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' REPLY IN SUPPORT OF MOTION TO STRIKE DEFENDANTS' SECOND AMENDED AFFIRMATIVE DEFENSES, OR ALTERNATIVELY, FOR A MORE DEFINITE STATEMENT

Plaintiffs, Andrea Rossi and Leonardo Corporation ("Plaintiffs"), hereby reply to Defendants Opposition to Plaintiffs' Motion to Strike in Part Defendants' Second Amended Answer, Affirmative Defenses, Counterclaims and Third-Party Clams, or in the Alternative, Motion for a More Definite Statement (DE 59), and files this reply in support of Plaintiffs' Motion to Strike in Part Defendants' Second Amended Answer, Affirmative Defenses, Counterclaims and Third-Party Clams, or in the Alternative, Motion for a More Definite Statement (DE 54), and states the following:

I. Defendants' First Affirmative Defense (Standing) Is Legally Insufficient.

Defendants' arguments in support of their purported standing defense are unpersuasive, legally insufficient, and continue to fail to admit, justify, or avoid Plaintiffs' claims.

Defendants' purported defense that Leonardo lacks standing is untenable according to the law of this Circuit, District, and State. In order to support their claim that a merger constitutes a transfer or assignment, Defendants direct the Court's attention to *Cincom Systems, Inc. v. Novelis Corp.*, a Sixth Circuit case that is both not controlling and distinguishable from the facts of this case. *See* 581 F. 3d 431 (2009). The Court in *Cincom* was concerned with the potential transfer of licenses for the use of intellectual property from one licensee to another, not with whether a

transfer occurs when the owner of the intellectual property merges with an affiliated company. In that case, the plaintiff developed and owned certain intellectual property that it licensed to licensees including the defendant company. Those licensees were prohibited from transferring their rights to the licenses without prior written approval of the licensor. *Id*. When the defendant licensee merged with another related entity, the licensor argued that the license was transferred to the new entity by operation of law and without plaintiff's prior written consent. *Id*. The Court found that since the purpose of intellectual property law was, *inter alia*, (1) to discourage an entity desiring a license from simply merging with a license holder rather than acquiring that license directly from the inventor and (2) preserving the inventor's control over the use of his creations, the entity originally holding the license and the license itself terminated upon the occurrence of the merger, and the newly emerged entity was required to acquire a new license. *Id*. at 436-38. The Court never addressed whether the reverse might be true, and none of the policy or legal grounds discussed in the case are applicable to such a scenario where the licensor merges into another company.

In the instant action, none of the potential harms or circumstances leading to the Sixth Circuit's decision exist. First, Leonardo was never a licensee, but rather was the licensor. When Leonardo Corporation New Hampshire merged into Leonardo Corporation Florida, the newly formed entity retained its ownership of the intellectual property, and the licenses it provided to Defendants were undisturbed. There was no risk whatsoever that a competitor of the inventor might somehow acquire the license or that the inventor might lose control of the use of his creations.

Florida law is clear that when Leonardo Corporation New Hampshire merged into Leonardo Corporation Florida, the title to its property and interests therein were vested in Leonardo Corporation Florida without reversion or impairment." Fla. Stat. § 607.1106(1)(b-c). Defendants have pointed to no controlling or apposite case-law stating to the contrary or describing the merger that took place in the instant action as an assignment or transfer. While Defendants seek to distinguish the language to the commentary of the Model Business Corporation Act predicated upon the omission of one term in the Florida Model Corporation Act, it is clear from the commentary, such language was not solely directed to the omitted language. While not binding

upon the Court, the commentary to the Model Business Corporation Act is certainly instructive as to the intent of the Florida Legislature in adopting its language with minimal change.

Defendant's purported defense that Plaintiff Rossi lacks standing is equally untenable. It is well settled in Florida that the "promisee of the contract, having given consideration therefor and being a contracting party thereto, is entitled to enforcement" of the contract regardless of whether a third-party may sue under the contract. *Brown v. Brown*, 484 So.2d 1282, 1283 (4th DCA 1986). In the instant case, both Rossi and Leonardo Corporation were in fact parties to the underlying License Agreement. Under the terms of the License Agreement, both Rossi and Leonardo Corporation constitute promisees granting the license to International Heat in exchange for International Heat's payment of $89 million. Whether the payment of the $89 million was to be directed to Leonardo Corporation, or any other person or entity, does not divest Rossi, a contracting party, of standing to enforce the terms of the contract.[1] *Brown*, 484 So.2d at 1283. In support of their argument that Rossi does not have standing to enforce the terms of the License Agreement, Defendants rely upon *Dinuro Inv.s., LLC v. Camacho,* 141 So.3d 731 (Fla. 3d DCA 2014). Such reliance is clearly misplaced. Specifically, the Third District Court acknowledged that a shareholder of a company may sue for breach of a contract to which he is a party even if his damages are not separate and distinct from those damages incurred by other parties to the contract. *See Id.* If the Court were to adopt the Defendants' logic, any contract in which there is a third-party beneficiary would be rendered unenforceable by the contracting party.

Moreover, Rossi is a real party in interest to the Agreement and can bring suit in his individual capacity. The 11th Circuit has held that Federal Rule of Civil Procedure 17(a) "explicitly provides that a party with whom or in whose name a contract has been made for another's benefit to be a real party in interest and therefore can sue in their own name." *Glob. Aerospace, Inc. v. Platinum Jet Mgmt., LLC*, 488 F. App'x 338, 340 (11th Cir. 2012) (citing Fed.

[1] Plaintiff's citation to the Third DCA's opinion in *Dinuro* is inapposite. In that case, the question the Court answered was whether a member of an LLC had standing individually or derivatively for damage allegedly caused to the LLC by other members of the LLC . *Dinuro Investments, LLC v. Camacho*, 141 So.3d 731 (3d DCA 2014). The question was not, and the Court did not consider, whether a promisee who provides consideration under a contract is divested of standing to sue thereunder when payment is to be made to another party to the contract. While the court's holding in that case may constitute Florida law with respect to LLC members suing under operating agreements, it does not preempt or override Florida contract law permitting a party to a contract to sue thereunder. See *Brown*, 484 So.2d at 1283.

R. Civ. P. 17(a)) (internal quotation marks omitted). Here, Rossi invented the underlying intellectual property and entered into the License Agreement for his and Leonardo Corporation's benefit. As such, it is clear that he is a real party in interest in this case. Id. Florida law is clear that the action of a real party in interest cannot be terminated for lack of standing. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1183 (Fla. 3d DCA 1985).

II. Defendants' Second Affirmative Defense (Failure to State a Claim) Is Legally Insufficient and Meritless.

Defendants agree in their Opposition that their second affirmative defense is not an affirmative defense that admits, denies, justifies, or avoids Plaintiffs' allegations. *See Defs.' Opposition* at 6, FN 1. For this reason alone, the purported defense should be stricken. Defendants assert, however, that they have set forth this defense in order to preserve the issue. Yet the Court has determined that Plaintiffs' existing claims have been adequately stated and has already dismissed the very arguments that Defendants seek to preserve. As previously noted, Defendants may not re-litigate this issue under the guise of an affirmative defense.

III. Defendants' Third Affirmative Defense (Estoppel, Waiver, Laches, "And Other Applicable Equitable Doctrines") Is Legally Insufficient.

Defendants' Opposition fails to cure or excuse (1) their failure to plead with specificity the elements of each individual defense; and (2) their failure to plead specific facts in support of each defense. Defendants' allegation that "they need not structure each defense explicitly to list the legal elements thereof" "[g]iven the detail Defendants [purportedly] have provided" is wholly unsupported by case-law and in direct contradiction of the cases that Plaintiffs' provided in their Motion.

Moreover, Defendants did not provide detailed factual allegations in support of any particular defense or any defense at all. Rather, Defendants cited generally to more than 110 paragraphs of their Second Amended Answers without tying any paragraph or allegation therein to any particular defense. Plaintiffs are apparently left to decipher which facts apply to which defense, much in the way of an impermissible shotgun pleading. *See Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir.1996) (shotgun pleadings impermissibly give the opposing party "the arduous task of determining which allegations of fact are intended to

support which claims for relief."); *Pk Studios, Inc. v. R.L.R. Investments, LLC*, 2:15-CV-389-FTM-99CM, 2016 WL 4529323, at *2 (M.D. Fla. 2016) ("District courts have a sua sponte obligation to identify shotgun affirmative defenses and strike them, with leave to replead."). Defendants cannot pass off their duty to give Plaintiffs fair notice of the grounds upon which their defense rests by throwing hundreds of paragraphs of purported factual allegations at Plaintiffs and expecting them to figure out which facts apply to which defense. *See Merrill Lynch Bus. Fin. Servs., Inc. v. Performance Mach. Sys. U.S.A., Inc.*, No. 04-60861-CIV-MARTINEZ, 2005 WL 975773, at *12 (S.D. Fla. Mar. 4, 2005) (striking defenses in part where the defense does not indicate how the theory is connected to the case at hand.")

The law is clear that 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). The Southern District of Florida did not decide *Noveshem* on the sole basis that the defendant there provided conclusory defenses sometimes not supported by facts, but also because the defendant failed to plead the specific elements of each defense. *Id*. Like the defendant in *Noveshem*, Defendants here have failed to plead the specific elements of their purported estoppel, waiver, and laches defenses, have cited to no specific factual support therefor, and have not cured their deficiency in their Opposition. Nor have Defendants given any indication or notice – factually, legally, or otherwise – of what other equitable defenses they might be raising, instead asking the Court to gloss over their patent failure and let their unnamed defense stand.

IV. Defendants' Fourth (Unclean Hands), Sixth (Unlawful Actions), and Seventh (Fraudulent Misrepresentation) Affirmative Defenses Are Legally Insufficient.

Defendants fourth, sixth, and seventh affirmative defenses are grounded in purported fraud committed by Plaintiffs, yet fail to meet the heightened pleading standards for asserting fraud under Federal Rule of Civil Procedure 9(b). Defendant's claims to the contrary are baseless.

To the extent that the defenses are grounded in Defendants' FDUPTA counterclaim, which is itself grounded in fraud, Defendants must meet the heightened pleading requirements of Rule 9(b). *See Llado-Carreno v. Guidant Corp.*, 2011 WL 705403, at *5 (S.D. Fla. Feb. 22, 2011) (a FDUPTA claim sounding in fraud must meet the heightened pleading requirements of Rule 9(b));

Begualg Inv. Management Inc. v. Four Seasons Hotel Ltd., 2011 WL 4434891 (S.D. Fla. Sep. 23, 2011) ("the averments in the complaint describe fraudulent conduct and thus, Rule 9(b) applies"); *Perret v. Wyndham Vacation Resorts, Inc.*, 846 F. Supp. 2d 1327, 1333 (S.D. Fla. 2012) (plaintiff was required to plead FDUPTA claim in accordance with Rule 9(b) where the FDUPTA claim was grounded in fraud allegation). Defendants failed to do so with respect to their purported affirmative defenses and likewise failed to do so in pleading their FDUPTA counterclaim where they failed to allege *any* actual damages. To the extent that other courts in this District have not applied Rule 9(b)'s heightened pleading requirement to FDUPTA claims, those claims were not grounded in fraud, but rather some other statutory violation and/or unfair trade practice.

Defendants' contentions aside, Defendants likewise failed to meet the heightened pleading requirements of Rule 9(b) with respect to their other counterclaims sounding in fraud. Although Defendants cited to numerous and various paragraphs from their Amended Complaint, Defendants failed to specifically aver how each purported allegation contained in sections separate and apart from their Affirmative Defenses related to each affirmative defense and the elements thereof. Defendants' seventh affirmative defense, for example, is a mere legal conclusion ("Plaintiffs' claims are barred, in whole or in part, as a result of Plaintiffs' fraudulent misrepresentations") followed by the statement that "Those fraudulent representations are pled *infra*," accompanied by general references to more than 80 paragraphs of the Seconded Amended Answer. In fact, all of the fourth, sixth, and seventh affirmative defenses are structured in this legally insufficient manner.

Defendants' failure to plead these purported defenses with the requisite specificity in terms of elements and/or facts direct this Court to strike the defenses.

V. Defendants' Ninth Affirmative Defense (Merger, Integration, and Ratification) Is Legally Insufficient.

Defendants' averment that Section 16.8 of the License Agreement and Section 2 of the First Amended thereto extinguished Plaintiffs' fraudulent inducement claims are meritless. The Southern District of Florida has clarified that "Under Florida law, the existence of a merger or integration clause, which purports to make oral agreements not incorporated into the written contract unenforceable, does not affect the oral representations which are alleged to have fraudulently induced a person to enter into the agreement." *TEC Serv., LLC v. Crabb*, No. 11-

62040-CIV, 2013 WL 11326552, at *6 (S.D. Fla. Jan. 23, 2013) (citing *McArthur Dairy, LLC v. McCowtree Bros. Dairy, Inc.*, No. 09-62033, 2011 WL 2731283, at *4 (S.D. Fla. July 13, 2011). The Florida Supreme Court has also made clear that "[t]o hold that by the terms of the contract which is alleged to have been procured by fraud, the [party] could bind the [other party] in such manner that lessee would be bound by the fraud of the [party] would be against the fundamental principles of law, equity, good morals, public policy and fair dealing." *Oceanic Villas, Inc. v. Godson*, 148 Fla. 454, 458, 4 So. 2d 689, 690 (1941). The Court went on "recognize the rule to be that fraud in the procurement of a contract is ground for rescission and cancellation of any contract unless for consideration or expediency the parties agree that the contract may not be cancelled or rescinded for such cause, and that by such special provisions of a contract it may be made incontestable on account of fraud, or for any other reason." *Id*.

The Supreme Court's holding in *Oceanic Villas* is undisturbed by, and not in conflict with, the 5th DCA's decision in *Billington v. Ginn-LA Pine Island, Ltd.*, 192 So.3d 77, 83 (Fla. 5th DCA 2016), which Defendants rely upon to support their erroneous conclusion that "a merger clause negates a fraud claim." *See* Opposition at 12. Had Defendants bothered to carefully read the case or explore this State's highest court's precedent related thereto, Defendants would see that the *Billington* court found such a conclusion to be "superficial" and in defiance of "logic." *Billington*, 192 So.3d at 83.

Billington involved a non-reliance clause that explicitly provided that the buyer under the contract agreed that it was not relying on any statement not specifically expressed in the contract or related documents. *Id*. The Court there found that the provision was "as clear and conspicuous as [it was] comprehensive," and thus clearly met the Supreme Court's standard as set forth in *Oceanic Villas*. *Id*. at 84. The Court went on to note that in "virtually all of the cases that have addressed the distinction between [a merger and non-reliance clause, the latter being the clause in question in the case] . . . [t]hese cases have concluded that non-reliance clauses negate claims for fraud, but integration or merger clauses do not. *Id*. (quoting *Vigortone AG Products, Inc. v. PM AG Products, Inc.*, 316 F.3d 641, 644 (7th Cir.2002) ("merger or integration clauses are intended to prevent a party from introducing parol evidence to vary the terms of a written contract. Because fraud is a tort, such a clause does not negate the tort claim.")).

VI. Defendants' Tenth Affirmative Defense (Speculative Damages) Is Legally Insufficient.

Defendants' purported defense that Plaintiffs' non-contractual claims are speculative is misdirected and premature at best, and legally insufficient at least. As the Court noted in its Order on Defendants' Motion to Dismiss (DE 24), Plaintiffs have yet to identify their non-contractual damages. Defendants may not logically label as speculative that which has yet to be identified in order to "preserve" a defense that will never ripen. If Defendants sought to preserve their purported defense, they should have moved the Court for the appropriate remedy rather than attempting to assert a meritless and legally unsupportable affirmative defense. Plaintiffs have not sought speculative damages and do not intend to do so. All of Plaintiffs' damages have accrued and are readily ascertainable. As such, and without legal or factual support therefor, Defendants' tenth affirmative defense must be stricken.

VII. Defendants' Counterclaim for Breach of Contract for Purported Failure to Pay Taxes Is Improper.

The Court should not be fooled by Defendants' scandalous attempt to couch their impertinent and immaterial allegations regarding whether Rossi has paid taxes under the guise of a purported defense of antecedent breach of contract. Defendants' assertions are irrelevant to this dispute, and their claim of purported antecedent breach is unsupported by law or fact.

If, *arguendo*, Defendants' purported defense were based on antecedent breach, Defendant would be required to plead as much as part of the affirmative defense. Florida law is clear that a claim or defense of breach of contract requires a showing of "(1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach. *Arthur J. Gallagher Serv. Co. v. Egan*, No. 12-80361-CIV, 2012 WL 12839373, at *7 (S.D. Fla. June 29, 2012), *report and recommendation adopted sub nom. Arthur J. Gallagher Serv. Co. v. Egan*, No. 12-CV-80361, 2012 WL 12838463 (S.D. Fla. Aug. 15, 2012), *aff'd*, 514 F. App'x 839 (11th Cir. 2013) (citing *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009) (in turn applying Florida law)).

Here, Defendants have not shown, and cannot show, material breach. Defendants cannot show that the tax provision in the contract was a material term of the License Agreement to support their defense of antecedent breach. Under Florida law, "[t]o constitute a vital or material breach, a party's nonperformance must go to the essence of the contract." *MDS (Canada) Inc. v. Rad*

Source Techs., Inc., 720 F.3d 833, 849 (11th Cir. 2013) (internal citations and quotations omitted). "A party's failure to perform some minor part of his contractual duty cannot be classified as a material or vital breach." *Id*. In fact, the tax provision in the contract did not go to the essence of the contract, as evidenced by the fact that both parties were willing to provide licenses of intellectual property in exchange for tens of millions of dollars before the tax provision was ever to be called into action. Similarly, Defendants have not pled the third element of damages, and cannot do so because they stand to suffer no harm even if, *arguendo*, Plaintiffs had failed to pay taxes.

If Defendants are entitled to allege "the basis for the defense of antecedent breach of contract based on failure to pay taxes" as an affirmative defense separate and apart from their defense of antecedent breach, they must do so with the requisite particularity for pleading affirmative defenses. If, however, Defendants' allegations are nothing more than scandalous, impertinent, and immaterial attempts at defamation, they should 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.

Dated: October 13, 2016

Respectfully submitted,

/s/ John W. Annesser

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 13, 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.

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