UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JEREMIAH'S INTERNATIONAL TRADING COMPANY d/b/a AMERICA'S AUCTION NETWORK,

Plaintiff,

v. **Case No: 8:14-cv-584-T-27TGW**

ANTHONY CALDERONE and RAYMOND TAYLOR,

Defendants.
_____/

ORDER

BEFORE THE COURT is Plaintiff's Motion to Strike Defendants' Affirmative Defenses (Dkt. 30), and Defendants' response (Dkt. 31). Upon consideration, the Motion is GRANTED to the extent stated herein.

I. BACKGROUND

Jeremiah's International Trading Company d/b/a America's Auction Network ("AAN") brings this action against two former employees alleging violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.* and Florida Civil RICO, Fla. Stat. § 772.102, civil conspiracy, breach of fiduciary duty, tortious interference with an advantageous business relationship, defamation, civil theft, conversion, misappropriation of trade secrets, breach of contract, and unfair and deceptive trade practices. AAN alleges that during the time Defendants worked for AAN, they received kickbacks from artwork suppliers, accepted fake and/or overpriced artwork from suppliers, misrepresented and sold fake and/or overpriced artwork to AAN customers,

created fraudulent invoices, and stole artwork and other merchandise from AAN. AAN also alleges that while working for competing businesses, Defendants have been using AAN's trade secrets, customer lists, and stolen merchandise to compete with AAN.

Defendants have asserted six affirmative defenses (Dkt. 29 at 23-26). AAN moves to strike all of them.

II. STANDARD

A court may "strike from a pleading" any "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Motions to strike are generally disfavored, *id.*, and are considered to be a "drastic remedy to be resorted to only when required for the purposes of justice." *Augustus v. Bd. of Pub. Instruction of Escambia Cnty., Fla.*, 306 F.2d 862, 868 (5th Cir. 1962).[1] Nevertheless, district courts have broad discretion in determining whether to grant a motion to strike. *Slone v. Judd*, No. 8:09-cv-1175-T-27TGW, 2009 WL 5214984, at *1 (Whittemore, J.) (citing *Anchor Hocking Corp. v. Jacksonville Elec. Auth.*, 419 F. Supp. 992, 1000 (M.D. Fla. 1976)). An affirmative defense is insufficient as a matter of law and should be stricken "if it appears to a certainty that the plaintiff would succeed despite any set of facts which could be proved in support of the defense." *Equal Employment Opportunity Comm'n v. First Nat. Bank of Jackson*, 614 F.2d 1004, 1008 (5th Cir. 1980) (citation omitted). Federal courts recognize that, by definition, defendants can only establish an affirmative defense when they admit the essential facts of the complaint and set forth other facts in justification or avoidance. *Wlodynski v. Ryland Homes of Florida Realty Corp.*, No. 8:08-CV-00361-JDW-MAP, 2008 WL 2783148, at *2 (M.D. Fla. July 17, 2008).

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[1] Decisions of the Fifth Circuit handed down prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

III. DISCUSSION

First Affirmative Defense

The First Affirmative Defense alleges that AAN brought this suit to harass and intimidate Defendants and in fact it is AAN that engaged in wrongful conduct and coerced Defendants' admissions by torture and threats of violence. AAN moves to strike Defendants' first affirmative defense of unclean hands as scandalous and insufficient. Whether or not Defendants have mischaracterized the state court litigation is not a matter to be addressed at the pleading stage. *See Muschong v. Millennium Physician Grp., LLC*, No. 2:13-CV-705-FTM-38CM, 2014 WL 3341142, at *2 (M.D. Fla. July 8, 2014) ("The Court will assume the truth of the facts asserted in both Plaintiff's Complaint and Defendant's Affirmative Defenses and not resolve factual disputes."). However, Defendants' assertion that AAN used "torture" to coerce admissions by Defendants warrants striking this defense. *See Alvarado-Morales v. Digital Equip. Corp.*, 843 F.2d 613, 618 (1st Cir. 1988) ("No matter the origin of these repugnant words replete with tragic historical connotations, they are superfluous descriptions and not substantive elements of the cause of action.").

Third Affirmative Defense

The Third Affirmative Defense alleges that the Amended Complaint fails to state a claim for relief. Although this defense is a denial of the elements of AAN's RICO claims and not a true affirmative defense, it will not be stricken. *See In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense.") Instead it will be treated as a denial. *Accord Adams v. Jumpstart Wireless Corp.*, 294 F.R.D. 668, 671 (S.D. Fla. 2013).

Fourth Affirmative Defense

The Fourth Affirmative Defense alleges that AAN should be estopped from seeking relief due to its own attempts to cover up accounting inaccuracies, incompetence, and the owner, Jeremiah Hartman's, family's theft from AAN. AAN contends that this defense fails to explain the defense and fails to provide notice. The elements of the defense of estoppel are: "(1) a misrepresentation of material fact by a party, which is contrary to a later asserted representation or position by that party; (2) reliance on that representation by the party claiming estoppel; and (3) a detrimental change in the position of the party claiming estoppel caused by the party's reliance on the misrepresentation." *Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville, Inc.*, 744 So. 2d 482, 485 (Fla.1st DCA 1999). It is unclear how Defendants' allegations pertain to the necessary elements of the defense of estoppel. This defense therefore fails to provide notice to AAN and must be repled, if possible.

Fifth Affirmative Defense

The Fifth Affirmative Defense alleges that AAN failed to mitigate it damages by correcting purported internal accounting errors and stopping the theft by Hartman's family. AAN asserts that failure to mitigate cannot constitute a defense to an intentional tort. Defendants contend that AAN's accounting practices caused their damages. This is more akin to a denial and will be treated as such.

Sixth Affirmative Defense

The Sixth Affirmative Defense alleges that AAN's claims are barred by the doctrine of laches because AAN knew of its injuries over four years before filing this lawsuit. AAN argues that the doctrine of laches does not apply to congressional acts providing a statute of limitations and that it is an equitable remedy generally not applicable to claims for legal remedies. Defendants contend

that there is no statutory statute of limitations to AAN's RICO claims and that the rest of AAN's claims are equitable in nature.

Generally, the doctrine of laches applies to claims that are equitable in nature. *See Jackmore v. Jackmore*, 71 So. 3d 912, 913 (Fla. 2d DCA 2011) ("action for enforcement is equitable in nature and thus may be limited by the doctrine of laches"). It is unclear how any of AAN's claims are equitable claims as AAN seeks damages for all of them.

AAN also asserts that the defense of laches does not apply to claims arising under congressional acts providing a statute of limitations. *See Wlodynski v. Ryland Homes of Florida Realty Corp.*, No. 808-CV-00361-JDW-MAP, 2008 WL 2783148, at *2 (M.D. Fla. July 17, 2008). Defendants do not argue otherwise. RICO's four-year statute of limitations is imported from the Clayton Anti-Trust Act. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 2767, 97 L. Ed. 2d 121 (1987). Therefore, the doctrine of laches does not apply and will be stricken.

AAN also argues generally that all of Defendants' Affirmative Defenses fail to comply with Federal Rule of Civil Procedure 8 and 10 and should be stricken as a shotgun pleading because they fail to specify the claims to which the defense applies.

Rule 8(b)(1)(A) requires that a party "state in short and plain terms its defenses to each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A). Although Rule 8 does not obligate a defendant to set forth detailed factual allegations, a defendant must give the plaintiff "fair notice" of the nature of the defense and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Defendant implicitly acknowledges that not every affirmative defense applies to every claim asserted by AAN (*see* Dkt. 31 at 7 (fifth affirmative

defense "defeats Plaintiff's allegations regarding civil theft, conversion and unfair and deceptive trade practices."). And, the defenses do not comply with Rule 10(b).

Accordingly, Plaintiff's Motion to Strike Defendants' Affirmative Defenses (Dkt. 30) is **GRANTED**. Defendants' First, Third, Fourth, and Fifth Affirmative Defenses are **STRICKEN** ***without prejudice***. Defendants may amend these Affirmative Defenses consistent with this Order, and in doing so shall comply with Rule 10(b) and specify to which claim each defense applies. Defendants' Sixth Affirmative Defense is **STRICKEN** ***with prejudice***.

DONE AND ORDERED this 20th day of May, 2015.

JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record