RANDALL | DANSKIN, P.S.
Thomas W. McLane (WSBA No. 12226)
601 W. Riverside Ave., Ste. 1500
Spokane, WA 99201
Tel. (509) 747-2052

JENNER & BLOCK LLP
Christopher J. Rillo (*pro hac vice*)
50 California Street, 15th Floor
San Francisco, CA 94111
Tel. (213) 239-2250

Amanda S. Amert (*pro hac vice*)
Jonathan A. Enfield (*pro hac vice*)
353 N. Clark Street
Chicago, IL 60654
Tel. (312) 222-9350

Counsel for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

R. ALEXANDER ACOSTA,
U.S. Secretary of Labor,

Plaintiff,

v.

JAMES DEWALT; ROBERT G. BAKIE; JACK L. FALLIS, JR.; JEFFREY A. BARTON; ASSOCIATED INDUSTRIES MANAGEMENT SERVICES, INC.; THE ASSOCIATED INDUSTRIES OF THE INLAND NORTHWEST; and THE ASSOCIATED EMPLOYERS HEALTH AND WELFARE TRUST,

Defendants.

Civil Action No.
2:17-cv-00082-TOR

OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Hon. Thomas O. Rice

October 18, 2017
Without Oral Argument

Plaintiff Department of Labor ("the Department") has filed a motion to strike (Dkt. No. 28) some of the affirmative and other defenses asserted in the answer to the Department's complaint filed by defendants James DeWalt, Robert G. Bakie, Jack L. Fallis, Jr., Associated Industries Management Services, Inc. ("AIMS"), the Associated Industries of the Inland Northwest ("AIIN"), and the Associated Employers Health and Welfare Trust ("the Trust") (collectively, excluding the Trust, "Defendants") (Dkt. No. 26).

The Department's premature and unnecessary motion illustrates why courts disfavor motions to strike. The parties and this Court will not be able to adequately address the factual and legal issues raised by the challenged defenses until after discovery has taken place. This Court should deny the motion.

STANDARD OF REVIEW

A motion to strike material from a pleading is made pursuant to Federal Rule of Civil Procedure 12(f), which allows a court to strike "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *F.T.C. v. Golden Empire Mortg., Inc.*, No. CV 09-3227 CAS (RCx), 2009 WL 4798874, at *2 (C.D. Cal. Dec. 10, 2009); Fed. R. Civ. P. 12(f). A defense is sufficiently pled if, in "general terms," the answer "gives [the] plaintiff fair notice of the defense." *Kohler v. Flava Enterprises, Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015); *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979). "[W]here not involving a purportedly insufficient defense, [a Rule 12(f) motion] simply tests whether a pleading contains inappropriate material." *Golden Empire*, 2009 WL 4798874 at *2. "Because of the limited importance of pleadings in federal practice, motions to strike pursuant to Fed.

R. Civ. P. 12(f) are disfavored." *Id.* (internal quotation marks omitted).

ARGUMENT

Like other motions to strike that do "nothing to streamline the litigation of [the] action or eliminate spurious issues from consideration," the Department's motion should be denied. *Bagramian v. Legal Recovery Law Offices*, No. CV 12-1512-CAS (MRWx), 2013 WL 1688317, at *2 (C.D. Cal. Apr. 16, 2013). This is particularly true because the challenged defenses contain no "redundant, immaterial, impertinent, or scandalous matter" and because the "legal merit of all of [the Department's] arguments is better addressed on a motion for summary judgment" after both parties have the chance to take discovery. *Id.*; *Golden Empire*, 2009 WL 4798874 at *3.

Golden Empire shows why courts should deny motions to strike that do nothing to advance the litigation. In that case, the Federal Trade Commission ("FTC") sought equitable relief under the Federal Trade Commission Act as well as the Equal Credit Opportunity Act ("ECOA") and one of ECOA's implementing regulations. 2009 WL 4798874 at *1. As to fair notice, the FTC argued that one of the defenses was "nothing more than a bare assertion and fail[ed] as a matter of law," that others such as the waiver defense "merely ma[de] a vague reference to a doctrine," and that some defenses lacked the facts needed to give the FTC fair notice of the nature of the defense. *Id.* at *2-3. For example, the FTC argued that the defendants' "general statement reserving their right to claim any and all defenses under ECOA and the FTC Act . . . fail[ed] to provide any notification whatsoever to the FTC of the specific statutory or regulatory provisions to which they [were] referring." *Id.* at *3.

JENNER & BLOCK LLP
353 N. Clark Street, Chicago, IL 60654-3456
(312) 222-9350

As to particular doctrinal issues, the FTC argued that the defendants' "good faith" defense failed because, among other reasons, "good faith is not a defense to liability under the FTC Act." *Id.* at *2. The FTC also argued that the defense that "the complaint [was] barred by the applicable statute of limitations or laches" should be struck because the court had "already found that the FTC's complaint was not barred by ECOA's statute of limitations" and because "defendants ha[d] provided no basis to explain how the doctrine of laches applie[d] to the claims asserted in the complaint." *Id.* at *2.

After describing but not assessing the FTC's arguments about the sufficiency and substance of the defenses, the court repeated that Rule 12(f) motions "are generally disfavored" given "the limited importance of pleadings in federal practice." *Id.* at *3. Noting that "none of the affirmative defenses contain[ed] redundant, immaterial, impertinent, or scandalous matter," the court denied the motion to strike because "the legal merit of all of these arguments is better addressed on a motion for summary judgment." *Id.*

The fundamental similarities between *Golden Empire* and this case counsel denying the Department's motion. As in *Golden Empire*, Defendants assert, and the Department moves to strike, defenses based on (1) the relevant laws (here, ERISA § 408 and related regulations promulgated by the DOL); (2) waiver; (3) good faith and/or reasonable action; and (4) laches. (Motion to Strike ("Mot.") 2:8-10; Answer 16:15-17, 16:21–17:10, 18:10-14.) As the FTC did in *Golden Empire*, the Department asserts that all the challenged defenses lack sufficient factual allegations and therefore are vague or conclusory. (Mot. 3:19–4:4, 4:15-19, 6:11-13, 7:14-17,

JENNER & BLOCK LLP
353 N. Clark Street, Chicago, IL 60654-3456
(312) 222-9350

7:20–8:2.) But, as in *Golden Empire*, the factual and legal adequacy of the defenses will be "better addressed on a motion for summary judgment," after the parties take discovery and the law can be applied to the relevant facts. 2009 WL 4798874 at *3.

Despite the Department's contrary assertions, good faith and laches are legally viable defenses to at least some of the Department's claims. Good faith, the Department argues, is not a defense to its claims that some Defendants violated their fiduciary duties and engaged in prohibited transactions. (Mot. 5:10–6:10.) First, even the Department's own authorities do not entirely support this claim. For example, the Department cites *Chao v. Hall Holding Company*, 285 F.3d 415, 441 n.12 (6th Cir. 2002) (Mot. 5:12-13). *Hall Holding* notes that the Sixth Circuit has recognized a "subjective intent" requirement for claims brought under ERISA § 406(a)(1)(D), 285 F.3d at 441, one of the provisions that the Department claims certain Defendants violated (Compl. ¶ 64(d)). Further, a defense of good faith and reasonable action is entwined with the statutory exemption that allows parties to receive "reasonable compensation for services rendered" and the "reimbursement of expenses properly and actually incurred." 29 U.S.C. § 1108(c)(2).

Second, even if good faith and reasonable action were not defenses against the direct violations alleged, the Department has also brought derivative claims of knowing participation against certain Defendants pursuant to ERISA § 502(a)(5) and § 405(a)(1)-(3). (Compl. ¶¶ 62, 66-67, 73.) Liability under § 502(a) requires that the relevant Defendants had actual or constructive knowledge of the circumstances that allegedly made the transaction unlawful. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000). Liability under § 405(a)(1) and (3) requires

that a defendant had actual knowledge of a relevant fiduciary breach, including knowing that the act in question was a breach. *Askew v. R.L. Reppert, Inc.*, 902 F. Supp. 2d 676, 687 (E.D. Pa. 2012); 29 U.S.C. § 1105(a)(1), (3) (imposing liability only on defendants who act or fail to act "*knowing* such act or omission is a breach" or who fail to make "reasonable efforts" to remedy a breach despite "ha[ving] knowledge" of it) (emphasis added). A defendant who "at all times acted reasonably and in good faith" (Answer 17:6) necessarily lacks the required actual or constructive knowledge that her actions constituted an ERISA violation. Good faith and reasonable action thus preclude liability under any cause of action requiring such actual or constructive knowledge.

Laches bars claims where the plaintiff's unreasonable delay in filing suit prejudiced the defendant. *Expert Microsystems, Inc. v. Univ. of Chicago*, 712 F. Supp. 2d 1116, 1120 (E.D. Cal. 2010). Whether the Department delayed unreasonably depends upon what the Department knew, when the Department knew it, and why the Department waited as long as it did to inform Defendants of its investigation and, after that, to file this action. At this stage of the litigation, before discovery, Defendants are not in a position to know those facts. As to the legal sufficiency of the defense, although courts generally should not apply laches where the statute provides a limitations period, in some cases laches may "contract" the statute of limitations. *Telink, Inc. v. United States*, 24 F.3d 42, 45 n.3 (9th Cir. 1994); *Teamsters & Employers Welfare Tr. of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002).

Rather than advance the litigation, the Department's motion prematurely seeks

JENNER & BLOCK LLP
353 N. Clark Street, Chicago, IL 60654-3456
(312) 222-9350

to foreclose viable defenses. This Court should deny the motion. However, if this Court decides to grant the motion in full or in part, Defendants request leave to file an amended answer that addresses any concerns the Court may have regarding any affected defense. "The court should freely give leave [to amend a pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2). "The standard for granting leave to amend is generous." *Wilhelm v. U.S. Dep't of the Navy Bd. for Corr. of Naval Records*, No. 2:15-CV-0276-TOR, 2016 WL 740447, at *5 (E.D. Wash. Feb. 24, 2016) (Rice, J.). Courts consider five factors when deciding whether to grant leave to amend: bad faith, undue delay, previous amendments, prejudice to the opposing party, and futility. *Id.* Defendants have not acted in bad faith, delayed unduly, or previously amended their answer. At this early stage, amendment would not prejudice the Department. Nor would amendment be futile, particularly where the Department's motion relies solely on Defendants' purportedly alleging insufficient facts in support of their defenses. *See United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

CONCLUSION

For the foregoing reasons, Defendants request that this Court deny the Department's motion to strike in its entirety. If the Court grants the Department's motion in part or in whole, Defendants request leave to file an amended answer that addresses any concerns the Court may have regarding any affected defense.

JENNER & BLOCK LLP
353 N. Clark Street, Chicago, IL 60654-3456
(312) 222-9350

DATED: October 2, 2017

Respectfully submitted,

Jenner & Block LLP

By: /s/ Amanda S. Amert

AMANDA S. AMERT (*pro hac vice*)
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the October 2, 2017, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send electronic notification of such filing to the following:

Peter B. Dolan	dolan.peter@dol.gov
Eirik J. Cheverud	cheverud.eirik.j@dol.gov
Marc Sarata	sarata.d.marc@dol.gov

By: /s/ Jonathan A. Enfield
Jonathan A. Enfield