

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

John Muir Health,
a corporation,

and

Tenet Healthcare Corporation,
a corporation.

Docket No. 9421

ANSWERS AND DEFENSES OF RESPONDENT
JOHN MUIR HEALTH

In accordance with Rule 3.12 of the Federal Trade Commission’s (“the Commission’s”) Rules of Practice for Adjudicative Proceedings, John Muir Health (“John Muir”), by and through its attorneys, 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.

INTRODUCTION

John Muir is a local non-profit based in northern Contra Costa County. Surrounded by much larger health systems—including Kaiser Permanente (“Kaiser”), Sutter Health (“Sutter”), and Stanford Health Care (“Stanford”)—John Muir’s two hospitals must compete to attract patients and add value to commercial payors. To that end, John Muir invests tens of millions of dollars each year to improve the quality of its care. This commitment has paid off. Three of its service lines are ranked among the top 40 nationally. Its two hospitals rank #2 and #3 overall in the San Francisco Bay Area. And its nursing services and foundation-based physician network hold the highest rating from their respective peer groups.

John Muir currently owns 49% of San Ramon Regional Medical Center (“SRRMC”), a small community hospital in the southern part of Contra Costa County. John Muir acquired its 49% ownership interest in SRRMC in 2013. Although that transaction was not reportable pursuant to the Hart-Scott-Rodino Act, the FTC conducted an extensive investigation and permitted John Muir to become a co-owner of SRRMC. John Muir and Tenet Healthcare Corporation (“Tenet”) entered into the joint venture with the shared goals of expanding its service offerings and better integrating SRRMC into the local physician community.

Notwithstanding some initial success, including the launch of a robotic surgery program, SRRMC is currently struggling. There are only two employed physicians at SRRMC and the

center has very limited service offerings. It cannot fill its beds—70% of which sit empty every day—and over [REDACTED] of its patients are admitted through the Emergency Room (“ER”). The very low number and proportion of non-ER patients at SRRMC means that patients who have a choice are consistently choosing to seek care elsewhere. Although SRRMC has achieved positive operating cash flows in recent years, having nearly 70% of its beds empty each day is not sustainable for any hospital and is a massive lost opportunity for the local community. SRRMC badly needs an infusion of capital to right the ship and compete with Kaiser, Sutter, and Stanford. But its majority owner, Tenet, cannot justify making the needed investments.

The proposed transaction would solve this problem. By acquiring Tenet’s 51% share, John Muir would become SRRMC’s sole owner. Unlike Tenet, John Muir is committed to make the investments necessary to ensure SRRMC’s long-term viability and attract patients from rival systems. These investments include renovating the facility to comply with California seismic requirements, adding needed clinical service lines, redoubling efforts to recruit and retain staff, and bringing SRRMC onto Epic, the electronic health record platform used by most Bay Area hospitals and physicians. The investments will make SRRMC more attractive to physicians; improve patient outcomes through better coordination of care; and protect the facility (and all who use it) from future seismic events. Ultimately, these investments will help SRRMC compete for the many local patients who currently seek care at other area hospitals. The proposed transaction thus offers significant benefits to the greater San Ramon community.

The transaction presents no risk to competition. Although John Muir and SRRMC are both located in Contra Costa County, they compete only minimally. Their respective 75% service areas (the zip codes closest to each party that account for 75% of that parties’ inpatient admissions) overlap in only a single zip code, and even then just barely. That zip code accounts for only [REDACTED] of John Muir’s privately insured patients and only [REDACTED] of SRRMC’s. By contrast, Kaiser, Sutter, and Stanford are the key competitors for both John Muir and SRRMC. Those larger health systems overlap substantially with the parties’ 75% service areas and vigorously compete against both John Muir and SRRMC for patients. They have invested in their facilities, and their medical groups attract patients from each other and from the parties. The parties’ ordinary course documents reflect this constant pressure from Kaiser, Sutter, and Stanford—and very little competition with each other.

To justify an order enjoining this transaction, the FTC’s burden is to show likely harm to competition in a properly defined market. Here, the FTC cannot do so for at least three reasons:

First, the government fails to properly define the relevant market. Here, a properly defined market must include Kaiser, Sutter, and Stanford. When those competitors are included, the parties’ market shares are beneath the thresholds required for a presumption of harm. To avoid this outcome, the government proposes a gerrymandered geographic market that excludes multiple competing hospitals, as well as large portions of the parties’ 75% service areas. The so-called “I-680 Corridor” market has no basis in commercial reality, is contradicted by the parties’ ordinary course documents, and violates the FTC’s own merger guidelines. The FTC’s gerrymandered market is reason alone to reject the government’s claims.

Second, the government has no credible theory of harm to competition. By portraying John Muir as an 800-pound gorilla “known for charging high prices,” the government suggests John Muir will use its “leverage” to negotiate higher prices for SRRMC. Although the government is wrong about John Muir’s prices—relying on an inaccurate, flawed, and outdated third-party study—that allegation is a red herring.¹ The question in a merger challenge is whether the parties compete closely with one another, and therefore whether John Muir’s prices are constrained by SRRMC, or vice-versa. Hence, the government must show that SRRMC’s supposedly lower prices are the result of competition with John Muir. The government must also show that other local rivals, including Kaiser, Sutter, and Stanford, will not constrain the parties post-closing. It cannot do either.

Third, and importantly, the proposed transaction will benefit the community of San Ramon and promote competition against Kaiser, Sutter, Stanford, and others. The suggestion in the complaint that Tenet will invest to improve SRRMC’s quality, but John Muir will not, is exactly backward. To date, Tenet has chosen (over John Muir’s objections) *not* to make investments necessary to expand service lines and improve quality at SRRMC. By contrast, over the next decade John Muir will invest over \$100 million in SRRMC, which will greatly benefit the local community, from the perspective of both patients and employees. More patients will receive the care they need closer to home. The facility will employ more people, including nurses, other care givers, and support staff.

In this regard, John Muir’s track record speaks for itself. John Muir built its first hospital in Walnut Creek in 1965. Six decades and hundreds of millions of dollars later, that hospital now offers a wide range of specialty services, reducing the need for local patients to travel further from home for specialized treatment. More recently, in the late-1990s, John Muir acquired a struggling community hospital in nearby Concord. That facility was underutilized. It suffered from a lack of resources and a poor reputation. Now, almost three decades later, John Muir-Concord is thriving. Like its sister facility, it consistently operates at or near capacity. And, like its sister facility, it offers a wide range of specialty services that help keep healthcare local. If and when this transaction closes, John Muir will do what it takes to ensure a similar outcome at SRRMC.

This transaction offers much to the San Ramon community and presents no risk to competition whatsoever. The Court should deny the request for preliminary relief.

SPECIFIC RESPONSES TO THE COMMISSION’S ALLEGATIONS

¹ As noted below, the parties’ vigorously dispute that John Muir’s pricing—if assessed correctly, accounting for quality—is higher than SRRMC’s or the marketplace’s more generally. Indeed, the data available to the parties currently indicates that—even before adjusting for quality—across privately insured patients (*e.g.*, commercial, Medicare Advantage, and Medi-Cal patients) over the last four years, the parties’ rates are quite close overall, with SRRMC having slightly higher rates in 2020 and John Muir having slightly higher rates in 2019, 2021, and 2022.

I. NATURE OF THE CASE²

1. John Muir admits that it intends to acquire the remaining 51% interest in San Ramon Regional Medical Center (“SRRMC”). John Muir denies that it is one of the largest and most expensive hospital systems in Northern California. The remaining allegations set forth in Paragraph 1 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

2. John Muir admits that it owns and operates the Walnut Creek and Concord Medical Centers, where it provides inpatient GAC services. John Muir denies that the John Muir hospitals are known for charging high prices and is the most costly system in the nation. John Muir lacks knowledge or information sufficient to form a belief as to the remaining allegations in Paragraph 2, and therefore denies them.

3. John Muir denies the allegations set forth in Paragraph 3.

4. John Muir admits that Tenet currently operates SRRMC. John Muir also admits that John Muir’s Walnut Creek hospital provides high-quality care, and that SRRMC sits approximately 14 miles south of John Muir’s Walnut Creek hospital. John Muir denies the remaining allegations set forth in Paragraph 4.

5. John Muir denies the allegations set forth in Paragraph 5.

6. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 6, and therefore denies them.

7. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in the second sentence of Paragraph 7, and therefore denies them. The remaining allegations set forth in Paragraph 7 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies the allegations.

II. JURISDICTION

8. John Muir admits the allegations set forth in Paragraph 8.

9. John Muir admits the allegations set forth in Paragraph 9.

III. RESPONDENTS

10. John Muir admits that in 2013, Tenet transferred a 49% non-controlling interest in San Ramon Regional Medical Center, LLC to John Muir. John Muir lacks knowledge or information sufficient to form a belief as to the remaining allegations set forth in Paragraph 10, and therefore denies them.

² For the Court’s ease of reference, John Muir’s Answer tracks the Complaint’s section headings. In so doing, John Muir does not admit or concede the factual bases or legal conclusions subsumed by the Complaint’s headings.

11. John Muir admits it is a California non-profit corporation headquartered in Walnut Creek, California, and that it operates two hospitals (Walnut Creek Medical Center and Concord Medical Center). John Muir admits it holds a 49% non-controlling interest in San Ramon Regional Medical Center, LLC. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in the rest of Paragraph 11, and therefore denies them.

IV. THE PROPOSED ACQUISITION

12. John Muir admits the allegations set forth in Paragraph 12.

V. COMPETITION BETWEEN HOSPITALS BENEFITS PATIENTS

13. John Muir admits that hospitals negotiate contracts with health plans, and that these contracts include reimbursement rates for services rendered to a health plan's enrollees. John Muir lacks knowledge or information sufficient to form a belief as to the remaining allegations set forth in Paragraph 13, and therefore denies them.

14. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 14, and therefore denies them.

15. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 15, and therefore denies them.

16. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 16, and therefore denies them.

17. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in the first sentence of Paragraph 17, and therefore denies them. The remaining allegations set forth in Paragraph 17 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

18. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 18, and therefore denies them.

19. The allegations set forth in the final sentence of Paragraph 19 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations. John Muir lacks knowledge or information sufficient to form a belief as to the remaining allegations set forth in Paragraph 19, and therefore denies them.

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

20. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 20, and therefore denies them.

21. John Muir denies the allegations set forth in the first sentence of Paragraph 21. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in the second through seventh sentences of Paragraph 21, and therefore denies them. John Muir also denies the allegations set forth in the final sentence of Paragraph 21.

22. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 22, and therefore denies them.

23. John Muir admits that the image in Paragraph 23 appears to be a map that purports to show the location of three hospitals relative to a small portion of I-680. John Muir denies that this map is a fair or accurate representation of hospitals that are or could be competitors to John Muir or SSRMC. John Muir denies the remaining allegations set forth in Paragraph 23.

24. John Muir denies the allegations set forth in Paragraph 24.

25. John Muir denies the allegations set forth in Paragraph 25.

26. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 26, and therefore denies them.

27. John Muir denies the allegations set forth in Paragraph 27.

28. John Muir denies the allegations set forth in Paragraph 28.

29. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 29, and therefore denies them.

30. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 30, and therefore denies them.

31. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 31, and therefore denies them.

32. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 32, and therefore denies them.

33. John Muir denies the allegations set forth in Paragraph 33.

34. The allegations set forth in Paragraph 34 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies the allegations.

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

35. The allegations set forth in Paragraph 35 constitute a legal conclusion to which no response is required. To the extent a response is required, John Muir denies the allegations.

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

36. The allegations set forth in Paragraph 36 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

37. The allegations set forth in Paragraph 37 constitute a legal conclusion to which no response is required. To the extent a response is required, John Muir denies the allegations.

38. The allegations set forth in Paragraph 38 constitute a legal conclusion to which no response is required. To the extent a response is required, John Muir denies the allegations.

39. The allegations set forth in Paragraph 39 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

40. The allegations set forth in Paragraph 40 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

41. The allegations set forth in Paragraph 41 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

42. The allegations set forth in Paragraph 42 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

43. The allegations set forth in Paragraph 43 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

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

44. The allegations set forth in the first sentence of Paragraph 44 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations. John Muir also denies the allegations set forth in the final sentence of Paragraph 44.

45. John Muir denies the allegations set forth in Paragraph 45.

46. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 46, and therefore denies them.

47. The allegations set forth in Paragraph 47 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

48. John Muir denies the allegations set forth in the first sentence of Paragraph 48. The remaining allegations set forth in Paragraph 48 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

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

49. The allegations set forth in Paragraph 49 constitute a legal conclusion to which no response is required. To the extent a response is required, John Muir denies the allegations.

50. John Muir lacks knowledge or information sufficient to form a belief as to the allegations set forth in the first sentence of Paragraph 50, and therefore denies them. John Muir denies the remaining allegations set forth in Paragraph 50, except that John Muir admits that in 1996, John Muir acquired the Mount Diablo Medical Center, which now operates as John Muir's Concord Medical Center.

51. John Muir denies the allegations set forth in the first sentence of Paragraph 51. John Muir lacks knowledge or information sufficient to form a belief as to the remaining allegations set forth in Paragraph 51, and therefore denies them.

52. John Muir lacks knowledge or information sufficient to form a belief as to the remaining allegations set forth in Paragraph 52, and therefore denies them.

53. John Muir lacks knowledge or information sufficient to form a belief as to the remaining allegations set forth in Paragraph 53, and therefore denies them.

54. John Muir denies the allegations set forth in Paragraph 54.

55. The allegations set forth in Paragraph 55 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

56. The allegations set forth in Paragraph 56 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

57. The allegations set forth in Paragraph 57 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir lacks knowledge or information sufficient to form a belief as to those allegations, and therefore denies them.

VIII. LACK OF COUNTERVAILING FACTORS

58. The allegations set forth in Paragraph 58 constitute legal conclusions to which no response is required. To the extent a response is required, John Muir denies those allegations.

59. John Muir admits that the FTC quoted from John Muir's Response to Specification 24 of the FTC's Request for Additional Information ("Second Request") in

alleging that in California, building a 150-bed inpatient hospital would likely take at least seven years from start to finish. John Muir further responds that the FTC's quotation is taken out of context and is misleading. The Response to Specification 24 speaks for itself. John Muir denies the remaining allegations set forth in Paragraph 59.

60. John Muir admits that construction of a new hospital includes high costs and significant financial risks, but they vary depending on the circumstances. John Muir denies the remaining allegations set forth in Paragraph 60.

61. John Muir lacks knowledge or information sufficient to form a belief as to the remaining allegations set forth in this Paragraph, and therefore denies them.

62. The allegations set forth in Paragraph 62 constitute a legal conclusion to which no response is required. To the extent a response is required, John Muir denies the allegations.

IX. VIOLATION

Count I – Illegal Agreement

63. Except where specifically admitted above, the allegations set forth in Paragraphs 1 through 62 are denied.

64. The allegations set forth in Paragraph 64 constitute conclusions of law to which no response is required. To the extent a response is required, John Muir denies the allegations.

Count II – Illegal Acquisition

65. Except where specifically admitted above, the allegations set forth in Paragraphs 1 through 62 are denied.

66. The allegations set forth in Paragraph 66 constitute conclusions of law to which no response is required. To the extent a response is required, John Muir denies the allegations.

AFFIRMATIVE AND OTHER DEFENSES

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

FIRST DEFENSE

The Commission lacks jurisdiction over John Muir under Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

SECOND DEFENSE

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

THIRD DEFENSE

Granting the relief sought is contrary to the public interest.

FOURTH DEFENSE

The alleged relevant service market definition fails as a matter of law.

FIFTH DEFENSE

The alleged relevant geographic market definition fails as a matter of law.

SIXTH DEFENSE

The Complaint fails to allege harm to competition.

SEVENTH DEFENSE

The Complaint fails to allege harm to any consumers.

EIGHTH DEFENSE

The Complaint fails to allege harm to consumer welfare.

NINTH DEFENSE

Any purported alleged harm to potential competition is not actionable.

TENTH DEFENSE

The proposed acquisition will be procompetitive. The acquisition will result in substantial merger-specific efficiencies, cost synergies, quality-of-care improvements, and other procompetitive effects that will directly benefit consumers. These benefits greatly outweigh any and all proffered anticompetitive effects.

John Muir is committed to making substantial and significant investments in SRRMC to benefit the local community, including investing over \$100 million in facility renovations, infrastructure upgrades, adding necessary clinical service lines, expanding medical staff recruitment and retainment efforts, extending community health programming to SRRMC, and converting SRRMC to the EHR system used by most Bay Area hospitals and physicians (Epic). With the Proposed Acquisition, SRRMC will provide John Muir with the scale necessary to compete with larger rivals in the area, and John Muir can engage in a comprehensive integration that it could not through its joint venture with Tenet. 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 John Muir.

ELEVENTH DEFENSE

This administrative proceeding is invalid because the appointment of the Administrative Law Judge (“ALJ”) is unconstitutional under the Appointments Clause.

TWELFTH 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 FTC Act, they may only be removed from their positions for “inefficiency, neglect of duty, or malfeasance in office.”

THIRTEENTH 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.

FOURTEENTH DEFENSE

The Commission’s procedures arbitrarily subject John Muir to administrative proceedings rather than to proceedings before an Article III judge in violation of John Muir’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 or have been reviewed under federal antitrust laws by the U.S. Department of Justice.

FIFTEENTH DEFENSE

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

Pursuant to the Federal Trade Commission Act (“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.

SIXTEENTH DEFENSE

The structure of these administrative proceedings, in which the Commission both initiates and finally adjudicates the Complaint against John Muir, violates John Muir’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 John Muir that would restrict John Muir’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.

SEVENTEENTH DEFENSE

These administrative proceedings violate John Muir’s Fifth Amendment Due Process right to adjudication before a neutral arbiter as applied to John Muir 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.

EIGHTEENTH DEFENSE

The Commission’s charges under Section 5 of the Federal Trade Commission 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

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

RESERVATION OF RIGHTS TO ASSERT ADDITIONAL DEFENSES

John Muir has not knowingly or intentionally waived any applicable defenses, and they reserve the right to assert and rely upon other applicable defenses that may become available or apparent throughout the course of the action. John Muir reserves the right to amend, or seek to amend, their answer or affirmative defenses.

NOTICE OF CONTEMPLATED RELIEF

WHEREFORE, John Muir respectfully requests that the Commission enter judgment in their favor as follows:

- A. That the Complaint be dismissed with prejudice;
- B. That none of the Complaint’s contemplated relief issue to the Commission;
- C. That costs incurred in defending against this action be awarded to John Muir; and
- D. That any and all other relief as the Commission may deem just and proper be awarded to John Muir.

Dated: December 4, 2023

Respectfully submitted,

By: /s/ Jeffrey A. LeVee

Jeffrey A. LeVee (CA SBN 125863)
JONES DAY
555 Flower St, 50th Floor
Los Angeles, CA 90071
Telephone: (213) 243-2572
Email: jlevec@jonesday.com

By: /s David C. Kiernan

David C. Kiernan (CA SBN 215335)
Margaret A. Ward (CA SBN 304435)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 875-5876
Email: dkiernan@jonesday.com
Email: maward@jonesday.com

By: /s/ Peter J. Schwingler

Peter J. Schwingler (MN SBN 0388909)
pschwingler@jonesday.com
JONES DAY
90 South Seventh Street, Suite 4950
Minneapolis, MN 55402
Telephone: (612) 217-8800
Email: pschwingler@jonesday.com

Counsel for Respondent John Muir Health

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2023, I filed the foregoing document electronically 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

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

John Wiegand
 Peter Colwell
 Matthew Delgado
 Peter Huston
 Lucy Rosenzweig
 Erika Wodinsky
 FEDERAL TRADE COMMISSION
 90 7th Street, Suite 14-300
 San Francisco, CA 94103
 Telephone: (415) 848-5174
 jwiegand@ftc.gov
 pcolwell@ftc.gov
 mdlgado@ftc.gov
 phuston@ftc.gov
 lrosenzweig@ftc.gov
 ewodinsky@ftc.gov

Christopher W. Keegan
 Anna Terteryan
 Psalm Cheung
 KIRKLAND & ELLIS LLP
 555 California Street, Suite 2700
 San Francisco, CA 94104
 Telephone: (415) 439-1400
 chris.keegan@kirkland.com
 anna.terteryan@kirkland.com
 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
 matt.reilly@kirkland.com
 rich.cunningham@kirkland.com
 jeffrey.ayer@kirkland.com

Nicolas Stebinger
 FEDERAL TRADE COMMISSION
 600 Pennsylvania Avenue NW
 Washington, D.C. 20580
 Telephone: (202) 326-2688
 nstebinger@ftc.gov

Counsel for Respondent Tenet Healthcare Corporation

Counsel Supporting the Complaint

By: /s/ Peter J. Schwingler
 Peter J. Schwingler

Counsel for Respondent John Muir Health

CERTIFICATE FOR ELECTRONIC FILING

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.

December 4, 2023

By: /s/ Peter J. Schwinger
Peter. J. Schwinger