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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Federal Trade Commission; Plaintiff, v. **Vemma Nutrition Company**, ***et al.***; Defendants.	**No. CV-15-01578-PHX-JJT** **PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION TO STRIKE AFFIRMATIVE DEFENSES**

I. INTRODUCTION

The Federal Trade Commission ("FTC") initiated this action against Defendants Vemma Nutrition Company, Vemma International Holdings, Inc. (together with Vemma Nutrition Company, the "Corporate Defendants"), Benson K. Boreyko, and Tom Alkazin for violating Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §

45(a).[1] Specifically, the FTC alleges that these Defendants violated Section 5 by operating an illegal pyramid scheme, misrepresenting that members of Vemma's marketing program ("Affiliates") are likely to earn substantial income, failing to adequately disclose that Vemma's structure ensures that most consumers who become Vemma Affiliates will not earn substantial income, and providing the means and instrumentalities for Affiliates to also make misrepresentations.

In their Answers to the FTC's Complaint, Defendants raise several "affirmative defenses" that are insufficiently pled, legally unavailable in defense of this action, or redundant.[2] Accordingly, the FTC respectfully requests that the Court strike each of Defendants' so-called affirmative defenses, other than the Corporate Defendants' eighth affirmative defense.

II. ARGUMENT

A. Legal Standard for Striking Affirmative Defenses

Under Federal Rule of Civil Procedure 12(f), a party may move to strike "from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Such a request "should be granted where the defenses to be stricken are insufficient as a matter of law, immaterial, in that they have no essential or important relationship to the claim for relief . . . or are impertinent in that the matter consists of

[1] *See* Doc. 3. The FTC also named Bethany Alkazin as a relief defendant.

[2] *See* Docs. 123, 124, and 125.

statements that do not pertain, and are not necessary, to the issues in question."[3] When evaluating a motion to strike affirmative defenses, a court should treat "all well pleaded facts as admitted and cannot consider matters beyond the pleadings."[4]

An affirmative defense is insufficient on its face if it contains no more than bare conclusory allegations of law unsupported by any asserted facts.[5] Affirmative defenses must meet minimum pleading standards to provide the opposing party with fair notice of the defense and the grounds on which it rests.[6] An affirmative defense is invalid if "the plaintiff would succeed despite any set of facts which could be proved in support of the

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[3] *FDIC v. Butcher*, 660 F. Supp. 1274, 1277 (E.D. Tenn. 1987) (internal citations and quotations omitted); *see also Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527-28 (9th Cir. 1993) (defining immaterial matter as matter that has no essential or important relationship to the claim for relief or the defenses being pled), *rev'd on other grounds*, 510 U.S. 517 (1994).

[4] *Microsoft Corp. v. Jesse's Computers & Repair*, 211 F.R.D. 681 (M.D. Fla. 2002); *see also Kelly v. Kosuga*, 358 U.S. 516, 516 (1959) ("[T]he facts underlying [a motion to strike] must be taken to be those set up in the [pleadings]."); *California ex rel. State Lands Com. v. United States*, 512 F. Supp. 36, 39 (N.D. Cal. 1981).

[5] *See, e.g., Schechter v. Comptroller of N.Y.*, 79 F.3d 265, 270 (2nd Cir. 1996) (quoting *Nat'l Acceptance Co. of Am. v. Regal Prods., Inc.*, 155 F.R.D. 631, 634 (E.D. Wis. 1994)) ("Defenses which amount to nothing more than mere conclusions of law and are not warranted by any asserted facts have no efficacy.'"); *Renalds v. S.R.G. Rest. Group*, 119 F. Supp. 2d 800, 803 (N.D. Ill. 2000) (finding affirmative defenses insufficient on their face where bare-boned conclusory allegations simply stated legal theories without indicating how they were connected to the case).

[6] *See Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 458 (10th Cir. 1982) ("The policy behind Rule 8(c) is to put plaintiff on notice well in advance of trial that defendant intends to present a defense in the nature of an avoidance."); *Scott v. Fed. Bond and Collection Serv., Inc.*, No. 10–CV–02825–LHK, 2011 U.S. Dist. LEXIS 5278, at *16 (N.D. Cal. Jan. 19, 2011); *Qarbon.com, Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1048-49 (N.D. Cal. 2004).

defense."[7]

A district court has the power to limit pleadings to "avoid the expenditure of time and money that would arise from litigating spurious issues, by dispensing with those issues prior to trial."[8] Striking irrelevant affirmative defenses is an appropriate use of such authority – "a defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and should be deleted."[9] If an affirmative defense is invalid as a matter of law, that determination should be made at an early stage of the proceedings, "in order to avoid the needless expenditures of time and money involved in litigating" fruitless matters and to focus the parties on the bona fide issues in the case.[10]

Further, sound policy reasons support striking redundant or legally insufficient affirmative defenses. Defendants should not be permitted to use legally insufficient

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[7] *EEOC v. First Nat'l Bank of Jackson*, 614 F. 2d 1004, 1008 (5th Cir. 1980).

[8] *See* 2-12 MOORE'S FEDERAL PRACTICE § 12.37[3] (2009); *Sky Harbor Air Serv., Inc. v. Reams*, 491 F. App'x 875, 884 (10th Cir. 2012) (finding that trial judge has discretion in barring faulty affirmative defenses that impede "the expeditious conclusion of litigation").

[9] *FDIC v. Main Hurdman*, 655 F. Supp. 259, 263 (E.D. Cal. 1987) (internal quotations omitted).

[10] *See Purex Corp., Ltd. v. Gen. Foods Corp.*, 318 F. Supp. 322, 323 (C.D. Cal. 1970); *Hart v. Baca*, 204 F.R.D. 456, 457 (C.D. Cal. 2001); *see also California ex rel. State Lands Com.*, 512 F. Supp. at 38 ("[W]here the motion may have the effect of making the trial of the action less complicated, or have the effect of otherwise streamlining the ultimate resolution of the action, the motion to strike will be well taken."); *Fed. Sav. & Loan Ins. Corp. v. Budette*, 696 F. Supp. 1183, 1187 (E.D. Tenn. 1988) ("Forthrightly dealing with inadequate or improper affirmative defenses . . . at an early stage in the litigation helps the parties focus discovery on the real issues in the case and reduces the cost of litigation to the parties."); *Main Hurdman*, 655 F. Supp. 259 at 263 n.6 (noting that motions to strike further the goal of judicial efficiency).

"affirmative defenses" to frustrate the purpose of a federal statute or to thwart public policy.[11] An agency charged with enforcement of an important regulatory scheme in the public interest, such as the FTC, should not be thwarted or distracted by conclusory and improbable allegations.[12]

B. Defendants' Alleged Affirmative Defenses Are Insufficiently Pled

As an initial matter, Defendants have not set forth in their Answers circumstances or conduct to support each of their affirmative defenses sufficient to give the FTC fair notice of the nature of the defenses, as required by Federal Rule of Civil Procedure 8. Defendants simply assert that the FTC's claims are barred by various affirmative defenses, giving little, if any, indication of what conduct they are referring to or how these vague legal concepts are adequate.[13] By listing generic affirmative defenses using only a few words—without any facts, details, or elaboration—Defendants fail to provide the FTC the required "fair notice" of each defense and the grounds on which it rests.[14] On

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[11] *See, e.g.*, *Pan Am. Petroleum 11 & Transp. Co. v. U.S.*, 273 U.S. 456, 506 (1927) ("The general principles of equity . . . will not be applied to frustrate the purpose of its laws or thwart public policy.").

[12] *See Donovan v. Robbins*, 99 F.R.D. 593, 600 (N.D. Ill. 1983) (finding "substantial policy considerations militating against inhibiting the enforcement of an important regulatory scheme based on some alleged 'unclean hands' of the agency charged with enforcement").

[13] *See* Docs. 123, 124, and 125.

[14] *See Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1295 (7th Cir. 1989) (finding defenses meritless where they were "nothing but bare bones conclusory allegations"); *Scott*, 2011 U.S. Dist. LEXIS 5278, at *20-21 (striking equitable affirmative defenses where defendant failed to identify any factual basis for asserting them); *Qarbon.com*, 315 F. Supp. 2d at 1049-50 (affirmative defenses stating only that plaintiffs are barred from recovery by doctrines of waiver, estoppel, and unclean hands insufficient to provide fair notice to plaintiffs); *Renalds*, 119 F. Supp. 2d at 803 (two

this basis alone, each of Defendants' affirmative defenses, other than the Corporate Defendants' eighth affirmative defense, should be stricken.

By way of example, all Defendants assert that "any losses sustained by the FTC and/or the consumers it purports to represent were caused by the acts or omissions of third parties over whom the [Defendants] had no control or right to control,"[15] without providing any facts whatsoever or identifying the other parties that are supposedly responsible.[16] Similarly, Defendants nakedly assert that the "FTC's claims for injunctive relief are not authorized or available at law or equity,"[17] and the Corporate Defendants and Defendant Boreyko likewise assert that the injunctive claims "may be" or "were and are" unconstitutional.[18] Again, Defendants provide no facts to support these defenses, do not identify what proposed injunctive provisions are unconstitutional or what constitutional provisions the requested injunction allegedly violates. Such unrestrained pleading will lead to unnecessarily broadening the issues in the case and in discovery.

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affirmative defenses, including one alleging failure to state a claim, stricken as "insufficient on their face because they are bare-bones conclusory allegations, simply naming legal theories without indicating how they are connected to the case at hand.").

[15] Docs. 123 (sixth affirmative defense), 124 (seventh affirmative defense), and 125 (affirmative defense F).

[16] *See FTC v. N. Am. Mktg. and Assoc., LLC*, No. CV-12-914-PHX-DGC, 2012 U.S. Dist. LEXIS 150102, at *13-14 (D. Ariz. Oct. 17, 2012) (citing *Joe Hand Promotions, Inc. v. Estrada*, No. 1:10-CV-02165-OWW, 2011 U.S. Dist. LEXIS 61010, at *10 (E.D. Cal. June 8, 2011)).

[17] Docs. 123 (second affirmative defense), 124 (fourth affirmative defense), and 125 (affirmative defense B). Alkazin adds vague, general assertions that the "FTC lacks authority" to seek disgorgement and damages from him. Doc. 124 (second and third affirmative defenses).

[18] Docs. 123 (third affirmative defense) and 125 (affirmative defense C).

C. Many of Defendants' Affirmative Defenses Are Unavailable as a Matter of Law

1. Defendants' "Affirmative Defense" of Failure to State a Claim Should Be Stricken

In their first affirmative defense, each of the Defendants asserts that the FTC "fails to state a claim" upon which relief can be granted.[19] As this district has recognized in striking this defense, it "is not a proper affirmative defense but, rather, asserts a defect in [Plaintiff's] prima facie case." [20] The FTC's Complaint alleges facts, which taken as true for the purposes of this motion,[21] are sufficient to support the counts set forth in the Complaint. In addition, the Court has already ruled the FTC is likely to succeed on the merits in this case.[22]

2. Good Faith Is Not a Defense to the FTC Act

Each of the Defendants asserts that they "acted reasonably, in good faith, and in accordance with any applicable standards and duties."[23] This defense should be stricken because the law is well established that good faith is not a valid defense to liability under

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[19] Docs. 123, 124, and 125 (first affirmative defense in each).

[20] *N. Am. Mktg.*, 2012 U.S. Dist. LEXIS 150102, at *6 (citing *Barnes v. AT & T Pension Ben. Plan – Nonbargained Program*, 718 F. Supp. 2d 1167, 1174 (N.D. Cal. 2010)).

[21] *FTC v. Hang-Up Art Enters., Inc.*, No. CV 95-0027 RMT(JGx), 1995 U.S. Dist. LEXIS 21444, at *9 (C.D. Cal. Sept. 27, 1995) ("Assuming, as this court must at this stage, that plaintiff can prove its allegations at trial, the complaint sufficiently states a claim. Defendants' First Affirmative Defense fails as a matter of law and should be stricken.").

[22] *See* Doc. 118.

[23] Docs. 123 (fourth affirmative defense), 124 (fifth affirmative defense), and 125 (affirmative defense D).

the FTC Act.[24] In the alternative, Plaintiff seeks to limit the application of this purported affirmative defense because it is not relevant or applicable to the determination of Defendants' liability.[25]

3. Individual Consumer-Specific Defenses Do Not Apply to a Case Brought by a Government Agency to Protect the Public at Large

All Defendants assert that the "FTC and/or the consumers it purports to represent have failed to mitigate their losses, if any;"[26] the Corporate Defendants and Defendant Boreyko assert that "[c]onsumers represented by the FTC knowingly and voluntarily, and possibly unreasonably, exposed themselves to any claimed losses with knowledge or

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[24] *See, e.g., Feil v. FTC*, 285 F.2d 879, 896 (9th Cir.1960) (whether an individual acts in good or bad faith is immaterial to liability under Section 5 of the FTC Act); *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988) ("an advertiser's good faith does not immunize it from responsibility for its misrepresentations") (citing *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 n. 5 (D.C. Cir. 1977)); *FTC v. Hope Now Modifications*, No. 09-1204 (JBS/JS), 2009 U.S. Dist. LEXIS 102596, at *3 (D.N.J. Nov. 4, 2009) (striking defendants' affirmative defense of good faith); *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1084 (C.D. Cal. June 22, 2012) ("As a matter of law, . . . good faith [is] not [a] defense[] to whether the defendant had the requisite knowledge under [FTC Act] section 5(a)"); *FTC v. NCH, Inc.*, No. CV-S-94-138-LDG, 1995 U.S. Dist. LEXIS 21098, at *21 (D. Nev. May 25, 1995) ("As a matter of law, a defendant's good faith is not a defense to liability for a violation of 15 U.S.C. § 45(a)"); *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 855 (D. Mass. 1992) ("Nor is an advertiser's good faith a defense to a violation of 15 U.S.C. § 45(a)(1)."); *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998) ("[T]he subjective good faith of the advertiser is not a valid defense to an enforcement action brought under [FTC Act] section 5(a)."); *Hang-Up Art Enters.*, 1995 U.S. Dist. LEXIS 21444, at *11 ("To the extent good faith is offered as an affirmative defense to violation of Section 5 of the FTC Act, the second affirmative defense should be stricken.").

[25] At most, good faith would be relevant to the request for permanent injunctive relief. *See Hang-Up Art Enters.*, 1995 U.S. Dist. LEXIS 21444, at *11.

[26] Docs. 123 (fifth affirmative defense), 124 (sixth affirmative defense), and 125 (affirmative defense E).

appreciation of the risk involved;"[27] and Defendant Alkazin asserts that "any consumers represented by the FTC knowingly and voluntarily assumed the risk of losses."[28] These defenses refer to the consumers affected by Defendants' actions, who are not parties to this suit. The FTC brings this suit in its own name, so defenses asserted against consumers are inapplicable and inappropriate.[29]

D. Blaming Unspecified Third Parties and Claiming Lack of Authority or Availability Are Negative Defenses that Should Also Be Stricken

Each of the Defendants assert as "affirmative defenses" that "any losses sustained by the FTC and/or the consumers it purports to represent were caused by the acts or omissions of third parties over whom the [Defendants] had no control or right to control,"[30] and that the "FTC's claims for injunctive relief are not authorized or available at law or equity."[31] Alkazin also adds that the "FTC lacks authority to seek

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[27] Docs. 123 (seventh affirmative defense) and 125 (affirmative defense G).

[28] Doc. 124 (eighth affirmative defense).

[29] *See generally United States ex rel. FTC v. Larkin*, 841 F. Supp. 899, 907 (D. Minn. 1993); *see also N. Am. Mktg.*, 2012 U.S. Dist. LEXIS 150102, at *12 (striking the affirmative defense of failure to mitigate because "it is unclear what Plaintiff, the Federal Trade Commission, could have done to mitigate the damages arising out of the Federal Trade Commission Act"); *see also generally Morrison v. Executive Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1319 (S.D. Fla. 2005) (striking mitigation defense as legally insufficient where the statute at issue did not require mitigation and any such requirement would seem to contradict the statute).

[30] Docs. 123 (sixth affirmative defense), 124 (seventh affirmative defense), and 125 (affirmative defense F).

[31] Docs. 123 (second affirmative defense), 124 (fourth affirmative defense), and 125 (affirmative defense B).

disgorgement" and "damages" from him.[32] In addition to being insufficiently pled, as set above, these so-called affirmative defenses are merely denials, or negative defenses, and should be stricken.[33]

In an affirmative defense, the defendant is asserting that the defendant should prevail in the case even if all of the allegations of the complaint are true.[34] Negative defenses, on the other hand, simply repeat a defendant's denials of the allegations in a

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[32] Doc. 124 (second and third affirmative defenses). Alkazin erroneously use the term "damages" in his Answer. More correctly, the FTC alleges consumer injury—the equitable monetary measure of injury consumers sustained caused by Defendants' unlawful business practices.

[33] *N. Am. Mktg.*, 2012 U.S. Dist. LEXIS 150102, at *13-14 (striking nearly identical "affirmative defense" regarding acts or omissions of third parties over whom defendants had no control); *FTC v. Stefanchik*, No. C04-1852RSM, 2004 U.S. Dist. LEXIS 30710, at *6 (W.D. Wash. Nov. 12, 2004) (striking purported "affirmative defense" that other persons were responsible for wrongdoing as "merely a redundant denial of liability"); *FTC v. Am. Microtel, Inc.*, No. CV-S-92-178-LDG(RJJ), 1992 U.S. Dist. LEXIS 11044, at *3-4 (D. Nev. June 10, 1992) (striking as redundant the defenses that any violations were the responsibility of others without defendants' knowledge, consent, or authority).

[34] *See Morrison*, 434 F. Supp. 2d at 1318 ("By its very definition, an affirmative defense is established only when a defendant *admits the essential facts* of a complaint and sets up other facts in justification or avoidance. Thus, a defense which simply points out a defect or lack of evidence in a plaintiff's case is not an affirmative defense.") (internal quotes and citations omitted, emphasis in original); *Instituto Nacional de Comercializacion Agricola (INDECA) v. Cont'l Ill. Nat'l Bank & Trust Co.*, 576 F. Supp. 985, 988 (N.D. Ill. 1983) ("[T]he basic concept of an affirmative defense is an *admission* of the facts alleged in the complaint, coupled with the assertion of some other reason defendant is not liable.") (emphasis in original).

complaint.[35] Consequently, under Federal Rule of Civil Procedure 12(f), such defenses are redundant and should be stricken.[36]

In this case, it is clear from their Answers that the Defendants deny engagement in the unlawful acts and practices alleged in the Complaint and that they deny liability for any consumer injury caused by these unlawful acts or practices. The so-called affirmative defenses in question relate to whether Defendants have violated statutes enforced by the FTC and whether they should be enjoined and are liable for consumer injury. In addition, once the FTC proves that the Defendants have violated the FTC Act, the culpability or actions of others are utterly irrelevant to the liability of the Defendants. These defenses should be stricken.

III. CONCLUSION

For the foregoing reasons, Defendants' affirmative defenses are legally insufficient, immaterial, or redundant. To save time, money, and to focus the parties on meritorious issues, the FTC respectfully requests that the Court strike, under Fed. R. Civ.

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[35] *Texidor v. E.B. Aaby's Rederi A/S*, 354 F. Supp. 306, 309 (D. P.R. 1972); *see also FTC v. Think All Pub. L.L.C.*, 564 F. Supp. 2d 663, 665 (E.D. Tex. 2008).

[36] *Bobbitt v. Victorian House, Inc.*, 532 F. Supp. 734, 736, 738-39 (N.D. Ill. 1982); *Texidor*, 354 F. Supp. at 309; *Renalds*, 119 F. Supp. 2d at 804 ("Moreover, defendant has already put these matters in issue by denying certain allegations in its answer, and defendant not only need not but cannot raise these matters again via an affirmative defense."); *Barnes*, 718 F. Supp. 2d at 1173-74; *see also FTC v. Hope Now Modifications, LLC*, No. 09-1204 (JBS/JS), 2010 U.S. Dist. LEXIS 35550, at *3 (D.N.J. Apr. 12, 2010) (striking general denials of fault, such as that wrongdoers were third parties, because they are not true affirmative defenses); *Think All Pub. L.L.C.*, 564 F. Supp. 2d at 666 (striking negative defenses as "redundant"); *FTC v. Bay Area Bus. Council, Inc.*, No. 02-C-5762, 2003 U.S. Dist. LEXIS 7261, at *9 (N.D. Ill. Apr. 30, 2003) ("Defendants have already put these matters in issue by denying certain allegations of the complaint; and, thus, these matters cannot be pled as affirmative defenses.").

P.12(f), each of Defendants' purported defenses other than the Corporate Defendants' eighth affirmative defense.

Dated: October 19, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 19, 2015, Plaintiff Federal Trade Commission electronically transmitted the attached Document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Filing to all CM/ECF registrants including:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Federal Trade Commission; Plaintiff, v. **Vemma Nutrition Company**, *et al.*; Defendants.	**No. CV-15-01578-PHX-JJT** **[proposed] ORDER GRANTING PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION TO STRIKE AFFIRMATIVE DEFENSES**

Plaintiff Federal Trade Commission ("FTC") has filed a Motion to Strike Affirmative Defenses (Doc. ___). After considering the Motion along with the Defendants' Answers (Docs. 123, 124, 125) and other submissions by the parties,

IT IS HEREBY ORDERED that the Motion is granted, and the affirmative defenses asserted in Defendants' Answers, other than the Corporate Defendants' eighth affirmative defense, are stricken as insufficient, immaterial, impertinent, or redundant under Federal Rule of Civil Procedure 12(f).