

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

John Muir Health,
a corporation,

and

Tenet Healthcare Corporation,
a corporation.

Docket No. 9421

PUBLIC VERSION

ANSWER AND DEFENSES
OF RESPONDENT TENET HEALTHCARE CORPORATION

Pursuant to Rule 3.12 of the Federal Trade Commission’s (the “FTC” or the “Commission”) Rules of Practice for Adjudicative Proceedings (the “Rules”), Respondent Tenet Healthcare Corporation (“Tenet”) hereby answers the Administrative Complaint (the “Complaint”) against John Muir Health (“John Muir”) and Tenet, that the FTC filed in relation to John Muir’s proposed acquisition of the remaining 51% interest of San Ramon Regional Medical Center, LLC (the “Proposed Acquisition”), as follows.

INTRODUCTION

Tenet built San Ramon Regional Medical Center (“SRRMC”) in 1990. By the 2010s, Tenet recognized that SRRMC would benefit from added investment and enhanced integration with local physicians. As a result, Tenet sought a partnership with John Muir. As is the case now, John Muir operated two hospitals—Walnut Creek, located approximately 14 miles to the north of SRRMC, and Concord, located approximately 19 miles north and slightly east of SRRMC—and a broad affiliated network of physicians and ancillary services (such as imaging and ambulatory surgery

centers) across the San Francisco Bay Area. In 2013, John Muir acquired a 49% ownership share of SRRMC, and, since then, the facility has been operated as a joint venture. The FTC closely reviewed that transaction and allowed it to proceed.

Notwithstanding some successes, including the launch of a robotic surgery service, the SRRMC joint venture has struggled in recent years, especially after Kaiser chose to end a bed rental arrangement at SRRMC after adding capacity at its own facilities in the area in 2021. SRRMC is licensed to operate 123 general acute care (“GAC”) beds. Over the last few months, SRRMC’s bed utilization has been only 30 to 40 beds, down from an already low 40- to 50-bed average during 2022. Over [REDACTED] of the patients who are admitted come through the Emergency Room (“ER”). Because ER patients generally receive care at a hospital selected by their ambulance service or that they perceive to be the most accessible in an emergent situation, these patients typically are not choosing where to receive care based on their preferences or insurer’s provider network. The very low number and proportion of non-ER patients at SRRMC means that patients who do have a choice are consistently choosing to seek care elsewhere.

For years, Tenet and John Muir have recognized that SRRMC needs investment to keep up with local competitors—including Kaiser, Stanford Health Care (“Stanford”), and Sutter Health (“Sutter”)—in terms of physician access, service offerings, facilities, and technology. Even though SRRMC generates modest positive cash flows from operations, as a public company with fiduciary duties to shareholders, Tenet has elected to invest its capital where it expects to achieve the highest return on investment for the enterprise. Because added investment in SRRMC requires the approval and contribution of both joint venture partners, SRRMC will remain grossly underutilized and will continue falling behind other hospitals that serve patients in and around San Ramon absent the Proposed Acquisition.

Recognizing the substantial lost opportunity associated with SRRMC remaining as a joint venture, Tenet and John Muir began discussing a possible buy-out. John Muir was an obvious choice for a number of reasons: (1) by virtue of its decade-long participation in the joint venture, John Muir knew SRRMC very well; (2) John Muir has a proven track record of providing quality care in Northern California, and of acquiring and turning around struggling community hospitals (as was the case with its prior acquisition of its Concord facility approximately 25 years ago); (3) John Muir has very substantial complementary assets, including a broad physician and ancillary services network in the San Francisco Bay Area, as described above; and (4) John Muir uses the Epic electronic health records (“EHR”) system, which is standard among providers in the area generally, and could efficiently implement Epic at SRRMC, replacing the Cerner system currently in use and that Tenet has standardized around at a corporate level.

As John Muir explained in its Answer, it plans to make substantial and significant investments in SRRMC that will benefit the local community.

The Complaint alleges that competition will be harmed if John Muir becomes the full and controlling owner of SRRMC. Tenet respectfully disagrees. The introduction to John Muir’s Answer explains some of the key legal flaws in the Complaint’s allegations that the Proposed Acquisition is likely to harm competition. In short, in a properly defined geographic market, John Muir’s and SRRMC’s combined market share is low, well beneath the standards set out in the Merger Guidelines and case law. In addition, there is no evidence of close competition between John Muir and SRRMC. Indeed, there is no allegation that John Muir acquiring 49% of SRRMC had any impact on competition whatsoever, and, as myriad evidence will show, there is no significant or unique price or quality competition between John Muir and SRRMC.

Ultimately, the Commission cannot show that the Proposed Acquisition would leave consumers worse off because the facts point to the opposite effect—John Muir would update and improve SRRMC, strengthening SRRMC’s ability to compete with its closest competitors such as Kaiser, Stanford, and Sutter. The relief sought in the Complaint should be denied.

GENERAL RESPONSE TO THE COMMISSION’S ALLEGATIONS

Each numbered paragraph below corresponds to the same-numbered paragraph in the Complaint. All allegations not expressly admitted herein are denied. Tenet further states that the acquisition of the remaining 51% interest in SRRMC by John Muir is procompetitive and will result in merger-specific efficiencies, synergies, and other procompetitive effects—all of which will directly benefit consumers. Use of headings and subheadings from the Complaint is solely for the benefit of the reader. Tenet does not interpret the headings and subheadings throughout the Complaint as well-pleaded allegations to which any response is required. To the extent such a response is required, Tenet denies all allegations of the headings and subheadings of the Complaint. The Commission’s unnumbered introductory paragraph characterizes this action and asserts legal arguments and conclusions to which no response is required. To the extent such a response is required, Tenet denies the allegations in the Commission’s unnumbered introductory paragraph. Use of certain terms or phrases defined in the Complaint is not an acknowledgement or admission of any characterization the Commission may ascribe to the defined terms. Unless otherwise defined, capitalized terms shall refer to the capitalized terms defined in the Complaint, but any such use is not an acknowledgement or admission of any characterization the Commission may ascribe to capitalized terms.

Tenet does not concede the truthfulness of third-party sources quoted or referenced in the Complaint. To the extent a response is required, Tenet denies all allegations of third-party sources quoted in or referenced in the Complaint. Tenet additionally denies that the Commission is entitled

to any relief sought in the Notice of Contemplated Relief on page 13 of the Complaint. Tenet reserves the right to amend and/or supplement this Answer at a later stage of the proceedings as permitted by the Rules.

SPECIFIC RESPONSES TO THE COMMISSION'S ALLEGATIONS

I. NATURE OF THE CASE

1. Paragraph 1 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet admits that John Muir seeks to acquire full control of SRRMC. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations concerning the relative size or cost of John Muir compared to other hospital systems in Northern California, and therefore denies the same. Tenet specifically denies that the "I-680 corridor" is a properly defined geographic market. Tenet denies the remaining allegations contained in Paragraph 1.

2. Tenet specifically denies that the "I-680 corridor" is a properly defined geographic market. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations concerning the relative size of John Muir in the "I-680 corridor," and the cost of John Muir compared to other hospital systems, and therefore denies the same. To the extent the Complaint is quoting from or characterizing statements made in a New York Times article or by private insurers, Tenet respectfully refers the Court to the article and the transcript or recording of the respective sources for an accurate and complete statement of its contents. Tenet denies the remaining allegations in Paragraph 2.

3. Paragraph 3 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet specifically denies that the "I-680 corridor" is a properly defined geographic market. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations concerning

whether insurers need John Muir in any health plan networks, and therefore denies the same. Tenet denies the remaining allegations in Paragraph 3.

4. Paragraph 4 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet admits that SRRMC is located approximately 14 miles south of John Muir's Walnut Creek location. Tenet denies the remaining allegations in Paragraph 4.

5. Paragraph 5 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet specifically denies that the "I-680 corridor" is a properly defined geographic market. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations concerning whether John Muir would be able to demand higher rates from insurers as a result of the Proposed Acquisition, and therefore denies the same. Tenet denies the other allegations in Paragraph 5.

6. Paragraph 6 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet denies the other allegations in Paragraph 6.

7. Paragraph 7 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet specifically denies that the "I-680 corridor" is a properly defined geographic market. Tenet denies the other allegations in Paragraph 7.

II. JURISDICTION

8. Paragraph 8 purports to state conclusions of law to which no response is required.

9. Paragraph 9 purports to state conclusions of law to which no response is required.

III. RESPONDENTS

10. Tenet admits that it is a public company incorporated in Nevada with its headquarters in Dallas, Texas; that it operates 61 general acute care and specialty hospitals and hundreds of outpatient facilities nationally, including in California; that it operates SRRMC, a 123-bed hospital in San Ramon, California roughly 14 miles south of John Muir's Walnut Creek Medical Center; that it was the sole owner of SRRMC until 2013; that it transferred a 49% non-controlling interest to John Muir in 2013; that it currently holds a 51% controlling interest in San Ramon Regional Medical Center, LLC; that it is the operator of SRRMC; and that it is solely responsible for negotiating contract rates with insurers for services performed at SRRMC. Tenet denies the other allegations in Paragraph 10.

11. Tenet admits that John Muir holds a 49% non-controlling interest in San Ramon Regional Medical Center, LLC, the entity that owns SRRMC. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in Paragraph 11, and therefore denies the same.

IV. THE PROPOSED ACQUISITION

12. Tenet admits the allegations in Paragraph 12.

V. COMPETITION BETWEEN HOSPITALS BENEFITS PATIENTS

13. Paragraph 13 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet admits that hospitals negotiate contracts with insurers, and that those contracts include reimbursement rates for services rendered to enrollees of insurers' health plans. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in Paragraph 13, and therefore denies the same.

14. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14, and therefore denies the same.

15. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 15, and therefore denies the same.

16. Paragraph 16 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in Paragraph 16, and therefore denies the same.

17. Paragraph 17 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in Paragraph 17, and therefore denies the same.

18. Paragraph 18 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in Paragraph 18, and therefore denies the same.

19. Paragraph 19 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in Paragraph 19, and therefore denies the same.

VI. THE PROPOSED ACQUISITION WILL ELIMINATE DIRECT COMPETITION BETWEEN JOHN MUIR AND SRRMC

20. Paragraph 20 purports to a state conclusion of law to which no response is required. To the extent a response is required to this conclusion, Tenet denies that allegation. Tenet denies any

implication from the allegation that competition with John Muir causes SRRMC to charge lower rates to many commercial insurers for inpatient GAC services.

21. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding sentences 1, 4, 5, 6, 7, and 8, and therefore denies the same. Tenet specifically denies that the “I-680 corridor” is a properly defined geographic market and the allegation that travel around the I-680 is slow and/or burdensome, especially as compared to more densely populated areas that have been the focus of other hospital merger challenges. Tenet denies the other allegations in Paragraph 21.

22. Tenet admits that SRRMC is smaller than some other hospitals. Tenet denies that its size and lack of “leverage over insurers to demand the rates that John Muir charges” drives it to compete or provide a meaningful alternative for insurers. Tenet specifically denies that the “I-680 corridor” is a properly defined geographic market.

23. Tenet admits that the image in Paragraph 23 appears to be a map that purports to show the approximate location of SRRMC and John Muir’s Walnut Creek and Concord Medical Centers relative to a small portion of the highway I-680. Tenet denies that this map is a fair or accurate representation of hospitals that are or could be competitors to John Muir or SRRMC.

24. Tenet denies any knowledge that “John Muir’s facilities are significantly more expensive than at SRRMC” today. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding the financial performance report referenced in Paragraph 24, and therefore denies the same. To the extent the Complaint is quoting from or characterizing a John Muir document, Tenet respectfully refers the Court to the document for an accurate and complete statement of its contents.

25. Paragraph 25 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding John Muir's leverage over insurers, its rates, or its plans regarding pricing at SRRMC, and therefore denies the same. Tenet denies the allegation that it lacks the "ability to negotiate higher rates with insurers" and the other allegations in Paragraph 25.

26. Tenet denies the allegations in Paragraph 26. To the extent the Complaint is quoting from or characterizing statements made in a document, Tenet respectfully refers the Court to the document for an accurate and complete statement of its contents.

27. Paragraph 27 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations.

28. Paragraph 28 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies those allegations. Tenet denies the other allegations in Paragraph 28.

29. Tenet admits that SRRMC provides various, quality services. Tenet denies the other allegations in Paragraph 29.

30. To the extent the Complaint is quoting from or characterizing statements made in a document, Tenet respectfully refers the Court to the document for an accurate and complete statement of its contents. Tenet admits that SRRMC did request approval for and did acquire a [REDACTED] Tenet specifically denies that "John Muir was a key factor that motivated SRRMC's management to seek the [REDACTED]." Tenet denies the other allegations in Paragraph 30.

31. To the extent the Complaint is quoting from or characterizing statements made in a document, Tenet respectfully refers the Court to the document for an accurate and complete statement of its contents. Tenet admits that SRRMC did request and received approval for tools used in minimally invasive heart surgery. Tenet denies the other allegations in Paragraph 31.

32. To the extent the Complaint is characterizing statements made in one or more documents, Tenet respectfully refers the Court to the documents for an accurate and complete statement of their contents. Tenet denies the allegations in Paragraph 32.

33. Paragraph 33 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding John Muir's incentives or plans after acquiring SRRMC, and therefore denies the same.

34. Paragraph 34 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

VII. THE PROPOSED ACQUISITION WILL SIGNIFICANTLY INCREASE CONCENTRATION IN A HIGHLY CONCENTRATED MARKET

35. Paragraph 35 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet specifically denies that the "I-680 corridor" is a properly defined geographic market. Tenet denies the other allegations in Paragraph 35.

A. The Relevant Service Market: Inpatient GAC Services Sold to Commercial Insurers and Their Enrollees

36. Paragraph 36 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

37. Paragraph 37 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

38. Paragraph 38 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

39. Paragraph 39 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

40. Paragraph 40 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

41. Paragraph 41 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

42. Paragraph 42 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

43. Paragraph 43 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

B. The Relevant Geographic Market: The I-680 Corridor

44. Paragraph 44 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet specifically denies that the relevant geographic market is “no broader than the “I-680 corridor” in California’s Contra Costa and Alameda Counties” and that the “I-680 corridor is the main area where SRRMC and John Muir’s Walnut Creek and Concord Medical Centers compete.”

45. Paragraph 45 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet specifically denies that the “I-680 corridor is bounded by geographical features that make travel out of the area cumbersome [and/or] unpredictable in terms of transit time.” Tenet lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in Paragraph 45, and therefore denies the same.

46. Paragraph 46 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet specifically denies that a significant portion of patients in the “I-680 corridor” area would not view hospitals outside the area as practical or desirable alternatives. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in Paragraph 46, and therefore denies the same.

47. Paragraph 47 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding California regulatory requirements for insurers, and therefore denies the same.

48. Paragraph 48 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

C. The Proposed Acquisition Leads to a Presumptively Unlawful Increase in Concentration

49. Paragraph 49 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding John Muir’s market shares for inpatient GAC services, and therefore denies the same. Tenet specifically denies that the “I-680 corridor” is a properly defined geographic market.

50. Paragraph 50 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding a trend toward concentration for inpatient GAC services or specifics about John Muir’s acquisition

history, and therefore denies the same. Tenet specifically denies that the “I-680 corridor” is a properly defined geographic market.

51. Paragraph 51 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet admits that Kaiser Permanente operates a hospital in Walnut Creek that provides inpatient GAC services. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding Kaiser in Paragraph 51, and therefore denies the same. Tenet specifically denies that the “I-680 corridor” is a properly defined geographic market. Tenet denies the other allegations in Paragraph 51.

52. Paragraph 52 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding switching between Kaiser and non-Kaiser health plans, and therefore denies the same.

53. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding individual health care preferences in Paragraph 53, and therefore denies the same.

54. Paragraph 54 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet specifically denies Tenet specifically denies that the “I-680 corridor” is a properly defined geographic market; switching between Kaiser and non-Kaiser health plans is burdensome; and Kaiser does not compete directly with other hospitals in the “I-680 corridor” for contracts with commercial insurers. Tenet denies the other allegations in Paragraph 54.

55. Paragraph 55 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

56. Paragraph 56 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet specifically denies that the “I-680 corridor” is a properly defined geographic market.

57. Paragraph 57 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

VIII. LACK OF COUNTERVAILING FACTORS

58. Paragraph 58 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations. Tenet specifically denies that the “I-680 corridor” is a properly defined geographic market.

59. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding John Muir’s estimates for building a new hospital offering inpatient GAC services in Paragraph 59, and therefore denies the same. To the extent the Complaint is quoting from or characterizing statements made in a John Muir document, Tenet respectfully refers the Court to the document for an accurate and complete statement of its contents.

60. Tenet denies the allegations in Paragraph 60.

61. Tenet denies the allegations in Paragraph 61. Tenet lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding potential entry, expansion, or repositioning by other firms, and therefore denies the same. Tenet specifically denies that the “I-680 corridor” is a properly defined geographic market.

62. Paragraph 62 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

IX. VIOLATION

Count I – Illegal Agreement

63. Tenet incorporates its responses to each of the allegations contained in Paragraphs 1 through 62 of the Complaint as if they were stated herein.

64. Paragraph 64 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

Count II – Illegal Acquisition

65. Tenet incorporates its responses to each of the allegations contained in Paragraphs 1 through 62 of the Complaint as if they were stated herein.

66. Paragraph 66 purports to state conclusions of law to which no response is required. To the extent a response is required to these conclusions, Tenet denies the allegations.

TENET'S AFFIRMATIVE AND OTHER DEFENSES

Tenet asserts the following defenses without assuming the burden of proof on such defenses that would otherwise rest with the Commission:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The relief sought is contrary to the public interest.

THIRD DEFENSE

The Complaint fails to allege a plausible relevant service market.

FOURTH DEFENSE

The Complaint fails to allege a plausible relevant geographic market.

FIFTH DEFENSE

The Complaint fails to allege any plausible harm to competition.

SIXTH DEFENSE

The Complaint fails to allege any plausible harm to consumers.

SEVENTH DEFENSE

The Complaint fails to allege any plausible harm to consumer welfare.

EIGHTH DEFENSE

The acquisition of SRRMC by John Muir will be procompetitive. The Proposed Acquisition will result in substantial procompetitive benefits, including, but not limited to, merger-specific efficiencies, cost-savings, innovation, and other procompetitive efficiencies that will directly increase the consumer value proposition in Northern California. These benefits greatly outweigh any and all purported anticompetitive effects.

On information and belief and as set out in greater detail in John Muir's Answer to the Complaint, John Muir is committed to making substantial and significant investments in SRRMC to ensure SRRMC's long-term viability and to attract patients from rival health systems, including making facility renovations, adding needed clinical service lines, redoubling efforts to recruit and retain staff, and transitioning SRRMC to the Epic EHR system used by most Bay Area hospitals and physicians. As a public company and due to its fiduciary obligations to shareholders, Tenet has other alternative uses of capital available that carry higher expected returns on investment. Consequently, the Proposed Acquisition represents an important opportunity to realize critical benefits that will improve quality of, and enhance access to, care for patients residing in and around SRRMC.

NINTH DEFENSE

These proceedings are invalid because the structure of the Commission as an independent agency that wields significant executive power, and the associated constraints on removal of the

Commissioners and other Commission officials, violates Article II of the U.S. Constitution and the separation of powers.

The Commissioners and other Commission officials are executive officers because they exercise executive authority delegated to them by the President, including among other things, exercising prosecutorial discretion and the ability to initiate enforcement proceedings. The Commissioners are not freely removable by the President. Rather, pursuant to Section 41 of the Federal Trade Commission Act (“FTC Act”), they may only be removed from their positions for “inefficiency, neglect of duty, or malfeasance in office.”

TENTH DEFENSE

These proceedings are invalid because adjudication of the Commission’s Complaint by an Administrative Law Judge and the Commission itself violates Article III of the U.S. Constitution and the separation of powers.

Article III requires that the judicial power of the United States be vested in Article III courts. As a result, cases involving private rights, including property rights and private parties’ freedom to contract, cannot be removed from the jurisdiction of Article III courts. Through these administrative proceedings, the Commission seeks to abridge Tenet’s freedom to contract in violation of Article III.

ELEVENTH DEFENSE

The Commission’s procedures violate Tenet’s right to procedural due process under the Due Process Clause of the Fifth Amendment.

Pursuant to the FTC Act, the Commission investigates and prosecutes, at its discretion, purported unlawful conduct that falls within its jurisdiction. Following an investigation, the FTC may issue an administrative complaint alleging unlawful conduct by private parties by a vote of its Commissioners. Through such administrative complaints, the FTC requests adjudication of the

allegations by, and seeks relief from, an Administrative Law Judge of the FTC. The Commission, by acting as both prosecutor and judge with respect to alleged unlawful behavior, violates Tenet's right to adjudication before a neutral arbiter.

TWELFTH DEFENSE

The structure of these administrative proceedings violates Tenet's Fifth Amendment Due Process right to adjudication before a neutral arbiter.

On November 17, 2023, the FTC, acting as prosecutor, initiated this administrative proceeding by a vote of its Commissioners and issuance of the Complaint. The Complaint alleges multiple violations by the Respondents of the FTC Act and the Clayton Act. Through the Complaint, the Commission requests adjudication of the allegations, including factual findings and conclusions of law, from an Administrative Law Judge of the Commission itself. The FTC also seeks relief against Tenet that would restrict Tenet's freedom to contract as guaranteed by the Due Process Clause of the Fifth Amendment. The FTC's dual role as prosecutor and a judge deprives Tenet from its right to receive a fair and unbiased hearing and carries as a potential consequence the denial of a core right.

THIRTEENTH DEFENSE

These administrative proceedings violate Tenet's Fifth Amendment Due Process right to adjudication before a neutral arbiter as applied to Tenet because the Commission has prejudged the merits of the instant action.

By issuing the Complaint, the Commission, acting as prosecutor, has formally determined that it has "reason to believe" that (i) John Muir and Tenet entered into an agreement in violation of the FTC Act and (ii) the Proposed Acquisition, if consummated, would violate the FTC Act and Clayton Act. Through these administrative proceedings, the FTC seeks a second formal

determination by a different branch of the same body—one that is subject to a deferential standard of review by a court of appeals—regarding the same conduct that it has already prejudged.

FOURTEENTH DEFENSE

The Commission’s procedures arbitrarily subject Tenet to administrative proceedings rather than to proceedings before an Article III judge in violation of Tenet’s right to Equal Protection under the Fifth Amendment.

The Commission and the Antitrust Division of the U.S. Department of Justice share jurisdiction and responsibility over enforcement of federal antitrust laws in the United States, including merger review. Merging parties have no control over which agency will review their proposed transaction, but may be faced with vastly different adjudicative processes if the reviewing agency determines such transaction to be unlawful. To challenge a transaction under federal antitrust laws, the U.S. Department of Justice has no choice but to file a complaint before a federal district court. By contrast, the FTC may seek adjudication from a federal district court or through an internal administrative proceeding.

As a result of the Commission’s choice to prosecute the violations alleged against Tenet through the FTC’s own internal administrative procedures, Tenet has been denied the right to an adjudication on the merits by a neutral arbiter and in a manner distinct from other merging parties whose proposed transactions are being or have been challenged under federal antitrust laws by the U.S. Department of Justice.

FIFTEENTH DEFENSE

The Commission’s charges under Section 5 of the FTC Act are unlawful to the extent the Commission purports to apply Section 5 beyond the metes and bounds of the Sherman and Clayton Acts.

Section 5 of the FTC Act declares “unfair methods of competition in or affecting commerce” to be unlawful. However, it provides no guidance regarding the types or categories of conduct that would fall within its scope—unlike antitrust violations under the Sherman and Clayton Acts which, for example, denote violations arising out of (i) transactions that substantially lessen competition, (ii) interlocking directorates, (iii) conspiracies in restraint of trade or commerce. As a result, Section 5 of the FTC Act risks vague application and undue discretion by the Commission, which would be unlawful if pursued.

DEFENSES INCORPORATED BY REFERENCE

Tenet incorporates by reference the affirmative defenses put forth by John Muir in its Answer to the Commission’s Complaint.

RESERVATION OF RIGHTS TO ASSERT ADDITIONAL DEFENSES

Tenet reserves the right to assert and rely upon other applicable defenses as they become available or apparent to Tenet throughout the course of the action. Tenet reserves the right to amend, or seek to amend, its answer or affirmative defenses.

NOTICE OF CONTEMPLATED RELIEF

WHEREFORE, Tenet requests that the Commission enter judgment in its favor providing as follows:

- A. That the Complaint be dismissed in its entirety with prejudice;
- B. That the Commission deny the relief contemplated in the Complaint;
- C. That the costs incurred in defending this action be awarded to Tenet, including experts’ fees and reasonable attorneys’ fees, as may be allowed by law; and
- D. For any and all further relief as the Commission may deem just and proper.

DATED: December 4, 2023

Respectfully submitted,

s/ Rich Cunningham

Christopher W. Keegan
Anna Terteryan
Psalm Cheung
KIRKLAND & ELLIS LLP
555 California Street, Suite 2700
San Francisco, CA 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500
Email: chris.keegan@kirkland.com
Email: anna.terteryan@kirkland.com
Email: psalm.cheung@kirkland.com

Matt Reilly
Rich Cunningham
Jeffrey Ayer
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200
Email: matt.reilly@kirkland.com
Email: rich.cunningham@kirkland.com
Email: jeffrey.ayer@kirkland.com

Counsel for Defendant Tenet Healthcare Corporation

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2023, I caused the foregoing document to be electronically filed using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580
oalj@ftc.gov

I also certify that I caused the foregoing document to be served via email to:

Nicolas Stebinger
Erik Herron
U.S. Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580
nstebinger@ftc.gov
eherron@ftc.gov

John P. Wiegand
Peter Colwell
Erika Wodinsky
Lucy Rosenzweig
Peter K. Huston
Matthew Delgado
U.S. Federal Trade Commission
90 7th St., Suite 14-300
San Francisco, CA 94103
jwiegand@ftc.gov
pcolwell@ftc.gov
ewodinsky@ftc.gov
lrosenzweig@ftc.gov
phuston@ftc.gov
mdelgado@ftc.gov

Counsel Supporting the Complaint

Jeffrey LeVee
JONES DAY
555 Flower St.
Los Angeles, CA 90071
(213) 243-2572
jlevee@jonesday.com

David Kiernan
Margaret A. Ward
JONES DAY
555 California St., 26th Floor
San Francisco, CA 94104
dkiernan@jonesday.com
maward@jonesday.com

Counsel for Respondent John Muir Health

s/ Anna Terteryan

Anna Terteryan

Counsel for Tenet Healthcare Corporation