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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

JOE HAND PROMOTIONS, INC.,

CASE NO. 1:10-cv-02165-OWW-SKO

Plaintiff,

**ORDER GRANTING PLAINTIFF'S  
MOTION TO STRIKE  
DEFENDANT'S AFFIRMATIVE  
DEFENSES**

v.

MICHAEL JOE ESTRADDA, individually  
and dba THE ORANGE BAR,

(Docket No. 20)

Defendant.

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**I. INTRODUCTION**

On November 19, 2010, Plaintiff Joe Hand Productions, Inc. ("Plaintiff") filed a complaint against Defendant Michael Joe Estrada, individually and dba The Orange Bar ("Defendant"), alleging violations of 47 U.S.C. §§ 553 and 605, as well as causes of action for conversion and for violation of the California Business and Professions Code section 17200, *et. seq.* The suit is based on Defendant's alleged unlawful interception, receipt, and exhibition of "*Ultimate Fighting Championship 106: Tito Ortiz v. Forrest Griffen II*," a fighting match that was broadcast on Saturday, November 21, 2009.

1 On April 4, 2011, Defendant filed an answer to the complaint asserting fourteen affirmative  
2 defenses. (Doc. 16.)<sup>1</sup> On April 25, 2011, Plaintiff filed a motion to strike all of Defendant's  
3 affirmative defenses arguing that they were insufficient. (Doc. 20.) On April 28, 2011, Defendant  
4 filed an opposition. (Doc. 21.) For the reasons stated below, Plaintiff's motion to strike is  
5 GRANTED. Defendant may file an amended answer within 15 days of the date of this order.

## 6 II. DISCUSSION

### 7 A. Legal Standard

8 Pursuant to Federal Rule of Civil Procedure 12(f), the court is permitted to "strike from a  
9 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."  
10 Fed. R. Civ. P. 12(f). A defense may be insufficient as a matter of pleading or as a matter of law.  
11 *Sec. People, Inc., Classic Woodworking, LLC*, No. C-04-3133, 2005 WL 645592, at \*2 (N.D. Cal.  
12 Mar. 4, 2005). An affirmative defense may be considered insufficiently pled where it fails to provide  
13 plaintiff with fair notice of the defense asserted. *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th  
14 Cir. 1979). An affirmative defense is insufficient as a matter of law where "there are no questions  
15 of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances  
16 could the defense succeed." *Ganley v. Cnty. of San Mateo*, No. C06-3923 THE, 2007 WL 902551,  
17 at \*1 (N.D. Cal. Mar. 22, 2007). A matter is "immaterial" if it "has no essential or important  
18 relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty*, 984 F.2d  
19 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994).

20 Further, a defense that demonstrates the plaintiff has not met its burden of proof as to an  
21 element the plaintiff is required to prove is not an affirmative defense. *Barnes v. AT&T Pension*  
22 *Benefit Plan*, No. 718 F. Supp. 2d 1167, 1173-74 (N.D. Cal. 2010) (quoting *Zivokovic v. S. Cal.*  
23 *Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). Rather, an affirmative defense is one that does not  
24 negate the elements of the plaintiff's claim, but instead precludes liability even if all the elements of  
25 the plaintiff's claim are proven. *Id.* (quoting *Roberge v. Hannah Marine Corp.*, No. 96-1691, 1997

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27  
28 <sup>1</sup> Defendant filed his answer before the District Judge had adopted the Magistrate Judge's Findings and  
Recommendations that the entry of Defendant's default be set aside. On April 25, 2011, the District Judge issued an  
Order Adopting the Magistrate Judge's Findings and Recommendations and ordered that Defendant prematurely filed  
answer be deemed filed as of April 25, 2011. (Doc. 19.)

1 WL 468330, at \*3 (6th Cir. 1997) (internal quotation marks omitted)). An affirmative defense is one  
2 on which the defendant has the burden of proof. *Id.* (citing *Kanne v. Conn. General Life Ins. Co.*,  
3 867 F.2d 489, 492 n.4 (9th Cir. 1988)).

4 As motions to strike a defense as insufficient are disfavored, they will not be granted if the  
5 insufficiency of the defense is not clearly apparent. *See Salcer v. Envicon Equities Corp.*, 744 F.2d  
6 935, 939 (2d Cir. 1984), *vacated on other grounds*, 478 U.S. 1015 (1986). Because the purpose of  
7 pleading an affirmative defense is simply to give fair notice to plaintiff of the defense being asserted,  
8 leave to amend should be freely granted in absence of prejudice to the opposing party. *Wyshak*,  
9 607 F.2d at 826- 27.

## 10 **B. Analysis**

### 11 **1. Defenses Alleged Not to Qualify as Affirmative Defenses**

12 "Affirmative defenses plead matters extraneous to the plaintiff's prima facie case, which deny  
13 plaintiff's right to recover, even if the allegations of the complaint are true." *Fed. Deposit Ins. Corp.*  
14 *v. Main Hurdman*, 655 F. Supp. 259, 262 (E.D. Cal. 1987). In contrast, denials of the allegations  
15 in the complaint or allegations that the plaintiff cannot prove the elements of his claim are not  
16 affirmative defenses. *G & G Closed Circuit Events, LLC v. Nguyen*, No. 10-cv-00168-LHK, 2010  
17 WL 3749284, at \*5 (E.D. Cal. Sept. 23, 2010). Here, Plaintiff argues that several defenses asserted  
18 by Defendant do not actually constitute affirmative defenses.

#### 19 **a. First Affirmative Defense (Failure to State a Claim)**

20 Defendant's first affirmative defense asserts that Plaintiff fails to state a cause of action  
21 against Defendant. (Doc. 16, 3:17-19.) Failure to state a claim is an assertion of a defect in  
22 Plaintiff's prima facie case, not an affirmative defense. *Barnes*, 718 F. Supp. 2d at 1174 (citing  
23 *Boldstar Tech., LLC v. Home Depot, Inc.*, 517 F. Supp. 2d 1283, 1291 (S.D. Fla. 2007) ("Failure to  
24 state a claim is a defect in the plaintiff's claim; it is not an additional set of facts that bars recovery  
25 notwithstanding the plaintiff's valid prima facie case. Therefore, it is not properly asserted as an  
26 affirmative defense.")). Accordingly, Defendant's first affirmative defense for failure to state a claim  
27 is STRICKEN.

1                   **b.       Second Affirmative Defense (Individual Liability)**

2                   Defendant's Second Affirmative Defense states that Defendant cannot be held "individually  
3 liable for actions, if any, of other individuals," and Defendant did not reap any commercial profit  
4 from any alleged violation. Defendant cites *J & J Sports Prods., Inc. v. 291 Bar & Lounge, LLC*,  
5 648 F. Supp. 2d 469, 473 (E.D.N.Y 2009). Defendant contends that *291 Bar & Lounge, LLC* stands  
6 for the proposition that there can be no individual liability in a signal piracy case if the complaint  
7 contains no allegation that the defendant was present for the violation, authorized or controlled it,  
8 or reaped commercial profit from it. (Doc. 21, 6:6-12.) Plaintiff asserts this is not an affirmative  
9 defense and only a possible defense at trial. (Doc. 20, 7:22-23.)

10                  This is essentially an argument that Plaintiff's complaint is insufficiently pled for purposes  
11 of a claim against Defendant in his individual capacity. This is a defense that can be raised by  
12 Defendant, but it is not an affirmative defense in a technical sense. *Barnes*, 718 F. Supp. 2d at  
13 1173-74. Defendant's Second Affirmative Defense is STRICKEN.

14                   **c.       Third Affirmative Defense (Duplicative Recovery)**

15                  Defendant's Third Affirmative Defense asserts that Plaintiff cannot recover statutory damages  
16 under Section 553 or Section 605 *and* recover damages for conversion. (Doc. 16, 3:26 - 4:4.)  
17 Plaintiff asserts that this is not an affirmative defense; it is only a denial of Plaintiff's right to recover.  
18 Further, even to the extent that Defendant is correct, it is permissible to plead alternative theories of  
19 relief. (Doc. 20, 8:1-9.) Defendant counters that this defense is essentially that Plaintiff cannot  
20 obtain the recovery sought even if all of Plaintiff's allegations are true, which is "by definition an  
21 affirmative defense." (Doc. 21, 7:3-17.)

22                  Defendant has not set forth an additional set of facts showing that Plaintiff may not recover  
23 even assuming the allegations of the complaint are proven. *See Barnes, supra*. Rather, this is an  
24 assertion that Plaintiff's recovery for conversion would be duplicative of damages awarded under  
25 Sections 553 or 605, and the conversion claim is not viable for that reason. Defendant is free to raise  
26 this as a defense during the litigation, but it is not accurately characterized as an affirmative defense.  
27 *Cf. Abou-Khadra v. Mahshie*, 4 F.3d 1071, 1079 n.7 (2d Cir. 1993) (defense that damages cannot  
28 be awarded for both breach of release and underlying claim is an argument about the propriety of an

1 award of full damages on mutually exclusive claims rather than an affirmative defense).  
2 Defendant's Third Affirmative Defense is STRICKEN.

3 **d. Fourth Affirmative Defense (No Recovery under both 553 and 605)**

4 Defendant's Fourth Affirmative Defense states that Plaintiff cannot recover damages under  
5 both Sections 553 and 605. (Doc. 16, 4:6-10.) Plaintiff argues this is merely a denial of Plaintiff's  
6 right to recover and is not properly asserted as an affirmative defense. (Doc. 20, 8:10-17.)

7 Defendant correctly contends that Plaintiff may not recover under both Section 553 and  
8 Section 605 for a single violation. *J & J Sports Prods, Inc. v. Manzano*, No. 08-cv-01872, 2008 WL  
9 4542962, at \*2 (N.D. Cal. Sept. 29, 2008) ("A signal pirate violates section 553 if he intercepts a  
10 cable signal, he violates section 605 if he intercepts a satellite broadcast. But he cannot violate both  
11 by a single action of interception."). However, the pleading rules allow a party to state inconsistent  
12 claims or defense. *Quintana v. Baca*, 233 F.R.D. 562, 564 (C.D. Cal. 2005) ("Not all contentions  
13 that attack a plaintiff's cause of action are affirmative defenses. Rather, a defense is an affirmative  
14 defense if it will defeat a plaintiff's claim even when the plaintiff has stated a prima facie case for  
15 recovery under the applicable law."). Therefore, Defendant's Fourth Affirmative Defense is  
16 STRICKEN.

17 **e. Fifth Affirmative Defense (No Satellite System)**

18 Defendant's Fifth Affirmative Defense asserts that Defendant cannot be liable as a matter of  
19 law under Section 605 because there was no satellite television system at the establishment. Plaintiff  
20 asserts that, if proven, this may be a defense to liability, but it is not a viable affirmative defense.  
21 Defendant argues that the complaint did not specify the means by which Defendant obtained the  
22 protected television signal; thus, the fact that Defendant had no satellite system makes it legally  
23 impossible for Plaintiff to recover under Section 605.

24 This is essentially a claimed deficiency in Plaintiff's prima facie case under Section 605.  
25 *Flay-O-Rich v. Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) (recognizing that a  
26 defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense).  
27 Defendant is not precluded from raising this issue as part of his defense of liability under Section  
28 605, but it is not an affirmative defense. Defendant's Fifth Affirmative Defense is STRICKEN.

1                   **f. Sixth Affirmative Defense (Damages Caused by Others)**

2                   Defendant's Sixth Affirmative Defenses states that any damages to Plaintiff were not caused  
3 by Defendant, but were the result of Plaintiff's own actions or breaches, or the acts of third parties  
4 over which Defendant has no control. (Doc. 16, 4:17-20.) Plaintiff asserts this is merely a denial  
5 of an element of Plaintiff's causes of action; further, it does not give fair notice as to what actions  
6 by Plaintiff or others occurred. The Court agrees that this is merely an attack on the prima facie  
7 elements of Plaintiff's claim and is not an affirmative defense. *Flay-O-Rich*, 846 F.2d at 1349.  
8 Further, even assuming it is an affirmative defense, the defense itself is insufficiently pled.  
9 Defendant's Sixth Affirmative Defense is STRICKEN.

10                   **g. Seventh Affirmative Defense (Excessive Damages)**

11                   Defendant's Seventh Affirmative Defense asserts that the damages assessed should be  
12 "constrained by the 'per person' valuation method and capped at \$50.00 per person or a similarly  
13 modest sum, or denied entirely." (Doc. 16, 4:22-25.) Plaintiff argues that this is simply a "damages  
14 methodology" which is not an affirmative defense. (Doc. 20, 9:12-13.) Defendant responds that,  
15 even if Plaintiff's allegations are true, Plaintiff cannot obtain the damages sought because it is  
16 contrary to the legally recognized means by which television signal piracy cases are evaluated. (Doc.  
17 21, 9:4-8.)

18                   Plaintiff is correct that this affirmative defense attacks the method of calculating damages  
19 that may ultimately be awarded – it does not prevent Plaintiff from recovering and, thus, does not  
20 actually constitute an affirmative defense. *Flay-O-Rich*, 846 F.2d at 1349. Defendant's Seventh  
21 Affirmative Defense is STRICKEN.

22                   **h. Tenth Affirmative Defense (No Basis for Conversion Damages)**

23                   Defendant's Tenth Affirmative Defense states that a broadcast signal is not the proper subject  
24 of a claim for conversion under California law. (Doc. 16, 5:4-9.) This is essentially an allegation  
25 that Plaintiff's claim for conversion is defective and cannot comprise a claim for which relief can be  
26 granted. This does not constitute an affirmative defense. *Flay-O-Rich*, 846 F.2d at 1349  
27 (recognizing that a defense which points out a defect in the plaintiff's prima facie case is not an  
28 affirmative defense). Defendant's Tenth Affirmative Defense is STRICKEN.

1                   **i. Twelfth Affirmative Defense (Reservation of Defenses)**

2           Defendant's Twelfth Affirmative Defense reserves the right to amend his affirmative  
3 defenses. (Doc. 16, 5:14-17.) "An attempt to reserve affirmative defenses for a future date is not  
4 a proper affirmative defense in itself. Instead, if at some later date defendant[] seek[s] to add  
5 affirmative defenses, [he] must comply with Rule 15 of the Federal Rules of Civil Procedure." *Solis*  
6 *v. Zenith Capital, LLC*, No. 08-cv-4854, 2009 WL 1324051, at \*7 (N.D. Cal. May 8, 2009); *J & J*  
7 *Sports Prods. Inc. v. Mendoza-Govan*, No. 10-cv-05123 WHA, 2011 WL 1544886, at\*7 (N.D. Cal.,  
8 Apr. 25, 2011). Defendant's Twelfth Affirmative Defense is STRICKEN.

9                   **2. Defense Insufficiently Pled: Ninth Affirmative Defense (Unjust Enrichment)**

10           Defendant's Ninth Affirmative Defense asserts that Plaintiff would be unjustly enriched if  
11 awarded the relief sought in the complaint. (Doc. 16, 5:2.) Plaintiff contends that this statement is  
12 insufficient because it merely references the doctrine of unjust enrichment, and it does not explain  
13 how Plaintiff would be unjustly enriched. Defendant asserts that this defense should not be stricken  
14 because "there would be no prejudice for leaving [this] affirmative defense[] in the pleadings." (Doc.  
15 21, 10:21-23.)

16           "The key to determining the sufficiency of pleading an affirmative defense is whether it gives  
17 plaintiff fair notice of the defense." *Wyshak*, 607 F.2d at 827 (citations omitted). "The fair notice  
18 pleading requirement is met if the defendant sufficiently articulated the defense so that the plaintiff  
19 was not a victim of unfair surprise." *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999)  
20 (internal quotation marks and citations omitted).

21           Plaintiff argues that the heightened pleading standard set forth in *Bell Atlantic Corp. v.*  
22 *Twombly*, 550 U.S. 544, 555 (2007), and clarified in *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937  
23 (2009), is applicable to the sufficiency of affirmative defenses. Whether *Iqbal* and *Twombly* apply  
24 to affirmative defenses has not yet been tested in the Ninth Circuit, and this Court need not reach the  
25 issue here.

26           Even under the lower standard of *Wyshak*, the Court finds that this defense is insufficiently  
27 pled. There are simply no facts or theories pled as to how Plaintiff will be unjustly enriched if  
28 awarded the damages sought. *See. Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049-50

1 (N.D. Cal. 2004) (striking affirmative defenses of waiver and estoppel where defendant failed to  
2 provide any factual basis for the defenses). Defendant's Ninth Affirmative Defense is STRICKEN.

3 **3. Defenses Insufficient as a Matter of Law**

4 **a. Eighth Affirmative Defense (Failure to Mitigate)**

5 In his Eighth Affirmative Defense, Defendant asserts that "the damages alleged by Plaintiff  
6 were not properly mitigated by Plaintiff." (Docs. 7, 8 ¶ 11.) The complaint, however, alleges no  
7 continuing harm. *See Valle De Oro Bank v. Gamboa*, 26 Cal. App. 4th 1686, 1691 (1994) (duty to  
8 mitigate generally arises when the injured party has an opportunity to prevent continuation or  
9 enhancement of the injury). Rather, Plaintiff's claims arise from Defendant's alleged unauthorized  
10 showing of the Program – a discrete event. On the face of the answer, Defendant's allegation that  
11 Plaintiff failed to mitigate damages appears to be without merit, and under "no set of circumstances  
12 could the defense succeed." *Ganley*, 2007 WL 902551, at \*1. Defendant's Eighth Affirmative  
13 Defense is STRICKEN.

14 **b. Eleventh Affirmative Defense (Defendant Unaware)**

15 Defendant's Eleventh Affirmative Defense states that he was not aware and had no reason  
16 to believe that his acts constituted any violation of the law. (Doc. 16, 5:11-12.) Plaintiff asserts that  
17 this is legally insufficient because ignorance of the law is not a proper defense. (Doc. 20, 12-11.)  
18 Defendant argues that this defense is proper and relevant because if his actions were not intentional,  
19 malicious, or willful, "Plaintiff cannot obtain the recovery sought." (Doc. 21, 10:4-10.)

20 To the extent that this affirmative defense asserts ignorance of the law, it is not a defense to  
21 liability. *United States v. Fierros*, 692 F.2d 1291, 1294 (9th Cir. 1982); *J & J Sports Prods., Inc.*  
22 *v. Enedina Soto*, No. 10-cv-00885, 2010 WL 3911467, at \*2 (S.D. Cal. Sept. 28, 2010) (striking  
23 "mistake of law" affirmative defense because "even if Defendants can show they did not know they  
24 were violating the law, their liability is not excused").

25 To the extent that Defendant is arguing that, if he can show that he did not act knowingly,  
26 damages under Section 553 or Section 605 may be reduced, a limitation on damages due to a lack  
27 of intent is not relevant to precluding liability under Sections 553 and 605. *See J & J Sports Prods.,*  
28 *Inc. v. Mendoza-Govan*, No. 10cv05123 WHA, 2011 WL 1544886, at \*5 -\*6 (N.D. Cal. Apr. 15,



1 2011). Defendant remains free to raise this issue during the litigation, but it is not an affirmative  
2 defense. The Eleventh Affirmative Defense is STRICKEN.

3 **c. Thirteenth Affirmative Defense (Statute of Limitations)**

4 Defendant's affirmative defense that Plaintiff's claims are outside the applicable statute of  
5 limitation is insufficient. The statute of limitations for violations of 47 U.S.C. §§ 605 and 553 is one  
6 year. *DirecTV, Inc. v. Webb*, 545 F.3d 837, 847-48 (9th Cir. 2008). The statute of limitations for  
7 conversion in California is three years. Cal. Civ. Pro. Code § 338(c). The statute of limitations for  
8 claims under the Unfair Competition Law is four years. Cal. Bus. & Prof. Code § 17208. Less than  
9 one year has elapsed between the violations allegedly committed on September 19, 2009, and the  
10 date the complaint was filed on September 16, 2009. While at this stage of the litigation the Court  
11 cannot conclude that the claims are all definitively timely under the applicable statutes of limitations,  
12 this defense, as pled, is insufficient. There is no theory offered or facts pled giving Plaintiff notice  
13 of how, given the allegations of the complaint and the date the complaint was filed, Plaintiff's action  
14 is nonetheless outside the applicable statutes of limitations. Therefore, Defendant's Thirteenth  
15 Affirmative defense that Plaintiff's claims are barred by the applicable statutes of limitations is  
16 STRICKEN.

17 **4. Immaterial and Impertinent Defense (Fourteenth Affirmative Defense)**

18 Defendant's Fourteenth Affirmative Defense asserts that Defendant obtained what he thought  
19 to be a lawful license to operate the television at the establishment and exhibit the signals they were  
20 receiving. (Doc. 16, 6:2-3.) Plaintiff argues that the defense has no relevance, and, even if it did,  
21 the complaint alleges that Defendant was not a licensee of the program – thus, this defense merely  
22 attacks the allegations of the complaint. Defendant offers no opposition to Plaintiff's argument other  
23 than to state that there is no prejudice for leaving this affirmative defense in the pleadings. (Doc.  
24 21, 10:20-23.)

25 As Sections 553 and 605 impose strict liability, a mistake with regard to the license is not a  
26 fact that would preclude liability. Thus, this defense is irrelevant and is STRICKEN.

1 **C. Conclusion**

2 Plaintiff asserts it will be prejudiced if the Court allows these "affirmative defenses" to stand  
3 because Plaintiff will have to expend time and resources litigating irrelevant issues. (Doc. 20, 14:3-  
4 7.) While many of the defenses asserted are not accurately characterized as affirmative defenses in  
5 the technical sense, they are still defenses that Defendant will be able to pursue during the course of  
6 litigation – which Plaintiff concedes. (*See, e.g.*, Doc. 20, 7:22-23 ("This only serves to underscore  
7 the fact that this is not an 'affirmative' defense, but merely a possible defense at trial.")) As a result,  
8 the filing of a motion to strike these defenses appears largely tactical in nature. This is precisely why  
9 motions to strike are not often granted and are generally disfavored. *See State of Cal. ex rel. State*  
10 *Lands Comm'n v. U.S.*, 512 F. Supp. 36, 38 (N.D. Cal. 1981) ("Motions to strike are often looked  
11 on with disfavor because of the tendency for such motions to be asserted for dilatory purposes.");  
12 *Student Loan Mktg. Ass'n v. Hanes*, 181 F.R.D. 629, 632 (S.D. Cal. 1998) ("Motions to strike are  
13 disfavored and are rarely granted.").

14 For the reasons set forth above, Plaintiff's Motion to Strike affirmative defenses in  
15 Defendant's answer is GRANTED, and Defendant is free to file an amended answer. *Wyshak*,  
16 607 F.2d at 826-27.

17 Accordingly, IT IS HEREBY ORDERED THAT:

- 18 1. Plaintiff's Motion to Strike is GRANTED; and  
19 2. Defendant is granted fifteen (15) days to file an amended answer to the extent that  
20 the deficiencies stated above can be adequately remedied.

21  
22 IT IS SO ORDERED.

23 **Dated: June 7, 2011**

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE