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** **JUDGE AFRICK (I)** **MAGISTRATE JUDGE NORTH (5)**

UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN EXPEDITED STATUS CONFERENCE AND EXPEDITED BRIEFING SCHEDULE

The U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) respectfully urge this Court to decline the Hospitals' invitation to engage in a race to the merits—one in direct competition with the parallel case before Judge Amy Berman Jackson in

the U.S. District Court for the District of Columbia (DDC), which has already received a full round of briefing on the merits and which will rule on the same legal question involved in this case. Judge Jackson has also entered a stipulated order governing any further integration between the merging parties, pending her ruling on the Hospitals' obligation to comply with the HSR Act. At this juncture, expedition of this case—whether in the form of a more "prompt" status conference than necessary or in the form of an expedited briefing schedule—would result in a duplication of efforts and potentially inconsistent judicial rulings. Because the Hospitals and the FTC—also parties to this suit—have briefed in the DDC the key legal question at issue here, the United States opposes the Hospitals' motion for an expedited briefing schedule. A status conference proceeding on a typical schedule suitable for this Court is more than sufficient, especially as a DDC ruling on the merits will be forthcoming.

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Not only have the Hospitals created duplicative litigation, but they themselves invited the risks of which they now complain. Under the Hart-Scott Rodino Act (HSR Act), parties to a transaction over a certain size—such as the Hospitals here—must notify the FTC and DOJ and observe a waiting period before consummating the merger. 15 U.S.C. § 18(a). But the Hospitals refused to comply with HSR Act requirements, instead consummating the merger in January 2023 without notifying the agencies or asking the agencies whether they needed to comply.

Even after the FTC notified the Hospitals of their delinquency, however, the Hospitals maintained they did not need to comply with the HSR Act. The HSR Act enumerates 12 specific exemptions, 15 U.S.C. § 18a(c), including for acquisitions from or by states or state agencies, *id.* § 18a(c)(4), and for acquisitions subject to federal *statutory* exemptions, *id.* § 18a(c)(5)—none of which apply to this merger. Instead, the Hospitals contend their merger is exempt from the HSR

Act by virtue of an extra-statutory exemption, on the basis of a court-created state-action defense to antitrust claims. But we are aware of no court that has ever applied this state-action doctrine, which is a defense to *substantive* antitrust liability (assessed after anticompetitive conduct has been challenged, *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013)), to the *procedural* requirements of the HSR Act—the notification and waiting-period requirements of which apply to all mergers, lawful and unlawful alike. The FTC thus made clear in pre-litigation discussions with the Hospitals that the parties had no basis to forgo a filing and that the FTC could seek an enforcement action in DDC to compel the Hospitals to comply. On April 19, 2023, the very day that FTC staff told the Hospitals they would recommend a suit to enforce the HSR Act, the Hospitals raced to this courthouse and filed this suit for a declaratory judgment, in hopes that this Court would preempt the FTC's filing.

Just as the Hospitals had been informed would occur, the FTC filed its suit in DDC the following day for an order to show cause and for a temporary restraining order (TRO) to preserve the status quo. In its DDC suit, the FTC alleged under 15 U.S.C. § 18a(g)(2) and 15 U.S.C. § 53(b) that the Hospitals failed to satisfy premerger-notification requirements under the HSR Act and should avoid further consolidating until the legal questions are resolved. *Federal Trade Commission v. LCMC et al*., No. 23-cv-1103 (D.D.C.); *see also* 15 U.S.C. § 18a(g)(2) (specifying a U.S. district court "may order compliance," "extend the waiting period," or grant other equitable relief for parties that do not comply with the HSR Act). On April 21, 2023, Judge Jackson signed a Stipulated Order pending her ruling on the merits, preventing the Hospitals from taking certain steps that could impair future efforts to disentangle the merger. *See* Order (ECF 12) and Stipulation (ECF 9), *Federal Trade Commission v. LCMC et al*., No. 23-cv-1103 (D.D.C. April 21, 2023). Under the terms of that Stipulated Order, the Hospitals'

requested relief in this suit—to resume integration of the acquired hospitals—is prohibited until the DDC rules on the FTC's claims.

Judge Jackson also ordered expedited briefing on the merits, which has now been completed, and the parties are awaiting the Court's decision.[1] At this stage, then, the FTC and the Hospitals have already addressed in DDC the fundamental legal issue raised in this case: Whether a potential state-action defense to enforcement of federal antitrust law exempts parties from the HSR Act's premerger requirements to submit notice of their deal to federal authorities and to comply with a waiting period. The DDC's ruling on this issue is forthcoming and will be dispositive in this case. For these very reasons, courts often disfavor preemptive declaratory-judgment lawsuits used for "procedural fencing" and decline to exercise jurisdiction. The DDC is also a more appropriate district for considering the issues raised, in part because the omission of the HSR filing occurred in D.C. and because D.C. is the home forum of the FTC—which is the natural plaintiff for a suit alleging noncompliance with the HSR Act.

Finally, the Hospitals' argument about potential ongoing daily penalties under Section 7A of the Clayton Act is overstated. Whether the United States will seek penalties for noncompliance is not yet ripe, as no civil action seeking penalties has been brought against the Hospitals. *See* 15 U.S.C. § 18a(g)(1). Although the Hospitals mention a $46,000 per day civil penalty (ECF at 2), such figures are statutory maxima, and a court would have significant discretion to impose a lower amount, should justice require.

For the reasons above, this Court should decline the Hospitals' attempts to expedite this case. The Hospitals filed this mirror-image case only to preempt the DDC suit they knew to be imminent—and their requests now to expedite a status conference or a briefing schedule would

[1] The DDC is also considering the Hospitals' motion to transfer the DDC action to this district.

result only in a duplication of judicial resources and a greater risk of inconsistent judgments.

Dated: May 11, 2023

Respectfully submitted,

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