UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17–cv–20848–Gayles–Otazo-Reyes

Federal Trade Commission,

Plaintiff,

v.

World Patent Marketing, Inc., et al.,

Defendants.

PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES AND JURY DEMAND

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PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES AND JURY DEMAND

This case is about an invention promotion scam that used deception to take consumers' money, and used unfair complaint suppression tactics to ensure that consumers' money would keep flowing. In the Preliminary Injunction, the Court held that Defendants' misrepresentations were deceptive under the FTC Act, and that their consumer complaint suppression tactics unfairly hid negative information from prospective purchasers. Preliminary Injunction ("PI," Docket No. 105), at 31, 33.[1] Following the PI decision, however, Defendants asserted in their Answer, *inter alia*, that their deceptive practices: were "mere puffery in marketing," were cured by "appropriate disclaimers and other informational disclosures," and are protected by the First Amendment. Answer (Docket No. 111), at 5. Defendants also assert that the FTC's unfairness count "is barred because the statute and cause of action are unconstitutionally vague." *Id.* These affirmative defenses are insufficient within the meaning of Federal Rule of Civil Procedure 12(f), and they should be stricken.[2] The Court has already made findings that negate aspects of these defenses, and all of them lack legal support. Defendants also make a jury demand in their Answer. But in this purely equitable action, Defendants have no right a jury trial. Defendants' jury demand should also be stricken.

Striking Defendants' improper affirmative defenses and jury demand now will narrow the issues going forward, thus conserving resources of both the Court and the parties. "[W]eeding out legally insufficient defenses at an early stage of a complicated lawsuit may be extremely

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[1] "Defendants' misrepresentations were deceptive under the FTC Act; they were likely to mislead consumers acting reasonably under the circumstances, and they were material to consumers' decision to purchase Defendants' services. The misrepresentations have induced customers to pay millions of dollars for useless and largely nonexistent services." PI, at 31. "Defendants' consumer complaint suppression tactics keep material, negative information hidden from prospective consumers, and such obstacles make it nearly impossible for consumers to make informed decisions." *Id.* at 33. The Court has also found that Count II of the Amended Complaint, regarding Defendants' complaint suppression tactics, "sufficiently alleges a cause of action for unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. §§ 45(a) and 45(n)." Order Denying Motion to Dismiss (Docket No. 107).

[2] Defendants also raise a "good faith" affirmative defense. Although "[g]ood faith is not a defense for a violation of section 5 of the FTC Act," it "may be relevant to the determination of appropriate relief." *FTC v. USA Fin., LLC*, No. 8:08-cv-899, 2009 WL 10671254, at *2 (M.D. Fla. Feb. 18, 2009). Thus, this Motion does not seek to strike the good faith defense.

valuable to all concerned in order to avoid the needless expenditures of time and money in litigating issues which can be seen to have no bearing on the outcome." *Aidone v. Nationwide Auto Guard, LLC*, 295 F.R.D. 658, 660–61 (S.D. Fla. 2013) (quoting *First Specialty Ins. Corp. v. GRS Mgmt. Assocs.*, No. 08-cv-81356, 2009 WL 2169869, at *2 (S.D. Fla. July 20, 2009)). Thus, the FTC respectfully requests that the Court strike Defendants' improper affirmative defenses and jury demand from their Answer.

I. Procedural History

The FTC filed its two-count Complaint for Permanent Injunction and Other Equitable Relief (Docket No. 1) on March 6, 2017. At the same time, the FTC filed its Motion for a Temporary Restraining Order ("TRO") (Docket No. 4), which the Court granted the next day. *See* TRO (Docket No. 11). After holding a hearing on April 6 and 20, 2017, and after reviewing further briefing from the parties, the Court issued a PI (Docket No. 105) against Defendants on August 16, 2017. In the PI, the Court found that the FTC was likely to succeed on the merits of both counts of the Complaint.

On May 25, 2017, the FTC filed its Amended Complaint against Defendants (Docket No. 84). Count I of the Amended Complaint alleges that Defendants have made ten specific misrepresentations in the marketing and sale of their invention promotion products and services. These ten misrepresentations are reproduced in the Appendix, attached hereto. Count II of the Amended Complaint alleges that Defendants engaged in unfair complaint suppression tactics—including threats, intimidation, and non-disparagement clauses—in an effort to discourage purchasers from speaking or publishing truthful or non-defamatory negative comments or reviews about Defendants and their services and to limit the availability of such comments or reviews. Am. Compl. ¶¶ 53–55.

On June 15, 2017, Defendants moved to dismiss Count II of the Amended Complaint (Docket No. 92). The FTC opposed Defendants' Motion (Docket No. 93), and Defendants replied (Docket No. 99). On August 17, 2017, the Court denied Defendants' Motion to Dismiss. *See* Order Denying Motion to Dismiss (Docket No. 107) ("The Court finds that Count II of the

[84] Amended Complaint sufficiently alleges a cause of action for unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. §§ 45(a) and 45(n).").

On September 1, 2017, Defendants answered the Amended Complaint. *See* Answer (Docket No. 111). Defendants' Answer included the following five affirmative defenses:

> [1] Plaintiff's claims of deceptive practices fail because any alleged deceptive or unfair practices describe mere puffery in marketing, which is not actionable under the FTC Act.
>
> [2] Plaintiff's claims fail because Defendants provided appropriate disclaimers and other informational disclosures to consumers regarding the risks of the invention industry.
>
> [3] Plaintiff's claims fail because Defendants have acted in good faith at all relevant times in their marketing and sales of Defendants' services.
>
> [4] Plaintiff's claims are barred because they violate Defendants' rights under the First Amendment of the Constitution regarding commercial speech.
>
> [5] Plaintiff's claim in Count II, based on allegedly "unfair practices," is barred because the statute and cause of action are unconstitutionally vague.

Answer at 5. Defendants' Answer also included a jury demand. *Id*. at 6.

II. Legal Standard

Upon motion by a party or on its own, "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "The purpose of a motion to strike is to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters." *Cubero v. Royal Caribbean Cruises Ltd.*, No. 16-cv-20929-Gayles, 2016 WL 4270216, at *2 (S.D. Fla. Aug. 15, 2016) (Gayles, J.) (internal quotation marks omitted). "Rule 12(f) reflects the inherent power of the Court to prune down pleadings so as to expedite the administration of justice and to prevent abuse of its process." *TracFone Wireless, Inc. v. Zip Wireless Prods., Inc.*, 716 F. Supp. 2d 1275, 1290 (N.D. Ga. 2010). The Court has broad discretion to grant a motion to strike. *Morrison v. Exec. Aircraft Refinishing, Inc.*, 434 F. Supp. 2d 1314, 1317–18 (S.D. Fla. 2005).

Defenses that are "insufficient as a matter of law should be stricken in order to avoid unnecessary time and money in litigating invalid and spurious issues." *Lafayette Corp. v. Bank of Boston Int'l S.*, 723 F. Supp. 1461, 1466 (S.D. Fla. 1989) (internal quotation marks omitted); *see also SEC v. Gulf & Western Indus., Inc.*, 502 F. Supp. 343, 345 (D.D.C. 1980) ("[A motion to strike] should be granted where it is clear that the affirmative defense is irrelevant and frivolous and its removal from the case would avoid unnecessary time and money litigating the invalid defense." (citing *SEC v. Weil*, No. 79-cv-440, 1980 WL 1417, at *1 (M.D. Fla. Feb. 7, 1980))). Doing so early in a proceeding is preferable. *Aidone*, 295 F.R.D. at 660–61; *cf. Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 165 (11th Cir. 1997) ("it is particularly important for district courts to undertake the difficult, but essential, task of attempting to narrow and define the issues from the earliest stages of the litigation").

"A defense is insufficient as a matter of law if, on the face of the pleadings, it is patently frivolous, or if it is clearly invalid as a matter of law." *Morrison*, 434 F. Supp. 2d at 1318 (quoting *Anchor Hocking Corp. v. Jacksonville Bd. of Educ.*, 219 F. Supp. 992, 1000 (M.D. Fla. 1976)); *see also Losada v. Norwegian (Bahamas) Ltd.*, 296 F.R.D. 688, 690 (S.D. Fla. 2013); *Exhibit Icons, LLC v. XP Cos.*, 609 F. Supp. 2d 1282, 1300 (S.D. Fla. 2009). An affirmative defense should also be stricken if it: "(1) has no possible relation to the controversy, (2) may cause prejudice to one of the parties, or (3) fails to satisfy the general pleading requirements of Rule 8 of the Federal Rules of Civil Procedure." *Tsavaris v. Pfizer, Inc.*, 310 F.R.D. 678, 680 (S.D. Fla. 2015).

III. Defendants' Affirmative Defenses Should be Stricken

Defendants' first, second, fourth, and fifth affirmative defenses (mere puffery, disclaimers and disclosures, First Amendment, and unconstitutional vagueness, respectively) are all insufficient and should be stricken. Each is "clearly invalid as a matter of law," *Morrison*, 434 F. Supp. 2d at 1318, and it will prejudice the FTC to expend time and resources to litigate them if they remain in the case beyond this early stage. Moreover, the Court has already rejected aspects of several of Defendants' affirmative defenses, as explained below.

A. Defendants' Representations are Not "Mere Puffery"

Defendants' first affirmative defense—that "any alleged deceptive or unfair practices describe mere puffery in marketing," Answer, at 5—should be stricken because all of Defendants' representations that are the subject of the Complaint are "[s]pecific, quantifiable statements of fact that refer to a product's absolute characteristics," and thus they "may constitute false advertising," *Marty v. Anheuser-Busch Cos.*, 43 F. Supp. 3d 1333, 1342 (S.D. Fla. 2014) (internal quotation marks omitted).

> Although courts have defined puffery in numerous ways, "puffing refers generally to an expression of opinion not made as a representation of fact." While the law affords a seller "some latitude in puffing his goods … he is not authorized to misrepresent them or to assign to them benefits they do not possess. Statements made for the purpose of deceiving prospective purchasers cannot properly be characterized as mere puffing."

FTC v. Nat'l Urological Grp., Inc., 645 F. Supp. 2d 1167, 1205–06 (N.D. Ga. 2008), aff'd, 356 F. App'x 358 (11th Cir. 2009) (citations, alterations, and some internal quotation marks omitted) (quoting *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 746 (N.D. Ill. 1992)).

None of the ten representations alleged in Count I of the Amended Complaint—and reproduced in the Appendix, attached hereto—fits the definition of "mere puffery." Each one of them is a representation of provable or falsifiable fact, not opinion, and each was made for the purpose of deceiving prospective purchasers:

A. The purchase of Defendants' invention-promotion services is *either likely or unlikely* to result in financial gain for Defendants' customers. Despite the fact that virtually all of Defendants' customers lost their entire investment, Defendants told consumers that they were likely to make money by purchasing their services.

B. World Patent Marketing's "Board," "Review Team," or "Management" *either does or does not* review and approve consumers' invention ideas before WPM asks consumers to purchase a market analysis. Despite the fact that there was no "Board," "Review Team," or "Management" that reviewed and approved consumers' invention ideas, Defendants told consumers that there was.

C. World Patent Marketing's Board of Advisors or "Invention Team Advisory Board" *either does or does not* serve in an advisory capacity to WPM and review consumers' invention ideas. Despite the fact that WPM's Board of Advisors or "Invention Team Advisory Board" did not actually serve in an advisory capacity to WPM and did not review consumers' invention ideas, Defendants told consumers that they did.

D. World Patent Marketing customers' inventions are *either sold or not sold* in "big box" stores such as Walmart, Target, Lowes, The Home Depot, Walgreens, Best Buy, Sears, and Petco. Despite the fact that none of Defendants' customers' inventions have been sold in "big box" stores, Defendants told consumers that they were.

E. WPM *either owns or does not own* a manufacturing plant in China, and *either has or does not have* a manufacturing division called "WPM China" or "World Patent Marketing China," which provides manufacturing services to WPM's customers. Despite the fact that WPM does not own a manufacturing plant in China, and there are no such entities as "WPM China" or "World Patent Marketing China," Defendants told consumers the opposite.

F. Defendants *either have or have not* successfully marketed the invention ideas of many of their customers, resulting in royalties or sales of their inventions. Despite the fact that virtually none of Defendants' customers earned royalties or sales of their inventions, Defendants told consumers that they had.

G. Defendants *either have or have not* successfully marketed specific invention ideas, such as Teddie's Ballie Bumpers, Live Expert Chat, and Supreme Diva Jeans. Despite the fact that Defendants did not successfully market Teddie's Ballie Bumpers, Live Expert Chat, and Supreme Diva Jeans—if they marketed them at all—Defendants told consumers that they had.[3]

[3] The Court has already held that Defendants' "success stories of WPM customers receiving patents and receiving licensing deals as a result of working with WPM … are not, as Defendants contend, mere puffery; rather, Defendants' success stories contain specific and measurable claims and claims that may be literally true or false." PI, at 26 (citations and internal quotation marks omitted). To the extent that Defendants' one-sentence affirmative defense echoes any of the puffery arguments they made in their Opposition to a PI, it is duplicative of previously-rejected arguments and should be stricken on that ground. *See infra* Part III.B.

H. Consumers who buy one of Defendants' "global" packages *either will or will not* receive a globally-applicable patent. Despite the fact that there is no such thing as a global patent as Defendants describe it to consumers, Defendants told consumers that they would receive a globally-applicable patent.

I. Defendants *either have or have not* regularly negotiated licensing and manufacturing agreements that have resulted in the manufacture and sale of their customers' inventions. Despite the fact that Defendants have not regularly negotiated such agreements, Defendants told consumers that they had.

J. Consumers who buy Defendants' invention-promotion services *either will or will not* have to pay any more money to receive Defendants' promised services. Despite the fact that consumers routinely discovered—when solicited for additional payments by Defendants themselves, third-party patent agents, or international patent offices—that they would need to pay significantly more money to receive Defendants' promised services, Defendants told consumers that they would not have to pay for more than their initial service packages.

Because "[t]he statements of fact for which the FTC sues [Defendants] convey specific (rather than vague), objective (rather than subjective) representations about" Defendants' services, they are not mere puffery. *FTC v. NPB Advert., Inc.*, 218 F. Supp. 3d 1352, 1364 (M.D. Fla. 2016). Moreover, Defendants made all of the misrepresentations alleged in the Amended Complaint "for the purpose of deceiving prospective purchasers," and thus they "cannot properly be characterized as mere puffing." *Nat'l Urological Grp.*, 645 F. Supp. 2d at 1205–06. Defendants' first affirmative defense "is clearly invalid as a matter of law" and it should be stricken. *Morrison*, 434 F. Supp. 2d at 1318.

B. Defendants' Disclaimers Do Not Cure Their Misrepresentations

Defendants' second affirmative defense—that "Defendants provided appropriate disclaimers and other informational disclosures to consumers regarding the risks of the invention industry," Answer, at 5—should be stricken because it is duplicative of arguments that the Court has already rejected, and, as a matter of law, Defendants' disclaimers and disclosures cannot cure

their misrepresentations. As the Court has already noted: "*Caveat emptor* is not the law in this circuit." PI, at 28 (quoting *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1233 (11th Cir. 2014) (alteration omitted)). Moreover, "[d]isclaimers or qualifications … are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." *Id.* (quoting *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010)). The Court has already found that: "Defendants' purported disclaimers did not appear prominently in contracts and were not discussed in telephone conversations." *Id.* And: "Defendants' disclaimers on their website and in articles emailed to consumers similarly do not absolve Defendants of liability." *Id.*[4]

Because Defendants have already raised, and the Court has already rejected, the disclaimers and disclosures defense, it is duplicative and invalid, and should be stricken under Rule 12(f). *See Vasquez v. Maya Publ'g Grp., LLC*, 14-cv-20791, 2015 WL 5317621, at *1–2 (S.D. Fla. Sept. 14, 2015) (striking affirmative defenses already rejected in denial of motion to dismiss); *Lorali, Inc. v. SMK Assocs., LLC*, 13-cv-22204, 2014 WL 12536977, at *9 (S.D. Fla. Aug. 26, 2014) (same, regarding improper venue defense); *see also FTC v. Liberty Supply Co.*, No. 4:15-cv-829, 2016 WL 4063797, at *5 (E.D. Tex. July 29, 2016) ("After reviewing the relevant pleadings, the Court finds Defendants' third, fourth, and fifth affirmative defenses are attempts to relitigate the Preliminary Injunction and Asset Freeze. As such, the Court finds that Defendants' claims are not properly asserted as affirmative defenses, and thus will strike those defenses."); *United States v. Hempfling*, No. 05-cv-594, 2007 WL 1299262, at *5 (E.D. Cal. May 1, 2007) ("A number of the affirmative defenses now asserted are issues already raised, argued, and decided by this Court in prior orders." (collecting cases)).

[4] Defendants' one-sentence affirmative defense does not indicate which of the misrepresentations alleged in Count I it applies to. It cannot apply to every alleged misrepresentation. For example, Defendants obviously never disclaimed or disclosed that: there is no group that reviews and approves invention ideas, the WPM Board does not review invention ideas, none of WPM's customers' inventions were sold in big box stores, there is no WPM China, WPM's "success stories" were not true, and there is no such thing as a "global patent," among others. It would be impossible for the purported "defense" to fully address the allegations in Count I, and thus it is legally insufficient and cannot have an impact on Defendants' liability.

In order to make the findings required to issue the PI, the Court has already undertaken a reasoned analysis of Defendants' disclaimers and disclosures defense and the Court rejected Defendants' arguments. *See* PI, at 14–15, 27–31. It would be wasteful and duplicative to rehash those arguments as an affirmative defense. *See Liberty Supply Co.*, 2016 WL 4063797, at *5. Moreover, for the reasons stated in the PI, the defense fails as a matter of law. *See* PI, at 14–15, 27–31 (finding Defendants' disclaimers and disclosures were inadequate to cure their misrepresentations). Defendants' disclaimers and disclosures defense should be stricken.

C. The First Amendment Does Not Bar the FTC's Complaint

Defendants' fourth affirmative defense—that "Plaintiff's claims are barred because they violate Defendants' rights under the First Amendment of the Constitution regarding commercial speech," Answer, at 5—should be stricken because false or misleading commercial speech is not protected by the First Amendment. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) ("For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading." (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 557 (1980))); *see also Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake." (collecting cases)). The First Amendment only protects commercial speech that concerns lawful activity, and is not misleading. *Lorillard Tobacco*, 533 U.S. at 554; *see also FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1298 (11th Cir. 2017); *United States v. Sarcona*, 457 F. App'x 806, 815 (11th Cir. 2012). The government therefore has the prerogative—indeed, the duty—to prevent commercial speech that *is* false or misleading. *See, e.g.*, 15 U.S.C. § 45(a) (declaring deceptive acts or practices in commerce unlawful); *Va. State Bd. of Pharm.*, 425 U.S. at 772 (the First Amendment does not prohibit the government from "insuring that the stream of commercial information flow cleanly as well as freely"); *Novartis Corp. v. FTC*, 223 F.3d 783, 788–89 (D.C. Cir. 2000) (finding "no First Amendment impediment" to the FTC's remedy in a deceptive advertising case). This Court has concluded that the FTC is likely to prevail on its claims that WPM made many false and

misleading statements to consumers. *See* PI, at 24–31. WPM's deceptive marketing practices are therefore not protected by the First Amendment. Defendants' First Amendment affirmative defense should be stricken as ineffective as a matter of law.

D. Section 5 of the FTC Act is Not Unconstitutionally Vague

Defendants' fifth affirmative defense—that "Plaintiff's claim in Count II … is barred because the statute and cause of action are unconstitutionally vague," Answer at 5—should also be stricken. Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce" is not unconstitutionally vague. As one court observed, "[Defendant's] contention that the term 'unfair … act or practice' is unconstitutionally vague falters in the face of a century's worth of legislative and judicial guidance establishing and refining the term's meaning." *CFPB v. ITT Educ. Servs.*, 219 F. Supp. 3d 878, 904 (S.D. Ind. 2015).

A statute can be impermissibly vague for either of two independent reasons: first, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago* v. *Morales*, 527 U.S. 41, 56–57 (1999)). Courts employ a more tolerant standard for vagueness in civil, rather than criminal, cases. *ITT Educ. Servs.*, 219 F. Supp. 3d at 900 (citing *Gresham v. Peterson*, 225 F.3d 899, 908 (7th Cir. 2000) (observing that "laws imposing civil rather than criminal penalties do not demand the same high level of clarity")). The fact that a statute may require the exercise of judgment does not render it impermissibly vague, nor is a statute impermissibly vague if it raises difficult questions of fact. *See Nat'l Urological Grp.*, 645 F. Supp. 2d at 1186. A statute will only be void for vagueness if it "fail[s] to articulate a definite standard." *Id.* at 1187 (quoting *United States v. Shackney*, 333 F.2d 475, 488 (2d Cir. 1964) (Dimock, J., concurring)).

"Unfair" has a clear meaning in the context of FTC Act enforcement. It is defined in Section 5(n) of the Act, which provides that an act or practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers." 15 U.S.C. § 45(n).

Congress added Section 5(n) to the statute in 1994, codifying decades of legal precedent, precisely to provide clarity to the concept of "unfairness." *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 243–44 (3d Cir. 2015). Numerous courts, including the Eleventh Circuit, have granted relief to the Commission on claims of unfairness under this standard. *See, e.g., Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363–68 (11th Cir. 1988) (affirming FTC finding that seller's unilateral breach of over 200,000 contracts was unfair).

The FTC Act, with its prohibition of "unfair methods of competition," has been in effect for more than one hundred years. *See* Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914). The Act's prohibition of "unfair or deceptive acts or practices in commerce" has been effect for nearly eighty years. *See* Federal Trade Commission Act Amendments, ch. 49, 52 Stat. 111 (1938). Over the last century, courts have consistently rejected challenges to the statute based on vagueness. *See, e.g., Sears, Roebuck & Co. v. FTC*, 258 F. 307, 310–11 (7th Cir. 1919). The Eleventh Circuit has recognized that the concept of unfairness has evolved over the years, "as a result of both legislation and judicial interpretation." *Orkin*, 849 F.2d at 1363. And it follows that "the courts reviewing applications of the Commission's unfairness standard have assumed, necessarily, that it is a valid standard. *Id.* at 1364 (citing *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985)). This Court has already determined that Defendants' complaint suppression tactics were unfair. PI, at 31–34. Defendants' affirmative defense alleging that the statute is void for vagueness is invalid as a matter of law and should therefore be stricken.[5]

[5] Additionally, the Court has already undertaken a reasoned analysis of Count II and found that it "sufficiently alleges a cause of action for unfair acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. §§ 45(a) and 45(n)." Order Denying Motion to Dismiss (Docket No. 107). In their Motion to Dismiss Count II (Docket No. 92), Defendants did not attack Section 5 of the FTC Act as unconstitutionally vague, but they did accuse the FTC of "massive regulatory overreach" and of making "grossly speculative" allegations. *Id.*, at 1, 5. The Court summarily rejected these arguments (Docket No. 107); *see also Wyndham Worldwide*, 799 F.3d at 243–44 ("Congress designed [unfairness] as a flexible concept with evolving content, and intentionally left its development to the [Federal Trade] Commission." (citations, alternations, and internal quotation marks omitted)). To the extent that Defendants' one-sentence affirmative defense echoes any of the arguments they made in their Motion to Dismiss, it is duplicative of previously-rejected arguments and should be stricken on that ground. *See supra* Part III.B.

IV. Defendants Have No Right to a Jury Trial

Though Defendants demand a jury trial, they have no right to one in this equitable action. A defendant only has a right to a jury trial when *either* the statute under which the suit is brought *or* the Seventh Amendment confers such a right. *See Tull v. United States*, 481 U.S. 412, 417 n.3 (1987) (deciding whether the Seventh Amendment created a right to a jury trial because the applicable statute did not do so); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564–65 (1990) (same). In this case, neither the FTC Act nor the Constitution provides Defendants with a right to a jury trial.

The FTC Act does not provide a right to a jury trial, so the question here is whether the Seventh Amendment does so—and it does not. The Seventh Amendment preserves the right to jury trials in "Suits at common law." U.S. Const. amend VII. The Supreme Court has consistently interpreted this term to refer to "'suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (quoting *Parsons v. Bedford*, 28 U.S. 433, 434 (1830)). Thus, "actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial." *Tull*, 481 U.S. at 417. This analysis applies even where, as here, the cause of action was created by Congress. *Id*. To determine whether an action is legal or equitable, and thus whether the right to a jury trial attaches, courts "must examine both the nature of the action and of the remedy sought." *Id.* The nature of the remedy sought, however, is the primary factor in determining whether a jury trial is available as a matter of right. *Chauffeurs*, 494 U.S. at 565; *Granfinanciera*, 492 U.S. at 42. Here, both the nature of the action and the nature of the remedy sought rest in equity.

Courts have repeatedly recognized that the equitable nature of actions under Section 13(b) of the FTC Act preclude a right to trial by jury. *See e.g.*, *FTC v. First Universal Lending, LLC*, No. 09-cv-82322, 2011 WL 688744, at *3 (S.D. Fla. Feb. 18, 2011) (citing "[a] wealth of … case law recognizing that the Seventh Amendment does not confer a right to jury trial in lawsuits brought under Section 13(b) of the Federal Trade Commission Act"); *FTC v. N.E.*

Telecomms., Ltd., No. 96-cv-6081, 1997 WL 599357, at *1 (S.D. Fla. June 23, 1997) (granting FTC's uncontested motion to strike demand for jury trial, and acknowledging "that the FTC's position [that there is no right to a jury trial for a Section 13(b) claim] is correct").[6] In this case, the FTC seeks equitable remedies, namely injunctive relief concerning Defendants' conduct and restitution to consumers. *See* Am. Compl. Prayer for Relief. "[I]t has been assumed for decades that a suit for an injunction, whether by the Government or private party, was the antithesis of a suit 'at common law' in which the Seventh Amendment requires that the right to a trial by jury 'shall be preserved.'" *SEC v. Commonwealth Chem. Secs.*, 574 F.2d 90, 95 (2d Cir. 1978); *see also Leary v. Daeschner*, 349 F.3d 888, 910 (6th Cir. 2003) ("A key dividing line between law and equity has historically been that the former deals with money damages and the latter with injunctive relief.").

That the FTC seeks equitable monetary relief does not change either the equitable nature of the remedy or the fact that Defendants are not entitled to a jury trial. *Tull*, 481 U.S. at 424 ("a court in equity may award monetary restitution as an adjunct to injunctive relief"); *Porter v. Warner Holding Co.* 328 U.S. 395, 402 (1946) ("Restitution, which lies within that equitable jurisdiction … is within the recognized power and within the highest tradition of a court of equity."); *Commonwealth Chem. Sec.*, 574 F.2d at 95 ("A historic equitable remedy was the grant of restitution by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives."). Indeed, courts repeatedly have stricken jury demands in FTC cases, recognizing the equitable nature of a FTC action and the attendant remedies, including monetary relief. *See, e.g., FTC v. Verity, Int'l, Ltd.*, 443 F.3d 48, 67 (2nd Cir. 2006) ("The fact that only an equitable remedy is available eviscerates the defendants-appellants' contention that the Seventh Amendment confers a right to a jury trial in this case." (citing *Granfinanciera*));

[6] For the general proposition that cases under Section 13(b) of the FTC Act are equitable in nature, see *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433–35 (11th Cir. 1984); *see also FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997) ("Section 13(b) … authorizes the court to provide equitable relief."); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989), *cert. denied*, 493 U.S. 954 (1989); *FTC v. H.N. Singer*, 668 F.2d 1107, 1110–12 (9th Cir. 1982).

FTC v. Think All Publ'g, LLC, 564 F. Supp. 2d 663, 665 (E.D. Tex. 2008) (granting FTC's motion to strike jury demand, stating: "That the Defendants may ultimately be liable in terms of money does not convert the matter into a suit at law."); *FTC v. Commonwealth Mktg. Group*, 72 F. Supp. 2d 530, 543–45 (W.D. Pa 1999); *FTC v. Kitco of Nevada*, 612 F. Supp. 1280, 1280–82 (D. Minn. 1985).

Because the nature of this action and the remedies sought by the FTC lie in equity, defendants are not entitled to a jury trial and their jury demand should be stricken.

V. Conclusion

Defendants' first, second, fourth, and fifth affirmative defenses fail as a matter of law, and thus they should be stricken. In order to avoid wasting time and money on discovery, briefing, and trial regarding Defendants' insufficient, invalid, duplicative, and irrelevant affirmative defenses, the Court should strike them at this stage. Defendants' jury demand is also improper, as they have neither a statutory nor a constitutional right to trial by jury in this case brought in equity. The Court should strike Defendants' jury demand, and this case should proceed to a just, speedy, and efficient resolution.

Pursuant to Local Rule 7.1(a)(3), counsel for the FTC certifies that counsel has conferred with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion, but has been unable to do so. Defendants oppose this Motion.

Respectfully submitted,

David C. Shonka
Acting General Counsel

Dated: September 22, 2017

/s/ James Evans

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2017, I electronically filed the foregoing Plaintiff's Motion to Strike Defendants' Affirmative Defenses and Jury Demand with the Clerk of the Court using CM/ECF, which will send a notice of electronic filing to counsel of record identified on the service list below:

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APPENDIX

Misrepresentations Alleged in Count I of the Amended Complaint

	Defendants' Representation Am. Compl. ¶ 50	**In Truth and In Fact** Am. Compl. ¶ 51
A	Purchase of Defendants' invention-promotion services is likely to result in financial gain for their customers.	Virtually all of Defendants' customers have lost their entire investment.
B	World Patent Marketing's "Board," "Review Team," or "Management" reviews and approves consumers' invention ideas before WPM asks consumers to purchase a market analysis.	There is no "Board," "Review Team," or "Management" that reviews and approves consumers' invention ideas before WPM asks consumers to purchase a market analysis.
C	World Patent Marketing's Board of Advisors or "Invention Team Advisory Board" serves in an advisory capacity to WPM and reviews consumers' invention ideas.	World Patent Marketing's Board of Advisors or "Invention Team Advisory Board" does not serve in an advisory capacity to WPM and does not review consumers' invention ideas.
D	World Patent Marketing customers' inventions are sold in "big box" stores such as Walmart, Target, Lowes, The Home Depot, Walgreens, Best Buy, Sears, and Petco.	None of Defendants' customers' inventions are sold in "big box" stores such as Walmart, Target, Lowes, The Home Depot, Walgreens, Best Buy, Sears, and Petco.
E	WPM owns a manufacturing plant in China, and has a manufacturing division called "WPM China" or "World Patent Marketing China," which provides manufacturing services to WPM's customers.	WPM does not own a manufacturing plant in China, and there are no such entities as "WPM China" or "World Patent Marketing China."
F	Defendants have successfully marketed the invention ideas of many of their customers, resulting in royalties or sales of their inventions.	Virtually none of Defendants' customers earned royalties or sales of their inventions.
G	Defendants successfully marketed specific invention ideas, such as Teddie's Ballie Bumpers, Live Expert Chat, and Supreme Diva Jeans.	Defendants did not successfully market Teddie's Ballie Bumpers, Live Expert Chat, and Supreme Diva Jeans.
H	Consumers who buy one of Defendants' "global" packages will receive a globally-applicable patent.	There is no such thing as a global patent as Defendants describe it to consumers.
I	Defendants have regularly negotiated licensing and manufacturing agreements that have resulted in the manufacture and sale of their customers' inventions.	Defendants have not regularly negotiated licensing or manufacturing agreements that have resulted in the manufacture and sale of their customers' inventions.
J	Consumers who buy Defendants' invention-promotion services will not have to pay any more money to receive Defendants' promised services.	Consumers routinely discover—when solicited for additional payments by Defendants themselves, third-party patent agents, or international patent offices—that they will need to pay significantly more money to receive Defendants' promised services.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17–cv–20848–Gayles–Otazo-Reyes

Federal Trade Commission,

Plaintiff,

v.

World Patent Marketing, Inc., et al.,

Defendants.

[Proposed] ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES AND JURY DEMAND

Plaintiff's' Motion to Strike Defendants' Affirmative Defenses and Jury Demand (Docket No. 118) is **GRANTED**.

IT IS ORDERED that Defendants' first, second, fourth, and fifth affirmative defenses and Defendants' jury demand are stricken from Defendants' Answer (Docket No. 111).

DONE AND ORDERED in Chambers at Miami, Florida, this __ day of ____, 2017.

Darrin P. Gayles
United States District Judge

Copies furnished to:

Magistrate Judge Otazo-Reyes
All counsel of record