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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

R. ALEXANDER ACOSTA, U.S. Secretary of Labor, Plaintiff, v. JAMES DEWALT, ET AL., Defendants.	Case Number 2:17-cv-00082-TOR Secretary's Motion to Strike Affirmative Defenses [No Hearing Requested]

SECRETARY OF LABOR'S MOTION TO STRIKE
DEFENDANTS' AFFIRMATIVE DEFENSES

R. Alexander Acosta, the U.S. Secretary of Labor (Secretary), hereby files this Motion to Strike Affirmative Defenses.

INTRODUCTION

On February 24, 2017, the Secretary filed a complaint against James DeWalt, Robert Bakie, Jack Fallis, Jeffrey Barton, Associated Industries Management Services, Inc., Associated Industries of the Inland Northwest, and

Associated Employers Health and Welfare Trust (Defendants), alleging they violated Title I of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* On July 31, 2017, this Court denied Defendants' preanswer motion to dismiss. Defendants filed their answer on August 28, 2017; the answer asserts eleven affirmative defenses. (ECF No. 26.)

With this motion, the Secretary seeks to reduce the issues for litigation and trial. To that end, the Secretary requests that this Court strike the following affirmative defenses Defendants asserted in their answer: (1) "ERISA Exemptions"; (2) "Department of Labor Exemptions"; (3) "Good Faith"; (4) "Laches"; and (5) "Waiver." (Id. at 16–18.) These affirmative defenses are legally insufficient and lack any allegations of fact that would give the Secretary fair notice as to their substance. The Secretary therefore respectfully asks this Court to strike these affirmative defenses from Defendants' answer.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(f) states that "the court may strike from a pleading [on its own or upon motion made by a party] an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." A defense may be stricken if it is insufficient as a matter of law, *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001), or if it fails to adequately give notice to the opposing party, *see Wyshak v. City Nat'l Bank*, 607 F.2d 824, 827 (9th Cir.

1979). A defense is insufficient if it is unsupported by any facts that would entitle the defendant to relief. *Straightshot Commc'ns Inc. v. Telekenex, Inc.*, No. C10-268Z, 2010 WL 4793538, at *2 (W.D. Wash. Nov. 19, 2010) (citing *Qarbon.com, Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004)). A reference to a legal doctrine, standing alone, is insufficient notice. *Id.*

"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. Robbins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Although Rule 12(f) motions are generally disfavored, "[t]he disposition of a motion to strike is within the broad discretion of the district court." *Sanders v. Energy Nw.*, No. 12-CV-0580-TOR, 2013 WL 12212725, at *1 (E.D. Wash. Feb. 22, 2013).

ARGUMENT

I. Defendants' Fourth Affirmative Defense of "ERISA Exemptions" Should Be Stricken as Insufficient

The answer asserts an "ERISA Exemptions" defense, alleging, "To the extent that the Department can establish any transactions prohibited by ERISA § 406, 29 U.S.C. § 1106, some or all of those claims are barred under the exemptions set forth in ERISA § 408, 29 U.S.C. § 1108." (ECF No. 26 at 16.) Because defendants failed to specify which of the many ERISA section 408 exemptions (set forth in ERISA subsections 408(a)–(g)) apply to the claims

asserted in the Secretary's complaint, and because they failed to allege facts supporting the application of a specific exemption, this affirmative defense is insufficient. The defense states a vague legal conclusion and fails to give the Secretary fair notice of the defense being advanced. *Straightshot Commc'ns Inc.*, 2010 WL 4793538, at *2; *Woodfield v. Bowman*, 193 F.3d 354, 362 (5th Cir. 1999) ("defendant nevertheless must plead an affirmative defense with enough specificity or factual particularity to give the plaintiff 'fair notice' of the defense that is being advanced"). This Court should therefore strike the defense of "ERISA Exemptions" as insufficient under Rule 12(f).

II. Defendants' Fifth Affirmative Defense of "Department of Labor Exemptions" Should Be Stricken as Insufficient

The answer asserts a "Department of Labor Exemptions" defense, alleging, "To the extent that the Department can establish any transactions prohibited by ERISA § 406, 29 U.S.C. § 1106, some or all of those claims are barred by the Prohibited Transaction Exemptions promulgated by the Department of Labor." (ECF No. 26 at 16.) Because Defendants failed to specify any regulatory exemption that they claim would allow them to avoid liability for the prohibited transactions alleged in the Secretary's complaint, this affirmative defense is insufficient, as it states a mere legal conclusion and fails to give the Secretary fair notice of the defense being advanced. *Woodfield*, 193 F.3d at 362. This Court

should therefore strike the defense of "Department of Labor Exemptions" as insufficient under Rule 12(f).

III. Defendants' Sixth Affirmative Defense of Good Faith Should Be Stricken as Insufficient

Defendants' answer asserts a "good faith" defense, alleging that the Secretary's claims "are barred, in whole or in part, because Defendants at all times acted reasonably and in good faith, and did not undertake any conduct that was malicious, egregious, in bad faith, grossly negligent, or in willful or reckless disregard to the legal rights under ERISA of any relevant person." (ECF No. 26 at 17.)

There is no good-faith defense to violations of Title I of ERISA. *See, e.g.*, *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007) (citing *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983)); *Chao v. Hall Holding Co.*, 285 F.3d 415, 441 n.12 (6th Cir. 2002); *Leigh v. Engle*, 727 F.2d 113, 124 (7th Cir. 1984) ("Good faith is not a defense to an ERISA fiduciary's breach of the duty of loyalty."). With respect to ERISA's fiduciary duty of prudence, a fiduciary either satisfies the statutory standard for prudence or breaches that duty. *See* 29 U.S.C. § 1104(a)(1)(B). The same is true for a fiduciary's statutory obligation to discharge his duties "in accordance with the documents and instruments governing the plan." *See* 29 U.S.C. § 1104(a)(1)(D). And with respect to the Secretary's allegations that defendants engaged in prohibited transactions, which are *per se*

ERISA violations, a defendant who engages in such a transaction may avoid liability only by satisfying a specific statutory or regulatory exemption. *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 434, 439–42 (6th Cir. 2002); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) (holding that ERISA's prohibition against self-dealing under 406(b) "creates a per se ERISA violation; even in the absence of bad faith, or in the presence of a fair and reasonable transaction"); *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984); *Cutaiar v. Marshall*, 590 F.2d 523, 529–30 (3d Cir. 1979); *Eaves v. Penn*, 587 F.2d 453, 457–59 (10th Cir. 1978). Because "good faith" is not a defense to the ERISA fiduciary violations alleged in the Secretary's complaint, it should be stricken.

In addition, Defendants allege no facts in support of this defense, and do not specify what ERISA violations in the Secretary's complaint they claim are subject to it. *See Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004) (striking affirmative defenses as insufficient because the answer did not give fair notice of claims advanced, as it merely referenced a defensive doctrine and did not set forth elements of asserted defense). For these reasons, the Court should therefore strike the defense of good faith as insufficient under Rule 12(f).

IV. Defendants' Tenth Affirmative Defense of Laches Should Be Stricken as Insufficient

Defendants' answer asserts "the defense of laches against some or all of the allegations in the Complaint." (ECF No. 26 at 18.) First, the defense of laches

does not apply to ERISA claims. *See Herman v. S.C. Nat'l Bank*, 140 F.3d 1413, 1427 (11th Cir. 1998). As the Ninth Circuit has noted, "generally speaking, if Congress has provided a specific limitations period, a court should not apply laches. In such cases, 'the Congressional statute of limitations is definitive' and a petitioner 'may do what he likes as long as he brings his suit within the stipulated period.'" *Telink, Inc. v. United States*, 24 F.3d 42, 45 n. 3 (9th Cir. 1994) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946), and *Royal Air Properties, Inc. v. Smith*, 312 F.2d 210, 214 (9th Cir. 1962)). Congress included a specific statute of limitations in Title I of ERISA, *see* 29 U.S.C. § 1113, and this Court has already held that the ERISA violations contained in the Secretary's complaint are not time-barred, *see* ECF No. 23 at 19. *See Stanton v. Couturier*, No. 2:09-cv-00519-RRB-GGH, 2009 WL 6327475, at *5 (E.D. Cal. Dec. 16, 2009) (holding laches did not apply to plaintiffs' ERISA claims).

This defense is also insufficient because defendants allege no facts in support, and they do not specify which of the Secretary's claims are subject to it. *See Qarbon.com Inc.*, 315 F. Supp. 2d at 1049. For these reasons, this Court should therefore strike the defense of laches as insufficient under Rule 12(f).

V. Defendants' Eleventh Affirmative Defense of Waiver Should Be Stricken as Insufficient

Defendants' answer asserts "the defense of waiver against some or all of the allegations in the Complaint." (ECF No. 26 at 18.) Defendants allege no facts in

support of this defense, and they do not specify which of the Secretary's claims are subject to it. *See Woodfield v. Nationwide Mutual Ins. Co.*, 193 F.3d 354, 362 (5th Cir. 1999) (merely "naming" the broad affirmative defense of "waiver and/or release" falls well short of the minimum particulars needed to identify the affirmative defense and provide "fair notice"); *see also Solis v. Zenith Capital, LLC*, No. C 08-4854 PJH, 2009 WL 1324051, at *5 (N.D. Cal. May 8, 2009) (striking affirmative defense of waiver in ERISA case because defendants did not allege "any facts that would support a defense of waiver against the Secretary, such as facts demonstrating that the Secretary (or anyone on her behalf) expressly waived the government's rights against defendants. Instead, defendants have merely pleaded a legal conclusion which is insufficient to withstand the Secretary's motion to strike"). Because Defendants have not given the Secretary fair notice as to the nature of the asserted defense, this Court should strike the defense of waiver as insufficient under Rule 12(f).

CONCLUSION

For these reasons, the Secretary respectfully requests that this Court grant his Motion to Strike Affirmative Defenses.

Date: September 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send electronic notification of such filing to the following:

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