UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

G & G CLOSED CIRCUIT EVENTS, LLC,

Plaintiff,

v.

CALIFORNIA CENTER FOR THE ARTS, ESCONDIDO, FOUNDATION, an unknown business entity d/b/a/ California Center for the Arts, Escondido,

Defendant.

Case No.: 20-CV-2137-JLS (NLS)

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO STRIKE

(ECF No. 6)

Presently before the Court is Plaintiff G & G Closed Circuit Events, LLC's Motion to Strike ("MTS," ECF No. 6). Defendant California Center for the Arts, Escondido, Foundation d/b/a California Center for the Arts, Escondido filed an Opposition to the Motion ("Opp'n," ECF No. 9), and Plaintiff filed a Reply ("Reply," ECF No. 10). The Court took the matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). *See* ECF No. 11. Having carefully considered the Parties' arguments, the evidence, and the law, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion, as set forth below.

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BACKGROUND

"Pursuant to contract, Plaintiff . . . was granted the exclusive nationwide commercial distribution (closed-circuit) rights to the *Saul "Canelo" Alvarez v. Sergey Kovalev Championship Fight Program*, telecast nationwide on Saturday, November 2, 2019" (the "Program"). ECF No. 1 ("Compl.") ¶ 16. Pursuant to its contract, "Plaintiff . . . entered into subsequent sublicensing agreements with various commercial entities throughout North America, including entities within the State of California, by which it granted these entities limited sublicensing rights, specifically the rights to publicly exhibit the Program within their respective commercial establishments." *Id.* ¶ 17 (emphasis omitted). "The Program could only be exhibited in a commercial establishment in California" if Plaintiff contractually authorized said establishment. *Id.* ¶ 18 (emphasis omitted). On Saturday, November 2, 2019, Defendant allegedly intercepted, received, and published the Program at California Center for the Arts, Escondido. *See id.* ¶ 21.

On October 31, 2020, Plaintiff filed the operative Complaint, alleging the following four claims against Defendant: (1) violation of 47 U.S.C. § 605; (2) violation of 47 U.S.C. § 553; (3) conversion; and (4) violation of California Business and Professions Code §§ 17200 *et seq*. *See generally* Compl. On December 29, 2020, Defendant filed an Answer raising seventeen affirmative defenses. *See generally* ECF No. 4 ("Answer"). Plaintiff then filed the instant Motion, which seeks to strike all Defendant's affirmative defenses. *See generally* MTS.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(f) provides that the court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." *Whittlestone, Inc. v. Handi–Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994)).

"Motions to strike are 'generally disfavored because they are often used as delaying tactics and because of the limited importance of pleadings in federal practice.'" *Cortina v. Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1182 (S.D. Cal. 2015) (quoting *Rosales v. Citibank*, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001)). "[M]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *San Diego Unified Port Dist. v. Monsanto*, 309 F. Supp. 3d 854 (S.D. Cal. 2018) (quotations and citations omitted). "When ruling on a motion to strike, this Court 'must view the pleading under attack in the light most favorable to the pleader.'" *Novick v. UNUM Life Ins. Co. of Am.*, 570 F. Supp. 2d 1207, 1208 (C.D. Cal. 2008) (quoting *RDF Media Ltd. v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 561 (C.D. Cal. 2005)).

"[T]he Ninth Circuit has not explicitly addressed whether the *Twombly* and *Iqbal* plausibility standard should replace the *Wyshak* [*v. City National Bank*, 607 F.2d 824 (9th Cir. 1979), *abrogated in part by Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc),] fair notice standard for affirmative defenses." *Philpot v. Baltimore Post-Exam'r*, No. 3:20-CV-00872-H-MSB, 2020 WL 6449199, at *3 (S.D. Cal. Nov. 3, 2020). Plaintiff requests that the Court apply the *Twombly* and *Iqbal* "plausibility" standard to Defendant's affirmative defenses. *See* MTS at 9. Defendant requests that the Court find that only a "fair notice standard" applies to the pleading of affirmative defenses. *See* Opp'n at 1, 9. Although this Court recognizes it previously has applied the *Twombly* and *Iqbal* "plausibility" standard in assessing the sufficiency of the pleading of affirmative defenses, in light of recent decisions in this District noting the Ninth Circuit's continuing recognition of the *Wyshak* fair notice standard for affirmative defenses and the lack of controlling authority to the contrary, this Court now elects to stand with the clear majority of courts within this District and apply the "fair notice" standard. *See, e.g.*, *Philpot*, 2020 WL 6449199, at *3 ("[S]ince *Twombly* and *Iqbal* were decided, the Ninth Circuit has continued to recognize the *Wyshak* fair notice standard.") (citations omitted); *Boba Inc. v. Blue Box Opco LLC*, No. 19-CV-00304-H-NLS, 2019 WL 2140597, at *3 n.2 (S.D. Cal. May 15, 2019) (similar); *Cota v. Aveda Corp.*, No. 320CV01137BENBGS, 2020 WL 6083423, at

*4 (S.D. Cal. Oct. 14, 2020) ("The Southern District follows the Ninth Circuit's decision in *Kohler*, which requires Defendant to plead its affirmative defenses under the fair notice standard."); *Hawkins v. Kroger Co.*, No. 15CV2320 JM(BLM), 2019 WL 6310553, at *3 (S.D. Cal. Nov. 25, 2019) ("Plaintiff has supplied the court with no binding authority for her assumption that the heightened pleading standards of *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), apply to affirmative defenses, and the court is unaware of any circuit court that has addressed this issue."); *Sundby v. Marquee Funding Grp., Inc.*, No. 19-CV-0390-GPC-AHG, 2019 WL 5963907, at *2 (S.D. Cal. Nov. 13, 2019) ("The Court declines to apply the plausibility standard here as neither the Ninth Circuit nor the Supreme Court have instructed the courts to depart from the notice-pleading standard applied in evaluating the sufficiency of an affirmative defense.") (citations omitted); *see also Kohler v. Flava Enters., Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015) ("Nonetheless, the 'fair notice' required by the pleading standards only requires describing the defense in 'general terms.' We will not disturb the district court's finding that [plaintiff] received sufficient notice.") (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1274 (3d ed. 1998)).

Although more relaxed than the *Twombly* and *Iqbal* "plausibility standard," Federal Rule of Civil Procedure 8's fair notice standard "requires that the allegations in the [answer] give the [plaintiff] fair notice of what the [defendant]'s [defense] is and the grounds upon which it rests." *Pac. Coast Fed'n of Fishermen's Assocs. v. Glaser*, 937 F.3d 1191, 1200 (9th Cir. 2019) (internal quotations omitted); *see also Rosen v. Masterpiece Mktg. Grp., LLC*, 222 F. Supp. 3d 793, 798 (C.D. Cal. 2016) ("[E]ven the fair notice standard requires 'at least some valid factual basis' in support of its affirmative defense."). If a court strikes an affirmative defense, "[i]n the absence of prejudice to the opposing party, leave to amend should be freely given." *Wyshak*, 607 F.2d at 826–27 (citing Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973)).

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ANALYSIS

Plaintiff requests that the Court strike all Defendant's seventeen affirmative defenses of (1) failure to state a cause of action; (2) unclean hands; (3) waiver; (4) failure to mitigate; (5) no damages; (6) acts or omissions of complainant and others; (7) estoppel; (8) statute of limitations; (9) costs and attorney's fees; (10) setoff/offset; (11) laches; (12) several liability for non-economic damages; (13) lack of jurisdiction; (14) lack of standing; (15) joinder of co-defendants' affirmative defenses; (16) no scienter, knowledge, intent, or willfulness; and (17) right to assert additional affirmative defenses, claiming each is insufficient for various reasons, as addressed more fully below. *See generally* MTS.

I. Defenses That Are Not Affirmative Defenses

A. First, Fifth, Sixth & Sixteenth Affirmative Defenses (Denials)

Defendant admits that the following affirmative defenses are better characterized as "denials of Plaintiff's ability to meet its burden to prove either liability or damages" and requests that the Court construe them as such: the first affirmative defense for failure to state a cause of action; the fifth affirmative defense for no damages; the sixth affirmative defense for acts or omissions of complainant and others; and the sixteenth affirmative defense for no scienter, knowledge, intent, or willfulness. Opp'n at 10.

Plaintiff contends that these denials should be stricken because "[p]ermitting denials, which by definition are not 'affirmative defenses,' would effectively reduce the concept of an 'affirmative defense' to a catch-all phrase permitting all manner of responses, some of which would otherwise be impermissible." Reply at 6. Plaintiff further asserts that, although a showing of prejudice is not required, it will suffer prejudice as a result of "expend[ing] time and resources litigating irrelevant issues" should these "defenses" not be stricken. MTS at 19. In support of its position, Plaintiff cites to *Rutherford v. Evans Hotels*, *LLC*, Case No. 18-CV-435, 2019 WL 1900889, at *3 (S.D. Cal. Apr. 29, 2019), where this Court struck various mislabeled "affirmative defenses" without a showing of prejudice. *See* Reply at 7. In response, Defendant requests that the Court "not strike denials it finds were mischaracterized as affirmative defenses" because mislabeling is an

insufficient basis for striking an affirmative defense when there is no prejudice to Plaintiff, and Defendant contends "Plaintiff has sufficient notice of its burden to prove both liability and damages, and, therefore, there is no risk of prejudice to Plaintiff." Opp'n at 10–11.

A majority of courts in this District have "held that 'denials that are improperly pled as defenses should not be stricken on that basis alone,' particularly where they do not prejudice Plaintiff.'" *Tattersalls Ltd. v. Wiener*, No. 3:17-CV-1125-BTM-JLB, 2019 WL 669640, at *3 (S.D. Cal. Feb. 19, 2019) (quoting *San Diego Unified Port Dist.*, 2018 WL 4281476, at *5); *see also Kohler v. Islands Rests., LP*, 280 F.R.D. 560, 567 (S.D. Cal. 2012) ("The Court fails to see how identifying a defense as 'affirmative,' when in actuality it is not, makes that defense legally insufficient.") (citations omitted). The Court finds this to be a sound approach in light of the plain language of Rule 12(f), pursuant to which "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Thus, because a denial is not a defense, "a motion to strike is inappropriate" unless the denial is "[redundant,] immaterial, impertinent, or scandalous." *Carlock v. RMP Fin.*, No. 03-CV-0688 W (AJB), 2003 WL 24207625, at *4 (S.D. Cal. Aug. 5, 2003) (citing *Van Schouwen v. Connaught Corp.,* 782 F. Supp. 1240, 1247 (N.D. Ill. 1991); Fed. R. Civ. P. 12(f)). Plaintiff does not argue, and the Court is not prepared to conclude based solely on the pleadings and arguments before it, that these denials are "redundant, immaterial, impertinent, or scandalous," Fed. R. Civ. P. 12(f), and accordingly striking them would appear inappropriate.

Further, the Court is not persuaded by Plaintiff's conclusory assertion that Defendant's mislabeled affirmative defenses would cause prejudice. *See Martinez v. Alltran Fin. LP*, No. CV-18-04815-PHX-DLR, 2019 WL 1777300, at *3 (D. Ariz. Apr. 23, 2019) (finding argument that plaintiff would be prejudiced by discovery regarding misclassified defenses "meritless because Plaintiff already bears the burden of proving matters such as standing, causation, and injury. Striking Defendant's improper affirmative defenses would not change Plaintiff's burden of proof and, therefore, would not change the evidence Plaintiff must be prepared to present."); *see also Harris v. Chipotle Mexican*

Grill, Inc., 303 F.R.D. 625, 629 (E.D. Cal. 2014) (denying the plaintiff's motion to strike mislabeled affirmative defenses because the court "cannot conceive how these defenses will 'cost both the parties and the [c]ourt unnecessary time and resources.'") (citation omitted). Therefore, the Court **DENIES** Plaintiff's Motion as to Defendant's mislabeled first, fifth, sixth, and sixteenth affirmative defenses.

B. Ninth Affirmative Defense

Plaintiff contends that Defendant's ninth affirmative defense for costs and attorney's fees is not a defense but is rather a request for affirmative relief that therefore should be stricken. *See* MTS at 12. The Court agrees that attorney's fees is not a valid affirmative defense. *See Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1174 (N.D. Cal. 2010) (striking an affirmative defense of attorney's fees because "[t]he award of attorney's fees does not act to preclude a defendant's liability even if a plaintiff proves all of the required elements of the cause of action."). Further, the Court finds that this "defense" is duplicative, as Defendant clearly requests its attorney's fees and costs in its Prayer. *See* Answer at Prayer (noting that "Defendant requests the following relief: . . . Defendant be awarded its attorney's fees and costs of suit . . ."). Accordingly, the Court **GRANTS** Plaintiff's Motion and **STRIKES** Defendant's ninth affirmative defense. Further, because amendment will not cure this defense's duplicativeness, the defense is stricken **WITHOUT LEAVE TO AMEND**.

C. Seventeenth Affirmative Defense

Plaintiff contends Defendant's seventeenth affirmative defense, which reserves Defendant's right to assert additional affirmative defenses, is not an affirmative defense and is redundant pursuant to Federal Rule of Civil Procedure 15, which addresses the right to and standard governing amended pleadings, and therefore the defense should be stricken. *See* MTS at 17–18. The Court agrees with Plaintiff. *See Hartford Underwriters Ins. Co. v. Kraus USA, Inc.*, 313 F.R.D. 572, 578 (N.D. Cal. 2016) (holding that a reservation is not an affirmative defense and is duplicative of Federal Rule of Civil Procedure 15) (citation omitted); *G & G Closed Cir. Events, LLC v. Nguyen*, No. 10-CV-00168-LHK, 2010 WL

3749284, at *5 (N.D. Cal. Sept. 23, 2010) ("[T]o the extent that the reservation defense attempts to preserve rights already preserved by the Federal Rules, it is duplicative.") (citation omitted). Because Defendant's seventeenth affirmative defense is duplicative, the Court **GRANTS** Plaintiff's Motion as to this "defense." Further, because amendment will not cure this defense's duplicativeness, the defense is stricken **WITHOUT LEAVE TO AMEND**.

II. Second, Third, Seventh & Eleventh Affirmative Defenses (Equitable Defenses)

Plaintiff contends that "Defendant's second, third, seventh, and eleventh affirmative defenses are boilerplate recitations of the doctrines of unclean hands, waiver, estoppel, and laches, respectively," and that "[t]hese general references to legal doctrines do not provide fair notice." MTS at 7 (citations omitted). The Court agrees with Plaintiff that, as presently pleaded, Defendant has failed to provide fair notice of the grounds on which these defenses rest and must at least provide notice of how each of the doctrines apply to this case. *See CTF Dev., Inc. v. Penta Hosp., LLC*, No. C 09-02429 WHA, 2009 WL 3517617, at *7 (N.D. Cal. Oct. 26, 2009) ("[B]are statements reciting mere legal conclusions do not provide a plaintiff with fair notice of the defense asserted, as required under *Wyshak*.") (citations omitted); *G & G Closed Cir. Events, LLC v. Nguyen*, No. 5:12-CV-03068 EJD, 2013 WL 2558151, at *4 (N.D. Cal. June 10, 2013) [hereinafter "*Nguyen II*"] (striking defenses for unclean hands, justification, waiver, and estoppel that "offer little more than legal definitions") (citations omitted). However, the deficiencies in these defenses conceivably could be cured by amendment, and the Court does not find that Plaintiff will suffer any prejudice if Defendant is granted leave to amend. *See Roe*, 289 F.R.D. at 608. Therefore, the Court **STRIKES** Defendant's second, third, seventh, and eleventh affirmative defenses **WITH LEAVE TO AMEND**.

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III. Remaining Affirmative Defenses

A. Fourth Affirmative Defense

Defendant's fourth affirmative defense alleges that Plaintiff's claims are barred by "Plaintiff's failure to mitigate, eliminate, or reasonably attempt to mitigate damages." Answer at 5. Plaintiff contends that this defense fails to provide fair notice and "has no legal significance in the case." MTS at 15. Defendant requests that the Court not strike the defense because "[c]ourts routinely permit parties to plead a failure to mitigate defense without specific factual allegations prior to the conclusion of discovery." Opp'n at 11 (citations omitted). The Court agrees with Plaintiff and finds that the failure to mitigate defense is unrelated to the underlying cause of action, as the alleged damage has already occurred. *See Nguyen II*, 2013 WL 2558151, at *3 (striking a failure to mitigate defense as unrelated to the underlying cause of action for the unlawful broadcast and interception of the plaintiff's program). Moreover, even if the Court provided Defendant with leave to amend, the Court finds that this defense still could have "no possible bearing on the subject matter of the litigation," *San Diego Unified Port Dist.*, 309 F. Supp. 3d at 854, and accordingly "Plaintiff would be compelled to expend additional time and resources litigating irrelevant issues if the defense was to remain," *Nguyen II*, 2013 WL 2558151, at *3 (citing *Barnes*, 718 F. Supp. 2d at 1173). Therefore, the Court **STRIKES WITH PREJUDICE** Defendant's fourth affirmative defense.

B. Fourteenth Affirmative Defense

Defendant's fourteenth affirmative defense alleges that "Plaintiff does not have standing to seek relief for each and every cause of action as set forth in the Complaint." Answer at 7. Plaintiff contends that Defendant's affirmative defense fails as a matter of law because "Defendant's conduct is not only fairly traceable to the injury" but is "specifically traceable to the injury." MTS at 20. Defendant asks the Court not to strike its lack of standing affirmative defense because "'the Court cannot conclude at this early stage in proceedings that these defenses will have no possible bearing on the subject matter

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of the litigation.'" Opp'n at 12 (quoting *San Diego Unified Port Dist.*, 309 F. Supp. 3d at 854).

Defendant's bare pleading of a conclusory statement that Plaintiff lacks standing, without more, does not meet the fair notice standard. Although the parties are in the early stages of the proceedings, Defendant must provide at least notice of the grounds upon which the defense rests. *See Kohler*, 291 F.R.D. at 469 (striking defendant's affirmative defense for lack of standing because, "[a]lthough [defendant's] pleading need not be supported by detailed factual allegations, it must at least give notice of the 'grounds upon which it rests.'") (citation omitted); *but see Cota*, 2020 WL 6083423, at *9 (finding that the defendant adequately pleaded its lack of standing defense under the fair notice standard where it specified that plaintiff "may not have standing due to lack of damages, injury, or harm") (citations omitted).

While the Court finds this defense inadequately pleaded at present, the Court agrees with Defendant that granting leave to amend at this early stage in the litigation would not prejudice Plaintiff. *See Roe v. City of San Diego*, 289 F.R.D. 604, 608 (S.D. Cal. 2013) ("Unless it would prejudice the opposing party, courts freely grant leave to amend stricken pleadings.") (citations omitted). Therefore, the Court **STRIKES** Defendant's fourteenth affirmative defense **WITH LEAVE TO AMEND.**

C. Eighth Affirmative Defense

Plaintiff contends that Defendant's eighth affirmative defense, asserting "that all causes of action are barred by the appropriate statutes of limitations," Answer at 5–6, fails as a matter of law in light of the filing date and the applicable statutes of limitations, *see* MTS at 11–12. The Court agrees. The statutes of limitations for the asserted claims are one year for claims under 47 U.S.C. sections 605 and 553; three years for claims of conversion; and four years for claims under California Business and Professions Code section 17200. *See* MTS at 11–12 (citing *Directv, Inc. v. Webb*, 545 F.3d 837, 847–48 (9th Cir. 2008); *J&J Sports Prods., Inc. v. Pacis*, 2008 WL 5245281, at *2 (N.D. Cal. Dec. 15, 2008); Cal. Code Civ. Proc. § 338(c); Cal. Bus. & Prof. Code § 17208). Plaintiff filed its

Complaint on October 31, 2020, *see* ECF No. 1, less than one year after the alleged violations occurred on November 2, 2019, *see* Compl. ¶ 2. Defendant's statute of limitations affirmative defense thus fails as a matter of law. Therefore, the Court **STRIKES WITH PREJDICE** Defendant's eighth affirmative defense. *See J & J Sports Prods. v. Coyne*, No. C 10-04206 CRB, 2011 WL 227670, at *2 (N.D. Cal. Jan. 24, 2011) (striking with prejudice affirmative defense asserting the statute of limitations where "this action is not time barred") (citations omitted).

D. Tenth Affirmative Defense

Defendant's tenth affirmative defense alleges that, "in the event that this Court finds that amounts are owed by Defendant to Complainant, such amounts are subject to setoff and/or offset by amounts owed to Defendant by Complainant in an amount according to proof at trial." Answer at 6. Plaintiff contends that "Plaintiff is unaware of any debt it owes Defendant and, in that regard, it is Plaintiff's position that this defense has no legal application to this case"; further, to the extent Defendant contends otherwise, "[c]ertainly Defendant is aware of any potential money owed to it by Plaintiff such that it could assert the defense with requisite specificity." MTS at 13. The Court finds that, as presently pleaded, this defense fails to provide fair notice to Plaintiff; however, this deficiency conceivably could be cured through amendment, and it does not appear Plaintiff would be prejudiced by leave to amend. Accordingly, the Court **STRIKES** Defendant's tenth affirmative defense **WITH LEAVE TO AMEND**. *See, e.g.*, *Gilmore v. Liberty Life Assurance Co. of Bos.*, No. C 13-0178 PJH, 2013 WL 12147724, at *1 (N.D. Cal. Apr. 19, 2013) (granting with leave to amend motion to strike affirmative defense for set-off "so that defendant may identify the source of the alleged set-off").

E. Twelfth Affirmative Defense

Defendant's twelfth affirmative defense alleges "that in the event of an award of non-economic damages, the damages are not joint but are several only." Answer at 7. Plaintiff contends that, "[w]hile there are other reasons why this defense ultimately would fail, as there is only one Defendant in this case, the defense is immaterial and impertinent."

MTS at 13 (citing Fed. R. Civ. P. 12(f)). As there is at present only one defendant, the Court agrees with Plaintiff that this defense clearly has no possible relevance in the present litigation. Therefore, the Court **STRIKES** Defendant's twelfth affirmative defense. Consistent with the provisions of Federal Rule of Civil Procedure 15, Defendant may move to amend its Answer to assert this defense should later developments in this litigation render it relevant.

F. Thirteenth Affirmative Defense

Defendant's thirteenth affirmative defense alleges that "[t]he Court is without jurisdiction over certain claims in the Complaint." Answer at 7. That is the entirety of the affirmative defense; Defendant provides no explanation of the basis for the Court's purported lack of jurisdiction. However, lack of jurisdiction only requires that the defendant invoke the defense, as the burden is on the plaintiff to show jurisdiction is proper. *See Hartford Underwriters Ins. Co. v. Kraus USA, Inc.*, 313 F.R.D. 572, 576 (N.D. Cal. 2016) ("[T]he only allegation material to a Rule 12(h)(1) defense is that the defense exists, so simply invoking the defense as set forth in Rule 12(b) gives a Plaintiff all the notice she needs . . . because it is the plaintiff, not the defendant, who bears the burden of showing that jurisdiction . . . [is] proper.") (citing *Ear v. Empire Collection Authorities, Inc.*, No. 12-1695-SC, 2012 WL 3249514, at *1 (N.D. Cal. Aug. 7, 2012)).

Plaintiff contends the defense fails as a matter of law because "this Court has subject matter jurisdiction over the federal counts pursuant to 28 U.S.C. § 1331," and accordingly "this Court may exercise supplemental jurisdiction over the state law claims" under 28 U.S.C. § 1367. MTS at 14. That may be so; however, "[t]he objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006) (citing Fed. R. Civ. P. 12(b)(1)). On the one hand, that may render the defense "redundant" such that it is properly subject to a motion to strike; however, "[a]s a practical matter, striking this affirmative defense only to later permit [any party] to raise it wastes judicial resources. Further, [Plaintiff] has not

demonstrated that it will suffer any prejudice" if this defense is permitted to remain. *Does 1-10 v. Univ. of Wash.*, No. C16-1212JLR, 2018 WL 3475377, at *2 (W.D. Wash. July 19, 2018) (citing *Hernandez v. Balakian*, No. CVF06-1383OWW/DLB, 2007 WL 1649911, at *1 (E.D. Cal. June 1, 2007)). Therefore, the Court **DENIES** Plaintiff's Motion as to Defendant's thirteenth affirmative defense.

G. Fifteenth Affirmative Defense

Defendant's fifteenth affirmative defense "alleges that this answering Defendant joins with and alleges herein in their entirety by reference as if fully set forth herein all of the Co-Defendants' affirmative defenses." Answer at 7. Plaintiff contends this defense is "immaterial and impertinent" because "there are no other defendants" in this case. MTS at 16 (citing Fed. R. Civ. P. 12(f)). Similar to Defendant's twelfth affirmative defense, this defense clearly has no possible relevance to the litigation at present, as there is only one defendant in this case. *See supra* Section III.E. Therefore, the Court **STRIKES** Defendant's fifteenth affirmative defense. Consistent with the provisions of Federal Rule of Civil Procedure 15, Defendant may move to amend its Answer to assert this defense should later developments in this litigation render it relevant.

CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion to Strike (ECF No. 6). Specifically, the Court **DENIES** Plaintiff's motion to strike Defendant's first, fifth, sixth, thirteenth, and sixteenth affirmative defenses. The Court **GRANTS** Plaintiff's motion to strike the remaining affirmative defenses. Defendant is granted **LEAVE TO AMEND** its second, third, seventh, tenth, eleventh, and fourteenth affirmative defenses. Defendant's fourth, eighth, ninth, and seventeenth affirmative defenses are **STRICKEN WITH PREJUDICE**. Defendant may move pursuant to Federal Rule of Civil Procedure 15 to amend its answer to assert its twelfth and fifteenth affirmative defenses if later developments render those defenses

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relevant to this litigation. Any amended answer must be filed within thirty (30) days of the date on which this Order is electronically docketed.

IT IS SO ORDERED.

Dated: April 6, 2021

Janis L. Sammartino
Hon. Janis L. Sammartino
United States District Judge