UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SAINT FRANCIS HOSPITAL AND MEDICAL CENTER, INC.,

Plaintiff,

v.

HARTFORD HEALTHCARE CORPORATION, HARTFORD HOSPITAL, HARTFORD HEALTHCARE MEDICAL GROUP, INC., INTEGRATED CARE PARTNERS, LLC,

Defendants.

Case No. 3:22-cv-00050-SVN

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' FIFTH, SIXTH, AND SEVENTH AFFIRMATIVE DEFENSES

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I. INTRODUCTION

Defendants' Opposition to Plaintiff's Tardy Motion to Strike (ECF No. 113) ("Defendant's Opposition") fails to address, and therefore effectively admits, the critical issue addressed by this Motion. Defendants' Fifth, Sixth, and Seventh Affirmative Defenses (the "Affirmative Defenses") consist entirely of vague, conclusory statements, without any factual support. Statements such as "in good faith," "in pursuit of legitimate business interests" and "procompetitive," are not sufficient under the most lenient pleading standard.

Instead, Defendants argue that what they themselves have labelled as Affirmative Defenses are not affirmative defenses at all. But that ignores controlling Second Circuit and other antitrust cases. Defendants also misstate the controlling standard under *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 98–99 (2d Cir. 2019).

II. ARGUMENT

A. Defendants' Affirmative Defenses Lack Any Factual Support

The issue at the heart of this Motion is whether Defendants pleaded sufficient facts to satisfy the pleading standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *GEOMC*. Defendants fail to argue—because they cannot—that these three Affirmative Defenses provide any actual facts to satisfy *Twombly.* They offer no more than "labels and conclusions," 550 U.S. at 555, "devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Defendants therefore attempt to pivot from the plain language of their pleaded Affirmative Defenses and rely on statements in their Motion to Dismiss and allegations in the Complaint. But this reliance on statements not in the Affirmative Defenses fares no better. In Defendants' Memorandum in Support of their Motion to Dismiss, Defendants asserted a series of equally conclusory statements that Defendants' actions led to "heightened efficiency", "consistent quality", "high standard of care", and "access to common resources, including population health-

management tools, care coordination staff, electronic medical records, and shared facilities." (ECF No. 113 at 18.)

These statements (even if they had been included in the Affirmative Defenses) equally fail the *Twombly* pleading standard and leave Saint Francis having to guess at the facts supporting these conclusions. Defendants fail to allege, for example, what specific actions which Defendants engaged in led to any of the alleged effects, thus failing the test in *In re Elevator Antitrust Litigation*, 502 F.3d 47, 50 (2d Cir. 2007) because they are "in entirely general terms without any specification of any particular activities"; the meaning of "heightened efficiency" (what exactly became more efficient?); where and how the "efficienc[ies]" improved; how "quality" improved, and what Defendants mean by "quality" (a term that can involve many different health care metrics). As a result, "without some further factual enhancement," Defendants' Affirmative Defenses (even as augmented) "stop[] short of the line between possibility and plausibility of entitle[ment] to relief." *See Twombly*, 550 U.S. at 557 (quotations omitted).These vague statements do not provide a clue as to how Defendants hope to satisfy the rigorous standard applicable to efficiencies, including quality claims, in antitrust cases:

> In order to be cognizable, the efficiencies must, first, offset the anticompetitive concerns in highly concentrated markets. . .
>
> Second, the efficiencies must be "*merger specific,"* . . . — meaning, "they must be efficiencies that cannot be achieved by either company alone." . . . Otherwise, "the merger's ... benefits [could] be achieved without the concomitant loss of a competitor." . . .
>
> Third, the efficiencies "must be *verifiable, not speculative,"* . . . they "must be shown in what economists label 'real' terms."

Federal Trade Commission v. Penn State Hershey Medical Center, 838 F.3d 327, 348 (3d Cir. 2016) (citations omitted).[1]

Nor does Saint Francis' Complaint provide Defendants any help. Defendants claim that "[t]he Challenged Defenses also are based on the same actions central to Plaintiff's Amended Complaint". (ECF No. 113 at 18.) Yet Saint Francis' Complaint never alleges that Defendants' actions heightened efficiency, improved the quality of care, or increased access to common resources. The Complaint does not mention "heightened efficiency," "care coordination," "electronic medical records," or "population health-management tools." Nor does it mention the phrases used in Mr. Weissman's letter (ECF No. 107-4), including "enhancing coordination," "risk-based contracting" or "job satisfaction."

In fact, Defendants' varying arguments further illustrate the problem with their allegations. Mr. Weissman's letter contains one series of vague descriptions of these affirmative defenses. In arguing that their motion to dismiss provided more information, Defendants reference a series of equally conclusory, but different, descriptions, as described above. Defendants do not say which of these, if any, properly describe the defenses the Defendants are prepared to offer. Saint Francis should not be required to guess.

Finally, Defendants claim that Saint Francis knows the factual bases for Defendants' Affirmative Defenses because Saint Francis propounded related discovery requests. But this ignores the fact (as Defendants admit) that Saint Francis' relevant discovery requests (ECF No. 113-1) ask only for very general categories of information relating to "benefits," "costs," "advantages," and similar phrases. The reason why these requests are so general highlights why

[1] *See also New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 208 (S.D.N.Y. 2020) (addressing verifiability and merger-specificity).

Defendants' Affirmative Defenses should be stricken: Saint Francis is forced to guess at the arguments Defendants may put forth in the future. Saint Francis cannot make targeted requests because it does not know what to target. This, of course, will prolong, and lead to inefficiencies in, discovery.[2]

B. Defendants' Failure to Plead Plausible Facts in Support of their Affirmative Defenses is Alone a Sufficient Basis to Grant the Motion to Strike

Having failed to adequately defend their conclusory allegations, Defendants misstate the standard applicable to affirmative defenses. First, their assertion that "the test followed by the Second Circuit requires a movant to show all three factors set out in *GEOMC*" is a misstatement of the law. Establishing any one of the factors in *GEOMC* is sufficient for a court to grant a motion to strike an affirmative defense.

It is evident from the Second Circuit's analysis in *GEOMC* of the remaining two factors that any one of the factors can be a basis for dismissal. In analyzing the second factor (legal insufficiency), the Second Circuit explicitly stated that "[t]here is no dispute that an affirmative defense is improper and ***should be stricken*** if it is a legally insufficient basis for precluding a plaintiff from prevailing on its claims." 918 F.3d at 98 (emphasis added). Even the third factor (prejudice) "in some cases, ***may be determinative*,** where a defense is presented beyond the normal time limits of the Rules, especially at a late stage in the litigation, and challenged by a motion to dismiss." *Id.* at 99 (emphasis added).

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[2] Saint Francis' Second Request for Production of Documents, promulgated after receiving Mr. Weissman's letter, does target some of the vague phrases referred to in the letter, but Saint Francis is still shooting in the dark, both because these phrases are totally conclusory, and because the letter says the defenses are "including but not limited to" the specific examples. This allows for Defendants to offer any number of other completely undisclosed defenses in the future.

Defendants also misstate the first test under *GEOMC*, stating that the test requires that "there must be no questions of fact or law that might allow the defense to succeed." (ECF No. 113 at 16.) This, however, ignores the central holding in *GEOMC*, modifying this first element of the prior test to incorporate the *Twombly* standard. If Defendants' statement of the standard were correct, *Twombly* would have nothing to do with affirmative defenses.

A careful review of *GEOMC* leaves no possible doubt that Defendants are in error. The *GEOMC* decision explains that the standard on which Defendants rely comes from a 1999, pre-*Twombly* district court case:

> In order to prevail on a motion to strike [an affirmative defense], a plaintiff must show that: (1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense. *S.E.C. v. McCaskey*, 56 F.Supp.2d 323, 326 (S.D.N.Y. 1999).

918 F.3d at 96.

GEOMC addressed "[w]hether the first of *McCaskey* factors should be reworded in light of *Twombly*[.]" *Id.* at 97. The Second Circuit concluded that it should be reworded, stating that "[w]e conclude that the plausibility standard of *Twombly* applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense." *Id.* at 98.

As a result, the Second Circuit affirmed the dismissal of two defenses because they did not provide "some factual allegations to make them plausible" under *Twombly*:

> The sixth defense lacked any indication of what conduct by GEOMC or others might have been a defense to the breach of contract claim added by the second amended complaint. The seventh defense lacked any indication of which party needed to be joined or why. Calmare needed to support these defenses with some factual allegations to make the plausible.

Id. at 99.[3]

The Second Circuit in *GEOMC* further explained that the "no question of fact" standard that Defendants erroneously claim is applicable today effectively tracks the standard in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) which was overruled by *Twombly*:

> This formulation expansively phrased the pleading standard with the wording then used by the Supreme Court in *Conley v. Gibson*, 355 U.S. 41,78 S.Ct. 99, 2 L.Ed.2d 80 (1957), for testing the sufficiency of a complaint: "[A] Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts in support of his claim* which would entitle him to relief." *Id.* at 45-46, 78 S.Ct. 99. That wording, the Court ruled in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed. 929 (2007), "is best forgotten," *id.* at 563,127 S.Ct.1955, and was replaced with a "plausibility standard," *id.* at 560, 127 S.Ct. 1955; *see Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (same).

GEOMC, 918 F.3d at 96 (emphasis added). It is clear that the standard that Defendants urge, and which they rely upon, is long since dead and buried.

A review of the district court decisions further establishes that both of Defendants' assertions are unsupportable. Numerous courts applying *GEOMC* have dismissed affirmative defenses solely because they lack sufficient factual allegations. In *ICR, LLC v. Neptune Wellness Solutions, Inc.*, 2023 WL 1463653, at *2 (D. Conn. Feb. 2, 2023), the court struck two affirmative defenses because the allegations were "conclusory" and "boilerplate", without analyzing the remaining two factors in *GEOMC*. Additionally, it made clear that the three part test was disjunctive, using the word "or." *Id.* at *1. In *Haxhe Properties, LLC v. Cincinnati Ins. Co.*, 2021 WL 2291101, at *4 (D. Conn. June 4, 2021), the court struck three affirmative defenses because

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[3] If there were any doubts about the fact that the Second Circuit has revised the first *McCaskey* factor, the further statement in *GEOMC* that "[t]he second factor identified in *McCaskey* needs no revision," *GEOMC*, 918 F.3d at 98, makes clear that the first factor was revised.

the allegations were "too conclusory to meet the applicable pleading standard" and "vague", without analyzing the remaining two factors in *GEOMC*. In *Alfonso v. FedEx Ground Package Sys., Inc.*, 2022 WL 4545888, at *5 (D. Conn. Sept. 29, 2022), this Court found "no question of fact" present only after it concluded that the defenses at issue required "no further factual pleading to be plausible." *Id.* at *4.

C. <u>Defendants Possess the Burden on Their Affirmative Defenses</u>

Defendants next argue that they mislabeled their Affirmative Defenses, and do not possess any burden of pleading or proof as to them. But in the Second Circuit, "[a]ffirmative defenses . . . typically impose, at the very least, a burden of production on the defendant." *United States v. Smith*, 160 F.3d 117, 123 (2d Cir. 1998).[4] Defendants do not dispute that they have the burden of production. (*See* ECF No. 113 at 13 ("Only if a prima facie antitrust claim is established does the **burden of production** then shift to the defendant.") (emphasis in original).) This alone means that Defendants' Affirmative Defenses are properly so labelled, and therefore that Defendants have the obligation to properly plead them. If it is Defendants' burden to produce evidence on the defenses, it is certainly their burden to explain what those defenses are. Otherwise, how can a plaintiff respond to them?

Defendants also misstate the law as to their burden of proof on these defenses under the antitrust laws. The rule of reason requires Defendants not only to produce evidence in response to Saint Francis' *prima facie* case, but also to successfully rebut Saint Francis' *prima facie* case. That is made clear in the case cited by Defendants:

> Typically the [plaintiff] establishes a prima facie case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is

[4] *Moore v. Kulicke & Soffa Indus., Inc.*, 318 F.3d 561, 566 (3d Cir. 2003), cited by Defendants, applied Pennsylvania state law.

> likely to substantially lessen competition. Once the [plaintiff] establishes the prima facie case, the [defendant] may rebut it by ***producing evidence*** to cast doubt on the accuracy of the [plaintiff]'s evidence as predictive of future anti-competitive effects. Finally, if the [defendant] ***successfully rebuts the prima facie case***, the burden of production shifts back to the [plaintiff] and merges with the ultimate burden of persuasion, which is incumbent on the [plaintiff] at all times.

New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 198–99 (S.D.N.Y. 2020) (quoting *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) (internal citations omitted) (emphasis added)).

Thus, Defendants must "successfully rebut" Saint Francis' *prima facie* case. The mere fact that Saint Francis ultimately bears the burden of persuasion does not change the fact that Defendants will be required to "rais[e] new facts and arguments" related to procompetitive effects in an attempt to "defeat the plaintiff's . . . claim". *See Saks v. Franklin Covey Co*., 316 F.3d 337, 350 (2d Cir. 2003). Of course, for that reason, these "new facts and arguments" must be disclosed, and must meet the *Twombly* requirements.

Defendants also ignore, because they cannot rebut, the antitrust merger and acquisition cases cited by Saint Francis in its initial brief that make clear that it is the Defendants' burden to prove the very affirmative defenses raised (in conclusory fashion) here. *See* Plaintiff's Memorandum of Law in Support of Motion to Strike Defendants' Fifth, Sixth and Seventh Affirmative Defenses (ECF No. 107-1) at p.6. As the Ninth Circuit explained, addressing the same issues presented by Defendants' arguments:

> Because the plaintiffs established a prima facie case, the burden shifted to St. Luke's to "cast doubt on the accuracy of the Government's evidence as predictive of future anticompetitive effects." *Chi. Bridge & Iron*, 534 F.3d at 423. The rebuttal evidence focused on the alleged procompetitive effects of the merger, particularly the contention that the merger would allow St. Luke's to move toward integrated care and risk-based reimbursement.

Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd., 778 F.3d 775, 788 (9th Cir. 2015).

Defendants' attempt to analogize the rule of reason's burden-shifting framework to other contexts supports Saint Francis' position. In numerous cases involving burden-shifting frameworks, the Second Circuit has characterized the defendant's burden as an affirmative defense. *See Fields v. New York State Off. of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 119 (2d Cir. 1997) ("In some cases, however, even if the plaintiff succeeds in proving motivation based on an impermissible reason, the defendant advances the additional contention that it would have taken the same adverse action for a permissible reason. *This additional contention is an affirmative defense, on which the defendant bears the burden of proof*.") (emphasis added); *N.L.R.B. v. Matros Automated Elec. Const. Corp.*, 366 F. App'x 184, 187 (2d Cir. 2010); *Luciano v. Olsten Corp.*, 110 F.3d 210, 218 (2d Cir. 1997).

Defendants cannot claim that their Affirmative Defenses are mere denials when they have an affirmative burden to put forth new evidence and facts to rebut Saint Francis' claims.

D. Defendants' Vague Affirmative Defenses Prejudice Saint Francis

Under the circumstances, there is no doubt that Defendants' pleading failures would severely prejudice Saint Francis. First, as noted above, Saint Francis would be forced in discovery to guess at these defenses, without knowing exactly what Defendants are arguing. Second, and even more importantly, Saint Francis would be forced to expend resources on discovery on these issues, when it may be that Defendants simply do not possess the facts sufficient to justify allowing this kind of extensive discovery to go forward. *See Twombly,* 550 U.S. at 558-59 ("a district court must retain the power to insist upon some specificity in pleading before allowing a massive factual controversy to proceed").

III. CONCLUSION

Because Defendants' Affirmative Defenses fail under *Twombly* and *GEOMC*, they should be struck with prejudice. Alternatively, if the Court strikes these Affirmative Defenses without prejudice, Defendants should be required to re-plead their Affirmative Defenses with "factual content that allows the court to draw the reasonable inference that the defendant is [not] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Date: May 1, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ *David A. Ettinger*
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