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6 dnewman@ftc.ts Motion to Dismiss Defendant Gugliuzza's Counterclaim (Docket No.

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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 of its enforcement of Section 5 is not arbitrary and discriminatory. (Docket No. 43 ¶ 66)

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

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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
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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,

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16 Dated: June 28, 2010

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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)

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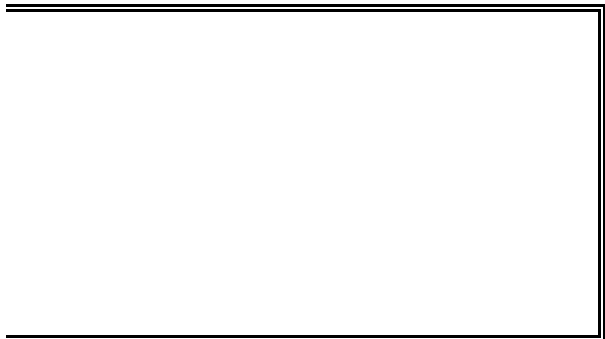
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1 week, a “void for vagueness” claim – whether premised on a concern that a
2 statute’s vagueness prevents people from understanding what conduct is
3 prohibited or a concern that the statute permits arbitrary and discriminatory
4 enforcement – begins with an assessment of the statute and interpretations of it to
5 ascertain the meaning of the phrase(s) alleged to be vague. *Skilling v. United*
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1 **CERTIFICATE OF SERVICE**

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3 I hereby certify that on June 28, 2010, I electronically filed Plaintiff FTC's

4 Reply to Defendant Gugliuzza's Opposition to Motion to Dismiss Defendant

5 Gugliuzza's Counterclaim with the Clerk of the United States District Court for

6 the Central District of California, using the Court's CM/ECF system. The

7 CM/ECF system will send an email notification of the foregoing filing to the

8 following parties and counsel of record who are registered with the Court's

9 CM/ECF system:

10 Michael A. Piazza

11 Wayne R. Gross

12 Donald A. Bunnin

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14 3161 Michelson Drive, Suite 1000

15 Irvine, CA 92612

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17 Attorneys for Defendant Charles Gugliuzza

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19 In accordance with the electronic filing procedures of this Court, service has

20 been effected on the aforesaid party, whose counsel of record are registered users

21 of CM/ECF, via electronic service through the CM/ECF system.

22 I declare under penalty of perjury that the foregoing is true and correct.

23 Executed on June 28, 2010, at San Francisco, California.

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27 /s/ David M. Newman

28 David M. Newman