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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION

J & J SPORTS PRODUCTIONS, INC.,

CASE NO. 1:10-cv-01693-AWI-SKO

Plaintiff,

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

v.

ELIASER MONTANEZ and GUADALUPE  
MONTANEZ, individually and dba EL  
CHARRO RESTAURANT,

(Docket No. 9)

Defendants.

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**I. BACKGROUND**

Plaintiff J & J Sports Productions, Inc. ("Plaintiff") owns exclusive commercial distribution rights to *Number One: The Floyd Mayweather, Jr. v. Juan Manuel Marquez Championship Fight Program* (the "Program"). (Complaint ("Compl.") ¶ 10.) On September 16, 2010, Plaintiff filed this action against defendants Eliaser Montanez and Guadalupe Montanez individually and dba El Charro Restaurant ("Defendants"), alleging that Defendants unlawfully intercepted or displayed the Program at their commercial establishment in Turlock, California. (Compl. ¶ 13.)

The complaint alleges violations of the Communications Act of 1934, 47 U.S.C. § 605; the Cable & Television Protection and Competition Act of 1992, 47 U.S.C. § 553; and California's Unfair Competition Law ("UCL"), Cal. Bus. & Profs. Code § 17200 *et seq.*, as well as a cause of

1 action for conversion. (See Compl. ¶¶ 18, 20, 25.)

2 On October 21, 2010, Defendants Eliaser Montanez and Guadalupe Montanez each filed  
3 identical answers to the complaint asserting fourteen affirmative defenses. (Docs. 7, 8.) On  
4 November 11, 2010, Plaintiff filed a Motion to Strike the Affirmative Defenses pled in both  
5 answers.<sup>1</sup> (Doc. 9.) Plaintiff also requests that the Court sanction Defendants under 28 U.S.C.  
6 § 1927 for filing inappropriate and irrelevant affirmative defenses. Defendants have filed no  
7 opposition to Plaintiff's motion.

## 8 II. DISCUSSION

### 9 A. Legal Standard

10 Pursuant to Federal Rule of Civil Procedure 12(f), the court is permitted to "strike from a  
11 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."  
12 Fed. R. Civ. P. 12(f). A defense may be insufficient as a matter of pleading or as a matter of law.  
13 *Sec. People, Inc., Classic Woodworking, LLC*, No. C-04-3133, 2005 WL 645592, at \*2 (N.D. Cal.  
14 Mar. 4, 2005). An affirmative defense may be considered insufficiently pled where it fails to provide  
15 plaintiff with fair notice of the defense asserted. *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th  
16 Cir. 1979). An affirmative defense is insufficient as a matter of law where "there are no questions  
17 of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances  
18 could the defense succeed." *Ganley v. Cnty. of San Mateo*, No. C06-3923 THE, 2007 WL 902551,  
19 at \*1 (N.D. Cal. Mar. 22, 2007). A matter is "immaterial" if it "has no essential or important  
20 relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty*, 984 F.2d  
21 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994). As motions to strike a  
22 defense as insufficient are disfavored, they will not be granted if the insufficiency of the defense is  
23 not clearly apparent. *See Salcer v. Envicon Equities Corp.*, 744 F.2d 935, 939 (2d Cir. 1984),  
24 *vacated on other grounds*, 478 U.S. 1015 (1986). Because the purpose of pleading an affirmative  
25 defense is simply to give fair notice to plaintiff of the defense being asserted, leave to amend should  
26 be freely granted in the absence of prejudice to the opposing party. *Wyshak*, 607 F.2d at 826- 27.

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28 <sup>1</sup> The affirmative defenses pled in each answer are identical, and the Court will address them together.

1           **B.     Analysis**

2                   **1.     Defenses that Do Not Qualify as Affirmative Defenses**

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

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

11           Defendants' first affirmative defense asserts that Plaintiff fails to state a claim. Failure to  
12 state a claim is an assertion of a defect in Plaintiff's prima facie case, not an affirmative defense.  
13 *Barnes v. AT&T Pension Benefit Plan*, No. C 08-0458 MHP, 2010 WL 2507769, at \*6 (N.D. Cal.  
14 June 22, 2010) (citing *Boldstar Tech., LLC v. Home Depot, Inc.*, 517 F. Supp. 2d 1283, 1291 (S.D.  
15 Fla. 2007) ("Failure to state a claim is a defect in the plaintiff's claim; it is not an additional set of  
16 facts that bars recovery notwithstanding the plaintiff's valid prima facie case. Therefore, it is not  
17 properly asserted as an affirmative defense.")). Accordingly, Defendants' first affirmative defense  
18 for failure to state a claim is STRICKEN.

19                           **b.     Second Affirmative Defense (Complaint Is Meritless)**

20           Plaintiff argues that this defense is merely a denial of Defendants' liability and is not an  
21 affirmative defense. The Court agrees. The affirmative defense that the complaint is meritless  
22 (Docs 7, 8 ¶ 2) will be STRICKEN.

23                           **c.     Fourteenth Affirmative Defense (Damages Unconscionable)**

24           Unconscionability is generally a contract defense. Under California law, "unconscionability"  
25 refers to "an absence of meaningful choice on the part of one of the parties together with contract  
26 terms which are unreasonably favorable to the other party." *A & M Produce Co. v. FMC Corp.*,  
27 135 Cal. App. 3d 473, 486 (1982); *see also* Cal. Civ. Code § 1670.5. Here, there is no alleged  
28 contract. Therefore, the unconscionability defense is immaterial. To the extent that Defendants are

1 asserting a defense that the damages allowed under the applicable law are unconscionable, it is not  
2 an affirmative defense. Therefore, this defense will be STRICKEN.

3 **2. Defenses Insufficiently Pled**

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

9 Plaintiff argues that the heightened pleading standard set forth in *Bell Atlantic Corp. v.*  
10 *Twombly*, 550 U.S. 544, 555 (2007), and clarified in *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937  
11 (2009), is applicable to the sufficiency of affirmative defenses. Whether *Iqbal* and *Twombly* apply  
12 to affirmative defenses has not yet been tested in the Ninth Circuit, and this Court need not reach the  
13 issue here. Even under the lower standard of *Wyshak*, the Court finds that the following defenses  
14 are insufficiently pled.

15 **a. Seventh Affirmative Defense (Statute of Limitations)**

16 Defendants' affirmative defense that Plaintiff's claims are outside the applicable statute of  
17 limitation is insufficiently pled. The statute of limitations for violations of 47 U.S.C. §§ 605 and 553  
18 is one year. *DirectTV, Inc. v. Webb*, 545 F.3d 837, 847-48 (9th Cir. 2008). The statute of limitations  
19 for conversion in California is three years. Cal. Civ. Pro. Code § 338(c). The statute of limitations  
20 for claims under the UCL is four years. Cal. Bus. & Prof. Code § 17208. Less than one year elapsed  
21 between the violations allegedly committed on September 19, 2009, and the date the complaint was  
22 filed on September 16, 2009. While at this stage of the litigation the Court cannot conclude that the  
23 claims are all definitively timely under the applicable statutes of limitations, this defense, as pled,  
24 is insufficient. There is no theory offered or facts pled giving Plaintiff notice of how, given the  
25 allegations of the complaint and the date the complaint was filed, Plaintiff's action is nonetheless  
26 outside the applicable statutes of limitations. Therefore, Defendants' seventh affirmative defense that  
27 Plaintiff's claims are barred by the applicable statutes of limitations is STRICKEN.

1                                   **b. Fifth Affirmative Defense (Standing)**

2           Defendants' fifth affirmative defense states that "Plaintiff[] is not a person protected by any  
3 of the statutory violations alleged in the Complaint. (Docs. 7, 8 ¶ 5.) Plaintiff argues its complaint  
4 adequately sets forth its standing, and the affirmative defense must be stricken. Plaintiff alleges that  
5 it has the exclusive distribution rights to the Program and that Defendants unlawfully intercepted  
6 and/or displayed the transmission of the Program without authorization. Plaintiff has adequately  
7 alleged its standing to pursue this lawsuit. *See Nguyen*, 2010 WL 3749284, at \*4. This defense  
8 constitutes a mere conclusion of law; it is not supported by any facts showing how Plaintiff lacks  
9 standing, given the allegations in the complaint. *See J & J Sports Prods., Inc. v. Soto*, No. 10-cv-  
10 885-LAB (CAB), 2010 WL 3911467, \*1 (S.D. Cal. Sept. 28, 2010). It provides no notice of any  
11 theory supporting how the defense is applicable. Therefore, this defense will be STRICKEN.

12                                   **c. Eighth Affirmative Defense (Estoppel)**

13           Defendants' eighth affirmative defense for estoppel fails to specify which theory of estoppel  
14 is being asserted, and the allegation is wholly insufficient to provide Plaintiff with adequate notice  
15 of the facts supporting the defense. Therefore, Defendants' eight affirmative defense will be  
16 STRICKEN.

17                                   **d. Tenth Affirmative Defense (Unclean Hands) and Thirteenth  
18 Affirmative Defense (Waiver)**

19           Defendants' tenth affirmative defense for unclean hands and thirteenth affirmative defense  
20 for waiver are vague, rendering them insufficient. These defenses are mere legal conclusions with  
21 no factual support or theory to notify Plaintiff how this defense is applicable. The doctrine of  
22 unclean hands bars recovery for a plaintiff who engaged in "reprehensible conduct in the course of  
23 the transaction at issue." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995).  
24 Waiver is an "intentional relinquishment or abandonment of a known right." *United States v. Perez*,  
25 116 F.3d 840, 845 (9th Cir. 1997). Here, there is no indication anywhere in Defendants' pleadings  
26 that Plaintiff engaged in activity that might constitute reprehensible conduct or a waiver of known  
27 rights. Thus, Defendants' tenth and thirteenth affirmative defenses will be STRICKEN.  
28

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

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

11                   **4.       Immaterial and Impertinent Defenses**

12                   **a.       Third Affirmative Defense (Ratification)**

13                   Defendants' third affirmative defense states that "Plaintiff ratified the conduct and actions of  
14 the Defendants." The doctrine of ratification is a contract principle. *See generally* Cal. Civ. Code  
15 § 1588 (contract voidable for want of consent may be ratified by a subsequent consent). Here, there  
16 is no indication in the pleadings that there was a contractual relationship between Plaintiff and  
17 Defendants. Rather, the gravamen of Plaintiff's complaint is that there was no contractual  
18 relationship between the parties. Therefore, this affirmative defense appears wholly irrelevant and  
19 immaterial and will be STRICKEN.

20                   **b.       Fourth Affirmative Defense (Plaintiff's Negligence), Sixth  
21 Affirmative Defense (Negligence of Others), Ninth Affirmative  
22 Defense (Plaintiff's Negligence), and Twelfth Affirmative Defense  
                  (Intentional Acts by Plaintiff)**

23                   The defenses regarding negligence on the part of Plaintiff and others are applicable in actions  
24 involving negligence, contract, and copyright infringement – none of which is alleged here.  
25 Moreover, none of these affirmative defenses provides any notice to Plaintiff how it was negligent  
26 or how others were negligent. These defenses appear both immaterial and insufficiently pled,  
27 providing no details and only legal conclusions. These affirmative defenses are STRICKEN.  
28

1                   **5.     Sanctions**

2                   Plaintiff seeks sanctions against Defendants for the "unmeritorious filing of wholly  
3 inappropriate, immaterial and impertinent affirmative defenses." (Doc. 9, 13:23-25.) The Court may  
4 impose sanctions against anyone "who so multiplies the proceedings in any case unreasonably and  
5 vexatiously." 28 U.S.C. § 1927.

6                   At this stage, the Court declines to impose sanctions. The pleading stage is designed to place  
7 parties on notice of the issues and focus the dispute. While Defendants' filings may contain  
8 irrelevant defenses, they were not vexatious and do not warrant the imposition of sanctions. Any  
9 future amended answer, however, should contain more specific facts and defenses focused toward  
10 this litigation rather than boilerplate defenses.

11                   **C.     Conclusion**

12                   For all of the reasons set forth above, Plaintiff's Motion to Strike affirmative defenses in  
13 Defendants' answers is GRANTED. However, as Plaintiff has not asserted that it would suffer any  
14 prejudice resulting from granting Defendants leave to amend, leave to amend is to be freely granted.  
15 *Wyshak*, 607 F.2d at 826-27.

16                   Accordingly, IT IS HEREBY ORDERED THAT:

- 17                   1.     Plaintiff's Motion to Strike is GRANTED;
- 18                   2.     Plaintiff's Request for Sanctions is DENIED; and
- 19                   3.     Defendants are granted 30 days to file an amended answer.

20  
21 IT IS SO ORDERED.

22 **Dated:** December 13, 2010

23                   /s/ Sheila K. Oberto  
24                   UNITED STATES MAGISTRATE JUDGE