IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JEREMIAH'S INTERNATIONAL TRADING COMPANY, Inc. d/b/a AMERICA'S AUCTION NETWORK, Plaintiff, vs. ANTHONY CALDERONE and RAYMOND TAYLOR, Defendants.	)	Civil No.: 8:14-cv-584-JDW-TGW

PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES

Plaintiff, JEREMIAH'S INTERNATIONAL TRADING COMPANY, Inc. d/b/a AMERICA'S AUCTION NETWORK ("AAN"), hereby files this Motion to Strike Defendants' Affirmative Defenses. (Doc. 29, Pages 23-26) Defendants have responded to AAN's meticulous documentation of their conspiracy and racketeering acts (Doc. 4) by lodging immaterial, impertinent, and scandalous accusations against AAN and Jeremiah Hartman's family without any basis in fact for such untoward assertions. Not only are these assertions factually false, they are improperly pled and fail to provide any defense to AAN's claims in this matter. As such, this Honorable Court should strike these affirmative defenses from Defendants' pleading.

A Motion to Strike is Appropriate in this Instance

Federal Rule of Civil Procedure 12(f) states that "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." An affirmative defense is defined as "a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are

true." *Ayers v. Consolidated Construction*, 07-123, 2007 WL 4181910 at *1 (M.D. Fla. Nov. 26 2007) (Steele, J.) (striking insufficient and inapplicable affirmative defenses). Several of Defendants' Affirmative Defenses, such as the First, Fourth and Fifth contain facts and assertions that would operate, if at all, to negate the Amended Complaint, rather than to defeat AAN's claims.

Federal district courts "have broad discretion in disposing of motions to strike" under Rule 12. *Microsoft v. Jesse's Computers*, 211 F.R.D. 681, 683 (M.D. Fla. 2002) (quotes and citation omitted). Although Rule 12(f) should be used sparingly, it is appropriate here where Defendants' affirmative defenses are obviously false, have little or no bearing on the adjudication of AAN's claims, and serve to prejudice and defame Plaintiff's owners and employees. *Wlodynski v. Ryland Homes*, 08-cv-361, 2008 WL 2783148 at *1 (M.D. Fla. July 17, 2008) (Whittemore, J.) (approving a Report and Recommendation that noted that "[w]hile courts generally disfavor motions to strike, if the allegations have no possible relation to the controversy, may confuse the issues, or may cause prejudice to one of the parties, a court may grant the motion.") Courts may grant motions to strike where, as here, "the allegations have no possible relation to the controversy and may cause prejudice to one of the parties." *Williams v. Eckerd Family Youth Alternative*, 908 F. Supp. 908, 910 (M.D. Fla. 1995). Even if Defendants somehow assert that these issues have some tangential relation to this controversy, "relevant portions of a complaint may be stricken where they are scandalous and are set out in needless detail." *Gleason v. Chain Service Restaurant*, 300 F.Supp. 1241, 1257 (S.D.N.Y. 1969) The "function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins*, 697 F.2d 880, 885 (9th Cir. 1983). That purpose would be served here by dispensing with Defendants' affirmative defenses which cannot possibly have any bearing on the adjudication of this matter.

Defendants' First Affirmative Defense is Both Scandalous and Insufficient

In their "First Affirmative Defense – Unclean Hands" Defendants assert that AAN has brought this lawsuit for "harassment and intimidation." Defendants then describe litigation initiated by Defendants' current employers and / or their affiliates or predecessors, by mischaracterizing the status of those cases, which have in any event been settled or dormant for years.[1] Defendants next assert slanderous and palpably ludicrous allegations against AAN, Jeremiah Hartman, and his family, claiming that they are gun toting drug addicts who stole from their own company and then sued Defendants years later to supposedly hide such conduct.[2] As discussed below, these allegations are not only palpably ludicrous on their face,[3] they are insufficient, individually or together, to constitute any "affirmative defense" under "unclean hands" or any other coherent legal theory.

Although a district court generally assumes the veracity of the pleadings at this stage, it may strike scandalous material that is palpably frivolous. For example, in *Talbot v. Robert Matthews*

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[1] Although Defendants claim that "the Defendants . . . could attest to the Plaintiff's wrongdoing in those cases," (Doc. 29, Page 4) Plaintiff has in fact not committed any wrongdoing in those cases nor does the record show that Defendants have testified or provided any information in those cases by way of affidavit, deposition or hearing testimony, or any formal or informal discovery. Defendants' theory that AAN would suddenly initiate litigation against them because they could potentially serve as witnesses in settled or dormant state court cases defies common sense. Moreover, if indeed Defendants are assisting or assisted with those cases, it would bolster AAN's assertion that Defendants acted together as well as with various AAN suppliers-cum-competitors in accordance with the allegations in the Amended Complaint. Lastly, because any alleged "wrongdoing" would have occurred when Defendants were still working for AAN and managing the art department, it would not be AAN but rather Defendants who have "unclean hands."

[2] Jeremiah Hartman and each member of his family have impeccable histories with not so much as a DUI on any of their records.

[3] *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009), states that "[d]etermining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." District courts are increasingly applying the Iqbal standard to affirmative defenses. *See e.g. HCRI TRS Acquirer v. Iwer*, 708 F.Supp.2d 687, 691 (N.D. Ohio 2010). This Honorable Court should, at the very least apply its own common sense and strike these incredible affirmative defenses.

Distributing, 961 F.2d 654, 665 (7th Cir. 1992), the plaintiff milk delivery workers asserted that food companies deliberately caused a salmonella outbreak in their own milk supply so that they could justify terminating the drivers. Although these allegations had some factual support, the district court struck them as scandalous. In this case, Defendants are also implausibly asserting that AAN acted in a self-destructive and irrational manner by tolerating theft and drug abuse by others and then blaming Defendants. In this case, of course, Defendants not only lack any factual basis for their assertion, but they also fail to even concoct a plausible story. *See Schlosser v. University of Tennessee*, 12-cv-534, slip op. (E.D. Tenn. October 20, 2014) (striking a nonsensical theory of the case), *see also Totalplan v. Lure Camera*, 613 F.Supp. 451 (W.D.N.Y. 1985) (striking allegation which was "obviously false.") As such, Defendants' scandalous allegations should be stricken.

Similarly, in *Alvarado-Morales v. Digital Equipment*, 843 F.2d 613, 618 (1st Cir. 1988), employees complained about, among other things, "torture" at the hands of their employer. Although their complaint provided some factual support for these complaints, the court nonetheless struck the allegations as scandalous. *Id*. at 618. Defendants similarly complain about "torture" at the hands of Jeremiah Hartman, while providing absolutely no factual support for this assertion.[4] Similarly, in *SEC v. Lauer*, 03-80612, 2007 WL 1393917 at *2 (S.D. Fla. April 30, 2007), the court struck as scandalous a letter that accused attorneys of immoral and unethical conduct without any legitimate basis. Surely, Jeremiah Hartman and his family, who are not directly before the court, are entitled to similar protections as the government lawyers in *Lauer*, who were trained prosecutors with the fortitude to withstand the rough and tumble of securities fraud litigation.

Even if AAN had accounting problems, or even more incredibly, Jeremiah Hartman or his

[4] Although Defendants describe an incident with a gun, which supposedly supports their assertion that their admissions were "coerced" through "threats of physical violence" they provide absolutely no basis for any allegation of "torture." (Doc. 29, Page 24)

family stole from the company themselves, used drugs, or brandished a gun, none of those actions would excuse Defendants' intentional torts. At most, Defendants raise credibility issues, not proper affirmative defenses. Defendants' "Affirmative Defense" thus only serves to prejudice AAN, which is now tainted unfairly and without basis and must distract itself from pursuing its claims against Defendants in order to refute these unfounded allegations.

In *Microsoft v. Jesse's Computers*, 211 F.R.D. 681, 683 (M.D. Fla. 2002), the court held that the defense of "unclean hands" does not apply "where Plaintiff's [alleged] misconduct is not directly related to the merits of the controversy between the parties, but only where the wrongful acts affect the equitable relations between the parties." Here, none of Defendants' assertions, even if proven, would provide any excuse whatsoever for their years-long fraudulent scheme whereby they defrauded and stole from AAN and then set out to ruin its business. Even if believed, Defendants' assertions regarding "unclean hands" boil down to an assertion that AAN seeks an advantage over former suppliers in other litigation, which is now settled or dormant. However, courts have held that "the alleged misconduct dirtying the hands of the plaintiff must occur in the context of the present lawsuit. . . . Specifically, the alleged misconduct must be directed against the defendant and must be directly related to the transaction at issue." *Safe Bed Tech. v. KCI*, 02-0097, 2003 WL 21183948 at *5 (N.D. Ill. 2003). Here, Defendants' assertions regarding "unclean hands" have, at most, a tangential relation to this lawsuit and, because they are scandalous and prejudicial, should be stricken.

Defendants' Third Affirmative Defense Has Already Been Adjudicated

The parties provided extensive briefing on Defendants' Motion to Dismiss (Doc. 13) and this Honorable Court issued a lengthy order explaining its reasoning for denying the same. (Doc. 25) Although the parties and this Honorable Court undoubtedly consumed substantial resources in that

endeavor, Defendants inexplicably reassert the very same arguments in their Amended Answer and Affirmative Defenses. (Doc. 29, Page 24-5) In fact Defendants' "Third Affirmative Defense - Failure to State a Cause of Action" is mostly cut and pasted from various sections of their Motion to Dismiss. (Doc. 13, Pages 4, 6, and 13-14) Defendants reassert previously rejected arguments that which, as discussed below, do not even constitute a proper affirmative defense.

In re Ben H. Willingham, 11-bk-1002, slip op. at *3 (Bankr. M.D. Fla. Jan. 26 2012) (Funk, B.J.) (attached hereto), notes that an affirmative defense that a complaint "fails to state a cause of action . . . simply points out purported defects in the Amended Complaint and is, therefore, not an affirmative defense." The court struck the defendant's affirmative defense as impertinent. *Id*. Defendants are, of course, entitled to defend this action, conduct discovery, and attempt to negate AAN's claims if they can. However, this Honorable Court has already rejected Defendants' assertion that the Amended Complaint fails to state a claim. (Doc. 25) This particular assertion therefore has no place in Defendants' Amended Answer and Affirmative Defenses and this Honorable Court should remove it from consideration. *See Reis Roberts v. Concept Industries*, 462 F.Supp. 2d 897, 905-6 (N.D. Ill. 2006) (striking affirmative defense of failure to state a claim which merely recited the standard under 12(b)(6).)

Defendants' Fourth Affirmative Defense is Insufficient

Defendants assert the affirmative defense of "estoppel" and falsely assert that Sydney Wade, an AAN employee, "noted a number of accounting inaccuracies on the part of Plaintiff." Although Defendants fail to explain how any "accounting inaccuracies" would estop any of AAN's claims here, they inexplicably assert that "Plaintiff is attempting to cover up its accounting department's many inaccuracies, incompetence, and Jeremiah Hartman's family's theft of certain items by attempting to seek a judgment against former employees." Not only do Defendants fail to explain

any "estoppel" defense, their assertion that AAN would attempt to "cover up" anything by filing an extensive complaint on a public docket defies common sense. Defendants' Fourth Affirmative Defense is insufficient, fails to provide adequate notice, and should be stricken.

Defendants' Fifth Affirmative Defense is Insufficient

Seizing upon supposed but unspecified "accounting irregularities,"[5] Defendants again claim that "Plaintiff failed to mitigate its own damages by correcting its own internal accounting errors and stemming the tide of theft by Jeremiah Hartman's family." Defendants' argument, at best, is similar to that of a burglar who attempts to exonerate himself by claiming that a homeowner failed to lock his doors or install a security system, allowing that burglar, and perhaps even others, to steal items from the residence. However, a defense that a plaintiff, even through negligence, failed to prevent the defendant from defrauding him, "is patently unfair and unjustifiable as a matter of law." *Morgan Olmstead v. Schipa*, 585 F.Supp. 245, 249 (S.D.N.Y. 1984). In other words, failure to mitigate cannot constitute a defense to an intentional tort. Because Defendants cannot exonerate themselves by any lack of diligence on AAN's part in detecting their fraud (or, for that matter, any theft by other persons as well), this defense is insufficient and should be stricken. *See Morrison v. Executive Aircraft Refinishing*, 434 F.Supp.2d 1314, 1319 (S.D. Fla. 2005) (striking affirmative defense of failure to mitigate damages in an FLSA case).

Defendants' Sixth Affirmative Defense Lacks Application Here

Defendants assert that AAN's claims are barred by laches. However, "the doctrine of laches does not apply to congressional acts providing a statute of limitations." *Morrison v. Executive Aircraft Refinishing*, 434 F.Supp.2d 1314, 1320 (S.D. Fla. 2005); *see also Wlodynski v. Ryland*

[5] Defendants claim that these supposed "accounting irregularities" were noted by AAN employee Sydney Wade during deposition several years ago in another case. An examination of the transcript reveals no such admission nor does it disclose any evidence whereby Defendants might exonerate themselves in this matter.

Homes, 08-cv-361, 2008 WL 2783148 at *2 (M.D. Fla. July 17, 2008) (Whittemore, J.) (approving Report and Recommendation striking laches defense to FLSA action), *citing Ayers v. Consolidated Construction*, 07-123, 2007 WL 4181910 (M.D. Fla. Nov. 26 2007). Although RICO's civil remedies provision does not have an explicit statute of limitations, *Agency Holding v. Malley-Duff*, 483 U.S. 143 (1987), imports the four year statute of limitations from the Clayton Anti-trust Act, 15 U.S.C. § 15, which served as Congress' model for RICO's civil remedies provision. Because RICO's statute of limitations is also derived from a congressional act, this Honorable Court should similarly refuse to apply the doctrine of laches to AAN's claims and strike Defendants' Sixth Affirmative Defense.

Laches is an equitable remedy, which is generally inapplicable to the claims for legal remedies which AAN asserts here. *See e.g. FDIC v. Fuller*, 994 F.2d 223, 224 (5th Cir. 1993) ("in legal actions, laches is not available.") In *Morgan v. Kock*, 419 F.2d 993, 996 (7th Cir. 1969), the court held that "[w]here, as here, a litigant is seeking to enforce federal and state rights in law only, the applicable statute of limitations controls rather than laches." That is clearly the case here, where Defendants' claims are legal in nature.

Although Defendants assert that they "would suffer undue prejudice as much of the evidence will have been destroyed and/or lost by both parties given the passage of time," and they claim in their Rule 26 disclosures not to have any documents relevant to this case, they fail identify any exculpatory documents which they have destroyed or lost due to "the passage of time." AAN, for its part, recently produced nearly 1,000 pages of documents relevant to this action, rebutting any assertion that "much of the evidence will have been destroyed and/or lost."

Defendants Fail to Comply with Rule 8 in Pleading Their Affirmative Defenses

Each of Defendants Affirmative Defenses, especially the first three Affirmative Defenses, set for numerous circumstances in a single run-on paragraph. Defendants thus run afoul of Federal Rule of Civil Procedure 8(d)(1), which requires that "each allegation must be simple, concise, and direct" as well as Rule 10(b), which requires that "a party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances." Defendants First, Second, and Third Affirmative Defenses each run approximately half a page and state numerous different circumstances. Many of Defendants' assertions are neither related to the respective titled affirmative defense nor provide Defendants any actual affirmative defense to Plaintiff's claims.

Defendants Have Pled "Shotgun" Affirmative Defenses

Each of Defendants' affirmative defenses, except the Second Affirmative Defense and the Third Affirmative Defense, fail to specify the claims to which Defendants assert the defenses apply. "To give fair notice of [a] defense . . . a party should identify the claim to which the defense applies." *Larson v. Correct Craft*, 05-1902438, 2005 WL 1902438 (M.D. Fla. Aug. 8, 2005) *citing Byrne v. Nezhat,* 261 F.3d 1075, 1129 (11th Cir.2001) (criticizing "shotgun" pleading of affirmative defenses that do not specify the claim to which the defense is directed); *Anderson v. Dist. Bd. Of Trustees of Cent. Fla. Community College,* 77 F.3d 364, 366-67 (11th Cir.1996) (same).[6] It is difficult to understand, for example, how Defendants' "Fourth Affirmative Defense – Estoppel" could apply to AAN's civil RICO, civil theft, tortious interference, defamation, or theft of trade secrets claims. Moreover, Defendants' "Fifth Affirmative Defense – Failure to Mitigate Damages," a contract defense, would not apply to

[6] *Anderson* was cited in this Honorable Court's Order Striking Plaintiff's Complaint.

Defendants' intentional torts. As pled, Defendants Affirmative Defenses constitute a shotgun pleading. *Morrison v. Executive Aircraft Refinishing*, 434 F.Supp.2d 1314, 1318 (S.D. Fla. 2005) ("a court must not tolerate shotgun pleading of affirmative defenses, and should strike vague and ambiguous defenses which do not respond to any particular count, allegation or legal basis of a complaint.") This Honorable Court policed (Doc. 3) Plaintiff's initial Complaint in this matter and should now hold Defendants to the same standard.

Conclusion

For the foregoing reasons, this Honorable Court should strike Defendants' affirmative defenses. Because these affirmative defenses are libelous, this Honorable Court should also consider deleting both Doc. 26, Defendants original pleading, as well as Doc. 29, their amended pleading, as both contain similar scandalous assertions. Defendants should then replead their Answer along with any valid affirmative defenses.

Filed: February 6, 2015

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 3.01(g)

Undersigned counsel has conferred several times with Nathan Nason, counsel for Defendants, but the parties have been unable to agree on the issues raised in this motion. After a discussion regarding Defendants original Answer and Affirmative Defenses, Plaintiff agreed to consent to Defendants amending their pleading. The parties agreed at that time that it would be without prejudice to AAN moving to strike the defenses. Defendants have amended their pleading but

objectionable content remains and the parties were unable to resolve the issue in subsequent discussions.

/s/Michael Paul Beltran
Michael Paul Beltran

CERTIFICATE OF SERVICE

I, Michael Beltran, certify that a true and correct copy of the foregoing has been served on counsel for all parties via the Court's CM/ECF system this the 6th day of February, 2015.

/s/Michael Paul Beltran
Michael Paul Beltran