

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Joseph J. Simons, Chairman**
 Noah Joshua Phillips
 Rohit Chopra
 Rebecca Kelly Slaughter
 Christine S. Wilson

In the Matter of

**Methodist Le Bonheur Healthcare,
a corporation;**

and

**Tenet Healthcare Corporation,
a corporation.**

Docket No. 9396

RESPONDENTS' ANSWERS AND DEFENSES

Pursuant to Rule 3.12 of the Federal Trade Commission's ("FTC" or "Commission") Rules of Practice for Adjudicative Proceedings, Tenet Healthcare Corporation ("Tenet") and Methodist Le Bonheur Healthcare ("Methodist" and, together with Tenet, "Respondents"), by and through their undersigned counsel hereby admits, denies, and avers as follows with respect to the Administrative Complaint ("Complaint") filed by the Commission. To the extent not specifically admitted in the following paragraphs, the allegations in the Complaint are denied.

GENERAL RESPONSE TO THE COMMISSION'S ALLEGATIONS

Respondents deny the allegations and legal conclusions set forth in the Commission's unnumbered introductory paragraph.

Further, Respondents submit that Methodist's proposed acquisition of certain Tenet assets (the "Proposed Transaction"), including Saint Francis Hospital – Memphis ("Saint Francis – Memphis") and Saint Francis Hospital – Bartlett ("Saint Francis – Bartlett" and, together with Saint Francis – Memphis, "Saint Francis") is likely to benefit consumers, patients, employers, and payors in the Memphis metropolitan area.

I.

NATURE OF THE CASE

1. In response to the first two sentences of Paragraph 1 of the Complaint, Respondents admit that, pursuant to an asset sale agreement, Methodist plans to acquire Saint Francis for approximately \$350 million and that Methodist and Saint Francis are two of four providers of general acute care (“GAC”) inpatient hospital services in the Memphis Metropolitan Statistical Area (“Memphis Area”). In response to the third and fourth sentences of Paragraph 1 of the Complaint, Respondents note that these sentences contain ambiguous language and legal conclusions and, to the extent a response is required, Respondents deny these allegations.

2. Respondents admit the allegations in Paragraph 2.

3. In response to Paragraph 3, Respondents deny that shares of all GAC inpatients (regardless of payor type) are a relevant proxy for, or predictor of, competitive significance, particularly with regard to the assessment of the Commission’s claims that are focused on solely commercial reimbursement rates and denies the remaining allegations in Paragraph 3. Respondents lack knowledge of the specific services offered by Regional One Health (“Regional One”) and the specific payor mix of its patient population. Respondents therefore lack knowledge or information sufficient to affirm or deny the allegations in Paragraph 3 relating to these issues and denies them on this basis. Respondents notes that Saint Francis, like many hospitals nationwide, primarily serves a patient population that lacks commercial insurance.

4. Respondents deny the allegations in Paragraph 4 of the Complaint. In particular, the evidentiary record shows that Methodist’s closest competitor, by far, is Baptist, not Saint Francis. Saint Francis has a limited competitive impact on any other hospital system serving metropolitan Memphis. The number of commercial patients served by Saint Francis is relatively small and Tenet has been unable to significantly expand its service offerings or market share in Memphis.

5. Paragraph 5 contains vague language and legal conclusions and, to the extent a response is required, Respondents deny the allegations.

6. Respondents deny the allegations in Paragraph 6.

7. Respondents deny the allegations in Paragraph 7.

II.

JURISDICTION

8. Paragraph 8 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

9. Paragraph 9 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

III.

BACKGROUND

A.

10. Respondents admit the allegations in Paragraph 10.

11. Respondents admit the allegations in Paragraph 11.

12. Respondents admit the allegations in Paragraph 12.

B.

13. In response to Paragraph 13, Respondents admit that they entered into a definitive asset sale agreement on December 12, 2019, pursuant to which Methodist will acquire the assets and operating rights associated with Saint Francis, their associated physician practices and urgent care centers, and other ancillary providers, for approximately \$350 million.

IV.

THE RELEVANT SERVICE MARKET

14. Paragraph 14 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

15. Paragraph 15 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

16. Paragraph 16 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

17. Paragraph 17 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

V.

THE RELEVANT GEOGRAPHIC MARKET

18. Paragraph 18 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations. Respondents specifically deny that the relevant geographic market in which to analyze the effects of the Proposed Transaction is the Memphis Metropolitan Statistical Area and includes all GAC inpatient hospitals in and around Memphis. Respondents also specifically deny the definition of the “Memphis Area.”

19. Paragraph 19 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

20. Paragraph 20 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

21. In response to Paragraph 21, Respondents deny that the Memphis Area is the “main area of competition” between Methodist and Saint Francis for GAC inpatient hospital services. Respondents admit that Saint Francis and Methodist have each analyzed competition within the Memphis Area (among other areas) and each identify hospitals within the Memphis Area as their competitors.

VI.

MARKET STRUCTURE AND THE PROPOSED TRANSACTION’S PRESUMPTIVE ILLEGALITY

22. Paragraph 22 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

23. Paragraph 23 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

24. In response to Paragraph 24, Respondents admit that the 2010 U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (“Merger Guidelines”) provide a framework for interpreting and applying antitrust laws and that the Merger Guidelines explain the Herfindahl-Hirschman Index (“HHI”), which is a model that may measure market concentration. To the extent the remaining allegations in Paragraph 24 contain legal conclusions, Respondents submit that they need not respond. If the remaining allegations in Paragraph 24 require a response, Respondents deny the allegations.

25. Paragraph 25 contains legal conclusions and, to the extent a response is required, Respondents deny the allegations.

VII.

ANTICOMPETITIVE EFFECTS

A.

26. Respondents admit that hospitals seek inclusion in commercial insurers’ health plan provider networks and seek to attract patients. Respondents deny the remaining allegations in Paragraph 26.

27. Respondents deny the allegations in Paragraph 27, except that Respondents admit that hospitals negotiate with commercial insurers to become an in-network provider and enter into contracts if mutually agreeable terms are reached.

28. Respondents lack knowledge or information sufficient to affirm or deny the allegations in Paragraph 28 and, therefore, Respondents deny the allegations.

29. Respondents lack knowledge or information sufficient to affirm or deny the allegations in Paragraph 29 and, therefore, Respondents deny the allegations.

30. Respondents deny the allegations in Paragraph 30.

31. Respondents deny the first sentence of Paragraph 31. Respondents admit that broad network health plans include all or nearly all hospitals in an area and that narrow network health plans exclude one or more sizable hospitals or hospital systems in an area. The remaining allegations in Paragraph 31 are vague and ambiguous and, to the extent a response is required, Respondents deny the remaining allegations.

32. Respondents deny the allegations in Paragraph 32.

33. Respondents lack knowledge or information sufficient to affirm or deny the allegations in Paragraph 33 and, therefore, Respondents deny the allegations.

34. Respondents deny the allegations in Paragraph 34, except that Respondents admit that hospitals generally compete to attract patients.

B.

35. Respondents deny the allegations in the first and last sentences of Paragraph 35. To the extent Paragraph 35 describes or quotes documents and/or testimony, Respondents submit that the Commission's selective quotation of unidentified documents and/or testimony, offered without context, is vague and ambiguous as written. Based on Respondents' understanding and identification of the documents being quoted, the Commission's selective quotation in this paragraph is misleading and incorrectly described. To the extent a response is required, Respondents deny the remaining allegations in Paragraph 35.

36. Respondents admit that diversion analysis is an economic tool that uses data to determine the extent to which hospitals are substitutes. Respondents deny that all (commercial and non-commercial) GAC inpatient services are a relevant metric, particularly with regard to the assessment of the Commission's claims that are focused solely on commercial patients. Respondents deny the remaining allegations in Paragraph 36.

37. Respondents deny the allegations in Paragraph 37. The principal competitive dynamic driving Methodist's rates is the head-to-head competition with Baptist for inclusion in narrow network products. That competition will be increased rather than diminished as a result of the Proposed Transaction. The evidence further shows that the degree of competition between Saint Francis and Methodist is significantly lower than their respective market shares suggest, as is clearly illustrated by historical natural experiments and other evidence.

C.

38. Respondents deny the allegations in Paragraph 38. As discussed above, the driver of competition in the Memphis Area is that between Methodist and Baptist. The Proposed Transaction will not lead to a significant increase in bargaining leverage with payors because this competition will be increased rather than lessened post-closing of the Proposed Transaction.

39. Respondents admit that narrow networks include fewer participating hospitals. Respondents deny the remaining allegations in Paragraph 39.

40. Respondents admit that narrow network health plans are prevalent in the Memphis Area, and certain commercial insurers offer a narrow network that includes Methodist or Baptist. Respondents deny the remaining allegations in Paragraph 40.

41. Respondents deny the allegations in Paragraph 41.

42. Respondents deny the allegations in Paragraph 42. Post-closing, payors will continue to have a fully viable alternative narrow network excluding Methodist by using Baptist as the anchor provider, with or without Regional One. Today, the Saint Francis hospitals alone are insufficient to anchor a viable attractive alternative narrow network. Payor networks including only Baptist and Regional One in the full-benefits tier exist today. Baptist offers every service currently available at Saint Francis and patient discharge data indicates that every zip code in Saint Francis's service area in Tennessee and Mississippi is also within Baptist's 90% service area. Baptist, as well as Regional One, will continue to offer ample access to virtually all patients who choose to use Saint Francis currently.

D.

43. Respondents deny the allegations in Paragraph 43.

44. Respondents deny the first sentence of Paragraph 44 as stated. To the extent Paragraph 44 describes or quotes documents and/or testimony, Respondents submit that the Commission's selective quotation of unidentified documents and/or testimony, offered without context, is vague and ambiguous as written. To the extent a response is required, Respondents deny the remaining allegations in Paragraph 44. Respondents deny the remaining allegations in Paragraph 44.

45. Respondents deny the allegations in Paragraph 45. As noted above, the Proposed Transaction will increase the combined firm's ability to compete on quality of care, access to care, and service offerings with Baptist and Regional One. The addition of Saint Francis to the Methodist system will not cause any detriment to patients who use the Saint Francis hospitals.

VIII.

ENTRY BARRIERS

46. Respondents the allegations in Paragraph 46.

47. Respondents deny the allegations in Paragraph 47, except that they admit that Tennessee requires a Certificate of Need under certain circumstances.

48. Respondents deny the allegations in Paragraph 48 as stated, except that they admit that Tennessee requires a Certificate of Need under certain circumstances.

49. Respondents deny the allegations in Paragraph 49.

IX.

EFFICIENCIES

50. Respondents deny the allegations in Paragraph 50.

X.

VIOLATION

51. In response to Paragraph 51, Respondents incorporate their responses to the allegations contained in Paragraphs 1 through 50 as if fully set forth herein.

52. Respondents deny the allegations in Paragraph 52.

53. In response to Paragraph 53, Respondents incorporate their responses to the allegations contained in Paragraphs 1 through 52 as if fully set forth herein.

54. Respondents deny the allegations in Paragraph 54.

AFFIRMATIVE DEFENSES

Respondents assert the following defenses without assuming the burden of proof for any defense that would otherwise rest with the Commission. Respondents have not knowingly or intentionally waived any applicable defense, and hereby reserve the right to rely upon any other applicable defense that may become available or apparent during the course of this action. Respondents reserve the right to amend, or seek to amend, this Answer to assert such defenses.

1. The Complaint fails to comply with Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), because the issuance of the Administrative Complaint and the contemplated relief are not in the public interest.
2. The Proposed Transaction will not violate of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.
3. The Proposed Transaction will not substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.
4. The Proposed Transaction will result in increased competition and procompetitive benefits.

The Proposed Transaction will result in substantial merger-specific efficiencies that will far outweigh any alleged anticompetitive effects and, as a result, will benefit consumers.

NOTICE OF CONTEMPLATED RELIEF

Wherefore, Respondents request that the Commission enter judgment in its favor as follows:

- A. The Complaint be dismissed with prejudice;
- B. None of the Complaint's contemplated relief issues to the Commission;

- C. Costs incurred in defending this action be awarded to Respondents; and
- D. Any and all other relief as the Commission may deem just and proper.

Dated: November 27, 2020

Respectfully submitted,

/s/ Norman Armstrong, Jr.

Norman Armstrong, Jr.
Jeffrey Spigel
Albert Kim
Meaghan Griffith
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20001
Telephone: (202) 737-0500
Facsimile: (202) 626-3737
narmstrong@kslaw.com
jspigel@kslaw.com
akim@kslaw.com
mgriffith@kslaw.com

/s/ Matthew J. Reilly

Matthew J. Reilly
Richard H. Cunningham
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 389-5041
matt.reilly@kirkland.com
rich.cunningham@kirkland.com

Tammy T. Tsoumas
KIRKLAND & ELLIS LLP
2049 Century Park East, Suite 3700
Los Angeles, CA 90067
Telephone: (213) 680-8233
tammy.tsoumas@kirkland.com

Brittany M. Lischinsky
KIRKLAND & ELLIS LLP
601 Lexington Ave.
New York, New York 10022-4611
Telephone: (212) 909-3024
Brittany.lischinsky@kirkland.com

Counsel for Respondent Tenet Healthcare Corporation

/s/ Tara L. Reinhart

Tara L. Reinhart
David P. Wales
Anisa A. Somani
SKADDEN ARPS SLATE MEAGHER &
FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
Telephone: (202) 371-7000
Tara.Reinhart@skadden.com
David.Wales@skadden.com
Anisa.Somani@skadden.com

/s/ Vic Domen

Vic Domen
Amanda Wait
NORTON ROSE FULBRIGHT US LLP
799 9th St NW
Suite 1000
Washington DC 20001
Telephone: (202) 662-4642
Vic.domen@nortonrosefulbright.com
Amanda.wait@nortonrosefulbright.com

Counsel for Respondent Methodist Le Bonheur Healthcare

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting 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

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

Counsel Supporting the Complaint:

Susan A. Musser, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2122
Email: smusser@ftc.gov

Herbert H. Slatery III, Esq.
Attorney General and Reporter

David McDowell, Esq.
Senior Assistant Attorney General
Office of the Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202
Telephone: (615) 741-8722
Email: David.McDowell@ag.tn.gov

By: /s/ Brittany M. Lischinsky

Brittany M. Lischinsky
brittany.lischinsky@kirkland.com
KIRKLAND & ELLIS LLP
601 Lexington Ave.
New York, New York 10022-4611
Telephone: (212) 909-3024
Facsimile: (212) 446-4900

Counsel for Respondent Tenet Healthcare Corporation

NOTICE OF ELECTRONIC SERVICE

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator. I hereby certify that on November 27, 2020, I filed an electronic copy of the foregoing Answer and Defense of Respondents Tenet Healthcare Corporation and Methodist Le Bonheur Healthcare with:

April Tabor
Acting 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

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

Counsel Supporting the Complaint:

Susan A. Musser, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2122
Email: smusser@ftc.gov

Herbert H. Slatery III, Esq.
Attorney General and Reporter

David McDowell, Esq.
Senior Assistant Attorney General
Office of the Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202
Telephone: (615) 741-8722
Email: David.McDowell@ag.tn.gov

November 27, 2020

By: /s/ Brittany M. Lischinsky
Brittany M. Lischinsky