UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

FEDERAL TRADE COMMISSION, *Plaintiff*, v. NOVANT HEALTH, INC. and COMMUNITY HEALTH SYSTEMS, INC., *Defendants*.	Case No. 5:24-cv-00028-KDB-SCR **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' CONSTITUTIONAL AFFIRMATIVE DEFENSES**

Defendants Novant Health, Inc. ("Novant") and Community Health Systems, Inc. ("CHS") have asserted all available affirmative defenses in this case, including challenges to the constitutionality of the underlying administrative proceedings. Defendants have, of course, also raised these same defenses in their answers to the complaint in the administrative proceeding—although history shows there is virtually no scenario in which the merits of this transaction will ever be tried in the administrative proceeding nor these defenses heard in that forum.

But the remote availability of the administrative proceeding to raise these defenses is no basis to sustain the motion to strike. As the Supreme Court recognized one year ago, these defenses concern whether defendants like Novant and CHS are "'being subjected' to 'unconstitutional agency authority'—a 'proceeding by an unaccountable ALJ'"—the very kind of injury that the Supreme Court said is "a here-and-now injury" that "is impossible to remedy once the [administrative] proceeding is over." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023) (citing *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183 (2020)). The Supreme Court in

Axon held it is entirely proper for federal district courts to hear these constitutional claims against the Federal Trade Commission ("FTC") and not require Defendants to endure an administrative proceeding (however unlikely it is that such a proceeding will ever occur, given business realities). Indeed, this Court is the constitutional bulwark against unconstitutional governmental action that *Axon* contemplated. And as it pertains to assessing the merits of the underlying merger's lawfulness, this is the only court whose constitutionality to assess the merits is unquestioned.

Regardless, Plaintiff FTC's motion to strike these defenses must fail for a simple reason: Defendants are required under Rule 8(c) of the Federal Rules of Civil Procedure to assert these affirmative defenses here or risk waiving them; accordingly, Novant and CHS properly raised them in their Answers, and they sufficiently pled them for purposes of Rule 12(f) of the Federal Rules of Civil Procedure—a fact the FTC does not contest. That is all that was required of them and that is all the Court need decide at this stage of this litigation.

The merits of Novant and CHS's constitutional defenses can be argued by the parties in pretrial briefs or, should the Court desire, in separate briefing. But to be clear, there is no need for the Court to decide on these larger, constitutional questions on this motion to strike. That is premature and unnecessary. All that the Court needs to decide now is whether the defenses were adequately pled. In both this and the administrative proceedings, Novant and CHS have adequately pled their affirmative defenses and they should not be struck here.

I. BACKGROUND

The FTC filed a Complaint for a Temporary Restraining Order and Preliminary Injunction pursuant to Section 13(b) of the Federal Trade Commission Act ("the Complaint") on January 25, 2024 to enjoin Novant's proposed acquisition of two hospitals and related assets from CHS. ECF No. 2. Concurrently, the FTC initiated administrative complaint proceedings before a Federal

Trade Commission administrative law judge ("ALJ"). Under FTC rules for administrative proceedings, an ALJ, or one or more commissioners sitting as an ALJ, presides over the administrative proceeding. 16 C.F.R. § 3.42 (2023). As a result of recent changes to its rules for administrative proceedings, the presiding ALJ no longer issues an initial decision in a merger case, but rather a "recommended" decision only. 16 C.F.R. § 3.51 (2023).[1]

On February 8, 2024, Novant and CHS filed their respective Answers and Defenses in both this Court and the ALJ administrative proceeding. In both answers, Novant and CHS pled a number of affirmative defenses in order to preserve them as part of the case, including defenses related to the constitutionality of the scope of the FTC's power and its role in the administrative proceeding. ECF Nos. 45 and 46. On February 29, 2024, the FTC moved to strike the affirmative constitutional defenses from Novant and CHS's Answers filed before this Court. ECF No. 59.

II. ARGUMENT

A. Motions to Strike Are Disfavored

Motions to strike, as the FTC concedes, "are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy … often sought by the movant simply as a dilatory tactic." *See Shanti Wines LLC v. Shanti Elixirs LLC*, No. 1:22-cv-00262-MR, 2023 WL 5620736, at *1 (W.D.N.C. Aug. 30, 2023) (denying motion to strike affirmative defenses) (quoting *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001). It follows that motions to strike brought pursuant to Rule 12(f) "are to be granted infrequently." *Renaissance Greeting*

[1] An appeal of the ALJ's recommended decision is heard by the Commission itself—which voted out the Complaint in this proceeding and the administrative proceeding—and which reviews the ALJ's findings of fact and conclusions of law effectively under a *de novo* standard of review. 16 C.F.R. § 3.54(a) (2023) ("In rendering its decision, the Commission will adopt, modify, or set aside the recommended findings, recommended conclusions, and proposed rule or order contained in the recommended decision.").

Cards, Inc. v. Dollar Tree Stores, Inc., 227 F. App'x 239, 247 (4th Cir. 2007). Ultimately, a party's ability to strike an affirmative defense comes with a high burden. As this Court has held, "any doubts about whether a [motion to strike] should be granted should be resolved in favor of the non-moving party." *GLF Constr. Corp. v. Heartland Concrete, LLC*, No. 1:22-CV-97-MR-WCM, 2022 WL 5027618, at *2 (W.D.N.C. Oct. 4, 2022). *See also Nat'l Credit Union Admin. v. First Union Cap. Markets Corp.*, 189 F.R.D. 158, 162-64 (D. Md. 1998) (deciding that a motion to strike should be granted "only when the pleading to be stricken has *no possible relation* to the controversy") (emphasis added) (quoting *Brown & Williamson Tobacco Corp. v. United* States, 201 F.2d 819, 822 (6th Cir. 1953)).

The FTC has not met that high burden.[2]

B. Defendants Have Adequately Pled Their Affirmative Defenses

The FTC argues that "the only courts that have ruled on this issue" granted motions to strike the defendants' constitution-based affirmative defenses, but these cases should be discounted here. One of those cases is *FTC v. Meta Platforms Inc.*, No. 5:22-cv-04325-EJD, 2022 WL 16637996 (N.D. Cal. Nov. 2, 2022)—decided before *Axon*, in which the court ruled that "Defendants' constitutional defenses are inadequately pled." *Id*. at *7.[3] The FTC does not contend, however, that Novant and CHS inadequately pleaded their affirmative defenses. Nor could it.

[2] The FTC's motion to strike also fails to comply with Local Rule 7.1(c), which requires a brief to be filed contemporaneously with a motion.

[3] The defendants in *Meta Platforms* alleged two bias-related defenses, to which, before striking them, the court devoted five pages of analysis. *Id*. at *2-7. When it came to considering the defendants' constitutional defenses, the court said only that its "assessment of these constitutional defenses overlaps significantly with its analysis of Defendants' bias-related defenses …." *Id*. at *7. It then proceeded to rule that the constitutional defenses were inadequately pled, rendering its brief "assessment" of the defenses *dicta*. Novant and CHS have raised no bias-related defenses here.

Under the "liberal" pleading standards applicable to affirmative defenses, Novant and CHS have more than sufficiently pled both the underlying legal theory behind each defense and how each is "connected to the case at hand." *See Sedgewick Homes LLC v. Stillwater Homes Inc.*, No. 516-CV-00049, 2016 WL 4499313, at *2 (W.D.N.C. Aug. 25, 2016).

Moreover, the FTC altogether overlooks Rule 8(c), which provides that a defendant "must affirmatively state any avoidance or affirmative defense." Failure to do so generally constitutes waiver. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir. 1999). Novant and CHS at present, and at the very least, seek to preserve the constitutional challenges presented by their affirmative defenses. Additionally, as the FTC well knows, the answers filed in §13(b) proceedings routinely mirror those filed in the underlying administrative proceeding, where Novant and CHS have pled these same affirmative defenses.

In short, Federal Rule of Civil Procedure 12(f) has a narrow focus. It does not invite the Court to review the merits of a defense, only whether a defense as pled is "insufficient." The FTC does not contest that point; it claims instead that the constitutional defenses are irrelevant or impertinent. That claim cannot withstand consideration of the Supreme Court's reasoning and ruling in *Axon*.

C. *Axon's* Reasoning Requires Denial of the Motion

It is telling that the FTC neither cites nor discusses *Axon*. In that case, as here, the FTC brought an administrative action to prevent Axon's purchase of a competitor. Unlike here, Axon brought suit against the FTC in district court, alleging that the structure of the FTC and its adjudicative process are constitutionally infirm. The district court dismissed Axon's claims for lack of subject matter jurisdiction, the Ninth Circuit affirmed, and the Supreme Court reversed, holding:

> [T]hose claims cannot receive meaningful judicial review through the FTC Act …. They are collateral to any decisions the Commission[] could make in individual enforcement proceedings. And they fall outside the Commission[']s] sphere of expertise. *Our conclusion follows: The claims are not "of the type" the statutory review schemes reach. A district court can therefore review them*.

Axon Enter., Inc., 598 U.S. at 195-96.[4]

In light of *Axon*, it cannot seriously be debated that the same theory that could animate an affirmative challenge to the FTC's structure cannot be raised as an affirmative defense. The FTC instead claims that the defenses are irrelevant or impertinent, relying on two out-of-circuit district court decisions, *Meta Platforms Inc.*, 2022 WL 16637996, and *FTC v. IQVIA Holdings Inc.*, No. 23 Civ. 06188 (ER), 2023 WL 7152577 (S.D.N.Y. Oct. 31, 2023). While in both cases the district courts struck similar affirmative defenses, the short answer to those authorities—not mentioned by the FTC in its motion to strike—is that the first case (*Meta*) was decided *before* the Supreme Court ruled in *Axon* and the second (*IQVIA*) relied extensively on the *Meta* court's flawed reasoning to reach the same flawed result. Given the post-*Axon* clarity that parties can indeed affirmatively challenge the "here-and-now injury" potentially caused by being subject to administrative proceedings those parties believe to be unconstitutional, *Axon Enter., Inc.*, 598 U.S. at 190, the corollary is that those same challenges may be raised as affirmative defenses.[5]

Axon notwithstanding, there are at least two problems with the FTC's position, one substantive and one procedural, such that accepting the FTC's position would yield the very result that *Axon* held defendants like Novant and CHS need not suffer—that is, in order to raise their constitutional claims against the FTC they would need to suffer the very administrative proceedings they claim are unconstitutional. First, the *substantive* shortcoming to the FTC's

[4] All emphases are added unless otherwise indicated.

[5] The FTC does not contend, rightly, that the ability to plead affirmative causes of action precludes the right to defend on those same grounds.

position is that, as a practical matter, this Section 13(b) proceeding will determine whether Novant's acquisition of the CHS hospitals takes place—a business reality that other courts have candidly acknowledged. *E.g.*, *FTC v. Great Lakes Chem. Corp.*, 528 F.Supp. 84, 86 (N.D. Ill. 1981) ("[T]he grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger"). Indeed, courts have called a Section 13(b) injunction "an extraordinary and drastic remedy" precisely because "it may prevent the transaction from ever being consummated." *FTC v. Microsoft Corp.*, No. 23-cv-02880-JSC, 2023 WL 4443412, at *8 (N.D. Cal. Jul. 10, 2023) (quoting *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980)); *see also Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (same); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 511 (3d Cir. 1969) (same); *FTC v. Foster,* No. CIV 07-352 JBACT, 2007 WL 1793441, at *51 (D.N.M. May 29, 2007) ("No substantial business transaction could ever survive the glacial pace of an FTC administrative proceeding."). In unconsummated merger cases, like this one, the merger lives or dies based on the preliminary injunction proceeding (including any appeal from that proceeding). In those cases, as will be the case here, the administrative proceeding never takes place.

Given this, the constitutional defenses are absolutely relevant to the preliminary injunction proceeding. If, as *Axon* instructs, parties otherwise subject to FTC proceedings have a right to go to court to avoid "the 'here-and-now' injury of subjection to an unconstitutionally structured decisionmaking process," 598 U.S. at 192, then it is equally incumbent upon a court presiding over a Section 13(b) action to hear like challenges if raised as affirmative defenses. The bottom line is that, in light of *Axon*, it simply cannot be said for Rule 12(f) purposes that the constitutional

defenses have "no possible relation to the controversy." *Nat'l Credit Union Admin.*, 189 F.R.D. at 162-64.[6]

It is all the more important not to strike these defenses in this proceeding because the FTC argues, in effect, that this 13(b) proceeding is a mere placeholder while the "real trial" awaits in the administrative proceeding. But that is the very administrative proceeding that is constitutionally infirm, as alleged in the affirmative defenses. If the Court accepts the FTC's motion to strike *and* the FTC's claim that this proceeding is not much more than a mere speed bump on the way to the administrative proceeding, then the Court will deprive Defendants of the opportunity to raise in federal court the very claims that *Axon* held must be provided to parties subject to FTC enforcement actions and would thereby facilitate the FTC's effort to muzzle Novant and CHS's claims and subject them to that very constitutionally infirm proceeding.

Second, *procedurally*, the FTC's argument is, at best, premature. Whatever the merits of Defendants' constitutional defenses, those questions are properly addressed as part of the preliminary injunction briefing (or separate briefing, if the Court prefers). This is especially important given that there is a lack of controlling Fourth Circuit precedent holding that Defendants' constitutional defenses may be disposed of on a motion to strike. After all, as set out by Rule 8(c), defendants "must affirmatively state any avoidance or affirmative defense" and failure to do so generally constitutes waiver. *See Brinkley,* 180 F.3d at 612.

In the context of the preliminary injunction hearing, contrary to the FTC's assertions, Novant and CHS at present merely seek to preserve the constitutional challenges highlighted by

[6] Although the *IQVIA* court found constitutional defenses immaterial, and thus struck them, because the denial of a preliminary injunction "would not stop the FTC from moving forward," 2023 WL 7152577, at *6, its logic blinks reality and should not be followed by this Court. In any case, whether the Court should follow the S.D.N.Y in *IQVIA* as the FTC argues, or the Supreme Court in *Axon* as Novant and CHS contend, is appropriate for later briefing—not a motion to strike.

their affirmative defenses while the Court evaluates whether the FTC has met its burden necessary to obtain a preliminary injunction. But the only question before the Court in regards to this motion to strike is simply whether these affirmative defenses were sufficiently pled for purposes of Rule 12(f) and nothing more. *Axon*, in combination with Rule 8(c), ends the analysis for Rule 12(f) purposes and shuts the door on the FTC's motion to strike.

D. The FTC Faces No Prejudice

The FTC suggests that not to strike the constitutional defenses would be prejudicial because to uphold the defenses would be consequential. But, of course, to uphold any defense is consequential: it blunts the plaintiff's claim for relief. The FTC cannot claim prejudice because it fears losing—especially when it chose to present the issue to the Court for resolution at this stage of the proceedings by filing its motion to strike. Nor can the FTC credibly do so because of "the accelerated schedule in these proceedings." Pl. Mot. to Strike, at 9. ECF No. 59. Scheduling considerations should not trump constitutional considerations (particularly when Defendants have yet to file any dispositive motion). The Constitution protects "the People" against government excesses, so it would stand the Constitution on its head to give primacy to the FTC's self-serving claim that consumers would be left unprotected. After all, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Lux v. Judd*, 842 F.Supp.2d 895, 905 (E.D. Va. 2012); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

CONCLUSION

Novant and CHS have sufficiently pled their affirmative constitutional defenses. For the reasons stated above, Defendants respectfully request the Court deny the FTC's motion to strike.

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Respectfully Submitted,

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