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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

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| Federal Trade Commission,<br><br>Plaintiff,<br><br>vs.<br><br>Vemma Nutrition Company, *et al.*,<br><br>Defendants. | NO. CV-15-01578-PHX-JJT<br><br>**DEFENDANTS' OMNIBUS RESPONSE IN OPPOSITION TO PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION TO STRIKE AFFIRMATIVE DEFENSES** |

Defendants Vemma Nutrition Company and Vemma International Holdings, Inc. ("**Corporate Defendants**"), Benson K. Boreyko ("**Mr. Boreyko**"), and Tom and Bethany Alkazin ("**Alkazin Defendants**") (collectively, "**Defendants**") hereby submit their omnibus response in opposition to the Federal Trade Commission's ("**FTC**") Motion to Strike Affirmative Defenses [Dkt. 157]. For the reasons set forth in the accompanying Memorandum of Points and Authorities, Defendants respectfully request that the Court deny the FTC's Motion and, in the event the Court deems any affirmative defenses deficient, that it grant Defendants leave to amend.

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION.

The FTC's stated purpose behind filing its Motion is to "save time, money, and to focus the parties on meritorious issues . . . ." [Motion, at 11.] But the FTC fails to explain how its Motion does anything of the sort. In reality, the Motion sidetracks this litigation with issues more appropriately decided on summary judgment or at trial. Indeed, at least one court has noted the irony present when the government files a motion to strike affirmative defenses on the grounds that it will preserve resources:

> [T]he entire Motion seems to be, to borrow a phrase, "much ado about nothing." The parties have undoubtedly expended many hours preparing and defending the Motion, advancing countless and sometimes highly technical reasons why each affirmative defense should be stricken. Yet regardless of the outcome and despite the Court's resources demanded by this Motion, ***it does little to advance or streamline the action***.

*U.S. Bank Nat. Ass'n v. Educ. Loans Inc.*, No. CIV. 11-1445 RHK/JJG, 2011 WL 5520437, at *6 (D. Minn. Nov. 14, 2011) (emphasis added). This sentiment matches the Ninth Circuit's strong hostility to motions to strike affirmative defenses under Fed. R. Civ. P. 12(f). District courts within the Ninth Circuit – including this Court – have routinely held that Rule 12(f) motions to strike are disfavored, and that the viability of affirmative defenses are better decided at summary judgment or at trial.

The FTC ignores the Ninth's Circuit's clear guidance, instead asking this Court to make a premature determination that Defendants' affirmative defenses fail as a matter of law. As is further demonstrated below, they do not – Defendants' affirmative defenses are all sufficiently pled and available as a matter of law.

Moreover, the FTC's reliance on the Court's finding that the FTC is likely to succeed on the merits cannot, and does not, justify the relief the FTC seeks in its Motion. The Court made this finding on a motion for preliminary injunction, for which Defendants had less than a month to prepare, whereas the FTC's investigation and preparation extended for one year before the entry of the temporary restraining order. Defendants are entitled to develop a record supporting their affirmative defenses by

engaging in all available discovery. The partial grant of a preliminary injunction does not strip Defendants of this fundamental right.

In sum, the Court should deny the FTC's Motion and allow the parties to vet the affirmative defenses through discovery, dispositive motion practice, and, if necessary, at trial. In the alternative, the Court should grant Defendants leave to amend any affirmative defenses it deems deficient.

## II. ARGUMENT.

### A. Motions to Strike Affirmative Defenses are Strongly Disfavored in the Ninth Circuit.

This Court has held that "[m]otions to strike are generally disfavored and are not granted unless it is clear that the matter sought to be stricken could have ***no possible bearing on the subject matter of the litigation***." *Patterson v. Two Fingers LLC*, No. CV-15-00494-PHX-NVW, 2015 WL 2345658, at *3 (D. Ariz. May 15, 2015) (emphasis added); *see also, Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248–49 (9th Cir. 1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim."); *F.T.C. v. Golden Empire Mortgage, Inc.*, No. CV 09-3227 CAS (RCX), 2009 WL 4798874, at *2 (C.D. Cal. Dec. 10, 2009) ("Because of the limited importance of pleadings in federal practice, motions to strike pursuant to Rule 12(f) are disfavored.")

District courts within the Ninth Circuit have imposed this high standard because motions to strike are "so often used as delaying tactics, and because of the limited importance of pleadings in federal practice." *F.T.C. v. Golden Empire Mortgage*, 2009 WL 4798874, at *3; *Mireles v. Paragon Sys. Inc.*, No. 3:13-CV-00122-L-BGS, 2013 WL 3450090, at *1 (S.D. Cal. July 9, 2013) (citing *Rosales v. Citibank*, 133 F.Supp.2d 1177, 1180 (N.D.Cal.2001) (same); *Cal. Dept. of Toxic Substances Control v. Alco Pacific, Inc.*, 217 F. Supp.2d 1028, 1033 (C.D. Cal. 2002) (same).

As a result of this strong presumption against motions to strike, courts must view the challenged affirmative defense in a "light more favorable to the pleader." *J & J*

*Sports Productions, Inc. v. Khachatrian*, 2011 WL 720049, *1 (D. Ariz. 2011) (citing *First Horizon Home Loan Corp. v. Phillips*, 2008 WL 906698, *4 (D. Ariz. 2008)); *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 669 (C.D. Cal. 2000) (same). "To strike an affirmative defense, the moving party must convince the court that there are ***no questions of fact***, that ***any questions of law are clear and not in dispute***, and that ***under no set of circumstances could the defense succeed***. *SEC v. Sands*, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995) (emphasis added, internal citations omitted).

In a similar case, where the FTC moved to strike nearly identical affirmative defenses, one court denied the FTC's motion in its entirety, holding that "the legal merit of all of these arguments is better addressed on a motion for summary judgment." *F.T.C. v. Golden Empire Mortgage*, 2009 WL 4798874, at *3. So too here. Defendants have not yet obtained the benefits of complete discovery, and should not be deprived of this right – especially where Defendants' beliefs and suspicions cannot be specifically alleged without the benefit of confirmation through discovery. The Court should allow Defendants to develop their affirmative defenses through discovery, and address any purported deficiencies on summary judgment. *See, e.g., SEC v. Sands*, 902 F. Supp. at 1166 (striking defense ***after completion of discovery*** where defendants failed to produce evidence that the SEC acted unconstitutionally in prosecuting action).

**B. <u>The FTC Discretely – and Incorrectly – Applies the *Iqbal/Twombly* Standard to its Motion to Strike.</u>**

Although the FTC technically cites the correct "fair notice" standard in its Motion, it repeatedly accuses Defendants of failing to support their affirmative defenses with "facts." [*See* Motion, at 5, 6.] The FTC's allegations of insufficient factual support strongly resemble the heightened pleading standard set forth in *Bell Atl.Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The heightened pleading standard set forth in *Iqbal* and *Twombly*, however, does not apply to the pleading of affirmative defenses, according to the prevailing law of this district and other districts in the Ninth Circuit. *See, e.g., AmeristarFence Products, Inc. v. Phoenix*

*Fence Co*., 2010 WL 2803907, *1 (D. Ariz. 2010) (collecting cases and holding that *Iqbal* and *Twombly* do not apply to pleading of affirmative defenses).

Instead, the Ninth Circuit holds that a defense is sufficient if it provides the plaintiff with "fair notice." *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir. 1979). And unless the defense is one that falls under Rule 9, there is no requirement that a party plead an affirmative defense with particular specificity. *Wong v. U.S.*, 373 F.3d 952, 969 (9th Cir. 2004). Indeed, "Rule 8(b) and Rule 8(c) contain no language that pleaders must 'show' that they are entitled to relief on their affirmative defenses." *Memory Control Enter. LLC v. Edmunds.com, Inc.*, 2012 WL 681765, at *4 (C.D. Cal. 2012) (citing *Wells Fargo & Co. v. United States*, 750 F. Supp.2d 1049, 1051 (D. Minn. 2010)).[1] "Thus, in some cases [namely, affirmative defenses listed under Rule 8(c)], ***simply pleading the name of the affirmative defense is sufficient.***[2] *United States v. Global Mortgage Funding, Inc.*, No. SACV071275DOCPJWX, 2008 WL 5264986, at *2 (C.D. Cal. May 15, 2008) (emphasis added); *see also Verco Decking, Inc. v. Consol. Sys., Inc.*, No. CV-11-2516-PHX-GMS, 2013 WL 6844106, at *5 (D. Ariz. Dec. 23, 2013) ("Accordingly, the only pleading requirement for an affirmative defense [under Rule 8(c)], as opposed to a defense or a claim, is that a party must affirmatively state it.")

As demonstrated below, Defendants' affirmative defenses meet this minimal pleading standard imposed by the Ninth Circuit. The Court should, therefore, deny the

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[1] As the Courts recognized in *Wells Fargo* and *Memory Control*, "[P]laintiffs and defendants are in much different positions. Typically, a plaintiff has months – often years – to investigate a claim before pleading that claim in federal court. By contrast, a defendant typically has 21 days to serve an answer." *Id.* Here, Defendants were under serious time constraints to respond to the FTC's motion for preliminary injunction and prepare for the evidentiary hearing, and have since had limited time to fully develop their defenses. The FTC, on the other hand, has been investigating Defendants for approximately one year.

[2] Requiring factual allegations supporting affirmative defenses is also unreasonable because an affirmative defense may be waived if a defendant fails to list it in its answer. Yet, establishing evidence sufficient for an affirmative defense to survive summary judgment requires factual investigation – i.e., discovery. *Lane v. Page*, 272 F.R.D. 581, 588-597 (D.N.M. 2011). Put differently, requiring defendants to support their affirmative defenses with sufficient factual detail places them in a Catch-22 – they have to include facts in their answers, but do not yet have the facts because discovery has not commenced.

FTC's motion in its entirety.

### C. Defendants' Affirmative Defenses Are Sufficiently Pled and Available as a Matter of Law.

#### *i. Failure to State a Claim is a Viable Affirmative Defense.*

While some courts have struck this affirmative defense, others have held that "the failure to state a claim defense is a perfectly appropriate affirmative defense." *SEC v. Toomey*, 866 F. Supp.719, 723 (S.D.N.Y. 1992); *Lane v. Page*, 272 F.R.D. at 597 (affirmative defense of failure to state a claim is sufficient as a matter of law). In *F.T.C. v. Verma Holdings, LLC*, 2013 WL 4506033, at *2 (S.D. Tex. Aug. 22, 2013), the court denied the FTC's motion to strike the defendant's failure-to-state-a-claim defense, noting that "[d]efendants have a right to preserve this defense from waiver." *Id.* (citing *F.D.I.C. v. Cheng*, 832 F.Supp. 181, 188 (N.D.Tex.1993)). The court also reasoned that:

> Form 30 of the Federal Rules of Civil Procedure contains language nearly identical to Defendants' stated affirmative defense . . . Moreover, Rule 84 provides that '[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity these rules contemplate.' Accordingly, Defendants' pleading is sufficient to provide fair notice.

*Id.* (internal citations omitted).[3]

As stated above, the Court can strike this defense only if there are no disputed questions of fact or law "and that ***under no set of circumstances could the defense succeed***." *Sands*, 902 F. Supp. at 1165 (emphasis added). The existence of authority permitting defendants to maintain this defense beyond a Rule 12(f) motion is enough for this Court to do the same, and deny the FTC's request to strike Defendants' failure-to-state-a-claim defense [Dkt. 123-125, first affirmative defense in each answer].

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[3] *See also, Schlosser v. Metro. Prop. & Cas. Ins. Co.*, No. 12–1301, 2012 WL 3879529, at *3 (E.D.La. Sept.6, 2012) (Vance, J.) (holding that the "failure to state a claim" affirmative defense "mimics Form 30 of the Federal Rules of Civil Procedure and is therefore sufficient as a matter of law"); *E.E.O.C. v. LHC Group, Inc.*, No. 1: 11 CV355–LG–JMR, 2012 WL 3242168, at *2 (S.D.Miss. Aug.7, 2012) (noting, in reference to Form 30, that "[t]he brief and simple nature of this language indicates that no more detail is required of a defendant in an answer") (quoting *Falley v. Friends University*, 787 F.Supp.2d 1255, 1258 (D.Kan.2011)); *Lane v. Page*, 272 F.R.D. 581, 597 (D.N.M.2011) (holding that the affirmative defense, if substantively similar to that stated in Form 30, is adequately pled).

Furthermore, the Court should reject outright the FTC's contention that the Court should strike this defense because "the Court has already ruled the FTC is likely to succeed on the merits in this case." [Motion, at 7.] "[D]ecisions on preliminary injunctions are just that—preliminary—and must often be made hastily and on less than a full record." *S. Oregon Barter Fair v. Jackson Cnty., Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004). As such, the FTC's findings on preliminary injunction "are not binding at trial on the merits and do not constitute the law of the case." *Id.*

***ii. The Defendants' Good Faith Defense is Relevant to the Relief Requested, as the FTC Concedes.***

After asking the Court to strike Defendants' "good faith" defense, the FTC acknowledges (albeit in a footnote) that "good faith would be relevant to the request for permanent injunctive relief." [Motion, at 8.] The FTC must acknowledge this, because multiple courts have held that "the defendants' intent is relevant to the court's determination of appropriate relief." *See F.T.C. v. Direct Benefits Grp.*, LLC, No. 6:11-CV-1186-ORL-28, 2013 WL 3771322, at *20 (M.D. Fla. July 18, 2013) (non-exhaustive list of factors relevant to the propriety of injunctive relief includes the degree of scienter involved) (citations omitted); *F.T.C. v. CEO Grp., Inc.*, No. 06-60602 CIV, 2007 WL 521933, at *1-2 (S.D. Fla. Feb. 15, 2007) ("Defendants should be entitled to at least raise these defenses at the remedies stage of this case"); *F.T.C. v. Bronson Partners, LLC*, No. 3:04CV1866(SRU), 2006 WL 197357, at *1 (D. Conn. Jan. 25, 2006) (same); *FTC v. Medicor LLC*, 2001 WL 765628, *2 (C.D.Cal. June 26, 2001) (denying motion to strike because good faith is relevant for determining whether to issue a permanent injunction and whether to hold defendants individually liable).

Moreover, good faith is relevant to the extent the FTC seeks to hold individuals liable for corporate violations of Section 5(A) of the FTC Act. An individual may be liable for corporate violations only if he or she, *inter alia*, "had knowledge of the wrongful practice or act, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional

avoidance of the truth." *F.T.C. v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1079 (C.D. Cal. 2012) (citations omitted). "Because of the knowledge requirement for individual liability, a defendant's good-faith belief in the truth of the representation . . . may be relevant to whether that defendant can be held individually liable for these misrepresentations." *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283 (S.D.N.Y. 2008).

Because good faith is relevant to the question of whether a permanent injunction should be issued, as well as issues relating to individual liability, the Court should deny the FTC's request to strike Defendants' good faith affirmative defenses [Dkt. 123 (fourth affirmative defense), 124 (fifth affirmative defense), and 125 (affirmative defense "D")].

***iii. Defendants' Consumer-Specific Defenses are Sufficiently Pled and Available as a Matter of Law.***

In its Motion, the FTC takes issue with the following "consumer-specific" affirmative defenses:

- The "FTC and/or the consumers it purports to represent have failed to mitigate their losses, if any" [Dkt. 123 (fifth affirmative defense), 124 (sixth affirmative defense), and 125 (affirmative defense "E")];
- "Consumers represented by the FTC knowingly and voluntarily, and possibly unreasonably, exposed themselves to any claimed losses with knowledge or appreciation of the risk involved" [Dkt. 123 (seventh affirmative defense), and 125 (affirmative defense "G")][4]; and,
- "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" [Dkt. 123 (sixth affirmative defense), 124 (seventh affirmative defense), and 125 (affirmative defense "F")].

[Motion, at 8–9.] The FTC argues that "[t]hese defenses refer to the consumers affected by Defendants' actions, who are not parties to the suit" and are, therefore, inappropriate. [*Id.*] The FTC is mistaken.

[4] The Alkazin Defendants have raised a similar defense, stating "any consumers represented by the FTC knowingly and voluntarily assumed the risk of losses." [Dkt. 124 (eighth affirmative defense)].

As a threshold matter, Defendants are not required to plead *any* facts supporting their assumption-of-the-risk affirmative defense, as this defense is listed under Rule 8(c). *See Verco Decking*, No. CV-11-2516-PHX-GMS, 2013 WL 6844106, at *5 ("[T]he only pleading requirement for an affirmative defense [under Rule 8(c)], as opposed to a defense or a claim, is that a party must affirmatively state it.") As to Defendants' non-parties at fault defense, the FTC need look no further than its extensive investigative file to uncover the individuals (namely, Alex Morten) whose actions form, at least partially, the factual predicate of this defense. In this light, the FTC cannot reasonably claim that it does not have "fair notice" of the basis of this affirmative defense. And if the FTC truly needs more facts, the proper approach would have been to engage in discovery – not move to strike the defense in its entirety.

Nor can the FTC legitimately expect Defendants to provide detailed facts supporting their failure-to-mitigate defense at this stage of the litigation, when doing so would require investigation into customers' actions – an investigation that Defendants could not possibly have conducted in the time allotted to file their answers.

In addition, despite the FTC's allegations to the contrary, these defenses are available as a matter of law. [Motion, at 6, 8.] At a minimum, because any monetary award may reflect benefits received by consumers and must be reduced by any refunds, the motion to strike the failure-to-mitigate affirmative defense must be denied. *See, e.g.*, *FTC v. Bronson Partners, LLC*, 2006 WL 197357, at *2 (rejecting motion to strike affirmative defense relating to monetary relief that would be improperly imposed absent reduction for benefits received by consumers). In fact, the FTC acknowledged in another case that the failure-to-mitigate affirmative defense "may relate to monetary relief necessary to redress consumer injury". *F.T.C. v. Verma Holdings*, 2013 WL 4506033, at *7. Based on this acknowledgement, the court in *Verma* denied the FTC's motion to strike the defendant's failure-to-mitigate defense. *Id.* The same reasoning applies with equal force to all of Defendants' consumer-specific affirmative defenses.

The FTC stands proxy for the consumers on whose behalf it has brought claims for monetary relief. As such, it should be limited from recovering any amounts that consumers should have avoided or recovered. For example, if a consumer paid by check and requested a refund, but refused to provide a valid address for the refund check, the ultimate relief should not include those sums, due to the consumer's failure to mitigate. Defendants expect to establish other examples of sums that should be excluded in discovery.

As such, all three "consumer-specific" defenses are adequately pled and legally available.

***iv. Defendants' Affirmative Defenses that the FTC's Claims for Injunctive Relief are not Authorized and are Unconstitutional are Well-Pled.***

The FTC objects to these affirmative defenses on the grounds that 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." [Motion, at 6.] As stated above, Defendants are not required to comply with the heightened pleading standard pronounced in *Iqbal* and *Twombly* – the standard the FTC attempts to impose on Defendants. In any event, the FTC cannot reasonably contend that it is in the dark regarding the proposed injunctive provisions and constitutional provisions at issue in this case. This is not the FTC's first rodeo – it has seen and addressed nearly identical defenses in *many* similar cases. *See, e.g., F.T.C. v. Bronson Partners, LLC*, 2006 WL 197357, at *2 (D. Conn. Jan. 25, 2006); *F.T.C. v. Ivy Capital, Inc.*, No. 2:11-CV-283 JCM GWF, 2011 WL 2470584, at *2 (D. Nev. June 20, 2011).

Nor can the FTC demonstrate that these defenses "could have ***no possible bearing on the subject matter of the litigation,***" which it must do to prevail on its Motion. *Patterson v. Two Fingers LLC*, 2015 WL 2345658, at *3 (emphasis added). In fact, courts in similar FTC cases have held the opposite. *See, e.g., F.T.C. v. Bronson Partners*, 2006 WL 197357, at *2 (denying motion to strike unconstitutionality defense because "there

may be a set of facts that support the defendants' claim that their actions are protected by the First Amendment"); *F.T.C. v. Ivy Capital, Inc.*, 2011 WL 2470584, at *2 (same).

Additionally, other courts have denied motions to strike similar defenses based on the limits the First Amendment imposes on the remedies available to the FTC for violations of the FTC Act. *Id.*; *see also Standard Oil Co. of California v. F. T. C.*, 577 F.2d 653 (9th Cir. 1978) (First Amendment considerations dictate that the Federal Trade Commission exercise restraint in formulating remedial orders which may amount to a prior restraint on protected commercial speech); *Beneficial Corp. v. FTC*, 542 F.2d 611, 619 (3d Cir. 1976) (holding that the remedy for commercial speech violations of the law can go only go so far as to accomplish the remedial objective of preventing the violation).

Thus, the First Amendment may be relevant as it relates to the relief sought by the FTC. As such, the Court should allow Defendants to pursue these affirmative defenses by denying the FTC's Motion to strike them.

## III. CONCLUSION.

The Court should deny the FTC's Motion because it wastes the parties' and the Court's resources, and because it attempts to deprive Defendants of the opportunity to build a record supporting their defenses through discovery. In the event any affirmative defense is deemed deficient, Defendants respectfully request that the Court grant leave to amend as justice may require.

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RESPECTFULLY SUBMITTED this 12th day of November, 2015.

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## CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2015, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a copy was electronically submitted to counsel at the e-mail addresses below:

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