**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**REPLY MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)**

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## PRELIMINARY STATEMENT

The FTC asks this Court to enjoin further integration of a purely intrastate merger that was expressly authorized by Louisiana statute and supervised and controlled by the Louisiana Attorney General. In its opposition brief, however, the FTC ignores all of this and frames the legal question as an abstract and "narrow" one, entirely unconnected to Louisiana. It describes the issue before the Court as merely whether "a potential state-action defense exempt[s] parties from the HSR Act's requirement to submit notice of their transaction to federal authorities." Pet'r's Mem. Points Authorities Opp. Resp'ts' Mot. Change Venue ("Opposition" or "Opp.") at 5.[1] The FTC posits that this judicial district's nexus to that abstract legal issue is as close as any other's. But the FTC's framing of the issue is not accurate, and federal courts are not in the business of "advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 241 (1937).

First, Section 7A of the Clayton Act is not merely a notice statute, as the FTC claims. Section 7A substantively bars mergers—here a merger in Louisiana—without both notice and a waiting period. The key conduct triggering an alleged violation of Section 7A is not the failure to give notice, it is merging without providing notice and observing the specified waiting period.

Second, the actual question before this Court is not hypothetical and is not divorced from Louisiana. Rather, the principal question is whether the Louisiana Attorney General, pursuant to the Louisiana Legislature's duly-enacted COPA statute, validly exempted the acquisition of three Louisiana hospitals by a Louisiana health care system from the notification and waiting period requirements of Section 7A. This question involves critically important state interests in health

[1] Unless otherwise indicated, all emphasis is added and all capitalized terms have the same meaning ascribed in Respondents' Memorandum of Law in Support of Respondents' Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) ("Memorandum" or "Memo").

care policy, and the Louisiana Attorney General has moved to intervene in the Louisiana Actions in order to defend those interests. And, depending on the answer to that principal question, the secondary question is whether any injunctive relief in Louisiana involving Louisiana hospitals and affecting Louisiana patients is appropriate in light of all of the equities. Those are questions with a decidedly local nexus – they are not tied to any particular interest of the U.S. District Court for the District of Columbia.

The FTC's other arguments against transfer are similarly unpersuasive. The FTC argues that the first-to-file rule should not apply to Respondents' earlier-filed complaints in the Eastern District of Louisiana because they were "preemptive strikes" meant to ensure a favorable forum. But it is actually the FTC—not Respondents—who is forum-shopping. Respondents sought declaratory judgment to resolve reasonable concerns about whether they were accruing substantial daily fines, and they did so in the district in which all of the relevant property and evidence is situated. Opp. at 7–9. The FTC, meanwhile, argues that the claim "arose" in this district because the filing "omission occurred" here, but the agency never attempts to explain how an omitted e-mail filing that might have been sent from anywhere "occurs" in D.C. *Id.* at 12. The FTC also myopically focuses on failure to give notice as the supposed event giving rise to its Section 7A claim, while the operative provision of the statute provides that merging without notice is the relevant event that triggers an alleged violation. In this case, the merger occurred in Louisiana.

The FTC also argues that D.C. is more convenient because both sides have lawyers who work there, but it offers no support for prioritizing convenience to lawyers over convenience to the parties they represent.

The opening sentence of the FTC's brief concedes that transfer "to the Eastern District of Louisiana might have merit if this case were about whether [the LCMC] transaction violates the

antitrust laws." *Id.* at 1. But that is exactly what this case is "about," notwithstanding the FTC's unexplained disassociation of "the HSR Act" from "the antitrust laws" elsewhere in its brief, *e.g.*, *Id.* at 1, 13. For that reason and others discussed below, Respondents respectfully request a transfer to the Eastern District of Louisiana.

## ARGUMENT

### I. Respondents' Ordinary Declaratory Judgment Actions Deserve Deference

To prevent contradictory outcomes and to conserve judicial resources, this Circuit's longstanding presumption is that the first complaint to be filed should be the first one to proceed. *Wash. Metro. Area Transit Auth. v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980) ("[W]here two cases between the same parties on the same cause of action are commenced in two different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first.") (internal quotations omitted); *Taylor Energy Co. LLC v. United States*, 2020 U.S. Dist. LEXIS 190661 (D.D.C. Oct. 14, 2020) (acknowledging that the first-to-file rule is "well-established in the D.C. Circuit" and dismissing the government's counterclaims on that ground). As the first-filed legal actions to determine whether the Acquisition required an HSR notification, Respondents' declaratory judgment actions in Louisiana presumptively should proceed first.

The FTC argues that the Louisiana Actions should be afforded no deference because they are mere "preemptive strike[s]" meant "to deprive the FTC from its choice of forum," and that they therefore deserve no consideration in the context of a motion to transfer. Opp. at 7–8. The FTC is wrong. Respondents filed declaratory judgment actions for their ordinary purpose, *i.e.*, to "declare the rights and other legal relations of an[] interested party." 28 U.S.C. § 2201. Specifically, after the FTC expressed to Respondents its view that the Acquisition violated the HSR Act irrespective of the COPA, *see* Razi Decl., Ex. A at ¶ 13, Ex. B at ¶ 13, and with potential

civil penalties accumulating daily, it was incumbent upon Respondents to obtain prompt resolution of their legal positions through declaratory judgment rather than as a defendant at a time of the FTC's choosing.

Respondents' actions were hardly unprecedented. In *Sackett v. E.P.A.*, the Supreme Court allowed landowners who had received a compliance order from the E.P.A. to challenge its validity in a declaratory judgment action rather than wait to challenge it in a defensive proceeding while potential fines accrued in the interim. 566 U.S. 120, 131 (2012). In his concurrence, Justice Alito synthesized the government's position, which the Court squarely rejected:

> If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day . . . . And if the owners want their day in court to show that [they did not violate the Act], well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a Nation that values due process . . . such treatment is unthinkable.

*Id.* at 132.

That is precisely the issue here, where Respondents, had they not filed, would have faced a threat of potential liability limited only by the FTC's own discretion regarding whether and when to bring suit. In that respect, the Louisiana Actions were obviously preemptive because that declaratory judgment was the precise (and only) mechanism available for them to obtain resolution of their legal position. But "preemptive" does not mean nefarious or otherwise reflective of intent to deprive the FTC of anything. The fact that the Louisiana Actions were filed in Louisiana merely reflects that the U.S. District Court for the Eastern District of Louisiana is the most logical place for this dispute to be resolved: the Acquisition occurred in Louisiana, and the Respondents rightly believed that the Louisiana State Attorney General would seek to intervene to protect its sovereign interests regarding the interpretation and application of Louisiana law. Moreover, venue and

jurisdiction are undisputed in Louisiana, and the FTC's long-standing practice of litigating hospital antitrust suits in the judicial district where the hospitals are located further point toward Louisiana as the most natural forum for this dispute.

## II. Public and Private Interest Factors Weigh in Favor of Transfer

Respondents were not required to file first in the Eastern District of Louisiana in order for the case to be transferred there, and the fact that the Louisiana Actions were filed first is not the sole basis for transfer. It is it not even the most important basis; the first-to-file rule is merely one of many considerations favoring transfer. The private and public interest factors, when properly considered, also weigh strongly in favor of transfer.

### a. Public Interest Factors

The "most importan[t] public interest factor" considers whether the interest in resolving local controversies locally weighs in favor of transfer. *See Burkman v. Prisons*, No. 21-cv-3338, 2023 U.S. Dist. LEXIS 53372, at *8 (D.D.C. Mar. 29, 2023) (internal quotations omitted). The Commission acknowledges that, in a substantive challenge to the Acquisition under the Clayton Act, local interests would likely warrant litigating in Louisiana, but local interests involved in a challenge to "a procedural violation of the kind at issue here" do not. Opp. at 16–17. The Commission's position completely disregards that the relief sought in this "procedural" action is the same as in a "substantive" challenge – namely, an injunction to hold separate the hospital systems that have already begun to integrate, given State recognition that such integration serves the important interests of its citizens in quality and affordable health care. The relief the FTC seeks would result in a complete halt to the integration plan carefully considered and adopted by the State of Louisiana. It would also delay indefinitely the benefits expected to be realized by Louisiana's citizens and meaningfully circumscribe Louisiana's sovereignty to implement health-

care policy as it sees fit. The FTC dismisses those consequences as having "limited" local impact "not sufficient to transform this into a local controversy," *id.*, but it is difficult to imagine any parties more affected than the State of Louisiana and its citizens. *See Seafreeze Shoreside Inc. v. United States DOI*, 2022 U.S. Dist. LEXIS 159640, at *12 (D.D.C. June 27, 2022) ("The public's interest is served by resolving cases within the view of people whose rights and interests are in fact most vitally affected by the suit.") (internal quotations omitted).[2] The FTC similarly ignores that the Court's analysis will necessarily require evaluation of whether any injunctive relief in Louisiana, involving Louisiana hospitals and affecting Louisiana patients, is appropriate in light of all of the equities. These are equities that a Louisiana court is better suited to evaluate. Moreover, as the hold-separate makes clear, any relief entered may need to be modified or monitored to accommodate the operational realities of the Louisiana hospitals. A Louisiana court is better suited to do that as well.

"The transferee's familiarity with the governing law" is also a "significant consideration" in evaluating the public interests in a Section 1404(a) transfer, *Onyeneho v. Allstate Ins. Co.*, 466 F. Supp. 2d 1, 4 (D.D.C. 2006), but the FTC argues that the Eastern District of Louisiana's familiarity with Louisiana law is irrelevant because Louisiana law is irrelevant to this case. Opp. at 18. As explained previously, however, this Court has not merely been asked to render an advisory opinion on the general applicability of state-action immunity to the HSR Act. It has been asked to find that a Louisiana health-care system violated the HSR Act when it acquired three

[2] Certainly the FTC is not more affected. Despite its protestations about the "national significance" of this issue, the Commission does not propose why this District Court is better suited than the Eastern District of Louisiana to resolve issues of national significance, or how an adverse ruling in this Court would have any less bearing than one in Louisiana on "the FTC's ability to investigate other similar transactions under the HSR Act." Opp. at 16. Moreover, that the action will interpret federal law, "alone does not transform a locally applicable action into a nationally applicable one." *Chevron U.S.A. Inc. v. EPA*, 45 F.4th 380, 387 (D.C. Cir. 2022).

Louisiana hospitals, despite receiving a COPA from the Louisiana Attorney General pursuant to an act of the Louisiana Legislature. Resolution of that question will require analysis of Louisiana law,[3] and for that particular task the Eastern District of Louisiana is better suited.

The final public interest consideration – relative congestion of the courts – is a neutral factor at best, and any concerns about the Eastern District's ability to grant timely relief are unfounded.[4] Where "[t]he median time from filing to disposition is longer in" one district, "but the median time from filing to trial is longer in" another district, "[t]he conflicting congestion statistics 'essentially cancel one another out.'" *Normantiene v. Cissna*, No. 19-cv-1370, 2022 U.S. Dist. LEXIS 202567, at *8 (D.D.C. Nov. 7, 2022) (quoting *Bartolucci v. 1-800 Contacts, Inc.*, 245 F. Supp. 3d 38, 49 (D.D.C. 2017)). Here, the FTC highlights that the median time to disposition is shorter here than in the Eastern District of Louisiana (5.0 months versus 70.8 months), but it ignores the median time to trial, which is meaningfully shorter in the Eastern District of Louisiana than here (29.5 months versus 54.4 months). *See* Opp. Ex. B, at 2–3.[5]

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[3] That analysis requires this Court to analyze a number of questions, including whether Louisiana's displacement of competition was part of an affirmative state policy, *see Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); whether Louisiana provided sufficiently active supervision of the COPA-approval process or merely "delegated" the State's regulatory power to active market participants, *see N. C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 506-07 (2015); and whether the effects of LCMC's acquisition 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).

[4] Should the Court grant Respondents' motion to transfer, LCMC is willing to meet and confer with the FTC regarding a brief extension of the terms of the temporary stipulated order on integration, ECF Doc. No. 12, to give the parties time to discuss an appropriate schedule for further proceedings with the transferee court.

[5] To the extent the Eastern District of Louisiana's time to disposition lags other districts, the figure is likely skewed by the disproportionate number of MDL cases pending, or recently terminated, there. Figures published by the Judicial Panel on Multidistrict Litigation indicate that the Eastern District of Louisiana currently has 12,132 total actions pending compared to just 223 in this District. None of those actions are before Judge Africk and would not affect his ability to bring the Louisiana Actions to a timely resolution. *See MDL Statistics Report – Distribution of*

**b. Private Interest Factors**

Private interest factors also strongly weigh in favor of transfer. Focusing only on the private interests of the FTC's attorneys, the FTC argues that the petitioner deserves deference to its choice of forum, especially when it is petitioner's home forum and especially when petitioner is the government. Opp. at 11. The FTC made the same arguments and even cited the same cases in *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 26 (D.D.C. 2008), but as Judge Bates explained in that case, "the FTC overlooks one critical limitation on such deference," namely, that it applies only when "the particular controversy has meaningful ties to the forum." *Id.* (quoting *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002)). In that case, like in this one, "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." *Cephalon*, 551 F. Supp. 2d at 26.

In recognition of that shortcoming, the FTC tries to manufacture a connection to D.C. by gerrymandering the alleged violation to "arise" there. While the HSR Act is plainly a prohibition against the acquisition of assets until certain conditions are met, *see* 15 U.S.C. § 18a(a) ("no person *shall acquire* . . . unless both persons . . . file notification . . . ."), the FTC repeatedly asserts that the omitted HSR filing is "[t]he only event relevant" in the case, Opp. at 12, as though there exists a freestanding obligation to make HSR filings untethered to any underlying transaction. That is, of course, incorrect. Any reporting requirement under the HSR Act, if it existed, necessarily would have arisen from the Acquisition in Louisiana. The FTC's assertion that no "relevant events took place outside of this District" because the relevant violation was "failing to provide notice before

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*Pending MDL Dockets by District*, U.S. Jud. Panel on Multidistrict Litig. (Apr. 17, 2023), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-17-2023.pdf.

consummating the[] transaction," rather than consummating the transaction before providing notice, Opp. at 13, is a distinction without a difference.

This is not the first time the government has tried to use a filing requirement to establish a link to D.C., and courts regularly grant transfers under Section 1404(a) in cases brought by other agencies where the only "factual nexus between th[e] case and the District of Columbia" is that "filings were made at the office of the [agency] here." *Comptroller of Currency v. Calhoun First Nat'l Bank*, 626 F. Supp. 137, 140 n.8 (D.D.C. 1985); *see also SEC v. Ernst & Young*, 775 F. Supp. 411, 416 (D.D.C. 1991) ("Texas is the site of nearly all of the facts underlying the filings here."); *SEC v. Roberts*, No. 07-cv-407, 2007 U.S. Dist. LEXIS 49301, at *8 (D.D.C. July 10, 2007) ("While plaintiffs in securities cases normally receive a strong presumption in favor of their forum choice, such a presumption is misplaced here because the district is unconnected to the facts of this case other than being the destination of the SEC filings, which would occur in the mine run of cases brought by the SEC."); *Kazenercom TOO v. Turan Petroleum, Inc.*, 590 F. Supp. 2d 153, 162–64 (D.D.C. 2008) (failure to file); *cf. Cameron v. Thornburgh*, 983 F.2d 253, 256 (D.C. Cir. 1993) ("Courts in this circuit must examine challenges to . . . venue carefully to guard against the danger that a plaintiff might manufacture venue in the District of Columbia" by alleging the involvement of government officials.). Moreover, as Respondents highlighted in their moving brief, the new electronic HSR filing regime, in which sender or recipient (or both) may not be physically present inside the District of Columbia, casts doubt on whether any cause of action arising from a filing (whether submitted or omitted) "arises" in D.C. more than any place else. *See* Moving Brief at 10, ECF Doc. No. 20-1. The FTC completely ignored that issue in its opposition.

Regarding the relative convenience to the parties of D.C. and Louisiana, the FTC notes that "a substantial majority of both the Commission's counsel and Respondents' lawyers work in this

District," and that it "would be inconvenient for all counsel to travel to Louisiana to resolve the narrow legal question" before the court now. Opp. At 14. It cites no case, however, and Respondents are aware of none, to suggest that it is the convenience of the lawyers, rather than the parties they represent, that matters. In transferring a civil enforcement proceeding to the Northern District of Texas, a judge in this District rejected the following convenience argument by the SEC which could apply equally to the FTC today:

> The SEC regularly investigates and tries cases all over the country. The reasons asserted by the SEC at oral argument for not wanting trial in this case to occur outside of Washington, D.C. relate to minor litigational inconveniences seemingly present in any enforcement action brought in a city other than the one where the agency is located. In other words, the concerns raised seem to relate far more to the convenience of SEC attorneys than to the SEC itself.

*Ernst & Young*, 775 F. Supp. at 415.

Finally, but perhaps most importantly, the FTC is incorrect in asserting that convenience of witnesses and access to proof are irrelevant because "[t]here is no need for discovery . . . to resolve the narrow legal issue presented." Opp. at 13. The "narrow" legal issue framed by the FTC is whether "a potential state-action defense exempt[s] parties from the HSR Act's" filing requirement. Opp. at 5. But unless this Court rules that all state-action defenses are irrelevant to the filing requirement in all cases (*i.e.*, that Section 7A of the Clayton Act is the only federal "antitrust law" completely impervious to state action immunity), then the next inquiry this Court will need to undertake is whether this state action by Louisiana exempted this Acquisition from the filing requirement and whether the injunctive relief sought (including an order to hold the Louisiana hospitals separate for an indefinite period) is appropriate in light of all the facts and circumstances of this case.

## III. The Court Should Grant the Transfer Regardless of Whether Venue is Proper

The FTC, relying on 28 U.S.C. § 1391(b)(2), asserts that venue is proper in the District of Columbia because (1) "a substantial part of the events or omissions giving rise to the claim occurred" in the District of Columbia; and relying on 28 U.S.C. § 1391(b)(1), that venue is proper in the District of Columbia because (2) LCMC and HCA are "subject to personal jurisdiction" in the District of Columbia and therefore are "deemed to reside in this district." Opp. at 9–10. But both of those questions are in dispute, and the latter is subject to a separate motion by LCMC to dismiss or alternatively transfer for lack of jurisdiction.[6] *See* ECF Doc. No. 19.

It is unnecessary to resolve either question in order to transfer this action to the Eastern District of Louisiana under 28 U.S.C. § 1404(a). *See Wei Lai Dev. LLC v. U.S. Citizenship & Immigr. Servs.*, No. 21-cv-887, 2021 U.S. Dist. LEXIS 97537, at *8 n.5 (D.D.C. May 24, 2021) (because the court was transferring the action under 28 U.S.C. § 1404(a), it did not need to determine whether the District of Columbia was also a proper venue); *Marshall v. I-Flow, LLC*, 856 F. Supp. 2d 104, 108 (D.D.C. 2012) ("Just because a case is properly venued here does not mean that it must remain here."). Nevertheless, the very fact that these disputes exist weighs in favor of transfer to the Eastern District of Louisiana, a district where it is not disputed that venue is proper and jurisdiction exists over each Respondent. *See* Opp. at 9. The Court can transfer the action without addressing the additional disputes as to jurisdiction and venue. *Mohammadi v. Scharfen*, 609 F. Supp. 2d 14, 16 n.2 (D.D.C. 2009) ("In light of the transfer, the court does not address the defendants' motion to dismiss.").

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[6] The Respondents dispute that a substantial part of the events or omissions giving rise to the claim occurred in the District of Columbia. Additionally, for all of the reasons cited in the contemporaneously filed Reply In Support of LCMC's Motion to Dismiss, or Alternatively Transfer The Action For Lack of Jurisdiction, the Commission has failed to demonstrate that it has personal jurisdiction over LCMC.

## CONCLUSION

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

Dated: April 28, 2023

Respectfully submitted,

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