

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIAHILDA L. SOLIS, SECRETARY
OF LABOR, UNITED STATES
DEPARTMENT OF LABOR,

No. C 08-4854 PJH

**ORDER GRANTING MOTION
TO STRIKE**

Plaintiff,

v.

ZENITH CAPITAL, LLC, et al.,

Defendants.
_____ /

Before the court is a motion to strike filed by Hilda Solis, Secretary of Labor, United States Department of Labor ("Secretary" or "plaintiff"), seeking to strike the affirmative defenses asserted by defendants Zenith Capital, LLC, Rick Tasker ("Tasker"), Michael Smith ("Smith") and Martel Cooper ("Cooper") (collectively "defendants"). Defendants oppose the motion. Because the court finds this matter suitable for decision without oral argument, the hearing date of May 13, 2009 is VACATED pursuant to Civil Local Rule 7-1(b). Having carefully reviewed the parties' papers and considered the relevant legal authority, the court hereby GRANTS the Secretary's motion to strike, for the reasons stated below.

BACKGROUND

The Secretary commenced the instant action against defendants on October 23, 2008 to redress violations and enforce provisions of Title I of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1191c ("ERISA"). Compl. ¶ 1. The Secretary alleges that defendants Tasker, Smith and Cooper were owners of and investment advisers with Zenith Capital, and that they provided investment advisory

1 services to fourteen ERISA-covered employee benefit plans ("ERISA Plans"). Id. ¶¶ 9, 13.
2 More particularly, the Secretary alleges that defendants provided investment advice as to
3 the purchase and sale of securities or other property for a fee, and that such services were
4 the primary basis for investment decisions with respect to the assets of the ERISA Plans.
5 Id. ¶ 21.

6 The Secretary further alleges that defendants, by virtue of their discretionary control
7 and authority over the assets and investments of the ERISA Plans, and the management
8 and disposition of those assets and investments, served as fiduciaries to the ERISA Plans
9 within the meaning of ERISA. See Compl. ¶¶ 14-21. According to the Secretary,
10 defendants, in their capacities as fiduciaries violated numerous provisions of ERISA by
11 breaching a number of fiduciary responsibilities, obligations or duties, causing the ERISA
12 Plans to suffer injury and losses for which the ERISA Plans are subject to equitable relief.
13 Id. ¶¶ 51-52, 55-56.

14 To this end, the Secretary filed the instant action, alleging two claims for relief under
15 ERISA: (1) breach of fiduciary duties, and (2) violation of prohibited transactions. Compl.
16 ¶¶ 50-57. Through this action, the Secretary seeks a variety of equitable remedies,
17 including restitution to the ERISA Plans for all losses resulting from defendants' breaches
18 of fiduciary duties, rescission of the illegal prohibited transactions, and an injunction against
19 defendants prohibiting them from future service as fiduciaries to ERISA-covered plans. Id.
20 ¶ 58. According to the Secretary, this lawsuit was brought in the public interest to advance
21 the public policy embodied in ERISA's regulatory scheme, including, among other things,
22 assuring the uniform enforcement of ERISA's fiduciary obligations and maintaining public
23 confidence in the integrity of employee benefit plans.

24 On January 6, 2009, defendants filed their answer to the complaint, asserting seven
25 affirmative defenses: (1) statute of limitations; (2) waiver; (3) release; (4) estoppel; (5)
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1 laches; (6) accord and satisfaction; and (7) unstated affirmative defenses.¹ On January 26,
2 2009, the Secretary filed a motion to strike defendants' affirmative defenses. Defendants
3 filed an opposition on April 22, 2009. A reply was filed on April 29, 2009.

4 DISCUSSION

5 The Secretary moves to strike all of defendants' affirmative defenses on the grounds
6 that these defenses: (1) are not pled with sufficient particularity to provide the Secretary
7 "fair" notice of the defenses being advanced; (2) are insufficient as a matter of law; and (3)
8 will prejudice the Secretary by requiring her to spend substantial time and resources
9 conducting discovery to ascertain the bases of the defenses being advanced.

10 A. Standard

11 Under Rule 12(f) of the Federal Rules of Civil Procedure, a "court may strike from a
12 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous
13 matter." "To strike an affirmative defense, the moving party must convince the court 'that
14 there are no questions of fact, that any questions of law are clear and not in dispute, and
15 that under no set of circumstances could the defense succeed.' " S.E.C. v. Sands, 902
16 F.Supp. 1149, 1165 (C.D. Cal. 1995). A defense is ordinarily not held to be insufficient
17 "unless it appears to a certainty that plaintiffs would succeed despite any state of the facts
18 which could be proved in support of the defense, and are inferable from the pleadings."
19 Williams v. Jader Fuel Co., 944 F.2d 1388, 1400 (7th Cir. 1991).

20 A defense is also insufficient if it does not provide the plaintiff with "fair notice" of the
21 defense. Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979) ("The key to
22 determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair
23 notice of the defense."); Qarbon.com Inc. v. eHelp Corp., 315 F.Supp.2d 1046, 1049 (N.D.
24 Cal. 2004) (Affirmative defenses are governed by the same pleading standard as
25 complaints, and therefore must give plaintiff "fair notice" of the defense being advanced.).

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27 ¹ The court notes that while the answer purports to assert eight affirmative defenses,
28 it only alleges seven affirmative defenses due a typographical error in the numbering of the
defenses. The court will refer to the affirmative defenses as they are numbered in the answer.

1 Where an affirmative defense simply states a legal conclusion or theory without the support
2 of facts explaining how it connects to the instant case, it is insufficient and will not withstand
3 a motion to strike. See Jones v. Community Redevelopment Agency, 733 F.2d 646, 649
4 (9th Cir. 1984).

5 Unless the defense is one that falls under Rule 9, there is no requirement that a
6 party plead an affirmative defense with particular specificity. Wong v. U.S., 373 F.3d 952,
7 969 (9th Cir. 2004). Thus, in some cases, simply pleading the name of the affirmative
8 defense is sufficient. See Woodfield v. Nationwide Mutual Ins. Co., 193 F.3d 354, 362 (5th
9 Cir. 1999). Other affirmative defenses, however, require greater specificity. See id. (baldly
10 “naming” the broad affirmative defense of “waiver and/or release” falls well short of the
11 minimum particulars needed to identify the affirmative defense and provide “fair notice”).

12 The function of a Rule 12(f) motion to strike is to avoid the expenditure of time and
13 money that will arise from litigating spurious issues by dispensing with those issues prior to
14 trial. Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). If the defense
15 asserted is invalid as a matter of law, the court should determine the issue prior to a
16 needless expenditure of time and money. Hart v. Baca, 204 F.R.D. 456, 457 (C.D. Cal.
17 2001). However, motions to strike should not be granted unless it is clear that the matter to
18 be stricken could have no possible bearing on the subject matter of the litigation. Colaprico
19 v. Sun Microsystems, Inc., 758 F.Supp. 1335, 1339 (N.D. Cal. 1991); see also Wright &
20 Miller, Federal Practice and Procedure: Civil 3d § 1381 (“Motions to strike a defense as
21 insufficient are not favored . . . because of their somewhat dilatory and often harassing
22 character. Thus, even when technically appropriate and well-founded, Rule 12(f) motions
23 often are not granted in the absence of a showing of prejudice to the moving party.”);
24 Augustus v. Board of Public Instruction of Escambia County, Florida, 306 F.2d 862, 868
25 (5th Cir. 1962). The Ninth Circuit has stated that prejudice can arise from allegations that
26 cause delay or confusion of the issues. Sands, 902 F.Supp. at 1166 (citing Fantasy, Inc. v.
27 Fogerty, 984 F.2d 1524, 1528 (9th Cir. 1993), rev’d on other grounds, 510 U.S. 517
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1 (1994)).

2 A decision to strike material from the pleadings is vested to the sound discretion of
3 the trial court. Nurse v. United States, 226 F.3d 996, 1000 (9th Cir. 2000). If the court
4 chooses to strike a defense, leave to amend should be freely given so long as there is no
5 prejudice to the opposing party. Qarbon.com, 315 F.Supp.2d at 1049 (citing Wyshak, 607
6 F.2d at 826).

7 B. Analysis

8 1. Statute of Limitations

9 Defendants' first affirmative defense states, in pertinent part: "the Complaint, in its
10 entirety, is barred by the applicable statutes of limitations." In their opposition brief,
11 defendants argue that this defense is premised on the theory that "the United States had all
12 the knowledge needed to bring a claim more than three years before the execution of the
13 tolling agreement." In support of their position, defendants point to paragraph 32 of the
14 answer, which alleges that "[t]he United States and the general public knew of any actual
15 breach or violation relevant to this action more than three years prior to April 27, 2007, the
16 effective date of the tolling agreement between Defendants and the Secretary of the
17 Department of Labor."

18 Although unclear from the allegations in the answer, defendants' position, as set
19 forth in their opposition brief, appears to be that the Secretary's claims are time-barred
20 because the Securities and Exchange Commission ("SEC") knew of any actual breach or
21 violation relevant to this action more than three years prior to the tolling agreement, and
22 that this knowledge can be imputed to the Secretary based on the agencies' "longstanding
23 relationship" of sharing information. Defendants maintain that the facts alleged in the
24 answer, in conjunction with the admitted existence of a sharing relationship between the
25 SEC and the Secretary, preclude a finding that their statute of limitations defense is
26 insufficient as a matter of law.

27 In addition, defendants argue that the statute of limitations defense is viable because
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1 of the “six year limitations period, which does not rely on knowledge of or actions by
2 Plaintiff.” According to defendants, this defense is premised on the theory that defendants
3 have admitted facts that relate to transactions that occurred more than six years from the
4 effective date of the tolling agreement.

5 The court finds such pleading insufficient to withstand the Secretary’s motion to
6 strike. The legal conclusion that the complaint “is barred by the applicable statutes of
7 limitation,” is inadequate to provide “fair notice” of this defense. Defendants have failed to
8 adequately plead the applicable statutes of limitations upon which they rely. See Wyshak,
9 607 F.2d at 827 (finding sufficient defendant’s allegation that “plaintiff’s claims are barred
10 by the applicable statute of limitations,” where an “attached memorandum made specific
11 mention of Cal.Code Civ. Proc. § 338.1 as the statute of limitations upon which [defendant]
12 relied”). Defendants’ vague allegation that the United States had knowledge about a
13 breach or violation relevant to this action more than three years prior to a tolling agreement
14 entered into between defendants and the Secretary, is insufficient to state a viable statute
15 of limitations defense. The court notes that to the extent defendants seek to rely upon a
16 six-year statute of limitations, there is no allegation in the answer identifying such a
17 limitations period. In short, as pleaded, the allegations in the answer fail to sufficiently
18 identify any applicable statute of limitations and explain how this limitations period relates to
19 the instant case

20 Accordingly, because defendants have not given the Secretary “fair notice” of the
21 defense being advanced, defendants’ first affirmative defense is STRICKEN. The court
22 finds that the Secretary will suffer prejudice in the form of delay and confusion if this
23 defense is not stricken. However, because this defense may be viable if pleaded in a
24 manner sufficient to put the Secretary on notice of the applicable statutes of limitations
25 upon which defendants rely, the court will afford defendants the opportunity to amend to
26 include more specific allegations. Finally, to the extent that the Secretary asks the court to
27 strike this defense on the ground that it is insufficient as a matter of law, the court declines
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1 to do so. The Secretary has not persuaded the court that under no set of circumstances
2 could this defense succeed.

3 2. Waiver

4 Defendants' second affirmative defense states, in pertinent part: "Plaintiff's claims
5 are barred because the subject ERISA Plans knowingly waived any claim against
6 Defendants." In their opposition brief, defendants generally argue, without citation to
7 authority, that "[w]hile the defenses of waiver, estoppel, release, and accord and
8 satisfaction may not relate to each of the plans that are the subject of Plaintiff's action, it
9 cannot be stated that as a matter of law those defenses are insufficient as to all the subject
10 plans." This is because "fiduciaries of two of the plans . . . separately filed lawsuits against
11 Defendants and entered into settlements with Defendants." Defs.' Opp. at 8 (emphasis in
12 original). Defendants further argue that the Secretary's "[c]laims should also be barred as
13 to four other subject plans that did not suffer any loss . . ." Id. (emphasis in original).

14 "Waiver is the intentional relinquishment of a known right with knowledge of its
15 existence and the intent to relinquish it." United States v. King Features Entm't, Inc., 843
16 F.2d 394, 399 (9th Cir. 1988). The court finds that defendants have not alleged any facts
17 that would support a defense of waiver against the Secretary, such as facts demonstrating
18 that the Secretary (or anyone on her behalf) expressly waived the government's rights
19 against defendants. Instead, defendants have merely pleaded a legal conclusion which is
20 insufficient to withstand the Secretary's motion to strike. Accordingly, defendants' second
21 affirmative defense is stricken. Because this defense is predicated on the settlement of
22 separately filed lawsuits instituted by private litigants, i.e., fiduciaries of two of the subject
23 ERISA Plans, this defense is STRICKEN WITH PREJUDICE. Defendants did not cite any
24 authority supporting their position; namely, that the ERISA Plans' waiver of their claims
25 against defendants operates as a waiver of the Secretary's claims against defendants.

26 In fact, such a finding would contravene the Secretary's independent and unqualified
27 right to sue and seek redress for ERISA violations on the basis that ERISA plans
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1 significantly affect the “national public interest.” See Herman v. South Carolina Nat’l Bank,
2 140 F.3d 1413, 1423-25 (11th Cir. 1998) (holding that a private litigant’s settlement does
3 not bar a Secretary’s independent action to address ERISA violations; observing that it is
4 well-established that the government is not bound by private litigation when the
5 government’s action seeks to enforce a federal statute that implicates both public and
6 private interests). While private ERISA litigants seek to redress individual grievances, the
7 Secretary, in suing for ERISA violations, seeks not only to recoup plan losses, but also to
8 supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose
9 and deter plan asset mismanagement, to protect federal revenues, to safeguard the
10 enormous amount of assets and investments funded by ERISA plans, and to assess civil
11 penalties for ERISA violations. Id. at 1423-24 (under ERISA’s statutory framework, private
12 plaintiffs do not adequately represent, and are not charged with representing, the broader
13 national public interests represented by the Secretary).

14 In Herman, the court stated that the ERISA enforcement scheme is undermined if
15 private litigants can sue ERISA violators first, reach a settlement, and bar the Secretary’s
16 action. Herman, 140 F.3d at 1425-26. The court reasoned:

17 While private plaintiffs understandably may be willing to compromise claims
18 to gain prompt and definitive relief, the . . . settlement does not further the
19 broader national public interests represented by the Secretary and reflected
20 in Congress’s delegation of ERISA enforcement powers to the Secretary.
21 The national public interest in deterrence of asset mismanagement suffers if
22 private parties can release claims against ERISA violators for negligible
23 financial recovery and thereby immunize plan trustees and ‘parties in interest’
24 from ERISA violations. Furthermore, the public treasury is ill-served by
25 denying the Secretary the opportunity to assess civil penalties, expressly
26 authorized by Congress to deter ERISA violations, as well as the occasion
27 to ensure that the Plan receives full value for the millions of dollars in tax
28 subsidies.

Id. at 1426.

3. Release

Defendants’ third affirmative defense states, in pertinent part: “Plaintiff’s claims are
barred because the subject ERISA Plans released all potential claims against Defendants.”
The court finds that defendants have not alleged sufficient facts that would support a

1 defense of release against the Secretary, such as facts demonstrating that the Secretary
2 (or anyone on her behalf) released the government's claims against defendants. Instead,
3 defendants have merely pleaded a legal conclusion which is insufficient to withstand the
4 Secretary's motion to strike. Accordingly, defendants' third affirmative defense is stricken.
5 Because this defense is predicated on the settlement of separately filed lawsuits instituted
6 by private litigants, this defense is STRICKEN WITH PREJUDICE, for the reasons stated
7 above. See Herman, 140 F.3d at 1423-26.

8 4. Estoppel

9 Defendants' fourth affirmative defense states, in pertinent part: "Plaintiff's claims are
10 barred by the equitable doctrine of estoppel." "The elements of equitable estoppel are that
11 (1) the party to be estopped knows the facts, (2) he or she intends that his or her conduct
12 will be acted on or must so act that the party invoking estoppel has a right to believe it is so
13 intended, (3) the party invoking estoppel must be ignorant of the true facts, and (4) he or
14 she must detrimentally rely on the former's conduct." Lehman v. United States, 154 F.3d
15 1010, 1016 (9th Cir. 1998). In addition, when a party seeks to invoke the equitable
16 estoppel doctrine against the government, the party must show that the agency engaged in
17 affirmative conduct going beyond mere negligence and that the public's interest will not
18 suffer undue damage as a result of the application of this doctrine. Id. at 1016-17.

19 The court finds that defendants have not alleged any facts that would support a
20 defense of equitable estoppel against the Secretary, such as facts alleging that the
21 Secretary engaged in affirmative conduct going beyond mere negligence or facts alleging
22 that the public's interest will not suffer undue damage as a result of the application of this
23 doctrine. Instead, defendants have merely pleaded a legal conclusion which is insufficient
24 to withstand the Secretary's motion to strike. Accordingly, defendants' fourth affirmative
25 defense is stricken. Because this defense is predicated on the settlement of separately
26 filed lawsuits instituted by private litigants (and/or the fact that four of the subject ERISA
27 Plans did not suffer any loss), this defense is STRICKEN WITH PREJUDICE, for the
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1 reasons stated above. See Herman, 140 F.3d at 1423-26.

2 5. Laches

3 Defendants have indicated their intent to withdraw their sixth affirmative defense
4 based on the Secretary's argument. However, because the equitable defense of laches is
5 not permitted in an ERISA enforcement action, see Herman, 140 F.3d at 1427, this defense
6 is STRICKEN WITH PREJUDICE.

7 6. Accord and Satisfaction

8 Defendants seventh affirmative defense states, in pertinent part: "Plaintiff's claims
9 are barred due to accord and satisfaction of the claims." An accord and satisfaction is the
10 "substitution of a new agreement for and in satisfaction of a pre-existing agreement
11 between the same parties." Red Alarm, Inc. v. Waycrosse, Inc., 47 F.3d 999, 1002 (9th Cir.
12 1995). The court finds that defendants have not alleged any facts that would support a
13 defense of accord and satisfaction, such as the substitution of a new agreement for and in
14 satisfaction of a pre-existing agreement between the parties. Instead, defendants have
15 merely pleaded a legal conclusion which is insufficient to withstand the Secretary's motion
16 to strike. Accordingly, defendants' seventh affirmative defense is stricken. Because this
17 defense is predicated on settlement agreements entered into by private litigants, this
18 defense is STRICKEN WITH PREJUDICE, for the reasons stated above. See Herman,
19 140 F.3d at 1423-26.

20 7. Unstated Affirmative Defenses

21 Defendants' eighth affirmative defense states: "Defendants are informed and believe
22 and thereon allege that they presently have insufficient knowledge or information on which
23 to form a belief as to whether they may have additional, as yet unstated, affirmative
24 defenses, and reserve the right to amend or supplement their affirmative defenses in the
25 event that the discovery indicates that said affirmative defenses would be appropriate."

26 The court finds that this affirmative defense insufficient as a matter of law. An
27 attempt to reserve affirmative defenses for a future date is not a proper affirmative defense
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1 in itself. See Reis Robotics U.S.A., Inc. v. Concept Indus., Inc., 462 F.Supp.2d 897, 907
2 (N.D. Ill. 2006). Instead, if at some later date defendants seek to add affirmative defenses,
3 they must comply with Rule 15 of the Federal Rules of Civil Procedure. Defendants cannot
4 avoid the requirements of Rule 15 simply by “reserving the right to amend or supplement
5 their affirmative defenses.” Accordingly, defendants’ eighth affirmative defense is
6 STRICKEN WITH PREJUDICE.

7 **CONCLUSION**

8 For the reasons stated above, the court hereby GRANTS the Secretary’s motion to
9 strike in its entirety. Defendants’ second, third, fourth, sixth, seventh and eighth affirmative
10 defenses are STRICKEN WITH PREJUDICE. Defendants’ first affirmative defense is
11 STRICKEN WITH LEAVE TO AMEND. If defendants choose to amend the answer to re-
12 allege the first affirmative defense, they shall do so within twenty days. The answer may
13 not be amended beyond what is permitted by this order.

14 **IT IS SO ORDERED.**

15 Dated: May 8, 2009

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18 PHYLLIS J. HAMILTON
19 United States District Judge
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