IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CIVIL ACTION NO. 5:24-cv-00028-KDB-SCR

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

NOVANT HEALTH, INC.

and

COMMUNITY HEALTH SYSTEMS, INC.,

Defendants.

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE DEFENDANTS' CONSTITUTIONAL AFFIRMATIVE DEFENSES

The FTC's motion to strike should be granted. In large part, Defendants either misunderstand or fail to respond to the FTC's arguments for striking certain affirmative defenses. Indeed, rather than address the FTC's arguments head-on, Defendants spend their opposition attacking the constitutionality of the FTC's century-old administrative process. *See, e.g.*, Opp. (ECF No. 78) at 1, 8-9. Those attacks have been firmly rejected by every recent court to have considered them.[1] In any event, Defendants' constitutional challenges raise far-reaching legal issues that have profound implications for the FTC and a number of other federal agencies, and

[1] *See, e.g.*, *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1046-47 (5th Cir. 2023) (after an administrative trial, and outside of the context of a Section 13(b) request for preliminary injunction, rejecting various constitutional challenges as "foreclosed by Supreme Court authority"); *FTC v. Syngenta Crop Prot. AG*, No. 22-CV-828, 2024 WL 149552, at *25-28 (M.D.N.C. Jan. 12, 2024) (denying defendants' motion to dismiss that had been based, in part, on a constitutional challenge to the FTC's authority).

they are irrelevant to the merits of the challenged transaction. As such, neither the parties nor the Court should be burdened by litigating these weighty constitutional issues—ones that no court has accepted—at the upcoming evidentiary hearing. Although two other federal courts held that merging parties are free to assert constitutional challenges in a separate action, both courts struck these same constitutional defenses as immaterial to the FTC's request for a preliminary injunction under Section 13(b) of the FTC Act, and this Court should reach the same conclusion.

ARGUMENT

While motions to strike are generally "disfavored," courts in this Circuit have nonetheless struck affirmative defenses when doing so removes "a defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (cleaned up). Here, Defendants' constitutional defenses are irrelevant both to this Court's evaluation of the FTC's request for injunctive relief under Section 13(b) and any appeal from this Court's decision, serving only to distract from this case. The FTC respectfully requests that the Court strike Defendants' irrelevant defenses so that the parties can focus the upcoming preliminary injunction hearing on the FTC's antitrust challenge to the unlawful proposed transaction.

I. DEFENDANTS' CONSTITUTIONAL CHALLENGES ARE IRRELEVANT TO THE COURT'S ANALYSIS OF THE PROPOSED TRANSACTION

The Court should reject Defendants' attempt to shoehorn constitutional issues into a narrow preliminary injunction action meant to enable a more robust administrative trial. This case requires the Court to determine whether it is in the public interest to temporarily enjoin the transaction at issue while the proposed transaction's merits are fully assessed in the FTC's underlying administrative proceeding. *See* 15 U.S.C. § 53(b); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976). This injunctive process is meant to "focus[] on the antitrust

merits." *FTC v. IQVIA Holdings Inc.*, No. 23-cv-06188, 2023 WL 7152577, at *4 (S.D.N.Y. Oct. 31, 2023) (collecting cases from various circuit courts). Defendants' constitutional defenses do not go to the antitrust merits of the transaction at issue; instead, they inappropriately invite the Court to mix together merits issues with collateral constitutional attacks against the entirety of the FTC's administrative process. As such, this Court should reject Defendants' invitation to inject constitutional issues into this proceeding and instead focus on a preliminary assessment of the transaction's merits, as Section 13(b) contemplates and as other courts have concluded in similar contexts. *See* Opp. at 4 (acknowledging that affirmative defenses should be stricken when they have "no possible relation to the controversy").

Two other federal courts struck the same constitutional challenges to the FTC's authority during a Section 13(b) proceeding. *See, e.g.*, *FTC v. Meta Platforms Inc.*, No. 5:22-cv-04325, 2022 WL 16637996, at *6-7 (N.D. Cal. Nov. 2, 2022); *IQVIA*, 2023 WL 7152577, at *8. Defendants attempt to distinguish *Meta* and *IQVIA* by citing *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023).[2] *See* Opp. at 6. But *IQVIA* cited *Axon* in support of its decision to strike virtually identical constitutional challenges as irrelevant to the Section 13(b) inquiry. *IQVIA*, 2023 WL 7152577, at *6-8 (noting that it would make more sense for the defendants to raise constitutional challenges "in a separate action," as *Axon* contemplated). Moreover, even though *Meta* was decided before *Axon*, this fact is of no moment. Unlike the situations in *Meta* and *IQVIA*, *Axon* was not a Section 13(b) case; it was a separate suit a company filed against the FTC, and the

[2] Defendants also distort the *Meta* court's reasoning by implying that the court treated certain non-bias-related constitutional affirmative defenses as potentially relevant to its Section 13(b) analysis. See Opp. at 4 n.3. Not so. The *Meta* court stated expressly that its assessment of the "constitutional affirmative defenses overlaps significantly with its analysis of Defendants' bias-related defenses, particularly regarding the Court's ability to consider these arguments in the limited procedural posture of a Section 13(b) preliminary injunction request." *Meta Platforms*, 2022 WL 16637996, at *7.

Supreme Court's decision addressed whether courts have jurisdiction to hear separate suits raising constitutional claims while an administrative proceeding is pending. *Axon*, 598 U.S. at 183-85. Here, by contrast, the key issue is whether constitutional challenges must be injected into the scope of the court's inquiry under Section 13(b). Every court to consider the latter question has held that constitutional challenges have no bearing on whether preliminary injunctive relief is warranted under Section 13(b). As *Meta* explained, "Section 13(b)'s 'likelihood of ultimate success' inquiry [means] the likelihood of the FTC's success on the merits in the underlying administrative proceedings," which would focus on the action's antitrust merits, "as opposed to success following a Commission hearing, the development of an administrative record, and appeal before an unspecified Court of Appeals," which might allow for consideration of collateral constitutional issues. 2022 WL 16637996, at *6-7; *see also IQVIA*, 2023 WL 7152577, at *3, *8 (same).

This Court should follow the reasoning in *Meta* and *IQVIA*. In actions like these, brought under Section 13(b) of the FTC Act, "the decision to grant or deny a preliminary injunction would turn on the likelihood that the acquisition really does violate section 7 [of the Clayton Act]." *FTC v. Elders Grain*, 868 F.2d 901, 905 (7th Cir. 1989). Accordingly, the Court's focus in this matter is directed to the merits of the underlying Section 7 case—in particular, whether the FTC has a "fair and tenable chance of ultimate success on the merits." *In re Sanctuary Belize Litig.*, 409 F. Supp. 3d 380, 396 (D. Md. 2019), *aff'd sub nom. FTC v. Pukke*, 795 F. App'x 184 (4th Cir. 2020). Defendants' constitutional arguments have no bearing on the "likelihood that the acquisition really does violate section 7," *Elders Grain*, 868 F.2d at 905, and therefore are irrelevant to the Section 13(b) analysis.

Meta's and *IQVIA*'s reasoning applies here, and Defendants' constitutional defenses should be stricken as they were in those cases. Just as in *Meta* and *IQVIA*, this is an FTC action for preliminary injunctive relief pursuant to Section 13(b). The precedent regarding the limited scope of a Section 13(b) proceeding applies. *See Food Town*, 539 F.2d at 1342; *Sanctuary Belize*, 409 F. Supp. 3d at 396. The Section 13(b) inquiry is strictly focused on the antitrust merits of the proposed transaction; alleged procedural issues (even of a constitutional dimension) are irrelevant to whether the transaction should be paused pending a full administrative trial. Accordingly, Defendants' constitutional affirmatives defenses provide "no possible bearing upon the subject matter of the litigation," *Billips v. NC Benco Steel, Inc.*, No. 10-cv-00095-V, 2011 WL 4829401, at *1 (W.D.N.C. Oct. 12, 2011) (cleaned up), and should be stricken on that basis.

II. DEFENDANTS MISCONSTRUE THE FTC'S POSITION AND MISREAD *AXON*

Defendants misunderstand the FTC's position. While courts have repeatedly rejected similar constitutional challenges to the FTC's structure and administrative process,[3] the FTC is not suggesting Defendants cannot raise those arguments in any forum. Rather, Defendants' constitutional challenges must be evaluated as part of a separate action—like in the Supreme Court's recent decision in *Axon*, 598 U.S. at 175—or as counterclaims, or on appeal from a final Commission order. *See* Mot. at 9.

Had Defendants properly asserted these constitutional challenges in a separate suit, the FTC could defend itself with the benefit of comprehensive briefing, focused argument, and robust legal processes afforded to government agencies subject to such challenges. *See* Mot. at 9 (describing the Department of Justice's role in defending the FTC in a civil action). Defendants instead ask the FTC and the Court to brief and decide consequential constitutional matters in the

[3] *See, e.g.*, *Illumina*, 88 F.4th at 1046-47; *Syngenta Crop Prot. AG*, 2024 WL 149552, at *25-28.

midst of a rapidly-paced preliminary injunction litigation focused on antitrust issues. Defendants can have their day in court raising these very constitutional challenges, but challenges of such import and impact should not be rushed through the fast-paced, limited inquiry of a Section 13(b) proceeding.

Defendants rely on two seemingly contradictory claims to defend their improper affirmative defenses: (1) Defendants must litigate their constitutional affirmative defenses immediately, in this federal proceeding, because the FTC's impending administrative process "is constitutionally infirm," Opp. at 8; and (2) "there is virtually no scenario in which the merits of this transaction will ever be tried in the administrative proceeding," Opp. at 1. Defendants' positions underscore "the oddity of resolving the constitutional challenges in a section 13(b) proceeding." *IQVIA*, 2023 WL 7152577, at *6.

First, the Supreme Court's decision in *Axon* does not require any federal court to hear constitutional issues whenever they are raised. Rather, the Supreme Court held that courts have *jurisdiction* to hear certain types of "existential" constitutional challenges, in some circumstances, before the conclusion of a corresponding administrative proceeding. *Axon*, 598 U.S. at 180-85. Here, Defendants are free to pursue those constitutional challenges by filing a separate action. But, as the *IQVIA* court recognized, Defendants cannot obfuscate the Section 13(b) proceeding by injecting irrelevant constitutional challenges. Even if a district judge were to hold that the FTC is unlikely to succeed on constitutional challenges, "the limited effect of that decision would be to deny the FTC a preliminary injunction." 2023 WL 7152577, at *6. In other words, even if Defendants were to prevail on these constitutional affirmative defenses, "it would not stop the FTC from moving forward with the very administrative proceedings that Defendants contend are unconstitutional." *Id.* Thus, as the *IQVIA* court recognized, it would make more

sense for Defendants to pursue their constitutional challenges "in a separate action," just as the *Axon* court suggested. *Id.* (citing *Axon* for support).

Second, there is no prejudice to Defendants proceeding separately, just as the *IQVIA* and *Axon* courts suggested. Defendants are free to file a separate civil action while this proceeding (and the underlying Part 3 administrative process) is ongoing. A court recently affirmed this reading of *Axon* by denying a preliminary injunction of the FTC's administrative proceeding while the defendant litigated certain constitutional challenges in federal court. *See Meta Platforms, Inc. v. FTC*, No. 23-3562-RDM, 2024 WL 1121424, at *8 (D.D.C. March 15, 2024) (assessing a similar argument regarding *Axon* and concluding that "the expense and annoyance of litigation, including in an FTC proceeding, does not constitute irreparable injury") (quoting *United States v. Facebook, Inc.*, No. 23-5280, Dkt. 2044641 (D.C. Cir. Mar. 12, 2024)).

In contrast to Defendants, the FTC would be prejudiced if these claims are incorporated into the Section 13(b) analysis. *See IQVIA*, 2023 WL 7152577, at *8. This case is proceeding on a truncated schedule, and the issue before the Court is narrowly focused on whether the FTC has raised a "fair and tenable chance of ultimate success on the merits." *Sanctuary Belize*, 409 F. Supp. 3d at 396; *see also Food Town*, 539 F.2d at 1342. Injecting irrelevant issues will only serve to obfuscate this proceeding, which is precisely the harm Rule 12(f) seeks to prevent. *Waste Mgmt.*, 252 F.3d at 347.

* * *

For the reasons stated above and in the Motion to Strike, ECF No. 59, the FTC respectfully requests that the Court strike Defendants' constitutional affirmative defenses.

Dated: March 21, 2024

Respectfully submitted,

/s/ Nathan Brenner

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