

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 SUNEARTH, INC.; and THE SOLARAY
5 CORPORATION,

6 Plaintiffs,

7 v.

8 SUN EARTH SOLAR POWER CO., LTD.;
9 NBSOLAR USA, INC.; and DOES 1-10,

10 Defendants.

No. C 11-4991 CW

ORDER GRANTING
PLAINTIFFS' MOTION
TO STRIKE
DEFENDANTS'
AFFIRMATIVE
DEFENSES
(Docket No. 91)

11 _____/
12 Plaintiffs SunEarth, Inc. and The Solaray Corporation move to
13 strike the affirmative defenses of Defendants Sun Earth Solar
14 Power Company, Limited (SESP) and NBSolar USA, Inc. Defendants
15 oppose Plaintiffs' motion. Having considered the arguments
16 presented by the parties in their papers and at the hearing, the
17 Court GRANTS Plaintiffs' motion, STRIKES Defendants' affirmative
18 defenses, and GRANTS Defendants leave to amend.

19 BACKGROUND

20 On October 11, 2011, Plaintiffs initiated this trade name and
21 trademark infringement action, alleging that Defendants have
22 misappropriated and infringed Plaintiffs' "Sun Earth" trademark,
23 service mark and trade name.

24 On November 8, 2011, Defendants filed their answer to
25 Plaintiffs' complaint, pleading as affirmative defenses that
26 "Plaintiffs' claims are barred by laches and estoppel," without
27 elaboration. Answer, Docket No. 23, 4.

28 On January 26, 2011, the parties filed a joint case
management statement, stating that a disputed legal issue was

1 whether laches bars Plaintiffs' claims. Joint Case Management
2 Statement, Docket No. 55, 9. Estoppel was not mentioned.

3 On March 13, 2012, after this Court granted Plaintiffs leave
4 to do so, Plaintiffs filed their first amended complaint (1AC).
5 Docket No. 81.

6 On March 27, 2012, Defendants filed their answer to the 1AC
7 and included counterclaims for unfair competition based on common
8 law and California statute. Docket No. 84. Defendants again
9 included as affirmative defenses that "Plaintiffs' claims are
10 barred by estoppel and laches," without elaboration. Id. at 6.

11 On April 5, 2012, Plaintiffs filed their answer to
12 Defendants' counterclaims. Docket No. 85. On the same day,
13 Defendants filed an amended answer to the 1AC, removing their
14 counterclaims completely but making no other alterations. Docket
15 No. 86. Defendants again asserted that "Plaintiffs' claims are
16 barred by estoppel and laches," without elaboration. Id. at 6.

17 On April 26, 2012, Plaintiffs filed the instant motion to
18 strike. Docket No. 91.

19 DISCUSSION

20 I. Timeliness of Plaintiffs' Motion to Strike

21 Federal Rule of Civil Procedure 12(f) states that a party may
22 make a motion to strike material from a pleading "either before
23 responding to the pleading or, if a response is not allowed,
24 within 21 days after being served with the pleading."

25 It is undisputed that Plaintiffs filed their motion to strike
26 within twenty-one days of being served with the amended answer to
27 the 1AC. Defendants argue that Plaintiffs' motion to strike is
28 nonetheless untimely because it was not filed within twenty-one

1 days of November 8, 2011, when Defendants first asserted their
2 affirmative defenses. In support, Defendants cite cases in which
3 courts have denied a motion to strike as untimely when it was
4 filed a long time after the filing of the pleading it challenged,
5 but do not provide authority in which a court has done so when a
6 motion to strike a pleading was filed within the applicable time
7 period after service of that pleading, because the material it
8 sought to strike was also contained in an earlier version of the
9 pleading.

10 At least one other judge in this District has rejected
11 Defendants' argument as "unpersuasive." See Raychem Corp. v. PSI
12 Telcoms., 1995 U.S. Dist. LEXIS 22325, at *5 (N.D. Cal.). This
13 Court agrees that Defendants' argument is unavailing. As
14 previously stated, Rule 12(f) allows a party to file a motion to
15 strike "within 21 days after being served with the pleading," and
16 the operative pleading was served exactly twenty-one days before
17 Plaintiffs filed their motion to strike. Thus, Plaintiffs' motion
18 is timely.

19 Further, even if Plaintiffs' motion were untimely, this Court
20 retains the discretion to consider the arguments they raise sua
21 sponte. Rule 12(f) allows the court to act "on its own" without a
22 time restriction. Thus, a number of courts have found they may
23 properly consider arguments raised in an untimely motion to strike
24 under this rule. See, e.g., Williams v. Jader Fuel Co., 944 F.2d
25 1388, 1399 (7th Cir. 1991); Abarca v. Franklin County Water Dist.,
26 2009 U.S. Dist. LEXIS 42609, at*16 (E.D. Cal.); United States v.
27 Global Mortg. Funding, Inc., 2008 U.S. Dist. LEXIS 102897, at *6
28

1 (C.D. Cal.). Accordingly, the Court will reach the merits of
2 Plaintiffs' motion.

3 II. Motion to Strike

4 Plaintiffs argue that Defendants have not adequately plead
5 the factual basis for their laches and estoppel affirmative
6 defenses under either the pleading standard set forth in the
7 Supreme Court's decisions in Bell Atlantic Corp. v. Twombly, 550
8 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), or
9 the less rigorous standard set forth in Wyshak v. City Nat'l Bank,
10 607 F.2d 824, 826 (9th Cir. 1979).

11 Rule 8 requires that, when "responding to a pleading, a party
12 must . . . state in short and plain terms its defenses to each
13 claim asserted against it." Federal Rule of Civil Procedure 8(b).
14 Rule 12(f) provides that, on its own or on a motion from a party,
15 a "court may strike from a pleading an insufficient defense or any
16 redundant, immaterial, impertinent, or scandalous matter."
17 Federal Rule of Civil Procedure 12(f). "The purposes of a Rule
18 12(f) motion is to avoid spending time and money litigating
19 spurious issues." Barnes v. AT&T Pension Benefit Plan--
20 Nonbargained Program, 718 F. Supp. 2d 1167 (N.D. Cal. 2010)
21 (citing Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir.
22 1993)).

23 Like the other judges in this district who have considered
24 the issue, this Court has recently held that "the heightened
25 pleading standard set forth in Twombly and Iqbal also applies to
26 affirmative defenses." Powertech Tech., Inc. v. Tessera, Inc.,
27 2012 U.S. Dist. LEXIS 68711, at *13 (N.D. Cal.). See also Perez
28 v. Gordon & Wong Law Group, P.C., 2012 WL 1029425, at *6 (N.D.

1 Cal.) (Koh, J.); Barnes & Noble, Inc. v. LSI Corp., 2012 WL
2 359713, at *2 (N.D. Cal.) (Chen, J.); Bottoni v. Sallie Mae, Inc.,
3 2011 WL 3678878, at *2 (N.D. Cal.) (Beeler, M.J.); Dion v. Fulton
4 Friedman & Gullace LLP, 2012 WL 160221, at *2 (N.D. Cal.) (Conti,
5 J.); J & J Sports Productions, Inc. v. Mendoza Govan, 2011 WL
6 1544886, at *1 (N.D. Cal.) (Alsup, J.); Barnes, 718 F. Supp. 2d at
7 1171-72 (Patel, J.). Because Defendants' affirmative defenses
8 include only conclusory allegations, without providing any
9 information about the grounds upon which they rest, they have
10 insufficiently plead these defenses as required to provide fair
11 notice under either this standard or the earlier Wyshak standard.
12 Thus, the Court GRANTS Plaintiffs' motion to strike.

13 Defendants ask that the Court either amend their pleadings to
14 conform to the details that they set forth in their prior filings,
15 or grant them leave to amend. They also provide a copy of their
16 proposed amendment to their laches affirmative defense.

17 The authority that Defendants cite does not establish that
18 the Court itself may amend their answer as Defendants have
19 requested. Further, even if the Court had the authority to do so,
20 it is not clear how the Court could construe Defendants' prior
21 filings to allege their affirmative defenses properly; none of the
22 documents to which Defendants point discusses estoppel or provides
23 allegations that would put Plaintiffs on notice of the grounds for
24 an affirmative defense on that basis.

25 The Court, however, will grant Defendants leave to amend
26 their affirmative defenses. If a defense is struck, "[i]n the
27 absence of prejudice to the opposing party, leave to amend should
28 be freely given." Wyshak, 607 F.2d at 826. Plaintiffs do not

1 contend that granting Defendants leave to amend would prejudice
2 them. Instead, they argue that Defendants' proposed amendment is
3 insufficient as a matter of law to allege the affirmative defenses
4 properly, in that it contains only allegations similar to the
5 laches defense that Defendants asserted in opposition to
6 Plaintiffs' motion for a preliminary injunction, which the Court,
7 in granting the preliminary injunction, found unlikely to succeed,
8 and that amendment would therefore be futile. However, that the
9 defense is not likely to succeed on its merits does not
10 necessarily mean that it is futile to allege.

11 CONCLUSION

12 For the reasons set forth above, the Court GRANTS Plaintiffs'
13 motion to strike Defendants' affirmative defenses (Docket No. 91).
14 Defendants are granted leave to file their amended affirmative
15 defenses within seven days of the date of this Order; Defendants
16 may file their proposed amended affirmative defense or may file a
17 different amended estoppel and/or laches defense. If Plaintiffs
18 file a motion challenging the sufficiency of Defendants'
19 amendment, they shall not repeat any of the arguments regarding
20 futility made in their reply to this motion.

21 IT IS SO ORDERED.

22
23 Dated: 6/19/2012


CLAUDIA WILKEN

United States District Judge