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## I. Introduction

On August 29, 2018, Defendants filed an Answer to the FTC's Complaint ("Answer") that asserted eight affirmative defenses. (Dkt. 162). On September 18, 2018, the Federal Trade Commission ("FTC") filed a narrowly tailored Motion to Strike Defendants' Laches, Estoppel, and Offset Affirmative Defenses ("Motion") (Dkt. 169).[1] On October 2, 2018, Defendants filed an Opposition to the FTC's Motion to Strike ("Opp.") (Dkt. 175). However, Defendants' Opposition ignores controlling caselaw, cites a bevy of non-binding or distinguishable cases, and does not cure the fatal flaws with their affirmative defenses. For the reasons described below, the FTC respectfully requests the Court strike Defendants' sixth, seventh, and eighth affirmative defenses.

## II. Courts Routinely Grant Motions to Strike in the Interest of Judicial Economy and to Prevent Prejudice to a Party

Defendants argue that the Court should not dismiss their defenses at this stage in the litigation because the Court has not reviewed evidence relating to the defenses. Opp. at 5, 10, 12 (distinguishing numerous cases cited by the FTC because they had a different procedural posture than this matter). According to Defendants' logic, even if their defenses cannot possibly succeed, the Court should allow Defendants to go on a fishing expedition, and then reject their legally deficient defenses closer to trial. This waste of money and resources on legally deficient defenses is exactly "the evils that Rule 12(f) is intended to avoid . . ." *Smith v. Wal-Mart Stores*, No. C 06-2069-SBA, 2006 U.S. Dist. LEXIS 72225, at *11-12 (N.D. Cal. Sept. 20, 2006) (Judge Saundra Brown Armstrong). As this Court has stated, "the function of a Rule 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Id.* at *4-5 (*citing Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)). Eliminating insufficient defenses early, especially those that could not possibly succeed under any facts pleaded, is an exercise of the

[1] The Defendants are American Financial Benefits Center, Ameritech Financial, Financial Education Benefits Center, and Brandon Frere (collectively "Defendants").

Here, Defendants fail to plead plausible facts supporting each element of their laches and estoppel defenses. Answer at 20-21. First, Defendants ignore key elements of their defenses. They plead no facts indicating egregious misconduct by the FTC, nor do they indicate how the FTC caused them serious injury. Motion at 4. They also fail to show that estopping this litigation will not harm the public's interest. In fact, Defendants' estoppel defense in so vague that it is unclear what type of estoppel they are asserting. *Smith*, 2006 U.S. Dist. LEXIS at *25 (striking estoppel defense and noting, "the defense of estoppel alone could refer to any of several legal doctrines"). Second, some of the facts that purportedly support their defenses are facially insufficient. For example, Defendants argue that their laches defense provides "fair notice of delay on the part of the FTC." Opp. at 3. Defendants rely heavily on a supposed four-month delay between receiving a draft complaint and the complaint being filed. This so-called "delay," however, occurred at Defendant's own request, and is not the basis for a plausible laches defense against the FTC. *See Infra*, Section V.B.

## IV. Prevailing Opinion in the Ninth Circuit Is that Laches Is Unavailable as a Defense in a Government Action

A string of Ninth Circuit precedent, relying on the Supreme Court decision *United States v. Summerlin*, 310 U.S. 414, 415 (1940), states that the defense of laches categorically does not apply to the government in a civil suit to enforce public rights.[3] Because a laches defense is not available under these circumstances, courts have stricken laches defenses in prior FTC matters. Mot. at 4-5 (citing three FTC cases); *see also FTC v. Moneymaker*, No. 2:11-CV-461 JCM, 2011 U.S. Dist. LEXIS 83913, at *5-6 (D. Nev. July 28, 2011) ("the equitable doctrine of laches . . . is not viable if asserted against the government in this context"); *United States v. Global Mortg.*,

[3] *See United States v. Menator*, 925 F.2d 333, 335 (9th Cir. 1991) (citing *Summerlin*) ("The government is not subject to the defense of laches when enforcing its rights"); *Chevron USA, Inc. v. United States*, 705 F.2d 1487, 1491 (9th Cir. 1983) (citing *Summerlin*) ("The government is not bound by . . . laches in enforcing its rights"); *SEC v. Sands*, 902 F. Supp. 1149, 1167 (C.D. Cal. 1995) ("It is well established United States doctrine (1) (1995) (settlitebeyondt, s cor govsy(es that th.

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authority, prosecutorial discretion, and disclosure rules. It also would result in a huge, probably impossible, drain on agency resources. It would play out in reality as a gigantic loophole to the FTC Act. Defendant's estoppel by silence defense is ludicrous and legally insufficient, and should be stricken.

**B. Delay Is Not Grounds for Estoppel Against the Government**

Defendants also allege that the FTC's "claims are barred in part or in whole by the doctrine of estoppel because [the FTC] delayed bringing any action" for over a year. Answer at 22. Specifically, they allege the FTC engaged in "gross delay" by sending Defendants a draft complaint and then "wait[ing] over four months to file its Complaint in this action." *Id*. Even if Defendants' allegation of gross delay were plausible, it is not grounds for an estoppel defense. Motion at 3, citing *Jaa*, 779 F.2d at 572 (58-month delay not grounds for estoppel); *see also FTC v. Neovi, Inc*., No. 06-1952, 2010 U.S. Dist. LEXIS 101583, at *9-11 (S.D. Cal. Sept. 27, 2010) (no grounds for estoppel where the FTC raised a new challenge to defendants' marketing practices after a years-long investigation and after the court had issued a final order).

Defendants' allegation of delay is particularly jaw dropping because they asked the FTC to hold the Complaint. As detailed in the FTC's Opposition to Defendants' Motion to Dismiss the Complaint, (Dkt. 130 at 9), the Commission waited to vote on the Complaint so the Defendants could meet with the Commissioners and engage in settlement negotiations with staff. Because Defendants have not pleaded a plausible estoppel defense based on delay, the Court should strike this defense.

**C. A Law Enforcement Agency Filing a Routine Lawsuit Is Not Grounds for Estoppel**

Defendants' vague allegation that the FTC "engaged in an indiscriminate industry 'sweep'" is also legally insufficient to support an estoppel defense.[6] Answer at 22. Filing

[6] The FTC cases that Defendants imply were part of an illegitimate "sweep" have resulted in court orders in favor of the FTC or in court-approved settlements. Opp. at 14; *See*, e.g, *FTC v. Alliance Document Prep.*, No. 17-7048 (C.D. Cal. Sept. 24, 2018) (final order awarding FTC $10.2 million); *FTC v. A1 DOCPREP*, No. 17-07044 (C.D. Cal. May 7, 2018) (final order

prejudice if the Court strikes their offsets affirmative defense. However, the FTC will suffer prejudice if it has to waste resources debating the alleged benefits Defendants provided to deceived consumers, an issue the Ninth Circuit has held is irrelevant in FTC matters involving misleading sales tactics.[9] Consumer benefit is simply not an affirmative defense to deception, and the Court should strike this defense.

## VII. Legally Insufficient Defenses Should Be Denied With Prejudice

Defendants request that if the Court strike any of Defendants' affirmative defenses that it "do so without prejudice and grant leave to amend the Answer." Opp. at 15. However, permitting Defendants to re-plead legally insufficient defenses will simply result in another round of unnecessary briefing. Because Defendants' laches, estoppel, and offset defenses cannot succeed under the circumstances of this case or are inappropriate as a matter of law, the Court should dismiss them with prejudice. *Global Mortg.*, 2008 U.S. Dist. LEXIS at *13 (striking laches defense with prejudice). If Defendants want to amend their Answer, the Court should require them to file a motion seeking leave to amend that "include[s] a proposed pleading (and a redlined copy)" and "clearly explain[s] why the foregoing problems are overcome by the proposed pleading." *Fishman*, 2018 U.S. Dist. LEXIS at *22.

## VIII. Conclusion

Defendants' laches, estoppel, and offset defenses, if allowed to remain in this case, will serve only to needlessly prolong the discovery process and waste time and resources of the Court and the parties. The Court should use its inherent power to strike these defenses and streamline the ultimate resolution of this case.

[9] Unlike here, there was "no discernable prejudice to Plaintiff" in a case where the court declined to strike an offset defense. *See, e.g., FTC v. BF Labs Inc.*, No. 4:14-CV-00815-BCW, 2015 U.S. Dist. LEXIS 184242, at *8-9 (W.D. Mo. Aug. 28. 2015); Opp. at 12.

Respectfully submitted,

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FEDERAL TRADE COMMISSION