UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:16-CV-21199-CMA/O'Sullivan

ANDREA ROSSI, *et al.*,

Plaintiffs,

v.

THOMAS DARDEN, *et al.*,

Defendants,
_____/

PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES, OR ALTERNATIVELY, FOR A MORE DEFINITE STATEMENT

Plaintiffs, Andrea Rossi and Leonardo Corporation ("Plaintiffs"), hereby move pursuant to Federal Rules of Civil Procedure 8, 12(f) and Local Rule 7.1 for an order striking Defendants' affirmative defenses [DE 30]. In the alternative, Defendants move pursuant to Federal Rule of Civil Procedure 12(e) and Local Rule 7.1 for a more definite statement of the affirmative defenses. In support of this Motion, Defendants state the following:

I. Standard to Plead and Strike Affirmative Defenses.

An affirmative defense may be stricken if it is insufficient as a matter of law. *Chetu, Inc. v. Salihu*, No. 09-60588-CIV, 2009 WL 3448205, at *1 (S.D. Fla. Oct. 26, 2009) (citing *Anchor Hocking Corp. v. Jacksonville Elec. Auth.*, 419 F. Supp. 992, 1000 (M.D. Fla. 1976)). A legally sufficient affirmative defense "satisfies the heightened pleading standard" of *Twombly* and *Iqbal*, and gives "fair notice of the defense" and "the grounds upon which it rests." *Ocean's 11 Bar & Grill, Inc. v. Indem. Ins. Corp. RRG*, No. 11-61577-CIV, 2012 WL 5398625, at *18 (S.D. Fla. Nov. 2, 2012), *aff'd sub nom. Ocean's 11 Bar & Grill, Inc. v. Indem. Ins. Corp. of DC, Risk Retention Grp.*, 522 F. App'x 696 (11th Cir. 2013); *Adams v. Jumpstart Wireless Corp.*, 294 F.R.D.

668, 671 (S.D. Fla. 2013); *see also* Fed. R. Civ. P. 8(a); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

Where a defense provides no factual allegation, "it is hard to see how a [defendant] could satisfy the requirement of providing not only 'fair notice' of the nature of the [defense], but also 'grounds' on which the [defense] rests." *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, No. 07-20608-CIV, 2007 WL 2412834 (S.D. Fla. Aug. 21, 2007) (quoting *Iqbal*, 550 U.S. at 1965); *see also Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at *1 (S.D. Fla. May 29, 2008) ("While [a party] need not provide detailed factual allegations, they must provide more than bare-bones conclusions. [A party] should not be left to discover the bare minimum facts constituting a defense until discovery."). In failing to provide the bare minimum facts related to her defense, Defendants deprive Plaintiffs of fair notice of their defenses and the grounds upon which the defenses rests.

Moreover, "[a]n affirmative defense is established only when 'a defendant admits the essential facts of the complaint and sets up other facts in justification or avoidance.'" *Sparta Ins. Co. v. Colareta*, No. 13-60579-CIV, 2013 WL 5588140, at *2 (S.D. Fla. Oct. 10, 2013) (citing *Morrison v. Exec. Aircraft Refinishing Co.*, 434 F. Supp. 2d 1314, 1317–18 (S.D. Fla. 2005)).

II. All of Defendants' Affirmative Defenses Are Insufficient as a Matter of Law.

All of Defendants' affirmative defenses "are improper because they contain mere conclusory allegations which are totally devoid of any allegations that would put Plaintiff[s] on notice of the factual basis for the legal defenses asserted." *Djahed v. Boniface & Co.*, No. 608CV962ORL18GJK, 2009 WL 453408, at *3 (M.D. Fla. Feb. 23, 2009) (finding same). Moreover, none of the defenses admit, deny, justify or avoid Plaintiffs' allegations. *Colareta*, 2013 WL 5588140, at *2. Defendants do not even attempt to satisfy the Rule 8, *Twombly* and *Iqbal*

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200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
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requirements. For these reasons, Defendants' affirmative defenses must be stricken.

A. Defendants' First Affirmative Defense (Standing) Is Insufficient as a Matter of Law.

Defendants' first affirmative defense is a single conclusory allegation that does not admit, deny, justify or avoid Plaintiffs' allegations. The purported defense is conclusory, legally insufficient and accordingly must be stricken.

To state the affirmative defense that Plaintiffs lack standing, Defendants must allege that Plaintiffs did not "(1) suffer an injury in fact, (2) that is fairly traceable to the challenged conduct of the [D]efendant[s], and (3) that is likely to be redressed by a favorable judicial decision." *Guarisma v. Microsoft Corp.*, No. 15-24326-CIV, 2016 WL 4017196, at *2 (S.D. Fla. July 26, 2016) (citing *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016), *as revised* (May 24, 2016)).

Defendants neither allege these elements nor support their conclusory allegation with any facts whatsoever. Defendants fail to meet the federal pleading requirements and give Plaintiffs no notice of their claimed defense. Such a bare-bones defense must be stricken.

B. Defendants' Second Affirmative Defense (Failure to State a Claim) Is Insufficient as a Matter of Law.

Defendants' second affirmative defense is a conclusory allegation devoid of legal or factual support that fails to admit, deny, justify or avoid Plaintiffs' allegations. Accordingly, the defense must be stricken.

Plaintiffs' remaining claims have survived Defendants' motion to dismiss [DE 17] and properly state causes of action that entitle Plaintiffs to relief. While Defendants may disagree with the Court's ruling on their motion, to the extent that they defend their breach of the underlying contract by claiming that Plaintiffs have failed to state a claim, Defendants must allege sufficient facts to show such a failure. *See, e.g.*, Fed. R. Civ. P. 8(a); *Twombly*, 550 U.S. at 544; *Iqbal*, 556

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U.S. at 662; *Ocean's 11*, 2012 WL 5398625, at *17. Here, Defendants fail to state which particular claim is lacking and how that claim is lacking. Defendants simply state their conclusion and move on to the next conclusory affirmative defense. As such, the defense must be stricken.

C. Defendants' Third Affirmative Defense (Estoppel, Waiver, Laches, "And Other Applicable Equitable Doctrines") Is Insufficient as a Matter of Law.

Defendants' third affirmative defense consists of multiple equitable defenses, some of which are not disclosed to Plaintiffs at all, none of which are pled with any particularity aimed at providing Plaintiffs with fair notice and all of which fail to admit, deny, justify or avoid Plaintiffs' allegations. Defendants' defenses, including any equitable defense that Defendants purport to assert but fail to ever notice in the pleading, must be stricken.

Equitable defenses such as waiver, estoppel, and laches "are equitable defenses that must be pled with the specific elements required to establish the defense." *Noveshen v. Bridgewater Associates, LP*, No. 13-CV-61535-KAM, 2016 WL 3902580, at *2 (S.D. Fla. Feb. 25, 2016). Where these defenses are not pled as such, the defense will be stricken. *Id*. (Striking equitable defenses for failure to plead the particular elements of each defense).

To state a claim for equitable estoppel, Defendants must plead: "(1) a representation of fact by one party contrary to a later asserted position; (2) good faith reliance by another party upon the representation; and (3) a detrimental change in position by the later party due to the reliance." *MSC Mediterranean Shipping Co. SA, Geneva v. Metal Worldwide, Inc.*, 884 F. Supp. 2d 1269, 1274 (S.D. Fla. 2012). Defendants fail to assert these particular elements and provide no facts whatsoever in support thereof. As such, this defense must be stricken.

To state a claim for waiver, Defendants must allege: "(1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right." *Dantzler, Inc. v.*

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PNC Bank, Nat. Ass'n, 946 F. Supp. 2d 1344, 1367–68 (S.D. Fla. 2013). Defendants fail to present these elements or any facts that would purport to support a waiver. Accordingly, the defense must be stricken.

To state a claim for laches, Defendants must show: "(1) a delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1545 (11th Cir. 1986); *see also I.C.E. Mktg. Corp. v. Gapardis Health & Beauty, Inc.*, No. 00-02280-CIV, 2014 WL 10093869 at *8 (S.D. Fla. Nov. 13, 2014), *report and recommendation adopted in part*, No. 00-CV-02280, 2015 WL 4243528 (S.D. Fla. July 13, 2015). Defendants allege none of the particular laches elements and plead no facts in support. The defense must accordingly be stricken. *See State Farm Mut. Auto. Ins. Co. v. B&A Diagnostic, Inc.*, No. 1:13-CV-24393-UU, 2014 WL 11906618 at *2 (S.D. Fla. May 14, 2014) (striking the defendant's laches defense as conclusory where the defendant stated the elements of the defense but provided no factual allegations in support).

Defendants fail to give Plaintiffs any notice – fair or otherwise – of the "other applicable equitable doctrines" upon which they intend to rely in defense. In so doing, Defendants also fail to make any legal or factual allegation in support. As such, the Court must strike these purported "other applicable equitable doctrines." *See, e.g.*, Fed. R. Civ. P. 8(a); *Twombly*, 550 U.S. at 544; *Iqbal*, 556 U.S. at 662; *Ocean's 11*, 2012 WL 5398625 at *17.

D. Defendants' Fourth Affirmative Defense (Unclean Hands) Is Insufficient as a Matter of Law.

Defendants' fourth affirmative defense is conclusory and lacks any factual or legal support. Accordingly, the defense must be stricken.

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Defendants must plead the specific elements of the unclean hands defense, and must show that Plaintiffs "acted in bad faith, resorted to trickery and deception, or are guilty of fraud, injustice, or unfairness." *Ocean's 11*, 2012 WL 5398625 at *17; *see also, Home Mgmt. Solutions*, 2007 WL 2412834 at *4 (striking the unclean hands affirmative defense based on failure to plead the elements of the defense or any supporting facts).

Defendants fail to allege any of the elements of an unclean hands defense, provide no supporting factual allegations, and fail to give Plaintiffs notice of the precise nature of the defense. For these reasons, the Court must strike the defense.

E. Defendants' Fifth Affirmative Defense (Prior Breach) Is Insufficient as a Matter of Law.

Defendants' fifth affirmative defense of prior breach is nothing more than a conclusory allegation that lacks any legal or factual foundation. As such, the defense must be stricken.

To state a defense of prior breach of contract, Defendants must allege sufficient facts to show: (1) Plaintiffs and Defendants were parties to a contract; (2) Plaintiffs breached a material, dependent term thereof and (3) Plaintiffs' breach occurred prior to Defendants' breach. *See Steak House, Inc. v. Barnett*, 65 So. 2d 736, 738 (Fla. 1953); *see also SEB S.A. v. Sunbeam Corp.*, 148 F. App'x 774, 787 (11th Cir. 2005).

Defendants fail to allege that Plaintiffs committed a prior breach of any particular agreement and do not clarify the way in which Plaintiffs purportedly did so. Likewise, Defendants assert no plausible facts that would show breach of a particular material, dependent term. Defendants give Plaintiffs no fair notice of the content of their defense, leaving Plaintiffs to guess how the defense applies. As such, the defense must be stricken.

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F. Defendants' Sixth Affirmative Defense (FDUPTA Violation) Is Insufficient as a Matter of Law.

Defendants' sixth affirmative defense must be stricken because it is conclusory, insufficiently pled and fails to admit, deny, justify or avoid Plaintiffs' claims.

To state a defense under the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA"), Defendants must allege: "(1) a deceptive act or unfair practice; (2) causation, and; (3) actual damages." *Randolph v. J.M. Smucker Co.*, No. 13-80581-CIV, 2014 WL 1018007 at *4 (S.D. Fla. Mar. 14, 2014) (citing *Mantz v. TRS Recovery Servs., Inc.*, 11–80580–CIV, 2011 WL 5515303 at *2 (S.D. Fla. Nov.8, 2011)); *see also KC Leisure, Inc. v. Haber*, 972 So.2d 1069, 1073 (Fla. 5th DCA 2008).

Defendants state none of these elements and do not allege nor incorporate facts to support a FDUPTA defense. Moreover, at no point in Defendants' pleadings do Defendants allege any *actual* damages. Defendants' FDUPTA defense is insufficient as a matter of law and must be stricken.

G. Defendants' Seventh Affirmative Defense (Fraudulent Misrepresentation) Is Insufficient as a Matter of Law.

Defendants' seventh affirmative defense must be stricken because it is conclusory, not alleged with the requisite particularity and lacks any factual support.

To state a fraudulent misrepresentation defense, Defendants must allege with the requisite level of particularity: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it, and; (4) consequent injury by the party acting in reliance on the representation." *Lobegeiger v. Celebrity Cruises, Inc.*, 869 F. Supp. 2d 1356, 1366 (S.D. Fla. 2012) (citing *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010)); Fed. R. Civ. P. 9(b).

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Defendants' two-line conclusory statement of their purported defense fails to assert the elements of a fraudulent misrepresentation defense or factual support therefor. Since Defendants fail to provide any support for a fraudulent misrepresentation defense, they likewise fail to plead the defense with the particularity required under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 9(b). Defendants' purported defense must therefore be stricken.

H. Defendants' Eighth Affirmative Defense (Contribution) Is Insufficient as a Matter of Law.

Defendants' eighth affirmative defense is vague, conclusory and without factual support. The defense likewise fails to admit, deny, justify or avoid Plaintiffs' claims. As such, the defense must be stricken.

Defendants' claim that Plaintiffs' injuries are barred in whole or in part because Plaintiffs and/or third parties proximately caused or contributed to those injuries is vague. Defendants do not specify the particular defense on which they rely and have not maintained a counterclaim sounded in tort or negligence. Defendants provide Plaintiffs with no facts to support whatever their defense may be, preventing Plaintiffs from ascertaining what Defendants' defense actually is or how to respond to it. Defendants' defense thus fails to meet the federal pleading standards, fails to give Plaintiffs fair notice and must be stricken as legally insufficient.

I. Defendants' Ninth Affirmative Defense (Merger, Integration and Ratification) Is Insufficient as a Matter of Law.

Defendants' ninth affirmative defense is insufficient as a matter of law because it is conclusory and fails to allege plausible facts in support. As such, the defense must be stricken.

Defendants refer to section 16.8 of the License Agreement, but fail to show how that provision justifies their breach of the Agreement. Section 16.8 establishes that the License Agreement, Amendments thereto, certain documents referenced therein and certain documents

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incorporated thereby constitute the entire agreement between the parties. The provision does nothing to admit, deny, justify or avoid Plaintiffs' claims for breach of contract. Nor does the provision preview to Plaintiffs what Defendants' defense actually is. Without facts, Plaintiffs are left in the dark.

Defendants likewise refer to section 2 of the First Amendment to the License Agreement in defense of Plaintiffs' claims. Section 2 provides that "[e]xcept as expressly provided herein, the Agreement remains in full force and effect and is ratified and confirmed by the parties to this Amendment." Like section 16.8 of the License Agreement, section 2 of the First Amendment does nothing to admit, deny, justify or avoid Plaintiffs' claims for breach of contract. Defendants provide no facts, plausible or otherwise, to show how Plaintiffs' purportedly ratified Defendants' breach of the License Agreement generally or failure to pay the eighty-nine million dollars ($89,000,000.00) required under the contract.

Defendants' vague, factless and legally insufficient defense fails to give Plaintiffs fair notice of the grounds upon which their defense rests, deprives Plaintiffs of the ability to respond to the defense and accordingly must be stricken.

J. Defendants' Tenth Affirmative Defense (Speculative Damages) Is Insufficient as a Matter of Law.

Defendants' tenth affirmative defense must be stricken because it is conclusory, unsupported by any facts and fails to admit, deny, avoid or justify Plaintiffs' claims.

Defendants fail to assert any support whatsoever for their claim that Plaintiffs' non-contractual damages claims are speculative. Defendants do not attempt to show, for example, how or why Plaintiffs' damages for unjust enrichment, misappropriation of trade secrets and fraud and deceit are insufficiently stated despite statutory and common law support therefor. Defendants do

PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
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283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

not give Plaintiffs fair notice of the particular grounds upon which this defense rests, but, rather conclude that the defense applies and leave Plaintiffs to figure out how. Such pleading fails to satisfy the federal rules, and must accordingly be stricken.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order striking Defendants' affirmative defenses or, alternatively, requiring Defendants to provide a more definite statement thereof and such other and further relief the Court deems just and proper.

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

The undersigned counsel hereby certifies that, in compliance with Rule 7.1(a)(3), Federal Rules of Civil Procedure, that undersigned counsel has conferred with counsel for Defendants in a good faith effort to resolve by agreement the issues raised in this Motion.

Dated: August 30, 2016

Respectfully submitted,

/s/ John W. Annesser

Paul D. Turner (0113743)
pturner@pbyalaw.com
John W. Annesser (98233)
jannesser@pbyalaw.com
Brian W. Chaiken (118060)
bchaiken@pbyalaw.com
D. Porpoise Evans (576883)
pevans@pbyalaw.com
PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
283 Catalonia Avenue, Suite 200
Coral Gables, FL 33134
Telephone: (305) 377-0086
Facsimile: (305) 377-0781
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 30, 2016, I electronically filed the foregoing motion with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served upon interested counsel either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/John W. Annesser
John W. Annesser

PERLMAN, BAJANDAS, YEVOLI & ALBRIGHT, P.L.
200 South Andrews Avenue, Suite 600, Fort Lauderdale, Florida 33301 • (954) 566-7117
283 Catalonia Avenue, Suite 200, Coral Gables, Florida 33134 • (305) 377-0086

SERVICE LIST

Christopher R.J. Pace (FBN 0721166)
Christopher Lomax (FBN 56220)
Christina T. Mastrucci (FBN 113013)
JONES DAY
Brickell World Plaza
600 Brickell Avenue, Suite 3300
Miami, FL 33131
Tel.: 305.714.9700
Fax: 305.714.9799
crjpace@jonesday.com
clomax@jonesday.com
cmastrucci@jonesday.com
Attorneys for Defendants

Service: *Via CM/ECF*

Fernando S. Aran (FBN 349712)
ARAN, CORREA & GUARCH, P.A.
255 University Drive
Coral Gables, FL 33134-6732
Tel.: 305-665-3400
Fax: 305-665-2250
faran@acg-law.com

Service: *Via CM/ECF*