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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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I. INTRODUCTION

The Federal Trade Commission's ("FTC") motion to strike ("Motion") must be denied because the affirmative defenses at issue – laches, estoppel, and offset – are properly raised against the FTC and are adequately pled. As many courts have noted, motions to strike are a disfavored tool. *Shaterian v. Wells Fargo Bank, N.A.*, 829 F. Supp. 2d 873, 879 (N.D. Cal. 2011) (quoting *Rosales v. Citibank Fed. Sav. Bank*, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001). The FTC's Motion reveals exactly why courts express this sentiment.

First, the FTC argues that Defendants have not provided fair notice of their laches defense, and fail to assert certain factual elements of the estoppel defense. The FTC is wrong on both counts. Defendants' Answer provides ample factual support for both defenses, and closely follows the level detail provided by other defendants to FTC actions in the Northern District that have survived motions to strike. In contrast, the cases cited by the FTC in the Motion involved affirmative defenses with no factual support. Defendants have provided fair notice here, but even if this Court determines otherwise the Court should grant Defendants leave to amend their Answer.

Second, the FTC argues that the defenses of laches, estoppel, and offset are "legally insufficient and prejudicial." That argument lacks any merit, and suggests that the FTC enjoys a unique status stripping Defendants of affirmative defenses. In so arguing, the FTC ignores dozens of rulings from across the United States denying motions to strike and permitting defendants to raise these exact defenses **against the FTC**. The cases cited by the FTC are universally dissimilar or, alternatively, support Defendants' arguments.

For the reasons that follow, Defendants respectfully request that this Court deny the Motion. The FTC clearly believes itself to be a privileged litigant, exempt from affirmative defenses and routine procedural vehicles such as responding to discovery and retaining experts. All Defendants have asked from the inception of this litigation is the opportunity to defend themselves in court. The FTC has taken every step in their power to prevent that from happening and to unnecessarily increase litigation costs. However, there is simply no legal authority that prevents Defendants from asserting these meritorious affirmative defenses. Basic fairness and due process require they be allowed to do so.

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II. LEGAL STANDARD

Under Rule 12(f), "[a]ffirmative defenses will be stricken ***only*** when they are insufficient on the face of the pleadings." *Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1400 (7th Cir. 1991) (quotation and citation omitted), emphasis added. "Motions to strike 'are generally disfavored because they are often used as a delaying tactic and because of the limited importance of pleadings in federal practice.'" *Shaterian*, 829 F.Supp.2d at 879 (quoting *Rosales*, 133 F. Supp. 2d at 1180). Given the disfavored status of Rule 12(f) motions, "'courts often require a showing of prejudice by the moving party before granting the requested relief.'" *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1122 (E.D. Cal. 2012) (quoting *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002)). "If there is any doubt whether the portion to be stricken might bear on an issue in the litigation, the court should deny the motion." *Holmes v. Elec. Document Processing, Inc.*, 966 F. Supp. 2d 925, 930 (N.D. Cal. 2013) (quoting *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004)).

III. THE DEFENSES OF LACHES AND ESTOPPEL ARE ADEQUATELY PLED.

Being subject to the rules of pleading, an affirmative defense must be pled in "short and plain terms." Fed. R. Civ. Proc. 8(b)(1)(A). The FTC suggests that Defendants must allege additional facts, and do so with "sufficient particularity." Motion, p. 2. That is not the correct standard. Defendants are not required to aver allegations to establish a prima facie claim or defense. *Boykin v. KeyCorp.*, 521 F.3d 202, 212 (2d Cir. 2008). Nor does Rule 8 require answers or complaints to state evidentiary facts. *Cromwell v. Deutsche Bank Nat'l Trust Co.*, No. C 11-2693 PJH, 2012 U.S. Dist. LEXIS 8528, at *2 (N.D. Cal., Jan. 25, 2012) ("[s]pecific facts are unnecessary"). A defendant need only provide "fair notice" to sufficiently plead affirmative defenses. *Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1023 (9th Cir. 2010); *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979). Here, Defendants have more than met this notice pleading standard, and the Court should reject the FTC's suggestion of a heightened pleading standard.

A. Defendants have Provided Fair Notice of their Laches Defense.

The FTC contends that Defendants have provided "no factual basis" for the defense of laches. Motion, p. 3. The FTC is demonstrably wrong. Below is how Defendants pled their affirmative

defense of laches:

> . . . Plaintiff delayed bringing any action despite having full knowledge of the corporate actions of Defendants for over a year before bringing this lawsuit. Specifically, Plaintiff refused to respond to a letter sent by corporate Defendants on December 30, 2016 to the Chairwoman of Plaintiff, Edith Ramirez, in which the Corporate Defendants sought guidance from the FTC regarding their standard business practices, and provided samples of their mailers and the scripts used by Account Specialists. Plaintiff understood that it would be important to respond to the letter because they had already opened an investigation into Corporate Defendants. Despite that, Plaintiff sat silently and did not respond to the letter at all. In addition, Plaintiff refused to file its lawsuit promptly after Defendants first filed a lawsuit against Plaintiff on August 18, 2017 for declaratory relief. Plaintiff was considering the filing of a lawsuit, as it sent a draft complaint to Defendants on October 3, 2017, yet waited over four months to file its Complaint in this action. Furthermore, Plaintiff engaged in an indiscriminate industry "sweep" that it described as "Game of Loans," and only decided to sue Defendants after gross delay, prejudice to Defendants and in response to Defendants' suit for declaratory relief. **In short, it would be inequitable for Plaintiff to seek equitable relief, including an injunction and the appointment of a receiver, when it had full knowledge of Corporate Defendants business practices yet refused to provide any guidance about what it thought the Corporate Defendants were doing wrong or how such actions could be corrected, and refused to file any lawsuit.**

Answer, ECF No. 162, ¶108 (emphasis added).

The FTC's Motion ignores all of the actual facts alleged, which go far beyond simply alleging the defense. The elements of laches are (1) an unreasonable delay by the plaintiff and (2) prejudice to the plaintiff. *Evergreen Safety Council v. RSA Network, Inc.*, 697 F.3d 1221, 1226 (9th Cir. 2012). Here, the asserted affirmative defense provides fair notice of each element.

The affirmative defense provides fair notice of delay on the part of the FTC. In characteristic fashion, the FTC simply ignores the actual facts alleged. The FTC focuses on the allegations regarding the delay in filing the lawsuit after it shared a draft complaint, but the Answer provides more detail. Specifically, the Answer sets forth that the FTC "refused to respond" to a December 2016 inquiry to the Chairman of the FTC after the FTC had already opened an investigation into Defendants' practices. *See* Answer, ECF No. 162, ¶108. The Answer also references the prejudice suffered by Defendants who could not modify their practices to meet the FTC's unknowable standards. This level of specificity is at least as great as that pled in the answer before Judge Griffith when he denied the FTC's motion to strike on the same defense. *See FTC v. DirecTV, Inc.*, No. 15-cv-01129-HSG, 2015 WL 9268119 (N.D. Cal.

Dec. 21, 2015) (*DirecTV I*); Declaration of James Vorhis ("Vorhis Decl."), ¶ 2, Exh. A [DirecTV Answer].

Moreover, the FTC incorrectly argues that "Defendants here meet neither prong" as if Defendants have the burden to prove their defenses now; but, that is not the question this Court must address. Defendants do not need to *prove*

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action.[2]

In sum, the answer includes allegations that provide fair notice, and the FTC has not met its burden of showing that the estoppel affirmative defense should be stricken.

IV. LACHES AND ESTOPPEL ARE NOT INSUFFICIENT DEFENSES AS A MATTER OF LAW, AND MAY BE ASSERTED AS AFFIRMATIVE DEFENSES AGAINST THE FTC

A. Laches is Properly Asserted in Defendants' Answer.

alleges that Plaintiffs have stopped their investigations multiple times, leading him to believe his actions were not illegal. Thus, given the liberal construction owed to his pleadings, Defendant has sufficiently pleaded his affirmative defense of estoppel, and the Court will not strike it."); *FTC v. U.S. Work Alliance, Inc.*, 2009 WL 10669724, at *3 (N.D. Ga. Feb. 24, 2009); *FTC v. Accusearch, Inc.*, No. 06-cv-105-D, 2007 WL 9709752, at *2 (D. Wyo. Mar. 28, 2007); *FTC v. Magazine Solutions, LLC*, No. 07-692, 2007 WL 2815695, at *1 (W.D. Pa. Sep. 25, 2007) (denying motion to strike estoppel defense because the defense was not "redundant, insufficient or immaterial to the matters at issue"); *FTC v. Stratford Career Institute*, NO. 16-cv-371, 2016 WL 3769187, at *2-3 (N.D. Ohio July 15, 2016).

The court in *FTC v. BF Labs Inc.*, No. 4:14-CV-00815-BCW, 2015 WL 12806580, (W.D. Mo. Aug. 28, 2015) aptly reasoned:

> Regardless of the impact of these defenses on liability, the Court finds that there are scenarios where this factual information may be relevant to the appropriate remedy. **Because the Court is reticent to strike** even a potentially marginal defense that causes no discernible prejudice to Plaintiff, the Court declines to strike these defenses. *Id.* (explaining that "the mere presence of redundant and immaterial matter not affecting the substance of the lawsuit is insufficient grounds to strike a pleading"). *Id.* at *3. Denied MTS estoppel and latches (different defendants, same action as above). **The Court is not convinced that these defenses are universally inapplicable in FTC Act cases**. *See, e.g., Hang-Ups Art Enters.*, 1995 WL 914179 at *4 (declining to strike similar defense and explaining that "[t]he facts of the case should decide whether there has been affirmative misconduct by the government such that laches might apply"). Because factual scenarios may exist where the defenses might apply, the Court declines to strike these defenses before Defendants have the benefit of some discovery.

Id. at *3, emphasis added. Similarly, here, the Court should deny the FTC's motion as to the estoppel defense because this defense does not fail as a matter of law, and because the FTC has not even attempted to argue any legitimate prejudice.

The cases cited by the FTC are easily distinguished. For example, the FTC relies on *FTC v. Medlab, Inc.*, Case No. CV-08-0822-SI (N.D. Cal. July 22, 2008), for the purported proposition that "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." Motion, p. 5. That is not at all what the *Medlab* order states. It does not reference sovereign entities or the public welfare. Instead, the order merely strikes the defense without any elaboration. *See* ECF 170-3 (Ortiz Declaration, Exh.

Second, and more important, offset is a valid affirmative defense to be raised against the FTC. Numerous courts have denied motions to strike on the offset defense because it is not *per se* invalid when raised against the FTC. *See, e.g., FTC v. Bronson Partner, LLC,* No. 3:04CV1866 SRU, 2006 WL 1973572006, at *1-2 (D. Conn., Jan. 25, 2006); *FTC v. Affiliate Strategies, Inc.*, No. 09-4104-JAR, 2010 WL 11470103, at *13-14 (D. Kan. June 8, 2010); *FTC v. BF Labs Inc.*, No. 4:14-CV-00815-BCW, 2015 WL 12806580, at *3 (W.D. Mo., Aug, 28, 2015). As the FTC knows, the defense of offset is highly factual, and it cannot be summarily defeated on a motion to strike by citation to cases with no factual similarity to this litigation. For example, the court in *BF Labs Inc.*, declined to strike defendants' offset defenses explaining that "there are scenarios where this factual information may be relevant to the appropriate remedy. Because the Court is reticent to strike even a potentially marginal defense that causes no discernible prejudice to Plaintiff, the Court declines to strike these defenses." *Id.* at *3; *see also Affiliate Strategies*, Inc., 2010 WL 11470103 at *13-15 (declining to strike offset defense due to limited case law on the subject and because the applicability of the defense was a question of fact).

Third, cases cited by the FTC should be disregarded. Again, the FTC seems to believe that Defendants must have a trial-ready case during the pleading stage. Not so. The FTC fails to recognize a critical distinction between the current case and those it cites. In each of those cases, defendants proposed that equitable monetary relief be decreased by the value of the positive benefits received from the product or services being sold. This case is entirely differently because the services consumers purchased resulted in reduced student loan payments, thereby reducing the amount of consumer loss.

The FTC fails to cite any case that says Defendants may not raise offset as a defense against the FTC in litigation. None of the cases cited by the FTC involved a product or service that would reduce consumers' overall expenses such as is the case here. As one example, the FTC relies on *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004). That case involved a company marketing magazine sales. *Id.* at 749-750. After the FTC obtained a judgment, the defendant continued to engage in the marketing of magazine sales. The FTC was forced to bring a contempt motion. In evaluating the issue of the equitable damages, the Court expressly stated that "[t]o accurately calculate actual loss, the defendants ***must be allowed to put forth evidence*** showing that certain amounts should offset the sanctions assessed against them…[f]or instance, the defendants might be able to show that some

have to address this frivolous argument.

The affirmative defenses at issue in the Motion are valid, and Defendants must be permitted to assert them just like any other litigant. The FTC attempts to play God when it states that "[a]n 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 or improbable allegations." It cites to purported "broad, burdensome, and prejudicial" discovery to support that far-fetched notion.[9] But it was the FTC that sued Defendants as part of a nationwide "sweep." It was the FTC that publicly acknowledged this complaint to be part of that larger effort. Discovery narrowly tailored to terminology in the FTC's own press release is not "wasteful" or "prejudicial" – it should be expected. Also, more importantly, the Court should consider only Defendants' Answer when ruling on the Motion, not the FTC's extraneous submissions. *See Williams*, 944 F.2d at 1400.[10]

As the court noted in *FTC v. U.S. Work Alliance, Inc.*:

> **Despite the FTC's argument to the contrary, the effect of briefing and ruling on these defenses was to raise several issues before they are factually ripe and caused the Court to consider purely legal defenses before the Defendants even attempt to utilize them**. The Court is essentially ruling in the dark on hypothetical legal defenses. The Court further notes that in its experience almost every experienced civil litigant will raise precisely these three affirmative defenses (mootness, laches, estoppel) in their answer because failure to do so, even if the defense likely lacks merit, may result in waiver. *See*

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pleadings." *Doe v. City of San Diego*, 289 F.R.D. 604, 608 (S.D. Cal. 2013). If the Court is inclined to grant the FTC's Motion and strike any of Defendants' affirmative defenses, Defendants respectfully request that the Court do so without prejudice and grant leave to amend the Answer.

VIII. CONCLUSION

For the reasons above, this Court should deny the FTC's Motion and let this case proceed on