UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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TELEVISION EDUCATION, INC., Plaintiff, v. CONTRACTORS INTELLGIENCE SCHOOL, INC.; CONTRACTORS PUBLISHER, INC.; LEONID VORONTSOV; OKSANA VORONTSOV; and DOES 1 through 25; Defendants.	CIV. NO. 2:16-1433 WBS EFB MEMORANDUM AND ORDER RE: MOTION TO STRIKE AFFIRMATIVE DEFENSES

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Plaintiff Television Education, Inc. brought this action against defendants Contractors Intelligence School and Contractors Publisher (collectively "defendants") for alleged copyright infringement.[1] (First Am. Compl. ("FAC") (Docket No.

[1] Two other defendants are named in this action: Leonid and Oksana Vorontsov. (First Am. Compl. ¶¶ 6-7 (Docket No. 12).) Plaintiff's Motion only concerns the Answer filed by Contractors

12).) Before the court is plaintiff's Motion to strike eleven of the twenty-six affirmative defenses asserted in defendants' Answer. (Pl.'s Mot. (Docket No. 18).)

Plaintiff leases and sells contractor's license exam preparation materials to private schools and businesses in California. (Id., Mem. ("Pl.'s Mem.") at 1 (Docket No. 19).) Plaintiff allegedly created and owns copyrights to a number of test preparation manuals and practice exams, and has "pending copyright applications in numerous other educational courses and materials." (FAC ¶¶ 15, 17.) From 2011 through 2014, plaintiff executed agreements to lease and sell its educational materials to Contractors Intelligence School "for use in [the school's] license examination preparation courses." (Id. ¶ 18.) According to plaintiff, the agreements stated that Contractors Intelligence School "will not 'copy, plagiarize, paraphrase, or duplicate' any of the educational materials owned by Television Education . . . or allow any of its employees or any other person or firm to do so." (Id. ¶ 20.)

From 2010 to 2016, Contractors Intelligence School allegedly "cop[ied]," "plagiariz[ed]," and sold "knock-offs" of plaintiff's materials in violation of the parties' agreements and federal copyright law. (See id. at 9-12.) The "knock-offs" were allegedly marketed as original works of Contractors Publisher, an affiliate of Contractors Intelligence School. (Id. Ex. A, Cease and Desist Letter at 2.) Plaintiff alleges that defendants

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Intelligence School and Contractors Publisher. (Pl.'s Mot. at 1 (Docket No. 18).)

continue to "plagiariz[e]" and create "knock-offs" of its materials despite receiving its cease and desist letter in June 2016. (Id. ¶¶ 37-38.)

On June 23, 2016, plaintiff filed this action. (Compl. (Docket No. 1).) Plaintiff amended its complaint in September 2016. (FAC.) The amended Complaint alleges a single cause of action "for copyright infringement under . . . 17 U.S.C. section 101 et seq." (Id. at 13.) Defendants filed an Answer to plaintiff's amended Complaint in October 2016. (Answer (Docket No. 17).) The Answer asserts twenty-six affirmative defenses. (Id.) Plaintiff now moves to strike eleven of the twenty-six affirmative defenses under Federal Rule of Civil Procedure 12(f). (Pl.'s Mot.)

Under Rule 12(f), the court may strike an affirmative defense if it is insufficiently pled. See Fed. R. Civ. P. 12(f); Saunders v. Fast Auto Loans, Inc., No. 2:15-2624 WBS CKD, 2016 WL 1627035, at *6-7 (E.D. Cal. Apr. 25, 2016) (striking affirmative defenses as insufficiently pled under Rule 12(f)). The Ninth Circuit has held that an affirmative defense is sufficiently pled when it provides plaintiff with "fair notice" of its grounds, which need only be described in "general terms."[2] Kohler v.

[2] Plaintiff cites several district court cases that applied the "plausibility" standard of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009) to affirmative defenses. (See Pl.'s Mem. at 4-5.) Those cases are no longer good law in light of Kohler v. Flava Enters., Inc., 779 F.3d 1019 (9th Cir. 2015), which applied the "fair notice" standard to affirmative defenses. See Staggs v. Doctor's Hosp. of Manteca, No. 211-CV-00414 MCE KJN, 2016 WL 3027742, at *1 (E.D. Cal. May 27, 2016) (stating that Kohler resolved the split in the Ninth Circuit as to whether "plausibility" or "fair

Flava Enters., Inc., 779 F.3d 1016, 1019 (9th Cir. 2015); see also Beco Dairy Automation, Inc. v. Global Tech Sys., Inc., Civ. No. 1:12-1310 LJO SMS, 2015 WL 5732595, at *10 (E.D. Cal. Sept. 28, 2015) (applying Kohler). "While this is less demanding than the Twombly/Iqbal standard, it still requires a party to plead some factual basis for its allegations." Beco Dairy Automation, 2015 WL 9583012, at *2; see also Gomez v. J. Jacobo Farm Labor Contractor, Inc., No. 1:15-CV-1489 AWI MJS, 2016 WL 6143342, at *3 (E.D. Cal. May 20, 2016) (holding the same). Mere "reference to a [legal] doctrine, like a reference to statutory provisions, is insufficient."[3] Qarbon.com Inc. v. eHelp Corp., 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004); see also Beco Dairy Automation, 2015 WL 9583012, at *2 (citing Qarbon.com post-Kohler).

Plaintiff seeks to strike the following affirmative defenses from defendants' Answer (numbers designated according to numbers used in defendants' Answer): (4) plaintiff's "waiver" of its copyright infringement claim; (5) the doctrines of "unjust

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notice" standard applies to affirmative defenses).

[3] Defendants cite cases holding that affirmative defenses may only be stricken if they "prejudice the [plaintiff]" and "ha[ve] no bearing on the subject matter of the litigation." (Def.'s Opp'n at 2-3 (Docket No. 23).) None of those cases are binding Ninth Circuit precedent, however, and the court has noted that no such precedent appears to exist, Houston Cas. Co. v. Crum & Forster Ins. Co., No. 1:16-CV-535 LJO EPG, 2016 WL 4494444, at *4 (E.D. Cal. Aug. 25, 2016). The Ninth Circuit rejected defendants' cases in an unpublished decision--Atlantic Richfield Co. v. Ramirez, 176 F.3d 481, 1999 WL 273241 (9th Cir. 1999)--where it stated that "Rule 12(f) says nothing about a showing of prejudice and allows a court to strike material sua sponte." Id. at *2. Accordingly, the court will not require plaintiff to show "prejudice" or complete lack of "bearing" with respect to the affirmative defenses at issue here.

enrichment and in pari delicto"; (6) "the doctrine of unclean hands"; (10) expiration of plaintiff's claim under the statute of limitations set forth in 17 U.S.C. § 507(b); (11) defendants' "good faith" in using plaintiff's materials; (12) defendants' "fair use" of plaintiff's materials; (13) plaintiff's "improper purpose," "abuse of process," and "improper restraint of trade" in filing this action; (18) plaintiff's failure to comply "with the statutory formalities of either the Copyright Act of 1909 or the Copyright Act of 1976"; (22) "the doctrine of independent creation"; (25) "the doctrine of copyright misuse"; and (26) defendants' "right of offset." (Pl.'s Mem. at 6-11.)

Defendants' fourth affirmative defense asserts that plaintiff waived its copyright infringement claim against defendants. (Answer at 6.) Defendants do not state when or how plaintiff might have waived its claim. Without providing any factual basis for the assertion that plaintiff waived its claim or otherwise consented to defendants' alleged plagiarism of its materials, defendants cannot be said to have provided plaintiff "fair notice" of their fourth affirmative defense. See Beco Dairy Automation, 2015 WL 9583012, at *2 (defendant must provide "some factual basis" for an affirmative defense). Accordingly, the court will strike that defense.

Defendants' fifth and sixth affirmative defenses assert that plaintiff "engaged in improper conduct of the same nature which it alleges [defendants] to have done," which bars its claim under the doctrines of unjust enrichment, in pari delicto, and unclean hands. (Answer at 6.) Again, defendants do not identify when or how plaintiff might have "engaged in improper conduct of

the same nature which it alleges [defendants] to have done." Because defendants fail to provide any factual basis for their fifth and sixth affirmative defenses, the court will strike those defenses as well.

Defendants' tenth affirmative defense asserts that plaintiff's claim is barred under the statute of limitations set forth in 17 U.S.C. § 507(b). (Id. at 7.) Here, defendants have identified a specific limitations period, three years, which, in conjunction with the filing date of this action, results in a threshold date that plaintiff's claim must not have accrued prior to--June 23, 2013. (See Compl. (filed on June 23, 2016).) Defendants argue that plaintiff's claim accrued prior to the threshold date because it is based on allegations of misconduct that took place as early as 2010.[4] (See Answer at 7; FAC ¶ 33.) Because this information is sufficient to notify plaintiff of the "general terms" of defendants' statute of limitations defense, the court will not strike that defense.

Defendants' eleventh affirmative defense asserts that defendants "acted at all times . . . in good faith" and thus are "not liable" under federal copyright law. (See Answer at 7-8.) The Ninth Circuit has held that "good faith" or "innocent intent"

[4] Plaintiff notes that defendants do not identify which specific act resulted in accrual. (See Pl.'s Mem. at 7.) Rule 12(f) only requires that affirmative defenses be pled in "general terms," however. See Kohler, 779 F.3d at 1019; see also Stevens v. Corelogic, Inc., No. 14-CV-1158 BAS JLB, 2015 WL 7272222, at *4 (S.D. Cal. Nov. 17, 2015) (Rule 12(f) does not require "a detailed recitation of facts"). Thus, the court will not strike defendants' defense for lack of specificity.

is not a defense to copyright infringement liability, however. Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1170 (9th Cir. 2012). In their Opposition, defendants cite a district court case--Wild v. Benchmark Pest Control, Inc., No. 1:15-CV-01876 JLT, 2016 WL 1046925 (E.D. Cal. Mar. 16, 2016)--for the proposition that "lack of intent serves as an affirmative defense to the amount of statutory damages" in copyright infringement cases. (Defs.' Opp'n at 7 (Docket No. 23).) Defendants' "good faith" defense, as stated in their Answer, is addressed to liability, however, not damages. Because defendants have not provided plaintiff "fair notice" of any "good faith" defense to the amount of damages, the court will strike that defense.

Defendants' twelfth, thirteenth, eighteenth, twenty-second, twenty-fifth, and twenty-sixth affirmative defenses all fail for lack of factual basis. For each defense, defendants cite a statute or doctrine that purportedly defeats plaintiff's claim, but provide no facts explaining how such statute or doctrine is implicated in this case.

Defendants' twelfth affirmative defense, for example, asserts that defendants' alleged misappropriation of plaintiff's materials was in fact "fair use" of the materials under federal copyright law, but states no facts explaining how defendants used the materials or why their use constituted "fair use" under the relevant statute. (Answer at 8.) Defendants' thirteenth affirmative defense, to cite another example, asserts that plaintiff filed this action "for an improper purpose, abuse of process and as an improper restraint of trade," but states no facts explaining why this case is improper, abusive, or

unlawfully restrains trade. (See id.) Defendants' other affirmative defenses--plaintiff's failure to comply "with the statutory formalities of either the Copyright Act of 1909 or the Copyright Act of 1976," "the doctrine of independent creation," "the doctrine of copyright misuse," and defendants' "right of offset"--are similarly bereft of facts.

Bare references to doctrine or statute are "insufficient notice" under Rule 12(f). Qarbon.com, 315 F. Supp. 2d at 1049. Because defendants' twelfth, thirteenth, eighteenth, twenty-second, twenty-fifth, and twenty-sixth affirmative defenses each reference a doctrine or statute without providing any supporting facts, the court will strike those defenses under Rule 12(f). See Beco Dairy Automation, 2015 WL 9583012, at *2.

The court is aware of defendants' concern that "Plaintiff's Motion to Strike . . . is really a thinly veiled attempt to obtain summary judgment on Defendants' defenses without letting Defendants engage in the discovery process." (Defs.' Opp'n at 5.) That concern is addressed by the court's grant of leave to amend in this Order. Because the court has already issued an order providing for discovery in this case, (see Oct. 19, 2016 Order at 2-3 (Docket No. 16)), defendants will have the opportunity to engage in discovery before filing an amended answer.

IT IS THEREFORE ORDERED that the following affirmative defenses are hereby STRICKEN from defendants' Answer: (4) plaintiff's "waiver" of its copyright infringement claim; (5) the doctrines of "unjust enrichment and in pari delicto"; (6) "the doctrine of unclean hands"; (11) defendants' "good faith" in

using plaintiff's materials; (12) defendants' "fair use" of plaintiff's materials; (13) plaintiff's "improper purpose," "abuse of process," and "improper restraint of trade" in filing this action; (18) plaintiff's failure to comply "with the statutory formalities of either the Copyright Act of 1909 or the Copyright Act of 1976"; (22) "the doctrine of independent creation"; (25) "the doctrine of copyright misuse"; and (26) defendants' "right of offset."

IT IS FURTHER ORDERED that plaintiff's Motion to Strike defendants' tenth affirmative defense--expiration of plaintiff's claim under the statute of limitations set forth in 17 U.S.C. § 507(b)-- be, and the same hereby is, DENIED.

Defendants have twenty-one days from the date this Order is signed to file an amended answer, if they can do so consistent with this Order.

Dated: December 12, 2016

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE