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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LUMASENSE TECHNOLOGIES, INC.,

Plaintiff,

v.

ADVANCED ENGINEERING SERVICES,
LLC,

Defendant.

Case No. [20-cv-07905-WHO](#)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
STRIKE**

Re: Dkt. No. 48

The purpose of an answer in federal court is to clarify for the parties what is at issue in the case. Lawyers are usually able to address ambiguities or insufficiencies in an answer without litigating motions to strike, which are rarely cost-effective unless directed at an important legal issue.

Before me is plaintiff LumaSense Technologies, Inc. (“LumaSense”) motion to strike four of Defendant Advanced Engineering Services, LLC’s (“AES”) responses in its answer to LumaSense’s complaint, for insufficient denial of allegations, and six of AES’s affirmative defenses on the grounds that the affirmative defenses are either not affirmative defenses or insufficiently pleaded under *Twombly* and *Iqbal*. I find that two of AES’s denials of knowledge or information are insufficiently pleaded and one of AES’s denials of knowledge or information is immaterial and impertinent to resolving the matter as it stands. The other response is a sufficient denial of allegations. Three of the disputed affirmative defenses are not proper affirmative defenses because they attack the sufficiency of the plaintiff’s prima facie case. Finally, the three remaining disputed affirmative defenses fail to meet the applicable *Twombly/Iqbal* pleading requirement because they are mere conclusory statements with no indication of factual support. I encourage the lawyers to use common sense in the future to avoid disputes like this one.

1 **BACKGROUND**

2 LumaSense operates its business of providing temperature and gas sensing solutions in
3 Santa Clara County, California. Complaint ¶ 1 [Dkt. No. 1] (“Compl.”). On or around late 2013,
4 Akhil Seth, the president of AES, proposed a joint business venture to LumaSense. *Id.* ¶ 16.
5 Shortly after, LumaSense and AES entered the Value Added Reseller Agreement (“VAR
6 Agreement”). *Id.* ¶ 17. The VAR Agreement granted AES a license to access and use
7 LumaSense’s sensor products for resale. *Id.* ¶ 17.

8 After the joint venture failed to materialize, AES filed suit in state court against
9 LumaSense for several claims, including breach of contract and misappropriation of trade secrets.
10 *Id.* ¶¶ 20–22. AES alleged that LumaSense impermissibly used confidential trade secret
11 information obtained under the VAR Agreement and disclosed exhibits identifying the trade
12 secrets at issue. *Id.* ¶¶ 22, 24. The content of AES’s exhibits, however, prompted LumaSense to
13 file suit against AES for four claims: (1) copyright infringement; (2) trademark infringement; (3)
14 false designation of origin, false description and representation; and (4) unfair competition. *Id.*
15 ¶ 25. LumaSense alleges that AES improperly used LumaSense’s trademarks as its own and
16 removed LumaSense’s trademark identifiers and registered symbols. *Id.* ¶ 26.

17 The original suit between AES and LumaSense was removed to federal court and
18 consolidated with this case on May 14, 2021. Order Granting Joint Administrative Motion to
19 Consolidate [Dkt. No. 45]; *see Advanced Engineering Services, LLC v. LumaSense Technologies,*
20 *Inc.*, Case No. 21-CV-03279-WHO (“Related Action”). On February 8, 2021, AES filed a motion
21 to strike LumaSense’s complaint under California’s Anti-SLAPP rule and to dismiss the action
22 under Federal Rule of Civil Procedure (“FRCP”) 12(b)(6). Defendant’s Motion to Dismiss and
23 Motion to Strike [Dkt. No. 23]. On March 30, 2021, I denied both of AES’s motions. Order
24 Denying Motion to Strike and Motion to Dismiss [Dkt. No. 35]. On April 13, 2021, AES filed an
25 answer to LumaSense’s complaint that included ten affirmative defenses (“Affirmative
26 Defenses”). Answer [Dkt. No. 39].

27 LumaSense now moves to strike four of AES’s answers and six of AES’s affirmative
28 defenses without leave to amend. Motion to Strike Answer (“Mot.”) [Dkt. No. 48]. In the

1 alternative, if leave to amend is granted, LumaSense requests that I order AES to file its amended
2 answer in no more than ten calendar days after the order on this motion is issued. *Id.* at 9.

3 **LEGAL STANDARD**

4 Federal Rule of Civil Procedure 8(b) requires that “[i]n responding to a pleading, a party
5 must: (A) state in short and plain terms its defenses to each claim asserted against it; and (B)
6 admit or deny the allegations asserted against it by an opposing party.” Fed. R. Civ. P. 8(b)(1).
7 Rule 8(b)(6) states that: “An allegation – other than one relating to the amount of damages – is
8 admitted if a responsive pleading is required and the allegation is not denied.” Fed. R. Civ. P.
9 8(b)(6).

10 Federal Rule of Civil Procedure 12(f) allows the Court to strike from a pleading an
11 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ.
12 P. 12(f). “The function of a 12(f) motion to strike is to avoid the expenditure of time and money
13 that must arise from litigating spurious issues by dispensing with those issues prior to trial.”
14 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citation and alteration
15 omitted). Motions to strike, however, “are generally disfavored by courts because the motions
16 may be used as delaying tactics and because of the strong policy favoring resolution on the
17 merits.” *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167,
18 1170 (N.D. Cal. 2010) (citation omitted). Such motions should only be granted if “the matter has
19 no logical connection to the controversy at issue and may prejudice one or more of the parties to
20 the suit.” *New York City Employees’ Ret. Sys. v. Berry*, 667 F. Supp. 2d 1121, 1128 (N.D. Cal.
21 2009). “Ultimately, whether to grant a motion to strike lies within the sound discretion of the
22 district court.” *Cruz v. Bank of New York Mellon*, No. 12-CV-00846-LHK, 2012 WL 2838957, at
23 *2 (N.D. Cal. July 10, 2012) (citing *Whittlestone*, 618 F.3d at 973).

24 **DISCUSSION**

25 **I. SUFFICIENCY OF ANSWERS TO THE COMPLAINT**

26 **A. Failure to Deny Under Rule 8(b)**

27 LumaSense argues that Paragraph 19 of AES’s answer adequately responds to allegations
28 in LumaSense’s original complaint. Mot. at 4. Paragraph 19 of LumaSense’s Complaint alleges:

1 “Importantly, LumaSense and AES did not enter into the VAR
2 Agreement to develop a new sensor in LumaSense’s product lines.
3 Rather, AES was a value-added reseller—performing only the
4 integration step for specific customers. LumaSense retained its
5 exclusive ownership in the intellectual property rights, including the
6 copyright, patent, trademark, and trade secret rights in its Original
7 Hardware.”

8 Compl. ¶ 19.

9 In Paragraph 19 of its Answer, AES responds:

10 “Answering paragraph 19 of the Complaint, said paragraph contains
11 conclusions of law and argument which do not require an answer. To
12 the extent that said paragraph may be deemed to require an answer
13 and the allegations of paragraph 19 seek to paraphrase or characterize
14 the contents of the VAR Agreement, the document speaks for itself
15 and AES denies the allegations to the extent that they are inconsistent
16 with that document.”

17 Answer ¶ 19.

18 **1. “Contains conclusions of law”**

19 LumaSense contends that AES refuses to answer the allegation from LumaSense’s
20 Complaint and that refusing to do so on grounds that the allegations are “conclusions of law” is
21 inexcusable. Mot. 4–5. As explained above in the legal standard section, a party’s failure to
22 respond to an allegation that requires a responsive pleading results in a default admission of the
23 allegation. Fed. R. Civ. P. Rule 8(b)(6). To be sure, refusing to answer an allegation merely on
24 the basis that it contains a legal conclusion may be an insufficient reason for evading the
25 requirements of Rule 8(b). *Guifu Li v. A Perfect Franchise, Inc.*, No. 10-CV-01189-LHK, 2011
26 WL 2971046, at *3 (N.D. Cal. July 21, 2011). But “[w]here defendants deny factual allegations in
27 addition to identifying legal conclusions, Ninth Circuit district courts generally decline to strike
28 defendants’ answers.” *Id.*

For example, when parties dispute the underlying facts of the allegations in the complaint,
the answer may properly deny the paragraph to the extent that the legal conclusion relies on the
factual allegation. *See, e.g., Barnes*, 718 F. Supp. 2d at 1175 (denying plaintiff’s motion to deem
allegations admitted where defendant failed to answer the legal conclusions but defendant plainly
denied the underlying factual allegations of the legal conclusions); *San Francisco Herring Ass’n*
v. Pac. Gas & Elec. Co., No. 14-CV-04393-WHO, 2015 WL 8482187, at *3 (N.D. Cal. Dec. 10,

1 2015) (finding that defendant’s denial of allegations “to the extent any of these allegations are
2 incomplete and/or inconsistent with the sources from which they originate” was an adequate
3 response to plaintiff’s legal conclusions). Generally, such a conditional denial satisfies the
4 standard under Rule 8(b).

5 AES’s answer is sufficient, notwithstanding its response that Paragraph 19 of the
6 Complaint “calls for a legal conclusion,” because AES denies the factual allegations on which
7 LumaSense’s legal conclusions rest. LumaSense argues that AES failed to respond to its
8 allegation because AES failed to provide fair notice of AES’s intentions in entering the VAR
9 Agreement or of AES’s perception of LumaSense’s ownership rights of the disputed intellectual
10 property. Mot. at 5. But AES contends that its response is proper in part because the phrase
11 “contains conclusions of law” was only directed at the legal dispute over the scope and nature of
12 the VAR agreement. Opposition to Motion to Strike 6 [Dkt. No. 51] (“Oppo.”). Further, when
13 read in its entirety, although AES’s Answer admits that it entered the VAR Agreement with
14 LumaSense, it denies the remaining factual allegations to the extent that they are inconsistent with
15 the VAR agreement. See Answer ¶ 19. To read AES’s response as a nonanswer would therefore
16 mischaracterize AES’s response because AES explicitly denies the factual allegations on which
17 LumaSense’s legal conclusions rest. LumaSense can easily clarify any ambiguity in discovery.

18 **2. “Document speaks for itself”**

19 LumaSense argues that AES’s answer that the “document speaks for itself” does not meet
20 the good faith requirement under Federal Rule of Civil Procedure 8(b). Mot. 4–5. An answer that
21 states that “the document speaks for itself” is sufficient under Rule 8(b) if the answer also
22 expressly includes an admission or denial of the allegation. *Barnes*, 718 F. Supp. 2d at 1175. This
23 issue has already been settled by courts in this district. The court in *Barnes* found the defendant’s
24 statement that the “document speaks for itself” accompanied by admission or denial of the factual
25 allegations met the pleading requirements under Rule 8(b)(1). *Id.* The court reasoned that the
26 conditional denial allowed both parties to “dispute the contents of the referenced document as the
27 litigation progress[ed].” *Id.*; see also *San Francisco Herring Ass’n*, 2015 WL 8482187 at *2
28 (finding that the defendant’s answer that the “document speaks for itself” was sufficient because it

1 was paired with the denial of the characterization of the documents or admission of allegations
2 only to the extent that they reflected the documents in dispute).

3 Like the answers in *Barnes* and *San Francisco Herring*, Paragraph 19 of AES’s Answer
4 does not merely assert that the VAR Agreement speaks for itself without further clarification.
5 AES plainly denies the allegations and characterizations “to the extent that they are inconsistent
6 with [the VAR Agreement].” Answer ¶ 19. The VAR Agreement rests at the center of the dispute
7 between LumaSense and AES. Following the approach from *Barnes*, I conclude that AES’s
8 conditional denial “satisfies its burden under Rule 8(b)(1) by providing partial admission or denial
9 and then a more generalized denial.” *Barnes*, 718 F. Supp. 2d at 1175. Paragraph 19 of AES’s
10 answer satisfies the standard of Rule 8(b). Accordingly, I DENY the motion to strike Paragraph
11 19 of the Answer.

12 **B. Lack of Knowledge Under Rule 8(b)**

13 LumaSense next argues that Paragraphs 11, 12, and 33 constitute insufficient denials under
14 Rule 8(b). It asserts that a response that the defendant has no information or belief to be able to
15 answer the allegations is insufficient when such information is easily obtained as a matter of
16 public record. Mot. at 5–6. But LumaSense misinterprets the case it cites in support. *Id.* In
17 *Chung v. U.S. Bank, N.A.*, 2016 WL 9525594, at *4 (D. Haw. Sept. 6, 2016), the court
18 acknowledged that other courts have held that, “Normally, a party may not assert a lack of
19 knowledge or information if the necessary facts or data involved are within his knowledge or
20 easily brought within his knowledge, a matter of general knowledge in the community, or a matter
21 of public record.” The court then explained that the Ninth Circuit, however, has held that “courts
22 cannot examine statements in an answer or other pleading and decide, on the basis of their own
23 intuition that the statements are implausible or a sham and thus can be disregarded. Factual
24 allegations in a pleading, as opposed to legal conclusions, must be presumed to be true.” *In re*
25 *Mortgs. Ltd.*, 771 F.3d 623, 632 (9th Cir. 2014).

26 Under this precedent, “a court cannot disregard statements in a pleading unless the court
27 specifically determines that the statement was made in bad faith under Federal Rule of Civil
28 Procedure 11, or should be struck under Rule 12(f).” *Id.* at 630. LumaSense has not filed a

1 motion for sanctions pursuant to Rule 11, nor would I grant one. Instead, I will consider whether
2 it is appropriate to strike AES’s answers as insufficient defenses, redundant, immaterial,
3 impertinent, or scandalous under FRCP 12(f).

4 Here, Paragraphs 11 and 33 of LumaSense’s Complaint allege that LumaSense owns
5 registered trademarks and copyrights. Compl. ¶¶ 11, 33. LumaSense argues that because the
6 Complaint includes specific registration numbers that correspond to a public database, Compl.
7 ¶¶ 11, 33, AES’s argument that it could not evaluate the veracity of these statements without
8 proper discovery of LumaSense’s documentation, Oppo. 7, is unpersuasive. Mot. at 6. AES
9 contends that its denials pertain to the validity of the trademarks and copyrights rather than the
10 ownership. Oppo. at 7. But that is not how AES responded in the answer. Paragraphs 11 and 33
11 are insufficiently denied under Rule 8(b).

12 LumaSense further asserts that I should not grant AES leave to amend. Mot. at 9. That is
13 ridiculous. “In the absence of prejudice to the opposing party, leave to amend should be freely
14 given.” *Wyshak v. City Nat. Bank*, 607 F.2d 824, 826 (9th Cir. 1979). LumaSense argues that it
15 will face prejudice if “it must proceed with discovery without the benefit of understanding AES’s
16 position on key issues in dispute.” Reply in Support of Motion to Strike (“Reply”) [Dkt. No. 57]
17 at 10. Nonsense. LumaSense does not argue that the conditional denials would cause prejudice if
18 they were to be properly amended. Requiring AES to properly respond to these allegations may
19 help in a modest way to streamline litigation and narrow the dispute. I GRANT the motion to
20 strike Paragraphs 11 and 33 of the Answer with leave to amend.

21 As for Paragraph 12 of the Complaint, LumaSense alleges that it has attached true and
22 correct copies of the trademark registrations to the record. Compl. ¶ 12. AES’s answer denies
23 “each and every allegation of said paragraph.” Answer ¶ 12. While it seems implausible that AES
24 lacks knowledge of whether LumaSense attached documents to its complaint, whether LumaSense
25 attached the trademarks to the complaint is unnecessary to resolve the issues in this case, rendering
26 the sufficiency of AES’s denial immaterial or impertinent pursuant to Rule 12(f). *See*
27 *Whittlestone*, 618 F.3d at 974 (defining matter as immaterial and impertinent if it has no essential
28 relationship to the resolution of the dispute). If AES meant to object to the truth or correctness of

1 the documents, AES fails again to plead with sufficient specificity as required under Rule 8(b).
2 Again, LumaSense does not argue that the conditional denial would cause prejudice if it were to
3 be properly amended. I GRANT LumaSense’s motion to strike Paragraph 12 of the Answer with
4 leave to amend.

5 **II. SUFFICIENCY OF AFFIRMATIVE DEFENSES**

6 **A. AES’s First, Sixth, and Seventh Defenses are Not Affirmative Defenses**

7 The next issue is whether three of AES’s affirmative defenses are proper affirmative
8 defenses, and if not, whether the three defenses should be struck. Mot. 7. LumaSense moves to
9 strike the First, Sixth, and Seventh affirmative defenses of failure to state a claim, no damages, and
10 no causation, respectively. Mot. at 7; *see* Answer at 9–10.

11 Defenses that target a deficiency of an element of the plaintiff’s prima facie case are not
12 affirmative defenses. *See Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir.
13 2002) (“A defense which demonstrates that plaintiff has not met its burden of proof is not an
14 affirmative defense.”). Moreover, the sturdiness of a defendant’s affirmative defense does not rest
15 on the weakness of an element of the plaintiff’s prima facie case. *See E.E.O.C. v. California*
16 *Psychiatric Transitions, Inc.*, 725 F. Supp. 2d 1100, 1118 (E.D. Cal. 2010) (“An affirmative
17 defense is an assertion raising new facts and arguments that, if true, will defeat plaintiff’s claim,
18 even if all allegations in complaint are true.”).

19 Failure to state a claim is not an affirmative defense. *See Thorium Cyber Sec., LLC v.*
20 *Nurmi*, No. 19-CV-07669-WHO, 2020 WL 7260507, at *8 (N.D. Cal. Dec. 10, 2020) (“A 12(b)(6)
21 defense is not an *affirmative* defense because it seeks to show a defect in the plaintiff’s prima facie
22 case”) (citing *Zivkovic*, 302 F.3d at 1080). “No damages” is not an affirmative defense because it
23 attacks an element of the plaintiff’s prima facie case. *See Vogel v. Huntington Oaks Delaware*
24 *Partners, LLC*, 291 F.R.D. 438, *442 (C.D. Cal. 2013) (finding that “no damage or injury” was
25 not an affirmative defense “because it merely points to a defect in [plaintiff’s] case”); *see also*
26 *Tattersalls Ltd. v. Wiener*, 2019 WL 669640, at *3 (S.D. Cal. Feb. 19, 2019) (finding that no
27 damages was not an affirmative defense because it did not introduce an “additional set of facts that
28 would bar plaintiff’s recovery irrespective of whether plaintiff has stated a prima facie case for

1 recovery.”). And “no causation” is not a proper affirmative defense because it is also directed
2 towards an element of plaintiff’s prima facie case. *See Jansen v. Travelers Com. Ins. Co.*, No. 16-
3 CV-04834-JST, 2017 WL 607610, at *3 (N.D. Cal. Feb. 15, 2017) (striking defense that
4 defendants were not the cause of any damages because such an argument merely “allege[d] that
5 Plaintiffs have not met their burden of proof,” which is not an affirmative defense).

6 AES argues that even if its affirmative defenses are not properly affirmative defenses, I
7 should not strike them unless LumaSense can demonstrate that the defenses would cause
8 prejudice. As a pragmatist, I could agree with that sentiment, but not as a judge. Granting a
9 motion to strike under Rule 12(f) does not turn on whether the moving party can show prejudice if
10 the pleading itself is insufficient under Rule 8(b). *See Barnes*, 718 F. Supp. 2d at 1173 (holding
11 defendant’s “arguments regarding prejudice cannot rescue its otherwise legally insufficient
12 affirmative defenses”); *cf. New York City Employees’ Ret. Sys.*, 667 F. Supp. 2d at 1128 (N.D. Cal.
13 2009) (finding that “[w]here the moving party cannot adequately demonstrate such prejudice,
14 courts frequently deny motions to strike even though the offending matter literally was within one
15 or more of the categories set forth in Rule 12(f),” i.e., redundant, immaterial, impertinent, or
16 scandalous, as opposed to insufficient defenses). If it did, I would also have to consider the
17 cascading inefficiency of researching redundant matters. *See, e.g., Barnes*, 718 F. Supp. at 1173
18 (finding that insufficiently pleaded affirmative defenses may in fact cause prejudice by provoking
19 the parties to engage in “expensive and potentially unnecessary and irrelevant discovery”); *Perez*
20 *v. Gordon & Wong L. Grp., P.C.*, No. 11-CV-03323-LHK, 2012 WL 1029425, at *8 n.6 (N.D.
21 Cal. Mar. 26, 2012) (“prejudice may arise solely from a plaintiff’s being required to engage in
22 discovery on frivolous issues”). And AES could simply have stipulated that those are not
23 affirmative defenses, sparing it and me the energy it has taken to address this issue.

24 Failure to state a claim, no damages, and no causation simply attempt to negate portions of
25 the prima facie case, for which LumaSense already bears the burden of proof at trial. “Defenses
26 [that] are redundant pursuant to Rule 12(f) [] should be struck so as to simplify and streamline the
27 litigation.” *Barnes*, 718 F. Supp. 2d at 1174. I GRANT the motion to strike Affirmative Defenses
28

1 One, Six, and Seven without leave to amend.¹

2 **B. Twombly/Iqbal’s Heightened Pleading Standard Applies to Affirmative Defenses**
3 **And Affirmative Defenses Three, Four, and Eight are Insufficient Under**
4 **Twombly/Iqbal**

5 The final issue is whether three other affirmative defenses are sufficiently pleaded under
6 Rule 8(b). Mot. at 8. As a threshold matter, the parties dispute the legal standard for the
7 sufficiency of affirmative defenses. AES asserts that the standard for pleading affirmative
8 defenses is fair notice, relying on the fact that the Ninth Circuit has not explicitly overruled
9 *Wyshak*’s holding that “[t]he key to determining the sufficiency of pleading an affirmative defense
10 is whether it gives plaintiff fair notice of the defense,” *Wyshak*, 607 F.2d at 827. Oppo. at 7–8.
11 According to AES, requiring its affirmative defenses to provide any more factual detail than
12 already included would improperly subject AES to a heightened pleading standard akin to that of
13 Rule 9(b) for claims of fraud or even Rule 26(a)(2) for expert disclosures. *Id.* at 8. In contrast,
14 *LumaSense* points to modern case law employing the heightened pleading standard set forth by
15 *Twombly* and *Iqbal*. Mot. at 3, 8.

16 Although some courts in this circuit have declined to apply the heightened pleading
17 standard, courts in this district have consistently held that the heightened pleading standard under
18 *Twombly/Iqbal* applies to affirmative defenses in order to provide fair notice. *See, e.g., Barnes*,
19 718 F. Supp. 2d at 1172 (“Applying the standard for heightened pleading to affirmative defenses
20 serves a valid purpose in requiring at least some valid factual basis for pleading an affirmative
21 defense and not adding it to the case simply upon some conjecture that it may somehow apply.”);
22 *Barnes & Noble, Inc. v. LSI Corp.*, 849 F. Supp. 2d 925, 929 (N.D. Cal. 2012) (“*Twombly*’s
23 rationale of giving fair notice to the opposing party would seem to apply as well to affirmative
24 defenses given the purpose of Rule 8(b)’s requirements for defenses”); *Blackberry Limited v. Typo*
25 *Prod. LLC*, No. 14-CV-00023-WHO, 2014 WL 1867009, at *5 (N.D. Cal. May 8, 2014) (“[T]he
26 *Twombly/Iqbal* standard properly applies to affirmative defenses”). As I have done previously, I

27 _____
28 ¹ But this does not preclude AES from filing a motion to dismiss so long as it does not repeat the
same arguments made in its prior motion to dismiss, which I denied. *See* Order Denying Motion
to Strike and Motion to Dismiss.

1 will apply the *Twombly/Iqbal* standard to affirmative defenses in this case. *See Illumina, Inc. v.*
2 *BGI Genomics Co.*, No. 19-CV-03770-WHO, 2020 WL 571030, at *5 (N.D. Cal. Feb. 5, 2020).

3 As LumaSense argues, AES’s Third, Fourth, and Eighth Affirmative Defenses are “bare
4 statements reciting mere legal conclusions” and are insufficiently pleaded under the
5 *Twombly/Iqbal* standard.² Mot. 8. AES’s response that LumaSense is well aware of the factual
6 bases for its asserted affirmative defenses and that AES has provided sufficient factual detail by
7 attaching various filings throughout this action is inadequate.³ Oppo. at 10–12. There is no
8 authority supporting the notion that the opposing party’s knowledge of the general facts of the
9 case excuses the omission of factual bases of pleading affirmative defenses. Nor do prior filings
10 suffice, except to the extent that specific, material portions of them are incorporated by reference
11 into the defense.

12 The purpose of the pleading requirements is to ensure that both parties are properly
13 informed of the factual basis of the opposing party’s arguments. *See Hernandez v. Cty. of*
14 *Monterey*, 306 F.R.D. 279, 284 (N.D. Cal. 2015) (“[A] defendant’s pleading of affirmative
15 defenses must put a plaintiff on notice of the underlying factual bases of the defense”).
16 Affirmative defenses that simply reel off a list of legal doctrines without any factual support do
17 not satisfy the heightened plausibility pleading standard under *Twombly/Iqbal*. *See, e.g., Perez*,
18 2012 WL 1029425, at *10 (“Each of the fifteen affirmative defenses recites a legal conclusion but
19 fails to point to the existence of some identifiable fact that if applicable to [Plaintiff] would make
20 the affirmative defense plausible on its face”) (internal quotation marks omitted); *Illumina, Inc. v.*

21 _____
22 ² The Third Affirmative Defense states, “The claims made in the Complaint are barred, in whole
23 or in part, by the doctrines of fair use, nominative fair use, and/or descriptive use.” Answer at 9.
24 The Fourth Affirmative Defense states, “Each of the purported claims made in the Complaint are
25 barred by the doctrines of waiver, acquiescence, and estoppel.” *Id.* The Eighth Affirmative
26 Defense states, “AES is informed and believes, and based on such information and belief, alleges
27 LumaSense is barred from the relief sought in its Complaint by breaching the alleged agreement
28 VAR Agreement.”

³ AES seeks judicial notice of Exhibits 1–4 attached to its opposition brief, which are briefings and
orders in the Related Action. Request for Judicial Notice [Dkt. No. 52]. LumaSense argues that
AES may not properly use the attached exhibits as the factual basis of AES’s affirmative defenses.
Reply at 5–6. However, LumaSense does not oppose the request. Accordingly, AES’s request is
GRANTED.

1 *BGI Genomics Co.*, 2020 WL 571030, at *5 (finding that a “one-sentence assertion of each
2 defense” was insufficient under the *Twombly/Iqbal* pleading standard for affirmative defenses).
3 AES’s Third, Fourth, and Eighth Affirmative Defenses closely resemble the mere recitations of
4 legal doctrines struck down in *Perez* and *Illumina*. AES fails to “provide even a brief statement as
5 to how [Plaintiff’s] claims are barred by th[ese] doctrine[s].” *Illumina, Inc.*, 2020 WL 571030, at
6 *5.

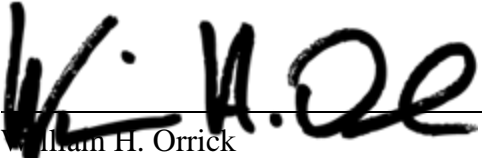
7 The Third, Fourth, and Eighth Affirmative Defenses are insufficiently pleaded. AES must
8 describe why it asserts that a particular legal doctrine applies as an affirmative defense in order to
9 provide fair notice. It may incorporate pertinent portions of prior pleadings and memoranda if that
10 is helpful in delineating what is at issue. I GRANT the motion to strike with leave to amend.

11 **CONCLUSION**

12 LumaSense’s motion to strike is GRANTED in part with leave to amend with respect to
13 Paragraphs 11, 12, and 33 of the Answer and the Third, Fourth, and Eighth Affirmative Defenses.
14 The motion to strike is GRANTED in part without leave to amend with respect to the First, Sixth,
15 and Seventh Affirmative Defenses. The motion to strike is DENIED in part with respect to
16 Paragraph 19 of the Answer. AES may file an amended Answer by July 26, 2021.

17 **IT IS SO ORDERED.**

18 Dated: July 14, 2021

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22 William H. Orrick
23 United States District Judge
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