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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 FEDERAL TRADE COMMISSION,
14 Plaintiff,
15 v.
16 COMMERCE PLANET, INC., et al,
17 Defendants.
18

Case No. SACV-09-01324 CJC
(RNBx)

**Plaintiff FTC's Reply to Defendant
Gugliuzza's Opposition to Motion to
Dismiss Defendant Gugliuzza's
Counterclaim**

19 In its Motion to Dismiss Defendant Gugliuzza's Counterclaim (Docket No.
20 52), Plaintiff argues that (1) Section 5 of Federal Trade Commission Act, 15
21 U.S.C. § 45, is not vague, and therefore cannot be void for vagueness; (2)
22 Gugliuzza has alleged no facts to support his claim that the statute, as interpreted
23 by the Commission and the courts, is vague; and (3) that Gugliuzza has not alleged
24 facts sufficient to support his assertion that the FTC's enforcement of the statute
25 has been arbitrary or discriminatory. Gugliuzza's Opposition (Docket No. 57)
26 completely ignores the threshold issue of whether Section 5 is vague, focusing
27 instead on the dubious claim that the FTC's enforcement regime is flawed.
28 Because Gugliuzza has failed to contest the FTC's well reasoned demonstration

1 that Section 5 is not vague, he has conceded that issue, and, on that basis alone,
2 Plaintiff's Motion to Dismiss should be granted. In addition, Gugliuzza has failed
3 to show that his factual allegations could under any circumstances support his
4 claim that the FTC's enforcement of Section 5 is arbitrary or discriminatory.¹ For
5 that reason, too, the FTC's Motion to Dismiss should be granted.

6 **I. A statute must be vague before it can be ruled void for vagueness.**

7 Having challenged Section 5 as unconstitutionally vague because it permits
8 "arbitrary and discriminatory enforcement," (Docket No. 43 ¶ 66) Gugliuzza then
9 surprisingly argues that the FTC's detailed demonstration that Section 5 is not
10 vague is "all for naught." (Docket No. 57 at 4:5-8) Gugliuzza misunderstands the
11 "void for vagueness" test. As the U.S. Supreme Court demonstrated anew last
12 week, a "void for vagueness" claim – whether premised on a concern that a
13 statute's vagueness prevents people from regardless of the alleged harm – begins
14 with an assessment of the statute and interpretations of it to ascertain the meaning
15 of the phrase(s) alleged to be vague. *Skilling v. United States*, No. 08-1894, slip
16 op. at 38-39 (Jun. 24, 2010). Based upon judicial and regulatory interpretations of
17 Section 5, Plaintiff showed that Section 5 is not vague and that Gugliuzza had
18 failed to allege facts showing that "the FTC Act or interpretations of it do not 'give
19 the person of ordinary intelligence a reasonable opportunity to know what is
20 prohibited,' or do not 'provide explicit standards' for those who enforce the
21 statute." (Docket No. 52-1 at 4-7)

22 Gugliuzza, however, clearly believes that the actual vagueness or clarity of
23 a statute is irrelevant to his "void for vagueness" claim, because he asserts that
24 "the argument set forth in Section A of the Motion to Dismiss must be disregarded
25 by the Court as it pertains to a vagueness challenge that Gugliuzza has not
26 asserted." (Docket No. 57 at 4:18-20) He is plainly incorrect; the Motion to

27 ¹ Gugliuzza also states that he is not challenging the FTC's case against him as selective
28 prosecution. (Docket No. 57 at 6:17-11:5)

1 Dismiss’s argument, which Gugliuzza claims is “all for naught” (Docket No. 57 at
2 4:8), in fact, addresses the essential element of any “void for vagueness” claim.
3 (Docket No. 57 at 4:8) Because Gugliuzza does not allege that Section 5, on its
4 face and as interpreted by the Commission and the courts, is vague and because his
5 Opposition fails to contest the FTC’s analysis showing that Section 5 is not vague,
6 he has conceded the issue. His counterclaim must, therefore, be dismissed for
7 failing to state a claim.

8 The requirement that a “void for vagueness” claim allege that the statute is
9 vague is not new. In *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294,
10 33 L. Ed. 2d 222 (1972), the Supreme Court considered the constitutionality of
11 two ordinances that were challenged as impermissibly vague. While the Court laid
12 out the various ways in which a vague statute can infringe the Constitution, 408
13 U.S. at 108, its analysis of the ordinances began with the question of whether they
14 were vague. In upholding one of the two ordinances, the Court found that the
15 “‘ordinance defines boundaries sufficiently distinct’ for citizens, policemen, juries
16 and appellate judges. It is not impermissibly vague.” 408 U.S. at 114, *quoting*
17 *Chicago v. Fort*, 262 N.E. 2d 473, 476 (Ill. 1970). In *United States v. Tabacca*,
18 924 F.2d 906 (9th Cir. 1991), which Gugliuzza also cites, this circuit held that
19 “[w]hen determining an issue of vagueness, this court must consider the common
20 understanding of the terms of the statute in question.” 924 F.2d at 912.

21 In *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct.
22 1186, 71 L. Ed. 2d 362 (1982), the Court held that a “law that does not reach
23 constitutionally protected conduct . . . may nevertheless be challenged on its face
24 as unduly vague, in violation of due process. To succeed, however, the
25 complainant must demonstrate that the law is impermissibly vague in all of its
26 applications.” 455 U.S. at 497. The Court found that the challenged statute was
27 “sufficiently clear as applied to [defendant]” and, therefore that the defendant’s
28 facial challenge “is unavailing.” 455 U.S. at 500.

1 The case law is thus clear that the threshold question in considering a “void
2 for vagueness” claim is whether the statute is actually vague. It is also clear that
3 the issue of vagueness depends on statutory interpretation, not fact-finding and,
4 therefore, is a matter of law that may appropriately be decided on a motion to
5 dismiss. Thus, Gugliuzza asserts incorrectly that *FTC v. National Urological*
6 *Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), suggests that whether Section
7 5 of the FTC Act is impermissibly vague is a factual question and not appropriate
8 for a motion to dismiss. (Docket No. 57 at 3:15-26) In fact, the court in *National*
9 *Urological* engaged in exactly the sort of legal analysis that the Commission has
10 proposed in this case. After noting that the defendants had failed to demonstrate
11 either prong of the “void for vagueness” doctrine, the Court held that the
12 challenged provision had been defined in various contexts, including in guidelines
13 promulgated by the FTC. The court could “find no reason why this definition
14 would not give people of ordinary intelligence a reasonable opportunity to
15 understand what evidence is required to substantiate their health-related claims.”
16 645 F. Supp. 2d at 1186. The court went on to note that “[s]tatutes are not . . .
17 void for vagueness because they raise difficult questions of fact. They are void for
18 vagueness only where they fail to articulate a definite standard. Here the FTC has
19 articulated a definite standard’; accordingly, the issues of fact that it generates do
20 not render it unconstitutionally vague.” 645 F. Supp. 2d at 1187, quoting *United*
21 *States v. Shackney*, 333 F.2d 475, 488 (2d Cir. 1964). That is exactly the sort of
22 inquiry that the Commission is inviting here: a legal analysis of whether Section 5
23 of the FTC Act, as interpreted by the Commission and courts, is vague.

24 The Commission has demonstrated and Gugliuzza has conceded that the
25 FTC Act – and specifically the terms “unfair,” “deceptive” and “clear and
26 conspicuous” – are not vague. His counterclaim therefore cannot succeed on any
27 set of facts. The FTC’s Motion to Dismiss should be granted.
28

1 **II. Gugliuzza has failed to show that he has properly alleged arbitrary or**
2 **discriminatory enforcement by the FTC.**

3 Even if Gugliuzza had alleged facts showing that Section 5 is vague, he has
4 failed to allege facts sufficient to show that the vagueness “authorizes or even
5 encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S.
6 703, 732; 120 S. Ct. 2480, 2498; 147 L. Ed. 2d 597, 621 (2000). Gugliuzza agrees
7 with the FTC’s summary of his allegations:

- 8 1. that there were other people and entities that the Commission could
9 possibly have named in its Complaint, but did not;
- 10 2. that there were other companies that may be engaged in comparable
11 conduct that the Commission could have sued, but did not; and
- 12 3. that the settling defendants in this case had their judgments suspended
13 based on their ability to pay, while Gugliuzza faces the possibility of
14 a multi-million dollar judgment in restitution.

15 (Docket No. 57 at 5:18-24, *citing* Docket No. 52 at 10:3-9)

16 Accepting these facts as true, Gugliuzza has still failed to describe anything
17 approaching arbitrary or discriminatory conduct by the FTC. All he has pled is
18 that the Commission picks and chooses its defendants, settling cases where it can
19 on bases more favorable than may be available to defendants who elect not to
20 settle. This is not an exceptional proposition; rather, it means that the Commission
21 exercises prosecutorial discretion. The exercise of prosecutorial discretion
22 pursuant to a statute that provides “fair warning as to what is prohibited” does not
23 rise to the level of arbitrary or discriminatory enforcement sufficient to invalidate
24 a statute. *Grayned*, 408 U.S. 104, 114 (1972). Rather, in order to be void for
25 vagueness for enabling discriminatory enforcement, the statute must fail to
26 “establish standards to permit [the enforcement agency] to enforce the law in a
27 non-arbitrary, nondiscriminatory manner.” *United States v. Sutcliffe*, 505 F.3d
28 944, 953 (9th Cir. 2007), *quoting* *Nunez v. City of San Diego*, 114 F.3d 935, 940

1 (9th Cir. 1997). As we demonstrate in our opening brief, the FTC Act clearly does
2 provide such standards. Thus, even if Gugliuzza were able to prove each of his 64
3 factual allegations, he could not sustain his challenge to the FTC Act.
4 Accordingly, the FTC’s Motion to Dismiss should be granted.

5 **CONCLUSION**

6 In order for his counterclaim to survive a motion to dismiss, Gugliuzza must
7 allege facts sufficient to show that the FTC Act is actually vague and that such
8 vagueness invites or encourages arbitrary or discriminatory enforcement. He has
9 done neither. In fact, he has conceded that the FTC Act is not vague, and his
10 pleadings, even taken at face value, do not allege facts sufficient to show that the
11 statute invites or encourages improper enforcement. Gugliuzza’s counterclaim is
12 simply an attempt to put the FTC on trial for attempting to enforce the law.² That
13 attempt should be rejected, and Gugliuzza’s counterclaim should be dismissed.

14 Respectfully submitted,

15
16 Dated: June 28, 2010

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26 _____
27 ² Gugliuzza states as much in his Opposition to Plaintiff’s Motion to Strike Affirmative
28 Defenses: “. . . the FTC’s conduct, including the conduct alleged in the Amended Answer and
Counterclaim and other actions it has taken with respect to online disclosures, will be one of, if
not, *the* primary issues in this litigation.” (Docket No. 56 at 8:4-7, italics in original)

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on June 28, 2010, I electronically filed Plaintiff FTC's
3 Reply to Defendant Gugliuzza's Opposition to Motion to Dismiss Defendant
4 Gugliuzza's Counterclaim with the Clerk of the United States District Court for
5 the Central District of California, using the Court's CM/ECF system. The
6 CM/ECF system will send an email notification of the foregoing filing to the
7 following parties and counsel of record who are registered with the Court's
8 CM/ECF system:

9 Michael A. Piazza
10 Wayne R. Gross
11 Donald A. Bunnin
12 Greenberg, Traurig, LLP
13 3161 Michelson Drive, Suite 1000
14 Irvine, CA 92612

15 Attorneys for Defendant Charles Gugliuzza

16 In accordance with the electronic filing procedures of this Court, service has
17 been effected on the aforesaid party, whose counsel of record are registered users
18 of CM/ECF, via electronic service through the CM/ECF system.

19 I declare under penalty of perjury that the foregoing is true and correct.
20 Executed on June 28, 2010, at San Francisco, California.

21 /s/ David M. Newman
22 David M. Newman

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Case No. SACV-09-01324 CJC
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**Notice of Errata re: Plaintiff FTC's
Reply to Defendant Gugliuzza's
Opposition to Motion to Dismiss
Defendant Gugliuzza's Counterclaim**

19 **TO THE COURT AND ALL PARTIES OF RECORD:**

20 PLEASE TAKE NOTICE that Plaintiff's Reply to Defendant Gugliuzza's
21 Opposition to Motion to Dismiss Defendant Gugliuzza's Counterclaim should be
22 corrected as follows:

23 The paragraph beginning at Page 2, line 7 should read in its entirety:

24 Having challenged Section 5 as unconstitutionally vague because it permits
25 "arbitrary and discriminatory enforcement," (Docket No. 43 ¶ 66) Gugliuzza then
26 surprisingly argues that the FTC's detailed demonstration that Section 5 is not
27 vague is "all for naught." (Docket No. 57 at 4:5-8) Gugliuzza misunderstands the
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3 prohibited or a concern that the statute permits arbitrary and discriminatory
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5 ascertain the meaning of the phrase(s) alleged to be vague. *Skilling v. United*
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7 regulatory interpretations of Section 5, Plaintiff showed that Section 5 is not vague
8 and that Gugliuzza had failed to allege facts showing that “the FTC Act or
9 interpretations of it do not ‘give the person of ordinary intelligence a reasonable
10 opportunity to know what is prohibited,’ or do not ‘provide explicit standards’ for
11 those who enforce the statute.” (Docket No. 52-1 at 4-7)

12 Respectfully submitted,

13
14 Dated: June 28, 2010

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17 Attorneys for Defendant Charles Gugliuzza

18
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22 I declare under penalty of perjury that the foregoing is true and correct.
23 Executed on June 28, 2010, at San Francisco, California.

24
25
26
27 /s/ David M. Newman
28 David M. Newman