IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Petitioner, v. **LOUISIANA CHILDREN'S MEDICAL CENTER**, and **HCA HEALTHCARE, INC.**, Respondents.	Case No. 1:23-cv-01103-ABJ

MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

Respondents Louisiana Children's Medical Center ("LCMC") and HCA Healthcare, Inc. ("HCA") (collectively, "Respondents"), by and through their counsel, respectfully move the Court to transfer this action, pursuant to 28 U.S.C. § 1404(a), to the U.S. District Court for the Eastern District of Louisiana. For reasons set forth more fully in the accompanying memorandum of points and authorities, which is incorporated herein by reference, Respondents respectfully submit that all public and private interests weigh in favor of transfer, that the Federal Trade Commission's choice of venue should be afforded little to no deference, and that the instant venue presents jurisdictional questions that would be pretermitted if this motion is granted. Accordingly, for these reasons (and those contained in the accompanying memorandum of points and authorities), Respondents respectfully request that this motion be granted.

Dated: April 24, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2023, I caused a copy of the foregoing to be filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's CM/ECF system. Parties may access this filing through the Court's CM/ECF system.

/s/ Sara Y. Razi
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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

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Respondents Louisiana Children's Medical Center ("LCMC")[1] and HCA Healthcare, Inc. ("HCA") (collectively, "Respondents") respectfully submit this memorandum of law in support of their motion to transfer venue under 28 U.S.C. § 1404(a) to the Eastern District of Louisiana, where two cases to resolve the same dispute, *HCA Healthcare, Inc. v. Garland*, No. 2:23-cv-01311 (E.D. La.) and *Louisiana Children's Medical Center v. Garland*, No. 2:23-cv-01305 (E.D. La.), are already pending (the "Louisiana Actions").

PRELIMINARY STATEMENT

The Federal Trade Commission (the "FTC" or "Commission") has a longstanding and consistent practice of filing suits to block hospital mergers in the district in which the hospitals are located. That makes good sense, as it is the district where the competitive effects are felt and where most of the evidence and witnesses are located. Those conditions exist in this case also. All of the underlying assets—the three hospitals that the FTC asks this Court to order LCMC to hold separate and maintain—are located in the Eastern District of Louisiana. All of the underlying conduct that give rise to the FTC's supposed cause of action—the transactions—occurred in Louisiana. LCMC largely operates in Louisiana and Mississippi. Moreover, LCMC and HCA each have already filed complaints in the Eastern District of Louisiana seeking declaratory judgments that they are immune under the state action doctrine from the antitrust laws the FTC seeks to enforce. The FTC, however, has broken from its past custom and has sued LCMC and HCA in *this* Court—a Court that has no connection to the underlying transaction, the relevant market, or any party besides the FTC.

[1] By participating in this motion Respondents do not concede that jurisdiction has been properly established and instead reserve the right to contest personal jurisdiction in the event the motion is denied. LCMC is filing a contemporaneous motion to transfer for lack of personal jurisdiction.

The Louisiana Actions, like the FTC's complaint here, raise important questions about the prerogative of the Louisiana Legislature and other state officials to set health care policy in their state free from the scrutiny of federal antitrust laws. Those questions are inextricably linked with interpretations of Louisiana laws. While this Court is, of course, qualified to rule on those issues, the Eastern District of Louisiana is more accustomed to interpreting Louisiana law and has greater first-hand knowledge of the relevant market, actors, and institutions, which will help guide its decision on the FTC's request for injunctive relief. In addition, the State of Louisiana has a clear interest in having these questions resolved in Louisiana, where its Attorney General who has already moved to intervene in both Louisiana Actions will have easier and more-efficient access to the district court. As explained in the Louisiana Attorney General's motions to intervene, the FTC's position is a "blatant attack on Louisiana's COPA law . . . and Louisiana's state sovereignty," and litigation without the State of Louisiana's participation will "impair the State of Louisiana's ability to protect its interests, and will impair and impede the Attorney General from carrying out his constitutional duties to defend and uphold the laws of the State of Louisiana." *See* Declaration of Sara Y. Razi in Support of Respondents' Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), dated April 24, 2023 ("S. Razi Decl."), Exhibit C at 6-7, Exhibit D at 6-7.

There is more. As LCMC explains in its contemporaneous motion to transfer for lack of personal jurisdiction, this Court does not have personal jurisdiction over it, a corporation that operates largely in Louisiana and Mississippi. If the Court transfers this case as a matter of discretion, that question may be pretermitted. *See Mathis v. Geo Grp., Inc.*, 535 F. Supp. 2d 83, 86 (D.D.C. 2008) ("Where a 'sound prudential justification' exists, a court may consider venue without deciding the question of personal jurisdiction.") (quoting *Cameron v. Thornburgh*, 983 F.2d 253, 257 n.3 (D.C. Cir. 1993)).

The only reason offered by the FTC for filing its complaint in the District of Columbia is because that is "where Respondents should have filed a notification of their transaction." (Compl. at 4). That is both wrong and, of course, a non sequitur. It is wrong because, ever since the pandemic began, the FTC has permitted parties to submit their HSR notifications by e-mail, so the "omitted" filing could have come from anywhere.[2] It is a non sequitur because the place where an administrative filing is made has nothing to do with the merging parties, the witnesses, the evidence, the substance of the underlying transaction, the Court's jurisdiction over the respondents, or anything else that might inform the Court's views on proper venue.

Given this dispute's overwhelming connection to the Eastern District of Louisiana, and its complete lack of connection to the District of Columbia, this Court should transfer the FTC's action to that forum.

BACKGROUND

On April 19, 2023, LCMC and HCA filed the Louisiana Actions in the Eastern District of Louisiana. *See* S. Razi Decl., Exhibit A, Exhibit B. The Louisiana Actions seek declaratory judgments that the parties to the Acquisition, including HCA and LCMC, are (1) not obligated to submit an HSR Filing concerning the Acquisition or to pay a related filing fee or (2) subject to any fine or penalty under 15 U.S.C. § 18a(g)(1) or any other antitrust law in connection with the Acquisition. *See* S. Razi Decl., Exhibit A, Exhibit B. Both cases have been assigned to District Judge Lance M. Africk. On April 23, 2023, the State of Louisiana, by and through Attorney General Jeff Landry, moved to intervene in the Louisiana Actions. *See* S. Razi Decl., Exhibit C, Exhibit D.

[2] *Guidance for Filing Parties*, Federal Trade Commission, http://www.ftc.gov/enforcement/premerger-notification-program/covid-19-guidance-filing-parties (last modified Nov. 16, 2022).

On April 20, 2023, the day after the Louisiana Actions were filed, the FTC filed this case in the District of Columbia.

LEGAL STANDARDS

Under Section 1404(a), district courts may "transfer any civil action to any other district or division where it might have been brought" for "the convenience of parties and witnesses." 28 U.S.C. §1404(a) . Section 1404(a) gives district courts broad discretion to evaluate motions to transfer "according to an individualized, case-by-case consideration of convenience and fairness." *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 939 F. Supp. 1, 3 (D.D.C. 1996) (quoting *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). In exercising their discretion, courts consider (1) whether venue would be proper in the proposed transferee district, and (2) whether private and public considerations of convenience and fairness favor transfer.[3] *FTC v. Illumina, Inc.*, No. 21-873 (RC), 2021 U.S. Dist. LEXIS 75172, at *5 (D.D.C. Apr. 20, 2021). In addition, a court may grant a motion to stay "[i]n the interest of judicial economy and avoiding unnecessary litigation." *Khadr v. Bush*, 587 F. Supp. 2d 225, 229 (D.D.C. 2008) (quoting *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 199 (D.D.C. 2005)).

[3] There can be no dispute that the threshold question of whether the FTC could have brought this suit in the Eastern District of Louisiana is satisfied. The FTC may bring a suit where a "corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28." 15 U.S.C. § 53(b)(2). Under Section 1391, venue is proper in any district "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(b)(2). LCMC is headquartered and has its principal place of business in Louisiana. Additionally, all of the hospitals at issue in the relevant transaction are located in the Eastern District of Louisiana. LCMC and HCA have both also submitted to the jurisdiction of the Eastern District of Louisiana and have filed the Louisiana Actions there. The FTC thus could have brought this suit in the Eastern District of Louisiana. Accordingly, this brief focuses on the second inquiry.

ARGUMENT

I. Both Convenience and Fairness Favor Transfer.

A motion to transfer requires consideration of both private and public interests. Private interests include: "(1) the plaintiff's choice of forum; (2) the defendant's preferred forum; (3) the location where the claim arose; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) ease of access to sources of proof." *Illumina, Inc.*, No. 21-873, 2021 U.S. Dist. LEXIS 75172, at *11. Public interests include "(1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home." *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 25 (D.D.C. 2008) (quoting *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res.*, 196 F. Supp. 2d 21, 31-32 (D.D.C. 2002)). In this case, both private and public interests weigh in favor of a transfer to Louisiana.

A. Litigating in the Eastern District of Louisiana is More Convenient.

Both private and public interests strongly support transfer to the Eastern District of Louisiana. The private interest considerations focus on the connection of the underlying case to the chosen forum. The underlying case here is connected exclusively to Louisiana. The acquired hospitals are located in Louisiana. LCMC—the purchaser of the hospitals, the party against which the FTC seeks a preliminary injunction and temporary restraining order—is headquartered in Louisiana. Thus, the FTC's claim originates in Louisiana. *See Illumina, Inc.*, No. 21-873, 2021 U.S. Dist. LEXIS 75172, at *12 (quoting *Beall v. Edwards Lifesciences LLC*, 310 F. Supp. 3d 97, 104 (D.D.C. 2018)) ("A claim originates 'in the location where the corporate decisions underlying those claims were made or where most of the significant events giving rise to the claims occurred.'").

To the extent any factual inquiries will be required, the principal witnesses, documents, and evidence are located in Louisiana. The patients served by the hospitals—those whom the FTC is purportedly trying to protect—are generally citizens of Louisiana, not—except perhaps in rare cases—the District of Columbia. None of this should be surprising; the nexus of local-hospital mergers is typically local, which is why the FTC has, in the past, consistently brought such challenges in the jurisdictions where the hospitals were located. *See, e.g., FTC v. HCA Healthcare, Inc.*, No. 22-cv-00375, ECF No. 2 (D. Utah June 3, 2022); *FTC v. Hackensack Meridian Health, Inc.*, No. 20-cv-18140, ECF No. 14 (D.N.J. Dec. 8, 2020); *FTC v. Thomas Jefferson Univ.*, No. 20-cv-01113, ECF No. 1 (E.D. Pa. Feb. 27, 2020); *FTC v. Advocate Health Care Network.*, No. 15-cv-11473, ECF No. 14 (N.D. Ill. Dec. 22, 2015); *FTC v. OSF Healthcare Sys.*, No. 11-cv-50344, ECF No. 1 (N.D. Ill. Nov. 18, 2011); *FTC v. Inova Health Sys. Found.*, No. 08-cv-00460, ECF No. 1 (E.D. Va. May 12, 2008). To litigate in D.C., where there are few—if any—assets, employees, patients, witnesses, documents or records, is inconvenient for everyone except the FTC.

Public interests also support transfer to the Eastern District of Louisiana. The predicate legal questions in both cases—and the *only* legal questions in the Louisiana Actions—are whether Louisiana's COPA legislation and implementation meet the Supreme Court's standard for state action antitrust immunity, and, if so, whether a transaction protected by the state action antitrust immunity doctrine is also exempt from compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94-435. Resolution of the state action question will involve inquiries into (1) whether the Louisiana Legislature and Attorney General acted with sufficient clarity for the Court to conclude that the displacement of competition was part of an affirmative state policy, *see Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S.

97, 105 (1980); (2) whether qualified state actors provided sufficiently active supervision of the COPA approval process or merely "delegated" the State's regulatory power to active market participants, *see North Carolina State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 506-07 (2015); and (3) whether the effects of the acquisition by LCMC are sufficiently local to constitute a matter of "local concern" amenable to regulation by the state government rather than by Congress, *see Parker v. Brown*, 317 U.S. 341, 360 (1943). These inquiries are inextricably linked with interpretations of Louisiana laws and "local concern." That examination of the acts and intent of Louisiana's elected officials should be undertaken in Louisiana, where the Louisiana Attorney General can participate. The Attorney General's office already has indicated a strong interest in doing so and moved to intervene in both Louisiana Actions. *See* S. Razi Decl., Exhibit C, Exhibit D. Indeed, in filing its motion to intervene, the Louisiana Attorney General has indicated that it has "unique sovereign interests" that justify its involvement in the Louisiana Actions. *See* S. Razi Decl., Exhibit C at 9, Exhibit D at 9. In particular, the Louisiana Attorney General has called the FTC's position a "blatant attack on Louisiana's COPA law … and Louisiana's state sovereignty." *See* S. Razi Decl., Exhibit C at 2, Exhibit D at 2. The Louisiana Attorney General asserts that it intended for the COPA to exempt LCMC and HCA from federal antitrust laws, and absent the participation of the Louisiana Attorney General office in the Louisiana Actions, the "disposition of the case will impair the State of Louisiana's ability to protect its interests, and it will impair and impede the Attorney General from carrying out his constitutional duties to defend and uphold the laws of the State of Louisiana." *See* S. Razi Decl., Exhibit C at 6-7, Exhibit D at 6-7.

Moreover, as part of the COPA process, LCMC promised to undertake certain obligations to the State of Louisiana to improve quality of and access to health care in the greater New Orleans region, including moving forward with integration of the acquired hospitals and combining certain

facilities. *See* ECF No. 19-1, Declaration of Jody B. Martin at ¶ 22, dated April 24, 2023 ("J. Martin Decl."). The injunctive relief the FTC is seeking from LCMC in this action, including an indefinite hold separate order preventing further integration, conflicts with these commitments and may prohibit LCMC from delivering the promised benefits to the people and the State of Louisiana. *See id.*

Louisiana's local interest in deciding local controversies at home accordingly weighs heavily in favor of transfer. *Lab. Corp. of Am. Holdings v. NLRB*, 942 F. Supp. 2d 1, 4 (D.D.C. 2013) (public and private factors favored transfer where the facilities and employees involved in the action were in New Jersey, proceedings surrounding dispute took place in New Jersey, and the case was essentially a challenge to an election in New Jersey).

B. Litigating in the Eastern District of Louisiana Would Prevent Judicial Inefficiencies and Inconsistent Judgements.

Additionally, failure to transfer this action could result in inefficiencies and inconsistent judgments. Section 1404(a) was specifically designed to prevent "a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts," a scenario that "leads to the wastefulness of time, energy and money." *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960). Courts in this district regularly transfer cases to districts where cases raising similar issues are already pending. *See Holland v. A.T. Massey Coal*, 360 F. Supp. 2d 72, 77 (D.D.C. 2004) ("[T]he fact that there is an ongoing case dealing with similar issues in another jurisdiction weighs very heavily in favor of a transfer under § 1404(a)."); *Cal. Farm Bureau Fed'n v. Badgley*, No. 02-2328 (RCL), 2005 U.S. Dist. LEXIS 12861, at *7 (D.D.C. June 29, 2005) (declining to allow two suits on the same issue to proceed unconsolidated in separate districts and transferring the case).

Transferring this action would promote judicial efficiency and avoid the risk of inconsistent judgments. The Louisiana Actions seek judicial resolution of a simple question: whether Louisiana's COPA, as governed by Louisiana law, shields the Acquisition and the parties from application of the federal antitrust laws, including the HSR Antitrust Act. If that question is resolved in the affirmative, then the FTC's other requested relief must be denied because there is no legal basis to require the parties to file a notification, or for the FTC to undertake a substantive review, of the transaction. If it is resolved in favor of the FTC, then the FTC could renew its request for relief in the Eastern District of Louisiana. In any case, resolution of the state action questions are the gating items in this case, putting the two courts in an unseemly race to *res judiciata*. This consideration thus weighs strongly in favor of transfer. *Cephalon, Inc.*, 551 F. Supp. 2d at 29 (explaining that "the risk of inconsistent judgments that would arise if this case is not transferred" was the "most compelling point" in favor of transfer where the transferor would be "forced simultaneously to litigate two cases in two different courts arising out of precisely the same conduct.").

Moreover, adjudicating the principal state action question would be significantly more complex here than in Louisiana because there are foundational jurisdictional issues that this Court must resolve first. Namely, as set out later in this brief, *infra*, the FTC has not established that this Court has jurisdiction over the parties, but there is no similar issue with respect to the Louisiana Actions. That dispute would be mooted if this Action were transferred to the more logical and efficient forum of the Eastern District of Louisiana.

C. The FTC's Choice of Forum Should Be Entitled to Little or No Deference.

The FTC is not entitled to substantial deference where there is "no significant connection to the events giving rise to this case" and the FTC's chosen forum. *Cephalon, Inc.*, 551 F. Supp.

2d at 31. Moreover, "'when the weight of the plaintiff's choice [of forum] is comparatively weak,' the defendant's choice deserves greater consideration." *Illumina, Inc.*, 2021 U.S. Dist. LEXIS 75172, at *19 (quoting *Mazzarino v. Prudential Ins. Co. of Am.*, 955 F. Supp. 2d 24, 31 (D.D.C. 2013)).

The District of Columbia has no nexus to the relevant transaction, other than the incidental fact that the FTC is headquartered here. In support of its assertion of venue, the FTC claims that D.C. is the site where "the cause of action arose" because it is where "Respondents failed to file the required notification of their transaction." (Compl. at 4). But under the plain text of the statute upon which the FTC's complaint is founded—Section 7A of the Clayton Act, codified at 15 U.S.C. § 18(a)—the allegedly prohibited conduct is the affirmative act of acquiring of assets without notification, not the negative act of omitting a filing. *See* 15 U.S.C. § 18a(a) ("no person shall acquire, directly or indirectly, any voting securities or assets of another person . . . ").[4] Thus, if LCMC and HCA violated the Clayton Act, they did so in Louisiana and not in D.C.

Even if the substantive violation was the filing omission, the notion that such a violation "arose" in D.C. is mistaken. The only connection to D.C. is that the FTC attorney who otherwise would have downloaded and read the hypothetical e-mailed HSR filing would have potentially done so in D.C.—assuming, of course, that the attorney was working from the office that day and was not telecommuting from, say, Maryland or Virginia. Even then, the violation would not have "arisen" in D.C. any more than in Louisiana, where LCMC's executive officers would have signed the omitted HSR Form's affidavit, *see* J. Martin ¶ 4, or Tennessee, where HCA's executive officers would have done the same, *see* Declaration of Kathryn Hays Sasser, Esq. at ¶ 5, dated April 24,

[4] Notably, the urgent relief sought by the FTC (the TRO and preliminary injunction), of course, seek to hold separate the substantive assets, not to require a filing. That substantive relief would also occur in the state of Louisiana.

2023) ("K. Sasser Decl."). *Cf. Berenson v. National Financial Services*, LLC, 319 F. Supp. 2d 1, 4 (D.D.C. 2004) (agreeing with "the defendants' position that the claims arose at the location where the corporate decisions were made"); *Illumina, Inc.*, 2021 U.S. Dist. LEXIS 75172, at *11-12 (quoting *Beall*, 310 F. Supp. 3d at 104) ("A claim originates 'in the location where the corporate decisions underlying those claims were made or where most of the significant events giving rise to the claims occurred.'").

Courts in this district regularly grant motions to transfer in actions brought by federal agencies, including the FTC, where the District of Columbia has little connection to the events giving rise to the action. *See, e.g., Comptroller of Currency v. Calhoun First Nat'l Bank*, 626 F. Supp. 137, 141 (D.D.C. 1985) (granting transfer where only factual nexus with District of Columbia was filing of documents, and cases with "same factual underpinning" were pending in transferee district); *FTC v. Lab'y Corp. of Am.*, No. 10-cv-2053, ECF No. 15 (D.D.C. Dec. 3, 2010) (granting transfer from D.C., where the parties had no meaningful connection, to the Central District of California where other proceedings, including an action for declaratory judgment against the FTC, were ongoing). For example, in *FTC v. Cephalon, Inc.*, this Court granted a transfer to the Eastern District of Pennsylvania in an antitrust action brought by the FTC when there were proceedings ongoing elsewhere. 551 F. Supp. 2d 21 (D.D.C. 2008). As that Court was careful to note in analyzing the Section 1404(a) transfer criteria, "apart from the fact that many of the FTC's prosecuting attorneys are located in this area, there are no meaningful ties between the District of Columbia and the events (or parties) that gave rise to this action." *Id.* at 26. Like this case, the FTC in *Cephalon* could not credibly cite delay as a reason not to transfer the case since there had not even been a litigation schedule entered in either proceeding, and it could not offer

any reason "why it could not conduct th[e] litigation just as effectively in" the district where the related case was already pending.

Similarly, in *FTC v. Graco Inc.*, the district court transferred the action, over the FTC's objection, to the District of Minnesota because the only connection to the District of Columbia was the FTC's presence. No. 11-cv-02239, 2012 U.S. Dist. LEXIS 116826, at *20 (D.D.C. Jan. 26, 2012). Meanwhile, "the operative events arose" in Minnesota, the defendants were located within or nearby Minnesota, the district had "a local interest" in adjudicating the dispute, and "the evidence and sources of proof [we]re located there, the Defendants are located there (or closer to there), and the district has a local interest to adjudicate this dispute." *Id.* at *21. All of those principles apply equally here.

Given the strong connection to the Eastern District of Louisiana and the dearth of any real connection to the District of Columbia, the FTC's choice of forum should be granted little to no deference.

D. Contested Personal Jurisdiction in the D.C. Action Makes Adjudication Here Significantly More Complex Than in Louisiana.

While personal jurisdiction is undisputed with respect to all parties in the Louisiana Actions, the FTC has failed to demonstrate that the Court has jurisdiction over the Respondents in the District of Columbia. The supposed statutory basis for personal jurisdiction here is Section 12 of the Clayton Act, but as set out more fully in LCMC's concurrent motion to dismiss under Rule 12(b)(2), the FTC's burden for establishing that jurisdiction is proper in D.C. is to show that Respondents are (1) inhabitants of D.C., *City of Moundridge v. Exxon Mobil Corp.*, 471 F. Supp. 2d 20, 35 (D.D.C. 2007) ("To demonstrate inhabitancy in the District of Columbia [under Section 12], a plaintiff must show that the defendant is incorporated here."); (2) found in D.C., *id.* ("A plaintiff must show that a corporation has 'presence' and 'continuous local activity' in the District

of Columbia to establish that it can be found here [under Section 12]."); or (3) transact business in D.C., *id.* at 36 ("[w]hether a defendant has transacted business is largely a factual question . . . courts look for tangible manifestations of doing business . . . [and] [t]he business transacted must be of a substantial character") (internal quotation marks omitted).

LCMC has none of those links. Indeed, Plaintiff has not identified a single link of any kind between either Respondent and this forum, and the deficiency is especially pronounced for LCMC, which operates largely in Louisiana and Mississippi, has never directed its business toward D.C., and has no employees there. *See* J. Martin Decl. ¶ 5.

Nor can the FTC rely on a combination of 15 U.S.C. § 22 and 28 U.S.C. § 1391(b) and (c) to establish personal jurisdiction and venue. *GTE New Media Servs.*, 199 F.3d at 1350-51. In *GTE New Media Servs.* the D.C. Circuit rejected an argument that "venue may be obtained under either Section 12 or under the general federal venue provision of 28 U.S.C. § 1391, and that use of either route allows resort to Section 12's national jurisdiction provision." Accordingly, the FTC cannot establish personal jurisdiction under Section 12 unless it can also establish venue under Section 12.

While the Court need not decide this threshold jurisdictional issue for purposes of this transfer motion, the complications created by the mere specter of such jurisdictional challenges weigh in favor of transferring or staying this Action in favor of allowing the Louisiana Actions to proceed.

CONCLUSION

For the foregoing reasons, the Court should transfer the case to the Eastern District of Louisiana.

Dated: April 24, 2023

Respectfully submitted,

/s/ Benjamin F. Holt

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2023, I caused a copy of the foregoing to be filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's CM/ECF system. Parties may access this filing through the Court's CM/ECF system.

/s/ Sara Y. Razi
Sara Y. Razi

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Petitioner,** ***v.*** **LOUISIANA CHILDREN'S MEDICAL CENTER,** **and** **HCA HEALTHCARE, INC.,** **Respondents.**	CIVIL ACTION No. 1:23-cv-01103

DECLARATION OF KATHRYN HAYS SASSER, ESQ.

I, Kathryn Hays Sasser, Esq., declare as follows:

1. I am a United States citizen over the age of eighteen. I am competent to make this Declaration, and I am not a party to this litigation in my individual capacity. I make and submit this Declaration pursuant to 28 U.S.C. § 1746.

2. If called upon as a witness, I could testify to the matters to which this Declaration refers and would be competent to do so.

3. I am an attorney and Vice President-Litigation at HCA Healthcare, Inc. I submit this declaration upon personal knowledge or information and belief, including inquiry of relevant employees, in support of HCA Healthcare Inc.'s motion to transfer this case to the Eastern District of Louisiana as a related case to *HCA Healthcare, Inc. v. Merrick Garland, in his official capacity as Attorney General of the United States, et al.*, United States District Court, Eastern District of

Louisiana, No. 2:23-cv-01311, Judge Lance M. Africk, Magistrate Judge Donna Phillips Currault; and *Louisiana Children's Medical Center, d/b/a LCMC Health v. Merrick Garland, in his official capacity as Attorney General of the United States, et al.*, United States District Court, Eastern District of Louisiana, No. 2:23-cv-01305, Judge Lance M. Africk, Magistrate Judge Michael North.

HCA HEALTHCARE

4. HCA Healthcare, Inc. and its affiliates (collectively "HCA Healthcare") own or operate more than 180 hospitals and 2,300 sites of care in 20 states and the United Kingdom. HCA Healthcare does not own or operate any hospitals or sites of care within the District of Columbia.

5. HCA Healthcare employs approximately 294,000 people across the United States and United Kingdom. HCA Healthcare's corporate offices are located in Nashville, Tennessee, where HCA Healthcare's senior management and other corporate employees reside. HCA Healthcare employees who work in or with particular hospitals typically live in the areas in which those hospitals are located. None of HCA Healthcare's senior management reside in the District of Columbia.

6. HCA Healthcare has its principal executive offices at One Park Plaza, Nashville, Tennessee, 37203.

The Acquisition

7. Prior to Louisiana Children's Medical Center's ("LCMC") acquisition of Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital (the "Acquisition"), HCA Healthcare operated the three hospitals subject to the transaction (the "UHS Hospitals") through University Healthcare System, L.C. ("UHS"), a joint venture between Tulane University of Louisiana ("Tulane") and affiliates of HCA Healthcare.

8. The Acquisition was structured such that HCA Healthcare transferred its ownership interest in UHS to Tulane, and LCMC then acquired the membership interests of UHS and related equity interests in certain physician clinics from Tulane.

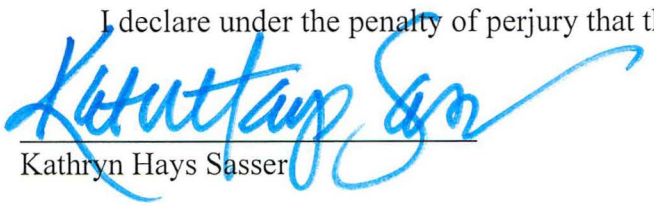
9. On October 10, 2022, the parties to the Acquisition, including HCA Healthcare and LCMC, submitted a Certificate of Public Advantage ("COPA") application to the Louisiana Department of Justice seeking approval of the Acquisition. A published public notice of the Louisiana Department of Justice's receipt of the COPA application is available online at https://louisianapublicnotice.com/notices/257989. The application spans 175 pages and includes extensive information about the hospitals and their operations, voluminous documents and records, and the efficiencies and other benefits to be realized as a result of the Acquisition.

10. On December 28, 2022, the State of Louisiana granted a COPA approving the agreements and merger effectuating the Acquisition.

11. On January 1, 2023, the parties to the Acquisition closed the transaction. Based on my knowledge, information, and belief, LCMC has been integrating the UHS Hospitals and physician clinics into its health care network.

12. Since the Acquisition closed on January 1, 2023, HCA Healthcare has had no involvement in the operation or administration of the UHS Hospitals, or in the operation or administration of any services provided in the UHS Hospitals.

I declare under the penalty of perjury that the foregoing is true and correct.



Kathryn Hays Sasser

Executed on April 24, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, Petitioner, v. **LOUISIANA CHILDREN'S MEDICAL CENTER**, and **HCA HEALTHCARE, INC.**, Respondents.	Case No. 1:23-cv-01103-ABJ

DECLARATION OF SARA Y. RAZI IN SUPPORT OF RESPONDENTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

I, Sara Y. Razi, declare the following:

1. I am a partner at Simpson Thacher & Bartlett LLP ("Simpson Thacher") and represent Respondent HCA Healthcare, Inc. in this case.

2. I am licensed to practice law in the District of Columbia. I am over 21 years of age, and I am competent to make this declaration.

3. I make this Declaration in support of Respondents' Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a).

4. On April 19, 2023, HCA Healthcare, Inc. and Louisiana Children's Medical Center each filed a complaint in the United States District Court for the Eastern District of Louisiana (the "Louisiana Actions").

5. Attached to this Declaration as Exhibit A is a true and correct copy of HCA Healthcare, Inc.'s complaint, *HCA Healthcare, Inc. v. Garland*, No. 2:23-cv-01311, ECF No. 1 (E.D. La.).

6. Attached to this Declaration as Exhibit B is a true and correct copy of Louisiana Children's Medical Center's complaint, *Louisiana Children's Medical Center v. Garland*, No. 2:23-cv-01305, ECF No. 1 (E.D. La.).

7. On April 23, 2023, the State of Louisiana, by and through Attorney General Jeff Landry, moved to intervene in the Louisiana Actions.

8. Attached to this Declaration as Exhibit C is a true and correct copy of Attorney General Jeff Landry's Motion to Intervene in *HCA Healthcare, Inc. v. Garland*, *HCA Healthcare, Inc. v. Garland*, No. 2:23-cv-01311, ECF No. 16 (E.D. La. Apr. 23, 2023).

9. Attached to this Declaration as Exhibit D is a true and correct copy of Attorney General Jeff Landry's Motion to Intervene in *Louisiana Children's Medical Center v. Garland*, *Louisiana Children's Medical Center v. Garland*, No. 2:23-cv-01305, ECF No. 14 (E.D. La. Apr. 23, 2023).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 24, 2023

Respectfully submitted,

/s/ Sara Y. Razi

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Counsel for HCA Healthcare, Inc.

Exhibit A

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

HCA HEALTHCARE, INC., Plaintiff *v.* **MERRICK GARLAND,** in his official capacity as **ATTORNEY GENERAL OF THE UNITED STATES,** **UNITED STATES DEPARTMENT OF JUSTICE,** **FEDERAL TRADE COMMISSION**, and **UNITED STATES OF AMERICA,** Defendants	CIVIL ACTION No. _____ JUDGE _____ SECTION ____ MAGISTRATE _____ DIVISION ____

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff HCA Healthcare, Inc. ("HCA"), by and through its undersigned attorneys, alleges as follows:

INTRODUCTION

1. This action seeks a declaratory judgment that the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Antitrust Act") does not apply to transactions that are immune from federal antitrust laws under the doctrine of state action immunity. A declaratory judgment is needed to vindicate an important policy choice of the State of Louisiana concerning the health care services available to its citizens.

2. The State Legislature and Attorney General have expressly and unequivocally authorized LCMC to acquire Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital (the "Acquisition"). Prior to the Acquisition, the hospitals were operated within the HCA network through a joint venture with the Tulane University of Louisiana ("Tulane").

3. The State Legislature and Attorney General have expressly and unequivocally concluded that the Acquisition furthers the State's policy goals for the health and welfare of its citizens.

4. The State Legislature and Attorney General have expressly and unequivocally provided for active supervision by the Attorney General of the Acquisition's implementation and subsequent operations of the merged entity.

5. As a result, the Acquisition is clearly and indisputably immune from the federal antitrust laws—including the HSR Antitrust Act—consistent with a long line of Supreme Court precedent affirming the state action antitrust immunity, as well as the HSR Antitrust Act's plain text.

6. The Federal Trade Commission ("FTC") has nevertheless demanded that the Acquisition must be halted and submitted to a costly review and approval under the HSR Antitrust Act, and threatened daily penalties for noncompliance against the parties, including HCA, to be enforced by the United States in a civil action.

7. HCA respectfully requests a judgment declaring that, under the state action immunity doctrine, HCA and LCMC are not subject to (1) a requirement to submit a notification providing notice of the Acquisition and observe a waiting period under the HSR Antitrust Act, with the filing fee defined at 16 C.F.R. § 803.9; or (2) penalties under the HSR Antitrust Act,

15 U.S.C. § 18a(g)(1), for consummating the Acquisition without the submission of a notification and expiration or termination of a waiting period under the HSR Antitrust Act..

8. The state action immunity doctrine, grounded in the sovereign rights of the States, exempts "from the federal antitrust laws" private parties who are "carrying out the State's regulatory program." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224-25 (2013). Private conduct—including transactions like the Acquisition—is exempted from enforcement of "the federal antitrust laws" where the conduct is authorized by clearly articulated and affirmatively expressed state policy and actively supervised by a state actor. *Id.* The HSR Antitrust Act created Section 7A of the Clayton Antitrust Act and is indisputably a federal antitrust law. Were it otherwise, the HSR Antitrust Act could not be reconciled with the state action doctrine because the HSR Antitrust Act imposes substantive waiting periods on mergers—mergers that are indisputably immune from Section 7 of the Clayton Antitrust Act. Consistent with the state action immunity doctrine, the HSR Antitrust Act itself excludes transactions that are exempt from the antitrust laws. 15 U.S.C. § 18a(c)(4), (5).

9. Pursuant to this doctrine, the Louisiana Legislature has established a process for exempting certain health care acquisitions from enforcement of the antitrust laws in order to promote public health:

> The legislature finds that the goals of controlling health care costs and improving the quality of and access to health care will be significantly enhanced in some cases by . . . mergers and consolidations among health care facilities. The purpose of this Part is to provide the state . . . with direct supervision and control over the implementation of cooperative agreements, mergers, joint ventures, and consolidations among health care facilities for which certificates of public

> advantage are granted. ***It is the intent of the legislature*** that supervision and control over the implementation of these agreements, mergers, joint ventures, and consolidations substitute state regulation of facilities for competition between facilities and that this regulation 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 (emphasis added).

10. The process for approving an exemption is a lengthy one that requires voluminous submissions by applicants, notice to the public, input from a wide range of stakeholders, a public hearing, and consideration by numerous State officials. The rigorous review process ensures that only applications that clearly benefit the public are approved; indeed, upon information and belief, prior to the Acquisition, the State of Louisiana had never approved an application since the statute was enacted in 1997.

11. On December 28, 2022, in response to a comprehensive application submitted by the parties to the Acquisition (including HCA and LCMC), and following a public notice-and-comment period and a public hearing, the State Attorney General issued a Certificate of Public Advantage ("COPA") authorizing the Acquisition and adopting a set of terms and conditions establishing active supervision of the Acquisition by the Attorney General. The supervisory scheme involves, among other things, comprehensive reporting by the acquirer of its progress towards meeting various health care cost, quality, and access benchmarks, and periodic reviews of the rates it charges.

12. In issuing the COPA, the State of Louisiana expressly and unequivocally adopted a State policy authorizing the Acquisition and removing it from regulation under the antitrust laws, including the HSR Antitrust Act on which Defendants seek to rely. In other words, the Acquisition is entirely shielded by the state action immunity doctrine.

13. Despite Louisiana's express authorization and supervision of the Acquisition, and the applicability of state action immunity, upon information and belief, the FTC has ordered LCMC to halt integration of the hospitals acquired in the Acquisition. It also expressed the view that HCA and LCMC are required to submit notice of the Acquisition under the HSR Antitrust Act and to pay the accompanying filing fee. The FTC's directive that HCA and LCMC must submit notice of the Acquisition is an immediate threat of imposition of a statutory penalty of tens of thousands of dollars *each day* until the FTC "clears" the Acquisition—which it may never do.

14. The FTC has informed HCA and LCMC of its view that the companies are in the penalty period, which began on January 1, 2023, and that the penalty is accruing daily.

15. None of this action is necessary or lawful. The Acquisition is exempt from the federal antitrust laws as a result of the Louisiana COPA. Contrary to the FTC's directive, the parties to the Acquisition, including LCMC and HCA, have no obligation to halt the implementation of the Acquisition, submit a filing pursuant to the HSR Antitrust Act (an "HSR Filing"), observe a waiting period, or pay the associated filing fee, and the United States may not impose a civil monetary penalty on HCA or LCMC for the failure to submit such a filing. HCA brings this action to remove the threat created by the FTC's unlawful demand, to obtain a declaration rejecting the FTC's determination that HCA and LCMC must submit an HSR Filing, and to obtain a declaration that HCA and LCMC are not subject to civil monetary penalties in an

action brought by the United States under 15 U.S.C. § 18a(g)(1) for the failure to submit such a filing.

16. The HSR Antitrust Act, which amended the Clayton Antitrust Act to add Section 7A, 15 U.S.C. § 18a, is indisputably a federal antitrust law. Section 7A(g)(1), when it applies, mandates that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person," unless the parties "file notification" with the FTC and obtain administrative preclearance for the transaction. 15 U.S.C. § 18a. Parties that consummate a covered transaction without preclearance are subject to daily penalties, which are currently at least $46,517 per day.[1] *Id.* § 18a(g)(1). This "penalty may be recovered in a civil action brought by the United States." *Id.* "[T]here 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).

17. Accordingly, the HSA Antitrust Act is a "federal antitrust law[]" subject to state action immunity. *Phoebe Putney*, 568 U.S. at 225; *see also City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 384 (1991); *Parker v. Brown*, 317 U.S. 341, 351-52 (1943).

18. Requiring payment of a fee or imposing a fine for failure to file a notification and observe a waiting period pursuant to the HSR Antitrust Act is a form of antitrust liability which, if imposed on a merging party whose transaction is subject to the state action immunity doctrine, would negate the purpose of that doctrine. Put differently, the parties to the Acquisition are exempt from antitrust liability in all forms, whether such liability would arise under the HSR Antitrust Act (Section 7A of the Clayton Act) or under the substantive Section 7 of the Clayton Act.

19. The plain text of the HSR Antitrust Act—properly interpreted— is consistent with the state action immunity doctrine. It includes a number of exceptions to the Act's applicability,

[1] *See* https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2023.

including for transactions that are "specifically exempted from the antitrust laws by Federal statute," 15 U.S.C. § 18a(c)(5), and those which are "transfers to or from . . . a State or political subdivision thereof," 15 U.S.C. § 18a(c)(4). Read in conjunction with Supreme Court precedent, this extends to mergers among private parties who qualify for state action immunity because a merger that qualifies for immunity is not attributable to private parties, but is instead "the State's own" conduct. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

20. Despite issuance of the COPA, which is expressly intended to grant and does grant state action immunity from liability under the antitrust laws, the FTC is unlawfully attempting to force HCA and LCMC to submit a notification of the Acquisition and observe a waiting period pursuant to the HSR Antitrust Act and to pay the HSR Filing fee. The FTC has threatened enforcement by the United States for penalties under 15 U.S.C. § 18a(g)(1), notwithstanding the fact that the parties to the Acquisition, including HCA, are immune from those penalties.

21. The FTC's actions constitute a significant violation of federal law and Louisiana's sovereignty. Left unchecked, this agency overreach would not only offend important principles of federalism, but also harm the people of Louisiana who are well-served by the Acquisition—as Louisiana itself concluded when it issued a COPA to approve the transaction.

22. With the FTC's threatened penalty accumulating daily, it is critical that HCA and LCMC obtain prompt resolution of their legal rights through declaratory judgment in this Court.

JURISDICTION AND VENUE

23. This Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1337.

24. This Court has the authority to grant the declaratory relief sought pursuant to the Declaratory Judgment Act. *See* 28 U.S.C. §§ 1361, 2201, 2202.

25. Venue is proper in this district under 28 U.S.C. § 1391(e)(1).

26. Defendants lack sovereign immunity in a declaratory judgment action challenging their threatened violation of federal law. *See* 5 U.S.C. 702; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11 (1949); *Dugan v. Rank*, 372 U.S. 609, 621–622 (1963).

PARTIES

27. HCA is a healthcare provider network. Prior to the Acquisition, Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital were affiliated with HCA. HCA Healthcare, Inc.'s principal place of business is One Park Plaza, Nashville, TN, 37203.

28. Defendant Merrick Garland is the Attorney General of the United States. He is sued in his official capacity.

29. Co-Defendant United States Department of Justice is an Executive Department of the United States.

30. Co-Defendant FTC is an administrative agency of the United States government, established by the FTC Act, 15 U.S.C. §§ 41-58, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

31. Co-Defendant is the United States of America.

ALLEGATIONS

I. The State Action Immunity Doctrine

32. The Supreme Court has made clear that where private parties are actively supervised in carrying out a clearly articulated anticompetitive policy of the State, they are treated as the State for purposes of state action immunity. *Ticor*, 504 U.S. at 635 (the private anticompetitive conduct is the "State's own").

33. For the doctrine to apply, the State must have clearly articulated and affirmatively expressed as State policy the alleged restraint on competition, and must actively supervise the

anticompetitive act. Here, both the Louisiana COPA statute and the COPA concerning the Acquisition do just that. *See* La. R.S. § 40:2254.1 *et seq.*

34. This doctrine is grounded in constitutional principles of federalism, in accordance with the "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker*, 317 U.S. at 351.

35. The doctrine vindicates the States' sovereign authority to regulate certain matters without interference from the antitrust laws, which the federal government has improperly brought to bear against LCMC (and Louisiana) in this case.

36. Pursuant to this doctrine, a number of States—including Louisiana—have enacted statutes by which hospital mergers like the Acquisition can be exempted from the antitrust laws in instances where the State issues a COPA.

II. The Louisiana COPA Statute

37. Louisiana enacted a COPA statute, reflecting legislative recognition that "the goals of controlling health care costs and improving the quality of and access to health care will be significantly enhanced in some cases by cooperative agreements and by mergers and consolidations among health care facilities." La. R.S. § 40:2254.1.

38. The statute's purpose is "to provide the state . . . with direct supervision and control over the implementation of cooperative agreements, mergers, joint ventures, and consolidations among health care facilities for which certificates of public advantage are granted." *Id.*

39. The statute expressly declares the "intent of the legislature that supervision and control over the implementation of these agreements, mergers, joint ventures, and consolidations substitute state regulation of facilities for competition between facilities and that *this regulation 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." *Id.* (emphasis added).

40. The State Attorney General authorizes and issues COPAs in Louisiana. The COPA statute provides that a COPA is "a written certificate issued by the [State Department of Justice] as evidence of the department's intention that the implementation of a cooperative agreement, when actively supervised by the department, receive state action immunity from prosecution by the state or by any district attorney in the state as a violation of state or federal antitrust laws." La. R.S. § 40:2254.2.

41. The statute also provides that the State Department of Justice "may not issue a [COPA] unless the department finds that the agreement is likely to result in lower health care costs or is likely to result in improved access to health care or higher quality health care without any undue increase in health care costs. If the department denies an application for a certificate for an executed agreement, the parties may submit a new application for a certificate based upon a cooperative agreement, merger, joint venture, or consolidation different from the original application." La. R.S. § 40:2254.4.

42. The statute provides for the State Attorney General to enforce the COPA, permitting that office to "bring an action in the name of the state against a person or persons to whom a certificate has been issued in order to enforce any terms or conditions imposed by the [State Department of Justice] upon the issuance of the certificate, to enjoin the violation of the terms or conditions, or to enjoin any material violation of or deviation from the terms of the cooperative, merger, joint venture, or consolidation agreement submitted to and approved by the department." La. R.S. § 40:2254.10.

43. The statute requires the merging entities subject to a COPA to "submit a report to the [State Department of Justice] evaluating whether the cooperative, merger, joint venture, or consolidation agreement submitted to and approved by the department has been complied with during the preceding year and, if applicable, evaluating whether any terms and conditions imposed by the department when it issued the certificate have been met or otherwise satisfied during the preceding year." La. R.S. § 40:2254.11. The statute requires this report to be "submitted annually or more frequently if required by the department," which "shall in turn issue findings as to whether the terms and conditions are being met or otherwise satisfied." *Id.*

III. The Acquisition and Louisiana's Decision to Exempt it From the Antitrust Laws

44. The Acquisition is a transaction designed to increase access to clinical services and high-quality health care in the New Orleans region and create expanded hubs for specialty care, innovation, and academic medicine in the region.

45. HCA previously operated the three hospitals acquired in the Acquisition—Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital (the "UHS Hospitals") through University Healthcare System, L.C. ("UHS"), a joint venture between Tulane and affiliates of HCA. Substantially all of the patients served by the hospitals and the individuals employed by the hospitals are residents of the State of Louisiana.

46. The Acquisition was structured such that HCA transferred its ownership interest in UHS to Tulane, and LCMC then acquired the membership interests of UHS and related equity interests in certain physician clinics from Tulane.

47. The Acquisition also contemplates a partnership between LCMC and Tulane that will provide significant benefits to the greater New Orleans community, even beyond the improvements in access to health care. For example, the Acquisition (1) represents an approximately $600 million commitment from Tulane to further develop downtown New Orleans,

including new construction and enhancements; (2) includes the establishment of new nursing, clinical research, and graduate scholarship programs; and (3) has the potential to establish new Centers of Excellence in Louisiana.

48. In addition, as part of the Acquisition, LCMC agreed to commit at least $220 million in capital investments to improve multiple hospitals in the first five years following the close of the transaction.

49. On October 10, 2022, the parties to the Acquisition, including HCA and LCMC, submitted a COPA application to the Louisiana Department of Justice seeking approval of the Acquisitions. The application itself was itself comprehensive, spanning 175 pages and including extensive information about the hospitals and their operations, voluminous documents and records, and the efficiencies and other benefits to be realized by the community as a result of the Acquisition, among other items. As part of the iterative review process, the applicants made supplemental submissions on November 2nd, 4th, 10th, 15th, and 18th in response to requests for information received from the Louisiana Department of Justice.

50. On December 28, 2022, the State of Louisiana granted a COPA approving the agreements and merger effectuating the Acquisition. *See* Exhibits A-B. The COPA reflects Louisiana's clearly articulated and affirmatively expressed intent that regulation, rather than competition, is the superior method of promoting health outcomes for the Louisiana residents served by the acquired hospitals, and therefore the Acquisition should be exempt from the federal antitrust laws. It is an important aspect of the State's health care policy, and an area of regulation constitutionally reserved for State—not federal—oversight.

51. Moreover, the issuance of this COPA necessarily means that the State found "that the agreement is likely to result in lower health care costs or is likely to result in improved access

to health care or higher quality health care without an undue increase of health care costs." La. R.S. § 40:2254.4.

52. The COPA expressly provides for Louisiana's active supervision of the Acquisition's implementation and the subsequent operations of the merged entity. In this way, Louisiana actively supervises the Acquisition and the subsequent operations of the merged entity.

53. The COPA was also subject to terms and conditions issued by the State Attorney General, which further provide for active supervision of the Acquisition and the subsequent operations of the merged entity.

54. In addition, the Louisiana COPA statute itself provides for active supervision of the Acquisition and the subsequent operations of the merged entity by permitting the State Attorney General to enforce the terms of the COPA, La. R.S. § 40:2254.10, and via the annual reporting requirements for the merged entity subject to the COPA, La. R.S. § 40:2254.11.

55. On January 1, 2023, the parties to the Acquisition closed the transaction. Since then, upon information and belief, LCMC has been integrating the UHS Hospitals and physician clinics into its heath care network to deliver on the promised benefits for the people of Louisiana.

IV. Because of the COPA, the Acquisition is Exempt From the Antitrust Laws, including the HSR Antitrust Act

56. By issuing a COPA for the Acquisition, Louisiana asserted its sovereign authority under the state action immunity doctrine to exempt the transaction from Defendants' oversight under the antitrust laws.

57. By its clearly articulated and affirmatively expressed assertion that the Acquisition is a matter of its own policy and not subject to the antitrust laws, together with active supervision of the transaction, Louisiana has stripped Defendants' authority to regulate the Acquisition under the federal antitrust laws.

58. The HSR Antitrust Act, which amended the Clayton Act and pursuant to which Defendants seek to require LCMC to submit an HSR Filing and pay the associated filing fee and penalty, is a federal antitrust law subject to the state action immunity doctrine.

V. The FTC's Order that HCA and LCMC Submit an HSR Filing

59. On April 14, 2023, counsel from the FTC's Compliance Division contacted HCA's counsel to ask for additional information about the Acquisition and the basis for HCA's not having notified the Acquisition under the HSR Antitrust Act. Counsel for HCA explained its position that the duly awarded COPA confers state action immunity for the Acquisition and negates the HSR Act's filing requirement.

60. In response, the FTC disagreed with HCA's position, expressed its view that an HSR Filing was required irrespective of the COPA approval, that daily penalties were accruing upon the HCA since the transaction closing date, and indicated that the FTC had opened a substantive investigation into the transaction as well.

61. Upon information and belief, counsel for the FTC has also contacted counsel for LCMC to convey a similar message.

62. The FTC's order that HCA and LCMC submit an HSR Filing would impose a filing fee of at least $30,000. Moreover, the FTC's order poses an even greater threat to HCA and LCMC because it would subject them to a daily penalty for the putatively delayed HSR Filing. For each relevant day up to and including January 10, 2023, the penalty could be up to $46,517 per day. For each day thereafter, it could be up to $50,120 per day.

63. By threatening HCA and LCMC with these penalties, notwithstanding Louisiana's decision to authorize the Acquisition, the FTC's apparent goal is to prevent States from enacting or implementing COPA statutes. The review process under the HSR Antitrust Act is costly and

enables the FTC to impose substantial delays to the closing of an acquisition. If the FTC succeeds in subjecting state-authorized mergers to Section 7A of the Clayton Act, it will permanently hamper the ability of States to authorize and approve time-sensitive mergers, even in instances where, as here, the State has concluded that a given transaction serves its critical interest in providing affordable, quality health care to its citizens.

CLAIMS FOR RELIEF

Count I—Declaratory Judgment Pursuant to the Hart-Scott-Rodino Antitrust Act

64. HCA incorporates by reference the allegations contained in the previous paragraphs as though set forth fully herein.

65. HCA is entitled to a declaration of its rights with respect to an actual and ongoing controversy over the applicability of state action immunity to the HSR Antitrust Act, 15 U.S.C. § 18a.

66. The state action immunity doctrine applies to the "federal antitrust laws," *Phoebe Putney*, 568 U.S. at 225, including the HSR Antitrust Act.

67. The Acquisition is immune from the federal antitrust laws, including the HSR Antitrust Act. The Acquisition was expressly authorized by the Louisiana State Legislature and the Louisiana Attorney General, and the implementation of the Acquisition is actively supervised by the Louisiana Attorney General.

68. The FTC's order improperly exceeds Defendants' authority under the HSR Antitrust Act in violation of the state action immunity doctrine.

69. Compliance with the FTC's order would impose significant economic costs on HCA and LCMC.

70. The FTC has threatened enforcement by the United States for penalties under 15 U.S.C. § 18a(g)(1), notwithstanding the fact that the parties to the Acquisition, including LCMC and HCA, are immune from those penalties. According to the FTC, the penalties are currently accruing daily.

71. Because of the FTC's directive to halt integration of the Acquisition and submit to a costly notice and review process, and because of the ongoing threat of daily penalties enforced by the U.S. Department of Justice, a declaratory judgment is immediately necessary to resolve the rights and obligations of the parties.

PRAYER FOR RELIEF

Wherefore, HCA prays for the following relief:

a. A declaration, order, and judgment holding that the parties to the Acquisition, including HCA and LCMC, are not obligated to submit an HSR Filing concerning the Acquisition or to pay a related filing fee as defined at 16 C.F.R. § 803.9;

b. A declaration, order, and judgment holding that the parties to the Acquisition, including HCA and LCMC, are not subject to any fine or penalty under 15 U.S.C. § 18a(g)(1) or any other antitrust law in connection with the Acquisition;

c. Any other relief this Court deems just and proper.

Dated: April 19, 2023

Respectfully submitted,

/s/ Judy Y. Barrasso

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Counsel for Plaintiff HCA Healthcare, Inc.

Exhibit A

State of Louisiana
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 94005
BATON ROUGE
70804-9005

Jeff Landry
Attorney General

December 28, 2022

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Jones Day
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Washington, D.C. 20001

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HCA Healthcare, Inc.
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Senior VP and Chief Development Officer
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Nashville, TN 37203

Re: ***Application for Certificate of Public Advantage – Louisiana Children's Medical Center/LCMC Health; The Administrators of the Tulane Educational Fund; Columbia/HCA of New Orleans, Inc.; Medical Center of Baton Rouge, Inc.; Columbia Healthcare System of Louisiana, Inc.; HCA Inc.***

Dear Counsel:

This correspondence is intended to serve as notification that the above-referenced application for Certificate of Public Advantage, filed with this office pursuant to La. R.S. 40:2254.1, et seq. on October 10, 2022 and supplemented on November 2, 2022, November 4, 2022, November 10, 2022, November 15, 2022, and November 18, 2022 (collectively referred to herein as "COPA

Application"), is hereby approved. The approval is based on the representations and information contained in the COPA Application, criteria set forth in Louisiana law and regulations, testimony at the public hearing held on December 8, 2022, and the large number of public comments received.

The approval is subject to the following conditions:

1. The execution of all documents necessary to close the transaction as described in the COPA Application;

2. Pursuant to Louisiana Revised Statute 40:2254.11 and the regulations promulgated in accordance therewith, the submission of annual reports, as more specifically described in the Terms and Conditions of Compliance attached hereto;

3. Full compliance with all requirements described in the Terms and Conditions of Compliance attached hereto.

Please note that the annual reports will be due on or before December 28th of the applicable year ("Anniversary Date"), quarterly reports will be due in 90-day increments from the Anniversary Date, and semi-annual reports will be due in 180-day increments from the Anniversary Date.

Should you have any questions or comments, please let us know.

Sincerely,

Jeff Landry

Encl.: Terms and Conditions of Compliance

Exhibit B

Jeff Landry
Attorney General

State of Louisiana
DEPARTMENT OF JUSTICE
CIVIL DIVISION
P.O. BOX 94005
BATON ROUGE
70804-9005

CERTIFICATE OF PUBLIC ADVANTAGE

TERMS AND CONDITIONS OF COMPLIANCE FOR:

LOUISIANA CHILDREN'S MEDICAL CENTER/LCMC HEALTH; THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND; COLUMBIA/HCA OF NEW ORLEANS, INC.; MEDICAL CENTER OF BATON ROUGE, INC.; COLUMBIA HEALTHCARE SYSTEM OF LOUISIANA, INC.; HCA INC. (referred to herein as "Applicants")

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CERTIFICATE OF PUBLIC ADVANTAGE
TERMS AND CONDITIONS OF COMPLIANCE
Effective: December 28, 2022

I. Legally Binding Effect of these Terms and Conditions and Corrective Action Plans

A. Conditions of COPA Approval and Applicability of Terms and Conditions. The terms and conditions set forth herein ("Terms and Conditions") are required as a condition for approval of the Certificate of Public Advantage ("COPA") submitted by the above-named Applicants. The Louisiana Department of Justice, Office of the Attorney General ("DOJ") may, at any time, alter these terms and conditions as it deems necessary to ensure that the COPA meets statutory and regulatory requirements. Pursuant to the terms of the proposed transaction among the Applicants for which a COPA application was submitted, LCMC Health will become the sole owner of Tulane University Medical Center, Tulane Lakeside Hospital, and Lakeview Regional Medical Center (collectively, the "UHS Hospitals"). As the sole owner of the UHS Hospitals and the operator of LCMC Health's six hospitals (Children's Hospital New Orleans, East Jefferson General Hospital, New Orleans East Hospital,[1] Touro Infirmary, University Medical Center New Orleans, and West Jefferson Medical Center) (together with the UHS Hospitals, the "Combined Entity"), LCMC Health (the "New Health System") will serve as the sole continuing operator of the Combined Entity and the sole entity subject to these Terms and Conditions. The New Health System does not have the right to withdraw from these COPA Terms and Conditions during the term of the COPA. Further, pursuant to Louisiana Revised Statute 40:2254.4(D), any amendment to the terms of the transaction submitted by the Applicants or any material change in the operations or conduct of the New Health System shall be considered to be a new agreement and shall not take effect or occur until the DOJ has issued a new COPA approving such amendment or material change. The New Health System shall follow the timeframes and procedures set forth in the statutory and regulatory framework for COPA applications with regard to notifying the DOJ of any amendments or material changes.

B. Corrective Action Plan. If, at any time, the DOJ determines that an activity of the New Health System is inconsistent with the policy goals described in Louisiana Revised Statute 40:2254.1, *et. seq*, the DOJ will notify the New Health System that it must adopt a plan to correct any deficiency in its activities. Within thirty (30) calendar days of notification, the New Health System shall return a written corrective action plan to the DOJ responding to each cited deficiency, including timeframes for corrections, together with any additional evidence of compliance. If the DOJ determines that the corrective action plan does not sufficiently address each cited deficiency, it will notify the New Health System that it must submit a revised corrective action plan within twenty (20) days of notification. If the DOJ determines that the corrective action plan does sufficiently address each cited deficiency ("Corrective Action Plan"), the New Health System shall use best efforts to implement the Corrective Action Plan and submit progress reports to the DOJ as set forth therein.

[1] New Orleans East Hospital ("NOEH") is not owned by LCMC Health; LCMC Health manages NOEH, which is not financially integrated into LCMC Health. NOEH is a Hospital Service District hospital and a political subdivision of the state. Accordingly, NOEH contracts separately and is not part of the LCMC Health payor contracting process.

C. Remedies. If the DOJ is not satisfied with any submitted corrective action plan, if the New Health System fails to comply with the terms and conditions set forth herein, fails to comply with any Corrective Action Plan, or if the DOJ otherwise determines that the transaction is not resulting in lower health care costs or greater access to or quality of health care, the DOJ reserves the right to revoke the COPA as provided for in Louisiana Revised Statute 40:2254.6. Additionally, the DOJ may pursue any other enforcement mechanisms available to it by law, including but not limited to injunctive relief.

D. Court Costs and Attorney Fees. If it becomes necessary for the DOJ to file suit to enforce any provision of law, regulation, the terms and conditions of any Corrective Action Plan, or these terms and conditions, the New Health System shall be responsible for all costs associated with any such litigation, including but not limited to all court costs and attorneys' fees.

E. Release of Liability for Corrective Action Plans. Subject to Louisiana Revised Statute 40:2254.7, the approval of any Corrective Action Plan does not confer any responsibility or liability for damages on the State of Louisiana or any of its officers, directors, employees, agents, or consultants. Applicants and their successors and assigns hereby RELEASE AND FOREVER DISCHARGE the State of Louisiana and all of its officers, directors, employees, agents, and consultants from any and all damages claims, debts, demands, losses, and liabilities whatsoever, known or unknown, whether in law or in equity, resulting from, respecting, relating to, or arising out of any Corrective Action Plan, which either party now has or may later discover. The New Health System may appeal a final decision on a corrective action plan or rate review decision in the manner provided in the Administrative Procedure Act.

F. The New Health System may designate as "Confidential" and redact any document or material submitted to the DOJ that is exempt from disclosure under the Louisiana Public Records Act, including any document or material containing trade secret, proprietary, or competitively sensitive information. In accord with Louisiana Revised Statute 44:4 *et seq*. and other applicable statutes, rules, and regulations, nothing in the Terms and Conditions limits the New Health System from claiming any exceptions, exemptions, and limitations to the laws pertaining to public records.

II. Purpose and Vision – Creating Value for Louisiana Citizens

The purpose of COPA law and similar statute-regulated transactions is to better serve the citizens of Louisiana by pursuing and attaining the key aims of value-based healthcare, namely—

- Cost: Decreased costs of care
- Quality: Improved quality of care
- Access: Increased access to care

For COPA and other transactions, the State of Louisiana, through the Louisiana DOJ, aspires to work with healthcare organizations to help the DOJ and the nation to achieve these goals. For approval to be granted, the DOJ must have reasonable assurances that these goals will be met.

Ultimately, decreased costs, improved quality, and increased access to healthcare aim to create better patient engagement, higher patient satisfaction, and more value for patients.

III. Guiding Principles and Expectations for Monitoring

The New Health System agrees to pursue these goals and to employ these guiding principles, which will be key to monitoring the transaction and ensuring its future success.

A. Relevant Metrics: The New Health System will be responsible for gathering, analyzing, and presenting its performance on relevant metrics to cost, quality, and access on a regular basis. The DOJ reserves the right to change, add, or remove metrics as it deems necessary to ensure that the COPA meets statutory and regulatory requirements.

B. Competitive Benchmarking: The New Health System will be expected to measure and report its performance in cost, quality, and access compared to national benchmark or relevant peer competitors within the markets it serves, the State of Louisiana, or any other areas (such as neighboring states or similar metropolitan areas in other states, etc.) as appropriate and as may be added at the discretion of the DOJ as it deems necessary to ensure that the COPA meets statutory and regulatory requirements, to the extent that relevant information on such competitors is publicly available.

C. Continuous Improvement: The New Health System should strive to create, build, and maintain a culture of excellence and continuous improvement. The DOJ expects the New Health System to show meaningful improvement in cost, quality, and access every year. The New Health System should improve beyond its baseline performance (past performance for the quarter and year prior to approval), and also relative to its peer group or competitive set.

IV. Key Monitoring Elements in the Louisiana Statute

Louisiana Revised Statute 40:2254.11 provides as follows:

> If the department issues a certificate of public advantage, the facilities to whom the certificate has been issued shall submit a report to the department evaluating whether the cooperative, merger, joint venture, or consolidation agreement submitted to and approved by the department has been complied with during the preceding year and, if applicable, evaluating whether any terms and conditions imposed by the department when it issued the certificate have been met or otherwise satisfied during the preceding year. The report must be submitted annually or more frequently if required by the department. The department shall in turn issue findings as to whether the terms and conditions are being met or otherwise satisfied. The department shall keep copies of all reports and findings based on the reports.

CERTIFICATE OF PUBLIC ADVANTAGE
TERMS AND CONDITIONS OF COMPLIANCE
Effective: December 28, 2022

Louisiana Admin. Code tit. 48, Part XXV, §517 outlines the information and supporting data that must be submitted by the New Health System. Annual reports following an approved COPA transaction shall include, but not be limited to, the following information:

- an update of all the information required in the COPA application;
- any change in the geographic territory that is served by the health care equipment, facilities, personnel, or services which are subject of the transaction;
- a detailed explanation of the actual effects of the transaction on each party, including any change in volume, market share, prices, and revenues;
- a detailed explanation of how the transaction has affected the cost, access, and quality of services provided by each party; and
- any additional information requested by the DOJ.

Louisiana Admin. Code tit. 48, Part XXV, §509 provides that the fee due with the filing of the reports required by Louisiana Revised Statute 40:2254.11 and described in Sections VIII-X shall be $15,000. If the actual cost incurred by the DOJ is greater, the parties involved shall pay any additional amounts due as instructed by the DOJ.

V. Structure of Monitoring

The DOJ will direct the monitoring of an approved COPA application. At its discretion, the DOJ may assign another existing or new department within the State of Louisiana, or an external organization, to monitor the New Health System and the terms of the COPA application, or to provide monitoring support to the DOJ. (The DOJ or other organization that does the monitoring is hereafter referred to as the "Monitoring Agency" or together, the "Monitoring Agencies").

The New Health System will be required to submit advanced written notice of certain events and reports that include specific information at the request of the Monitoring Agency. The Monitoring Agency will require reports according to the following schedule:

A. Rate Review – During the term of the COPA, the New Health System will be required to submit information related to changes in rates to the Monitoring Agency as described in Section VI.

B. Quarterly Reports – Quarterly reports will include an update on the transaction objectives as set forth in the COPA application and supplemental submission, with specific focus on updates on the investment and repurposing of facilities claims. Quarterly reports will be required for first three (3) years or until completion of application objectives, whichever is longer.

C. Semi-Annual Reports – Semi-annual reports will require submission of a set of key metrics tied to cost, quality, and access. The reports will be submitted semi-annually for first five (5) years following the transaction.

D. Annual Reports – During the term of the COPA, the New Health System will be required to submit annual reports that detail an update on its application, a description of any change

to geographic territory, any changes in volume, market share, prices, and revenues, and a detailed explanation of how the transaction has affected cost, quality, and access.

The time periods for which quarterly and semi-annual reports will be required may be shortened or extended at the discretion of the Monitoring Agency. All annual reports should be submitted on or before the anniversary of the COPA approval date. Quarterly reports are to be submitted in 90-day increments after the anniversary of the COPA approval date and semi-annual reports are to be submitted in 180-day increments, while applicable, after the anniversary of the COPA approval date. In the event of a hurricane, earthquake, flood, tornado, natural disaster, public health emergency, epidemic, pandemic or disease outbreak, or other force majeure event or "act of God" that affects the ability of the New Health System to submit a report during the time periods outlined herein, the New Health System must contact the DOJ to determine a late report submission date that is mutually agreed upon by the New Health System and the DOJ.

VI. Rate Review

A. The New Health System may not contract with a third-party payor for a change in rates for any services provided by such New Health System without the prior written approval of the DOJ. At least sixty (60) days before the proposed implementation of any change in rates for any services provided by the New Health System under a newly negotiated third-party payor contract, the New Health System shall submit any proposed changes in rates to the DOJ for approval. The information submitted to the DOJ must include, at a minimum:

i. Completion of any Rate Review application form which may be adopted by the DOJ;

ii. The proposed change in rate(s);

iii. For an agreement with a third-party payor other than an agreement with a managed care organization that provides or arranges for the provision of services under the Medicare or Medicaid programs, information showing:

a. That the New Health System and the third-party payor have agreed to the proposed rates;

b. Whether the proposed rates are less than the corresponding amounts in a relevant price index published by the Bureau of Labor Statistics of the United States Department of Labor relating to services for which the rates are proposed, or a comparable price index chosen by the DOJ if the relevant price index is abolished; and

c. If the proposed rates are above the corresponding amount in the relevant price index, a justification for proposing rates above the corresponding amounts in such index.

iv. To the extent allowed by federal law, for an agreement with a managed care organization that provides or arranges for the provision of services under the Medicare or Medicaid programs, information showing:

a. Whether the proposed rates are different from rates under an agreement that was in effect before the date of the transaction;

b. Whether the proposed rates are different from the rates most recently approved by the DOJ for the New Health System, if the DOJ has previously approved rates following the issuance of the COPA; and

c. If the rates exceed the rates those described in subparagraphs (a) or (b) of this paragraph, a justification for proposing rates in excess; and

v. Any information concerning costs, patient volumes, acuity, payor mix, or other information requested by the DOJ.

a. To the extent that the DOJ requests such information, such information shall be provided no later than twenty (20) business days from the request.

B. The Monitoring Agency shall approve or deny the proposed rate change within sixty (60) days from receipt of a notice of proposed rate change.

C. The rate review process intends to ensure that rates remain at a level that is supported by economic, cost, or other growth trend indicators. The DOJ, in its sole discretion, may designate an individual or entity to review the provided materials and make a recommendation to the DOJ. The Monitoring Agency may evaluate proposed rate increases by comparing the proposed rates to: (1) price indexes, (2) cost report data and trends, (3) governmental program rates, and (4) other information as provided by the New Health System or as deemed necessary by Monitoring Agency. Based on evaluation, the DOJ shall approve the proposed rates unless the DOJ determines that rates inappropriately exceed competitive rates for comparable services in the New Health System's market area.

VII. Notice

The New Health System must provide written notice to the DOJ at least ninety (90) days in advance of any mergers, acquisitions, joint ventures, or other partnership arrangements.

VIII. Report Elements – Quarterly Reports

The New Health System must submit quarterly reports, in accordance with the schedule set forth in Section V, providing an update on the transaction objectives cited in the COPA application regarding the investments and repurposing of facilities, including but not limited to the following:

A. Changes in services at the Tulane University Medical Center New Orleans ("TUMC") facility in Orleans Parish, to the extent available, related to:

i. Creation of new nursing program in Orleans Parish;
ii. Development of downtown campus;

B. Creation of a new, premier academic medical center and leading teaching institution in Jefferson Parish at East Jefferson General Hospital ("EJGH"), including:
   i. Transition or relocation of advanced clinical services from TUMC to EJGH;
   ii. Investment in capital improvements at EJGH, Tulane Lakeside, and Lakeview;

C. Creation of Centers of Excellence;

D. Engagement in medical research;

E. Expansion of electronic medical record system to Tulane Lakeside and Lakeview;

F. Access changes such as:
   i. Material openings, closures, or mergers of outpatient facilities;
   ii. Material openings, closures, or mergers of inpatient services; or
   iii. Material service line changes.

G. Any changes or events requiring reporting to The Joint Commission or other accrediting bodies, including any change in accreditation status.

IX. Report Elements – Semi-Annual Reports

The New Health System must submit semi-annual reports in accordance with the schedule set forth in Section V. To serve as long- and short-term baseline comparators, the New Health System should include data from one (1) year prior to the merger and one (1) quarter before the merger. Semi-annual reports should include data from these two (2) baseline comparators, in addition to the data from all preceding reports. Where possible, the New Health System should also compare the following measures to the top two (2) to four (4) competitors in the area. The semi-annual reports must include the following elements, to the extent available:

Cost

- Number of patients who benefited from charity care
- Description of capital investments
- Overall cost of agency nurses (details to be kept confidential)
- List of open care delivery positions
- Summary of charges billed and payments received for inpatient care, including drugs, from each facility
- Dollar value and service volume of programs and services for poor and underserved communities
- Final Medicare cost reports

Quality

- Patient satisfaction ratings

- Readmission rates
- A summary of quality improvement measures for each hospital
- CMS star ratings
- Leapfrog safety rating

Access

- Staffed bed changes greater than ten percent (10%) compared to the same period in the prior year.
- Inpatient volumes, broken down by major classifications such as pediatrics, women's health, Med Surg, ICU, etc.
- Outpatient volumes, broken down by each outpatient category, such as primary and specialty clinic visits, emergency department, outpatient surgery, etc.
- Emergency department times in minutes for each hospital
- Number of providers who have privileges to practice
- Current number of physicians, nurses, PAs in the market area and employed by the New Health System
- Number of newly recruited physicians seeing patients by the New Health System to the area in the past year

X. Report Elements – Annual Reports

In addition to the quarterly and semi-annual reports, the New Health System must submit annual reports as required by Louisiana law. The report must include all report elements listed for the quarterly and semi-annual reports, in addition to the following:

A. An update of all the information required in the application. Provide an update on the claims made in the initial and supplemental COPA applications.

B. Any change in the geographic territory that is served by the health care equipment, facilities, personnel, or services which are subject of the transaction. Provide detailed explanation of any change in geographic territory that is served by the health care equipment, facilities, personnel, or services which are subject to the transaction.

C. A detailed explanation of the actual effects of the transaction on each party, including any change in volume, market share, prices, and revenues:

i. Volume: Provide a detailed account of how volumes have been impacted by the transaction.

ii. Market share: Provide a detailed account of how market share has been impacted by the transaction.

iii. Price: Provide a detailed account of how prices have been impacted by the transaction. Provide prices for a key group of services/procedures – recommend the most common

ten (10) to thirty (30) procedures or services. Include charts that compare change in price to general inflation and health care inflation.

iv. Revenue: Provide a detailed account of how revenues have been impacted by the transaction.

D. A detailed explanation of how the transaction has affected the cost, access, and quality of services provided by each party. Provide a narrative explanation of the transaction's impact on cost, quality, and access.

XI. Release of Liability

Subject to Louisiana Revised Statute 40:2254.7, the granting of a COPA application does not confer any responsibility or liability for damages on the State of Louisiana or any of its officers, directors, employees, agents, or consultants. Applicants and their successors and assigns hereby RELEASE AND FOREVER DISCHARGE the State of Louisiana and all of its officers, directors, employees, agents, and consultants from any and all damages claims, debts, demands, losses, and liabilities whatsoever, known or unknown, whether in law or in equity, resulting from, respecting, relating to, or arising out of any COPA application or approval, which such party now has or may later discover.

JS 44 (Rev. 10/20)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
HCA HEALTHCARE, INC.,

(b) County of Residence of First Listed Plaintiff Davidson County, TN
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
BARRASSO USDIN KUPPERMAN FREEMAN & SARVER, L.L.C.,909 Poydras St., # 2350,New Orleans, LA 70112. 504-589-9700

DEFENDANTS
MERRICK GARLAND, in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES, et al.

County of Residence of First Listed Defendant Washington, D.C.
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*
Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS
Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☒ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
15 U.S.C. § 18a
Brief description of cause:
A Complaint for Declaratory Judgment seeking a declaration that the Hart-Scott-Rodino Antitrust Improvements Act does not apply.

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:
JUDGE Judge Lance M Africk DOCKET NUMBER 2:23-cv-01305

DATE 4/19/2023
SIGNATURE OF ATTORNEY OF RECORD Judy Barrasso

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE 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,** **UNITED STATES DEPARTMENT OF JUSTICE,** **FEDERAL TRADE COMMISSION**, and **UNITED STATES OF AMERICA,** Defendants	CIVIL ACTION No. **23-1305**

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Louisiana Children's Medical Center ("LCMC"), by and through its undersigned attorneys, alleges as follows:

INTRODUCTION

1. This action seeks a declaratory judgment that the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Antitrust Act") does not apply to transactions that are immune from federal antitrust laws under the doctrine of state action immunity. A declaratory judgment is needed to vindicate an important policy choice of the State of Louisiana concerning the health care services available to its citizens.

2. The State Legislature and Attorney General have expressly and unequivocally authorized LCMC to acquire Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital (the "Acquisition") from HCA Healthcare, Inc. ("HCA"), a for-profit provider network that previously operated the three hospitals through a joint venture with the Tulane University of Louisiana ("Tulane").

3. The State Legislature and Attorney General have expressly and unequivocally concluded that the Acquisition furthers the State's policy goals for the health and welfare of its citizens.

4. The State Legislature and Attorney General have expressly and unequivocally provided for active supervision by the Attorney General of the Acquisition's implementation and subsequent operations of the merged entity.

5. As a result, the Acquisition is clearly and indisputably immune from the federal antitrust laws—including the HSR Antitrust Act—consistent with a long line of Supreme Court precedent affirming the state-action antitrust immunity, as well as the HSR Antitrust Act's plain text.

6. The Federal Trade Commission ("FTC") has nevertheless demanded that the Acquisition must be halted and submitted to a costly HSR review and approval, on pain of crushing daily penalties for noncompliance, to be enforced by the United States in a civil action.

7. LCMC respectfully requests a judgment declaring that, under the state action immunity doctrine, LCMC and the other parties to the Acquisition, including HCA, are not subject to (1) a requirement to submit a notification providing notice of the Acquisition and observe a waiting period under the HSR Antitrust Act, with the filing fee defined at 16 C.F.R. § 803.9; or (2) penalties under the HSR Antitrust Act, 15 U.S.C. § 18a(g)(1), for consummating the

Acquisition without the submission of a notification and expiration or termination of a waiting period under the HSR Antitrust Act.

8. The state action immunity doctrine, grounded in the sovereign rights of the States, exempts "from the federal antitrust laws" private parties who are "carrying out the State's regulatory program." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224-25 (2013). Private conduct—including transactions like the Acquisition—is exempted from enforcement of "the federal antitrust laws" where the conduct is authorized by clearly articulated and affirmatively expressed state policy and actively supervised by a state actor. *Id.* The HSR Antitrust Act enacted Section 7A of the Clayton Antitrust Act and is indisputably a federal antitrust law. Were it otherwise, HSR could not be reconciled with the state-action doctrine because HSR imposes substantive waiting periods on mergers—mergers that are indisputably immune from Section 7 of the Clayton Antitrust Act. Consistent with the state action immunity doctrine, the HSR Antitrust Act itself excludes transactions that are exempt from the antitrust laws. 15 U.S.C. § 18a(c)(4), (5).

9. Pursuant to this doctrine, the Louisiana Legislature has established a process for exempting certain health care acquisitions from enforcement of the antitrust laws in order to promote public health:

> The legislature finds that the goals of controlling health care costs and improving the quality of and access to health care will be significantly enhanced in some cases by . . . mergers and consolidations among health care facilities. The purpose of this Part is to provide the state . . . with direct supervision and control over the implementation of cooperative agreements, mergers, joint ventures, and consolidations among health care facilities for which certificates of public advantage are granted. ***It is the intent of the legislature*** that supervision and control

> over the implementation of these agreements, mergers, joint ventures, and consolidations substitute state regulation of facilities for competition between facilities and that this regulation 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 (emphasis added).

10. The process for approving an exemption is a lengthy one that requires voluminous submissions by applicants, notice to the public, input from a wide range of stakeholders, a public hearing, and consideration by numerous State officials. The rigorous review process ensures that only applications that clearly benefit the public are approved; indeed, upon information and belief, prior to the Acquisition, the State of Louisiana had never approved an application since the statute was enacted in 1997.

11. On December 28, 2022, in response to a comprehensive application submitted by LCMC and HCA, and following a public notice-and-comment period and a public hearing, the State Attorney General issued a Certificate of Public Advantage ("COPA") authorizing the Acquisition and adopting a set of terms and conditions establishing active supervision of the Acquisition by the Attorney General.

12. In issuing the COPA, the State of Louisiana expressly and unequivocally adopted a State policy authorizing the Acquisition and removing it from regulation under the antitrust laws, including the HSR Antitrust Act on which Defendants seek to rely. In other words, the Acquisition is entirely shielded by the state action immunity doctrine.

13. Despite Louisiana's express authorization and supervision of the Acquisition, and the applicability of state action immunity, the FTC has ordered LCMC to halt the Acquisition, submit notice of the Acquisition under the HSR Antitrust Act, and pay a filing fee. The FTC's directive that LCMC must submit notice of the Acquisition is an immediate threat of imposition of a statutory penalty of tens of thousands of dollars *each day* until the FTC "clears" the Acquisition—which it may never do.

14. The FTC has informed LCMC of its view that LCMC is in the penalty period, which began on January 1, 2023, and that the penalty is accruing daily. The FTC has threatened LCMC with enforcement of this penalty in a civil suit brought by the Department of Justice on behalf of the United States.

15. None of this action is necessary or lawful. The Acquisition is exempt from the federal antitrust laws as a result of the Louisiana COPA. Contrary to the FTC's directive, the parties to the Acquisition, including LCMC and HCA, have no obligation to halt the implementation of the Acquisition, submit a filing pursuant to the HSR Antitrust Act (an "HSR Filing"), observe a waiting period, or pay the associated filing fee, and the United States may not impose a civil monetary penalty on LCMC or HCA for the failure to submit such a filing. LCMC brings this action to remove the threat created by the FTC's unlawful demand, to obtain a declaration rejecting the FTC's determination that LCMC and HCA must submit an HSR Filing, and to obtain a declaration that LCMC and HCA are not subject to penalties in an action brought by the United States under 15 U.S.C. § 18a(g)(1).

16. The HSR Antitrust Act, which amended the Clayton Antitrust Act to add Section 7A, 15 U.S.C. § 18a, is indisputably a federal antitrust law. Section 7A(g)(1), when it applies, mandates that "no person shall acquire, directly or indirectly, any voting securities or assets of any

other person," unless the parties "file notification" with the FTC and obtain administrative preclearance for the transaction. 15 U.S.C. § 18a. Parties that consummate a covered transaction without preclearance are subject to daily penalties, which are currently at least $46,517 per day.[1] *Id.* § 18a(g)(1). This "penalty may be recovered in a civil action brought by the United States." *Id.* "[T]here 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).

17. Accordingly, the HSA Antitrust Act is a "federal antitrust law[]" subject to state action immunity. *Phoebe Putney*, 568 U.S. at 225; *see also City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 384 (1991); *Parker v. Brown*, 317 U.S. 341, 351-52 (1943).

18. Requiring payment of a fee or imposing a fine for failure to file a notification and observe a waiting period pursuant to the HSR Antitrust Act is a form of antitrust liability, which—if imposed on a merging party whose transaction is subject to the state action immunity doctrine—would negate the purpose of that doctrine. Put differently, the parties to the Acquisition are exempt from antitrust liability in all forms, whether such liability would arise under the HSR Antitrust Act (Section 7A of the Clayton Act) or under the substantive Section 7 of the Clayton Act.

19. The plain text of the HSR Antitrust Act—properly interpreted— is consistent with the state action immunity doctrine. It includes a number of exceptions to the Act's applicability, including for transactions that are "specifically exempted from the antitrust laws by Federal statute," 15 U.S.C. § 18a(c)(5), and those which are "transfers to or from . . . a State or political subdivision thereof," 15 U.S.C. § 18a(c)(4). Read in light of Supreme Court precedent, this extends to mergers among private parties who qualify for state action immunity because a merger

[1] *See* https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2023.

that qualifies for immunity is not attributable to private parties, but is instead "the State's own" conduct. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

20. Despite issuance of the COPA, which is expressly intended to grant and does grant state action immunity from liability under the antitrust laws, the FTC is unlawfully attempting to force LCMC and HCA to submit a notification of the Acquisition and observe a waiting period pursuant to the HSR Antitrust Act and to pay the HSR Filing fee. The FTC has threatened enforcement by the United States for penalties under 15 U.S.C. § 18a(g)(1), notwithstanding the fact that the parties to the Acquisition, including LCMC, are immune from those penalties.

21. The FTC's actions constitute a significant violation of federal law and Louisiana's sovereignty. Left unchecked, this agency overreach would not only offend important principles of federalism, but also harm the people of Louisiana who are well-served by the Acquisition—as Louisiana itself concluded when it issued a COPA to approve the transaction.

JURISDICTION AND VENUE

22. This Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1337.

23. This Court has the authority to grant the declaratory relief sought pursuant to the Declaratory Judgment Act. *See* 28 U.S.C. §§ 1361, 2201, 2202.

24. Venue is proper in this district under 28 U.S.C. § 1391(e)(1).

25. Defendants lack sovereign immunity in a declaratory judgment action challenging their threatened violation of federal law. *See* 5 U.S.C. 702; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11 (1949); *Dugan v. Rank*, 372 U.S. 609, 621–622 (1963).

PARTIES

26. LCMC is a non-profit health system operating as an Organized Health Care Arrangement under Louisiana law. It is a nonprofit network of health care providers, which

operates nine hospitals and a number of other locations in Louisiana and Mississippi. Its principal place of business is 1100 Poydras Street, New Orleans, LA 70163.

27. Defendant Merrick Garland is the Attorney General of the United States. He is sued in his official capacity.

28. Co-Defendant United States Department of Justice is an Executive Department of the United States.

29. Co-Defendant FTC is an administrative agency of the United States government, established by the FTC Act, 15 U.S.C. §§ 41-58, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

30. Co-Defendant is the United States of America.

ALLEGATIONS

I. LCMC's Role in the Community

31. LCMC was formed in 2009 through a partnership between Children's Hospital and the Touro Infirmary in New Orleans.

32. LCMC is a non-profit health system dedicated to providing the best possible care for every person and parish in Louisiana and beyond. It operates nine hospitals and also provides a network of urgent care centers across the greater New Orleans area, as well as other health care services.

33. LCMC also plays an important role in developing the next generation of health care professionals. It partners with local universities to provide training for medical, dentistry, nursing, and other students.

34. The State of Louisiana has long trusted LCMC as a critical part of its public health policy. For example, in 2012-2013, LCMC partnered with the State to operate the Interim LSU

Hospital, which preserved services and access to care in New Orleans, and also averted a significant disruption in university teaching programs. Likewise in 2015, the State contracted with LCMC to operate the new University Medical Center New Orleans.

35. Prior to the Acquisition, LCMC operated Children's Hospital New Orleans, East Jefferson General Hospital, New Orleans East Hospital, Touro Infirmary, University Medical Center New Orleans, and West Jefferson Medical Center. These hospitals have been recognized with a number of awards and accreditations for their high standard of care.[2]

II. The State Action Immunity Doctrine

36. The Supreme Court has made clear that where private parties are actively supervised in carrying out a clearly articulated anticompetitive policy of the State, they are treated as the State for purposes of state action immunity. *Ticor*, 504 U.S. at 635 (the private anticompetitive conduct is the "State's own").

37. For the doctrine to apply, the State must have clearly articulated and affirmatively expressed as State policy the alleged restraint on competition, and must actively supervise the anticompetitive act. Here, the Louisiana COPA statute and the COPA concerning the Acquisition does just that. *See* La. R.S. § 40:2254.1 *et seq.*

38. This doctrine is grounded in constitutional principles of federalism, in accordance with the "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker*, 317 U.S. at 351.

[2] https://www.lcmchealth.org/about-us/awards-accreditations/.

39. The doctrine vindicates the States' sovereign authority to regulate certain matters without interference from the antitrust laws, which the federal government has improperly brought to bear against LCMC (and Louisiana) in this case.

40. Pursuant to this doctrine, a number of States—including Louisiana—have enacted statutes by which hospital mergers like the Acquisition can be exempted from the antitrust laws in instances where the State issues a COPA.

III. The Louisiana COPA Statute

41. Louisiana enacted a COPA statute, reflecting legislative recognition that "the goals of controlling health care costs and improving the quality of and access to health care will be significantly enhanced in some cases by cooperative agreements and by mergers and consolidations among health care facilities." La. R.S. § 40:2254.1.

42. The statute's purpose is "to provide the state . . . with direct supervision and control over the implementation of cooperative agreements, mergers, joint ventures, and consolidations among health care facilities for which certificates of public advantage are granted." *Id.*

43. The statute expressly declares the "intent of the legislature that supervision and control over the implementation of these agreements, mergers, joint ventures, and consolidations substitute state regulation of facilities for competition between facilities and that *this regulation 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." *Id.* (emphasis added).

44. The State Attorney General authorizes and issues COPAs in Louisiana. The COPA statute provides that a COPA is "a written certificate issued by the [State Department of Justice] as evidence of the department's intention that the implementation of a cooperative agreement, when actively supervised by the department, receive state action immunity from prosecution by

the state or by any district attorney in the state as a violation of state or federal antitrust laws." La. R.S. § 40:2254.2.

45. The statute also provides that the State Department of Justice "may not issue a [COPA] unless the department finds that the agreement is likely to result in lower health care costs or is likely to result in improved access to health care or higher quality health care without any undue increase in health care costs. If the department denies an application for a certificate for an executed agreement, the parties may submit a new application for a certificate based upon a cooperative agreement, merger, joint venture, or consolidation different from the original application." La. R.S. § 40:2254.4.

46. The statute provides for the State Attorney General to enforce the COPA, permitting that office to "bring an action in the name of the state against a person or persons to whom a certificate has been issued in order to enforce any terms or conditions imposed by the [State Department of Justice] upon the issuance of the certificate, to enjoin the violation of the terms or conditions, or to enjoin any material violation of or deviation from the terms of the cooperative, merger, joint venture, or consolidation agreement submitted to and approved by the department." La. R.S. § 40:2254.10.

47. The statute requires the merging entities subject to a COPA to "submit a report to the [State Department of Justice] evaluating whether the cooperative, merger, joint venture, or consolidation agreement submitted to and approved by the department has been complied with during the preceding year and, if applicable, evaluating whether any terms and conditions imposed by the department when it issued the certificate have been met or otherwise satisfied during the preceding year." La. R.S. § 40:2254.11. The statute requires this report to be "submitted annually

or more frequently if required by the department," which "shall in turn issue findings as to whether the terms and conditions are being met or otherwise satisfied." *Id.*

IV. The Acquisition and Louisiana's Decision to Exempt it From the Antitrust Laws

48. The Acquisition is a transaction designed to increase access to clinical services and high-quality health care in the New Orleans region and create expanded hubs for specialty care, innovation, and academic medicine in the region.

49. HCA previously operated the three hospitals acquired in the Acquisition—Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital (the "UHS Hospitals") through University Healthcare System, L.C. ("UHS"), a joint venture between Tulane and affiliates of HCA.

50. The Acquisition was structured such that HCA transferred its ownership interest in UHS to Tulane, and LCMC then acquired the membership interests of UHS and related equity interests in certain physician clinics from Tulane.

51. The Acquisition also contemplates a partnership between LCMC and Tulane that will provide significant benefits to the greater New Orleans community, even beyond the improvements in access to health care. For example, the Acquisition (1) represents an approximately $600 million commitment from Tulane to further develop downtown New Orleans, including new construction and enhancements; (2) includes the establishment of new nursing, clinical research, and graduate scholarship programs; and (3) has the potential to establish new Centers of Excellence in Louisiana.

52. In addition, as part of the Acquisition, LCMC agreed to commit at least $220 million in capital investments to improve multiple hospitals in the first five years following the close of the transaction.

53. On December 28, 2022, the State of Louisiana granted a COPA approving the agreements and merger effectuating the Acquisition.[3] The COPA reflects Louisiana's clearly articulated and affirmatively expressed intent that the Acquisition should be exempt from the federal antitrust laws. It is an important aspect of the State's health care policy, and an area of regulation constitutionally reserved for State—not federal—oversight.

54. Moreover, the issuance of this COPA necessarily means that the State found "that the agreement is likely to result in lower health care costs or is likely to result in improved access to health care or higher quality health care without an undue increase of health care costs." La. R.S. § 40:2254.4.

55. The COPA expressly provides for Louisiana's active supervision of the Acquisition's implementation and the subsequent operations of the merged entity. In this way, Louisiana actively supervises the Acquisition and the subsequent operations of the merged entity.

56. The COPA was also subject to terms and conditions issued by the State Attorney General, which further provide for active supervision of the Acquisition and the subsequent operations of the merged entity.

57. In addition, the Louisiana COPA statute itself provides for active supervision of the Acquisition and the subsequent operations of the merged entity by permitting the State Attorney General to enforce the terms of the COPA, La. R.S. § 40:2254.10, and via the annual reporting requirements for the merged entity subject to the COPA, La. R.S. § 40:2254.11.

58. On January 1, 2023, the parties to the Acquisition closed the transaction. Since then, LCMC has been integrating the UHS Hospitals and physician clinics into its heath care network to deliver on the promised benefits for the people of Louisiana.

[3] *See* Exhibits A-B.

V. Because of the COPA, the Acquisition is Exempt From the Antitrust Laws, including the HSR Antitrust Act

59. By issuing a COPA for the Acquisition, Louisiana asserted its sovereign authority under the state action immunity doctrine to exempt the transaction from Defendants' oversight under the antitrust laws.

60. By its clearly articulated and affirmatively expressed assertion that the Acquisition is a matter of its own policy and not subject to the antitrust laws, together with active supervision of the transaction, Louisiana has stripped Defendants' authority to regulate the Acquisition under the federal antitrust laws.

61. The HSR Antitrust Act, which amended the Clayton Act and pursuant to which Defendants seek to require LCMC to submit an HSR Filing and pay the associated filing fee and penalty, is a federal antitrust law subject to the state action immunity doctrine.

VI. The FTC's Order that LCMC Submit an HSR Filing

62. On March 3, 2023, counsel from the FTC's Premerger Notification Office contacted LCMC's counsel, asking to be "walk[e]d . . . through the HSR analysis" for the Acquisition. Counsel for LCMC responded that "Attorney General Jeff Landry of Louisiana approved a Certificate of Public Advantage (COPA) under Louisiana Revised Statute [40:2254.1], et seq., for LCMC Health's below-referenced partnership with Tulane University. The COPA was granted prior to the closing of the transaction."[4]

63. The FTC's response stated in part that LCMC's email "is not sufficient to explain why [LCMC] didn't file an HSR notification prior to its January 2023 acquisition." The FTC continued, "Please explain your HSR analysis as to why the acquisition did not require an HSR

[4] The relevant email correspondence with the FTC is appended to this Complaint as Exhibit C.

notification. Additionally, please provide more detail on how the Louisiana COPA analysis exempts the acquisition from HSR notification."[5]

64. Following a more detailed reply from LCMC's counsel, the FTC signaled its definitive disagreement with LCMC's position and ordered LCMC to submit an HSR Filing (the "FTC's Order"). The FTC stated, "We disagree with your analysis below. Assuming your transaction met the statutory thresholds, you should have submitted an HSR filing. Please submit your HSR filing as soon as possible."[6]

65. The FTC's Order that LCMC submit an HSR Filing would impose on LCMC a filing fee of at least $30,000. Moreover, the FTC's Order poses an even greater threat to LCMC because LCMC is subject to a daily penalty for the putatively delayed HSR Filing. For each relevant day up to and including January 10, 2023, the penalty could be up to $46,517 per day. For each day thereafter, it could be up to $50,120 per day.

66. By threatening LCMC with these penalties, notwithstanding Louisiana's decision to authorize the Acquisition, the FTC's apparent goal is to prevent States from enacting or implementing COPA statutes. The HSR antitrust review process is costly and enables the FTC to impose substantial delays to the closing of an acquisition. If the FTC succeeds in subjecting state-authorized mergers to Section 7A of the Clayton Act, it will permanently hamper the ability of States to authorize and approve time-sensitive mergers, even in instances where, as here, the State has concluded that a given transaction serves its critical interest in providing affordable, quality health care to its citizens.

[5] *Id.*
[6] *Id.*

CLAIMS FOR RELIEF

Count I—Declaratory Judgment Pursuant to the Hart-Scott-Rodino Antitrust Act

67. LCMC incorporates by reference the allegations contained in the previous paragraphs as though set forth fully herein.

68. LCMC is entitled to a declaration of its rights with respect to an actual and ongoing controversy over the applicability of state-action immunity to the HSR Antitrust Act, 15 U.S.C. § 18a.

69. The state-action immunity doctrine applies to the "federal antitrust laws," *Phoebe Putney*, 568 U.S. at 225, including the HSR Antitrust Act.

70. The Acquisition is immune from the federal antitrust laws, including the HSR Antitrust Act. The Acquisition was expressly authorized by the Louisiana State Legislature and the Louisiana Attorney General, and the implementation of the Acquisition is actively supervised by the Louisiana Attorney General.

71. The FTC's Order improperly exceeds Defendants' authority under the HSR Antitrust Act in violation of the state action immunity doctrine.

72. Compliance with the FTC's Order would impose economic costs on LCMC, including the HSR Filing fee.

73. The FTC has threatened enforcement by the United States for penalties under 15 U.S.C. § 18a(g)(1), notwithstanding the fact that the parties to the Acquisition, including LCMC, are immune from those penalties. According to the FTC, the penalties are currently accruing daily.

74. Because of the FTC's directive to halt the Acquisition and submit to a costly notice and review process, and because of the ongoing threat of crushing penalties enforced by the U.S.

Department of Justice, a declaratory judgment is immediately necessary to resolve the rights and obligations of the parties.

PRAYER FOR RELIEF

Wherefore, LCMC prays for the following relief:

a. A declaration, order, and judgment holding that the parties to the Acquisition, including LCMC and HCA, are not obligated to submit an HSR Filing concerning the Acquisition or to pay a related filing fee as defined at 16 C.F.R. § 803.9;

b. A declaration, order, and judgment holding that the parties to the Acquisition, including LCMC and HCA, are not subject to any fine or penalty under 15 U.S.C. § 18a(g)(1) or any other antitrust law in connection with the Acquisition;

c. Any other relief this Court deems just and proper.

Dated: April 19, 2023

Respectfully submitted,

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/s/ Robert N. Stander
Robert N. Stander (*pro hac vice* forthcoming)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-7628
rstander@jonesday.com

Counsel for Plaintiff Louisiana Children's Medical Center

Exhibit A

State of Louisiana
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 94005
BATON ROUGE
70804-9005

Jeff Landry
Attorney General

December 28, 2022

Kenneth W. Field
Jones Day
51 Louisiana Avenue N.W.
Washington, D.C. 20001

Louisiana Children's Medical Center
Attn: Jody Martin
Senior Vice President, Chief Legal Officer
1100 Poydras St., Suite 2500
New Orleans, LA 70163

Tulane Educational Fund
Tulane University
Attn: Victoria D. Johnson
General Counsel
6823 St. Charles Ave.
300 Gibson Hall
New Orleans, LA 70118

HCA Healthcare, Inc.
Attn: Joseph A. Sowell, III
Senior VP and Chief Development Officer
One Park Plaza, Bldg. 2
Nashville, TN 37203

Re: ***Application for Certificate of Public Advantage – Louisiana Children's Medical Center/LCMC Health; The Administrators of the Tulane Educational Fund; Columbia/HCA of New Orleans, Inc.; Medical Center of Baton Rouge, Inc.; Columbia Healthcare System of Louisiana, Inc.; HCA Inc.***

Dear Counsel:

This correspondence is intended to serve as notification that the above-referenced application for Certificate of Public Advantage, filed with this office pursuant to La. R.S. 40:2254.1, et seq. on October 10, 2022 and supplemented on November 2, 2022, November 4, 2022, November 10, 2022, November 15, 2022, and November 18, 2022 (collectively referred to herein as "COPA

Application"), is hereby approved. The approval is based on the representations and information contained in the COPA Application, criteria set forth in Louisiana law and regulations, testimony at the public hearing held on December 8, 2022, and the large number of public comments received.

The approval is subject to the following conditions:

1. The execution of all documents necessary to close the transaction as described in the COPA Application;

2. Pursuant to Louisiana Revised Statute 40:2254.11 and the regulations promulgated in accordance therewith, the submission of annual reports, as more specifically described in the Terms and Conditions of Compliance attached hereto;

3. Full compliance with all requirements described in the Terms and Conditions of Compliance attached hereto.

Please note that the annual reports will be due on or before December 28th of the applicable year ("Anniversary Date"), quarterly reports will be due in 90-day increments from the Anniversary Date, and semi-annual reports will be due in 180-day increments from the Anniversary Date.

Should you have any questions or comments, please let us know.

Sincerely,

Jeff Landry

Encl.: Terms and Conditions of Compliance

Exhibit B

Jeff Landry
Attorney General

State of Louisiana
DEPARTMENT OF JUSTICE
CIVIL DIVISION
P.O. BOX 94005
BATON ROUGE
70804-9005

CERTIFICATE OF PUBLIC ADVANTAGE

TERMS AND CONDITIONS OF COMPLIANCE FOR:

LOUISIANA CHILDREN'S MEDICAL CENTER/LCMC HEALTH; THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND; COLUMBIA/HCA OF NEW ORLEANS, INC.; MEDICAL CENTER OF BATON ROUGE, INC.; COLUMBIA HEALTHCARE SYSTEM OF LOUISIANA, INC.; HCA INC. (referred to herein as "Applicants")

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CERTIFICATE OF PUBLIC ADVANTAGE
TERMS AND CONDITIONS OF COMPLIANCE
Effective: December 28, 2022

I. Legally Binding Effect of these Terms and Conditions and Corrective Action Plans

A. Conditions of COPA Approval and Applicability of Terms and Conditions. The terms and conditions set forth herein ("Terms and Conditions") are required as a condition for approval of the Certificate of Public Advantage ("COPA") submitted by the above-named Applicants. The Louisiana Department of Justice, Office of the Attorney General ("DOJ") may, at any time, alter these terms and conditions as it deems necessary to ensure that the COPA meets statutory and regulatory requirements. Pursuant to the terms of the proposed transaction among the Applicants for which a COPA application was submitted, LCMC Health will become the sole owner of Tulane University Medical Center, Tulane Lakeside Hospital, and Lakeview Regional Medical Center (collectively, the "UHS Hospitals"). As the sole owner of the UHS Hospitals and the operator of LCMC Health's six hospitals (Children's Hospital New Orleans, East Jefferson General Hospital, New Orleans East Hospital,[1] Touro Infirmary, University Medical Center New Orleans, and West Jefferson Medical Center) (together with the UHS Hospitals, the "Combined Entity"), LCMC Health (the "New Health System") will serve as the sole continuing operator of the Combined Entity and the sole entity subject to these Terms and Conditions. The New Health System does not have the right to withdraw from these COPA Terms and Conditions during the term of the COPA. Further, pursuant to Louisiana Revised Statute 40:2254.4(D), any amendment to the terms of the transaction submitted by the Applicants or any material change in the operations or conduct of the New Health System shall be considered to be a new agreement and shall not take effect or occur until the DOJ has issued a new COPA approving such amendment or material change. The New Health System shall follow the timeframes and procedures set forth in the statutory and regulatory framework for COPA applications with regard to notifying the DOJ of any amendments or material changes.

B. Corrective Action Plan. If, at any time, the DOJ determines that an activity of the New Health System is inconsistent with the policy goals described in Louisiana Revised Statute 40:2254.1, *et. seq*, the DOJ will notify the New Health System that it must adopt a plan to correct any deficiency in its activities. Within thirty (30) calendar days of notification, the New Health System shall return a written corrective action plan to the DOJ responding to each cited deficiency, including timeframes for corrections, together with any additional evidence of compliance. If the DOJ determines that the corrective action plan does not sufficiently address each cited deficiency, it will notify the New Health System that it must submit a revised corrective action plan within twenty (20) days of notification. If the DOJ determines that the corrective action plan does sufficiently address each cited deficiency ("Corrective Action Plan"), the New Health System shall use best efforts to implement the Corrective Action Plan and submit progress reports to the DOJ as set forth therein.

[1] New Orleans East Hospital ("NOEH") is not owned by LCMC Health; LCMC Health manages NOEH, which is not financially integrated into LCMC Health. NOEH is a Hospital Service District hospital and a political subdivision of the state. Accordingly, NOEH contracts separately and is not part of the LCMC Health payor contracting process.

C. Remedies. If the DOJ is not satisfied with any submitted corrective action plan, if the New Health System fails to comply with the terms and conditions set forth herein, fails to comply with any Corrective Action Plan, or if the DOJ otherwise determines that the transaction is not resulting in lower health care costs or greater access to or quality of health care, the DOJ reserves the right to revoke the COPA as provided for in Louisiana Revised Statute 40:2254.6. Additionally, the DOJ may pursue any other enforcement mechanisms available to it by law, including but not limited to injunctive relief.

D. Court Costs and Attorney Fees. If it becomes necessary for the DOJ to file suit to enforce any provision of law, regulation, the terms and conditions of any Corrective Action Plan, or these terms and conditions, the New Health System shall be responsible for all costs associated with any such litigation, including but not limited to all court costs and attorneys' fees.

E. Release of Liability for Corrective Action Plans. Subject to Louisiana Revised Statute 40:2254.7, the approval of any Corrective Action Plan does not confer any responsibility or liability for damages on the State of Louisiana or any of its officers, directors, employees, agents, or consultants. Applicants and their successors and assigns hereby RELEASE AND FOREVER DISCHARGE the State of Louisiana and all of its officers, directors, employees, agents, and consultants from any and all damages claims, debts, demands, losses, and liabilities whatsoever, known or unknown, whether in law or in equity, resulting from, respecting, relating to, or arising out of any Corrective Action Plan, which either party now has or may later discover. The New Health System may appeal a final decision on a corrective action plan or rate review decision in the manner provided in the Administrative Procedure Act.

F. The New Health System may designate as "Confidential" and redact any document or material submitted to the DOJ that is exempt from disclosure under the Louisiana Public Records Act, including any document or material containing trade secret, proprietary, or competitively sensitive information. In accord with Louisiana Revised Statute 44:4 *et seq*. and other applicable statutes, rules, and regulations, nothing in the Terms and Conditions limits the New Health System from claiming any exceptions, exemptions, and limitations to the laws pertaining to public records.

II. Purpose and Vision – Creating Value for Louisiana Citizens

The purpose of COPA law and similar statute-regulated transactions is to better serve the citizens of Louisiana by pursuing and attaining the key aims of value-based healthcare, namely—

- Cost: Decreased costs of care
- Quality: Improved quality of care
- Access: Increased access to care

For COPA and other transactions, the State of Louisiana, through the Louisiana DOJ, aspires to work with healthcare organizations to help the DOJ and the nation to achieve these goals. For approval to be granted, the DOJ must have reasonable assurances that these goals will be met.

Ultimately, decreased costs, improved quality, and increased access to healthcare aim to create better patient engagement, higher patient satisfaction, and more value for patients.

III. Guiding Principles and Expectations for Monitoring

The New Health System agrees to pursue these goals and to employ these guiding principles, which will be key to monitoring the transaction and ensuring its future success.

A. Relevant Metrics: The New Health System will be responsible for gathering, analyzing, and presenting its performance on relevant metrics to cost, quality, and access on a regular basis. The DOJ reserves the right to change, add, or remove metrics as it deems necessary to ensure that the COPA meets statutory and regulatory requirements.

B. Competitive Benchmarking: The New Health System will be expected to measure and report its performance in cost, quality, and access compared to national benchmark or relevant peer competitors within the markets it serves, the State of Louisiana, or any other areas (such as neighboring states or similar metropolitan areas in other states, etc.) as appropriate and as may be added at the discretion of the DOJ as it deems necessary to ensure that the COPA meets statutory and regulatory requirements, to the extent that relevant information on such competitors is publicly available.

C. Continuous Improvement: The New Health System should strive to create, build, and maintain a culture of excellence and continuous improvement. The DOJ expects the New Health System to show meaningful improvement in cost, quality, and access every year. The New Health System should improve beyond its baseline performance (past performance for the quarter and year prior to approval), and also relative to its peer group or competitive set.

IV. Key Monitoring Elements in the Louisiana Statute

Louisiana Revised Statute 40:2254.11 provides as follows:

> If the department issues a certificate of public advantage, the facilities to whom the certificate has been issued shall submit a report to the department evaluating whether the cooperative, merger, joint venture, or consolidation agreement submitted to and approved by the department has been complied with during the preceding year and, if applicable, evaluating whether any terms and conditions imposed by the department when it issued the certificate have been met or otherwise satisfied during the preceding year. The report must be submitted annually or more frequently if required by the department. The department shall in turn issue findings as to whether the terms and conditions are being met or otherwise satisfied. The department shall keep copies of all reports and findings based on the reports.

Louisiana Admin. Code tit. 48, Part XXV, §517 outlines the information and supporting data that must be submitted by the New Health System. Annual reports following an approved COPA transaction shall include, but not be limited to, the following information:

- an update of all the information required in the COPA application;
- any change in the geographic territory that is served by the health care equipment, facilities, personnel, or services which are subject of the transaction;
- a detailed explanation of the actual effects of the transaction on each party, including any change in volume, market share, prices, and revenues;
- a detailed explanation of how the transaction has affected the cost, access, and quality of services provided by each party; and
- any additional information requested by the DOJ.

Louisiana Admin. Code tit. 48, Part XXV, §509 provides that the fee due with the filing of the reports required by Louisiana Revised Statute 40:2254.11 and described in Sections VIII-X shall be $15,000. If the actual cost incurred by the DOJ is greater, the parties involved shall pay any additional amounts due as instructed by the DOJ.

V. Structure of Monitoring

The DOJ will direct the monitoring of an approved COPA application. At its discretion, the DOJ may assign another existing or new department within the State of Louisiana, or an external organization, to monitor the New Health System and the terms of the COPA application, or to provide monitoring support to the DOJ. (The DOJ or other organization that does the monitoring is hereafter referred to as the "Monitoring Agency" or together, the "Monitoring Agencies").

The New Health System will be required to submit advanced written notice of certain events and reports that include specific information at the request of the Monitoring Agency. The Monitoring Agency will require reports according to the following schedule:

A. Rate Review – During the term of the COPA, the New Health System will be required to submit information related to changes in rates to the Monitoring Agency as described in Section VI.

B. Quarterly Reports – Quarterly reports will include an update on the transaction objectives as set forth in the COPA application and supplemental submission, with specific focus on updates on the investment and repurposing of facilities claims. Quarterly reports will be required for first three (3) years or until completion of application objectives, whichever is longer.

C. Semi-Annual Reports – Semi-annual reports will require submission of a set of key metrics tied to cost, quality, and access. The reports will be submitted semi-annually for first five (5) years following the transaction.

D. Annual Reports – During the term of the COPA, the New Health System will be required to submit annual reports that detail an update on its application, a description of any change

to geographic territory, any changes in volume, market share, prices, and revenues, and a detailed explanation of how the transaction has affected cost, quality, and access.

The time periods for which quarterly and semi-annual reports will be required may be shortened or extended at the discretion of the Monitoring Agency. All annual reports should be submitted on or before the anniversary of the COPA approval date. Quarterly reports are to be submitted in 90-day increments after the anniversary of the COPA approval date and semi-annual reports are to be submitted in 180-day increments, while applicable, after the anniversary of the COPA approval date. In the event of a hurricane, earthquake, flood, tornado, natural disaster, public health emergency, epidemic, pandemic or disease outbreak, or other force majeure event or "act of God" that affects the ability of the New Health System to submit a report during the time periods outlined herein, the New Health System must contact the DOJ to determine a late report submission date that is mutually agreed upon by the New Health System and the DOJ.

VI. Rate Review

A. The New Health System may not contract with a third-party payor for a change in rates for any services provided by such New Health System without the prior written approval of the DOJ. At least sixty (60) days before the proposed implementation of any change in rates for any services provided by the New Health System under a newly negotiated third-party payor contract, the New Health System shall submit any proposed changes in rates to the DOJ for approval. The information submitted to the DOJ must include, at a minimum:

i. Completion of any Rate Review application form which may be adopted by the DOJ;

ii. The proposed change in rate(s);

iii. For an agreement with a third-party payor other than an agreement with a managed care organization that provides or arranges for the provision of services under the Medicare or Medicaid programs, information showing:

a. That the New Health System and the third-party payor have agreed to the proposed rates;

b. Whether the proposed rates are less than the corresponding amounts in a relevant price index published by the Bureau of Labor Statistics of the United States Department of Labor relating to services for which the rates are proposed, or a comparable price index chosen by the DOJ if the relevant price index is abolished; and

c. If the proposed rates are above the corresponding amount in the relevant price index, a justification for proposing rates above the corresponding amounts in such index.

iv. To the extent allowed by federal law, for an agreement with a managed care organization that provides or arranges for the provision of services under the Medicare or Medicaid programs, information showing:

a. Whether the proposed rates are different from rates under an agreement that was in effect before the date of the transaction;

b. Whether the proposed rates are different from the rates most recently approved by the DOJ for the New Health System, if the DOJ has previously approved rates following the issuance of the COPA; and

c. If the rates exceed the rates those described in subparagraphs (a) or (b) of this paragraph, a justification for proposing rates in excess; and

v. Any information concerning costs, patient volumes, acuity, payor mix, or other information requested by the DOJ.

a. To the extent that the DOJ requests such information, such information shall be provided no later than twenty (20) business days from the request.

B. The Monitoring Agency shall approve or deny the proposed rate change within sixty (60) days from receipt of a notice of proposed rate change.

C. The rate review process intends to ensure that rates remain at a level that is supported by economic, cost, or other growth trend indicators. The DOJ, in its sole discretion, may designate an individual or entity to review the provided materials and make a recommendation to the DOJ. The Monitoring Agency may evaluate proposed rate increases by comparing the proposed rates to: (1) price indexes, (2) cost report data and trends, (3) governmental program rates, and (4) other information as provided by the New Health System or as deemed necessary by Monitoring Agency. Based on evaluation, the DOJ shall approve the proposed rates unless the DOJ determines that rates inappropriately exceed competitive rates for comparable services in the New Health System's market area.

VII. Notice

The New Health System must provide written notice to the DOJ at least ninety (90) days in advance of any mergers, acquisitions, joint ventures, or other partnership arrangements.

VIII. Report Elements – Quarterly Reports

The New Health System must submit quarterly reports, in accordance with the schedule set forth in Section V, providing an update on the transaction objectives cited in the COPA application regarding the investments and repurposing of facilities, including but not limited to the following:

A. Changes in services at the Tulane University Medical Center New Orleans ("TUMC") facility in Orleans Parish, to the extent available, related to:

i. Creation of new nursing program in Orleans Parish;
ii. Development of downtown campus;

B. Creation of a new, premier academic medical center and leading teaching institution in Jefferson Parish at East Jefferson General Hospital ("EJGH"), including:
   i. Transition or relocation of advanced clinical services from TUMC to EJGH;
   ii. Investment in capital improvements at EJGH, Tulane Lakeside, and Lakeview;

C. Creation of Centers of Excellence;

D. Engagement in medical research;

E. Expansion of electronic medical record system to Tulane Lakeside and Lakeview;

F. Access changes such as:
   i. Material openings, closures, or mergers of outpatient facilities;
   ii. Material openings, closures, or mergers of inpatient services; or
   iii. Material service line changes.

G. Any changes or events requiring reporting to The Joint Commission or other accrediting bodies, including any change in accreditation status.

IX. Report Elements – Semi-Annual Reports

The New Health System must submit semi-annual reports in accordance with the schedule set forth in Section V. To serve as long- and short-term baseline comparators, the New Health System should include data from one (1) year prior to the merger and one (1) quarter before the merger. Semi-annual reports should include data from these two (2) baseline comparators, in addition to the data from all preceding reports. Where possible, the New Health System should also compare the following measures to the top two (2) to four (4) competitors in the area. The semi-annual reports must include the following elements, to the extent available:

Cost

- Number of patients who benefited from charity care
- Description of capital investments
- Overall cost of agency nurses (details to be kept confidential)
- List of open care delivery positions
- Summary of charges billed and payments received for inpatient care, including drugs, from each facility
- Dollar value and service volume of programs and services for poor and underserved communities
- Final Medicare cost reports

Quality

- Patient satisfaction ratings

- Readmission rates
- A summary of quality improvement measures for each hospital
- CMS star ratings
- Leapfrog safety rating

Access

- Staffed bed changes greater than ten percent (10%) compared to the same period in the prior year.
- Inpatient volumes, broken down by major classifications such as pediatrics, women's health, Med Surg, ICU, etc.
- Outpatient volumes, broken down by each outpatient category, such as primary and specialty clinic visits, emergency department, outpatient surgery, etc.
- Emergency department times in minutes for each hospital
- Number of providers who have privileges to practice
- Current number of physicians, nurses, PAs in the market area and employed by the New Health System
- Number of newly recruited physicians seeing patients by the New Health System to the area in the past year

X. Report Elements – Annual Reports

In addition to the quarterly and semi-annual reports, the New Health System must submit annual reports as required by Louisiana law. The report must include all report elements listed for the quarterly and semi-annual reports, in addition to the following:

A. An update of all the information required in the application. Provide an update on the claims made in the initial and supplemental COPA applications.

B. Any change in the geographic territory that is served by the health care equipment, facilities, personnel, or services which are subject of the transaction. Provide detailed explanation of any change in geographic territory that is served by the health care equipment, facilities, personnel, or services which are subject to the transaction.

C. A detailed explanation of the actual effects of the transaction on each party, including any change in volume, market share, prices, and revenues:

i. Volume: Provide a detailed account of how volumes have been impacted by the transaction.

ii. Market share: Provide a detailed account of how market share has been impacted by the transaction.

iii. Price: Provide a detailed account of how prices have been impacted by the transaction. Provide prices for a key group of services/procedures – recommend the most common

ten (10) to thirty (30) procedures or services. Include charts that compare change in price to general inflation and health care inflation.

iv. Revenue: Provide a detailed account of how revenues have been impacted by the transaction.

D. A detailed explanation of how the transaction has affected the cost, access, and quality of services provided by each party. Provide a narrative explanation of the transaction's impact on cost, quality, and access.

XI. Release of Liability

Subject to Louisiana Revised Statute 40:2254.7, the granting of a COPA application does not confer any responsibility or liability for damages on the State of Louisiana or any of its officers, directors, employees, agents, or consultants. Applicants and their successors and assigns hereby RELEASE AND FOREVER DISCHARGE the State of Louisiana and all of its officers, directors, employees, agents, and consultants from any and all damages claims, debts, demands, losses, and liabilities whatsoever, known or unknown, whether in law or in equity, resulting from, respecting, relating to, or arising out of any COPA application or approval, which such party now has or may later discover.

Exhibit C

From: Walsh, Kathryn E. <kwalsh@ftc.gov>
Sent: Tuesday, April 4, 2023 6:31 PM
To: Field, Ken
Cc: Jones, Robert L.; Petrizzi, Maribeth; Seidman, Mark
Subject: RE: HSR Question

[EXTERNAL]
Ken:

We disagree with your analysis below. Assuming your transaction met the statutory thresholds, you should have submitted an HSR filing. Please submit your HSR filing as soon as possible.

Thanks,
Kate

From: Field, Ken <ken.field@hoganlovells.com>
Sent: Monday, April 3, 2023 10:41 AM
To: Walsh, Kathryn E. <kwalsh@ftc.gov>
Subject: RE: HSR Question

Hi Kate,

On December 28, 2022, the State of Louisiana granted a Certificate of Public Advantage under La. R.S. 40:2254.1, et seq., approving the agreements and merger through which Tulane Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital joined LCMC Health.

You asked whether Section 7A of the Clayton Antitrust Act of 1914, as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 USC 18(a), required the filing of a pre-merger notification and report form ("HSR" filing) prior to closing despite the transaction being approved under La. R.S. 40:2254.1.

The Louisiana legislature expressly and clearly articulated the purpose and intent of La. R.S. 40:2254.1 in the language of the statute: "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."

We believe the state action immunity doctrine arising from *Parker v. Brown*, 317 U.S. 341 (1943) and subsequent cases effectively immunized and exempted the transaction from the Clayton Act and its HSR filing amendments given Louisiana's approval under La. R.S. 40:2254.1, et seq., prior to the merger date. While we understand that the Commission strongly disfavors Certificates of Public Advantage and assertions of state action immunity, we also understand our position here is consistent with prior Commission actions in Certificate of Public Advantage matters, including matters in which I was directly involved and specifically engaged with the Commission on this issue.

Should you disagree, please let us know and share your analysis. We are happy to discuss in more detail as necessary.

Thank you,
Ken

Ken Field
Antitrust Partner, Health Care Antitrust Practice Leader

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109
Office +1 202 637 5869
Cell +1 703 927 8631
ken.field@hoganlovells.com

From: Walsh, Kathryn E. <kwalsh@ftc.gov>
Sent: Thursday, March 23, 2023 5:24 PM
To: Field, Ken <ken.field@hoganlovells.com>
Subject: RE: HSR Question

[EXTERNAL]
Ken:

Your March 14, 2023, email is not sufficient to explain why your client didn't file an HSR notification prior to its January 2023 acquisition noted below. Please explain your HSR analysis as to why the acquisition did not require an HSR notification. Additionally, please provide more detail on how the Louisiana COPA analysis exempts the acquisition from HSR notification.

Thanks,

Kate

From: Field, Ken <ken.field@hoganlovells.com>
Sent: Tuesday, March 14, 2023 2:43 PM
To: Walsh, Kathryn E. <kwalsh@ftc.gov>
Subject: HSR Question

Hi Kate,
Thank you for taking the time to speak with me by phone. As we discussed, I have changed firms but I continue to represent LCMC Health in this matter.

By this email I also confirm, as you requested, that Attorney General Jeff Landry of Louisiana approved a Certificate of Public Advantage (COPA) under Louisiana Revised Statute 40:225411, et. seq., for LCMC Health's below referenced partnership with Tulane University. The COPA was granted prior to the closing of the transaction.

Thank you,
Ken

Ken Field
Partner

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109
Office: +1 202 637 5869
Cell: +1 703 927 8631
Email: ken.field@hoganlovells.com
www.hoganlovells.com

From: Walsh, Kathryn E. <kwalsh@ftc.gov>
Sent: Friday, March 3, 2023 11:49 AM
To: Field, Kenneth W. <kfield@jonesday.com>
Subject: HSR Question

** External mail **

Ken:

I understand Jones Day acted as Antitrust counsel to LCMC Health in the partnership with Tulane University in which Tulane Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital were acquired from HCA Healthcare and joined LCMC Health. Could you walk me through the HSR analysis?

Thanks,
Kate

Kathryn E. Walsh
Deputy Assistant Director
Premerger Notification Office
Federal Trade Commission
(202) 326-2977

JS 44 (Rev. 10/20)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Louisiana Children's Medical Center, d/b/a LCMC Health

(b) County of Residence of First Listed Plaintiff Orleans
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
E. Paige Sensenbrenner/Diana Cole Surprenant, Adams and Reese LLP, 701 Poydras St., Suite 4500, New Orleans, LA 70139; (504) 581-3234

DEFENDANTS

Merrick Garland, in his official capacity as Attorney General of the United States, et al.

County of Residence of First Listed Defendant Washington, D.C.
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

(See Attachment to Civil Cover Sheet)

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☒ 4	☐ 4
Citizen of Another State	☐ 2	☒ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent - Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☒ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit (15 USC 1681 or 1692)
- ☐ 485 Telephone Consumer Protection Act
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
15 U.S.C. § 18a

Brief description of cause:
A Complaint for Declaratory Judgment seeking a declaration that the Hart-Scott Rodino Antitrust Improvements Act does not apply.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:

JUDGE _____ DOCKET NUMBER _____

DATE
4/19/2023

SIGNATURE OF ATTORNEY OF RECORD
Diana Cole Surprenant

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

Attachment to Civil Cover Sheet

PLAINTIFF: Louisiana Children's Medical Center d/b/a LCMC Health

Counsel for Plaintiff:

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DEFENDANTS

1) Merrick Garland, in his official capacity as Attorney General of the United States

2) United States Department of Justice

3) United States of America

Exhibit C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

HCA HEALTHCARE, INC. Plaintiff, v. MERRICK GARLAND, in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES, UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL TRADE COMMISSION, and UNITED STATES OF AMERICA, Defendants	CIVIL ACTION No. 23-01311

THE STATE OF LOUISIANA'S MOTION TO INTERVENE

The State of Louisiana, by and through Attorney General Jeff Landry, moves to intervene pursuant to Federal Rule of Civil Procedure 24. The Court should grant the State's motion to intervene because it satisfies the requirements of intervention as of right and of permissive intervention under Federal Rule of Civil Procedure 24.

BACKGROUND

This action seeks a declaratory judgment that the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Antitrust Act") does not apply to transactions that are immune from federal antitrust laws under the doctrine of state action immunity. A

declaratory judgment is needed to vindicate an important policy choice of the State of Louisiana concerning the health care services available to its citizens.

Louisiana has, to the benefit of its citizens, chosen to regulate the issuance of a Certificate of Public Advantage ("COPA") in accordance with and in furtherance of the articulated state interest set forth at La. R.S. 40:2254.1. This lawsuit comes more than one hundred days after the Attorney General issued a COPA and authorized Louisiana Children's Medical Center ("LCMC") to acquire Tulane University Medical Center, Lakeview Regional Medical Center, and Tulane Lakeside Hospital from HCA Healthcare, Inc.—a for-profit provider network that previously operated three hospitals through a joint venture with the Tulane University of Louisiana ("Tulane").

Prior to issuance of the COPA, the Louisiana Department of Justice ("LADOJ") conducted a lengthy review of the proposed COPA application. Despite the comprehensive review, providing notice to the public that an application was received and pending with the Attorney General's office, holding a public comment period, and a public hearing, the Federal Trade Commission ("FTC") never contacted the LADOJ or Attorney General to express any concern or issues with the proposed COPA. To this date, the FTC has never reached out to the LADOJ or Attorney General.

Upon information and belief, the FTC now demands that the acquisition previously approved by Louisiana be halted and submitted to the FTC for review under the HSR Antitrust Act. The FTC's complete disregard towards Louisiana and failure to communicate on this issue is a blatant attack on Louisiana's COPA law found at La. R.S. 40:2254.1, *et seq.*, and Louisiana's state sovereignty.

Under the state action immunity doctrine, LCMC and the other parties to the acquisition, are not subject to the HSR Antitrust Act. The state action immunity doctrine, grounded in the sovereign rights of the States, exempts "from the federal antitrust laws" private parties who are "carrying out the State's regulatory program." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224-25 (2013). Private conduct—including transactions like the acquisition—is exempted from enforcement of "the federal antitrust laws" where the conduct is authorized by clearly articulated and affirmatively expressed state policy and actively supervised by a state actor. *Id.*

ARGUMENT

Federal Rule of Civil Procedure 24(a) requires a federal court to permit intervention of a non-party who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Rule 24(b) permits a federal court to allow intervention of non-parties that tender "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b) (1)(B). "Rule 24 is to be liberally construed" in favor of intervention. *Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014); *accord Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016). "The inquiry is a flexible one, and a practical analysis of the facts and circumstances of each case is appropriate." *Brumfield*, 749 F.3d at 341 (internal quotation marks

omitted). "Intervention should generally be allowed where no one would be hurt and greater justice could be attained." *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005).

I. LOUISIANA SATISFIES THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT.

Under Rule 24, "[a] party seeking to intervene as of right must satisfy four requirements: (1) The application must be timely; (2) the applicant must have an interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit." *Brumfield*, 749 F.3d at 341 (citation omitted). The State satisfies each of these elements.

A. The State's Application Is Timely.

This intervention motion is timely. The Complaint was filed on April 20, 2023, the deadline for responsive pleadings has not yet passed, and no meaningful case events have occurred. As a result, "timeliness is not at issue." *Brumfield*, 749 F.3d at 342; *see also Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (finding that delays of "only 37 and 47 days . . . are not unreasonable"); *Ross,* 426 F.3d at 755 (permitting post-judgment intervention); *United States v. Virginia*, 282 F.R.D. 403, 405 (E.D. Va. 2012) ("Where a case has not progressed beyond the initial pleading stage, a motion to intervene is timely."); *Mullins v. De Soto Securities Co.*, 3 F.R.D. 432, 433 (W.D. La. 1944) (finding motion to intervene timely during the initial pleading stage).

B. The State Has the Requisite Interest in the Subject of this Case.

The State "has a 'direct, substantial, legally protectable interest in the proceedings.'" *Edwards*, 78 F.3d at 1004 (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984)). "A 'legally protectable' right" for intervention purposes "is not identical to a 'legally enforceable' right, such that 'an interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor . . . would not have standing to pursue her own claim.'" *DeOtte v. Nevada*, 20 F.4th 1055, 1068 (5th Cir. 2021) (citations omitted); *accord Wal-Mart Stores*, 834 F.3d at 566. Rather, "[a] movant found to be a 'real party in interest' generally establishes sufficient interest." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 187 (5th Cir. 1989) ("LULAC, Council No. 4434"). "[A] 'real party in interest' may be ascertained by determining whether that party caused the injury and, if so, whether it has the power to comply with a remedial order of the court." *Id.* at 187.

Louisiana regulates the issuance of a COPA in accordance with and in furtherance of the articulated state interest set forth at La. R.S. 40:2254.1. Louisiana's goal of authorizing COPA's is to control health care costs and improve the quality of and access to health care, which the State acknowledges will be significantly enhanced in some cases by cooperative agreements and by mergers and consolidations among health care facilities. La. R.S. 40:2254.1.

The State, through Attorney General Jeff Landry and the Louisiana Department of Justice ("LADOJ"), has direct supervision and control over the

implementation of cooperative agreements, mergers, joint ventures, and consolidations among healthcare facilities for which a COPA is granted. La. R.S. 40:2254.1, *et seq*. The process for approving a COPA requires voluminous submissions by applicants, consultation with experts, notice to the public, input from a wide range of stakeholders, a public hearing, and consideration by State officials. Only applications that clearly benefit the public are approved.

On December 28, 2022, the State issued a COPA. The State determined that LCMC and Tulane exceeded the statutory burden of proof required to issue a COPA. The merger will enhance competition, lead to greater access to health care, result in higher quality health care, and will likely not result in undue increases to costs. The agreement guarantees ongoing oversight to ensure fair prices for consumers. What's more: it will provide a world-class medical education program for both medical students and nursing students, at a time when the State and the Nation are faced with a nursing shortage.

The State intended for LADOJ's supervision and control over the COPA to 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.

C. The Disposition of this Case May Substantially Impair or Impede the State's Interests.

Without intervention, the disposition of this case will impair the State of Louisiana's ability to protect its interests, and it will impair and impede the Attorney

General from carrying out his constitutional duties to defend and uphold the laws of the State of Louisiana.

Louisiana Revised Statutes 40:2254.4 authorizes issuance of a COPA if the Louisiana Department of Justice "finds that an agreement is likely to result in lower health care costs or is likely to result in improved access to health care or higher quality health care without any undue increase in health care costs." Louisiana's COPA statute requires active supervision by the LADOJ, oversight which comprises regular reporting and a detailed review of the effects of the transaction, including the actual effects on prices. Pursuant to the terms of the COPA, LCMC is approaching an upcoming reporting deadline imposed by the State. However, the FTC wants to halt the transaction and impede the ability for LCMC to make progress relative to the COPA. This interferes with the States' ability to provide active state supervision, and it is an infringement on the State's rights.

The Supreme Court has made clear that where private parties are actively supervised in carrying out a clearly articulated anticompetitive policy of the State, they are treated as the State for purposes of state action immunity. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992) (the private anticompetitive conduct is the "State's own"). For the doctrine to apply, the State must have clearly articulated and affirmatively expressed as State policy the alleged restraint on competition, and must actively supervise the anticompetitive act. Here, Louisiana's COPA statute and the COPA concerning the acquisition does just that. *See* La. R.S. 40:2254.1 *et seq.* This doctrine is grounded in constitutional principles of federalism, in accordance with the

"dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker v. Brown*, 317 U.S.341 at 351 (1943).

Despite issuance of the COPA, which is expressly intended to grant and does grant state action immunity from liability under the antitrust laws, the FTC is unlawfully attempting to force LCMC and HCA to submit a notification of the Acquisition and observe a waiting period pursuant to the HSR Antitrust Act and to pay the HSR Filing fee. The FTC's actions constitute a significant violation of federal law and Louisiana's sovereignty.

D. The State's Interests are Inadequately Represented by the Existing Parties.

The State's interests are inadequately represented by the existing parties to the suit. The Attorney General has an interest in defending the injury to the State that would result if the State is prevented from implementing its COPA statutes. If the FTC subjects state-authorized mergers to Section 7A of the Clayton Act, it will impede the ability for states to authorize COPAs and other time-sensitive mergers, especially here where the State of Louisiana approved the transaction months prior to the FTC's purported objection.

In *Miller v. Vilsack,* the Fifth Circuit recently discussed two presumptions of adequate representation that must be considered when determining if representation by the current parties is, in fact, inadequate. No. 21-11271, 2022 WL 851782 (5th Cir. Mar. 22, 2022). The burden for the proposed intervenor to demonstrate inadequate representation is minimal. *Id.* (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th

Cir. 1994)). The burden, however, "cannot be treated as so minimal as to write the requirement completely out of the rule." *Id*. The first presumption applies "when the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Id.* The second presumption applies in cases where a party "is presumed to represent the interests of all of its citizens," *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (per curiam), such as "when the putative representative is a governmental body or officer charged by law with representing the interests of the [intervenor]," *Texas*, 805 F.3d at 661 (quotation omitted). This presumption is limited, however, to "suits involving matters of sovereign interest." *Edwards*, 78 F.3d at 1005. Neither presumption applies here.

There is no reason to believe that the State's sovereign interests will be represented by existing parties. This is not a case where "the would-be intervenor has the same ultimate objective as a party to the lawsuit." *See Entergy Gulf States*, 817 F.3d (citation omitted). The State has unique sovereign interests not shared by the other parties. Any proposed judgment or federal oversight would have future consequences for the State and necessarily involve the State's sovereign interests.

II. IN THE ALTERNATIVE, THE STATE SHOULD BE GRANTED PERMISSIVE INTERVENTION.

The Attorney General fulfills the requirements for permissive intervention. Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." "In exercising its discretion, the court must consider

whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Permissive intervention under Rule 24(b) "is wholly discretionary with the [district] court . . . even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987). Intervention is appropriate when: "(1) timely application is made by the intervenor, (2) the intervenor's claim or defense and the main action have a question of law or fact in common, and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *See Frazier v. Wireline Solutions, LLC*, 2010 WL 2352058, at *4 (S.D. Tex. June 10, 2010) (citation omitted); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 229 F.R.D. 126, 131 (S.D. Tex. 2005).

As discussed above, the intervention is timely; the State's claims or defense and the main action have a question of law or fact in common; and the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Moreover, the State's intervention will facilitate an equitable result. The State can provide a crucial perspective on the important issues implicated by the Complaint. This case has significant implications; therefore, it is essential that all arguments related to the viability of the COPA and the approved acquisition receive full attention. For the reasons stated above, this Court should grant this motion permissively, if it does not grant it as of right.

CONCLUSION

The Court should grant the State of Louisiana's Motion to Intervene, and Louisiana Attorney General Jeff Landry should be allowed to fulfill his constitutional duty to represent the State's interests.

Dated: April 23, 2023

Respectfully Submitted,

Jeff Landry
Louisiana Attorney General

/s/ Angelique Duhon Freel
Elizabeth B. Murrill (LSBA No. 20685)
Solicitor General
Angelique Duhon Freel (LSBA No. 28561)
Carey Tom Jones (LSBA No. 07474)
Terrence J. Donahue, Jr. (LSBA No. 32126)
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CERTIFICATE PURSUANT TO LR 7.6

I do hereby certify that, on the 21st day of April 2023, undersigned counsel reached out to counsel for plaintiffs and defendants in this matter and obtained consent for the filing of the State's intervention. Counsel for the United States Defendants noted that they have not yet been served with the Plaintiff's Complaint and they do not waive service of the original complaint.

/s/ Angelique Duhon Freel
Angelique Duhon Freel

CERTIFICATE OF SERVICE

I do hereby certify that, on this 23rd day of April 2023, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record. And the United States Defendants were served via email through counsel of record, Suzanne Morris at Suzanne.Morris@usdoj.gov .

/s/ Angelique Duhon Freel
Angelique Duhon Freel

Exhibit D

UNITED STATES DISTRICT COURT FOR THE 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, UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL TRADE COMMISSION, and UNITED STATES OF AMERICA, Defendants	CIVIL ACTION No. 23-1305

THE STATE OF LOUISIANA'S MOTION TO INTERVENE

The State of Louisiana, by and through Attorney General Jeff Landry, moves to intervene pursuant to Federal Rule of Civil Procedure 24. The Court should grant the State's motion to intervene because it satisfies the requirements of intervention as of right and of permissive intervention under Federal Rule of Civil Procedure 24.

BACKGROUND

This action seeks a declaratory judgment that the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Antitrust Act") does not apply to transactions that are immune from federal antitrust laws under the doctrine of state action immunity. A

declaratory judgment is needed to vindicate an important policy choice of the State of Louisiana concerning the health care services available to its citizens.

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ARGUMENT

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C. The Disposition of this Case May Substantially Impair or Impede the State's Interests.

Without intervention, the disposition of this case will impair the State of Louisiana's ability to protect its interests, and it will impair and impede the Attorney

General from carrying out his constitutional duties to defend and uphold the laws of the State of Louisiana.

Louisiana Revised Statutes 40:2254.4 authorizes issuance of a COPA if the Louisiana Department of Justice "finds that an agreement is likely to result in lower health care costs or is likely to result in improved access to health care or higher quality health care without any undue increase in health care costs." Louisiana's COPA statute requires active supervision by the LADOJ, oversight which comprises regular reporting and a detailed review of the effects of the transaction, including the actual effects on prices. Pursuant to the terms of the COPA, LCMC is approaching an upcoming reporting deadline imposed by the State. However, the FTC wants to halt the transaction and impede the ability for LCMC to make progress relative to the COPA. This interferes with the States' ability to provide active state supervision, and it is an infringement on the State's rights.

The Supreme Court has made clear that where private parties are actively supervised in carrying out a clearly articulated anticompetitive policy of the State, they are treated as the State for purposes of state action immunity. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992) (the private anticompetitive conduct is the "State's own"). For the doctrine to apply, the State must have clearly articulated and affirmatively expressed as State policy the alleged restraint on competition, and must actively supervise the anticompetitive act. Here, Louisiana's COPA statute and the COPA concerning the acquisition does just that. *See* La. R.S. 40:2254.1 *et seq.* This doctrine is grounded in constitutional principles of federalism, in accordance with the

"dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority." *Parker v. Brown*, 317 U.S.341 at 351 (1943).

Despite issuance of the COPA, which is expressly intended to grant and does grant state action immunity from liability under the antitrust laws, the FTC is unlawfully attempting to force LCMC and HCA to submit a notification of the Acquisition and observe a waiting period pursuant to the HSR Antitrust Act and to pay the HSR Filing fee. The FTC's actions constitute a significant violation of federal law and Louisiana's sovereignty.

D. The State's Interests are Inadequately Represented by the Existing Parties.

The State's interests are inadequately represented by the existing parties to the suit. The Attorney General has an interest in defending the injury to the State that would result if the State is prevented from implementing its COPA statutes. If the FTC subjects state-authorized mergers to Section 7A of the Clayton Act, it will impede the ability for states to authorize COPAs and other time-sensitive mergers, especially here where the State of Louisiana approved the transaction months prior to the FTC's purported objection.

In *Miller v. Vilsack,* the Fifth Circuit recently discussed two presumptions of adequate representation that must be considered when determining if representation by the current parties is, in fact, inadequate. No. 21-11271, 2022 WL 851782 (5th Cir. Mar. 22, 2022). The burden for the proposed intervenor to demonstrate inadequate representation is minimal. *Id.* (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th

Cir. 1994)). The burden, however, "cannot be treated as so minimal as to write the requirement completely out of the rule." *Id*. The first presumption applies "when the would-be intervenor has the same ultimate objective as a party to the lawsuit." *Id.* The second presumption applies in cases where a party "is presumed to represent the interests of all of its citizens," *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (per curiam), such as "when the putative representative is a governmental body or officer charged by law with representing the interests of the [intervenor]," *Texas*, 805 F.3d at 661 (quotation omitted). This presumption is limited, however, to "suits involving matters of sovereign interest." *Edwards*, 78 F.3d at 1005. Neither presumption applies here.

There is no reason to believe that the State's sovereign interests will be represented by existing parties. This is not a case where "the would-be intervenor has the same ultimate objective as a party to the lawsuit." *See Entergy Gulf States*, 817 F.3d (citation omitted). The State has unique sovereign interests not shared by the other parties. Any proposed judgment or federal oversight would have future consequences for the State and necessarily involve the State's sovereign interests.

II. IN THE ALTERNATIVE, THE STATE SHOULD BE GRANTED PERMISSIVE INTERVENTION.

The Attorney General fulfills the requirements for permissive intervention. Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." "In exercising its discretion, the court must consider

whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Permissive intervention under Rule 24(b) "is wholly discretionary with the [district] court . . . even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied." *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 806 F.2d 1285, 1289 (5th Cir. 1987). Intervention is appropriate when: "(1) timely application is made by the intervenor, (2) the intervenor's claim or defense and the main action have a question of law or fact in common, and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *See Frazier v. Wireline Solutions, LLC*, 2010 WL 2352058, at *4 (S.D. Tex. June 10, 2010) (citation omitted); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 229 F.R.D. 126, 131 (S.D. Tex. 2005).

As discussed above, the intervention is timely; the State's claims or defense and the main action have a question of law or fact in common; and the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Moreover, the State's intervention will facilitate an equitable result. The State can provide a crucial perspective on the important issues implicated by the Complaint. This case has significant implications; therefore, it is essential that all arguments related to the viability of the COPA and the approved acquisition receive full attention. For the reasons stated above, this Court should grant this motion permissively, if it does not grant it as of right.

CONCLUSION

The Court should grant the State of Louisiana's Motion to Intervene, and Louisiana Attorney General Jeff Landry should be allowed to fulfill his constitutional duty to represent the State's interests.

Dated: April 23, 2023

Respectfully Submitted,

Jeff Landry
Louisiana Attorney General

/s/ Angelique Duhon Freel
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CERTIFICATE PURSUANT TO LR 7.6

I do hereby certify that, on the 21st day of April 2023, undersigned counsel reached out to counsel for plaintiffs and defendants in this matter and obtained consent for the filing of the State's intervention. Counsel for the United States Defendants noted that they have not yet been served with the Plaintiff's Complaint and they do not waive service of the original complaint.

/s/ Angelique Duhon Freel
Angelique Duhon Freel

CERTIFICATE OF SERVICE

I do hereby certify that, on this 23rd day of April 2023, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record. And the United States Defendants were served via email through counsel of record, Suzanne Morris at Suzanne.Morris@usdoj.gov .

/s/ Angelique Duhon Freel
Angelique Duhon Freel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Petitioner,** *v.* **LOUISIANA CHILDREN'S MEDICAL CENTER,** **and** **HCA HEALTHCARE, INC.,** **Respondents**.	Case No. 1:23-cv-01103-ABJ

[PROPOSED] ORDER

Upon consideration of the Motion of Respondents Louisiana Children's Medical Center and HCA Healthcare, Inc. to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), it is hereby, on this ____ day of _____ 2023,

ORDERED that the Motion is **GRANTED**. And it is

FURTHER ORDERED that this action is transferred to the United States District Court for the Eastern District of Louisiana.

The Honorable Amy Berman Jackson