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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA BREWING COMPANY, a
California Corporation,

Plaintiff/Counter
Defendant,

v.

3 DAUGHTERS BREWING LLC, a
Florida Limited Liability Company, et al.,

Defendants/Counter
Claimants.

No. 2:15-cv-02278-KJM-CMK

ORDER

Plaintiff/counter-defendant California Brewing Company (“CBC”) moves to strike affirmative defenses numbered 1, 2, 3, 4, 5, 6, 7, 8, and 10¹ in this trademark action. ECF No. 28. In response, defendants/counter-claimants 3 Daughters Brewing LLC (“3 Daughters”) and LMMML LLC (“LM”) move to amend the answer, arguing their proposed amended answer “should resolve the issues raised by CBC.” ECF No. 31 at 2.² Defendants seek to remove

¹ Unless otherwise noted, the numbering cited in this order refers to the numbering used in the original answer, rather than the proposed amended answer.

² Defendants contend CBC filed its motion to strike without providing defendants an adequate opportunity to substantively review their affirmative defenses. ECF No. 31 at 1–2. Plaintiff responds that it was defendants who did not comply with the court’s meet and confer requirements. ECF No. 32 at 7–8. The parties are cautioned that the court’s meet and confer

1 affirmative defenses numbered 1, 7, 8, and 10, add factual allegations supporting their other
2 affirmative defenses, and add an affirmative defense for failure to mitigate damages. *See*
3 Proposed Am. Answer, Defs.’ Response Ex. A, ECF No. 31-1. CBC opposes in part defendants’
4 motion. ECF No. 32.

5 In the interest of judicial economy, the court considers both motions together and
6 decides the matter without a hearing. As explained below, the court GRANTS IN PART and
7 DENIES IN PART each motion.

8 I. LEGAL STANDARD

9 Under Rule 12(f) of the Federal Rules of Civil Procedure, the court may strike
10 “from a pleading an insufficient defense or any redundant, immaterial, impertinent or scandalous
11 matter.” Fed. R. Civ. P. 12(f); *see Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th
12 Cir. 1983). A defense may be insufficient as a matter of pleading or as a matter of law. *Sec.*
13 *People, Inc., v. Classic Woodworking, LLC*, No. 04–3133, 2005 WL 645592, at *2 (N.D. Cal.
14 Mar. 4, 2005). An affirmative defense is legally insufficient when “it lacks merit under any set of
15 facts the defendant might allege.” *Dodson v. Strategic Rests. Acquisition Co. II, LLC*, 289 F.R.D.
16 595, 603 (E.D. Cal. 2013) (citation omitted), *abrogated on other grounds by Kohler v. Flava*
17 *Enters., Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015).

18 Rule 8 of the Federal Rules of Civil Procedure requires that a party “state in short
19 and plain terms” its defenses when responding to a pleading. Fed. R. Civ. P. 8(b). An affirmative
20 defense is insufficient as a matter of pleading where it fails to provide the plaintiff with “fair
21 notice” of the defense asserted. *Wyshak v. City Nat’l Bank*, 607 F.2d 824, 827 (9th Cir. 1979).

22 “The ‘fair notice’ required by the pleading standards only requires describing the defense in
23 ‘general terms.’” *Kohler*, 779 F.3d at 1019 (quoting 5 Charles Alan Wright & Arthur R. Miller,
24 *Federal Practice and Procedure* § 1274 (3d ed. 1998)).³ “Although fair notice is a low bar that

25 requirements require a thorough and meaningful discussion regarding the substance of the
26 contemplated motion and any potential resolution. *See* ECF No. 30 at 4.

27 ³ As a colleague has noted, “[i]n this district, courts have recently read *Kohler* to have
28 resolved the split regarding whether the heightened ‘plausibility’ requirement set out in [*Bell*
Atlantic Corp. v. Twombly, 550 U.S. 544 (2007),] and [*Ashcroft v. Iqbal*, 556 U.S. 662 (2009),]

1 does not require great detail, it does require a defendant to provide some factual basis for its
2 affirmative defenses.” *Gibson Wine Co.*, 2016 WL 1626988, at *5 (internal quotation marks and
3 citations omitted). “Simply identifying an affirmative defense by name does not provide fair
4 notice of the *nature* of the defense or how it applies in [the] action” *Bd. of Trs. of IBEW*
5 *Local Union No. 100 Pension Tr. Fund v. Fresno’s Best Indus. Elec., Inc.*, No. 13-01545, 2014
6 WL 1245800, at *4 (E.D. Cal. Mar. 24, 2014) (emphasis in original). In alleging fraud, including
7 in an affirmative defense, “a party must state with particularity the circumstances constituting
8 fraud.” Fed. R. Civ. P. 9(b); *Gold Club-SF, LLC v. Platinum SJ Enter.*, No. 13-03797, 2013 WL
9 6248475, at *3 (N.D. Cal. Dec. 3, 2013). “Averments of fraud must be accompanied by the who,
10 what, when, where, and how of the misconduct charged.” *Kearns v. Ford Motor Co.*, 567 F.3d
11 1120, 1124 (9th Cir. 2009) (internal quotation marks and citation omitted).

12 “Motions to strike are disfavored in part because of the limited importance of
13 pleading in federal practice,” *Staggs*, 2016 WL 880960, at *4 (citation omitted), a proposition still
14 valid after the Supreme Court’s decisions in *Twombly* and *Iqbal*. Unless it would prejudice the
15 opposing party, courts freely grant leave to amend stricken pleadings. *See Wyshak*, 607 F.2d at
16 826 (citing Fed. R. Civ. P. 15(a)(2); other citations omitted); *see also Ascon Props., Inc. v. Mobil*
17 *Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (“stress[ing] Rule 15’s policy of favoring
18 amendments”).

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22 modifies the ‘fair notice’ standard traditionally applied to affirmative defenses; they found that it
23 does not.” *United States v. Gibson Wine Co.*, No. 15-1900, 2016 WL 1626988, at *5 (E.D. Cal.
24 Apr. 25, 2016) (citing *Staggs v. Doctor’s Hosp. of Manteca, Inc.*, No. 11-00414, 2016 WL
25 880960, at *3 (E.D. Cal. Mar. 8, 2016), and *Deleon v. Elite Self Storage Mgmt., LLC*, 2016 WL
26 881144, at *1–2 (E.D. Cal. Mar. 8, 2016)); *see also Lexington Ins. Co. v. Energetic Lath &*
27 *Plaster, Inc.*, No. 15-00861, 2015 WL 5436784, at *12 (E.D. Cal. Sept. 15, 2015). By contrast,
28 “[c]ourts in the Northern District continue to apply the plausibility standard.” *Gibson Wine Co.*,
2016 WL 1626988, at *5 (collecting cases). Here, consistent with its prior practice, this court
does not apply the plausibility standard, because it finds the *Kohler* court’s requirement that the
defense be described in “general terms” is inconsistent with the heightened “plausibility”
standard. *See id.*

1 II. DISCUSSION

2 Defendants' proposed amendments in the form of removing affirmative defenses
3 numbered 1, 7, 8, and 10 and adding factual allegations to support the affirmative defense
4 numbered 6 would cure the deficiencies raised in CBC's motion to strike with respect to those
5 defenses. *See* ECF Nos. 28 & 31. CBC agrees to withdraw its motion with respect to those
6 defenses to the extent the court allows the proposed amendments. ECF No. 32 at 2, 6–7. Good
7 cause appearing, and in light of the Federal Rules' policy of favoring amendments, the court
8 GRANTS defendants leave to make the proposed amendments with respect to affirmative
9 defenses numbered 1, 6, 7, 8, and 10. *See* Fed. R. Civ. P. 15(a)(2); *Wyshak*, 607 F.2d at 826. The
10 court DENIES AS MOOT CBC's motion to strike affirmative defenses numbered 1, 6, 7, 8,
11 and 10.

12 CBC argues affirmative defenses numbered 2, 3, 4, and 5 remain deficient as pled
13 in the proposed amended answer, and the proposed additional affirmative defense for failure to
14 mitigate damages fails as a matter of pleading. ECF No. 32 at 2–6, 10. The court addresses each
15 affirmative defense in turn.

16 A. Second Affirmative Defense: Unclean Hands/Fraud

17 The Second Affirmative Defense initially provided, "All of California Brewing's
18 claims fail because its registered trademark is was [sic] obtained through fraud and is invalid."
19 Answer at 7, ECF No. 24. Defendants propose the following amended defense:

20 California Brewing affirmed, under oath, that it was using the
21 BEACH BLONDE ALE mark in connection with actual sales of
22 beer at least as early as October 2007. That was a lie. California
23 Brewing did not use the BEACH BLONDE ALE mark in
24 commerce until many years later, in 2014. In granting a federal
25 registration, the US Patent & Trademark Office relied on California
26 Brewing's false statement that it was using the BEACH BLONDE
27 ALE mark on beer that California Brewing was selling in
28 commerce. Since California Brewing was not selling any beer until
seven years after filing the application, the federal trademark
registration for BEACH BLODNE [sic] ALE was void from the
beginning. Therefore, all of California Brewing's claims fail
because its registered trademark is was [sic] obtained through fraud
and is invalid.

Proposed Am. Answer at 7 ("First Affirmative Defense: Unclean Hands/Fraud").

1 These allegations do not meet Rule 9(b)'s particularity requirements for averments
2 of fraud. The court therefore STRIKES this affirmative defense. However, it appears defendants
3 could satisfy Rule 9(b)'s pleading requirements by incorporating other allegations pled in the
4 proposed amended answer and counterclaim. *See* Proposed Am. Answer at 12–17. Accordingly,
5 the court GRANTS defendants leave to amend this affirmative defense to add or incorporate
6 additional factual allegations.

7 B. Third Affirmative Defense: Acquiescence, Implied Consent, Estoppel and Waiver

8 The Third Affirmative Defense initially provided, “California Brewing’s claims
9 are barred by acquiescence, implied consent, estoppel and/or waiver.” Answer at 8. Defendants
10 propose the following amended defense:

11 California Brewing’s claims are barred by acquiescence, implied
12 consent, estoppel and/or waiver, because it has permitted third
13 parties to use the BEACH BLONDE ALE mark without proper
14 quality controls. California Brewing acquiesced or gave implied
15 consent to 3 Daughters Brewing’s use of BEACH BLONDE ALE
16 by failing to object to its use even though California Brewing knew
that 3 Daughters Brewing was making actual use of the mark in
commerce. In failing to object to such use, California Brewing has
waived any rights in the mark and is estopped from seeking any
relief related thereto.

17 Proposed Am. Answer at 7–8 (“Second Affirmative Defense: Implied Consent, Estoppel and
18 Waiver”).

19 To establish an acquiescence defense, a defendant must plead: “(1) the senior user
20 actively represented that it would not assert a right or a claim; (2) the delay between the active
21 representation and assertion of the right or claim was not excusable; and (3) the delay caused the
22 defendant undue prejudice.” *Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ.,*
23 *Inc.*, 621 F.3d 981, 989 (9th Cir. 2010). Defendants’ answer and proposed amended answer
24 allege no facts showing active consent or undue prejudice. The allegation regarding lack of
25 proper quality controls is irrelevant to the referenced defenses.

26 As this court previously has observed, “to establish a defense of estoppel, a party
27 must show that the adverse party, either intentionally or under circumstances that induced
28 reliance, engaged in conduct upon which [the relying party] relied and that the relying party acted

1 or changed [its] position to [its] detriment.” *Lexington Ins. Co.*, 2015 WL 5436784, at *14
2 (citation omitted; alterations in *Lexington*); see *Heckler v. Cmty. Health Servs. of Crawford Cty.,*
3 *Inc.*, 467 U.S. 51, 59 (1984). Defendants’ answer and proposed amended answer allege no facts
4 with respect to CBC’s inducement or defendants’ detrimental reliance.

5 To establish a defense of waiver, a defendant must show the plaintiff “intentionally
6 relinquished or abandoned a known right.” *Desert European Motorcars, Ltd. v. Desert European*
7 *Motorcars, Inc.*, No. 11-197, 2011 WL 3809933, at *2 (C.D. Cal. Aug. 25, 2011) (citing *United*
8 *States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)). Defendants’ answer and proposed amended
9 answer likewise merely reference the legal doctrine of waiver without stating the factual basis
10 giving rise to the defense.

11 Even under the low “fair notice” standard, the pleadings are insufficient. The
12 court STRIKES the third affirmative defense. However, because it appears defendants could
13 allege additional facts to support these doctrines, the court GRANTS defendants leave to amend.

14 C. Fourth Affirmative Defense: Laches

15 The Fourth Affirmative Defense initially provided, “California Brewing’s claims
16 are barred because of the doctrine of laches.” Answer at 8. Defendants propose the following
17 amended defense:

18 California Brewing’s claims are barred because of the doctrine of
19 laches because it failed to take any action or launch any objection to
20 3 Daughters Brewing’s use of the Mark until long after it became
21 aware that 3 Daughter [sic] Brewing was using the Mark.
22 California Brewing’s delay in bringing suit caused substantial
23 prejudice to 3 Daughters Brewing and LMMML. Accordingly,
24 California Brewing’s delay and the resultant prejudice to 3
25 Daughters Brewing and LMMML results in an equitable bar to
26 California Brewing’s claims in this action.

27 Proposed Am. Answer at 8 (“Third Affirmative Defense: Laches”).

28 “To establish the defense of laches, a defendant must allege neglect or delay in
bringing suit to remedy an alleged wrong, which taken together with lapse of time and other
circumstances, causes prejudice to the adverse party and operates as an equitable bar.” *Lexington*
Ins. Co., 2015 WL 5436784, at *12 (citation and internal quotation marks omitted). Here, the
answer and proposed amended answer provide no factual allegations showing how defendants

1 were prejudiced. As with the acquiescence defense, the laches defense is insufficient as a matter
2 of pleading. The court STRIKES the fourth affirmative defense but GRANTS defendants leave
3 to amend to allege additional facts if they can do so consonant with Rule 11.

4 D. Fifth Affirmative Defense: Unclean Hands

5 The Fifth Affirmative Defense initially provided, “California Brewing obtained its
6 federal trademark registration through fraud and any claims based on the federal registration are
7 barred by the doctrine of unclean hands.” Answer at 8. Defendants propose the following
8 amended defense:

9 California Brewing affirmed, under oath, that it was using the
10 BEACH BLONDE ALE mark in connection with actual sales of
11 beer at least as early as October 2007. That was a lie. California
12 Brewing did not use the BEACH BLONDE ALE mark in
13 commerce until many years later. In granting a federal registration,
14 the US Patent & Trademark Office relied on California Brewing’s
15 false statement that it was using the BEACH BLONDE ALE mark
16 on beer that California Brewing was selling in commerce. Since
California Brewing was not selling any beer until seven years after
filing the application, the federal trademark registration for BEACH
BLODNE [sic] ALE was void from the beginning. California
Brewing obtained its federal trademark registration through fraud
and any claims based on the federal registration are barred by the
doctrine of unclean hands.

17 Proposed Am. Answer at 8–9 (“Fourth Affirmative Defense: Unclean Hands”).

18 This defense is nearly identical to defendants’ Unclean Hands/Fraud Affirmative
19 Defense. For the same reasons discussed above, the court STRIKES this defense but grants
20 defendants leave to amend to add or incorporate additional factual allegations.

21 E. Proposed Additional Affirmative Defense for Failure to Mitigate Damages

22 Defendants seek to add the following defense: “California Brewing has failed to
23 mitigate its damages, if there by [sic] any.” Proposed Am. Answer at 9 (“Seventh Affirmative
24 Defense: Failure to Mitigate Damages”). “[C]ourts have held that a generalized statement meets
25 [a] defendant’s pleading burden with respect to the affirmative defense of damage mitigation.”
26 *Lexington*, 2015 WL 5436784, at *13 (quoting *Bd. of Trs. of San Diego Elec. Pension Trust v.*
27 *Bigley, Elec., Inc.*, No. 07–634, 2007 WL 2070355, at *3 (S.D. Cal. July 12, 2007)); *see also*
28 *Desert European Motorcars, Ltd.*, 2011 WL 3809933, at *2. As such, although this proposed

1 affirmative defense contains a generalized statement, defendants have met their pleading burden
2 of fair notice. The court GRANTS defendants leave to amend to add this defense.

3 III. CONCLUSION

4 For the foregoing reasons, the court GRANTS IN PART and DENIES IN PART
5 each motion, as follows:

6 The court GRANTS defendants leave to make the proposed amendments with
7 respect to affirmative defenses numbered 1, 6, 7, 8, and 10. The court DENIES AS MOOT
8 CBC's motion to strike affirmative defenses numbered 1, 6, 7, 8, and 10.

9 The court GRANTS CBC's motion to strike affirmative defenses numbered 2, 3, 4,
10 and 5. However, the court GRANTS defendants leave to amend these defenses to add additional
11 supporting allegations, as specified above. The court also GRANTS defendants' motion to
12 amend the answer to add the proposed affirmative defense of failure to mitigate damages. An
13 amended answer shall be filed within fourteen (14) days of the issuance of this order.

14 This order resolves ECF Nos. 28, 31, and 32.

15 IT IS SO ORDERED.

16 DATED: July 25, 2016.

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UNITED STATES DISTRICT JUDGE