UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LOUISIANA CHILDREN'S MEDICAL CENTER, d/b/a/ LCMC HEALTH, Plaintiff *v.* **MERRICK GARLAND,** in his official capacity as **ATTORNEY GENERAL OF THE UNITED STATES et al.,** Defendants	CIVIL ACTION No. 2:23-cv-1305, c/w 23-cv-1890 JUDGE LANCE M. AFRICK SECTION I MAGISTRATE JUDGE NORTH DIVISION 5 THIS DOCUMENT RELATES TO: Case No. 23-cv-1890

MEMORANDUM OF RESPONDENTS
LOUISIANA CHILDREN'S MEDICAL CENTER AND HCA HEALTHCARE, INC.,
IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF FTC

Eight months ago, Respondents LCMC and HCA (the Hospitals) consummated a transaction (the Acquisition) in which LCMC purchased three hospitals with the State of Louisiana's express approval and active supervision. Since then, LCMC has been integrating the hospitals into its health system to deliver on its commitments to the State of Louisiana to improve access to high-quality healthcare in the New Orleans region. As the Hospitals demonstrated in their motion for summary judgment, the Acquisition is attributable to the State of Louisiana and is therefore exempt from "the federal antitrust laws" under the state action doctrine. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 219 (2013). That doctrine, which the Supreme Court has repeatedly applied for 80 years, holds that conduct attributable to States is exempt from "the federal antitrust laws," absent a clear statement from Congress to the contrary. *Id.*; *see Parker v. Brown*, 317 U.S. 341, 351 (1943).

The Federal Trade Commission nevertheless contends that the Hospitals violated Section 7A of the Clayton Antitrust Act, which requires pre-merger notice to the Commission, compliance with information requests, and a pre-merger waiting period. The purpose of Section 7A is to enable

the Commission to determine whether a merger violates Section 7 of the Clayton Act, the principal federal antitrust law regulating mergers. In an unprecedented argument, the Commission argues that Section 7A should be carved out from all the other "federal antitrust laws" that are subject to the state action doctrine. On that erroneous view, the Commission asks this Court to issue injunctions under Section 7A forcing LCMC and HCA to make pre-merger filings and comply with any requests for information, and barring LCMC from integrating the three hospitals while the Commission reviews the transaction to determine whether it violates Section 7.

The Court should deny the Commission's motion for summary judgment, and should instead grant the Hospitals' motion for summary judgment, for two independent reasons. *First*, on the merits, the Commission does not contest that the Acquisition meets the requirements for the state action doctrine and that the Acquisition is exempt from Section 7 itself. And the Commission is wrong that Section 7A is special and should be carved out from the state action doctrine. Section 7A is indisputably a "federal antitrust law," *Phoebe Putney*, 568 U.S. at 219, and it contains no clear statement that Congress intended it to apply to States or state-controlled mergers, or that it should be interpreted "to compromise the States' ability to regulate their domestic commerce." *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 56 (1985). The Commission argues that the text of Section 7A is different from the Sherman Act and Clayton Act, and that Section 7A therefore should be interpreted differently. That is not correct. Like the Sherman Act and the Clayton Act, Section 7A applies only to "person[s]." The Supreme Court's state action decisions have held that that term, in federal antitrust statutes, does not capture States' conduct or state-controlled conduct. The Commission's statutory construction is also inconsistent with the reasoning of *Parker* and its progeny. Indeed, applying Section 7A to state-controlled mergers would grossly interfere with state regulatory programs, as this case illustrates. Carving Section

7A out from the state action doctrine would also be particularly anomalous because Section 7A fits hand-in-glove with Section 7, and the state action doctrine concededly applies to Section 7.

Second, the Commission's motion independently fails because it does not address all of the issues necessary for the final relief that the Commission seeks in the case. The Commission asks the Court to enter two injunctions under Section 7A. Injunctions turn not just on the merits, but also on non-merits factors like the balance of harms and the public interest. Yet the Commission addresses only the merits—and only one of the two merits questions, at that. The Commission does not even attempt to argue that the Acquisition falls outside the scope of the state action doctrine, and instead relies exclusively on its argument that state action immunity does not apply to Section 7A. In the absence of argument or evidence on the remaining injunction factors, the Court should deny the Commission's request for entry of final judgment and two injunctions disposing of all the issues in the case.

The Commission could not succeed even if it did seek summary judgment on the remaining elements of the injunction standard. As the Hospitals explained in their motion for summary judgment, the remaining injunction factors overwhelmingly favor the Hospitals and the State. The Acquisition is immune from antitrust liability. A waiting period to allow the Commission to ponder the counterfactual question whether the Acquisition would violate the antitrust laws if it were not immune would not serve the public interest, would not avert irreparable harm to the Commission, and would harm the Hospitals more than the Commission in any case. And an injunction would affirmatively harm the public interest. The State of Louisiana has determined that the Acquisition serves the interest of the people of the State. Enjoining integration would nullify that policy choice and severely impinge on the State's regulatory program. Accordingly,

the Court should deny the Commission's motion for summary judgment and should instead grant the Hospitals' motion.

BACKGROUND

A. The Hospitals' Acquisition Was Implemented Under Louisiana's COPA Program, Which Displaces Federal Antitrust Law For Hospital Mergers

The Louisiana Legislature has enacted a statute permitting the Louisiana Attorney General to grant certificates of public advantage (COPAs). The statute expressly states that a COPA "substitute[s] state regulation … for competition," and is intended to "grant[] … state action immunity … [from] federal antitrust laws" by placing healthcare mergers under the State's "supervision and control." La. Stat. § 40:2254.1. After granting COPA approval, the Louisiana Department of Justice must "active[ly] supervis[e]" the merger. *Id.* § 40:2254.9(3). The Department has authority to promulgate supervision regulations, enforce compliance with a COPA's terms and conditions, and ultimately to revoke a certificate. *See id.* §§ 40:2254.4, 40:2254.6(A), 40:2254.9; La. Admin. Code tit. 48, pt. XXV, § 517.

The Hospitals applied for COPA approval on October 10, 2022. Dkt. 75-2 ¶ 13. Under the proposed Acquisition, LCMC would acquire Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital. *Id.* ¶ 17. The Acquisition was designed to increase access to high-quality clinical services and health care in the New Orleans region including through $220 million in capital investments to modernize the facilities (such as investing in robotic surgical systems), offer new medical services (such as kidney, pancreas, liver, bone marrow, and stem cell transplants), and add new specialty care units. *Id.* ¶¶ 20, 62. After substantial review, consultation with experts, and public input, the Department approved the Acquisition and granted a COPA on December 28, 2022. *Id.* ¶ 29.

The COPA's "Terms and Conditions" provide for comprehensive supervision via regular reporting and Department preclearance of rate changes. *Id.* ¶¶ 30–34, 36–38. Under the COPA's terms, the Department may "revoke the COPA" if it is "not satisfied with any submitted corrective action plan," if LCMC fails to comply with the Terms and Conditions, or if the Department "otherwise determines"—as a matter of state policy—"that the transaction is not resulting in lower health care costs or greater access to or quality of health care." *Id.* ¶ 34. Relying on the COPA and the Department's supervision, the Hospitals closed the transaction on January 1, 2023, and announced the closing on January 3, 2023. *Id.* ¶ 35.

B. Federal Law Regulates Mergers Under Sections 7 And 7A Of The Clayton Act

The principal federal statutes regulating mergers are Sections 7 and 7A of the Clayton Antitrust Act. Under Section 7, "[n]o person … shall acquire" ownership or assets of "another person" if "the effect … may be substantially to lessen competition." 15 U.S.C. § 18.

The Hart-Scott-Rodino Antitrust Improvements Act (HSR) added Section 7A. *Id.* § 18a. It prohibits consummation of mergers without notice to the Commission, imposes a pre-merger waiting period, and conditions the ending of that waiting period on compliance with the Commission's information requests. *Id.* Section 7A exists to enable federal antitrust authorities to prevent mergers that violate Section 7, and to avoid the difficulty of unwinding an illegal merger after it has already been consummated. H.R. Rep. No. 94-1373, at 5 (1976). The Commission can extend the length of the waiting period by issuing what is commonly referred to as a "second request" for information. 15 U.S.C. § 18a(e)(1)(A). Second requests typically cover a wide range of sensitive company documents and information, and the second request process can last up to a year or more. Dkt. 75-2 ¶¶ 45, 48–49. The cost of responding to a second request routinely exceeds $4 million and can reach $20 million. *Id.* ¶¶ 45–47, 50. Parties who complete a covered merger without compliance with Section 7A are subject to daily penalties that can exceed $50,000

per day. § 18a(g)(1); Dkt. 75-2 ¶ 44. Section 7A also authorizes the Commission to seek injunctive relief to remedy violations. *See* 15 U.S.C. § 18a(g)(2)(A), (C). But injunctive relief is discretionary: A court "may order compliance," and "may grant such other equitable relief as the court in its discretion determines necessary or appropriate." *Id.*

C. The Commission Seeks To Enforce Section 7A Against The Hospitals' State-Controlled Merger

No court has ever held that Section 7A applies to state-controlled mergers. To the Hospitals' knowledge, the Commission has never enforced Section 7A against a state-controlled merger. Instead, the Commission has submitted comments and participated in state-led hearings during COPA review processes without raising Sections 7 or 7A. Dkt. 75-2 ¶ 39.

The Commission has now reversed course. Here, it did not participate in the COPA process. *Id.* ¶ 40. Three months after the Acquisition closed, the Commission insisted that the Hospitals make a Section 7A filing and halt integration of the hospitals while it determined whether the transaction violates Section 7, and threatened penalties for failure to comply. *Id.* ¶¶ 41–43. After the Hospitals sought declaratory relief in this Court, the Commission filed this petition in the District of Columbia, asserting that the Acquisition violated Section 7A. No. 23-cv-1890, Dkt. 1.

The Hospitals successfully moved to transfer the petition to this Court. One part of Judge Amy Berman Jackson's reasoning for transferring the petition remains particularly relevant. As Judge Jackson explained, if the Acquisition is "exempt" from "federal antitrust enforcement"—meaning state action immunity prevents the Commission from obtaining relief against the merger under the Clayton Act, regardless of its assessment of the Acquisition's competitive effects—then compliance with Section 7A would be "an empty exercise now" that Louisiana has already granted a COPA and the Acquisition has already occurred. No. 23-cv-1890, Dkt. 31 at 22. Thus, "the

state action question"—that is, whether this transaction meets the requirements for state action immunity—"must be resolved first." *Id.*

Ignoring Judge Jackson's cogent reasoning, the Commission's motion for summary judgment addresses only one question: whether the state action immunity doctrine applies to Section 7A. As relief, the Commission asks the Court to enter injunctions that would require the Hospitals to make a Section 7A filing, comply with requests for information, and hold the hospitals separate until the Commission finishes its review of the Acquisition. Dkt. 71-3, 71-4. As authority for these requests, the Commission invokes 15 U.S.C. § 18a(g)(2)(A) and (C). Dkt. 71-1 at 19–20; 71-3 at 1; 71-4 at 1. But the Commission fails to address two issues that are prerequisites for granting injunctive relief in this case. First, the Commission refuses to take a position on what Judge Jackson referred to as "the state action question"—whether this transaction meets the requirements for state action immunity—which is the question that "must be resolved first." No. 23-cv-1890, Dkt. 31 at 22. Second, and relatedly, the Commission failed to address the equitable factors for granting an injunction, including at minimum whether an injunction would serve the public interest in these circumstances where the State of Louisiana has granted antitrust immunity.

LEGAL STANDARD

Summary judgment. Summary judgment is improper if there is either a genuine issue of material fact or the moving party is not entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). A moving party's failure to brief or submit evidence on an issue necessary to decide the case precludes summary judgment. *See Grogan v. Kumar*, 873 F.3d 273, 277 (5th Cir. 2017); *May v. Strain*, 55 F. Supp. 3d 885, 901 (E.D. La. 2014); *Abbott v. Town of Livingston*, No. 16-cv-188, Dkt. 101 at 20 (M.D. La. July 16, 2018).

Injunctive relief. The Commission seeks final injunctive relief. *See* No. 23-cv-1890, Dkt. 1 at 1 ("Petition for Injunctive Relief"); Dkt. 71-1 at 19–20. Despite the Commission's contention

that the Hospitals bear the burden in this proceeding, Dkt. 71-1 at 7, "it is well-established that the party *seeking* a permanent injunction must demonstrate" that it satisfies the injunction factors, *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 626 (5th Cir. 2013) (emphasis added).

To obtain an injunction, the Commission must demonstrate that the Hospitals violated Section 7A, *see* 15 U.S.C. § 18a(g)(2), and that the well-established equitable factors—irreparable injury, balance of harms, and public interest—favor injunctive relief. *See, e.g.*, *VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006). At minimum, the Commission must demonstrate that the "public equities" favor an injunction. *See FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 35–36 (D.D.C. 2009) (addressing relief sought under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b)). And the Commission's burden is particularly heavy because of the type of injunctive relief it seeks—a permanent injunction mandating affirmative action by the Hospitals. "Mandatory injunctions are particularly disfavored," moreover, "and are generally not granted unless extreme or very serious damage will result." *FTC v. Lake*, 181 F. Supp. 3d 692, 704 (C.D. Cal. 2016) (internal quotation marks omitted).

ARGUMENT

I. THE STATE ACTION DOCTRINE APPLIES TO SECTION 7A OF THE CLAYTON ACT

A. The State Action Doctrine Is Deeply Rooted And Operates Through A Clear Statement Rule

At the outset, the Commission mischaracterizes the state action doctrine, claiming that the Hospitals seek "to create a new, implied exemption to the HSR Act." Dkt. 71-1 at 6. There is nothing "new" about the state action doctrine, and it is not an "implied exemption." The Supreme Court has applied it to "the federal antitrust laws" for 80 years, both for reasons of statutory construction and of federalism and state sovereignty. *Phoebe Putney*, 568 U.S. at 21; *Parker*, 317 U.S. at 351. "Relying on principles of federalism and state sovereignty" that date back to the

Founding, the state action doctrine provides that "the federal antitrust laws" do "not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991) (quoting *Parker*, 317 U.S. at 352).

The Court first applied this principle in *Parker*, holding that, as a matter of statutory construction, the phrase "[e]very person" in the Sherman Act was insufficiently clear to include States or "official action directed by a state." 317 U.S. at 351. The Court has since applied that clear statement rule to the same term, "persons," in Section 7 of the Clayton Act, *Phoebe Putney*, 568 U.S. at 222–25, and has repeatedly held "that federal antitrust laws are subject to supersession by state regulatory programs." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632–33 (1992); *see Hunnicutt v. Tafoya-Lucero*, No. 21-cv-867, 2022 WL 832566, at *4 (D.N.M. Mar. 21, 2022) ("The state action exemption … appl[ies] to all of the federal antitrust laws."). In short, for 80 years, the Court has consistently interpreted federal antitrust statutes to exempt "state action or official action directed by a state." *Parker*, 317 U.S. at 351.

Rather than creating an "implied exemption," moreover, the state action doctrine operates as a clear statement rule. The Supreme Court presumes that Congress—absent a clear statement to the contrary—would "not intend to compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56; *accord Parker*, 317 U.S. at 351. Applying that presumption, the Court has repeatedly held that state action—including private conduct authorized and supervised by the State—is exempt from federal antitrust enforcement because the federal antitrust laws lack clear statements that they apply to States or state action. *See Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par.*, 171 F.3d 231, 234 (5th Cir. 1999) (discussing *Parker*'s clear statement rule and explaining that "[t]he doctrine of clear statement is vital to the concreteness of federalism"). This is grounded in "the well-established

principle" that federal courts must "be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 572 U.S. 844, 858 (2014) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Where traditional state powers are concerned, "Congress [must] enact *exceedingly clear language* if it wishes to significantly alter the balance between federal and state power." *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023) (emphasis added). That is why the Court consistently interprets federal antitrust statutes to exempt "state action or official action directed by a state," *Parker*, 317 U.S. at 351, and that is why "the federal antitrust laws are subject to supersession by state regulatory programs," *Ticor*, 504 U.S. at 632–33.

B. The Federalism And Textual Rationales For The State Action Doctrine Apply With Full Force To Section 7A Of the Clayton Antitrust Act

Contrary to the Commission's erroneous view, state action immunity applies to Section 7A of the Clayton Antitrust Act, just as it applies to Section 7. Mergers attributable to a State are "exempt" from "the federal antitrust laws." *Phoebe Putney*, 568 U.S. at 219. Section 7A is a federal antitrust law. Like the Sherman Act and Section 7 of the Clayton Act, Section 7A applies only to a "person," not a State, and lacks a clear statement that Congress intended "to compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56. Federalism principles, too, apply equally to Section 7A, and Section 7A interferes with state COPA programs by imposing waiting periods and penalties on state-controlled mergers.

1. As explained in the Hospitals' motion for summary judgment, Section 7A of the Clayton Antitrust Act is indisputably a federal antitrust law in both form and function. Section 7A imposes penalties for merging without observing requirements designed to prevent mergers that would violate Section 7 because they "substantially … lessen competition." 15 U.S.C. § 18; *see United States v. Smithfield Foods, Inc.*, 332 F. Supp. 2d 55, 58 (D.D.C. 2004). These penalties are a form

of antitrust liability, as "there can be no reasonable dispute that an HSR Act civil penalty action arises 'under the antitrust laws.'" *United States v. Blavatnik*, 168 F. Supp. 3d 36, 41 (D.D.C. 2016) (quoting 15 U.S.C. § 16(b)). Because Section 7A is a "federal antitrust law[]," the Supreme Court has already instructed that state-controlled mergers are "exempt" from Section 7A. *Phoebe Putney*, 568 U.S. at 219. The Commission's attempt to carve out Section 7A from the "federal antitrust laws" should be rejected.

2. Next, Congress used the operative word "person" the same way in Section 7A, Section 7, and the Sherman Act. *See* 15 U.S.C. § 18a ("no person shall acquire"), § 18 ("No person … shall acquire"), §§ 1–2 ("Every person who shall [make or monopolize]"). This is dispositive. Under *Parker*'s clear statement rule, the phrase "[e]very person" in the Sherman Act did not include States or "action directed by a state." *Parker*, 317 U.S. at 351; *see Uetricht v. Chi. Parking Meters, LLC*, 64 F.4th 827, 833 (7th Cir. 2023) (recounting *Parker*'s reliance on "persons"). This accords with the firmly established "presumption that 'person' does not include the sovereign." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780 (2000). And—crucially—because the Sherman Act lacks a clear statement that it applies to States, it also does not apply to state-controlled private conduct. *Motor Carriers*, 471 U.S. at 56–57; *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 105 (1980).

This same rationale applies to Section 7A. Just as in *Parker*, Section 7A applies only to "persons," not States. Just as in *Motor Carriers*, state-controlled conduct is also exempt, because to hold otherwise would reduce *Parker*'s holding to a mere "formalism." 471 U.S. at 57.

The Commission argues that there is no ambiguity in the word "person" under Section 7A because its regulations define "person" to exclude a State but include private parties. Dkt. 71-1 at 8–9, 14–15. But neither the statute nor the regulations speak to the issue here: whether state-

controlled mergers are exempt. The Clayton Act, of which Section 7A is a part, defines "person" generally to include private parties, but its definition says nothing about States and—more importantly—nothing about state-controlled conduct. 15 U.S.C. § 12(a). The regulation, in turn, parrots the statute: It defines "person," but says nothing about state-controlled conduct, and it expressly *excludes* States. 16 C.F.R. § 801.1(a)(1)–(2). Absent a clear statement, the statute and regulation do not apply to States or state-controlled mergers, and neither the statute nor regulation contains any such clear statement. Indeed, the only clear statement is that States are *exempt* under the regulation, which cuts in favor of the state action doctrine. *Id.*

The Commission argues that Section 7A's silence on the state action doctrine, and its grant of authority to the Commission to establish additional exemptions, suggest that Congress left the Commission to decide whether to exempt state-controlled mergers from Section 7A. *See* Dkt. 71-1 at 13. That is not how a clear statement rule works. To the contrary, a clear statement rule means that an agency that wishes to regulate "must provide clear evidence that it is authorized to regulate in the manner it proposes." *Sackett*, 143 S. Ct. at 1341. Moreover, a clear statement is required before courts will assume Congress meant to delegate authority over such a major question as whether to "compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56. Congress made no clear statement here; it is irrelevant whether the Commission has exempted through regulation what it was not empowered to regulate in the first place.

3. *Parker*'s federalism rationale also applies forcefully to Section 7A. A key reason for the state action doctrine is "respect for ongoing regulation by the State." *Ticor*, 504 U.S. at 633. To that end, courts must avoid interpreting antitrust statutes in a way that would "compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56.

"[R]espect for ongoing regulation by the State" also requires extending immunity to private parties. *Ticor*, 504 U.S. at 633. "If *Parker* immunity were limited to the actions of public officials, … a State would be unable to implement programs that restrain competition among private parties." *Motor Carriers*, 471 U.S. at 56. Any "plaintiff could frustrate" state regulation "merely by filing suit against the regulated private parties, rather than the state officials who implement the plan." *Id.* at 56–57. This would "reduce *Parker*'s holding to a formalism." *Id.* at 57.

Here, applying Section 7A to COPA-authorized mergers would frustrate the State's regulatory program and "reduce *Parker*'s holding to a formalism." *Id.* The Louisiana Department of Justice spent months in the approval process, determined that the Acquisition serves Louisiana's public interest, entered into an arrangement for ongoing supervision, and authorized the transaction to close immediately. *Supra* pp.4–5.

In direct contradiction, Section 7A would impose a new set of substantive requirements, and a waiting period (subject to a potential year-long extension, during which the merging parties must expend millions of dollars to comply with voluminous demands for data, documents, and depositions) on a transaction already approved by the State. Imposing Section 7A on top of COPA-approved transactions would leave parties with little or no reason to seek COPA approval in the first place, thereby depriving States of the opportunity to encourage or shape transactions to best serve their citizens' public interest. And imposing Section 7A's requirements on COPA-approved transactions could interfere with the State's time limits for review and approval of the merger, La. Stat. § 40:2254.4(C), and with COPA approval that is contingent on terms and conditions that require immediate integration of affected facilities. *See* Dkt. 75-2 ¶¶ 20, 62.

Indeed, the Commission's attempt to use Section 7A to enjoin the acquisition—months after it closed under the COPA—starkly illustrates the disruption to state COPA programs that

would occur if the state action doctrine did not apply. *See id.* ¶¶ 51–63 (describing deleterious effects of the requested injunction). In many instances, including here, Section 7A could effectively nullify the State's COPA program.

4. It also makes no sense to apply Section 7A to state-controlled mergers that are immune from a Section 7 challenge. The express purpose of pre-merger review is to avoid the unscramble-the-eggs problem that arises in a Section 7 enforcement action once an illegal merger has been consummated. *Smithfield Foods, Inc.*, 332 F. Supp. 2d at 58; H.R. Rep. No. 94-1373, at 5 (1976). But if a merger is exempt from Section 7 enforcement, there is no reason to subject it to Section 7A. Congress recognized this by excluding from Section 7A all transactions that are "specifically exempted from the antitrust laws." 15 U.S.C. § 18a(c)(5). Judge Jackson recognized the same point in her transfer order, explaining that pre-merger review is "an empty exercise" for a merger that is "exempt" from "federal antitrust enforcement." No. 23-cv-1890, Dkt. 31 at 22. This refutes the Commission's argument that exempting COPA-approved mergers will frustrate the purpose of Section 7A. *See* Dkt. 71-1 at 19; No. 23-cv-1890, Dkt. 28 at 19–20.

C. The Commission's Arguments Should Be Rejected

The Commission largely ignores the Hospitals' arguments and instead spends pages attacking a straw man by pretending that the Hospitals rely primarily on two enumerated exceptions. Dkt. 71-1 at 7–12. Those exemptions do support the Hospitals.[1] But they are

[1] Contrary to the Commission's argument, the exceptions in § 18a(c)(4)–(5) can fairly be read to encompass mergers that qualify for state action immunity, particularly in light of the applicable clear statement rule. First, such mergers are "specifically exempted" by the antitrust statutes themselves, as those statutes have been interpreted by the Supreme Court. *See* § 18a(c)(5) (exempting "transactions specifically exempted from the antitrust laws by Federal statute"). Second, Section 7A also exempts "transfers to or from … a State." § 18a(c)(4). This is broad enough to include mergers that qualify for state action immunity. After all, immunity applies only when the conduct is sufficiently controlled by the State so that it must be considered "the State's own." *Ticor*, 504 U.S. at 634–35.

ultimately irrelevant. As explained above, state-controlled mergers are exempt at the outset because Section 7A applies only to "persons," the same language the Court relied on in *Parker* itself. The contrary arguments the Commission makes should be rejected.

1. The Commission errs twice over when it argues that Section 7A leaves no room for the state action doctrine because it contains enumerated exceptions and permits regulatory exceptions. *See* Dkt. 71-1 at 13–14. For one thing, the Supreme Court did not hesitate to apply the state action doctrine to Section 7, which, like Section 7A, contains its own set of enumerated exceptions and does not specifically refer to state action immunity. *See Phoebe Putney*, 568 U.S. at 224–27; 15 U.S.C. § 18. For another, an implicit inference—like the Commission's inference that textual exceptions leave no room for the state action doctrine—is not a clear statement. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 288 & n.2 (1994) (Scalia, J., concurring in judgment) (a negative inference is "no substitute for clear statement"). Contrary to the Commission's reliance on an implicit inference, the mandate from the Supreme Court is to apply a clear statement rule to interpret federal antitrust laws, wherever possible, to exempt conduct attributable to a State. Relatedly, the Commission is wrong to conceptualize the state action doctrine as an atextual exception. At its core, the state action doctrine is a clear statement rule that serves to determine the scope of the statute. *Supra* pp.8–10.

2. The Commission's argument that state action immunity does not apply to Section 7A because Section 7A's requirements are "procedural," and state action immunity supposedly applies only to "substantive" antitrust laws, has no basis in law. *See* Dkt. 71-1 at 15–17. State action precedent has never distinguished between substantive and procedural antitrust laws. The Commission cites no state action case even mentioning such a distinction, which is a strong reason to reject it. *See Moore v. Harper*, 143 S. Ct. 2065, 2086 (2023) (rejecting attempt to introduce

substance/procedure distinction without support in precedent). The question is not whether Section 7A is procedural, but rather whether it clearly states that it applies to state-controlled mergers (or instead merely applies to "persons"), is one of "the federal antitrust laws," *Phoebe Putney*, 568 U.S. at 219, and would "compromise the States' ability to regulate their domestic commerce" if applied to state-controlled mergers, *Motor Carriers*, 471 U.S. at 56. That reasoning—not any slippery distinction between substance and procedure—undergirds each state action case. *See Phoebe Putney*, 568 U.S. at 236; *Ticor*, 504 U.S. at 633; *Midcal*, 445 U.S. at 103.

Even if it made sense to introduce a substance/procedure distinction in this context, Section 7A is not purely procedural in any meaningful sense. *See Weatherly v. Pershing, LLC*, 945 F.3d 915, 925 & n.48 (5th Cir. 2019) ("[D]istinctions between substance and procedure are inherently ephemeral and thus difficult to draw.") (internal quotation marks omitted). After all, Section 7A prohibits consummating mergers during the waiting period, conditions that waiting period on responding to substantive information requests, and imposes steep daily penalties for failure to comply. *See Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 884–85 (10th Cir. 2006) (state law imposing a fine is substantive); *Pennsylvania v. Mid-Atl. Toyota Distribs., Inc.*, 704 F.2d 125, 128 n.5 (4th Cir. 1983) (different provision of HSR Act is not purely procedural when it imposes new penalties); *cf.* 17A Moore's Federal Practice - Civil § 124.07 ("[D]amages are a matter of substantive law"). Those penalties are a form of antitrust liability, not a mere procedural hoop.

The Commission likewise does not move the needle with dicta describing Section 7A as procedural in other contexts. *See* Dkt. 71-1 at 15. *First*, the Commission's citation to *Blavatnik* sharply undercuts its argument. There, the court was asked to enter a consent judgment to resolve a Section 7A violation. 168 F. Supp. 3d at 37. The dispositive question was whether the Tunney Act, which imposes special requirements on "[a]ny proposal for a consent judgment submitted by

the United States for entry in any civil proceeding brought by or on behalf of the United States *under the antitrust laws*," 15 U.S.C. § 16(b) (emphasis added), applied to that Section 7A consent judgment. *Blavatnik*, 168 F. Supp. 3d at 41. The court concluded that the Tunney Act did apply, in part because "there can be no reasonable dispute that an HSR Act civil penalty action arises 'under the antitrust laws.'" *Id.* (quoting 15 U.S.C. § 16(b)). While the Commission points out offhanded *dicta* to the effect that Section 7A is procedural, the case's *holding* that Section 7A is an antitrust law squarely supports the Hospitals' view of Section 7A.

The Commission's other citations are no better. The quoted comment from a second case addressed a different provision of the Hart-Scott-Rodino Act—not Section 7A's pre-merger review, but a separate section that created new cause of action permitting States to sue over antitrust violations. *See Mid-Atl. Toyota*, 704 F.2d at 128 (discussing 15 U.S.C. § 15c(a)(1)). To the extent that case is relevant at all, it again cuts against the Commission's position. The court noted—in a footnote in the middle of the Commission's quote, which the Commission omitted—that the new cause of action was not *entirely* procedural because it added penalties that were not previously available. *See id.* at 128 n.5; Dkt. 71-1 at 15. By the same reasoning, Section 7A is also not purely procedural. And the Commission's final case arose in the entirely different context of an argument that the then-recent enactment of Section 7A undercut a preexisting consent agreement. *See United States v. Loew's Inc.*, 705 F. Supp. 878, 891 (S.D.N.Y. 1988). It is telling that the thirty-five-year-old offhanded dicta in *Loew's* may be the Commission's *best* support for its argument that Section 7A is purely procedural. All of this is beside the point anyway, because there is no basis for the Commission's novel theory that procedural antitrust laws should be carved out from the scope of the state action doctrine.

3. The Commission's attempt to equate Section 7A to an administrative subpoena is a false analogy. *See* Dkt. 71-1 at 17–19. The Commission relies on inapposite cases holding that defenses to liability, such as the state action doctrine, cannot be used to quash a subpoena issued under the FTC Act. *FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987); *see also FTC v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977). But Section 7A is fundamentally different than a subpoena. For one thing, unlike a subpoena, Section 7A bars mergers pending a waiting period, requires a filing fee, and imposes monetary penalties—a form of antitrust liability—for failure to comply. For another, unlike a subpoena, Section 7A is itself an antitrust law, and state action immunity applies to "the federal antitrust laws." *See, e.g.*, *Columbia*, 499 U.S. at 370. Thus, the question is not whether Section 7A is a form of compulsory process with some characteristics of an investigatory tool; the question is whether Section 7A contains a clear statement that Congress meant to "compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56. It does not. States and state-controlled mergers are therefore exempt from Section 7A under the state action doctrine.

Also misplaced is the Commission's related concern that parties could evade investigation by "unilaterally" deciding that their transaction meets the elements for state action immunity. Dkt. 71-1 at 2–3, 19. Merging parties routinely make unilateral determinations as to whether they must comply with Section 7A because they fall below monetary thresholds or because they fit within one of the 12 statutory or 29 additional regulatory exemptions. *See* 15 U.S.C. § 18a(a) (thresholds); *id.* § 18a(c) (exemptions); 16 C.F.R. pt. 802 (regulatory exemptions). And if the Commission disagrees with the parties' determination, it may bring an enforcement action like this one for a court to answer the question, or the Department of Justice can seek penalties. 15 U.S.C. § 18a(g). Any parties that determine they are exempt from Section 7A's requirements, whether

based on state action immunity or any other exemption, bear the risk that the Commission will disagree and bring an enforcement action, and the risk of penalties if they are wrong. This is routine, and Congress plainly contemplated it when it enacted the statute. *See, e.g.*, *United States v. Farley*, 11 F.3d 1385, 1388, 1390 (7th Cir. 1993) (enforcement action where defendant asserted the acquisition "fell within the investment-only exemption contained in the HSR Act"); Compl. (Dkt. 1), *United States v. VA Partners I, LLC*, No. 16-cv-1672 (N.D. Cal.) (same); Compl. (Dkt. 1), *United States v. Leucadia Nat'l Corp.*, No. 15-cv-1547 (D.D.C.) (enforcement action where defendant asserted the acquisition fell within exception for certain institutional investors). In fact, that is exactly what the Commission itself tells parties to do. *See* SOMF at p.4 ¶¶ 3–4 (citing Commission guidance directing parties to "consult these exemption rules, as well as the exemptions set out in the statute itself, to determine whether any of them apply."). Whether a transaction is ultimately exempt under the state action doctrine or any other exemption is for the parties to litigate and the court to decide.

For similar reasons, exempting COPA mergers from Section 7A does not present the practical concerns raised by the Commission (even if practical concerns could overcome or satisfy the applicable clear-statement rule). *See* Dkt. 71-1 at 19. As just discussed, many transactions are already exempt from Section 7A. And COPA mergers are a narrow category of transactions that hardly threaten the overall HSR review framework. As this case demonstrates, Louisiana's COPA approval process not only ensures public notice and an opportunity for the Commission to comment, but it ensures that the merger will be exempt from federal antitrust laws as conduct attributable to the State.

Finally, evasion of antitrust enforcement is unlikely because nothing prevents the Commission from using its existing investigative tools to determine whether parties meet the

criteria for exemptions from Section 7A's requirements. As the Hospitals have always agreed, the state-action doctrine does not render parties immune from administrative subpoenas. But the Commission is wrong to argue that Section 7A is itself an investigative tool just like an administrative subpoena. Section 7A clearly provides that courts cannot compel HSR filings, waiting periods, or payment of penalties under Section 7A without *first* determining whether the party was required to make an HSR filing. *See* 15 U.S.C. § 18a(g)(2) (permitting injunctions if "any person … fails substantially to comply" with Section 7A). That limitation on Section 7A exposes a key difference between administrative subpoenas and Section 7A. And it properly directs argument back to the key questions: not whether Section 7A is substantive or procedural, or whether it is like an administrative subpoena, but whether state-controlled mergers fall outside Section 7A's scope and whether this state-controlled merger meets the requirements for state action immunity.

* * *

As the Supreme Court has long recognized and repeatedly reaffirmed, the federal antitrust laws leave room for States to structure and execute their regulatory programs in accordance with their sovereign interests. The federal antitrust laws also leave room for the States to carry out their regulatory programs through private actors. Section 7A is just such a federal antitrust law. And the State of Louisiana's COPA is just such a regulatory program. The Court should reject the Commission's novel and unprecedented theory, which threatens to interfere with the State's healthcare policy and assessment of the public interest of its citizens, in precisely the ways the state action doctrine has long sought to avoid. The Hospitals, not the Commission, are entitled to judgment as a matter of law.

II. THE COMMISSION IS NOT ENTITLED TO ITS REQUESTED RELIEF BECAUSE IT FAILED TO SEEK SUMMARY JUDGMENT ON THE NON-MERITS ELEMENTS OF THE INJUNCTION STANDARD OR THE STATE ACTION QUESTION

The Court should deny the Commission's summary judgment motion and deny its requested injunctions for a second reason: The Commission has effectively moved for partial summary judgment, exclusively on the question whether state action immunity applies to Section 7A. Even if the Commission's position were correct on that narrow question (and it is not), that question is independent from two other questions necessary to decide whether to issue the Commission's requested injunctions: (1) whether the Commission is entitled to summary judgment on the equitable factors of the injunction standard, and (2) relatedly, whether the Commission is entitled to summary judgment on the question whether the Acquisition meets the requirements for state action immunity. The answer to both questions is no.

The simplest reason for that conclusion is that the Commission has presented no evidence or argument on either question, and the Hospitals have presented undisputed evidence and argument in their own motion for summary judgment. See Dkt. 71-1 at 2–3 ("The FTC … has no position on whether the state action defense would protect the Hospitals' transaction from antitrust liability"); Dkt. 75-1 at 8–13. The Commission's silence forecloses those arguments. *Jackson v. Watkins*, 619 F.3d 463, 467 (5th Cir. 2010); *Alizadeh v. BP Expl. & Prod., Inc.*, No. 22-cv-3159, Dkt. 26 (July 17, 2023). But even if the Commission had presented evidence or argument on those issues, it could not meet its burden to support its entitlement to the injunctions it seeks.

A. The Commission Cannot Meet The Standard For Granting An Injunction.

The party seeking an injunction bears the burden to satisfy the well-established four-part test for injunctive relief: success on the merits, irreparable harm absent an injunction, balance of harms to the movant and nonmovant, and the public interest. *See supra* pp.7–8. The Commission asks the Court to enter two injunctions. Dkt. 71-3, 71-4. As authority, it invokes Section

7A(g)(2)(A) and (C), which afford courts discretion to enter injunctions. Dkt. 71-1 at 19–20; 71-3 at 1; 71-4 at 1. The Commission thus must satisfy the injunction standard, not merely make a showing on the merits. *See supra* pp.7–8. And the injunction standard is particularly strict here because the Commission seeks a mandatory injunction that would require the Hospitals to affirmatively act by making an HSR filing. *See Lake*, 181 F. Supp. 3d at 704. (Even under Section 13(b), on which the Commission has relied at other points in this litigation, the Commission must make a showing that the public equities support the issuance of an injunction. *CCC Holdings*, 605 F. Supp. 2d at 35–36.)

The Commission has not even attempted to make any of the required non-merits showings, under any standard. Its motion for summary judgment and entry of the two requested injunctions should accordingly be denied. *See Grogan*, 873 F.3d at 277; *May*, 55 F. Supp. 3d at 901; *Abbott*, No. 16-cv-188, Dkt. 101 at 20.

Nor, as the Hospitals argued in their motion for summary judgment, could the Commission make the required showings even if it tried. The State of Louisiana has already evaluated the public interest of its citizens and determined that the Acquisition would serve the public interest. *See* La. Stat. § 40:2254.4; Dkt. 75-2 ¶¶ 27, 29; Dkt. 68 ¶¶ 6–7, 10, 28–29; Dkt. 14 at 6. And the fact that the Acquisition is exempt from Section 7, regardless of whether state action immunity applies to Section 7A, cuts against any argument the Commission could make with respect to public interest, irreparable harm, or the balance of harms (or, under Section 13(b), the public equities generally). No interest is served by an injunction that requires notification to the Commission and a halt to integration for a transaction that is *exempt* from Section 7 enforcement, particularly when the transaction has already been consummated and the Commission is already aware of it. As Judge Jackson recognized, the purely academic review to be facilitated by such

an injunction would be "an empty exercise" for an already-consummated merger that is "exempt" from "federal antitrust enforcement," No. 23-cv-1890, Dkt. 31 at 22. A pointless injunction does not serve the public interest.

That same point goes to the balance of harms and irreparable harm factors, too. Under these circumstances, the Commission cannot show irreparable harm (or any harm) from the lack of a Section 7A filing, and the undisputed harm to the Hospitals and the State far outweighs any conceivable harm to the commission in not receiving notification of a transaction of which it is already aware and that is outside its Section 7 enforcement authority. Likewise, the Commission's emphasis on administrative subpoenas underscores why the Commission is not irreparably harmed: It can accomplish any investigation it deems necessary through other, legitimate investigatory powers if it chooses. Indeed, the Commission has already opened a separate investigation into the Acquisition. SOMF at p.4 ¶ 2. And as for the waiting period, there is no irreparable harm to law enforcement or the public because the Acquisition is exempt from Section 7 itself.

While the Commission would not be harmed by denial of an injunction, enjoining integration will harm the Hospitals and the public. Dkt. 75-2 ¶¶ 51–63. The Acquisition was designed to benefit the people of Louisiana by allowing the Hospitals to increase access to high-quality clinical services and health care in the New Orleans region, and the COPA application detailed the plan to achieve those benefits. *Id.* ¶¶ 18–20. The Louisiana Department of Justice conditioned the COPA on LCMC's commitments that it would improve access to high-quality healthcare by modernizing hospital assets, making capital investments, recruiting providers, and relocating services. *Id.* ¶¶ 18–20. Those commitments will be delayed or rendered impossible if the Court halts further integration. *Id.* ¶¶ 51–63.

B. The Acquisition Satisfies The Requirements For State Action Immunity.

As the Hospitals explain further in their motion for summary judgment, the Acquisition meets the requirements for state action immunity. Conduct that might otherwise violate the antitrust laws is exempt from the federal antitrust laws if it satisfies two elements. *Phoebe Putney*, 568 U.S. at 225; *see Midcal*, 445 U.S. at 105 (adopting the two-part test). ***First,*** the State must have authorized the challenged anticompetitive conduct—it must be "clearly articulated and affirmatively expressed as state policy." *Phoebe Putney*, 568 U.S. at 226. "[N]o express mention of anticompetitive conduct" is required. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41–42 (1985). But "the State must have foreseen and implicitly endorsed the anticompetitive effects." *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 507 (2015).

Second, the conduct must be "actively supervised" by the State. *Phoebe Putney*, 568 U.S. at 225 (quoting *Midcal*, 445 U.S. at 105). Active supervision means "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Dental Exam'rs*, 574 U.S. at 507. To satisfy active supervision, a state official must (1) "have the power to veto or modify" the challenged conduct, (2) "review the substance of the anticompetitive decision," and (3) make a "decision" that the conduct "accord[s] with state policy." *Id.* at 515.

The facts of this case easily meet those requirements. For clear articulation, the Louisiana Legislature unequivocally authorized "mergers … and consolidations among health care facilities for which certificates of public advantage are granted." La. Stat. § 40:2254.1. The express "intent of the legislature" is to "substitute state regulation … for competition," and to "grant[] … state action immunity" from "federal antitrust laws." *Id.* This crystal clear statement authorizing and immunizing COPA-approved mergers goes well beyond "implicitly endors[ing]" allegedly

anticompetitive conduct. *Dental Exam'rs*, 574 U.S. at 507. The statute as implemented here accordingly meets the clear articulation requirement.

For active supervision, the Department had power to veto or modify the Acquisition, reviewed its substance, and affirmatively decided to allow the Acquisition as consistent with state policy. *Id.* at 507, 515; *DFW Metro Line Servs. v. Sw. Bell Tel., Corp.*, 988 F.2d 601, 605–06 (5th Cir. 1993). Under Louisiana's COPA statute, the Department had "power to veto" the Acquisition by denying a COPA, or "modify" the Acquisition by imposing conditions on COPA approval. *Dental Exam'rs*, 574 U.S. at 515; La. Stat. § 40:2254.4(A)–(C). The Department "review[ed] the substance of" the Acquisition by evaluating the detailed COPA application, retaining expert consultants, receiving and reviewing input from a wide range of stakeholders, and holding a public hearing. *Dental Exam'rs*, 574 U.S. at 515; Dkt. 75-2 ¶¶ 18, 22–29. Based on that review, the Department affirmatively decided that the challenged conduct "accord[s] with state policy." *Dental Exam'rs*, 574 U.S. at 515; Dkt. 75-2 ¶ 29. These undisputed facts easily meet the governing standard for active supervision. *See Dental Exam'rs*, 574 U.S. at 515. And even if ongoing supervision were required, *but see* Dkt. 75-1 at 12–13 & n.2, the COPA's terms and conditions provide for such supervision, including review of rate changes and regular reporting requirements that permit the Department to evaluate LCMC's progress toward various quality, cost, and access benchmarks, and ongoing supervision is occurring. Dkt. 75-2 ¶¶ 30–34, 36–38.

CONCLUSION

For the foregoing reasons, this Court should deny each of the Commission's requests for injunctive relief and deny the Commission's motion for summary judgment.

Dated: August 9, 2023

Respectfully submitted,

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

FEDERAL TRADE COMMISSION, Petitioner, *v.* **LOUISIANA CHILDREN'S MEDICAL CENTER,** **HCA HEALTHCARE, INC.,** Respondents, **STATE OF LOUISIANA,** Intervenor	**Case No. 2:23-cv-1305, c/w 23-cv-1890** **JUDGE AFRICK (I)** **MAGISTRATE JUDGE NORTH (5)** **THIS DOCUMENT RELATES TO: Case No. 23-1890**
LOUISIANA CHILDREN'S MEDICAL CENTER, d/b/a LCMC HEALTH, **HCA HEALTHCARE, INC.** Plaintiffs **STATE OF LOUISIANA,** Intervenor *v.* **MERRICK GARLAND et al.** Defendants	

RESPONDENTS' RESPONSE TO THE STATEMENT OF MATERIAL FACTS SUBMITTED BY THE FEDERAL TRADE COMMISSION IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rules 56.1 and 56.2, Respondents Louisiana Children's Medical Center and HCA Healthcare, Inc. (together, the Hospitals) hereby respond to the alleged uncontested material facts set forth by the Federal Trade Commission.

Responses

1. Respondent LCMC Health ("LCMC") is a non-profit corporation incorporated under the laws of Louisiana, with its principal place of business at 1100 Poydras Street, New

Orleans, LA 70163. LCMC operates a network of hospitals in the greater New Orleans area.

Response: Uncontested.

2. LCMC had revenues over $2.2 billion and $3.7 billion in assets in 2021.

Response: Uncontested.

3. Respondent HCA Healthcare Inc. ("HCA") is a for-profit corporation incorporated under the laws of Delaware with its principal place of business located at One Park Plaza, Nashville, TN 37203.

Response: Uncontested.

4. HCA operates 182 hospitals in the United States and abroad, with revenues totaling approximately $60.2 billion in 2022.

Response: Uncontested.

5. On January 1, 2023, LCMC completed its acquisition of three HCA hospitals in the New Orleans area—Tulane Medical Center, Lakeview Hospital, and Lakeside Hospital—for approximately $150 million.

Response: Uncontested.

6. On January 3, 2023, LCMC announced that it had finalized the acquisition.

Response: Uncontested.

7. In 2022 and early 2023, firms engaging in mergers or acquisitions had to file premerger notification reports of transactions of between $101 million and $403.9 million in voting securities or assets, provided that the entities involved in the transaction met the "size of person" test. The thresholds for the size of person test in January 2023 were $20.2 million for the smaller entity and $202 million for the larger entity based on total assets or net sales.

Response: Uncontested that for firms subject to the HSR filing requirements, the

transaction thresholds are accurately recited. The Hospitals state that the transaction at issue is not subject to the HSR filing requirements, pursuant to the state action immunity doctrine. Therefore, the Commission's assertion is inaccurate to the extent it purports that all firms—including LCMC and HCA in this instance—are subject to these thresholds.

8. The Hospitals' transaction met the financial thresholds for an HSR Act premerger notification filing.

Response: Uncontested that if LCMC and HCA were subject to HSR filing requirements (which they are not), the transaction would have met the relevant thresholds for an HSR filing. The Hospitals state that the transaction at issue is not subject to the HSR filing requirements, pursuant to the state action immunity doctrine. Therefore, the Commission's assertion is inaccurate to the extent it purports that the transaction is subject to these thresholds.

9. Neither LCMC nor HCA filed an HSR notification report or accompanying materials with the FTC or the DOJ prior to or since consummating their transaction.

Response: Uncontested.

Additional Material Facts

The Hospitals respectfully submit that additional material facts are relevant to the FTC's motion. While these facts support the Hospitals' opposition to the FTC's motion, they are not in dispute. These material facts are found in the Hospitals' statement of facts in support of their motion for summary judgment, Dkt. No. 75-2, at paragraphs 13, 17-20, and 22-63.

The following additional undisputed material facts are also relevant to the FTC's motion:

1. The Commission can and regularly does investigate and bring enforcement actions against mergers that are not covered by the HSR Act, such as in *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216 (2013); *FTC v. ProMedica Health Sys.*, 2011 U.S. Dist. LEXIS 33434 (N.D Ohio Mar. 29, 2011); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015); *In the Matter of ARKO Corp. et al.*, FTC Matter No. 2110187 (2022); and *In the Matter of Cardinal Health, Inc.*, FTC Matter No. 0910136 (2011).

2. The Commission informed the Hospitals that it has opened an investigation into the acquisition. *See* No. 23-cv-1890, Dkt. 5-8 at 2–3.

3. Merging parties must determine on their own whether the HSR Act and its rules and regulations apply to their transaction—whether because they fall below monetary thresholds or because they fit within the 12 statutory or 29 additional regulatory exemptions. *See* 15 U.S.C. § 18a(a) (thresholds); *id.* § 18a(c) (exemptions); 16 C.F.R. pt. 802 (regulatory exemptions).

4. The Commission's public guidance regarding premerger notification filing instructs parties to make unilateral determinations regarding whether any of these exemptions apply to their transaction. *See, e.g.*, Fed. Trade Comm'n Introductory Guide II, To File or Not to File: When You Must File A Premerger Notification Report Form, at 1 (Sept. 2008) ("Before filing, you should consult these exemption rules, as well as the exemptions set out in the statute itself, to determine whether any of them apply."), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide2.pdf; Fed. Trade Comm'n, Formal Interpretation No. 17, n.1 (directing "[p]arties wishing to determine the application of the HSR Act and the Rules to a particular set of facts" to review the Commission's guidance), https://www.ftc.gov/legal-library/browse/hsr-formal-interpretations/formal-interpretation-no-17.

Dated: August 9, 2023

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