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II. This Court Should Strike Insufficient Defenses to Prevent Wasteful Litigation

Under Fed. R. Civ. P. 12(f), it is appropriate to strike "an insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter." The function of a motion to strike is avoidance of "the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994) (citation omitted). As a "sensible matter," courts should strike "a defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action." *FDIC v. Main Hurdman*, 655 F. Supp. 259, 263 (E.D. Cal. 1987) (citation omitted).

A. Defendants Do Not Provide Fair Notice of the Facts Allegedly Supporting their Laches Defense

Defendants have provided no factual basis for the defense of laches. To prove laches, the defendant must prove (1) an unreasonable delay by the plaintiff and (2) prejudice to itself. *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1226 (9th Cir. 2012). Defendants here meet neither prong. First, Defendants do not explain how the FTC waiting four months to file its Complaint, during which time the FTC met with counsel for the Defendants on multiple occasions to discuss whether the FTC should bring the instant action, constitutes unreasonable delay. Second, Defendants also do not specify how the claimed "unreasonable delay" caused them prejudice. Instead, they simply state that the FTC "only decided to sue Defendants after gross delay, prejudice to Defendants, and in response to the Defendants' suit for declaratory judgment." Answer at 21. Defendants' barebones pleading and conclusory statements do not provide the FTC with fair notice of their defense, particularly the prejudice Defendants allegedly suffered while continuing to operate during negotiations with the FTC.

B. Defendants Fail to Plead Numerous Elements Required for an Estoppel Defense

Defendants also fail to plead adequately their estoppel defense. "To prove equitable estoppel, Defendants must show that: (1) the FTC knew the facts; (2) the FTC intended that its conduct be acted on, or acted so that Defendants had a right to believe it is so intended; (3) Defendants were ignorant of the true facts; and (4) Defendants relied on the FTC's conduct to their injury." *FTC v. EDebitPay, LLC*, Case No. CV-07-4880, 2011 U.S. Dist. LEXIS 15750, at *29-30 (C.D. Cal. Feb. 3, 2011) (citing *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989)). A party seeking to raise an estoppel defense against the government also must establish three additional elements: (1) affirmative misconduct beyond mere negligence, (2) the government's wrongful act will cause a serious injustice, and (3) the public's interest will not suffer undue damage by imposition of the liability. *Id.* at *30 (citing *United States v. Bell*, 602 F.3d 1074, 1082 (9th Cir. 2010)). Unexplained delay does not constitute affirmative misconduct. *Jaa v. I.N.S.*, 779 F.2d 569, 572 (9th Cir. 1986) (citing *I.N.S. v. Miranda*, 459 U.S. 14, 18-19 (1982)).

Aug. 7, 2006) (Order) (laches defense "unavailable to a party seeking to avoid a governmental entity's exercise of statutory power").[1]

The Court should not permit Defendants to use their laches defense (or any other defense) as a means to undertake a fishing expedition. Permitting this wholly unsupported defense to go forward would unnecessarily complicate this case and waste time, money, and resources. Accordingly, the Court should strike the Defendants' sixth affirmative defense.

B. "Estoppel by Silence" Is Inapplicable Against the Government When There Is No Duty to Act

Defendants have not properly pleaded their estoppel defense and, in any event, it is insufficient as a matter of law. The general principle governing the applicability of estoppel to the federal government is that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *United States v. City and County of San Francisco*, 310 U.S. 16, 32 (1940). Applying this general principle, courts have routinely disallowed the application of the estoppel doctrine against the Securities and Exchange Commission, which, like the FTC, is mandated by Congress to enforce federal law. *See, e.g., SEC v. Morgan, Lewis & Bockius*, 209 F.2d 44, 49 (3rd Cir. 1953) ("[T]he [C]ommission may not waive the requirements of an act of Congress nor may the doctrine of estoppel be invoked against the Commission.").

District courts in this circuit have held that the estoppel defense may not be asserted against sovereigns who act to protect the public welfare, such as the FTC. *FTC v. Medlab, Inc.*, Case No. CV-08-0822-SI (N.D. Cal. July 22, 2008) (Order Granting in Part

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371 F.3d 745, 766 (10th Cir. 2004) (holding no need to offset gross receipts "by the value of the [product] the consumers received"). Deviating from this standard would prejudice the FTC by unnecessarily increasing the costs of this litigation, including potentially forcing the FTC to hire an expert to rebut Defendants' calculations of alleged consumer benefit.

The Ninth Circuit has specifically rejected the notion that defendants in FTC cases are entitled to offset the alleged value of a product when determining the amount of consumer injury. *Publishers Bus. Servs.*, 540 F. App'x at 557-558. As the Ninth Circuit stated in *Publishers Business Services*, "Courts have previously rejected the contention 'that restitution is available only when the goods purchased are essentially worthless.' . . . This is particularly true where the injury to consumers arises out of misrepresentations made in the sales process, which lead to a 'tainted purchasing decision.'" *Id.* (citing *FTC v. Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993) ("The fraud in the selling, not in the value of the thing sold, is what entitles consumers . . . to full refunds.")). Based on this reasoning, the Ninth Circuit remanded the case and instructed the district court to apply the proper restitution calculation.

On remand, the district court made "no deductions from the first-time orders based on so-called 'satisfied' consumers" and awarded the FTC over $23 million. *FTC v. Publishers Bus. Servs.*, Case No. CV-00620, 2017 U.S. Dist. LEXIS 14720, at *21, 23 (D. Nev. Feb. 1, 2017), *aff'd FTC v. Dantuma*, Case No. 17-15600, 2018 U.S. App. LEXIS 24893, at *5 (9th Cir. Aug. 31, 2018). In August 2018, the Ninth Circuit affirmed the district court's decision stating, "We have previously held that there is 'no authority' for the proposition that equitable monetary awards in the consumer protection context should be reduced by amounts paid by customers who were 'satisfied' or obtained a benefit from the defendant's services." *FTC v. Dantuma*, 2018 U.S. App. LEXIS at *5 (citing *FTC v. Gill*, 265 F.3d 944, 958 (9th Cir. 2001), and *CFPB v. Gordon*, 819 F.3d 1179, 1196 (9th Cir. 2016)).

Similarly, Judge Illston struck an offset defense in another FTC case and later based her monetary judgment on the defendants' gross revenue. In *Medlab*, the defendants attempted to assert the following defense: "Any monetary relief is subject to offsets by the benefits received by consumers, costs associated with the sale of services, and/or refunds paid to consumers."