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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AUTOMATORS LLC, ET AL.,

Defendants,

PEREGRINE WORLDWIDE, LLC, a Delaware limited liability company,

Relief Defendant.

Case No. 23-cv-1444-DMS-BGS

PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Hearing: December 15, 2023, at 1:30 p.m.
Courtroom 13B

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Pursuant to Federal Rule of Civil Procedure 12(f), Plaintiff, the Federal Trade Commission ("FTC"), respectfully moves the Court to strike the affirmative defenses pleaded in the Answers of Defendants John Cresto and Roman Cresto (collectively, "Crestos") (ECF No. 58); Defendants Andrew Chapman and Pelenea Ventures and Relief Defendant Peregrine Worldwide, LLC (collectively, "Chapman Defendants") (ECF No. 60); and Defendants Automators LLC and Stryder Holdings, LLC (collectively, "Automators Defendants") (ECF No. 61).

BACKGROUND

On August 8, 2023, the FTC filed its Complaint (ECF No. 1) against Defendants and Relief Defendant for violations of the Federal Trade Commission Act ("FTC Act"), the Business Opportunity Rule, and the Consumer Review Fairness Act ("CRFA"), and simultaneously sought an *ex parte* temporary restraining order ("TRO") (ECF No. 5-1).

The Court issued the TRO (ECF No. 8) on August 11, freezing the assets of Defendants and Relief Defendant, and appointing a temporary receiver over the Corporate Defendants and Relief Defendant. The parties subsequently stipulated to a Preliminary Injunction (ECF No. 48). Defendants and Relief Defendant filed their Answers (ECF Nos. 58, 60, 61) on October 23, in accordance with the Court's order granting an extension of time to answer (ECF No. 43).

In their Answers, the Crestos and Automators Defendants asserted sixteen affirmative defenses: (1) failure to state a claim, (2) statute of limitations, (3) good faith, (4) no proximate cause, (5) no control, (6) waiver/estoppel, (7) negligence, (8) no material misrepresentation, (9) Fifth Amendment, (10) First Amendment, (11) reasonable reliance, (12) failure to mitigate, (13) no substantial injury, (14) relief, (15) offset, and (16) reservation of rights to assert additional affirmative defenses. (ECF No. 58 at 16–18; ECF No. 61 at 16–18.) The Chapman Defendants raise the same affirmative defenses except Fifth Amendment. (ECF No. 60 at 19–22.)

ARGUMENT

I. LEGAL STANDARD

Federal Rule of Civil Procedure 12(f) authorizes the Court to strike "an insufficient defense or any redundant, immaterial, or impertinent . . . matter." In ruling on a motion to strike, the court must assume that the moving party—here, the FTC—can successfully prove its complaint allegations at trial. *Cal. ex rel. State Lands Comm'n v. United States*, 512 F. Supp. 36, 39 (N.D. Cal. 1981).

Although some courts require movants to show prejudice to succeed in a motion to strike affirmative defenses, *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds*, *Fogerty v. Fantasy, Inc.,* 510 U.S. 517 (1994), the text of Rule 12(f) includes no such requirement, *see* Fed. R. Civ. P. 12(f). "Rather, it appears a showing of prejudice was 'judicially created,' as a result of the view that 'motions to strike are often used as delaying tactics and because of the limited importance of pleadings in federal practice.'" *G&G Closed Circuit Events, LLC v. Alfaro*, No. 1:22-CV-0543, 2023 WL 1803399, at *3 (E.D. Cal. Feb. 7, 2023) (quoting *Citizens for Quality Educ. San Diego v. San Diego Unified Sch. Dist.*, No. 17-CV-1054, 2018 WL 828099, at *3 (S.D. Cal. Feb. 12, 2018)). The Ninth Circuit has "decline[d] to add additional requirements to the Federal Rules of Civil Procedure when they are not supported by the text of the rule." *Atlantic Richfield Co. v. Ramirez*, 176 F.3d 481, 1999 WL 273241, at *2 (9th Cir. May 4, 1999) (declining to require movant to show prejudice); *see also G&G Closed Circuit Events*, 2023 WL 1803399, at *10–*11 (declining to require movant to show prejudice).

The purpose of a Rule 12(f) motion is "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983); *see also Boykins v. City of San Diego*, No. 21-cv-01812, 2022 WL 3362273, at *3 (S.D. Cal. Aug. 15, 2022) (quoting *Sidney-Vinstein*). While courts can be reluctant to excise affirmative defenses, "if the defense asserted is invalid as a matter of law, such determination should

be made now, in order to avoid the needless expenditures of time and money" involved in litigating fruitless matters. *Purex Corp., Ltd. v. Gen. Foods Corp.*, 318 F. Supp. 322, 323 (C.D. Cal. 1970); *see also Boykins*, 2022 WL 3362273, at *3 ("However, where 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." (internal quotation omitted)).

II. DEFENDANTS' AFFIRMATIVE DEFENSES SHOULD BE STRICKEN.

A. Affirmative defenses that should be stricken as insufficient

"An affirmative defense may be insufficient as a matter of pleading or as a matter of law." *Kohler v. Staples the Office Superstore, LLC*, 291 F.R.D. 464, 467 (S.D. Cal. 2013) (citation omitted). "The key to determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense." *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1008 (9th Cir. 2019) (citing *Wyshak*). "[A]n affirmative defense is legally insufficient only if it lacks merit 'under any set of facts the defendant might allege.'" *Kohler*, 291 F.R.D. at 468 (internal quotation omitted).

i. Affirmative defenses 2, 6, and 15 fail as a matter of law.

Statute of limitations (2). Defendants do not state the applicable statute of limitations when alleging their statute of limitations affirmative defense (ECF No. 58 at 16; ECF No. 60 at 16; ECF No. 61 at 20), thereby failing to provide fair notice (*see infra* II.A.ii). Moreover, Defendants could not properly allege a statute of limitations defense regarding Section 13(b), 15 U.S.C. of the FTC Act (*see* ECF No. 1 at 23–24 (Count One: False or Unsubstantiated Earnings Claims)) because none applies. In the Ninth Circuit, a statute of limitations defense against the United States government is only valid when the statute in question contains an *express* limitations period. *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993). Because Section 13(b) of the FTC Act contains no such limitations period, the statute of limitations defense does not apply. *See*

United States v. Dish Network, LLC, 75 F. Supp. 3d 942, 1004 (C.D. Ill. 2014) ("The Plaintiffs' claims for equitable relief under § 13(b) are simply not subject to any statute of limitations."), *vacated in part on reconsideration on other grounds, United States v. Dish Network, LLC*, 80 F. Supp. 3d 917 (C.D. Ill. 2015); *FTC v. Ivy Capital, Inc.*, 2:11-CV-283, 2011 WL 2470584, at *8 (D. Nev. June 20, 2011) ("Section 13(b) of the Federal Trade Commission Act specifies no statute of limitations period"); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 263 (E.D.N.Y. 1998) (noting that Section 13(b) of the FTC Act does not contain a statute of limitations).

Section 19 of the FTC Act, the section under which the FTC's claims for violations of the Business Opportunity Rule and CRFA arise (ECF No. 1 at 24–29 (Counts Two through Seven)), has a three-year statute of limitations. [1] 15 U.S.C. § 57b(d). The Complaint's allegations, when taken as true (*see Cal. ex rel. State Lands Comm'n*, 512 F. Supp. at 39), demonstrate that it was filed within the applicable statute of limitations (ECF No. 1 at 24, ¶ 95; 30), and the affirmative defense should be stricken. *See G&G Closed Circuit Events,* 2023 WL 1803399, at *6 (striking, without leave to amend, affirmative defense when the complaint was filed within the applicable statute of limitations).

Waiver and/or Estoppel (6). In addition to being insufficiently pled because they fail to give the FTC fair notice (*see infra* II.A.ii), these defenses should be stricken for being generally unavailable as defenses against a government enforcement action. *See, e.g.*, *SEC v. Culpepper*, 270 F.2d 241, 248 (2d Cir. 1959); *SEC v. Morgan, Lewis & Bockius*, 209 F.2d 44, 49 (3d Cir. 1953); *Mines and Metals Corp. v. SEC*, 200 F.2d 317, 320–21 (9th Cir. 1952).

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[1] Section 19's three-year statute of limitations does not limit the relief sought under Section 13(b) because Section 19 provides that "nothing in this section shall be construed to affect any authority of the Commission under any other provision of law." 15 U.S.C. § 57b(e); *see also Ivy Capital*, 2011 WL 2470584, at *8–*9.

"[W]aiver is the intentional relinquishment or abandonment of a known right." *FTC v. Tracers Info. Specialists, Inc.*, No. 8:16-MC-18TGW, 2016 WL 3896840, at *7 (M.D. Fla. June 10, 2016) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)). Numerous courts have also held that waiver is not a defense in a case where, as here, a government agency is attempting to enforce an act of Congress. *See*, *e.g.*, *Capital Funds, Inc. v. SEC*, 348 F.2d 582, 588 (8th Cir. 1965) (holding that government agency may not waive violations of federal law); *see also FTC v. Consumer Def., LLC*, 18-cv-30, 2019 WL 266287, at *5 (D. Nev. Jan. 18, 2019) (striking waiver and estoppel); *FTC v. Bronson Partners, LLC*, No. 3:04-cv-1866, 2006 WL 197357, at *2 (D. Conn. Jan. 25, 2006) (granting motion to strike waiver defense because "[t]he FTC may not waive the requirement of an act of Congress"); *Morgan, Lewis & Bockius*, 209 F.2d at 49 (holding that government agency may not waive violations of federal law). Because the FTC cannot waive its right—and its duty—to enforce the FTC Act's prohibition on unfair or deceptive acts or practices, the Court should strike Defendants' waiver defense as a matter of law.

Equitable estoppel is a viable affirmative defense against the government only if the defendant establishes two threshold elements: (1) affirmative misconduct on the part of the government and (2) that the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of estoppel. *Watkins v U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989). Ninth Circuit decisions that have applied these elements have routinely declined to allow the estoppel defense in government actions.[2] *See*, *e.g.*, *Mukherjee v. INS*, 793 F.2d 1006, 1008–09 (9th Cir. 1986); *United States v. Ruby Co.*, 588 F.2d 697, 703–04 (9th Cir. 1978). Furthermore,

[2] The Ninth Circuit cases that allowed the estoppel defense to be used against the government have not involved actions brought by the government in its role as protector of the public welfare or enforcer of public rights or interests. Rather, these few cases have involved employment and contract issues. *See Watkins*, 875 F.2d at 706; *United States v. Hatcher*, 922 F.2d 1402, 1410 (9th Cir. 1990).

district courts in the Ninth Circuit have held that equitable defenses, including estoppel, may not be asserted against a sovereign who acts to protect the public welfare. *See*, *e.g.*, *Consumer Def.*, 2019 WL 266287, at *13–*14 (laches, waiver, estoppel); *United States v. Iron Mountain Mines*, 812 F. Supp. 1528, 1546 (E.D. Cal. 1992) (waiver, estoppel, unclean hands); *United States v. Stringfellow*, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987) (equitable defenses).

Here, Defendants merely recite the word "estoppel" without providing allegations of any affirmative misconduct on the part of the FTC. (ECF No. 58 at 17; ECF No. 60 at 20; ECF No. 61 at 16). Moreover, this action clearly seeks to further the public interest by seeking injunctive relief to prevent further harm to consumers and equitable monetary relief for redress to consumers. As such, the Court should strike Defendants' estoppel defense as a matter of law, just as other courts have done in previous FTC law enforcement actions. *See*, *e.g.*, *FTC v. OMICS Grp. Inc.,* No. 2:16-cv-02022, 2017 WL 6806802, at *3 (D. Nev. Dec. 15, 2017) (striking estoppel affirmative defense as a matter of law); *FTC. v. Am. Microtel Inc.*, No. CV-S-92-178, 1992 WL 184252, at *1 (D. Nev. June 10, 1992) ("[T]he law is well established that principles of laches and equitable estoppel are not available as defenses in a suit brought by the government to enforce a public right or a public interest." (citation omitted)).

Offset (15). Defendants assert as an affirmative defense that any monetary relief is subject to offset by (1) the benefits received by consumers, (2) costs associated with the advertising or marketing of goods and/or services, and (3) the alleged damages caused to Defendants by the TRO and Stipulated Preliminary Injunction entered in this action. (ECF No. 58 at 18; ECF No. 60 at 22; ECF No. 61 at 18.) The Court should strike Defendants' offset defenses because they are legally insufficient to reduce their monetary relief.[3]

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[3] It is well settled that, for violations of the FTC Act, consumer loss is calculated by the amount of money paid by the consumers, less any refunds made. *FTC v. Commerce*

The Ninth Circuit has determined that the alleged benefit received by a consumer, or the value of a defendant's product or service, is not a proper basis to reduce monetary relief. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606–07 (9th Cir. 1993). In *Figgie*, the FTC sought consumer redress under the FTC Act against a seller of heat detectors. The Ninth Circuit rejected defendant's argument that a full refund was inappropriate because the heat detectors had some value. *Id*. Rather, the court analogized its case to that of a dishonest merchant who sold rhinestones as diamonds and held that a customer's recovery should not be limited "to the difference between what they paid and a fair price for rhinestones" because if the customers "had been told the truth, perhaps they would not have bought rhinestones at all." *Id*. at 606. The Ninth Circuit explained that"[t]he fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds[.]" *Id.*; *see also FTC v. Lights of Am., Inc.*, No. SACV10-01333, 2013 WL 5230681, at *51–*52 (C.D. Cal. Sept. 17, 2013) ("The proper measure of recovery for consumers is the full amount the consumers paid.").

Similarly, Defendants should not be allowed to deduct their costs, such as business expenses and production costs, from the monetary judgment award. *See FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (" . . . [B]ecause the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits.").

Finally, Defendants' apparent effort to recoup the forgone revenues from their illegal business operation is devoid of any merit (i.e., Defendants' claims for damages from the TRO and Stipulated Preliminary Injunction). Having considered the FTC's extensive evidence, this Court has found good cause to believe Defendants were engaged in illegal conduct and that their ongoing violations were likely to result in immediate and

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Planet, Inc., 815 F.3d 593, 603 (9th Cir. 2016); *FTC v. Publishers Bus. Servs., Inc*., 540 F. App'x 555, 558 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2724 (2014). Accordingly, the only legitimate offset in FTC enforcement actions like this one is refunds.

irreparable harm to consumers. (ECF No. 8 at 6.) Subsequently, Defendants stipulated to a Preliminary Injunction with terms similar to the terms of the TRO. (ECF No. 48.) A district court in Nevada confronted with this same defense found it to be legally insufficient under Rule 12(f), stating, "The court is not aware of and the counter-movants have not provided any authority showing that this is a proper affirmative defense." *Consumer Defense*, 2019 WL 266287, at *5. Here, too, Defendants provide no authority to support such a defense, and it should be stricken.

ii. Insufficiently pled affirmative defenses

As this Court has written, "the defense must be sufficiently articulated so that the plaintiff is not a victim of unfair surprise." *J&J Sports Prods. v. Jimenez*, No. 10cv0866, 2010 WL 4639314, at *4–*5 (S.D. Cal. Dec. 15, 2010). Fair notice requires more than "bare bones conclusory allegations." *United States. v. Hempfling*, No. CVF05-594, 2007 WL 1299262, at *4 (E.D. Cal. May 1, 2007) (internal quotations omitted). Defendants have not met that standard here.

Defenses 1 to 6 and 8 to 14 are conclusory statements devoid of any factual details and should be stricken for failing to provide fair notice. *See, e.g.*, *G&G Closed Circuit Events*, 2023 WL 1803399, at *14–*15 (striking affirmative defenses for failing to allege facts sufficient to provide fair notice for the basis of the claims); *Vertical Bridge Dev., LLC v. Brawley*, No. 21-cv-02153, 2022 WL 4879898, at *10 (S.D. Cal. June 28, 2022) (striking two affirmative defenses where defendants offered only conclusory allegations that did not satisfy the fair notice standard); *FTC v. N. Am. Mktg. & Assocs., LLC*, No. CV-12-0914, 2012 WL 5034967, at *2–*5 (D. Ariz. Oct. 18, 2012) (striking affirmative defenses when defendants failed to "provide some explanation of their defenses," including, *inter alia*, failure to state a claim; estoppel, waiver, and laches; statute of limitations; release; reservation of rights; and mitigation of damages); *Jimenez*, 2010 U.S. WL 4639314, at *5 (granting motion to strike conclusory defenses).

Fifth Amendment (9). The Crestos' and Automators Defendants' ninth affirmative defense asserts that "Defendants were deprived the procedural due process

guaranteed by the Fifth Amendment to the United States Constitution." (ECF No. 58 at 17; ECF No. 61 at 17). It is a basic principle of due process that laws provide persons subject to regulation with a "reasonable opportunity to know what [conduct] is prohibited, so that [they] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). However, Defendants fail to state any supporting facts or even state what statute, rule, or standard is the subject of their challenge. Accordingly, this defense should be stricken.

B. Affirmative defenses 1, 4, 5, 7, 8, 10, 11, 13, and 14 are redundant.

Nine of Defendants' affirmative defenses are merely denials of allegations in the Complaint. "Affirmative defenses plead matters extraneous to the plaintiff's *prima facie* case, which deny the plaintiff's right to recover even if the allegations of the complaint are true." *FDIC v. Main Hurdman*, 655 F. Supp. 259, 262 (E.D. Cal. 1987); *see also J&J Sports Prods v. Juarez*, No. 15-cv-1477, 2016 WL 795891, at *1 (S.D. Cal. Mar. 1, 2016) (noting that a statement that denies plaintiff's prima facie case is not an affirmative defense). "A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense." *Zivkovic v. So. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002).

Failure to state a claim (1). Defendants allege the Complaint fails to state a claim. (ECF No. 58 at 16; ECF No. 60 at 16; ECF No. 61 at 20.) "Failure to state a claim is a defect in the plaintiff's claim; it is not an additional set of facts that bars recovery notwithstanding the plaintiff's valid prima facie case. Therefore, it is not properly asserted as an affirmative defense." *Boldstar Tech., LLC v. Home Depot, Inc.*, 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007). Accordingly, Defendants' first affirmative defense should be stricken. *See, e.g.*, *Vertical Bridge Dev.*, 2022 WL 4879898, at *6 (striking affirmative defense of failure to state a claim without leave to amend); *see also G&G Closed Circuit Events*, 2023 WL 1803399, at * 10–*11 (same); *Grano v. Sodexo Mgmt., Inc.*, No. 18-cv-1818, 2020 WL 7074905, at *24 (S.D. Cal. Dec. 3, 2020) (same).

Moreover, that the FTC's Complaint alleges facts which, if taken as true for the purposes of this motion, (*see Cal. ex rel. State Lands Comm'n*, 512 F. Supp. at 39), are sufficient to support the counts set forth in the Complaint, provides an independent basis to strike Defendants' affirmative defense. Specifically, the FTC has alleged that (a) Defendants operated a business opportunity (ECF No. 1, ¶¶ 26–46, 67–80); (b) Defendants violated Section 5 of the FTC Act (*id.*, ¶¶ 47–51, 79, 81–85), the Business Opportunity Rule (*id.*, ¶¶ 47–51, 60–61, 79–80), and the CRFA (*id.*, ¶¶ 52–59); (c) the Corporate Defendants operated as a Common Enterprise (*id.*, ¶¶ 21–24); (d) the Individual Defendants formulated, directed, had the authority to control, or participated in the acts and practices set forth in the Complaint and are liable for violations of Section 5 of the FTC Act, the Business Opportunity Rule, and the CRFA (*id.*, ¶¶ 17–19); and (e) the Relief Defendant received funds that can be traced directly to Defendants' deceptive and unlawful acts or practices and to which it has no legitimate claim (*id.*, ¶ 20). The FTC alleges in the Complaint that it brings this action under (1) Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits unfair or deceptive acts or practices (*id.*, ¶¶ 93–95), (2) the Business Opportunity Rule, 16 C.F.R. Part 437, violations of which constitute an unfair or deceptive act or practice (*id.*, ¶¶ 99–108), and (3) the CRFA, 15 U.S.C. § 45b, violations of which also constitute an unfair or deceptive act or practice (*id.*, ¶¶ 119–24). These allegations meet every element required to establish that Defendants violated the FTC Act, Business Opportunity Rule, and CRFA. Thus, Defendants' first affirmative defense fails as a matter of law and should be stricken.

No proximate cause (4), no control (5), negligence (7), and reasonable reliance (11). These affirmative defenses (ECF No. 58 at 16–17, ECF No. 60 at 20–21, ECF No. 61 at 16–17) allege that unnamed others, or, in the case of the seventh affirmative defense, consumers themselves, are responsible for the unlawful conduct alleged in the Complaint. These defenses are denials, not affirmative defenses, because they deny the allegations in the Complaint while pointing the finger at other, typically

unidentified, parties. Because the FTC bears the burden of demonstrating that Defendants are liable, Defendants' denials or arguments that others were responsible represents an attack on the FTC's ability to meet its burden of proof. Since they merely restate Defendants' denials of certain Complaint allegations appearing in their Answers (*e.g.*, ECF No. 58 at 4–5, 8–9; ECF No. 60 at 6, 10; ECF No. 61 at 4–5, 8), they should be stricken as redundant.[4] *See G&G Closed Circuit Events*, 2023 WL 1803399, at *15, *24, *36 (striking affirmative defenses such as fault of others, no proximate causation, and lack of control or responsibility because assertions that attack the prima facie elements of the claims are not proper affirmative defenses); *N. Am. Mktg. & Assocs.*, 2012 WL 5034967, at *11–*15 (striking defenses based on non-parties at fault, acts or omissions of third parties, no knowledge or control over other defendants' actions); *Jimenez*, 2010 WL 4639314, at *6–*7.

Once the FTC proves that Defendants have violated the FTC Act or rules under Section 19 and caused injury, the culpability or actions of others is irrelevant because the fault of other persons or entities does not absolve Defendants of liability for their own actions. The FTC is not required to name as defendants all parties who may be jointly and severally liable. *See SEC v. Princeton Econ. Int'l Ltd.*, Nos. 99 CIV 9667 RO, 99 CIV 9669 RO, 2001 WL 102333, at *2–*4 (S.D.N.Y. Feb. 5, 2001) (rejecting defendant's argument that he "could not have violated the law[] . . . without the willful and knowing participation" of other entities, and ruling that the presence of the unnamed entities "is not required to ascertain [the defendant's] liability for the alleged fraudulent conduct and

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[4] Defendants' fourth affirmative defense—"[d]efendants' alleged conduct was not the legal or proximate cause of any alleged injury or damages to consumers"—is also immaterial, as it is not an element of any claim contained in the FTC's Complaint, and there is no requirement that the FTC show proximate cause. For example, to prove that an act or practice is deceptive under Section 5, the FTC must show that such act or practice (1) involves a material representation or omission, (2) that is likely to mislead consumers, (3) acting reasonably under the circumstances, (4) to their detriment. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995).

the potential applicability of injunctive relief, restitution, disgorgement, civil monetary penalties, etc.").

No material misrepresentations (8), First Amendment (10), no substantial injury (13). Defendants' affirmative defenses 8, 10, and 13 (ECF No. 58 at 17–18; ECF No. 60 at 21; ECF No. 61 at 17) are also redundant denials, not proper affirmative defenses.

In their Answers, Defendants already deny that they made material misrepresentations (*See* ECF No. 58 at 12–13; ECF No. 60 at 15–16; ECF No. 61 at 11–13.) Similarly, Defendants deny the FTC's pleading of consumer injury (ECF No. 1 at 30). (*See* ECF No. 58 at 16; ECF No. 60 at 7–8, 13; ECF No. 61 at 15.)

Defendants assert "a right to communicate *truthful* commercial speech under the First Amendment to the United States Constitution." (ECF No. 58 at 17; ECF No. 60 at 21; ECF No. 61 at 17) (emphasis added). This purported affirmative defense, therefore, repeats Defendants' denials described above. [5] *See N. Am. Mktg. & Assocs.*, 2012 WL 5034967, at *6 (concluding defendant's affirmative defense asserting its communication was "nondeceptive, and thus protected commercial speech" was "a factual disagreement with the merits of Plaintiff's case," not a proper affirmative defense).

Accordingly, their pleading of these affirmative defenses is redundant and improper as an affirmative defense. *See Barnes v. AT&T Pension Benefit Plan-*

[5] For commercial speech to receive First Amendment protection, "it at least must concern lawful activity and not be misleading." *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 844 (9th Cir. 2017) (quoting *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). Because Defendants' commercial speech is alleged in the Complaint to be false and misleading (ECF No. 1 at 21–22, 24), Defendants' First Amendment affirmative defense is also unavailable as a matter of law. *See FTC v. Stefanchik*, No. C04-1852RSM, 2004 WL 5495267, at *2 (W.D. Wash. Nov. 12, 2004) (striking purported First Amendment affirmative defense because, assuming facts alleged in the complaint to be true, the defense fails as a matter of law).

Nonbargained Program, 718 F. Supp. 2d 1167, 1173–74 (N.D. Cal. 2010) (striking as redundant negative defenses that repeated denials already made in answer).

Relief (14). Defendants assert as an affirmative defense that "[t]he relief sought is impermissibly punitive in nature, is not limited to what is necessary and appropriate to redress the alleged harm, and would not be in the public interest." (ECF No. 58 at 18; ECF No. 60 at 21; ECF No. 61 at 18.) In other words, Defendants argue that the requested relief is not authorized by law. Yet in the Complaint, the FTC clearly requests "temporary, preliminary, and permanent injunctive relief, monetary relief, and other relief for Defendants' acts or practices in violation of . . . the FTC Act, [Business Opportunity Rule], . . . and the C[RFA][.]" (ECF No. 1 at 2.) Furthermore, 15 U.S.C. Section 57b expressly lists "rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages" as relief available for violations of Section 19 of the FTC Act. 15 U.S.C. § 57b(b). If Defendants are asserting that such "relief" is not authorized by the FTC Act and aforementioned rules, they must be arguing that they did not violate the FTC Act or the aforementioned rules.[6] But this raises a question of fact, not an affirmative defense.[7] *See Zivkovic,* 302 F.3d at 1088 ("A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense."). Accordingly, the Court should strike this affirmative defense.

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[6] To the extent that this affirmative defense is predicated upon Defendants' assertion of various offset defenses, the FTC reasserts and repeats by reference each argument for why the Court should strike each offset defense as legally insufficient to reduce monetary relief.

[7] If Defendants are arguing that some other law makes the "relief" unauthorized, then they have failed to provide fair notice of what law they mean. *See Wyshak*, 607 F.2d at 827 ("The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.") Similarly, Defendants have also failed to provide fair notice of how relief, which would be fashioned by this Court, would not be in the public interest.

C. Affirmative defenses 3 and 12 should be stricken as immaterial.

"'Immaterial' matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc.,* 984 F.2d at 1527 (quoting 5 Charles A. Wright & Arthur R. Miller, *Fed. Practice & Procedure* § 1382, at 706–07 (1990)).

Good faith (3). Defendants' third affirmative defense—that they acted in "good faith" and "in a manner that was reasonable and justified"—also should be stricken. (ECF No. 58 at 16; ECF No. 60 at 20; ECF No. 61 at 16.) This defense is immaterial because good faith is not a defense to liability for violating Section 5 of the FTC Act.[8] *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960) (holding that whether good or bad faith exists is not material, if the Commission finds that there is a likelihood to deceive); *FTC v. Gugliuzza*, 527 B.R. 370, 376 (C.D. Cal. 2015) (noting that proof that the individual intended to deceive consumers or acted in bad faith is unnecessary to establish a violation of Section 5); *see also Jimenez.*, No. 10-cv-0866, 2010 WL 4639314, at *6–*7 (striking good faith affirmative defense because evidence of intent is unnecessary in determining the existence of a violation). Accordingly, the Court should strike Defendants' third affirmative defense.

Failure to mitigate (12). Defendants allege that recovery against them is barred because consumers failed to mitigate damages. (ECF No. 58 at 18; ECF No. 60 at 21; ECF No. 61 at 17.) The FTC's request for consumer redress is solely an equitable request brought under Section 19 of the FTC Act, which authorizes the court "to grant such relief as the court finds necessary to redress injury to consumers," including "the refund of money," resulting from violations of the Business Opportunity Rule and CRFA. 15

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[8] Similarly, good faith is inapplicable to the Business Opportunity Rule and the CRFA because violations of these rules constitute unfair or deceptive acts or practices in violation of Section 5 of the FTC Act. *See* 15 U.S.C. § 45b(d)(1); 16 C.F.R. §§ 437.2–.4, 6.

U.S.C. § 57b(b). Accordingly, this affirmative defense is not available here and should be stricken. *See FTC v. Medicor LLC*, No. CV011896CBMEX, 2001 WL 765628, at *2 (C.D. Cal., June 26, 2001) (granting FTC's motion to strike affirmative defense of mitigation of damages as "not relevant" because the FTC sought only equitable relief).

D. Affirmative defense 16 should be stricken because it is a legal request.

All Defendants assert the reservation of their right to include additional affirmative defenses. (ECF No. 58 at 18; ECF No. 60 at 22; ECF No. 61 at 18.) "An attempt to reserve affirmative defenses for a future date is not a proper affirmative defense." *United States. v. Glob. Mortg. Funding, Inc.*, No. SACV 07-1275, 2008 WL 5264986, at *5 (C.D. Cal. May 15, 2008). "If Defendants seek to amend the Answer, they must do so pursuant to Fed. R. Civ. P. 15." *Jimenez*, No. 10-CV-0866, 2010 WL 4639314, at *6. Accordingly, the Court should strike this improper affirmative defense. *See, e.g.*, *Hinrichsen v. Quality Loan Servs. Corp.*, No. 16-CV-0690, 2016 WL 9458800, at *4 (S.D. Cal. Nov. 23, 2016) (striking reservation of rights as an affirmative defense); *Jimenez.*, No. 10-CV-0866, 2010 WL 4639314 at *7 (same).

III. THE FTC WILL BE PREJUDICED IF THE COURT DENIES ITS MOTION.

Some courts require a movant to show prejudice in order to grant a motion to strike affirmative defenses. *See, e.g.*, *Fantasy, Inc.*, 984 F.2d at 1528. While the FTC believes that it does not need to show prejudice in order to prevail in its motion to strike Defendants' affirmative defenses, *see, e.g.*, *G&G Closed Circuit Events*, 2023 WL 1803399, at *10–*11 (declining to require movant to show prejudice), it nevertheless can do so.

For example, Defendants' offset and relief affirmative defenses, if allowed to stand, will prejudice the FTC by increasing the costs of this litigation, including forcing the agency to hire an expert to rebut Defendants' calculations of alleged benefits, costs, and damages. *See Sidney-Vinstein*, 697 F.2d at 885 (noting that "the function of a 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"). As another example, failing to strike Defendants' affirmative defenses of consumer negligence and consumer failure to mitigate damages will prejudice the FTC by permitting Defendants to seek discovery on irrelevant and extraneous issues from every consumer they deceived, a time- and cost-intensive process involving hundreds of consumer victims that only distracts from the matter at issue in this case: Defendants' failure to comply with the FTC Act, the Business Opportunity Rule, and the CRFA. Because failure to do so will prejudice the FTC, the Court should grant the FTC's motion to strike Defendants' affirmative defenses.

CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Court strike the above-referenced affirmative defenses of the Crestos, Chapman Defendants, and Automators Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2023, I electronically filed the foregoing with the Clerk of the Court using CM/ECF, which will cause a copy of the same to be served on the following parties entitled to service:

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