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.	NO. 2:17-CV-0082-TOR ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

BEFORE THE COURT is Plaintiff's Motion to Strike Affirmative Defenses (ECF No. 28). This matter was submitted for consideration without oral argument. The Court has reviewed the record and files herein, and is fully informed. This

matter is set for hearing without oral argument on October 18, 2017. The briefing having been completed, there is no reason to delay a ruling. For the reasons discussed below, Plaintiff's Motion to Strike Affirmative Defenses (ECF No. 28) is **GRANTED**.

BACKGROUND

Plaintiff R. Alexander Acosta, United States Secretary of Labor, Department of Labor ("Secretary") brings this action under the Employment Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001 *et seq.*, against Defendants for alleged breaches of their fiduciary duties committed in the course of managing the Associated Employers Health and Welfare Trust and the ERISA-covered employee benefit plans that participate in the Trust. ECF No. 1 at ¶ 1.

The Secretary moves to strike the following affirmative defenses asserted in Defendants' Answer to Complaint (ECF No. 26): (1) ERISA exemptions; (2) Department of Labor exemptions; (3) good faith; (4) laches; and (5) waiver. ECF No. 28 at 2. The Secretary contends that "[t]hese affirmative defenses are legally insufficient and lack any allegations of fact that would give the Secretary fair notice as to their substance." *Id.* Defendants assert that the Secretary's Motion is premature and unnecessary, as the parties will not be able to adequately address the factual and legal issues raised by the defenses until after discovery. ECF No. 29 at

2. The Secretary's Motion to Strike Affirmative Defenses (ECF No. 28) is now before the Court.

DISCUSSION

Pursuant to Federal Rule of Civil Procedure 12(f), a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."[1] Fed. R. Civ. P. 12(f). A defense is "insufficient" if there are no questions of fact, any questions of law are clear and not in dispute, and under no set of circumstances could the defense succeed. *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*, 258 F.R.D. 663, 665 (W.D. Wash. 2009) (quoting *California Dep't of Toxic Substances Control v. Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1032 (C.D. Cal. 2002)). "[T]he 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. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Generally, courts disfavor motions to strike, which should not be granted "unless it is clear that the

[1] Under FRCP 12(f), the court may act on its own, or on a motion made by a party before responding to the pleading. Fed. R. Civ. P. 12(f)(1)–(2). Here, Plaintiff's Motion is timely because it was made before any reply to Defendants' Answer was filed.

matter to be stricken could have no possible bearing on the subject matter of the litigation." *Colaprico v. Sun Microsystems, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991) (citation omitted).

A. ERISA and Department of Labor Exemptions

Defendants allege that to the extent the Secretary can establish any transactions prohibited by ERISA § 406, 29 U.S.C. § 1106, some or all of the claims are barred by the ERISA § 408 exemptions and the Prohibited Transaction Exemptions promulgated by the Department of Labor. ECF No. 26 at 17–18. The Secretary asserts that Defendants fail to specify which of the many exemptions apply and facts to support the application of a specific exemption. ECF No. 28 at 3–4.

Defendants contend that the factual and legal adequacy of the defenses will better be addressed on a motion for summary judgment after the parties take discovery. ECF No. 29 at 5 (citing *F.T.C. v. Golden Empire Mortg., Inc.*, No. CV 09-3227 CAS (RCX), 2009 WL 4798874, at *3 (C.D. Cal. Dec. 10, 2009)). Yet, the Secretary urges that the court in *Golden Empire* "did not establish a rule requiring courts to allow discovery on legally insufficient defenses." ECF No. 30 at 2. The Secretary is correct that *Golden Empire* merely listed the various affirmative defenses and then concluded that the motion to strike should be denied, stating that the legal arguments are better addressed on a motion for summary

judgment. Defendants admit that the court described, but did not assess, the arguments regarding the sufficiency of the defenses. ECF No. 29 at 4. This conclusion without specific analysis by a persuasive authority is not sufficient to support Defendants' claim that the parties should first take discovery.

The Secretary is correct that the defenses are a vague legal conclusion and do not provide fair notice because Defendants did not specify the applicable ERISA or regulatory exemptions. ECF No. 28 at 3–4. As shown above, Defendants' argument based on *Golden Empire* is not compelling. Considering that striking a party's pleading is disfavored, the Court finds that while Defendants gave insufficient notice for these affirmative defenses, they are given leave to amend. The Court then grants the Secretary's Motion to Strike on the ERISA and Department of Labor exemptions with leave to amend.

B. Good Faith

Defendants claim that they acted reasonably and in good faith. ECF No. 26 at 18. The Secretary argues that there is no good faith defense to the ERISA fiduciary violations. ECF No. 28 at 5–6. The Secretary cites *Chao v. Hall Holding Co.*, where the Sixth Circuit noted its skepticism of cases requiring a subjective intent under § 406(a)(1)(D). ECF Nos. 28 at 5–6; 30 at 3 (citing *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 441 n.12 (6th Cir. 2002)). The *Chao* court outlined its concerns and concluded that requiring a subjective intent went against

the great weight of authority where most courts and commentators have found per se violations. *Chao*, 285 F.3d at 441 n.12. Defendants disregard this footnote and incorrectly interpret the case to find a subjective intent requirement. ECF No. 29 at 5.

Additionally, Defendants note that the Secretary brought derivative claims of knowing participation against certain Defendants pursuant to ERISA § 502(a)(5) and § 405(a)(1)–(3). *Id.* The Secretary and Defendants agree that a defendant must have actual knowledge of a fiduciary breach, but they disagree regarding whether good faith is relevant to the knowledge requirement. ECF Nos. 29 at 5–6; 30 at 4. Defendants argue that a defendant who acts reasonably and in good faith lacks the required knowledge that her actions constituted an ERISA violation. ECF No. 29 at 6. Yet, as the Secretary emphasizes, Defendants fail to cite any legal authority for this interpretation. ECF No. 30 at 3. Therefore, the Court finds that Defendants failed to show that good faith is an affirmative defense and the Court grants the Secretary's Motion to Strike the good faith defense without leave to amend.

C. Laches

The Secretary alleges that the defense of laches does not apply to ERISA claims. ECF No. 28 at 6–7. The Ninth Circuit has determined that, "if Congress has provided a specific limitations period, a court should not apply laches," and the

"Congressional statute of limitations is definitive." *Telink, Inc. v. U.S.*, 24 F.3d 42, 45 n.3 (9th Cir. 1994) (citation omitted). The doctrine of laches then does not apply to ERISA claims, as it has its own statute of limitations provided by Congress. *Stanton v. Couturier*, No. 2:09-CV-00519-RRBGGH, 2009 WL 6327475, at *5 (E.D. Cal. Dec. 16, 2009).

Defendants concede that "courts generally should not apply laches where the statute provides a limitations period." ECF No. 29 at 6 (citing *Telink, Inc.*, 24 F.3d at 45 n.3). Yet, they argue that in some cases laches may "contract" the statute of limitations. *Id.* (citing *Teamsters & Employers Welfare Tr. of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002)). In *Teamsters*, the court borrowed a state's analogous statute of limitations in an ERISA suit for the recovery of employers' delinquent contributions under 29 U.S.C. § 1145. *Teamsters*, 283 F.3d at 880. The court admits that "some courts have invoked a presumption against the use of laches to shorten the statute of limitations," but found that when "Congress fails to enact a statute of limitations, a court that borrows a state statute of limitations but permits it to be abridged by the doctrine of laches is not invading congressional prerogatives." ECF No. 30 at 5; *Teamsters*, 283 F.3d at 881 (citation omitted). This case is distinguishable as here Congress has provided a specific statute of limitations for the Secretary's claims and the court need not borrow a state statute. *See* ECF No. 30 at 5. Defendants' reliance

on this case is then misplaced. Additionally, this case is merely persuasive and the Ninth Circuit does not invoke the use of laches. *See Telink, Inc.*, 24 F.3d at 45 n.3.

Therefore, the defense of laches does not apply to the ERISA claims here and the Court grants the Secretary's Motion to Strike Defendants' affirmative defense of laches without leave to amend.

D. Waiver

Defendants assert the defense of waiver and the Secretary argues that Defendants allege no facts nor specify which of the claims are subject to the defense. ECF Nos. 26 at 19; 28 at 7–8. Waiver is the "intentional relinquishment or abandonment of a known right." *U.S. v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Without supporting factual allegations, the assertion that the doctrine of waiver is applicable is insufficient to provide fair notice. *J & J Sports Prods., Inc. v. Terry Trang Nguyen*, No. C 11-05433 JW, 2012 WL 1030067, at *2 (N.D. Cal. Mar. 22, 2012). Here, the broad affirmative defense of waiver fails to provide fair notice as Defendants do not provide any factual allegations. Accordingly, the Court finds that the defense of waiver is stricken with leave to amend.

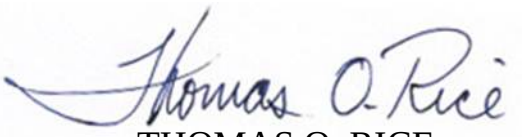
ACCORDINGLY, IT IS HEREBY ORDERED:

1. Plaintiff's Motion to Strike Affirmative Defenses (ECF No. 28) is **GRANTED**.

2. Defendants' affirmative defenses of the ERISA exemptions, Department of Labor exemptions, and waiver are stricken with leave to amend.
3. Defendants' affirmative defenses of good faith and laches are stricken without leave to amend.

The District Court Executive is directed to enter this Order and furnish copies to counsel.

DATED October 11, 2017.



THOMAS O. RICE
Chief United States District Judge