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 MOTION TO STRIKE DEFENDANTS' FIFTH, SIXTH AND SEVENTH AFFIRMATIVE DEFENSES

Pursuant to Fed. R. Civ. P. 12(f), Plaintiff Saint Francis Hospital and Medical Center, Inc. ("Saint Francis") moves to strike the Fifth, Sixth, and Seventh Affirmative Defenses asserted by Defendants Hartford Healthcare Corporation, Hartford Hospital, Hartford Healthcare Medical Group, Inc., and Integrated Care Partners, LLC (collectively, "HHC") in their Answer to the Amended Complaint (ECF No. 104).

As detailed more fully in the accompanying Memorandum of Law, HHC fails to allege any facts in support of its Fifth, Sixth, or Seventh Affirmative Defenses. For that reason, these defenses fail under the pleading standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which applies to affirmative defenses, *see GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92 (2d Cir. 2019). Accordingly, HHC's Fifth, Sixth, and Seventh Affirmative Defenses should be stricken from HHC's Answer under Fed. R. Civ. P. 12(f).

Date: March 27, 2023

Respectfully submitted,

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

Defendants.

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

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. BACKGROUND 1

A. Procedural History 2

B. HHC's Improper Affirmative Defenses 2

C. The Parties' Correspondence 3

III. LEGAL STANDARD 3

IV. ARGUMENT 4

A. HHC's Fifth, Sixth, and Seventh Affirmative Defenses Are Affirmative Defenses to Which *GEOMC* and *Twombly* Apply 5

B. These Defenses Do Not Meet The Standard Set Forth In *Twombly* and *GEOMC* 6

C. HHC's Deficient Affirmative Defenses Prejudice Saint Francis. 11

D. The Fifth Affirmative Defense Fails to State a Claim 12

E. The Court Should Exercise its Discretion to Strike HHC's Affirmative Defenses 13

V. CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Alfonso v. FedEx Ground Package Sys., Inc.,
2022 WL 4545888 (D. Conn. Sept. 29, 2022) 10

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 1, 4, 7, 9

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) ..... *passim*

CR, LLC v. Neptune Wellness Sols., Inc.,
2023 WL 1463653 (D. Conn. Feb. 2, 2023) 4, 7, 9

In re Elevator Antitrust Litig.,
502 F.3d 47 (2d Cir. 2007) 4, 8

F.T.C. v. Instant Response Sys., LLC,
2014 WL 558688 (E.D.N.Y. Feb. 11, 2014) 13

Federal Trade Commission v. Hackensack Meridian Health, Inc.,
30 F.4th 160 (3d Cir. 2022) 6

Federal Trade Commission v. Penn State Hershey Medical Center,
838 F.3d 327 (3d Cir. 2016) 6

GEOMC Co. v. Calmare Therapeutics Inc.,
918 F.3d 92 (2d Cir. 2019) ..... *passim*

H*axhe Properties, LLC v. Cincinnati Ins. Co.*,
2021 WL 2291101 (D. Conn. June 4, 2021) 9, 11

Jablonski v. Special Couns., Inc.,
2020 WL 1444933 (S.D.N.Y. Mar. 25, 2020) 9, 10

Nat'l Soc'y of Prof'l Eng'rs v. United States,
435 U.S. 679 (1978) 12

Olin Corp. v. FTC,
986 F.2d 1295 (9th Cir. 1993) 6

Oregon Laborers-Employers Trust Funds v. Pacific Fence and Wire Co.,
726 F.Supp.786 (D. Ore.1989) 14

Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.,
778 F.3d 775 (9th Cir. 2015) 12

Spinner Consulting LLC v. Stone Point Cap. LLC,
843 F. App'x 411 (2d Cir. 2021) 4, 8

Stonybrook Tenants Ass'n, Inc. v. Alpert,
29 F.R.D. 165 (D. Conn. 1961).....14

Town & Country Linen Corp., 2020 WL 3472597 (S.D.N.Y. June 25, 2020) 8, 9

United States v. Baker Hughes, Inc.,
908 F.2d 981 (D.C. Cir. 1990) 6

United States v. Phil. Nat'l Bank,
374 U.S. 321 (1963).....12

United States v. Rockford Mem'l Corp.,
717 F. Supp. 1251 (N.D. Ill. 1989), *aff'd* 898 F. 2d 1278 (7th Cir. 1990) 13

United States v. Visa U.S.A., Inc.,
344 F.3d 229 (2d Cir. 2003).....6, 12

US Airways, Inc. v. Sabre Holdings Corp.,
938 F.3d 43 (2d Cir. 2019).....5, 6, 10

Williams v. Jader Fuel Co.,
944 F.2d 1388 (7th Cir. 1991) 14

Statutes

Clayton Act 6, 13

Sherman Act § 1.....5

Connecticut Minimum Wage Act 10

Rules

Fed. R. Civ. P. 12(f).....3, 13, 14

Fed. R. Civ. P. 12(f)(1) 14

I. INTRODUCTION

Plaintiff Saint Francis Hospital and Medical Center, Inc. ("Saint Francis") moves to strike the Fifth, Sixth and Seventh Affirmative Defenses asserted by Defendants Hartford Healthcare Corporation, Hartford Hospital, Hartford Healthcare Medical Group, and Integrated Care Partners, LLC (collectively, "HHC") in their Answer and Affirmative Defenses to the Amended Complaint (ECF No. 104).[1]

In answering Saint Francis's Amended Complaint, HHC asserts 23 boilerplate affirmative defenses. Three of these defenses are highly significant, but are based entirely on legal conclusions and devoid of any facts, and thereby fail to even arguably meet the pleading standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Given the absence of any facts to support these broad legal conclusions, Defendants fail to even provide adequate notice of their defenses.

HHC's Fifth, Sixth, and Seventh Affirmative Defenses assert (without any supporting detail) that HHC's conduct was allegedly "procompetitive," led to "procompetitive effects" and was undertaken in "good faith" and in the "pursuit of legitimate business interests." None of these effects or interests are identified. The limited elaboration provided by HHC during "meet and confer" correspondence does not remedy these deficiencies.

To allow these affirmative defenses to remain in HHC's Answer without any factual basis would cause Saint Francis significant prejudice in discovery and at trial. For these reasons, more fully described below, the Court should grant Saint Francis's Motion to Strike HHC's Fifth, Sixth and Seventh Affirmative Defenses.

II. BACKGROUND

[1] These three defenses are quoted below.

A. Procedural History

On February 1, 2022, Saint Francis filed its Amended Complaint. ECF No. 33. On February 23, 2022, HHC filed a motion to dismiss Saint Francis's Amended Complaint. ECF No. 42. On February 13, 2023, the Court denied HHC's motion to dismiss on all claims, except for one theory of liability related to HHC's refusal to participate in tiered networking and other similar programs. ECF No. 100.

On February 27, 2023—more than a year after Saint Francis filed its Amended Complaint—HHC filed its Answer and Affirmative Defenses to Saint Francis's Amended Complaint. ECF No. 104.

B. HHC's Improper Affirmative Defenses

The following affirmative defenses asserted by HHC are the subject of this Motion; with the critical language in the Sixth and Seventh affirmative defenses in italics (the remaining language is arguably not properly an affirmative defense at all). The Fifth Affirmative Defense is challenged in its entirety.

Fifth Affirmative Defense: "Plaintiff's claims are barred, in whole or in part, because any conduct by or on behalf of Hartford HealthCare alleged in the Complaint was taken independently in good faith and was legally or equitably protected by applicable privileges, and/or was undertaken in pursuit of legitimate business interests" (ECF No. 104 at 110);

Sixth Affirmative Defense: "Any conduct engaged in by Hartford HealthCare was not anticompetitive and cannot support a claim sounding in antitrust. Indeed, *at all times Hartford HealthCare's actions and practices that are the subject of the Complaint were lawful, procompetitive*, justified under the rule of reason, and caused no injury to competition." (*Id.*);

Seventh Affirmative Defense: "Insofar as Plaintiff alleges that Hartford HealthCare violated the antitrust rule of reason, such claims are barred, among other reasons, because the

Complaint does not allege a properly defined relevant market, *because any restraints complained of are ancillary to legitimate, procompetitive activities*, and because the Complaint does not allege how *procompetitive effects of Hartford HealthCare's legitimate activities* are outweighed by anticompetitive effects." (*Id.*)

C. The Parties' Correspondence

Prior to filing this Motion, the parties met and conferred regarding the contents of this Motion and exchanged letters outlining each party's position. *See* Exhibits A-D. The parties were unable to reach an agreement on, among others HHC's Fifth, Sixth and Seventh Affirmative Defenses.[2]

In relation to HHC's Sixth and Seventh Affirmative Defenses, HHC asserted for the first time in its March 7, 2003 letter that its conduct resulted in "procompetitive effects", "*including, without limitation*, by expanding access to healthcare services, investing in physician training and higher quality services, enhancing coordination of healthcare for the benefit of patients, lowering overall healthcare costs including by increasing the likelihood of risk-based contracting with payers, increasing competition for labor, and providing employment opportunities for physicians that increase their job satisfaction, motivation, and ability to treat patients." *See* Exhibit B (emphasis added). HHC has refused to provide any greater detail regarding these defenses. *See* Exhibit D.

III. LEGAL STANDARD

Fed. R. Civ. P. 12(f) provides that a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." An affirmative defense

[2] HHC agreed to withdraw its 17th, 18th and 19th defenses, *see* Exhibit B, but has not yet formally done so.

may be stricken if (1) it does not meet the "plausibility" pleading standard of *Twombly*, 550 U.S. 544 (2007); (2) it is legally insufficient; or (3) it prejudices the opposing party and it is presented beyond the normal time limits of the Rules. *CR, LLC v. Neptune Wellness Sols., Inc.*, 2023 WL 1463653, at *1 (D. Conn. Feb. 2, 2023) (citing *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 98–99 (2d Cir. 2019)).

The Supreme Court explained in *Twombly* that

> [A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' [under FRCP 8(a)(2)] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . Factual allegations must be enough to raise a right to relief above the speculative level . . .

550 U.S. at 555. A plaintiff cannot rely upon mere "labels . . . devoid of further factual enhancement." *Ashcroft*, 556 U.S. at 678. *See also In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (affirming dismissal where the averments were "in entirely general terms without any specification of any particular activities by any particular defendant") (emphasis added); *Spinner Consulting LLC v. Stone Point Cap. LLC*, 843 F. App'x 411, 413 (2d Cir. 2021) ("Beyond this allegation, Spinner's complaint does little more than make "a bare assertion" of Stone Point's participation in the purported conspiracy.").

"The plausibility standard of *Twombly* applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense." Thus, a defendant must "support [its] defenses with some factual allegations to make them plausible." *GEOMC*, 918 F.3d at 98–99. Moreover, "[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." *Id.* at 98.

HHC's Fifth, Sixth and Seventh Affirmative Defenses fail for one or both of these reasons.

IV. ARGUMENT

A. HHC's Fifth, Sixth, and Seventh Affirmative Defenses Are Affirmative Defenses to Which *GEOMC* and *Twombly* Apply

Initially, it is important to note that the Fifth Defense and the italicized language in the Sixth and Seventh Defenses are, indeed, affirmative defenses which HHC has the burden to properly plead and prove. HHC has argued that its Sixth and Seventh Affirmative Defenses are not in fact affirmative defenses. This is belied by HHC's own labeling of them as such in its Answer (ECF No. 104 at 108-112), and, as explained below, is incorrect, at least as to the Fifth Affirmative Defense and the italicized language in the Sixth and Seventh Affirmative Defenses. To the extent these paragraphs do not state affirmative defenses, they serve no purpose, and are not properly included in HHC's Answer.

HHC's Sixth and Seventh Affirmative Defenses allege, without any facts in support, that HHC's actions were "procompetitive," "ancillary to legitimate, procompetitive activities" and "justified by the rule of reason." HHC asserts in its Fifth Affirmative Defense, without any facts in support, that its conduct was "taken independently in good faith" "protected by applicable privileges", and/or "undertaken in pursuit of legitimate business interests". These defenses thus claim that there are benefits from, or rationales or justifications for, HHC's conduct.

It is beyond doubt that such claimed benefits, rationales and justifications are affirmative defenses. HHC uses language that is almost verbatim identical to the formulations in the controlling antitrust cases. Under the rule of reason (applicable to Saint Francis' Section 1 Sherman Act claim), there is a three-step burden-shifting analysis. "[T]he plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market [and] [i]f the plaintiff carries its burden, then the burden shifts to the defendant to show a *procompetitive rationale* for the restraint." *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 55 (2d Cir. 2019) (emphasis added). Only if the defendant makes this showing

does the burden then shift back to the plaintiff "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id. See also United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) ("Once that initial burden is met, the burden of production shifts to the defendants, who must provide a *procompetitive justification* for the challenged restraint.") (emphasis added).[3]

The further elaboration in HHC's letter makes this conclusion even more clear. For example, HHC refers to "procompetitive effects" "including, without limitation" "enhancing coordination of healthcare for the benefit of patients," and "increasing the likelihood of risk-based contracting with payers." *See* Exhibit B. The cases routinely treat these arguments as affirmative defenses on which defendant has the burden. *See Federal Trade Commission v. Penn State Hershey Medical Center*, 838 F.3d 327, 347 (3d Cir. 2016) (cost savings and claim that "the merger will enhance . . . efforts to engage in risk-based contracting" analyzed as affirmative defenses on which defendants possessed the burden); *Federal Trade Commission v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 175-176 (3d Cir. 2022) (claim of quality improvements analyzed as affirmative defense).

The non-italicized portions of the Sixth and Seventh Affirmative Defenses may well not be proper defenses, as HHC contends, despite its own assertion to the contrary in its Answer. Of course, as such, they should not be described in an answer as Affirmative Defenses. For that reason, they should be stricken.

B. <u>These Defenses Do Not Meet The Standard Set Forth In *Twombly* and *GEOMC*</u>

[3] Courts use a similar burden-shifting framework to analyze whether an acquisition is likely to substantially lessen competition under Section 7 of the Clayton Act. *Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982–93 (D.C. Cir. 1990).

HHC clearly failed to meet its burden to plead these affirmative defenses. Rather than plead any facts to support its contentions, HHC offers only "conclusory statement[s]." *ICR*, 2023 WL 1463653, at *2; *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citing *Twombly*, 550 U.S. at 555). Under *GEOMC*, a party must "support [its] defenses with some factual allegations to make them plausible." 918 F.3d at 98–99. HHC fails to support theses affirmative defenses with *any* factual allegations.

Of course, the language in the Affirmative Defenses themselves is wholly inadequate; they do little more than recite the buzzword "procompetitive." But even the statements set forth in HHC's letter are wholly conclusory. For example, HHC first states that "Hartford HealthCare's activities [have] expand[ed] access to healthcare services…" Yet, this statement fails to identify in even the most rudimentary way which healthcare services have been expanded, how they expanded, what specific conduct caused them to expand, or how this conduct caused them to expand. Nor does the statement provide a single alleged fact to "plausibly" suggest that the assertion that this conduct did expand access is more than "speculative." *Twombly*, 550 U.S. at 555, 557.

HHC also says that HHC's conduct has led to "investing in physician training and higher quality services"—yet HHC does not suggest, e.g. what investments were made as a result of its conduct, what training was provided, or which specific physician groups benefited from those investments. HHC states that its actions have allegedly resulted in higher quality services, but it does not identify which services improved, which actions of HHC caused them to improve or how they improved. Likewise, HHC asserts that its conduct allegedly "enhanc[ed] coordination of healthcare for the benefit of patients", but omits any facts about how its challenged conduct

enhanced coordination of healthcare, which conduct did so, what the "coordination" involved, or how this alleged coordination benefitted patients. And again, not a single fact is alleged as to either of these assertions that would support a conclusion that they are plausible and not merely speculative.

HHC conclusorily asserts that its conduct allegedly"lower[ed] overall healthcare costs including by increasing the likelihood of risk-based contracting with payers, increasing competition for labor, and providing employment opportunities for physicians that increase their job satisfaction, motivation, and ability to treat patients." Yet, HHC provides no facts to support this contention, such as identifying what conduct allegedly lowered healthcare costs or how they were lowered.[4] Yet again, not a single fact is alleged that makes these contentions more than speculative.

The language of *Twombly* makes clear why these allegations are inadequate. They do not "possess enough heft to 'sho[w] that the pleader is entitled to relief.'" Like the term "conspiracy," the general contentions made by HHC "stop[] short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Twombly*, 550 U.S. at 557. They are no more than "labels and conclusions." 550 U.S. at 555. In the words of this Circuit, they are "bare assertions," in "entirely general terms," without any reference to "any particular activities." *In re Elevator*, 502 F.3d at 50, *Spinner Consulting LLC*, 843 F. App'x at 413.

[4] Moreover, the statements in the letter are incomplete, since HHC states they are "without limitation"[.] If there are other alleged procompetitive effects, Saint Francis is entitled to be apprised of them, now, so that it has notice of HHC's defenses and the ability to take discovery regarding those defenses. *See Town & Country Linen Corp.*, 2020 WL 3472597, at *13 (S.D.N.Y. June 25, 2020) (striking affirmative defenses because they did not "put Plaintiffs on notice of the nature of the[] defenses").

These contentions also fail based on the analysis in numerous cases in this Circuit applying *Twombly* and *GEOMC*. *See, e.g., ICR,* 2023 WL 1463653, at *2; H*axhe Properties, LLC v. Cincinnati Ins. Co.*, 2021 WL 2291101, at *4 (D. Conn. June 4, 2021). In *ICR*, the court struck the defendant's affirmative defenses based on equitable estoppel and unjust enrichment because they were merely "conclusory statement[s]." *ICR*, 2023 WL 1463653, at *2. Such conclusory affirmative defenses do not "meet the plausibility standard articulated in *Twombly* and *Iqbal*." *Id.* Similarly, the court in *Haxhe Properties* struck the defendant's affirmative defense based on waiver and/or estoppel because it was "too conclusory to meet the applicable pleading standard." H*axhe Properties*, 2021 WL 2291101, at *4. The court went on to strike multiple other affirmative defenses, including breach and misrepresentation, because the defendant failed to plead sufficient facts. *Id.*

In *Town & Country Linen Corp.*, 2020 WL 3472597 (S.D. N.Y. June 25, 2020), the defendant asserted that the plaintiffs' claims were barred because of "acquiescence, equitable estoppel, unclean hands, laches, and/or waiver". *Id.* at *13. The court struck these affirmative defenses because "they d[id] not plead facts that would make out a single affirmative defense for any particular claim[.]" *Id.* at *13. Without such factual allegations, the plaintiffs would be left "guessing as to which affirmative defenses [the defendants] intend[ed] to rely on, and how they intend[ed] to prove each of them." *Id.*

In *Jablonski v. Special Couns., Inc*., 2020 WL 1444933, at *3 (S.D.N.Y. Mar. 25, 2020), the court struck numerous affirmative defenses, including administrative exhaustion, collateral estoppel, waiver, failure to include in administrative charge, failure to timely file administrative complaint, and business necessity, for failure to plead sufficient facts in support of them. Like here, the defendant in that case failed "to provide any factual support" for its defenses even though

the defenses involved "facts that should be known to the defendant." *Id.* Importantly, in *Jablonski*, the defendant's defense of "business necessity" was analyzed as a true affirmative defense because "the defendant may rebut a plaintiff's prima facie showing by demonstrate[ing] that the challenged practice is job related for the position in question and consistent with business necessity." *Id.* at *4 (quoting *Gulino v. New York State Educ. Dep't*, 460 F.3d 361, 382 (2d Cir. 2006)). That burden-shifting standard is similar to the one applicable to HHC's Fifth, Sixth, and Seventh Affirmative Defenses. *See US Airways, Inc.*, 938 F.3d at 55. Thus, like the defendant in *Jablonski*, HHC was required, but failed, to plead sufficient facts in support of those defenses.

HHC's reliance in its letter on this Court's ruling in *Alfonso v. FedEx Ground Package Sys., Inc.*, 2022 WL 4545888, at *3 (D. Conn. Sept. 29, 2022) is misplaced. In that case, the plaintiffs argued that the defendant's fourteenth affirmative defense was not cognizable under the Connecticut Minimum Wage Act. This Court found that the defendant's defense presented a "complex issue of statutory interpretation not properly resolved on the present motion to strike" and related to "the same exact actions central to Plaintiffs' complaint[.]" *Id.* at *4. Here, HHC's Fifth, Sixth, and Seventh Affirmative Defenses do not present a complex issue of statutory interpretation. Nor are they based on any facts in Saint Francis' complaint. The Complaint references cost and risk-sharing, but does not address the specific impact of physicians acquisitions on cost or the ability to assume risk, and does not remotely address HHC's other assertions.

While the application of *Twombly* to affirmative defenses is "context specific" (*GEOMC*, 918 F.3d at 98), the context here makes clear that HHC's pleadings are insufficient. Since the filing of Saint Francis' Amended Complaint occurred over a year ago, HHC has had ample time to analyze and prepare its affirmative defenses. There is no reason why, if there are facts that make these defenses plausible, they cannot be asserted now. That is especially true since HHC's Fifth,

Sixth, and Seventh Affirmative Defenses all relate to the activities of HHC. Thus, HHC should have no difficulty explaining in detail why the activities it has conducted present significant benefits, if, indeed, that is the case. That information is in its possession. *See* H*axhe*, 2021 WL 2291101, at *4 (granting motion to strike where the information relevant to the defense "should be readily available to the Defendant").

C. HHC's Deficient Affirmative Defenses Prejudice Saint Francis.

The alternative to striking these defenses is for Saint Francis to send out a series of general contention interrogatories and document requests seeking discovery as to what these affirmative defenses might be, and then, in later waves of discovery, asking for documents relating to those defenses. That process will not only delay progress in this case by many months, but will also generate substantial discovery that may well be unnecessary if there is no plausible factual basis for one or more of these defenses.[5] Avoidance of unnecessary, expensive discovery was a primary basis for the Supreme Court's ruling in *Twombly*:

> Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 459 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." See also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel

[5] Saint Francis is now promulgating new discovery pending a decision on its motion, since none of the contentions contained in HHC's letter are covered by Saint Francis' First Request for Production of Documents to Defendants. While those requests address risk-sharing and cost generally, they do not seek documents relating to the effect on costs or risk-sharing of HHC's physician acquisitions. Nor do they address in any way any of the other categories contained in HHC's letter. They do not, and cannot, address any other unnamed categories of alleged procompetitive rationales or justifications that have not yet been articulated.

> against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint")

Twombly, 550 U.S. at 558-59. That admonition of the Supreme Court applies to defenses as much as it does to the original claims themselves. *See GEOMC,* 918 F.3d at 98-99.

D. The Fifth Affirmative Defense Fails to State a Claim

HHC's Fifth Affirmative Defense – pleading "good faith" and "legitimate business interests" – also fails because it is not a proper affirmative defense to Saint Francis' antitrust claims. It is not enough that a practice was "legitimate" or "in good faith" in order to be an affirmative defense to restraint of trade claim; it must benefit competition in the market, *i.e.*, to be "procompetitive."

The Supreme Court has made clear that the relevant issue to be addressed under the antitrust laws is the impact on competitive conditions. "Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead it focuses directly on the challenged restraint's impact on competitive conditions." *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 688 (1978). Therefore, the mere existence of a "legitimate business interest" will not suffice. As the Second Circuit has made clear, any defenses must involve "procompetitive" justifications or rationales. *U.S. Airways*, *supra*; *United States v. Visa*, *supra*. "Anticompetitive conduct is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." *United States v. Phil. Nat'l Bank,* 374 U.S. 321, 371 (1963).

The mere fact that HHC acted in "good faith" or has a "legitimate business interest" in certain activities does not indicate that such an interest will offset anticompetitive effects. As the Ninth Circuit explained in *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 791 (9th Cir. 2015), as one ground for its rejection of a "patient care" defense, "[t]he

Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate." For similar reasons, the Supreme Court in *National Society of Professional Engineers, supra*, rejected as a matter of law a defense that the challenged restraint increased safety. The district court in *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1288-89 (N.D. Ill. 1989), *aff'd* 898 F. 2d 1278 (7th Cir. 1990) explained that the court's "exclusive role [was] to evaluate the merger's effect on competition for the relevant market and no more."

Accordingly the Fifth Affirmative Defense is inadequate as a matter of law and should be dismissed.

E. The Court Should Exercise its Discretion to Strike HHC's Affirmative Defenses

Under Fed. R. Civ. P. 12(f)(1) and (2), the court may strike from a pleading an insufficient defense "on its own" or "on motion . . . within 21 days after being served with the pleading." HHC filed its Answer on February 27, 2023 and Saint Francis inadvertently failed to file this Motion within 21 days after being served with HHC's Answer. Saint Francis apologizes for filing this motion one week late, but requests this Court to nevertheless entertain this motion, as many courts have done under similar circumstances. The Court "may nonetheless entertain the motion because [t]he authority given the court by the rule to strike an insufficient defense on its 'own initiative at any time' has been interpreted to allow the district court to consider untimely motions to strike and to grant them if doing so seems proper." *F.T.C. v. Instant Response Sys., LLC*, 2014 WL 558688, at *2 (E.D.N.Y. Feb. 11, 2014) (quotations omitted) (citing 5C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1380 (3d ed. 2004); Fed. R. Civ. P. 12(f)(1); *UMG Recordings, Inc. v. Lindor*, 531 F.Supp.2d 453, 458 (E.D.N.Y.2007); *FDIC v. Pelletreau & Pelletreau*, 965 F.Supp. 381, 390 (E.D.N.Y.1997)).

"Courts have read Rule 12(f) to allow a district court to consider a motion to strike at any point in a case, reasoning that it is considering the issue of its own accord despite the fact that its attention was prompted by an untimely filed motion." *Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1399 (7th Cir. 1991) (collecting cases, including *Stonybrook Tenants Ass'n, Inc. v. Alpert*, 29 F.R.D. 165, 168 (D. Conn. 1961)). *See also Oregon Laborers-Employers Trust Funds v. Pacific Fence and Wire Co.*, 726 F.Supp.786, 788 (D. Ore.1989) ("[A] party has the right to challenge the legal sufficiency of a defense at any time."). Here, the one week delay in Saint Francis' filing certainly has not caused any prejudice to HHC.[6] Saint Francis respectfully requests that the Court strike HHC's affirmative defenses on its own accord under Rule 12(f)(1), despite Saint Francis' delay in filing this Motion.

V. CONCLUSION

For the reasons stated herein, Saint Francis respectfully requests that the Court grant its Motion to Strike HHC's Fifth, Sixth and Seventh Affirmative Defenses.

Date: March 27, 2023

Respectfully submitted,

/s/William S. Fish, Jr. (with permission)

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[6] Significantly, HHC responded to Saint Francis' most recent letter on this issue regarding its contentions only yesterday. *See* Exhibit D.

/s/David A. Ettinger
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2023, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/*David A. Ettinger*
David A. Ettinger

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

Exhibit	Description
A	March 1, 2023 Ettinger letter to Dillickrath re Affirmative Defenses
B	March 7, 2023 Weissman letter to Ettinger responding to March 1 letter
C	March 10, 2023 Ettinger letter to Weissman responding to March 7 letter
D	March 26, 2023 Weissman email to Ettinger re Affirmative defenses

EXHIBIT A

HONIGMAN®

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March 1, 2023

Thomas Dillickrath
Sheppard Mullin Richter & Hampton LLP
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006-6801

Re: ***Saint Francis Hospital and Medical Center, Inc. v Hartford HealthCare Corporation, et al.,*** **Case No. 22-cv-00050**

Affirmative Defenses

Dear Tom,

We have reviewed your Answer and Affirmative Defenses, and are surprised and disappointed to see how little information they provide. In particular, your 6th defense (references to practices as "procompetitive"), 7th defense (restraints are "ancillary to legitimate procompetitive activities"), 11th defense (any injuries were "proximately caused by [Saint Francis'] own actions"), 12th defense (Saint Francis' losses "resulted from acts or omissions of third parties"), 17th defense (claims barred by "estoppel, waiver, laches and/or unclean hands"), 18th defense (claims are "moot"), 19th defense (the doctrines of "collateral estoppel and/or res judicata apply here"), 20th defense (any recovery would result in Plaintiff being "unjustly enriched") and 21st defense ("Plaintiff has failed to mitigate its damages") are completely conclusory, without the allegation of a single fact supporting them. This is completely insufficient under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and the Second Circuit's application of *Twombly* to affirmative defenses in *GEOMC Co., Ltd. v. Calmare Therapeutics Inc.*, 918 F. 3d 92 (2d Cir. 2019).

Please let us know as soon as possible if you agree within seven days to supplement these defenses by providing the specific factual allegations on which you rely in raising each of these defenses. If you are not willing to do so, we will need to file a motion to strike all of these defenses or for a more definite statement.

Your lack of specificity also makes it impossible for us at this time to take discovery with regard to these defenses. We will report this to the Court in our Friday Joint Report.

HONIGMAN®

Very truly yours,

HONIGMAN LLP

s/David A. Ettinger
David A. Ettinger

c: Joshua Obear
Joseph Antel
Stephen Weissman
Karen Staib
Leo Caseria
Eric Stock
Jamie France
William Fish

EXHIBIT B

GIBSON DUNN

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March 7, 2023

VIA ELECTRONIC MAIL

David Ettinger
Honigman LLP
660 Woodward Avenue
2290 First National Bldg.
Detroit, MI 48226

Re: *Saint Francis Hospital & Medical Center, Inc. v. Hartford HealthCare Corp. et al.*, C.A. No. 22-cv-00050-SVN

Dear David:

We write on behalf of Hartford HealthCare in response to your March 1, 2023 letter regarding the defenses stated in Hartford HealthCare's Answer. We respectfully disagree with the position you set out in that letter, as well as in our subsequent meet and confer on March 3, 2023. For the reasons below, Hartford HealthCare's defenses are adequately pled under the Federal Rules of Civil Procedure and relevant case law.

To start, the Second Circuit's decision in *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92 (2d Cir. 2019), applied the plausibility standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), to "affirmative defenses." An affirmative defense "is defined as a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's . . . claim, *even if all allegations in the complaint are true*." *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (emphasis added) (citation omitted). Where defenses negate allegations in a complaint or elements of Plaintiff's claims, such defenses do not constitute "affirmative defenses" and instead are treated as specific denials, which are not subject to *Twombly*. *See, e.g.*, *Town & Country Linen Corp. v. Ingenious Designs LLC*, No. 18-CV-5075 (LJL), 2020 WL 3472597, at *10-11 (S.D.N.Y. June 25, 2020) ("[A] denial is not required to be pled in conformance with *GEOMC*."); *Jablonski v. Special Counsel, Inc.*, No. 1:16-CV-05243 (ALC), 2020 WL 1444933, at *5 (S.D.N.Y. Mar. 25, 2020).

Here, most of the defenses identified in your March 1 letter are not affirmative defenses. For example, the sixth,[1] seventh,[2] eleventh,[3] and twelfth[4] defenses in Hartford HealthCare's Answer are not affirmative defenses, either under Federal Rule of Civil Procedure 8(c)(1) or applicable case law. *E.g., Jablonski*, 2020 WL 1444933, at *5 (treating damages causation and speculative damages defenses as specific denials and denying motion to strike); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984) (stressing that the plaintiff bears the burden of proving that conduct violated the Sherman Act "because it unreasonably restrained competition. That burden necessarily involves an inquiry into the actual effect of the [conduct] on competition . . . ."). Indeed, through these asserted defenses, Hartford HealthCare is not raising new facts and arguments that would defeat Plaintiff's claim on the assumption that all allegations in the Amended Complaint are in fact true. Rather, Hartford HealthCare is effectively denying allegations already repeatedly cited in Plaintiff's Amended Complaint. These include Plaintiff's allegations that Hartford HealthCare's conduct unreasonably restrained trade, was not undertaken to increase quality or efficiency, and directly caused Plaintiff's alleged injuries. Your effort to impose the *Twombly* plausibility standard under *GEOMC* on these defenses in particular is therefore mistaken.

To be clear, Hartford HealthCare denies the Amended Complaint's claims about Hartford HealthCare's purported anticompetitive conduct and lack of procompetitive effects, including the allegations supporting Plaintiff's remaining claims about hiring or acquiring physicians and then integrating them with the alleged effect of increasing in-network referrals. Not only are the Amended Complaint's allegations about anticompetitive conduct and lack of procompetitive benefits not supported by facts, but they are belied by the

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[1] "Any conduct engaged in by Hartford HealthCare was not anticompetitive and cannot support a claim sounding in antitrust. Indeed, at all times Hartford HealthCare's actions and practices that are the subject of the Complaint were lawful, procompetitive, justified under the rule of reason, and caused no injury to competition." Sixth Defense, Defs.' Answer to Am. Compl. at 110, Feb. 27, 2023.

[2] "Insofar as Plaintiff alleges that Hartford HealthCare violated the antitrust rule of reason, such claims are barred, among other reasons, because the Complaint does not allege a properly defined relevant market, because any restraints complained of are ancillary to legitimate, procompetitive activities, and because the Complaint does not allege how procompetitive effects of Hartford HealthCare's legitimate activities are outweighed by anticompetitive effects." Seventh Defense, Defs.' Answer to Am. Compl. at 110, Feb. 27, 2023.

[3] "Any injuries, losses, or damages suffered by the Plaintiff were proximately caused by its own actions, regardless of whether contributory, negligent, incompetent, careless, or reckless." Eleventh Defense, Defs.' Answer to Am. Compl. at 111, Feb. 27, 2023.

[4] "Plaintiff's injuries, losses, or damages (if any) which were not proximately caused by its own actions resulted from the acts or omissions of third parties over whom Hartford HealthCare had no control. The acts of such third parties constitute intervening or superseding causes of the harm, if any, suffered by the Plaintiff." Twelfth Defense, Defs.' Answer to Am. Compl. at 111, Feb. 27, 2023.

procompetitive effects that Hartford HealthCare's activities in fact have had on promoting competition in the marketplace, including, without limitation, by expanding access to healthcare services, investing in physician training and higher quality services, enhancing coordination of healthcare for the benefit of patients, lowering overall healthcare costs including by increasing the likelihood of risk-based contracting with payers, increasing competition for labor, and providing employment opportunities for physicians that increase their job satisfaction, motivation, and ability to treat patients.

And, even if the sixth, seventh, eleventh, and twelfth defenses in the Answer were "affirmative defenses," Judge Nagala's recent decision in *Alfonso* underscores that there would be no basis to strike them anyway, among other reasons because the actions at issue in these defenses rely on the same actions central to Plaintiff's amended complaint. *See Alfonso v. FedEx Ground Package*, 3:21-CV-1644 (SVN), 2020 WL 4545888, at *4 (D. Conn. Sept. 29, 2022) (determining that an affirmative defense that relies on "the same exact actions central to Plaintiffs' complaint . . . requires no further factual pleading to be plausible under *Twombly* and *Iqbal*"). Likewise, your assertion of potential unfair surprise and prejudice is not well taken given the stage of the case, and because Plaintiff already has propounded a number of discovery requests seeking facts about these defenses and will have ample opportunity for further discovery. *Id.* at * 5 ("[T]he activities potentially subject to the defense are the same activities for which the Plaintiffs seek [damages], so inclusion of this defense will not expand the scope of the litigation, require Plaintiffs to conduct significant or late-stage discovery, or otherwise delay the proceedings of the case.").

Your position about Hartford HealthCare's other defenses identified in your letter is equally misplaced. The Second Circuit recognized that applying the plausibility standard to even an affirmative defense is a "context-specific" task. *GEOMC*, 918 F.3d at 98. "Accordingly, in determining whether to apply [the] plausibility standard or a relaxed version courts . . . consider . . . the 'nature of the affirmative defense,' i.e., whether factual support is readily available." *Jablonski*, 2020 WL 1444933, at *2 (citing *GEOMC*, 918 F.3d at 98). Here, the facts to support the seventeenth,[5] twentieth,[6] and twenty-first[7] defenses in Hartford HealthCare's Answer relate to Plaintiff's behavior. For example, specific facts relating to when Plaintiff first learned of each aspect of the challenged conduct (including Hartford HealthCare's hiring of physicians many months if not years before suit was filed), the reasons Plaintiff sat on its hands and raised no concern with Hartford HealthCare or the

[5] "Plaintiff's claims are barred, in whole or in part, by the doctrines of estoppel, waiver, laches, and/or unclean hands." Seventeenth Defense, Defs.' Answer to Am. Compl. at 111, Feb. 27, 2023.

[6] "Plaintiff would be unjustly enriched if allowed to recover any relief claimed to be due." Twentieth Defense, Defs.' Answer to Am. Compl. at 112, Feb. 27, 2023.

[7] "Plaintiff has failed to mitigate its damages, if any, and recovery should be reduced or denied accordingly." Twenty-First Defense, Defs.' Answer to Am. Compl. at 112, Feb. 27, 2023.

physicians, the extent and details of Plaintiff's own internal missteps and misdeeds that caused or contributed to the claimed effects of the challenged conduct, and the extent to which Plaintiff engaged in conduct no different from that complained of against Hartford HealthCare "are likely in the possession of [Plaintiff] at this stage" and "can be readily explored through discovery," so further factual allegations in the Answer are not required to support these defenses. *Haxhe Properties, LLC v. Cincinnati Ins. Co.*, No. 3:20-CV-01594 (KAD), 2021 WL 2291101, at *3-4 (D. Conn. June 4, 2021) (permitting defendants' affirmative defense alleging plaintiffs failed to mitigate damages because the facts to support such a defense were likely in plaintiffs' possession and could be readily explored through discovery); *Jablonski*, 2020 WL 1444933, at *4 (denying motion to strike defenses regarding damages "since the factual allegations necessary to support such defenses are likely not readily available to Defendant").

In any event, as to information already available to Hartford HealthCare, Hartford HealthCare's prior submissions regarding Plaintiff's inability to show antitrust injury and its failure to invest and compete, including for labor, already have given Plaintiff ample notice of some of the details of how Plaintiff would be unjustly enriched if allowed to recover any relief in this case and examples of how it failed to mitigate alleged damages. *See Wu v. Sagrista*, No. 19-81203-CIV, 2020 WL 13539901, at *2 (S.D. Fla. June 12, 2020) (finding that an affirmative defense, when combined with the defendants' motion to dismiss, was "more than sufficient to put the Plaintiff on notice and satisfy the pleading requirements of Rule 8" and *Twombly*).

Finally, while all the above principles apply to Hartford HealthCare's eighteenth[8] and nineteenth[9] defenses as well, we have revisited those specific defenses, as well as the estoppel, waiver, and unclean hands defenses, in a good faith attempt to address your letter. We hereby inform Plaintiff that we are withdrawing these five defenses from Hartford HealthCare's Answer.

We remain available to meet and confer and are open to considering any legal precedent that you believe supports your positions.

[8] "Plaintiff's claims should be dismissed to the extent they are moot." Eighteenth Defense, Defs.' Answer to Am. Compl. at 112, Feb. 27, 2023.

[9] "Plaintiff's claims are barred, in whole or in part, by the doctrines of collateral estoppel and/or res judicata." Nineteenth Defense, Defs.' Answer to Am. Compl. at 112, Feb. 27, 2023.

Sincerely,

/s/ Stephen Weissman

cc: Thomas Dillickrath

EXHIBIT C

HONIGMAN®

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March 10, 2023

Stephen Weissman
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20036-5306

Re: Saint Francis Hospital & Medical Center, Inc. v. Hartford HealthCare Corp., et al.

Dear Stephen,

This is in response to your March 7 letter.

We believe that we no longer need to pursue our dispute with regard to most of the affirmative defenses. However, you should amend your answer to strike the defenses that you have agreed to withdraw, so that the record is clear.

We still have a dispute as to the sixth, seventh and twelfth defenses. Indeed, the case law you cite makes it crystal clear that these conclusory statements are inadequate. Your recitation of a few more specific assertions with regard to the sixth defense is inadequate, both because these statements are still extremely conclusory and because they are "without limitation". Therefore, apparently, you reserve the right to raise yet unknown issues under these defenses.

On reflection, we believe the same deficiency exists with regard to your fifth defense. Additionally, the assertions in the fifth defense are legally inadequate to create an antitrust defense, since the antitrust laws do not recognize "good faith" or "legitimate business interests", as defenses.

Unless you agree to provide significant specific detail in support of these defenses, we will need to file a motion. We will also inform the Court that this dispute will likely affect the discovery deadlines.

If you think there is a point in discussing this further, we are happy to do so.

HONIGMAN®

Very truly yours,

HONIGMAN LLP

/s/ David A. Ettinger

David A. Ettinger

EXHIBIT D

Roberts, Nicole

From: Weissman, Stephen <SWeissman@gibsondunn.com>
Sent: Sunday, March 26, 2023 5:51 PM
To: Ettinger, David A.; France, Jamie; Thomas Dillickrath; Joseph Antel; Obear, Joshua; lcaseria@sheppardmullin.com; Patrick Fahey; Karen Staib; Stock, Eric J.
Cc: William Fish , Jr.; Burandt, Nicholas A.
Subject: RE: Affirmative defenses
Attachments: 2023.03.07 Letter from S. Weissman to D. Ettinger re HHC Defenses.pdf

[EXTERNAL EMAIL]

David, getting back to you on this. We don't agree with the positions you take in your letter and stand by our March 7 letter, attached. Please let us know if you want to discuss—we are available to meet & confer more if you think productive.

Best, Steve

Stephen Weissman

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From: Ettinger, David A. <DEttinger@honigman.com>
Sent: Friday, March 10, 2023 10:05 AM
To: Weissman, Stephen <SWeissman@gibsondunn.com>; France, Jamie <JFrance@gibsondunn.com>; Thomas Dillickrath <TDillickrath@sheppardmullin.com>; Joseph Antel <JAntel@sheppardmullin.com>; Obear, Joshua <JObear@gibsondunn.com>; lcaseria@sheppardmullin.com; Patrick Fahey <PFahey@goodwin.com>; Karen Staib <kstaib@goodwin.com>; Stock, Eric J. <EStock@gibsondunn.com>
Cc: William Fish , Jr. <wfish@hinckleyallen.com>; Burandt, Nicholas A. <NBurandt@honigman.com>
Subject: Affirmative defenses

[WARNING: External Email]

Please see attached.

David A. Ettinger

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