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10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

13 FACEBOOK, INC., and MARK ZUCKERBERG,

14 Plaintiff,

15 v.

16 CONNECTU LLC, (now known as CONNECTU,
 17 INC.), CAMERON WINKLEVOSS, TYLER
 18 WINKLEVOSS, DIVYA NARENDRA,
 19 PACIFIC NORTHWEST SOFTWARE, INC.,
 20 WINSTON WILLIAMS, WAYNE CHANG,
 21 DAVID GUCWA, and DOES 1-25,

22 Defendants.

23 CASE NO. C 07-01389 RS

24 **DEFENDANT CONNECTU, LLC'S**
 25 **OPPOSITION TO PLAINTIFFS'**
 26 **MOTION TO STRIKE CONNECTU,**
 27 **LLC'S AFFIRMATIVE DEFENSES**

28 Date: August 15, 2007
 Time: 9:30 a.m.
 Dept.: 4
 Judge: Hon. Richard Seeborg

1 **I. INTRODUCTION**

2 Ignoring this Court's earlier pronouncement to avoid form over substance arguments,
3 Plaintiffs move to strike ConnectU, LLC's ("ConnectU") Second, Third, Fourth, Fifth, Seventh,
4 Eighth, Ninth, Tenth and Thirteenth Affirmative Defenses. The Second Amended Complaint
5 ("SAC") was filed in violation of the Federal Rules, and was outside of the bounds of this Court's
6 Order granting Plaintiffs the right to amend. In an effort to move the case along, this Court deemed
7 the SAC filed despite these violations. Now however, knowing that the only discovery which has
8 been done relates to personal jurisdiction, Plaintiffs claim most of the affirmative defenses should be
9 stricken because "there is no way to determine what grounds support ConnectU's allegations." (Pls.'
10 Mot. 1.) This case is moving backwards as a result of Plaintiffs' procedural games. Indeed, it is
11 worthy to note that Plaintiffs did not move to strike any of ConnectU's previously-asserted
12 affirmative defenses following its answer to the initial complaint. Those affirmative defenses are
13 nearly identical to the ones Plaintiffs now attack. (Mosko Decl. Exh. A).

14 Plaintiffs' goal is to force ConnectU to needlessly expend funds in this litigation in which
15 Mark Zuckerberg has already admitted there were no damages suffered as a result of the alleged
16 activities. This motion is just another piece of evidence proving Plaintiffs' goal. As the many cases
17 written by judges in this district have noted, motions to strike are highly disfavored. The liberality
18 of pleading approach, combined with the opportunity to conduct discovery regarding assertions
19 made in pleadings should result in this Court's denial of this motion. Moreover, and in any event,
20 none of the cases cited by Plaintiffs, and none of the arguments Plaintiffs make in their motion
21 support an order striking any of ConnectU's affirmative defenses.

22 **II. ARGUMENT**

23 **A. This Court Should Deny Plaintiffs' Motion Because it Is Disfavored and**
24 **Unsupported**

25 Motions to strike are viewed negatively and with disfavor "because of the limited import of
26 the pleadings under the Federal Rules." *Netflix, Inc. v. Blockbuster, Inc.*, No. C 06-02361 WHA,
27 2006 WL 2458717, at *8 (N.D. Cal. Aug. 22, 2006). As such, "motions to strike should not be
28 granted unless it is clear that the matter to be stricken could have no possible bearing on the subject

1 matter of the litigation.” *Id.*, quoting *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339
 2 (N.D. Cal. 1991). Courts should only grant a motion to strike affirmative defenses if “a defense is
 3 insufficient as a matter of law.” *Ganley v. County of San Mateo*, No. C06-3923 THE, 2007 U.S.
 4 Dist. LEXIS 26467, at * 3 (N.D. Cal. Mar. 22, 2007). “A defense is ordinarily not held to be
 5 insufficient unless it appears to a certainty that plaintiffs would succeed despite any state of the facts
 6 which could be proved in support of the defense, and are inferable from the pleadings, or unless the
 7 defense fails to give [] plaintiff fair notice of the defense.” *Smith v. Wal-Mart Stores*, No. C 06-2069
 8 SBA, 2006 U.S. Dist. LEXIS 72225, at *4 (N.D. Cal. Sep. 20, 2006) (internal citations omitted).

9 Plaintiffs have not made a showing supporting any argument that would justify an order
 10 striking any of their defenses. The only argument Plaintiffs make is that they are unsure of the bases
 11 for these defenses. However, once discovery opens, Plaintiffs will undoubtedly propound
 12 exhausting discovery that will clear up any confusion they may have. This motion must be denied.

13 **B. The Supreme Court’s Decision in *Bell Atlantic Corp. v. Twombly* Did Not Change
 14 the Pleading Standard for the Affirmative Defenses Relevant to This Motion**

15 Plaintiffs claim that the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*,
 16 127 S. Ct. 1955 (2007) established “new pleading standards” under the Federal Rules. (Pls.’ Mot.
 17 1.) However, as the Second Circuit has recognized, there is “considerable uncertainty” surrounding
 18 the implications of the *Bell Atlantic* holding. *Iqbal v. Hasty*, No. 05-5768-CV, 2007 WL 1717803, at
 19 *8 (2d Cir. June 14, 2007). For example, the Second Circuit noted that the holding from *Bell*
 20 *Atlantic* might be limited to its facts. *See id.* at *9 (“some of the Court’s linguistic signals point
 21 away from a heightened pleading standard and suggest that whatever the Court is requiring in *Bell*
 22 *Atlantic* might be limited to, or at least applied most rigorously in, the context of either all section 1
 23 [anti-trust] allegations or perhaps only those section 1 allegations relying on competitors’ parallel
 24 conduct.”). After carefully analyzing *Bell Atlantic*’s “conflicting signals,” the Second Circuit
 25 concluded that the Supreme Court was “not requiring a universal standard of heightened fact
 26 pleading, but [was] instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to
 27 amplify a claim with some factual allegations in those contexts where such amplification is needed
 28 to render the claim *plausible*.” *Id.* at *11 (emphasis in original). Thus, contrary to Plaintiffs’

1 assertion, *Bell Atlantic* did not universally change the pleading standard, but instead required an
2 amplified plausibility standard “in those contexts where such amplification is needed.” *Id.* Here,
3 unlike in *Bell Atlantic* and in *Iqbal*, Plaintiffs have alleged that certain *affirmative defenses* are
4 insufficient as a matter of law and have failed to provide Plaintiffs with fair notice. As Plaintiffs
5 have put forth no argument as to how amplification of the notice pleading standard is necessary in
6 this context, ConnectU’s affirmative defenses provide Plaintiffs with sufficient notice and this Court
7 should deny Plaintiffs’ motion to strike in its entirety.

8 **C. Plaintiffs’ Motion to Strike Should be Denied in Its Entirety Because Plaintiffs**
9 **Have Failed to Demonstrate a Showing of Prejudice**

10 Motions to strike “are rarely granted in the absence of a showing of prejudice to the
11 moving party.” *Smith*, 2006 U.S. Dist. LEXIS 72225, at *7; *see also* 2-12 *Moore’s Federal Practice*
12 - *Civil* § 12.37 (“To prevail on this motion to strike, the movant must clearly show that the
13 challenged matter ‘has no bearing on the subject matter of the litigation and that its inclusion will
14 prejudice the defendants.’”). Plaintiffs have failed to allege, much less demonstrate, that they will be
15 prejudiced by the inclusion of ConnectU’s challenged affirmative defenses, and, therefore, this Court
16 should deny Plaintiffs’ motion to strike. As stated, once discovery opens regarding all matters,
17 Plaintiffs will have a full opportunity to inquire about the details of these asserted affirmative
18 defenses.

19 **D. ConnectU’s Affirmative Defenses Are Not Insufficient as a Matter of Law**

20 Plaintiffs allege that ConnectU’s Second, Third, Fourth, Fifth, Seventh, Eighth,
21 Ninth, Tenth and Thirteenth Affirmative Defenses are “conclusory allegations” and therefore
22 “insufficient as a matter of law.” (Pls.’ Mot. 2.) Yet Plaintiffs fail to provide any analysis of how
23 any of the allegedly deficient affirmative defenses are insufficient as a matter of law. Nor do
24 Plaintiffs cite any cases in support of their blanket allegation that such defenses are insufficient as a
25 matter of law. *See Ganley*, 2007 U.S. Dist. LEXIS 26467, at *3 (“To determine that a defense is
26 insufficient as a matter of law, ‘the court must be convinced that there are no questions of fact, that
27 any questions of law are clear and not in dispute, and that under no set of circumstances could the
28 defense succeed.’”(citation omitted)). Accordingly, Plaintiffs’ broad, unsupported assertion that

1 ConnectU's affirmative defenses are insufficient as a matter of law is without merit. *Cf., e.g., id.* at
 2 *12 (striking as insufficient as a matter of law defendant's affirmative defense based on failure to
 3 comply with the Tort Claims Act and State Law Immunities because neither defense was a legally
 4 valid defense against an action under 42 U.S.C. § 1983 under any set of facts); *United States v.*
 5 *729.773 Acres of Land*, 531 F. Supp. 967, 972 (D. Haw. 1982) (striking defense that government had
 6 no authority to acquire property by condemnation because government's authority was established
 7 by statute); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057-
 8 60 (5th Cir. 1982) (striking defense to breach of contract action that contract was "intrinsically
 9 illegal" because under federal antitrust laws the defense was invalid as contract did not further
 10 anticompetitive practices).

11 **E. ConnectU's Affirmative Defenses Provide Plaintiffs With Fair Notice**

12 **1. ConnectU's Equitable Estoppel Defense Provides Plaintiffs With Fair**
 13 **Notice**

14 Plaintiffs argument that ConnectU's affirmative defenses fail to provide Plaintiffs
 15 with fair notice of the defenses is based primarily on language taken from only one case. *See*
 16 *Qarbon.com Inc. v. EHelp Corp.*, 315 F. Supp.2d 1046, 1049 (N.D. Cal. 2004) ("A reference to a
 17 doctrine, like a reference to statutory provisions, is insufficient notice."). Yet *Qarbon.com* is
 18 factually distinguishable from this case, and it is not clear that the language from *Qarbon.com* even
 19 comports with the holdings from other cases in the Ninth Circuit, or that *Qarbon.com* represents the
 20 current law in the Ninth Circuit. *See Ganley*, 2007 U.S. Dist. LEXIS 26467, at *4 (noting that
 21 "[w]hile in some cases, merely naming a particular defense will be sufficient to satisfy the notice
 22 pleading standard, other affirmative defenses require greater specificity, including additional factual
 23 allegations.").

24 *Qarbon.com* is factually distinguishable because it was a patent infringement case.
 25 Here, there is no issue of patent infringement, or infringement of any intellectual property, for that
 26 matter. In addition, the *Qarbon.com* court, in deciding that the defendant's affirmative defense of
 27 "estoppel" did not provide the plaintiff with fair notice, noted that the defendant did not specify
 28 "whether it is asserting a single type of estoppel or several types of estoppel such as prosecution

1 history estoppel, equitable estoppel, or some other type of estoppel.” *Qarbon.com*, 315 F. Supp.2d
 2 at 1049. Here, ConnectU’s Fourth Affirmative Defense specifies that the Plaintiffs’ complaint is
 3 barred by the doctrine of “*equitable estoppel*.” (ConnectU’s Answer ¶ 79.) As such, the concerns
 4 voiced by the *Qarbon.com* court are of no concern here, and, ConnectU’s affirmative defenses
 5 provide Plaintiffs with fair notice.

6 **2. ConnectU’s Res Judicata and Collateral Estoppel Defenses Provide**
 7 **Plaintiffs With Fair Notice**

8 Plaintiffs argue that the mere reference to the doctrines of res judicata and
 9 collateral estoppel is insufficient notice. (Pls.’ Mot. 4.) To the contrary, Plaintiffs are fully aware
 10 that prior to this case being removed to this Court, the Santa Clara State Court and the U.S. District
 11 Court for the District of Massachusetts issued orders directly relevant to this case. Plaintiffs have
 12 chosen to litigate these facts simultaneously in multiple courts. As a result, the adverse rulings
 13 Plaintiffs have received and undoubtedly will continue to receive will serve to limit this case via res
 14 judicata and collateral estoppel.¹ Given that Mark Zuckerberg has voluntarily appeared as a party
 15 plaintiff, both he and TheFacebook, Inc. know full well the adverse rulings from these other courts.
 16 Thus, ConnectU’s Second and Third Affirmative Defenses provide Plaintiffs with fair notice.

17 **3. ConnectU’s Waiver Defense Provides Plaintiffs With Fair Notice**

18 Plaintiffs cite to *Qarbon.com* in support of the argument that ConnectU’s
 19 waiver defense does not provide fair notice. Although *Qarbon.com* did strike a waiver defense as
 20 not providing fair notice, one of this Court’s more recent opinions provides a more reasoned
 21 approach to a motion to strike the defense of waiver. *See Ganley*, 2007 U.S. Dist. LEXIS 26467, at
 22 *16-17 (denying motion to strike waiver defense). In *Ganley*, this Court noted that “[s]ome courts
 23 have taken the approach that pleading an affirmative defense of waiver ‘requires a recitation of
 24

25
 26 ¹ For example, the Ninth Circuit in *Kendall v. Overseas Dev. Corp.*, noted that the
 27 issue of a prior state court ruling regarding personal jurisdiction concerned the doctrine of issue
 28 preclusion, or collateral estoppel. 700 F.2d 536, 538 n.2 (9th Cir. 1983). However, for “the sake of
 simplicity” the Ninth Circuit used the term *res judicata* throughout its opinion. *Id.* As a result of
 this ambiguity, ConnectU pleaded both res judicata and collateral estoppel as valid affirmative
 defenses.

1 adequate facts; conclusions do not suffice.” *Id.*, quoting *Weber Shandwick Worldwide v. Reid*, No.
2 05 C 709, 2005 WL 1651030, at *6 (N.D. Ill. May 12, 2005). However, the *Ganley* court reasoned
3 that “the more prevalent approach is to broadly construe the notice pleading standard under the
4 Federal Rules” and “the question is merely whether the pleading provides the plaintiff with sufficient
5 notice of the defense.” *Id.* Here, like the defendant in *Ganley*, ConnectU has alleged that Plaintiffs
6 have waived any rights they may have in their allegations. Thus, this Court should deny Plaintiffs’
7 motion to strike ConnectU’s Fifth Affirmative Defense.

8 **4. ConnectU’s Mitigation Defense Provides Plaintiffs With Fair Notice**

9 Plaintiffs characterize ConnectU’s Eighth Affirmative Defense as a
10 “negligence” defense. In actuality, ConnectU’s Eighth Affirmative Defense is a mitigation defense.
11 ConnectU alleges that Plaintiffs failed to mitigate any of the alleged damages they claimed to have
12 suffered. This Court recently noted that “[a]lthough no case law from this district or circuit is
13 available, several courts have held that ‘where discovery has barely begun, the failure to mitigate
14 defense is sufficiently pled without additional facts.’” *Id.* at *18, quoting *AAR Int’l, Inc. v. Vacances*
15 *Heliades S.A.*, 202 F. Supp.2d 788, 800 (N.D. Ill. 2002). Here, the parties have engaged in very
16 limited discovery, and the discovery that has been conducted has focused on jurisdictional issues.
17 Accordingly, like the defendant in *Ganley*, ConnectU has put Plaintiffs on notice of the defense.
18 “[T]he failure to mitigate defense is [therefore] sufficiently plead without additional facts.” *Id.* This
19 Court should deny Plaintiffs’ motion to strike ConnectU’s Eighth Affirmative Defense.

20 **5. ConnectU’s Lack of Causation Defense Provides Plaintiffs With Fair** 21 **Notice**

22 Plaintiffs’ argument in favor of striking ConnectU’s Tenth Affirmative
23 Defense is similarly flawed. Plaintiffs allege that ConnectU has failed “to identify any intervening
24 or superseding causes.” (Pls.’ Mot. 5.) However, ConnectU’s Tenth Affirmative Defense is
25 sufficient to put Plaintiffs on notice. Discovery will uncover the details of this and the other
26 affirmative defenses. Consequently Plaintiffs motion to strike ConnectU’s Tenth Affirmative
27 Defense is without merit. *See Ganley*, 2007 U.S. Dist. LEXIS 26467, at *10-11 (noting that defense
28 of “Third Parties” was enough to put plaintiff on notice and “ Plaintiff has not demonstrated that

1 Defendant will be unable to prove a set of facts by which third parties were responsible for some or
2 all of the harm suffered by Plaintiff.”).

3 **6. ConnectU’s Unclean Hands and *In Pari Delicto* Defenses Provide**
4 **Plaintiffs With Fair Notice**

5 Finally, for the same reasons articulated above, *see supra* Part II.D.4, this
6 Court should deny Plaintiffs’ motion to strike ConnectU’s Ninth and Thirteenth Affirmative
7 Defenses. ConnectU has put Plaintiffs on fair notice of these defenses. As explained above,
8 discovery is just beginning in this case. *See id.* at *14 (denying a motion to strike the defense of
9 unclean hands). As such, this Court should deny Plaintiffs’ motion to strike ConnectU’s Ninth and
10 Thirteenth Affirmative Defenses.

11 **F. If This Court Strikes Any of ConnectU’s Affirmative Defenses, ConnectU**
12 **Should be Given Leave to Amend**

13 Should this Court decide to strike any of ConnectU’s Affirmative Defenses,
14 ConnectU respectfully requests leave to amend. *See, e.g., Smith*, 2006 U.S. LEXIS 72225, at *6 (“A
15 court granting a Rule 12(f) motion should generally grant leave to amend, unless the amendment
16 would be futile.”).

17 **III. CONCLUSION**

18 For the foregoing reasons, this Court should deny Plaintiffs’ Motion to Strike ConnectU’s
19 affirmative defenses.

20
21 Dated: July 25, 2007

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

22
23
24 By: _____ /s/
25 Scott R. Mosko
26 Attorneys for Defendant
27 ConnectU, LLC
28