

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FEDERAL TRADE COMMISSION,
Plaintiff,
v.
META PLATFORMS INC., et al.,
Defendants.

Case No. [5:22-cv-04325-EJD](#)

**ORDER GRANTING IN PART
MOTION TO STRIKE**

Re: Dkt. No. 89

Plaintiff Federal Trade Commission’s (the “FTC”) moves to strike certain affirmative defenses asserted by Defendants Meta Platforms, Inc. (“Meta”) and Within Unlimited, Inc. (“Within,” collectively with Meta, “Defendants”). Dkt. No. 89 (“Mot.”). Having considered the parties’ briefing and heard oral arguments, the Court GRANTS IN PART the FTC’s Motion.

I. BACKGROUND AND PROCEDURAL HISTORY

On July 27, 2022, the FTC brought this action to enjoin Defendant Meta—one of the largest technology companies in the world and provider of virtual reality (“VR”) devices and applications—from consummating its proposed acquisition (“Acquisition”) of Defendant Within, a software company that develops VR applications and most relevantly the VR fitness application, “Supernatural.” Dkt. No. 1 ¶ 1. The FTC sought preliminary injunctive relief pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), alleging that the Acquisition poses a reasonable probability of lessening competition in violation of Section 7 of the Clayton Act. *Id.* ¶ 13-14.

Both Defendants filed answers to the FTC’s Complaint on August 26, 2022, with Meta asserting twenty-two affirmative defenses (Dkt. No. 84) and Within asserting twenty affirmative

Case No. [5:22-cv-04325-EJD](#)

1 defenses (Dkt. No. 83). On September 9, 2022, the FTC filed the instant motion to strike six of
2 Meta’s affirmative defenses and three of Within’s defenses. Mot. 2-3.

3 After the Motion was fully briefed, the parties stipulated to the FTC’s amendment of its
4 complaint, which removed certain allegations and theories asserted in the initial Complaint. Dkt.
5 No. 101, 101-1 (“FAC”). The parties further stipulated that Defendants’ answers and affirmative
6 defenses shall remain responsive to the FTC’s Amended Complaint, Dkt. No. 101, and represented
7 to the Court that the FTC’s amendments do not affect the issues raised in the pending Motion.
8 Hr’g Tr. 6:11-19, 7:21-23, Oct. 17, 2022.

9 **II. LEGAL STANDARD**

10 Federal Rule of Civil Procedure 12(f) permits a court to “strike from a pleading an
11 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
12 Civ. P. 12(f). The purpose of a motion to strike under Rule 12(f) “is to avoid the expenditure of
13 time and money that must arise from litigating spurious issues.” *SidneyVinstein v. A.H. Robins*
14 *Co.*, 697 F.2d 880, 885 (9th Cir. 1983).

15 “A defense may be insufficient as a matter of pleading or a matter of law.” *G & G Closed*
16 *Cir. Events, LLC v. Nguyen*, 2010 WL 3749284, at *1 (N.D. Cal. Sept. 23, 2010). “The key to
17 determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair
18 notice of the defense.” *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979). In this
19 district, defendants provide “fair notice” of an affirmative defense by meeting the *Twombly/Iqbal*
20 pleading standard. *See, e.g., Goobich v. Excelligence Learning Corp.*, 2020 WL 1503685, at *2
21 (N.D. Cal. Mar. 30, 2020) (collecting cases). Accordingly, although an affirmative defense “need
22 not include extensive factual allegations . . . it must nonetheless include enough supporting
23 information to be plausible; bare statements reciting legal conclusions will not suffice.” *MIC*
24 *Prop. & Cas. Corp. v. Kennolyn Camps, Inc.*, 2015 WL 4624119, at *2 (N.D. Cal. Aug. 3, 2015).

25 In addition to insufficiently pled defenses, Rule 12(f) permits courts to strike matters that
26 are immaterial or impertinent. Fed. R. Civ. P. 12(f). An immaterial matter is “that which has no
27 essential or important relationship to the claim for relief or the defenses being pleaded,” and an

28 Case No. 5:22-cv-04325-EJD

1 impertinent matter “consists of statements that do not pertain, and are not necessary, to the issues
2 in question.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other*
3 *grounds*, 510 U.S. 517 (1994) (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice*
4 *and Procedure* § 1382, at 706–07 (1990)).

5 “In the absence of prejudice to the opposing party, leave to amend [a stricken affirmative
6 defense] should be freely given.” *Wyshak*, 607 F.2d at 826.

7 **III. DISCUSSION**

8 In their briefs, the parties have generally addressed the challenged affirmative defenses in
9 four categories, as follows: (1) bias defenses; (2) constitutional defenses; (3) selective enforcement
10 defense; and (4) equitable defenses.¹

11 **A. Bias Defenses**

12 Meta asserts two affirmative defenses arising from Chair Khan’s alleged bias. Meta’s
13 Eighteenth Affirmative Defense states that the “FTC is not entitled to relief because the Chair of
14 the FTC is disqualified,” and that she has made “numerous public statements that demonstrate her
15 bias against Meta, and in particular its acquisitions, demonstrating her lack of impartiality with
16 respect to Meta’s proposed acquisition.” Meta Answer 16-17, Dkt. No. 84. Meta’s Nineteenth
17 Affirmative Defense asserts that the “FTC cannot proceed because it cannot demonstrate
18 likelihood of success on the merits or that the balance of equities favor an injunction, as Chair
19 Khan is disqualified.” Meta Answer 17.

20 The FTC moves to strike these bias-related defenses on two related grounds: first, the
21 Court does not have subject matter jurisdiction to consider Defendants’ challenges to the FTC’s
22 administrative proceeding; and second, as a result, the issue of Chair Khan’s bias is not relevant to
23 this Court’s consideration of a Section 13(b) request. Mot. 10-15. Defendants respond that (1) the
24 Court’s subject matter jurisdiction is provided by Section 13(b) of the FTC Act under which the
25

26 ¹ Within’s Seventeenth Affirmative Defense is identical to Meta’s Seventeenth Affirmative
27 Defense; Within’s Eighteenth Affirmative Defense is analogous to Meta’s Twentieth Affirmative
28 Affirmative Defense. *See* Meta Answer, Dkt. No. 84; Within Answer, Dkt. No. 83.

1 FTC has brought the present action, and (2) Chair Khan’s bias is relevant because “ultimate
2 success” under Section 13(b) contemplates appellate success before a Court of Appeals where
3 Defendants can raise bias and other due process defenses to the FTC’s proceedings. Opp. 11-15.

4 As an initial matter, the Court notes—and the FTC does not appear to dispute—that Meta’s
5 Eighteenth and Nineteenth Affirmative Defenses satisfy the requisite pleading standards. *See,*
6 *e.g., MIC*, 2015 WL 4624119, at *2 (“[A] defense need not include extensive factual allegations
7 [but] must nonetheless include enough supporting information to be plausible.”). Both defenses
8 go beyond mere recitation of legal doctrines and contain factual allegations substantiating
9 Defendants’ assertion that Chair Khan is biased and should be disqualified as a Commissioner.
10 Accordingly, the Court finds that these affirmative defenses have provided the FTC with fair
11 notice of the defenses and the factual bases underlying them.

12 **1. Subject Matter Jurisdiction**

13 The FTC first asserts that district courts do not have subject matter jurisdiction to consider
14 a party’s challenges to the FTC’s structure or the underlying administrative proceedings, including
15 those based on the alleged bias of Chair Khan. Mot. 10-11. Such challenges, it argues, should be
16 heard by a Court of Appeals, not a district court, following an appeal from the final FTC order in
17 the administrative proceedings. Mot. 11-12; 15 U.S.C. § 45(c).

18 To support this position, the FTC relies primarily on the recent Ninth Circuit opinion in
19 *Axon Enterprise, Inc. v. F.T.C.*, 986 F.3d 1173 (9th Cir. 2021), *cert. granted in part*, 142 S. Ct.
20 895 (2022). There, the FTC initiated an administrative complaint against Axon’s acquisition of a
21 competitor, and Axon filed suit in federal court seeking relief from the FTC’s allegedly
22 unconstitutional administrative proceedings. *Id.* at 1177. The Ninth Circuit affirmed the district
23 court’s dismissal of Axon’s complaint for lack of subject matter jurisdiction, holding that the FTC
24 Act impliedly barred jurisdiction in district court and required Axon to first proceed through the
25 agency process. *Id.* In so holding, the Ninth Circuit applied the *Thunder Basin* factors established
26 by the Supreme Court to determine whether district court jurisdiction was impliedly precluded.
27 *Id.* at 1180-88; Mot. 11-15. The FTC argues that this Court similarly does not have subject matter

28 Case No. 5:22-cv-04325-EJD

1 jurisdiction to consider Defendants' affirmative defenses raising the same type of claims that *Axon*
 2 would have precluded. Mot. 14 (citing *Jarkesy v. S.E.C.*, 803 F.3d 9 (D.C. Cir. 2015) (affirming
 3 dismissal under the *Thunder Basin* factors where plaintiffs alleged the SEC was biased and had
 4 prejudged their charges in the underlying agency proceedings)).

5 Although *Axon* is helpful in clarifying the Court's jurisdiction to hear claims brought by
 6 parties *against* an FTC administrative proceeding, the Court agrees with Defendants that *Axon*
 7 does not bear upon subject matter jurisdiction in the present case. Neither party dispute this
 8 Court's subject matter jurisdiction over the FTC's claim. *See* FAC ¶¶ 16-17 (citing 28 U.S.C. §
 9 1337 ("The district courts shall have original jurisdiction of any civil action or proceeding arising
 10 under any Act of Congress regulating commerce or protecting trade and commerce against
 11 restraints and monopolies.")). Defendants also have not asserted any counterclaims seeking relief
 12 over which the Court may need to exercise jurisdiction, nor does the FTC argue that Meta's
 13 Eighteenth and Nineteenth Affirmative Defenses should be designated as counterclaims. *See* Fed.
 14 R. Civ. P. 8(c)(2). Furthermore, unlike *Axon* where the precluded issues were raised offensively
 15 by a plaintiff to block underlying administrative proceedings, here, the purportedly precluded
 16 issues are raised defensively *in response to* a complaint filed by the FTC. Although the FTC
 17 counters that these are formalistic distinctions without a difference, it also acknowledged in oral
 18 arguments that no court has relied on the *Thunder Basin* analysis to strike an affirmative defense
 19 for lack of subject matter jurisdiction, which the FTC urges the Court to do so here. Hr'g Tr.
 20 17:11-20, Oct. 21, 2022, Dkt. No. 172.

21 Accordingly, the Court is satisfied that its subject matter jurisdiction is secure over the
 22 FTC's claim for Section 13(b) preliminary injunctive relief, as well as the affirmative defenses
 23 raised by Defendants in their answers.

24 2. Pertinence to Section 13(b) Preliminary Injunction

25 In its Motion, the FTC also argues that Defendants cannot insert their bias arguments—
 26 arguments that Defendants would otherwise be barred from bringing as a complaint per *Axon* and
 27 *Jarkesy*—by recasting them as defenses rebutting the FTC's required showing for Section 13(b)

28 Case No. 5:22-cv-04325-EJD

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