UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of **Otto Bock HealthCare North America, Inc.,** **a corporation,** **Respondent**	**DOCKET NO. 9378** **PUBLIC RECORD VERSION**

OPINION AND ORDER OF THE COMMISSION

By OHLHAUSEN, Acting Chairman:

On December 20, 2017, the Commission issued an administrative complaint alleging that the agreement for Otto Bock HealthCare North America, Inc. ("Otto Bock" or "Respondent") to purchase FIH Group Holdings, LLC ("Freedom") violated Section 5 of the FTC Act, and that consummation of that transaction on September 22, 2017, violated Section 7 of the Clayton Act. According to the Complaint, the agreement and consummated transaction had the effect of substantially reducing competition in the market for microprocessor-controlled prosthetic knees sold to prosthetic clinics in the United States.

In its Answer to the Complaint, *inter alia*, Respondent denied that the merger harmed consumers or competition, Am. Ans. ¶ 57,[1] and asserted affirmative defenses. Respondent's Seventh Affirmative Defense asserts [redacted]

[1] We use the following abbreviations for purposes of this opinion:

Compl.:	Complaint
CCM:	Memorandum of Law in Support of Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense
Am. Ans.:	Amended Answer and Affirmative Defenses of Respondent Otto Bock Healthcare North America, Inc.
ROpp:	Respondent's Opposition to Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense
Shotzbarger Decl.:	Declaration of William Shotzbarger (attached to ROpp)

[redacted] Am. Ans. at 30.

At this time, we consider Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense, which was filed pursuant to Commission Rule 3.22(a). *See* 16 C.F.R. § 3.22(a) (permitting motions to strike); *see also* Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense . . . ."). Complaint Counsel argue that a [redacted] does not affect the legality of the merger agreement between Otto Bock and Freedom or the consummated merger. CCM at 2. According to Complaint Counsel, Respondent's affirmative defense is improper because Respondent cannot prove any set of facts about [redacted] that would foreclose liability for possible antitrust violations that occurred when the transaction was completed and Respondent took control of its merger partner. *Id.* at 3. Complaint Counsel seek an order striking Respondent's Seventh Affirmative Defense and precluding Respondent from raising [redacted] as a defense to the allegations in the Complaint.

Respondent argues that because [redacted], the acquisition will not substantially lessen competition. ROpp at 3-4, 6. Respondent explains that it acquired Freedom on September 22, 2017, and received inquiries about the transaction from the FTC within a week. According to Respondent, [redacted]. *Id.* at 4, 5 n.5; Shotzbarger Decl., Exh. C. Respondent also states that it [redacted] ROpp at 4; Shotzbarger Decl., Exh. D [redacted] According to Respondent, whether the acquisition will substantially lessen competition "depends on a forward-looking evaluation," ROpp at 2, and [redacted] the acquisition of Freedom is not likely to result in a substantial lessening of competition. *Id.* at 3.[2]

[2] Respondent also contends we should refer this motion to the Administrative Law Judge. Commission Rule 3.22(a) provides, "Motions to dismiss filed before the evidentiary hearing . . ., motions to strike, and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a). The Commission adopted this rule in 2009 "in order to further expedite its adjudicative proceedings, improve the quality of adjudicative decision making, and clarify the respective roles of the Administrative Law Judge ('ALJ') and the Commission in Part 3 proceedings." 73 Fed. Reg. 58,832 (Oct. 7, 2008) (Proposed Rule Amendments); *see also* 74 Fed. Reg. 1804 (Jan. 13, 2009) (Interim Final Rules); 74 Fed. Reg. 20,205 (May 1, 2009) (Amendments Adopted As Final). Since this rule's adoption in 2009, the Commission has consistently ruled upon such motions. *See, e.g.*, *Impax Labs., Inc.*, Docket No. 9373 (F.T.C. Oct. 27, 2017) (Comm'n Op. and Order denying motion for partial summary decision); *1-800 Contacts, Inc.*, Docket No. 9372 (F.T.C. Feb. 1, 2017) (Comm'n Op. and Order granting motion for partial summary decision); *N.C. Bd. of Dental Examiners*, 151 F.T.C. 607 (2011) (Commission's Op. and Order Denying Mot. to Dismiss and Granting Mot. for Partial Summ. Decision). There is no reason to depart from normal Commission practice in this case. Contrary to Respondent's contention, our decision does not determine factual issues that should be developed before the Administrative Law Judge, and there is no reason to refer the motion to him.

For the reasons discussed below, Respondent's averment fails as an affirmative defense. We agree with Complaint Counsel that the averment is not sufficient to negate liability if the allegations in the Complaint are shown. Notwithstanding Respondent's affirmative defense label, the claim can appropriately be viewed as a denial. As Respondent repeatedly explains in its Opposition to the Motion, it asserts this factual issue in arguing that there will be no substantial lessening of competition. Courts typically do not strike negative averments pled as affirmative defenses rather than denials. Consequently, although the claim is not a valid affirmative defense, we will not strike it, and Respondent will remain entitled to develop and produce evidence regarding [redacted] as relevant to the claimed likely substantial lessening of competition and to [redacted].

I. Respondent's Averment as an Affirmative Defense

"An affirmative defense is defined as "[a] defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." *Saks v. Franklin Covey Co.*, 316 F. 3d 337, 350 (2d Cir. 2003) (quoting *Black's Law Dictionary* 430 (7th ed. 1999)); *see also Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 449 (1st Cir. 1995) (describing an affirmative defense as "a bar to the right of recovery even if the general complaint were more or less admitted to") (internal quotation marks omitted); *Drzik v. Haskell Co.*, 2011 WL 2981565, at *1 (M.D. Fla. 2011) ("By definition, an 'affirmative defense' is established when a defendant admits to the essential facts of the complaint, but sets forth other facts in justification and/or avoidance."); *Barnes v. AT&T Pension Ben. Plan-Nonbargained Prog.*, 718 F. Supp. 2d 1167, 1173 (N.D. Cal. 2010) (defining an affirmative defense as "'a defense that does not negate the elements of the plaintiff's claim, but instead precludes liability even if all of the elements of the plaintiff's claim are proven'") (quoting *Roberge v. Hannah Marine Corp.*, 1997 WL 468330, at *3 (6th Cir. 1997)). Respondent's Seventh Affirmative defense raises [redacted] as a new, liability-barring fact. Consequently, in evaluating its sufficiency as an affirmative defense, we inquire whether [redacted] would defeat liability even if the Complaint's allegations are established.

As an initial matter, Respondent's Seventh Affirmative Defense is speculative: it rests on [redacted] There are good grounds to reject Respondent's Seventh Affirmative Defense as an affirmative defense even assuming that [redacted].

Respondent's Seventh Affirmative Defense rests entirely on [redacted]; thus, by its own terms, it rests on the

premise that the only appropriate time to consider the likelihood of future anticompetitive effects is [redacted]. The challenged merger agreement, however, was entered and the merger was consummated on September 22, 2017. Several months already have passed, and [redacted] cannot eliminate the potential for demonstrating likely anticompetitive effects during the intervening period.

Respondent's Opposition to the Motion to Strike seeks to remedy this deficiency by pointing to [redacted], and by asserting that, after receiving inquiries from the FTC within a week of the merger's consummation, it [redacted] ROpp at 6. Even if these additional considerations were part of the Affirmative Defense, however, they still would not suffice to defeat Complaint Counsel's claims if the Complaint's allegations are taken as true. The Complaint alleges that "Otto Bock and Freedom sales personnel no longer have an incentive to compete against each other for sales," Compl. ¶ 57. "Under common ownership and without the incentive to introduce innovations to take and defend sales from each other," the Complaint continues, "Otto Bock does not have the same incentive to launch these [new] products on the same timeline or in the same form as Otto Bock and Freedom had independently pre-Merger." Compl. ¶ 58. Nothing in Otto Bock's Seventh Affirmative Defense or even in its arguments in opposing the Motion to Strike addresses the alleged change in incentives attributable to the consummated merger or the competitive harm that the Complaint alleges followed therefrom.

We find inapposite the cases cited as support for Respondent's claim that [redacted]. All of those cases involved *unconsummated* mergers. Unlike here, the courts in those cases were analyzing the likely competitive harm that would result [redacted]. In those circumstances, the courts ruled, [redacted]. *See* [redacted]. Similarly, in [redacted]

[3] Of course, standing alone, the representations about [redacted] do not preclude a finding of likely future anticompetitive effects. As courts and the Commission have repeatedly recognized, a merged firm's choice not to take anticompetitive actions while litigation is pending does not preclude a finding of likely anticompetitive effects. *See, e.g.*, *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 504-05 (1974) ("If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending. . . . [T]he mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter . . . ."); *Polypore Int'l, Inc.*, 150 F.T.C. 586, 599 n.16 (2010).

[4] In each instance the courts' reasoning was influenced by the fact that [redacted]

[redacted] In those cases, unlike this one, the fact that the merger had not been consummated meant that [redacted]. Here, where the merger *has* already been consummated, likely anticompetitive effects may arise both [redacted], and the cited holdings have no applicability to the former period.

II. Treating Respondent's Averment as a Denial

Respondent's Opposition repeatedly states that Respondent intends [redacted] to rebut the Complaint's allegation that the merger agreement and consummated transaction had the likely effect of substantially lessening competition. ROpp *passim*. In substance, this is part of Respondent's denial of Complaint Counsel's *prima facie* case, rather than a true affirmative defense. *See, e.g.*, *Drzik*, 2011 WL 2981565, at *1 (stating that a defense that points to a fact that would negate a factor in plaintiff's *prima facie* case "is not an affirmative defense, but a denial"); *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, 2007 WL 2412834, at *3 (S.D. Fla. 2007) (finding that a contention that a challenged joint venture agreement had been modified through subsequent agreements and the course of conduct and dealings was a denial rather than an affirmative defense); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1269 (3d ed. 2017) (discussing improper designation of a "negative averment" as an affirmative defense); *see also In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense.").

In these circumstances, Respondent's choice of label as an affirmative defense is not dispositive. Courts typically do not strike such averments. "When a party incorrectly labels a 'negative averment as an affirmative defense rather than as a specific denial[,] . . . the proper remedy is not [to] strike the claim, but rather to treat it as a specific denial.'" *Drzik*, 2011 WL 2981565, at *1 (quoting *Home Mgmt. Solutions*, 2007 WL 2412834, at *3); Wright & Miller, *supra* § 1269, at 557 ("The federal courts have accepted the notion of treating a specific denial that has been improperly denominated as an affirmative defense as though it were correctly labeled."). Mere choice of label should not prejudice a respondent that has sought to identify a specific element of its defense.[6] "[R]esearch has not revealed a single reported decision since the promulgation of the federal rules in which an erroneous designation resulted in any substantial prejudice to the pleader." Wright & Miller, *supra* § 1269, at 557.

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[5] The court noted that the parties were willing to make [redacted].

[6] Indeed, separate designation of such elements may have benefits by providing useful notice and identifying specific information that should be highlighted and to which respondent has better access. *See* Wright & Miller, *supra* § 1271, at 603-605.

Under these circumstances we will not treat Respondent's Seventh Affirmative Defense as a defense, but only as a denial. As such, this denial regarding [redacted] should not be stricken from Respondent's pleading. To be clear, as discussed above, the averment which composes Respondent's denial is insufficient in itself to defeat liability. We agree with Complaint Counsel's analysis on that issue, and the fact that [redacted] reinforces our conclusion. Nonetheless, [redacted] could potentially be relevant to rebut a showing of likely anticompetitive effects [redacted], and Respondent remains entitled to develop and present relevant evidence regarding [redacted] Moreover, in support of its denial, Respondent may develop and present relevant evidence regarding the [redacted] for any violation found. Those factual issues are properly addressed in the hearing before Chief Administrative Law Judge Chappell.

Accordingly,

IT IS ORDERED THAT Complaint Counsel's Motion to Strike Respondent's Seventh Affirmative Defense is **DENIED**.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: April 18, 2018