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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TRADE ASSOCIATES, INC.,  
a Washington corporation,

Plaintiff,

v.

FUSION TECHNOLOGIES, INC.,  
a Washington corporation,

Defendant.

CASE NO. C09-5804 RJB

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT AS TO DEFENDANT'S  
AFFIRMATIVE DEFENSES

This matter comes before the Court on Plaintiff Trade Associates, Inc.'s (Trade Associates) motion for summary judgment seeking dismissal of the affirmative defenses of Defendant Fusion Technologies, Inc. (Fusion). Dkt. 85. The Court has considered the motion, response, reply, and the remainder of the file herein.

1 **INTRODUCTION AND BACKGROUND**

2 The underlying facts of this case are known to the Court and the parties, and will not be  
3 repeated herein. See Dkt. 71. Fusion has asserted eleven affirmative defenses in its Answer to  
4 the First Amended Complaint. Dkt. 34 pp. 7-8. These are set forth as follows:

- 5 1. Trade Associates fails to state a claim upon which relief can be granted.
- 6 2. Trade Associates fails to plead fraud or misrepresentation with the requisite  
7 particularity according to CR 9.
- 8 3. Trade Associates' claims are barred by the doctrine of unclean hands.
- 9 4. Trade Associates' claims for repudiation are barred by a prior breach.
- 10 5. Trade Associates' claims are an abuse of process, being pursued for an improper  
11 purpose.
- 12 6. Trade Associates' claims are barred by mistake.
- 13 7. Trade Associates' claims are barred by assumption of risk.
- 14 8. Fusion's conduct was licensed or approved by Trade Associates.
- 15 9. Trade Associates' claims are barred by estoppel.
- 16 10. Trade Associates' claims are barred by laches.
- 17 11. Trade Associates' claims are barred by license.

18 Dkt. 34. Pp. 7-8.

19 Plaintiff asserts that Fusion has failed to present and cannot present, evidence to support  
20 its burden of proof as to any of these defenses.

21 In response to the motion Fusion withdraws the following affirmative defenses: (1)  
22 Failure to state a claim, (2) Failure to plead fraud with particularity, (5) Abuse of process, (6)  
23 Mistake, (7) Assumption of the risk, (8) Licensed or Approved, and (11) License. Dkt. 88 pp. 4.

1 Fusion submits that there are genuine issues of material fact sufficient to support the remaining  
2 affirmative defenses.

### 3 SUMMARY JUDGMENT STANDARDS

4 Summary judgment is proper only if the pleadings, the discovery and disclosure materials  
5 on file, and any affidavits show that there is no genuine issue as to any material fact and that the  
6 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is  
7 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient  
8 showing on an essential element of a claim in the case on which the nonmoving party has the  
9 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue  
10 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find  
11 for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586  
12 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some  
13 metaphysical doubt.”). See also Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a  
14 material fact exists if there is sufficient evidence supporting the claimed factual dispute,  
15 requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty*  
16 *Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors*  
17 *Association*, 809 F.2d 626, 630 (9th Cir. 1987).

18 The determination of the existence of a material fact is often a close question. The court  
19 must resolve any factual issues of controversy in favor of the nonmoving party only when the  
20 facts specifically attested by that party contradict facts specifically attested by the moving party.  
21 The nonmoving party may not merely state that it will discredit the moving party’s evidence at  
22 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect.*  
23 *Service Inc.*, 809 F.2d at 630. Conclusory, nonspecific statements in affidavits are not sufficient,

1 and “missing facts” will not be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S.  
2 871, 888-89 (1990).

### 3 **AFFIRMATIVE DEFENSES**

#### 4 **Affirmative Defense No. 3 Unclean Hands**

5 The doctrine of unclean hands bars relief to a plaintiff who has violated conscience, good  
6 faith or other equitable principles in his prior conduct, as well as to a plaintiff who has dirtied his  
7 hands in acquiring the right presently asserted. *Seller Agency Council, Inc. v. Kennedy Center*  
8 *for Real Estate Educ., Inc.*, 621 F.3d 981, 986 (9th Cir. 2010); *Dollar Sys., Inc. v. Avcar Leasing*  
9 *Sys., Inc.*, 890 F.2d 165, 173 (9th Cir.1989). It is fundamental to the operation of the doctrine of  
10 unclean hands that the alleged misconduct by the party relates directly to the transaction  
11 concerning which the complaint is made. *Seller Agency Council, Inc.*, at 986. Unclean hands  
12 does not constitute misconduct in the abstract, unrelated to the claim to which it is asserted as a  
13 defense. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841-42 (9th Cir. 2002).  
14 Stated in other terms, the unclean hands doctrine bars recovery by a plaintiff (1) whose behavior  
15 is tainted with inequity or bad faith (2) that occurred in acquiring the right he now asserts.  
16 *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985).

17 Based on its review of the facts, the Court finds that there are issues of material fact as to  
18 whether the Plaintiff’s conduct was inequitable or unconscionable, and that the Plaintiff’s conduct  
19 related to the very activity that is the basis of its claim.

#### 20 **Affirmative Defense No. 4 Prior Breach**

21 A party is not liable for a material failure of performance if it can show that the other  
22 party committed a prior material breach of the contract; in such event, the prior breach  
23 discharged the first party's own duty to perform. Restatement (Second) of Contracts § 237 cmt.

1 b; *CKP, Inc. v. GRS Canst. Co.*, 63 Wn.App. 601, 620, 821 P.2d 63 (1991); *City of Shawnee,*  
2 *Kan. v. AT&T Corp.*, 910 F. Supp. 1546, 1553 (D. Kan. 1995).

3 There exist genuine issues of material facts precluding summary judgment. The Court  
4 cannot determine as a matter of law that Trade Association did not commit a prior breach of the  
5 royalty contract and such alleged breach was immaterial. These issues present questions of fact  
6 to be determined at trial.

7 **Affirmative Defense No. 9 Estoppel**

8 Equitable estoppel is an affirmative defense which may apply where an admission,  
9 statement, or act has been detrimentally relied on by another party. *Campbell v. Dep't of Soc. &*  
10 *Health Servs.*, 150 Wn.2d 881, 902, 83 P.3d 999 (2004). The principle of equitable estoppel is  
11 based upon the reasoning that a party should be held to a representation made or position  
12 assumed where inequitable consequences would otherwise result to another party who has  
13 justifiably and in good faith relied thereon. *Cornerstone Equipment Leasing, Inc. v. MacLeod,*  
14 *159 Wn.App. 899, 247 P.3d 790, 795 (2011).*

15 Equitable estoppel requires: (1) an admission, statement, or act inconsistent with a claim  
16 afterward asserted; (2) action by another in reasonable reliance on that act, statement, or  
17 admission; and (3) injury to the party who relied if the court allows the first party to contradict or  
18 repudiate the prior act, statement, or admission. *Robinson v. City of Seattle*, 119 Wn.2d 34, 82,  
19 830 P.2d 318 (1992). Equitable estoppel is not favored, and a party asserting it must prove each  
20 of its elements by clear, cogent, and convincing evidence. *Id.*

21 The Court finds that there are genuine issues of material fact as to whether Plaintiff is  
22 estopped from asserting its claims.

1 **Affirmative Defense No. 10 Laches**

2 Laches is an equitable defense based on the principles of equitable estoppel. *Rutter v.*  
 3 *Rutter*, 59 Wn.2d 781, 785, 370 P.2d 862 (1962). The purpose of laches is to prevent injustice  
 4 and hardship. *Brost v. L.A.N.D., Inc.*, 37 Wn.App. 372, 375, 680 P.2d 453 (1984). “Laches is an  
 5 implied waiver arising from knowledge of existing conditions and acquiescence in them.” *Buell*  
 6 *v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). The elements of laches are: (1)  
 7 knowledge or a reasonable opportunity to discover on the part of a potential plaintiff that he or  
 8 she has a cause of action against a defendant; (2) the plaintiff’s unreasonable delay in  
 9 commencing that cause of action; and (3) damage to the defendant resulting from the  
 10 unreasonable delay. *Id.*

11 Whether the doctrine of laches should be applied depends upon the facts and  
 12 circumstances of the particular case. *Schrock v. Gillingham*, 36 Wn.2d 419, 427, 219 P.2d 92  
 13 (1950). Factors to be considered by the court in making this determination include the nature of  
 14 the lawsuit, the circumstances, if any, justifying the delay, the relief sought, and whether the  
 15 rights of defendant or other persons, such as the public, will be prejudiced by the maintenance of  
 16 the suit. *Lopp v. Peninsula Sch. Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978).

17 The Court finds there are genuine issues of material fact regarding whether Plaintiff’s suit  
 18 is barred by the doctrine of laches.

19 **CONCLUSION**

20 In response to the motion, the Defendant has withdrawn a number of its affirmative  
 21 defenses. These defenses are dismissed from this action. The Court, having considered the  
 22 remainder of the motion, the response, reply, and the relevant documents, finds there are genuine  
 23

1 issues of material fact precluding summary judgment on the affirmative defenses of unclean  
2 hands, prior breach, equitable estoppels and laches. Therefore, it is hereby **ORDERED** that:

3 Plaintiff's Motion for Summary Judgment as to Defendant's Affirmative Defenses (Dkt.  
4 85) is **GRANTED IN PART AND DENIED IN PART**. The withdrawn affirmative defenses:  
5 (1) Failure to state a claim, (2) Failure to plead fraud with particularity, (5) Abuse of process, (6)  
6 Mistake, (7) Assumption of the risk, (8) Licensed or Approved, and (11) License are  
7 **DISMISSED** from this action. Defendant may proceed with the affirmative defenses: No. 3  
8 Unclean Hands, No. 4 Prior Breach, No. 9 Estoppel, and No. 10 Laches.

9 Dated this 18th day of April, 2011.

10 

11 ROBERT J. BRYAN  
12 United States District Judge