

FILED IN CHAMBERS
RICHARD W. STORY
U.S.D.C. Atlanta

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LUTHER D. THOMAS, Clerk
By: *[Signature]*
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL TRADE
COMMISSION,

Plaintiff,

v.

ALYON TECHNOLOGIES, INC.,
a Delaware corporation;
TELCOLLECT, INC., a New York
corporation; and STEPHANE
TOUBOUL, individually and as an
officer of Alyon Technologies,
Inc.,

Defendants.

CIVIL ACTION NO.
1:03-CV-1297-RWS

ORDER

Plaintiff, the Federal Trade Commission ("FTC"), filed this case on May
13, 2003, alleging that Defendants Alyon Technologies, Inc., Telcollect, Inc.,

and Stephane Touboul¹ are engaging in unfair and deceptive trade practices in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (the "FTC Act"), the Telephone Disclosure and Dispute Resolution Act of 1992 (TDDRA), Pub. L. No. 102-556, 106 Stat. 4181-95 (codified as amended in scattered sections of 15 U.S.C. and 47 U.S.C.), and the FTC's Trade Regulation Rule pursuant thereto (the "Pay-Per-Call Rule"), 16 C.F.R. Part 308. Now before the Court for consideration are: Defendant Telcollect's Motion to Dismiss [37-1] or in the Alternative for More Definite Statement [37-2]; Plaintiff's Motion for Reconsideration [42-1]; Plaintiff's Motion to Strike the Alyon Defendants' Nine Affirmative Defenses [45-1]; and the Alyon Defendants' Motion for Leave to File Sur Reply [55-1]. After considering the parties' arguments, the Court enters the following Order.

As an initial matter, the Alyon Defendants' Motion for Leave to File Sur Reply [55-1] is hereby **GRANTED**.

Background

On June 18, 2003, this Court held a hearing on the FTC's Motion for

¹The Court refers to all of the Defendants as "Defendants." The Court refers to Alyon Technologies, Inc. and Stephane Touboul as "the Alyon Defendants."

Preliminary Injunction. With the consent of the parties, the Court met separately with each party in an attempt to help the parties reach an agreement as to practices and procedures that Defendants could follow during the pendency of this case. During these discussions, it became clear that the parties could not agree. However, Defendants satisfied the Court that they had already implemented, on a nationwide basis, practices and procedures set forth in a Pennsylvania Assurance of Voluntary Compliance ("AVC"). Defendants voluntarily offered to consent to this Court's entering an order much like the AVC. The AVC met any concerns the Court may have had, and the Court concluded that a preliminary injunction of the nature proposed by the FTC was not warranted under the applicable standards. See FTC v. Univ. Health, Inc., 938 F.2d 1206, 1217 (11th Cir. 1991) (setting forth standards). The Court informed all the parties that it intended to formalize those provisions in its own Order and provided all parties the opportunity to offer particular provisions.

Thus, although the Order entered July 10, 2003 ("the July 10 Order") made the AVC's provisions enforceable against Defendants, it was never based on a finding that Defendants were violating the law and was entered only with Defendants' consent.

Discussion

I. Motion for Reconsideration

The FTC moves the Court to reconsider its July 10 Order, arguing that the Court's denial of the FTC's Motion for Preliminary Injunction as moot was in error, and that the July 10 Order should be modified. A motion for reconsideration should not be used to reiterate arguments that have been made previously, but "should be reserved for certain limited situations, namely the discovery of new evidence, an intervening development or change in the law, or the need to correct a clear error or prevent a manifest injustice." Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc., 972 F. Supp. 665, 674 (N.D. Ga. 1997). Moreover, a motion for reconsideration may not be used to offer new legal theories or evidence that could have been presented in a previously filed motion or response, unless a reason is given for failing to raise the issue at an earlier stage in the litigation. Escareno v. Noltina Crucible & Refractory Corp., 172 F.R.D. 517, 519 (N.D. Ga. 1994) (citing O'Neal v. Kenamer, 958 F.2d 1044, 1047 (11th Cir. 1992)).

The FTC begins by arguing that its Motion for Preliminary Injunction should not have been denied as moot. First, the Court notes that it was the

FTC's counsel who suggested to the Court that that would be the proper disposition, given the Court's stated intention to simply adopt the terms of the AVC with which Defendants had voluntarily agreed to comply. To the extent the FTC now wishes to submit evidence showing that the standards for denying a motion for preliminary injunction were not met, see Siegel v. Lepore, 234 F.3d 1163, 1172-73 (11th Cir. 2000), it should have done so on June 18 rather than inviting the very error of which it now complains. Second, based on Defendants' representations to this Court and the evidence presented, the Court concluded that Defendants' voluntary implementation of the practices and procedures set forth in the AVC met the standards for denying a motion for preliminary injunction as moot. FTC has therefore failed to meet the standards for a motion for reconsideration on this issue.

Next, the FTC urges that various provisions of the July 10 Order are "inconsistent with the law or unworkable as a matter of fact." In this regard, the FTC's Motion for Reconsideration reiterates arguments that were previously made or that could have been presented prior to the entry of the July 10 Order. The FTC had notice of all the terms of the AVC before it even initiated this suit. Defendants attached a copy of the AVC to their Opposition

to the FTC's Motion for Preliminary Injunction. The Court informed the parties at the June 18 hearing that it considered the AVC a starting point for fashioning relief. The FTC has never offered specific alternatives to these provisions; moreover, with one exception discussed below, the FTC had ample opportunities to raise the complaints it now presents for the first time in its Motion for Reconsideration.^{2,3} The FTC has therefore not met the requirements for reconsideration as to these issues.

One provision in the July 10 Order was new to the FTC: in section IV, "Consumer Dispute Resolution Mechanism," the Order provides that consumers must file written complaints with both the FTC and Alyon. The FTC contends that consumers should not be required to file written complaints with the FTC. If the FTC does not wish to receive these complaints, the Court will not require it. Accordingly, the July 10 Order is hereby **AMENDED** to delete section IV's requirement that consumers file written complaints with the

²The Court notes that the July 10 Order was never intended to and did not contravene existing law. The Defendants must continue to comply with the law.

³Should the FTC eventually succeed on the merits, the Court will of course consider at that time any concerns the FTC has about fashioning appropriate equitable relief.

FTC. The new paragraph shall read as follows:

IV. Consumer Dispute Resolution Mechanism

Alyon shall provide restitution to any consumers who have filed or, within ninety (90) days of the entry of this Order, file written complaints with Alyon alleging that they were billed for access to an Alyon billed site

Two additional matters require discussion. First, the FTC argues that the July 10 Order should have stopped Defendants from billing, collecting, or attempting to collect from consumers for services provided prior to the time Defendants implemented their new practices and procedures under the AVC. The FTC proposed language that would have done so, and this Court rejected it. Indeed, the Order did not prohibit Defendants from billing, collecting, or attempting to collect from past consumers.⁴ Instead, the Order set forth the parameters under which Defendants may continue to conduct these activities--by use of the dispute resolution mechanism Defendants had already implemented through the AVC. The FTC also argues that the 90-day dispute submission period set forth in the July 10 Order was too short. Defendants

⁴Accordingly, Defendants' request for clarification of the July 10 Order is **GRANTED**.

have offered to extend that period an additional 90 days. Accordingly, the Court hereby **EXTENDS** the 90-day dispute resolution period set forth in the July 10 Order for an additional 90 days following entry of this Order.

Second, the FTC has submitted new evidence that, it contends, shows that Defendants continue to engage in unlawful activity. If the FTC believes Defendants are violating the law, it may follow the procedures set forth in the July 10 Order to address such issues.

Based on the foregoing, the FTC's Motion for Reconsideration of the July 10 Order is hereby **GRANTED in part and DENIED in part**.

II. Telcollect's Motion to Dismiss

Telcollect submits that in light of the July 10 Order, there are no claims or issues remaining to be adjudicated and the Complaint fails to state a claim upon which relief may be granted. As discussed above, however, the Court has not adjudicated any of the claims or issues. Further, the standards that this Court must follow in considering a motion to dismiss do not contemplate that evidence presented with respect to a motion for a preliminary injunction will shed light on the question whether a complaint states a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6) (matters outside the pleadings

may not be considered). Finally, the provisions set forth in the July 10 Order are meant to balance protection to consumers with Defendants' business needs during the pendency of this case. As noted above, it may be that those provisions would be inappropriate as final relief should the FTC prevail on the merits. Or, it may be that no relief is necessary.

In the alternative, Telcollect requests the Court to order the FTC to amend its complaint to allege specifically the relief it now believes it is entitled to recover. "A motion under Rule 12(e) is only to be granted when the pleading is so unintelligible that the movant cannot be expected to draft a responsive pleading." Kish v. Milwaukee County, 48 F.R.D. 102, 104 (D. Wis. 1969). "Rule 12(e) is not designed to frustrate the concept of notice pleading." United States by Clark v. Ga. Power Co., 301 F. Supp. 538, 544 (N.D. Ga. 1969). The Court finds that the Complaint is sufficiently drafted to provide notice of the FTC's allegations and claims and comports with the requirements set forth in Federal Rule of Civil Procedure 8(a). Accordingly, Defendant Telcollect's Motion to Dismiss [37-1] is hereby **DENIED** and the Alternative Motion for More Definite Statement [37-2] is hereby **DENIED**.

III. The FTC's Motion to Strike Alyon Defendants' Nine Affirmative Defenses

The Alyon Defendants included nine affirmative defenses in their Answer, all of which the FTC moves to strike pursuant to Federal Rule of Civil Procedure 12(f). Rule 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are disfavored and will be granted only if the allegations have no possible relation to the controversy and may cause prejudice to the opposing party. Somerset Pharms., Inc. v. Kimball, 168 F.R.D. 69, 71 (M.D. Fla. 1996). In evaluating a Rule 12(f) motion to strike, the Court must treat all well-pleaded facts as admitted and cannot consider matters beyond the pleadings. Stapleton v. State Farm Fire & Cas. Co., 11 F. Supp. 2d 1344, 1345 (M.D. Fla. 1998); Cherry v. Crow, 845 F. Supp. 1520, 1524 (M.D. Fla. 1994). To prevail on a motion to strike, the movant must show: (1) there is no question of fact that could allow the defendant to succeed; (2) there is no substantial question of law, resolution of which could allow the defendant to succeed; and (3) the plaintiff is prejudiced by the inclusion of the defense. County Vanlines, Inc. v. Experian Info. Sys.,

205 F.R.D. 148, 153 (S.D.N.Y. 2002); Cabela v. James D. Bernard, D.O., P.C., 155 F.R.D. 221, 224 (N.D. Ga. 1992). Even so, "motions to strike are useful tools to narrow a lawsuit down to its essential components and pare away the superfluous material." Mathis v. Velsicol Chem. Corp., 786 F. Supp. 971, 975 (N.D. Ga. 1991).⁵ The Court considers each of the Alyon Defendants' affirmative defenses in turn.

A. First Defense: Plaintiff's Complaint fails to state a claim upon which relief may be granted.

The FTC contends that the law is "well settled" that the conduct alleged in the Complaint is sufficient to state claims for violations of section 5 of the FTC Act and the Pay-Per-Call Rule and the remedies sought are statutorily authorized. Thus, the FTC concludes, the Alyon Defendants' First Defense cannot be sustained. First, the law is not necessarily so well settled. The only case upon which the FTC relies, FTC v. Verity Int'l Ltd., 124 F. Supp. 2d 193, 202 (S.D.N.Y. 2002), is distinguishable on a number of grounds. Second, "it is

⁵But see Van Shouwen v. Connaught Corp., 782 F. Supp. 1240, 1245 (N.D. Ill. 1991) ("Indeed, motions to strike can be nothing other than distractions. If a defense is clearly irrelevant, then it will likely never be raised again by the defendant and can be safely ignored. If a defense may be relevant, then there are other contexts in which the sufficiency of the defense can be more thoroughly tested with the benefit of a fuller record—such as on a motion for summary judgment.")

well settled that the failure-to-state a claim defense is a perfectly appropriate affirmative defense to include in the answer." SEC v. Toomey, 866 F. Supp. 719, 723 (S.D.N.Y. 1992). Finally, the FTC has not shown how this defense causes it prejudice. Based on the foregoing, the FTC's Motion to Strike [45-1] is hereby **DENIED** as to the Alyon Defendants' First Defense.

B. Second Defense: Plaintiff's Complaint seeks relief in contravention of Fed. R. Civ. P. 64 and is otherwise overbroad and unnecessary on its face to ensure Defendants' compliance with the law.

The FTC contends that this defense is immaterial and impertinent because the relief sought by the FTC is not overbroad or unnecessary and does not contravene Federal Rule of Procedure 64.⁶ As the FTC explains, it has authority to seek the relief requested and such relief has been awarded "time and again in cases brought by the FTC." (FTC's Mot. to Strike [45] at 9.)

The Alyon Defendants' second defense does not question the FTC's authority to seek the relief requested in the Complaint; rather, it contends that such relief contravenes Rule 64, is overbroad, or is unnecessary on its face.

⁶Rule 64 provides means by which, after commencement of an action and until the time of judgment, a party may seek an order of the Court to seize a person or property to secure satisfaction of an eventual judgment. Fed. R. Civ. P. 64.

Although the FTC has been awarded such relief in other cases, this case must be judged on its own particular circumstances. Because the facts have not been fully developed in this case and there remain significant questions of law, it is not certain that the Second Defense is immaterial or impertinent. Further, the FTC has not shown that this defense prejudices it in any way. Accordingly, the FTC's Motion to Strike is hereby **DENIED** as to the Alyon Defendants' Second Defense.

C. Third Defense: Defendants have acted in good faith to comply with state and federal law and with regulations, requirements and industry standards applicable at the time to the conduct and activities alleged in the Complaint.

The FTC contends that this defense should be stricken as invalid because good faith is not a defense to a finding of a violation of the FTC Act or Pay-Per-Call Rule. Although good faith may not bar liability for a violation of the FTC Act or Pay-Per-Call Rule, see FTC v. World Travel Vacation Brokers, 861 F.2d 1020, 1029 (7th Cir. 1988), it is relevant to equitable relief should the FTC prevail, see Sears, Roebuck & Co. v. FTC, 676 F.2d 385, 392 (9th Cir. 1982). See also FTC v. Hang-ups Art Enters., 1997-1 Trade Cas. (CCH) p. 71,709 (C.D. Cal. Sept. 22, 1995) (denying motion to strike good faith defense

to extent asserted against request for permanent injunction). In their opposition memorandum, Defendants make clear that this defense is directed to the FTC's requested relief. Finally, the FTC has not alleged any prejudice resulting from this defense. Accordingly, the FTC's Motion to Strike [45-1] is hereby **DENIED** as to the Alyon Defendants' Third Defense.

D. Fourth Defense: Plaintiff's claims are barred by the doctrine of unclean hands.

The FTC argues that the defense of unclean hands "may not be invoked against a governmental agency which is attempting to enforce a congressional mandate in the public interest." SEC v. Gulf & W. Indus., Inc., 502 F. Supp. 343, 348 (D.D.C. 1980). Although equitable defenses may at times be available even against a government agency, equitable principles may not be used to frustrate federal law or thwart public policy. United States v. Second Nat'l Bank of N. Miami, 502 F.2d 535, 548 (5th Cir. 1974). "[U]nless the Government did something which in good conscience it should not have done, or failed to do something fair dealing required it to do, it comes into court with clean hands and is entitled to the equitable relief it obtained." Id. (quotations and citations omitted). It is therefore only in "rare exceptions" that such

defenses are applicable. United States v. Delgado, 321 F.3d 1338, 1349 (11th Cir. 2003).

Here, the Alyon Defendants' Answer does not set forth any facts to support their unclean hands defense. It is thus impossible to conclude that there are alleged circumstances that would, if treated as true, constitute a "rare exception" to the general rule barring equitable defenses. Cf. FTC v. Medicor LLC, 2001 WL 765628, at *3 (C.D. Cal. June 26, 2001) (denying FTC's motion to strike equitable defense of unclean hands where defendants in their answer alleged "specific wrongdoing by the government"). Accordingly, FTC's Motion to Strike [45-1] is hereby **GRANTED** as to the Alyon Defendants' Fourth Defense.

E. Fifth Defense: Plaintiff is barred by laches from proceeding in this action against Defendants.

Similarly, the FTC contends that laches cannot be asserted against the United States in this case. Under the reasoning set forth above with respect to the doctrine of unclean hands, the laches defense is also foreclosed; the Alyon Defendants have failed to set forth any facts that, taken as true, would support an exception to the general rule. See Weiszmann v. U.S. Army Corps of

Eng'rs, 526 F.2d 1302, 1305 (5th Cir. 1976) (government is not subject to defense of laches in enforcing its rights); see also Delgado, 321 F.3d at 1348 (noting rare exceptions where laches defense may be available in civil cases).

Accordingly, the FTC's Motion to Strike [45-1] is hereby **GRANTED** as to the Alyon Defendants' Fifth Defense.

F. Sixth Defense: To the extent that Defendants engaged in any of the acts alleged in the Complaint, such acts were excused, justified and/or privileged.

The FTC contends that there is nothing about this defense that would allow Defendants to violated to FTC Act with impunity. Like the good faith defense discussed above, the Court concludes that the assertions in the sixth defense could be relevant to injunctive relief. Accordingly, the FTC's Motion to Strike [45-1] is hereby **DENIED** as to the Alyon Defendants' Sixth Defense.

G. Seventh Defense: The Complaint and each and every cause of action are barred because Defendants did not proximately cause any of the injuries, harm or damage alleged in the Complaint.

The FTC argues that this defense is not an affirmative defense at all but rather a denial of liability. The FTC reasons, "since such matters will not take the FTC by surprise if later raised by the defendant, they need not be pleaded as

affirmative defenses.” (FTC.’s Mot. to Strike at 14.) Although this defense does appear to be a denial, the FTC’s own reasoning shows that the defense causes it no prejudice. Thus, there is no need to strike it. Accordingly, the FTC’s Motion to Strike [45-1] is hereby **DENIED** as to the Alyon Defendants’ Seventh Defense.

H. Eighth Defense: Each and every cause of action set forth in the Complaint is barred, in whole, or in part, because it would result in unjust enrichment.

The FTC contends that unjust enrichment is not a defense to an action; it is a claim and therefore the defense fails as a matter of law. The Alyon Defendants argue that like the Second Defense, this defense challenges the availability of the relief sought. The Court rejects this argument: the wording of the defense does not refer to the relief sought; rather, it contends that the doctrine of unjust enrichment somehow bars the FTC’s claims. If the Alyon Defendants are ultimately found to be liable and restitution is warranted, consumers who receive restitution will not be unjustly enriched because that restitution was based on a finding of liability. Finally, defenses may be stricken that allege not a defense but a claim. United States v. Ein Chem. Corp., 161 F. Supp. 238, 244 (S.D.N.Y. 1958). The Court hereby **GRANTS**

the FTC's Motion to Strike [45-1] as to the Alyon Defendants' Eighth Defense.

I. Ninth Defense: Defendants allege that Plaintiff's position is not substantially justified.

This defense apparently relates to the Alyon Defendants' request for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. The FTC argues that this defense is redundant; further, it contends that substantial justification is not a defense. The Court agrees that lack of substantial justification is not a defense. Rather, the Equal Access to Justice Act provides that it must be alleged in an application following entry of final judgment. See 28 U.S.C. § 2412(d)(1)(B). Even so, the determination whether there was substantial justification is to be made on the basis of the record. Id. Thus, the Ninth Defense is harmless in that it simply provides advance notice of the Alyon Defendants' position should they prevail. There is therefore no prejudice to the FTC from this defense and accordingly, the Court hereby **DENIES** the FTC's Motion to Strike [45-1] as to the Alyon Defendants' Ninth Defense.

J. Failure to Properly Plead

The FTC argues that none of the defenses are properly pled because they

do not conform to Federal Rule of Civil Procedure 8(a). It appears that there is some dispute whether affirmative defenses must conform to Rule 8(a). By its terms, Rule 8(a) applies only to “[a] pleading which sets forth a claim for relief.” As the FTC has pointed out with respect to the Eighth Defense, affirmative defenses do not constitute claims for relief. See 5A Wright & Miller, Federal Practice & Procedure: Civil 2d § 1381 at 745 n.13 (Supp. 2003) (“affirmative defenses do not establish a right to relief for the party asserting them and therefore are not subject to Rule 8(a) pleading requirements”). Some courts, however, have imposed the Rule 8(a) requirements on parties setting forth affirmative defenses. See Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989) (requiring affirmative defenses to comply with Rule 8(a)); Microsoft Corp. v. Jesse’s Computer & Repair, Inc., 211 F.R.D. 681, 684 (M.D. Fla. 2002) (striking affirmative defense of copyright misuse for failure to comply with Rule 8(a)).

Although these positions seem in conflict, from a practical standpoint the distinction is immaterial. The purpose of Rule 8(c) (governing affirmative defenses) is to give the opposing party notice of an affirmative defense and an opportunity to rebut it. Grant v. Preferred Research, Inc., 885 F.2d 795, 797

(11th Cir. 1989). This purpose is consistent with the standards governing motions to strike. See Fed. R. Civ. P. 12(f). Here, the procedural history of this case has necessitated significant briefing from the parties already; based on the entire record before it, the Court concludes that the FTC has sufficient notice of how the affirmative defenses that remain relate to this matter.⁷ See Grant, 885 F.2d at 797-98 (although statute of limitations was not pled as affirmative defense, there was no prejudice to plaintiff who gained notice of the defense in a motion for summary judgment). Thus, none of the defenses are due to be stricken on this ground.

Conclusion

The Alyon Defendants' Motion for Leave to File Sur Reply [55-1] is hereby **GRANTED**. The July 10 Order [33-1] is hereby **AMENDED** to delete section IV's requirement that consumers file written complaints with the FTC. The Court hereby **EXTENDS** the 90-day dispute resolution period set forth in the July 10 Order [33-1] for an additional 90 days following entry of this Order. The FTC's Motion for Reconsideration of the July 10 Order [42-1] is hereby

⁷Indeed, the FTC specifies only the unclean hands and laches defense as examples of defenses providing no notice. As discussed above, these defenses fail as alleged.

GRANTED in part and DENIED in part. Defendant Telcollect's Motion to Dismiss [37-1] is hereby **DENIED** and the Alternative Motion for More Definite Statement [37-2] is hereby **DENIED**. Plaintiff's Motion to Strike the Alyon Defendants' Nine Affirmative Defenses [45-1] is hereby **GRANTED** as to the Fourth, Fifth, and Eighth Defenses and **DENIED** as to the First, Second, Third, Sixth, Seventh, and Ninth Defenses.

SO ORDERED this 16th day of October, 2003.


RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

OCT 20 2003

BY  L.D.T. CLERK
DEPUTY CLERK