had "elected, without explanation, not to name as defendants the state Public Service Commissions," the court stated that "the success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant," because to hold otherwise would reduce the holding in *Parker v. Brown* "to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties." 471 U.S. 48, 53-54, n. 12, 57-58 (1985). As in *Hoover,* the State's legislature vested sole authority for approving the proposed transaction between LCMC and HCA with the State's Attorney General, who is therefore "the real party in interest," regardless of who the FTC elected to sue. *See Hoover,* 466 U.S. at 575, quoting *Bates v. State Bar of Arizona,* 433U.S. 350, 361 (1977).

F. The FTC's Opposition Reflects a Misunderstanding of Preemption Principles

While the State's Motion makes abundantly clear that it is the FTC's attempt to enjoin LCMC and HCA from fulfilling their obligations under the State-issued COPA that represents "an unauthorized attempt to preempt the State's COPA Law," the agency ignores this argument in asserting that the *HSR Act* does not conflict with the State's law. *Compare* [Doc. 74-1] at pp. 7-9 *with* [Doc. 76] at pp. 11-14. These statements only make sense if the state action immunity

doctrine can serve to preclude application of the HSR Act to COPA transactions.

If, as the FTC has asserted throughout these proceedings, Congress intended the state action immunity doctrine to be unavailable in actions to enforce the provisions of the HSR Act, the law would clearly conflict with the COPA law's provision stating that issuance of a COPA will "have the effect of granting the parties to the agreements, mergers, joint ventures, or consolidations state action immunity for actions that might otherwise be considered to be in violation of state antitrust laws, federal antitrust laws, or both." La. R.S. 40:2254.1. Moreover, if the HSR Act authorizes the FTC to enjoin LCMC and HCA from proceeding with the COPA transaction, it would be impossible for the hospitals to comply with the COPA's terms and conditions. *See* [Doc.68-10] (providing that the merged entity must apply for and receive a new COPA before "any material change in the operation or conduct" of the merged entity can occur).

Conflict preemption occurs "where it is impossible for a private party to comply with both state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Est. of Miranda v. Navistar, Inc.,* 23 F.4th 500, 504 (5th Cir.), *cert. denied,* 143 S.Ct. 93 (2022) (citation omitted) The position advanced by the FTC in this case, and the nature of the relief sought, simply cannot be reconciled with the assertions in the FTC's Opposition.

G. The FTC's Opposition Contradicts the Agency's Official Policy Statements

The FTC's Opposition also asserts that the agency's repeated statement over the course of decades that it would challenge mergers with anticompetitive effects and assertions of state action immunity when a state's supervision of private conduct appears to be deficient do not reflect official agency policy. [Doc. 76] at pp. 15-18. The FTC asserts the same argument with respect to the agency's publicly available statements describing its approach to COPA transactions and evaluation of the state action immunity doctrine. *Id.* The FTC further argues that, in any event,

these official statements of policy have no bearing on the present action, because none of them address FTC's enforcement of the HSR Act in the context of COPA transactions.

The FTC's argument proves the State's point. Nowhere in any of the documents explaining the FTC's approach to COPA transactions and acknowledging the ability of state COPA laws to effectively confer state action immunity does there appear any reference to the continued applicability of the HSR Act's premerger notification and waiting period requirements. As stated above, despite what was presumably an exhaustive search, the FTC failed to identify even one instance where the agency stated its belief, or even suggested the possibility, that of all the federal antitrust laws, only the provisions of the HSR Act continue to apply to transactions subject to the doctrine. What is more, *after* the FTC filed the instant suit, the agency withdrew several longstanding policy statements addressing federal antitrust enforcement in health care markets, and instead referred regulated entities to its "extensive record of enforcement actions, policy statements, and advocacy in health care statements" to receive "up-to-date guidance" on the agencies policies.[1]

The closest thing the FTC could muster to counter the State's well-supported argument that the agency failed to sufficiently notify regulated entities of the interpretation of the HSR advanced in this proceeding is that, on one occasion, a party to a COPA transaction *may* have submitted a premerger notification to the FTC. [Doc. 76] at. p. 17. In essence, the FTC argues that it should be relieved of its obligation to notify regulated entities of its interpretation of the laws it is charged with enforcing because of a one-line entry in the Federal Register that says absolutely nothing about the agency's interpretation or enforcement of the federal antitrust laws. The arguments

[1] *See* July 14, 2023 FTC Press Release, "Federal Trade Commission Withdraws Health Care Enforcement Policy Statements," available at: https://www.ftc.gov/news-events/news/press-releases/2023/07/federal-trade-commission-withdraws-health-care-enforcement-policy-statements.

advanced in the FTC's Opposition illustrate that, at least in this instance, the agency believes it is appropriate to notify regulated entities of its policies through litigation rather than promulgation, a position that is contrary to both law and reason.

For the foregoing reasons, the State respectfully requests that the Court dismiss FTC's claims and grant all other relief to which it is or may be entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 23, 2023, a copy of the foregoing Reply Memorandum was filed electronically with the Clerk of Court via the CM/ECF system. Notice of the filing will be sent to all counsel of record by operation of the court's electronic filing system.

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