UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 0:18-cv-60379-KMM

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

THOMAS DLUCA, LOUIS GATTO,
ERIC PINKSTON, and SCOTT CHANDLER,

Defendants.
_____/

ORDER ON MOTION TO STRIKE

THIS CAUSE is before the Court on the Federal Trade Commission's (the "FTC") Motion to Strike Defendants Dluca and Pinkston's Affirmative Defenses. *Mot*. (ECF No. 82). Defendants Dluca and Pinkston have responded in opposition. *Dluca Response* (ECF No. 88); *Pinkston Response* (ECF No. 93). The Motion is now ripe for review. For the following reasons, the Motion is GRANTED IN PART AND DENIED IN PART.

I. BACKGROUND

In February 2018, the FTC filed a complaint against four defendants, including Defendants Dluca and Pinkston, for promoting a deceptive investment scheme in violation of Section 5(a) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a). *Compl*. (ECF No. 1). Defendants Dluca and Pinkston filed answers asserting various affirmative defenses. *Dluca Answer* (ECF No. 76), *Pinkston Answer* (ECF No. 74). The FTC now moves to strike those affirmative defenses. *Mot*. at 1–18. Defendants oppose the Motion. *Dluca Response* at 1–9; *Pinkston Response* at 1–13.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(f) provides that a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "An affirmative defense is one that admits to the complaint, but avoids liability, wholly or partly, by new allegations of excuse, justification, or other negating matters." *Freestream Aircraft USA Ltd. v. Chowdry*, No. 16-cv-81232, 2018 WL 1309921, *1–2 (S.D. Fla. Mar. 12, 2018) (citing *Adams v. Jumpstart Wireless Corp.*, 294 F.R.D. 668, 671 (S.D. Fla. 2013)). "A defense that simply points out a defect or lack of evidence in the plaintiff's case is not an affirmative defense." *Id.* "Motions to strike are generally disfavored and will usually be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *Id.*

The Eleventh Circuit has not yet resolved whether affirmative defenses are subject to the heightened pleading standard set forth in Federal Rule of Civil Procedure 8(a)—which requires a short and plain statement *showing* an entitlement to relief—or the less stringent pleading standard set forth in Federal Rule of Civil Procedure 8(c)—which requires that a party must affirmatively *state* any avoidance or affirmative defense. *See Alhassid v. Bank of Am., N.A.*, No. 14-cv-20484, 2015 WL 11216747, *2 (S.D. Fla. Jan. 27, 2015). The FTC urges this Court to apply the heightened pleading standard of Rule 8(a). *Mot*. at 3–5. Absent guidance from the Eleventh Circuit, however, the Court declines to read the language set forth in Rule 8(a) into the more forgiving language of Rule 8(c). *See Alhassid*, No. 14-cv-20484, 2015 WL 11216747 at *2 (declining to apply Rule 8(a) standard to affirmative defenses). The Court will therefore strike Defendants affirmative defenses only if "they fail to give the plaintiff fair notice of the nature of the defense or where they are clearly insufficient as a matter of law." *Id.*

III. DISCUSSION

A. Negative Defenses

The FTC argues that the Court should strike several of Defendants' affirmative defenses as negative defenses. *Mot*. at 5–6, 13–14. A defense that only points out a defect or lack of evidence in the plaintiff's case is not an affirmative defense. *See Alhassid*, No. 14-cv-20484, 2015 WL 11216747 at *2 (citing *Flav-O-Rich, Inc. v. Rawson Food Serv., Inc*. 846 F.2d 1343, 1349 (11th Cir. 1988)). When a defendant mislabels a negative averment as an affirmative defense, courts generally treat that statement as a specific denial. *See id*.

Defendants Dluca and Pinkston have pleaded several negative defenses that merely identify an alleged defect in the FTC's case: (1) failure to state a cause of action; (2) failure to plead with particularity; (3) failure to plead time period; and (4) no consumer injury. *See Dluca Answer* (Dluca Affirmative Defenses No. 1, 2, 9); *Pinkston Answer* (Pinkston Affirmative Defense No. 1, 2, 3, 4, 5, 8, 9, 12, 16, 17). The Court declines to strike these negative averments and instead treats them as specific denials. *See Alhassid*, No. 14-cv-20484, 2015 WL 11216747 at *2.

B. Set Off

The FTC argues that the Court should strike Defendants' set-off affirmative defenses. *Mot*. at 13; *see Dluca Answer* at 6 (Dluca Affirmative Defense No. 6); *Pinkston Answer* at 11–12 (Pinkston Affirmative Defense No. 7). In this context, unjust gains are calculated based on the amount of net revenue (gross receipts minus refunds) rather than the amount of profit (net revenue minus expenses); therefore, Defendants are not entitled to set-off based on the profitably of their cryptocurrency holdings. *See FTC v. Washington Data Res., Inc.*, 704 F.3d 1323, 1327 (11th Cir. 2013). The Court therefore strikes Defendants' set-off affirmative defenses.

C. Third Party Caused Losses

The FTC argues that the Court should strike Defendants' affirmative defenses that losses were caused by the acts or omissions of independent third parties that the FTC failed to join. *Mot*. at 7; see *Dluca Answer* at 6 (Dluca Affirmative Defense No. 7); *Pinkston Answer* at 13 (Pinkston Affirmative Defense No. 11). The Court concludes that striking these affirmative defenses is appropriate given that Defendants have not identified the independent third parties and have therefore failed to give the FTC fair notice of their defenses. *See Alhassid*, No. 14-cv-20484, 2015 WL 11216747 at *2 (appropriate to strike defense if it fails to give plaintiff fair notice of the nature of the defense). Moreover, these defenses are legally insufficient as the FTC is not required to join every individual who may have played a role in the alleged scheme. *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (unnecessary to join all tortfeasors in a single lawsuit). The Court therefore strikes Defendants' third-party affirmative defenses.

D. Mootness

The FTC argues that the Court should strike Defendants' affirmative defenses that allege mootness. *Mot*. at 7–9. Defendants contend that the FTC's request for injunctive relief is moot because Defendants have voluntarily stopped their allegedly deceptive conduct. *Dluca Answer* at 6 (Dluca Affirmative Defense No. 8); *Pinkston Answer* at 14–15 (Pinkston Affirmative Defense No. 15). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1183 (11th Cir. 2007). Nonetheless, "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. Because there is a possibility

that Defendants could satisfy this stringent standard, the Court declines to strike Defendants' affirmative defenses that allege mootness.

E. Good Faith

The FTC argues that the Court should strike Defendants' affirmative defenses that allege a good faith defense because Defendants cannot avoid liability by showing that they acted in good faith. *Mot*. at 9; *see Dluca Answer* at 5 (Dluca Affirmative Defense No. 3); *Pinkston Answer* at 14 (Pinkston Affirmative Defense No. 13). "A defendant cannot avoid liability under section 5 of the FTCA by showing that he acted in good faith because the statute does not require an intent to deceive." *FTC v. USA Fin., LLC*, 415 F. App'x 970, 974 n.2 (11th Cir. 2011) (citing *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988)). But Defendants' intent may be relevant to the determination of appropriate relief, including a permanent injunction. *FTC v. USA Fin., LLC*, 08-cv-899, 2009 WL 10671254 (M.D. Fla. Feb. 18, 2009). The Court therefore declines to strike Defendants' affirmative defenses that allege good faith.

F. First Amendment

The FTC argues that the Court should strike Defendants' affirmative defenses claiming First Amendment protection. *Mot*. at 9–11. Defendants allege that their speech concerning promotion of the cryptocurrency platform is legitimate speech that is protected by the First Amendment. *Dluca Answer* at 6 (Dluca Affirmative Defense No. 4); *Pinkston Answer* at 14 (Pinkston Affirmative Defense No. 14). First Amendment protection, however, does not extend to deceptive commercial speech. *See United States v. Raymond*, 228 F.3d 804, 815–16 (7th Cir. 2000) (government may prevent dissemination of false or mislead commercial speech). The Court therefore strikes Defendants' First Amendment affirmative defenses.

G. Mitigation

The FTC argues that the Court should strike Defendant Pinkston's mitigation affirmative defense. *Mot*. at 11. Defendant Pinkston states as an affirmative defense that any monetary relief is subject to mitigation. *Pinkston Answer* at 13 (Pinkston Affirmative Defense No. 10). Defendant Pinkston argues that any damages should be reduced by returning or crediting the current value of the cryptocurrency to the consumer. *Id*. As set forth above, unjust gains are calculated based on the amount of net revenue (gross receipts minus refunds). *See Washington Data Res., Inc.*, 704 F.3d at 1327. Defendant Pinkston may be entitled to mitigation based on refunds received by the consumer. The Court therefore declines to strike Defendant Pinkston's mitigation affirmative defense.

H. General Denial and Demand for Strict Proof

The FTC argues that the Court should strike Defendant Pinkston's general denial and demand for "strict proof." *Mot*. at 11–12; *see Pinkston Answer* at 8. The federal rules of civil procedure are clear: a defendant may use a general denial only if the defendant "intends in good faith to deny all the allegations of a pleading." *See* Fed. R. Civ. P. 8(b)(3). Here, Defendant Pinkston has submitted to the Court specific denials and cannot also rely on a catchall general denial. *See id*. Moreover, Defendant Pinkston does not oppose the FTC's request to strike the general denial and demand for strict proof. *See generally, Pinkston Response*. The Court therefore strikes Defendant Pinkston's general denial and demand for strict proof.

I. Overbreadth

The FTC argues that the Court should strike Defendants' affirmative defenses that the FTC's requested permanent injunction is overbroad and not specifically tailored to the individual defendants. *Mot*. at 12–13; *see Dluca Answer* at 6 (Dluca Affirmative Defense No. 5); *Pinkston*

Answer at 14 (Pinkston Affirmative Defense No. 6). As Defendants argue in opposition, however, they are entitled to challenge the scope of the requested injunctive relief. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965). The Court therefore declines to strike Defendants' affirmative defenses concerning the breadth of the permanent injunction sought by the FTC. *See Alhassid*, No. 14-cv-20484, 2015 WL 11216747 at *2.

J. Reservation of Right to Allege Additional Affirmative Defenses

The FTC argues that the Court should strike Defendant Pinkston's attempt to reserve the right to allege additional affirmative defenses. *Mot*. at 14–15. The federal rules of civil procedure are clear: a defendant must assert every defense in the responsive pleading and may amend that response only with leave of court. *See* Fed. R. Civ. P. 12(b), Fed R. Civ. P. 15(a)(2). The Court therefore acknowledges that Defendant Pinkston's inclusion of this language is superfluous but declines to strike the addition as it does not prejudice the FTC. *See Alhassid*, No. 14-cv-20484, 2015 WL 11216747 at *2.

IV. CONCLUSION

For the foregoing reasons and UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion to Strike is GRANTED IN PART AND DENIED IN PART as set forth above.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of September, 2018.

K. MICHAEL MOORE
UNITED STATES CHIEF DISTRICT JUDGE

c: All counsel of record